No. 21-1394

IN THE

Supreme Court of the United States

JOHN FITISEMANU, *et al.*,

Petitioners,

v.

UNITED STATES OF AMERICA, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR SCHOLARS OF CONSTITUTIONAL LAW AND LEGAL HISTORY AS AMICI CURIAE IN SUPPORT OF PETITIONERS

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INTEREST OF AMICI CURIAE[1]

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Amici have written and edited works about the *Insular Cases*, decisions of this Court upon which the court of appeals relied in this case. Amici take no position on whether the Fourteenth Amendment confers

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[1] No counsel for a party authored this brief in whole or in part, and no entity or person other than amici or their counsel made a monetary contribution intended to fund the preparation or submission of this brief. Sup. Ct. R. 37.6. All parties received timely notice and have consented to the filing of this brief. *Id.* 37.2(a).

birthright citizenship upon persons born in American Samoa. They do, however, disagree with the conclusion of the court of appeals that the *Insular Cases* provide the answer to that question. As amici explain, the court of appeals' principal opinion erroneously interprets the *Insular Cases* as establishing an approach to answering the question whether constitutional provisions apply to the territories, and then uses that approach to hold the Citizenship Clause inapplicable to the territory of American Samoa. Although it is because of the *Insular Cases* that the issue whether the Citizenship Clause applies in U.S. territories is even a question, the *Insular Cases* provide no guidance on how to answer that question. Moreover, the *Insular Cases* rest on offensive ideas about race, and for that reason alone should no longer be relied upon by any court. Amici therefore urge this Court to grant review and either provide much-needed guidance on the correct interpretation of the *Insular Cases* or, better still, overrule them altogether.

SUMMARY OF ARGUMENT

The Fourteenth Amendment guarantees citizenship to "[a]ll persons born or naturalized in the United States." In concluding that this guarantee does not extend to individuals born in American Samoa, the court of appeals' principal opinion relied on a widespread—but gravely mistaken—interpretation of the *Insular Cases*. Under that misreading, the Constitution distinguishes between "incorporated" territories, where the Constitution applies in its entirety, and "unincorporated" territories like American Samoa, where constitutional provisions apply only if they guarantee a "fundamental right" or "the circumstances of the territory warrant their application." Pet. App. 15a, 32a-40a.

While the *Insular Cases* did distinguish between incorporated and unincorporated territories, they did not distinguish between them in the manner described above. Instead, to the extent those cases addressed constitutional questions, they comprise narrow holdings falling into two distinct categories.[2] The first category concerns whether constitutional clauses that define their own geographic scope encompass unincorporated territories. The second category concerns whether certain constitutional rights—of undefined geographic scope—apply in those territories.

The leading case in the series, *Downes* v. *Bidwell*, 182 U.S. 244 (1901), belongs in the first category. *Downes* asked whether the phrase "the United States" as used in the Uniformity Clause included the territories; it did not address the Citizenship Clause of the Fourteenth Amendment. Subsequent *Insular Cases* fall into the second category, asking whether particular constitutional rights applied in particular territories. *See, e.g.*, *Balzac* v. *Porto Rico*, 258 U.S. 298, 309 (1922) (whether Sixth Amendment jury trial was applicable in local courts in Puerto Rico); *Ocampo* v. *United States*, 234 U.S. 91, 98 (1914) (whether Fifth Amendment grand jury clause was applicable in territorial court of the Philippines).

The *Insular Cases* are of at most limited relevance here. They establish that an unincorporated territory may or may not be part of "the United States" for purposes of a given constitutional provision, but they do not offer guidance as to how to resolve that question for any provision other than the Uniformity Clause. Even

[2] Some of the cases concerned questions of statutory interpretation. *See, e.g.*, *Huus* v. *New York & Porto Rico S.S. Co.*, 182 U.S. 392, 396-397 (1901). Those cases have even less relevance here.

Downes is of no help because, notwithstanding the fact that both the Uniformity Clause and the Citizenship Clause reference "the United States," there are important differences between the two provisions. The question presented here accordingly must be answered through a clause-specific inquiry that none of the *Insular Cases* ever conducted.

