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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH CENTRAL DIVISION

JOHN FITISEMANU, et al., Plaintiffs, vs. UNITED STATES OF AMERICA, et al., Defendants.	**MEMORANDUM FOR AMICI CURIAE SCHOLARS OF CONSTITUTIONAL LAW AND LEGAL HISTORY IN SUPPORT OF NEITHER PARTY** Case No. 1:18-CV-00036-EJF Magistrate Judge Evelyn J. Furse

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Amici curiae are Christina Duffy Ponsa-Kraus, George Welwood Murray Professor of Legal History at Columbia Law School; Rafael Cox Alomar, Associate Professor of Law at the University of the District of Columbia David A. Clarke School of Law; J. Andrew Kent, Professor of Law at Fordham Law School; and Gary S. Lawson, Philip S. Beck Professor of Law at Boston University School of Law. Amici are scholars who have studied extensively the constitutional implications of American territorial expansion. In particular, amici have written and edited collected works about the Supreme Court's early-twentieth-century decisions known collectively as the *Insular Cases*, in which the Court held that noncontiguous islands annexed at the end of the nineteenth century were part of the United States for some purposes but not for others. Amici take no position on the merits of Plaintiffs' constitutional claims, but maintain a scholarly interest in ensuring that the limited scope of the *Insular Cases* be accurately understood and the "territorial incorporation" doctrine commonly attributed to these decisions not be further extended.

SUMMARY OF ARGUMENT

Amici submit this brief to explain why this Court should decide this case without reliance on the *Insular Cases*. Those decisions in no way inform whether the Fourteenth Amendment's Citizenship Clause—at issue here—confers birthright

citizenship to persons born in American Samoa. None of the *Insular Cases* resolved a claim under the Citizenship Clause, nor does their reasoning logically extend to the question this case presents.

Reliance on the *Insular Cases* here would also contravene the caution expressed in later Supreme Court decisions that the reasoning in those cases—including the notion of "territorial incorporation"—should not be extended. That admonition is well founded. As jurists and scholars have recognized, the *Insular Cases* rest on unpersuasive reasoning inconsistent with the original meaning of the Constitution and now-settled constitutional analysis, and based on repudiated imperialist and racist ideologies. The deeply problematic reasoning of the *Insular Cases* is the product of another age, and it has no place in modern jurisprudence, even if (as amici doubt) it ever did.

ARGUMENT

I. The *Insular Cases* Do Not Determine The Citizenship Clause's Scope

A. The Insular Cases Addressed Only Specific Constitutional Provisions—A Limitation Courts Have Often Not Recognized

The group of cases commonly referred to as the *Insular Cases* concerned the reach of particular provisions of the Constitution and federal law in overseas territories annexed following the Spanish-American War of 1898.[1] The first

[1] Scholars differ on the roster of decisions that make up the *Insular Cases*, but there is "nearly universal consensus that the series" begins with cases decided in May 1901, such as *Downes v. Bidwell*, 182 U.S. 244 (1901), and "culminates with

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

Of the early cases, only two concerned the applicability of constitutional provisions in the newly acquired territories. The first and leading case, *Downes v. Bidwell*, 182 U.S. 244 (1901), held that the reference to "the United States" in the Uniformity Clause of Article I, Section 8—which requires that "all Duties, Imposts and Excises shall be uniform throughout the United States"—did not extend to Puerto Rico.[2] The second, *Dooley*, held that duties on goods shipped from New York to Puerto Rico did not violate the Export Clause of Article I, Section 9, which provides that "[n]o Tax or Duty shall be laid on Articles exported from any State."

Balzac v. Porto Rico[, 258 U.S. 298 (1922)]." Burnett, *A Note on the* Insular Cases, in *Foreign in a Domestic Sense: Puerto Rico, American Expansion, and the Constitution* 389, 389-90 (Burnett & Marshall eds., 2001).

[2] As explained in Part I.B *infra*, *Downes*'s discussion of the Uniformity Clause does not resolve the Citizenship Clause question in this case.

