UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

LENEUOTI F. TUAUA, *et al.*, Plaintiffs-Appellants, v. UNITED STATES OF AMERICA, *et al.*, Defendants-Appellees.	Case No: 13-5272

PLAINTIFFS-APPELLANTS' OPPOSITION TO DEFENDANTS-APPELLEES' MOTION FOR SUMMARY AFFIRMANCE

Plaintiffs-Appellants Leneuoti F. Tuaua; Va'Aleama T. Fosi; Fanuatanu F. L. Mamea, on his own behalf and on behalf of his minor children, M.F.M., L.C.M., and E.T.M.; Taffy-Lei T. Maene; Emy F. Afalava; and Samoan Federation of America, Inc. (collectively, "Appellants"), respectfully submit this opposition to Defendants-Appellees' Motion for Summary Affirmance ("Motion").

This case presents the first opportunity for any appellate court to consider whether people born in the current and long-held U.S. territory of American Samoa are U.S. citizens by virtue of the Fourteenth Amendment's guarantee that "[a]ll persons born . . . in the United States, and subject to the jurisdiction thereof, are citizens of the United States." U.S. Const. amend. XIV, § 1, cl.1. American Samoa has been a part of the United States for 113 years. Nonetheless, Appellants – three of whom are veterans of the U.S. Armed Forces – are labeled by federal

statute with an inferior status as "nationals, but not citizens, of the United States." 8 U.S.C. § 1408(1). Whether Congress has the power to limit the geographic scope of the Citizenship Clause to exclude persons born in any U.S. territory – let alone a current and long-held territory – remains an open question before the Supreme Court and this Circuit. For this reason alone, this appeal is inappropriate for summary disposition and warrants a full briefing on the merits.

Contrary to the claim by Defendants-Appellees (collectively, "the Government"), the merits of this appeal are also not "so clear as to make summary affirmance proper." Mot. at 2. The text, history, and the Supreme Court's interpretation of the Fourteenth Amendment establishes that the Constitution's guarantee of birthright citizenship extends throughout the territorial limits of the United States, including American Samoa. The Government's Motion relies heavily on labeling American Samoa an "unincorporated territory." But even to the extent that such a label matters, this Circuit's precedent requires a remand for a fact-based determination about whether recognizing the right at issue would be "impractical and anomalous" in the context of "the situation as it exists in American Samoa today." *King v. Morton*, 520 F.2d 1140, 1147 (D.C. Cir. 1975).

The bar for summary disposition is high. "A party seeking summary disposition bears the heavy burden of establishing that the merits of his case are so clear that expedited action is justified." *Taxpayers Watchdog, Inc. v. Stanley*, 819

F.2d 294, 297-98 (D.C. Cir. 1987). The Government's Motion falls far short of meeting its heavy burden and should be denied.

I. Summary Disposition Is Inappropriate Because Appellants Present Issues of First Impression for This Court.

This case does not qualify for summary disposition. Issues of first impression are "not appropriate for summary disposition." *Am. Petroleum Inst. v. U.S. E.P.A.*, 72 F.3d 907, 914 (D.C. Cir. 1996); *see also* D.C. Cir. Handbook of Practice and Internal Procedures 36 (2011) ("Parties should avoid requesting summary disposition of issues of first impression for the Court."). Even the District Court recognized that Appellants' claims present "truly novel, interesting and difficult questions." Oral Arg. Tr. (Dec. 17, 2012) at 50:12, *Tuaua v. United States*, No. 12-CV-1143 (D.D.C.) ("Tr.") (excerpts attached hereto as Exhibit A). In response to the Government's argument that Appellants' claims were unprecedented, the District Court stated, "Well, we get a lot of cases of first impression around here." *Id.* at 6:13-14.

At each opportunity, the District Court invited additional briefing and consideration, not less. Although the District Court does not "hear arguments on much more than 10 percent of the motions [it] get[s] in this court," Tr. at 50:10-11, here it entertained 70 minutes of oral argument, including 30 minutes for each of the parties and 10 minutes for *amicus curiae*. The District Court even took the unusual step of inviting *amicus* to file a reply brief. Far from supporting truncating

this appeal as the Government suggests, *see* Mot. at 1, 6, the extended briefing and argument in the proceedings below only further support plenary consideration of the merits on appeal.

This Court's handling of *Mendoza v. Social Security Commissioner*, 92 F. App'x 3 (D.C. Cir. 2004) (per curiam), confirms that the Government's Motion is misconceived. In *Mendoza*, a *pro se* litigant sought Social Security benefits, arguing in part that her deceased husband was "a citizen of the United States within the meaning of the Citizenship Clause" based on his birth in the former U.S. territory of the Philippines. *Id.* at 3. This Court requested additional briefing on these issues, appointing O'Melveny & Myers to serve as *amicus curiae*. *See id*. Even though the Government made many of the same arguments that it now makes here, the Court ultimately reserved the constitutional question for another day, concluding that it "need not decide any of the constitutional questions presented by Amicus" because Mendoza's claim could be resolved on other grounds. *Id.* If the constitutional question in the present case were so open and shut as to be appropriate for summary disposition as the Government suggests, it seems unlikely that the Court would have seen any need to commission additional briefing or ultimately to reserve decision on a similar question in *Mendoza*.

The Government nonetheless suggests that summary affirmance is proper because "binding case law" bars Appellants' claims, citing to a series of Supreme

Court decisions known collectively as the *Insular Cases*. *See* Mot. at 9. This contention ignores that, as the District Court recognized, "none of the Insular Cases directly addressed the Citizenship Clause." *Tuaua v. United States*, No. 12-CV-1143, slip op. at 10 (D.D.C. June 26, 2013) ("Dist. Ct. Op.") (attached hereto as Exhibit B). Even the decisions from other circuits which addressed issues similar to *Mendoza*, upon which the Government relies, *see* Mot. at 9-10, emphasized that the Supreme Court has never answered the question of the Citizenship Clause's application in U.S. territories. *See, e.g., Rabang v. INS*, 35 F.3d 1449, 1452 (9th Cir. 1995) ("No court has addressed whether persons born in a United States territory are born 'in the United States,' within the meaning of the Fourteenth Amendment."); *Valmonte v. INS*, 136 F.3d 914, 918 (2d Cir. 1998) ("Petitioner's argument is relatively novel, having been addressed previously only in the Ninth Circuit."). In any event, these other circuits' decisions are distinguishable from the present case because, like *Mendoza*, they only addressed individuals born in the Philippines, a former territory that the United States never intended to hold permanently.

Moreover, *Rabang*, the first and most extensive of these decisions, was split 2-1, with the dissenting opinion embracing many of the arguments raised by Appellants in this case. *See* 35 F.3d at 1455 (Pregerson, J., dissenting) ("[The majority's] narrow approach overlooks principles of common law, readily accepted

by the framers of the Constitution and the authors of the Fourteenth Amendment, which demonstrate that the Citizenship Clause applies to all persons who owe allegiance to, and are born within the territory or dominion of, the United States.").

An issue that is open in this Circuit, and whose resolution has divided judges in other circuits, is hardly the type of issue for which the summary affirmance procedure was designed. The Government's Motion should be denied to allow for full briefing and consideration on the merits of these issues of first impression.

