No. 15-981

IN THE

Supreme Court of the United States

LENEUOTI FIAFIA TUAUA, VA'ALEAMA TOVIA FOSI, FANUATANU F. L. MAMEA, ON BEHALF OF HIMSELF AND HIS THREE MINOR CHILDREN, TAFFY LEI T. MAENE, EMY FIATALA AFALAVA AND SAMOAN FEDERATION OF AMERICA, INC.,

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 DC CIRCUIT

BRIEF OF FORMER FEDERAL AND LOCAL JUDGES AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Whether the Fourteenth Amendment's Citizenship Clause, which provides that "[a]ll 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, entitles persons born in the U.S. Territory of American Samoa to birthright citizenship.

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INTEREST OF *AMICI CURIAE*[1]

Amici are retired federal and local judges who served in United States territories.

Retired Judge Hector 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.

Retired Judge Thomas Moore served on the District Court of the Virgin Islands from 1992 through 2005. Prior to his appointment, Judge Moore served as an Assistant U.S. Attorney in Virginia and the Virgin Islands.

Retired Justice B.J. Cruz is a Senator in the Guam Legislature. 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 Justice Peter Charles Siguenza, Jr., served on the Superior Court of Guam from 1984 until 1996. He served as the Chief Justice of the Supreme Court of Guam from 1996 to 1999, an Associate Justice on that court from 1999 until 2001, and again as Chief Justice from 2001 to 2003.

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[1] No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No persons other than *amici curiae*, their members, or their counsel made a monetary contribution to its preparation or submission. Letters from the parties consenting to the filing of *amicus* briefs have been filed with the Clerk of the Court.

While serving on the bench, *amici* were required, from time to time, to apply the controversial "territorial incorporation" doctrine established by this Court in the Insular Cases. In *amici*'s experience, the territorial incorporation doctrine is incapable of sensible or objective application, and is impossible to separate from the outdated notions of racial inferiority that animated its adoption. *Amici* respectfully submit that the time has come for this Court to overrule the Insular Cases, adopt a coherent doctrine governing the applicability of the U.S. Constitution to the territories, and ensure that no judge will ever again be forced to apply a precedent that assumes that he or she is a second-class citizen.

SUMMARY OF ARGUMENT

This Court should grant certiorari because the court of appeals' decision relied and expanded upon the territorial incorporation doctrine established by the Insular Cases, which were as incoherent and incorrect when they were decided as they have proven to be in the century since.

In holding that "the Citizenship Clause does not extend birthright citizenship to those born in American Samoa," Pet. App. 2a, the court of appeals "resort[ed] to the . . . analytical framework" of the Insular Cases. Pet. App. 11a-12a. The Insular Cases establish a "doctrine of territorial incorporation" whereby there are incorporated and unincorporated territories. *Ibid.* According to the court of appeals, in "incorporated territories . . . the entire Constitution applies *ex proprio vigore*," whereas in "unincorporated territories such as American Samoa . . . only certain fundamental constitutional rights apply by their own force." *Ibid.* (internal quotation marks and brackets omitted). And the right to citizenship en-

shrined by the Citizenship Clause of the Fourteenth Amendment, according to the court of appeals, is non-fundamental, as well as impractical and anomalous as applied to American Samoa.

The Insular Cases should be reconsidered and overruled. The decision below is only the most recent example in decades of failed judicial efforts to interpret the Insular Cases. Despite this Court's emphasis on establishing clear rules to guide lower courts' interpretation of constitutional liberties, the vague principles expressed in the Insular Cases have proven to be unworkable and incapable of consistent application. The court of appeals' two-step analytical framework lacks any objective guideposts, and that inquiry's inherently malleable nature confirms the need for review by this Court. The application of fundamental constitutional rights is too important to be left to unbounded judicial discretion.

