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No. 13-5272

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**In The  
District of Columbia Court of Appeals**

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LENEUOTI FIAFIA TUUAU, VA'ALEAMA TOVIA FOSI, FANUATANU FAUESALA  
LIFA 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 FIATALA AFALAVA,  
SAMOAN FEDERATION OF AMERICA, INC.,  
*Plaintiffs-Appellants,*

v.

UNITED STATES OF AMERICA, UNITED STATES DEPARTMENT OF STATE,  
JOHN F. KERRY, JANICE JACOBS,  
*Defendants-Appellees.*

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

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**MOTION TO INTERVENE OR, IN THE ALTERNATIVE,  
FOR LEAVE TO PARTICIPATE AS *AMICI CURIAE***

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September 26, 2013

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The American Samoa Government and Congressman Eni F.H. Faleomavaega respectfully request that this Court grant them leave to intervene or, in the alternative, to participate as *amici curiae* in this appeal, which poses a question of exceptional importance to the people of American Samoa. Five U.S. nationals from American Samoa as well as the Samoan Federation of America ask that this Court reverse the decision of the district court and conclude that the Citizenship Clause of the Fourteenth Amendment applies to all persons born in American Samoa. Such a decision would conflict with longstanding Supreme Court precedent and fundamentally alter the status of both the people and the unincorporated territory of American Samoa. The American Samoa Government and Congressman Faleomavaega have a direct and substantial interest in the issue presented in this appeal that is not adequately represented by the current parties to it.

### **BACKGROUND**

American Samoa is an unincorporated territory in the South Pacific Ocean that, by mutual consent, has long been possessed by the United States, but whose people have *never* been recognized as U.S. citizens by birth. Dist. Ct. Op. at 2. More than a century ago, the

Supreme Court held that the Citizenship Clause of the Fourteenth Amendment does not extend birthright citizenship to U.S. nationals born in unincorporated territories. *See Downes v. Bidwell*, 182 U.S. 244, 251 (1901). The Court has reaffirmed this principle through the years, noting that individuals who are born in an unincorporated territory, though “subject to the jurisdiction of the United States,” are “American nationals” who are not birthright citizens of the United States. *Barber v. Gonzales*, 247 U.S. 637, 639 n.1 (1954). In accordance with this determination and other provisions of federal law, the State Department acknowledges persons born in American Samoa as U.S. nationals, but not U.S. citizens.

Five U.S. nationals born in American Samoa as well as the Samoan Federation of America, a private organization serving Samoans in Los Angeles, brought an action against the United States and related parties entrusted with executing its citizenship laws. In their complaint, they alleged that they were entitled to U.S. citizenship as a birthright because the Citizenship Clause of the Fourteenth Amendment extends to American Samoa and that the failure of the U.S. government to recognize this right had caused them various harms.

The district court permitted the Honorable Eni F.H. Faleomavaega to participate as *amicus curiae*. Congressman Faleomavaega filed an *amicus* brief and, at the request of the district court, a reply brief to the plaintiffs' opposition to the United States' motion to dismiss. The Congressman also participated in the December 10, 2012 oral argument on the United States' motion to dismiss.

As *amicus curiae*, Congressman Faleomavaega argued on behalf of the defendants that the Court should dismiss the plaintiffs' complaint. Congressman Faleomavaega agreed with the defendants that longstanding precedent of the Supreme Court foreclosed the plaintiff Samoans' arguments, but he also offered additional context and arguments about the application of birthright citizenship to unincorporated territories. Congressman Faleomavaega argued that Congress, not the courts, should determine whether birthright citizenship should extend to the people of American Samoa, as in every other case in which people born in overseas territories were granted birthright citizenship. And Congressman Faleomavaega explained that establishing birthright citizenship by judicial fiat could have an unintended and potentially harmful impact upon American Samoa

society because many of the traditional aspects of Samoan culture, *fa'a Samoa* (which includes, among other things, restrictions on the alienation of communal land), might raise complicated legal questions if subjected to scrutiny under the Fourteenth Amendment.

The district court agreed with the defendants and Congressman Faleomavaega and dismissed the complaint. In its decision, the district court cited Congressman Faleomavaega's brief multiple times, particularly his argument about the longstanding practice of congressional grants of birthright citizenship to people born in other overseas territories of the United States.

