CHAD A. READLER
Acting Assistant Attorney General
Civil Division

JOHN W. HUBER
United States Attorney

ANTHONY J. COPPOLINO
Deputy Director
Federal Programs Branch

STEPHEN M. PEZZI
Trial Attorney
United States Department of Justice
Civil Division, Federal Programs Branch
20 Massachusetts Avenue NW
Washington, DC 20530
Phone (202) 305-8576; Fax (202) 616-8470
Email: stephen.pezzi@usdoj.gov
D.C. Bar No. 995500

Attorneys for the United States of America

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH, CENTRAL DIVISION

JOHN FITISEMANU, *et al.*,

Plaintiffs,

v.

UNITED STATES OF AMERICA, *et al.*,

Defendants.

Case No. 1:18-cv-00036-CW

REPLY IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS OR, IN THE ALTERNATIVE, CROSS-MOTION FOR SUMMARY JUDGMENT

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

CONSTITUTIONAL PROVISIONS

STATUTES

OTHER AUTHORITIES

The Citizenship Clause of the Fourteenth Amendment to the United States Constitution provides: "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside." U.S. Const. amend. XIV, § 1, cl. 1. Every court of appeals to consider the question has held that the phrase "in the United States" in the Citizenship Clause does not apply to unincorporated territories—just as the Supreme Court held with respect to a similar constitutional provision that applies "throughout the United States." Nevertheless, Plaintiffs ask this Court to depart from that consensus, notwithstanding more than a century of historical practice that is inconsistent with their interpretation. Congress has not provided for birthright citizenship in American Samoa, as it has with respect to the unincorporated territories of Guam, Puerto Rico, the U.S. Virgin Islands, and the Northern Mariana Islands—perhaps in part because of the objection of American Samoa itself. But whatever the explanation, American Samoa is not "in the United States" for purposes of the Citizenship Clause. Unless and until Congress acts, those born in American Samoa may be appropriately classified as United States nationals, rather than citizens, and remain in that status unless and until they complete the naturalization process. This case should be dismissed.

I. THE TEXT AND STRUCTURE OF THE CONSTITUTION FORECLOSE PLAINTIFFS' INTERPRETATION OF THE CITIZENSHIP CLAUSE.

As Defendants explained in their motion, Defs.' Mot. to Dismiss or Cross-Mot. for Summ. J. ("MTD"), ECF No. 66, at 11-12, the text of the Citizenship Clause of the Fourteenth Amendment covers individuals born "in the United States, *and* subject to the jurisdiction thereof." U.S. Const. amend. XIV, § 1, cl. 1 (emphasis added). The text of the Thirteenth Amendment, however, is broader; it prohibits slavery "within the United States, *or* any place subject to their jurisdiction," U.S. Const. amend. XIII, § 1 (emphasis added). The Thirteenth Amendment's more sweeping,

disjunctive language confirms that "there may be places subject to the jurisdiction of the United States, but which are not incorporated into it, and hence are not within the United States in the completest sense of those words." *Downes v. Bidwell*, 182 U.S. 244, 336-37 (1901) (White, J., concurring); *see also id.* at 251 (opinion of Brown, J.) ("The Thirteenth Amendment . . . is also significant as showing that there may be places within the jurisdiction of the United States that are no part of the Union."). That textual contrast, and the general distinction drawn throughout the Constitution between "the United States," U.S. Const. amend. XIV, § 1, cl. 1, and lands "*belonging to* the United States," U.S. Const. art. IV, § 3, cl. 2 (emphasis added), supports the inference that territories are not "in the United States" for purposes of the Citizenship Clause.

Plaintiffs argue instead that comparing the language in the Citizenship Clause ("in the United States") to the Apportionment Clause, U.S. Const. amend. XIV, § 2 ("the several States"), "show[s] that 'the United States' sweeps beyond states." Pls.' Opp'n & Reply, ECF No. 75, at 5, 7. Plaintiffs attribute unjustified significance to this minor variation. Because the Apportionment Clause, unlike the Citizenship Clause, is describing the states *in their capacities as individual states* (*i.e.*, rather than describing their union as a whole), *see also* U.S. Const. art. I, § 2, cl. 3 (also using "the several States"), that language sheds no more light on the Citizenship Clause's reach than the statement, also addressed to states *qua* states, that "[t]he Senate of the United States shall be composed of two Senators from each state." U.S. Const. art. I, § 3.

Plaintiffs also cite the Northwest Ordinance of 1787, in support of the proposition that "territories have been part of the United States from the Founding." Pls.' Opp'n & Reply at 6. But the historical existence of territories belonging to the United States is not in dispute—the question is whether territories are "in the United States" for purposes of the Citizenship Clause.

To the extent the Northwest Ordinance is relevant to that question (though it does not specifically address citizenship) it supports Defendants' position, as one of the many examples—both before and after the Fourteenth Amendment—of Congress legislating in detail with respect to the terms by which a territory was to be governed, and the rights to be guaranteed (or not) to its inhabitants.[1] In any event, unlike the legal documents associated with the cession of American Samoa, the Northwest Ordinance included "a promise of ultimate statehood," *Downes*, 182 U.S. at 320 (White, J., concurring). So whatever the citizenship status of inhabitants of the Northwest Territory, it cannot tell us whether an unincorporated territory like American Samoa is "in the United States" for purposes of the Citizenship Clause.

