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 FORMER FEDERAL AND LOCAL JUDGES AS *AMICUS CURIAE* SUPPORTING THE PETITIONERS

GREGORY DUBINSKY
Counsel of Record
ALVINA PILLAI
HOLWELL SHUSTER & GOLDBERG LLP
425 Lexington Avenue
New York, NY 10017
(646) 837-5151
gdubinsky@hsgllp.com

Counsel for Amici Curiae

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INTEREST OF *AMICI CURIAE*[1]

Amici are former federal and local judges who served in the U.S. territories.

Retired Justice B.J. Cruz is the Public Auditor of Guam. He was appointed to the Superior Court of Guam in 1984 and to the Supreme Court of Guam as an Associate Justice in 1997. From 1999 until 2001, he served as Chief Justice of the Supreme Court of Guam.

Retired Judge José Fusté served on the United States District Court for the District of Puerto Rico from 1985 until he retired in 2016. He served as the Chief Judge of that court from 2004 to 2011.

Former Judge Soraya Diase Coffelt served on the United States Virgin Islands Superior Court from 1994 until 2000 and intermittently on the Appellate Division of the District Court of the United States Virgin Islands during that time.

Retired Judge Héctor Manuel Laffitte served on the United States District Court for the District of Puerto Rico from 1983 until he retired in 2007. He served as the Chief Judge of that court from 1999 until 2004.

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[1] Pursuant to S. Ct. Rule 37.2(a), all parties received timely notice of amici's intent to file this brief, and all have provided written consent to its filing. No counsel for a party authored this brief in whole or in part, and no person other than the *amici* or their counsel made a monetary contribution to fund its preparation or submission.

Retired Chief Justice Liana Fiol Matta was appointed to the Court of Appeals of Puerto Rico in 1992, and served as Chief Judge of that court from 1996 to 2002. In 2004, she was appointed to the Supreme Court of Puerto Rico. She was named Chief Justice of that court in 2014, and served as such until she retired in 2016.

Retired Judge Adam G. Christian served as a general jurisdiction judge on the Superior Court of the Virgin Islands from 2010 to 2016. He served as Legal Counsel to the Governor of the Virgin Islands from 2007 to 2009.

While serving on the bench, *amici* were required to apply the controversial "territorial incorporation" doctrine set forth in the Insular Cases. In *amici*'s experience, the Insular framework is unworkable in application and rooted in offensive racial stereotypes. *Amici* respectfully submit that the time has come for this Court to overrule the Insular Cases, to ensure that they cannot be used to selectively apply the Constitution in the territories, and to ensure that no judge serving in the territories will ever again be forced to apply a precedent that assumes that he or she belongs to a sub-class deserving of fewer constitutional protections.

SUMMARY OF THE ARGUMENT

This case implicates the Insular Cases, a doctrine that Justices of this Court have explained is without

"foundation in the Constitution" and "deserve[s] no place in our law," *United States* v. *Vaello Madero*, 142 S.Ct. 1539, 1552 (2022) (Gorsuch, J., concurring), "premised on beliefs both odious and wrong," *id.* at 1560 n.4 (Sotomayor, J., dissenting), and "very dangerous," *Reid* v. *Covert*, 354 U.S. 1, 14 (1957) (plurality op. of Black, J.). Indeed, the Insular Cases are a line of authority that is "without parallel in our judicial history," *King* v. *Morton*, 520 F.2d 1140, 1153 (D.C. Cir. 1975) (Tamm, J., dissenting). The Insular Cases, as they have recently been applied by some lower courts, suggest that only vague "fundamental" personal rights in the Constitution that are "universally . . . integral to free and fair society" necessarily apply to unincorporated American territories such as American Samoa. *Tuaua* v. *United States*, 788 F.3d 300, 308 (D.C. Cir. 2015); *see* Pet. App. 32a (analyzing "whether citizenship is a 'fundamental personal right' as that term is defined by the Insular Cases").