### **ARGUMENT**

The American Samoa Government and Congressman Faleomavaega have distinct and exceptionally important interests at stake in this appeal, which seeks to disrupt settled principles of constitutional interpretation and, if successful, would have a significant impact on the entire people of American Samoa. Because the Government and the Congressman's interests will not be adequately represented by the parties to this appeal, the American Samoa Government and Congressman Faleomavaega respectfully move to

intervene as of right or, in the alternative, seek permission to intervene as an exercise of this Court's discretion. If this Court declines to grant the American Samoa Government and Congressman Faleomavaega the opportunity to intervene, the American Samoa Government and Congressman Faleomavaega respectfully request that they be allowed to participate as *amici curiae*.

**I. The American Samoa Government And Congressman Faleomavaega Have Distinct And Exceptionally Important Interests In This Appeal.**

The American Samoa Government is the elected government of the people of American Samoa, and the Honorable Eni F.H. Faleomavaega represents the Territory of American Samoa in the United States House of Representatives. Congressman Faleomavaega has held his position since 1989 and was reelected to his thirteenth term in November 2012. Congressman Faleomavaega serves as a senior Member of the House Committee on Foreign Affairs and as Ranking Member on the House Foreign Affairs Subcommittee on Asia and the Pacific. He is one of the most senior Members of the House Committee on Natural Resources, which has jurisdiction for American Samoa and other U.S. Insular Areas. In addition to his responsibilities

in the U.S. Congress, Congressman Faleomavaega holds the *matai*, or chieftain, orator title *Faleomavaega* in American Samoa.

The American Samoa Government and Congressman Faleomavaega have a unique perspective on the relationship between the U.S. Government and the people of American Samoa. The American Samoa Government is tasked with the day-to-day administration of the territory and communicates with the federal government about issues important to its people. Since he began his congressional tenure more than 20 years ago, Congressman Faleomavaega has taken a particularly important role in strengthening the bonds between the federal government and the American Samoa Government while carefully protecting the special status of American Samoa as an unincorporated territory and preserving the unique cultural and historical heritage of American Samoa, the *fa'a Samoa*.

## **II. The American Samoa Government and Congressman Faleomavaega Should Be Permitted To Intervene As Of Right.**

This Court should grant the motion of the American Samoa Government and Congressman Faleomavaega to intervene as of right. Although the Federal Rules of Appellate Procedure do not explicitly

provide for intervention on appeal, the Supreme Court has counseled that “the policies underlying intervention [outlined in the Federal Rules of Civil Procedure] may be applicable in appellate courts.” *International Union, UAW, Local 283 v. Scofield*, 382 U.S. 205, 217 n.10, 86 S. Ct. 373, 381 n.10 (1965). Under Federal Rule of Civil Procedure 24(a)(2), a court must grant a timely motion to intervene when the movant “claims an interest relating to the property or transaction that is the subject of the action, and is so situated that disposing of the action may as a practical matter impair or impede the movant’s ability to protect its interest, unless existing parties adequately represent that interest.” Fed. R. Civ. P. 24(a)(2). The American Samoa Government and Congressman Faleomavaega satisfy each of these requirements.

The American Samoa Government and Congressman Faleomavaega have a direct and substantial interest in the subject matter of this action and are so situated that disposing of the action may impede their ability to protect that interest. This Court has explained that the interest test of Rule 24(a) is “primarily a practical guide to disposing of lawsuits by involving as many apparently

concerned persons as is compatible with efficiency and due process.” *Smuck v. Hobson*, 408 F.2d 175, 179 (D.C. Cir. 1969) (en banc) (internal quotation marks omitted).

The American Samoa Government is the democratically elected government of the people of American Samoa, and Congressman Faleomavaega is the only elected representative of the American Samoan people to the U.S. Congress. The American Samoa Government is entrusted with promulgating and enforcing the laws of the territory. And Congressman Faleomavaega is entrusted with representing the people of American Samoa on the question of Samoan citizenship, among other things, in the U.S. Congress. A decision from this Court that the Citizenship Clause of the Fourteenth Amendment applies to Samoans would impede the historical ability of the American Samoa Government to negotiate with the federal government about the naturalization status of American Samoans and the ability of Congressman Faleomavaega to represent the Samoan people on this important issue before Congress.

