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 PETITION FOR REHEARING EN BANC

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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 laws. The ACLU of Utah is a statewide affiliate of the national ACLU, with over 5,000 members throughout the state.

The ACLU is interested 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, any of the fifty states, or the District of Columbia. As it explained in a report published over 80 years ago, the ACLU remains deeply committed to the "[m]aintenance of civil liberties in the [territories.]"[2]

The specific question presented here—whether people born in the U.S. territory of American Samoa are citizens by virtue of the Fourteenth Amendment's guarantee to birthright citizenship—is of profound interest to the

[1] In accordance with Fed. R. App. P. 29(b)(2), *amici* have filed a motion for leave to file this brief. No party's counsel for either side authored this brief in whole or in part. No person or entity other than the amici, their members, or their counsel, made a monetary contribution to the preparation or submission of this brief.

[2] ACLU, *Civil Liberties in American Colonies* 7 (1939), https://ligadepatriotas.org/articulos/civil-liberties-in-american-colonies-aclu-1939.html.

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) ("ACLU *Aurelius* Brief") (highlighting how federal courts have ignored Supreme Court instruction against expanding the *Insular Cases'* territorial incorporation doctrine) (citing *Reid v. Covert*, 354 U.S. 1, 14 (1957) (plurality op.)). Amici also filed an amicus brief during proceedings before the panel. Br. for ACLU et al. as Amici Curiae, *Fitisemanu v. United States*, Nos. 20-4017, 20-4019 (U.S. May 12, 2020), ECF No. 10739735.

ARGUMENT

The full Court should rectify the panel majority's mistake of embracing the *Insular Cases*. Not only is the reasoning underlying the "incorporation" doctrine in those decisions explicitly and offensively race-based, but the Supreme Court has instructed lower courts (as recently as last year) not to extend their reasoning to constitutional provisions they left unaddressed. The panel majority ignored that warning and conflicts with decisions of the Supreme Court as a result. Finally, Plaintiffs-Appellees' petition presents the Court the opportunity to reject the notions—embraced by the majority—that constitutional rights could be subject to majoritarian will, or that the *Insular Cases* can be "repurposed" to advance self-

determination when constitutional injury happens to align with the present views of a territory's local government.

I. The *Insular Cases* Cannot Be Redeemed Given Their Racist Premise

The territorial incorporation doctrine of the *Insular Cases*—which is understood to leave certain constitutional provisions inapplicable in so-called "unincorporated" territories—turns on the presumed racial inferiority of the residents of those islands. This Court should not expand its reach.

The racist views animating territorial incorporation are well documented. *See, e.g.*, ACLU *Aurelius* Brief (describing, with citations to cases and other authorities, the race-based reasoning underlying the *Insular Cases'* doctrine of territorial incorporation). Amici will not repeat them here; instead, we emphasize the majority's misuse of these cases, even as it correctly acknowledged the *Insular Cases*' offensive origins.

We focus on two of the majority's missteps. At a general level, the panel majority erred by trying to rehabilitate and redeem the *Insular Cases*. It first reframed their controversy as novel, writing "[t]he Insular Cases have become controversial." Op.14. That is incorrect. They were controversial from the start, beginning with *Downes v. Bidwell*, 182 U.S. 244 (1901), the case on which the majority's decision principally rests. That case did not command a majority and included two dissents. Its lead decision was penned by Justice Henry Billings

Brown—author of *Plessy v. Ferguson*, 163 U.S. 537 (1896). This recasting of the *Insular Cases*—or "repurpos[ing]" as the majority puts it—cannot be justified given the cases' unprincipled roots. Op.16. As the relied-upon opinions from *Downes* demonstrate, the only recognizable principles underlying the incorporation doctrine are fears grounded in racism and xenophobia and a zeal for unfettered empire-building.

More specifically, the majority erred by misstating the *Insular Cases*' significance in ways that conceal their racist ideology, giving undue weight to Justice Edward Douglass White's concurrence in *Downes*. To buttress its conclusion denying plaintiffs birthright citizenship, the majority stressed how "Justice White specifically mentioned citizenship as the type of constitutional right that should not be extended automatically to unincorporated territories." Op.14. That much is true. But Justice White only spoke for three justices. *See Downes*, 182 U.S. at 287–88 (White, J., concurring; joined by McKenna and Shiras, JJ.). And the case in no way concerned citizenship, making Justice White's statement dictum.[3]

Just as importantly, the panel majority overlooked the basis for Justice White's reasoning in *Downes*. Justice White's statements concerning citizenship

[3] In *Gonzalez v. Williams*, one of the *Insular Cases*, the Supreme Court expressly *declined* to reach the Citizenship Clause question. 192 U.S. 1, 12 (1904).

