[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 SAMOA GOVERNMENT and THE HON. AUMUA AMATA,

Intervenor Defendants-Appellants

On Appeal from the United States District Court for the District of Utah
District Court Case No. 18-cv-36 (Judge Waddoups)

REPLY BRIEF FOR DEFENDANTS-APPELLANTS

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INTRODUCTION AND SUMMARY OF ARGUMENT

As the Supreme Court has long recognized, Congress has the authority "to prescribe upon what terms the United States will receive [a territory's] inhabitants, and what their status shall be." *Rabang v. Boyd*, 353 U.S. 427, 432 (1957) (quoting *Downes v. Bidwell*, 182 U.S. 244, 279 (1901) (opinion of Brown, J.)). That power exists because American Samoa and territories like it are not "in the United States" for purposes of the Citizenship Clause of the Fourteenth Amendment.

American Samoa is governed under the Territories Clause, which distinguishes between "the United States" and "Territory or other Property belonging to" it. U.S. Const. art. IV, § 3, cl. 2. The Thirteenth Amendment confirms this distinction between "the United States" and places "subject to their jurisdiction." U.S. Const. amend. XIII, § 1. Other constitutional provisions that apply "throughout the United States," U.S. Const. art. I, § 8, cl. 1, 4, do not apply to American Samoa, either. *See Downes*, 182 U.S. at 287; *Eche v. Holder*, 694 F.3d 1026, 1031 (9th Cir. 2012). Indeed, plaintiffs identify no constitutional provision that treats "the United States" as including "all U.S. Territories." Br. 21. There is no basis for reading these provisions to sweep in territories that "belong[] to" the United States but are "not a part of the Union of states under the Constitution." *Hooven & Allison Co. v. Evatt*, 324 U.S. 652, 673 (1945).

Congress has long exercised its authority to set the terms of citizenship in unincorporated territories, including the Philippines, Puerto Rico, Guam, the U.S.

Virgin Islands, and the Northern Mariana Islands. And the courts of appeals have consistently rejected claims that such territories are "in the United States" for purposes of the Citizenship Clause—including American Samoa. *Tuaua v. United States*, 788 F.3d 300 (D.C. Cir. 2015), *cert. denied*, 136 S. Ct. 2461 (2016).

Plaintiffs do not fully confront the text and structure of the Constitution, and they attempt to evade the Supreme Court's recognition that Congress may determine the citizenship status of a territory's inhabitants. In doing so, they cite cases that do not interpret the phrase "in the United States" in the Citizenship Clause, advance a series of historical arguments that do not address the scope of that phrase either, and rely on three snippets of legislative history and a letter from a Congressman written thirty-seven years after the relevant Congressional debate. And despite insisting that the phrase "in the United States" encompasses "all U.S. Territories," Br. 21, they are unwilling to embrace the full consequences of that logic, attempting to explain away the status of persons born in the Philippines during its period as a U.S. territory without reconciling their distinctions with the Supreme Court's guidance.

The text and structure of the Constitution, as well as precedent from the Supreme Court and Congress, demonstrate that American Samoa is not "in the United States" for purposes of the Citizenship Clause. Because the Citizenship Clause defines its own geographic scope, this Court need not consider whether birthright citizenship is a "fundamental right" for purposes of the territorial-incorporation doctrine. But if the Court were to reach the question, it should hold that birthright

citizenship is not a "fundamental right" in the constricted sense that term carries in the territorial-incorporation context. That doctrine looks to whether a right is at the foundation of "all free government." *Dorr v. United States*, 195 U.S. 138, 147 (1904) (quoting *Downes*, 182 U.S. at 291 (White, J., concurring)). But many "free government[s]" base citizenship on parentage, not place of birth. Moreover, imposing birthright citizenship over the objections of American Samoa's own elected representatives would undermine the ability of American Samoa's "people to make large-scale choices about their own political institutions," *Puerto Rico v. Sanchez Valle*, 136 S. Ct. 1863, 1876 (2016), and run counter to the very purpose of the territorial-incorporation doctrine, which is to respect the differing legal and social cultures of the United States' diverse unincorporated territories.

The district court's judgment thus should be reversed in its entirety, but at a minimum, there is no dispute that the district court's overbroad injunction should be limited to the plaintiffs actually before the court. Plaintiffs expressly decline to defend the sweeping grant of injunctive relief, Br. 4 n.2, which cannot be reconciled with Article III or fundamental principles of equity.

