No. 15-981

IN THE

Supreme Court of the United States

LENEUOTI FIAFIA TUAUA, *et al.*,
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 DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR SCHOLARS OF CONSTITUTIONAL LAW AND LEGAL HISTORY AS AMICI CURIAE SUPPORTING PETITIONERS

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INTEREST OF AMICI CURIAE[1]

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Amici have written and edited numerous works about this Court's early-twentieth-century decisions in the *Insular Cases*, on which the lower courts relied. Amici also filed an amicus brief in the court of appeals in this case.

Amici take no position on whether the Fourteenth Amendment requires birthright citizenship for those born in American Samoa. Amici do, however, disagree

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[1] Counsel for the parties have consented to the filing of this brief. No counsel for a party authored any portion of this brief, and no person other than amici or their counsel made a monetary contribution intended to fund the preparation or submission of this brief.

with the conclusion of the court of appeals that this Court's decisions in the *Insular Cases* yield the answer to that question. As amici explain, the court of appeals' decision reflects a persistent but erroneous interpretation of the *Insular Cases*. It reads the *Insular Cases* as establishing a single framework for analyzing whether the *entire* Constitution applies in unincorporated territories, and relies on that framework to hold the Citizenship Clause inapplicable to the unincorporated territory of American Samoa. In fact, the *Insular Cases* decided far narrower issues, and none of those decisions governs the resolution of the question presented in this case. Amici therefore urge this Court to grant review and to provide much-needed guidance on the correct interpretation of the *Insular Cases*.

SUMMARY OF ARGUMENT

The court of appeals' decision in this case reflects a persistent but inaccurate interpretation of this Court's decisions in a series of early-twentieth-century cases known as the *Insular Cases*. In concluding that the Citizenship Clause of the Fourteenth Amendment does not guarantee citizenship to persons born in American Samoa, the court of appeals misread the *Insular Cases* as establishing a single analytical framework for determining whether the Constitution, in its entirety, applies in any particular territory. The import of the *Insular Cases* is far narrower. The *Insular Cases* asked two distinct kinds of questions: questions about the geographic scope of certain constitutional clauses, and questions about the applicability of certain constitutional rights. The leading case, *Downes* v. *Bidwell*, 182 U.S. 244 (1901), belongs in the former category. It asked whether the phrase "the United States" as used in one particular constitutional clause—the Uniformity

Clause—included territories annexed at the turn of the century; it did not address the Citizenship Clause of the Fourteenth Amendment. Later *Insular Cases* belong in the latter category; they asked whether specific constitutional rights applied in those territories. None of the decisions purported to establish an analytical framework by which to judge whether all of the Constitution's provisions apply in a particular territory. The decision below—like many before it—overstates the holdings of the *Insular Cases* and overlooks their more limited reach.

The *Insular Cases* are thus relevant here only as to a threshold question: They established that when a territory is "unincorporated," it may or may not be part of "the United States" as that phrase is used in a given constitutional clause. Under the *Insular Cases*, then, the starting point of the Court's inquiry is whether the phrase "the United States" in the Citizenship Clause encompasses American Samoa. Although the *Insular Cases* identify the initial inquiry, they do not offer guidance as to its resolution; the question presented must be answered through a clause-specific inquiry that none of the *Insular Cases* ever conducted.

The reach of the Citizenship Clause should be ascertained by reference, in the first instance, to the language of the Fourteenth Amendment itself, which defines the Clause's geographic scope. There is therefore no need to resort either to the analysis in *Downes*, which concerned an entirely different constitutional provision (the Uniformity Clause), or to the fundamental-rights-analysis framework that the Court employed in some of the later *Insular Cases*, which decided that certain procedural constitutional rights were inapplicable to criminal prosecutions in the new territories.

The court of appeals misunderstood the import of the *Insular Cases*. It misread the *Insular Cases* as governing the application of the Constitution *in its entirety*, and then misapplied the analysis relevant to the determination of which rights apply where, to a clause that defines its own geographic scope. This Court should correct that misunderstanding, which is unfortunately widely shared in the lower courts and cannot be reconciled with either the *Insular Cases* themselves or this Court's later decisions. Moreover, the *Insular Cases* reflect outmoded sentiments about the ability of non-white residents of the new territories to participate in American institutions—sentiments that our society, and this Court, have long since repudiated. For that reason too, this Court should ensure that lower courts adopt and apply an appropriately narrow understanding of the *Insular Cases*.

ARGUMENT

I. GUIDANCE FROM THIS COURT ABOUT THE PROPER APPLICATION OF THE *INSULAR CASES* IS NECESSARY AND WARRANTED

With its decision below, the D.C. Circuit joins several other courts that have misapplied this Court's decisions in the early-twentieth-century *Insular Cases* and have "overstated their holding with respect to constitutional extraterritoriality." Burnett,[2] *A Convenient Constitution? Extraterritoriality After Boumediene*, 109 Colum. L. Rev. 973, 984 (2009). In concluding that the Fourteenth Amendment's guarantee of U.S. citizenship does not extend to persons born in American Samoa, the court of appeals below relied on a wide-

[2] Amicus Professor Christina Duffy Ponsa was formerly Christina Duffy Burnett.

spread—but nonetheless mistaken—misreading of the *Insular Cases*. The court read the *Insular Cases* as holding generally that the Constitution applies in its entirety within States and "incorporated" territories, but only its "fundamental" provisions apply in territories that remain "unincorporated." Pet. App. 11a-12a.

That reading of the *Insular Cases*, though not uncommon, is nonetheless severely flawed. This Court did not purport to decide the geographic reach of every constitutional provision in any of the *Insular Cases*.[3] Those decisions concerned the reach of particular provisions of the Constitution and federal law in overseas territories that the United States annexed following the Spanish-American War of 1898. The first decisions in the series, handed down in 1901, concerned the application of tariffs on goods imported and exported from the territories. *See, e.g.*, *Dooley* v. *United States*, 183 U.S. 151, 156-157 (1901) (holding duties on goods shipped to Puerto Rico did not violate Export Tax Clause, U.S. Const. art. I, § 9, cl. 5); *Huus* v. *New York & Puerto Rico S.S. Co.*, 182 U.S. 392, 396-397 (1901) (holding vessels involved in trade between Puerto Rico and U.S. ports engaged in "domestic trade" under federal tariff laws). Without exception, these "Insular Tariff Cases," as the Court itself described them, *see De Lima* v. *Bidwell*, 182 U.S. 1, 2 (1901), involved "narrow legal issues." Kent, Boumediene, Munaf, *and the Su-*

[3] Scholars differ on the roster of decisions known as the *Insular Cases*, but there is "nearly universal consensus that the series" begins with cases this Court decided in May 1901, such as *Downes* v. *Bidwell*, 182 U.S. 244 (1901), and "culminates with *Balzac* v. *Porto Rico*[, 258 U.S. 298 (1922)]." Burnett, *A Note on the* Insular Cases, in *Foreign in a Domestic Sense: Puerto Rico, American Expansion, and the Constitution* 389, 389-390 (Burnett & Marshall eds., 2001).

preme Court's Misreading of the Insular Cases, 97 Iowa L. Rev. 101, 108 (2011).

Of the early cases in the *Insular* series, only two required this Court to consider the applicability of constitutional provisions in the newly acquired territories. *Downes* v. *Bidwell*, 182 U.S. 244 (1901), held that the reference to "the United States" in the Uniformity Clause of Article I, Section 8, did not extend to Puerto Rico, and *Dooley* held that duties on goods shipped from New York to Puerto Rico did not violate the Export Tax Clause. In those decisions, the Court examined whether clauses specifying a geographic scope encompassed the new territories: in *Dooley*, whether the word "state" in the Export Clause encompassed the new territories, and in *Downes*, whether the new territories were part of "the United States" as that phrase is used in the Uniformity Clause.

