UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

LENEUOTI FIAFIA TUAUA, *et al.*,	)	
Plaintiffs,	)	
v.	)	Civil Action No. 12-1143 (RJL)
UNITED STATES OF AMERICA, *et al.*,	)	
Defendants.	)	

DEFENDANTS' MOTION TO DISMISS
PLAINTIFFS' COMPLAINT

Defendants United States of America, United States Department of State (the "Agency"), Hillary Rodham Clinton, in her official capacity as Secretary of State, and Janice L. Jacobs, in her official capacity as Assistant Secretary of State for Consular Affairs ("Defendants" or the "Government"), by and through undersigned counsel, hereby move to dismiss the complaint filed by Plaintiffs Leneuoti Fiafia Tuaua, Va'aleama Tovia Fosi, Fanuatanu Fauesala Lifa Mamea, on his own behalf and on behalf of his minor children, M.F.M., L.C.M., and E.T.M., Taffy-Lei T. Maene, Emy Fiatala Afalava, and the Samoan Federation of America, Inc. ("Plaintiffs"). For the reasons more fully set forth below, Plaintiffs' complaint fails to state a claim as a matter of law and this Court lacks jurisdiction over Plaintiffs' complaint.

In support of this motion, Defendants respectfully refer the Court to the following Memorandum of Points and Authorities in Support. A proposed order consistent with this motion is attached as well.

Dated: November 7, 2012
Washington, DC

Respectfully submitted,

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

LENEUOTI FIAFIA TUAUA, *et al.*, Plaintiffs, v. UNITED STATES OF AMERICA, *et al.*, Defendants.	)	Civil Action No. 12-1143 (RJL)

MEMORANDUM OF POINTS AND AUTHORITIES
IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS

Defendants United States of America, United States Department of State (the "Agency"), Hillary Rodham Clinton, in her official capacity as Secretary of State, and Janice L. Jacobs, in her official capacity as Assistant Secretary of State for Consular Affairs ("Defendants" or the "Government"), by and through undersigned counsel, respectfully submit this memorandum of points and authorities in support of their Motion to Dismiss Plaintiffs' Leneuoti Fiafia Tuaua ("Tuaua"), Va'aleama Tovia Fosi ("Fosi"), Fanuatanu Fauesala Lifa Mamea ("Mamea"), on his own behalf and on behalf of his minor children, M.F.M., L.C.M., and E.T.M., Taffy-Lei T. Maene ("Maene"), Emy Fiatala Afalava ("Afalava") (Tuaua, Fosi, Mamea, Maene, and Afalava are the "Individual Plaintiffs"), and the Samoan Federation of America, Inc. (the "Federation") (the Federation and the Individual Plaintiffs collectively are the "Plaintiffs") complaint. First, the Federation lacks standing to bring the claims it purports to bring. Second, many of the Individual Plaintiffs' claims are moot and/or untimely. Third, Plaintiffs fail to state a claim as a matter of law. For the reasons more fully explained below, Plaintiffs' complaint should be dismissed.

I. SUMMARY OF RELEVANT FACTS, LEGAL FRAMEWORK, AND HISTORY OF THE RELATIONSHIP BETWEEN AMERICAN SAMOA AND THE UNITED STATES

A. Summary of the Allegations in Plaintiffs' Complaint

The Individual Plaintiffs in this case allege in their Complaint that they are United States nationals born in American Samoa. Additionally, the Federation describes itself as a "social services organization that serves the Samoan community in the greater Los Angeles area. Founded in 1965, it is one of the oldest Samoan organizations in the continental United States." (Compl. ¶ 15(a).) Plaintiff Tuaua, one of the Individual Plaintiffs, alleges that he was born in American Samoa in 1951, and currently resides in American Samoa. (*Id.* ¶ 10(a).) From 1969 to 1976, he lived in Daly City, CA, and was not able to vote under California law because he was (and alleges still is) a non-citizen national. (*Id.* ¶ 10(c).) Tuaua claims that during this time (over thirty-five years ago), he wanted to be a law enforcement officer in California, but was not eligible to become one because he was not a U.S. citizen or permanent resident alien who had applied for citizenship. (*Id.* ¶ 10(c).) He moved back to American Samoa and had a 30-year law enforcement career there. (*Id.* ¶ 10(c).) Tuaua claims to seek a passport that states he is a U.S. citizen so he can "enjoy the same rights and benefits and be eligible for the same opportunities as all other persons born in the United States." (*Id.*) Tuaua has two children – 10 and 15 – and states that he would like for them to grow up having all of the opportunities of U.S. citizens and not be classified as "non-citizen nationals." (*Id.* ¶ 10(d).) In 2008, Tuaua was issued a U.S. passport imprinted with endorsement code 09, the proper code which notes that while the passport is a United States passport, the bearer is not a citizen of the United States. (*Id.* ¶ 10(b), Exh. A.)

Plaintiff Fosi, another of the Individual Plaintiffs, alleges that he was born in American Samoa in 1965. (*Id.* ¶ 11(a).) He currently lives in Honolulu, Hawaii. (*Id.* ¶ 11(a).) While in

college, Fosi alleges he was ineligible for federal work study programs and certain other federal employment opportunities as a non-citizen national. (*Id.* ¶ 11(c).) Fosi served in the Army Reserves and Hawaii National Guard, and believed he had been naturalized in 1987 in connection with his service, but when he renewed his passport in 1999, it stated he was a non-citizen national. (*Id.* ¶ 11(c)-(d).) He alleges that, as a U.S. national, he cannot vote or bear arms in Hawaii. (*Id.* ¶ 11(e).) Fosi demands a U.S. passport that states he is a U.S. citizen so that he can enjoy the same rights and benefits and be eligible for the same opportunities as all other persons born in the United States. (*Id.* ¶ 11(f).)

