Nos. 20-4017, 20-4019

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

JOHN FITISEMANU, et al.,
Plaintiffs-Appellees,

v.

UNITED STATES OF AMERICA, et al.,
Defendants-Appellants,

and

THE AMERICAN SAMOA GOVERNMENT and THE HON. AUMUA AMATA,
Intervenor Defendants-Appellants.

On Appeal from the United States District Court for the District of Utah,
Judge Clark Waddoups, No. 1:18-cv-00036-CW

BRIEF OF *AMICI CURIAE* MEMBERS OF CONGRESS, FORMER MEMBERS OF CONGRESS, AND FORMER GOVERNORS OF GUAM, THE NORTHERN MARIANA ISLANDS, PUERTO RICO, AND THE U.S. VIRGIN ISLANDS IN SUPPORT OF PLAINTIFFS-APPELLEES AND AFFIRMANCE

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STATEMENT OF INTEREST OF *AMICI CURIAE*

Amici are current and former elected officials — Members of Congress, former Members of Congress, and former Governors — of the United States Territories of Guam, the Northern Mariana Islands ("NMI"), Puerto Rico, and the U.S. Virgin Islands.[1] Their interest in this case is profound: at stake is the very nature of the U.S. citizenship of their current and former constituents. Under the view advanced by the U.S. and American Samoa governments, those born in Guam, the NMI, Puerto Rico, and the U.S. Virgin Islands enjoy citizenship not as a matter of constitutional birthright but legislative grace — and what Congress can give, Congress can take away. The citizenship status of the people born in these four Territories, and not just American Samoa, is at stake in this case.

Moreover, in response to the concerns raised by the government of American Samoa that U.S. citizenship might somehow interfere with its distinctive culture, *Amici* are uniquely positioned to describe how the experiences of their own Territories show that U.S. citizenship is fully harmonious with each Territory's distinct legal and cultural heritage. *Amici* also bear a first-hand understanding of the challenges that unequal access to federal resources, economic turmoil, and natural disasters have created for the Territories in recent years, which would only be

[1] All parties to this case have consented to the filing of this brief. No party's counsel authored this brief in whole or in part, and no party, party's counsel, or other person contributed money that was intended to fund preparing or submitting this brief.

worsened if the Constitution were interpreted to relegate the people of the Territories to a court-sanctioned second-class status.

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.

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

Felix P. Camacho served as Governor of Guam from 2003 to 2011.

Juan Babauta served as Governor of the Commonwealth of the Northern Mariana Islands from 2002 to 2006.

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

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

Luis Fortuño served as Governor of Puerto Rico from 2009 to 2013.

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

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

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

INTRODUCTION AND SUMMARY OF ARGUMENT

The specific controversy before the Court concerns the citizenship of three individuals born in American Samoa. But to withhold citizenship from these Americans, the U.S. Government — joined by the government of American Samoa — adopts a remarkable view of the Constitution that would reverberate well beyond 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, then neither is Guam, neither is the NMI, neither is Puerto Rico, and neither is the U.S. Virgin Islands. And if those Territories are not "in the United States," then the millions of citizens born there are truly second-class citizens. They would be citizens at the pleasure of Congress only, a status that could be revoked at the whim of a temporary legislative majority.

This shocking and un-American possibility finds no support in the Constitution. Indeed, the U.S. Government's interpretation rests on the absurd premise that Territories that have long been part of the United States — in some cases for much more than a century — are not really "in the United States." U.S. Const. amend. XIV, § 1. As Plaintiffs well explain, that premise and the reading of the Constitution that flow from it are wrong. *Amici* will not repeat those points, but instead offer the perspective from the Territories in which U.S. citizenship has long been enjoyed in harmony with distinctive cultures. And while *Amici* have great

respect for American Samoa and its support for cultural preservation and self-determination, the specific concerns it raises over citizenship are misplaced. Moreover, American Samoa's leaders do not hold a veto over the constitutional rights of the inhabitants of *all* the Territories. *Amici* wish to make clear to the Court that the futures of the U.S. citizens in Guam, the NMI, Puerto Rico, and the U.S. Virgin Islands are very much at stake in this appeal.

