Nos. 20-4017 and 20-4019

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 U.S. District Court for the District of Utah,
Judge Clark Waddoups, No. 1:18-cv-00036-CW

BRIEF OF CITIZENSHIP SCHOLARS AS *AMICI CURIAE* IN SUPPORT OF REHEARING EN BANC

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Constitutional Provisions, Statutes, and Treaties

Other Authorities

INTRODUCTION AND INTEREST OF *AMICI CURIAE*

Amici Curiae are scholars of law, history, and political science who have written on the history of American citizenship.[1] *Amici* write to urge that *en banc* review be granted, not only for the reasons set forth in plaintiffs-appellees' petition, but also because the Panel majority's decision rests on premises sharply at odds with the historical record. Specifically, the Fourteenth Amendment's Citizenship Clause codified and reconfirmed the birthright-citizenship rule in place since the Founding: all born within the dominion and allegiance of the United States are U.S. citizens. Review is merited because the case involves a question of exceptional importance: access to birthright citizenship that is constitutive of the U.S. nation and among the Constitution's most precious individual guarantees.[2] The panel majority's decision also conflicts with *United States v. Wong Kim Ark*, 169 U.S. 649 (1898).

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[1] The scholars who join this brief are listed in Appendix A. *Amici* confirm under Rule 29(a)(4)(E) that no counsel for a party authored this brief in whole or part; no party or party's counsel contributed money intended to fund preparing or submitting this brief; and no person other than *Amici* and their counsel contributed money that was intended to fund preparing or submitting this brief.

[2] The Panel majority's decision reduces the security of citizenship for natives of the territories. American Samoans who naturalize can lose their citizenship over any error (even if minor or unintentional) on their

At the panel stage, an overlapping group of citizenship scholars submitted an *amicus* brief showing:

(1) At the U.S. founding, the long-settled English common-law rule was that all born within the dominion and allegiance of the sovereign were subjects and that dominion extended to the sovereignty's outermost borders. (Dkt. 20, Citizenship Scholars *Amicus Brief* ("Scholars' Br."), 5-7.)

(2) The Founders and early American courts and commentators concurred that the United States adopted the English common law, with citizens replacing subjects. (*Id.* at 3-10, 14-16.)

(3) After *Dred Scott v. Sanford*, 60 U.S. 93 (1857), briefly ratified a race-based exception to the common-law rule, the Fourteenth Amendment's Citizenship Clause overruled that decision, reaffirming the common-law rule. (Scholars' Br. 11-17.)

(4) The late-nineteenth-century Supreme Court repeatedly affirmed that the U.S. rule codified in the Fourteenth Amendment was the English common-law rule, most notably in *Wong Kim Ark*. (Scholars' Br. 12-17.)

(5) Hence, through the nineteenth century's end, the U.S. practice, broken by the subsequently repudiated *Dred Scott* decision, was that birthright citizenship operated everywhere within U.S. borders. (*Id.* at 3-17.)

(6) Prior to 1901, the U.S. Constitution, state constitutions, and American courts established that, with an exception for members

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naturalization application. *See* Immigration Legal Resource Center, *Denaturalization and Revocation of Naturalization* 1 (Feb. 2020), https://www.nationalimmigrationproject.org/PDFs/practitioners/practice_advisories/fed/2020_07Apr_denaturalization-pa.pdf. Statutes ensuring *jus soli* citizenship in other territories may be repealed.

of Indian Tribes, all inhabitants of the United States were either citizens or aliens. (*Id.* at 17-22.)

(7) The one exception—the doctrine of *Dred Scott*—was conclusively rejected by the Citizenship Clause, which reaffirmed the binary division of nontribal inhabitants into citizens and aliens. (*Id.* at 20-21.)

(8) To achieve racist ends, twentieth-century administrators and lawmakers sought to resurrect a middle category of not-quite-citizens that the Supreme Court expressly declined to recognize. (*Id.* at 22-26.)

The Panel majority departed from this analysis based on three premises, each of which was necessary to the result the Panel majority reached, and none of which can be squared with the historical record.

The Panel majority reasoned:

(1) The "consistent practice of the American government since our nation's founding" was that "citizenship in the territories comes from a specific act of law, not from the Constitution." (Op. 12.)

