Nos. 20-4017 and 20-4019

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

UNITED STATES OF AMERICA; U.S. DEPARTMENT OF STATE; MICHAEL R. POMPEO, in his official capacity as U.S. Secretary of State; and CARL C. RISCH, in his official capacity as U.S. Assistant Secretary of State for Consular Affairs,

Defendants-Appellants,

and

THE AMERICAN SAMOA GOVERNMENT and THE HONORABLE AUMUA AMATA,

Intervenor Defendants-Appellants,

v.

JOHN FITISEMANU, PALE TULI, ROSAVITA TULI, and SOUTHERN UTAH PACIFIC ISLANDER COALITION,

Plaintiffs-Appellees.

On Appeal from the United States District Court for the District of Utah,
Judge Clark Waddoups, No. 1:18-cv-00036-CW

INTERVENOR DEFENDANTS-APPELLANTS' REPLY BRIEF

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ORAL ARGUMENT REQUESTED

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GLOSSARY

'Aiga	The organization of Samoan households according to large, extended families
Fa'a Samoa	The Samoan way of life
Matai	Chiefs of Samoan extended families

INTRODUCTION

This appeal raises a straightforward question: Whether the district court erred in holding, for the first time in the history of the United States, that the Fourteenth Amendment requires the judicial extension of birthright citizenship to residents of an unincorporated territory. The ruling under review is based upon novel theories that may be topics of keen interest in the legal academy and among various nonprofit groups. But those same novel arguments were authoritatively rejected by the federal Court of Appeals that addressed them during the first round of this litigation, and with good reason. The people of American Samoa, as represented by their elected officials in the American Samoa Government and the U.S. Congress, emphatically do not want the relief the district court purported to grant.

None of the arguments advanced by the Plaintiffs or the Plaintiffs' *amici* addresses a fundamental flaw in the district court's ruling: the judicial extension of citizenship to residents of American Samoa is not only incorrect as a matter of law, but impractical and anomalous in effect. *See generally Tuaua v. United States*, 788 F.3d 300 (D.C. Cir. 2015). The people of American Samoa do not want U.S. citizenship at this time. They certainly do not want the federal courts to decide whether they should become citizens, with all the rights and obligations that entails. Rather, the people of American Samoa want most of all to decide for themselves, through well-established democratic processes that have never been challenged as

unfair or inadequate, whether to maintain or change their status. *See id.* at 311 (noting "little that is more anomalous, under modern standards, than the forcible imposition of citizenship against the majoritarian will").

The arguments presented by Plaintiffs and their *amici* only underscore the political nature of this question. For example, selected former officials representing *other* territories purport to explain what American Samoa's relationship with the United States should be. Similarly, various law professors offer reasons to ignore the elected representatives of American Samoa in favor of their own academic theories. This is precisely the "exercise of paternalism—if not overt cultural imperialism—offensive to the shared democratic traditions of the United States" that the D.C. Circuit rejected five years ago. *Id.* at 312.

At the end of the day, Plaintiffs' arguments that American Samoa is "in the United States" and "subject to the jurisdiction thereof" fail. First, the Government's and Intervenors' reading of the Fourteenth Amendment most naturally aligns with the Constitution's text, structure, and history: "in the United States" for purposes of the Citizenship Clause means the states and the District of Columbia, unless Congress decides otherwise for territories. Second, and as the D.C. Circuit recognized in *Tuaua*, those born in American Samoa are not subject to the jurisdiction of the United States for purposes of the Citizenship Clause. American Samoa is a "significantly self-governing political territor[y] within the United

States's sphere of sovereignty," *Tuaua*, 788 F.3d at 306, "standing in a peculiar relation to the national government," *United States v. Wong Kim Ark*, 169 U.S. 649, 682 (1898).

For these reasons, and as set forth in detail below, this Court should reverse the district court and align the Tenth Circuit with the D.C. Circuit and four of its sister circuits.

I. The Judicial Imposition of Birthright Citizenship Would Violate American Samoa's Sovereignty and Cultural Traditions.

Plaintiffs decline to respond substantively to or engage with the American Samoan Government and the Honorable Aumua Amata's arguments. And nowhere in Plaintiffs' brief do they sufficiently address why the Court should ignore Intervenors' position and forcibly impose U.S. citizenship on all American Samoans—over the objections of their democratically elected representatives and despite their unique cultural and historical circumstances. The people of American Samoa believe, with good justification, that a fundamental change in their status (including the judicial extension of U.S. citizenship) could threaten *fa'a Samoa*.

Despite Plaintiffs' best efforts to avoid it, Supreme Court precedent directly invites the Court to consider American Samoan culture and the potential effect of imposition of U.S. citizenship by judicial fiat. As the district court recognized, this case involves the question "whether, under the *Insular Cases* framework, persons born in American Samoa are entitled to a fundamental right to citizenship."

