No. 21-1394

IN THE

Supreme Court of the United States

JOHN FITISEMANU, PALE TULI, ROSAVITA TULI, AND SOUTHERN UTAH PACIFIC ISLANDER COALITION,
Petitioners,

v.

UNITED STATES OF AMERICA, *ET AL.*,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF OF AMICUS CURIAE SAMOAN FEDERATION OF AMERICA, INC. IN SUPPORT OF PETITIONERS

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INTEREST OF AMICUS CURIAE[1]

The Samoan Federation of America, Inc. ("Samoan Federation") is a non-profit organization based in Carson, California, that seeks to advance the cultural and socio-economic well-being of the Samoan community in the greater Los Angeles area and across the United States. Founded in 1969, it is one of the oldest Samoan organizations on the American mainland. For over 35 years, the Samoan Federation has hosted an annual "Flag Day" celebration, the largest annual gathering of Samoans in the continental United States. That event commemorates the decision of American Samoans to join the United States and celebrates their cultural identity and contributions to this country.

The Samoan Federation was a plaintiff in *Tuaua v. United States*, 788 F.3d 300 (D.C. Cir. 2015), where it argued that persons born in American Samoa are constitutionally entitled to birthright citizenship. The Samoan Federation has witnessed firsthand the profound harm inflicted by the denial of rights that the Constitution affords to persons born in American Samoa, including citizenship. American Samoans suffer discrimination and powerlessness because of their imposed noncitizen status. Those who choose to relocate stateside are, by and large, unable to vote and excluded from the formal lawmaking processes that

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[1] The parties have consented to the filing of this amicus brief. No counsel for a party authored the brief in whole or in part. No party, counsel for a party, or any person other than amicus curiae and its counsel made a monetary contribution intended to fund the preparation or submission of the brief.

directly affect them. Because the ruling below invoked and indeed expanded upon the harmful precedents responsible for their denial of constitutional rights (i.e., the Insular Cases), the Samoan Federation has a strong interest in the reversal of the Tenth Circuit's ruling. Ultimately, the Samoan Federation is committed to ending the harsh reality that many American Samoans experience—the fact that, as the late High Chief Loa Pele Faletogo, former president of the Samoan Federation, aptly described, American Samoans are "citizens of nowhere."

INTRODUCTION AND SUMMARY OF ARGUMENT

The Tenth Circuit relied on the doctrine of territorial incorporation that emerged from the Insular Cases to hold that the Constitution's Citizenship Clause does not extend to persons born in American Samoa. As typically described, that doctrine draws a distinction between territories destined for statehood (incorporated), to which the Constitution applies in full, and those that are not (unincorporated), to which it only applies in part. *See Boumediene v. Bush*, 553 U.S. 723, 757 (2008). For years, this Court has "come to admit discomfort" with the doctrine, which has no basis in the Constitution's text and instead finds support in racial stereotypes and anachronistic imperialist ambitions. *United States v. Vaello Madero*, 142 S. Ct. 1539, 1555 (2022) (Gorsuch, J., concurring) (citing *Fin. Oversight & Mgmt. Bd. for Puerto Rico v. Aurelius Inv., LLC*, 140 S. Ct. 1649, 1665 (2020); *Reid v. Covert*, 354 U.S. 1, 14 (1957) (plurality opinion)); *see also Vaello Madero*, 142 S. Ct. at 1560 n.4 (Sotomayor, J., dissenting); *Torres v. Puerto Rico*, 442 U.S. 465,

475-76 (1979) (Brennan, J., concurring in the judgment). As recently as two years ago, this Court unanimously agreed with Justice Black's plurality opinion in *Reid* that "the Insular Cases should not be further extended … whatever their continued validity." *Aurelius*, 140 S. Ct. at 1665; *accord Reid*, 354 U.S. at 14 ("[The] concept that the Bill of Rights and other constitutional protections against arbitrary government are inoperative when they become inconvenient or when expediency dictates otherwise is a very dangerous doctrine and if allowed to flourish, would destroy the benefit of a written Constitution and undermine the basis of our government.").

Despite the discomfort, this Court has not resolved the doctrine's continued vitality, as lower courts have been reticent to conclude that parts of the Constitution do not apply in the territories. That is until this case. Because the Tenth Circuit has attempted to disinter and repurpose that shameful line of precedent to deny something as fundamental as citizenship to persons born in a U.S. territory, this case squarely presents the much-awaited opportunity to cast aside the Insular Cases and place them in the dustbin of history, where they belong.

