No. 16-4240

UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

LUIS SEGOVIA, *et al.*,
Plaintiff-Appellants,
v.

BOARD OF ELECTION COMMISSIONERS FOR THE CITY OF CHICAGO, *et al.*,
Defendant-Appellees.

On Appeal from the United States District Court
for the Northern District of Illinois, No. 15 C 10196
Before the Honorable Judge Joan B. Gottschall

BRIEF FOR AMICI CURIAE SCHOLARS OF CONSTITUTIONAL LAW AND LEGAL HISTORY IN SUPPORT OF NEITHER PARTY

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Amici curiae are Christina Duffy Ponsa, George Welwood Murray Professor of Legal History at Columbia Law School; Andrew Kent, Professor of Law at Fordham University School of Law; 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 School of Law; Bartholomew Sparrow, Professor of Government at the University of Texas at Austin; and Stephen I. Vladeck, Professor of Law at the University of Texas School of Law. Amici are scholars of constitutional law and legal history who have studied extensively the constitutional implications of American territorial expansion, including in the late nineteenth and early twentieth centuries. Among other things, amici have written and edited collected works about the Supreme Court's early-twentieth-century decisions in the so-called "*Insular Cases*," on which the district court's opinion below partly relied in resolving Appellants' constitutional claims.

Pursuant to Federal Rule of Appellate Procedure 29(a), counsel for amici certifies that this separate brief in support of neither party is necessary because

[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 a monetary contribution toward this brief's preparation or submission.

amici—based on their academic expertise and scholarly research—have unique background and knowledge regarding the *Insular Cases*' history and relevance to the constitutional status of the U.S. territories. Although amici take no position on the ultimate outcome of Appellants' constitutional claims, amici have a strong interest in aiding this Court's understanding of the *Insular Cases*.

SUMMARY OF ARGUMENT

In assessing the constitutionality of the Uniformed and Overseas Citizens Absentee Voting Act (UOCAVA)'s differential treatment of the Northern Mariana Islands and other U.S. territories, 52 U.S.C. §§ 20310(5)(C), 20310(8), the district court "turn[ed] to principles" drawn from a series of Supreme Court decisions called the "*Insular Cases*" that it deemed "generally applicable to constitutional challenges involving territories." SA30. Those "generally applicable principles," in the district court's view, include the territorial incorporation principle—namely, that the U.S. Constitution does not "'apply in full'" to U.S. territories "'until such time as the territory is incorporated into, or made a part of the United States by Congress.'" *Id.* (quoting *United States v. Lebrón-Caceres*, 2016 WL 204447, at *7 (D.P.R. Jan. 15, 2016)).

Amici take no position on the ultimate legal merits of Appellants' constitutional claims, but amici strongly disagree with the district court's view that the *Insular Cases* have any relevance to the proper disposition of this case. Those

decisions—which concerned limited questions about the applicability of certain federal laws and specific constitutional provisions in the U.S. territories—simply do not bear on the "issue of first impression" regarding the constitutionality of selective enfranchisement between U.S. territories that the district court considered and from which Appellants now appeal. SA30.

Amici submit this brief to explain why this Court should take care to decide this case without reliance on the *Insular Cases*—and, indeed, why the Court should affirmatively reject the relevance of those decisions. Not only would reliance on the *Insular Cases* run contrary to the Supreme Court's instruction, in more recent decisions, that the *Insular Cases* should not be expansively construed, but as this brief explains, those decisions in no way inform the applicability of the federal right to vote to residents of the so-called "unincorporated" territories. Residents of all U.S. territories—whether incorporated or not—have historically lacked a constitutionally based right to vote in federal elections. That result has nothing to do with the *Insular Cases*, but instead follows from a straightforward interpretation of the Constitution's text and structure. Consistent with that undisputed fact, Appellants' challenge is not based on their status as residents of unincorporated territories, but rather, on their status as former residents of a State. Thus, whatever "generally applicable [principles]," SA30, may be derived from the *Insular Cases*,

this Court should make clear that the decisions are irrelevant to the constitutional issues in this case.

