

July 22, 2020

VIA CM/ECF

Christopher M. Wolpert
Clerk of the Court
U.S. Court of Appeals for the Tenth Circuit
Byron White U.S. Courthouse
1823 Stout Street
Denver, CO 80257

Re: **Rule 28(j) Letter**
Fitisemanu v. United States, Nos. 20-4017 & 20-4019

Dear Mr. Wolpert:

Financial Oversight and Management Board for Puerto Rico v. Aurelius Investment, LLC, No. 18-1334 (June 1, 2020) (“*Aurelius*”) (Exhibit A) supports affirming the district court’s opinion for two reasons.

First, *Aurelius* confirms that the “much-criticized” Insular Cases “should not be further extended” beyond their precise holdings. Slip op. 21 (quoting *Reid v. Covert*, 354 U.S. 1, 14 (1957) (plurality opinion)). *Aurelius* addressed whether the members of the Financial Oversight and Management Board for Puerto Rico had been appointed contrary to the Appointments Clause. See Slip. Op. 2. Some parties in *Aurelius* argued that the Appointments Clause does not apply in Puerto Rico under the Insular Cases. See *id.* at 21. But the Court rejected that argument: the Insular Cases “did not reach this issue, and whatever their continued validity we will not extend them in these cases.” *Id.* at 22 (emphasis added). Thus, the district court was correct here in refusing to extend *Downes v. Bidwell*, 182 U.S. 244 (1901), a case the Government concedes involved the Uniformity Clause, not the Citizenship Clause (see U.S. Br. 18; see also I. Supp. App. 91 (“I concede that this is not a case under the Tax Uniformity Clause, Your Honor.”)), and instead applying *United States v. Wong Kim Ark*, 169 U.S. 649, 659 (1898), which squarely interprets the Citizenship Clause, including its geographic scope.

Second, the “Supreme Court has not curtailed” constitutional rights in the territories “in almost a century,” opting instead to hold constitutional provision after constitutional provision applicable. Answering Br. 47-48. *Aurelius* furthers this uniform trend, holding that the Appointments Clause clearly applies in all territories. In *Aurelius*, because

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“Congress created the Board pursuant to its power under Article IV of the Constitution to ‘make all needful Rules and Regulations respecting the Territory,’” slip op. 5 (quoting U.S. Const. art. IV, § 3, cl. 2), the Court noted, “[s]ome ... argued in these cases that the Appointments Clause simply does not apply,” slip. op. 5. But the Court unanimously rejected that contention, holding that the “the Appointments Clause has no Article IV exception,” *id.* at 7.

Sincerely,

s/ Matthew D. McGill
Matthew D. McGill
Counsel of Record

cc: All Counsel of Record (via CM/ECF)

Enclosures

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**CERTIFICATE OF DIGITAL SUBMISSION
AND PRIVACY REDACTIONS**

I certify that all required privacy redactions have been made in compliance with 10th Cir. R. 25.5 and the digital submission has been scanned for viruses with the latest version of Symantec Endpoint Protection, and according to that program, the digital submission is free of viruses.

Dated: July 22, 2020

s/ Matthew D. McGill
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CERTIFICATE OF SERVICE

I certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Tenth Circuit by using the appellate CM/ECF system on July 22, 2020.

I certify that all participants in the case are registered CM/ECF users, and that service will be accomplished by the appellate CM/ECF system.

Dated: July 22, 2020

s/ Matthew D. McGill

Matthew D. McGill