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 Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

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

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QUESTION PRESENTED

Justices Sotomayor and Gorsuch recently expressed the hope of millions that "the Court will soon recognize that the Constitution's application should never turn on . . . the misguided framework of the *Insular Cases*." *United States* v. *Vaello Madero*, 142 S. Ct. 1539, 1560 n.4 (2022) (Sotomayor, J., dissenting) (quoting *id.* at 1556 (Gorsuch, J., concurring)). If only "an appropriate case" were presented.

This is that "appropriate case." A federal court has once again denied a fundamental constitutional right under the *Insular Cases*. This time "one of the most valuable rights in the world"—American citizenship. *Kennedy* v. *Mendoza-Martinez*, 372 U.S. 144, 160 (1963).

The government claims it can deny the citizenship of those born in America's territories. The Citizenship Clause forbids this. But the court of appeals held otherwise under the "binding precedent" of the *Insular Cases*. These cases must be set aside. The question presented is:

Whether the *Insular Cases* should be overruled and the Citizenship Clause applied as written to secure the constitutional right to citizenship of those born in America's territories.

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INTEREST OF *AMICUS CURIAE*[1]

The Virgin Islands Bar Association is comprised of 1,000 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 for its members, the judicial system, and the people of the Virgin Islands.

The scope of the decision below—holding those born in "unincorporated" territories have no constitutional right to citizenship—demonstrates the Bar Association's duty to again advocate for 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 certiorari and reverse the court of appeals.

"Citizenship is a most precious right. It is expressly guaranteed by the Fourteenth Amendment to the Constitution, which speaks in the most positive terms." *Kennedy*, 372 U.S. at 159. "Deprivation of citizenship—particularly American citizenship, which is one of the most valuable rights in the world today—

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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 were timely notified of the Bar Association's intent to file and consent to this filing. 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.

has grave practical consequences." *Id.* at 160 (citation omitted).

"[T]he undeniable purpose of the Fourteenth Amendment was . . . to put citizenship beyond the power of any governmental unit[ ] to destroy." *Rogers* v. *Bellei*, 401 U.S. 815, 822 (1971). Despite this, courts continue to rely on the *Insular Cases* to endorse the government's claimed power to destroy the citizenship of those born in America's territories. See, *e.g.*, *Tuaua* v. *United States*, 788 F.3d 300, 306 (D.C. Cir. 2015) ("Analysis of the Citizenship Clause's application to American Samoa would be incomplete absent invocation of the sometimes contentious *Insular Cases*.").

In denying the petitioners' constitutional right to citizenship, the court of appeals expressly relied on "the distinction between incorporated and unincorporated territories" written into the Constitution by the *Insular Cases*. Pet.App.29a.

Like American Samoa, the Virgin Islands is an "unincorporated" American territory. Unlike American Samoa, Congress declared "all persons born in [the Virgin Islands] . . . citizens of the United States at birth." 8 U.S.C. § 1406(b). But under the court of appeals' reasoning, this statute—subject to repeal by Congress at any time—serves as Virgin Islanders' only claim to American citizenship.

In its application of the "binding precedent" of the *Insular Cases*, Pet.App.31a, the court of appeals subjects Virgin Islanders to a second-class, statutory citizenship that exists only at the whim of Congress.

Letting the court of appeals' decision stand would tell Virgin Islanders, Puerto Ricans, Guamanians, and Northern Mariana Islanders alike that they are Americans only to the extent Congress allows.

The second-class citizenship imposed on Virgin Islanders by the *Insular Cases* finds no support in the text of the Constitution. It's time for the Court to set aside the *Insular Cases* and instead apply the Constitution as written.

SUMMARY OF THE ARGUMENT

The *Insular Cases* promised "fundamental" constitutional rights in America's territories. But this was an empty promise. Instead, courts routinely invoke the *Insular Cases* to deny fundamental constitutional rights in America's territories.

The territorial incorporation doctrine invented by the *Insular Cases* has no basis in the text or history of the Constitution. It was fashioned out of whole cloth by the same people who decided *Plessy* v. *Ferguson*. It served the cause of political expedience and imposed a permanent second-class citizenship on the "alien races" of America's territories.