(2) *Wong Kim Ark* may be contravened because (a) "English conceptions regarding territorial acquisition from that era differ markedly from . . . the role ascribed to consent to citizenship by the Founders" (Op. 20); (b) the Court's decision did not contemplate unincorporated territories (Op. 22); and (c) several Justices in *Downes v. Bidwell*, 182 U.S. 244 (1901), intimated disfavoring the *Wong Kim Ark* framework for unincorporated territories (Op. 23).

(3) It is unclear whether the Citizenship Clause applies to unincorporated territories, because the relevant historical materials do not address unincorporated territories. (Op. 25-30.)

As detailed below, none of these assertions can be sustained.

ARGUMENT

I. The Panel Majority Is Wrong that "the Consistent Practice of the American Government since Our Nation's Founding" Was that "Citizenship in the Territories Comes from a Specific Act of Law, Not from the Constitution."

Reams of evidence before this Court at the panel stage indicate that, from the Founding through the end of the nineteenth century, the United States followed the English common-law rule that birth within the territorial borders and allegiance of the nation brought U.S. citizenship. (Scholar's Br. 3-17.) The Panel majority disagrees without citing persuasive evidence.

The Panel majority's primary citations are provisions from treaties accomplishing expansions in 1803, 1848, and 1867, which it mistakenly asserts "show that citizenship was not assumed to automatically extend with sovereignty." (Op. 11-12.) But the cited provisions all concern *existing* (already-born) inhabitants of acquired lands. *See* Treaty of Peace, Friendship, Limits and Settlement (Treaty of Guadalupe Hidalgo), Mex.-U.S., art. VIII, Feb. 2, 1848, 9 Stat. 922; Cession of Alaska, U.S.-Russ., art. III, Mar. 30, 1867, 15 Stat. 539; Cession of Louisiana, Fr.-U.S., art. III, Apr. 30, 1803, 8 Stat. 200. They say nothing about the citizenship of those born in territories that have

already come within U.S. sovereignty—indicating that constitutional law or common law provided the rule in such cases.[3]

The Panel majority's other evidence is equally unavailing. To support its claim that "citizenship generally came from some kind of ad hoc legal procedure . . . rather than as an automatic individual right guaranteed by the Constitution," (Op. 10), the panel majority relies on a stray sentence in a modern immigration practice manual (Op. 10-11), which in turn cites only a U.S. State Department publication that itself contains no historical evidence in support of the proposition. Charles Gordon et al., 7 *Immigration Law and Procedure* § 92.04[1][a] (2020) (citing U.S. Department of State, 7 *Foreign Affairs Manual* 1121 (2005) *since recodified* 8:302 (2020)). The Panel majority also quotes Kal Raustiala's book, *Does the Constitution Follow the Flag?* (2009): "[T]erritory could be sovereign American soil for some purposes, yet still

[3] Worse, the Panel majority relies on provisions that foreign powers demanded even when the United States insisted that any such provisions duplicated existing U.S. law. *See, e.g.*, James K. Hosmer, *The History of the Louisiana Purchase* 140 (1902); *The Treaty Between the United States and Mexico*, Sen. Exec. Doc. No. 30-52, at 83. Moreover, early U.S. congresses repeatedly enacted statutes declarative of existing citizenship-from-birth doctrine out of "superabundant caution." *Lynch v. Clarke*, 1 Sand. Ch. 583, 248 (N.Y. Ch. 1844).

be foreign for others." (Op. 11 (quoting Raustiala, *supra*, at 46).) The majority strips these words from their context to suggest that territory might be treated as within U.S. sovereignty for some constitutional purposes and as foreign for other constitutional purposes. Not so. Raustiala is clear that constitutional sovereignty depends on an "act by the political branches," *i.e.*, a statute or treaty formalizing the acquisition. Raustiala, *supra*, at 45; *accord* Michael D. Ramsey, *Originalism and Birthright Citizenship*, 109 Georgetown L.J. 405, 429-32 (2020). Raustalia's point in the sentence that the Panel majority quotes is that territories that are domestic for constitutional purposes may be foreign for some non-constitutional purposes, such as provisions of international law or certain U.S. statutes. Raustiala, *supra*, at 43-47.

