No. 19-1390

IN THE

United States Court of Appeals for the First Circuit

UNITED STATES OF AMERICA,
Plaintiff-Appellant,

v.

JOSE LUIS VAELLO-MADERO,
Defendant-Appellee.

On Appeal from the United States District Court
for the District of Puerto Rico
Case No. 17-cv-2133

BRIEF OF AMICUS CURIAE VIRGIN ISLANDS BAR ASSOCIATION IN SUPPORT OF APPELLEE'S 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]

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. The Bar Association's duty to intervene in this matter as an advocate for the people of the Virgin Islands is explained succinctly by the brief of the United States. It explains that "[f]or purposes of [Supplemental Security Income (SSI)], Congress specifically" excluded "residents of Puerto Rico, Guam, American Samoa, and the U.S. Virgin Islands" from receiving benefits, but "separately extended SSI benefits to residents" of the Northern Mariana Islands. (United States Brief at 2–3). So like

[1] This brief, the positions taken in it, and the Bar Association's decision to file, 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. Pursuant to Federal Rule of Appellate Procedure 29(a)(4)(E), the Bar Association states 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).

Puerto Rico, the people of the Virgin Islands are excluded from federal disability benefits, while these benefits are available to Americans in the 50 states, the District of Columbia, and—underscoring the arbitrary nature of the exclusions—the Northern Mariana Islands.

The Bar Association urges this Court to affirm the district court and send a clear message: Americans anywhere are Americans everywhere, and cannot be arbitrarily excluded from federal programs. Although this Court's decision won't have an immediate impact in the Virgin Islands, a decision distinguishing the *Insular Cases*—and declining to give "any further expansion" to this "discredited lineage of cases," *Aurelius Inv., LLC v. Puerto Rico*, 915 F.3d 838, 855 (1st Cir. 2019), *cert. granted* 2019 WL 1790539 (U.S. 2019)—would set precedent laying the groundwork for decisions from the Third Circuit, Ninth Circuit, and Supreme Court vindicating the rights of Americans living in U.S. territories.

II. INTRODUCTION

"In 1917, the United States purchased what was then the Danish West Indies from Denmark 'in exchange for $25 million in gold and American recognition of Denmark's claim to Greenland.'" *Vooys v. Bentley*, 901 F.3d 172, 176 (3d Cir. 2018) (en banc). The treaty transferring the Virgin Islands to the United States became effective March 31, 1917. *Malloy v. Reyes*, 61 V.I. 163, 168 n.2 (2014). March 31 is commemorated as an annual public holiday in the Virgin Islands—Transfer Day, *see*

1 V.I.C. § 171—and Virgin Islanders celebrated 100 years under the American flag in 2017.

"Now home to a population of around 100,000, the U.S. Virgin Islands became an unincorporated American territory in 1954." *Vooys*, 901 F.3d at 176; *see* 48 U.S.C. § 1541(a) ("The Virgin Islands [is] declared an unincorporated territory of the United States of America."). In addition to their shared status as "unincorporated" territories, Puerto Rico and the Virgin Islands have many other similarities. Like Puerto Rico, people born in the Virgin Islands are U.S. citizens. 8 U.S.C. § 1406(b) ("[A]ll persons born in those islands on or after February 25, 1927, and subject to the jurisdiction of the United States, are declared to be citizens of the United States at birth.").

And like Puerto Rico, "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) (citing 48 U.S.C. § 1711). The Virgin Islands is also majority non-White, with 77.5 percent of the population identifying as Black or African-American, and only 16.7 percent of the population identifying as White.[2]

[2] University of the Virgin Islands, *2010 U.S. Virgin Islands Demographic Profile* at 1 (available at https://bit.ly/2YJO4Vz) (last accessed Aug. 6, 2019).