Because the Supreme Court has made clear that citizenship resulting from legislative grace is not entitled to the same protections as Fourteenth Amendment birthright citizenship, reversing the district court's decision would not only impact American Samoans but also destabilize the U.S. citizenship enjoyed by the people of Guam, the NMI, Puerto Rico, and the U.S. Virgin Islands. People in the Territories who have lived their entire lives as U.S. citizens could therefore face the prospect of having their citizenship revoked by legislative whim. To make matters worse, reversing the decision below would further push the Territories towards the periphery of the American political project, as they continue to confront the challenges that unequal access to federal resources, economic collapse, and natural catastrophe have compounded in recent years. After Hurricanes Irma and María ravaged Puerto Rico and the Virgin Islands within two weeks in 2017, and Super Typhoon Yutu devastated the NMI in 2018, the Territories are now on the verge of yet another calamity as they face the threat of COVID-19. These natural events have

exacerbated the economic and social disparities already entrenched in the Territories by their unequal access to federal resources, with unemployment and poverty rates double the national average.

Amici are also deeply troubled that the United States and even American Samoa have urged this Court to extend the *Insular Cases* to decide this appeal. Supreme Court precedent commands that neither this discredited line of cases nor their reasoning be extended. They simply do not control the proper interpretation of the Citizenship Clause, and it would be a grave constitutional error to apply them, with all of their well-recognized baggage, here.

Again with great respect for the Government of American Samoa, its speculative reasons for opposing citizenship are simply without basis. *Amici* can say this based on actual experience. Guamanians, Puerto Ricans, Northern Mariana Islanders, and Virgin Islanders have enjoyed U.S. citizenship for decades without sacrificing their cultural heritage or ability to alter the terms of their political relationship with the United States. There is no reason to think that the experience of American Samoans would be any different. Likewise, the prospect that citizenship might somehow make American Samoa's laws more susceptible to constitutional challenge is refuted by the experience of the other Territories, whose distinctive legal norms have been upheld against similar challenges. As Judge Waddoups did in his opinion below, this Court should confirm that the Fourteenth

Amendment provides all persons born across the Territories with equal access to the Constitution's promise of birthright citizenship.

ARGUMENT

I. THIS CASE PRESENTS IMPLICATIONS OF DEEP SIGNIFICANCE FOR THE U.S. CITIZENS BORN IN GUAM, THE NORTHERN MARIANA ISLANDS, PUERTO RICO, AND THE U.S. VIRGIN ISLANDS.

The Constitution states 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. The district court correctly concluded that U.S. Territories like American Samoa are "within the dominion of the United States" for purposes of the Citizenship Clause because they are "under the full sovereignty of the United States — that is . . . within the 'full possession and exercise of [the United States'] power.'" Appellants' App. Vol. 3 at 598 (citing *United States v. Wong Kim Ark*, 169 U.S. 649, 659 (1898)). Yet the U.S. Government insists that Plaintiffs-Appellees are not entitled to birthright citizenship because American Samoa and the other Territories are not "in the United States" for purposes of the Fourteenth Amendment. If Appellants succeed before this Court, the continued denial of citizenship to those born in American Samoa would further relegate the people of *all* the Territories to the periphery of American democracy. By contrast, recognizing U.S. citizenship for those born in American Samoa would constitutionally safeguard the citizenship of those born across the Territories and

repudiate the Government's troubling reading of the *Insular Cases*, which are irrelevant to the question at issue here. This case therefore provides a rare chance to ensure that those who call American Samoa, Guam, the Northern Mariana Islands, Puerto Rico, and the U.S. Virgin Islands home remain, for no longer, our Nation's "almost and forgotten Americans." Tom C.W. Lin, *Americans, Almost and Forgotten*, 107 Calif. L. Rev. 1249, 1251 (2019).

A. Ruling That American Samoans Are Not Birthright Citizens Would Imperil the Citizenship and Increase the Marginalization of Those Born in *All* the Territories.

Reversing the district court's decision would not only affect American Samoans but also imperil the U.S. citizenship, with all its attendant rights, of the people born in the other four Territories.

The Supreme Court has made clear that citizenship resulting from legislative grace is not entitled to the same protections as birthright citizenship derived from the Fourteenth Amendment. In *Rogers v. Bellei*, 401 U.S. 815, 835 (1971), the 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." Since the petitioner there "was a citizen at birth, not by constitutional right, but *only* through operation of a federal statute," the Court did not regard him a "Fourteenth-Amendment-first-sentence citizen." *Id.* at 827, 845 (emphasis added); *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").

