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

IN THE

Supreme Court of the United States

FINANCIAL OVERSIGHT AND MANAGEMENT BOARD FOR PUERTO RICO,

Petitioner,

v.

AURELIUS INVESTMENT, LLC, *et al.*,

Respondents.

AURELIUS INVESTMENT, LLC, *et al.*,

Petitioners,

v.

COMMONWEALTH OF PUERTO RICO, *et al.*,

Respondents.

(For Continuation of Caption See Inside Cover)

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR *AMICUS CURIAE* EQUALLY AMERICAN LEGAL DEFENSE AND EDUCATION FUND IN SUPPORT OF NEITHER PARTY

STEVEN S. ROSENTHAL
Counsel of Record
NEIL C. WEARE
LOEB & LOEB LLP
901 New York Avenue NW,
Suite 300 East
Washington, DC 20001
(202) 618-5000
srosenthal@loeb.com

Counsel for Amicus Curiae

290768

OFFICIAL COMMITTEE OF UNSECURED CREDITORS OF ALL TITLE III DEBTORS OTHER THAN COFINA,

Petitioner,

v.

AURELIUS INVESTMENT, LLC, *et al.*,

Respondents.

UNITED STATES OF AMERICA,

Petitioner,

v.

AURELIUS INVESTMENT, LLC, *et al.*,

Respondents.

UNIÓN DE TRABAJADORES DE LA INDUSTRIA ELÉCTRICA Y RIEGO, INC.,

Petitioner,

v.

FINANCIAL OVERSIGHT AND MANAGEMENT BOARD FOR PUERTO RICO, *et al.*,

Respondents.

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INTEREST OF THE *AMICUS CURIAE*[1]

Equally American Legal Defense and Education Fund ("Equally American") seeks to advance equality and civil rights for the nearly 4 million Americans living in U.S. Territories. In *Fitisemanu v. United States*,[2] Equally American represents a group of passport-holding Americans living in Utah who are denied recognition as United States citizens because they were born in American Samoa. The United States—relying on the controversial, *Plessy*-era *Insular Cases*—argues the *Fitisemanu* Plaintiffs are not U.S. citizens under the Constitution because American Samoa and other Territories are not "in the United States" for purposes of the Citizenship Clause of the Fourteenth Amendment.[3] A decision in *Fitisemanu* is currently pending in federal district court in Utah. Equally American previously litigated similar issues in *Tuaua v. United States*, 788 F.3d 300 (D.C. Cir. 2015), where the D.C. Circuit held that residents of present day Territories have no constitutional right to citizenship based on a new, troubling interpretation of the

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[1] All parties have filed blanket consents to the filing of *amicus* briefs. No counsel for a party authored this brief in whole or in part, and no person other than *Amici*'s counsel made a monetary contribution to fund the preparation or submission of this brief.

[2] Complaint, Dkt. No. 2, *Fitisemanu v. United States*, No. 18-cv-00036-CW (D. Utah Mar. 27, 2018).

[3] Defendants' Motion to Dismiss, Dkt. No. 66, *Fitisemanu v. United States*, No. 18-cv-00036-CW (D. Utah June 6, 2018).

Insular Cases. In 2016, an eight-Justice Supreme Court denied review in *Tuaua,* 136 S. Ct. 2461 (2016).

Equally American has an interest in overruling or narrowing the *Insular Cases* and their doctrine of territorial incorporation to ensure that the rights guaranteed by the Constitution and its limitations on government power do not depend on where one lives in the United States. Equally American also believes that overruling the *Insular Cases* is necessary to create a political environment where unresolved issues like self-determination, voting rights, and parity in federal benefits are given greater attention by policymakers.[4]

Equally American has a strong interest in this litigation because the *Insular Cases* and the D.C. Circuit's expansive ruling in *Tuaua* have been invoked as relevant to whether the Financial Oversight And Management Board For Puerto Rico ("FOMB") is constitutional under the Appointments Clause. Equally American is concerned that until the Supreme Court overrules or narrows the *Insular Cases*, litigants and lower courts will continue relying on them in ways that diminish the Constitution's protections for Americans living in the Territories.

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[4] *See*, *e.g.*, Neil Weare, *Why the Insular Cases Must Become the Next Plessy*, Harvard Law Review Blog (Mar. 28, 2018), https://blog.harvardlawreview.org/why-the-insular-cases-must-become-the-next-plessy/.

Equally American takes no position on the merits of this litigation.

