No. 21-1394

In the Supreme Court of the United States

JOHN FITISEMANU, et al.,

Petitioners,

vs.

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 FOR *AMICI CURIAE* NORTHERN MARIANAS DESCENT CORPORATION AND UNITED CAROLINIANS ASSOCIATION IN SUPPORT OF RESPONDENTS

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INTEREST OF *AMICI CURIAE*[1]

Amici Curiae Northern Marianas Descent Corporation and United Carolinians Association are non-governmental organizations dedicated to the protection and advancement of the interests of the indigenous peoples of the Northern Mariana Islands, with a particular focus, in the case of *Amicus* UCA, on advancing the economic, educational, cultural and overall well-being of the Carolinian people. Both *amici* are dedicated to protecting the existing restriction on acquisition of land in the Northern Mariana Islands to persons of Northern Marianas descent, a restriction that has been upheld on the authority of the Insular Cases.

SUMMARY OF ARGUMENT

The petition seeks the overturning of the Insular Cases – a series of decisions by this Court holding that the United States, when acting outside its incorporated territory, holds all the powers belonging to a nation under international law, subject only to express constitutional prohibitions, and to such inherent

[1] Written consent to the filing of this *amicus* brief has been provided by counsel of record for each party. The parties received timely notice of this filing.

No counsel for any party authored this brief in whole or in part. No party, counsel for any party, or any other person, other than the *amici curiae* or their counsel, made any monetary contribution intended to fund the preparation or submission of this brief.

constitutional limitations as are essential to all free government.[2]

Because of the reliance placed on them, especially in the Northern Mariana Islands, and because they were correctly decided, the Insular Cases should not be disturbed, and the writ of certiorari should be denied.

ARGUMENT

A. The Northern Marianas' Reliance on the Insular Cases Urges *Stare Decisis*.

The principle of *stare decisis* counsels against revisiting or overturning longstanding precedent, and the Insular Cases have been standing for a very long time – half as long as the Constitution itself. They were controversial within the Court when first decided, but three of the dissenters from the first two Insular Cases concurred in the third on *stare decisis* grounds, in 1904. *See Dorr*, *supra*, 195 U.S. at 153 (Peckham, J., concurring). By the time of the last, in 1922, the Insular rule was described as "the settled law of the court." *Balzac*, *supra*, 258 U.S. at 305. The Cases weathered another stern test in *Reid v. Covert*, 354 U.S. 1 (1957), but they survived it, and were reaffirmed and applied as recently as *United States v. Verdugo-Urquidez*, 494 U.S. 259, 268-69 (1990), and *Boumediene v. Bush*, 553 U.S.

[2] The principal Insular Cases are: *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); *Rassmussen v. United States*, 197 U.S. 516 (1905); *Balzac v. Porto Rico*, 258 U.S. 298 (1922).

723, 759 (2008). If any cases are entitled to the benefit of the doubt that *stare decisis* provides, it is the Insular Cases.

Amici urge the Court to apply *stare decisis* in this case, however, not so much for the age and durability of the Cases as for the reliance that has been placed on them by the people of the Commonwealth of the Northern Mariana Islands (CNMI), especially the indigenous people, whose interests *Amici* exist to protect. Reliance is one major recognized reason for *stare decisis*, *see*, *e.g.*, *Payne v. Tennessee*, 501 U.S. 808, 828 (1991) ("Considerations in favor of *stare decisis* are at their acme in cases . . . where reliance interests are involved[.]"), and the CNMI was established, its indigenous lands protected, and that protection upheld in reliance on the Insular Cases.

The CNMI was established pursuant to a mutually binding constitutional agreement between the Northern Marianas people and the United States, known as the Covenant.[3] The Covenant creates a bilateral political union between the United States and the CNMI, and it sets out certain conditions which shall prevail in the CNMI notwithstanding any conflict with the US Constitution. *See* COVENANT § 501(b). One of these is that neither grand nor petit jury shall be required for trial by local law. *See id.* § 501(a). Another is that each of the three principal islands of the CNMI

[3] *See* Covenant to a Establish a Commonwealth of the Northern Mariana Islands in Political Union with the United States of America, *approved by and reprinted in* U.S. Pub. L. 94–241 (March 24, 1976), 90 Stat. 263 (hereinafter COVENANT).

(Saipan, Tinian and Rota) shall have equal representation in one house of the CNMI legislature, regardless of differences in population. *See id.* § 203(c). A third – the condition of chief concern to *Amici* – is that the acquisition of long-term interests in real property in the CNMI shall be restricted to persons of Northern Marianas descent. *See id.* § 805(a).

