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**Testimony On “Voting Rights and Election Administration
in the U.S. Virgin Islands and Other Territories”**

**Subcommittee on Elections
Of the Committee on House Administration**

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Chair Marcia L. Fudge, Ranking Member Rodney Davis, and distinguished subcommittee members:

Thank you for the opportunity to testify in support of full voting rights for the nearly 4 million Americans living in U.S. Territories – 98% of whom are racial or ethnic minorities. I am Neil Weare, President and Founder of Equally American Legal Defense & Education Fund.

Equally American is the only public interest law organization focused exclusively on advancing equality and voting rights in U.S. Territories. Building on the progress of earlier civil rights movements, we approach our work through a civil rights lens. We do not take a position on political status in the Territories, other than to reject the undemocratic status quo. In other words, we seek to obtain full constitutional rights and political equality for disenfranchised communities in the Territories while also supporting these communities’ right to determine their own future relationship to the United States. Through our impact litigation we hope to build the kind of broad awareness and consensus at both a national and local level needed to end the second-class treatment of U.S. citizens in the Territories.

Advancing Voting Rights and Political Participation in U.S. Territories

Last week, on the 76th Anniversary of the Liberation of Guam from a brutal Japanese occupation, Equally American led a group of civil rights organizations to call on the Inter-American Commission on Human Rights (IACHR) to hold a thematic hearing on the denial of voting rights in U.S. Territories and the District of Columbia.¹ This follows our prior advocacy in *Rosselló v. United States*, where we represented current and former elected officials from the U.S. Virgin Islands, Guam, and the Northern Mariana Islands – Democrats and Republicans alike – to argue before the IACHR that the denial of voting rights in the Territories violates not only our Nation’s foundational principles, but also U.S. obligations under international law.² The State Department’s response to this legal challenge was that U.S. citizens in the Territories are “free to move to any state of the United States, where they can take up residence and exercise their voting

¹ Equally American, [Equally American Calls for Human Rights Commission to Examine Disenfranchisement in U.S. Territories and DC](#), EQUALLY AM. BLOG (July 21, 2020).

² Brief of Amici Curiae, *Rosselló v. United States*, [Case 13-326](#), Inter-Am. Comm’n H.R. (2018).

rights.”³ A decision in this case is pending, but one thing is clear: the right to vote should not depend on where you happen to live. No U.S. citizen should have to move to be able to vote.

On Veterans Day in 2015, Equally American filed a federal lawsuit on behalf of Luis Segovia and other residents of Guam, the U.S. Virgin Islands, and Puerto Rico who would have been able to vote for President in their former state of residence had they lived literally anywhere else outside the 50 states, including other Territories or even foreign countries. Luis and three other plaintiffs were decorated veterans who had honorably served in the U.S. Armed Forces, swearing an oath to “support and defend the Constitution of the United States” and to “obey the orders of the President of the United States.” Yet, despite their service, they remained disenfranchised, unable to vote for their Commander-in-Chief, and denied equal protection of the law.

In 2005, Luis was deployed for 18 months in Iraq as part of Operation Iraqi Freedom. Serving at Forward Operation Base Marez near Mosul, one of his primary missions was providing security for the 2005 Iraqi election. He could not have imagined then that 15 years later he would be disenfranchised based simply on a change in address, especially after he would go on to serve two tours in Afghanistan as part of Operation Enduring Freedom. With the Supreme Court having denied review of his case in 2018, this November Luis will remain on the sidelines of democracy, a spectator rather than a participant despite his three tours of service. A decorated veteran like Luis deserves better. And Luis’s story is not unique.

U.S. Territories: On the Front Lines Every Day

U.S. Territories have a proud tradition of military service. Over 100,000 veterans living in the Territories have served to defend our Nation’s democratic and constitutional principles. Yet they remain disenfranchised simply because of where they live. More than 20,000 veterans from the Territories served in Iraq and Afghanistan, with nearly 100 making the ultimate sacrifice. Military service rates in the Territories exceed any State, and casualty rates for the Territories during these conflicts range from three, four, to even seven times the national average, as is the case in American Samoa. Service members from the Territories have been awarded the Medal of Honor by the President of the United States on multiple occasions, yet denied the right to vote for President even as they receive that honor. Voting rights should not be denied these patriotic citizens, or the communities in which they live.

