5-12-2020

John Fitisemanu, et. al. v. United States of America, et. al., and The American Samoa Government and The Hon. Aumua Amata

Rafael Cox Alomar

Nos. 20-4017 & 20-4019

UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

JOHN FITISEMANU, ET AL.,
Plaintiffs-Appellees,

v.

UNITED STATES OF AMERICA, ET AL.,
Defendants-Appellants,

AND

THE AMERICAN SAMOA GOVERNMENT AND THE HON. AUMUA AMATA,
Intervenor Defendants-Appellants,

On Appeal from the United States District Court
for the District of Utah, No. 18-cv-36,
Before District Judge Clark Waddoups

BRIEF FOR SCHOLARS OF CONSTITUTIONAL LAW AND LEGAL HISTORY AS AMICI CURIAE SUPPORTING APPELLEES WITH RESPECT TO THE *INSULAR CASES*

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INTEREST OF AMICI CURIAE[1]

Amici curiae are Rafael Cox Alomar, 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; Gary S. Lawson, Philip S. Beck Professor of Law at Boston University School of Law; Sanford V. Levinson, W. St. John Garwood and W. St. John Garwood, Jr. Centennial Chair in Law at the University of Texas at Austin School of Law; Christina Duffy Ponsa-Kraus, George Welwood Murray Professor of Legal History at Columbia Law School; and Stephen I. Vladeck, A. Dalton Cross Professor in Law at the University of Texas at Austin 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 ultimate merits of Appellees' constitutional claims, but they maintain a scholarly interest in ensuring that the limited scope of the *Insular Cases*

[1] Pursuant to Federal Rule of Appellate Procedure 29(a)(4)(E), amici certify that no party's counsel authored this brief in whole or in part, and that no one other than amici and their counsel made any monetary contribution toward this brief's preparation or submission. All parties to this case have consented to the filing of this brief.

be accurately understood and the doctrine commonly attributed to these decisions not be further extended, and in that respect they support Appellees' position and oppose that of Appellants.

SUMMARY OF ARGUMENT

Amici submit this brief to explain why the *Insular Cases* do not control the outcome of this case. Although one of those cases, *Downes v. Bidwell*, 182 U.S. 244 (1901), concerned whether the Uniformity Clause included the unincorporated territories, none of the *Insular Cases* answered the question whether the Fourteenth Amendment's Citizenship Clause confers birthright citizenship to persons born in American Samoa. Indeed, none of the *Insular Cases* analyzed the geographic scope of the Citizenship Clause, nor does *Downes*'s analysis of the geographic scope of the Uniformity Clause logically extend to the question this case presents. Instead, the most directly relevant precedent here is *United States v. Wong Kim Ark*, 169 U.S. 649 (1898). The district court was therefore correct to conclude that the *Insular Cases* do not answer the question in this case, and to conduct an analysis that reconciles *Wong Kim Ark* and *Downes*.

Reliance on the *Insular Cases* here would also contravene the caution expressed in later Supreme Court decisions that the reasoning in those cases should not be extended. That admonition is well founded. As jurists and scholars have recognized, the *Insular Cases* rest on unpersuasive reasoning that is inconsistent

with the original meaning of the Constitution, dependent on since-repudiated imperialist and racist ideologies, and contrary to now-settled constitutional analysis. 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.[2] The first decisions in the series, handed down in 1901, concerned the application of tariffs on goods imported into 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*

[2] 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 *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, 389-390 (Burnett & Marshall eds., 2001).

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, they 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. One of these, *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.[3] The other, *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." 183 U.S. at 156-157.

In those decisions, the Court examined whether clauses specifying a geographic scope encompassed the new territories. *Dooley* held that none of the new territories was a "State" for Export Clause purposes; *Downes* held that they were not part of "the United States" as that phrase is used in the Uniformity

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

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 "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 announced the judgment but wrote an opinion in which no other Justice joined. He 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 (emphasis and internal quotation marks omitted); *see id.* at 260-261. Justice Brown reasoned that the Constitution's terms were not applicable to territories until Congress chose expressly to "extend" them. *Id.* at 271.

