ORAL ARGUMENT REQUESTED

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 SAMOAN GOVERNMENT, and THE HON. AUMUA AMATA,

Intervenors-Defendants-Appellants.

On Appeal From The United States District Court For The District Of Utah
Honorable Clark Waddoups, No. 1:18-CV-00036-CW

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CORPORATE DISCLOSURE STATEMENT

Plaintiffs-Appellees John Fitisemanu, Pale Tuli, and Rosavita Tuli are individuals. Plaintiff-Appellee Southern Utah Pacific Islander Coalition ("SUPIC") is a Utah nonprofit corporation with its principal place of business in St. George, Utah. SUPIC has no parent corporation and no publicly held corporation owns ten percent or more of its stock.

Dated: May 5, 2020

/s/ *Matthew D. McGill*
Matthew D. McGill

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INTRODUCTION

The Citizenship Clause declares that those born "in the United States, and subject to the jurisdiction thereof, are citizens of the United States." U.S. Const. amend. XIV, § 1. Yet a federal statute purports to deny birthright citizenship to Appellees because they were born in the U.S. Territory of American Samoa. This statute provides that persons born in American Samoa—unlike those born in any State, District, or other Territory of the United States—are "nationals, *but not citizens*, of the United States." 8 U.S.C. § 1408(1) (emphasis added). In this case, "[t]he government does not dispute that American Samoa is subject to the jurisdiction of the United States." I.Supp.App. 73.[1] The dispositive question thus is whether American Samoa is "in the United States" within the meaning of the Citizenship Clause. The answer to that question—as the district court correctly held—is yes.

The text, structure, and history of the Citizenship Clause, and Supreme Court decisions interpreting it, all demonstrate that as a U.S. Territory, American Samoa is "in the United States." Indeed, the phrase "the United States" has long

[1] "Supp.App." refers to Appellees' supplemental appendix; "App." refers to the joint appendix of the Government and Intervenors.

been understood to "designate the whole . . . of the American empire," including "States and territories": "The district of Columbia, or the territory west of the Missouri, is not less within the United States, than Maryland or Pennsylvania." *Loughborough v. Blake*, 18 U.S. (5 Wheat.) 317, 319 (1820) (Marshall, C.J.). At the time of the Fourteenth Amendment's adoption, as now, the plain meaning of "in the United States" is within those geographical areas over which the United States exercises sovereignty. And a U.S. Territory cannot sensibly be described as outside of the territorial sovereignty of the United States.

Moreover, as the Supreme Court held in *United States v. Wong Kim Ark*, the Citizenship Clause constitutionalized the common law doctrine of *jus soli*, or "right of the soil." 169 U.S. 649, 659 (1898). At common law, *jus soli* applied to "[e]very one born within the dominions of the King of England, whether [in England proper] or in his colonies or dependencies." III.App. 569. And at the time of the Fourteenth Amendment's adoption, *jus soli*—and thus the Citizenship Clause—was well understood to apply to *all* the territorial "dominions" of the United States. *See Wong Kim Ark*, 169 U.S. at 659. The doctrine of *jus soli* embodied in the Citizenship Clause thus squarely encompasses American Samoa and demands affirmance of the district court's order and judgment.

The Government and Intervenors have never identified any contemporaneous evidence suggesting that "the United States" was understood to

exclude U.S. Territories in 1868. Nor could they; both supporters and opponents of the Fourteenth Amendment in Congress agreed that the Citizenship Clause "refers to persons everywhere, whether in the States *or in the Territories* or in the District of Columbia." Cong. Globe, 39th Cong., 1st Sess. 2894 (1866) (statement of Sen. Trumbull) (emphasis added).

Instead, the Government and Intervenors urge this Court to expand the Supreme Court's notorious *Insular Cases* (specifically, *Downes v. Bidwell*, 182 U.S. 244 (1901)) to hold that all U.S. Territories (or perhaps just "unincorporated" Territories) are not "in the United States" for purposes of the Citizenship Clause. This Court should reject that invitation, as did the district court. *Downes* is a fractured decision with no majority, and thus carries limited precedential weight. And neither *Downes* nor any of the other *Insular Cases* involved the Citizenship Clause. To the extent *Downes* discussed citizenship at all, its dicta was facially motivated by racial animus. *See*, *e.g.*, *Downes*, 182 U.S. at 279-80, 282, 287 (opinion of Brown, J.) (referencing "savages" and "alien races, differing from us"). In any event, the Supreme Court has recognized that, even under the *Insular Cases*, whatever power Congress might have over the Territories does not include any authority to deny territorial residents fundamental rights. And because so many other rights are premised upon it, the right to citizenship indisputably is fundamental in nature. As the district court rightly concluded, there is no plausible

reason for courts to *expand* upon an inapposite case premised on indefensible assertions "of white supremacy" when *Wong Kim Ark* speaks directly to the question at hand. III.App. 622 n.31.

As the Supreme Court has explained, the Citizenship Clause abrogated *Dred Scott v. Sandford* by cementing the common-law doctrine of *jus soli* into the Constitution and thereby "put[ting] th[e] question of citizenship . . . beyond the legislative power." *Afroyim v. Rusk*, 387 U.S. 253, 263 (1967). Yet the Government's position is that, with respect to all Territories, birthright citizenship remains a matter of Congress's grace. Whatever one thinks of that proposition today, it would have been inconceivable in 1868, when Territories comprised nearly half of the Nation's land mass and memories of Bleeding Kansas still were fresh. The notion that, against that background, the Framers of the Citizenship Clause set out to overrule *Dred Scott* only in States of the Union, and to leave birthright citizenship as applied in the Territories subject to continuing congressional debate is utterly implausible. Because the Citizenship Clause's Framers surely understood "the United States" to include all of its many Territories, and because American Samoa is a U.S. Territory, the Court should affirm.[2]

[2] The Government also complains about the scope of the district court's injunction, which it interprets as applying nationwide. *See* U.S. Br. 31-39.

JURISDICTION

Appellees agree with the Government's and Intervenors' statements of jurisdiction. *See* U.S. Br. 2-3; A.S. Br. 2.

STATEMENT OF THE CASE

A. American Samoa Becomes Part Of The United States.

American Samoa encompasses the eastern islands of an archipelago located southwest of Hawaii in the South Pacific. On April 17, 1900, the traditional leaders of the islands of Tutuila and Aunu'u voluntarily signed Deeds of Cession formally ceding sovereignty of their islands to the United States. *See* 48 U.S.C. § 1661. Similar Deeds of Cession were signed by the traditional leaders of the Manu'a islands in 1904. *See id.* In 1925, federal law recognized the atoll of Swains Island as part of American Samoa. *See id.* § 1662. All persons born in American Samoa owe "permanent allegiance" to the United States. *See* 8 U.S.C. § 1101(21), (22).

When the American flag was raised over their Territory following the Deeds of Cession, the people of American Samoa believed that they had become citizens of the United States. *See* Reuel S. Moore & Joseph R. Farrington, *The American Samoan Commission's Visit to Samoa, September-October 1930*, at 53 (G.P.O.

Appellees did not request a nationwide injunction and do not object if the Court wishes to clarify that the injunction applies only to Appellees.

1931); *see also* I.Supp.App. 25. When they learned that the federal government did not share this view, they attempted to seek recognition of birthright citizenship through the legislative process. *See The American Samoan Commission Report* 6 (G.P.O. 1931); *see also* I.Supp.App. 27-68. In 1930, leaders in American Samoa explained to the visiting U.S. American Samoan Commission that the American Samoan people "desire[d] citizenship." Moore & Farrington, *supra*, at 53; I.Supp.App. 25.

Since 1900, the ties between American Samoa and the rest of the United States have grown ever stronger. American Samoa is superintended by the U.S. Department of Interior, *see* 43 U.S.C. § 1458, and locally governed through a republican form of government, *see generally* Revised Const. of Am. Samoa. Its education system reflects U.S. educational standards, including instruction in English. *See*, *e.g.*, *Exec Order Adopts Common Core State Standards, ASDOE Is Implementor*, Samoa News (Oct. 10, 2012), https://tinyurl.com/y9l3l3yt. And American Samoa has one of the highest enlistment rates of military service in the Nation. Blue Chen-Fruean, *American Samoa Army Recruiting Station Again Ranked #1 Worldwide*, Pacific Islands Report (July 17, 2017), https://tinyurl.com/y9p5fuw3.[3]

[3] All websites last visited May 4, 2020.

B. Congress Labels American Samoans "Nationals, But Not Citizens."

Despite all of this, the federal government does not recognize those born in American Samoa as U.S. citizens. Starting in 1940, federal statutes have labeled those born in American Samoa as "nationals, but not citizens, of the United States at birth." 8 U.S.C. § 1408(1).

This ongoing denial of citizenship imposes significant harms. Those born in American Samoa, including Appellees, are labeled second-class by their government. Despite being taxpayers who contribute to their communities, Appellees are unable to vote. *See* Utah Const. art. IV, § 5; Utah Code Ann. § 20A-2-101. They are precluded from running for office at the federal and state levels. *See* U.S. Const. art. I, § 2; Utah Code Ann. § 20A-9-201(1). They are barred from serving on juries. *See* 28 U.S.C. § 1865(b)(1); Utah Code Ann. § 78B-1-105(1). They cannot serve as officers in the U.S. Armed Forces, *see* 10 U.S.C. § 532(a), or Utah peace officers, Utah Code Ann. § 53-6-203(1)(a). And persons born in American Samoa must carry an endorsement code in their passports that disclaims their citizenship and creates confusion about their relationship to the United States, inhibiting their right to travel. *See* Dep't of State, *Foreign Affairs Manual*, at 7 F.A.M. § 1111(b)(1).

