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

REPLY BRIEF FOR PETITIONERS

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

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

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

Counsel for Petitioners

RULE 29.6 STATEMENT

The corporate-disclosure statement included in the petition for a writ of certiorari remains accurate.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

CASES

CONSTITUTIONAL PROVISIONS

STATUTES

OTHER AUTHORITIES

REPLY BRIEF FOR PETITIONERS

Neither respondent disputes that the question presented is exceptionally important. Neither defends the *Insular Cases*. And neither disagrees that *if* the panel majority below applied them to resolve this case, that was contrary to this Court's precedents, justifies review, and makes this an appropriate vehicle for overturning them.

Instead, respondents attempt to defeat certiorari by pretending that the *Insular Cases* "were not even central to the decision below." Intervenors Opp. 34. "[O]nly one judge," the government insists, relied on the *Insular Cases* and "Chief Judge Tymkovich[] expressly declined to rely on the[ir] framework." U.S. Opp. 17.

This attempt to rewrite the decision below has no basis in reality. The majority considered "which of two lines of precedent w[ould] guide [its] analysis," "explain[ed] why the Insular Cases supply the correct framework for application of constitutional provisions to the unincorporated territories," and rejected the dissent's textual and historical analysis because it "elid[ed] the distinction between incorporated and unincorporated territories" established by this Court "in the Insular Cases." Pet.App.14a, 29a.

Yet the government (in this Court at least) refuses to defend the *Insular Cases* and the decision below. To sidestep that uncomfortable issue, it advances the farfetched argument that the "United States" does not include Territories *at all*—a theory that would have baffled the Reconstruction Congress intent on overturning *Dred Scott*.

Unsurprisingly, no court has *ever* accepted that argument. Rather, every court of appeals has expressly relied on the "authoritative" "*Insular Cases*" to determine the "scope of the term 'the United States' in the Fourteenth Amendment." *Valmonte* v. *INS*, 136 F.3d 914, 918 (2d Cir. 1998); *see also Tuaua* v. *United States*, 788 F.3d 300, 306 (D.C. Cir. 2015); *Nolos* v. *Holder*, 611 F.3d 279, 284 (5th Cir. 2010); *Lacap* v. *INS*, 138 F.3d 518, 519 (3d Cir. 1998); *Rabang* v. *INS*, 35 F.3d 1449, 1452 (9th Cir. 1994). Likewise, the panel majority here "fe[lt] constrained to apply" them. *United States* v. *Vaello Madero*, 142 S. Ct. 1539, 1555 (2022) (Gorsuch, J., concurring) (citing Pet.App.23a).

Only this Court can answer the question presented based on "the Constitution's text and its original understanding" and "the Nation's historical practices … uninfected by the Insular Cases." *Vaello Madero*, 142 S. Ct. at 1556. It should grant review to do so.

This Court should not be deterred by intervenors' fears that recognizing the Constitution's guarantee of birthright citizenship would somehow harm principles of cultural preservation and self-determination in U.S. Territories. Petitioners and their *amici agree* with intervenors about those important principles. Extending citizenship has not impaired cultural preservation or self-determination in any other U.S. Territory, *see* Territorial Officials Br. 16-26, and there is no reason to suppose the result would be different in American Samoa, *see* Samoan Federation Br. 21-22. After all, this case is about citizenship. None of the constitutional provisions intervenors invoke turn on citizenship, and all already apply in American Samoa.

Nor would American Samoa lose its right to self-determination if this Court recognizes petitioners' individual right to citizenship. If anything, ongoing uncertainty over the constitutional status of "unincorporated" territories and the continuing viability of the *Insular Cases* serve as obstacles to self-determination.

In all events, what matters is the Citizenship Clause itself, the entire purpose of which was "'to put th[e] question of citizenship and the rights of citizens … beyond the legislative power.'" *Afroyim* v. *Rusk*, 387 U.S. 253, 263 (1967) (quoting Cong. Globe, 39th Cong., 1st Sess. 2896 (Sen. Howard)). For the reasons stated in the petition and below, the Court should grant certiorari to reverse the panel majority, overturn the *Insular Cases*, and recognize that petitioners—like all others born on U.S. soil—are citizens by birth.

ARGUMENT

I. THE DECISION BELOW CONTRAVENES THE CONSTITUTION AND THIS COURT'S PRECEDENTS.

The panel majority's decision extended the *Insular Cases* contrary to this Court's precedents. *See* Pet. 13-28. That is sufficient to grant certiorari.

Respondents do not defend the *Insular Cases* or even *cite* this Court's repeated instruction that the "much-criticized 'Insular Cases'" should not be "extend[ed]" to issues those cases "did not reach." *Fin. Oversight & Mgmt. Bd.* v. *Aurelius Inv., LLC*, 140 S. Ct. 1649, 1665 (2020); *see also* Pet. 25 (citing additional admonitions from this Court). Instead, they pretend that the panel majority did not actually apply

or extend the *Insular Cases*.