That reasoning found no takers: "The 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 the Uniformity Clause did not constrain Congress in legislating with respect to the newly annexed territories because they had not been "incorporated" into the United States for purposes of that clause, either by legislation or by treaty. 182 U.S. at 287-288 (White, J. concurring). 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."). In *Downes* itself, however, the only issue presented—and the only issue dependent on Justice White's distinction between "incorporated" and "unincorporated" territories—was whether the unincorporated territories were part of "the United States" as that phrase is used in the Uniformity Clause. To be sure, Justice White added in passing that certain constitutional "restrictions" might be "of so fundamental a nature that they cannot be transgressed" irrespective of incorporation. *Downes*, 182 U.S. at 291. But that statement was not necessary to Justice White's disposition of the case at hand.

Indeed, contrary to the reading of the *Insular Cases* espoused by some lower courts (but not the Supreme Court), none of the *Insular Cases* actually *held* that the only constitutional provisions that apply in unincorporated territories are those

protecting "fundamental" rights or that the entire Constitution applies only in incorporated areas.[4] That understanding of the *Insular Cases*—though persistent[5]—is deeply flawed and "overstate[s] the[] [cases'] holding[s]." Burnett, *A Convenient Constitution? Extraterritoriality After* Boumediene, 109 Colum. L. Rev. 973, 984 (2009).[6]

B. The "Fundamental Rights" and "Impractical and Anomalous" Approaches Are Inapplicable To This Case

Later decisions of the Supreme Court expanded on the incorporation approach found in Justice White's concurring opinion in *Downes*, but even those

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[4] Moreover, 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 yet apply even against States. *See generally* Burnett, Untied *States: American Expansion and Territorial Deannexation*, 72 U. Chi. L. Rev. 797, 824-834 (2005); Kent, *The Jury and Empire: The* Insular Cases *and the Anti-Jury Movement in the Gilded Age and Progressive Era*, 91 So. Cal. L. Rev. 375 (2018).

[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)).

[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 & n.103. Other constitutional provisions have been understood as inapplicable outside the States, whether a territory was incorporated or not. *See id*. at 821 n.102.

decisions did not adopt the sweeping interpretation advanced by the United States and American Samoa governments in this case, under which even "fundamental" constitutional rights would apply in unincorporated territories only when applying them would not be "impractical and anomalous." Those later decisions, without exception, dealt with the applicability of specific constitutional provisions concerning individual rights—not provisions defining their geographic scope with the phrase "the United States"—and the only rights they held inapplicable were those related to proceedings in criminal trials in territorial courts. *See, e.g.*, *Balzac*, 258 U.S. at 309 (Sixth Amendment jury trial inapplicable in local courts in Puerto Rico); *Ocampo v. United States*, 234 U.S. 91, 98 (1914) (Fifth Amendment grand jury clause inapplicable in territorial court of 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 territories, whereas it could withhold them from unincorporated territories." Burnett, 109 Colum. L. Rev. at 991-992. And in support of that distinction, the Court reasoned that the rights at issue were not "fundamental." *Id.* at 992. But again, these cases did *not* demarcate territorial areas where the Constitution applies "in full" from others where *only* "fundamental" provisions apply. That expansive reading—which implies that, aside from a few fundamental provisions, Congress may

disregard the Constitution when governing the unincorporated territories—finds no support in either the original or the later *Insular* decisions.