183 U.S. at 156-157. In those decisions, the Court examined whether clauses specifying a geographic scope encompassed the new territories: in *Dooley*, whether the word "State" in the Export Clause encompassed the new territories, and in *Downes*, whether the new territories were part of "the United States" as that phrase is used in the Uniformity Clause. Thus, as the Supreme Court has more recently explained, "the real issue in the *Insular Cases* was *not whether the Constitution extended to* [territories], but *which of its provisions were applicable* by way of limitation upon the exercise of executive and legislative power in dealing with new conditions and requirements." *Boumediene v. Bush*, 553 U.S. 723, 758 (2008) (emphasis added).

Downes, the "seminal case of the *Insular Cases*," illustrates the limited scope of the Supreme Court's inquiry in those decisions. Sparrow, *The* Insular Cases *and the Emergence of American Empire* 80 (2006). In *Downes*, the Court addressed whether the phrase "throughout the United States" in the Uniformity Clause encompassed Puerto Rico. A fractured majority of the Court agreed on little other than the case's ultimate result. Justice Brown, who announced the Court's judgment but wrote an opinion in which no other Justice joined, posited that the phrase "the United States" included only "the states whose people united to form the Constitution, and such as have since been admitted to the Union." 182 U.S. at 277 (internal quotation marks and emphases omitted); *see id.* at 260-261.

Justice Brown reasoned that the Constitution's terms were not applicable to the territories until Congress chose expressly to "extend" them. *Id.* at 271.

That reasoning found no takers: "[t]he other eight justices rejected [Justice] Brown's radical view." Kent, 97 Iowa L. Rev. at 157. In a separate opinion that marked the "origin of the doctrine of territorial incorporation," *id.*, Justice White (joined by Justices Shiras and McKenna) reasoned that acquired territories were not part of the United States because Congress had not "incorporated" them by legislation or treaty. *Downes*, 182 U.S. at 287-288 (White, J. concurring in judgment). Justice White's novel distinction between "incorporated" territories and those that remained unincorporated and thus "merely appurtenant [to the United States] as . . . possession[s]," *id.* at 342, eventually commanded the votes of a majority of the Court in later *Insular Cases*. *See Balzac v. Porto Rico*, 258 U.S. 298, 305 (1922) ("[T]he opinion of Mr. Justice White ... in *Downes v. Bidwell*, has become the settled law of the court.").[3] Although early cases such as *Downes* and *Dooley* articulated a distinction between "incorporated" and "unincorporated" territories, none held—contrary to what several modern courts have asserted about

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[3] Justice White's opinion in *Downes* did not explain how a court was to determine whether Congress had "incorporated" a territory. In *Balzac v. Porto Rico*, the Supreme Court explained that at least as to those territories claimed by the United States at or after the close of the Spanish-American War (when the concept of territorial incorporation entered American legal and political consciousness) congressional intent to "incorporate" a territory should not be found absent a "plain declaration" of such intent from Congress. 258 U.S. at 306.

the *Insular Cases*—that the operative difference between the two kinds of territories is that only "fundamental" constitutional rights apply in the latter.[4] That understanding of the *Insular Cases*—though persistent[5]—is deeply flawed and "overstate[s] the[] [cases'] holding." Burnett, *A Convenient Constitution? Extraterritoriality After* Boumediene, 109 Colum. L. Rev. 973, 984 (2009).[6]

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[4] Some language in those early decisions, such as Justice White's statement in his *Downes* concurrence that certain constitutional "restrictions" might be "of so fundamental a nature that they cannot be transgressed," have lent credence to that assertion. 182 U.S. at 291. But Justice White's distinction between fundamental and other constitutional rights must be understood in its temporal context; at the time the Court had not yet found most of the Bill of Rights to be "incorporated" against the States through the Fourteenth Amendment, so most constitutional rights did not apply even to the States. It would thus be mistaken to equate the "fundamental" rights to which Justice White referred with, for example, the rights deemed "fundamental" under modern substantive due process doctrine. *See generally* Burnett, Untied *States: American Expansion and Territorial Deannexation*, 72 U. Chi. L. Rev. 797, 824-34 (2005).