Downes, the "most significant" of the *Insular Cases* (*see Examining Bd. of Eng'rs, Architects and Surveyors* v. *Flores de Otero*, 426 U.S. 572, 599 n.30 (1976)), illustrates the limited scope of the Court's inquiry. In *Downes*, this Court addressed whether the phrase "throughout the United States" encompassed Puerto Rico for purposes of the Uniformity Clause, which provides that "all duties, imposts and excises shall be uniform throughout the United States." U.S. Const. art. I, § 8, cl. 1. A fractured Court agreed on little other than the ultimate result in that case. Justice Brown, who announced the Court's judgment but wrote an opinion in which no other Justice joined, posited that the phrase "the United States" included only "the *states* whose people *united* to form the Constitution, and such as have since been admitted to the Union." 182 U.S. at 277; *see id.* at 260-261 (internal quotation marks omitted). Justice Brown reasoned that the Constitution's

terms were not applicable to the territories until Congress chose to "extend" them. *Id.* at 251.

"The other eight [J]ustices rejected [Justice] Brown's radical view." Kent, 97 Iowa L. Rev. at 157. Justice White, joined by Justices Shiras and McKenna, took a markedly different tack. In a separate opinion that marked the "origin of the doctrine of territorial incorporation," *id.*, Justice White reasoned that the newly acquired territories, though subject to U.S. sovereignty, were not part of the United States because Congress had not "incorporated" them into the United States by legislation or treaty. *Downes*, 182 U.S. at 287-288 (White, J. concurring in judgment). Justice White's novel distinction between "incorporated" territories and those that remained "unincorporated" and thus "merely appurtenant [to the United States] as … possession[s]," *id.* at 342, eventually commanded the votes of a majority of the Court in later *Insular Cases*. *See Balzac* v. *Porto Rico*, 258 U.S. 298, 305 (1922) ("[T]he opinion of Mr. Justice White … in Downes v. Bidwell, has become the settled law of the court.").

Although early cases such as *Downes* and *Dooley* articulated a distinction between "incorporated" and "unincorporated" territories, none advanced the proposition—crucial to the decision below, *see* Pet. App. 11a-12a—that the operative difference between the two is that only "fundamental" constitutional rights apply in the latter.[4] That rights-analysis framework emerged in

[4] Some language in those early decisions, such as Justice White's statement in his concurrence in *Downes* that certain constitutional "restrictions" might be "of so fundamental a nature that they cannot be transgressed," have lent credence to that distinction. 182 U.S. at 291. But Justice White's distinction between fundamental and other constitutional rights must be understood in its temporal context; at the time the Court had not yet found most

later decisions of this Court commonly included in the *Insular* series. All of those decisions, however, dealt with specific constitutional provisions mainly related to proceedings in criminal trials in territorial courts. *See, e.g.*, *Balzac*, 258 U.S. at 309 (Sixth Amendment right to jury trial inapplicable in Puerto Rico); *Ocampo* v. *United States*, 234 U.S. 91, 98 (1914) (Fifth Amendment grand jury clause inapplicable in Philippines). Refining the distinction between the two kinds of territories that Justice White had developed in *Downes*, those later cases "explained that Congress, despite its plenary power over all territories, did not have the power to withhold jury trial rights from incorporated ones, whereas it could withhold them from unincorporated territories." Burnett, 109 Colum. L. Rev. at 991-992.

But none of the *Insular Cases* went so far as to demarcate territorial areas where the Constitution applies "in full" from others where only fundamental provisions apply. That understanding, which the court below adopted, finds no support in the collected *Insular* decisions. Instead, as this Court most recently explained in *Boumediene* v. *Bush*, "the real issue in the *Insular Cases* was not *whether* the Constitution extended to [territories], but *which of its provisions* were applicable by way of limitation upon the exercise of executive and legislative power in dealing with new conditions and requirements." 553 U.S. 723, 758 (2008) (cit-

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of the Bill of Rights to be "incorporated" through the Fourteenth Amendment, and most constitutional rights did not apply even to the States. Justice White's observation also harked back to earlier controversies over the federal government's authority to limit slavery in territories destined for statehood, well before the *Insular Cases* reached this Court. *See generally* Burnett, Untied *States: American Expansion and Territorial Deannexation*, 72 U. Chi. L. Rev. 797, 824-834 (2005).

ing *Balzac*, 258 U.S. at 312). In two specific contexts—one, concerning the applicability of duties on goods imported to and exported from the territories, and another, involving the right to trial by juries in territorial (not federal)[5] courts—this Court held that certain constitutional provisions did not apply. That is all the *Insular Cases* did. Yet by adopting the imprecise shorthand that the *Insular Cases* withheld all but "fundamental" constitutional provisions from unincorporated territories, the court below assigned undue weight to those decisions and applied an analysis that in no way informs the applicability of the Citizenship Clause of the Fourteenth Amendment to American Samoa.

The decision below is emblematic of enduring confusion about the *Insular Cases*—the D.C. Circuit is not alone in misstating their import. Courts have frequently assumed that the *Insular Cases* dictate the geographic scope and application of constitutional provisions that were not at issue in those cases. *See*, *e.g.*, *Rabang* v. *INS*, 35 F.3d 1449, 1452 (9th Cir. 1994) ("In the *Insular Cases* the Supreme Court decided that the territorial scope of the phrase 'the United States' as used *in the Constitution* is limited to the states of the Union." (emphasis added); *Wabol* v. *Villacrusis*, 958 F.2d 1450, 1459 (9th Cir. 1992) (citing *Insular Cases* for proposition that "the *entire* Constitution applies to a United States territory … of its own force—only if that territory is 'incorporated.' Elsewhere, absent congres-

[5] No decision in the *Insular Cases* catalogue ever held that jury guarantees were inapplicable to defendants in U.S. courts within the unincorporated territories. In that regard, the Court did not treat the unincorporated territories any differently than it treated the States; the right to trial by jury did not apply against state governments until 1968. *See generally Duncan* v. *Louisiana*, 391 U.S. 145, 162 (1968).

sional extension, only 'fundamental' constitutional rights apply" (emphasis added)); *Montalvo* v. *Colon*, 377 F. Supp. 1332, 1336 (D.P.R. 1974) (noting "Constitution applie[s] *in full*" in incorporated territories but "to some lesser degree" in unincorporated territories (emphasis added)); *see also Valmonte* v. *INS*, 136 F.3d 914, 918 (2d Cir. 1998) (indicating *Insular Cases* were authoritative on "territorial scope of the term 'United States' *in the Fourteenth Amendment*" (emphasis added)); *Lacap* v. *INS*, 138 F.3d 518, 519 (3d Cir. 1998) (per curiam) (following *Rabang*); *Nolos* v. *Holder*, 611 F.3d 279, 282-284 (5th Cir. 2010) (per curiam) (following *Rabang* and *Valmonte*). In making that assumption, those courts have overlooked the Court's admonition that "the 'specific circumstances of each particular case' are relevant in determining the geographic scope of the Constitution." *Boumediene*, 553 U.S. at 759 (quoting *Reid* v. *Covert*, 354 U.S. 1, 54 (1957) (Frankfurter, J. concurring)).

This case affords this Court the opportunity to correct this mistaken assumption and to provide critical guidance on the correct application of the *Insular Cases*.

II. THIS COURT SHOULD MAKE CLEAR THAT THE *INSULAR CASES* DO NOT CONTROL THE GEOGRAPHIC SCOPE OF THE CITIZENSHIP CLAUSE OF THE FOURTEENTH AMENDMENT

The court of appeals concluded that "the scope of the Citizenship Clause, as applied to territories, may not be readily discerned … absent resort to the *Insular Cases*' analytical framework." Pet. App. 12a. That statement reflects a fundamental misapprehension about the *Insular Cases*—namely, that they established a singular analytical framework that informs the application of the Constitution, in its entirety, to the

territories. As explained above, the notion that the *Insular Cases* created extraconstitutional zones (*i.e.*, "unincorporated" territories) where only "fundamental" constitutional provisions apply misconstrues those cases. Rather, as Justice White explained in his concurrence in *Downes*, "In the case of the territories, *as in every other instance*, when a provision of the Constitution is invoked, the question which arises is, *not whether the Constitution is operative, for that is self-evident, but whether the provision relied on is applicable*." 182 U.S. at 292 (emphasis added). Thus, while amici take no position on whether the Citizenship Clause encompasses American Samoa, they do submit that the *Insular Cases* do not resolve that issue.