Moreover, the Supreme Court's instruction against any expansion of the reasoning of the *Insular Cases*—including the "territorial incorporation doctrine," of which they are considered emblematic—is well-founded. As various jurists and a recognized near-consensus of scholars have now recognized, the decisions rest on unpersuasive reasoning inconsistent with original meaning, now well-settled constitutional analysis, and present-day disapproval of antiquated imperialist and racist norms. 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 had any validity in earlier times.

ARGUMENT

I. THE *INSULAR CASES* HAVE NOTHING TO DO WITH APPELLANTS' CONSTITUTIONAL CLAIMS

The *Insular Cases* held that the noncontiguous islands annexed at the turn of the twentieth century were part of the United States for some purposes but not for others. This holding is commonly understood to have meant that the Constitution applies fully within States and incorporated territories, but that only certain

"fundamental" constitutional provisions apply in "unincorporated" territories. That understanding of the *Insular Cases*—though persistent[2]—is deeply flawed.

Even given their broadest application, the *Insular Cases* did not establish a framework for determining the entire Constitution's reach in the newly acquired U.S. territories. Their scope was far narrower, as the decisions simply concerned the reach of particular provisions of the Constitution and federal law in those territorial holdings. And, as most relevant to this case, *none* of the *Insular Cases* spoke to the application of the Constitution's voting provisions in the U.S. territories—whether or not those territories had been "incorporated." Long before the *Insular Cases* were decided, territories lacked voting representation in the federal government; the *Insular Cases* did nothing to change that fact. The district

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[2] *E.g.*, *Davis v. Commonwealth Elections Comm'n*, 844 F.3d 1087, 1095 (9th Cir. 2016) ("The *Insular Cases* held that [the] United States Constitution applies in full to 'incorporated' territories, but that 'elsewhere, absent congressional extension, only 'fundamental' constitutional rights apply[.]'"); *United States v. Lebrón-Caceres*, 2016 WL 204447, at *7 (D.P.R. Jan. 15, 2016) ("In this … framework, the Constitution does not apply in full to acquired territory until such time as the territory is incorporated into, or made a part of the United States by Congress."); *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); *Consejo de Salud Playa de Ponce v. Rullan*, 586 F. Supp. 2d 22, 25 (D.P.R. 2008) ("Under the *Insular Cases* doctrine, only fundamental constitutional rights extend to unincorporated United States territories, whereas in incorporated territories all constitutional provisions are in force.").

court's contrary analysis was thus incorrect and should not be repeated by this Court.

In assessing Appellants' constitutional claims, the district court reasoned that the *Insular Cases* supplied "generally applicable [principles]" governing Appellants' constitutional claims, SA30, and it separately stated that "the current voting situation in Puerto Rico, Guam, and the U.S. Virgin Islands is at least in part grounded on the *Insular Cases*," SA21. Respectfully, those references misapprehend the scope and meaning of the *Insular Cases*.

To start, the difference in the baseline voting rights of residents of the States and territories is attributable to the texts of Article I, Section 2; the Seventeenth Amendment; and Article II, Section 1 of the Constitution—all of which apply to States, not to territories.[3] Under those constitutional provisions, States and their residents enjoy a right to participate in federal elections, while residents of the

[3] Under Article II, Section 1, "Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors, equal to the number of Senators and Representatives to which the State may be entitled in the Congress." U.S. Const. art. II, § 1, cl. 2. Under the Seventeenth Amendment, "[t]he Senate of the United States shall be composed of two Senators from each State, elected by the people thereof." And under Article I, Section 2, "[t]he House of Representatives shall be composed of Members chosen every second Year by the People of the several States." *Id*. art. I, § 2, cl. 1.

territories do not have the same access to the federal franchise.[4] That difference is a function of constitutional text referring to States, and not to territories of any kind; it has nothing to do with the *Insular Cases*, and it certainly has nothing to do with the distinction between incorporated and unincorporated territories originating in those decisions.[5] Residents of incorporated and unincorporated territories have always been *identically* situated with respect to voting rights in federal elections—

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[4] *See, e.g.*, *Igartua de la Rosa v. United States*, 417 F.3d 145, 148 (1st Cir. 2005) (en banc) ("That the franchise for choosing electors is confined to 'states' cannot be 'unconstitutional' because it is what the Constitution itself provides."); *Igartua de la Rosa v. United States*, 32 F.3d 8, 9 (1st Cir. 1994) ("Pursuant to Article II, therefore, only citizens residing in *states* can vote for electors and thereby indirectly for the President.").

