Nos. 20-4017, 20-4019

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

JOHN FITISEMANU, et al.

Plaintiffs-Appellees,

v.

UNITED STATES OF AMERICA, et al.

Defendants-Appellants.

and

THE AMERICAN SAMOA GOVERNMENT and THE HON. AUMUA AMATA,

Intervenor Defendants-Appellants.

On Appeal from the United States District Court for the District of Utah
District Court Case No. 18-cv-00036-CW
The Hon. Clark Waddoups

BRIEF *AMICI CURIAE* OF THE AMERICAN CIVIL LIBERTIES UNION AND THE ACLU OF UTAH, SUPPORTING PLAINTIFFS-APPELLEES

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The American Civil Liberties Union Foundation, Inc. ("ACLU") and the ACLU of Utah Foundation (collectively, "*amici*") are non-profit entities operating under § 501(c)(3) of the Internal Revenue Code, are not subsidiaries or affiliates of any publicly owned corporations, and do not issue shares of stock. No publicly held corporation has a direct interest in the outcome of this litigation due to *amici*'s participation.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

Rules

Constitutional Provisions

INTEREST OF AMICI[1]

The American Civil Liberties Union ("ACLU") is a nationwide, nonprofit, nonpartisan organization with approximately 1.75 million members, dedicated to protecting the fundamental liberties and basic civil rights guaranteed by the U.S. Constitution and our nation's civil rights laws. The ACLU of Utah is a statewide affiliate of the national ACLU, with approximately 4,200 members throughout the state.

The ACLU has an abiding interest in the civil and democratic rights of persons born in American Samoa and other U.S. territories, who are fully entitled to the Constitution's protections and rights whether they reside in the federal territories or in any of the fifty states or the District of Columbia. As it explained in a report it published over 80 years ago, the ACLU is deeply committed to the "[m]aintenance of civil liberties in the [territories]."[2] The specific question presented in this case—whether people born in the U.S. territory of American

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[1] *Amici* submit this brief pursuant to Federal Rule of Appellate Procedure 29(a) with the consent of all parties. Undersigned counsel for *amici curiae* certify that no party's counsel authored this brief in whole or in part; no party or party's counsel contributed money that was intended to fund preparing or submitting the brief; and no person other than the *amici curiae*, their members, or their counsel contributed money that was intended to fund preparing or submitting the brief. *See* Fed. R. App. P. 29(a)(4)(E).

[2] ACLU, *Civil Liberties in American Colonies* 7 (1939), http://debs.indstate.edu/a505c5_1939.pdf.

Samoa are citizens by virtue of the Fourteenth Amendment's guarantee to birthright citizenship—is of profound interest to the ACLU. *See* Br. for ACLU et al. as Amici Curiae at 4–5, *Fin. Oversight & Mgmt. Bd. For P.R. v. Aurelius Inv., LLC*, 2019 WL 4192294, Nos. 18-1334, 18-1475, 18-1496, 18-1514, 18-1521 (U.S. Aug. 29, 2019) (underscoring important ways in which federal courts have given short-shrift to Supreme Court instruction against assigning the territorial incorporation doctrine of the *Insular Cases* "'any further expansion'") (quoting *Reid v. Covert*, 354 U.S. 1, 14 (1957) (plurality op.)).

Amici are mindful of the "unique" relationship "between the United States and American Samoa," Intervenor Appellees' Br. at 3, and recognize that the district court's judgment does not reflect a "consensus" among American Samoans on birthright citizenship, *id.* at 8. However, *amici* agree that the Fourteenth Amendment compels the result below and ought to remain inviolate: "Because the Citizenship Clause applies to [Appellees], Congress has no authority to deny them citizenship." *Fitisemanu v. United States*, 426 F. Supp. 3d 1155, 1196 (D. Utah 2019).

ARGUMENT

The district court correctly applied fundamental constitutional principles to reach an unescapable conclusion: because American Samoa is "within the dominion of the United States" and residents are "subject to" U.S. jurisdiction,

persons born there must be "citizens by virtue of the . . . Fourteenth Amendment." *Id.* This premise ineluctably follows from the Amendment's Citizenship Clause and controlling Supreme Court precedent like *United States v. Wong Kim Ark*, 169 U.S. 649 (1898). And it is in no way undercut by the so-called *Insular Cases*, which the Supreme Court instructed should be cabined to their specific holdings and say nothing of the Citizenship Clause's applicability in U.S. territories. *Amici* write, first, to briefly underscore that neither *Downes v. Bidwell*, 182 U.S. 244 (1901) nor the broader "territorial incorporation doctrine" of the "*Insular Cases*" ought to be read to inform the question of the Citizenship Clause's applicability in American Samoa. This Court should not breathe life into "a very dangerous doctrine" that the Supreme Court has already limited to well-settled boundaries. *Reid*, 354 U.S. at 14.