09/13/2018 Order Denying Mot. for Intervention of Right but Granting Mot. for Permissive Intervention at 10–11 [ECF No. 92]. Under this framework, courts must evaluate whether imposing birthright citizenship "would be 'impracticable and anomalous,'" considering the "particular circumstances" of American Samoa. *Boumediene v. Bush*, 553 U.S. 723, 759 (2008) (quoting *Reid v. Covert*, 354 U.S. 1, 74–75 (1957)); *see also Tuaua*, 788 F.3d at 310.

Plaintiffs contend that Intervenors' concern for *fa'a Samoa* is "without any warrant" and claim that Intervenors "have *never* explained the basis for them." Resp. Br. at 49 (emphasis in original). That is easy for Plaintiffs to say when it is not their risk to take. But Intervenors described at length multiple aspects of *fa'a Samoa* that are unique to American Samoa and that could be jeopardized by a decision imposing citizenship that it does not want. Intervenors' Opening Br. at 17–21. And many aspects of *fa'a Samoa* are wholly unlike anything in either the other territories or the continental United States. This unique cultural heritage permeates every level of Samoan society, from the individual, to the familial, to the institutional. Because of these unique traditional aspects alone, it would be impractical and anomalous—and, indeed, deeply "un-American," Br. of Amici Curiae Members of Congress, *et al.* at 3—for the Court to impose U.S. citizenship upon American Samoa against its will. Such a judicial determination could threaten certain aspects of *fa'a Samoa*, including its basic social structures, its traditional practices for land alienation, and its religious

customs—all of which are constitutionally protected principles of American Samoan society. *See* Revised Const. of Am. Samoa art. I, § 3 ("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.").

First, citizenship by judicial fiat could threaten the basic structure of American Samoan society. As explained in Intervenors' brief, American Samoan households are organized according to *'aiga* (large, extended families), and the *matai* (holders of hereditary chieftain titles) regulate village life. *See* Intervenors' Opening Br. at 5–8, 17–24. The United States has always recognized the *matai* system in American Samoa, including when American Samoa was under the authority of the Navy from 1900 to 1951. *See* Arnold H. Leibowitz, *Defining Status: A Comprehensive Analysis of United States Territorial Relations* 440 (1989).

The prominence of the *matai* system in American Samoan culture is recognized by limiting eligibility to serve in the upper house of the territorial legislature to a "registered *matai* of a Samoan family who fulfills his obligations as required by Samoan custom in the county from which he is elected." Revised Const. of Am. Samoa art. 2, § 3. Were all American Samoan people granted automatic, birthright U.S. citizenship, this tradition could face scrutiny under the Equal Protection Clause. Indeed, this Court has observed that "[d]istinctions between

citizens solely because of their ancestry are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality." *Hirabayashi v. United States*, 320 U.S. 81, 100 (1943). Although it is not guaranteed that the *matai* system would have to be abolished if the Court extended U.S. citizenship to American Samoans, there is good reason for the people of American Samoa to urge restraint in any societal changes that could threaten the foundation of their culture. *Cf.* U.S. Opening Br. at 29–30.

Second, citizenship by judicial fiat could also compromise the ways in which land in American Samoa is owned and alienated. "Communal ownership of land is the cornerstone of the traditional Samoan way of life." *Corp. of Presiding Bishop of Church of Jesus Christ of the Latter-Day Saints v. Hodel*, 830 F.2d 374, 377 (D.C. Cir. 1987). Indeed, more than ninety percent of the land in American Samoa is communally owned. *See* Arnold H. Leibowitz, *American Samoa: Decline of a Culture*, 10 Cal. W. Int'l L.J. 220, 239 (1980). And social institutions in American Samoa revolve around the management of the land for the good of the community. It is this unique relationship that American Samoans sought to protect since the Instruments of Cession, which expressly provide for the preservation of Samoan culture. *See* Cession of Tutuila and Aunu'u, Tutuila Samoa-U.S., Apr. 17, 1900, *available at* https://bit.ly/2yYwMN7 ("Am. Samoa Cession"); Cession of Manu'a

Islands, Manua Samoa-U.S., Jul. 16, 1904, *reprinted in* Am. Samoa Code Ann., Historical Documents and Constitutions (1992).

Furthermore, Samoan law restricts the sale of community land to anyone with less than fifty percent racial Samoan ancestry and the governor must approve each sale. Am. Samoa Code Ann. § 37.0204(a)–(b) (1992). This restriction dates back to when the United States assumed possession of American Samoa in 1900 and the American governor of American Samoa prohibited the alienation of land to non-Samoans. *See* Jeffrey B. Teichert, *Resisting Temptation in the Garden of Paradise: Preserving the Role of Samoan Custom in the Law of American Samoa*, 3 Gonz. J. Int'l L. 2, 50 (1999).

