

GOVERNOR ALBERT BRYAN, JR.
U.S. VIRGIN ISLANDS

**Written Testimony of Governor Albert Bryan, Jr.
of the United States Virgin Islands Before the
Senate Committee on Energy and Natural
Resources**

Good morning Chairman Manchin, Ranking Member Barrasso, and members of the Committee:

On behalf of the people of the U.S. Virgin Islands, I wish to thank you for the opportunity to appear before you today to discuss the state of the United States Virgin Islands and our Territory's priorities for 2022. Chairman Manchin, you have been a stalwart friend to the Virgin Islands for as long as I can remember, dating back to when you were a Governor yourself and initiated a unique West Virginia-Virgin Islands collaboration on Medicaid issues. Your sound judgment and compassion for the underprivileged, together with your long history of friendship to America's Territories, give us tremendous confidence in your leadership of this Committee. I would also like to take this opportunity to offer special thanks to Senator Murkowski, who has long understood the unique challenges that face the insular areas and has given us so much help and encouragement over the years.

More broadly, I thank the entire Committee and your colleagues in Congress for your concern and support in our efforts to mitigate the effects of the COVID-19 pandemic, which struck and paralyzed our tourism economy just as it was emerging from the catastrophic losses caused by the two back-to-back Category 5 hurricanes—Hurricanes Irma and Maria—in September 2017. That

third blow to our economic well-being might have crushed a less resilient people, but the American citizens of the U.S. Virgin Islands have once again battled through adversity. With the help of Congress and this Committee, we have endured the worst of the pandemic, and our tourism sector—nearly one-third of our economy—is thriving again. The cruise ships are back, air passenger arrivals nearly doubled from 2020 to 2021, and all but one of our major resorts have reopened. Our overall revenues are up and our debt burden is down. Just yesterday, my administration participated in hearings to support new legislation that will provide a long-term funding source to support our struggling government employee retirement system, which has been a drag on our fiscal situation for decades. I am proud to say that we are laying the foundation for a stable, sustainable prosperity for the people of the Virgin Islands.

But there is still much work to be done. Your continued support and assistance is critically needed for us to rebuild our Territory to be stronger and more resilient in the face of constant economic challenges and increasing occurrence of natural disasters. Even before the pandemic and the hurricanes, the Virgin Islands and the other Territories faced unique challenges not encountered on the U.S. mainland. Many of these challenges are the result of factors beyond the control of the federal government, such as geographic distance and isolation, lack of natural resources, and general small island limitations on scale and their related impact on economic development options. But some challenges we face are exacerbated by—and, in some cases, the direct result of—federal policies, which are within the power of Congress to change. I will focus my comments today on the more pressing issues we face and how Congress can and should act to address them.

The Need for Equity

Before I talk about specific policy issues, I want to frame our political, financial, and economic issues around an overarching principle. That principle is this: the United States Virgin Islands, as its name suggests, is an integral part of the United States of America. Its people are American citizens, entitled to the same rights, privileges, and benefits as American citizens who reside in Hawaii or West Virginia or Wyoming. As President Biden said last year, “there can be no second-class citizens in the United States of America.”

This principle should guide Congress when it legislates for the Virgin Islands and the other Territories. For too long, and for too many purposes, the Americans living in the Insular Areas have been treated as foreign, as “other”—as something less than what we are: full American citizens living on American soil. To cite just a few examples: a disabled American who lives in a State is entitled to receive Supplemental Security Income. If that same disabled American moves to the Virgin Islands, she receives nothing. Medicaid funding for the Territories has for decades systematically lagged funding for the poorest States, leaving our most vulnerable people without adequate medical care. And under the tax laws, investments made by U.S. investors in the Virgin Islands are treated as investments in a foreign country. This means that tax rules designed to disincentivize American investments in foreign tax havens like the Cayman Islands apply equally to investments in the Virgin Islands, even though the Virgin Islands is part of the United States.