Another Individual Plaintiff, Mamea, alleges that he was born in American Samoa in 1941. (*Id.* ¶ 12(a).) Mamea attempts to assert claims on behalf of himself and his three minor children: MFM – 5; LCM – 4; and ETM – 2, all of whom were allegedly born in American Samoa. (*Id.* ¶ 12(a).) Mamea and all three children have U.S. passports stating (as they must) that they are non-citizen nationals. (*Id.* ¶ 12(b).). Mamea asserts that he served in the U.S. Army, and was honorably discharged in 1984. (*Id.* ¶ 12(c).) Prior to his discharge, he resided in Hawaii, California, South Carolina, and Washington, but, as a non-citizen national, was not able to vote. (*Id.* ¶ 12(d).) Mamea further alleges that he has previously traveled to Hawaii to receive treatment at a Veterans Hospital as an 80% combat-disabled veteran, and anticipates needing to do so again. (*Id.* ¶ 12(e).) He alleges that due to his non-citizen national status, he cannot obtain an immigrant visa for his wife (a Tongan national) as an immediate relative of a U.S. citizen. (*Id.*) Mamea claims that if he were a U.S. citizen, his wife would also be eligible for a K-3 non-immigrant visa during processing of her immigrant visa application and so she could travel to Hawaii immediately with him. (*Id.* ¶ 12(e), (f).).

Individual Plaintiff Taffy-lei T. Maene alleges she was born in American Samoa in 1978, and currently lives in Seattle. (*Id.* ¶ 13(a).). Maene further alleges she was issued a U.S.

passport in 1995 listing her as a non-citizen national. (*Id.* ¶ 13(b).). Maene alleges she was hired by the Washington State Department of Licensing, but was removed from that position because she was not able to demonstrate that she was a citizen of the U.S. (*Id.* ¶ 13(c).). She further alleges she has been deterred from applying for federal jobs requiring citizenship as a prerequisite, since she is a non-citizen national. (*Id.* ¶ 13(c).) Maene states that she is not eligible to vote in Washington State, where she has resided since 2006. (*Id.* ¶ 13(d).) Further, she alleges that she cannot receive an "enhanced drivers license" to travel to Canada because she is a non-citizen national. (*Id.* ¶ 13(d).) Finally, she asserts that she is unable to sponsor her mother, a Samoan national, for immigration to the United States as a non-citizen national. (*Id.* ¶ 13(e).) Maene seeks a U.S. passport listing her as a U.S. citizen. (*Id.* ¶ 13(f).)

Individual Plaintiff Afalava alleges he was born in American Samoa in 1964, and resides there. (*Id.* ¶ 14(a).) He states that his U.S. passport, issued in 2012, describes him (accurately) as a non-citizen national. (*Id.* ¶ 14(b).) Afalava claims that he lived in the continental United States for 13 years, including in Texas, Oklahoma and California. (*Id.* ¶ 14(d).) He alleges that he could not vote as a non-citizen national. (*Id.* ¶ 14(d).) Afalava demands a U.S. passport that lists him as a citizen. (*Id.* ¶ 14(e).)

Plaintiff Federation is a 501(c)(3) tax-exempt organization that claims to serve the Samoan community in the greater Los Angeles area. (*Id.* ¶ 15(a).) The Federation states that its activities include helping to promote political empowerment of the Samoan community in California. (*Id.* ¶ 15(b).) The Federation holds voter registration drives, and it alleges that "[r]ecognition by the United States that all persons born in American Samoa are U.S. citizens would significantly advance the Samoan Federation's efforts to increase the political voice of the Samoan community." (*Id.* ¶ 15(b).) The Federation further alleges that it expends resources helping American Samoans with the naturalization process, and could use those funds for other

purposes if the United States found American Samoans to be citizens in the absence of naturalization. (*Id.* ¶ 15(c).)

Additionally, Plaintiffs allege that various changes have occurred since American Samoa became a U.S. territory, and further allege that the United States has taken actions "reflecting and celebrating American Samoa's integration" into the United States. (*Id.* ¶ 35). They state that "[o]ver the past 112 years, American Samoa's ties to the rest of the United States have strengthened significantly as American Samoa has been integrated into the nation's political, economic and cultural identity." (*Id.* ¶ 26). Among other changes, in 1951, authority to administer American Samoa was transferred from the U.S. Navy to the Department of Interior. (*Id.* ¶ 27). Plaintiffs allege that "[i]n 1967, the Secretary of the Interior approved the Constitution of American Samoa, establishing a tripartite government. . . ." (*Id.*) In 1977, the Secretary of the Interior provided for a "popularly elected Governor" and in 1978, "Congress enacted legislation providing for a non-voting Delegate to represent American Samoa in the U.S. House of Representatives." (*Id.*) Plaintiffs further allege that the population has grown from 5,600 in 1900 to more than 55,500, and "many generations of American Samoans also now live throughout the United States." (*Id.* ¶ 28). Plaintiffs cite to a more developed primary school system (*id.* ¶ 29); communication advances in light of the internet; and regular flights that have further developed ties with the United Sates. (*Id.* ¶ 30). Plaintiffs also note the extensive contributions of American Samoans to the U.S. Armed Forces, the presence of U.S. military facilities on American Samoa and the federal government's "strong civilian presence" on American Samoa, as well as a National Park System. (*Id.* ¶¶ 31-34).

B. Relevant Legal Framework

The Department of State's authority to grant and issue passports is set forth in 22 U.S.C. § 211a. Under the law, "no passport shall be granted or issued to or verified for any other

persons than those owing allegiance, whether citizens or not, to the United States." 22 U.S.C. § 212. Additionally, the Immigration and Nationality Act ("INA") § 101(a)(29), 8 U.S.C. § 1101(a)(29), designates American Samoa as an "outlying possession" of the United States.[1] Persons born to non-U.S. citizen parents in an outlying possession of the United States on or after its date of acquisition are nationals but not U.S. citizens at birth. INA § 308(1), 8 U.S.C. § 1408(1).

