

Wabash College Moot Court Competition:  
Fall 2022 Participant's Guide

Preliminary rounds of the Competition will be held on Saturday, October 22. Participants should report to Baxter Hall at 8:30 A.M.; room assignments will be available outside of Baxter 101. The First Round will begin at 9:00 A.M., and the Second Round will begin at 11:00 A.M. Each team, consisting of two (2) members, will argue in two rounds, once for Petitioners and once for Respondents.

**To participate in this competition, you must sign up on the Microsoft Form (use link or QR code):**  
<https://forms.office.com/r/VxGAXtC4yg>



If you have problems signing up, please contact Dr. Jeff Drury ([druryj@wabash.edu](mailto:druryj@wabash.edu)).

**I. THE PARTIES:**

<b><i>Party</i></b>	<b><i>Name before Trial Court</i></b>		<b><i>Name in the Court of Appeals</i></b>	<b><i>Result in the Court of Appeals</i></b>	<b><i>Name in the Supreme Court</i></b>
J. Tilo, P. Gabbard, and S. Gabbard	Plaintiffs	<b>Won</b>	Appellees	<b>Lost</b>	Petitioners
United States of America (the "Government")	Defendant	<b>Lost</b>	Defendant- Appellant	<b>Won</b>	Respondents
The Government of American Samoa,	Intervenor Defendant	<b>Lost</b>	Intervenor Defendant- Appellant	<b>Won</b>	

## II. THE PROBLEM:

**A.** For over a century, the land of American Samoa – five islands and two coral atolls in the South Pacific approximately 2500 miles south of Hawaii – has been an American territory. The territory is unincorporated, meaning that it is not ever intended to become an American state. American Samoans owe allegiance to the United States and serve in the U.S. military, but they have never been considered American citizens. They cannot vote, hold federal or state elective office, or serve on federal or state juries. Some American Samoans do not want American citizenship, fearing it will destroy their distinctive native culture, which centers around collective land ownership. But Petitioners, three native American Samoans who now reside in a U.S. state, asked a federal district court to upend this long-standing arrangement and declare that American Samoans have been American citizens from the start.

The district court declared the Petitioners to already be birthright citizens under the Citizenship Clause of the Fourteenth Amendment to the U.S. Constitution which states: “All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside.” U.S. Const. amend. XIV, § 1, cl. 1. The court relied on the plain language of the Citizenship Clause as well as the U.S. Supreme Court’s decision in *United States v. Wong Kim Ark*, 169 U.S. 649 (1898), a case in which the Supreme Court drew upon principles rooted in English common law to consider whether the Citizenship Clause guaranteed birthright citizenship to man born in California to parents who were both Chinese citizens.

The United States federal government and the American Samoan government, which intervened as a defendant in the case, appealed to the United States Court of Appeals for the Fourteenth Circuit arguing that the Citizenship Clause does not encompass unincorporated territories. The appellate court reversed the district court’s decision. It determined that the geographic scope of the Citizenship Clause is ambiguous. Then it relied on *Downes v. Bidwell*, 182 U.S. 244 (1901), to determine that Congress, rather than the courts, should decide whether U.S. Citizenship should be extended to natives of American Samoa.

*Downes* is one of the *Insular Cases*, a string of Supreme Court decisions from the early twentieth century that address how the Constitution applies to unincorporated territories. As the Court of Appeals acknowledged, the *Insular Cases* have become controversial because they were rooted in the racist belief that natives of unincorporated territories were unfit for inclusion in the American constitutional regime. Nevertheless, the Court of Appeals attempted to “repurpose” the basic *Insular Case* framework – courts should not impose constitutional provisions on citizens of unincorporated territories if it would be impractical and anomalous to do so – because that framework allows courts to defer to the preferences of indigenous persons in the unincorporated territories.

Petitioners now ask the U.S. Supreme Court to find that persons born in United States Territories are entitled to birthright citizenship under the Fourteenth Amendment’s Citizenship Clause. The U.S. Supreme Court has granted the petition for certiorari and set the case for oral argument.

**B.** The case is to be decided on the merits. The issue as stated in the petition for certiorari is:

Whether persons born in United States Territories are entitled to birthright citizenship under the Fourteenth Amendment’s Citizenship Clause. Specifically:

- Are Petitioners citizens of the United States under the plain language of the United States Constitution and its history?
- If not, should the federal courts or Congress decide whether they are citizens?