Plaintiffs next cite *Loughborough v. Blake*, though not for its actual holding—that the application of the Tax Uniformity Clause "throughout the United States" includes the District of Columbia—but for dictum suggesting the same would be true for "the territory west of the Missouri." Pls.' Opp'n & Reply at 5 (quoting 18 U.S. (5 Wheat.) 317, 319 (1820)). But Plaintiffs fail to meaningfully respond to the government's explanation that *Loughborough* says nothing about the application of the Citizenship Clause to unincorporated territories. *See* MTD

[1] Other U.S. territories eventually granted statehood were governed similarly. *See Downes*, 182 U.S. at 279 (opinion of Brown, J.) ("Congress did not hesitate, in the original organization of the territories of Louisiana, Florida, the Northwest Territory, and its subdivisions of Ohio, Indiana, Michigan, Illinois, and Wisconsin and still more recently in the case of Alaska, to establish a form of government bearing a much greater analogy to a British Crown colony than a republican state of America, and to vest the legislative power either in a governor and council, or a governor and judges, to be appointed by the President. It was not until they had attained a certain population that power was given them to organize a legislature by vote of the people. In all these cases, as well as in territories subsequently organized west of the Mississippi, Congress thought it necessary either to extend the Constitution and laws of the United States over them, or to declare that the inhabitants should be entitled to enjoy the right of trial by jury, of bail, and of the privilege of the writ of *habeas corpus*, as well as other privileges of the bill of rights.")

at 23. Nor do Plaintiffs dispute the significance of the District of Columbia's unique constitutional status, as the textually designated seat of the United States government, *see* U.S. Const. art. I, § 8, cl. 17, carved from two of the original thirteen states, which readily distinguishes it from American Samoa. *See Downes*, 182 U.S. at 260-61 (opinion of Brown, J.) (distinguishing *Loughborough*, explaining that "it would have been a fanciful construction to hold that territory which had been once a part of the United States ceased to be such by being ceded directly to the Federal government" by "the states of Maryland and Virginia").

II. PLAINTIFFS' INTERPRETATION OF THE CITIZENSHIP CLAUSE IS INCONSISTENT WITH OVER A CENTURY OF HISTORICAL PRACTICE AND PRECEDENT.

As explained in Defendants' motion, the meaning of "in the United States" in the Citizenship Clause is further informed by the Supreme Court's approach to application of the Constitution to U.S. territories, and over a century of historical practice by the political branches reflecting a settled constitutional understanding that supports the government's interpretation. Plaintiffs' theory is impossible to reconcile with this practice and precedent.

A. Plaintiffs' interpretation is inconsistent with the *Insular Cases*.

Despite the fact that every court of appeals to consider the question has relied on the *Insular Cases* (and in particular on *Downes v. Bidwell*) to reject the claim that Plaintiffs now bring in this Court, *see infra*, Section III, Plaintiffs seem to argue that *Downes* is irrelevant. *See* Pls.' Opp'n & Reply at 19. It is not. Notwithstanding the differing approaches taken by some of the justices in the *Downes* majority, five justices held that a constitutional provision that applies "throughout the United States" (in that case, the Tax Uniformity Clause) did not apply in the unincorporated territory of Puerto Rico. 182 U.S. at 263, 277-78, 287 (opinion of Brown, J.); *id.* at 341-42

(White, J., concurring); *id.* at 346 (Gray, J., concurring). The relevance of *Downes* to this case—which likewise presents the question whether an unincorporated territory is in "the United States" under the Constitution—is self-evident. *See, e.g.*, *Valmonte v. INS*, 136 F.3d 914, 918 (2d Cir. 1998) ("[T]he Supreme Court in the *Insular Cases* provides authoritative guidance on the territorial scope of the term "the United States" in the Fourteenth Amendment.") (internal footnote omitted).

As confirmation that the government's reading of *Downes* does not "distort[]" it, Pls.' Opp'n & Reply at 19, the Court need look no farther than its two dissenting opinions. Chief Justice Fuller acknowledged in dissent that despite the several opinions from the majority, "there seems to be concurrence in the view that Porto Rico belongs to the United States, but nevertheless . . . is not a part of the United States[.]" *Downes*, 182 U.S. at 347 (Fuller, C.J., dissenting). Justice Harlan read the holding the same way, disagreeing with the proposition that "Porto Rico can be a domestic territory of the United States . . . , and yet, *as is now held*, not embraced by the words 'throughout the United States[.]'" *Id.* at 386 (Harlan, J., dissenting) (emphasis added). *Downes* means exactly what it appears to mean: although unincorporated territories belong to the United States, they are not within "the United States."

