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VIA ELECTRONIC MAIL

Hon. Elizabeth B. Prelogar
Solicitor General
Office of the Solicitor General
950 Pennsylvania Avenue, NW
Washington, DC 20530

Re: *Fitisemanu, et al.* v. *United States, et al.*, No. 21-1394

Dear General Prelogar:

I write on behalf of my clients, petitioners in *Fitisemanu* v. *United States*, No. 21-1394 (U.S.), to urge the government to acquiesce in certiorari and join petitioners in asking the Supreme Court to finally and formally overturn the *Insular Cases*. There are overwhelming legal, policy, and moral grounds to do so, regardless of what position the government ultimately takes on the merits.

Petitioners John Fitisemanu, Pale Tuli, and Rosavita Tuli were born in American Samoa, a U.S. Territory since 1900. Under the plain text of the Fourteenth Amendment's Citizenship Clause, they were born "in the United States," and there can be no dispute that American Samoa is "subject to the jurisdiction" of the United States. U.S. Const. amend. XIV, § 1; *see* 48 U.S.C. §§ 1661, 1662. Accordingly, they are entitled to U.S. citizenship by virtue of their birth, and federal statutes that purport to render them "nationals, but *not* citizens, of the United States," 8 U.S.C. § 1408(1) (emphasis added), are unconstitutional. As set forth in the petition for a writ of certiorari filed in this case, the text, history, and precedent all point in an unequivocal and singular direction—our individual clients are citizens by virtue of their birth in American Samoa. *See* Pet. for Cert. 14, 20, 24.

In the proceedings below, the district court agreed with this straightforward view of the law, holding that petitioners are "citizens of the United States by virtue of the Citizenship Clause." *Fitisemanu v. United States*, 426 F. Supp. 3d 1155, 1197 (D. Utah 2019). But a divided panel of the Tenth Circuit reversed, holding that "the Insular Cases supply the correct framework for application of constitutional provisions to the unincorporated territories." *Fitisemanu v. United States*, 1 F.4th 862, 869 (10th Cir. 2021). After the Tenth Circuit denied review en banc over two recorded dissents, *Fitisemanu v. United States*, 20 F.4th 1325, 1327 (10th Cir. 2021), petitioners sought the Supreme Court's review, asking "whether the *Insular Cases* should be overruled." Pet. for Cert. i.

As you undoubtedly are aware, the Department has—at every stage of this litigation from the district court to the Tenth Circuit—relied on and *vigorously defended* the *Insular Cases* to sustain the conclusion that petitioners are not entitled to birthright citizenship under the Citizenship Clause. *E.g.*, Dist. Ct. Mot. to Dismiss 16; C.A. Br. 16-18; C.A. En. Banc Pet. Opp. 9-11. In particular, the Department has repeatedly relied on some of the very *worst* passages from the splintered separate opinions of *Downes* v. *Bidwell*, 182 U.S. 244 (1901), *see* Dist. Ct. Mot. to Dismiss 15, 17; C.A. Br. 10, 18-19; C.A. En Banc Pet. Opp. 9-11, including the radical opinion of Justice Brown—joined by no other Justice—that argued for a different set of rules appropriate for "alien races, differing from us," and openly fretted over the possibility that "savages" would become "citizens of the United States." 182 U.S. at 279-80, 282, 287; *see also id.* at 302, 306 (White, J., concurring in judgment) (similarly arguing that different rules are appropriate for an "uncivilized race" of "fierce, savage, and restless people," necessary to "curb their impetuosity, and keep them under subjection" (quotation marks omitted)).

