

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

: _____ :
UNITED STATES OF AMERICA, :
Plaintiff, :
vs. : No. 17-CV-2133 GAG
JOSÉ L. VAELLO-MADERO, :
Defendant. :

TRANSCRIPT OF CIVIL HEARING
HELD BEFORE THE HONORABLE CHIEF JUDGE GUSTAVO A. GELPÍ
U.S. BANKRUPTCY COURT, PONCE, PUERTO RICO
THURSDAY, DECEMBER 20, 2018, BEGINNING AT 9:45 A.M.

A P P E A R A N C E S:

UNITED STATES DEPARTMENT OF JUSTICE
Civil Division - Federal Programs Branch
BY DANIEL RIESS, ESQUIRE
P.O. Box 883
Washington, DC 20044
For the Plaintiff

SOCIAL SECURITY ADMINISTRATION
BY ARIELLA ZOLTAN, ESQUIRE
26 Federal Plaza, Room 3904
New York, New York 10278
For the Plaintiff

CURTIS, MALLET-PREVOST, COLT & MOSLE, LLP
BY HERMANN FERRÉ, ESQUIRE and
JUAN O. PERLA, ESQUIRE
101 Park Avenue
New York, New York 10178
For the Defendant

JOHN W. FERRÉ-CROSSLEY, ESQUIRE
119 Rodrigo de Triana
Urb. El Vedado de Baldrich
San Juan, Puerto Rico 00918
For the Defendant

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

DEPARTMENT OF JUSTICE COMMONWEALTH OF PR
BY SUSANA I. PEÑAGARÍCANO-BROWN, ESQUIRE
P.O. Box 9020192
San Juan, Puerto Rico 00902-0192
For Amicus Commonwealth of Puerto Rico

CARLOS LUGO-FIOL, ESQUIRE
Urb. El Dorado
F8 Calle D
San Juan, Puerto Rico 00926
For Amicus Commonwealth of Puerto Rico

ESTUDIO LEGAL FERRAIUOLI, PSC
BY VERONICA FERRAIUOLI-HORNEDO, ESQUIRE
P.O. Box 195384
San Juan, Puerto Rico 00919-5384
For Amicus Resident Commissioner of PR

IGARTÚA LAW OFFICE
BY GREGORIO IGARTÚA-DE-LA-ROSA, ESQUIRE
Box 3911
Aguadilla, Puerto Rico 00605
For Amicus Gregorio Igartúa-De-La-Rosa

ALSO PRESENT: Courtroom Deputy Clerk Sonia C. Cardona

COPY - HERMAN FERRER

U.S. v. Vaello-Madero - Civil Hearing

1 THE COURTROOM DEPUTY: All rise.

2 (The Court enters the room.)

3 THE COURTROOM DEPUTY: The United States
4 District Court for the District of Puerto Rico is now
5 in session. All those having business before this
6 Court shall draw near, give your attention and you
7 shall be heard. God save the United States of
8 America and this Honorable Court. Honorable Judge
9 Gustavo A. Gelpí presiding.

10 THE COURT: Please be seated. Let's call
11 the matter for this morning.

12 THE COURTROOM DEPUTY: Civil case
13 No. 17-2133. United States of America versus
14 Vaello-Madero. Set for oral arguments. Will the
15 parties please identify themselves for the record.

16 MR. REISS: Good morning, Your Honor.
17 Daniel Riess for the United States, and my colleague
18 Ariella Zoltan from the Social Security
19 Administration.

20 THE COURT: Good morning.

21 MR. REISS: Good morning.

22 MR. FERRÉ: Hermann Ferré for Defendant
23 Vaello-Madero here with John Ferré-Crossley as
24 co-counsel, and colleague Juan Perla also from the
25 law firm of Curtis, Mallet-Prevost, Colt & Mosle.

U.S. v. Vaello-Madero - Civil Hearing

1 THE COURT: Okay, welcome.

2 MS. FERRAIUOLI-HORNEDO: Good morning, Your
3 Honor. For the record, this is Veronica Ferraiuoli
4 representing the Resident C.G.

5 THE COURT: Okay, good morning.

6 MS. PEÑAGARÍCANO-BROWN: Good morning, Your
7 Honor. Susana Peñagaricano representing the
8 Commonwealth of Puerto Rico.

9 MR. LUGO-FIOL: Good morning. Carlos
10 Lugo-Fiol also representing Amicus the Commonwealth
11 of Puerto Rico.

12 THE COURT: Thank you very much all for
13 being here and being here in Ponce. The reason this
14 argument is being held here is this is a very
15 comfortable courthouse and I try to use it for
16 matters as this. I think it's more quiet and
17 everybody can focus on the task at hand.

18 I want to -- first of all, I want to commend
19 both the United States and Counsel Vaello's
20 attorneys, as well as Congressman González, and the
21 Commonwealth of Puerto Rico for the briefs. All the
22 briefs filed in this case are top quality. I've had
23 the pleasure of reading them and re-reading them over
24 again. And this is the quality of litigation that as
25 a federal judge I expect and I would like to see more

U.S. v. Vaello-Madero - Civil Hearing

1 often from other parties. So thank you very much for
2 that.

3 I also want to note that counsel for
4 Vaello-Madero, Mr. Ferré and his law firm and local
5 counsel, are doing this on a pro bono basis, they
6 were court appointed by the Court. So I'm very
7 thankful because this type of litigation without the
8 proper resources is very hard to handle. So thanks
9 for that. And I know that you all flew from New York
10 for this hearing, except local counsel, so thank you
11 very much.

12 I also want to note that Counsel Gregorio
13 Igartúa who has filed an amicus, he will not be
14 arguing, is here in court and I recognize his
15 presence. And also I note that Counsel Nicolás
16 Noguerras, who is a former senator here in Puerto Rico
17 for many years, also filed an amicus. That's part of
18 the record and it's been duly noted even though these
19 two other amicus briefs will not be arguing.

20 Now, the way I'm going to proceed this
21 morning is as follows: I will make some general
22 statements and observations and then I'm going to
23 pose some questions both -- and I want to hear as to
24 these questions from the United States and from
25 Vaello's attorneys. And what I will do is I'll

U.S. v. Vaello-Madero - Civil Hearing

1 probably pose one or two questions at a time and then
2 I'll hear prospective answers.

3 After that I'm going to have the amicus
4 counsel for the Commonwealth make a statement and
5 argument, I'll perhaps ask some questions for
6 approximately ten minutes, and then counsel for
7 Congresswoman González. After that I'm going to
8 allow counsel first for the United States to make any
9 other arguments and presentations that I have not
10 covered in my questions to please make that, and take
11 your time, and then I'll have Counsel Ferré do the
12 same on behalf of Mr. Vaello, and then I'll allow a
13 short rebuttal time for the government and for
14 counsel. So that's the proceedings we're going to
15 have.

16 Okay. So let me begin, and I think -- and
17 I'll start my questions. Now let me -- I think
18 it's -- I want to point to the amicus brief filed by
19 Congresswoman González. And in that brief in her
20 conclusion I would like to open up with a statement.
21 And, again, that's a statement of the amicus, not
22 necessarily a statement of the Court but I think it's
23 a very good starting point. And I'll read from her
24 conclusion.

25 "Of all the disparities that Americans

U.S. v. Vaello-Madero - Civil Hearing

1 living in Puerto Rico face, none is as shocking to
2 the conscience as the disparity in the assistance
3 available to the most vulnerable citizens -- people
4 who under no circumstance can support themselves. An
5 American citizen living under the poverty line in the
6 continental United States is no more needy,
7 vulnerable, or deserving of assistance than an
8 American citizen living under the poverty line in
9 this territory.

10 "Supplemental Social Security income, SSI,
11 is a means tested entitlement program which, unlike
12 Social Security" -- or I would add Medicare -- "does
13 not require a beneficiary to make payments into the
14 program to be entitled to the benefits. An American
15 in a state receiving SSI is as likely to pay federal
16 taxes as an American living in Puerto Rico. There is
17 no justifiable reason for this statutory
18 discrimination."

19 So what I would ask, beginning with the
20 United States and then I'll hear from Vaello's
21 counsel, in regards to that collusion, are you in
22 agreement or in disagreement and why? So Counsel you
23 may proceed. And you can -- let's do this so we
24 don't have to shuffle back and forth, at least for
25 this part of the argument, you can remain sitting

U.S. v. Vaello-Madero - Civil Hearing

1 down and you can answer from where you are. Please
2 proceed.

3 MR. RIESS: Thank you, Your Honor. And may
4 it please the Court.

5 THE COURT: Good morning.

6 MR. RIESS: Good morning, sir. We do
7 respectfully disagree with the statement by the
8 respective amicus, and I'd just like to focus on this
9 response. Residents of Puerto Rico generally do not
10 pay federal income tax. And there are exceptions,
11 but that's very important, and I'll explain why and
12 why that pertains to Supplemental Security Income.

13 So there are at least two models for how to
14 handle paying for governmental benefits. One is to
15 assess a specific tax that pays for that specific
16 benefit and the other is to use general revenues as
17 the source of payment. So an example of a specific
18 tax approach is the federal payroll tax, that pays
19 for specific benefits. So it pays for Title II
20 retirement and disability. Residents of Puerto Rico
21 pay payroll taxes and as a result they can and do
22 receive Title II benefits, including the defendant
23 here, Mr. Vaello-Madero. He receives Title II
24 retirement benefits.

25 But Supplemental Security Income, SSI,

U.S. v. Vaello-Madero - Civil Hearing

1 that's a different model. It's paid for by general
2 revenues, and those general revenues are funded in
3 very significant part by individual federal income
4 tax. And so because Puerto Rico residents generally
5 don't pay federal income tax, they are not eligible
6 for SSI.

7 THE COURT: Let me ask you a question
8 because most individuals even in the mainland, and in
9 the Mariana Islands where they receive SSI, these are
10 poor, disabled, sick individuals who even if they
11 lived in the States or in the CNMI, in the Marianas,
12 they would likely not even be contributing to these
13 systems. Wouldn't that make a difference?

14 MR. RIESS: Respectfully, no, Your Honor,
15 and here's why. As a matter of law, it's reasonable
16 for Congress to decide as a general matter that if
17 residents of Puerto Rico don't pay federal income
18 tax, regardless of an individual's circumstances,
19 therefore Puerto Rico residents are not eligible for
20 SSI benefits from general revenues. The Constitution
21 of the line drawing, it doesn't turn on whether or
22 not any individual might have paid federal income
23 tax. As -- the rationale here is --

24 THE COURT: It's more like the jurisdiction
25 paying or providing federal income to the general

U.S. v. Vaello-Madero - Civil Hearing

1 treasury, correct?

2 MR. RIESS: That's correct, Your Honor. The
3 rationale --

4 THE COURT: Let me -- and these are
5 statistics and I believe they are discussed in some
6 of the amicus briefs. But, for example, Puerto Rico
7 individuals generally don't pay federal taxes, even
8 those who file their tax returns, because federal law
9 allows the money to remain in Puerto Rico. That's a
10 given. But Puerto Rico notwithstanding collects and
11 provides to the general fund more federal funds, more
12 taxes, again from all sorts of possible taxes, than
13 at least one state of the union and almost as much as
14 two other states. So in the Government's position
15 that still would not make a difference?

16 MR. RIESS: Respectfully, no, Your Honor.
17 Whether or not the Court disagrees ultimately with
18 the policy here, respectfully that doesn't render it
19 unconstitutional under rational basis. It could have
20 queries about the wisdom of the policy or about the
21 logic of the policy, but respectfully speaking that
22 does not render a federal statute unconstitutional.

23 THE COURT: Okay. Let me then -- anything
24 else? If not, I'll hear from Mr. Ferré.

25 MR. RIESS: I don't believe so, Your Honor.

U.S. v. Vaello-Madero - Civil Hearing

1 THE COURT: As it pertains to this
2 particular question.

3 Okay, Mr. Ferré, let me hear your position,
4 if your client is in agreement or disagreement with
5 the statement made by Congresswoman Jennifer
6 González.

7 MR. FERRÉ: Your Honor, thank you. Well,
8 certainly we are entirely in agreement. We agree
9 that it is shocking the different treatment with
10 respect to the most needy in Puerto Rico versus the
11 most needy stateside.

12 Now we'd like to just in recent
13 examination -- after reviewing again the amicus
14 briefs and including the amicus brief for Congressman
15 González, we note that the Tax Policy Center has
16 reported that in 2016 over 44 percent of all U.S.
17 residents paid no federal income tax. So, certainly
18 the fact that some and many U.S. citizens in Puerto
19 Rico do not pay federal income tax should not be
20 determinative on this issue of the level of support
21 for the most needy.

22 And I think the Court also has on the record
23 the fact that Puerto Rico indeed does pay into the
24 general treasury. In 2016 alone, Puerto Rico paid
25 nearly \$3.5 billion, and we can see that on the IRS

U.S. v. Vaello-Madero - Civil Hearing

1 Web site itself.

2 THE COURT: Let me ask you because you
3 mentioned the word "shocking." Obviously shocking
4 does not make a federal statute or federal action
5 unconstitutional. There has to be a violation, again
6 in this case, of equal protection or some other
7 constitutional provision. So my question is, when
8 these -- when SSI was enacted and Puerto Rico was
9 excluded, for purposes of either rational basis or
10 higher scrutiny, should we look to the moment the
11 action was taken by the Federal Government, or can we
12 look at Puerto Rico's current situation?

13 And I'm going to ask the response also from
14 the U.S. government as to this question. Should we
15 look at the situation now in 2018 almost 2019, or we
16 go back and everything that has changed? Or if it
17 hasn't changed then there's nothing the Court can do.
18 What would be Mr. Vaello's position beginning with
19 Mr. Ferré?

20 MR. FERRÉ: I would argue that certainly you
21 could look at either the point in time at which the
22 statute was enacted or today, and I think you would
23 come out with the same result. I think -- our
24 position is the very fact that the statute excludes a
25 politically powerless group makes the statute's

U.S. v. Vaello-Madero - Civil Hearing

1 exclusion subject to strict scrutiny.

2 THE COURT: Let me hear from counsel for the
3 United States then as to that particular question.

4 MR. RIESS: Just to be clear, Your Honor, on
5 Counsel's point or as to your question?

6 THE COURT: No, as to the question. For
7 purposes of either rational basis or strict scrutiny
8 Mr. Riess, do we look at the moment the legislation
9 was enacted or do we continue to look at the overall
10 big picture up to the present to see if the effect at
11 present violates equal protection?

12 MR. RIESS: Respectfully, Your Honor, we
13 look to the moment that the statute was created. And
14 on this point, the First Circuit in the
15 *Montalvo-Huertas* case, which is 885 F.2d at 971,
16 explained that and I quote, "Evaluating the continued
17 need for and suitability of legislation of this genre
18 is exactly the kind of policy judgment that the
19 rational basis test was designed to preclude."

20 I also note that the pertinent situation
21 here -- that the most important facts that were found
22 in *Califano* and *Harris* is that this is a law that
23 provides for governmental payment of money benefits,
24 and because Puerto Rico is a United States
25 territory -- and when Congress acts under its

U.S. v. Vaello-Madero - Civil Hearing

1 Territory Clause it has extremely broad discretion --
2 those were true in 1978 and 1980 when the Supreme
3 Court decided *Califano* and *Harris* as they are today.

4 THE COURT: Okay, thank you. And I'll ask
5 first from the government and then from Mr. Vaello.
6 I now go to the amicus filed by the Commonwealth of
7 Puerto Rico, particularly page 12. And this is
8 something that until I read this amicus and saw these
9 statistics -- and let me comment this, I think the
10 amicus briefs in this case obviously they support the
11 position of Mr. Vaello but they brought to light --
12 there's a lot of research and statistical research
13 that's been done which is very helpful to
14 understanding the whole situation.

15 I will read from page 12 to 13. "...the SSI
16 program clearly aims at individuals who do not pay
17 federal income taxes because their income is too low.
18 Moreover, the beneficiaries of SSI do not pay federal
19 taxes regardless of the state they reside in.
20 Additionally" -- and this is what I'm going to ask
21 disagree or agree or comments from the parties.
22 "Additionally, even noncitizens" -- and, again, I'll
23 repeat non U.S. citizens -- "may qualify for SSI
24 benefits from which the U.S. citizens of Puerto Rico
25 are excluded. In fact, in 2017, 6 percent of all SSI

U.S. v. Vaello-Madero - Civil Hearing

1 beneficiaries were non U.S. citizens." In 1995, that
2 percentage was even higher. It was 12.1 percent
3 which represented a total of 785,410 beneficiaries
4 who were non U.S. citizens.

