No. 21-1394

# In the Supreme Court of the United States

JOHN FITISEMANU, ET AL., PETITIONERS

*v.*

UNITED STATES OF AMERICA, ET AL.

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

**BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION**

ELIZABETH B. PRELOGAR
*Solicitor General*
*Counsel of Record*
BRIAN M. BOYNTON
*Principal Deputy Assistant Attorney General*
SHARON SWINGLE
BRAD HINSHELWOOD
*Attorneys*

*Department of Justice*
*Washington, D.C. 20530-0001*
*SupremeCtBriefs@usdoj.gov*
*(202) 514-2217*

## QUESTION PRESENTED

Whether the Citizenship Clause of the Fourteenth Amendment confers United States citizenship on individuals born in American Samoa.

## TABLE OF CONTENTS

Page

Opinions below ..... 1
Jurisdiction ..... 1
Statement ..... 2
Argument ..... 6
Conclusion ..... 21

## TABLE OF AUTHORITIES

Cases:

*Afroyim* v. *Rusk*, 387 U.S. 253 (1967) ..... 13
*Arizona State Legislature* v. *Arizona Independent Redistricting Commission*, 576 U.S. 787 (2015) ..... 7
*Azar* v. *Allina Health Services*, 139 S. Ct. 1804 (2019) ..... 14
*Barber* v. *Gonzales*, 347 U.S. 637 (1954) ..... 12
*Boumediene* v. *Bush*, 553 U.S. 723 (2008) ..... 16
*California* v. *Rooney*, 483 U.S. 307 (1987) ..... 17
*Downes* v. *Bidwell*, 182 U.S. 244 (1901) ..... 8, 12
*Eche* v. *Holder*, 694 F.3d 1026 (9th Cir. 2012), cert. denied, 570 U.S. 904 (2013) ..... 18
*Elk* v. *Wilkins*, 112 U.S. 94 (1884) ..... 14, 15
*Fleming* v. *Page*, 50 U.S. (9 How.) 603 (1850) ..... 9
*Garcia* v. *United States*, 469 U.S. 70 (1984) ..... 14
*Hooven & Allison Co.* v. *Evatt*, 324 U.S. 652 (1945) ..... 7, 8, 9
*Houston Community College System* v. *Wilson*, 142 S. Ct. 1253 (2022) ..... 13
*Lacap* v. *INS*, 138 F.3d 518 (3d Cir. 1998) ..... 18
*Martin* v. *Hunter's Lessee*, 14 U.S. (1 Wheat.) 304 (1816) ..... 10

Cases—Continued: Page

*McCulloch* v. *Maryland*,
17 U.S. (4 Wheat.) 316 (1819) ..... 7
*National Coalition for Men* v. *Selective Service System*, 141 S. Ct. 1815 (2021) ..... 20
*Nolos* v. *Holder*, 611 F.3d 279 (5th Cir. 2010) ..... 18
*O'Connor* v. *United States*, 479 U.S. 27 (1986) ..... 12
*Rabang* v. *Boyd*, 353 U.S. 427 (1957) ..... 11, 12, 13
*Rabang* v. *INS*, 35 F.3d 1449, (9th Cir. 1994), cert. denied, 515 U.S. 1130 (1995) ..... 17, 18
*Russello* v. *United States*, 464 U.S. 16 (1983) ..... 10
*Slaughter-House Cases*,
83 U.S. (16 Wall.) 36 (1873) ..... 14, 15
*Toyota* v. *United States*, 268 U.S. 402 (1925) ..... 12
*Tuaua* v. *United States*:
788 F.3d 300 (D.C. Cir. 2015), cert. denied, 579 U.S. 902 (2016) ..... 18, 20
579 U.S. 902 (2016) ..... 7, 17
*United States* v. *Ptasynski*, 462 U.S. 74 (1983) ..... 8
*United States* v. *Vaello Madero*,
142 S. Ct. 1539 (2022) ..... 9, 13
*United States* v. *Wong Kim Ark*,
169 U.S. 649 (1898) ..... 14, 15
*Valmonte* v. *INS*, 136 F.3d 914 (2d Cir.), cert. denied, 525 U.S. 1024 (1998) ..... 17, 18

Constitutions, treaties, statutes, and rule: Page

U.S. Const.:
Pmbl. ..... 7, 8
Art. I:
§ 8:
Cl. 1 (Tax Uniformity Clause) ..... 8
Cl. 4 (Naturalization Clause) ..... 18
§ 10, Cl. 2 (Import-Export Clause) ..... 9
Art. II ..... 8
§ 1, Cl. 4 ..... 8
Art. IV ..... 8
§ 3, Cl. 2 ..... 8
Art. VII ..... 8
Amend. XII ..... 8
Amend. XIII ..... 4, 9
§ 1 ..... 9
Amend. XIV ..... 4, 6, 10, 11, 14, 15
§ 1 (Citizenship Clause) ..... *passim*
Amend. XVIII ..... 9
§ 1 ..... 10
Amend. XXIII, § 1 ..... 8
Am. Sam. Rev. Const.:
Art. I, § 3 ..... 2
Art. V, § 11 ..... 2
Adams-Onis Treaty, U.S.-Spain, Art. 6, Feb. 22, 1819, 8 Stat. 256, 258 ..... 11
Convention Between the United States and Denmark for Cession of the Danish West Indies, U.S.-Den., Aug. 4, 1916, 39 Stat. 1706 ..... 12

