No.

IN THE

Supreme Court of the United States

JOHN FITISEMANU, PALE TULI, ROSAVITA TULI, AND SOUTHERN UTAH PACIFIC ISLANDER COALITION,

Petitioners,

v.

UNITED STATES OF AMERICA, *ET AL.*,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

"The United States includes five Territories." *United States* v. *Vaello Madero*, 596 U.S. ___, slip op. at 3 (2022). And the Citizenship Clause declares that those born "in the United States, and subject to the jurisdiction thereof, are citizens of the United States." U.S. Const. amend. XIV, § 1. But a divided panel of the Tenth Circuit held that so-called "unincorporated" Territories are not "in the United States" within the meaning of the Citizenship Clause. To reach this conclusion, the panel majority expanded and "repurposed" the *Insular Cases*, Pet.App.17a, in direct conflict with this Court's recent affirmation "that the Insular Cases should not be further extended," *Fin. Oversight & Mgmt. Bd.* v. *Aurelius Inv., LLC*, 140 S. Ct. 1649, 1665 (2020) (citing *Reid* v. *Covert*, 354 U.S. 1, 14 (1957) (plurality opinion)). The question presented is:

Whether persons born in United States Territories are entitled to birthright citizenship under the Fourteenth Amendment's Citizenship Clause, including whether the *Insular Cases* should be overruled.

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

1. Petitioners John Fitisemanu, Pale Tuli, Rosavita Tuli, and Southern Utah Pacific Islander Coalition were plaintiffs in the district court and appellees before the court of appeals.

Respondents United States of America; United States Department of State; Antony Blinken, in his official capacity as Secretary of the U.S. Department of State; and Ian G. Brownlee, in his official capacity as Assistant Secretary of State for Consular Affairs, were defendants in the district court and appellants before the court of appeals.[*]

Respondents The Honorable Aumua Amata and the American Samoa Government were intervenor-defendants in the district court and intervenor defendants-appellants before the court of appeals.

2. Petitioners John Fitisemanu, Pale Tuli, and Rosavita Tuli are individuals. Petitioner Southern Utah Pacific Islander Coalition ("SUPIC") is a Utah nonprofit corporation with its principal place of business in St. George, Utah. SUPIC has no parent corporation and no publicly held corporation owns ten percent or more of its stock.

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[*] In the court of appeals, Antony Blinken replaced Rex W. Tillerson and Ian G. Brownlee replaced Carl C. Risch as appellants, pursuant to Federal Rule of Appellate Procedure 43(c)(2).

STATEMENT OF RELATED PROCEEDINGS

Pursuant to this Court's Rule 14.1(b)(iii), the following proceedings are directly related to this case:

- *Fitisemanu, et al.* v. *United States, et al.*, Nos. 20-4017, 20-4019 (10th Cir.) (judgment entered June 15, 2021; rehearing en banc denied Dec. 27, 2021); and
- *Fitisemanu, et al.* v. *United States, et al.*, No. 18-cv-36 (D. Utah) (judgment entered Dec. 12, 2019).

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PETITION FOR A WRIT OF CERTIORARI

Petitioners John Fitisemanu, Pale Tuli, Rosavita Tuli, and Southern Utah Pacific Islander Coalition respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit.

OPINIONS BELOW

The opinion of the court of appeals (Pet.App.1a-94a) is reported at 1 F.4th 862. The opinion of the district court (Pet.App.95a-181a) is reported at 426 F. Supp. 3d 1155. The court of appeals' order denying rehearing en banc (Pet.App.182a-212a) is reported at 20 F.4th 1325 (Mem.).

JURISDICTION

The court of appeals entered judgment on June 15, 2021. Petitioners' timely petition for rehearing en banc was denied on December 27, 2021. On March 10, 2022, Justice Gorsuch extended the time for filing a petition for certiorari to April 27, 2022. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Relevant constitutional and statutory provisions are reprinted in an appendix to this brief. Pet.App.213a-216a.

STATEMENT

Few questions are more important to our constitutional system than who is entitled to United States citizenship. Our Nation fought a civil war over that very question, and in the aftermath enshrined the answer in the Fourteenth Amendment's Citizenship Clause. That Clause repudiated the infamous *Dred*

Scott v. *Sanford* decision, and declared that all those born "in the United States, and subject to the jurisdiction thereof, are citizens of the United States." U.S. Const. amend. XIV, § 1. Yet a federal statute purports to deny birthright citizenship to petitioners because they were born in the U.S. Territory of American Samoa, declaring them to be "nationals, *but not citizens*, of the United States." 8 U.S.C. § 1408(1) (emphasis added).

Text, history, and relevant precedents all uniformly show that this statute is unconstitutional because U.S. Territories like American Samoa are "in the United States" within the meaning of the Citizenship Clause. But a divided panel of the Tenth Circuit upheld the statute pursuant to the infamous *Insular Cases*. The choice for this Court, then, is clear: it can either give its sanction to the panel majority's extension of the *Insular Cases*, or it can uphold the original meaning of and binding precedent interpreting the Citizenship Clause, and thereby safeguard the right to birthright citizenship for people born in U.S. Territories.

1. Although the original Constitution as ratified referred to "Citizen[s] of the United States," and made citizenship a prerequisite to serving in Congress or the Presidency, U.S. Const. art. I, § 2, cl. 2 & § 3, cl. 3; *id.* art. II, § 1, cl. 5, it did not define who was a "Citizen." Consistent with the principle that terms not defined in a Constitution "framed in the language of the English common law" should be read "in the light of" that common law tradition, *Smith* v. *Alabama*, 124 U.S. 465, 478 (1888), courts looked to the common law to determine who was a citizen, *see*, *e.g.*, *Dawson's Lessee* v. *Godfrey*, 8 U.S. (4 Cranch) 321, 322-24 (1808);

Minor v. *Happersett*, 88 U.S. (21 Wall.) 162, 166 (1875).

The common law rule regarding birthright citizenship, known as *jus soli*, was straightforward: "'the party must be born within a place where the sovereign is at the time in full possession and exercise of his power, and the party must also at his birth … owe obedience or allegiance to … the sovereign.'" *United States* v. *Wong Kim Ark*, 169 U.S. 649, 659 (1898) (quoting *Inglis* v. *Trs. of Sailor's Snug Harbor*, 28 U.S. (3 Pet.) 99, 155 (1830) (Story, J., concurring)). The geographic scope of birthright citizenship at common law was "birth locally within the dominions," or territory, "of the sovereign." *Ibid.*; *id.* at 655-58 (canvassing English cases).

Prior to American independence, it was "universally admitted … that all persons within the colonies of North America, whilst subject to the crown of Great Britain, were natural born British subjects." *Inglis*, 28 U.S. (3 Pet.) at 120. After the Revolution, nothing "displaced in this country the fundamental rule of citizenship by birth within its sovereignty." *Wong Kim Ark*, 169 U.S. at 658-63, 674; *accord*, *e.g.*, *United States* v. *Rhodes*, 27 F. Cas. 785, 789 (C.C.D. Ky. 1866); *Lynch* v. *Clarke*, 1 Sand. Ch. 583, 663 (N.Y. Ch. 1844); *Leake* v. *Gilchrist*, 13 N.C. (2 Dev.) 73, 76 (1829); *Gardner* v. *Ward*, 2 Mass. 244 (1805).