were not rooted in constitutional interpretation maxims; his view that citizenship should not automatically extend to territories sprang from explicit racial prejudices against the people living in them. To illustrate his fears, he referred to them as "uncivilized" and "absolutely unfit" to receive citizenship. *Downes*, 182 U.S. at 306. Justice White concluded, without evidence or explanation, that recognizing the people living in newly-acquired territories as U.S. citizens would "inflict grave detriment on the United States[.]" *Id.* In considering the value of Justice White's statement, the district court correctly observed that:

> the Supreme Court has, since *Downes*, thoroughly rejected the bigoted premise upon which Justice White's dicta is founded—that some groups are inferior to others based simply on their race. *See, e.g*, *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 272 (1995) ("the Constitution and [the Supreme] Court . . . abide no measure 'designed to maintain White Supremacy.'")

Fitisemanu v. United States, 426 F. Supp. 3d 1155, 1194 (D. Utah 2019), rev'd, 1 F.4th 862 (10th Cir. 2021).

The majority erred by endorsing Justice White's race-based view that citizenship should, at the outset, be withheld to the people of acquired territories. Unfortunately, it similarly elevated Justice Brown's opinion in *Downes*.

The panel majority wrote "that *Downes*, published a mere three years after *Wong Kim Ark*, contains dicta, unchallenged by any Justice, casting doubt on the constitutional extension of citizenship to the peoples of the new American

territories." Op.23. The problem is that the basis for this dicta, like that of Justice White's, is an acute sense of white supremacy; it is thus unworthy of the court's endorsement. *See, e.g.*, *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 272 (1995) (emphasizing that since at least *Loving v. Virginia* in 1967 the Supreme Court's interpretation of the Constitution would not abide any measure designed to maintain white supremacy). This is evident when viewing the entirety of Justice Brown's quote, which the majority only partially excerpts. Op.23. The full quote reads:

> We are also of opinion that the power to acquire territory by treaty implies, not only the power to govern such territory, but to prescribe upon what terms the United States will receive its inhabitants, and what their status shall be in what Chief Justice Marshall termed the 'American empire.' There seems to be no middle ground between this position and the doctrine that if their inhabitants do not become, immediately upon annexation, citizens of the United States, their children thereafter born, *whether savages* or civilized, are such, and entitled to all the rights, privileges and immunities of citizens. *If such be their status, the consequences will be extremely serious.* Indeed, it is doubtful if Congress would ever assent to the annexation of territory upon the condition that its inhabitants, *however foreign they may be to our habits, traditions, and modes of life, shall become at once citizens of the United States.*

Downes, 182 U.S. at 279–80 (emphasis added).

The full excerpt illustrates that Justice Brown, like Justice White, was principally motivated by fear of integrating people of color in foreign places into the broader U.S. polity. He concluded, without evidence or explanation, that the consequences of automatically conferring citizenship to the people living in these

acquired lands would be "extremely serious." *Id.* at 279. So serious, he wrote, that Congress may avoid acquiring new lands in the future. Thus, in the name of unhindered empire-building, Justice Brown assured the Court would do its part to avoid integrating people living in acquired lands.

None of this is the stuff courts should attempt to "repurpose[.]" Op.16. Not a single principle from the text, history, or structure of the Constitution supports the *Insular Cases'* doctrine of territorial incorporation. *See Downes*, 182 U.S. at 299 (White, J., concurring) (announcing the doctrine by asking, without reference to the Constitution, what he saw as the dispositive question: "Had Porto Rico, at the time of the passage of the act in question, been incorporated into and become an integral part of the United States?"). This was made clear by Justice Harlan's bewilderment in dissent: "I am constrained to say that this idea of 'incorporation' has some occult meaning which my mind does not apprehend. It is enveloped in some mystery which I am unable to unravel." *Id.* at 391. Justice Fuller expressed similar confusion: "Great stress is thrown upon the word 'incorporation,' as if possessed of some occult meaning." *Id.* at 373 (Fuller, J., dissenting).

Because the *Insular Cases'* doctrine was never grounded in sound constitutional analysis, but in racial animus and fear, and because *Wong Kim Ark* controls, the full Court should review and reconsider the panel majority's decision and, with it, Plaintiffs' claim to birthright citizenship.

II. By Applying The *Insular Cases*, The Majority Contravenes Supreme Court Directives That Lower Courts Avoid Doing So

Even assuming any of the *Insular Cases* informed the questions in this case, the panel majority erred by expanding those decisions' reach after the Supreme Court warned against doing so just a year ago, in *Fin. Oversight & Mgmt. Bd. for P.R. v. Aurelius Inv., LLC*, 140 S. Ct. 1649 (2020). The majority ignores *Aurelius*, citing it not once, and, in so doing, disregards the Court's admonition, expressed first in 1957 in *Reid* and reaffirmed in *Aurelius*, that the *Insular Cases* should not be extended to new constitutional provisions such as the Citizenship Clause.

