

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH
NORTHERN DIVISION

In re:)	
)	
JOHN FITISEMANU, PALE)	
TULI, ROSAVITA TULI,)	
SOUTHERN UTAH PACIFIC)	
ISLANDERS COALITION,)	
)	
Plaintiffs,)	
)	
vs.)	Case No.
UNITED STATES OF)	1:18-CV-00036
AMERICA, US)	
DEPARTMENT OF STATE,)	
et al.,)	
)	
Defendants.)	
-----)	

BEFORE THE HONORABLE CLARK WADDOUPS

November 14, 2018

Motion for Summary Judgment
Motion to Dismiss
Motion to Dismiss for Failure to
State a Claim

Appearances of Counsel:

For the Plaintiffs: Jacob T. Spencer
Jeremy Max Christiansen
Matthew D. McGill
Attorneys at Law
Gibson Dunn & Crutcher LLP
1050 Connecticut Ave NW
Washington, D.C. 20036

For the United States: Stephen Michael Pezzi
Attorney at Law
US Department of Justice
Civil Division Federal
Programs Branch
1100 L. St NW Room 11504
Washington, D.C. 20005

For the Honorable
Aumua Amata: Michael F. Williams
Britney A. Lewis
Attorneys at Law
Kirkland & Ellis
655 Fifteenth ST NW
Washington, D.C. 20005

Jess M. Krannich
Attorney at Law
Manning Curtis Bradshaw
& Bednar PLLC
136 E. South Temple
Suite 1300
Salt Lake City, Utah 84111

For Equal American
Protection: Neil Weare
Attorney at Law
Equally American Legal Defense
& Education Fund
1300 Pennsylvania Avenue
NM-190-413
Washington, D.C. 20004

Court Reporter:

Laura W. Robinson, RPR, FCRR, CSR, CP
351 South West Temple
8.430 U.S. Courthouse
Salt Lake City, Utah 84101
(801)328-4800

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

Salt Lake City, Utah November 14, 2018
(3:00 p.m.)

00:14:10

THE COURT: Good afternoon. We are here in the matter of *Fitisemanu versus the United States*, case 1:18-CV-36. Will counsel please state their appearance.

00:14:25

MR. SPENCER: Jacob Spencer for the plaintiffs.

THE COURT: Thank you.

MR. MCGILL: Matthew McGill of Gibson Dunn and Crutcher for the plaintiffs, Your Honor.

THE COURT: Thank you.

00:14:32

MR. CHRISTIANSEN: Jeremy Christiansen with Gibson Dunn and Crutcher for the plaintiffs, Your Honor.

MR. WEARE: Neil Weare for Equal American for the plaintiffs.

THE COURT: Thank you.

00:14:41

MR. PEZZI: Good afternoon, Your Honor, Stephen Pezzi from the Department of justice on behalf of the United States.

THE COURT: Thank you.

00:14:49

MR. WILLIAMS: Good afternoon, Your Honor, Mike Williams from Kirkland and Ellis on behalf of the American Samoa Government and Congresswoman

1 Amata.

2 THE COURT: Thank you.

3 MS. LEWIS: Britney Lewis from Kirkland Ellis
4 also on behalf of the American Samoa Government.

00:15:00

5 MR. KRANNICH: And good afternoon, Your Honor,
6 Jess Krannich on behalf of the American Samoan
7 Government and the Congresswoman.

00:15:11

8 THE COURT: We're here on cross motions for
9 summary judgment and motions to dismiss. I have
10 reviewed the parties submissions and many of the
11 supporting materials although not all of them. Let
12 me just as an initial matter make an observation. We

00:15:29

13 have had a request, an inquiry, about whether it
14 would be appropriate to record these proceedings. I
15 just want to remind everyone that the official

00:15:45

16 transcript of this proceeding is only by the court
17 reporter and recording the audio version of this is
18 prohibited by the court's rules. Although if you're
19 a part of the recognized press corp you may use your
20 digital devices for purpose of taking notes but not
21 recording. I assume that all of you probably already
22 understand that.

23 Let's proceed with the plaintiffs' argument.

00:16:16

24 MR. SPENCER: Good afternoon, Your Honor. May
25 it please the court, Jacob -- my name is Jacob

1 Spencer from Gibson Dunn and Crutcher. I'm here on
2 behalf of the plaintiffs.

3 Your Honor, this case involves a single
4 question of constitutional law. The government does
00:16:30 5 not dispute that American Samoa is subject to the
6 jurisdiction of the United States so the sole
7 question in this case is whether American Samoa is in
8 the United States as that phrase was used by the
9 Fourteenth Amendment of the United States -- of the
00:16:45 10 U.S. Constitution. If so, then the individual
11 plaintiffs are entitled to birthright citizenship and
12 defendants refusal to recognize their citizenship is
13 unconstitutional.

14 American Samoa is in the United States, we
00:17:01 15 know, as of 1868 when the Fourteenth Amendment was
16 ratified that the United States as used in the
17 Fourteenth Amendment included the District of
18 Columbia and we also know that it included
19 territories. We have gone through in our briefs the
00:17:16 20 extensive historical evidence from the text, the
21 structure, historical understanding, the legislative
22 history to show that it included territories when the
23 Fourteenth Amendment was ratified, and included
24 territories both that the U.S. had in 1868 when over
00:17:33 25 50 percent of the land mass of the United States was

1 in the form of territories. And we also -- there is
2 little dispute that it included territories that the
3 U.S. would acquire after 1868. But the government
4 asks this court to carve out from the United States a
5 single category of so-called unincorporated
6 territories, these outlying islands acquired by the
7 U.S. at the end of the 19th Century and the early
8 20th Century. But there is no textual reason for
9 carving out unincorporated territories from the
10 United States.

11 THE COURT: What is an unincorporated
12 territory?

13 MR. SPENCER: I think the phrase, as I
14 understand it, an unincorporated territory the court
15 said in *Boumediene* is a territory that was not surely
16 -- that is not surely destined for --

17 THE COURT: What is the legal determination?
18 What makes the territory incorporated versus not
19 incorporated?

20 MR. SPENCER: I'm not sure of the answer to
21 that, Your Honor.

22 THE COURT: Isn't that something that just
23 came up in the *Insular* cases basically carved out of
24 whole clothe?

25 MR. SPENCER: Certainly as a legal term that

1 is exactly correct. It was developed by the
2 political and judicial branches over 40 years after
3 the Fourteenth Amendment was ratified.

00:18:44 4 THE COURT: Is there any kind of a procedure
5 to determine when a territory is incorporated versus
6 unincorporated?

7 MR. SPENCER: I'm not sure the answer to that
8 question, Your Honor.

00:18:52 9 THE COURT: Do we have any determination as to
10 whether American Samoa is incorporated or
11 unincorporated?

12 MR. SPENCER: The government says that it is
13 an unincorporated territory.

14 THE COURT: Which government?

00:18:59 15 MR. SPENCER: The government of the United
16 States says it is unincorporated on the theory that
17 is not surely destined for statehood.

18 THE COURT: And what is the vehicle by which
19 they make that pronouncement?

00:19:08 20 MR. SPENCER: They would say, I think, this
21 would obviously be a question for my colleague, but I
22 think they would say that by statute congress has not
23 -- has not incorporated American Samoa.

00:19:21 24 THE COURT: Is there a statute that says
25 they're unincorporated?

1 MR. SPENCER: Not to my knowledge.

2 THE COURT: I'll ask the United States to
3 address that further.

4 MR. SPENCER: So I think there is no
00:19:30 5 historical evidence that there was this category of
6 unincorporated territories carved out of the
7 Fourteenth Amendment as 1868. And it is moreover
8 would be flatly inconsistent with what the Supreme
9 Court said at the end of the 19th Century in *Wong Kim*
00:19:47 10 *Ark* where in a learned and scholarly opinion the
11 United States Supreme Court said that the purpose of
12 the Fourteenth Amendment was to constitutionalize and
13 reaffirm what it called the fundamental and ancient
14 principle of birth of -- citizenship by birth within
00:20:00 15 the territories so that there would be no question
16 that someone who was born, as they had said in the
17 *Slaughter-House* cases, that someone who was born in
18 the territories or in the District of Columbia would
19 be a citizen of the United States no less than
00:20:12 20 somebody who was born in one of the states.

21 So the government's case ultimately relies,
22 and they turn to this over and over again, on the
23 *Insular* cases and specifically one of the *Insular*
24 cases *Downes against Bidwell*. To be clear about what
00:20:28 25 it would mean to adopt *Downes against Bidwell's*

1 definition and carve out unincorporated territories
2 from the United States, there are millions of
3 Americans living in Puerto Rico, in the Virgin
4 Islands, in the Northern Mariana Islands and in Guam
5 who are American citizens. But on the government's
6 theory, they are American citizens not because of
7 their birthright, but solely because of an act of
8 legislative race. So to adopt the United States'
9 theory would mean that congress could withdraw that
10 grant of citizenship at any time. And even the D.C.
11 Circuit in the *Tuaua* case was unwilling to take that
12 step because it recognized that *Downes against*
13 *Bidwell* is not controlling of the question in front
14 of this court for several reasons. *Downes* was a
15 fractured opinion with no single opinion garnering a
16 majority of the court. *Downes* discussed the separate
17 clause, the Tax Uniformity Clause, and *Downes*
18 discussed Puerto Rico in 1901 not citizenship in
19 American Samoa in 2018.

20 And we know if there were any doubt that
21 *Downes* does not resolve questions of citizenship
22 because the Supreme Court was confronted with those
23 questions just a few years later in the *Gonzales* case
24 where there was active briefing from both sides about
25 *Wong Kim Ark* and about whether at that point someone

1 who had been born in Puerto Rico before it became a
2 part of the United States acquired U.S. citizenship
3 and the Supreme Court declined to resolve that
4 question. If the government were correct that *Downes*
00:22:05 5 *against Bidwell* resolved the question, then it would
6 have been easy for the Supreme Court to say in
7 *Gonzales* that Puerto Rico is not -- that those who
8 became part of the United States in -- through the
9 annexation were not U.S. citizens but it didn't take
00:22:21 10 that step and so the D.C. Circuit appropriately
11 recognized that *Downes* does not control there. But I
12 think what is even more important is that *Downes*
13 *against Bidwell* should simply not be not be extended
14 as many justices of the Supreme Court have noted. It
00:22:38 15 is an eerie parallel I think in many ways to *Dred*
16 *Scott*. Before the Fourteenth Amendment there was one
17 exception to citizenship by birth within the
18 territory of the United States and that was the *Dred*
19 *Scott* case where the Supreme Court carved out
00:22:54 20 African-Americans and said that they could not be
21 citizens. If *Downes versus Bidwell* extends to
22 citizenship, then there would be a new exception
23 carved out for unincorporated territories or
24 so-called unincorporated territories where congress
00:23:09 25 could switch citizenship on and off at will. And the

1 rhetoric, the reasoning I should say of *Downes* is --
2 was wrong when it was uttered, there is dicta about
3 citizenship saying that those who are savages or
4 absolutely unfit to receive citizenship should not
5 have it extended to them automatically. That is
6 dicta, as I say. It was dicta that was wrong when it
7 was uttered and it should not be extended. And I
8 think if you look at the *Boumediene* case, which the
9 government relies on as supposedly reaffirming the
10 core principles of the *Insular* cases, what *Boumediene*
11 says is that at the time of the *Insular* cases the
12 Supreme Court was confronted with the question of
13 whether the Constitution extends to the newly
14 acquired territories of its own force, or whether it
15 requires congress to extend it. And the court's
16 answer was it extends to the territories of its own
17 force. Now there were some practical difficulties
18 *Boumediene* says that were involved at the turn of the
19 20th century with some of the provisions of the
20 Constitution, but none of them involved citizenship
21 and none of them of the same practical difficulties
22 would be practical difficulties with recognizing
23 birthright citizenship in American Samoa today.