II. The Merits Are Not "So Clear as to Make Summary Affirmance Proper."

The Government must show that "the merits . . . are so clear as to justify summary action." *Taxpayers Watchdog*, 819 F.2d at 297; *see also* D.C. Cir. Handbook of Practice and Internal Procedures 36 (2011) (same). It cannot. Far from the District Court's decision being "plainly correct," Mot. at 7, the text, history, and Supreme Court interpretation of the Citizenship Clause support the opposite view: that the Constitution, not Congress, determines the citizenship of persons born on U.S. soil, including in American Samoa. And even if the answer to the question were informed by the Government's preferred label of "unincorporated territory," this Circuit's precedent requires a remand for a fact-based determination of whether recognizing the right at issue would be "impractical and anomalous" in the context of "the situation as it exists in American Samoa today." *King*, 520 F.2d at 1147. The fact-specific analysis

required under *King* is reinforced by the Supreme Court's recent statements in *Boumediene v. Bush*, 553 U.S. 723 (2008). Additionally, it does not matter whether American Samoa is labeled an "unincorporated" territory, because the right to citizenship provided by the Fourteenth Amendment is "fundamental," meaning it applies in U.S. territories, incorporated or not, regardless of congressional action. For all these reasons, further briefing and consideration is warranted.

A. The Constitution Guarantees Birthright Citizenship Throughout the Territorial Limits of the United States, Including American Samoa.

The District Court correctly identified the "key question" in this case: the meaning of the phrase "the United States" as it is used in the Citizenship Clause. Dist. Ct. Op. at 9. But the District Court incorrectly answered that question. The text, history, and Supreme Court interpretation of the Citizenship Clause support an understanding of "the United States" that includes states, territories, and the District of Columbia.

At the time the Fourteenth Amendment was drafted and ratified, there was a settled understanding, based on longstanding Supreme Court precedent, that "the United States" referred to more than just the states alone. As Chief Justice John Marshall explained for a unanimous Court in *Loughborough v. Blake*, "the United States" was "the name given to our great republic, which is composed of States and

territories." 18 U.S. 317, 319 (1820). Influential legal treatises published during the Reconstruction period cited to *Loughborough* and similarly embraced its broad conception of "the United States."[1] This makes sense, because when the Fourteenth Amendment was ratified in 1868, almost half of all land in the United States was part of a U.S. territory.[2]

The text of the Fourteenth Amendment itself draws a clear distinction between provisions applying to the United States as a whole and those applying only to the states. Section 1 of the Fourteenth Amendment uses the phrase "the United States," while Section 2 uses the separate and distinct phrase "the Several States." U.S. Const. amend. XIV. Senator Lyman Trumbull, Chairman of the Senate Judiciary Committee, explained the significance of these distinctions during

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[1] *E.g.*, 1 J. Kent, Commentaries on American Law 269-70 (11th ed. 1866) ("[T]here were principles involved in [*Loughborough*] which had an extensive and important relation to the whole United States. It was declared that the power to tax extended equally to all places over which the government extended. It extended as well to the District of Columbia, and to the territories which were not represented in Congress, as to the rest of the United States . . . ."); J. Pomeroy, An Introduction to the Constitutional Law of the United States §§ 491-492, pp. 310-12 (1868) (citing *Loughborough* and then commenting: "The safeguards of individual rights[,] those clauses which preserve the lives, liberty, and property of the citizens from the encroachments of arbitrary power, must apply as well to that legislation of Congress which is concerned exclusively with the District of Columbia or with the territories, as to that which is concerned with the states.").

[2] Of the twenty largest states today, twelve were U.S. territories in 1868, including Alaska, Arizona, Colorado, Idaho, Montana, New Mexico, North Dakota, Oklahoma, South Dakota, Utah, Washington, and Wyoming, making up over 1.5 million square miles.

congressional debate over the Amendment: while "[t]he second section refers to no persons except those in the States of the Union" in apportioning representatives, "the first section 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) (emphasis added). Contrary to the District Court's dismissal of these and similar contemporary statements in a footnote as "stray comments," Dist. Ct. Op. at 14 n. 14, they provide essential insight into the original meaning of the phrase "the United States" as used in the Citizenship Clause.

Just four years after the Fourteenth Amendment was ratified, the Supreme Court echoed the understanding of the Citizenship Clause embraced by Senator Trumbull. In the *Slaughter-House Cases*, the Court observed that the Citizenship Clause "put[] at rest" the notion 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. 36, 72-73 (1872) (emphases added). The Court went on to explain that "a man [may] be a citizen of the United States without being a citizen of a State," since "it is only necessary that he should be born or naturalized in the United States to be a citizen of the Union." *Id.* at 74.

The Supreme Court's most extensive examination of the Citizenship Clause was in the 1898 case *United States v. Wong Kim Ark*, 169 U.S. 649 (1898), decided just two years prior to American Samoa becoming a part of the United States. In

Wong Kim Ark, the Supreme Court stated that the Citizenship Clause "affirms the ancient and fundamental rule of citizenship by birth *within the territory*, in the allegiance and under the protection *of the country*," emphasizing that "[t]he amendment, in clear words and in manifest intent, includes the children born *within the territory* of the United States . . . ." *Id.* at 693 (emphases added). The Court went on to explain that "[t]he [F]ourteenth [A]mendment . . . has conferred no authority upon [C]ongress to restrict the effect of birth, declared by the [C]onstitution to constitute a sufficient and complete right to citizenship." *Id.* at 703. Thus, contrary to the Government's contention that the question of citizenship in U.S. territories turns on congressional action or inaction, *see* Mot. at 10-11, as the Court explained in *Wong Kim Ark*, "no act or omission of [C]ongress . . . can affect citizenship acquired as a birthright, by virtue of the [C]onstitution itself." 169 U.S. at 703.[3]

[3] Recent scholarship supports the principle that the Constitution's guarantee of birthright citizenship extends throughout the territorial limits of the United States, including U.S. territories. *See*, *e.g.*, Opinion Letter by Laurence Tribe and Theodore Olson, *Presidents and Citizenship* (Mar. 19, 2008), *reprinted in* 2 Journal of Law (2 Pub. L. Misc.) 509 (2012) ("[B]irth on soil that is under the sovereignty of the United States, but not within a State" satisfies the requirement for being a "'natural born' citizen," in light of "the well-established principle that 'natural born' citizenship includes birth within the territory and allegiance of the United States"); James C. Ho, Presidential Eligibility, The Heritage Guide to the Constitution (2012) ("Under the longstanding English common-law principle of *jus soli*, persons born within the territory of the sovereign (other than children of

(Footnote continued)

B. *King v. Morton* Does Not Permit Dismissal Without a Finding That Birthright Citizenship Would Be "Impractical and Anomalous" in American Samoa Today.

To the extent the "unincorporated" territory label is relevant to this case, D.C. Circuit precedent requires a fact-based determination of whether it would be impractical and anomalous to recognize birthright citizenship in American Samoa today. The District Court erred by dismissing the case without making such a determination. *See* Dist. Ct. Op. at 14-16.

