No. 20-303

In The
Supreme Court of the United States

UNITED STATES OF AMERICA,

Petitioner,

v.

JOSE LUIS VAELLO-MADERO,

Respondent.

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

BRIEF OF *AMICUS CURIAE* VIRGIN ISLANDS BAR ASSOCIATION IN OPPOSITION TO SUMMARY REVERSAL

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QUESTION PRESENTED

Is Congress's authority to arbitrarily discriminate against Americans living in U.S. territories so well established that summary reversal is warranted?

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I. INTERESTS 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's mission is to advance the administration of justice, enhance access to justice, and advocate 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 opposition to the request by the United States for summary reversal, and for the affirmance of the decision of the United States Court of Appeals for the First Circuit.

The Bar Association's duty to intervene in this matter as an advocate for the people of the Virgin Islands is explained succinctly by the petition of the United States. It explains that "[w]hen Congress created [Supplemental Security Income (SSI)] in 1972, it made the program available in the 50 States and the

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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 counsel of record for all parties received notice of the Bar Association's intention to file an *amicus curiae* brief on October 19, 2020, more than 10 days prior to the due date for the *amicus curiae* brief, in compliance with Supreme Court Rule 37.2(a). The parties consent to the filing of this brief. This brief is not intended to reflect the views of any individual member of the Bar Association or the Supreme Court of the Virgin Islands.

District of Columbia, but not in Puerto Rico and other Territories." (Pet. 2). "Congress later extended SSI to the Northern Mariana Islands, ... [b]ut Congress has not similarly extended SSI to Puerto Rico or other Territories." (Pet. 3).

So like Americans in Puerto Rico, Americans in the Virgin Islands are excluded from federal disability benefits, while these benefits are available to Americans in the 50 states, the District of Columbia, and—underscoring the arbitrary nature of the exclusions—the Northern Mariana Islands.

The Bar Association urges this Court to reject the claim that arbitrary discrimination in federal programs is so well established in this Court's precedent as to warrant summary action. The Bar Association urges this Court to affirm the First Circuit and make clear that Congress cannot discriminate against Americans living in U.S. territories as a matter of course.

Although this case deals only with Puerto Rico, a decision of this Court affirming the First Circuit would ultimately allow the neediest of Americans living in the Virgin Islands access to SSI benefits for the first time.

II. INTRODUCTION

A. Virgin Islanders struggled for years to achieve American freedoms.

"In 1917, the United States purchased what was then the Danish West Indies from Denmark in exchange

for $25 million in gold and American recognition of Denmark's claim to Greenland." *Vooys v. Bentley*, 901 F.3d 172, 176 (3d Cir. 2018) (en banc) (internal quotation marks omitted). Although they had no formal say in the matter, the residents of St. Croix, St. Thomas, St. John, and Water Island—then known as the Danish West Indies—held "an unofficial referendum on the sale of the islands to the United States [that] passed with a vote of 4,727 in favor and only seven against." *Balboni v. Ranger Am. of the V.I.*, 2019 VI 17, ¶ 39 n.34, 70 V.I. 1048, 1088 n.34. Likewise, "the elected Colonial Councils of St. Thomas-St. John and St. Croix unanimously passed resolutions in support of annexation of the islands by the United States." *Id.*

The treaty transferring the islands from Denmark to the United States became effective March 31, 1917. *Malloy v. Reyes*, 61 V.I. 163, 168 n.2 (2014). Virgin Islanders' dedication to the United States remains as strong today as it did in 1916, with March 31, Transfer Day, commemorated every year as a public holiday. 1 V.I.C. § 171.

