Nos. 20-4017 and 20-4019

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

JOHN FITISEMANU, et al.,

Plaintiffs-Appellees,

v.

UNITED STATES OF AMERICA, et al.,

Defendants-Appellants,

and

THE AMERICAN SAMOA GOVERNMENT and
THE HON. AUMUA AMATA,

Intervenor Defendants-Appellants.

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

BRIEF OF CITIZENSHIP SCHOLARS AS *AMICI CURIAE* IN SUPPORT OF PLAINTIFFS-APPELLEES AND AFFIRMANCE

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INTRODUCTION AND INTEREST OF *AMICI CURIAE*

Amici Curiae are scholars of law, history, and political science who have written on the history of American citizenship.[1] *Amici*'s names, titles, and institutional affiliations (for identification purposes only) are listed in Appendix A. *Amici* have a professional interest in the doctrinal, historical, and policy issues involved in this Court's interpretation of the meaning of citizenship in the United States. Moreover, *Amici* have a professional interest in historical conceptions of citizenship before and after the ratification of the Fourteenth Amendment's Citizenship Clause, modern notions of citizenship and non-citizen national status, and their impact on policy today.

Amici submit this brief to provide insight into the historical record relating to three primary points relevant to this case. First, although the original U.S. Constitution did not identify any qualifications for citizenship, its references to citizenship are best understood against the

[1] *Amici* submit this brief with the consent of all parties pursuant to Federal Rule of Appellate Procedure 29(a)(2). *Amici* confirm under Rule 29(a)(4)(E) that no counsel for a party authored this brief in whole or part, that no party or party's counsel contributed money intended to fund preparing or submitting this brief, and that no person other than *Amici* and their counsel contributed money that was intended to fund preparing or submitting this brief.

principle inherited from English common law that *United States v. Wong Kim Ark*, 169 U.S. 649, 667 (1898), termed *jus soli*—"the right of the soil." Second, the designation of American Samoans as "non-citizen nationals" had no precedent in antebellum America. Rather, that designation is an unconstitutional exception to the principle of *jus soli* citizenship, invented by administrators and legislators operating under racialist presuppositions during America's territorial expansion at the turn of the twentieth century. Third, the government incorrectly suggests that the same rule must control whether American Samoans and millions of Filipinos are U.S. citizens. The American Revolution firmly established the enduring default rule of Anglo-American law that a change of sovereignty over a territory extinguishes the allegiance of the population to the former sovereign and establishes its allegiance to the new sovereign. It is this rule, separate and apart from *jus soli*, that causes the population of the Philippines to be Filipino citizens rather than American citizens.

ARGUMENT

I. The Rule That Citizenship Flows From the Place of Birth Has Deep Roots in the American Tradition, Drawn From English Common Law.

Appellees in this case invoke *jus soli*—"the law of the soil"—as the basis for their right to citizenship. Under that doctrine, all people born within the dominion and "allegiance of the United States" are citizens of the United States. *United States v. Wong Kim Ark*, 169 U.S. 649, 655 (1898).[2] The rule has deep roots in the American tradition and is drawn from the English common law.

A. The Rule that Citizenship Flows From the Place of Birth Was the English Common Law Rule.

The 1789 U.S. Constitution repeatedly uses the term "citizen," but until the ratification of the Fourteenth Amendment, the Constitution did not expressly identify who was (or was not) a U.S. citizen. *See Lynch v. Clarke*, 1 Sand. Ch. 583 (N.Y. Ch. 1844). As the Supreme Court has long recognized, terms used but not defined in the Constitution should be read "in the light of" English common law, because the U.S.

[2] At common law, "birth within the allegiance" of the king was understood to mean birth within the "'ligealty,' 'obedience,' 'faith,' or 'power'—of the king . . . [O]r, as would be said at this day, within the jurisdiction, of the king." *Wong Kim Ark*, 169 U.S. at 655.

Constitution is "framed in the language of the English common law." *Smith v. Alabama*, 124 U.S. 465, 478 (1888); *see also Carmel v. Texas*, 529 U.S. 513, 521 (2000) (finding that, for an undefined term in the Constitution, "the necessary explanation is derived from English common law well known to the framers"); *Wong Kim Ark*, 169 U.S. at 654. Accordingly, early U.S. courts turned to English common law to inform their understanding of citizenship. *See Dawson's Lessee v. Godfrey*, 8 U.S. (4 Cranch) 321 (1808) (applying common law to determine citizenship); *M'Ilvaine v. Coxe's Lessee*, 6 U.S. (2 Cranch) 280 (1805) (same). And when they did so, American courts concluded that, although citizenship and subjecthood are distinct,[3] "'[s]ubject' and 'citizen' are, in a degree, convertible terms as applied to natives; and though the term 'citizen' seems to be appropriate to republican freemen, yet we are, equally with the inhabitants of all other countries, 'subjects,' for we are equally bound by allegiance and subjection to the government and law of the land." *Wong Kim Ark*, 169 U.S. at 665; *see also Leake v.*

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[3] For example, although subjecthood was considered immutable, U.S. courts allowed that the Revolution provided some opportunity for the exercise of choice in political membership of a community. *M'Ilvaine*, 6 U.S. at 284 (1805) ("When the Revolution was proposed, he has a right to chuse his side.").