Unlike a foreign country, however, we in the Virgin Islands lack the political autonomy to develop our own solutions to these problems. The results can be both absurd and severely consequential. For example, the European Union has placed

the Virgin Islands on its “blacklist” of income tax havens as if we are a foreign country, which is forcing major insurers to move out of the Territory to avoid penalties from European regulators. There has been no recognition that the US Virgin Islands and the other US Territories are part of the US and controlled by the US sovereign. There is nothing the Virgin Islands can do to change this: our income tax laws are established by Congress, our banking and treaty systems are established and controlled by the federal government, and responsibility for contesting the blacklisting falls on the Department of the Treasury. We are working with Treasury to convince the EU’s regulators to remove us from the blacklist—a project for which we need and would be grateful for Congressional assistance—but as too often happens, we are merely bystanders in the determination of our own fate.¹

In short, residents of the Territories are neither fish nor fowl: we have neither the full benefit of being American nor the freedom of action afforded to an independent jurisdiction. I ask this Committee today to change that. Even if the Constitution permits the federal government to treat American citizens living on American land unequally simply because that land is a territory, rather than a State—a question the Supreme Court is even now considering—there is no question that Congress has the authority, and I would argue the moral obligation, to treat all Americans the same. Citizenship is not geographical. As one federal court recently put it, any “decision to disparately classify United States citizens residing”

¹ An assessment of the blacklist’s impact of the Virgin Islands’ ability to attract investment is attached as Appendix I.

in Territories runs “counter to the very essence and fundamental guarantees of the Constitution itself.”²

With that principle in mind, let me speak briefly about specific challenges our Territory continues to face.

Cost Share Waiver under the Insular Areas Act

First, although our economic recovery is progressing, we continue to cope with a series of financial challenges that began with the hurricanes and were exacerbated by the pandemic. While Congress has acted admirably in appropriating funds for disaster recovery and COVID mitigation, significant amounts of those disaster funds remain unspent or completely inaccessible to the Territory because of labyrinthine regulatory requirements, burdensome federal bureaucracy, and unrealistic local match requirements. Those local match requirements, which typically range from ten to twenty-five percent of project costs, present formidable obstacles to our ability to timely access appropriated funds. It is the policy of Congress, expressed by statute in 48 U.S.C. 1469a, that “the administering authority of any department or agency, in its discretion, may waive any requirement for matching funds otherwise required by law to be provided by the Insular Area involved.” In practice, however, that authority is rarely used. The policy reasons for the waiver are obvious. While the Insular Areas are in great need of federal funding, they do not have the resources available to come up with the local match in order to access those funds. I understand the agencies’ desire for the Territory to have “skin in the game,” but where that desire

² *United States v. Vaello-Madero*, 956 F.3d 12, 17 (1st Cir. 2020) (internal quotation omitted).

effectively forecloses the Territory’s ability to use critically needed federal funds, it does not serve an appropriate public purpose and contravenes the will of Congress. I respectfully urge the Committee to strongly encourage federal agencies to exercise the authority provided in §1469a to free us from local match requirements that exceed our limited ability to pay and allow appropriated funds to flow as this body intends. In fact, I would urge this Committee to amend 48 U.S.C. 1469a to provide that each department or agency “shall waive any requirement for matching funds otherwise required by law to be provided by the Insular Area involved.”

Regulatory Reform

In addition, Congress can greatly facilitate our access to appropriated funds by encouraging the agencies to streamline and rationalize their processes for enacting and harmonizing the regulations and guidance necessary to implement Congressional appropriations. Lengthy delays in obtaining necessary guidance for disbursing funds not only impede our ability to promptly undertake the projects for which those funds are appropriated, but also inevitably increase the costs of those projects. To use one example: the monies for rebuilding schools following the 2017 hurricanes were appropriated in early 2018. We did not receive official guidance on how to draw and use those monies for nearly two years—and when we did receive it, the guidance seemed more focused on impeding completion of the projects than facilitating it. The result is that four years after Congress appropriated the funds, we have completed exactly zero new schools. I do not believe that this is what Congress thought it was buying when it appropriated the funds for this purpose. There must be a better way to get the money moving faster—to allow us to begin critical projects before the supervising agencies have dotted every “i” and crossed every “t” and filled out every form in triplicate. I ask you to work with us and the key agencies to

identify and implement a pragmatic but responsible approach to these issues that will allow us to do the important work when it is needed, rather than years later.

