Nos. 18-1334, 18-1475, 18-1496, 18-1514 & 18-1521

IN THE

Supreme Court of the United States

FINANCIAL OVERSIGHT AND MANAGEMENT BOARD FOR PUERTO RICO,

Petitioner,

—v.—

AURELIUS INVESTMENT, LLC, ET AL.,

Respondents.

(*Caption continued on inside cover*)

ON WRITS OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

BRIEF *AMICI CURIAE* OF THE AMERICAN CIVIL LIBERTIES UNION AND THE ACLU OF PUERTO RICO, SUPPORTING THE FIRST CIRCUIT'S RULING ON THE APPOINTMENTS CLAUSE ISSUE

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AURELIUS INVESTMENT, ET AL.,

Petitioner,

—v.—

COMMONWEALTH OF PUERTO RICO, ET AL.,

Respondents.

OFFICIAL COMMITTEE OF UNSECURED CREDITORS OF ALL TITLE III DEBTORS OTHER THAN COFINA,

Petitioner,

—v.—

AURELIUS INVESTMENT, ET AL.,

Respondents.

UNITED STATES OF AMERICA,

Petitioner,

—v.—

AURELIUS INVESTMENT, ET AL.,

Respondents.

UNIÓN DE TRABAJADORES DE LA INDUSTRIA ELÉCTRICA Y RIEGO, INC.,

Petitioner,

—v.—

FINANCIAL OVERSIGHT and MANAGEMENT BOARD FOR PUERTO RICO, ET AL.,

Respondent.

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INTEREST OF AMICI CURIAE[1]

The American Civil Liberties Union (ACLU) is a nationwide, non-profit, non-partisan organization with approximately two million members and supporters dedicated to the principles of liberty and equality enshrined in the Constitution. The ACLU of Puerto Rico is the ACLU affiliate for Puerto Rico of the national ACLU.

The ACLU has an abiding interest in the civil and democratic rights of residents of Puerto Rico and other unincorporated U.S. territories—including the approximately four million U.S. citizens among them. As it explained in a report it published over 80 years ago, the ACLU is committed to the "[m]aintenance of civil liberties in the [territories]," which it considers "essential to political or economic reforms of any sort."[2]

SUMMARY OF ARGUMENT

The *Insular Cases*, which impose a second-class constitutional status on all who live in so-called "unincorporated" territories, explicitly rest on outdated racist assumptions about the inferiority of "alien races," and depart in unprincipled ways from the fundamental constitutional tenet of limited government.

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[1] All parties to the cases have lodged blanket consents for the filing of amicus briefs. 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 or entities, other than amici curiae, their members, or their counsel made a monetary contribution to the preparation or submission of this brief.

[2] ACLU, *Civil Liberties in American Colonies* 7 (1939), at http://debs.indstate.edu/a505c5_1939.pdf.

Handed down at the turn of the last century after a burst of overseas expansion, the *Insular Cases* created an untenable 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 "unincorporated" territories, however, those not bound for statehood, the Constitution applied only "in part." *Boumediene v. Bush*, 553 U.S. 723, 757 (2008). That double standard was never grounded in the Constitution's text, was intended to be temporary, and was expressly justified by racist assumptions about the territories' inhabitants. Yet to this day, the doctrine the *Insular Cases* set forth casts a pall on the rights of residents of Puerto Rico, including more than three million U.S. citizens, and close to 500,000 more in other so-called "unincorporated" territories.

I. Amici take no position on whether the Financial Oversight and Management Board (FOMB) of Puerto Rico violates the Appointments Clause. Our brief is limited to the proposition that however that question is decided, the *Insular Cases* should play no role. At a minimum, the Court should make clear that the *Insular Cases* are strictly limited to their precise holdings, and may not be relied upon to render any other provisions of the Constitution inapplicable simply because a territory is "unincorporated." Over 60 years ago, in *Reid v. Covert*, 354 U.S. 1 (1957), the Court warned that the *Insular Cases* and their territorial incorporation doctrine are "very dangerous" and directed that they should not be "given any further expansion," in effect limiting them to their specific holdings that a handful of constitutional provisions do not apply in the unincorporated territories, including Puerto Rico. *Id.* at 14 (plurality op.). The Court

should reiterate that warning today, and hold that the Appointments Clause applies to federal entities operating in Puerto Rico just as it does to federal entities operating in Rhode Island or New York.