C. Appellees Sue To Vindicate Their Right To U.S. Citizenship.

John Fitisemanu, Pale Tuli, and Rosavita Tuli are residents of Utah, were born in American Samoa, and have been injured by the Government's refusal to recognize their citizenship. For example, Mr. Fitisemanu has "experienced negative comments . . . questioning [his] 'choice' not to vote," I.App. 63; Mr. Tuli "would like to pursue a career as a police officer" but is impeded from doing so due to his lack of citizenship, *id.* at 74; and Ms. Tuli has been "precluded from obtaining an immigration visa to sponsor [her] parents to relocate to the United States," *id.* at 83. Moreover, all three are denied the right to vote and have suffered "emotional anguish" by the government's labeling of them as "non-citizen nationals." *Id.* at 63, 74, 82.

On March 27, 2018, Appellees sued to vindicate their constitutional right to citizenship. *See* I.App. 24-60. Appellees sought a declaratory judgment that persons born in American Samoa are U.S. citizens by virtue of the Citizenship Clause of the Fourteenth Amendment and, therefore, that both Section 1408(1) and State Department policies implementing that statute are unconstitutional. *Id.* at 108-09. Appellees further sought orders enjoining the Government from enforcing Section 1408(1) and any implementing policies against them. *Id*.

D. The District Court Holds That Appellees Are Birthright Citizens.

In a 69-page opinion, the district court granted Appellees' motion for summary judgment. The court considered "the parties' arguments related to the text, structure, and historical evidence" concerning the Citizenship Clause and concluded that the evidence "favor[s] [Appellees'] position." III.App. 604. The court also recognized the significance of *Wong Kim Ark*, thoroughly explaining how the Supreme Court's holdings and reasoning apply to this case.

The court concluded that, under *Wong Kim Ark*, the Fourteenth Amendment "*must* be interpreted in the light of the *common law*," III.App. 608-09, which, since the 1600s, premised birthright citizenship on the rule of "*jus soli*," *id.* at 609 (citing *Calvin's Case*, 77 Eng. Rep. 377 (1608)). This rule "was in force in all English colonies upon this continent down to the time of the Declaration of Independence, and in the United States afterwards, and continued to prevail under the constitution as originally established." *Id.* at 609-10. The district court held that "the historical evidence—as established by the Supreme Court [in *Wong Kim Ark*]—demonstrates that the Fourteenth Amendment *must* be interpreted" as adopting "the doctrine of *jus soli*." *Id.* at 601 (emphasis added). And the "ancient and fundamental rule of citizenship" under *jus soli* was "by birth *within the territory*" of the sovereign. *Id.* at 612 (emphasis altered) (quoting *Wong Kim Ark*, 169 U.S. at 693). The relevant question for the district court was, therefore, whether Appellees had been born

"within the dominion" of the United States. *Id.* at 616. The court held that "American Samoa is within the dominion of the United States because it is a territory under the full sovereignty of the United States," *id.* at 618, and, accordingly, that "Congress has no authority to deny [Appellees] citizenship," *id.* at 627.

The district court rejected the Government's invitation to extend *Downes*, recognizing that it "did not concern the Fourteenth Amendment," resulted in a "splintered" decision with no majority opinion, and "did not construe the Citizenship Clause" beyond scattered "dicta" about citizenship in some of the separate opinions. III.App. 563, 624. Of these, the Government was relying "extensively on the opinion of Justice Brown," which, the court observed, contained a "digression related to citizenship" "premised on notions of white supremacy that the Supreme Court . . . long ago rejected." *Id.* at 622 n.31. "*Downes*," the district court concluded, "does not control the outcome of this case." *Id.* at 624.

The district court issued a final judgment following its memorandum decision. III.App. 630. Mr. Fitisemanu immediately thereafter registered to vote in the State of Utah. *See* I.Supp.App. 153. Shortly afterward, the district court issued a *sua sponte* stay of its order pending appeal, meaning that neither he nor

the other Appellees will be able to vote unless and until this appeal is resolved in their favor. III.App. 631.

SUMMARY OF THE ARGUMENT

Appellees are U.S. citizens under the Citizenship Clause of the Fourteenth Amendment by virtue of their birth in American Samoa.

I. The text, structure, and history of the Fourteenth Amendment all confirm that the Citizenship Clause applies with equal force to States, the District of Columbia, *and* Territories.

A. The plain meaning "in the United States" includes U.S. Territories such as American Samoa. As Chief Justice John Marshall long ago explained, "the United States" is "the name given to our great republic, which is composed of States *and territories*." *Loughborough*, 18 U.S. at 319 (emphasis added). Without acknowledging Chief Justice Marshall's well-established definition, the Government claims that "the United States" includes the District of Columbia but excludes all U.S. Territories. But the Government offers no evidence contemporaneous to the Fourteenth Amendment's ratification supporting that view (which surely would have come as a shock to the thousands of Americans then inhabiting Territories), and dictionaries from the era contradict it. In fact, Territories have been considered integral parts of the United States since the Northwest Ordinance of 1787.

The Constitution's structure confirms this plain meaning. Section 2 of the Fourteenth Amendment uses the narrower phrase "among *the several States*" instead of "in *the United States*," showing that the latter phrase encompasses more than just the states. U.S. Const. amend. XIV, § 2 (emphasis added). The Thirteenth Amendment also supports this reading. It prohibits slavery "within the United States, *or any place subject to their jurisdiction*," which extends the Amendment's reach to areas outside the territorial sovereignty of the United States but nevertheless subject to U.S. law, such as military bases abroad and vessels outside of U.S. waters. U.S. Const. amend. XIII, § 1 (emphasis added).

B. Historical sources unanimously support reading the Citizenship Clause's "United States" to include U.S. Territories. Under the common law, citizenship was granted to persons born "within the dominions of the sovereign," including Territories. *Wong Kim Ark*, 169 U.S. at 659. Thus, for almost eighty years before the Fourteenth Amendment's adoption, persons were "citizen[s] in the sense of the Constitution" if they were "born within the United States, its territories or districts." William Rawle, *A View of the Constitution of the United States of America* 86 (2d ed. 1829). This settled common-law rule was briefly upended by the infamous *Dred Scott* decision, but the Fourteenth Amendment's Citizenship Clause was adopted expressly to overturn *Dred Scott* and to codify the *jus soli* rule. That the Fourteenth Amendment was indented to codify the full extent of *jus soli*—

and not some rump version of it limited to States and the District of Columbia—is confirmed by statements of its Framers that they viewed the Citizenship Clause as "refer[ing] to persons everywhere, whether in the States *or in the Territories* or in the District of Columbia." Cong. Globe, 39th Cong., 1st Sess. 2894 (emphasis added).

II. The Supreme Court's Citizenship Clause cases confirm that U.S. Territories such as American Samoa are in the United States.

A. The Supreme Court's decision in *Wong Kim Ark* unequivocally held that the Citizenship Clause "reaffirmed" the "fundamental principle of citizenship by birth *within the dominion*"—i.e., *jus soli*. *Wong Kim Ark*, 169 U.S. at 675 (emphasis added). The Court held that the Clause, "in clear words and in manifest intent, includes the children born *within the territory* of the United States, . . . of whatever race or color, domiciled within the United States." *Id.* at 693 (emphasis added). Under *Wong Kim Ark*, because Appellees were born "within the dominion of the United States," they are citizens by birth. *Id.* at 657.

B. The Supreme Court's decisions in the *Slaughter-House Cases* and *Elk v. Wilkins* similarly make clear that U.S. Territories are "in the United States" for purposes of the Citizenship Clause. The *Slaughter-House Cases* announced that the Fourteenth Amendment put "at rest" the proposition that "[t]hose . . . who had been born and resided always in the District of Columbia *or in the Territories*,

though within the United States, were not citizens." 83 U.S. (16 Wall.) 36, 72-73 (1873) (emphasis added). *Elk* similarly treated Iowa Territory as "within the territorial limits of the United States" for purposes of the Citizenship Clause. 112 U.S. 94, 102 (1884).

III. The Government relies almost exclusively on the *Insular Cases*, primarily *Downes v. Bidwell*. But neither *Downes* nor the doctrine of territorial incorporation offers any support for the Government's primary argument—that the Citizenship Clause excludes *all* Territories.

A. The *Insular Cases* held that the Constitution applies of its own force in Territories acquired after the Spanish-American War, while allowing the Supreme Court "to use its power sparingly and where it would be most needed" by distinguishing between incorporated and unincorporated Territories. *Boumediene v. Bush*, 553 U.S. 723, 757, 759 (2008).

B. The *Insular Cases* do not permit Congress to deprive persons in American Samoa of birthright citizenship. *Downes* does not control this case. It did not involve the Citizenship Clause, it contains no majority opinion, and the *particular* opinion on which the Government relies "is largely premised on notions of white supremacy that the Supreme Court has long ago rejected." III.App. 622 n.31. The territorial-incorporation doctrine does not apply to American Samoa today and does not govern the Citizenship Clause, which defines its own

geographic scope. And even *if* the *Insular Cases* were relevant, "'guaranties of certain fundamental personal rights declared in the Constitution'" apply "even in unincorporated Territories." *Boumediene*, 553 U.S. at 758 (citation omitted). Citizenship is just such a "fundamental right." *Trop v. Dulles*, 356 U.S. 86, 103 (1958) (plurality opinion).

C. Neither the supposed "longstanding practice" asserted by the Government nor the views of American Samoa's elected leaders justify depriving persons born in American Samoa of birthright citizenship. Intervenors have never explained how applying the Citizenship Clause to American Samoa would jeopardize *fa'a Samoa*, the American Samoan way of life. It would not. And although Congress and American Samoa's leaders can determine its future political status, their views cannot determine citizenship; the very purpose of the Citizenship Clause was to "put th[e] question of citizenship . . . beyond the legislative power." *Afroyim*, 387 U.S. at 263. Intervenors' assertion that American Samoa is not subject to the jurisdiction of the United States was affirmatively waived below and is meritless.

