Nos. 20-4017, 20-4019

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

JOHN FITISEMANU, et al.,
Plaintiffs-Appellees,

v.

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

and

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

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

BRIEF OF AMICI CURIAE MEMBERS OF CONGRESS, FORMER MEMBERS OF CONGRESS, AND FORMER GOVERNORS OF GUAM, THE NORTHERN MARIANA ISLANDS, PUERTO RICO, AND THE U.S. VIRGIN ISLANDS IN SUPPORT OF PETITION FOR REHEARING EN BANC

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STATEMENT OF INTEREST OF AMICI CURIAE

Amici are a bipartisan group of current and former elected officials of the United States Territories of Guam, the Northern Mariana Islands ("NMI"), Puerto Rico, and the U.S. Virgin Islands (the "Territories").[1] Their interest in this case is profound: Under the majority opinion's view, those born in the Territories enjoy citizenship not as a matter of constitutional birthright, but as mere congressional privilege. Thus, the citizenship status of the people born in *all* Territories—and not just American Samoa—is at stake. Further, since birthright citizenship has existed in these four Territories for decades, the experiences of amici can show that U.S. citizenship is fully harmonious with the preservation of each Territory's cultural heritage and political autonomy.

Congresswoman Stacey Plaskett represents the U.S. Virgin Islands in the U.S. House of Representatives and has served in that role since 2015.

Congressman Michael F.Q. San Nicolas represents Guam in the U.S. House of Representatives and has served in that role since 2019.

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

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

[1] No party's counsel authored this brief in whole or in part, and no party, party's counsel, or other person contributed money that was intended to fund preparing or submitting this brief.

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

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

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

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

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INTRODUCTION AND SUMMARY OF ARGUMENT

Under the Constitution, "[a]ll persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States." U.S. Const. amend. XIV, § 1. While acknowledging that American Samoans owe "permanent allegiance" to the United States, Op. at 6 (quoting 8 U.S.C. § 1101(21), (22)), and that American Samoa has been an American territory "[f]or over a century," Op. at 3, the majority opinion nevertheless concludes that the people of American Samoa are not constitutionally entitled to citizenship. Op. at 4. In the majority's view, the Territories are not "in the United States" for purposes of the Fourteenth Amendment and thus the citizenship status of their residents "properly falls under the purview of Congress." *Id*.

This conclusion is momentous, creating a divisive two-tiered citizenship structure whereby individuals born in the fifty states are *constitutionally* entitled to birthright citizenship, while those born in the Territories may receive citizenship only as a *favor* dispensed by Congress, capable of being withdrawn at will. Because this holding affects millions of individuals born in the Territories—nearly all of whom are not parties to this suit—this Court should grant en banc review.

ARGUMENT

I. THE MAJORITY OPINION THROWS THE CITIZENSHIP STATUS OF U.S. CITIZENS BORN IN GUAM, THE NORTHERN MARIANA ISLANDS, PUERTO RICO, AND THE VIRGIN ISLANDS INTO A STATE OF PERPETUAL UNCERTAINTY, MAKING THIS A CASE OF EXCEPTIONAL PUBLIC IMPORTANCE.

The reverberations of the majority's two-tiered citizenship structure extend far beyond the three individual plaintiffs in this case, and even beyond American Samoa, making this case a matter of "exceptional public importance." *See* 10th Cir. R. 35.1(A). If American Samoa is not "in the United States" for purposes of the Citizenship Clause, then neither is Guam, neither is the NMI, neither is Puerto Rico, and neither is the U.S. Virgin Islands. Individuals born in these territories would thus enjoy citizenship as a mere congressional privilege, not as a matter of constitutional law.

While the two majority judges did not adopt the same reasoning, both ultimately defer to Congress on citizenship questions: Congress could withdraw

citizenship from any Territories in the future. Judge Tymkovich squarely concludes that "Congress has the authority to decide the citizenship status of unincorporated territorial inhabitants." Concurrence at 4. And while Judge Lucero does not examine whether constitutional citizenship would be "impracticable and anomalous" if applied to territories besides American Samoa, his reasoning likewise suggests that Congress's decision would control. *See* Op. at 36 n.26 (agreeing that "the political branches" are "best positioned to consider the wishes of the American Samoan people" in the event of changed circumstances in the future and that the "wishes" of its residents "are best acted upon by Congress").

