

No. _____

IN THE
Supreme Court of the United States

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

Applicants,

v.

UNITED STATES OF AMERICA, *ET AL.*,

Respondents.

**APPLICATION FOR AN EXTENSION OF TIME
WITHIN WHICH TO FILE A PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT**

NEIL C. WEARE
EQUALLY AMERICAN LEGAL
DEFENSE & EDUCATION FUND
1300 Pennsylvania Avenue, NW
#190-413
Washington, DC 20004

CHARLES V. ALA'ILIMA
THE LAW OFFICES OF
CHARLES V. ALA'ILIMA, PLLC
P.O. Box 1118
Nu'uuli, AS 96799

MATTHEW D. MCGILL
Counsel of Record
JACOB T. SPENCER
JEREMY M. CHRISTIANSEN
JOHN H. HEYBURN
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, NW
Washington, DC 20036
(202) 955-8500
MMcGill@gibsondunn.com

Counsel for Applicants

PARTIES TO THE PROCEEDING AND CORPORATE DISCLOSURE STATEMENT

1. Applicants John Fitisemanu, Pale Tuli, Rosavita Tuli, and Southern Utah Pacific Islander Coalition (“SUPIC”) were plaintiffs in the district court and appellees before the court of appeals.

Respondents United States of America; United States Department of State; Antony Blinken, in his official capacity as Secretary of the U.S. Department of State; and Ian G. Brownlee, in his official capacity as Assistant Secretary of State for Consular Affairs, were defendants in the district court and appellants before the court of appeals.*

Respondents The Honorable Aumua Amata and the American Samoa Government were intervenor-defendants in the district court and intervenor defendants-appellants before the court of appeals.

2. Applicants John Fitisemanu, Pale Tuli, and Rosavita Tuli are individuals. Applicant SUPIC is a Utah nonprofit corporation with its principal place of business in St. George, Utah. SUPIC has no parent corporation and no publicly held corporation owns ten percent or more of its stock.

* In the court of appeals, Antony Blinken replaced Rex W. Tillerson and Ian G. Brownlee replaced Carl C. Risch as appellants, pursuant to Federal Rule of Appellate Procedure 43(c)(2).

APPLICATION FOR AN EXTENSION OF TIME

TO THE HONORABLE NEIL M. GORSUCH, ASSOCIATE JUSTICE OF THE SUPREME COURT OF THE UNITED STATES AND CIRCUIT JUSTICE FOR THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT:

Pursuant to this Court’s Rules 13.5, 22, and 30.3, applicants John Fitisemanu, Pale Tuli, Rosavita Tuli, and SUPIC respectfully request a 30-day extension of time—to and including April 27, 2022—within which to file a petition for a writ of certiorari to the United States Court of Appeals for the Tenth Circuit. The district court granted summary judgment to applicants on December 12, 2019, in an opinion reported at 426 F. Supp. 3d 1155 (attached as Exhibit A). On appeal, a divided Tenth Circuit panel reversed and entered judgment on June 15, 2021. Its opinion, reported at 1 F.4th 862, is attached as Exhibit B. The court of appeals denied applicants’ petition for rehearing en banc on December 27, 2021, with two judges dissenting and four not participating in the consideration of the petition. The order denying rehearing is reported at 20 F.4th 1325 (Mem.), and is attached as Exhibit C. Unless extended, the deadline to file a petition for a writ of certiorari is March 28, 2022. This application is timely. *See* Sup. Ct. R. 30.2. And this Court’s jurisdiction will be invoked under 28 U.S.C. § 1254(1).

1. This case presents the important question whether persons born in U.S. Territories are is entitled to American citizenship by birth. The Fourteenth Amendment’s Citizenship Clause declares that those born “in the United States, and subject to the jurisdiction thereof, are citizens of the United States.” U.S. Const. amend. XIV, § 1. But a federal statute purports to deny birthright citizenship to

persons born in the U.S. Territory of American Samoa, declaring them to be “nationals, but not citizens, of the United States.” 8 U.S.C. § 1408(1) (emphasis added).

2. Applicants brought this action in March 2018, challenging 8 U.S.C. § 1408(1) as unconstitutional under the Citizenship Clause and seeking declaratory and injunctive relief. After the American Samoa Government and the Honorable Aumua Amata intervened in support of respondents, applicants moved for summary judgment on a set of undisputed facts. The district court granted summary judgment for applicants, holding 8 U.S.C. § 1408(1) unconstitutional. The court concluded that, under *United States v. Wong Kim Ark*, 169 U.S. 649 (1898), the Fourteenth Amendment’s Citizenship Clause “must be interpreted in the light of the common law,” Ex. A, at 56, which unequivocally extends birthright citizenship to people born in U.S. Territories, including American Samoa. Moreover, the court recognized that the so-called *Insular Cases* “did not concern the Fourteenth Amendment,” and thus have no application to this case. *Id.* at 3.

