IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF PUERTO RICO

UNITED STATES OF AMERICA, Plaintiff v. JOSE LUIS VAELLO MADERO, Defendant	Case No. 17-2133 (GAG)

JOSE LUIS VAELLO MADERO'S MOTION FOR SUMMARY JUDGMENT AND INCORPORATED MEMORANDUM OF LAW

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TABLE OF CONTENTS

PRELIMINARY STATEMENT 1

FACTUAL AND PROCEDURAL BACKGROUND.....3

ARGUMENT.....7

I. The Exclusion of Puerto Rico Residents from the SSI Program Violates the Equal Protection Component of the Due Process Clause of the Fifth Amendment.....7

II. The Exclusion of Puerto Rico Residents from the SSI Program Is Subject to Heightened Scrutiny, Yet Fails under Any Standard of Review 9

III. The Territories Clause Does Not Excuse Congress from Its Obligation to Treat Puerto Rico Residents on Equal Terms as Residents of the United States.....18

IV. A District Court Has the Power to Disregard Outdated Supreme Court Precedent 23

CONCLUSION.....26

TABLE OF AUTHORITIES

Cases

Adarand Constructors, Inc. v. Pena,
515 U.S. 200 (1995) 10

Baker v. Nelson,
409 U.S. 810 (1972) 23, 24, 25

Balzac v. Porto Rico,
258 U.S. 298 (1922) 15

Binns v. United States,
194 U.S. 486 (1904) 20

Boumediene v. Bush,
553 U.S. 723 (2007) 25

Brown v. Board of Education,
347 U.S. 483 (1954) 3, 14

Bruns v. Mayhew,
750 F.3d 61 (1st Cir. 2014) 10

Calero v. Pearson Yacht Leasing Co.,
416 U.S. 663 (1974) 20

Califano v. Gautier Torres,
435 U.S. 1 (1978) ..... passim

Cincinnati Soap Co. v. United States,
301 U.S. 308 (1937) 19, 20

City of Cleburne v. Cleburne Living Ctr.,
473 U.S. 432 (1985) 8, 9, 10, 11

Consejo de Salud Playa de Ponce v. Rullan,
586 F. Supp. 2d 22 (D.P.R. 2008) ..... passim

Craig v. Boren,
429 U.S. 190 (1976) 16

D.C. Fed'n of Civic Assocs. v. Volpe,
434 F.2d 436 (D.C. Cir. 1970) 22

Downes v. Bidwell,
182 U.S. 244 (1901) ..... passim

Examining Bd. of Eng'rs, Architects, & Surveyors v. Flores de Otero,
426 U.S. 572 (1976) 8, 20, 25

Graham v. Richardson,
403 U.S. 365 (1971) 10

Hampton v. Mow Sun Wong,
426 U.S. 88 (1976) 10

Harris v. Rosario,
446 U.S. 651 (1980) ..... passim

Herbert v. Kitchen,
135 S. Ct. 265 (2014) 24

Hollingsworth v. Perry,
570 U.S. 693 (2013) 24

In re Subpoena to Witzel,
531 F.3d 113 (1st Cir. 2008) 13

Industrias Metalicas Marva v. Lausell,
CIVIL NO. 96-1697 (JP), 1997 U.S. Dist. LEXIS 13773 (D.P.R. Aug. 27, 1997) 7

Keller v. Potomac Elec. Power Co.,
261 U.S. 428 (1923) 21

Kitchen v. Herbert,
961 F. Supp. 2d 1181 (D. Utah 2013) 24

Korematsu v. United States,
323 U.S. 214 *(1944)* 23, 25

Late Corp. of Church of Jesus Christ v. United States
136 U.S. 1 (1890) 20

Lawrence v. Texas,
539 U.S. 558 (2003) 24

Lopez v. Aran,
844 F.2d 898 (1st Cir. 1988) 12

Massachusetts v. United States HHS,
682 F.3d 1 (1st Cir. 2012) 11, 12

Nat'l Bank v. Cty. of Yankton,
101 U.S. 129 (1879) 19

Obergefell v. Hodges,
135 S. Ct. 2584 (2015) 3, 23, 24

Palmore v. United States,
411 U.S. 389 (1973) 21

Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1,
551 U.S. 701 (2007) 11, 16

Perry v. Schwarzenegger,
704 F. Supp. 2d 921 (N.D. Cal. 2010) 23, 24

Pers. Adm'r of Mass. v. Feeney,
442 U.S. 256 (1979) 9

Plessy v. Ferguson,
163 U.S. 537 (1896) ..... passim

Posadas de Puerto Rico Assocs. v. Tourism Co.,
478 U.S. 328 (1986) 25

Reich v. John Alden Life Ins. Co.,
126 F.3d 1 (1st Cir. 1997) 7

Romer v. Evans,
517 U.S. 620 (1996) 11, 24

Soto v. Flores,
103 F.3d 1056 (1st Cir. 1997) 12

Toll v. Moreno,
458 U.S. 1 (1982) 10

Torres v. Puerto Rico,
442 U.S. 465 (1979) 8, 25

Trump v. Hawaii,
138 S. Ct. 2392 (2018) 23, 25

United States v. Carolene Products Co.,
304 U.S. 144 (1938) 10, 12

United States v. Mass. Mar. Acad.,
762 F.2d 142 (1st Cir. 1985) 7

United States v. Thompson,
452 F.2d 1333 (D.C. Cir. 1971) 22

United States v. Windsor,
570 U.S. 744 (2013) 17, 24

Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.,
429 U.S. 252 (1977) 13

Washington v. Davis,
426 U.S. 229 (1976) 10, 12, 13

Weinberger v. Wiesenfeld,
420 U.S. 636 (1975) 7

Windsor v. United States,
833 F. Supp. 2d 394 (S.D.N.Y. 2012) 17

Constitutional Provisions

U.S. Const. amend. V 7

U.S. Const. art. I, § 8, cl. 17 21

U.S. Const. art. IV, § 3, cl. 2 19

Statutes

28 U.S.C. § 1345 ..... 5, 6

42 U.S.C. § 1382 ..... 3, 7, 8

42 U.S.C. § 408 ..... 5, 6

Regulations

20 C.F.R. § 416.215 3

Rules

Fed. R. Civ. P. 56 ..... 1, 7

Local Civil Rule 56 1

Other Sources

INTERNAL REVENUE SERVICE, STATISTICS OF INCOME TAX, GROSS COLLECTION BY TYPE OF TAX AND STATE AND FISCAL YEAR 16

Jose A. Cabranes, *Citizenship and the American Empire: Notes on the Legislative History of the United States Citizenship of Puerto Ricans*, 127 U. Pa. L. Rev. 391 (1978) 14

Juan R. Torruella, *Ruling America's Colonies: The* Insular Cases, 32 Yale L. & Pol'y Rev. 57 (2013) 14

Juan R. Torruella, *The Insular Cases: The Establishment of a Regime of Political Apartheid*, 29 U. Pa. J. Int'l L. 283, 291-96 (2007) 15

JUAN R. TORRUELLA, THE SUPREME COURT AND PUERTO RICO: THE DOCTRINE OF SEPARATE AND UNEQUAL (1985) 15

Office of the Inspector Gen., Social Sec. Admin., *Audit Report: Supplemental Security Income Recipients Receiving Payments in Bank Accounts Outside the United States* 15

Sean Lowry, CONG. RESEARCH SERV., R44651, TAX POLICY AND U.S. TERRITORIES: OVERVIEW AND ISSUES FOR CONGRESS 17

SOCIAL SECURITY ADMINISTRATION, SSI FEDERAL PAYMENT AMOUNTS FOR 2018 16

U.S. CENSUS BUREAU, QUICK FACTS, PUERTO RICO 13

Defendant Jose Luis Vaello Madero, by his undersigned attorneys, respectfully submits this Motion for Summary Judgment and incorporated memorandum of law pursuant to Local Civil Rule 56 of the United States District Court for the District of Puerto Rico and Federal Rule of Civil Procedure 56.

