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 THE DESCENDENTS OF DRED SCOTT AND ISABEL GONZALEZ AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

NEAL KUMAR KATYAL
Counsel of Record
NATHANIEL A.G. ZELINSKY
NATALIE J. SALMANOWITZ
HOGAN LOVELLS US LLP
555 Thirteenth St., N.W.
Washington, D.C. 20004
(202) 637-5600
neal.katyal@hoganlovells.com

Counsel for Amici Curiae

TABLE OF CONTENTS

TABLE OF CONTENTS—Continued

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

IN THE

Supreme Court of the United States

No. 21-1394

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 DESCENDENTS OF DRED SCOTT AND ISABEL GONZALEZ AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

STATEMENT OF INTEREST

Lynne M. Jackson and Belinda Torres-Mary submit this brief as *amici curiae* in support of Petitioners.[1]

[1] No party or counsel for a party authored this brief in whole or in part. No party, counsel for a party, or person other than *amici curiae* or their counsel made any monetary contribution intended to fund the preparation or submission of this brief. All parties have consented to the filing of this amicus brief. All parties were given 10 days' notice of the filing of this brief.

Lynne M. Jackson is the great-great-granddaughter of Dred and Harriet Scott, through her father. Dred Scott was born into slavery in Virginia in 1799. In the 1830s, Dred's owner brought him to live in Illinois and the Wisconsin territory, both of which then banned slavery. After Dred and his owner moved back to a slave state, Dred filed a lawsuit to establish his freedom, invoking his right as a citizen to sue in federal court. In an infamous decision, this Court rejected Dred's claim to freedom and, in the process, declared that no person of African descent was or could become a citizen of the United States. *Dred Scott* v. *Sandford*, 60 U.S. (19 How.) 393, 404-405, 453 (1857). Despite this Court's ruling, Dred and his family were emancipated in 1857 by one of the children of his original owners. During Reconstruction, Congress passed—and the States ratified—the Citizenship Clause of the Fourteenth Amendment to overturn *Dred Scott*. It conclusively establishes that: "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside." U.S. Const. amend. XIV, § 1.

In 2006, Ms. Jackson founded the Dred Scott Heritage Foundation. *See* The Dred Scott Heritage Foundation, https://dredscottlives.org/ (last visited May 27, 2022). The foundation commemorates Dred and Harriet Scott's struggle for freedom, educates the public on the impact of the case, and promotes racial reconciliation. The foundation also emphasizes the consequences of denigrating a group of people to a "less than" status and depriving them of their rights to citizenship.

Belinda Torres-Mary is the great-granddaughter of Isabel Gonzalez, through her father. In 1902, Isabel Gonzalez left her native home of Puerto Rico to move to New York. Isabel was a pregnant, young widow with only eleven dollars to her name, who planned to start a new life in New York. Despite Puerto Rico being a territory of the United States, immigration officials detained Isabel at Ellis Island and denied her entry as an alien immigrant.

Isabel argued that she was not an alien immigrant, but rather a citizen of the United States. When her case reached this Court, the Court ruled that Isabel was not an alien within the narrow meaning of the relevant immigration provisions. *Gonzales* v. *Williams*, 192 U.S. 1, 13 (1904).[2] But by ruling on that narrow basis, the Court intentionally sidestepped the question whether Puerto Ricans were citizens, and enabled the political branches to limit birthright citizenship in the territories.

Over a century later, Puerto Ricans remain second-class citizens. Congress has extended citizenship to those born in the Commonwealth by statute. But no court has confirmed Puerto Ricans' status as birthright citizens under the Constitution. In light of her family's history, Ms. Torres-Mary has a deep, personal interest in ensuring that all individuals like Isabel, whether born in a State, Puerto Rico or other U.S. territories, are finally acknowledged as complete citizens of this country.

---

[2] When referring to the case, this brief uses the spelling of the official caption, "*Gonzales*." When referring to Isabel, the brief spells her last name the way she spelled it herself—ending in a "z" instead of an "s" and without any accent mark over the "a."

Amici have a particular interest in this case. The decision below wrongfully denies American Samoans birthright citizenship and contradicts the text, history, and purpose of the Citizenship Clause. *Amici* write to explain how that decision echoes the mistakes of the past, and to urge this Court to enforce the clear meaning and enduring promise of the Fourteenth Amendment.