SUMMARY OF ARGUMENT

Continued uncertainty about the scope and significance of the *Insular Cases*[5] in U.S. Territories today has sown unnecessary confusion in the present litigation and contributed to a situation where the nearly 4 million Americans living in U.S. Territories continue to be denied "Equal Justice Under Law." The *Insular Cases* represent a regrettable chapter in American jurisprudence and constitutional law, creating an artificial doctrine of "territorial incorporation," whereby "the Constitution applies in full" in certain so-called "incorporated" Territories that are "surely destined for statehood," while only applying "in part" in Puerto Rico and other so-called "unincorporated" Territories. *Boumediene v. Bush*, 553 U.S. 723, 757 (2008). This Court should overrule the *Insular Cases* and their doctrine of territorial incorporation here, just as it recently overruled

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[5] The *Insular Cases* include between 9 and 23 cases decided between 1901 and 1922. *See*, *e.g.*, Efren Rivera Ramos, *The Legal Construction of American Colonialism: The Insular Cases (1901-1922)*, 65 Rev. Jur. U.P.R. 225, 242-271 (1996). Our focus is primarily upon the four most significant and controversial of the *Insular Cases*, *Downes v. Bidwell*, 182 U.S. 244 (1901) (Uniformity Clause), *Hawaii v. Mankichi*, 190 U.S. 197 (1903) (Grand Jury), *Dorr v. United States*, 195 U.S. 138 (1904) (jury trial), and *Balzac v. Porto Rico*, 258 U.S. 298 (1922) (jury trial). For consistency, this brief italicizes the *Insular Cases* throughout.

Korematsu v. United States in *Trump v. Hawaii*, 138 S. Ct. 2392, 2423 (2018). Like *Korematsu*, the *Insular Cases* were "gravely wrong the day [they were] decided, ha[ve] been overruled in the court of history, and … 'ha[ve] no place in law under the Constitution.'" *Id.* (citing *Korematsu*, 323 U.S. 214, 248 (1944) (Jackson, J., dissenting)). As Justice John Marshall Harlan wrote in his dissent to *Downes v. Bidwell*, the most prominent of the *Insular Cases*: "The idea that this country may acquire territories anywhere upon the earth, by conquest or treaty, and hold them as mere colonies or provinces—the people inhabiting them to enjoy only such rights as Congress chooses to accord to them—is wholly inconsistent with the spirit and genius as well as with the words of the Constitution." 182 U.S. at 380.

Short of expressly overruling the *Insular Cases* and their doctrine of territorial incorporation, this Court should make clear—as the First Circuit did below—that courts should "not further expand the[ir] reach." JA164. Since the Supreme Court's decision in *Reid v. Covert*, 354 U.S. 1 (1957), the Court has consistently narrowed the scope of the *Insular Cases*' application in the Territories. In part, as the Court explained in *Boumediene*, this is because over the last 118 years "the ties between the United States and any of its unincorporated Territories" may have "strengthen[ed] in ways that are of constitutional significance." 553 U.S. at 758. But at an even more

fundamental level, it is because "[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*." *Id.* at 765 (emphasis added).

Even the United States now agrees that "the *Insular Cases* are not relevant here." *See* U.S. Br. 25. This represents an important shift from its arguments in the District Court where it relied on the *Insular Cases* for the troubling proposition that "the Constitution is 'suggestive of no limitations upon the power of Congress in dealing with [the Territories]' and gives no indication 'that the power of Congress in dealing with [the Territories] was intended to be restricted by any of the [Constitution's] other provisions.'"[6] Puerto Rico would go further, not only arguing against "giving [the *Insular Cases*] continued vitality today," but that "[t]hey must be overruled." Puerto Rico Fiscal Agency and Financial Advisory Authority Br. 15.[7]

Other parties also reject the First Circuit's narrow approach to the *Insular Cases* in favor of the

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[6] Memorandum of Law filed by the United States in Support of the Constitutionality of PROMESA, Dkt. No. 1929, *In re: The Commonwealth of Puerto Rico*, No. 17-3283-LTS (D.P.R. Dec. 6, 2017), at 9, quoting *Downes*, 182 U.S. at 285-86.

[7] *See also* Consolidated Opening Brief for Petitioner Unión De Trabajadores De La Industria Eléctrica Y Riego, Inc. ("UTIER") dated Aug. 22, 2019 at 56-66 (arguing to overrule the *Insular Cases*).

unprecedented interpretation recently adopted by the D.C. Circuit in *Tuaua v. United States*. The Committee of Unsecured Creditors of All Title III Debtors (Other Than COFINA) ("Unsecured Creditors") advances the far-reaching view from *Tuaua* that "only" certain "fundamental" rights restrict congressional action in the Territories. Unsecured Creditors Br. 21.[8] Quoting at length from *Tuaua*, Unsecured Creditors advance the problematic view taken by the D.C. Circuit that:

> "Fundamental" has a distinct and narrow meaning in the context of territorial rights. It is not sufficient that a right be considered fundamentally important in a colloquial sense or even that a right be "necessary to [the] American regime of ordered liberty." . . . [T]he designation of fundamental extends only to the narrow category of rights and "principles which are the basis of *all* free government."