"The flaws in the Insular Cases are as fundamental as they are shameful." *Vaello Madero*, 142 S.Ct. at 1554 (Gorsuch, J., concurring); *see id.* at 1560 n.4 (Sotomayor, J., dissenting) ("[I]t is past time to acknowledge the gravity of the error of the Insular Cases.") (quotation marks omitted). The Insular Cases rest on the untenable principle that—in the unincorporated territories alone—the Constitution is a menu, such that Congress may pick and choose certain provisions limiting its powers while declining others. This doctrine jeopardizes the rights of the inhabitants of the territories and disregards the

constitutional text. Moreover, the Insular framework requires judges to undertake the flawed exercise of sifting out "fundamental personal rights" applicable to all free societies from the "artificial, procedural, or remedial" constitutional provisions that are "idiosyncra[sies]" of "the American social compact." *Tuaua*, 788 F.3d at 308. This dichotomy, besides being unworkable, disregards that the procedural provisions of the Constitution generally protect individual liberty.

Worse yet, the Insular doctrine is rooted in the discredited assumption that the different racial groups occupying the territories are not capable of properly applying the Anglo-American legal tradition. This assumption is impossible to separate from any application of the Insular Cases. *See Vaello Madero*, 142 S.Ct. at 1552 (Gorsuch, J., concurring) ("The Insular Cases . . . rest instead on racial stereotypes."); *see also* Bartholomew H. Sparrow, The *Insular Cases* and the Emergence of American Empire 214 (2006) ("[T]he *Insular Cases*—a hundred years later—seem to be the artifacts of a distant past, a different world.").

Notwithstanding their incoherence and discredited reasoning, the Tenth Circuit "attempt[ed] to repurpose the Insular Cases," which "merely drape[s] the worst of their logic in new garb." *Id*. at 1557 n.4 (Gorsuch, J., concurring); *see* Pet. App. 17a (asserting that "the approach developed in the Insular Cases . . . can be repurposed"). The Circuit thus ignored this Court's latest clear signal that the Insular Cases have no continuing purchase, *Fin.*

Oversight & Mgmt. Board for Puerto Rico v. *Aurelius Investment, LLC*, 140 S.Ct. 1649, 1665 (2020), and committed a profound error.

This Court should grant certiorari and overrule the Tenth Circuit's attempt to breathe new life into the Insular Cases.

This Court may reject the Insular Cases' application to these facts. *Reid*, 354 U.S. at 14 ("neither the [Insular] cases nor their reasoning should be given any further expansion"). The Tenth Circuit badly erred in expressly adopting and repurposing the Insular framework as against in-point Supreme Court precedent governing "the Citizenship Clause's guarantee of birthright citizenship." Pet. App. 14a. No Insular Case squarely decided the applicability of the Citizenship Clause to an unincorporated territory. The District of Utah correctly recognized, therefore, that "the Insular Cases . . . do not control the outcome of this case." Pet. App. 98a.

But *amici* respectfully urge the Court to take another course. The time has come to overrule the Insular Cases. Lower courts continue to expand the Insular framework, resulting in a judge-made regime of second-class rights in the territories. All the while, the Insular Cases have lost any relevance, and were never workable in the first place. The enforcement of constitutional rights is too important to be left to the vicissitudes of an arcane and outdated doctrine.

ARGUMENT

I. The Court Should, At A Bare Minimum, Cabin The Insular Cases To Their Precise Facts And Hold They Do Not Bar Application Of The Citizenship Clause To American Samoa.

In assessing "which of two lines of precedent [to] guide our analysis"—"the Insular Cases" or "a case in which the Supreme Court considered the Citizenship Clause's guarantee of birthright citizenship"—the Tenth Circuit decided that "the Insular Cases supply the correct framework for application of constitutional provisions to the unincorporated territories." Pet. App. 14a. This was a grave error, and the Court should grant certiorari to clarify, at a minimum, that the Insular Cases should not be extended beyond their precise facts.

