No. 21-1394

IN THE

Supreme Court of the United States

JOHN FITISEMANU ET AL.,
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 FOR *AMICI CURIAE* CURRENT AND FORMER ELECTED OFFICIALS OF GUAM, THE NORTHERN MARIANA ISLANDS, PUERTO RICO, AND THE U.S. VIRGIN ISLANDS IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICI CURIAE*

Amici are current and former elected officials of the United States Territories of Guam, the Northern Mariana Islands ("NMI"), Puerto Rico, and the U.S. Virgin Islands.[1] This case does not only concern individuals born in American Samoa. Rather, it implicates the constitutional rights of U.S. citizens born in the four Territories *amici* represent. The Tenth Circuit concluded that these Americans were not "born ... in the United States" for purposes of the Fourteenth Amendment, a conclusion the court reached by expressly extending the notorious *Insular Cases*. *Amici* address the second-class citizenship to which the decision below would consign their constituents and former constituents.

The Tenth Circuit concluded that individuals born in the Territories that *amici* represent enjoy citizenship not as a matter of constitutional birthright under the plain text of the Fourteenth Amendment, but as a mere privilege founded on congressional largesse. The decision below reached that result based not on the text of the Constitution, but on a line of cases that "have no foundation in the Constitution and rest instead on racial stereotypes." *United States v. Vaello Madero*, 142 S. Ct. 1539, 1552 (2022) (Gorsuch, J., concurring). According to the *Plessy*-era cases on which the Tenth Circuit relied, the reason

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[1] Pursuant to Rule 37.6, *amici* affirm that no counsel for a party authored this brief in whole or in part, and that no person other than *amici* or their counsel made a monetary contribution intended to fund the brief's preparation or submission. All parties were timely notified and consented in writing to the filing of this brief.

that *amici* and their current or former constituents do not qualify for constitutional birthright citizenship is that they are "savages" who are "unfit" for most constitutional rights. *See Downes v. Bidwell*, 182 U.S. 244, 306 (1901) (White, J., concurring).

Amici are also well-positioned to address the concerns that have been raised by the government of American Samoa that giving the Fourteenth Amendment its ordinary meaning might result in negative practical consequences. Since citizenship has existed in Guam, the NMI, Puerto Rico, and the U.S. Virgin Islands for decades as a statutory matter, the experience of these Territories confirms that U.S. citizenship is fully harmonious with the preservation of each Territory's right to self-determination, legal traditions, and cultural heritage.

Congresswoman Stacey Plaskett represents the U.S. Virgin Islands in the U.S. House of Representatives and has served in that role since 2015.

Congressman Michael F.Q. San Nicolas represents Guam in the U.S. House of Representatives and has served in that role since 2019.

Donna M. Christian-Christensen represented the U.S. Virgin Islands in the U.S. House of Representatives from 1997 to 2015.

Carl Gutierrez served as Governor of Guam from 1995 to 2003.

Aníbal Acevedo Vilá served as Governor of Puerto Rico from 2005 to 2009.

Dr. Pedro Rosselló served as Governor of Puerto Rico from 1993 to 2000.

Kenneth E. Mapp served as Governor of the U.S. Virgin Islands from 2015 to 2019.

John de Jongh served as Governor of the U.S. Virgin Islands from 2007 to 2015.

Tina Rose Muña Barnes is the current Vice Speaker of the Guam Legislature, and was formerly the Speaker of the Guam Legislature from 2019 to 2021.

Eduardo Bhatia Gautier served as President of the Puerto Rico Senate from 2013 to 2017.

Sheila J. Babuata is a member in the Northern Mariana Islands House of Representatives and has served in that role since 2019.

Kaleo Moylan served as the Lieutenant Governor of Guam from 2003 to 2007.

INTRODUCTION AND SUMMARY OF ARGUMENT

"The United States" is "the name given to our great republic, which is composed of States and Territories." *Loughborough v. Blake*, 18 U.S. (5 Wheat.) 317, 319 (1820) (Marshall, C.J.); *see also Vaello Madero*, 142 S. Ct. at 1541 ("The United States includes five Territories …."). The Constitution guarantees that "[a]ll persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States." U.S. Const. amend. XIV, § 1. Disregarding that clear constitutional text, the Tenth Circuit concluded that individuals born in the U.S. Territory of American Samoa are not entitled to birthright citizenship under the Fourteenth Amendment. Even though American Samoa has been a U.S. Territory "[f]or over a century," Pet.App.4a, and even though American Samoans owe "permanent allegiance" to the United States, Pet.App.7a (quoting 8 U.S.C. § 1101(21), (22)), the majority decided that American Samoa is not "in the United States" for purposes of the Fourteenth Amendment, and thus the citizenship status of American Samoans "properly falls under the purview of Congress." Pet.App.5a.