Plaintiffs and some of their *amici* argue that the American Samoan people should not be concerned that U.S. citizenship may threaten traditional Samoan practices with respect to ownership and alienation of land. They argue that racial alienation laws have been upheld in other territories against challenges under the Equal Protection Clause. *See Wabol v. Villacrusis*, 958 F.2d 1450, 1460–61 (1990). But the alienation laws in places such as the Commonwealth of the Northern Mariana Islands, where such laws have been upheld, are unlike the traditional practices in American Samoa. In the former case, the laws simply restrict who may buy land. *See* Covenant to Establish a Commonwealth of the Northern Mariana Islands in Political Union with the United States of America, Pub. L. 94-241, 90 Stat. 263

(1976) (limiting "the alienation of permanent and long-term interests in real property so as to restrict the acquisition of such interests to persons of Northern Mariana Islands descent"). In American Samoa, on the other hand, the racial land-alienation rules are uniquely tied into the *communal* ownership of land and its traditional relation to both the *matai* hierarchy and the *'aiga* clan system. Although the result of such a challenge is not certain, Intervenors' concerns are legitimate, and all of this could be endangered by judicial imposition of U.S. citizenship.

At bottom, the arguments advanced by Plaintiffs and their *amici* thus amount to a plea that this Court extend U.S. citizenship to the American Samoan people, whether they like it or not, and further risk a loss of their unique culture. That is untenable and illogical. It is noteworthy that the same litigants who assure the Court that the concerns of the people of American Samoa are misplaced are those presently asking the Court to change their status against their will.

II. Plaintiffs' Unprecedented Position Spurns Centuries of Consistent Practice as to Every Other U.S. Territory and Violates Fundamental Principles of Self-Determination and Consent.

For centuries, and in every other U.S. territory, the decision whether to extend U.S. citizenship to persons born in a particular U.S. territory—including when and on what terms—has been left to Congress, in cooperation with the people and government of that territory. And Congress has never imposed U.S. citizenship on a U.S. territory over its objections. *See* Intervenors' Opening Br. at 28–29 (collecting

statutes). Plaintiffs do not and cannot dispute this inconvenient historical fact and, instead, ignore it entirely.

Plaintiffs' failure to confront centuries of consistent practice as to every other U.S. territory dooms their position. While Plaintiffs purport to pursue automatic U.S. birthright citizenship on behalf of all persons born in American Samoa to ameliorate the "significant harms" allegedly incurred by the "ongoing denial of citizenship," which Plaintiffs claim "label[s]" those born in American Samoa as "second-class," Resp. Br. at 7, Plaintiffs fail to address the fact that, while the three named individual plaintiffs may seek to become full U.S. citizens, there is no consensus of the rest of the American Samoan people regarding the imposition of birthright citizenship.[1] Indeed, the democratically elected government of American Samoa and its democratically elected representative, the American Samoa Government and the Honorable Aumua Amata—actively *oppose* judicial imposition of birthright citizenship. This means that "to impose citizenship by judicial fiat" would require the Court to "override the democratic prerogatives of the American

[1] Plaintiffs suggest that it is "Intervenors' position that American Samoans have some monolithic view on citizenship." Resp. Br. at 51. To the contrary, Intervenors maintain—and have consistently maintained—the *lack* of a monolithic view on citizenship among American Samoan people. *See, e.g.*, Intervenors' Opening Br. at 8 ("the people of American Samoa . . . have never come to a consensus"); *id.* at 26 ("the American Samoan people have never achieved consensus regarding the imposition of birthright citizenship"); *id.* at 46 (noting "the overwhelming lack of consensus of the American Samoan people on the question of U.S. citizenship").

Samoan people themselves." *Tuaua*, 788 F.3d at 302. While Intervenors' presence may be inconvenient for Plaintiffs, it cannot and should not be ignored.

After all, and as explained in Intervenors' brief, voluntary consent of the governed is necessary to ensure a viable democratic republic. *See* Intervenors' Opening Br. at 24–28. And Plaintiffs cannot seriously attempt to harness support of "the relevant 'longstanding practice,'" which they maintain "is the common-law tradition that, except for the brief period occasioned by *Dred Scott*, governed from the 1600s until the *Insular Cases*," Resp. Br. at 49, when Plaintiffs simultaneously fail to grapple with the longtime common-law traditions of consent and self-determination. Instead, Plaintiffs relegate Intervenors' self-determination arguments to a single paragraph, suggesting in conclusory terms that "[t]his argument fundamentally misunderstands the nature of a written constitution" because "the Fourteenth Amendment 'put th[e] question of citizenship . . . beyond the legislative power.'" Resp. Br. at 50–51 (second and third alterations in original) (quoting *Afroyim v. Rusk*, 387 U.S. 253, 263 (1967)). *Afroyim*, of course, deals only with the impropriety of stripping existing U.S. citizens of their citizenship; it says absolutely nothing about the question whether a person is a U.S. citizen in the first place, let alone whether persons born in an unincorporated U.S. territory like American Samoa are automatically deemed U.S. citizens at birth.