IV. The Government and Intervenors rely on out-of-circuit authorities that are either inapposite or erroneous.

A. The line of cases arising from the Philippines are distinguishable because it was "'always . . . the purpose of the people of the United States to withdraw their

sovereignty over the Philippine Islands and to recognize their independence as soon as a stable government c[ould] be established therein.'" *Boumediene*, 553 U.S. at 757 (citation omitted). When the Philippines became an independent nation, its inhabitants' "relations with their former sovereign [were] dissolved," along with their claims to citizenship. 3 J. Story, *Commentaries on the Constitution of the United States* § 1318 (1833). Such cases have no bearing on persons born in American Samoa, who continue to owe *permanent* allegiance to the United States.

B. The D.C. Circuit's decision in *Tuaua v. United States* does not bind this Court and failed to engage with the text, structure, and history of the Citizenship Clause, or the Supreme Court's decisions construing it. This Court should reject it.

STANDARD OF REVIEW

This Court reviews the grant of summary judgment de novo. *Navajo Nation v. San Juan Cty.*, 929 F.3d 1270, 1280 (10th Cir. 2019).

ARGUMENT

The text, structure, and history of the Fourteenth Amendment make clear that the phrase "in the United States" includes all of the Nation's Territories. The Supreme Court's precedents construing the Citizenship Clause likewise hold that it constitutionalized the doctrine of *jus soli*, which indisputably applies to all territorial dominions of the United States. Against this, the Government and

Intervenors invoke the *Insular Cases*, but those cases do not concern the Citizenship Clause, should not be extended, and in all events are no barrier to affirmance because Appellees' right to citizenship is fundamental. And the out-of-circuit authority on which the Government and Intervenors rely is inapposite or wrong.

I. The Text, Structure, And History Of The Citizenship Clause Show That All U.S. Territories—American Samoa Included—Are In The United States.

As with all constitutional questions, answering the question presented here requires a "careful examination of the [relevant] textual, structural, and historical evidence" of the Citizenship Clause's meaning. *Zivotofsky ex rel. Zivotofsky v. Clinton*, 566 U.S. 189, 201 (2012); *see also NLRB v. Noel Canning*, 134 S. Ct. 2550, 2578 (2014). This examination is "guided by the principle that the Constitution was written to be understood" by those who ratified it, *District of Columbia v. Heller*, 554 U.S. 570, 576 (2008) (brackets omitted), and that the Citizenship Clause's words mean today what "they were understood to [mean] when the people adopted them," *id.* at 634-35. Neither the Government nor Intervenors contest this interpretive framework.

The text, structure, and history of the Citizenship Clause all point in one direction: Appellees are U.S. citizens by virtue of their birth in the U.S. Territory of American Samoa.

A. Text and Structure

The Citizenship Clause declares 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. The Government concedes that "persons born in the territories are 'subject to the jurisdiction' of the United States," so the only question here is "whether American Samoa is 'in the United States' for purposes of the Fourteenth Amendment." III.App. 595. The Constitution's text and structure both show that American Samoa is in the United States.

1. Under the constitutional text's plain meaning, American Samoa is "in the United States." In the 1860s, as now, the word "in" connoted "presence in place, time, or state" and was synonymous with "within" as opposed to "without." Joseph E. Worcester, *A Dictionary of the English Language* 730 (1878); *accord Wong Kim Ark*, 169 U.S. at 687 (under the Citizenship Clause, the words "in the United States" are "the equivalent of the words 'within the limits . . . of the United States.'").

From the early days of the Republic, the phrase "the United States" was understood to "designate *the whole* . . . of the American empire." *Loughborough v. Blake*, 18 U.S. (5 Wheat.) 317, 319 (1820) (Marshall, C.J.) (emphasis added). And from the Founding, that empire has included Territories. While the delegates were

debating the Constitution in Philadelphia, the Confederation Congress declared that the Northwest Territory would "forever *remain* a part of th[e] Confederacy of the United States of America." Northwest Ordinance of 1787, § 14, art. 4 (July 13, 1787) (emphasis added). And after the Constitution was ratified, the First Congress reenacted the Ordinance without altering that provision. *See* Northwest Ordinance of 1789, ch. 8, 1 Stat. 50, 50-53 (1789). Thus, Chief Justice Marshall later explained, "the United States" is "the name given to our great republic, which is composed of States *and territories*." *Loughborough*, 18 U.S. at 319 (emphasis added). "The district of Columbia, or the territory west of the Missouri, is not less within the United States, than Maryland or Pennsylvania." *Id.* So it was widely understood, from "a very early day," that the phrase "the United States" included Territories, while narrower phrases such as "states united" meant the States alone. 29 *The American and English Encyclopaedia of Law* 146 (1904).

Without acknowledging the Chief Justice's definition of "the United States," the Government argues that it includes "*only* the 50 States and the District of Columbia," and excludes *all* Territories. U.S. Br. 15 (emphasis added). This surely would have come as a surprise to the 1868 residents of the eleven Western territories (including the entire Tenth Circuit, save Kansas) that, prior to the Fourteenth Amendment, had enjoyed birthright citizenship under common-law *jus soli* principles. And the surprise would have turned to dismay upon revelation that,

while excluding all Territories, the "United States" includes the District of Columbia. The Government suggests that Congress's "general and plenary" authority over the "territories" somehow explains why the District of Columbia is *in* the United States and Territories are *out*. *Id.* But "[t]he power of Congress over the District and its power over the Territories" have long been treated identically. *District of Columbia v. John R. Thompson Co.*, 346 U.S. 100, 105-06 (1953). That offers no basis for textually defining the United States to exclude its Territories.

Intervenors, who also ignore Chief Justice Marshall's teaching, propose the latest definition from *Black's Law Dictionary*, A.S. Br. 33, as well as one from a dictionary post-dating ratification of the Fourteenth Amendment by twenty years. This dictionary defined "the United States" to mean "the nation occupying the territory between British America on the north, Mexico on the south, the Atlantic Ocean and Gulf of Mexico on the east, and the Pacific Ocean on the west." *Id.* at 36-37 (quoting Stewart Rapalje & Robert L. Lawrence, *A Dictionary of American and English Law with Definitions of the Technical Terms of the Canon and Civil Laws* 1310 (1888)). Intervenors are forced to concede that the described area included "territories," yet they claim that it excluded "unorganized, unincorporated U.S. territories," such as "Alaska." *Id.* This nuanced position escapes some of the most obvious deficiencies of the Government's, but Intervenors also are wrong, in two distinct ways. First, Intervenor's definition actually was cribbed from the

1868 edition of the more famous *Bouvier's Law Dictionary*, and the area described included the unincorporated, unorganized Indian Territory that would not become Oklahoma Territory until 1890.[4] *See* II John Bouvier, *A Law Dictionary, Adapted to the Constitution and Laws of the United States* 622 (1868). That same edition of *Bouvier's* accordingly defined "territory" as "*[a] portion of the country* subject to and belonging to the United States not within the boundary of any of the states." *Id.* at 587 (emphasis added).

Second, Intervenors are wrong about Alaska. While Alaska in 1888 was an *unorganized* Territory, the Supreme Court long ago recognized that "Alaska had been undoubtedly incorporated into the United States" at the time of its acquisition in 1867. *Rassmussen v. United States*, 197 U.S. 516, 525 (1905). Intervenors' definition thus cannot be said to reflect an accurate understanding of the territorial limits of the United States either in 1888 or (more importantly) in 1868. By that time the American empire already reached to Alaska.

"[T]he United States," as understood by those who ratified the Fourteenth Amendment in 1868, includes the States, the District of Columbia, and all U.S. Territories, including unorganized Alaska and Indian Territory.

[4] *See* Oklahoma Organic Act, Pub. L. No. 51-182, 26 Stat. 81 (1890).

2. The Constitution's structure confirms that the Citizenship Clause includes Territories. Consider the text of Section 2 of the Fourteenth Amendment. Whereas Section 1 says that those born "in the United States" (and subject to the jurisdiction thereof) are U.S. Citizens, U.S. Const. amend. XIV, § 1, Section 2 uses the narrower phrase "among *the several States*," to provide that Representatives are to be apportioned only among States, *id.* § 2 (emphasis added). Just as courts presume that Congress's use of different language in neighboring statutory provisions is "'intentiona[l] and purpose[ful],'" *Russello v. United States*, 464 U.S. 16, 23 (1983) (citation omitted), the Framers' choice of different language in these adjacent, simultaneously adopted constitutional provisions is strong evidence that the provisions' geographic scopes are not coextensive. "[I]n the United States" must therefore mean something more extensive than "among the several states."

The Government argues that the District of Columbia explains this difference because "no one disputes that the District of Columbia is 'in the United States' but also is not 'among the several States' entitled to congressional representation." U.S. Br. 27. Missing from this reasoning is any explanation why, if the District of Columbia is "in the United States," Territories are not also in the United States. The Constitution uses several terms to describe places within the United States, including "the United States," *e.g.*, U.S. Const. art. I, §§ 1, 2, the "several states," *e.g.*, *id.* amend. XIV, § 2, the "District" of Columbia, *id.* art. I, § 8,

cl. 17, "Territory," *id.* art. IV, § 3, cl. 2, and "other Property belonging to the United States," *id.* The phrase "the United States" is the broadest term and encompasses the "*whole*" of the American empire, "the district of Columbia," "territory," and "States." *Loughborough*, 18 U.S. at 319 (emphasis added). The Government cannot explain why—much less offer any contemporaneous evidence that suggests—the States and the District of Columbia are "in the United States," but Territories are not.