The 1917 annexation was the culmination of Virgin Islanders' half-century struggle to achieve American freedoms. In 1868, when the United States and Denmark were first engaged in negotiation for the sale of St. Thomas and St. John, a referendum was held regarding the transfer. "The inhabitants remember the day of the voting as the greatest holiday in the history of the islands. Guns were fired and all the church bells were rung." Isabel Foster, *Natives of Danish West Indies Have Shown Their Strong Feeling*, N.Y. Times

(Feb. 26, 1916) (available at https://nyti.ms/2HNy3vu) (last accessed Nov. 2, 2020). Voters "marched to the polls cheering and singing 'The Star Spangled Banner.'" *Id.* "It was said at the time that there never was a national conquest so proud and peaceful," with only 22 votes against joining the United States. *Id.* Although this early effort was unsuccessful, the strong desire among Virgin Islanders to join the United States never subsided.

As early as 2015,[2] Virgin Islanders began preparations to celebrate 100 years under the American flag, with festivities planned throughout 2017, including "parades, sporting events, concerts, and multi-cultural celebrations to exhibitions and festivals featuring local art, dance and food." Joseph T. Gasper II, *Too Big to Fail: Banks and the Reception of the Common Law in the U.S. Virgin Islands*, 46 Stetson L. Rev. 295, 365 n.6 (2017); *see* 3 V.I.C. § 338 (establishing the "Centennial Commission of the Virgin Islands").

B. Excluding the Virgin Islands from SSI denies federal benefits to the neediest of Americans.

"Now home to a population of around 100,000, the U.S. Virgin Islands became an unincorporated American territory in 1954." *Vooys*, 901 F.3d at 176; *see* 48

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[2] *See* U.S. Dep't of Interior, Office of Insular Affairs, News Release: Interior Provides $500,000 to Help U.S. Virgin Islands Prepare for Centennial Celebrations in 2017 1–2 (July 21, 2015) (available at https://on.doi.gov/35Uf7D3) (last accessed Oct. 30, 2020).

U.S.C. § 1541(a) ("The Virgin Islands [is] declared an unincorporated territory of the United States of America."). In addition to their shared status as "unincorporated" territories, Puerto Rico and the Virgin Islands have many other similarities. Like Puerto Rico, people born in the Virgin Islands are U.S. citizens. 8 U.S.C. § 1406(b) ("[A]ll persons born in those islands on or after February 25, 1927, and subject to the jurisdiction of the United States, are declared to be citizens of the United States at birth.").

And like Puerto Rico, "the Virgin Islands [is] represented in Congress by an elected, nonvoting Delegate in the House of Representatives who, unlike the House's voting membership, serves pursuant to legislation, not the Constitution." *Ballentine v. United States*, 486 F.3d 806, 811 (3d Cir. 2007) (citing 48 U.S.C. § 1711). The Virgin Islands is also majority non-White, with 77.5 percent of the population identifying as Black or African-American, and only 16.7 percent of the population identifying as White.[3]

Puerto Rico and the Virgin Islands also shared in the devastation of recent natural disasters. "In September 2017, Hurricanes Irma and Maria made landfall in the Virgin Islands as category-5 hurricanes, resulting in significant damage to the Territory and the declaration of a prolonged state of emergency." *James v. O'Reilly*, 2019 VI 14 ¶ 5, 70 V.I. 990, 993; *see*

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[3] University of the Virgin Islands, *2010 U.S. Virgin Islands Demographic Profile* at 1 (available at https://bit.ly/2YJO4Vz) (last accessed Nov. 5, 2020).

also Wycoff v. Gabelhausen, No. 2015-cv-70, 2018 WL 1527826, at *1 (D.V.I. Mar. 28, 2018) ("In September 2017, the Virgin Islands . . . suffered extensive damage from Hurricanes Irma and Maria."). Even before the hurricanes, many Virgin Islanders already faced difficult circumstances. As of the 2010 census, over 5,000 Virgin Islanders were categorized as disabled, with only 4 percent of that population employed.[4]

The numbers were even more alarming as of 2014, with "approximately 10% of the USVI population . . . reporting a disability, and within that group, half are between the ages of 18–64 and 44% are over 65 years old."[5] Virgin Islanders also endure unemployment and poverty well above the national average, reporting 18.9 percent of families living below the poverty level and 10.2 percent unemployment in 2019.[6]

Of the 100,000 people of the Virgin Islands, "65,000 individuals"—nearly 65 percent of all Virgin Islanders—were "dependent on government services to address the basic needs of living in the Territory," including "financial, medical, and nutrition support."[7] Further, "86% (15,856) of all USVI children (0–18 years) received Supplemental Nutrition Assistance

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[4] *Id.* at 3.