King considered a claim against the Secretary of Interior that American Samoa laws denying a right to jury trial for serious criminal offenses were "unconstitutional on their face and as applied to plaintiff." 520 F.2d at 1143. While acknowledging that the Supreme Court had upheld similar laws in the Philippines and other overseas territories in the *Insular Cases*, this Court emphasized that those decisions were informed by their context. *See id.* at 1147. Accordingly, this Court held that the relevant question was whether recognizing the jury trial right would be "impractical and anomalous" in the context of "the situation as it exists in American Samoa today." *Id.* (citing *Reid v. Covert*, 354 U.S. 1, 75 (1957) (Harlan, J., concurring in the result)).

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enemy aliens or foreign diplomats) are citizens from birth."), *available at* http://www.heritage.org/constitution#!/articles/2/essays/82/presidential-eligibility.

Reversing the district court's dismissal of the case, this Court ordered a remand so that "an adequate factual record may be developed." *King*, 520 F.2d at 1147. On remand, the district court was presented with arguments that the right to criminal trial by jury in American Samoa would "undercut the preservation of traditional values," and disrupt the Fa'a Samoa, or Samoan way of life. *King v. Andrus*, 452 F. Supp. 11, 12-13 (D.D.C. 1977). Rejecting these arguments as a factual matter, the district court concluded that trial by jury for serious criminal offenses would not be "impractical and anomalous" in American Samoa, and held that laws denying jury trials for such offenses right were "unconstitutional on their face and as applied to plaintiff." *Id.* at 17.

The relevance of the *King* framework here was confirmed by the Motion to Intervene or, in the Alternative, for Leave to Participate as *Amicus Curiae* ("Intervention Brief") that was recently filed in this case by the American Samoan government and Congressman Eni F.H. Faleomavaega. The American Samoan government and Congressman suggest that they are uniquely situated to argue that "a ruling that the Citizenship Clause of the Fourteenth Amendment encompasses the people of American Samoa could have unintended and harmful effects on the culture of America Samoa." Intervention Br. at 9. This concern for the possible effects on American Samoa's culture is ***precisely*** why this Court required a remand in *King*: "The importance of the constitutional right at stake makes it essential that

a decision in this case rest on a solid understanding of the present legal and cultural development of American Samoa. That understanding cannot be based on unsubstantiated opinion; it must be based on facts." 520 F.2d at 1147.

The Government and the District Court have attempted to distinguish *King* on two grounds. First, they suggest that the analysis in *King* is somehow limited to the rights of recognized U.S. citizens, simply because the *King* plaintiff was a U.S. citizen. Mot. at 12; Dist. Ct. Op. at 15. But when ordering remand in *King*, this Court did not order factual development solely as to the practicality of jury trials for U.S. citizens. And on remand, the district court held that laws denying criminal trial by jury were "unconstitutional on their face," with no suggestion that this ruling only applied to citizens. *King*, 452 F. Supp. at 17. Indeed, the Government's cramped reading of *King* would be news in American Samoa today, where *every* resident now enjoys a right to jury trial in serious criminal cases.

Second, the Government suggests that *King* has been superseded by *Corporation of Presiding Bishop of Church of Jesus Christ of Latter-Day Saints v. Hodel*, 830 F.2d 374 (D.C. Cir. 1987). *See* Mot. at 12-13; *see also* Dist. Ct. Op. at 15-16. This is also unavailing. *Hodel* considered a challenge to a property ruling by the High Court of American Samoa. The challenge was brought, *inter alia*, on the grounds that the Due Process Clause requires a judiciary in American Samoa that is independent of the Department of Interior's supervision. *See* 830 F.2d at

383-84. The claim was dismissed on the grounds that the Property Clause gives Congress the power in U.S. territories to delegate judicial authority to the executive. *See id.* at 384. Tellingly, the *Hodel* Court approvingly cited *King* without suggesting any inconsistency with that earlier decision. *See id.* at 383 n.58 (citing *King*). And even if there were some inconsistency, *King* would still provide the framework applicable here because it preceded *Hodel*, and "[o]ne three-judge panel . . . does not have the authority to overrule another three judge panel of the court." *LaShawn A. v. Barry*, 87 F.3d 1389, 1395 (D.C. Cir. 1996) (en banc).

In any event, unlike *King* and the present case, *Hodel* was not a direct constitutional challenge to a statute, nor did it involve a clearly enumerated individual constitutional right. *See Hodel*, 830 F.2d at 385 (discussing appellant's theory of a due process right of "access to an independent court"). Moreover, although *Hodel* considered Congress's Property Clause power to dispose of and govern territories and other federal *property*, the Citizenship Clause is a separate guarantee of *individual* rights that cannot be affected by any "act or omission of [C]ongress." *Wong Kim Ark*, 169 U.S. at 703.

C. The Impact of the Supreme Court's Decision in *Boumediene v. Bush* Warrants Further Briefing.

The need for the fact-specific analysis that this Court required in *King* is reinforced by the Supreme Court's recent decision in *Boumediene v. Bush*, 553 U.S. 723 (2008). Although *Boumediene* addressed the application of the

Constitution's Suspension Clause outside the United States, its discussion of the *Insular Cases* and the powers of Congress in U.S. territories today warrant further consideration by this Court.

The Supreme Court's *Boumediene* opinion, like this Court's decision in *King*, cited repeatedly to the "impractical and anomalous" standard first articulated by Justice Harlan in *Reid v. Covert*. *See* 553 U.S. at 758-61. Addressing the application of constitutional rights in U.S. territories today, the *Boumediene* Court explained that "[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." *Id.* at 759 (citing approvingly to *Torres v. Puerto Rico*, 442 U.S. 465, 475-476 (1979) (Brennan, J., concurring in judgment) ("Whatever the validity of the [*Insular Cases*] in the particular historical context in which they were decided, those cases are clearly not authority for questioning the application of the Fourth Amendment – or any other provision of the Bill of Rights – to the Commonwealth of Puerto Rico in the 1970's.")).

Boumediene, however, went even further, stating that "[t]he Constitution grants Congress and the President the power to acquire, dispose of, and govern territory, *not the power to decide when and where its terms apply*." *Id.* at 765 (emphasis added). The Court expressly rejected the notion that "the political branches have the power to switch the Constitution on or off at will." *Id.* As the

Court explained, "[t]he test for determining the scope of" the constitutional provision at issue "must not be subject to manipulation by those whose power it is designed to restrain." *Id.* at 765-66.

In its opinion below, the District Court dismissed all this as "vague statement[s] crafted in a vastly different context." Dist. Ct. Op. at 13. But the Supreme Court's pronouncements in *Boumediene* speak directly to the issues at the heart of this case. At the very least, the relevance and impact of *Boumediene* warrant full consideration on appeal, not disposition by summary procedures.

D. Citizenship Is a "Fundamental Right" That Congress Cannot Deny to Persons Born in U.S. Territories.

The Government emphasizes that American Samoa has historically been labeled as an "unincorporated" territory by the courts and an "outlying territory" by Congress. Mot. at 3, 8. But as the Supreme Court recently reiterated, "as early as *Balzac* [*v. Porto Rico*] in 1922, the Court took for granted that even in unincorporated Territories the Government of the United States was bound to provide . . . 'guaranties of certain fundamental personal rights declared in the Constitution.'" *Boumediene*, 553 U.S. at 758 (quoting *Balzac v. Porto Rico*, 258 U.S. 298, 312-13 (1922)).