None of the *Insular Cases* determined the meaning of the phrase "in the United States" in the context of the Fourteenth Amendment's Citizenship Clause. In fact, in one of the *Insular Cases*, the Court expressly declined to reach the Citizenship Clause question. *See Gonzales* v. *Williams*, 192 U.S. 1, 12 (1904). The only one of the *Insular Cases* to address whether a particular reference to "the United States" in the Constitution encompassed the territories was *Downes* v. *Bidwell*. In *Downes*, a splintered majority of the Court concluded that Congress could impose tariffs on products shipped from Puerto Rico to the United States without violating the Uniformity Clause. But the five Justices in the *Downes* majority reached that result by following different paths. *See* 182 U.S. at 244 n.1 (opinion syllabus) (Justice Brown delivered an opinion "announcing the conclusion and judgment of the court in this case," but in light of Justice White's and Justice Gray's separate opinions, "it is seen that there is no opinion in which a majority of the court concurred"). And the four dissenting members of the Court—Chief Justice Fuller

and Justices Harlan, Brewer, and Peckham—posited that the phrase "the United States," as used in the Uniformity Clause, encompassed all territories, including the newly annexed islands. *See, e.g.*, *id.* at 354-355 (Fuller, C.J., dissenting); *see also* Sparrow, *The* Insular Cases *and the Emergence of American Empire* 87 (2006) ("[N]o single opinion among the five opinions in *Downes* attracted a majority on the bench."). Because the five Justices in the *Downes* majority reached their shared judgment through divergent constitutional theories, the decision, lacking a majority rationale, is precedential only as to the case's precise facts. *See Arizona* v. *Inter-Tribal Council of Ariz.*, 133 S. Ct. 2247, 2258 n.8 (2013); *Seminole Tribe of Fla.* v. *Florida*, 517 U.S. 44, 66 (1996). Thus, *Downes* is only instructive to the extent it makes clear that an unincorporated territory may or may not be part of "the United States" as that phrase is used in a particular constitutional provision. But *Downes* does not provide the answer to that question.

The proper scope of the Citizenship Clause must therefore be ascertained, not by reference to the incorporated/unincorporated distinction articulated in Justice White's concurrence in *Downes* and some of the later *Insular Cases*, but by an examination of the text, structure, history, and purpose of that particular clause. 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 and of the State wherein they reside." U.S. Const. amend. XIV, § 1. As its text illustrates, the Citizenship Clause, like the Uniformity Clause interpreted in *Downes*, defines its own geographic scope—those born in "the United States" (and subject to its jurisdiction) are citizens. If that geographic phrase includes the U.S. territory of American Samoa, then petitioners'

claim to birthright citizenship cannot be rejected on the atextual grounds that American Samoa is "unincorporated," that citizenship may or may not be a "fundamental" right, or that it would be "impractical and anomalous" to extend citizenship to individuals born there. And if that geographic phrase does *not* include American Samoa, nothing is added to that conclusion by the *Insular Cases* or any territoriality or fundamental-rights analysis therein. American Samoa's status as an unincorporated territory does not bear on anything beyond the fact that the starting point of the Court's inquiry is the identification of this case as a "geographic scope" case, in which the Court will have to ascertain whether the territory is or is not part of "the United States" for purposes of the Citizenship Clause.

Downes in no way informs the answer to that question. As stated, that decision held that a similar but not identical geographic phrase in the Uniformity Clause—"throughout the United States"—excluded Puerto Rico. But that conclusion would not necessarily extend to the Citizenship Clause even if any of the three opinions in support of the holding in *Downes* had garnered a majority of the Court's votes. There are important differences between the Uniformity Clause and the Citizenship Clause, which may require the courts to construe them differently.

First, the clauses were enacted almost a century apart and may reflect different historical meanings. The Uniformity Clause was written at the time of the Founding. At that time, the phrase "the United States" was commonly understood to mean a collective of individual (and largely independent) States. *See* Burnett, *The Constitution and Deconstitution of the United States*, in *The Louisiana Purchase and American Expansion, 1803-1898*, at 181, 181-182 (Levinson &

Sparrow eds., 2005) (citing Civil War historian James M. McPherson's work for this proposition, and explaining that just before the *Insular Cases*, the Founding-era conception "reemerged" among expansionists). By contrast, the Citizenship Clause was enacted after the Civil War, by which time the phrase had long since evolved to signify a unitary entity—one nation inclusive of its individual states and the "territories subject to its sovereignty." *Id.* Therefore, even if "throughout the United States" as used in the Uniformity Clause refers only to States, *Downes*, 182 U.S. at 251 (opinion of Brown, J.), that is not necessarily true of the phrase "in the United States" as it is employed by the Citizenship Clause.

Second, the Uniformity Clause and the Citizenship Clause emerged in different legal contexts. The fundamental purpose of the Citizenship Clause was to repudiate the infamous decision in *Dred Scott* v. *Sandford*, which held that the descendants of African slaves could not become citizens because they were "a subordinate and inferior class of beings." 60 U.S. (19 How.) 393, 403-405 (1857); *see also* Burnett, *Empire and the Transformation of Citizenship*, in *Colonial Crucible: Empire in the Making of the Modern American State* 332, 338-340 (McCoy & Scarano eds., 2009). The enactment of the Citizenship Clause thus points decidedly against a rule that makes distinctions between Americans for purposes of the rights and responsibilities of citizenship. The Uniformity Clause reflects no such concerns.

Third, the Citizenship Clause and Uniformity Clause serve different functions. The Framers adopted the Uniformity Clause to ensure that Congress could not "use its power over commerce to the disadvantage of particular *States*." *Banner* v. *United States*, 428 F.3d

303, 310 (D.C. Cir. 2005) (per curiam). Along with other constitutional provisions, *see*, *e.g.*, U.S. Const. art. I, §§ 9, 10, the Uniformity Clause protects *States* from export taxes and duties laid by the federal government or other States. By contrast, the Citizenship Clause affords *individuals* a guarantee of birthright citizenship. *See* Amar, *America's Constitution: A Biography* 381 (2005) ("The [Citizenship Clause] aimed to provide an unimpeachable legal foundation for the [Civil Rights Act of 1866], making clear that everyone born under the American flag … was a free and equal citizen."). The Citizenship Clause's reference to "States" only clarifies that U.S. citizenship exists "without regard to … citizenship of a particular State." *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 73 (1873). Distinguishing between States and territories, or incorporated territories and unincorporated territories, therefore does not make sense in the context of the Citizenship Clause.

The lower courts have failed to grapple with these potentially meaningful differences and misguidedly interpreted the *Insular Cases* to render those distinctions ineffectual. This case presents an opportunity to correct that fundamental misconception about constitutional interpretation.

III. The Territorial Incorporation Doctrine Attributed To The *Insular Cases* Is Unpersuasive As A Matter Of Constitutional Analysis And Ought Not Be Expanded

This Court has been hesitant to expand the application of the *Insular Cases*—with good reason. The territorial incorporation doctrine established in the *Insular Cases* is unpersuasive as a matter of constitutional analysis, and the antiquated notions of racial inferiority and imperial expansionism on which those cases are

based have no place in modern constitutional analysis. Thus, as several members of this Court have stated over the years, "neither the [*Insular Cases*] nor their reasoning should be given any further expansion." *Reid*, 354 U.S. at 14 (plurality opinion); *see also Torres* v. *Puerto Rico*, 442 U.S. 465, 475-476 (1979) (Brennan, J., concurring in judgment) ("Whatever the validity of the old cases such as *Downes* v. *Bidwell*, *Dorr* v. *United States*, and *Balzac* v. *Porto Rico* in the particular historical context in which they were decided, those cases are clearly not authority for questioning the application of the Fourth Amendment—or any other provision of the Bill of Rights—to the Commonwealth of Puerto Rico in the 1970's." (internal citations omitted)). Not only did the court of appeals read the *Insular Cases* too broadly, but by relying on them to resolve the scope of the Citizenship Clause, it also grounded its understanding of a constitutional provision designed to eliminate racial discrimination upon decisions now widely recognized as resting on discredited racial theories of a bygone era. If the *Insular Cases* are to remain on the books, courts should be especially cautious not to extend them any further than they warrant.