Without this Court's review, the Tenth Circuit's holding will reverberate far beyond the shores of American Samoa. There are millions of U.S. citizens born in Guam, the NMI, Puerto Rico, and the U.S. Virgin Islands. If American Samoa is not "in the United States" for purposes of the Citizenship Clause, there is no guarantee that Guam, the NMI, Puerto Rico, and the U.S. Virgin Islands are. This conclusion is momentous. It endorses a divisive structure

whereby individuals born in the fifty states and D.C. are *constitutionally* entitled to birthright citizenship, while those born in the Territories may receive citizenship only as a *favor* dispensed by Congress. And what Congress can give, Congress can take away. The decision below does nothing less than relegates the people of *all* the Territories to second-class status at the periphery of the American polity.

To reach this extraordinary conclusion, the Tenth Circuit majority applied, and even extended, the analytical framework of the *Insular Cases*—an irredeemable line of cases rooted in open bigotry, not constitutional text. This Court's precedents already instruct that neither the *Insular Cases* nor their reasoning should be extended, a command several courts of appeals—including the Tenth Circuit—have ignored. It is past time for this Court to make clear that this discredited line of cases has no place in American jurisprudence. This Court can and should finally overrule these racist decisions.

In applying the *Insular Cases* here, the Tenth Circuit credited the unsubstantiated notion that if American Samoans are granted citizenship, "traditional elements of American Samoan culture could run afoul of constitutional protections." Pet.App.9a, 38a–40a. This speculation is legally wrong and belied by the experiences of U.S. citizenship in Guam, the NMI, Puerto Rico, and the U.S. Virgin Islands.

This case therefore provides a rare chance to both correct one of the most grievous errors in this Court's history, and to finally provide certainty that the

citizenship of people born in Guam, the NMI, Puerto Rico, and the U.S. Virgin Islands has equal stature to the citizenship of people born in the fifty states.

This Court should thus grant certiorari, reverse the Tenth Circuit's decision, and confirm that the Fourteenth Amendment means what it says: *all* persons born in the United States, including the Territories of the United States, have equal entitlement to the Constitution's promise of birthright citizenship.

ARGUMENT

I. The Court's Review Is Necessary to Provide Constitutional Certainty to the U.S. Citizens Born in Guam, the Northern Mariana Islands, Puerto Rico, and the U.S. Virgin Islands.

This Court's review is necessary to clarify that the U.S. citizenship status of people born in Guam, the Northern Mariana Islands, Puerto Rico, and the U.S. Virgin Islands is a matter of constitutional right, not legislative grace. Under the Constitution, "[a]ll persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States." U.S. Const. amend. XIV, § 1. This Court's decisions in *United States v. Wong Kim Ark*, 169 U.S. 649 (1898), and the *Slaughter-House Cases* "pu[t] at rest" any suggestion that "[t]hose ... who had been born and resided always ... in the Territories, though within the United States, were not citizens," 83 U.S. (16 Wall.) 36, 72–73 (1872). Disregarding both the Constitution and this Court's precedent, the Tenth Circuit endorsed a disturbing paradox whereby

individuals born in the Territories owe "permanent allegiance" to the United States, *see* 8 U.S.C. § 1101(21), (22), but are not "in the United States" for purposes of the Fourteenth Amendment. Such an outcome imperils the U.S. citizenship of the people born in the other four Territories who, under the Tenth Circuit's view, enjoy birthright citizenship as a matter of statute alone. If American Samoa is not "in the United States" for purposes of the Citizenship Clause, then there is no guarantee that Guam, the NMI, Puerto Rico, and the U.S. Virgin Islands are "in the United States."

This Court has made clear that citizenship resulting from "congressional generosity," *Rogers v. Bellei*, 401 U.S. 815, 835 (1971), is not entitled to the same protections as birthright citizenship derived from the Fourteenth Amendment. In *Rogers*, this Court held that Congress can "take away an American citizen's citizenship without his assent" when his citizenship is "not based upon the Fourteenth Amendment."[2] *Id.*; *see also González-Alarcón v. Macías*, 884 F.3d 1266, 1277 n.5 (10th Cir. 2018) (noting that the Supreme Court "recognize[s] a distinction between those who are citizens under the Fourteenth Amendment and individuals whose claim to citizenship rests on statute").

