13-5272

In the United States Court of Appeals for the District of Columbia Circuit

LENEUOTI FIAFIA TUAUA, VA'ALEAMA TOVIA FOSI, FANUATANU FAUSELA LIFEA MAMEA, ON HIS OWN BEHALF AND ON BEHALF OF HIS MINOR CHILDREN, M.F.M., L.C.M., AND E.T.M., TAFFY-LEI T. MAENE, EMY FIATALA AFALAVA, SAMOAN FEDERATION OF AMERICA, INC.,
Plaintiffs-Appellants,

v.

UNITED STATES OF AMERICA, UNITED STATES DEPARTMENT OF STATE, JOHN F. KERRY, JANICE JACOBS,
Defendants-Appellees.

On Appeal from the United States District Court for the District of Columbia (Leon, J.), Case No. 12-01143

BRIEF FOR INTERVENORS OR, IN THE ALTERNATIVE, *AMICI CURIAE* THE AMERICAN SAMOA GOVERNMENT AND CONGRESSMAN ENI F.H. FALEOMAVAEGA

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August 25, 2014

[ORAL ARGUMENT NOT YET SCHEDULED]

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to D.C. Circuit Rule 28(a)(1), counsel certifies as follows:

A. Parties and *Amici*. All parties, intervenors, and *amici* appearing before the district court and in this Court are listed in the Brief for Defendants-Appellees.

B. Rulings Under Review. References to the ruling at issue appear in the Brief for Plaintiffs-Appellants.

C. Related Cases. Intervenors for Defendants-Appellees are unaware of any related cases.

Dated: August 25, 2014

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GLOSSARY

Fa'a Samoa — the Samoan way of life

Matai — chiefs of Samoan extended families

'Aiga — the organization of Samoan households according to large, extended families

Fono — a council, legislative assembly

CNMI — Commonwealth of the Northern Mariana Islands

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Whether the district court correctly concluded, consistent with over a century of precedent and practice, that the Citizenship Clause of the U.S. Constitution does not grant birthright citizenship to persons born in the unincorporated territory of American Samoa.

2. Whether the district court erred in resolving this purely legal question on a motion to dismiss.

STATUTES AND REGULATIONS

Relevant statutes and regulations are reproduced in the Addendums to the Plaintiffs-Appellants' and Defendants'-Appellees' Briefs.

INTRODUCTION

Whether birthright citizenship should extend to the people of American Samoa is a question for the people of American Samoa, and not for this Court to decide. In ***every*** other case in which people born in overseas territories were granted birthright citizenship, Congress, not the courts, has made that decision. There simply is no legal basis for upsetting one hundred years of precedent indicating that the Citizenship Clause does not apply in every territory subject to the jurisdiction of the United States. Nor would doing so make any sense. Many aspects of *the fa'a Samoa*—the Samoan way of life—are wholly unlike anything either in the other territories or the continental United States, and this way of life and foundational, cultural institutions would be jeopardized if subjected to scrutiny under the Fourteenth Amendment. For these reasons, this appeal presents unique and serious concerns to the elected representative of the American Samoan people, Congressman Eni F.H. Faleomavaega and the American Samoa Government, and they should be permitted to intervene in a suit that seeks to upend their sovereignty, autonomy, and way of life.

STATEMENT OF THE CASE

During the period spanning from 1857 to 1947, the United States gained control of a number of lands outside the continental United States. The United States first took possession of a series of uninhabited islands in the Pacific containing deposits of guano, which was prized for its use in gunpowder and agricultural fertilizer. In 1899, Spain ceded control of Guam, the Philippines, and Puerto Rico to the United States in the Treaty of Paris. In 1900, the tribal leaders of American Samoa ceded sovereignty of the Samoan Islands to the United States. And in 1917, the United States purchased the U.S. Virgin Islands from Denmark. Finally, in 1947, the United Nations entrusted the United States with the Trust Territory of the Pacific Islands, which included the Marshall Islands, Federated States of Micronesia, Northern Mariana Islands, and Palau.

The relationship between the United States and these lands has changed over time in response to the will of the people inhabiting them. The Philippines gained self-governance and, eventually, full independence. The Marshall Islands, Federated States of Micronesia, and Palau became independent, but freely associated with the United States following the end of a trusteeship. American Samoa, Guam, the Northern Mariana

Islands, Puerto Rico, and the U.S. Virgin Islands have all remained unincorporated territories of the United States.

American Samoa is unique among the territories of the United States. In contrast to many other former colonies, "American Samoa has never been conquered, never been taken as a prize of war, and never been annexed against the will of [its] people." *See* Statement of Cong. Eni F.H. Faleomavaega, Stmt. before the United Nations Special Committee on Decolonization (May 23, 2001), *available at* https://web.archive.org/web/20120702002618/http://www.house.gov/list/speech/as00_faleomavaega/undecolonization.html. Instead, American Samoa's tribal leaders, the *matai*, voluntarily ceded sovereignty to the United States Government in 1900.

American Samoa is predominantly a self-governing territory. Its Constitution establishes a bicameral legislature, elected by the Samoan people; a judiciary appointed by the Secretary of the Interior; and a popularly-elected territorial governor. *See* Joint Appendix at 13. The Constitution includes a Bill of Rights that recognizes freedom of speech, freedom of religion, due process under law, freedom from unreasonable searches and seizures, and many other protections of civil rights. *See*

Revised Const. of Am. Samoa art. 1 §§ 1, 2, 5. And since 1978, American Samoa has had representation in the U.S. House of Representatives.

Although American Samoa has adopted many of the governing values of the United States, it retains a vibrant and unique culture, the Samoan way of life or *fa'a Samoa*. Samoan households, for example, are notable for their organization according to large, extended families, known as '*aiga*. These extended families, under the authority of *matai*, or chiefs, remain a fundamental social unit in Samoan society. *See* Arnold H. Leibowitz, *American Samoa: Decline of a Culture*, 10 Cal. W. Int'l L.J. 220, 224–25 (1980). These deep kinship and social ties are also highly conducive to a strong sense of community. For example, the *matai* traditionally organize the resources of the '*aiga* to undertake projects for the benefit of the entire community. *Id.* at 224. At the same time, an intricate series of ceremonial exchanges of goods and food provide a *private* social safety net within Samoan society. *See id.* at 225–26.