Because the Supreme Court has held that citizenship resulting from legislative grace is not entitled to the same protections as Fourteenth Amendment birthright citizenship, this conclusion has profound implications for the millions of current U.S. citizens born in the Territories. Under the majority opinion, these individuals would remain citizens only at the pleasure of Congress, a status that could be revoked at the whim of a temporary legislative majority. *See Rogers v. Bellei*, 401 U.S. 815, 835 (1971) (holding that that Congress can "take away an American citizen's citizenship without his assent" when his citizenship is "not based upon the Fourteenth Amendment"); *see also González-Alarcón v. Macías*, 884 F.3d 1266, 1277 n.5 (10th Cir. 2018) (discussing *Rogers*).

The inherently unstable nature of citizenship by legislative grace relegates these individuals to a second-class status lacking the protection "against [the] congressional forcible destruction of [their] citizenship, whatever [their] creed, color, or race" the Citizenship Clause affords. *Afroyim v. Rusk*, 387 U.S. 253, 268 (1967). Without that protection, people in the Territories who have lived their entire lives as U.S. citizens could face the very real danger of having their citizenship revoked by a temporary congressional majority—*without* any consent or voting representation from the people of the Territories themselves—were that majority to find it politically convenient to do so. At stake in this case is thus a fundamental question of Constitutional law that reverberates well beyond the Samoan archipelago.

That possibility must be taken seriously in light of the continued marginalization and invisibility faced by residents of the Territories. For decades, they have been pushed to the periphery of American democracy through disparities in federal funding and access to federal programs. For example, unlike the States, the Territories receive federal Medicaid matching funds at a fixed rate, irrespective of need, which has created significant funding shortfalls.[2]

[2] Selena Simmons-Duffin, A*merica's 'Shame': Medicaid Funding Slashed in U.S. Territories*, NPR (Nov. 20, 2019), https://www.npr.org/sections/health-shots/2019/11/20/780452645/americas-shame-medicaid-funding-slashed-in-u-s-territories.

The federal government has also inadequately addressed wider economic distress confronting the Territories. Puerto Rico, for instance, is on the fifteenth year of a recession that began in 2006. *See Puerto Rico v. Franklin Cal. Tax-Free Trust*, 136 S. Ct. 1938, 1942 (2016). To make matters worse, the Territories have recently been in the crosshairs of several catastrophic natural disasters. For example, in September 2017, Category 5 Hurricanes Irma and María wrecked Puerto Rico and the Virgin Islands within a two-week period. Two years later, the Federal Emergency Management Agency had only funded 218 long-term recovery projects across the islands, compared to the 3,700 projects supported by the agency in Florida and Texas two years after Hurricane Harvey hit the Gulf Coast region.[3] This lackluster federal response typifies the disparities the Territories face in the reach and speed of federal assistance.

The U.S. citizens who live in the Territories thus already face myriad challenges based on their perceived subordinate status. The majority's ruling only leaves them more vulnerable and creates additional questions about their belonging in the American polity. The Constitution demands more—it demands recognition of U.S. citizenship for anyone born on sovereign U.S. soil.

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

II. THE MAJORITY OPINION DEVIATES FROM THE SUPREME COURT'S LONGSTANDING INSTRUCTION NOT TO EXTEND THE DISCREDITED REASONING OF THE *INSULAR CASES*.

To reach its conclusion that individuals born in the Territories are not entitled to constitutional birthright citizenship, the fractured majority opinion embraces the dubious distinction between "unincorporated territories" and "incorporated territories"—a framework invented in the *Insular Cases*—and extends it into the realm of citizenship. *See* Op. at 13-16. This approach is both under-developed and troubling.

First, the *Insular Cases* deserve *at most* a narrow reading: "neither the [*Insular Cases*] nor their reasoning should be given any further expansion." *Reid v. Covert*, 354 U.S. 1, 14 (1957) (plurality opinion); *see also Fin. Oversight & Mgmt. Bd. v. Aurelius Inv., LLC*, 140 S. Ct. 1649, 1665 (2020) (describing the *Insular Cases* as "much-criticized"); *Torres v. Puerto Rico*, 442 U.S. 465, 475–76 (1979) (Brennan, J., concurring in the judgment) ("Whatever the validity of the [*Insular*] cases . . . those cases are clearly not authority for questioning the application of the Fourth Amendment—or any other provision of the Bill of Rights—to the Commonwealth of Puerto Rico in the 1970's." (citations omitted)).

