IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

LENEUOTI FIAFIA TUAUA, *et al.*,	)	
Plaintiffs,	)	
v.	)	**Civil Action No. 12-1143-RJL**
UNITED STATES OF AMERICA, *et al.*,	)	
Defendants.	)	

PLAINTIFFS' MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS

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INTRODUCTION

Defendants do not dispute that everyone born in the U.S. territory of American Samoa is an American. Defendants simply deny that these Americans are citizens. Instead, under federal law, Individual Plaintiffs are labeled as "nationals, but not citizens, of the United States," 8 U.S.C. § 1408(1), even though they "owe[] permanent allegiance to the United States." 8 U.S.C. § 1101(22). The anomalous and subordinate status of the so-called "non-citizen national" is today reserved solely for Americans born in the U.S. territory of American Samoa. Everyone else born in the United States is recognized as a citizen at birth under federal law.

Defendants ask this Court to dismiss Plaintiffs' Complaint for lack of subject matter jurisdiction and for failure to state a claim upon which relief may be granted, based primarily on two theories: first, that precedent and statutory law foreclose Plaintiffs' argument that they have an individual right to birthright citizenship under the Fourteenth Amendment, and, second, that the Court lacks jurisdiction because Plaintiffs are raising a non-justiciable "political question." The Motion to Dismiss should be denied. Whether or not the Citizenship Clause provides birthright citizenship to Plaintiffs is an open question in this Circuit, and there is compelling constitutional text and history, as well as Supreme Court precedent, supporting Plaintiffs' legal theory underlying their claim for relief. In addition, Defendants' assertion that Plaintiffs raise a political question profoundly misunderstands the Complaint—which makes no argument regarding whether American Samoa should be a state—and contradicts case law cited in Defendants' own motion.

Plaintiffs have more than met the standard to survive a Rule 12(b)(6) motion, stating both a plausible legal theory under which relief could be granted and directly linking the Defendants' refusal to recognize Individual Plaintiffs' citizenship to the harms detailed in the Complaint.

Plaintiffs' claim for relief rests on the text of the Fourteenth Amendment's Citizenship Clause, which provides that "[a]ll persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States," U.S. Const. amend. XIV, § 1. The drafters of the Clause made clear that its guarantee of birthright citizenship "refers *to persons everywhere*, whether in the States *or in the Territories* or in the District of Columbia." Cong. Globe, 39th Cong., 1st Sess. 2894 (1866) (Sen. Trumbull) (emphasis added). Affirming this text and history, the Supreme Court has declared that the Citizenship Clause "put[] at rest" the notion that "[t]hose . . . who had been born and resided always in the District of Columbia *or in the Territories*, though *within the United States*, were not citizens." *Slaughter-House Cases*, 83 U.S. 36, 72-73 (1872) (emphasis added). And just a few years before American Samoa became part of the territory of the United States, the Supreme Court reiterated that the Citizenship Clause "affirms the ancient and fundamental rule of citizenship by birth *within the territory*, in the allegiance and under the protection *of the country*," and that "[t]he [Fourteenth] amendment, in clear words and in manifest intent, includes the children born *within the territory* of the United States." *United States v. Wong Kim Ark*, 169 U.S. 649, 693 (1898) (emphases added). As the Supreme Court has recently reaffirmed, "[c]onstitutional rights are enshrined with the scope they were understood to have when the people adopted them, whether or not future legislatures or (yes) even future judges think that scope too broad." *District of Columbia v. Heller*, 554 U.S. 570, 634-35 (2008).

Defendants nonetheless contend that Plaintiffs' arguments are foreclosed by a body of Supreme Court decisions between 1901 and 1922 informally known as the "Insular Cases." But the application of the Citizenship Clause in circumstances such as those raised by the Complaint remains an open question in this Circuit. Moreover, the Supreme Court's decision in

Boumediene v. Bush, 553 U.S. 723 (2008), and the D.C. Circuit's decision in *King v. Morton*, 520 F.2d 1140 (D.C. Cir. 1975), both reject the broad reading of the *Insular Cases* upon which Defendants rely in seeking to dismiss the Complaint. Indeed, the D.C. Circuit's ruling in *King*, which called for a factual assessment of whether a constitutional right can be applied practically in American Samoa today, reinforces why Defendants' arguments must fail on a motion to dismiss.

Finally, Defendants make a variety of jurisdictional and procedural arguments, all of which are without merit. In particular, Defendants assert that the Court lacks jurisdiction because Plaintiffs raise a non-justiciable political question. This argument fails. Plaintiffs emphatically do not argue that the Court should recognize American Samoa as a state; whether American Samoa should pursue statehood, remain a territory, become independent, or change its official status in any other way is a decision left to the American Samoan people and not at issue in this litigation. But, so long as American Samoa remains part of the United States, as it is now, the Constitution requires that the Defendants respect the birthright citizenship guaranteed under the Fourteenth Amendment. Plaintiffs have stated a justiciable claim upon which relief may be granted. The Complaint more than clears the bar to survive Defendants' Motion to Dismiss, and, indeed, supports judgment in Plaintiffs' favor as a matter of law.

BACKGROUND

I. HISTORY OF AMERICAN SAMOA AS PART OF THE UNITED STATES

American Samoa is part of the "Insular Areas" of the United States, which are "an integral part of the U.S. political family." U.S. Dep't of State, Report to the United Nations Committee on Human Rights Concerning the International Covenant on Civil and Political

Rights ¶¶ 6-7 (Dec. 2011).[1] *See generally* U.S. Dep't of State, Updated Core Document, Report to the United Nations Committee on Human Rights Concerning the International Covenant on Civil and Political Rights ¶ 35 (Oct. 2005) ("In its totality, the United States of America covers almost 9.4 million square km, including the 48 coterminous states which span the North American continent, Alaska, Hawaii *and the various insular areas* in the Pacific Ocean and Caribbean Sea." (emphasis added))[2]. The United States claimed American Samoa pursuant to the Tripartite Convention of 1899 among the United States, Great Britain, and Germany. Compl. ¶¶ 3, 24 (citing 31 Stat. 1878 (ratified Feb. 16, 1900)). The American flag was raised over American Samoa on April 17, 1900, during a ceremony in which the traditional leaders of two of the islands comprising American Samoa, Tutuila and Aunu'u, signed Deeds of Cession formally ceding sovereignty of their islands to the United States.[3] Compl. ¶ 25 (citing 48 U.S.C. § 1661). At this time, American Samoans believed that U.S. citizenship was part of the deal they struck in ceding their lands to the United States.[4] After being informed in the 1920s by the U.S. Navy that they were not U.S. citizens,[5] American Samoans organized a vigorous but ultimately unsuccessful effort to be recognized as citizens.[6]

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[1] *Available at* http://www.state.gov/j/drl/rls/179781.htm#art1.

[2] *Available at* http://www.state.gov/j/drl/rls/55516.htm.

[3] Similar Deeds of Cession were signed by the traditional leaders of the Manu'a islands in 1904. *See* 48 U.S.C. § 1661. Congress ratified all of these Deeds of Session in 1929. *Id.* Federal law recognized the atoll of Swains Island as part of American Samoa in 1925. *See id.* § 1662.

[4] *See* Reuel S. Moore and Joseph F. Farrington, *The American Samoan Commission's Visit to Samoa, Sept.-Oct. 1930*, 53 (U.S. G.P.O. 1931) ("After the American Flag was raised in 1900 the people [of American Samoa] thought they were American Citizens.").

[5] *Id.* at 53-54 ("The people of [American] Samoa were happy . . . until Lieut. Commander C.H. Boucher, United States Navy, came [in the 1920s] and told them . . . that they were not American citizens.").

[6] *See id.*; American Samoa, Hearings Before the Commission Appointed by the President of the United States, September 26, 27, 29, 30, October 1, 2, 3, 4, 1930 in American Samoa (U.S. G.P.O. 1931). Samuel Tulele Galeai testified, "[T]he soil of Tutuila and Manua has been made a part of America but the people of Tutuila and Manua are not American Citizens, that as Tutuila and Manua has been accepted as part of America, I therefore pray that the people of Tutuila and Manua may also become citizens of America." *Id.* at 234. Chief Fanene testified: "[M]any years we have been under the American flag. . . . But we have not received the word 'true American.' . . . We are

During American Samoa's first 51 years as part of the United States, it was administered by the U.S. Navy, with limited self-governance. In 1951, authority was transferred to the Department of the Interior, which retains general administrative supervision to this day. In 1967, the Secretary of the Interior approved the Constitution of American Samoa, establishing a tripartite government with a popularly elected bicameral legislature, an appointed governor, and an independent judiciary appointed by the Secretary. In 1977, the Secretary provided for a popularly elected Governor. In 1978, Congress enacted legislation providing for a non-voting Delegate to represent American Samoa in the U.S. House of Representatives.[7] Compl. ¶ 27.

American Samoans have served in the U.S. Armed Forces since the islands first became part of the United States, and have served the nation during every major war of the 20th and 21st Centuries. As early as July 1900, the Navy Commandant stationed in American Samoa was authorized to enlist 58 Samoans as "Navy Landsmen" to form the Fita Fita Guard, which supported the U.S. Navy during 51 years of naval administration in American Samoa. The U.S. Army has a full-time recruiting station in American Samoa, and recruiters from other military branches also make regular recruiting visits. Supporting these efforts, American Samoa's six

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only a few people that is true, but we wish to become loyal and peaceful citizens of the United States." Hearings at 229. Chief Nua testified, "I desire . . . that the people of American Samoa should be true American citizens; receive American citizenship, to be equal with the true American." *Id.* at 221. Chief Matoa testified, "My full desire that I wish to present before the commission [is] that the people of Samoa should obtain true American citizenship." *Id.* at 223. The Commission, which included Chief Mauga, one of the original signers of the Deeds of Session, unanimously supported recognizing American Samoans as citizens. *Id.* at 268-70. Congressional legislation to implement the Commission's recommendation was unanimously approved by the U.S. Senate on two occasions, only to fail in the House because of opposition from the U.S. Navy. *See, e.g.*, Hiram Bingham, *American Samoans: Further Delay is Protested in Granting Them Citizenship*, N.Y. Times, Nov. 17, 1946; Harold Ickes, *Navy Withholds Samoan and Guam Petitions From Congress*, Honolulu Advertiser, Apr. 16, 1947.