To be sure, this case is not about the Tax Uniformity Clause. But Plaintiffs have provided no principled justification for holding that unincorporated territories are "in the United States," for purposes of the Citizenship Clause, even though the Supreme Court has held that unincorporated territories are *not* a part of "the United States," for purposes of the Tax Uniformity Clause. Indeed, the *dissenting* justices in *Downes* advanced many of the same arguments that Plaintiffs raise here. *See, e.g.*, 182 U.S. at 357 (Fuller, C.J., dissenting) (claiming that the *Slaughter-House Cases* support the proposition "that the United States included the District [of Columbia] and the

territories"); *id.* at 358 (Fuller, C.J., dissenting) (suggesting that the disjunctive "or" in the Thirteenth Amendment was "used simply out of abundant caution"); *id.* at 354 (Fuller, C.J., dissenting) (claiming that *Loughborough* supports the proposition that "the territories as well as the District [of Columbia]" are "part of the United States"). Those arguments, however, did not persuade a majority of the Court.

Downes also directly addressed citizenship. All five justices in the majority recognized that when the United States acquires territories, the decision to afford citizenship—whether, when, and under what circumstances—is for Congress. *Id.* at 280 (opinion of Brown, J.) ("In all these cases there is an implied denial of the right of the inhabitants to American citizenship until Congress by further action shall signify its assent thereto."); *see id.* at 306 (White, J., concurring); *id.* at 345-46 (Gray, J., concurring). That view is inconsistent with Plaintiffs' interpretation of the Citizenship Clause as guaranteeing birthright citizenship to anyone born in any U.S. territory.[2]

Finally, relying on the Supreme Court's recent decision in *Trump v. Hawaii*, 138 S. Ct. 2392 (2018), Plaintiffs assert that—akin to *Hawaii*'s treatment of the infamous decision in *Korematsu v. United States*, 323 U.S. 214 (1944)—certain statements in *Downes* "were 'gravely wrong the day' they were uttered and have 'no place in law under the Constitution.'" Pls.' Opp'n & Reply at 22 (quoting *Hawaii*, 138 S. Ct. at 2423). What appears to be Plaintiffs' argument—

[2] Plaintiffs (and some amici) make much of *Gonzales v. Williams*, 192 U.S. 1 (1904), even though they acknowledge that the decision was resolved only on statutory grounds. *See* Pls.' Opp'n & Reply at 22. That result should not be surprising. Frequently, "[t]he Court will not pass upon a constitutional question although properly presented by the record, if there is also present some other ground upon which the case may be disposed of." *Ashwander v. Tenn. Valley Auth.*, 297 U.S. 288, 347 (1936) (Brandeis, J., concurring). Such a ruling says nothing about the constitutional issue left unaddressed.

that the *Insular Cases*, like *Korematsu*, "ha[ve] been overruled in the court of history," *Hawaii*, 138 S. Ct. at 2423—is an approach that is unavailable in the lower courts, given our system of absolute vertical stare decisis. Plaintiffs are free to present that argument to the Supreme Court (again[3]) in the future, although if they do they will run into the problem that, rhetoric aside, the core principles of the *Insular Cases* have been repeatedly (and recently) reaffirmed. *See, e.g.*, *Boumediene v. Bush*, 553 U.S. 723, 756-57 (2008); *Torres v. Puerto Rico*, 442 U.S. 465, 469 (1979); *Reid v. Covert*, 354 U.S. 1, 8-9 (1957) (plurality); *Balzac v. Porto Rico*, 258 U.S. 298, 312 (1922); *Tuaua v. United States*, 788 F.3d 300, 307 (D.C. Cir. 2015) ("Although some aspects of the *Insular Cases*' analysis may now be deemed politically incorrect, the framework remains both applicable and of pragmatic use in assessing the applicability of rights to unincorporated territories."), *cert. denied*, 136 S. Ct. 2461 (2016).

The key lesson of the *Insular Cases* that the government relies on here—cases in which the Supreme Court was first faced with novel questions relating to acquisition of geographically dispersed and distant territory that nobody anticipated becoming a state—is that the United States may acquire outlying territories, and then let Congress decide whether, when, and under what circumstances such territories become incorporated into the United States. Although some of the rhetoric of the *Insular Cases* has not aged well, their bottom-line conclusion about the United States of America as a sovereign power still makes sense today, and in any event remains good

[3] *See* Pet. for a Writ of Cert., *Tuaua v. United States*, No. 15-891 (U.S. Feb. 1, 2016), *cert. denied*, 136 S. Ct. 2461 (2016), at 19 (arguing that the *Insular Cases* "are inconsistent with the Constitution and should be modified or overruled"), *available at* http://www.scotusblog.com/wp-content/uploads/2016/05/15-981-Tuaua-v-US.Cert-Petition-Appendix.pdf.

law—applied as recently as 2008 by the Supreme Court, *see Boumediene*, 553 U.S. at 756-57, and 2015 by the D.C. Circuit, *see Tuaua*, 788 F.3d at 307.[4]