Gilchrist, 13 N.C. 73 (1829) (equating "natural born subject or citizen"); *Minor v. Happersett*, 88 U.S. 162, 166 (1874) (the choice between the terms "subject," "inhabitant," and "citizen," "is sometimes made to depend upon the form of the government").[4]

The English rule regarding citizenship based on place of birth was clear and uncontested. Those born within lands over which the English king's sovereignty extended were subjects of the King of England. Or, as pre-revolutionary courts would have explained, those who were born on any soil under the sovereign power of the King of England were his "natural liege subjects" and were properly considered "natural born" subjects under the law. *Calvin's Case*, (1608) 77 Eng. Rep. 377, 409; 7 Co. Rep. 1 b 27 b; *see also id.* at 399. As Chief Justice Coke stated in

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[4] *See also* John A. Hayward, *Who Are Citizens?*, 2 AM. L.J. 315 (1885) ("The word [citizen] as used in the articles of confederacy and the constitution must have had the same acceptation and meaning as subject. The only difference being that a subject is under subjection to a monarch, and a citizen is under subjection to a government of which he is a component part."); Munroe Smith, *Nationality, Law of*, *in* 2 CYCLOPAEDIA OF POLITICAL SCIENCE, POLITICAL ECONOMY, AND OF THE POLITICAL HISTORY OF THE UNITED STATES BY THE BEST AMERICAN AND EUROPEAN WRITERS, 941, 942 (John J. Lalor ed., 1883) ("citizen" supplanted "subject" because the latter was "historically associated with the theories of feudal and absolute monarchy, and has thus fallen into disfavor.").

Calvin's Case, "all those that were born under one natural obedience while the realms were united under one sovereign, should remain natural born subjects, and no aliens." *Id.* at 409. The Supreme Court has long recognized this "fundamental principle of the common law," that "English nationality . . . embraced all persons born within the king's allegiance, and subject to his protection." *Wong Kim Ark*, 169 U.S. at 655.

English and American jurists from the seventeenth century onward understood the common law rule to extend to any territory over which the king exercised some form of sovereign authority. In *Calvin's Case*, Coke explicitly included within the rule's ambit a wide variety of lands: territories within another kingdom (Wales) subject to the King of England, territories acquired by conquest (Ireland), and regions into which "the king's Writ did run" (Gascony). As the U.S. Supreme Court noted in 1830, the common law rule was recognized as operating beyond the British Isles and Europe: it was "universally admitted, both in the English courts and in those of our own country," that the birthright rule extended to "all persons born within the colonies of North America,

whilst subject to the crown of Great Britain." *Inglis v. Trustees of Sailor's Snug Harbour*, 28 U.S. (3 Pet.) 99, 120 (1830).

The English common law rule extended to all persons born on English territory, excepting only a subset of those who already owed allegiance to another sovereign—for example, children of diplomats and persons born under hostile occupation were not subjects of the King of England even if they were born on English lands. *See* 1 WILLIAM BLACKSTONE, COMMENTARIES *369-374; *Calvin's Case*, (1608) 77 Eng. Rep. 377, 399; *Wong Kim Ark*, 169 U.S. at 655. In other words, under the English common law rule, affirmatively owing exclusive allegiance to another sovereign was a necessary condition to escape the reach of the birthplace citizenship rule inherited from England.

Many early U.S. cases echo the English rule. The Supreme Judicial Court of Massachusetts thus declared:

> [A] man born within the jurisdiction of the common law, is a citizen of the country wherein he is born. By this circumstance of his birth, he is subjected to the duty of allegiance which is claimed and enforced by the sovereign of his native land and becomes reciprocally entitled to the protection of that sovereign, and to the other rights and advantages which are included in the term "citizenship."