A key aspect of the traditional kinship practices and social structures is the land. As island people, Samoans are acutely aware of the scarcity of land. The importance of land as a place for creating a home, for sustaining a livelihood, and for gathering together the '*aiga* are fundamental to

Samoan culture. *See Craddick v. Territorial Registrar*, 1 Am. Samoa 2d 11, 13 (1980), *available at* http://www.asbar.org/index.php?option=com_content&view=article&id=641:craddick-v-territorial-registrar&catid=50&Itemid=254. As the High Court of American Samoa has observed:

> Land to the American Samoan is life itself. He cherishes the land where his ancestors came hundreds of years ago, and where he and his children were born. Land is the only thing he values above anything else because it belongs to him and will belong to his children, just as it belonged to his predecessors for centuries past.

Id. Communal ownership of land is a fundamental aspect of American Samoan identity because other important parts of Samoan culture, such as the '*aiga* and the *matai*, are intimately and historically predicated upon control of the land. *See* Leibowitz, *supra*, at 222–23. As such, the American Samoa Bill of Rights specifically provides restrictions on alienation of land to prevent "the destruction of the Samoan way of life and language, contrary to [the] best interests [of the Samoan people]." Revised Const. of Am. Samoa art. 1, § 3.

Although the people of American Samoa are proud of their relationship with the United States, they have never come to a consensus about whether they should ask for Congress to grant them citizenship at

birth. Instead, people born in American Samoa are U.S. nationals, not U.S. citizens, by birth. They owe allegiance to the United States, are able to enter the United States freely, and may apply for U.S. citizenship without satisfying the requirements of permanent residence. Many American Samoans also serve with distinction in the U.S. Armed Forces.

Five U.S. nationals born in American Samoa and the Samoan Federation of America, a private organization serving Samoans in Los Angeles, sued the United States and related parties entrusted with executing its citizenship laws. In their complaint, they alleged that they were entitled to U.S. citizenship as a birthright because the Citizenship Clause of the Fourteenth Amendment extends to American Samoa and that the failure of the U.S. government to recognize this right had caused them various harms.

The district court permitted the Honorable Eni F.H. Faleomavaega to participate as *amicus curiae*. Congressman Faleomavaega filed an *amicus* brief and—at the request of the district court—a reply brief to the Plaintiffs-Appellants' opposition to the United States' motion to dismiss. The Congressman also participated in the oral argument on the United States' motion to dismiss.

As *amicus curiae*, Congressman Faleomavaega argued on behalf of the defendants that the district court should dismiss the Plaintiffs-Appellants' complaint. Congressman Faleomavaega agreed with the defendants that longstanding precedent of the Supreme Court foreclosed the plaintiff Samoans' arguments, but he also offered additional context and arguments about the application of birthright citizenship to unincorporated territories. Congressman Faleomavaega argued that Congress, not the courts, should determine whether birthright citizenship should extend to the people of American Samoa, as it has in ***every*** other case in which people born in overseas territories were granted birthright citizenship. Congressman Faleomavaega also explained that mandating birthright citizenship by judicial fiat could have unintended and potentially harmful consequences for American Samoan society because many aspects of the *fa'a Samoa*, which are wholly unlike anything either in the other territories or the continental United States, might be jeopardized if subjected to scrutiny under the Fourteenth Amendment.

The district court agreed with the defendants and Congressman Faleomavaega and dismissed the complaint. The district court explained that, although "none of the Insular Cases directly addressed the

Citizenship Clause, they suggested that citizenship was not a 'fundamental' right that applied to unincorporated territories." Joint Appendix at 47. The district court cited Congressman Faleomavaega's brief multiple times, particularly his argument about the longstanding and non-controversial practice of congressional grants of birthright citizenship to people born in other overseas territories of the United States.

On appeal, Congressman Faleomavaega and the American Samoa Government seek to intervene on behalf of the Defendant-Appellee United States. This appeal presents unique and serious concerns to the Congressman and the American Samoa Government as the elected representatives of the American Samoan people.

SUMMARY OF ARGUMENT

Plaintiffs-Appellants' suit is foreclosed by the Insular Cases. Citizenship by judicial fiat would undermine the American Samoan way of life and interfere with American Samoan cultural autonomy and sovereignty by effectively removing the resolution of American Samoa's status from the democratic process.

ARGUMENT

I. THE INSULAR CASES FORECLOSE PLAINTIFFS-APPELLANTS' CLAIMS.

The constitutional framework that governs the outlying territories of the United States has been in place for over a century. Through a series of decisions in 1901 known as the Insular Cases, the Supreme Court acknowledged the limited application of the Constitution in the territories.[1] Since then, this "century-old doctrine," *Boumediene v. Bush*, 553 U.S. 723, 759 (2008), has been followed by every appellate court to address the issue to find that the Citizenship Clause does not apply in every territory subject to the jurisdiction of the United States.[2] The Supreme Court has affirmed the basic principle of the Insular Cases, stating that "[o]nly 'fundamental' constitutional rights are guaranteed to inhabitants" of unincorporated United States territories. *See, e.g.*, *United*

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1 *See, e.g.*, *De Lima v. Bidwell*, 182 U.S. 1 (1901); *Goetze v. United States*, 182 U.S. 221 (1901); *Dooley v. United States,* 182 U.S. 222 (1901); *Armstrong v. United States*, 182 U.S. 243 (1901); *Downes v. Bidwell*, 182 U.S. 244 (1901); *Huus v. N.Y. & Porto Rico Steamship Co.,* 182 U.S. 392 (1901).

2 *See Eche v. Holder*, 694 F.3d 1026, 1027-28 (9th Cir. 2012); *Valmonte v. INS*, 136 F.3d 914 (2d Cir. 1998); *Lacap v. INS*, 138 F.3d 518 (3d Cir. 1998); *Rabang v. INS*, 35 F.3d 1449 (9th Cir. 1995).

States v. Verdugo-Urquidez, 494 U.S. 259, 268 (1990) (citing *Dorr v. United States*, 195 U.S. 138, 149 (1904)); *Balzac v. Porto Rico*, 258 U.S. 298, 312-13 (1922); *Examining Bd. of Eng'rs, Architects and Surveyors v. Flores de Otero*, 426 U.S. 572, 599 n.30 (1976).

One of the most famous Insular Cases, *Downes v. Bidwell,* is long-cited as authority for the proposition that citizenship is not one such "fundamental right" applicable to the territories. 182 U.S. 244, 282 (1901). While *Downes* lacked a single majority opinion, both Justices Brown and White's opinions in the case stated that citizenship is "unnecessary to the proper protection of individuals" and is therefore not a "natural right." *Id.* at 382-83. *Downes* went on to find that the Uniformity Clause did not apply in the territory of Puerto Rico prior to Congress's grant of statutory citizenship to inhabitants of that territory. *Id.*; *see also* Jones-Shafroth Act of 1917, Pub. L. 64-368, 39 Stat. 951. Though *Downes* was a plurality opinion that addressed the Citizenship Clause in dicta, these dicta are persuasive and have been both cited and undisputed for over a hundred years. The reasoning in *Downes* should control here just as it has for other lower courts seeking a coherent rubric for the application of constitutional provisions in other territories.