The Government points to the Thirteenth Amendment prohibiting slavery "within the United States, or any place subject to their jurisdiction," U.S. Const. amend. XIII, § 1—and says it demonstrates that there exists a category of "'places subject to the jurisdiction of the United States but which are not incorporated into'" the United States, U.S. Br. 16 (quoting *Downes v. Bidwell*, 182 U.S. 244, 336-37 (1901) (White, J., concurring)). That the Framers of the Thirteenth Amendment had unincorporated Territories in mind seems quite implausible given that it would be nearly forty years before the Court first divined the doctrine of territorial incorporation. In fact, as the Thirteenth Amendment's co-author explained, "[w]hatever else these words" (that is, "or any place subject to their jurisdiction") "may refer to, they surely were not intended to embrace or refer to the territories of the United States." Ltr. from J.B. Henderson to Hon. C.E. Littlefield (June 28, 1901), *reproduced in* Charles E. Littlefield, *The Insular Cases*

(II: Dred Scott v. Sandford), 15 Harv. L. Rev. 281, 299 (1901) ("Henderson Letter"). Rather, these words encompass locations beyond the Nation's sovereign limits but nevertheless under U.S. control—such as vessels outside U.S. territorial waters, embassies abroad, and military installations on foreign soil—where Congress also sought to forbid slavery. *See*, *e.g.*, *In re Chung Fat*, 96 F. 202, 203-04 (D. Wash. 1899) (slavery aboard U.S. vessel would violate Thirteenth Amendment).[5]

There is no interpretive or structural basis for concluding that the Citizenship Clause includes the District of Columbia but not Territories.

B. History

All historical evidence about the Citizenship Clause's meaning likewise confirms that U.S. Territories, including American Samoa, are "in the United

[5] The Eighteenth Amendment's supposed distinction between "'the United States'" and "'territories subject to the jurisdiction thereof'" cuts against the Government's position. U.S. Br. 16 (citing U.S. Const. amend. XVIII, § 1). The Thirteenth Amendment refers to "*place[s]* subject to their jurisdiction"—not *territories*. U.S. Const. amend. XIII, § 1 (emphasis added). Although the text of the Thirteenth Amendment in isolation does not reveal whether Congress understood "the United States" to include U.S. Territories, every source of historical evidence confirms that it did. The Eighteenth Amendment's distinction between "the United States" and "territories" did not retroactively alter that unanimous understanding. Instead, Congress needed to refer to "territories" explicitly because the *Insular Cases* had cast doubt on whether "the United States" included U.S. Territories. If anything, Congress's express use of "territories" in the Eighteenth Amendment suggests that "places" as used in the Thirteenth Amendment did not include territories.

States." This conclusion follows from the common-law doctrine of *jus soli*, the context for the Fourteenth Amendment's ratification in the wake of *Dred Scott*, every relevant statement of the Fourteenth Amendment's Framers, and the Fourteenth Amendment's "blueprint"—the Civil Rights Act of 1866.

1. *The Common Law.* As the district court held, "the historical evidence . . . demonstrates that the Fourteenth Amendment must be interpreted in light of the [common-law] doctrine of *jus soli*." III.App. 601.

Originally, there was no definition of "citizen" in the Constitution. But when "a word is obviously transplanted from another legal source, whether the common law or other legislation, it brings the old soil with it." Felix Frankfurter, *Some Reflections on the Reading of Statutes*, 47 Colum. L. Rev. 527, 537 (1947). In other words, "[t]he interpretation of the constitution of the United States is necessarily influenced by the fact that its provisions are framed in the language of the English common law, and are to be read in the light of its history." *Smith v. Alabama*, 124 U.S. 465, 478 (1888). The definition of "citizen," in particular, "*must* be interpreted in the light of the common law." *Wong Kim Ark*, 169 U.S. at 654 (emphasis added); *see Dawson's Lessee v. Godfrey*, 8 U.S. (4 Cranch) 321, 322-24 (1808) (applying common-law principles to decide citizenship question); *cf. Heller*, 554 U.S. at 592 (when the Constitution "codified a *pre-existing* right," courts must look to its "historical background" to discern its contours).

The common-law rule regarding birthright citizenship was straightforward: Citizenship was granted by virtue of "birth locally *within the dominions* of the sovereign." *Wong Kim Ark*, 169 U.S. at 659 (emphasis added). This rule originated in *Calvin's Case*, Eng. Rep. 377, 409 (1608), which "established a territorial rule for acquisition of subject status at birth":

> Every one born within the dominions of the King of England, whether here or in his colonies or dependencies, being under the protection of—therefore, according to our common law, owes allegiance to—the King . . . is subject to all the duties and entitled to enjoy all the rights and liberties of an Englishman.

III.App. 569. There can be no doubt that this included birth within England's territories and colonies. Indeed, prior to American Independence, it was "universally admitted . . . that all persons within the colonies of North America, whilst subject to the crown of Great Britain, were natural born British subjects." *Inglis v. Trs. of Sailor's Snug Harbor*, 28 U.S. (3 Pet.) 99, 120 (1830). And after the Revolution, nothing "displaced in this country the fundamental rule of citizenship by birth within its sovereignty." *Wong Kim Ark*, 169 U.S. at 658-63, 674.

This was hornbook law in the early Republic. Before the Fourteenth's Amendment's ratification, case after case recognized these points and thus the territorial basis of citizenship under *jus soli*. *See*, *e.g.*, *Picquet v. Swan*, 19 F. Cas. 609, 616 (C.C.D. Mass. 1828) (Story, J.) ("A citizen of one of our territories is a

citizen of the United States."); William Rawle, *A View of the Constitution of the United States of America* 86 (2d ed. 1829) ("every person born within the United States, its territories or districts . . . is a natural born citizen in the sense of the Constitution"). And that doctrine applies to *all* of the sovereign's territorial dominions. *See Dred Scott v. Sandford*, 60 U.S. 393, 583 (1857) (Curtis, J., dissenting) ("Nor is any inhabitant of the District of Columbia, or of either of the Territories, eligible to the office of Senator or Representative in Congress, *though they may be citizens of the United States*.") (emphasis added).

2. *Codification of* Jus Soli *in the Fourteenth Amendment.* "[T]he Fourteenth Amendment's repudiation of the Supreme Court's *Dred Scott* decision provides [additional] evidence that *jus soli* governs citizenship by birth." III.App. 601. *Dred Scott* infamously concluded, over powerful dissents, that African Americans were not U.S. citizens regardless of birth in the United States because (the Court said) "they were . . . considered as a subordinate and inferior class of beings, who had been subjugated by the dominant race . . . and had no rights or privileges but such as those who held the power and the Government might choose to grant them." *Dred Scott*, 60 U.S. at 404-05. *Dred Scott* thus temporarily disturbed the settled *jus soli* rule. *See* III.App. 601-02.

After the Civil War, Congress and the States emphatically repudiated *Dred Scott* by adopting the Fourteenth Amendment, which expressly codified the pre-

existing common-law rule of birthright citizenship. *See Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 73 (1873) (Citizenship Clause was adopted to "overtur[n] the *Dred Scott* decision"). The Clause thus "reaffirmed in the most explicit and comprehensive terms" "the fundamental principle of citizenship by birth within the dominion." *Wong Kim Ark*, 169 U.S. at 675. By codifying in the Constitution this "ancient and fundamental rule of citizenship by birth within the territory, in the allegiance and under the protection of the country," *id.* at 693, its Framers sought "'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 (1866) (Sen. Howard)).

The Government brushes *Dred Scott* aside, asserting that the district court failed to "explain[ ] how" *Dred Scott* was relevant. U.S. Br. 9, 28. But the relevance is unmistakable: Dred Scott lost his suit because the Court held he was held not to be a citizen and therefore could not sue in diversity in federal court. *Dred Scott*, 60 U.S. at 427. Because he had been born in the United States, however, *see id.* at 400, to reach that conclusion the Court had to overcome the common-law doctrine of *jus soli*. To do so, Chief Justice Taney insisted that "'national citizenship could not be held to derive automatically from birth "within the dominion and jurisdiction" of the national government.'" III.App. 575 at n.4 (quoting Daniel A. Farber, *A Fatal Loss of Balance: Dred Scott Revisited*, 39 Pepp.

L. Rev. 13, 28 (2011)). In the Court's view, citizenship under the Constitution was never intended to extend to African Americans. *Dred Scott*, 60 U.S. at 404-05. *Dred Scott* concluded that "free blacks . . . were not entitled to any national status as citizens" and so "could not enjoy the privileges and immunities of citizenship under the Constitution." *Dred Scott* thus created "'a racial exception to the normal rule of birthright U.S. citizenship'" contrary to the common-law rule of *Calvin's Case*. III.App. 575 (quoting Farber, 39 Pepp. L. Rev. at 24).

The Citizenship Clause repudiated *Dred Scott* and restored the rule of *Calvin's Case*: birthright citizenship for all those born within the dominion of the United States. If, as the Government contends, the Citizenship Clause grants birthright citizenship only to those born within a State or the District of Columbia, U.S. Br. 15, the Fourteenth Amendment would have failed in its purpose. In the 1860s, nearly *half* of the land mass of the United States consisted of Territories. *See* Willis Drummond, *Report of the Commissioner of the General Land Office* 297 (G.P.O. 1872). Under the Government's view, the Citizenship Clause left Congress with discretion to deny citizenship to persons born across that great swath of the Nation, and perhaps even to allow citizenship of certain residents to be sacrificed in the sharp politics of statehood. Not surprisingly, the Government cites no historical evidence in support of that unlikely theory.