Second, *amici* highlight the very real harms that Appellants' position would unlawfully sanction. Classified "non-citizen nationals" instead of citizens, American Samoans suffer serious and tangible harms by being deprived of nothing less than "membership in [our] political society," *Luria v. United States*, 231 U.S. 9, 22 (1913): a "priceless treasure," *Fedorenko v. United States*, 449 U.S. 490, 507 (1981). And they suffer them daily. Indeed, the benefits, rights, and privileges that accrue by virtue of U.S. citizenship are extensive, and range from the exalted—*e.g.*, voting in state or federal elections as a resident of a state—to the

mundane—*e.g.*, using a driver's license to enter a federal building. Even if the stigma of subordination to "non-citizen national" status could be somehow set aside, denying the many incidences of citizenship to American Samoans reinforces their inferior standing among the nation's members, and marks them as not fully part of their national and local communities. The district court's judgment accordingly redresses a longstanding constitutional harm that relegates tens of thousands of members of the American polity to second-class status.

I. Properly Limited to Its Holding, Neither *Downes v. Bidwell* Nor Other *Insular Cases* Inform the Question Before the Court

Appellants recognize that neither *Downes v. Bidwell*, 182 U.S. 244 (1901), nor any of the other *Insular Cases* addressed whether the Citizenship Clause applied to so-called unincorporated territories by its own force, generally—or for that matter, American Samoa, specifically. U.S. Appellants' Br. at 18. This cancels any benefit Appellants seek from looking to *Downes* and related principles of "territorial incorporation." For more than 70 years, the Supreme Court has limited that doctrine to the specific facts and holdings of cases it decided at the turn of the last century, and warned that its "reasoning" should not "be given any further expansion." *Reid*, 354 U.S. at 14. It had good reason to do so. Whatever "flexibility" the Constitution affords the federal government to govern its territories, U.S. Appellants' Br. at 17, "[t]he concept that the Bill of Rights and

other constitutional protections [become] inoperative when . . . inconvenient . . . would destroy the benefit of a written Constitution." *Reid*, 354 U.S. at 14.

Appellants are thus flatly wrong that "[t]he Supreme Court has [said] *many* constitutional provisions do not apply of their own force in unincorporated territories." U.S. Appellants' Br. at 12 (citing *Boumediene v. Bush*, 553 U.S. 723, 756–57 (2008)). The list is instead quite short. "[T]he real issue in the *Insular Cases* was not *whether* the Constitution extended to [territories], but which of its provisions were applicable by way of limitation upon . . . executive and legislative power." *Boumediene*, 553 U.S. at 758 (emphasis added). Between 1901 and 1922, the Supreme Court answered its own question by holding *four* constitutional provisions—concerning tariffs, taxation, and jury rights—were inoperable in specific territories based on the specific historical context of the times. *See Balzac v. Porto Rico*, 258 U.S. 298, 309 (1922) (Sixth Amendment right to jury trial inapplicable in Puerto Rico); *Ocampo v. United States*, 234 U.S. 91, 98 (1914) (Fifth Amendment grand jury provision inapplicable in the Philippines); *Dorr v. United States*, 195 U.S. 138, 143 (1904) (right to jury trial inapplicable in Philippines); *Downes*, 182 U.S. at 347 (Gray, J., concurring) (reference to "the United States" in Uniformity Clause did not include Puerto Rico); *Dooley v. United States*, 183 U.S. 151, 156–57 (1901) (Export Clause bar on taxation of exports from any state inapplicable to goods shipped from Puerto Rico).

But the line stopped there. Warning that expanding the territorial incorporation doctrine could "undermine the basis of our government," *Reid*, 354 U.S. at 14, by giving Congress the power to determine when the Constitution constrained its actions, the Court has not held a constitutional provision inapplicable in the territories since *Balzac*—98 years ago. Instead, it has consistently found provisions or safeguards "applicable" in U.S. territories when it has considered them.[3]

Not once citing the Supreme Court's warning against extending a doctrine it has limited for decades, Appellants invite this Court to join the courts of appeal that have taken an unduly expansive view of "territorial incorporation" to hold the Citizenship Clause inapplicable in U.S. territories. U.S. Appellants' Br. at 22–23. Appellants ignore that other courts can be (and here, are) wrong: by extending *Downes* or other *Insular Cases* to preclude application of the Citizenship Clause—

[3] *See, e.g.*, *El Vocero de P.R. v. Puerto Rico*, 508 U.S. 147, 148 n.1 (1993) (Free Speech Clause "fully applies" in Puerto Rico); *Rodriguez v. Popular Democratic Party*, 457 U.S. 1, 8 (1982) ("[I]t is clear that the voting rights of Puerto Rico citizens are constitutionally protected to the same extent as those of all other citizens of the United States."); *Torres v. Puerto Rico*, 442 U.S. 465, 470 (1979) (Fourth Amendment protections against unreasonable searches and seizures applicable against Puerto Rico government); *Califano v. Torres*, 435 U.S. 1, 4 n.6 (1978) (per curiam) (assuming "there is a virtually unqualified constitutional right to travel between Puerto Rico and any of the 50 States"); *Examining Bd. of Eng'rs, Architects & Surveyors v. Flores de Otero*, 426 U.S. 572, 600 (1976) (equal protection and due process applicable).

a provision never addressed in those cases—in American Samoa, other courts have flown against Supreme Court precedent. And they have abrogated a fundamental constitutional principle: that persons born within the dominion of the United States become citizens by constitutional operation.

