Nos. 18-1334, 18-1475, 18-1496, 18-1514, and 18-1521

In The
Supreme Court of the United States

FINANCIAL OVERSIGHT AND MANAGEMENT BOARD FOR PUERTO RICO
v.
AURELIUS INVESTMENT, LLC, *et al*.

AURELIUS INVESTMENT, LLC, *et al*.
v.
COMMONWEALTH OF PUERTO RICO, *et al*.

OFFICIAL COMMITTEE OF UNSECURED CREDITORS OF ALL TITLE III DEBTORS OTHER THAN COFINA
v.
AURELIUS INVESTMENT, LLC, *et al*.

UNITED STATES OF AMERICA
v.
AURELIUS INVESTMENT, LLC, *et al*.

UNIÓN DE TRABAJADORES DE LA INDUSTRIA ELÉCTRICA Y RIEGO, INC.
v.
FINANCIAL OVERSIGHT AND MANAGEMENT BOARD FOR PUERTO RICO, *et al*.

On Writs Of Certiorari To The United States Court Of Appeals For The First Circuit

BRIEF OF *AMICUS CURIAE* VIRGIN ISLANDS BAR ASSOCIATION SUPPORTING THE RULING ON THE APPOINTMENTS CLAUSE

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INTEREST OF *AMICUS CURIAE*[1]

The Virgin Islands Bar Association is an integrated bar association with hundreds of members practicing law in the "unincorporated" territory of the Virgin Islands of the United States. The Bar Association operates with the mission of advancing the administration of justice, enhancing access to justice, and advocating public policy positions for the benefit of the judicial system, its members, and the people of the Virgin Islands.

In fulfillment of its duties, the Bar Association submits this brief as *amicus curiae* in order to urge the Court to affirm the First Circuit's decision on the Appointments Clause and use this case as a vehicle to set aside—or at least limit—the *Insular Cases*. Under the discriminatory incorporation doctrine enshrined into constitutional law by the *Insular Cases*, over 3.5 million Americans live as second-class citizens in Puerto Rico, the Virgin Islands, and other U.S. territories.

The First Circuit's decision declining to give "any further expansion" to the *Insular Cases* should be affirmed and expanded upon by this Court. *Aurelius Inv.,*

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[1] Pursuant to Supreme Court Rule 37.6, *amicus curiae* and its counsel state that none of the parties to this case nor their counsel authored this brief in whole or in part, and that no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. The parties to these consolidated cases have filed blanket consents to *amicus curiae* briefs with the Clerk. The positions taken in this brief are not intended to reflect the views of any individual member of the Bar Association or the views of the Supreme Court of the Virgin Islands.

LLC v. Puerto Rico, 915 F.3d 838, 855 (1st Cir. 2019). The First Circuit held it "lack[s] the authority to" "reverse the 'Insular Cases,'" *Aurelius*, 915 F.3d at 855, but this Court undoubtedly has that authority, and should exercise it here so that the *Insular Cases* will no longer "hover[] like a dark cloud over" every single case concerning the rights of Americans living in U.S. territories. *Aurelius*, 915 F.3d at 855.

SUMMARY OF THE ARGUMENT

In the *Insular Cases*, this Court promised those living in U.S. territories that they would enjoy at least those constitutional rights considered "fundamental." But it broke that promise. Instead, federal courts have routinely relied on the *Insular Cases* to justify the refusal to extend to the territories constitutional rights considered "fundamental" in every other context.

Worse still, the territorial incorporation doctrine enshrined into constitutional law by the Court through the *Insular Cases* has no basis in the text or history of the Constitution. It is a constitutional doctrine fashioned out of whole cloth by the same Court that decided *Plessy v. Ferguson*. It was meant to serve the cause of political expedience and secure a permanent second-class citizenship to the "alien races" of the new territories of the Philippines, Puerto Rico, and Guam.

There has been a substantial change in constitutional law since the *Insular Cases* were decided. The Court repudiated the central holding of *Plessy* over 60

years ago in *Brown v. Board of Education*, and the subsequent development of the Fourteenth Amendment incorporation doctrine undermines the very premise on which the incorporation doctrine of the *Insular Cases* is based. *Stare decisis* couldn't save *Plessy*. It shouldn't save the *Insular Cases*.

The Virgin Islands Bar Association, on behalf of its members and the more than 100,000 members of "alien races" it serves in the "unincorporated" territory of the Virgin Islands of the United States, urges the Court to take this opportunity to rectify the injustice imposed by the *Plessy* Court on generations of Americans living in U.S. territories.