Review is further warranted because the doctrine of territorial incorporation cannot be divorced from the Insular Cases' anachronistic assumption that different races deserve different kinds of constitutional rights. The lower court decisions in this case suggest that the territorial incorporation doctrine was derived from race-neutral differences in habits and traditions. *See, e.g.*, Pet. App. 24a (*Tuaua v. United States*, 951 F. Supp. 2d 88, 95 (D.D.C. 2013)). But the text of the Insular Cases resists any such interpretation. Judges in the territories remain obliged to apply the Insular Cases' doctrine faithfully, even though the precedents challenge those judges' equal status under law. The time has come to end judicial support for a doctrine of constitutional inequality that belongs on the same pages of history as *Plessy v. Ferguson*, 163 U.S. 537 (1896).

ARGUMENT

I. THE INSULAR CASES ARE OUTDATED, VAGUE, AND INCAPABLE OF PROVIDING MEANINGFUL GUIDANCE TO COURTS.

For over a century, federal courts have failed in repeated efforts to interpret and apply the fractured and incoherent doctrine established by the Insular Cases. *See King v. Morton,* 520 F.2d 1140, 1153 (D.C. Cir. 1975) (Tamm, J., dissenting) ("The 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, I believe, without parallel in our judicial history."). "Whatever the validity of the Insular Cases in the particular historical context in which they were decided," *Boumediene v. Bush*, 553 U.S. 723, 758 (2008) (brackets and internal quotation marks omitted), the decisions are incapable of providing meaningful guidance to modern courts.

Clear judicial rules are necessary to cabin judicial discretion and ensure fair and consistent treatment of parties before the federal courts. Clarity is even more important when courts are asked to opine on the applicability of important constitutional rights, such as the right to equal citizenship enshrined in the Citizenship Clause of the Fourteenth Amendment. The Insular Cases, unfortunately, offer only discordant guidance, and this Court's precedents counsel in favor of reconsidering a doctrine that has yielded consistent confusion over time.

A. The Insular Cases Have Proven Unworkable And Incapable Of Consistent Application.

The Insular Cases offer only vague and hazy principles from which no clear judicial rules can be discerned. The result has been incongruous interpretations of the territorial incorporation doctrine throughout the federal courts.

In the Insular Cases, this "Court held that the Constitution has independent force in [the unincorporated] territories, a force not contingent upon acts of legislative grace." *Boumediene*, 553 U.S. at 764. Specifically, the doctrine of territorial incorporation established by the Insular Cases provides that "the Constitution applies in full in incorporated Territories surely destined for statehood but only in part in unincorporated Territories." *Ibid.* at 757-58 (quoting *Dorr v. United States*, 195 U.S. 138, 143 (1904); *Downes v. Bidwell*, 182 U.S. 244, 293 (1901); *Balzac v. Porto Rico*, 258 U.S. 298, 312 (1922)). In recent years, perhaps because the Constitution itself does not mention, let alone distinguish between, incorporated and unincorporated territories, this Court has taken "note of the difficulties inherent in that position." *Boumediene,* 553 U.S. at 756-57 (citations omitted). Indeed, the invention of "incorporated" and "unincorporated" territories departed, in at least some respects, from this Court's prior precedents. *See, e.g., Loughborough v. Blake*, 18 U.S. 317, 319 (1820) ("[The United States] is the name given to our great republic, which is composed of States and territories."); *Slaughter-House Cases*, 83 U.S. 36, 72 (1872) (noting that the Citizenship Clause repudiated the proposition that those born "in the District of

Columbia or in the Territories, though within the United Sates, were not citizens").