The right to citizenship guaranteed by the Fourteenth Amendment is a "fundamental" right, and as such it cannot be selectively withheld by Congress in U.S. territories, incorporated or not. As the Supreme Court stated in *Afroyim v.*

Rusk, "[c]itizenship is no light trifle to be jeopardized any moment Congress decides to do so under the name of one of its general or implied grants of power." 387 U.S. 253, 267-68 (1967). *See also Trop v. Dulles*, 356 U.S. 86, 103 (1958) (plurality op.) ("When the Government acts to take away *the fundamental right of citizenship*, the safeguards of the Constitution should be examined with special diligence." (emphasis added)). The District Court dismissed this argument in a footnote, *see* Dist. Ct. Op. at 10 n. 11, yet it was fully embraced by the dissenting judge in *Rabang v. INS*, 35 F.3d at 1456 (Pregerson, J., dissenting) ("I believe that the right to citizenship by birth is among those fundamental constitutional rights which must apply by their own force even under [the *Insular Cases*]."). These conflicting views further demonstrate why this Court's plenary consideration of this issue is warranted.

CONCLUSION

For the foregoing reasons, Appellants respectfully request that the Court deny the Government's Motion for Summary Affirmance.

Dated: November 22, 2013

Respectfully submitted,

/s/ Murad Hussain

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CERTIFICATE OF SERVICE

I, Murad Hussain, hereby certify that on this 22nd day of November 2013, I caused a true and correct copy of the foregoing to be filed electronically using the Court's CM/ECF system, causing a true and correct copy to be served on all counsel of record.

/s/ Murad Hussain
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EXHIBIT A

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

LENEUOTI FIAFIA TUAUA, et al.,	:	Docket No. CV12-1143 (RJL)
Plaintiffs,	:	
	:	December 17, 2012
v.	:	2:40 p.m.
UNITED STATES OF AMERICA, et al.,	:	
Defendants.	:	
. . . . .	:	

TRANSCRIPT OF ORAL ARGUMENTS
BEFORE THE HONORABLE RICHARD J. LEON
UNITED STATES DISTRICT JUDGE

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(Appearances continued on the next page.)

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Court Reporter:	PATTY ARTRIP GELS, RMR Official Court Reporter Room 4700-A, U.S. Courthouse Washington, D.C. 20001 (202) 962-0200

Proceedings reported by machine shorthand, transcript produced by computer-aided transcription.

for the U.S. Virgin Islands, and most recently the Northern Mariana Islands.

Designating persons within those jurisdictions as nationals but not citizens then changed based on congressional action here. As your Honor knows, the elected --

THE COURT: Have the courts ever done this?

MR. KELLY: Your Honor, no --

THE COURT: Have the federal courts ever declared someone or some group of people the rights to citizenship when Congress hadn't acted?

MR. KELLY: No, your Honor. No court has ever done what the Plaintiffs are asking the Court here to do.

THE COURT: Well, we get a lot of cases of first impression around here.

MR. KELLY: We do, your Honor. However, courts -- other federal courts who have looked at similar situations, which we discussed in our brief -- for example, the Ninth Circuit both in Rabang, as related to the Philippines, and in Eche versus Holder, which is very recent, September of this year, as it relates to citizens of the Northern Mariana Islands.

In both of those cases, the Ninth Circuit looked to the text of the Fourteenth Amendment, looked to the situation of the persons involved, and held that the birthright citizenship memorialized in the Fourteenth Amendment does not extend to outlying unincorporated territories, and it is up to Congress to

THE COURT: Thank you.

MR. KELLY: Your Honor, if you have any further questions, I am happy to answer them.

THE COURT: That's fine.

MR. KELLY: Okay. Thank you very much, your Honor, and again, for the reasons we've expressed, we request that our motion to dismiss be granted.

THE COURT: All right. Well, I will take it under advisement. Thank you for your fine briefs, Counsel, and your fine arguments today. I don't hear arguments on much more than 10 percent of the motions I get in this court, so we reserve it for the truly novel, interesting and difficult questions, and this is certainly one of those.

But I appreciate your hard work on relatively short notice, and they are very high-quality briefs indeed, as were your arguments. So I will take it under advisement and sit by the fire with an eggnog and see if I can come up with a solution to this problem. Happy holidays.

(Whereupon, at 3:46 p.m., the proceedings were concluded.)

CERTIFICATE OF REPORTER

I, Patty A. Gels, certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

_____ __ _____ __

EXHIBIT B

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

LENEUOTI FIAFIA TUAUA, et al.,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	**Civil Case No. 12-01143 (RJL)**
	)	
UNITED STATES OF AMERICA, et al.,	)	
	)	
Defendants.	)	

MEMORANDUM OPINION
June 26, 2013 [# 9]

Plaintiffs are five non-citizen U.S. nationals born in American Samoa and the Samoan Federation of America, a nonprofit organization serving the Samoan community in Los Angeles. Compl. ¶¶ 10-15.[1] They seek declaratory and injunctive relief against defendants, the United States and the related parties that execute its citizenship laws. *Id.* ¶¶ 16–19.[2] They assert that the Fourteenth Amendment's Citizenship Clause extends to American Samoa and that people born in American Samoa are therefore U.S. citizens at birth. *Id.* at 25-26. Plaintiffs also argue that Immigration and Naturalization Act § 308(1) is unconstitutional because it provides that American Samoans are noncitizen U.S. nationals. *See id.* at 26. Further, they ask the Court to hold that a State Department policy and practice are unconstitutional and invalid under the Administrative Procedure

[1] The five individual plaintiffs are Leneuoti Fiafia Tuaua ("Tuaua"), Va'aleama Tovia Fosi ("Fosi"), Fanuatanu Fauesala Lifa Mamea ("Mamea"), Taffy-Lei T. Maene ("Maene"), and Emy Fiatala Afaleva ("Afaleva"). Mamea also brings his claims on behalf of his three minor children. *Id.* ¶ 12(a).
[2] Defendants are the United States, the State Department, the Secretary of State, and the Assistant Secretary of State for Consular Affairs.

Act ("APA"). *See* Compl. at 26. Underlying all of these claims is the same legal argument: the Citizenship Clause applies to American Samoa, so contrary law and policy must be invalidated. The United States and related parties move to dismiss plaintiffs' complaint pursuant to Federal Rule of Civil Procedure 12(b) for lack of subject-matter jurisdiction and failure to state a claim. *See* Mem. of P. & A. in Supp. of Defs.' Mot. to Dismiss ("Defs.' Mem.") [Dkt. # 9] at 1. Because plaintiffs have failed to state a claim upon which relief can be granted, the Court GRANTS defendants' Motion to Dismiss.