I. An integral aspect of American Samoa's history has been the pursuit of U.S. citizenship.

A. In 1900, the people of American Samoa transferred their sovereignty and pledged allegiance to the United States, reasonably expecting that U.S. sovereignty would bring them U.S. citizenship. That expectation was consistent with this Court's settled precedents establishing that the Citizenship Clause

of the Fourteenth Amendment extends to persons born under U.S. sovereignty.

B. After becoming a part of the United States, American Samoans began a decades-long campaign for citizenship. Through public demonstrations, resolutions by their territorial legislature, and petitions to the U.S. President, American Samoans repeatedly asked the U.S. government to grant them the citizenship that the Constitution already afforded them. Detractors in the U.S. government wielded established tactics grounded in racism and fearmongering to successfully block proposed legislation. In response, Congress imposed upon American Samoans—contrary to their expectations and wishes—the status of "noncitizen U.S. national," a unique and confusing label that purports to define and exclude American Samoans to this day.

II. This Court should grant certiorari in this case to overturn a ruling that relies on, and indeed extends, the Insular Cases.

A. Although the Tenth Circuit tried to sidestep the racist rationale of the Insular Cases, it found the flexibility of their legal framework enticing. The court of appeals sought to repurpose the doctrine of territorial incorporation to supposedly safeguard the preferences and traditional practices of American Samoa from the U.S. Constitution. It did not explain, however, how denying citizenship would accomplish that purported goal. In any event, the repurposed version of the Insular Cases' doctrine is as unconstitutional and dangerous as its original version.

B. The lack of consensus on the citizenship question in contemporary American Samoa and the opposition of the current territorial government cannot justify denying American Samoans a right that the Constitution plainly affords them. The views of current officials are immaterial to the meaning of the Citizenship Clause. Even if this kind of poll were germane, there is no evidence in the record suggesting that the majority of American Samoans oppose citizenship. And those who oppose citizenship rely on factually and legally unfounded speculation about what the Citizenship Clause's application might do to American Samoan mores and customs.

III. This Court should also grant certiorari to bring to a halt the deep and ongoing harm that American Samoans experience as a result of their noncitizen status. That status interferes with American Samoans' individual right to self-determination, holding them back from fully realizing their hopes and aspirations. For example, those who move to the states are, by and large, unable to vote, run for office, and serve on juries. In certain jurisdictions, they cannot purchase or carry firearms. And despite having among the highest military recruitment rates in the Nation, American Samoans are barred from becoming commissioned officers in the U.S. Armed Forces. In short, American Samoans are reminded every day that they are neither "aliens" nor "citizens." They are in an offensive constitutional limbo—or as Chief Loa noted before his passing, "We're hanging in the middle," being "citizens of nowhere." Aaron Mendelson, *Why Can't American Samoans Be Citizens? Lawsuit Says They Should Be,* U.S. & World (Mar. 28, 2018), https://tinyurl.com/ycyt68v5.

ARGUMENT

I. The Pursuit Of U.S. Citizenship Is An Integral Part Of American Samoa's History.

A. American Samoans transferred their sovereignty to the United States, reasonably expecting they would become U.S. citizens.

Before 1900, the United States and European countries had frequent interactions with the South Pacific archipelago that came to be known as American Samoa. *See, e.g.*, Staff of S. Comm. on Interior & Insular Affairs, 86th Cong., *Staff Study on American Samoa: Information on the Government, Economy, Public Health, and Education of American (Eastern) Samoa* 4 (Comm. Print 1960) [C.A. Exhibit 1 at 9-10][2] (describing interactions based on exploration and commerce); Treaty of Friendship and Commerce, U.S.-Am. Samoa, Jan. 17, 1878, 20 Stat. 704 (permitting U.S. Navy to establish coaling station in the island of Tutuila). The people of these islands were sovereign and independent, organized around a system of hereditary chiefs that governed the islands. *See* Pet. App. 7a. That changed in the early part of the twentieth century, however, not least because of U.S. pressure.

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[2] "C.A. Exhibit" refers to the exhibits attached to the Brief of Amicus Curiae Samoan Federation of America filed on May 12, 2020, before the Tenth Circuit. "C.A. Supp. App." refers to the appendix filed on April 14, 2020, by Appellees in the Tenth Circuit (now, Petitioners).