24 So that leaves, I think, as the last argument
25 the government has the *Tuaua* case itself. Because

1 the D.C. Circuit did not think that *Downes* applied,
2 that *Downes* was controlling. It instead decided to
3 adopt some of the *Insular* cases framework and say
4 that it could be impractical and anomalous to
5 recognize birthright citizenship in American Samoa.
6 And I think that that is wrong and it is wrong for at
7 least three reasons.

8 First, ultimately what the D.C. Circuit said
9 is that it would be impractical and anomalous to
10 extend birthright citizenship when the government of
11 American Samoa did not want citizenship extended to
12 American Samoa, but that can't be what impractical
13 and anomalous means. It can't turn on a legislative
14 judgment and we know that especially with regard to
15 the Citizenship Clause because the very purpose of
16 the Citizenship Clause as the senators told us when
17 it was adopted, but also as the Supreme Court
18 confirmed in *Afroyim*, was to place questions of
19 citizenship beyond the legislative power. So to say
20 that the Citizenship Clause can be turned on or off
21 in American Samoa based on the will of the American
22 Samoan Government, is inconsistent with the purpose
23 of the Citizenship Clause. Nor is it impractical or
24 anomalous to recognize birthright citizenship in
25 American Samoa. There are plenty of American

1 citizens living in American Samoa, and there are many
2 people who acquire citizenship at birth in American
3 Samoa because their parents are recognized as United
4 States citizens. The government of American Samoa
00:26:05 5 has said that this might have an effect on
6 traditional Samoan way of life fa'a Samoa. But with
7 respect, we don't think that it will. This case
8 involves citizenship. The provisions that the
9 American Samoan Government have talked about involve
00:26:21 10 the Equal Protection Clause or the Establishment
11 Clause. As a matter of constitutional text, those
12 don't turn on whether someone is a citizen or not,
13 those turn on the Equal Protection Clause whether
14 somebody is a person or not. So we don't think that
00:26:35 15 there will be any effect of recognizing birthright
16 citizenship in American Samoa. But even if you were
17 inclined to accept as the D.C. Circuit did the
18 American Samoan Government's views on whether it
19 should be extended to American Samoa, that can't
00:26:53 20 control this case because this case involves three
21 Utahns, three residents of Utah. And if anything
22 would be anomalous, it would be to allow the
23 government of American Samoa for whom none of the
24 plaintiffs voted or were entitled to vote, to declare
00:27:11 25 whether they are entitled to citizenship of the

1 United States.

2 That question, to come back to where I began,
3 as the United States government agrees, depends on
4 what is the meaning of "in the United States." And
00:27:26 5 as we pointed out in our briefs, and I would be happy
6 to answer any questions, every historical source,
7 every source of constitutional meaning we have,
8 points to the same answer to that question.

9 Territories like American Samoa are in the United
00:27:41 10 States and for that reason the individual plaintiffs
11 are entitled to citizenship by virtue of the
12 Fourteenth Amendment.

13 THE COURT: Would you address the question as
14 to whether the provisions of the Constitution that
00:27:52 15 would seem to provide that territories should be
16 under the control of congress how that applies,
17 relates to your argument.

18 MR. SPENCER: Certainly. We have no dispute
19 that congress has plenary control over the
00:28:05 20 territories as it does over the District of Columbia.
21 But that does not mean that congress is free from the
22 constitutional obligations it has in passing laws for
23 the territories and especially it is not free of the
24 personal rights that are in the original Constitution
00:28:24 25 as well as the Bill of Rights under the Fourteenth

1 Amendment.

2 THE COURT: Okay. Unless you have got further
3 argument, let's hear from the government's position.

4 MR. SPENCER: Thank you, Your Honor.

00:28:34

5 MR. PEZZI: Good afternoon, Your Honor,
6 Stephen Pezzi from the Department of Justice on
7 behalf of the United States. Plaintiffs ask this
8 court to issue the first ever holding that with
9 respect to unincorporated territories birthright
10 citizenship is not only --

00:28:55

11 THE COURT: How do we know that American Samoa
12 is an unincorporated territory?

13 MR. PEZZI: Great question, Your Honor. First
14 of all, I don't think there is any dispute in this
15 case that American Samoa is an unincorporated
16 territory. I suspect that if you ask the
17 plaintiffs --

00:29:05

18 THE COURT: It doesn't just become an
19 unincorporated territory by fiat, somebody has got to
20 do something to say this is an unincorporated
21 territory.

00:29:14

22 MR. PEZZI: I think that's almost exactly
23 right, Your Honor. We would put it just slightly
24 differently. Actually the presumption with respect
25 to a territory is that it is unincorporated.

00:29:23

1 THE COURT: Where does that presumption arise?

2 MR. PEZZI: In *Balzac versus Porto Rico*, which

3 is one of the cases that followed after *Downes v*

4 *Bidwell* as decided in 1922, a majority of the Supreme

00:29:35

5 Court clearly adopts the *Insular* cases framework of

6 territorial incorporation, and it adopts effectively

7 what's a clear statement rule that suggests that if a

8 territory is to be incorporated into the union, we

9 look for a clear statement from congress to that

00:29:48

10 effect. There is no such clear statement from

11 congress here, and I again I think plaintiffs

12 wouldn't disagree with that. And Your Honor is

13 correct and my friend on the other side is correct

14 that generally the definition of an unincorporated

00:30:00

15 territory, and what we're looking for in that clear

16 statement, is a path to statehood.

17 It was around the turn of the 20th Century

18 where for the first time the United States acquired

19 territories that were not placed on the path towards

00:30:13

20 statehood, and that -- that new factual circumstance

21 was presented to the Supreme Court.

22 THE COURT: So at what point in the

23 territory's history is that determination made?

24 MR. PEZZI: It can be made at any point as

00:30:25

25 soon as congress acts to provide for the territory's

1 incorporation into the United States. So with
2 respect to some territories, it could be the moment
3 of acquisition. So there are many territories that
4 the United States acquired over the years primarily
5 before the Fourteenth Amendment for which either some
6 treaty with a foreign government or an explicit act
7 of congress or both.

8 THE COURT: To what extent does the treaty
9 under which the territory becomes subject to the
10 sovereignty of the United States influence that
11 decision?

12 MR. PEZZI: A treaty can be the supreme law of
13 the land just like an act of congress can.

14 THE COURT: So in the case of Puerto Rico,
15 there was a specific provision that talked about the
16 rights of the citizens would be subject to the
17 determinations of congress.

18 MR. PEZZI: That's exactly right.

19 THE COURT: Is there anything similar to that
20 in the treaties under which the American Samoan
21 islands became part of the United States.

22 MR. PEZZI: The short answer, Your Honor, is
23 no. Um, the legal document --

24 THE COURT: In fact, the treaty seems to
25 suggest that they will come with no discrimination.

1 MR. PEZZI: For today's purposes I think what
2 is important is that the treaties do not purport to
3 incorporate the American Samoa into the United States
4 and again I don't think plaintiffs would dispute
5 that. And so the question becomes when you have what
6 everyone agrees is an unincorporated territory, to
7 what extent does the Citizenship Clause apply. And I
8 think it is important to return to the text of that
9 provision again just to make sure we're all on the
10 same page there are two independent textual
11 requirements. One is that the individual be born in
12 the United States, the second that they're subject to
13 the jurisdiction thereof. My friend on the other
14 side is correct that the government does not dispute
15 that American Samoa is subject to the jurisdiction of
16 the United States. The question is whether American
17 Samoa, as an unincorporated territory, is in the
18 United States. Every court --

19 THE COURT: So at the time that the Fourteenth
20 Amendment was adopted, what was the -- what was the
21 common law understanding in the United States as what
22 it meant to be in the United States? The plaintiff
23 argues that it was well understood that that included
24 both the states and the territories.

25 MR. PEZZI: Well importantly, Your Honor,

1 there were no unincorporated territories in 1868 so
2 that does complicate the question of what --

3 THE COURT: There were territories, nobody had
4 made up the idea yet of unincorporated versus
5 incorporated so it was not on a play.

6 MR. PEZZI: That is true, Your Honor, there
7 were territories and the Doctrine of Territorial
8 Incorporation was not clearly expressed by the
9 Supreme Court until the early 1900s. But
10 respectfully, that argument and much of plaintiffs
11 argument is an argument that --

12 THE COURT: So answer my question. What was
13 the general understanding, under common law, as to
14 what it meant to be in the United States?

15 MR. PEZZI: So I think the government's
16 position is that "in the United States" means within
17 the 50 states.

18 THE COURT: That is not my question. That is
19 not my question. At the time the Fourteenth
20 Amendment was adopted, was it clearly understood that
21 "in the United States" included anyone that was
22 subject to the dominion and sovereignty of the United
23 States?

24 MR. PEZZI: The government does not dispute
25 that there was a common law understanding with

1 respect to birthright citizenship and that in the
2 United States for much of its history that --

3 THE COURT: Including at the time when the
4 Fourteenth Amendment was adopted?

00:33:42 5 MR. PEZZI: But before and after the
6 Fourteenth Amendment.

7 THE COURT: So at the time -- at the time that
8 the American Samoa islands became ceded to the United
9 States, what was the understanding under common law
00:33:58 10 of what it meant to be in the United States.

11 MR. PEZZI: So respectfully, Your Honor, at
12 that time I don't think there was any common law
13 understanding.

14 THE COURT: What do you do -- what do you do
00:34:07 15 with the 1898 decision of *Wong Kim Ark*?

16 MR. PEZZI: That is a great question.

17 THE COURT: Doesn't that clearly express
18 exactly the opposite of what you're arguing?

19 MR. PEZZI: I don't think it did, Your Honor.
00:34:18 20 So *Wong Kim Ark* is a plaintiff who was born in the
21 state of --

22 THE COURT: I understand the factual
23 distinction. But the court goes on after page after
24 page after page talking about the English common law
00:34:30 25 and what it meant under English common law and

1 applies that as an essential ingredient of part of
2 the logic to its conclusion.

3 MR. PEZZI: But the conclusion is about not
4 the in the United States requirement it is about --

00:34:44 5 THE COURT: I'm supposed to disregard --
6 disregard the 30 plus pages of analysis and say just
7 read the conclusion?

8 MR. PEZZI: Not at all, Your Honor, and I'm
9 not saying that. I'm saying that is a case about the
00:34:53 10 separate requirement not at issue here that someone
11 be subject to the jurisdiction of the United States.

12 THE COURT: But you can't deny the fact that
13 page after page of that decision develops the premise
14 that if you're subject to the jurisdiction of the
00:35:08 15 king, if you are a liege of the king, you are the
16 king's subject and subject to his rule which is
17 equivalent to being a citizen.

18 MR. PEZZI: I would dispute that that's
19 equivalent to being a citizen, Your Honor. Again,
00:35:21 20 I'm of course not asking Your Honor to ignore
21 anything that the Supreme Court has said and I'm not
22 just saying, to be clear, I'm not just saying our
23 only argument about *Wong Kim Ark* is there is a
24 factual difference. That is not the argument. It is
00:35:34 25 that the court in *Wong Kim Ark* was not setting out to

1 define but alone define with any rigor the meaning of
2 constitutional text within the United States.