ARGUMENT

I. THE *INSULAR CASES* REPRESENT A BROKEN PROMISE OF FUNDAMENTAL RIGHTS FOR AMERICANS LIVING IN THE TERRITORIES.

"In a series of decisions that have come to be known as the *Insular Cases*, the Court created the doctrine of incorporated and unincorporated Territories." *Examining Bd. of Engineers, Architects & Surveyors v. Flores de Otero*, 426 U.S. 572, 601 n.30 (1976).[2] "The

[2] In *Examining Bd. of Engineers*, the Court identified the *Insular Cases* to include *De Lima v. Bidwell*, 182 U.S. 1 (1901), *Dooley v. United States*, 182 U.S. 222 (1901), *Armstrong v. United States*, 182 U.S. 243 (1901), and *Downes v. Bidwell*, 182 U.S. 244 (1901). In *United States v. Verdugo-Urquidez*, 494 U.S. 259, 268 (1990), the Court identified additional *Insular Cases*, including

former category encompassed those Territories destined for statehood from the time of acquisition, and the Constitution was applied to them with full force. The latter category included those Territories not possessing that anticipation of statehood. As to them, only 'fundamental' constitutional rights were guaranteed to the inhabitants." *Id.* (citations omitted).

Despite the Court's promise that "'fundamental' constitutional rights are guaranteed to inhabitants of [the] territories," *United States v. Verdugo-Urquidez*, 494 U.S. 259, 268 (1990) (quoting *Dorr v. United States*, 195 U.S. 138, 146 (1904)), for more than a century, federal courts have routinely relied on the *Insular Cases* as justification for refusing to extend to the territories constitutional rights considered fundamental in every other context.

One example is *Balzac v. Porto Rico*, 258 U.S. 298 (1922), where the Court held that the right to a jury trial secured by the Sixth Amendment was not a fundamental right and did not apply to the residents of unincorporated territories. *Id.* at 309 ("The citizen of the United States living in Porto Rico cannot there enjoy a right of trial by jury under the federal Constitution."). Since then, the Court held that "trial by jury in criminal cases is fundamental to the American scheme of justice," requiring the states to recognize "a right of jury trial in all criminal cases which—were they to be

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Balzac v. Porto Rico, 258 U.S. 298 (1922), *Ocampo v. United States*, 234 U.S. 91 (1914), *Dorr v. United States*, 195 U.S. 138 (1904), and *Hawaii v. Mankichi*, 190 U.S. 197 (1903).

tried in a federal court—would come within the Sixth Amendment's guarantee." *Duncan v. Louisiana*, 391 U.S. 145, 149 (1968).

As a plurality of the Court explained, "it seems peculiarly anomalous to say that trial before a civilian judge and by an independent jury picked from the common citizenry is not a fundamental right." *Reid v. Covert*, 354 U.S. 1, 8–9 (1957) (plurality opinion). In the 50 years since that decision though, federal courts have repeatedly rejected the claim that the "fundamental" Sixth Amendment right to a jury trial applies in unincorporated territories. *See*, *e.g.*, *Commw. of N. Mar. I. v. Atalig*, 723 F.2d 682, 688 (9th Cir. 1984) (holding the Sixth Amendment doesn't apply in the Northern Mariana Islands); *Gov't of the V.I. v. Bodle*, 427 F.2d 532, 534 n.1 (3d Cir. 1970) (holding the Sixth Amendment only applies in the Virgin Islands because "Congress . . . has provided the right to a jury trial in criminal cases to the inhabitants of the Virgin Islands by virtue of the Revised Organic Act of 1954"); *King v. Morton*, 520 F.2d 1140, 1147 (D.C. Cir. 1975) (holding Sixth Amendment right to a jury trial is not fundamental in American Samoa under the *Insular Cases*).

A notable exception is the United States Court for Berlin, which determined "the holdings in the *Insular Cases* that trial by jury in criminal cases was not 'fundamental' in American law . . . was thereafter authoritatively voided in *Duncan*." *United States v. Tiede*, 86 F.R.D. 227 (U.S. Ct. Berlin 1979). And so Germans living in American occupied post-war Berlin "charged with criminal offenses [by the United States] have

constitutional rights, including the right to a trial by jury," *id.*, while Americans living in U.S. territories still do not.