Downes announced a distinction between "incorporated" and "unincorporated" territories that was not only "unprecedented," Burnett, 109 Colum. L. Rev. at 982, but constituted a significant departure from this Court's prior conception of the Constitution's application to the territories.[6] As one amicus has explained,

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[6] *See Loughborough* v. *Blake*, 18 U.S. (5 Wheat.) 317, 319 (1820) ("[The United States] is the name given to our great republic, which is composed of States and territories."); *Downes*, 182 U.S. at 353-369, 359 (Fuller, C.J., dissenting) (citing numerous Supreme Court decisions "[f]rom *Marbury* v. *Madison* to the present day" establishing that constitutional limits apply with respect to

"nothing in the Constitution … intimates that express constitutional limitations on national power apply differently to different territories once that territory is properly acquired." Lawson & Seidman, *The Constitution of Empire: Territorial Expansion and American Legal History* 196-197 (2004). Recognizing that distinction as constitutionally unfounded, members of this Court and scholars have criticized the territorial incorporation doctrine from its inception. *See, e.g.*, *Downes*, 182 U.S. at 391 (Harlan, J., dissenting) ("[T]his idea of 'incorporation' has some occult meaning which my mind does not apprehend."); Lawson & Sloane, *The Constitutionality of Decolonization by Associated Statehood: Puerto Rico's Legal Status Reconsidered*, 50 B.C. L. Rev. 1123, 1146 (2009) ("[N]o current scholar, from any methodological perspective, [has] defend[ed] *The Insular Cases*[.]").

The notion of territorial incorporation has been rightly criticized for a second reason: It undermines our system of limited and enumerated federal powers. *Downes*, 182 U.S. at 389 (Harlan, J., dissenting) ("[T]he National Government is one of enumerated powers to be exerted only for the limited objects defined in the

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the territories); *Igartua-de la Rosa* v. *United States*, 417 F.3d 145, 163 (1st Cir. 2005) (en banc) (Torruella, J., dissenting) (noting *Insular Cases* were "unprecedented in American jurisprudence and unsupported by the text of the Constitution"); Torruella, *The* Insular Cases*: The Establishment of a Regime of Political Apartheid*, 29 U. Pa. J. Int'l L. 283, 286 (2007) ("[T]he *Insular Cases* … squarely contradicted long-standing constitutional precedent."); *see also* Biklé, *The Constitutional Power of Congress Over the Territory of the United States*, 49 Am. L. Register 11, 94 (1901) (noting shortly prior to *Downes* that "in no case in regard to jurisdiction within the territory of the United States has a limitation of the power of Congress over personal or proprietary rights been held inapplicable").

Constitution."). As Justice Harlan explained in his dissent in *Downes*, the idea of territorial incorporation "could produce the same results as those that flow from the theory that Congress may go outside of the Constitution in dealing with newly acquired territories, and give[s] [those territories] the benefit of that instrument only when and as [Congress] shall direct." *Id.* In other words, the territorial incorporation concept enables "the political branches … to switch the Constitution on or off at will," *Boumediene*, 553 U.S. at 765, by affording them sole discretion to decide whether or not to "incorporate" a territory. That result is inconsistent with a proper understanding of constitutional government. Although the Constitution authorizes Congress and the President "to acquire, dispose of, and govern territory," it does not grant them "the power to decide when and where [the Constitution's] terms apply." *Id.*

Finally, the territorial incorporation approach is even less deserving of a place in constitutional analysis today than it was at the time it was established. The distinction between incorporated and unincorporated territories reflected then-prevalent notions that certain classes of individuals, because of their heritage and racial background, could never be assimilated into American society and might never be deemed worthy of participating in American institutions of self-government. "When the Supreme Court reached its judgments in the Insular Cases, prevailing governmental attitudes presumed white supremacy and approved of stigmatizing segregation." Minow, *The Enduring Burdens of the Universal and the Different in the* Insular Cases, in *Reconsidering the* Insular Cases, *the Past and Future of the American Empire* vii (Neuman & Brown-Nagin eds., 2015).

The *Insular Cases*, and the territorial incorporation doctrine in particular, were the product of turn-of-the-twentieth-century notions about racial inferiority and imperial governance. *See, e.g.*, *Ballentine* v. *United States*, 2006 WL 3298270, at *4 (D.V.I. Sept. 21, 2006) (noting that the cases were "decided in a time of colonial expansion by the United States into lands already occupied by non-white populations"), *aff'd*, 486 F.3d 806 (3d Cir. 2007); Torruella, *The* Insular Cases*: The Establishment of A Regime of Political Apartheid*, 29 U. Pa. J. Int'l L. 283, 286 (2007) (describing the *Insular Cases* as "strongly influenced by racially motivated biases and by colonial governance theories that were contrary to American territorial practice and experience"). The doctrine's dubious underpinnings are undeniable. *See Downes*, 182 U.S. at 287 (opinion of Brown, J.) (describing territorial inhabitants as "alien races, differing from us" in many ways); *id.* at 302 (White, J. concurring in judgment) (quoting from treatise passages explaining that "if the conquered are a fierce, savage and restless people," the conqueror may "govern them with a tighter rein, so as to curb their impetuosity, and to keep them under subjection." (internal quotation marks omitted)); *see also* Rivera Ramos, *Puerto Rico's Political Status: The Long-Term Effects of American Expansionist Discourse*, in *Louisiana Purchase*, *supra* p. 13, at 165, 171, 174 (These concepts of "inferior[ity] … justified not treating [territorial inhabitants] as equals," and the *Insular Cases*' classification of some territories as "unincorporated … owed much to racial and ethnic factors.").

These notions—that whole classes of persons subject to the laws of the United States ought not have any role in the making of those laws—have no place in modern constitutional analysis, and this Court has long re-

pudiated them elsewhere. The Court should not expand the application of the territorial incorporation doctrine generally and should be especially wary of applying the doctrine when analyzing the Citizenship Clause of the Fourteenth Amendment—a provision designed to repudiate racist notions like the ones on which the doctrine was originally based.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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No. 15-981

IN THE
Supreme Court of the United States

LENEUOTI FIAFIA TUAUA, *ET AL.*,
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 District of Columbia Circuit

BRIEF OF LEAGUE OF UNITED LATIN AMERICAN CITIZENS, ASIAN AMERICANS ADVANCING JUSTICE | AAJC, AND THE NATIONAL ASIAN PACIFIC AMERICAN BAR ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICI CURIAE*[1]

League of United Latin American Citizens ("LULAC") is a nationwide nonprofit organization dedicated to advancing the economic condition, educational attainment, political influence, housing, health and civil rights of Hispanic Americans. LULAC involves and serves all Hispanic nationality groups and has approximately 132,000 members throughout the United States, including many in the U.S. Territory of Puerto Rico. LULAC and its members have an interest in this case because of its potential impact for racial equality in general and the people of Puerto Rico in particular. The same discriminatory rationale employed by the court below to deny birthright citizenship to the people of American Samoa based on their race and culture has been invoked to deny foundational rights to the 3.5 million U.S. citizens of Puerto Rico. LULAC seeks to explain why that rationale and the legal framework it has created have no place in our constitutional jurisprudence.

