No. 15-981

IN THE

Supreme Court of the United States

LENEUOTI FIAFIA TUAUA, *et al.*,
Petitioners,

v.

UNITED STATES OF AMERICA, *et al.*,
Respondents.

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

BRIEF FOR SCHOLARS OF CONSTITUTIONAL LAW AND LEGAL HISTORY AS AMICI CURIAE SUPPORTING PETITIONERS

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INTEREST OF AMICI CURIAE[1]

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Amici have written and edited numerous works about this Court's early-twentieth-century decisions in the *Insular Cases*, on which the lower courts relied. Amici also filed an amicus brief in the court of appeals in this case.

Amici take no position on whether the Fourteenth Amendment requires birthright citizenship for those born in American Samoa. Amici do, however, disagree

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[1] Counsel for the parties have consented to the filing of this brief. No counsel for a party authored any portion of this brief, and no person other than amici or their counsel made a monetary contribution intended to fund the preparation or submission of this brief.

with the conclusion of the court of appeals that this Court's decisions in the *Insular Cases* yield the answer to that question. As amici explain, the court of appeals' decision reflects a persistent but erroneous interpretation of the *Insular Cases*. It reads the *Insular Cases* as establishing a single framework for analyzing whether the *entire* Constitution applies in unincorporated territories, and relies on that framework to hold the Citizenship Clause inapplicable to the unincorporated territory of American Samoa. In fact, the *Insular Cases* decided far narrower issues, and none of those decisions governs the resolution of the question presented in this case. Amici therefore urge this Court to grant review and to provide much-needed guidance on the correct interpretation of the *Insular Cases*.

SUMMARY OF ARGUMENT

The court of appeals' decision in this case reflects a persistent but inaccurate interpretation of this Court's decisions in a series of early-twentieth-century cases known as the *Insular Cases*. In concluding that the Citizenship Clause of the Fourteenth Amendment does not guarantee citizenship to persons born in American Samoa, the court of appeals misread the *Insular Cases* as establishing a single analytical framework for determining whether the Constitution, in its entirety, applies in any particular territory. The import of the *Insular Cases* is far narrower. The *Insular Cases* asked two distinct kinds of questions: questions about the geographic scope of certain constitutional clauses, and questions about the applicability of certain constitutional rights. The leading case, *Downes* v. *Bidwell*, 182 U.S. 244 (1901), belongs in the former category. It asked whether the phrase "the United States" as used in one particular constitutional clause—the Uniformity

Clause—included territories annexed at the turn of the century; it did not address the Citizenship Clause of the Fourteenth Amendment. Later *Insular Cases* belong in the latter category; they asked whether specific constitutional rights applied in those territories. None of the decisions purported to establish an analytical framework by which to judge whether all of the Constitution's provisions apply in a particular territory. The decision below—like many before it—overstates the holdings of the *Insular Cases* and overlooks their more limited reach.

The *Insular Cases* are thus relevant here only as to a threshold question: They established that when a territory is "unincorporated," it may or may not be part of "the United States" as that phrase is used in a given constitutional clause. Under the *Insular Cases*, then, the starting point of the Court's inquiry is whether the phrase "the United States" in the Citizenship Clause encompasses American Samoa. Although the *Insular Cases* identify the initial inquiry, they do not offer guidance as to its resolution; the question presented must be answered through a clause-specific inquiry that none of the *Insular Cases* ever conducted.

The reach of the Citizenship Clause should be ascertained by reference, in the first instance, to the language of the Fourteenth Amendment itself, which defines the Clause's geographic scope. There is therefore no need to resort either to the analysis in *Downes*, which concerned an entirely different constitutional provision (the Uniformity Clause), or to the fundamental-rights-analysis framework that the Court employed in some of the later *Insular Cases*, which decided that certain procedural constitutional rights were inapplicable to criminal prosecutions in the new territories.

The court of appeals misunderstood the import of the *Insular Cases*. It misread the *Insular Cases* as governing the application of the Constitution *in its entirety*, and then misapplied the analysis relevant to the determination of which rights apply where, to a clause that defines its own geographic scope. This Court should correct that misunderstanding, which is unfortunately widely shared in the lower courts and cannot be reconciled with either the *Insular Cases* themselves or this Court's later decisions. Moreover, the *Insular Cases* reflect outmoded sentiments about the ability of non-white residents of the new territories to participate in American institutions—sentiments that our society, and this Court, have long since repudiated. For that reason too, this Court should ensure that lower courts adopt and apply an appropriately narrow understanding of the *Insular Cases*.