That argument blinks reality. "At the outset," the majority declared (in Part II), "we must decide which of two lines of precedent will guide our analysis": "the Insular Cases" or "*Wong Kim Ark*." Pet.App.14a. And however "disreputable" the *Insular Cases* might be "to modern eyes," Pet.App.16a, the majority selected them as "the more relevant, workable, and, as applied here, just standard," Pet.App.23a. Accordingly, to answer the question presented, the majority (in Part III) applied the "first" part of "the Insular Cases' framework." Pet.App.26a-32a. Chief Judge Tymkovich unequivocally joined "the majority *except for Parts IV and V*," which went on to apply a further "fundamental rights" analysis under the *Insular Cases*. Pet.App.44a (emphasis added).

The panel majority's reliance on the *Insular Cases* is no surprise. After all, every previous court of appeals has done the same. *See supra* 2. And respondents urged the courts below to do so at every stage of this case, relying on some of their ugliest passages. *See* U.S. En Banc Pet. Opp. 4, 9-11 (the "majority" relied on "the long-settled" doctrine of territorial incorporation); Intervenors En Banc Pet. Opp. 10 ("as the panel decision explains, the *Insular Cases* are 'plainly relevant' here"); U.S. C.A. Br. 10, 16-19; U.S. Mot. to Dismiss 15-17.

It is only the "government's argument *here*" that backs away from the *Insular Cases* "framework." U.S. Opp. 16 (emphasis added). The government's attempt to disclaim the *Insular Cases* in this Court, while preserving its ability to press them as binding before lower courts, is a compelling reason to *grant* review, not deny it.

The parties *agree* that the answer to the question presented *should* be found in the text, history, and relevant precedents. But every court of appeals has relied on the *Insular Cases*, rather than traditional tools of constitutional interpretation. Pet.App.14a, 26a-32a, 44a; *see also supra* 2 (cases cited). Even Chief Judge Tymkovich's supposed reliance on "[historical] practice over the past century" fundamentally relies on the *Insular Cases*, because it is an examination of Congress's "authority" to deny birthright citizenship to "*unincorporated* territorial inhabitants" pursuant to *Downes* v. *Bidwell*, 182 U.S. 244 (1901). Pet.App.43a-44a (emphasis added). But the need here is to consider "text," "original understanding," and "the Nation's historical practices" "*uninfected by the Insular Cases*." *Vaello Madero*, 142 S. Ct. at 1556 (Gorsuch, J., concurring) (emphasis added).

Only this Court can answer the exceptionally important question whether persons born in U.S. Territories are entitled to citizenship without falling back on the *Insular Cases*. It should do so.

II. RESPONDENTS' MERITS ARGUMENTS ARE WRONG AND CONFIRM THE NEED FOR CERTIORARI.

Respondents' efforts to defend the judgment below without relying on the *Insular Cases* have never been endorsed by any court and provide no basis for denying review. When this question was previously presented, the government relied on the *Insular Cases*' doctrine of territorial incorporation, arguing that only *unincorporated* territories are outside the United States. *See* U.S. Opp. 13, *Tuaua* v. *United States*, No. 15-981 (arguing that "*Downes* confirms that 'in the United States' excludes *unincorporated* territories" (emphasis added)). But now, attempting to shield the

Insular Cases from review, it embraces the erroneous conclusion that *all* territories are outside the United States. That novel and extraordinary argument defies this Court's precedent and history and finds no support in the text or structure of the Constitution.

A. The government offers no meaningful response to this Court's Citizenship Clause jurisprudence.

The government writes off (at 15) *United States* v. *Wong Kim Ark*, 169 U.S. 649 (1898), because it involved a person born in a State. But the government ignores the pivotal point: Because *Wong Kim Ark* authoritatively construed the Citizenship Clause as "codif[ying] a *pre-existing* right"—the common-law *jus soli* rule—courts must look to *that* right's "historical background" to discern its scope. *District of Columbia* v. *Heller*, 554 U.S. 570, 592 (2008). And because *jus soli* extended birthright citizenship to territories within the sovereign's dominion, Pet. 2-4; Citizenship Scholars Br. 7-9, 12-14, the Clause encompasses U.S. Territories. Tellingly, the government does not even mention *jus soli*, much less dispute that application of that common-law doctrine would require judgment for petitioners in this case.

The government also dismisses (at 15) the *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36 (1873), ignoring the Court's explicit determination that the Clause extends birthright citizenship to "the Territories" and makes "citizenship of a particular State" unnecessary to U.S. citizenship. *Id.* at 72-73. And it has no response to the Court's reaffirmation of that reading in *Elk* v. *Wilkins*, 112 U.S. 94 (1884).

