Nos. 20-4017, 20-4019

IN THE

United States Court of Appeals for the Tenth Circuit

JOHN FITISEMANU, ET AL.,
Plaintiffs-Appellees,

v.

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

&

THE AMERICAN SAMOA GOVERNMENT, ET AL.,
Intervenor Defendants-Appellants.

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

BRIEF OF AMICUS CURIAE VIRGIN ISLANDS BAR ASSOCIATION IN SUPPORT OF APPELLEES' PRAYER FOR AFFIRMANCE

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I. INTERESTS OF AMICUS CURIAE

The Virgin Islands Bar Association is an integrated bar association with hundreds of members practicing law in the "unincorporated" territory of the Virgin Islands of the United States. The Bar Association operates with the mission of advancing the administration of justice, enhancing access to justice, and advocating public policy positions for the benefit of the judicial system, its members, and the people of the Virgin Islands.[1]

The heavy reliance on the *Insular Cases* by the United States and American Samoa demonstrates the Bar Association's duty to intervene in this matter as an advocate for the people of the Virgin Islands. In fulfillment of its duties, the Bar Association submits this brief as amicus curiae urging the Court to affirm the decision of the district court.

Like with all cases implicating the rights of Americans living in U.S. territories, the *Insular Cases*—a "discredited lineage of cases, which ushered the unincorporated territories doctrine"—"hovers like a dark cloud." *Aurelius Inv.,*

[1] This brief and the positions taken in it are not intended to reflect the views of any individual member of the Bar Association. This brief is not intended to reflect the views of the Supreme Court of the Virgin Islands or any of its members. The Bar Association states under Federal Rule of Appellate Procedure 29(a)(4)(E) that no party's counsel authored this brief in whole or in part; no party or party's counsel contributed money that was intended to fund preparing or submitting this brief; and no person—other than the amicus curiae, its members, or its counsel—contributed money that was intended to fund preparing or submitting this brief. All parties consent to this filing. Fed. R. App. P. 29(a)(2).

LLC v. Puerto Rico, 915 F.3d 838, 854–55 (1st Cir.), *cert. granted*, 139 S. Ct. 2735 (2019). And even though "neither the cases nor their reasoning should be given any further expansion," *Reid v. Covert*, 354 U.S. 1, 14 (1957) (plurality opinion), the United States returns to federal court yet again[2] urging the further expansion of the *Insular Cases*—this time to deny to territories the most basic and fundamental constitutional right, birthright citizenship. This urged expansion is particularly insulting here.

"[T]he undeniable purpose of the Fourteenth Amendment was . . . to put citizenship beyond the power of any governmental unit[] to destroy." *Rogers v. Bellei*, 401 U.S. 815, 822 (1971) (quoting *Afroyim v. Rusk*, 387 U.S. 253, 263 (1967)) (internal quotation marks omitted).

Yet the United States claims the unfettered discretion to destroy the citizenship of Americans born in U.S. territories. Although this case is about the citizenship of American Samoans, a decision of this Court granting that discretion

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[2] This is but one in a long line of recent cases where the United States has urged federal courts to deny basic constitutional rights to Americans living in U.S. territories. *See, e.g.*, *United States v. Vaello-Madero*, 956 F.3d 12 (1st Cir. 2020) (unsuccessfully attempting to justify the arbitrary denial of some federal benefits to Americans living in Puerto Rico); *United States v. Baxter*, 951 F.3d 128 (3d Cir. 2020) (successfully arguing Americans may be subjected to warrantless searches when traveling between the U.S. Virgin Islands and the U.S. mainland); *Segovia v. United States*, 880 F.3d 384 (7th Cir. 2018) (successfully defending federal law arbitrarily denying some Americans the right to vote); *Tuaua v. United States*, 788 F.3d 300 (D.C. Cir. 2015) (successfully insisting the Citizenship Clause doesn't apply to "unincorporated" territories).

