May 26, 2021

Chair Raúl M. Grijalva
1324 Longworth House Office Building
Washington, D.C., 20515

Ranking Member Bruce Westerman
1329 Longworth House Office Building
Washington, D.C 20515

Dear Chair Grijalva and Ranking Member Westerman,

I am writing to supplement the record regarding the May 12, 2021 Full Committee Hearing on H.Res. 279 relative to condemning the *Insular Cases*. My name is Leiataua Charles V. Ala'ilima. I have practiced law in American Samoa for forty-two years. I started practice as an Assistant Attorney General before being appointed a District Court Judge (similar to a municipal judge), and then as the first Samoan Acting Associate Justice of the High Court of American Samoa. I went into private practice in 1984. During my decades of legal practice, I have been involved extensively in legal actions before the Lands and Titles Court and the Appellate Division on disputed matters involving land ownership issues and chief title selections. My father, Vaiao Ala'ilima, and Congresswoman Aumua Amata's father, Uifatali Peter Coleman, were the first Samoans returning after completing post graduate education in the early 1950s to lead the Government of American Samoa's Human Resources and Attorney General departments respectively under the U.S. Department of Interior. I was born in American Samoa in 1955, but I was recognized as a U.S. citizen on registration of my birth at the New Zealand embassy because my mother, Fay Calkins, was a U.S. citizen born in New York State.

Although I am writing in my personal capacity, I represent John Fitisemanu, Pale and Rosavita Tuli, and the Southern Utah Pacific Islander Coalition in the federal lawsuit *Fitisemanu v. United States*. In a previous case, I represented Leneuoti Tuaua, Emy Afalava, Va'aleama Fosi, Fanuatanu Mamea, Taffy-Lei Maene, and the Samoan Federation of America in *Tuaua v. United States*. My clients were all born in American Samoa – U.S. soil since 1900 – and now live in American Samoa, Utah, or other states. They are challenging the constitutionality of federal statutes that deny them recognition as U.S. citizens, labeling them instead as so-called "non-citizen U.S. nationals."[1] In defense of this denial of citizenship, the U.S. Department of Justice – joined by elected officials in American Samoa – relies almost exclusively on the *Insular Cases*.

The reliance on the *Insular Cases* to deny citizenship to people born in American Samoa has had a significant impact on my clients and thousands of other American Samoans. Leneuoti Tuaua, a well-respected elder of the community in American Samoa, filed suit because he wants his children and grandchildren to have opportunities that were denied to him—as a young man he was unable to pursue a law enforcement career in California because the federal government does not recognize him as a citizen. John Fitisemanu has now lived in Utah for more than 20 years, yet despite being a passport-holding, taxpaying American who served a critical role distributing

[1] 8 U.S.C. § 1408(1).

COVID-19 tests, he has not been able to vote for members of his children's school board, much less the President because he is not recognized as a citizen. Taffy-Lei Maene lost her job at the Seattle DMV because her U.S. passport says she is not a citizen. Va'a Fosi in Hawaii has been denied the right to bear arms despite ten years of service as an officer in the U.S. Armed Forces. These are just a few of thousands of similar stories shared by American Samoans across the world.

My clients ask one simple question: so long as American Samoa is part of the United States, do people born in American Samoa have an individual right under the U.S. Constitution to be recognized as citizens? As a federal judge recently ruled in *Fitisemanu*,[2] the Citizenship Clause of the Fourteenth Amendment provides a clear and definitive answer: "All persons born . . . in the United States, and subject to the jurisdiction thereof, are citizens of the United States."

With respect to Lt. Governor Talauega Eleasalo Va'alele Ale, non-citizen national status is not a "unique first-class status." It is and always has been a subordinate status imposed on – <u>not chosen by</u> – the American Samoan people. Further, contrary to Lt. Governor Ale's suggestion, my clients' case and any reconsideration of the *Insular Cases* will not address – much less answer – any questions about American Samoa's self-determination or future political status. The question for American Samoa self-determination and political status is whether the people of American Samoa would like to be part of the United States or would like to be independent – not which individual rights secured by the U.S. Constitution apply. As Lt. Governor Ale testified, in American Samoa "there is no serious discussion of going [towards independence]. Some 120 years of being a part of the American family has really instilled in all of us that we are Americans and part of the American family." So long as American Samoa is under the U.S. flag, my clients simply demand their constitutional right to be recognized as U.S. citizens, even as they continue to support broader questions of self-determination and political status being resolved through the democratic process.