SUMMARY OF ARGUMENT

I. The Fourteenth Amendment is a crown jewel in our Constitution. Enacted in the aftermath of a bloody war to preserve the Union and to extinguish slavery, the amendment announces the fundamental equality of all Americans, regardless of their race or creed, color or ethnicity. This case involves the very first sentence of the first clause: "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside." U.S. Const. amend. XIV, § 1.

As a legal matter, the Citizenship Clause should not have been necessary. The "rule of citizenship by birth within the territory" is "ancient and fundamental." *United States* v. *Wong Kim Ark*, 169 U.S. 649, 693 (1898). But because of the most notorious decision in this Court's history, the Citizenship Clause became a necessity. In *Dred Scott*, this Court declared that all African Americans—even those "emancipated" or "born of parents who had become free before their birth"—could *never* become citizens of the United States and gain full membership in our American community. 60 U.S. at 403-405.

That conclusion, found nowhere in the Constitution's text, stemmed from a profoundly racist

assertion: that by virtue of their race alone, African Americans did not deserve to be part of "the People of the United States" striving to build our ever "more perfect Union." U.S. Const. pmbl. The Framers of the Fourteenth Amendment crafted the Citizenship Clause to ensure that no one—neither this Court nor the political branches—could ever again limit the American polity and establish tiers of membership in our community.

II. At the turn of the Twentieth Century, the constitutional codification of that ancient and fundamental promise came into conflict with America's imperial aspirations. As the United States gained new overseas territories, those in favor of expansion fretted about making "savage" foreigners full Americans. To facilitate empire, some of the nation's leading lawyers concocted a theory that the political branches could determine whether and when the Constitution applied to America's new acquisitions.

In *Gonzales* v. *Williams*, the Court had the opportunity to declare Puerto Ricans citizens, and thus full members of this polity. But instead of enforcing the fundamental promise of equality embodied in the Fourteenth Amendment, the Court sidestepped the issue to avoid hobbling a nascent American empire. In the process, this Court allowed the political branches to dilute the Citizenship Clause, and revitalize the evil at the heart of *Dred Scott*.

III. The decision below denies American Samoans birthright citizenship, directly undermining the core promise of the Citizenship Clause and repeating the mistakes of *Dred Scott*. That decision has no basis in—indeed, flatly contradicts—the Constitution's

text, history, and purpose. Instead of complying with its obligation to say what the law is, the Tenth Circuit deferred to the whims of the political branches—the very thing the Framers of the Fourteenth Amendment sought to prevent.

This Petition now presents this Court with a choice, not unlike the one it faced over a century ago in *Gonzales*. The Court can deny the Petition, and through silence empower the political branches at the expense of the Citizenship Clause. Or it can choose to intervene, right the wrong which this Court enabled in *Gonzales*, and enforce the promise that *all* persons born in the United States are citizens.

This Court should grant the Petition and reverse.

ARGUMENT

I. THE FOURTEENTH AMENDMENT OVERTURNED *DRED SCOTT* V. *SANDFORD* AND GUARANTEED BIRTHRIGHT CITIZENSHIP TO ALL.

Dred Scott occupies "the lowest circle of constitutional hell" and "is openly trashed, not merely by many of America's best scholars, but by Justices of all stripes." Akhil Reed Amar, Plessy v. Ferguson *and the Anti-Canon*, 39 Pepp. L. Rev. 75, 76, 78 (2011). The reason is simple. Chief Justice Taney's announcement that African Americans were not—and could never be—citizens of the United States had no basis in the Constitution and was rooted in racism.

Chief Justice Taney's opinion rested on the belief that the Constitution reserved its protections for the "dominant" white race. *Dred Scott*, 60 U.S. at 404-405. Under that view, African Americans were banished from the American citizenry, forever

relegated to a subordinate class. In extending citizenship to anyone born in the United States, the Fourteenth Amendment conclusively repudiated *Dred Scott* and settled beyond doubt a simple proposition: There are no tiers of membership in this "more perfect Union."