One such case, *Rabang v. Boyd,* rejected a Filipino national's claim that "his status as a national" bore a "close relationship to the constitutionally secured birthright of citizenship acquired by the American-born." 353 U.S. 427, 430 (1957). *Amici* contend that *Rabang* is not on point, since it deals with Congress's power to divest those in the territories of non-alien status. Br. of Constitutional Law Scholars at 15 n.8. But limits on the power to grant and divest rights are similarly affected by citizenship. Far from assuming rights of citizenship applied to Filipino then-nationals, as Plaintiffs-Appellants would have the court do with respect to American Samoa, *Rabang* reiterated Congress's power to "prescribe upon what terms the United States will receive its inhabitants, and what their status shall be." *Id.* at 432 (citing *Downes*, 182 U.S. at 279) (internal quotation marks omitted). That power is at the heart of this lawsuit.

Since 1901 lower courts have adhered to the precedent of the Insular Cases in cases involving the Philippines, the Northern Mariana Islands, and the United States Virgin Islands. *See Eche v. Holder*, 694 F.3d 1026, 1027-28 (9th Cir. 2012) (finding the Citizenship Clause did not apply to the Northern Mariana Islands); *Valmonte v. INS*, 136 F.3d 914 (2d Cir. 1998);

Lacap v. INS, 138 F.3d 518 (3d Cir. 1998); *Rabang v. INS*, 35 F.3d 1449 (9th Cir. 1995) (all finding that "United States" in the Citizenship Clause did not include the Philippines during its time as an unincorporated territory); *Licudine v. Winter*, 603 F. Supp. 2d 129, 132-34 (D.D.C. 2009) (finding that, as an unincorporated territory, the Philippines did not enter the orbit of the Fourteenth Amendment); *Gov't of Virgin Islands v. Rijos*, 285 F. Supp. 126, 129 (D.V.I. 1968) (citing the *Insular Cases* to state that "[i]t is settled" that the Fifth Amendment right to a grand jury indictment does not govern a prosecution for offenses against the Virgin Islands "without Congressional approval"). These cases send a clear and consistent message: the territories of the United States are not automatically invested with constitutional citizenship. If all territories ought to be treated alike, as *amici* contend, *see* Br. of Certain Members of Congress at 9, then the Insular Cases are to be applied to American Samoa just as they have been to her sister territories. And although *amici* also claim that the Insular Cases should no longer be considered good law, Br. of Constitutional Law Scholars, at 4, this is simply not the case. *See* Pedro Malavet, *The Inconvenience of a "Constitution (That) Follows the Flag … but Doesn't Quite Catch Up with It": From* Downes v. Bidwell *to*

Boumediene v. Bush, 80 Miss. L.J. 181, 182 (2010) ("While they disagreed on whether or not the rule should apply to Guantanamo, the dissenting justices and those in the majority agreed that the over-a-century-old rule of the *Insular Cases* … is still good law.").

In short, courts have refused to apply the Citizenship Clause to other territories for over a century. That precedent should be followed with respect to American Samoa. The Supreme Court and this Circuit have repeatedly emphasized that longstanding precedent should only be overruled in limited situations, such as when it has proven unworkable. *See, e.g.*, *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 362 (2010); *Planned Parenthood v. Casey*, 505 U.S. 833, 854-55 (1992); *United States v. Burwell*, 690 F.3d 500, 504 (D.C. Cir. 2012). Where there is "wide acceptance in the legal culture," that is also "adequate reason not to overrule" precedent. *Dickerson v. United States,* 530 U.S. 428, 443-44 (2000) (finding, even without approval of *Miranda*'s reasoning or resulting rule, *Miranda* warnings were too embedded in routine police practice to justify overruling that precedent). Respect for precedent is also "indispensable" and "fundamental" to the rule of law, and serves many valuable policy ends. *Planned Parenthood*, 505 U.S. at 854; *Welch v. Texas*

Dep't of Highways & Pub. Transp., 483 U.S. 468, 494 (1987). In particular, it enhances efficiency, promotes consistency, and fosters predictability. *See* Erwin Chemerinsky, *Decision-Makers: In Defense of Courts*, 71 Am. Bankr. L.J. 109, 128 (1997).

Given that federal courts across the country have "adhered to the precedents of the Insular Cases" in cases involving unincorporated territories, Joint Appendix at 50, judicial policy favoring the application of settled precedent applies here. Should the Insular Cases be abandoned, it would upset a consistent history of deference to Congress on the management of unincorporated territories, while automatically naturalizing tens of thousands of people, and hampering the flexibility of the United States to distinguish between territory "in the United States" and territory "subject to the jurisdiction thereof," as the Constitution intended. U.S. Const. amend. XIV, § 1. Plaintiffs-Appellants rightly point out that "[b]irthright citizenship has already been recognized *by statute*…in the Territories of Puerto Rico, Guam, the U.S. Virgin Islands, and the Northern Mariana Islands." Brief of Plaintiffs-Appellants ("Appellants' Br.") at 58. Plaintiffs-Appellants' own argument thereby

makes clear the fundamental issue presented here: statutory citizenship is the norm, constitutional citizenship the exception.

Although Plaintiffs-Appellants' suit is foreclosed by the Insular Cases, even supposing it were not and that this is an issue of first impression, as Plaintiffs-Appellants contend, this Court should still follow the Insular Cases, in harmony with the Supreme Court's recent decision in *Noel Canning*. *NRLB v. Noel Canning,* Slip No. 12-1281, 573 U.S. __ (2014).[3] The Supreme Court in *Noel Canning* made clear that when interpreting a constitutional provision "for the first time in more than 200 years, [the Court] must hesitate to upset the compromises and working arrangements that the elected branches of Government themselves have reached." *Id.* at 9. This is especially true, the court observed, where the

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3 Plaintiffs-Appellants rely heavily on Judge Sentelle's *approach* in *Noel Canning* when it was before this Court. In their reading it supports the proposition that the Court should look to the original meaning of a constitutional provision over its historical practice and such a reading should be followed regardless of the then-imminent, now-recent Supreme Court opinion. Appellants' Br. at 15 n.7. But this disclaimer notwithstanding, the fact is that the majority of the Supreme Court decidedly rejected and overruled this Court's approach even as it agreed as to the outcome.

question concerns "the allocation of power between two elected branches of Government." *See id.* at 7 (citing *The Pocket Veto Case*, 279 U.S. 655, 689 (1929); *McCullough v. Maryland*, 4 Wheat. 316, 401 (1819)). Here, the Insular Cases did just that: confirming Congress's power to decide the "status" of the territories. *See Downes*, 182 U.S. at 279 (asserting that Congress has the power to grant statutory rights to territories and to "prescribe … what their status shall be"). The interpretation of the Insular Cases has not only been followed by federal courts for over a hundred years, but Congress has also acquiesced, acting through *legislation* to grant statutory citizenship rights to certain territories as appropriate. Acquiescence to historical practice under is particularly warranted in this case, and the Court below rightly recognized such. Joint Appendix at 53 ("[T]his Court is mindful of the years of past practice in which territorial citizenship has been treated as a statutory, and not a constitutional, right.").

