No. 21-1394

IN THE

Supreme Court of the United States

JOHN FITISEMANU, *et al.*,
Petitioners,

v.

UNITED STATES OF AMERICA, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

BRIEF OF CITIZENSHIP SCHOLARS AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICI CURIAE*[1]

Amici are scholars of law, history, and political science who have written on the history of American citizenship. *Amici*'s names, titles, and institutional affiliations (for identification purposes only) are listed in Appendix A. *Amici* have a professional interest in the doctrinal, historical, and policy issues involved in this Court's interpretation of the meaning of citizenship in the United States. Moreover, *amici* have a professional interest in historical conceptions of citizenship before and after the ratification of the Fourteenth Amendment's Citizenship Clause, modern notions of citizenship and non-citizen national status, and their impact on policy today.

INTRODUCTION

Amici submit this brief to provide insight into the historical record relating to three primary points relevant to this case. First, although the original U.S. Constitution did not identify any qualifications for citizenship, its references to citizenship are best understood against the principle inherited from English common law that *United States* v. *Wong Kim Ark*, 169 U.S. 649, 667 (1898) termed "*jus soli*"—the right of the soil. Second, the "non-citizen national" designation imposed on American Samoans had no precedent in antebellum America. Rather, that designation is an unconstitutional exception to the principle of *jus soli* citizenship, invented by administrators and legislators operating

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[1] Pursuant to Supreme Court Rule 37, *amici* state that no counsel for any party authored this brief in whole or in part, and that no entity or person other than *amici* and their counsel made any monetary contribution toward the preparation and submission of this brief. Counsel for all parties received timely notice of this brief and have consented to its filing.

under racist presuppositions during America's territorial expansion at the turn of the twentieth century. Third, and contrary to the government's suggestion in the court of appeals, see Brief for Defendants-Appellants at 29, *Fitisemanu* v. *United States*, No. 20-4017 (10th Cir. Apr. 14, 2020) [hereinafter *Fitisemanu* 10th Cir. Defs. Br.], the same rule does not control whether American Samoans and millions of Filipinos are U.S. citizens. The American Revolution firmly established the enduring default rule of Anglo-American law that a change of sovereignty over a territory extinguishes the allegiance of the population to the former sovereign and establishes its allegiance to the new sovereign. It is this rule that causes the population of the Philippines to be Filipino citizens rather than American citizens. Recognizing that people born in American Samoa are citizens under the Fourteenth Amendment would have no impact on the citizenship of people born in the Philippines.

These historical insights have been validated by scholarship, sources, and litigation. They are matters of scholarly consensus that rest on an unusually rich primary document base. Despite ample opportunity, neither the government of the United States nor that of American Samoa has offered historical evidence that refutes the account. Nor have federal judges offered credible alternatives.[2]

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[2] Compare *Tuaua* v. *United States*, 951 F. Supp. 2d 88, 95 (D.D.C. 2013) (casting *Downes* v. *Bidwell*, 182 U.S. 244 (1901), as establishing that birth in unincorporated territories is not birth in the United States for Citizenship Clause purposes), *aff'd*, 788 F.3d 300 (D.C. Cir. 2015), with Brief of Citizenship Scholars as *Amici Curiae* in Support of Plaintiffs-Appellees and Affirmance at 22-25, *Fitisemanu* v. *United States*, No. 20-4017 (10th Cir. May 12, 2020) (demonstrating that the Court instead explicitly reserved the question). On appeal, "the D.C. Circuit declared itself

This settled understanding of the relevant historical record is one reason that the question presented is appropriate for Supreme Court resolution. Another is the numerous, inconsistent approaches that federal judges have taken in answering the question presented. A third and related reason is the basis of this confusion in unjustified and illogical extensions of the much-criticized *Insular Cases* by some federal judges, including here. See *United States* v. *Vaello Madero*, 142 S. Ct. 1539, 1552 (2022) (Gorsuch, J., concurring) ("The Insular Cases have no foundation in the Constitution and rest instead on racial stereotypes. They deserve no place in our law."); *id.* at 1560 n.4 (Sotomayor, J., dissenting) ("[I]t 'is past time to acknowledge the gravity' of the error of the Insular Cases."). A decade of litigation has resulted in seven opinions, three on one side, Pet. App. 95a-181a; Pet. App. 45a-94a (Bacharach, J., dissenting); Pet. App. 188a-212a (Bacharach, J., dissenting from the denial of en banc consideration), and four on the other. The four that favor the government disagree as to why the government's view should prevail. *Tuaua* v. *United States*, 951 F. Supp. 2d 88, 95 (D.D.C. 2013) (treating *Downes* v. *Bidwell*, 182 U.S. 244 (1901), as establishing that birth in unincorporated territory is not birth "in the United States"), *aff'd*, 788 F.3d 300 (D.C. Cir. 2015); *Tuaua* v. *United*

