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)

RESPONSE TO PETITION FOR REHEARING

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INTRODUCTION AND SUMMARY

Federal law provides that persons born in American Samoa—an unincorporated territory of the United States—are noncitizen nationals of the United States. 8 U.S.C. §§ 1101(a)(29), 1408(1). Noncitizen nationals are issued U.S. passports and may work and travel freely in the United States. In addition, noncitizen nationals may apply for naturalization upon taking up residence in any state (like plaintiffs here) or in any other U.S. territory. *Id.* § 1436; *see id.* § 1101(a)(36). American Samoa's democratically-elected government and its Delegate to the House of Representatives have intervened in this case to defend this unique status, which they view as important to preserving American Samoa's traditional way of life.

The panel here upheld this statutory scheme against constitutional challenge. That conclusion was in accord with Constitutional text and over 100 years of precedent and practice establishing that persons born in unincorporated territories are not born "in the United States" for purposes of the Citizenship Clause of the Fourteenth Amendment. As the Supreme Court has explained, Congress's power over the territories includes the power "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.)). In keeping with this recognition, Congress has long addressed by statute the citizenship status of individuals born in those territories, such as the Philippines, Puerto Rico, Guam, the Virgin Islands, and the Commonwealth of

the Northern Mariana Islands. And the panel decision here accords with the decision of every other circuit to consider the application of the Citizenship Clause to unincorporated territories. *See Tuaua v. United States*, 788 F.3d 300 (D.C. Cir. 2015); *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).

In seeking rehearing, plaintiffs have no account for this longstanding practice. Their argument for en banc review instead depends on the claim that the panel should have entirely disregarded the well-established distinction between incorporated and unincorporated territories and Congress's repeated reliance on that distinction. They base that assertion on a Supreme Court decision—*United States v. Wong Kim Ark*, 169 U.S. 649 (1898)—that both involved a person born in a State and predated the Court's territorial-incorporation decisions, and thus had no occasion to address the question presented here. The panel properly declined to discard over 100 years of precedent and practice on that basis. And more generally, plaintiffs' resistance to the territorial-incorporation doctrine, rooted in that doctrine's "disreputable" origins, ignores the ways in which that doctrine has been "repurposed to preserve the dignity and autonomy of the peoples of America's overseas territories." Op. 15, 16. Despite its origins, that doctrine today serves to allow respect for "America Samoa's unique culture and social structure." Op. 38 (opinion of Lucero, J.). En banc review is unwarranted.

STATEMENT

1. The Citizenship Clause of the Fourteenth Amendment 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, cl. 1. Individuals who do not fall within the scope of this provision "acquire citizenship by birth only as provided by Acts of Congress." *Miller v. Albright*, 523 U.S. 420, 424 (1998).

For United States territories, Congress has decided on a territory-by-territory basis whether and under what circumstances persons born in the territory (or already living in the territory at the time of acquisition) become U.S. citizens or nationals. Thus, Congress has enacted provisions addressing birthright citizenship for individuals born in Puerto Rico, the U.S. Virgin Islands, Guam, and the Northern Mariana Islands. 8 U.S.C. §§ 1402, 1406, 1407; Pub. L. No. 94-241, §§ 301, 303, 90 Stat. 263, 265-66 (1976) (codified at 48 U.S.C. § 1801 note). Conversely, Congress never enacted a birthright citizenship statute for the Philippines while it was a U.S. territory, and as a result, individuals "born in the Philippines during this period were American nationals" rather than citizens. *Barber v. Gonzales*, 347 U.S. 637, 639 n.1 (1954).