ARGUMENT

I. GUIDANCE FROM THIS COURT ABOUT THE PROPER APPLICATION OF THE *INSULAR CASES* IS NECESSARY AND WARRANTED

With its decision below, the D.C. Circuit joins several other courts that have misapplied this Court's decisions in the early-twentieth-century *Insular Cases* and have "overstated their holding with respect to constitutional extraterritoriality." Burnett,[2] *A Convenient Constitution? Extraterritoriality After Boumediene*, 109 Colum. L. Rev. 973, 984 (2009). In concluding that the Fourteenth Amendment's guarantee of U.S. citizenship does not extend to persons born in American Samoa, the court of appeals below relied on a wide-

[2] Amicus Professor Christina Duffy Ponsa was formerly Christina Duffy Burnett.

spread—but nonetheless mistaken—misreading of the *Insular Cases*. The court read the *Insular Cases* as holding generally that the Constitution applies in its entirety within States and "incorporated" territories, but only its "fundamental" provisions apply in territories that remain "unincorporated." Pet. App. 11a-12a.

That reading of the *Insular Cases*, though not uncommon, is nonetheless severely flawed. This Court did not purport to decide the geographic reach of every constitutional provision in any of the *Insular Cases*.[3] Those decisions concerned the reach of particular provisions of the Constitution and federal law in overseas territories that the United States annexed following the Spanish-American War of 1898. The first decisions in the series, handed down in 1901, concerned the application of tariffs on goods imported and exported from the territories. *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). Without exception, these "Insular Tariff Cases," as the Court itself described them, *see De Lima* v. *Bidwell*, 182 U.S. 1, 2 (1901), involved "narrow legal issues." Kent, Boumediene, Munaf, *and the Su-*

[3] Scholars differ on the roster of decisions known as the *Insular Cases*, but there is "nearly universal consensus that the series" begins with cases this Court 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).

preme Court's Misreading of the Insular Cases, 97 Iowa L. Rev. 101, 108 (2011).

Of the early cases in the *Insular* series, only two required this Court to consider the applicability of constitutional provisions in the newly acquired territories. *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, did not extend to Puerto Rico, and *Dooley* held that duties on goods shipped from New York to Puerto Rico did not violate the Export Tax Clause. In those decisions, the Court examined whether clauses specifying a geographic scope encompassed the new territories: in *Dooley*, whether the word "state" in the Export Clause encompassed the new territories, and in *Downes*, whether the new territories were part of "the United States" as that phrase is used in the Uniformity Clause.

Downes, the "most significant" of the *Insular Cases* (*see Examining Bd. of Eng'rs, Architects and Surveyors* v. *Flores de Otero*, 426 U.S. 572, 599 n.30 (1976)), illustrates the limited scope of the Court's inquiry. In *Downes*, this Court addressed whether the phrase "throughout the United States" encompassed Puerto Rico for purposes of the Uniformity Clause, which provides that "all duties, imposts and excises shall be uniform throughout the United States." U.S. Const. art. I, § 8, cl. 1. A fractured Court agreed on little other than the ultimate result in that case. Justice Brown, who announced the Court's judgment but wrote an opinion in which no other Justice joined, 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; *see id.* at 260-261 (internal quotation marks omitted). Justice Brown reasoned that the Constitution's

terms were not applicable to the territories until Congress chose to "extend" them. *Id.* at 251.

"The other eight [J]ustices rejected [Justice] Brown's radical view." Kent, 97 Iowa L. Rev. at 157. Justice White, joined by Justices Shiras and McKenna, took a markedly different tack. In a separate opinion that marked the "origin of the doctrine of territorial incorporation," *id.*, Justice White reasoned that the newly acquired territories, though subject to U.S. sovereignty, were not part of the United States because Congress had not "incorporated" them into the United States by legislation or treaty. *Downes*, 182 U.S. at 287-288 (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.").

