No. 17-1463

In The
Supreme Court of the United States

LUIS SEGOVIA, ET AL.,

Petitioners,

v.

UNITED STATES OF AMERICA, ET AL.,

Respondents.

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

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

DWYER ARCE
Counsel of Record
KUTAK ROCK LLP
The Omaha Building
1650 Farnam Street
Omaha, Nebraska 68102
402.346.6000
Dwyer.Arce@KutakRock.com

J. RUSSELL B. PATE
THE PATE LAW FIRM
11A Norre Gade
P.O. Box 890
St. Thomas, USVI 00804
340.777.7283
pate@sunlawvi.com

Counsel for Amicus Curiae

[Additional Counsel Listed On Inside Cover]

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

EDWARD L. BARRY
LAW OFFICES OF EDWARD L. BARRY
2120 Company Street, Third Floor
Christiansted, USVI 00820
340.719.0601
ed@AttorneyEdBarry.com

Counsel for Amicus Curiae

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES – Continued

Page

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

Page

OTHER AUTHORITIES

INTEREST OF *AMICUS CURIAE*[1]

The Virgin Islands Bar Association is an integrated bar association with approximately 1,000 members practicing law in the U.S. territory of the Virgin Islands and across the country. The Bar Association operates under the auspices of the Supreme Court of the Virgin Islands with the mission of advancing the administration of justice, enhancing access to justice, and advocating public policy positions for the benefit of the judicial system, its members, and the Virgin Islands as a whole.

In fulfillment of its duties, the Bar Association submits this brief as *amicus curiae* in order to urge the Court to grant the petition for a writ of certiorari as a vehicle to reexamine the *Insular Cases*. Under the discriminatory incorporation doctrine enshrined into constitutional law by the *Insular Cases*, over 100,000 Americans live as second-class citizens in the Virgin Islands—including Bar Association members like petitioner Pamela Colon.

---

[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. Pursuant to Supreme Court Rule 37.2, the Bar Association sent counsel for each party timely notice of its intention to file this brief on May 10, 2018. The Bar Association files this brief with the written consent of all parties. The positions taken in this brief are not intended to reflect the views of any individual member of the Bar Association or the views of the Supreme Court of the Virgin Islands.

The Bar Association is deeply concerned that the Seventh Circuit's decision allows federal and state governments to discriminate between Americans living in different territories without any identifiable justification. This is an unprecedented expansion of the second-class citizenship of Virgin Islanders. The Bar Association urges the Court to take this opportunity to reject the continued application of the *Insular Cases* to deny constitutional rights in the Virgin Islands and other U.S. territories.

SUMMARY OF THE ARGUMENT

In the *Insular Cases*, this Court promised those living in U.S. territories that they would enjoy at least those constitutional rights considered "fundamental." But as the Seventh Circuit's decision demonstrates, that promise has been broken repeatedly. Instead, federal courts have routinely relied on the *Insular Cases*—both explicitly and implicitly—to justify the refusal to extend to the territories constitutional rights considered fundamental in every other context.

The decision below is just the latest example in a long line of cases where federal courts have reflexively relied on the *Insular Cases* to reject any claim by those 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.

There has been a sea change in constitutional law since the *Insular Cases* were decided. The Court repudiated the central holding of *Plessy* over 60 years ago in *Brown v. Board of Education*. *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 grant the writ of certiorari and take this opportunity to rectify the injustice imposed by the *Plessy* Court on generations of Americans living in U.S. territories.

ARGUMENT

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

"In a series of decisions that have come to be known as the *Insular Cases*, the Court created the doctrine of incorporated and unincorporated Territories." *Examining Bd. of Eng'rs, Architects & Surveyors*

v. Flores de Otero, 426 U.S. 572, 599 n.30 (1976).[2] "The former category encompassed those Territories destined for statehood from the time of acquisition, and the Constitution was applied to them with full force. The latter category included those Territories not possessing that anticipation of statehood. As to them, only 'fundamental' constitutional rights were guaranteed to the inhabitants." *Id.* (citations omitted).

Despite the Court's promise that "'fundamental' constitutional rights are guaranteed to inhabitants of [the] territories," *United States v. Verdugo-Urquidez*, 494 U.S. 259, 268 (1990) (quoting *Dorr v. United States*, 195 U.S. 138, 146 (1904)), over the last 117 years, federal courts have routinely relied on the *Insular Cases* as justification for refusing to extend to the territories constitutional rights considered fundamental in every other context. The decision below is just the latest example.

The legal issues actually in dispute are not complicated. By statute, Illinois extends the right to vote in its federal elections to former Illinois residents who move from Illinois to the U.S. territories of American Samoa and the Northern Mariana Islands. That

---

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

statute does not grant the right to vote in Illinois federal elections to those former Illinois residents who move from Illinois to the U.S. territories of the Virgin Islands, Puerto Rico, or Guam.