The common law rule included birth within U.S. Territories. As Justice Story explained, "[a] citizen of one of our territories is a citizen of the United States." *Picquet* v. *Swan*, 19 F. Cas. 609, 616 (C.C.D. Mass. 1828). A leading legal scholar of the era agreed that

"every person born within the United States, its territories or districts, whether the parents are citizens or aliens, is a natural born citizen in the sense of the Constitution." William Rawle, *A View of the Constitution of the United States of America* 86 (2d ed. 1829).

2. The settled *jus soli* rule was temporarily disturbed by *Dred Scott* v. *Sandford*, 60 U.S. (19 How.) 393 (1857). *Dred Scott* infamously concluded, over powerful dissents, that one group of persons—African Americans—were not U.S. citizens regardless of birth in the United States because (the Court said) "they were … considered as a subordinate and inferior class of beings, who had been subjugated by the dominant race … and had no rights or privileges but such as those who held the power and the Government might choose to grant them." *Id.* at 404-05. *Dred Scott* thus "held that there was a racial exception to the normal rule of birthright U.S. citizenship." Daniel A. Farber, *A Fatal Loss of Balance:* Dred Scott *Revisited*, 39 Pepp. L. Rev. 13, 24 (2011).

Following the Civil War, Congress and the States emphatically repudiated *Dred Scott* by adopting the Fourteenth Amendment and constitutionalizing the pre-existing common law *jus soli* rule. The first sentence of Section 1 (the Citizenship Clause) 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. Both the Clause's advocates and opponents in Congress understood that it accorded citizenship to all persons born anywhere in the United States, *including* U.S. Territories. *See infra* 15-16.

As this Court has explained, the Clause was adopted to "overtur[n] the *Dred Scott* decision" and to "pu[t] at rest" the proposition that "[t]hose … who had been born and resided always in the District of Columbia *or in the Territories*, though *within the United States*, were not citizens." *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 72-73 (1873) (emphases added). The Clause "reaffirmed in the most explicit and comprehensive terms" "the fundamental principle of citizenship by birth within *the dominion*," *Wong Kim Ark*, 169 U.S. at 675 (emphasis added), which includes the Territories, *see Gonzales* v. *Williams*, 192 U.S. 1, 13 (1904) ("[C]itizens of Porto Rico … live in the peace of the dominion of the United States."); *Nat'l Bank* v. *County of Yankton*, 101 U.S. 129, 133 (1880) ("The Territories are" within the "outlying dominion of the United States."). By constitutionalizing this "ancient and fundamental rule of citizenship by birth within the territory, in the allegiance and under the protection of the country," *Wong Kim Ark*, 169 U.S. at 693, the Clause's Framers sought "'to put th[e] question of citizenship and the rights of citizens … beyond the legislative power,'" *Afroyim* v. *Rusk*, 387 U.S. 253, 263 (1967) (quoting Cong. Globe, 39th Cong., 1st Sess. 2896 (Sen. Howard)).

In 1898, this Court decided what is to this day the leading case on the Citizenship Clause: *United States* v. *Wong Kim Ark*. This Court held that, in light of the Citizenship Clause, the "established rule of citizenship by birth within the dominion" could not be "superseded or restricted, in any respect," by any "authority, legislative, executive, or judicial." 169 U.S. at 674. Thus, "Congress" had "no authority … to restrict

the effect of birth, declared by the Constitution to constitute a sufficient and complete right to citizenship." *Id.* at 703.

3. In the wake of the Spanish-American War, this Court decided the controversial series of *Insular Cases*, which addressed questions regarding Congress's authority to govern newly acquired Territories. This Court "held that the Constitution has independent force in these Territories, a force not contingent upon acts of legislative grace." *Boumediene* v. *Bush*, 553 U.S. 723, 757 (2008). But this Court also took into account Congress's ability to govern these new Territories pursuant to its longstanding power "to dispose of" or otherwise regulate "the Territory or other Property belonging to the United States." U.S. Const. art. IV, § 3, cl. 2. Thus, these decisions examined how Congress's power under the Territory Clause to create territorial governments would apply to newly acquired Territories "with wholly dissimilar traditions and institutions." *Reid* v. *Covert*, 354 U.S. 1, 14 (1957) (plurality opinion).

To avoid a disruptive "transformation of the prevailing legal culture" through the immediate imposition of a common law system of governance, *Boumediene*, 553 U.S. at 757, the Court created and applied a new doctrine of "territorial incorporation" when considering challenges to territorial criminal procedure and revenue collection, *see generally*, *e.g.*, *Dorr* v. *United States*, 195 U.S. 138 (1904). This new doctrine distinguished between "incorporated Territories surely destined for statehood" and so-called "unincorporated Territories" that were not so destined, thus allowing the Court "to use its power sparingly and where it would be most needed." *Boumediene*, 553

U.S. at 757-59. But even under this doctrine, inhabitants of unincorporated Territories were entitled to "'certain fundamental personal rights declared in the Constitution.'" *Id.* at 758.

4. Less than two years after *Wong Kim Ark*, American Samoa—the eastern islands of an archipelago in the South Pacific—became a U.S. Territory. Pet.App.7a. In 1900, the traditional leaders of the Samoan islands of Tutuila and Aunu'u voluntarily ceded "all sovereign rights" in those islands "unto the Government of the United States of America." Instrument of Cession by Chiefs of Tutuila to U.S. Gov't, at 2 (Apr. 17, 1900), https://tinyurl.com/2p8d8j45. Four years later, the traditional leaders of the Samoan islands comprising the Manu'a island group also voluntarily ceded their lands "under the full and complete sovereignty of the United States." Instrument of Cession by Chiefs of Manu'a Islands to U.S. Gov't, at 2 (July 14, 1904), https://tinyurl.com/mr2vhxsp; *see also Mulu* v. *Taliutafa*, 3 Am. Samoa 82, 89-90 (1953) ("cession of the Islands passed the sovereignty … to the United States"); 48 U.S.C. § 1661. In 1925, U.S. "sovereignty" over American Samoa was "extended" to include Swains Island, defined as "a part of American Samoa." 48 U.S.C. § 1662.

When the American flag was raised over their Territory following the Deeds of Cession, the people of American Samoa believed that they had become citizens of the United States. *See* Reuel S. Moore & Joseph R. Farrington, *The American Samoan Commission's Visit to Samoa, September-October 1930*, at 53 (G.P.O. 1931). And when they learned that the federal government did not share this view, they attempted to seek recognition of birthright citizenship through

the legislative process. *See The American Samoan Commission Report* 6 (G.P.O. 1931); *see also* C.A. American Samoan Federation *Amicus* Br. 5-25; Ross Dardani, *Citizenship in Empire: The Legal History of U.S. Citizenship in American Samoa, 1899-1960*, 60 Am. J. of Legal Hist. 311 (Sept. 2020). In 1930, leaders in American Samoa explained to the visiting U.S. American Samoan Commission that the American Samoan people "desire[d] citizenship." Moore & Farrington, *supra*, at 53.