Treaties, statutes, and rule—Continued: Page

Treaty of Paris, U.S.-Spain, Dec. 10, 1898, 30 Stat. 1754:
Art. II, 30 Stat. 1755 ..... 12
Art. IX, 30 Stat. 1759 ..... 11
Act of Mar. 2, 1807, ch. 22, § 1, 2 Stat. 426 ..... 10
Act of Mar. 1, 1809, ch. 24, § 1, 2 Stat. 528 ..... 10
Act of June 30, 1864, ch. 173, § 94, 13 Stat. 264 ..... 10
Act of July 4, 1864, ch. 246, § 5, 13 Stat. 386 ..... 10
Act of Feb. 25, 1927, ch. 192, 44 Stat. 1234 ..... 12
Autonomy Act, ch. 416, § 2, 39 Stat. 546 ..... 11
Organic Act of Guam, ch. 512, § 4, 64 Stat. 384-385 ..... 12
Organic Act of Puerto Rico, ch. 145, § 5, 39 Stat. 953 ..... 12
8 U.S.C. 1101(a)(29) ..... 2
8 U.S.C. 1403(a) ..... 12
8 U.S.C. 1408(1) ..... 2, 3, 6, 16
8 U.S.C. 1427(a) ..... 2, 20
8 U.S.C. 1436 ..... 2, 20
48 U.S.C. 1661(a) ..... 2
48 U.S.C. 1662 ..... 2
Sup. Ct. R. 10(a) ..... 18

Miscellaneous:

H.R. 1941, 117th Cong., 1st Sess. (2021) ..... 19
Letter from James Madison to Spencer Roane (Sept. 2, 1819), *in* 8 *Writings of James Madison* (Gaillard Hunt ed. 1908) ..... 13
S. Con. Res. 37-3, 37th Leg., 2d Reg. Sess. (Am. Sam. 2021) ..... 19, 20

# In the Supreme Court of the United States

No. 21-1394

JOHN FITISEMANU, ET AL., PETITIONERS,

*v.*

UNITED STATES OF AMERICA, ET AL.

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

**BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION**

## OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-94a) is reported at 1 F.4th 862. The memorandum decision and order of the district court (Pet. App. 95a-181a) is reported at 426 F. Supp. 3d 1155.

## JURISDICTION

The judgment of the court of appeals was entered on June 15, 2021. A petition for rehearing was denied on December 27, 2021 (Pet. App. 182a-212a). On March 10, 2022, Justice Gorsuch extended the time within which to file a petition for a writ of certiorari to and including April 27, 2022, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## STATEMENT

1. American Samoa is a group of islands in the Pacific Ocean, approximately 2500 miles south of Hawaii, with a population of almost 50,000. Pet. App. 7a. It became a territory of the United States in 1900. *Ibid.*; see 48 U.S.C. 1661(a).

American Samoa governs itself under a constitution adopted in 1967. See Am. Sam. Rev. Const. Art. V, § 11. That constitution seeks to preserve American Samoa's traditional way of life, known as the *fa'a Samoa*, including a traditional regime of communal property ownership. Pet. App. 38a. The constitution directs the American Samoan government to "protect persons of Samoan ancestry against alienation of their lands and the destruction of the Samoan way of life and language." Am. Sam. Rev. Const. Art. I, § 3. It also empowers the American Samoan government to enact legislation to "protect the lands, customs, culture, and traditional Samoan family organization of persons of Samoan ancestry." *Ibid.*

Congress has defined American Samoa and Swains Island—a later-acquired coral atoll that is administered as part of American Samoa, 48 U.S.C. 1662—as "outlying possessions of the United States." 8 U.S.C. 1101(a)(29). And Congress has provided that persons born in outlying possessions "shall be nationals, but not citizens, of the United States at birth." 8 U.S.C. 1408(1). Noncitizen nationals may apply for U.S. citizenship, via an expedited process, once they meet certain residency and other requirements. See 8 U.S.C. 1427(a); see also 8 U.S.C. 1436 (allowing noncitizen nationals to count any period of residency in American Samoa toward the residency requirement for naturalization).