'skeptical the framers plainly intended to extend birthright citizenship to distinct, significantly self-governing political territories within the United States' sphere of sovereignty.' But that was precisely the genesis of the right-of-the-soil doctrine." Brief of Citizenship Scholars as *Amici Curiae* in Support of Petitioners at 14, *Tuaua* v. *United States*, 136 S. Ct. 2461 (2016) (No. 15-981) (mem.), 2016 WL 860971 (citation omitted). See also Brief of Citizenship Scholars as *Amici Curiae* in Support of Rehearing En Banc, *Fitisemanu* v. *United States*, No. 20-4017 (10th Cir. Aug. 6, 2021) (revealing myriad fatal historical errors in the court of appeals decision in this case).

States, 788 F.3d 300, 303, 306 (D.C. Cir. 2015) (finding *Downes* not "fully persuasive" and suggesting that birth in American Samoa is not birth "subject to the jurisdiction" of the United States); Pet. App. 16a-18a, 24a-25a (deemphasizing discussions of citizenship in *Downes*); *id.* at 27a n.15 (rejecting the subject-to-the-jurisdiction argument); *id.* at 32a-40a (using a repurposed *Insular Cases* doctrine to conclude that birth in American Samoa is not birth in the United States); *id.* at 43a-44a (Tymkovich, J., concurring) (finding longstanding practice to be dispositive and withholding support from Judge Lucero's repurposed *Insular Cases* approach).

Next, and again relatedly, the controversy arises from competing readings of this Court's decisions that only this Court can resolve. As described below, the racist reasoning of Justices in the majority in *Downes* v. *Bidwell* (1901), the question that this Court reserved in *Gonzales* v. *Williams* (1904), and the Court's ensuing silence underlie the dispute here. Unless this Court clarifies matters,[3] the issue will continue flummoxing federal judges and wreaking mischief.[4]

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[3] It is no answer to "recognize that Congress plays the preeminent role in the determination of citizenship" vis-à-vis courts. Pet. App. 5a. The Citizenship Clause places citizenship for those born "in the United States and subject to the jurisdiction thereof" beyond restraint by any governmental actor. The Fourteenth Amendment empowers Congress to "enforce" the rule and commands courts to prevent its abridgement.

[4] On the confusion sown by the court of appeals' analogy in *Tuaua* between Indian Tribes and unincorporated territories, see Sam Erman, *Status Manipulation and Spectral Sovereigns*, 53 COLUM. HUM. RTS. L. REV. 813, 846-52 (2022). In this case, the court of appeals distorted *Wong Kim* and its progeny to evade the dictates of the Fourteenth Amendment and the common law of citizenship that it codifies. See Neil Weare & Sam Erman, *Trump's Threat to Restrict Birthright Citizenship Has (Troubling)*

Finally, and yet again relatedly, the unwarranted extension of the *Insular Cases* by the court of appeals opinion directly contravenes this Court's decision in *Wong Kim Ark*. Compare *Wong Kim Ark*, 196 U.S. at 677, 693 (declaring birth in U.S. territory to be birth within the United States, hence U.S. citizen need not be accompanied by state citizenship), with Pet. App. 23a-24a (choosing to extend the *Insular Cases* rather than apply *Wong Kim Ark*). For these reasons, *Amici* urge this Court to grant certiorari.

ARGUMENT

I. THE RULE THAT CITIZENSHIP FLOWS FROM THE PLACE OF BIRTH HAS DEEP ROOTS IN THE AMERICAN TRADITION, DRAWN FROM ENGLISH COMMON LAW.

Petitioners in this case invoke *jus soli*—"the law of the soil"—as the basis for their right to citizenship. Under that doctrine, all people born within the dominion and "allegiance of the United States" are citizens of the United States. *E.g.*, *Wong Kim Ark*, 169 U.S. at 664-65.[5] The rule has deep roots in the American tradition and is drawn from the English common law.

