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

JOHN FITISEMANU; PALE TULI; ROSAVITA TULI; and SOUTHERN UTAH PACIFIC ISLANDER COALITION; Plaintiffs, v. UNITED STATES OF AMERICA; U.S. DEPARTMENT OF STATE; REX W. TILLERSON, in his official capacity as Secretary of the U.S. Department of State; and CARL C. RISCH, in his official capacity as Assistant Secretary of State for Consular Affairs; Defendants.	Case No. 1:18-cv-00036-EJF MOTION FOR SUMMARY JUDGMENT AND MEMORANDUM IN SUPPORT **HEARING REQUESTED** Magistrate Judge Evelyn J. Furse

Pursuant to Federal Rule of Civil Procedure 56, Plaintiffs John Fitisemanu, Pale Tuli, Rosavita Tuli, and Southern Utah Pacific Islander Coalition respectfully move this Court for an order granting judgment in their favor. There are no genuine disputes of material fact regarding whether 8 U.S.C. § 1408 violates the Fourteenth Amendment, whether the State Department's policy and practice of refusing to recognize Plaintiffs' birthright citizenship violates the Fourteenth Amendment, or whether the State Department's practice of placing Endorsement Code 09 on Plaintiffs' passports violates the Fourteenth Amendment and the Administrative Procedure Act. *See* Dkt. 2 ¶¶ 6, 79-98 ("Compl."). For the reasons articulated below, the text, history, and purpose of the Fourteenth Amendment, along with Supreme Court precedent, all dictate that Plaintiffs are entitled to judgment as a matter of law.

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INTRODUCTION AND RELIEF SOUGHT

Few questions are more fundamental to the Nation's constitutional design than which persons are unconditionally entitled to claim the Nation as their own and to bear the rights and responsibilities of citizens. Only United States citizens can serve as voting members of Congress or as President, and States permit only citizens to vote. The scope of U.S. citizenship lay at the heart of the Civil War that nearly tore the Nation apart. A central feature of the Republic's response to that crisis was a constitutional amendment that, in its opening sentence, cemented the well-established common-law rule of *jus soli*—the right of the soil—into the Constitution's text. The Fourteenth Amendment's Citizenship Clause provides that "[a]ll 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. The Clause's purpose was "'to put th[e] question of citizenship and the rights of citizens . . . beyond the legislative power.'" *Afroyim v. Rusk*, 387 U.S. 253, 263 (1967) (citation omitted). This lawsuit concerns whether Congress may, by fiat, subvert that constitutional safeguard of individual rights and limitation on its power by denying birthright citizenship to persons who owe allegiance to this country and are born within the sovereign limits of the United States.

Notwithstanding the Citizenship Clause's unequivocal promise, Congress has singled out persons born in American Samoa—part of the United States since at least 1900—as "nationals, *but not citizens*, of the United States." 8 U.S.C.

§ 1408(1) (emphasis added). Defendants United States, the U.S. Department of State, U.S. Secretary of State Rex W. Tillerson, and U.S. Assistant Secretary of State for Consular Affairs Carl C. Risch refuse to recognize Plaintiffs' citizenship. Instead, they expressly brand Plaintiffs—persons born in American Samoa, a U.S. Territory—as inferior, second-class "non-citizen nationals." *See* 8 U.S.C. § 1408(1); Dep't of State, *Foreign Affairs Manual* ("F.A.M.") at 7 F.A.M. § 1125.1(b), (d). Despite their birth in and allegiance to the United States, Mr. Fitisemanu, Ms. Tuli, and other persons born in American Samoa are forced by Defendants to carry in their passports an express denial of their citizenship, known as "Endorsement Code 09," which states: "THE BEARER IS A UNITED STATES NATIONAL AND NOT A UNITED STATES CITIZEN."

This inferior, subordinate status deprives Plaintiffs of their full rights, including the right to vote and to run for public office. As every new citizen learns, Justice Brandeis once observed that "'[t]he only title in our democracy superior to that of President is the title of citizen.'" U.S. Citizenship & Immigration Servs., *The Citizen's Almanac* 2 (2014), http://tinyurl.com/qfesah6 (brackets and citation omitted). If Section 1408(1) and its related executive policies are upheld, persons born in American Samoa will continue to be deprived of the latter, and forever barred from holding the former.

But the Fourteenth Amendment's text, structure, history, and purpose *all* point to one conclusion: With a handful of exceptions not relevant to this case (such as for the children of ambassadors), birthright citizenship extends to persons

born in U.S. Territories, including American Samoa. Just five years after the Citizenship Clause was ratified, the Supreme Court recognized that it applies in States and Territories alike. *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 72-73 (1873). And just two years before American Samoa ceded sovereignty to the United States, the Supreme Court held that the Clause constitutionalized the common-law rule of *jus soli*, which makes birthright citizenship extend throughout the country's territorial limits. *United States v. Wong Kim Ark*, 169 U.S. 649, 675-705 (1898). The Constitution does not empower Congress to redefine the scope of the Citizenship Clause with respect to persons born in American Samoa or other U.S. Territories any more than it does for persons born in one of the States or the District of Columbia. Rather, the Fourteenth Amendment guarantees the right to citizenship for all persons born on U.S. soil—whether in a state, a territory, or the District of Columbia—placing it beyond the reach of legislative majorities.

The badges of inferiority Defendants impose on Plaintiffs in this case inflict continuing and irreparable harm on them. Plaintiffs therefore seek summary judgment on all five claims for relief asserted in their Complaint:

First Claim for Relief: A declaratory judgment that persons born in American Samoa are citizens of the United States by virtue of the Citizenship Clause of the Fourteenth Amendment, and that 8 U.S.C. § 1408(1) is unconstitutional both on its face and as applied to Plaintiffs. Compl. ¶ 83.

Second Claim for Relief: An order enjoining Defendants from enforcing 8 U.S.C. § 1408(1), including enjoining Defendants from imprinting Endorsement

Code 09 in Plaintiffs' passports and requiring that Defendants issue new passports to Plaintiffs that do not disclaim their U.S. citizenship. Compl. ¶ 87.

Third Claim for Relief: A declaratory judgment that the State Department's policy that "the citizenship provisions of the Constitution do not apply to persons born [in American Samoa]," as reflected in 7 F.A.M. § 1125.1(b) and (d), violates the Fourteenth Amendment, both on its face and as applied to Plaintiffs through the State Department's practice of imprinting Endorsement Code 09 in passports issued to persons born in American Samoa. Compl. ¶ 91.

Fourth Claim for Relief: An order enjoining Defendants from enforcing 7 F.A.M. § 1125.1(b) and (d). Compl. ¶ 95.

Fifth Claim for Relief: An order declaring that Defendants' practice and policy of enforcing 8 U.S.C. § 1408(1) and 7 F.A.M. § 1125.1(b) and (d) through imprinting Endorsement Code 09 in the passports of persons born in American Samoa is contrary to constitutional right and is not in accordance with law, and enjoining further enforcement of that practice and policy pursuant to 5 U.S.C. § 706(2)(A) and (B). Compl. ¶ 98.

BACKGROUND

American Samoa comprises the eastern islands of an archipelago located southwest of Hawaii in the South Pacific. On April 17, 1900, the traditional leaders of the islands of Tutuila and Aunu'u voluntarily signed Deeds of Cession formally ceding sovereignty of their islands to the United States, *see* 48 U.S.C. § 1661, pursuant to the Tripartite Convention of 1899 among the United States,

Great Britain, and Germany, *see* 31 Stat. 1878 (ratified Feb. 16, 1900). Similar Deeds of Cession were signed by the traditional leaders of the Manu'a islands in 1904. *See* 48 U.S.C. § 1661. In 1925, federal law recognized the atoll of Swains Island as part of American Samoa. *See* § 1662. All persons born in American Samoa owe "permanent allegiance" to the United States. *E.g.*, 8 U.S.C. § 1101(21), (22).