II. While reaffirming the limits of the *Insular Cases* would be sufficient to resolve this case, the Court should take this opportunity to overrule them once and for all. As it did in *Trump v. Hawaii*, 138 S. Ct. 2392 (2018), where the Court went out of its way to overrule *Korematsu v. United States*, 323 U.S. 214 (1944), because of that decision's express racist assumptions, so, too, here, the Court should lay the *Insular Cases* to rest. Wrong when they were decided, they are even more objectionable over a century later. As four members of the Court argued in dissent even then—and others have echoed since—the territorial incorporation doctrine departed from over a century of precedent, spurned historical practice, and could not be reconciled with principles of a national government restrained by enumerated powers. And even then, they were expressly designed to apply only temporarily. More than a century after they were initially applied to Puerto Rico, it is high time for this Court to repudiate the *Insular Cases*.

More importantly, the *Insular Cases* explicitly rest on anachronistic and deeply offensive racial and cultural assumptions. The decisions sought to draw a distinction between a limited category of "fundamental" rights that could be extended to the non-English speaking peoples inhabiting the new U.S. insular possessions and a broader set of rights particular to Anglo-American traditions, which would not. Other cases resting on strikingly similar racist assumptions have been rejected. *See Plessy v. Ferguson*, 163 U.S.

537 (1896), overruled by *Brown v. Bd. Of Educ.*, 347 U.S. 483 (1954); *Korematsu*, 323 U.S. at 214, overruled by *Trump*, 138 S. Ct. at 2392. The *Insular Cases* deserve the same fate.

ARGUMENT

I. THE *INSULAR CASES* DO NOT BAR THE APPLICATION OF THE APPOINTMENTS CLAUSE TO THE PROMESA BOARD.

Amici take no position on the ultimate question of whether the convening of the Financial Oversight and Management Board (FOMB) satisfies the Appointments Clause. But the answer to that question should be no different because the FOMB happens to operate in Puerto Rico. The *Insular Cases*, which declined to apply a handful of constitutional provisions to "unincorporated territories" like Puerto Rico, at a minimum should be limited to their particular facts, and as such should pose no bar to application of the Appointments Clause in Puerto Rico.

A. *Because They Are So Contrary to Foundational Constitutional Principles, the* Insular Cases *Should At a Minimum Be Limited to Their Specific Facts and Holdings.*

The Court has already cautioned that "neither the [*Insular Cases*] nor their reasoning should be given any further expansion." *Reid v. Covert*, 354 U.S. 1 (1957) (plurality op.). "The concept that the Bill of Rights and other constitutional protections . . . are inoperative when they become inconvenient . . . would destroy the benefit of a written Constitution . . . ." *Id.*

This Court had good reason to constrain the *Insular Cases* in *Reid*. Territorial incorporation was from the start "a very dangerous doctrine [which] if allowed

to flourish would destroy the benefit of a written Constitution and undermine the basis of our government." *Id.* Members of the Court have warned of its dangers for more than a century.

By 1901, the year the first set of *Insular Cases* was decided, it was already well established that in governing territory, "Congress [was] supreme, and . . . ha[d] all the powers of the people of the United States, *except* such as [were] . . . reserved in the prohibitions of the Constitution." *First Nat'l Bank v. Yankton Cty.*, 101 U.S. 129, 133 (1879) (emphasis added). Consistent with those principles, this Court had explained that the national government was constrained by the Constitution—even when it acted within acquired territory. *See Murphy v. Ramsey*, 114 U.S. 15, 44 (1885).