3. *The Framers' Understanding*. Contemporaneous—and *unanimous*—statements from the Fourteenth Amendment's Framers provide further evidence that the Citizenship Clause applies to all Territories, as both supporters and opponents of the Amendment agreed.

Senator Trumbull, for example, explained that "[t]he second section" of the Fourteenth Amendment—the Apportionment Clause—"refers to no persons except those in the States of the Union; but the first section"—the Citizenship Clause—"refers to persons everywhere, whether in the States *or in the Territories or in the District of Columbia*." Cong. Globe, 39th Cong., 1st Sess. 2894 (emphasis added). Senator Howard, in introducing the Clause, explained that it declared what was "the law of the land already, that every person born within the limits of the United States, and subject to their jurisdiction, is by virtue of natural law and national law a citizen of the United States." *Id.* at 2890. And Senator Johnson, who voted against the Amendment, nonetheless agreed that there is "no better way to give rise to citizenship than the fact of birth within the territory of the United States." *Id.* at 2893. In sum, when the Citizenship Clause was debated, "each member [of Congress] knew and properly respected the old and revered decision in the Loughborough-Blake case, which had long before defined the term 'United States.'" Henderson Letter 299.

The Government discounts these as "scattered statements" about the Fourteenth Amendment's history, "'from which conflicting inferences can be drawn.'" U.S. Br. 28 (quoting *Tuaua v. United States*, 788 F.3d 300, 304 (D.C. Cir. 2015), in turn quoting *Afroyim*, 387 U.S. at 267). But these "conflicting inferences" are nowhere to be found in the Government's brief—or in the *Congressional Globe*. Instead, the Government wrests a quote from its context—the Supreme Court in *Afroyim* was discussing evidence of the Framers' disparate views on *stripping* citizenship, not *conferring* citizenship. *See* 387 U.S. at 264-67. The Framers' views on the latter point were uniform and uncontested, which is why the Supreme Court called them "valuable . . . contemporaneous opinions" bearing "upon the legal meaning of the words themselves." *Wong Kim Ark*, 169 U.S. at 699. The district court thus was right to observe that "the Framers' contemporaneous statements . . . support [Appellees'] position that the Citizenship Clause applies with full force in the territories." III.App. 603.

4. *The Civil Rights Act of 1866.* Finally, the "'initial blueprint'" for the Fourteenth Amendment—Section 1 of the Civil Rights Act of 1866, *Jett v. Dallas Indep. Sch. Dist.*, 491 U.S. 701, 721 (1989) (plurality opinion) (citation omitted)—further confirms that the original understanding of "in the United States" included States *and* Territories. That Act "declared" (among other things) that "all persons born in the United States and not subject to any foreign power" are "citizens of the

United States" and "shall have the same right, in every State *and Territory in the United States*, . . . to full and equal benefit of all laws and proceedings for the security of person and property." Ch. 31, § 1, 14 Stat. 27, 27 (1866) (emphasis added). "Many of the Members of the 39th Congress viewed § 1 of the Fourteenth Amendment as 'constitutionalizing' and expanding the protections of the 1866 [Civil Rights] Act," *Jett*, 491 U.S. at 721, which means that "the United States" as used in Section 1 of the Fourteenth Amendment cannot be understood to have a narrower geographic reach than "every State and Territory."

* * *

The text, structure, and history all show that American Samoa is "in the United States." U.S. Const. amend. XIV, § 1.

II. The Supreme Court's Citizenship Clause Cases Confirm That Territories Such As American Samoa Are In The United States.

The Supreme Court's decisions in *Wong Kim Ark*, the *Slaughter-House Cases*, and *Elk v. Wilkins* are authoritative constructions of the Citizenship Clause. In each case, the Court confirmed that the Citizenship Clause encompasses U.S. Territories and constitutionalized *jus soli*. These opinions reflect the text, structure, and history of the Citizenship Clause, and powerfully support affirmance of the district court's judgment.

A. Under *Wong Kim Ark*, *Jus Soli* Applies To U.S. Territories.

Just two years before the United States obtained sovereignty over American Samoa, the Supreme Court expressly articulated and applied the principle that the Citizenship Clause incorporated the common-law *jus soli* rule. *See Wong Kim Ark*, 169 U.S. at 675, 693. Based on a painstaking survey of common-law authorities and the Fourteenth Amendment's history, the Court held that the Clause "reaffirmed" the "fundamental principle of citizenship by birth *within the dominion*"—that is, *jus soli*—using "the most explicit and comprehensive terms." *Id.* at 675 (emphasis added). The Clause, "in clear words and in manifest intent, includes the children born *within the territory* of the United States, . . . of whatever race or color, domiciled within the United States." *Id.* at 693 (emphasis added).

Applying that principle, the Court rejected the government's claim that a person born within the United States' sovereign territorial limits (there, California) could be deprived of citizenship based on his parents' place of birth: "The fourteenth amendment . . . ha[d] conferred no authority upon Congress to restrict the effect of birth, declared by the constitution to constitute a sufficient and complete right to citizenship." *Wong Kim Ark*, 169 U.S. at 703. The "established rule of citizenship by birth *within the dominion*" could not be "superseded or restricted, in any respect," by any "authority, legislative, executive, or judicial." *Id.* at 674 (emphasis added). And the Court already had held that "[t]he Territories

are but political subdivisions of the *outlying dominion* of the United States." *Nat'l Bank v. County of Yankton*, 101 U.S. 129, 133 (1880) (emphasis added). Thus, while *Wong Kim Ark* addressed the citizenship status of a person born in a State, the constitutional principles the Supreme Court articulated and applied speak directly to the Citizenship Clause's reach to outlying Territories. *Wong Kim Ark* held that the Clause applied to all born "within the dominion of the United States." *Wong Kim Ark*, 169 U.S. at 657. And there can be no question that American Samoa is "within the dominion of the United States." Indeed, the Government has never contended otherwise.

The Government instead resists application of *Wong Kim Ark* on the ground that the Court there did not address "the distinct question presented here of whether unincorporated territories are 'in the United States' for purposes of the Citizenship Clause." U.S. Br. 26. It is, of course, true that *Wong Kim Ark* did not directly address the status of unincorporated Territories; it would take a few more years for the Supreme Court to divine the doctrine of territorial incorporation in the *Insular Cases*. But the Government's position is that "[t]he correct reading of the Citizenship Clause is that U.S. territories"—all of them, incorporated or not—"are not 'in the United States.'" *Id.* at 15. And *Wong Kim Ark* directly refutes that argument by confirming that the Citizenship Clause constitutionalized the common-law doctrine of *jus soli*, and holding that the Clause applies throughout

the entire dominion of the United States—just as *jus soli* applied in "*any part* of the territories of England," *Wong Kim Ark*, 169 U.S. at 657, be that a "colon[y] [in] North America," *Inglis*, 28 U.S. (3 Pet.) at 120, or within Scotland, *Calvin's Case*, 77 Eng. Rep. at 383.

Below, the Government attempted to dismiss *Wong Kim Ark*'s extensive discussion of the "common-law *jus soli* principles" as "dicta." I.App. 281. But as the district court recognized, far from "simply dicta—the Court's discussion of the English common-law rule was a determination of a matter of law that was pivotal to its decision." III.App. 607. It is not dicta, but even if it were, "there is dicta and then there is dicta, and then there is Supreme Court dicta." *Schwab v. Crosby*, 451 F.3d 1308, 1325 (11th Cir. 2006). *Wong Kim Ark*'s analysis of *jus soli* is "thoroughly reasoned, and carefully articulated analysis by the Supreme Court describing the scope of one of its own decisions." *Id.* That sort of Supreme Court "dicta" is binding in the Tenth Circuit so long as it "squarely relates to the holding[ ] itself," and has not been "enfeebled by later statements" from the Court. *E.g.*, *Bonidy v. U.S. Postal Serv.*, 790 F.3d 1121, 1125 (10th Cir. 2015).

The Government suggests that the Supreme Court in subsequent cases has retreated from *Wong Kim Ark*'s explication of the Citizenship Clause as constitutionalizing *jus* soli principles. *See* U.S. Br. 20 (citing *Barber v. Gonzales*, 347 U.S. 637 (1954); *Toyota v. United States*, 268 U.S. 402 (1925); *Rabang v.*

Boyd, 353 U.S. 427 (1957)). But those cases did nothing of the kind. In *Gonzales* and *Rabang*, the Supreme 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 v. INS*, 136 F.3d 914, 919 (2d Cir. 1998); *see also Nolos v. Holder*, 611 F.3d 279, 282 (5th Cir. 2010). And in *Toyota*, the Court described the treaty of peace between the United States and Spain as authorizing Congress "to determine the civil rights and political status of the native inhabitants of the Philippine Islands," 268 U.S. at 410-11, but it made no comment that casts doubt on *Wong Kim Ark*.

Not only has the Supreme Court never called into question the rule of *jus soli* articulated in *Wong Kim Ark*, but members of the Court repeatedly have extolled the decision and its reasoning. *See*, *e.g.*, *Miller v. Albright*, 523 U.S. 420, 453 (1998) (Scalia, J., concurring in the judgment, joined by Thomas, J.) (under *Wong Kim Ark*, it is only those "born *outside the territory* of the United States" who must be naturalized) (emphasis added); *id.* at 478 (Breyer, J., dissenting, joined by Souter and Ginsburg, JJ.) (acknowledging that "since the Civil War, the transmission of American citizenship" has primarily occurred under "*jus soli*" and citing *Wong Kim Ark*); *Rogers v. Bellei*, 401 U.S. 815, 828 (1971) (observing that the "unanimous Court" has relied on *Wong Kim Ark*'s holding that "nationality" is "fixed" by "birth *within the limits* . . . of the United States") (emphasis added);

Weedin v. Chin Bow, 274 U.S. 657, 660 (1927) (approving of "[t]he very learned and useful opinion of Mr. Justice Gray, speaking for the court in . . . *Wong Kim Ark*," and holding that it "establishes that at common law in . . . the United States the rule with respect to nationality was that of the jus soli"). This Court, like the district court, is bound to follow these decisions and hold that U.S. Territories are "in the United States" within the meaning of the Citizenship Clause.