It is unsurprising then that it flunks every factor the Court evaluates in applying *stare decisis*. No one defends the quality (such as it is) of the reasoning behind the territorial incorporation doctrine—it is openly racist. It creates an unworkable rule with unclear

standards inconsistently applied to the detriment of millions. It is completely at odds with a century's worth of precedent on fundamental constitutional rights. It is time to set it aside.

The Virgin Islands Bar Association—on behalf of its members and the "alien races" of the "unincorporated" territory of the Virgin Islands—urges the Court to grant the petition for a writ of certiorari, overrule the *Insular Cases*, and secure the constitutional birthright of those born in America's territories.

ARGUMENT

"[R]espect for past judgments also means respecting their limits." *Brown* v. *Davenport*, 142 S. Ct. 1510, 1528 (2022). "*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 (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.*

"Our cases identify factors that should be taken into account in deciding whether to overrule a past decision." *Janus* v. *Am. Fed'n of State, Cty., & Mun. Emps., Council 31*, 138 S. Ct. 2448, 2478 (2018). Those factors include: "the quality of [the decision's] reasoning, the workability of the rule it established, its consistency

with other related decisions, developments since the decision was handed down, and reliance on the decision." *Id.* at 2478–79.

The *Insular Cases* flunk every one of them.

1. The quality of the reasoning in the *Insular Cases* is indefensible. "An important factor in determining whether a precedent should be overruled is the quality of its reasoning." *Id.* at 2479. "When neither party defends the reasoning of a precedent, the principle of adhering to that precedent through *stare decisis* is diminished." *Citizens United* v. *Fed. Election Comm'n*, 558 U.S. 310, 363 (2010).

The territorial incorporation doctrine of the *Insular Cases* had few defenders when handed down. See, *e.g.*, 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 . . . are . . . without a parallel in our judicial history."). Today, it appears the openly racist reasoning of the *Insular Cases* has no defenders at all.

The harshest critics of the *Insular Cases* have been members of this Court. As far back as 1957, a plurality of the Court refused to apply the *Insular Cases* to Americans abroad. Four members of the Court could "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).

More recently, Justices Sotomayor and Gorsuch renewed the call to set aside the *Insular Cases*. As Justice Gorsuch succinctly explained, "[t]he *Insular Cases* have no foundation in the Constitution and rest instead on racial stereotypes. They deserve no place in our law." *Vaello Madero*, 142 S. Ct. at 1554 (Gorsuch, J., concurring). "Nothing in the Constitution speaks of 'incorporated' and 'unincorporated' Territories," and "[n]othing in it authorizes judges to engage in the sordid business of segregating Territories and the people who live in them on the basis of race, ethnicity, or religion." *Id.*

Not even the court of appeals endorsed the reasoning of the *Insular Cases* when it invoked them to rule against the petitioners. Instead, the court of appeals went out of its way to criticize the *Insular Cases*: "Not only is the purpose of the *Insular Cases* disreputable to modern eyes, so too is their reasoning. The Court repeatedly voiced concern that native inhabitants of the unincorporated territories were simply unfit for the American constitutional regime." Pet.App.16a.

"It is past time to acknowledge the gravity of this error." *Vaello Madero*, 142 S. Ct. at 1560 n.4 (Sotomayor, J., dissenting) (quoting *id.* at 1554 (Gorsuch, J., concurring)).

2. The territorial incorporation doctrine of the *Insular Cases* is unworkable. Courts have toiled for over a century to tease out which constitutional rights

are "fundamental" enough to apply to "unincorporated" territories. This is made all the more difficult because, according to the courts of appeals, the term "fundamental" apparently "has a distinct and narrow meaning in the context of territorial rights." *Tuaua*, 788 F.3d at 308. "Even rights that we would normally think of as fundamental, such as the constitutional right to a jury trial, are not 'fundamental' under the framework of the *Insular Cases*." Pet.App.32a–33a. Under this "distinct and narrow meaning," "[i]t is not sufficient that a right be considered fundamentally important in a colloquial sense or even that a right be necessary to the American regime of ordered liberty." *Tuaua*, 788 F.3d at 308 (cleaned up). Instead, "[u]nder the Insular framework the designation of fundamental extends only to the narrow category of rights and principles which are the basis of *all* free government." *Id.* (quoting *Dorr* v. *United States*, 195 U.S. 138, 147 (1904)) (emphasis in original).