The Insular Cases' fractured opinions and disjointed explanations offer little if any guidance as to how judges should determine which constitutional rights apply in which "unincorporated" territories. This Court has identified the "common thread" of the Insular Cases as "the idea that questions of extraterritoriality turn on objective factors and practical concerns, not formalism." *Boumediene*, 553 U.S. at 764; *see also* Christina Duffy Burnett, *A Convenient Constitution? Extraterritoriality After Boumediene*, 109 COLUM. L. REV. 973, 984 (2009) ("The *Boumediene* Court rejected the notion that the Insular Cases stand for the proposition that the Constitution does not follow the flag to the unincorporated territories."). But the lower courts have little way of knowing *which* objective factors and practical concerns should guide the application of constitutional protections in modern cases. Indeed, even this Court's application of the territorial incorporation doctrine "has been fraught with irreconcilable inconsistencies." Gustavo A. Gelpi, *The Insular Cases: A Comparative Historical Study of Puerto Rico, Hawai'i, and the Philippines*, THE FED. LAWYER, March/April 2011, at 22, 23.

The Insular Cases have been incoherent from their inception.[2] In *Downes*, the Court held that

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[2] *Boumediene* cited six cases as the Insular Cases: *Dorr v. United States*, 195 U.S. 138 (1904); *Territory of Hawaii v. Mankichi*, 190 U.S. 197 (1903); *Downes v. Bidwell*, 182 U.S. 244 (1901); *Armstrong v. United States*, 182 U.S. 243 (1901); *Dooley v. United States*, 182 U.S. 222 (1901); and *De Lima v. Bidwell*, 182 U.S. 1 (1901). *See Boumediene*, 553 U.S. at 756-57.

Congress could impose a tariff on products shipped from Puerto Rico without violating the Uniformity Clause. 182 U.S. at 287. The "five Justices in the *Downes* majority reached their shared judgment by way of divergent theories of the Constitution." Br. of Amici Curiae Scholars of Constitutional Law and Legal History in Supp. of Neither Party 9, *Tuaua v. United States*, Case No. 13-5272 (D.C. Cir. 2014). In his oft-cited concurrence, Justice White stated that "[T]he determination of what particular provision of the Constitution is applicable, generally speaking, in all cases, involves an inquiry into the situation of the territory and its relations to the United States." *Downes*, 182 U.S. at 293 (White, J., concurring). But Justice White's concurrence offers no clue as to how a judge might conduct such an inquiry as a territory's relations with the United States evolves over time, and further leaves unresolved how a court should construe constitutional rights whose scope remains unclear even within the "several States."

Similarly, in *Dorr*, the Court held that the right to trial by jury did not apply in the Philippines. 195 U.S. at 139, 149. The Court explained, "[W]e regard it as settled by [*Downes*] that the territory is to be governed under the power existing in Congress to make laws for such territories, and subject to such constitutional restrictions upon the powers of that body as are applicable to the situation." *Dorr*, 195 U.S. at 143. Again, *Dorr* failed to explain how a court might determine in the future *which* "constitutional restrictions upon" Congress "are applicable to the situation." *See ibid.*

In *Balzac*, the Court held that the right to trial by jury did not apply in Puerto Rico. 258 U.S. at 300, 304-05. The Constitution "contains grants of power,

and limitations which in the nature of things are not always and everywhere applicable." *Ibid.* at 313. Thus, after *Dorr* and *Balzac*, it appeared that the right to due process extended to the Philippines and Puerto Rico, *see ibid.* at 312-13, but the right to trial by jury did not. Beyond that, the Court "'left open *which* constitutional provisions and *which* individual protections applied to the residents of the unincorporated territories.'" BARTHOLOMEW H. SPARROW, THE INSULAR CASES AND THE EMERGENCE OF AMERICAN EMPIRE 149, 190 (2006).

Although some have attempted to explain the Insular Cases as drawing a clear constitutional line as between incorporated and unincorporated territories, the history is not so straightforward. As one scholar has explained:

> Of the fourteen Insular Cases decided after 1901, up to and including the unanimous decision in 1922 in *Balzac*, six dealt with the applicability of constitutional provisions in the territories. All of these concerned jury-related rights: they held either that jury-related rights did not apply in unincorporated territories, or that these rights applied only in incorporated territories. In the remaining eight cases, either the Court declined to reach the constitutional question, or the case did not raise one. . . . While it is certainly not insignificant that the Court held several constitutional provisions inapplicable in the unincorporated territories, these holdings hardly amount to withholding all but the "fundamental" provisions of the Constitution from those territories, nor do they some-

> how imply that the "entire" Constitution applied elsewhere.