A. *Dred Scott* Invented A Racial Conception Of Citizenship And The American Polity.

In *Dred Scott*, the Court confronted an ostensibly narrow threshold question: Whether Dred was a citizen of Missouri for purposes of bringing suit in federal court. 60 U.S. at 400. In a sweeping opinion, Chief Justice Taney reached far beyond that question to determine a much broader one with significantly broader ramifications: Whether African Americans were citizens of the United States, regardless of their status in any particular state. *Id.* at 404-406. To answer that question, Chief Justice Taney relied on three propositions.

First, the term "citizens" in the Constitution was "synonymous" with "people of the United States"—a phrase which "describe[d] the political body, who * * * form the sovereignty," and "conduct the Government through their representatives." *Id.* at 404. Citizens, in other words, are the members who make up our "political community." *Id*. at 403.

Second, African Americans, whether enslaved or free, were barred from the American political community. According to Chief Justice Taney, the Framers deemed African Americans an inherently "subordinate and inferior class of beings, who had been subjugated by the dominant race." *Id.* at 404-405. They were excluded from America's "political family," and "had no rights or privileges but such as

those who held the power and the Government might choose to grant them." *Id.* at 404-406.

Third, African Americans could never become naturalized citizens. Naturalization was available only to those "born in a foreign country, under a foreign Government," which African Americans were not. *Id.* at 417.

The result: Even when not slaves, African Americans occupied a permanent second class status—never fully American, but permanently subject to the whims of a dominant race.

Chief Justice Taney claimed that a "mass of proof" supported his conclusion. *Id.* at 419. In reality, not one of the sources Chief Justice Taney cited substantiated his unconstitutional ruling. To pick just the most glaring example, Chief Justice Taney asserted that the Constitution's language "point[ed] directly and specifically to the negro race as a separate class of persons," distinct from "the people or citizens" of the United States. *Id.* at 411. Yet the Constitution nowhere excluded certain races from citizenship, much less differentiated African Americans—whether free or enslaved—as "a separate class of persons." *Id.*; *see, e.g.*, Cass R. Sunstein, *The Dred Scott Case*, 1 Green Bag 2d 39, 45 (1997). To the contrary, the Constitution had *counted* free African Americans as part of the polity for purposes of representation and direct taxation. *See* U.S. Const. art. I, § 2.

In short, *Dred Scott* invented race-based limits on citizenship and the American community that had no basis in the Constitution. In so doing, this Court did not just deny an entire race legal protections. It

sought to exclude them from the fabric of the polity, in perpetuity and without recourse.

B. The Fourteenth Amendment Overturned *Dred Scott* And Clarified That All Americans Are Citizens And Members Of The Polity.

Following the Civil War, the same American polity Chief Justice Taney sought to protect conclusively renounced *Dred Scott*.

First, in the Civil Rights Act of 1866, Congress "declared" that "all persons born in the United States, and not subject to any foreign power" were "citizens of the United States." Act of Apr. 9, 1866 § 1, 14 Stat. 27, 27. This landmark statute "repudiate[d] *Dred Scott*," *United States* v. *Vaello Madero*, 596 U.S. __, slip op. at 17 (2022) (Thomas, J., concurring), and announced that citizenship extended to *any* person born within the United States, regardless of their race. *See* Garrett Epps, *The Citizenship Clause: A "Legislative History*," 60 Am. U. L. Rev. 331, 350 (2010) (noting that the final version of the Act replaced "persons of 'African descent'" with "all persons"); *see* Cong. Globe, 39th Cong., 1st Sess. 498 (1866) (explaining that this language would cover the "children of Chinese and Gypsies born in this country").

But a congressional act is not a permanent guarantee. To forever prevent *Dred Scott*'s resurrection, by either this Court or the political branches, Congress proposed and the People adopted the Citizenship Clause.