This core principle is beyond debate. The Citizenship Clause nullified the infamous notion of *Dred Scott v. Sandford*, 60 U.S. 393 (1857) that anyone born within the United States could ever be denied citizenship or its privileges. *See Wong Kim Ark*, 169 U.S. at 676. While the Citizenship Clause's immediate effect was to "put it beyond doubt that all blacks, as well as whites, born or naturalized within [U.S.] jurisdiction" were citizens, *id.*, the Clause applies with all its force and immediately bestows citizenship to *all* children born within the United States or its dominions. *See id.*; *Perkins v. Elg*, 307 U.S. 325, 328–29 (1939) (individual became citizen by virtue of being born in the U.S., independent of the status of her parents). And as the district court correctly concluded, it applies with no less force to persons born in American Samoa. Appellees, "having been born in the United States, and owing allegiance to the United States, are citizens by virtue of the Citizenship Clause of the Fourteenth Amendment." *Fitisemanu*, 426 F. Supp. 3d at 1196.

II. Rights and Benefits Denied American Samoans as Non-citizen Nationals

A. The Exclusionary Effect of Non-citizen National Status for American Samoans Who Live in the Fifty States

Citizenship's significance is indisputable, it is "a right no less precious than life or liberty." *Klapprott v. United States*, 335 U.S. 601, 616–17 (1949) (Rutledge, J., concurring). From the founding, "the word 'citizen' [has] convey[ed] the idea of membership in [our] nation." *Ex parte Lockwood*, 154 U.S. 116, 117 (1894). But citizenship holds unique salience for countless persons born in American Samoa—the lone remaining class of people born in U.S. territory yet denied formal membership into the national community. Part of the national fabric but kept at arm's length, American Samoans are denied the innumerable benefits of citizenship even as many bear its most serious burdens. *See Tuaua v. United States*, 951 F. Supp. 2d 88, 90 (D.D.C. 2013) ("American Samoans have served in the U.S. military since 1900 and, most recently, in the wars in both Iraq and Afghanistan."). And because federal law directs that they "owe[] permanent allegiance to the United States," it is exceedingly difficult—if not impossible—to discern a national interest in distinguishing American Samoans from U.S. citizens. *See* 8 U.S.C. § 1101(a)(22), (29); *id.* § 1408(1).

The subordinate status of the "non-citizen national" label is perhaps starkest for American Samoans who reside in one of the fifty states or the District of Columbia. As citizens, persons born in any other U.S. territory are free "to move

into the continental United States and becoming residents of any State there to enjoy every right of any other citizen . . . civil, social, and political." *Balzac*, 258 U.S. at 308. Not so for persons born in American Samoa—like the individual appellees—who must instead confront a patchwork of federal, state, and local laws referencing citizenship or limiting their applicability to citizens.

This patchwork results in a harm unique to American Samoans among persons born within U.S. bounds: the rights and privileges accessible to them can dauntingly change as they move from state to state or even from locality to locality. Generally, "[t]he right to move freely from State to State is an incident of national citizenship . . . ." *Edwards v. People of State of Calif.*, 314 U.S. 160, 178 (1941) (Douglas, J., concurring). And the unquestioned access that a citizen has to the rights and benefits inherent in citizenship as they travel the United States affirms that they belong in the nation—wherever they may be. For American Samoans, this legal patchwork does the opposite: it reinforces that even when moving from state to state or city to city, they remain at least partially outsiders.

In many cases, denial of specific rights for non-citizen nationals is clear—a particular legal provision applies only to U.S. citizens and excludes all others. In other cases, regulation is more direct. Unprecedented 2018 U.S. Army policy, for example, now expressly denies unnaturalized American Samoans the chance to

hold an officer's commission or security clearance[4] despite the fact that American Samoans enlist at remarkably high rates. *See* Appellee's Br. at 6. Nor can residents of American Samoa use their driver's licenses to enter federal buildings or military installations.[5] And in another set of instances, laws reference rights that apply to citizens, lawful aliens, and other immigration statuses while simply omitting mention of "non-citizen nationals." For example, Utah law requires that a "court reporter" "be a citizen of the United States and a resident of the state." Utah Code Ann. § 58-74-302(1)(b). Optometrists in New Mexico must be "citizen[s] of the United States or ha[ve] taken out [their] first naturalization papers." N.M. Stat. Ann. § 61-2-8(D). And funeral home directors in Oklahoma must be "citizen[s] or permanent resident[s] of the United States." Okla. Stat. tit. 59, § 396.3(C)(1). On these requirements, persons born in American Samoa cannot serve any of these

[4] *See* U.S. Dep't of Army, HQDA EXORD 107-18 U.S. Citizenship Verification for Former American Samoan Nationals (Mar. 18, 2018) (on file with author) ("American Samoans are not citizens by birth. Absent naturalization, an American Samoan may not hold a commission in the regular Army and may not retain a secret clearance."); Press Release, U.S. Congresswoman Aumua Amata (R-AS), Amata Advises On Army Administrative Memo for U.S. Nationals (May 3, 2018), https://radewagen.house.gov/media-center/press-releases/amata-advises-army-administrative-memo-us-nationals.