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[2] The petitioner in *Rogers* was born abroad and had one parent who was a U.S. citizen. 401 U.S. at 816. His suit challenged a federal law that made him a U.S. citizen at birth, subject to the condition that he would lose his citizenship if he was not physically present in the U.S. for a minimum period of time. *Id.*

Citizenship by legislative grace relegates individuals born in the Territories to second-class status, lacking the protection "against [the] congressional forcible destruction of [their] citizenship, whatever [their] creed, color, or race," the Citizenship Clause affords. *Afroyim v. Rusk*, 387 U.S. 253, 268 (1967). Without that protection, people who have lived their entire lives as U.S. citizens could face the real danger of having their citizenship revoked by legislative whim, even as the United States continues to maintain full and exclusive sovereignty over their lands.

At stake in this case is a fundamental question of constitutional law that reverberates well beyond the American Samoan archipelago: Whether a temporary legislative majority in Congress could—without any voting representation from the affected people of the U.S. Territories themselves—choose to revoke the citizenship of the millions of individuals born in the Territories, or prospectively deny citizenship to future generations.

However unlikely that may sound, the possibility must be considered in light of the marginalization and invisibility of the Territories that unequal access to federal resources and economic neglect have so starkly brought to the forefront in recent years.

For example, "[u]nlike in the 50 states and D.C., annual federal funding for Medicaid in the U.S. territories is subject to a statutory cap and fixed matching rate." Lina Stolyar & Robin Rudowitz, *Implications of the Medicaid Fiscal Cliff for the U.S. Territories*, Kaiser Fam. Found. (Sept. 14, 2021),

https://tinyurl.com/mu6ffdhu. Similarly, Congress has made most Territories ineligible for various important public benefits programs, such as Supplemental Security Income ("SSI") and the Supplemental Nutrition Assistance Program ("SNAP"). *See* 7 U.S.C. § 2012(r) (excluding the NMI, Puerto Rico, and American Samoa from eligibility for SNAP benefits); *Vaello Madero*, 142 S. Ct. at 1542–43 (upholding Congress' limitation of SSI benefits to residents of the fifty states, the District of Columbia, and the NMI).

Wider economic distress and neglect from the U.S. mainland have further exacerbated the challenges confronting the Territories and highlighted perceptions of their peripheral status. For example, as of March 2022, Puerto Rico's unemployment rate stood at 6.5 percent, higher than any of the fifty states and D.C. *See* U.S. Bureau of Lab. Stat., *Economy at a Glance: Puerto Rico* (last visited May 10, 2022), https://tinyurl.com/5c6sbewx; U.S. Bureau of Lab. Stat., *Unemployment Rates for States* (last visited May 10, 2022), https://tinyurl.com/yktdjeca. And even "[b]efore the COVID-19 pandemic hit in 2020, the island's average household income was about one-third of the U.S. average, and its poverty rate was about twice that of the poorest state, Mississippi." Amelia Cheatham & Diana Roy, *Puerto Rico: A U.S. Territory in Crisis*, Council on Foreign Rels. (Feb 3, 2022), https://tinyurl.com/ywe8npva. Likewise, the Virgin Islands' "economy declined by over 30% between 2008 and 2016, accompanied by population loss and job loss in certain industries ...." Lina Stolyar et al., *Challenges in the U.S. Territories: COVID-19 &*

the Medicaid Financing Cliff, Kaiser Fam. Found. (May 18, 2021), https://tinyurl.com/zz4skeek.

This case likely provides the only means available to assuage the fears of individuals born in Guam, the NMI, Puerto Rico, and the U.S. Virgin Islands who worry that Congress could strip away their statutory citizenship. Any direct attempt they may make to clarify their citizenship status—such as by suing to establish their own entitlement to constitutional citizenship—is likely not capable of judicial resolution. *See Efron ex rel. Efron v. United States*, 1 F. Supp. 2d 1468, 1469 (S.D. Fla. 1998) (dismissing as unripe an action filed by an individual born in Puerto Rico seeking a declaratory judgment that her U.S. citizenship was irrevocable), *aff'd sub nom*. *Efron v. United States*, 189 F.3d 482 (11th Cir. 1999). Thus, if this Court does not grant certiorari, these individuals will be forced to continue living with their citizenship under a perpetual cloud.

U.S. citizens born in the Territories already face myriad challenges based on their perceived subordinate status, and the Tenth Circuit only creates additional questions about their belonging in the American polity. This case presents a rare opportunity to correct an injustice and recognize what the Constitution on its face demands: that the Citizenship Clause applies with full force to all persons born in the Territories, because the Territories are "in the United States."