Following the Deeds of Cession, the people of American Samoa believed that they had become citizens of the United States when the American flag was raised upon their territory. *See* Reuel S. Moore & Joseph R. Farrington, *The American Samoan Commission's Visit to Samoa, September-October 1930*, at 53 (1931). When they learned that the federal government did not recognize this as being true, they attempted to seek recognition of birthright citizenship through the legislative process. *See The American Samoan Commission Report* 6 (G.P.O. 1931). In 1930, community leaders in American Samoa explained to the visiting U.S. American Samoan Commission that the American Samoan people "desire[d] citizenship." Moore & Farrington, *supra*, at 53.

Since 1900, the ties between American Samoa and the rest of the United States have grown ever stronger. For instance, American Samoa has a republican form of government. *See* Revised Const. of Am. Samoa, arts. II, III, & IV. Its education system reflects U.S. educational standards, including instruction in English. *See*, *e.g.*, *Executive Order Adopts Common Core State Standards, ASDOE is Implementor*, Samoa News (Oct. 10, 2012),

https://tinyurl.com/y9l3l3yt.[1] It is home to U.S. national parks and national historic landmarks. *See*, *e.g.*, *Explore the Islands of Sacred Earth*, National Park of American Samoa, National Park Service (last updated Apr. 14, 2016), https://www.nps.gov/npsa/index.htm. In July 2009, the United States Mint released the American Samoa Quarter as part of its D.C. & U.S. Territories Quarters Program, following the popular 50 State Quarters Program. *American Samoa Quarter*, U.S. Mint, https://www.usmint.gov/coins/coin-medal-programs/dc-and-us-territories/american-samoa. And American Samoa has one of the highest enlistment rates of military service in the nation. Blue Chen-Fruean, *American Samoa Army Recruiting Station Again Ranked #1 Worldwide*, Pacific Islands Report (Jul. 17, 2017), https://tinyurl.com/y9p5fuw3. As a result, American Samoa has had a higher casualty rate in Iraq and Afghanistan on a per capita basis than any state or territory. Kirsten Scharnberg, *Where the U.S. Military is the Family Business*, Chi. Trib. (Mar. 11, 2007), https://tinyurl.com/y9z7fq48.

American Samoa has a disproportionate impact on another pillar of American life as well—football. On any given Sunday, there are dozens of American Samoans or persons of Samoan descent playing in the NFL. *See* Julian Sonny, *Inside Football Island: How Samoa Is Breeding The World's Best Football Stars*, Elite Daily (Apr. 1, 2014), https://tinyurl.com/y9838ejq; *see also American Samoa: Football Island*, 60 Minutes (CBS television broadcast Jan. 17, 2010).

[1] All websites were last visited on March 28, 2018.

Indeed, by one estimate, a Samoan male is *56 times* more likely to play in the NFL than an American who is not Samoan. *See* Leigh Steinberg, *How Can Tiny Samoa Dominate The NFL?*, Forbes (May 21, 2015), https://tinyurl.com/ybntbf8m. Hundreds of American Samoans play football at NCAA Division I universities across the country also, including universities in Utah. *See*, *e.g.*, Ted Miller, *Polynesian Pipeline A Pillar of Utah's Pac-12 Surge*, ESPN (Oct. 7, 2015), https://tinyurl.com/yckqjwnj.

Despite all of this, Congress does not recognize those born in American Samoa as U.S. citizens. Starting in 1940, federal statutes have expressly stated that those born in American Samoa "shall be recognized as nationals, but not citizens, of the United States at birth." 8 U.S.C. § 1408(1).

This citizenship disclaimer carries with it significant harms. Those born in American Samoa, including Plaintiffs, suffer the indignity of being labeled second-class by their government. Despite being taxpayers who contribute to their communities, they are unable to vote. *See* Utah Const. art. IV, § 5; Utah Code Ann. § 20A-2-101. They are prevented from running for office at the federal and state levels. U.S. Const. art. I, § 2; Utah Code Ann. § 20A-9-201(1). They are barred from serving on juries. 28 U.S.C. § 1865(b)(1); Utah Code Ann. § 78B-1-105(1). They also face various forms of employment discrimination—they cannot serve as officers in the U.S. Armed Forces, 10 U.S.C. § 532(a), district or country attorneys in Utah, Utah Code Ann § 17-18a-302, or serve as Utah peace officers, Utah Code Ann. §§ 17-30-7(1), 53-6-2039(1)(a); *see also* §§ 53-13-102 to

-105. American Samoans must carry an endorsement code in their passports that disclaims their citizenship and itself creates confusion about their relationship to the U.S., inhibiting their right to travel. *See* 7 F.A.M. § 1111(b)(1).

Plaintiffs are residents of Utah, born in American Samoa, who are injured by this discriminatory regime in the manner outlined above and in the Complaint, and in countless other ways. The following undisputed facts show that Plaintiffs are entitled to judgment as a matter of law.

STATEMENT OF UNDISPUTED FACTS

A. Defendants' Actions

1. Defendant United States exercises exclusive sovereignty over the U.S. territory of American Samoa. 48 U.S.C. § 1661(a).

2. Defendant the U.S. Department of State is an executive department of the United States. 22 U.S.C. § 2651.

3. The State Department, through its Bureau of Consular Affairs, is responsible for the issuance of United States passports. *See U.S. Passports*, State.gov, https://travel.state.gov/content/travel/en/passports.html.

4. Defendant Rex W. Tillerson is the Secretary of State. *See Rex W. Tillerson*, State.gov, https://www.state.gov/r/pa/ei/biog/267393.htm; *see also* 22 U.S.C. § 2651a(a)(1).

5. Under federal law, Secretary Tillerson or his designee is directly responsible for the execution and administration of the statutes and regulations governing the issuance of U.S. passports. *See* 22 U.S.C. § 211a.

6. Secretary Tillerson "delegates this function to the Bureau of Consular Affairs." 7 F.A.M. § 1311(e).

7. Defendant Carl C. Risch is the Assistant Secretary of State for Consular Affairs. *See Carl C. Risch*, State.gov, https://www.state.gov/r/pa/ei/biog/273407.htm; *see also* 22 U.S.C. § 2651a(c).

8. In that capacity, Assistant Secretary Risch is responsible for the State Department's Bureau of Consular Affairs and the creation of policies and procedures relating to the issuance of passports. *See* 1 F.A.M. § 251.1(d). Accordingly, he is Secretary Tillerson's designee as to the execution and administration of the statues and regulations governing the issuance of U.S. passports.

9. It is the State Department's policy that the Fourteenth Amendment's Citizenship Clause does not apply to persons born in American Samoa. *See* 7 F.A.M. § 1125.1(b) ("[T]he citizenship provisions of the Constitution do not apply to persons born there [*i.e.*, American Samoa].").

10. It is also the State Department's policy to recognize only "non-citizen U.S. nationality for the people born . . . in American Samoa." 7 F.A.M. § 1125.1(d).

11. This policy relies upon INA § 308(1), which provides that persons born in American Samoa "shall be nationals, but not citizens, of the United States at birth[.]" 8 U.S.C. § 1408(1); *see* 7 F.A.M. § 1125.1(d)-(e).