The vulnerability of statutory citizenship stands in sharp contrast with the guarantees of a birthright citizenship secured under the Citizenship Clause of the Constitution, which "protect[s] every citizen of this Nation against [the] congressional forcible destruction of [their] citizenship, whatever [their] creed, color, or race." *Afroyim v. Rusk*, 387 U.S. 253, 268 (1967). Without that protection, people in the Territories who have lived their entire lives as U.S. citizens could face the very real danger of having their citizenship revoked by legislative whim, even as the United States continues to maintain full and excusive sovereignty over their lands. A reversal of the decision below would only further destabilize the foundation of the citizenship that those born in Guam, Puerto Rico, the NMI, and the U.S. Virgin Islands are recognized to receive at birth. Far from the Samoan Government's assertion that "questions of birthright citizenship" in the Territories are "necessarily political questions best left to the democratic process," Am. Samoa Br. 29, what is at stake here is a fundamental question of constitutional law that reverberates well beyond the Samoan archipelago. It would hardly be a victory for the democratic process if a temporary legislative majority — *absent* any voting representation from

the people of the Territories themselves — were to find it politically convenient to revoke the citizenship of millions of Americans.

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, economic calamity, and natural catastrophe have so starkly brought to the forefront in recent years. For decades, disparities in federal funding have compromised the access of territorial residents to quality healthcare. "Unlike the states, whose federal funding covers a specified share of their Medicaid spending, the [T]erritories receive a fixed amount of federal funds as a capped block grant. And while each state's matching rate is tied to its relative per capita income and can go as high as 83 percent, the territories' matching rate is fixed at 55 percent, irrespective of need. As a result, their federal Medicaid funding doesn't cover their needs."[2] Because of this formula, the Territories faced a looming healthcare crisis last summer with the upcoming "expiration of federal funds [that] supplement[ed] their inadequate Medicaid block grants."[3] And according to forecasts, without permanent changes to how Medicaid funds are allotted, not even short-term

[2] Judith Solomon, *Medicaid Funding Cliff Approaching for U.S. Territories*, Ctr. on Budget and Policy Priorities (June 19, 2019), https://www.cbpp.org/blog/medicaid-funding-cliff-approaching-for-us-territories.

[3] *Id.*

extensions of supplemental funding would "enable the [T]erritories . . . to meet the health care needs of their low-income residents."[4]

The human impact of these disparities — which hinder the capacity of medical facilities in the Territories to treat a range of conditions — could not be more evident. As just one example, American Samoan cancer patients have been forced to travel to New Zealand to receive the critical care they cannot obtain at home.[5] Differential treatment in the Territories' access to federal benefits also extends to programs such as the Supplemental Security Income ("SSI") and the Supplemental Nutrition Assistance Program ("SNAP"), and is currently subject to constitutional challenge in other federal courts. *See, e.g.*, *United States v. Vaello-Madero*, 356 F. Supp. 3d 208, 215 (D.P.R. 2019) (concluding that the exclusion of U.S. citizens residing in Puerto Rico from eligibility for the SSI program violates the Equal Protection Clause), *aff'd*, No. 19-1390 (1st Cir. Apr. 10, 2020); *Schaller v. U.S. Soc. Sec. Admin.*, No. 18-1625, 2020 WL 956422 (W.D. Pa. Feb. 27, 2020), *appeal filed*, (3rd

[4] *Id.*; *see also Healthcare Disparities Affecting Americans in the US Territories: A Century-Old Dilemma*, 130 J. Am. Med. 2 (Feb. 2017), https://www.amjmed.com/article/S0002-9343(16)30856-7/pdf (suggesting that "[t]he doctrine of the Insular Cases may have influenced the Social Security Act in 1935 and Medicare and Medicaid in 1965, because these programs are applied differently to the approximately 4 million US citizens who reside in the territories compared with those residing in the 50 states and the District of Columbia").

[5] *See* Selena Simmons-Duffin, *America's 'Shame': Medicaid Funding Slashed in U.S. Territories*, NPR (Nov. 20, 2019), https://www.npr.org/sections/health-shots/2019/11/20/780452645/americas-shame-medicaid-funding-slashed-in-u-s-territories (quoting American Samoa's Medicaid Director as saying that "[p]eople who need cancer treatment won't get it. Children with rheumatic heart disease won't get the heart surgeries that they need").

Cir. Apr. 27, 2020) (challenging the exclusion of Guam residents from SSI eligibility on Equal Protection grounds).