The court of appeals misunderstood the import of the *Insular Cases*. Like other lower courts confronting questions involving the applicability of constitutional provisions in unincorporated territories, the court of appeals misread the *Insular Cases* as governing the application of the Constitution *in its entirety*. Worse, the court of appeals then became the second circuit court to misapply the "rights" analysis to a clause that defines its own geographic scope. *See Tuaua* v. *United States*, 788 F.3d 300 (D.C. Cir. 2015). At minimum, this Court should correct the widespread misunderstanding of the *Insular Cases*—and make clear that they do not provide guidance on whether the Citizenship Clause applies to individuals born in the unincorporated territories. But the Court should go further. The *Insular Cases*' doctrine of territorial incorporation lacks any basis in the Constitution and is grounded in "ugly racial stereotypes" and "the theories of social Darwinists," *United States* v. *Vaello Madero*, No. 20-303, slip op. 5 (U.S. Apr. 21, 2022) (Gorsuch, J., concurring). The Court should therefore repudiate the doctrine of territorial incorporation—and to the extent necessary, overrule the *Insular Cases*—once and for all.

ARGUMENT

I. GUIDANCE FROM THIS COURT ABOUT THE PROPER APPLICATION OF THE *INSULAR CASES* IS NECESSARY

A. The *Insular Cases* Govern Only A Limited Number Of Constitutional Provisions

The *Insular Cases* concerned the reach of particular provisions of the Constitution and federal law in overseas territories annexed following the Spanish-American War of 1898.[3] The first decisions in the series, handed down in 1901, concerned the application of tariffs on goods imported into and exported from the territories. *See, e.g.*, *Dooley* v. *United States*, 183 U.S. 151, 153, 156-157 (1901) (duties on goods shipped to Puerto Rico did not violate Export Tax Clause, U.S. Const. art. I, § 9, cl. 5); *Huus* v. *New York & Porto Rico S.S. Co.*, 182 U.S. 392, 396-397 (1901) (vessels involved in trade between Puerto Rico and U.S. ports engaged in "domestic trade" under federal tariff laws). Without exception, these "Insular Tariff Cases," *De Lima* v. *Bidwell*, 182 U.S. 1, 2 (1901), involved "narrow legal issues." Kent, Boumediene, Munaf, *and the Supreme Court's Misreading of the* Insular Cases, 97 Iowa L. Rev. 101, 108 (2011).

Of the early cases, only two concerned the applicability of constitutional provisions in the newly annexed territories. *Downes* v. *Bidwell*, 182 U.S. 244 (1901), held that duties imposed on goods shipped from Puerto

[3] Scholars differ on which decisions make up the *Insular Cases*, but there is nearly universal consensus that the series begins with cases decided in May 1901, such as *Downes* v. *Bidwell*, 182 U.S. 244 (1901), and culminates with *Balzac* v. *Porto Rico*, 258 U.S. 298 (1922). *See* Sparrow, *The* Insular Cases *and the Emergence of American Empire* 257-258 (2006).

Rico to New York did not violate the Uniformity Clause of Article I, Section 8, which requires that "all Duties, Imposts and Excises shall be uniform *throughout the United States*" (emphasis added). And *Dooley* held that duties on goods shipped from New York to Puerto Rico did not violate the Export Clause of Article I, Section 9, which provides that "[n]o Tax or Duty shall be laid on Articles exported from any state." 183 U.S. at 156-157. In those decisions, the Court examined whether clauses specifying a geographic scope encompassed the new territories. Thus, as this Court has more recently explained, "'the real issue in the *Insular Cases* was *not whether the Constitution extended to* [territories] but *which of its provisions were applicable* by way of limitation upon the exercise of executive and legislative power.'" *Boumediene* v. *Bush*, 553 U.S. 723, 758 (2008) (emphasis added).

Downes, the "seminal case" in the series, illustrates the limited scope of this Court's inquiry in those decisions. Sparrow, *The* Insular Cases *and the Emergence of American Empire* 80 (2006). Not only did *Downes* concern a single constitutional provision—not the entire Constitution—but a fractured majority of the Court agreed on little other than the ultimate result. Justice Brown announced the judgment but wrote for himself only. He posited that the phrase "the United States" included only "the states whose people united to form the Constitution, and such as have since been admitted to the Union." 182 U.S. at 277 (emphasis and quotation marks omitted); *see id.* at 260-261. Justice Brown reasoned that the Constitution's terms were not applicable to territories until Congress chose expressly to "extend" them. *Id.* at 271.