12. According to the State Department, "U.S. citizens and U.S. non-citizen nationals who have satisfactorily established their identity and U.S. citizenship/non-citizen U.S. nationality . . . are entitled to U.S. passports." 7 F.A.M. § 1313(a).

13. "[N]ationals of the United States who are not citizens," however, are entitled only to "U.S. passports with appropriate endorsements." 7 F.A.M .§ 1111(b)(1).

14. Passports issued by the State Department to those born in American Samoa of non-citizen parents must carry the disclaimer known as "Endorsement Code 09." *See* 7 F.A.M. § 1111(b)(1).

15. This endorsement states: "THE BEARER IS A UNITED STATES NATIONAL AND NOT A UNITED STATES CITIZEN." *See* Exs. A.1 & C.1.

16. A U.S. passport is the only federal document for which a member of the general public may apply in order to obtain official federal recognition of U.S. citizenship by virtue of birth in the United States. *See* U.S. Passport Application at 2, https://eforms.state.gov/Forms/ds11.pdf.

B. Harms To Plaintiffs

17. Plaintiff John Fitisemanu was born in American Samoa in 1965. *See* Ex. A.3.

18. Defendants do not recognize Mr. Fitisemanu as a citizen of the United States. To the contrary, Defendants have issued a U.S. passport to Mr. Fitisemanu that is imprinted with Endorsement Code 09. *See* Ex. A.1 at 2.

19. Plaintiff Pale Tuli was born in American Samoa in 1993. *See* Ex. B.2.

20. Defendants do not recognize Mr. Tuli as a citizen of the United States. *See* 8 U.S.C. § 1408(1).

21. Plaintiff Rosavita Tuli was born in American Samoa in 1985. *See* Ex. C.3.

22. Defendants do not recognize Ms. Tuli as a citizen of the United States. To the contrary, Defendants have issued a U.S. passport to Ms. Tuli that is imprinted with Endorsement Code 09. *See* Ex. C.1 at 2.

23. Plaintiffs Mr. Fitisemanu, Mr. Tuli, and Ms. Tuli are members of Plaintiff Southern Utah Pacific Islander Coalition (the "Coalition"). Ex. A ¶ 5; Ex. B ¶ 4; Ex. C ¶ 4.[2]

24. Plaintiffs all owe "permanent allegiance" to the United States. 8 U.S.C. § 1101(21), (22).

25. Plaintiffs are all residents of Utah. *See* Exs. A.2, B.1, & C.2.

26. As a result of Defendants' actions described in paragraphs 9 to 16, *supra*, Plaintiffs are denied various rights, benefits, and privileges belonging to U.S. citizens, such as the right to vote, *e.g.*, Utah Code Ann. § 20A-2-101; the right

[2] The Coalition derives its standing from the harms suffered by its members as described herein and in the Complaint. It is accordingly included as one of the "Plaintiffs" referred to throughout.

to run for elective federal or state office, *e.g.*, U.S. Const. art. I, § 2; Utah Code Ann. § 20A-9-201(1); and the right to serve on federal and state juries, 28 U.S.C. § 1865(b)(1); Utah Code Ann. § 78B-1-105(1).

27. As a result of Defendants' actions described in paragraphs 9 to 16, *supra*, Plaintiffs feel discriminated against and branded as inferior to their fellow citizens. *See* Ex. A.1 ¶¶ 6-7; Ex. B.1 ¶ 5; Ex. C.1 ¶ 5.

STANDARD OF REVIEW

"The court grants summary judgment when 'there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.'" *Kitchen v. Herbert*, 961 F. Supp. 2d 1181, 1192-93 (D. Utah 2013) (quoting Fed. R. Civ. P. 56(a)). "The court views the evidence in the light most favorable to the non-moving party, 'and all justifiable inferences are to be drawn in the [non-movant's] favor.'" *Am. Nat. Prop. & Cas. Co. v. Jackson*, 2010 WL 2555120, at *2 (D. Utah June 21, 2010) (unpublished) (quoting *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 255 (1986)).

ARGUMENT

Under any plausible theory of constitutional interpretation, the Citizenship Clause entitles Plaintiffs to U.S. citizenship by virtue of their birth in American Samoa. The text, structure, history, and purpose of the Fourteenth Amendment make clear that the phrase "in the United States" includes both States *and* Territories. And relevant Supreme Court precedent confirms this understanding.

Defendants' established practice of branding those born in American Samoa, including Plaintiffs, as "non-citizen nationals" is thus flatly unconstitutional. To the extent that the *Insular Cases*, a series of controversial, deeply divided Supreme Court decisions from the early 1900s, remain good law, they cannot support Defendants' practice because they are irrelevant to the question of the Citizenship Clause's scope. Moreover, American Samoans are entitled to citizenship even under the *Insular Cases*. Accordingly, 8 U.S.C. § 1408(1), as well as Defendants' policies and practices implementing that statute, are unconstitutional. As a result, those policies and practices also violate the Administrative Procedure Act.

Because there are no disputed material facts, this motion presents a pure question of law. For the reasons below, Plaintiffs are entitled to judgment as a matter of law and this Court should grant Plaintiffs' motion, enter the declaratory and injunctive relief to which Plaintiffs are entitled (and any other relief the Court deems appropriate), and afford them the equal dignity enjoyed by all other citizens of the United States.

I. The Constitution's Text, Structure, And History Show That Plaintiffs Are Citizens By Birth.

The Citizenship Clause states that "[a]ll 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 (emphasis added). As with all questions of constitutional interpretation, this court should conduct a "careful examination of the [relevant] textual, structural, and

historical evidence." *Zivotofsky v. Clinton*, 566 U.S. 189, 201 (2012). And "[i]n interpreting [the Clause]," this Court should "be guided by the principle that 'the Constitution was written to be understood'" by those who ratified it. *District of Columbia v. Heller*, 554 U.S. 570, 576 (2008) (brackets and citation omitted). That is because the Citizenship Clause's words mean today what "they were understood to [mean] when the people adopted them." *Id.* at 634-35. "[I]n all cases," the Constitution should be interpreted "in light of its text, purposes, and 'our whole experience' as a Nation." *NLRB v. Noel Canning*, 134 S. Ct. 2550, 2578 (2014) (citation omitted).

The Constitution's text, structure, and history all point in one direction: Plaintiffs are citizens of the United States by their birth in American Samoa, and Defendants' actions are therefore unconstitutional.

A. The Fourteenth Amendment's Text

The Citizenship Clause's text provides two requirements for citizenship by birth: that a person (1) be born "in the United States" and (2) at that time, be "subject to the jurisdiction thereof." U.S. Const. amend. XIV, § 1. The ordinary meaning of these words as they were understood at the ratification of the Fourteenth Amendment supports the common-sense conclusion that when each Plaintiff was born in American Samoa, *see*, *e.g.*, Ex. A.3, he or she was born in the United States and subject to its jurisdiction. Each Plaintiff is, therefore, a citizen of the United States by guarantee of the Constitution.

In the 1860s, as now, the word "in" connoted "presence in place, time, or state" and was synonymous with "within" as opposed to "without." Joseph E. Worcester, *A Dictionary of the English Language* 730 (1878); *see also* Noah Webster, *A Dictionary of the English Language* 195 (1850) ("Present; inclosed; within; as *in* a house, *in* a city"); *see also United States v. Wong Kim Ark*, 169 U.S. 649, 687 (1898) (explaining that the words "'in the United States'" are "the equivalent of the words 'within the limits . . . of the United States,' and the converse of the words 'out of the limits . . . of the United States'"). There is no conceivable reading of the Fourteenth Amendment's text that would suggest someone born in a U.S. territory was born "without" the United States.

