July 12, 2022

VIA ELECTRONIC MAIL

Hon. Elizabeth B. Prelogar  
Solicitor General  
Office of the Solicitor General  
950 Pennsylvania Avenue, NW  
Washington DC 20530


Dear General Prelogar:

I write on behalf of my clients, petitioners in *Fitisemanu v. United States*, No. 21-1394 (U.S.), to urge the government to acquiesce in certiorari and join petitioners in asking the Supreme Court to finally and formally overturn the *Insular Cases*. There are overwhelming legal, policy, and moral grounds to do so, regardless of what position the government ultimately takes on the merits.

Petitioners John Fitisemanu, Pale Tuli, and Rosavita Tuli were born in American Samoa, a U.S. Territory since 1900. Under the plain text of the Fourteenth Amendment’s Citizenship Clause, they were born “in the United States,” and there can be no dispute that American Samoa is “subject to the jurisdiction” of the United States. U.S. Const. amend. XIV, § 1; see 48 U.S.C. §§ 1661, 1662. Accordingly, they are entitled to U.S. citizenship by virtue of their birth, and federal statutes that purport to render them “nationals, but not citizens, of the United States,” 8 U.S.C. § 1408(1) (emphasis added), are unconstitutional. As set forth in the petition for a writ of certiorari filed in this case, the text, history, and precedent all point in an unequivocal and singular direction—our individual clients are citizens by virtue of their birth in American Samoa. See Pet. for Cert. 14, 20, 24.

In the proceedings below, the district court agreed with this straightforward view of the law, holding that petitioners are “citizens of the United States by virtue of the Citizenship Clause.” *Fitisemanu v. United States*, 426 F. Supp. 3d 1155, 1197 (D. Utah 2019). But a divided panel of the Tenth Circuit reversed, holding that “the Insular Cases supply the correct framework for application of constitutional provisions to the unincorporated territories.” *Fitisemanu v. United States*, 1 F.4th 862, 869 (10th Cir. 2021). After the Tenth Circuit denied review en banc over two recorded dissents, *Fitisemanu v. United States*, 20 F.4th 1325, 1327 (10th Cir. 2021), petitioners sought the Supreme Court’s review, asking “whether the Insular Cases should be overruled.” Pet. for Cert. i.
As you undoubtedly are aware, the Department has—at every stage of this litigation from the district court to the Tenth Circuit—relied on and vigorously defended the Insular Cases to sustain the conclusion that petitioners are not entitled to birthright citizenship under the Citizenship Clause. E.g., Dist. Ct. Mot. to Dismiss 16; C.A. Br. 16-18; C.A. En Banc Pet. Opp. 9-11. In particular, the Department has repeatedly relied on some of the very worst passages from the splintered separate opinions of Downes v. Bidwell, 182 U.S. 244 (1901), see Dist. Ct. Mot. to Dismiss 15, 17; C.A. Br. 10, 18-19; C.A. En Banc Pet. Opp. 9-11, including the radical opinion of Justice Brown—joined by no other Justice—that argued for a different set of rules appropriate for “alien races, differing from us,” and openly fretted over the possibility that “savages” would become “citizens of the United States.” 182 U.S. at 279-80, 282, 287; see also id. at 302, 306 (White, J., concurring in judgment) (similarly arguing that different rules are appropriate for an “uncivilized race” of “fierce, savage, and restless people,” necessary to “curb their impetuosity, and keep them under subjection” (quotation marks omitted)).


Judicial criticism of the Insular Cases has been consistent and unspiring. As both Justices Gorsuch and Sotomayor—jurists appointed by Presidents of different political parties who have different approaches to judging—recently observed in Vaello Madero, the Insular Cases “were premised on beliefs both odious and wrong,” Vaello Madero, slip op. at 6 n.4 (Sotomayor, J., dissenting), and “[t]he flaws in the Insular Cases are as fundamental as they are shameful,” id. at 5 (Gorsuch, J., concurring). But because of the government’s advocacy before the Tenth Circuit in this case, the divided court of appeals ignored the Supreme Court’s
admonition that the “much-criticized” Insular Cases “should not be further extended,” Fin. Oversight & Mgmt. Bd. v. Aurelius Inv., LLC, 140 S. Ct. 1649, 1665 (2020) (citing Reid v. Covert, 354 U.S. 1, 14 (1957) (plurality opinion)), and expanded and “repurposed” the cases to deny petitioners citizenship, 1 F.4th 862, 870 (10th Cir. 2021). The Insular Cases were wrong when they were decided and are wrong today—they “have no foundation in the Constitution” and “deserve no place in our law.” Vaello Madero, slip op. at 1 (Gorsuch, J., concurring). It is respectfully submitted that the Department now should recognize that.


“[T]he time has come to recognize that the Insular Cases rest on a rotten foundation.” Vaello Madero, slip op. at 10 (Gorsuch, J., concurring). I therefore urge you to acquiesce in certiorari so that the Supreme Court can overturn these terrible decisions. My colleagues and I are available at your convenience to discuss these matters with your office.

Very truly yours,

Matthew D. McGill