Nos. 20-4017 & 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 United States District Court
for the District of Utah, No. 18-cv-36,
Before District Judge Clark Waddoups

BRIEF FOR SCHOLARS OF CONSTITUTIONAL LAW AND LEGAL HISTORY AS AMICI CURIAE SUPPORTING APPELLEES' PETITION FOR REHEARING EN BANC

MARK C. FLEMING
WILMER CUTLER PICKERING
HALE AND DORR LLP
60 State Street
Boston, MA 02109
(617) 526-6000

PAUL R.Q. WOLFSON
ANDRES C. SALINAS
WILMER CUTLER PICKERING
HALE AND DORR LLP
1875 Pennsylvania Ave., NW
Washington, DC 20006
(202) 663-6000
Paul.Wolfson@wilmerhale.com

August 6, 2021

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

CONSTITUTIONAL PROVISIONS AND RULES

INTEREST OF AMICI CURIAE[1]

Amici curiae are Rafael Cox Alomar, Professor of Law at the University of the District of Columbia David A. Clarke School of Law; J. Andrew Kent, Professor of Law at Fordham Law School; Gary S. Lawson, Philip S. Beck Professor of Law at Boston University School of Law; Sanford V. Levinson, W. St. John Garwood and W. St. John Garwood, Jr. Centennial Chair in Law at the University of Texas at Austin School of Law; Christina Duffy Ponsa-Kraus, George Welwood Murray Professor of Legal History at Columbia Law School; and Stephen I. Vladeck, A. Dalton Cross Professor in Law at the University of Texas at Austin School of Law. Amici have extensively studied the constitutional implications of American territorial expansion and have written and edited works about the Supreme Court's *Insular Cases*, in which the Court held that noncontiguous islands annexed at the end of the nineteenth century were part of the United States for some purposes but not for others. Amici take no position on the ultimate merits of Appellees' constitutional claims, but they maintain a scholarly interest in ensuring that the limited scope of the *Insular Cases* be accurately understood and the doctrine commonly attributed to these decisions not be further

[1] Pursuant to Federal Rule of Appellate Procedure 29(b)(3), amici certify that no party's counsel authored this brief in whole or in part, and that no one other than amici and their counsel made any monetary contribution toward this brief's preparation or submission. All parties have consented to the filing of this brief.

extended. In light of that interest, amici filed a brief before the merits panel, *see* Amicus Br. of Scholars of Constitutional Law & Legal History, Doc. #010110346687 (May 12, 2020), and they now submit this brief to further explain why the panel majority's "repurposing" of the *Insular Cases* was erroneous and warrants correction by the en banc Court.

ARGUMENT

In holding that the Citizenship Clause does not confer birthright citizenship on individuals born in American Samoa, the panel majority relied extensively on the *Insular Cases*, which the majority itself acknowledged are "disreputable to modern eyes" because of their racist and imperialist underpinnings, Op. 15, and which the Supreme Court has long said should not be "given any further expansion," *Reid v. Covert*, 354 U.S. 1, 14 (1957) (plurality opinion). Nonetheless, the majority reasoned that the *Insular Cases* can be "repurposed to preserve the dignity and autonomy of the peoples of America's overseas territories," because the cases can be interpreted to stand for the sanitized "proposition … that constitutional provisions apply only if the circumstances of the territory warrant their application." Op. 14, 16. From that premise, Judge Lucero concluded that it would be "impracticable and anomalous" to "impose citizenship" over the supposed "preferences of the American Samoan people." Op. 36. Chief Judge Tymkovich, while not adopting that "impracticable and anomalous"

approach, nonetheless concluded that American Samoans are not entitled to birthright citizenship because "of the historical practice … that Congress has the authority to determine the citizenship status of unincorporated territorial inhabitants." Concurrence 4.

Neither of these approaches reflects the proper method of constitutional interpretation in this case, and both are profoundly flawed by their reliance on the *Insular Cases*. The precise question presented here is whether the phrase "the United States," as used in the Citizenship Clause, includes American Samoa. Historical practices that post-date the Citizenship Clause's enactment are not dispositive of that question, nor are the preferences of the government of the day in American Samoa.