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[8] The Financial Oversight and Management Board for Puerto Rico ("FOMB") also relied extensively on *Tuaua*'s interpretation of the *Insular Cases* before the District Court. *See* FOMB's Opposition to the Motion to Dismiss, Dkt. No. 1622, *In re The Commonwealth of Puerto Rico*, No. 17-3283-LTS (D.P.R. Nov. 3, 2017) at 23-26. *See also* Brief of Appellee American Federation of State, County & Municipal Employees at 9-16, *Aurelius Inv. LLC v. Commonwealth of Puerto Rico,* No. 18-1671 (1st Cir. Oct. 1, 2018) (citing *Tuaua* and arguing that "[the *Insular Cases*] should be overruled, but, until they are, the Appointments Clause does not apply in Puerto Rico.").

Id., quoting *Tuaua*, 788 F.3d at 308 (internal citation omitted).

The First Circuit and the D.C. Circuit present two starkly different views of the *Insular Cases* and what the Constitution means to residents of the Territories. The Court should resolve this split by expressly overruling the *Insular Cases* to the extent they rely on the distinction between "incorporated" and "unincorporated" Territories. Short of that, the Court should make clear that the First Circuit's narrow approach to the *Insular Cases* is the correct one, and that "neither the *[Insular C]ases* nor their reasoning should be given any further expansion." *Reid*, 354 U.S. at 14 (plurality opinion). Silence by the Court at this juncture would ensure the continued misapplication of the *Insular Cases* and the ongoing treatment of residents of Puerto Rico and other Territories as "separate and unequal." *See*, *e.g.*, Juan R. Torruella, *The Supreme Court and Puerto Rico: The Doctrine of Separate and Unequal* (1985).

ARGUMENT

I. The *Insular Cases* and Their Doctrine of Territorial Incorporation Should Be Overruled

"The doctrine of 'territorial incorporation' that emerges from the *Insular Cases* is transparently an invention designed to facilitate the felt needs of a particular moment in American history. Felt needs

generally make bad law, and the *Insular Cases* are no exception." Gary Lawson and Guy Seidman, *The Constitution of Empire* 197 (2004). Indeed, "[t]he *Insular Cases* … exemplify[y] the 'anticanon'" of constitutional law. Sanford Levinson, *Installing the Insular Cases into the Canon of Constitutional Law,* in *Foreign in a Domestic Sense* 123 (Burnett & Marshall eds., 2001). Other Supreme Court decisions in this category include such infamous cases as *Scott v. Sandford*, 60 U.S. 393 (1857), *Plessy v. Ferguson*, 163 U.S. 537 (1896) and *Korematsu v. United States,* 323 U.S. 214 (1944). But while American law has turned the page on these cases, and the eras they stood for, "frozen in time, the *Insular Cases* stand." Martha Minow, *The Enduring Burdens of the Universal and the Different in the Insular Cases*, in *Reconsidering the Insular Cases* vii (Neuman & Brown-Nagin eds., 2015). One reason for the *Insular Cases*' longevity is that the Supreme Court has had relatively few opportunities to reconsider them. That is why the Supreme Court should take the opportunity here to overrule the *Insular Cases*, as it recently did with respect to *Korematsu* in *Trump v. Hawaii*, 138 S. Ct. at 2423, to the extent their decisions rely on the distinction between "incorporated" and "unincorporated" Territories.

The *Insular Cases* and their doctrine of territorial incorporation were deeply controversial when decided, and have long been criticized by legal academics and jurists alike. Over the last two