3 Instead that is a case about whether or not Mr. Wong
4 Kim Ark was born subject to the jurisdiction of the
00:35:47 5 United States because his parents were citizens of
6 China and at the time that carried a lot of
7 significance under the Chinese Exclusion Acts.

8 Now, as to the constitutional text in the
9 United States which again was not at issue in *Wong*
00:35:59 10 *Kim Ark* just about a few years later the Supreme
11 Court did issue some holdings on the meaning of that
12 -- of very similar constitutional text. So in *Downes*
13 *v Bidwell*, five justices of the Supreme Court held
14 that the meaning -- that the constitutional provision
00:36:14 15 that applied quote, "throughout the United States,"
16 did not apply to Puerto Rico because Puerto Rico was
17 an unincorporated territory of the United States.

18 THE COURT: That court was not construing the
19 language at issue before this court.

00:36:26 20 MR. PEZZI: It was construing the meaning of
21 the phrase the United States.

22 THE COURT: In a completely -- in a totally
23 different context.

24 MR. PEZZI: I would disagree that it was a
00:36:34 25 totally different context, Your Honor, and I think

1 that's reflected in part by the extensive discussion
2 of citizenship in those cases. But the point is, the
3 constitutional text -- the constitutional provision
4 that was to apply throughout the United States did
5 not apply to Puerto Rico because it was an
6 unincorporated territory and I do not think that's a
7 holding that this court can ignore. And I think
8 importantly, again, every court to consider this
9 question --

00:36:48
10 THE COURT: Are you suggesting that that
11 decision binds the court to reach that conclusion?

12 MR. PEZZI: I concede that this is not a case
13 under the Tax Uniformity Clause, Your Honor, so there
14 -- there is some analytical work to be done to
15 explain why that holding applies to this case. But I
16 think it is quite clear and I have not heard any
17 argument from plaintiffs as would offer a principle
18 distinction between constitutional text that says
19 throughout the United States and constitutional text
20 that says in the United States especially when you
21 look to those opinions. I mean citizenship itself is
22 of course discussed.

00:37:11
23 THE COURT: One of the problems with the
24 *Downes* decision, and the *Insular* decisions uniformly,
00:37:23
25 is that they seem to be based on racial animus. They

1 have language in there that we would all find
2 disgusting today. But doesn't that suggest that that
3 should no longer be considered good law unless it is
4 absolutely mandated that this court follow it?

00:37:53 5 MR. PEZZI: So Your Honor of course the
6 government does not quarrel with the proposition that
7 there is some language in the *Insular* cases that when
8 you read it in 2018 at a minimum raises your eyebrows
9 and frankly worse than that. I mean there is
00:38:05 10 language that is entirely inappropriate and I'm not
11 asking this court to rely on any of that language and
12 none of it has appeared in the government's brief.
13 However --

14 THE COURT: And that language is absolutely
00:38:15 15 essential to the conclusion they reached in those
16 decisions.

17 MR. PEZZI: I don't think I would agree with
18 that, Your Honor. I think the *Insular* cases are
19 cases about the United States of America as a
00:38:24 20 sovereign power and whether it like every other
21 country at that time had the power to acquire
22 territory and whether its legislature had the
23 authority --

24 THE COURT: And the logic as to why these
00:38:35 25 provisions don't apply is based on the racial animus

1 that's expressed in those decisions. We don't want
2 to recognize these territories as being, quote,
3 "throughout the United States," because these people
4 because of the racial makeup simply are not equal to
5 American citizens.

6 MR. PEZZI: Your Honor, again, setting aside
7 the rhetoric you're referring to, the Supreme
8 Court --

9 THE COURT: Isn't that -- that's more than
10 just a rhetoric. Isn't that the logic of the
11 decisions?

12 MR. PEZZI: I don't think that's the logic of
13 the decisions, I mean I think the decisions again are
14 about the United States of America as a sovereign
15 power. But I mean importantly, whether -- no matter
16 how strong our feelings are about some of that
17 language or about the *Insular* cases in general, they
18 are the law of the land and that has not changed.
19 The Supreme Court has reaffirmed their --

20 THE COURT: Isn't it also true in those cases
21 not a -- it was a fractured plurality. You could not
22 even -- the one that wrote the opinion that's
23 recognized as the opinion of the court couldn't get
24 any other justice to join his opinion.

25 MR. PEZZI: Respectfully, Your Honor, I don't

1 agree with that. It was not a fractured plurality.
2 There is a majority of five of nine justices who set
3 forth --

00:39:46

4 THE COURT: Who didn't join each others
5 opinions.

00:39:56

6 MR. PEZZI: Well, some joined, some didn't.
7 There were three separate opinions. But even the
8 dissenting justices in those cases acknowledged that
9 there was a holding from five justices that although
10 Puerto Rico belonged to the United States, it was not
11 part of the United States. And --

12 THE COURT: Isn't that what -- isn't that what
13 a plurality decision is?

00:40:05

14 MR. PEZZI: No, Your Honor. I mean it's a
15 majority, it's five of nine. It's not like there is
16 only four justices of nine came to that conclusion.
17 I mean five of nine --

18 THE COURT: I take your point.

00:40:15

19 MR. PEZZI: -- constitutional violation but
20 importantly, I mean setting aside *Downes v Bidwell*,
21 *Downes v Bidwell* entirely for a moment, I mean
22 throughout the 20 Century and as recently as 2008 in
23 *Boumediene*, it remains the case that the *Downes v*
24 *Bidwell* and the *Insular* cases are the law of the land
25 and, you know, the D.C. Circuit applied it as

00:40:28

1 recently as 2015. Again, the Supreme Court in 2008
2 said there are parts of the *Insular* cases that nobody
3 likes. There are parts of it that the government
4 still thinks are absolutely correctly decided about
5 the United States of America as a sovereign power,
6 that they remain the law of the land, and, you know,
7 plaintiffs are free to one day ask the Supreme Court
8 as you know other plaintiffs have asked before that
9 they be narrowed or overruled in some way. But until
10 that happens, I think --

11 THE COURT: If they don't apply -- they don't
12 apply as a matter of holding that's binding on this
13 court because they were addressing a completely
14 different issue.

15 MR. PEZZI: I wouldn't call it a completely
16 different issue. I mean I think there is extensive
17 discussion of course in those opinions about what it
18 means for a territory to be unincorporated and the
19 significance of the application of the Constitution.
20 It's not really a tariff opinion. Frankly, when you
21 read *Downes v Bidwell*, you don't walk away from it
22 thinking you learned a lot about taxes and duties and
23 tariffs applying in foreign ports. It's case about
24 the United States of America's ability to acquire
25 territory and about the discretion that congress

1 retains under the Constitution to manage that
2 territory and to make a determination about how its
3 inhabitants are to be received into the United States
4 and whether and when. Now of course that
5 Constitutional understanding, you know, whether
6 plaintiffs would have joined the dissenters in *Downes*
7 *v Bidwell* where they own the court or not, the
8 subsequent 120 years I mean there has been an
9 absolutely unanimous settled consensus from all three
10 branches of government and including every court to
11 consider the question that it is up to congress to
12 decide whether, when, and under what circumstances
13 individuals are granted birthright citizenship. And
14 that's why congress has passed statutes providing for
15 birthright citizenship in Guam and the Virgin Islands
16 and Puerto Rico and the Northern Mariana Islands.

17 THE COURT: How do you address the plaintiffs
18 argument that if congress can make them citizens they
19 can make them uncitizens?

20 MR. PEZZI: Well, I mean so first of all the
21 Supreme Court has actually said the opposite in some
22 ways. I mean in a case called *Afroyim versus Rusk*
23 the plaintiffs themselves cite suggest that congress
24 has very little if any power to withdraw someone's
25 U.S. citizenship.

1 THE COURT: In fact, there is language that
2 says that depriving a person of citizen once a person
3 is a citizen, it is cruel and unusual punishment.

4 MR. PEZZI: That's right. The Supreme Court
5 has taken a very strict view of expatriation.

6 THE COURT: So how is that consistent if that
7 right is so essential, how is that consistent with
8 the fact that this right could be set by congress?
9 Presumably congress has the ability to repeal any act
10 it passes. Why wouldn't that extend to citizenship?

11 MR. PEZZI: I mean there is no dispute that
12 congress has the constitutional authority to provide
13 a uniform rule of naturalization and make laws
14 regarding naturalization. Now once someone has been
15 granted citizenship, removing that citizenship from
16 someone raises different constitutional concerns that
17 the Supreme Court has been very strict about that are
18 not presented here. But I do think the fact that for
19 the past 120 years every branch of government and
20 every court to consider the question has understood
21 that congress has the power to decide when if ever an
22 unincorporated territory should be granted
23 citizenship. I think that is meaningful and it
24 cannot be cast aside as easily as plaintiffs would
25 wish.

1 With respect to the Philippines, in
2 particular. I mean that is a territory that was for
3 about 50 years an unincorporated territory of the
4 United States just like American Samoa is today.
5 Congress never provided for birthright citizenship by
6 statute and nobody thought that individuals born in
7 the Philippines were U.S. citizens. The Supreme
8 Court has encountered those enactments on several
9 occasions and has never once expressed any concern
10 that there might be any constitutional problem.

11 THE COURT: How would you address what seems
12 to be undisputed in the historical factual background
13 that when the -- when the American Samoans came in to
14 the United States they believed they were coming in
15 as citizens?

16 MR. PEZZI: I'm not sure that's undisputed.
17 Frankly the government hasn't taken a position on
18 that factual question. I don't think ultimately it
19 answers any questions before Your Honor now, you
20 know, whether they were correct --

21 THE COURT: Well, isn't it relevant as to what
22 the language meant at the time they came into the
23 United States?

24 MR. PEZZI: Well, it might be relevant if
25 there were something in, you know, the legal

1 documents incorporating American Samoa or even
2 acquiring American Samoa that addressed the question
3 of citizenship. But again, as I don't think
4 plaintiffs would dispute, there is nothing in those
00:44:58 5 Deeds of Cession and there is nothing in the relevant
6 treaties with Great Britain and Germany that would
7 suggest that anyone in American Samoa is entitled to
8 citizenship and that's not their argument of course.
9 Their argument is regardless of what anybody put in
00:45:09 10 those documents as a matter of constitutional law
11 they're entitled to birthright citizenship.

12 THE COURT: I think their argument is at least
13 as I understand it would be that the time they came
14 in to the United States the common law was so well
00:45:21 15 established that if you are subject to the
16 jurisdiction, subject to the dominion, subject to the
17 control of the United States, you are a citizen of
18 the United States and therefore that should be the
19 understanding of the provisions that brought them
00:45:38 20 into the United States and the Fourteenth Amendment
21 that of course controlled whether they are citizens
22 of the United States.

23 MR. PEZZI: Respectfully, Your Honor, again I
24 don't think that common law understanding sheds any
00:45:49 25 light on the question of whether in an unincorporated

1 territory one is born, quote, in the United States.

2 And remember here I mean you have specific --

3 THE COURT: There is nothing in the treaty
4 that says you're coming in as a -- that was a concept
5 that was formed and not even conceived in anyone's
6 mind at the time they came into the United States.

7 MR. PEZZI: That may be so, Your Honor.

8 THE COURT: So why should we pick something
9 that happened 40 years later and use that as the
10 basis of the understanding of what their position was
11 when they came into the United States or within its
12 control.