These principles of constraint reflected concerns expressed at the founding about the danger posed by a government free to act without limit in national territory. The Articles of Confederation gave Congress no power to regulate existing territory. Yet the national government had taken broad action there "without the least color of constitutional authority." *The Federalist* No. 38, at 239 (Madison) (Rossiter, ed., 1961). It not only "proceeded to form new States," but also "assumed" their "administration," "erect[ed] temporary governments . . . and [] prescribe[d] the conditions on which such States [would] be admitted into the Confederacy." *Id.*

The Framers pointedly noted the potential for mischief in such an arrangement. Writing in Federalist 38, Madison cautioned against allowing "[a] great and independent fund of revenue" to pass into the hands of a "single body of men, who c[ould] raise

troops . . . and appropriate money to their support for an indefinite period of time." *Id.* By expressly constraining the federal government's power to govern territory in defined ways, concluded Madison, a Constitution would "guard the Union against [its] future powers and resources." *Id.*

The *Insular Cases* ignored these elemental concerns in proposing that parts of the Constitution could be withheld from territories until Congress saw fit to "incorporate" them. They carved a wholly unprecedented exception to the principle of constitutionally limited government. No prior case had held inapplicable to the federal government "a limitation of the power of Congress over personal or proprietary rights" "within the territory of the United States." Henry W. Biklé, *The Constitutional Power of Congress Over the Territory of the United States*, 49 Am. L. Reg. 11, 94 (1901). As another contemporaneous commentator put it in the *Harvard Law Review*, "[t]he Insular Cases, in the manner in which the results were reached, the incongruity of the results, and the variety of inconsistent views . . . [were] without a parallel in our judicial history." Charles E. Littlefield, *The Insular Cases*, 15 Harv. L. Rev. 169, 170 (1901).

Several members of the Court recognized this problem in the deeply fractured *Insular Cases* themselves.[3] Dissenting in *Downes v. Bidwell*, for example,

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[3] The Court reached most of the decisions in the 1901 *Insular Cases* by pluralities. *See Downes v. Bidwell*, 182 U.S. 244, 347 (1901); *Armstrong v. United States*, 182 U.S. 243, 244 (1901); *De Lima v. Bidwell*, 182 U.S. 1, 200 (1901). In *Downes*, "[t]he most significant of the Insular Cases," *Examining Bd. of Eng'rs, Architects & Surveyors v. Flores de Otero*, 426 U.S. 572, 599 n.30 (1976), Justice Brown delivered an opinion "announc[ing] the

Chief Justice Fuller admonished that the concept of territorial incorporation:

> assumes that the Constitution created a government empowered to . . . govern[] [acquired countries] by different rules than those obtaining in the original states and territories, and substitutes for [our] system of republican government a system of domination over distant provinces in the exercise of unrestricted power.

182 U.S. 244, 372–73 (1901) (Fuller, C.J., dissenting). Justice Harlan joined Chief Justice Fuller's dissent, but also wrote separately to stress that Congress is "a creature of the Constitution. It has no powers which that instrument has not granted, expressly or by necessary implication." *Id.* at 382 (Harlan, J., dissenting). Justice Harlan dismissed the notion that the United States could retain territories "as mere colonies or provinces" as "wholly inconsistent with the spirit and genius, as well as the words, of the Constitution." *Id.* at 380.

These dissenting opinions correctly reflected historical practice and longstanding principles of republican governance. No case or doctrine supported the paradoxical "theory that Congress, in its discretion, can *exclude* the Constitution from a domestic territory of the United States, acquired . . . *in virtue of* the Constitution." *Id.* at 386 (emphasis added). If Congress can decide for itself when the Constitution's

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conclusion and judgment of the court," which *none* of the other Justices joined, *see Downes*, 182 U.S. at 247. There was no opinion in which a majority of the court concurred. *See id.* at 244 n.1 (opinion syllabus).

protections apply to constrain its actions, then those protections are effectively extinguished.