Fa'a Samoa **Is Who We Are, Not What We Are Labeled**

Lt. Governor Ale and Congresswoman Amata often create the impression that non-citizen national status was something chosen by our traditional leaders to protect our land and culture. They often refer to what they want protected in pleadings and court argument by the colloquial and emotive phrase, *fa'a Samoa*. Before providing an historical and legal analysis of why citizenship and turning the page on the *Insular Cases* do not pose a threat to our land and culture, I would like to provide some personal impressions on what I have noted my whole life about how Samoans approach our custom and culture.

Fa'a Samoa translates simply as "Doing things the Samoan way." There are no unifying set of laws defining *fa'a Samoa*, nor is there a single ultimate authority to determine what it is or what rules it follows. *Fa'a Samoa* is who we are, not what we are labeled.

[2] 426 F.Supp. 3d 1155 (D.Utah 2019).

At its core, *fa'a Samoa* is about how members of any Samoan collective – be they church groups, chief councils, family groups or other association of Samoans – gather together to address matters that require immediate collective attention, and who they choose at that time to listen to when making decisions about collective action. Samoan collective action is expected to be made by consensus to maintain harmony. As such, the ideas of consistent adherence to law or prior practice or setting future precedents are always secondary to ensuring harmony is maintained in the present. Finally, applying the *fa'a Samoa* in any context is primarily about a collective group discerning patterns from the many prior collective decision-making processes in order to reach a consensus. The strength of *fa'a Samoa* is our collective flexibility and resilience as a people – this is what has allowed it to not just survive but thrive even when exposed to outside pressures and influences. Our focus on the importance of maintaining collective harmony allows us to continue protecting our sense of self, community, and culture despite far-ranging legal, political, economic, and religious shifts. The *fa'a Samoa* is us, and it is each of our responsibility to shape and protect.

Historical Context Regarding Citizenship and American Samoa

When the United States flag was raised over Pago Pago harbor 120 years ago, our traditional leaders believed that as part of the deal for transferring sovereignty to the United States they would be recognized as U.S. citizens. It was not until 20 years later that they were informed by the U.S. Navy that in the eyes of the federal government they were not U.S. citizens, even as American Samoans had taken on the obligations of permanent allegiance to the United States. Thus the status of "non-citizen national" was invented – a status no one in the United States even imagined existed until it was imposed by the federal government on non-white overseas populations in the early 1900s, and a status no one in American Samoa asked for.

Almost immediately, our people organized together to form the Mau movement in support of being recognized as full U.S. citizens rather than be labeled with the subordinate status of non-citizen U.S. nationals. These efforts culminated in 1930 with passionate testimony presented by our leaders to the American Samoan Commission sent by Congress to visit our islands. I quote from just a few of the statements:

- Samuel Tulele Galeai: "[T]hat as Tutuila and Manua has been accepted as part of America, I therefore pray that the people of Tutuila and Manua may also become citizens of America."
- Chief Fanene: "[M]any years we have been under the American flag. . . . But we have not received the word 'true American.' . . . We are only a few people that is true, but we wish to become loyal and peaceful citizens of the United States."
- Chief Nua: "I desire . . . that the people of American Samoa should be true American citizens; receive American citizenship, to be equal with the true American."

Our leaders were persuasive — the 1930 Commission unanimously recommended to Congress and the President that American Samoans be recognized as "full American citizens[]." But while this recommendation twice received the unanimous support of the U.S. Senate, legislation failed to pass the U.S. House due to opposition from the U.S. Navy (which administered American Samoa) and racist Congressmen who called American Samoans "poor unsophisticated people," "absolutely unqualified to receive [citizenship]." In the 1940s, the Navy even withheld from Congress several resolutions passed by the Fono seeking recognition as citizens, and spread ungrounded fears over cultural preservation as a bogeyman to try and persuade American Samoan leaders not to pursue citizenship.

All this history is set forth in a 2020 academic article written by Professor Ross Dardani about citizenship, the *Insular Cases*, and American Samoa that was published in the prestigious American Journal of Legal History.[3] Additional historical background is provided in an excellent amicus brief filed by the Samoan Federation of America that relies on nearly 500 pages of primary and secondary source materials.[4] I have attached both these resources and request that they be included in the record.

Our past leaders had it right. So long as American Samoa is a part of the United States, citizenship by birth in American Samoa is a right guaranteed by the Constitution, not a privilege left to the whims of Congress – *Insular Cases* or no. The very purpose of the Constitution's Citizenship Clause was to make sure that the right of citizenship by birth on American soil was not left to be decided by Congress or elected officials in any state or territory.