Wider economic distress further exacerbates the challenges confronting the Territories. Puerto Rico, for instance, is on the fourteenth year of a recession that began in 2006. *See Puerto Rico v. Franklin Cal. Tax-Free Trust*, 136 S. Ct. 1938, 1942 (2016). This ongoing crisis led to the passage in 2016 of the Puerto Rico Oversight, Management, and Economic Stability Act ("PROMESA"), which established a financial oversight board to control Puerto Rico's finances and a unique bankruptcy process to restructure territorial debt. 48 U.S.C. § 2101. The board "has extensive powers to bind Puerto Rico's government, and is not subject to Puerto Rican control or oversight." *Developments in the Law — Ch. II: The International Place of Puerto Rico*, 130 Harv. L. Rev. 1656, 1666 (2017) (citations omitted). Before accounting for the impact of COVID-19, Puerto Rico's unemployment rate had recently hovered around 8 percent, almost double the national rate of 4 percent,[6] and an estimated 58 percent of its children — compared to 22 percent nationwide — live below the federal poverty line.[7] The unemployment rate in Guam was also

[6] *Employment at a Glance: Puerto Rico*, Bureau of Labor Statistics (last updated Apr. 30, 2020), https://www.bls.gov/eag/eag.pr.htm.

[7] Bianca Faccio, *Left Behind: Poverty's Toll on the Children of Puerto Rico*, Child Trends (Mar. 28, 2016), https://www.childtrends.org/left-behind-povertys-toll-on-the-children-of-puerto-rico.

around eight percent before the current pandemic. Lin, *supra*, 107 Calif. L. Rev. at 1258. And the Virgin Islands have faced "persistent economic challenges" that recently left their government with "a narrow set of liquidity resources" after losing access to the capital markets.[8]

To make matters worse, during the last five years, the Territories have been repeatedly in the crosshairs of catastrophic, once-in-a-generation natural disasters. In August 2015, the Northern Mariana Islands were hit by Typhoon Soudelor, which "was the strongest tropical cyclone in the 2015 Pacific typhoon season."[9] Just three years later, with the recovery from Typhoon Soudelor still underway, Super Typhoon Yutu ravaged the NMI with sustained winds of 180 miles per hour, becoming the most potent storm to hit U.S. soil since 1935.[10]

Puerto Rico and the U.S. Virgin Islands met a comparable fate in September 2017 when Category 5 Hurricanes Irma and María wrecked the Territories within a two-week period. *See Aurelius v. Puerto Rico*, 915 F.3d 838, 862 (1st Cir. 2019), *cert. granted*, 139 S. Ct. 2735 (2019) (argued Oct. 2019) (noting that Puerto Rico's

[8] *Economic and Fiscal Conditions in the U.S. Virgin Islands*, Cong. Research Serv. (Feb. 13, 2020), https://fas.org/sgp/crs/row/R45235.pdf.

[9] Allyson Chiu et al. *Extreme Category 5 Typhoon, The Worst U.S. Storm Since 1935, Leaves Northern Mariana Islands Devastated*, Wash. Post (Oct. 25, 2018), https://www.washingtonpost.com/energy-environment/2018/10/25/category-typhoon-devastates-northern-marianas-worst-storm-hit-us-since/.

[10] *Id.*

"historic debt restructuring process [under PROMESA] was . . . turned upside down . . . by the ravage of the hurricanes that affected [the island] in September 2017"). In Puerto Rico, Hurricane María caused almost 3,000 deaths and left millions of families without electricity for months, which resulted in the longest blackout in U.S. history.[11] And as Puerto Ricans continued their march through a long recovery process that has been hindered by the delayed arrival of federal aid, they were awakened earlier this year by another disaster: a 6.4-magnitude quake, the most destructive tremor to affect the island in over a century.[12]

Before Hurricane María made a direct hit as a Category 5 hurricane on the island of St. Croix, Hurricane Irma took a similarly heavy toll on the U.S. Virgin Islands also as a Category 5 hurricane less than two weeks before. In St. Thomas alone, with a population of approximately 52,000, the hurricane left 40,000

[11] S*ee, e.g.*, Sheri Fink, *Nearly a Year After Hurricane María, Puerto Rico Revises Death Toll to 2,975*, N.Y. Times (Aug. 28, 2018), https://www.nytimes.com/2018/08/28/us/puerto-rico-hurricane-mariadeaths.html; Alexia Fernández Campbell, *It Took 11 Months to Restore Power to Puerto Rico After Hurricane Maria. A Similar Crisis Could Happen Again*, Vox (Aug. 15, 2018), https://www.vox.com/identities/2018/8/15/17692414/puerto-rico-power-electricity-restored-hurricane-maria.