Although early cases such as *Downes* and *Dooley* articulated a distinction between "incorporated" and "unincorporated" territories, none advanced the proposition—crucial to the decision below, *see* Pet. App. 11a-12a—that the operative difference between the two is that only "fundamental" constitutional rights apply in the latter.[4] That rights-analysis framework emerged in

[4] Some language in those early decisions, such as Justice White's statement in his concurrence in *Downes* that certain constitutional "restrictions" might be "of so fundamental a nature that they cannot be transgressed," have lent credence to that distinction. 182 U.S. at 291. But 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

later decisions of this Court commonly included in the *Insular* series. All of those decisions, however, dealt with specific constitutional provisions mainly related to proceedings in criminal trials in territorial courts. *See, e.g.*, *Balzac*, 258 U.S. at 309 (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). Refining the distinction between the two kinds of territories that Justice White had 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 991-992.

But none of the *Insular Cases* went so far as to demarcate territorial areas where the Constitution applies "in full" from others where only fundamental provisions apply. That understanding, which the court below adopted, finds no support in the collected *Insular* decisions. Instead, as this Court most recently explained in *Boumediene* v. *Bush*, "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." 553 U.S. 723, 758 (2008) (cit-

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of the Bill of Rights to be "incorporated" through the Fourteenth Amendment, and most constitutional rights did not apply even to the States. Justice White's observation also harked back to earlier controversies over the federal government's authority to limit slavery in territories destined for statehood, well before the *Insular Cases* reached this Court. *See generally* Burnett, Untied *States: American Expansion and Territorial Deannexation*, 72 U. Chi. L. Rev. 797, 824-834 (2005).

ing *Balzac*, 258 U.S. at 312). In two specific contexts—one, concerning the applicability of duties on goods imported to and exported from the territories, and another, involving the right to trial by juries in territorial (not federal)[5] courts—this Court held that certain constitutional provisions did not apply. That is all the *Insular Cases* did. Yet by adopting the imprecise shorthand that the *Insular Cases* withheld all but "fundamental" constitutional provisions from unincorporated territories, the court below assigned undue weight to those decisions and applied an analysis that in no way informs the applicability of the Citizenship Clause of the Fourteenth Amendment to American Samoa.

The decision below is emblematic of enduring confusion about the *Insular Cases*—the D.C. Circuit is not alone in misstating their import. Courts have frequently assumed that the *Insular Cases* dictate the geographic scope and application of constitutional provisions that were not at issue in those cases. *See*, *e.g.*, *Rabang* v. *INS*, 35 F.3d 1449, 1452 (9th Cir. 1994) ("In the *Insular Cases* the Supreme Court decided that the territorial scope of the phrase 'the United States' as used *in the Constitution* is limited to the states of the Union." (emphasis added); *Wabol* v. *Villacrusis*, 958 F.2d 1450, 1459 (9th Cir. 1992) (citing *Insular Cases* for proposition that "the *entire* Constitution applies to a United States territory … of its own force—only if that territory is 'incorporated.' Elsewhere, absent congres-

[5] No decision in the *Insular Cases* catalogue ever held that jury guarantees were inapplicable to defendants in U.S. courts within the unincorporated territories. In that regard, the Court did not treat the unincorporated territories any differently than it treated the States; the right to trial by jury did not apply against state governments until 1968. *See generally Duncan* v. *Louisiana*, 391 U.S. 145, 162 (1968).

sional extension, only 'fundamental' constitutional rights apply" (emphasis added)); *Montalvo* v. *Colon*, 377 F. Supp. 1332, 1336 (D.P.R. 1974) (noting "Constitution applie[s] *in full*" in incorporated territories but "to some lesser degree" in unincorporated territories (emphasis added)); *see also Valmonte* v. *INS*, 136 F.3d 914, 918 (2d Cir. 1998) (indicating *Insular Cases* were authoritative on "territorial scope of the term 'United States' *in the Fourteenth Amendment*" (emphasis added)); *Lacap* v. *INS*, 138 F.3d 518, 519 (3d Cir. 1998) (per curiam) (following *Rabang*); *Nolos* v. *Holder*, 611 F.3d 279, 282-284 (5th Cir. 2010) (per curiam) (following *Rabang* and *Valmonte*). In making that assumption, those courts have overlooked the Court's admonition that "the 'specific circumstances of each particular case' are relevant in determining the geographic scope of the Constitution." *Boumediene*, 553 U.S. at 759 (quoting *Reid* v. *Covert*, 354 U.S. 1, 54 (1957) (Frankfurter, J. concurring)).

