Case No. 13-5272

IN THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

LENEUOTI F. TUAUA, ET AL.,

Appellant,

v.

UNITED STATES OF AMERICA, ET AL.,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

BRIEF OF *AMICI CURIAE* CERTAIN MEMBERS OF CONGRESS AND FORMER GOVERNMENTAL OFFICIALS IN SUPPORT OF PLAINTIFFS-APPELLANTS AND IN SUPPORT OF REVERSAL

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May 12, 2014

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to Circuit Rule 28(a)(1), counsel for *amici curiae* certifies as follows:

A. **Parties and Amici.** Except for the following, all parties, intervenors, and *amici* appearing before the district court and in this Court are listed in the Brief for Plaintiffs-Appellants:

Amici curiae in support of Plaintiffs-Appellants in this Court: Governor Carl Gutierrez, Governor Pedro Rosselló, Governor Charles W. Turnbull; and movant *amicus* Anthony M. Babauta. Under Circuit Rule 26.1, no corporate disclosure rule is required for the listed *amici*.

B. **Rulings Under Review.** The ruling under review is the Memorandum Opinion and Order entered on June 26, 2013, by the U.S. District Court for the District of Columbia (Leon, J.), in *Tuaua v. United States*, No. 12-01143.

C. **Related Cases.** *Amici* and counsel are unaware of any related cases.

DATED: May 12, 2014

/s/
Eugene Gulland
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INTEREST OF AMICI CURIAE

This brief is submitted by *amici curiae* Congresswoman Madeleine Z. Bordallo, who represents the United States Territory of Guam in the U.S. House of Representatives; Congresswoman Donna Christensen, who represents the United States Territory of the U.S. Virgin Islands in the U.S. House of Representatives; Governor Carl Gutierrez, who served as Governor of Guam from 1995 to 2003; Dr. Pedro Rosselló, who served as Governor of Puerto Rico from 1993 to 2001; and Governor Charles W. Turnbull, who served as Governor of the U.S. Virgin Islands from 1999 to 2007; and by movant *amicus* Anthony M. Babauta, who served as Assistant Secretary of the Interior for Insular Areas from 2009 to 2013.

This case presents an important issue of first impression in this Court: whether individuals born in Territories of the United States are granted citizenship at birth by virtue of the Citizenship Clause of the Fourteenth Amendment. Questions were raised below about whether recognition of birthright citizenship would adversely affect the culture and traditions of American Samoa. *Amici*, as elected officials of U.S. Territories that have enjoyed birthright citizenship for many years and

as government officials with expertise in U.S-territorial relations, seek to inform the Court of the experience of birthright citizenship in those Territories. They also seek to address the limited effect that a favorable decision for Plaintiffs-Appellants would have on other constitutional doctrines.

Amici Bordallo, Christensen, Gutierrez, Rosselló and Turnbull have authority to file under Orders of this Court granting *amici*'s Motions for Leave to Participate. Movant *amicus* Babauta's Motion for Leave to Participate is pending before the Court as of May 12, 2014.

STATEMENT REGARDING COUNSEL

Pursuant to Circuit Rule 29(c)(5), *amici* state that their counsel authored this brief in whole. No party or counsel contributed money that was intended to fund preparing or submitting this brief. No other person contributed money that was intended to fund preparing or submitting this brief.

SUMMARY OF ARGUMENT

The meaning of the Citizenship Clause of the Fourteenth Amendment is clear: United States citizenship is guaranteed to all persons born on U.S. soil, both in the States and in the Territories. The text and original understanding of the Citizenship Clause make this proposition clear. Furthermore, citizenship by birth is a fundamental right that, as such, applies in all the Territories.

To the extent that factual considerations inform the constitutional analysis, this Court's test formulated in *King v. Morton*, 520 F.2d 1140, 1147 (D.C. Cir. 1975), furnishes guidance for determining whether rights enjoyed in the mainland United States apply to its Territories: Would application of the right be "impractical and anomalous" in the Territory? *See id.* at 1147-48 (citation and internal quotation marks omitted). A right is "impractical" if it would not work logistically in the Territory, and a right is "anomalous" if its implementation would damage a Territory's culture.

The experience of many years of birthright citizenship enjoyed in all U.S. Territories other than American Samoa shows that birthright citizenship would not be impractical or anomalous in American Samoa.