B. The government makes little effort to dispute petitioners' historical evidence. Instead, it takes the numerous contemporary dictionaries, maps, atlases, and censuses cited by petitioners (at 17-19) at face value, but simply argues (at 13-14) that this evidence demonstrates that "in the United States" "*can*" include the territories. The government also devotes *zero* words responding to the numerous contemporary judicial opinions, Pet. 15, that "referred to U.S. territories as 'in' the United States," Michael D. Ramsey, *Originalism and Birthright Citizenship*, 109 Geo. L.J. 405, 426 (2020). And it provides no response about the Citizenship Clause's purpose, Pet. 19, this Court's recent statement that the "United States includes five Territories," *Vaello Madero*, 142 S. Ct. at 1541, or how the Citizenship Clause codified the common-law rule of *jus soli*, Pet. 20-21.

The government says that the statements of Senators Howard and Johnson "beg the question." U.S. Opp. 14. But it does not attempt to dispute the crystal-clear statements of Senators Trumbull and Henderson. *See* Pet. 15-16. And it offers *no* competing evidence that any of the Clause's Framers held a different view—or that *anyone* who framed or ratified the Citizenship Clause would have understood its geographic scope as excluding *all* U.S. Territories.

Nor could it do so. After all, "the Citizenship Clause 'forever closed the door on *Dred Scott*,'" *Vaello Madero*, 142 S. Ct. at 1549 (Thomas, J., concurring) (citation omitted), and *Dred Scott* infamously held that Congress had no power to prohibit slavery in the Territories, *see Dred Scott* v. *Sandford*, 60 U.S. (19 How.) 393, 452 (1857). The notion that the Framers

of the Citizenship Clause somehow excluded Territories—which made up nearly *half* of the Nation's land mass in 1868—is inconceivable. *See* Pet. 4-5, 19.

C. The government relies primarily on other constitutional and statutory provisions. Remarkably, it ignores those that were "adopted at or about the same time as the Citizenship Clause." Pet.App.67a (Bacharach, J., dissenting). The government has no answer to the contrast *in the Fourteenth Amendment* itself between the Citizenship Clause ("in the United States") and the Apportionment Clause ("among the several States"), U.S. Const. amend. XIV, §§ 1-2, which shows that the Citizenship Clause sweeps *beyond* States. And it fails even to cite the Civil Rights Act of 1866—constitutionalized in the Citizenship Clause—that proclaimed equal rights "in every State and Territory in the United States." Ch. 31, § 1, 14 Stat. 27, 27 (1866).

Instead, the government cites (at 9-10) the Thirteenth Amendment's disjunctive language. But it never confronts the explanation—corroborated by that Amendment's coauthor—that "these words" (that is, "or any place subject to their jurisdiction") did *not* "refer to the territories of the United States." Ltr. from J.B. Henderson to Hon. C.E. Littlefield (June 28, 1901). Rather, these words encompass locations *outside* "the United States" but subject to U.S. *control*, such as embassies, military bases, or other outposts.

The clauses the government cites in the original Constitution "long predate[]" the Citizenship Clause and should not be given "more weight than [they] can rightly bear." *N.Y. State Rifle & Pistol Ass'n, Inc.* v. *Bruen*, 142 S. Ct. 2111, 2136 (2022). Nor do those clauses support the government. This Court has previously held, for example, that the Tax Uniformity

Clause's reference to "the United States" *includes* the Territories. *Loughborough* v. *Blake*, 18 U.S. (5 Wheat.) 317, 319 (1820) (Marshall, C.J.).

The Electoral Votes Clause's reference to "the United States," U.S. Const. art. II, § 1, cl. 4, must be read in light of the immediately preceding clauses, which note that "Each *State* shall appoint … Electors," *id.* cl. 2 (emphasis added), who "shall meet in their respective *States*" to vote for President, *id.* cl. 3 (emphasis added). Thus, "the United States" does not "exclude[] the territories," U.S. Opp. 8, on its own terms—the preceding clauses do so explicitly.

And because "the presumptive meaning of 'the United States' in 1788 included federal territory," "the presumptive meaning of 'the People of the United States'" in the Preamble "would similarly include people in federal territory." Gary Lawson & Guy Seidman, *Are People in Federal Territories Part of "We the People of the United States"?*, 9 Tex. A&M L. Rev. 655, 655 (2022). The fact that the Territories didn't ratify the Constitution is irrelevant—the Preamble doesn't use the phrase "We the Ratifiers of the Constitution." *Id.* at 679.

