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 COMBINED OPPOSITION TO THE UNITED STATES' CROSS-MOTION FOR SUMMARY JUDGMENT AND REPLY BRIEF IN SUPPORT OF DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

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PRELIMINARY STATEMENT

The exclusion of Puerto Rico residents from the SSI program is rooted in invidious discrimination on the basis of race and ethnic origin and targets a disempowered group that is unable to protect its rights through the political process. As a result, the exclusion cannot survive the full equal protection analysis that the Constitution requires in such cases. The question before this Court, therefore, is whether Puerto Rico residents are protected by the full force of the equal protection doctrine, or whether they are only entitled to a lower level of protection. Under the Fifth Amendment, Puerto Rico residents are entitled to the full effects of equal protection.

In contending that a lower level of protection applies, the Government does not contest that Puerto Rico is nearly 100% comprised of a historically disadvantaged ethnic minority or that the historical treatment of Puerto Rico has been marred by racist concerns for the consequences of admitting "alien races" into the Union. Nor does the Government contest that Puerto Rico residents are a politically powerless class with no representation in the federal government. Rather, the Government contends that, despite these factors, Puerto Rico's status as a territory entitles Congress to discriminate against it through legislation that is subject only to the lowest level of scrutiny, and furthermore that such legislation is "virtually unreviewable" by any court – in short, an unequal application of the Equal Protection Clause.

The Government's view of the United States' relationship to Puerto Rico is one of unrestrained power that is unchecked by the normal safeguards of the Constitution, such as the guarantee of equal protection. This view is the logical endpoint of the views expressed in the *Insular Cases*, which more than century ago established a framework to allow for colonial rule over the territories without accepting them as fully part of the United States. Vaello Madero respectfully requests that this Court reject this framework, apply a full equal protection analysis, and strike down Puerto Rico's exclusion from the SSI program as unconstitutional.

ARGUMENT

I. The Exclusion of Puerto Rico Residents from the SSI Program Violates Equal Protection

The exclusion of Puerto Rico residents from the SSI program should be invalidated as violating the equal protection component of the Fifth Amendment's Due Process Clause.[1]

(a) The Exclusion is Subject to Heightened Scrutiny

The exclusion is subject to heightened scrutiny because it (1) facially discriminates against Puerto Rico residents, who constitute a suspect class due to their political powerlessness; and (2) is rooted in a racially discriminatory purpose. The Government contends that "heightened scrutiny does not comport with the level of deference that Congress is accorded in matters of social and economic policy." Pl.'s MSJ 17. But this argument ignores that it is precisely when a suspect class is implicated that this general rule gives way. *See City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 439-41 (1985).

1. Heightened Scrutiny Is Warranted Because Puerto Rico Residents Are a Politically Powerless Class

Vaello Madero's Motion for Summary Judgment established that Puerto Rico residents are a politically powerless class because they lack any representation in the federal government. And equal protection jurisprudence requires strict scrutiny of classifications involving prejudice against any politically powerless group that constitutes a "discrete and insular minority." *United States v. Carolene Products Co.*, 304 U.S. 144, 152 n. 4 (1938). This prejudice "tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities." *Id.* In particular, the Supreme Court has identified classifications involving

[1] On August 10, 2018, this Court instructed the Government to address (1) whether heightened scrutiny is applicable to the exclusion; and (2) if it is applicable, whether the exclusion satisfies such scrutiny. ECF No. 58. The Government has argued that heightened scrutiny is inapplicable here, but has not argued that the exclusion could survive such level of review.

noncitizens as subject to strict scrutiny because noncitizens are "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." *Hampton v. Mow Sun Wong*, 426 U.S. 88, 102 (1976) (invalidating exclusion of noncitizens from the federal civil service). Puerto Rico residents likewise lack any ability to vote in federal elections, despite their status as U.S. citizens. They have no Electoral College votes and thus have no say in electing the president, and they have no congressional representatives with voting power. Redress in the courts is the only means by which Puerto Rico residents can seek to remedy violations of their rights.