To implement applicable statutory mandates like the ones outlined above, the Department of State's Foreign Affairs Manual ("FAM") sets forth guidance on a variety of topics, including the issuance of passports. The current FAM is publicly available at http://www.state.gov/m/a/dir/regs/fam/. In their Complaint, Plaintiffs allege that 7 FAM 1125.1(b) states that "[t]he citizenship provisions of the Constitution do not apply to persons born [in American Samoa.]" (Compl. ¶ 49). This is only part of the FAM statement, however; the full statement in the FAM is: "American Samoa and Swains Island *are not incorporated territories*, and the citizenship provisions of the Constitution do not apply to persons born there." 7 FAM 1125.1(b) (emphasis added). The FAM also outlines current law under the INA applicable to nationality of those born on American Samoa.

Plaintiffs rightfully acknowledge that the Department of State has properly "given effect" to Congress' "non-citizen national" classification by imprinting an endorsement – Endorsement Code 09 – in U.S. passports issued to persons whose claim to nationality is based upon birth in

[1] The term "outlying possession" of the United States is contrasted with "State" under the INA. In fact, INA § 101(a)(36), 8 U.S.C. § 1101(a)(36) specifies that the term "State" includes the District of Columbia, Puerto Rico, Guam, the U.S. Virgin Islands and the Commonwealth of the Northern Mariana Islands. Further, INA § 101(a)(38), 8 U.S.C. § 1101(a)(38) defines the term "United States" as the continental United States, Alaska, Hawaii, Puerto Rico, Guam, the U.S. Virgin Islands and the Northern Mariana Islands.

American Samoa. Endorsement Code 09 states, "The bearer is a United States National and not a United States citizen." (Compl. ¶ 7 and Ex. A).

Plaintiffs admit that since 1952, American Samoans have been permitted to naturalize under federal immigration law. (*Id.* ¶ 47.) Plaintiffs allege this is a "lengthy, costly, and burdensome" process, and that minors may not apply for naturalization. (*Id.*) Plaintiffs allege that "the naturalization process can take a year or more to complete." (*Id.*) Plaintiffs claim that "the ultimate citizenship determination is made on a case-by-case basis by an officer of the U.S. Citizenship and Immigration Service ("USCIS"), an agency of the U.S. Department of Homeland Security," but do not point to any adverse determinations made against them. (*Id.*)

C. Relevant History of American Samoa's Relationship to the United States

The Samoan Islands are an archipelago in the Pacific; the eastern portion of the archipelago became known as "American Samoa" after a Convention to Adjust the Question between the United States, Germany, and Great Britain in Respect to the Samoan Islands signed at Washington on December 2, 1899, and ratified on February 16, 1900, in which Great Britain and Germany ceded claims to American Samoa to the United States. 31 Stat. 1878. Congress accepted, ratified and confirmed the voluntary cessions of territory signed by Samoan chiefs retroactive to April 10, 1900 and July 16, 1904, by the Ratification Act of February 20, 1929, 45 Stat. 1253, which provided that until Congress should provide for the government of such islands, all civil, judicial and military powers should be vested in such person or persons and exercised in such manner as the President of the United States should direct, with power in the President to remove officers and fill vacancies. The President, through Executive Order No. 125-A, directed the Department of the Navy to exercise control over and administer the islands comprising American Samoa. Subsequently, the President, by Executive Order No. 10264, dated June 29, 1951, to become effective July 1, 1951, 48 U.S.C. § 1431 (note), transferred the

administration of American Samoa from the Secretary of the Navy to the Secretary of the Interior, directing that the latter "take such action as may be necessary and appropriate, and in harmony with applicable law, for the administration of the civil government in American Samoa." The administration of American Samoa by the Department of the Interior continues presently. Finally, the people of American Samoa have drafted, voted on, and implemented a constitution to govern them.[2] *See* Const. of Am. Samoa, *available at* http://www.house.gov/faleomavaega/samoan-constitution.shtml (last visited Nov. 1, 2012). This constitution contains several critical provisions distinct from the U.S. Constitution, including, but not limited to, Section 3 of Article I, which memorializes the responsibility of the government of American Samoa to preserve the traditional American Samoan way of life. *See* Const. of Am. Samoa, art. I, § 3.

II. LEGAL STANDARD

A. Federal Rule of Civil Procedure 12(b)(1) – Lack of Subject Matter Jurisdiction

A motion to dismiss under Federal Rule of Civil Procedure 12(b)(1) "presents a threshold challenge to the Court's jurisdiction," and thus "the Court is obligated to determine whether it has subject-matter jurisdiction in the first instance." *Curran v. Holder*, 626 F. Supp. 2d 30, 32 (D.D.C. 2009) (internal citation and quotation marks omitted). "[I]t is presumed that a cause lies outside [the federal courts'] limited jurisdiction," *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994), unless the plaintiff can establish by a preponderance of the evidence that the Court possesses jurisdiction. *See, e.g.*, *U.S. ex rel. Digital Healthcare, Inc. v. Affiliated Computer*, 778 F. Supp. 2d 37, 43 (D.D.C. 2011) (citing *Hollingsworth v. Duff*, 444 F. Supp. 2d 61, 63 (D.D.C. 2006)). Thus, the "'plaintiff's factual allegations in the complaint . . . will bear

[2] Additionally, undersigned counsel has learned that American Samoa's representative to Congress, Congressman Faleomavaega, intends to seek leave of this Court to file an *amicus curae* brief in support of the Government's motion.

closer scrutiny in resolving a 12(b)(1) motion than in resolving a 12(b)(6) motion for failure to state a claim.'" *Id.* (quoting *Grand Lodge of Fraternal Order of Police v. Ashcroft*, 185 F. Supp. 2d 9, 13-14 (D.D.C. 2001) (internal citation and quotation marks omitted)).