The other eight justices rejected Justice Brown's "radical view." Kent, 97 Iowa L. Rev. at 157. In a

separate opinion that marked the "origin of the doctrine of territorial incorporation," *id.*, Justice White (joined by Justices Shiras and McKenna) reasoned that the Uniformity Clause did not constrain Congress in legislating with respect to the newly annexed territories because they had not been "incorporated" into the United States for purposes of that clause, either by legislation or by treaty. 182 U.S. at 287-288 (White, J., concurring). Justice White's novel distinction between "incorporated" and "unincorporated" territories eventually commanded a majority of the Court. *See Balzac* v. *Porto Rico*, 258 U.S. 298, 305 (1922) ("[T]he opinion of Mr. Justice White … in *Downes* v. *Bidwell*, has become the settled law of the court."). In *Downes* itself, however, the only issue presented—and the only issue dependent on Justice White's distinction between "incorporated" and "unincorporated" territories—was whether the unincorporated territories were part of "the United States" as that phrase is used *in the Uniformity Clause*.

B. The "Fundamental Rights" And "Impracticable And Anomalous" Standards Are Inapplicable To Questions Of Geographic Scope

1. Later decisions of this Court (commonly included in the *Insular* series) expanded on Justice White's territorial incorporation doctrine. However, as the government noted in the proceedings below, those decisions dealt with the applicability of specific constitutional provisions concerning individual rights—not provisions defining their geographic scope with the phrase "the United States." The only rights they held inapplicable were those related to proceedings in criminal trials in territorial courts. *See, e.g.*, *Balzac*, 258 U.S. at 309 (Sixth Amendment jury trial inapplicable in local

courts in Puerto Rico); *Ocampo* v. *United States*, 234 U.S. 91, 98 (1914) (Fifth Amendment grand jury clause inapplicable in territorial court of the Philippines); Kent, *The Jury and Empire: The* Insular Cases *and the Anti-Jury Movement in the Gilded Age and Progressive Era*, 91 S. Cal. L. Rev. 375, 380 (2018).

Refining the "incorporation" distinction that Justice White developed in *Downes*, those later cases "explained that Congress, despite its plenary power over all territories, did not have the power to withhold jury trial rights from incorporated territories, whereas it could withhold them from unincorporated territories." Burnett, *A Convenient Constitution? Extraterritoriality After* Boumediene, 109 Colum. L. Rev. 973, 991-992 (2009). And in support of that distinction, the Court reasoned that the rights at issue were not "fundamental." *Id.* at 992. None of the later cases held, as the court of appeals here did (Pet. App. 40a), that the applicability of a right in a territory could turn on whether elected officials in that territory believed that a majority of territorial inhabitants might not want it to apply (Pet. App. 38a-39a).

2. Though commonly attributed to the *Insular Cases* (*e.g.*, Pet. App. 34a), the "impracticable and anomalous" standard originated decades later, in Justice Harlan's concurrence in *Reid* v. *Covert*, 354 U.S. 1, 74-78 (1957). That case concerned not U.S. territories but U.S. military bases in foreign countries. In *Reid*, the Court held that civilian dependents living with servicemembers on bases abroad enjoyed the right to a trial by jury in capital cases. Justice Black's plurality opinion found the *Insular Cases* immaterial to that question. The *Insular Cases*, Justice Black explained, did not have "anything to do with military trials," so they could not "properly be used as vehicles to support

an extension of military jurisdictions to civilians." 354 U.S. at 14 (plurality opinion). "Moreover," Justice Black added, "neither the [*Insular Cases*] nor their reasoning should be given any further expansion." *Id.*

Justice Harlan viewed things differently. According to him, when "properly understood," the *Insular Cases* were relevant insofar as they instructed that "there is no rigid and abstract rule that Congress, as a condition precedent to exercising power over Americans overseas, must exercise it subject to all guarantees of the Constitution, no matter what the conditions and considerations are that would make adherence to a specific guarantee altogether impracticable and anomalous." *Reid*, 354 U.S. at 67, 74 (Harlan, J., concurring). For Justice Harlan, in other words, "the question [was] which guarantees of the Constitution should apply in view of the particular circumstances, the practical necessities, and the possible alternatives which Congress had before it." *Id.* at 75. Under that functional approach—developed, again, in the context of U.S. military bases *abroad*—Justice Harlan saw no ground to deny the civilian dependents at issue a jury trial given the capital nature of their offenses. *Id.* at 76.