After the United States convinced Germany and Great Britain to renounce their claims over the eastern Samoan islands, *see* Convention to Adjust Amicably the Questions in Respect to the Samoan Group of Islands, U.S.-Ger.-Gr. Brit., Dec. 2, 1899, 31 Stat. 1878, the U.S. government turned its focus to assuming control of the territory. It did so through "a sadly familiar pattern" that our Nation's Indian Tribes know all too well. *McGirt v. Oklahoma*, 140 S. Ct. 2452, 2482 (2020). In exchange for control of foreign lands and resources, U.S. officials would dangle the benefits and privileges of citizenship alongside promises of self-government that in effect served to perpetuate colonial rule. *See* Sam Erman, *Status Manipulation and Spectral Sovereigns*, 53 Colum. Hum. Rts. L. Rev. 813, 828-52 (2022) (discussing the continued practice of "status manipulation" and promises of "spectral native sovereignty" in American Samoa).

Faced with the ever-looming presence of the U.S. Navy and promises of prosperity and protection, between 1900 and 1904, Samoan chiefs signed treaties granting the U.S. government "full power and authority" to govern the territory. Cession of Tutuila and Aunu'u Islands at 1-2, Apr. 17, 1900 (codified at 48 U.S.C. § 1661) [C.A. Exhibit 2 at 15-16]; Cession of Manu'a Islands, July 14, 1904 (codified at 48 U.S.C. § 1661) [C.A. Exhibit 3 at 26]. Under these arrangements, American Samoans pledged to "obey and owe allegiance to the Government of the United States of America." Cession of Tutuila and Aunu'u, *supra*, at 3 [C.A. Exhibit 2 at 17].

American Samoans believed that, by transferring their sovereignty and pledging allegiance to the United States, they would be recognized as U.S. citizens. *See* Reuel S. Moore & Joseph R. Farrington, *The American Samoan Commission's Visit to Samoa* 45 (G.P.O. 1931) [C.A. Supp. App. 23] ("[T]he Samoans understood first that annexation by the United States meant the people would receive American citizenship."); *id.* at 53 [C.A. Supp. App. 25] ("After the American flag was raised in 1900 the people thought they were American citizens."); *American Samoa: Hearings Before the Comm'n Appointed by the President of the United States,* 70th Cong. 217 (G.P.O. 1931) [C.A. Supp. App. 41] ("[W]e understood in that annexation that we automatically became American citizens.").

The expectation that U.S. citizenship would follow the U.S. flag was eminently reasonable. After all, the first round of the infamous Insular Cases that arguably eroded that understanding would not be decided until May 1901—a little over a year after the Samoan chiefs ceded control to the United States of the primary island group. *See, e.g.*, *Downes v. Bidwell*, 182 U.S. 244 (1901); *DeLima v. Bidwell*, 182 U.S. 1 (1901). Even then, in 1904, this Court left open the question of whether persons born in unincorporated territories are entitled to birthright U.S. citizenship. *See Gonzales v. Williams*, 192 U.S. 1, 12 (1904).

But the Constitution's Citizenship Clause, properly understood, confirms the status of American Samoans as U.S. citizens. *See United States v. Wong Kim Ark*, 169 U.S. 649, 693 (1898) (holding that clause reaffirmed "the ancient and fundamental rule

of citizenship by birth within the territory, in the allegiance and under the protection of the country"); *Boyd v. Nebraska*, 143 U.S. 135, 162 (1892) ("Manifestly the nationality of the inhabitants of territory acquired by . . . cession becomes that of the government under whose dominion they pass."); *accord* Michael D. Ramsey, *Originalism and Birthright Citizenship*, 109 Geo. L.J. 405, 424 (2020) (explaining that clause codified the common-law rule that birth within U.S. sovereignty brought U.S. citizenship).

B. Racism and fearmongering in the U.S. government drove the early opposition to citizenship.

The U.S. government nonetheless declined to acknowledge American Samoans' citizenship. In response, in 1920, American Samoans created a new political movement, the *Mau* (meaning "public opposition"), that organized peaceful demonstrations to press the U.S. government to "make [them] real American citizens" and even petitioned President Coolidge for U.S. citizenship. David A. Chappell, *The Forgotten* Mau: *Anti-Navy Protest in American Samoa, 1920-1935*, 69 Pac. Hist. Rev. 217, 233, 249, 254-55 (2000). That group—not to be confused with the separate *Mau* movement in Western Samoa that contributed to the formation of the independent country of Samoa—led to Congress's creation of the American Samoa Commission (the "Commission"). *Id.* at 251-52. After conducting extensive field hearings and learning about the desire of American Samoans (including prominent chiefs) to be both proud Samoans and U.S. citizens, the Commission unanimously recommended to Congress that American Samoans be granted U.S.

citizenship. *See id.* at 252-55; S. Doc. No. 71-249 (G.P.O. 1931) [C.A. Exhibit 8 at 159].

