No. 22-16742

IN THE

United States Court of Appeals for the Ninth Circuit

VICENTE TOPASNA BORJA, ET AL.,
Plaintiffs-Appellants,

v.

SCOTT T. NAGO, ET AL.,
Defendants-Appellees,

On Appeal from the United States District Court
for the District of Hawaii
Case No. 1:20-cv-00433
Hon. Jill A. Otake, Judge of the District Court

BRIEF OF AMICUS CURIAE VIRGIN ISLANDS BAR ASSOCIATION IN SUPPORT OF APPELLANTS' REHEARING PETITION

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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 and the people of the Virgin Islands.[1]

The panel's approval of the discriminatory system created by UOCAVA and UMOVA based only on rational-basis review 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 urges the Court to vacate the panel opinion.

[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).

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) (internal quotation marks omitted). Although they had no formal say in the matter, the residents of St. Croix, St. Thomas, St. John, and Water Island—then known as the Danish West Indies—held "an unofficial referendum on the sale of the islands to the United States [that] passed with a vote of 4,727 in favor and only seven against." *Balboni v. Ranger Am. of the V.I.*, 2019 VI 17, ¶ 39 n.34, 70 V.I. 1048, 1088 n.34. Likewise, "the elected Colonial Councils of St. Thomas-St. John and St. Croix unanimously passed resolutions in support of annexation of the islands by the United States." *Id.*

The treaty transferring the islands from Denmark to the United States became effective March 31, 1917. *Malloy v. Reyes*, 61 V.I. 163, 168 n.2 (2014). The treaty required that "[t]he civil rights and the political status of the inhabitants of the islands shall be determined by the Congress, subject to the stipulations contained in the present

convention." Convention Between the United States and Denmark for Cession of the Danish West Indies, art. 6, Aug. 4, 1916, 39 Stat. 1706. The treaty contains several restrictions reserving certain civil and property rights to Virgin Islanders.

Virgin Islanders' dedication to the United States remains as strong today as it did in 1916, with March 31, Transfer Day, commemorated every year as a public holiday. 1 V.I.C. § 171.

The 1917 annexation was the culmination of Virgin Islanders' half-century struggle to achieve American freedoms. In 1868, when the United States and Denmark were first engaged in negotiation for the sale of St. Thomas and St. John, a referendum was held among the residents of those islands regarding the transfer. "The inhabitants remember the day of the voting as the greatest holiday in the history of the islands. Guns were fired and all the church bells were rung." Isabel Foster, *Natives of Danish West Indies Have Shown Their Strong Feeling*, N.Y. Times (Feb. 26, 1916), available at https://nyti.ms/2HNy3vu (last accessed Oct. 22, 2024). Voters "marched to the polls cheering and singing 'The Star Spangled Banner.'" *Id.* "It was said at the time that there never was a national conquest so proud

and peaceful," with only 22 votes cast against joining the United States. *Id.* Although this early effort was unsuccessful, the strong desire among Virgin Islanders to join the United States never subsided.

As early as 2015, Virgin Islanders began preparations to celebrate 100 years under the American flag, with festivities planned throughout 2017, including "parades, sporting events, concerts, and multi-cultural celebrations to exhibitions and festivals featuring local art, dance and food." Joseph T. Gasper II, *Too Big to Fail: Banks and the Reception of the Common Law in the U.S. Virgin Islands*, 46 Stetson L. Rev. 295, 365 n.6 (2017); *see* 3 V.I.C. § 338 (establishing the "Centennial Commission of the Virgin Islands").

The patriotism of Virgin Islanders—indeed, of all those living in American territories—runs so deep that the territories have the highest per capita rates of military enlistment than anywhere in the country. Despite this strong desire to serve their country, Virgin Islanders and others living in American territories are categorically excluded from having any meaningful voice in the federal government.

III. ARGUMENT

A. This Court now joins an ignominious list of courts that have refused to uphold the fundamental rights of those living in American territories.

Despite the enduring affection Virgin Islanders have for the United States, a federal court of appeals has once again refused to defend their rights as Americans. The panel declined to apply strict-scrutiny review to a restriction discriminating among United States citizens living in American territories. If any other group of Americans were selectively granted the right to vote, while others were expressly excluded, case law unambiguously mandates strict-scrutiny review. But here, because this case involves politically powerless and federally disenfranchised citizens living in American territories, the panel concluded that this overt discrimination must pass only the most lenient standard of rational-basis review. The plaintiffs in the Virgin Islands and Guam have no voting representation in Congress and lack any political recourse to this discrimination. This should be reason enough to recognize the need for greater judicial scrutiny, not less.

