No. 20-303

In The
Supreme Court of the United States

UNITED STATES OF AMERICA,

Petitioner,

v.

JOSE LUIS VAELLO-MADERO,

Respondent.

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

BRIEF OF *AMICUS CURIAE* VIRGIN ISLANDS BAR ASSOCIATION IN SUPPORT OF RESPONDENT

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QUESTION PRESENTED

Whether Congress violated the equal-protection component of the Due Process Clause of the Fifth Amendment by establishing Supplemental Security Income—a program that provides benefits to needy aged, blind, and disabled individuals—in the 50 States and the District of Columbia, but not extending it to Puerto Rico.

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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 and the people of the Virgin Islands.

The Bar Association's duty to intervene as an advocate for the people of the Virgin Islands is readily demonstrated by the brief of the United States. In its telling, "[d]ifferential treatment of Territories in federal benefits programs remains commonplace today." (Brief of United States at 26). So like Americans in Puerto Rico, Americans in the Virgin Islands are excluded from numerous federal benefits, while those benefits are available to Americans in the 50 states, the District of Columbia, and—underscoring how arbitrary this all is—whichever territory or combination of territories Congress seems to think should be included at the time.

For some reason, the United States thinks the prevalence of "commonplace" discrimination against

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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 consent to the filing of this brief. This brief is not intended to reflect the views of any individual member of the Virgin Islands Bar Association or the Supreme Court of the Virgin Islands.

one group of Americans is a justification in itself for its continuation. This, of course, is nonsense. "Unlawful acts, performed long enough and with sufficient vigor, are never enough to amend the law. To hold otherwise would be to elevate the most brazen and longstanding injustices over the law, both rewarding wrong and failing those in the right." *McGirt v. Oklahoma*, 140 S. Ct. 2452, 2482 (2020).

In fulfillment of its duties to the people of the Virgin Islands, the Bar Association calls on this Court to again refuse "to hold otherwise," and reject the lawless claim that Congress can arbitrarily exclude any territory it wants—and every American living there—from federal programs simply because it always has.

The Bar Association joins the respondent's request for this Court to affirm the decision of the United States Court of Appeals for the First Circuit.

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 Transfer Day commemorated every year on March 31. 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 Sept. 1, 2021). 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 cast 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 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

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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 Sept. 1, 2021).

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 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

[3] University of the Virgin Islands, *2010 U.S. Virgin Islands Demographic Profile* at 1 (available at https://bit.ly/2YJO4Vz) (last accessed Sept. 1, 2021). The results of the 2020 census in the Virgin Islands have not yet been made available.

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 Program (SNAP) benefits in 2014."[8] While there are few updated post-hurricane statistics, the welfare of

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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 Sept. 1, 2021).

[6] *Id.* at 24.

[7] *Id.* at 25.

[8] *Id.* at 26.

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 the shutdowns and travel restrictions imposed to combat the pandemic, the Virgin Islands continues to suffer 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 sometimes, and while Virgin Islanders are able to take advantage of many federal and territorial assistance programs, they are denied millions of dollars of

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[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 Sept. 1, 2021).

[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 Sept. 1, 2021).

[11] Island Analytics and Marketing, LLC, *USVI COVID-19 Economic Impact Report* at 4–5 (available at https://bit.ly/320Ivqf) (last accessed Sept. 1, 2021).

[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 Sept. 1, 2021).

additional federal assistance that would be available to them if they lived in a state instead of a territory.[13]

The Court should refuse to endorse this denial of federal assistance to Americans who need it most in the Virgin Islands, Puerto Rico, and other U.S. territories. To do otherwise—and to reaffirm *Torres* and *Rosario*—would "uphold[ ] this discriminatory treatment [by] relying on the doctrine of the *Insular Cases*." Juan R. Torruella, *The Insular Cases: The Establishment of A Regime of Political Apartheid*, 29 U. Pa. J. Int'l L. 283, 331–32 (2007). Such an extension of "the much-criticized 'Insular Cases' and their progeny" will only perpetuate the second-class citizenship imposed on those Americans deemed to live in the wrong part of the country. *Fin. Oversight & Mgmt. Bd. for P.R. v. Aurelius Inv., LLC*, 140 S. Ct. 1649, 1665 (2020).