[12] *See* Katy O'Donnell, *Trump to Lift Hold on $8.2B in Puerto Rico Disaster Aid*, Politico (Jan. 15, 2020), https://www.politico.com/news/2020/01/15/trump-to-lift-hold-on-82b-in-puerto-rico-disaster-aid-099139 (explaining that, by early January 2020 when the earthquake occurred, Puerto Rico had only received "$1.5 billion of the roughly $20 billion in congressionally authorized [Hurricane María] disaster funds that [the Department of Housing and Urban Development] is supposed to administer").

homeless.[13] The islands' recovery process has also been marked by disparities in the reach and speed of federal assistance. Two years after Hurricane Irma, for instance, the Federal Emergency Management Agency (FEMA) had only funded 218 long-term recovery projects across the islands, compared to the 3,700 projects supported by the agency in Florida and Texas two years after Hurricane Harvey hit the Gulf Coast region.[14] Lacking voting representation in Congress, facing disparate access to federal funds, and contending with diminished local government capacity after the recent disasters, the Territories are now on the verge of yet another calamity as they confront the quickly-evolving threat of COVID-19.[15]

The U.S. citizens who live in the Territories face a myriad of challenges based on their perceived subordinate status, and reversing the decision below would only create additional questions about their belonging in the American polity. A ruling for Plaintiffs-Appellees will not involve this Court in a "conquest of American

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[13] Michael Sheetz, *The US Virgin Islands, Devastated by Hurricane Irma, Are in Serious Need of Aid*, CNBC (Sept. 13, 2017), https://www.cnbc.com/2017/09/13/the-us-virgin-islands-devastated-by-hurricane-irma-are-in-serious-need-of-aid.html.

[14] *See, e.g.*, Mark Walker & Zolan Kanno-Youngs, *FEMA's Hurricane Aid to Puerto Rico and the Virgin Islands Has Stalled*, N.Y. Times (Nov. 27, 2019), https://www.nytimes.com/2019/11/27/us/politics/fema-hurricane-aid-puerto-rico-virgin-islands.html.

[15] *See, e.g.*, Erin Durkin, *COVID-19 May Strain Puerto Rico's Medicaid, Nutrition Programs*, Nat'l J. (Apr. 8, 2020), https://www.nationaljournal.com/s/705955/covid-19-may-strain-puerto-ricos-medicaid-nutrition-programs (noting that "[a]s the COVID-19 pandemic brings Puerto Rico's economy to a standstill, experts are worried that the territory's Medicaid and nutritional programs won't be able to keep up with the surge in demand").

Samoa" by "judicial fiat," as American Samoa provocatively suggests. *See* Am. Samoa Br. 1, 24. It would simply recognize what the Constitution plainly demands: that the Citizenship Clause applies with full force to all persons born in the Territories because the Territories are in the United States — proclaimed by Chief Justice Marshall as "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). Amidst a maelstrom of political, economic, and environmental insecurity, recognizing all persons born in the Territories as Fourteenth Amendment citizens will offer them at least a degree of the assurance and dignity conferred upon their fellow Americans born elsewhere in the United States. *See* José A. Cabranes, *Citizenship and the American Empire: Notes on the Legislative History of the U.S. Citizenship of Puerto Rico*, 127 U. Pa. L. Rev. 391, 396 n.12 (1978) (describing the essence of citizenship as "inclusion in the American political community").

B. The *Insular Cases* Do Not Resolve Whether the Citizenship Clause Applies in Any of the Territories.

Without a convincing textual argument for why Territories of the United states are not "in the United States," the U.S. Government rests its constitutional interpretation on the *Insular Cases*. In its brief, the Government cites the notorious *Downes v. Bidwell* case no less than 30 times. *See* U.S. Br. 1, 10, 12, 16–20, 22. Even the Government of American Samoa asks for the *Insular Cases* not to be "discount[ed]" or given a "narrow reading." *See* Am. Samoa Br. 15.

This reliance on the *Insular Cases* is not just *legally* wrong but deeply troubling. A narrow reading is the most that those decisions can be given under existing Supreme Court precedent: "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 Torres v. Puerto Rico*, 442 U.S. 465, 475 (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." (internal citations omitted)). Invoking *Reid*, the First Circuit recently reasoned that — because they did not specifically examine the Appointments Clause — the *Insular Cases* were irrelevant to deciding whether Congress must comply with that clause when legislating for the Territories. *Aurelius v. Puerto Rico*, 915 F.3d 838, 855 (1st Cir. 2019), *cert. granted*, 139 S. Ct. 2735 (2019) (argued Oct. 2019). The *Aurelius* court accordingly concluded that the "*only* course . . . allowed . . . [was] to not further expand the reach of the 'Insular Cases.'" *Id.* (emphasis added).