Indeed, taken literally, Plaintiffs' reading of *Afroyim* (*i.e.*, to put all questions of citizenship entirely beyond the legislative power) would seem to mean that the Fourteenth Amendment *sub silentio* extinguished Congress' naturalization powers. That, of course, is not true: the Fourteenth Amendment expressly reaffirmed them. *See* U.S. Const. amend. XIV, § 1. This confirms that *Afroyim* stands only for the unremarkable proposition that the Fourteenth Amendment made *existing* U.S. citizenship "permanent and secure," it did not erase Congress' role in conveying citizenship in the first place. 387 U.S. at 263.[2]

Plaintiffs' broad reading of the Citizenship Clause (and *Afroyim*) suffers from another problem: It renders superfluous several Acts of Congress regarding other U.S. territories and Native American Tribes. *Cf. Elk v. Wilkins*, 112 U.S. 94, 104 (1884) ("Since the ratification of the fourteenth amendment, congress has passed

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[2] *Amici* invoke *Rogers v. Bellei*, 401 U.S. 815 (1971), to suggest that "statutory citizenship" (*i.e.*, U.S. citizenship conferred by statute, as Congress has done for centuries, rather than "constitutional citizenship" conferred by Plaintiffs' unprecedented interpretation of the Citizenship Clause) means that "people in the Territories who have lived their entire lives as U.S. citizens could face the very real danger of having their citizenship revoked by legislative whim." Br. of Amici Curiae Members of Congress, *et al.* at 8. That risk is unfounded. *Rogers* at most permits Congress in the first instance to grant "*conditional*" U.S. citizenship by requiring a "condition subsequent" that "is not unreasonable, arbitrary, or unlawful." 401 U.S. at 831, 836 (emphasis added). Nothing in *Rogers* suggests that Congress has the authority to transform already-conferred *unconditional* citizenship into *conditional* citizenship or to revoke citizenship by adding new conditions when the person has already satisfied any existing condition(s).

several acts for naturalizing Indians of certain tribes, which would have been superfluous if they were, or might become without any action of the government, citizens of the United States."); *Wong Kim Ark*, 169 U.S. at 670 ("subsequent legislation on the subject would have been wholly unnecessary"). Plaintiffs do not even attempt to explain away this odd result, other than to suggest simply that "'longstanding practice' . . . cannot limit rights expressly granted by the text of the Fourteenth Amendment," and because "[t]here is no 'adverse-possession theory' of constitutional law[,] . . . the mere fact that the Government has been violating constitutional rights for a long time does not mean that it may continue to do so." Resp. Br. at 48 (citations omitted). That may be true, but the fact that Congress has repeatedly and consistently decided the question of territorial citizenship by *statute*, even after adoption of the Fourteenth Amendment, strongly suggests that the question is neither clearly nor plainly resolved by the Citizenship Clause alone. At a bare minimum, centuries of consistent congressional practice proves there is at least some ambiguity or doubt as to the plain meaning of the Citizenship Clause as applied to U.S. territories. *See Tuaua*, 788 F.3d at 308 n.7 ("[N]o one acquires a vested or protected right in violation of the Constitution by long use. . . . Yet an unbroken practice . . . openly [conducted] . . . by affirmative state action . . . is not something to be lightly cast aside." (alterations in original) (citation omitted)). This

counsels in favor of applying the "impracticable and anomalous" framework from *Boumediene*.

In the end, it is *Plaintiffs'* position—not Intervenors'—that singles American Samoa out for "second-class" differential treatment. Congress has always decided whether to extend U.S. citizenship to persons born in U.S. territories, and it has never done so over their objections. Yet Plaintiffs' position would result in the unprecedented, unilateral, and forcible imposition of a compact of U.S. citizenship on all persons born in American Samoa, whether they want it or not. As the D.C. Circuit recognized in *Tuaua*, imposing this kind of mandatory compact of U.S. citizenship over the will of the American Samoan people and their democratically elected representatives "would be to mandate an irregular intrusion into the autonomy of Samoan democratic decision-making; *an exercise of paternalism—if not overt cultural imperialism—offensive to the shared democratic traditions of the United States and modern American Samoa*." 788 F.3d at 312 (emphasis added). It is hard to imagine a more "impractical and anomalous" result. *Id.* at 310.

III. The Citizenship Clause Does Not Apply to Persons Born in American Samoa.

Persons born in American Samoa, an unincorporated U.S. territory, are neither "born . . . in the United States" nor "subject to the jurisdiction thereof." U.S. Const. amend. XIV, § 1, cl. 1.

"In the United States." The parties all agree that the different language used in the text of § 1 of the Thirteenth Amendment ("within the United States, or any place subject to their jurisdiction," U.S. Const. amend. XIII, § 1) and § 2 of Fourteenth Amendment ("in the United States, and subject to the jurisdiction thereof," U.S. Const. amend. XIV, § 1, cl. 1) means that "in the United States" must be broader than "among the several States," but narrower than "any place subject to their jurisdiction." *See* Resp. Br. at 22–24. Plaintiffs propose "within the territorial limits," while the Government and Intervenors propose the states and the District of Columbia, unless Congress decides otherwise for territories. Under a fair application of either proposal, those born in American Samoa are not born "in the United States" for purposes of the Fourteenth Amendment.