The Court's most recent pronouncement on the reach of constitutional limits beyond the 50 states, moreover, hews more closely to the *Insular Cases*' dissents than to their majority or plurality opinions. Addressing the reach of the constitutional right of habeas corpus to a U.S. naval base in Guantánamo Bay, Cuba, the Court wrote that "[t]he 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).

The *Insular Cases*, in short, cannot be squared with what predated them, or with what followed. They are a glaring anomaly in the fabric of our constitutional law. The notion that "the political branches have the power to switch the Constitution on or off at will," *id.*, in domestic territory under complete U.S. control is diametrically opposed to fundamental concepts of a limited federal government of enumerated powers. *See Hawaii v. Mankichi*, 190 U.S. 197, 240 (1903) (Harlan, J., dissenting) (a system where subject peoples are "controlled as Congress may see fit . . . not . . . as the people governed may wish" is "entirely foreign to . . . our government and abhorrent to the principles that underlie and pervade the Constitution").

B. *Properly Limited to Their Specific Holdings and Facts, the* Insular Cases *Do Not Bar the Application of The Appointments Clause.*

Given their anomalous character, the *Insular Cases* should at a minimum be limited to their precise facts and holdings. As none of the cases addresses the Appointments Clause, the *Insular Cases* should pose no bar to its application in Puerto Rico. Moreover, reinforcing the highly limited character of the *Insular Cases* would assist lower courts as they seek to determine how the decisions should be applied to constitutional provisions not already expressly addressed.

As this Court noted in *Boumediene,* "the Court [in the *Insular Cases*] held that the Constitution had independent force in the territories that was not contingent upon acts of legislative grace." 553 U.S. at 757. Indeed, that the Constitution applied to U.S. territories was deemed "*self-evident*" at the time. *Downes v. Bidwell*, 182 U.S. 244, 291 (1901) (White, J., concurring). After more than a century of continental expansion, it was well established that the Constitution applied in territory belonging to the United States. *See, e.g.*, *Loughborough v. Blake*, 18 U.S. (5 Wheat.) 317, 319 (1820) (Marshall, C.J.) ("[T]erritory west of the Missouri, is not less within the United States, than Maryland or Pennsylvania[.]"). The premise that constitutional protections extended past the States and into federal territory took root at the founding and only strengthened thereafter. Even the otherwise deplorable decision in *Scott v. Sandford*, 60 U.S. (19 How.) 393 (1857), recognized the full force of the Constitution in the territories. *Id.* at 446 ("[N]o power [is] given by the Constitution to the Federal Government

to establish or maintain colonies . . . to be ruled and governed at its own pleasure . . . ."); *see also Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 73–74 (1872) (persons born in territories are "citizens of the United States without regard to . . . citizenship of a particular State").

The *Insular Cases* broke new ground, however, by crafting out of whole cloth an unprecedented distinction between "incorporated" and "unincorporated" territories: those destined for full inclusion in the United States through their admission into statehood, and those whose future remained uncertain. As discussed more fully in Point II.B, *infra,* the distinction was grounded in the view that inhabitants of the "unincorporated" territories were undeserving of full inclusion and constitutional protection because of their different (and presumed inferior) racial and cultural makeup. *See, e.g.*, *Balzac v. Porto Rico*, 258 U.S. 298, 310 (1922) (denying right to jury trial in Puerto Rico because "Porto Ricans" "living in compact and ancient communities" were incapable of implementing "this institution of Anglo-Saxon origin").

Efforts to distill a general guiding principle for which rights apply in "unincorporated" territories and which rights do not apply have been a failure. As it is often unhelpfully described, the doctrine holds that Congress may govern as it pleases, limited only by "restrictions . . . so fundamental in nature that they cannot be transgressed . . . ." *Downes*, 182 U.S. at 291 (White, J., concurring). This hardly affords a useful yardstick. *See Examining Bd. Of Eng'rs, Architects & Surveyors v. Flores de Otero*, 426 U.S. 572, 599 (1976) ("The Court's decisions respecting the rights of the

inhabitants of Puerto Rico have been neither unambiguous nor exactly uniform.").