But there were opponents in the U.S. government, and their motivations were not exactly subtle. For example, a former Naval Governor to American Samoa stated, "The people are primitive …. They become savage … when deeply aroused …. They are like grown-up, intelligent children who need kindly guidance …." *American Samoa*: *Hearings Before the Comm'n Appointed by the President, supra, at* 334 (statement of former Gov. H.F. Bryan) [C.A. Supp. App. 66]. He also said, "[t]he people of American Samoa are, at present, not at all prepared to become citizens of the United States; and have given the subject little or no thought." *Id.* at 335 [C.A. Supp. App. at 67].

Unfortunately, that statement found agreement among other U.S. government officials. A congressman, for example, stated:

> What I am opposed to is taking American citizenship and flinging it … out to a group of people absolutely unqualified to receive it …. [T]hese poor unsophisticated people …. Let us not load upon them the responsibility of American citizenship. They cannot take it …. I say to you that this is a right that we ought to circumscribe with safeguards and is something that should never be given except as a privilege, and let us not give it to these people until they are able to appreciate the privilege.

76 Cong. Rec. 4926, 4932, 4937 (1933) (statement of Rep. Jenkins) [C.A. Exhibit 11 at 202, 207].

These sentiments effectively stymied the fight for citizenship. Although federal legislation that was proposed in 1931 and would have granted citizenship to American Samoans passed the U.S. Senate, the bill was defeated in the House. *Id.* at 4937. Similar bills were proposed in 1934, 1936, and 1937, and so on—all of them failing, after facing opposition in the House and from the U.S. Navy. *See* 78 Cong. Rec. 4895, 4895 (1934) [C.A. Exhibit 12 at 209]; *accord* Charles R. Venator-Santiago, *Citizens and Nationals: A Note on the Federal Citizenship Legislation for the United States Pacific Island Territories, 1898 to the Present*, 10 Charleston L. Rev. 251, 271-72 (2016).

In 1940, Congress imposed upon American Samoans the cryptic status of "nationals, but not citizens, of the United States." Nationality Act, Pub. L. No. 76-853, 54 Stat. 1137, 1139 (1940) (codified at 8 U.S.C. § 1408(1)). That category is one that the political branches created out of whole cloth in light of this Court's reticence in *Gonzales*, *supra* at 8, to decide whether persons born in unincorporated territories are entitled to birthright citizenship. *See* Christina Duffy Burnett [Ponsa-Kraus], They Say I Am Not an American …: *The Noncitizen National and the Law of American Empire,* 48 Va. J. Int'l L. 659, 668-82 (2008) (explaining that this category did not exist in 1900; either one was a "citizen" or an "alien"); *accord* Sam Erman, *Almost Citizens: Puerto Rico, the U.S. Constitution, and Empire* 60-62, 87, 102, 114-15 (2018).

The efforts of American Samoans to gain citizenship remained unabated for decades. In 1945, the American Samoan legislature, or *Fono*, passed a resolution demanding recognition as U.S. citizens. *See* Harold L. Ickes, Opinion*, Navy Withholds Samoan and Guam Petitions from Congress*, Honolulu Star-Bull., Apr. 16, 1947, at 9 [C.A. Exhibit 13 at 217]. U.S. Naval officers arguably prevented the resolution from getting to Congress, and it was only after a member of Congress and the Secretary of the Interior visited the territory two years later that they learned about the *Fono*'s resolution. *Id.* A similar resolution was adopted in 1960, which was presented to a congressional subcommittee that visited the island, again to no avail. *See* Study Mission to E. [Am.] Samoa, S. Comm. on Interior & Insular Affairs, 86th Cong., Rep. of Sens. Oren E. Long, of Haw., and Ernest Gruening, of Alaska VII (Comm. Print 1961) [C.A. Exhibit 15 at 229].

To this day, dozens of bills have been introduced to grant persons born in American Samoa a citizenship right that the Constitution already affords them. *See* Venator-Santiago, *supra*, at 271-72 & n.124 (collecting 31 bills introduced in Congress between 1931 and 2013); *see also* H.R. 3482, 116th Cong. (2019); H.R. 1208, 116th Cong. (2019) (providing mechanisms for American Samoans to choose citizenship and to streamline naturalization procedures); H.R. 5026, 115th Cong. (2017) (same). Yet Congress has not acted, necessitating judicial intervention.