II. The Court's Review Is Necessary to Overrule the *Insular Cases* and Stop Their Continuing Expansion.

This Court's review is also necessary to repudiate the Tenth Circuit's erroneous reliance on the discredited *Insular Cases*—by finally overruling these flawed decisions. The Tenth Circuit's holding rests on the bizarre framework, set forth in the *Insular Cases*, that the Constitution applies differently to "incorporated" Territories (i.e., those destined for statehood) and "unincorporated" Territories (i.e., those which may remain Territories in perpetuity). *See* Pet.App.14a–26a; *Downes*, 182 U.S. at 341–42.

The *Insular Cases* propounded the "tortured formulation" that "unincorporated" Territories like American Samoa, Guam, the NMI, Puerto Rico, and the U.S. Virgin Islands are "foreign to the United States in a domestic sense." Christina Duffy Burnett, *A Convenient Constitution? Extraterritoriality After* Boumediene, 109 Colum. L. Rev. 973, 983 (2009) (quoting *Downes*, 182 U.S. at 341). In other words, an "unincorporated" Territory has "not been incorporated into the United States, but [is] merely appurtenant thereto as a possession." *Downes*, 182 U.S. at 341–42.

The Tenth Circuit's reliance on, and expansion of, the *Insular Cases* is *legally* incorrect. This Court has instructed that "neither the [*Insular Cases*] nor their reasoning should be given any further expansion." *Reid v. Covert*, 354 U.S. 1, 14 (1957) (plurality opinion); *see also Fin. Oversight & Mgmt. Bd. v. Aurelius Inv., LLC*, 140 S. Ct. 1649, 1665 (2020) (describing the *Insular Cases* as "much-criticized" and

declining to rely on them when assessing the Appointments Clause's applicability to Puerto Rico); *Torres v. Puerto Rico*, 442 U.S. 465, 475–76 (1979) (Brennan, J., concurring in the judgment) ("Whatever the validity of the [*Insular*] cases ... those cases are clearly not authority for questioning the application of the Fourth Amendment—or any other provision of the Bill of Rights—to the Commonwealth of Puerto Rico in the 1970's." (citations omitted)).

Despite this Court's admonitions, the Tenth Circuit relied upon and even expanded the *Insular Cases*.[3] The majority recognized that "[n]ot only is the purpose of the Insular Cases disreputable to modern eyes, so too is their reasoning. The Court repeatedly voiced concern that native inhabitants of the unincorporated Territories were simply unfit for the American constitutional regime." Pet.App.16a. And yet, the majority extensively relied upon the distinction between "incorporated" and "unincorporated" Territories that the *Insular Cases* invented, *see, e.g.,* Pet.App.14a, and determined that the applicability of the Citizenship Clause to American Samoans turned on "the Insular Cases' 'impracticable and anomalous' framework," which asks whether application of a particular constitutional provision to an unincorporated

[3] The Tenth Circuit's expansion of the *Insular Cases* is profound, as none of the *Insular Cases* construed the Citizenship Clause, nor resolved the Clause's applicability to the Territories. *See, e.g.*, *De Lima v. Bidwell*, 182 U.S. 1 (1901) (examining a federal customs law related to Puerto Rico); *Dooley v. United States*, 182 U.S. 222, 240 (1901) (examining a federal law imposing duties on goods from Puerto Rico); *Downes*, 182 U.S. at 348 (same).

Territory would be "impracticable and anomalous," *see* Pet.App.31a–32a.

The Tenth Circuit's reliance on the *Insular Cases* illustrates the need to immediately overrule these decisions. These cases have "no home in our Constitution or its original understanding." *Vaello Madero*, 142 S. Ct. at 1554 (Gorsuch, J., concurring); *id.* at 1555 ("The Insular Cases' departure from the Constitution's original meaning has never been much of a secret."). The Citizenship Clause of the Constitution is clear: "[a]ll persons born ... in the United States, and subject to the jurisdiction thereof, are citizens of the United States." U.S. Const. amend. XIV, § 1. Individuals born in *United States* Territories are undeniably born *in the United States*. Yet the Tenth Circuit, along with five other courts of appeals, have felt compelled to ignore the plain text of the Constitution and apply the spurious reasoning of the *Insular Cases* when interpreting the Citizenship Clause. *See Tuaua v. United States*, 788 F.3d 300, 306–07 (D.C. Cir. 2015) ("[T]he framework [of the *Insular Cases*] remains both applicable and of pragmatic use in assessing the applicability of rights to unincorporated territories."); *Valmonte v. INS*, 136 F.3d 914, 918 (2d Cir. 1998) ("[T]he Supreme Court in the *Insular Cases* provides authoritative guidance on the territorial scope of the term 'the United States' in the Fourteenth Amendment."); *Rabang v. INS*, 35 F.3d 1449, 1452–54 (9th Cir. 1994) (relying on the *Insular Cases* when considering the applicability of the Citizenship Clause to individuals born in the Territories); *see also Nolos v. Holder*, 611 F.3d 279, 282–84 (5th Cir. 2010) (same); *Lacap v. INS*, 138 F.3d 518, 519 (3d Cir. 1998) (same).