B. Plaintiffs' interpretation is inconsistent with settled historical practice.

Defendants' dispositive motion laid out more than a century of "past practice in which territorial citizenship has been treated as a statutory, and not a constitutional, right." *Tuaua*, 788 F.3d at 308 n.7. In particular, Defendants pointed to a plethora of statutes and treaties by which the political branches conferred citizenship on the inhabitants of some unincorporated territories (but not others) slowly over time, and prescribed the specific conditions by which citizenship would (or would not) attach. *See* Defs.' MTD at 16-18. On Plaintiffs' theory, *all* of these statutes and treaties would have been either unnecessary or unconstitutional or both. Yet when the Supreme Court has encountered these enactments, it has offered not the slightest hint that any might be constitutionally infirm. *See Miller v. Albright*, 523 U.S. 420, 467 n.2 (1998) (Ginsburg, J., dissenting) ("Nationality and citizenship are not entirely synonymous; one can be a national of the United States and yet not a citizen. 8 U.S.C. § 1101(a)(22). The distinction has little practical impact today, however, for the only remaining noncitizen nationals are residents of American Samoa and Swains Island."); *Barber v. Gonzales*, 347 U.S. 637, 639 n.1 (1954) ("Persons born in the Philippines during this period were American nationals entitled to the protection of the United

[4] Plaintiffs accuse the government of relying "not just on the *Insular Cases*, but on their most egregious, indefensible passages." Pls.' Opp'n & Reply at 22. But in support of that accusation, Plaintiffs quote statements from *Downes* that do not appear in the government's brief. *See* Pls.' Opp'n & Reply at 21-22. It should go without saying that no language is being relied upon here for any purpose related to any "notions of racial inferiority," Pls.' Opp'n & Reply at 22 (quoting Amicus Br. of Scholars, ECF No. 56, at 19-22), and any insinuation to the contrary is baseless.

States and conversely owing permanent allegiance to the United States. They could not be excluded from this country under a general statute relating to the exclusion of 'aliens.' But, until 1946, neither could they become United States citizens.") (citations omitted).

To be sure, "'[n]o one acquires a vested or protected right in violation of the Constitution by long use.'" *Tuaua*, 788 F.3d at 308 n.7 (quoting *Walz v. Tax Comm'n of City of New York*, 397 U.S. 664, 678 (1970)). "'Yet an unbroken practice . . . openly [conducted] . . . by affirmative state action . . . is not something to be lightly cast aside.'" *Id.*; *see also Jackman v. Rosenbaum Co.*, 260 U.S. 22, 31 (1922) (Holmes, J.) ("If a thing has been practiced for two hundred years by common consent, it will need a strong case for the Fourteenth Amendment to affect it.").

In response, Plaintiffs cite *Medellin v. Texas* for the proposition that "[p]ast practice does not, *by itself*, create power." 552 U.S. 491, 532 (2008) (emphasis added) (cited in Pls.' Opp'n & Reply at 32). True enough, as a general matter. But even *Medellin* included an analysis of historical precedent for the challenged government action, with the Court ultimately supporting its holding in part on the basis that "[t]he President's Memorandum is not supported by a particularly longstanding practice of congressional acquiescence, but rather is what the United States itself has described as unprecedented action." *Id.* (internal quotations and citations omitted). In constitutional cases, courts routinely attach significance to whether a challenged government practice is grounded "in the history and tradition of this country," *Marsh v. Chambers*, 463 U.S. 783, 786 (1983), and arguments that are "alien to our entire constitutional history and tradition," *Reid*, 354 U.S. at 17, are greeted with heavy skepticism.

In sum, at a minimum, longstanding practice provides strong evidence that the Citizenship Clause was not intended to override Congress's plenary powers with respect to the territories, *see*

U.S. Const. art IV, § 3, cl. 2, or its broad authority over naturalization, *see* U.S. Const. art. I, § 8, cl. 4—at least with respect to unincorporated territories like American Samoa.

III. EVERY COURT OF APPEALS TO CONSIDER THE QUESTION HAS AGREED THAT UNINCORPORATED TERRITORIES ARE NOT "IN THE UNITED STATES" FOR PURPOSES OF THE CITIZENSHIP CLAUSE.

Every court of appeals to consider the question has held that the Citizenship Clause does not apply to unincorporated territories. *See Tuaua*, 788 F.3d at 311 (holding that the Citizenship Clause does not apply to American Samoa); *Valmonte*, 136 F.3d at 917-20 (holding that the Citizenship Clause does not apply to individuals born in the Philippines while it was a U.S. territory), *cert. denied*, 525 U.S. 1024 (1998); *Lacap v. INS*, 138 F.3d 518, 519 (3d Cir. 1998) (per curiam) (same); *Nolos v. Holder*, 611 F.3d 279, 282-84 (5th Cir. 2010) (per curiam) (same); *Rabang v. INS*, 35 F.3d 1449, 1451-1453 (9th Cir. 1994) (same), *cert. denied*, 515 U.S. 1130 (1995); *Licudine v. Winter*, 603 F. Supp. 2d 129, 135 (D.D.C. 2009) (same); *see also Eche v. Holder*, 694 F.3d 1026, 1027-28, 1030-31 (9th Cir. 2012) (construing "the United States" in the Naturalization Clause, U.S. Const. art. I, § 8, cl. 4, not to apply to the Northern Mariana Islands because "federal courts have repeatedly construed similar and even identical language in other clauses to include states and incorporated territories, but not unincorporated territories"), *cert. denied*, 570 U.S. 904 (2013).