Supreme Court cases like *Balzac* spawned countless lower court opinions sanctioning conduct that would be considered egregious civil-rights violations if occurring in the mainland United States. For example, many of those working in the Virgin Islands press were subject to libel prosecutions for publishing articles critical of the police and the courts. *See*, *e.g.*, *In re Contempt Proceedings against Francis*, 1 V.I. 91 (D.V.I. 1925) (holding editor of local newspaper in contempt for publishing article critical of criminal prosecutions conducted without a jury); *People v. Francis*, 1 V.I. 66 (D.V.I. 1925) (convicting same editor of libel for publishing articles critical of the police).

In a more recent example, the United States Court of Appeals for the District of Columbia Circuit rejected a claim to birthright citizenship under the Fourteenth Amendment made by individuals born in American Samoa. *Tuaua v. United States*, 788 F.3d 300 (D.C. Cir. 2015). Unlike with respect to every other U.S. territory, the federal government does not recognize those born in American Samoa as U.S. citizens at birth. *Compare* 8 U.S.C. § 1406(b) ("all persons born in [the Virgin Islands] . . . are declared to be citizens of the United States at birth"), *with* 8 U.S.C. § 1408(1) ("A person born in an outlying possession of the United States" "shall be nationals, but not citizens, of the United States at birth"), *and* 8 U.S.C. § 1101(29) ("The term

'outlying possessions of the United States' means American Samoa and Swains Island.").

The court rationalized its reliance on the *Insular Cases*—despite acknowledging "some aspects of the *Insular Cases*' analysis may now be deemed politically incorrect"—by insisting "the framework remains both applicable and of pragmatic use in assessing the applicability of rights to unincorporated territories." *Tuaua*, 788 F.3d at 307. Under that framework, only "fundamental limitations in favor of personal rights" are guaranteed to the residents of unincorporated territories, and birthright citizenship is not one of those fundamental rights. *Id.* at 309. But as courts have recognized, "United States citizenship itself is a fundamental right." *Mondaca-Vega v. Lynch*, 808 F.3d 413, 431 (9th Cir. 2015) (citing *Trop v. Dulles*, 356 U.S. 86, 93 (1958) (plurality opinion)). Yet again the *Insular Cases* served to deny basic constitutional rights to those living in the territories, despite the promise made in the *Insular Cases* that "fundamental" constitutional rights exist in the territories.

In short, the framework created by the *Insular Cases* has served only to deny the one thing the Court promised to the territories—fundamental constitutional rights. Instead, the *Insular Cases* have essentially granted Congress "the power to switch the Constitution on or off at will"—something this Court has squarely rejected. *Boumediene v. Bush*, 553 U.S. 723, 765 (2008). The Bar Association urges the Court to take this opportunity to rectify the broken promise

of the *Insular Cases* and vindicate the constitutional rights of those Americans living in the territories.

II. THE *INSULAR CASES* HAVE NO BASIS IN THE TEXT OF THE CONSTITUTION.

The lone constitutional provision addressing territories is Article IV, § 3, cl. 2, providing in relevant part "[t]he Congress shall have power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States." U.S. Const. art. IV, § 3, cl. 2. The Court recently recognized that this power is not without limits, as "[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." *Boumediene v. Bush*, 553 U.S. 723, 727 (2008). Yet as demonstrated by this case, the *Insular Cases* still "hover[ ] like a dark cloud over," *Aurelius*, 915 F.3d at 855, and federal courts continue to rely on a framework created by the *Insular Cases* that is at odds with the Constitution itself.

"In interpreting [constitutional] text, we are guided by the principle that the Constitution was written to be understood by the voters; its words and phrases were used in their normal and ordinary as distinguished from technical meaning." *District of Columbia v. Heller*, 554 U.S. 570, 576 (2008) (quoting *United States v. Sprague*, 282 U.S. 716, 731 (1931)) (internal quotation marks and brackets omitted). "Normal meaning may of course include an idiomatic meaning,

but it excludes secret or technical meanings that would not have been known to ordinary citizens in the founding generation." *Id.* at 576–77. Without mention of "incorporation" or any analogous concept in the Constitution, such a constitutional doctrine would not have been known to ordinary citizens in the founding generation.