Gardner v. Ward, 2 Mass. 244 (1805). American courts in the nineteenth century also read the common law rule so that it reached children born to alien parents on U.S. soil. In the Supreme Court's words: "Nothing [was] better settled at the common law than the doctrine that the children even of aliens born in a country . . . are subjects by birth." *Sailor's Snug Harbor*, 28 U.S. at 164. No matter "how accidental soever his birth in that place may have been, and although his parents belong to another country," the country of one's birth "is that to which he owes allegiance," *Leake*, 13 N.C. 73 (1829), and that birth "does of itself constitute citizenship," *Lynch*, 1 Sand. Ch. 583 (1844). *See also United States v. Rhodes*, 27 F. Cas. 785, 789 (Swayne, Circuit Justice, C.C.D. Ky. 1866) (No. 16,151) ("[A]ll persons born in the allegiance of the United States are natural[-]born citizens."). Even a person "born within the United States" who later emigrated, "not being proved to have expatriated himself according to any form prescribed by law, is said to remain a citizen, entitled to the benefit and subject to the disabilities imposed upon American citizens." *Murray* v. *Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 120 (1804). *See also Talbot v. Janson*, 3 U.S. (3 Dall.) 133, 165-66 (1795) (a person

born in Virginia who later moves to France is still a citizen of the United States).[5]

In the writings of the Framers there is similar evidence of a Founding-era commitment to determining citizenship by the English common law rule. For example, James Madison noted in 1789, the year the Constitution came into effect, that "[i]t is an established maxim that birth is a criterion of allegiance. Birth however derives its force sometimes from place and sometimes from parentage, but in general place is the most certain criterion; it is what applies in the United States; it will therefore be unnecessary to investigate any other." 1 Annals of Cong. 420 (1789) (Joseph Gales ed., 1834).

U.S. courts also followed the English common law in recognizing that there were some distinct classes of people born within the dominion of the United States who were not "born within the allegiance" of the United States, and therefore were not citizens—namely children of diplomats and those born under foreign occupation. *Sailor's Snug Harbor*, 28 U.S. at 155-56; *Wong Kim Ark*, 169 U.S. at

[5] *See also* Bernadette Meyler, *The Gestation of Birthright Citizenship, 1868-1898 State's Rights, the Law of Nations, and Mutual Consent*, 15 GEO. IMMIGR. L. J. 519, 527-32 (2001).

682. American judges further recognized the unique situation of Native Americans, who, although "born within the territorial limits of the United States," were "members of, and ow[ed] immediate allegiance to, one of the Indian tribes." *Elk v. Wilkins*, 112 U.S. 94, 102 (1884).[6] Accordingly, *Elk* held that Native Americans "are no more 'born in the United States and subject to the jurisdiction thereof,' within the meaning of the first section of the Fourteenth Amendment, than the children of subjects of any foreign government born within the domain of that government, or the children born within the United States, of ambassadors or other public ministers of foreign nations." *Id.*; *see also Ex parte Reynolds*, 20 F. Cas. 582, 583 (C.C.W.D. Ark. 1879) (No. 11,719) ("[N]ot being subject to the jurisdiction of the United States, [Indians] are not citizens thereof. . . . Indians, if members of a tribe, are not citizens or members of the body politic.").[7]

[6] Native American tribes were viewed as "domestic dependent nations," separate from the United States. *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1 (1831).

[7] The Indian Citizenship Act of 1924 enacted birthright citizenship for Native Americans. 8 U.S.C. § 1401(b).

B. United States Courts Briefly Recognized a Narrow Exception to the Rule that Citizenship Flows From the Place of Birth.

In antebellum America, the rule that birth within the territory and allegiance of the nation ensured citizenship admitted of one clear and notable departure: the exclusion of people "of African descent" from citizenship. *Dred Scott v. Sanford*, 60 U.S. 393 (1857). In *Dred Scott v. Sanford*, the Supreme Court denied citizenship to African Americans born within, and owing undivided allegiance to, the United States. This exception was grounded in a racial exclusion. The Supreme Court held that African Americans were not United States citizens because "they were . . . considered as a subordinate and inferior class of beings, who had been subjugated by the dominant race, and, whether emancipated or not, yet remained subject to their authority, and had no rights or privileges but such as those who held the power and the Government might choose to grant them." *Id.* at 404-05. But *Dred Scott*'s departure from the general rule only supports Plaintiffs' claims in this case, because *Dred Scott* provides the backdrop against which the Fourteenth Amendment's codification of the background rule was adopted.

C. The Fourteenth Amendment Constitutionalized the Rule That Citizenship Flows From the Place of Birth, Thereby Confirming That Birthright Citizenship Applies to All Those Born Within the Geographic Boundaries of the United States.

The Fourteenth Amendment constitutionalized the common law rule that birth within the nation's territory and allegiance bestowed citizenship.[8] That amendment's Citizenship Clause repudiated *Dred Scott*'s race-based exception to citizenship, so that "*[a]ll persons* born . . . in the United States, and subject to the jurisdiction thereof"—including African Americans—were deemed "citizens of the United States." U.S. Const. amend. XIV, § 1 (emphasis added); *In re Look Tin Sing,* 21 F. 905, 909 (C.C.D. Cal. 1884) (noting that the Citizenship Clause was meant to "overrule" *Dred Scott* and grant citizenship to African Americans). The debates in the Senate over the Fourteenth Amendment make clear that the Citizenship Clause was aimed at putting freed slaves and other African Americans in the same position with respect to citizenship as all other people born in the United States. As Senator

[8] Kristin A. Collins, *Illegitimate Borders: Jus Sanguinis Citizenship and the Legal Construction of Family, Race, and Nation*, 123 YALE L. J. 2134, 2153 (2014) (the Fourteenth Amendment "constitutionalized *jus soli* citizenship").