That lack of clarity has led some lower courts to invoke the doctrine with disturbing results. In *Rayphand v. Sablan*, the district court held that the "one person, one vote" principle was not a fundamental constitutional right guaranteed to residents of the Commonwealth of the Northern Mariana Islands ("CNMI"). 95 F. Supp. 2d 1133 (D.N. Mar. I. 1999), *aff'd sub nom. Torres v. Sablan*, 528 U.S. 1110 (2000). The court based its ruling on its understanding that "the Insular Cases have long provided the legal framework and justification for allowing otherwise unconstitutional practices to continue in United States territories." *Id.* at 1139. The court neither addressed nor distinguished *Rodriguez v. Popular Democratic Party*, 457 U.S. 1 (1982), in which this Court recognized the same "one person, one vote" principle as applicable in Puerto Rico. *See id.* at 10.

Similarly, in *Conde Vidal v. Garcia-Padilla*, the district court ruled that the constitutional right of same-sex couples to marry—"'fundamental . . . in all States'"—had not been incorporated to Puerto Rico. 167 F. Supp. 3d 279, 286–87 (D.P.R. 2016) (quoting *Obergefell v. Hodges*, 135 S. Ct. 2584, 2607 (2015)). The district court based its ruling on its understanding of the territorial incorporation doctrine. *See id.* at 286 ("[P]uerto Rico remains . . . subject to the plenary powers of Congress . . . . [T]he question of whether a constitutional guarantee applies to Puerto Rico is subject to determination by [the] Supreme Court of the United States."). The First Circuit, in response, granted mandamus and reversed. *In re Conde Vidal*, 818 F.3d 765, 767 (1st Cir. 2016).

These rulings illustrate the difficult position in which the doctrine places lower courts—having to demarcate, with little or no guidance, which constitutional rights apply in the territories and which do not. The applicability of the one-person, one-vote principle or marriage equality ought not be different in the CNMI, Puerto Rico, and New York.

To avoid such confusion, this Court should at a minimum clearly and unequivocally reaffirm that the *Insular Cases* and their territorial incorporation doctrine must be limited to their precise original holdings—that a handful of particular constitutional clauses do not apply in those territories, and should not be relied upon to render *any* other constitutional provisions inapplicable to U.S. territories.

"[T]he 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 . . . executive and legislative power . . . ." *Boumediene*, 553 U.S. at 758 (emphasis added). And there is no longer any basis for holding that other provisions of the Constitution ought not extend to Puerto Rico to the same extent that they extend to the District of Columbia.

The Court has already effectively treated the *Insular Cases* as limited in this way. Not once since the *Insular Cases* has this Court found any other constitutional provision inoperable within Puerto Rico or other unincorporated territory. Rather, the decisions have been limited to the four constitutional provisions they addressed. In the first group of cases concerning the territories—then narrowly described as the "Insular Tariff Cases," *De Lima v. Bidwell*, 182 U.S. 1, 2 (1901)—the Court held that specific constitutional

provisions concerning tariffs and taxation did not apply to Puerto Rico. *See Dooley v. United States*, 183 U.S. 151, 156–57 (1901) (Export Clause bar on taxation of exports from any state inapplicable to goods shipped to Puerto Rico); *Downes*, 182 U.S. at 347 (Gray, J., concurring) (reference to "the United States" in Uniformity Clause did not include Puerto Rico). In later cases, the Court resolved that the Fifth and Sixth Amendment rights to indictment by grand jury and to a jury trial were inoperative in the territorial courts of the Philippines and the local courts of Puerto Rico. *See Balzac*, 258 U.S. at 309; *Ocampo v. United States*, 234 U.S. 91, 98 (1914); *Dorr v. United States*, 195 U.S. 138, 143 (1904).[4] These are the only provisions the Court has deemed inapplicable in unincorporated territories. The line stopped there.