The contributions of citizens in the Territories to our Nation’s security is not limited to service in uniform. Guam, for instance, is often called the “tip of the spear” because of its proximity to threats in Asia, hosting forward deployed weapons like the B-2 stealth bomber and other powerful military assets. At the same time, nearly one-third of Guam’s land is occupied by the U.S. military. Because of the military assets stationed in Guam, North Korea has made credible threats to attack the island with nuclear weapons.⁴ Possible military threats against Guam from China or other adversaries are also taken seriously in military circles.⁵ If citizens in Guam and

³ [U.S. Consolidated Response to Petitioners Merits Submission](#), *Rosselló v. United States* (2018).

⁴ Choe Sang-Hun, [North Korean Threat to Guam Tests Credibility of Kim and Trump](#), *NY Times* (Aug. 10, 2017).

⁵ David Ax, [China Aims Missiles At Guam. How Should the Pentagon Defend America’s Pacific Bomber Base?](#), *Forbes* (July 23, 2020).

other Territories face a disproportionate share of military threats, should they not have some say in electing the leaders who make America’s national security decisions?

Structural Political Inequality Results in Structural Economic Inequality

Political inequality in U.S. Territories has resulted in significant economic inequality, demonstrating why the right to vote must be viewed as a kitchen table issue, not just a matter of principle. Deprived of a voice in presidential elections and voting representation in Congress, residents of U.S. Territories are short-changed in a range of federal benefits programs that most Americans take for granted.

Disparities in federal Medicaid policy leave citizens in the Territories without the funding that ensures a basic level of healthcare sustainability to most American communities.⁶ Throughout the country, Medicaid enables providers to care for low-income Americans and to invest in equipment, infrastructure, and health-worker salaries. Congress allocates Medicaid funds to states based on residents’ per capita income. But it has historically allocated funds to Territories at rates associated with the wealthiest States, like California, rather than the higher rates associated with states with similarly low per capita incomes. Congress also caps Territories’ funds at an arbitrary dollar amount that falls well below actual need.⁷ Although Congress increased Medicaid funding to all Territories in response to Hurricanes Irma and Maria, this funding bump expires in 2021—setting the stage for a Medicaid cliff that has life or death consequences.

NMI Congressman Gregorio Kilili Sablan has introduced bipartisan legislation to eliminate Medicaid’s general funding limitations for Territories and thereby enable the more than 4 million Americans living in U.S. Territories to fully participate in the Medicaid program.⁸ We commend Congressman Sablan’s leadership and hope that Congress will enact this important legislation. But if history is any guide, a lack of voting rights in Congress will likely mean these communities will continue waiting to be treated the same as other Americans.

Another example of how a lack of voting rights in the Territories leads to benefits discrimination is the Supplemental Security Income program. Under federal law, otherwise eligible low-income aged, blind, or disabled Americans living in the Virgin Islands, Puerto Rico, Guam, and American Samoa are entirely *precluded* from receiving SSI benefits solely based on where they happen to live. So, for example, if someone receiving SSI benefits moves from Ohio or Illinois to the Virgin Islands or Guam, their benefits will end even as their very real needs continue. This discriminatory treatment unjustly disqualifies some of America’s most vulnerable citizens from accessing the basic benefits they need and deserve.

The U.S. Court of Appeals for the First Circuit recently struck down this statutory discrimination as an unconstitutional denial of equal protection in *United States v. Vaello Madero*. According to Judge Torruella, “[t]he categorical exclusion of otherwise eligible . . . residents from

⁶ Selena Simmons-Duffin, [America’s ‘Shame’: Medicaid Funding Slashed In U.S. Territories](#), NPR.org (November 20, 2019).

⁷ Lena O’Rourke, [Congress is Holding Health, Wellbeing of U.S. Territory Residents in the Balance](#), CLASP.org (December 19, 2019).

⁸ Insular Area Medicaid Parity Act, [H.R. 6495](#), 116th Cong. (2020).

SSI is not rationally related to a legitimate government interest.”⁹ *Vaello Madero* will almost certainly be taken up by the Supreme Court. But Congress need not and should not wait for the Supreme Court to say whether this kind of discrimination is unconstitutional for Congress to know it is wrong. Congresswoman Jenniffer González-Colón has proposed bipartisan legislation that would include all the Territories in the SSI program.¹⁰ If residents of the Territories had full voting representation in Congress, this discrimination would likely be remedied in quick order. Absent voting rights, unfortunately this kind of legislation faces tough odds.