ARGUMENT

I. Because American Samoa Is Not "In The United States" For Purposes Of The Citizenship Clause, Citizenship Does Not Attach By Birth There

A. The Text and Structure of the Constitution Demonstrate that American Samoa Is Not "In the United States"

1. As our opening brief explained, the correct reading of the Citizenship Clause is that "in the United States" encompasses the 50 States—which combine to form the union and continue to exercise their own concurrent sovereignty with the federal government—and the District of Columbia—an enclave carved from two of those States to serve as the seat of government for the whole. It does not include unincorporated territories like American Samoa. That conclusion follows from the text and structure of the Constitution, controlling Supreme Court precedent, and longstanding practice.

Plaintiffs accept that American Samoa is not a constituent State of "the United States," and that it was not carved out of a State to serve as the seat of government. Instead, plaintiffs insist that "in the United States" must encompass "all U.S. Territories." Br. 21. They barely attempt to ground this conclusion in the text of the Citizenship Clause, much less reconcile it with the Constitution's text and structure. Aside from providing a dictionary definition of the term "in," Br. 18, plaintiffs suggest that the Fourteenth Amendment's reference to apportionment of representatives "among the several States" in the second clause demonstrates that "in the United

States" in the Citizenship Clause must "mean something more extensive than 'among the several States,'" Br. 22. But as our brief explained (U.S. Br. 27), no one disputes that the District of Columbia is both "in the United States" and not "among the several States" entitled to representation. And in any event, the Apportionment Clause, unlike the Citizenship Clause, addresses the States in their capacities as individual States, not their union as a whole. *See* U.S. Const. art. I, § 2, cl. 3 (Enumeration Clause) (also using "among the several States"). That language thus sheds little light on the Citizenship Clause's geographic reach.

Plaintiffs express surprise that the District of Columbia and American Samoa would be treated differently under the Constitution, contending that there is no reason why "the District of Columbia is 'in the United States'" but "Territories are not." Br. 22. But that distinction follows from the Constitution itself. Congress's authority over the District of Columbia derives from the Enclave Clause of the Constitution, which grants Congress the authority to "exercise exclusive Legislation in all Cases whatsoever" over "such District . . . as may, by Cession of particular States, and the Acceptance of Congress, become the Seat of the Government of the United States." U.S. Const. art. I, § 8, cl. 17. The District of Columbia is thus "the capital—the very heart—of the Union itself." *O'Donoghue v. United States*, 289 U.S. 516, 539 (1933). And as the District "was made up of portions of two of the original states of the Union," it "was not taken out of the Union by the cession," *id.* at 540, just as the "Forts, Magazines, Arsenals, dock-Yards, and other needful Buildings" the federal

government purchases from the States under the same clause are not taken out of the United States by virtue of the federal government's control, U.S. Const. art. I, § 8, cl. 17.

By contrast, the Territories Clause provides Congress's authority over American Samoa, and that Clause expressly distinguishes between "the United States" and the "Territory or other Property belonging to" it. U.S. Const. art. IV, § 3, cl. 2. Plaintiffs simply ignore this distinction, asserting without explanation that the Clause "describe[s] places within the United States." Br. 22-23. And plaintiffs' suggestion that there is no difference between the District of Columbia and the territories because Congress's authority over both is plenary, Br. 20, misses the point: the District's unique constitutional status confirms that it is "in the United States" in a way that American Samoa is not, regardless of the scope of Congress's substantive authority.

Plaintiffs likewise strain to distinguish other constitutional provisions that reinforce the distinction between the United States and its territories. Although the Citizenship Clause of the Fourteenth Amendment is confined to individuals born "in the United States, and subject to the jurisdiction thereof," the Thirteenth Amendment prohibits slavery "within the United States, *or* any place subject to their jurisdiction." U.S. Const. amend. XIII, § 1 (emphasis added), demonstrating 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, 336-37 (1901) (White, J., concurring); *see also id.* at 251 (opinion of Brown, J.).