A. The Rule that Citizenship Flows from the Place of Birth Was the English Common Law Rule.

The 1789 U.S. Constitution repeatedly uses the term "citizen," but until the ratification of the Fourteenth

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Precedent, TAKE CARE Blog (Nov. 13, 2018), https://takecareblog.com/blog/trump-s-threat-to-restrict-birth-right-citizenship-has-troubling-precedent (placing such distortions in historical context).

[5] At common law, "birth within the allegiance" of the king was, "as would be said at this day, within the jurisdiction of the King." *Wong Kim Ark*, 169 U.S. at 655.

Amendment, the Constitution did not expressly identify who was (or was not) a U.S. citizen. See *Lynch* v. *Clarke*, 1 Sand. Ch. 583 (N.Y. Ch. 1844). As this Court has long recognized, terms used but not defined in the Constitution should be read "in the light of" English common law, because the U.S. Constitution is "framed in the language of the English common law." *Smith* v. *Alabama*, 124 U.S. 465, 478 (1888); see also *Carmell* v. *Texas*, 529 U.S. 513, 521 (2000) (finding that for an undefined term in the Constitution "the necessary explanation is derived from English common law well known to the framers"); *Wong Kim Ark*, 169 U.S. at 654. Accordingly, early U.S. courts turned to English common law to inform their understanding of citizenship. See, *e.g.*, *Dawson's Lessee* v. *Godfrey,* 8 U.S. (4 Cranch) 321 (1808) (applying common law to determine citizenship); *M'Ilvaine* v. *Coxe's Lessee*, 6 U.S. (2 Cranch) 280 (1805) (same). When they did so, American courts concluded that citizenship and subjecthood "are, in a degree, convertible terms as applied to natives; . . . though the term *citizen* seems to be appropriate to republican freemen, yet we are, equally . . . *subjects*, for we are equally bound by allegiance and subjection to the government and law of the land." *Wong Kim Ark*, 169 U.S. at 665 (citation omitted).

The English rule regarding citizenship based on place of birth was clear and uncontested. Those born within lands over which the English king's sovereignty extended were subjects of the King of England. Or, as pre-revolutionary courts explained, those who were born on any soil under the sovereign power of the King of England were his "natural liege subjects" and were properly considered "natural born" subjects under the law. *Calvin's Case* (1608) 77 Eng. Rep. 377, 383; 7 Co. Rep. 1 b, 5 b; see also *id.* at 398-99. The Supreme Court has long recognized this "fundamental principle of the

common law," that "English nationality . . . embraced all persons born within the King's allegiance and subject to his protection." *Wong Kim Ark*, 169 U.S. at 655.

English and American jurists from the seventeenth century onward understood the common law rule to extend to any territory over which the king exercised some form of sovereign authority. In *Calvin's Case*, Coke explicitly included within the rule's ambit a wide variety of lands: territories within another kingdom (Wales) subject to the King of England, territories acquired by conquest (Ireland), and regions into which "the king's Writ did run" (Gascony). As this Court noted in 1830, the common law rule was recognized as operating beyond the British Isles and Europe: it was "universally admitted, both in the English courts and in those of our own country," that the birthright rule extended to "all persons born within the colonies of North America, whilst subject to the crown of Great Britain." *Inglis* v. *Trs. of Sailor's Snug Harbor*, 28 U.S. (3 Pet.) 99, 120-21 (1830).

The English common law rule extended to all persons born on English territory, excepting only a subset of those who already owed allegiance to another sovereign—for example, children of diplomats and those born to alien enemies during hostile occupation were not subjects of the King of England even if they were born on English lands. See 1 WILLIAM BLACKSTONE, COMMENTARIES *369-74; *Calvin's Case*, 77 Eng. Rep. at 399; *Wong Kim Ark*, 169 U.S. at 655. In other words, under the English common law rule, affirmatively owing exclusive allegiance to another sovereign was a necessary condition to escape the reach of the birthplace citizenship rule inherited from England.

Many early U.S. cases echo the English rule. The Supreme Judicial Court of Massachusetts's approach to citizenship provides a case in point:

> [A] man, born within the jurisdiction of the common law, is a citizen of the country wherein he is born. By this circumstance of his birth, he is subjected to the duty of allegiance, which is claimed and enforced by the sovereign of his native land; and becomes reciprocally entitled to the protection of that sovereign and to the other rights and advantages, which are included in the term "citizenship."