Asian Americans Advancing Justice | AAJC ("Advancing Justice | AAJC") is a national nonprofit, non-partisan organization working to advance the human and civil rights of Asian Americans and build

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[1] Pursuant to Rule 37.2, *amici* notified all parties of their intent to file an *amicus* brief at least ten days prior to the due date for the brief. The parties' written consent to this filing accompany this brief. Pursuant to Rule 37.6, *amici* affirm that no counsel for a party authored this brief in whole or in part, and no person other than *amici curiae* and their counsel made a monetary contribution to its preparation or submission. The parties' letters of consent to the filing of this brief are filed herewith.

and promote a fair and equitable society for all. Founded in 1991 and based in Washington, D.C., Advancing Justice | AAJC engages in litigation, public policy advocacy, and community education and outreach on a range of issues, including equal opportunity and economic development for Asian-American communities. Toward this end, Advancing Justice | AAJC is hopeful that, by agreeing to accept certiorari in this case, this Court will be able to address grave concerns of justice and equity for American Samoans.

The National Asian Pacific American Bar Association ("NAPABA") is the national association of Asian Pacific American attorneys, judges, law professors, and law students, representing the interests of nearly seventy five state and local Asian Pacific American bar associations and nearly 50,000 attorneys. NAPABA serves as the national voice for Asian Pacific Americans in the legal profession and has promoted justice, equity, and opportunity for Asian Pacific Americans. NAPABA recognizes that the Asian Pacific American community and other minority communities have been subject to discriminatory laws and practices in the past and opposes the continued use of racist and discriminatory justification to serve as the basis for American law.

SUMMARY OF ARGUMENT

Petitioners ask this Court to resolve an issue of exceptional importance—whether the Citizenship Clause of the Fourteenth Amendment applies to persons born in the territory of American Samoa. The question Petitioners pose is no less than whether

Americans born in a territory over which the United States has exercised sovereignty for 115 years, who owe permanent allegiance to the United States,[2] and who serve in our military and other public institutions in great numbers, may be denied the rights and responsibilities of citizenship—and thereby held indefinitely in a second-class status—because of their racial and cultural heritage. At present, American Samoans are the only natural-born Americans still denied birthright citizenship.

The District of Columbia Circuit analyzed this question under a line of Supreme Court holdings in the *Insular Cases*. Decided between 1901 and 1922, those cases considered whether the rights secured by the Constitution extended to the people of the noncontiguous territories, and concluded generally that, while "the Constitution applies in full in incorporated [t]erritories surely destined for statehood," it applied "only in part in unincorporated [t]erritories." *Boumediene v. Bush*, 553 U.S. 723, 757 (2008); *see also Balzac v. Porto Rico*, 258 U.S. 298, 311 (1922); *Downes v. Bidwell*, 182 U.S. 244, 288, 293-95 (1901) (White, J., concurring). In those cases, this Court found that the territories of Puerto Rico, the Philippines, and Hawaii remained "unincorporated," and therefore certain constitutional protections, including provisions of the Fifth, Sixth, and Seventh Amendments, did not apply to those territories. American Samoa, along with Puerto Rico, the U.S.

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[2] *See* 8 U.S.C. § 1101(a)(22) (a "national of the United States" is a person who "owes permanent allegiance to the United States").

Virgin Islands, Guam and the Northern Marianas, remain "unincorporated" territories today.

Applying its interpretation of the doctrine of "territorial incorporation" arising from the *Insular Cases*,[3] the D.C. Circuit held that birthright citizenship under the Fourteenth Amendment is not "fundamental" or "integral to [a] free and fair society," but instead is "idiosyncratic to the American social compact or to the Anglo-American tradition of jurisprudence." Pet. App. 15a. The court thus held that the Citizenship Clause does not apply to "unincorporated" territories like American Samoa and therefore does not entitle persons born in American Samoa to citizenship.

The question of whether certain Americans are entitled to birthright citizenship under the Fourteenth Amendment is itself "an important question of federal law" that should be settled by this Court. *See* Sup. Ct. R. 10(c). But it is especially crucial that the Court grant certiorari in this case to address the potential consequences of the D.C. Circuit's opinion, which affects not only American Samoans, but also people born in the other noncontiguous territories, and the American constitutional system generally.

The D.C. Circuit erred in extending the reach of the *Insular Cases'* discriminatory framework to Petitioners' claim. Its decision to do so was erroneous for at least two reasons addressed here: First, the

[3] As argued in the Petition, the court below actually applied a significantly expanded version of the analytical framework from the *Insular Cases*. Pet. App. 27-30.

rationale underlying the *Insular Cases*—and specifically its distinction between "fundamental" constitutional rights and those "idiosyncratic" to the Anglo-American legal tradition—is based on anachronistic and abhorrent assumptions about the racial and cultural backgrounds of people born in the noncontiguous territories, and particularly the belief that those non-Anglo-Saxon people are less capable of exercising the rights and bearing the burdens of U.S. citizenship. The rationale underlying the *Insular Cases* is a close relative of the more infamous rationale of *Plessy v. Ferguson*, 163 U.S. 537 (1896), which was decided by the same Court just a few years before *Downes*. But the rationale of *Plessy*, along with its resultant legal rule, was resoundingly rejected in *Brown v. Board of Education*, 347 U.S. 483 (1954). The *Insular Cases*, even as applied to American Samoa and other "unincorporated" territories—territories that have long been part of our country and are currently home to more than four million Americans—remain good law. The rationale of racial and cultural exclusion at the heart of the *Insular Cases*, like that of *Plessy*, has no place in our constitutional jurisprudence, and can no longer be grounds for denying American Samoans citizenship.

Second, the D.C. Circuit's ruling failed to appreciate the foundational role that citizenship plays in the American political system and in the relationship between the citizen and his or her government. In distinguishing between "fundamental" constitutional rights and those particular to the Anglo-American legal tradition, the court considered birthright citizenship in

isolation, divorced from the many basic and practical rights that citizenship bestows. To say that the Citizenship Clause is not fundamental because of the way citizenship is acquired misses the point. In denying citizenship to American Samoans, the D.C. Circuit has denied them access to some of our most basic and sacred rights—even when they reside in one of the 50 states or the District of Columbia—from voting and jury service to military advancement to the right to pursue certain careers.

The rationale underlying the *Insular Cases* is a stain on our constitutional tradition, which the court below used to justify the continued second-class status of American Samoans. The Petition presents this Court with the opportunity to ensure that a rationale of racial and cultural exclusion is, like its jurisprudential cousin in *Plessy*, properly relegated to a regrettable chapter of history. Accordingly, the Petition should be granted.

ARGUMENT

I. The *Insular Cases'* "Territorial Incorporation" Doctrine Reflects an Agenda of Racial and Cultural Discrimination That Has No Place in Current Constitutional Jurisprudence.

The *Insular Cases* did not consider whether the Citizenship Clause's grant of birthright citizenship to those "born … in the United States," U.S. Const. amend. XIV, applies to persons born in the noncontiguous territories. Nevertheless, the D.C. Circuit addressed Petitioners' claim by "resort to the

… analytical framework" of the *Insular Cases*. Pet. App. 12a. The court, calling the *Insular Cases* "contentious," explained that "some aspects of the Insular Cases' analysis may now be deemed politically incorrect...." Pet. App. 13a. Even so, the court believed it could separate the "framework" created by those cases for determining whether the Constitution applies to outlying territories from the "anachronistic views of race and imperialism" that gave rise to the doctrine. *Id.* at 12a-13a. Finding that birthright citizenship is not fundamental, but rather particular to the Anglo-American legal tradition, the D.C. Circuit denied Petitioners' claims.