Tax Policy

Federal tax policy has imposed significant constraints on our ability attract badly needed private investment. As I mentioned, the tax code treats U.S. investments in the Virgin Islands as investments in a foreign jurisdiction, making them subject to the tax on global intangible low-taxed income, or GILTI. GILTI is a minimum tax regime designed to discourage American companies from stashing profits in low-tax foreign tax havens like the Cayman Islands, Ireland, and the Isle of Jersey. The U.S. Virgin Islands is neither a foreign jurisdiction nor a tax haven: it is U.S. territory, governed by the U.S. Internal Revenue Code, and the aspects of that Code—specifically, Section 934—that allow us to offer tax incentives were designed by Congress for the express purpose of *encouraging* U.S. investment in the Territory. With GILTI, Congress takes away with one hand what it gives with the other.³ And without the tax incentive programs authorized by Section 934, our ability to attract significant investment is severely constrained: the Territory is small, isolated, and expensive, making it a difficult business proposition without the lure of economic development incentives.

The Territory's Delegate, Stacy Plaskett, and our friends in the Senate have introduced several bills designed to fix the GILTI inequity. One partial fix is included in the Build Back Better Act. We are open to a variety of potential

³ A report by the accounting firm EY, attached to this statement as Appendix II, sets forth the economic consequences of the GILTI regime for Virgin Islands investment.

solutions to this problem, but it remains a major priority of my Administration to obtain some kind of relief from the GILTI regime's insistence on treating the Virgin Islands as a foreign country.

Reconciling Environmental Protection and Economic Development

The economic problems resulting from the hurricanes and COVID have now been further aggravated by the Environmental Protection Agency's decision last May to shut down the Limetree Bay oil refinery, which when operating constitutes nearly our entire industrial economy. The loss of this important source of revenue and skilled employment is another crushing blow: the Territory's Bureau of Economic Research estimates the costs of the shutdown to include 800 jobs, \$25 million in annual tax revenues, and \$633 million in reduced GDP.⁴ The EPA's shutdown of the refinery, which had only reopened in January 2021 after sitting idle for nearly ten years and receiving more than \$2 billion in renovations, almost immediately forced the refinery operator into bankruptcy. Although a new owner has emerged from the Chapter 11 proceedings, it is not at all clear when or whether the EPA will allow the facility to reopen.

We all share the EPA's concern with the safety of the refinery, which experienced several environmental incidents in early 2021, and with the health and welfare of the Virgin Islanders who live and work nearby. But it is not clear that the EPA understands the unique importance of the refinery to the Territory's present and long-term economic, financial, and social well-being on the Virgin Islands community. As I observed earlier, the refinery is essentially the Virgin

⁴ The Bureau of Economic Research study is attached as Appendix III.

Islands' entire industrial economy. The EPA's mandate requires it to think about the refinery in narrow environmental terms, without regard to countervailing considerations that are equally important to the overall well-being of the Territory and its people. And the agency sometimes seems to forget that the Territory has just as much responsibility—and often more—than EPA does to protect the health of its citizens and their environment. The Territory's elected government, acting on behalf of those citizens, is better placed than a federal agency—even a well-intentioned one—to ensure that promotion of environmental protection and economic development go together and are not at odds. Environmental justice is a hollow victory without economic opportunity. I therefore ask for Congress's assistance in working with the Territory and EPA to ensure that the refinery is permitted to responsibly and safely reopen as soon as possible, and that other critical development projects are not precluded or unduly delayed by unnecessarily aggressive environmental review.

Territorial Highway Program

We are urgently seeking restoration of adequate funding for the Territory's highways. In the final years of the "Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users" ("SAFETEA-LU") and extensions thereof, Congress allocated \$50 million annually to the four small Territories under the Territorial Highway Program (in addition to amounts equivalent to the funding for High Priority Projects in the Territories). In July 2012, the Moving Ahead for Progress in the 21st Century Act ("MAP-21") maintained highway funding levels for all states, as well as the District of Columbia and Puerto Rico, but inexplicably cut the Territorial Highway Program funding by 20% (to \$40 million)—another example of Americans receiving poorer treatment simply because of where in the United States they live. Singling out the

four small Territories for funding cuts was unfair, discriminatory, and ignored the substantial pressing transportation funding needs of the Territories. The subsequent bill (the FAST Act) did not restore the funding cut in MAP-21; it provided only a small increase over the reduced MAP-21 allocation for the small Territories. Most recently, the Infrastructure Investment and Jobs Act of 2021 increased Territorial Highway Program funding only marginally, to an average of \$47 million over the next five years. The Virgin Islands receives just \$19 million of that total, even though our own Department of Public Works estimates that we need at least \$30 million annually just to properly repair and maintain our highways.