What would have been known to ordinary citizens in the founding generation is better approximated by comparison to the Enclave Clause, Article I, § 8, cl. 17, providing Congress's authority over the District of Columbia. "The power of Congress over the District and its power over the Territories are phrased in very similar language in the Constitution." *District of Columbia v. John R. Thompson Co.*, 346 U.S. 100, 105–06 (1953). "Plenary jurisdiction over the District of Columbia is specifically vested in Congress by Art. I, § 8, of the Constitution," *Doe v. McMillan*, 412 U.S. 306, 334 (1973), providing Congress the authority "[t]o exercise exclusive Legislation in all Cases whatsoever, over such District." U.S. Const. art. I, § 8, cl. 17. The Constitution grants Congress the authority to "exercise exclusive Legislation in all Cases whatsoever" with regard to the District of Columbia, yet speaks in more restrained language with regard to the territories, permitting Congress the authority to "make all needful Rules and Regulations respecting the Territor[ies]."

Despite the "all Cases whatsoever" language of the Enclave Clause, the Court has made clear that Congress can't actually legislate for the District of Columbia in "all Cases whatsoever," but is instead restricted

by the Bill of Rights and other constitutional restrictions on Congress's authority. So for example, while federal courts have refused to apply the fundamental right to a jury trial in the territories, "[i]t is beyond doubt, at the present day, that the provisions of the constitution of the United States securing the right of trial by jury, whether in civil or in criminal cases, are applicable to the District of Columbia." *Capital Traction Co. v. Hof*, 174 U.S. 1, 5 (1899).

Given the "very similar language" of the Territorial Clause and the Enclave Clause, there is no support in the text of the Constitution for the distinction between the rights of those living in the District of Columbia and those living in the territories. The District of Columbia government and the governments of the territories "are not sovereigns distinct from the United States." *Puerto Rico v. Sanchez Valle*, 136 S. Ct. 1863, 1873 (2016). "[W]hereas a State does not derive its powers from the United States, a territory does[,] . . . exert[ing] all their powers by authority of the Federal Government." *Id.* (internal quotation marks omitted). "[A] territorial government is entirely the creation of Congress, and its judicial tribunals exert all their powers by authority of the United States. When a territorial government enacts and enforces . . . laws to govern its inhabitants, it is not acting as an independent political community like a State, but as an agency of the federal government." *United States v. Wheeler*, 435 U.S. 313, 320–21 (1978), *superseded by statute on other grounds as recognized by United States v. Lara*, 541 U.S. 193, 207 (2004).

And "Congress cannot grant . . . what it does not possess." *Perez v. Mortg. Bankers Ass'n*, 135 S. Ct. 1199, 1224 (2015) (Thomas, J., concurring) (quoting *Bowsher v. Synar*, 478 U.S. 714, 726 (1986)). This principle has been consistently observed with regard to the District of Columbia, with the Court explaining "there is no constitutional barrier to the delegation by Congress to the District of Columbia of full legislative power *subject of course to constitutional limitations to which all lawmaking is subservient*." *District of Columbia v. John R. Thompson Co.*, 346 U.S. 100, 109 (1953) (emphasis added).

But under the *Insular Cases*, all lawmaking is not subservient to those constitutional limitations, and the *Insular Cases* permit Congress to delegate legislative authority to territories with no basis in the text of the Constitution. *Compare Commw. of N. Mar. I. v. Atalig*, 723 F.2d 682, 690–91 (9th Cir. 1984) (affirming the constitutionality of "the NMI's elimination of jury trials" under the *Insular Cases*), *with Capital Traction Co. v. Hof*, 174 U.S. 1, 5 (1899) ("It is beyond doubt, at the present day, that the provisions of the constitution of the United States securing the right of trial by jury, whether in civil or in criminal cases, are applicable to the District of Columbia.").

With no basis in the text of the Constitution, the *Insular Cases* are, "[f]rom the standpoint of an originalist . . . 'a strict constructionist's worst nightmare.'" Gary Lawson & Robert D. Sloane, *The Constitutionality of Decolonization by Associated Statehood: Puerto Rico's Legal Status Reconsidered*, 50 B.C. L.

Rev. 1123, 1177 (2009) (quoting Juan R. Torruella, *The* Insular Cases*: The Establishment of a Regime of Political Apartheid*, 29 U. Pa. J. Int'l L. 283 (2007)).

A plurality of the Court already laid out the originalist critique of the *Insular Cases* in refusing to apply the *Insular Cases* framework to American citizens abroad, explaining that "[w]hile it has been suggested that only those constitutional rights which are 'fundamental' protect Americans abroad, we can find no warrant, in logic or otherwise, for picking and choosing among the remarkable collection of 'Thou shalt nots' which were explicitly fastened on all departments and agencies of the Federal Government by the Constitution and its Amendments." *Reid v. Covert*, 354 U.S. 1, 8–9 (1957) (plurality opinion). The result of *Reid* is an anomalous and inexplicable situation in which Americans possess greater constitutional rights when in a foreign country than when in a United States territory.