13 MR. PEZZI: Respectfully, Your Honor, I hear
14 that from plaintiffs as an argument effectively that
15 the *Insular* cases are wrongly decided, that they
16 should be overruled, that the distinction between
17 unincorporated territory --

18 THE COURT: I don't have to overrule them,
19 they don't apply to this case. That's all I have to
20 find.

21 MR. PEZZI: But to do so, Your Honor --

22 THE COURT: I obviously couldn't overrule
23 them, that's not within my jurisdiction. But I can
24 find that they don't apply because they dealt with a
25 completely different constitutional provision.

1 MR. PEZZI: And to do that, Your Honor, you
2 would have to come up with a principle justification
3 that explains why although the five justices of the
4 Supreme Court held that constitutional language
00:46:59 5 throughout the United States does not include
6 unincorporated territories but does include
7 incorporated territories, you would have to come up
8 with some sort of principle legal explanation as to
9 why that wouldn't be true in a case of constitutional
00:47:13 10 language that says in the United States. And I have
11 heard nothing from plaintiffs thus far and again I
12 think it is instructive that again every court to
13 consider this question has come out the other way,
14 has looked at the same authorities that Your Honor is
00:47:25 15 considering, and has obviously ruled very closely.

16 THE COURT: Let me ask the question
17 differently. Do I even have to reach the *Insular*
18 cases to decide this case?

19 MR. PEZZI: It's a great question, Your Honor.
00:47:33 20 So I mean I think there is two answers. One, I think
21 the *Insular* cases are relevant for some of the
22 reasons we just discussed about the constitutional
23 text in the United States and what it means. That
24 said, there is a separate and frankly what the
00:47:46 25 *Insular* cases are more famously known for outside of

1 this case is the Doctrine of Territorial
2 Incorporation by which individual constitutional
3 rights either apply or don't apply to the
4 territories. So there are cases that come up that
00:47:59 5 say does the First Amendment apply in the
6 territories? Does the Fourth Amendment apply? Does
7 the Sixth Amendment apply? That doctrine I think the
8 plaintiffs and the government agree is not a doctrine
9 the court needs to consider here. That's because
00:48:13 10 there is a constitutional provision here that
11 actually has its own geographic scope and the real
12 question for Your Honor is whether in the United
13 States applies to incorporated territories, whether
14 that applies to unincorporated territories. So that
00:48:26 15 -- that secondary question of territorial
16 incorporation frankly I don't think makes a lot of
17 sense with respect to the Citizenship Clause.
18 Although, of course I do think it's entirely
19 consistent with the government's argument here and in
00:48:38 20 some tension with the plaintiffs' argument that the
21 Supreme Court continues to analyze these questions,
22 you know, as to whether certain constitutional rights
23 apply in the territories. It's hard to understand
24 why that would be the law of the land if everyone
00:48:52 25 understood that everyone born in the U.S. territory

1 was a U.S. citizen.

2 But in any event, to be clear, I think that
3 the parties agree that at least the government's view
4 is to the extent the *Insular* cases are relevant,
5 they're relevant in terms of defining the
6 constitutional text in the United States and that's
7 why primarily *Downes v Bidwell* is the case that's
8 most important. But the fundamental rights question
9 and the impractical and anomalous question that is
10 only in our brief really as an alternative argument
11 in response to plaintiffs' arguments that they
12 satisfied those requirements which we don't.

13 THE COURT: If I'm understanding what you're
14 saying, you're saying that I don't have to reach the
15 question of whether being a citizen is a fundamental
16 right.

17 MR. PEZZI: I think that's right, Your Honor.

18 THE COURT: But does the question of whether
19 being a citizen as a fundamental right inform as to
20 how the Fourteenth Amendment should be interpreted?

21 MR. PEZZI: I don't think it does, Your Honor.
22 I mean I think the only question is whether
23 unincorporated territories are in the United States
24 as that language is used in the Fourteenth Amendment.
25 And again, I think in *Downes v Bidwell*, Your Honor is

1 right this is about -- this case is about the Tax
2 Uniformity Clause. I think that the holding of that
3 case and even much of its reasoning makes it very
4 hard to see how plaintiffs can get around to a
00:50:05 5 holding that "in the United States" includes
6 unincorporated territories. And, you know, were we
7 in the D.C. Circuit or the Second or Third or Fifth
8 or Ninth Circuits, you know, we would have submitted
9 a five page brief instead of a 75 page brief that
00:50:19 10 just says, you know, the courts have already decided
11 with respect to the Philippines that in the United
12 States --

13 THE COURT: Your whole argument is premised on
14 the argument which we started with which is whether
00:50:29 15 or not American Samoa is an unincorporated territory.
16 If I wanted to go look up whether or not American
17 Samoa is an unincorporated territory, where would I
18 go find the answer to that?

19 MR. PEZZI: I think it is -- you would be
00:50:42 20 proving a negative so I can't point you to one
21 document to look up, but I mean you could look at the
22 legal documents by which American Samoa was acquired
23 by the United States you would find no discussion of
24 incorporating American Samoa into the United States,
00:50:55 25 you would find no discussion providing citizenship,

1 you would find no discussion making sure that
2 constitutional rights apply.

3 THE COURT: What territories were incorporated
4 territories?

00:51:06

5 MR. PEZZI: So I mean the Utah territory is an
6 example that was an incorporated territory. I mean
7 much of the --

00:51:19

8 THE COURT: If I wanted to go find the legal
9 documentation of Utah being an incorporated
10 territory, where would I find that?

00:51:31

11 MR. PEZZI: I wish I had that particular one
12 with me. I mean with respect to all of the -- with
13 respect to many of the territories, there were
14 explicit acts of congress or explicit treaty
15 provisions that provided that this territory will be
16 incorporated into the United States, will be placed
17 on a path to statehood under a certain timeline both
18 before and after the Fourteenth Amendment. That's
19 actually also discussed in *Downes*. I mean in
20 footnote one of the government's reply brief in this
21 case actually pulls out some language from *Downes*.

00:51:45

22 THE COURT: Let's test your logic. What about
23 Alaska?

24 MR. PEZZI: So Alaska --

00:51:54

25 THE COURT: Was there a treaty that said

1 Alaska will be made a state?

2 MR. PEZZI: On that particular example I don't
3 have the answer with respect to Alaska in particular.
4 I can tell you the Supreme Court did decide that
5 Alaska was an incorporated territory. And there is a
6 Supreme Court decision called *Rasmussen* that says
7 that Alaska is incorporated into the United States
8 and it was incorporated by means of legal documents
9 acquiring the territory from Russia. And so that
10 would present a different question.

11 THE COURT: But what about Hawaii?

12 MR. PEZZI: Hawaii I think is the same answer
13 except maybe without an explicit Supreme Court case
14 saying so. So Hawaii originally one of the *Insular*
15 cases is *Hawaii versus Mankichi* and that talks about
16 the Sixth Amendment jury trial right. But eventually
17 Hawaii is incorporated into the United States and
18 there is also an explicit act of congress that
19 provides that individuals in Hawaii, even while it
20 was a territory, were to be provided birthright
21 citizenship.

22 THE COURT: So is it -- is it a correct
23 conclusion to say at this point we have no
24 determination as to whether American Samoa is an
25 incorporated or unincorporated. We don't have any

1 judicial actions saying it's unincorporated. We
2 don't have any legislative actions saying it's
3 unincorporated. We have an assumption by the United
4 States that it's unincorporated as a position in this
5 party in this litigation. What else is there?

00:53:18
6 MR. PEZZI: Well, there's the Supreme Court's
7 decision in *Balzac* which sets forth a clear statement
8 that says absent a clear statement suggesting a
9 territory has been incorporated, it's not
10 incorporated.

11 THE COURT: Clear statement by whom?

12 MR. PEZZI: By the congress or by the treaty,
13 whatever legal documents acquired the territory.

14 THE COURT: So your argument is all
00:53:39 15 territories are unincorporated until someone makes a
16 determination that they're incorporated?

17 MR. PEZZI: That is the Supreme Court's -- I
18 mean that is the law of the land in *Balzac*. And
19 again, if you're concerned about the question of
00:53:50 20 whether you can confidently rely on the fact that
21 American Samoa is an unincorporated territory, I mean
22 you could ask plaintiffs or you could ask the
23 permissive intervenors I suspect plaintiffs would
24 tell you they don't like the distinction between
00:54:01 25 incorporated and unincorporated territories at all,

1 but I don't think plaintiffs are arguing here that
2 American Samoa is an incorporated territory. And
3 again, I mean that distinction whether we find it
4 persuasive or not, whether we would have ruled
5 differently if we were on the Supreme Court in the
6 1900s, that is the law of the land, there is a
7 distinction between incorporated and unincorporated
8 territories, and I don't think that's something that
9 this court can ignore.

00:54:11
10 THE COURT: Other than American Samoa, are
11 there any other unincorporated territories?

12 MR. PEZZI: There are. Guam, the U.S. Virgin
13 Islands, Puerto Rico, and the Northern Mariana
14 Islands are all unincorporated territories. Congress
15 has provided for birthright citizenship by statute in
16 those territories. The Philippines was also an
17 unincorporated territory where they did not like
18 American Samoa and of course that's all consistent
19 with the government's view that it is up to congress
20 to determine whether, when, and under what
21 circumstance citizenship is provided to
22 unincorporated territories.

23 Again, I mean if plaintiffs are correct, then,
24 you know, the U.S. congress and the executive branch
25 have been violating the Constitution for hundreds of

1 years. Every court to have considered the question
2 has misinterpreted the meaning of the constitutional
3 text and I just don't think that's the appropriate
4 reading of the past 120 years of practice and
5 precedent. They spend a lot of time in their briefs
6 arguing about sort of background common law
7 understanding, and I think some -- well some of that
8 is certainly interesting and some of it is even
9 helpful in terms of understanding what the drafters
10 of the Fourteenth Amendment were thinking about, it
11 can't answer the question of whether citizenship
12 applies in unincorporated territories because the
13 United States had no unincorporated territories at
14 the time of the Fourteenth Amendment's enactment.

15 So I think with respect to plaintiffs' other
16 arguments, unless Your Honor has specific questions
17 on what we just discussed --

18 THE COURT: You just made an assertion that
19 there were no unincorporated territories at the time
20 of the Fourteenth Amendment. So what were the
21 territories?

22 MR. PEZZI: So --

23 THE COURT: If they weren't -- they were
24 either incorporated or unincorporated or that concept
25 didn't exist.

1 MR. PEZZI: They were incorporated
2 territories. So I mean --

3 THE COURT: So what made them incorporated
4 territories?

00:56:10 5 MR. PEZZI: Say that again, Your Honor?

6 THE COURT: What made them incorporated
7 territories?

8 MR. PEZZI: So there were either acts of
9 congress or they were treaties and the legal
00:56:17 10 documents by which the United States acquired those
11 territories provided that they were placed on a path
12 toward statehood. So the first example is the
13 Northwest Territory, you know, the territory
14 northwest of the Ohio River that eventually became
00:56:30 15 Ohio, Michigan, Wisconsin, et cetera. The Northwest
16 Ordinance of 1787 enacted by the Confederation
17 Congress and then ultimately by the First Congress in
18 1789 it explicitly places the Northwest Territory on
19 the path to statehood. It sets forth a system of
00:56:48 20 government in that territory that is entirely
21 inconsistent with the way the rest of the actual
22 states were governed and the way the District of
23 Columbia was later governed, and says, you know, when
24 a certain amount of people live in the Northwest
00:56:58 25 Territory they can elect a representative and be

1 placed on a timeline by which they become
2 incorporated into the United States as individual
3 states.