[5] *E.g.*, *Davis v. Commonwealth Elections Comm'n*, 844 F.3d 1087, 1095 (9th Cir. 2016) ("The *Insular Cases* held that [the] Constitution applies in full to 'incorporated' territories, but that elsewhere, absent congressional extension, only 'fundamental' constitutional rights apply[.]" (internal quotation marks omitted)); *Tuaua v. United States*, 951 F. Supp. 2d 88, 94-95 (D.D.C. 2013) ("In an unincorporated territory, the Insular Cases held that only certain 'fundamental' constitutional rights are extended to its inhabitants."), *aff'd*, 788 F.3d 300 (D.C. Cir. 2015).

[6] Indeed, that expansive reading "confuses matters, for the 'entire' Constitution does not apply, as such, anywhere. Some parts of it apply in some contexts; other parts in others." Burnett, 72 U. Chi. L. Rev. at 821. For example, neither the Seat of Government Clause, U.S. Const. art. I, § 8, cl. 17, which grants Congress authority over the District of Columbia, nor the Territory Clause, U.S. Const. art. IV, § 3, cl. 2, have ever applied to the States. *See* Burnett, 72 U. Chi. L. Rev. at 821. Other constitutional provisions have been understood as inapplicable outside the States, whether a territory was incorporated or not. *See id.* at 821 n.102.

That rights-analysis framework emerged in later decisions commonly included in the *Insular* series. But those decisions, without exception, dealt with specific constitutional provisions mainly related to proceedings in criminal trials in territorial courts. *See, e.g.*, *Balzac*, 258 U.S. at 309 (Sixth Amendment right to jury trial inapplicable in Puerto Rico); *Ocampo v. United States*, 234 U.S. 91, 98 (1914) (Fifth Amendment grand jury clause inapplicable in the Philippines). Refining the "incorporation" distinction that Justice White developed in *Downes*, those later cases "explained that Congress, despite its plenary power over all territories, did not have the power to withhold jury trial rights from incorporated ones, whereas it could withhold them from unincorporated territories." Burnett, 109 Colum. L. Rev. at 991-92. But, again, *none* of the *Insular Cases* demarcated territorial areas where the Constitution applies "in full" from others where only fundamental provisions apply. That understanding finds no support in the collected *Insular* decisions. *See* Sparrow, *The* Insular Cases, *supra*, at 149, 190 (noting Court "left open *which* constitutional provisions and *which* individual protections applied to the residents of the unincorporated territories").

The *Insular Cases* could therefore bear on this case only if they illuminated the proper application of the specific constitutional provision at issue. They do not. *None* of the *Insular Cases* spoke to the meaning of the phrase "the United States" as used in the Fourteenth Amendment's Citizenship Clause. In fact, in one

of the *Insular Cases*, the Court expressly *declined* to reach the Citizenship Clause question. *See Gonzales v. Williams*, 192 U.S. 1, 12 (1904). The only one of the *Insular Cases* to address whether a particular reference to "the United States" in the Constitution encompassed the territories was *Downes*, where, as noted above, a splintered majority of the Court concluded that Congress could impose tariffs on products shipped from Puerto Rico to the United States. The five Justices in the *Downes* majority not only expressly limited their holding to the Uniformity Clause, but reached that result by following different paths. *See* 182 U.S. at 244 n.1 (opinion syllabus) (Justice Brown delivered an opinion "announcing the conclusion and judgment of the court in this case," but in light of Justice White's and Justice Gray's separate opinions, "it is seen that there is no opinion in which a majority of the court concurred"). And the four dissenting members of the Court—Chief Justice Fuller and Justices Harlan, Brewer, and Peckham—contended that the phrase "the United States," as used in the Uniformity Clause, encompassed *all* territories, including the newly annexed islands. *See, e.g.*, *id.* at 354-55 (Fuller, C.J., dissenting); *see also* Sparrow, *The* Insular Cases, *supra*, at 87 ("[N]o single opinion among the five opinions in *Downes* attracted a majority on the bench."). Because the five Justices in the *Downes* majority reached their shared judgment through divergent constitutional theories, the decision, lacking a majority rationale, is precedential only as to the case's precise facts. *See Arizona v. Inter Tribal*