As the Tenth Circuit recognized, no Insular Case[2] was brought to decide whether the Citizenship Clause applies in American Samoa or any other unincorporated territory. The Circuit noted that Justice White's concurrence in *Downes* "specifically mentioned citizenship as the type of constitutional right that should not be extended automatically to unincorporated territories." Pet. App. 15a. But not only was that merely *dicta* from a concurrence—it

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[2] *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); *Downes* v. *Bidwell*, 182 U.S. 244 (1901); *Hawaii* v. *Mankichi*, 190 U.S. 197 (1903); *Dorr* v. *United States*, 195 U.S. 138 (1904).

sprang from a premise no longer tenable in our caselaw. Justice White was concerned with the extension of citizenship to "an uncivilized race" "absolutely unfit to receive it" and the resulting impact on the Government's "right to acquire" "an unknown island . . . for commercial and strategic reasons." 182 U.S. at 306. But as this Court explained in *Boumediene* v. *Bush*, the "political branches" do not "have the power to switch the Constitution on or off at will." 553 U.S. 723, 765 (2008).

Over 50 years ago, a plurality of this Court admonished that "neither the [Insular] cases nor their reasoning should be given any further expansion" because, "if allowed to flourish," they "would destroy the benefit of a written Constitution and undermine the basis of our government." *Reid*, 354 U.S. at 14 (plurality op. of Black, J.). Indeed, as recently as 2020, this Court—citing *Reid*—refused to "extend" the "much-criticized" Insular Cases any further. *Aurelius*, 140 S.Ct. at 1665.

The Tenth Circuit, without even citing *Aurelius*, disregarded this Court's long-clear signal to lower courts not to extend the Insular Cases beyond their precise facts. The Circuit squarely held that the Insular Cases continue to govern "whether" a constitutional "provision even applies to an unincorporated territory in the first place." Pet. App. 24a. And in deciding that question, the court asserted that the Insular doctrine "erect[s] something of a plain-language standard" wherein courts asses whether "the text of the constitutional provision states that it applies to unincorporated territories."

Pet. App. 26a. As discussed below, *infra* at 16-17, however, that is no way to read the Constitution, which nowhere makes any distinction between incorporated and unincorporated territories. The Constitution means what it says—the Insular Cases are no valid basis to interpolate a "plain-language" requirement into the Constitution just for the unincorporated territories alone.

At least one judge of the Circuit also went on to analyze (1) "whether citizenship is a 'fundamental personal right' as that term is defined by the Insular Cases" and (2) whether "the right to birthright citizenship would prove impracticable and anomalous, as applied to contemporary American Samoa." Pet App. 32a, 35a (quotation marks omitted).

Such analysis draws on decisions that have interpreted the Insular Cases to support a blanket distinction between "fundamental personal rights," which apply in all territories, and other constitutional provisions, which do not necessarily. For example, in *Tuaua* v. *United States*, purporting to apply the "Insular framework," the D.C. Circuit determined that the Citizenship Clause does not apply in American Samoa. 788 F.3d at 308. The court held that "the Insular Cases distinguish as universally fundamental those rights so basic as to be integral to free and fair society," while "non-fundamental" provisions are "artificial, procedural, or remedial rights" that are "idiosyncratic to the American social compact or to the Anglo-American tradition of jurisprudence." *Id.* In the decision below, Judge Lucero—drawing on *Tuaua*—stated that "only those

'principles which are the basis of all free government' establish the rights that are 'fundamental' for Insular purposes." Pet App. 33a (quoting *Dorr*, 195 U.S. at 147).

But this blanket distinction finds no purchase in the Insular Cases. The distinction rests, at best, on scattered statements from the jumbled, incoherent Insular jurisprudence. *See, e.g.*, *Downes*, 182 U.S. at 282 (noting "there may be a distinction between certain natural rights . . . and what may be termed artificial or remedial rights which are peculiar to our own system of jurisprudence"); *Dorr*, 195 U.S. at 148 (suggesting that the right to trial by jury is not "a fundamental right which goes wherever the jurisdiction of the United States extends"). Viewed as a whole, however, "[t]he 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 . . . without parallel in our judicial history." *King*, 520 F.2d at 1153 (Tamm, J., dissenting).