Gardner v. *Ward*, 2 Mass. 244, 246 (1805). American courts in the nineteenth century also read the common law rule so that it reached children born to alien parents on U.S. soil. This Court declared: "Nothing [was] better settled at the common law than the doctrine that the children even of aliens born in a country . . . are subjects by birth." *Sailor's Snug Harbor*, 28 U.S. (3 Pet.) at 164. No matter "how accidental soever his birth in that place may have been, and although his parents belong to another country," the country of one's birth "is that to which he owes allegiance," *Leake* v. *Gilchrist*, 13 N.C. (2 Dev.) 73, 76 (1829), and that birth "does of itself constitute citizenship," *Lynch*, 1 Sand. Ch. at 663. See also *United States* v. *Rhodes*, 27 F. Cas. 785, 789 (C.C.D. Ky. 1866) (No. 16,151) ("[A]ll persons born in the allegiance of the United States are natural[-]born citizens."). Even a person "born within the *United States*" who later emigrated, "not being proved to have expatriated himself according to any form prescribed by law, is said to remain a citizen." *Murray* v. *Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 119-20 (1804). Accord *Talbot* v. *Jansen*, 3 U.S. (3 Dall.) 133, 165-66 (1795) (native Virginian who removes to France remains a U.S. citizen).[6]

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[6] See also Michael D. Ramsey, *Originalism and Birthright Citizenship*, 109 GEO. L.J. 405, 410-16 (2020); Bernadette Meyler,

U.S. courts also followed the English common law in recognizing that there were some distinct classes of people born within the dominion of the United States who were not "born within the allegiance" of the United States, and therefore were not citizens—namely children of diplomats and those born of alien enemies during hostile occupation. *Sailor's Snug Harbor*, 28 U.S. (3 Pet.) at 155-56; see also *Wong Kim Ark*, 169 U.S. at 682. American judges further recognized the unique situation of Native Americans, who, although "born within the territorial limits of the United States," were "members of, and ow[ed] immediate allegiance to, one of the Indian tribes." *Elk* v. *Wilkins*, 112 U.S. 94, 102 (1884).[7] Accordingly, *Elk* held that Native Americans "are no more 'born in the United States and subject to the jurisdiction thereof,' . . . than . . . children born within the United States, of ambassadors . . . of foreign nations." *Id.*; see also *Ex Parte Reynolds*, 20 F. Cas. 582, 583 (C.C.W.D. Ark. 1879) (No. 11,719) ("[N]ot being subject to the jurisdiction of the United States, [Indians] are not citizens thereof. . . . Indians, if members of a tribe, are not citizens or members of the body politic.").

B. United States Courts Briefly Recognized a Narrow Exception to the Rule that Citizenship Flows from the Place of Birth.

In antebellum America, the rule that birth within the territory and allegiance of the nation ensured citizenship admitted of a notable departure . In *Dred Scott*

The Gestation of Birthright Citizenship, 1868-1898 State's Rights, the Law of Nations, and Mutual Consent, 15 GEO. IMMIGR. L.J. 519, 526-32 (2001); 9 Op. Att'y Gen. 373, 373-74 (1859); 10 Op. Att'y Gen. 328, 328 (1862).

[7] Native American tribes were viewed as "domestic dependent nations," separate from the United States. *Cherokee Nation* v. *Georgia*, 30 U.S. (5 Pet.) 1, 13 (1831).

v. *Sanford*, 60 U.S. (19 How.) 393 (1857), *superseded by constitutional amendment*, U.S. Const. amend. XIV, this Court denied citizenship to African Americans born within, and owing undivided allegiance to, the United States. This was a racial exclusion. The Court held that African Americans were not United States citizens because "they were . . . considered as a subordinate and inferior class of beings, who had been subjugated by the dominant race, . . . and had no rights or privileges but such as those who held the power and the Government might choose to grant them." *Id.* at 404-05.

Dred Scott's since-repudiated departure from the general rule only supports petitioners' claims in this case. That is so because the Fourteenth Amendment nullified the *Dred Scott* exception by codifying and reaffirming the background common law rule that *Dred Scott* had violated.

C. The Fourteenth Amendment Constitutionalized the Rule that Citizenship Flows from the Place of Birth, Thereby Confirming that Birthright Citizenship Applies to All Those Born Within the Geographic Boundaries of the United States.

The Fourteenth Amendment constitutionalized the common law rule that birth within the nation's territory and allegiance bestowed citizenship.[8] That amendment's Citizenship Clause repudiated *Dred Scott*'s race-based exception to citizenship, so that

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[8] Kristin A. Collins, *Illegitimate Borders:* Jus Sanguinis *Citizenship and the Legal Construction of Family, Race, and Nation*, 123 YALE L.J. 2134, 2153 (2014) (the Fourteenth Amendment "constitutionalized *jus soli* citizenship").

