IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF PUERTO RICO

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

JOSE LUIS VAELLO MADERO'S SUPPLEMENTAL BRIEF IN SUPPORT OF HIS MOTION FOR SUMMARY JUDGMENT

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Defendant Jose Luis Vaello Madero, by his undersigned attorneys, respectfully submits this supplemental brief pursuant to the Court's order dated December 28, 2018. Dkt. No. 86.

INTRODUCTION

The evolution of Constitutional jurisprudence since the *Insular Cases* were decided demonstrates that the discrimination condoned in those cases is fundamentally at odds with modern conceptions of equal rights, and cannot withstand an equal protection challenge. Supreme Court decisions evince an ever-increasing recognition that laws singling out historically marginalized groups for disfavored legal status, no matter how long they have been in effect or how rooted they are in the legal structure, must be struck down as violating the Constitutional guarantee of equal protection. Over the last seventy years, the Court has struck down racial segregation, *Brown v. Board of Education*, 347 U.S. 483 (1954), the exclusion of noncitizens from welfare benefits, *Graham v. Richardson*, 403 U.S. 365 (1971), gender inequalities in marriage, *Kirchberg v. Feenstra*, 450 U.S. 455 (1981), criminal penalties for same-sex sexual activity, *Lawrence v. Texas*, 539 U.S. 558 (2003), and laws denying same-sex couples the right to marry, *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015), among others. The disfavored legal status of Puerto Rico residents established long ago by the *Insular Cases*, and embodied in statutes such as the exclusion of Puerto Rico residents from receiving SSI disability benefits at issue in this case, similarly violates the guarantee of equal protection, and accordingly must be struck down.

Throughout this case, the Government's paper-thin justification for discrimination against Puerto Rico residents has been that Congress was acting pursuant to its plenary powers under the Territories Clause when it excluded Puerto Rico residents from the SSI program, and that courts may apply only the most deferential standard of review "whenever Congress enacts legislation deemed to affect residents of U.S. territories." Pl.'s Reply Br. 6-7, Dkt. No. 077. The

Government's view is thus that the Territories Clause acts as a carve-out in which equal protection principles do not limit Congress's power. The implication of this view is that Congress is not constrained to respect the equal dignity and personhood of residents of the territories so long as it purports to legislate pursuant to the Territories Clause. The Territories Clause, however, provides no such carve-out.

The political powerlessness of Puerto Rico residents makes any political solution to this long-standing discrimination remote. As such, the only option for Puerto Rico residents is to seek redress from the courts for the recognition that they deserve equal protection and equal dignity before the law. After more than a century of waiting, such recognition is long overdue.

ARGUMENT

I. The Exclusion of Puerto Rico Residents from the SSI Program Violates Equal Protection Because it Demeans Puerto Rico Residents and Denies Them Equal Dignity Under the Law

As this Court noted (Oral Arg. 51:13-21), the recent Supreme Court decisions in *Windsor v. United States*, 570 U.S. 744 (2013), and *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015), establish that when a statute demeans members of a targeted group, that statute violates equal protection. In *Windsor*, the Court invalidated the Defense of Marriage Act ("DOMA"), a federal law that had defined the term "marriage" as referring only to a legal union between one man and one woman. The Court recognized that the "principal purpose and the necessary effect of this law are to demean those persons who are in a lawful same-sex marriage" by denying them the same rights and benefits as opposite-sex couples. 570 U.S. at 829-30. In reaching this conclusion, the Court found that DOMA prevented same-sex couples from obtaining many of the federal benefits that opposite-sex couples enjoyed, such as government healthcare, tax breaks for children's medical care, and Social Security spouse/widow benefits. *Id.* at 773. The effect of this discrimination was to demean same-sex couples and to "instruct[] all federal officials, and

indeed all persons with whom same-sex couples interact, including their own children, that their marriage is less worthy than the marriages of others." *Id.* at 830. The Court accordingly held that the equal protection guarantee of the Fifth Amendment "withdraws from Government the power to degrade or demean in the way this law does" and struck down DOMA.

