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

AURELIUS INVESTMENT, LLC, *et al.*,

Petitioners,

v.

COMMONWEALTH OF PUERTO RICO, *et al.*,

Respondents.

(For Continuation of Caption See Inside Cover)

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

BRIEF FOR *AMICI CURIAE* SCHOLARS OF CONSTITUTIONAL LAW AND LEGAL HISTORY SUPPORTING THE FIRST CIRCUIT'S RULING ON THE APPOINTMENTS CLAUSE ISSUE

DAVID N. ROSEN
Counsel of Record
DAVID ROSEN & ASSOCIATES PC
400 Orange Street
New Haven, CT 06511
(203) 787-3513
drosen@davidrosenlaw.com

Counsel for Amici Curiae

290889

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

Petitioner,

v.

AURELIUS INVESTMENT, LLC, *et al.*,

Respondents.

UNITED STATES OF AMERICA,

Petitioner,

v.

AURELIUS INVESTMENT, LLC, *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.*,

Respondents.

TABLE OF CONTENTS

TABLE OF CITED AUTHORITIES

Page

Cases

Cited Authorities

Statutes and Other Authorities

Cited Authorities

Page

Cited Authorities

Page

INTEREST OF AMICI CURIAE

Amici are scholars who have extensively studied the constitutional implications of American territorial expansion.[1] Amici have written and edited works about the Supreme Court's early-twentieth-century decisions known collectively as the *Insular Cases*, in which the Court held that noncontiguous islands annexed at the end of the nineteenth century were part of the United States for some purposes but not for others. Amici take no position on the merits of Plaintiffs' constitutional claims but maintain a scholarly interest in ensuring that the limited scope of the *Insular Cases* be accurately understood and that the "territorial incorporation" doctrine commonly attributed to these decisions not be further extended.

SUMMARY OF ARGUMENT

Amici submit this brief to explain why this Court should decide this case without reliance on the *Insular Cases*. Those decisions in no way inform whether the Appointments Clause, art. II, §2, cl. 2, at issue here,

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1. Amici are Christina Duffy Ponsa-Kraus, George Welwood Murray Professor of Legal History at Columbia University, Rafael Cox Alomar, Associate Professor of Law at the University of the District of Columbia David A. Clarke School of Law, Gary S. Lawson, Philip S. Beck Professor of Law at Boston University School of Law, and Sam Erman, Professor of Law at the USC Gould School of Law. No counsel for a party authored this brief in whole or in part, and no party or counsel for a party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than amici curiae or their counsel made a monetary contribution to the preparation or submission of this brief. All parties have consented to the filing of this brief.

governs the appointment of the members of the Federal Oversight and Management Board for Puerto Rico. None of the *Insular Cases* resolved a claim involving the Appointments Clause, nor does their reasoning logically extend to the question this case presents.

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

ARGUMENT

I. The *Insular Cases* Do Not Determine The Meaning or Scope of the Appointments Clause

The group of cases commonly referred to as the *Insular Cases* concerned the reach of particular provisions of the Constitution and federal statutes in overseas territories annexed following the Spanish-American War of 1898.[2] The first decisions in the series, handed down

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*

in 1901, concerned the imposition of tariffs on goods imported into the territories and exported from them. *See, e.g.*, *Dooley v. United States*, 183 U.S. 151, 156-57 (1901) (duties on goods shipped to Puerto Rico did not violate Export Tax Clause, U.S. Const. art. I, § 9, cl. 5); *Huus v. New York & P.R. S.S. Co.*, 182 U.S. 392, 396-97 (1901) (trade between Puerto Rico and U.S. ports is "domestic trade" under federal tariff laws). Without exception, these "Insular Tariff Cases," *De Lima v. Bidwell*, 182 U.S. 1, 2 (1901), involved "narrow legal issues." Kent, Boumediene, Munaf, *and the Supreme Court's Misreading of the* Insular Cases, 97 Iowa L. Rev. 101, 108 (2011).

Of the early cases, only two concerned the applicability of constitutional provisions in the newly acquired territories. The first and leading case, *Downes v. Bidwell*, 182 U.S. 244 (1901), held that the reference to "the United States" in the Uniformity Clause of Article I, Section 8—which requires that "all Duties, Imposts and Excises shall be uniform throughout the United States"—did not extend to Puerto Rico.[3] The second, *Dooley*, 183 U.S. 151, 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: "No Tax or Duty shall be laid on Articles exported from any State." In those decisions,

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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, 389-90 (Burnett & Marshall eds., 2001).