The Government ignores the lack of political representation for Puerto Rico residents in its brief and instead miscasts the exclusion of Puerto Rico as "a facially-neutral law" that merely "disparately affects a particular group of persons." Pl's. MSJ 16. The Government then asserts that this "disparate impact" by itself does not trigger heightened scrutiny. *Id.* The opposite is true. The exclusion is discriminatory because it singles out Puerto Rico by definition, *see Califano v. Gautier Torres*, 435 U.S. 1, 2 (1978) ("The exclusion of Puerto Rico . . . is apparent in the definitional section."), and therefore facially excludes Puerto Rico residents, a politically powerless "discrete and insular minority." Adopting the Government's characterization would be akin to claiming that the regulation barring noncitizens from employment in the federal civil service at issue in *Hampton* was "facially neutral" and only had an incidental "disparate impact" on noncitizens. The Court rejected that type of reasoning in *Hampton*. 426 U.S. at 102-03. The exclusion must therefore be subject to heightened scrutiny.

2. Heightened Scrutiny Is Warranted Because the Exclusion Impermissibly Discriminates on the Basis of Race

The exclusion is additionally subject to heightened scrutiny because it is rooted in a racially discriminatory purpose. The legal and political relationship between Puerto Rico and the

United States has been deeply marred by racism since its inception. Most significantly, the *Insular Cases* used the explicitly racist premise that people of "alien races, differing from us in religion, customs, laws, methods of taxation, and modes of thought" were unworthy of full constitutional rights. *See, e.g., Downes v. Bidwell*, 182 U.S. 244, 287 (1901). The reasoning of these cases has been used to justify continuing discrimination against Puerto Rico residents, and to effectively accord them the status of second-class citizens.

The Government does not contest that the exclusion targets a population that is almost 100% Hispanic/Latino. However, the United States argues that this "discriminatory impact" does not warrant heightened scrutiny because there is no evidence that it was motivated by a "discriminatory purpose." Pl.'s MSJ 15-16. The Government attempts to dismiss the *Insular Cases* as irrelevant by arguing that any inquiry into discriminatory purpose must be narrowly limited to consideration of Congress' purpose at the time it enacted the SSI program in 1972. But the underlying history cannot be brushed aside. As the Supreme Court has acknowledged, the exclusion can only be justified by reference to the *Insular Cases*, which established the constitutional framework for extending lesser protections to Puerto Rico residents under the Incorporation Doctrine. *See Califano*, 435 U.S. at 3, n. 4. The exclusion's roots in the *Insular Cases* must therefore factor into a full and fair equal protection analysis.

Viewed through this lens, the exclusion of Puerto Rico from the SSI program cannot be plausibly explained without reference to race; it is no coincidence that the populations targeted by the exclusion are precisely the same "alien races" referenced in *Downes*. The discriminatory intent underlying the exclusion of Puerto Rico is as blatant as if a state government were to exclude municipalities with predominantly ethnic minority populations from receiving certain social and economic benefits. *See Washington v. Davis*, 426 U.S. 229, 242 (1976) (a

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"); *Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 266 (1977) (heightened scrutiny applies where there is "a clear pattern, unexplainable on grounds other than race").[2]

(b) The Exclusion Fails to Satisfy Even Rational Basis Review

Even if this Court elects to apply rational basis review, the exclusion must be invalidated because the Government cannot meet its burden of showing that it advances any legitimate purpose, much less that it "bear[s] a rational relationship to an independent and legitimate legislative end." *Romer v. Evans*, 517 U.S. 620, 633 (1996).

1. The First Circuit Applies a More Intensive Level of Rational Basis Review When Minorities Are Subject to Discrimination

Massachusetts v. United States HHS, 682 F.3d 1, 10 (1st Cir. 2012), establishes that even under rational basis review, "Supreme Court equal protection decisions have both intensified scrutiny of purported justifications where minorities are subject to discrepant treatment and have limited the permissible justifications." These decisions have "stressed the historic patterns of disadvantage suffered by the group adversely affected by the statute. . . . The Court has in these cases undertaken a more careful assessment of the justifications than the light scrutiny offered by conventional rational basis review." *Id.* at 11.

The Government incorrectly contends that this intensified scrutiny is only available in cases analogous to *Romer v. Evans*, 517 U.S. 620 (1996), "in which the defense of a federal law is based solely on the singling out of a group that is 'irrationally hated or irrationally feared.'"

[2] Notably, in *Missouri v. Lewis*, 101 U.S. 22, 32 (1879), the Court stated, "[i]t is not impossible that a distinct territorial establishment and jurisdiction might be intended as, or might have the effect of, a discrimination against a particular race or class, where such race or class should happen to be the principal occupants of the disfavored district." In other words, a state would violate the Equal Protection Clause if it classified a population on the basis of geographic location if the classification had a clear impact on a particular race or class. *See also Gomillion v. Lightfoot*, 364 U.S. 339, 344-46 (1960).