3. As explained in greater detail in Part III below, both the *Insular Cases*' "fundamental rights" analysis and Justice Harlan's "impracticable and anomalous" inquiry are of questionable validity. But even on their own terms, they are inapplicable in this case, as the government acknowledged below. U.S. C.A. Br. 20. Unlike the constitutional provisions at issue in cases involving individual rights, the Citizenship Clause defines its own geographic scope with the phrase "United States": "All persons born or naturalized *in the United States* and subject to the jurisdiction thereof, are citizens of the United States." U.S. Const. amend. XIV,

§ 1 (emphasis added). The question in this case is therefore whether unincorporated U.S. territories fall within that defined geographic scope—whether such territories are "in the United States" as that phrase is used in the Citizenship Clause.

This Court has never used the "fundamental rights" or "impracticable and anomalous" tests to answer the question whether a constitutional provision defining its own geographic scope includes an unincorporated territory. That is for good reason: The "fundamental rights" and "impracticable and anomalous" tests examine legal and cultural traditions. Such traditions have been considered relevant when determining the substantive status of individual rights even *outside* the territorial context. Within the fifty States, this Court has said that "the Due Process Clause specially protects those fundamental rights and liberties which are, objectively, 'deeply rooted in this Nation's history and tradition.'" *Washington* v. *Glucksberg*, 521 U.S. 702, 720-721 (1997) (quoting *Moore* v. *City of E. Cleveland*, 431 U.S. 494, 503 (1977)). Likewise, a "Bill of Rights protection is incorporated" against the States by virtue of the Due Process Clause "if it is 'fundamental to our scheme of ordered liberty,' or 'deeply rooted in this Nation's history and tradition.'" *Timbs* v. *Indiana*, 139 S. Ct. 682, 687 (2019) (quoting *McDonald* v. *City of Chicago*, 561 U.S. 742, 767 (2010)). In cases involving U.S. territories, the "fundamental rights" and "impracticable and anomalous" inquiries resemble that jurisprudence—asking how the particular individual right at issue may apply harmoniously with the legal

and cultural traditions of the particular territory at issue (if at all).[4]

In cases involving constitutional provisions defining their own geographic scope, however, these pragmatic, cultural considerations are inapposite. The task here is not to establish the precise substantive contours of citizenship; the task is simply to interpret the words "in the United States" as used in a specific constitutional provision. The legal and cultural traditions of the territories have no bearing on that question.

C. The Decision Below Exemplifies And Exacerbates The Enduring Confusion About The *Insular Cases*

Despite the *Insular Cases*' narrow holdings and the *Reid* plurality's admonition against extending them, lower courts have frequently assumed that the *Insular Cases* provide the answers to any and all constitutional questions involving the territories.[5] The Tenth Circuit

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[4] *See, e.g.*, *King* v. *Morton*, 520 F.2d 1140, 1147 (D.C. Cir. 1975) ("[I]t must be determined whether the Samoan mores and matai culture … will accommodate a jury system in which a defendant is tried before his peers."); *King* v. *Andrus*, 452 F. Supp. 11, 15-16 (D.D.C. 1977) (applying "impracticable and anomalous" test on remand and concluding that a jury system would be "entirely feasible" in American Samoa because the one "major cultural difference between the United States and American Samoa is that land is held communally in Samoa," and "[t]he jury trial requirement in criminal proceedings would have no foreseeable impact on that system").

[5] *See, e.g.*, *Davis* v. *Commonwealth Election Comm'n*, 844 F.3d 1087, 1095 (9th Cir. 2016) ("The Insular Cases held that [the] Constitution applies in full to 'incorporated' territories, but that elsewhere, absent congressional extension, only 'fundamental' constitutional rights apply." (quotation marks omitted)); *Valmonte* v. *INS*, 136 F.3d 914, 918 (2d Cir. 1998) (*Insular Cases* were

made the same mistake below. Moreover, it is now the second court of appeals to have relied erroneously on the *Insular Cases* to hold the Citizenship Clause inapplicable to people born in American Samoa; the D.C. Circuit made the same mistake in *Tuaua* v. *United States*, 788 F.3d 300 (D.C. Cir. 2015). In both cases, the error was twofold: The courts looked to the *Insular Cases* for the answer to a question those cases did not address—whether the phrase "in the United States" *in the Citizenship Clause* includes the unincorporated territories—and they conceived of the question presented as a rights question instead of a geographic scope question.