impacts every American born in a U.S. territory. It would send the unequivocal message to each of those Americans that their citizenship—a foundational principle of every American's identity—can be destroyed at any moment by Congress, a governmental unit in which territories have no voting representation.[3]

The Bar Association urges this Court to affirm the district court and reaffirm the basic principle that "United States citizenship itself is a fundamental right." *Mondaca-Vega v. Lynch*, 808 F.3d 413, 431 (9th Cir. 2015) (citing *Trop v. Dulles*, 356 U.S. 86, 93 (1958) (plurality opinion)). "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," and something as fundamental as citizenship cannot be "switch[ed] . . . on or off at will" by the arbitrary decisions of federal authorities. *Boumediene v. Bush*, 553 U.S. 723, 765 (2008).

[3] Like American Samoa, "the Virgin Islands [is] represented in Congress by an elected, nonvoting Delegate in the House of Representatives who, unlike the House's voting membership, serves pursuant to legislation, not the Constitution." *Ballentine v. United States*, 486 F.3d 806, 811 (3d Cir. 2007); *see also* 48 U.S.C. § 1711. And like with all territorial delegates, "[t]he Delegate from the Virgin Islands is not entitled to vote." *Id.*

II. ARGUMENT

A. The *Insular Cases* represent a broken promise of fundamental rights to Americans in U.S. territories.

"In a series of opinions later known as the *Insular Cases*, the Court addressed whether the Constitution, by its own force, applies in any territory that is not a State." *Boumediene*, 553 U.S. at 756. The *Insular Cases* "held that the Constitution has independent force in these territories, a force not contingent upon acts of legislative grace." *Id.* at 757.

In doing so, "the Court created the doctrine of incorporated and unincorporated Territories." *Examining Bd. of Eng'rs, Architects & Surveyors v. Flores de Otero*, 426 U.S. 572, 599 n.30 (1976).[4] Incorporated territories were "those Territories destined for statehood from the time of acquisition, and the Constitution was applied to them with full force." *Id.* Unincorporated territories, on the other hand, were "those Territories not possessing that anticipation of statehood. As to them, only 'fundamental' constitutional rights were guaranteed to the inhabitants." *Id.* (citations omitted).

[4] In *Examining Bd. of Engineers*, the Court identified the *Insular Cases* to include *De Lima v. Bidwell*, 182 U.S. 1 (1901), *Dooley v. United States*, 182 U.S. 222 (1901), *Armstrong v. United States*, 182 U.S. 243 (1901), and *Downes v. Bidwell*, 182 U.S. 244 (1901). In *United States v. Verdugo-Urquidez*, 494 U.S. 259, 268 (1990), the Court identified additional *Insular Cases*, including *Balzac v. Porto Rico*, 258 U.S. 298 (1922), *Ocampo v. United States*, 234 U.S. 91 (1914), *Dorr v. United States*, 195 U.S. 138 (1904), and *Hawaii v. Mankichi*, 190 U.S. 197 (1903).

Despite the Supreme Court's promise that "'fundamental' constitutional rights are guaranteed to inhabitants of [the] territories," *United States v. Verdugo-Urquidez*, 494 U.S. 259, 268 (1990) (quoting *Dorr v. United States*, 195 U.S. 138, 148 (1904)), for more than a century, federal courts have routinely relied on the *Insular Cases* to justify refusing to extend to the territories constitutional rights considered fundamental in every other context.

An early example is *Balzac v. Porto Rico*, 258 U.S. 298 (1922), where the Supreme Court held that the right to a jury trial secured by the Sixth Amendment was not a fundamental right and did not apply to the residents of unincorporated territories. *Id.* at 309 ("The citizen of the United States living in Porto Rico cannot there enjoy a right of trial by jury under the federal Constitution.").

Since then, the Supreme Court held that "trial by jury in criminal cases is fundamental to the American scheme of justice," requiring the states to recognize "a right of jury trial in all criminal cases which—were they to be tried in a federal court—would come within the Sixth Amendment's guarantee." *Duncan v. Louisiana*, 391 U.S. 145, 149 (1968).