"[O]nce the franchise is granted to the electorate, lines may not be drawn which are inconsistent with the Equal Protection Clause of the Fourteenth Amendment." *Harper v. Virginia State Bd. of Elections*, 383 U.S. 663, 665 (1966). "[I]f a challenged statute grants the right to vote to some citizens and denies the franchise to others, 'the Court must determine whether the exclusions are necessary to promote a compelling state interest.'" *Dunn v. Blumstein*, 405 U.S. 330, 337 (1972) (quoting *Kramer v. Union Free Sch. Dist. No. 15*, 395 U.S. 621, 627 (1969)). With no compelling state interest identified for the distinction between former Illinois residents living in American Samoa and the Northern Mariana Islands versus those living in the Virgin Islands, Puerto Rico, and Guam, that distinction can't be necessary to promote a compelling state interest.

The Seventh Circuit didn't see it that way. Despite the district court's heavy reliance on the *Insular Cases*, the Seventh Circuit's decision affirming the district court in relevant part didn't cite or directly reference the *Insular Cases*. Yet the legal framework enshrined into constitutional law by this Court in the *Insular Cases* informed every aspect of the Seventh Circuit's opinion.

This is demonstrated by the fact that the Seventh Circuit required the statutory distinction to withstand only rational-basis scrutiny, even though Illinois extended the franchise to former residents living in some U.S. territories and not others without explanation—i.e., "grant[ed] the right to vote to some citizens and denie[d] the franchise to others." *Dunn*, 405 U.S. at 337. The Seventh Circuit's decision to apply rational-basis scrutiny appears to rest entirely on its observation that "the residents of the territories have no fundamental right to vote in federal elections," and "[t]he plaintiffs have no special right simply because they *used to* live in a State." 880 F.3d 384, 390 (emphasis in original). The court concluded that "[b]ecause the Illinois law does not affect a fundamental right or a suspect class, it need only satisfy rational-basis review." *Id.*

The Seventh Circuit then attempted to articulate a rational basis for the arbitrary decision to treat some territories as "part of the United States" and others "as foreign countries." *Id.* at 391. The court emphasized "[o]ne could rationally conclude that [American Samoa and the Northern Mariana Islands] were . . . more similar to foreign nations than were the *incorporated* territories where the plaintiffs reside." *Id.* (emphasis added). Except that the Virgin Islands, Puerto Rico, and Guam—just like American Samoa and the Northern Mariana Islands—have always been and remain *un*incorporated territories under the *Insular Cases* framework. *See, e.g.*, 48 U.S.C. § 1541(a) ("The Virgin Islands . . . are declared an unincorporated territory of

the United States of America."); 48 U.S.C. § 1421a ("Guam is declared to be an unincorporated territory of the United States."); *Balzac*, 258 U.S. at 305 (Puerto Rico is not a "territory which had been incorporated in the Union or become a part of the United States"); *cf. Boumediene v. Bush*, 553 U.S. 723, 726 (2008) (identifying "incorporated Territories" as those "destined for statehood"). So the Seventh Circuit's "rational" basis justifying "grant[ing] the right to vote to some citizens and den[ying] the franchise to others" fails even under the territorial incorporation doctrine of the *Insular Cases*.

Were this any other instance of unexplained and unjustified discrimination in extending the franchise, federal courts would not hesitate to apply strict scrutiny in accordance with *Dunn*. But instead, the application of *Insular Cases*—explicitly by the district court and implicitly by the Seventh Circuit—resulted in the courts below insulating the Illinois law from any real constitutional scrutiny simply because the Americans attempting to vindicate their constitutional rights happen to live in territories rather than states.

Another example is *Balzac*, 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. 258 U.S. 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).

As a plurality of the Court had already explained, "it seems peculiarly anomalous to say that trial before a civilian judge and by an independent jury picked from the common citizenry is not a fundamental right." *Reid v. Covert*, 354 U.S. 1, 9 (1957) (plurality opinion). But in the 50 years since *Duncan* was decided, federal courts have repeatedly rejected the claim that the "fundamental" Sixth Amendment right to a jury trial applies in unincorporated territories. *See, e.g.*, *Commonwealth of N. Mar. I. v. Atalig*, 723 F.2d 682, 688 (9th Cir. 1984) (holding the Sixth Amendment doesn't apply in the Northern Mariana Islands); *Gov't of the V.I. v. Bodle*, 427 F.2d 532, 533 n.1 (3d Cir. 1970) (holding the Sixth Amendment applies in the Virgin Islands only because "Congress . . . has provided the right to a jury trial in criminal cases to the inhabitants of the Virgin Islands by virtue of the Revised Organic Act of 1954"); *King v. Morton*, 520 F.2d 1140, 1147 (D.C. Cir. 1975) (holding Sixth Amendment right to a jury trial not fundamental in American Samoa under the *Insular Cases*). A notable exception is the United States Court for Berlin, which determined "the holdings in the *Insular Cases* that trial by jury in criminal cases was not 'fundamental' in American law . . . was thereafter authoritatively voided in *Duncan*." *United States v. Tiede*, 86 F.R.D. 227 (U.S. Ct. Berlin 1979). And so Germans living in American-occupied post-war Berlin "charged

