No. 15-981

# In the Supreme Court of the United States

LENEUOTI FIAFIA TUAUA, 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 DISTRICT OF COLUMBIA CIRCUIT*

**BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION**

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## QUESTION PRESENTED

Whether the Fourteenth Amendment's Citizenship Clause, which provides 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, Cl. 1, confers United States citizenship on individuals born in American Samoa.

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## OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-23a) is reported at 788 F.3d 300. The opinion of the district court granting the government's motion to dismiss (Pet. App. 24a-43a) is reported at 951 F. Supp. 2d 88.

## JURISDICTION

The judgment of the court of appeals was entered on June 5, 2015. A petition for rehearing was denied on October 2, 2015 (Pet. App. 44a-45a). On December 14, 2015, the Chief Justice extended the time within which to file a petition for a writ of certiorari to and including February 1, 2016, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## STATEMENT

1. The Citizenship Clause of the Fourteenth Amendment to the United States Constitution 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, Cl. 1. "Persons not born in the United States acquire citizenship by birth only as provided by Acts of Congress." *Miller* v. *Albright*, 523 U.S. 420, 424 (1998).

Many people are United States citizens or United States nationals by virtue of Acts of Congress, rather than by operation of the Citizenship Clause. Exercising its plenary authority over naturalization, see U.S. Const. Art. I, § 8, Cl. 4, Congress has conferred U.S. citizenship on children born to members of Indian Tribes, 8 U.S.C. 1401(b), and on children born abroad to U.S. citizen parents when certain physical presence or residence requirements have been met, 8 U.S.C. 1401(c)-(e) and (g), 1409; see 8 U.S.C. 1403. For United States territories, Congress has decided on a territory-by-territory basis whether and under what circumstances persons born in the territory (or already living in the territory at the time of acquisition) become U.S. citizens or nationals. Thus, Congress has, over time, conferred U.S. citizenship on persons born in (or already living in) several U.S. territories, including Puerto Rico, 8 U.S.C. 1402; the U.S. Virgin Islands, 8 U.S.C. 1406; Guam, 8 U.S.C. 1407; the Northern Mariana Islands, Act of Mar. 24, 1976, Pub. L. No. 94-241, §§ 301, 303, 90 Stat. 265-266 (48 U.S.C. 1801 note); and Alaska and Hawaii before they became States, 8 U.S.C. 1404, 1405. Congress has decided that persons born in "an outlying possession of the

United States"—currently defined as American Samoa and Swains Island (which is part of American Samoa)—"shall be nationals, but not citizens, of the United States at birth." 8 U.S.C. 1408(1); see 8 U.S.C. 1101(a)(29); 48 U.S.C. 1662.

2. American Samoa is a territory of the United States. See U.S. Gen. Accounting Office, *U.S. Insular Areas: Application of the U.S. Constitution* 7-8 (Nov. 1997), http://www.gao.gov/archive/1998/og98005.pdf (*U.S. Insular Areas*). It is comprised of several islands in an archipelago located in the South Pacific between Hawaii and New Zealand. *Id.* at 3, 22. It became a territory of the United States in 1900, after Great Britain and Germany withdrew their claims to it, see Tripartite Convention of 1899, Dec. 2, 1899, Art. II, 31 Stat. 1879, and Samoan leaders ceded sovereignty over it to the United States, see Acceptance of Cessions, Dec. 23, 1921, *reprinted in* Am. Samoa Code, Historical Documents 12 (1973); Cession of Manu'a Islands, July 14, 1904, *reprinted in* Am. Samoa Code, Historical Documents 9-11 (1973); Cession of Tutuila and Aunu'u, Apr. 17, 1900, *reprinted in* Am. Samoa Code, Historical Documents 6-8 (1973); see also Act of Feb. 20, 1929, ch. 281, 45 Stat. 1253; 48 U.S.C. 1661, 1662.