The fundamental inconsistency between the territorial incorporation doctrine and the text of the Constitution was outlined by Justice Harlan in one of the first *Insular Cases*, where he criticized the majority for "plac[ing] Congress above the Constitution." *Hawaii v. Mankichi*, 190 U.S. 197, 238–40 (1903) (Harlan, J., dissenting). He explained that under the reasoning of the *Insular Cases*,

> the benefit of the constitutional provisions designed for the protection of life and liberty may be claimed by some of the people subject

> to the authority and jurisdiction of the United States, but cannot be claimed by others equally subject to its authority and jurisdiction. . . . Thus will be engrafted upon our republican institutions, controlled by the supreme law of a written Constitution, a colonial system entirely foreign to the genius of our government and abhorrent to the principles that underlie and pervade the Constitution. It will then come about that we will have two governments over the peoples subject to the jurisdiction of the United States—one, existing under a written Constitution, creating a government with authority to exercise only powers expressly granted and such as are necessary and appropriate to carry into effect those so granted; the other, existing outside of the written Constitution, in virtue of an unwritten law, to be declared from time to time by Congress, which is itself only a creature of that instrument.

Hawaii v. Mankichi, 190 U.S. 197, 238–40 (1903) (Harlan, J., dissenting); *see also* Charles E. Littlefield, *The Insular Cases*, 15 Harv. L. Rev. 169, 170 (1901) ("The *Insular Cases*, in the manner in which the results were reached, the incongruity of the results, and the variety of inconsistent views expressed by the different members of the court, are, I believe, without a parallel in our judicial history.").

The Bar Association urges the Court to take this opportunity to affirm the right of those living in the territories to the constitutional protections enjoyed by

everyone else in America by overturning the *Insular Cases*.

III. *STARE DECISIS* SHOULD NOT SAVE THE *INSULAR CASES*.

To the extent the framework created by the *Insular Cases* undermines the First Circuit's decision, it must be set aside. "[*S*]*tare decisis* is not an inexorable command, but instead reflects a policy judgment that in most matters it is more important that the applicable rule of law be settled than that it be settled right." *Agostini v. Felton*, 521 U.S. 203, 235–36 (1997) (citations, internal quotation marks, and brackets omitted). "That policy is at its weakest when we interpret the Constitution because our interpretation can be altered only by constitutional amendment or by overruling our prior decisions." *Id.*

"[*S*]*tare decisis* does not prevent . . . overruling a previous decision where there has been a significant change in, or subsequent development of, our constitutional law." *Agostini v. Felton*, 521 U.S. 203, 235–36 (1997). It "cannot possibly be controlling when . . . the decision in question has been proved manifestly erroneous, and its underpinnings eroded, by subsequent decisions of this Court." *United States v. Gaudin*, 515 U.S. 506, 521 (1995). Or when "related principles of law have so far developed as to have left the old rule no more than a remnant of abandoned doctrine." *Planned Parenthood of Se. Pennsylvania v. Casey*, 505 U.S. 833, 854–55 (1992); *accord* Oliver Wendell Holmes, *The*

Common Law 8 (1963) ("The customs, beliefs, or needs of a primitive time establish a rule or a formula. In the course of centuries the custom, belief, or necessity disappears, but the rule remains.").

There has been a sea change in constitutional law since the *Insular Cases* were decided. "With the exception of two of its members, all justices of the Court that decided the *Insular Cases* had in 1896 also joined the Court's decision in *Plessy v. Ferguson*, 163 U.S. 537 (1896)." *Consejo de Salud Playa de Ponce v. Rullan*, 586 F. Supp. 2d 22, 28 (D.P.R. 2008). And so "[t]here is no question that the *Insular Cases* are on par with the Court's infamous decision in *Plessy v. Ferguson* in licencing the downgrading of the rights of discrete minorities within the political hegemony of the United States." *Igartua-De La Rosa v. United States*, 417 F.3d 145, 162 (1st Cir. 2005) (en banc) (Torruella, J., dissenting).