Plaintiffs discount this difference, arguing that "within the United States" includes the territories, while "subject to their jurisdiction" applies only to "vessels outside U.S. territorial waters, embassies abroad, and military installations on foreign soil." Br. 24. But that reading is not consistent with the text of the amendment: "within the United States" refers to the States, as confirmed by the Thirteenth Amendment's use of the phrase "subject to *their* jurisdiction." That plural form is employed precisely because "within the United States" refers to the States united under the Constitution, while "subject to their jurisdiction" covers the territories (among other "place[s]"). Plaintiffs neither address this point nor offer textual evidence for their constricted reading, instead falling back on the claim that "the text of the Thirteenth Amendment in isolation does not reveal whether Congress understood 'the United States' to include U.S. Territories." Br. 24 n.5. And the only evidence plaintiffs do offer is a letter from one former Congressman written "thirty-seven years" after the drafting of the amendment (and without any "examination of Congressional records and other data"). Letter 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, 297 (1901). Such post-enactment legislative history "by definition 'could have had no effect on the congressional vote,'" and thus is "not a legitimate tool" for interpreting the text. *Bruesewitz v. Wyeth LLC*, 562 U.S.

223, 242 (2011) (quoting *District of Columbia v. Heller*, 554 U.S. 570, 605 (2008)); *see Graham Cty. Soil & Water Conservation Dist. v. United States ex rel. Wilson*, 559 U.S. 280, 298 (2010) (letter written by bill sponsors thirteen years after enactment of statute was "of scant or no value" in interpreting statutory text).

Plaintiffs likewise consign to a footnote the Eighteenth Amendment, dismissing its distinction between the United States and territories as merely "supposed." Br. 24 n.5. But the distinction is not "supposed," as the text plainly distinguishes between the two: "from the United States *and* all territory subject to the jurisdiction thereof." U.S. Const. amend. XVIII, § 1 (emphasis added). Plaintiffs alternatively contend that the Eighteenth Amendment, by using the term "territory," somehow "suggests that 'places' as used in the Thirteenth Amendment did not include territories." Br. 24 n.5. It is difficult to see how. The amendments employ those terms to specify the extent of their coverage beyond "the United States," and the Eighteenth Amendment's use of the term "territory" makes it narrower than the Thirteenth Amendment. *E.g.*, *Cunard S.S. Co. v. Mellon*, 262 U.S. 100, 123 (1923) (rejecting argument that the Eighteenth Amendment "covers domestic merchant ships outside the waters of the United States").

Other provisions of the Constitution underscore the point. The provision requiring that the "Rule of Naturalization" and "Laws on the subject of Bankruptcies" be "uniform . . . throughout the United States," U.S. Const. art. I, § 8, cl. 4, does not apply to American Samoa, *see Eche v. Holder*, 694 F.3d 1026, 1031 (9th Cir. 2012). Nor

does the Tax Uniformity Clause, which requires that "all duties, imposts, and excises shall be uniform throughout the United States." U.S. Const. art. I, § 8, cl. 1; *see Downes*, 182 U.S. at 287. Plaintiffs do not dispute these points, and identify no other provision of the Constitution in which the term "the United States" is used in the sense they assign it in the Citizenship Clause.

2. Plaintiffs dismiss this understanding as implausible because the United States had several incorporated territories at the time of the Fourteenth Amendment's passage. Br. 19, 29. But for incorporated territories, Congress routinely extended the Constitution by statute. *See, e.g.*, Act of Sept. 9, 1850, § 17, 9 Stat. 453, 458 ("[T]he Constitution and all laws of the United States are hereby extended over and declared to be in force in said Territory of Utah, so far as the same, or any provision thereof, may be applicable"). And contrary to plaintiffs' suggestion that the phrase "the United States" uniformly connoted the territories in the years before the Fourteenth Amendment, Br. 18-19, 23, statutes often treated "the United States" as separate from its "territories." *See, e.g.*, Act of Mar. 2, 1807, § 1, 2 Stat. 426, 426 (banning the importation of slaves "into the United States or the territories thereof"); Act of Mar. 1, 1809, § 1, 2 Stat. 528, 528 (barring certain French and British vessels from "harbors and waters of the United States and of the territories thereof"); Act of June 30, 1864, § 94, 13 Stat. 223, 264 (setting duties on products made, produced, or sold "within the United States or the territories thereof"); Act of July 4, 1864, § 5, 13 Stat. 385, 386

(barring from certain offices persons involved "in the carrying or transportation of immigrants . . . to the United States and its territories").