Each of these conditions likely conflicts with one or more provisions of the United States Constitution.[4] Yet they are explicitly recognized in the Covenant as "fundamental" provisions, to which no change is permissible without the agreement of both the United States and the CNMI. *See id.* § 105. Indeed, they were "integral" matters of sufficient importance that the Covenant could not have been adopted without them.[5]

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[4] The jury trial provision conflicts with the plain text of the fifth, sixth and seventh amendments, and the apportionment provision with the "one man, one vote" equal protection rule exemplified by *Reynolds v. Sims*, 377 U.S. 533 (1964). The land alienation provision conflicts with the equal protection clause, the privileges and immunities clauses, and possibly the takings clause, the commerce clause, and others. *See* Howard P. Willens & Deanne C. Siemer, *The Constitution of the Northern Mariana Islands: Constitutional Principles and Innovations in a Pacific Setting*, 65 GEO. L.J. 1373, 1392-93 (1977).

[5] *See generally* Marianas Political Status Commission, *Section by Section Analysis of the Covenant to Establish a Commonwealth of the Northern Mariana Islands* (1975) at 44 ("The parties negotiating the Covenant believe the provisions of the Covenant referred to in Subsection [501](b) constitute integral parts of the actual compromises and concessions without which the accessions of the Northern Mariana Islands to the United States would not have been possible."). *See also*, *e.g.*, Willens & Siemer, 65 GEO. L.J. at 1398 ("Rota and Tinian were unwilling to accede to a permanent political union with Saipan without adequate protection

All have been challenged on constitutional grounds, but all have been upheld.[6] And they have been upheld on the specific authority of the Insular Cases.[7]

The overruling of those cases would therefore endanger key Covenant provisions on which the CNMI's existence rests. In particular, it would endanger the land alienation restriction, which enables the people of the Northern Marianas "to retain the ownership of their most precious asset: their land." *Section by Section Analysis* at 116.

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of their separate interests in at least one house of the legislature."); *Wabol v. Villacrusis*, 958 F.2d 1450, 1461 (9th Cir. 1990) ("The legislative history of the Covenant and the Constitution indicate that the political union of the Commonwealth and the United States could not have been accomplished without the [land alienation] restrictions.").

[6] *See Northern Mariana Islands v. Atalig*, 723 F.2d 682 (9th Cir. 1984) (upholding jury exemption); *Wabol*, 958 F.2d 1450 (upholding land alienation exemption); *Rayphand v. Sablan*, 95 F.Supp.2d 1133 (D.N.M.I. 1999), *aff'd sub nom. Torres v. Sablan*, 528 U.S. 1110 (2000) (upholding legislative apportionment exemption).

[7] *See Atalig*, 723 F.2d at 688-90 (following Insular Case framework in analyzing and upholding jury trial exemption); *Wabol*, 958 F.2d at 1459 (applying Insular Case approach to issue of land rights) (*citing Atalig* and *Balzac*); *Rayphand*, 95 F.Supp.2d at 1139 fn. 11 ("[W]e focus on the central test of *Atalig, Wabol*, and the *Insular Cases*[.]"). *Atalig* noted that, in the legislative history of its approval of the Covenant, "Congress specifically noted the *Insular Cases*." 723 F.2d at 688 fn. 17. *See also* Willens & Siemer, 65 GEO. L.J. at 1393-1412 (article by NMI counsel in Covenant negotiations, describing and applying the Insular Cases as the legal standards for evaluating the Covenant's constitutional exemptions).

> This Section expressly recognizes the importance of the ownership of land for the culture and traditions of the people of the Northern Mariana Islands and the desirability of protecting them against exploitation and promoting their economic advancement and self-sufficiency.

Id. The constitutionality of this provision would certainly be challenged again once the Insular Cases were no longer there to guard it. It might survive under strict scrutiny, or some other applicable test of constitutionality, or it might not. The same is true of the legislative apportionment exemption.