Furthermore, applying the Citizenship Clause to American Samoa would effectively decide its status within the political system of the United States. The Supreme Court in *Rabang* treated the question of citizenship as a question about status, and rightly so. Citizenship is "nothing less

than the right to have rights." *Perez v. Brownell*, 356 U.S. 44, 64 (1958) (Warren, C.J., dissenting), *majority opinion overruled by Afroyim v. Rusk*, 387 U.S. 253, 267 (1967). *Amici* do not disagree. *See* Br. of David Cohen at 5. Yet Plaintiffs-Appellants and *amici* inexplicably claim that deciding the application of the Citizenship Clause to American Samoa will not decide the status of American Samoa as a permanent part of the United States. *See* Appellants' Br. at 26; Br. of Certain Members of Congress at 22-23. In doing so, Plaintiffs-Appellants draw a strained distinction between seeking birthright citizenship and seeking wholesale naturalization. Appellants' Br. at 36. But the effect of bestowing birthright citizenship on territories through a constitutional provision, as opposed to Act of Congress,[4] is that naturalization of all American Samoans results. *See Downes*, 182 U.S. at 306 (White, J., concurring) (cautioning that if any "territory when acquired becomes absolutely incorporated into the United States, every provision of the Constitution

[4] *See, e.g.*, statutes conferring citizenship on every other territory: 48 U.S.C. §1421 (Guam); Jones-Shafroth Act of 1917, Pub. L. 64-368, 39 Stat. 951 (Puerto Rico); 8 U.S.C. § 1406 (U.S. Virgin Islands); Act of March 24, 1976, Pub. L. No. 94-241, §301, 90 Stat. 266 (Northern Mariana Islands).

which would apply under that situation is controlling in such acquired territory").

In addition to conferring status, citizenship also confers other rights. Plaintiffs-Appellants' own cited authority, the *Slaughter-House Cases*, supports that all "fundamental rights, privileges, and immunities which belong to [an individual] as a free man and a free citizen, now belong to him as a citizen of the United States." Appellants' Br. at 50 (citing 83 U.S. 36, 95 (1872)). Even *amici* in support of Plaintiffs-Appellants argue that "[a]t the most tangible level, citizenship is a 'turn-key'—a right that unlocks a set of other rights that federal, state, and local laws have keyed to the legal concept of citizenship." Br. of David Cohen at 4. Plaintiffs-Appellants cannot have it both ways; either citizenship will not affect application of other constitutional provisions to American Samoa or it will.

Importantly, Plaintiffs-Appellants offer no coherent method of interpreting the Fourteenth Amendment. Instead, they rely on a series of question-begging inferences to support their interpretation of the phrase "in the United States." First, Plaintiffs-Appellants cite the *Slaughter-House* cases as authoritative on whether the Citizenship Clause reaches to the territories. That precedent assumed only that citizenship applied

"within the United States." 83 U.S. 36, 72-73 (1872); *see also Loughborough v. Blake*, 18 U.S. 317, 319 (1820) (noting that "the United States" includes the "district of Columbia" and "the territory west of the Missouri").[5] This meaning of "within the United States" is circular. Furthermore, the *Slaughter-House* cases largely interpreted the Privileges or Immunities Clause, not the Citizenship Clause. With respect to the Citizenship Clause, they primarily observed that the Fourteenth Amendment had overturned *Dred Scott* to grant citizenship to *all* persons born "in the United States." 83 U.S. at 73-74. Again, the meaning of this phrase is precisely what is at issue in this suit. Plaintiffs-Appellants next invoke *Wong Kim Ark*, another case that applied the Fourteenth Amendment to an American-born individual in San Francisco, without disputing that San Francisco was "within the United States." 169 U.S. 649, 693 (1898). Both *Slaughter-House* and *Wong Kim Ark* affirm that

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[5] The cases Plaintiffs-Appellants do not cite, curiously, are those finding the Citizenship Clause does apply to the then-territories of Hawaii and Alaska. *See generally Hawaii v. Mankichi*, 190 U.S. 197 (1903) (Hawaii); *Rassmussen v. United States*, 197 U.S. 516 (1905) (Alaska). Clearly, there is a recognized dichotomy between incorporated and unincorporated territories. But even without this dichotomy, the Plaintiffs-Appellants' application of the phrase "the United States" in these cases is inapposite.

citizenship applies "within the United States." But as Plaintiffs-Appellants point out, the very scope of the phrase "in the United States" is the issue here. Appellants' Br. at 10. Therefore, these cases cannot be "authoritative." *Id.* at 25.

As additional support for the supposedly far-reaching consensus on the meaning of "in the United States," Plaintiffs-Appellants refer to acts of Congress. First, they cite to the 1866 Civil Rights Act, which famously predated, and precipitated, the Fourteenth Amendment. Section 1 of the statute states:

> "all persons born *in the United States* and not subject to any foreign power … are hereby declared to be citizens of the United States; and such citizens … shall have the same right, in every State and Territory in the United States."

Appellants' Br. at 22 (citing 14 Stat. 27, § 1 (1866)). Plaintiffs-Appellants use this statutory provision to support the proposition that "in the United States" includes both "State[s] and Territor[ies]. *Id.* But the provision clearly draws a distinction between the grant of citizenship "in the United States" and its recognition in States and territories. It never defines "in the United States" related to the grant of citizenship.