More specifically, a Rule 12(b)(1) motion to dismiss for lack of jurisdiction may be presented as either a facial or factual challenge. "A facial challenge attacks the factual allegations of the complaint that are contained on the face of the complaint, while a factual challenge is addressed to the underlying facts contained in the complaint." *Al-Owhali v. Ashcroft*, 279 F. Supp. 2d 13, 20 (D.D.C. 2003) (internal quotations and citations omitted). When a defendant makes a facial challenge, the district court must accept the allegations contained in the complaint as true and consider the factual allegations in the light most favorable to the non-moving party. *Leatherman v. Tarrant Cnty. Narcotics Intelligence & Coordination Unit*, 507 U.S. 163, 164 (1993); *see also Erby v. United States*, 424 F. Supp. 2d 180, 182 (D.D.C. 2006). With respect to a factual challenge, the district court may consider materials outside of the pleadings to determine whether it has subject matter jurisdiction over the claims. *Jerome Stevens Pharmacy, Inc. v. FDA*, 402 F.3d 1249, 1253 (D.C. Cir. 2005). The plaintiff bears the burden of establishing the factual predicates of jurisdiction by a preponderance of the evidence. *Erby*, 424 F. Supp. 2d at 182.

B. Federal Rule of Civil Procedure 12(b)(6) – Failure to State a Claim

A motion to dismiss pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure tests whether a complaint has properly stated a claim upon which relief may be granted. *Woodruff v. DiMario*, 197 F.R.D. 191, 193 (D.D.C. 2000). For a complaint to survive a Rule 12(b)(6) motion, Federal Rule of Civil Procedure 8(a) requires that it contain "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). Although Rule 8(a) does not require "detailed factual allegations," a plaintiff is required to

provide "more than an unadorned, the-defendant-unlawfully-harmed-me accusation," *Ashcroft v. Iqbal*, 556 U.S. 662 (2009) (citing *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555-57 (2007)), in order to "give the defendant fair notice of what the . . . claim is and the grounds upon which it rests," *Twombly*, 550 U.S. at 555 (omission in original). In other words, "a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Iqbal*, 556 U.S. at 669 (quoting *Twombly*, 550 U.S. at 547). A claim is facially plausible "when the plaintiff pleads factual content that allows the court to draw [a] reasonable inference that the defendant is liable for the misconduct alleged." *Id.* (citing *Twombly*, 550 U.S. at 556). A complaint alleging facts which are "merely consistent with a defendant's liability . . . stops short of the line between possibility and plausibility of entitlement to relief." *Id.* (quoting *Twombly*, 550 U.S. at 557) (internal quotation marks omitted).

In evaluating a Rule 12(b)(6) motion under this framework, although the Court must accept the plaintiff's factual allegations as true, any conclusory allegations are not entitled to an assumption of truth, and even those allegations pled with factual support need only be accepted to the extent that "they plausibly give rise to an entitlement to relief." *Iqbal*, 556 U.S. at 669. If "the [C]ourt finds that the plaintiff[ ] has failed to allege all the material elements of [his] cause of action," then the Court may dismiss the complaint without prejudice, *Taylor v. FDIC*, 132 F.3d 753, 761 (D.C. Cir. 1997), or with prejudice, if the Court "determines that the allegation of other facts consistent with the challenged pleading could not possibly cure the deficiency," *Firestone v. Firestone*, 76 F.3d 1205, 1209 (D.C. Cir. 1996) (internal quotation marks and citations omitted).

III. ARGUMENT

A. Plaintiffs' Entire Complaint Rests on a Flawed Attack on the Determination by Congress that Those Born in the Unincorporated Territory of American Samoa are Nationals of the United States, a Determination Supported by the Constitution and Over a Century of Supreme Court Precedent

At the heart of Plaintiffs' complaint is an attempt to sidestep Congress's proper exercise of its constitutionally enumerated power to determine the naturalization process for potential citizens in favor of a judicial fiat declaring an entire class of persons citizens of the United States. Plaintiffs claim that INA § 308(1), 8 U.S.C. § 1408(1), violates the Fourteenth Amendment on its face and as applied to individual Plaintiffs through the State Department's policy and practice of imprinting endorsement code 09 in the passports issued to persons born in American Samoa to non-U.S. citizen parents. (Compl. at 24, ¶¶ 67-69.) Additionally, Plaintiffs assert that the Department of State's policy and practice of "refusing to recognize the birthright citizenship" of persons born in American Samoa violates the Fourteenth Amendment. (*Id.* at 24-25, ¶¶ 70-72.) Plaintiffs' claims fail for at least two clearly-established reasons. First, it is well-settled that the territorial scope of the Citizenship Clause of the Fourteenth Amendment does not extend to unincorporated territories like American Samoa. Second, the determination of who should be eligible for naturalization and/or birthright citizenship (either through allowance of a territory's admission as a state into the Union, *see* Const., art. IV, § 3, cl. 1, or through Congress's duty to make rules and regulations for the territories, *see* Const., art. IV, § 3, cl. 2), is a responsibility specifically delegated to Congress by the Constitution; to the extent Plaintiffs raise policy arguments to question Congress' decisions in this area, that raises political questions not subject to review by this Court.