John Henderson noted in 1866: "I propose to discuss the first section [of the Fourteenth Amendment] only so far as citizenship is involved in it. I desire to show that this section will leave citizenship where it now is. It makes plain only what has been rendered doubtful by the past action of the Government." Cong. Globe, 39th Cong., 1st Sess. 3031 (1866) (then identifying *Dred Scott* as the case that erroneously introduced doubts).

The Supreme Court in *Wong Kim Ark* confirmed that the Fourteenth Amendment follows the "established" and "ancient rule of citizenship by birth within the dominion" and allegiance of the nation—that "[e]very person born in the United States, and subject to the jurisdiction thereof, becomes at once a citizen of the United States, and needs no naturalization." 169 U.S. at 674, 667, 702.[9] Born in San Francisco in 1873 to Chinese nationals, Wong Kim Ark had been denied reentry to the United States following a trip to China on the ground that he was not a U.S. citizen. *Id.* at 649-51. The Supreme Court rejected that analysis, declaring that "there is no authority, legislative,

[9] *Wong Kim Ark,* 169 U.S. at 659 ("Two things usually concur to create citizenship: First, birth locally within the dominions of the sovereign; and, secondly, birth within the protection and obedience, or, in other words, within the ligeance, of the sovereign.").

executive, or judicial" which "superseded or restricted, in any respect, the established rule of citizenship by birth within the dominion." *Id.* at 674; *see also id.* at 703 ("The fourteenth amendment . . . has conferred no authority upon congress to restrict the effect of birth, declared by the constitution to constitute a sufficient and complete right to citizenship.").

D. At the Time of the Ratification of the Fourteenth Amendment, the Rule That Citizenship Flowed From the Place of Birth Was Understood to Include Persons Born in the Territories of the United States.

The geographic scope of the Fourteenth Amendment is informed by the common understanding at the time it was ratified. Under the English common law rule that the Fourteenth Amendment codified, the doctrine extended beyond the boundaries of England to encompass any territory under the sovereignty of the King of England: "whosoever [wa]s born within the fee of the King of England, though it be in another kingdom, [wa]s a natural-born subject." *Calvin's Case*, (1608), 77 Eng. Rep. 377, 403. In the seventeenth and eighteenth centuries, jurists extended the principle beyond the British Isles to overseas colonies under the sovereignty of the King of England. Persons born in all territories held by the King, and thus "into the King's allegiance,"

were his subjects. Polly J. Price, *Natural Law and Birthright Citizenship in* Calvin's Case (1608), 9 YALE J. L. & HUMAN. 73, 86-87 (1997). The American colonists were themselves "subjects of the crown of Great Britain." 1 WILLIAM BLACKSTONE, COMMENTARIES *106-109; *see also Sailor's Snug Harbor*, 28 U.S. at 120-21 ("[A]ll persons born within the colonies of North America, whilst subject to the crown of Great Britain, were natural[-]born British subjects.").

This doctrine was incorporated into American law. And before the twentieth century, following the lead of English jurists including Coke, U.S. courts made little distinction, on questions of citizenship status, between the states and the territories. Justice Story declared that "[a] citizen of one of our territories is a citizen of the United States." *Picquet v. Swan*, 19 F. Cas. 609, 616 (C.C.D. Mass. 1828) (No. 11,134). William Rawle took a similar view in his influential commentary, A VIEW OF THE CONSTITUTION OF THE UNITED STATES (1829), where he wrote that "every person born within the United States, its territories or districts, whether the parents are citizens or aliens, is a natural born citizen in the sense of the Constitution." *Id.* at 86. As discussed above, that principle, that "every person born within the dominions and allegiance

of the United States . . . is a natural born citizen," governed American jurisprudence from the Founding through the nineteenth century. *Lynch*, 1 Sand. Ch. 583 (1844); *see also Look Tin Sing*, 21 F. at 909 (1884); *Wong Kim Ark*, 169 U.S. at 659, 688 (1898).[10]

That is why the Supreme Court expressly contemplated in 1898 that one born outside of the established states, yet, still within U.S. jurisdiction, could lay claim to citizenship. *See Wong Kim Ark*, 196 U.S. at 677 ("[A] man [may] be a citizen of the United States without being a citizen of a state. . . . [I]t is only necessary that he should be born or naturalized in the United States to be a citizen of the Union.") (internal citation omitted). Indeed, after the Fourteenth Amendment, being subject to U.S. jurisdiction no more depended on birth within an established state than on membership in a particular racial, cultural, or