PRELIMINARY STATEMENT

In June 2012, Vaello Madero qualified for Supplemental Security Income ("SSI") under Title XVI of the Social Security Act, a federal benefits program intended to assist elderly, blind, and disabled people in need. He applied for SSI assistance while he was living in New York and suffering from severe health problems that left him unable to support himself. The Social Security Administration ("SSA") approved his application after determining that he met the program's requirements of being disabled and having limited income and resources. A year later, Vaello Madero moved to Puerto Rico to be closer to his ailing wife. He did not realize that his move made him ineligible for SSI benefits, and he did not inform SSA of his relocation until June 2016, around the time of his sixty-second birthday, when he was applying for Title II Social Security benefits. Unbeknownst to him, Vaello Madero was about to face one of his most distressing ordeals.

The following month, SSA terminated Vaello Madero's SSI benefits because, after his move to Puerto Rico, he was statutorily considered to be residing "outside the United States." SSA did not provide any reason for this decision other than his move to Puerto Rico, a U.S. territory that Congress omitted from the Social Security Act's definition of the "United States." SSA informed Vaello Madero that his benefits were being adjusted retroactively, but it never sent him notice of any overpayment. Instead, the United States chose to bring a federal action, seeking a $28,081 judgment against Vaello Madero for benefits he was allegedly overpaid from

the time he started residing in Puerto Rico to the time his SSI benefits were terminated. Had Vaello Madero moved to any one of the fifty States, or even another federal territory such as the District of Columbia (the "District") or the Northern Mariana Islands (the "NMI"), the stated justification for this termination would not apply. In effect, the United States contends that Congress is allowed to deny SSI benefits to otherwise eligible applicants such as Vaello Madero simply by virtue of their classification as Puerto Rico residents.

The basis for this disparate treatment finds its genesis in a line of early twentieth century cases known as the "*Insular Cases*," beginning with *Downes v. Bidwell* (1901), in which the Supreme Court held that certain constitutional provisions are not fully applicable in territories that Congress has not "incorporated" into the United States. Known as the "Incorporation Doctrine," this judicial gloss on the Territories Clause of the U.S. Constitution was explicitly based on archaic beliefs about "differences of race" and the supposed inability of an "uncivilized race" to assimilate into the Anglo-Saxon legal tradition or to handle the responsibilities of full constitutional rights. In support of these views, the *Downes* Court drew an artificial distinction between "contiguous" territories such as Florida and Alaska, which were supposedly populated with "native white inhabitants" and were thus destined to statehood from the moment they were acquired, and "distant" territories such as Puerto Rico and the Philippines, which were inhabited by "alien races" and were meant to be acquired only temporarily. Not surprisingly, these earlier cases were adjudicated by the same Court that decided *Plessy v. Ferguson*, which infamously held that States could lawfully segregate public spaces between the "white race" and the "colored race" as long as the facilities were equal. The *Plessy* doctrine, known as "separate, but equal," has been entirely discredited, yet the *Downes* Court's "separate and unequal" doctrine persists to this day. Indeed, ever since *Downes*, Congress has excluded Puerto Rico residents from many federal benefits programs including SSI. The Court has summarily upheld this exclusion in

Califano v. Gautier Torres and *Harris v. Rosario*, citing the *Insular Cases*, without regard to the Fifth Amendment's guarantees of equal protection. On this foundation, the Government seeks to recover the SSI benefits Vaello Madero received after he became a resident of Puerto Rico, which by now has been a U.S. territory for 120 years.

Vaello Madero's only recourse is to ask this Court to reconsider the validity of these precedents and to recognize that Puerto Rico residents are entitled to the full promise of equal protection under the Constitution. The continual expansion of equal protection rights in the last century has rendered the *Insular Cases* legal anachronisms that are inconsistent with modern jurisprudence and basic human values. As demonstrated by decisions from *Brown v. Board of Education*, which overruled *Plessy*'s endorsement of race-based segregation, to *Obergefell v. Hodges*, which similarly overturned precedent to bring marriage equality to same sex couples, equal protection has been progressively extended to many groups that have been historically disadvantaged. Likewise, *Downes* and its progeny, *Califano* and *Rosario*, are long overdue for reversal. This Court must exercise its constitutional duty to strike down the exclusion of Puerto Rico residents from the SSI program, reject the Government's claim for alleged overpayments, and enter summary judgment in favor of Vaello Madero.

FACTUAL AND PROCEDURAL BACKGROUND

Congress created the SSI program under the Social Security Act to aid qualified elderly, blind, and disabled persons. 42 U.S.C. § 1382. Section 1382(f) states that no adult is eligible for benefits during any month in which he or she resides "outside the United States." And section 1382c(e), in turn, defines the "United States" only as "the 50 States and the District of Columbia." *Id*. at § 1382c(e). SSA regulations issued pursuant to the Social Security Act define the "United States" to include "the 50 States, the District of Columbia, and the Northern Mariana Islands." 20 C.F.R. § 416.215. Because Puerto Rico is a U.S. territory rather than one of the "50

States," and because Puerto Rico is not expressly included in the definition of the "United States," the Social Security Act facially excludes Puerto Rico residents from receiving the same SSI benefits as residents of the fifty States, the District and the NMI.

Defendant Vaello Madero suffers from severe health problems that prevent him from supporting himself. Answer ¶ 7, ECF No. 17. While residing in New York, he applied for SSI disability benefits. SUF ¶¶ 4-5. In June 2012, SSA determined Vaello Madero met of all the eligibility requirements for SSI and approved his application. *Id.* ¶ 5. Vaello Madero received these benefits through direct deposit into a New York bank account. Answer ¶ 8, ECF No. 17.

A year later, on July 6, 2013, Vaello Madero moved to Loiza, Puerto Rico to help care for his wife, who had previously moved to Loiza due to her own health issues. *Id.* ¶ 9. Vaello Madero continued to receive SSI disability payments through direct deposit into his New York bank account. *Id.* He was not aware that his move to Puerto Rico made him ineligible to continue receiving SSI benefits, and he did not inform SSA of his move until he applied for Title II Social Security benefits in June 2016 when he was about to turn sixty-two. *Id.* ¶¶ 10-12.