decades, the *Insular Cases* and the doctrine of territorial incorporation have received a surge of academic critique. *See*, *e.g.*, Sam Erman, *Almost Citizens: Puerto Rico, the U.S. Constitution, and Empire* (2019); Lawson & Seidman, *The Constitution of Empire* (2004); *Foreign in a Domestic Sense* (Burnett & Marshal eds., 2001). Lower court judges—who remain bound to follow and apply the *Insular Cases*—have offered their own steady drumbeat of criticism. *See*, *e.g.*, *United States v. Vaello-Madero*, 313 F. Supp. 3d 370, 375 (D.P.R. 2018) ("The controversial *Insular Cases* … were grounded on outdated premises."); *Segovia v. Bd. of Election Comm'rs for Chi.*, 201 F. Supp. 3d 924, 937 n.9 (N.D. Ill. 2016) (noting criticism of "the *Insular Cases* as establishing a race-based doctrine of 'separate and unequal' status for residents of overseas United States Territories."); *Paeste v. Gov't of Guam*, 798 F.3d 1228, 1231 n.2 (9th Cir. 2015) ("[T]he so-called '*Insular Cases*,' … ha[ve] been the subject of extensive judicial, academic, and popular criticism."); *Ballentine v. United States*, No. 1999-130, 2001 U.S. Dist. LEXIS 16856, at *23 (D.V.I. Oct. 15, 2001) ("[T]he *Insular Cases* have been, and continue to be, severely criticized as being founded on racial and ethnic prejudices that violate the very essence and foundation of our system of government."). The *Insular Cases* and their court-made doctrine of territorial incorporation, like *Plessy* and its doctrine of "separate but equal," should simply have no place in our jurisprudence today. 63 U.S. 537.

Overruling the *Insular Cases* and the doctrine of territorial incorporation would secure greater

dignity and equality for residents of the Territories without creating any significant or disruptive sea changes to the law. The *Insular Cases* have largely been displaced as a practical matter through congressional action recognizing the broad application of the Constitution in the Territories. *See*, *e.g.*, 48 U.S.C. § 1421b (Guam); § 1561 (U.S. Virgin Islands). Further, the Court's established jurisprudence with respect to the District of Columbia—a jurisdiction that shares many constitutional similarities to the Territories—offers a ready framework for examining the application of the Constitution to non-state areas where Congress has plenary power. *See*, *e.g.*, *O'Donoghue v. United States*, 289 U.S. 516, 539 (1933) ("The power conferred by [the District Clause] is plenary; but it does not … authorize a denial to the inhabitants [of the District] of any constitutional guaranty not plainly inapplicable.").

The time has come for the Supreme Court to provide a decisive rejection to the *Insular Cases* and the anachronistic logic of the territorial incorporation doctrine.

II. Short of Overruling the *Insular Cases*, the Court Should Clarify The Narrow Scope of Their Application Today

While many of the parties now challenging the First Circuit's ruling relied extensively on the *Insular Cases* below, all parties and amici—with the sole exception of Unsecured Creditors—now appear to accept the First Circuit's narrow reading of the

Insular Cases. There is good reason for this. Read closely, the *Insular Cases* themselves do not support the broad application ascribed to them by Unsecured Creditors and the D.C. Circuit in *Tuaua*. Further, over the last 60 years, the Supreme Court has made clear that the *Insular Cases* should be read narrowly, raising significant doubts about applying the territorial incorporation doctrine in Territories today.

A. The *Insular Cases* Were Grounded In A Transitory Historical Context

On careful review, the *Insular Cases* and the doctrine of territorial incorporation offer no sweeping rule for the application of the Constitution in Territories today. The holdings of the *Insular Cases* were inextricably grounded in a transitory historical context that finds no parallel in present-day Territories.

Downes v. Bidwell, a deeply divided 5-4 decision with three opinions in the majority alone, cannot be unmoored from its facts. The most far-reaching opinion was by Justice Henry Billings Brown—the author of *Plessy v. Ferguson*—writing for himself alone. In Brown's view the question of the Constitution's application in newly acquired overseas Territories was left almost entirely to the political branches, yet he acknowledged that restrictions on "the blessings of a free government under the Constitution" could only be justified "*for a time*" while

differences "in religion, customs, laws, methods of taxation and modes of thought" made the application of "Anglo-Saxon principles … impossible." *Downes*, 182 U.S. at 287 (emphasis added). Justice Edward White's opinion set forth what would become the territorial incorporation doctrine. But even White's concept of "incorporation" was strongly grounded in the specific factual context and unique practical challenges presented by the recent acquisition by military conquest of densely populated overseas Territories. *Id.* at 341-44. Justice Horace Gray provided the critical fifth vote, making clear that in his view any ability of Congress to "establish a temporary government, which is not subject to all the restrictions of the Constitution," was limited in time to a "transition period." *Id.* at 346-47. Thus, key to each of the majority opinions in *Downes* was the idea that restrictions on the Constitution's application to recently acquired Territories could only be *temporary* and were based on the specific factual exigencies that existed at the time.