[5] *See* Dep't of Homeland Sec., Notice from DHS to American Samoa on REAL ID Enforcement (Jan. 19, 2018), https://www.dhs.gov/news/2018/01/19/notice-dhs-american-samoa-real-id-enforcement.

functions, or, despite being Americans by birth, either naturalize or be considered "permanent residents" to do so.[6]

Other laws say nothing of non-citizen nationals on their terms, only revealing whether or not they apply to American Samoans after further research or cross-reference to other laws or regulations. For instance, an Oklahoma resident non-citizen national looking to determine whether they are Medicaid-eligible, would have to look to regulations of the State's Department of Human Services. *See* Okla. Admin. Code § 340:65-3-1. There, they would find a listed "citizenship requirement" instructing the applicant to "declare the citizenship or alien status for each household member" applying for benefits. *Id.* § 340:65-3-1(g). Only by following a cross-reference to a separate provision listing ways to satisfy "Citizenship/alien status and identity verification requirements," would that person learn that an American Samoa-issued birth certificate qualifies as "acceptable evidence" of citizenship for purposes of Medicaid eligibility. *Id.* § 317:35-5-25. This is a confusing landscape for a legal practitioner to traverse—let alone a layperson trying to assess whether they have access to an often-essential public benefit program.

[6] A number of these provisions appear unconstitutional even as to non-citizens who are not U.S. nationals. Even if constitutionally suspect, however, they have practical consequences for non-citizen nationals.

The ways in which these laws exclude American Samoans from full participation in their national, state, and local communities are obviously clearest where statutes or rules apply only to citizens, excluding others. But even where laws or regulations have been construed to apply to American Samoans, real harm results from American Samoans' unique status slipping through bureaucratic cracks. One example: the Systematic Alien Verification for Entitlements (SAVE) program. The program was ostensibly designed to help federal, state, and local governments quickly "verify status for various federal-state cooperative programs" where eligibility depends on lawful immigration status. *League of United Latin Am. Citizens v. Wilson*, 908 F. Supp. 755, 770 (C.D. Cal. 1995). Whatever benefits SAVE may afford officials, however, may often be lost on American Samoans, because the federal government's guidance offers no explanation on whether the system is meant to verify the status of non-citizen nationals—or could even do so. *See* U.S. Citizenship & Immigration Servs., Information for Noncitizens Applying for a Public Benefit, https://www.uscis.gov/save/benefit-applicants/information-noncitizens-applying-a-public-benefit. So even if a person born in American Samoa is entitled to a benefit, a government official using SAVE—*e.g.*, a clerk

determining whether to give someone a driver's license in Kansas[7]—could deny it to them if they cannot confirm the applicant's lawful status in the system.

American Samoans' *sui generis* status among members of the nation is also reinforced in explicit, glaring ways. Most blatantly, each non-citizen national's U.S.-issued passport bears a special imprint ("Endorsement Code 09") "announc[ing] that 'THE BEARER IS A UNITED STATES NATIONAL AND NOT A UNITED STATES CITIZEN.'" *Fitisemanu*, 426 F. Supp. 3d at 1158 n.1. No similar badge of otherness is stamped on any other group of individuals born in the United States (including other territories). Indeed, because "a passport is both proof of identity and proof of allegiance to the United States," *Haig v. Agee*, 453 U.S. 280, 293 (1981), Endorsement Code 09 effectively disclaims that the nation fully "vouches for the bearer and for his conduct," *id.* More than any other document issued to them by the U.S. government, passports reaffirm that American Samoans "occup[y] the space between citizenship and alienage." Rose Cuison Villazor, *American Nationals and Interstitial Citizenship*, 85 Fordham L. Rev. 1673, 1676 (2017).

[7] *See* Kansas Dep't of Revenue, Driver's License Proof of Identity ("Non-U.S. Citizens must be processed through the System Alien Verification for Entitlement (SAVE) prior to application for Credentials."), https://www.ksrevenue.org/dovproof.html.

B. An Undignified and Cumbersome Naturalization Process Does Not Provide a Proper Cure for Persons Born into the American Nation

To be sure, American Samoans "receive certain advantages if they choose to apply for naturalization." U.S. Appellants' Br. at 2. They can avoid the indignities and hardships described above after establishing a three-month residency in one of the fifty states or the District of Columbia. *See* 8 U.S.C. § 1427(a)(1). But Appellants' characterization of these allowances as "advantages" misses the point: as natural-born Americans who owe permanent allegiance to the United States, *any* form of naturalization process for American Samoans should lie beyond the pale. In any event, the naturalization process applicable to American Samoans is by no means easy—or dignified. It should hardly be considered a highlight of non-citizen national status.