[5] Indeed, the Supreme Court spoke in expansive terms about Congress's plenary power over territories during the United States' nineteenth-century westward expansion, well before the *Insular Cases*. *See, e.g.*, *Late Corp. of the Church of Jesus Christ of Latter-Day Saints v. United States*, 136 U.S. 1, 42 (1890) ("The territory of Louisiana, when acquired from France … became the absolute property and domain of the United States, subject to such conditions as the government, in its diplomatic negotiations, had seen fit to accept relating to the rights of the people then inhabiting those territories."); *National Bank v. County of Yankton*, 101 U.S. 129, 133 (1880) ("All territory within the jurisdiction of the United States not included in any State must necessarily be governed by or under the authority of Congress."); *United States v. Gratiot*, 39 U.S. (14 Pet.) 526, 537 (1840) ("Congress has the same power over [U.S. territory] as over any other property belonging to the United States; and this power is vested in Congress without limitation; and has been considered the foundation upon which the territorial governments rest."); *see also* Burnett, Untied *States: American Expansion and Territorial Deannexation*, 72 U. Chi. L. Rev. 797, 814-816, 875 (2005) ("[T]he Insular Cases offered Congress no more latitude in governing territories than it already enjoyed: Congress had *always* exercised plenary power over territories[.]").

neither group has a guaranteed right to vote in a federal election under the constitutional provisions cited above.[6] Thus, whatever the present-day validity of the *Insular Cases*, any distinction between the voting rights of residents of the States and the territories in federal elections owes nothing to those decisions.[7]

Moreover, Appellants do not challenge discrimination against residents of unincorporated territories *as such*. Rather, they challenge discrimination among different groups of former State residents, with respect to a right they claim as former State residents. The relevant theoretical locus in this case is thus *not*

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[6] Even though residents of territories—incorporated or unincorporated—lack the federal franchise under these constitutional provisions, that does not resolve Appellants' claims, which concern discrimination among former State residents with respect to a right they assert on the basis of that former State residency.

[7] In 1999, the U.S. District Court for the Northern Mariana Islands relied on the *Insular Cases* to uphold, against an equal protection challenge, the malapportionment of the Senate of the Commonwealth of the Northern Mariana Islands ("CNMI"), which allocates the same number of senators to each of the three municipalities comprising the CNMI despite their significantly different population numbers (in a manner analogous to the U.S. Senate). *See Rayphand v. Sablan*, 95 F. Supp. 2d 1133, 1139-1140 (D.N. Mar. I. 1999), *aff'd mem., Torres v. Sablan*, 528 U.S. 1110 (2000). However, *Rayphand* does not contradict amici's position. First, *Rayphand* concerned local voting mechanisms applicable in the CNMI, not the federal franchise or voting rights claims of former residents of the States based on that former residency. Second, respectfully, amici suggest that *Rayphand* belongs to the catalogue of decisions that have given undue weight and significance to the *Insular Cases* in reading them far too broadly. *Compare id.* at 1139 ("The primary legal doctrine arising from those cases is that the extent to which a territory's inhabitants are entitled to the protections afforded by the U.S. Constitution is dependent upon the degree to which the territory has been 'incorporated' into the United States."), *with infra* pp. 10-12.

residence in an unincorporated territory, but former residence in a State. For this reason too, the *Insular Cases* do not supply a coherent framework for the resolution of Appellants' constitutional claims. This Court should make clear the irrelevance of that precedent in resolving those claims.