In the D.C. Circuit's view, the language of racial and cultural inferiority pervading the *Insular Cases* was just unfortunate and unnecessary dicta underlying an otherwise legitimate doctrine. But this supposed dichotomy between the *Insular Cases*' reasoning and its doctrinal legacy is illusory. The framework of "incorporated" and "unincorporated" territories arose from discriminatory motives and was crafted to serve a discriminatory purpose. This Court recognized in *Brown v. Board of Education* that the nation could not divide people of different races into supposedly "separate but equal" categories without serving *Plessy's* purpose of perpetuating Anglo-Saxon supremacy. So too, courts cannot deny American Samoans birthright citizenship on the ground that they were born in a so-called "unincorporated" territory and therefore unworthy of rights "idiosyncratic to the Anglo-American tradition of jurisprudence," Pet. App. 15a (first quotation from *Dorr v. United States*, 195

U.S. 138, 147 (1904)), without sanctioning the belief that they are not fully capable of U.S. citizenship because of their non-Anglo-Saxon heritage.

A. The Doctrine of "Territorial Incorporation" Arose from the View that the Diverse Peoples of the Noncontiguous Territories Were Incapable of U.S. Citizenship.

By 1901, the year in which the first set of the *Insular Cases* was decided, the United States found itself in a new role—that of a global imperial power. *See* The Hon. Juan R. Torruella, *The Insular Cases*, 29 U. Pa. J. Int'l L. 283, 289 (2007). Victory in the Spanish-American War in 1898 gave the United States possession of the former Spanish colonies of Puerto Rico, the Philippines and Guam. *Id.* at 288-89. The same year, the Republic of Hawaii (itself a product of the overthrow of the Kingdom of Hawaii led by white planters) was annexed as the Territory of Hawaii. In 1900, the United States annexed American Samoa. *See generally* Sylvia R. Lazos Vargas, *History, Legal Scholarship, and LatCrit Theory*, 78 Denv. U. L. Rev. 921, 923-33 (2001).

The United States thus became sovereign over noncontiguous territories that were extensively settled by non-Anglo-Saxon people living in societies, cultures, and systems of government markedly different from what the Court would term the "Anglo-American tradition." *See Dorr v. United States*, 195 U.S. 138, 147 (1904). These territorial acquisitions ignited political and legal debates between so-called "imperialists" and "anti-imperialists"—those who believed that the

United States could and should annex the new territories, and those who believed the nation should not or could not. *See* Torruella, *supra* at 287-300; *see also* Efrén Rivera Ramos, *The Legal Construction of American Colonialism*, 65 Rev. Jur. U.P.R. 225, 237, 241-42 (1996).

At the center of these debates was the question of how to treat the diverse, non-Anglo-Saxon peoples inhabiting the new territories: would they become American citizens like those living in western continental territories, or would they be ruled like colonial subjects? Some anti-imperialists opposed annexation because they believed that it was both illegal and antithetical to American values to rule territories indefinitely as colonies. *See* Rivera Ramos, *supra* at 238-39. Others in the "anti-imperialist" camp, however, were motivated by a very different concern—that annexing the new territories required making their inhabitants citizens. Those in this second camp thought that the Constitution permitted only two choices for the new territories: full independence or full integration into the United States, as had been provided to the western continental territories held by the United States at the time of independence, acquired in the Louisiana Purchase, or annexed following the Mexican-American War. *Id.* at 238, 297–98. These anti-imperialists found the idea of integrating the new territories into the nation to be unthinkable, as doing so would mean granting "alien" people of "inferior" races U.S. citizenship and therefore full access to the rights and mechanisms of self-government. In the words of

Carl Schurz, a one-time U.S. senator and Secretary of the Interior:

> The fundamental objection to bring [the new territories] in as states was that they would then participate in the government of the Republic. If they become states on an equal footing with the other states they will not only be permitted to govern themselves as to their home concerns, but they will take part in governing the whole republic, in governing us …. The prospect of the consequences which would follow the admission of the Spanish creoles and the negroes of West India islands and of the Malays and Tagals of the Philippines to participation in the conduct of our government is so alarming that you instinctively pause before taking the step.

See Rivera Ramos, *supra* at 238 n.35.

Despite their sharp differences of opinion, those in favor of annexing the new territories and those opposed were united on one issue—that the inhabitants of the new territories were unfit for U.S. citizenship, as is evident in the congressional and academic debates at the time, which referred to "the half-civilized Moros of the Philippines, or the ignorant and lawless brigands that infest Puerto Rico …,"[4] "mongrels of the East, with breath of pestilence and touch of leprosy,"[5] coming

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[4] Simeon E. Baldwin, *The Constitutional Questions Incident to the Acquisition and Government by the United States of Island Territory*, 12 Harv. L. Rev. 393, 415 (1899).

[5] Hon. Gustavo A. Gelpi, *The Insular Cases*, 58-Fed. Law. 22, 22 (Mar./Apr. 2011) (quoting 33 Cong. Rec. 3616 (1900)).

from a "cannibal island."[6] The prevailing view in these debates was that the inhabitants of the noncontiguous territories had "nothing in common with us and centuries cannot assimilate them" and thus they would "never be clothed with the rights of American citizenship nor their territory be admitted as a State of the American Union."[7] *See* Rivera Ramos, *supra* at 238-39.

But Supreme Court rulings and historical practice at that point were clear that the Constitution required the new territories to be fully integrated into the nation — and their inhabitants provided the rights and responsibilities of citizenship. *See* Rivera Ramos, *supra* at 241-42. In fact, in the far-less infamous portion of *Dred Scott v. Sanford*, the Court held unequivocally that the Constitution granted "no power … to the Federal Government to establish or maintain colonies bordering on the United States or at a distance, to be ruled or governed at its own pleasure," and "no power is given to acquire a territory to be held and governed" as a permanent colony. 60 U.S. 393, 446 (1857). Likewise, historical practice offered no precedent for holding the new territories indefinitely as colonies, as the western continental territories had always been governed by a framework providing them a path to statehood and affording their non-Native American inhabitants U.S. citizenship. *See* Rivera Ramos, supra at 237.

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[6] James Bradley Thayer, *Our New Possessions*, 12 Harv. L. Rev. 464, 481 (1899).

[7] Gelpi, *supra* at 22 (quoting 33 Cong. Rec. 2105 (1900)).

The challenge for those who could not fathom extending citizenship, with its rights and responsibilities of self-government, to the non-Anglo-Saxon inhabitants of the new territories, was to distinguish these new territories and their people from the territories acquired and settled through western expansion. *See* Lazos Vargas, *supra* at 930-31. The Supreme Court in the *Insular Cases* answered that challenge.

B. Like *Plessy v. Ferguson*, the *Insular Cases* Created a Discriminatory Framework that Cannot Be Separated from its Discriminatory Purpose.

The *Insular Cases*, and in particular *Downes v. Bidwell*, 182 U.S. 244 (1901) and *Balzac v. Porto Rico*, 258 U.S. 298 (1922), developed a constitutional framework for holding the new territories as colonies, even while extending the full rights and responsibilities of citizenship to settlers in the western continental territories. The race and culture of the peoples of the new territories served as the primary distinguishing factor.

Joined by two other justices, Justice White wrote what would eventually emerge as the central holding of the *Insular Cases*. Warning of the "evil(s) of immediate incorporation," including the possibility of "millions of inhabitants of alien territory," which could result in a breakdown of the "whole system of government," *Downes*, 182 U.S. at 311-13 (White, J., concurring), Justice White distinguished between "incorporated" territories, which were fit for eventual statehood, and "unincorporated" territories of "alien

races" not so fit. *Id.* at 291. He determined that only in incorporated territories, as in the states themselves, would residents enjoy full benefits of constitutional protection, while the "alien races" of unincorporated territories like Puerto Rico would enjoy only those constitutional provisions that were "of so fundamental a nature that they cannot be transgressed…." *Id.* Justice White's rationale for this new rule was unequivocally imperialist. Postulating a scenario in which the United States discovered "an unknown island, peopled with an uncivilized race, yet rich in soil, and valuable to the United States for commercial and strategic reasons," he reasoned that the country's supposed right to acquire the island "could not be practically exercised if the result would be … the immediate bestowal of citizenship on those absolutely unfit to receive it[.]" *Id.* at 306.