Plaintiffs suggest—without confronting Intervenors' arguments to the contrary—that the Civil Rights Act "confirms that the original understanding of 'in the United States' included States *and* Territories." Resp. Br. at 31–32 (emphasis in original). Not so. In reality, and as the district court recognized, the Civil Rights Act supports Intervenors' interpretation because it proves that the Reconstruction Congress knew how to use language that would unambiguously include all territories and states (*e.g.*, "every State and Territory in the United States"), but chose not to use that language in the Citizenship Clause. 39th Cong. Ch. 31, 14 Stat. 27–30 (1866); *see* App. Vol. III at 603–04 (12/12/2019 Mem. Decision & Order) ("The

decision of the 39th Congress to not include, in the Fourteenth Amendment, language related to territories—language that was present in the Civil Rights Act—may by itself constitute evidence that they did not intend for territories to be included within the Citizenship Clause's geographic scope."); *see also* Intervenors' Opening Br. at 35–36.

Plaintiffs largely fail to address Intervenors' arguments regarding the Constitution's structure, which confirms that states and the District Columbia are fundamentally different than U.S. territories. Intervenors' Opening Br. at 37–42. "Prior to forming the Union, the States possessed 'separate and independent sources of power and authority.'" *Puerto Rico v. Sanchez Valle*, 136 S. Ct. 1863, 1871 (2016). This is reflected in the Tenth Amendment, which generally "reserve[s] to the States" the powers not otherwise "delegated to the United States by the Constitution, nor prohibited by it to the States," U.S. Const. amend X, and throughout the rest of the Constitution's design, which radiates "a 'fundamental principle of equal sovereignty' among the States," *Shelby Cty. v. Holder*, 570 U.S. 529, 544 (2013) (emphasis omitted); *see also, e.g.*, *Sanchez Valle*, 136 S. Ct. at 1871 n.4 (noting that the "principle of 'equal footing,'" under which "a new State, upon entry, necessarily becomes vested with all the legal characteristics and capabilities of the first 13," is "the very bedrock of our Union"). The District of Columbia is likewise a unique fixture of constitutional design: It was created "by Cession of

particular States," U.S. Const. art. I, § 8, cl. 17, and was described by the First Congress as the "permanent seat of the Government of the United States," Residence Act, 1st Cong. Ch. 28, 1 Stat. 130 (1790); *see also, e.g.*, *O'Donoghue v. United States*, 289 U.S. 516, 539 (1933) (the District of Columbia is "the capital—the very heart—of the Union itself, to be maintained as the 'permanent' abiding place of all its supreme departments").

Territories, by contrast, are more transitory. U.S. territories "belong[] to the United States" and the Constitution vests Congress with the "Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States." U.S. Const. art. IV, § 3, cl. 2. Unlike the District of Columbia and states, Congress has the power "to dispose of," *id.*, territories or to admit them "into this Union" as a state, U.S. Const. art. IV, § 3, cl. 1. History and current territorial efforts underscore the flexible, transitory, and unique nature of territories. Congress' power to "make all needful Rules and Regulations" also shows that "Congress has broad latitude to develop innovative approaches to territorial governance." *Sanchez Valle*, 136 S. Ct. at 1868, 1876. The baseline for U.S. territories is that "they do not participate in political power; nor can they share in the powers of the general government, until they become a State, and are admitted into the Union, as such." 2 Joseph Story, *Commentaries on the Constitution of the United States* § 1324 (2d ed. 1851).

Congress also has the authority to determine whether a territory is foreign or domestic. As explained in Intervenors' opening brief, *Fleming v. Page* is a prime example of these broad territorial powers. In that case, the Supreme Court determined whether a port in Mexico subject to U.S. military occupation during war was "in the United States." 50 U.S. 603, 614–15 (1850). Although the port "was a part of the United States, and belonged to them as exclusively as the territory included in our established boundaries," the Court made clear that "*it does not follow that it was a part of the United States* . . . in the sense in which these words are used in the acts of Congress." *Id.* (emphasis added); *see* Intervenors' Opening Br. at 39–40. This broad understanding of Congress' powers remained unchanged after Reconstruction. *See, e.g.*, *Jones v. United States*, 137 U.S. 202, 212 (1890) ("Who is the sovereign, *de jure* or *de facto*, of a territory, is not a judicial, but a political, question, the determination of which by the legislative and executive departments of any government conclusively binds the judges, as well as all other officers, citizens, and subjects of that government."). Plaintiffs fail to address (or even cite) either of these cases. Both confirm Congress' critical role in deciding whether a particular territory is "within the territorial limits" "of the United States." *See* Resp. Br. at 13–14.[3]

[3] Plaintiffs pluck isolated quotations from other cases suggesting that courts have equated "in the United States" and "within the territorial limits of the United States." *See, e.g.*, Resp. Br. at 14, 21, 38. But those cases do not cast doubt on Congress'

The Constitution also vests the political branches with powers over treaties (U.S. Const. art. II, § 2) and naturalization (U.S. Const. art. I, § 8, cl. 4). Both powers are linked to the territories and demonstrate Congress' critical role in territorial citizenship, including naturalization laws regulating birthright citizenship. *See* Intervenors' Opening Br. at 40–41.