[7] In signing this legislation into law, President Jimmy Carter observed that "the people of American Samoa have demonstrated their attachment to this Nation by their patriotic service in the Armed Forces and have contributed greatly to our sports and cultural life." Jimmy Carter, Presidential Statement on Signing H.R. 13702 into Law (Congressional Delegate for the Territory of American Samoa) (Oct. 31, 1978), *available at* http://www.presidency.ucsb.edu/ws/?pid=30080. He continued, "The United States should recognize, in view of this history, that American Samoa is a permanent part of American political life, deserving of representation in the United States Congress. The American Samoa Delegate legislation provides that recognition." *Id.*

public high schools host U.S. Army Junior Reserve Officer Training Corp ("ROTC") programs, and the American Samoa Community College hosts a U.S. Army ROTC program.[8] Compl. ¶ 31.

The federal government also has a strong civilian presence in American Samoa, with numerous federal agency offices in the territory. The federal government has also recognized and celebrated American Samoa and its role in the nation on numerous occasions, commemorating the territory's history as part of the United States and designating its parks and landmarks as nationally significant sites. Compl. ¶¶ 33-35.

II. PLAINTIFFS' ALLEGATIONS OF HARM CAUSED BY DEFENDANTS' REFUSAL TO RECOGNIZE PERSONS BORN IN AMERICAN SAMOA AS CITIZENS

A brief overview of the facts alleged in the Complaint demonstrates that Plaintiffs have provided detailed allegations of the harm caused by Defendants' refusal to recognize persons born in American Samoa as citizens—a far cry from the type of "unadorned, the-defendant-unlawfully-harmed-me accusation" that the Supreme Court has found insufficient to survive a Rule 12(b)(6) motion. *Ashcroft v. Iqbal*, 556 U.S. 662 (2009). Defendants do not recognize persons born in American Samoa as U.S. citizens "born . . . in the United States" within the meaning of the Fourteenth Amendment's Citizenship Clause. U.S. CONST., amend XIV, § 1; Compl. ¶ 41. Instead, Defendants deem persons born in American Samoa as "non-citizen nationals," and they are the only Americans so classified. *See* Compl. ¶¶ 45, 50 (citing U.S.

[8] The U.S. Military Academy, the U.S. Naval Academy, the U.S. Air Force Academy, and the U.S. Merchant Marine Academy each reserve space for two students from American Samoa to be appointed and enrolled. (Compl. ¶ 31.) American Samoa is also home to a U.S. Army Reserve Center, supports a Community-Based Outpatient Clinic as part of the U.S. Department of Veterans Affairs Pacific Islands Health Care System, and hosts a U.S. Coast Guard Marine Safety Detachment Unit. (*Id.*)

State Dep't, 7 Foreign Affairs Manual ("FAM") § 1111(b)(3) ("Under current law, only persons born in American Samoa and Swains Island are U.S. non-citizen nationals.").)[9]

Plaintiff Leneuoti Tuaua has brought this lawsuit because he wants his two young children, ages 11 and 16, not to grow up subjected to the subordinate status of "non-citizen national" to which he has been subject his entire life, a status that continues to harm him. In 1969, Mr. Tuaua moved from his birthplace of American Samoa to pursue educational and career opportunities in California. As he believed to be his duty as an American, Mr. Tuaua registered for the military draft. Yet even as he sought to serve his country during wartime, he was nonetheless prohibited from voting under California law because Defendants refused to recognize him as a citizen. Mr. Tuaua later took steps towards a career in law enforcement, only to discover after scoring well on entrance examinations at the California Highway Patrol and the San Mateo Sheriff's Office that he could not be hired under California law unless he naturalized. Rather than undergo this costly and burdensome process, Mr. Tuaua returned home to American Samoa in 1976 to pursue his dream of serving in law enforcement. After 30 years of distinguished service, including many years as Marshal for the High Court of American Samoa, Mr. Tuaua retired from law enforcement in 2007. Mr. Tuaua does not want any doors of opportunity closed for his children the way they have been closed for him. *See generally* Compl. ¶ 10.

Plaintiff Va'aleama Fosi has brought this lawsuit after believing for more than a decade that he was recognized as a U.S. citizen. In 1987, Mr. Fosi was commissioned as an officer in the Hawaii Army National Guard, having moved to Hawaii from his birthplace in American

[9] The FAM is available at http://www.state.gov/m/a/dir/regs/fam. There is a narrow exception for "children born in the United States to parents serving as foreign diplomats," who are not considered "subject to the jurisdiction of the United States." 7 FAM § 1100(d)(3).

Samoa to pursue educational and career opportunities. Later, he transferred to the U.S. Army Reserve in Hawaii, and was honorably discharged in 1994 as a First Lieutenant. Because U.S. citizenship is a requirement to serve as an officer in both the Hawaii Army National Guard and the U.S. Army Reserve, Mr. Fosi believed he was naturalized during his commissioning ceremony when he swore an oath to defend the Constitution. But when he renewed his U.S. passport in 1999, he was shocked to read in capital letters in his passport that Defendants do not recognize him as a citizen. Mr. Fosi was informed that his service as a military officer did not change his status as a "non-citizen national." Because Defendants insist on this subordinate status, Mr. Fosi is denied the right to vote and the right to bear arms under Hawaii law, despite having served as a military officer for nearly a decade. *See generally* Compl. ¶ 11.

Plaintiff Fanuatanu Mamea is a decorated Vietnam veteran who has brought this lawsuit on behalf of himself and his three young children. Called to serve, Mr. Mamea enlisted in the U.S. Army in 1964 while living in Hawaii. He applied to join the U.S. Special Forces in 1965, only to be told he was ineligible as a "non-citizen national." Even so, Mr. Mamea's subordinate status did not keep him from serving multiple tours in Vietnam, where he sustained serious injuries during combat for which he was awarded two Purple Hearts. Defendants' refusal to recognize him as a citizen did mean, however, that he was denied the right to vote in state and federal elections during his twenty years of military service. Mr. Mamea, who returned to his birthplace of American Samoa in 1984 after being honorably discharged, has a combined disability rating of 80% based on complications from his combat injuries. Should Mr. Mamea need to relocate to Hawaii for medical care, his subordinate status would make it more difficult for him to sponsor his wife, who is a foreign national, to obtain an immigration visa so that she could join him. Mr. Mamea does not believe he should have to go through the naturalization

process because he already swore an oath to protect and defend the Constitution when he joined the U.S. Armed Forces. Mr. Mamea does not want his children to suffer any of the indignities or harms he has suffered as a result of Defendants' having labeled him a "non-citizen national." *See generally* Compl. ¶ 12.

Plaintiff Taffy-lei Maene has brought this lawsuit after losing her job at the Washington State Department of Licensing because of her subordinate status as a "non-citizen national." In January 2012, days before the end of her one-year probationary period as a Licensing Services Representative, Ms. Maene was told she would not be retained as a permanent employee for the sole reason that she could not prove citizenship, a requirement under state law for her position. In addition, because Defendants refuse to recognize Ms. Maene as a citizen, she is unable to exercise her right to vote and is unable to obtain a Washington state Enhanced Driver's License. While Ms. Maene has since been able to obtain full-time employment, her subordinate status continues to make her feel as if she is not a full American. *See generally* Compl. ¶ 13.

Plaintiff Emy Afalava has brought this lawsuit as a veteran of Operations Desert Shield and Desert Storm. Mr. Afalava was recruited by the U.S. Army straight out of high school in his birthplace of American Samoa, going on to serve in the U.S. Army and U.S. Army Reserves from 1981 to 1996 before being honorably discharged. Mr. Afalava served alongside his fellow countrymen during the 1991 Liberation of Kuwait, but was unable to vote alongside his colleagues at arms during the 1992 presidential election because Defendants refuse to recognize him as a citizen. Mr. Afalava returned to American Samoa in 1999, and in 2010 he was diagnosed with post-traumatic stress disorder related to his war-time experiences. Mr. Afalava wants to be recognized as a citizen so that he will be treated the same as any other American,

whether on the battlefield or at the ballot box, regardless of where he and his family choose to live. *See generally* Compl. ¶ 14.

Finally, Plaintiff Samoan Federation of America ("Samoan Federation") has brought this lawsuit as a social services organization serving the Samoan community in the greater Los Angeles area, home to the highest concentration of Samoans in the continental United States. Founded in 1965, its members include persons born in American Samoa who are labeled by the Defendants with the subordinate status of "non-citizen national." The Samoan Federation's efforts to promote political empowerment of the Samoan community are hindered because "non-citizen nationals" are denied the right to vote in California. The Samoan Federation also diverts some of its limited resources to help "non-citizen nationals" in the community apply to naturalize. The Samoan Federation would better be able to serve its mission of promoting the interests of the Samoan community if the Defendants recognized people born in American Samoa as citizens rather than labeled with the subordinate status of "non-citizen national." *See generally* Compl. ¶ 15.