BACKGROUND

American Samoa is located on the eastern islands of an archipelago in the South Pacific. Compl. ¶ 3. The United States claimed this territory in a 1900 treaty with Great Britain and Germany, 31 Stat. 1878, and Samoan leaders formally ceded sovereignty to the United States in 1900 and 1904, 45 Stat. 1253. American Samoa was administered by the Secretary of the Navy until 1951, when President Truman transferred administrative responsibility to American Samoa's current supervisor, the Secretary of the Interior. Exec. Order No. 10,264, 16 Fed. Reg. 6,417 (July 3, 1951).

Over the past half-century, American Samoa has strengthened its ties to the United States. The Constitution of American Samoa was approved by the Secretary of the Interior in 1967 and provides for an elected bicameral legislature, an appointed governor, and an independent judiciary. Compl. ¶ 27. In 1977, the Secretary permitted the governor to be selected by popular vote. *Id.* One year later, Congress voted to give

American Samoa a nonvoting delegate in the U.S. House of Representatives. *Id.* [3] American Samoans have served in the U.S. military since 1900 and, most recently, in the wars in both Iraq and Afghanistan. *Id.* ¶ 31. In signing the 1978 legislation granting American Samoa a delegate in Congress, President Carter acknowledged the islands' contributions to American sports and culture and their role as "a permanent part of American political life." Jimmy Carter, Presidential Statement on Signing H.R. 13702 into Law (Oct. 31, 1978), *cited in* Pls.' Mem. of P. & A. in Opp'n to Gov't's Mot. Dismiss ("Pls.' Opp'n") [Dkt. # 18] at 5 n.7.

At the same time, however, American Samoa has endeavored to preserve its traditional way of life known as *fa'a Samoa*. Indeed, its constitution protects the Samoan tradition of communal ownership of ancestral lands by large, extended families:

> It shall be the policy of the Government of American Samoa to protect persons of Samoan ancestry against alienation of their lands and the destruction of the Samoan way of life and language, contrary to their best interests. Such legislation as may be necessary may be enacted to protect the lands, customs, culture, and traditional Samoan family organization of persons of Samoan ancestry, and to encourage business enterprises by such persons. No change in the law respecting the alienation or transfer of land or any interest therein, shall be effective unless the same be approved by two successive legislatures by a two-thirds vote of the entire membership of each house and by the Governor.

Rev. Const. of Am. Samoa art. I, § 3; *see also Craddick v. Territorial Registrar*, 1 Am. Samoa 2d 11, 12 (1980); Amicus Br. at 4-5. American Samoans take pride in their unique political and cultural practices, and they celebrate its history free from conquest or involuntary annexation by foreign powers. Amicus Br. at 3.

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[3] The current delegate, Eni F. H. Faleomavaega, appears as Amicus Curiae in this case opposing the plaintiffs' suit. *See generally* Br. of the Hon. Eni F.H. Faleomavaega as Amicus Curiae in Supp. of Defs. ("Amicus Br.") [Dkt. # 12].

Federal law classifies American Samoa as an "outlying possession" of the United States. Immigration and Naturalization Act ("INA") § 101(a)(29), 8 U.S.C. § 1101(a)(29). As such, people born in American Samoa are U.S. nationals but not U.S. citizens at birth. INA § 308(1), 8 U.S.C. § 1408(1). The State Department's Foreign Affairs Manual ("FAM") accordingly categorizes American Samoa as an unincorporated territory and states that "the citizenship provisions of the Constitution do not apply to persons born there." 7 FAM § 1125.1(b). In accordance with INA and FAM, the State Department stamps the passports of people born in American Samoa with "Endorsement Code 09," which declares that the holder of the passport is a U.S. national but not a U.S. citizen. *See* Compl. ¶ 7; Defs.' Mem. at 6–7. American Samoans have been permitted to become naturalized U.S. citizens since 1952, but plaintiffs describe that process as "lengthy, costly, and burdensome." Compl. ¶¶ 47–48. American Samoans must relocate to another part of the United States to begin the naturalization process, and the citizenship application requires a $680 fee, a moral character assessment, fingerprinting, and an English and civics examination. Pls.' Opp'n at 11.

All of the individual plaintiffs were issued passports by the State Department bearing Endorsement Code 09. *See id.* ¶¶ 10–14. Plaintiffs allege a variety of harms that have befallen them due to their non-citizen national status. Several plaintiffs, despite long careers in the military or law enforcement, remain unable to vote or to work in jobs that require citizenship status. *Id.* ¶ 10(c), 11(c)-(e), 14(c)–(d). Other harms include: ineligibility for federal work-study programs in college, *id.* ¶ 11(c); ineligibility for

firearm permits, *id.* ¶ 11(e); and inability to obtain travel and immigration visas, *id.* ¶ 12(e), 13(d-e).

STANDARD OF REVIEW

Pursuant to the Federal Rules of Civil Procedure, defendants have moved to dismiss plaintiffs' complaint for lack of subject-matter jurisdiction under Rule 12(b)(1) and for failure to state a claim under Rule 12(b)(6). *See* Defs.' Mot. to Dismiss Pls.' Compl. ("Defs.' Mot.") [Dkt. # 9] at 1. For a motion to dismiss under Rule 12(b)(1), "the plaintiff bears the burden of establishing the factual predicates of jurisdiction by a preponderance of the evidence." *Erby v. United States*, 424 F. Supp. 2d 180, 182 (D.D.C. 2006) (citing, *inter alia*, *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992)). "[P]laintiff's factual allegations in the complaint . . . will bear closer scrutiny in resolving a 12(b)(1) motion than in resolving a 12(b)(6) motion for failure to state a claim." *U.S. ex rel. Digital Healthcare, Inc. v. Affiliated Computer*, 778 F. Supp. 2d 37, 43 (D.D.C. 2011) (citation and internal quotation marks omitted).

A motion to dismiss under Rule 12(b)(6) tests whether the plaintiff has pleaded facts sufficient to "raise a right to relief above the speculative level," assuming that the facts alleged are true. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007). "While a complaint should not be dismissed unless the court determines that the allegations do not support relief on any legal theory, the complaint nonetheless must set forth sufficient information to suggest that there is some recognized legal theory upon which relief may be granted." *District of Columbia v. Air Fla., Inc.*, 750 F.2d 1077, 1078 (D.C. Cir. 1984).

In considering motions under both Rule 12(b)(1) and Rule 12(b)(6), a court must construe the complaint in a light favorable to the plaintiff and must accept as true plaintiff's reasonable factual inferences. *See Howard v. Fenty*, 580 F. Supp. 2d 86, 89–90 (D.D.C. 2008); *Smith v. United States*, 475 F. Supp. 2d 1, 7 (D.D.C. 2006) (citing *EEOC v. St. Francis Xavier Parochial Sch.*, 117 F.3d 621, 624 (D.C. Cir. 1997)).

ANALYSIS

I. Jurisdiction

Before the Court can reach the merits of this case, it must, of course, ensure that the dispute falls within its jurisdiction. *Util. Air Regulatory Grp. v. EPA*, 320 F.3d 272, 277 (D.C. Cir. 2003). Defendants put forth three arguments contesting this Court's jurisdiction over plaintiffs' claims: 1) two of plaintiffs' APA claims are jurisdictionally time-barred, 2) the Samoan Federation of America lacks standing, and 3) plaintiffs' complaint is barred by the political question doctrine. *See* Defs.' Mem. at 17-18, 19-23. For the reasons set forth below, the Court finds that it has jurisdiction.