with criminal offenses [by the United States] have constitutional rights, including the right to a trial by jury," *id.*, while Americans living in U.S. territories still do not.

In a more recent example, the United States Court of Appeals for the District of Columbia Circuit rejected a claim to birthright citizenship under the Fourteenth Amendment made by individuals born in American Samoa. *Tuaua v. United States*, 788 F.3d 300 (D.C. Cir. 2015), *cert. denied*, 136 S. Ct. 2461 (2016). Unlike with respect to every other U.S. territory, the federal government does not recognize those born in American Samoa as U.S. citizens. *Compare* 8 U.S.C. § 1406(b) ("all persons born in [the Virgin Islands] . . . are declared to be citizens of the United States at birth"), *with* 8 U.S.C. § 1408(1) ("A person born in an outlying possession of the United States" "shall be nationals, but not citizens, of the United States at birth."), *and* 8 U.S.C. § 1101(29) ("The term 'outlying possessions of the United States' means American Samoa and Swains Island.").

The court rationalized its reliance on the *Insular Cases*—despite acknowledging "some aspects of the *Insular Cases*' analysis may now be deemed politically incorrect"—by insisting "the framework remains both applicable and of pragmatic use in assessing the applicability of rights to unincorporated territories." *Tuaua*, 788 F.3d at 307. Under that framework, only "fundamental limitations in favor of personal rights" are guaranteed to the residents of unincorporated territories, and birthright citizenship is not one of those

fundamental rights. *Id.* at 309. But as courts have recognized, "United States citizenship itself is a fundamental right." *Mondaca-Vega v. Lynch*, 808 F.3d 413, 431 (9th Cir. 2015) (citing *Trop v. Dulles*, 356 U.S. 86, 93 (1958) (plurality opinion)). Yet again the *Insular Cases* served to deny basic constitutional rights to those living in the territories, despite the promise made in the *Insular Cases* that "fundamental" constitutional rights exist in the territories.

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

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

The lone constitutional provision addressing territories is Article IV, § 3, cl. 2, providing in relevant part "[t]he Congress shall have power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States." U.S. Const. art. IV, § 3, cl. 2. The Court recently recognized that this power is not without limits, as "[t]he Constitution grants Congress and the President

the power to acquire, dispose of, and govern territory, not the power to decide when and where its terms apply." *Boumediene*, 553 U.S. at 727. Yet as demonstrated by this case, federal courts continue to rely on a framework created by the *Insular Cases* that is at odds with the Constitution itself.

"In interpreting [constitutional] text, we are guided by the principle that the Constitution was written to be understood by the voters; its words and phrases were used in their normal and ordinary as distinguished from technical meaning." *District of Columbia v. Heller*, 554 U.S. 570, 576 (2008) (quoting *United States v. Sprague*, 282 U.S. 716, 731 (1931)) (internal quotation marks and brackets omitted). "Normal meaning may of course include an idiomatic meaning, but it excludes secret or technical meanings that would not have been known to ordinary citizens in the founding generation." *Id.* at 576–77. Without mention of "incorporation" or any analogous concept in the Constitution, such a constitutional doctrine would not have been known to ordinary citizens in the founding generation.

What would have been known to ordinary citizens in the founding generation is better approximated by comparison to the Enclave Clause, Article I, § 8, cl. 17, providing Congress's authority over the District of Columbia. "The power of Congress over the District and its power over the Territories are phrased in very similar language in the Constitution." *District of Columbia v. John R. Thompson Co.*, 346 U.S. 100, 105–06 (1953). "Plenary jurisdiction over the District of

Columbia is specifically vested in Congress by Art. I, § 8, of the Constitution," *Doe v. McMillan*, 412 U.S. 306, 334 (1973), providing Congress the authority "[t]o exercise exclusive Legislation in all Cases whatsoever, over such District." U.S. Const. art. I, § 8, cl. 17.