Pl's. MSJ 14. Rather, in *Massachusetts*, the First Circuit emphasized that the reason for intensified scrutiny of distinctions drawn against historically disadvantaged groups "is that such a group has historically been less able to protect itself through the political process." 682 F.3d at 14. As Puerto Rico residents are unable to protect themselves through the political process, the "intensified scrutiny" applied in *Massachusetts* applies here. Even if irrational hatred or fear were needed to trigger this type of scrutiny, the *Insular Cases* themselves demonstrate that the continued discrimination against Puerto Rico residents is the result of such irrational animosity.

2. The Justifications for the Exclusion Do Not Satisfy Any Level of Scrutiny

The Government has put forward two purported rational bases for the exclusion: (1) Puerto Rico's "unique" tax status; and (2) the "high cost" of extending SSI benefits to Puerto Rico.[3] Pl's. MSJ 9-12.

First, the Government incorrectly asserts that "Puerto Rico residents are exempted from paying the taxes that fund the SSI program." Pl's. MSJ 10. In fact, SSI is funded from the general revenues, not solely from income taxes. *See* SOCIAL SEC. ADMIN., SUPPLEMENTAL SECURITY INCOME HOME PAGE – 2018 EDITION, at https://www.ssa.gov/ssi/. Even discounting Social Security payroll taxes, Puerto Rico residents pay import/export taxes, commodity taxes, income tax on money earned outside of Puerto Rico, and tax on income earned by federal employees within Puerto Rico. *See Consejo de Salud Playa de Ponce v. Rullan*, 586 F. Supp. 2d 22, 38 (D.P.R. 2008); 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-

[3] *Califano* and *Harris v. Rosario*, 446 U.S. 651 (1980), additionally cited the possibility that "greater benefits could disrupt the Puerto Rican economy" as an alleged rational basis for legislation according Puerto Rico residents lesser benefits than residents of the states. *See Rosario*, 446 U.S. at 652. However, the Government has abandoned that argument in its brief, and Vaello Madero therefore does not address it any further here.

book-table-5. All of these taxes go into general revenues, and therefore assist in funding the SSI program. Yet, Puerto Rico residents receive no benefit from the portion of the funding allocated to SSI.

The Government further claims that the "rationale underlying the limitation here is that the community of Puerto Rico residents, taken as a whole, are exempt from payment of the very revenue source (federal income tax) that would support the SSI program if it were extended to cover that community of residents." Pl's. MSJ 11 n. 6. Not so. Congress has extended SSI benefits to the Northern Mariana Islands, which pays fewer federal taxes than Puerto Rico. The Government brushes aside this inconsistency by citing to the "*sui generis* nature of the relationship between the United States and each territory" and stating that Congress is not "constrained to extend federal benefits legislation to U.S. territories uniformly." *Id.* at 11. But this argument misses the point. The United States is "constrained" to act in accordance with the guarantee of equal protection, and therefore has the burden to establish that there is at least a rational basis for the exclusion of Puerto Rico residents from the SSI program. Simply asserting that the United States may treat the territories differently does not provide this rational basis, especially where such disparate treatment is tainted by a history of invidious discrimination. Congress' flagrant disregard of the supposed "rationale" underlying the exclusion indicates that there is no logical connection between income tax and the extension of SSI benefits.[4]

Second, the purported concern with "the cost of including Puerto Rico" in the SSI program and with "protecting the fiscal integrity of Government programs, and of the

[4] Moreover, a policy of tying the entitlement of receiving SSI benefits based on whether Puerto Rico is subject to personal income tax makes particularly little sense because federal SSI benefits are uniform across the country, regardless of how much a particular state pays into the general revenues. *See* SOCIAL SEC. ADMIN., SSI FEDERAL PAYMENT AMOUNTS FOR 2019, https://www.ssa.gov/oact/cola/SSI.html. It is therefore far more rational to consider SSI as a national program, in which funds raised from across the nation are used to support the program nationally, rather than on a state-by-state basis.