Later that same month, SSA sent written notice to Vaello Madero advising him that the agency was discontinuing his SSI benefits. SUF ¶ 9. This notice also stated that SSA was retroactively lowering his monthly benefit to $0 effective August 2014. *Id.* ¶ 10. SSA determined Vaello Madero had become ineligible for SSI as of that date because that is when he started to reside "outside the United States." *Id.* In August 2016, SSA sent Vaello Madero a second notice informing him that the agency was retroactively lowering his monthly benefit to $0 effective August 2013 for the same reason. *Id.* ¶ 12. Neither of these notices requested reimbursement of any funds, nor did they indicate that Vaello Madero was liable for any overpayment. *Id.* ¶ 15. Rather, they stated that SSA would contact him in the future. *Id.* To

date, SSA has never sent Vaello Madero notice of any overpayments in connection with these benefit reductions. *Id.* ¶ 16.

More than a year later, on August 25, 2017, the United States brought this action "for collection of an overpayment of $28,081 in SSI benefits received by [Vaello Madero] after he moved to Puerto Rico." Pl's Omnibus Mot. 2, ECF No. 23. The United States asserted jurisdiction under 28 U.S.C. § 1345, which applies to any case "brought by the United States," and a criminal statute, 42 U.S.C. § 408(a)(4), which provides for criminal penalties including up to five years in prison. Complaint ¶ 1. Under the specter of criminal prosecution, and only days after Hurricane Irene had caused extensive damage to Loiza, an SSA investigator approached Vaello Madero without the presence of any attorneys and asked him to sign a Stipulation for Consent Judgment in which Vaello Madero purportedly accepted responsibility for "unlawfully" collecting the alleged overpayment and agreed to repay the full amount plus costs. Stip. for Consent Judgment, ECF No. 3. The Stipulation was presented in English, although Vaello Madero's native language is Spanish and he has only a limited understanding of English. Vaello Madero Decl. ¶ 2, ECF No. 19-2. Under these circumstances, the United States was set to obtain a quick and easy judgment against an indigent, unrepresented defendant.

Before approving the Stipulation, however, this Court decided to appoint *pro bono* counsel for the defendant. ECF No. 7. With the assistance of counsel, on February 1, 2018, Vaello Madero moved to withdraw the Stipulation on the grounds that he never intended to consent to its terms and conditions, and that he did not understand the legal significance of accepting responsibility for "unlawfully" collecting SSI disability benefits. Def's Mot. to Withdraw Stip. 2, ECF No. 19-1. That same day, Vaello Madero filed his Answer to the Complaint. Answer, ECF No. 17. The Answer raises three affirmative defenses, including an absolute defense to liability on the premise that the exclusion of Puerto Rico residents from the

SSI program is unconstitutional because it violates the equal protection guarantees of the due process clause of the Fifth Amendment to the U.S. Constitution. *Id.* ¶¶ 14-16.

In a sudden change of heart, on March 14, 2018, the United States moved for voluntary dismissal of the action without prejudice to its ability to pursue its collection action through administrative proceedings. Pl's Omnibus Mot., ECF No. 23. The Government conceded that the Court lacked jurisdiction over a civil collection action under the criminal statute, 42 U.S.C. § 408(a)(4), but completely ignored the other jurisdictional statute it had invoked: 28 U.S.C. § 1345. *Id.* 3-6. The Government then tried to re-cast Vaello Madero's constitutional defense as a counterclaim and argued that the Court lacked jurisdiction over such claim unless and until the defendant had exhausted administrative remedies under the Social Security Act. *Id.* 6-13. The United States also agreed, "out of an abundance of caution," to withdraw the Stipulation. *Id.* 13.

Vaello Madero opposed this motion on the grounds that the Court had jurisdiction to consider the merits of the overpayment claim, including his defense to liability, because this was an action "brought by the United States" under 28 U.S.C. § 1345. Def's Opp. to Vol. Dismissal 7, ECF No. 25. He also argued that dismissal without prejudice would be unfair and prejudicial, because it countenanced the Government's overly aggressive and vexatious litigation tactics and unnecessarily protracted the final resolution of his constitutional defense to liability. *Id.* 11-12. On May 14, 2018, this Court denied the Government's motion and approved withdrawal of the Stipulation. ECF No. 36. The Court explained that it would "not allow the United States to avoid judicial review of an unsympathetic topic using jurisdictional pretexts." *Id.* 9.

At the Court's direction, the Parties submitted a Joint ISC Memorandum on June 15, 2018. ECF No. 51. The Parties agreed that no material factual disagreements existed and that discovery was unnecessary. *Id.* 2. They further agreed to stipulate to all material facts of the

case.[1] *Id.* 2-4. As such, the case is ripe for summary judgment on whether Vaello Madero is liable for the alleged overpayments. Because the merits of that claim depend on the constitutionality of the Social Security Act's exclusion of Puerto Rico from the SSI benefits program under section 1382c(e), the only question remaining for the Court to decide is whether the exclusion of Puerto Rico residents from the SSI program is permissible under the equal protection guarantees of the due process clause of the Fifth Amendment. For the following reasons, the answer must be a resounding "No."

ARGUMENT

I. The Exclusion of Puerto Rico Residents from the SSI Program Violates the Equal Protection Component of the Due Process Clause of the Fifth Amendment

The Social Security Act's exclusion of Puerto Rico residents from the SSI program under section 1382c(e) is unconstitutional because it violates the equal protection guarantees of the due process clause of the Fifth Amendment, which provides that no person "shall be deprived of life, liberty, or property, without due process of law." U.S. CONST. amend. V.

The Fifth Amendment's due process clause includes an equal protection component coextensive with the Fourteenth Amendment's Equal Protection Clause. *Weinberger v. Wiesenfeld*, 420 U.S. 636, 638 n.2 (1975); *United States v. Mass. Mar. Acad.*, 762 F.2d 142, 153 (1st Cir. 1985) ("[T]he standards for determining an equal protection claim under the fifth and fourteenth amendments are the same."). The Equal Protection Clause "commands that no State shall 'deny to any person within its jurisdiction the equal protection of the laws,' which is

[1] Summary judgment is appropriate when "the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). Courts may decide a summary judgment motion on the basis of facts stipulated by agreement of the parties. *Reich v. John Alden Life Ins. Co.*, 126 F.3d 1, 5 (1st Cir. 1997) (upholding summary judgment decision based on stipulated facts). The Court may consider on a motion for summary judgment any facts of which it could take judicial notice at trial. *Industrias Metalicas Marva v. Lausell*, CIVIL NO. 96-1697 (JP), 1997 U.S. Dist. LEXIS 13773, at *23 n.9 (D.P.R. Aug. 27, 1997).

essentially a direction that all persons similarly situated should be treated alike." *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 439 (1985) (internal citations omitted).