From the early decades of the Republic the phrase "the United States" was understood to "designate the whole . . . of the American empire." *Loughborough v. Blake*, 18 U.S. (5 Wheat.) 317, 319 (1820) (Marshall, C.J.). As Chief Justice Marshall explained, "the United States" is "the name given to our great republic, which is composed of States *and territories*." *Id.* (emphasis added). "The district of Columbia, or the territory west of the Missouri, is not less within the United States, than Maryland or Pennsylvania." *Id.* When the Citizenship Clause was debated in the 1860s, "[e]ach member [of Congress] knew and properly respected the old and revered decision in the Loughborough-Blake case, which had long before defined the term 'United States.'" Ltr. from J.B. Henderson to Hon. C.E. Littlefield (June 28, 1901), *reproduced in* Charles E. Littlefield, *The Insular Cases (II: Dred Scott v. Sandford)*, 15 Harv. L. Rev. 281, 299 (1901) ("Henderson

Letter"); *see also Dred Scott v. Sandford*, 60 U.S. 393, 583 (1857) (Curtis, J., dissenting) ("Nor is any inhabitant of the District of Columbia, *or of either of the Territories*, eligible to the office of Senator or Representative in Congress, *though they may be citizens of the United States*.") (emphasis added).

At the dawn of the twentieth century, the leaders of American Samoa ceded sovereignty to the United States through Deeds of Cession. *See* 48 U.S.C. § 1661(a). Congress expressly "accepted, ratified, and confirmed" the Deeds of Cession, recognizing that American Samoa's leaders "agreed to cede absolutely and without reserve to the United States of America all rights of sovereignty of whatsoever kind in and over these islands of the Samoan group." S.J. Res. 110, 70th Cong. (1929). From the moment the United States exercised sovereignty over American Samoa, American Samoa was "in the United States" as those words were understood at the time the Fourteenth Amendment was ratified.

Similarly, there can be no dispute that American Samoa is and has been "subject" to the United States' jurisdiction—that is, American Samoa is and has been "under [the United States'] authority" from the time of Cession until today. Webster, *supra*, at 395 (defining "subject"). Those born in American Samoa owe "permanent allegiance" to the United States, 8 U.S.C. § 1101(21), (22), and are subject to the regulatory control, both civil and criminal, of Congress, *see generally United States v. Lee*, 472 F.3d 638 (9th Cir. 2006).

B. Constitutional Structure

Surrounding constitutional provisions support the conclusion that Plaintiffs are citizens within the meaning of the Citizenship Clause. While Section 1 of the Fourteenth Amendment (the Citizenship Clause) uses the term "in the United States," Section 2 (the Apportionment Clause) uses the narrower phrase "among *the several States*" to provide that Representatives are to be apportioned only among States. U.S. Const. amend. XIV, § 2 (emphasis added). Just as courts presume that Congress's use of different language in neighboring statutory provisions is "'intentiona[l] and purpose[ful],'" *Russello v. United States*, 464 U.S. 16, 23 (1983) (citation omitted), the Framers' choice of different language in these adjacent, simultaneously adopted constitutional provisions is strong evidence that the provisions' geographic scopes are not coextensive. "In the United States" must therefore mean something more extensive than "among the several states."

Given that, the only plausible interpretation of "in the United States" is that it includes U.S. Territories. Besides states, the only areas that could have been included in 1868 were Territories, the District of Columbia, and foreign possessions such as embassies. And there is simply no interpretive or structural basis for concluding that it includes the District of Columbia but not Territories, or excludes both but includes foreign possessions.

Similarly, the Thirteenth Amendment, which prohibits slavery "within the United States, or any place subject to their jurisdiction," U.S. Const. amend. XIII, supports this reading. The areas to which the Thirteenth Amendment refers that

are not "within the United States," yet are subject to U.S. jurisdiction, do *not* include Territories. As the Thirteenth Amendment's co-author explained, "[w]hatever else these words" (that is, "or any place subject to their jurisdiction") "may refer to, they surely were not intended to embrace or refer to the territories of the United States." Henderson Letter at 299. Rather, these words encompass locations beyond the Nation's sovereign limits but nevertheless under U.S. control—such as vessels outside U.S. territorial waters, embassies abroad, and military installations on foreign soil—where Congress also sought to forbid slavery. *See*, *e.g.*, *In re Chung Fat*, 96 F. 202, 203-04 (D. Wash. 1899) (slavery aboard U.S. vessel would violate Thirteenth Amendment).

C. Historical Evidence

Numerous historical sources similarly align and show that the common-sense reading of the Citizenship Clause—that it extends to the Territories—is correct. Plaintiffs are undoubtedly citizens.

First, the reason the phrase "the United States" was understood to encompass U.S. Territories was a result of the common law doctrine of *jus soli*. "[I]f a word is obviously transplanted from another legal source, whether the common law or other legislation, it brings the old soil with it." Felix Frankfurter, *Some Reflections on the Reading of Statutes*, 47 Colum. L. Rev. 527, 537 (1947). In other words, "[t]he interpretation of the constitution of the United States is necessarily influenced by the fact that its provisions are framed in the language of the English common law, and are to be read in the light of its history." *Smith v.*

Alabama, 124 U.S. 465, 478 (1888); *see also Dawson's Lessee v. Godfrey*, 8 U.S. (4 Cranch) 321, 322-24 (1808); *Minor v. Happersett*, 88 U.S. (21 Wall.) 162, 166 (1875). Because the Citizenship Clause was drafted and ratified under the common-law understanding of the term "citizen," the Clause "*must* be interpreted in the light of the common law." *Wong Kim Ark*, 169 U.S. at 654 (emphasis added); *cf. Heller*, 554 U.S. at 592 (when Constitution "codified a *pre-existing* right," courts must look to its "historical background" to discern its contours).

The common-law rule regarding birthright citizenship was straightforward: "'the party must be born within a place where the sovereign is at the time in full possession and exercise of his power, and the party must also at his birth . . . owe obedience or allegiance to . . . the sovereign.'" *Wong Kim Ark*, 169 U.S. at 659 (quoting *Inglis v. Trs. of Sailor's Snug Harbor*, 28 U.S. (3 Pet.) 99, 155 (1830) (opinion of Story, J.)). The geographic scope of birthright citizenship at common law was "birth locally within the dominions of the sovereign." *Id.*; *see also*, *e.g.*, *id.* at 655-58 (canvassing English cases); *Calvin's Case*, 7 Co. Rep. 1a, 77 Eng. Rep. 377 (1608).

Prior to American Independence, it was "universally admitted . . . that all persons within the colonies of North America, whilst subject to the crown of Great Britain, were natural born British subjects." *Inglis*, 28 U.S. (3 Pet.) at 120 (majority opinion). After the Revolution, nothing "displaced in this country the fundamental rule of citizenship by birth within its sovereignty." *Wong Kim Ark*, 169 U.S. at 658-63, 674; *accord*, *e.g.*, *United States v. Rhodes*, 27 F. Cas. 785, 789

(C.C.D. Ky. 1866); *Lynch v. Clarke*, 1 Sand. Ch. 583, 663 (N.Y. Ch. 1844); *Leake v. Gilchrist*, 13 N.C. (2 Dev.) 73, 76 (1829); *Gardner v. Ward*, 2 Mass. 244 (1805). That included U.S. Territories. As Justice Story explained, "[a] citizen of one of our territories is a citizen of the United States." *Picquet v. Swan*, 19 F. Cas. 609, 616 (C.C.D. Mass. 1828); *see also*, *e.g.*, William Rawle, *A View of the Constitution of the United States of America* 86 (2d ed. 1829) ("[E]very person born within the United States, its territories or districts, whether the parents are citizens or aliens, is a natural born citizen in the sense of the Constitution.").