4 And so that's an example of although the, you
00:57:09 5 know, the distinction between incorporated and
6 unincorporated territories those labels perhaps not a
7 matter of common parlance until later the ideas
8 behind that distinction really do come from the
9 founding, and, you know, wasn't just the Northwest
00:57:22 10 Territory. I mean virtually all of the land that is
11 in the contiguous 48 states the portions of it that
12 were once territories and that later became states,
13 the documents by which they were acquired would
14 generally explicitly point out they would say
00:57:38 15 something to the effect of, you know, the
16 Constitution will attach to this land and be set on
17 some path 5 years, 10 years become a state, et
18 cetera. And so, you know, much of this debate of
19 course is a debate that the Supreme Court has already
00:57:52 20 resolved. So even if Your Honor thinks that the
21 distinction between incorporated and unincorporated
22 territories makes some sense, even if you think it's
23 inappropriate to draw those distinctions, that is the
24 approach the Supreme Court has taken and I think it
00:58:05 25 remains the law of the land today.

1 Unless Your Honor has other questions.

2 THE COURT: Let's -- let me hear from the --
3 from Amici brief or counsel.

4 MR. PEZZI: Thank you.

00:58:19

5 MR. WILLIAMS: Good afternoon, Your Honor.
6 For the record, Mike Williams from Kirkland and Ellis
7 on behalf of the American Samoa Government and
8 Congresswoman Aumua Amata. And if Your Honor would
9 indulge me, I have a presentation that I would like
10 to show. I have hard copies that I can hand up to
11 the court and to counsel. May I approach?

00:58:35

12 THE COURT: You may.

13 MR. WILLIAMS: May I publish this in the
14 courtroom, Your Honor?

00:58:52

15 THE COURT: You may.

16 MR. WILLIAMS: And Your Honor, I would like to
17 thank Your Honor for granting my pro hac motion and
18 for giving us an opportunity to be heard today.

00:59:20

19 During the argument on the motion for
20 intervention, we stressed to the court that the
21 American Samoa Government and the Congresswoman view
22 this as an existential issue for American Samoa. I
23 have heard a lot of arguments about the text of the
24 Constitution and English common law. I'm going to
25 try to address each of the questions that Your Honor

00:59:34

1 asked both plaintiffs counsel and counsel for the
2 United States over the course of this presentation.
3 But while I'm giving the presentation I would like to
4 focus on three particular issues that I hope will
5 inform Your Honor's ruling in this case. And those
6 three issues are, first, what happened before, what
7 is the precedent, what is the context, what did the
8 law say at the time that this case came to Your
9 Honor.

10 Second, what American Samoa expects. And I
11 don't mean expects in the terms of entitlement during
12 the terms of wants from the court, but rather what
13 are the stabilized expectations that the American
14 Samoa Government is acting under today.

15 And then third, because I don't think it was
16 addressed by either of the counsel that spoke before
17 me, including plaintiffs' counsel, what about these
18 plaintiffs? What about their injuries? And is there
19 some way that they can be ameliorated.

20 So turning to the first of those issues, Your
21 Honor, what happened before. I want to quote Judge
22 Leon on the Federal Court in the District of the
23 District of Columbia who was reviewing the same
24 issues, substantively the same issues that are before
25 this court. And when he granted the motion to

1 dismiss in the case *Tuaua versus The United States*,
2 he acknowledged, "in short, federal courts have held
3 over and over again that unincorporated territories
4 are not included within the Citizenship Clause, and
01:00:54 5 this court sees no reason to do otherwise"
6 exclamation point. Which is sort of a tick that
7 Judge Leon does.

8 But what he was saying was absolutely correct.
9 Because this goes back, even though these are cases
01:01:09 10 that don't necessarily resolve this specific issue on
11 the unincorporated status of American Samoa, Your
12 Honor, the United States Supreme Court was assuming
13 in the footnotes as early as 1954, for example, that
14 the people of the Philippines were nationals who had
01:01:25 15 permanent allegiance to the United States, but who
16 weren't on the path to citizenship. And granted
17 that's dicta in a Supreme Court footnote, but dicta
18 in a Supreme Court footnote are the things that court
19 of appeals cases and then district court cases are
01:01:39 20 made of later on because they're the sort of things
21 that establish those stabilized expectations that I'm
22 going to speak about in just a little bit. And
23 consistent with this understanding, Your Honor, as
24 you will see over and over again, the federal courts
01:01:52 25 of appeals have ruled that the Citizenship Clause

1 does not extend into the unincorporated territories
2 of the United States. This case was brought by this
3 counsel with a different set of plaintiffs in the
4 D.C. Circuit. They lost that case all the way up to
5 certiorari denied at the United States Supreme Court.
6 I expect that we would see this case brought in the
7 Ninth Circuit next because there is such a huge
8 Samoan population in the Ninth Circuit and because
9 there are stereotypes about the Ninth Circuit Court
10 of Appeals. But there the arguments are probably
11 foreclosed. Because as Your Honor knows, in *Rabang*
12 *versus I.N.S.* in 1994, the Ninth Circuit rejected
13 these arguments as applied to the Philippines. The
14 Fourth Circuit in 1998 called these arguments an
15 intricate argument but this was 20 years ago, Your
16 Honor, and they rejected just the theories that the
17 plaintiffs are putting before you at this time.

18 The Second Circuit in 1998, and again 20 years
19 ago the Second Circuit said that these arguments are
20 novel, they're interesting. But was it novel 20
21 years ago, Your Honor? At this point it is pretty
22 old and stale and it has been rejected every time
23 that it has come up.

24 Now, the Fifth Circuit has also ruled that
25 these cases have persuasive reasoning as recently as

1 2010, so 1998, and then we can bring this back to
2 about 10 years ago. And on the face of this,
3 plaintiffs' argument is as follows. None of these
4 other courts took this case seriously. That is, they
01:03:23 5 say none take seriously the task of examining the
6 text, structure, history, and purpose of the
7 Citizenship Clause. I'm going to say that's just not
8 true from a review of these courts decisions, Your
9 Honor, because if you look at cases like *Rabang*,
01:03:41 10 you'll see that they were addressing exactly the
11 textual arguments that you saw the plaintiffs'
12 counsel on this side and the United States Government
13 on that side raise about whether or not the
14 Fourteenth Amendment is different from the Thirteenth
01:03:53 15 Amendment because it contains this expressed
16 geographical limitation. The Ninth Circuit also
17 addressed all of these common law issues that Your
18 Honor had addressed here. So the *Snails* case or the
19 *Barnes* case and all of those other cases from before
01:04:08 20 the United States was founded or at around that time,
21 the *Rabang* decision took on this notion that there
22 were codified English common law principles and it
23 addressed them. And the cases that followed *Rabang*
24 in the Ninth Circuit more than 20 years ago also
01:04:23 25 looked at all these arguments and rejected them.

1 There is nothing new under the sun so far, Your
2 Honor.

3 Next, there is this idea that we should extend
4 *Wong Kim Ark*. But both the Ninth Circuit, the Second
01:04:35 5 Circuit, the Fourth Circuit, the Fifth Circuit have
6 all said that *Wong Kim Ark*, despite its page after
7 page about citizenship, shouldn't be extended to the
8 unincorporated territories because of the anomalous
9 results that it would have that would put too much
01:04:49 10 wait on *Wong Kim Ark* to say that.

11 Finally, there is this argument that because
12 the *Insular* cases were born on racist sentiments that
13 the court should disregard them. I will say Your
14 Honor on that point I think there is nobody who is
01:05:04 15 more exercised about the racist sentiments that are
16 in the *Insular* cases than the Government of American
17 Samoa that represents the American Samoan people or
18 the congresswoman from American Samoa who represents
19 those same people in our federal government. And she
01:05:17 20 is the only individual who represents the people of
21 American Samoa in the federal government, Your Honor,
22 by popular vote. Nobody is more offended, is more
23 mortified and who has more at stake in deploring
24 those racist arguments. But I will say that those
01:05:34 25 same courts, Your Honor, also address those racist

1 arguments. As you can see in *Rabang*, the Ninth
2 Circuit said, while we're mindful of plaintiffs'
3 claims that the district court erroneously excluded
4 expert evidence, it says they are affirming the
5 district court's dismissal on an issue of law only.
6 So it is they wouldn't affirm the racial elements of
7 the *Insular* cases, but it's a matter of law that they
8 knew they were going to apply them, Your Honor.

9 There is a separate argument that plaintiffs
10 have made that you should ignore those cases, not
11 *Tuaua* which spoke directly to this issue by the D.C.
12 Circuit, but these other Courts of Appeals cases that
13 involve the Philippines because the Philippines are a
14 former colony. Now I'll note, Your Honor, that this
15 argument is at tension with the arguments that
16 they're making about how citizenship can't be
17 withdrawn. Because by my calculations, and this
18 isn't record evidence and I could be wrong, but I
19 think there are 11,000,000 Filipino citizens who were
20 born before 1946, before the Philippines gained its
21 independence who could claim to be birthright
22 citizens of the United States today. And I think
23 that the valence of the Philippines could claim to be
24 citizens by descendency from a U.S. citizen. So it
25 is understandable why the plaintiffs would want to

1 try to set that apart, but their argument for doing
2 so, Your Honor, is that when the Philippines became
3 independent, it extinguished any claim to
4 citizenship. There is no statute on that, there is
01:07:01 5 no case law on that. It is an anomaly because
6 they're trying to explain away an inconvenient fact
7 for them, Your Honor. But even if that weren't the
8 case, this hasn't been applied just to the
9 Philippines and it hasn't been applied just 20 years
01:07:14 10 ago or 100 years ago. Because as recently as 2012,
11 the Ninth Circuit in applying the Naturalization
12 Clause of the Fourteenth Amendment to the
13 Commonwealth of the Northern Mariana Islands affirmed
14 that the Citizenship and Naturalization provisions of
01:07:30 15 the Fourteenth Amendment do not apply to
16 unincorporated territories. And we've cited all
17 these courts -- all these cases in our brief, Your
18 Honor.

19 Now, I'll notice as the United States
01:07:42 20 government did, that it's not just courts who have
21 been making these decisions. That it has been the
22 uniform understanding of the United States government
23 in congress, in the executive, and in the judiciary,
24 that the Citizenship Clause does not apply to these
01:07:58 25 unincorporated territories.

1 Now, I don't know what senator so and so or
2 what some ratifier was thinking in 1866 or in 1868,
3 but I do have a sense of what was being done in 1899
4 in the Supreme Court and what has been done in all of
01:08:15 5 the times since when unincorporated territories like
6 Guam, like the Commonwealth of Northern Mariana
7 Islands had evinced such a desire for citizenship
8 that congress decided to act upon it. And in each of
9 those cases, congress said as a statutory matter that
01:08:32 10 they would make Puerto Rican citizens, that they
11 would make residents of the CNMI citizens, or that
12 they would make residents of Guam citizens. And they
13 have not done so for American Samoa. And I can say
14 that's important, Your Honor. Not because American
01:08:46 15 Samoans are being racially excluded, I'm coming right
16 now before you, Your Honor, as the only voice of the
17 elected representatives of the American Samoan people
18 to say we do not want you to grant birthright
19 citizenship. It would be an affront to our
01:09:03 20 sovereignty if you were to do that now. It's not
21 something that we believe you should do as a matter
22 of the law what the cases say and what the Fourteenth
23 Amendment says, but it is something that if you take
24 that step Your Honor, will threaten American Samoan
01:09:17 25 society and upset the real agreement that we had with

1 the United States.