Government as a whole" in no way justifies the exclusion. The Government exaggerates the additional cost of extending SSI to Puerto Rico by comparing the amounts Puerto Rico residents would receive under SSI to the small amounts they currently receive under analogous programs. It is more logical to compare the current cost of the SSI program, as a whole, to the comparatively small cost of extending this program to Puerto Rico residents. As of 2017, the total amount of payments under the SSI program was almost $55 billion. SOCIAL SEC. ADMIN., SSI ANNUAL STATISTICAL REPORT, 2017, https://www.ssa.gov/policy/docs/statcomps/ssi_asr/. The cost of extending SSI to Puerto Rico, even by the Government's estimate, would therefore be less than 2.75% of the total cost of the program. This amount is unlikely to jeopardize the fiscal integrity of the program. And even if fiscal integrity were an overriding concern, this would not justify the targeted exclusion of Puerto Rico residents from the SSI program. Rather, the solution would be to reduce benefits across the board. *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 government resources," but an "interest in conserving the public fisc alone . . . can hardly justify the classification used in allocating those resources"), *aff'd*, 699 F.3d 169 (2d Cir. 2012), *aff'd*, *United States v. Windsor*, 570 U.S. 744 (2013) (quotations omitted); *see also Massachusetts*, 682 F.3d at 14 (rejecting argument that denial of benefits to same-sex couples was justified by the need to "preserv[e] scarce government resources").

The Government's argument on this point would lead to absurd results. For example, if Congress decided tomorrow to exclude D.C. entirely from the SSI program solely to reduce costs, this too could be justified as the sort of "line-drawing" in economic or social legislation that is "virtually unreviewable." Pl's. MSJ 13. And it would not matter that D.C. residents are

subject to the personal income tax, because the *sui generis* nature of the United States' relationship to its territories would not require Congress to treat D.C. on the same level as the states, or even other territories. That cannot be the law.

II. The Territory Clause Does Not Preclude Heightened Scrutiny

The Government maintains that, when enacting social and economic legislation, Congress may discriminate against the territories, whether incorporated or not, simply by virtue of its powers under the Territory Clause. This argument is inconsistent with the rationales of *Califano* and *Rosario*, and with how courts have long understood Congress' powers under the Territory Clause.

The Territory Clause does not grant Congress a license to discriminate against the territories or allow such discrimination to be subject to only the lowest level of scrutiny. Rather, the Territory Clause provides only that Congress may exercise the same powers over United States territories as the states have over their municipalities "*in all cases where legislation is possible*." *Cincinnati Soap Co. v. United States*¸ 301 U.S. 308, 317 (1937) (emphasis added); *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 organization"). This means that Congress is bound by the dictates of equal protection when legislating for the territories just as any state government is when legislating for its citizens. Accordingly, neither *Califano* nor *Rosario* could have justified Congress' purported ability to discriminate against the territories solely by reference to the Territory Clause. Rather, these decisions relied on the *Insular Cases*, 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. Thus, the exclusion of Puerto Rico residents from the SSI program cannot be justified except by reference to the Incorporation Doctrine developed in the *Insular Cases*.

(a) *Califano* and *Rosario* Were Premised on Puerto Rico's Status as an Unincorporated Territory

Supreme Court doctrine since the *Insular Cases* has held that Puerto Rico is not afforded the full protections of the Constitution because it is an "unincorporated" territory. For this reason, the *Califano* Court cited the *Insular Cases* and the Incorporation Doctrine in considering whether the exclusion of Puerto Rico residents from the SSI program would violate equal protection principles:

> [Plaintiffs'] complaint had also relied on the equal protection component of the Due Process Clause of the Fifth Amendment in attacking the exclusion of Puerto Rico from the SSI program . . . But the District Court apparently acknowledged that Congress has the power to treat Puerto Rico differently, and that every federal program does not have to be extended to it. Puerto Rico has a relationship to the United States that has no parallel in our history.

Califano, 435 U.S. at 4, n. 4 (citations omitted).

If the *Califano* Court had based its decision solely on Congress' powers under the Territory Clause, it would have simply cited the Territory Clause itself, or to cases discussing the general extent of Congress' powers under this clause. *See, e.g.*, *Cincinnati Soap*, 301 U.S. at 317. However, the Court instead focused on the specific relationship between Puerto Rico and the United States and cited authorities that were central to the development of the Incorporation Doctrine, namely *Downes*, 182 U.S. at 287 (holding that the Uniformity Clause of the Constitution was inapplicable to Puerto Rico because it was unincorporated); *Dorr v. United States*, 195 U.S. 138, 149 (1904) (holding that the right to trial by jury was inapplicable in the Philippines because it was unincorporated); *Balzac v. Porto Rico*, 258 U.S. 298, 313 (1922) (holding that the right to trial by jury was inapplicable in Puerto Rico because it was

unincorporated); and Arnold H. Leibowitz, *The Applicability of Federal Law to the Commonwealth of Puerto Rico*, 56 GEO. L.J. 219 (1967) (discussing the reach of federal law to Puerto Rico in light of the Incorporation Doctrine). Thus, the Court was relying on Puerto Rico's status as an unincorporated territory to justify its exclusion from the SSI program. And *Rosario* affirmed this justification by expressly adopting the reasoning of *Califano*. *See* 446 U.S. at 652 (upholding exclusion of Puerto Rico residents from a federal benefits program by stating "we see no reason to depart from our conclusion in *Torres*" that the exclusion would survive rational basis review).