The majority quotes a concurrence in *Reid* but ignores its main opinion. Op. 33. That opinion, a plurality, doubted the *Insular Cases*' validity, announcing "that neither the cases nor their reasoning should be given any further expansion." *Reid*, 354 U.S. 14. It criticized the *Insular Cases'* doctrine as "dangerous" because it allows government to pick and choose when to apply the protections afforded by the Constitution. *See Id.*

This precise danger manifested in the majority's decision, which lauded the "flexibility" of the *Insular Cases*. Op.16. ("The flexibility of the Insular Cases' framework gives federal courts significant latitude to preserve traditional cultural practices that might otherwise run afoul of individual rights enshrined in the Constitution."). Any such "flexibility" should have been foreclosed if not by *Reid* then by *Aurelius*.

The *Aurelius* Court acknowledged the *Insular Cases* as "much-criticized[,]" questioned their continued validity, and reaffirmed *Reid*'s view that they be limited to the issues they specifically addressed. *See Aurelius*, 140 S. Ct. 1665. Yet for reasons the majority does not explain, it ignores this binding precedent and instead directs its analysis to accord with the political views of the current American Samoan government.

III. Invoking the *Insular Cases* To Deny Birthright Citizenship Cannot Be Deemed "Just" Only Because It Coincides With The Preferences Of The Current American Samoan Government

As Judge Bacharach correctly noted, the majority placed undue weight on a claimed "preference against citizenship expressed by the American Samoan people through their elected representatives." Op.34. To start—and as the American Samoan government concedes—there is no "monolithic view of citizenship among American Samoan people." Intervenors' Reply Br. at 9 n.1.

But en banc review is also warranted because the scope and reach of personal constitutional rights ought not be defined by political winds—whether in Congress or the Fono. "The idea of the Constitution 'was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts." *Obergefell v. Hodges*, 576 U.S. 644, 677 (2015) (quoting *W. Va. Bd. of Educ. v. Barnette*, 319 U.S. 624, 638 (1943)). Fundamental rights

"may not be submitted to vote; they depend on the outcome of no elections." *Barnette*, 319 U.S. at 638–39.

The Fourteenth Amendment—and, specifically, its Citizenship Clause—sprang from that bedrock principle. It nullified the infamous, then-"contested" (*cf.* Op.8) notion of *Dred Scott*, that anyone born within the United States could ever be denied citizenship. Its meaning is clear: anyone "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. Its rule is irrevocable: aside from clear and narrow exceptions (i.e., children of ambassadors or foreign enemies), it puts the citizenship of persons born within the United States "beyond the power of any governmental unit to destroy." *Afroyim v. Rusk*, 387 U.S. 253, 263 (1967). And it "put[] at rest" the argument that "[t]hose [born] in . . . *in the Territories* . . . were not citizens." *Slaughter-House Cases*, 83 U.S. 36, 72–73 (1872) (emphasis added).

The majority's concern for the "dignity and autonomy of the peoples of America's overseas territories," (Op.16), is warranted and commendable; its misstep was to suggest that this valid concern informs the Citizenship Clause's scope. American Samoa's right to self-determination is unassailable. *See* U.N. Charter art. 1, para. 2, art. 73 (July 28, 1945) (describing tenets of self-determination including respect for culture of peoples). But self-determination turns on whether the people of American Samoa choose to be part of the United

States or not. It is unrelated to the question whether certain individual rights or civil liberties apply to persons born there. The Constitution nowhere grants anyone that power. *Cf. Boumediene v. Bush*, 553 U.S. 723, 765 (2008) ("[C]onstitution grants Congress . . . the power to acquire, dispose of, and govern territory, not the power to decide when and where its terms apply."). In defining their relationship with the United States, the people of American Samoa should be free to "choose independence. But while American Samoa remains joined with the United States, birthright citizenship respects the promises underlying th[at] political union . . . ." Dissent.45.

In short, the *Insular Cases* cannot be repurposed to serve the aims of self-determination when they only reinforce congressional dominion over the territories. Only by mere coincidence does congressional treatment of the people of American Samoa happen to align with preferences of the current American Samoan government. Tomorrow another government could embrace citizenship. Indeed, even today many American Samoans wish to be citizens yet are denied that right.[4]

CONCLUSION

[4] Equally American, *American Samoan Voices* (July 31, 2021), https://www.equalrightsnow.org/american_samoan_voices.

For all these reasons, we support Plaintiffs' petition for en banc rehearing of the panel's decision.

Dated this 6th day of August, 2021.

/s/ Alejandro A. Ortiz

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Dated this 6th day of August, 2021.

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Dated this 6th day of August, 2021.

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CERTIFICATE OF SERVICE

I hereby certify that on August 6, 2021 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 6th day of August, 2021.

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