The Supreme Court has held or otherwise indicated that the equal protection guarantee of the Fifth or Fourteenth Amendment applies in Puerto Rico. *Torres v. Puerto Rico*, 442 U.S. 465, 469-70 (1979); *Examining Bd. of Eng'rs, Architects, & Surveyors v. Flores de Otero*, 426 U.S. 572, 601 (1976). But the Court has yet to correct Congress' failure to place Puerto Rico residents on the same footing as residents of the fifty States, or even residents of other territories, for purposes of receiving federal benefits. *See Harris v. Rosario*, 446 U.S. 651, 651-52 (1980) (*per curiam*); *Califano v. Gautier Torres*, 435 U.S. 1, 5 (1978) (*per curiam*). In *Califano*, the Court summarily upheld section 1382c(e)'s exclusion of Puerto Rico residents because, according to the majority, Congress may distribute "governmental payments of monetary benefits" however it wishes "[s]o long as its judgments are rational, and not invidious." 435 U.S. at 5 (internal quotation marks omitted). Subsequently, in *Rosario*, a majority of the Court again sustained the exclusion of Puerto Rico residents from a federal benefits program against a Fifth Amendment challenge on the grounds that Congress may treat Puerto Rico differently under the Territories Clause of the U.S. Constitution "so long as there is a rational basis for its actions." 446 U.S. at 651-52. To date, Puerto Rico residents such as Vaello Madero are excluded from the SSI program for no other reason than being residents of Puerto Rico.

That outcome is inconsistent with the guarantees of equal protection. *See Consejo de Salud Playa de Ponce v. Rullan*, 586 F. Supp. 2d 22, 44 (D.P.R. 2008) (Gelpí, J.). Indeed, neither *Califano* nor *Rosario* purported to engage in a full equal protection analysis. *Rosario*, 446 U.S. at 654-55 (Marshall, J., dissenting). When section 1382c(e) is reviewed under a proper equal protection analysis, the exclusion of Puerto Rico residents does not survive. Furthermore, the Territories Clause does not justify a deviation from the full demands of the Fifth

Amendment. *Califano* and *Rosario* inherited their rationale from the *Insular Cases*, a line of pre-civil rights cases that created an artificial distinction between "incorporated" and "unincorporated" territories for purposes of deciding the reach of constitutional protections under the Territories Clause. But that distinction is unsupported by the text of the Constitution, as well as prior and subsequent case law, and its underlying rationale has since been discredited. This Court is therefore not bound by *Califano* or *Rosario*, and may properly strike down the exclusion of Puerto Rico from the SSI program as unconstitutional.

II. The Exclusion of Puerto Rico Residents from the SSI Program Is Subject to Heightened Scrutiny, Yet Fails under Any Standard of Review

The exclusion of Puerto Rico residents from the SSI program is subject to a stricter standard of review than rational basis. *Consejo*, 586 F. Supp. 2d at 44 ("Under the Equal Protection Clause . . . a heightened level of scrutiny is available to protect the Commonwealth and its citizens from discriminatory federal legislation."). By excluding Puerto Rico residents as a class, the Social Security Act singles out a "discrete and insular" minority and politically powerless group, and discriminates against this entire group of people on the premise that they belong to a class of "alien races." Because this exclusion serves no legitimate governmental end under any standard of review, it must fail.

When legislation draws a classification on which to base disparate treatment of particular groups of people, courts must scrutinize the classification to determine if it violates equal protection. *See Pers. Adm'r of Mass. v. Feeney*, 442 U.S. 256, 271-72 (1979). Depending on the classification at issue, courts apply different levels of review. *Cleburne*, 473 U.S. at 439-41. Certain classifications, such as race, alienage, or national origin, are considered "suspect" and are thus subject to "strict scrutiny"—the most demanding level of review—because these classifications are often "deemed to reflect prejudice and antipathy, a view that those in the

burdened class are not as worthy or deserving as others," and because "such discrimination is unlikely to be soon rectified by legislative means." *Id.* at 440; *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 224 (1995) (explaining that any law that explicitly classifies people according to race is subject to strict scrutiny); *Washington v. Davis*, 426 U.S. 229, 239 (1976) (noting that a "central purpose" of equal protection "is the prevention of official conduct discriminating on the basis of race"); s*ee also Bruns v. Mayhew*, 750 F.3d 61, 66 (1st Cir. 2014) ("[A] state's alienage-based classifications inherently raise concerns of invidious discrimination and are therefore generally subject to strict judicial scrutiny.").

Additionally, courts apply a "more searching judicial inquiry" in cases of "prejudice against discrete and insular minorities" as these factors create a "special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities." *United States v. Carolene Products Co.*, 304 U.S. 144, 152 n.4 (1938). For example, strict scrutiny is warranted for classifications involving noncitizens, because "[a]liens as a class are a prime example of a 'discrete and insular' minority for whom such heightened judicial solicitude is appropriate." *Graham v. Richardson*, 403 U.S. 365, 371-72 (1971) (internal citations omitted); *see also Hampton v. Mow Sun Wong*, 426 U.S. 88, 101-02 (1976) (noting that noncitizens were "an identifiable class of persons who . . . are already subject to disadvantages not shared by the remainder of the community" in that they are "not entitled to vote"). In *Graham*, the Court invalidated state laws that excluded aliens from receiving the same welfare benefits given to citizens because these laws violated equal protection. 403 U.S. at 376. Later, in *Hampton*, the Court applied the same level of scrutiny to invalidate a federal regulation barring noncitizens from employment in the civil service. 426 U.S. at 116-17. The core premise behind the application of strict scrutiny in *Graham* and *Hampton* was the need to protect a politically powerless group against discrimination by the majority. *See also Toll v. Moreno*, 458

U.S. 1, 23 (1982) (Blackmun, J., concurring) ("[T]he fact of powerlessness is crucial, for in combination with prejudice it is the minority group's inability to assert its political interests that '[curtails] the operation of those political processes ordinarily to be relied upon to protect minorities.'") (internal citations omitted). Statutes that discriminate on the basis of these suspect classifications must be invalidated unless they are "narrowly tailored to achieve a compelling government interest." *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 720 (2007) (internal quotation marks omitted).

If a classification based on a person's status as a resident of Puerto Rico alone is not sufficiently "suspect" to warrant strict scrutiny, then it should be analyzed under the next highest level of review, "intermediate scrutiny," which applies to "quasi-suspect" classifications. For instance, gender and "illegitimacy" at birth are quasi-suspect because, like a person's status as a resident of Puerto Rico, they bear "no relation to the individual's ability to participate in and contribute to society." *Cleburne*, 473 U.S. at 441. These classifications fail unless they are "substantially related to a sufficiently important governmental interest." *Id*.

