No. 21-1394

IN THE

Supreme Court of the United States

JOHN FITISEMANU, *et al.*,

—v.—

Petitioners,

UNITED STATES OF AMERICA, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR AMICI CURIAE AMERICAN CIVIL LIBERTIES UNION, ACLU OF UTAH, ASIAN AMERICAN LEGAL DEFENSE AND EDUCATION FUND, AUTISTIC SELF ADVOCACY NETWORK, BRENNAN CENTER FOR JUSTICE AT NYU SCHOOL OF LAW, DĒMOS, HUMAN RIGHTS CAMPAIGN, LAMBDA LEGAL DEFENSE AND EDUCATION FUND, INC., LATINOJUSTICE PRLDEF, THE LEADERSHIP CONFERENCE ON CIVIL AND HUMAN RIGHTS, OCA–ASIAN PACIFIC AMERICAN ADVOCATES, AND WASHINGTON LAWYERS' COMMITTEE FOR CIVIL RIGHTS AND URBAN AFFAIRS IN SUPPORT OF PETITIONERS

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INTEREST OF AMICI CURIAE[1]

The **American Civil Liberties Union ("ACLU")** is a non-partisan organization with approximately two million members and supporters dedicated to the principles of liberty and equality enshrined in the Constitution. The ACLU is devoted to protecting the civil rights of all who live in the United States, including the residents of American Samoa and other so-called unincorporated U.S. territories. As the ACLU explained over 80 years ago, it is committed to the "[m]aintenance of civil liberties in the [territories]," which it considers "essential to political or economic reforms of any sort." ACLU, *Civil Liberties in American Colonies* 7 (1939), https://tinyurl.com/pccjv9tp. The ACLU has long condemned the *Insular Cases* as wrongly decided and predicated on racial prejudice. The **ACLU of Utah** is the ACLU's affiliate in Utah.

The **Asian American Legal Defense and Education Fund ("AALDEF")**, founded in 1974, is a national organization that protects and promotes the civil rights of Asian Americans. By combining litigation, advocacy, education, and organizing, AALDEF works with Asian American communities across the country to secure human rights for all. AALDEF advocates for fair policies that eliminate

[1] All parties to this case received notice of amici's intent to file this brief at least 10 days before the filing deadline and consented to its filing. No party or counsel for a party authored this brief in whole or in part. No party, or counsel for a party, or persons or entities other than amici, their members, or their counsel made any monetary contribution intended to fund the preparation or submission of this brief.

racial and ethnic profiling, and end other discriminatory practices that violate due process and equal protection.

The **Autistic Self Advocacy Network ("ASAN")** is a national, private, nonprofit organization, run by and for autistic individuals. ASAN provides public education and promotes public policies that benefit autistic individuals and others with developmental or other disabilities. ASAN's advocacy activities include combating stigma, discrimination, and violence against autistic people and others with disabilities; promoting access to health care and long-term supports in integrated community settings; and educating the public about the access needs of autistic people. ASAN takes a strong interest in cases that affect the rights of autistic individuals and others with disabilities to participate fully in community life and enjoy the same rights as others without disabilities, including advocacy that would extend rights to those historically denied them.

Named for the late Associate Justice William J. Brennan, Jr., the **Brennan Center for Justice at NYU School of Law ("Brennan Center")** is a not-for-profit, nonpartisan think tank and public interest law institute that seeks to improve the systems of democracy and justice. In pursuit of that goal, the Brennan Center works, among other things, to ensure voting is free, fair, and accessible; to promote an equitable judicial system; to reduce mass incarceration; and to develop effective national security policies that protect our fundamental freedoms. Central to all of this advocacy is a

commitment to racial justice and principled constitutional jurisprudence, both of which are imperiled by the perpetuation of the *Insular Cases*. The Brennan Center regularly appears as an amicus before the Supreme Court in cases involving democracy issues. This brief does not purport to convey the position, if any, of New York University School of Law.

Dēmos is a "think and do" tank that powers the movement for a just, inclusive, multi-racial democracy. Founded in 2000, Dēmos deploys research, advocacy, litigation, multi-platform communications, and deep partnerships with grassroots organizations to remove barriers to political participation and economic justice. Dēmos—which means "the people"—is the root word of democracy. Its policy platform includes advocating for the rights of territories to de-colonization and full sovereignty and self-determination.