Dictionaries and early usage reinforce that Congress decides which lands are "in the United States." Black's Law Dictionary defines the United States as "[a] federal republic formed after the late-18th-century War of Independence and made up of 48 conterminous states, plus the state of Alaska and the District of Columbia in North America, plus the state of Hawaii in the Pacific." *United States*, Black's Law Dictionary (11th ed. 2019). This is consistent with late-eighteenth-century usage, *see* Intervenors' Opening Br. at 33 ("I hear he is gone [from the Ohio territory] to the U[nited] States." (quoting Letter from Henry Vanderburgh to Winthrop Sargent (April 30, 1795), in Winthrop Sargent Papers (on file with the Massachusetts Historical Society, Reel 4))), which Plaintiffs conveniently ignore.[4]

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power to determine what is foreign or domestic as a threshold matter. Here, Congress has used its constitutionally enshrined power to do just the opposite—Congress made American Samoa an "outlying possession[]," 8 U.S.C. § 1101(a)(29), and Plaintiffs' cases are consistent with respecting Congress' decision to treat American Samoa as an outlying possession rather than "in the United States."

[4] At a minimum, this early usage suggests that then, as now, the "United States" was a term with different scopes depending on context. Those in the Northwest Territories—contrary to Plaintiffs' assertions, Resp. Br. at 11, 19—understood as

Plaintiffs also quibble with Intervenors' example of a dictionary shortly after Reconstruction that also suggests that "the United States" could be narrower than anywhere it had dominion over. *See* Intervenors' Opening Br. at 36–37 (citing Stewart Rapalje & Robert L. Lawrence, *A Dictionary of American and English Law with Definitions of the Technical Terms of the Canon and Civil Laws* 1310 (1888)); Resp. Br. at 20–21. Plaintiffs initially suggest the definition is weak evidence because the 1888 dictionary "post-dat[ed] ratification of the Fourteenth Amendment by twenty years." Resp. Br. at 20. But that is a non-starter because Plaintiffs also argue that the "definition actually was cribbed from the *1868* edition of . . . *Bouvier's Law Dictionary*," Resp. Br. at 20–21 (emphasis added), which is after the U.S. acquisition of Alaska and contemporaneous to the Fourteenth Amendment. And while Plaintiffs maintain that the definition "cannot be said to reflect an accurate understanding of the territorial limits of the United States," Resp. Br. at 21, the definition plainly reflects a contemporaneous understanding "in 1888 or (more importantly) in 1868," *id.*, that "the United States" does not necessarily

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much. *See* Gregory Ablavsky, *Administrative Constitutionalism and the Northwest Ordinance*, 167 U. Pa. L. Rev. 1631, 1652 (2019) (noting that there were "multiple meanings of 'United States' in the late eighteenth century. Sometimes, the term referred specifically and only to the thirteen states collectively; in other instances, it described the entire territory of the nation of the United States").

extend to anywhere over which it has dominion.[5] Plaintiffs provide no dictionary definition that supports their proposed meaning.

Plaintiffs also invoke various quotations from *Loughborough v. Blake*, 18 U.S. 317, 319 (1820), in which the Supreme Court interpreted the Tax Uniformity Clause (U.S. const. art. I, § 8, cl. 1), to support their claim that "in the United States" "include[s] states and territories," *see, e.g.*, Resp. Br. at 2, 11, 18–19, 23, 30, 55. At the same time, Plaintiffs turn around and attempt to undermine the precedential value of *Downes v. Bidwell*, 182 U.S. 244 (1901), precisely because it was interpreting *the same Tax Uniformity Clause* (rather than the Citizenship Clause). Resp. Br. at 42. Plaintiffs cannot have it both ways. In all events, *Downes* is plainly more relevant than *Loughborough*—*Loughborough* involved whether the Tax Uniformity Clause applied in the District of Columbia, while *Downes* at least involved territories. *Compare Loughborough*, 18 U.S. at 317–18, *with Downes*, 182 U.S. at 292.

"Subject to the jurisdiction thereof." Even under *Wong Kim Ark*, those born in American Samoa are not automatically citizens under the Fourteenth Amendment

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[5] Plaintiffs' other argument noting that the definition included unorganized and unincorporated territories misses the key point: that the meaning of the United States may be narrower than wherever the United States has dominion. Put another way, the takeaway is that United States could exclude both unorganized (Alaska) and unincorporated (Navassa Island) territories, like American Samoa. *See Duncan v. Navassa Phosphate Co.*, 137 U.S. 647, 650–51 (1891) (explaining that since the mid-1800s "the island of Navassa must be considered as appertaining to the United States"); Resp. Br. at 21 ("Alaska in 1888 was an *unorganized* Territory").

because they are not born "subject to the jurisdiction" of the United States. *Wong Kim Ark* itself recognized that the Fourteenth Amendment did not take the entire English common law; it had an "additional exception of children of members of the Indian tribes." 169 U.S. at 693. That is because Native Americans "st[oo]d[] in a peculiar relation to the national government, unknown to the common law." *Id.* at 682.