As with the Philippines, Congress has never enacted a birthright citizenship statute for American Samoa. The Immigration and Nationality Act (INA) defines American Samoa and Swains Island (a later-acquired island administered as part of

American Samoa) as "outlying possessions of the United States." 8 U.S.C. § 1101(a)(29). The INA provides that "[a] person born in an outlying possession of the United States" is a "national[], but not [a] citizen[], of the United States at birth." *Id.* § 1408(1); *see* U.S. Dep't of State, *Foreign Affairs Manual*, 8 FAM 308. A noncitizen national may, upon becoming "a resident of any State" or territory other than American Samoa, become a naturalized U.S. citizen, and (unlike other candidates for naturalization) is entitled to treat any period of residence in American Samoa toward the residency requirement for naturalization. 8 U.S.C. § 1436; *see id.* § 1101(a)(36) (defining "State" for these purposes to include territories other than American Samoa).

2. The district court concluded that 8 U.S.C. § 1408(1) was unconstitutional and enjoined its enforcement nationwide. The panel reversed. The majority concluded that the text and structure of the Constitution, as well as the legislative history of the Fourteenth Amendment, left the "geographic scope" of the Fourteenth Amendment "ambiguous." Op. 25; *see* Op. 25-27; Concurrence 2. The majority noted, however, the "long-settled distinction" between incorporated and unincorporated territories, Op. 28, reflected in "both binding precedent and over a century of unbroken historical practice," Op. 29. As the majority explained, "Congress has always wielded plenary authority over the citizenship status of unincorporated territories, a practice that itself harked back to territorial administration in the nineteenth century," Op. 30, and this "evidence of an unbroken

understanding of the meaning of the text, confirmed by longstanding practice, is persuasive," Op. 29.

The majority also rejected plaintiffs' argument that language from *United States v. Wong Kim Ark*, 169 U.S. 649 (1898), controlled the case. The majority observed that that case "concerned a man who was born in the state of California to two non-citizen parents who had immigrated from China," Op. 17, and thus "there could have been no argument that Wong was born outside American territory," Op. 19. Thus, the Supreme Court in that case did not decide how to determine the scope of "dominion" under the Fourteenth Amendment, and the English common law—which featured prominently in *Wong Kim Ark*—"has much less to say" about the relationship between the United States and American Samoa. Op. 19-20.

In Chief Judge Tymkovich's view, the "historical practice, undisturbed for over a century, that Congress has the authority to determine the citizenship status of unincorporated territorial inhabitants" was sufficient to resolve the case. Concurrence 4. Judge Lucero went further, however, considering whether it would be "impractical or anomalous" to apply the Citizenship Clause over the objections of the elected officials of American Samoa. Judge Lucero explained that birthright citizenship would not qualify as a "fundamental right" under the constricted definition of that term reflected in territorial-incorporation jurisprudence, Op. 32-33 (opinion of Lucero, J.), and emphasized that "a people's incorporation into the citizenry of

another nation ought to be done with their consent or not done at all," Op. 34 (opinion of Lucero, J.).

Judge Bacharach dissented. In his view, the historical evidence supported the conclusion that the territories were understood to be "in the United States" before the ratification of the Fourteenth Amendment. Dissent 6-14. He further concluded that the drafters of the Fourteenth Amendment intended to include the territories as well. Dissent 14-20. Judge Bacharach believed that *Wong Kim Ark* was, at a minimum, strongly persuasive dicta on the question. Dissent 22-24. In his view, other uses of the term "United States" in the Constitution did not alter this conclusion, even though he acknowledged that those uses demonstrated "that the term 'the United States' doesn't always include territories." Dissent 29. And Judge Bacharach dismissed the longstanding practice with respect to unincorporated territories because that practice postdated the ratification of the Fourteenth Amendment. Dissent 31-32. Finally, Judge Bacharach disagreed with Judge Lucero's conclusion that the application of the Citizenship Clause would be impractical or anomalous. Dissent 42-53.

ARGUMENT

The petition for rehearing should be denied. The panel decision correctly aligns this Court with the Supreme Court, every other circuit to consider the question, and over 100 years of unbroken practice in concluding that the Citizenship Clause of the Fourteenth Amendment does not apply to persons born in unincorporated

territories. Plaintiffs' attempts to manufacture a conflict with Supreme Court precedent—or with this Court's precedent emphasizing the importance of Supreme Court dicta—simply disregard the Supreme Court's explicit instruction that Congress has the power, exercised in 8 U.S.C. § 1408(1), "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.)).