II. SUMMARY OF THE ARGUMENT

In the *Insular Cases*, the Court promised "fundamental" constitutional rights to the millions of Americans living in U.S. territories. But that promise was broken.

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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 Sept. 1, 2021) ("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.").

The decision below is the single interruption of a long line of cases where federal courts have reflexively relied on the *Insular Cases* to reject any claim by Americans living in territories to even the most basic rights the Constitution secures to every other American.

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 territories.

The Court's jurisprudence has changed completely since the *Insular Cases* were decided. The Court repudiated the central holding of *Plessy* nearly 70 years ago in *Brown v. Board of Education*. *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 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.

III. ARGUMENT

A. The *Insular Cases* represent a broken promise of fundamental rights to Americans in U.S. territories.

"In a series of opinions later known as the *Insular Cases*, the Court addressed whether the Constitution, by its own force, applies in any territory that is not a State." *Boumediene v. Bush*, 553 U.S. 723, 756 (2008). The *Insular Cases* "held that the Constitution has independent force in these territories, a force not contingent upon acts of legislative grace." *Id.* at 757.

In doing so, "the Court created the doctrine of incorporated and unincorporated Territories." *Examining Bd. of Eng'rs, Architects & Surveyors v. Flores de Otero*, 426 U.S. 572, 599 n.30 (1976). Incorporated territories were "those Territories destined for statehood from the time of acquisition, and the Constitution was applied to them with full force." *Id.* Unincorporated territories, on the other hand, were "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, 148 (1904)), for more than a century, federal courts have routinely relied on the *Insular Cases* to deny fundamental constitutional rights to Americans living in U.S. territories.

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

Despite this, federal courts have routinely rejected extending this "fundamental" Sixth Amendment right to a jury trial to "unincorporated" territories. *See*, *e.g.*, *Commonwealth of N. Mar. I. v. Atalig*, 723 F.2d 682, 688 (9th Cir. 1984) (holding the Sixth Amendment does not apply in the Northern Mariana Islands); *Gov't of the V.I. v. Bodle*, 427 F.2d 532, 533 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) (declining to hold the Sixth Amendment right to a jury trial is fundamental as applied to American Samoa and remanding); *but see United States v. Tiede*, 86 F.R.D. 227, 252 (U.S. Ct. Berlin 1979) (Stern, J.)

(holding that Germans living in U.S.-occupied Berlin "charged with criminal offenses [by the United States] have constitutional rights, including the right to a trial by jury").

Cases like *Balzac* resulted in countless lower court opinions sanctioning government actions that would be considered egregious civil-rights violations in the mainland United States. For example, shortly after *Balzac* was decided, members of the Virgin Islands press were prosecuted for libel after publishing articles critical of the police and the courts. *See*, *e.g.*, *People v. Francis*, 1 V.I. 66 (D.V.I. 1925) (convicting editor of local newspaper of libel for publishing articles critical of the police); *In re Contempt Proceedings against Francis*, 1 V.I. 91 (D.V.I. 1925) (holding same editor in contempt for publishing article critical of criminal prosecutions conducted without a jury).

The framework created by the *Insular Cases* serves only to deny the one thing it purported to grant—fundamental constitutional rights. Instead, the *Insular Cases* essentially give Congress "the power to switch the Constitution on or off at will"—something the Court squarely rejected. *Boumediene*, 553 U.S. at 765.

B. By their own terms the *Insular Cases* have no application to national legislation.

1. The *Insular Cases* are limited to the Territory Clause.

The Territory Clause provides Congress the "power to dispose of and make all needful Rules and Regulations respecting the Territory . . . belonging to the United States." U.S. Const. art. IV, § 3, cl. 2.

In the *Insular Cases*, the 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 Territory 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, each of which examines the constitutionality of congressional enactments applicable only to U.S. territories.

For example, in *De Lima v. Bidwell*, 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."[14] 182 U.S. 1, 199 (1901). In doing so, the Court reaffirmed that under the Territory 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)).

Another example is *Hawaii v. 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. 197, 209 (1903). This legislation was enacted pursuant to the Territory Clause for the temporary governance of the newly acquired territory of Hawaii, and the question before the Court was

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[14] *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.' ").