Second, the Fourteenth Amendment's repudiation of the Supreme Court's notorious *Dred Scott* decision provides compelling evidence that *jus soli* governs citizenship by birth. *Dred Scott* infamously concluded, over powerful dissents, that one group of persons—African Americans—were not U.S. citizens regardless of birth in the United States because (the Court said) "they were . . . considered as a subordinate and inferior class of beings, who had been subjugated by the dominant race . . . and had no rights or privileges but such as those who held the power and the Government might choose to grant them." 60 U.S. at 404-05. After the Civil War, Congress and the States emphatically repudiated *Dred Scott* by adopting the Fourteenth Amendment, which expressly codified the pre-existing common-law rule of birthright citizenship. *See Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 73 (1873) (Citizenship Clause was adopted to "overtur[n] the *Dred Scott* decision"). The first sentence of Section 1 provides that "[a]ll persons born

or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States." U.S. Const. amend. XIV, § 1.

The Clause thus "reaffirmed in the most explicit and comprehensive terms" "the fundamental principle of citizenship by birth within the dominion." *Wong Kim Ark*, 169 U.S. at 675. By codifying in the Constitution this "ancient and fundamental rule of citizenship by birth within the territory, in the allegiance and under the protection of the country," *id.* at 693, its Framers sought "'to put th[e] question of citizenship and the rights of citizens . . . beyond the legislative power,'" *Afroyim v. Rusk*, 387 U.S. 253, 263 (1967) (quoting Cong. Globe, 39th Cong., 1st Sess. 2896 (1866) (Sen. Howard)). It is inconceivable that Congress would have left the question of citizenship in U.S. Territories to congressional whim, *especially* when Congress's power over the Territories had been a central issue in *Dred Scott*. *See* 60 U.S. at 432.

Third, contemporaneous statements from the Fourteenth Amendment's Framers provide further evidence of the common understanding that the Citizenship Clause applies to Territories. *See Wong Kim Ark*, 169 U.S. at 699 (describing such statements as "valuable as contemporaneous opinions of jurists and statesmen upon the legal meaning of the words themselves"). Senator Trumbull, for example, explained that "[t]he second section" of the Fourteenth Amendment—the Apportionment Clause—"refers to no persons except those in the States of the Union; but the first section"—the Citizenship Clause—"refers to persons everywhere, whether in the States *or in the Territories* or in the District of

Columbia." Cong. Globe, 39th Cong., 1st Sess. 2894 (emphasis added). Both supporters and opponents of the Amendment agreed. *See*, *e.g.*, *id.* at 2890 (Sen. Howard) (explaining, in introducing the Clause, that it declared what was "the law of the land already, that every person born within the limits of the United States, and subject to their jurisdiction, is by virtue of natural law and national law a citizen of the United States"); *id.* at 2893 (Sen. Johnson) (there is "no better way to give rise to citizenship than the fact of birth within the territory of the United States").

Fourth, the "'initial blueprint'" for the Amendment—Section 1 of the Civil Rights Act of 1866, *Jett v. Dallas Indep. Sch. Dist.*, 491 U.S. 701, 721 (1989) (plurality opinion) (citation omitted)—further confirms that the original understanding of "in the United States" included States *and* Territories. That Act "declared" (among other things) that "all persons born in the United States and not subject to any foreign power" are "citizens of the United States" and "shall have the same right, in every State *and Territory* in the United States, . . . to full and equal benefit of all laws and proceedings for the security of person and property." Ch. 31, § 1, 14 Stat. 27, 27 (1866) (emphasis added). "Many of the Members of the 39th Congress viewed § 1 of the Fourteenth Amendment as 'constitutionalizing' and expanding the protections of the 1866 [Civil Rights] Act," *Jett*, 491 U.S. at 721, which means that Section 1 of the Fourteenth Amendment cannot be understood to take a geographic reach narrower than "every State and Territory."

The Fourteenth Amendment's text, structure, and history all demonstrate that Plaintiffs are citizens and thus Defendants' policies and practices of branding Plaintiffs "non-citizen nationals" are plainly unconstitutional.

II. Supreme Court Precedent Confirms That Plaintiffs Are Citizens.

In the three decades after the Fourteenth Amendment's ratification, the Supreme Court repeatedly and authoritatively construed the Citizenship Clause as applying to Territories like American Samoa. As "legal . . . sources" demonstrating "the public understanding of [the Fourteenth Amendment] in the period after its enactment or ratification," these early cases are "critical tool[s] of constitutional interpretation." *Heller*, 554 U.S. at 605 (emphasis omitted). Moreover, the Supreme Court's repeated construction of the Citizenship Clause as applying in U.S. territory is binding on this Court.

A. The Supreme Court Has Construed The Citizenship Clause To Apply In The Territories Three Times.

Only five years after the Citizenship Clause was ratified, the Court concluded in the *Slaughter-House Cases* that the Fourteenth Amendment "pu[t] at rest" any notion that "[t]hose . . . who had been born and resided always in the District of Columbia *or in the Territories, though within the United States*, were not citizens." *See* 83 U.S. (16 Wall.) at 72-73 (emphasis added). The Amendment, the Court explained, "declares that persons may be citizens of the United States without regard to their citizenship of a particular State." *Id*. at 73.

The Supreme Court confirmed this understanding in *Elk v. Wilkins*, 112 U.S. 94 (1884), where it explained that "Indians born *within the territorial limits* of the United States"—there, evidently in the Iowa Territory—were "in a geographical sense born in the United States." *Id.* at 102 (emphasis added); *see* Anna Williams Shavers, *A Century of Developing Citizenship Law and the Nebraska Influence: A Centennial Essay*, 70 Neb. L. Rev. 462, 480 (1991). Those "Indians" who were "members of, and owing allegiance to, one of the Indian tribes" were not covered by the Clause for a *different* reason: As members of sovereign tribes, they did not owe allegiance to, and were not "subject to the jurisdiction" of, the United States. *Elk*, 112 U.S. at 102.

And just two years before the United States obtained sovereignty over American Samoa, the Supreme Court directly articulated and applied the principle that the Citizenship Clause incorporated the common-law *jus soli* rule. *See Wong Kim Ark*, 169 U.S. at 675, 693. Based on a painstaking survey of common-law authorities and the Fourteenth Amendment's history, the Court held that the Clause "reaffirmed" the "fundamental principle of citizenship by birth *within the dominion*"—that is, *jus soli*—using "the most explicit and comprehensive terms." *Id.* at 675 (emphasis added). The Clause, "in clear words and in manifest intent, includes the children born, *within the territory* of the United States, . . . of whatever race or color, domiciled within the United States." *Id.* at 693 (emphasis added). Applying that principle, the Court rejected the government's claim that a person born within the United States' sovereign territorial limits (there, California)

could be deprived of citizenship based on his parents' place of birth: "The Fourteenth Amendment ha[d] . . . conferred no authority upon Congress to restrict the effect of birth, declared by the Constitution to constitute a sufficient and complete right to citizenship." *Id.* at 703. The "established rule of citizenship by birth *within the dominion*" could not be "superseded or restricted, in any respect," by any "authority, legislative, executive or judicial." *Id.* at 674 (emphasis added). In the decades before *Wong Kim Ark*, the Court had held that "[t]he Territories are but political subdivisions of the *outlying dominion* of the United States." *Nat'l Bank v. County of Yankton*, 101 U.S. 129, 133 (1880) (emphasis added). Thus, while *Wong Kim Ark* addressed the citizenship status of a person born in a state, the constitutional principles the Supreme Court articulated and applied speak directly to the question presented here. Those principles, as articulated by all of the early Supreme Court cases construing the Citizenship Clause, confirm that Plaintiffs are citizens.