The Insular Cases establish, at most, that certain constitutional provisions are inapplicable in certain unincorporated territories by virtue of those territories' purported "wholly dissimilar traditions and institutions." *Reid*, 354 U.S. at 14. Their holdings "hardly amount to withholding all but the 'fundamental' provisions of the Constitution from those territories." Christina Duffy Burnett, *Untied States: American Expansion and Territorial Deannexation*, 72 U. Chi. L. Rev. 797, 836 (2005). Such a garbled line of precedent is far too thin a reed

to support a doctrine that denies much of the Constitution to the unincorporated territories.

Even taking as a given the Insular framework as articulated by Judge Lucero below (drawing on *Tuaua*), the notion that it is possible to identify and distinguish the Constitution's "fundamental personal rights" (which apply *per se* in the unincorporated territories) from its other provisions (which do not) is fatally flawed and utterly unworkable in practice.

The sweeping categories articulated by lower courts—in *Tuaua*, "rights so basic as to be integral to free and fair society" versus "artificial, procedural, or remedial rights" that are "idiosyncratic to the American social compact or to the Anglo-American tradition of jurisprudence," 788 F.3d at 308, and here, those "principles which are the basis of all free government" versus those that are not, Pet. App. 33a—are light years from constituting the "objective factors and practical concerns" that this Court emphasized should guide the Constitution's application outside the continental mainland. *Boumediene*, 553 U.S. at 764. It is not obvious that a "procedural" right can be meaningfully decoupled from the substantive right it protects, or that a judge can objectively separate the universal notions of "free and fair society" (whatever those are) embedded in the Constitution from the "idiosyncra[sies]" of "Anglo-American tradition." In any event, as the world draws on the U.S. experience, it is an increasingly futile task. *See, e.g.*, *United States* v. *Then*, 56 F.3d 464, 469 (2d Cir. 1995) (Calabresi, J., concurring) (describing the

global impact "[s]ince World War II" of "American constitutional theory and practice").

As is clear, this framework is an invitation to a judicial morass.[3] It is based on airy and unworkable distinctions, rather than constitutional text or structure. *See* Pet. App. 33a (without citing support, "I also question whether citizenship is properly conceived of as a personal right at all.").

II. The Insular Cases Should Be Overruled.

The Insular Cases have long been obsolete and unworkable. They defy objective and consistent application. The result is that the millions who inhabit the territories live in doubt as to which constitutional rights they actually possess. This state of limbo is legally and morally untenable.

The Insular doctrine is supported by two assumptions, neither of which hold currency any longer: (1) the racial groups who inhabit the unincorporated territories are so different from mainland Americans that a lesser regime of constitutional guarantees should apply; and (2) the practical conditions in the unincorporated territories

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[3] To be clear, the Insular framework is easily distinguished from the analysis this Court applies in determining whether a provision of the Bill of Rights applies to the States via the Due Process Clause of the Fourteenth Amendment. The latter analyzes which "safeguard[s]" are "fundamental to our scheme of ordered liberty," a far more judicially manageable task than deciding which American notions of freedom are "idiosyncratic" and which are truly integral to any and all free societies across the globe. *Timbs* v. *Indiana*, 139 S.Ct. 682, 686-87 (2019) (emphasis added).

are so different from the mainland that a lesser regime of constitutional guarantees should apply. The first assumption was never valid. The second assumption—to the extent it was valid in 1901 when the Insular Cases were decided—is no longer valid today. "Subsequent developments" have thus "eroded" the "underpinnings" of the Insular Cases, providing the "special justification" needed to overrule them. *Janus* v. *Am. Federation of State, Cnty. & Municipal Employees*, 138 S.Ct. 2448, 2486 (2018).

All the standard *stare decisis* factors militate in favor of discarding this line of authority: the "quality of [the case'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 foundation of the Insular Cases' reasoning—the supposed racial unsuitability of those living in the territories to Anglo-American legal norms—was always wrong. Nor, as of 2022, are there any cultural or practical concerns justifying the selective application of constitutional rights in the territories. And there are no valid concerns that parties will have detrimentally relied on the Insular Cases. There is thus no reason to give any further precedential weight to the Insular Cases.