The **Human Rights Campaign ("HRC")**, represents more than three million members and supporters. It strives to end discrimination against lesbian, gay, bisexual, transgender, and queer ("LGBTQ") people and realize a world in which LGBTQ people are ensured of their basic equal rights and can be open, honest, and safe at home, at work, in school, and in every community.

Lambda Legal Defense and Education Fund, Inc. ("Lambda Legal") is the nation's largest legal organization committed to achieving the full recognition of the civil rights of lesbian, gay, bisexual, and transgender ("LGBT") people and everyone living

with HIV through impact litigation, education, and public policy work. Lambda Legal has served as counsel or amicus in seminal cases regarding the rights of LGBT people and people living with HIV. *See, e.g.*, *Obergefell v. Hodges*, 576 U.S. 644 (2015) (counsel); *Lawrence v. Texas*, 539 U.S. 558 (2003) (counsel); *Romer v. Evans*, 517 U.S. 620 (1996) (counsel). It has also served as counsel of record or consultant in cases involving the federal constitutional rights of LGBT people in the U.S. territories. Lambda Legal has fought the misapplication of the racist *Insular Cases* to improperly limit the federal constitutional rights of LGBT people in the U.S. territories.

LatinoJustice PRLDEF is a national civil rights legal defense fund that seeks to protect the civil, constitutional, and human rights of the Latino/a community in the United States and Puerto Rico. Founded in 1972 as the Puerto Rican Legal Defense and Education Fund, LatinoJustice has for five decades advocated against systemic discriminatory practices and policies that adversely impact Latinos/as by seeking to ensure the constitutional rights and equal protection of all Latinos/as are upheld. LatinoJustice has a strong interest in ensuring that the full citizenship rights afforded by the Constitution are enforced and applied fairly to all Puerto Ricans.

The Leadership Conference on Civil and Human Rights ("The Leadership Conference"), founded in 1950, is a nonprofit, nonpartisan organization and the oldest, largest, and most diverse civil and human rights coalition in the United States.

The Leadership Conference is committed to the advancement of civil and human rights of every person in the United States, including the U.S. territories. Its work is to fight discrimination in all its forms and expand opportunity and fairness for all, including the elimination of political disenfranchisement and the denial of benefits. Towards those ends, The Leadership Conference has participated as amicus in cases of great public importance that will affect many individuals other than the parties before the court and the interests of constituencies in its coalition.

Founded in 1973, **OCA—Asian Pacific American Advocates ("OCA")** is a national non-profit, membership-driven civil rights organization based in Washington, D.C. with over 50 chapters and affiliates around the country. OCA is dedicated to advancing the social, political, and economic well-being of Asian American and Pacific Islanders ("AAPIs"). Touching hundreds of thousands of AAPIs each year, OCA works with its organizational partners, members, chapters, and supporters to empower the next generation of leaders. And central to its policy and advocacy work is the promotion of racial equity and the fight against hate speech, xenophobia, and discrimination.

The **Washington Lawyers' Committee for Civil Rights and Urban Affairs ("WLC")**, founded in 1968, is a nonprofit, nonpartisan organization that works to create legal, economic, and social equity. WLC fights discrimination against all people, recognizing in particular the central role that current and historic race discrimination plays in sustaining

inequity. As part of its work, WLC frequently combats government practices that disproportionately exclude individuals of color.

Amici curiae support the grant of certiorari in this case to overrule the *Insular Cases*.

SUMMARY OF ARGUMENT

This case presents a rare opportunity to squarely address the *Insular Cases* and their deeply problematic "territorial incorporation doctrine." The Court has repeatedly warned against expanding the *Insular Cases*, yet the Tenth Circuit here did just that—applying their colonial-era reasoning to a dispute concerning the Fourteenth Amendment's Citizenship Clause, which those decisions did not address. The *Insular Cases* have long been a stain on this Court's jurisprudence, poorly reasoned, unfounded in the text, and resting on racial stereotypes. This case presents an opportunity to repudiate the decisions once and for all.