Residents of Guam, Puerto Rico, the U.S. Virgin Islands and the Commonwealth of the Northern Mariana Islands are recognized by statute as U.S. citizens at birth; birthright citizenship has not disturbed in any way the unique culture and traditions of those Territories.

Nor would a holding that the Citizenship Clause applies to American Samoa affect the analysis of other constitutional questions regarding American Samoa. Congressman Faleomavaega's argument, in his *amicus* brief below, that recognizing constitutional birthright citizenship in American Samoa could affect land alienation restrictions in the Territory, is incorrect; the land restrictions about which he is most concerned have already survived equal protection challenges. Moreover, in determining how constitutional provisions apply to the Territories, the analysis of the Citizenship Clause is entirely separate from the analysis of any other clause, each of which has its own text, history, and application in each unique territorial context.

Finally, any doubt should be cause for remand and an evidentiary determination of whether birthright citizenship would be impractical and anomalous in American Samoa, based on current facts and circumstances.

ARGUMENT

I. Birthright Citizenship Has Not Proven Impractical and Anomalous in Other Territories, and, at a Minimum, Such a Contention Should Be the Subject of an Evidentiary Determination.

A right that is not fundamental may apply in the United States Territories so long as its application would not be "impractical and anomalous" to the life and culture of the Territory. *See King v. Morton*, 520 F.2d 1140, 1147 (D.C. Cir. 1975). It is thus instructive to look at the experiences of Territories that have birthright citizenship — Guam, the Northern Mariana Islands, Puerto Rico, and the U.S. Virgin Islands — and have been able to maintain their unique cultural and social characteristics while their residents enjoy the many benefits of U.S. citizenship by virtue of their birth in the Territory. The experience of these Territories shows that birthright citizenship, through decades of application, has not proven impractical or anomalous. Should there be any doubt on this issue as applied to American Samoa, this Court should follow *King* and remand this case to the district court for an evidentiary determination of whether birthright citizenship would prove impractical and anomalous in American Samoa. *See id.* at 1148 (remanding for determination of whether trial by jury would be

impractical and anomalous in American Samoa because "[t]he answer to that question must come from more solid evidence of actual and existing conditions").

A. Birthright Citizenship Has Not Proven Impractical and Anomalous in Any Other Territory.

The seamless integration of birthright citizenship into the culture and politics of all other United States Territories is strong evidence that the critical right of birthright citizenship will not be impractical or anomalous in American Samoa, just as it has not been impractical or anomalous in any other Territory in which it been implemented.

1. Birthright Citizenship Is Highly Practical in United States Territories.

While there is little case law defining the term "impractical," it is generally understood to refer to the logistical difficulties associated with the implementation of a right. This includes a consideration of the "particular local setting, the practical necessities, and the possible alternatives." *Reid v. Covert*, 354 U.S. 1, 75 (1957) (Harlan, J., concurring). The practicality test largely comes down to a question of whether the right is workable in the Territory.

One scholar who has studied the Territories has stated that the impractical test "must be formulated in such a way that constitutional

protections may not be defeated by mere inconvenience or expediency." Stanley K. Laughlin, Jr., *Cultural Preservation in Pacific Islands: Still a Good Idea — and Constitutional*, 27 U. Haw. L. Rev. 331, 353 (2005). Laughlin found that there must be "a substantial degree of inconvenience" for a right to be too impractical to apply in a Territory. *Id.*

From a workability perspective, birthright citizenship has proven highly practical for the residents of Guam, the Northern Mariana Islands ("NMI"), Puerto Rico, and the U.S. Virgin Islands. As U.S. citizens, if they move to the States, they can vote, serve on a jury, and run for public office — all actions that are quintessentially American yet are not available to residents of American Samoa without a costly and lengthy naturalization process. For Guam, NMI, Puerto Rico, and the U.S. Virgin Islands, this seamless integration into the States helps strengthen the ties between the Territories and the United States, underscoring a highly practical advantage of birthright citizenship. It does so without impairing the Territories' ability to manage their own questions of self-determination. Reinforcing those ties has long been a goal, and result, of birthright citizenship in the Territories. Congresswoman Bordallo, one of the *amici* on this brief, echoes the words of her

husband's father, Mr. B.J. Bordallo, who in 1937 testified before Congress in support of U.S. citizenship for Guam residents: "[F]ull citizenship rights not only brings about the fulfillment of our aspirations to become citizens but will also cement firmly and permanently our internal relations with the mother country." Arnold H. Leibowitz, *Defining Status: A Comprehensive Analysis of United States Territorial Relations* 331 (1989).