The Court reaffirmed this reasoning in *Obergefell*, which invalidated state restrictions on same-sex marriage on the grounds that they "demean[ed] gays and lesbians" and denied them "equal dignity in the eyes of the law." *Obergefell* so ruled in part because the restrictions denied same-sex couples "the constellation of benefits that the States have linked to marriage." 135 S. Ct. at 2601-02, 2608. In this regard, the Court observed that the government's recognition of marriage between two people conferred "material benefits to protect and nourish the union" related to taxation, inheritance, property, and other areas. *Id.* at 2601. The restrictions on same-sex marriage therefore represented a judgment that same-sex couples were unworthy to receive these benefits. The effect of these restrictions was to impose "material burdens" and "instability" on same-sex couples, and to demean gays and lesbians by teaching that they were "unequal in important respects." *Id.* at 2602.

Similarly here, the exclusion of Puerto Rico residents from SSI benefits demeans Puerto Rico residents. It singles out otherwise qualified Puerto Rico residents who are disabled, who receive little to no income, and who are in just as dire need of support as similarly situated residents of the mainland, and denies them this support solely on the basis of their Puerto Rico residency. The exclusion thereby imposes "material burdens" and "instability" that have been devastating for the most vulnerable Puerto Rico residents, who suffer harm every day due to their inability to access SSI benefits. *See generally* Resident Commissioner's Amicus Br. 3 (stating that the "implementation of SSI in Puerto Rico would have represented 54 times as much money

for individuals who have no ability to support themselves"). These effects have been particularly damaging for families caring for disabled children, as SSI is the only source of federal income for those families who are especially likely to face material hardships in caring for their children. *Id.* at 9. The response cannot be to require these families to uproot their lives and leave their island for the mainland.

Denying the poorest and most vulnerable Puerto Rico residents recourse to the SSI program conveys that Puerto Rico residents are "unequal in important respects" to their fellow citizens elsewhere. It teaches Puerto Rico residents that they are less deserving of assistance and that their lives are viewed as less important to the federal government. The guarantee of equal protection bars the government from demeaning and stigmatizing Puerto Rico residents in this manner. Furthermore, the exclusion advances the long-standing view expressed in the *Insular Cases*, that residents of Puerto Rico are undeserving of full constitutional protections because they are members of an "uncivilized race" and are therefore "unfit" to receive these protections. *Downes v. Bidwell*, 182 U.S. 244, 306 (1901) (White, J. concurring). This doctrine, upon which the Supreme Court has previously upheld the exclusion in the context of the right to travel, *Califano v. Harris*, 435 U.S. 1, 3 n. 4 (1978), has long demeaned Puerto Rico residents and denied them equal dignity under the law. These precedents can no longer be considered good law after *Windsor* and *Obergefell*, and must be discarded along with the exclusion.

II. The Exclusion Violates Equal Protection Because it Impermissibly Targets a Politically Powerless Class and Discriminates on the Basis of Race

The exclusion of Puerto Rico residents from the SSI program must be subject to strict scrutiny because it impermissibly discriminates on the basis of race and ethnic origin. *See* Def.'s

MSJ 11-14.[1] In rebuttal, the Government argues that strict scrutiny should not apply because the exclusion is "based on residency rather than, say, race or national origin." Oral Arg. 28:13-22. However, as this Court noted by analogy to Title VII, even when there is no "smoking gun" direct statement of legislative intent to discriminate, this intent may be shown by statistical evidence establishing disparate harmful impact on a particular race. Oral Arg. 87:25-88:10.