The agreements by which the United States acquired American Samoa did not set out specific rules for governance of the territory and did not provide that the territory would be incorporated into the United States or placed on a path toward statehood. Congress provided that the President or his designees shall administer American Samoa unless and until Congress provides otherwise. See Act of Feb. 20, 1929, § (c), 45 Stat. 1253. The President originally

placed American Samoa under the authority of the Department of the Navy. See William McKinley, Exec. Order 125-A, Placing Certain Islands of the Samoan Group Under the Control of the Navy Department (Feb. 19, 1900), available at http://www.asbar.org/index.php?option=com_content&view=article&id=13683:executive-order-placing-samoa-under-the-u-s-navy&catid=112&Itemid=178. In 1951, the President transferred that authority to the Department of the Interior, where it remains, see Exec. Order No. 10,264, 3 C.F.R. 447-448 (Supp. 1951). The Department of the Interior has worked with the people of American Samoa to adopt a constitution and to provide for popular elections. See Am. Samoa Rev. Const. Art. V, § 11 (noting that constitution became effective on July 1, 1967, following approval by a popular vote and by the Secretary of the Interior); U.S. Dep't of the Interior, Order No. 3009, at 1-3 (Sept. 13, 1977), https://www.doi.gov/sites/doi.gov/files/migrated/oia/about/upload/Secretary-s-Order-3009-Elected-Governor-and-Lt-Governor-of-American-Samoa.pdf (providing for elected governor and lieutenant governor).

Today, American Samoa governs itself with respect to local affairs. Pet. App. 2a-3a. Although it remains subject to federal oversight, American Samoa has a popularly elected governor, lieutenant governor, and bicameral legislature, as well as an independent judiciary. See *id.* at 2a-3a, 26a; see also Office of Insular Affairs, U.S. Dep't of the Interior, *American Samoa*, https://www.doi.gov/oia/islands/american-samoa (last visited May 10, 2016) (*American Samoa*). American Samoa also has a delegate in the United States House of Representatives. See U.S. House of Representatives,

*Directory of Representatives*, http://www.house.gov/representatives (last visited May 10, 2016).

At the same time, "American Samoa has endeavored to preserve its traditional way of life," including its unique tradition of communal land ownership. Pet. App. 26a-27a. The constitution of American Samoa explicitly pledges to protect that practice, as well as "the Samoan way of life and language" more generally. Am. Samoa Rev. Const. Art. I, § 3. In this case, the government of American Samoa and its delegate in Congress both contend that application of the Citizenship Clause to persons born in American Samoa would have serious consequences for American Samoa's traditions and culture. Pet. App. 26a-27a & n.3.

3. Petitioners are five individuals born in American Samoa and the Samoan Federation of America, a nonprofit organization that serves the Samoan community in Los Angeles. Pet. App. 24a & n.1. They sued the United States and various federal government officials, contending that the Fourteenth Amendment's Citizenship Clause applies to persons born in American Samoa, and so the Act of Congress designating individuals born in American Samoa as non-citizen nationals of the United States is unconstitutional. *Id.* at 24a-25a & n.2. The federal government filed a motion to dismiss on the ground that the Citizenship Clause does not apply to individuals born in American Samoa. *Id.* at 33a.

The district court agreed and granted the motion to dismiss. Pet. App. 24a-43a. The district court explained that whether the Citizenship Clause applies to persons born in American Samoa depends on whether such persons are "born * * * in the United States." *Id.* at 33a (quoting U.S. Const. Amend. XIV,

§ 1, Cl. 1). The court concluded that such persons are not born "in the United States" within the meaning of the Clause because American Samoa is an "unincorporated territor[y]" of the United States, meaning that it "ha[s] not yet become part of the United States and [is] not on a path toward statehood." *Id.* at 34a. In reaching that conclusion, the court relied on *Downes* v. *Bidwell*, 182 U.S. 244 (1901), where this Court held that Puerto Rico is not part of "the United States" for purposes of the Tax Uniformity Clause, U.S. Const. Art. I, § 8, Cl. 1, and also expressed the view that persons born in unincorporated territories are not citizens by operation of the Citizenship Clause. Pet. App. 35a-36a. The district court observed that "*no* federal court has recognized birthright citizenship as a guarantee in unincorporated territories"; to the contrary, the district court observed, four courts of appeals have rejected such claims, and this Court has "continued to suggest that citizenship is not guaranteed to people born in unincorporated territories." *Id.* at 36a-38a (citing cases). Finally, the district court determined that Congress's "years of past practice in which territorial citizenship has been treated as a statutory, and not a constitutional, right" provide strong support for its conclusion that the Citizenship Clause does not apply to American Samoa. *Id.* at 42a-43a.