The Supreme Court reaffirmed this less than a month ago, emphasizing "[t]his Court has long explained that the Sixth Amendment right to a jury trial is fundamental to the American scheme of justice." *Ramos v. Louisiana*, 590 U.S. ___, 2020 WL 1906545, at *6 (2020); *see also Reid*, 354 U.S. at 9 (plurality opinion)

("[I]t seems peculiarly anomalous to say that trial before a civilian judge and by an independent jury picked from the common citizenry is not a fundamental right.").

Despite this, federal courts have routinely rejected extending this "fundamental" Sixth Amendment right to a jury trial to "unincorporated" territories. *See, e.g.*, *Commonwealth of N. Mar. I. v. Atalig*, 723 F.2d 682, 688 (9th Cir. 1984) (holding the Sixth Amendment doesn't apply in the Northern Mariana Islands); *Gov't of the V.I. v. Bodle*, 427 F.2d 532, 533 n.1 (3d Cir. 1970) (holding the Sixth Amendment only applies in the Virgin Islands because "Congress . . . has provided the right to a jury trial in criminal cases to the inhabitants of the Virgin Islands by virtue of the Revised Organic Act of 1954"); *King v. Morton*, 520 F.2d 1140, 1147 (D.C. Cir. 1975) (declining to hold the Sixth Amendment right to a jury trial is fundamental as applied to American Samoa and remanding).[5]

Cases like *Balzac* resulted in countless lower court opinions sanctioning government actions that would be considered egregious civil-rights violations in the

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[5] A notable exception is the United States Court for Berlin, "created by the High Commissioner for Germany" with "the mandate . . . limited . . . to criminal cases within the U.S. sector of Berlin." David J. Bederman, *Extraterritorial Domicile and the Constitution*, 28 Va. J. Int'l L. 451, 479–80 (1988). That court, in a case heard by a federal judge from New Jersey, determined "the holdings in the *Insular Cases* that trial by jury in criminal cases was not 'fundamental' in American law . . . was thereafter authoritatively voided in *Duncan*." *United States v. Tiede*, 86 F.R.D. 227, 252 (U.S. Ct. Berlin 1979) (Stern, J.). And so Germans living in American-occupied post-war Berlin "charged with criminal offenses [by the United States] have constitutional rights, including the right to a trial by jury," *id.* at 228, while Americans living in U.S. territories still do not.

mainland United States. For example, shortly after *Balzac* was decided, members of the Virgin Islands press were prosecuted for libel after publishing articles critical of the police and the courts. *See, e.g.*, *People v. Francis*, 1 V.I. 66 (D.V.I. 1925) (convicting same editor of libel for publishing articles critical of the police); *In re Contempt Proceedings against Francis*, 1 V.I. 91 (D.V.I. 1925) (holding editor of local newspaper in contempt for publishing article critical of criminal prosecutions conducted without a jury).

The United States points to a more recent example in urging reversal, *Tuaua v. United States*, 788 F.3d 300 (D.C. Cir. 2015). (United States Brief at 21). There, the United States Court of Appeals for the District of Columbia Circuit expressly invoked the *Insular Cases* to reject a claim to birthright citizenship made by American Samoans.

The D.C. Circuit rationalized its reliance on the *Insular Cases*—despite acknowledging "some aspects of the *Insular Cases*' analysis may now be deemed politically incorrect"—by insisting "the framework remains both applicable and of pragmatic use in assessing the applicability of rights to unincorporated territories." *Tuaua*, 788 F.3d at 307. Under that framework, only "fundamental limitations in favor of personal rights" are guaranteed to the residents of "unincorporated" territories, with birthright citizenship apparently not being one of them, *id.* at 307,

even though "United States citizenship itself is a fundamental right." *Mondaca-Vega*, 808 F.3d at 431 (citing *Trop*, 356 U.S. at 93 (plurality opinion)).