II. This Court Should Grant Certiorari To Overturn A Decision That Invokes And Expands On The Insular Cases.

A. The Tenth Circuit's repurposing of the doctrine of territorial incorporation is both unconstitutional and dangerous.

The Tenth Circuit's reliance on the territorial incorporation doctrine of the Insular Cases to deny American Samoans their constitutional right to U.S. citizenship warrants certiorari. That doctrine has no basis in the Constitution's text or original meaning. The Constitution's Territory Clause simply authorizes Congress "to dispose of and make all needful Rules and Regulations respecting the [United States] Territory." U.S. Const. art. IV, § 3, cl. 2. It does not distinguish among territories based on "incorporated" or "unincorporated" status. Nor does it empower Congress to decide whether to extend or withhold constitutional rights. Because Congress "'has no existence except by virtue of the Constitution,' … it may not ignore that charter in the Territories any more than it may in the States." *Vaello Madero*, 142 S. Ct. at 1555 (Gorsuch, J., concurring) (quoting *Downes*, 182 U.S. at 382 (Harlan, J., dissenting)).

The doctrine upon which the Tenth Circuit relied is "transparently an invention designed to facilitate the felt needs of a particular moment in American history." Gary Lawson & Guy Seidman, *The Constitution of Empire: Territorial Expansion & American Legal History* 197 (2004). The "felt needs" of that moment revolved around the expansion of the American Empire, as well as how to govern distant possessions

inhabited by different races that were said to lack experience in Anglo-American traditions. *See* José A. Cabranes, *Citizenship and the American Empire: Notes on the Legislative History of the United States Citizenship of Puerto Ricans*, 127 U. Pa. L. Rev. 391, 392-395, 436-442 (1978) (identifying debate in the United States on governance of new territories, and the pervasive racism infecting the Insular Cases); *see also* Juan R. Torruella, *The* Insular Cases*: The Establishment of a Regime of Political Apartheid*, 29 U. Pa. J. Int'l L. 283, 286, 294 (2007) (describing socio-political context and racist views that led to the Insular Cases).

The Insular Cases sought to facilitate those "felt needs" by purporting to help Congress avoid potential practical difficulties that might come with governing new colonies. *See Downes*, 182 U.S. at 286 ("A false step at this time might be fatal to the development of … the American empire."); *see also Boumediene*, 553 U.S. at 759 (discussing basis of the territorial incorporation doctrine as the putative need to avoid "the inherent practical difficulties of enforcing all constitutional provisions 'always and everywhere'" (quoting *Balzac v. Porto Rico*, 258 U.S. 298, 312 (1922)). Among these so-called "practical difficulties" was that, in the eyes of the same Court that decided *Plessy v. Ferguson*, 163 U.S. 537 (1896), these territories were inhabited by "alien races, differing from us in religion, customs, laws, methods of taxation, and modes of thought." *Downes*, 182 U.S. at 287; *see also id.* at 306 (White, J., concurring) (stating that Congress has a "right" to acquire and govern "an unknown island, peopled with an uncivilized race … for commercial and strategic reasons," which it "could not …

practically exercise[ ] if the result would be to endow" constitutional protections "on those absolutely unfit to receive [them]").

The Tenth Circuit acknowledged the racist rhetoric and "disreputable" reasoning of the Insular Cases. Pet. App. 16a. It thought, however, that the territorial incorporation doctrine could "be repurposed to preserve the dignity and autonomy of the peoples of America's overseas territories." Pet. App. 17a. In its view, the "Insular Cases' framework" is sufficiently "flexib[le]" to "permit[] courts to defer to the preferences of indigenous peoples, so that they may chart their own course" and "preserve [their] traditional cultural practices" Pet. App. 17a-18a. The Tenth Circuit's attempted repurposing of that framework is as unconstitutional as it is dangerous. Indeed, "[f]elt needs generally make bad law, and [like] the *Insular Cases*," the decision below is "no exception." Lawson & Seidman, *supra*, at 197.