Guam became a United States Territory in 1898 and was administered by the United States military until 1950. (Japan occupied Guam for two-and-a-half years during World War II, until America liberated the island in 1944.) The Guam Organic Act, passed by the United States Congress in 1950, transferred control from military to civilian authorities and established three branches of government. *See* 48 U.S.C. § 1421 *et seq.*; *see also* Leibowitz, *Defining Status*, at 325. The Organic Act also recognized the U.S. citizenship of the people of Guam. *See* 8 U.S.C. § 1407. Guamanians had long sought full citizenship because it brought "a sense of dignity and equality with the rest of the United States, the security of permanent political union," and an acceptance of their "political loyalty and willingness to share the

obligations of the U.S. Federal system." Leibowitz, *Defining Status*, at 330.

Guam's indigenous people are the Chamorros, and the Chamorro language is still spoken by many and is, along with English, the official language of Guam. *See* 1 Guam Code Ann. § 706; Leibowitz, *Defining Status*, at 315. Guam has worked to preserve the Chamorro culture and language, with bilingual education and efforts to integrate the culture and language throughout the community. *See* Leibowitz, *Defining Status*, at 326. The U.S. military also maintains a significant presence on Guam, which is of strategic importance in the Western Pacific.

In the Northern Mariana Islands, as in Guam, the Chamorro people and the Chamorro language are dominant parts of the culture. Bilingual and cultural programs were started in the 1970s to preserve the Chamorro cultural heritage. *Id.* at 521. In 1975, the NMI and the United States entered into the Covenant to Establish a Commonwealth of the Northern Mariana Islands in Political Union with the United States of America, which was approved by the U.S. Congress in 1976. The Covenant provided for self-governance for the people of the NMI, in accordance with their own Constitution. *Id.* at 547. The Covenant rec-

ognized United States citizenship for the people of the NMI and provided for United States citizenship for all persons born in the NMI. Marianas Covenant, Sec. 303.[1]

The United States Virgin Islands, in the Caribbean, are comprised of the islands of St. Thomas, St. John and St. Croix, along with approximately 50 islets and cays. Their cultural heritage includes African and West Indian culture, as well as influences from nearby Puerto Rico. The United States purchased the islands from Denmark in 1917 for $25 million. After some years of control by the United States Navy, the 1936 Organic Act provided for local control. Leibowitz, *Defining Status*, at 259. U.S. citizenship was recognized for residents of the Virgin Islands in 1927, including birthright citizenship for all those born in the Virgin Islands after 1927. 8 U.S.C. § 1406.

United States troops landed in Puerto Rico in July 1898, during the Spanish-American War, and Spain ceded Puerto Rico to the United States under the Treaty of Paris of 1899. *See* Jose A. Cabranes, *Citizenship and the American Empire: Notes on the Legislative History of*

[1] The Covenant to Establish a Commonwealth of the Northern Mariana Islands in Political Union with the United States of America is available at http://www.cnmilaw.org/cnmicovenant.html.

the U.S. Citizenship of Puerto Rico, 127 U. Pa. L. Rev. 391, 410 (1978). In 1917, the Jones Act recognized U.S. citizenship for all citizens of Puerto Rico. *See* 8 U.S.C. § 1402. The recognition of citizenship did not end the ongoing conversation about Puerto Rico's relationship with the United States, including, most recently a nonbinding referendum among Puerto Ricans in 2012 on whether the Territory should seek to become a state, seek independence, or be a "sovereign free associated state." R. Sam Garrett, Cong. Research Serv., R42765, *Puerto Rico's Political Status and the 2012 Plebiscite: Background and Key Questions* (2013), *available at* http://www.fas.org/sgp/crs/row/R42765.pdf.

In the same way in which it was not impractical to recognize birthright citizenship in those other Territories, there is no reason to conclude that it would be impractical to implement birthright citizenship in American Samoa. Like those other Territories, American Samoa has an American education system, a republican system of government modeled on the United States', and a judicial branch. Those institutions have made birthright citizenship quite practical in the other Territories, and would do so as well in American Samoa. Moreover, as the experience of Puerto Rico makes clear, birthright citizenship has not

impaired the ability of the Territories to manage the degree to which they integrate into the U.S. political system.