Lower courts' incorrect, yet persistent, expansions of the *Insular Cases* lay bare the uncomfortable reality that, so long as the *Insular Cases* remain "on the books[,] ... [l]ower courts continue to feel constrained to apply their terms." *Vaello Madero*, 142 S. Ct. at 1555 (Gorsuch, J., concurring). With the Court's repeated admonitions not to extend these precedents going unheeded, "the time has come to recognize that the Insular Cases rest on a rotten foundation" and "squarely overrule[] them." *Id.* at 1557 (Gorsuch, J., concurring); *see also id.* at 1560 n.4 (Sotomayor, J., dissenting) (characterizing the *Insular Cases* as "premised on beliefs both odious and wrong" and agreeing that it is past time to acknowledge the "error" of these decisions); *Trump v. Hawaii*, 138 S. Ct. 2392, 2423 (2018) (overruling *Korematsu v. United States*, 323 U.S. 214 (1944), which "was gravely wrong the day it was decided" and had already "been overruled in the court of history").

Racist notions about the supposed unsuitability of Territorial residents for citizenship and self-government permeate the rotten foundation of the *Insular Cases*. *See, e.g.*, *Vaello Madero*, 142 S. Ct. at 1552 (Gorsuch, J., concurring) (noting that the *Insular Cases* "rest ... on racial stereotypes"). Specifically, "[t]he unincorporated territory was a judicial innovation designed for the purpose of squaring the Constitution's commitment to representative democracy with the Court's implicit conviction that nonwhite people from unfamiliar cultures were ill-suited to participate in a majority-white, Anglo-Saxon polity." 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://tinyurl.com/445s43ht.

Take, for example, Justice White's concurrence in *Downes*, where he worried about the "grave evils" of a permanent union between the United States and its new insular possessions. 182 U.S. at 342–44. In his eyes, those living in the Territories were nothing more than "fierce, savage and restless" and therefore "absolutely unfit" to become citizens. *Id.* at 302, 306. Justice Brown similarly described the newly-acquired Territories as "inhabited by alien races." *Id.* at 282, 286–87 (Brown, J., writing alone but announcing the judgment of the Court). And the Court's decision in *Dorr v. United States* referred to the new insular possessions as "peopled by savages." 195 U.S. 138, 148 (1904).

The Tenth Circuit suggests these racist decisions "can be repurposed to preserve the dignity and autonomy" of the peoples of the Territories, by "permit[ting] courts to defer to the preferences of indigenous peoples." Pet.App.17a. But bigoted foundations cannot be repurposed so easily, especially where, as here, those bigoted foundations infect the very analytic framework the *Insular Cases* propound. *See Vaello Madero*, 142 S. Ct. at 1557 n.4 (Gorsuch, J., concurring) (noting "the uncomfortable truth that recent attempts to repurpose the Insular Cases merely drape the worst of their logic in new garb"); *see also id.* at 1554 ("The flaws in the Insular Cases are as fundamental as they are shameful.").

What is more, as explained below, normal principles of constitutional law are already capable of

accounting for and respecting the political autonomy, legal traditions, and cultural heritage of the Territories. There is no need to invent a "Constitution-lite" for this purpose.

The time has arrived for this Court to reconsider and overrule the *Insular Cases*, and this case presents a rare and ideal vehicle to do so.

III. U.S. Citizenship Is Compatible with the Territories' Political Autonomy, Legal Traditions, and Cultural Heritage.

In concluding that recognizing birthright citizenship for American Samoans would be "impracticable and anomalous," the Tenth Circuit credited the concern that if American Samoans were granted citizenship, various "traditional elements of the American Samoan culture could run afoul of constitutional protections." Pet.App.9a, 38a–40a. The D.C. Circuit previously deferred to similar concerns. *See Tuaua*, 788 F.3d at 309–10 (noting that members of the American Samoan government "posit the extension of citizenship could result in greater scrutiny under the Equal Protection Clause of the Fourteenth Amendment, imperiling American Samoa's traditional, racially-based land alienation rules").