Puerto Rico and the Virgin Islands also shared in the devastation of recent natural disasters. "In September 2017, Hurricanes Irma and Maria made landfall in the Virgin Islands as category-5 hurricanes, resulting in significant damage to the Territory and the declaration of a prolonged state of emergency." *James v. O'Reilly*, 2019 VI 14 ¶ 5, 2019 WL 1996919, at *1 (2019); *see also Wycoff v. Gabelhausen*, No. 2015-cv-70, 2018 WL 1527826, at *1 (D.V.I. Mar. 28, 2018) ("In September 2017, the Virgin Islands . . . suffered extensive damage from Hurricanes Irma and Maria."). Even before the hurricanes, many Virgin Islanders were already facing difficult circumstances. As of the 2010 census, over 5,000 Virgin Islanders were categorized as disabled, with only 4 percent of that population employed.[3]

The numbers were even more alarming as of 2014, with "approximately 10% of the USVI population . . . reporting a disability, and within that group, half are between the ages of 18–64 and 44% are over 65 years old."[4] Virgin Islanders also endure unemployment and poverty well above the national average, reporting 18.9 percent of families living below the poverty level and 10.2 percent unemployment.[5]

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[3] *Id.* at 3.

[4] Caribbean Exploratory Research Center, *Community Needs Assessment: Understanding the Needs of Vulnerable Children and Families in the U.S. Virgin Islands Post Hurricanes Irma and Maria* at 27–28 (Feb. 2019) (available at https://bit.ly/2YQjrla) (last accessed Aug. 6, 2019).

[5] *Id.* at 24.

Of the 100,000 people of the Virgin Islands, "65,000 individuals"—*nearly 65 percent of all Virgin Islanders*—were "dependent on government services to address the basic needs of living in the Territory," including "financial, medical, and nutrition support."[6] Further, "86% (15,856) of all USVI children (0–18 years) received Supplemental Nutrition Assistance Program (SNAP) benefits in 2014."[7] While there are few updated post-hurricane statistics, the welfare of Virgin Islanders has undoubtedly declined substantially as a result of the massive devastation.[8]

Virgin Islanders are strong and dedicated Americans[9]—they don't *suffer* poverty, unemployment, and devastating natural disasters, they *endure*. But everyone needs help at times, and while Virgin Islanders are able to take advantage of many federal and territorial assistance programs, they are denied millions of dollars of additional federal assistance that would be available to them if they lived in a state instead of a territory.[10]

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[6] *Id.* at 25.

[7] *Id.* at 26.

[8] National Public Radio, *After 2 Hurricanes, A 'Floodgate' Of Mental Health Issues In U.S. Virgin Islands* (Apr. 23, 2019) (available at https://n.pr/2IS5KtT) (last accessed Aug. 6, 2019).

[9] Virgin Islanders, like all Americans living in U.S. territories, volunteer for military service at a higher per capita rate than elsewhere in the United States. National Conference of State Legislatures, *The Territories: They Are Us* (Jan. 2018) (available at https://bit.ly/2ZFoSAB) (last accessed Aug. 6, 2019).

[10] *See, e.g.*, Judith Solomon, Sr. Fellow, Center on Budget and Policy Priorities, *Medicaid Funding Cliff Approaching for U.S. Territories* (June 19, 2019) (available at https://bit.ly/33eHQAp) (last accessed Aug. 6, 2019) ("Unlike the states, whose

The continued reliance on the *Insular Cases* as justification to limit or deny federal assistance to Americans who need it most in the Virgin Islands, Puerto Rico, and other U.S. territories is yet another "further expansion" of a "discredited lineage of cases" that this Court just recently rejected. *Aurelius*, 915 F.3d at 855.

This Court should reject it again.

III. ARGUMENT

A. The *Insular Cases* have no application to national legislation.

1. *The Insular Cases are limited to defining congressional power under the Territorial Clause.*

Like with another of this Court's recent cases, the *Insular Cases*—a "discredited lineage of cases, which ushered the unincorporated territories doctrine"—"hovers like a dark cloud over this case." *Aurelius*, 915 F.3d at 854–55. Despite the fact that the *Insular Cases* stand as "discredited," this Court still concluded that it "lack[s] the authority to" "reverse the 'Insular Cases.'" *Id.* at 855. Regardless, like in *Aurelius*, "nothing about the 'Insular Cases' casts doubt over [the] analysis" employed by the district court, *id.*, and this Court should affirm.