4. The court of appeals affirmed. Pet. App. 1a-23a. The court determined that the Citizenship Clause's "text and structure alone" do not resolve the question presented, but it concluded that the better view is that an unincorporated territory, such as American Samoa, is not "in the United States" for purposes of the Clause. *Id.* at 5a-6a, 11a-23a. The court of appeals

explained that there is a fundamental distinction between "incorporated territories, which are intended for statehood from the time of acquisition," and "unincorporated territories," such as American Samoa, "which are not intended for statehood and in which only [certain] fundamental constitutional rights apply by their own force." *Id.* at 11a-12a (citation omitted; brackets in original). Applying principles set out in the *Insular Cases* (see note 1, *infra*), the court of appeals determined that the Constitution should not be read to mandate citizenship at birth for all residents of U.S. territories, because "numerous free and democratic societies" base citizenship on the nationality of a child's parents, rather than on place of birth, and the Constitution should "accommodate variation" based on local traditions and customs. *Id.* at 12a-17a. That is especially important in the case of American Samoa, the court reasoned, because citizenship is a highly debated issue within American Samoa and "the American Samoan people have not formed a collective consensus in favor of United States citizenship." *Id.* at 17a-18a. Indeed, many oppose U.S. citizenship because they believe it would undermine American Samoa's "unique kinship practices and social structures." *Id.* at 18a.

The court of appeals also recognized that Congress requires broad authority with respect to unincorporated territories and offered the example of the Philippines, which was a U.S. territory for several decades before becoming an independent nation. Pet. App. 9a n.6. If all persons born in U.S. territories automatically become citizens under the Constitution, the court explained, it would "necessarily implicate the United States citizenship status of persons born in the Philip-

pines during the territorial period." *Ibid.* The court further determined that the meaning of the Clause should be informed by the long-settled understanding that Congress decides whether residents of unincorporated U.S. territories become citizens or nationals. *Id.* at 14a n.7. And the court recognized that it would be highly anomalous to upset that settled understanding when the result would be to "impose citizenship over the objections of the American Samoan people themselves, as expressed through their democratically elected representatives." *Id.* at 19a-20a.

5. The court of appeals denied petitioners' petition for rehearing en banc, with no judge calling for a vote on the petition. Pet. App. 44a-45a.

**ARGUMENT**

Petitioners seek review (Pet. 15-35) of the court of appeals' conclusion that persons born in American Samoa are not entitled to United States citizenship at birth under the Citizenship Clause of the Fourteenth Amendment to the Constitution. The court of appeals correctly rejected petitioners' constitutional challenge to the Act of Congress governing the nationality status of persons born in American Samoa. The decision below is consistent with the decisions of four other courts of appeals that have held that persons born in unincorporated territories of the United States do not acquire U.S. citizenship at birth under the Citizenship Clause. Petitioners' contrary position also is inconsistent with Congress's longstanding practice under the Citizenship Clause.

Further, the democratically elected government of American Samoa and its delegate in Congress oppose petitioners' constitutional claim. To the extent that the people of American Samoa may in the future de-

sire to obtain U.S. citizenship, the proper course is to seek that result from Congress, through enactment of a law conferring citizenship. That is the manner in which U.S. citizenship has been conferred on residents of other unincorporated territories of the United States. Further review is therefore unwarranted.

1. The Fourteenth Amendment's Citizenship Clause provides that "[a]ll 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, Cl. 1. The question in this case is whether persons born in the United States territory of American Samoa are born "in the United States" within the meaning of this Clause.