Despite that admonition, the majority imports these decisions wholesale into Citizenship Clause jurisprudence, even though none of the *Insular Cases* construed the Citizenship Clause or resolved the clause's applicability to the Territories.

Instead, the *Insular Cases* addressed narrow disputes arising from the federal laws that initially facilitated commercial relations between the United States and the Territories. *See, e.g.*, *De Lima v. Bidwell*, 182 U.S. 1 (1901) (examining a federal customs law related to Puerto Rico); *Dooley v. United States*, 182 U.S. 222, 240 (1901) (examining a federal law imposing duties on goods from Puerto Rico); *Downes v. Bidwell*, 182 U.S. 244, 348 (1901) (same).

Second, besides being wholly inapposite to the question of citizenship, the *Insular Cases* were animated by racist notions about the supposed unsuitability of Territorial residents for citizenship and self-government. For example, in Justice White's concurrence in *Downes*, he opined that those living in the Territories were nothing more than "fierce, savage and restless" and therefore "absolutely unfit" to become citizens. 182 U.S. at 302, 306. The Court's decision in *Dorr v. United States* likewise referred to the Territories as "peopled by savages." 195 U.S. 138, 148 (1904).

The majority suggests that these racist decisions "can be repurposed to preserve the dignity and autonomy" of the peoples of the Territories, by "permit[ting] courts to defer to the preferences of indigenous peoples." Op. at 16. But bigoted foundations cannot be repurposed so easily. As explained in Section III *infra*, constitutional law is more than capable of accounting for and respecting the Territories' cultural heritage and political autonomy. The notion that these priorities

cannot be reconciled with our Constitution is not respect; it is just new clothes for the old notion that the people of the Territories are not amenable to our constitutional system of government.

III. THE MAJORITY OPINION ERRONEOUSLY DISREGARDS THE WELL-ESTABLISHED LESSON THAT U.S. CITIZENSHIP IS COMPATIBLE WITH THE CULTURAL HERITAGE AND POLITICAL AUTONOMY OF EACH TERRITORY.

The majority opinion credits the concern that, if American Samoans were considered citizens, various "traditional elements of the American Samoan culture could run afoul of constitutional protections." Op. at 8. Judge Lucero invokes this concern to support his conclusion that "extension of United States birthright citizenship is impracticable and anomalous." Op. at 38. However, American Samoa has, at most, offered vague speculation to support this view, while ignoring the fact that due process and equal protection rights already apply to American Samoans. *See* Dissent at 42–43 (Bacharach, J.) (citing cases). Amici, in contrast, can demonstrate through actual experience how U.S. citizenship is compatible with the Territories' local legal traditions, the preservation of their vibrant cultural heritage, and their political autonomy. Each Territory's continued ability to define and shape its own political destiny and relationship with the United States does not turn on the citizenship status of its residents.

For example, territorial governments already resemble their counterparts in the States in fundamental ways, with each territory having a tripartite government

headed by an elected governor. Most also have a multiparty legislature and a Supreme Court. Furthermore, "Congress has broad latitude to develop innovative approaches to territorial governance" and "may thus enable a territory's people to make large-scale choices about their own political institutions." *Puerto Rico v. Sanchez Valle*, 136 S. Ct. 1863, 1876 (2016).

Contrary to the majority's speculation, there is no concrete support for the notion that U.S. citizenship would threaten this arrangement or compromise American Samoa's local legal regime. In fact, American Samoa's own High Court, led by the then-Chief Judge of the Southern District of California sitting by designation, has already rejected an equal protection challenge to local land alienation rules. *See Craddick v. Territorial Registrar*, 1 Am. Samoa 2d 10 (App. Div. 1980). Moreover, any reservations due to future uncertainty attending recognition of birthright citizenship for the people of American Samoa are belied by the experiences of other Territories:

Guam. Since congressional recognition of U.S. citizenship in 1950, the people of Guam have maintained their distinctive culture, identity, and political autonomy. The indigenous CHamoru are the largest ethnic group in Guam, and both the Federal and territorial governments have taken steps to preserve the CHamoru language through legislation and public education campaigns. *See* Eduardo D.