"[T]he 'Territorial Clause,' provid[es] Congress with the 'power to dispose of and make all needful Rules and Regulations respecting the Territory . . . belonging to the United States.'" *Id.* at 843 (quoting U.S. Const. art. IV, § 3, cl. 2). "The

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federal funding covers a specified share of their Medicaid spending, the territories receive a fixed amount of federal funds as a capped block grant.").

Territorial Clause is one of general application authorizing Congress to engage in rulemaking for the temporary governance of territories." *Id.* at 851.

The Supreme Court 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, 265–66 (1901); *see also Palmore v. United States*, 411 U.S. 389, 403 (1973) ("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))).

This doctrine, first stated in 1828 and expanded in the *Insular Cases*, applies only where Congress exercises the "powers . . . of a *state* government" under the Territorial Clause. Each of the *Insular Cases* interprets and applies congressional enactments applicable exclusively to a territory, as opposed to congressional enactments of national scope—like Social Security and other federal assistance programs—which constitute an exercise of the "powers of the *general* . . . government."

This distinction is demonstrated in the *Insular Cases* themselves,[11] each of which examine the constitutionality of congressional enactments applicable only to U.S. territories.

[11] The *Insular Cases* are often said 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), *Downes v. Bidwell*, 182 U.S. 244 (1901), *Balzac v. Porto Rico*, 258 U.S.

For example, in *De Lima*, the Supreme Court interpreted "an act of Congress, passed March 24, 1900 (31 Stat. at L. 51), applying for the benefit of Porto Rico the amount of the customs revenue received on importations by the United States from Porto Rico."[12] 182 U.S. at 199. In doing so, the Supreme Court reaffirmed that under the Territorial Clause, "Congress has full and complete legislative authority over the people of the territories and all the departments of the territorial governments. It may do for the territories what the people, under the Constitution of the United States, may do for the states." *Id.* (quoting *First Nat'l Bank v. Yankton Cty.*, 101 U.S. 129, 133 (1879)).

Another example is *Mankichi*, where the Supreme Court interpreted "the Newlands resolution," by which "the Hawaiian islands and their dependencies were annexed 'as a part of the territory of the United States.'" 190 U.S. at 209. This legislation was enacted pursuant to the Territorial Clause for the temporary governance of the newly acquired territory of Hawaii, and the question before the Court was whether this legislation immediately extended the protections of the Bill of Rights to criminal defendants in Hawaii. The Supreme Court explained in

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), among others.

[12] *See* 48 U.S.C. § 731a ("All laws, regulations, and public documents and records of the United States in which such island is designated or referred to under the name of 'Porto Rico' shall be held to refer to such island under and by the name of 'Puerto Rico.'").

Mankichi that the subject of the *Insular Cases* was "the power of Congress to annex territory without, at the same time, extending the Constitution over it." *Id.* at 218.

And in *Balzac*, the Supreme Court interpreted the "Organic Act of Porto Rico of March 2, 1917, known as the Jones Act, 39 Stat. 951." 258 U.S. at 313. The Court concluded it was not unconstitutional for a Puerto Rico court try a criminal defendant without a jury because "the purpose of Congress [was not] to incorporate Porto Rico into the United States with the consequences which would follow." *Id.*

The other *Insular Cases* similarly address only the scope of Congress's authority under the Territorial Clause. *See, e.g.*, *Dooley*, 182 U.S. at 240 (applying "the act of Congress imposing a duty on goods from Porto Rico"); *Armstrong*, 182 U.S. at 244 ("This case is controlled by the case of *Dooley v. United States*."); *Downes*, 182 U.S. at 348 ("The inquiry is whether the act of April 12, 1900, so far as it requires the payment of import duties on merchandise brought from a port of Porto Rico as a condition of entry into other ports of the United States, is consistent with the Federal Constitution."); *Ocampo*, 234 U.S. at 98 (interpreting "the act of Congress of July 1, 1902"); *Dorr*, 195 U.S. at 145 (same).