Like the court of appeals below, every other court of appeals that has considered the issue has held that the Citizenship Clause does not apply to unincorporated territories of the United States, meaning territories that are not destined for statehood. See *Valmonte* v. *INS*, 136 F.3d 914, 917-920 (2d Cir.) (holding that the Citizenship Clause does not apply to individuals born in the Philippines while it was a U.S. territory), cert. denied, 525 U.S. 1024 (1998); *Lacap* v. *INS*, 138 F.3d 518, 519 (3d Cir. 1998) (per curiam) (same); *Nolos* v. *Holder*, 611 F.3d 279, 282-284 (5th Cir. 2010) (per curiam) (same); *Rabang* v. *INS*, 35 F.3d 1449, 1451-1453 (9th Cir. 1994) (same), cert. denied, 515 U.S. 1130 (1995); see also *Eche* v. *Holder*, 694 F.3d 1026, 1027-1028, 1030-1031 (9th Cir. 2012) (construing "the United States" in the Naturalization Clause, U.S. Const. Art. I, § 8, Cl. 4, not to apply to the Northern Mariana Islands because "federal courts have repeatedly construed similar and even identical

language in other clauses to include states and incorporated territories, but not unincorporated territories"), cert. denied, 133 S. Ct. 2825 (2013). Petitioners acknowledge (Pet. 34) that every court of appeals that has considered the question whether the Citizenship Clause applies to an unincorporated territory has held that it does not.

2. The court of appeals correctly concluded that persons born in American Samoa do not obtain citizenship at birth under the Citizenship Clause. The Clause extends citizenship to persons who are "born or naturalized in the United States" and "subject to the jurisdiction thereof." U.S. Const. Amend. XIV, § 1, Cl. 1. By constitutional design, a U.S. territory is under the sovereignty of the United States, and Congress has plenary power to administer the territory. See U.S. Const. Art. IV, § 3, Cl. 2 (Territory Clause); *Shively* v. *Bowlby*, 152 U.S. 1, 48 (1894). Accordingly, persons born in the territories are "subject to the jurisdiction" of the United States. Cf. *Elk* v. *Wilkins*, 112 U.S. 94, 99-103 (1884) (explaining that members of Indian Tribes did not obtain citizenship under the Citizenship Clause because Tribes are not "subject to the jurisdiction" of the United States in the relevant sense). But there remains another, prior question: whether U.S. territories are "in the United States" for purposes of the Clause.

a. The best reading of the Citizenship Clause is that U.S. territories are not "in the United States" within the meaning of the Clause because "in the United States" means in the 50 States and the District of Columbia. At the time the Constitution was adopted, "the United States" consisted of the 13 States, and the Constitution contemplated creation of a district

carved out of those States to "become the Seat of the Government of the United States." U.S. Const. Art. I, § 8, Cl. 17; see, *e.g.*, *Black's Law Dictionary* 1769 (10th ed. 2014) (defining "United States of America" as a republic comprised of the 50 States and the District of Columbia).

The Constitution expressly distinguishes between States and territories of the United States. The Constitution reserves to the States all powers "not delegated to the United States by the Constitution, nor prohibited by it to the States," U.S. Const. Amend. X, thereby recognizing that States have "sovereignty concurrent with that of the Federal Government," *Tafflin* v. *Levitt*, 493 U.S. 455, 458 (1990). Territories, on the other hand, are defined as lands "belonging to the United States" that are under the plenary authority of Congress. U.S. Const. Art. IV, § 3, Cl. 2 (Territory Clause). The Constitution itself therefore sets out a fundamental distinction between "the United States" and the territories belonging to the United States.

Further, while the Citizenship Clause of the Fourteenth Amendment is confined to individuals born "in the United States, *and* subject to the jurisdiction thereof," U.S. Const. Amend. XIV, § 1, Cl. 1 (emphasis added), the Thirteenth Amendment prohibits slavery "within the United States, *or* any place subject to their jurisdiction," U.S. Const. Amend. XIII, § 1 (emphasis added). The Thirteenth Amendment's broader language demonstrates that "there may be places subject to the jurisdiction of the United States but which are not incorporated into it, and hence are not within the United States in the completest sense of those words." *Downes* v. *Bidwell*, 182 U.S. 244, 336-

337 (1901) (White, J., concurring); see also *id.* at 251 (opinion of Brown, J.). At a minimum, this textual distinction underscores the soundness of the settled understanding that unincorporated territories, while subject to the jurisdiction *of* the United States, are not "*in* the United States" for purposes of the Citizenship Clause.