In the years since, American Samoa's ties to the rest of the country have strengthened significantly as it has become part of the Nation's political, economic, and cultural identity. Approximately 50,000 people reside on the islands today, with even more American Samoans living throughout the rest of the Nation. Pet.App.7a. American Samoa is superintended by the U.S. Department of the Interior, *see* 43 U.S.C. § 1458, and locally governed through a republican form of government, *see generally* Revised Const. of Am. Samoa. Its education system reflects U.S. educational standards, including instruction in English. *See*, *e.g.*, *Exec Order adopts Common Core State Standards, ASDOE is Implementor*, Samoa News (Oct. 10, 2012), https://tinyurl.com/y9l3l3yt. And American Samoa has one of the highest enlistment rates of military service in the Nation. Blue Chen-Fruean, *Local US Army Recruiting Station sets world record, again*, Samoa News (July 15, 2017), https://tinyurl.com/3a5yv53d.

Despite all of this, persons born in American Samoa are the only U.S. nationals *not* recognized as U.S. citizens. Section 101(a)(29) of the Immigration and Nationality Act classifies American Samoa—and *only* American Samoa—as an "outlying possessio[n] of the

United States." 8 U.S.C. § 1101(a)(29). Section 308(1) of the Act, in turn, provides that "person[s] born in an outlying possession of the United States"—*i.e.*, American Samoa—are "nationals, *but not citizens*, of the United States at birth." *Id.* § 1408(1) (emphasis added). As nationals, they "ow[e] permanent allegiance to the United States," *id.* § 1101(a)(22), and they have no citizenship under or allegiance to any *other* sovereign. Yet they are not themselves citizens of the United States. In effect, they are citizens of nowhere.

This ongoing denial of citizenship imposes significant harms, which fall disproportionately on those who relocate from American Samoa to other parts of the United States. Those born in American Samoa, including petitioners, are labeled second-class by the U.S. government. Those living in the States, despite being taxpayers who contribute to their communities, are unable to vote. *See* Utah Const. art. IV, § 5; Utah Code Ann. § 20A-2-101. They are precluded from running for office at the federal and state levels. *See* U.S. Const. art. I, § 2; Utah Code Ann. § 20A-9-201(1). They are barred from serving on juries. *See* 28 U.S.C. § 1865(b)(1); Utah Code Ann. § 78B-1-105(1). They cannot serve as officers in the U.S. Armed Forces, *see* 10 U.S.C. § 532(a), or Utah peace officers, Utah Code Ann. § 53-6-203(1)(a). And persons born in American Samoa must carry an endorsement code in their U.S. passports that *expressly disclaims* their citizenship and creates confusion about their relationship to the United States, inhibiting their right to travel. *See* Dep't of State, *Foreign Affairs Manual*, at 7 F.A.M. § 1111(b)(1).

5. Petitioners are three individuals born in American Samoa now residing in Utah who are denied recognition as U.S. citizens, as well as the Southern Utah Pacific Islander Coalition—a non-profit organization that serves the Samoan community in the area. Their experiences exemplify the harms associated with non-citizen national status. For example, Mr. Fitisemanu has "experienced negative comments . . . questioning [his] 'choice' not to vote," C.A.App.63; Mr. Tuli "would like to pursue a career as a police officer" but is impeded from doing so due to his lack of citizenship, C.A.App.74; and Ms. Tuli has been "precluded from obtaining an immigration visa to sponsor [her] parents to relocate to the United States," C.A.App.83. Moreover, all three are denied the right to vote and have suffered "emotional anguish" by the government's labeling of them as "non-citizen national[s]." C.A.App.63, 74, 82.

Petitioners brought this action in March 2018, challenging Section 308(1) of the Immigration and Nationality Act as unconstitutional under the Citizenship Clause, and seeking declaratory and injunctive relief. *See* C.A.App.24-60. Petitioners also challenged the State Department's implementing policies and practices. C.A.App.108-09. The American Samoa Government and the Honorable Aumua Amata intervened. C.A.App.16. Petitioners moved for summary judgment on a set of undisputed facts. C.A.App.92-146.

6. The district court granted summary judgment for petitioners. The court concluded that, under *Wong Kim Ark*, the Fourteenth Amendment "*must* be interpreted in the light of the *common law*," Pet.App.154a, which unequivocally extends birthright citizenship to

Territories such as American Samoa. Moreover, the court recognized that the *Insular Cases* "did not concern the Fourteenth Amendment," and thus have no application to this case. Pet.App.97a.

7. A divided panel of the Tenth Circuit reversed. Writing for the majority, Judge Lucero (joined in part by Chief Judge Tymkovich) stated that there was "ambiguity" in the text and history of the Citizenship Clause. Pet.App.31a, 32a. Therefore, the majority concluded that "the Insular Cases supply the correct framework for application of constitutional provisions to the unincorporated territories," and that "the district court erred by relying on *Wong Kim Ark*." Pet.App.14a. The panel majority acknowledged the "disreputable," "ignominious," and "racist" history of the *Insular Cases*, Pet.App.15a-16a, but nonetheless held they were necessary to resolve "whether [a constitutional] provision even *applies* to an unincorporated territory in the first place," Pet.App.24a. It went even further, though, concluding that the *Insular Cases* "can be repurposed" to provide a "more relevant, workable, and … just" standard by which to purportedly "respect the wishes of the American Samoan people." Pet.App.17a, 23a, 26a.

Judge Lucero, writing only for himself, further concluded that birthright citizenship does not apply in unincorporated Territories under the *Insular Cases* because it is not a "fundamental right" and because application of birthright citizenship would be "impracticable and anomalous" in light of a "preference against citizenship" expressed by intervenors. Pet.App.32a-40a.

Chief Judge Tymkovich, in a brief concurrence, wrote that the constitutional text is "ambiguous," the "evidence of … original public meaning" "equivocal," and "Supreme Court precedent" "uncertain," and therefore he would defer to "historical practice"—that is, Congress's purported ability under the *Insular Cases* to deny citizenship to those born in unincorporated Territories. Pet.App.41a-44a.

Judge Bacharach dissented. "When the Fourteenth Amendment was ratified," he explained, "courts, dictionaries, maps, and censuses uniformly regarded territories as land 'in the United States,'" and neither the majority opinion nor the concurrence pointed to any contrary evidence contemporaneous with the ratification of the Citizenship Clause. Pet.App.46a. This evidence "unambiguously" dictated that petitioners are birthright citizens. Pet.App.48a-94a. Judge Bacharach also noted that even under the *Insular Cases* framework "the Citizenship Clause would apply because citizenship is a fundamental right," and "even if the right were not fundamental, applying the Citizenship Clause to the three American Samoan plaintiffs would not be impracticable or anomalous." Pet.App.46a. He also rejected Judge Lucero's assertion that American Samoans do not prefer U.S. citizenship, stating that it "lacks factual … support," because "the record says nothing about the preference of a majority in American Samoa," and "legal support," because the court's "application of the Citizenship Clause" cannot change with "every change in the popular will." Pet.App.86a-88a.