### III. DIVISION OF THE ARGUMENT:

**A. Petitioners (Mr. Tuli and Mr. & Mrs. Gabbard):** The Court of Appeals is wrong and should be reversed.

**1. First Petitioners' counsel:** American Samoa is a U.S. Territory, and its people should already be considered American citizens. The Fourteenth Amendment's Citizenship Clause extends birthright citizenship to every person "born . . . in the United States." U.S. Const. amend. XIV, § 1, cl. 1. When the Fourteenth Amendment was ratified (1866 to 1868), courts, dictionaries, maps, and censuses uniformly regarded U.S. territories as land "in the United States." This view is bolstered by the fact that drafters and ratifiers of the 14<sup>th</sup> Amendment interpreted the Citizenship Clause to extend birthright citizenship to those born in U.S. territories as well as the states. Other provisions of the Constitution such as the 13<sup>th</sup> Amendment, the Territories Clause, and the now-repealed 18<sup>th</sup> Amendment do not undercut this conclusion. The Court of Appeals erred in focusing on events and decisions occurring years after the adoption of the 14<sup>th</sup> Amendment. What matters is what legislators, courts, and the public understood between 1866 and 1868. There is nothing ambiguous about the Constitutional text. This Court should find that Petitioners are citizens of the United States under the plain language of the Constitution and its history.

**2. Second Petitioners' counsel:** This Court should decide the question of citizenship. *Wong Kim Ark*, 169 U.S. 649 (1898), not *Downes v. Bidwell*, 182 U.S. 244 (1901) and the other *Insular Cases*, is the controlling precedent. In *Wong Kim Ark*, the Supreme Court interpreted the Citizenship Clause as embodying the English common-law doctrine of *jus soli* – birthright citizenship comes to those born within the sovereign's domain. Accordingly, it stated that "the Citizenship Clause 'in clear words and manifest intent, includes the children born *within the territory of the United States*[,] . . . of whatever race or color, domiciled within the United States.'" *Id.* at 693 (emphasis added). *Wong Kim Ark* settles this matter. In *Downes*, the Supreme Court had no reason to consider the country's geographic scope. The *Downes* Court said that for purposes of the Tax Uniformity Clause, the phrase "United States" does not include unincorporated territories. But that finding should not be extended to the Citizenship Clause because (1) the Citizenship Clause's use of "United States" includes territories; (2) the brief discussion of citizenship in *Downes* was nothing more than dicta in a plurality (less than a majority) opinion; and (3) this Court has repeatedly warned against extending the *Insular Cases*, including *Downes*. The *Insular Case* framework should not be applied here. The Court can, and should, decide this matter rather than leaving the Plaintiffs' citizenship to Congress' whims.

**B. Respondents (United States Government and the Government of America Samoa):** The Court of Appeals opinion is right and should be affirmed.

**1. First Respondents' counsel:** The Citizenship Clause's geographic scope is ambiguous. Comparisons of the Citizenship Clause's text to other sections of Constitutional text (13<sup>th</sup> Amendment, Section 2 of the 14<sup>th</sup> Amendment, the Territories Clause, and the now-repealed 18<sup>th</sup> Amendment) suggest opposing interpretations of the meaning of "in the United States." The legislative history of the Citizenship Clause is inconclusive. The dissenting judge in the Court of Appeals was wrong to conflate incorporated territories – those intended for statehood – and unincorporated territories – those not intended for statehood. The Supreme Court established the distinction between the two types of territories in the *Insular Cases* and relied on it repeatedly thereafter. See, e.g., *Downes v. Bidwell*, 182 U.S. 244 (1901). The long-standing distinction between the two types of territories undercuts the relevance of the Petitioners' historical evidence and prevents that evidence from resolving the meaning of the constitutional text. Finally, even if the Court were to attempt to resolve the ambiguity about the geographic scope of the Citizenship Clause, historical practice would recommend a narrow

interpretation. When faced with textual ambiguity, evidence of an unbroken understanding of the meaning of the text, confirmed by longstanding practice, is persuasive. Congress has always wielded plenary authority over the citizenship status of those in unincorporated territories. In the last 100+ years, residents of every other unincorporated territory gained birthright citizenship through acts of Congress. The plain text of the Citizenship Clause is ambiguous, and even if it was decisive, its consistent historical interpretation would counsel a much narrower reading than the dissenting judge in the Court of Appeals gave it.