White's doctrine of territorial incorporation from *Downes* was adopted by a majority of the Court in *Dorr v. United States*, 195 U.S. 138 (1904), and by the full Court in *Balzac v. Porto Rico*, 258 U.S. 298 (1922). *Dorr* and *Balzac*, both of which limited jury trial rights, were similarly grounded in the practical challenges presented by recently acquired Territories that lacked familiarity with the criminal procedures

guaranteed in the Constitution. 195 U.S. at 148-49; 258 U.S. at 310-11. All this calls into serious question applying the *Insular Cases* or the territorial incorporation doctrine to any of the Territories today—*nearly 120 years later*—long after the factual circumstances undergirding the *Insular Cases* have ceased to exist.

B. The *Insular Cases* Did Not Limit Constitutional Protections To A Narrow Category Of Fundamental Rights

Neither *Downes*, *Dorr*, *Balzac*—nor *any* of the *Insular Cases*—support the broad assertion by Unsecured Creditors here and the D.C. Circuit in *Tuaua* that "only" certain "fundamental" rights apply to residents of the Territories. Unsecured Creditors Br. 21; *Tuaua*, 788 F.3d at 308. Such an idea is not only contrary to the *actual* language of these cases, it turns their language on its head.

In *Downes*, Justice White conceded that "every express limitation of the Constitution which is applicable" has force in the Territories, stating further that "even in cases where there is no direct command of the Constitution which applies, there may nevertheless be restrictions of so fundamental a nature that they cannot be transgressed, although not expressed in so many words in the Constitution." 182 U.S. at 291. In this way, White recognized that in *addition* to what the Constitution commands, there

may "be inherent, although unexpressed, principles which are the basis of all free government which cannot be with impunity transcended." *Id.*

The Court in *Dorr* adopted White's language in full. 195 U.S. at 147. Importantly, *Dorr* also recognized that "the exercise of the power expressly granted to govern the territories is not without limitations." *Id.* at 142. Such power, *Dorr* emphasized, "finds limits in the express prohibitions on Congress not to do certain things," and remains "subject to such constitutional restrictions upon the powers of that body as are applicable to the situation." *Id.* at 142-143 (internal citations omitted).

Balzac continued to cite affirmatively to *Downes* and *Dorr* for the principle that "[t]he Constitution of the United States is in force in Porto Rico as it is wherever and whenever the sovereign power of that government is exerted." 258 U.S. at 312. *Balzac*'s statement that "guaranties of certain fundamental personal rights declared in the Constitution" apply in overseas Territories should not be read to narrow this. *Id.*

In short, *Downes*, *Dorr*, and *Balzac* each flatly contradict the assertion that "only" a narrow category of "fundamental" rights that "are the basis of *all* free government" apply in the Territories. Unsecured Creditors Br. 21; *Tuaua*, 788 F.3d at 308. At

minimum, this Court should reject this clear misapplication of the *Insular Cases*.

C. More Recent Supreme Court Decisions Cabin the *Insular Cases* To Their Facts

Lacking any support from the *Insular Cases* themselves, Unsecured Creditors cite *Boumediene* for the proposition that "only" certain "fundamental" rights apply in the Territories. Unsecured Creditors Br. 21. But just as the *Insular Cases* do not say this, neither does *Boumediene*. *Boumediene* simply observed that in *Balzac* "the Court took for granted that even in unincorporated Territories the Government of the United States was bound to provide to noncitizen inhabitants guaranties of certain fundamental personal rights declared in the Constitution." 553 U.S. at 758 (internal citations omitted). This was not recognition of some rigid rule that absent congressional action "only" certain narrow "fundamental" rights applied in the Territories. After all, one page earlier *Boumediene* properly characterized *Downes* and *Dorr* as holding that "the Constitution has independent force in these Territories, a force not contingent upon acts of legislative grace." 553 U.S. at 757.

Indeed, *Boumediene* is the culmination of a series of plurality and concurring opinions that have the effect of cabining the *Insular Cases* to their facts, as the First Circuit properly recognized here.

Boumediene cited extensively to the three majority opinions in *Reid v. Covert*, emphasizing how each understood the *Insular Cases* to be highly contextual, fact-bound decisions. *Id.* at 759. The four-Justice plurality in *Reid* had concluded that "neither [the *Insular Cases*] nor their reasoning should be given any further expansion." 354 U.S. at 14 (Black, J.). It cautioned that "[t]he concept that the Bill of Rights and other constitutional protections against arbitrary government are inoperative when they become inconvenient or when expediency dictates otherwise is a very dangerous doctrine" that "if allowed to flourish would destroy the benefit of a written Constitution." *Id. Boumediene*, 553 U.S. at 758, also cited approvingly to Justice William Brennan's four-Justice concurring opinion in *Torres v. Puerto Rico*, 442 U.S. 465, 475-76 (1979), which relied on the above language from *Reid* to conclude that "[w]hatever the validity of the [*Insular Cases*] in the particular historical context in which they were decided, those cases are clearly not authority for questioning the application of … the Bill of Rights" in long-held Territories like Puerto Rico.