8. Petitioners sought rehearing en banc. After ordering a response, a divided court denied the petition.[1]

Judge Bacharach dissented from the denial in an opinion joined by Judge Moritz. Judge Bacharach chided the panel majority and concurrence for "skirt[ing] [their] obligation to determine the meaning of the constitutional language." Pet.App.188a. He faulted the panel majority for relying on the *Insular Cases*, which "provide no guidance" on the question presented and "'should [not] be given any further expansion.'" Pet.App.207a, 209a. And he criticized the concurrence for relying on "congressional practice that didn't begin until roughly a half-century after ratification of the Citizenship Clause." Pet.App.188a. Instead, he reasoned that the phrase "in the United States" is "unambiguous" and had a "uniform historical meaning." Pet.App.211a. He concluded that "there is only one answer: The Territory of American Samoa lies within the United States," and persons born there are citizens at birth. Pet.App.211a.

REASONS FOR GRANTING THE PETITION

I. THE DECISION BELOW CONTRAVENES THE CONSTITUTION AND THIS COURT'S PRECEDENTS.

The decision below conflicts with constitutional text and history; contravenes this Court's precedents interpreting the Citizenship Clause; and directly conflicts with this Court's precedents cabining the *Insular Cases* to their particular facts. This Court should grant review to vindicate the Clause's guarantee of

[1] Tenth Circuit Judges Matheson, McHugh, Eid, and Rossman "did not participate in the consideration of [the] petition for rehearing en banc." Pet.App.186a n.*.

birthright citizenship in U.S. Territories and to overrule the *Insular Cases*.

A. Constitutional Text, Structure, History, and Purpose.

Constitutional questions must be resolved based on a "careful examination of the [relevant] textual, structural, and historical evidence." *Zivotofsky ex rel. Zivotofsky* v. *Clinton*, 566 U.S. 189, 201 (2012). This examination is "guided by the principle that the Constitution was written to be understood" by those who ratified it, *District of Columbia* v. *Heller*, 554 U.S. 570, 576 (2008) (brackets and quotation marks omitted), and that its words mean today what "they were understood to [mean] when the people adopted them," *id.* at 634-35. Yet, as noted by the en banc dissent, the panel majority "skirt[ed]" this important "obligation to determine the meaning of the constitutional language" at issue here. Pet.App.188a. Far from being "ambiguous," Pet.App.27a, "the text of the Citizenship Clause, along with *all* of the historical evidence," clearly "shows that the Citizenship Clause extend[s] to everyone born in the U.S. Territories," Pet.App.206a.

1. The Citizenship Clause declares that "[a]ll persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside." U.S. Const. amend. XIV, § 1. Under the text's plain meaning, American Samoa is "in the United States." The words "in the United States" are "the equivalent of the words 'within the limits . . . of the United States.'" *Wong Kim Ark*, 169 U.S. at 687. And it was widely understood, from "a very early day," that the phrase "the United States" included Territories, while narrower phrases such as "states united" meant the

States alone. 29 *The American and English Encyclopaedia of Law* 146 (1904).

Contemporary judicial opinions "commonly referred to U.S. territories as 'in' the United States." Michael D. Ramsey, *Originalism and Birthright Citizenship*, 109 Geo. L.J. 405, 426 (2020). In the early days of the Republic, this Court—in an opinion by Chief Justice Marshall—held that the phrase "the United States" was understood to "designate *the whole* . . . of the American empire." *Loughborough* v. *Blake*, 18 U.S. (5 Wheat.) 317, 319 (1820) (Marshall, C.J.) (emphasis added). The Chief Justice explained that "the United States" is "the name given to our great republic, which is composed of States *and territories*." *Ibid.* (emphasis added). "The district of Columbia, or the territory west of the Missouri, is not less within the United States, than Maryland or Pennsylvania." *Ibid.*

A few years later, Justice Story agreed, writing, "[a] citizen of one of our territories is a citizen of the United States." *Picquet* v. *Swan*, 19 F. Cas. 609, 616 (C.C.D. Mass. 1828). This understanding of "the United States" has prevailed to this day. *See United States* v. *Vaello Madero*, 596 U.S. ___, slip op. at 3 (2022) ("The United States *includes* five Territories." (emphasis added)).

2. Statements by the Framers of the Fourteenth Amendment confirm this straightforward interpretation. Senator Trumbull, for example, explained that "[t]he second section" of the Fourteenth Amendment—the Apportionment Clause—"refers to no persons except those in the States of the Union; but the first section"—the Citizenship Clause—"refers to persons everywhere, whether in the States *or in the Territories or in the District of Columbia*." Cong. Globe, 39th Cong., 1st Sess. 2894 (emphasis added).

Senator Howard, while introducing the Clause, explained that it declared what was "the law of the land already, that every person born within the limits of the United States, and subject to their jurisdiction, is by virtue of natural law and national law a citizen of the United States." Cong. Globe, 39th Cong., 1st Sess. 2890. And Senator Johnson, who voted against the Amendment, nonetheless agreed that there is "no better way to give rise to citizenship than the fact of birth within the territory of the United States." *Id.* at 2893. Moreover, when the Citizenship Clause was debated, "each member [of Congress] knew and properly respected the old and revered decision in the Loughborough-Blake case," discussed above, "which had long before defined the term 'United States.'" Ltr. 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, 299 (1901).

The panel majority brushed aside these uncontradicted statements of the Clause's Framers as "'isolated,'" and invoked this Court's observation that on *other* topics the Fourteenth Amendment's history "'contains many statements from which conflicting inferences can be drawn.'" Pet.App.28a-29a (brackets omitted) (quoting *Afroyim*, 387 U.S. at 267). But the court pointed to *no* contrary statements on this issue regarding the Citizenship Clause's *geographic scope*.

3. Because the Citizenship Clause must be interpreted based on its "*public understanding*" when ratified, *Heller*, 554 U.S. at 605, "contemporary" "dictionaries, maps, atlases, and censuses" are also valuable sources for determining the Clause's meaning, Pet.App.192a.