The courts in both *Tuaua* and this case concluded that they were bound to apply the *Insular Cases* in light of this Court's decision in *Boumediene*. Pet. App. 16a-17a; *Tuaua*, 788 F.3d at 306-307. Unlike the issue here, however, *Boumediene* involved a rights question, not a constitutional provision that expressly defines its own geographic scope. Moreover, while *Boumediene* did rely on the *Insular Cases*, it relied on them only in part, using the "impracticable and anomalous" inquiry as only one factor in a three-factor test concerning whether the Suspension Clause applies at Guantánamo Bay. *See* 553 U.S. at 766. The "citizenship and status" of the individuals at issue was a separate factor, the answer to which in no way depended on the "impracticable and anomalous" test. *Id.* The *Boumediene* decision

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authoritative on "territorial scope of the term 'the United States' in the *Fourteenth Amendment*" (emphasis added)); *Lacap* v. *INS*, 138 F.3d 518, 519 (3d Cir. 1998) (per curiam) (following *Valmonte*); *Nolos* v. *Holder*, 611 F.3d 279, 282-284 (5th Cir. 2010) (per curiam) (same).

accordingly does not support the court of appeals' reliance on the *Insular Cases* here.

The erroneous decisions here and in *Tuaua* implicate important questions of federal law that fundamentally affect how the Constitution applies in U.S. territories. Sup. Ct. R. 10(c). These and other lower court decisions relying on the *Insular Cases* also conflict with this Court's repeated admonitions that the "Insular *Cases* should not be further extended." *Financial Oversight & Mgmt. Bd. for P.R.* v. *Aurelius Inv., LLC*, 140 S. Ct. 1649, 1665 (2020); *Reid*, 354 U.S. at 14 (plurality opinion). This case affords the Court the opportunity to provide urgently needed guidance and to ensure that the lower courts finally heed its admonition.

II. THIS COURT SHOULD MAKE CLEAR THAT THE *INSULAR CASES* DO NOT GOVERN THE GEOGRAPHIC SCOPE OF THE CITIZENSHIP CLAUSE

Like this case—but unlike *Boumediene* and all of the *Insular Cases* concerning the applicability of rights provisions—*Downes* did involve a geographic scope question, namely the meaning of the phrase "the United States" as used in the Uniformity Clause of Article I, Section 8. But for several reasons, *Downes* is of limited relevance to this case.

First, the five justices in the *Downes* majority expressly limited their holding to the facts at issue, and reached that result by following different paths. *See* 182 U.S. at 244 n.1. Even if the opinions constituting the majority—which differed and indeed conflicted with each other on their rationale—could be pieced together to form a precedent, that precedent would govern only the Uniformity Clause. *Arizona* v. *Inter Tribal Council of Ariz., Inc.*, 570 U.S. 1, 16 n.8 (2013); *see also Ramos* v. *Louisiana*, 140 S. Ct. 1390, 1402 (2020)

(opinion of Gorsuch, J., joined by Ginsburg & Breyer, JJ.) (similarly fractured decision did not "suppl[y] a governing precedent").

Second, there are important differences between the Uniformity Clause and the Citizenship Clause. The clauses were enacted almost a century apart, they reflected different historical understandings, and they emerged in dramatically different legal contexts. The fundamental purpose of the Citizenship Clause was to repudiate the infamous decision in *Dred Scott* v. *Sandford*, which held that Black people could not become citizens because they were "a subordinate and inferior class of beings," 60 U.S. (19 How.) 393, 404-405 (1857). *See The Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 73 (1872) (noting that the Citizenship Clause "overturns the Dred Scott decision"). The context in which the Citizenship Clause was enacted thus points decidedly against a rule that allows Congress to make distinctions among Americans for purposes of who is a citizen.

The Uniformity Clause, by contrast, reflects no such concerns. The Founders adopted the Uniformity Clause to ensure that Congress could not "'use its power over commerce to the disadvantage of particular States.'" *Banner* v. *United States*, 428 F.3d 303, 310 (D.C. Cir. 2005) (per curiam). Along with other constitutional provisions, *see, e.g.*, U.S. Const. art. I, §§ 9, 10, the Uniformity Clause protects *states* from export taxes and duties laid by the federal government or other states. By contrast, the Citizenship Clause guarantees birthright citizenship to *individuals*. *See* Amar, *America's Constitution: A Biography* 381 (2005) ("The [Citizenship Clause] ma[de] clear that *everyone born under the American flag* … was a free and equal citizen." (emphasis added)). The Citizenship Clause's reference to "States" only clarifies that U.S. citizenship exists

"without regard to … citizenship of a particular State." *Slaughter-House Cases*, 83 U.S. (16 Wall.) at 73. Distinguishing between states and territories, or incorporated territories and unincorporated territories, therefore makes less sense in the context of the Citizenship Clause than it does in the context of the Uniformity Clause. For these reasons, the question whether the phrase "in the United States" in the Citizenship Clause includes U.S. territories *cannot* be answered by a case concerning the Uniformity Clause.