II. Contrary to the Panel Majority's Decision, *Wong Kim Ark* Settles the Question in this Case.

As the citizenship scholars explained at the panel stage (Scholars Br. 3-17), *Wong Kim Ark* held that the United States adopted as its birthright-citizenship rule the English common-law test of birth within the dominion and allegiance of the sovereign, abided by that rule without relevant alterations, then codified that rule into its Constitution. *See also Wong Kim Ark*, 169 U.S. at 654 (Constitution,

including the Citizenship Clause, should "be interpreted in the light of the common law"); *Smith v. Alabama*, 124 U.S. 465, 478 (1888) (U.S. Constitution "framed in the language of the English common law," so undefined constitutional terms should be read "in the light of" it); *Carmel v. Texas*, 529 U.S. 513, 521 (2000) ("necessary explanation" for undefined term in Constitution "derived from English common law"); *Dawson's Lessee v. Godfrey*, 8 U.S. (4 Cranch) 321 (1808) (applying common law to determine citizenship); *M'Ilvaine v. Coxe's Lessee*, 6 U.S. (2 Cranch) 280 (1805) (same). As the Panel majority implicitly acknowledged, (Op. 17-21), plaintiffs would win under that rule.

The Panel majority's contrary result rests on an inaccurate understanding of the U.S. embrace of portions of the English common law. To adapt the English common law to U.S. ideals and circumstances, early U.S. authorities abandoned some parts, took up others, and altered others still. *See, e.g.*, *Van Ness v. Pacard*, 27 U.S. (2 Pet.) 137, 143-44 (1829); William E. Nelson, *The Americanization of the Common Law* 65-176 (1994). The Panel majority is right that the English common-law subject-from-birth rules here did not emphasize consent. (Op. 20-21.) But the Panel majority omits to mention that, long

before *Wong Kim Ark*, the United States paired its embrace of citizenship as a birthright with a rejection of perpetual allegiance. *See* Expatriation Act of 1868, 15 Stat. 223, 223 ("expatriation is a natural and inherent right"). The right to voluntarily expatriate ensured that the citizenship that one acquired as a birthright could be rejected.

Nor does *Downes v. Bidwell*, 182 U.S. 244 (1901), undercut *Wong Kim Ark*. In *Downes*, a fractured 5–4 majority that generated no majority opinion rejected a Uniformity Clause challenge to a tariff on Puerto Rican trade. Two opinions on behalf of a total of four Justices digressed to engage in racist ruminations on reasons not to naturalize inhabitants of new territories. But such stray comments of a minority of the Court did not overturn reasoning necessary to the Court's decision in *Wong Kim Ark*.

A mere three years later, the Court in *Gonzales v. Williams*, 192 U.S. 1 (1904), expressly declined the invitation to transform the race-based discomfort of several justices into a new citizenship rule. The question presented in *Gonzales* was whether Puerto Ricans were aliens, hence subject to immigration laws. The Court unanimously held that Puerto Ricans were not aliens, hence not subject to immigration

restrictions. 192 U.S. at 15. As to whether they were U.S. citizens, the Court left the holding in *Wong Kim Ark* undisturbed by expressly declining to opine on the question. *Id*. at 12. The Court has maintained that stance since. (*See* Scholars Br. 22-26.) The status of noncitizen U.S. national was the sole invention of twentieth-century federal lawmakers and administrators who were pursuing race-based goals. (*See id.*)

III. The Panel Majority Wrongly Found the Historical Evidence Inadequate.

Despite the extensive authority cited in the citizenship scholars' panel-stage brief that the consistent U.S. rule codified in the Fourteenth Amendment is that birth within the dominion (and allegiance) of the nation brings citizenship, three errors led the panel majority to characterize the historical evidence as inadequate. One—the erroneous assumption that U.S. citizenship always came from an act of law rather than the Constitution—was discussed in Part I.

The second error is the Panel majority's too-hasty dismissal of certain historical evidence as "[i]solated statements" of "legislative history." (Op. 27 (alteration in original) (quoting *Garcia v. United States*, 469 U.S. 70, 78 (1984) (interpreting a federal statute).) This is not a case that involves using legislative history to interpret a statute.

The relevant sources concern the drafting history of the Fourteenth Amendment, which courts and commentators routinely draw upon in interpreting that amendment. *See, e.g.*, *Wong Kim Ark*, 169 U.S., 698-99; *Brown v. Board*, 347 U.S. 483, 489 (1954) (recounting reargument that "covered exhaustively consideration of the Amendment in Congress"); Ramsey, *supra*, at 425-26 nn. 91-92, passim, *cited by* Op. 40 n.1 (Tymkovich, J., concurring). Nor are the statements isolated. They permeate the Senate's thorough discussion of the clause, and are not contradicted by anything in the debates. (Scholars' Br. 12-13.) *See also* Ramsey, *supra*, at 427-29.