Decided over a hundred years ago, the *Insular Cases* contrived a distinction between "incorporated" and "unincorporated" U.S. territories. Incorporated territories, such as Alaska, were destined for statehood, the Court assumed, and the Constitution applied in full there. In so-called "unincorporated" territories, however—namely, those Congress had not expressly deemed bound for statehood—the Constitution applied only "in part." *Boumediene v. Bush*, 553 U.S. 723, 757 (2008) (describing reasoning of *Insular Cases*). That distinction was never grounded in the Constitution's text, purpose, or

history. It rested solely on racist assumptions about the territories' inhabitants.

Despite the bigotry they represent, the *Insular Cases* remain on the books. Their doctrine casts a pall on the rights of residents of the territories—including American Samoa. And notwithstanding the Court's clear warnings against extending them, lower courts, including the Tenth Circuit here, continue to apply them to new contexts.

The Court should grant review to correct the Tenth Circuit's error and finally overrule the *Insular Cases*' territorial incorporation doctrine.

ARGUMENT

I. The Tenth Circuit Erred By Extending the *Insular Cases* Despite this Court's Repeated Warnings Not To Do So.

More than 120 years ago, the *Insular Cases* invented a distinction between "incorporated" and "unincorporated" territories that remains a stain on our constitutional jurisprudence to this day. The justification, scope, and implications of that distinction were notoriously difficult to grasp from the start. As Justice John Marshall Harlan remarked in dissent, "th[e] idea of 'incorporation' ha[d] some occult meaning which [his] mind d[id] not apprehend." *Downes v. Bidwell*, 182 U.S. 244, 391 (1901) (Harlan, J., dissenting).

The doctrine of territorial incorporation holds that "the Constitution applies in full in incorporated Territories surely destined for statehood" but only "in part" in "unincorporated" noncontiguous islands.

Boumediene, 553 U.S. at 757. But that distinction finds no support in the Constitution's text or purpose. The doctrine ignored more than a century of practice providing that the Constitution followed the flag into national territory.[2] In short, as Justice Gorsuch recently noted, "[t]he Insular Cases' departure from the Constitution's original meaning has never been much of a secret." *United States v. Vaello Madero*, 142 S. Ct. 1539, 1555 (2022) (Gorsuch, J., concurring).

In addition to being unmoored from the text and history of the Constitution, the doctrine rests on racist assumptions about the people living in the overseas territories that the Court labeled as "unincorporated." Yet "[n]othing in [the Constitution] authorizes judges to engage in the sordid business of segregating Territories and the people who live in them on the basis of race, ethnicity, or religion." *Id.* at 1554.

For decades, members of the Court have questioned the *Insular Cases*' reasoning and legacy, and have warned lower courts against expanding them. As noted above, Justice Harlan was a critic from the outset. Justice Fuller also questioned the mystical-sounding "incorporation" doctrine. *See Downes*, 182 U.S. at 373 (Fuller, J., dissenting).

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[2] Christina Duffy Burnett, Untied *States: American Expansion and Territorial Deannexation*, 72 Univ. Chi. L. Rev. 797, 824–34 (2005) (explaining that before the *Insular Cases*, the Constitution had generally been regarded as applying in the territories, either of its own force or through Congressional extension).

Criticism of the *Insular Cases* has only increased since then.

In 1957, a four-Justice plurality warned "that neither the [*Insular*] cases nor their reasoning should be given any further expansion." *Reid v. Covert*, 354 U.S. 1, 14 (1957) (plurality opinion). *Reid* criticized territorial incorporation as "dangerous" for allowing the very government the Constitution protected against to decide when those protections apply in U.S. territories. As the plurality explained, "[t]he concept that . . . constitutional protections against arbitrary government are inoperative when they become inconvenient . . . if allowed to flourish would destroy the benefit of a written Constitution . . . ." *Id.*

In 1978, another four-Justice plurality echoed *Reid*, noting that "[w]hatever the validity" of those "old cases," the *Insular Cases* were "clearly not authority for questioning the application . . . of the Bill of Rights" in Puerto Rico. *Torres v. Puerto Rico*, 442 U.S. 465, 475–76 (1979) (Brennan, J., concurring in the judgment). And just two years ago, the Court acknowledged that the *Insular Cases* are now "much-criticized," again questioned their continued validity, and reaffirmed that they should be limited to their facts. *See Fin. Oversight & Mgmt. Bd. for P.R. v. Aurelius Inv., LLC.*, 140 S. Ct. 1649, 1665 (2020) (citing *Reid* for proposition that *Insular Cases* "should not be further extended").