In short, the framework created by the *Insular Cases* serves only to deny the one thing it purported to grant—fundamental constitutional rights. Instead, the D.C. Circuit's expansive reading of the *Insular Cases* essentially grants Congress "the power to switch the Constitution on or off at will"—something the Supreme Court squarely rejected. *Boumediene*, 553 U.S. at 765.

Nothing in the *Insular Cases* dictates that outcome here, and nothing prevents this Court from acknowledging the fundamental right of every person born on American soil to American citizenship. This Court should decline the invitation of the United States to add one more constitutional right to the long list of rights that are "fundamental" only when invoked by an American in the mainland.

The Bar Association urges the Court to take this opportunity to rectify (at least in this one respect) the broken promise of the *Insular Cases* by vindicating the fundamental constitutional right of Americans born in U.S. territories to citizenship.

B. The Citizenship Clause puts citizenship beyond the power of both Congress and the states to regulate or destroy.

1. *By their own terms, the Insular Cases only grant Congress the authority of a state government when legislating for a territory.*

The Court should affirm the district court's decision "harmonizing the *Insular Cases* with *Wong Kim Ark*" and "hold[ing] that the Citizenship Clause of the

Fourteenth Amendment is a Constitutional provision that is applicable to American Samoa." *Fitisemanu v. United States*, 426 F. Supp. 3d 1155, 1196 (D. Utah 2019). This is an easy task—nothing in the *Insular Cases* even purports to give Congress the discretion to dictate when and where the Fourteenth Amendment applies.

Under the Territorial Clause, "Congress [has] the 'power to dispose of and make all needful Rules and Regulations respecting the Territory . . . belonging to the United States.'" *Aurelius Inv., LLC*, 915 F.3d at 843 (quoting U.S. Const. art. IV, § 3, cl. 2). "The Territorial Clause is one of general application authorizing Congress to engage in rulemaking for the temporary governance of territories." *Id.* at 851.

The *Insular Cases* interpreted this constitutional language to provide that "in legislating for [territories] Congress exercises the combined powers of the general and of a state government." *Downes v. Bidwell*, 182 U.S. 244, 266 (1901); *see also Palmore v. United States*, 411 U.S. 389, 403 (1973) ("In legislating for [territories], Congress exercises the combined powers of the general, and of a state government." (quoting *Am. Ins. Co. v. 356 Bales of Cotton*, 26 U.S. 511, 546 (1828))). "It may do for the territories what the people, under the Constitution of the United States, may do for the states." *De Lima v. Bidwell*, 182 U.S. 1, 196 (1901) (quoting *First Nat'l Bank v. Yankton Cty.*, 101 U.S. 129, 133 (1879)).

So just as "[t]he states have not now, if they ever had, any power to restrict their citizenship to any classes or persons," *United States v. Wong Kim Ark*, 169 U.S.

649, 678 (1898), Congress likewise does not have the power to restrict citizenship when exercising the "powers . . . of a state government" under the Territorial Clause. *See Saenz v. Roe*, 526 U.S. 489, 507–08 (1999) ("[T]he protection afforded to the citizen by the Citizenship Clause . . . is a limitation on the powers of the National Government as well as the States.").

There is nothing in the *Insular Cases* supporting the position taken by the United States in this case. This Court should not "give[] any further expansion" to the *Insular Cases* by extending them to this new circumstance. *Reid*, 354 U.S. at 14.

2. *Reading the Insular Cases to allow Congress to act as a state government when legislating for a territory is consistent with then-existing law.*

"When ratified in 1791, the Bill of Rights applied only to the Federal Government." *Timbs v. Indiana*, 139 S. Ct. 682, 687 (2019). And when the *Insular Cases* were decided in the early 1900s, the Supreme Court had yet to hold that the Bill of Rights applied to state governments by operation of the Fourteenth Amendment's due-process clause.