[10] The question of citizenship status discussed here is of course distinct from that of rights. Both English law and later U.S. law envisioned that subjects or citizens in a colony or territory could have circumscribed rights. *See* BLACKSTONE, COMMENTARIES *107 ("[A]ll the English laws then in being, which are the birthright of every subject, are immediately there [i.e., in the American colonies] in force. But this must be understood with very many and very great restrictions."); Northwest Ordinance (1787), 32 JOURNALS OF THE CONT'L CONG. 334-343 (property rights in slaves were not permitted to migrants to the Northwest Territory).

social category. *See id.* at 693 ("The [Fourteenth] amendment, in clear words and in manifest intent, includes the children born within the territory of the United States of all other persons [besides "children of members of the Indian tribes owing direct allegiance to their several tribes" and a handful of narrow, ancient exceptions concerning ambassadors, foreign ships, and hostile occupations], of whatever race or color, domiciled within the United States.").[11]

II. The Anomalous Concept of a Non-Citizen National Was Invented by the Political Branches.

The term "non-citizen national" is a twentieth-century invention of the federal agencies and political branches that the Supreme Court has never embraced.[12] English common law recognized the status of

[11] The Court in *Wong Kim Ark* also declined the government's invitation to conceive of allegiance as embodying racial and cultural affiliation, and instead "focused on obedience to the laws as the essential element of allegiance, and on the authority of the national government to compel the obedience of all within its geographical boundaries." Lucy E. Salyer, *Wong Kim Ark: The Contest Over Birthright Citizenship*, *in* IMMIGRATION STORIES 51, 72, 75 (David A. Martin and Peter H. Schuck eds., 2005). *See also Wong Kim Ark*, 169 U.S. at 683-88, 690, 693.

[12] *Miller v. Albright*, 523 U.S. 420, 467, n.2 (1998), did not address the question of the Constitution's codification of the rule that citizenship flows from the place of birth, and does not support the proposition that the Supreme Court *embraced* the unconstitutional non-citizen national status.

denizen, which shared some characteristics with the non-citizen national, but early U.S. jurisprudence (as explained below) both implicitly and explicitly repudiated that status. The sole exception to this repudiation during the first half of the nineteenth century, like the sole exception to the principle that citizenship flowed from birth within U.S. sovereignty and allegiance, was the African American.[13] Both controversial innovations suffered the same fate: constitutional repudiation after the Civil War.

English common law, on the eve of the American Revolution, and as interpreted in its most authoritative form by William Blackstone, envisioned four possible statuses: subject, naturalized subject, alien, and denizen. Subjects, those born within allegiance to the king, owed indissoluble allegiance to the crown. 1 WILLIAM BLACKSTONE, COMMENTARIES *369 ("Natural allegiance is therefore a debt of gratitude, which cannot be . . . altered"). Naturalized subjects, who had acquired English subjecthood later in life, had an identical status except that they were not permitted to hold certain high offices. *Id.* at *374. An

[13] As noted, Native Americans were a special case of a different sort: neither denizens nor citizens, but generally treated as aliens due to their allegiance to sovereign tribes. *See supra* at 10.

alien owed "local" or temporary allegiance to the English crown, but only while "within the king's dominion and protection." *Id.* at *370; *see also id.* at *372. Finally, "[a] denizen is in a kind of middle state between an alien, and natural-born subject." *Id.* at *374. One became a denizen by acquiring royal letters patent which made one "an English subject;" however, the denizen still lacked certain civil and political rights. *Id.* at *374.

Distinct categories of naturalized subject (or naturalized citizen) and denizen were both repudiated by the jurisprudence of the early United States. First, U.S. law never drew any significant distinction between naturalized and native-born citizens, and indeed explicitly repudiated any such distinction in virtually every case. *See, e.g.*, *Osborn v. Bank of the United States*, 22 U.S. (9 Wheat) 738, 827-28 (1824) ("[The naturalized citizen] is distinguishable in nothing from a native citizen, except so far as the constitution makes the distinction. The law makes none."). Article I, section 2 of the U.S. Constitution gave naturalized citizens the same right to high office as native-born citizens, with the sole exception of the presidency. U.S. Const. art. II, § 1. All subsequent efforts during the 1790s to draw distinctions between the

status of native-born and naturalized citizens were rejected. *See, e.g.*, 8 Annals of Cong. 1580 (1798).