By applying this lenient standard, this Court now joins other federal courts that routinely disregard the fundamental constitutional

rights of citizens living in American territories. *See, e.g.*, *Segovia v. United States*, 880 F.3d 384, 390 (7th Cir. 2018) ("[T]he residents of the territories have no fundamental right to vote in federal elections."); *Fitisemanu v. United States*, 1 F.4th 862, 878 (10th Cir. 2021) ("[B]irthright citizenship does not qualify as a fundamental right under the Insular framework."); *Tuaua v. United States*, 788 F.3d 300, 307-08 (D.C. Cir. 2015) (rejecting "the existence of a fundamental right to citizenship for persons born in the United States' unincorporated territories.").

The panel did not expressly rely on the "much-criticized 'Insular Cases.'" *Fin. Oversight & Mgmt. Bd. for Puerto Rico v. Aurelius Inv., LLC*, 590 U.S. 448, 472 (2020). But the insidious doctrine of second-class citizenship invented by the *Insular Cases* infects this case just as much as the other decisions that expressly rely on it. Indeed, the panel opinion expressly relies on the purported differences between the CNMI and other unincorporated territories to justify denying the appellants the right to vote. *See Borja v. Nago*, 115 F.4th 971, 983-84 (9th Cir. 2024).

The en banc Court should revisit the panel decision.

B. The distinction drawn between the CNMI and other territories is illusory.

The panel opinion emphasized that "the covenant governing the CNMI's consensual relationship with the United States continues to impose unique restrictions on the United States's ability to enact new legislation governing the CNMI." *Borja*, 115 F.4th at 983. The panel did not explain how this distinguishes the CNMI from other territories, especially the Virgin Islands.

The panel decision, among other decisions of this Court, rely on the Covenant to Establish a Commonwealth of the Northern Mariana Islands in Political Union with the United States of America to distinguish CNMI from other territories. *Id.* (citing *United States ex rel. Richards v. De Leon Guerrero*, 4 F.3d 749, 752 (9th Cir. 1993)). Through this covenant, according to this Court, the CNMI "voluntarily joined the United States on negotiated terms." *Id.* at 974. Based on this observation, the Court has held that "it is solely by the Covenant that we measure the limits of Congress' legislative power," without regard to what would otherwise be permitted under the Territory Clause. *Richards*, 4 F.3d at 754.

What this Court has never explained is how this covenant and CNMI's voluntary agreement to join the United States distinguishes it from other territories. Like CNMI, the Virgin Islands became part of the United States under a negotiated treaty between the elected representatives of the Danish West Indies (the Danish government) and the United States. Like in CNMI, Virgin Islanders overwhelmingly approved joining the United States. In fact, there was stronger support in the Virgin Islands for joining the United States than in CNMI. The Virgin Islands legislative bodies unanimously approved the transfer to the United States, and the Virgin Islands electorate approved the transfer with only 22 votes against.

The treaty transferring the Virgin Islands to the United States contained restrictions on the authority similar to—although not as extensive as—those contained in the CNMI covenant. The treaty requires that "[t]he civil rights and the political status of the inhabitants of the islands shall be determined by the Congress, *subject to the stipulations contained in the present convention*." Convention Between the United States and Denmark for Cession of the Danish West Indies, art. 6, Aug. 4, 1916, 39 Stat. 1706 (emphasis added). Yet it

does not appear any court has explained why the CNMI covenant creates "unique restrictions" on the authority of Congress to legislate for the CNMI, and supersedes the plenary authority of Congress under the Territory Clause, while the treaty transferring the Virgin Islands to the United States does not.

The en banc Court should address and resolve this discrepancy in its case law and recognize that the existence of the CNMI covenant does not provide a rational basis for providing fewer voting rights to those living in the Virgin Islands, Guam, or other territories compared to those who live in the CNMI.

IV. CONCLUSION

The Virgin Islands Bar Association urges this Court to vacate the panel opinion, reverse the district court, and uphold the right of Virgin Islanders—and all citizens living in American territories—to equal protection of the law.

Dated this 24th day of October, 2024.

Respectfully submitted,

By */s/ Dwyer Arce*

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