The Panel majority's third error is its fundamentally anachronistic dismissal of all pre-twentieth-century evidence as inattentive to the "distinction between incorporated and unincorporated territories," (Op. 27). In reality, there *was no distinction* between "incorporated and unincorporated territories" until the *Insular Cases* of 1901 first invented the concept of unincorporated territory. (Scholars' Br. 17-22.) Hence, pre-twentieth-century references to territories were understood by speakers and audiences alike to refer to *all* territories.

The Panel majority was wrong to conclude that the authors and ratifiers of the Fourteenth Amendment were unfamiliar with territories like "those around which this case turns." (Op. 29.) Indeed, the Panel majority buries the lede in observing that existing territories during ratification of the Fourteenth Amendment were "*generally* geographically contiguous, in the process of being settled by American citizens, and destined for statehood." (*Id.* (emphasis added).) As the adverb "generally" reflects, one territory—Alaska—was noncontiguous, not destined for rapid large-scale settlement, nor yet certain to become a state. *See* Eric Sandberg, *A History of Alaska Population Settlement* 6 (Apr. 2013) (less than 500 white settlers in 1880 Alaska); Stephen Haycox, *Alaska* 268 (2002) (Alaska statehood contingent on World War II bringing "increased spending, a growing population, and broader national awareness").

Indeed, the Citizenship Clause was so well understood to embody the English common-law rule that its appearance alongside the Fourteenth Amendment's rights guarantees caused a fundamental shift in U.S. foreign policy. Before the Fourteenth Amendment, the United States never went fifteen years without expanding its borders. Sam

Erman, *Almost Citizens* 12 (2018). Afterward, a more-than-thirty-year gap between annexations yawned. *Id.* The reasons were the Fourteenth Amendment and the racial character of populations under consideration. *Id.* U.S. officials still proposed annexations—Dominican Republic, Virgin Islands, Hawai'i—but now opponents defeated them by pronouncing without contradiction that the Fourteenth Amendment would require citizenship and rights for the (mostly non-white) residents who would be born post-annexation. *See, e.g.*, *id.* at 1-26.

The Panel majority reasons the Thirteenth Amendment's text shows that the Constitution envisions places outside the United States yet subject to U.S. jurisdiction. (Op. 26.) That Amendment describes places "within the United States, or any place subject to their jurisdiction." However, many places are subject to U.S. jurisdiction yet outside U.S. borders: embassies, ships, occupied lands, etc. *See, e.g.*, Jeffrey E. Zinsmeister, *In Rem Actions Under U.S. Admiralty Jurisdiction as an Effective Means of Obtaining Thirteenth Amendment Relief to Combat Modern Slavery*, 93 Cal. L. Rev. 1249, 1251 (2005) (ships); Eileen P. Scully, *Bargaining with the State from Afar: American Citizenship in Treaty Port China, 1844-1942* (2001) (Treaty Port

China).[4] Hence, the Thirteenth Amendment does not undermine *amici*'s contention that the Citizenship Clause was understood to apply to all territories, unincorporated or otherwise.

CONCLUSION

Rehearing *en banc* is warranted.

August 6, 2021

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[4] The Panel majority's fallback is the Fourteenth Amendment's grant to those born or naturalized in the United States of citizenship "of the United States and of the State wherein they reside." But that provision addresses one's current residence. A Massachusetts native relocating to California trades Massachusetts citizenship for California citizenship. Relocating instead to a territory means residence—and thus citizenship—in no state. Moreover, the Panel majority's reading is foreclosed by the *Slaughter-House Cases*, 83 U.S. 36, 72-73 (1873); *Wong Kim Ark*, 169 U.S. at 677, and would produce an absurd result never contemplated by anyone: that natives of Washington, D.C., lack Fourteenth Amendment citizenship.

APPENDIX

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CERTIFICATE OF DIGITAL SUBMISSION

I hereby certify that (1) all required privacy redactions have been made; (2) if required to file additional hard copies, the ECF submission will be an exact copy of those documents; and (3) the electronic submission was scanned for viruses and found to be virus-free.

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CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the type-volume limitation of Fed. R. App. P. 29(b)(5) because it contains 2,599 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 Century Schoolbook typeface using Microsoft Word for Office 365.

May 12, 2020

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CERTIFICATE OF SERVICE

I hereby certify that I filed the foregoing with the Clerk of the United States Court of Appeals for the Tenth Circuit using the CM/ECF system this 6th day of August, 2021, and that a copy was served on all counsel of record by the CM/ECF system.

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