Although the Court has cast doubt on their validity, it has not overruled the *Insular Cases*. As a result, lower courts continue to struggle with the doctrine, entangling themselves in questions of

territorial incorporation to interpret rights and constitutional provisions the *Insular Cases* never addressed.

Like *Korematsu v. United States*, 323 U.S. 214 (1944), another decision that was "gravely wrong the day it was decided," *Trump v. Hawaii*, 138 S. Ct. 2392, 2423 (2018), the *Insular Cases* will, without the Court's intervention, continue to "lie[] about like a loaded weapon[,] ready for the hand of any authority that can bring forward a plausible claim of an urgent need." *Korematsu*, 323 U.S. at 246 (Jackson, J., dissenting).

Here, the Tenth Circuit expressly relied on, and expanded, the doctrine of territorial incorporation. It announced that "[t]he Insular Cases grapple with the thorny question at the heart of this case" and that "[t]his case falls squarely in that line of caselaw." *Fitisemanu v. United States*, 1 F.4th 862, 873 (10th Cir. 2021). It held that the case "call[ed] for the extension of another constitutional provision to another unincorporated territory." *Id.* And it reasoned that territorial incorporation's "flexibility . . . gives federal courts significant latitude to preserve traditional cultural practices that might otherwise run afoul of individual rights enshrined in the Constitution." *Id.* at 870–71. Ultimately, it refused to apply the Citizenship Clause to American Samoa precisely because it is an "unincorporated territory." *Id*. at 877. That is the sort of "further expansion" of a flawed doctrine that this Court foreclosed since *Reid*. *See* 354 U.S. at 14.

Nor is the court below alone. In *Conde Vidal v. Garcia-Padilla*, a federal district court ruled that the constitutional right of same-sex couples to marry—"'fundamental . . . in all States'"—did not apply to Puerto Rico because it was an unincorporated territory. 167 F. Supp. 3d 279, 282, 286–87 (D.P.R. 2016) (quoting *Obergefell v. Hodges*, 135 S. Ct. 2584, 2607–08 (2015)). The district court looked to the "particular condition of Puerto Rico in relation to the Federal Constitution" to hold that this Court's ruling in *Obergefell* did not apply there because of "underlying cultural, social and political currents" specific to the territory. *Id.* at 286. The First Circuit reversed. *In re Conde Vidal*, 818 F.3d 765, 767 (1st Cir. 2016).

Similarly, in *United States v. Baxter*, the Third Circuit held that the Fourth Amendment does not protect persons arriving in the U.S. Virgin Islands from one of the 50 states from warrantless searches and seizures. 951 F.3d 128, 129 (3d Cir. 2020), *cert. denied*, 141 S. Ct. 1269 (2021). Relying on precedent grounded in the fiction of "unincorporated" territories, the court concluded that Congress could devise an international "border" between the Virgin Islands and the 50 states such that the border-search exception to the Fourth Amendment applied. *Id.* at 131, 133 n.11 (citing *United States v. Hyde*, 37 F.3d 116, 121 (3d Cir. 1994) (discussing *Downes*, 182 U.S. 244 and its distinction between "incorporated" and "unincorporated" territories)).

These cases show that, as Justice Gorsuch recently observed, "[l]ower courts continue to feel constrained to apply" the *Insular Cases*. *Vaello*

Madero, 142 S. Ct. at 1555 (Gorsuch, J., concurring); *see, e.g.*, *Tuaua v. United States*, 788 F.3d 300, 306–07 (D.C. Cir. 2015) (looking to *Insular Cases* and the territorial incorporation doctrine in deciding the reach of the Citizenship Clause of the Fourteenth Amendment); *Montalvo v. Colon*, 377 F. Supp. 1332, 1336–42 (D.P.R. 1974) (considering, in light of the *Insular Cases*, whether the right to personal privacy in Supreme Court precedent concerning abortion applies in Puerto Rico); *see also, e.g.*, *Segovia v. Bd. of Election Comm'rs.*, 201 F. Supp. 3d 924, 938–39 (N.D. Ill. 2016) (citing criticism of *Insular Cases*, noting that the "court's task, however, is not to opine on the wisdom or fairness of" doctrine).