As one of the Framers of the Fourteenth Amendment explained, courts had "stumbled on the

subject" of citizenship and thrown "doubt * * * over" a historical truth: that "every person, of whatever race or color, who was born within the United States was a citizen of the United States." Cong. Globe, 39th Cong., 1st Sess. 2768-69 (1866) (statement of Sen. Wade). The Fourteenth Amendment "settle[d] the great question of citizenship" once and for all, "remov[ing] all doubt as to what persons are or are not citizens of the United States" and placing the "question of citizenship * * * under the civil rights bill beyond the legislative power." *Id.* at 2890, 2896 (statement of Sen. Howard); *see also id.* at 2768 (statement of Sen. Wade) (noting that a constitutional amendment was necessary "if the Government should fall into the hands of those who are opposed to the views [expressed in the civil rights bill] * * * and may construe the provision in such a way as we do not think it liable to construction at this time").

The Fourteenth Amendment is unequivocal. Citizenship in no way depends on race, status, or the particular geographic region of the United States in which a person was born or lives. Instead, under the Citizenship Clause, "[a]ll persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States," as well as any "State wherein they reside." U.S. Const. amend. XIV, § 1. As Justice Harlan recognized in his canonical dissent to *Plessy* v. *Ferguson*, the Fourteenth Amendment "added greatly to the dignity and glory of American citizenship," and in concert with the Thirteenth and Fifteenth Amendments, "obliterated the race line from our systems of

governments." 163 U.S. 537, 555, 563 (1896) (Harlan, J., dissenting).[3]

This constitutional greatness was no accident. The Framers of the Fourteenth Amendment intended the clause to apply to persons of all races, not only whites and African Americans. *See* Cong. Globe, 39th Cong., 1st Sess. 2892 (1866) (statement of Sen. Conness) (rejecting the argument that citizenship would not extend to children born in the U.S. of "Chinese" and "Mongolian parents"). They intended it to cover "persons everywhere, whether in the States or in the Territories or in the District of Columbia." *Id.* at 2894 (statement of Sen. Trumbull). And they intended it to totally dispose of the notion that "persons may be born in the United States and yet not be citizens of the United States," despite owing allegiance to no other country. *Id.* at 2769 (statement of Sen. Wade).

The Citizenship Clause is, in short, an unambiguous affirmation of equality. The United States no longer belongs to a "dominant" race, and there are no tiers of membership in this "more perfect Union." *Dred Scott*, 60 U.S. at 404-405; U.S. Const. pmbl.

II. IN *GONZALES*, THIS COURT WRONGLY DECLINED TO ENFORCE THE CITIZENSHIP CLAUSE'S GUARANTEES.

Given the Citizenship Clause's clarity, its application to Puerto Rico and other territories should

---

[3] As Justice Harlan rightfully noted, all three Reconstruction Amendments played distinct roles in that process. In particular, the Fifteenth Amendment ensured "no citizen should be denied, on account of his race, the privilege of participating in the political control of his country." *Plessy*, 163 U.S. at 555 (Harlan, J., dissenting).

never have been a serious question. Yet as the Framers of the Fourteenth Amendment had feared, power indeed fell "into the hands of those who [were] opposed to" its core promise. Cong. Globe, 39th Cong., 1st Sess. 2768 (1866) (statement of Sen. Wade). At the turn of the century, America became an imperial power, and those who favored empire fretted about extending citizenship to new and "savage" foreign acquisitions.

In *Gonzales* v. *Williams*, the Court had the opportunity to declare Puerto Ricans to be citizens, and thus full members in the American community. But instead of enforcing the fundamental promise of equality, the Court sidestepped the issue. In the process, this Court allowed the political branches to dilute the Citizenship Clause, limit membership in our American community, and revitalize *Dred Scott*.

A. The Fourteenth Amendment's Protections Posed An Obstacle To American Empire.

1. In the immediate aftermath of the Fourteenth Amendment, there was little question that anyone born in the United States was a citizen. In the *Slaughter-House Cases*, this Court confirmed that the Fourteenth Amendment made "*all persons* born within the United States and subject to its jurisdiction citizens of the United States." 83 U.S. (16 Wall.) 36, 73 (1872). And the Court reaffirmed that "[i]nhabitants of Federal territories and new citizens, made such by annexation of territory or naturalization, * * * could, * * * *as citizens of the United States*, lay claim to every one of the privileges and immunities" that United States "citizenship confer[s]." *Id.* at 119 (emphasis added).