Boumediene's reliance on certain aspects of the *Insular Cases*' logic to *extend* the Constitution's guarantee of habeus corpus extra-territorially should not be read to *restrict* any of the Constitution's

guarantees in the Territories today.[9] At bottom, *Boumediene* flatly rejected any view that "the political branches have the power to switch the Constitution on or off at will," 553 U.S. at 765, which is what the expansive interpretation of the *Insular Cases* by Unsecured Creditors and the D.C. Circuit in *Tuaua* would seem to endorse.

Short of overruling the *Insular Cases*, this Court should recognize the narrow scope of their holdings and make express that the doctrine of territorial incorporation has no bearing on the application of the Constitution in Territories today.

III. Silence Here Would Ensure the Continued Misapplication of the *Insular Cases*, With Serious Consequences

Given that both proponents and some opponents of the First Circuit's ruling are now arguing that the *Insular Cases* should have no bearing here, the Court may be tempted to simply remain silent on the territorial incorporation doctrine. That would be a mistake. The Supreme Court—as the creator of this doctrine—has a special duty to limit and reverse its negative impacts. *See*, *e.g.*, *Igartúa v. United States*, 626 F.3d 592, 612-13 (1st Cir. 2010)

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[9] Overruling the *Insular Cases* for purposes of the *domestic* territorial application of the Constitution should have no effect on the analytically distinct question of the Constitution's extra-territorial application *internationally*.

(Torruella, J., concurring in part, dissenting in part). Silence now risks continued extension of the troubling view of the *Insular Cases* advanced by Unsecured Creditors here and by the D.C. Circuit in *Tuaua*.

Relying on *Tuaua*, Unsecured Creditors argue that the dispositive question here is "whether the Appointments Clause creates some 'personal right' that is 'so basic as to be integral to free and fair society.'" Unsecured Creditors Br. 22, quoting *Tuaua*, 788 F.3d at 308. This framing of the case highlights the stark contrast between the D.C. Circuit's expansive application of the *Insular Cases* and the First Circuit's narrow one. In order to understand the consequences the Court's silence on the *Insular Cases* would have, it is helpful to examine the D.C. Circuit's decision in *Tuaua* at greater length.

A. The D.C. Circuit's Restrictive View of Fundamental Rights in *Tuaua v. United States* is Improper

In *Tuaua v. United States*, the D.C. Circuit considered whether individuals born in American Samoa who are labeled "nationals, but not citizens, of the United States" under federal statute[10] have a constitutional right to be recognized as U.S. citizens under the Citizenship Clause of the Fourteenth Amendment. Rather than focus on the Clause's text, history, purpose, or related Supreme Court precedent,

[10] 8 U.S.C. § 1408(1).

the D.C. Circuit concluded plaintiffs had no right to citizenship based on the "sometimes contentious *Insular Cases*." *Tuaua*, 788 F.3d at 306. Dismissing concerns that the territorial incorporation doctrine "rests on anachronistic views of race and imperialism" with the terse statement that "some aspects of the *Insular Cases*' analysis may now be deemed politically incorrect," the D.C. Circuit held that their "framework remains both applicable and of pragmatic use in assessing the applicability of rights to unincorporated territories." *Id.* at 307.

The D.C. Circuit was not persuaded by plaintiffs' argument that birthright citizenship was a "fundamental" right that applied in even so-called unincorporated Territories. It dismissed plaintiffs' "bevy of [Supreme Court] cases" supporting recognition of citizenship as a "fundamental right" on the grounds that "those cases d[id] not arise in the *territorial* context." *Id* (emphasis added). In the D.C. Circuit's view, it was not enough for the Supreme Court to declare a right "fundamental" as a general matter, "the Court's considered judgment as to the existence of a fundamental right" specifically applicable to "unincorporated territories" must *also* be announced. *Id.*

In the D.C. Circuit's view, "'[f]undamental' has a distinct and narrow meaning in the context of territorial rights." *Id.* at 308. That is, "[i]t is not sufficient that a right be considered fundamentally

important in a colloquial sense or even that a right be necessary to the American regime of ordered liberty." *Id.* (internal quotations, modifications and citations omitted). In its view, "[u]nder the *Insular* [*Cases*] framework the designation of fundamental extends only to the narrow category of rights and principles which are the basis of *all* free government." *Id.* (internal quotations and citations omitted). In its understanding, "the *Insular Cases* distinguish as universally fundamental those rights so basic as to be integral to free and fair society." *Id.* "In contrast," the D.C. Circuit explained, "we consider non-fundamental those artificial, procedural, or remedial rights that—justly revered though they may be—are nonetheless idiosyncratic to the American social compact or to the Anglo-American tradition of jurisprudence." *Id.* Perhaps most troubling, the D.C. Circuit expressly adopted "the conclusion of Justice Brown's dictum in his judgment for the Court in *Downes*" drawing a distinction between "natural rights" and "artificial or remedial rights which are peculiar to our own system of jurisprudence," *id.*, a view that has never received support from a single other Justice, either in *Downes* or since.