To be sure, as noted above, it is because of *Downes* that the question whether the Citizenship Clause applies in an unincorporated territory is even a question. But the *Insular Cases* provide no guidance whatsoever on how to answer it.

III. THE TERRITORIAL INCORPORATION DOCTRINE IS UNPERSUASIVE AS A MATTER OF CONSTITUTIONAL ANALYSIS AND SHOULD BE CABINED OR OVERRULED

If the above considerations were not enough to show why the *Insular Cases* do not control here, there are two additional reasons why the court of appeals was wrong to rely on them. First, "[n]othing in the Constitution speaks of 'incorporated' and 'unincorporated' territories," and certainly "[n]othing in it extends to the latter only certain supposedly 'fundamental' constitutional guarantees." *Vaello Madero*, slip op. 5 (Gorsuch, J., concurring). Second, the *Insular Cases* are grounded in "ugly racial stereotypes" that "have no home in our Constitution." *Id.*; *see also id.* at 6 n.4 (Sotomayor, J., dissenting) (*Insular Cases* "premised on beliefs both odious and wrong"). For these reasons, this Court should either clarify that the incorporation doctrine is limited to the cases where it was previously applied, or even better, overrule the doctrine entirely.

A. The *Insular Cases* And The Territorial Incorporation Doctrine Are Constitutionally Infirm

The notion that some territories are "incorporated" while others are not has no basis in the Constitution's text, structure, or history. Until the *Insular Cases*, neither this Court nor any other branch of government even hinted at such a distinction. *See* Burnett, Untied *States*: *American Expansion and Territorial Deannexation*, 72 U. Chi. L. Rev. 797, 817-834 (2005) (discussing Congress's plenary power to govern U.S. territories in the nineteenth century and this Court's "expansive" conception of the scope of this constitutional discretion even before the *Insular Cases*). And as this Court has explained, the doctrine's paramount constitutional vice is that it is readily misconstrued as a broad and generic license to the political branches "to switch the Constitution on or off at will," *Boumediene*, 553 U.S. at 765—a proposition this Court has rejected. *Id.* at 757-758; *see also Vaello Madero*, slip op. 6 (Gorsuch, J., concurring) ("[O]ur Nation's government 'has no existence except by virtue of the Constitution,' and it may not ignore that charter in the Territories any more than it may in the States.").

Concern over the potential misuse inherent in this vague and unprecedented doctrinal innovation was evident from the beginning. It carries throughout the fractured opinions in *Downes*. The dissenters in *Downes* rejected the idea of territorial "incorporation" as unprecedented and illogical. 182 U.S. at 373 (Fuller, C.J., dissenting). "Great stress is thrown upon the word 'incorporation,'" wrote Chief Justice Fuller, "as if possessed of some occult meaning, but I take it that the act under consideration made P[ue]rto Rico, whatever its situation before, an organized territory of the

United States." *Id.* Justice Harlan was even more mystified: "I am constrained to say that this idea of 'incorporation' has some occult meaning which my mind does not apprehend. It is enveloped in some mystery which I am unable to unravel." *Id.* at 391 (Harlan, J., dissenting).

Even though the newly minted distinction between "incorporated" and "unincorporated" territories eventually attracted a majority of the Court's votes in later cases, the distinction was not only "unprecedented," Burnett, 109 Colum. L. Rev. at 982, but a significant departure from the Court's prior conception of the Constitution's application to the territories.[6] Indeed, "there is nothing in the Constitution that even intimates that express constitutional limitations on national power apply differently to different territories once that territory is properly acquired." Lawson & Seidman, *The Constitution of Empire: Territorial Expansion & American Legal History* 196-197 (2004). In part for that reason, the *Insular Cases* have been the subject of widespread condemnation. *See, e.g.*, Ramsey, *The Supreme Court,* FOMB *v.* Aurelius Investment, *and the* Insular Cases, Originalism Blog (June 4, 2020), https://tinyurl.com/2p92ma26 ("The *Insular Cases* are an abomination."); Torruella, *Ruling America's Colonies: The* Insular Cases, 32 Yale L. & Pol'y Rev. 57, 71-72 (2013) (describing Justice White's reasoning in *Downes* as "indecipherable"). The supposed constitutional justifications for the *Insular Cases*' unequal

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[6] *See Downes*, 182 U.S. at 359-369 (Fuller, C.J., dissenting) (citing numerous decisions "[f]rom *Marbury* v. *Madison* to the present day" establishing that constitutional limits apply with respect to the territories); *Loughborough* v. *Blake*, 18 U.S. (5 Wheat.) 317, 319 (1820) ("[The United States] is the name given to our great republic, which is composed of States and territories.").

treatment of residents of unincorporated territories "are certainly not convincing today, if they ever were." Kent, *Citizenship and Protection*, 82 Fordham L. Rev. 2115, 2128 (2014).