Second, the category of "denizen" also was ignored or explicitly repudiated in U.S. law. The 1777 Vermont Constitution used "denizen" as a synonym for "citizen," indicating that it did not denote a separate status. Vt. Const. of 1777, ch. 2, sec. xxxviii (explaining when an alien "shall be deemed a free denizen thereof, and intitled to all the rights of a natural born subject of this State."). Chief Justice Taylor of the North Carolina Supreme Court confirmed in 1824 that "[t]he middle state in which the common law places a denizen is unknown here" in the United States, for "all [free white] persons . . . residing here, are either citizens or aliens . . . ." *Ex Parte Thompson*, 10 N.C. (3 Hawks) 355, 361 (1824).

A small number of courts in a handful of cases during the first half of the nineteenth century suggested that free African Americans inhabited a middle state between citizen and alien. The Kentucky Court of Appeals, for example, described them as "quasi citizens, or, at least, denizens." *Rankin v. Lydia*, 9. Ky. (2 A. K. Marsh) 467, 476 (1820), *quoted in Dred Scott*, 60 U.S. at 562 (McLean, J. dissenting). This view, however, never won broad acceptance at the national level, nor was it

ever adopted by the U.S. Supreme Court. Even *Dred Scott*, declaring that native-born African Americans were not citizens, did not adopt the language of denizenship. It stopped short of expressly recognizing a third status beyond citizen and alien, leaving it instead to necessary implication. 60 U.S. at 457. Moreover, the Fourteenth Amendment later made clear that African Americans were citizens of the United States, and not denizens. As House Judiciary Chairman James F. Wilson noted in support of the Civil Rights Act of 1866, the "pestilent doctrines of the *Dred Scott* case" providing that the United States had "six million persons in this Government subject to its laws, and liable to perform all the duties and support all the obligations of citizens, and yet who are neither citizens nor aliens," was "an absurdity which cannot survive long in the light of these days of progressive civilization." Cong. Globe, 39th Cong., 1st Sess. 1116-17 (1866). And indeed, it did not.

In sum, the best available evidence suggests that by 1898, the U.S. Constitution, state constitutions, and American courts had long established a binary division of nontribal inhabitants into citizens and aliens. During the revolutionary and early Republican periods (ca. 1776-1830), they explicitly repudiated the intermediate categories (denizen

and naturalized subject) that had existed in English common law. Although an attempt was made before the Civil War to place free African Americans in middle category between citizen and alien, the aftermath of the Civil War conclusively erased any vestige of this innovation, reaffirming the binary division of nontribal inhabitants into citizens and aliens.

The Court has never held otherwise,[14] though not for the federal government's lack of trying. In *Downes v. Bidwell*, 182 U.S. 244 (1901), a fractured bare majority upheld a tariff on Puerto Rico–mainland trade. *Id.* at 278. Two of the three opinions in support of the judgment digressed to discuss naturalized citizenship and race. Justice White hypothesized: "Citizens of the United States discover an unknown island, peopled with an uncivilized race, yet rich in soil . . . . Can it be denied that such right [to acquire] could not be practically exercised if the result would be to endow the inhabitants with citizenship of the United States . . . ." *Id.* at 306. Justice Brown wrote separately: "it is doubtful if Congress would ever assent to the annexation of territory

[14] The Court has, however, declared unconstitutional some distinctions between naturalized and native-born. *E.g.*, *Schneider v. Rusk*, 377 U.S. 163 (1964).

upon the condition that its inhabitants, however foreign they may be to our habits, traditions, and modes of life, shall become at once citizens . . . .” *Id*. at 279-80.

Three years later, the government sought to transform White’s and Brown’s race-based discomfort with the prospect of U.S. citizenship into the basis of a decision by the Court.[15] The vehicle was *Gonzales v. Williams*, 192 U.S. 1 (1904), which presented the question whether Puerto Ricans could be excluded under the immigration laws. The government’s answered “yes,” because the peoples of the newly acquired territories were not citizens. As Professor Sam Erman summarizes, the government cast such peoples as “remote in time, space, culture, and ‘civilization’ and suffering problems of climate, ‘overcrowding,’ ‘primitive hygiene,’ ‘low standards . . . of living and moral conduct, and the ‘the extreme and willing indigency’ that characterized the tropics.” SAM ERMAN, ALMOST CITIZENS, 81 (2019).

[15] As Professor Sam Erman has described, the government’s proposed “revolution in Fourteenth Amendment citizenship doctrine” to authorize a novel form of allegiance without citizenship sprang from influential 1899 War Department memoranda laying out a new constitutional theory of empire. SAM ERMAN, ALMOST CITIZENS, 40-43, 51, 55 (2019).

The lawyer for the other side responded by aligning the government's view with the infamous *Dred Scott* case, which had, "for the first time in our history," declared "that in the United States there were persons who, although subjects, were yet not citizens." Frederic R. Coudert, Jr., *Our New Peoples: Citizens, Subjects, Nationals, or Aliens*, 3 COLUM. L. REV. 13, 16-17 (1903). The nation had quickly repudiated that result through the Fourteenth Amendment, and the lawyer cautioned the justices not to make "recourse to . . . precedents in our history of which we are least proud" to reach a "peculiar, and, from a standard of American civilization, most anomalous result." Br. of Pet'r 39, *Gonzales*, 192 U.S. 1 (1903) (No. 225).