5 So my question first to Mr. Riess, isn't
6 there some sort of discrimination in favor of
7 noncitizens who live in the mainland or the states or
8 the Mariana Islands versus U.S. citizens who live in
9 the territory, the Commonwealth of Puerto Rico?

10 And let me note that, again, when I refer
11 to -- I don't like to use the term Puerto Ricans
12 because it's -- obviously, you know, it's an ethnic
13 group and it goes to ethnicities, but when I'm
14 referring to anybody who is discriminated by the
15 statute it's U.S. citizens residing in Puerto Rico.
16 Because there are many U.S. citizens here who are
17 natural-born citizens of Puerto Rican origin but we
18 also have a percentage of U.S. citizens here who
19 moved to Puerto Rico, who retired, same as in the
20 Virgin Islands or any other territory. They come
21 here to retire or to work for X, Y, Z purposes and
22 when they move here also they lose that benefit.

23 So isn't that a problem? Or what's your
24 reaction to the statement that there are aliens,
25 resident aliens, in the United States who receive SSI

U.S. v. Vaello-Madero - Civil Hearing

1 when there are U.S. citizens that are not receiving
2 SSI and they are as equally poor, as equally sick,
3 and need these helps and they're not -- and these
4 U.S. citizens are not getting SSI here in the
5 territory? Let me hear first from Mr. Riess.

6 MR. RIESS: Yes, Your Honor. So I present
7 two points on the statement on pages 12 and 13
8 regarding the tax as it applies to SSI. I guess,
9 number one, as a matter of law, the eligibility of --
10 to -- for SSI doesn't depend on whether or not
11 someone pays federal income tax. That is -- whether
12 or not -- their taxpayer status is not relevant as to
13 whether they qualify for SSI.

14 And, number two, respectfully as a matter of
15 fact we don't know for a fact that beneficiaries of
16 SSI don't pay federal taxes. We noted in our
17 response to the amicus that SSI recipients may have
18 any number of income and revenue streams and may
19 incur federal tax liability. So, for example, in
20 2019 a person with only earnings income could earn up
21 to more than \$1,600 a month and still be eligible for
22 SSI.

23 With regard to the statement --

24 THE COURT: But in a sense somebody who
25 makes -- again, we're talking about the mainland, for

U.S. v. Vaello-Madero - Civil Hearing

1 example, somebody in New York who makes \$1,600 a
2 month even in the poorest suburbs probably most if
3 not all of that money will go to rent, other
4 expenses. And, again, when you're talking the
5 mainland, you know, somebody who lives somewhere in
6 North Dakota makes 1600 a month probably lives pretty
7 well off.

8 Again, I don't think that's totally
9 dispositive because somebody who makes \$1600 a month
10 in Puerto Rico and is disabled probably won't have
11 too much money left over if the person is not healthy
12 to move around. Please continue.

13 MR. RIESS: Sure. Thank you, Your Honor. I
14 understand that. Respectfully I believe that the
15 statement by amicus boils down to a statement that
16 amicus disagrees fundamentally with the policy behind
17 this. And respectfully the -- whether or not one
18 agrees with the wisdom or the logic of the policy,
19 that does not constitute a basis for striking it down
20 under rational basis review when the link is --

21 THE COURT: In other words, and this is
22 something I learned when I went through my
23 confirmation hearing, federal judges, district,
24 appellate, Supreme Court justices are not
25 super-legislators. There's one hundred senators,

U.S. v. Vaello-Madero - Civil Hearing

1 there's, I don't know the number, 600-plus
2 representatives but they make policy. And, again,
3 it's not up to one single judge or justice or group
4 of judges to say, Well, that policy, we don't like
5 that policy. That's very clear. It has to be a
6 violation of equal protection or some other
7 Constitutional provision and that's where the judges
8 can exercise, you know, the case in controversy power
9 and determine the constitutionality.

10 So I'm very clear with that, that just
11 because Mr. Vaello doesn't like the policy, just
12 because I don't like it, perhaps even the United
13 States Government doesn't like the policy, the
14 Attorney General's Office; but, again, if that is the
15 policy through Congress obviously that's within our
16 separation of powers, that's pretty clear. Please
17 continue.

18 MR. RIESS: Respectfully that's correct,
19 Your Honor. What we're dealing with here is a
20 statute that is about the payment of monetary
21 benefits. And what the Supreme Court and other
22 courts have made clear is that when you have that,
23 and this is the *Lyng* case, 485 U.S. 373, the review
24 by courts of distinctions that Congress makes in
25 order to make allocations from a finite pool of

U.S. v. Vaello-Madero - Civil Hearing

1 resources has to be differential because the
2 discretion about how to spend money to improve the
3 general welfare is lodged in Congress rather than in
4 the courts. So a policy disagreement respectfully is
5 simply not sufficient to strike down a statute.

6 THE COURT: Okay, let me hear from Mr. Ferré
7 as to the statement in the Commonwealth's amicus
8 brief.

9 MR. FERRÉ: Thank you, Your Honor. Two
10 points to make and that is, first, I think that the
11 issue with respect to the fact that resident aliens
12 are able to participate in the SSI program I think
13 that the resident commissioner's point is that the
14 very fact that aliens can participate in the program
15 and U.S. citizens residing in the territories cannot
16 is irrational. I think that highlights the
17 irrationality of the exclusion of Puerto Rico.

18 The other point is --

19 THE COURT: When you say "irrationality," I
20 assume you refer that if there's X or Y or Z number
21 of limited federal funds out of the federal treasury,
22 before we start giving medical assistance to poor
23 aliens who have not become U.S. citizens,
24 we should -- when I say "we" I mean the American
25 nation or the Congress -- should first consider or

U.S. v. Vaello-Madero - Civil Hearing

1 treat or provide that assistance to its own citizens,
2 and after it's done so, if there's any additional
3 funds, then provide it to resident aliens. That's I
4 believe what you're arguing, correct? There's no
5 rationality as to providing noncitizens benefits that
6 citizens don't have.

7 MR. FERRÉ: Well, one would imagine, that's
8 correct, Your Honor.

9 The other point that we'd like to highlight
10 is the case law establishes that it would be
11 difficult for Congress to exclude aliens from the
12 program and that's because the exclusion of aliens
13 from the program would then be subject to --

14 THE COURT: Strict scrutiny.

15 MR. FERRÉ: -- strict scrutiny. These are a
16 politically powerless group. We would expect that
17 the same then standard of scrutiny should apply to
18 the exclusion of the residents of the territories and
19 that is but for the insular cases which appear to
20 hold that the standard of review then would be
21 rational basis. So, again, it goes to show that the
22 framework in which we are operating, something
23 doesn't seem correct. It seems that --

24 THE COURT: You're aware that obviously if
25 there's resident aliens, and there's a lot here in

U.S. v. Vaello-Madero - Civil Hearing

1 Puerto Rico and I'm sure they would also -- you know,
2 a lot of Dominican nationals are here -- and, again,
3 we naturalize them every month, many of them, but
4 there's many who still are resident aliens. Those
5 are denied the benefits also just like the U.S.
6 citizens in Puerto Rico. Wouldn't that make a
7 difference? because it's everybody who is in the
8 territory, it's not just U.S. citizens.

9 MR. FERRÉ: That's correct. All residents
10 of Puerto Rico are excluded.

11 THE COURT: So, I guess for this argument
12 you in that sense would also argue that we could
13 include the resident aliens and the U.S. citizens of
14 Puerto Rico being discriminated against everybody
15 else who is in the mainland in that sense.

16 MR. FERRÉ: Yes. If you were to compare how
17 U.S. citizens and aliens are treated in the
18 territories, in the territory of Puerto Rico, and
19 U.S. citizens and aliens are treated stateside, then
20 yes.

21 THE COURT: Okay. Next question, moving on.
22 And let me make -- point this out first and just to
23 make sure we're all -- I think we're all in the same
24 boat. Obviously the amicus curiae briefs are argued
25 in a big picture. The case we have before the Court

U.S. v. Vaello-Madero - Civil Hearing

1 today involves whether Mr. Vaello has to reimburse
2 the United States -- it's a collections, in that
3 sense a collections case -- he has to reimburse
4 approximately \$30,000 plus any interests to the
5 United States treasury. And obviously as a defense
6 he's bringing these arguments which obviously from
7 amicus's perspective, and that's why I thought it was
8 important for them to participate, any ruling here
9 could eventually have a broader context. But insofar
10 as we're concerned in this case, if Mr. Vaello
11 prevails, it is the remedy -- again, he's not moving
12 for declaratory relief class-wide or island-wide, it
13 is simply limited to his defense that right now he
14 does not have to reimburse that money. And I ask
15 Mr. Ferré you're in agreement that that is the case
16 that we have before the Court right now?

17 MR. FERRÉ: Yes, Your Honor.

18 THE COURT: And Mr. Riess I think you're
19 also in agreement that it is limited to whether
20 there's reimbursement or not. We're not talking --
21 again, this is not a declaratory judgment for a much
22 broader group of citizens right now, correct?

23 MR. RIESS: We are in agreement, Your Honor,
24 yes.

25 THE COURT: So I just wanted to make that

U.S. v. Vaello-Madero - Civil Hearing

1 very clear because whatever the ruling is in this
2 case, either in favor or Mr. Vaello or in favor of
3 the United States, I'm sure it will probably be
4 appealed one way or another, but it is limited to
5 Mr. Vaello at this particular case. Obviously
6 whatever precedent is set obviously it may lead to
7 further actions or other matters but obviously at
8 this time we're concerned with Mr. Vaello.

9 Let me go back to something Mr. Riess
10 mentioned when he was responding to my earlier
11 question that Mr. Riess brought up the Territory
12 Clause of the Constitution in Article IV and
13 mentioned that based on that Territory Clause, citing
14 the *Califano* case and the *Harris* case, that the
15 Congress and Federal Government, its agencies, have
16 broad discretion in treating Puerto Rico differently,
17 distinctly from the states, actions that cannot be
18 taken in the States can be taken in the territories.
19 And, as we have seen, each territory can be treated
20 differently because there is -- and, again, we'll
21 discuss this maybe later a little bit. The Mariana
22 Islands, citizens there have full Social Security,
23 full Medicare, full SSI benefit, and other federal
24 benefits. Obviously the population there is about
25 50,000 U.S. citizens compared to about 3.5, but

U.S. v. Vaello-Madero - Civil Hearing

1 there's those distinctions.

2 But Mr. Riess, again, the bottom line is
3 that under the jurisprudence that is still a good law
4 up to this moment, the government's position, as it's
5 been the position throughout the years, is that the
6 Federal Government, the Congress, whether we like it
7 or not individually, the Congress has unrestraint
8 power as long as it does not violate a constitutional
9 provision. If it's strict scrutiny it's very hard,
10 but if it's rational basis the Congress has basically
11 unrestrained, unfettered authority to pass federal
12 laws as to the territories. Am I correct?

13 MR. RIESS: That's correct, Your Honor. And
14 just two points on that very briefly. Just to be
15 clear, that's one basis that it boils down to that.
16 The *Harris* case talked about the Territory Clause.
17 The *Califano* case also talked about when there's a
18 program that creates social and economic welfare
19 benefits Congress's line drawing as to eligibility
20 requirements gets a strong presumption of
21 constitutionality. So I just want to be clear it's
22 not just the Territory Clause, it's also that.

23 But, second, with respect to the Territory
24 Clause --

25 THE COURT: As interpreted by the Supreme

U.S. v. Vaello-Madero - Civil Hearing

1 Court Congress has that additional leeway.

2 MR. RIESS: Correct, Your Honor.

3 THE COURT: And, again, this pertains to
4 federal benefits. Now, within that context -- this
5 is a broader question and I think I know what the
6 answer is but I just want to hear it for the
7 record -- but in theory Congress tomorrow could, you
8 know, as to Social Security, Medicare there is a cap
9 to U.S. citizens here and any resident aliens who may
10 qualify.

11 And, again, this includes U.S. citizens who
12 may move from the mainland to Puerto Rico, many
13 perhaps for the climate, medical reasons, but
14 Congress could take that cap and if it wants it could
15 say tomorrow no more cap, or it could say that cap is
16 limited here, we're going to reduce that cap even
17 more. Just the same way Congress tomorrow could say,
18 well, we feel like extending SSI to Puerto Rico, we
19 can do so or we're going to provide 43 percent SSI
20 benefits when compared to the states. That would be
21 at the discretion of the Congress and the agencies
22 that administer those particular funds. Am I
23 correct?

24 MR. RIESS: That's correct, Your Honor. I
25 see no reason why Congress wouldn't be able to do

U.S. v. Vaello-Madero - Civil Hearing

1 that, as you say, tomorrow.

2 But I just want to be clear that the
3 Territory Clause continues to be recognized by the
4 First Circuit in more recent cases like the
5 *Rivera-Torres* case which we've cited in our briefs,
6 that's an opinion by Judge Torruella about the
7 plenary powers under that; and then two cases from
8 this district earlier this year, the *Centro de*
9 *Periodismo Investigativo*, and *In Re Financial*
10 *Oversight* about the broad sweeping even plenary
11 powers under the Territory Clause.

12 THE COURT: And those last two you mentioned
13 they pertain to the PROMESA law, correct?

14 MR. RIESS: Correct, Your Honor.

15 THE COURT: And basically the ruling --
16 again, this is at the Circuit level that, again, the
17 Congress can enact PROMESA, statutes like PROMESA
18 which in a sense Puerto Rico has -- and it's very
19 interesting because Puerto Rico since 1952 Congress
20 had not enacted any federal statute that had a local
21 implication, a statute directly, specifically for
22 Puerto Rico. And in the case of PROMESA you have a
23 Constitution locally with three branches of
24 government but basically in the FLOW chart, the
25 government FLOW chart basically the fiscal board

U.S. v. Vaello-Madero - Civil Hearing

1 created by federal law, which is a state agency, is
2 in a sense placed above the three branches of
3 government for purposes of fiscal matters.

4 So, again, that would be another example,
5 unless the Supreme Court were to say at some point --
6 and I don't know if that challenge has been made, but
7 unless the Supreme Court were to say it's
8 unconstitutional, it is an example of the Congress
9 acting with that unrestrained power for the benefit
10 or whatever -- sometimes it may be for the benefit of
11 Puerto Rico, sometimes it can have repercussions, but
12 Congress basically has that power unless Puerto Rico
13 were to become a state. Correct?

14 MR. RIESS: That is my understanding, Your
15 Honor, yes, sir.

16 THE COURT: And recently, this is another
17 example, Congress has legislated, I believe it's up
18 to the president to sign the law, but Congress has
19 prohibited or will prohibit a year from now
20 cockfighting in all the territories. That's another
21 example of congressional power. Am I correct?

22 MR. RIESS: It is Your, Honor. And, as I
23 said, it is broad and sweeping and plenary and it's
24 been recognized very recently. It's not just cases
25 from the Supreme Court going back to 1978 and 1980.

U.S. v. Vaello-Madero - Civil Hearing

1 THE COURT: Okay, let me ask, because in one
2 of the briefs there -- one thing is to treat the
3 territory differently, another thing is the U.S.
4 citizens in the territory. And, for example, there
5 are programs medical -- Medicare or Medicaid that go
6 to the Commonwealth Fisc versus others such as SSI
7 that the aid would go directly to the U.S. citizen.
8 Would that make a difference, or the fact that the
9 U.S. citizens have decided to remain in Puerto Rico
10 or live in Puerto Rico he falls within the
11 Territorial Clause and the benefits or non benefits
12 of being in a territorial jurisdiction?

13 MR. RIESS: So I think here -- yes, Your
14 Honor, I think here we're talking about a residency
15 classification. For SSI this is a classification
16 that's based on residency rather than, say, race or
17 national origin. So, for example, a Puerto Rico
18 resident who would otherwise be eligible for SSI
19 benefits if he or she were to move to the 50 states
20 or the District of Columbia, he or she, if they met
21 all the other requirements, would be eligible for
22 SSI.