Two decades later, in *United States* v. *Wong Kim Ark*, this Court reaffirmed the Citizenship Clause's import, in a moment of moral and legal clarity. The Court emphasized that the Fourteenth Amendment, "in clear words and in manifest intent, includes the children born *within the territory* of the United States of all other persons, of whatever race or color, domiciled within the United States." *Wong Kim Ark*, 169 U.S. at 693 (emphasis added). "Whatever considerations * * * might influence" the political branches to prohibit certain races from entering the country, this Court recognized that it must "give full effect" to the Citizenship Clause's "peremptory and explicit" text. *Id.* at 694; *see also* Pet. 21.

2. But at the turn of the Twentieth Century, the Citizenship Clause's guarantees foundered on the rocks of American empire. In 1898, the United States acquired Puerto Rico, Guam, and the Philippines as a result of the Spanish-American war. America's new borders posed a critical legal challenge: If the Constitution applied to individuals living in U.S. territories, the Fourteenth Amendment required any individual born within those territories to become citizens of the United States. For many in power at the time, the prospect of bringing the territories' "racially inferior" people into the American polity was an unacceptable proposition. *See* Sam Erman, *Almost Citizens: Puerto Rico, the U.S. Constitution, and Empire* 8 (2019).

To circumvent the Constitution's clear text, executive officials and academics concocted new theories limiting the Constitution's effect outside the country's contiguous borders. *See id.* at 39-42 *(*citing S. Doc. No. 234 (56th Cong., 1st Sess. 1900))

(describing proposals by members of the War Department to withhold the Constitution's protections in some U.S. regions); *Vaello Madero*, slip op. at 25 (Gorsuch, J., concurring) (explaining that "[l]eading members of the legal academy," such as Christopher Langdell, James Bradley Thayer, and Abbott Lawrence Lowell, "provided influential support" for the notion that "Congress could permanently rule the country's new acquisitions as a European power might, unrestrained by domestic law"). According to these novel accounts, the Constitution did not automatically extend to newly-acquired territories. Instead, Congress could dictate whether and to what extent constitutional guarantees apply. *See, e.g.*, *Developments in the Law—The U.S. Territories*, 130 Harv. L. Rev. 1617, 1618-19 (2017).

At their core, these supposedly sophisticated legal theories reflected the social Darwinism of the day, a fear of "unfit" and "savage" "alien race[s]." *Id.* at 1618; S. Doc. No. 234, at 46; *see Vaello Madero*, slip op. at 27 (Gorsuch, J., concurring).

In the *Insular Cases*, this Court adopted this newfound interpretation of the Constitution in substance and in style. *Downes* v. *Bidwell*, 182 U.S. 244 (1901), declared that the Constitution's applicability in the territories, at least with respect to certain Constitutional provisions, turned on the express actions of Congress. *See Vaello Madero*, slip op. at 25-26 (Gorsuch, J., concurring); *see also Downes*, 182 U.S. at 279-280 (Brown, J.); *id.* at 293 (White, J., concurring in the judgment). Members of this Court did not hide their contempt for the territories' inhabitants. Justice Brown warned about the "extremely serious" "consequences" of making

"savages" into "citizens," granting them "all the rights, privileges and immunities of citizens," and extending our Constitution to "alien races, differing from us in religion, customs, laws, * * * and modes of thought." *Downes*, 182 U.S. at 279-280, 287. So too, Justice White argued that certain races could properly be excluded from the "American family" based on their unfitness for the American way of life. *See id.* at 306, 339 (White, J., concurring in the judgment); *see also* Christina Duffy Ponsa-Kraus, *The* Insular Cases *Run Amok: Against Constitutional Exceptionalism in the Territories*, 131 Yale L.J. (forthcoming 2022) (manuscript at 4) (*available at* https://ssrn.com/abstract=4016666) (noting that the *Insular Cases* were rooted in "the Court's implicit conviction that nonwhite people from unfamiliar cultures were ill-suited to participate in a majority-white, Anglo-Saxon polity").