Unlike the panel majority, Judge Bacharach exhaustively surveyed these sources, finding that they "provide convincing proof that nineteenth-century Americans considered the U.S. territories to lie 'in the United States.'" Pet.App.195a. This contemporary evidence includes:

- Dictionaries that define "Territory" as "[a] portion of the country subject to and belonging to the United States," II John Bouvier, *A Law Dictionary, Adapted to the Constitution and Laws of the United States* 587 (1868); *see also* William G. Webster & William A. Wheeler, *A Dictionary of the English Language* 434 (academic ed. 1867) (similar), and the "United States of America" as "[t]he nation occupying *the territory* between British America on the north, Mexico on the south, the Atlantic Ocean and Gulf of Mexico on the east, and the Pacific Ocean on the west," Bouvier, *A Law Dictionary* 622 (emphasis added).
- Maps of "the United States" that include all Territories—even unorganized territories that were not destined for statehood at the time. *See*, *e.g.*, J.H. Colton & Co., *The United States of America* (1856), https://tinyurl.com/54s6n376 (including the Indian Territory in a map of the United States); Henry D. Rogers, W. & A.K. Johnston Ltd. & Edward Stanford Ltd., *General Map of the United States, Showing the Area and Extent of the Free & Slave-Holding States & the Territories of the Union: Also the Boundary of the Seceding States* (1857), https://ti-

nyurl.com/4snmaakf (same); G.W. & C.B. Colton & Co., *United States* (1868), https://tinyurl.com/23dhzxe8 (same); H.H. Lloyd & Co., *The Washington Map of the United States* (1868), https://tinyurl.com/2p9b3etp (including the unorganized Alaska Territory in a map of the United States).

- Censuses and Statistical Atlases providing that "[t]he United States consist at the present time (1st July 1854,) of thirty-one independent States and nine Territories," J.D.B. De Bow, Superintendent of the U.S. Census, *Statistical View of the United States* 35 (A.O.P. Nicholson 1854), and including the population of the Territories in the total population of the United States, *see*, *e.g.*, Francis A. Walker, *Statistical Atlas of the United States Based on the Results of the Ninth Census 1870* (1874), https://tinyurl.com/2p9aae4a; Francis A. Walker, *Report of the Superintendent of the Ninth Census*, *in* 1 *The Statistics of the Population of the United States* xvi (1870), https://tinyurl.com/y492cxvy.

In fact, as Judge Bacharach noted in his panel dissent, "no one in the case—not the parties, the intervenors, or [the majority]—has pointed to a single contemporary judicial opinion, dictionary, map, census, or congressional statement that treated U.S. territories as outside the United States from 1866 to 1868." Pet.App.73a.

The panel majority did offer one map that purportedly supported its ruling. Pet.App.29a n.18 (citing Mary Van Schaack, A Map of the United States and Part of Louisiana (c. 1830), https://bit.ly/3GGBJs5

(on file with the Library of Congress)). But that map itself *contradicts* the majority's argument, because it includes the Illinois Territory, Indiana Territory, and Mississippi Territory *as part of the United States*. *See also* Pet.App.197a ("[The] map supplies further historical proof that nineteenth-century Americans considered the territories part of the United States.").

4. Finally, the Citizenship Clause's purpose confirms the geographic scope of the clause. As discussed above, *supra* 4-5, it is undisputed that the Citizenship Clause was intended to "forever close[] the door on *Dred Scott* and constitutionalize[] the Civil Rights Act of 1866." *Vaello Madero*, slip op. at 18 (Thomas, J., concurring) (quotation marks omitted). That Act, in turn, had "declared" that "all persons born in the United States and not subject to any foreign power" are "citizens of the United States" and "shall have the same right, in every State and *Territory in the United States*, … to full and equal benefit of all laws." Ch. 31, § 1, 14 Stat. 27, 27 (1866) (emphasis added). If, as the government contended below, the Citizenship Clause grants birthright citizenship only to those born within a State or the District of Columbia, the Fourteenth Amendment would have failed in its purpose. In the 1860s, nearly *half* of the land mass of the United States consisted of Territories. *See* Willis Drummond, *Report of the Commissioner of the General Land Office* 297 (G.P.O. 1872). Under this view, the Citizenship Clause would have left Congress with discretion to deny citizenship to persons born across that great swath of the Nation.

B. The Decision Below Conflicts With This Court's Precedents Construing The Citizenship Clause.

The panel majority's decision also contradicts this Court's precedents interpreting the Citizenship Clause. In a series of decisions in the three decades after the Fourteenth Amendment's ratification—culminating in *Wong Kim Ark*—this Court authoritatively construed the Clause, making clear that it constitutionalized the common law rule of *jus soli* and guaranteed birthright citizenship to those born in the Territories. The panel majority's side-stepping of this Court's precedents—on the critical issue of citizenship, no less—is an important reason to grant review.

1. Just five years after the Clause was ratified, this Court concluded in the *Slaughter-House Cases* that the Fourteenth Amendment "pu[t] at rest" any notion that "[t]hose … who had been born and resided always in the District of Columbia *or in the Territories, though within the United States*, were not citizens." 83 U.S. (16 Wall.) at 72-73 (emphasis added). The Amendment, the Court explained, "declares that persons may be citizens of the United States without regard to their citizenship of a particular State." *Id.* at 73.

This Court confirmed this understanding in *Elk* v. *Wilkins*, 112 U.S. 94 (1884), where it explained that "Indians born *within the territorial limits* of the United States"—there, evidently in the Iowa Territory—were "in a geographical sense born in the United States." *Id.* at 102 (emphasis added); *see* Anna Williams Shavers, *A Century of Developing Citizenship Law and the Nebraska Influence: A Centennial Essay*, 70 Neb. L. Rev. 462, 480 (1991). Such "Indi-

ans" who were "members of, and owing immediate allegiance to, one of the Indian tribes" were not covered by the Clause for a *different* reason not applicable here: As members of tribes, they did not owe allegiance to, and hence were not "subject to the jurisdiction" of, the United States. 112 U.S. at 102.

Then, two years before American Samoa's leaders transferred sovereignty to the United States, the Court spoke directly to the Citizenship Clause's geographic scope in *Wong Kim Ark*. The Clause, the Court held, "must be interpreted in the light of the common law, the principles and history of which were familiarly known to the framers of the Constitution." 169 U.S. at 654. Based on a painstaking survey of common law authorities and the Fourteenth Amendment's history, the Court held that the Clause "reaffirmed" the "fundamental principle of citizenship by birth *within the dominion*"—*i.e.*, *jus soli*—using "the most explicit and comprehensive terms." *Id.* at 675 (emphasis added). The Clause, "in clear words and in manifest intent, includes the children born *within the territory* of the United States … *of whatever race or color*, domiciled within the United States." *Id.* at 693 (emphases added). Applying that principle, the Court rejected the government's claim that a person born within the United States' sovereign territorial limits (there, California) could be deprived of citizenship based on his parents' place of birth: "The Fourteenth Amendment … ha[d] conferred no authority upon Congress to restrict the effect of birth, declared by the [C]onstitution to constitute a sufficient and complete right to citizenship." *Id.* at 703.