23 THE COURT: And, for example, if somebody
24 who is Asian American in origin and became a U.S.
25 citizen came from, let's say, Japan, moved to

U.S. v. Vaello-Madero - Civil Hearing

1 California, became a U.S. citizen and was receiving
2 all the benefits and happens to move to Puerto Rico,
3 that's not a discrimination based on being an
4 American moving to Puerto Rico or somebody who is
5 Native American and getting the benefits and moves
6 here, that's based on residency is what you're
7 saying, correct?

8 MR. RIESS: Yes, that's correct, Your Honor.

9 THE COURT: Let me hear then as to the
10 arguments of Mr. Riess, Mr. Ferré.

11 MR. FERRÉ: Thank you, Your Honor. Your
12 Honor has highlighted the PROMESA act and also Public
13 Law 600 which were specific laws of Congress that
14 dealt with the governance of -- in the case of Public
15 Law 600 the governance of the territory of Puerto
16 Rico, and with respect to the PROMESA act really
17 pertaining to all the territories. These are laws
18 that unquestionably are passed under Congress's
19 Territorial Clause power.

20 Similarly, the law that Your Honor mentioned
21 with respect to prohibiting cockfighting applicable
22 to the territories, again, this is law -- laws passed
23 by Congress in its capacity as the local legislature
24 for the territories.

25 Now --

U.S. v. Vaello-Madero - Civil Hearing

1 THE COURT: And when you say "local
2 legislature," it's like when the states were still
3 territories. For example, there's cases cited in the
4 briefs. For example, Congress could pass a federal
5 law but had local implications because -- for
6 example, in Utah, because it was acting as -- because
7 there's no state Constitution, it's still not a
8 state, it's acting as the local legislature. Am I
9 correct?

10 MR. FERRÉ: Yes, yes, Your Honor, precisely.

11 I think that -- and this goes back as well
12 to Your Honor's question with respect to the
13 treatment, how Congress might treat the territory
14 versus a law that specifically addresses individuals.
15 Mr. Vaello-Madero's position is that the analysis
16 should be first an analysis of whether -- under what
17 power is Congress acting. Is it acting under its
18 general welfare clause power of the taxing and
19 spending clause or under the Territorial Clause
20 power?

21 Mr. Vaello-Madero's position is that once
22 you engage in that analysis and determine that
23 Congress is acting pursuant to a broader power, then
24 all of the constitutional limitations would apply.

25 THE COURT: Let me ask one question because

U.S. v. Vaello-Madero - Civil Hearing

1 you mentioned the spending clause and the tax clause.
2 I assume when you say tax clause it's the Uniformity
3 Clause, correct?

4 MR. FERRÉ: Yes. But in addition, aside
5 from the fact of a requirement for uniformity of
6 certain tax laws, there's a power for Congress to
7 enact legislation with respect to the general
8 welfare, and our position is that the SSI program is
9 in fact a program that was enacted pursuant to that
10 power.

11 THE COURT: Okay, and let me ask this
12 question because back to 1901 when *Downes versus*
13 *Bidwell* was decided that dealt with the Uniformity
14 Clause. The spending clause is in that same
15 constitutional provision, they are together. And
16 basically if we read strictly *Downes*, these clauses
17 would not apply to Puerto Rico. But what has
18 happened over the year is, for example, the spending
19 clause has been used in Puerto Rico for multiple
20 instances. Even the First Circuit, without going
21 into *Downes versus Bidwell* has basically inferred
22 that the spending clause applies to Puerto Rico, and
23 in many cases it's been the source of the decision.
24 I don't have the citations here.

25 But my question would be, is it Mr. Vaello's

U.S. v. Vaello-Madero - Civil Hearing

1 position that the Uniformity Clause and spending
2 clauses, based on the constitutional evolution of
3 Puerto Rico throughout the years and the way it's
4 treated by Congress, should apply to Puerto Rico?

5 MR. FERRÉ: Yes, it definitely is our
6 position that it should apply to Puerto Rico,
7 uniformity.

8 THE COURT: What does -- Mr. Riess, what do
9 you have to say about those clauses applying to
10 Puerto Rico or not, if you're in a position to
11 answer?

12 MR. RIESS: Thank you, Your Honor. I guess
13 first we would respectfully disagree that there is an
14 analysis as to which power that the Congress was
15 working under. So, for example, in the recent
16 ObamaCare case, *NFIB v. Sebelius*, the Court rejected
17 the commerce power but upheld under the taxing power.
18 When the Court looks at legislation, it doesn't look
19 to whether Congress acted under one power or another
20 if there's a power under which the legislation
21 is currently --

22 THE COURT: So Congress doesn't have to say,
23 Today I'm acting pursuant to the Commerce Clause or
24 I'm acting pursuant to X power. As long as the
25 Constitution allows it Congress can do it and then

U.S. v. Vaello-Madero - Civil Hearing

1 can justify, We could do it under this power or under
2 all these powers but not under this one, correct?

3 MR. RIESS: That's correct, Your Honor. And
4 so here where *Harris* Made clear that social and
5 economic welfare benefits legislation that applies to
6 Puerto Rico is justifiable under the Territory Clause
7 power, that dictates it here, as I said, together
8 with *Califano's* statement of how when Congress makes
9 line drawing decisions about such welfare benefits
10 legislation, it gets a strong presumption of
11 constitutionality. So that would be our response.

12 THE COURT: Let me then -- and this is
13 another argument that's been discussed in the briefs
14 by Mr. Vaello. The situation with the U.S. residents
15 in Puerto Rico, and the word was mentioned already
16 here -- disenfranchised. The issue that -- and,
17 again, I think everybody's in agreement that because
18 Puerto Rico is not a state and Congress has not
19 legislated in any manner that would allow a
20 quasi-enfranchisement, let's put it that way, the
21 problem is these federal statutes if they're capped
22 or there's reductions or whatever changes are made,
23 there's no direct participation of two senators, five
24 congressmen who can participate in that process.

25 All we do have or, the Commonwealth has, is

U.S. v. Vaello-Madero - Civil Hearing

1 a congresswoman right now who has a voice but no
2 vote. She can present bills, but she has no equal
3 power to other Congress people. And when it comes to
4 Congress obviously, you know, you're a Congress
5 person or a senator from a state you can get allies
6 in other jurisdiction by saying, Well, I have this
7 voting power and I can help you but you need to help
8 me. But in the case of Puerto Rico we, when I say
9 "we" I mean the Commonwealth of Puerto Rico, doesn't
10 have that voting power. It has one congressperson
11 who does the work of five Congress people and two
12 senators and the problem is that unless Puerto
13 Rico -- this is where I'm going to ask you if you
14 agree, and I think you mentioned it.

15 If Puerto Rico were to become a state this
16 would not be an issue. The problem is until and if
17 it were to become a state this is going to be like a
18 never-ending loop. And it's a vicious circle because
19 there's no end. There's no enfranchisement, no
20 representation, and the U.S. citizens who are here
21 are politically powerless to change this process
22 unless at some point they decide let's become a
23 state, and then it's up to Congress to admit Puerto
24 Rico.

25 But my question specifically is the fact

U.S. v. Vaello-Madero - Civil Hearing

1 that there's disenfranchisement, would that in any
2 way affect the analysis you have mentioned or that is
3 something that should not be taken into consideration
4 when doing the equal protection analysis or
5 challenging the legislation?

6 MR. RIESS: Respectfully, Your Honor, so the
7 difficulty with that position, and I believe Counsel
8 refers to it as a discreet and insular minority, the
9 difficulty here is that there are two circuit courts
10 that have rejected that argument, and they are from
11 different circuits, but the First Circuit relies on
12 the same sort of arguments here. We don't know any
13 case law adverse to --

14 THE COURT: I think one of the cases that
15 you mention is the opinion of then Circuit Judge
16 Ginsburg and the *Quiban* case, correct?

17 MR. RIESS: Correct, Your Honor.

18 THE COURT: And, again, that is not binding
19 on the First Circuit but you would submit that that
20 is the correct rule of law, correct?

21 MR. RIESS: Correct. We don't know of
22 anything adverse to it and, as I said, their holdings
23 are based on Congress's broad authority when it
24 legislates under the Territory Clause. And I can --
25 let's see, that's what the *Quiban* case said at 928

U.S. v. Vaello-Madero - Civil Hearing

1 F.2d at 1160 to 61, so there it was Filipino World
2 War II veterans.

3 THE COURT: If I'm not mistaken, they were
4 not U.S. citizens, they were World War -- when the
5 Philippines became -- before the Philippines in '46
6 becomes independent, throughout World War II -- and
7 when you go to D.C. you see the World War II
8 memorial, there's a whole wall of Filipinos who
9 participated in the war. And they were veterans,
10 they were asking for benefits, they as a group get
11 discriminated but obviously -- they say, Obviously
12 we're politically powerless.

13 But isn't there a distinction between non
14 U.S. citizens World War II veterans who are
15 Filipinos, not U.S. citizens versus U.S. citizens who
16 are disenfranchised and will, unless Puerto Rico
17 becomes a state, be disenfranchised per *saecula*
18 *saeculorum*? Wouldn't that be a difference between
19 the *Quiban* case?

20 MR. RIESS: Two points on that, but the
21 first, respectfully, no because the difficulty there
22 is that what the D.C. circuit says is that you can't
23 at the same time say that Congress has these broad
24 powers to legislate with respect to U.S. territories,
25 regardless of whether it is citizens or noncitizens,

U.S. v. Vaello-Madero - Civil Hearing

1 and then also say that heightened scrutiny applies
2 whenever that legislation has a disparate effect on
3 residents of a territory.

4 THE COURT: And the reason it was considered
5 a territory was because all these Filipino citizens
6 were residents of once at a time U.S. territory,
7 correct?

8 MR. RIESS: That's my understanding, Your
9 Honor.

10 THE COURT: Let me hear regarding
11 disenfranchisement and then since the *Quiban* case was
12 raised, Mr. Ferré.

13 MR. FERRÉ: Your Honor, the *Quiban* case
14 relies on *Califano* and *Harris* versus Rosario and to
15 the extent that it does we think it reaches the wrong
16 conclusion. If as we see in other cases dealing with
17 different treatment of aliens from national programs
18 the *Hampton* and the *Graham* cases basically would hold
19 that strict scrutiny should apply when an exclusion
20 is specifically targeted at a politically powerless
21 group. And --

22 THE COURT: And I think you would add
23 politically powerless group of U.S. citizens, am I
24 correct?

25 MR. FERRÉ: Correct, making it even more

U.S. v. Vaello-Madero - Civil Hearing

1 egregious that we're dealing here with U.S. citizens
2 that are politically powerless. And, again, what we
3 have specifically in this case is the SSI program
4 which expressly excludes residents of Puerto Rico.

5 THE COURT: Let me further along these same
6 lines when I talk to disenfranchisement -- and I
7 raise this because this has been raised in a death
8 penalty certified case that U.S. DOJ recently
9 certified, but one of the arguments that's being
10 brought is all these federal laws apply to the
11 Commonwealth of Puerto Rico without the consent of
12 the government.

13 And obviously a death penalty case has
14 consequences that \$30,000 in no way could compare to
15 a possible death penalty, but the issue is isn't the
16 doctrine of consent of the government something that
17 the Court could look, along with disenfranchisement,
18 and, if that is the case, issue some sort of remedy,
19 or would the government's position be that that is a
20 doctrine, it's more a historical doctrine, it's not
21 part of any amendment or constitutional provisions
22 therefore even though this may be a grave injustice
23 or even though it may smell that it's antidemocratic
24 but it is still good law under U.S. constitutional
25 law? What would be the government's position?

U.S. v. Vaello-Madero - Civil Hearing

1 MR. RIESS: I guess two, Your Honor, that I
2 think we can't reconcile Defendant's argument with
3 the *Quiban* and the *Besinga* cases, that's number one.
4 And I think number two is the, fundamental point is,
5 that the argument is respectfully not an argument for
6 declaring a federal statute unconstitutional. I
7 believe that the First Circuit in *Igartúa* said
8 several times that the problem -- the solution to the
9 problems of the limited representation lies in the
10 political process and it wasn't a constitutional
11 violation there. Perhaps it could be a policy
12 argument for statehood and perhaps it could be a
13 policy argument for amending the U.S. Constitution,
14 but respectfully it is not a reason to declare a
15 federal benefit statute unconstitutional.

16 THE COURT: Thank you. Let me move on then
17 to another point. Obviously we have *Califano*, which
18 is a precedent whether anybody likes it or not, but
19 the question is can a federal court, either district
20 or appellate -- obviously the Supreme Court you don't
21 have to ask that question, they can -- as happened in
22 the recent Trump case -- basically the holding in
23 *Korematsu* was basically the legal landscape had
24 changed and the Supreme Court basically said that was
25 simply wrong. But can a U.S. District Court or

U.S. v. Vaello-Madero - Civil Hearing

1 perhaps a circuit court find that the Social Security
2 denial of benefits is unconstitutional on arguments
3 that are different or additional or were never
4 presented in, let's say for example, *Califano*? So
5 let me hear from Mr. Ferré first.

6 MR. FERRÉ: Our position is yes, Your Honor,
7 that the circumstances are different and in fact the
8 *Califano* decision was not based -- the ruling was
9 based on a right-to-travel claim and no equal
10 protection issue was actually before the Court.

11 The other consideration is that the Court
12 can take note, and in fact this Court has taken note
13 in the *Consejo v. Rullán* case that *Boumediene* puts in
14 doubt whether in fact the entire framework that has
15 been set up by the Insular Cases and on which
16 *Califano* and *Harris versus Rosario* is based -- is
17 still good law. And I think it's worth noting the
18 specific passage of *Boumediene* that puts in doubt the
19 validity of all these Insular Cases including
20 *Califano* and *Harris versus Rosario*.

21 THE COURT: At least *Boumediene* upholds the
22 doctrine of the Insular Cases, but you would refer to
23 the language that says that with the passage of time
24 the ties between the territory and the mainland can
25 rise to the level of having constitutional

U.S. v. Vaello-Madero - Civil Hearing

1 significance, that's what you're mentioning. That
2 would be a new judicial or Supreme Court
3 jurisprudential event that the Court can take into
4 consideration which did not exist at the time of
5 *Califano*, correct?

6 MR. FERRÉ: Yes, Your Honor. In addition, I
7 think that Your Honor noted, most importantly, about
8 the *Boumediene* case, and I'll quote from the case.
9 It says, "Our basic charter cannot be contracted away
10 like this. The Constitution grants the Congress and
11 the President the power to acquire, dispose of, and
12 govern a territory, not the power to decide when and
13 where its terms apply."

14 Even when the United States acts outside its
15 borders, its powers are not absolute and unlimited
16 but are subject to such restrictions as are expressed
17 in the Constitution. So if that's outside of its
18 borders certainly within its borders as well with
19 respect to the territories -- and then I'll continue
20 in the quote from the *Boumediene* case. "Abstaining
21 from questions involving formal sovereignty and
22 territorial governance is one thing. To hold the
23 political branches have the power to switch the
24 Constitution on and off at will is quite another."

25 We think that quote in *Boumediene* really

U.S. v. Vaello-Madero - Civil Hearing

1 does put in doubt the -- to the extent that the
2 Insular Cases would restrict certain provisions of
3 the Constitution when dealing with the territories.
4 We think that that --

5 THE COURT: So *Califano* would -- at least
6 I'm sticking to the *Califano* case, which deals with
7 SSI and right to travel, it should be reexamined in
8 new light; and *Boumediene* I guess you posit that it
9 would basically -- it's inconsistent with *Califano*,
10 am I correct?

11 MR. FERRÉ: Yes, Your Honor.

12 THE COURT: Before I hear from the
13 government, Mr. Riess, let me also note that in
14 *Califano* that was an SSI case. It was -- and it's
15 like the typical Social Security case, benefits are
16 denied. There's an appeal, direct appeal to the U.S.
17 District Court, and it followed its way and it went
18 to the Supreme Court because it was a private case,
19 for example, the Social Security review. And, again,
20 district courts act in appellate review. Obviously
21 the Commonwealth of Puerto Rico is not the party,
22 nobody had any idea probably that that case was
23 there. It goes to the Supreme Court, probably a
24 Social Security attorney who brings that issue and is
25 asking for SSI to be allowed in an analogous

U.S. v. Vaello-Madero - Civil Hearing

1 situation to Mr. Vaello, but the Supreme Court there
2 issues its ruling and obviously it affects every
3 individual in Puerto Rico who would otherwise qualify
4 for SSI.