B. Other Supreme Court Citizenship Clause Precedent Confirms Territories Are In The United States.

The Supreme Court's decisions in the *Slaughter-House Cases* and *Elk v. Wilkins* similarly make clear that the Territories are "in the United States" for purposes of the Citizenship Clause.

1. Just five years after the Citizenship Clause was ratified, the Supreme Court ruled directly on the Clause's meaning, purpose, and geographic scope in the *Slaughter-House Cases*. Some judges had previously said that only citizens of "one of the States" could be "citizen[s] of the United States," meaning that "[t]hose . . . who had been born and resided always in the District of Columbia *or in the Territories*, though *within the United States*, were not citizens." 83 U.S. (16 Wall.) at 72-73 (emphasis added). But, the Supreme Court held, the Citizenship Clause "put[ ]" that question "at rest" by "declar[ing] that persons may be citizens of the United States without regard to their citizenship of a particular State." *Id.* at 73.

Below, the Government tried to evade the *Slaughter-House Cases* with the observation that they concerned only the "constitutionality of laws enacted by the State of Louisiana to regulate local butchers." I.App. 209. But the Supreme Court's discussion of the Citizenship Clause was integral to its analysis. The Court rejected the butchers' claims because the rights they sought to vindicate were not "privileges and immunities of citizens *of the United States*." 83 U.S. at 80 (emphasis added). And the Fourteenth Amendment's Privileges or Immunities Clause protects only those rights, not the privileges and immunities belonging to "citizens *of the several States*." *Id.* at 75 (emphasis added). The Court drew its "distinction between citizenship of the United States and citizenship of a State" from the text of the Citizenship Clause. *Id.* at 73. That Clause makes clear that a person "who had been born and resided always . . . in the Territories" could "be a citizen of the United States *without being a citizen of a State*." *Id.* at 72, 74 (emphasis added). Without its discussion of the Citizenship Clause—and of that Clause's geographic scope—the Court's analysis falls apart. *See id.* at 74.

2. The Supreme Court confirmed this understanding in *Elk v. Wilkins*, where it explained that "Indians born *within the territorial limits* of the United States"—there, evidently in Iowa Territory—were "in a geographical sense born in the United States." 112 U.S. 94, 102 (1884) (emphasis added); *see* Anna Williams Shavers, *A Century of Developing Citizenship Law and the Nebraska Influence: A*

Centennial Essay, 70 Neb. L. Rev. 462, 480 (1991). Those "Indians" who were "members of, and owing immediate allegiance to, one of the Indian tribes" were not covered by the Clause for a *different* reason: As members of sovereign tribes, they did not owe allegiance to, and were not "subject to the jurisdiction" of, the United States. *Elk*, 112 U.S. at 102. But the Supreme Court has clearly understood that the plaintiff in *Elk* was born "within the United States," *Wong Kim Ark*, 169 U.S. at 680, despite his birth in a U.S. Territory.

* * *

Every single case in which the Supreme Court has actually construed the Citizenship Clause's phrase "in the United States" has interpreted it as encompassing *all* of the sovereign's geographic dominion. This Court should do so as well.

III. The *Insular Cases* Are Inapposite And Cannot Support Denial Of The Fundamental Right Of Citizenship.

The Government has no textual, structural, or historical argument, or Supreme Court authority, to support its assertedly "correct reading" of the Citizenship Clause as excluding all persons born in a U.S. Territory. U.S. Br. 15. The Government thus immediately retreats to the somewhat narrower argument that the Citizenship Clause excludes persons born in American Samoa because it is an "unincorporated territory." To support that argument, the Government turns to "the *Insular Cases*," U.S. Br. 16, a "discredited lineage of cases" that court after

court has cautioned against extending, *Aurelius Inv., LLC v. Puerto Rico*, 915 F.3d 838, 854-55 & n.12 (1st Cir.) (footnote omitted), *cert. granted*, 139 S. Ct. 2735 (2019) (argued Oct. 15, 2019). The primary case the Government invokes, *Downes v. Bidwell*, has no application here. It did not involve the Citizenship Clause; it contains no majority opinion; and the *particular* opinion on which the Government relies "is largely premised on notions of white supremacy that the Supreme Court has long ago rejected." III.App. 622 n.31. The Court should reject the Government's invitation to extend the *Insular Cases* here. Even *if* the *Insular Cases* applied, however, birthright citizenship is a "fundamental personal right[ ]," *Boumediene v. Bush*, 553 U.S. 723, 757-59 (2008), that Congress lacks power to abridge—even in "unincorporated" Territories.

A. The *Insular Case* Framework

In the wake of the 1898 Spanish-American War, the Supreme Court addressed questions regarding Congress's authority to govern newly acquired Territories in the *Insular Cases*. The Court "held that the Constitution has independent force in these Territories, a force not contingent upon acts of legislative grace." *Boumediene*, 553 U.S. at 757. But the Court also took into account Congress's ability to govern these new Territories pursuant to its longstanding power "to dispose of" or otherwise regulate "the Territory or other Property belonging to the United States." U.S. Const. art. IV, § 3, cl. 2; *see also*

Rasul v. Myers, 563 F.3d 527, 532 (D.C. Cir. 2009). Thus, these decisions examined how Congress's power under the Property Clause to create territorial governments would apply to newly acquired Territories "with wholly dissimilar traditions and institutions." *Reid v. Covert*, 354 U.S. 1, 14 (1957) (plurality opinion).

To avoid a disruptive "transformation of the prevailing legal culture" through the immediate imposition of a common-law system of governance, *Boumediene*, 553 U.S. at 757, the Supreme Court created and applied a new doctrine of "territorial incorporation" when considering challenges to territorial criminal procedure and revenue collection. *See generally*, *e.g.*, *Dorr v. United States*, 195 U.S. 138 (1904). This new doctrine distinguished between "incorporated Territories surely destined for statehood" and "unincorporated Territories" that were not so destined, thus allowing the Supreme Court "to use its power sparingly and where it would be most needed." *Boumediene*, 553 U.S. at 757, 759. But even under this doctrine, inhabitants of unincorporated Territories were entitled to "certain fundamental personal rights declared in the Constitution." *Id.* at 758.

B. The *Insular Cases* Do Not Allow Congress To Deprive Persons Born In Unincorporated Territories Of Birthright Citizenship.

1. "'Whatever the validity of the *Insular Cases* in the particular historical context in which they were decided,'" *Boumediene*, 553 U.S. at 758 (brackets and

citation omitted), they are irrelevant here. None involved the Citizenship Clause or defined "in the United States" as it is used in the Fourteenth Amendment. *See Downes*, 182 U.S. 144.

Rather than addressing the Citizenship Clause, *Downes* held—as the Government acknowledges—"that Puerto Rico is not part of 'the United States' *for purposes of the Tax Uniformity Clause*." U.S. Br. 18 (emphasis added); *see* U.S. Const. art. I, § 8, cl. 1. Even if that holding were correct, it would not control the meaning of "the United States" as used in the Citizenship Clause, which was ratified in a different historical context—after the Civil War—and with the fundamental purpose of abrogating *Dred Scott* and codifying the common-law doctrine of *jus soli*. *Cf. Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n*, 135 S. Ct. 2652, 2668 (2015) ("[T]he meaning of the word 'legislature,' used several times in the Federal Constitution, differs according to the connection in which it is employed.") (alteration in original).

And splintered decisions such as *Downes*, where the majority agrees in the ultimate result but not on any particular rationale, are of "minimal precedential value" and are controlling only on the narrowest available grounds. *Arizona v. Inter Tribal Council of Ariz., Inc.*, 570 U.S. 1, 16 n.8 (2013). If this case presented the question whether the Uniformity Clause applied to Puerto Rico during the

transitional period, *Downes* would control. But it does not control the question here.

2. Undeterred, the Government insists that although *Downes* was not about the Citizenship Clause, and "commanded [no] majority" opinion on the actual question presented (concerning the Uniformity Clause), "all Justices in the majority agreed that it is for Congress to decide whether persons in newly acquired territories become U.S. Citizens." U.S. Br. 18 n.4. This is untrue.

Contrary to the Government's unexplained characterization, Justice Gray's opinion does not say that Congress had power to determine the citizenship of the inhabitants of newly acquired Territories contrary to the Citizenship Clause. Justice Gray crafted a short, and narrow, decision, concluding that "[t]he system of duties temporarily established by [the Foraker Act] during the transition period was within the authority of Congress under the Constitution of the United States." *Downes*, 182 U.S. at 347.

And although the Government relies on dicta from the opinions of Justices Brown and White, it understandably declines to quote those Justices' explanations *why* they believed Congress must have the power to determine citizenship in new Territories. Justice Brown, the only Justice to advance the Government's radical position that *no* Territory is "in the United States," lamented the possibility that the "children" of "savages" born in such Territories would "immediately" be "entitled

to all the rights, privileges and immunities of citizens." *Downes*, 182 U.S. at 279-80. To Justice Brown, Congress had to have power to exclude such "foreign" peoples from the citizenry, *id.*, because they were "alien races, differing from us," *id.* at 287. Similarly, Justice White's opinion fretted over the possibility of "the immediate bestowal of citizenship on" those of "uncivilized race[s]," who were "absolutely unfit" to receive it. *Id.* at 306 (White, J., concurring).