To start, naturalization requires American Samoans, like foreign nationals, to take and pass an English and civics test—even though the public curriculum in American Samoa already reflects U.S. standards. 8 C.F.R. §§ 312.1, 312.2. They must submit to fingerprinting, a good moral character review (including an in-person interview), and take the same Oath of Allegiance as other non-citizens who seek to naturalize, 8 C.F.R. § 1337.1, even though American Samoans *already* owe allegiance to the United States as a matter of federal law, *see* 8 U.S.C. § 1101(a)(22)(B). Requiring American Samoans to prove their knowledge of and

commitment to the United States and national civil life is yet another reminder that despite being born Americans, they are not fully part of the American community.

And naturalization for non-citizen nationals is by no means simple. As a threshold matter, as noted, American Samoans who wish to naturalize must "become[] a resident of any State," 8 C.F.R. § 325.2(a), "for three months immediately preceding the filing of the [naturalization] application," *id.* § 325.4(b)(3). This, of course, necessitates that someone first physically move from American Samoa to a state before even beginning the naturalization process—a financially burdensome step often beyond the means of many residents of the U.S. territory, 65% of whom lived under the U.S. poverty rate as of the latest census.[8] Once the person has met the three-month residency requirement, they must submit a naturalization application to the U.S. Citizenship and Immigration Services ("USCIS"), and meet all the same requirements as foreign nationals who wish to naturalize. 8 C.F.R. § 325.4(a).

Even where an applicant meets the requirements for naturalization, USCIS retains broad discretion to deny such applications. An applicant must show "good moral character" to naturalize. *See* 8 U.S.C. § 1101(f); 8 C.F.R. § 316.10(a). And

[8] American Factfinder, *American Samoa Poverty Status in 2009 by Age*, Census.gov (archived), https://archive.vn/20200214061115/https://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=DEC_10_ASSF_PBG82&prodType=table.

the agency can deny an application where, at any point prior, the applicant "[c]ommitted unlawful acts that adversely reflect upon [their] moral character." *Id.* § 316.10(b)(3)(iii). This catch-all provision grants the agency broad discretion to deny applications. For instance, an officer may deny naturalization for lack of good moral character for "fail[ing] to file or pay taxes," "possession" of marijuana even where permitted by state law, or a single "driving while under the influence" offense (even without a conviction or civil citation). *See* USCIS Policy Manual, Vol. 12, Ch. 5 §§ C (describing bases to deny for controlled substance violations), L (providing examples of unlawful acts); *see also Ragoonanan v. U.S. Citizenship & Immigration Servs.*, civ. No. 07-3461 PAM/JSM, 2007 WL 4465208, at *3 (D. Minn. Dec. 18, 2007) (overturning agency denial for single "driving while impaired" offense where applicant was contributing member of society who had demonstrated rehabilitation).

C. Core Federal, State, and Local Rights or Privileges Denied to American Samoans as Non-citizen Nationals

The Constitution affords meaningful protections to all persons,[9] but certain core rights are available only to citizens. In that practical sense, Chief Justice Earl

[9] *See, e.g.*, *Plyler v. Doe*, 457 U.S. 202, 210 (1982) ("Aliens, even aliens whose presence in this country is unlawful, have long been recognized as 'persons' guaranteed due process of law by the Fifth and Fourteenth Amendments."); *Graham v. Richardson*, 403 U.S. 365, 371 (1971) (striking down state welfare laws discriminating among non-citizens on the basis of the Fourteenth Amendment's Equal Protection Clause).

Warren was not widely off mark to view the "basic right" of citizenship as "nothing less than the right to have rights." *Perez v. Brownell*, 356 U.S. 44, 64 (1958) (Warren, C.J., dissenting), *overruled in part by Afroyim v. Rusk*, 387 U.S. 253 (1967). Non-citizen national status deprives American Samoans of various core federal, state, and local rights and privileges that should rightly apply to them by virtue of being born "in the United States," as the district court correctly concluded.[10] *Fitisemanu*, 426 F. Supp. 3d at 1195. Based, in part, on their experience advocating on behalf of these and other integral civil liberties, *amici* now detail some of the core federal, state, and local rights and privileges that the enjoined provisions unlawfully deny to persons born in American Samoa.

i. The right to vote

The fundamental right to vote is "preservative of all other rights"; the "essence of a democratic society."[11] *Reynolds v. Sims*, 377 U.S. 533, 555, 562

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[10] Scholar Rose Cuison Villazor has aptly described non-citizen national status as a form of "interstitial citizenship." Rose Cuison Villazor, *American Nationals and Interstitial Citizenship*, 85 Fordham L. Rev. 1673, 1711 (2017). "As a descriptive matter," this is "an intermediate status in which its holders possess some rights that are limited to U.S. citizens, yet are still denied some citizenship rights because they are formally noncitizens." *Id.*