In addition to lacking anchor in constitutional text or history, the territorial incorporation doctrine is in serious tension with the foundational constitutional principle that "the [n]ational [g]overnment is one of enumerated powers, to be exerted only for the limited objects defined in the Constitution," as the dissenting Justices in *Downes* explained. *Downes*, 182 U.S. at 389 (Harlan, J., dissenting); *see also id.* at 364 (Fuller, C.J., dissenting) (whatever the bounds of Congress's authority over the territories, "it did not … follow that [they] were not parts of the United States, and that the power of Congress in general over them was unlimited"). As this Court emphasized, the "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 765 (emphasis added).

B. The *Insular Cases* Rest On Offensive Notions Of Racial Inferiority

The *Insular Cases* and the territorial incorporation doctrine cannot be understood without a frank recognition that they rest in important part on discredited notions of racial inferiority and imperial governance. *See Vaello Madero*, slip op. 4-7 (Gorsuch, J., concurring); *Igartúa de la Rosa* v. *United States*, 417 F.3d 145, 163 (1st Cir. 2005) (Torruella, J., dissenting) (the *Insular Cases* "are anchored on theories of dubious legal or historical validity, contrived by academics interested in promoting an expansionist agenda"). That is another reason this Court should repudiate them.

The *Insular Cases*—and in particular, the reasoning that gave rise to the territorial incorporation doctrine—reflected turn-of-the-century imperial fervor and a hesitancy to admit into the Union supposedly "uncivilized" members of "alien races" except as colonial subjects. *See Vaello Madero*, slip op. 3-4 (Gorsuch, J., concurring). Writing in *Downes*, for example, Justice Brown suggested that "differences of race" raised "grave questions" about the rights that ought to be afforded to territorial inhabitants. *See* 182 U.S. at 282, 287 (describing territorial inhabitants as "alien races, differing from us" in many ways). Similarly, Justice White's analysis was guided in part by the possibility that the United States would acquire island territories "peopled with an uncivilized race, yet rich in soil" whose inhabitants were "absolutely unfit to receive" citizenship. *Id.* at 306 (concurring opinion). Justice White quoted approvingly from treatises explaining that "if the conquered are a fierce, savage and restless people," the conqueror may "govern them with a tighter rein, so as to curb their impetuosity, and to keep them under subjection." *Id.* at 302 (internal quotation marks omitted).

These statements demonstrate that, when the Court "reached its judgments in the *Insular Cases*, prevailing governmental attitudes presumed white supremacy and approved of stigmatizing segregation." Minow, *The Enduring Burdens of the Universal and the Different in the* Insular Cases, in *Reconsidering the* Insular Cases*: The Past and Future of the American Empire* vii, vii (Neuman & Brown-Nagin eds., 2015). As a result, the "outcome [of the *Insular Cases*] was strongly influenced by racially motivated biases and by colonial governance theories that were contrary to American territorial practice and experience."

Torruella, *The* Insular Cases*: The Establishment of a Regime of Political Apartheid*, 29 U. Pa. J. Int'l L. 283, 286 (2007); *see also* Gelpí & Baum, *Manifest Destiny: A Comparison of the Constitutional Status of Indian Tribes and U.S. Overseas Territories*, 63 Fed. Lawyer 38, 39-40 (Apr. 2016) (*Insular* framework is "increasingly criticized by federal courts … as founded on racial and ethnic prejudices"); Kent, 82 Fordham L. Rev. at 2128 (noting "frankly racist" rationales in key *Insular Cases*).