At a minimum, the text and structure of the Constitution underscore the soundness of the well-settled understanding that *unincorporated* territories like American Samoa—*i.e.*, those that are not destined for statehood—are subject to the jurisdiction of the United States, but are not "in the United States" for purposes of the Citizenship Clause. That distinction follows from the recognition that certain territories are "surely destined for statehood," *Boumediene v. Bush*, 553 U.S. 723, 756-57 (2008), and that Congress has made those territories "a part of the United States, as distinguished from merely belonging to it," *Hooven & Allison Co. v. Evatt*, 324 U.S. 652, 678 (1945). Unincorporated territories, by contrast, do "not form[] part of the United States." *Board of Pub. Util. Comm'rs v. Ynchausti & Co.*, 251 U.S. 401, 406-07 (1920). Those territories, though "belonging to" the United States, are "not a part of the Union of states under the Constitution." *Hooven & Allison*, 324 U.S. at 673. Whatever the application of the Citizenship Clause to a territory that Congress has marked for statehood and, in that sense, made "part of the United States," the mere acquisition of an unincorporated territory does not render it "in the United States" for purposes of the Citizenship Clause (or any other constitutional provision).

3. Plaintiffs chiefly rely on various historical arguments to support their contention that the term "in the United States" bears a meaning in the Citizenship Clause that it carries nowhere else in the Constitution. These arguments do not

displace the text of the Constitution and are unpersuasive on their own terms. Plaintiffs note (Br. 31-32) that the Civil Rights Act of 1866 included a definition of a citizen, and specified that citizens had "full and equal benefit of all laws and proceedings for the security of person and property" "in every State and Territory in the United States." Civil Rights Act of 1866, § 1, 14 Stat. 27, 27. But the Fourteenth Amendment as enacted omitted any comparable reference to territories; its protections of the "privileges or immunities of citizens of the United States" apply only to "State[s]." U.S. Const. amend. XIV, § 1. As the district court observed, this change cuts against plaintiffs' position: "[t]he decision of the 39th Congress to not include, in the Fourteenth Amendment, language related to territories—language that was present in the Civil Rights Act—may by itself constitute evidence that they did not intend for territories to be included within the Citizenship Clause's geographic scope." Aplts. App. Vol. 3 at 603.

Plaintiffs also provide an extended discussion of *Dred Scott v. Sandford*, 60 U.S. 393 (1857). Br. 27-29. No one disputes that the Fourteenth Amendment overruled *Dred Scott*, but this guarantee that former slaves were properly recognized as citizens provides no guidance about the geographic scope of the phrase "in the United States." Plaintiffs also rely on statements from three Senators in the course of the debate over the Fourteenth Amendment. Br. 30. Only Senator Trumbull's statement actually addresses whether territories are "in the United States" for purposes of the Clause. In any event, passing statements from three legislators "are not impressive

legislative history," and cannot determine the meaning of the Clause. *Garcia v. United States*, 469 U.S. 70, 78 (1984); *accord Tuaua v. United States*, 788 F.3d 300, 304 (D.C. Cir. 2015). And whatever their implications for incorporated territories, those statements have no bearing on unincorporated territories like American Samoa, which the United States did not possess at the time.

B. Precedent and Practice Confirm That American Samoa Is Not "In the United States"

Until the decision below, no court had ever held that an unincorporated territory was "in the United States" for purposes of the Citizenship Clause. Instead, Congress and the courts have consistently recognized that Congress's flexibility in acquiring, governing, and relinquishing territories includes the authority "to prescribe upon what terms the United States will receive [a territory's] inhabitants, and what their status shall be." *Rabang v. Boyd*, 353 U.S. 427, 432 (1957) (quoting *Downes*, 182 U.S. at 279 (opinion of Brown, J.)). Congress thus determines whether and under what conditions individuals in those territories will become citizens.

Plaintiffs strain to discount the Supreme Court's guidance on the scope of the Citizenship Clause. As our opening brief explained (U.S. Br. 18-19), the majority in *Downes v. Bidwell* agreed that it is for Congress to decide whether persons in newly acquired territories become U.S. citizens. *See* 182 U.S. at 279-80 (opinion of Brown, J.); *id.* at 306 (White, J., concurring); *id.* at 345-46 (Gray, J., concurring). Plaintiffs contest this premise, contending that "Justice Gray's opinion does not say" as much.