2. Birthright Citizenship Has Not Been Anomalous in Other Territories.

As with the impracticality aspect of the *King v. Morton* test, birthright citizenship has not proven to be anomalous in all other Territories where it exists. "Anomalous" is generally understood to mean that implementation of a provision would damage a Territory's culture. In considering whether application of a right would be anomalous, the question "is whether enforcement of the constitutional provision would damage the culture." Laughlin, 27 U. Haw. L. Rev. at 353-54.

The experience of Guam, NMI, Puerto Rico and the U.S. Virgin Islands clearly indicates that their culture and traditions have not just survived but thrived with birthright citizenship in place. Cultural institutions, native languages and other unique markers of the Territories have been preserved and supported. Courts have respected these traditions, as well.

For example, in *Wabol v. Villacrusis*, 958 F.2d 1450 (9th Cir. 1992), the Ninth Circuit upheld the land alienation restrictions in the Northern Mariana Islands. To protect the local culture, the NMI Con-

stitution restricted long-term interests in land to persons of Northern Mariana Islands descent. *Id.* at 1452. The protection against land alienation was written into the U.S.-NMI agreement establishing the political relationship with the United States. *Id.* (discussing § 805 of the Covenant). "It would truly be anomalous," the Ninth Circuit held, "to construe the equal protection clause to force the United States to break its pledge to preserve and protect NMI culture and property." *Id.* at 1462. The United States has made the same pledge to preserve and protect the culture of American Samoa. *See Corp. of Presiding Bishop of Church of Jesus Christ of Latter-Day Saints v. Hodel*, 830 F.2d 374, 386 (D.C. Cir. 1987) (discussing instruments of cession).

In *King v. Morton*, this Court considered whether an American citizen charged with a crime in violation of the laws of American Samoa was entitled to a trial by jury. 520 F.2d at 1141. Rejecting King's argument that trial by jury was a fundamental right that should be extended to American Samoa, the Court found "the question is whether in American Samoa 'circumstances are such that trial by jury would be impractical and anomalous.'" *Id.* at 1147 (quoting *Reid v. Covert*, 354 U.S. at 75 (Harlan, J., concurring)). The Court found that it could not

answer that question based on the information in the record: affidavits, letters, a law review article, a legislative report, and the Samoan Constitution and Code. *Id.* at 1147-48. Because, based on those materials, "no one can say with certainty whether trial by jury in Samoa would be impractical and anomalous," the Court remanded the case for the district court to develop "an adequate factual record." *Id.* at 1148.

On remand in *King*, the district court held "an extensive trial" in which it carefully examined features of Samoan culture including the *aiga* or extended family, the *matai* or chieftal system, the land tenure system "under which nearly all land is communally owned," and the custom of *ifoga*, whereby one family formally apologizes to another for serious offenses. *King v. Andrus*, 452 F. Supp. 11, 13-15 (D.D.C. 1977). The court considered how Samoan culture and traditions had changed over the years and been influenced by outside events. *Id.* at 14-15.

The district court also heard evidence on American Samoa's system of government, the Territory's educational system of its citizens, transportation to the courthouse, and the legal culture and personnel of American Samoa. *Id.* at 15-16. Finally, the district noted "[t]he obviously major cultural difference between the United States and

American Samoa is that land is held communally in Samoa," and the court concluded that the right to a jury trial "would have no foreseeable impact on that system." *Id.* at 15.

And so it is here. Birthright citizenship would not have the vast and profound effects on culture and tradition that appellees and opposing *amicus* profess to fear. Furthermore, long experience teaches that birthright citizenship has been highly beneficial and entirely practical for residents of Guam, NMI, Puerto Rico and the U.S. Virgin Islands. Appellees and Congressman Faleomavaega have put forth no persuasive basis for concluding that the experience of American Samoa would be any different from the combined decades of experience in those four Territories that have had birthright citizenship for many years and have maintained their unique cultures and traditions.

B. At a Minimum, this Case Should Be Remanded for an Evidentiary Determination of Whether Birthright Citizenship Would Be Impractical and Anomalous in American Samoa.