2. Petitioners are a nonprofit organization based in Utah and three individuals who were born in American Samoa but now live in Utah. Pet. App. 96a. Petitioners sued the federal government in the U.S. District Court for the District of Utah, claiming that the Citizenship Clause of the Fourteenth Amendment makes the individual petitioners citizens of the United States by virtue of their birth in American Samoa. *Ibid.* That clause provides: "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.

The government of American Samoa and American Samoa's non-voting delegate in the U.S. House of Representatives intervened to defend the constitutionality of 8 U.S.C. 1408(1). See Pet. App. 4a-5a. The intervenors explained that "[e]stablishing birthright citizenship by judicial fiat could have an unintended and potentially harmful impact upon American Samoa society." D. Ct. Doc. 61, at 3 (June 8, 2018).

The district court granted summary judgment to petitioners. Pet. App. 95a-181a. The court observed that this case turns on "whether American Samoa is 'in the United States' for purposes of the Fourteenth Amendment." *Id.* at 138a. The court concluded that, because American Samoa is "under the full sovereignty of the United States," it forms part of the "United States" for purposes of the Citizenship Clause. *Id.* at 168a. The court accordingly declared that Section 1408(1) is unconstitutional, and it enjoined the federal government from enforcing that provision. *Id.* at 180a-181a. The court, however, stayed its judgment pending appellate review. D. Ct. Doc. 109 (Dec. 13, 2019).

3. A divided panel of the court of appeals reversed. Pet. App. 1a-94a.

The court of appeals concluded that the text and structure of the Constitution and the background of the Fourteenth Amendment left the "geographic scope" of the Citizenship Clause "ambiguous." Pet. App. 27a. The court juxtaposed the Fourteenth Amendment, which extends citizenship to individuals born "in the United States," with the Thirteenth Amendment, which prohibits slavery "within the United States, *or any place subject to their jurisdiction*." *Ibid.* (emphasis added; citations omitted). The court explained that "[b]ecause the Thirteenth Amendment seems to apply more broadly," "it is plausible to conclude territories are covered by the Thirteenth Amendment but not the Citizenship Clause." *Id.* at 27a-28a.

The court of appeals then explained that "consistent historical practice" supports the federal government's narrower reading of the Citizenship Clause. Pet. App. 31a. The court observed that "Congress has always wielded plenary authority over the citizenship status of unincorporated territories, a practice that itself harked back to territorial administration in the nineteenth century." *Ibid.* It noted that "[r]esidents of Puerto Rico, Guam, the Northern Mariana Islands, and the U.S. Virgin Islands each enjoy birthright citizenship by an act of Congress," not automatically by virtue of the Fourteenth Amendment. *Ibid.*

Judge Lucero, writing only for himself, also relied on a series of decisions of this Court known as the Insular Cases. Pet. App. 32a-40a. Judge Lucero read those cases to mean that constitutional provisions guaranteeing "'fundamental'" rights extend to territories of the United States "without regard to local context," while

other constitutional provisions do not extend to the territories if it would be "impracticable and anomalous" to apply them there. *Id.* at 32a, 34a (citation omitted). Although he acknowledged "[s]everal difficulties" with that analysis, he concluded that "birthright citizenship does not qualify as a fundamental right" under that framework, because it is "like the right to a trial by jury" which is "an important element of the American legal system" but "not a prerequisite to a free government." *Id.* at 33a, 34a. Judge Lucero further concluded that it would be "impracticable and anomalous" to apply the Citizenship Clause in American Samoa, both because "the American Samoan people through their elected representatives" have expressed their "preference against citizenship" and because, according to those representatives, extending birthright citizenship to American Samoa would be in "tension" with "the American Samoan way of life (the *fa'a Samoa*)." *Id.* at 34a, 35a, 38a.

Chief Judge Tymkovich issued a concurring opinion. Pet. App. 41a-44a. He did not find it necessary to turn to the Insular Cases for guidance because he found "the traditional tools of constitutional interpretation" sufficient to resolve the territorial scope of the Citizenship Clause. *Id.* at 41a. "Faced with an ambiguous constitutional text," Chief Judge Tymkovich turned to "historical practice." *Id.* at 43a. He observed that "[t]he settled understanding and practice over the past century is that Congress has the authority to decide the citizenship status of unincorporated territorial inhabitants." *Id.* at 43a-44a. Because he found each side's reading of the Citizenship Clause to be "plausible," he "resolve[d] the tie in favor of the historical practice." *Id.* at 44a.

Judge Bacharach dissented. Pet. App. 45a-94a. He concluded, based on his review of historical sources, that the term "United States" in the Citizenship Clause encompasses U.S. territories, including American Samoa. *Id.* at 48a-78a. In Judge Bacharach's view, U.S. citizenship would have been understood as extending to "everyone born within the nation's territorial limits who did not owe allegiance to another sovereign entity." *Id.* at 49a. He discounted longstanding practice with respect to citizenship in unincorporated territories on the ground that it postdated the ratification of the Fourteenth Amendment. *Id.* at 72a-74a. He also disagreed with Judge Lucero's judgments about how to apply the framework from the Insular Cases, concluding instead that birthright citizenship is a "fundamental" right and that extending it to persons born in American Samoa would be neither impracticable nor anomalous. *Id.* at 78a-92a.