3. A divided panel of the Tenth Circuit reversed. Writing for the majority, Judge Lucero (joined in part by Chief Judge Tymkovich) stated that there was “ambiguity” in the text and history of the Citizenship Clause. Ex. B, at 31-32 (panel majority). Therefore, the majority concluded that “the *Insular Cases* supply the correct framework for application of constitutional provisions to the unincorporated territories,” and that “the district court erred by relying on *Wong Kim Ark*.” *Id.* at 13. The panel majority acknowledged the “disreputable,” “ignominious,” and “racist”

history of the *Insular Cases*, but decided that these cases could be “repurposed.” *Id.* at 15. Judge Lucero, writing only for himself, further concluded that birthright citizenship does not apply in unincorporated Territories under the *Insular Cases* because it is not a “fundamental right” and because application of birthright citizenship would be “impracticable and anomalous” in light of intervenors’ characterization of American Samoans’ purported “preference against citizenship.” *Id.* at 33-39.

4. In a brief concurrence, Chief Judge Tymkovich wrote that the text is “ambiguous,” the “evidence of . . . original meaning” “equivocal,” and “Supreme Court precedent” “uncertain,” and therefore he would defer to the “historical practice” that began after the *Insular Cases* were decided—that is, Congress’ purported ability under those cases to deny citizenship to those born in unincorporated Territories. Ex. B, at 4 (concurrence).

5. Judge Bacharach dissented. “When the Fourteenth Amendment was ratified,” he explained, “courts, dictionaries, maps, and censuses uniformly regarded territories as land ‘in the United States,’” Ex. B, at 2 (dissent), and “no one in the case—not the parties, the intervenors, or [his] colleagues—has pointed to a single contemporary judicial opinion, dictionary, map, census, or congressional statement that treated U.S. territories as outside the United States from 1866 to 1868,” *id.* at 31. This evidence “unambiguously” dictated that applicants are birthright citizens. *Id.* at 4-5. Judge Bacharach also noted that the *Insular Cases* have been “enfeebled” by “the Supreme Court’s ‘later statements,’” including in *Financial Oversight &*

Management Board for Puerto Rico v. Aurelius Investment, LLC, 140 S. Ct. 1649 (2020). *Id.* at 37 (quoting *Bonidy v. U.S. Postal Serv.*, 790 F.3d 1121, 1125 (10th Cir. 2015)). But even under the *Insular Cases* framework, and “even if the right were not fundamental,” he concluded, “applying the Citizenship Clause to the three American Samoan plaintiffs would not be impracticable or anomalous.” *Id.* at 2.

6. Applicants sought rehearing en banc. After ordering a response, a divided court denied the petition.¹ Judge Bacharach dissented from the denial in an opinion joined by Judge Moritz. Judge Bacharach chided the panel majority and concurrence for “skirt[ing] [their] obligation to determine the meaning of the constitutional language.” Ex. C, at 1 (dissent). He then faulted the panel majority for relying on the *Insular Cases*, which “provide no guidance” on the question presented and “should [not] be given any further expansion.” *Id.* at 22, 24. And he criticized the concurrence for relying on “congressional practice that didn’t begin until roughly a half-century after ratification of the Citizenship Clause.” *Id.* at 1. Instead, he reasoned that the phrase “in the United States” is “unambiguous” and had a “uniform historical meaning.” *Id.* at 27. He concluded that “there is only one answer: The Territory of American Samoa lies within the United States,” and persons born there are citizens at birth. *Id.*

¹ Tenth Circuit Judges Matheson, McHugh, Eid, and Rossman “did not participate in the consideration of [the] petition for rehearing en banc.” Ex. C n.*.

7. “For good cause, a Justice may extend the time to file a petition for a writ of certiorari for a period not exceeding 60 days.” Sup. Ct. R. 13.5. Additional time is necessary to allow counsel to prepare and file a petition on this exceptionally important and complex question of constitutional law. Counsel for applicants also have significant professional obligations during the period in which the petition would otherwise need to be prepared, including a March 11 hearing on a motion for summary judgment in *City of Providence, Rhode Island v. Bats Global Markets, Inc.*, 14-cv-02811 (S.D.N.Y.), and a merits brief due on March 22 in *Devas Multimedia Private Ltd. v. Antrix Corp. Ltd.*, No. 20-36024 (9th Cir.). Moreover, applicants are not aware of any party that would be prejudiced by a 30-day extension.

Accordingly, good cause exists for this application, and applicants respectfully request a 30-day extension of time within which to file a petition for a writ of certiorari, to and including April 27, 2022.

Dated: March 9, 2022

Respectfully submitted,

NEIL C. WEARE
EQUALLY AMERICAN LEGAL
DEFENSE & EDUCATION FUND
1300 Pennsylvania Avenue, NW
#190-413
Washington, DC 20004
(202) 304-1202

CHARLES V. ALA’ILIMA
THE LAW OFFICES OF
CHARLES V. ALA’ILIMA, PLLC
P.O. Box 1118
Nu’uuli, AS 96799

/s/ Matthew D. McGill

MATTHEW D. MCGILL
Counsel of Record
JACOB T. SPENCER
JEREMY M. CHRISTIANSEN
JOHN H. HEYBURN
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, NW
Washington, DC 20036
(202) 955-8500
MMcGill@gibsondunn.com

Counsel for Applicants