A. The Insular Cases Are Based On Discredited Racial Stereotypes.

While it is possible to cast the Insular framework in purportedly race-neutral terms—*i.e.*, by focusing on whether territories have "wholly dissimilar traditions

and institutions," *Reid*, 354 U.S. at 14—the reality is that the Insular Cases are rooted in the assumption that certain racial groups in the territories are not capable of implementing Anglo-American legal institutions. *See, e.g.*, *Downes*, 182 U.S. at 287 (Brown, J.) ("If those possessions are inhabited by alien races, differing from us in religion, customs, laws, methods of taxation, and modes of thought, the administration of government and justice, according to Anglo-Saxon principles, may for a time be impossible . . . ."); *id.* at 302 (White, J.) (arguing that different rules are necessary to govern with a "tighter rein, so as to curb their impetuosity," when Americans "conquer[]" lands that are home to a "fierce, savage, and restless people"); *Dorr*, 195 U.S. at 145, 148 (holding that "the uncivilized parts of the archipelago [of the Philippines] were wholly unfitted to exercise the right of trial by jury").

The Insular Cases are thus "rooted in dangerous stereotypes" about "a particular group's supposed inability to assimilate." *Trump* v. *Hawaii*, 138 S.Ct. 2392, 2447 (2018) (Sotomayor, J., dissenting) (characterizing the government order at issue in *Korematsu* v. *United States*, 323 U.S. 214 (1944)). Thus, in approving the denial of constitutional rights "solely and explicitly on the basis of race," the Insular Cases are "gravely wrong." *Trump* v. *Hawaii*, 138 S.Ct. at 2423 (Roberts, C.J.). As Justice Gorsuch has recently 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 1552 (Gorsuch, J., concurring).

But while these cases remain binding precedents of this Court, lower courts must apply them. And every time they do so, the courts implicitly endorse the unacceptable racial assumptions that gave rise to the doctrine. *See, e.g.*, *United States* v. *Pollard*, 209 F. Supp. 2d 525, 546 (D.V.I. 2002) ("Rail as I may against the *Insular Cases* and their progeny, however, this federal trial court is bound by the view of the Supreme Court and United States Court of Appeals for the Third Circuit that disparate treatment based on a territory's unincorporated status need only have a basis in reason."), *rev'd on other grounds*, 326 F.3d 397 (3d Cir. 2003). To no group is this fact more painfully obvious than to *amici* here—former judges who served in the U.S. territories—who were bound to apply precedents premised on the notion that they are entitled to some lesser balance of constitutional protection.

B. Any Previously Valid Practical Considerations Supporting The Insular Doctrine No Longer Apply.

To the extent there were once "practical" or "functional" justifications rooted in history or culture for the selective application of the Constitution to the unincorporated territories, those justifications no longer hold today. *See Balzac* v. *Porto Rico*, 258 U.S. 298, 312-13 (1922) ("[T]he real issue in the *Insular Cases* was not whether the Constitution extended to the Philippines or Porto Rico when we went there, but which of its provisions were applicable" in "dealing with *new conditions and requirements*.") (emphasis

added). For example, in *Dorr*, the jury-trial right was held inapplicable to the Philippines because the Court deemed it unsuited to the civil law regime then in place. 195 U.S. at 145. This was the precise example discussed by this Court in *Boumediene* when it described the Insular Cases as adopting a "functional approach" to "questions of extraterritoriality." *Boumediene,* 553 U.S. at 764; *see Reid*, 354 U.S. at 50, 51 (Frankfurter, J., concurring in the judgment).[4]

But there are no "conditions or requirements" in American Samoa today, if there ever were, that justify a carve-out for the Citizenship Clause specifically, let alone the Constitution's provisions *en masse*. Times have changed. The Insular Cases' assumptions that the territories have "wholly dissimilar traditions and institutions" (*Reid*, 354 U.S. at 14) "are not valid today where all the territories have television, direct communications with the States, automobiles, jet airplane transportation, and when many of the inhabitants have high school and college education and where virtually all speak and understand English." James A. Branch, Jr., *The Constitution of the Northern Mariana Islands: Does a Different Cultural Setting Justify Different Constitutional Standards?*, 9 Denv. J. Int'l L. & Pol'y 35, 66 (1980).