III. INDIVIDUAL PLAINTIFFS' "NON-CITIZEN NATIONAL" STATUS

Despite American Samoa's history as part of the United States and its people's contributions to the nation, Individual Plaintiffs are reminded that Defendants have labeled them with the subordinate status of "non-citizen national" every time they look at their U.S. passports. In capital letters, the State Department has imprinted a disclaimer known as Endorsement Code 09, which reads: "THE BEARER IS A UNITED STATES NATIONAL AND NOT A UNITED STATES CITIZEN." *See, e.g.*, Compl. Ex. A at 2 (citing 7 FAM § 1130 App. H). Moreover, as "non-citizen nationals," Individual Plaintiffs' rights and privileges throughout the United States are largely determined by the legislative discretion of Congress and state legislatures. The

federal government, for example, limits "non-citizen nationals" from serving as officers in the U.S. Armed Forces, even as American Samoa's enlistment rate is among the highest in the nation and, on a per capita basis, American Samoa has made a greater sacrifice in Iraq and Afghanistan than has any other U.S. territory or state. Compl. ¶ 31. States can and do deny "non-citizen nationals" the right to vote, the right to serve on juries, and the right to bear arms. Compl. ¶¶ 62, 65. States also can and do exclude "non-citizen nationals" from serving as public safety officers, as firefighters, in sensitive civil service positions, and even in some cases as teachers and lawyers. Compl. ¶ 63. The confusing patchwork of state and federal laws sometimes even treats "non-citizen nationals" less favorably than permanent resident aliens. Compl. ¶ 61.

Defendants offer only one solution for Individual Plaintiffs to cure their subordinate status and be treated the same as other Americans: naturalization. *See* Defs.' Mem. in Supp. of Mot. to Dismiss ("Defs.' Mem.") at 7. But the naturalization process is not only costly and burdensome, there is also no guarantee of success. Indeed, until 1952, Congress closed the door to naturalization entirely for "non-citizen nationals" born in American Samoa. Compl. ¶ 47. Moreover, Individual Plaintiffs residing in American Samoa must first uproot and relocate to another part of the United States even to begin the naturalization process. Compl. ¶ 48. Minor Plaintiffs are ineligible to apply to naturalize at all until they turn eighteen. *Id.* And although Individual Plaintiffs "owe[] permanent allegiance to the United States," *id.*, they are generally subject to the same naturalization requirements as foreign nationals, including a $680 fee, an English language and civics test, fingerprinting, a good moral character determination, and an oath of allegiance. *Id.* Individual Plaintiffs and other so-called "non-citizen nationals" are the only Americans required to naturalize in order to be recognized as citizens.

ARGUMENT

I. THE CITIZENSHIP CLAUSE GUARANTEES CITIZENSHIP BY BIRTH WITHIN THE UNITED STATES, WHICH INCLUDES U.S. TERRITORIES.

The Citizenship Clause of the Fourteenth Amendment states that "All 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. Defendants, in their Motion to Dismiss, argue that Plaintiffs are not citizens by birth, claiming that, as used in the Citizenship Clause, "the phrase 'the United States' does not include the territories of the United States." Defs.' Mem. at 12. The text and history of the Citizenship Clause and Supreme Court precedent, however, show otherwise and support Plaintiffs' claim to relief.

The Citizenship Clause was written into the Constitution to avoid the politicization of citizenship and ensure that it was granted by an objective measure: birth on U.S. soil. The Fourteenth Amendment's Framers recognized that fixing the conditions of birthright citizenship in the Constitution—rather than leaving them up to constant revision or debate by the political branches—befits the inherent dignity of citizenship. Contrary to Defendants' assertions, this holds true throughout the territorial limits of the United States, including American Samoa, as well as the states.[10] Congress thus cannot constrain the Citizenship Clause's terms, because "[c]onstitutional rights are enshrined with the scope they were understood to have when the

[10] Defendants wrongly state that "[a]t the heart of Plaintiffs' complaint is an attempt to sidestep Congress's proper exercise of its constitutionally enumerated power to determine the naturalization process for potential citizens . . . ." Defs.' Mem. at 11. Plaintiffs are not challenging Congress's authority under Article I's Naturalization Clause. Their sole claim to citizenship rests upon their birth in American Samoa, and upon the Citizenship Clause's birthright provision. *Cf. Rabang v. INS*, 35 F.3d 1449, 1453 n.8 (9th Cir. 1994) ("[I]f the plaintiffs were entitled to citizenship under the Fourteenth Amendment, this would not conflict with Congress' constitutional power to regulate naturalization, as urged by the government. The power to confer citizenship through naturalization does not confer the power to take citizenship away.").

people adopted them, whether or not future legislatures or (yes) even future judges think that scope too broad." *District of Columbia v. Heller*, 554 U.S. 570, 634-35 (2008).[11]

A. The Text and History of the Fourteenth Amendment's Citizenship Clause Demonstrate that Birthright Citizenship Applies to the Territories.

The Fourteenth Amendment was adopted in 1868 in order to constitutionalize the common law understanding of citizenship by birth within the territorial limits of the United States, including U.S. territories, known as *jus soli*. The text of the ratified Citizenship Clause embodies the *jus soli* rule of citizenship, under which citizenship is acquired by right of the soil (contrasted with *jus sanguinis*, according to which citizenship is granted based on bloodline). As the Supreme Court subsequently observed with respect to the Fourteenth Amendment, "the fundamental principle of citizenship by birth within the dominion was reaffirmed in the most explicit and comprehensive terms." *United States v. Wong Kim Ark*, 169 U.S. 649, 675 (1898).

The historical record of the congressional debates over the Citizenship Clause demonstrates that its *jus soli* rule was written to cover persons born in U.S. territories. *See generally* Cong. Globe, 39th Cong., 1st Sess. 2890-97 (1866).[12] As Senator Jacob Howard explained when introducing the Fourteenth Amendment, "[t]his amendment . . . is simply declaratory of what I regard as the law of the land already, that every person born *within the limits* of the United States . . . is by virtue of natural law and national law a citizen of the United States." *Id.* at 2890 (emphasis added). Senator Lyman Trumbull, who was Chairman of the Senate Judiciary Committee, elaborated: while "[t]he second section [of the Fourteenth

[11] Contrary to Defendants' suggestion that Plaintiffs' "own complaint acknowledges" that only Congress may choose to "extend[]" the Citizenship Clause to territories, Defs.' Mem. at 17, the Complaint alleges merely that Congress has "recognized" the birthright citizenship of persons born in other territories, and that it has "refused to recognize" American Samoans as birthright U.S. citizens. Compl. ¶¶ 41-42.

[12] The Congressional Globe is available at http://memory.loc.gov/ammem/amlaw/lwcglink.html.

Amendment] refers to no persons except those in the States of the Union" in apportioning representatives, "the first section [of the Fourteenth Amendment] refers *to persons everywhere*, whether in the States *or in the Territories* or in the District of Columbia." *Id.* at 2894 (emphasis added). This statement accords with the accepted understanding at the time of the Fourteenth Amendment's adoption that "the United States" was "the name given to our great republic, *which is composed of states and territories*." *Loughborough v. Blake*, 18 U.S. 317, 319 (1820) (Marshall, C.J.) (emphasis added).[13]

The Citizenship Clause was modeled after Section 1 of the Civil Rights Act of 1866, which had been authored by Senator Trumbull and was enacted in April 1866, a month before the Citizenship Clause debates began. The Act contained a nearly identical guarantee of birthright citizenship: "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[s], in every State and Territory of the United States . . . ." 14 Stat. 27, §1 (1866). During the debates on the Act, Senator Trumbull stated: "I have already said that in my opinion birth entitles a person to citizenship, that every free-born person in this land is, by virtue of being born here, a citizen of the United States, and that the bill now under consideration is but declaratory of what the law now is." Cong. Globe, 39th Cong., 1st Sess. 600 (1866).

[13] Influential legal treaties published during Reconstruction reflected this understanding. *E.g.*, 1 J. Kent, Commentaries on American Law 269-70 (11th ed. 1866) ("[T]here were principles involved in [*Loughborough*] which had an extensive and important relation to the whole United States. It was declared that the power to tax extended equally to all places over which the government extended. It extended as well to the District of Columbia, and to the territories which were not represented in Congress, as to the rest of the United States. . . . The inhabitants of the then territories of Michigan, and of Florida, and Arkansas, for instance, as well as the District of Columbia, though without any representation in Congress, were subject to the full operation of the power of taxation, equally as the people of New York or Massachusetts."); J. Pomeroy, An Introduction to the Constitutional Law of the United States §§ 491-492, pp. 310-12 (1868) (citing *Loughborough*, then commenting: "The safeguards of individual rights[,] those clauses which preserve the lives, liberty, and property of the citizens from the encroachments of arbitrary power, must apply as well to that legislation of Congress which is concerned exclusively with the District of Columbia or with the territories, as to that which is concerned with the states.").

In the House debates over the Act, Judiciary Committee Chairman Rep. James F. Wilson also expressed his view that the guarantee of birthright citizenship extends to U.S. territories: "Every person born within the United States, *its Territories*, or districts . . . is a natural-born citizen in the sense of the Constitution, and entitled to all the rights and privileges appertaining to that capacity." *Id.* at 1117 (quoting W. Rawle, A View of the Constitution of the United States of America, 86 (2d ed. 1829) (emphasis added).[14] Even the Act's opponents confirmed its expansive territorial scope—President Andrew Johnson acknowledged in his Veto Message that the Act would "confer the rights of citizens upon all persons . . . born within the extended limits of the United States," referencing also the "rights to be enjoyed" by those whom the Act "made citizens, 'in every State and Territory in the United States.'" Cong. Globe, 39th Cong., 1st Sess. at 1679.