First, applying the territorial incorporation doctrine in any form perpetuates the ill-conceived idea that the courts can, and should, determine which constitutional provisions are not so "fundamental" that they require an act of Congress to be extended to territories like American Samoa. *Cf. Dorr v. United States*, 195 U.S. 138, 148-49 (1904) (concluding that only fundamental constitutional provisions apply to unincorporated territories). This is a made-up inquiry. Nothing in the Constitution "marks out certain categories of rights or powers as more or less 'fundamental' than others" in this context. Lawson & Seidman, *supra*, at 197. How can a court hold on any principled basis that the Due Process Clause applies

in unincorporated territories, *Examining Board of Engineers, Architects & Surveyors v. Flores de Otero*, 426 U.S. 572, 600 (1976), but not the Citizenship Clause, Pet. App. 5a? Or, how can a court coherently conclude that criminal defendants in unincorporated territories are protected from successive prosecutions for the same conduct under the Double Jeopardy Clause, *Puerto Rico v. Sanchez Valle*, 579 U.S. 59, 77 (2016), but are not entitled to the guarantee of jury trial in criminal cases, *Balzac*, 258 U.S. at 310-12? Those kinds of questions have no principled answers under any version of the territorial incorporation doctrine.

Second, the Tenth Circuit sought to repurpose the Insular Cases' framework supposedly to protect American Samoa's "traditional cultural practices" from the "individual rights enshrined in the Constitution." Pet. App. 17a-18a. It did not explain, however, how denying citizenship to American Samoans would guard those "cultural practices." By repurposing the doctrine of territorial incorporation under the guise of (supposedly) benign colonialism, the Tenth Circuit failed to appreciate a critical fact: There is no way to repurpose that doctrine in a way that saves it from its unconstitutional and insupportable foundation. Christina D. Ponsa-Kraus, *The Insular Cases Run Amok*, 131 Yale L.J. (forthcoming 2022) (manuscript at 8) ("[A]rguing that we need to repurpose the *Insular Cases* to accommodate culture is like arguing that we need to repurpose *Plessy v. Ferguson* to accommodate benign racial classifications."). Repurposed or not, that doctrine "deserve[s] no place in our law." *Vaello Madero*, 142 S. Ct. at 1552 (Gorsuch, J., concurring). Ultimately, questions about the

Constitution's applicability must turn on the document's terms and structure, and relevant historical practice, not invented inquiries that "merely drape the worst of the[] [Insular Cases'] logic in new garb." *id.* at 1557 n.4 (Gorsuch, J., concurring) (stating that "the Constitution's restraints on federal power do not turn on a court's unschooled assessment of a Territory's local customs"); *see also id.* at 1560 n.4 (Sotomayor, J., dissenting) (agreeing that "the Constitution's application should never depend on … the misguided framework of the Insular Cases" (citation omitted)).

B. The current lack of consensus on the citizenship question is no excuse to deny persons born in American Samoa their constitutional rights.

The Tenth Circuit relied in part on the D.C. Circuit's framework in *Tuaua*, Pet. App. 34a-35a, a case in which, as noted above (at 1), the Samoan Federation was a plaintiff. Like *Tuaua*, the lead opinion below ventured to answer the question of "whether the circumstances are such that recognition of the right to birthright citizenship would prove impracticable and anomalous, as applied to contemporary American Samoa." Pet. App. 35a (quoting *Tuaua*, 788 F.3d at 309). That question was wrong in *Tuaua* and is wrong here—in both its framing and the answer that resulted from it.

1. The extraterritoriality analysis presumes—wrongly and illogically—that some U.S. territories are not a part of the United States. But the territories are not foreign entities; the United States includes its

territories. *See Loughborough v. Blake*, 18 U.S. (5 Wheat.) 317, 319 (1820) (Marshall, C.J.); Ramsey, *supra*, at 426. This Court said so as recently as last month in the very first sentence of its *Vaello Madero* opinion: "The United States *includes* five Territories." 142 S. Ct. at 1541 (emphasis added). The only argument to the contrary rests on the atextual and ahistorical distinction among territories that emerged from the Insular Cases. *Downes*, 182 U.S. at 287 (explaining that unincorporated territories "belong[] to the United States, but [are] not a part of the United States"); *see id.* at 341 (White, J., concurring) (describing unincorporated territories as "foreign to the United States in a domestic sense").

The focus on the "circumstances" of "contemporary American Samoa," Pet. App. 35a, also marks a stark departure from how the Constitution is normally interpreted. Such a focus begs the question: Would the Tenth Circuit's holding be any different if the court had been presented with the question a few decades earlier when, as discussed above, American Samoan support for citizenship was overwhelming? And how, if at all, would its holding change in the future? American Samoans are not, after all, a monolithic entity with unchangeable preferences. Its own history demonstrates otherwise. In no other context would the Constitution permit the current views of elected officials to determine whether the people they represent—and, as here, many they do not—can be deprived of the rights and protections that the document by its plain terms affords them. Constitutional interpretation should be applied no differently for American Samoa and the citizenship question.