The court of appeals denied petitioners' petition for rehearing en banc. Pet. App. 182a-212a. Judge Bacharach, joined by Judge Moritz, dissented from the denial of rehearing. *Id.* at 188a-212a.

**ARGUMENT**

Petitioners contend (Pet. 13-34) that the Citizenship Clause of the Fourteenth Amendment confers birthright citizenship on individuals born in American Samoa and that 8 U.S.C. 1408(1) thus violates the Constitution. The court of appeals correctly rejected that contention, and its decision does not conflict with any decision of this Court or of any other court of appeals. The court of appeals' interpretation of the Citizenship Clause is consistent with the Constitution's test and with the long-established practice of the political Branches. It is also consistent with the wishes of the Samoan people,

who have made clear through their elected representatives that they do not favor birthright citizenship. And to the extent that petitioners and other American Samoans who now reside in the United States would prefer to become citizens, they can avail themselves of the favorable terms for naturalization Congress has provided. This Court previously denied a petition for a writ of certiorari presenting the same question in *Tuaua* v. *United States*, 579 U.S. 902 (2016) (No. 15-981). The same result is warranted here.

1. The Citizenship Clause provides: "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 (emphasis added). The term "the United States," as used in the Citizenship Clause, does not include the territories.

a. "The term 'United States' may be used in any one of several senses." *Hooven & Allison Co.* v. *Evatt*, 324 U.S. 652, 671 (1945). In its narrowest sense, it refers only to "the states which are united by and under the Constitution"; in its broadest, it encompasses "the territory over which the sovereignty of the United States extends." *Id.* at 671-672.

In determining how the Citizenship Clause uses the term "United States," "there is no better dictionary than the rest of the Constitution itself." *Arizona State Legislature* v. *Arizona Independent Redistricting Commission*, 576 U.S. 787, 829 (2015) (Roberts, C.J, dissenting); see, *e.g.*, *McCulloch* v. *Maryland*, 17 U.S. (4 Wheat.) 316, 404-405 (1819). The rest of the Constitution often uses the term "United States" in a way that does not encompass the territories. The Preamble, for example, declares that the Constitution was established

by "We the People of the United States." U.S. Const. Pmbl. Yet only the States participated in proposing and ratifying the Constitution; the Northwest Territory did not. See U.S. Const. Art. VII. Similarly, Article II provides that Congress "may determine the Time of chusing the [presidential] Electors, and the Day on which they shall give their Votes; which Day shall be the same *throughout the United States*." U.S. Const. Art. II, § 1, Cl. 4 (emphasis added). That provision plainly uses the term "United States" in a sense that excludes the territories, which do not participate in presidential elections. See U.S. Const. Amend. XII (1804 amendment providing that "[t]he Electors shall meet in their respective states"); *id.* Amend. XXIII, § 1 (1961 amendment providing that electors from the District of Columbia "shall be considered * * * to be electors appointed by a State"). And Article IV provides that Congress may legislate with respect to the "Territory or other Property belonging to the United States." U.S. Const. Art. IV, § 3, Cl. 2. Article IV thus describes the territories as "belonging to, but not a part of, the Union of states under the Constitution." *Hooven & Allison*, 324 U.S. at 673.

This Court, moreover, has held that territories do not automatically form part of the "United States" for purposes of other constitutional provisions. For example, the Tax Uniformity Clause provides that "all Duties, Imposts and Excises shall be uniform *throughout the United States*." U.S. Const. Art. I, § 8, Cl. 1 (emphasis added). Yet this Court has concluded that Congress may impose non-uniform taxes and duties in territories such as Puerto Rico. See, *e.g.*, *United States* v. *Ptasynski*, 462 U.S. 74, 83 n.12 (1983) (discussing *Downes* v. *Bidwell*, 182 U.S. 244 (1901)). In fact, as the

Court recently noted, "Congress has long maintained federal tax * * * programs for residents of Puerto Rico * * * that differ in some respects from the federal tax * * * programs for residents of the 50 States." *United States* v. *Vaello Madero*, 142 S. Ct. 1539, 1542 (2022); see, *e.g.*, *ibid.* (observing that "residents of Puerto Rico are typically exempt from most federal * * * excise taxes").

Similarly, the Import-Export Clause restricts the authority of the States to tax "Imports," U.S. Const. Art. I, § 10, Cl. 2—*i.e.*, articles that are brought into the United States from outside the United States, see *Hooven & Allison*, 324 U.S. at 669. In *Hooven & Allison*, the Court held that, although an article brought from another State did not qualify as an "Import" under the Clause, an article brought from the Philippines (then a U.S. territory) did. See *id.* at 674. That is so, the Court has explained, because the Philippines were "not a part of the United States in the constitutional sense to which the provisions with respect to imports are applicable." *Id.* at 679; see also *Fleming* v. *Page*, 50 U.S. (9 How.) 603, 615 (1850) (holding that territory occupied during the Mexican-American War was not part of the United States for purposes of a federal customs statute).