This point is illustrated by *N.C. State Conf. of the NAACP v. McCrory*, 831 F.3d 204 (4th Cir. 2016). *McCrory* considered a series of revisions to state voting laws enacted by the North Carolina legislature. These revisions imposed a number of voting restrictions, such as: requiring in-person voters to present a DMV-issued photo ID, shortening the period for early voting, eliminating same-day voter registration, eliminating out-of-precinct voting, and eliminating preregistration for 16- and 17-year olds. *Id.* at 216-18. The district court upheld the voting restrictions because they were facially neutral and applied equally to all races. However, the Fourth Circuit reversed this decision after finding that these restrictions "were enacted with racially discriminatory intent in violation of the Equal Protection Clause of the Fourteenth Amendment and § 2 of the Voting Rights Act." *Id.* at 219.

In reaching this decision, the court did not point to any "smoking gun" statements in the statute's legislative history. Rather, it focused on the disparate impact the restrictions had on African Americans, and on the history of discrimination suffered by African Americans in the state. First, the court considered data showing "that African Americans disproportionately used early voting, same-day registration, and out-of-precinct voting, and disproportionately lacked DMV-issued ID." *Id.* at 230. The court also considered that the legislature had not imposed the

[1] Heightened scrutiny is also warranted because the exclusion targets a politically powerless class. *See* Def.'s Reply ISO MSJ 2-3. Importantly, the exclusion does not merely have a disparate impact on a politically powerless group, but facially discriminates against a politically powerless "discrete and insular minority." *See United States v. Carolene Products Co.,* 304 U.S. 144, 152 n.4 (1938).

more restrictive photo ID requirement on absentee voting, which was a procedure that white Americans disproportionately used. *Id.* Notably, the court did not find that the effect of the restrictions corresponded perfectly with race, but only that the effects were racially disproportionate. In other words, there were some white Americans who were affected by the restrictions and some African Americans who were not. For example, trial evidence showed that around 60% of African Americans voted early in 2008 and 2012, compared to around 45% of white Americans. *Id.* at 216. Nonetheless, the court found that "in the totality of the circumstances . . . [s]howing disproportionate impact, even if not overwhelming impact, suffices to establish one of the circumstances evidencing discriminatory intent" under *Arlington Heights*. *Id.* at 231.

The court additionally emphasized a "historical pattern of laws producing discriminatory results" as evidence that the voting restrictions were enacted with a discriminatory purpose. *Id.* at 223-24. It found that "North Carolina has a long history of race discrimination generally and race-based vote suppression in particular" and that the district court erred by failing to consider this history when analyzing the plaintiffs' discriminatory intent claim. *Id.* at 223.

Here, the historical and statistical evidence of intentional racial discrimination is stronger than in *McCrory*. First, as in *McCrory*, it is of no moment that the exclusion of Puerto Rico from the SSI program is over-inclusive (insofar as it encompasses a small group of non-Hispanic residents of Puerto Rico) or under-inclusive (insofar as it does not affect Puerto Ricans residing in one of the constituent States). The point is that the exclusion targets the population of Puerto Rico, which is almost 100% Hispanic or Latino. This disparate impact is indisputable. Additionally, there is a clear historical pattern of racial discrimination in the territories in that contiguous territories supposedly inhabited primarily by white Americans have long been automatically incorporated into the union, while "distant" lands, such as Puerto Rico or the

Philippines, inhabited primarily by "alien" races have historically remained unincorporated and without the benefit of full constitutional protections. Indeed, the premise of the *Insular Cases*, on which *Califano* grounded its decision to uphold the exclusion, was that it would "inflict grave detriment on the United States" if territories inhabited by people of "an uncivilized race" were automatically incorporated into the union. *Downes*, 182 U.S. at 306 (White, J. concurring).

Taken together, the overwhelming racially discriminatory impact of the exclusion, and the undeniable history of discrimination against the people of Puerto Rico by the federal government, sufficiently demonstrates the discriminatory intent behind the exclusion.