Council of Ariz., 570 U.S. 1, 16 n.8 (2013). Thus, *Downes* is only instructive to the extent it makes clear that an unincorporated territory may or may not be part of "the United States" as that phrase is used in the Uniformity Clause. It does not provide the answer to that question in the context of the Citizenship Clause.

The Citizenship Clause's proper scope—at issue in Plaintiffs' complaint—must therefore be ascertained by looking to the text, structure, history, and purpose of that clause rather than by reference to the doctrine of territorial incorporation. That clause provides that "[a]ll persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside." U.S. Const. amend. XIV, § 1. Like the Uniformity Clause interpreted in *Downes*, the Citizenship Clause defines its own geographic scope—those born in "the United States" (and subject to its jurisdiction) are citizens. Thus, if that geographic phrase includes the U.S. territory of American Samoa, then this Court should not reject Plaintiffs' claims on grounds that American Samoa is "unincorporated" or that citizenship may or may not be a "fundamental" right as that concept is understood under incorporation doctrine. And if that geographic phrase does not include American Samoa, nothing is added to that conclusion by the *Insular Cases* or any territoriality or fundamental rights analysis therein. American Samoa's status as an unincorporated territory does not bear on anything beyond the fact that the starting point of the Court's inquiry is the

identification of this case as a "geographic scope" case, in which the Court must look to whether the territory is or is not part of "the United States" for purposes of the Citizenship Clause.

B. This Court Should Not Follow The Reasoning In *Tuaua v. United States*

In *Tuaua v. United States*, 788 F.3d 300 (D.C. Cir. 2015), the D.C. Circuit relied on the notion of territorial incorporation and engaged in fundamental-rights analysis to hold that the Citizenship Clause does not afford birthright citizenship to persons born in American Samoa. In doing so, the D.C. Circuit gave the *Insular Cases* exactly the kind of expansive and acontextual reading that they should not receive. The court failed to recognize that the *Insular Cases* did *not* adopt a broad, across-the board rationale that only certain "fundamental" constitutional rights apply in unincorporated territories—a mistake that other courts have made as well. Worse still, it failed to recognize that fundamental-rights analysis is irrelevant to the geographic scope question.

The D.C. Circuit acknowledged the hazards of applying the *Insular Cases*, describing them as "contentious" and "without parallel in our judicial history" in terms of the "the incongruity of the[ir] results, and the variety of inconsistent views expressed by the different members of the court." *Tuaua*, 788 F.3d at 306 (quoting *King v. Morton*, 520 F.2d 1140, 1153 (D.C. Cir. 1975)). However, it ultimately decided that it was forced to "resort" to their "analytical framework" on the ground

that "the [Supreme] Court has continued to invoke the Insular framework when dealing with questions of territorial and extraterritorial application," citing *Boumediene* as its sole support. *Id.* at 306-307.

The D.C. Circuit misread *Boumediene*. In deciding that the Suspension Clause had full effect at the U.S. Naval Station at Guantanamo Bay, the Supreme Court in *Boumediene* did not apply the doctrine of territorial incorporation, nor did it ask whether the habeas right was "fundamental" as that term is used under the broad reading of the *Insular Cases*. *See* 553 U.S. at 766 (conducting three-factor inquiry to determine applicability of Suspension Clause that did not encompass either of those points). Indeed, its discussion of the *Insular Cases* fell far short of endorsing any "framework" in which only "fundamental" constitutional provisions apply in unincorporated territories. Rather, *Boumediene* described the *Insular Cases* as a practical adaptation to the United States' acquisition of territories "'with wholly dissimilar traditions' that Congress intended to govern only 'temporarily,'" *id.* at 759 (quoting *Reid v. Covert*, 354 U.S. 1, 14 (1957) (plurality op.)), and reasoned that it "may well be that over time the ties between the United States and any of its unincorporated Territories strengthen in ways that are of constitutional significance," *id.* at 758. The United States has now exercised sovereignty over American Samoa for well over a century, and its sovereignty shows no signs of abating. Thus, far from requiring application of a broad reading of the *Insular*