Though commonly attributed to the *Insular Cases*, the "impractical and anomalous" standard originates even later—in Justice Harlan's concurrence in *Reid v. Covert*, 354 U.S. 1, 74-78 (1957) (Harlan, J., concurring). In *Reid*, the Court held that civilian dependents living with servicemembers on military bases abroad enjoyed the right to a trial by jury in capital cases. Justice Black's plurality opinion (joined by Chief Justice Warren, Justice Douglas, and Justice Brennan) found the *Insular Cases* immaterial to that question. The *Insular Cases*, Justice Black explained, did not have "anything to do with military trials," so they could not "properly be used as vehicles to support an extension of military jurisdiction to civilians." 354 U.S. at 14 (plurality opinion). "Moreover," Justice Black added, "neither the [*Insular Cases*] nor their reasoning should be given any further expansion." *Id.*

Justice Harlan viewed things differently, though. According to him, the *Insular Cases*, "properly understood," instructed that "there is no rigid and abstract rule that Congress, as a condition precedent to exercising power over Americans overseas, must exercise it subject to all guarantees of the Constitution, no matter what the conditions and considerations are that would make adherence to a specific guarantee altogether impracticable and anomalous." *Reid*, 354 U.S. at 67, 74

(Harlan, J., concurring). For Justice Harlan, in other words, "the question [was] which guarantees of the Constitution should apply in view of the particular circumstances, the practical necessities, and the possible alternatives which Congress had before it." *Id.* at 75. Under that functional approach, Justice Harlan saw no ground to deny the civilian dependents at issue a jury trial given the capital nature of their offenses. *Id.* at 76.

Regardless of their merit on their own terms, the "fundamental rights" and "impractical and anomalous" inquiries have no relevance in this case. The questions presented in the later cases in the *Insular* series and in *Reid* are of an entirely different kind than the question presented here: Unlike the constitutional provisions at issue in *Reid*, *Balzac*, and *Ocampo*, the Citizenship Clause defines its own geographic scope. It provides that "[a]ll persons born or naturalized *in the United States*, and subject to the jurisdiction thereof, are citizens of the United States." U.S. Const. amend. XIV, § 1 (emphasis added). The question here is merely whether American Samoa falls within the Citizenship Clause's defined geographic scope—whether American Samoa is in "the United States" as that phrase is used in that Clause. The Supreme Court has never used the "fundamental rights" or "impractical and anomalous" tests to answer a geographic scope question.

That is for good reason: The "fundamental rights" and "impractical and anomalous" tests require courts to examine legal and cultural traditions. Such traditions have been considered relevant when determining the substantive status of individual rights even *outside* the territorial context. Within the fifty States, the Supreme Court has said that "the Due Process Clause specially protects those fundamental rights and liberties which are, objectively, 'deeply rooted in this Nation's history and tradition.'" *Washington v. Glucksberg*, 521 U.S. 702, 720-721 (1997) (quoting *Moore v. City of E. Cleveland*, 431 U.S. 494, 503 (1977)). Likewise, a "Bill of Rights protection is incorporated" against the States by virtue of the Due Process Clause "if it is 'fundamental to our scheme of ordered liberty,' or 'deeply rooted in this Nation's history and tradition.'" *Timbs v. Indiana*, 139 S. Ct. 682, 687 (2019) (quoting *McDonald v. City of Chicago*, 561 U.S. 742, 767 (2010)). In cases involving U.S. territories, the "fundamental rights" and "impractical and anomalous" standards apply that jurisprudence in asking how the particular individual right at issue may apply harmoniously with the legal and cultural traditions of the particular territory at issue (if at all). *See, e.g.*, *King v. Morton*, 520 F.2d 1140, 1147 (D.C. Cir. 1975) ("[I]t must be determined whether

the Samoan mores and matai culture … will accommodate a jury system in which a defendant is tried before his peers.").[7]

In geographic scope cases, however, these pragmatic, cultural considerations are inapposite. The Court's task here is not to establish the precise substantive contours of citizenship; the task is merely to interpret the words "the United States." And the cultural traditions of American Samoa have no bearing on that latter question. Those cultural traditions may be of constitutional significance in other contexts, but they shed no light on the meaning of "the United States" as the Fourteenth Amendment uses that phrase.