[5] Caribbean Exploratory Research Center, *Community Needs Assessment: Understanding the Needs of Vulnerable Children and Families in the U.S. Virgin Islands Post Hurricanes Irma and Maria* at 27–28 (Feb. 2019) (available at https://bit.ly/2YQjrla) (last accessed Nov. 5, 2020).

[6] *Id.* at 24.

[7] *Id.* at 25.

Program (SNAP) benefits in 2014."[8] While there are few updated post-hurricane statistics, the welfare of Virgin Islanders has undoubtedly declined substantially as a result of the massive devastation.[9]

The global COVID-19 pandemic has undoubtedly made the situation worse still. There are few statistics available, but "[t]ourism is the largest industry in the U.S. Virgin Islands, contributing an estimated 60% to the territory's GDP."[10] With shutdowns and other measures taken to combat the pandemic, the Virgin Islands has suffered substantial economic hardship.[11]

Virgin Islanders are resilient and dedicated Americans[12]—they don't *suffer* poverty, unemployment, and devastating natural disasters, they *endure*, as they have for hundreds of years. But everyone needs help at times, and while Virgin Islanders are able to take

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[8] *Id.* at 26.

[9] National Public Radio, *After 2 Hurricanes, A 'Floodgate' Of Mental Health Issues In U.S. Virgin Islands* (Apr. 23, 2019) (available at https://n.pr/2IS5KtT) (last accessed Nov. 5, 2020).

[10] Sabrina A. Taylor, *Albert Bryan, Jr., Governor of the US Virgin Islands, Shows Himself to Be an Exemplary, Innovative Leader* (Oct. 16, 2020) (available at https://bit.ly/382MCpv) (last accessed Nov. 2, 2020).

[11] Island Analytics and Marketing, LLC, *USVI COVID-19 Economic Impact Report* at 4–5 (available at https://bit.ly/320Ivqf) (last accessed Nov. 2, 2020).

[12] Virgin Islanders, like all Americans living in U.S. territories, volunteer for military service at a higher per capita rate than elsewhere in the United States. National Conference of State Legislatures, *The Territories: They Are Us* (Jan. 2018) (available at https://bit.ly/2ZFoSAB) (last accessed Nov. 5, 2020).

advantage of many federal and territorial assistance programs, they are denied millions of dollars of additional federal assistance that would be available to them if they lived in a state instead of a territory.[13]

Limiting and denying federal assistance to Americans who need it most in the Virgin Islands, Puerto Rico, and other U.S. territories is yet another extension of "the much-criticized 'Insular Cases' and their progeny"[14] that this Court disavowed just last term. *Fin. Oversight & Mgmt. Bd. for P.R. v. Aurelius Inv., LLC*, 140 S. Ct. 1649, 1665 (2020).

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[13] *See*, *e.g.*, Judith Solomon, Sr. Fellow, Center on Budget and Policy Priorities, *Medicaid Funding Cliff Approaching for U.S. Territories* (June 19, 2019) (available at https://bit.ly/33eHQAp) (last accessed Nov. 5, 2020) ("Unlike the states, whose federal funding covers a specified share of their Medicaid spending, the territories receive a fixed amount of federal funds as a capped block grant.").

[14] 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 *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).

III. ARGUMENT

A. The *Insular Cases* have no application to national legislation.

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

"[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—like Social Security and

other federal assistance programs—which constitute an exercise of the "powers of the *general* . . . government."