The district court was wrong to think the *Insular Cases* established a comprehensive framework governing application of the Constitution to U.S. territories even outside the context of the federal franchise. The scope of the cases was far narrower. Early *Insular* canon generally concerned the interpretation of constitutional provisions and federal statutes affecting the applicability of specific tariff laws,[8] while later *Insular Cases* addressed the application of constitutional provisions principally related to criminal trials in territorial courts.[9] *See, e.g.*, Kent, Boumediene, Munaf, *and the Supreme Court's Misreading of the* Insular Cases, 97 Iowa L. Rev. 101, 108 (2011) (noting "most well-known Insular Cases"

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[8] *See, e.g.*, *Dooley v. United States*, 183 U.S. 151, 156-157 (1901) (holding 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 & Puerto Rico 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); *Downes v. Bidwell*, 182 U.S. 244, 287 (1901) (solo opinion of Brown, J.) (territories not part of phrase "the United States" as found in Constitution's Uniformity Clause, U.S. Const. art. I, § 8, cl. 1).

[9] *See, e.g.*, *Balzac v. Porto* [sic] *Rico*, 258 U.S. 298, 305 (1922) (Sixth Amendment right to jury trial inapplicable in Puerto Rico); *Ocampo v. United States*, 234 U.S. 91, 98 (1914) (Fifth Amendment grand jury clause inapplicable in Philippines).

involved "narrow legal issues" "concerning import and export tariffs and the use of juries in criminal cases"). *None* of the *Insular Cases* established a distinction between territorial areas where "'a less-than-complete application of the Constitution'" governs and territorial areas where the Constitution applies in "full," as the district court suggested. SA21. For that reason alone, the district court's reference to the *Insular Cases*—and, implicitly, to the doctrine of territorial incorporation—added confusion to an already muddled area of law. *Cf. Examining Bd. of Eng'rs v. Flores de Otero*, 426 U.S. 572, 599 (1976) (noting "[t]he Court's decisions respecting the rights of the inhabitants of Puerto Rico have been neither unambiguous nor exactly uniform").

To be sure, over time the *Insular Cases* have been interpreted by some as establishing that the Constitution applies in "full" within States and incorporated territories, but that only "fundamental" constitutional provisions apply in unincorporated territories. That view, however, "overstate[s] the[] [cases'] holding." Burnett, *A Convenient Constitution? Extraterritoriality After* Boumediene, 109 Colum. L. Rev. 973, 984 (2009). 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, Untied *States: American Expansion and Territorial Deannexation*, 72 U. Chi. L. Rev. 797, 821 (2005). For example, parts of the Constitution, such as the Seat of

Government Clause, U.S. Const. art. I, § 8, cl. 17, which grants Congress authority over the District of Columbia, or the Territory Clause, art. IV, § 3, cl. 2, have never applied to the States altogether. *See* Burnett, 72 U. Chi. L. Rev. at 821. And other constitutional provisions have been understood as inapplicable outside the States, whether a territory was incorporated or not. *See id.* at 821 n.102.

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). Under a proper understanding of the *Insular Cases*, then, this Court's resolution of Appellants' constitutional claims should turn on the text, structure, and purposes of the relevant constitutional provisions at issue, not the *Insular Cases*.

II. THE TERRITORIAL INCORPORATION DOCTRINE ATTRIBUTED TO THE *INSULAR CASES* IS UNPERSUASIVE AS A MATTER OF CONSTITUTIONAL ANALYSIS AND OUGHT NOT BE EXPANDED

There is a second reason this Court should take care not to extend the reach of the *Insular Cases*: the Supreme Court has stated that "neither the [*Insular Cases*] nor their reasoning should be given any further expansion." *Reid v. Covert*, 354 U.S. 1, 14 (1957) (plurality opinion); *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)).

In amici's judgment, the Supreme Court's command 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, as amici explain below, even when properly understood, the territorial incorporation doctrine established in the *Insular Cases* is unpersuasive as a matter of constitutional first principles and it 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 they ought not be given any expansive reading by this Court.