Christina Duffy Burnett, *Untied States: American Expansion and Territorial Deannexation*, 72 U. CHI. L. REV. 797, 835-36 (2005) (citations omitted). In sum, the Insular Cases offer courts little guidance when deciding which additional constitutional protections apply, and to what extent, in the territories.

B. Recent Decisions Have Further Obscured The Insular Cases' Meaning.

Despite the passage of nearly a century since the Insular Cases were decided, the Court has failed to clarify the territorial incorporation doctrine. Unfortunately, this Court's decision in *Boumediene* has enhanced, rather than diminished, the confusion.[3]

In *Boumediene*, the Court held that "aliens designated as enemy combatants and detained at the United States Naval Station at Guantanamo Bay, Cuba . . . have the habeas corpus privilege." 553 U.S. at 753. The Court consulted the Insular Cases as well as *Reid v. Covert*, 354 U.S. 1 (1957), which applied the jury right to American civilians tried by the U.S. military abroad, and *Johnson v. Eisentrager*, 339 U.S. 763 (1950), which denied habeas corpus to enemy aliens convicted of violating the laws of war.

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[3] The Court has most recently discussed the Insular Cases in examining the extraterritorial, as opposed to territorial, reach of the Constitution. *See Boumediene*, 553 U.S. at 756-60; *United States v. Verdugo-Urquidez*, 494 U.S. 259, 268-69 (1990). The conflation of territorial and extraterritorial doctrine has further frustrated lower courts' ability to apply this Court's precedents regarding territorial issues with clarity and consistency.

The *Boumediene* Court explained that the Insular Cases, *Eisentrager*, and *Reid* stand against the proposition that "the Constitution necessarily stops where *de jure* sovereignty ends." *Boumediene*, 553 U.S. at 755. "As early as *Balzac* in 1922, the Court took for granted that even in unincorporated Territories the Government of the United States was bound to provide to noncitizen inhabitants 'guaranties of certain fundamental personal rights declared in the Constitution.' . . . Yet noting the inherent practical difficulties of enforcing all constitutional provisions 'always and everywhere,' the Court devised in the Insular Cases a doctrine that allowed it to use its power sparingly and where it would be most needed." *Ibid.* at 758-59 (quoting *Balzac*, 258 U.S. at 312). The Insular Cases and *Reid* share a "functional approach to questions of extraterritoriality," and the "common thread" is "the idea that questions of extraterritoriality turn on objective factors and practical concerns, not formalism." *Boumediene*, 553 U.S. at 764.

The Court's description of the Insular Cases in *Boumediene* added little, if any, clarity regarding the lasting import of those decisions.[4] While "guaranties of certain fundamental personal rights declared in the Constitution," *Balzac*, 258 U.S. at 312, extend to the territories, neither *Balzac* nor *Boumediene* reveals a rule for deciding which rights might qualify as "fundamental" or what precise rights are the "cer-

[4] As previously noted, the practical direction offered by *Boumediene* is further limited by the fact that *Boumediene* addressed the reach of the Constitution outside of U.S. territories, not within them. *See supra* n.2.

tain" ones that are guaranteed in the territories.[5] Courts may enforce constitutional provisions "sparingly" and where "most needed," *Boumediene*, 553 U.S. at 759, but it is impossible to discern an objective test for determining which constitutional protections are "most needed." Further, while *Boumediene* noted that "objective factors and practical concerns" should guide the application of extraterritorial constitutional rights, *ibid.* at 764, lower courts have no way to know which objective factors or practical concerns should be consulted.