B. The Drafters of the Citizenship Clause Sought to Protect Individual Rights in the Territories.

The purpose of the Constitution's guarantee of citizenship at birth across the United States, including the territories, is illuminated by its historical context. The Fourteenth Amendment's Citizenship Clause emerged against the backdrop of the Civil War, a decade-long struggle over slavery and suppression of rights in the Territories, and the Supreme Court's decision in *Dred Scott v. Sandford*, 60 U.S. 393 (1856), which held that African American persons "were not intended to be included, under the word 'citizens' in the Constitution," *id.* at 404, and "had no rights or privileges but such as those who held the power and the Government might choose to grant them." *Id.* at 405. In overturning *Dred Scott*, the Fourteenth Amendment

[14] *See also* Cong. Globe, 39th Cong., 1st Sess. 1832 (1866) (Rep. Lawrence) (noting that "as to certain enumerated civil rights every citizen 'shall have the same right in every State or Territory'"); Cong. Globe, 39th Cong., 2nd Sess. 452 (1867) (Rep. Dawes) ("The civil rights bill, which is above any territorial legislation . . . has guarantied to him beyond peril every civil right known under the Constitution of the United States.").

guaranteed, as a matter of federal constitutional principle, birthright citizenship to all persons born in the United States, whether in one of the several states or in one of the Territories of the United States. To ensure adequate protection of the rights of citizens, the Joint Committee that authored the Fourteenth Amendment demanded "changes of the organic law" in order to "determine the civil rights and privileges of all citizens *in all parts of the republic*." Report of the Joint Committee on Reconstruction xxi (1866) (emphasis added). As the Reconstruction Framers explained, the Fourteenth Amendment "settles the great question of citizenship and removes all doubt as to what persons are or are not citizens of the United States" putting the "question of citizenship . . . beyond the legislative power. . . ." Cong. Globe, 39th Cong., 1st Sess. 2890, 2896 (Sen. Howard).

The Framers discussed *Dred Scott* at length in establishing a rule of birthright citizenship for anyone born throughout the nation. For example, Chairman Wilson addressed "the pestilent doctrines of the Dred Scott case" during his speech in support of the Civil Rights Act's birthright citizenship provision. *Id.* at 1116. He called the fact "[t]hat we have six million persons in this Government subject to its laws, and liable to perform all the duties and support all the obligations of citizens, and yet who are neither citizens nor aliens, [] an absurdity which cannot survive long in the light of these days of progressive civilization." *Id.* at 1117. In his view, "[t]he Constitution of the United States recognizes the division of the people into the two classes named by Blackstone—natural-born and naturalized citizens." *Id.* at 1116. Representative John Broomall added, "[c]ivilized man must of necessity be a citizen somewhere. He must owe allegiance to some Government. There is some spot upon the earth's surface upon which it is possible for him to commit treason." *Id.* at 1262.

In enacting a universal constitutional guarantee of birthright citizenship covering every person "born within the limits of the United States," *id.* at 2890 (Sen. Howard), the Reconstruction Framers acted against the backdrop not only of *Dred Scott*, but also recent events demonstrating the importance of protecting the constitutional rights of citizens in the Territories. Informed by this history, the Framers of the Fourteenth Amendment crafted the Citizenship Clause to ensure that the protections of citizenship extended to all persons born within the United States, whether in the Territories or in the several States.

In the 1850s, in a fierce, often bloody struggle over the status of slavery in Kansas, the Kansas Territorial legislature enacted laws that made it a crime to utter any speech that would induce a slave to escape from his master or to deny the right of slave-owners to hold slaves in the Territory. *See* Michael Kent Curtis, No State Shall Abridge: The Fourteenth Amendment and the Bill of Rights 32-33 (1986). In the same time period, the Territory of Oregon enacted a proposed State Constitution that contained a number of discriminatory provisions designed to exclude free African Americans from the territory and deny them the right to hold property and to sue in the local courts. *Id.* at 59-60. In the years leading up to the Civil War, Rep. John Bingham—who would go on to become "the principal author" of the Fourteenth Amendment, see *McDonald v. City of Chicago*, 130 S. Ct. 3020, 3033 n.9 (2010)—maintained that these territorial enactments violated the rights of citizens under the Constitution and could not stand. Rep. Bingham argued that the "Constitution, being in force in the Territories, is the supreme law. Whatever legislation, therefore, of the territorial government, conflicts with the Constitution . . . is void." Cong. Globe, 34th Cong., 3d Sess. app. 138 (1857). *See also* Cong. Globe, 34th Cong., 1st Sess. app. 124 (1856) ("[L]et no man here . . . talk about the American Congress being bound to a respectful obedience to any territorial enactment which violates so palpably the Constitution.").

Significantly, in arguing that the proposed Oregon Constitution was unconstitutional, Rep. Bingham argued that Oregon's territorial government had failed to respect the principle of birthright citizenship. "Who are citizens of the United States? All persons born and domiciled within the jurisdiction of the United States are citizens of the United States from birth." Cong. Globe, 35th Cong., 2d Sess. 983 (1859).

During the debates over the Fourteenth Amendment, the Civil Rights Act of 1866, and other Reconstruction-era enforcement legislation, Rep. Bingham drew on these constitutional principles to emphasize the importance of protecting constitutional rights in the Territories and the fundamental principle of birthright citizenship for persons born anywhere in the United States. For example, Rep. Bingham maintained that "every human being born within the jurisdiction of the United States of parents not owing allegiance to any foreign sovereignty is, in the language of your Constitution [], a natural-born citizen . . . . Citizenship is his birthright, and neither the Congress nor the States can justly or lawfully take it from him." Cong. Globe, 39th Cong., 1st Sess. 1291 (1866); *see also* Cong. Globe, 42d Cong., 1st Sess. app. 81 (1872) (urging passage of legislation "for the enforcement . . . of the Constitution on behalf of every individual citizen of the Republic in every State and Territory").

In short, the text of the Fourteenth Amendment, its original meaning, and the historical context for the Amendment's guarantee of birthright citizenship, all establish that the Constitution secures United States citizenship to all persons born within the territorial limits of the United States, whether in one of the several States or in a Territory of the United States.

C. The Thirteenth Amendment Does Not Support Defendants' Narrow Construction of "the United States" in the Fourteenth Amendment.

The only textual argument offered by Defendants for their position that the Citizenship Clause excludes U.S. territories from its geographic scope comes by way of analogy to the Thirteenth Amendment. Defs.' Mem. at 13-14. Defendants place great weight on the Ninth Circuit's conclusion in *Rabang v. INS*, 35 F.3d 1449 (9th Cir. 1995), that the text of the Thirteenth Amendment supports a narrow construction of the phrase "the United States" in the Fourteenth Amendment. This is a nonstarter. Nothing in the text of the Thirteenth Amendment supports reading persons born in U.S. territories out of the broad scope of the Citizenship Clause's universal guarantee of citizenship to all persons born in the United States.[15]

The Thirteenth Amendment provides that "Neither slavery nor involuntary servitude . . . shall exist within the United States, or any place subject to their jurisdiction." U.S. Const. amend. XIII, § 1. The drafters of the Thirteenth Amendment chose the broadest possible language to prohibit slavery both within the territorial limits of the United States as well as any place within the jurisdiction of the United States, such as military bases or domestic vessels outside the United States. Senator Trumbull, who served on the Judiciary Committee that wrote the Amendment and took the lead role in securing its passage in the Senate, explained that "the only effectual way of ridding the country of slavery . . . is by an amendment of the Constitution forever prohibiting it within the jurisdiction of the United States. Cong. Globe, 38th Cong., 1st Sess. 1314 (1864).[16]

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[15] Defendants rely principally on Justice Brown's opinion in *Downes v. Bidwell*, 182 U.S. 244 (1901), as well as Ninth Circuit's decision in *Rabang*. As explained *infra* Section II, Defendants overlook—as did the *Rabang* court—that the *Downes* language at issue was not that of the Supreme Court, but of Justice Brown speaking only for himself in a non-controlling opinion.

[16] As Senator Trumbull's speech suggests, the Reconstruction Framers wanted to make sure that the Thirteenth Amendment applied in the Confederacy, despite the fact that the Confederate States—by their act of secession—had sought to leave the Union.

As its text reflects, the Thirteenth Amendment is "an absolute declaration that slavery or involuntary servitude shall not exist in any part of the United States," *The Civil Rights Cases*, 109 U.S. 3, 20 (1883), whether in a state, a territory, or a fort or vessel outside the United States but subject to its jurisdiction. *See In re Chung Fat*, 96 F. 202, 203-04 (D. Wash. 1899) ("[I]f . . . the petitioners are being coerced to labor on board an American vessel against their will, . . . they are being subjected to involuntary servitude within the United States, in violation of the thirteenth amendment"). Speaker after speaker affirmed this understanding, explaining that the Amendment's text "provides for the future and makes slavery impossible," *id.* at 1369 (Sen. Clark), by prohibiting slavery "anywhere beneath the flag of the republic," *id.* at 1482 (Sen. Sumner), "anywhere where its flag floats, anywhere where its Constitution is obeyed." *Id.* at app. 111 (Sen. Howe).