Since the *Insular Cases*, the Court has repeatedly and consistently found constitutional provisions or safeguards "applicable" in Puerto Rico when it has considered them. *See El Vocero de P.R. v. Puerto Rico*, 508 U.S. 147, 148 n.1 (1993) (First Amendment Free

[4] Moreover, *Balzac* in effect treated Puerto Rico no differently than the states at that time. *Balzac* held only that the jury trial right did not apply to Puerto Rico's *local* court. Like the states, Puerto Rico had a dual court system (local and federal). *See* 258 U.S. at 300, 312 (case filed in "district court for Arecibo, Porto Rico"; distinguishing from U.S. District Court for Puerto Rico). The Court did not hold jury rights inapplicable in *federal* court in Puerto Rico, only in local courts. "In this sense Puerto Rico looked like a state of the Union, for the Sixth Amendment right to a trial by jury did not apply against state governments . . . until 1968." Christina Duffy Burnett, *A Convenient Constitution? Extraterritoriality After* Boumediene, 109 Colum. L. Rev. 973, 992 (2009) (citing *Duncan v. Louisiana*, 391 U.S. 145 (1968)). As such, *Balzac* did not hold the right to a jury trial inoperative as a limitation upon Congress.

Speech Clause "fully applies to Puerto Rico"); *Rodriguez*, 457 U.S. at 8 ("[I]t is clear that the voting rights of Puerto Rico citizens are constitutionally protected to the same extent as those of all other citizens of the United States."); *Torres v. Puerto Rico*, 442 U.S. 465, 470 (1979) (Fourth Amendment protections against unreasonable searches and seizures applicable against Puerto Rican government); *Examining Bd.*, 426 U.S. at 600 (equal protection and due process applicable); *Califano v. Torres*, 435 U.S. 1, 4 n.6 (1978) (per curiam) (assuming "there is a virtually unqualified constitutional right to travel between Puerto Rico and any of the 50 States").[5]

To extend the *Insular Cases* at this juncture to preclude application of the Appointments Clause, a provision never addressed in those cases, would contravene the Court's admonition that the cases should be limited to their particular holdings. The answer to the Appointments Clause question presented here should be determined not based on the fact that the FOMB

[5] The Court has determined that certain constitutional doctrines impose more lenient restrictions upon Congress in governing U.S. territories—whether or not they are "unincorporated"—than when it enacts laws that apply to the states. *See, e.g.*, *Harris v. Rosario*, 446 U.S. 651, 651–52 (1980) (applying rational review instead of heightened scrutiny to Congress's decision, pursuant to its Article IV territorial powers, to exclude Puerto Rico residents from Aid for Families with Dependent Children (AFDC) funding); *Dist. of Columbia v. Thompson Co.*, 346 U.S. 100, 105–06 (1953) ("The power of Congress to delegate legislative power to a territory is well settled."). But as the court of appeals explained, those dispensations at best reflect that specific restrictions might "bend to the peculiar demands of providing for governance within the territories." J.A.157. They do not suggest relevant constitutional provisions are inapplicable or inoperative within them.

operates in Puerto Rico, but by determining whether members of the FOMB are "Officers of the United States," and, if so, whether they are "principal or inferior" officers. *See Morrison v. Olson*, 487 U.S. 654, 670–72 (1988). The same analysis that applied in *Morrison* should apply here.

II. THE *INSULAR CASES* SHOULD BE OVERRULED.

The *Insular Cases* are so at odds with our constitutional tradition, and so infected by invidious racial stereotypes, that the Court should go further and overrule them. Because the territorial incorporation doctrine continues to endorse the "striking anomaly" of the "political branches hav[ing] the power to switch the Constitution on or off at will," the Court should lay it to rest. *Boumediene*, 553 U.S. at 765. The cases were always intended to provide only temporary and transitional rules, and the status of the unincorporated territories is no longer temporary or transitional. And the decisions were predicated on offensive racial assumptions that should have no place in our constitutional law.

A. *The Territorial Incorporation Approach Was Intended As Temporary And Should Be Abandoned More Than A Century After Its Conception.*

The territorial incorporation doctrine at the heart of the *Insular Cases* was never intended to last this long. The decisions themselves were conceived as transitional only, and were not meant to have enduring effect. Territorial "incorporation" was at most designed to provide a *temporary* and flexible framework through which Congress could govern "[then-]distant ocean communities." *Balzac*, 258 U.S. at 311.