Justice Brown, announcing the judgment of the Court but writing only for himself, was even more explicit than Justice White about the need to create a rule that would prevent the entire Constitution from applying to the overseas territories once they were annexed:

> It is obvious that in the annexation of outlying and distant possessions grave questions will arise from differences of race, habits, laws and customs of the people, and from differences of soil, climate and production, which may require action on the part of Congress that would be quite unnecessary in the annexation of contiguous territory inhabited only by people of

> the same race, or by scattered bodies of native Indians.

182 U.S. at 282. In other words, Justice Brown drew a distinction between continental territories on the one hand, and "outlying" territories such as those newly acquired on the other, based on "grave questions" about whether the non-Anglo-Saxon residents of such territories should be given "rights ... peculiar to our own system of jurisprudence." *Id.* at 282-83. Indeed, Justice Brown concluded that "[i]f [distant] possessions are inhabited by alien races ... the administration of government and justice, according to Anglo-Saxon principles, may for a time be impossible." *Id.* at 287.

Given that no opinion in *Downes* garnered the support of a majority of the Court, the doctrinal rule of the *Insular Cases* would not crystallize until years later, in *Balzac v. Porto Rico*, 258 U.S. 298 (1922). Applying Justice White's incorporation doctrine while invoking the explicit rationale of Justice Brown's opinion, the *Balzac* Court held that the right to a jury trial did not apply on Puerto Rico as an unincorporated territory. 258 U.S. at 311. Writing for the Court, Justice Taft (formerly President and before that Governor General of the Philippines) developed the distinction in Justices White's and Brown's opinions between "fundamental" rights and those "peculiar to our own system of jurisprudence." *Downes*, 182 U.S. at 282-83 (Brown, J.). He explained that the residents of Puerto Rico and the Philippines were not well-suited to adopting the jury system, as those territories were populated by people who "liv[ed] in compact and ancient communities, with definitely formed customs

and political conceptions," and who need not benefit from "institution[s] of Anglo-Saxon origin." *Id.* at 310.

Distinguishing *Rassmussen v. United States*, 197 U.S. 516 (1905), *abrogated by Williams v. Florida*, 399 U.S. 78 (1970), which held that the Sixth Amendment jury trial right applied in the territory of Alaska, Justice Taft explained that, in contrast to the "compact and ancient communities" of the new territories, Alaska was "an enormous territory, very sparsely settled, and offering opportunity for immigration and settlement by American citizens." *Balzac*, 258 U.S. at 309-10.

The *Insular Cases* remain a relatively unknown chapter of American constitutional history. Yet, they should not be mistaken for a niche area of the law, because their effect is profound. The *Insular Cases* do to the diverse races and cultures of the noncontiguous territories what the Court's infamous decision in *Plessy v. Ferguson*, 163 U.S. 537 (1896), *overruled by Brown v. Bd. of Educ.*, 347 U.S. 483 (1954), did to African-Americans — legalize a system of racial subordination and provide constitutional legitimacy to racially discriminatory motives. *See* Ediberto Román, *Empire Forgotten*, 42 Vill L. Rev. 1119, 1148 (1997). Notably, *Downes* and *Plessy* were decided by the same Justices joining along similar lines, with Justice Brown writing both opinions for the Court, and Justice White joining in both judgments. Justice Harlan dissented both times. *See* Torruella, *supra* at 300-01.

In both the *Insular Cases* and *Plessy*, the prevailing opinions adopt abhorrent racial stereotypes to justify racial subjugation. *Compare Downes*, 182 U.S. at 306, 311-13 (White, J., concurring) *with Plessy*,

163 U.S. at 552 ("If one race be inferior to the other socially, the constitution of the United States cannot put them upon the same plane."). Both created a legal framework, thinly veiled in supposedly non-discriminatory terms, that actually operated to constitutionalize racial discrimination. In *Plessy*, this was "separate but equal;" in the *Insular Cases*, it was the sanitized lexicon of "incorporation." In creating these frameworks, both sanctioned a two-tiered, racially segregated system of civic membership, as Justice Harlan observed in his dissents in both cases. *See Plessy*, 163 U.S. at 563-64 (Harlan, J., dissenting) (laws such as the one upheld "interfere with the full enjoyment of the blessings of freedom, to regulate civil rights, common to all citizens, upon the basis of race, and to place in a condition of legal inferiority a large body of American citizens, now constituting a part of the political community, called the 'People of the United States ….'"); *Downes*, 182 U.S. at 380 (Harlan, J., dissenting) (the judgment permits Congress to "engraft upon our republican institutions a colonial system such as exists under monarchical governments."). And both endeavored to add constitutional legitimacy to their holdings by claiming that they did not lead to racial subjugation at all. *Compare Plessy*, 163 U.S. at 550 ("[E]very exercise of the police power must be reasonable, and extend only to such laws as are enacted in good faith for the promotion of the public good, and not for the annoyance or oppression of a particular class."), *with Downes*, 182 U.S. at 291 ("there may nevertheless be restrictions of so fundamental a nature that they cannot be

transgressed, although not expressed in so many words in the Constitution.").

Most notably for purposes of the Petition pending before the Court, each case put forth a legal framework that cannot be separated from the discriminatory rationale it was created to serve. Both "separate but equal" and "territorial incorporation" discriminate on the basis of race by their very operation. The Supreme Court in *Brown v. Board of Education* recognized this when it ruled that "[s]eparate educational facilities are inherently unequal" because segregation of African-American students on the basis of race "generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone," and that "[t]he impact is greater when it has the sanction of the law, for the policy of separating the races is usually interpreted as denoting the inferiority of the negro group." 347 U.S. 494-95.

In the same way, courts cannot, as the D.C. Circuit attempted to do below, undertake the bizarre and unmoored exercise of carving up the Constitution into those rights that are "fundamental" and those that are "idiosyncratic to the Anglo-American tradition of jurisprudence," Pet. App. 15a (first quotation from *Dorr v. United States*, 195 U.S. 138, 147 (1904)), without serving the purpose of that exercise—to deny certain rights, as foundational to our Constitution as those ensconced in the Fifth, Sixth, and Seventh Amendments, to people deemed too far outside the Anglo-American legal tradition. That purpose is the only rationale ever provided in the *Insular Cases* for

why such a test should govern which constitutional rights apply to those living in the territories like American Samoa.

There is, however, one stark difference between *Plessy* and the *Insular Cases*: *Plessy's* doctrine of separate but equal was rightly rejected 62 years ago in *Brown v. Board of Education*. 347 U.S. 483, 494–95 (1954). The rationale of racial and cultural exclusion underlying the *Insular Cases* has long been due the same fate. Even if that rationale ever had legitimacy, it certainly has none now. American Samoa has been part of our nation for 115 years. Its people operate within our systems of government and law, and have one of the highest military enlistment rates of the states and territories. *See* Pet. at 9. It cannot plausibly be said that American Samoans are incapable of U.S. citizenship. *See* Pet. at 8-10. It is time for this Court to hold that American Samoans are birthright citizens, and can no longer be denied that right based on the discriminatory doctrine of territorial incorporation.

II. By Denying Citizenship To American Samoans, the Court Below Denied Them Access To a Host of Political, Social, and Civil Rights.

The decision below has real and practical consequences for Americans born in American Samoa. Citizenship is not only an honorific entitling one to full membership in the political community. It is also, in its most practical sense, a "turn-key" that entitles the citizen to an entire set of additional exclusive rights. *Perez v. Bronwell*, 356 U.S. 44, 64 (1958) (Warren, C.J., dissenting) (citizenship is "nothing less than the right

to have rights"), *overruled in part by Afroyim v. Rusk*, 387 U.S. 253 (1967). It is the basis on which the polity grants, or denies, a set of other rights based on federal, state, and local law. *See* Linda Bosniak, *The Citizen and the Alien: Dilemmas of Contemporary Membership* 21-23 (2008). The indignities and uncertainties suffered by American Samoans alone among persons born within the United States' jurisdiction are discrete and identifiable.