[11] Residents of American Samoa—citizens or not—cannot vote in national elections because the Constitution reserves congressional representation and participation in presidential elections as the domain of the states and the District of Columbia. *See* U.S. Const. art. I, § 2, cl. 1; *id.* art. II, § 1, cl. 2; *see also id.* amend. XXIII (granting Electoral College votes to the District of Columbia). *Amici* focus

(1964). In our national framework, it is the principal mechanism by which individuals engage with and exercise control over governance in their communities. *See Dool v. Burke*, 497 F. App'x 782, 787 (10th Cir. 2012) (right to vote jurisprudence "grounded by the principle that voters should be given an equal opportunity to participate in elections affecting their daily lives").

American Samoans' subordinate status to citizens has denied them the right to vote in most elections held in any of the fifty states, the District of Columbia, and, peculiarly, most other U.S. territories.[12] This is not by constitutional operation: the U.S. Constitution does not reserve the right to vote to citizens.[13]

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on the right to vote of American Samoans living in the fifty states, Washington, D.C., or other U.S. territories.

[12] *See, e.g.*, Guam Code Ann. § 3101 (only "citizen[s] of the United States" who reside in Guam entitled to vote); 16 L.P.R.A. § 4063 (only "citizen[s] of the United States of America . . . legally domiciled in the Island's jurisdiction" qualified to vote in Puerto Rico); 48 U.S.C. § 1542 ("The franchise [in U.S. Virgin Islands] shall be vested in residents . . . who are citizens of the United States . . . ."). By contrast, in the Commonwealth of the Northern Mariana Islands, "a citizen *or national* of the United States" is qualified to vote. CNMI Const. art. VII, § 1 (emphasis added).

[13] Many states allowed noncitizens to vote at the founding and throughout the nineteenth century. *See, e.g.*, *Pope v. Williams*, 193 U.S. 621, 633 (1904), *overruled on other grounds by Dunn v. Blumstein*, 405 U.S. 330 (1972) (noting "persons of foreign birth could vote without being naturalized . . . for the conditions under which that right is to be exercised are matters for the states alone to prescribe"); *Minor v. Happersett*, 88 U.S. 162, 177 (1874) ("[C]itizenship has not in all cases been made a condition precedent to the enjoyment of the right of suffrage.").

Rather, it grants states the power to define voter qualifications for elections for national office. *See* U.S. Const. art. I, § 2, cl. 1; *id.* art. II, § 1, cl. 2; *id.* amend. XVII, cl. 1. But the Supreme Court has recognized citizenship as a "permissible criterion" to limit the right to vote, and all states now limit the franchise in state and federal elections to U.S. citizens.[14] *See Sugarman v. Dougall*, 413 U.S. 634, 649 (1973); *see also Foley v. Connelie*, 435 U.S. 291, 296 (1978) ("[A] State may deny aliens the right to vote . . . .").

It is doubtful that these laws all purposefully meant to disenfranchise American Samoans specifically, who owe permanent allegiance to the nation and were born in a territory under exclusive U.S. control for the past 120 years. Here, federal immigration law illuminates the intermediate space American Samoans occupy in the national framework. Since 1996, Congress has made it a crime for "aliens" to vote in federal elections. *See* 18 U.S.C. § 611. But federal law also expressly provides that the term "alien" means "any person *not* a citizen *or national* of the United States." 8 U.S.C. § 1101(a)(3) (emphasis added). And it defines the term "United States" for purposes of the immigration laws to include American Samoa. *See id.* §§ 1101(29), 1101(38). Properly read, these provisions should not subject an American Samoan who accidentally votes in elections for the

[14] *See, e.g.*, Colo. Rev. Stat § 1-2-101(1); Utah Const. Art. IV, § 2; Okla. Const. Art. III, § 1; Wyo. Const. Art. VI, § 10.

state in which they live to federal prosecution—specifically, because they are not "alien" to the nation. But it is much less clear whether they could be prosecuted under various states' laws, which penalize acts described, *e.g.*, as "voting without being qualified" (citizenship being a qualification) absent mention of how they would be interpreted to affect American Samoan residents holding non-citizen national status.[15]

Still, the universal requirement of U.S. citizenship as a prerequisite to voting has denied American Samoans the right to vote throughout the country, notwithstanding the deep connections they may have developed in states or communities where they reside. And it has denied American Samoan candidates the chance to represent the communities they live in and wish to serve. In a recent and well-publicized example, Sai Timoteo, an American Samoan who ran in 2018 as a Hawaii state representative for the Republican Party, ended her run when she was disqualified by "decades old policies" barring American Samoans from holding public office.[16] These policies leave American Samoans on the outside looking in on our nation's most revered democratic traditions. That is certainly the

[15] K.S.L. § 25-2416.