Facing the competing pulls of a racial exclusion from U.S. citizenship and fidelity to precedent, the Court took a narrow and unanimous approach. It held that Puerto Ricans were not aliens, hence not subject to existing immigration restrictions. *Gonzales*, 192 U.S. at 15. As to whether they were U.S. citizens, the Court expressly declined to decide. *Id.* at 12.

Unfortunately, *Gonzales* has sometimes been read to have resolved the very question—*i.e.*, the citizenship status of Puerto Ricans

or others born in U.S. territories—that the Court reserved. *See, e.g.*, Office of Directives Management, U.S. Department of State, 7 U.S. Dep't of State, Foreign Affairs Manual 1121.2-2 (Oct. 10, 1996), https://fam.state.gov/fam/07fam/07fam1120.html (last visited March 26, 2018) (claiming that the Court "developed the rationale that . . . [i]nhabitants of territories acquired by the United States acquire U.S. nationality—but not U.S. citizenship"). In reality, the Supreme Court never resurrected *Dred Scott*'s seeming distinction between citizenship and nationality.

Although the Court never recognized the existence of non-citizen nationals in the years since *Gonzales*, federal lawmakers and administrators embraced the category to achieve race-based goals. Congressional debates on Puerto Rico following its cession to the United States are representative. Shortly before *Gonzales*, Congress considered whether to recognize the U.S. citizenship of Puerto Ricans. A debate "filled with racist rhetoric" ensued, and Puerto Ricans did not secure the statutory recognition. José A. Cabranes, *Citizenship and American Empire: Notes on the Legislative History of United States Citizenship of Puerto Ricans*, 127 U. PA. L. REV. 391, 429-33 (1978).

In sum, a non-citizen national status did not exist at the Founding, was eradicated by the Fourteenth Amendment, and has never been resurrected by the Court. When lawmakers and administrators attempted to breathe new life into the term, they repeated the mistakes that led to *Dred Scott*. They acted against clear precedent and constitutional text based upon racial classifications and animus.

III. Filipinos Lack U.S. Citizenship as a Result of Philippines Independence, Regardless of Whether the Philippines Was Previously Part of the "United States" for Fourteenth Amendment Purposes.

In urging reversal in this case, the government asserts that the "logic of the district court's opinion would also compel the conclusion that every person born in the Philippines from 1898 to 1946 was a U.S. citizen at birth, likewise implicating the citizenship status of their children." (Gov't Br. 13.) But that reasoning omits the signal event distinguishing the Philippines from all other U.S. territories: The Philippines gained its independence in 1946. Its people thereby severed their allegiance to the United States and became citizens of the Philippines instead. The common law rule commanding the result predates the Constitution and took firm root in U.S. law. Under it, a

change in sovereignty occasions a corresponding change in inhabitants' allegiance and citizenship.

By the time of the American Revolution, the common law already recognized the rule that the transfer of territory to a new sovereign brought about a corresponding change in the allegiance of the inhabitants. This result flowed straightforwardly from the understanding that the people's allegiance to the sovereign and the sovereign's protection of the people were reciprocal duties. Change the protector, allegiance follows. Or as Lord Chief Justice Mansfield explained following the British conquest of Grenada, inhabitants of that island, "once received under the King's protection, become subjects, and are to be universally considered in that light, not as enemies or aliens." *Campbell v. Hall*, 1 Cowp. 204, 98 Eng. Rep. 1045 (1774).

During the American Revolution, state legislatures and the Continental Congress hewed to the rule and its logic when they asserted that declarations of independence severed the states' allegiance to England and made their inhabitants into citizens of the American states. The Continental Congress declared that all "residing within any of the United Colonies, and deriving protection from the

laws of the same, owe allegiance to the said laws, and are members of such colony." V JOURNALS OF THE CONTINENTAL CONGRESS, 475-76. *See Inglis v. Trustees of Sailor's Snug Harbor*, 28 U.S. 99, 124-25 (1830) ([T]he doctrine of allegiance . . . is the tie which binds the governed to their government, in return for the protection which the government affords them."). Great Britain also recognized the continuing strength of the principle, though its judges dated its application in North America to the 1783 Treaty of Paris formally acknowledging American independence. *See id.* at 120-21. So has the Supreme Court of this country, which declared in *Inglis* that when the American states achieved independence, their inhabitants "may be deemed to have become thereby an American citizen." *Id.* 123. *Accord* 2 James Kent, *Commentaries on American Law*, 33-35 (1827).[16]