Br. 43. This ignores the very first sentence of Justice Gray's concurrence, which states that he "in substance agree[d] with the opinion of Mr. Justice White." *Downes*, 182 U.S. at 345 (Gray, J., concurring). It likewise ignores Justice Gray's statements that "a treaty of cession . . . subject[s] the territory to the disposition of the government of the United States," like the Treaty of Paris, under "which 'the civil rights and political status of the native inhabitants of the territories hereby ceded to the United States shall be determined by the Congress.'" *Id.* at 346 (quoting Treaty of Paris, U.S.-Spain, art. IX, Dec. 10, 1898, 30 Stat. 1754, 1759)).

At bottom, plaintiffs primarily contend that *Downes*, and the *Insular Cases* in general, should be disregarded, or should not be "expand[ed]." Br. 3-4, 39-40, 42-44. But the Supreme Court has repeatedly reaffirmed the core principles of those cases that are applicable here. The Court has explained that it is for the political branches to determine whether newly acquired territory is incorporated into the United States. *Boumediene*, 553 U.S. at 756-57; *Torres v. Puerto Rico*, 442 U.S. 465, 469 (1979). And in *Rabang v. Boyd*, the Supreme Court rejected the argument "that Congress was without power to legislate the exclusion of Filipinos in the same manner as 'foreigners'" during the Philippines' territorial period because "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, and what their status shall be." 353 U.S. at 432 (quoting *Downes*, 182 U.S. at 279 (opinion of Brown, J.)). Applying

the principles that the Supreme Court has reiterated in different contexts in the ensuing years would in no sense "expand" the *Insular Cases*.

Plaintiffs are similarly unable to come to grips with Congress's longstanding tradition of addressing by statute the citizenship status of individuals in the territories. Aside from statutes providing that persons born in the Philippines were not citizens, Congress has exercised its authority to determine the citizenship status of persons living in territories the United States acquires by enacting statutes addressing citizenship in Puerto Rico, the Virgin Islands, Guam, and the Northern Mariana Islands, U.S. Br. 4, 20-21, as well as Alaska and Hawaii before they were States, *see* 8 U.S.C. §§ 1404, 1405. Plaintiffs' only answer is that this practice reflects a series of unnoticed and unremedied constitutional violations dating back over 100 years. Br. 48. Rather, those provisions reflect the well-settled understanding of the Citizenship Clause that has prevailed since the United States first acquired unincorporated territories.

That well-settled understanding is reflected in the courts of appeals, which have unanimously rejected claims that the Citizenship Clause applies in unincorporated territories. Aside from the D.C. Circuit's decision in *Tuaua*, which directly addressed American Samoa, 788 F.3d at 305, four other circuits have rejected claims that persons born in the Philippines while it was an unincorporated territory were born "in the United States" for purposes of the Citizenship Clause. *Nolos v. Holder*, 611 F.3d 279, 282-84 (5th Cir. 2010) (per curiam); *Lacap v. INS*, 138 F.3d 518, 519 (3d Cir.

1998) (per curiam); *Valmonte v. INS*, 136 F.3d 914, 917-20 (2d Cir. 1998); *Rabang v. INS*, 35 F.3d 1449, 1451-53 (9th Cir. 1994). As those circuits have recognized, *Downes* "provides authoritative guidance on the territorial scope of the term 'the United States' in the Fourteenth Amendment," *Valmonte*, 136 F.3d at 918, and makes clear that, "as used in the Constitution, the term 'United States' does not include all territories subject to the jurisdiction of the United States government," *Rabang*, 35 F.3d at 1453. And those cases are directly applicable here; "the extension of citizenship to the American Samoan people would necessarily implicate the United States citizenship status of persons born in the Philippines during the territorial period—and potentially their children through operation of statute." *Tuaua*, 788 F.3d at 305 n.6; *cf. Nolos*, 611 F.3d at 282-84 (rejecting petitioner's claim that he derived U.S. citizenship through his parents, who were born in the Philippines while it was a territory).