When Congress meant to refer not only to the United States but also to the territories—whether in proposed constitutional amendments or in legislation—it often made that intention explicit. The Thirteenth Amendment, for example, which was proposed and ratified in 1865, provides that neither slavery nor involuntary servitude "shall exist within the United States, *or any place subject to their jurisdiction*." U.S. Const. Amend. XIII, § 1 (emphasis added). And the Eighteenth

Amendment, while it was in effect between 1920 and 1933, prohibited intoxicating liquors in "the United States *and all territory subject to the jurisdiction thereof*." U.S. Const. Amend. XVIII, § 1 (emphasis added). Similarly, federal statutes enacted before Reconstruction referred separately to the United States and its territories. See, *e.g.*, Act of Mar. 2, 1807, ch. 22, § 1, 2 Stat. 426 (banning the importation of slaves "into the United States or the territories thereof"); Act of Mar. 1, 1809, ch. 24, § 1, 2 Stat. 528 (banning certain French and British vessels from "harbors and waters of the United States and of the territories thereof"); Act of June 30, 1864, ch. 173, § 94, 13 Stat. 264 (imposing duties on products made or sold "within the United States or territories thereof"); Act of July 4, 1864, ch. 246, § 5, 13 Stat. 386 (referring to the transportation of immigrants "to the United States and its territories").

In contrast, the Fourteenth Amendment's Citizenship Clause—which Congress proposed for ratification by state legislatures in 1866—refers only to the "United States"; it says nothing about territories or places (as opposed to persons) that are subject to the United States' jurisdiction. "From this difference of phraseology, * * * a difference in constitutional intention may, with propriety, be inferred. It is hardly to be presumed that the variation in the language could have been accidental." *Martin* v. *Hunter's Lessee*, 14 U.S. (1 Wheat.) 304, 334 (1816); see *Russello* v. *United States*, 464 U.S. 16, 23 (1983).

b. Historical practice strongly supports that interpretation of the Fourteenth Amendment. As the court of appeals explained, practice between the Founding and the Fourteenth Amendment was consistent with the understanding that citizenship in the territories

"was not extended by operation of the Constitution," because it was instead addressed by other instruments, such as specific provisions of treaties or statutes. Pet. App. 11a; see *id.* at 11a-13a & n.5 (discussing examples); Adams-Onis Treaty, U.S.-Spain, Art. 6, Feb. 22, 1819, 8 Stat. 256, 258 ("The inhabitants of [Florida] shall be incorporated into the Union of the United States, as soon as may be consistent with the principles of the Federal Constitution, and admitted to the enjoyment of all the privileges, rights, and immunities of the citizens of the United States."). And since the adoption of the Fourteenth Amendment, "every extension of citizenship to inhabitants of an overseas territory has come by an act of Congress." Pet. App. 13a. Thus, as Chief Judge Tymkovich emphasized in his concurring opinion, "[t]he settled understanding and practice over the past century" is that Congress may determine the citizenship status of territorial inhabitants. *Id.* at 43a-44a.

For example, the Treaty of Paris, in which Spain ceded the Philippines to the United States, provided that the "civil rights and political status" of the inhabitants of the Philippines "shall be determined by Congress." Treaty of Paris, U.S.-Spain, Art. IX, Dec. 10, 1898, 30 Stat. 1759. Congress, in turn, provided that inhabitants of the Philippines would be "citizens of the Philippine Islands" rather than citizens of the United States. Autonomy Act, ch. 416, § 2, 39 Stat. 546. In *Rabang* v. *Boyd*, 353 U.S. 427 (1957), this Court applied that provision in the course of allowing the federal government to deport a person who had been born in the Philippines during its territorial period. *Id.* at 428-429, 433. The Court expressly rejected "the erroneous assumption that Congress was without power to legislate the exclusion of Filipinos." *Id.* at 432. It explained that,

when the United States acquires a territory, Congress has the power "to prescribe upon what terms the United States will receive * * * inhabitants, and what their status shall be." *Id.* at 432 (quoting *Downes*, 182 U.S. at 279 (opinion of Brown, J.)) (emphasis omitted). Other decisions of this Court likewise applied that statutory citizenship provision without questioning its constitutionality. See *Barber* v. *Gonzales*, 347 U.S. 637, 639 n.1 (1954); *Toyota* v. *United States*, 268 U.S. 402, 410-411 (1925).