Unchecked, this scattershot approach to interpreting the Constitution is a recipe for arbitrary double standards. The Tenth Circuit's approach is illustrative. It framed the test for deciding whether a right applies in the unincorporated territories as asking, first, whether the right is a peculiar brand of "fundamental":

> Fundamental has a distinct and narrow meaning in the context of territorial rights. Even rights that we would normally think of as fundamental, such as the constitutional right to a jury trial, are not fundamental under the framework of the Insular Cases. Instead, only those principles which are the basis of all free government establish the rights that are fundamental for Insular purposes.

Fitisemanu, 1 F.4th at 878 (internal citations, quotation marks, and brackets omitted). Under this formula, courts must assess whether rights this Court has long deemed fundamental are "fundamental for Insular purposes," *id.* (internal quotation marks and citation omitted), such that they apply to the territories. There is simply no objective yardstick by which such distinctions can be drawn. The Court should halt this confusion and propensity to extend the irredeemable *Insular Cases*.

II. The *Insular Cases*' Doctrine of Territorial Incorporation Should be Overruled.

As detailed above, members of the Court have long criticized the *Insular Cases*. Almost no one defends the decisions at this point. This case provides the ideal opportunity to overrule them once and for all.

The Court should do so for two main reasons. First, the *Insular Cases* are "egregiously wrong as a matter of law." *See Ramos v. Louisiana*, 140 S. Ct. 1390, 1414 (2020) (Kavanaugh, J., concurring) (discussing considerations guiding inquiry on whether to overrule constitutional decision). The territorial incorporation doctrine has no foundation in either the Constitution's text or history and cannot be squared with our structure of a limited federal government of enumerated powers. It is an anomaly lacking a "home in our Constitution or its original understanding." *Vaello Madero*, 142 S. Ct. at 1554 (Gorsuch, J., concurring).

Second, the doctrine rests on obsolete and offensive notions of racial inferiority that have no place in our jurisprudence. *See Ramos*, 140 S. Ct. at

1417–19 (Kavanaugh, J., concurring) (Whether a decision "causes significant negative consequences" may depend on whether it "tolerates and reinforces a practice that is thoroughly racist in its origins and has continuing racially discriminatory effects[.]").

A. The *Insular Cases*' principle of "unincorporated territories" has no foundation in the text or original understanding of the Constitution.

Territorial incorporation was, from the start, at war with bedrock principles of a national government constrained by the Constitution. By 1901, it was well settled that in governing territories, "Congress [was] supreme" and held "all the powers of the people of the United States . . . ." *First Nat'l Bank v. Yankton Cnty.*, 101 U.S. 129, 133 (1879). But Congress' authority over territories yielded to "restrictions . . . expressed" or "necessarily implied" in the Constitution. *Murphy v. Ramsey*, 114 U.S. 15, 44 (1885). Even as it exercised its broad powers to govern national lands, Congress could not act outside of the Constitution's boundaries. *See, e.g.*, *Reynolds v. United States*, 98 U.S. 145, 162 (1878) ("Congress cannot pass a law for the government of the Territories . . . prohibit[ing] the free exercise of religion.").

The *Insular Cases* ignored these elemental principles in concluding that parts of the Constitution could be withheld until Congress saw fit to "incorporate" territories. As dissenting Justices explained at the time the doctrine was invented, the decisions carved out a novel and unfounded exception to the precept of limited national government with no

mooring in the Constitution's text or history. *See Downes*, 182 U.S. at 380 (Harlan, J., dissenting) (notion that territories could be held "as mere colonies" was "inconsistent with the spirit and genius, as well as the words, of the Constitution").