b. The meaning of "in the United States" under the Citizenship Clause is further informed by this Court's decisions concerning application of the Constitution to U.S. territories. The Court has long recognized that the Constitution does not automatically apply in full to all territories of the United States. In the *Insular Cases*[1]—a series of decisions about the application of the Constitution to territories the United States acquired at the turn of the 20th century, such as Puerto Rico, Guam, and the Philippines—the Court explained that the Constitution has more limited application in "unincorporated Territories" that are not intended for statehood than it does in States and "incorporated Territories surely destined for statehood." *Boumediene* v. *Bush*, 553 U.S. 723, 756-757 (2008). In those cases, the Court set out a "general rule" that in an "unincorporated territory," the Constitution does not necessarily apply in full. *United States* v. *Verdugo-Urquidez*, 494 U.S. 259, 268 (1990). Such a rule is necessary to provide the United States with flexibility in acquiring, governing, and relinquishing territories. For example, the Court has explained that some territories (such as the former Spanish colonies) operated

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[1] *Dorr* v. *United States*, 195 U.S. 138 (1904); *Hawaii* v. *Mankichi*, 190 U.S. 197 (1903); *Downes* v. *Bidwell*, *supra*; *Armstrong* v. *United States*, 182 U.S. 243 (1901); *Dooley* v. *United States*, 182 U.S. 222 (1901); *De Lima* v. *Bidwell*, 182 U.S. 1 (1901).

under civil-law systems quite unlike our own, and in some cases, like the Philippines, "a complete transformation of the prevailing legal culture would have been not only disruptive but also unnecessary, as the United States intended to grant independence to that Territory." *Boumediene*, 553 U.S. at 757-758.

The *Insular Cases* invoked the distinction between incorporated and unincorporated territories both to determine the reach of constitutional provisions that are silent as to geographic scope, see, *e.g.*, *Dorr* v. *United States*, 195 U.S. 138, 144-149 (1904) (Sixth Amendment jury-trial right), and to interpret constitutional provisions that specify a geographic reach, see *Downes*, 182 U.S. at 287 (opinion of Brown, J.) (Tax Uniformity Clause). Here, the Citizenship Clause confers citizenship on those born "in the United States," and the Court's decision in *Downes* confirms that "in the United States" excludes unincorporated territories.

The particular question in *Downes* was whether the requirement that "all Duties, Imposts and Excises shall be uniform throughout the United States," U.S. Const. Art. I, § 8, Cl. 1, applies to Puerto Rico, a U.S. territory. 182 U.S. at 249 (opinion of Brown, J.). The Court held that Puerto Rico is not part of "the United States" for purposes of that provision. *Id.* at 263, 277-278, 287 (opinion of Brown, J.); *id.* at 341-342 (White, J., concurring); *id.* at 346 (Gray, J., concurring).[2]

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[2] Although Justice Brown's opinion was designated an "[o]pinion of the Court," 182 U.S. at 247-287, a reporter's note indicates that no opinion commanded a majority of the Court, see *id.* at 244 n.1 (syllabus). But all Justices in the majority agreed that it is for Congress to decide whether persons in newly acquired territories

Justice Brown explained that, from a review of the Constitution's text and history, "it can nowhere be inferred that the territories were considered a part of the United States." *Id.* at 250-251. Both the Thirteenth and Fourteenth Amendments distinguish between places "within" or "in" the United States and places "subject to the jurisdiction" of the United States, U.S. Const. Amends. XIII, § 1, XIV, § 1, Cl. 1, and that textual distinction "show[s] that there may be places within the jurisdiction of the United States that are no part of the Union," 182 U.S. at 251 (opinion of Brown, J.); see *id.* at 336-337 (White, J., concurring). Justice Brown also observed that, as a historical matter, Congress has needed the flexibility to make a variety of arrangements for the territories, especially at the time they were acquired by the United States. *Id.* at 250-256 (discussing the territories of Louisiana, Florida, Hawaii, and the Philippines).