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

Given the "very similar language" of the Territorial Clause and the Enclave Clause, there is no support in the text of the Constitution for the distinction between the rights of those living in the District of Columbia and the rights of those living in the territories. The District of Columbia government and the governments of the territories "are not sovereigns distinct from the United States." *Puerto Rico v. Sanchez Valle*, 136 S. Ct. 1863, 1873 (2016). "[W]hereas a State does not derive its powers from the United States, a territory does[,] . . . exert[ing] all their powers by authority of the Federal Government." *Id.* (internal quotation marks omitted). "[A] territorial government is entirely

the creation of Congress, and its judicial tribunals exert all their powers by authority of the United States. When a territorial government enacts and enforces . . . laws to govern its inhabitants, it is not acting as an independent political community like a State, but as an agency of the federal government." *United States v. Wheeler*, 435 U.S. 313, 320–21 (1978), *superseded by statute on other grounds as recognized by United States v. Lara*, 541 U.S. 193, 207 (2004).

And "Congress cannot grant . . . what it does not possess." *Perez v. Mortg. Bankers Ass'n*, 135 S. Ct. 1199, 1224 (2015) (Thomas, J., concurring) (quoting *Bowsher v. Synar*, 478 U.S. 714, 726 (1986)). This principle has been consistently observed with regard to the District of Columbia, with the Court explaining "there is no constitutional barrier to the delegation by Congress to the District of Columbia of full legislative power *subject of course to constitutional limitations to which all lawmaking is subservient*." *John R. Thompson Co.*, 346 U.S. at 109 (emphasis added). But under the *Insular Cases*, all lawmaking is not subservient to those constitutional limitations, and Congress has delegated to territorial governments legislative authority that it cannot itself exercise. *Compare Atalig*, 723 F.2d at 690–91 (affirming the constitutionality of "the NMI's elimination of jury trials" under the *Insular Cases*), *with Hof*, 174 U.S. at 5 ("It is beyond doubt, at the present day, that the provisions of the constitution of the United States securing the right of trial by jury,

whether in civil or in criminal cases, are applicable to the District of Columbia.").

With no basis in the text of the Constitution, the *Insular Cases* are, "[f]rom the standpoint of an originalist . . . 'a strict constructionist's worst nightmare.'" Gary Lawson & Robert D. Sloane, *The Constitutionality of Decolonization by Associated Statehood: Puerto Rico's Legal Status Reconsidered*, 50 B.C. L. Rev. 1123, 1177 (2009) (quoting Juan R. Torruella, *The Insular Cases: The Establishment of a Regime of Political Apartheid*, 29 U. Pa. J. Int'l L. 283 (2007)).

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

The fundamental inconsistency between the territorial incorporation doctrine and the text of the Constitution was outlined by Justice Harlan in one of the

first *Insular Cases*, where he criticized the majority for "plac[ing] Congress above the Constitution." *Mankichi*, 190 U.S. at 239 (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 239–40 (Harlan, J., dissenting); *see also* Charles E. Littlefield, *The Insular Cases*, 15 Harv. L. Rev. 169, 170 (1901) ("The *Insular Cases*, in the manner in which the results were reached, the incongruity of the results, and the variety of inconsistent views expressed by the

different members of the court, are, I believe, without a parallel in our judicial history.").

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

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

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

"[*S*]*tare decisis* does not prevent . . . overruling a previous decision where there has been a significant change in, or subsequent development of, our constitutional law." *Id*. at 235–36. 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, 855 (1992); *accord* Oliver Wendell Holmes, *The Common Law* 8 (M. Howe ed. 1963) ("The customs, beliefs, or needs of a primitive time establish a rule or a formula. In the course of centuries the custom, belief, or necessity disappears, but the rule remains.").

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

The Court repudiated the central holding of *Plessy* over 60 years ago in *Brown v. Board of Education*, 347 U.S. 483 (1954). Still the legacy of the *Plessy* Court governs the lives of four million Americans—or as the author of *Plessy* put it in announcing the judgment of the Court in the first of the *Insular Cases*, four million members of "alien races, differing from us in religion, customs, laws, methods of taxation, and modes of thought." *Downes*, 182 U.S. at 287 (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.

CONCLUSION

For these reasons, the Court should grant the petition for a writ of certiorari and finally vindicate the basic constitutional rights of those Americans living in U.S. territories.

Respectfully submitted,

DWYER ARCE
Counsel of Record
KUTAK ROCK LLP
The Omaha Building
1650 Farnam Street
Omaha, Nebraska 68102
402.346.6000
Dwyer.Arce@KutakRock.com

J. RUSSELL B. PATE
THE PATE LAW FIRM
11A Norre Gade
P.O. Box 890
St. Thomas, USVI 00804
340.777.7283
pate@sunlawvi.com

EDWARD L. BARRY
LAW OFFICES OF EDWARD L. BARRY
2120 Company Street, Third Floor
Christiansted, USVI 00820
340.719.0601
ed@AttorneyEdBarry.com

Counsel for Amicus Curiae