B. This Court Is Bound By The Supreme Court's Cases.

The Supreme Court has never called into question, let alone repudiated, its unequivocal statements in cases such as *Wong Kim Ark*, that the Territories are "in the United States" within the meaning of the Citizenship Clause. To the contrary, the Court and its members have extolled this opinion, and this particular view, on numerous occasions. *See*, *e.g.*, *Miller v. Albright*, 523 U.S. 420, 453 (1998) (Scalia, J., concurring in the judgment, joined by Thomas, J.) (under *Wong Kim Ark*, it is only those "born *outside the territory* of the United States" who must be

naturalized) (emphasis added); *id.* at 478 (Breyer, J., dissenting, joined by Souter, J., and Ginsburg, J.) (acknowledging that "since the Civil War, the transmission of American citizenship" has primarily occurred under "*jus soli*" and citing *Wong Kim Ark*); *Rogers v. Bellei*, 401 U.S. 815, 828 (1971) (observing that the "unanimous Court" has relied on *Wong Kim Ark*'s holding that "nationality" is "fixed" by "birth *within the limits* . . . of the United States") (emphasis added); *Weedin v. Chin Bow*, 274 U.S. 657, 660 (1927) (approving of "[t]he very learned and useful opinion of Mr. Justice Gray, speaking for the court in . . . *Wong Kim Ark*," and holding that it "establishes that at common law in . . . the United States the rule with respect to nationality was that of the jus soli"). This Court is bound to follow these decisions and hold that U.S. Territories are "in the United States" within the meaning of the Citizenship Clause.

Some courts have suggested that *Wong Kim Ark*'s statement was merely dicta, as the individual at issue in *Wong Kim Ark* was born in California, which was a State. *See Tuaua v. United States*, 788 F.3d 300, 305 (D.C. Cir. 2015); *Rabang v. I.N.S.*, 35 F.3d 1449, 1453-54 (9th Cir. 1994). That is incorrect. The Supreme Court's statement that its lengthy, reasoned discussion of the doctrine of *jus soli* "irresistibly" led to its "conclusion[]" that "[t]he fourteenth amendment affirms the ancient and fundamental rule of citizenship by birth within the territory," *Wong Kim Ark*, 169 U.S. at 693, cannot be dismissed as mere dicta. Rather, the Court articulated a constitutional principle—"children born within the territory of the United States" and subject to its jurisdiction are entitled to

citizenship, *id.*—and applied it to a child born in California. That principle, as the Court's thorough reasoning makes clear, applies equally to children born *throughout* the territory of the United States, including in American Samoa.

But *even if* the Court's reasoned discussion and statement of principle were dicta, "there is dicta and then there is dicta, and then there is Supreme Court dicta." *Schwab v. Crosby*, 451 F.3d 1308, 1325 (11th Cir. 2006). *Wong Kim Ark*'s ultimate conclusion is, without doubt, "thoroughly reasoned, and carefully articulated analysis by the Supreme Court describing the scope of one of its own decisions." *Id.* That sort of Supreme Court "dicta" is binding in the Tenth Circuit so long as it "squarely relates to the holding[] itself," has been "repeated" by the Supreme Court, and has not been "enfeebled by later statements" from the Court. *Bonidy v. U.S. Postal Serv.*, 790 F.3d 1121, 1125 (10th Cir. 2015). *Wong Kim Ark*'s pronouncement that the Citizenship Clause applies to all U.S. Territories is "squarely" related to the Court's holding (indeed, it *is* the Court's holding), the Court and its members have repeated this understanding on multiple occasions both before and after *Wong Kim Ark*, *see Miller*, 523 U.S. at 453 (Scalia, J., concurring in the judgment) *id.* at 478 (Breyer, J., dissenting); *Rogers*, 401 U.S. at 828; *Weedin*, 274 U.S. at 660; *Inglis*, 28 U.S. (3 Pet.) at 120; *Loughborough*, 18 U.S. (5 Wheat.) at 319, and there is no other statement contradicting the Court's views.

III. This Court Should Not Rely On The *Insular Cases* To Deny Citizenship To Plaintiffs.

Regrettably, in order to deny citizenship to those born in American Samoa, some courts have refused to apply (as dicta) Supreme Court precedent actually defining the scope of the Citizenship Clause, *see* Part II, *supra*, and instead extended questionable Supreme Court precedent that does not even purport to involve the Citizenship Clause: the so-called *Insular Cases*. *See*, *e.g.*, *Tuaua*, 788 F.3d 300. This Court should not follow that erroneous path.[3]

In the wake of the 1898 Spanish-American War, the Supreme Court addressed questions regarding Congress's authority to govern newly acquired Territories in a series of cases. The Court "held that the Constitution has

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[3] Notably, nearly all of the circuit cases considering whether the Citizenship Clause applies in U.S. Territories are inapposite. Those cases considered claims of U.S. citizenship arising from birth (of the claimant or a parent) in the Philippines that were asserted long *after* the Philippines became an independent nation in 1946. *See Nolos v. Holder*, 611 F.3d 279 (5th Cir. 2010); *Valmonte v. INS*, 136 F.3d 914 (2d Cir. 1998); *Lacap v. I.N.S.*, 138 F.3d 518 (3d Cir. 1998); *Rabang*, 35 F.3d 1449. The constitutional questions of citizenship by birth in a *current* U.S. territory like American Samoa are fundamentally different from those of birth in a *former* U.S. territory like the Philippines. *Cf. Boyd v. Nebraska*, 143 U.S. 135, 162 (1892) ("Manifestly the nationality of the inhabitants of territory acquired by conquest or cession becomes that of the government under whose dominion they pass, subject to the right of election on their part to retain their former nationality by removal, or otherwise, as may be provided."). Moreover, 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.'" *Boumediene v. Bush*, 553 U.S. 723, 757 (2008) (citation omitted). The Philippines cases thus establish no consensus relevant to the status of longstanding *current* territories like American Samoa.

independent force in these Territories, a force not contingent upon acts of legislative grace." *Boumediene*, 553 U.S. at 757. But the Court also took into account Congress's ability to govern these new Territories pursuant to its longstanding power "to dispose of" or otherwise regulate "the Territory or other Property belonging to the United States." U.S. Const., art. IV, § 3, cl. 2; *see also Rasul v. Myers*, 563 F.3d 527, 532 (D.C. Cir. 2009). Thus, these decisions examined how Congress's power under the Property Clause to create territorial governments would apply to newly acquired Territories "with wholly dissimilar traditions and institutions." *Reid v. Covert*, 354 U.S. 1, 14 (1957) (plurality opinion).

To avoid a disruptive "transformation of the prevailing legal culture" through the immediate imposition of a common-law system of governance, *Boumediene*, 553 U.S. at 757, the Supreme Court created and applied a new doctrine of "territorial incorporation" when considering challenges to territorial criminal procedure and revenue collection. *See generally*, *e.g.*, *Dorr v. United States*, 195 U.S. 138 (1904). This new doctrine distinguished between "incorporated Territories surely destined for statehood" and "unincorporated Territories" that were not, thus allowing the Supreme Court "to use its power sparingly and where it would be most needed." *Boumediene*, 553 U.S. at 757, 759. But even under this doctrine, inhabitants of unincorporated Territories were entitled to "certain fundamental personal rights declared in the Constitution." *Id.* at 758.