Amici submit this brief to highlight two fundamental errors in the majority's analyses. *First*, the *Insular Cases* framework—particularly the "impracticable and anomalous" test later decisions have drawn from those cases—is inapposite here, where the constitutional provision at issue defines its own geographic scope. *Second*, even if the *Insular Cases* framework were relevant, the panel majority applied it incorrectly, because the framework does not permit unquestioning deference to Congress or the territorial government currently in power; rather, it requires serious scrutiny of whether application of the relevant constitutional provision would actually threaten the legal and cultural traditions of the territory at

issue. Both of these errors raise questions of exceptional importance because they fundamentally affect how the Constitution applies in U.S. territories. Fed. R. App. P. 35(a)(2). The Court should accordingly grant rehearing.

I. THE *INSULAR CASES* DO NOT DETERMINE THE CITIZENSHIP CLAUSE'S SCOPE

A. As Judge Lucero noted, "the lodestar of the Insular framework has come to be the 'impracticable and anomalous' standard." Op. 33. But irrespective of the merits of "impracticable and anomalous" as a test, the Supreme Court has never applied it to a case like this. Nor is there any evidence that the test was ever intended to answer this type of question. Rather, the Supreme Court has applied the test to determine whether individual constitutional rights—always of undefined geographic scope—apply to particular areas outside the fifty States. Those cases are categorically different from this one, where the constitutional provision at issue defines its own geographic scope and the question is simply whether that defined area encompasses American Samoa.

The "impracticable and anomalous" test originates in Justice Harlan's concurrence in *Reid v. Covert*, 354 U.S. 1 (1957), where the Supreme Court held that civilian dependents living with servicemembers on military bases abroad enjoy the Sixth Amendment right to trial by jury in capital cases. The plurality opinion found the *Insular Cases* immaterial to that question and stressed that "their reasoning" should not "be given any further expansion." *Id.* at 14. Justice Harlan,

however, cited the *Insular Cases* to argue "there is no rigid and abstract rule that Congress, as a condition precedent to exercising power over Americans overseas, must exercise it subject to all guarantees of the Constitution, no matter what the conditions and considerations are that would make adherence to a specific guarantee altogether impracticable and anomalous." *Id.* at 67, 74 (Harlan, J., concurring in the result). For Justice Harlan, in other words, "the question [was] which guarantees of the Constitution should apply in view of the particular circumstances, the practical necessities, and the possible alternatives which Congress had before it." *Id.* at 75. Under that functional approach, Justice Harlan saw no reason to deny the American civilians at issue a jury trial.

As the panel majority noted (Op. 15-16), the Supreme Court has continued to invoke the "impracticable and anomalous" test, but only in cases involving rights questions—not in questions of geographic scope. For example, in a concurrence in *United States v. Verdugo-Urquidez*, 494 U.S. 259 (1990), Justice Kennedy urged reliance on the "impracticable and anomalous" approach to resolve whether the Fourth Amendment applied to the search of a Mexican national's home in Mexico conducted jointly by federal and Mexican agents. *See id.* at 277-278. Then, in *Boumediene v. Bush*, 553 U.S. 723 (2008), the Court invoked the "impracticable and anomalous" standard as one of three factors relevant to

determining whether the Suspension Clause's habeas right is applicable at Guantánamo Bay. *See id.* at 759-760, 766.

Regardless of whether "impracticable and anomalous" was the proper approach in those cases, it has no relevance in this case. Unlike the constitutional provisions at issue in *Reid, Verdugo-Urquidez*, and *Boumediene*, the Citizenship Clause defines its own geographic scope. It provides that "[a]ll persons born or naturalized *in the United States*, and subject to the jurisdiction thereof, are citizens of the United States." U.S. Const. amend. XIV, § 1 (emphasis added). The question here is merely whether American Samoa is in "the United States" as that phrase is used in that Clause. The Supreme Court has never used the "impracticable and anomalous" test to answer that type of question.

That is for good reason: The "impracticable and anomalous" test requires courts to examine legal and cultural traditions—which are doctrinally relevant when determining the substantive status of individual rights even in the domestic context. Within the fifty States, "the Due Process Clause specially protects those fundamental rights and liberties which are … 'deeply rooted in this Nation's history and tradition.'" *Washington v. Glucksberg*, 521 U.S. 702, 720-721 (1997). Likewise, a "Bill of Rights protection is incorporated" against the States by virtue of the Due Process Clause "if it is 'fundamental to our scheme of ordered liberty,' or 'deeply rooted in this Nation's history and tradition.'" *Timbs v. Indiana*, 139 S.