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

the Court examined whether the geographic scope that each constitutional clause specified encompassed the new territories. *Dooley* held that none 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 Clause. As this 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," Sparrow, *The* Insular Cases *and the Emergence of American Empire* 80 (2006), illustrates the limited scope of the Supreme Court's inquiry in those decisions. In *Downes*, the Court addressed whether the phrase "throughout the United States" in the Uniformity Clause encompassed Puerto Rico. A fractured Court produced a majority only for the judgment, and not for any opinion supporting it. 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 (internal quotation marks omitted); *see id.* at 260-61. Justice Brown reasoned that the Constitution's terms were not applicable to the territories until Congress chose expressly to "extend" them. *Id.* at 251.

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 newly annexed territories were not part of the United States for purposes of the Uniformity Clause because Congress had not "incorporated" them by legislation or treaty. 182 U.S. at 287-88 (White, J. concurring in judgment). Justice White's novel distinction between "incorporated" territories and those that remained "unincorporated" and thus "merely appurtenant [to the United States] as . . . possession[s]," *id.* at 342, eventually commanded the votes of a majority of the Court in later *Insular Cases*. *See Balzac v. Porto Rico*, 258 U.S. 298, 305 (1922) ("[T]he opinion of Mr. Justice White … in *Downes v. Bidwell*, has become the settled law of the court.").[4] *Downes* articulated a distinction between what came to be known as "incorporated" and "unincorporated" territories, which in that case stood merely for the proposition that the unincorporated territories are not part of the "United States" as that phrase is used in the Uniformity Clause. Although Justice White added, in dicta in his *Downes* concurrence, that certain constitutional "restrictions" might be "of so fundamental a nature that they cannot be transgressed," 182 U.S. at 291, none of the *Insular Cases* held—contrary to what several modern

4. Justice White's opinion in *Downes* did not explain how a court was to determine whether Congress had "incorporated" a territory. In *Balzac v. Porto Rico*, the Supreme Court explained that at least as to those territories claimed by the United States at or after the close of the Spanish-American War (when the concept of territorial incorporation entered American legal and political consciousness) congressional intent to "incorporate" a territory should not be found absent a "plain declaration" of such intent from Congress. 258 U.S. 298, 306 (1922).

courts have asserted about them—that the operative difference between the two kinds of territories is that *only* "fundamental" constitutional rights apply in the latter, whereas the entire Constitution applies in their incorporated counterparts.[5] That understanding of the *Insular Cases*, though persistent,[6] is deeply flawed, and "overstate[s] the[cases'] holding." Burnett, *A Convenient Constitution? Extraterritoriality After* Boumediene, 109 Colum. L. Rev. 973, 984 (2009).[7]

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5. 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 apply even against the States. *See generally* Burnett, Untied *States: American Expansion and Territorial Deannexation*, 72 U. Chi. L. Rev. 797, 824-34 (2005).

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

7. 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, art. IV, § 3, cl. 2, have ever applied to the States. *See id.* Other constitutional provisions have been understood as inapplicable outside the States, whether a territory was incorporated or not. *See id*. at 821 n.102.

That rights-analysis framework emerged in later decisions commonly included in the *Insular* series. Those decisions, without exception, dealt with the applicability of specific constitutional provisions concerning individual rights, and the only rights they held inapplicable to unincorporated territories were those related to proceedings in criminal trials in territorial courts—rights that at the time did not apply in state courts, either. *See, e.g.*, *Balzac*, 258 U.S. at 309 (Sixth Amendment right to 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 courts the Philippines). Refining the "incorporation" distinction that Justice White developed in *Downes*, those later cases "explained that Congress, despite its plenary power over all territories, did not have the power to withhold jury trial rights from incorporated ones, whereas it could withhold them from unincorporated territories." Burnett, 109 Colum. L. Rev. at 991-92. But, again, *none* of the *Insular Cases* demarcated territorial areas where the Constitution applies "in full" from others where only fundamental provisions apply.

The *Insular Cases* could therefore bear on this case only if they illuminated the proper application of the specific constitutional provision at issue. They do not. *None* of the *Insular Cases* spoke to the meaning or applicability of the Appointments Clause.