None of the *Insular Cases* addressed whether the U.S. Territories are "in the United States" for purposes of the Citizenship Clause, which defines its own geographic scope. And even if they were relevant to that question—and if they remain good law—they confirm that Plaintiffs are entitled to constitutional citizenship.

A. The *Insular Cases* Are Irrelevant To Citizenship In The Territories, Even If They Remain Good Law.

"'Whatever the validity of the *Insular Cases* in the particular historical context in which they were decided,'" *Boumediene*, 553 U.S. at 758 (brackets and citation omitted), they are irrelevant here. None involved the Citizenship Clause or defined "in the United States" as it is used in the Fourteenth Amendment. *Downes v. Bidwell*, 182 U.S. 144 (1901), for example, concerned the Uniformity Clause, U.S. Const. art. I, § 8, cl. 1—a provision that arose in a different historical background with a different purpose unrelated to codifying any common-law right. 182 U.S. at 249. And because the idea that "constitutional protections . . . are inoperative when they become inconvenient or when expediency dictates otherwise is a very dangerous doctrine," "neither the [Insular C]ases nor their reasoning should be given any further expansion." *Reid*, 354 U.S. at 14; *see also Torres v. Puerto Rico*, 442 U.S. 465, 475-76 (1979) (Brennan, J., concurring in judgment). A failure to heed that warning by extending the *Insular Cases*' framework to the Citizenship Clause would be especially inappropriate because that Clause expressly defines its own geographic scope. The Supreme Court has characterized

Dorr, 195 U.S. 138, as holding "that the Constitution, *except insofar as required by its own terms*, did not extend to" unincorporated Territories. *Examining Bd. of Eng'rs, Architects & Surveyors v. Flores de Otero*, 426 U.S. 572, 589 n.21 (1976) (emphasis added). The Citizenship Clause is "applicable" in American Samoa "by its own terms" because it codifies the common law doctrine of birthright citizenship to persons born anywhere "in the United States," including Territories. U.S. Const. amend. XIV, § 1.

Furthermore, the *Insular Cases*' rationale for adopting special rules for certain Territories does not extend to American Samoa. Those cases "involved the power of Congress to provide rules and regulations to govern *temporarily* territories with wholly dissimilar traditions and institutions," *Reid*, 354 U.S. at 14 (plurality opinion) (emphasis added). "The Court . . . was reluctant to risk the uncertainty and instability that could result from a rule that displaced altogether the existing legal systems in these *newly acquired* Territories." *Boumediene*, 553 U.S. at 757 (emphasis added); *see also Downes*, 182 U.S. at 287 ("[T]he administration of government and justice, according to Anglo-Saxon principles, may *for a time* be impossible; and the question at once arises whether large concessions ought not to be made *for a time*, that, ultimately, our own theories may be carried out, and the blessings of a free government under the Constitution extended to them.") (emphasis added); *id.* at 345 (Gray, J., concurring) ("There must, of necessity, be a transition period."). The reasoning of those cases has no bearing on Territories, including American Samoa, that have now been a part of the United States for

more than a century, and in which "over time the ties [with] the United States" have "strengthen[ed] in ways that are of constitutional significance." *Boumediene*, 553 U.S. at 758.

In light of those ties, and that history, applying the *Insular Cases* to the question of citizenship in American Samoa would be improper. That is because the *Insular Cases* rest in significant part on outdated, indefensible racial biases that the Supreme Court has since renounced. *See*, *e.g.*, *Downes*, 182 U.S. at 279-80, 282, 287 (opinion of Brown, J.) (applying a separate set of constitutional rules for "alien races, differing from us"); *id*. at 302, 306 (White, J., concurring in judgment) (separate rules appropriate for an "uncivilized race" of "fierce, savage, and restless people"); *Dorr*, 195 U.S. at 148 (jury-trial right does not extend to territory of "savages"); *see also* Juan R. Torruella, *The Insular Cases: A Declaration of Their Bankruptcy and My Harvard Pronouncement,* in *Reconsidering the Insular Cases* 61, 62 (Gerald L. Neuman & Tomiko Brown-Nagin eds., 2015) ("[T]he *Insular Cases* represent classic *Plessy v. Ferguson* legal doctrine and thought that should be eradicated from present-day constitutional reasoning.") (footnote omitted). The *Insular Cases* are not merely "politically incorrect," *Tuaua*, 788 F.3d at 307; they are premised on the idea that certain races or peoples are unable to participate as equals in the American experiment. This manner of reasoning has no place in our system of constitutional law, and its pernicious effects should not be extended to deny citizenship to Plaintiffs.

B. Even Under the *Insular Cases*, Plaintiffs Are Entitled To Citizenship.

In all events, the *Insular Cases* themselves support the proposition that American Samoans owe allegiance to the United States and are thus granted birthright citizenship by the Fourteenth Amendment's codification of the common-law *jus soli* rule. For example, in 1904 the Supreme Court explained that the people of Puerto Rico, "whose permanent *allegiance* is due to the United States, . . . live in the peace of the *dominion* of the United States." *Gonzales v. Williams*, 192 U.S. 1, 13 (1904) (emphases added). *Gonzales* was referring to what *Wong Kim Ark* had described just six years earlier as the touchstones for birthright citizenship. And in *De Lima v. Bidwell*, 182 U.S. 1 (1901), decided the same day as *Downes*, the Supreme Court rejected the notion that Puerto Rico was "without the sovereignty of the United States." *Id*. at 180.

Beyond that, the framework of the *Insular Cases*—if it were relevant—would provide a strong basis for including American Samoa within the Citizenship Clause's reach. As the Supreme Court has made clear, "'guaranties of certain fundamental personal rights declared in the Constitution'" apply "even in unincorporated Territories." *Boumediene*, 553 U.S. at 758 (quoting *Balzac v. Porto Rico*, 258 U.S. 298, 312 (1922)); *see also Flores de Otero*, 426 U.S. at 599 n.30. Citizenship is a "fundamental right." *Trop v. Dulles*, 356 U.S. 86, 103 (1958) (plurality opinion); *see also*, *e.g.*, *Afroyim*, 387 U.S. at 267-68 ("Citizenship is no light trifle to be jeopardized any moment Congress decides to do so under the

name of one of its general or implied grants of power."); *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 159 (1963) ("Citizenship is a most precious right. It is expressly guaranteed by the Fourteenth Amendment to the Constitution, which speaks in the most positive terms.").

Applying the Citizenship Clause to persons born in American Samoa would thus align with the Supreme Court's express extension of numerous constitutional rights to the Territories, such as the First Amendment, *Posadas de Puerto Rico Assocs. v. Tourism Co. of Puerto Rico*, 478 U.S. 328, 331 n.1 (1986), the Fourth Amendment, *Torres*, 442 U.S. at 468-71 (majority opinion), equal protection, *Flores de Otero*, 426 U.S. at 600, due process, *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 668 n.5 (1974), the Double Jeopardy Clause, *Puerto Rico v. Sanchez Valle*, 136 S. Ct. 1863 (2016), and the Suspension Clause, *Boumediene*, 553 U.S. at 771. *See also Redondo Const. Corp. v. Izquierdo*, 662 F.3d 42, 48 (1st Cir. 2011) (Contracts Clause); *Tenoco Oil Co. v. Dep't of Consumer Affairs*, 876 F.2d 1013, 1017 (1st Cir. 1989) (Takings Clause).