The sentiments expressed by Justices Brown and White in *Downes* are not merely "politically incorrect," *Tuaua*, 788 F.3d at 307; they are premised on the idea that certain races are unable to participate as equals in the American experiment, *see* Juan R. Torruella, *The Insular Cases: A Declaration of Their Bankruptcy and My Harvard Pronouncement,* in *Reconsidering the Insular Cases* 61, 62 (Gerald L. Neuman & Tomiko Brown-Nagin eds., 2015) ("[T]he *Insular Cases* represent classic *Plessy v. Ferguson* legal doctrine and thought that should be eradicated from present-day constitutional reasoning.") (footnote omitted). That idea has no place in our constitutional jurisprudence—and never did.

The district court correctly rejected the Government's invitation to draw guidance from divided opinions driven by "white supremacy" that do not interpret the Citizenship Clause. III.App. 622 n.31.

3. After *Downes*, the Supreme Court adopted the doctrine of territorial incorporation, limiting when the Constitution applies in so-called "unincorporated"

Territories. *See Dorr*, 195 U.S. at 143. But the Court has long cautioned that "neither the [Insular C]ases nor their reasoning should be given any further expansion." *Reid*, 354 U.S. at 14 (plurality opinion); *see also Torres v. Puerto Rico*, 442 U.S. 465, 476 (1979) (Brennan, J., concurring in judgment). Simply put, "[t]he Constitution grants Congress and the President the power to acquire, dispose of, and govern territory, not the power to decide when and where its terms apply." *Boumediene*, 553 U.S. at 765. The territorial-incorporation doctrine does not apply here.

First, the *Insular Cases*' rationale for adopting special rules for certain Territories cannot be extended to American Samoa today. Those cases "involved the power of Congress to provide rules and regulations to govern *temporarily* territories with wholly dissimilar traditions and institutions," *Reid*, 354 U.S. at 14 (plurality opinion) (emphasis added). "The Court . . . was reluctant to risk the uncertainty and instability that could result from a rule that displaced altogether the existing legal systems in these *newly acquired* Territories." *Boumediene*, 553 U.S. at 757 (emphasis added). The reasoning of those cases has no bearing on Territories, including American Samoa, that have now been a part of the United States for more than a century, and in which "over time the ties [with] the United States" have "strengthen[ed] in ways that are of constitutional significance." *Id.* at 758.

Second, the territorial-incorporation framework does not apply to the Citizenship Clause, because that Clause expressly defines its own geographic scope. The Supreme Court has characterized *Dorr*, 195 U.S. 138, as holding "that the Constitution, *except insofar as required by its own terms*, did not extend to" unincorporated Territories. *Examining Bd. Of Eng'rs, Architects & Surveyors v. Flores de Otero*, 426 U.S. 572, 589 n.21 (1976) (emphasis added). The Citizenship Clause is "applicable" in American Samoa "by its own terms" because it codifies the common-law doctrine of birthright citizenship to persons born anywhere "in the United States," including Territories. U.S. Const. amend. XIV, § 1. Thus, this case should be resolved by interpreting the Citizenship Clause in light of its text, structure, history, and Supreme Court precedent construing that Clause, not the inapposite territorial-incorporation doctrine.

4. In all events, the *Insular Cases* themselves support Appellees' claim to citizenship. As the Supreme Court has made clear, "'guaranties of certain fundamental personal rights declared in the Constitution'" apply "even in unincorporated Territories." *Boumediene*, 553 U.S. at 758 (quoting *Balzac v. Porto Rico*, 258 U.S. 298, 312 (1922)); *see also Flores de Otero*, 426 U.S. at 599 n.30. Citizenship is a "fundamental right." *Trop v. Dulles*, 356 U.S. 86, 103 (1958) (plurality opinion); *see also*, *e.g.*, *Afroyim*, 387 U.S. at 267-68 ("Citizenship is no light trifle to be jeopardized any moment Congress decides to do so under the

name of one of its general or implied grants of power."); *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 159 (1963) ("Citizenship is a most precious right. It is expressly guaranteed by the Fourteenth Amendment to the Constitution, which speaks in the most positive terms.").

If this Court determines that the *Insular Cases* apply at all, it should apply their fundamental-rights framework. *See Tuaua*, 788 F.3d at 376-77 (engaging in the fundamental rights analysis after concluding the *Insular Cases* did not squarely control, but adopting them nonetheless). Under this framework, the Citizenship Clause would apply to persons born in American Samoa. This would align with the Supreme Court's express extension of numerous constitutional rights to unincorporated Territories, such as the First Amendment, *Posadas de Puerto Rico Assocs. v. Tourism Co. of Puerto Rico*, 478 U.S. 328, 331 n.1 (1986), the Fourth Amendment, *Torres*, 442 U.S. at 468-71 (majority opinion), equal protection, *Flores de Otero*, 426 U.S. at 600, due process, *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 668 n.5 (1974), the Double Jeopardy Clause, *Puerto Rico v. Sanchez Valle*, 136 S. Ct. 1863, 1876 (2016), and the Suspension Clause, *Boumediene*, 553 U.S. at 771. *See also Redondo Constr. Corp. v. Izquierdo*, 662 F.3d 42, 48 (1st Cir. 2011) (Contracts Clause); *Tenoco Oil Co. v. Dep't of Consumer Affairs*, 876 F.2d 1013, 1017 (1st Cir. 1989) (Takings Clause).

In fact "the only constitutionally protected individual rights that the Supreme Court has found inapplicable to unincorporated Territories are the rights to trial by jury and to a grand jury indictment," *Rabang v. INS*, 35 F.3d 1449, 1465 (9th Cir. 1994) (Pregerson, J., dissenting); *see Balzac*, 258 U.S. 308-11; *Dorr*, 195 U.S. at 139. The Supreme Court has not curtailed any individual constitutional right in the Territories in almost a century.

C. Neither "Longstanding Practice" Nor The Will Of An Ephemeral Majority Can Justify Continued Denial Of Birthright Citizenship.

1. The Government's last-ditch effort is to discern from the *Insular Cases* a "longstanding practice" of denying birthright citizenship to those born in unincorporated Territories. U.S. Br. 22. Both the Government and Intervenors cite Justice Holmes' statement that "'[i]f 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.'" *Id.* (quoting *Jackman v. Rosenbaum Co.*, 260 U.S. 22, 31 (1922)); *accord* A.S. Br. 29, 45-46. However that maxim might bear on the contours of the Due Process Clause, *but see*, *e.g.*, *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015), it cannot limit rights expressly granted by the text of the Fourteenth Amendment. There is no "adverse-possession theory" of constitutional law. *Noel Canning*, 573 U.S. at 615 (Scalia, J., concurring in judgment). And the mere fact that the Government has been violating constitutional rights for a long time does not mean that it may continue to do so. *See generally Brown v. Bd. of Educ. of*

Topeka, 347 U.S. 483 (1954). Moreover, the relevant "longstanding practice" here is the common-law tradition that, except for the brief period occasioned by *Dred Scott*, governed from the 1600s until the *Insular Cases*.

2. For their part, Intervenors devote the bulk of their brief to arguing that, under the *Insular Cases* framework, it would be "'impracticable and anomalous'" to recognize birthright citizenship in American Samoa. A.S. Br. 14 (quoting *Boumediene*, 553 U.S. at 759, 764). Specifically, Intervenors contend that the American Samoan way of life, or *fa'a Samoa*, is incompatible with birthright citizenship, warning that the structure of American Samoan families, its system of communal land ownership, and its religious life would all be wiped away if birthright citizenship were recognized. *See* A.S. Br. 17-24. These fears are without any warrant, and Intervenors have *never* explained the basis for them.

Intervenors assert that birthright citizenship would carry with it the "full application of the Equal Protection Clause," the "Establishment Clause," and "the Due Process Clause." A.S. Br. 19, 23. But these constitutional provisions *already* apply to unincorporated Territories. *See Posadas de Puerto Rico Assocs.*, 478 U.S. at 331 n.1 (First Amendment); *Flores de Otero*, 426 U.S. at 600 (Equal Protection). Nor do any of those provisions turns on citizenship. *See Yick Wo v. Hopkins*, 118 U.S. 356, 369 (1886) (Equal Protection Clause "is not confined to protection of *citizens*"; it protects "all *persons* . . . without regard to any differences

of race, of color, or of nationality") (emphasis added). Indeed, Intervenors fail to mention that at least one court has already assessed land alienation restrictions in American Samoa and held that they survive strict scrutiny. *See Craddick v. Territorial Registrar*, 1 Am. Samoa 2d 11 (App. Div. 1980) (Schwartz, C.J., of the U.S. District Court for the Southern District of California, sitting by designation).

Accordingly, Intervenors' unsupported assertions that numerous aspects of *fa'a Samoa* violate fundamental constitutional principles should not dissuade this Court from applying the Citizenship Clause to American Samoa. A.S. Br. 20.[6]

3. Intervenors also argue that American Samoans' right of "self-determination" would be undermined by application of the Citizenship Clause. *See* A.S. Br. 24-28. They contend that ruling for Appellees would "directly conflict[ ] with the will of the American Samoan people," and represent "a particularly egregious and 'irregular intrusion into the autonomy of Samoan democratic decision-making.'" *Id.* at 27 (quoting *Tuaua*, 788 F.3d at 312). This argument fundamentally misunderstands the nature of a written constitution. While American Samoa's future *political status* remains open to Congress and American

[6] Tellingly, Intervenors have left ample room for themselves to argue in a future case that birthright citizenship poses no legal threat to *fa'a Samoa*—as indeed, it does not. *See* A.S. Br. 20 ("[I]t is far from predetermined that precedent would require abolition of the *matai* system if the Court extended U.S. citizenship to American Samoans.").