If either of these did *not* survive, that would not mean that the NMI people would simply lose their land rights, or their senate, but that all else would carry on as before – although that would be bad enough. On the contrary, if the United States is found to have lacked the constitutional power to approve any one of the Covenant's "fundamental," "integral" provisions, that would likely mean that it had no power to enter into the Covenant at all, and that the entire agreement was a void act.[8] The existing US-CNMI political union – sovereignty, citizenship and all – would evaporate overnight, and a new relationship between the US and the Northern Marianas would need to be constructed

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[8] *See generally*, *e.g.*, 17A AM. JUR. 2d Contracts § 218 ("An illegal consideration causes the whole promise to fail, and the contract is void. In other words, a contract that rests on illegal consideration is itself illegal.") (footnotes omitted).

from scratch.[9] Perhaps no relationship agreeable to both sides could be constructed now at all, particularly if the NMI people are now to be told, "You can have your land, or you can have your citizenship, but not both." To reopen the Insular Cases, in other words, is to invite a constitutional crisis of existential proportions in the CNMI. It is to gamble using the islands of the CNMI as dice.[10]

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[9] *See*, *e.g.*, Paul M. Leary, *The Northern Marianas Covenant and American Territorial Relations*, Inst. of Governmental Studies Research Report 80-1 (Berkeley, 1980) ("If the federal courts hold that the principle of population alone must apply to the apportionment of the Northern Marianas legislature . . . then the entire Northern Marianas agreement will be thrown into disarray. If one of its fundamental parts is invalid, then the very basis for the compact is imperiled.").

[10] Even if the existing exemptions somehow survived, the door would be closed to any future agreement between the United States and the CNMI establishing any additional constitutional exemptions, even if both parties agreed to them. The desirability of such further exemptions has become clear over time. For example, a longstanding CNMI statutory handgun ban was recently struck down as violating the second amendment. *See Radich v. Deleon Guerrero*, 2016 WL 1212437 (D.N.M.I. 2016). A provision of the CNMI constitution limiting voting rights on local land matters was similarly struck down as violating the fifteenth. *See Davis v. Commonwealth Election Commission*, 844 F.3d 1087 (9th Cir. 2016). Another constitutional provision regarding abortion was long in danger of such a challenge. *See* N.M.I. CONST., Art. I, § 12 ("The abortion of the unborn child during the mother's pregnancy is prohibited in the Commonwealth of the Northern Mariana Islands, except as provided by law."). As the law currently stands, the Covenant could be amended, by mutual agreement, to create constitutional exemptions covering such issues. However, such an agreement would likely be impossible without the Insular Cases.

The reliance interest therefore counsels leaving them alone, "even if we question their soundness[.]" *Ramos v. Louisiana*, 590 U.S. ___, 140 S. Ct. 1390, 1408 (2020) (Sotomayor, J., concurring).

B. The Insular Cases Were Soundly Decided

That said, there is no reason to question their soundness. The Insular Cases were correctly decided.

1. The Rule of the Insular Cases Is Not Racist.

In making this point, a word must first be said about the most controversial aspect of the Cases, namely their supposed racism.[11] There is no doubt that the Insular Cases contain much arrogant language about hypothetical peoples in far-flung lands,[12] and that they were put to the immediate service of an imperialist political agenda.[13] However, their

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[11] *See* Petition at 27 ("[T]he reasoning in the decisions rests on indefensible racial animus."). *See also*, *e.g.*, *United States v. Vaello Madero*, ___ U.S. ___, 142 S.Ct. 1539, 1552 (2022) (Gorsuch, J., concurring) ("The Insular Cases . . . rest . . . on racial stereotypes."); *id*. at 1560 fn. 4 (Sotomayor, J., dissenting) ("[The Insular Cases] were premised on beliefs both odious and wrong.").

[12] *See*, *e.g.*, *Downes*, 182 U.S. at 306 ("an unknown island, peopled with an uncivilized race"); *id*. ("the immediate bestowal of citizenship on those absolutely unfit to receive it"); *id*. at 311 ("an island inhabited with people utterly unfit for American citizenship") (White, J.); *Dorr*, 195 U.S. at 148 ("territory peopled by savages").

[13] *See*, *e.g.*, *Downes*, 182 U.S. at 286 (Brown, J.) ("A false step at this time might be fatal to the development of what Chief Justice Marshall called the American Empire."). *Cf*. *Mankichi*, 190

fundamental insight – that the same federal constitutional rules need not, and ought not, be imposed on all people in all places – is not in any sense racist.

The Insular Cases first express this principle, as one might expect, with reference to "territory peopled by savages,"[14] but in the very next breath they make the same point about civilized peoples with their own long-established legal traditions.[15] Indeed, it is often forgotten that the same limitation that the Insular Cases imposed on the reach of the federal constitution beyond the states – *i.e.*, that it protects only those rights fundamental to all free government[16] – also

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U.S. at 240 (Harlan, J., dissenting) ("[I]f the principles now announced should become firmly established, the time may not be far distant when . . . to gratify an ambition to become the dominant political power in all the earth, the United States will acquire territories in every direction. . . .").