COVID-19 is another example where the federal response has allowed too many residents of Territories to fall through the cracks. The Virgin Islands was recently called “the hottest of hotspots” in the current pandemic, exposing gaps in the federal response and necessitating congressional action to avoid long-term harm to the Territory’s economy.¹¹

The denial of voting rights in the Territories means these vital decisions are being made in the absence of the usual democratic checks and balances. The grim reality is that until residents of the Territories are able to vote for President and have voting representation in Congress, decisions will continue to be made without their input that could be the difference between life or death for too many of these U.S. citizens.

Ongoing Disenfranchisement a Legacy of the *Insular Cases*

Underlying the ongoing disenfranchisement and inequality facing U.S. citizens in the Territories is the shameful legacy of the *Insular Cases*, a series of controversial decisions which for over a century have relegated those living in the Territories to second-class status.¹² The same Justices who ruled in *Plessy v. Ferguson* to justify Jim Crow and racial segregation decided the *Insular Cases*, which invented a distinction between so-called “incorporated” and “unincorporated” Territories. The territorial incorporation doctrine gave the Court’s imprimatur for the acquisition of overseas Territories without any promise of eventual political equality. In the most prominent of these cases, *Downes v. Bidwell*, Justice Brown distinguished between what he called “natural” and “artificial” rights, classifying voting rights among the latter, which he believed could be perpetually withheld by Congress.¹³

Thus, even as the *Insular Cases* are perhaps best known for restricting the application of certain constitutional requirements in so-called “unincorporated” Territories, their most far-reaching effect has been to justify the perpetual denial of political equality to these communities. Unlike *Plessy*’s doctrine of “separate but equal,” which has long been overturned, the *Insular Cases* doctrine of “separate and unequal” remains valid Supreme Court precedent. As recently as June 2020, the Supreme Court had the opportunity to overrule the *Insular Cases* in *Financial Oversight and Management Board for Puerto Rico v. Aurelius Investment, LLC*, but failed to act.¹⁴

⁹ United States v. Vaello-Madero, 956 F.3d 12, 17 (1st Cir. 2020).

¹⁰ Supplemental Security Income Equality Act, [H.R. 947](#), 116th Cong. (2019).

¹¹ Colby Hall, [The Biggest Coronavirus Hotspot No One Is Talking About](#), MSN.com (July 15, 2020).

¹² Neil Weare, [Why the Insular Cases Must Become the Next Plessy](#), HARV. L. REV.: BLOG (Mar. 28, 2018).

¹³ Downes v. Bidwell, 182 U.S. 244, 282-83 (1901).

¹⁴ Neil Weare, Kyla Eastling, and Danny Li, [The Supreme Court Just Passed Up a Chance to Overrule Appallingly Racist Precedents](#), Slate.com (June 1, 2020).

The inaction of the Supreme Court with respect to the *Insular Cases* continues to have real consequences for the millions of Americans living in the Territories today.

The *Insular Cases* created what Judge Torruella has described as a “noxious condition that continues to the present day allowing the citizens of the United States who reside in [the Territories] to be treated unequally from those in the rest of the nation solely by reason of their geographical residence.”¹⁵ It is a colonial relationship not substantively unlike the one our Nation was founded in opposition to. Legal scholars from across the ideological spectrum have rejected the *Insular Cases* as inconsistent with the Constitution’s text and spirit.¹⁶

I remain optimistic that one day soon the Supreme Court will overrule the *Insular Cases*. But simply waiting for the Supreme Court to reverse a century of injustice is not enough. I commend Congressman Raúl Grijalva for his bipartisan resolution, H.Res. 641, which calls on the *Insular Cases* to be “be rejected in their entirety” as decisions that have “no place in United States Constitutional law.” Congress has often used its expansive powers over the Territories in ways that perpetuate the injustices of the *Insular Cases*, it is refreshing to see a congressional resolution that seeks to reverse these injustices.