As particularly relevant here, the Court recognized in *Downes* that the Constitution should not be read to automatically confer citizenship on inhabitants of U.S. territories. Justice Brown explained that "the power to acquire territory by treaty implies not only the power to govern such territory, but to prescribe upon what terms the United States will receive its inhabitants." 182 U.S. at 279; see *id.* at 306 (White, J., concurring); *id.* at 345-346 (Gray, J., concurring). The right to acquire territory "could not be practically exercised if the result would be to endow the inhabitants with citizenship of the United States." *Id.* at 306 (White, J., concurring). The Justices in the majority thus recognized that when the United States acquires

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become U.S. citizens. See *id.* at 279-280 (opinion of Brown, J.); *id.* at 306 (White, J., concurring); *id.* at 345-346 (Gray, J., concurring).

various territories, the decision to afford citizenship is to be made by Congress. *Id.* at 280 (opinion of Brown, J.) ("In all these cases there is an implied denial of the right of the inhabitants to American citizenship until Congress by further action shall signify its assent thereto."); see *id.* at 306 (White, J., concurring); *id.* at 345-346 (Gray, J., concurring).

Petitioners suggest (Pet. 29-30) that this reasoning is inapplicable to American Samoa because it has been a territory of the United States for many years. But the relevant point is that the Constitution grants Congress plenary power with respect to the territories and that this Court has recognized that reading the Constitution to mandate citizenship for residents of unincorporated territories would be a significant and unwarranted limitation on that power. And an unincorporated territory does not lose that status by passage of time. See, *e.g.*, *Torres* v. *Puerto Rico*, 442 U.S. 465, 468-470 (1979) (recognizing Puerto Rico to be an unincorporated territory 80 years after its acquisition). Petitioners also suggest (Pet. 33) that the *Insular Cases* "should be modified or overruled," but this Court has reaffirmed their core principle, which is that the political Branches determine whether newly acquired territory is incorporated into the United States. See *Boumediene*, 553 U.S. at 756-757; *Torres*, 442 U.S. at 469; *Reid* v. *Covert*, 354 U.S. 1, 8-9 (1957) (plurality opinion); *Balzac* v. *Porto Rico*, 258 U.S. 298, 312 (1922).

c. American Samoa is an unincorporated territory of the United States. The agreements by which American Samoa was acquired did not contemplate that it would become a State, and Congress has not enacted

any law that provides a path to statehood.[3] Persons born in American Samoa therefore are not born "in the United States" for purposes of the Citizenship Clause.

The Constitution grants Congress plenary power to administer the territories, U.S. Const. Art. IV, § 3, Cl. 2, and that power, combined with Congress's broad authority over naturalization, U.S. Const. Art. I, § 8, Cl. 4, inform the meaning of "in the United States" under the Citizenship Clause. In particular, Congress must have flexibility, when it acquires territories, to determine whether and when the inhabitants of those territories become citizens or nationals. *Downes*, 182 U.S. at 279-280 (opinion of Brown, J.).

That flexibility has proven important when the United States has acquired territories. For example, in 1898, when the United States acquired Puerto Rico and the Philippines from Spain in the Treaty of Paris, the Treaty provided that "[t]he civil rights and political status of the native inhabitants of the[se] territories * * * shall be determined by the Congress." Treaty of Paris, Dec. 10, 1898, U.S.-Spain, Art. IX, 30 Stat. 1759. Congress later extended U.S. citizenship to residents of Puerto Rico, see Organic Act of 1917 (Jones Act), ch. 145, § 5, 39 Stat. 953; see also Nationality Act of 1940, § 202, 54 Stat. 1139, but it provided that residents of the Philippines would be "citizens of the Philippine Islands," rather than citizens of the United States, Autonomy Act, ch. 416, § 2, 39 Stat.

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[3] The other U.S. territories (Puerto Rico, Guam, the Northern Mariana Islands, the U.S. Virgin Islands, and a number of small, mostly uninhabited outlying islands) also are unincorporated territories, because Congress has not currently provided a path to statehood for any of them. See *U.S. Insular Areas* 6-10, 39-40.