"*[a]ll persons* born . . . in the United States, and subject to the jurisdiction thereof"—including African Americans—were deemed "citizens of the United States." U.S. Const. amend. XIV, § 1 (emphasis added); see also *In re Look Tin Sing*, 21 F. 905, 909 (C.C.D. Cal. 1884) (noting that the Citizenship Clause was meant to "overrule" *Dred Scott* and grant citizenship to African Americans). The debates in the Senate over the Fourteenth Amendment make clear that the Citizenship Clause was aimed at putting freed slaves and other African Americans in the same position with respect to citizenship as all other people born in the United States. As Senator John Henderson noted in 1866, the Fourteenth Amendment "will leave citizenship where it now is. It makes plain only what has been rendered doubtful by the past action of the Government." Cong. Globe, 39th Cong., 1st Sess. 3031 (1866) (then identifying *Dred Scott* as the case that erroneously introduced doubts).

This Court in *Wong Kim Ark* confirmed that the Fourteenth Amendment follows the "established" and "ancient rule of citizenship by birth within the dominion" and allegiance of the nation." 169 U.S. at 674, 667, 702; see also *id.* at 674 (declaring that "there is no authority, legislative, executive or judicial" which "superseded or restricted, in any respect, the established rule of citizenship by birth within the dominion"); *id.* at 703 ("The Fourteenth Amendment . . . 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.").

D. At the Time of the Ratification of the Fourteenth Amendment, the Rule that Citizenship Flowed from the Place of Birth Was Understood to Include Persons Born in the Territories of the United States.

The geographic scope of the Fourteenth Amendment is informed by the common understanding at the time it was ratified. Under the English common law rule that the Fourteenth Amendment codified, the doctrine extended beyond the boundaries of England to encompass any territory under the sovereignty of the King of England: "whosoever [wa]s born within the fee of the King of England, though it be in another kingdom, [wa]s a natural-born subject." *Calvin's Case*, 77 Eng. Rep. at 403. In the seventeenth and eighteenth centuries, jurists extended the principle beyond the British Isles to overseas colonies under the sovereignty of the King of England. Persons born in all territories held by the King, and thus "into the King's allegiance," were his subjects. Polly J. Price, *Natural Law and Birthright Citizenship in* Calvin's Case *(1608)*, 9 YALE J.L. & HUMAN. 73, 86-87 (1997). The American colonists were themselves "subjects of the crown of Great Britain." 1 WILLIAM BLACKSTONE, COMMENTARIES *106-09; see also *Sailor's Snug Harbor*, 28 U.S. (3 Pet.) at 120-21 ("[A]ll persons born within the colonies of North America, whilst subject to the crown of Great Britain, were natural[-]born British subjects . . . .").

This doctrine was incorporated into American law. And before the twentieth century, following the lead of English jurists including Coke, U.S. courts made little distinction, on questions of citizenship status, between the states and the territories. Justice Story declared that "[a] citizen of one of our territories is a citizen of the United States." *Picquet* v. *Swan*, 19 F. Cas. 609,

616 (C.C.D. Mass. 1828) (No. 11,134); see also William Rawle, *A View of the Constitution of the United States of America* 80 (1825) ("[E]very person born within the United States, its territories or districts, whether the parents are citizens or aliens, is a natural born citizen in the sense of the constitution . . . ."); Ramsey, *supra*, at 427-29 (showing that the relevant speakers during congressional debates over the Fourteenth Amendment treated birth in a U.S. territory as birth in the United States for Citizenship Clause purposes). As discussed above, that principle, that "every person born within the dominions and allegiance of the United States . . . is a natural born citizen," governed American jurisprudence from the Founding through the nineteenth century. *Lynch*, 1 Sand. Ch. at 663; see also *Look Tin Sing*, 21 F. at 909; *Wong Kim Ark*, 169 U.S. at 659, 688.

That is why this Court expressly contemplated in 1898 that one born outside of the established states, yet, still within the jurisdiction of the United States, could lay claim to being a citizen. See *Wong Kim Ark*, 196 U.S. at 677 ("[A] man [may] be a citizen of the United States without being a citizen of a State . . . . [I]t is only necessary that he should be born or naturalized in the United States to be a citizen of the Union." (citation omitted)). Indeed, after the Fourteenth Amendment, being subject to U.S. jurisdiction no more depended on birth within an established state than on membership in a particular racial, cultural, or social category. See *id.* at 693 ("The [Fourteenth] [A]mendment, in clear words and in manifest intent, includes the children born, within the territory of the United States, of all other persons, of whatever race or color, domiciled within the United States" besides "children of members of the Indian tribes owing direct allegiance

to their several tribes" and a handful of narrow, ancient exceptions concerning children of ambassadors and alien enemies and children born on foreign ships).