Second, Plaintiffs-Appellants draw comparisons between the Citizenship Clause and provisions of the Naturalization Act. But all this

act does is condition naturalization on residence "within the limits and under the jurisdiction of the United States," which may include one year "within the state or territory" where the petition is heard. Naturalization Act of 1795, 1 Stat. 414, § 1, ¶¶ 2-3. Far from being a clear and authoritative interpretation of the text of the Citizenship Clause (or the Naturalization Clause, for that matter), the Naturalization Act clarifies the residency requirement for *naturalization*, saying nothing about birthright citizenship. Indeed, Plaintiffs-Appellants themselves highlight the difference between the birthright citizenship and naturalization as reassurance that citizenship would not have far-reaching results. Appellants' Br. at 36. The Naturalization Act does not speak to the status of citizens or the meaning of "the United States" for purposes of the Citizenship Clause. And, indeed, a statute does not necessarily determine constitutional interpretation at all. *See Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2583 (2012) (explaining that Congress cannot decide the meaning of a phrase "for constitutional purposes simply by describing it as one or the other [in a statute]").

In short, this court is faced with the choice between Plaintiffs-Appellants' chaotic array of non-persuasive sources on the one hand, and

over a century of precedent and practice on the other. The Supreme Court just this term observed that shorter periods of historical practice are worthy of deference. *See Noel Canning*, at 7 ("at least twenty years … is entitled to great regard in determining the true construction of a constitutional provision"); *id.* at 31-33 ("three-quarters of a century" of practice is entitled to "great regard"). And even if there are scattered examples that counter historical practice, that does not upset its reliability. *Id.* at 21. Although some courts, following the Insular Cases, have extended "fundamental rights" to unincorporated territories, *see, e.g.*, *Boumediene*, 553 U.S. at 757-58, those rights have been interpreted very narrowly, *see* Joint Appendix at 52-53 (citing *Corp. of Presiding Bishop of Church of Jesus Christ of the Latter-Day Saints v. Hodel*, 830 F.2d 374, 385 (D.C. Cir. 1987) (excluding due process access to Article III courts from those "principles which are the basis of all free government")). And the *only* cases to explicitly recognize rights of citizenship in territories dealt with *American citizens* in those territories. *See, e.g.*, *King v. Morton*, 520 F.2d 1140, 1147 (D.C. Cir. 1975); *Reid v. Covert*, 354 U.S. 1, 75 (1957).

II. CONGRESS AND THE PEOPLE OF AMERICAN SAMOA, NOT THE COURTS, SHOULD DECIDE WHETHER TO EXTEND BIRTHRIGHT CITIZENSHIP TO AMERICAN SAMOA.

Whether or not to extend birthright citizenship to the people of American Samoa is a question for Congress and not the courts. In *every other territory*, the grant of birthright citizenship has been made by Congress without any significant controversy. This is as it should be, because questions of birthright citizenship are tied to questions of political status, and thus necessarily political questions.

A. The Imposition Of Birthright Citizenship By Judicial Fiat Would Have Unintended Negative Consequences For The Culture Of American Samoa, Which Congress Has Long Protected.

American Samoa occupies a truly unique position among the territories of the United States. As explained above, American Samoa is a territory of the United States that has managed to maintain unique cultural practices such as *matai* titles and community-owned American Samoan land; these traditions are unlike anything else in the United States, and Congress has made sure to preserve this unique culture for over a century.

The American Samoan way of life, the *fa'a Samoa*, is of critical importance to the American Samoan people. For example, American

Samoa's land-tenure system and its clan-based restrictions on ownership are longstanding and rooted in the very nature of insular life and the scarcity of land it entails. *See* Stanley K. Laughlin, Jr., *The Application of the Constitution in the United States Territories: American Samoa, A Case Study*, 2 U. Haw. L. Rev. 337, 371 (1981) (explaining the "land oriented" culture of "Insular peoples" due to their "limited land resources"); Statement of Hon. Salanoa S.P. Aumoeualogo, LH, *Revised Constitution of Am. Samoa: Hearing before the Subcomm. on Energy Conservation and Supply of the Comm. on Energy and Natural Res.*, 98th Cong. (May 8, 1984) ("*Constitution Hearing*") ("Land to the American Samoan is life itself."). As such, American Samoan social institutions revolve around the communal ownership and management of the land for the good of the community. This is primarily accomplished through the '*aiga* or extended family or clan, which is the *basic social unit* of American Samoan society. *See* Stanley K. Laughlin, Jr., *Cultural Preservation in Pacific Islands: Still A Good Idea-and Constitutional*, 27 U. Haw. L. Rev. 331, 337 (2005). The '*aiga*, which can range in number from dozens to thousands, own the land in common for the benefit of the group, and the property is managed via the *matai* or chiefs. *Id.* at 338. The *matai*, in turn, supervise the economic

activity of the common land and meet with each other in council, known as *fono*, to organize larger projects. *See* Arnold H. Leibowitz, *American Samoa: Decline of a Culture*, 10 Cal. W. Int'l L.J. 220, 224-25 (1980). Since all of this occurs in the context of communal land, it is unsurprising that this Court has observed, "Communal ownership of land is the cornerstone of the traditional Samoan way of life." *Corp. of Presiding Bishop*, 830 F.2d at 377.

The United States has long recognized the importance of the American Samoan way of life and the American Samoan people value the role the United States and Congress play as the protectors of this way of life. When Congress voted to amend the American Samoan Constitution in 1984, the legislative history was instructive of this relationship. It made clear that "[i]t has been the constant policy of the United States, partly as a matter of honor, partly as a result of treaty obligations, not to impose our way of life on Samoa." Statement of Robert B. Shanks, Deputy Assistant Attorney General, Office of Legal Counsel, *Constitution Hearing* at 53. Indeed, as the then-Governor of American Samoa said to Congress during the same hearing, "[t]he United States in turn has guaranteed protection to American Samoa not only of our islands themselves but also of our land,

customs and traditions." Statement of Hon. Peter Tali Coleman, *Constitution Hearing* at 10. Governor Coleman went on to note that "Congress has played, and we pray, that it will continue to play a meaningful role in our development, and particularly, the role of being the protector of the Samoan way of life." *Id.* at 16.

Birthright citizenship by judicial fiat would upend this longstanding relationship and jeopardize the *fa'a Samoa*. The traditional way of life in American Samoa would likely face heightened scrutiny under the United States Constitution if the scope of the Citizenship Clause were read to reach American Samoa. Most problematically, the communal land system at the heart of the *fa'a Samoa* is protected by Samoan law restricting the sale of community land to anyone with less than fifty percent racial Samoan ancestry. Am. Samoa Code Ann. § 37.0204(a) (1992). This restriction is consistent with practice going back to when America assumed possession of American Samoa in 1900 and Commander B.F. Tilley prohibited the alienation of land to non-Samoans. Jeffrey B. Teichert, J.D., *Resisting Temptation in the Garden of Paradise: Preserving the Role of Samoan Custom in the Law of American Samoa*, 3 Gonz. J. Int'l L. 35, 47 (2000). As the Department of Justice noted to Congress during

American Samoa's constitutional debates of 1984, protecting the American Samoan culture and way of life

> has been based partly on treaty and partly simply on our sense of obligation of not imposing our ways arbitrarily on others. That protection … has been accomplished in part through a legal isolation of American Samoa, which stems *in part from the fact that American Samoans are noncitizen nationals rather than American citizens*.