C. *Downes* Does Not Answer the Citizenship Clause Question

Like this case—but unlike all of the *Insular Cases* concerning the applicability of rights provisions in the territories—*Downes* did involve a geographic scope question, namely the meaning of the phrase "the United States" as used in the Uniformity Clause of Article I, Section 8. But for several reasons, *Downes* is of limited relevance to this case.

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[7] *See also King v. Andrus*, 452 F. Supp. 11, 15-16 (D.D.C. 1977) (applying "impractical and anomalous" test on remand and concluding that jury system would be "entirely feasible" in American Samoa because the one "major cultural difference between the United States and American Samoa is that land is held communally in Samoa," and "[t]he jury trial requirement in criminal proceedings would have no foreseeable impact on that system").

First, the five justices in the *Downes* majority expressly limited their holding to the facts at issue, and reached that result by following different paths. *See* 182 U.S. at 244 n.1. Even if the opinions constituting the majority—which differed and indeed conflicted with each other on their rationale—can be pieced together to form a precedent,[8] that decision governs only the Uniformity Clause. *See Arizona v. Inter Tribal Council of Ariz.*, 570 U.S. 1, 16 n.8 (2013).

Second, there are important differences between the Uniformity Clause and the Citizenship Clause. The clauses were enacted almost a century apart, they reflect different historical understandings, and they emerged in dramatically 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, 404-405 (1857). *See Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 73 (1872) (noting that the Citizenship Clause "overturns the Dred Scott decision"). The context in which the Citizenship Clause was enacted thus points decidedly against a rule that allows

[8] *But cf. Ramos v. Louisiana*, No. 18-5924, 2020 WL 1906545, at *10 (U.S. Apr. 20, 2020) (opinion of Gorsuch, J., joined by Ginsburg and Breyer, JJ.) (similarly fractured Supreme Court decision did not "suppl[y] a governing precedent").

Congress to make distinctions among Americans for purposes of the rights and responsibilities of citizenship.

The Uniformity Clause reflects no such concerns. 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] ma[de] clear that *everyone born under the American flag* … was a free and equal citizen." (emphasis added)). 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.) at 73. 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.[9]

[9] As the district court correctly recognized, *see* App. 623-624, while Justice White's concurrence in *Downes* did make several statements concerning citizenship, and those statements indicate that Justice White hoped his doctrine of territorial incorporation would forestall (if not foreclose) a grant of citizenship to

The district court correctly determined, then, that the question whether the phrase "the United States" in the Citizenship Clause includes American Samoa cannot be answered by a case concerning the Uniformity Clause. *See* App. 624. Instead, the district court properly relied on the more directly relevant Supreme Court precedent: *United States v. Wong Kim Ark*, 169 U.S. 649 (1898). *See* App. 625-627. The district court correctly reasoned that *Wong Kim Ark* and *Downes* can be reconciled: While it is because of *Downes* that the issue whether a territory is part of "the United States" for purposes of a given constitutional provision is even a question, it is *Wong Kim Ark*, not *Downes*, that offers guidance on how to answer that question with respect to the Citizenship Clause. *Wong Kim Ark*, not *Downes*, should therefore guide this Court's analysis.

D. 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 erroneously engaged in rights analysis to hold that the Citizenship Clause excludes American Samoa. The D.C. Circuit's errors were twofold.