That departure was anomalous when written. Not even the Justices who fabricated the *Insular Cases*' doctrine understood their efforts to be grounded in the Constitution's text or meaning. Justice Brown, for his part, thought that applying the Constitution made little sense in territories "inhabited by alien races, differing from us in religion, customs, laws, methods of taxation, and modes of thought." *Downes*, 182 U.S. at 287. Justice White, in turn, surmised that whether the Constitution applied to a territory depended on "the situation of the territory and its relations to the United States," and, in particular, whether Congress had expressed an intent to incorporate that territory into the United States. *Id.* at 293, 339 (White, J., concurring); *see also Vaello Madero*, 142 S. Ct. at 1553–54 (Gorsuch, J., concurring) (discussing origins of the territorial incorporation doctrine). Justice White's "incorporation" theory ultimately prevailed. But like Justice Brown's theory, it lacked any textual or historical foundation.

The dissenting Justices in *Downes* correctly criticized the origin and implications of the "incorporation" theory. Justice Harlan announced that the "idea of 'incorporation' has some occult meaning" and is "enveloped in some mystery which [he was] unable to unravel," with the result of adopting "a colonial system such as exists under

monarchical governments." 182 U.S. at 391 (Harlan, J., dissenting). Justice Fuller similarly rebuked the idea of "incorporation" "as if possessed of some occult meaning." *Id.* at 373 (Fuller, J., dissenting); *see also Vaello Madero*, 142 S. Ct. at 1555 (Gorsuch, J., concurring) (explaining that "[e]ven commentators at the time [of the *Insular Cases*] understood that the notion of territorial incorporation was a thoroughly modern invention.").

The *Insular Cases*' departure from constitutional norms, anomalous then, remains so today. Indeed, with the exception of a few decisions in the *Insular Cases* grouping,[3] the Court has never said

[3] Seven of the *Insular Cases* relied on the territorial incorporation doctrine to find certain constitutional provisions "inapplicable" in unincorporated territories: *Balzac v. Porto Rico*, 258 U.S. 298, 309 (1922) (holding Sixth Amendment right to jury trial inapplicable in Puerto Rico); *Ocampo v. United States*, 234 U.S. 91, 98 (1914) (Fifth Amendment grand jury provision inapplicable in the Philippines); *Dowdell v. United States*, 221 U.S. 325, 332 (1911) (jury trial right inapplicable in Philippines); *Dorr v. United States*, 195 U.S. 138, 149 (1904) (constitutional right to trial by jury did not extend to Philippines unless provided by Congress); *Hawaii v. Mankichi*, 190 U.S. 197, 223–24 (1903) (grand jury and unanimous verdict guarantee inapplicable in Hawai'i); *Dooley v. United States*, 182 U.S. 222, 236 (1901) (holding Export Clause inapplicable in Puerto Rico); *Downes v. Bidwell*, 182 U.S. 244, 347 (holding Uniformity Clause inapplicable in Puerto Rico). Rejecting this doctrine would thus likely mean directly overruling at least these seven decisions. However, four of them—*Mankichi*, *Dorr*, *Dowdell*, and *Ocampo*—are presumptively obsolete and overruled *de facto*, because they addressed the applicability of constitutional provisions in what are now former territories, specifically, the Philippines (an independent republic for over seven decades) and Hawai'i (a state since 1959). *See* Bryan A. Garner, et al., *The Law of*

that the Constitution's constraints on national government apply differently in U.S. territories. To the contrary, it has been clear that the Constitution endows Congress with 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). This case affords the Court an opportunity to correct that aberrant territorial incorporation doctrine once and for all.

B. The *Insular Cases*' principle of "unincorporated" territories is based on racist assumptions that are widely rejected today, and should be rejected for that reason.

The *Insular Cases*' lack of foundation in the Constitution's text, structure, or history is reason enough to overrule them. But there is another compelling reason to discard their doctrine: the *Insular Cases* are "premised on beliefs" of the racial inferiority of the territories' residents that are "both odious and wrong." *Vaello Madero*, 142 S. Ct. at 1560 n.4 (Sotomayor, J., dissenting). The decisions infamously rest on pernicious racist assumptions that were wrong from the start and anathema today. Their continuing vitality in the canon taints the constitutional framework. The Court should repudiate them.