Defendants point to the breadth of the Thirteenth Amendment's language as a reason to construe the Fourteenth Amendment as a guarantee of birthright citizenship only for persons born in the several States. But Defendants misconstrue the implications of the difference in the text of the Thirteenth Amendment, which applies both within the territorial limits of the United States and in places outside the United States but subject to its jurisdiction, and the Fourteenth Amendment, which guarantees birthright citizenship to anyone born within the territorial limits of the United States, including Territories such as American Samoa. As the plain text and original meaning of the Fourteenth Amendment discussed above establish, the very same Congress that in 1864 and 1865 advocated a prohibition on slavery anywhere within the jurisdiction of the United States also demanded, in 1866, "changes of the organic law" in order to "determine the civil rights and privileges of all citizens *in all parts of the republic*." Report of the Joint Committee on Reconstruction xxi (1866) (emphasis added). In prohibiting slavery

"within the United States," U.S. Const. amend. XIII, § 1, and guaranteeing birthright citizenship to "[a]ll persons born or naturalized in the United States," U.S. Const. amend. XIV, § 1, the Reconstruction Framers protected persons throughout the States and Territories of the United States. Indeed, as explained above, during the debates over the Fourteenth Amendment, Sen. Trumbull—who of course had helped author the Thirteenth Amendment—explained that the Fourteenth Amendment would establish birthright citizenship for all persons born in the United States, whether in the several States or the Territories of the United States. During the debates on the Citizenship Clause, Sen. Trumbull stressed that "the first section [of the Fourteenth Amendment] refers to persons everywhere, whether in the States or in the Territories or in the District of Columbia." Cong. Globe, 39th Cong., 1st Sess. 2894 (1866).

Defendants make much of the statement of one Justice that "there may be places within the jurisdiction of the United States that are no part of the Union." *Downes v. Bidwell*, 182 U.S. 244, 251 (1901) (opinion of Brown, J.). That is certainly true. For example, domestic vessels outside the territorial waters of the United States where slavery is prohibited by the Thirteenth Amendment are not generally considered a part of the United States. *See Cunard S.S. Co. v. Mellon*, 262 U.S. 100, 122-23 (1926) (holding, for purposes of the Eighteenth Amendment, that "territory subject to its jurisdiction includes the land areas subject to its dominion and control" but not "domestic merchant ships outside the waters of the United States"). In a modern example, persons in a military installation, such as Guantanamo Bay, Cuba, have a Thirteenth Amendment right not to be enslaved, but no Fourteenth Amendment right to citizenship. Thus, Justice Brown's statement in *Downes* does not justify ignoring the text, original meaning, and context of the Fourteenth Amendment, which establish that birthright citizenship extends to

persons born in United States Territories, places that are unquestionably a part of the United States.

D. The Fourteenth Amendment's Citizenship Clause Placed Birthright Citizenship above Politics and Popular Sentiment.

In a final bid to avoid the powerful guarantees of the Citizenship Clause, the government suggests—and *Amicus Curiae* Congressman Eni Faleomavaega explicitly asserts—that Congress, working with American Samoans, should determine whether or not American Samoans are U.S. citizens regardless of the Constitution's Citizenship Clause. But in doing so, *Amicus* elides the difference between American Samoans' unquestioned right to determine their political status—that is, whether or not to be a part of the United States—and the Constitution's guarantee of birthright citizenship for those who are born in the United States, which applies to American Samoa so long as it remains a U.S. territory.[17] The former is rightfully placed within the political process. The latter is placed by the Constitution outside of the political process—it is a constitutionally guaranteed individual right not granted at the whim of Congress. *See* Cong. Globe, 39th Cong., 1st Sess. at 2896 (Sen. Howard) (explaining that the Fourteenth Amendment "put this question of citizenship and the rights of citizens . . . beyond the legislative power").

The Fourteenth Amendment constitutionalized the conditions sufficient for citizenship because "the rights of a class of persons still suffering under a ban of prejudice could never be deemed entirely secure when at any moment it was within the power of an unfriendly majority in Congress to take them away by repealing the act which conferred them." 2 Joseph Story, Commentaries on the Constitution of the United States 653 (Thomas M. Cooley ed., 4th ed.

[17] This lawsuit says nothing about whether or not American Samoa should change its relationship with the United States, which is something to be decided by the people of American Samoa. But individual rights guaranteed by the Constitution, including birthright citizenship, are appropriate subjects for judicial review and protection.

1873). Indeed, after cataloguing the discriminatory enactments of the slaveholding states in the record supporting the Fourteenth Amendment, it would have made no sense for the Reconstruction Framers to have made the citizenship of freed slaves open to easy revocation if these states regained legislative power. *See* Cong. Globe, 39th Cong., 1st Sess. 474 (1866) (Sen. Trumbull). Senator Hotchkiss specifically raised this fear with respect to the Fourteenth Amendment, which was originally drafted simply to allow Congress to enforce the protections of the Constitution rather than to enumerate the specific rights and guarantees it eventually embodied. He noted the possibility that "rebel states" could gain power in the Congress and strip away the rights envisioned by the Reconstruction Framers, unless these rights were "secured by a constitutional amendment that legislation cannot override." *Id*. at 1095. The provision of citizenship by birthright was constitutionalized to place the question of who should be a citizen beyond the mere consent of politicians and the sentiments of the day.

While Defendants appear to suggest otherwise, *see* Defs.' Mem. at 11, Congress has no power under the Constitution to legislatively redefine the meaning of the "United States" in the Citizenship Clause. Congress does, of course, have power to make rules and regulations for the territories, U.S. Const., art. IV, § 3, cl. 2. But this power is necessarily limited by other constitutional provisions, including the subsequently ratified Citizenship Clause. This Court should reject Defendants' invitation to alter the scope of the Constitution's guarantee of birthright citizenship, well understood at the time it was adopted and ratified to encompass the entire territorial limits of the United States, including the States and Territories.

E. Supreme Court Precedent Supports Plaintiffs' Claim That the Citizenship Clause Guarantees Citizenship to Persons Born in U.S. Territories.

Defendants ignore established Supreme Court precedent that supports the "plausibility" of Plaintiffs' "entitlement to relief." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 557 (2007). Consistent with the text and history of the Fourteenth Amendment, the Supreme Court has interpreted the Citizenship Clause to guarantee birthright citizenship throughout the territorial limits of the United States, including U.S. territories. For example, in the *Slaughter-House Cases*, 83 U.S. 36 (1872), decided just four years after the ratification of the Fourteenth Amendment, and in *United States v. Wong Kim Ark*, 169 U.S. 649 (1898), decided immediately prior to the United States' acquisition of American Samoa, the Supreme Court confirmed that the Citizenship Clause is a universal guarantee of birthright citizenship that protects all persons born within the territorial limits of the United States.

In the *Slaughter-House Cases*, the Supreme Court observed that the Citizenship Clause "put[] at rest" the notion that "[t]hose . . . who had been born and resided always in the District of Columbia *or in the Territories*, though *within the United States*, were not citizens." 83 U.S. at 72-73 (emphasis added). Similarly, in *Wong Kim Ark*, the Supreme Court stated that the Citizenship Clause "affirms the ancient and fundamental rule of citizenship by birth *within the territory*, in the allegiance and under the protection *of the country*," emphasizing that "[t]he amendment, in clear words and in manifest intent, includes the children born *within the territory* of the United States . . . ." *Id.* at 693.

Wong Kim Ark and the *Slaughter-House Cases* support Plaintiffs' claim that the geographic scope of the Citizenship Clause extends throughout the territorial limits of the United States, which includes American Samoa. Defendants' assertion that Plaintiffs' claims fail as a matter of law because of congressional enactments treating American Samoa as outside the

guarantees of the Citizenship Clause conflicts with these Supreme Court decisions. As the Court declared in *Wong Kim Ark*, "no act or omission of Congress . . . can affect citizenship acquired as a birthright, by virtue of the Constitution itself . . . . The Fourteenth Amendment, while it leaves the power, where it was before, in Congress, to regulate naturalization, has conferred no authority upon Congress to restrict the effect of birth, declared by the Constitution to constitute a sufficient and complete right to citizenship." 169 U.S. at 703. "[S]tatutes enacted by Congress," the Court explained, "must yield to the paramount and supreme law of the Constitution." *Id.* at 701. Indeed, there are no considerations "that can constrain or permit the judiciary to refuse to give full effect to the peremptory and explicit language of the Fourteenth Amendment . . . ." *Id.* at 694.

II. THE CITIZENSHIP CLAUSE APPLIES TO AMERICAN SAMOA WHETHER OR NOT IT IS AN "UNINCORPORATED" TERRITORY.

Despite the compelling constitutional text and history and Supreme Court precedent discussed above, Defendants contend that because American Samoa is an "unincorporated territory," the Citizenship Clause should not apply. Defs.' Mem. at 12-15. Defendants assert that "the Court has noted that citizenship is not within the class of fundamental constitutional rights that would apply to unincorporated territories in the absence of a treaty provision or direct Congressional action." *Id.* at 15. Arguing that "it is well-settled that the territorial scope of the Citizenship Clause of the Fourteenth Amendment does not extend to unincorporated territories like American Samoa," *id.* at 11, Defendants rely (directly and indirectly) on one Supreme Court authority for this claim: Justice Henry Billings Brown's opinion in *Downes v. Bidwell*, 182 U.S.

at 247-87. But Justice Brown's opinion is not controlling because it did not receive the vote of any other Justice.[18]

In fact, the Supreme Court has never held that the Citizenship Clause does not apply in U.S. territories, and this issue was never decided by the Court in any of the *Insular Cases*—a fact that courts and commentators have long recognized.[19] *Downes*, the case relied upon most heavily by Defendants and *Amicus*, is a case about whether the Revenue Clauses permit duties on fruit shipped from Puerto Rico to New York—not whether the Citizenship Clause permits the denial of citizenship to Americans born in U.S. territories.[20] The issue of whether the Citizenship Clause applies in U.S. territories, which was left open by the *Insular Cases*,[21] remains an open question in this Circuit. Indeed, the D.C. Circuit stated in 2004 that it "need not

[18] *Downes* was decided by an unusually fragmented Court. Justice Brown "announc[ed] the conclusion and judgment of the court" but, as explained by the reporter for the United States Reports, "there [was] no opinion in which a majority of the court concurred." 182 U.S. at 244 n.1. The Supreme Court Reporter edition's headnotes similarly reflect that Justice Brown's reasoning is his alone. *See* 21 S. Ct. 770, 770-71 (headnote paragraphs 1-3 versus paragraph 4, which states "Per Mr. Justice Brown"). Although the pages of Justice Brown's opinion in the United States Reports bear the caption "Opinion of the Court," which unfortunately has caused some confusion, commentators have observed that this caption is "erroneous." Dudley O. McGovney, *Our Non-Citizen Nationals - Who Are They?*, 22 Cal. L. Rev. 593, 617 n.70 (1934), *available at* http://scholarship.law.berkeley.edu/cgi/viewcontent.cgi?article=3803&context=californialaw review. *See also* L.S. Rowe, *The Supreme Court and the Insular Cases*, 18 Annals Am. Acad. Pol. & Soc. Sci. 38 (1901) ("[I]f we disassociate the judgment from the supporting opinions, we find . . . [that] Mr. Justice Brown stands alone, the other eight Justices being equally divided."), *available at* http://www.jstor.org/stable/10.2307/1010370.