Statement of Robert B. Shanks, *Constitution Hearing* at 47 (emphasis added). Without the buffers of national-status and the Insular Cases, American Samoa's restrictions on land alienation might be subject to "the most exacting scrutiny." *Palmore v. Sidoti*, 466 U.S. 429, 432 (1984).

As experience in other territories shows, even clear protections for traditional practices are quickly circumscribed when courts begin to scrutinize the rights of citizens under the Equal Protection Clause. Just this last May, the United States District Court for the Northern Mariana Islands struck down the Commonwealth of the Northern Mariana Islands' (CNMI's) laws restricting voting in constitutional referenda to the indigenous people of CNMI (known as Chamorros and Carolinians).[6]

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6 Perhaps tellingly, CNMI is the only territory not represented in Plaintiffs-Appellants' *amici*.

Davis v. Commonwealth Election Comm'n, 14-CV-00002, 2014 WL 2111065 (D.N.M.I. May 20, 2014). Those voting restrictions were put in place to safeguard CNMI's racial land-alienation provisions in its constitution.[7] Nevertheless, the court found that "[a]ll citizens have an equal interest in whether they are entitled to buy real property, and on what terms." *Id.* at *38. Indeed, the court went on to conclude,

> The interest of the non-privileged class in whether the privilege will be extended to them is as substantial as the interest of the privileged class in whether it will remain exclusive. This is not to discount the interest of Northern Marianas Chamorros and Carolinians, recognized in the Covenant and validated in *Wabol*, to preserve their ancestral lands. But that interest does not override the stake the Commonwealth's non-[Northern Mariana descent] citizens have in whether they will ever be able to own outright the land on which they make their homes.

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[7] *Amici* for Plaintiffs-Appellants make much of the fact that these racial-alienation laws have been upheld so far under Equal Protection challenge. *See Wabol v. Villacrusis*, 958 F.2d 1450, 1460-61 (1990). But the alienation laws in CNMI, importantly, are not in fact similar to those of American Samoa. In the former case there are simply restrictions on who may buy land. Covenant to Establish a Commonwealth of the Northern Mariana Islands in Political Union with the United States of America, Proclamation No. 4534, 42 Fed. Reg. 56,593 (Oct. 24, 1977) § 805 (restricting for a period of time "the alienation of permanent and long-term interest in real property so as to restrict the acquisition of such interests to persons of Northern Mariana Islands descent"). In American Samoa the racial land alienation rules are tied into the *communal* ownership of land and its relation to both the *matai* hierarchy and the '*aiga* clan system.

Id. at 38-39. That is, even with the CNMI's racial-alienation laws being held constitutional under established precedent, equal citizenship will not permit one group of people to be privileged in CNMI law over another.

It also does not avail Plaintiffs-Appellants to say that the land-alienation laws of CNMI have been found constitutional in the past. *See* Appellants' Br. at 58. The entire point of this lawsuit is that prior determinations of constitutionality do not control. As explained above, courts have repeatedly concluded that the Citizenship Clause does not apply to unincorporated territories of the United States over the course of decades, and yet Plaintiffs-Appellants insist that the courts must set aside those determinations in favor of a novel revisionist reading of the Citizenship Clause. While seeking to dismantle a century of precedent, Plaintiffs-Appellants incredibly tell the people of American Samoa not to worry about their traditional way of life because there is legal precedent protecting it.

But there is not. The case cited by Plaintiffs-Appellants in support of the theory that land-alienation laws can survive equal protection challenge, *Wabol v. Villacrusis*, was critically decided *under the framework of the Insular Cases*. *See Wabol*, 958 F.2d at 1459 ("It is well established

that the entire Constitution applies to a United States territory *ex proprio vigore*—of its own force—only if that territory is "incorporated." Elsewhere, absent congressional extension, only "fundamental" constitutional rights apply in the territory.") Plaintiffs-Appellants and *amici* seek to upend this very framework in extending the Citizenship Clause to American Samoa. Once the Insular Cases no longer govern the relationship between the United States and American Samoa, new challenges to aspects of the *fa'a Samoa* will be subject to new analysis consistent with newly articulated constitutional principles. *See, e.g.*, *Ezell v. City of Chicago*, 651 F.3d 684, 707-10 (7th Cir. 2011) (inferring the appropriate standard of review for first-impression challenges to Chicago's gun laws in the wake of *Heller* and *McDonald*).

These new cases of first impression will also involve the constitutional rights of natural-born citizens of the United States. Citizens have already been involved in the cases importing American legal principles to American Samoa. *King v. Morton*, 520 F.2d 1140, 1141 (D.C. Cir. 1975). This should come as no surprise: as *amicus* David Cohen notes in his brief, "At the most tangible level, citizenship is a "turn-key"—a right

that unlocks a set of other rights that federal, state, and local laws have keyed to the legal concept of citizenship." Br. of David Cohen at 4.

Last, all the other assurances given to the people of American Samoa by *amici* from her sister territories that citizenship presents no difficulties are inapposite for precisely the reasons presented here: these territories received citizenship by statute, as required by the Constitution. *Amici* claim that citizenship has not proved impractical in any other territory, citing the experience of Guam, Puerto Rico, CNMI, and the U.S. Virgin Islands. Br. of Certain Members of Congress at 4-13. Tellingly, though, *not one* of these territories received citizenship by judicial fiat. Each received it by Act of Congress. *See* 48 U.S.C. §1421 and 8 U.S.C. §1407 (Guam); Jones-Shafroth Act of 1917, Pub. L. 64-368, 39 Stat. 951 (Puerto Rico); Act of March 24, 1976, Pub. L. No. 94-241, § 301, 90 Stat. 266 (CNMI); 8 U.S.C. § 1406 (U.S. Virgin Islands). Indeed, the territory most analogous to American Samoa, CNMI (which, again, is not represented by *amici*) was able to strike a careful balance through legislation to preserve aspects of its culture that might not conform to mainland legal values. *See Wabol*, 958 F.2d 1450; 8 U.S.C. § 1406 (U.S. Virgin Islands) (establishing a procedure to renounce birthright citizenship in favor of national status).