2. The panel majority failed to engage meaningfully with these cases. After barely mentioning the *Slaughter-House Cases*, Pet.App.11a, and *Elk*,

Pet.App.27a n.15, it offered two reasons for refusing to apply *Wong Kim Ark*. First, the majority said that *Wong Kim Ark* did not mandate the application of *jus soli* when interpreting the Citizenship Clause; instead, it viewed *jus soli* as merely "persuasive" authority to consider. Pet.App.19a. Second, it reasoned that *Wong Kim Ark* did not speak to the geographic *scope* of *jus soli*, but rather "only concerned allegiance." Pet.App.20a. In short, the panel majority held that everything *Wong Kim Ark* said about the scope of *jus soli* was dicta. Both rationales are incorrect and conflict with clear Supreme Court authority.

The panel majority cited no authority to support its view that *Wong Kim Ark* suggests *jus soli* is only a persuasive consideration under the Citizenship Clause. This Court in *Wong Kim Ark* could not have been clearer: The Citizenship Clause "reaffirmed in the most explicit and comprehensive terms" "the fundamental principle of citizenship by birth within the dominion." 169 U.S. at 675. For that reason, the Supreme Court rejected the argument of the United States in that case that "*jus sanguinis*"—or citizenship determined by parental citizenship—"had superseded the rule of the common law." *Id.* at 666-67. The pages of reasoning in the Court's decision on *jus soli* were necessary to the rejection of the United States' position on *jus sanguinis*, and cannot reasonably be characterized as dicta.

Subsequent opinions of the Supreme Court and individual Justices confirm that *Wong Kim Ark* held that the Fourteenth Amendment constitutionalized the doctrine of *jus soli*. *See*, *e.g.*, *Miller* v. *Albright*, 523 U.S. 420, 453 (1998) (Scalia, J., concurring in judgment, joined by Thomas, J.) (under *Wong Kim*

Ark, only those "born *outside the territory* of the United States" must be naturalized (emphasis added)); *id.* at 478 (Breyer, J., dissenting) (explaining that "since the Civil War, the transmission of American citizenship" primarily occurs via "*jus soli*" and citing *Wong Kim Ark*); *Rogers* v. *Bellei*, 401 U.S. 815, 828 (1971) (observing that the "unanimous Court" has relied on *Wong Kim Ark*'s holding that "nationality" is "fixed" by "birth *within the limits* … of the United States" (emphasis added)); *Weedin* v. *Chin*, 274 U.S. 657, 660 (1927) (*Wong Kim Ark* "establishes that at common law in … the United States the rule with respect to nationality was that of the *jus soli*").

Wong Kim Ark and those subsequent opinions also refute the panel majority's conclusion that this Court determined only the question of allegiance and not the geographic scope of *jus soli*. *Wong Kim Ark*'s analysis of *jus soli* and the framing of the Citizenship Clause contains multiple explicit references to the Clause's geographic scope: That Clause, "in clear words and in manifest intent, includes the children born *within the territory* of the United States … *of whatever race or color*." 169 U.S. at 693 (emphases added); *see also id.* at 655, 657-66, 667-69, 671-75, 677, 681-84, 686. Under the settled common law rule of *jus soli* that the Citizenship Clause codified and *Wong Kim Ark* confirmed, persons born in American Samoa are natural-born U.S. citizens, and the panel majority erred in holding otherwise.

The panel majority's decision is thus contrary to *Wong Kim Ark* and, if allowed to stand, would deal a serious blow to the validity of that canonical case.

C. The Decision Below Contravenes This Court's Precedents By Extending The *Insular Cases*.

The panel majority further erred by ignoring this Court's recent teaching in *Aurelius* and extending the *Insular Cases* to limit birthright citizenship. Indeed, the panel majority not only extended those cases, it purported to "repurpose[]" them to achieve, in its view, more just ends. Pet.App.17a. But any "repurposing" of this Court's precedents is a job for this Court and this Court alone. And even if the court of appeals had such authority, the *Insular Cases*, like *Plessy* or *Dred Scott*, should not be repurposed. They should be overruled.

1. "'Whatever the validity of the Insular Cases in the particular historical context in which they were decided,'" *Boumediene*, 553 U.S. at 758 (brackets and citation omitted), they should have been irrelevant here. *None* involved the Citizenship Clause or defined "in the United States" as it is used in the Fourteenth Amendment. *Downes* v. *Bidwell*, on which the decision below relied, concerned the Uniformity Clause, U.S. Const. art. I, § 8, cl. 1—a provision that arose in a different historical background with a different purpose unrelated to codifying any common law right. 182 U.S. 244, 249 (1901). Moreover, there was "no opinion" in *Downes* "in which a majority of the court concurred." 182 U.S. at 244 n.1 (syllabus). Indeed, because the fractured decision in *Downes* "lacked a majority rationale," it "is of minimal precedential value." *Arizona* v. *Inter Tribal Council of Ariz., Inc.*, 570 U.S. 1, 16 n.8 (2013).

Moreover, the reasoning underlying these cases is very deeply flawed. Members of this Court have rec-

ognized that the *Insular Cases* are a "dangerous doctrine" that "would destroy the benefit of a written Constitution" "if allowed to flourish." *Reid*, 354 U.S. at 14 (plurality opinion). They have repeatedly cautioned that "neither the [Insular C]ases nor their reasoning should be given any further expansion." *Ibid.*; *see also Torres* v. *Puerto Rico*, 442 U.S. 465, 475-76 (1979) (Brennan, J., concurring in judgment). This Court admonished in *Financial Oversight & Management Board* v. *Aurelius Investment, LLC* that the "much-criticized" *Insular Cases*, "whatever their continued validity," should not be extended to issues they did not reach. 140 S. Ct. 1649, 1665 (2020). And members of this Court in *Vaello Madero* explained that these cases "were premised on beliefs both odious and wrong," *Vaello Madero*, slip op. at 39 n.4 (Sotomayor, J., dissenting), and that "[t]he flaws in the Insular Cases are as fundamental as they are shameful," *id.* at 28 (Gorsuch, J., concurring).

Aurelius addressed whether the members of the Financial Oversight and Management Board for Puerto Rico had been appointed contrary to the Constitution's Appointments Clause. 140 S. Ct. at 1665. Because Puerto Rico is considered an unincorporated Territory, "some of the parties" argued "that the Insular Cases support[ed] reversal" of the First Circuit's holding that "the Appointments Clause" applied in Puerto Rico. *Ibid.* But this Court squarely rejected that argument, explaining that "[t]hose cases did not reach this issue, and whatever their continued validity" the Court would "not extend them in these cases." *Ibid.* (citing *Reid*, 354 U.S. at 14 (plurality opinion)). In so doing, the Court endorsed the *Reid* plurality's conclusion that "neither the cases nor their reasoning should be given any further expansion." 354 U.S. at 14.

The majority decision below disregarded that clear instruction. The majority admitted that the Citizenship Clause was "not the issue in" *Downes*, Pet.App.15a, and also that the case is "disreputable," "ignominious," and "racist," Pet.App.15a-16a. Undeterred, the panel majority held that the *Insular Cases* could be "repurposed" to provide in its view a "more relevant, workable, and … just standard" than the one specifically relating to the Citizenship Clause supplied by *Wong Kim Ark*. Pet.App.17a, 23a. That clear and unequivocal extension of the *Insular Cases* to a situation that was not at issue in them directly conflicts with *Aurelius*, as Judge Bacharach noted, Pet.App.78a. Yet the majority did not even cite *Aurelius*, let alone explain how it did not preclude the panel majority's extension of *Downes*.