[19] *See, e.g.*, *Rabang*, 35 F.3d at 1452 ("No court has addressed whether persons born in a United States territory are born 'in the United States,' within the meaning of the Fourteenth Amendment."); McGovney, *Our Non-Citizen Nationals*, 22 Cal. L. Rev. at 620 ("[I]t appears that it is an entirely open question whether the citizenship provision of the Fourteenth Amendment is operative in Puerto Rico, the Philippines, and other 'unincorporated territory,' and that the Supreme Court is free to decide it according to its appreciation of the requirements of statesmanship and expediency.").

[20] More generally, the *Insular Cases* reviewed the validity of revenue laws and criminal procedure in insular territories that the United States acquired at the turn of the 20th Century. *See Boumediene v. Bush*, 553 U.S. 723, 757 (2008); Efren Rivera Ramos, *The Legal Construction of American Colonialism: The Insular Cases (1901-22)*, 65 Rev. Jur. U.P.R. 225, 236-271 (1996) (examining the doctrinal development of the *Insular Cases*).

[21] The closest the *Insular Cases* ever came to deciding citizenship issues was in *Gonzales v. Williams*, 192 U.S. 1 (1904), which addressed the question of whether a person born in Puerto Rico *before* its acquisition by the United States was an "alien" for purposes of immigration law. The Court answered this question in the negative and expressly avoided making any broader determinations on the question of whether Ms. Gonzalez or anyone else in Puerto Rico was a U.S. citizen. *Id.* at 12.

decide" the applicability of the Citizenship Clause to a former insular territory, even after hearing the same arguments that Defendants make now. *Mendoza v. Soc. Sec. Comm'r*, 92 F. App'x 3, 3 (D.C. Cir. 2004) (per curiam).[22]

To the degree this Court looks beyond the text and history of the Citizenship Clause itself, the Supreme Court and the D.C. Circuit offer guideposts for considering the significance of the *Insular Cases* in current U.S. territories like American Samoa. The Supreme Court's decision in *Boumediene v. Bush*, 553 U.S. 723 (2008), and the D.C. Circuit's decision in *King v. Morton*, 520 F.2d 1140 (D.C. Cir. 1975), both reject the broad reading of the *Insular Cases* that Defendants rely on and demonstrate why Defendants' argument that the Citizenship Clause does not apply in American Samoa must fail, particularly on a motion to dismiss. The *Insular Cases*, understood in the narrow legal and historical context in which they were decided, cannot bear the weight Defendants ask these cases to support. Moreover, Defendants' reliance on non-binding authorities related to the citizenship status of persons born in the former territory of the Philippines is misplaced. Given the unique history of the Philippines and its trust-like relationship with the United States prior to its independence in 1946, these cases should not be applied to American Samoa.

[22] In *Mendoza*, a panel consisting of then-Chief Judge Ginsburg, Judge Randolph, and then-Judge John Roberts considered the petitioner's appeal of a denial of Social Security benefits, which turned upon the insured status of her deceased husband, who had been born in the Philippines while it was a U.S. territory. The petitioner argued, *inter alia*, that her husband had enjoyed birthright citizenship under the Citizenship Clause. In opposition, the government relied on the same out-of-circuit cases that Defendants cite here, which hold that the Citizenship Clause does not apply to the Philippines. *See* Br. for Appellee at 15-18, *Mendoza*, No. 03-5033, 2003 WL 23164468 (D.C. Cir. Dec. 31, 2003) (citing *Rabang*, 35 F.3d at 1452; *Valmonte v. INS*, 136 F.3d 914, 916 (2d Cir. 1998); and *Lacap v. INS*, 138 F.3d 518 (3d Cir. 1998)). Ultimately, the panel explained that it "need not decide" the constitutional issues, assumed *arguendo* that the petitioner's husband had been "a citizen of the United States within the meaning of the Citizenship Clause," and affirmed the benefits denial on statutory grounds instead. 92 F. App'x at 3. By choosing to avoid the constitutional question, *Mendoza* left it open for this Court's resolution.

A. The Supreme Court's Decision in *Boumediene* Rejected the Broad Reading of the *Insular Cases* Suggested by Defendants.

The Supreme Court's decision in *Boumediene* provides an important guidepost for considering how the *Insular Cases* relate to the question of constitutional birthright citizenship in American Samoa. In *Boumediene*, the Supreme Court examined the *Insular Cases* framework in holding that the Constitution's Suspension Clause, U.S. Const., art. I, § 9, cl. 2, applies to Guantanamo Bay Cuba, a U.S. military installation over which the United States maintains *de facto* sovereignty. 553 U.S. at 755. The Court expressly rejected the notion that "the political branches have the power to switch the Constitution on or off at will." *Id.* at 765. As the Court explained, "[t]he test for determining the scope of this provision must not be subject to manipulation by those whose power it is designed to restrain." *Id.* at 765-66. Similarly, here, the test for determining the application of the Citizenship Clause in American Samoa cannot be subject to the mere legislative discretion of Congress. Simply put, "[t]he Constitution grants Congress and the President the power to acquire, dispose of, and govern territory, *not the power to decide when and where its terms apply*." *Id.* at 765 (emphasis added).

Boumediene also explained that at least "as early as *Balzac* [*v. Porto Rico*] in 1922, the Court took for granted that even in unincorporated Territories the Government of the United States was bound to provide . . . 'guaranties of certain fundamental personal rights declared in the Constitution.'" *Id.* at 758 (quoting *Balzac v. Porto Rico*, 258 U.S. 298, 312-13 (1922)). Over the last 50 years, the Supreme Court has recognized that citizenship is a "fundamental right" and has expressed great skepticism at any congressional action to deny anyone their

citizenship.[23] Because citizenship is a "fundamental right," the *Insular Cases* provide no grounds for Defendants to deny citizenship in American Samoa.

Moreover, the Court in *Boumediene* emphasized that the *Insular Cases* were a product of their particular legal and historical context: "It may well be that over time the ties between the United States and any of its unincorporated Territories strengthen in ways that are of constitutional significance." *Id.* at 759 (citing approvingly to *Torres v. Puerto Rico*, 442 U.S. 465, 475-476 (1979) (Brennan, J., concurring in judgment) ("Whatever the validity of the [*Insular Cases*] 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."). Such critiques of the *Insular Cases* are not new, but *Boumediene* represents the first time that a majority of the Supreme Court endorsed them.[24] After *Boumediene*, the *Insular Cases* simply cannot support the weight Defendants would place on them, if they ever could.

B. The D.C. Circuit's Decision in *King v. Morton* Demonstrates Why Defendants' Motion to Dismiss Must Fail.

The D.C. Circuit has also rejected the kind of broad reading of the *Insular Cases* demanded by Defendants. While acknowledging that the *Insular Cases* "have never been

[23] *See, e.g.*, *Trop v. Dulles*, 356 U.S. 86, 103 (1958) (plurality op.) ("When the Government acts to take away *the fundamental right of citizenship*, the safeguards of the Constitution should be examined with special diligence.") (emphasis added)); *Afroyim v. Rusk*, 387 U.S. 253, 267-68 (1967) ("Citizenship is no light trifle to be jeopardized any moment Congress decides to do so under the name of one of its general or implied grants of power.").

[24] *See Reid v. Covert*, 354 U.S. 1, 13 (1957) (plurality op.) (stating "it is our judgment that neither the [*Insular Cases*] nor their reasoning should be given any further expansion. The concept that the Bill of Rights and other constitutional protections against arbitrary government are inoperative when they become inconvenient or when expediency dictates otherwise is a very dangerous doctrine and if allowed to flourish would destroy the benefit of a written Constitution and undermine the basis of our government"); *see In re Iraq & Afghanistan Detainees Litig.*, 479 F. Supp. 2d 85, 99-100 & n.18 (D.D.C. 2007) (observing that "the Insular Cases are truly historical cases," and that the *Reid* plurality, despite its non-binding nature, "signal[s] an intent to limit the holdings in the Insular Cases"), *aff'd on other grounds sub nom. Ali v. Rumsfeld*, 649 F.3d 762 (D.C. Cir. 2011).

overruled," the D.C. Circuit in *King v. Morton* considered the application of the right to trial by jury in American Samoa, concluding that the application of this constitutional right "does not depend on key words such as 'fundamental' or 'unincorporated territory' in [the *Insular Cases*], but can be reached only by applying the principles of the earlier cases, as controlled by their respective contexts, to the situation as it exists in American Samoa today." 520 F.2d at 1147. Thus, adapting the test articulated by Justice Harlan in *Reid v. Covert* (and later cited approvingly by the Court in *Boumediene*), the D.C. Circuit stated that the question was "whether in American Samoa 'circumstances are such that trial by jury would be impractical and anomalous.'" *Id*. (quoting *Reid*, 354 U.S. at 75 (Harlan, J., concurring in result).) The Court of Appeals emphasized that this determination "must be based on facts," reversing the District Court's prior dismissal of the case and remanding to "determine whether summary judgment for either party is appropriate." *Id.* at 1148. On remand, Chief Judge Bryant determined that a right to trial by jury would not be "impractical and anomalous." *King v. Andrus*, 452 F. Supp. 11, 17 (D.D.C. 1977).