Because the *Insular Cases* address only the Territorial Clause, they have no relevance to the validity of congressional action creating a federal assistance program like Social Security. Such a program isn't created through Congress's Territorial Clause authority, but is "grounded on Article I, Section 8, Clause 1, of

the Constitution (Congress' power to spend and tax in the aid of the 'general welfare')." *Marshall v. Cordero*, 508 F. Supp. 324, 326 n.2 (D.P.R. 1981) (citing *Helvering v. Davis*, 301 U.S. 619 (1937)).

The *Insular Cases* are distinguishable from the case now before the Court, and like in *Aurelius*, this Court shouldn't give "any further expansion" to this "discredited lineage of cases." 915 F.3d at 855.

2. *A "law of the United States" is not exempt from constitutional scrutiny simply because it applies to a territory.*

The distinction between congressional action under the Territorial Clause of Article IV (which was the subject of the *Insular Cases*) and congressional action under Article I is not academic. The Supreme Court has repeatedly held that where Congress enacts a law for a territory under the Territorial Clause (or the related Enclave Clause governing the District of Columbia), it is not a "law of the United States"—it is instead a law of the territory (or District of Columbia).

"Whether a law passed by Congress is a 'law of the United States' depends on the meaning given to that phrase by its context. A law for the District of Columbia, though enacted by Congress, was held to be not a 'law of the United States' within the meaning of [federal law]." *Puerto Rico v. Rubert Hermanos, Inc.*, 309 U.S. 543, 549–50 (1940) (citing *Am. Sec. & Tr. Co. v. Comm'rs of D.C.*, 224 U.S. 491 (1912)). "Likewise, . . . the Organic Act [of Puerto Rico] is not one of 'the laws of the United States'" either. *Id.* at 549–50; *accord Aurelius*,

915 F.3d at 854 ("Congress's exercise of its plenary powers over the District of Columbia under Article I, Section 8, Clause 17, . . . are fairly analogous to those under Article IV.").

The Supreme Court has made this distinction in other instances too. For example, when determining the authority of judges appointed by the President and confirmed by the Senate, whether Congress created the court under Article III or Article IV (or in other instances Article I) is controlling in any case regarding the salary, tenure, and constitutional authority of that judge. *Nguyen v. United States*, 539 U.S. 69, 72 (2003) ("These cases present the question whether a panel of the Court of Appeals consisting of two Article III judges and one Article IV judge had the authority to decide petitioners' appeals. We conclude it did not.").

This is demonstrated by comparing the federal courts of Puerto Rico and the Virgin Islands. While "Puerto Rico . . . has had, since 1966, an Article III court," *Aurelius*, 915 F.3d at 849, "[t]he District Court of the Virgin Islands derives its jurisdiction from Article IV, § 3 of the United States Constitution, which authorizes Congress to regulate the territories of the United States." *United States v. Gillette*, 738 F.3d 63, 70 (3d Cir. 2013); *Vooys*, 901 F.3d at 180–81 ("[T]he District Court of the Virgin Islands as an Article IV court."); 48 U.S.C. § 1614(a) ("The President shall, by and with the advice and consent of the Senate, appoint two judges for the District Court of the Virgin Islands, who shall hold office for terms of ten years and

until their successors are chosen and qualified, unless sooner removed by the President for cause.").

So while the Territorial Clause, as interpreted in the *Insular Cases*, may permit Congress to enact a law of a territory that would otherwise violate a right granted by the Constitution, the *Insular Cases* don't grant Congress the authority to enact a law of the United States—such as the Social Security Act—in violation of those rights.

B. The Fourteenth Amendment incorporation doctrine undermines the validity of the incorporation doctrine of the *Insular Cases*.