Moreover, in contrast to the Uniformity Clause, the Appointments Clause does not define its own geographic scope. Although the clause contains the phrase "officers of the United States," that phrase describes the status of the officers in question, not the geographic scope of

the clause—otherwise, one could argue that the clause does not apply to the appointment of United States Ambassadors to foreign countries, which would be absurd. The question in this case is how to reconcile two clauses: one concerning Congress's power to govern territories that belong to the United States, and the other concerning the President's power to appoint officers whose authority springs from the United States. Put differently, the question is whether the Territory Clause, art. IV, §3, cl. 2, displaces the Appointments Clause when it comes to the appointment of officers of the United States to serve in unincorporated territory. The answer to that question does not depend on the *Insular Cases*' doctrine of territorial incorporation. That doctrine concerns the Uniformity Clause (which unlike the Appointments Clause defines its own geographic scope), or rights provisions (pursuant to the rights-analysis framework developed in later cases).

Recognizing the irrelevance of the *Insular Cases* to this case, the First Circuit correctly declined to rely on them in its analysis of whether the Territory Clause trumps the Appointments Clause. As the court put it in the final pages of its discussion of that question, "nothing about the 'Insular Cases' casts doubt over our foregoing analysis." *Aurelius Investment v. Commonwealth*, 915 F.3d 838, 854 (1st Cir. 2019) (internal citation omitted). This Court should adopt the First Circuit's approach in this respect, and decline to rely on the *Insular Cases* in its analysis of whether the Territory Clause trumps the Appointments Clause.

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

There is a second reason this Court should take care not to extend the reach of the *Insular Cases*: "[N]either the [*Insular Cases*] nor their reasoning should be given any further expansion." *Reid v. Covert*, 354 U.S. 1, 14 (1957) (plurality opinion); *see also Torres v. Commonwealth of P.R.*, 442 U.S. 465, 475 (1979) (Brennan, J., concurring in the judgment) ("Whatever the validity of the [*Insular*] cases … those cases are clearly not authority for questioning the application of the Fourth Amendment—or any other provision of the Bill of Rights—to the Commonwealth of Puerto Rico in the 1970's." (internal citations omitted)).

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

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

The notion that some territories are "incorporated" while others are not is constitutionally infirm. The Constitution's single reference to "Territor[ies]," U.S. Const. art. IV, § 3, cl. 2, does not differentiate between "incorporated" and "unincorporated" territorial lands. Until the *Insular Cases*, neither the Supreme Court nor any other branch of government had even intimated that such a distinction existed. *See* Burnett, 72 U. Chi. L. Rev. at 817-34 (discussing Congress's plenary power to govern U.S. territories in nineteenth century). And as this Court itself explained, the doctrine's paramount constitutional vice is that it lends itself to misconstruction as a broad and generic license to the political branches "to switch the Constitution on or off at will," *Boumediene*, 553 U.S. at 765, by affording them the discretion to decide whether or not to "incorporate" a territory—an outcome that the *Insular Cases* did not sanction, *see* pp. 5-7 *supra*, and that this Court has rejected, *Boumediene*, 533 U.S. at 757-58.

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

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

Even though the then-newly minted distinction between "incorporated" and "unincorporated" territories eventually attracted a majority of the Court's votes in later cases, the distinction was not only unprecedented, but constituted a significant departure from the Supreme Court's prior conception of the Constitution's application to the territories.[8] As one of the authors of this brief has explained, "there is nothing in the Constitution that even intimates that express constitutional limitations on national power apply differently to different territories once that territory is properly acquired." Lawson & Seidman, *The Constitution of Empire: Territorial Expansion & American Legal History* 196-97 (2004). In part for that reason, "no current scholar, from any methodological

8. *See Downes*, 182 U.S. at 359-69 (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").

perspective, [has] defend[ed] The *Insular Cases*." Lawson & Sloane, *The Constitutionality of Decolonization by Associated Statehood: Puerto Rico's Legal Status Reconsidered*, 50 B.C. L. Rev. 1123, 1146 (2008). The supposed constitutional justifications for the *Insular Cases*' unequal treatment of residents of unincorporated territories "are certainly not convincing today, if they ever were." Kent, *Citizenship and Protection*, 82 Fordham L. Rev. 2115, 2128 (2014).