That leaves the government with the now-defunct Eighteenth Amendment. But that Amendment was ratified in 1919, so its distinction between "the United States" and "territor[ies] subject to the jurisdiction thereof" was necessary only because the *Insular Cases* had cast doubt on whether "the United States" included U.S. Territories. *See also Hooven & Allison Co.* v. *Evatt*, 324 U.S. 652, 673-74 (1945) (relying on the *Insular Cases*).

D. The government also relies heavily on the post-*Downes* practice of the political branches. But prior to 1898, the longstanding tradition in the United

States had been to recognize birthright citizenship for all persons born in every State and Territory. That was the common-law rule from the Founding until *Dred Scott*; it was the rule codified in the Fourteenth Amendment and reaffirmed in *Wong Kim Ark*. *See* Pet. 2-6; Citizenship Scholars Br. 5-14.

Respondents' sources merely show that the government *strayed* from longstanding practice in the wake of the *Insular Cases*. The Adams-Onis Treaty, for example, *recognized* that the Constitution and Laws of the United States are in force in a newly created territory. *See* U.S. Opp. 11. And the statutes providing citizenship to persons born in Puerto Rico, Guam, the U.S. Virgin Islands, and the Panama Canal were all enacted *after* this Court decided the *Insular Cases*. *See* U.S. Opp. 12. Congress had no choice but to legislate against the backdrop of those decisions.

Moreover, as *amici* Citizenship Scholars explain (at 2, 18-21), recognizing birthright citizenship for American Samoans "would have no impact on the citizenship of people born in the Philippines," because "a change of sovereignty over a territory," such as the Philippines' independence in 1946, "extinguishes the allegiance of the population to the former sovereign." And in *Barber* v. *Gonzales*, 347 U.S. 637 (1954), and *Rabang* v. *Boyd*, 353 U.S. 427 (1957), this Court merely "observed, without deciding, that persons born in the Philippines prior to its independence in 1946 are not citizens of the United States." *Valmonte*, 136 F.3d at 919.

III. INTERVENORS' ARGUMENTS PROVIDE NO REASON FOR DENYING REVIEW.

Intervenors' arguments concerning the effect of the question presented on cultural preservation and self-determination in American Samoa provide no basis for denying review.

Birthright citizenship does not threaten the preservation of any American Samoan cultural or legal traditions. Intervenors suggest (at 14-19) that "the Constitution's equal protection and due process guarantees" as well as the "Establishment Clause" might interfere with certain aspects of those traditions. But none of those provisions turn on citizenship, all *already* apply in American Samoa, and no court has ever held that American Samoa's traditions violate them. *See Craddick* v. *Territorial Registrar*, 1 Am. Samoa 2d 11 (App. Div. 1980); Territorial Officials Br. 19-25; Samoan Federation Br. 21.

Nor would recognizing that the Citizenship Clause applies in U.S. Territories threaten territorial self-determination. *See* Territorial Officials Br. 17-18; Samoan Federation Br. 21-22. The question for self-determination is whether to remain a part of the United States, not which individual rights secured by the U.S. Constitution apply. *See* Guy Charlton & Tim Fadgen, *Fitisemanu v. United States: U.S. Citizenship in American Sāmoa and the Insular Cases*, 39 UCLA Pac. Basin L.J. 25, 41-42 (2022). And as the history of American Samoa itself makes clear, a territorial consensus in favor of citizenship does not control the U.S. government.

To the contrary, non-citizen national status (a newly invented category, *see* Citizenship Scholars Br. 16-17) was imposed on American Samoans against

their wishes and their understanding that, after transferring sovereignty to the United States, they would become U.S. citizens. Pet. 7-8; Samoan Federation Br. 6-12. Congress repeatedly ignored resolutions from the American Samoan legislature requesting recognition of citizenship. Samoan Federation Br. 9-12. And the government today agrees that the "views" of the American Samoan people "do not, of course, control the meaning of the Citizenship Clause." U.S. Opp. 19. If anything, uncertainty over the constitutional status of "unincorporated" territories and the continuing validity of the *Insular Cases* impedes the exercise of territorial self-determination by making it unclear where things stand. "Those cases were premised on beliefs both odious and wrong," and the time has come to correct this Court's "error." *Vaello Madero*, 142 S. Ct. at 1560 n.4 (Sotomayor, J., dissenting).

Intervenors' assertion (at 2) that petitioners should seek citizenship through naturalization is no answer. Forcing Americans born on U.S. soil and owing "permanent allegiance to the United States," 8 U.S.C. § 1101(a)(22), to naturalize is the *harm*, not the remedy.

Finally, intervenors' argument (at 30) that American Samoa is not "subject to the jurisdiction" of the United States provides no basis for denying review. The panel majority rightly rejected that argument, which the government has never pressed, Pet.App.27a n.15, and, regardless, it is encompassed in the question presented, *see* Pet. i.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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

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

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

Counsel for Petitioners

September 14, 2022