Samoa's elected leaders to decide, the question whether the Citizenship Clause applies on sovereign U.S. soil is not. That is because the Fourteenth Amendment "put th[e] question of citizenship . . . beyond the legislative power." *Afroyim*, 387 U.S. at 263.

Moreover, whatever American Samoa's elected leaders may think *now*, history on this subject shows that they very well could change their minds. American Samoan leaders believed they *were* citizens in the early 1900s, then fought to obtain citizenship upon learning that it had been denied them, *see supra* 4-6, with bills being introduced in Congress annually, *e.g.*, 74 Cong. Rec. 3186-90, 3420 (1931); 75 Cong. Rec. 4129-33, 4591-92, 4844 (1932); 76 Cong. Rec. 4926-27 (1933). American Samoa's own delegate has introduced bills seeking to make naturalization easier, *e.g.*, H.R. 1208, 116th Cong. (2019); H.R. 4021, 112th Cong. (2012), but to no avail. This belies Intervenors' position that American Samoans have some monolithic view on citizenship and that the Government has simply withheld citizenship out of deference to American Samoans' right of "self-determination." *See* A.S. Br. 24-28.

4. Finally, although they conceded below that American Samoa "undisputedly owe[s] allegiance to the United States," III.App. 565-66 n.2, Intervenors now claim (for the first time on appeal) that American Samoa is *not* "subject to the jurisdiction of the United States." A.S. Br. 32, 42-46. Intervenors

"never raised their argument . . . in the district court" and it is therefore forfeited. *Waldo v. Ocwen Loan Servicing, LLC*, 483 F. App'x 424, 426 (10th Cir. 2012). Indeed, it is affirmatively waived because Intervenors "concur[red] with" and "incorporate[d] . . . by reference" the Government's arguments in the district court, II.App. 294 n.1, including the Government's acknowledgment that American Samoa is subject to the jurisdiction of the United States, III.App. 595.

In any event, Intervenors' argument that American Samoa is not "subject to the jurisdiction" of the United States because it is a "significantly self-governing" Territory is meritless. A.S. Br. 44. "Strictly speaking, there is no sovereignty in a Territory of the United States but that of the United States itself," although it is "the practice of the government to invest these dependencies with a limited power of self-government." *Snow v. United States*, 85 U.S. (18 Wall.) 317, 321 (1873). If Intervenors were correct, residents of States, who are not only "significantly self-governing" but possess "inviolable sovereignty," *Franchise Tax Bd. of California v. Hyatt*, 139 S. Ct. 1485, 1493 (2019), also (quite implausibly) would not be subject to the jurisdiction of the United States. But as the case cited by Intervenors makes plain, what removes a person from the jurisdiction of the United States is "allegiance to" "an *alien*" power. *Elk*, 112 U.S. at 102 (emphasis added). States are not alien powers and neither is American Samoa. Quite the opposite; every single person born in American Samoa, including all of its leadership since

the cessions of sovereignty, owes "*permanent allegiance*" to the United States. 8 U.S.C. § 1101(21) (emphasis added).

IV. Contrary Circuit Authorities Are Either Inapposite Or Erroneous.

The Government and Intervenors both rely on out-of-circuit authorities to contend that American Samoa, as an "unincorporated" Territory, is not "in the United States." *See* U.S. Br. 22-24, 29; A.S. Br. 44. That reliance is misplaced.

A. Cases Involving the Philippines Are Inapposite.

Circuit decisions adjudicating citizenship claims connected to the Philippines, made long after Philippine independence in 1946, are of no moment here. *See Nolos*, 611 F.3d 279; *Valmonte*, 136 F.3d 914; *Lacap v. INS*, 138 F.3d 518 (3d Cir. 1998); *Rabang*, 35 F.3d 1449.

It was "'always . . . the purpose of the people of the United States to withdraw their sovereignty over the Philippine Islands and to recognize their independence as soon as a stable government c[ould] be established therein.'" *Boumediene*, 553 U.S. at 757 (citation omitted); *see also Shanks v. Dupont*, 28 U.S. 242, 246 (1830) (Story, J.) (temporary "capture and possession" by a foreign sovereign does not work "an absolute change of the allegiance of the captured inhabitants"). Moreover, as the Supreme Court has long acknowledged, "the nationality of the inhabitants of territory acquired by conquest or cession becomes that of the government under whose dominion they pass," "subject to the right of

election on their part to retain their former nationality by removal, or otherwise, as may be provided." *Boyd v. Nebraska*, 143 U.S. 135, 162 (1892). Thus, the British capture of James Island in Charleston, South Carolina, in 1780 created only "temporary allegiance" to the British Crown as to the Island's inhabitants, but "did not annihilate their allegiance to the State of South Carolina, and make them de facto aliens." *Shanks*, 28 U.S. at 246. Only "permanent conquest," "ce[ssion] of territory," and a "treaty of peace" could effectuate that. *Id.* Under settled principles of international law, "[t]he act transferring the country transfers the allegiance of its inhabitants." 3 J. Story, *Commentaries on the Constitution of the United States* § 1318 (1833). Therefore, when the Philippines became an independent nation, its inhabitants' "relations with their former sovereign [were] dissolved," along with any claims to U.S. citizenship. *Id.* These cases are a poor comparison to American Samoa, whose residents continue to live under the U.S. flag and undisputedly owe *permanent* allegiance to the United States.

B. *Tuaua* Was Wrongly Decided, and Poorly Reasoned.

The Government and Intervenors rely heavily on the D.C. Circuit's *Tuaua* decision. *See*, *e.g.*, U.S. Br. 2; A.S. Br. 1. But *Tuaua* was wrong and poorly reasoned, and this Court should reject it just as the district court did.

1. The D.C. Circuit's opinion fails to substantively engage with the text, structure, history, or relevant precedent. For example, the court acknowledged that

it was possible that the phrase "in the United States" might be broader than "among the several States" in the Fourteenth Amendment, but threw up its hands because "the *precise* contours of the 'United States'" were not apparent based *solely* on that difference. *Tuaua*, 788 F.3d at 303 (emphasis added). The decision likewise fails to discuss Chief Justice Marshall's views about the meaning of "the United States" in *Loughborough*, or views of prominent legal scholars from the Founding, *see* Rawle, *supra*, at 86.

Similarly, when faced with compelling evidence of the Framers' uniform understanding about *jus soli* and the Citizenship Clause, the D.C. Circuit quipped that these "scattered statements" would not do, never explaining how any statement could cut against *jus soli* citizenship extending to U.S. Territories, nor offering examples of a contrary understanding. *Tuaua*, 788 F.3d at 304.

And the court adopted, uncritically, the view that *Wong Kim Ark*'s extensive analysis is merely "dicta" because the individual at issue was born in California, *Tuaua*, 788 F.3d at 304-05, failing to acknowledge that *jus soli* applied to anyone born "within the dominion of the United States," *Wong Kim Ark*, 169 U.S. at 657.

The district court's opinion here stands in stark contrast to *Tuaua*—it is extensive, scholarly, and appropriately concludes that the D.C. Circuit was wrong.

2. Contrary to Intervenors' suggestion, this Court does not apply a heightened standard of review before creating a circuit conflict. *See* A.S. Br. 13-14

(citing *United States v. Thomas*, 939 F.3d 1121, 1131 (10th Cir. 2019)). *Thomas* explained that "[t]his court has simply expressed reluctance to create a circuit split," noting that there should be a "sound reason" or "good reason" for doing so. 939 F.3d at 1130-31. Moreover, *Thomas* involved the "unique" context of federal sentencing guidelines. *Id.* at 1132 ("[C]ircuit splits regarding the sentencing guidelines are best left to the Sentencing Commission to resolve through amendments to the guidelines."). And it expressed reluctance to create a circuit split only after it had already decided that "standard tools of statutory interpretation all point[ed]" in the government's favor. *Id.* at 1130.

Importantly, this Court has not hesitated to split with the D.C. Circuit on important questions of constitutional law. The Court did so in *Bandimere v. SEC*, 844 F.3d 1168 (10th Cir. 2016), becoming the first court of appeals to hold that the SEC's Administrative Law Judges were unconstitutionally appointed and rejecting two on-point D.C. Circuit opinions. *See Raymond J. Lucia Cos. v. SEC*, 832 F.3d 277 (D.C. Cir. 2016); *Landry v. FDIC*, 204 F.3d 1125 (D.C. Cir. 2000). This Court should not hesitate to reject *Tuaua* here. *See Lucia v. SEC*, 138 S. Ct. 2044, 2051 (2018) (reversing D.C. Circuit).

CONCLUSION

The Court should affirm.

STATEMENT REGARDING ORAL ARGUMENT

Appellees request oral argument as soon as practicable to address the important question presented on the constitutionality of a federal statute, an issue of first impression in this Circuit.

Respectfully submitted,

Dated: May 5, 2020

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I certify that this brief complies with the type-volume limitation of Fed. R. App. P. 27(d)(2)(A) because it contains 12,984 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f) and 10th Cir. R. 32(B).

I certify that this brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and 10th Cir. R. 32(A) and the type-style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionately spaced 14-point Times New Roman typeface using Microsoft Word 2016.

Dated: May 5, 2020

s/ *Matthew D. McGill*
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CERTIFICATE OF DIGITAL SUBMISSION AND PRIVACY REDACTIONS

I certify that with respect to this brief:

- All required privacy redactions have been made in compliance with 10th Cir. R. 25.5.
- Consistent with this Court's 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), Appellees have not submitted paper copies of their Answering Brief nor of their Supplemental Appendix, but stand ready to do so if the Court lifts its current suspension of the paper-copy requirements.
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s/ *Matthew D. McGill*
Matthew D. McGill

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I certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Tenth Circuit by using the appellate CM/ECF system on May 5, 2020.

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