Plaintiffs barely acknowledge these cases. Despite repeatedly asserting that the Citizenship Clause covers "all U.S. Territories," Br. 21; *e.g.*, Br. 1, 4, 16, 32, 37, they are unwilling to embrace the consequences of that view for the Philippines, Br. 53-54. But plaintiffs' efforts to distinguish the Philippines are not based in existing law. Plaintiffs suggest that the United States' control over the Philippines was akin to a temporary military occupation, which does not work a "change of the allegiance" of the inhabitants. Br. 53 (quoting *Shanks v. Dupont*, 28 U.S. 242, 246 (1830)). But the Philippines "were not simply occupied, but acquired," and "became, by virtue of the

[Treaty of Paris], ceded conquered territory." *The Diamond Rings*, 183 U.S. 176, 178 (1901); *see* Treaty of Paris, arts. III, IX, 30 Stat. at 1755, 1759. Persons born there thus "owe[d] no allegiance to any foreign government." *Toyota v. United States*, 268 U.S. 402, 411 (1925). Plaintiffs say that persons born in the Philippines did not "owe *permanent* allegiance to the United States," Br. 54, but the Supreme Court has twice explained that individuals "born in the Philippines" during its territorial period "were American nationals entitled to the protection of the United States and conversely owing permanent allegiance to the United States." *Barber v. Gonzales*, 347 U.S. 637, 639 n.1 (1954); *accord Rabang*, 353 U.S. at 430.

Likewise, although plaintiffs assert that Congress could revoke "any claims to U.S. citizenship" by individuals born in the Philippines by granting independence, Br. 54, they fail to reconcile that assertion with the general principle that, in the context of birthright citizenship, Congress has no "power, express or implied, to take away an American citizen's citizenship without his assent," *Afroyim v. Rusk*, 387 U.S. 253, 257 (1967). That issue has never arisen with respect to the Philippines precisely because persons born in the Philippines were never treated as citizens at birth, and plaintiffs have no account for this pre-independence practice. And even if it were true that those born in the Philippines were U.S. citizens but rendered non-citizens by independence, their children might still be eligible for U.S. citizenship, for example under statutes providing that a child born to a U.S. citizen parent abroad was generally eligible for U.S. citizenship from birth, even if the parent later lost U.S. citizenship.

See, e.g., Act of May 24, 1934, ch. 344, § 1, 48 Stat. 797, 797. Plaintiffs are undoubtedly correct that Philippine independence "transfer[red] the allegiance of its inhabitants" to the new nation, Br. 54 (quotation omitted), but that transfer underscores the importance of Congress's power to acquire, govern, and relinquish territories—a power that "could not be practically exercised if the result [of acquisition] would be to endow the inhabitants with citizenship of the United States." *Downes*, 182 U.S. at 306 (White, J., concurring).

Plaintiffs' efforts to distinguish the Philippines are instructive for another reason. Despite insisting that the Supreme Court's decision in *United States v. Wong Kim Ark*, 169 U.S. 649 (1898), controls the question of birthright citizenship's application to the territories (Br. 33-37), they do not attempt to ground their efforts to distinguish the Philippines in that decision, or in their understanding of the common-law *jus soli* doctrine. Plaintiffs thus appear to recognize that *Wong Kim Ark* is not dispositive of the Citizenship Clause's application to all persons born "within the dominion of the United States." Br. 34 (quoting *Wong Kim Ark*, 169 U.S. at 664).

That recognition reflects reality: as plaintiffs acknowledge, *Wong Kim Ark* involved a person born in a State—California. "The question of the Fourteenth Amendment's territorial scope was not before the Court," *Valmonte*, 136 F.3d at 920, and thus, regardless of the extent to which the Court's general discussion of common-law rules concerning *jus soli* citizenship may have been material to the analysis, it indisputably was "unnecessary to define 'territory' rigorously or decide whether

'territory' in its broader sense (i.e. outlying land subject to the jurisdiction of this country) meant 'in the United States' under the Citizenship Clause," *Rabang*, 35 F.3d at 1454; *accord Tuaua*, 788 F.3d at 305; *Nolos*, 611 F.3d at 284. As every other court of appeals to consider the question has recognized, *Wong Kim Ark* should be read in light of the "maxim, not to be disregarded, that general expressions, in every opinion, are to be taken in connection with the case in which those expressions are used. If they go beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit when the very point is presented for decision." *Wong Kim Ark*, 169 U.S. at 679 (quoting *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 399 (1821) (Marshall, C.J.)); *accord Arkansas Game & Fish Comm'n v. United States*, 568 U.S. 23, 35 (2012). And that is true even where those courts of appeals recognize Supreme Court dicta as generally authoritative. *Compare, e.g.*, *Tuaua*, 788 F.3d at 305, *with United States v. Oakar*, 111 F.3d 146, 153 (D.C. Cir. 1997). Here, the Supreme Court's consistent recognition that Congress may "prescribe upon what terms the United States will receive its inhabitants, and what their status shall be," *Rabang*, 353 U.S. at 432 (quoting *Downes*, 182 U.S. at 279 (opinion of Brown, J.)), Congress's general power to determine when and whether territory will be incorporated into the United States, and the consistent practice of Congress and the courts in this area provide the relevant guidance.