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

This Court should heed the Supreme Court's admonition to resist further extension of the *Insular Cases* because the territorial incorporation doctrine is constitutionally infirm. The Constitution's single reference to "Territor[ies]," U.S.

Const. art. IV, § 3, cl. 2, does not differentiate between "incorporated" and "unincorporated" territorial lands. Until the *Insular Cases*, neither the Supreme Court nor any other branch of government had even intimated that such a distinction existed. *See* Burnett, 72 U. Chi. L. Rev. at 817-834 (discussing Congress's accepted plenary power to govern U.S. territories in nineteenth century and Supreme Court's "expansive" conception of the scope of this Congressional discretion even before the *Insular Cases*). And as the Supreme Court itself explained in *Boumediene*, the doctrine's paramount constitutional vice is that the distinction between incorporated and unincorporated territories lends itself to being misconstrued (as has repeatedly occurred since its invention, and as the district court did here) 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* Part I, *supra*, and that the Supreme Court has rejected, *id.* at 757-758.

Concern over the potential misuse inherent in this vague and unprecedented doctrinal innovation was evident from the beginning, and carries throughout the various, fractured opinions of members of the Court in the 1901 case of *Downes v. Bidwell*, 182 U.S. 244 (1901), the "most significant of the *Insular Cases*." *Examining Bd. of Eng'rs*, 426 U.S. at 599 n.30. *Downes*—which "brought the

constitutional question of congressional authority" over the U.S. overseas territories "into sharp relief"—required the Court to determine whether recently acquired Puerto Rico was part of the "United States" for purposes of the Constitution's Uniformity Clause, U.S. Const. art. I, § 8, cl. 1. Bartholomew H. Sparrow, *The* Insular Cases *and the Emergence of American Empire* 80 (2006). Writing for a deeply divided Court in an opinion no other Justice joined, Justice Brown concluded that that clause's reference to the "United States" did not encompass Puerto Rico.[10] And in a concurring opinion of lasting consequence (which two Justices joined), Justice White concurred in the Court's judgment based on the reasoning that Congress had not formally "incorporated" Puerto Rico into the Union by legislative act, which rendered the island "merely appurtenant [to the United States] as … [its] possession." *Downes*, 182 U.S. at 341-342. The dissenters in *Downes* reacted to Justice White's reasoning by noting that the idea of territorial "incorporation" was both unheard of and incomprehensible. "Great

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[10] Four Justices concurred in Justice Brown's judgment, but not his reasoning. *See Downes*, 182 U.S. at 287, 345 (White, J. and Gray, J. concurring in the judgment). The remaining four Justices authored or joined "vigorous dissents … [which] took the position that all the restraints of the Bill of Rights and of other parts of the Constitution were applicable to the United States Government wherever it acted." *Reid*, 354 U.S. at 13 n.24 (plurality opinion). In significant ways, *Downes* was therefore consistent with other early *Insular Cases*, "[m]any of [which] were divisive even when decided, yielding close and fractured … decisions at a time with stronger norms of judicial cohesion than today." *American Samoa and the Citizenship Clause: A Study in* Insular Cases *Revisionism*, 130 Harv. L. Rev. 1680, 1682 (2017).

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 put it even more pointedly: "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).

That newly minted distinction—between "incorporated" and "unincorporated" territories—eventually commanded a majority of the Court's votes in later *Insular Cases*. *See Balzac v. Porto* [sic] *Rico*, 258 U.S. 298, 305 (1922) ("[T]he opinion of Mr. Justice White … in *Downes* … has become the settled law of the court."). Nevertheless, even when accurately understood, 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.[11] As one amicus has explained,

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[11] *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."); Biklé, *The Constitutional Power of Congress Over the Territory of the United States*, 49 Am. L. Register 11, 94 (1901) (noting shortly prior to *Downes* that "in no case in regard to jurisdiction within the territory of the United

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

In addition to lacking any anchor in constitutional text, structure, or history, the territorial incorporation doctrine is in serious tension, if not at war, with the foundational constitutional principle that "the national government is one of enumerated powers, to be exerted only for the limited objects defined in the Constitution," as dissenting Justices in *Downes* first explained. *Downes*, 182 U.S.