As one example of the incoherence of the Insular Cases' "objective factors," *Downes* emphasized the importance of both geographic distance and perceived cultural differences between the territories and the states. *See* 182 U.S. at 282 ("It is obvious that in the annexation of outlying and distant possessions grave questions will arise from differences of race, habits, laws, and customs of the people, and from differences of soil, climate, and production, which may require action on the part of Congress that would be quite unnecessary in the annexation of contiguous territory inhabited only by people of the same race, or by scattered bodies of native Indians."). Setting aside the unsupportable racial assumptions in *Downes*, for at least several decades these perceived differences have not been understood as either

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[5] Additionally, in *Reid*, 354 U.S. 1, a plurality of the Court suggested that this might not always be the determinative question. *See ibid.* at 8-9 ("While it has been suggested that only those constitutional rights which are 'fundamental' protect Americans abroad, we can find no warrant, in logic or otherwise, for picking and choosing among the remarkable collection of 'Thou shalt nots' which were explicitly fastened" by the Constitution).

"objective" or "practical" considerations. *See, e.g.*, 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) (Insular Cases' assumptions "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").

Adding additional confusion, *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." *Boumediene*, 553 U.S. at 758.[6] While perhaps unobjectionable at the highest levels of generality, this principle can only sow confusion in the lower courts. In this case, for example, lower court judges have no way of knowing whether the ties between the contiguous states and American Samoa have become sufficiently strong to rise to the level of "constitutional significance." Even if this were clear, it would leave unanswered how strong those ties must be before rights such as the right to birthright citizenship may be applied.

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[6] *See also Reid*, 354 U.S. at 14 (plurality opinion) (explaining that the Insular Cases "involved the power of Congress to provide rules and regulations to govern *temporarily* territories with wholly dissimilar traditions and institutions") (emphasis added).

C. The Decision Below Demonstrates The Need To Reconsider The Insular Cases.

The decision below underscores the need for this Court to clarify the reach of the Insular Cases. Citing its earlier decision in *King v. Morton*, the court of appeals applied the Insular Cases' purported analytical framework to determine the reach of the Citizenship Clause in the territories. Under that inquiry, a court must first determine whether the constitutional right in question is so "fundamental" that it presumptively applies in the unincorporated territories. *See King*, 520 F.2d at 1146. If the right is not fundamental, the court must determine whether that right would be "impractical and anomalous" in the territory. *See ibid.* at 1147 (quoting *Reid*, 354 U.S. at 75).

Despite the fact that a plurality of this Court previously directed that "neither the [Insular C]ases nor their reasoning should be given any further expansion," *Reid*, 354 U.S. at 14, the court of appeals did just that by holding that citizenship is not a fundamental right, and that the right would be anomalous if applied to American Samoa. That holding, which is inconsistent with other precedents of this Court and certain of the Insular Cases themselves, only highlights the hopeless ambiguity of the Insular Cases.

The first step in the court of appeals' analysis was to ask whether the constitutional right in question—here, the citizenship guaranteed by the Fourteenth Amendment—is a "fundamental" right. *See King*, 520 F.2d at 1146-47. But while certain of the Insular Cases and their progeny did hold that certain "fundamental" rights extend to the territories, *see, e.g., Boumediene*, 553 U.S. at 758-59, these cases did not hold that only "fundamental" rights may be applied extraterritorially. Further, the Insular Cases

offer little guidance regarding what constitutes a "fundamental" right, and what guidance they do offer does not support the court of appeals' constricted reading of that term.