The majority reached this conclusion based on vague and unsubstantiated speculation, and it is legally unsound. The reality is that critical constitutional rights, such as due process and equal protection, *already* apply in American Samoa irrespective of citizenship. *See, e.g., Balzac v. Porto Rico*, 258 U.S. 298, 312–13 (1922) (holding, prior to

Congress's recognition of birthright citizenship, that the Due Process Clause applied to Puerto Rico). Likewise, there is no support for the view that the citizenship status of individuals born in the Territories plays any role in the applicability of other provisions of the Constitution to the Territories. *See Craddick v. Terr. Registrar*, 1 Am. Samoa 2d 10 (App. Div. 1980).

Amici, in contrast, can demonstrate through their own experiences how U.S. citizenship is fully compatible with the Territories' right to self-determination, their local legal traditions, and the preservation of their vibrant cultural heritage. Each Territory's continued ability to define and shape its own political destiny and relationship with the United States *as a Territory* does not—and need not—turn on the relationship individuals have with the United States *as citizens*. It is possible to be proud U.S. citizens while still being proud CHamorus (indigenous people of Guam and the NMI), proud Virgin Islanders, proud Puerto Ricans, proud Guamanians, and proud Samoans.

A. U.S. Citizenship Is Compatible with the Territories' Right to Self-Determination.

The recognition of constitutional birthright citizenship for persons born in American Samoa will not diminish that Territory's right to self-determination. The question of the citizenship status of American Samoans exists separately from the question of the future political relationship between the United States and American Samoa.

The experiences of Puerto Rico and Guam are instructive. In Puerto Rico, debate concerning the ultimate political relationship between the Island and the United States has only become more robust in recent decades, as Puerto Rico has held six non-binding referenda regarding its political status since 1967. Cristina Corujo, *What to Know About Puerto Rico's Divide Over its Territorial Status*, ABC News (Apr. 27, 2021), https://tinyurl.com/2p8tzj4z. Last year, two separate bills, each supported by separate groups from Puerto Rico, were introduced in Congress regarding the Territory's status. *See* H.R. 1525, 117th Cong. (2021); H.R. 2070, 117th Cong. (2021). Similarly, from 1980 to 1997, Guam undertook a number of plebiscites and referenda "to fundamentally advance its political status," with voters weighing in on drafting a constitution. 1 Carlyle G. Corbin, Comm'n on Decolonization, *Giha Mo'na: A Self-Determination Study for Guåhan* 1 (2021), https://tinyurl.com/4ee9b6ku. In 1997, its government formed a Decolonization Commission to study and educate its population about different potential models of sovereignty. *Id.* at 2.

The fact that the people having these debates were U.S. citizens has been immaterial. Recognition of the birthright citizenship enjoyed by people born in American Samoa will similarly do nothing to prevent American Samoa from debating its future political relationship with the United States and deciding how it wishes to exercise its right to self-determination.

B. U.S. Citizenship Is Compatible with the Territories' Legal Traditions.

Recognition of birthright citizenship does nothing to undermine a Territory's unique legal regime and political institutions, and there is no reason to doubt that this will hold true in American Samoa. For the last century, U.S. citizenship has proven an important and enduring part of the other Territories' relationship to the United States. Territorial governments already resemble their counterparts in the fifty states in many ways, with each Territory having a tripartite government headed by a democratically elected governor. Most have a multiparty legislature and a Supreme Court, from which aggrieved parties may petition for review to this Court. Concerns that elements of the Samoan way of life "rest uneasily alongside the American legal system," *see* Pet.App.38a, lack substance and hearken back to the stereotypes embraced by the *Insular Cases*. "Congress has broad latitude to develop innovative approaches to territorial governance," and "may thus enable a territory's people to make large-scale choices about their own political institutions." *Puerto Rico v. Sanchez Valle*, 136 S. Ct. 1863, 1876 (2016).

Contrary to the Tenth Circuit's speculation, there is little support for the notion that U.S. citizenship would threaten American Samoa's institutions or legal traditions. For instance, Courts have *already* held that the Sixth Amendment's right to a jury trial in American Samoa can coexist with the Samoan legal fixtures of "aiga" (extended family), "matai" (communal land ownership), and "ifoga" (custom in

which one family renders formal apology to another for a serious offense). *See King v. Andrus*, 452 F. Supp. 11, 13–17 (D.D.C. 1977). Likewise, the recognition of statutory birthright citizenship in the NMI has not invalidated longstanding laws. *See, e.g.*, *N. Mariana Islands v. Atalig*, 723 F.2d 682, 690 (9th Cir. 1984) (upholding rule providing for jury trials in criminal cases only if the offense is punishable by more than five years' imprisonment or a $2,000 fine); *Rayphand v. Sablan*, 95 F. Supp. 2d 1133, 1136 (D. N. Mar. I. 1999) (malapportionment of the NMI Senate does not violate the Constitution's equal protection guarantee), *aff'd*, 528 U.S. 1110 (2000).