The *Insular Cases* were prompted by overseas "expansion by the United States into lands already

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Judicial Precedent 178 (2016) (discussing "ancient" decisions and obsolescence).

occupied by non-white populations." *Ballentine v. United States*, No. Civ. 1999-130, 2006 WL 3298270, at *4 (D.V.I. Sept. 21, 2006) *aff'd,* 486 F.3d 806 (3d Cir. 2007). It was only "[a]t this point Congress chose to discontinue its previous practice of extending constitutional rights to the [U.S.] territories by statute." *See Boumediene*, 553 U.S. at 756. That choice was driven by "prevailing governmental attitudes presum[ing] white supremacy and approv[ing] of stigmatizing segregation." Martha Minow, *The Enduring Burdens of the Universal and the Different in the Insular Cases*, *Preface* to Reconsidering the Insular Cases, vii (Neuman & Brown-Nagin, eds.) (2015).

Notions of Anglo-Saxon supremacy pervaded debates over the United States' annexation of territories in the buildup to and wake of the Spanish-American War. "The division of opinion in the Congress over how, and to what extent, the Constitution applied" to the new territories was a key point of contention. *Examining Bd. of Eng'rs, Architects & Surveyors v. Flores de Otero*, 426 U.S. 572, 599 n.30 (1976).

Prominent voices on both sides of the debate found common ground in the belief that the territories' inhabitants were racially inferior. Senator William Bate, an avowed "anti-imperialist," argued that "expanding our authority once to the Europeans living in Louisiana" could not justify "the incorporation of millions of savages, cannibals, Malays, Mohammedans, head hunters, and polygamists into even the subjects of an American Congress." José A. Cabranes, *Citizenship and the American Empire*, 127

Univ. Pa. L. Rev. 391, 431 (1978) (quoting 33 Cong. Rec. 3608 (1900)). Senator Ben Tillman opposed "incorporating any more colored men into the body politic." B.R. Tillman, *Causes of Southern Opposition to Imperialism*, 171 North Am. Rev. 439, 445 (1900). And Congressman Thomas Spight "opined that the Filipinos and Puerto Ricans, who were Asiatics, Malays, negroes and of mixed blood 'have nothing in common with us and centuries cannot assimilate them.'" *Consejo de Salud Playa de Ponce v. Rullan*, 586 F. Supp. 2d 22, 28 n.9 (D.P.R. 2008) (quoting 33 Cong. Rec. 2105 (1900)).

Proponents of annexation agreed that inhabitants of the new territories were unfit for U.S. citizenship. Thus, Senator Chauncey Depew endorsed the Foraker Act on the understanding that it would not "incorporate the alien races, and civilized, semi-civilized, barbarous, and savage peoples of these islands into our body politic as States of our Union." Cabranes, 127 Univ. Pa. L. Rev. at 432 (quoting 33 Cong. Rec. 3622 (1900)). And leading constitutional scholars sternly counseled against extending "[o]ur Constitution," "made by a civilized and educated people," to "the half-civilized Moros of the Philippines, or the ignorant and lawless brigands that infest Puerto Rico, or even the ordinary Filipino of Manila." Simeon E. Baldwin, *The Constitutional Questions Incident to the Acquisition & Government by the U.S. of Island Territory*, 12 Harv. L. Rev. 393, 415 (1899).

Those same assumptions were expressly repeated in the *Insular Cases*, which disturbingly

echoed the infamous reasoning of *Plessy v. Ferguson,* 163 U.S. 537 (1896), decided just five years earlier.

As in *Plessy*, so in the *Insular Cases*, the perceived inferiority of the race and culture of non-white peoples drove the outcome. In *Downes*, for example, Justice Brown, *Plessy*'s author, justified a rule preventing the Constitution from applying fully in Puerto Rico by noting the "grave questions" "aris[ing] from differences of *race* . . . which may require action on the part of Congress that would be [] *unnecessary in . . . territory inhabited only by people of the same race*." 182 U.S. at 282 (opinion of Brown, J.) (emphasis added). In effect, Justice Brown reasoned, Puerto Rico's inhabitants, *because of their race*, were ill-suited to form part of the Nation and its polity. He cautioned further that "[i]f [distant] possessions are inhabited by *alien races* . . . the administration of government and justice, according to Anglo-Saxon principles, may for a time be impossible." *Id.* at 287 (emphasis added).