In the absence of a suspect or quasi-suspect classification, courts apply rational basis review. Under rational basis, a court will uphold a legislative classification "so long as it bears a rational relation to some legitimate end." *Romer v. Evans*, 517 U.S. 620, 631 (1996).[2] Even under rational basis, however, courts use a more critical lens where the legislative distinction "is drawn against a historically disadvantaged group and has no other basis." *Massachusetts v. United States HHS*, 682 F.3d 1, 14 (1st Cir. 2012) ("The reason, derived from equal protection analysis, is that such a group has historically been less able to protect itself through the political

[2] In conducting this review, the court must consider that, "[c]entral both to the idea of the rule of law and to our own Constitution's guarantees of equal protection is the principle that government and each of its parts remain open on impartial terms to all who seek its assistance." *Romer*, 517 at 633. "[I]ndiscriminate imposition of inequalities" is inconsistent with this principle. *Id.* For this reason, laws "singling out a certain class of citizens for disfavored legal status or general hardships are rare." *Id.*

process."). Thus, legislation that has a "disparate impact on minority interests" requires a more searching inquiry than typical rational basis, regardless of whether the statute was motivated by a discriminatory purpose. *Id.* at 15.

(a) By Excluding Puerto Rico Residents, Section 1382c(e) Targets a Politically Powerless, "Discrete and Insular" Minority for Disparate Treatment

Puerto Rico residents are the quintessential example of a politically powerless class that constitutes a "discrete and insular" minority." *Carolene Products*, 304 U.S. at 152 n.4. Puerto Rico residents have no direct political power in the operation of the federal government, which established the SSI program. Puerto Rico has no Electoral College votes and consequently its residents play no role in electing the President. Furthermore, Puerto Rico has no senators and its sole representative in Congress is a non-voting Resident Commissioner. This lack of representation in Congress means Puerto Rico residents cannot use the legislative process to make their voices heard. As Judge Torruella has noted:

> It would be difficult to imagine a more "discrete and insular" minority, both geographically and constitutionally, than the residents of Puerto Rico. And these persons, despite their citizenship in the United States, have virtually no access to "the operation of those political processes ordinarily to be relied upon to protect minorities."

Lopez v. Aran, 844 F.2d 898, 913 (1st Cir. 1988) (Torruella, J., concurring in part, dissenting in part) (internal citations omitted).

(b) By Excluding Puerto Rico Residents, Section 1382c(e) Also Discriminates on the Basis of Race and Ethnic Origin

Furthermore, the exclusion of Puerto Rico residents from SSI finds its roots in a racially discriminatory purpose. A law need not be racially discriminatory on its face to receive strict scrutiny. This demanding level of review is also triggered when a law disproportionately impacts a particular race and reflects a discriminatory purpose. *Davis*, 426 U.S. at 242; *Soto v.*

Flores, 103 F.3d 1056, 1067 (1st Cir. 1997). This discriminatory purpose "may often be inferred from the totality of the relevant facts, including . . . that the law bears more heavily on one race than another." *Davis*, 426 U.S. at 242.

In assessing whether a discriminatory purpose is present, courts undertake "a sensitive inquiry into such circumstantial and direct evidence of intent as may be available." *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 266 (1977); *In re Subpoena to Witzel*, 531 F.3d 113, 119 (1st Cir. 2008) (noting that "circumstantial evidence of discrimination may be probative of an equal protection violation"). This inquiry includes consideration of (1) whether "a clear pattern, unexplainable on grounds other than race, emerges from the effect of state action even when the governing legislation appears neutral on its face"; (2) the "historical background of the decision…particularly if it reveals a series of official actions taken for invidious purposes"; (3) "the specific sequence of events leading up to the challenged decision"; (4) "[d]epartures from the normal procedural sequence [and] [s]ubstantive departures…if the factors usually considered important by the decisionmaker strongly favor a decision contrary to the one reached"; and (5) "[t]he legislative or administrative history…especially where there are contemporary statements by members of the decisionmaking body, minutes of its meetings, or reports." *Arlington Heights*, 429 U.S. at 266-68.

Here, the *Arlington Heights* factors are easily met; there is a clear pattern of purposeful discrimination, unexplainable on grounds other than race. No doubt, the exclusion of Puerto Rico targets a population that is overwhelmingly Hispanic/Latino. In fact, almost 100 percent of Puerto Rico residents identify as Hispanic or Latino. *See* U.S. CENSUS BUREAU, QUICK FACTS, PUERTO RICO (July 1, 2017), https://www.census.gov/quickfacts/fact/table/pr/ PST045217. Furthermore, the groundwork for the disparate treatment of Puerto Rico residents was laid on the express premise that Puerto Rico was inhabited by "alien races, differing from us in religion,

customs, laws, methods of taxation, and modes of thought." *Downes v. Bidwell*, 182 U.S. 244, 287 (1901). Indeed, *Downes* and its progeny, the *Insular Cases*, were decided on grounds that would shock the consciences of most people today. For example, the *Downes* Court worried about "inflict[ing] grave detriment on the United States" if territories inhabited by people of "an uncivilized race," as opposed to "native white inhabitants," were automatically incorporated into the union, as this would result in the "bestowal of citizenship on those absolutely unfit to receive it[.]" *Id*. at 306 (White, J., concurring). The Court was also concerned that "the administration of government and justice, according to Anglo-Saxon principles, may for a time be impossible" in "distant" and "foreign" territories, as opposed to the "contiguous" territories "inhabited only by people of the same race, or by scattered bodies of native Indians." *Id*. at 282, 287.

Needless to say, the race-based reasoning of the *Downes* Court has been discredited as reflecting a "prejudice and antipathy" that was prevalent at the time. As this Court has noted:

> The Supreme Court that from 1901-1904 decided the Insular Cases was the very Court that decided *Plessy v. Ferguson*. The doctrine of "separate but equal" established in said case was reversed in 1954 by *Brown v. Board of Education*. Under *Brown* and subsequent civil rights legislation, comments regarding the annexation of Puerto Rico and its citizens, such as those made in the Harvard Law Review articles, the very Floor of Congress, and in the *Insular Cases* themselves, would constitute direct *prima facie* evidence of intentional discrimination based on race and ethnic origin.

Consejo, 586 F. Supp. 2d at 40-41.[3]

[3] For a more detailed history of the racial animus motivating decisions about Puerto Rico, *see, e.g.*, Juan R. Torruella, *Ruling America's Colonies: The* Insular Cases, 32 YALE L. & POL'Y REV. 57 (2013), and Jose A. Cabranes, *Citizenship and the American Empire: Notes on the Legislative History of the United States Citizenship of Puerto Ricans*, 127 U. PA. L. REV. 391 (1978). Judge Cabranes of the U.S. Court of Appeals for the Second Circuit describes how race was a significant factor in debating the Jones Act, the federal law that extended citizenship to Puerto Ricans in 1917. *See* 127 U. PA. L. REV. at 481 (quoting Representative Cannon, who opposed the Jones Act, as stating that "'[t]he people of Porto Rico have not the slightest conception of self-government" and that "[a]bout 30 percent are pure African… [and fully] 75 to 80 percent of the population…was pure African or had an African strain in their blood.'" (alterations and ellipses in original)). Similarly, Judge Torruella documents the racial animus behind the *Insular Cases*. Specifically, he points out that Chief Justice Taft, who wrote the opinion in *Balzac v.*

Nevertheless, the effects of those beliefs persisted through the *Insular Cases*, which provided the constitutional justification for the disparate treatment of Puerto Rico residents on the basis that Congress had opted not to "incorporate" Puerto Rico fully into the United States. More relevantly, it is the *Insular Cases*, and Puerto Rico's unincorporated status, that would later be used to justify a lower standard of review for Puerto Rico's exclusion from the SSI program. *See Califano*, 435 U.S. at 3, n.4. In effect, the racially motivated decision to treat Puerto Rico differently as a territory ultimately allowed for the exclusion of Puerto Rico residents from SSI. *See* Office of the Inspector Gen., Social Sec. Admin., *Audit Report: Supplemental Security Income Recipients Receiving Payments in Bank Accounts Outside the United States* 1 ("Concurrent beneficiaries are generally entitled to receive [Title II] benefits while outside the United States; however, if they leave the country for longer than 30 consecutive days, SSA should suspend their SSI payments. These provisions also apply to Puerto Rico . . . .") (citing *Califano v. Gautier Torres*, 435 U.S. 1, 4 (1978)), *available at* https://oig.ssa.gov/sites/default/files/audit/full/pdf/A-06-14-14037.pdf.