The court of appeals held that "[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.'" Pet. App. at 15a (quoting *Dorr*, 195 U.S. at 147). But *Dorr*, the Insular Case on which the court of appeals relied, did not establish that a right must be common to "all free government" in order to be "fundamental." Instead, *Dorr* stated that there may "be inherent, although unexpressed, principles which are the basis of all free government, which cannot be with impunity transcended. But *this does not suggest that every express limitation of the Constitution which is applicable has not force*, but only signifies that *even in cases where there is no direct command of the Constitution which applies*, there may nevertheless be restrictions of so fundamental a nature that they cannot be transgressed, although not expressed in so many words in the Constitution." *Dorr*, 195 U.S. at 147 (emphasis added) (quoting *Downes*, 182 U.S. 291). According to *Dorr*, Congress is restricted from legislating in the territories *not only* by the "express limitation[s] of the Constitution," but *also* "restrictions of so fundamental a nature." Because the Citizenship Clause is an "express limitation" and "direct command of the Constitution," whatever limitations may apply to "inherent" or "unexpressed" constitutional principles are simply irrelevant.

Further, the court of appeals' approach to interpreting the scope of "fundamental rights" under the U.S. Constitution expressly relied upon its interpre-

tation of principles of international law. *See* Pet. App. at 15a-16a (finding the American tradition of *jus soli* "non-fundamental" because other "democratic societies principally follow *jus sanguinis*," which determines citizenship based on parentage). But this Court has previously held that citizenship is a fundamental right under the U.S. Constitution. *See Trop v. Dulles*, 356 U.S. 86, 103 (1958) (plurality opinion). The fact that other nations have chosen to adopt narrower (or more expansive) definitions of citizenship than the United States does not compel U.S. courts to apply those interpretations to the U.S. Constitution. *See, e.g., McDonald v. Chicago*, 561 U.S. 742, 784 (2010) (the question whether a "guarantee is fundamental [should be analyzed] from an *American* perspective").

The second prong applied by the court of appeals—whether recognizing a non-fundamental right would be "impractical and anomalous" as-applied to the territory in question, *King*, 520 F.2d at 1147-48—is just as problematic as the court's fundamental rights analysis.

The court of appeals' "impractical and anomalous" analysis derives from Justice Harlan's concurrence in *Reid*. 354 U.S. at 75 (Harlan, J., concurring in the result) ("there is no rigid rule that jury trial must always be provided in the trial of an American overseas, if the circumstances are such that trial by jury would be impractical and anomalous"). As an initial matter, Justice Harlan's opinion was not controlling. Further, Justice Harlan noted that "what *Ross* and the Insular Cases hold is that the particular local setting, the practical necessities, and the possible alternatives are relevant to a question of judgment . . . . [F]or me, the question is 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." *Ibid.* at 76. That guidance is vague to the point of meaninglessness—it is impossible to predict how even like-minded judges would apply such guidance to identical fact patterns.[7]

Neither the court of appeals below, nor its predecessor opinion in *King*, explained how a reviewing court should determine whether the application of a right would, indeed, be "impractical and anomalous." Should impracticality be judged by reference to Congress, the courts, or local governments? How does a court decide if a right is anomalous? In *King*, the court of appeals recognized that it could not answer these questions, and instead remanded to the district court to find the "answer to that question . . . from . . . solid evidence of actual and existing conditions." 520 F.2d at 1148. The decision below added no content to the inquiry. *See* Pet. App. at 19a-23a.

II. THE UNCLEAR AND UNWORKABLE DOCTRINE CREATED BY THE INSULAR CASES WARRANTS RECONSIDERATION.

The application of our most basic constitutional rights is too important to be left to unbounded judicial discretion. This Court should grant certiorari to clarify the meaning of the Insular Cases and provide clear instructions to lower courts regarding the in-

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[7] Directing a lower court to examine whether a non-fundamental right is "impractical and anomalous" is especially concerning in the context of enumerated rights based on seemingly objective criteria, such as a right to citizenship based on the location of one's birth.

terpretation and application of fundamental constitutional rights in the territories.