The *Insular Cases* create an unworkable system tasking federal courts with determining which constitutional rights are "the basis of all free government" versus merely part of the "American regime of ordered liberty." Unsurprisingly, these nonsense statements masquerading as legal principles do not create a standard capable of consistent application. Accord *Janus*, 138 S. Ct. at 2481 (setting aside precedent creating a distinction that "has proved to be impossible to draw with precision").

Much like "[a]ttempting to judg[e] whether a particular line is longer than a particular rock is heavy,"

"[t]here is no plausible sense in which anyone, let alone this Court, could objectively assign weight to such imponderable values and no meaningful way to compare them if there were." *June Med. Servs. L.L.C.* v. *Russo*, 140 S. Ct. 2103, 2136 (2020) (Roberts, C.J., concurring) (quoting *Bendix Autolite Corp.* v. *Midwesco Enters., Inc.*, 486 U.S. 888, 897 (1988) (Scalia, J., concurring)). The *Insular Cases* have created an unworkable patchwork where constitutional rights are fundamental only sometimes and only in some places.

3. The *Insular Cases* are inconsistent with related decisions and stand at odds with all modern-day constitutional jurisprudence. There is no better example of this than *Reid*. Because the *Reid* plurality fell just one vote short, Americans have greater constitutional rights in a foreign country than in an American territory.

Nor are the *Insular Cases* consistent with a century's worth of precedent on fundamental constitutional rights. Yet federal courts continue to routinely invoke the *Insular Cases* to deny these fundamental rights in America's territories.

Since the *Insular Cases* were decided, the Court has recognized nearly all the Bill of Rights to be so "fundamental" as to restrict all government action, whether State or Federal. See, *e.g.*, *Gitlow* v. *New York*, 268 U.S. 652 (1925) (right to free speech); *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) (establishment of religion); *Edwards* v. *South Carolina*, 372 U.S. 229 (1963) (petition for redress of grievances); *Mapp* v. *Ohio*, 367 U.S. 643 (1961) (unreasonable search and seizure); *Aguilar* v. *Texas*, 378 U.S. 108 (1964) (warrant requirement); *Benton* v. *Maryland*, 395 U.S. 784 (1969) (double jeopardy); *Duncan* v. *Louisiana*, 391 U.S. 145 (1968) (right to jury trial); *McDonald* v. *City of Chicago*, 561 U.S. 742 (2010) (right to bear arms); *Timbs* v. *Indiana*, 139 S. Ct. 682 (2019) (excessive fines).

Instead of recognizing these fundamental constitutional rights, courts applying the *Insular Cases* invented a new, "distinct and narrow meaning" of the term in an attempt to reconcile these fundamental rights with the *Insular Cases*. *Tuaua*, 788 F.3d at 308.

The Court should save the federal judiciary the trouble of harmonizing these two irreconcilable lines of precedent and finally overrule the "much-criticized 'Insular Cases.'" *Fin. Oversight & Mgmt. Bd. for Puerto Rico* v. *Aurelius Inv., LLC*, 140 S. Ct. 1649, 1665 (2020).

4. The territorial incorporation doctrine of the *Insular Cases* lacks the consistency to create any valid reliance interests. "[*S*]*tare decisis* accommodates only legitimate reliance interests." *S. Dakota* v. *Wayfair, Inc.*, 138 S. Ct. 2080, 2098 (2018) (quoting *United States* v. *Ross*, 456 U.S. 798, 824 (1982)) (cleaned up). None exist here.

Instead, any attempt to identify a reliance interest created by the *Insular Cases* would "miss[] maybe the

most important one: the reliance interests of the American people"—in this case the millions living in America's territories. *Ramos* v. *Louisiana*, 140 S. Ct. 1390, 1408 (2020). As the Court recently noted, reliance interests in *stare decisis* "cannot outweigh the interest we all share in the preservation of our constitutionally promised liberties." *Id.*

The Court must not "elide the reliance the American people place in their constitutionally protected liberties." *Id.* The territorial incorporation doctrine of the *Insular Cases* has robbed generations of Americans of "their constitutionally protected liberties."

The Court must set it aside.

CONCLUSION

For these reasons, the Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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