The same is true for American Samoa. Plaintiffs have never challenged the unique tradition and custom of *fa'a Samoa*. Nor have they challenged American Samoa's unique history and relationship with the United States. For good reason. As Plaintiffs' *amici* admit, American Samoa has a "distinctive culture," and they "fully respect the importance that American Samoa's leaders place on cultural preservation and self-determination," noting the "enduring vibrancy and diversity of the cultural heritage" of American Samoa. Br. of Amici Curiae Members of Congress, *et al.* at 1, 19, 22.

Comparing Native American Tribes to American Samoa further illustrates the peculiar relation to the United States. *Cf. Crawford v. Washington*, 541 U.S. 36, 52 n.3 (2004) (using a "proxy" and "reasonable inference[s]" "to determine the application of a constitutional provision to a phenomenon that did not exist at the time of its adoption"). American Samoa, like some Native American Tribes, voluntarily entered into a treaty with the United States. *See Elk*, 112 U.S. at 99; Am.

Samoa Cession, *supra*. As in many Native American treaties, American Samoa in its treaty sought to preserve crucial land rights. *Compare, e.g.*, *Herrera v. Wyoming*, 139 S. Ct. 1686, 1691–92 (2019) ("the United States promised that the Crow Tribe 'shall have the right to hunt on the unoccupied lands of the United States,'" as "preserving their hunting traditions" was "vital[ly] importan[t]" (quoting Treaty Between the United States of America and the Crow Tribe of Indians, Art. IV, May 7, 1868, 15 Stat. 650)), *with* Am. Samoa Cession, *supra* (requiring the United States to "respect and protect the individual rights of all people dwelling in Tutuila to their lands and other property in said District"); *see also United States v. Felter*, 752 F.2d 1505, 1509 (10th Cir. 1985) ("The right to hunt and fish on reservation land is a long-established tribal right."); Intervenors' Opening Br. at 6–8.

The similarities continue with the importance of custom in self-governance. Indeed, traditional custom has been vital to American Samoan governance since its first treaty with the United States. *See* Am. Samoa Cession, *supra* ("The Chiefs of the towns will be entitled to retain their individual control of the separate towns . . . ."); *see also id.* (noting that "representatives by Samoan Custom" signed the treaty). The same is true today: "Under [the] Constitution of American Samoa[,] the Legislature, and particularly the Senate which is composed of traditional chiefs chosen according to Samoan custom, has a peculiar relationship to the preservation of land and culture." *Tuika Tuika v. Governor of Am. Samoa*, 4 A.S.R.2d 85 (1987).

Similarly, the Supreme Court has emphasized the importance of custom in tribal governance. *See, e.g.*, *In re Kan. Indians*, 72 U.S. 737, 756 (1866) ("They have elective chiefs and an elective council . . . with powers regulated by custom; by which they punish offences, adjust differences, and exercise a general oversight over the affairs of the nation. This people have their own customs and laws by which they are governed."). At bottom, like many Native Americans, Samoans have never "abandon[ed] their national character." *Worcester v. Georgia*, 31 U.S. 515, 555 (1832).

These similarities, as Plaintiffs suggest, do not vanish just because American Samoa's "ultimate governance remains statutorily vested with the United States Government." *Tuaua*, 788 F.3d at 306; *see also Worcester*, 31 U.S. at 552 ("Protection does not imply the destruction of the protected."). The D.C. Circuit in *Tuaua* recognized as much, when it applied *Elk*'s "subject to the jurisdiction thereof" logic to modern American Samoa. 788 F.3d at 310. "Even assuming a background context grounded in principles of *jus soli*," the D.C. Circuit was "skeptical the framers plainly intended to extend birthright citizenship to distinct, significantly self-governing political territories within the United States's sphere of sovereignty." *Id.* The court explained:

> As even the dissent to *Elk* recognized, "it would be obviously inconsistent with the semi-independent character of such a tribe, and with the obedience they are expected to render to their tribal head, that they should be vested with the complete rights—or, on the other,

> subjected to the full responsibilities—of American citizens. It would not for a moment be contended that such was the effect of this amendment."

Id. (quoting *Elk*, 112 U.S. at 119–20 (Harlan, J., dissenting)). So too for American Samoa given the *'aiga* and *matai*.

Plaintiffs suggest that holding that those born in American Samoa are not "subject to the jurisdiction" of the United States for purposes of the Citizenship Clause would mean the same for "residents of States." Resp. Br. at 52. But the point is not that *any* self-governing entity is not subject to the jurisdiction of the United States; the point is that a self-governing entity *in peculiar relation* to the United States is not. A state's relationship with the national government is anything but peculiar, and does not implicate any of the arguments unique to unincorporated U.S. territories like American Samoa.