Similarly, Spain ceded Puerto Rico to the United States in 1898, but Congress chose to extend citizenship to persons born in Puerto Rico in 1917. See Treaty of Paris, Art. II, 30 Stat. 1755; Organic Act of Puerto Rico, ch. 145, § 5, 39 Stat. 953. Spain also ceded Guam to the United States in 1898, but Congress chose to extend citizenship to persons born in Guam in 1950. See Treaty of Paris, Art. II, 30 Stat. 1755; Organic Act of Guam, ch. 512, § 4, 64 Stat. 384-385. Denmark ceded the U.S. Virgin Islands to the United States in 1917, but Congress chose to extend citizenship to persons born in the Virgin Islands in 1927. See Convention Between the United States and Denmark for Cession of the Danish West Indies, U.S.-Den., Aug. 4, 1916, 39 Stat. 1706; Act of Feb. 25, 1927, ch. 192, 44 Stat. 1234. And the Panama Canal Zone was a U.S. territory from 1904 to 1979, but Congress has provided that a person is a U.S. citizen by virtue of birth in the Canal Zone only if his mother or father was also a U.S. citizen. See *O'Connor* v. *United States*, 479 U.S. 27, 28 (1986); 8 U.S.C. 1403(a).

That longstanding congressional practice confirms that the Citizenship Clause does not confer citizenship upon people born in territories such as American Samoa. As this Court has explained, "long settled and es-

tablished practice is a consideration of great weight" in the interpretation of the Constitution. *Houston Community College System* v. *Wilson*, 142 S. Ct. 1253, 1259 (2022) (brackets and citation omitted). "Often, 'a regular course of practice' can illuminate or 'liquidate' our founding document's 'terms & phrases.'" *Ibid.* (quoting Letter from James Madison to Spencer Roane (Sept. 2, 1819), in 8 *Writings of James Madison* 450 (Gaillard Hunt ed. 1908)).

Here, Congress's longstanding practice also illustrates the practical problems created by petitioners' reading. As discussed above, Congress treated persons born in the Philippines as citizens of the Philippine Islands rather than citizens of the United States. See pp. 11-12, *supra*. That choice proved important when the Philippines later became independent, because it avoided thorny questions about whether people born in the Philippines during its territorial period would retain U.S. citizenship after independence. Compare *Afroyim* v. *Rusk*, 387 U.S. 253, 257 (1967) (stating that Congress lacks the power to deprive a natural-born citizen of U.S. citizenship without his consent), with *Rabang*, 353 U.S. at 431 (holding that persons born in the Philippines became "aliens" upon independence). Petitioners' reading of the Citizenship Clause would deprive Congress of the power to make such choices, thus diminishing its ability to account for the "unique histories, economic conditions, social circumstances, independent policy views, and relative autonomy of the individual Territories." *Vaello Madero*, 142 S. Ct. at 1541.

2. Petitioners' contrary arguments lack merit.

a. Petitioners first cite (Pet. 14-19) dictionaries, maps, atlases, and other sources that use the term "United States" to encompass the territories. But those

sources show only that one *can* use the term "United States" in a manner that includes the territories—a point that the government does not dispute. See p. 7, *supra*. Those sources do not suggest that the Constitution in general, or the Citizenship Clause in particular, uses the term that way. To the contrary, sources of greater legal relevance than maps and atlases—including other provisions of the Constitution itself, congressional practice before and after the Fourteenth Amendment, and this Court's precedents—show that the Clause does not use the term "United States" in a sense that includes territories such as American Samoa.

Petitioners also cite (Pet. 15-16) three statements made by Senators during debates over the ratification of the Fourteenth Amendment. But two of those statements merely said that the Citizenship Clause extends to persons born "within the limits of the United States" or "within the territory of the United States." Pet. 16 (citations omitted). In citing those statements, petitioners beg the question whether a territory forms part of "the United States" in the first place. In any event, "legislative history is not the law," *Azar* v. *Allina Health Services*, 139 S. Ct. 1804, 1814 (2019) (citation omitted), and isolated floor statements are "not impressive legislative history," *Garcia* v. *United States*, 469 U.S. 70, 78 (1984) (citation omitted).

b. Petitioners next rely (Pet. 20-23) on this Court's decisions in the *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36 (1873), *Elk* v. *Wilkins*, 112 U.S. 94 (1884), and *United States* v. *Wong Kim Ark*, 169 U.S. 649 (1898). But none of those cases establishes that the Citizenship Clause confers birthright citizenship on persons born in American Samoa.

In the *Slaughter-House Cases*, this Court observed that, as a result of the Fourteenth Amendment, "persons may be citizens of the United States without regard to their citizenship of a particular State." 83 U.S. (16 Wall.) at 73. But the Court did not purport to set out the particular circumstances in which that may be the case. It did not determine how the Citizenship Clause applies to territories.