First, defendants allege that two of the five individual plaintiffs' APA claims are time-barred because their passports, bearing Endorsement Code 09, were issued outside the six year limitations period. *See* Defs.' Mem. at 20-21.[4] Putting aside the merits of defendants' argument, however, the fact remains that the three other plaintiffs have, in essence, raised the identical APA claim. Thus, having jurisdiction to hear those claims

[4] The APA time bar issue is best understood as a jurisdictional matter. Our Circuit has held that the general section 2401(a) statute of limitations applies to APA claims unless another statute provides otherwise, *see Harris v. FAA*, 353 F.3d 1006, 1009 (D.C. Cir. 2004), and that, "[u]nlike an ordinary statute of limitations, § 2401(a) is a jurisdictional condition," *Spannaus v. U.S. Dep't of Justice*, 824 F.2d 52, 55 (D.C. Cir. 1987).

effectively provides this Court with the very jurisdiction necessary to evaluate the merits of these claims.

Similarly, defendants' assertion that the Samoan Federation of America lacks standing to sue either on its own behalf or on behalf of its members, *see* Defs.' Mem. at 21-23, is an argument that is of no real consequence.[5] It is well-established that a court need not consider the standing of the other plaintiffs when at least one plaintiff has standing. *See In re Navy Chaplaincy*, 697 F.3d 1171, 1178 (D.C. Cir. 2012); *Tozzi v. U.S. Dep't of Health & Human Servs.*, 271 F.3d 301, 310 (D.C. Cir. 2001); *see also Watt v. Energy Action Educ. Found.*, 454 U.S. 151, 160 (1981); *Mountain States Legal Found. v. Glickman*, 92 F.3d 1228, 1232 (D.C. Cir. 1996). The bottom line here is clear: defendants do not allege that the individual plaintiffs lack standing, nor is there any reason for this Court to believe that they do. As such, the Court need not address the standing of the Samoan Federation of America in order to determine whether it has jurisdiction.

Finally, defendants advance the novel and somewhat exotic jurisdictional argument that plaintiffs' suit raises a nonjusticiable political question.[6] *See* Defs.' Mem. at 17–18. The Government argues that, "at bottom," plaintiffs are arguing for a grant of

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[5] "A . . . motion to dismiss for lack of standing implicates subject matter jurisdiction . . . ." *Edwards v. Aurora Loan Serv.*, 791 F. Supp. 2d 144, 150 (D.D.C. 2011).

[6] The political question doctrine is a jurisdictional matter. "[T]he concept of justiciability, which expresses the jurisdictional limitations imposed on federal courts by the 'case or controversy' requirement of Art. III, embodies . . . the . . . political question doctrine[] . . . . [T]he presence of a political question [thus] suffices to prevent the power of the federal judiciary from being invoked by the complaining party." *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208, 215 (1974) (quoted in *Hwang Geum Joo v. Japan*, 413 F.3d 45, 47–48 (D.C. Cir. 2005)).

statehood to American Samoa, and that such a determination is a political question committed by the Constitution to Congress. *See id.* at 18. Plaintiffs respond that their complaint does not argue for statehood, but instead argues for the application of a particular constitutional provision to a territory, a claim "eminently fit for judicial resolution." Pls.' Opp'n at 33.

To the extent they view plaintiffs as petitioning for statehood, however, defendants misread the complaint. The complaint clearly urges the application of the Citizenship Clause to American Samoa, but it never "demands" recognition of American Samoa as a state or even mentions the word "statehood." *See generally* Compl. The actual task before the Court—determining whether the Citizenship Clause applies to American Samoa—is, indeed, a proper judicial inquiry.[7]

II. Failure to State a Claim

Having jurisdiction, the Court turns to defendants' motion to dismiss under Rule 12(b)(6) for failure to state a claim. Plaintiffs' claims all hinge upon one legal assertion:

[7] The Supreme Court has decided similar questions throughout its history. *See, e.g.*, *Boumediene v. Bush*, 553 U.S. 723 (2008) (finding Suspension Clause applicable to U.S. Naval Station at Guantanamo Bay); *Balzac v. Porto Rico*, 258 U.S. 298 (1922) (Sixth Amendment jury trial right inapplicable to unincorporated territory of Puerto Rico); *Downes v. Bidwell*, 182 U.S. 244 (1901) (Revenue Clauses inapplicable to Puerto Rico). Most recently, in *Boumediene*, the Supreme Court expressly rejected the contention that the Constitution's extraterritorial application presents a political question. 553 U.S. at 754-55. In fact, defendants themselves rely on several cases in which courts exercised their jurisdiction to determine whether the Citizenship Clause extended to the Philippines while it was an unincorporated territory of the United States. *See* Defs.' Mem. at 12-15 (citing, *inter alia*, *Nolos v. Holder*, 611 F.3d 279 (5th Cir. 2010); *Lacap v. INS*, 138 F.3d 518 (3d Cir. 1998); *Valmonte v. INS*, 136 F.3d 914 (2d Cir. 1998); *Rabang v. INS*, 35 F.3d 1449 (9th Cir. 1995), *cert. denied sub nom. Sanidad v. Immigration & Naturalization Serv.*, 515 U.S. 1130 (1995); *Licudine v. Winter*, 603 F. Supp. 2d 129 (D.D.C. 2009)).

the Citizenship Clause guarantees the citizenship of people born in American Samoa. Defendants argue that this assertion must be rejected in light of the Constitution's plain language, rulings from the Supreme Court and other federal courts, longstanding historical practice, and pragmatic considerations. *See generally* Defs.' Mem.; Gov't's Reply in Supp. of Their Mot. to Dismiss ("Defs.' Reply") [Dkt. # 20]; Amicus Br. Unfortunately for the plaintiffs, I agree. The Citizenship Clause does *not* guarantee birthright citizenship to American Samoans. As such, for the following reasons, I must dismiss the remainder of plaintiffs' claims.

The Citizenship Clause of the Fourteenth Amendment provides that "[a]ll persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside." U.S. Const. amend. XIV, section 1. Both parties seem to agree that American Samoa is "subject to the jurisdiction" of the United States, and other courts have concluded as much. *See* Pls.' Opp'n at 2; Defs.' Mem. at 14 (citing *Rabang* as noting that the territories are "subject to the jurisdiction" of the United States). But to be covered by the Citizenship Clause, a person must be born or naturalized "in the United States *and* subject to the jurisdiction thereof." Thus, the key question becomes whether American Samoa qualifies as a part of the "United States" as that is used within the Citizenship Clause.[8]

[8] The Court is also guided by the familiar principle that "'[p]roper respect for a coordinate branch of the government' requires that we strike down an Act of Congress only if 'the lack of constitutional authority to pass [the] act in question is clearly demonstrated.'" *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2579 (2012) (quoting *United States v. Harris*, 106 U.S. 629, 635 (1883)). Unless it can be *clearly*