The Court repudiated the central holding of *Plessy* over 60 years ago in *Brown v. Board of Education*, 347 U.S. 483 (1954). Still the legacy of the *Plessy* Court governs the lives of millions of Americans—or as the author of *Plessy* put it in announcing the judgment of the Court in the first of the *Insular Cases*, millions of members of "alien races, differing from us in religion, customs, laws, methods of taxation, and modes of thought." *Downes v. Bidwell*, 182 U.S. 244, 287 (1901) (Brown, J.); *accord* Nathan Muchnick, *The Insular Citizens: America's Lost Electorate v. Stare Decisis*, 38 Cardozo L. Rev. 797, 832 (2016) ("[S]ince the *Insular Cases* were decided, the facts used to rationalize the

Court's holdings have changed and are viewed so differently that the old holdings have been robbed of significant justification.").

Further, substantial changes in Supreme Court jurisprudence have undermined the entire framework on which the *Insular Cases* are built.

The main consequence of the *Insular Cases* is that Americans living in "unincorporated" U.S. territories don't enjoy the same constitutional rights with respect to the territorial government (or Congress acting as the territorial legislature) as Americans in the states do until the territory is "incorporated" into the United States. This seems entirely anomalous today (particularly because the territorial incorporation doctrine has no basis in the text of the Constitution). But it may not have seemed so strange in the early 1900s, when even Americans living in states had no federal constitutional rights with respect to their state governments.

"When ratified in 1791, the Bill of Rights applied only to the Federal Government." *Timbs v. Indiana*, 139 S. Ct. 682, 687 (2019). And when the *Insular Cases* were decided in the early 1900s, the Supreme Court had yet to hold that the Bill of Rights restricted the authority of state governments by virtue of the Fourteenth Amendment incorporation doctrine. The Bill of Rights didn't begin to restrict state governments until many years later, with the First Amendment applied against state governments for the first time in 1925. *Gitlow v. New York*, 268 U.S. 652 (1925) (incorporating right to free speech); *see also Near v. Minnesota*, 283

U.S. 697 (1931) (freedom of the press); *DeJonge v. Oregon*, 299 U.S. 353 (1937) (assembly); *Cantwell v. Connecticut*, 310 U.S. 296 (1940) (free exercise of religion); *Everson v. Bd. of Ed. of Ewing Twp.*, 330 U.S. 1 (1947) (prohibition against establishment of religion); *Edwards v. South Carolina*, 372 U.S. 229 (1963) (right to petition for redress of grievances).

Since then, "[w]ith only 'a handful' of exceptions, this Court has held that the Fourteenth Amendment's Due Process Clause incorporates the protections contained in the Bill of Rights, rendering them applicable to the States." *Timbs*, 139 S. Ct. at 687. This includes the Fourth Amendment in the 1960s. *Mapp v. Ohio*, 367 U.S. 643 (1961) (incorporating prohibition on unreasonable search and seizure); *Aguilar v. Texas*, 378 U.S. 108 (1964) (warrant requirement). Same with the Fifth and Sixth Amendments. *Benton v. Maryland*, 395 U.S. 784 (1969) (right against double jeopardy); *Duncan v. Louisiana*, 391 U.S. 145 (1968) (right to a jury trial). The Second Amendment in 2010, *McDonald v. City of Chicago*, 561 U.S. 742 (2010), and the Eighth Amendment prohibition on excessive fines earlier this year. *Timbs*, 139 S. Ct. 682.

So because Congress has all the same powers as a state government with respect to a territory, and when the *Insular Cases* were decided a state government was not restricted by the Bill of Rights, there is at least some logic to holding that Congress, when acting with the power of a state government, would likewise not be restricted by the Bill of Rights. The *Insular Cases* even acknowledged this distinction, noting that "we have

also held that the states, when once admitted as such, may dispense with grand juries," when holding that grand juries were not required in a territorial criminal prosecution. *Mankichi*, 190 U.S. at 211.

But this underlying rationale is gone now that nearly all of the Bill of Rights has been incorporated against the states through the Fourteenth Amendment. This was recognized by a federal judge in 1979, where it was noted that "the holdings in the *Insular Cases* that trial by jury in criminal cases was not 'fundamental' in American law . . . was thereafter authoritatively voided in *Duncan*," which incorporated the Sixth Amendment right to a jury trial against the states. *United States v. Tiede*, 86 F.R.D. 227 (U.S. Ct. Berlin 1979).

While courts of appeals have disagreed with this analysis, *see*, *e.g.*, *Commw. of N. Mar. I. v. Atalig*, 723 F.2d 682, 688 (9th Cir. 1984), *King v. Morton*, 520 F.2d 1140, 1147 (D.C. Cir. 1975), *Gov't of the V.I. v. Bodle*, 427 F.2d 532, 533 n.1 (3d Cir. 1970), this Court has never addressed the impact the Fourteenth Amendment's incorporation doctrine has on the continued application of the *Insular Cases*. The Court should do so now.