This Court should likewise deny any further expansion to this "discredited lineage" of cases. *Id.* at 854–55. None of the *Insular Cases* construed the Citizenship Clause or resolved the clause's applicability to the Territories. Instead, this line of cases mostly addressed narrow disputes arising from the federal laws that

initially facilitated commercial relations between the United States and the newly-acquired Territories. *See, e.g.*, *De Lima v. Bidwell*, 182 U.S. 1 (1901) (examining "an act of Congress, passed March 24, 1900 . . . applying for the benefit of Porto Rico the amount of the customs revenue received on importations by the United States from Porto Rico"); *Dooley v. United States*, 182 U.S. 222, 240 (1901) (examining an "act of Congress imposing a duty on goods from Porto Rico"); *Downes v. Bidwell*, 182 U.S. 244, 348 (1901) (examining "whether the act of April 12, 1900, so far as it requires the payment of import duties on merchandise brought from a port of Porto Rico as a condition of entry into other ports of the United States, is consistent with the Federal Constitution"); *see also* Andrew Kent, Boumediene, Munaf, *and the Supreme Court's Misreading of the Insular Cases*, 97 Iowa L. Rev. 101, 108 (2011) (noting that the "Insular Tariff Cases" involved "narrow legal issues").

The *Insular Cases* also invented an unprecedented category of "unincorporated territories." In sidelining territories such as Guam and Puerto Rico, the Court propounded the "tortured formulation" that these places were "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). Racist notions about the supposed unsuitability of territorial residents for citizenship and self-government underpinned

this novel and bizarre idea of territories that were simultaneously domestic and "foreign." 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 Justice White's 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). In the opinion now on appeal, the district court rightly recognized these "digressions" to be "largely premised on notions of white supremacy that the Supreme Court has long ago rejected." Appellants' App. Vol. 3 at 622 n.31; *see also id.* at 644 (further noting that "the Supreme Court has, since [then], thoroughly rejected the bigoted premise . . . that some groups are inferior to others based simply on their race").

It is not for this Court to overrule decisions of the Supreme Court. But this Court certainly is not required to pollute the proper interpretation of the Citizenship Clause by *extending* an inapposite line of precedent that is premised on certain races being "savages." The Court should resist the U.S. Government's invitation to do so.

II. U.S. CITIZENSHIP IS COMPATIBLE WITH THE PRESERVATION OF THE DISTINCT LEGAL AND CULTURAL HERITAGE OF EACH TERRITORY.

The Government of American Samoa has intervened in this litigation to express the concern that if American Samoans were considered citizens, aspects of that Territory's culture or ability to exercise self-determination could be imperiled. While *Amici* fully respect the importance that American Samoa's leaders place on cultural preservation and self-determination, the most American Samoa has done is offer vague speculation about how its culture or right to self-determination *might* be affected. *Amici*, on the other hand, can show through actual lived experience how U.S. citizenship is compatible with the Territories' local legal traditions, the preservation of their vibrant cultural heritage, and their ability to determine their own political future. It is possible to be proud U.S. citizens while still being proud CHamorus, proud Virgin Islanders, proud Puerto Ricans, proud Carolinians, and, indeed, proud Samoans.

A. Recognizing Birthright Citizenship Will Not Alter American Samoa's Legal Regime.

For the last century, U.S. citizenship has proven an important and enduring part of the Territories' relationship to the United States. Territorial governments are already similar to their counterparts in the 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 the Supreme Court of the United States. Concerns about American Samoa's ability to reinvent its political relationship with the United States under birthright citizenship, *see* Am. Samoa Br. 27, are unfounded. *See, e.g.*, *Puerto Rico v. Sanchez Valle*, 136 S. Ct. 1863, 1876 (2016) (recognizing that "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").