[14] *See*, *e.g.*, *Dorr*, 195 U.S. at 148 ("If the United States . . . shall acquire territory peopled by savages, [then] if this doctrine is sound, it must establish there the trial by jury. To state such a proposition demonstrates the impossibility of carrying it into practice.").

[15] *See id.* ("Again, if the United States shall acquire by treaty the cession of territory having an established system of jurisprudence, where jury trials are unknown, but a method of fair and orderly trial prevails under an acceptable and long-established code, the preference of the people must be disregarded, their established customs ignored, and they themselves coerced to accept, in advance of incorporation into the United States, a system of trial unknown to them and unsuited to their needs.").

[16] *See*, *e.g.*, *Downes*, 182 U.S. at 282-83 ("such . . . immunities as are indispensable to a free government") (Brown, J.), *id.* at 291 ("principles which are the basis of all free government which cannot be with impunity transcended") (White, J.).

originally applied to the people of the states themselves. At the time the Insular Cases were decided, that was the measure of the federal constitutional rights applicable to the states through the fourteenth amendment due process clause.[17] Moreover, the rationale for this limited federal constitutional safety net was explicitly an openness to accommodating the states' own local cultural diversity:

> The Constitution of the United States was ordained, it is true, by descendants of Englishmen, who inherited the traditions of English law and history; but it was made for an undefined and expanding future, and for a people gathered and to be gathered from many nations, and of many tongues. And, while we take just pride in the principles and institutions of common law, we are not to forget that, in lands where other systems of jurisprudence prevail, the ideas and processes of civil justice are also not unknown. . . . There is nothing in Magna Charta, rightly construed as a broad

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[17] *See*, *e.g.*, *Twining v. New Jersey*, 211 U.S. 78, 106 (1908) ("a fundamental principle of liberty and justice which inheres in the very idea of a free government and is the inalienable right of a citizen of such a government") (in New Jersey) (*overruled by Malloy v. Hogan*, 378 U.S. 1 (1964)); *Holden v. Hardy*, 169 U.S. 366, 389 (1898) ("certain immutable principles of justice, which inhere in the very idea of a free government") (in Utah); *Chicago, Burlington & Quincy R. Co. v. City of Chicago*, 166 U.S. 226, 237 (1897) ("limitations on [governmental] power, which grow out of the essential nature of all free governments") (in Illinois); *Hurtado v. California*, 110 U.S. 516, 521 (1884) ("the general principles of public liberty and private right, which lie at the foundation of all free government") (in California).

> charter of public right and law, which ought to exclude the best ideas of all systems and every age[.]

Hurtado, 110 U.S. at 530-31.

In other words, the limited federal constitution of the Insular Cases was not just something concocted in order to be foisted onto "alien races" on distant islands, "differing from us in religion, customs . . . and modes of thought." *Downes*, 182 U.S. at 287 (Brown, J.). On the contrary, it reflects a prescient recognition that "*we*," the American people, can and will often differ from each other in all these ways as well, and that *we* will require some constitutional room in which to do so. And the wider the scope of *us* becomes, the truer this is.

The people of the states, however, no longer enjoy this degree of constitutional flexibility. The old "free government" rule still prevailed as late as *Powell v. Alabama*, 287 U.S. 45, 71-72 (1932) ("certain immutable principles of justice, which inhere in the very idea of a free government, which no member of the Union may disregard") (*quoting Holden*, 169 U.S. at 389), but, under a series of "incorporation" decisions culminating with *Duncan v. Louisiana*, 391 U.S. 145 (1968), the states are now bound by all federal constitutional principles that are deemed fundamental, not to *all* free government, but to "an Anglo-American regime" specifically.[18] That, if anything, is the "racist" rule. It is

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[18] *Duncan* describes the shift in perspective at 391 U.S. at 149 fn.14. *See also Atalig*, 723 F.2d at 689 ("*Duncan* . . . adopt[ed]

thanks to the Insular Cases that the older, more broad-minded, rule still prevails outside the states.[19]

2. The Insular Cases Correctly Link Federal Powers to the Law of Nations.

All questions of racism aside, the Insular Cases are constitutionally sound. The foundational principle of their analysis – that the constitution creates a nation within the meaning of international law, which is governed by that law when it acts as a nation on the international stage – has been widely accepted by this Court in other contexts, including the law of treaties and that of immigration.[20] In the case of treaties, the rule is stated in very Insular-like terms as follows:

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a new definition of fundamental rights for the purpose of applying the Bill of Rights to the states. Previously, the inquiry had been whether a civilized system could be imagined that would not accord the particular protection. The new approach only asks whether a procedure is necessary to an *Anglo-American* regime of ordered liberty.") (internal quotation marks omitted) (emphasis by *Atalig* court). *See generally McDonald v. City of Chicago*, 561 U.S. 742, 759-66 (2010) (discussing this development).