First, the court failed to recognize that the later *Insular Cases* did *not* adopt a broad across-the-board rule that the "entire" Constitution applies in incorporated territories whereas only "fundamental" constitutional rights apply in

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the inhabitants of the territories annexed in 1898, those statements were entirely unnecessary to the disposition of the case and, as such, clearly dicta.

unincorporated territories—a contrast that implies that most of the Constitution is inapplicable in unincorporated territories, and a mistake that other courts have made as well. As the *Tuaua* court saw it, "the Insular Cases distinguish[] between incorporated territories, which are intended for statehood from the time of acquisition and in which the entire Constitution applies *ex proprio vigore*, and unincorporated territories [such as American Samoa], which are not intended for statehood and in which only [certain] fundamental constitutional rights apply by their own force." 788 F.3d at 306 (alterations in original) (quoting *Commonwealth of N. Mariana Islands v. Atalig*, 723 F.2d 682, 688 (9th Cir. 1984)). But as explained above, none of the *Insular Cases* went that far. As Justice White put it in his *Downes* concurrence, "the question … is not whether the Constitution is operative, for that is self-evident, but whether the provision relied on is applicable." 182 U.S. at 292. And the Court's discussions in later *Insular Cases* of rights as fundamental (and therefore applicable) or not fundamental (and therefore inapplicable) concern the personal rights protected by the Bill of Rights—not the Citizenship Clause (nor the rest of the Constitution).

Second, and worse still, the *Tuaua* court failed to recognize that rights analysis does not answer questions of geographic scope. The court acknowledged the hazards of applying the *Insular Cases*, describing them as "contentious" and "without parallel in our judicial history" in light of "the incongruity of the[ir]

results, and variety of inconsistent views expressed by the different members of the court." *Tuaua*, 788 F.3d at 306 (quoting *King*, 520 F.2d at 1153). Nonetheless, the court ultimately decided that it was forced to "resort" to their "analytical framework" because "the [Supreme] Court has continued to invoke the Insular framework when dealing with questions of territorial and extraterritorial application"—citing *Boumediene* as the sole support for that proposition. *Id.* at 306-307. As a result, purporting to "apply[] the principles of the" *Insular Cases*, the *Tuaua* court deemed itself obligated to ask whether birthright citizenship was a "fundamental right" and "whether the circumstances are such that the recognition of the right to birthright citizenship would prove 'impracticable and anomalous' as applied to contemporary American Samoa." *Id.* at 307-309.

What the *Tuaua* court failed to appreciate was that *Boumediene* did not use the "impractical and anomalous" test to answer a question of geographic scope; *Boumediene* used the "impractical and anomalous" test to answer a rights question. Indeed, *Boumediene* did not involve a constitutional provision that expressly defines its own geographic scope, much less one that does so using the phrase "the United States." To be sure, *Boumediene* did address the question whether the United States has "de facto" sovereignty over Guantánamo Bay. *See* 553 U.S. at 753-755. But the *Boumediene* Court answered that question first, and without asking whether it would be "impractical and anomalous" to recognize U.S.

sovereignty there (whether du jure or de facto). *See id.* Only after resolving the sovereignty question did the Court turn to the *Insular Cases* for the question whether the Suspension Clause's habeas right is applicable in Guantánamo Bay. And even then, the "impractical and anomalous" inquiry was only one factor in a three-factor test. *See id*. at 766. The "citizenship and status" of the individuals at issue was a separate factor, the answer to which in no way depended on the "impractical and anomalous" test. *Id*.

In short, while *Boumediene* did rely in part on the *Insular Cases*, and did employ the "impractical and anomalous" test, it employed that test to answer a rights question—*not* a question of geographic scope or of citizenship status, and emphatically not the question of what the phrase "the United States" means when used in a given constitutional provision. The D.C. Circuit therefore erred in relying on *Boumediene* to determine that the question whether the Citizenship Clause applies in American Samoa depends on whether such application would be "impractical and anomalous." Practical considerations have no bearing on the question in this case—namely, what the phrase "the United States" means for purposes of the Citizenship Clause.