This case affords this Court the opportunity to correct this mistaken assumption and to provide critical guidance on the correct application of the *Insular Cases*.

II. THIS COURT SHOULD MAKE CLEAR THAT THE *INSULAR CASES* DO NOT CONTROL THE GEOGRAPHIC SCOPE OF THE CITIZENSHIP CLAUSE OF THE FOURTEENTH AMENDMENT

The court of appeals concluded that "the scope of the Citizenship Clause, as applied to territories, may not be readily discerned … absent resort to the *Insular Cases*' analytical framework." Pet. App. 12a. That statement reflects a fundamental misapprehension about the *Insular Cases*—namely, that they established a singular analytical framework that informs the application of the Constitution, in its entirety, to the

territories. As explained above, the notion that the *Insular Cases* created extraconstitutional zones (*i.e.*, "unincorporated" territories) where only "fundamental" constitutional provisions apply misconstrues those cases. Rather, as Justice White explained in his concurrence in *Downes*, "In the case of the territories, *as in every other instance*, when a provision of the Constitution is invoked, the question which arises 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 (emphasis added). Thus, while amici take no position on whether the Citizenship Clause encompasses American Samoa, they do submit that the *Insular Cases* do not resolve that issue.

None of the *Insular Cases* determined the meaning of the phrase "in the United States" in the context of the Fourteenth Amendment's Citizenship Clause. In fact, in one of the *Insular Cases*, the Court expressly declined to reach the Citizenship Clause question. *See Gonzales* v. *Williams*, 192 U.S. 1, 12 (1904). The only one of the *Insular Cases* to address whether a particular reference to "the United States" in the Constitution encompassed the territories was *Downes* v. *Bidwell*. In *Downes*, a splintered majority of the Court concluded that Congress could impose tariffs on products shipped from Puerto Rico to the United States without violating the Uniformity Clause. But the five Justices in the *Downes* majority reached that result by following different paths. *See* 182 U.S. at 244 n.1 (opinion syllabus) (Justice Brown delivered an opinion "announcing the conclusion and judgment of the court in this case," but in light of Justice White's and Justice Gray's separate opinions, "it is seen that there is no opinion in which a majority of the court concurred"). And the four dissenting members of the Court—Chief Justice Fuller

and Justices Harlan, Brewer, and Peckham—posited that the phrase "the United States," as used in the Uniformity Clause, encompassed all territories, including the newly annexed islands. *See, e.g.*, *id.* at 354-355 (Fuller, C.J., dissenting); *see also* Sparrow, *The* Insular Cases *and the Emergence of American Empire* 87 (2006) ("[N]o single opinion among the five opinions in *Downes* attracted a majority on the bench."). Because the five Justices in the *Downes* majority reached their shared judgment through divergent constitutional theories, the decision, lacking a majority rationale, is precedential only as to the case's precise facts. *See Arizona* v. *Inter-Tribal Council of Ariz.*, 133 S. Ct. 2247, 2258 n.8 (2013); *Seminole Tribe of Fla.* v. *Florida*, 517 U.S. 44, 66 (1996). Thus, *Downes* is only instructive to the extent it makes clear that an unincorporated territory may or may not be part of "the United States" as that phrase is used in a particular constitutional provision. But *Downes* does not provide the answer to that question.

The proper scope of the Citizenship Clause must therefore be ascertained, not by reference to the incorporated/unincorporated distinction articulated in Justice White's concurrence in *Downes* and some of the later *Insular Cases*, but by an examination of the text, structure, history, and purpose of that particular clause. The Citizenship Clause provides that "[a]ll persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside." U.S. Const. amend. XIV, § 1. As its text illustrates, the Citizenship Clause, like the Uniformity Clause interpreted in *Downes*, defines its own geographic scope—those born in "the United States" (and subject to its jurisdiction) are citizens. If that geographic phrase includes the U.S. territory of American Samoa, then petitioners'

claim to birthright citizenship cannot be rejected on the atextual grounds that American Samoa is "unincorporated," that citizenship may or may not be a "fundamental" right, or that it would be "impractical and anomalous" to extend citizenship to individuals born there. And if that geographic phrase does *not* include American Samoa, nothing is added to that conclusion by the *Insular Cases* or any territoriality or fundamental-rights analysis therein. American Samoa's status as an unincorporated territory does not bear on anything beyond the fact that the starting point of the Court's inquiry is the identification of this case as a "geographic scope" case, in which the Court will have to ascertain whether the territory is or is not part of "the United States" for purposes of the Citizenship Clause.