If, under the *King v. Morton* framework, this Court remains concerned that birthright citizenship would be impractical and anomalous in American Samoa, the Court should remand this case for the district court to make an evidentiary determination of the issue. *Amici* believe

that birthright citizenship would have no impact on the system of communal land ownership or any other custom or tradition of American Samoa. But any doubt must be resolved on the basis of sound, current evidence on Samoan culture. "That understanding cannot be based on unsubstantiated opinion; it must be based on facts." *King v. Morton*, 520 F.2d at 1147.

An evidentiary determination is all the more appropriate because, as this Court has recognized, what is impractical and anomalous can change over time. *Compare Am. Sam. v. Willis*, 1 A.S.R. 635 (High Ct. 1911) (jury trial impractical) to *King v. Andrus*, 452 F. Supp. 11 (jury trial not impractical). Indeed, "[i]t may well be that over time the ties between the United States and any of its unincorporated Territories strengthen in ways that are of constitutional significance." *Boumediene v. Bush*, 553 U.S. 723, 758 (2008). The district court's analysis of Samoan culture in *King* is now nearly 40 years old. To the degree factual considerations affect the constitutional analysis in American Samoa, this Court should remand the instant case for a determination of what the likely consequences of birthright citizenship in American Samoa would be.

II. Holding that the Citizenship Clause Applies to American Samoa Will Not Answer Other Constitutional Questions.

As Plaintiffs-Appellants' brief makes clear, and as discussed above, the text and original understanding of the Citizenship Clause demonstrate that that clause guarantees birthright citizenship in American Samoa. Moreover, even under the doctrinal framework of territorial incorporation, birthright citizenship is a fundamental right, guaranteed throughout the Territories. However, to the extent that this Court analyzes the question under *King v. Morton*'s "impractical and anomalous" framework, it should be noted that the policy concerns raised by Congressman Faleomavaega in the district court do not render birthright citizenship impractical and anomalous.

In his *amicus* brief below, Congressman Faleomavaega argued that recognizing the applicability of the Citizenship Clause to American Samoa "could have" side effects on American Samoan governance and culture, including on a provision of the Samoan Code that restricts non-Samoans' ability to purchase communal land. Br. of the Hon. Eni F.H. Faleomavaega as Amicus Curiae in Supp. of Defs. 12-18, ECF No. 12 (D.D.C. Nov. 7, 2012) ("Faleomavaega Amicus"); *see also* Am. Samoa Code Ann. § 37.0204(b) (1992). In fact, this Court's recognition that

American Samoa is part of the "United States" within the meaning of the Citizenship Clause will not have the deleterious effects that Congressman Faleomavaega raises, for two independent reasons.

First, restrictions on the alienation of land practically identical to those of American Samoa have already survived several Equal Protection challenges in other Territories. As the Congressman himself notes, "the land alienation statutes . . . meet even the most exacting standards." Faleomavaega Amicus 17.

Second, the constitutional analysis under the Citizenship Clause is fundamentally different from other analyses under other constitutional clauses. As leading cases examining other constitutional issues arising in the Territories show, the Citizenship Clause does not impact the interpretation of these other clauses.

A. Territorial Land Alienation Statutes Have Survived Constitutional Challenge.

In his *amicus* brief, Congressman Faleomavaega professed concern that, should American Samoans enjoy birthright citizenship, Samoan land alienation laws would be subject to strict constitutional scrutiny. Faleomavaega Amicus 17. As this Court has noted, communal land ownership is a "cornerstone" of the traditional Samoan way of

life, so alienation of land to non-Samoans is regulated by statute. *Hodel*, 830 F.2d at 377; Am. Samoa Code Ann. § 37.0204(b) (1992). However, in every instance where these (and similar) alienation restrictions in the Territories have been challenged, they have passed constitutional muster, even under strict scrutiny.

Craddick v. Territorial Registrar involved just such a challenge. 1 A.S.R.2d 10 (App. Div. 1980) (*Craddick I*).[2] In *Craddick I* a non-Samoan sought a writ of mandamus to compel the territorial registrar to register a deed conveying land to him, though his ownership would violate the Samoan alienation law. *Id.* at 11. The Samoan High Court found that the alienation statute created a classification based on race and applied strict scrutiny. *Id.* at 12. The court concluded that there is "a compelling state interest in preserving the lands of American Samoa for Samoans and in preserving the *Fa'a Samoa*, or Samoan culture." *Id.* Recognizing that "land holds a central and vital place in Samoan culture," *id.*, the court noted that the "need to preserve an entire culture and way of life," *id.* at 14, provided a proper objective "'independent of

[2] *Available at* http://www.asbar.org/index.php?option=com_content&view=article&id=641:craddick-v-territorial-registrar&catid=50&Itemid=254.

the racial discrimination'" that is forbidden by the Constitution. *Id.* at 13 (quoting *Loving v. Virginia*, 388 U.S. 1, 11 (1967)).