Contrary to the Samoan Government's speculation, there is no support at all for the notion that U.S. citizenship would threaten this arrangement or compromise American Samoa's local legal regime by subjecting its traditions "to heightened — and potentially fatal — constitutional scrutiny." Am. Samoa Br. 18. For instance, the recognition of birthright citizenship in the Northern Mariana Islands has not overridden the constitutionality of longstanding local 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) (finding that malapportionment of the NMI Senate does not violate the Fourteenth Amendment'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 misplaced. The Samoan Government itself concedes that "it is far from predetermined that precedent would require abolition of the *matai* system" and other unique aspects of the archipelago's legal ordering "if th[is] Court extend[s] U.S. citizenship to American Samoa." *See* Am. Samoa Br. 20. This is quite an understatement. American Samoa does not mention that similar land alienation restrictions are also in place throughout the NMI, and the Ninth Circuit has upheld such restrictions in the face of constitutional scrutiny. *Wabol v. Villacrusis*, 958 F.2d 1450, 1462 (9th Cir. 1990) (holding that "[i]t would truly be anomalous to construe the equal protection clause to force the United States to break its pledge to preserve and protect [the NMI's] culture and property"). The Ninth Circuit made no suggestion at all that the citizenship of the Islanders played any role in this 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 v. Territorial Registrar*, 1 Am. Samoa 2d 10 (App. Div. 1980). Again, there is no constitutional reason why citizenship would change this result, and American Samoa offers none.

B. U.S. Citizenship Is Similarly Compatible with the Preservation of Each Territory's Unique and Distinctive Cultural Heritage.

U.S. citizenship has likewise been compatible with the enduring vibrancy and diversity of the cultural heritage of the Territories.

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* Lin, *supra*, 107 Calif. L. Rev. at 1261. After overcoming a "very painful" occupation by Japan during World War II, *see* Arnold H. Leibowitz, *Defining Status: A Comprehensive Analysis of United States Territorial Relations* 323–24 (1989), 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) (2004).

Since the recognition of U.S. citizenship, Guamanians have maintained their distinctive culture and identity. "Although the political status of Guam has changed through two centuries of Western colonialism, . . . the indigenous inhabitants of Guam[] have remained steadfast and managed to survive as a collective, identifiable entity." *See* Anthony F. Quan, Comment, *"Respeta I Taotao Tano": The Recognition and Establishment of the Self-Determination and Sovereign Rights of the Indigenous Chamorros of Guam Under International, Federal, and Local Law*, 3 Asian-Pac. L. & Pol'y J. 56, 59 (2003). 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). Guamanians also remain deeply connected to other dimensions of their unique heritage. Guam's largest public holiday is Liberation Day, which commemorates the people of Guam's liberation from Japan. *See* Jesse K. Souki, *The Forgotten Heroes: Reparations for Victim of Occupied Guam During World War II*, 1 Seattle J. Soc. Just. 573, 581 (2003). These weeks-long, island-wide celebrations include traditional dances, cultural competitions, and exhibitions, alongside patriotic commemoration of Guam's relationship with the United States.[16]

2. The Northern Mariana Islands

After World War II, the United States administered the Northern Mariana Islands as part of the Trust Territories of the Pacific Islands ("TTPI"), 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*

[16] Andrew Critchelow, *Cultural Event Marks Liberation of Guam*, The News-Enterprise (July 20, 2019), https://www.thenewsenterprise.com/news/local/cultural-event-marks-liberation-of-guam/article_03c31227-f22e-5f94-b207-735caae7d231.html.

Islands, 4 Asian-Pac. L. & Pol'y J. 180, 181 (2003). The United States administered the NMI under the TTPI until 1975, when Congress approved the Covenant to Establish a Commonwealth of the Northern Mariana Islands. This Covenant 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 citizenship provision, which took effect in 1986. *See* Charles R. Venator 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). The citizenship provision afforded the "collective naturalization of TTPI nationals" and "granted the new citizens a right to a *jus soli*, or birthright, U.S. citizenship." *Id*.

The Covenant has from its inception sought to preserve certain "cultural balances" in the NMI. *See* Marybeth Herald, *The Northern Mariana Islands: A Change in the Course Under Its Covenants 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 its 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, CHamoru and Carolinian are the Northern Mariana Islands' 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 that finalized the Spanish-American War. *See* Lin, *supra*, 107 Calif. L. Rev. at 1254. In 1917, Congress passed the Jones Act, which provided "a fully elected bicameral legislature . . . and citizenship to the residents of Puerto Rico." *See* Juan R. Toruella, *¿Hacia Dónde Vas [Where Are You Going] Puerto Rico?*, 107 Yale L. J. 1503, 1511 (1998) (citing Puerto Rican Federal Relations Act, ch. 145, 39 Stat. 951 (1917) (codified as amended at 48 U.S.C. § 737 (1994))). Later, the Nationality Act of 1940 recognized that "all persons born in Puerto Rico on or after January 14, 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 does indeed mix Native, Spanish, and African heritage." Pedro A. Malavet, *Puerto Rico: Cultural Nation, American Colony*, 6 Mich. J. Race & L. 1 (2000). And as manifested through its unique cuisine and music, Puerto Rican culture is widely recognized and celebrated around the globe. *See id.* Moreover, although English and Spanish are Puerto Rico's official languages, over 95% of its