Defendants do not contend that "circumstances are such" that constitutional birthright citizenship in American Samoa "would be impractical and anomalous." Nor can they. Quite to the contrary, the experiences of Individual Plaintiffs and American Samoa's increased integration into the nation's political and cultural identity demonstrate that it is the subordinate status of "non-citizen national" that has become an "impractical and anomalous" vestige of another era. *See* Compl. ¶¶ 10-15, 26-35. Accordingly, *King* instructs that to the degree this Court goes beyond the text and history of the Fourteenth Amendment to determine the citizenship rights of Individual Plaintiffs, such a determination cannot be made through a threshold motion to dismiss. If for this reason alone, Defendants' motion should be denied.

C. The Authorities Cited by Defendants Are Legally Flawed and Factually Distinguishable.

Defendants rely on several decisions, including one from this District, which held that the Citizenship Clause does not apply to persons born in the Philippines during the period in which it was held by the United States.[25] *See Rabang v. INS*, 35 F.3d 1449 (9th Cir. 1995); *Valmonte v. INS*, 136 F.3d 914 (2d Cir. 1998); *Lacap v. INS*, 138 F.3d 518 (3d Cir. 1998) (per curiam); *Nolos v. Holder*, 611 F.3d 279 (5th Cir. 2010) (per curiam); *Licudine v. Winter*, 603 F. Supp. 2d 129, 132-34 (D.D.C. 2009) (relying on the circuit cases but not analyzing Supreme Court cases). Defendants' reliance is misplaced.

First, these decisions each relied erroneously—directly or indirectly—on Justice Brown's ahistorical interpretation of the Thirteenth and Fourteenth Amendments. That interpretation was wrong for the reasons expressed in Section I.C, *supra*. Those decisions also mistakenly viewed Justice Brown's non-controlling opinion as the opinion of "the *Downes* Court." *Rabang*, 35 F.3d at 1452-53; *see also, e.g.*, *Valmonte*, 136 F.3d at 918 ("[t]he Court's conclusion").

Second, these cases are distinguishable on their facts, because they addressed birth in the Philippines, which were held temporarily by the United States prior to its independence. As the Supreme Court explained in *Boumediene*, from 1898 onward "the United States intended to grant independence to [the Philippines]." 553 U.S. at 757 (observing that the Philippine Autonomy Act, 39 Stat. 545 (1916), declared "it was never the intention of the people of the United States in the incipiency of the War with Spain to make it a war of conquest or for territorial aggrandizement" and that "it is, as it has always been, the purpose of the people of the United

[25] Defendants also rely on *Eche v. Holder*, No. 10-17652, 2012 WL 3939622 (9th Cir. Sept. 11, 2012), a case involving the Naturalization Clause and its application to lawful permanent residents in the U.S. Territory of the Northern Mariana Islands. *Eche* relies on the same flawed arguments as the other cases cited by Defendants. And, as with the Thirteenth Amendment, the Naturalization Clause should not be interpreted as limiting the geographic scope of the Citizenship Clause, which was well-understood at the time it was ratified to encompass the territorial limits of the United States, including U.S. territories. *See Supra* Section I.

States to withdraw their sovereignty over the Philippine Islands and to recognize their independence as soon as a stable government can be established therein"). In 1946, following World War II, "Congress granted full and complete independence to the [Philippine] Islands, and necessarily severed the obligation of permanent allegiance owed by Filipinos who were nationals of the United States." *Rabang v. Boyd*, 353 U.S. 427, 430 (1957).

By contrast, American Samoa was permanently and voluntarily ceded to the United States, which never expressed a desire to hold the islands only temporarily. *See* 48 U.S.C. § 1661. As *Amicus* himself has stated, "American Samoa has never been conquered, never been taken as a prize of war, and never been annexed against the will of our people. American Samoa, through the mutual and voluntary agreement of our leaders, joined the United States by Treaties of Cession negotiated and executed in 1900 and 1904." Stmt. of the Hon. Eni F.H. Faleomavaega Before the U.N. Special Comm. on Decolonization, Havana, Cuba (May 23, 2001) (quoted in Br. of *Amicus Curiae* ("*Amicus* Br.") at 3-4). The Congressman also emphasized that "[t]he people of American Samoa treasure their relationship with the United States, are immensely proud to be part of the U.S. political family, and have not requested that our status as a U.S. Territory be changed in any way." *Id*. Even Defendant U.S. Department of State has acknowledged in a report to the United Nations that "the District of Columbia, *American Samoa*, Puerto Rico, the United States Virgin Islands, Guam, and the Northern Marianas," are "outside the 50 states and yet *within the political framework* of the United States."[26]

[26] U.S. Dep't of State, Common Core Document, Report to the United Nations Committee on Human Rights Concerning the International Covenant on Civil and Political Rights ¶ 27 (Dec. 2011) (emphasis added), *available at* http://www.state.gov/j/drl/rls/179780.htm.

In sum, the *Insular Cases* cannot foreclose Plaintiffs' claim that they are entitled to relief under the Citizenship Clause because they did not address the Citizenship Clause and are of questionable value today. More recent cases regarding the citizenship status of individuals born in the Philippines during the period in which it was held by the United States are likewise distinguishable and cannot justify Defendants' unconstitutional statute, policy, and practice. *Iqbal*, 556 U.S. at 669 (observing that a complaint will survive a Rule 12(b)(6) motion "when the plaintiff pleads factual content that allows the court to draw [a] reasonable inference that the defendant is liable for the misconduct alleged").

III. DEFENDANTS' JURISDICTIONAL AND PROCEDURAL ARGUMENTS ARE WITHOUT MERIT.

A. The Political Question Doctrine Does Not Bar This Action.

The Government suggests that "this Court lacks jurisdiction" because "the determination of whether American Samoa should be made a state is a political question." Defs.' Mem. at 18. This argument is difficult to comprehend because, unlike *De la Rosa v. United States*, 842 F. Supp. 607 (D.P.R.), *aff'd*, 32 F.3d 8 (1st Cir. 1994), nowhere does the Complaint request a determination that American Samoa should be made a state. *See also supra* note 17. Rather, the gravamen of the Complaint is that the Fourteenth Amendment guarantees citizenship to persons born in American Samoa *notwithstanding its non-state status*. Questions about whether constitutional rights apply in U.S. territory outside the states have been frequently litigated and are eminently fit for judicial resolution. Indeed, the Government undercuts its own argument by relying heavily on a number of cases ruling, albeit incorrectly in Plaintiffs' view (*see supra* Section II.C), on the merits of whether the Citizenship Clause applied to persons born in the Philippines while it was a U.S. territory. *See* Defs.' Mem. at 12-16. Thus, Defendants' political question argument is wholly without merit.

B. Plaintiffs Have Stated a Valid Claim under the Administrative Procedure Act.

In Count III of the Complaint, Plaintiffs seek relief under the Administrative Procedure Act ("APA") for the State Department's unconstitutional policy and practice of imprinting American Samoans' passports with an Endorsement Code disavowing that they are U.S. citizens. The Government argues that Count III fails to state a claim on the ground that the policy and practice, *even if unconstitutional*, is "in accordance with the plain language of [the] federal statutes, and therefore . . . cannot be deemed 'arbitrary,' 'capricious,' or an 'abuse of discretion.'" Defs.' Mem. at 20.

Defendants are wrong. Agency action is not immune from APA review merely because it implements an unconstitutional statute. After all, the APA explicitly provides a cause of action to challenge not only agency action that is "arbitrary and capricious" or an "abuse of discretion" conferred by statute, but also agency action that is simply "contrary to constitutional right, power, privilege, or immunity," 5 U.S.C. § 706(2)(B), or "otherwise not in accordance with law," *id.* § 706(2)(A). It is thus well-established that the APA is a proper and appropriate vehicle through which to challenge agency action implementing a facially unconstitutional statute. *See*, *e.g.*, *Alliance for Natural Health U.S. v. Sebelius*, 714 F. Supp. 2d 48, 59 (D.D.C. 2010) ("[T]he APA . . . provides for the Courts to make an independent assessment of constitutional issues, and the role of the Court is the same whether the plaintiff sues directly under the Constitution or under the APA." (internal quotation marks and alteration omitted)); *cf. R.J. Reynolds Tobacco Co. v. FDA*, 696 F.3d 1205, 1218, 1222 (D.C. Cir. 2012) (vacating agency action under the APA because, though taken pursuant to statutory mandate, it violated the First Amendment).

It is also incorrect that "[a]n agency violates the APA *only* if it 'relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the

problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.'" Defs.' Mem. at 19 (quoting *Motor Vehicles Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)) (emphasis added). The quoted language from *State Farm* elaborates on the "arbitrary and capricious" prong of the APA, but, as discussed, that prong is but one among several independent grounds for setting aside agency action under the APA. Because, as demonstrated above, persons born in American Samoa enjoy a constitutional right to birthright citizenship, Individual Plaintiffs have stated a valid claim under the APA for review of agency action, namely the State Department's policy and practice of disclaiming their citizenship, which is contrary to that constitutional right.

C. The Claims of Plaintiffs Fosi and Maene Are Not Time-Barred.

Defendants argue that the APA claims of Plaintiffs Fosi and Maene under Count III (but not their claims in Counts I and II) are barred by the APA's six-year statute of limitations. Defs.' Mem. at 20-21. Defendants misunderstand Fosi and Maene's APA claims as relying on Defendants' past issuance of passports to them in 1999 and 1995, respectively.