Moreover, fears that recognition of U.S. citizenship would result in a loss of land rights in American Samoa are unsupported. Similar land alienation restrictions are also in place throughout the NMI, and the Ninth Circuit has upheld such restrictions against constitutional challenge. *Wabol v. Villacrusis*, 958 F.2d 1450, 1462 (9th Cir. 1990) ("It would truly be anomalous to construe the equal protection clause to force the United States to break its pledge to preserve and protect NMI culture and property."). Crucially, the Ninth Circuit made no suggestion that citizenship played any role in its analysis. And American Samoa's own High Court, led by the then-Chief Judge of the Southern District of California sitting by designation, has already rejected an equal protection challenge to local land alienation rules. *See Craddick*, 1 Am. Samoa 2d 10.

The Constitution offers no reason to think citizenship would change this result. To the contrary, the text of the Constitution provides an important

reason to conclude the opposite: the Fifth Amendment's guarantee of due process, including its equal protection component, *see Vaello Madero*, 142 S. Ct. at 1541, refers to "persons," not citizens. U.S. Const. amend. V.

C. U.S. Citizenship Is Compatible with the Preservation of Each Territory's Distinctive Cultural Heritage.

Even a brief discussion of the vibrant cultures and traditions of the four Territories *amici* represent demonstrates that U.S. citizenship does not come at the cost of losing cultural heritage.

1. Guam

The case of Guam is perhaps most similar to that of American Samoa. The United States acquired Guam from Spain in 1898 under the terms of the Treaty of Paris that concluded the Spanish-American War. *See* Tom C.W. Lin, *Americans, Almost and Forgotten*, 107 Calif. L. Rev. 1249, 1261 (2019). However, Guamanians were labeled as non-citizen U.S. nationals until 1950, when Congress finally passed the Organic Act of Guam. *See* 48 U.S.C. § 1421(a).

Since the recognition of U.S. citizenship, Guamanians have maintained their distinctive culture and identity. The CHamoru are the largest ethnic group in Guam, and CHamoru (also referred to as Chamorro), along with English, are the Territory's official languages. Both the Federal and Territorial governments have taken steps to preserve the CHamoru language through legislation and public

education campaigns. *See* Eduardo D. Faingold, *Language Rights and the Law in the United States and its Territories* 78 (2018); *see also* Corbin, *supra*, at 126 ("The government of Guam has established agencies which aid CHamoru cultural preservation and perpetuation, recognizing the need to preserve CHamoru language and heritage."). Guamanians also remain deeply connected to other dimensions of their unique heritage, exemplified by Liberation Day, which commemorates the people of Guam's liberation from Japan. *See* Jesse K. Souki, *The Forgotten Heroes: Reparations for Victims of Occupied Guam During World War II*, 1 Seattle J. Soc. Just. 573, 581 (2003). This weeks-long, island-wide celebration includes traditional dances, cultural competitions, and exhibitions, alongside patriotic commemoration of Guam's relationship with the United States. Andrew Critchelow, *Cultural Event Marks Liberation of Guam*, The News-Enterprise (July 20, 2019), https://tinyurl.com/mwuwrsn7.

2. The Northern Mariana Islands

After World War II, the United States initially administered the Northern Mariana Islands as part of the Trust Territories of the Pacific Islands, to be governed under the terms of the United Nations Trusteeship Agreement. *See* Joseph E. Horey, *The Right of Self-Government in the Commonwealth of the Northern Mariana Islands*, 4 Asian-Pac. L. & Pol'y J. 180, 181 (2003). In 1975, Congress approved the Covenant to Establish a Commonwealth of the Northern Mariana Islands, which authorized the NMI to self-govern on matters related to internal affairs, while reserving for the federal government control

over foreign affairs and defense. *Id.* at 183. The Covenant also contained a provision recognizing birthright citizenship for the NMI. *See* Charles R. Venator-Santiago et al., *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, 273 (2016).