The Bar Association acknowledges and respects this Court's recent holding that it "lack[s] the authority to" "reverse the 'Insular Cases.'" *Aurelius*, 915 F.3d at 855. That holding binds future panels of this Court under "[t]he law of the circuit rule." *United States v. Wurie*, 867 F.3d 28, 34 (1st Cir. 2017). But substantial changes in Supreme Court jurisprudence have undermined the entire framework on which the *Insular Cases* are built.

The main consequence of the *Insular Cases* is that Americans living in "unincorporated" U.S. territories don't enjoy the same constitutional rights with respect to the territorial government (or Congress acting as the territorial legislature) as Americans in the states do until the territory is "incorporated" into the United States. This seems entirely anomalous today (particularly because the territorial incorporation doctrine has no basis in the text of the Constitution). But it

may not have seemed so strange in the early 1900s, when even Americans living in states had no federal constitutional rights with respect to their state governments.

"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 restricted the authority of state governments by virtue of the Fourteenth Amendment incorporation doctrine. The Bill of Rights didn't begin to restrict state governments until many years later, with the First Amendment applied against state governments 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*, 283 U.S. 697 (1931) (freedom of the press); *DeJonge 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, "[w]ith only 'a handful' of exceptions, this Court has held that 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. 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 earlier this year. *Timbs*, 139 S. Ct. 682.

So because Congress has all the same powers as a state government with respect to a territory, and when the *Insular Cases* were decided a state government was not restricted by the Bill of Rights, there is at least some logic to holding that Congress, when acting with the power of a state government, would likewise not be restricted by the Bill of Rights. The *Insular Cases* even acknowledged this distinction, noting that "we have also held that the states, when once admitted as such, may dispense with grand juries," when holding that grand juries were not required in a territorial criminal prosecution. *Mankichi*, 190 U.S. at 211.

But this underlying rationale is gone now that the Bill of Rights has been incorporated against the states through the Fourteenth Amendment. This was recognized by a federal judge in 1979, where it was noted that "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*," which incorporated the Sixth Amendment right to a jury trial against the states. *United States v. Tiede*, 86

F.R.D. 227 (U.S. Ct. Berlin 1979) (holding that 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").

While other courts have disagreed with this analysis, *see, e.g.*, *Commw. of N. Mar. I. v. Atalig*, 723 F.2d 682, 688 (9th Cir. 1984), *King v. Morton*, 520 F.2d 1140, 1147 (D.C. Cir. 1975), *Gov't of the V.I. v. Bodle*, 427 F.2d 532, 533 n.1 (3d Cir. 1970), the First Circuit and the Supreme Court appear to have never addressed whether the Fourteenth Amendment's incorporation doctrine undermines the *Insular Cases*. So at least in that respect, the continuing validity of the *Insular Cases* remains unresolved in this Court.

IV. CONCLUSION

The continued application of the *Insular Cases* to limit or deny federal assistance to Americans who need it most in the Virgin Islands, Puerto Rico, and other U.S. territories is yet another "further expansion" of the "discredited lineage of cases" embodied in the *Insular Cases* that this Court just recently rejected. *Aurelius*, 915 F.3d at 855. This Court should reject it again and affirm the decision of the district court striking down the arbitrary exclusion of the residents of Puerto Rico and other territories from the full benefits of the Social Security Act.

Dated this 8th day of August, 2019.

Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE

I certify under Federal Rule of Appellate Procedure 32(g)(1) that the word count does not exceed 6,500 words, or one-half the maximum length authorized by Federal Rule of Appellate Procedure 32(a)(7)(B)(i) for a party's principal brief, because, excluding the parts of the document exempted by Federal Rule of Appellate Procedure 32(f), this document contains 3,777 words.

/s/ Dwyer Arce

CERTIFICATE OF SERVICE

I certify that on August 8, 2019, I filed this brief via CM/ECF, which will automatically complete service to counsel listed below as permitted by Federal Rule of Appellate Procedure 25(c)(2)(A).

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