A. Plaintiffs contend that rehearing is warranted because the panel decision conflicts with the Supreme Court's decision in *United States v. Wong Kim Ark*, 169 U.S. 649 (1898), which they regard as controlling on the question here. Pet. 9-11. The only "question presented" in *Wong Kim Ark* was "whether a child born in the United States, of parents of Chinese descent, who at the time of his birth are subjects of the emperor of China, but have a permanent domicile and residence in the United States, and are there carrying on business, and are not employed in any diplomatic or official capacity under the Emperor of China, becomes at the time of his birth a citizen of the United States, by virtue of the first clause of the fourteenth amendment." 169 U.S. at 653. The Court answered that question in the affirmative. *Id.* at 705. In doing so, the Court did not dwell on the undisputed proposition that the plaintiff in that case had been born "in the United States" for purposes of the Citizenship Clause, because he was born in a State (California). *See id.* at 652. Thus, as the majority here recognized, "*Wong Kim Ark* likewise only concerned allegiance—there could have been no

argument that Wong was born outside American territory." Op. 19. The Supreme Court's conclusion that Wong was "subject to the jurisdiction" of the United States, 169 U.S. at 705, in no way suggests that a person born in an unincorporated territory is covered by the Citizenship Clause.

Plaintiffs focus on the Supreme Court's general statements about the scope of English common law in *Wong Kim Ark*. Pet. 9-11. As the majority explained, however, while those statements emphasize that the common law is persuasive authority, *Wong Kim Ark* "does not incorporate wholesale the entirety of English common law as governing precedent" and likewise did not "consider, much less endorse, any aspect of the English common law's approach to defining the scope of the monarch's dominion." Op. 18, 19. Indeed, *Wong Kim Ark* itself cautioned against this sort of over-reading, repeating the longstanding "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.)). That is why every other court of appeals to consider the question has likewise concluded that *Wong Kim Ark* is not controlling. *Thomas v. Lynch*, 796 F.3d 535, 540-41 (5th Cir. 2015); *Tuaua*, 788 F.3d at 305; *Nolos*, 611 F.3d at 284; *Valmonte*, 136 F.3d at 920; *Rabang*, 35 F.3d at 1454.

Moreover, when the Supreme Court *has* considered the question of whether unincorporated territory is part of "the United States," it has answered that question in the negative. In *Downes v. Bidwell*, one of the collection of decisions known as the *Insular Cases*, the Court held that Puerto Rico is not part of "the United States" for purposes of the Tax Uniformity Clause of the Constitution, which states 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 263, 277-78, 287 (opinion of Brown, J.); *id.* at 341-42 (White, J., concurring); *id.* at 346 (Gray, J. concurring). And in *Downes*, all of the Justices in the majority further agreed that the Constitution should not be read to automatically confer citizenship on inhabitants of U.S. territories. Instead, "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." 182 U.S. at 279 (opinion of Brown, J.); *see id.* at 306 (White, J., concurring); *id.* at 345-46 (Gray, J., concurring). The Justices in the majority thus recognized that when the United States acquires various territories, the decision to afford citizenship is to be made by Congress. *Id.* at 280 (opinion of Brown, J.) ("In all these cases there is an implied denial of the right of the inhabitants to American citizenship until Congress by further action shall signify its assent thereto."); *see id.* at 306 (White, J., concurring); *id.* at 345-46 (Gray, J., concurring). And these points further undercut plaintiffs' reliance on *Wong Kim Ark*: as the majority pointed out, just three years after *Wong Kim Ark* was decided, a majority of Justices wrote or joined

opinions in *Downes* emphasizing Congress's power to determine the citizenship status of those in unincorporated territories—a proposition "unchallenged by any Justice." Op. 23.