The decisions "reflected many of the attitudes that permeated the expansionist movement of the United States during the nineteenth century." Ramos, *Puerto Rico's Political Status: The Long-Term Effects on American Expansionist Discourse*, in *The Louisiana Purchase and American Expansion, 1803-1898*, at 163, 163 (Levinson & Sparrow eds., 2005); *see also* Sparrow, *The* Insular Cases, *supra*, at 10, 14, 57-63. That "ideological outlook" included "Manifest Destiny, Social Darwinism, the idea of the inequality of peoples, and a racially grounded theory of democracy that viewed it as a privilege of the 'Anglo-Saxon race.'" Ramos, *Puerto Rico's Political Status*, *supra*, at 167. Those concepts of "inferior[ity] … justified not treating [territorial inhabitants] as equals," and the *Insular Cases*' classification of some territories as "unincorporated … owed much to racial and ethnic factors." *Id.* at 168, 170; *see* Go, *Modes of Rule in America's Overseas Empire: The Philippines, Puerto Rico, Guam, and Samoa*, in *The Louisiana Purchase and American Expansion, 1803-1898*, at 205, 212-213 (Levinson & Sparrow eds., 2005) (use of "racial schemes for classifying overseas colonial subjects"—from "Anglo-Saxons … at the top of the ladder, while beneath them were an array of 'lesser races' down to the darkest, and thereby the most

savage, peoples"—"served to slide the new 'possessions' … into the category of 'unincorporated'").

To their credit, lower courts—including the court of appeals in this case—have begun to acknowledge that both the "purpose" and "reasoning" of the *Insular Cases* are "disreputable to modern eyes." Pet. App. 16a. Nonetheless, some of those courts—again including the court of appeals in this case—have reasoned that the *Insular Cases* "can be repurposed to preserve the dignity and autonomy of the peoples of America's overseas territories." Pet. App. 17a. Though well-intentioned, this attempt to "drape the worst of [the *Insular Cases*'] logic in new garb" does not solve the problem. *Vaello Madero*, slip op. 10 n.4 (Gorsuch, J., concurring). The *Insular Cases* are "unsalvageable" because their *effect* is to "create[] permanent colonies, which could remain subject to Congress's plenary power … *forever*." Ponsa-Kraus, *The* Insular Cases *Run Amok: Against Constitutional Exceptionalism in the Territories*, 131 Yale L.J.__ (forthcoming 2022) (manuscript p. 30), https://tinyurl.com/2s3pv3a3. Preserving such a regime does not safeguard territorial autonomy or cultures. To the contrary, so long as the *Insular Cases* "remain on the books, they will stand in the way of that goal." *Id.* at p. 56.

The racist and imperialist premises of the *Insular Cases* have no place in modern jurisprudence. Decisions of such "racist origin[]" are entitled to less precedential weight. *Ramos*, 140 S. Ct. at 1405. This Court should at minimum disapprove their extension in this case. Better yet, the Court should overrule the territorial incorporation doctrine altogether. Indeed, this case is a rare and ideal vehicle for taking the territorial incorporation doctrine off the books entirely. Likely due to their xenophobic roots, the government rarely

invokes the *Insular Cases* before this Court as the primary justification for its action, relying instead on the considerable flexibility the Territory Clause already affords Congress. *See Vaello Madero*, slip op. 8-9 (Gorsuch, J., concurring); U.S. Br. 25-26, *Financial Oversight & Mgmt. Bd. for P.R.* v. *Aurelius Inv., LLC*, No. Nos. 18-1334, 18-1496, 18-1514 (U.S. July 25, 2019). But parties continue to invoke the *Insular Cases* in lower courts. *See, e.g.*, Opp. Mot. Dismiss 23-27, *In re Financial Oversight & Mgmt. Bd. for P.R.*, No. 3:17-bk-03283 (D.P.R. Nov. 3, 2017) (Dkt. 1622). And "[l]ower courts continue to feel constrained to apply their terms." *Vaello Madero*, slip op. 7 (Gorsuch, J., concurring). Here, confronting the *Insular Cases* is unavoidable, because American Samoa's status as an unincorporated territory was indispensable to both the government's and intervenors' positions below, as well as to the court of appeals' analysis. *See* U.S. C.A. Br. 14-24; Intervenors' C.A. Br. 2, 15-16, 23-27, 32-37; Pet. App. 15a, 32a-40a. Accordingly, "[i]t is past time to acknowledge the gravity" of the error of the *Insular Cases*. *Vaello Madero*, slip op. 1, 8-9 (Gorsuch, J., concurring); *see also id.* at 6 n.4 (Sotomayor, J., dissenting). Yet vehicles that squarely present the doctrine of territorial incorporation are few and far between. If the Court declines to consider it in this case, it may not have another opportunity to do so for a long time.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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