As a last resort, Plaintiffs claim that the Court should not consider whether persons born in American Samoa are born "subject to the jurisdiction" of the United States because the argument purportedly was "affirmatively waived below." Resp. Br. at 15, 52. That argument mischaracterizes Intervenors' motion for summary judgment. To be sure, Intervenors stated that they "concur with the current Defendants' arguments . . . , and incorporate those arguments by reference." App. Vol. II at 294 n.1 (09/10/2018 Proposed Intervenors' Mot. to Dismiss, or, In the Alternative, Cross-Mot. for Summ. J.). But Intervenors incorporated the

Government's "arguments"—not their concessions. The rest of the motion backs this up. Intervenors wrote that "the Court should dismiss the complaint for *at least two additional reasons* not fully addressed in the current Defendants' briefs." *Id.* at 294 (emphasis added). And Intervenors elsewhere "[d]isputed to the extent that Plaintiffs inaccurately describe, and overly simplify, the unique status of American Samoa as an unincorporated U.S. territory whose tribal leaders, the *matai*, voluntarily ceded sovereignty to the United States government, and to the extent that Plaintiffs undermine the American Samoan people's inherent right to self-determination." *Id.* at 299. Intervenors' motion is thus a far cry from the affirmative waiver that Plaintiffs claim. Resp. Br. at 15, 52.

In all events, even if it were not preserved below, Intervenors' subject-to-the-jurisdiction-thereof argument is "'not a new claim.' Rather, it is—at most—'a new argument to support what has been [a] consistent claim." *Citizens United v. FEC*, 558 U.S. 310, 330–31 (2010) (citation omitted). Intervenors have consistently maintained that "imposition of citizenship by judicial fiat would fail to recognize American Samoa's sovereignty and the importance of the *fa'a Samoa*," and would "violate[] fundamental principles of self-determination." App. Vol. II at 302. And the district court "passed upon" the subject-to-the-jurisdiction-thereof issue, *Waldo v. Ocwen Loan Servicing, LLC*, 483 F. App'x 424, 426 (10th Cir. 2012), when it concluded that because "American Samoans owe permanent allegiance to the United

States, . . . [t]hey are therefore 'subject to the jurisdiction' of the United States." App. Vol. III at 627. *See also, e.g.*, *Lebron v. Nat'l R.R. Passenger Corp.*, 513 U.S. 374, 379 (1995) ("[E]ven if this were a claim not raised by petitioner below, we would ordinarily feel free to address it, since it was addressed by the court below."). So there is no reason for the Court to avoid deciding this important, "purely legal question." *Waldo*, 483 F. App'x at 426; *see Elk*, 112 U.S. at 98 (explaining that the subject-to-the-jurisdiction-thereof issue is a "legal conclusion").

All this to say: Plaintiffs cannot escape that even under *Wong Kim Ark*, those born in American Samoa are not automatic citizens under the Fourteenth Amendment. Congress has decided to convey U.S. citizenship on Native Americans and persons born in all other U.S. territories, and Congress should retain the power to decide whether—and on what terms—to do the same for persons born in American Samoa. *See supra* Part II. This is the correct result as a matter of law. And this is the only way to ensure the voice of the American Samoan people is heard and that citizenship is not imposed against the will of its democratically elected representatives.

CONCLUSION

The Court should reverse the district court's impractical and anomalous decision to forcibly impose constitutional birthright citizenship on American Samoa against its will.

Respectfully submitted,

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May 26, 2020

CERTIFICATE OF COMPLIANCE

Pursuant to Tenth Circuit Rule 32 and Rules 27(d) and 32(a)(7)(B) of the Federal Rules of Appellate Procedure, I hereby certify that the textual portion of the foregoing brief (exclusive of the tables of contents and authorities, statement of prior or related appeals, glossary, statement regarding oral argument, certificates of compliance, digital submission, and service, but including footnotes) contains 6,483 words as determined by the word counting feature of Microsoft Word 2016.

Pursuant to Tenth Circuit Rule 25.3, I also hereby certify that an electronic file of this brief has been submitted to the Clerk via the Court's CM/ECF system. The file has been scanned for viruses and is virus-free.

May 26, 2020

/s/ Michael F. Williams, P.C.
Michael F. Williams, P.C.

CERTIFICATE OF DIGITAL SUBMISSION

I hereby certify that with respect to the foregoing:

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May 26, 2020

/s/ Michael F. Williams, P.C.
Michael F. Williams, P.C.

CERTIFICATE OF SERVICE

In accordance with Tenth Circuit Rule 25.4 and Federal Rule of Appellate Procedure 25(c)(2), I hereby certify that on May 26, 2020, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Tenth Circuit by using the CM/ECF system. I certify that all participants are registered CM/ECF users and will be served via the CM/ECF system.

May 26, 2020

/s/ Michael F. Williams, P.C.
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