Cases, as the D.C. Circuit concluded, *Boumediene*'s discussion of the *Insular Cases* leaves very much in doubt whether those decisions have any relevance in determining the applicability of constitutional provisions in American Samoa today.

The court in *Tuaua* specifically looked to *Downes* to interpret the Citizenship Clause's scope in relation to American Samoa. *See* 788 F.3d at 306-308. It should not have done so, because *Downes* says nothing to resolve the geographic scope of the Citizenship Clause. *Downes* held that the phrase "the United States" in the Uniformity Clause excluded Puerto Rico. But that conclusion would not necessarily extend to the Citizenship Clause even if any of the three opinions in support of the holding in *Downes* had garnered a majority of the Court's votes. Important differences between the Uniformity Clause and the Citizenship Clause should compel courts to construe them differently.

First, the clauses were enacted almost a century apart and may reflect different historical meanings. The Uniformity Clause was written at the time of the Founding. At that time, the phrase "the United States" was commonly understood to mean a collective of individual (and largely independent) States. *See* Burnett, *The Constitution and Deconstitution of the United States*, in *The Louisiana Purchase and American Expansion, 1803-1898*, at 181, 181-182 (Levinson & Sparrow eds., 2005) (citing historian James M. McPherson's

description of the transformation of the phrase "United States" from the plural to the singular). By contrast, the Citizenship Clause was enacted in the Reconstruction Era, by which time the phrase had long since evolved to signify a unitary entity—one Nation inclusive of its individual states and the "territories subject to its sovereignty." *Id.* Therefore, even if "throughout the United States" as used in the Uniformity Clause refers only to states, *Downes*, 182 U.S. at 251 (opinion of Brown, J.), or to states and some, but not all, territories, *id.* at 287-288 (opinion of White, J., concurring), that is not necessarily true of the phrase "in the United States" as employed in the Citizenship Clause.

Second, the Uniformity Clause and the Citizenship Clause emerged in different legal contexts. The fundamental purpose of the Citizenship Clause was to repudiate the infamous decision in *Dred Scott v. Sandford*, which held that the descendants of African slaves could not become citizens because they were "a subordinate and inferior class of beings." 60 U.S. (19 How.) 393, 403-405 (1857); *see* Burnett, *Empire and the Transformation of Citizenship*, in *Colonial Crucible: Empire in the Making of the Modern American State* 332, 338-40 (McCoy & Scarano eds., 2009). The context in which the Citizenship Clause was enacted thus points decidedly against a rule that makes distinctions between Americans for purposes of the rights and responsibilities of citizenship. The Uniformity Clause reflects no such concerns.

Third, the Citizenship Clause and Uniformity Clause serve different functions. The Framers adopted the Uniformity Clause to ensure that Congress could not "use its power over commerce to the disadvantage of particular States." *Banner v. United States*, 428 F.3d 303, 310 (D.C. Cir. 2005) (per curiam). Along with other constitutional provisions, *see, e.g.*, U.S. Const. art. I, §§ 9, 10, the Uniformity Clause protects *states* from export taxes and duties laid by the federal government or other states. By contrast, the Citizenship Clause affords *individuals* a guarantee of birthright citizenship. *See* Amar, *America's Constitution: A Biography* 381 (2005) ("The [Citizenship Clause] aimed to provide an unimpeachable legal foundation for the [Civil Rights Act of 1866], making clear that everyone born under the American flag . . . was a free and equal citizen."). The Citizenship Clause's reference to "States" only clarifies that U.S. citizenship exists "without regard to . . . citizenship of a particular State." *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 73 (1873). Distinguishing between states and territories, or incorporated territories and unincorporated territories, therefore makes less sense in the context of the Citizenship Clause than it does in the context of the Uniformity Clause.

