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My name is Rose Cruz Cuison-Villazor. I am Vice Dean and Professor of Law at Rutgers Law School in New Jersey.

Thank you for inviting me to provide testimony on the *Insular Cases* and territorial incorporation doctrine.

As you may know, I am a legal scholar whose work has focused on immigration, citizenship, critical race theory and Asian Americans and the Law and Pacific Islanders and the Law. In my work on Pacific Islanders and the Law, I have written about the *Insular Cases*, which have been published in various journals, including the *California Law Review*, *Harvard Law Review Forum*, and *Southern California Law Review*. My remarks today are based on articles published in those articles and I include links to those articles at the end of my written testimony.

On a personal level, I was born in the Philippines and grew up on the island of Saipan in the Commonwealth of the Northern Mariana Islands (CNMI). I therefore also have a personal connection to issues that involve people in the U.S. territories.

Today, I offer my qualified support for House Resolution 279, which acknowledges "that the United States Supreme Court's decisions in the *Insular Cases* and the "territorial incorporation doctrine" are contrary to the text and history of the U.S. Constitution, rest on racial views and stereotypes from the era of *Plessy v. Ferguson* that have long been rejected, are contrary to the Nation's most basic constitutional principles, and should be rejected as having no place in U.S. constitutional law."

There are three reasons why my support for House Resolution 279, is qualified.

First, I support denouncing the *Insular Cases*' for their racist origins and racial subordination of people in the U.S. territories. The words from the most well-known of the *Insular Cases*, *Downes v. Bidwell*,[1] evidence racism when Justice Brown wrote that the territories were, "inhabited by alien races, differing from us in religion, customs, and. . . .modes of thought," which made it impossible for the United States to govern them "according to Anglo-Saxon principles." Another Supreme Court jurist, Justice White, referred to the millions of people in the U.S. territories as "uncivilized" and "unfit" for citizenship. In light of the country's current reckoning with historical, structural and ongoing racism, it is important to acknowledge how these racist and hurtful words constructed people as racialized and inferior people and rendered them second-class citizens.

Second, I recognize that the *Insular Cases* have led to unequal application of U.S. constitutional principles in the U.S. territories, which has led to the denial of constitutional rights in the territories.

[1] 182 U.S. 244 (1901).

Understanding and amplifying this unknown and complex history is crucial for recognizing the unique harms that people in the U.S. territories have experienced since the 1900s and that these harms are ongoing.[2]

Having said the above, allow me to explain my third point, which addresses why my support for House Resolution 279 is qualified. Despite the racist origins of the *Insular Cases*, it is important to recognize that these cases may be seen in a different light when viewed from the perspective of individuals who negotiated the political agreement known as the "Covenant" that established the commonwealth of the Northern Mariana Islands in political union with the United States.[3] In particular, the Covenant provided that because of the "importance of the ownership of land for the culture and traditions of the people of the Northern Mariana Islands" and "in order to protect them against exploitation and to promote their economic advancement and self-sufficiency," only "persons of Northern Marianas descent" may own "permanent and long-term interests in real property" in the CNMI.[4] Article XII of the CNMI Constitution in turn defines "persons of Northern Marianas descent" as a U.S. citizen or U.S. national "who has at least some degree of Northern Marianas Chamorro or Northern Marianas Carolinian blood or a combination thereof."[5] For purpose of determining Northern Marianas descent, Article XII defines such person as "full-blooded Northern Marianas Chamorro or Northern Marianas Carolinian if that person was born or domiciled in the Northern Mariana Islands by 1950 and was a citizen of the Trust Territory of the Pacific Islands."[6]

Because Article XII restricts landownership in the CNMI based on bloodline, it would arguably be categorized as a racial classification and thereby open to being challenged under the Fourteenth Amendment's Equal Protection Clause. Under conventional equal protection analysis, race-based laws are subjected to the most rigorous and exacting constitutional standard of strict scrutiny, which provides that for the law to survive, it must have a compelling government interest and that the means employed is narrowly-tailored to achieve that compelling government interest. Crucially, laws that are viewed as racially discriminatory are generally struck down.[7]