In his reply brief below, Congressman Faleomavaega argues that the land alienation statute's constitutionality is an open question under the Equal Protection Clause. He cites *Craddick Development, Inc. v. Craddick*, 2 A.S.R.3d 20 (App. Div. 1998) ("*Craddick II*"),[3] for the proposition that *Craddick I* "did not address the Equal Protection Clause at all." Reply of the Hon. Eni F.H. Faleomavaega as *Amicus Curiae* in Supp. of Defs. 6, ECF No. 21 (D.D.C. Dec. 12, 2012) (citing *Craddick Dev., Inc. v. Craddick*, 2 A.S.R.3d 20) ("Faleomavaega Reply"). This argument is plainly incorrect. *Craddick I* and *Craddick II* both upheld the land use restrictions under an Equal Protection framework. *Craddick I* asserted that the Equal Protection Clause applies fully in American Samoa and that the land alienation statute survives strict scrutiny. 1 A.S.R.2d at 12. *Craddick II* treated as open the question of the full applicability of the Equal Protection Clause but unambiguously declared that — assuming the Clause applies — "the land restrictions

[3] *Available at* http://www.asbar.org/index.php?option=com_content&view=article&id=2312:2asr3d20&catid=82:2asr3d&Itemid=230.

at issue would not violate [the Equal Protection] clause." *Craddick II*, 2 A.S.R.3d at 26. Both cases stand directly for the proposition that the land alienation statute survives strict scrutiny under an Equal Protection Clause analysis.

Nor are the *Craddick* cases outliers. In the context of a land dispute turning in part on interpretation of American Samoa's land alienation restrictions, this Court found that preserving the *fa'a Samoa* "by respecting Samoan traditions concerning land ownership" is "legitimate congressional policy." *Hodel*, 830 F.2d at 386. In *Hodel*, this Court evaluated, *inter alia*, the fairness of the American Samoan judicial system's use of only *matai* judges (and not Interior Department-appointed judges) in cases implicating land ownership. This Court found a rational basis for the special structure of the system: preservation of Samoan life by protection of native ownership of land. Any other policy would undermine the Samoan Constitution's guarantee to "protect persons of Samoan ancestry against alienation of their lands" because alienation "would inevitably spell the end of the *fa'a Samoa*." *Id.* at 386 (internal citation and quotation marks omitted). Given that earlier portions of the *Hodel* opinion turned on the interpretation of the

land alienation statute, *id.* at 381-83, it would have been unlikely for the Court to cite protection of Samoan land against alienation as the rational basis for upholding related Congressional policy if the constitutionality of the alienation law was in doubt.

Similarly to *Craddick I*, in *Wabol v. Villacrusis*, 958 F.2d 1450, the Ninth Circuit upheld land alienation restrictions in the Northern Mariana Islands that are virtually identical to the restrictions in American Samoa. As in American Samoa, the NMI law restricts acquisition of interest in real property by persons of non-native descent. *Id.* at 1452. As in American Samoa, the purpose of the law is to "protect the people against exploitation and to promote their economic advancement and self-sufficiency and to preserve the islanders' culture and traditions." *Id.* at 1452 (citation and internal quotation marks omitted). As in American Samoa, the land use restrictions were written into the instrument establishing the political relationship between the Territory and the United States. *Id.* (describing section 805 of the Covenant to Establish a Commonwealth in Political Union with the United States of America); *see also Hodel*, 830 F.2d at 386 (discussing Instruments of Cession).

The Ninth Circuit held that imposing the right of equal access to long-term interest in land (sounding in equal protection) would "be both impractical and anomalous in this setting" because, without this restriction, political union between the United States and the Northern Mariana Islands "would not be possible." *Wabol*, 958 F.2d at 1462. Using a fact-intensive, context-sensitive approach similar to the *Craddick* cases — and explicitly derived from *King* — the *Wabol* court arrived at the same result through a different doctrinal route. *Wabol*, 958 F.2d at 1461. *Cf. King v. Morton*, 520 F.2d at 1147 (requiring remand to determine applicability of constitutional right because it is "essential that a decision in this case rest on a solid understanding of the present legal and cultural development of American Samoa" that is "based on facts" not "unsubstantiated opinion"). Functionally, *Craddick*, *Wabol* and *King* all agree that a detailed, fact-specific analysis grounded in the local reality of the Territories demonstrates the constitutionality of the land alienation restrictions in each context.