II. THE ANOMALOUS CONCEPT OF A NON-CITIZEN NATIONAL WAS INVENTED BY FEDERAL AGENCIES AND THE POLITICAL BRANCHES AND IMPOSED UPON MANY INHABITANTS OF UNINCORPORATED TERRITORIES.

The term "non-citizen national" is a twentieth-century invention that federal agencies and the political branches created and imposed and that this Court has never embraced. English common law recognized a similar in-between status, that of the "denizen," but early U.S. jurisprudence repudiated that status. The sole exception to this repudiation during the first half of the nineteenth century, like the sole exception to the principle that citizenship flowed from birth within U.S. sovereignty and allegiance, was the African American. Both controversial innovations experienced the same fate: constitutional repudiation after the Civil War.

English common law, on the eve of the American Revolution, envisioned four possible statuses: subject, naturalized subject, alien, and denizen. 1 WILLIAM BLACKSTONE, COMMENTARIES *369-70, *372, *374. But distinct categories of naturalized subject (or naturalized citizen) and denizen were both repudiated by the jurisprudence of the early United States. First, U.S. law never drew any significant distinction between naturalized and native-born citizens, and indeed explicitly repudiated any such distinction in virtually every case. See, *e.g.*, *Osborn* v. *Bank of the United States*, 22 U.S. (9 Wheat) 738, 827-28 (1824) ("[The naturalized citizen] is distinguishable in nothing from a native citizen, except so far as the constitution

makes the distinction. The law makes none."); *Schneider* v. *Rusk*, 377 U.S. 163, 168-69 (1964). Article I, section 2 of the U.S. Constitution gave naturalized citizens the same right to high office as native-born citizens, with the sole exception of the presidency. U.S. Const. art. I, § 2. All subsequent efforts during the 1790s to draw distinctions between the status of native-born and naturalized citizens were rejected. See, *e.g.*, 8 Annals of Cong. 1580 (1798).

Second, the category of "denizen" also was ignored or explicitly repudiated in U.S. law. The 1777 Vermont Constitution used "denizen" as a synonym for "citizen," indicating that it did not denote a separate status. See Vt. Const. of 1777, ch. 2, § XXXVIII (explaining when an alien "shall be deemed a free denizen thereof, and intitled to all the rights of a natural born subject of this State"). Chief Justice Taylor of the North Carolina Supreme Court confirmed in 1824 that "denizen is unknown here," for "all [free white] persons . . . residing here, are either citizens or aliens." *Ex Parte Thompson*, 10 N.C. (3 Hawks) 355, 361 (1824).

A small number of judicial decisions during the first half of the nineteenth century suggested that free African Americans inhabited a middle state between citizen and alien.[9] This view, however, never won broad acceptance at the national level, and the Fourteenth Amendment later made clear that African Americans were citizens of the United States, and not denizens.[10]

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[9] See, *e.g.*, *Rankin* v. *Lydia*, 9 Ky. (2 A.K. Marsh.) 467, 476 (1820) (deeming free African Americans "*quasi* citizens, or at least, denizens").

[10] As House Judiciary Chairman James F. Wilson noted in support of the Civil Rights Act of 1866, the "pestilent doctrines of the

In sum, the best available evidence suggests that by 1898, the U.S. Constitution, state constitutions, and American courts had long established a binary division of nontribal inhabitants into citizens and aliens.

This Court has never held otherwise, though not for the federal government's lack of trying. In *Downes* v. *Bidwell*, 182 U.S. 244 (1901), a fractured bare majority upheld a tariff on Puerto Rico-mainland trade. *Id.* at 278 (plurality opinion). Two of the three opinions in support of the judgment digressed into race-based arguments against citizenship for inhabitants of annexed lands. See *id.* at 279-80 (plurality opinion); *id.* at 306 (White, J., concurring); see also Ramsey, *supra*, at 432-435.