Article XII faced such an equal protection challenge in the 1980s but survived. In *Wabol v. Villacrusis*,[8] the U.S. Court of Appeals for the Ninth Circuit chose not to use traditional equal protection analysis but instead relied on the *Insular Cases* to uphold Article XII's

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[2] For example, in multiple cases in which Filipinos argued that they were entitled to birthright citizenship because they were born in the Philippines when the islands were subject to the jurisdiction of the United States, several appellate courts relied on the *Insular Cases* to hold that the Citizenship Clause did not apply in the Philippines. The non-recognition of citizenship had concrete and negative consequences, including deportation of Filipinos from the United States and inability to pass down citizenship to family members. *See* Friend v. Reno, 172 F.3d 638 (9th Cir. 1999); Valmonte v. Immigration & Naturalization Serv., 136 F.3d 914, 920 (2d Cir. 1998); Lacap v. Immigration & Naturalization Serv., 138 F.3d 518 (3d Cir. 1998); Rabang v. Immigration & Naturalization Serv., 35 F.3d 1449 (9th Cir. 1994).

[3] Covenant to Establish a Commonwealth of the Northern Mariana Islands in Political Union with the United States of America, Pub. LO. No. 94-241, 90 Stat. 263 (1976) [Covenant].

[4] *See id.* at § 805.

[5] N. Mar. I. Const. art. XII, §4.

[6] *Id.*

[7] *See* Shelley v. Kraemer, 334 U.S. 1 (1948).

[8] 958 F.2d 1450 (9th Cir. 1990).

constitutionality.[9] I discuss in detail the Ninth Circuit's analysis in *Wabol* in my *California Law Review*, which I am including in the written testimony, and in the interest of time, I will not revisit the court's analysis today.[10] But as I explain in that article and subsequent writing, if Article XII were to be challenged again today, and a court were to use equal protection analysis instead of relying on the *Insular Cases*, it would may be struck down because it is race-based. As I explain in that article, equal protection jurisprudence today classifies blood quantum land laws along a political versus racial binary. Significantly, under this binary, courts have upheld laws that protect federally recognized tribes as non-racial, political laws. By contrast, groups that are not federally recognized tribes have seen their laws struck down as racially discriminatory. The most recent Supreme Court case that demonstrates the juxtaposition of race versus political laws with respect to indigenous peoples is *Rice v. Cayetano*, in which the Supreme Court struck down a blood quantum preference for Native Hawaiians as violative of the Fifteenth Amendment.[11]

My goal for today is to prompt a discussion on the limits of equal protection analysis and my concern that courts are ill-equipped to address unique laws that are designed to promote the political and cultural rights of the people of Northern Marianas descent. While Congress would be correct in condemning the *Insular Cases* for their racism, it should also be mindful that the alternative here—equal protection law—might not also be as helpful in protecting the rights of certain indigenous peoples.

In case the Committee finds it helpful, I include below links to my articles that expand on my remarks.

- *Problematizing the Protection of Culture in the* Insular Cases, 131 Harv. L. Rev. F. 127 (2018), https://harvardlawreview.org/2018/04/problematizing-the-protection-of-culture-and-the-insular-cases/.
- *Reading Between the (Blood) Lines*, 83 S. CAL. L. REV. 473 (2010), https://southerncalifornialawreview.com/wp-content/uploads/2018/01/83_473.pdf
- *Blood Quantum Land Laws and the Race Versus Political Identity Dilemma*, 96 CAL. L. REV. 801 (2008), https://cslc.law.columbia.edu/sites/default/files/content/docs/Villazor-Blood-Quantum-and-Equal-Protection.pdf.

Thank you for this opportunity and honor to share my views with you.

[9] *See id.* at 1459.
[10] *See* Rose Cuison Villazor, *Blood Quantum Land Laws and the Race Versus Political Identity Dilemma*, 96 Cal. L. Rev. 801 (2008).
[11] *See* 528 U.S. 495 (2000).