No. 20-5133

In The
Supreme Court of the United States

STEVEN BAXTER,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

BRIEF OF *AMICUS CURIAE* VIRGIN ISLANDS BAR ASSOCIATION IN SUPPORT OF PETITION FOR CERTIORARI

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QUESTION PRESENTED

Should the *Insular Cases* be further extended to deny Fourth Amendment protections to Americans traveling to and from U.S. territories?

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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 operates with the mission of advancing the administration of justice, enhancing access to justice, and advocating public policy positions for the benefit of the judicial system, its members, and the people of the Virgin Islands.

In fulfillment of its duties, the Bar Association submits this brief as *amicus curiae* urging the Court to grant the petition for a writ of certiorari to the United States Court of Appeals for the Third Circuit and reverse the decision in *United States v. Baxter*, 951 F.3d 128 (3d Cir. 2020).

The Bar Association's duty to intervene in this matter as an advocate for the people of the Virgin Islands is demonstrated by the Third Circuit's heavy reliance on the *Insular Cases* in holding that travel from

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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 September 22, 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.

the mainland United States to the Virgin Islands of the United States is the same as crossing an international border. Although not explicit in the opinion below, the limitation on the application of the Fourth Amendment in the Virgin Islands originates from the Third Circuit's extension of the *Insular Cases* in *United States v. Hyde*, 37 F.3d 116 (3d Cir. 1994).

In *Hyde*, the Third Circuit relied on the *Insular Cases* and the status of the Virgin Islands as "an unincorporated territory of the United States." 37 F.3d at 121. In the Third Circuit's view, the *Insular Cases* support a categorical rule that Americans traveling between the Virgin Islands and the mainland United States have "reasonable expectations of individual privacy" that are not "materially greater than the reasonable privacy expectations of travelers at an international border." *Hyde*, 37 F.3d at 122; *see also United States v. Mora-Santana*, 99 Fed. Appx. 397, 399 n.3 (3d Cir. 2004) ("There is no question under this Court's precedent that the territorial border between the U.S. Virgin Islands and the United States is treated the same as an international border for the purposes of Fourth Amendment scrutiny.").

The Third Circuit's decisions in *Hyde* and *Baxter* represent an expansion of the *Insular Cases* far beyond what this Court's precedent requires or permits. Allowing these decisions to stand adds one more constitutional right to the growing list of rights Americans in U.S. territories are denied.

The Bar Association urges the Court to grant the petition for a writ of certiorari and reaffirm that an American's freedom from unreasonable search and seizure cannot be "switch[ed] . . . on or off at will" by the arbitrary decisions of federal authorities. *Boumediene v. Bush*, 553 U.S. 723, 727 (2008).

II. SUMMARY OF THE ARGUMENT

In the *Insular Cases*, those living in U.S. territories were promised at least those constitutional rights considered "fundamental." But that promise was broken. Instead, federal courts have routinely relied on the *Insular Cases* to justify the refusal to recognize constitutional rights considered fundamental in every other context.

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

The Virgin Islands Bar Association, on behalf of its members and the more than 100,000 members of "alien races" it serves in the "unincorporated" territory of the Virgin Islands of the United States, urges the Court to grant certiorari and prevent the further

extension of the *Insular Cases* to deny yet another constitutional right to Americans in U.S. territories.

III. ARGUMENT

A. The court below further extended the *Insular Cases* contrary to *Aurelius*.

Last term, the Court held "the Constitution's Appointments Clause applies to the appointment of officers of the United States with powers and duties in and in relation to Puerto Rico." *Fin. Oversight & Mgmt. Bd. for P.R. v. Aurelius Inv., LLC*, 140 S. Ct. 1649, 1665 (2020). The Court noted that "[g]iven this conclusion, we need not consider the request by some of the parties that we overrule the much-criticized 'Insular Cases' and their progeny." *Id.*[2] And because "[t]hose cases did not reach this issue, . . . whatever their continued validity we will not extend them in these cases." *Id.*

In reaching this conclusion, the Court relied on an earlier decision, where a plurality of the Court determined "that neither [the *Insular Cases*] nor their reasoning should be given any further expansion." *Reid v.*

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[2] In *Examining Bd. of Engineers v. Flores de Otero*, 426 U.S. 572 (1976), 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).

Covert, 354 U.S. 1, 14 (1957) (plurality opinion). The *Reid* plurality criticized "[t]he concept that the Bill of Rights and other constitutional protections against arbitrary government are inoperative when they become inconvenient or when expediency dictates otherwise," and warned that this "very dangerous doctrine . . . if allowed to flourish would destroy the benefit of a written Constitution and undermine the basis of our government." 354 U.S. at 14 (plurality opinion); *accord Torres v. Puerto Rico*, 442 U.S. 465, 470 (1979) ("[T]he limitation on the application of the Constitution in unincorporated territories is based in part on the need to preserve Congress' ability to govern such possessions.").