Stare decisis couldn't save *Plessy*. It shouldn't save the *Insular Cases*. The Court should take this opportunity to finally rectify the historical injustice imposed by the *Plessy* Court on generations of Americans living in U.S. territories.

IV. IF THE COURT DOES NOT SET ASIDE THE *INSULAR CASES*, IT SHOULD LIMIT THIS LINE OF CASES.

A. The *Insular Cases* are limited to defining congressional power under the Territorial Clause.

The Court should affirm the holding in *Aurelius* that "nothing about the 'Insular Cases' casts doubt over [the] analysis" employed by the district court. 915 F.3d at 854.

"[T]he 'Territorial Clause,' provid[es] Congress with the 'power to dispose of and make all needful Rules and Regulations respecting the Territory . . . belonging to the United States.'" *Id.* at 843 (quoting U.S. Const. art. IV, § 3, cl. 2). "The Territorial Clause is one of general application authorizing Congress to engage in rulemaking for the temporary governance of territories." *Id.* at 851.

This Court interpreted this constitutional language to provide that "in legislating for [territories] Congress exercises the combined powers of the general and of a state government." *Downes v. Bidwell*, 182 U.S. 244, 265–66 (1901); *see also Palmore v. United States*, 411 U.S. 389, 403 (1973) ("Congress exercises the combined powers of the general, and of a state government." (quoting *Am. Ins. Co. v. 356 Bales of Cotton*, 26 U.S. 511, 546 (1828))).

This doctrine, first stated in 1828 and expanded in the *Insular Cases*, applies only where Congress exercises the "powers . . . of a *state* government" under

the Territorial Clause. Each of the *Insular Cases* interprets and applies congressional enactments applicable exclusively to a territory, as opposed to congressional enactments of national scope which constitute an exercise of the "powers of the *general* . . . government." This very point was made recently by the Supreme Court of the Virgin Islands, which noted "when enacting statutes such as the District of Columbia Home Rule Act or a territory's Organic Act, Congress is not exercising national legislative powers, but instead acts as a local sovereign for that particular enclave." *Balboni v. Ranger Am. of the V.I., Inc.*, 2019 VI 17 ¶ 26, 2019 WL 2352281, at *11 n.21 (2019).

This distinction is demonstrated in the *Insular Cases* themselves, each of which examine the constitutionality of congressional enactments applicable only to U.S. territories.

For example, in *De Lima*, the Supreme Court interpreted "an act of Congress, passed March 24, 1900 (31 Stat. at L. 51), applying for the benefit of Porto Rico the amount of the customs revenue received on importations by the United States from Porto Rico."[3] 182 U.S. at 199. In doing so, this Court reaffirmed that under the Territorial Clause, "Congress has full and complete legislative authority over the people of the territories and all the departments of the territorial governments.

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[3] *See* 48 U.S.C. § 731a ("All laws, regulations, and public documents and records of the United States in which such island is designated or referred to under the name of 'Porto Rico' shall be held to refer to such island under and by the name of 'Puerto Rico.' ").

It may do for the territories what the people, under the Constitution of the United States, may do for the states." *Id.* (quoting *First Nat'l Bank v. Yankton Cty.*, 101 U.S. 129, 133 (1879)).

Another example is *Mankichi*, where the Supreme Court interpreted "the Newlands resolution," by which "the Hawaiian islands and their dependencies were annexed 'as a part of the territory of the United States.'" 190 U.S. at 209. This legislation was enacted pursuant to the Territorial Clause for the temporary governance of the newly acquired territory of Hawaii, and the question before the Court was whether this legislation immediately extended the protections of the Bill of Rights to criminal defendants in Hawaii. This Court explained in *Mankichi* that the subject of the *Insular Cases* was "the power of Congress to annex territory without, at the same time, extending the Constitution over it." *Id.* at 218.