5 So, let me ask Mr. Riess, can you
6 distinguish or do you understand that again *Califano*
7 is good law, that there are -- again, it involved the
8 right to travel but do you think just because the way
9 it was presented it is still dispositive? And what's
10 your position regarding *Boumediene* and *Califano*; are
11 they consistent with each other or should this Court
12 begin to re-examine this new doctrine laid by
13 *Boumediene*?

14 MR. RIESS: Thank you, Your Honor. I guess
15 first the Supreme Court and the First Circuit both
16 made clear even if it looks like later case law might
17 undermine a prior precedent, it's up to the Supreme
18 Court to decide whether to overturn a decision.
19 That's the Supreme Court in the *Agostini* case, the
20 *State Oil* case in our briefs, and the First Circuit
21 in the *Figueroa* --

22 THE COURT: But doesn't there -- again,
23 every challenge must begin -- again, if Mr. Ferré
24 were to bring this case all the way to the Supreme
25 Court and he raises this for the first time, the

U.S. v. Vaello-Madero - Civil Hearing

1 Supreme Court is going to say, or at least the
2 Circuit, You did not raise it below. So it has to be
3 raised at the district level.

4 Now, let me make an analogy, and sorry to
5 interrupt. But in the same-sex marriage case the
6 Supreme Court precedence was *Baker*. That's one of
7 these cases that -- again, I don't think this happens
8 in the Supreme Court, but it was summarily denied but
9 it was still good law, *Baker*.

10 Now, the district courts, I believe in
11 California or Utah, analyzed the whole situation, and
12 based on other Supreme Court, other precedents,
13 decided contrary to *Baker*. These cases went on
14 appeal. At some point we probably had 50 to 100
15 between Circuit and district court rulings mostly
16 finding that same-sex marriage precluding that
17 violated the Constitution, but obviously it was the
18 *Baker* ruling. And eventually the Supreme Court said
19 we overrule *Baker*, I just want to make it very clear.
20 But these cases begin from the bottom up, you just
21 don't litigate the other way around.

22 So isn't at least Counsel entitled to
23 present these arguments? And if this Court -- for
24 example, let's assume I were to agree with the
25 plaintiffs, my ruling is not a final ruling, it's

U.S. v. Vaello-Madero - Civil Hearing

1 subject to appeal and subject to review. Wouldn't
2 Counsel be able to make these arguments based on
3 *Boumediene*, equal protection rather than right to
4 travel? Wouldn't he be allowed similarly to -- if
5 that was not the case, *Baker*, you know, would still
6 be the law of the land if we go further back. And if
7 we go further back, *Plessy versus Ferguson* would
8 probably still be the law of the land. And there's
9 been many other examples where cases begin to be
10 litigated all the way from, you know, the bottom all
11 the way up. Let me hear from Mr. Riess.

12 MR. RIESS: Yes, Your Honor. Counsel
13 certainly has the right to present his arguments.
14 The question just is whether or not the circuit
15 courts and the district courts can contradict clear
16 Supreme Court precedent. And respectfully both the
17 Supreme Court and First Circuit have made clear that
18 the answer to that is no.

19 The difficulty with the --

20 THE COURT: Isn't *Baker* an example where the
21 district courts did and basically said that precedent
22 is no longer good law and the legal landscape has
23 changed?

24 MR. RIESS: Respectfully, no, Your Honor,
25 and here's the difference. There in *Baker* what you

U.S. v. Vaello-Madero - Civil Hearing

1 had was a dismissal for want of a substantial federal
2 question without an opinion. There was no opinion
3 there. And so in the -- what the First Circuit said
4 in *Massachusetts*, 682 F.3d 8, "A Supreme Court
5 summary dismissal prevents lower courts from coming
6 to opposite conclusions on the precise issues that
7 are presented and necessarily decided by those
8 courts." So where there's no opinion there can't be
9 a precise issue that's presented and necessarily
10 decided. That was the case in *Baker*. That's not the
11 case here. We have *Califano*. And we don't address
12 whether or not there's later involvement that's
13 undermined *Califano* or *Harris* because there is an
14 opinion on that.

15 And what those cases come down to is that
16 residents of Puerto Rico generally don't pay income
17 tax, federal income tax, and that Congress has broad
18 line drawing power when it sets eligibility
19 requirements for social and economic benefits.
20 That's *Califano*. And that it also, Congress, has
21 broad sweeping Territorial Clause power. That's
22 *Harris*. Respectfully, that hasn't changed since
23 those cases and, therefore, there isn't a basis to
24 distinguish them.

25 Now --

U.S. v. Vaello-Madero - Civil Hearing

1 THE COURT: What about when I mentioned
2 *Califano* was an SSI appeal, that's a per curiam
3 opinion, and that's a review of an administrative
4 decision. This, contrary to a review of
5 administrative decision, which obviously had at the
6 time and has continued to have broader implications,
7 but this is being raised not as a review of
8 administrative decision of denial of SSI benefits.
9 It's raised as a defense to a collection of moneys
10 filed by the United States. Wouldn't that allow
11 Mr. Vaello to raise it as a defense?

12 Because, again, this is right now it's a
13 defense. This is not a claim that he's making, I'm
14 entitled to prospective SSI. Or he's not arguing I
15 want a declaratory judgment that every U.S. citizen
16 in Puerto Rico, including Mr. Igartúa who is here is
17 entitled to SSI. Wouldn't that be a distinction in
18 the way that the Court can handle this as a defense
19 versus a declaratory judgment that perhaps would run
20 contrary to *Califano*? And I'll hear from Mr. Ferré
21 in that respect later.

22 MR. RIESS: Respectfully, Your Honor, two
23 points on that. Number one, we had earlier presented
24 arguments as to whether or not the Court has
25 jurisdiction to entertain the case as an affirmative

U.S. v. Vaello-Madero - Civil Hearing

1 defense, but setting that aside --

2 THE COURT: That's been ruled and it's
3 preserved for the record, so if the case goes on
4 appeal, that's another argument you will have in due
5 course.

6 MR. RIESS: Understood, Your Honor, so I'll
7 move to my second point.

8 So I don't think the procedural stance
9 distinguishes *Califano* because so there, like here,
10 what you had were recipients of SSI benefits and
11 those benefits were discontinued when the recipients
12 moved to Puerto Rico. The facts are on all fours
13 with the circumstances here. And there was an equal
14 protection challenge that was raised in that case
15 respectfully. But the source that there wasn't was a
16 single justice dissenting opinion, that was not
17 joined by any others.

18 And respectfully in a footnote the *Califano*
19 court noted, in addition to the right to travel, the
20 complaint also relied on the equal protection clause
21 of the due -- equal protections of the Due Process
22 Clause. Now, set that aside, regardless of that,
23 *Harris*, which came two years later, addressed an
24 equal protection challenge and it said that it was a
25 "similar statutory classification as that in

U.S. v. Vaello-Madero - Civil Hearing

1 *Califano*," which is the SSI and rational basis
2 applied to that. So we don't think that that is a
3 basis for distinguishing it.

4 THE COURT: So let me ask this question
5 because *Harris* dealt with a different statute. That
6 was the assistance to mothers with dependent
7 children. And, again, there is the expression that
8 it's the similar sort of statute, but *Harris* does not
9 deal with SSI. So what you're saying is that *Harris*
10 should be still considered for SSI purposes rather
11 than just merely *Califano*. And, again, the rulings
12 are almost exactly the same as to different statutes.
13 But what you're saying is that *Harris* makes it
14 broader and basically says equal protection should
15 also apply to *Califano*, that's what you're saying,
16 correct?

17 MR. RIESS: Yes, Your Honor, you can't get
18 by it because it specifically says that SSI was "a
19 similar statutory classification." That's what
20 *Harris* said about the statutory scheme in *Califano*,
21 SSI, that it was similar, so I don't think that
22 *Harris* can be distinguished on that grounds.

23 THE COURT: Okay, let me hear from Mr. Ferré
24 in regards to this argument that this is being raised
25 as a defense rather than a declaratory judgment or a

U.S. v. Vaello-Madero - Civil Hearing

1 much broader ruling. Would that allow the Court to
2 go into this, again, just for purposes of raising it
3 as a defense rather than like an affirmative action?

4 MR. FERRÉ: I'm not sure that it does make a
5 difference in that respect, but I would like to note
6 for the record as well that while my colleague has
7 pointed out that one justice noted that no equal
8 protection issue was before the Court in *Califano*, I
9 think that if one justice noted that that issue was
10 not actually before the Court it's because in fact
11 that issue was not before the Court. So we can be
12 assured that in *Califano* the equal protection
13 argument just was not raised, certainly was not
14 briefed, and it was not argued.

15 So we don't have a -- the *Califano* ruling
16 was decided on a completely different basis, and that
17 is the right to travel claim. And *Harris versus*
18 *Rosario* simply just relies and makes an assumption by
19 relying on *Califano* without really doing the analysis
20 as to what the proper standard of review would be.

21 THE COURT: Okay, thank you. Let me move on
22 to another area and I'm going to read a quote or some
23 quotes from *U.S. versus Windsor*, 2013, and that is
24 the case, just for the record, in which the Supreme
25 Court found that the federal statute known as the

U.S. v. Vaello-Madero - Civil Hearing

1 Defense of Marriage Act was unconstitutional. So,
2 I'm going to read three separate quotes and then I'm
3 going to ask for reaction of the parties should this
4 analysis apply to this particular case.

5 The first one is," The power the
6 Constitution grants, it also retains. And though
7 Congress has great authority" -- which we've been
8 discussing here, and for purposes of territory it has
9 probably greater authority -- "to design laws to fit
10 its own conception of sound national policy, it
11 cannot deny the liberty protected by the Due Process
12 Clause of the Fifth Amendment."

13 Second quote. "What has been explained to
14 this point should more than suffice to establish that
15 the principle purpose and the necessary effect of
16 DOMA are to demean" -- and I repeat demean -- "those
17 persons who are in lawful same-sex marriage. This
18 requires the Court to hold, as it does now, that DOMA
19 is unconstitutional as a deprivation of the liberty
20 of the person protected by the Fifth Amendment of the
21 Constitution."

22 And the final citation. The liberty
23 protected by the Fifth Amendment's due process clause
24 contains within it the prohibition against denying to
25 any person the equal protection of the laws. While

U.S. v. Vaello-Madero - Civil Hearing

1 the Fifth Amendment itself would draw from government
2 the power to degrade or demean in the way this law
3 does, the equal protection guarantee of the
4 Fourteenth Amendment makes the Fifth Amendment right
5 all the more specific and all the better understood."

6 So let me begin by asking Counsel Ferré, can
7 you analogize the situation with the U.S. citizens
8 residing in the territories where there's a statute
9 that is treating them distinctly from their brethren
10 in the U.S. mainland, and under the *Windsor* analysis
11 would that constitute unconstitutional demeaning
12 which would violate the protections of the Due
13 Process Clause and the equal protection component?
14 Is there an analogy that could be made and/or is
15 *Windsor* applicable, or a new along -- you mentioned
16 *Boumediene*, but would *Windsor* give your client a
17 stronger argument?

18 And, again, I'm talking not about just
19 generally saying Puerto Ricans and ethnic origins,
20 I'm talking about U.S. citizens residing in
21 territories that are, as you all mention in the
22 briefs, you know, 95 percent of the population is of
23 Hispanic ethnic origin, would *Windsor* apply?

24 MR. FERRÉ: Yes, Your Honor. And I think
25 that, as mentioned in the *Windsor* case, the power

U.S. v. Vaello-Madero - Civil Hearing

1 granted to Congress of course is a restrained power.
2 The question here is whether in excluding U.S.
3 residents in Puerto Rico there's a continuation of
4 U.S. citizens residing in Puerto Rico continuing to
5 feel like second-class citizens. And we know that
6 this is much discussed in the press and it is much
7 felt certainly in the territory of Puerto Rico.

8 I think that the fact that Congress can
9 continue to treat Puerto Rico at will to exclude
10 Puerto Rico entirely at its discretion without
11 otherwise considering its needs we think is demeaning
12 and in fact falls within the framework of *Windsor* and
13 would show then that there's an improper basis or
14 purpose in excluding U.S. citizens of Puerto Rico.

15 THE COURT: Let me say when you say U.S.
16 citizens of Puerto Rico, let me go to the purpose of
17 the SSI statute; that is to, make payments to the
18 poor, sick, needy. So wouldn't -- would you agree
19 that more than normal healthy everyday,
20 run-of-the-mill U.S. citizens in the territory, we're
21 talking about a smaller subgroup that is even further
22 discriminated because they are needier, they don't
23 perhaps have federal assistance, and again they are
24 U.S. citizens who are deprived of that. Wouldn't
25 that again fall squarely within *Windsor*? Would that

U.S. v. Vaello-Madero - Civil Hearing

1 be your position?

2 MR. FERRÉ: Yes. In fact, what this
3 exclusion does is fall most heavily on the poor, the
4 sick, and the needy in Puerto Rico and, again,
5 continues this pattern of treating Puerto Rico
6 differently. And there's a long history of that.

7 THE COURT: And based on *Windsor* you would
8 of course, based on your brief, request on behalf of
9 your client a strict scrutiny analysis, correct?

10 MR. FERRÉ: Yes, Your Honor.

11 THE COURT: But let's say even if it were a
12 rational basis analysis there's some circuit case law
13 which you cite -- I don't have the exact case.

14 MR. FERRÉ: It's a more exacting
15 examination.

16 THE COURT: It's a little higher standard
17 than rational basis.

18 MR. FERRÉ: Yes.

19 THE COURT: You would say that's still not
20 helping the U.S. citizens who are poor, sick, and
21 needy that would also not satisfy that First Circuit
22 standard, correct?

23 MR. FERRÉ: Yes, Your Honor.

24 THE COURT: Let me then hear from Mr. Riess
25 regarding the *Windsor* ruling. What's the

U.S. v. Vaello-Madero - Civil Hearing

1 government's position? Wouldn't this be applicable
2 to the situation? And, again, *Windsor* was a
3 2013-case, it's five years old. That's after 1978,
4 after *Califano* was decided and many years after also
5 the SSI enactment. What would be the government's
6 position as to *Windsor*?

7 MR. RIESS: Thank you, Your Honor. *Windsor*,
8 I believe, was a challenge to DOMA, the Defense of
9 Marriage Act.

10 THE COURT: Also a federal statute just like
11 the SSI.

12 MR. RIESS: Correct. But I guess the
13 difference there is that this is a residency
14 classification. This is not a limitation as to an
15 arbitrary group, there, for example, gays and
16 lesbians. Here it is a classification based on
17 residency because if Puerto Rico residents who are
18 otherwise eligible for SSI benefits move to the 50
19 states or district Of Columbia, they are eligible;
20 that could not be said for the participants in
21 *Windsor* who were denied the benefit in question
22 regardless of where they lived. So I think that
23 would be a basis for distinguishing there.

24 And respectfully the Supreme Court in the
25 *Califano* and *Harris* cases did say that it was

U.S. v. Vaello-Madero - Civil Hearing

1 rational basis and they did understand that the
2 supplemental security and low-income program was
3 aimed at low-income individuals. I don't think that
4 there are any changed circumstances from then that
5 would justify a different result.

6 THE COURT: So your position would be -- and
7 obviously we can't speak for the Supreme Court, but
8 your educated legal analysis would be that had this
9 situation instead of DOMA been the statute, the
10 result would have been different to DOMA, correct, in
11 the Supreme Court?

12 MR. RIESS: I believe that is correct, Your
13 Honor.

14 THE COURT: Okay, let me then go to the 2015
15 decision also with same-sex marriage because this
16 is -- I'm using this as an analogy because it is a
17 sudden change in the law.

18 And, again, it's contrary to *Brown versus*
19 *Board of Education* where *Plessy* was the law for
20 decades and it took years of litigation. This is
21 something that within a shorter span the Supreme
22 Court resolved. But I'm going to read another quote
23 from *Obergefell versus Hodges*. Then I'll ask
24 Mr. Ferre and Mr. Riess to react to it.

25 "The dynamic of our constitutional system is

U.S. v. Vaello-Madero - Civil Hearing

1 that individuals need not to await legislative action
2 before asserting a fundamental right. The nation's
3 courts are open to injured individuals who come to
4 them to vindicate their own direct, personal stake in
5 our basic charter. An individual can invoke a right
6 to constitutional protection when he or she is harmed
7 even if the broader public disagrees and even if the
8 legislature refuses to act.