A constitutional analysis based on the perceived circumstances of a particular historical moment is antithetical to the very document that is being interpreted. The Constitution does not grant anyone—not even Congress or a territory's elected representatives—"the power to decide when and where its terms apply." *Boumediene*, 553 U.S. at 765. As this Court has made clear, there is no such thing as "the power to switch the Constitution on or off at will." *Id.*

2. The Tenth Circuit's conclusion is also wrong. Judge Lucero explained, for example, that "[n]o circumstance is more persuasive to [him] than the preference against citizenship … by the American Samoan people." Pet. App. 35a. That sentiment misses the mark in all respects.

For starters, as Judge Bacharach noted in his dissent, "the record says nothing about the preference of a majority in American Samoa." Pet. App. 86a. Nothing in the record tells us the percentage of persons born in American Samoa that currently support or oppose birthright citizenship. Based on the available evidence, there is no way to conclude that most American Samoans oppose birthright citizenship. If anything, the American Samoan government's views have varied over time. Support for citizenship went from being overwhelming, *see supra* § I, to more contested, *see Final Report, The Future Political Status Study Commission of American Samoa,* 64-65 (Jan. 2, 2007) [C.A. Exhibit 17 at 276-77] (reporting different views on citizenship among American Samoans).

Admittedly, the current American Samoan government intervened in this case to support the denial

of U.S. citizenship to persons born in the territory. But it does not follow from that intervention that most American Samoans share that view, even if that were a relevant consideration. American Samoans residing in the territory may cast their ballots to choose candidates for a variety of reasons affecting their day-to-day lives—very much like the residents of the states do when they vote for their own representatives. At best, they represent the views of a portion of the territory's shrinking population—since many American Samoans choose to relocate stateside.[3] Indeed, it has been the case, for decades now, that more American Samoans reside in the states than in the territory itself. *Id.* [C.A. Exhibit 17 at 269]. And so, the elected officials that have intervened in this suit do not necessarily represent the interests of the majority of the people affected by the denial of citizenship. There is no reason to take the position of the current American Samoan government as reflecting how most American Samoans view citizenship.

What is more, the concerns articulated by American Samoan officials about birthright citizenship reflect a misunderstanding of the constitutional implications of recognizing the right to citizenship. One stated concern is the possible imposition of federal taxation on the residents of American Samoa if they were to become citizens. *Id.* [C.A. Exhibit 17 at 276]. But as this Court is aware, taxation is not tied to citizenship or nationality. *Cf. Vaello Madero*, 142

[3] According to the 2020 U.S. Census, American Samoa's population was 49,710—representing a 10.5% decrease from the previous census. U.S. Census Bureau, tbl.1, Population of American Samoa: 2010 and 2020, https://tinyurl.com/4mr7msfe.

S. Ct. at 1541 ("Congress has not required residents of Puerto Rico to pay most federal income, gift, estate, and excise taxes.").

Another concern that has been put forward is the potential loss of collective property rights, and the likelihood that "existing American Samoan traditions [would be subjected] to heightened—and potentially fatal—constitutional scrutiny." C.A. Intervenor Defendant-Appellants' Opening Br. 18. But citizenship does not subject American Samoan traditions to scrutiny and is irrelevant to questions about the constitutionality of certain practices and traditions. *See* Erman, *Status Manipulation*, at 845 ("Territorial nonincorporation doctrine distributes rights without regard to citizenship status ...."). Constitutional guarantees that may speak to the constitutionality of these practices and traditions—perhaps, for example, the rights to equal protection and due process—already apply in American Samoa. Pet. App. 84a (Bacharach, J., dissenting) (collecting cases); *cf. Craddick v. Territorial Registrar*, 1 Am. Samoa 2d 10, 12-14 (1980) (rejecting challenge to land-alienation law and upholding its constitutionality on equal-protection grounds).

A final concern is that extending U.S. citizenship would prevent American Samoans from exercising their right to collective self-determination and choosing the territory's future political status. Not so. Being recognized as U.S. citizens would not affect the ability of American Samoans to decide for themselves what kind of relationship they would like to have with the United States.