This distinction is demonstrated in the *Insular Cases* themselves,[15] each of which examines the constitutionality of congressional enactments applicable only to U.S. territories.

For example, in *De Lima*, the 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."[16] 182 U.S. at 199. In doing so, the 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. It may do for the territories what the people, under the Constitution of the United States, may do for the states." *Id.* at 196 (quoting *First Nat'l Bank v. Yankton Cty.*, 101 U.S. 129, 133 (1879)).

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[15] The *Insular Cases* are often said 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), *Downes v. Bidwell*, 182 U.S. 244 (1901), *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), among others.

[16] *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.' ").

Another example is *Mankichi*, where the 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. The 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 Supreme 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 constitutional 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 creating a federal assistance program like Social Security. Such a program isn't created through Congress's Territorial Clause authority, but is "grounded on Article I, Section 8, Clause 1, of the Constitution (Congress' power to spend and tax in the aid of the 'general welfare')." *Marshall v. Cordero*, 508 F. Supp. 324, 326 n.2 (D.P.R. 1981) (citing *Helvering v. Davis*, 301 U.S. 619 (1937)).

The *Insular Cases* are distinguishable from the case now before the Court, making summary reversal inappropriate. This Court should instead follow its recent decision and hold that because "[t]hose cases did not reach this issue, . . . whatever their continued validity we will not extend them in these cases." *Fin. Oversight & Mgmt. Bd. for P.R. v. Aurelius Inv., LLC*, 140 S. Ct. 1649, 1665 (2020).

2. 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 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.

The Court has also made this distinction in other instances. 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, 71 (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 an Article III court since 1966,

"[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*, 901 F.3d at 180–81 ("[T]he District Court of the Virgin Islands [is] 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—such as the Social Security Act—in violation of those rights.

B. The *Insular Cases* are undermined by the Fourteenth Amendment incorporation doctrine.

As this Court has recognized, substantial changes in 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" territories don't enjoy the same constitutional rights as Americans in

the states until the territory is "incorporated" into the United States. This distinction has no basis in the text of the Constitution. *See* Const. art. IV cl. 2 ("The 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."). But the conclusion that the Bill of Rights does not extend to territories is at least somewhat consistent with this Court's jurisprudence in the early 1900s, when the Bill of Rights did not apply to state governments either.

"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 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 wasn't applied to state governments until many years later, with the Court subjecting state governments to the requirements of the First Amendment 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 was incorporated in 2010, *McDonald v. City of Chicago*, 561 U.S. 742 (2010), and most recently the Eighth Amendment prohibition on excessive fines was incorporated. *Timbs*, 139 S. Ct. 682.

So there was at least some logic to holding in the early 1900s that Congress was not restricted by the Bill of Rights when acting with the power of a state government in a territory. When the *Insular Cases* were decided, a state government was likewise not restricted by the Bill of Rights. The *Insular Cases* even acknowledged this distinction in *Mankichi*, noting that "we have also held that the states, when once admitted as such, may dispense with grand juries," when holding a territorial criminal prosecution did not require a grand jury. 190 U.S. at 211.

But this underlying rationale is gone now that 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) (holding that 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").

The Court has never revisited this aspect of the *Insular Cases* after these fundamental changes in this Court's jurisprudence on the Bill of Rights. This petition presents an opportunity for the Court to do so. The Court should deny summary reversal and grant certiorari to finally overrule the "much-criticized 'Insular Cases.'" *Fin. Oversight & Mgmt. Bd. for Puerto Rico v. Aurelius Inv., LLC*, 140 S. Ct. 1649, 1665 (2020).

IV. CONCLUSION

The petition for a writ of certiorari should be granted, summary reversal denied, and the decision of the First Circuit affirmed.

Dated this 9th day of November, 2020.

Respectfully submitted,

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