In addition to its reliance on the Incorporation Doctrine, the *Califano* Court also cited *Examining Board of Engineers, Architects, & Surveyors v. Flores de Otero*, 426 U.S. 572 (1976), to articulate the nature of Puerto Rico's relationship to the United States. *Examining Board* had earlier established that the equal protection guarantee of the Fifth or Fourteenth Amendment applies in Puerto Rico. 426 U.S. at 599-601. When read together with the Court's reliance on the *Insular Cases*, the clear implication of *Califano* is that, although the equal protection guarantee applies to Puerto Rico, this protection is limited in scope due to Puerto Rico's status as an unincorporated territory.

(b) The Scope of Congress' Powers under the Territory Clause Is Not Dispositive of the Level of Scrutiny Applicable Here

Contrary to the Government's contentions, the *Califano* and *Rosario* Courts could not have justified the exclusion of Puerto Rico residents from the SSI program based solely on Congress' powers under the Territory Clause. Simply put, there is no logical reason why Congress' ability to act as a local legislator for the territories, *i.e.*, to act analogously to a state legislature, would preclude heightened scrutiny of legislation enacted pursuant to that power.

After all, legislation enacted by state governments is routinely subject to heightened scrutiny when warranted.

And even if legislation enacted pursuant to the Territory Clause were somehow exempt from heightened scrutiny, there is no indication that Congress was acting pursuant to its powers under the Territory Clause, *i.e.*, as local legislator for the territories, when it enacted the SSI program. Rather, Congress was enacting economic legislation in its capacity as national legislator. *See Binns v. United States*, 194 U.S. 486, 496 (1904) (upholding a special system of license taxes upon certain lines of business within the territory of Alaska only after determining that these local taxes were intended to support the territorial government, and therefore within Congress' powers under the Territory Clause); *Cincinnati Soap*, 301 U.S. at 323 (holding the same regarding tax on Philippine coconut oil). In short, the Territory Clause empowers Congress only to fulfill the functions of a local legislator for the territories. It is not, however, a license to discriminate against the territories when enacting national economic legislation; nor can it be used as a magic wand to wave away constitutional limitations on its power.

That is why the Incorporation Doctrine was adopted. In *Downes*, for example, the Court expressly noted that the duty on merchandise shipped from Puerto Rico to the States was not a local tax, and therefore did not fall within Congress' powers to act as local legislator for Puerto Rico pursuant to the Territory Clause. 182 U.S. at 299 (White, J., concurring). As such, this tax would normally be subject to the Uniformity Clause, which requires that taxes levied pursuant to Congress' power to tax be uniform throughout the United States. *Id.* The Court could not have upheld the duty without first determining that Puerto Rico had not been incorporated into the United States, and that the constitutional protections of the Uniformity Clause were thus not applicable to Puerto Rico. Similarly, the *Califano* Court could not have anticipated that the exclusion of Puerto Rico residents from the SSI program would survive equal protection review

without relying on the Incorporation Doctrine to conclude that equal protection is not fully applicable in Puerto Rico.

The Government relies on two out-of-circuit decisions to support its argument that Congress may discriminate against residents of the territories when enacting social and economic legislation simply by virtue of its powers under the Territory Clause: *Quiban v. Veterans Admin.*, 928 F.2d 1154 (D.C. Cir. 1991), and *Besinga v. United States*, 14 F.3d 1356 (9th Cir. 1994). However, both *Quiban* and *Besinga* support their holdings by citing *Califano* and *Rosario*. And, as demonstrated above, *Califano* and *Rosario* explicitly relied on the Incorporation Doctrine as established in the *Insular Cases* in support of that proposition.[5]

Therefore, *Quiban* and *Besinga* are also dependent on the separate and unequal framework of the *Insular Cases*, and their reasoning should be rejected.