The American Samoa Government and Congressman Faleomavaega’s interests will not be adequately represented by the

parties to this action. As Congressman Faleomavaega explained to the district court in his *amicus* brief, 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 American Samoa. The American Samoa Government shares this view. The position of the plaintiff Samoans is directly opposed to this position. The plaintiff Samoans assert individual harms based on their status as U.S. nationals, but they do not consider the potential societal harms that their proposed remedy could cause. And although the U.S. defendants have taken the legal position that the American Samoa Government and Congressman Faleomavaega advocate, the U.S. defendants have no particular interest in protecting the traditional way of life in American Samoa. The American Samoa Government and Congressman Faleomavaega are best situated to represent the concerns of the people of American Samoa on this matter of exceptional importance.

The motion of the American Samoa Government and Congressman Faleomavaega is timely and will not prejudice any of the parties. This motion is filed in accordance with the initial order of this

Court, establishing a deadline for procedural motions before any substantive briefing has begun. Because Congressman Faleomavaega participated as *amicus curiae* in the district court, the parties are well aware of the arguments that Congressman Faleomavaega advances on this subject. Indeed, the district court heard from Congressman Faleomavaega in multiple briefs and at oral argument, and relied upon some of the Congressman's arguments in its decision. The American Samoa Government now joins Congressman Faleomavaega and seeks to advance the same arguments on appeal. The American Samoa Government and Congressman Faleomavaega are well versed in the factual and legal issues presented in this appeal and will abide by any briefing schedule adopted by this Court.

The American Samoa Government and Congressman Faleomavaega also have standing to participate in this suit. Under the law of this circuit, all movants who seek to intervene as of right must demonstrate both Article III and prudential standing. *Deutsche Bank Nat'l Trust Co. v. FDIC*, 717 F.3d 189, 193 (D.C. Cir. 2013). "It is axiomatic that Article III requires a showing of injury-in-fact, causation, and redressability." *Id.* "[P]rudential standing encompasses

the general prohibition on a litigant's raising another person's legal rights, the rule barring adjudication of generalized grievances more appropriately addressed in the representative branches, and the requirement that a plaintiff's complaint fall within the zone of interests protected by the law invoked." *Elk Grove Unified Sch. Dist. v. Newdow*, 524 U.S. 1, 12 (2004). The American Samoa Government satisfies these requirements in its capacity as *parens patriae*, and Congressman Faleomavaega satisfies these requirements because of his personal interest in the action.

The American Samoa Government possesses *parens patriae* standing to participate in this action. *See Alfred L. Snapp & Son, Inc. v. Puerto Rico, ex. rel., Barez*, 458 U.S. 592, 607–08 (1982) (concluding that Puerto Rico had *parens patriae* standing in a suit involving the federal employment system). As the Supreme Court has counseled, "One helpful indication in determining whether an alleged injury to the health and welfare of its citizens suffices to give the State standing to sue as *parens patriae* is whether the injury is one that the State, if it could, would likely attempt to address through its sovereign lawmaking powers." *Id.* at 607; *see also Massachusetts v. EPA*, 549 U.S. 497, 519

(2007). Naturalization laws fall squarely in this category. Through this suit, the plaintiff Samoans seek to circumvent the historical role of the American Samoa Government in negotiating with the United States about the rights of the American Samoan people, and this Court should not exclude the American Samoa Government from the litigation, particularly because the interests advanced by the plaintiff Samoans are adverse to those advanced by the American Samoa Government.

Although Congressman Faleomavaega shares the interest of the American Samoa Government in representing the will of the Samoan people, Congressman Faleomavaega also has personal interests at stake in the action. If the plaintiff Samoans succeed in this suit, Congressman Faleomavaega will suffer several harms: *inter alia*, it will undermine his role as advisor to Congress on the question of Samoan citizenship; it will nullify his ability to guide legislation through the House of Representatives on the subject of Samoan citizenship; it will preclude him from choosing U.S. national status in the future; and it can jeopardize his *matai* standing as Faleomavaega. For these reasons, Congressman Faleomavaega also has standing to intervene in this suit.