2 Turning to that agreement, that's what
3 American Samoa expects. So I'll preface this by
4 saying, American Samoa is a very different place than
01:09:32 5 what Your Honor is used to here in Utah. I
6 understand that Utah doesn't have the largest
7 territory of the United States, but American Samoa
8 has roughly 50,000 people. The judicial definition
9 of unincorporated territory as a shorthand has often
01:09:47 10 been whether or not a territory is on a path to
11 statehood. American Samoa would be unlikely for
12 many, many years to ever reach the population minimum
13 in order to become a United States state. It has
14 about 50,000 people and I believe it would need about
01:10:04 15 500,000 to even start contemplating that. But the
16 differences between American Samoa and the United
17 States go far beyond just the fact that it is very
18 remote geographically and the fact that there are so
19 few people there.

01:10:19 20 Your Honor saw the American Samoan seal
21 splashed on the screen for just a moment. I can
22 bring it back just so that you can see it because I
23 think it is worth looking at. And it has the logo of
24 American Samoa on it. And the motto of American
01:10:32 25 Samoa is Samoa Muamua Le Atua which means in Samoan,

1 "In Samoa God is first." Not in God we trust, not
2 God is great, but there's lots of freedom of religion
3 around here. And for sure it is a very pluralistic
4 place and it is very accepting of outside people.
01:10:50 5 But American Samoa has a culture and a history and
6 traditions that are completely different from
7 anything that ever existed in the United States, Your
8 Honor. Hawaii is a useful analogue, but Hawaii is
9 also an instructive analogue because of the way that
01:11:05 10 the Hawaiian people have lost their land and because
11 of the way that Hawaiians have had to struggled to
12 maintain their language, their identity, and their
13 culture. And the reason why I think it is important
14 to talk about what American Samoa expects, is because
01:11:18 15 American Samoa was promised something different from
16 the United States Government, Your Honor. And what
17 the plaintiffs argue is that without granting
18 birthright citizenship, and this appears at Page 30
19 of their summary judgment motion, that denying their
01:11:34 20 right to birthright citizenship would thwart the
21 voluntary agreement that Samoans entered with the
22 United States. And I am here to tell you nothing
23 could be further than the truth, Your Honor, because
24 American Samoa is the only U.S. territory that was
01:11:49 25 not taken by conquest. The relationship with the

1 United States and American Samoa has been entirely
2 voluntary since its inception since the chiefs deeded
3 their territories to the United States and entered
4 into the Deeds of Cession. And I would challenge
5 plaintiffs' counsel to point to a single provision in
6 the Deeds of Cession that show that citizenship of
7 any sort was ever a part of this deal. We can go
8 back to 1899 and determine whether or not there is
9 something in those Deeds of Cession which exist, you
10 can find them in the U.S. reports, Your Honor, you
11 can find them in the U.S. statutes, anything about
12 citizenship there, but I would also point Your Honor
13 to the history of American Samoa since those Deeds of
14 Cession were entered because American Samoa has
15 created its own Constitution in 1967, it has amended
16 its Constitution in 1984, and it has developed its
17 own system of self-government, it has a voice in the
18 federal government, and in all of those 100 plus
19 years since the Deeds of Cession were entered,
20 American Samoa has never, despite its vibrant
21 democracy, and its functioning self-government, asked
22 the United States for citizenship.

23 THE COURT: That seems to be contrary with the
24 historical evidence that has been provided. That for
25 the first 30 years after they were ceded into the

1 United States they strongly believed that they were
2 citizens and were much disappointed that they were
3 not accepted as citizens.

4 MR. WILLIAMS: Your Honor, I would like
01:13:17 5 plaintiffs' counsel, when he or she gets up, when he
6 gets up in reply, to discuss that historical
7 evidence. Because all that I have seen to support it
8 is a stray reference to two members of a commission
9 that went to Samoa in 1930, there is a page that's
01:13:32 10 cited there, and I have looked through those
11 materials, Your Honor, and I haven't seen what it is
12 exactly whom they spoke to, whether or not there were
13 some governmental pronouncement, this isn't a
14 document that's very accessible, I've looked for it
01:13:47 15 and I haven't been able to find it. I know
16 representing the United States the American Samoan
17 Government that right now we are telling Your Honor
18 that there is no desire for citizenship and in fact
19 there is an opposite desire. If American Samoa wants
01:14:02 20 citizenship, we will decide it for ourself and we'll
21 raise it with congress or if necessary with the
22 courts, Your Honor. But I would be really interested
23 in learning more about that, whatever that -- I don't
24 see any quotations, I didn't see any documents that
01:14:14 25 were attached to any of the briefs. All I have seen

1 are stray references to that document which I haven't
2 had a chance to examine despite my best efforts to
3 get it in my hand.

4 Now, I'm not saying that two members of
01:14:26 5 congress or two members of a commission in 1930
6 didn't go to American Samoa and despite the
7 linguistic differences didn't learn that some Samoans
8 thought that they were citizens or thought that there
9 might be some confusion about their citizenship
01:14:38 10 status. What I am saying is that if American Samoa
11 wants citizenship, Your Honor, I'm telling you it
12 knows how to ask for it now, it knew how to ask for
13 it in 1967, it knew how to ask for it in 1984, and it
14 has seen Puerto Rico and Guam and the Northern
01:14:54 15 Mariana Islands ask for it. There should be no
16 confusion on this point, Your Honor.

17 And if there were any place where that promise
18 of citizenship should have been made, it would have
19 been in the Deeds of Cession. And I will be
01:15:06 20 surprised if plaintiffs' counsel gets up after I sit
21 down and says it is right here, Your Honor.

22 What did the United States promise? And I'm
23 quoting here from something that we attached to the
24 record and it is our brief in opposition from the
01:15:21 25 Supreme Court decision in *Tuaua*, Your Honor, and it's

1 an observation by Governor Peter Tali Coleman who was
2 the first Samoan who became governor of American
3 Samoa. Peter Tali Coleman in addition to being the
4 first governor of American Samoa is also the
01:15:36 5 congresswoman's father. He is a gentleman who was a
6 Capital Hill Police Officer who worked in the daytime
7 on Capital Hill, put himself through Georgetown Law
8 School at night, and then went back home to become
9 the first Samoan who was governor of American Samoa.

01:15:50 10 And so what he says should be given some credence.
11 And what he noted that what was promised was that the
12 United States would guarantee not only the protection
13 of American Samoa, not only our islands themselves,
14 but also of our land, customs, and traditions. And
01:16:06 15 that is what American Samoa has asked of the United
16 States. And as of the United States Government --

17 THE COURT: What is the basis for his making
18 that statement? Was he present? Was he part of the
19 negotiation?

01:16:19 20 MR. WILLIAMS: He can review the Deed of
21 Cessions and Your Honor in American Samoa --

22 THE COURT: Yeah, I understand his statement,
23 but I don't know the foundation for his statement.
24 What basis does he have to make that assertion?

01:16:33 25 MR. WILLIAMS: The foundation is -- there are

1 two, Your Honor. First, in the United States -- in
2 the American Samoan Constitution which because
3 American Samoa is an unincorporated territory was
4 also enacted as a statute in congress and I believe
01:16:46 5 that it is at 14 USC 1661, I might be wrong about
6 that citation but if I am I will be sure to get it to
7 Your Honor, it explicitly guarantees Samoa and makes
8 it of paramount importance that the Samoan way of
9 life is preserved.

01:17:01 10 And second, as Robert Shanks who was one of
11 the people who was involved in the 1984 amendment to
12 the Constitution observed, it has been a constant
13 policy of the United States partly as a matter of
14 honor, partly as result of treaty obligations, not to
01:17:17 15 impose our way of life on Samoa. That's where that's
16 coming from, Your Honor. It's coming from Deeds of
17 Cession that were signed by chiefs who aren't just
18 Thomas Jefferson and George Washington, they're not
19 just people who we watch Broadway plays about like
01:17:31 20 Hamilton, these are people who are family members who
21 hold chiefly titles that have been passed down, who
22 these 50,000 people in American Samoa feel a
23 familial, traditional, cultural, social connection
24 with that's very different from how we view our
01:17:46 25 founding fathers, Your Honor, and that's why Peter

1 Coleman spoke about that with such authority.

2 So what I would say is what do the plaintiffs
3 do with these arguments that granting birthright
4 citizenship would disrupt the American traditional
5 way of life which the United States Government has
6 agreed would be of paramount importance. And what
7 they say, Your Honor, is they say on Page 75 of their
8 motion -- on Page 30 of their motion to dismiss they
9 say there are -- their arguments that this

10 citizenship clause extension would imperil the
11 traditional Samoan way of life such as the
12 territories longstanding system of communal land
13 ownership in *Tuava* American Samoa's government and
14 the territories delegate posited that the extension
15 of citizenship could result in greater scrutiny under
16 the Equal Protection Clause. This concern has never
17 made any sense. So you can understand why the
18 American Samoa Government doesn't necessarily see

19 these plaintiffs who are just saying that their
20 arguments don't make any sense, that these concerns
21 are unfounded, and that Mr. Spencer can stand up in
22 front of you and say he doesn't think it would make a
23 difference in the future, why they're not willing to
24 take Mr. Spencer and plaintiffs word for it when
25 they're saying that this fundamental change to status

1 is something that could harm American Samoa. And
2 I'll say what gives them more concern there, Your
3 Honor, is when you look at the plaintiffs' complaint,
4 over and over again at the same time that the
5 plaintiffs seem to give some sort of hand waving to
6 the idea that Samoan culture would be preserved, the
7 statements in their brief show that what they're
8 really looking to do, or what they're really asking
9 the court to do, is to recognize that because times
10 are changing American Samoa should change as well.

11 And if you look on Page 31 of their summary
12 judgment motion, they say the *Insular* cases rationale
13 for adopting special rules for certain territories
14 does not extend because it only provides rules and
15 regulations to govern temporarily territories. So
16 Your Honor, it has been 100 years, but the United
17 States Government, the American Samoa Government,
18 hasn't made a decision yet that it is not temporarily
19 a territory of the United States. They go on to say
20 in their complaint where they talk about American
21 Samoa governance. This is where they're talking
22 about the clients that I represent, Your Honor. They
23 say the government's structure of American Samoa has
24 become distinctly American in significant ways since
25 it came under U.S. sovereignty.

1 Your Honor, that's absolutely irrelevant. If
2 plaintiffs are saying that because times are changing
3 it is time for American Samoa to accept this court
4 ordering their citizenship, that's exactly why I so
5 urgently asked to intervene in this case, Your Honor,
6 because as Judge Janice Roger-Brown writing for the
7 unanimous panel of the D.C. Circuit in *Tuaua*
8 recognized, despite American Samoa's lengthy
9 relationship with the United States, the American
10 Samoan people have not formed a collective consensus
11 in favor of the United States citizenship. In part,
12 this reluctance stems from unique kinship practices
13 and social structures inherent to the traditional
14 Samoan way of life. And that's absolutely correct,
15 Your Honor. And what the D.C. Circuit said was that
16 to accede to the plaintiffs demands in this case and
17 to impose birthright citizenship over the objections
18 of the American Samoan Government that is the
19 elected, the only representative voice of the
20 American people that is coming before Your Honor in
21 this court or in any of this litigation, would be
22 paternalistic or imperialistic, Your Honor.

23 THE COURT: But isn't that a misdirected
24 argument? The whole argument you've made seems to me
25 to ignore the fact if the Fourteenth Amendment in

1 fact requires that anyone born in the United States
2 be a citizen, it seems irrelevant whether or not the
3 Samoan people today want that right or not. We long
4 ago decided the issue. You don't get to voluntarily
5 decide whether or not you can opt out of the
6 Constitution.