(c) The Equal Protection Analysis in D.C. Does Not Foreclose Heightened Scrutiny

The D.C. Circuit cases cited by the Government do not preclude the application of heightened scrutiny to legislation that excludes Puerto Rico. Both *United States v. Cohen*, 733 F.2d 128, 134-35 (D.C. Cir. 1984), and *Calloway v. Dist. of Columbia*, 216 F.3d 1, 7 (D.C. Cir. 2000), held only that D.C. residents do not constitute a suspect class. But this conclusion does not apply to Puerto Rico. D.C. residents are not "politically powerless" because they are represented in the Electoral College, unlike Puerto Rico residents. Additionally, the population of D.C. is not overwhelmingly composed of a racial minority, as is the case with Puerto Rico.

[5] As explained in Vaello Madero's Motion for Summary Judgment, the *Insular Cases* originated from explicitly racist premises concerning the consequences of admitting people of "an uncivilized race" fully into the Union. Def's. MSJ 14. The reasoning of these cases has long been used to justify denying basic constitutional rights to the inhabitants of these territories, and to effectively accord them the status of second-class citizens. This doctrine is fundamentally inconsistent with the guarantee of equal protection. *Quiban* and *Besinga* are merely two additional fruits of this poisonous tree.

Legislation targeting D.C. residents therefore may not trigger the same concerns of political powerlessness and racial discrimination as legislation targeting Puerto Rico.

Furthermore, neither *Cohen* nor *Calloway* forecloses the application of heightened scrutiny to legislation involving D.C. in appropriate circumstances. If Congress passed legislation excluding municipalities with predominantly African-American populations in D.C., there is no question this would be subject to heightened scrutiny, and the reasoning of *United States v. Thompson*, 452 F.2d 1333 (D.C. Cir. 1971), would be controlling. Vaello Madero submits that the reasoning of *Thompson*, which held that legislation discriminating against D.C. residents is inherently suspect, is the correct framework for legislation targeting Puerto Rico. In particular, *Thompson*'s warning about the dangers of creating a "federal colony," in which the Constitution is not fully applicable, is highly relevant to Puerto Rico. *See* 452 F.2d at 1338. This is precisely the status to which the Supreme Court has relegated Puerto Rico in the *Insular Cases*.

III. Outdated, Non-Adversarial Summary Dispositions are Not Binding

Finally, neither *Califano* nor *Rosario* have the binding, precedential weight normally attached to Supreme Court decisions. Both decisions were issued *per curiam* and as summary dispositions, without the benefit of either briefing or oral argument before the Supreme Court. *See Rosario*, 446 U.S. at 652. This substantially weakens their status as binding precedent. *See United States Bancorp Mortg. Co. v. Bonner Mall P'ship*, 513 U.S. 18, 24 (1994) (noting that courts display "customary skepticism toward *per curiam* dispositions that lack the reasoned consideration of a full opinion"); *Connecticut v. Doehr*, 501 U.S. 1, 12 n.4 (1991) (noting that the Court's summary affirmance of a previous case does not control because "[a] summary disposition does not enjoy the full precedential value of a case argued on the merits and disposed of by a written opinion"); *Gray v. Mississippi*, 481 U.S. 648, 651 n.1 (1987) (noting that prior

decision which summarily reversed a judgment of a state court "does not have the same precedential effect as does a case decided upon full briefing and argument").

In his Motion for Summary Judgment, Vaello Madero cited the line of same-sex marriage cases as examples of the district courts' role in the development of equal protection analysis. Def.'s MSJ 23-25. The Government now attempts to dismiss these cases on the grounds that "the precedent at issue there was in fact a summary dismissal," and therefore supposedly entitled to lesser precedential weight. *See* Pl.'s MSJ 20. These concerns also apply to *Califano* and *Rosario*. In fact, the circumstances of *Califano* and *Rosario* make them even more suspect. For example, in *Califano* no equal protection claim was even before the Court, and the Court discussed this issue only briefly in dicta. *See Rosario*, 446 U.S. at 654-55 (Marshall, J., dissenting) (stating that in *Califano* "no equal protection question was before this Court" and that "[t]he Court merely referred to the equal protection claim briefly in a footnote"). The *Rosario* Court then adopted the conclusion from *Califano* without any additional reasoning or explanation. Under the circumstances, these two summary dispositions containing only a cursory consideration of the equal protection claim do not have the typical precedential weight accorded to Supreme Court decisions.

CONCLUSION

For these reasons, summary judgment should be granted in favor of Vaello Madero and the United States' cross-motion should be denied.

Date: October 24, 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 24th day of October, 2018.

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