The Supreme Court famously addressed the extent to which the Constitution applies in territories in a series of cases known as the Insular Cases.[9] In these cases, the Supreme Court contrasted "incorporated" territories—those lands expressly made part of the United States by an act of Congress—with "unincorporated territories" that had not yet become part of the United States and were not on a path toward statehood. *See, e.g.*, *Downes*, 182 U.S. at 312; *Dorr v. United States*, 195 U.S. 138, 143 (1904); *see also United States v. Verdugo-Urquidez*, 494 U.S. 259, 268 (1990); *Eche v. Holder*, 694 F.3d 1026, 1031 (9th Cir. 2012) (citing *Boumediene v. Bush*, 553 U.S. 723, 757-58 (2008)).[10] In an unincorporated territory, the Insular Cases held that only certain "fundamental" constitutional rights are extended to its inhabitants. *Dorr*, 195 U.S. 148-49; *Balzac v. Porto Rico*, 258 U.S. 298, 312 (1922); *see also Verdugo-Urquidez*, 494 U.S. at 268. While none of the Insular Cases directly addressed the Citizenship Clause, they suggested that citizenship was not a "fundamental" right that applied to unincorporated territories.[11]

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shown that the Citizenship Clause extends to American Samoa, plaintiffs' legal theory should be rejected.

[9] The Insular Cases include *De Lima v. Bidwell*, 182 U.S. 1 (1901); *Goetze v. United States*, 182 U.S. 221 (1901); *Dooley v. United States*, 182 U.S. 222 (1901); *Armstrong v. United States*, 182 U.S. 243 (1901); *Downes v. Bidwell*, 182 U.S. 244 (1901); and *Huus v. N.Y. and Porto Rico Steamship Co.*, 182 U.S. 392 (1901).

[10] Plaintiffs do not contest whether American Samoa is an "incorporated" or "unincorporated" territory; rather they reject this dichotomy altogether. *See* Pls.' Opp'n at 25-33. For the purposes of this characterization, the Court assumes that American Samoa is an "unincorporated" territory, as no act of incorporation has been identified.

[11] Plaintiffs cite two cases to support the conclusion that citizenship is a fundamental right: *Trop v. Dulles*, 356 U.S. 86, 103 (1958) (plurality op.) (mentioning the "fundamental right of citizenship") and *Afroyim v. Rusk*, 387 U.S. 253, 267-68 (1967) (citizenship is "no light trifle"). Each of these cases discusses the fundamentality of citizenship in dicta, and neither case has anything to do with territorial citizenship. Such precedent is unpersuasive in light of the voluminous federal case law discussed herein

For example, in the Insular Case of *Downes v. Bidwell*, the Court addressed, via multiple opinions, whether the Revenue Clause of the Constitution applied in the unincorporated territory of Puerto Rico. In an opinion for the majority, Justice Brown intimated in dicta that citizenship was not guaranteed to unincorporated territories. *See Downes*, 182 U.S. at 282 (suggesting that citizenship and suffrage are not "natural rights enforced in the Constitution" but rather rights that are "unnecessary to the proper protection of individuals."). He added that "it is doubtful if Congress would ever assent to the annexation of territory upon the condition that its inhabitants, however foreign they may be to our habits, traditions, and modes of life, shall become at once citizens of the United States." *Id.* at 279-80. He also contrasted the Citizenship Clause with the language of the Thirteenth Amendment, which prohibits slavery "within the United States, *or* in any place subject to their jurisdiction." *Id.* at 251 (emphasis added). He stated:

> [T]he 14th Amendment, upon the subject of citizenship, declares only that "all persons born or naturalized in the United States, *and* subject to the jurisdiction thereof, are citizens of the United States, and of the state wherein they reside." Here there is a limitation to persons born or naturalized in the United States, which is not extended to persons born in any place "subject to their jurisdiction."

Id. (emphasis added). In a concurrence, Justice White echoed this sentiment, arguing that the practice of acquiring territories "could not be practically exercised if the result would be to endow the inhabitants with citizenship of the United States." *Id.* at 306.

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that concludes that citizenship is not guaranteed to people born in unincorporated territories.

Plaintiffs rightly note that *Downes* did not possess a singular majority opinion and addressed the right to citizenship only in dicta. Pls.' Opp'n at 25-27. But in the century since *Downes* and the Insular Cases were decided, *no* federal court has recognized birthright citizenship as a guarantee in unincorporated territories. To the contrary, the Supreme Court has continued to suggest that citizenship is not guaranteed to people born in unincorporated territories. For example, in a case addressing the legal status of an individual born in the Philippines while it was a territory, the Court noted—without objection or concern—that "persons born in the Philippines during [its territorial period] were American nationals" and "until 1946, [could not] become United States citizens. *Barber v. Gonzales*, 347 U.S. 637, 639 n.1 (1954). Again, in *Miller v. Albright*, 523 U.S. 420, 467 n.2 (1998), Justice Ginsberg noted in her dissent that "the only remaining noncitizen nationals are residents of American Samoa and Swains Island" and failed to note anything objectionable about their noncitizen national status. More recently, in *Boumediene v. Bush*, the Court reexamined the Insular Cases in holding that the Constitution's Suspension Clause applies in Guantanamo Bay, Cuba. 553 U.S. 723, 757-59 (2008). The Court noted that the Insular Cases "devised . . . a doctrine that allowed [the Court] to use its power sparingly and where it would most be needed. This century-old doctrine informs our analysis in the present matter." *Id.* at 759.

Plaintiffs argue that *Boumediene* did not reaffirm—but instead narrowed—the Insular Cases. Pls.' Opp'n at 28-29. They point to the Court's statement that "[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*, 553

U.S. at 758 (citing *Torres v. Puerto Rico*, 442 U.S. 465, 475–476 (1979) (Brennan, J., concurring in judgment) ("Whatever the validity of the [Insular Cases] in the particular historical context in which they were decided, those cases are clearly not authority for questioning the application of the Fourth Amendment—or any other provision of the Bill of Rights—to the Commonwealth of Puerto Rico in the 1970's.")). *Id.* This vague statement crafted in a vastly different context, however, does not license this Court to turn its back on the more direct and more persuasive precedent and the legal framework that has predominated over the unincorporated territories for more than a century.