II. The *Insular Cases* Should Not Be Extended Beyond Their Holdings

There is a second reason this Court should take care not to extend the reach of the *Insular Cases*: "[N]either the [*Insular Cases*] nor their reasoning should be

given any further expansion." *Reid v. Covert*, 354 U.S. 1, 14 (1957) (plurality opinion); *see also Torres v. Puerto Rico*, 442 U.S. 465, 475 (1979) (Brennan, J., concurring in the judgment) ("Whatever the validity of the [*Insular*] cases … those cases are clearly not authority for questioning the application of the Fourth Amendment—or any other provision of the Bill of Rights—to the Commonwealth of Puerto Rico in the 1970's." (internal citations omitted)).

The admonition not to expand the *Insular Cases*' application is well-founded. More than a hundred years after the Court decided the early cases in the series, the decisions "remain exceptionally controversial." Vladeck, *Petty Offenses and Article III*, 19 Green Bag 2d 67, 76-77 (2015). Indeed, the territorial incorporation doctrine attributed to the *Insular Cases* is unpersuasive as a matter of constitutional first principles and rests, at least in part, on archaic notions of racial inferiority and imperial expansionism which courts and commentators have emphatically repudiated. For those reasons among others, the *Insular Cases* have "nary a friend in the world," Fuentes-Rohwer, *The Land That Democratic Theory Forgot*, 83 Ind. L.J. 1525, 1536 (2008), and ought not be expansively read by this Court.

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

The notion that some territories are "incorporated" while others are not is constitutionally infirm. The Constitution's single reference to "Territor[ies]," U.S.

Const. art. IV, § 3, cl. 2, does not differentiate between "incorporated" and "unincorporated" territorial lands. Until the *Insular Cases*, neither the Supreme Court nor any other branch of government had even intimated that such a distinction existed. *See* Burnett, 72 U. Chi. L. Rev. at 817-834 (discussing Congress's plenary power to govern U.S. territories in nineteenth century and Supreme Court's "expansive" conception of the scope of this Congressional discretion even before the *Insular Cases*). And as the Supreme Court itself explained, the doctrine's paramount constitutional vice is that it lends itself to misconstruction as a broad and generic license to the political branches "to switch the Constitution on or off at will," *Boumediene*, 553 U.S. at 765, by affording them the discretion to decide whether or not to "incorporate" a territory—an outcome that the *Insular Cases* did not sanction, *see supra* p. 8, and that the Supreme Court has rejected, *see Boumediene*, 553 U.S. at 757-758.

Concern over the potential misuse inherent in this vague and unprecedented doctrinal innovation was evident from the beginning. It carries throughout the fractured opinions in *Downes*. The dissenters in *Downes* reacted to Justice White's reasoning, which posited that whether Puerto Rico was in "the United States" for purposes of the Uniformity Clause depended on whether Congress had "incorporated" the territory, by rejecting the idea of territorial "incorporation" as unprecedented and illogical. "Great stress is thrown upon the word

'incorporation,'" wrote Chief Justice Fuller, "as if possessed of some occult meaning, but I take it that the act under consideration made Porto [sic] Rico, whatever its situation before, an organized territory of the United States." 182 U.S. at 373 (Fuller, C.J., dissenting). Justice Harlan was even more mystified: "I am constrained to say that this idea of 'incorporation' has some occult meaning which my mind does not apprehend. It is enveloped in some mystery which I am unable to unravel." *Id.* at 391 (Harlan, J., dissenting).