We urge Congress to correct this inequity. The Build Back Better Act would have increased Territorial Highway Program funding to approximately \$64 million annually over the next five years, placing the USVI and the other small Territories much closer to the funding levels they held prior to 2012. Whether it is through a slimmed-down version of Build Back Better or in the next highway or infrastructure bill, I ask that you assist us in bringing this about.

Other Legislative Needs

In addition to the major issues described heretofore, there are a number of important policy and legislative initiatives on which we are seeking Congressional support. These include:

Resolving the Medicaid “fiscal cliff”: The Territory is again facing significant Medicaid financing challenges in the new fiscal year. Congress has increased our Medicaid funding following the 2017 hurricanes and again during the COVID-19 pandemic, but those temporary increases are scheduled to terminate

next month. Without further legislative action, the USVI Medicaid program will revert to its historical Medicaid funding, which includes a spending cap and fixed matching rate not applicable to the States. Going over the Medicaid “fiscal cliff” will have devastating consequences for our health care system and our budget. The Build Back Better Act offers fixes for both the cap and the matching problem, and I urge the Committee to support those fixes, whether in a new version of Build Back Better or in separate legislation.

Supplemental Security Income and other welfare benefits: as you know, the Supreme Court is currently considering a challenge to the Supplemental Security Income program, under which State residents are entitled to benefits but residents of most Territories are not. However the Supreme Court decides that issue, President Biden has urged Congress to expand SSI to the remaining Territories, including the Virgin Islands. Principles of simple equity require that result, even if the Supreme Court decides that the Constitution does not.

Raising rum cover-over rate: Congress has historically provided that all federal excise taxes on rum manufactured in the Virgin Islands be returned, or “covered-over,” to the Virgin Islands treasury. Rum tax revenues covered-over to the USVI constitute a major source of funding for the Territory, and are used to finance essential public services and to pay debt service on the USVI’s bonds and facilitate the Territory’s future access to the capital markets. In 1984, Congress increased the excise tax on rum from \$10.50 per proof gallon to \$12.50, but provided that the proceeds of the \$2.00 increase in the tax would—for the first time in the history of the Territorial relationship—be retained by the U.S. Treasury rather than be covered over to the Virgin Islands. After Congress increased the excise tax on rum (and other distilled spirits) to \$13.50 per proof gallon, Congress

acted to restore the principles of the original tax relationship and raised the amount subject to cover-over to \$13.25 per proof gallon for a temporary two-year period. Congress has extended the “temporary” cover-over rate ever since, but it lapsed at the end of 2021, abruptly reducing the amounts “covered over” to the USVI by more than 20%. I request that Congress enact legislation making the temporary cover-over rate permanent and thereby avoid the need to extend the rate in the future and the associated budgeting problems and uncertainties.

Extension of Guam-CNMI visa waiver program to USVI: Congress has authorized a successful visa waiver program for Guam and the Commonwealth of the Northern Marianas, under which DHS may approve nonimmigrant visitor visa waivers for entry into those Territories for a limited period. We request that a similar program be extended to the USVI to facilitate tourism from other Caribbean countries, which is currently limited by strict visa requirements.

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In closing, I wish to say: I am an American, just as you are. My constituents are Americans, just as your constituents are. They should receive the same consideration and the same treatment from Congress and the rest of the federal Government that their fellow citizens on the mainland do. I urge you to move beyond the days when it was acceptable, and even expected, that the Americans I serve would be treated differently than the Americans you serve. There is so much that we can do together to improve the lives of the people of the Virgin Islands and the other Territories, to bring us up to the level of our fellow citizens on the mainland. All we ask is your gracious assistance.

Thank you for considering this testimony and for your support of your fellow Americans in the U.S. Virgin Islands.