Three years later, the government sought to transform some Justices' race-based discomfort with the prospect of U.S. citizenship into the basis of a decision by the Court. The vehicle was *Gonzales* v. *Williams*, 192 U.S. 1 (1904), which presented the question whether Puerto Ricans could be excluded under the immigration laws. As Professor Sam Erman summarizes, the government cast such peoples as "remote in space, culture, and 'civilization' and suffering problems of climate, 'overcrowding,' 'primitive hygiene,' 'low . . . standards of living and moral conduct,' and 'the extreme and willing indigency' that characterized the tropics." Sam Erman, *Almost Citizens* 81 (2019).

The lawyer for the other side reached for the *Dred Scott* case, which he contended had, "for the first time in our history," declared "that in the United States there were persons who, although subjects, were yet

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Dred Scott case" of Americans "who are neither citizens nor aliens," was "an absurdity." Cong. Globe, 39th Cong., 1st Sess. 1116-17 (1866).

not citizens." Frederic R. Coudert, Jr., *Our New Peoples: Citizens, Subjects, Nationals or Aliens*, 3 COLUM. L. REV. 13, 16-17 (1903). The nation had quickly repudiated that result through the Fourteenth Amendment, and the lawyer cautioned the Justices not to make "recourse to . . . precedents in our history of which we are least proud." Brief of Petitioner at 39, *Gonzales*, 192 U.S. 1 (No. 225).

The Court responded with a narrow and unanimous approach. It held that Puerto Ricans were not aliens, hence not subject to existing immigration restrictions. *Gonzales*, 192 U.S. at 13. As to whether they were U.S. citizens, the Court expressly reserved the question. *Id.* at 12.

Although the Court never recognized the existence of non-citizen nationals in the years since *Gonzales*, federal lawmakers and administrators embraced the category as a means to achieve race-based goals. Congressional debates on Puerto Rico following its cession to the United States provide a representative example. Shortly before *Gonzales*, Congress considered whether to recognize the U.S. citizenship of Puerto Ricans. After a debate "filled with racist rhetoric" ensued, Puerto Ricans did not secure the statutory recognition. José A. Cabranes, *Citizenship and the American Empire: Notes on the Legislative History of United States Citizenship of Puerto Ricans*, 127 U. PA. L. REV. 391, 429-35 (1978).

In sum, a non-citizen national status did not exist at the Founding, was eradicated by the Fourteenth Amendment, and has never been resurrected by the Court. When lawmakers and administrators attempted to breathe new life into the term, they repeated the mistakes that led to *Dred Scott*. They acted against clear precedent and constitutional text based

upon a desire to exclude non-white territorial inhabitants from U.S. citizenship.

III. FILIPINOS LACK U.S. CITIZENSHIP AS A RESULT OF PHILIPPINES INDEPENDENCE, REGARDLESS OF WHETHER THE PHILIPPINES WAS PREVIOUSLY PART OF THE "UNITED STATES" FOR FOURTEENTH AMENDMENT PURPOSES.

Below, the government asserted that recognition of constitutional birthright citizenship in American Samoa "would also compel the conclusion that every person born in the Philippines from 1898 to 1946 was a U.S. citizen at birth, likewise implicating the citizenship status of their children." *Fitisemanu* 10th Cir. Defs. Br. at 13. But that reasoning omits the signal event distinguishing the Philippines from all other U.S. territories: The Philippines gained its independence in 1946. Its people thereby severed their allegiance to the United States and became citizens of the Philippines instead. The common law rule commanding the result took firm root in U.S. law at the nation's founding. Under it, a change in sovereignty occasions a corresponding change in inhabitants' allegiance and citizenship.

By the time of the American Revolution, the common law already recognized the rule that the transfer of territory to a new sovereign brought about a corresponding change in the allegiance of the inhabitants. This result flowed straightforwardly from the understanding that the people's allegiance to the sovereign and the sovereign's protection of the people were reciprocal duties. Change the protector, and the allegiance followed. Or as Lord Chief Justice Mansfield explained following the British conquest of Grenada, inhabitants there, "once received under the King's protection, become subjects, and are to be universally considered in

that light, not as enemies or aliens." *Campbell* v. *Hall* (1774), 98 Eng. Rep. 1045, 1047; 1 Cowp. 204, 208.