The *Insular Cases*' project of trying to draw clear lines around specific constitutional provisions and label them as "fundamental" or "idiosyncratic to the Anglo-American tradition," is plainly inadequate to consider this meaning of citizenship. By decoupling citizenship from the attendant rights and obligations it bestows and considering only the source of the title itself, the D.C. Circuit failed to account for the practical way that citizenship functions in our nation.

Like other residents of the territories, American Samoans are denied the right to vote for president and have no representation in Congress. The Supreme Court has also held that Americans living in the territories can be denied equal access to benefits such as Aid to Families With Dependent Children, *see Harris v. Rosario*, 446 U.S. 651, 651-52 (1980), or Social Security benefits, *Califano v. Gautier Torres*, 435 U.S. 1, 5 (1978). But American Samoans, in the unique position of non-citizen U.S. nationals, are denied a host of additional rights even when they are living in one of the fifty states or the District of Columbia.

For instance, American Samoans living in a state cannot vote in most elections, even state and local

elections. The right to vote is not simply a routine privilege; it is "the essence of a democratic society," and the principal mechanism by which individuals engage with and exercise control over the governance of the community. *Reynolds v. Sims*, 377 U.S. 533, 555 (1964); *see also Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886).

As non-U.S. citizens, American Samoans are also uniformly denied another primary mechanism of civic engagement and participation—service on federal and state juries. *See* 28 U.S.C. § 1865(b). Like voting, jury service is a quintessential means of participating in American social and civic life. *See Powers v. Ohio*, 499 U.S. 400, 407 (1991). The inability to serve on a jury is "practically a brand upon [an individual], affixed by the law, [and] an assertion of [his] inferiority." *Strauder v. West Virginia*, 100 U.S. 303, 308 (1879), *abrogated by Taylor v. Louisiana*, 419 U.S. 522 (1975). Moreover, the exclusion of American Samoans from jury service is particularly harmful to American Samoan litigants and—most of all—American Samoan criminal defendants, who cannot go before juries "composed of the peers or equals of the person whose rights it is selected or summoned to determine; that is, of his neighbors, fellows, associates, persons having the same legal status in society as that which he holds." *Batson v. Kentucky*, 476 U.S. 79, 86 (1986) (quoting *Strauder*, 100 U.S. at 308). For American Samoans, the reality of trial by a jury of one's peers is a far cry from this ideal.

American Samoans also face obstacles to advancement within the United States Armed Services, even though they have bravely fought for this

country for the past century. According to the U.S. Army Reserve, America Samoa "yields the highest rate of military enlistment of any U.S. state or territory." U.S. Army Reserve, *American Samoa and the United States Army Reserve*, http://www.usar.army.mil/Featured/ArmyReserveAtAGlance/AmericanSamoa.aspx. However, as of 2011, only about one quarter of enlisted active-duty positions in the Air Force were in occupations that did not require citizenship. Molly F. McIntosh & Seema Sayala with David Gregory, *Noncitizens in the Enlisted U.S. Military*, Center for Naval Analyses, 21-22 (Nov. 2011). Once a non-citizen has finished the initial enlistment commitment with the Air Force, he or she is prohibited from reenlisting without citizenship. *Id.* American Samoan service members in the other branches of the armed services face similar restrictions: as of 2011, non-citizens were eligible for only two-fifths of enlisted active-duty positions in the Navy and one-half of those positions in the Army and Marine Corps. *Id.* Advancement of non-citizens in the military is also limited. Non-citizens may not be appointed or commissioned as officers or reserve officers in any branch of the armed forces. 10 U.S.C. §§ 532(a)(1), 12201(b)(1).

Even when they die serving their country, American Samoan service members are treated less favorably than American citizens. Spouses, children, and parents of deceased service members who were citizens may apply for naturalization without demonstrating residence or physical presence in the United States. 8 U.S.C. § 1430(d). However, the law denies this benefit to the families of service members

who were not citizens at death. *Id.* The spouse, child, or parent of the deceased service member may overcome this slight only if they first obtain posthumous citizenship for their deceased loved one. *Id.; see also* 8 U.S.C. § 1440-1(a)-(b).

Citizenship also plays a significant role in family-based immigration laws, under which American Samoans—as non-citizens—are afforded only the rights and benefits granted to legal permanent residents. *See Matter of Ah San*, 15 I. & N. Dec. 315 (BIA 1975). Thus, American Samoans who live in the fifty States and the District of Columbia do not enjoy the same advantages as U.S. citizens in their ability to sponsor their foreign-national family members for visas to immigrate to the United States. Perhaps most significantly, there are entire classes of foreign nationals that non-citizen nationals simply may not sponsor to immigrate to the United States, even though U.S. citizens would have that ability. For example, a U.S. citizen may sponsor his or her parents to immediately immigrate to the United States under the "immediate relatives" provision. INA § 201(b)(2)(A)(i), 8 U.S.C. § 1151(b)(2)(A)(i). Non-citizen nationals do not have that right. Under different provisions of the immigration law, U.S. citizens may sponsor their married sons or daughters, or their brothers and sisters, for immigration to the United States and eventual citizenship, INA § 203(a)(3), (4), 8 U.S.C. § 1153(a)(3), (4), but non-citizen nationals are afforded no correlate right.

Even where American Samoans can sponsor their relatives' immigration to the United States, their

ability to do so is more limited than that of U.S. citizens. For instance, both American Samoans and U.S. citizens may sponsor their foreign national spouses or unmarried children under the age of 21. However, only citizens may take advantage of the "immediate relatives" provision of INA § 201(b)(2)(A)(i), 8 U.S.C. § 1151(b)(2)(A)(i), which allows citizens to immediately sponsor those relatives (as well as their parents) for permanent residence and eventual citizenship. This has significant practical consequences, because it allows citizens and their sponsored family members to avoid the complicated system of per-year and per-country limits on immigration that are part of the family-based visa program—a system that often entails a substantial waiting period before an individual is finally eligible for a visa.

Finally, many professional opportunities in the public sector are limited to U.S. citizens. It is well known that the Constitution requires the President to be a "natural born [c]itizen," U.S. Const. art. II § 1, cl. 4, and the Constitution requires that members of the Senate and the House of Representatives be citizens for nine or seven years, respectively. *Id.* art. I, §§ 2, 3. But state and local laws often impose significant restrictions on public positions at all levels that American Samoans may hold. Many states require that state governors, legislators, judges, and other state leaders be U.S. citizens. Numerous state and local laws also require U.S. citizenship to hold a number of ordinary but vital public positions, such as that of police officer or state trooper, firefighter or paramedic, and public school teacher. Those laws also prohibit non-

citizens from holding various public and quasi-public leadership positions, such as a member of a state board of nursing, a state pharmacy commission, a school board, or a real estate commission, among a wide variety of others. The State of Washington, home to one of the largest communities of ethnic American Samoans in the country, broadly prohibits any non-citizen from "hold[ing] any elective public office within the state of Washington, or any county, district, precinct, school district, municipal corporation or other district or political subdivision." Wash. Rev. Code § 42.04.020. Public employment, like private employment, provides a means of income as well as opportunities for personal and professional development. *Cf. Rutan v. Republican Party of Ill.*, 497 U.S. 62, 74 (1990). For that reason alone, restrictions on the types of positions American Samoans can hold is harmful. But public employment, similar to voting and jury service, also provides an opportunity to shape and serve one's community, whether by working in national security or serving on a local school board.

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The Petition presents an important question of federal law—whether a group of Americans can be denied U.S. citizenship based on racial and cultural stereotypes. This question is of great importance to people born in American Samoa, who are currently denied U.S citizenship on those very bases. But the question is also important to all Americans who no longer wish to have a racially and culturally tiered system of citizenship.

CONCLUSION

For the reasons stated herein, the petition for writ of certiorari should be granted.

Respectfully submitted,

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