This Court has frequently emphasized the utility of clear rules, particularly with respect to the interpretation of constitutional liberties. In *amici*'s experience, clear rules from this Court help guide lower court judges' discretion, improve the consistency and value of judicial review, and enhance the predictability of judicial outcomes.

When this Court decides a case, "not merely the *outcome* of that decision, but the *mode of analysis* that it applies will thereafter be followed by the lower courts within that system. . . ." Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175, 1177 (1989). Thus, "a clear, previously enunciated rule that one can point to in explanation of [a] decision" is enormously helpful to future courts. *Ibid.* at 1178. Among other benefits, a definite rule generates the valuable "appearance of equal treatment." *Ibid.*

Clear rules also have the advantage of predictability. *See ibid.;* Jeffrey L. Fisher, *Categorical Requirements in Constitutional Criminal Procedure*, 94 GEO. L.J. 1493, 1518 (2006) ("A need for predictability is a classic reason for favoring bright-line rules over more malleable frameworks."). Because this Court is able to hear only a small percentage of the total cases in which certiorari is sought, the Court's older precedents are generally the only guidance lower courts and litigants will receive in a given matter. Thus, when this Court fails to clarify incoherent precedent, it "effectively . . . conclude[s] that uniformity is not a particularly important objective with

respect to the legal question at issue." Scalia, *supra*, at 1179.[8]

The importance of unambiguous rules in constitutional contexts applies with equal force to the interpretation of constitutional provisions in the territories, including the application of the Citizenship Clause. The interpretation of the Citizenship Clause is a constitutional question of enormous importance—its meaning should not be determined by reference to an analytical framework that was fractured and confusing when adopted, and impossible to apply in a sensible manner today.

This Court has the duty to clarify, and overrule where necessary, past precedents such as the Insular Cases notwithstanding the doctrine of *stare decisis*. That doctrine is not an "inexorable command," particularly in a constitutional case. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 854 (1992). Prior precedents interpreting the Constitution may be overruled or clarified where they are "clearly erroneous," but also where a "rule has proven to be intolerable simply in defying practical workability," where "related principles of law have so far

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[8] For example, this Court has stressed the importance of clear rules in applying the Fourth, Fifth, and Sixth Amendments. *See, e.g.*, *Blakely v. Washington*, 542 U.S. 296, 308 (2004) (rejecting a "manipulable standard" in favor of a "bright-line rule" regarding the Sixth Amendment right to trial by jury); *Kyllo v. United States*, 533 U.S. 27, 39 (2001) (rejecting ambiguous standard in the Fourth Amendment context); *Kirby Forest Indus., Inc. v. United States*, 467 U.S. 1, 10 (1984) (emphasizing the need for "a clear, easily administrable rule" in Fifth Amendment takings cases).

developed as to have left the old rule no more than a remnant of abandoned doctrine," or where "facts have so changed or come to be seen so differently, as to have robbed the old rule of significant application or justification." *Ibid.* at 854-55. *Amici* respectfully submit that all of these factors apply to the Insular Cases, which have proven unworkable over time, which have been overtaken by developments in both statutory and constitutional law, and which relied upon factual assumptions that can no longer be taken seriously, let alone taken for granted.

III. THE INSULAR CASES' RELIANCE ON DISCREDITED ASSUMPTIONS OF RACIAL INFERIORITY REQUIRES CORRECTION.

No United States judge should be required to cite and apply precedent that is based upon a foundational assumption that the judge is himself or herself a second-class citizen. Yet that is precisely what application of the Insular Cases requires for federal and local judges who reside in any of the U.S. territories. This fundamental injustice must end.