The *Insular Cases*' "results-oriented" approach reconciled the needs of American empire with the promises of the Constitution. *See* Ponsa-Kraus, *supra*, at 30; *see also* Gary Lawson & Guy Seidman, *The Constitution of Empire: Territorial Expansion & American Legal History* 197 (2004) ("The doctrine * * * that emerged from *The Insular Cases* is transparently an invention designed to facilitate the felt needs of a particular moment in American history."). But like *Dred Scott*, the *Insular Cases* "were premised on beliefs both odious and wrong." *Vaello Madero*, slip op. at 39 n.4 (Sotomayor, J., dissenting). They found no support in the Constitution's text or history, and perpetuated the very type of race-based reasoning the Fourteenth Amendment had sought to eradicate.

B. *Gonzales* Enabled The Political Branches To Impose Tiers Of Membership In The American Polity.

For all their assertions about the subordinate nature of individuals living in U.S. territories, the *Insular Cases* did not decide whether the territories' inhabitants were citizens of the United States. *Gonzales* v. *Williams* squarely presented the Court with that question—and with an opportunity to right the constitutional ship. Instead, animated by its continued desire to further "the development of" "American empire," this Court through its inaction allowed the political branches to strip those born in the territories of their rightful place in our community. *Downes*, 182 U.S. at 286.

1. When Isabel Gonzalez arrived at Ellis Island, she had no intention of becoming a test-case. Like many who sailed to New York, she sought the promise of opportunity. *See* Erman, *supra*, at 75. Isabel was pregnant, penniless, and recently widowed. *Id*. at 74-75. When the immigration laws "changed while she was en route," *id*. at 75, immigration officials detained her "as an 'alien immigrant,' in order that she might be returned to Porto Rico if it appeared that she was likely to become a public charge," *Gonzales*, 192 U.S. at 7.

The issue in the case that bears her name was whether Isabel was "an alien immigrant within the intent and meaning of the" relevant immigration act. *Id*. But the matter turned on the scope and meaning of citizenship. According to the lower court, whether Isabel was an alien depended on whether she was a naturalized citizen. *In re Gonzalez*, 118 F. 941, 941 (C.C.S.D.N.Y. 1902). Because the treaty ceding

Puerto Rico to the United States did not naturalize "foreign born" Puerto Ricans, the lower court reasoned that Isabel was an alien and not a citizen. *Id*. at 941-942.

Before this Court, competing visions of citizenship took center stage.

The Solicitor General argued (among other things) that Puerto Ricans were "American in nationality and citizens of their islands, but not of American citizenship; that, although now Americans internationally, they retain their former alienage in large degree." *See* Br. for the United States at 41, *Gonzales* v. *Williams*, 192 U.S. 1 (1904) (No. 225). And the Solicitor General vehemently disputed the notion "that the inhabitants of Porto Rico born subsequent to the cession * * * are citizens of the United States." *Id*. at 35. "[N]ative inhabitants" were not incorporated "into our body politic." *Id*. at 54 (internal quotation marks omitted).

Isabel's counsel, meanwhile, disagreed and "sought U.S. citizenship and nationality for Puerto Ricans." Erman, *supra*, at 81.[4] Above all, he urged the Court to avoid the dreadful result of readopting *Dred Scott* and returning to a moment "in our history of which we are least proud." Br. of Appellant at 39, *Gonzales*, 192 U.S. 1 (No. 225).

Finally, in an *amicus* brief, Puerto Rico's Resident Commissioner to the House of Representatives,

---

[4] Isabel's counsel distinguished "active citizens (burghers)" who held "political rights or privileges" from "passive citizens" who comprise "all members of the nation." Br. of Appellant at 6, *Gonzales*, 192 U.S. 1 (No. 225); *see also* Erman, *supra*, at 81 (noting that this was "a highly discounted form" of citizenship).

Federico Degetau, argued that Puerto Ricans were complete citizens of the United States. According to Degetau, the Fourteenth Amendment's pronouncement that " 'All persons * * * are citizens of the United States *and the State wherein they reside*' * * * establishes a double allegiance, a double citizenship." Br. of Resident Comm'r from Porto Rico as *Amicus Curiae* at 13, *Gonzales*, 192 U.S. 1 (No. 225) (emphasis in original) (quoting U.S. Const. amend. XIV, § 1). That "same double allegiance ha[d] been required from the Porto Rican citizens" who took "an oath to support the Constitution (National allegiance) and the laws of Porto Rico (local allegiance)." *Id*.