Lt. Governor Ale and Congresswoman Amata are of course entitled to their own opinions regarding citizenship. But they must recognize that their view today contrasts with the view of our traditional leaders who signed the Deeds of Cessions and fought to free American Samoa from U.S. Navy rule – those leaders believed in and fought for a right to U.S. citizenship for American Samoans.

Insular Cases **Are "An Anchor, Not a Life Preserver" For Protecting Culture**

Lt. Governor Ale and Congresswoman Amata also suggest that non-citizen national status and the *Insular Cases* are necessary to protect American Samoa's land and culture. Lt. Governor Ale, himself a distinguished attorney, went so far as to testify that American Samoan laws that preserve our land and culture "would automatically be a violation of the Equal Protection Clause if all the provisions of the constitution applied to American Samoa, by saying that the *Insular Cases* are not applicable, that the Constitution applies everywhere there is American land." But

[3] Ross Dardani, *Citizenship in Empire: The Legal History of U.S. Citizenship in American Samoa, 1899-1960*, American Journal of Legal History (2020).
[4] Brief of Amicus Curiae Samoan Federation of America, Inc., Nos. 20-4017 and 20-4019 (10th Cir. May 12, 2020). The appendix is available at https://www.equalrightsnow.org/fitisemanu.

this view both ignores applicable case law that has already upheld these laws under traditional equal protection analysis based on reasoning that would not be affected in any way by citizenship and places a dangerous reliance on the *Insular Cases* that they simply cannot bear.

Federal judges sitting by designation on the American Samoa High Court have been forceful in their recognition that American Samoa's cultural preservation laws are constitutional under a traditional equal protection analysis, even as they have openly rejected any reliance on the *Insular Cases* to say that certain parts of the Constitution do not apply in American Samoa unless Congress says they do. Sitting on the High Court by designation, former Chief Judge of the Southern District of California Edward J. Schwartz wrote the opinion of the Court in *Craddick v. Territorial Registrar* recognizing "a compelling state interest in preserving the lands of American Samoa for Samoans and in preserving the Fa'a Samoa, or Samoan culture . . . ."[5] As an initial matter, he dismissed the notion that the *Insular Cases* framework applied at all, stating that "the constitutional guarantees of due process and equal protection are fundamental rights *which do apply* in the Territory of American Samoa . . . . [I]t is inconceivable that the Secretary of the Interior would not be bound by these provisions in governing the territories, whether 'organized,' 'incorporated,' or no."[6] Accordingly, he acknowledged that American Samoa's land alienation law "does create a classification based on race."[7]

Nonetheless, Chief Judge Schwartz upheld the law because "the protection of Samoan lands is a permissible state objective 'independent of the racial discrimination which it was the object of the Fourteenth Amendment to eliminate.'"[8] As Chief Judge Schwartz explained, "[i]t is this compelling state need to preserve an entire culture and way of life that permits the government of American Samoa to utilize a racial classification and still withstand the rigorous scrutiny of a watchful court."[9] Ultimately, he concluded that American Samoa's land alienation law "pursues a proper purpose rather than a discriminatory one, and that the government of American Samoa has demonstrated a compelling historical and continuing interest in preserving the land and culture of the Samoan people."[10]

In reaching these conclusions, Chief Judge Schwartz cited approvingly to the American Samoa High Court's prior decision in *Haleck v. Lee*, which upheld as constitutional other aspects of American Samoa's land alienation law. Even High Court Justice Thomas Murphy, who wrote an opinion in dissent on the grounds that additional factual development was warranted, recognized that if "the Samoan way of life" was put at risk by invalidating its land alienation laws, he "would be loathe to change by judicial fiat a culture founded on its communal land system."[11]

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[5] 1 Am Samoa 2d 10, 12 (1980).
[6] *Id.* (emphasis added).
[7] *Id.*
[8] *Id.* at 13 (quoting *Loving v. Virginia*, 388 U.S. 1, 11 (1967).
[9] *Id.* at 14.
[10] *Id.*
[11] *Id.* at 17 (Murphy, J., dissenting).