In fact, "the only constitutionally protected individual rights that the Supreme Court has found inapplicable to unincorporated territories are the rights to trial by jury and to a grand jury indictment," *Rabang*, 35 F.3d at 1465 (Pregerson, J., dissenting); *see Balzac*, 258 U.S. 308-11; *Dorr*, 195 U.S. at 139, common-law features that would have fit uneasily with existing civil-law systems during transitional periods in Puerto Rico and the Philippines. The Supreme Court has not curtailed any individual constitutional right in the Territories in almost a century

and has given no indication that individual rights should be scaled back—indeed, it has signaled the exact opposite. In the Court's most recent pronouncement on the *Insular Cases*, the Court made clear that "the Constitution has independent force" in the Territories, *Boumediene*, 553 U.S. at 757, that "over time" as "the ties between the United States and any of its unincorporated Territories strengthen" such strengthening has "constitutional significance," *id.* at 758, and that whatever power Congress has "to acquire, dispose of, and govern territory," Congress does "not [have] the power to decide when and where [the Constitution's] terms apply," *id.* at 765. And the Court's ultimate holding in *Boumediene* was, based on the *Insular Cases*' "practical" approach to the Territories, to *extend* the Suspension Clause to Guantanamo Bay. *Cf. King v. Andrus*, 452 F. Supp. 11 (D.D.C. 1977) (extending the right to trial by jury in criminal cases to American Samoa).

To be sure, birthright citizenship is not considered a fundamental right in *other* countries, with different histories and legal systems. *See Tuaua*, 788 F.3d at 308-09. But in determining whether particular aspects of the U.S. Constitution apply in specific places, the benchmark must be—as in other contexts where courts consider whether rights are "fundamental"—whether the rights are "fundamental from an *American* perspective." *McDonald v. City of Chicago*, 561 U.S. 742, 784 (2010) (plurality opinion) (emphasis added). After all, numerous free and democratic societies do not recognize, or construe more narrowly, various rights that are undoubtedly central to the American Constitution. Many free societies, for example, "have established state churches," "ban or severely limit handgun

ownership," or do not share this Nation's understanding of "the right against self-incrimination" and "the right to counsel." *Id.* at 781-83. The Supreme Court has never applied some watered-down, lowest-common-denominator version of the First Amendment, the Fourth Amendment, or any other constitutional right in the Territories. Narrowly construing "fundamental rights" to preclude citizenship to those born in American Samoa would jeopardize an array of core American rights currently held by residents of the Territories.

Courts that have held that the *Insular Cases* are relevant and applicable to the question of birthright citizenship have required a further inquiry: "whether the circumstances are such that recognition of the right to birthright citizenship would prove 'impracticable and anomalous.'" *Tuaua*, 788 F.3d at 309 (quoting *Reid*, 354 U.S. at 75). In *Tuaua*, the court held that birthright citizenship for American Samoans would be anomalous because elected representatives of American Samoa were against judicial resolution of the question. *Id.* at 310. The court wrote that recognizing birthright citizenship for American Samoans would constitute "an exercise of paternalism—if not overt cultural imperialism—offensive to the shared democratic traditions of the United States and modern American Samoa." *Id.* at 312. To the contrary, recognizing American Samoans' birthright citizenship would enforce an agreement that the American Samoan people entered voluntarily, and denying their right to birthright citizenship would thwart that voluntary agreement. When the people of American Samoa voluntarily joined the United States after the Citizenship Clause had been ratified and authoritatively construed by the Supreme

Court to recognize birthright citizenship, they believed that citizenship was part of the deal. *See* Reuel S. Moore & Joseph R. Farrington, *The American Samoan Commission's Visit to Samoa, September-October 1930*, 53 (1931) (when American Samoa ceded sovereignty to the United States, "the people [of American Samoa] thought they were American Citizens").

The preferences of current elected officials in American Samoa—whatever they might be—are irrelevant: The Supreme Court has repudiated the notion that elected officials "have the power to switch the Constitution on or off at will." *Boumediene*, 553 U.S. at 765. The whole "purpose" of the Citizenship Clause was to put the "'question of citizenship and the rights of citizens . . . under the civil rights bill beyond the legislative power.'" *Afroyim*, 387 U.S. at 263 (omission in original) (citation omitted). Subjecting constitutional rights such as birthright citizenship—an *individual* right—to the shifting winds of elected officials or political majorities is antithetical to the value of a written Constitution. While American Samoa's future political status remains open to Congress and the people of American Samoa to decide, the question of the application of the Citizenship Clause on sovereign U.S. soil is not. Accordingly, applying even the most restrictive reading of the *Insular Cases* leads to the same conclusion that the text, structure, history, and purpose of the Citizenship Clause, as well as pertinent Supreme Court precedent, require: Plaintiffs are citizens, and Defendants' practice of labeling them "non-citizen nationals" is unconstitutional.

IV. The State Department's Policy Of Stamping American Samoans' Passports With Citizenship Disclaimers Violates The Administrative Procedure Act.

The Administrative Procedure Act requires a reviewing court to "hold unlawful and set aside agency action" that is "contrary to constitutional right, power, privilege, or immunity." 5 U.S.C. § 706(2), (2)(B). For the reasons stated above in Parts I-III, *supra*, the State Department's policy of imprinting Endorsement Code 09 in the passports of persons born in American Samoa is "contrary to constitutional right" and therefore must be enjoined. Specifically, the Citizenship Clause of the Fourteenth Amendment entitles persons born in American Samoa to U.S. citizenship. Both the Clause's advocates and opponents in Congress understood that it accorded citizenship to all persons born anywhere in the United States—including its Territories—and subject to its jurisdiction. Because Endorsement Code 09 instructs those persons and the world that they are *not* citizens, it directly contradicts that Clause. Moreover, the statutory basis on which the State Department claims the power to enforce its Endorsement Code 09 policy—8 U.S.C. § 1408(1)—is likewise unconstitutional.

Finally, because the Constitution does not allow the State Department to withhold passports indicating citizenship from American Samoans while extending such passports to all other U.S. citizens, the Administrative Procedure Act also mandates an injunction ordering Defendants to issue new passports to Plaintiffs Mr. Fitisemanu and Ms. Tuli that do not contain Endorsement Code 09 and that do

not otherwise disclaim that they are citizens of the United States. *See* 5 U.S.C. § 706(1) (requiring the reviewing court to "compel agency action unlawfully withheld").

CONCLUSION

For the foregoing reasons, the Court should grant Plaintiffs' motion for summary judgment and order the declaratory and injunctive relief Plaintiffs seek, along with any other relief the Court deems appropriate.

Dated: March 30, 2018

Respectfully submitted.

s/ *Matthew D. McGill*

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CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing complies with the word-count limitations of DUCivR 56-1(g), and that this document contains 9,846 words, excluding portions of the memorandum exempted by DUCivR 56-1(g).

I further certify that the foregoing complies with DUCivR 10-1(b) and is written in Times New Roman, 14 point font, using Microsoft Word 2016.

Date: March 30, 2018

s/ Matthew D. McGill
Matthew D. McGill

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States District Court for the District of Utah by using the Court's CM/ECF system on March 30, 2018.

I hereby certify that on March 30, 2018, I caused a copy of the foregoing to be served upon the UNITED STATES OF AMERICA, by way of U.S. Attorney General Jefferson B. Sessions, and U.S. Attorney for the District of Utah John W. Huber; the U.S. DEPARTMENT OF STATE; REX W. TILLERSON, in his official capacity as Secretary of the U.S. Department of State; and CARL C. RISCH, in his official capacity as Assistant Secretary of State for Consular Affairs; via First Class Mail.

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