Downes in no way informs the answer to that question. As stated, that decision held that a similar but not identical geographic phrase in the Uniformity Clause—"throughout the United States"—excluded Puerto Rico. But that conclusion would not necessarily extend to the Citizenship Clause even if any of the three opinions in support of the holding in *Downes* had garnered a majority of the Court's votes. There are important differences between the Uniformity Clause and the Citizenship Clause, which may require the courts to construe them differently.

First, the clauses were enacted almost a century apart and may reflect different historical meanings. The Uniformity Clause was written at the time of the Founding. At that time, the phrase "the United States" was commonly understood to mean a collective of individual (and largely independent) States. *See* Burnett, *The Constitution and Deconstitution of the United States*, in *The Louisiana Purchase and American Expansion, 1803-1898*, at 181, 181-182 (Levinson &

Sparrow eds., 2005) (citing Civil War historian James M. McPherson's work for this proposition, and explaining that just before the *Insular Cases*, the Founding-era conception "reemerged" among expansionists). By contrast, the Citizenship Clause was enacted after the Civil War, by which time the phrase had long since evolved to signify a unitary entity—one nation inclusive of its individual states and the "territories subject to its sovereignty." *Id.* Therefore, even if "throughout the United States" as used in the Uniformity Clause refers only to States, *Downes*, 182 U.S. at 251 (opinion of Brown, J.), that is not necessarily true of the phrase "in the United States" as it is employed by the Citizenship Clause.

Second, the Uniformity Clause and the Citizenship Clause emerged in 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, 403-405 (1857); *see also* Burnett, *Empire and the Transformation of Citizenship*, in *Colonial Crucible: Empire in the Making of the Modern American State* 332, 338-340 (McCoy & Scarano eds., 2009). The enactment of the Citizenship Clause thus points decidedly against a rule that makes distinctions between Americans for purposes of the rights and responsibilities of citizenship. The Uniformity Clause reflects no such concerns.

Third, the Citizenship Clause and Uniformity Clause serve different functions. 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] aimed to provide an unimpeachable legal foundation for the [Civil Rights Act of 1866], making clear that everyone born under the American flag … was a free and equal citizen."). 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.) 36, 73 (1873). Distinguishing between States and territories, or incorporated territories and unincorporated territories, therefore does not make sense in the context of the Citizenship Clause.

The lower courts have failed to grapple with these potentially meaningful differences and misguidedly interpreted the *Insular Cases* to render those distinctions ineffectual. This case presents an opportunity to correct that fundamental misconception about constitutional interpretation.

III. The Territorial Incorporation Doctrine Attributed To The *Insular Cases* Is Unpersuasive As A Matter Of Constitutional Analysis And Ought Not Be Expanded

This Court has been hesitant to expand the application of the *Insular Cases*—with good reason. The territorial incorporation doctrine established in the *Insular Cases* is unpersuasive as a matter of constitutional analysis, and the antiquated notions of racial inferiority and imperial expansionism on which those cases are

based have no place in modern constitutional analysis. Thus, as several members of this Court have stated over the years, "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. *Puerto Rico*, 442 U.S. 465, 475-476 (1979) (Brennan, J., concurring in judgment) ("Whatever the validity of the old cases such as *Downes* v. *Bidwell*, *Dorr* v. *United States*, and *Balzac* v. *Porto Rico* in the particular historical context in which they were decided, 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)). Not only did the court of appeals read the *Insular Cases* too broadly, but by relying on them to resolve the scope of the Citizenship Clause, it also grounded its understanding of a constitutional provision designed to eliminate racial discrimination upon decisions now widely recognized as resting on discredited racial theories of a bygone era. If the *Insular Cases* are to remain on the books, courts should be especially cautious not to extend them any further than they warrant.