The other cases on which plaintiffs rely are of even less import. Plaintiffs cite a law review article for the premise that *Elk v. Wilkins* involved an Indian born in Iowa Territory. Br. 38-39. Even if true, that fact appears nowhere in *Elk* or *Wong Kim Ark*

because it was irrelevant to *Elk*'s holding that the Indian tribes there were not "subject to the jurisdiction" of the United States for purposes of the Citizenship Clause. *Elk*, 112 U.S. 94, 99-103 (1884). "Questions which merely lurk in the record, neither brought to the attention of the court nor ruled upon, are not to be considered as having been so decided as to constitute precedents." *Cooper Indus., Inc. v. Aviall Servs., Inc.*, 543 U.S. 157, 170 (2004) (quoting *Webster v. Fall*, 266 U.S. 507, 511 (1925)). For the same reason, plaintiffs' reliance (Br. 37-38) on language in the *Slaughter-House Cases*, 83 U.S. 36, 72-73 (1872), is misplaced. The Court in those cases did not purport to decide the geographic scope of the Citizenship Clause. Although the Court there observed that the Fourteenth Amendment generally establishes that a person may be a U.S. citizen without being a citizen of a State, the Court did not purport to resolve the particular circumstances in which that may be the case, let alone decide the Citizenship Clause's specific applicability to territories (much less unincorporated territories).

Plaintiffs also repeatedly cite *Loughborough v. Blake*, 18 U.S. 317 (1820), which involved application of the Tax Uniformity Clause to the District of Columbia. Br. 18, 19, 23. *Loughborough* does not interpret the Citizenship Clause at all, because it did not yet exist. And *Loughborough*'s passing reference to the territories does not even apply to the constitutional provision it actually addressed: as plaintiffs themselves concede (Br. 42-43), the controlling holding of *Downes* is that the Tax Uniformity Clause does not extend to unincorporated territories. *See Downes*, 182 U.S. at 260-61

(opinion of Brown, J.); *id.* at 292-93 (White, J., concurring); *see also Hooven & Allison*, 324 U.S. at 674.

C. Birthright Citizenship Should Not Be Imposed on American Samoa Under a "Fundamental Rights" Analysis

As the preceding discussion illustrates, this Court need not consider whether birthright citizenship is a "fundamental right" that must be extended to territories under the *Insular Cases* framework. The Citizenship Clause defines its own geographic scope: it applies to persons born "in the United States," and constitutional provisions with that scope have never been understood to reach unincorporated territories of their own force. Because "[t]he phrase 'the United States' is an express territorial limitation on the scope of the Citizenship Clause," the Court "need not determine the application of the Citizenship Clause to [American Samoa] under the doctrine of territorial incorporation." *Valmonte*, 136 F.3d at 918 n.7; *accord Rabang*, 35 F.3d at 1453 n.8.

Plaintiffs agree. Br. 46. They nonetheless contend, in the alternative, that birthright citizenship is a "fundamental right" that must be extended to unincorporated territories under that framework. Br. 47-48. But birthright citizenship is not a "fundamental right" in the constricted sense in which that term is used for purposes of territorial incorporation. In that context, the term "fundamental" encompasses only those rights that reflect "principles which are the basis of all free government." *Dorr v. United States*, 195 U.S. 138, 147 (1904) (quoting

Downes, 182 U.S. at 291 (White, J., concurring)). And there is nothing about birthright citizenship that makes it such a "principle[]."