If American Samoa is to take solace from the experience of the other territories, it should not be denied the right to resolve these questions legislatively like they were. If anything, these examples prove the point: the *fa'a Samoa* is not threatened by *legislative* grants of citizenship, and thus any such grant should come from Congress.

B. The Imposition Of Birthright Citizenship Would Upset A Political Process That Ensures Self-Determination For The People Of Unincorporated Territories.

If Plaintiffs-Appellants and *amici* are correct and the courts must set aside the framework of the Insular Cases, it would undercut the very predicate of the *fa'a Samoa*. American Samoa has worked closely with Congress to maintain a deliberate distance between the territory and the law of the United States. It has done so because this distance is necessary to respect the cultural autonomy of American Samoa and its way of life. *See* Statement of Hon. Salanoa S.P. Aumoeualogo, LH, *Constitution Hearing* at 15, 16 ("American Samoa enjoy and welcome our present status as an unincorporated and unorganized territory of the United States. It signifies our desire to be part of the American Family, and at the same time, it preserves and protects our communal land and *matai* system, the basic core of our Samoan way of life."). If the courts bridge this distance

with a novel application of the Citizenship Clause it would effectively decide the political status of American Samoa without any democratic input.

Ultimately, a decision for citizenship is a decision for statehood. Proposed Intervenors cannot think of any example of a territory that was deemed part of the United States for constitutional citizenship purposes where the result has been anything other than closer union. Any such decision *must* be made by Congress and the people of American Samoa.

Plaintiffs-Appellants attempt to distinguish the highly relevant Filipino citizenship cases on the grounds that the Philippines were not expected to stay in the United States for the long term. *See* Appellants' Br. at 41-44. While Plaintiffs-Appellants are correct in quoting Congressman Faleomavaega noting that American Samoa values its relationship with the United States, *see id.* at 43, the fact is that American Samoa has not requested a change in its status. Nevertheless, it is neither for Plaintiffs-Appellants nor an Article III court nor Congressman Faleomavaega to proclaim how long American Samoa will maintain its status as a United States territory. *See* U.S. Const. art. IV, § 3. That is a legislative and *political* decision. Indeed, Congressman Faleomavaega has

long advocated that the people of American Samoa put serious thought into their status in the United States. *See American Samoa must consider independence - congressman*, Radio Australia, May 18, 2012, *available at* http://www.radioaustralia.net.au/international/radio/program/pacific-beat/american-samoa-must-consider-independence-congressman/946070. Among the options currently available to American Samoa are closer relationship (like Puerto Rico or the CNMI), Free Association (like the Marshall Islands or the Federated States of Micronesia), or even independence (like the Philippines).

But a decision extending constitutional citizenship to American Samoans would short-circuit this process and undeniably put American Samoa on a path to greater union with the United States. And accepting the Plaintiffs-Appellants' view would have some of the same political implications for the other unincorporated territories. But this union, however, could not mean statehood for American Samoa given its small population (of 55,519 people according to the 2010 Census) and remote location. With statehood and nationhood foreclosed, American Samoa would be permanently precluded from equal voting representation at the national government level. Thus, if Plaintiffs-Appellants have their way,

American Samoa will be rendered a permanent unequal territory of the United States. Ironically, under the guise of "equality," the judiciary would achieve what the U.S. Navy could not: the conquest of American Samoa.

III. THE AMERICAN SAMOA GOVERNMENT AND CONGRESSMAN ENI F.H. FALEOMAVAEGA SHOULD BE PERMITTED TO INTERVENE.

The American Samoa Government and Congressman Faleomavaega have distinct and exceptionally important interests at stake in this appeal, which, if successful, would have a significant impact on the entire people of American Samoa. Because the Government and the Congressman's interests will not be adequately represented by the parties to this appeal, the American Samoa Government and Congressman Faleomavaega respectfully move to intervene as of right or, in the alternative, seek permission to intervene as an exercise of this Court's discretion.

The American Samoa Government is the elected government of the people of American Samoa, and the Honorable Eni F.H. Faleomavaega represents the territory of American Samoa in the United States House of Representatives. Congressman Faleomavaega has held his position since 1989 and was reelected to his thirteenth term in November 2012. In

addition to his responsibilities in the U.S. Congress, Congressman Faleomavaega holds the *matai* orator title *Faleomavaega* in American Samoa.

The American Samoa Government and Congressman Faleomavaega have a unique perspective on the relationship between the U.S. Government and the people of American Samoa. The American Samoa Government is tasked with the day-to-day administration of the territory and communicates with the federal government about issues important to its people. Since he began his congressional tenure more than 20 years ago, Congressman Faleomavaega has taken a particularly important role in strengthening the bonds between the federal government and the American Samoa Government while carefully protecting the special status of American Samoa.

Importantly, while Plaintiffs-Appellants have marshaled an array of parties as *amici* in support of their position, none of these parties have any *direct* connection to or interest in American Samoa. The American Samoa Government and Congressman Faleomavaega are the only parties to this appeal who can credibly claim to represent the interests of the people who

will be most affected by its outcome: the people of American Samoa who elected them.

A. This Court Should Grant The Motion Of The American Samoa Government and Congressman Faleomavaega To Intervene As Of Right.

Although the Federal Rules of Appellate Procedure do not explicitly provide for intervention on appeal, the Supreme Court has counseled that "the policies underlying intervention [outlined in the Federal Rules of Civil Procedure] may be applicable in appellate courts." *International Union, UAW, Local 283 v. Scofield*, 382 U.S. 205, 217 n.10 (1965). Under Federal Rule of Civil Procedure 24(a)(2), a court must grant a timely motion to intervene when the movant "claims an interest relating to the property or transaction that is the subject of the action, and is so situated that disposing of the action may as a practical matter impair or impede the movant's ability to protect its interest, unless existing parties adequately represent that interest." Fed. R. Civ. P. 24(a)(2). The American Samoa Government and Congressman Faleomavaega satisfy each of these requirements.

The American Samoa Government and Congressman Faleomavaega have a direct and substantial interest in the subject matter of this action

and are so situated that disposing of the action may impede their ability to protect that interest. This Court has explained that the interest test of Rule 24(a) is "primarily a practical guide to disposing of lawsuits by involving as many apparently concerned persons as is compatible with efficiency and due process." *Smuck v. Hobson*, 408 F.2d 175, 179 (D.C. Cir. 1969) (en banc) (internal quotation marks omitted).