In addition to lacking anchor in constitutional text, structure, or history, the territorial incorporation doctrine is in serious tension, if not at war, with the foundational constitutional principle that "the national government is one of enumerated powers, to be exerted only for the limited objects defined in the Constitution," as the dissenting justices in *Downes* first explained. 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 this Court itself has recently acknowledged in explaining that the *Insular Cases* have often been misconstrued, the "Constitution grants Congress and the President the power to acquire, dispose of, and govern territory, *not the power to decide when and where its terms apply*." *Boumediene*, 553 U.S. at 765 (emphasis added).

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

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

The *Insular Cases* and the territorial incorporation doctrine cannot be understood without a frank recognition that they rest in important part on discredited notions of racial inferiority and imperial governance. *See Igartúa de la Rosa v. United States*, 417 F.3d 145, 162 (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*, 2006 WL 3298270, at *4 (D.V.I. 2006) (observing that the cases were "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. 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 were the handmaidens of the ill-conceived and short-lived U.S. turn toward formal imperial expansion. The most significant grouping of *Insular Cases* reached this Court following the Nation's 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*, p. 4 *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." Juan R. Torruella, *The Insular Cases: The Establishment of a Regime of Political Apartheid*, 29 U. Pa. J. Int'l L. 283, 286 (2007); *see also* Gustavo A. Gelpí, *Manifest Destiny: A Comparison of the Constitutional Status of Indian Tribes and U.S. Overseas Territories*, 63 A.P.R. Fed.

L. 38, 39-40 (2016) (*Insular* framework is "increasingly criticized by federal courts . . . as founded on racial and ethnic prejudices"); Kent, 82 Fordham L. Rev. at 2128 (noting Supreme Court offered "frankly racist" rationales in key *Insular Cases*).

The decisions "reflected many of the attitudes that permeated the expansionist movement of the United States during the nineteenth century." Rivera Ramos, *Puerto Rico's Political Status*, in *The Louisiana Purchase and American Expansion, 1803-1898*, at 209 (Levinson & Sparrow eds., 2005); *see* Sparrow, *The* Insular Cases, *supra*, at 10, 14, 57-63. That "ideological outlook" included "Manifest Destiny, Social Darwinism, the idea of the inequality of peoples, and a racially grounded theory of democracy that viewed it as a privilege of the 'Anglo-Saxon race.'" Rivera Ramos, *Puerto Rico's Political Status*, p.4 *supra*, at 170. These concepts of "inferior[ity] . . . justified not treating [territorial inhabitants] as equals," and the *Insular Cases*' classification of some territories as "unincorporated . . . owed much to racial and ethnic factors." *Id.* at 171, 174; *see* Go, *Modes of Rule in America's Overseas Empire: The Philippines, Puerto Rico, Guam, and Samoa*, in *Louisiana Purchase*, *supra*, at 209, 217 (use of "racial schemes for classifying overseas colonial subjects"—from "Anglo-Saxons . . . at the top of the ladder, while beneath them were an array of 'lesser races' down to the darkest, and thereby the most savage, peoples"—"served to slide the new 'possessions' . . . into the category of 'unincorporated'").

Put simply and at the risk of understatement, the racial and colonizing underpinnings of the *Insular Cases* are "now recognize[d] as illegitimate." Burnett,

109 Colum. L. Rev. at 992; *see also* Sam Erman, *Almost Citizens: Puerto Rico, the U.S. Constitution, and Empire* 161 (2019) (describing "the rare and shocking spectacle of case law as racist as [the *Insular Cases*] remaining largely untouched by time"). Such notions have no place in modern jurisprudence, and courts have rightly repudiated these views in modern case law. This Court should therefore take care not to expand the *Insular Cases* beyond their specific facts or to give further vitality to these decisions.

CONCLUSION

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

Dated: August 29, 2019 Respectfully submitted,

David N. Rosen
Counsel of Record
David Rosen & Associates PC
400 Orange Street
New Haven, CT 06511
(203) 787-3513
drosen@davidrosenlaw.com

Counsel for Amici Curiae

APPENDIX

APPENDIX — LIST OF AMICI CURIAE

Amici are Christina Duffy Ponsa-Kraus, George Welwood Murray Professor of Legal History at Columbia University, Rafael Cox Alomar, Associate Professor of Law at the University of the District of Columbia David A. Clarke School of Law, Gary S. Lawson, Philip S. Beck Professor of Law at Boston University School of Law, and Sam Erman, Professor of Law at the USC Gould School of Law.