To begin, Congress has the power to determine the political relationship between the United States and its unincorporated territories, and the decision whether and on what conditions to extend citizenship is part and parcel of that relationship. That power also enables Congress to respect the self-determination interests of the people who reside in those territories; Congress's "broad latitude to develop innovative approaches to territorial governance" includes "enabl[ing] a territory's people to make large-scale choices about their own political institutions." *Puerto Rico v. Sanchez Valle*, 136 S. Ct. 1863, 1876 (2016). Imposing birthright citizenship on American Samoa over the objections of its democratically elected leaders would disserve the very purpose of the territorial-incorporation doctrine, which is to respect the differing legal and social cultures of the United States' diverse unincorporated territories. *See Boumediene*, 553 U.S. at 757-58.

Nor is there anything particular to birthright citizenship that compels its extension here over the objections of American Samoa's elected government. Many "free government[s]" use *jus sanguinis*—citizenship by descent from citizen parents—as the determinant of citizenship. *See, e.g.*, *Faddoul v. INS*, 37 F.3d 185, 189 n.3 (5th Cir. 1994) (noting that "[*j*]*us sanguinis* was the standard determinant of citizenship under Roman law and continues to be the primary basis for citizenship throughout much of Europe, Africa and the Near East"); *Tuaua*, 788 F.3d at 308-09.

Plaintiffs largely ignore these premises. They instead quote language describing the right to citizenship as "fundamental" in other contexts. Br. 46-47. But that does not substitute for analysis under the territorial-incorporation doctrine. Other rights sometimes described as "fundamental," like the "fundamental right" to "trial by jury in criminal cases," *Duncan v. Louisiana*, 391 U.S. 145, 149 (1968), have been held not to apply in unincorporated territories, *see Balzac v. Puerto Rico*, 258 U.S. 298, 309-10 (1922) (Puerto Rico); *Dorr*, 195 U.S. at 147 (Philippines). And despite extolling the importance of citizenship as a political marker, plaintiffs believe that American Samoa has no choice at all in whether to seek that particular political tie. The fact that American Samoans may not share a "monolithic view on citizenship," Br. 51, is precisely why this Court should respect Congress's ability to consider the American Samoan people's own range of views about such "large-scale choices," *Sanchez-Valle*, 136 S. Ct. at 1876; *see Tuaua*, 788 F.3d at 310-12. All the more so given that individuals (like plaintiffs here) who are born in American Samoa and later take up residence in the United States may seek citizenship on favorable terms. *See* 8 U.S.C. § 1436.

Plaintiffs also suggest (Br. 45) that the territorial-incorporation doctrine 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 the Supreme 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*, 442 U.S. at 468-70 (recognizing Puerto Rico to be an unincorporated territory 80 years after its acquisition). Plaintiffs articulate no explanation for why the Citizenship Clause applies today when it did not when American Samoa first became a territory—particularly when American Samoa's elected representatives oppose that result.

II. At A Minimum, The District Court's Injunction Should Be Narrowed

As our opening brief explained in detail (U.S. Br. 31-39), the district court's injunction—which bars enforcement of 8 U.S.C. § 1408(1) and the State Department's implementing policies against "persons born in American Samoa," even if they are not plaintiffs here, Aplts. App. Vol. 3 at 628-29—violates basic principles of Article III standing and traditional rules of equity. Although the district court's relief largely tracks the language of plaintiffs' complaint, *see* Aplts. App. Vol. 1 at 53, 55, 57, plaintiffs assert that they did not intend that request to reach beyond plaintiffs as parties to the suit, Br. 4 n.2, and do not attempt to defend the scope of the relief entered. Indeed, plaintiffs expressly state that they "do not object if the Court wishes to clarify that the injunction applies only to them." *Id.* Thus, at a minimum, this Court should clarify that the injunction applies only to the individual plaintiffs in this suit.

CONCLUSION

For the foregoing reasons, the judgment of the district court should be reversed. At a minimum, the court's injunction should be narrowed to apply only to plaintiffs.

Respectfully submitted,

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This brief complies with the type-volume limit of Federal Rule of Appellate Procedure 32(a)(7)(B) because it contains 6,006 words. This brief also complies with the typeface and type-style requirements of Federal Rule of Appellate Procedure 32(a)(5)-(6) because it was prepared using Microsoft Word 2016 in Garamond 14-point font, a proportionally spaced typeface.

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I hereby certify that on May 26, 2020, I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the Tenth Circuit by using the appellate CM/ECF system. Participants in the case are registered CM/ECF users, and service will be accomplished by the appellate CM/ECF system.

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