In response, Plaintiffs struggle to distinguish these cases on the basis that they were about the Philippines (a former territory), while this one is about American Samoa (a current territory).[5]

[5] That distinction would only get Plaintiffs so far, even if it were persuasive: the D.C. Circuit recently rejected the argument that the Citizenship Clause applies *to American Samoa*. *Tuaua*, 788 F.3d at 302. And the Ninth Circuit has held that the phrase "the United States" in the Naturalization Clause does not include the Northern Mariana Islands, another unincorporated

Pls.' Opp'n & Reply at 27. But Plaintiffs still offer no principled legal basis that would justify varying interpretations of the geographic scope of the Citizenship Clause based upon whether an unincorporated territory is currently a territory, or merely used to be one. Plaintiffs' factual premise is also imprecise. To be sure, the Philippines is *now* a former territory. But for about fifty years—and when the relevant individuals in *Valmonte*, *Lacap*, *Nolos*, and *Rabang* were *born*—the Philippines was an unincorporated territory of the United States, no different from American Samoa today.[6] (Otherwise, the question whether the Philippines was "in the United States" for purposes of the Citizenship Clause would never have been presented.)

Even if some of the Philippines cases *could have been* resolved on other grounds—*see* Pls.' Opp'n & Reply at 27-28 ("The courts should have resolved the Philippines cases by applying" the principle that there was a "transfer of nationality" when the Philippines gained independence)—the *actual* basis of all of these decisions is directly applicable. Each case analyzed the precise legal question now before this Court, examined the same authorities now discussed in these briefs and, ultimately, each held that "'birth in the Philippines during the territorial period does not constitute birth 'in the United States' under the Citizenship Clause.'" *Valmonte*, 136 F.3d at 918 (quoting *Rabang*, 35 F.3d at 1452); *accord Nolos*, 611 F.3d at 284; *Lacap*, 138 F.3d at 519. Just as the government does here, those cases relied on *Downes*, the historical practice in which birthright citizenship in the territories was treated as a statutory right, and textual distinctions

territory of the United States. *Eche*, 694 F.3d at 1027-28, 1030-31.

[6] In 1898, "[t]he United States acquired the Philippines by treaty at the close of the Spanish-American War." *Valmonte*, 136 F.3d at 916. It was not until "July 4, 1946 [that] the United States declared the Philippines to be an independent nation, terminating the Philippines' status as a United States territory." *Id.* at 917.

between the Thirteenth and Fourteenth Amendments—while distinguishing cases like *Wong Kim Ark* on which Plaintiffs heavily depend.

Plaintiffs try another tack, arguing that it was "'always . . . the purpose of the people of the United States to withdraw their sovereignty over the Philippine Islands and to recognize their independence as soon as a stable government c[ould] be established therein.'" Pls.' Opp'n & Reply at 28 (quoting *Boumediene*, 553 U.S. at 757). But Plaintiffs cannot explain *why* that particular fact affects the reach of the Citizenship Clause. As the D.C. Circuit put it, "there is no material distinction between nationals born in American Samoa and those born in the Philippines prior to its independence in 1946." 788 F.3d at 305 n.6.

The fact that certain "legal proclamations . . . expressly dealt with the subject" of citizenship in the Philippines, Pls.' Opp'n & Reply at 28, cuts in *Defendants'* favor. On Plaintiffs' theory, the relevant portions of the Philippine Organic Act of 1902—providing that residents of the Philippines and "their children born subsequent thereto" would be "citizens of the Philippine Islands," ch. 1369, § 4, 32 Stat. 691, 692 (1902)—would have been unconstitutional. But neither the courts, the Congress, nor the Executive Branch ever treated it that way. (In any event, that fact offers no distinction from this case at all, because Plaintiffs' alleged constitutional injury here is premised on a federal statute that classifies those born in American Samoa as nationals, rather than citizens, of the United States. *See* 8 U.S.C. § 1408(1).)

Plaintiffs also minimize "the vast practical consequences" that would result from belated adoption of their novel theory, disagreeing with the D.C. Circuit that "[t]he extension of citizenship to the American Samoan people would necessarily implicate the United States citizenship status of persons born in the Philippines during the territorial period—and potentially their children

through operation of statute." *Tuaua*, 788 F.3d at 305 n.6. According to Plaintiffs, even if persons born in the Philippines during the territorial period were U.S. citizens, "they presumably became citizens of the Philippines alone upon independence." Pls.' Opp'n & Reply at 27. Plaintiffs appear to misunderstand the D.C. Circuit's point, as well as the statutory process by which one may derive citizenship from U.S. citizen parents. Even accepting Plaintiffs' (counterfactual) premise that those born in the Philippines during the territorial period were U.S. citizens, and also assuming that those individuals lost U.S. citizenship upon independence, *but cf. Afroyim v. Rusk*, 387 U.S. 253 (1967), their *children* might still be eligible for U.S. citizenship. As one example: by statute, a child born to a U.S. citizen parent abroad was generally eligible for U.S. citizenship from birth, even if the parent later lost U.S. citizenship (provided they satisfied any other applicable statutory requirements). *See, e.g.*, An Act To Amend The Law Relative To Citizenship And Naturalization, And Other Purposes, ch. 344, § 1, 48 Stat. 797 (1934).