Undeterred that the *Insular Cases* themselves and subsequent Supreme Court precedent provide no support for such a narrow application of rights in the Territories, see *supra* Section II, the D.C. Circuit applied its new rule to the question of the

Constitution's guarantee of birthright citizenship. "We are unconvinced," the D.C. Circuit explained, that "a right to be designated a citizen at birth under the *jus soli* tradition, rather than a non-citizen national, is a *sine qua non* for free government or otherwise fundamental under the *Insular Cases*' constricted understanding of the term." *Id.* (internal quotation marks and citation omitted). The D.C. Circuit found it dispositive that "numerous free and democratic societies" follow the rule "where birthright citizenship is based upon nationality of a child's parents." *Id.* "[T]he asserted right" to birthright citizenship, the D.C. Circuit concluded, was not "so natural and intrinsic to the human condition as could not warrant transgression in civil society." *Id.* at 309.

The D.C. Circuit's crabbed understanding of fundamental rights is inconsistent with modern Supreme Court authority, which recognizes that the relevant question is whether rights are "fundamental from an *American* perspective." *McDonald v. City of Chicago*, 561 U.S. 742, 784 (2010) (controlling plurality opinion) (emphasis added). After all, numerous free and democratic societies do not recognize, or construe more narrowly, various rights that are undoubtedly central to the United States Constitution. Many free societies, for example, "have established state churches," "ban or severely limit handgun ownership," or do not share this Nation's understanding of "the right against self-

incrimination" and "the right to counsel." *Id.* at 781-83. The Supreme Court, however, has never suggested that some least-common-denominator version of fundamental rights applies in unincorporated Territories. Indeed, this Court's statements are to the contrary. *See*, *supra*, II.B.

Taken seriously, the D.C. Circuit's expansive approach to the *Insular Cases* could have far-reaching and troubling consequences for the nearly 4 million Americans living in the Territories. Since the D.C. Circuit's 2015 decision in *Tuaua*, a broad array of important rights have already been questioned. *See, e.g.*, *Vidal v. Garcia-Padilla*, 167 F. Supp. 3d 279, 287 (D.P.R. 2016), *vacated by, In re Conde Vidal*, 818 F.3d 765 (1st Cir. 2016) (relying on the *Insular Cases* to hold that "the fundamental right to marry, as recognized by the Supreme Court in *Obergefell*, has not been incorporated to the juridical reality of Puerto Rico"); *Segovia v. Bd. of Election Comm'rs for Chi.*, 201 F. Supp. 3d 924, 942 (N.D. Ill. 2016), *aff'd in relevant part*, *Segovia v. United States*, 880 F.3d 384 (2017), *cert. denied*, 139 S.Ct. 320 (2018) ("United States citizens living in territories do not have the same fundamental right to vote as United States citizens residing in Illinois."); Guam Election Comm'n Brief, *Davis v. Guam Election Comm'n,* No. 17-15719, 2017 U.S. 9th Cir. Briefs LEXIS 2469, at *59 (9th Cir. Aug. 31, 2017) (arguing that the right to vote in a political status plebiscite under the Fifteenth

Amendment is not "fundamental" because "'fundamental' has an abridged meaning in the territories"). It is also of little assurance that Congress has recognized most constitutional rights as applicable in the Territories, since statutory rights may be rescinded by simple majorities in Congress (where territorial residents lack voting representation).

B. Allowing Elected Officials to Determine the Scope of the Constitution's Application is Inappropriate

The D.C. Circuit in *Tuaua* narrowed the application of the Constitution in the Territories in another significant way as well, giving broad deference not just to Congress, but also to the views of locally elected officials.