Ct. 682, 687 (2019). In cases involving U.S. territories, the "impracticable and anomalous" standard takes a similar approach by asking whether the particular individual right at issue may apply harmoniously with the legal institutions and cultural traditions of the particular territory at issue.

In geographic scope cases, however, these pragmatic, cultural considerations are inapposite. The task here is not to define the precise substantive contours of citizenship; the task is merely to interpret the words "the United States." Practical circumstances have no bearing on that latter question.

B. Against this backdrop, the only case from the *Insular* series of even *potential* relevance here is *Downes v. Bidwell*, 182 U.S. 244 (1901), where the Court construed the phrase "the United States" as used in the Uniformity Clause of Article I, Section 8. But as Judge Bacharach noted in dissent (at 33), *Downes* provides "little insight" because it involved splintered opinions limited to the facts at hand, and because the Uniformity Clause and the Citizenship Clause were enacted to address dramatically different concerns. *See also* Amicus Br. of Scholars of Constitutional Law & Legal History 12-15. Indeed, the basic purpose of the Citizenship Clause was to "overturn[]" the infamous "Dred Scott decision." *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 73 (1873). That purpose counsels decidedly against a regime that allows Congress to draw distinctions among Americans for purposes of the rights and responsibilities of citizenship. The

Uniformity Clause, by contrast, reflects no such concerns, as its purpose is to protect *states* (not individuals) from exports and duties laid by the federal government or other states. Accordingly, none of the *Insular Cases*, including *Downes*, answers the Citizenship Clause question presented here.

II. EVEN IF THE *INSULAR CASES* WERE APPLICABLE, THE PANEL MAJORITY APPLIED THEM IMPROPERLY

The panel majority compounded its errors by applying the *Insular* framework incorrectly. After agreeing that the *Insular Cases* hold that "constitutional provisions apply only if the circumstances of the territory warrant" it, Op. 14, Chief Judge Tymkovich and Judge Lucero took differing approaches, neither of which can be squared with the *Insular Cases* themselves.

A. Chief Judge Tymkovich concluded that "either party's reading of the Citizenship Clause is plausible," so he "resolve[d] the tie in favor of historical practice," which he said instructed that "Congress has the authority to decide the citizenship status of unincorporated territorial inhabitants." Concurrence 4. But no case from the *Insular* series—including *Downes*—contains such a holding.[2] And

[2] Justice White's *Downes* concurrence makes statements indicating that he hoped the territorial incorporation doctrine would forestall a grant of citizenship to territorial inhabitants. But those statements were clearly dicta and, in any event, grounded in transparent notions of racial inferiority entitled to less precedential respect. *See Ramos v. Louisiana*, 140 S. Ct. 1390, 1405 (2020); Amicus Br. of Scholars of Constitutional Law & Legal History at 23-27. Moreover, Congress has broadly rejected that reasoning, as it has provided for citizenship in all of the

Boumediene squarely rejects the contention that "the political branches have the power to switch the Constitution on or off at will." 553 U.S. at 765. As the Court there explained, the "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." *Id.* Chief Judge Tymkovich's deference to Congress is irreconcilable with this precedent.

B. Judge Lucero, meanwhile, purported to apply the "impracticable and anomalous" standard, but he focused primarily on the apparent "preference against citizenship expressed by the American Samoan people through elected representatives." Op. 34. Setting aside the potential problems with attributing a single view to all American Samoans, deference to a territorial government is not a valid application of the "impracticable and anomalous" test. As noted above, the standard requires courts to scrutinize whether application of the constitutional provision would conflict with the legal institutions or cultural traditions of the territory. In *Boumediene*, for example, the Court concluded that the Suspension Clause should apply in Guantánamo because "[n]o Cuban court ha[d] jurisdiction over American military personnel … or the enemy combatants detained there," making any "practical barriers" to habeas review unlikely. 553 U.S. at 770.

---

remaining territories acquired at the end of the nineteenth century—except American Samoa.

Similarly, in his *Verdugo-Urquidez* concurrence, Justice Kennedy explained that the "impracticable and anomalous" approach counseled against application of the Fourth Amendment warrant requirement to searches conducted in Mexico given the "absence of local judges or magistrates … the differing and perhaps unascertainable conceptions of reasonableness and privacy that prevail abroad, and the need to cooperate with foreign officials." 494 U.S. at 278.