In adherence to the rule that changes in the sovereignty of a territory occasion changes in the allegiance of the population, U.S. expansions have always been accompanied by new Americans. Every

[16] Given the dispute over the date of the change of sovereignty, the Court declared that its "general rule must necessarily be controlled by special circumstances attending particular cases" arising in the period between 1776 and 1783. *Id.* at 121.

treaty of annexation up to 1898 guaranteed U.S. citizenship for the acquired peoples. *See Downes*, 182 U.S., 280 (White, J., concurring) (describing how the United States, "[i]n all its treaties hitherto" 1898, had granted U.S. citizenship to non-Indian residents of the lands that it annexed).[17] Twentieth-century annexations followed suit. *See, e.g.,* Convention Between the United States and Denmark, 39 Stat. 1706 (1917) (annexing the Danish West Indies and guaranteeing U.S. citizenship to the populace).

Because the rule operates automatically by default, active steps are required for individuals to retain their prior allegiance. During the American Revolution, British subjects who inhabited the colonies before 1776 automatically became state citizens instead upon independence unless they actively retained their British allegiance, usually by rapidly departing North America for England. *See, e.g.*, *Inglis v. Trustees of Sailor's Snug Harbor*, 28 U.S. 99 (1830). After the Mexican-American War, the United States annexed from Mexico what is today the

[17] Although Hawai'i was annexed by joint congressional resolution rather than by treaty, Newlands Resolution, 30 Stat. 750 (1898), its inhabitants still received U.S. citizenship, Hawaiian Organic Act, 31 Stat. 141 (1900).

southwestern United States in the 1848 Treaty of Guadalupe Hidalgo. Inhabitants (other than Indians) automatically became U.S. citizens unless they made a formal election to the contrary within one year. Treaty of Guadalupe Hidalgo, 9 Stat. 922, 929 (1848). *See also* Alaska Purchase Treaty, 15 Stat. 539, 542 (1867) (automatically extending U.S. citizenship to all non-Indian inhabitants unless they returned to Russia within three years); Treaty of Paris, 30 Stat. 1754, 1759, 1755-56 (1899) (transferring Puerto Rico, Guam, and the Philippines to the United States; automatically changing inhabitants' "nationality" unless they recorded in court a declaration to retain their Spanish allegiance).

The United States also adhered to the rule in the converse situation, when it granted independence to the Philippines and thereby recognized that Filipinos' allegiance had switched to that of their new sovereign. Section 2(a)(1) of the Philippines Independence Act of 1934, 48 Stat. 456, demanded Filipinos' allegiance to the United States prior to independence: "All citizens of the Philippine Islands shall owe allegiance to the United States." Section 14 insisted on their alienage afterward: "Upon the final and complete withdrawal of American sovereignty over the Philippine Islands the immigration laws of the

United States . . . shall apply to persons who were born in the Philippine Islands to the same extent as in the case of other foreign countries." The Supreme Court upheld this policy: "In the Independence Act, the Congress granted full and complete independence to the Islands, and necessarily severed the obligation of permanent allegiance owed by Filipinos . . . ." *Rabang v. Boyd*, 353 U.S. 427, 430 (1957).[18]

The principle that inhabitants' allegiance attaches to their territory's new sovereign is not just as ancient as the Republic, it is constitutive of it. "We the People of the United States" only exist because Americans' allegiance to the Crown dissolved when British sovereignty gave way to American independence. Filipinos and their nation are heirs to the same tradition.

CONCLUSION

Amici respectfully submit that the historical and Constitutional record supports recognizing birthright citizenship for persons born into American allegiance in any U.S. territory, including the territory of American Samoa.

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[18] Notably, it was another decade before *Afroyim v. Rusk*, 387 U.S. 253 (1967), limited Congress's power to denaturalize on an individual basis outside of the context of transfers of territory and sovereignty.

May 12, 2020

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I hereby certify that (1) all required privacy redactions have been made; (2) although the obligation to submit paper copies has been suspended by this Court's General Order No. 95-1 (Mar. 16, 2020), *Amici* are prepared to submit paper copies of this document that are exact copies of the version filed electronically; and (3) the electronic submission was scanned for viruses and found to be virus-free.

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CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the type-volume limitation of Fed. R. App. P. 29(a)(5) because it contains 6,449 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f) and 10th Cir. R. 32(B).

I certify that this brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and 10th Cir. R. 32(A) and the type-style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionately spaced, 14-point Century Schoolbook typeface using Microsoft Word 2016.

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CERTIFICATE OF SERVICE

I hereby certify that I filed the foregoing with the Clerk of the United States Court of Appeals for the Tenth Circuit using the CM/ECF system this 12th day of May, 2020, and that a copy was served on all counsel of record by the CM/ECF system.

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