In *De Lima*, 182 U.S. 1 (1901), the Court considered whether tariffs assessed on goods transported to New York from Puerto Rico could be collected under laws taxing imports from "foreign countries." A plurality of the Court held they could not. *Id.* at 196. It reasoned that once Congress ratified the treaty ending the Spanish-American War, Puerto Rico "became territory of the United States," and therefore "domestic" for tariff purposes. *Id.* at 196–97. Rejecting the argument that Puerto Rico could remain a "foreign," taxable country to the United States until Congress "embraced it within the Customs Union," the Court explained that the proposed theory led to untenable results, as it:

> presupposes that territory may be held indefinitely by the United States . . . . for years, *for a century even*, but that until Congress enacts otherwise, it still remains a foreign country. To hold that this can be done as a matter of law we deem to be pure judicial legislation. *We find no warrant for it in the Constitution or in the powers conferred upon this court*.

Id. at 198 (emphasis added).

In *Downes*, decided the same day as *De Lima*, another plurality of the Court determined that Puerto Rico was not part of the "United States" for purposes of the Constitution's Uniformity Clause; thus leaving the island "foreign to the United States in a domestic sense," as Justice White observed. *Downes*, 182 U.S. at 341–42 (White, J., concurring).

But even the two principal opinions in *Downes*—Justice Brown's, announcing the judgment, and

Justice White's, reflecting the later-adopted incorporation framework—clarified that the new territories could be left at a remove from the Constitution only *temporarily*. Differing "religion, customs, laws . . . and modes of thoughts" of the possessions' "alien races," Justice Brown wrote, counseled that "large concessions . . . be made *for a time*" in the "administration of government and justice, according to Anglo-Saxon principles." *Id.* at 287 (opinion of Brown, J.) (emphasis added). Justice White cautioned that "it would be a violation of duty under the Constitution" for Congress to "permanently hold territory which is not intended to be incorporated." *Id.* at 343–44.

Later decisions reaffirmed that the territorial incorporation doctrine at most gave Congress transitory license to govern territories when they were new to the country—now almost 120 years ago. At midcentury, in *Reid*, the Court distinguished the *Insular Cases* from prosecutions of U.S. citizens abroad during peacetime by explaining that the *Insular Cases* "involved the power of Congress to . . . govern *temporarily* territories with wholly dissimilar traditions and institutions." *Reid*, 354 U.S. at 13–14 (emphasis added); *cf. Torres*, 442 U.S. at 475–76 (Brennan, J., concurring) ("Whatever the validity of the [*Insular Cases*] in the particular historical context in which they were decided, those cases are clearly not authority for questioning the application of . . . any [] provision of the Bill of Rights . . . to the Commonwealth of Puerto Rico in the 1970's."). And most recently in *Boumediene*, the Court identified the *Insular Cases* as addressing the "constitutional protections" available in "territories the United States *did not intend to govern indefinitely*." 553 U.S. at 768–69 (emphasis added).

To be sure, this Court has never limited Congress to a timetable by which to resolve the status of annexed territory. However, it has acknowledged "that over time the ties between the United States and . . . its unincorporated Territories [may] strengthen in ways that are of constitutional significance." *Id.* at 758. For Puerto Rico, those ties have strengthened for close to 120 years, a period that cannot be deemed "temporary" under any common sense meaning of the term. It is time to declare that the *Insular Cases* have passed their sell-by date.

B. *The Insular Cases Rest on Racist Assumptions That Have No Place in Our Constitutional Law.*

More significantly, the Court should overrule the *Insular Cases* and their territorial incorporation doctrine because they rest on outmoded and pernicious racist assumptions that are plainly unacceptable today. Leaving these decisions standing taints the constitutional framework. Like *Plessy v. Ferguson* and *Korematsu v. United States*, they should be firmly and finally repudiated.