9 "The idea of the Constitution was to
10 withdraw certain subjects from the vicissitudes of
11 political controversy, to place them beyond the reach
12 of authorities and officials, and establish them as
13 legal principles to be applied by the courts. This
14 is why fundamental rights may not be submitted to a
15 vote, depend on the outcome of no elections. Leaving
16 the current state of affairs in place would maintain
17 and promote instability and uncertainty. The
18 disruption caused could is significant and
19 ever-growing. We ask for equal dignity in the eyes
20 of the law; the Constitution grants us that right."

21 Now, *Obergefell* deals with not the DOMA, but
22 the situation was that at the time probably like
23 three-quarters of the states recognized same-sex
24 marriage, the other quarter did not.
25 Territorial-wise I believe one or two territories

U.S. v. Vaello-Madero - Civil Hearing

1 did; Puerto Rico was an example that didn't. And
2 what the Supreme Court does is -- and, again,
3 obviously that's the case applying the DOMA, the
4 *Windsor* rational to the states, but it talks about
5 certain principles that when legislature or Congress
6 has not acted -- and, again, we're not here to say
7 Congress has been wise or not, but what if there is a
8 prolonged period where Congress has not taken any
9 action?

10 And, again, there has to be a fundamental
11 right, there has to be equal protection or some other
12 constitutional provision. But *Obergefell* also talks
13 about disruption and instability and uncertainty;
14 wouldn't there be an uncertainty and instability of a
15 constitutional nature? Because, for example,
16 Mr. Vaello of course as a U.S. citizens has a right
17 to move to Puerto Rico, has a right -- he could have
18 moved to the Mariana Islands. He moved here, he's
19 got an alien wife and, you know, he moved here for
20 his particular reasons. But the problem is that
21 depending on where he moves and he goes to a
22 territory, that constitutional right is -- well, his
23 equal protection rights are affected.

24 And this is similar in a sense -- or the
25 question is, is this similar to when, for example, a

U.S. v. Vaello-Madero - Civil Hearing

1 same-sex couple would move let's say from Virginia
2 where perhaps it was legal -- I don't know if that's
3 correct as to Virginia at the time. But that couple
4 happened to be on vacation let's say in Kentucky that
5 didn't recognize it, and then one of the spouses
6 suffers a heart attack and the other spouse has to
7 make a decision as to a transplant or, you know,
8 disconnect the person, and because that state doesn't
9 recognize same-sex marriage.

10 Again, I think *Obergefell* stands for the
11 greater proposition that equal protection, all these
12 constitutional principles should be uniform
13 throughout the nation. Because what we get is, you
14 go one place, you go another -- and, again, in this
15 case it applies to territories. You leave the
16 mainland and you go to U.S. soil but as a citizen
17 your rights vary and you can move to another
18 territory where they can increase or decrease and
19 that is the situation I think denounced *Obergefell*.

20 Based on that and with *Windsor* in tandem let
21 me ask Mr. Ferré, what would be your position
22 regarding the SSI statute? Is this precedent
23 helpful, applicable to your client; and is it an
24 intervening or a change of legal landscape which
25 would allow the Court to revisit the SSI argument in

U.S. v. Vaello-Madero - Civil Hearing

1 a constitutional context?

2 MR. FERRÉ: Thank you, Your Honor. We
3 believe that the *Obergefell* case allows this Court to
4 take note of additional developments that have taken
5 place. Considering the constitutional landscape
6 which would otherwise under *Califano* permit Congress
7 to exclude residents of Puerto Rico, we think that
8 the holding in *Obergefell* would allow the Court to
9 take note of developments that would put in question
10 the framework under which *Califano* was decided. So,
11 yes, we do think it's helpful.

12 THE COURT: Let me hear from Mr. Riess.

13 MR. RIESS: Thank you, Your Honor. Three
14 points on that. First, because *Obergefell* was not in
15 our briefs I'm not certain of this, but I believe
16 that the standard in that was intermediate scrutiny
17 which would be a basis --

18 THE COURT: It would be higher than rational
19 basis.

20 MR. RIESS: Correct.

21 THE COURT: And let me say this because it
22 was not in your brief and because I have raised it
23 because it's the sequel to *Windsor*, if you need to
24 file a short five-, seven-page brief, feel free to do
25 so. If you could do so perhaps by the 31st or by the

U.S. v. Vaello-Madero - Civil Hearing

1 30th. And I'll also allow of course Mr. Ferré on
2 behalf of his client if he wants to file a very short
3 supplemental brief, you have that simultaneous. Now
4 the 31st is a Monday so actually I think federal
5 court here closes, the chief judge authorized that,
6 it's only half a day of work anyway. So it's a court
7 holiday. So let's say by the 3rd -- let's say by the
8 4th of January so that way you can enjoy your
9 holidays, I know I brought you down here.

10 So I would ask the parties -- and, again,
11 anything else that comes up in this argument that I
12 ask should require a little further briefing let's
13 set that deadline of January 4th so that way you have
14 some additional time. So let me hear from you. And,
15 again, if there's something you're not sure of feel
16 free not to respond right now and feel free to put it
17 in the brief.

18 MR. RIESS: Thank you, Your Honor. I just
19 wanted to hedge there, I didn't want to make an
20 incorrect statement to you.

21 The second and third points are, number two,
22 as the Supreme Court in the *Agostini* and the *State*
23 *Oil Co.* and the First Circuit in the *Figueroa* and
24 *Igartúa* cases made clear, it is up to the Supreme
25 Court to decide whether to overturn a decision even

U.S. v. Vaello-Madero - Civil Hearing

1 if it does look like later case law might undermine
2 it. So we would respectfully disagree that -- it is
3 the prerogative of the Supreme Court to make that
4 decision.

5 And I guess, third, the difference here is
6 that the line drawing in social benefits legislation,
7 which I believe would distinguish this from
8 *Obergefell* where we weren't talking about economic
9 and social benefits legislation, it means that simply
10 because Congress extends a benefit to residents of
11 one territory that doesn't mean it's constitutionally
12 required to extend the benefits to residents of all
13 territories. As we noted in our brief, federal law
14 is long distinguished between and among territories
15 in many ways. And so we believe that that would be
16 an additional basis for distinguishing *Obergefell*
17 here.

18 THE COURT: Let me also point out -- and,
19 again, this is something that you may not have the
20 answer now and that could also come in the
21 supplemental brief. One of the things that was
22 interesting in *Obergefell* was that when -- or
23 actually in the *Windsor* case specifically, the DOMA
24 was a federal statute and the U.S. Department of
25 Justice, the solicitor general, the task that he or

U.S. v. Vaello-Madero - Civil Hearing

1 she has is to defend federal law.

2 In *Windsor* the solicitor general of the
3 United States, and I guess this came from the
4 executive, the decision was made that the law would
5 not be defended. And obviously one thing led to the
6 unconstitutionality. But that is an example where
7 the United States realized that it had to be the
8 Supreme Court to make the ruling. It could have been
9 Congress that could have legislated and passed or,
10 you know, repealed the DOMA.

11 But that's an example where the executive
12 branch sees that a particular discrete -- and, again,
13 because the same-sex marriage, gay, lesbian community
14 is also within the United States. It's not
15 necessarily a majority, it's a subgroup of
16 individuals that was being discriminated. And in
17 that sense the executive -- and, again, in the past
18 the Supreme Court in *Brown*, for example, took the
19 prerogative. Different branches have taken action
20 during the '60s, and Civil Rights Act, but in *Windsor*
21 it was the executive that took that affirmative step
22 of not defending the law.

23 Wouldn't -- and, again, in this particular
24 case obviously the executive is supporting a law
25 which obviously there's no question that if there is

U.S. v. Vaello-Madero - Civil Hearing

1 discrimination. Is there any difference between
2 supporting or arguing to uphold the law that
3 discriminates, again, this pertains to the benefits
4 of U.S. citizens, insofar as, particularly the poor
5 and needy, I'm specifically talking about SSI, the
6 versus a law that discriminated against a group of
7 individuals who were not necessarily needy but
8 obviously had some -- what ultimately the Supreme
9 Court held were constitutional violations? Would
10 there be a distinction against that? And I don't
11 know if there's an answer to that question. Let me
12 hear from Mr. Riess first.

13 MR. RIESS: I think there is a distinction
14 there, Your Honor. And I think it goes back again to
15 the broad discretion that Congress has when it's
16 providing for governmental payments of money
17 benefits.

18 THE COURT: Or the executive as well,
19 correct.

20 MR. RIESS: Correct, Your Honor. It gets to
21 set line drawing as to those and that gets a strong
22 presumption of constitutionality. I just note that
23 in the Ninth Circuit in the *Besinga* case on the basis
24 of the Territory Clause power. It's inconsistent
25 there it was talking about heightened judicial

U.S. v. Vaello-Madero - Civil Hearing

1 scrutiny, but similar here, a contrary rule that is
2 applying heightened scrutiny would subject virtually
3 every failure by Congress to extend federal benefits
4 to U.S. territories to the charge that the decision
5 was based on impermissible considerations of race or
6 national origin. So that's inconsistent with the
7 broad discretion under the Territory Clause that has
8 been repeatedly reiterated by the First Circuit and
9 the Supreme Court so I think that would be an
10 additional basis for distinguishing *Obergefell* and
11 *Windsor*.

12 THE COURT: One last question I'll first
13 hear from you and then I'll have Mr. Ferré respond.
14 Let's assume that the Court agrees with you that a
15 rational basis security will be applied under equal
16 protection. When the needy and the poor specifically
17 are not provided the same treatment because they are
18 in a territory, doesn't that violate that rational
19 basis standard; or you would agree that that's an
20 economic reason and because it's made in economic
21 terms that's the end of the analysis and it's up to
22 the wisdom of Congress to -- it's a battle for
23 another day and another time but that should not be
24 fought in the court, that would be your position?

25 MR. RIESS: It would, Your Honor, I think

U.S. v. Vaello-Madero - Civil Hearing

1 for the basis that the Supreme Court specifically
2 said in the *Califano* decision, that it was rational.
3 And it was certainly aware at that point that the
4 Supplemental Security Income program was aimed and
5 targeted at low-income individuals. And so that was
6 a question that was necessarily decided by it at that
7 time. And since that situation has not changed, that
8 requires the same result from the Court here. We
9 don't relitigated the basis when the Supreme Court
10 has determined its rational basis in these basis are
11 rational.

12 THE COURT: Okay, thank you.

13 Last question, the same question to
14 Mr. Ferré. What is Mr. Vaello's position, for
15 example, comparing *Windsor* where the solicitor
16 general of the United States decided not to defend
17 that federal law versus a law here that has
18 discriminatory effect regardless of whatever scrutiny
19 but the U.S. government is defending that position?

20 MR. FERRÉ: Well, I think the Court can take
21 note in instances in which the executive branch does
22 not feel compelled or feels -- or has a tendency to
23 enforce or defend a law that it deems to be
24 unconstitutional. We see here that the government
25 has taken a different stance, the executive branch

U.S. v. Vaello-Madero - Civil Hearing

1 has taken a different stance and in fact is defending
2 on the law as it is. Certainly that is something
3 that the Court can take note of, but I don't think it
4 changes the analysis of whether an individual right
5 has been affected. And as we've indicated, we think
6 that there are doctrinal changes, there are
7 circumstances that have also changed that the Court
8 can certainly consider in engaging its analysis of
9 the case before it.

10 We also wanted to highlight that, you know,
11 while it may be true that a specific pronouncement of
12 the Supreme Court might be necessary to make
13 absolutely clear that a precedent has been overruled,
14 the Court noted in overruling in the *Trump v. Hawaii*
15 case, the Court noted in overruling *Korematsu* that
16 that precedent was gravely wrong the day it was
17 decided and has been overruled in the court of
18 history. To the extent that the issues here in this
19 case impinge on the Insular Cases and its progeny,
20 including *Califano* and *Harris versus Rosario*, we
21 think the same thing applies. We think that there's
22 certainly sufficient doctrinal and factual
23 circumstances that should give the Court reason to
24 question the validity of the Insular Cases.

25 THE COURT: Okay, thank you.

U.S. v. Vaello-Madero - Civil Hearing

1 One last question based on this argument
2 that Mr. Ferré just mentioned, and I just want to
3 make it clear. The position of the United States is
4 that the Insular Cases, unless the Supreme Court were
5 to overrule them, are still the law of the land. And
6 during the Bush administration the U.S. DOJ argued
7 regarding the Insular Cases in *Boumediene*, during the
8 Obama administration *Fia Fia Tuaua* case from American
9 Samoa, so the I understand the U.S. DOJ's position is
10 that these cases remain the law of the land until
11 either the Constitution is amended or the Supreme
12 Court says they're no longer good law. Am I correct?

13 MR. RIESS: Three points on that, Your
14 Honor. Number one, you are correct that as a general
15 matter the Supreme Court cases remain in effect until
16 they are expressly overruled by the Supreme Court.
17 Number two, I want to make clear that we respectfully
18 disagree that the Insular Cases were either the basis
19 or the foundation for *Califano* and *Harris*.

20 Number one, these are cases that are decades
21 later, they're in 1978 and 1980 they're not
22 turn-of-the-century decisions. *Califano* said it once
23 in a Footnote 3 of the Insular Cases, to be clear, it
24 was not to support the proposition that Puerto Rico
25 was incorporated or unincorporated. It was not to

U.S. v. Vaello-Madero - Civil Hearing

1 say that because, for example, Puerto Rico has
2 different customs and traditions they were entitled
3 to less benefits. It was in a footnote to support
4 the proposition that Puerto Rico has a special
5 relationship with the United States. Instead of the
6 Insular Cases, what these two cases were founded on
7 were two premises that remain true today.

8 The text of *Califano*, this is 435 U.S. 5,
9 not a footnote, explain why rational basis applied,
10 and I quote, "We deal here with a constitutional
11 attack upon a law providing for governmental payments
12 and monetary payments benefits that's 'entitled to a
13 strong presumption of constitutionality'." And then
14 in a later footnote, Footnote 7 at the end, the Court
15 explained the factors why it satisfied rational
16 basis. *Harris*, the later case, didn't mention the
17 Insular Cases at all. So we respectfully disagree
18 that those were the basis here.

19 And I also want to make perfectly clear, we
20 are not here to defend any of the rhetoric of some of
21 the passages of the Insular Cases. That is not the
22 position of the United States or of the Department of
23 Justice or of the Social Security Administration.

24 THE COURT: And I think that's important
25 that it be made clear. The proposition is that the

U.S. v. Vaello-Madero - Civil Hearing

1 Insular Cases there's different types of territories,
2 territories become states or non-states.

3 And my question would be, since you
4 mentioned that, let's assume the fact -- let's
5 assume Congress has taken after the *Sánchez-Valle*
6 position that Puerto Rico is not incorporated,
7 there's some circuit case law to that extent. But my
8 question is, whether Puerto Rico were to be
9 incorporated or whether it's not incorporated, and I
10 believe you explained this in your brief, it doesn't
11 make a difference to the equal protection analysis if
12 it's made on the basis of an economic benefit to a
13 territory that has not become a state -- and that
14 would be a equal protection analysis -- and your
15 result would be exactly the same, correct?

16 MR. RIESS: That's correct, Your Honor. And
17 two points on that. *Boumediene* talked about
18 unincorporated and incorporated. It would only be a
19 question if there were an open question as to whether
20 equal protection principles apply to Puerto Rico and
21 they do. That's the *Torres* case we cited in our
22 brief. So regardless of whether Puerto Rico is an
23 incorporated territory, the defendant here is still
24 challenging a classification that is based on
25 residency. It's one that is made under Congress's

U.S. v. Vaello-Madero - Civil Hearing

1 broad Territory Clause power, and it is one that
2 involves social benefits legislation. And so under
3 equal protection such a classification is subject to
4 rational basis.

5 And just number two very quickly. As we
6 pointed out in our brief, if the Insular Cases were
7 overturned tomorrow, that would not affect the
8 decision in this case because all of those factors
9 that I mentioned would still be the case.