1. The Territorial Scope of the Citizenship Clause of the Fourteenth Amendment Does Not Extend to Unincorporated Territories, and American Samoa Is an Unincorporated Territory

An individual may acquire U.S. citizenship at birth (as opposed to a later time through naturalization) by birth in the United States (*jus solis*) or by descent (*jus sanguinis*). The Fourteenth Amendment to the Constitution provides, in pertinent part, that "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, section 1. American Samoa, however, is an outlying possession of the United States. INA § 101(a)(29), 8 U.S.C. § 1101(a)(29). Persons born to non U.S. citizen parents in an outlying possession of the United States on or after the possession's date of acquisition by the United States are nationals but not U.S. citizens at birth. INA § 308(1), 8 U.S.C. § 1408(1). Designating such persons as nationals but not citizens of the United States does not violate the Fourteenth Amendment because, as numerous courts have held, the phrase "the United States" does not include the territories of the United States and, therefore, Plaintiffs' claims fail as a matter of law.

a. The Territorial Scope of the Citizenship Clause Does Not Extend to American Samoa as an Outlying, Unincorporated Territory

Plaintiffs' complaint seeks a judicial determination that the Citizenship Clause extends to American Samoa. Whether the Citizenship Clause applied or applies to an outlying, unincorporated territory of the United States has been examined and decided in a series of cases. In each case that courts have held that they could examine the issue, those courts have held that where Congress has not specifically enumerated that the outlying territory is subject to the territorial scope of the Citizenship Clause, the clause does not apply to those territories. Here, as outlined above, Congress has properly exercised its Constitutional duty to legislate the

naturalization status for American Samoa, an unincorporated, outlying territory. Therefore, Plaintiffs' claims challenging this designation fail as a matter of law.

Thus, while Plaintiffs' challenge to Congress' properly-exercised authority appears to be the first such challenge related to the outlying territory of American Samoa, other persons have raised similar challenges involving other unincorporated territories of the United States. For example, persons born in the Philippine Islands during that archipelago's period as an outlying, unincorporated territory of the United States, or persons born to parents who were born in the Philippine Islands during the territorial time period, brought cases seeking a judicial determination of their citizenship. The Second, Third, Fifth and Ninth Circuits considered whether the term "United States" as used in the Citizenship Clause of the Fourteenth Amendment included the then-U.S. territory of the Philippines. Each of these Courts of Appeals held that the territorial scope of the phrase "the United States" did not extend to cover territories such as the Philippines, which was, at that time, an outlying, unincorporated territory without a path to statehood.

Specifically, in *Rabang v. Immigration & Nat. Serv.*, 35 F.3d 1449 (9th Cir. 1995), *cert. denied*, 515 U.S. 130 (1995), the court analyzed the territorial scope of the phrase "the United States". The Ninth Circuit held that the territorial scope of the phrase "the United States" in the Constitution generally, and in the Fourteenth Amendment in particular, is limited to the "states of the Union." *See id.* at 1452-53 (construing *Downes v. Bidwell*, 182 U.S. 244, 287 (1904)). In relevant part, the Ninth Circuit described the *Downes* analysis as follows:

> [T]he Court compared the language of the revenue clause ("all duties . . . shall be uniform throughout the United States") with that of the Thirteenth Amendment (prohibiting slavery "within the United States, or in any place subject to their jurisdiction") and the Fourteenth Amendment (extending citizenship to those born "in the United States, and subject to the jurisdiction thereof"). *Id.* at 251 (emphasis added). The Court emphasized that the language of the Thirteenth Amendment demonstrates that "there may be places within the jurisdiction of the United States that are no part of the Union." *Id.* In

> comparison, the Fourteenth Amendment has "a limitation to persons born or naturalized in the United States *which is not extended to persons born in any place 'subject to their jurisdiction.'*" *Id.* (emphasis added). Like the revenue clauses, the Citizenship Clause has an express territorial limitation which prevents its extension to every place over which the government exercises its sovereignty. *Cf. United States v. Verdugo-Urquidez*, 494 U.S. 259, 291 n.11 (1990) (Brennan, J., dissenting) (distinguishing *Downes* holding regarding the revenue clauses, because the Fourth Amendment "contains no express territorial limitations").
>
> The *Downes* court further stated: "In dealing with foreign sovereignties, the term "United States" has a broader meaning than when used in the Constitution, and includes all territories subject to the jurisdiction of the Federal government, wherever located. *Downes*, 182 U.S. at 263. In other words, as used in the Constitution, the term 'United States' does not include all territories subject to the jurisdiction of the United States government."

Rabang, 35 F.3d at 1452- 1453. The *Rabang* court held, based on its review of the Supreme Court's decision in *Downes*, that it is "incorrect to extend citizenship to persons living in the United States simply because the territories are 'subject to the jurisdiction' or 'within the dominion' of the United States, because those persons are not born 'in the United States' within the meaning of the Fourteenth Amendment." *Id.* at 1453. The Ninth Circuit's decision in *Rabang* has been followed by the Second Circuit, *Valmonte v. INS*, 136 F.3d 914 (2d Cir. 1998); Third Circuit, *Lacap v. INS*, 138 F.3d 518 (3d Cir. 1998); the Fifth Circuit, *Nolos v. Holder*, 611 F.3d 279 (5th Cir. 2010); and by this Court in *Licudine v. Winter*, 603 F. Supp. 2d 129, 132-34 (D.D.C. 2009) ("Consistent with the rulings of these Circuits [the Ninth, Second, Third, and Fifth], this Court concludes that Licudine's birth in the Philippines during its territorial period does not constitute birth in the United States for purposes of the Citizenship Clause of the Fourteenth Amendment.").