Lt. Governor Ale's invocation of the *Insular Cases* as a shield to protect American Samoa's land and culture appears to come from a decision in the Ninth Circuit addressing racially restrictive land ownership rules in the Northern Mariana Islands[12] that is both inapplicable to American Samoa and whose reasoning and reliance on the *Insular Cases* is highly questionable. Congressman Sablan, who represents the Northern Mariana Islands, addressed this questionable Ninth Circuit precedent directly, cautioning, "if anyone is holding on to these racist *Insular Cases* as a way of keeping [the Northern Mariana Island's land alienation laws] afloat, they may be holding on to an anchor, not a life preserver." Congressman Sablan is correct for at least two reasons.

As an initial matter, the Ninth Circuit's reasoning started by applying the same traditional equal protection analysis as *Craddick*, recognizing a "compelling justification for [land ownership] restrictions."[13] It explained, "There can be no doubt that land in the Commonwealth is a scarce and precious resource. Nor can the vital role native ownership of land plays in the preservation of NMI social and cultural stability be underestimated."[14] It went on that "[i]t appears that land is principally important in the Commonwealth not for its economic value but for its stabilizing effect on the natives' social system."[15] Further, "[t]he legislative history of the Covenant and the Constitution indicate that the political union of the Commonwealth and the United States could not have been accomplished without the restrictions."[16] But then, rather than uphold the challenged laws under equal protection analysis, as *Craddick* had (and as the district court in *Wabol* had below), it instead shifted to an unwarranted and unnecessary reliance on the *Insular Cases*, concluding somehow that equal protection "does not apply *ex proprio vigore*" to the Northern Mariana Islands.[17] This reasoning – that the NMI's land rules are constitutional because the constitution does not apply – is problematic, since it creates a constitutional infirmity where one simply need not exist.

It is also problematic because this kind of broad reliance on the *Insular Cases* to carve out equal protection is contrary to more recent Supreme Court decisions that have sought to narrow the application of the *Insular Cases* in U.S. territories. Last summer, the Supreme Court indicated that "the Insular Cases should not be further extended," calling them "much-criticized."[18] In 2008, the Supreme Court made clear that "[t]he Constitution grants Congress and the President the power to acquire, dispose of, and govern territory, *not the power to decide when and where its terms apply*," expressly rejecting the idea that "the political branches have the power to switch the

[12] Wabol v. Villacrusis, 958 F.2d 1450 (9th Cir. 1990).
[13] *Id.* at 1461.
[14] *Id.*
[15] *Id.*
[16] *Id.*
[17] *Id.*at 1462.
[18] 140 S.Ct. 1649, 1665 (2020).

Constitution on or off at will." [19] This year, equal protection in U.S. territories will be front and center before the Supreme Court as it considers whether the denial of Supplemental Security Income benefits to otherwise eligible residents of U.S. territories (including those living in American Samoa) violates equal protection. Even as the U.S. Department of Justice defends this harmful discrimination against residents of the territories, it has disclaimed any reliance on the *Insular Cases*, expressly rejecting the idea that the Constitution's "equal-protection guarantee simply does not apply in unincorporated territories."[20] Instead, its view under long-established Supreme Court precedent is "that the guarantee of equal protection does apply" in so-called unincorporated territories, "and does forbid the government from drawing invidious distinctions among residents" of the territories without a sufficient justification.[21] However the Supreme Court rules in this case, it will almost certainly continue to embrace the full application of equal protection in U.S. territories.

This is why Congressman Sablan is correct when he says the *Insular Cases* are "an anchor, not a life preserver." Lt. Governor Ale and Congresswoman Amata's attempts to rely on the *Insular Cases* to protect American Samoa's land and culture are not just unnecessary, but ultimately self-defeating and dangerous to the cause of American Samoan cultural preservation and self-determination, a cause which my clients and I all strongly support.

Turning the page on the racist *Insular Cases*, as H.Res. 279 proposes, would not "hasten the destruction of unique cultures within U.S. Territories," as Lt. Governor Ale warns, nor would it "destroy the right of the people of American Samoa to democratic self-determination." To the contrary, the *Insular Cases* have served to delay or deny the right of self-determination in U.S. territories by entrenching undemocratic rule over the territories. Simply put, the *Insular Cases* are no friend to the people of American Samoa or any U.S. territory.

The *Insular Cases* are the problem, not the solution. That is why I support H.Res. 279.

Sincerely,

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cc: Members of the House Natural Resources Committee

[19] 553 U.S. 723, 765-66 (2008) (emphasis added).
[20] *See* Reply Brief for the United States at 9, *United States v. Vaello Madero*, No. 20-303 (November 24, 2020).
[21] *Id.* at 9-10, citing Examining Board v. Flores de Otero, 426 U.S. 572, 599-601 (1976).