10 THE COURT: Okay, and taking *Boumediene* in
11 the light most favorable to Mr. Vaello, and let's
12 assume under *Boumediene* because of constitutional or
13 legislative developments in Puerto Rico, the creation
14 of a commonwealth, Puerto Rico has -- you, know,
15 Puerto Rico is not a state, so that's clear. But
16 let's assume that from an unorganized, unincorporated
17 territory is incorporated of whatever gradations,
18 let's assume under *Boumediene* Puerto Rico has
19 constitutionally evolved in ways that have
20 constitutional significance, and let's say it's a
21 pseudo sort of -- whether incorporated or
22 non-incorporated, it's basically Puerto Rico.

23 And citing Justice O'Connor from her
24 Circuit -- I forget the name of the case. And she's
25 citing the Supreme Court case and it said, Puerto

U.S. v. Vaello-Madero - Civil Hearing

1 Rico is like a state. And Justice O'Connor said,
2 It's not a state of the union, but it is a state. So
3 Puerto Rico has -- still the analysis as long as it's
4 not a state, the analysis, no matter if it's from an
5 unincorporated, the most basic type of unincorporated
6 territory all the way to 99.9 percent, but it's still
7 not a state, it hasn't crossed that finish line, the
8 analysis of the United States, regardless of the
9 nature of the territorial relationship, with greater
10 rights or whatever, it still would be the same
11 analysis, correct?

12 MR. RIESS: It would, Your Honor. I just
13 want to quote one case on that and that's from the
14 First Circuit, *Mayhew v. Burwell*, 772 F.3d at 95.
15 And the quote says, "Federal laws that have differing
16 impacts on different states are an unremarkable
17 feature of, rather than an affront to, our federal
18 system." So for that reason, even if it were, it
19 would not make a difference here because Defendant
20 would still be challenging a classification on
21 residency, still be challenging one under the
22 Territory Clause power, and one that involved line
23 drawing which relates to social benefits legislation.

24 THE COURT: Okay, Mr. Ferré, briefly if
25 there's anything you wish to respond to this. And

U.S. v. Vaello-Madero - Civil Hearing

1 after that I'm going to hear from counsel for
2 Congresswoman González.

3 MR. FERRÉ: Thank you, Your Honor. I don't
4 think there's any question that an equal protection
5 challenge based on the classification of residency in
6 one state versus another for a national program would
7 be challenged. The only reason why in this case the
8 government is arguing that the equal protection
9 challenge is only subject to rational basis review is
10 because we're talking about a classification based on
11 residency in the territories. And that is entirely
12 based and relies on the doctrine established in the
13 Insular Cases.

14 So we're talking about residency in an
15 unincorporated territory where then Congress's act is
16 reviewed under a lesser standard, the rational basis
17 review, purportedly because it's acting under the
18 Territorial Clause. That's what we believe is
19 actually the incorrect framework. So it's not true
20 that the Insular Cases are not implicated. It's only
21 because of the Insular Cases that the irrationality
22 of excluding residents in the territories is
23 permitted in this circumstance.

24 THE COURT: Okay, thank you. I'm going to
25 hear now from Counsel Ferraiuoli on behalf of

U.S. v. Vaello-Madero - Civil Hearing

1 Congresswoman Jenniffer González. If you want to
2 come up to the podium because you're going to have --
3 I'm going to time you because I want to finish here
4 around noontime, 12:15. So you have ten minutes.
5 What I would ask is that obviously I have read the
6 brief, it has a lot of very informative background
7 data. It's excellent. So what I would ask is that
8 perhaps you divide your time if there's anything from
9 your brief that you want to highlight.

10 And, again, it's already in the record and
11 it has been carefully read, but anything you -- and
12 actually it's been responded to by the United States,
13 but anything here that you would like to highlight.
14 And what I would ask is that you take the thrust of
15 your time if you want to on behalf of your client to
16 make any statements regarding any arguments that you
17 just heard from both of the parties. I think that
18 would be the most protective. It's 11:25 so I will
19 tell you when you have two minutes left.

20 MS. FERRAIUOLI-HORNEDO: May it please the
21 Court.

22 THE COURT: Please go ahead.

23 MS. FERRAIUOLI-HORNEDO: For the record,
24 this is Veronica Ferraiuoli on behalf of the Resident
25 Commissioner Jenniffer González. We already know

U.S. v. Vaello-Madero - Civil Hearing

1 that the Supplemental Security Income program was
2 established in 1974 and it began as a relatively
3 small program providing benefits largely to the
4 elderly population.

5 And I wanted to point out, and this is
6 important, that right now it is the only program that
7 provides benefits to -- the only federal program that
8 provides benefits to disabled children. So disabled
9 children have no other program, federal program, from
10 which to gain assistance. So that in Puerto Rico,
11 because SSI does not apply, there are no federal
12 programs that would allow these types of benefits for
13 impaired children.

14 And SSI is important overall in the
15 population that it serves because without it a lot of
16 people -- most of the people -- actually 66 percent
17 of the people that receives SSI would have fallen
18 under the poverty line without SSI, and in children
19 we're talking about 59 percent. And studies have
20 shown that children that receive SSI have a stabler
21 family life because of the particular stressors that
22 families taking care of children with disabilities
23 have. So we're not only talking about actual
24 services but the SSI program also provides additional
25 societal services and benefits to these children.

U.S. v. Vaello-Madero - Civil Hearing

1 It's also important to note that the SSI is
2 a program of last resort. That means that you have
3 to -- you have to -- you have to apply for all other
4 available programs before you can get the benefits.
5 And the money that you get from any other program
6 goes into determining whether you're eligible for
7 SSI. So we are really talking about the people that
8 have no other help from anywhere else.

9 THE COURT: Let me say something. You
10 mentioned disabled children and I have experience
11 because I preside over consent decree pertaining to
12 anybody over 21 who has Down syndrome or mental --
13 what was known as mental retardation, now it's --
14 there's another term, or have autism, and they're
15 over 21 and are wards of the state. So all these --
16 and I have close to 1,000 individuals and that
17 population will -- and obviously they're under the
18 health department auspices, when they're in their
19 toddler years, they're also under the health
20 department. So what you're telling me is that all
21 these individuals, for example from this class that
22 the Commonwealth is award of, they're not receiving
23 these moneys.

24 MS. FERRAIUOLI-HORNEDO: That's correct,
25 Your Honor.

U.S. v. Vaello-Madero - Civil Hearing

1 THE COURT: They're only receiving the
2 percentage of Social Security that under Social
3 Security is provided to them.

4 MS. FERRAIUOLI-HORNEDO: That's correct,
5 Your Honor. The SSI, like I said, is the only source
6 of federal income support targeted to families caring
7 for children with disabilities. And that includes
8 the people that the Court just spoke about --
9 children with Down syndrome, children with autism,
10 children with developmental disorder, children with
11 cancer, children with cerebral palsy and sensory
12 disabilities like blindness.

13 The program in Puerto Rico that applies
14 currently in Puerto Rico, the AABD program, does not
15 grant benefits to children.

16 THE COURT: And I know that I believe it's
17 at page 29 of your brief that even to adults that
18 AABD, it's Aged, Blind and Disabled, program, for
19 example, the monthly -- average month paycheck if you
20 live in a state or the District of the Columbia would
21 be \$483.02; and if you live in Puerto Rico it's
22 \$73.85. So that's like a fifth or a sixth of that.
23 Again, with \$73 that's nothing here. Virgin Islands
24 actually it's twice as much, 176.07, which is higher.
25 Guam is \$150. And, incredibly, if you're in the

U.S. v. Vaello-Madero - Civil Hearing

1 Mariana Islands it's 525.69, higher than even in the
2 mainland. So I note that's Table 7 of your brief.

3 MS. FERRAIUOLI-HORNEDO: Yes, that is
4 correct. And not only that, because the maximum
5 benefit allowable by law is one of the standards that
6 you use to determine whether the person qualifies --
7 for example the person cannot have -- in Puerto Rico
8 they would not be able to receive the local
9 equivalent if their income that is taken into
10 consideration exceeds \$65. So, the income limit in
11 Puerto Rico is you need to make less than \$65, where
12 in SSI, because the benefit is higher, now \$725, then
13 you need to show that you earn less than \$725. So
14 the standard by which you are allowed into these
15 programs is markedly different.

16 And in Puerto Rico only the poorest of the
17 super poor are able to receive just the tiny bit of
18 benefit that they do receive, which is obviously not
19 enough to move you out of under the poverty line
20 which is one of the things that SSI is supposed to
21 do.

22 THE COURT: Let me ask you, and sort of
23 shift gears, but this is something discussed with the
24 parties about disenfranchisement. What is the
25 situation, the particular situation, of Congresswoman

U.S. v. Vaello-Madero - Civil Hearing

1 González's position as a U.S. Congresswoman? She's
2 a -- she's got a four-year term, she's been elected
3 and she's a member of Congress, but can't she simply
4 file a bill and move to have the Commonwealth of
5 Puerto Rico treated equally as a state? Or what is
6 the situation given the fact that she has no vote?
7 What difficulties -- again, from a very short in a
8 nutshell point, what are the -- because obviously one
9 of the things we're talking about is, well, this is
10 something Congress can remedy whenever it wants.

11 But obviously how effective is her filing of
12 a bill or trying to lobby from Congressmen and
13 senators compared to that of, let's say, in
14 California if that were the case of 20, 30, 40, 50
15 Congressmen, or even the state of Hawaii with two
16 congressmen, a small state like that? What would be
17 the difference? How is that political process to
18 overcome this problem in Puerto Rico? What's the
19 situation.

20 MS. FERRAIUOLI-HORNEDO: Well, I could tell
21 you that at least in Congress a bill has been filed
22 to equate SSI benefits for residents of Puerto Rico.
23 In every Congress ever since SSI was started.

24 And nothing has come of it. In Congress you
25 not only file the bill, it gets assigned to a

U.S. v. Vaello-Madero - Civil Hearing

1 committee. The committee has to have a markup
2 session and they have to vote to send it to the next
3 level. If it's a subcommittee then it's voted
4 subcommittee, then committee, then the body. The
5 fact is that Congresswoman González and every single
6 other representative of the territories, they have no
7 vote. And there's five of us -- five, compared to
8 430 other representatives, is nothing. And even
9 those members of Congress that are of Puerto Rican
10 descent we are only few. I think right now they
11 would be only 11.

12 THE COURT: Well, those congressmen, for
13 example, it could be in Idaho or in Chicago or
14 whatever, but they represent their own citizens
15 before they -- they don't represent the people of
16 Puerto Rico.

17 MS. FERRAIUOLI-HORNEDO: That is correct, we
18 are not number one on their agenda.

19 THE COURT: And what you say about committee
20 markup, going through the whole process, I know
21 Congresswoman González also presented a statehood
22 bill, and if that went through that would resolve the
23 situation because if Puerto Rico tomorrow would
24 become a state then there's no more issues, there
25 would be equal SSI.

U.S. v. Vaello-Madero - Civil Hearing

1 MS. FERRAIUOLI-HORNEDO: Yes.

2 THE COURT: That bill obviously -- and,
3 again, I am not auguring or promoting statehood or
4 that it be passed or not, that's not my prerogative,
5 but as a possible remedy that is something that would
6 also face the whole political legislative -- and now
7 we have a new Congress -- type situation. And this
8 could -- in theory, statehood could come in a year.
9 In theory statehood could take 50 years or never
10 come, correct, and then the problem would still
11 remain.

12 MS. FERRAIUOLI-HORNEDO: That is correct,
13 Your Honor. And the fact is that even though the
14 representatives of the territories vote in committee,
15 they don't vote in -- you know, for the bill, which
16 is really where the political power lies. Everybody
17 knows that the political process includes not only
18 convincing your fellow members of Congress but it
19 also deals with, I'll help you here if you help me
20 there. And basically we have nothing to trade other
21 than the fact that there are 3 -- probably now 3
22 million American citizens in Puerto Rico that have no
23 representation. The fact is that the Congresswoman
24 represents more than any other congressperson there
25 and she has less power.

U.S. v. Vaello-Madero - Civil Hearing

1 And the situation of Puerto Rico is even
2 worse in the senate. In the senate everybody has two
3 representative and we have none. So when you're
4 talking about fewer votes and fewer people that you
5 have to garner in order to pass a bill through the
6 chamber, we have no representation there whatsoever.

7 THE COURT: And in the particular committee
8 Congresswoman González if her vote would be the
9 decisive vote, it will not count, correct?

10 MS. FERRAIUOLI-HORNEDO: It doesn't count,
11 that's correct, Your Honor.

12 THE COURT: Okay. And you have two more
13 minutes, the anything else you want to add? And,
14 again, I think the brief it's been extremely helpful.
15 Anything else you want to add?

16 MS. FERRAIUOLI-HORNEDO: No, Your Honor. I
17 just wanted to really make the point that especially
18 for children the lack of application of the SSI
19 program to Puerto Rico affects children more than it
20 affects any other group that currently receives funds
21 from SSI because there is just no other program that
22 helps this population. And we're talking about
23 disenfranchised citizens, you know, citizens that
24 have absolutely no other rights, political rights,
25 you know pretty much. This is the population that

U.S. v. Vaello-Madero - Civil Hearing

1 really matters.

2 THE COURT: Okay, well, thank you very much.

3 On behalf of the Commonwealth ten minutes
4 for argument. Ms. Peñagaricano, welcome to Ponce
5 again.

6 MS. PEÑAGARICANO-BROWN: Thank you.

7 THE COURT: You're a frequent customer here,
8 frequent litigant here I mean. And, again, thank you
9 for the Commonwealth's brief. I must say it is of
10 even superior quality than when I was solicitor
11 general of Puerto Rico. I hope I did a good job back
12 then. I think this is what amicus briefs should be
13 because they bring forth the big picture and provide
14 a lot of information that is perhaps not as to the
15 particular individuals but it's the bigger, broader
16 picture. And it's important that these briefs be
17 filed, I think, at the outset. So please go ahead.
18 Anything you want to comment from the parties'
19 arguments. I've read your briefs several times, so
20 please go ahead.

21 MS. PEÑAGARICANO-BROWN: Thank you, Your
22 Honor. For the record, Susana Peñagaricano on behalf
23 of the Commonwealth. May it please the Court.

24 THE COURT: Yes.

25 MS. PEÑAGARICANO-BROWN: I would like to

U.S. v. Vaello-Madero - Civil Hearing

1 first say that I'll be dividing the arguments with
2 Attorney Lugo-Fiol within the time allotted by the
3 Court. And I'll be discussing the scrutiny and he
4 will be discussing the Insular Cases.

5 I would like to start by saying that we
6 echoed defendant's arguments in that the exclusion of
7 Puerto Rico residents from the SSI benefits program
8 under the Social Security Act is subject to a strict
9 scrutiny because it discriminates against U.S.
10 citizens for the sole reason that they reside in
11 Puerto Rico where most of its residents are Puerto
12 Rican or identify as Hispanics or Latinos. I also
13 must stress the fact that this benefit is aimed at
14 individuals, not at a territory. Therefore, also by
15 excluding the Puerto Rico residents as a class, the
16 Social Security Administration is creating a suspect
17 classification singling out an entire group of people
18 on the wrong premise that they belong to a class of
19 alien races. And this is subject to a heightened
20 judicial solicitude.

21 The Equal Protection Clause directs that all
22 similarly situated be treated alike and Puerto Ricans
23 are similarly situated to U.S. citizens in terms of
24 citizenship and also as to the conditions that the
25 SSI benefit wishes or seeks to address or aims to

U.S. v. Vaello-Madero - Civil Hearing

1 address. Because --

2 THE COURT: Let me ask, when you mention
3 treated differently alien or ethnic races, let's
4 forget the population in the entire U.S. mainland and
5 focus simply on the Mariana Islands and Puerto Rico.
6 And the Mariana U.S. citizens have full SSI. They
7 are of Chamorro and Carolinian descent versus Creole,
8 black, Indian, you know, mulatto -- here it's a big
9 mixture of everything. Would that apply the strict
10 scrutiny if we were to simply say Puerto Rico is
11 being discriminated vis-a-vis the CNMI?

12 MS. PEÑAGARÍCANO-BROWN: It would apply the
13 strict scrutiny. We're talking about a
14 classification based on ethnicity, race, national
15 origin. So it is our theory that it would apply as
16 strict scrutiny.