Because section 1382c(e) targets a politically powerless, "discrete and insular" minority and does so on the basis of a historical animus against "alien races," strict scrutiny is warranted.

(c) The Exclusion of Puerto Rico Residents under Section 1382c(e) Does Not Serve Any Legitimate Government End

Although the exclusion of Puerto Rico residents from SSI is subject to strict scrutiny, it ultimately fails under any level of review because the United States cannot meet its burden of

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Porto Rico, 258 U.S. 298 (1922), and confirmed Puerto Rico's status as an unincorporated territory, harbored prejudice towards Puerto Ricans and did not believe the territory was fit to be a state within the United States. *See* 32 Yale L. & Pol'y Rev. at 75-79; *see also* Juan R. Torruella, *The Insular Cases: The Establishment of a Regime of Political Apartheid*, 29 U. Pa. J. Int'l L. 283, 291-96 (2007) (describing the academic debate concerning the status of Puerto Rico and noting Judge Simeon Baldwin's article in which he characterized Puerto Ricans as "ignorant and lawless brigands that infest" the island); JUAN R. TORRUELLA, THE SUPREME COURT AND PUERTO RICO: THE DOCTRINE OF SEPARATE AND UNEQUAL (1985).

showing that this exclusion advances any legitimate purpose, much less that it is "substantially related" to achieving "important governmental objectives," *Craig v. Boren*, 429 U.S. 190, 197 (1976), or "narrowly tailored to achieve a compelling government interest," *Parents Involved*, 551 U.S. at 720 (internal quotation marks omitted).

The United States has previously offered three justifications for Puerto Rico's exclusion: (1) the unique tax status of Puerto Rico in that its residents "do not contribute to the public treasury;" (2) the costs of including Puerto Rico would be extremely great; and (3) inclusion in the SSI program "might seriously disrupt the Puerto Rican economy." *Califano*, 435 U.S. at 5 n.7. None of these reasons hold water.

First, it is simply false that Puerto Rico does not contribute to the public treasury. To the contrary, Puerto Rico residents pay many types of federal taxes, including import/export taxes, commodity taxes, Social Security payroll taxes, income taxes on money earned outside of Puerto Rico, and others. *See Consejo*, 586 F. Supp. 2d. at 38. In 2016 alone, Puerto Rico paid $3.479 billion into the U.S. treasury. *See* INTERNAL REVENUE SERVICE, STATISTICS OF INCOME TAX, GROSS COLLECTION BY TYPE OF TAX AND STATE AND FISCAL YEAR (2016), https://www.irs.gov/statistics/soi-tax-stats-gross-collections-by-type-of-tax-and-state-irs-data-book-table-5. While Puerto Rico residents do not pay federal income tax on earnings local to the island, this does not provide a rational justification for excluding them from the SSI program. This justification is especially nonsensical in the context of a federal benefits program designed to help disabled individuals with minimal earnings. Any individual with earnings low enough to qualify for SSI will not be paying federal income tax regardless of where they reside. *See* SOCIAL SECURITY ADMINISTRATION, SSI FEDERAL PAYMENT AMOUNTS FOR 2018, https://www.ssa.gov/oact/cola/SSI.html. Recipients of SSI benefits in the States therefore pay no more federal income tax than SSI recipients who, like Vaello Madero, reside in Puerto Rico.

Further undercutting this purported reason is the situation of another U.S. territory with a similar status as Puerto Rico, the NMI. NMI residents are not excluded from the SSI program although they do not pay federal income tax. *See* Sean Lowry, CONG. RESEARCH SERV., R44651, TAX POLICY AND U.S. TERRITORIES: OVERVIEW AND ISSUES FOR CONGRESS 5 (2016). In fact, the NMI receives more favorable tax treatment as all income earned by its *bona fide* residents (including territory- and non-territory source income) are taxable only to the NMI. *Id.* at 23. By contrast, Puerto Rico residents' non-territory source income is taxed and payable to the U.S. government. *Id.* at 24.

Second, the costs of including Puerto Rico in the SSI program cannot justify its exclusion. Otherwise, Congress could justify the wholesale exclusion of residents of any State from the SSI program on the basis that this would reduce costs. But this would be obviously improper. If Congress were concerned with the costs of the program, the solution would be to reduce benefits across the board, or to improve its efficiency, not to single out residents of a particular State or territory for disparate treatment. *See Windsor v. United States*, 833 F. Supp. 2d 394, 406 (S.D.N.Y. 2012) (noting that excluding "any arbitrarily chosen group of individuals from a government program conserves public resources," but an "interest in conserving the public fisc alone . . . can hardly justify the classification used in allocating those resources"), *aff'd, United States v. Windsor*, 570 U.S. 744 (2013).

Third, there is no basis for the suspicion that including Puerto Rico residents in the SSI program will somehow disrupt the Puerto Rican economy. As Justice Marshall noted in his dissent in *Rosario*, the United States provided no "evidence in the record supporting the notion that such a speculative fear of economic disruption is warranted." 446 U.S. at 656. The only "disruption" would be a positive one, as the SSI benefits would enable recipients to more fully participate in the local economy. In any event, such vague speculation, as noted by Justice

Marshall, cannot obscure that the plain purpose and effect of the exclusion is to economically disfavor residents of Puerto Rico as compared to residents of the fifty States or even other federal territories such as the District and the NMI. *See id.* Thus, there is no rational, much less a "compelling" or "substantial," government interest served by the exclusion of Puerto Rico from the SSI program. Nor can the United States meet its burden of showing the exclusion is "narrowly tailored" or "substantially related" to any of these supposed government interests.

In sum, because the exclusion of Puerto Rico residents from the SSI program does not advance any legitimate governmental objective, and instead invidiously denies members of this historically disadvantaged group the ability to seek assistance from the government on equal footing with similarly situated residents of the fifty States and other U.S. territories, it fails the equal protection test under any standard of review.