The Supreme Court has since repeatedly applied these principles outside the context of the *Insular Cases*. In *Barber v. Gonzales*, 347 U.S. 637 (1954), the Supreme Court noted 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," but could not "become United States citizens." *Id.* at 639 n.1; *see Toyota v. United States*, 268 U.S. 402, 410-11 (1925). Similarly, in *Rabang v. Boyd*, the Supreme Court rejected "the erroneous assumption that Congress was without power to legislate the exclusion of Filipinos in the same manner as 'foreigners'" during the period when the Philippines was a U.S. territory, quoting Justice Brown's opinion in *Downes* to reaffirm Congress's power "to prescribe upon what terms the United States will receive [a territory's] inhabitants, and what their status shall be." 353 U.S. at 432. And the Court offered as "[i]llustrative of the scope of the congressional power . . . the treatment afforded Puerto Ricans who were first nationals, and who later became citizens." *Id.* at 432 n.12 (citations omitted).

As this background illustrates, plaintiffs' are likewise wrong to assert that rehearing is warranted because the panel improperly "extended" the *Insular Cases*. Pet. 7 (citing *Financial Oversight & Mgmt. Bd. for P.R. v. Aurelius Inv., LLC*, 140 S. Ct. 1649,

1665 (2020)). Even aside from Congress's repeated use of its power to determine the citizenship status of persons born in unincorporated territories, the Supreme Court has continually reaffirmed the core principles of those cases that are applicable here. Not only has the Court reiterated that it is for the political branches to determine whether newly acquired territory is incorporated into the United States, *Boumediene v. Bush*, 553 U.S. 723, 756-57 (2008); *Torres v. Puerto Rico*, 442 U.S. 465, 469 (1979), but it has also specifically relied on *Downes* in resolving a case turning on Congress's ability to treat persons born in the Philippines while it was an unincorporated U.S. territory "in the same manner as 'foreigners,'" *Rabang*, 353 U.S. at 432. It thus does not "extend" the *Insular Cases* to apply the general principle that Congress determines the citizenship status of persons born in unincorporated territories to American Samoa, which is materially identical to the Philippines in this respect.

For the same reasons, plaintiffs are wrong to suggest that the panel decision conflicts with this Court's general respect for Supreme Court dicta. Pet. 11-12. Even assuming the discussion in *Rabang* could properly be characterized as dicta, the Supreme Court's explicit acknowledgment and reaffirmance of the principle that Congress may determine the citizenship status of persons born in unincorporated territories would, at a minimum, qualify as more recent dicta to which this Court would likewise give substantial weight. *See Bonidy v. U.S. Postal Serv.*, 790 F.3d 1121, 1125 (10th Cir. 2015) (noting that the weight given to dicta turns on its recency and whether it has been "enfeebled by later statements" (quotation omitted)).

B. Plaintiffs' contention that the panel erred in answering a question of exceptional importance is no more persuasive. Plaintiffs accuse the majority of disregarding the history of the Fourteenth Amendment, Pet. 14-15, but offer no account for the "historical practice, undisturbed for over a century, that Congress has the authority to determine the citizenship status of unincorporated territorial inhabitants," Concurrence 4, including Congress's repeated enactment of statutes addressing citizenship by birth in unincorporated territories. They do not grapple, for example, with Congress's treatment of the Philippines; as the D.C. Circuit observed, "there is no material distinction between nationals born in American Samoa and those born in the Philippines prior to its independence in 1946," such that "[t]he 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; *see generally* 8 U.S.C. § 1401 (outlining acquisition of citizenship by birth for individuals born abroad). Taking plaintiffs' arguments at face value, every person born in the Philippines between 1898 and 1946 was a U.S. citizen, and plaintiffs make no effort to distinguish the multiple court of appeals decisions rejecting that premise. *See Nolos*, 611 F.3d at 282-84; *Lacap*, 138 F.3d at 519; *Valmonte*, 136 F.3d at 917-20; *Rabang*, 35 F.3d at 1451-53. And if plaintiffs were correct, it is far from clear how Congress could have validly terminated the citizenship of those individuals. *See Afroyim v. Rusk*, 387 U.S. 253, 257 (1967) (stating 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"); *see* Pet. 17-18 (quoting *Afroyim* to emphasize that birthright citizenship is "beyond the legislative power"). That issue has never arisen with respect to the Philippines precisely because persons born in the Philippines were never treated as citizens at birth by virtue of U.S. dominion over the territory. Instead, Congress's ability to relinquish the Philippines underscores the importance of Congress's power, reflected in the territorial-incorporation doctrine, to acquire, govern, and, when appropriate, 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).