17 THE COURT: And that would be -- and let me
18 analogize here. The Supreme Court case from Hawaii,
19 U.S. Supreme Court, *Rice versus Cayetano* or *Cayetano*
20 *versus Rice* where that was cases for plebiscite, but
21 those cases were like the state or jurisdiction
22 saying only people of X ethnic origin can vote,
23 that's considered racial origin, and that's the
24 effect that you're saying is happening in Puerto
25 Rico.

U.S. v. Vaello-Madero - Civil Hearing

1 MS. PEÑAGARÍCANO-BROWN: Correct, Your
2 Honor, that would be the effect. And regarding that
3 issue particularly, the constitutional interpretation
4 or the race-based reasoning crafted by the Insular
5 Cases have been applied to justify the unequal
6 treatment of citizens residing or living in Puerto
7 Rico. These cases in particular provide a historical
8 animus against a politically powerless and
9 historically disadvantaged group. Aside -- under the
10 plaintiff's stance, and a mechanical reliance in the
11 case of *Califano* and *Harris*, cases like *Brown versus*
12 *Board of Education*, *Afroyim*, and *Obergefell* which
13 overruled previous Supreme Court precedent extending
14 equal protection to those historically disadvantaged
15 never would have happened.

16 I would like to address quickly the argument
17 regarding residency. Even if we were to entertain
18 that argument for the sake of argument, we would have
19 to say that then disparate treatment analysis would
20 come into play. The disparate treatment is evident
21 from a law that bears more heavily on a race than
22 another. And the exclusion of Puerto Rico residents
23 from the SSI program serves no legitimate government
24 end under any standard of review and therefore it
25 must fail.

U.S. v. Vaello-Madero - Civil Hearing

1 If we were to apply the same exclusion to
2 another state in the mainland, you wouldn't get the
3 same disparate result as it does when applied to
4 Puerto Rico. And it is our contention, the
5 Commonwealth's contention, that the economic law
6 cannot be rational if it's grounded in a suspect
7 classification like race or ethnicity because it is
8 against a powerless -- a discrete and powerless group
9 of people before Congress.

10 And the Commonwealth is well aware of
11 Congress's plenary powers and authority; however, it
12 is our contention that that plenary authority is
13 limited by the Constitution which does not make a
14 distinction between incorporated and unincorporated
15 territories so, therefore, it shouldn't be.
16 Including the Territory Clause does not make a
17 distinction either.

18 As to the alleged rational basis for --

19 THE COURT: Let me just go back to something
20 that you mentioned because I believe that the
21 argument you're making, the SSI law on its face,
22 there's no direct evidence of discrimination. What
23 you're -- and let me analogize this to Title 7, which
24 I know you handle many cases in your office at the
25 Department of Justice. But what Title 7 provides is

U.S. v. Vaello-Madero - Civil Hearing

1 that you can have the smoking gun direct evidence but
2 you also have disparate impact cases. And I assume
3 what you're sort of saying is that here based on the
4 circumstances, the statistics, the population of
5 Puerto Rico historically has been Hispanic, Latino,
6 you know, 95 percent approximately. That would
7 definitely evidence then, in your position, the
8 disparate impact of the law which would obviously
9 trigger ethnic origin or the heightened scrutiny. Am
10 I correct?

11 MS. PEÑAGARÍCANO-BROWN: That's correct,
12 your Honor. If you would do the same exclusion in a
13 state, you wouldn't get the same disparate impact;
14 you would get a more uniform treatment. So, yeah,
15 that would correct. If we were to assume that a
16 residency classification applies -- which we disagree
17 totally, we believe that this is a suspect
18 classification based on alienage and there's like
19 race and ethnicity.

20 If we were to address the allege rational
21 basis for excluding Puerto Rico from the SSI program,
22 the three basis were the unique tax status of Puerto
23 Rico, the high cost of treating Puerto Rico as a
24 state under the statute, and also that providing
25 greater benefits would disrupt the Puerto Rico

U.S. v. Vaello-Madero - Civil Hearing

1 economy.

2 THE COURT: Which there is no economy right
3 now.

4 MS. PEÑAGARÍCANO-BROWN: Those three
5 premises are totally wrong. If we were to start with
6 the first one, we would have to say that this Court
7 can take judicial notice of the fact that residents
8 in Puerto Rico do pay, individually or corporations,
9 do pay federal taxes. Many of them.

10 Also, we would have to say that the SSI
11 program is aimed at the individuals who do not pay
12 federal income tax regardless of the residency
13 because they make very low income. Also, we would
14 have to bring what the Court brought today to the
15 attention which is that even nonresidents,
16 noncitizens who are not similarly situated to other
17 U.S. citizens, are allowed to participate in the
18 program. Also, we have the scenario with the
19 Northern Mariana Islands who also have a unique tax
20 status and are considered unincorporated territory
21 and do participate in the SSI benefits.

22 THE COURT: And the Commonwealth of the
23 CNMI, if you look at the legislative history, it was
24 patterned after the Commonwealth of Puerto Rico. So
25 that would be, I assume, more towards your argument,

U.S. v. Vaello-Madero - Civil Hearing

1 correct?

2 MS. PEÑAGARÍCANO-BROWN: Correct. That's
3 correct, Your Honor. And all these arguments
4 disprove the belief that treating Puerto Rico as a
5 state would be too costly.

6 Also, there is no basis to support the
7 speculative fear that providing greater benefits
8 would disrupt the Puerto Rico economy. To the
9 contrary, Your Honor. The lack of SSI benefits or
10 other federal benefits would contribute to the
11 out-migration to the states and would actually
12 adversely affect the Puerto Rico economy.

13 THE COURT: And let me say, those three
14 prongs of the *Califano* and *Harris* analysis they
15 were -- and let me put it this way, that was, in a
16 sense, argued by the United States before the Supreme
17 Court which upheld those arguments. These were not
18 arguments raised by the, I guess, plaintiff
19 appellant, because it was an individual person, and
20 in those cases those were cases that the Commonwealth
21 of Puerto Rico literally had no way of tracking or
22 even knowing that those cases ended up before the
23 Supreme Court until the ruling came out. So in a
24 sense it was an *ex parte* presentation from the United
25 States without the Commonwealth having the benefit to

U.S. v. Vaello-Madero - Civil Hearing

1 address those particular issues. Am I correct?

2 MS. PEÑAGARÍCANO-BROWN: That's correct. As
3 the Court mentioned --

4 THE COURT: I'm sorry. And my question is,
5 when Mr. Riess gets an opportunity at the end to
6 respond he can do so, but would that in a sense from
7 the Commonwealth's perspective allow these arguments
8 to be considered for the first time in the record and
9 to respond to these arguments?

10 MS. PEÑAGARÍCANO-BROWN: Your Honor, I
11 believe that because *Califano* did not touch upon the
12 issue of the equal protection by right to travel and
13 because in *Harris* there was a cursorily -- the Court
14 cursorily addressed the equal protection without the
15 benefit of argument and briefing, we believe that
16 these cases should not be applied to this particular
17 case, and that the Court should have a chance to
18 revisit the issue which is long overdue for reversal.
19 We believe that if that was not the position then all
20 the other cases like *Obergefell* and *Brown versus*
21 *Board of Education* would have never happened. So we
22 believe that the issue should be revisited with the
23 opportunity for the parties to have a full briefing
24 and argument regarding that issue.

25 THE COURT: Okay, thank you. You have one

U.S. v. Vaello-Madero - Civil Hearing

1 more minute than I'll hear from Mr. Lugo.

2 MS. PEÑAGARÍCANO-BROWN: I'll allow him to.

3 THE COURT: Okay, so Mr. Lugo welcome to
4 Ponce.

5 MR. LUGO-FIOL: Thank you, Your Honor, and
6 may it please the Court.

7 THE COURT: Yes, please proceed.

8 MR. LUGO-FIOL: Before 1901, it was
9 generally assumed that the full protection of the
10 Constitution applied to the territories that the
11 United States were acquiring, be it by treaty or by
12 conquest, whatever. In 1901, the Supreme Court
13 decided two cases regarding Puerto Rico on the same
14 day, May 27, 1901. The first one is *DeLima v.*
15 *Bidwell*, and I'm going to talk a little bit about
16 those cases because they establish contrast.

17 In *DeLima*, the Supreme Court decided that
18 upon ratification of the Treaty of Paris, Puerto Rico
19 was no longer a foreign country and became domestic.
20 And in so deciding, at page 198, the Court rejected
21 two ideas: The first idea it rejected is that a
22 country could be domestic for some purposes and
23 foreign for others. And the second idea it rejected
24 it was that territories could be held indefinitely by
25 the United States. And it rejected these ideas

U.S. v. Vaello-Madero - Civil Hearing

1 because it found no support in the Constitution for
2 them.

3 However, in that same date the Supreme Court
4 also decided *Downes versus Bidwell* and began the
5 establishment of what is now known as the
6 Incorporation Doctrine. And essentially this
7 doctrine, decided by *Downes* provided that Congress
8 could treat Puerto Rico as foreign for some purposes,
9 which it has been doing ever since, and that Congress
10 is allowed to hold these "distant possessions"
11 indefinitely as territories of the United States.
12 It's basically contradicting itself. In our view, it
13 basically contradicted itself.

14 And the reason why -- in the consideration,
15 the reason why the Court did this, in our view, is
16 expressed at pages 286 to 287 of *Downes v. Bidwell* if
17 which I will read if I may --

18 THE COURT: Please go ahead.

19 MR. LUGO-FIOL: This is citing a paragraph.
20 "Patriotic and intelligent men may differ widely as
21 to the desirableness of this or that acquisition, but
22 this is solely a political question. We can only
23 consider this aspect of the case so far as to say
24 that no construction of the Constitution should be
25 adopted which would prevent Congress from considering

U.S. v. Vaello-Madero - Civil Hearing

1 each case upon its merits, unless the language of the
2 instrument imperatively demand it. A false step at
3 this time might be fatal to the development of what
4 Chief Justice Marshall called the American Empire.

5 "Choice in some cases, the natural
6 gravitation of small bodies towards large ones in
7 others, the result of a successful war in still
8 others, may bring about conditions which would render
9 the annexation of distant possessions desirable. If
10 those possessions are inhabited by alien races,
11 differing from us in religion, customs, laws, methods
12 of taxation and modes of thoughts, the administration
13 of government and justice, according to Anglo-Saxon
14 principles, may for a time be impossible, and the
15 question that once arises whether large concessions
16 ought not to be made for a time, that, ultimately our
17 own theories may be carried out, and the blessings of
18 a free government under the Constitution extended to
19 them. We decline to hold that there is anything in
20 the Constitution that forbid such action."

21 I'm stressing on this because this
22 establishes that the real classification in this case
23 is not residency, it's alienage because this
24 decision, and the decision of *Balzac* which followed
25 in 1922, they're founded on the same type of thought,

U.S. v. Vaello-Madero - Civil Hearing

1 the same type of rationalization.

2 THE COURT: So you would say that even
3 though the current Congress and Congress 20, 30 years
4 ago is no longer -- and is affirmatively not using
5 race and ethnic origin, the fact that the power to do
6 so comes from a decision of the Supreme Court that
7 based that power on alienage, classification,
8 basically is tainting or converting the whole
9 treatment into alienage?

10 MR. LUGO-FIOL: Yes, into alienage, yes.

11 THE COURT: Because it's still promoting
12 that -- again, the people in Guam still they're
13 basically Chamorros in origin. The people in the
14 Virgin Islands they're basically Afro-American. In
15 Puerto Rico it's basically Hispanic, Latinos. And in
16 American Samoa it's native Samoans, and same in the
17 Marianas.

18 MR. LUGO-FIOL: Yes. And that ties up also
19 with the position that there is a gross disparate
20 impact by the legislation that -- of the legislation
21 that is the object of this case. It has a disparate
22 impact upon residents of Puerto Rico most of which
23 are Puerto Ricans, so it has a gross disparate impact
24 on a discrete ethnic group.

25 THE COURT: And I understand that the

U.S. v. Vaello-Madero - Civil Hearing

1 individual who moves from New York or let's say
2 somebody who is from Anglo-Saxon origin but is in New
3 York or Florida, California, moves to Puerto Rico,
4 that person is being treated as a Puerto Rican
5 alienage because by living here he's treated as such,
6 correct?

7 MR. LUGO-FIOL: Well, it is a collateral
8 effect. I mean, it is more -- it would affect them.

9 THE COURT: But it's also affecting
10 individuals who not necessarily are Hispanic, but any
11 U.S. citizen who moves to Puerto Rico is being
12 affected by being treated within this group, correct?

13 MR. LUGO-FIOL: Yeah, that is correct. But
14 the impact is much, much larger upon Puerto Ricans
15 than upon persons from other states or other
16 residents or other nationalities.

17 In 1922, the Court decided *Balzac*, and in
18 the *Balzac* the Court had the opportunity, it could've
19 simply said, Well, the Jones Act extended U.S.
20 citizenship to Puerto Ricans and under *Rasmussen v.*
21 *United States* they did the same in Alaska. In
22 Alaska, we decided back in 1905 that Alaskans were
23 citizens of the United States and it was
24 incorporated --

25 THE COURT: And actually in *Rasmussen* the

U.S. v. Vaello-Madero - Civil Hearing

1 Supreme Court of the United States said Alaska is
2 incorporated because it's part of the Ninth Circuit.
3 Puerto Rico is part of the First Circuit and that
4 didn't do the change.

5 MR. LUGO-FIOL: No. And, well, I'm not
6 going to enter into all the distinctions. I mean, it
7 made some distinctions from Alaska that are really
8 mainly geographical, which geographical location is
9 really about a piece of land --

10 THE COURT: Alaska was mainly uninhabited,
11 Puerto Rico was packed just like the Philippines.

12 MR. LUGO-FIOL: Yes, but the individual
13 protections of the Constitution should not be guided
14 or governed by such type of consideration.

15 THE COURT: Who lives there or --

16 MR. LUGO-FIOL: Yes. And then we go to
17 *Califano* and *Harris*. And the issue that the Insular
18 Cases have to be considered in this case is because
19 in *Harris versus Rosario* -- *Califano versus Torres*,
20 to begin with, is a right-to-travel case. And the
21 Court in a footnote really states clearly that the
22 equal protection controversy was not before the
23 Court. And therefore clearly the statement it made
24 at the end of the decision about equal protection and
25 rational basis is dictum.

U.S. v. Vaello-Madero - Civil Hearing

1 And in *Harris versus Rosario* in two
2 paragraphs they relied upon the dictum in *Califano*,
3 without any sort of consideration or argument
4 whatsoever, and simply struck out from the picture
5 any possibility that a person could go and allege --
6 in an equal protection claim assert that he is
7 entitled to strict scrutiny. Why? because it simply
8 says, the Court in *Harris v. Rosario* simply says, if
9 it's legislation by Congress that affects a territory
10 under the Territorial Clause, it's always rational
11 basis. It's an absolute opinion, and there's no
12 reasoning why. And the dissent by Justice Marshall
13 is very illustrative of this.

14 And we understand that all these cases
15 together have formed the basis of a situation which
16 is discriminatory to American citizens who live in
17 Puerto Rico, and particularly residents of Puerto
18 Rico, people who were born in Puerto Rico, who live
19 in live in Puerto Rico, who have made Puerto Rico
20 their home and who, in order to enjoy the full
21 privileges that all other Americans citizens have,
22 have to move. And that situation -- we understand
23 that this situation is discriminatory. And this is a
24 proper case in which at least, even if it's only
25 limited to one individual defending himself against a

U.S. v. Vaello-Madero - Civil Hearing

1 claim for reimbursement to the United States, this
2 opinion -- this -- a decision in his favor will be
3 influential in future -- in all sorts of decisions
4 that may be taken in the future.

5 I think the Insular Cases, in particular the
6 Incorporation Doctrine should be reexamined, can be
7 reexamined and, can be reversed and should be
8 reversed. And that would be our upon in support of
9 Plaintiff, Your Honor.

10 THE COURT: Okay. Thank you very much,
11 Mr. Lugo.

12 MR. LUGO-FIOL: Defendant, I'm sorry.

13 THE COURT: What we're going to do is I
14 think during my initial questioning to the parties I
15 think I raised probably almost everything in your
16 respective arguments, so rather than have a simply
17 near rebuttal turn, what I'm going to ask is first
18 from the government and then for Mr. Ferré, and then
19 I'll allow the government to respond two minutes and
20 Mr. Ferré two more minutes. Let's say anywhere from
21 five to ten minutes. Anything that you wish to state
22 to the Court that during any questioning I did not
23 bring up, please so state. And then if you want to
24 respond to anything in the amicus arguments please go
25 ahead. I'll allow Mr. Ferré -- I believe Mr. Ferré

U.S. v. Vaello-Madero - Civil Hearing

1 is going to be in agreement with the argument, so
2 that should be shorter, and then I'll allow each of
3 you. So we should be here about 15, 20 more minutes.