[16] Rick Daysog, *American Samoan Citizenship Status Under Scrutiny After Candidate Told to Leave Race*, Hawaii News Now (Aug. 2, 2018), https://www.hawaiinewsnow.com/story/38803434/house-candidates-ineligibility-raises-questions-about-citizenship-status-of-american-samoans/.

case for the individual Appellees, who have underscored their "great[] desire" to "vote in the November 2020 General Election" as citizens and residents of Utah. Mot. to Consolidate and Expedite Appeals, at 14 (Feb. 2, 2020). *Amici* agree that they—like all other American Samoans who reside in the fifty states—"have every right to do" so. *Id.*

ii. Jury Service

Persons born in American Samoa are denied the right to serve on federal juries[17] and many state juries.[18] This denial deprives them of yet another core touchpoint to the Nation to which they owe allegiance, since, "with the exception of voting, for most citizens the honor and privilege of jury duty is their most significant opportunity to participate in the democratic process." *Powers v. Ohio*, 499 U.S. 400, 407 (1991); *see also* Alexis De Tocqueville, *Democracy in America* 314 (Goldhammer trans., Penguin Putnam Inc. 2004) (1838) ("The jury system as it is understood in America seems . . . a consequence of . . . popular sovereignty just as direct . . . as universal suffrage.").

Government-mandated exclusion from juries is thus a grievous deprivation of a right fundamental to civil life that only American Samoans are born into. It is

[17] 28 U.S.C. § 1865(b)(1)

[18] *See, e.g.*, Utah Code Ann. § 78B-1-105(1)(a); Cal. Civ. Proc. Code § 203(a)(1); Colo. Rev. Stat. § 13-71-105(1); Haw. Rev. Stat. § 612-4(a); Wash. Rev. Code § 2.36.070.

"practically a brand upon [a person], affixed by the law, [and] an assertion of . . . inferiority." *Strauder v. West Virginia*, 100 U.S. 303, 308 (1880) (holding that a state denies a defendant equal protection when it purposefully excludes all members of the defendant's race from being eligible to serve as jurors), *overruled on other grounds by Taylor v. Louisiana*, 419 U.S. 522 (1975). Moreover, the fact that American Samoans residing in any of the fifty states can be deprived of life, liberty, or property by the verdict of a jury in which they could not serve highlights the elemental unfairness of their status.[19]

iii. Sponsoring non-American family members for immigration

American Samoans do not enjoy the same rights as U.S. citizens in their ability to petition for immigrant status on behalf of family members who wish to immigrate to the United States.

U.S. citizens, lawful permanent residents ("LPRs"), and non-citizen nationals may petition for immigrant status on behalf of certain relatives. *See, e.g.*, 8 U.S.C. § 1153(a) (describing classes of relatives who citizens and LPRs may petition for); *Matter of Ah San*, 15 I. & N. Dec. 315, 317 (BIA 1975) (holding that while a non-citizen national "does not have the rights of a citizen of the United States [they have] at least the rights of a permanent resident of the United States").

[19] *See Taylor v. Louisiana*, 419 U.S. 522, 530 (1975) ("Restricting jury service to only special groups or excluding identifiable segments playing major roles in the community cannot be squared with the constitutional concept of jury trial.").

For the purpose of petitioning for relatives, non-citizen nationals like American Samoans are treated as LPRs—not U.S. citizens. *Matter of B-*, 6 I. & N. Dec. 555, 556 (BIA 1955); *Matter of Ah San*, 15 I. & N. Dec. at 317. This means that American Samoans cannot petition for immigration benefits on behalf of specific classes of relatives—most notably, their parents. Thus, a U.S. citizen may petition for an immigrant visa[20] on behalf of an "immediate relative," including "children, spouses, and parents." 8 U.S.C. § 1151(b)(2)(A)(i). Whereas non-citizen nationals and LPRs may petition for spouses and children under a different statutory provision, *see* 8 U.S.C. § 1153(a)(2), they do not have the right to petition for visas on behalf of their parents, *see* 8 U.S.C. § 1153. Under different provisions of immigration law, U.S. citizens can petition for married sons and daughters, *id.* § 1153(a)(3), and brothers and sisters, *id.* § 1153(a)(4). But non-citizen nationals and LPRs have no such right. Similarly, citizens can petition for fiancé(e)s to enter the country on a K-1 visa, 8 U.S.C. § 1101(a)(15)(K)(i), which allows the fiancé(e) of a U.S. citizen to enter the country for the purpose of marrying a U.S. citizen within 90 days of entry, 8 C.F.R. § 214.2(k). Upon marriage, the fiancé(e) may then adjust their status to that of a lawful permanent

[20] A citizen or LPR petitions for an "immigrant visa" on behalf of a relative, regardless of whether the relative is processing the visa at a consular post abroad, or adjusting status in the United States.

resident. *Id.* Non-citizen nationals and LPRs, however, cannot apply for K-1 visas on behalf of fiancé(e)s. 8 U.S.C. § 1101(a)(15)(K)(i).