Even though the then-newly minted distinction between "incorporated" and "unincorporated" territories eventually attracted a majority of the Court's votes in later cases, the distinction was not only "unprecedented," Burnett, 109 Colum. L. Rev. at 982, but constituted a significant departure from the Supreme Court's prior conception of the Constitution's application to the territories.[7] As one amicus has explained, "there is nothing in the Constitution that even intimates that express constitutional limitations on national power apply differently to different territories once that territory is properly acquired." Lawson & Seidman, *The Constitution of*

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[7] *See Downes*, 182 U.S. at 359-369 (Fuller, C.J., dissenting) (citing numerous Supreme Court decisions "[f]rom *Marbury v. Madison* to the present day" establishing that constitutional limits apply with respect to the territories); *Loughborough v. Blake*, 18 U.S. (5 Wheat.) 317, 319 (1820) ("[The United States] is the name given to our great republic, which is composed of States and territories."); *see also Igartúa de la Rosa v. United States*, 417 F.3d 145, 163 (1st Cir. 2005) (Torruella, J., dissenting) (*Insular Cases* were "unprecedented in American jurisprudence and unsupported by the text of the Constitution").

Empire: Territorial Expansion & American Legal History 196-197 (2004). In part for that reason, "no current scholar, from any methodological perspective, [has] defend[ed] The *Insular Cases*." Lawson & Sloane, *The Constitutionality of Decolonization by Associated Statehood: Puerto Rico's Legal Status Reconsidered*, 50 B.C. L. Rev. 1123, 1146 (2008). The supposed constitutional justifications for the *Insular Cases*' unequal treatment of residents of unincorporated territories "are certainly not convincing today, if they ever were." Kent, *Citizenship and Protection*, 82 Fordham L. Rev. 2115, 2128 (2014).

In addition to lacking anchor in constitutional text, structure, or history, the territorial incorporation doctrine is in serious tension, if not at war, with the foundational constitutional principle that "the national government is one of enumerated powers, to be exerted only for the limited objects defined in the Constitution," as dissenting justices in *Downes* first explained. *Downes*, 182 U.S. at 389 (Harlan, J., dissenting); *see also id.* at 364 (Fuller, C.J., dissenting) (noting whatever the bounds of Congress's authority over the territories "it did not . . . follow that [they] were not parts of the United States, and that the power of Congress in general over them was unlimited"). Again, as the Supreme Court itself has recently acknowledged in explaining that the *Insular Cases* have often been misconstrued, the "Constitution grants Congress and the President the power

to acquire, dispose of, and govern territory, *not the power to decide when and where its terms apply*." *Boumediene*, 553 U.S. at 765 (emphasis added).

In sum, serious constitutional concerns provide a strong reason for this Court not to decide this case based on the *Insular Cases* or any distinction between incorporated and unincorporated territories.

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

The *Insular Cases* and the territorial incorporation doctrine cannot be understood without a frank recognition that they rest in important part on discredited notions of racial inferiority and imperial governance. *See Igartúa de la Rosa v. United States*, 417 F.3d 145, 163 (1st Cir. 2005) (Torruella, J., dissenting) (noting *Insular Cases* "are anchored on theories of dubious legal or historical validity, contrived by academics interested in promoting an expansionist agenda"); *Ballentine v. United States*, 2006 WL 3298270, at *4 (D.V.I. Sept. 21, 2006) (cases "decided in a time of colonial expansion by the United States into lands already occupied by non-white populations" and have "racist underpinnings"), *aff'd*, 486 F.3d 806 (3d Cir. 2007). This Court should decline to rely on the *Insular Cases* for those reasons as well.

The *Insular Cases*—and in particular, the reasoning that gave rise to the territorial incorporation doctrine—reflected turn-of-the-century imperial fervor and a hesitancy to admit into the Union supposedly "uncivilized" members of "alien

races" except as colonial subjects. Writing in *Downes*, for example, Justice Brown suggested that "differences of race" raised "grave questions" about the rights that ought to be afforded to territorial inhabitants. *See* 182 U.S. at 282, 287 (describing territorial inhabitants as "alien races, differing from us" in many ways). Similarly, Justice White's analysis was guided in part by the possibility that the United States would acquire island territories "peopled with an uncivilized race, yet rich in soil" whose inhabitants were "absolutely unfit to receive" citizenship. *Id.* at 306. Justice White quoted approvingly from treatise passages explaining that "if the conquered are a fierce, savage and restless people," the conqueror may "govern them with a tighter rein, so as to curb their impetuosity, and to keep them under subjection." *Id.* at 302 (internal quotation marks omitted).

