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' PETITION FOR REHEARING

Dwyer Arce
KUTAK ROCK LLP
The Omaha Building
1650 Farnam Street
Omaha, Nebraska 68102
(402) 346-6000
Dwyer.Arce@KutakRock.com

Counsel for Amicus Curiae

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

FEDERAL CASES

OTHER AUTHORITIES

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, American Samoa, and now a panel of this Court, demonstrates the Bar Association's duty to again 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 grant en banc rehearing, vacate the panel decision, and affirm the decision of the district court.

Despite the United States Supreme Court's admonition just last year that it would "not extend" the "much-criticized 'Insular Cases' and their progeny . . . .

[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.

whatever their continued validity," *Fin. Oversight & Mgmt. Bd. for Puerto Rico v. Aurelius Inv., LLC*, 140 S. Ct. 1649, 1665 (2020), the panel decision does just that, adopting the arguments of the United States to once again expand the *Insular Cases* and deny yet another fundamental right to Americans living in U.S. territories.

"[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 panel decision has now sanctioned the federal government's claimed discretion to destroy the citizenship of Americans born in U.S. territories.

Although this case seeks to vindicate the citizenship of American Samoans, allowing the panel decision to stand would call into question the foundation and durability of the citizenship of Americans born in the Virgin Islands, and of every American born in any U.S. territory. It sanctions a second class, statutory citizenship that exists only at the whim of Congress, sending the unequivocal message to Virgin Islanders, Puerto Ricans, Guamanians, and Northern Mariana Islanders alike that their citizenship—a foundational principle of every American's identity—can be destroyed at any moment by a governmental unit in which they have no voting representation.

The Bar Association urges this Court to grant en banc rehearing, vacate the

panel decision, 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)).

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 v. Bush*, 553 U.S. 723, 756 (2008). 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). 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).

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, other federal courts—and now the Tenth Circuit—have routinely relied on the *Insular Cases* to refuse 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*, 140 S. Ct. 1390, 1397 (2020); *see also Reid v. Covert*, 354 U.S. 1, 9 (1956) (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 does not 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); but see *United States v. Tiede*, 86 F.R.D. 227, 252 (U.S. Ct. Berlin 1979) (Stern, J.) (holding that Germans living in U.S.-occupied Berlin "charged with criminal offenses [by the United States] have constitutional rights, including the right to a trial by jury").

Cases like *Balzac* resulted in countless lower court opinions sanctioning government actions that would be considered egregious civil-rights violations in the 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 editor of local newspaper of libel for publishing articles critical of the police); *In re Contempt Proceedings against Francis*, 1 V.I. 91 (D.V.I. 1925) (holding same editor in contempt for publishing article critical of criminal prosecutions conducted without a jury). The framework created by the *Insular Cases* serves only to deny the one thing it purported to grant—fundamental constitutional

rights. Instead, the panel decision'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 the en banc Tenth Circuit from acknowledging the fundamental right of every person born on American soil to American citizenship. 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 grant en banc rehearing and 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." U.S. Const. art. IV, § 3, cl. 2. 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. The en banc Court should heed the direction of the Supreme Court to "not extend" the "much-criticized 'Insular Cases' and their progeny . . . . whatever their continued validity." *Fin. Oversight & Mgmt. Bd. for Puerto Rico v. Aurelius Inv., LLC*, 140 S. Ct. 1649, 1665 (2020).

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 extension of 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). And later the extension of 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 was extended in 2010, *McDonald v. City of Chicago*, 561 U.S. 742 (2010), and the Eighth Amendment prohibition on excessive fines was recently added to that list. *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 as a state government under the Territorial Clause—was consistent with constitutional law as it existed at the time. 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 or the panel decision. 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 *Insular Cases* do not mandate the outcome of the panel decision, and indeed do not even support it. This Court should grant en banc rehearing and reject the attempt 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 6th day of August, 2021.

Respectfully Submitted,

By */s/ Dwyer Arce*

Dwyer Arce
KUTAK ROCK LLP
The Omaha Building
1650 Farnam Street
Omaha, Nebraska 68102
(402) 346-6000
Dwyer.Arce@KutakRock.com

Counsel for Amicus Curiae
Virgin Islands Bar Association

CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMIT

I certify under Federal Rule of Appellate Procedure 32(g)(1) that the word count does not exceed 2,600 words because, excluding the parts of the document exempted by Federal Rule of Appellate Procedure 32(f), this document contains 2,539 words.

This document complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type-style requirements of Federal Rule of Appellate Procedure 32(a)(6) because this document was prepared in a proportionally spaced typeface using Microsoft Word for Office 365 in size 14 Times New Roman font.

/s/ Dwyer Arce

CERTIFICATE OF DIGITAL SUBMISSION

I certify all required privacy redactions have been made as required by Tenth Circuit Rule 25.5.

I certify that paper copies of this brief will be provided as required by Tenth Circuit Rules 29.2 and 31.5, and the ECF submission will be an exact copy of those documents, once notice is received that this electronic filing is compliant.

I certify the digital submissions have been scanned for viruses with the most recent version of a commercial virus scanning program, CylancePROTECT (version 2.0), and according to the program are free of viruses.

/s/ Dwyer Arce

CERTIFICATE OF SERVICE

I certify under Tenth Circuit Rule 25.4 that on August 6, 2021, I electronically filed a copy of this brief, providing copies to all counsel of record.

Joseph H. Hunt
John W. Huber
Sharon Swingle
Brad Hinshelwood
U.S. DEPARTMENT OF JUSTICE, CIVIL DIVISION
950 Pennsylvania Avenue, N.W., Room 7256
Washington, D.C. 20530
(202) 514-7823
bradley.a.hinshelwood@usdoj.gov

Counsel for Defendants-Appellants

Michael F. Williams, P.C.
Kathleen A. Brogan
Britney A. Lewis
Lauren N. Beebe
Thomas S. Vaseliou
KIRKLAND & ELLIS LLP
1301 Pennsylvania Avenue NW
Washington, D.C. 20004
(202) 389-5000
mwilliams@kirkland.com

Counsel for Intervenor Defendants-Appellants

Matthew D. McGill
Jacob T. Spencer
Jeremy M. Christiansen
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 955-8500
MMcGill@gibsondunn.com
JSpencer@gibsondunn.com
JChristiansen@gibsondunn.com

Neil C. Weare
EQUALLY AMERICAN LEGAL DEFENSE & EDUCATION FUND
1300 Pennsylvania Avenue, N.W., #190-413
Washington, D.C. 20004
(202) 304-1202
NWeare@equallyamerican.org

Charles V. Ala'ilima
THE LAW OFFICES OF CHARLES V. ALA'ILIMA, PLLC
P.O. Box 1118
Nu'uuli, American Samoa 96799
(684) 699-6732
cvalaw@msn.com

Counsel for Appellees

/s/ Dwyer Arce