546; see *Barber* v. *Gonzales*, 347 U.S. 637, 639 n.1 (1954).[4] As this Court has recognized, it was important for Congress to have the authority to make different arrangements for these territories, particularly because a territory (such as the Philippines) may not permanently remain under the sovereignty of the United States. See *Boumediene*, 553 U.S. at 757-758; see also *Downes*, 182 U.S. at 318 (White, J., concurring). As the court of appeals recognized, there would be "vast practical consequences" if the Citizenship Clause now were applied to unincorporated territories, including that such a development would raise questions about "the United States citizenship status of persons born in the Philippines during the territorial period," and "potentially their children through operation of statute." Pet. App. 9a n.6.

The "years of past practice in which territorial citizenship has been treated as a statutory, and not a constitutional, right" confirm that the Citizenship Clause does not apply to American Samoa. Pet. App. 42a; see *id.* at 14a n.7. Congress has long understood that it has the authority to decide whether and when to deem residents of U.S. territories (particularly residents of unincorporated territories) to be U.S. citizens or nationals, and Congress has exercised that authority to fashion rules for individual territories

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[4] Similarly, although the United States acquired Guam in 1898, see Treaty of Paris, Art. II, 30 Stat. 1755, Congress did not extend citizenship based on birth in Guam until 1950, see Organic Act of Guam, ch. 512, § 4, 64 Stat. 384-385. The United States acquired the U.S. Virgin Islands in 1917, see Convention Between the United States and Denmark for Cession of the Danish West Indies, Aug. 4, 1916, U.S.-Den., 39 Stat. 1706, but Congress did not extend citizenship based on birth there until 1927, and only under certain conditions, see Act of Feb. 25, 1927, ch. 192, 44 Stat. 1234.

based on their particular characteristics and political futures. *Downes*, 182 U.S. at 251-258, 267-270 (opinion of Brown, J.). Congress's longstanding practice provides strong evidence that the Citizenship Clause was not intended to override Congress's plenary powers with respect to the territories—at least with respect to unincorporated territories like American Samoa. See *Jackman* v. *Rosenbaum Co.*, 260 U.S. 22, 31 (1922) (Holmes, J.) ("If a thing has been practiced for two hundred years by common consent, it will need a strong case for the Fourteenth Amendment to affect it.").

3. Petitioners contend (Pet. 3, 5, 24-27) that this Court has recognized that the Citizenship Clause applies in U.S. territories. They are mistaken. This Court recognized in *Downes* that application of the Clause to the territories would substantially impair Congress's constitutional authority to administer the territories, especially newly acquired territories. See pp. 14-15, *supra*. And the Court has continued to assume that persons born in U.S. territories obtain citizenship only by Act of Congress, not through the Constitution. *Barber*, 347 U.S. at 639 n.1; see *Miller* v. *Albright*, 523 U.S. 420, 467 n.2 (1998) (Ginsburg, J., dissenting); see also *Rabang* v. *Boyd*, 353 U.S. 427, 432 (1957) (reiterating Congress's power to "prescribe upon what terms the United States will receive [a territory's] inhabitants, and what their status shall be" (emphasis and citation omitted)).

Petitioners primarily rely (Pet. 25-27) on *United States* v. *Wong Kim Ark*, 169 U.S. 649 (1898), where the Court held that the Citizenship Clause conferred citizenship at birth on a child born in California whose parents were citizens of China. *Id.* at 705. As the

court of appeals explained (Pet. App. 8a-9a), it was undisputed that the plaintiff in *Wong Kim Ark* was born in the United States because he was born in a State. 169 U.S. at 652. As a result, the Court had no occasion to consider whether the Citizenship Clause applies to unincorporated U.S. territories. The Court explained that the Constitution generally premises citizenship on place of birth, rather than citizenship of the child's parents, see *id.* at 655-705, but that discussion does not establish that a person born in an unincorporated territory is covered by the Citizenship Clause, because that question simply was not before the Court. See *Valmonte*, 136 F.3d at 920 (noting that courts have declined to construe *Wong Kim Ark* as petitioners suggest here because "[t]he question of the Fourteenth Amendment's territorial scope was not before the Court"). For the same reason, petitioners' reliance (Pet. 24) on language in the *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36 (1873), is misplaced. As in *Wong Kim Ark*, the Court in those cases did not purport to decide the geographic scope of the Citizenship Clause—and certainly did not purport to address application of the Clause to unincorporated territories.