And in *Balzac*, the Court interpreted the "Organic Act of Porto Rico of March 2, 1917, known as the Jones Act, 39 Stat. 951." 258 U.S. at 313. The Court concluded it was not unconstitutional for a Puerto Rico court to try a criminal defendant without a jury because "the purpose of Congress [was not] to incorporate Porto Rico into the United States with the consequences which would follow." *Id.*

The other *Insular Cases* similarly address only the scope of Congress's authority under the Territorial Clause. *See*, *e.g.*, *Dooley*, 182 U.S. at 240 (applying "the act of Congress imposing a duty on goods from Porto

Rico"); *Armstrong*, 182 U.S. at 244 ("This case is controlled by the case of *Dooley v. United States*."); *Downes*, 182 U.S. at 348 ("The inquiry is whether the act of April 12, 1900, so far as it requires the payment of import duties on merchandise brought from a port of Porto Rico as a condition of entry into other ports of the United States, is consistent with the Federal Constitution."); *Ocampo*, 234 U.S. at 98 (interpreting "the act of Congress of July 1, 1902"); *Dorr*, 195 U.S. at 145 (same).

Because the *Insular Cases* address only the Territorial Clause, they have no relevance to the validity of congressional action taken under other grants of power in the Constitution.

Regardless of whether the Court affirms or reverses the First Circuit's application of the Appointments Clause, the Court should take this opportunity to clarify that the *Insular Cases* are distinguishable from cases where Congress acts outside of its Article IV authority, and the Court should follow the First Circuit's lead in denying "any further expansion" to this "discredited lineage of cases." 915 F.3d at 855.

B. A "law of the United States" is not exempt from constitutional scrutiny simply because it applies to a territory.

The distinction between congressional action under the Territorial Clause of Article IV (which was the subject of the *Insular Cases*) and congressional action under Article I is not academic. The Court has

repeatedly held that where Congress enacts a law for a territory under the Territorial Clause (or the related Enclave Clause governing the District of Columbia), it is not a "law of the United States"—it is instead a law of the territory (or District of Columbia).

"Whether a law passed by Congress is a 'law of the United States' depends on the meaning given to that phrase by its context. A law for the District of Columbia, though enacted by Congress, was held to be not a 'law of the United States' within the meaning of [federal law]." *Puerto Rico v. Rubert Hermanos, Inc.*, 309 U.S. 543, 549–50 (1940) (citing *Am. Sec. & Tr. Co. v. Comm'rs of D.C.*, 224 U.S. 491 (1912)). "Likewise, . . . the Organic Act [of Puerto Rico] is not one of 'the laws of the United States'" either. *Id.* at 549–50; *accord Aurelius*, 915 F.3d at 854 ("Congress's exercise of its plenary powers over the District of Columbia under Article I, Section 8, Clause 17, . . . are fairly analogous to those under Article IV.").

The Court has made this distinction in other instances too. For example, when determining the authority of judges appointed by the President and confirmed by the Senate, whether Congress created the court under Article III or Article IV (or in other instances Article I) is controlling in any case regarding the salary, tenure, and constitutional authority of that judge. *Nguyen v. United States*, 539 U.S. 69, 72 (2003) ("These cases present the question whether a panel of the Court of Appeals consisting of two Article III judges and one Article IV judge had the authority to decide petitioners' appeals. We conclude it did not.").

This is demonstrated by comparing the federal courts of Puerto Rico and the Virgin Islands. While "Puerto Rico . . . has had, since 1966, an Article III court," *Aurelius*, 915 F.3d at 849, "[t]he District Court of the Virgin Islands derives its jurisdiction from Article IV, § 3 of the United States Constitution, which authorizes Congress to regulate the territories of the United States." *United States v. Gillette*, 738 F.3d 63, 70 (3d Cir. 2013); *Vooys v. Bentley*, 901 F.3d 172, 180–81 (3d Cir. 2018) (*en banc*) ("[T]he District Court of the Virgin Islands as an Article IV court."); 48 U.S.C. § 1614(a) ("The President shall, by and with the advice and consent of the Senate, appoint two judges for the District Court of the Virgin Islands, who shall hold office for terms of ten years and until their successors are chosen and qualified, unless sooner removed by the President for cause.").

So while the Territorial Clause, as interpreted in the *Insular Cases*, may permit Congress to enact a law of a territory that would otherwise violate a right granted by the Constitution, the *Insular Cases* don't grant Congress the authority to enact a law of the United States in violation of those rights. The Court should take this opportunity to clarify this point of law and base its decision here on a determination of whether the law at issue is "a law of the United States" under Article I, or a law of a territory under Article IV.

CONCLUSION

The Court should finally vindicate the basic constitutional rights of those Americans living in U.S. territories by setting aside—or at least limiting—the *Insular Cases*. It is time for the Court to finally make clear that we are all equally American and Americans anywhere are Americans everywhere.

Respectfully submitted,

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