Previously, when examining whether the right to trial by jury applied to American Samoa, the D.C. Circuit had emphasized that the *Insular Cases* and the territorial incorporation doctrine were "controlled by their respective contexts." *King v. Morton*, 520 F.2d 1140, 1147 (D.C. Cir. 1975). Adopting Justice Harlan's narrow approach in *Reid*, it had ruled that "the particular local setting, the practical necessities, and the possible alternatives are relevant" when examining constitutional questions in the Territories. *Id.*, quoting *Reid*, 354 U.S. at 75 (Harlan, J., concurring). Noting "[t]he importance of the

constitutional right at stake," the D.C. Circuit in *King* concluded it was "essential that a decision [on a right to jury trial] rest on a solid understanding of the present legal and cultural development of American Samoa." *Id.* Further, "[t]hat understanding cannot be based on unsubstantiated opinion; it must be based on facts." *Id.* The D.C. Circuit in *King* remanded the case for the district court to determine "whether in American Samoa 'circumstances are such that trial by jury would be impractical and anomalous.'" *Id.*, quoting *Reid*, 354 U.S. at 75 (Harlan, J., concurring).

On remand, after extensive fact-finding, the district court reached the "inescapable conclusion that trial by jury in American Samoa" was not "impractical and anomalous," striking down laws that denied the right of trial by jury in criminal cases. *King v. Andrus*, 452 F. Supp. 11, 17 (D.D.C. 1977). It reached this conclusion despite opposition from the United States and officials in American Samoa, who argued that "these questions should be resolved by American Samoans themselves." *Id.* The decisions in *King* are significant because they recognized that context matters, and that even as the Supreme Court denied recognition of a right to jury trial in the Philippines and Puerto Rico in the early 1900s, that did not mean the *Insular Cases* or the doctrine of territorial incorporation meant that a right to jury trial must be denied in other Territories many decades later. In short, the *King* decisions recognized that, even under

the *Insular Cases*, restricting application of the Constitution in the Territories could only be justified by the most compelling facts on the ground.

In *Tuaua*, the D.C. Circuit recognized that the application of its prior decision in *King* would "require delving into the particulars of American Samoa's present legal and cultural structures to an extent ill-suited to the limited factual record before us." *Tuaua*, 788 F.3d at 310. However, rather than remand, as required by its prior decision in *King*, the D.C. Circuit in *Tuaua* held that recognition of birthright citizenship in American Samoa would be "anomalous" as a matter of law, regardless of the actual facts on the ground. Its reason: "the objections" of American Samoa's "democratically elected representatives," who filed a brief arguing against the application of the Citizenship Clause in American Samoa. *Id.* This contrasts with the conclusion on remand in *King*, where the district court held that similar concerns raised by local officials with respect to recognition of a jury trial right could "not of themselves establish dispositively the impracticality or anomaly of" the right in question. 452 F.Supp. at 17.

The D.C. Circuit's approach in *Tuaua* is a sharp break from the narrow, fact-sensitive inquiry developed in *Reid*, applied by *King*, and emphasized again in *Boumediene*. Without any meaningful consideration of the facts on the ground, *Tuaua* created from whole cloth a new rule giving dispositive

deference to the litigating position of territorial officials. The D.C. Circuit's approach in *Tuaua* cannot be squared with *Boumediene*'s clear rejection of the idea that elected officials "have the power to switch the Constitution on or off at will." 553 U.S. at 765. As this Court explained in *Boumediene*, this level of deference "would permit a striking anomaly in our … system of government, leading to a regime in which [political actors], not this Court, say 'what the law is.'" *Id.*, quoting *Marbury v. Madison*, 5 U.S. 137 (1803).

In the present case, it should be of no moment whether Congress or elected officials in Puerto Rico support or oppose the application of the Appointments Clause to the FOMB. While the legal questions in this case are complicated, the parties appear to agree that this Court must look to the Constitution for answers, not the views of elected officials or Congress.

Ultimately, the relationships between each Territory and the federal government do raise an array of thorny constitutional questions, leaving a healthy room for debate over the correct legal answer in each particular instance. But arbitrarily narrowing the scope of constitutional provisions that apply in these areas or providing dispositive weight to the views of elected officials—as the D.C. Circuit did in *Tuaua*—is simply incompatible with the principles that are the foundation of our constitutional order. This Court should make clear that the Constitution is our lodestar, even in the Territories.

CONCLUSION

The Supreme Court should overrule the *Insular Cases* and the doctrine of territorial incorporation, or, in the alternative, it should affirm the First Circuit's conclusion that the *Insular Cases* should be narrowly limited to their facts.

Respectfully submitted,

STEVEN S. ROSENTHAL
Counsel of Record
NEIL C. WEARE
LOEB & LOEB LLP
901 New York Ave. N.W., Suite 300 E
Washington, D.C. 20001
(202) 618-5034
srosenthal@loeb.com
nweare@loeb.com
Counsel for Amicus Curiae Equally American Legal Defense and Education Fund

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