Extending the *Insular Cases*' "framework" to the Citizenship Clause is especially inappropriate because that Clause expressly defines its own geographic scope. This Court has characterized *Dorr* v. *United States*, 195 U.S. 138 (1904), as holding "that the Constitution, *except insofar as required by its own terms*, did not extend to" unincorporated Territories. *Examining Bd. of Eng'rs, Architects & Surveyors* v. *Flores de Otero*, 426 U.S. 572, 589 n.21 (1976) (emphasis added). The Citizenship Clause is "applicable" in American Samoa "by its own terms" because it codifies birthright citizenship to persons born anywhere "in the United States," and that includes Territories. *Ibid.*; U.S. Const. amend. XIV, § 1.

2. The *Insular Cases* "have no foundation in the Constitution" and "deserve no place in our law." *Vaello Madero*, slip op. at 24 (Gorsuch, J., concurring).

Accordingly, to forestall further misadventures in extending or applying the *Insular Cases*, this Court should overrule them.

As the panel majority and the government acknowledged, *see* Pet.App.15a-17a; C.A.App.202, the reasoning in those decisions rests on indefensible racial animus that was wrong the day the decisions were handed down and continues to be wrong today. *See*, *e.g.*, *Downes*, 182 U.S. at 279-80, 282, 287 (opinion of Brown, J.) (arguing for a different set of rules appropriate for "alien races, differing from us," and expressing concern over "savages" becoming "citizens of the United States"); *id.* at 302, 306 (White, J., concurring in judgment) (similarly arguing that different rules are appropriate for an "uncivilized race" of "fierce, savage, and restless people," necessary to "curb their impetuosity, and keep them under subjection" (quotation marks omitted)); *see also* C.A. Constitutional-Law Scholars *Amicus* Br. 24-30; Juan R. Torruella, *The Insular Cases: A Declaration of Their Bankruptcy and My Harvard Pronouncement,* in *Reconsidering the Insular Cases* 61, 62 (Gerald L. Neuman & Tomiko Brown-Nagin eds., 2015) ("[T]he Insular Cases represent classic *Plessy v. Ferguson* legal doctrine and thought that should be eradicated from present-day constitutional reasoning." (footnote omitted)). The *Insular Cases* are thus properly understood as "central documents in the history of American racism." Sanford Levinson, *Why the Canon Should Be Expanded to Include the Insular Cases and the Saga of American Expansionism*, 17 Const. Comment. 241, 245 (2000).

Further, the term "unincorporated Territories" is "nowhere mentioned in the Constitution." *Vaello Madero*, slip op. at 30 (Gorsuch, J., concurring). Thus, modern academic authorities agree that, "[f]or an

original meaning assessment, the central attribute of the *Insular Cases* is their non-originalist analysis, founded on the ahistorical judicially invented doctrine of incorporation." Ramsey, 109 Geo. L.J. at 435; *see also* Gary Lawson & Guy Siedman, *The Constitution of Empire: Territorial Expansion & American Legal History* 196-97 (2004) (similar). In fact, virtually "no current scholar, from any methodological perspective, defends *The Insular Cases*." Gary Lawson & Robert D. Sloane, *The Constitutionality of Decolonization by Associated Statehood: Puerto Rico's Legal Status Reconsidered*, 50 B.C. L. Rev. 1123, 1146 (2009).

As this Court has explained, "[t]he Constitution grants Congress and the President the power to acquire, dispose of, and govern territory," but "*not* the power to decide when and where [the Constitution's] terms apply." *Boumediene*, 553 U.S. at 765 (emphasis added). Insofar as the *Insular Cases* establish a contrary principle, as the panel majority apparently believed, then this case is an appropriate vehicle to declare that the *Insular Cases*, like *Korematsu* and *Plessy*, were "gravely wrong the day [they were] decided" and have "'no place in law under the Constitution.'" *Trump* v. *Hawaii*, 138 S. Ct. 2392, 2423 (2018) (quoting *Korematsu* v. *United States*, 323 U.S. 214, 248 (1944) (Jackson, J., dissenting)).

II. THE QUESTION PRESENTED IS EXCEPTIONALLY IMPORTANT.

The importance of the question presented is indisputable. At stake is not just the *meaning* of a core constitutional provision that defines the boundaries of a foundational right—U.S. citizenship—on which many other rights are premised, but also whether that constitutional provision even *has* a fixed meaning that

cannot be turned on and off based on evolving or subjective factors.

Every court in this case has agreed that the question presented has tremendous legal and practical significance. The panel majority acknowledged that "[b]irthright citizenship … is an important element of the American legal system," Pet.App.34a, and the dissent agreed that "[f]ew judicial tasks are more important than deciding who are U.S. citizens and who aren't," Pet.App.189a. At the en banc stage, Judge Bacharach, joined by Judge Moritz, twice reiterated the "exceptional importance" of this issue in arguing that the en banc court should have granted the petition and changed course. Pet.App.188a.

None of this is remotely surprising in light of this Court's precedents which have repeatedly called citizenship a "fundamental right," *Trop* v. *Dulles*, 356 U.S. 86, 103 (1958) (plurality opinion), that "is no light trifle to be jeopardized any moment Congress decides to do so under the name of one of its general or implied grants of power," *Afroyim*, 387 U.S. at 267-68; *see also Kennedy* v. *Mendoza-Martinez*, 372 U.S. 144, 159 (1963) ("Citizenship is a most precious right.").

The question presented matters greatly to all 3.6 million residents of U.S. Territories. While Congress has by statute, *for now*, recognized birthright citizenship in Puerto Rico, Guam, the U.S. Virgin Islands, and the Northern Mariana Islands, on the panel majority's view, Congress did so purely as a matter of grace. *See*, *e.g.*, C.A. Virgin Islands Bar Ass'n *Amicus* Br. 8-9 (discussing how this case "impacts every American born in a U.S. territory"). If the decision below is allowed to stand, the Framers of the Citizenship Clause will have failed in their objective "'to put th[e] question of citizenship and the rights of citizens

… beyond the legislative power.'" *Afroyim*, 387 U.S. at 263 (citation omitted). Instead, the citizenship of persons born in U.S. Territories will remain subject to legislative whim—the exact opposite of what the Clause meant to achieve.[2]

The question presented is also of great practical consequence to the thousands of persons born in American Samoa. American Samoa is home to approximately 50,000 individuals, and even more who were born in American Samoa live elsewhere in the United States, where they are more significantly impacted by the denial of citizenship. Pet.App.7a. The answer to the question presented is critical to those individuals who are barred from recognition as citizens unless they first undergo the costly and burdensome naturalization process, which requires relocating from American Samoa and offers no guarantee of success. C.A.App.50-52.