Instead, plaintiffs insist that this longstanding practice should be ignored altogether: they argue that the Court "*must*" "reject 'the distinction between incorporated and unincorporated territories' in interpreting the Fourteenth Amendment." Pet. 16 (quoting Op. 28). In other words, plaintiffs acknowledge that their claims must fail if the distinction the Supreme Court has established between incorporated and unincorporated territories is taken seriously. The majority properly declined to "cast aside this distinction, backed by both binding precedent and over a century of unbroken historical practice." Op. 29. That is particularly true given that the only support plaintiffs now offer for this Court to take that remarkable step is the assertion—addressed above—that continuing to recognize Congress's longstanding

and oft-used power in this area would "extend" the *Insular Cases* in some prohibited fashion. Pet. 16; *see supra* pp. 10-11.

Plaintiffs' resistance to the entire concept of territorial incorporation is reflected in their claim that the panel erred in declining to "forc[e] the American Samoan people to become American citizens against their wishes," Op. 24, as expressed by American Samoa's democratically-elected officials, Pet. 16-18. As the panel explained, despite the "disreputable" origins of the approach developed in the *Insular Cases*, it has been "repurposed to preserve the dignity and autonomy of the peoples of America's overseas territories." Op. 15, 16. 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 ignore the very considerations that have led to the "repurpos[ing]" of the territorial-incorporation doctrine, Op. 16, including respecting the differing legal cultures of the United States' diverse unincorporated territories. *See Boumediene*, 553 U.S. at 757-58; Op. 34-38 (opinion of Lucero, J.) (noting concerns about undermining "America Samoa's unique culture and social structure"). And here, too, Judge Lucero's analysis accords with the only other circuit to consider the issue. *See Tuaua*, 788 F.3d at 307-12.

In any event, plaintiffs' presentation of the pre-1868 historical evidence leaves out much that calls their narrative into doubt. It is not difficult to locate statutes predating 1866 that distinguish between "the United States" and the "territories." *See* Act of Mar. 2, 1807, ch. 22, § 1, 2 Stat. 426, 426 (banning the importation of enslaved people "into the United States or the territories thereof"); Act of Mar. 1, 1809, ch. 24, § 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, ch. 173, § 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, ch. 246, § 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"). And Congress regularly extended the Constitution to territories by statute—a move that would have been unnecessary if, as plaintiffs insist, all recognized that "Territories were considered part of the United States." Pet. 15; *see, e.g.*, Act of Sept. 9, 1850, ch. 51, § 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"); *see also Examining Bd. of Eng'rs, Architects & Surveyors v. Flores de Otero*, 426 U.S. 572, 588 & n.20 (1976).

CONCLUSION

The petition for rehearing en banc should be denied.

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COMBINED CERTIFICATIONS

This response conforms with Federal Rule of Appellate Procedure 35(b)(2)(A), which limits a petition for rehearing to 3,900 words, because it contains 3,850 words. This response was prepared using Microsoft Word 2013 in Garamond 14-point font, a proportionally spaced typeface.

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s/ Brad Hinshelwood
Brad Hinshelwood

CERTIFICATE OF SERVICE

I hereby certify that on September 15, 2021, I electronically filed the foregoing response 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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