**III. If They Are Not Entitled To Intervene As Of Right, The American Samoa Government And Congressman Faleomavaega Request That This Court Grant Them Permissive Intervention.**

For essentially the same reasons given above, the American Samoa Government and Congressman Faleomavaega also meet the standard for permissive intervention under Federal Rule of Civil Procedure 24(b). The American Samoa Government and Congressman Faleomavaega intend to support the position of the United States that the Citizenship Clause does not apply to persons born in American Samoa and, as a result, they “ha[ve] a claim or defense that shares with the main action a common question of law or fact.” *See* Fed. R. Civ. P. 24(b)(1)(B). And because Congressman Faleomavaega participated extensively as *amicus curiae* below and the movants timely file this motion, their intervention would not “unduly delay or prejudice the adjudication of the original parties’ rights.” *Id.* 24(b)(3).

“It remains . . . an open question in this circuit whether Article III standing is required for permissive intervention,” *Defenders of Wildlife v. Perciasepe*, 714 F.3d 1317, 1327 (D.C. Cir. 2013), but, if this Court is inclined to address the question in this matter, this Court should conclude that the American Samoa Government and Congressman

Faleomavaega need not establish standing to obtain permissive intervention on behalf of the defendant-respondents. As this Court has acknowledged in dicta, “[R]equiring standing of someone who seeks to intervene as a defendant runs into the doctrine that the standing inquiry is directed at those who invoke the court’s jurisdiction.” *Roeder v. Islamic Republic of Iran*, 333 F.3d 228, 233 (D.C. Cir. 2003). This Court has since required individuals who seek to intervene *as of right* on behalf of defendants to establish standing—in no small part a prophylactic measure intended to address the potential problems that arise from an unwieldy number of intervenors. *See Deutsche Bank*, 717 F.3d at 195–96 (Silberman, J., concurring). Such concerns are neither present in permissive intervention, in which courts possess substantial discretion to decide whether the intervention would serve the interests of judicial economy and justice, nor present in this case, as the would-be intervenors are the American Samoa Government itself and the only territory-wide representative of the Samoan people in Congress.

**IV. At A Minimum, The American Samoa Government And  
Congressman Faleomavaega Request Leave To Participate  
As *Amici Curiae*.**

In light of their exceptionally important interests in the action and Congressman Faleomavaega's participation as *amici curiae* in the district court, the American Samoa Government and Congressman Faleomavaega request, at minimum, leave to participate as *amici curiae* on appeal. *See* Fed. R. App. R. 29(a). The American Samoa Government and Congressman Faleomavaega hope that their unique perspective on this issue that affects the entire Samoan people would be helpful to this Court, as it was to the district court.

Dated: September 26, 2013

Respectfully submitted,

*/s/ Michael F. Williams*

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**CERTIFICATE AS TO PARTIES,  
RULINGS, AND RELATED CASES**

Pursuant to D.C. Circuit Rules 27(a)(4) and 28(a)(1), counsel certifies as follows:

**A. Parties and Amici.** The plaintiffs included the Samoan Federation of America, Leneuoti Fiafia Tuaua, Va'aleama Tovia Fosi, Fanuatanu Fauesala Lifa Mamea, Taffy-Lei T. Maene, and Emy Fiatela Afelava. Maene also brought claims on behalf of his three minor children. The defendants were the United States, the State Department, the Secretary of State, and the Assistant Secretary of State for Consular Affairs. Congressman Eni F.H. Faleomavaega appeared as *amicus curiae* in the district court. The American Samoa Government moved to intervene in the district court, but the motion was denied as moot.

**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.** Counsel for the American Samoa Government and Congressman Eni F.H. Falemoavega is unaware of any related cases.

Dated: September 26, 2013

/s/ Michael F. Williams

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**CERTIFICATE OF SERVICE**

The undersigned certifies that on September 26, 2013, he caused copies of the MOTION TO INTERVENE OR, IN THE ALTERNATIVE, FOR LEAVE TO PARTICIPATE AS *AMICI CURIAE* to be served by email on the following:

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