Petitioners' experiences illustrate the impact of being deprived recognition as citizens. Petitioners are reminded of their unequal status whenever they open their passports, which are imprinted with a disclaimer that the bearer is "NOT A UNITED STATES CITIZEN." Pet.App.102a. That stigmatizing classification means American Samoans are citizens of *nowhere*: American Samoa is not a country, nor part of any other besides the United States. 48 U.S.C. §§ 1661-1662.

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[2] To be clear, this case does not implicate questions about American Samoa's future *political status*. Those are political questions for Congress and American Samoa's elected leaders to decide, and are entirely separate from the constitutional question of whether the Citizenship Clause applies in the Territories.

The subordinate, inferior non-citizen national status relegates American Samoans to second-class participation in the Republic. As non-citizens, for example, they cannot run for President or serve as Representatives or Senators in Congress. And those in Utah or other States are barred from voting for the federal, state, and local elected officials who determine what rights non-citizen nationals enjoy. Many, like petitioner Pale Tuli, have also had their livelihood affected by state laws barring them from certain public-service occupations, such as law enforcement. Other state laws bar non-citizens—even military veterans—from exercising the right to bear arms. Non-citizen nationals also face discrimination at the federal level, from serving as officers in the U.S. military, to how foreign-national family members are treated under immigration law. *Supra* 8-9.

Finally, this case is exceptionally important because of the panel majority's purported "repurpos[ing]" of this Court's precedents. Pet.App.17a. As an initial matter, this is an affront to our system of "[v]ertical stare decisis," which "is absolute and requires lower courts to follow applicable Supreme Court rulings in every case." *United States* v. *Duvall*, 740 F.3d 604, 609 (D.C. Cir. 2013) (Kavanaugh, J., concurring in denial of rehearing en banc). A lower court simply cannot, "on its own authority," "renounc[e]" or alter "a precedent of this Court." *Rodriguez de Quijas* v. *Shearson/Am. Express, Inc.*, 490 U.S. 477, 484 (1989). That task "'is this Court's prerogative alone.'" *Bosse* v. *Oklahoma*, 137 S. Ct. 1, 2 (2016) (per curiam) (quoting *United States* v. *Hatter,* 532 U.S. 557, 567 (2001)).

In any event, the project of repurposing the *Insular Cases* is fundamentally flawed. "[A]rguing that we need to repurpose the *Insular Cases* to accommodate culture is like arguing that we need to repurpose *Plessy v. Ferguson* to accommodate benign racial classifications." Christina D. Ponsa-Kraus, *The Insular Cases Run Amok*, 131 Yale L.J. (forthcoming 2022) (manuscript at 8). Such "revisionist account[s] of the Insular Cases" "merely drape the worst of their logic in new garb" while "neglecting" the courts' task of actually interpreting the Constitution. *Vaello Madero*, slip op. at 32 & n.4 (Gorsuch, J., concurring).

In sum, if the panel majority's decision is allowed to stand, it would set a dangerous precedent that this Court's decisions are malleable, that they may be "repurposed" by lower courts as they see fit, and that lower courts are free to expand the *Insular Cases* to deny American citizens their constitutional rights.

III. THIS CASE IS AN EXCELLENT VEHICLE TO RESOLVE THIS IMPORTANT QUESTION.

This case is an ideal vehicle for resolving the question presented.

There are no factual issues involved at all—the question presented was resolved on a set of undisputed facts on summary judgment as the sole issue in the case, and thoroughly briefed by able counsel on all sides both in the district court and before the Tenth Circuit. The question presented is also outcome determinative: If U.S. territories like American Samoa are "in the United States," then 8 U.S.C. § 1408(1) is unconstitutional and petitioners are citizens by birth. If these areas are outside the United States, then the

statute stands and petitioners are citizens of nowhere.[3]

Despite the lack of a circuit split on this question, there has been a significant split of authority among the judges below. Of the five judges who opined on the merits of this question below, three (District Judge Waddoups, and Circuit Judges Bacharach and Moritz) sided with petitioners. Given the extensive briefing and multiple opinions below, it is also unlikely that the Court would benefit from further briefing in and opinions from the lower courts.

Recent scholarly commentary has also sided emphatically with the dissenting opinions below. *See* Ramsey, 109 Geo. L.J. at 424 ("[T]he original meaning [of the Citizenship Clause] is relatively clear": "Birth 'in' the United States meant birth in territory under permanent U.S. sovereign authority."); Gary Lawson & Guy Seidman, *Are People in Federal Territories Part of "We the People of the United States"?*, 9 Tex. A&M L. Rev. (forthcoming 2022) (manuscript at 1); Ponsa-Kraus, *The Insular Cases Run Amok* (manuscript at 79); Cassandra Burke Robertson & Irina D. Manta, *Integral Citizenship*, Tex. L. Rev (forthcoming 2022) (manuscript at 1); John Vlahoplus, *Other Lands and*

[3] Petitioners and the United States both agreed that American Samoa is subject to the jurisdiction of the United States. Intervenors-Respondents the Honorable Aumua Amata and the American Samoa Government, who were intervenor defendants-appellants before the court of appeals, argued that American Samoa also is not "subject to the jurisdiction" of the United States. But the court of appeals rejected this meritless argument in a footnote. Pet.App.27a n.15.

Other Skies: Birthright Citizenship and Self-Government in Unincorporated Territories, 27 Wm. & Mary Bill Rts. J. 401 (2018).

This case is also just the latest instance of the courts of appeals continuing to struggle with applying the *Insular Cases*. *See Vaello Madero*, slip op. at 30 (Gorsuch, J., concurring) ("Lower courts continue to feel constrained to apply [the *Insular Cases*]."). In the fractured opinion below, the panel majority erroneously held that the *Insular Cases* compelled its conclusion, despite this Court's recent admonition not to extend those decisions, *see Aurelius*, 140 S. Ct. at 1665 ("much-criticized 'Insular Cases'" should not be "extend[ed]" to "issue[s]" they "did not reach"). Other circuits, too, have invoked mistaken interpretations of the inapposite *Insular Cases* to hold that the Citizenship Clause does not apply in U.S. Territories. *See*, *e.g.*, *Tuaua* v. *United States*, 788 F.3d 300, 308 n.7 (D.C. Cir. 2015); *Nolos* v. *Holder*, 611 F.3d 279, 283-84 (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, 918 (2d Cir. 1998); *Rabang* v. *INS*, 35 F.3d 1449, 1452 (9th Cir. 1994). Only this Court can correct those wrongs, and bring clarity to the widespread misapprehension of the meaning and relevance of its own precedents. *Cf.* Sup. Ct. R. 10(c). Even if the circuits' application of the *Insular Cases* were proper, none could entertain arguments that those cases should be abrogated. This Court "alone" has the "prerogative" to overrule or modify its own decisions. *State Oil Co.* v. *Khan*, 522 U.S. 3, 20 (1997).

Because the court of appeals premised its holding on the *Insular Cases*, this case offers an appropriate vehicle for overruling those ill-founded decisions.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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