Like the Appointments Clause, the *Insular Cases* "did not reach [the] issue" presented to the Third Circuit: Whether "the Fourth Amendment permits routine warrantless customs searches at the customs border between the mainland United States and the Virgin Islands." *Baxter*, 951 F.3d at 134.

Yet, in resolving this issue, the Third Circuit looked to the *Insular Cases*. As the court below acknowledged, "[t]he border between the United States and the Virgin Islands is neither an international boundary nor its functional equivalent." *Baxter*, 951 F.3d at 133. Nonetheless, the court determined the *Insular Cases* dictate that Congress may treat it as an international border since the "current legal relationship between the Virgin Islands and the United States is not materially different from that of Puerto Rico and the Panama Canal Zone at the time [the *Insular Cases*] were decided." *Hyde*, 37 F.3d at 121.

It may be true that "since the acquisition of the Virgin Islands, Congress has consistently . . . authorized customs officials to search vessels and goods passing between the Virgin Islands and the rest of the country." *Hyde*, 37 F.3d at 121. But "[u]nlawful 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).

The Court should grant the petition for a writ of certiorari to prevent this further extension of the *Insular Cases* to deny Americans in U.S. territories yet another right guaranteed to every other American.

B. There is no basis to apply the Fourth Amendment differently in the Virgin Islands than the mainland.

The court below reasoned that "*Hyde* . . . observ[ed] that the application of the border-search exception at the customs border is consistent with the protections of the Fourth Amendment, which apply *within* the territory of the Virgin Islands." *Baxter*, 951 F.3d at 134 (citing Revised Organic Act of 1954, 48 U.S.C. § 1561) (emphasis in original). The Court must reject this attempt to distinguish the operation of the Fourth Amendment in the Virgin Islands versus the mainland United States.

As recognized by statute, "[t]he Virgin Islands . . . [is] an unincorporated territory of the United States of America." 48 U.S.C. § 1541(a). Like the Virgin Islands, "Puerto Rico continues to be an unincorporated territory of the United States." *Popular Democratic Party v. Puerto Rico*, 24 F. Supp. 2d 184, 193 (D.P.R. 1998) (citing *Balzac v. Porto Rico*, 258 U.S. 298 (1922)).

Despite this "unincorporated" status, the Court unequivocally "conclude[d] that the constitutional requirements of the Fourth Amendment apply to [Puerto Rico]" directly, even without Congress explicitly extending it via statute. *Torres*, 442 U.S. at 471. There is no reason the Fourth Amendment would not also apply of its own force to the similarly "unincorporated" territory of the Virgin Islands.

So while the court below observed "the protections of the Fourth Amendment . . . apply *within* the territory of the Virgin Islands," *Baxter*, 951 F.3d at 134 (citing 48 U.S.C. § 1561) (emphasis in original), this is a distinction without a difference. Just as the Fourth Amendment "appl[ies] *within* the territory of the Virgin Islands," it also applies *within* the territory of each of the 50 states and the District of Columbia. But this does not subject interstate travelers to warrantless searches upon crossing state lines. The result should be the same with respect to those travelers going to or coming from one of the states to the Virgin Islands—the Fourth Amendment applies equally *within* both.

The lack of contiguity between the mainland United States and the Virgin Islands makes no difference. A territory "is not unique because it is an island . . . neither Alaska nor Hawaii are contiguous to the continental body of the United States." *Torres*, 442 U.S. at 474.

C. The *Insular Cases* are inconsistent with 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. At the very least, this renders the Third Circuit's extension of the *Insular Cases* to the Fourth Amendment unwarranted and contrary to this Court's precedent.

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."). And to the extent the *Insular Cases* were in any way supported by this Court's jurisprudence in the early 1900s, that support is gone now that the Bill of Rights have been extended to the states through the Fourteenth Amendment.

"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, this Court had yet to hold that the Bill of Rights restricted the actions of state governments by virtue of the Fourteenth Amendment incorporation doctrine. The Bill of Rights wasn't applied to state governments until decades after the first of the *Insular Cases*, 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's right of privacy" in 1961. *Mapp v. Ohio*, 367 U.S. 643, 655 (1961); *see also Aguilar v. Texas*, 378 U.S. 108 (1964) (warrant requirement). Same with the Fifth and Sixth Amendments, *Benton v. Maryland*, 395 U.S. 784 (1969) (right against double jeopardy), *Duncan v. Louisiana*, 391 U.S. 145 (1968)

(right to a jury trial), the Second Amendment in 2010, *McDonald v. City of Chicago*, 561 U.S. 742 (2010), and the Eighth Amendment prohibition on excessive fines. *Timbs*, 139 S. Ct. 682.

So when the *Insular Cases* were decided, it was at least consistent to hold that Congress was not restricted by the Bill of Rights when acting with the power of a state government with respect to 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.

IV. CONCLUSION

The petition for a writ of certiorari should be granted.

Dated this 9th day of October, 2020.

Respectfully submitted,

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