The American Samoa Government is the democratically elected government of the people of American Samoa, and Congressman Faleomavaega is the only elected representative of the American Samoa people to the U.S. Congress. A decision from this Court that the Citizenship Clause of the Fourteenth Amendment applies would impede the historical ability of the American Samoa Government to negotiate with the federal government about the naturalization status of American Samoans and the ability of Congressman Faleomavaega to represent the Samoan people on this important issue before Congress.

The interests of American Samoa will not be adequately represented by the parties to this action. As Congressman Faleomavaega explained to the district court, a ruling that the Citizenship Clause of the Fourteenth Amendment encompasses the people of American Samoa could have

unintended and harmful effects on their culture. The American Samoa Government shares this view. The position of the Plaintiffs-Appellants and their non-Samoan *amici* is directly opposed to it. The Plaintiffs-Appellants assert individual harms based on their status as U.S. nationals, but they do not consider the potential societal harms that their proposed remedy could cause in American Samoa. And although the U.S. defendants have taken the legal position that Proposed Intervenors advocate, the U.S. defendants have no particular interest in protecting the traditional way of life in American Samoa.

The request of American Samoa to intervene is timely and will not prejudice any of the parties. Their Motion to Intervene was filed in accordance with the initial order of this Court. Because Congressman Faleomavaega participated as *amicus curiae* in the district court, the parties are well aware of the arguments that Congressman Faleomavaega advances on this subject. In fact, no fewer than two *amici* and Plaintiffs-Appellants themselves have already responded to arguments advanced by Congressman Faleomavaega and the American Samoa Government. The district court also heard from Congressman Faleomavaega in briefs and at

oral argument and relied upon some of the Congressman's arguments in its decision.

The American Samoa Government and Congressman Faleomavaega also have standing to participate in this suit. Under the law of this circuit, all movants who seek to intervene as of right must demonstrate both Article III and prudential standing. *Deutsche Bank Nat'l Trust Co. v. FDIC*, 717 F.3d 189, 193 (D.C. Cir. 2013). "It is axiomatic that Article III requires a showing of injury-in-fact, causation, and redressability." *Id.* And, although elements of the prudential standing inquiry have recently been called into question by the Supreme Court, there remains a general prohibition on a "litigant's raising another person's legal rights" and the "adjudication of generalized grievances more appropriately addressed in the representative branches." *See Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 134 S.Ct. 1377, 1386 (2014), *abrogating in part Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 12 (2004). The American Samoa Government satisfies these requirements in its capacity as *parens patriae*, and Congressman Faleomavaega satisfies these requirements because of his personal interest in the action.

The American Samoa Government possesses *parens patriae* standing. *See Alfred L. Snapp & Son, Inc. v. Puerto Rico, ex. rel., Barez*, 458 U.S. 592, 607–08 (1982) (concluding that Puerto Rico had *parens patriae* standing in a suit involving the federal employment system). As the Supreme Court has counseled, "One helpful indication in determining whether an alleged injury to the health and welfare of its citizens suffices to give the State standing to sue as *parens patriae* is whether the injury is one that the State, if it could, would likely attempt to address through its sovereign lawmaking powers." *Id.* at 607; *see also Massachusetts v. EPA*, 549 U.S. 497, 519 (2007). Naturalization laws fall squarely in this category. Through this suit, the plaintiff Samoans seek to circumvent the historical role of the American Samoa Government in negotiating with the United States about the rights of the American Samoan people, and this Court should not exclude the America Samoa Government from that litigation, particularly because the interests advanced by the Plaintiff-Appellant Samoans are adverse to those advanced by the American Samoa Government.

Although Congressman Faleomavaega shares the interest of the American Samoa Government in representing the will of the Samoan

people, Congressman Faleomavaega also has personal interests at stake in the action. If the Plaintiff-Appellant Samoans succeed in this suit, Congressman Faleomavaega will suffer several, specific harms: it will undermine his role as advisor to Congress on the question of Samoan citizenship; it will nullify his ability to guide legislation through the House of Representatives on the subject of Samoan citizenship; it may preclude him from choosing U.S. national status in the future; and it can jeopardize his *matai* standing as *Faleomavaega*. For these reasons, Congressman Faleomavaega also has standing to intervene in this suit.

B. In The Alternative, The American Samoa Government And Congressman Faleomavaega Request That This Court Grant Them Permissive Intervention.

For many of the same reasons explained above, the American Samoa Government and Congressman Faleomavaega also meet the standard for permissive intervention under Federal Rule of Civil Procedure 24(b). The American Samoa Government and Congressman Faleomavaega intend to support the position of the United States that the Citizenship Clause does not apply to persons born in American Samoa and, as a result, they "ha[ve] a claim or defense that shares with the main action a common question of law or fact." *See* Fed. R. Civ. P. 24(b)(1)(B). And because Congressman

Faleomavaega participated extensively as *amicus curiae* below and the movants timely filed their motion, their intervention would not "unduly delay or prejudice the adjudication of the original parties' rights." *Id.* 24(b)(3).

"It remains … an open question in this circuit whether Article III standing is required for permissive intervention," *Defenders of Wildlife v. Perciasepe*, 714 F.3d 1317, 1327 (D.C. Cir. 2013), but, if this Court is inclined to address the question in this matter, this Court should conclude that the American Samoa Government and Congressman Faleomavaega need not establish standing to obtain permissive intervention on behalf of the defendant-respondents. As this Court has acknowledged in dicta, "requiring standing of someone who seeks to intervene as a defendant runs into the doctrine that the standing inquiry is directed at those who invoke the court's jurisdiction." *Roeder v. Islamic Republic of Iran*, 333 F.3d 228, 233 (D.C. Cir. 2003). This Court has since required individuals who seek to intervene as of right on behalf of defendants to establish standing—in no small part a prophylactic measure intended to address the potential problems that arise from an unwieldy number of intervenors. *See Deutsche Bank*, 717 F.3d at 195–96 (Silberman, J., concurring). Such

concerns are neither present in permissive intervention, in which courts possess substantial discretion to decide whether the intervention would serve the interests of judicial economy and justice, nor present in this case, as the would-be intervenors are the American Samoa Government itself and the only representative of the American Samoan people in Congress.

CONCLUSION

For the foregoing reasons, this Court should affirm the district court's decision dismissing the Plaintiffs-Appellants' claims as a matter of law.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7), I hereby certify that this brief contains 8734 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii) and D.C. Cir. R. 32(a)(1), on the basis of a count made by the word processing system used to prepare the brief.

/s/ Michael F. Williams
Michael F. Williams

CERTIFICATE OF SERVICE

I hereby certify that on this day, August 25, 2014, I filed the above document using the ECF system, which will automatically generate and send service to all registered attorneys participating in this case.

/s/ Michael F. Williams
Michael F. Williams