Downes announced a distinction between "incorporated" and "unincorporated" territories that was not only "unprecedented," Burnett, 109 Colum. L. Rev. at 982, but constituted a significant departure from this Court's prior conception of the Constitution's application to the territories.[6] As one amicus has explained,

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[6] *See 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."); *Downes*, 182 U.S. at 353-369, 359 (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

"nothing in the Constitution … 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 and American Legal History* 196-197 (2004). Recognizing that distinction as constitutionally unfounded, members of this Court and scholars have criticized the territorial incorporation doctrine from its inception. *See, e.g.*, *Downes*, 182 U.S. at 391 (Harlan, J., dissenting) ("[T]his idea of 'incorporation' has some occult meaning which my mind does not apprehend."); Lawson & Sloane, *The Constitutionality of Decolonization by Associated Statehood: Puerto Rico's Legal Status Reconsidered*, 50 B.C. L. Rev. 1123, 1146 (2009) ("[N]o current scholar, from any methodological perspective, [has] defend[ed] *The Insular Cases*[.]").

The notion of territorial incorporation has been rightly criticized for a second reason: It undermines our system of limited and enumerated federal powers. *Downes*, 182 U.S. at 389 (Harlan, J., dissenting) ("[T]he National Government is one of enumerated powers to be exerted only for the limited objects defined in the

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the territories); *Igartua-de la Rosa* v. *United States*, 417 F.3d 145, 163 (1st Cir. 2005) (en banc) (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."); *see also* 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 States has a limitation of the power of Congress over personal or proprietary rights been held inapplicable").

Constitution."). As Justice Harlan explained in his dissent in *Downes*, the idea of territorial incorporation "could produce the same results as those that flow from the theory that Congress may go outside of the Constitution in dealing with newly acquired territories, and give[s] [those territories] the benefit of that instrument only when and as [Congress] shall direct." *Id.* In other words, the territorial incorporation concept enables "the political branches … to switch the Constitution on or off at will," *Boumediene*, 553 U.S. at 765, by affording them sole discretion to decide whether or not to "incorporate" a territory. That result is inconsistent with a proper understanding of constitutional government. Although the Constitution authorizes Congress and the President "to acquire, dispose of, and govern territory," it does not grant them "the power to decide when and where [the Constitution's] terms apply." *Id.*

Finally, the territorial incorporation approach is even less deserving of a place in constitutional analysis today than it was at the time it was established. The distinction between incorporated and unincorporated territories reflected then-prevalent notions that certain classes of individuals, because of their heritage and racial background, could never be assimilated into American society and might never be deemed worthy of participating in American institutions of self-government. "When 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 (Neuman & Brown-Nagin eds., 2015).

The *Insular Cases*, and the territorial incorporation doctrine in particular, were the product of turn-of-the-twentieth-century notions about racial inferiority and imperial governance. *See, e.g.*, *Ballentine* v. *United States*, 2006 WL 3298270, at *4 (D.V.I. Sept. 21, 2006) (noting that the cases were "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); Torruella, *The* Insular Cases*: The Establishment of A Regime of Political Apartheid*, 29 U. Pa. J. Int'l L. 283, 286 (2007) (describing the *Insular Cases* as "strongly influenced by racially motivated biases and by colonial governance theories that were contrary to American territorial practice and experience"). The doctrine's dubious underpinnings are undeniable. *See Downes*, 182 U.S. at 287 (opinion of Brown, J.) (describing territorial inhabitants as "alien races, differing from us" in many ways); *id.* at 302 (White, J. concurring in judgment) (quoting 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." (internal quotation marks omitted)); *see also* Rivera Ramos, *Puerto Rico's Political Status: The Long-Term Effects of American Expansionist Discourse*, in *Louisiana Purchase*, *supra* p. 13, at 165, 171, 174 (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.").

These notions—that whole classes of persons subject to the laws of the United States ought not have any role in the making of those laws—have no place in modern constitutional analysis, and this Court has long re-

pudiated them elsewhere. The Court should not expand the application of the territorial incorporation doctrine generally and should be especially wary of applying the doctrine when analyzing the Citizenship Clause of the Fourteenth Amendment—a provision designed to repudiate racist notions like the ones on which the doctrine was originally based.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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