The *Insular Cases* are universally understood as "central documents in the history of American racism," Sanford Levinson, *Why the Canon Should Be Expanded to Include the Insular Cases and the Saga of American Expansionism*, 17 Const. Comment. 241, 245 (2000), representing "classic *Plessy v. Ferguson* legal doctrine and thought that should be eradicated from present-day constitutional reasoning," 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) (footnote omitted). "No current scholar, from any methodological perspective, defends *The Insular Cases*." Gary Lawson & Robert D. Sloane, *The Constitutionality of Decolonization by Associated Statehood: Puerto Rico's Legal Status Reconsidered*, 50 B.C. L. Rev. 1123, 1146 (2009). It thus is both distressing and ironic for the Biden Administration, which has explicitly declared that "there can be no second-class citizens in the United States of America," Statement by President Joseph R. Biden, Jr. on Puerto Rico (June 7, 2021), https://www.whitehouse.gov/briefing-room/statements-releases/2021/06/07/statement-by-president-joseph-r-biden-jr-on-puerto-rico/, to invoke and defend case law that *literally created second-class citizenship* in the territories on the basis of racial animus.

Judicial criticism of the *Insular Cases* has been consistent and unsparing. As both Justices Gorsuch and Sotomayor—jurists appointed by Presidents of different political parties who have different approaches to judging—recently observed in *Vaello Madero*, the *Insular Cases* "were premised on beliefs both odious and wrong," *Vaello Madero*, slip op. at 6 n.4 (Sotomayor, J., dissenting), and "[t]he flaws in the Insular Cases are as fundamental as they are shameful," *id.* at 5 (Gorsuch, J., concurring). But because of the government's advocacy before the Tenth Circuit in this case, the divided court of appeals ignored the Supreme Court's

admonition that the "much-criticized" *Insular Cases* "should not be further extended," *Fin. Oversight & Mgmt. Bd.* v. *Aurelius Inv., LLC*, 140 S. Ct. 1649, 1665 (2020) (citing *Reid* v. *Covert*, 354 U.S. 1, 14 (1957) (plurality opinion)), and expanded and "repurposed" the cases to deny petitioners citizenship, 1 F.4th 862, 870 (10th Cir. 2021). The *Insular Cases* were wrong when they were decided and are wrong today—they "have no foundation in the Constitution" and "deserve no place in our law." *Vaello Madero*, slip op. at 1 (Gorsuch, J., concurring). It is respectfully submitted that the Department now should recognize that.

There is ample precedent for the Solicitor General to reconsider the position taken by the government in litigation before the lower courts, and to advocate for the opposite position before the Supreme Court. *See*, *e.g.*, Gov't Br. at 11, *Culbertson* v. *Berryhill*, No. 17-773 (2018); *Lucia* v. *SEC*, 138 S. Ct. 2044, 2050 (2018); *R.G. & G.R. Harris Funeral Homes, Inc.* v. *EEOC*, No. 18-107 (2018); *Smith* v. *Berryhill*, No. 17-1606 (2018); *Kucana* v. *Holder*, 558 U.S. 233 (2010); *see also* Ltr. of Edwin S. Kneedler, *Brnovich* v. *Democratic Nat'l Comm.*, No. 19-1257 (Feb. 16, 2021); Ltr. of Edwin S. Kneedler, *California* v. *Texas*, No. 19-840 (Feb. 10, 2021). Indeed, some of our government's proudest moments have been confessing gross error of this very kind, confessions that surely did not go unnoticed at the Court. *See Trump* v. *Hawaii*, 138 S. Ct. 2392, 2423 (2018) (formally overturning *Korematsu*); Dep't of Justice, *Confession of Error: The Solicitor General's Mistakes During the Japanese-American Internment Cases* (May 20, 2011), https://www.justice.gov/archives/opa/blog/confession-error-solicitor-generals-mistakes-during-japanese-american-internment-cases.

"[T]he time has come to recognize that the Insular Cases rest on a rotten foundation." *Vaello Madero*, slip op. at 10 (Gorsuch, J., concurring). I therefore urge you to acquiesce in certiorari so that the Supreme Court can overturn these terrible decisions. My colleagues and I are available at your convenience to discuss these matters with your office.

Very truly yours,

Matthew D. McGill