Ultimately, Plaintiffs' final fallback position is their most candid: they assert that all of these cases are wrongly decided, as is their right (at least outside of the Second, Third, Fifth, Ninth, and D.C. Circuits). Plaintiffs claim that "none" of these courts of appeals "[took] seriously the task of examining the text, structure, history, and purpose of the Citizenship Clause." Pls.' Opp'n & Reply at 29. Respectfully, the inference to be drawn from this robust consensus is *not* that the courts of appeals have failed to take seriously their role in interpreting the Constitution—it is that Plaintiffs' legal position is erroneous.

IV. PLAINTIFFS' REMAINING ARGUMENTS LACK MERIT.

Plaintiffs contend that the Supreme Court has thrice made statements that "confirm[] that the Citizenship Clause applies to American Samoa." Pls.' Opp'n & Reply at 13-14. Even setting

aside the fact that each of those three cases was decided before the more directly applicable *Insular Cases*, none of them can bear the weight that Plaintiffs ascribe to them.

With respect to the *Slaughter-House Cases*, Defendants have no quarrel with the proposition that the Citizenship Clause "overturns the *Dred Scott* decision by making *all persons* born within the United States and subject to its jurisdiction citizens of the United States." 83 U.S. (16 Wall.) 36, 73 (1872). But Plaintiffs' eventual conclusion—that "[t]hose born in the territories are thus citizens of the United States because they were born within the United States," Pls.' Opp'n & Reply at 14—does not follow from its premises, and begs the central question in this case: whether unincorporated territories are within "the United States" in the relevant sense.

Defendants also agree that the *Slaughter-House Cases* "make[] clear that 'a man [may] be a citizen of the United States *without being a citizen of a State*." Pls.' Opp'n & Reply at 15 (quoting 83 U.S. at 73). But that statement is entirely consistent with the government's position. U.S. citizens residing in a foreign country, or in the District of Columbia, or in a U.S. territory for which Congress has provided for citizenship by statute or treaty, all may be citizens of the United States without being a citizen of any particular State. The *Slaughter-House Cases*—primarily about regulations imposed by the *State* of Louisiana, and their compatibility with the Privileges and Immunities Clause—have little to do with the territories.

As for *Elk v. Wilkins*, 112 U.S. 94 (1884), Plaintiffs claim that the government "fails to acknowledge" it, "let alone refute it."[7] Pls.' Opp'n & Reply at 15. But *Elk*—as the parties seem to agree, *see* Pls.' Opp'n & Reply at 27—stands for the proposition that, under the plain text of the

[7] *Elk*'s holding was summarized twice in Defendants' motion. *See* MTD at 10, 24-25.

Citizenship Clause, one can only be entitled to birthright citizenship if born "subject to the jurisdiction" of the United States. Because the child in *Elk* was not—rather, he was born as a "member of" and "owing allegiance to" an Indian tribe, 112 U.S. at 102-03—the location of his birth was ultimately irrelevant. Accordingly, that particular fact from *Elk* is also irrelevant here, as the government has already conceded that "persons born in the territories are 'subject to the jurisdiction' of the United States." MTD at 10 (citing *Elk*, 112 U.S. at 99-103).

Finally, Plaintiffs continue to rely heavily on *United States v. Wong Kim Ark*, 169 U.S. 649 (1898), even though they acknowledge that the question presented there was "whether a man of Chinese decent [sic] born in California was a citizen." Pls.' Opp'n & Reply at 16. But all agree that the Citizenship Clause applies to those born in a *state*; that is not the question here.

To be sure, *Wong Kim Ark* also contains dicta about common-law *jus soli* principles. But even considering those statements divorced from the actual case-and-controversy in which they were decided, they cannot answer the question presented here, given Plaintiffs' failure to point to any *jus soli* precedent (in *Wong Kim Ark*, or elsewhere) that speaks to birthright citizenship in unincorporated territories. Unsurprisingly, multiple courts have considered and rejected Plaintiffs' reading of *Wong Kim Ark*. *See Tuaua*, 788 F.3d at 304 ("We are unconvinced . . . that *Wong Kim Ark* reflects the constitutional codification of the common law rule as applied to outlying territories."); *Valmonte*, 136 F.3d at 920 ("The question of the Fourteenth Amendment's territorial scope was not before the Court in *Wong Kim Ark* or *Inglis* and we will not construe the Court's statements in either case as establishing the citizenship principle that a person born in the outlying territories of the United States is a United States citizen under the Fourteenth Amendment."); *Rabang*, 35 F.3d at 1454 ("There is no indication that the Court in *Wong Kim Ark*

and *Inglis* would have used such broad language had it been faced with the facts of the case before us. *Wong Kim Ark* involved a person born in San Francisco, California.").[8]