In *Elk*, this Court held that the Citizenship Clause does not confer citizenship on members of Indian tribes "born within the territorial limits of the United States," because they are not subject to the jurisdiction of the United States within the meaning of the clause. 112 U.S. at 102. But that statement says nothing about whether territories such as American Samoa fall within "the territorial limits of the United States." *Ibid.*

Finally, in *Wong Kim Ark*, this Court held that the Citizenship Clause conferred birthright citizenship upon a child born in California, even though the child's parents were not citizens of the United States. 169 U.S. at 705. Because the child had been born in a State, the Court had no occasion to consider the application of the Citizenship Clause to the territories. Petitioners cite *Wong Kim Ark*'s statements that the clause confers citizenship upon persons born in "the dominion" or "the territory of the United States," Pet. 21 (citations and emphases omitted), but those statements do not answer the question of how far "the United States" extends.

c. Petitioners also contend (Pet. 24-28, 34) that the decision below improperly applies the framework from the Insular Cases and that this case provides an appropriate vehicle for reexamining those decisions. That is incorrect.

In the Insular Cases, a series of decisions issued in the first decade of the 20th century, this Court concluded that the Constitution applies "in full" in incorporated territories but "only in part" in unincorporated territories. *Boumediene* v. *Bush*, 553 U.S. 723, 757 (2008). Specifically, the Court held that "guaranties of certain fundamental personal rights" apply in unincorporated territories. *Id.* at 758 (citation omitted). But it held that other constitutional guarantees do not apply in unincorporated territories, at least if "judicial enforcement of the provision[s] would be 'impracticable and anomalous.'" *Id.* at 759 (citation omitted).

The government's argument here does not rest on that framework. The government does not rely on the premise that citizenship is not "fundamental," or on the view that extending birthright citizenship to American Samoa would be "impracticable and anomalous." And the government in no way relies on the indefensible and discredited aspects of the Insular Cases' reasoning and rhetoric that petitioners highlight here (*e.g.*, Pet. 27).

The government's defense of Section 1408(1)'s constitutionality instead relies on the text of the Citizenship Clause, which confers citizenship only on persons born in "the United States," U.S. Const. Amend. XIV, § 1, and precedent that well predates the Insular Cases. As discussed above, the ordinary tools of constitutional interpretation—including text, context, historical practice, and precedent—establish that the term "the United States," as used in that provision, does not include American Samoa. The multi-step framework from the Insular Cases is therefore beside the point. As a result, this case would be an unsuitable vehicle for reexamining those cases—cases which, petitioners emphasize (Pet. 26), did not apply the Citizenship Clause.

Petitioners argue (Pet. 34) that, "[b]ecause the court of appeals premised its holding on the *Insular Cases*, this case offers an appropriate vehicle for overruling those ill-founded decisions." But only one judge, Judge Lucero, relied on the Insular Cases' distinction between fundamental and non-fundamental rights. See Pet. App. 32a n.21. The other judge in the majority, Chief Judge Tymkovich, expressly declined to rely on the framework of the Insular Cases and instead rested his decision on historical practice. See *id.* at 41a-44a. The latter approach is akin to that of previous court of appeals decisions that found no need to "determine the application of the Citizenship Clause to inhabitants of the Philippines under the doctrine of territorial incorporation" because "[t]he phrase 'the United States' is an express territorial limitation on the scope of the Citizenship Clause." *Valmonte* v. *INS*, 136 F.3d 914, 918 n.7 (2d Cir.), cert. denied, 525 U.S. 1024 (1998); accord *Rabang* v. *INS*, 35 F.3d 1449, 1453 n.8 (9th Cir. 1994), cert. denied, 515 U.S. 1130 (1995).

In any event, this Court "reviews judgments, not statements in opinions." *California* v. *Rooney*, 483 U.S. 307, 311 (1987) (per curiam) (citation omitted). For the reasons discussed above, the court of appeals' judgment was correct; the "fact that [one judge] reached [his] decision through analysis different than this Court might have used" does not warrant review. *Ibid.*

3. In 2016, this Court denied a petition for a writ of certiorari raising the same question that is presented here. See *Tuaua*, *supra* (No. 15-981). The Court should likewise deny the petition in this case.

a. Petitioners concede (Pet. 33) "the lack of a circuit split on this question." Every court of appeals that has considered the question has reached the same conclu-

sion: birth in a territory does not automatically confer citizenship under the Citizenship Clause. See Pet. App. 5a (American Samoa); *Tuaua* v. *United States*, 788 F.3d 300, 302-312 (D.C. Cir. 2015) (American Samoa), cert. denied, 579 U.S. 902 (2016); *Valmonte*, 136 F.3d at 917-920 (2d Cir.) (Philippines); *Lacap* v. *INS*, 138 F.3d 518, 519 (3d Cir. 1998) (per curiam) (Philippines); *Nolos* v. *Holder*, 611 F.3d 279, 282-284 (5th Cir. 2010) (per curiam) (Philippines); *Rabang*, 35 F.3d at 1451-1453 (9th Cir.) (Philippines); see also *Eche* v. *Holder*, 694 F.3d 1026, 1031 (9th Cir. 2012) (holding that the Commonwealth of the Northern Mariana Islands does not form part of the United States for purposes of the Naturalization Clause's requirement that naturalization laws be "uniform * * * throughout the United States," U.S. Const. Art. I, § 8, Cl. 4), cert. denied, 570 U.S. 904 (2013).