During the American Revolution, state legislatures and the Continental Congress hewed to the rule and its logic when they asserted that declarations of independence severed the states' allegiance to England and made their inhabitants into citizens of the American states. The Continental Congress declared that all "abiding within any of the United Colonies, and deriving protection from the laws of the same, owe allegiance to the said laws, and are members of such colony." V *Journals of the Continental Congress* 475-76 (1776). See *Sailor's Snug Harbor*, 28 U.S. (3 Pet.) at 124-25 ("[T]he doctrine of allegiance . . . is the tie which binds the governed to their government, in return for the protection which the government affords them."). Great Britain also recognized the continuing strength of the principle. See *id.* at 120-21. So has the Supreme Court of this country, which declared in *Inglis* that when the American States achieved independence, their inhabitants "may be deemed to have become thereby an American citizen." *Id.* at 123. Accord 2 James Kent, *Commentaries on American Law* 33-35 (1827).

In adherence to the rule that changes in the sovereignty of a territory occasion changes in the allegiance of the population, U.S. expansions have always been accompanied by new Americans. See *Boyd* v. *Nebraska ex rel. Thayer*, 143 U.S. 135, 162 (1892) ("Manifestly the nationality of the inhabitants of territory acquired by conquest or cession becomes that of the government under whose dominion they pass, subject to the right of election on their part to retain their former nationality by removal or otherwise, as may be provided.") Every treaty of annexation up to 1898 guaranteed U.S. citizenship for the acquired peoples. See *Downes*, 182

U.S. at 280 (plurality opinion) (describing how "all [U.S.] treaties hitherto" 1898 granted U.S. citizenship to non-Indian residents of the lands that they annexed).[11] Twentieth-century annexations followed suit of pre-1898 treaties of annexation. See, *e.g.*, Convention Between the United States and Denmark for Cession of the Danish West Indies, Aug. 4, 1916, 39 Stat. 1706 (annexing the Danish West Indies and guaranteeing U.S. citizenship to the populace).

Because the rule operates automatically by default, active steps are required for individuals to retain their prior allegiance. During the American Revolution, British subjects who inhabited the colonies before 1776 automatically became state citizens instead upon independence unless they actively retained their British allegiance, usually by rapidly removing to England. See, *e.g.*, *Sailor's Snug Harbor*, 28 U.S. (3 Pet.) 99. After the Mexican-American War, the United States annexed from Mexico what is today the southwestern United States in the 1848 Treaty of Guadalupe Hidalgo. Inhabitants (other than Indians) automatically became U.S. citizens unless they made a formal election to the contrary within one year. Treaty of Peace, Friendship, Limits, and Settlement Between the United States of America and the Mexican Republic art. VIII, Feb. 2, 1848, 9 Stat. 922, 929. See also Treaty Concerning the Cession of the Russian Possessions in North America art. III, Mar. 30, 1867, 15 Stat. 539, 542 (automatically extending U.S. citi-

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[11] Although Hawai'i was annexed by joint congressional resolution rather than by treaty, Newlands Resolution, 30 Stat. 750 (1898), its inhabitants still received U.S. citizenship, Hawaiian Organic Act, ch. 339, 31 Stat. 141 (1900). On congressional Republicans' discussions in 1866 of such provisions, see Cong. Globe, 39th Cong. 1st Sess. 475, 1124, 1293, 1756, 1832 (1866).

zenship to all non-Indian inhabitants unless they returned to Russia within three years); Treaty of Peace between the United States of America and the Kingdom of Spain arts. II, IX, Dec. 10, 1898, 30 Stat. 1754, 1755, 1759 (transferring Puerto Rico, Guam, and the Philippines to the United States; automatically changing inhabitants' "nationality" unless they took formal steps to retain their Spanish allegiance)

The United States also adhered to the rule in the converse situation, when it granted independence to the Philippines and thereby recognized that Filipinos' allegiance had switched to that of their new sovereign. Compare Philippine Independence Act, ch. 84, § 2(a)(1), 48 Stat. 456, 456 (1934) (declaring, pre-independence, that "citizens of the Philippine Islands shall owe allegiance to the United States"), with *id.* § 14, 48 Stat. at 464 ("Upon . . . withdrawal of American sovereignty over the Philippine Islands the immigration laws of the United States . . . shall apply to persons who were born in the Philippine Islands to the same extent as in the case of other foreign countries."). This Court upheld this policy in *Rabang* v. *Boyd*, 353 U.S. 427, 430 (1957).

The principle that inhabitants' allegiance attaches to their territory's new sovereign is not just as ancient as the Republic, it is constitutive of it. "We the People of the United States" only exist because Americans' allegiance to the Crown dissolved when British sovereignty gave way to American independence. Filipinos and their nation are heirs to the same tradition. They will remain exclusively citizens of the Philippines regardless of the recognition of people born in American Samoan as U.S. citizens.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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