III. The Territories Clause Does Not Excuse Congress from Its Obligation to Treat Puerto Rico Residents on Equal Terms as Residents of the United States

To the extent that *Califano* and *Rosario* were premised on the conclusion that Congress may treat Puerto Rico residents differently under the Territories Clause because Puerto Rico is unincorporated, notwithstanding the Fifth Amendment's equal protection guarantees, that reasoning was incorrect.

Both *Califano* and *Rosario* support their holdings with reference to the *Insular Cases*, beginning with *Downes*. In *Downes*, a plurality of the Court ruled that the U.S. Constitution's Uniformity Clause, which mandates that "all Duties, Imposts and Excises shall be uniform throughout the United States," did not bar Congress from imposing a duty on merchandise shipped from Puerto Rico to the States under the Territories Clause. 182 U.S. at 299. The Court drew an artificial distinction between "incorporated" territories, those which are destined to statehood from the moment they are acquired, and other territories that are only meant to be

acquired temporarily. *Id.* at 311-12 (White, J., concurring). The Court concluded that Puerto Rico was not an "incorporated" territory, stating that "whil[e] in an international sense Puerto Rico was not a foreign country, since it was subject to the sovereignty of and was owned by the United States, it was foreign to the United States in a domestic sense, because the island had not been incorporated into the United States, but was merely appurtenant thereto as a possession." *Id.* at 341-42. Thus, according to the Plurality, the imposition of duties on imports from "such island" was constitutional even though the same duties, if applied to the fifty States or "incorporated" territories, would be unconstitutional. *See id.* at 342. This decision gave birth to what became known as the Incorporation Doctrine, a judicial gloss on the Territories Clause that finds no support in the text of the Constitution and that misconstrues the nature of Congress' powers over U.S. territories as understood in prior and subsequent case law.

(a) The Incorporation Doctrine Is Inconsistent with the Text and Structure of the Constitution and Has Been Rightfully Discredited

While the Territories Clause grants Congress the power to "make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States," U.S. CONST. art. IV, § 3, cl. 2, this provision was never intended to relieve Congress from the obligation to respect the constitutional rights of individuals simply by virtue of their geographic location in a U.S. territory as opposed to a State. Properly understood, Congress' power under the Territories Clause is plenary only insofar as it may exercise the additional powers reserved to the States "in all cases where legislation is possible." *Cincinnati Soap Co. v. United States*, 301 U.S. 308, 317 (1937); *Nat'l Bank v. Cty. of Yankton*, 101 U.S. 129, 133 (1879) (explaining that a federal territory's "relation to the general government is much the same as that which counties bear to the respective States, and Congress may legislate for them as a State does for its municipal organizations").

For example, in *Late Corp. of Church of Jesus Christ v. United States*, the Court held that Congress had the power to repeal the charter of the Mormon Church in the Territory of Utah pursuant to its plenary powers under the Territories Clause. 136 U.S. 1, 42, 45 (1890) ("[Congress] has full and complete legislative authority over the people of the Territories and all the departments of the territorial governments."). However, the Court crucially noted that Congress' power is plenary only insofar as it is acting as a *local* legislator in the territories. In other words, Congress "*may do for the Territories what the people, under the Constitution of the United States, may do for the States*." *Id.* at 42 (quoting *Yankton*, 101 U.S. at 133); *see also Binns v. United States*, 194 U.S. 486, 496 (1904) (upholding license taxes upon citizens of Alaska only after determining that these were local taxes intended to support the territorial government, and stating that the holding should not be extended to cases in which Congress taxes citizens of a territory to raise revenue for the nation); *Cincinnati Soap*, 301 U.S. at 323 (holding the same regarding tax on Philippine coconut oil). Just as a State would be constrained in excluding an entire class of people from governmental programs by the Fourteenth Amendment, so would Congress under the Territories Clause. *See, e.g.*, *Calero v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 668 n.5 (1974) (holding that either the Fifth or Fourteenth Amendment applied to Puerto Rico because "there cannot exist under the American flag any governmental authority untrammeled by the requirements of due process of law as guaranteed by the Constitution of the United States"). *Flores de Otero*, 426 U.S. at 599–601 (holding that Puerto Rico is guaranteed equal protection under either the Fifth or the Fourteenth Amendment).[4]

[4] In *Flores de Otero*, for instance, the Court applied strict scrutiny to strike down on equal protection grounds a Puerto Rico statute prohibiting aliens from engaging in the private practice of engineering. 426. U.S. at 601-02.

The Plurality in *Downes* eviscerated this limitation by creating the Incorporation Doctrine out of whole cloth. In his dissent, Chief Justice Fuller criticized the Plurality for taking this approach, correctly pointing out that the concept of incorporation "assumes that the Constitution created a government empowered to acquire countries throughout the world . . . and substitute[] for the present system of republican government, a system of domination over distant provinces in the exercise of unrestricted power." *Downes*, 182 U.S. at 373. But that cannot be the law because, as Chief Justice Fuller further explained, Congress' powers "can only exist if, and as, granted by the Constitution." *Id.* at 354. Hence, Chief Justice Fuller rejected the Incorporation Doctrine as inconsistent with the principle of limited, constitutional governance.

(b) Congress' Plenary Power to Legislate in the District of Columbia Is Illustrative of Congress' Power under the Territories Clause

The scope of Congress' powers over the "insular" territories is further clarified by reference to Congress' power in the District, an analogous federal territory.

Just as Congress has plenary powers under the Territories Clause, Congress also has plenary powers in legislating for the District under Article I. *See* U.S. Const. art. I, § 8, cl. 17 (granting Congress the power "[t]o exercise exclusive Legislation in all Cases whatsoever"); *Palmore v. United States*, 411 U.S. 389, 397 (1973) (describing Congress' power to legislate for the District as "plenary"). As in the Territories Clause cases predating the *Insular Cases*, Congress' power to legislate in the District mirrors the plenary power of the state governments when legislating within their own borders. *See Keller v. Potomac Elec. Power Co.*, 261 U.S. 428, 442–43 (1923) ("This means that as to the District Congress possesses not only the power which belongs to it in respect to territory within a State but the power of the State as well.").

When Congress treats District residents differently from residents in the States, it raises equal protection concerns. The D.C. Circuit has recognized that Congress is subject to the same

constitutional constraints when its legislation affects District residents as when its legislation affects residents of the fifty States. *See United States v. Thompson*, 452 F.2d 1333, 1338 (D.C. Cir. 1971) ("Surely appellee does not mean to contend that because Congress has plenary power in the District it can therefore ignore the Constitution. Congress' power over the District, like all powers in our system of government, has constitutional limits…."). Recognizing this limiting principle, in *Thompson*, the D.C. Circuit further noted:

> There is nothing unconstitutional about tailoring local statutes to meet local needs. But when Congress decides to enact national legislation, the situation is fundamentally different. The passage of such a law implies a threshold decision to override regional differences in favor of a uniform standard that will govern the entire country. If one small isolated group is then excluded from the operational effect of the statute, the rationality of that exclusion is highly suspect.