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[4] The only guidance courts have as to constitutionally relevant differences between the territories and the States from the Insular Cases is much too outdated and incoherent to have any import today. *See, e.g.*, *Downes*, 182 U.S. at 282 (referring to "differences of race, habits, laws, and customs of the people" and "differences of soil, climate, and production"). The Insular Cases' outdated reasoning and unworkable doctrine provide yet another reason to overrule them. *Janus*, 138 S.Ct. at 2478-79.

American Samoa remains the only territory without birthright citizenship, and as a result, American Samoans "are denied the right to vote, the right to run for elective federal or state office outside American Samoa, and the right to serve on federal and state juries." Pet. App. 6a.

Indeed, most of the unincorporated territories have been part of our country for over 100 years. Even assuming *arguendo* that conditions in 1904 justified this Court's stay of the imposition of the right to trial by jury in a territory that had thus far known only the civil law inquisitorial system, *see Dorr*, 195 U.S. at 145, no such justification exists in 2022 for a carve-out of—for example—the Citizenship Clause in American Samoa. The same goes for any other constitutional protection.

A decade ago, this Court already doubted that the Insular Cases' reasoning could stand the test of time. *Boumediene* noted that "over time the ties between the United States and any of its unincorporated Territories [may] strengthen in ways that are of constitutional significance." 553 U.S. at 758. The Court thus recognized that the Insular Cases' purported justification for the unequal application of constitutional rights—the "wholly dissimilar traditions and institutions" of the unincorporated territories (*Reid*, 354 U.S. at 14)—might fade with time with respect to some or all the unincorporated territories. That time has come.

C. The Insular Cases Are At Odds With The Constitutional Text.

By declining to enforce the Constitution's express terms, the Insular Cases are plainly at odds with the notion, firmly embedded in the Supremacy Clause, that "the written document is supreme law." Akhil Reed Amar, *The Document and the Doctrine*, 114 Harv. L. Rev. 26, 32 (2000). The Constitution, both in the territories and in the mainland, is not a menu from which the political branches can pick and choose which rights to afford. *Boumediene*, 553 U.S. 723, 765 (the Constitution does not grant the political branches "the power to decide when and where its terms apply").

Indeed, a half-century after the Insular Cases were decided, a plurality in *Reid* rejected the "suggest[ion] that only those constitutional rights which are 'fundamental' protect Americans abroad" on the basis that there is "no warrant, in logic or otherwise, for picking and choosing among the remarkable collection of 'Thou shalt nots'" in the Constitution. 354 U.S. at 8-9. But it is precisely this flawed "picking and choosing" that underlies the distinction between "fundamental personal rights" and other provisions that decisions like the one below and others embrace.

To the extent that the Insular doctrine endorses this approach, it undermines the nature of our Constitution as an imperative instrument. "The constitution is either a superior, paramount law, unchangeable by ordinary means, or it is on a level with ordinary legislative acts, and like other acts, is alterable when the legislature shall please to alter it,"

and "there is no middle ground." *Marbury* v. *Madison*, 5 U.S. 137, 177 (1803). When four Justices of this Court in *Reid* inveighed against the expansion of the Insular Cases or their reasoning, it was because "[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 is a very dangerous doctrine and if allowed to flourish would destroy the benefit of a written Constitution and undermine the basis of our government." *Reid*, 354 U.S. at 14 (plurality of Black, J.). The *Reid* plurality explained that the only route to avoid applying the Constitution's express terms in the territories should be through the formal amendment process, as the Justices understood that they had "no authority, or inclination, to read exceptions into it which are not there." *Id.* This Court should close this constitutional loophole in the territories by overruling the Insular Cases.

CONCLUSION

For the foregoing reasons, the Court should grant the petition for a writ of certiorari and reverse the judgment of the Tenth Circuit.

Respectfully submitted,

GREGORY DUBINSKY
Counsel of Record
ALVINA PILLAI

HOLWELL SHUSTER &
GOLDBERG LLP
425 Lexington Avenue
New York, NY 10017
(646) 837-5151
gdubinsky@hsgllp.com

Counsel for Amici Curiae

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