population speaks Spanish.[17] The Spanish language dominates everyday life in Puerto Rico, even serving as the primary language of its public school system. *See* Ingrid T. Colón, *Blog Post: Bilingual Education in Puerto Rico*, New America (Aug. 12, 2019). In addition, local laws are in place to promote and regulate the celebration of enduring Catholic holidays, such as Holy Week and Three Kings Day. *See* Pedro A. Malavet, *The Accidental Crit II: Culture and the Looking Glass of Exile*, 78 Den. U. L. Rev. 753, 774 (2001). *But cf.* Am. Samoa Br. 23 (speculating that citizenship might lead to Establishment Clause challenges for religiously inspired local practices).

The harmony between Puerto Rican culture and U.S. citizenship is in fact enshrined in the Constitution that the people of Puerto Rico drafted and approved in 1952, 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.

[17] *See* Puerto Rico Languages, GraphicMaps (last visited May 9, 2020), https://www.graphicmaps.com/puerto-rico/languages.

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*, 107 Calif. L. Rev. 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.[18] Like in other Territories, Virgin Islanders remain deeply connected to their Afro-Caribbean and indigenous roots. Quelbe — a style thought to have derived from the Islands' formerly enslaved people — is the territory's official music, with classic folk songs of this genre and cariso retelling important events in the islands' history.[19] 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.

* * *

There is no question that each of the Territories has experienced cultural shifts over the course of several centuries. But this cultural evolution has nothing to do

[18] *See* Virgin Islands Language, VInow (last visited May 9, 2020), https://www.vinow.com/general_usvi/culture/virgin-islands-language.

[19] *See* Susanna Henighan Potter, *Quelbe Music of the Virgin Islands*, Hachette Book Group, (last visited May 9, 2020), https://www.hachettebookgroup.com/travel/arts-culture/quelbe-music-virgin-islands.

with whether people born in the Territories are recognized as "citizens" or labeled with the subordinate status of "non-citizen national." To the contrary, throughout their century under the American flag, the peoples of the Territories have shown that U.S. citizenship is fully compatible with the resilience and continued celebration of their heritage, sustained for millennia by the diverse cultures that have traversed their corners of the Pacific Ocean and the Caribbean Sea. There is absolutely no reason to believe that citizenship would have a different effect on the strong cultural heritage of American Samoa.

CONCLUSION

For the foregoing reasons, this Court should affirm the decision below and recognize that those born in American Samoa — and Guam, the Northern Mariana Islands, Puerto Rico, and the U.S. Virgin Islands — are birthright citizens under the Fourteenth Amendment.

Date: May 12, 2020

Respectfully submitted,

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CERTIFICATE OF DIGITAL SUBMISSION AND PRIVACY REDACTIONS

I hereby certify that:

1. All required privacy redactions have been made in compliance with 10th Cir. R. 25.5.

2. In accordance with General Order No. 95-1, *In re: Restrictions on Public Access to the Byron White United States Courthouse and Temporary Suspension of Paper Copy Requirements* (Mar. 16, 2020), *Amici* are not submitting paper copies of their Brief at this time, but stand ready to do so if the Court lifts its current suspension of the paper-copy requirements.

3. *Amici* have scanned this digital submission using the latest version of Symantec Endpoint Protection, which confirmed it is free of viruses.

Date: May 12, 2020 s/ David M. Zionts

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limit of Federal Rules of Appellate Procedure 29(a)(5) and 32(a)(7)(B) because it contains 6,473 words, excluding the parts of the brief exempted by Rule 32(f).

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Date: May 12, 2020 s/ David M. Zionts

CERTIFICATE OF SERVICE

I hereby certify that on May 12, 2020, I caused the Brief of *Amici Curiae* Members of Congress, Former Members of Congress, and Former Governors of Guam, the Northern Mariana Islands, Puerto Rico, and the U.S. Virgin Islands in Support of Plaintiffs-Appellees and Affirmance to be filed with the Clerk of the United States Court of Appeals for the Tenth Circuit using the Appellate CM/ECF system, causing a true and correct copy to be served upon all counsel of record who are registered CM/ECF users.

Date: May 12, 2020 s/ David M. Zionts