Perhaps an even more apt illustration is *King v. Morton*, 520 F.2d 1140 (D.C. Cir. 1975). There, the D.C. Circuit, citing Justice Harlan's *Reid* concurrence, held that application of the Sixth Amendment right in American Samoa turned on whether it would be "impracticable and anomalous." *Id.* at 1147. And the answer to that question, the D.C. Circuit explained, must "come from … evidence of actual and existing conditions" in the territory. *Id.* at 1148. To allow consideration of such evidence, the D.C. Circuit remanded to the district court, which subsequently held—over objections from American Samoan officials—that jury trials would be "entirely feasible" because the one "major cultural difference between the United States and American Samoa is that land is held communally in Samoa" and a "jury trial requirement in criminal proceedings would have no foreseeable impact on that system." *King v. Andrus*, 452 F. Supp. 11, 15-17 (D.D.C. 1977).

Although amici, again, take no position on whether the approaches in *Boumediene*, *Verdugo-Urquidez*, or *King* were the correct ones for those cases, there is no denying that Judge Lucero's analysis differs significantly. Admittedly, Judge Lucero noted briefly that potential "tension between individual constitutional rights and the American Samoan way of life (the *fa'a Samoa*)" was a "further concern." Op. 36-37. But rather than examine the "actual and existing conditions" in American Samoa, *King*, 520 F.2d at 1148, he concluded that there "is simply insufficient caselaw to conclude with certainty that citizenship will have no effect on the legal status of the *fa'a Samoa*" before adding that "even if the contrary conclusion were tenable, it is not the role of this court to second-guess the political judgment of the American Samoan people," Op. 38.

Respectfully, this analysis is the "impracticable and anomalous" approach in name only. The Supreme Court has, for one thing, never suggested that the test turns on whether there would be "no effect" on territorial institutions. Nor has the Court ever indicated that the current "political judgments" of territorial governments are relevant to the inquiry. In short, Judge Lucero's opinion not only applies the "impracticable and anomalous" test to a question the test was never intended to resolve, it modifies the test in a manner entirely unsupported by precedent. The Court should grant rehearing en banc to remedy this conflict with Supreme Court decisions regarding a question of exceptional importance.

CONCLUSION

The petition for rehearing en banc should be granted.

Respectfully submitted,

/s/ Paul R.Q. Wolfson

MARK C. FLEMING
WILMER CUTLER PICKERING
HALE AND DORR LLP
60 State Street
Boston, MA 02109
(617) 526-6000

PAUL R.Q. WOLFSON
ANDRES C. SALINAS
WILMER CUTLER PICKERING
HALE AND DORR LLP
1875 Pennsylvania Ave. NW
Washington, DC 20006
(202) 663-6000
Paul.Wolfson@wilmerhale.com

August 6, 2021

CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(g)(1), the undersigned hereby certifies that this brief complies with the length limitations set forth in Fed. R. App. P. 29(b)(4).

1. Exclusive of the exempted portions of the brief, as provided in Fed. R. App. P. 32(a)(7)(B) and Fed. R. App. P. 32(f), the brief contains 2,563 words.

2. The brief has been prepared in proportionally spaced typeface using Microsoft Word for Office 365 in 14-point Times New Roman font. As permitted by Fed. R. App. P. 32(g)(1), the undersigned has relied upon the word count feature of this word processing system in preparing this certificate.

/s/ Paul R.Q. Wolfson
PAUL R.Q. WOLFSON

ADDITIONAL CERTIFICATIONS

Pursuant to the Court's CM/ECF User's Manual, the undersigned hereby certifies the following:

1. All required privacy redactions have been made.

2. This ECF submission was scanned for viruses with Cylance Protect (version 2.1.1574.39, updated August 3, 2021), and according to the program, the file is free of viruses.

/s/ Paul R.Q. Wolfson
PAUL R.Q. WOLFSON

CERTIFICATE OF SERVICE

I hereby certify that on this 6th day of August, 2021, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Tenth Circuit using the appellate CM/ECF system. Counsel for all parties to the case are registered CM/ECF users and will be served by the appellate CM/ECF system.

/s/ Paul R.Q. Wolfson
PAUL R.Q. WOLFSON