As noted by the *Rabang* court and outlined above, the holding rested on over a century of Supreme Court precedent. In the Insular Cases, the Supreme Court found that the direct application of the full U.S. Constitution to a territory turns on whether a territory "has been incorporated into the United States as a part thereof, or is simply held . . . under the sovereignty

of the United States as a possession or dependency." *Rassmussen v. United States*, 197 U.S. 516, 521 (1905), *abrogated on other grounds by Williams v. Florida*, 399 U.S. 78, 92 (1970) (contrasting Alaska with unincorporated U.S. territories such as Philippines). As a general matter, the Supreme Court recently reaffirmed the principle that in an unincorporated territory of the United States, one "not clearly destined for statehood," only "fundamental" constitutional rights are guaranteed. *United States v. Verdugo-Urquidez*, 494 U.S. 259, 268 (1990) (citing *Dorr v. United States*, 195 U.S. 138, 148-49 (1904); *Balzac v. Porto Rico*, 258 U.S. 298, 312-13 (1922) (additional citation omitted)). The Supreme Court has described fundamental rights as "inherent, although unexpressed principles which are the basis of all free government . . . ." *Dorr*, 195 U.S. at 147. Specifically, the Court has noted that citizenship is not within the class of fundamental constitutional rights that would apply to unincorporated territories in the absence of a treaty provision or direct Congressional action. *Downes*, 182 U.S. at 282-83 (contrasting fundamental constitutional rights from rights to citizenship and suffrage). Indeed, a cornerstone of the incorporation doctrine announced in the Insular Cases is 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 . . . ." *Downes*, 182 U.S. at 279. *But see King v. Morton*, 520 F. 2d 1140, 1147 (D.C. Cir. 1975) (while noting that the Insular Cases have never been overruled, deciding that in making the determination of *a U.S. citizen's* right to a jury trial for a criminal tax charge in American Samoa "does not depend on key words such as "fundamental" or "unincorporated territory" … but can be reached only by applying the principles of the earlier cases, as controlled by their respective contexts, to the situation as it exists in American Samoa today).

Very recently, the Ninth Circuit had occasion to re-visit the holding in *Rabang* discussed above and addressed an even more similar claim to the ones raised by the Plaintiffs here in *Eche*

v. Holder, -- F.3d --, No. 10-17652, 2012 WL 3939622, at *5-*6 (9th Cir. Sept. 11, 2012). In *Eche*, the plaintiffs/appellants had resided in the Commonwealth of the Northern Mariana Islands. *See id.* at *2. Through their suit, they sought to have their time as residents of the Commonwealth count towards the time in the United States required for citizenship. *See id.* In reviewing the plaintiffs' claims, the Ninth Circuit looked to the governing documents of the Commonwealth as well as Supreme Court precedent and rejected the plaintiffs' contention that the Naturalization Clause applied automatically to those born in the Commonwealth. *See id.*

Specifically, the *Eche* court noted:

> The Naturalization Clause does not apply of its own force and the governments have not consented to its applicability. The Naturalization Clause has a geographic limitation: it applies "throughout the United States." The federal courts have repeatedly construed similar and even identical language in other clauses to include states and incorporated territories, but not unincorporated territories. In *Downes v. Bidwell*, 182 U.S. 244 (1901), one of the Insular Cases, the Supreme Court held that the Revenue Clause's identical explicit geographic limitation, "throughout the United States," did not include the unincorporated territory of Puerto Rico, which for purposes of that Clause was "not part of the United States." *Id*. at 287. The Court reached this sensible result because unincorporated territories are not on a path to statehood. *See Boumediene v. Bush*, 553 U.S. 723, 757-58 (2008) (citing *Downes*, 182 U.S. at 293). In *Rabang v. I.N.S.*, 35 F.3d 1449 (9th Cir. 1994), this court held that the Fourteenth Amendment's limitation of birthright citizenship to those "born . . . in the United States" did not extend citizenship to those born in the Philippines during the period when it was an unincorporated territory. U.S. Const., 14th Amend., cl. 1; *see Rabang*, 35 F.3d at 1451. Every court to have construed that clause's geographic limitation has agreed. *See Valmonte v. I.N.S.*, 136 F.3d 914, 920-21 (2d Cir. 1998); *Lacap v. I.N.S.*, 138 F.3d 518, 519 (3d Cir. 1998); *Licudine v. Winter*, 603 F. Supp. 2d 129, 134 (D.D.C. 2009).
>
> Like the constitutional clauses at issue in *Rabang* and *Downes*, the Naturalization Clause is expressly limited to the "United States." This limitation "prevents its extension to every place over which the government exercises its sovereignty." *Rabang*, 35 F.3d at 1453.

2012 WL 3939622, at *5-*6.

Here, the Plaintiffs' claims rest on identical arguments to the ones raised by the plaintiffs in *Eche* and fail for the same reasons. (*See* Compl. at 17-20.) Plaintiffs argue that this Court should declare that the Fourteenth Amendment somehow automatically confers citizenship on

the U.S. nationals of American Samoa, despite the Constitution's explicit grant of authority in the matters of naturalization to Congress – an authority that Congress has properly exercised through INA § 308(1), 8 U.S.C. § 1408(1) – declaring that persons born in an outlying possession of the United States are non-citizen nationals. Further, Congress has specifically addressed the status of American Samoa as an *outlying possession* in INA § 101(a)(29), 8 U.S.C. § 1101(a)(29). In fact, Plaintiffs' own complaint acknowledges that the determination of whether the Fourteenth Amendment should be extended to territories lies only with Congress. (*See* Compl. at 17-18, ¶ 43 (noting that *Congress* had extended citizenship to the residents of Puerto Rico in 1917, to Guam in 1950, and to the Northern Mariana Islands in 1986).)