The Supreme Court did not hold the Bill of Rights applied to state governments until many years later, with the Supreme Court subjecting state governments to the requirements of the First Amendment for the first time in 1925. *Gitlow v. New York*, 268 U.S. 652 (1925) (incorporating right to free speech); *see also Near v. Minnesota ex rel. Olson*, 283 U.S. 697 (1931) (freedom of the press);

De Jonge v. Oregon, 299 U.S. 353 (1937) (assembly); *Cantwell v. Connecticut*, 310 U.S. 296 (1940) (free exercise of religion); *Everson v. Bd. of Ed. of Ewing Twp.*, 330 U.S. 1 (1947) (prohibition against establishment of religion); *Edwards v. South Carolina*, 372 U.S. 229 (1963) (right to petition for redress of grievances).

Since then, "with only a handful of exceptions . . . the Fourteenth Amendment's Due Process Clause incorporates the protections contained in the Bill of Rights, rendering them applicable to the States." *Timbs*, 139 S. Ct. at 687 (cleaned up). This includes the Fourth Amendment in the 1960s. *Mapp v. Ohio*, 367 U.S. 643 (1961) (incorporating prohibition on unreasonable search and seizure); *Aguilar v. Texas*, 378 U.S. 108 (1964) (warrant requirement). Same with the Fifth and Sixth Amendments. *Benton v. Maryland*, 395 U.S. 784 (1969) (right against double jeopardy); *Duncan v. Louisiana*, 391 U.S. 145 (1968) (right to a jury trial). The Second Amendment in 2010, *McDonald v. City of Chicago*, 561 U.S. 742 (2010), and the Eighth Amendment prohibition on excessive fines last year. *Timbs*, 139 S. Ct. 682.

So when the *Insular Cases* were decided, the Bill of Rights had no application to a state government. And the holdings of the *Insular Cases*—that the Bill of Rights does not restrict Congress when it acts with the power of a state government in a territory—was consistent with then-existing constitutional law. The *Insular Cases* even acknowledged this distinction in *Hawaii v. Mankichi*, 190 U.S. 197, 211

(1903), noting that "we have also held that the states, when once admitted as such, may dispense with grand juries," when holding that a territorial criminal prosecution did not require a grand jury.

Given that almost every provision of the Bill of Rights now applies against state governments, the *Insular Cases* are a relic of a bygone era of constitutional law. Hopefully they will soon join their contemporaries—such as *Plessy v. Ferguson*, 163 U.S. 537 (1896)—in the ash heap of history.

But even by their own terms, the *Insular Cases* do not support the position of the United States. Even when "Congress exercises the combined powers of the general and of a state government," *Downes*, 182 U.S. at 266, citizenship remains "beyond the power of any governmental unit[] to destroy." *Rogers*, 401 U.S. at 822. And the contention the *Insular Cases* stand for the proposition that Americans living in U.S. territories have no rights but what Congress gives them reads far too much into the *Insular Cases*.

III. CONCLUSION

The continued application of the *Insular Cases* to deny American Samoans—and by extension, all Americans born in U.S. territories—the fundamental constitutional right to citizenship is yet another "further expansion" of the "discredited lineage of cases" embodied in the *Insular Cases*. *Aurelius*, 915 F.3d at 855. The *Insular Cases* do not mandate that outcome, and indeed do not even

support it. This Court should decline the invitation of the United States to deny yet another fundamental constitutional right to those Americans Congress deems to have been born in the wrong part of the country.

The Bar Association urges this Court to affirm the district court and reaffirm the basic premise of the Fourteenth Amendment—that "every person who is born here [is] a citizen; and there is no second or third or fourth class of citizenship." *Bell v. Maryland*, 378 U.S. 226, 249 (1964) (Douglas, J., concurring).

Dated this 12th day of May, 2020.

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I certify under Tenth Circuit Rule 25.4 that on May 12, 2020, I electronically filed a copy of this brief, providing copies to all counsel of record.

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