Justice White's concurring opinion was similarly guided by the "evils," *id.* at 342 (White, J., concurring), of admitting "millions of inhabitants," *id.* at 313, of "unknown island[s], *peopled with an uncivilized race*, yet rich in soil" whose inhabitants were "absolutely unfit to receive" citizenship, *id.* at 306 (emphasis added). Quoting from a leading contemporary treatise, he added: "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 (quotation marks omitted). And in *Balzac v. Porto Rico*, the last *Insular* case, this

Court reasoned that residents of Puerto Rico were not entitled to jury trials because they "liv[ed] in compact and ancient communities, with . . . customs and political conceptions" alien to "institution[s] of Anglo-Saxon origin." 258 U.S. 298, 310 (1922).

Deploying the antiseptic language of "incorporation," the *Insular Cases* ratified a discriminatory framework no less offensive to the Constitution than *Plessy*'s "separate but equal" principle. Both doctrines endorsed racially segregated systems of civic membership, as Justice Harlan explained in dissent in both cases. *See Plessy*, 163 U.S. at 563–64 (Harlan, J., dissenting) (laws segregating Black from white people "place in a condition of legal inferiority a large body of American citizens, now constituting a part of the political community, called the 'People of the United States'"); *Downes*, 182 U.S. at 380 (Harlan, J., dissenting) (the judgment permits Congress to "engraft upon our republican institutions a colonial system such as exists under monarchical governments"). And both sought constitutional legitimacy for their holdings by claiming that pernicious distinctions drawn among races were natural, not discriminatory. As Justice Brown put it in *Plessy*: "If one race be inferior to the other socially, the constitution of the United States cannot put them upon the same plane." 163 U.S. at 552.

Justice Harlan was right both times. Fifty-eight years after *Plessy*, this Court vindicated his view and abrogated the odious "separate but equal" doctrine. *Brown v. Bd. of Educ. of Topeka*, 347 U.S. 483 (1954). More recently, the Court reversed

Korematsu, 323 U.S. 214, which was also premised "explicitly on the basis of race" and "morally repugnant" racial and cultural assumptions. *Trump*, 138 S. Ct. at 2423. Yet the *Insular Cases* endure, despite equally abhorrent views about the inferiority of certain races long "overruled in the court of history." *Id.* Lower courts and commentators have long criticized the decisions for that reason.[4] But only this Court can bring its jurisprudence into line with now-accepted constitutional norms—by overruling them once and for all. It is time to recognize that Justice Harlan was as right about the *Insular Cases* as he was about *Plessy*.

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[4] *See, e.g.*, *United States v. Cotto-Flores*, 970 F.3d 17, 50–51 (1st Cir. 2020) (Torruella, J., concurring) (noting "unincorporated" constitutional placement "is based on a rationale of racial inequality" and "flawed premises"); *Paeste v. Gov't of Guam*, 798 F.3d 1228, 1231 n.2 (9th Cir. 2015) ("[T]he so-called 'Insular Cases' . . . ha[ve] been the subject of extensive judicial, academic, and popular criticism."); *Tuaua v. United States*, 788 F.3d 300, 307 (D.C. Cir. 2015) ("[S]ome aspects of the Insular Cases' analysis may now be deemed politically incorrect[.]"); *Hueter v. Kruse*, --- F. Supp. 3d ---, 2021 WL 5989105, at *2 n.2 (D. Haw. Dec. 17, 2021) (noting origin of territorial incorporation "is explicitly racist" and doctrine has a "shameful genesis"); *Pena Martinez v. Azar*, 376 F. Supp. 3d 191, 209 (D.P.R. 2019) ("To the extent [precedent] rest[s] on the much-criticized *Insular Cases* . . . the Court has no authority to set them aside on that ground."); *id.* ("[T]his Court is bound to follow those cases unless and until the Supreme Court states otherwise."); *United States v. Vaello-Madero*, 313 F. Supp. 3d 370, 375 (D.P.R. 2018) ("Whatever pros and cons may have evolved from [the territorial incorporation doctrine], the fact remains that they were grounded on outdated premises.").

CONCLUSION

For the reasons discussed above, the Court should grant certiorari to overrule the *Insular Cases* and their doctrine of territorial incorporation, on which the Tenth Circuit relied to withhold the Citizenship Clause from American Samoa.

Respectfully submitted,

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