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 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 Territory Clause. *See*, *e.g.*, *Dooley v. United States*, 182 U.S. 222, 240 (1901) (applying "the act of Congress imposing a duty on goods from Porto Rico"); *Armstrong v. United States*, 182 U.S. 243, 244 (1901) ("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 v. United States*, 234 U.S. 91, 98 (1914) (interpreting "the act of Congress of July 1, 1902"); *Dorr*, 195 U.S. at 145 (same).

Because the *Insular Cases* address only the Territory 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 Territory 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. 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 Territory 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 Territory 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. *See 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.").

So while the Territory 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, even on their own terms the *Insular Cases* do not grant Congress any authority to enact a law of the United States—such as the Social Security Act—in violation of those rights.

C. If the *Insular Cases* do apply here, they must be set aside.

1. *Stare decisis* couldn't save *Plessy*, and shouldn't save the *Insular Cases*.

To the extent the framework created by the *Insular Cases* supports reversal, it must be set aside. The United States argues at length the *Insular Cases* must be preserved under *stare decisis*. (Brief of United States at 36–39). But "*stare 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) (cleaned up). "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." *Id.* 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* nearly 70 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.").

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.

2. The Court should finally end this originalist's nightmare.

The lone constitutional provision addressing territories is Article IV, § 3, cl. 2, providing in relevant part that "[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.

But 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 here, 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)) (cleaned up). "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.

Of course, the distinction between "incorporated" and "unincorporated" territories has no basis in the text of the Constitution. These words do not appear in the Territory Clause. Indeed, this "incorporation" doctrine is "'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)). Without any basis in the text of the Constitution, the *Insular Cases* at best represent an application of "secret or technical meanings" of Article IV "that would not have been known to ordinary citizens in the founding generation."

For an originalist application of the Territory Clause, the Enclave Clause provides a good example. "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). Just like the Territory Clause does with respect to the

territories, the Enclave Clause grants Congress the power "[t]o exercise exclusive Legislation in all Cases whatsoever" over the District of Columbia. U.S. Const. art. I, § 8, cl. 17.

Despite the Enclave Clause's seemingly unqualified grant of power, it *is* qualified—as it must be—by other provisions of the Constitution. 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 Territory Clause and the Enclave Clause, there is no support in the text of the Constitution for the distinction between the rights of Americans 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 in 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 as a result, Americans living in U.S. territories suffer a second-class citizenship that has persisted for over a century.

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 Americans 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 in a foreign country than when in a United States territory. This second-class citizenship continues despite the Court's recent endorsement of the *Reid* plurality opinion in *Aurelius*.

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.

Id. at 238–40; *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.").

Justice Harlan's critique of the *Insular Cases* proved prophetic, dooming millions of Americans to second-class citizenship merely because they apparently live in the wrong part of the country.

The Bar Association urges the Court to finally end this nightmare.

3. The logic of the *Insular Cases* is undermined by subsequent decisions.

Setting aside the originalist's nightmare, crafted out of whole cloth by the same Court that penned *Plessy v. Ferguson*, the conclusion that the Bill of Rights does not extend to territories was at least consistent with early 1900s jurisprudence.

"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, no provision of the Bill of Rights applied to the states.

That didn't change for many years, with the Court extending protections of the First Amendment to the states 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.

The Fourteenth Amendment's incorporation doctrine reached 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 followed in 2010, *McDonald v. City of Chicago*, 561 U.S. 742 (2010), as did the Eighth Amendment prohibition on excessive fines in 2019. *Timbs*, 139 S. Ct. 682.

Before the Bill of Rights was incorporated against the states, there was logic to the Court's early 1900s reasoning that Congress should likewise be free from the limitations of the Bill of Rights when acting essentially as a state government in an "unincorporated" territory. The *Insular Cases* relied on this distinction expressly in *Mankichi*, stating 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 with the extension of the Bill of Rights to the states through the Fourteenth Amendment, this logic fails. 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 the *Insular Cases* since these fundamental changes in this Court's jurisprudence. The Court should do so now and finally overrule the "much-criticized 'Insular Cases.'" *Aurelius*, 140 S. Ct. at 1665.

IV. CONCLUSION

The judgment of the United States Court of Appeals for the First Circuit should be affirmed, and the *Insular Cases* relegated to where they belong—with *Plessy* on the ash heap of history.

Dated this 7th day of September, 2021.

Respectfully submitted,

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