7 MR. WILLIAMS: Your Honor, that raises an
8 interesting question because if we long ago decided
9 the issue, why have all of the other courts got it
10 wrong?

11 THE COURT: I don't know. Maybe they didn't
12 get it wrong. But it is at least a question that has
13 to be answered.

14 MR. WILLIAMS: And that's why I think pointing
15 to the context and why I spent so much time on it,
16 Your Honor, is because the fact that all of these
17 courts unanimously have decided whether it's with the
18 specific holding with regard to American Samoa,
19 whether it is in a case that's about taxes and
20 duties, whether it is with racist judges or whether
21 it is with more enlightened judges of the Ninth
22 Circuit just eight years ago, they have unanimously
23 found that plaintiffs' arguments do not state a
24 claim. That they are wrong. And so whether or not
25 that's persuasive authority, whether or not that is

1 binding authority, what I will say to Your Honor is
2 it is authority that the American Samoa government
3 has relied upon in ordering its business. It's a
4 framework that even though there were racist elements
01:22:57 5 to it, the American Samoan Government is saying let's
6 put aside the racist arguments of the Florida court
7 or the Taney court or whatever you have. If there
8 weren't something like the unincorporation doctrine,
9 the United States would probably have to invent one.
01:23:12 10 Because the alternative, Your Honor, would be even
11 crazier. The alternative would be that any time the
12 United States takes some territory, that the
13 Constitution, including the Citizenship Clause,
14 applies with full force and effect wherever the
01:23:24 15 United States might find itself. And I don't know
16 all of the different permutations, and my imagination
17 probably isn't good enough to give you great examples
18 right now, but I can point to Bagram Air Force Base,
19 I can point to Guantanamo Bay, I can anticipate that
01:23:37 20 some time maybe not in ten years and maybe not under
21 the Trump Administration but maybe at some point in
22 100 years there might be a use for trust territories
23 of the way that the United States and other European
24 powers have taken on after World War I and World War
01:23:53 25 II. And even Justice Kennedy, who is no racist, Your

1 Honor, recognized in *Boumediene* when you were asking
2 counsel for the United States isn't the inherent
3 logic of these *Insular* cases racist? I would say no.
4 What Justice Kennedy said in *Boumediene* was there was
5 a recognition, Your Honor, that these territories
6 that were acquired by the United States, many of them
7 had Spanish civil law systems, there would have been
8 great disruption to those societies to impose the
9 English common law system upon them. And so what the
10 *Insular* cases allowed, whether right or wrong, we
11 have been living under it for 100 years and we've
12 come to rely on it, is that the United States could
13 hold territories and not say to people who didn't
14 want it, you are now Americans, welcome to America,
15 this is how it's going to be. And for the American
16 Samoa people, Your Honor, this has allowed them to
17 perpetuate their cultures and their traditions in a
18 way that wouldn't be possible otherwise. And that's
19 why we're asking Your Honor to maintain that today.

20 Now, let's say the third point, Your Honor, is
21 what about the plaintiffs. Because as I said, nobody
22 has spoken about the plaintiffs during this entire
23 argument. But I read their complaint and I do see
24 that they have different categories of complaints,
25 different categories of harms they're alleging. And

1 the American Samoan Government and the congresswoman
2 from American Samoa they care deeply about any harms
3 that are being undertaken to any American Samoans
4 anywhere in the world. Now, one category of those
01:25:19 5 complaints, Your Honor, is the fact that people who
6 are in Utah but they are nationals, who are really
7 U.S. American Samoa citizens, they're not citizens of
8 the United States, but more citizens from American
9 Samoa, they're not able to vote, and say, that's --
01:25:34 10 that is right, Your Honor. That happens when
11 somebody from France or somebody from Spain is in a
12 different jurisdiction. If I were to move to
13 California I wouldn't be able to vote without
14 establishing a residency within California. What's
01:25:47 15 fortunate for these particular plaintiffs is that if
16 they had decided that they wanted to become United
17 States citizens, not only do they have a path, not
18 only are they not disabled from doing so, but they
19 have a glide path for doing so, Your Honor.

01:26:01 20 The United States has made it easier for
21 American Samoan residents to become citizens of the
22 United States. There is no five-year resident alien
23 requirement. That's actually a three-month
24 requirement. They do have to take the citizenship
01:26:16 25 exam. They do have to demonstrate a proficiency in

1 English. And having grown up in American Samoa with
2 the schools there and with the English education
3 there, they'll have a much better chance at it than
4 others. But if these plaintiffs in this case want to
01:26:29 5 become American Samoans, they want to become United
6 States citizens, they have a way to do so very
7 quickly Your Honor and for very little in terms of
8 resources. And I understand the \$700.00 fee may be a
9 burden, but as I look around this room and I think
01:26:42 10 what their lawyers must be charging by the hour, or
11 could be charging by the hour, I think that there is
12 a way that people who have resources can help
13 American Samoans who want to become citizens get
14 there without a financial burden.

01:26:56 15 Second, Your Honor, I saw that there were
16 allegations that these American Samoan residents are
17 being discriminated against in Utah in terms of their
18 economic opportunities, their jobs, their positions
19 within the military and the like. I don't know that
01:27:11 20 that is the case. We're here on notice pleading. I
21 know that there are American Samoan -- American
22 Samoan nationals of the United States who have
23 reached high positions as commissioned officers
24 within the United States. What I'll say there is if
01:27:25 25 there really is this invidious discrimination, the

1 sort of discrimination that doesn't make sense, I'll
2 fight it. The American Samoan Government will fight
3 it. The congresswoman from American Samoa will grant
4 it. If one of these plaintiffs really was denied a
5 job because she is a U.S. national and not a U.S.
6 citizen, I welcome her to come and tell me who that
7 was and we'll start working on that 1983 action or
8 whatever it is right now because that would be an
9 irrational distinction that I don't think would pass
10 muster under Title VII or under the Equal Protection
11 Clause. So there is a way to address the harms that
12 these plaintiffs are alleging.

13 What's going on here, Your Honor, and I just
14 learned this vocabulary word so I'm going to use it
15 even though I'm worried I'm taxing Your Honor's
16 attention, is iatrogenic. And for the court reporter
17 that's I-A-T-R-O-G-E-N-I-C. I just learned this. It
18 is a term that I understand applies to a medical
19 treatment that is actually worse than the disease.
20 That is, that it causes more harm than it cures. And
21 I think that's what would happen, Your Honor, if you
22 were to accept these plaintiffs' invitations to
23 declare that all American Samoans are now birthright
24 citizens. Notwithstanding that every court who has
25 considered the issue or to consider related issues

1 have come out in the opposite way.

2 So I started by thanking Your Honor and by
3 saying this is an issue of existential importance to
4 the American Samoan Government and they would say on
01:28:53 5 behalf of the American Samoan people for all of those
6 people Your Honor doesn't get a chance, we can't do a
7 site visit to American Samoa so you can see firsthand
8 what makes that place very special and what makes it
9 so different from the United States. But the
01:29:08 10 overriding concern here is if you were to rule that
11 all American Samoan citizens have a change in status,
12 have a change in allegiance, have to do something
13 different just because of what you understand the
14 text of the Fourteenth Amendment to be or to have
01:29:21 15 been in 1868, it might ensure that Your Honor never
16 gets a chance to experience that ever.

17 And that's why at the end of the day we're
18 going to ask you to deny the plaintiffs' motion for
19 summary judgment and to grant the United States'
01:29:33 20 motion to dismiss and our motion to dismiss because
21 on this record that's the only just and fair result.
22 And if Your Honor has questions, I'll answer them.

23 THE COURT: Thank you. Other amici wish to be
24 heard? If not, let's hear response from the
01:29:50 25 plaintiffs' counsel.

1 MR. SPENCER: Your Honor, I think I would like
2 to start with the record evidence that the
3 intervenors mentioned. First, on the evidence of
4 American Samoan people believing that they had
5 acquired U.S. citizenship, I would point Your Honor
6 to the brief filed by the Samoan Federation of
7 America which is Docket 55 as well as the extensive
8 exhibits and supporting evidence that they put into
9 place. And in particular, I think counsel questioned
10 whether we had properly cited a source about the
11 commissions visit to Samoa which counsel said that he
12 had not been able to find. That is in the docket,
13 Document 41-1, and on Page 91 you see that or a
14 report that "people were pretty well satisfied with
15 the naval government. The first witness, a high
16 chief, told the commission that the Samoans
17 understood first that annexation by the United States
18 meant the people would receive American citizenship."

19 And then if you turn to page 74, you will see
20 that High Chief Mauga, District Governor of the
21 Eastern District of Tutuila, American Samoa, was
22 actually one of the chiefs who signed the original
23 Deed of Cession. So I would say that that is fairly
24 compelling evidence that at least some American
25 Samoans here in the early years believed that they

1 had in fact acquired citizenship by virtue of the
2 Deeds of Cession.

3 And I think they would have been right to do
4 so because we heard this afternoon no textual
01:31:40 5 argument and no history supporting the view that in
6 the United States which in 1868 meant states and the
7 District of Columbia and territories somehow carved
8 out a category that was developed in the judicial
9 opinion 40 years later of so-called unincorporated
01:32:02 10 U.S. territories. And as I understand that phrase,
11 according to *Boumediene*, that refers to territories
12 that are surely destined for statehood.

13 So I think that if that is the correct
14 definition of unincorporated territory, then it is
01:32:17 15 inaccurate as counsel for the U.S. Government said to
16 say that there were no unincorporated territories as
17 of 1868 because certainly there were territories that
18 no one knew would become states. As of that time the
19 United States had acquired Alaska in 1867 and
01:32:36 20 although there was an act, an organic act for the
21 territory of Utah in 1850, whether Utah would become
22 a state is my understanding was actually settled
23 very, very late in the process for all manner of
24 historical reasons. So to say that all territories
01:32:53 25 in 1868 were on a sure path to statehood is

1 anarchistic. But if we move beyond that to jus soli
2 into the history of the common law, we find just a
3 few years before the Deeds of Cession the United
4 States Supreme Court in *Wong Kim Ark* saying seven
5 times that it was a fundamental principle or a
6 fundamental rule at common law that was
7 constitutionalized and added to the Fourteenth
8 Amendment of the United States of citizenship by
9 birth within the sovereignty, by birth within the
10 dominion, by birth within the territory, or by birth
11 within the country. A fundamental principle the
12 court said seven times all of which would apply to
13 all territories and the Deeds of Cession or in the --
14 when congress passed a statute, a statute that says
15 the persons of American Samoa owe permanent
16 allegiance to the United States and that is the
17 lynchpin said *Wong Kim Ark* for the fundamental
18 principle of birthright citizenship.

19 But I think we can move further back in
20 history if we take this concept of territories that
21 not only are not surely destined for statehood but
22 have very little possibility of becoming states. To
23 my mind the best historical example of that would be
24 the British colonies including the North American
25 colonies at the time of war the revolutionary war.

1 And we don't have to question what the common law
2 understanding there was because the Supreme Court
3 told us in *Inglis versus Sailor's Snug Harbor*. That
4 there was no dispute that a person born in what would
5 become the State of New York, if he was born before
6 July 4th, 1776, was a subject of Great Britain
7 because he owed allegiance to the crown of Great
8 Britain. And it is true that sometimes some courts
9 have suggested that there might be a meaningful
10 difference between being a subject and being a
11 citizen, but the court in *Wong Kim Ark* told us that
12 there is no meaningful difference. A citizen is
13 someone who is part of the polity, a subject is a
14 subject of a king. But from the perspective of jus
15 soli, common law, which was constitutionalized, is
16 there is no dispute. Those two terms are synonymous.