**2. Second Respondents' counsel:** Congress, not the Courts must decide the issue of birthright citizenship for American Samoans. The *Insular Cases* control here. In the seminal *Insular Case, Downes v. Bidwell*, 182 U.S. 244 (1901), Justice White wrote, "[T]he determination of what particular provision of the Constitution is applicable [in an unincorporated territory] . . . involves an inquiry into the situation of the territory and its relations to the United States." In other words, constitutional provisions apply only if the circumstances of the unincorporated territory warrant their application. If a provision does not by its own terms apply to an unincorporated territory, and judicial enforcement would be "impractical and anomalous," then Courts should not impose the constitutional provision on the unincorporated territory. Any imposition of such a provision, must be left to Congress. While the *Insular Cases* have become controversial due to their grounding in the racist idea that natives of unincorporated territories are unfit for the America constitutional regime, they can be repurposed to preserve the dignity of the and autonomy of people in America's overseas territories. In contrast, *Wong Kim Ark*, 169 U.S. 649 (1898), was not about unincorporated territories at all. It was about the improper denial citizenship to an American man born in an American state. It was published before the United States even acquired its first unincorporated territory. And the same justices who decided *Wong Kim Ark* decided *Downes* only three years later without mentioning *Wong Kim Ark*. The *Insular Cases* contemplate the issue of constitutional extension to unincorporated territories; *Wong Kim Ark* does not. *Wong Kim Ark* does not require that the English common law regarding subjectship be authoritative precedent for all questions concerning American citizenship. And the *Insular* framework better upholds the goal of cultural autonomy and self-direction here. If the American Samoans are to be granted birthright citizenship, that grant must come from Congress as it has for the people of every other unincorporated American territory.

**C. Special Note for Fall 2022:** The problem has a strong majority opinion and a strong dissent, but the two talk past each other almost as frequently as they directly refute each other. You will find that the majority opinion focuses more closely on the second question, and the dissent focuses more closely on the first question. There is enough information to make four strong arguments, but you need to study the entire problem to find all of it. Please read the entire problem at least once before you try to formulate any arguments. AND BE SURE YOU CAREFULLY READ ALL OF THE FOOTNOTES. They contain helpful definitions and extra bits of law and fact that will be important to your arguments.

#### **IV. OUTSIDE RESEARCH:**

**A. Outside research is NOT required. It is entirely optional.** Time is much better spent on understanding and refining the arguments presented than on doing outside research. Suppress, if you can, the desire to find the "gotcha" or killer authority, statistic, or quotation. There's plenty of "ammunition" for the arguments in the two opinions you have.

**B.** The problem is based on *Fitisemanu et. al. v. United States et. al.*, 1 F.4th 862 (10<sup>th</sup> Cir. 2021). The petition for certiorari is fully briefed (with multiple amicus briefs) in the United States Supreme Court. The Court is scheduled to consider the petition at its conference on October 7, 2022.

## **V. ORAL ARGUMENT PROCEDURE:**

- You will argue before a panel of three judges, usually made up of a mixture of practicing attorneys, professors, and judges who have had moot court, trial, and appellate experience.
- Staple your argument into a manila folder. It is NOT a crutch. DO NOT READ FROM IT VERBATIM. Use it for reference and to keep your place in your argument. Your folder should contain relevant facts, summaries of legal authorities or concepts, and other pertinent information.
- When you enter the room, put your name and the side you will be arguing on the blackboard. If you are in a “courtroom” without a blackboard, the judges will ask your name and the respective side you are arguing and will write it on their evaluation sheets.
- The Petitioners (here Mr. Tuli and Mr. & Mrs. Gabbard) always argue first. When the judges ask if you are ready to proceed, respond “Yes, Your Honor.”
- The introduction both sides should use is “May it please the Court. My name is \_\_\_\_\_, and I represent \_\_\_\_\_, the [Petitioners or Respondents] in this appeal.” The Petitioners are allowed rebuttal and MUST reserve rebuttal time. You ask for rebuttal immediately after your introduction. “At this time, I would like to reserve (1 to 3) minutes of my time for rebuttal.”
- You will be timed by one of the three (3) judges. The timekeeper will remind you how much time you have left. EACH person gets ten minutes. This may sound like an eternity, but it will go by quickly once you get into your argument. You will get a “5 minutes” left signal card, and “2 minutes” left signal card, and “1 minute” left signal card and a STOP card.
- When the STOP card is flashed, it means STOP regardless of where you are in your argument, but don’t stop mid-sentence. The best way to handle this is to say, “I see my time has expired. May I have a moment to conclude?” The judge will then grant you additional time quickly to finish your thought and cut to your prayer. More about the prayer later.
- Pay respect to the Court. Be deferential, but assert your client’s position. Never interrupt a judge – let him/her get the question out before you answer. Listen carefully to the question to ensure you are really answering it. Never get mad at a judge or be argumentative – be respectful and assertive. Converse with the judges – don’t run over them with a truck and call it advocacy!
- Refer to each of the judges – regardless of gender, profession in the non-moot-court world, or age – as “your Honor” or “Justice (fill in the individual’s last name).”
- DON’T talk too fast. Speak clearly and in a moderate tone of voice. Don’t dance behind the lectern. It is distracting, unprofessional and makes you appear nervous and tentative. Appear confident and collected (even if you don’t feel it). Be calm and alert – you’ll be amazed with how much it will enhance your argument. Dress appropriately. Conservative, dark suit and tie.