The dubious—and in many ways, pernicious—foundations of the territorial incorporation doctrine undoubtedly reflect that the most significant grouping of *Insular Cases* reached the Supreme Court following the Nation's unprecedented accession of overseas territories after the Spanish-American War. "Although continental expansion had previously provoked constitutional questions, never before had the United States added areas this populated and this remote from American shores." Sparrow, The *Insular Cases*, *supra*, at 4. Moreover, "[w]hen the Supreme Court reached its judgments in the *Insular Cases*, prevailing governmental attitudes presumed white supremacy and approved of stigmatizing

segregation." Minow, *The Enduring Burdens of the Universal and the Different in the* Insular Cases, in *Reconsidering the* Insular Cases*, the Past and Future of the American Empire* vii, vii (Neuman & Brown-Nagin eds., 2015). As a result, the "outcome [of the *Insular Cases*] was strongly influenced by racially motivated biases and by colonial governance theories that were contrary to American territorial practice and experience." Torruella, 29 U. Pa. J. Int'l L. at 286; *see also* Gelpí & Baum, *Manifest Destiny: A Comparison of the Constitutional Status of Indian Tribes and U.S. Overseas Territories*, 63 Fed. Lawyer 38, 39-40 (Apr. 2016) (*Insular* framework is "increasingly criticized by federal courts . . . as founded on racial and ethnic prejudices"); Kent, 82 Fordham L. Rev. at 2128 (noting Supreme Court offered "frankly racist" rationales in key *Insular Cases*).

The decisions "reflected many of the attitudes that permeated the expansionist movement of the United States during the nineteenth century." Rivera Ramos, *Puerto Rico's Political Status*, in *The Louisiana Purchase and American Expansion, 1803-1898*, at 165, 165 (Levinson & Sparrow eds., 2005); *see* Sparrow, *The* Insular Cases, *supra*, at 10, 14, 57-63. That "ideological outlook" included "Manifest Destiny, Social Darwinism, the idea of the inequality of peoples, and a racially grounded theory of democracy that viewed it as a privilege of the 'Anglo-Saxon race.'" Rivera Ramos, *Puerto Rico's Political Status*, *supra*, at 170. These concepts of "inferior[ity] . . . justified not treating

[territorial inhabitants] as equals," and the *Insular Cases*' classification of some territories as "unincorporated . . . owed much to racial and ethnic factors." *Id.* at 171, 174; *see* Go, *Modes of Rule in America's Overseas Empire: The Philippines, Puerto Rico, Guam, and Samoa*, in *Louisiana Purchase*, *supra*, at 209, 217 (use of "racial schemes for classifying overseas colonial subjects"—from "Anglo-Saxons . . . at the top of the ladder, while beneath them were an array of 'lesser races' down to the darkest, and thereby the most savage, peoples"—"served to slide the new 'possessions' . . . into the category of 'unincorporated'").

Put simply and at the risk of understatement, the racial and colonizing underpinnings of the *Insular Cases* are "now recognize[d] as illegitimate." Burnett, 109 Colum. L. Rev. at 992. Such notions have no place in modern jurisprudence, and courts have rightly repudiated these views in modern case law. This Court should therefore take care not to expand the *Insular Cases* beyond their specific facts or to give further vitality to decisions that by all accounts stand, in inescapable part, for arcane and anachronistic views.

CONCLUSION

Amici respectfully urge this Court not to rely on the *Insular Cases* in resolving Plaintiffs' constitutional challenges.

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Respectfully submitted,

/s/ John R. Lund