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

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

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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 district court's endorsement of the unequal treatment of Virgin Islanders—even with respect to other territories—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 submits this brief as amicus curiae urging the Court to reverse the decision of the district court.

[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. ARGUMENT

The district court relied in part on an alleged government interest in avoiding the "creat[ion] [of] a class of 'super citizens' whose ability to vote in federal elections—a right not given to territorial residents—would turn on prior residence in a state." ER-34.

This "super citizen" concept appears to originate from an observation from the United States Court of Appeals for the Second Circuit. That court stated that extending UOCAVA to all territories would create "a distinction of questionable fairness among Puerto Rican U.S. citizens, some of whom would be able to vote for President and others not, depending whether they had previously resided in a State." *Romeu v. Cohen*, 265 F.3d 118, 125 (2d Cir. 2001).

Relying on this language, the United States Court of Appeals for the Seventh Circuit later added: "we think it is significant that were we to require Illinois to grant overseas voting rights to all its former citizens living in the territories, it would facilitate a larger class of 'super citizens' of the territories." *Segovia v. United States*, 880 F.3d 384, 391 (7th Cir. 2018).

This Court should take this opportunity to recognize this purported government interest in avoiding "super citizens" as completely without merit. Mandating that all federal voting rights must be denied to all Americans living in the Virgin Islands, Puerto Rico, Guam, and American Samoa as a matter of "fairness" is patently absurd.

Federal courts have routinely turned to "the much-criticized 'Insular Cases' and their progeny" to deny Americans living in U.S. territories countless rights considered fundamental everywhere else in the Nation. *Fin. Oversight & Mgmt. Bd. for Puerto Rico v. Aurelius Inv.*, 140 S. Ct. 1649, 1665 (2020); *see, e.g.*, *United States v. Baxter*, 951 F.3d 128 (3d Cir. 2020) (holding Americans may be subjected to warrantless searches when traveling to or from the U.S. Virgin Islands); *Tuaua v. United States*, 788 F.3d 300, 302 (D.C. Cir. 2015) (holding the Citizenship Clause does not apply to "unincorporated" territories); *Fitisemanu v. United States*, 1 F.4th 862, 873 (10th Cir. 2021) (holding "the Insular Cases provide the more relevant, workable, and, as applied here, just standard" in denying citizenship to American Samoans).

Given this history, to describe anyone living in a U.S. territory as a "super citizen" is ridiculous on its face. The Court should categorically

reject the idea that no American living in a U.S. territory may have their rights vindicated simply because those rights are still denied to others.

III. CONCLUSION

The Virgin Islands Bar Association urges this Court to reverse the district court and reject the nonsensical "super citizen" rationale used to defend the discriminatory treatment of Virgin Islanders and other Americans living in U.S. territories.

Dated this 8th day of May, 2023.

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

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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Signature /s/ Dwyer Arce **Date** May 8, 2023
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