In short, American Samoa's land alienation law has already survived several constitutional challenges, which alleviates the core concern on which Congressman Faleomavaega's argument is based.

There is no reason to think that recognizing the Citizenship Clause's application to American Samoa would alter the *substance* of the equal protection analysis in a way that would change these results.

B. Recognizing that the Citizenship Clause Applies to American Samoa Will Not Answer the Analysis of Other Constitutional Clauses.

In his *amicus* brief below, Congressman Faleomavaega argued that the application of the "Fourteenth Amendment" to American Samoa would have deleterious consequences for the island. Faleomavaega Br. 12-18. The interpretation of the Fourteenth Amendment writ large is not at issue in this case; only the interpretation of the Citizenship Clause is contested here. There is no reason to believe that a recognition that the Citizenship Clause applies to American Samoa will cause significant changes in independent analyses of different clauses of the Constitution.

Birthright citizenship status has not entered into the analysis of how other constitutional rights apply to residents of U.S. Territories that enjoy birthright citizenship. *See, e.g., Commonwealth of N. Mariana Islands v. Atalig*, 723 F.2d 682, 690 (9th Cir. 1984) (upholding NMI rule providing for jury trials in criminal cases only if the offense is pun-

ishable by more than five years imprisonment or a $2,000 fine); *Rayphand v. Sablan*, 95 F. Supp. 2d 1133, 1136 (D.N.M.I. 1999) (finding that malapportionment of the NMI Senate does not violate the Fourteenth Amendment's equal protection guarantee), *aff'd,* 528 U.S. 1110 (2000). Similarly, birthright citizenship is not mentioned in *Wabol* and *Craddick* and it played no part in the analyses of the Ninth Circuit and the American Samoa High Court. Indeed, birthright citizenship stands on its own in Guam, NMI, Puerto Rico and the U.S. Virgin Islands and has had no impact on the analysis of other constitutional issues facing those Territories.

Under the impractical and anomalous framework, the determination of how various provisions of the Constitution apply in the Territories "must be based on facts," *King*, 520 F.2d at 1147, and "depends upon the 'particular circumstances'" of the case. *Boumediene*, 553 U.S. at 759 (quoting *Reid v. Covert*, 354 U.S. 1, 75 (1957) (Harlan, J., concurring)). In determining how a right applies in the Territories, a court considers how the right would impact the "cultures, traditions and institutions" in which it would be applied. *Atalig*, 723 F.2d at 690. The analysis in all of these cases are fact-intensive and culture-sensitive, as

the application of Constitutional principles must take into account "the shared beliefs of diverse cultures." *Wabol*, 958 F.2d at 1460.

Against the background of this fact-specific approach, there is no basis in law to say that recognizing that the Citizenship Clause is applicable to American Samoa will have any effect on the analysis of how another clause might apply at a later date.

CONCLUSION

The Court should reverse the judgment below and hold that the Citizenship Clause guarantees birthright citizenship in American Samoa, or remand for an evidentiary determination of whether implementation of birthright citizenship in American Samoa would prove impractical and anomalous.

Respectfully submitted,

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May 12, 2014

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitations of Federal Rule of Appellate Procedure 32(a)(7)(B) because it contains 4,571 words, excluding the parts of the brief exempted by Rule 32(a)(7)(B)(iii). This brief complies with the typeface requirements of Rule 32(a)(5) and the type-style requirements of Rule 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in Century Schoolbook 14 point font.

/s/ Eugene D. Gulland
Eugene D. Gulland

May 12, 2014

CERTIFICATE OF SERVICE

I hereby certify that on May 12, 2014, I caused the Brief of *Amici Curiae* Certain Members of Congress and Former Governmental Officials to be filed with the Clerk of the United States Court of Appeals for the D.C. Circuit using the appellate CM/ECF system, causing a true and correct copy to be served upon all counsel of record who are registered CM/ECF users.

/s/ Eugene D. Gulland
Eugene D. Gulland