Faingold, *Language Rights and the Law in the United States and its Territories* 78 (2018).

Puerto Rico. Recognition of birthright citizenship in Puerto Rico has not undermined the celebration of religious holidays, such as Holy Week and Three Kings Day, which are promoted and regulated by local laws. *See* Pedro A. Malavet, *The Accidental Crit II: Culture and the Looking Glass of Exile*, 78 Den. U. L. Rev. 753, 774 (2001). Further, the harmonious relationship between Puerto Rican culture and U.S. citizenship has been enshrined in the Puerto Rican Constitution. P.R. Const. pmbl.

NMI. Recognition of birthright citizenship in the Northern Mariana Islands has not jeopardized its longstanding local laws. *See, e.g.*, *N. Mariana Islands v. Atalig*, 723 F.2d 682, 690 (9th Cir. 1984) (upholding rule providing for jury trials in criminal cases only under certain circumstances); *Rayphand v. Sablan*, 95 F. Supp. 2d 1133, 1136 (D. N. Mar. I. 1999) (malapportionment of the NMI Senate does not violate equal protection), *aff'd*, 528 U.S. 1110 (2000). Moreover, land alienation restrictions similar to those in American Samoa have survived constitutional scrutiny and remain in place throughout the NMI. *Wabol v. Villacrusis*, 958 F.2d 1450, 1462 (9th Cir. 1990) ("It would truly be anomalous to construe the equal protection clause to force the United States to break its pledge to preserve and protect [the NMI's] culture and property.").

U.S. Virgin Islands. Since Congress' recognition of citizenship in 1927, Virgin Islanders have continued to enjoy a unique culture deeply connected to their Afro-Caribbean and indigenous roots. For instance, quelbe—likely derived from the Islands' formerly enslaved people—is the territory's official music, with performances during Emancipation Day, which commemorates the 1848 uprising that ended slavery. [4]

* * *

From the Pacific to the Caribbean, these examples demonstrate that concerns about American Samoa's ability to "maintain[] a traditional and distinctive way of life" under birthright citizenship, Op. at 7, are unfounded. Citizenship is fully consistent with the preservation of the Territories' cultural heritage and political self-determination, and certainly not "impracticable and anomalous."

CONCLUSION

For the foregoing reasons, this Court should grant Plaintiff-Appellees' petition for en banc review and recognize that those born in American Samoa—and the other Territories—are birthright citizens under the Fourteenth Amendment.

[4] *Virtual Quelbe Concert Commemorates Emancipation Day*, V.I. Daily News (July 3, 2020), http://www.virginislandsdailynews.com/virtual-quelbe-concert-commemorates-emancipation-day/article_bde203af-397b-58d1-89a3-3325d9d4e9d4.html.

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CERTIFICATE OF DIGITAL SUBMISSION AND PRIVACY REDACTIONS

I hereby certify that:

1. All required privacy redactions have been made in compliance with 10th Cir. R. 25.5.
2. Amici have scanned this digital submission using the latest version of Symantec Endpoint Protection, which confirmed it is free of viruses.

Date: August 6, 2021 s/ David M. Zionts

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limit of Federal Rule of Appellate Procedure 29(b)(4) because it contains 2,587 words, excluding the parts of the brief exempted by Rule 32(f).

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Date: August 6, 2021 s/ David M. Zionts

CERTIFICATE OF SERVICE

I hereby certify that on August 6, 2021, I caused the Brief of Amici Curiae Members of Congress, Former Members of Congress, and Former Governors of Guam, the Northern Mariana Islands, Puerto Rico, and the U.S. Virgin Islands in Support of Petition for Rehearing En Banc to be filed with the Clerk of the United States Court of Appeals for the Tenth Circuit using the Appellate CM/ECF system, causing a true and correct copy to be served upon all counsel of record who are registered CM/ECF users.

Date: August 6, 2021 s/ David M. Zionts