States has a limitation of the power of Congress over personal or proprietary rights been held inapplicable"); *see also Igartua de la Rosa*, 417 F.3d at 163 (Torruella, J., dissenting) (noting *Insular Cases* were "unprecedented in American jurisprudence and unsupported by the text of the Constitution"); Torruella, *The* Insular Cases*: The Establishment of a Regime of Political Apartheid*, 29 U. Pa. J. Int'l L. 283, 286 (2007) ("[T]he *Insular Cases* … squarely contradicted long-standing constitutional precedent.").

at 389 (Harlan, J., dissenting); *see also id.* at 364 (Fuller, C.J., dissenting) (noting whatever the bounds of Congress's authority over the territories "it did not … follow that [they] were not parts of the United States, and that the power of Congress in general over them was unlimited"). Again, as the Supreme Court itself has recently acknowledged in explaining that the *Insular Cases* have often been misconstrued, the "Constitution grants Congress and the President the power to acquire, dispose of, and govern territory, *not* the power to decide when and where its terms apply." *Boumediene*, 553 U.S. at 765 (emphasis added).

The serious constitutional concerns with the territorial incorporation doctrine 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 That Ought Not Be Extended

In addition to the profound constitutional problems with the *Insular Cases* and the territorial incorporation doctrine, the decisions rest in important part on turn-of-the-twentieth-century notions of racial inferiority and imperial governance. *See Igartua de la Rosa v. United States*, 417 F.3d 145, 162 (1st Cir. 2005) (Torruella, J., dissenting) ("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) (describing cases as "decided in a time of colonial expansion by the

United States into lands already occupied by non-white populations"), *aff'd*, 486 F.3d 806 (3d Cir. 2007). For those reasons, as well, this Court should decline to rely on the *Insular Cases* in deciding this case.

The *Insular Cases*' reasoning—and in particular, the reasoning that gave rise to the territorial incorporation doctrine—reflected turn-of-the-century imperial fervor and the hesitation 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 commented on the possibility of acquiring island territories "peopled with an uncivilized race, yet rich in soil" whose inhabitants were "absolutely unfit to receive" citizenship. *Id*. at 306. Justice White quoted approvingly from treatise passages explaining that "if the conquered are a fierce, savage and restless people," the conqueror may "govern them with a tighter rein, so as to curb their impetuosity, and to keep them under subjection." *Id.* at 302 (internal quotation marks omitted).

The dubious—and in many ways pernicious—foundations of the territorial incorporation doctrine undoubtedly reflect that the most significant grouping of *Insular Cases* reached the Supreme Court following the Nation's unprecedented

accession of overseas territories after the Spanish-American War and, as an amicus has explained, "[a]lthough continental expansion had previously provoked constitutional questions, never before had the United States added areas this populated and this remote from American shores." Sparrow, *The* Insular Cases, *supra*, at 4. Moreover, "[w]hen the Supreme Court reached its judgments in the Insular Cases, prevailing governmental attitudes presumed white supremacy and approved of stigmatizing segregation." Minow, *The Enduring Burdens of the Universal and the Different in the* Insular Cases, in *Reconsidering the* Insular Cases, *the Past and Future of the American Empire* vii, vii (Neuman & Brown-Nagin eds., 2015). As a result, the "outcome [of the *Insular Cases*] was strongly influenced by racially motivated biases and by colonial governance theories that were contrary to American territorial practice and experience." Torruella, 29 U. Pa. J. Int'l L. at 286; *see also* Kent, 82 Fordham L. Rev. at 2128 (noting Supreme Court offered "frankly racist" rationales in key *Insular Cases*).

The decisions in fact "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*, *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.

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

CONCLUSION

For those reasons, amici respectfully urge this Court not to apply the *Insular Cases* in resolving Appellants' constitutional challenges in this case.

Respectfully submitted.

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