Id. at 1338-39 (internal citations omitted). When confronted with federal legislation that treats the District and its residents differently, the D.C. Circuit has tested the law under the equal protection component of the Fifth Amendment. *See, e.g., D.C. Fed'n of Civic Assocs. v. Volpe*, 434 F.2d 436, 438–39, 442–43 (D.C. Cir. 1970) (engaging in a Fifth Amendment equal protection analysis where a federal law purported to exclude the District).

These cases not only illustrate that, properly understood, the Territories Clause does not exempt Congress from its obligation to legislate in conformity with the requirements of equal protection, but also further expose the racial animus underlying the *Insular Cases* and the Incorporation Doctrine. There is no reason for the *Downes* Court's artificial distinction between incorporated and unincorporated territories aside from the Plurality's views on whether "alien races" are worthy of full constitutional protections. As the D.C. Circuit found in *Thompson*, Congress' decision to exclude Puerto Rico from national legislation should likewise be "highly suspect," 452 F.3d at 1339, but that is not how the Supreme Court treated this inquiry under the

Insular Cases. This Court should reject this dissimilarity, and put Congress' power over Puerto Rico back in line with the scope of its constitutional powers over non-State territories.

IV. A District Court Has the Power to Disregard Outdated Supreme Court Precedent

This Court is not bound to follow outdated Supreme Court precedent. There are numerous examples of constitutional jurisprudence evolving over time, including overturning precedent. *See Consejo*, 586 F. Supp. 2d at 40-41 (noting the expansion of civil rights after *Brown* overruled *Plessy*); *see also Trump v. Hawaii*, 138 S. Ct. 2392, 2423 (2018) (overruling *Korematsu v. United States*, which upheld the internment of Japanese Americans during WWII, and stating that this precedent was "gravely wrong the day it was decided, has been overruled in the court of history, and – to be clear – has no place in law under the Constitution").

District courts often play a critically important role in that process. *See* Opinion and Order 5, ECF No. 36 ("[C]onstitutional litigation must commence at the district court level and work its way up."). The most recent example of this transformation is the line of cases addressing the constitutionality of state laws banning same-sex marriage. The precedent at issue in the same sex marriage cases was *Baker v. Nelson*, 409 U.S. 810 (1972), which summarily upheld a Minnesota statute banning same-sex marriage against a constitutional challenge on the grounds that it did not raise a "substantial federal question." *Id.* *Baker* would not be overruled until more than forty years later in *Obergefell v. Hodges*, 135 S. Ct. 2584, 2604-05 (2015). Nonetheless, by this time, many lower courts had already recognized that the legal landscape had changed, and that *Baker* was no longer good law.

As with any change, of course, there must be a first mover. In the same sex marriage cases, the first federal judge to recognize the evolution in the law was Judge Walker of the Northern District of California. *See Perry v. Schwarzenegger*, 704 F. Supp. 2d 921, 1003 (N.D. Cal. 2010). In *Perry*, Judge Walker struck down an amendment to the California constitution

known as "Proposition 8," which banned same sex marriage. The court held that Proposition 8 violated equal protection because it "disadvantage[d] gays and lesbians without any rational justification." *Id.* After the Ninth Circuit affirmed the district court's decision, the Supreme Court nullified the appeal on standing grounds and left the district court's opinion as binding and unchallenged. *Hollingsworth v. Perry*, 570 U.S. 693, 715 (2013).

Similarly, before *Obergefell*, Judge Shelby held that Utah's ban on same sex marriage violated equal protection. *Kitchen v. Herbert*, 961 F. Supp. 2d 1181, 1188 (D. Utah 2013). The court expressly rejected *Baker* by noting numerous "doctrinal developments" that had occurred since that case had been decided. *Id.* at 1194-95. Specifically, the court noted that the Supreme Court had held that the Constitution protects individuals from discrimination on the basis of sexual orientation, citing *Romer* and *Lawrence v. Texas*, 539 U.S. 558 (2003). *Id.* at 1195. The Court had also struck down DOMA, a federal law that denied married same-sex couples equal treatment, citing *United States v. Windsor*, 570 U.S. 744, 744 (2013). *Id.* Accordingly, Judge Shelby found that *Baker* was "no longer controlling precedent," and held that Utah's ban on same-sex marriage was unconstitutional. *Id.* at 1195, 1216. The Tenth Circuit later affirmed that decision, and the Supreme Court denied certiorari. *Herbert v. Kitchen*, 135 S. Ct. 265 (2014).

These district court opinions would eventually be vindicated by the Supreme Court. In *Obergefell*, the Court praised the "thoughtful District Court decisions addressing same sex marriage," most of which had departed from the holding in *Baker* and had concluded that "same sex couples must be allowed to marry" under the U.S. Constitution. 135 S. Ct. at 2597. Notably, the Court did not admonish the lower courts for refusing to adhere blindly to precedent. Instead, it celebrated their contributions to the ongoing dialogue and, ultimately, vindicated their rulings by overturning *Baker* and invalidating state restrictions on same-sex marriage.

Similarly, here *Califano* and *Rosario* are no longer controlling precedent. Doctrinal developments have undercut the basis for the Incorporation Doctrine. Since the *Insular Cases* were decided, the Supreme Court has recognized that many constitutional rights extend to the territories regardless of whether they are "incorporated." For example, Puerto Rico's citizens are entitled to many constitutional protections: the Fifth or Fourteenth Amendment, *Examining Bd. of Eng'rs v. Flores de Otero*, 426 U.S. 572 (1976); the Fourth Amendment, *Torres v. Puerto Rico*, 442 U.S. 465 (1979); and the First Amendment, *Posadas de Puerto Rico Assocs. v. Tourism Co.*, 478 U.S. 328 (1986). More recently, in *Boumediene v. Bush*, 553 U.S. 723, 768 (2007), the Court recognized that Congress cannot act outside the bounds of the Constitution in any territory over which the United States exercises total sovereign control, even Guantanamo, a territory with significantly more attenuated ties to the United States than Puerto Rico. These developments demonstrate that the *Insular Cases*—and namely the Incorporation Doctrine—have been steadily contracting and are long overdue for reversal. But more fundamentally, the seminal case for the Incorporation Doctrine underlying *Califano* and *Rosario*, *Downes*, was "gravely wrong the day it was decided" and certainly "has been overruled in the court of history." *Trump*, 138 S. Ct. at 2423. Like *Korematsu*, *Plessy* or *Baker*, *Downes* and its progeny are at odds with modern conceptions of equal rights and have "no place in law under the Constitution." *Id*.

Now, this Court has the opportunity and duty to correct this doctrinal mistake and remove the stain of the *Insular Cases* from our jurisprudence by ruling that Vaello Madero did not "unlawfully" collect SSI disability benefits during the time he was residing in Puerto Rico, an island territory that is not only under the United States' total sovereign control, but also is an enduring part of its legal and cultural mosaic.

CONCLUSION

For these reasons, summary judgment should be granted in favor of Vaello Madero.

Date: August 10, 2018

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this date, I electronically filed the foregoing document with the Clerk of the Court using CM/ECF, which will send automatic notification of such filing to all CM/ECF Participants.

In San Juan, Puerto Rico, this 10th day of August, 2018.

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