Thus, just as the *Eche* court held after analyzing the claims of the residents of the Commonwealth of the Northern Mariana Islands, the Plaintiffs, residents of American Samoa, are not subject to the Citizenship Clause of the Fourteenth Amendment because: 1) American Samoa is an unincorporated territory pursuant to federal statute, *see* INA § 101(a)(29); 8 U.S.C. § 1101(a)(29); 2) American Samoa is not on a clear path to statehood and, in fact, has its own constitution mandating the preservation of its own culture and way of life; therefore, 3) the limitation of the Clause to the "United States" does not extend to American Samoa. *See Eche*, 2012 WL 3939622, at *5-*6; *see also Downes*, 182 U.S. at 293; *Rabang*, 35 F.3d at 1453. Thus, Plaintiffs' claim that the Citizenship Clause of the Fourteenth Amendment extends to American Samoa fails, and as that claim underpins Plaintiffs' entire complaint, Plaintiffs' complaint should be dismissed.

b. American Samoa Is an Unincorporated Territory/Outlying Possession and the Plaintiffs' Policy Arguments for Making American Samoa a State Present Question a Political Question

As noted above, the Citizenship Clause of the Fourteenth Amendment extends only to persons born or naturalized "in the United States." American Samoa is a cluster of seven small

islands in the South Pacific and treaties with Great Britain and Germany established and recognize the claims of the United States to the islands. 31 Stat. 1878, T. S. No. 314. American Samoa is not a state. Yet Plaintiffs make several policy arguments that, at bottom, contend that American Samoa should be a state in light of history, integration, and other concerns. (*See* Compl. ¶¶ 24-35.)

The Supreme Court has recognized and acknowledged the unique relationship and authority that the United States executive branch asserts over the island group, stating: "By Act of Congress, 45 Stat. 1253, 48 U. S. C. § 1661, powers to govern the islands are vested in the President, who has delegated the authority to the Secretary of the Interior, Exec. Order No. 10264, 16 Fed. Reg. 6417." *United States v. Standard Oil Co.*, 404 U.S. 558, 558-59 (1972). The Court further acknowledged, even while holding that the district court erred in concluding that Congress did not have the power to extend the Sherman Act to American Samoa, that American Samoa is not an "organized" territory, which is defined as "one in which a civil government has been established by an Organic Act of Congress." *Id.* at 559 & n.3. This unique relationship is instructive as the determination of Statehood (or whether to create new states, *see* Const., art. IV, § 3, cl. 1), is a political question that is not for judicial determination, as the Constitution specifically commits that decision to Congress. *See De la Rosa v. United States*, 842 F. Supp. 607, 608-09 (D.P.R. 1994), *aff'd sub. nom. Igartua De La Rosa v. United States*, 32 F.3d 8 (1st Cir. 1994), *cert. denied*, 514 U.S. 1049 (1995). Thus, as the determination of whether American Samoa should be made a state is a political question, this Court lacks jurisdiction to review Plaintiffs' policy arguments for why they, and the other residents of American Samoa, should be given automatic citizenship.

B. Plaintiffs Fail to State a Claim Under the Administrative Procedure Act

In their complaint, Plaintiffs alternatively claim that the Department of State's policy and practice of imprinting endorsement code 09 on the passports issued to persons born in American Samoa violates the Administrative Procedure Act ("APA"), 5 U.S.C. § 702 *et seq.*, as that policy is "contrary to constitutional right" and therefore "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." (Compl. at 26, ¶¶ 73-75.) This claim fails as a matter of law and should be dismissed.

In their complaint, Plaintiffs have failed to allege sufficient facts that the Agency's administrative decision to imprint accurately endorsement code 09 on the passports of persons born in American Samoa was in any way "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). The APA requires a court to set aside a final agency action only if it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law"; or "contrary to constitutional right, power, privilege, or immunity"; or "in excess of statutory jurisdiction, authority, or limitations, or short of statutory right." 5 U.S.C. § 706 (2)(A)-(C); *see, e.g.*, *Perez v. Lappin*, 672 F. Supp. 2d 35, 43-44 (D.D.C. 2009) (holding that alien requesting change to his prisoner classification status failed to state a claim under the APA); *California Valley Miwok Tribe v. United States*, 424 F. Supp. 2d 197, 202-03 & n.8 (D.D.C. 2006) (holding that where APA claim was merely restatement of other claims that required statutory interpretation but failed as a matter of law, Court would grant motion to dismiss entire complaint, including APA claim, for failure to state a claim).

An agency violates the APA only if it "relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency

expertise." *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). "APA review is very deferential." *Cablevision Systems Corp. v. F.C.C.*, 649 F.3d 695, 714 (D.C. Cir. 2011). Further, this Court should "defer to the wisdom of the agency, provided its decision is reasoned and rational, and even uphold a decision of less than ideal clarity if the agency's path may reasonably be discerned." *Dillmon v. Nat'l Transp. Safety Bd.*, 588 F.3d 1085, 1090 (D.C. Cir. 2009) (internal quotation and citation marks omitted).

Here, Plaintiffs acknowledge (as they must) that Defendants' decision merely "gives effect" to the plain language of the INA. (Compl. at 3, ¶¶ 6-7) ("The Defendants recognize that the individual Plaintiffs are Americans, but deny that they are U.S. citizens. Instead, the Defendants classify the Individual plaintiffs as so-called "non-citizen nationals of the United States, as reflected in Section 308(1) of the [INA] . . . and the State Department's Foreign Affairs Manual ("FAM") at 7 FAM 1125.1(b)-(c). The State Department has given effect to the 'non-citizen national' classification by imprinting a disclaimer of citizenship…."). Thus, while Plaintiffs have attempted to dispute the constitutionality of the statutes at issue (which claims fail for the reasons discussed above), it is not in dispute that the Government acted in accordance with the plain language of those federal statutes, and therefore the Government's actions cannot be deemed "arbitrary," "capricious," or an "abuse of discretion." Therefore, Plaintiffs fail to state a claim under the APA and their complaint should be dismissed.