And even where American Samoans can petition for immigrant visas on behalf of relatives, their ability to do so is much more limited than that of U.S. citizens. Most significantly, because they are not subject to numerical limitations on visa issuances, 8 U.S.C. § 1151(b)(2)(A)(i), immediate relatives of U.S. citizens (including spouses, children, and parents) are eligible to apply for an immigrant visa—or to adjust status—as soon as their petition is approved. *Id.* In fact, if they are adjusting status in the United States, immediate relatives may file their petitions and adjustment applications *concurrently* with their petition, effectively maintaining lawful status in the country. 8 C.F.R. § 245.2(a)(2)(i).[21]

American Samoans, however, are subject to visa wait times that can often separate families for months, if not years. Like the spouses and children of LPRs, the spouses and children of non-citizen nationals are subjected to annual caps on the number of immigrant visas that the U.S. government can issue. 8 U.S.C. § 1153(a)(2). Because the number of visa applications ordinarily exceeds the

[21] Concurrent filing is especially important for individuals already in the United States on nonimmigrant visas, or other temporary statuses, that may be term-limited. *See, e.g.* 8 C.F.R. § 214.2(h)(13)(iii)(A) (limiting the time periods of L and H visas) If such individuals do not file a concurrent petition and application prior to the expiration of their status, they may be forced to leave the country—for months or even years—to process their immigration paperwork abroad.

number of visas available, prospective applicants with approved petitions are processed on a first-come, first-serve basis. *See* 9 Foreign Affairs Manual 504.2-2(E); USCIS Policy Manual, Vol. 7, Sec. 4, https://www.uscis.gov/policy-manual/volume-7-part-a-chapter-3.

Accordingly, family members of non-citizen nationals with approved petitions must ordinarily wait before they can apply for an immigrant visa. Wait times vary significantly, and depend on the number of visa applicants in a given year. In June 2019, for instance, relatives of non-citizen nationals with approved petitions had to wait nearly *two years* to apply for a visa. *See* U.S. Dep't of State, Visa Bulletin for June 2019, at 2 (May 9, 2019). These wait times have the effect of making families chose between remaining together and living abroad, or having a non-citizen national or LPR live in the United States, while their family waits abroad for an immigrant visa to become available. Even where relatives may already be in the United States in lawful status (such as a work visa, for instance), if that status is term-limited, they may be forced to leave the country until an immigrant visa becomes available, unless they are able to independently extend their lawful status.[22]

[22] As noted above, extending lawful status is not always possible. Many categories of visas are term-limited, and do not allow for automatic renewal.

iv. Public employment limitations

Persons born in American Samoa are limited in the public positions they may hold. Most notably, the Constitution limits the highest national offices in the land to citizens only. It requires the President be a "natural born citizen"[23] and that members of Congress be citizens for seven years before assuming office.[24]

Federal, state and local laws often follow the same model, requiring U.S. citizenship as a condition of employment. At the federal level, citizenship is required for service as an officer in the U.S. Armed Forces and the U.S. Special Forces[25] and for many positions within the federal civil service. At the state and local level, citizenship is often required for elective office including governors, legislator, judges, and other state leaders.[26] It is also required of many ordinary but

[23] U.S. Const. art. II, § 1, cl. 4.

[24] U.S. Const. art. I, §§ 2, 3.

[25] *See, e.g.,* 10 U.S.C. § 532(a) (restricting appointment as a commissioned officer to U.S. citizens).

[26] *See, e.g.*, Utah Code Ann. § 20A-9-201(1) (Candidates for any elective office must be a citizen); Cal. Const. art. V, § 2 (Governor must be a citizen); Ga. Const. art. V, § 1, ¶ iv (Governor and Lieutenant Governor); Me. Const. art. V, pt. 1, § 4 (Governor); Cal. Const. art. IV, § 2(c) (members of the Legislature must be citizens); Haw. Const. art. VI, § 3 (justices and judges must be citizens); Ill. Const. art. VI, § 11 (judges and associate judges); Mo. Const. art. V, § 21 (judges of the supreme court and court of appeals); Tex. Const. art. V, § 2(b) (Justices of the Supreme Court).

meaningful positions such as such as police officer, firefighter or paramedic, or public-school teacher.

Allegiance to the governments they serve is an essential quality for any public servant. That quality, if faithfully held, may well provide a check against corruption, malfeasance, and treason. However, as the district court underscored—and as no party has challenged—no reason exists to doubt the allegiance of persons born in American Samoa to the United States. *Fitisemanu*, 426 F. Supp. 3d at 1196. As any citizen would, they should rightly receive a benefit for their devotion.

CONCLUSION

The district court's judgment remedies a longstanding constitutional harm that has deprived American Samoans the status of citizenship and its countless attendant rights and opportunities. This Court should affirm the district court's judgment.

Dated this 12th day of May, 2020.

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I hereby certify that with respect to the foregoing:

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CERTIFICATE OF SERVICE

I hereby certify that on May 12, 2020 I electronically filed the foregoing using the court's CM/ECF system which will send notification of such filing to all counsel of record.

Dated this 12th day of May, 2020.

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