Petitioners also rely (Pet. 21) on *Loughborough* v. *Blake*, 18 U.S. (5 Wheat.) 317 (1820), which held that the application of the Tax Uniformity Clause "throughout the United States" includes the District of Columbia. *Id.* at 319. But as was later explained in *Downes*, *Loughborough* should not be read to support the proposition that an unincorporated U.S. territory must be considered part of "the United States" under the Constitution. See *Downes*, 182 U.S at 260-261

(opinion of Brown, J.); *id.* at 292-293 (White, J., concurring).

Petitioners also cite (Pet. 23-24) statements of individual legislators from the time of the Fourteenth Amendment's ratification. But as the court of appeals noted, the background to the Fourteenth Amendment "contains many statements from which conflicting inferences can be drawn," Pet. App. 6a (quoting *Afroyim* v. *Rusk*, 387 U.S. 253, 267 (1967)), and passing statements from three legislators "are not impressive legislative history" and cannot determine the meaning of the Clause, *id.* at 6a-7a (quoting *Garcia* v. *United States*, 469 U.S. 70, 78 (1984)). And whatever the import of those statements with respect to territories that were destined for statehood, they do not address the application of the Constitution to unincorporated territories, because the United States had no such territories at the time.

4. There are two additional factors that counsel against further review in this case. First, "the American Samoan people have not formed a collective consensus in favor of United States citizenship." Pet. App. 18a. As a result, the democratically elected government of American Samoa and the territory's delegate in Congress have participated in this case to oppose application of the Citizenship Clause to American Samoa. As the court of appeals explained, the people of American Samoa have been reluctant to seek citizenship because they fear it would upset "the traditional Samoan way of life," including the territory's longstanding "system of communal land ownership." *Ibid.* This is not to say that the wishes of the people of American Samoa are controlling with respect to the application of the Citizenship Clause. But the opposi-

tion of the government of American Samoa (which represents the people of American Samoa) counsels strongly against reaching out to upset the settled constitutional understanding. See *id.* at 22a-23a (declining to "mandate an irregular intrusion into the autonomy of Samoan democratic decision-making").[5] Indeed, the position of the American Samoan government in this case underscores the importance of Congress's plenary power over the territories, which includes the power to foster self-determination in the territories.

Second, and relatedly, the ability to resolve the question of citizenship for American Samoans through the political process makes clear that there is no occasion for this Court's review. As petitioners note (Pet. 34), American Samoa, with a population of approximately 55,500, see *American Samoa*, is the only U.S. territory whose inhabitants are U.S. nationals, rather than U.S. citizens. That status may be changed by Congress at any time. And residents of American Samoa who become residents of any State[6] (as several petitioners have, see Pet. 11-12) and wish to naturalize may do so on favorable terms. See 8 U.S.C. 1436.

If a consensus view on citizenship were to develop in American Samoa, the territory's delegate could bring the issue to Congress. By contrast, if this Court were now to extend the Citizenship Clause to impose

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[5] That is especially true because, as the court of appeals noted, there is only a "limited factual record" in this case about what effect mandated citizenship would have on "American Samoa's present legal and cultural structures." Pet. App. 19a.

[6] See 8 U.S.C. 1101(a)(36) (defining "State" to include the District of Columbia, Puerto Rico, Guam, the U.S. Virgin Islands, and the Northern Mariana Islands).

U.S. citizenship on all persons born in American Samoa, that would eliminate the opportunity for democratic consideration and consensus by the people of American Samoa. It also would disrupt the long-settled understanding with respect to all of the territories, including territories (like the Philippines) that are no longer under the sovereignty of the United States. The appropriate course under our constitutional structure, which affords Congress broad authority over the administration of the territories, is to permit the people of American Samoa to continue to assess whether they wish to obtain U.S. citizenship, and perhaps to seek citizenship through an Act of Congress, rather than construing the Constitution to mandate U.S. citizenship based on the urging of the petitioners in this case. For these reasons as well, further review is unwarranted.

**CONCLUSION**

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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