Since its inception, the Covenant has sought to preserve "cultural balances" in the NMI. *See* Marybeth Herald, *The Northern Mariana Islands: A Change in Course Under Its Covenant with the United States*, 71 Or. L. Rev. 127, 140 (1992). To this end, the Covenant includes provisions that protect the political and property interests of the NMI's smaller islands and their inhabitants. *Id.* The NMI also share a rich cultural heritage with Guam, as "the Chamorro people of Guam and the Northern Marianas have retained their common culture and language and have maintained the close ties that flow from kinship and geographic proximity." *Id.* at 201 n.329. In addition to English, Chamorro and Carolinian are the NMI's official languages.

3. Puerto Rico

Like Guam, Puerto Rico became part of the United States under the terms of the Treaty of Paris of 1898. *See* Lin, *supra*, at 1254. Later, the Nationality Act of 1940 recognized that "all persons born in Puerto Rico on or after January 13, 1941, and subject to the jurisdiction of the United States, are citizens of the United States at birth." *See* 8 U.S.C. § 1402.

Similar to other Territories, Puerto Rico has maintained a vibrant culture since its people were

recognized as U.S. citizens. "Puerto Rican culture is a rich and diverse tapestry that mixes Native, Spanish, and African heritage." Pedro A. Malavet, *Puerto Rico: Cultural Nation, American Colony*, 6 Mich. J. Race & L. 1, 66 (2000). Although English and Spanish are Puerto Rico's official languages, over 95% of its population speaks Spanish. *See What Languages Are Spoken in Puerto Rico?*, WorldAtlas (last visited May 10, 2022), https://tinyurl.com/2p86wsra. The Spanish language dominates everyday life, serving as the primary language of its public school system. *See* Ingrid T. Colón, *Bilingual Education in Puerto Rico: Interview with Dr. Kevin S. Carroll*, New America (Aug. 12, 2019), https://tinyurl.com/yc24w6tk.

The harmony between Puerto Rican culture and U.S. citizenship is even enshrined in Puerto Rico's Constitution, which reads in part: "We consider as determining factors in our life our citizenship of the United States of America and our aspiration continually to enrich our democratic heritage in the individual and collective enjoyment of its rights and privileges ... [and] the co-existence in Puerto Rico of the two great cultures of the American Hemisphere." P.R. Const. pmbl.

4. U.S. Virgin Islands

The United States acquired the Virgin Islands from Denmark in 1917, with Congress recognizing citizenship ten years later. *See* Lin, *supra*, at 1261. Since then, Virgin Islanders have continued to enjoy a unique culture. Although English is the Islands' official language, its residents are known to infuse English with Creole to create a distinctive local

vernacular. *See Virgin Islands Language*, VInow (last visited May 10, 2022), https://tinyurl.com/4sc5cy9w. As in other Territories, Virgin Islanders remain deeply connected to their Afro-Caribbean and indigenous roots. For instance, quelbe—likely derived from the Islands' formerly enslaved people—is the Territory's official music, with performances during Emancipation Day, which commemorates the 1848 uprising that ended slavery. *Virtual Quelbe Concert Commemorates Emancipation Day*, V.I. Daily News (July 3, 2020), https://tinyurl.com/yckk9dye. The month-long Carnival in spring and Festival during Christmas provide Virgin Islanders with another occasion to celebrate their culture, cuisine, history, music, and people each year.

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Each of the four Territories *amici* represent has experienced political and cultural shifts over the course of several centuries. But these natural evolutions of culture are unrelated to the citizenship status of persons born in the Territories. Throughout their time under the American flag, the peoples of the Territories have shown that U.S. citizenship is fully compatible with their resilience and the continued celebration of their heritage, sustained for millennia by diverse cultures from the Pacific Ocean to the Caribbean Sea. There is no reason to believe that recognition of birthright citizenship would diminish American Samoa's unique culture or stifle its right to shape its own destiny.

This Court can and should show respect for the right to political and cultural self-determination of

American Samoa, as well as Guam, the NMI, Puerto Rico, and the U.S. Virgin Islands. But the way to show that respect is not to "repurpose[]" the racist and constitutionally anomalous *Insular Cases*. Pet.App.17a. "The way to stop [disrespecting the people of the U.S. Territories] is to stop [disrespecting the people of the U.S. Territories]." *Parents Involved in Community Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 748 (2007). That means overruling the *Insular Cases*. And it means not ignoring the Constitution's straightforward command that "*[a]ll* persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States." U.S. Const. amend. XIV, § 1 (emphasis added).

CONCLUSION

For the foregoing reasons, this Court should grant the petition for certiorari.

Respectfully submitted,

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