The decisions themselves, and the double standard they concocted, were specifically prompted by overseas "expansion by the United States into lands already occupied by non-white populations." *Ballentine v. United States*, No. Civ. 1999-cv-130, 2006 WL 3298270, at *4 (D.V.I. Sept. 21, 2006). As this Court recognized, it was only "[a]t this point Congress chose to discontinue its previous practice of extending constitutional rights to [U.S.] territories by statute." *Boumediene*, 553 U.S. at 756. "For the first time in American history, 'in a treaty acquiring territory for the United States, there was no promise of

citizenship . . . nor any promise, actual or implied, of statehood.'"[6] José A. Cabranes, *Citizenship and the American Empire*, 127 U. Pa. L. Rev. 391, 431 (1978) (quoting J. Pratt, *America's Colonial Experiment* 68 (1950)). That choice was expressly justified 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* vii, *Preface to Reconsidering the Insular Cases* (Neuman & Brown-Nagin, eds.) (2015).

Notions of Anglo-Saxon racial supremacy pervaded debates over America's 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 Puerto Rico," was a key point of contention. *Examining Bd.*, 426 U.S. at 599 n.30.

Prominent voices on both sides of this debate found common ground in the belief that the new territories' inhabitants were racially inferior. Senator William Bate, an avowed "anti-imperialist," opposed the 1900 Foraker Act—establishing a civil government and a federal court in Puerto Rico—arguing 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

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[6] In amici's view, the Constitution's limitations and rights should apply fully to all federal territories, regardless of whether they may or may not eventually become states. The ACLU takes no position on statehood for Puerto Rico. But it insists that residents of Puerto Rico are entitled to equal constitutional protection regardless.

American Congress." Cabranes, 127 U. Pa. L. Rev. at 431 (quoting 33 Cong. Rec. 2696 (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 U. Pa. L. Rev. at 432 (quotation marks omitted). 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).

The underpinnings of the doctrine of incorporation lay squarely on these racist assumptions, which infected both sides of the debate about territorial expansion. Those same assumptions were expressly repeated in the *Insular Cases* themselves, eerily echoing

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, the author of *Plessy*, justified a rule preventing the Constitution from applying fully in Puerto Rico due to 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 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 in part by the "evils," *id.* at 342, 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*, 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. at 310.

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" structure. 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 blacks from whites "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.

Fifty-eight years after this Court decided *Plessy*, it rightly abrogated its odious "separate but equal" doctrine. *See Brown v. Bd. Of Educ.*, 347 U.S. 483 (1954). More recently, it overruled *Korematsu v. United States*, 323 U.S. 214 (1944), which also legitimized policy premised "explicitly on the basis of race" and "morally repugnant" racial and cultural assumptions, *Trump v. Hawaii*, 138 S. Ct. 2392, 2423 (2018). Yet the *Insular Cases* endure, notwithstanding 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.[7] But only this Court can bring its jurisprudence into line with now-accepted constitutional norms—by overruling them once and for all.

CONCLUSION

The *Insular Cases* are a stain on this Court's constitutional jurisprudence. For the reasons stated above, the Court should at a minimum hold that they are strictly limited to their specific holdings and thus pose no bar to application of the Appointments Clause. But because they rest on explicitly racist assumptions that have no place in our constitutional firmament, the Court should overrule them altogether.

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[7] *See, e.g.*, *Paeste v. Gov't of Guam*, 798 F.3d 1228, 1231 n.2 (9th Cir. 2015) ("the 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) ("some aspects of the Insular Cases' analysis may now be deemed politically incorrect"); *Pena Martinez v. Azar*, 376 F. Supp. 3d 191, 209–11 (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."); *Segovia v. Bd. of Election Comm'rs.*, 201 F. Supp. 3d 924, 938–39 (N.D. Ill. 2016) (citing criticism of *Insular Cases*, noting "court's task, however, is not to opine on the wisdom or fairness of" doctrine).

Respectfully submitted,

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