The act of applying the Insular Cases asks the applying court to affirm, tacitly or expressly, the notion that territories are different from the contiguous states because the people who live in those territories are of a different race. The lower court decisions in this case ignored the Insular Cases' racial underpinnings, and instead suggested that the Court created the notion of "incorporated" and "unincorporated" territories based on the foreign "habits, traditions, and modes of life" of individuals living in newly annexed territories. Pet. App. 35a-36a (*Tuaua v. United States*, 951 F. Supp. 2d 88, 95 (D.D.C. 2013)); Pet. App. 13a (*Tuaua v. United States*, 788 F.3d 300, 307 (D.C. Cir. 2015) (holding that the "framework

remains both applicable and of pragmatic use" even if "politically incorrect"). But a candid assessment of the Insular Cases reveals the impossibility of separating the territorial incorporation doctrine from its underlying assumptions. *See, e.g.*, *Downes*, 182 U.S. at 279-80, 282, 287 (opinion of Brown, J.) (noting that different rules are appropriate for the territories, which are "inhabited by alien races, differing from us. . . ."); *ibid.* at 302, 306 (White, J., concurring in judgment) (arguing that different rules are necessary to govern with a "tighter rein, so as to curb their impetuosity," when Americans annex lands that are home to a "fierce, savage, and restless people").

Every lower court that is asked to interpret the Insular Cases must confront this history, and judges whose humanity is devalued by these cases are expected not only to adhere faithfully to their holdings, but to further devalue the worth of territorial residents as a result. *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). This is not an abstract issue—the Insular Cases are commonly cited and interpreted by federal courts at all levels.[9]

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[9] *See, e.g.*, *Harris v. Rosario*, 446 U.S. 651, 651 (1980) (holding that the lower level of reimbursement from the Aid to Families with Dependent Children program provided to Puerto Rico was constitutional); *Califano v. Gautier Torres*, 435 U.S. 1, 2 (1978)

The assumptions at the heart of the Insular Cases mirror those espoused in *Plessy v. Ferguson* and have no place in modern constitutional analysis. Ultimately, it is this Court, and this Court alone, that is capable of providing the necessary correction. As Judge Torruella has explained,

> At the root of this problem is the unacceptable role of the courts. As in the case of racial segregation, it is the courts that are responsible for the creation of this inequality. . . . Changed conditions have long undermined the foundations of these judge made rules, which were established in a by-gone era in consonance with the distorted views of that epoch. Although the unequal treatment of

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(holding that the geographic limitation of the Social Security Act, which applied only to the 50 States and the District of Columbia, was constitutional as applied to people who moved to Puerto Rico and lost their benefits); *United States v. Ntreh*, 279 F.3d 255, 255-56 (3d Cir. 2002) (holding that the Government may proceed on information in prosecuting a federal felony offense, and that a grand jury indictment is unnecessary); *Romeu v. Cohen*, 265 F.3d 118, 210 (2d Cir. 2001) (holding that, though a "grave injustice" occurred, plaintiff's constitutional rights were not violated when he was denied the right to vote as a U.S. citizen living in Puerto Rico); *United States v. Hyde*, 37 F.3d 116, 117 (3d Cir. 1994) (holding that evidence seized by customs officers conducting a search without probable cause need not be suppressed, because Congress has the authority to create borders between unincorporated territories and the rest of the U.S.); *N. Mar. I. v. Diaz*, No. 2012-SCC-0002-CRM, 2013 WL 7017963, at *10 (N. Mar. I. Dec. 31, 2013) (holding that the right to a jury trial is not a fundamental right as that term was meant by the Supreme Court in the Insular Cases).

> persons because of the color of their skin or other irrelevant reasons was then the *modus operandi* of governments, and an accepted practice of societies in general, the continued enforcement of these rules by the courts is today an outdated anachronism, to say the least.

Igartua v. United States, 626 F. 3d 592, 612-38 (1st Cir. 2010) (Torruella, J., dissenting).

The Insular Cases invented a constitutional distinction between incorporated and unincorporated territories that was unwarranted when it was created. It has become no more persuasive since. Given the constitutional dimension of the Insular Cases' core holding, this Court is the sole forum in which individuals affected can obtain relief. *Amici* respectfully submit that the time has come for this Court to provide it.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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