Additionally, some of the Individual Plaintiffs' claims under the APA should be dismissed as they are untimely. Individual Plaintiffs Fosi and Maene,[3] who acknowledge that their passports were issued more than six years ago (Fosi in 1999 and Maene in 1995), fail to

[3] Individual Plaintiff Mamea fails to allege any date for the issuance of his passport. Mamea alleges that his children are ages 5, 4 and 2, so it is probable that their passports (if issued) were issued fewer than six years ago, but Plaintiff Mamea has not provided sufficient information to determine when his passport was issued.

state a claim under the APA related to the issuance of those passports, as the statute of limitations has expired. It is well-settled that the APA has, at most, a six-year statute of limitations. *See, e.g., James Madison Ltd. by Hecht v. Ludwig*, 82 F.3d 1085, 1094 (D.C. Cir. 1996) ("challenge . . . pursuant to the APA . . .carries a six-year statute of limitations") (citing *Impro. Prods., Inc. v. Block*, 722 F.2d 845, 850 (D.C. Cir. 1983), *cert. denied*, 469 U.S. 931 (1984) (interpreting 28 U.S.C. § 2401 to apply to APA claims)). As this Court has held, "'[w]hen a party seeks to sue the United States pursuant to a waiver of sovereign immunity,' the statute of limitations is jurisdictional and must be 'strictly construed.'" *Terry v. United States Small Business Administration*, 699 F. Supp. 2d 49, 54-55 (D.D.C. 2010) (quoting *W. Va. Highlands Conservancy v. Johnson*, 540 F. Supp. 2d 125, 138 (D.D.C. 2008)). "Moreover, when a statute of limitations has been regarded as jurisdictional, 'it has acted as an absolute bar [that cannot] be overcome by the application of judicially recognized exceptions . . . such as waiver, estoppel, equitable tolling, fraudulent concealment, the discovery rule, and the continuing violations doctrine.'" *Terry*, 699 F. Supp 2d at 55 (quotation and citation omitted). Thus, Individual Plaintiffs Fosi's and Maene's claims are time-barred and should be dismissed.

C. The Samoan Federation of America Lacks Standing as a Matter of Law and Should Be Dismissed as a Plaintiff

Should the Court find that, despite the arguments discussed above, Plaintiffs have stated a claim as a matter of law and that the Court may exercise jurisdiction over Plaintiffs' claims, the Federation does not have standing and it should therefore be dismissed pursuant to Rule 12(b)(1) of the Federal Rules of Civil Procedure. "A . . . motion to dismiss for lack of standing implicates subject matter jurisdiction, and the plaintiff bears the burden of establishing that the court has subject matter jurisdiction." *Edwards v. Aurora Loan Serv.*, 791 F. Supp. 2d 144, 150 (D.D.C. 2011). "Under Article III of the Constitution of the United States, an association … has standing

to sue on behalf of its members only if (1) at least one of its members would have standing to sue in his own right, (2) the interests the association seeks to protect are germane to its purpose, and (3) neither the claim asserted nor the relief requested requires that an individual member of the association participate in the lawsuit." *Sierra Club and Environmental Technology Council, Inc. v. Environmental Protection Agency*, 292 F. 3d 895, 898 (D.C. Cir 2002) (citing *Hunt v. Washington State Apple Advertising Comm'n*, 432 U.S. 333, 342-43 (1977)); *see also National Ass'n of Home Builders v. E.P.A.*, 667 F.3d 6, 12 (D.C. Cir. 2011).

Here, the Federation has failed to plead facts demonstrating that any of its members has standing to sue in his or her own right. The complaint only states generally that the Federation "is one of the oldest Samoan organizations in the continental United States" (Compl. at 10, ¶ 15(a)), but does not include any concrete facts demonstrating that any individual member has standing to sue in his or her own right. Additionally, as outlined above, "Samoa" may refer to not only American Samoa but also the independent nation of Samoa. Further, the Federation has failed to plead that there are members of the Federation who are not naturalized citizens, and are non-citizen U.S. nationals by virtue of their birth on American Samoa, therefore, the Federation's allegations are insufficient to demonstrate standing to sue as an association on behalf of its members as the Federation has failed to allege an injury-in-fact or an imminent injury. *See Nat'l Ass'n of Home Builders*, 667 F.3d at 12 (denying claim of representation standing where association could not demonstrate imminent injury to its members that would be prevented and traceable to a favorable decision in the lawsuit).

Similarly, the Federation does not have standing to sue on its own behalf. The Federation claims that "[r]ecognition by the United States that all persons born in American Samoa are U.S. citizens would significantly advance the Samoan Federation's efforts to increase the political voice of the Samoan community." (Compl. at 10, ¶ 15(b).) The Federation further alleges that it

expends resources helping with naturalization process, and could use those funds for other purposes if the U.S. found American Samoans to be citizens in the absence of naturalization. (Compl. at 11, ¶ 15(c).). This exact same argument was reviewed by the D.C. Circuit in *Nat'l Ass'n of Home Builders* and found wanting. 667 F.3d at 12 ("The mere fact that an organization redirects some of its resources to litigation and legal counseling in response to actions or inactions of another party is insufficient to impart standing upon the organization") (quotation and citation omitted). An organization suing on its own behalf must establish a "concrete and demonstrable injury to the organization's activities – with [a] consequent drain on the organization's resources . . . Indeed, the organization must allege that discrete programmatic concerns are being directly and adversely affected by the challenged action." *Nat'l Taxpayers Union, Inc. v. United States*, 68 F. 3d 1428, 1433 (D.C. Cir. 1995). Here, Plaintiffs have alleged vaguely that some "limited resources" of the Federation are spent helping "members of the Samoan community with the complex naturalization process" and for purposes relating to that process. (Compl. at 11, ¶ 15(c).). As Plaintiffs have failed to plead sufficiently that discrete programmatic concerns are being "directly and adversely affected" by any challenged action, the Federation is without constitutional standing, and should be dismissed as a plaintiff.

CONCLUSION

For the reasons discussed above, Defendants respectfully request the dismissal of Plaintiffs' complaint for failure to state a claim for which relief can be granted and because this Court lacks jurisdiction over Plaintiffs' claims. A proposed order is attached.

Dated: November 7, 2012
Washington, DC

Respectfully submitted,

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