Petitioners contend (Pet. 33) that this Court should grant review because "there has been a significant split of authority among the judges below." But this Court typically grants review only when "a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter." Sup. Ct. R. 10(a). It does not usually grant certiorari because the court of appeals' decision "conflicts" with the views of the district court or a dissenting judge.

b. The views expressed by the American Samoan people provide a further reason to deny the petition for a writ of certiorari. The people of American Samoa "have not formed a collective consensus in favor of United States citizenship." *Tuaua*, 788 F.3d at 309. To the contrary, American Samoa's elected government and congressional delegate have participated in this

case to oppose the imposition of birthright citizenship on the American Samoan people. See p. 3, *supra*. They have argued that "an extension of birthright citizenship without the will of the governed is in essence a form of 'autocratic subjugation' of the American Samoan people." Pet. App. 37a (opinion of Lucero, J.). After the court of appeals issued its decision, the American Samoan legislature unanimously passed a resolution that praised the court of appeals for "respecting the right of the American Samoan people to retain our current statutory birthright status as U.S. nationals" and expressed opposition to "efforts to impose U.S. citizenship on our people without our consent through judicial fiat." S. Con. Res. 37-3, 37th Leg., 2d Reg. Sess. (Am. Sam. 2021). Those views do not, of course, control the meaning of the Citizenship Clause, but they do counsel against reaching out to upset the longstanding and settled understanding that Congress may determine the citizenship status of persons born in the territories. See pp. 10-13, *supra*.

Inhabitants of other territories, such as Puerto Rico, have obtained citizenship as a result of legislation, not as a result of judicial decisions. See pp. 10-13, *supra*. The same process remains available to the people of American Samoa. If the American Samoan people form a consensus in favor of birthright citizenship, the territory's delegate to the U.S. House of Representatives could bring that issue to Congress's attention, and Congress could change federal law at that time. As it stands, American Samoa's delegate has already proposed legislation that would further streamline the naturalization process for American Samoans, see H.R. 1941, 117th Cong., 1st Sess. (2021), and the territorial

legislature has endorsed that proposal, see S. Con. Res. 37-3, 37th Leg., 2d Reg. Sess. (Am. Sam. 2021).

In contrast, if this Court were now to accept petitioners' invitation to hold that the Citizenship Clause imposes U.S. citizenship on all persons born in American Samoa, it would eliminate the opportunity for the American Samoan people to consider the issue democratically and to develop a consensus as to its proper resolution. Cf. *National Coalition for Men* v. *Selective Service System*, 141 S. Ct. 1815, 1816 (2021) (statement of Sotomayor, J., respecting the denial of certiorari) (agreeing with the Court's decision to decline review of the constitutionality of the male-only registration requirement for the draft in order to give Congress the opportunity to resolve that issue). Such a decision would also destabilize the long-settled understanding with respect to citizens of other territories, including those, like the Philippines, that are no longer under the sovereignty of the United States. See *Tuaua*, 788 F.3d at 305 n.6 (noting that "[t]he extension of citizenship to the American Samoan people would necessarily implicate the United States citizenship status of persons born in the Philippines during the territorial period—and potentially their children through the operation of statute").

Those disruptive consequences are particularly unwarranted because federal law already allows American Samoans to naturalize as U.S. citizens after moving to any State, to the District of Columbia, or to any territory outside American Samoa, and to use their previous time residing in American Samoa to satisfy the five-year residency requirement for naturalization. 8 U.S.C. 1436; see 8 U.S.C. 1427(a). The individual petitioners complain (Pet. 9-10) that, as noncitizen residents of Utah, they cannot vote or serve as jurors, Utah peace

officers, or officers of the U.S. Armed Forces. But petitioners have provided no reason to believe that they could not avail themselves of that favorable naturalization procedure and thus eliminate the disadvantages that they associate with being noncitizen nationals of the United States without also imposing citizenship status on unwilling fellow American Samoans. Cf. Pet. 9 (acknowledging that the asserted "harms" of a lack of citizenship "fall disproportionately on those who relocate from American Samoa" and are therefore eligible to naturalize under Section 1436).

**CONCLUSION**

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ELIZABETH B. PRELOGAR
*Solicitor General*
BRIAN M. BOYNTON
*Principal Deputy Assistant Attorney General*
SHARON SWINGLE
BRAD HINSHELWOOD
*Attorneys*

AUGUST 2022