Plaintiffs' remaining arguments fare no better. Plaintiffs claim the support of "the consistent testimony of numerous historical sources," Pls.' Opp'n & Reply at 8, but *none* of their historical evidence—much of it in fact quite equivocal, as the Supreme Court and D.C. Circuit have recognized[9]—reflects *any* post-enactment understanding of how the Citizenship Clause has actually been understood and applied. By contrast, the government has laid out over a century of precedent, by which all three branches of government interpreted the Clause just as Defendants do here. *See* MTD at 16-18. In short, whomever scholars believe the King of England would have considered his "natural liege subjects" in the year 1608, Pls.' Opp'n & Reply at 10, that says little about the Citizenship Clause, and nothing about its application to unincorporated territories belonging to the United States.

---

[8] Plaintiffs offer a partial quotation from Justice Scalia's concurrence in *Miller v. Albright*, for what they claim is a recent endorsement of their interpretation of *Wong Kim Ark*'s "statements" about citizenship. *See* Pls.' Opp'n & Reply at 17 n.2 ("[U]nder *Wong Kim Ark*, it is only those 'born outside the territory of the United States' who must be naturalized." (quoting *Miller*, 523 U.S. at 453 (Scalia, J., concurring in the judgment))). But the full quotation confirms that Justice Scalia's statement is entirely consistent with Defendants' arguments here: "Petitioner, having been born outside the territory of the United States, is an alien as far as the Constitution is concerned, and 'can only become a citizen by being naturalized, either by treaty, as in the case of the annexation of foreign territory; or by authority of Congress." *Miller*, 523 U.S. at 453 (Scalia, J., concurring in the judgment) (quoting *Wong Kim Ark*, 169 U.S. at 702-03).

[9] "Even assuming a background context grounded in principles of *jus soli*," the D.C. Circuit was "skeptical the framers plainly intended to extend birthright citizenship to distinct, significantly self-governing political territories within the United States's sphere of sovereignty," given the evidence pointing the other direction. *Tuaua*, 788 F.3d at 304-06; *see also Afroyim*, 387 U.S. at 267 ("The legislative history of the Fourteenth Amendment . . . contains many statements from which conflicting inferences can be drawn.").

V. THE COURT NEED NOT CONSIDER WHETHER BIRTHRIGHT CITIZENSHIP IS A FUNDAMENTAL RIGHT FOR PURPOSES OF THE TERRITORIAL INCORPORATION DOCTRINE.

The parties agree that the Court need only decide whether the phrase "in the United States" in the Citizenship Clause applies to the unincorporated territory of American Samoa. *See* MTD at 26-27; Pls.' Opp'n & Reply at 24; *accord Rabang*, 35 F.3d at 1453 n.17 (noting "the territorial scope of the phrase 'the United States' is a distinct inquiry from whether a constitutional provision should extend to a territory, . . . and we rely on the *Insular Cases* only to determine the meaning of the phrase 'in the United States'") (internal citation omitted); *Valmonte*, 136 F.3d at 918 n.7 ("The phrase 'the United States' is an express territorial limitation on the scope of the Citizenship Clause. Because we determine that the phrase 'the United States' did not include the Philippines during its status as a United States territory, we need not determine the application of the Citizenship Clause to the Philippines under the doctrine of territorial incorporation.").

In the alternative, should this Court go on to analyze separately whether birthright citizenship is a sufficiently fundamental right for purposes of the territorial-incorporation doctrine that it must be extended to American Samoa, it should answer that question in the negative. That is because (1) any such right is not "fundamental" in the sense that it falls within "the narrow category of rights and 'principles which are the basis of all free government,'" *Tuaua*, 788 F.3d at 308 (quoting *Dorr v. United States*, 195 U.S. 138, 147 (1904)); and (2) the extension of that right to American Samoa would be "'impracticable and anomalous'" under the circumstances, *id.* at 309 (quoting *Reid*, 354 U.S. at 74) (Harlan, J., concurring).

In response, Plaintiffs double down on two errors. First, Plaintiffs continue to overlook that labeling a right "fundamental" in one context does not automatically make it "fundamental"

for the purposes of the territorial-incorporation doctrine. *See King v. Morton*, 520 F.2d 1140, 1147 (D.C. Cir. 1975) (recognizing distinction between fundamental rights "in states rather than unincorporated territories"); *see also Commonwealth of the N. Mariana Islands v. Atalig*, 723 F.2d 682, 689 (9th Cir. 1984) (observing that "the doctrine of incorporation for purposes of applying the Bill of Rights to the states serves one end while the doctrine of territorial incorporation serves a related but distinctly different one"). Plaintiffs protest that this means that "a right can be fundamental in some parts of the United States, but not fundamental in unincorporated territories." Pls.' Opp'n & Reply at 24. But that does not "make a hash of the fundamental-rights framework," *id.*—that *is* the fundamental-rights framework, as applied by the Supreme Court in the territories.