17 So I would submit that as of 1868 it was the
18 United States had unincorporated territories and no
19 one thought that those unincorporated territories
20 were somehow not a part of the United States.

21 I think the government, the United States
22 Government ultimately comes down to the *Insular*
23 cases. But it's curious because they don't really
24 want you to look at the *Insular* cases, they don't
25 want you to look at the fundamental rights doctrine

1 under which I would submit that birthright
2 citizenship is being the right to have rights is a
3 preeminent fundamental right. They don't want you to
4 look to the other nonfundamental rights which may be
5 applied in so-called unincorporated territories
6 unless it is impractical and anomalous. They want
7 you to ignore that entire framework of the *Insular*
8 cases and they want you to focus on *Downes against*
9 *Bidwell*.

10 Well, as Your Honor said, *Downes against*
11 *Bidwell* involved the Tax Uniformity Clause not the
12 Citizenship Clause. And counsel said that he has yet
13 to hear a principle distinction between the phrase
14 throughout the United States and the Tax Uniformity
15 Clause and in the United States in the Citizenship
16 Clause. But as the Supreme Court said just a few
17 years ago in the Arizona legislature case, the word
18 legislature is used several times in the Constitution
19 and it means different things in different places.

20 Also say the word officer, the word property. And it
21 should be no surprise that the words the United
22 States had a different meaning at the time when the
23 original Constitution was ratified, and in the years
24 shortly after the great Civil War that changed the
25 relationship between this nation and its federal

1 government and the individual states. Moreover, the
2 purpose of the two clauses is entirely different.

3 The Tax Uniformity Clause was at root a
4 nondiscrimination provision to mollify the concerns
5 of the new states that the federal government would
6 discriminate against one in favor of the other.

7 The Citizenship Clause, there is no dispute on
8 what the purpose of the Citizenship Clause was as
9 *Wong Kim Ark* says to reaffirm the fundament --
10 ancient and fundamental principle of birth within --
11 the citizenship by birth within the territory.

12 So as the phrase "the United States" was used
13 in the context of citizenship and in the Fourteenth
14 Amendment, it is very different context from the Tax
15 Uniformity Clause. And I think that the best example
16 of that, the best textual example of what the United
17 States meant is the Civil Rights Act of 1866. Now,
18 that Act was enacted by the same congress that
19 adopted the Fourteenth Amendment and, in fact, it was
20 enacted two months before congress enacted the
21 Fourteenth Amendment. Of course the Fourteenth
22 Amendment was ratified a few years later, but it was
23 adopted by congress just two months after the Civil
24 Rights Act of 1866. And that Act first declared that
25 all persons born in the United States were citizens

1 of the United States of the United States and then it
2 guaranteed that they would have equal rights in every
3 quote, "state and territory in the United States",
4 end quote.

01:38:18 5 So whatever the historical evidence might be
6 regarding the meaning of "throughout the United
7 States" in the Tax Uniformity Clause, the tax
8 structure, the purpose and not to mention the context
9 of the Civil War demonstrates that it has a very
01:38:32 10 different meaning in the context of the Citizenship
11 Clause.

12 I will also say about *Downes versus Bidwell*
13 that it was a fractured opinion and the Supreme Court
14 has said that fractured opinions that do not garner a
01:38:45 15 majority of any given line of reasoning are binding.
16 It is good law to a very limited and narrow
17 extension. And that is what is the meaning of the
18 Tax Uniformity Clause as applied to Puerto Rico in
19 the year 1901. Because as *Boumediene* told us, the
01:39:05 20 ties between the United States and one of its
21 territories can strengthen in a way that are of
22 constitutional significance. I think it's striking
23 that the court would say that which means that even
24 as to the Tax Uniformity Clause and Puerto Rico, I
01:39:20 25 don't think that you can say post *Boumediene* that it

1 is controlling. As Justice Brennan said, whatever
2 the value of the *Insular* cases may have been at their
3 time, they are no excuse for refusing to extend the
4 Fourth Amendment to Puerto Rico in the 1970s. What
01:39:37 5 it comes down to is not the holding of *Downes versus*
6 *Bidwell* or any of the other *Insular* cases, what it
7 comes down to is what counsel for the government
8 referred to as their extensive discussion on
9 citizenship. And I must say it is surprising that
01:39:49 10 counsel for the government would rely on that --
11 those passages because those are the exact passages
12 that include the rhetoric that everyone agrees is
13 abhorrent. The driving force behind those -- that
14 decision in *Downes versus Bidwell* is that Puerto Rico
01:40:05 15 cannot be part of the United States because if it is,
16 then that may mean the United States would have to
17 grant citizenship to people who are entirely unfit to
18 receive it. That reasoning has no place in
19 constitutional juris prudence now and it never did.

01:40:23 20 So I would urge Your Honor as the D.C. Circuit
21 recognized to recognize that *Downes versus Bidwell* is
22 not controlling and to resolve this case in light of
23 the text, the structure, and the largely undisputed
24 history of the Fourteenth Amendment yourself.

01:40:36 25 THE COURT: Let me ask you to address

1 Mr. Williams' heartfelt argument that this would be a
2 significant impact upon the people of American Samoa
3 in terms of how their culture, law, and customs have
4 developed.

01:40:51 5 MR. SPENCER: Your Honor, I took issue with
6 parts of Mr. Williams' argument because he certainly
7 represents the Government of American Samoa but he
8 does not represent the plaintiffs who are born in
9 American Samoa and who care deeply about the

01:41:07 10 traditional American Samoan way of life and fa'a
11 Samoa. And I will say this, there is when he pointed
12 out our statement that the concerns make little sense
13 that recognizing citizenship in American Samoa would
14 have an impact on the Samoan way of life. We did not
01:41:24 15 mean by that that the value placed on the Samoan way
16 of life makes little sense. It makes a great deal of
17 sense to the plaintiffs themselves, they care very
18 deeply about it. What we meant is this. The

01:41:41 19 argument, as I understand it, is that certain
20 practices, customs, and traditional way of life
21 might, some might think, be subject to scrutiny under
22 equal protection or as Mr. Williams began at one
23 point in his presentation pointed out to the slogan
24 of American Samoa which perhaps he was suggesting as
01:41:57 25 he did in his motion to intervene might be subject to

1 scrutiny under the Establishment Clause.

2 This case is about citizenship. The
3 Fourteenth Amendment or the Fifth Amendment, Equal
4 Protection and due process principles protect
5 persons. They do not protect citizens. Nothing
6 about them turns on citizenship status. And it would
7 be very surprising to me if the government of the
8 United States could establish a religion in a place
9 so long as it ensured that no one who lived in the
10 place had birthright citizenship. I don't think that
11 there is any constitutional theory under which
12 recognizing birthright citizenship in American Samoa
13 would somehow change the analysis of the traditional
14 American Samoan way of life under the Equal
15 Protection or Establishment Clauses. As we pointed
16 out in our brief, in fact, the Equal Protection
17 Clause has been held to extend to American Samoa and
18 certain traditional aspects of fa'a Samoa have been
19 upheld under strict scrutiny under the Equal
20 Protection Clause. So that's what we said made
21 little sense. It makes little sense to say that
22 recognizing birthright citizenship would somehow
23 implicate the customs of American Samoa. But I think
24 there is one other piece of Mr. Williams' argument.
25 It's not that this would impact particular customs,

1 because as a matter of constitutional theory, it is
2 an autonomy interest that the people of American
3 Samoa should be allowed to decide for themselves
4 whether they want to be citizens of the United
5 States. And I think that autonomy interest and that
6 independence is vitally important. And as a
7 political matter, it is in short that people of
8 American Samoa can decide, I believe, whether they
9 want to be a part of the United States, whether they
10 want to seek independent status, or whether they want
11 to remain a territory of the United States.

12 That is the autonomy interest that the people
13 of American Samoa have. But so long as they are a
14 part of the United States, so long as they are a
15 territory of the United States, and so long as by
16 statute they owe permanent allegiance to the United
17 States, they are, as a matter of every source of
18 constitutional meaning we have in the United States
19 for purposes of the Fourteenth Amendment and that, as
20 Your Honor said, as the United States Government has
21 said, is the sole question in this case.

22 If American Samoa is in the United States,
23 then plaintiffs who are three Utahns are entitled to
24 citizenship. And the defendants' refusal to
25 recognize that citizenship, to deny them the right to

1 vote, to serve on juries, to make them have to decide
2 as they move from state to state which rights they do
3 or do not have, are entirely unconstitutional.

4 THE COURT: Okay.

01:44:42 5 MR. SPENCER: Are there any further questions?

6 THE COURT: Mr. Pezzi, I'll give you the
7 chance to have the final word, if you wish.

8 MR. PEZZI: Just for a few moments, Your
9 Honor, if you would indulge me. I will be brief
01:44:54 10 unless Your Honor has additional questions. We have
11 talked extensively today about common law, about the
12 law of Great Britain, and a lot of the history
13 leading up to the adoption of the Fourteenth
14 Amendment. And Mr. Spencer and his colleagues are
01:45:08 15 able advocates who have told that story the best they
16 can tell it to advance the position that they're
17 representing here.

18 The story that they tell stops at 1868. And
19 they have offered no explanation and no precedent
01:45:21 20 since the Citizenship Clause was actually enacted of
21 how it was actually understood by the courts, by the
22 Executive Branch, by the Congress, and we are left to
23 understand that on their view, every congressional
24 enactment with respect to citizenship in the
01:45:39 25 unincorporated territories was either

1 unconstitutional, unnecessary, or both. Every judge
2 to look at the same question that Your Honor is now
3 considering has gotten it wrong despite the fact that
4 all of the same arguments being advanced here were
01:45:52 5 advanced in those cases. And respectfully, I don't
6 think that is the appropriate outcome. I think that
7 the D.C. Circuit and the Second Circuit, the Third
8 Circuit, the Fifth Circuit and the Ninth Circuit I
9 think they got it right. Congress may provide for
01:46:07 10 birthright citizenship in the territories as it has
11 done with respect to Guam, the U.S. Virgin Islands,
12 Puerto Rico and the Northern Mariana Islands. It is
13 not required, as a matter of constitutional law, and
14 for that reason I would ask that the court grant the
01:46:19 15 government's motion to dismiss. And, of course, I'm
16 happy to answer any additional questions Your Honor
17 may have.

18 THE COURT: Thank you. Thank all of the
19 parties for the work that you have done on the
01:46:29 20 briefs. I am going to take this under submission and
21 will issue an opinion once I have been able to reach
22 a decision as to what the appropriate conclusion
23 would be. We will be in recess.

24 (Whereupon, the hearing concluded
25 at 4:34 p.m.)

REPORTER'S CERTIFICATE

I, Laura W. Robinson, Certified Shorthand Reporter, Registered Professional Reporter and Notary Public within and for the County of Salt Lake, State of Utah, do hereby certify:

That the foregoing proceedings were taken before me at the time and place set forth herein and were taken down by me in shorthand and thereafter transcribed into typewriting under my direction and supervision;

That the foregoing pages contain a true and correct transcription of my said shorthand notes so taken.

In witness whereof I have subscribed my name this 20th day of November, 2018.

Laura W. Robinson
RPR, FCRR, CSR, CP