2. When this Court released its opinion, it intentionally said nothing about citizenship. It did not

> discuss the power of Congress in the premises; or the contention of Gonzales' counsel that the cession of Porto Rico accomplished the naturalization of its people; or that of Commissioner Degetau, in his excellent argument as *amicus curioe*, that a citizen of Porto Rico * * * is necessarily a citizen of the United States.

Gonzales, 192 U.S. at 12. Instead, the Court held only that Puerto Ricans were not aliens within the technical meaning of the applicable immigration laws. *Id*.

This Court's decision was no admirable act of judicial restraint. By avoiding the citizenship question, the Court implicitly greenlit racial limitations on membership in the American community. The Fourteenth Amendment had flatly rejected *Dred Scott*'s conclusion that people born in

the United States could simultaneously be non-foreigners and non-citizens. *See supra* p. 10. But the Court's "strategic silence" invited "the possibility of a status somewhere between citizen and alien." Erman, *supra*, at 87.

Predictably, after *Gonzales*, "the federal government began designating the inhabitants of" certain U.S. territories as "noncitizen U.S. nationals"—subjecting these individuals' futures to the political branches' whim. Ponsa-Kraus, *supra*, at 58-59. It is that same political process which today denies American Samoans equal membership in our body politic. *Id.*

III. THE DECISION BELOW RESUCCITATES *DRED SCOTT* AND PRESENTS THIS COURT WITH AN OPPORUNITY TO CORRECT *GONZALES*'S MISTAKES.

In denying American Samoans the protections of the Citizenship Clause, the decision below echoes the tragic mistakes of *Dred Scott*, that moment "in our history of which we are least proud." Br. of Appellant at 39, *Gonzales*, 192 U.S. 1 (No. 225). This Court should take this case to declare that we are all equally American. Otherwise, just as it did over a century ago in *Gonzales*, this Court—through its strategic silence—will prize policy over text, and allow the political branches to hollow out the enduring promise of the Fourteenth Amendment.

1. According to the decision below, it has "always [been] clear" that citizenship in U.S. territories is not "an automatic individual right guaranteed by the Constitution"—even if it *is* an automatic right for Americans born anywhere else in the country. Pet. App. 11a. In the Tenth Circuit's view, that disparate

treatment aligns with the government's historical view of territories as quasi-American, *id.* at 12a, and (at least according to the panel majority) preserves American Samoans' "traditional and distinctive way of life," *id.* at 8a.

The panel majority's reasoning was of course well-intentioned. But the ultimate meaning of its conclusion is clear. American Samoans are a "separate class of persons," and the Constitution does not "include[]" them among the "people of the United States." *Dred Scott*, 60 U.S. at 404, 411.

The ramifications are profound: Petitioners have no "right to vote," no "right to run for elective federal or state office outside American Samoa," and no "right to serve on federal and state juries." Pet. App. 6a. By affirming the concept of American-born non-citizens, the decision below stigmatizes American Samoans, and "trap[s]" them "in a subordinate status." Ponsa-Kraus, *supra*, at 30. Despite being born on U.S. soil, American Samoans are not citizens of the United States. Because they owe permanent allegiance to the United States, they are not citizens of anywhere else either. *See Dred Scott*, 60 U.S. at 420 ("The African race, however, born in the country, did owe allegiance to the Government, whether they were slave or free; but it is repudiated, and rejected from the duties and obligations of citizenship * * * ."). They are therefore "left without the protection of citizenship in any country in the world—as [people] without a country." *Afroyim* v. *Rusk*, 387 U.S. 253, 268 (1967); *see Perez* v. *Brownell*, 356 U.S. 44, 64 (1958) (Warren, C.J., dissenting) ("[A] stateless person, disgraced and degraded in the eyes of his countrymen[,] * * * has no lawful claim to protection from any nation, and no

nation may assert rights on his behalf."). That result squarely defies the core promise of the Citizenship Clause: that there are no tiers of citizenship in this great nation. *See supra* pp. 9-11.