Although the Complaint references these dates of past passport issuances in the course of setting forth factual background, Plaintiffs' actual claims do not turn solely on the discrete, historical act of issuing a particular passport with Endorsement Code 09 on a particular date. Rather, the Complaint plainly challenges Defendants' ongoing and undisputed "policy and practice of imprinting Endorsement Code 09 in the passports of persons born in American Samoa." Compl. ¶ 74; *see Ind. Petroleum Ass'n v. Babbitt*, 971 F. Supp. 19, 27 (D.D.C. 1997) (APA allows parties "to challenge an agency policy or practice in the courts"). Defendants do not dispute that this policy exists, that it is a final policy, that Plaintiffs Fosi and Maene (and

other Individual Plaintiffs) continue to be subject to that policy, or that any renewed passports issued to them would disavow their U.S. citizenship through Endorsement Code 09. Because Plaintiffs challenge an ongoing agency policy rather than an historical act, the statute of limitations does not bar Plaintiffs Fosi or Maene's claims. *See Atlas Air, Inc. v. Air Line Pilots Ass'n*, 232 F.3d 218, 226 (D.C. Cir. 2000).[27]

D. Plaintiff Samoan Federation of America, Inc. Has Standing to Sue.

Defendants also seek dismissal of the claims of the Samoan Federation of America for alleged lack of standing. *See* Defs.' Mem. at 21-23. However, it is axiomatic that only one plaintiff in a multi-plaintiff case need have standing to sustain Article III jurisdiction in a suit for declaratory and injunctive relief. For example, the D.C. Circuit recently remarked, after finding standing on the part of at least some individual plaintiffs to challenge unconstitutional government action, that "[b]ecause only one plaintiff must have standing, we have no need to consider . . . whether the organizational plaintiffs have standing to pursue their claims." *In re Navy Chaplaincy*, 697 F.3d 1171, 1178 (D.C. Cir. 2012); *accord Ry. Labor Executives' Ass'n v. United States*, 987 F.2d 806, 810 (D.C. Cir. 1993) ("if one party has standing in an action, a court need not reach the issue of the standing of other parties when it makes no difference to the merits of the case").

In any event, Defendants' attack on the Federation's standing is wholly without merit. As alleged in the Complaint, the Federation is dedicated to political empowerment of the Samoan community in California, and also "expends some of its limited resources helping members of the Samoan community with the complex naturalization process and family

[27] Defendants issued a new passport, bearing Endorsement Code 09, to Plaintiff Fosi in 2010. Although Plaintiffs do not believe this information is relevant to the time bar argument (because the Complaint challenges an ongoing policy and practice and not the issuance of any particular passport on any particular date), if the Court is otherwise inclined to dismiss Plaintiff Fosi's APA claim as time-barred, Plaintiffs respectfully request an opportunity to amend the Complaint to reflect the 2010 issuance.

immigration issues," including through English classes intended in part to help prepare Samoan speakers for the naturalization exam and interview, and a referral service for non-citizen nationals needing naturalization assistance. Compl. ¶ 15(b), (c). Because birthright citizenship obviates the need for naturalization, those expenditures would be unnecessary if the Government recognized American Samoans' birthright citizenship in accordance with the Constitution. The Federation thus has suffered an injury-in-fact that is traceable to Defendants' unconstitutional statute and policy and redressable by a judicial ruling invalidating that statute and policy.

The Supreme Court, D.C. Circuit, and Judges of this Court have all found organizational standing in analogous situations. For example, the Supreme Court held that an organization's allegations that it "had to devote significant resources to identify and counteract the defendant's racially discriminatory steering practices" established injury-in-fact because "[s]uch concrete and demonstrable injury to the organization's activities—with the consequent drain on the organization's resources—constitutes far more than simply a setback to the organization's abstract social interests." *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 379 (1982); *accord Abigail Alliance for Better Access to Developmental Drugs v. Eschenbach*, 469 F.3d 129, 133 (D.C. Cir. 2006); *Humane Soc'y v. U.S. Postal Service*, 609 F. Supp. 2d 85, 91 (D.D.C. 2009).

Given the undisputed existence of other plaintiffs with standing, it is unnecessary for the Court to consider Defendants' challenge to the Federation's standing. But to the extent that such consideration is necessary, the Federation possesses constitutional standing and the Court should allow its claims to proceed along with those of the other plaintiffs.[28]

[28] Contrary to Defendants' argument, the Federation's standing in this case is not based on the "exact same argument" that was rejected in *National Association of Home Builders v. EPA*, 667 F.3d 6 (D.C. Cir. 2011). In that case, an association's expenditures on litigation and congressional and Executive Branch advocacy "'in the quest to clarify [Clean Water Act] jurisdiction'" failed to establish standing to challenge a particular agency determination concerning jurisdiction under that Act. *Id.* at 12 (quoting complaint). Here, in contrast, the Federation claims standing not on the basis of general litigation, lobbying, or similar advocacy activities, but because it has tangibly devoted resources to assisting American Samoans with a process—naturalization—that would be wholly

IV. *AMICUS CURIAE*'S POLICY ARGUMENTS CANNOT FORM THE BASIS FOR DISMISSAL AND, AT ANY RATE, ARE MISPLACED.

In an effort to deny his own constituents recognition of their birthright U.S. citizenship, Congressman Eni Faleomavaega of American Samoa has filed an *amicus curiae* brief supporting Defendants' Motion to Dismiss. To the extent the *amicus* brief presents legal arguments, they are duplicative of those made by the Defendants and have been addressed herein. But as *Amicus* himself admits, his brief also presents "policy" arguments about potential collateral consequences of this case (*Amicus* Br. at 12)—arguments that cannot properly form the basis for dismissing important constitutional claims at all, let alone on the pleadings. But even if the Court could properly entertain them, *Amicus*'s policy arguments are fundamentally misplaced.

Amicus does not dispute that the Individual Plaintiffs and other American Samoans denied birthright citizenship are harmed by that denial. Rather, *Amicus* fears that applying the Citizenship Clause to persons born in American Samoa might someday bring about a fulsome application of other, unrelated portions of the Constitution—the requirements of equal protection—creating "unintended and potentially harmful effects on important aspects of Samoan culture," in particular, laws restricting alienation of real property to non-Samoans. *Amicus* Br. at 13-18.

However, *Amicus* ignores the fact that American Samoa's highest court has already held—in an opinion authored by a federal judge sitting by designation of the Interior Secretary—that the constitutional requirement of equal protection for all persons applies in American Samoa, and that it does so regardless of American Samoa's status as an "unorganized" or

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unnecessary if only the Government would conform to the Constitution. Nor is this a case like *Equal Rights Center v. Post Properties, Inc.*, 657 F. Supp. 2d 197 (D.D.C. 2009), where this Court held that an advocacy organization that voluntarily chose to investigate a particular property owner could not claim injury-in-fact from the costs it incurred in that investigation. The Federation does not claim standing here on account of costs incurred investigating Defendants, and the injuries to its programmatic interests are not self-inflicted.

"unincorporated" territory. *Craddick v. Territorial Registrar*, 1 Am. Samoa 2d 10, 12 (1980) (Schwartz, J., then Chief Judge of the U.S. District Court for the District of Southern California) ("[T]he constitutional guarantees of due process and equal protection are fundamental rights which do apply in the Territory of American Samoa," "whether 'organized,' 'incorporated,' or no."), *at* http://www.asbar.org/archive/Cases/Second-Series/1ASR2d/1ASR2d10.htm.[29]

Moreover, in that same case, the High Court of American Samoa upheld the constitutionality of the very land ownership restrictions that *Amicus* warns might be thrown into doubt by the instant litigation. Applying strict scrutiny, the High Court held in *Craddick* that "the Territory of American Samoa has demonstrated a compelling state interest in preserving the lands of American Samoa for Samoans and in preserving the Fa'a Samoa, or Samoan culture," and that the restrictions were "necessary to the safeguarding of these interests." *Craddick*, 1 Am. Samoa 2d at 12. *See also Corp. of Presiding Bishop v. Hodel*, 830 F.2d 374, 386 (D.C. Cir. 1987) (recognizing that "preserving the Fa'a Samoa by respecting Samoan traditions concerning land ownership" constituted "legitimate congressional policy," and emphasizing that "[t]here can be no doubt that such is the policy" of Congress).

In other words, *Amicus*'s concern that a ruling for the Plaintiffs in this case might subject "restrictions preventing the alienation of Samoan land . . . to the most exacting scrutiny," *Amicus* Br. at 17 (quotation marks omitted), overlooks the fact that those restrictions have already been subject to the most exacting scrutiny—and passed muster. To the extent there remain any equal protection concerns over cultural preservation laws in American Samoa, these

[29] This holding was in accord with Supreme Court precedent on equal protection in U.S. territories. *See, e.g.*, *Examining Bd. of Eng'rs, Architects & Surveyors v. Flores de Otero*, 426 U.S. 572, 600 (1976) ("[T]he protections accorded by either the Due Process Clause of the Fifth Amendment or the Due Process and Equal Protection Clauses of the Fourteenth Amendment apply to residents of Puerto Rico.").

concerns exist today and are separate and apart from the question of citizenship. *Amicus*'s misplaced "policy" arguments should have no place in this Court's analysis of whether Plaintiffs have pleaded sufficient claims under the Citizenship Clause and the APA.

Simply put, despite the efforts of *Amicus* to suggest otherwise, this case presents the issue of the applicability of the Citizenship Clause to persons born in American Samoa, nothing more and nothing less.

CONCLUSION

For the foregoing reasons, Defendants' Motion to Dismiss should be denied in its entirety.

Date: December 7, 2012

Respectfully submitted,

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