For example, the Supreme Court has twice held that the Sixth Amendment right to a jury trial in criminal cases does not apply in unincorporated territories. *See Balzac*, 258 U.S. at 309-10 (Puerto Rico); *Dorr*, 195 U.S. at 147 (the Philippines). But that same right has been described as "fundamental" in the United States, in other contexts. *See Duncan v. Louisiana*, 391 U.S. 145, 149 (1968) ("Because we believe that trial by jury in criminal cases is fundamental to the American scheme of justice, we hold that the Fourteenth Amendment guarantees a right of jury trial in all criminal cases."); *United States v. Robertson*, 45 F.3d 1423, 1431 (10th Cir. 1995) ("A criminal defendant's right to a trial by jury is a fundamental right."). Accordingly, Plaintiffs' reliance on non-territorial cases to show that birthright citizenship is "fundamental" does them little good.

Similarly, Plaintiffs suggest that the Supreme Court's description of fundamental rights in the territorial context—that is, as "principles which are the basis of all free government," *Dorr*, 195 U.S. at 147—reflects a "crabbed understanding" that is "inconsistent with modern Supreme Court authority." Pls.' Opp'n & Reply at 26. But in support, Plaintiffs cite only the plurality

opinion in *McDonald v. City of Chicago*, a non-territorial case holding that "the right to possess a handgun in the home for the purpose of self-defense" is "fundamental" in the sense that it "applies equally to the Federal Government and the States." 561 U.S. 742, 791 (2010). The *McDonald* plurality suggests nothing that would upset settled principles of *territorial* incorporation.

Second, even setting aside the distinction between "fundamental" rights in the territorial context and the labeling of rights as "fundamental" generally, Plaintiffs continue to rely primarily on decisions striking down statutes that would have expatriated individuals *already* deemed United States citizens. Pls.' MSJ at 33-34, ECF No. 30; Pls.' Opp'n & Reply at 23-24. But those cases suggest little about birthright citizenship, given the Supreme Court's strict approach to expatriation, acknowledging the "grave practical consequences" that result from such a "punitive" act, including the potential creation of a "stateless person" who "may end up shunted from nation to nation, there being no one obligated or willing to receive him." *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 160-61 (1963); *see also Afroyim*, 387 U.S. at 257 (Congress has no "general power . . . to take away an American citizen's citizenship without his assent"). No comparable consequences result from being classified at birth as a "national," rather than a "citizen," of the United States—especially considering the streamlined naturalization process available to non-citizen nationals from American Samoa, *see* 8 U.S.C. § 1436; Compl. ¶ 77, ECF No. 2.

In response, Plaintiffs argue that birthright citizenship has an even more "fundamental" footing than the right to keep one's existing status as an American citizen, because "[*b*]*irthright* citizenship 'is expressly guaranteed by the Fourteenth Amendment.'" Pls.' Opp'n & Reply at 25-26 (quoting *Kennedy*, 372 U.S. at 159). But birthright citizenship is only constitutionally guaranteed to those born *in the United States*. And if Plaintiffs were correct that unincorporated

territories are "in the United States," then no fundamental-rights analysis would be necessary at all; they would already be entitled to birthright citizenship directly under the Citizenship Clause.

Instead, as Defendants demonstrated, MTD at 27-29, and as the D.C. Circuit concluded in *Tuaua*, birthright citizenship in unincorporated territories is not a fundamental right for purposes of the territorial-incorporation doctrine. *See* 788 F.3d at 308-12. Holding to the contrary would be inconsistent with the language of the Citizenship Clause, longstanding historical practice, and Congress's well-settled authority to determine the terms of acquisition of territories. It would also be incongruous with the *Insular Cases* framework itself, which already considers citizenship as one factor in determining the application of other constitutional provisions in unincorporated territories, *see Boumediene*, 553 U.S. at 766; *Balzac*, 258 U.S. at 309.

Finally, "the forcible imposition of citizenship against the majoritarian will" of American Samoa would itself be anomalous. *Tuaua*, 788 F.3d at 311; *see also* American Samoa's Mot. to Intervene, ECF No. 61, at 3 ("Establishing birthright citizenship by judicial fiat could have an unintended and potentially harmful impact upon American Samoa society[.]").

CONCLUSION

For the foregoing reasons, this action should be dismissed for failure to state a claim, and Plaintiffs' motion for summary judgment should be denied as moot. In the alternative, the Court should deny Plaintiffs' motion for summary judgment and grant Defendants' cross-motion.

DATE: August 3, 2018

Respectfully submitted,

CHAD A. READLER
Acting Assistant Attorney General
Civil Division

JOHN W. HUBER
United States Attorney

ANTHONY J. COPPOLINO
Deputy Director
Federal Programs Branch

/s/ Stephen M. Pezzi
STEPHEN M. PEZZI
Trial Attorney
United States Department of Justice
Civil Division, Federal Programs Branch
20 Massachusetts Avenue NW
Washington, DC 20530
Phone: (202) 305-8576
Fax: (202) 616-8470
Email: stephen.pezzi@usdoj.gov
D.C. Bar No. 995500

Attorneys for the United States of America