Worse still, the result below defies the clear purpose of the Fourteenth Amendment: to remove the question of citizenship from the political branches. The decision below declared the Citizenship Clause too "ambigu[ous]" to govern the case at bar, and "le[ft] the citizenship status of American Samoans in the hands of Congress" instead. Pet. App. 32a. According to the panel majority, "*Congress* plays the preeminent role in the determination of citizenship in unincorporated territorial lands," while "courts play but a subordinate role in the process." *Id.* at 5a (emphasis added).

But the Citizenship Clause teaches the reverse. The Framers of the Fourteenth Amendment deemed birthright citizenship too fundamental to subject to "the legislative power" and its changing views. Cong. Globe, 39th Cong., 1st Sess. 2896 (1866) (statement of Sen. Howard). As this Court has long acknowledged, citizenship is "a right no less precious than life or liberty." *Klapprott* v. *United States*, 335 U.S. 601, 616 (1949) (Rutledge, J., concurring). "[I]t is regarded as the highest hope of civilized men." *Schneiderman* v. *United States*, 320 U.S. 118, 122 (1943). Because the "citizenry is the country and the country is its citizenry," it would be "completely incongruous to [recognize] a rule of law under which a group of citizens temporarily in office can deprive another group of citizens of their citizenship." *Afroyim*, 387 U.S. at 268. Yet that is precisely what the Tenth Circuit allowed: American Samoans cannot receive birthright citizenship unless Congress gives it to

them—and even then, Congress may remove that right at whim. In other words, American Samoans have only "the rights [and] privileges" that "those who h[o]ld the power and the Government might choose to grant them." *Dred Scott*, 60 U.S. at 404-405.

2. The Tenth Circuit justified its decision by pointing to the significant policy considerations it believed were at stake. Pet. App. 5a. In the panel majority's view, the "wishes of the territory's democratically elected representatives, who * * * urge us not to impose citizenship on an unwilling people from a courthouse thousands of miles away, have not been taken into adequate consideration." *Id.* The panel majority invoked the *Insular Cases*—in a "repurposed" form—to "preserve [the American Samoans'] traditional cultural practices" and "defer to the preferences of indigenous peoples." *Id.* at 17a-18a.

But it is not the courts' role to sidestep the Citizenship Clause to accommodate policy concerns—even when those concerns come from local elected officials. Nor should courts be relying on severely discredited cases that lack any "foundation in the Constitution"—no matter how those cases may be reframed. *Vaello Madero*, slip op. at 24 (Gorsuch, J., concurring); *see* Pet. 32 (arguing "the project of repurposing the *Insular Cases* is fundamentally flawed"). And even if the *Insular Cases* could be repurposed to promote policy considerations, the panel opinion at no point explained how denying American Samoans citizenship advances those goals. Self-determination and cultural preservation are

undoubtedly important. But it is not at all clear that citizenship implicates those concerns one bit.[5]

This case now confronts this Court with a stark choice, not unlike the one posed in *Gonzales*. The Court can deny the Petition and subordinate the clear meaning of the Constitution to the vague policy concerns of the day. Or this Court can grant the Petition and enforce the Constitution's guarantee of citizenship to all persons born in the United States.

In *Gonzales*, this Court enabled racial limits on citizenship—undoing the grand promise of the Fourteenth Amendment. The Court should avoid repeating that same mistake here, and "should settle this question right." *Vaello Madero*, slip op. at 32 (Gorsuch, J., concurring). "Our fellow Americans" "deserve no less." *Id*. at 33.

---

[5] *See, e.g.*, Ponsa-Kraus, *supra*, at 51-53, 61-62 (explaining that "[n]one" of the constitutional provisions that potentially threaten certain cultural practices in American Samoa "applies to U.S. citizens any more or less than noncitizen U.S. nationals," and that, in any event, courts have upheld the constitutionality of American Samoan cultural practices).

CONCLUSION

For these reasons, and those stated in the Petition, this Court should grant certiorari and reverse the decision below.

Respectfully submitted,

NEAL KUMAR KATYAL
Counsel of Record
NATHANIEL A.G. ZELINSKY
NATALIE J. SALMANOWITZ
HOGAN LOVELLS US LLP
555 Thirteenth St., N.W.
Washington, D.C. 20004
(202) 637-5600
neal.katyal@hoganlovells.com

Counsel for Amici Curiae

MAY 2022