Until the *Insular Cases* are overruled, the federal government will continue relying on them to justify discrimination against residents of the Territories. In May 2020, the United States filed a brief arguing against recognition of birthright citizenship in U.S. Territories that cited the *Insular Cases* in fully *half* of its pages. The United States is appealing a district court decision from December 2019, *Fitisemanu v. United States*, that held people born in U.S. Territories – like those born anywhere else on U.S. soil – have a constitutional right under the Citizenship Clause of the Fourteenth Amendment to be recognized as U.S. citizens.¹⁷ Because that decision has been stayed pending appeals, lead plaintiff John Fitisemanu—who has been a tax-paying, law-abiding, passport-holding resident of Utah for more than 20 years— may be unable to vote this year for President, Governor, or even his local school board, despite the district court’s recognition that he has been a U.S. citizen since the day he was born. Thus, it is not just voting rights that are at stake for residents of the Territories, it is citizenship itself.

Both Democrats and Republicans Should Support Expanding Territorial Voting Rights

One political obstacle to the expansion of voting rights in U.S. Territories has been the perception and myth that providing political representation to these Americans would benefit one party over the other. But as the bipartisan makeup of the first panel illustrates, the truth is that voters in the Territories consistently elect both Democrats and Republicans to represent them in all levels of Government. The facts speak for themselves.

In Puerto Rico, Congresswoman González is a Republican, her predecessor a Democrat, and his predecessor a Republican. The current Governor is Republican, her two immediate

¹⁵ Juan R. Torruella, [*Why Puerto Rico Does Not Need Further Experimentation with its Future: A Reply to the Notion of “Territorial Federalism,”*](#) 131 Harv. L. Rev. Forum 65, 69 (2018).

¹⁶ Gary Lawson and Guy Seidman, *The Constitution of Empire* (2004); Sanford Levinson, *Why the Canon Should be Expanded to Include the Insular Cases and the Saga of American Expansionism*, 17 Const. Comment. 241, 145 (2000).

¹⁷ *Fitisemanu v. United States*, 426 F.Supp 3d. 1155 (D. Utah 2019).

predecessors were Democrats, and their predecessor was a Republican. Guam has had more Republicans elected Governor than Democrats, and has elected both Democrats and Republicans to represent them in Congress. The Northern Mariana Islands currently has a Republican Governor and a Democratic Congressman; in American Samoa it is reversed, with a Democratic Governor and a Republican Congresswoman. The Virgin Islands has also elected both Democrats and Republicans as their Governor and Delegate to Congress.

Guam is especially illustrative of the idea that territorial voters are swing voters that both Democrats and Republicans can successfully appeal to. While residents of Guam cannot vote for President, since 1980 a “straw poll” has been included on the ballot to allow residents to indicate who they *would* vote for if they could vote. From 1980 through 2012, residents of Guam – who vote a day ahead of the rest of the nation because Guam sits on the other side of the international date line – have chosen the candidate that went on to win in *every single election*. The streak was finally broken in 2016, but what other American community voted for the winning candidate in nine straight presidential elections?

Conclusion

The United States has long championed democracy both at home and around the world. Indeed, the Declaration of Independence rooted our nation in the principle that governments derive their just powers from the consent of the governed. And from the Fifteenth Amendment to women’s suffrage to the Voting Rights Act of 1965 to Ranking Member Davis’s Counting All Military Votes Act, the arc of American history has bent toward ever more inclusion and representation. Yet, when it comes to the rights of the more than 4 million American citizens living in the Territories, we fall far short of our democratic principles.

This ongoing structural disenfranchisement is particularly concerning because of the undeniable connection it has to issues of race. When America’s overseas Territories were initially acquired, Members of Congress and others were explicit that they viewed the race of the inhabitants of these areas to disqualify them from ever being able to vote for President or have voting representation in Congress. While such racist sentiments are no longer stated so openly, it is not a mere coincidence that more than 98 percent of territorial residents are racial or ethnic minorities.¹⁸

We cannot ignore the fact that by silencing our Territories, we are silencing Americans who have long faced racism, systemic bias, and exclusion because of their race. We cannot erase that tragic history—nor should we permit ourselves to forget it. But it need not be our future. Indeed, Congress has the power to help turn the page on America’s long history of discrimination against those living in our Territories and ensure that the future is one that more closely aligns with the fundamental principles of democracy and representation that our Nation was founded upon.

We ask Congress to act so that citizens in the Territories who cannot vote for President and lack voting representation in Congress can finally have their voices heard. It is the right thing to do, the moral thing to do, and in 2020 it is long overdue.

¹⁸ Stacey Plaskett, [The Left and Right’s Blind Spot in Systemic Racism: The US Colonies](#), THE GRIO (June 24, 2020).