4 So let me hear first from Mr. Riess,
5 anything you would like to add or comment.

6 MR. RIESS: Yes, Your Honor. The one topic
7 that was brought up in our briefs that we didn't get
8 to was the situation with the Northern Mariana
9 Islands. And so let me make two points about that
10 please. Number one, under rational basis review,
11 this is the *Katzenbach* case, a statute is not invalid
12 because it might have gone farther than it did; and
13 legislation can take one step at a time, that's the
14 *Williamson v. Lee Optical* case. So what that means
15 is that line drawing and social benefits legislation,
16 which is what we have here, means simply because
17 Congress extends a benefit to residents of one
18 territory, in the case the Northern Marianas, that
19 doesn't mean it's constitutionally required to extend
20 it to residents of all territories.

21 As we know, the federal law has long
22 distinguished among territories in many ways, and the
23 defendant has presented no authority that shows that
24 the Constitution mandates that Congress needs to
25 extend social benefits legislation to territories

U.S. v. Vaello-Madero - Civil Hearing

1 uniformly. That's point number one.

2 THE COURT: Let me say, if that were the
3 case -- and these are things that, for example, in
4 Puerto Rico we have an Article III court, all the
5 territories don't have an Article III court. So
6 litigants there don't have the benefits of an Article
7 III court, the citizens, U.S. citizens. If that
8 rationale required the same treatment in all the
9 territories, then you'd have to treat -- you know,
10 everything that you get in Puerto Rico that you can
11 get in the other jurisdictions Congress would have to
12 treat everybody the same, that's your position,
13 correct?

14 MR. RIESS: Precisely, Your Honor. That
15 leads to my second point.

16 THE COURT: And before that, you mentioned
17 the *Katzenbach* case what page of your brief are you
18 citing to?

19 MR. RIESS: I don't have the page of the
20 brief. I do have the citation which is 384 U.S. 657.

21 THE COURT: And what's the full name?
22 *Katzenbach*?

23 MR. RIESS: *Katzenbach v. Morgan*.

24 THE COURT: Okay. That's what I thought.
25 And let me ask, now that you mention it, because I

U.S. v. Vaello-Madero - Civil Hearing

1 just wanted to make sure it was that case you're
2 alluding to, that is an interesting case because that
3 was the case where U.S. citizens who moved from
4 Puerto Rico to New York were deprived voting rights
5 because there was an English literacy test and their
6 language was -- so basically they were flunking it,
7 they couldn't pass it, they were not voting.

8 And in that case which was argued by
9 Thurgood Marshall and the former governor of Puerto
10 Rico, then Attorney General, Rafael
11 Hernández-Colón -- who happens to be from Ponce --
12 the Supreme Court ruled that while that language test
13 perhaps on its face may not be discriminatory, the
14 effect was that it was discriminatory. And it was
15 targeted towards U.S. citizens from Puerto Rico who
16 were U.S. citizens by birth. So wouldn't that case
17 strengthen the defendant's argument because here
18 again it's the U.S. citizens in Puerto Rico who are
19 being affected?

20 MR. RIESS: I don't think so, Your Honor,
21 and here's why. The difficulty is that would be a
22 disparate impact argument, and we've already
23 explained why that doesn't work in the discrete and
24 insular minority context. Under equal protection
25 too --

U.S. v. Vaello-Madero - Civil Hearing

1 THE COURT: That would be under *Quiban* for,
2 example.

3 MR. RIESS: Exactly. If the argument too is
4 that the basis for disparate impact is that Puerto
5 Rico residents are predominately Hispanic, that also
6 fails. The *Quiban* court rejected that as well, and I
7 would note so does the Court in this district. That
8 was the *Hospital San Rafael* case, 784 F. Supp. 939 to
9 40. There was an allegation that it was facially
10 neutral. There was a classification about a Medicare
11 payment system, that it discriminated against
12 Hispanics because Puerto Rico hospitals -- it would
13 result in a lower level of payment to the Puerto Rico
14 hospitals. And the Court here said yes, Hispanics
15 are a suspect class, but disparate impact is not
16 enough for equal protection purposes and you need to
17 show proof of a discriminatory purpose. That was a
18 1991 case by Judge Laffitte.

19 THE COURT: Continue.

20 MR. RIESS: So on the second point on the
21 Northern Marianas, this is similar to the *Segovia*
22 case recently decided where the district court said
23 that for purposes of UOCAVA, The Uniformed and
24 Overseas Citizens Absentee Voting Act, The fact that
25 Congress drew a distinction between U.S. citizens and

U.S. v. Vaello-Madero - Civil Hearing

1 former state residents in NMI versus citizens and
2 former state residents who reside in other
3 territories, that doesn't mean it was required to
4 extend absentee voting across the board to all the
5 territories.

6 THE COURT: And that case is still pending
7 Cert granted or Cert denied, correct?

8 MR. RIESS: I believe Cert was denied.

9 THE COURT: Cert was denied, okay.

10 MR. RIESS: Yes, very recently, Your Honor.

11 THE COURT: And that *Segovia* case is based
12 on *Romeo verus Cohen* case also for the Second
13 Circuit. And, as a matter of fact, I know Mr. Xavier
14 Romeo happens to be here in the audience. So I guess
15 these cases, like Mr. Igartúa, have a collective
16 gathering of former plaintiffs. Okay, anything else?

17 MR. RIESS: Very briefly, Your Honor. In
18 response to the argument of amici, which were
19 powerfully presented, policy arguments as to
20 disagreements as to the policy not to extend SSI
21 benefits to Puerto Rico residents, questions as to
22 the wisdom or the fairness of the law, that doesn't
23 make it unconstitutional. The Supreme Court made
24 clear in the *Beach Communications* case rational basis
25 is not a license for courts to judge the wisdom or

U.S. v. Vaello-Madero - Civil Hearing

1 the fairness or even the logic of legislative
2 choices.

3 And also in that case it said, A legislative
4 choice isn't subject to courtroom factfinding. There
5 was a lower court that sought legislative facts in
6 the Supreme Court reversed. It said, Legislative
7 choice can be based on rational legislation
8 unsupported by evidence or empirical data. So as
9 long as there's a facially valid reason and it's not
10 wholly irrational, it survives rational basis.

11 THE COURT: Let me make an analogy. Assume
12 we're pre-1954 *Brown* has not been decided and let's
13 assume the Federal Government issued a law that in
14 the Commonwealth -- yes, 1952, the Commonwealth of
15 Puerto Rico there can be schools for black and white
16 children respectively, and let's assume then --
17 again, obviously *Brown* had not been decided. That's
18 not a fair, that's not a wise law of course, I'm sure
19 everybody would be in agreement nowadays. But in
20 those days the federal court, before *Brown* had been
21 decided, would have no constitutional prerogative to
22 make that ruling, am I correct, because it would have
23 had to apply *Plessy* at the time?

24 MR. RIESS: Unfortunately a district court
25 would need to apply the Supreme Court --

U.S. v. Vaello-Madero - Civil Hearing

1 THE COURT: So the district court would say
2 I can't grant the remedy, of course a different judge
3 could've written all the -- I guess that would have
4 been Clemente Ruiz Nazario in those days -- all the
5 dictum necessary, but it would have to go to the
6 Circuit, probably Circuit would have had to uphold,
7 and then it would've had to have been the Supreme
8 Court, or maybe *Brown* would have intervened at the
9 time, am I correct?

10 MR. RIESS: Yes, Your Honor. I would make
11 absolutely certain I'm not at all defending *Plessy*
12 *versus Ferguson*.

13 THE COURT: Oh, I note that for the record.
14 This is just a historical hypothetical. That's not
15 the U.S. DOJ's position. Those statutes were state
16 statutes and never the Federal Government. To the
17 contrary, the Federal Government and the U.S. DOJ
18 promoted the Civil Rights Act. That is just a
19 speculative hypothetical --

20 MR. RIESS: Thank you, Your Honor. I just
21 wanted to make that clear.

22 THE COURT: -- which could have been a law
23 school example. Well, thank you very much, Counsel.
24 Let me hear from Mr. Ferré, some closing arguments.
25 And if there's anything you wish to respond after

U.S. v. Vaello-Madero - Civil Hearing

1 that one or two minutes, I will allow you.

2 MR. FERRÉ: Thank you, Your Honor. I just
3 want to come to a couple of points that have been
4 raised. The government argues that in areas of
5 social policies a statutory classification would --
6 should be upheld against an equal protection
7 challenge, but this is if it does not proceed along
8 suspect lines or infringes on fundamental
9 constitutional rights. And we would argue here that
10 of course it does.

11 Your Honor asked or actually asked a number
12 of questions pertaining to the consent of the
13 government. And we wanted to comment that one of the
14 basic precepts of our constitutional system are those
15 proclamations in the Declaration Independence which
16 of course includes that all are to be treated
17 equally -- "We hold certain truths to be
18 self-evident." So we would say that the consent of
19 the government should be something that is --

20 THE COURT: That would be along the lines, I
21 remember when Justice Ginsburg was confirmed, one of
22 her questions was, You just can't go to the
23 Constitution, you have to go to the Declaration of
24 Independence as well because that's the basis for the
25 whole government.

U.S. v. Vaello-Madero - Civil Hearing

1 MR. FERRÉ: Exactly.

2 THE COURT: Anything else?

3 MR. FERRÉ: Yes. The other point that I
4 wanted to raise and I didn't raise it earlier is,
5 there are additional cases, and perhaps we can
6 include it in our supplementary brief, and that is, I
7 wanted to highlight the *Torres v. Puerto Rico* case in
8 which Justice Brennan in his concurrence, joined by
9 Justices Stewart, Marshall, and Blackmun, observes
10 that any implicit limits based on the Insular Cases
11 on the basic rights guaranteed by the Constitution
12 were anachronistic in the 1970s. So certainly if
13 they were anachronistic in the 1970s we would expect
14 that they would be so today.

15 THE COURT: And there's also a dissent in, I
16 think it's, *Igartúa, III* or *IV*, from Judge Torruella
17 which even expands on *Torres*.

18 MR. FERRÉ: Yes. In addition, we would like
19 to comment that certainly when the Supreme Court
20 invalidates a law as unconstitutional, it doesn't
21 then go on to determine if there is nevertheless some
22 basis to have that law apply to the territories. So
23 we think that's not quite the analysis that the Court
24 should engage in.

25 Finally, I would just like, as a closing

U.S. v. Vaello-Madero - Civil Hearing

1 comment, to highlight that in 1898 in this very city
2 of Ponce, General Nelson A. Miles, commanding general
3 of the United States Army, upon entering the city is
4 reported to have proclaimed to the people of Puerto
5 Rico in a speech that's reflected in Karl Stephen
6 Hermann's book, "A recent Campaign in Puerto Rico,"
7 that was published in 1907 -- in that book he
8 reports, quotes the proclamation of General Miles and
9 it goes as follows:

10 "The people of the United States in the
11 cause of liberty, justice, and humanity come bearing
12 the banner of freedom inspired by a noble purpose to
13 seek the enemies of our country and yours and to
14 destroy or capture all who are in armed resistance.
15 They bring you -- that is, the United States brings
16 you -- the fostering arm of a free people whose
17 greatest power is in its justice and humanity to all
18 those living within its fold. Hence, the first
19 effect of this occupation will be the immediate
20 release from your former relations and it is hoped
21 with cheerful acceptance of the government of the
22 United States."

23 Now, the rest of the book of course shows
24 the racial animus in the author's -- you can see that
25 in the author's commentaries at the time. But

U.S. v. Vaello-Madero - Civil Hearing

1 General Miles' promise of the blessings to be
2 bestowed by our government of the United States, I
3 think the Court should consider at what point does
4 "our government" include Puerto Rico.

5 THE COURT: Let me just add that based on
6 that quote in *Downes versus Bidwell* Justice Harlan in
7 his dissent he says it's a mockery planting the U.S.
8 flags and saying that you have all these liberties
9 while at the same time you retain the power to shape
10 the destiny of these now free people. So, again,
11 that's another historical fact.

12 So with that in mind, Mr. Riess, any
13 two-minute final comments or anything else? If not,
14 we have December 4th simultaneous deadline -- I mean,
15 January 4, 2019, to file any supplemental briefs on
16 anything you may have forgotten or anything that I
17 asked that you find out there's other jurisprudence
18 or any other argument, but if there's anything you
19 would like to close, please go ahead.

20 MR. RIESS: Just to follow up on my very
21 last right remark. I just wanted to make sure that
22 my point is that only a Supreme Court can overturn
23 another Supreme Court decision and so that was why
24 *Brown v. Board of Education* --

25 THE COURT: Amply understood. And, again, I

U.S. v. Vaello-Madero - Civil Hearing

1 brought the argument and it was a hypothetical. It
2 may be hypothetical, but it could have been
3 *Obergefell*, it could have been any other Supreme
4 Court decision.

5 MR. RIESS: That's fine. I just want to
6 make clear.

7 THE COURT: Mr. Ferré, anything else?

8 MR. FERRÉ: No thank you, Judge.

9 THE COURT: Well, I thank everybody. Safe
10 travels back. I'm not going to issue a ruling. I'm
11 going to wait until I have your final supplemental
12 perhaps, let's call it, closing briefs. Let me say,
13 I think let's limit it to ten pages each. I think
14 you probably may not need the whole ten pages.

15 With that in mind, I also want to note --
16 again, Mr. Riess I know from your division a U.S. DOJ
17 this is not the only challenge to the situation in
18 Puerto Rico, there are several other cases. I have
19 two or three of these -- Social Security, Medicare,
20 other entitlements. I also have a death-penalty case
21 where the issued consent of the government is being
22 raised. So I think it's important for U.S. DOJ and
23 for you to get the message back there that --
24 because, again, the death penalty is a criminal case,
25 but I think that it's important for the U.S. DOJ

U.S. v. Vaello-Madero - Civil Hearing

1 because that case will also probably be argued at
2 some point.

3 But it's important for U.S. DOJ to ensure
4 that everybody knows what's going on because there's
5 only one U.S. government, only one U.S. DOJ, and it's
6 important for everybody at DOJ to keep in mind that
7 there's -- again, these are just the cases before me.
8 I believe before some of my colleagues there are some
9 other types of these constitutional challenges. And
10 whether I'm able to address them affirmatively or
11 against the United States, that's a question that I
12 will have to decide. But if not, probably there's
13 going to be a waive of appellate challenges in the
14 next couple of years, and that apparently is the
15 trend. At least I know the Commonwealth of Puerto
16 Rico and United States have been appearing as amicus
17 in all these briefs.

18 And, again, I thank the Commonwealth,
19 Congresswoman González, as well as counsel, and
20 Mr. Ferré and counsel from New York thank you for
21 coming here. And once I have the supplemental briefs
22 I will work on this as diligently as possible in
23 light of the extensive criminal docket that I have.
24 Court is adjourned. Thank you very much. Happy
25 holidays all.

U.S. v. Vaello-Madero - Civil Hearing

(Civil hearing is concluded at 12:16 p.m.)

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

COPY - HERMANN FERRE

U.S. v. Vaello-Madero - Civil Hearing

1 UNITED STATES DISTRICT COURT)
 2 OF) ss.
 3 PUERTO RICO)
 4
 5
 6

CERTIFICATE

7
 8
 9
 10 I, EVILYS E. CARRIÓN-ESQUILÍN, hereby
 11 certify that the proceeding is contained fully and
 12 accurately, to the best of my ability, in the notes
 13 recorded stenographically by me, at the civil hearing
 14 in the above matter; and that the foregoing is a true
 15 and accurate transcript of the same.
 16

/s/ Evilys E. Carrión-Esquilín

17
 18 EVILYS E. CARRIÓN-ESQUILÍN, RPR
 19 Official Court Reporter
 20 United States District Court
 21 Federal Building, Room 200
 22 San Juan, Puerto Rico 00918
 23 787-772-3377
 24
 25