As to the current status, the territory's then-Attorney General (and current Lt. Governor) told the United Nations that American Samoa's "government structure exists largely at the pleasure of the U.S. Congress," which "limits [their] ability to self-govern and exposes [them] to the vagaries of decisions made in Washington D.C. *without [their] input*." United Nations, Statement by Mr. Talauega Eleasalo Va'alele Ale at 5 (May 9-11, 2018), https://tinyurl.com/2p8mkh3h (emphasis added) [hereinafter 2018 U.N. Statement]; *accord* United Nations, Statement by Mr. Talauega Eleasalo Va'alele Ale (May 19-21, 2015), https://tinyurl.com/4jfew4c3. That is true. But that unfortunate reality is separate from the question of whether persons born in the territories are entitled to birthright citizenship. It is American Samoa's territorial status that perpetuates the colonial structure that territorial officials have rightly protested. And depriving American Samoans stateside from voting for those who represent them in Congress makes things worse by further isolating American Samoans from having any input on the decisions that affect them.

III. This Court Should Grant Certiorari Because Denial Of Citizenship Deprives American Samoans Of Real And Concrete Rights And Benefits.

"American Samoans are proud and loyal Americans." 2018 U.N. Statement, *supra*, at 5. Despite their loyalty, their noncitizen status concretely harms American Samoans in myriad and fundamental ways. As the Petition explains (at 9), although American Samoans who move to the states—such as Utah, in the

case of the individual Petitioners—pay taxes, they cannot: (1) vote in federal or state elections (or even in most local ones); (2) run for office; or (3) serve on juries. In some jurisdictions, they are not allowed to purchase or carry firearms. *See* S.F. Police Code art. 13, § 841 ("Any person carrying a firearm or any other deadly or dangerous weapon … must … (2) Be a citizen of the United States ….").

Despite being labeled second-class noncitizens and treated as such, American Samoans have demonstrated their indelible commitment to the defense of this Nation's liberty and security. Like their citizen counterparts, they "have been obliged to drop their own affairs to take up the burdens of the nation." *Boone v. Lightner*, 319 U.S. 561, 575 (1943). All too often they have sacrificed their well-being—and sometimes their lives—in defense of the United States, honoring with solemn irony the motto of their U.S. Army Reserve Recruiting Station: "Twice the Citizen." *See* Heidi Lara, *Cardwell Reflects on Military Career, Command in Pacific*, News-Herald (Oct. 4, 2015), https://tinyurl.com/2p9ykjb6.

Incredibly, American Samoa's military recruitment rate is among the highest of any state or territory. *See* Pet. App. 47a; *see also* 2018 U.N. Statement, *supra*, at 5. And the casualty rate for American Samoans serving in combat duty in Iraq and Afghanistan exceeded seven times the national average. Siniva Marie Bennett, *Warriors, at What Cost? American Samoa and the U.S. Military*, Center for Pacific Islands Studies, 4 (May 26, 2009), https://tinyurl.com/2vyvzuux. Despite their distinguished service, American Samoans have limited advancement

opportunities in the military. Because they are not citizens, they cannot serve as commissioned or reserve officers in the U.S. Armed Forces. *See, e.g.*, 10 U.S.C. § 532(a)(1); 10 U.S.C. § 12201(b)(1).

Further, American Samoans' U.S.-issued passports expressly disclaim their citizenship, bearing a special and derogatory endorsement that says: "THE BEARER IS A UNITED STATES NATIONAL AND NOT A UNITED STATES CITIZEN." Pet. App. 99a. Not surprisingly, this cryptic verbiage creates ample confusion with respect to American Samoans traveling internationally or even within the United States. Pet. 9 (citing U.S. Dep't of State, Foreign Affairs Manual, at 7 F.A.M. § 1111(b)(1)). It is also a painful reminder of the constitutional limbo that the U.S. government has imposed on them—an interstitial "space between citizenship and alienage." Rose Cuison Villazor, *American Nationals and Interstitial Citizenship*, 85 Fordham L. Rev. 1673, 1676 (2017).

* * *

When the Samoan chiefs representing the eastern Samoan people ceded their sovereignty and pledged allegiance to the United States, little did they know that generations of American Samoans would be treated as second-class for more than a century and counting. The Constitution does not deprive American Samoans, or anyone born in the U.S. territories, of their right to birthright citizenship. The Citizenship Clause grants them that right. This Court should make that clear. "Our fellow Americans … deserve no less." *Vaello Madero*, 142 S. Ct. at 1557 (Gorsuch, J., concurring).

CONCLUSION

The Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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