II. THE *INSULAR CASES* SHOULD NOT BE EXTENDED BEYOND THEIR PRECISE HOLDINGS

There is a second reason this Court should take care not to extend the reach of the *Insular Cases*: As Justice Black stated for a Supreme Court plurality more

than sixty years ago, "neither the [*Insular Cases*] nor their reasoning should be given any further expansion." *Reid*, 354 U.S. at 14 (plurality opinion); *see also Torres v. Commonwealth of Puerto Rico*, 442 U.S. 465, 475-476 (1979) (Brennan, J., concurring) ("Whatever the validity of the [*Insular*] cases … those cases are clearly not the 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." (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, 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 that 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 here.

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, Untied *States: American Expansion and Territorial Deannexation*, 72 U. Chi. L. Rev. 797, 817-834 (2005) (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 has 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—an outcome the Supreme Court has rejected, *see id.* 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* responded 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. 182 U.S. at 373 (Fuller, C.J., dissenting). "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." *Id*. 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 (dissenting opinion).

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.[10] Indeed, "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 Empire: Territorial Expansion & American Legal History* 196-197 (2004). In part for that

[10] *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").

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 (2009). 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 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 recently emphasized 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).

Defendants' position here, however, is that the political branches possess exactly the kind of discretion that the Supreme Court has warned against: "Congress," Defendants say, "has the authority to decide whether and when to deem residents of U.S. Territories (particularly residents of unincorporated territories) to be U.S. citizens or nationals." U.S. Gov't Br. 21; *see also* Am. Samoa Br. 28 ("Whether to extend U.S. citizenship to the people of American Samoa is a question for Congress."). That reading of Congress's power to exclude residents of territories from constitutional protections is breathtakingly broad; indeed, Defendants provide no explanation why or how it could be confined to "unincorporated" territories. And that approach was decisively rejected in *Boumediene*. *See* 553 U.S. at 765 ("Our basic charter cannot be contracted away like this.").

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 that the *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*, No. Civ. 1999-130, 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 annexation 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, *The* Insular Cases: *The Establishment of a Regime of Political Apartheid*, 29 U. Pa. J. Int'l L. 283, 286 (2007); *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." Ramos, *Puerto Rico's Political Status*, in *The Louisiana Purchase and American Expansion, 1803-1898*, at 163, 163 (Levinson & Sparrow eds., 2005); *see also* 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.'" Ramos, *Puerto Rico's Political Status*, *supra*, at 167. Those 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 168, 170; *see* Go, *Modes of Rule in America's Overseas Empire: The Philippines, Puerto Rico, Guam, and Samoa*, in *The Louisiana Purchase and American Expansion, 1803-1898*, at 205, 212-213 (Sanford Levinson & Bartholomew H. Sparrow eds., 2005) (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. Indeed, as the Supreme Court just explained earlier this term, decisions of such "racist origin[]" are entitled to less precedential respect. *See Ramos v. Louisiana*, No. 18-5924, 2020 WL 1906545, at *12 (U.S. Apr. 20, 2020). It goes without saying, then, that they are unworthy of expansion.

CONCLUSION

For the foregoing reasons, Amici respectfully urge this Court not to treat the *Insular Cases* as controlling the outcome of Plaintiffs' constitutional challenges.

Respectfully submitted,

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May 12, 2020

CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(g), the undersigned hereby certifies that this brief complies with the length limitations set forth in Fed. R. App. P. 32(a)(7).

1. Exclusive of the exempted portions of the brief, as provided in Fed. R. App. P. 32(a)(7)(B) and Fed. R. App. P. 32(f), the brief contains 6,318 words.

2. The brief has been prepared in proportionally spaced typeface using Microsoft Word for Office 365 in 14-point Times New Roman font. As permitted by Fed. R. App. P. 32(g)(1), the undersigned has relied upon the word count feature of this word processing system in preparing this certificate.

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Pursuant to the Court's CM/ECF User's Manual, the undersigned hereby certifies the following:

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I hereby certify that on this 12th day of May, 2020, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Tenth Circuit using the appellate CM/ECF system. Counsel for all parties to the case are registered CM/ECF users and will be served by the appellate CM/ECF system.

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