## **VI. PREPARING A SUCCESSFUL ARGUMENT:**

- An oral argument has three parts – the introduction, the body of the argument, and the prayer.
- The Petitioners may briefly state the RELEVANT facts of the case, which should last one to two minutes. They must be fair, but they can be slanted toward your theory of the case. Don’t give facts not contained in the record. DO NOT BE SURPRISED IF A JUDGE ASKS A QUESTION BEFORE YOU GET THROUGH YOUR FACTS. IF IT HAPPENS, ANSWER AND MOVE ON. Your focus should, however, be on the APPLICATION OF THE LAW TO THE FACTS.

- The Respondents should do one of the following: (1) accept the Petitioners' statement of the facts; (2) make corrections in the Petitioners' statement of facts; (3) clarify or point out any ambiguity in the Petitioners' statement of the facts; or (4) make any necessary additions to the Petitioners' statement of the facts. Take issue with the facts to suit your theory of the case. Be brief! DON'T ARGUE THE FACTS: ARGUE THE LAW! That said, this case demands that all litigants have an excellent command of the relevant facts to make the most effective arguments. DO NOT MAKE UP FACTS. YOU MUST STAY WITHIN THE PROBLEM ITSELF.
- Road map your argument. State the issues for the court to consider in clear, concise terms. For example: "There are three reasons our client should prevail. First, . . ." BE PERSUASIVE. That is the whole object of an appellate argument. Tell the Court why you should win. "The Court of Appeals erred in finding for the Respondents because..." or "the ruling of the Court of Appeals should be upheld because..." (The word "erred" is pronounced so that it rhymes with "bird").
- After you have "road mapped" your issues for argument, go back to point one and begin your analysis of each point/reason why you should win.
- The Prayer: Tell the Court in one sentence what you want them to do for your client. "We respectfully request that this Court reverse/affirm the Court of Appeal's decision." After your prayer, close your folder and sit down.
- For rebuttal, do not be verbose. Only one of Petitioners' attorneys gives a rebuttal. Your rebuttal should include one or two strong points. Listen to the Respondents' argument closely to pick up on what the judges are questioning him about. If it favors your side, hit it hard in your rebuttal. An example might be the correction of a case that the Respondents did not analyze or apply correctly. Rebuttal is very important because it is a great way to win points.
- EYE CONTACT IS VERY IMPORTANT! Look directly at the judges as much as possible. This will also help you appear confident in your argument and enhance your overall advocacy style.
- The most important thing to keep in mind is that you are very familiar with your case, and you know what you are talking about. The best way to avoid feeling nervous is to prepare your argument well, think clearly, and HAVE FUN!
- The judges will give you feedback after the entire argument, including rebuttal, is complete. These helpful hints and comments will be invaluable in the next round.

## **VII. WHY SO MANY QUESTIONS?**

- The judges will ask EVERYONE questions about the case. The purpose is not to humiliate or confuse you. To the contrary, the judges need your help in figuring out how to decide this case. Also, in a moot court competition, they want to determine how well you know your material, how well you can think on your feet, and how well you respond and return to the flow of your argument.
- Anticipate what questions might be and prepare to respond to them. BUT don't try to write out answers and read them back. Answer the question briefly, and then get back into your argument. Remember, YOU control the flow of your argument as much as possible, so don't open yourself up to distractions and interruptions by fumbling around trying to figure out what to say next.
- Remember to listen to EACH question before you answer it. It may not be as difficult as you think. If you do not hear or do not understand what a judge is asking, it is acceptable to ask him/her to repeat the question so long as you do so politely and on a limited basis.