[19] *See Wabol*, 958 F.2d at 1460 ("In the territorial context, the definition of a basic and integral freedom must narrow to incorporate the shared beliefs of diverse cultures.").

[20] *See*, *e.g.*, *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 318 (1936) ("As a member of the family of nations, the right and power of the United States in that field [of international relations] are equal to the right and power of the other members of the international family."); *Fong Yue Ting v. United States*, 149 U.S. 698, 705 (1893) ("The United States, in their relation to foreign countries and their subjects or citizens, are one nation, invested with powers which belong to independent nations[.]") (*quoting Chae Chan Ping v. United States*, 130 U.S. 581, 604

> The treaty power, as expressed in the Constitution, is in terms unlimited except by those restraints which are found in that instrument against the action of the government, or of its departments, and those arising from the nature of the government itself, and that of the States. . . . But with these exceptions, it is not perceived that there is any limit to the questions which can be adjusted touching any matter which is properly the subject of negotiation with a foreign country.

Geofroy v. Riggs, 133 U.S. 258, 267 (1890) (citation omitted). The Insular Cases are clear that they are based on the same principle, and that they find the power to acquire territory, and determine its governing law, to exist in the United States *because* it existed in all sovereign nations under international law as it then stood. *See Downes*, 182 U.S. at 300 *ff.* (White, J.).[21]

Under such law, an acquiring power could choose to "incorporate [the people of an acquired territory] with his former states, giving to them the rights,

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(1889)); *Usoyan v. Republic of Turkey*, 6 F.4th 31, 41 (D.C. Cir. 2021) ("International law is the source of many powers that are incidental to sovereignty," including power to acquire territory, to expel aliens, and to make international agreements short of treaties). *See generally The Nereide*, 13 U.S. (9 Cranch) 388, 423 (1815) ("[T]he Court is bound by the law of nations which is a part of the law of the land.").

[21] In support, *Downes* cites the Declaration of Independence, which provides that the United States "have full power to levy war, conclude peace, contract alliances, establish commerce, and to do all other acts and things which independent states may of right do." *Id.* at 302.

privileges, and immunities of his own subjects," or, if circumstances warranted, "govern them with a tighter rein [and] keep them under subjection." *Id*. at 301-02 (*quoting* Halleck, INTERNATIONAL LAW, ch. 33, § 3). However, application of the Insular rule does not result in the same outcome today. The United States is still a nation and is still, by virtue of being such, empowered to do what nations may do, but nations may no longer acquire or maintain colonies. On that point, the law of nations has changed radically since the time of the Insular Cases. Indeed, it has undergone what might appropriately be called a "sea change." It now firmly rejects colonialism, and charges all nations with the duty to develop self-government in all territories under their administration. *See*, *e.g.*, U.N. CHARTER, Art. 73 ("Members of the United Nations which have or assume responsibilities for the administration of territories whose peoples have not yet attained a full measure of self-government . . . accept as a sacred trust the obligation to . . . develop self-government[.]").[22]

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[22] *See also*, *e.g.*, Declaration on the Granting of Independence to Colonial Countries and Peoples, G.A. Res. 1514 (1960), A/RES/1514(XV) ("Immediate steps shall be taken, in . . . territories which have not yet attained independence, to transfer all power to the peoples of those territories, without any conditions or reservations, in accordance with their freely expressed will and desire[.]"); International Covenant on Civil and Political Rights, G.A. Res. 2200 (1966), A/RES/2200(XXI)A, Part I, Art. 1, § 1 ("All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development."); Programme of Action, G.A. Res. 2621 (1970), A/RES/2621(XXV) ("[T]he further continuation of colonialism in all its forms and manifestations [is]