Indeed, other federal courts have adhered to the precedents of the Insular Cases in similar cases involving unincorporated territories. For example, the Second, Third, Fifth, and Ninth Circuits have held that the term "United States" in the Citizenship Clause did not include the Philippines during its time as an unincorporated territory. *See generally Nolos v. Holder*, 611 F.3d 279 (5th Cir. 2010); *Valmonte v. INS*, 136 F.3d 914 (2d Cir. 1998); *Lacap v. INS*, 138 F.3d 518 (3d Cir. 1998); *Rabang*, 35 F.3d 1449. These courts relied extensively upon *Downes* to assist with their interpretation of the Citizenship Clause. *See Nolos*, 611 F.3d at 282-84; *Valmonte*, 136 F.3d at 918-21; *Rabang*, 35 F.3d at 1452-53. Indeed, one of my own distinguished colleagues in an earlier decision cited these precedents to reaffirm that the Citizenship Clause did not include the Philippines during its territorial period. *See Licudine v. Winter*, 603 F. Supp. 2d 129, 132-34 (D.D.C. 2009) (Robinson, J.).[12]

[12] The Philippines cases also reject the applicability of *United States v. Wong Kim Ark*, 169 U.S. 649 (1898), in which the Supreme Court addressed whether a child born to alien

Plaintiffs attempt to distinguish these cases by noting that the Philippines, unlike American Samoa, was a territory only "temporarily." Pls.' Opp'n at 31. But none of these cases based their decision on the fact that the Philippines was a temporary territory. Even if this distinction made a difference, plaintiffs fail to rebut the Ninth Circuit's recent holding that the Northern Mariana Islands—a current and longstanding territory—is not included within the bounds of the Citizenship Clause. *Eche v. Holder*, 694 F.3d 1026, 1027-28 (9th Cir. 2012).[13] In short, federal courts have held over and over again that unincorporated territories are not included within the Citizenship Clause, and this Court sees no reason to do otherwise![14]

In both their brief and in oral argument, plaintiffs placed great weight on our Circuit's decision in *King v. Morton*, 520 F.2d 1140 (D.C. Cir. 1975). In that case, the Court addressed whether an American citizen was guaranteed the right to trial by jury in

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parents in the United States was a citizen. *See Nolos*, 611 F.3d at 284; *Valmonte,* 136 F.3d at 920; *Rabang,* 35 F.3d at 1454; *see also* Pls.' Opp'n at 13, 24 (citing *Wong Kim Ark*). Because the child was born in San Francisco, the Court did not need to address the territorial scope of the Citizenship Clause in that case.

[13] Plaintiffs address *Eche* in a footnote, stating simply that it "relies on the same flawed arguments as the other cases cited by Defendants." Pls.' Opp'n at 31 n.25.

[14] Unpersuasively, plaintiffs attempt to use legislative history to support the territorial reach of the Citizenship Clause. *See* Pls.' Opp'n at 13-18. Plaintiffs cite, *inter alia*, a senator's comment that the Citizenship Clause declares that "every person born within the limits of the United States [is] a citizen." *Id.* at 13. This comment fails to shed any light on whether the "United States" includes its territories. Plaintiffs also rely upon contemporaneous language from another senator, President Jackson, and other legislation that include people in the "Territories" within the bounds of the Citizenship Clause. *Id.* at 13-15. However, it is unclear from this language whether the "Territories" included only incorporated territories on the path to statehood or also unincorporated territories—particularly unincorporated territories such as American Samoa that had not yet come into existence. Even if this legislative history were clear, these stray comments are not sufficient to upend years of contrary legal precedent.

American Samoa. *Id.* at 1146. Rejecting the reliance on "key words such as 'fundamental' or 'unincorporated territory'" in the Insular Cases and other cases, the court instead employed the test from *Reid v. Covert*, 354 U.S. 1, 75 (1957) (Harlan, J., concurring): asking whether the right to trial by jury would be "'impractical and anomalous.'" *King*, 520 F.2d at 1147 (quoting *Reid*, 354 U.S. at 75). As defendants rightly note, this case addressed the rights of an *existing* citizen in American Samoa—not the right of persons born in American Samoa to citizenship itself. Defs.' Reply at 9. This distinction was critical in *Reid*, the case upon which *King* relied. As the Supreme Court noted in *Boumediene*, "That the petitioners in *Reid* were American citizens was a key factor in the case and was central to the plurality's conclusion that the Fifth and Sixth Amendments apply to American civilians tried outside the United States." 553 U.S. at 760. Further, neither *King* nor *Reid* discussed the right to citizenship—a right that other federal courts have addressed directly and, in doing so, have refused to extend to unincorporated territories.

Morever, our Circuit appeared to reaffirm its commitment to Insular Cases—in terms of extending only "fundamental" rights to unincorporated territories—in a case following *King* that involved a due process claim in American Samoa. *Corp. of Presiding Bishop of Church of Jesus Christ of the Latter-Day Saints v. Hodel*, 830 F.2d 374, 385 (D.C. Cir. 1987). In that case, the Circuit stated that "the Supreme Court long ago determined that in the 'unincorporated' territories, such as American Samoa, the guarantees of the Constitution apply only insofar as its 'fundamental limitations in favor of personal rights' express 'principles which are the basis of all free government which

cannot be with impunity transcended.'" *Id.* (citing *Dorr*, 195 U.S. at 146-47). The court held that access to a court independent of the executive branch is not a "fundamental" right extending to American Samoa. *Id.* at 386. In light of this later case and *King*'s distinct context, this Court does not find *King* to be an appropriate guidepost for this case.[15]

Finally, this Court is mindful of the years of past practice in which territorial citizenship has been treated as a statutory, and not a constitutional, right. In the unincorporated territories of Puerto Rico, Guam, the U.S. Virgin Islands, and the Northern Mariana Islands, birthright citizenship was conferred upon their inhabitants by various statutes many years after the United States acquired them. *See* Amicus Br. at 10-11. If the Citizenship Clause guaranteed birthright citizenship in unincorporated territories, these statutes would have been unnecessary. While longstanding practice is not sufficient to demonstrate constitutionality, such a practice requires special scrutiny before being set aside. *See, e.g.*, *Jackman v. Rosenbaum Co.*, 260 U.S. 22, 31 (1922) (Holmes, J.) ("If a thing has been practiced for two hundred years by common consent, it will need a strong case for the Fourteenth Amendment to affect it[.]"); *Walz v. Tax Comm'n*, 397 U.S. 664, 678 (1970) ("It is obviously correct that no one acquires a vested

[15] In a brief, per curiam opinion, our Circuit declined to address the question of whether the Citizenship Clause applied to the Philippines in *Mendoza v. Soc. Security Comm'r*, 92 F. App'x 3, 3 (2004). In claiming that *Mendoza* suggests that birthright citizenship in the territories is "an open question in the Circuit," plaintiffs attempt to make a mountain out of a molehill. The *Mendoza* court sidestepped the issue not because it was necessarily "an open question"—but rather because the issue was simply unnecessary to the disposition of the case. *See id.* ("We need not decide any of the constitutional questions presented by Amicus . . . .").

or protected right in violation of the Constitution by long use . . . . Yet an unbroken practice . . . is not something to be lightly cast aside."). And while Congress cannot take away the citizenship of individuals covered by the Citizenship Clause, it can bestow citizenship upon those not within the Constitution's breadth. *See* U.S. Const. art. IV, § 3, cl. 2 ("Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory belonging to the United States."); *id.* at art. I, § 8, cl. 4 (Congress may "establish an uniform Rule of Naturalization . . . ."). To date, Congress has not seen fit to bestow birthright citizenship upon American Samoa, and in accordance with the law, this Court must and will respect that choice.[16]

CONCLUSION

For the foregoing reasons, the Court GRANTS defendants' Motion to Dismiss. An order consistent with this decision accompanies this Memorandum Opinion.

/s/
RICHARD J. LEON
United States District Judge

[16] Because the Court finds statutory interpretation and legal precedent sufficient to grant defendants' motion to dismiss, it need not address the Amicus's arguments about the potentially deleterious effects of mandating birthright citizenship on American Samoa's traditional culture. *See* Amicus Br. at 12-18.