This does not change the need for constitutional flexibility that the Insular Cases recognized. On the contrary, that flexibility is needed at least as much in developing and safeguarding the islanders' self-government as it formerly was in "keeping them under subjection." That is especially true if the islands are to remain in some form of association with the United States, as the law of nations also allows.[23] That flexibility was needed when the CNMI was created, and it was needed in this case in American Samoa. When it is needed, the Insular Cases are there to provide it. But the flexibility that they provide is now appropriately exercised in support of the islanders' own autonomy, as the Tenth Circuit recognized in this case. *See Fitisemanu v. United States*, 1 F.4th 862, 871 (10th Cir. 2021) ("This same flexibility permits courts to defer to the preferences of indigenous peoples, so that they may chart their own course."); *id*. at 873 ("[T]he Insular Cases permit this court to respect the wishes of the American Samoan people."); *id*. at 874 ("The Insular framework better upholds the goals of cultural autonomy and self-direction."); *id*. at 879 (urging recognition of "consent as a cornerstone of a flexible approach").

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a crime which constitutes a violation of the Charter of the United Nations . . . and the principles of international law.").

[23] The self-government which is the ultimate goal under modern intentional law for all territories can be achieved through independence, full and equal integration, "free association with an independent state." or "other separate system of self-government." *See*, *e.g.*, G.A. Res. 1541 (1960), A/RES/1541(XV); G.A. Res. 742 (1953), A/RES/742(VIII); G.A. Res. 648 (1952), A/RES/648(VII); G.A. Res. 567 (1952), A/RES/567(VI).

In order to apply the rule of the Insular Cases in this salutary way, the Tenth Circuit did not need to "extend," or even "repurpose," the Cases, although it claimed to "repurpose" them.[24] Nor did it need to apply Justice Harlan's "impractical or anomalous" gloss on the Insular standard from *Reid v. Covert*, although it claimed to do so.[25] It needed only to apply the basic rule of the Insular Cases themselves – *i.e.*, that the United States holds the powers of a nation under international law – correctly and straightforwardly, given the modern state of international law in favor of self-government and self-determination, and against colonialism.[26] Several years ago, the author of this brief wrote:

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[24] *Cf. Reid*, 354 U.S. at 14 ("[I]t is our judgment that neither the [Insular] cases nor their reasoning should be given any further expansion.") (plurality opinion); *Fitisemanu*, 1 F.4th at 870 ("[T]he approached developed by the Insular Cases . . . can be repurposed to preserve the dignity and autonomy of the peoples of America's overseas territories.").

[25] *See Reid*, 354 U.S. at 75-76 (Harlan, J., concurring); *Fitisemanu*, 1 F.4th at 879 ("Though its articulation postdates the Insular Cases, the lodestar of the Insular framework has come to be the 'impracticable and anomalous' standard.") (*citing Reid*). *See also Wabol*, 958 F.2d at 1462 (applying this standard). *But see Rayphand*, 95 F. Supp. 2d 1139 fn. 11 (noting that "the vitality of that [impractical or anomalous] test is in doubt;" applying original Insular Cases "free government" analysis alone).

[26] It could also have gone on to find that self-determination *is* fundamental to all free government, thus mandated by the second prong of the Insular rule as well. *Cf. Fitisemanu*, 1 F.4th at 879 ("[It] is a fundamental and timeless truth [that] a people's incorporation into the citizenry of another nation ought to be done with their consent or not done at all.").

> The Insular Cases have received their share of criticism over the years. They have come to be seen as an embarrassing relic of manifest-destiny imperialism, reflecting, at best, a result-oriented post hoc justification of politically popular expansionism, and, at worst, a racist unwillingness to extend to non-white peoples the basic civil liberties enjoyed by white Americans. *This conventional view of the Cases must be reassessed.*

Joseph E. Horey, *The Right of Self-Government in the Commonwealth of the Northern Mariana Islands*, 4 ASIAN-PAC. L. & POL'Y J. 180, 228 (2003) (footnote omitted, emphasis added). The decision of the Tenth Circuit in this case shows that this reassessment is indeed underway, and that the Insular Cases have at last begun to live up to their considerable potential as heralds of a just, free and flexible federal territorial policy. This is certainly not the time to get rid of them.

CONCLUSION

Because of the reliance that has been placed on their validity by the people of the Northern Marianas, and because they were correctly decided in the first instance, the Insular Cases should not be revisited or overruled, and the petition for writ of certiorari, which seeks to overturn them, should be denied. Alternatively, if the petition is granted, the writ should be limited to any asserted grounds for citizenship which do not implicate the Insular Cases.

Respectfully submitted this thirteenth day of July, 2022.

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