III. The Government's Arguments that the Exclusion Survives Equal Protection Analysis are All Unavailing

At oral argument, the Government contended that this Court must defer to Congress because when Congress elected to exclude Puerto Rico from the SSI program it was (1) acting pursuant to its broad, sweeping and plenary powers under the Territories Clause, Oral Arg. 26:2-11, and (2) exercising its broad discretion to make line-drawing decisions concerning eligibility for social and economic benefits. The Government further argued that this holding is compelled by *Califano* and *Rosario*. These arguments are incorrect.

(a) The Territories Clause Cannot Justify the Exclusion

Congress's plenary powers under the Territories Clause are irrelevant to the equal protection analysis here. This is because neither the SSI program nor the exclusion of Puerto Rico residents was enacted pursuant to these powers. Rather, the Territories Clause grants Congress only the power to act as local legislator for the territories, *i.e.,* to act analogously to a state legislature. *See* Def.'s Reply ISO MSJ 11-12. Simply put, no state legislature has the power to enact a nationwide benefits program such as SSI, or to exclude its own residents from participating in such a program.

The Government points to cases involving the PROMESA Act in support of its view that Congress's powers under the Territories Clause are "broad" and "sweeping," but these cases do not support the Government's position. Oral Arg. 26:2-14 (citing *United States v. Rivera Torres*, 826 F.2d 151 (1st Cir. 1987)). Rather, the PROMESA Act is within Congress's Territories Clause powers precisely because it targets Puerto Rico and the other territories and addresses aspects of those territorial governments and their instrumentalities. These cases are therefore inapposite to the SSI program, which is clearly a national program enacted pursuant to Congress's general powers to tax and spend and is directed at individuals.

Even if enacting the exclusion could somehow be considered local legislation pursuant to Congress's Territories Clause powers, this would have no bearing on the level of scrutiny applied in an equal protection analysis. The ability to enact local legislation does not give Congress a license to ignore equal protection principles that are binding on all local governments. This is why it was necessary for the *Califano* Court to ground the constitutionality of the exclusion on the Incorporation Doctrine, rather than on the Territories Clause. *See Califano*, 435 U.S. at 4, n. 4; Def.'s Reply ISO MSJ 10-11. Critically, the Government cites no case applying this supposed lower standard of review to "incorporated" territories.

(b) The Court Need Not Defer to Congress Merely Because SSI is a Social and Economic Benefits Program

The Government further contends that "Congress's line drawing as to eligibility requirements gets a strong presumption of constitutionality" when it provides social and economic welfare benefits. Oral Arg. 24:13-22. But the Government ignores that this presumption gives way when legislation discriminates against a suspect class or has the effect of demeaning a targeted group. As explained in Section I, Vaello Madero's objection to the

exclusion is not mere policy disagreement, but rather an assertion of the fundamental right to equal protection, which Congress has no power to transgress.

(c) The Equal Protection Issue was Not Presented to the Court in Either *Califano* or *Rosario*, and Neither Case is Determinative of the Outcome Here

The Supreme Court decisions in *Califano* and *Rosario*, both issued as *per curiam* summary dispositions without the benefit of briefing or argument, are not dispositive of the issues before the Court in this case. First, *Califano* did not squarely address whether the exclusion violates equal protection. Indeed, *Califano* considered only whether the exclusion violated the right to travel, and no equal protection challenge was before the Court. *See* 435 U.S. at 4 n. 4 (noting that district court had based its decision solely on the right to travel); *Rosario*, 446 U.S. at 654-55 (Marshall, J. dissenting) (stating that in *Califano* "the District Court relied entirely on the right to travel, and therefore no equal protection question was before this Court").[2] Thus, the holding in *Califano* was necessarily limited to the right to travel issue. *See* 435 U.S. at 4-5. And as *Califano* did not address the equal protection argument, it cannot be dispositive of this case. *See In re Naturalization of 68 Filipino War Veterans*, 406 F. Supp. 931, 942-43 (holding that a prior Supreme Court decision did not control equal protection claim despite "dealing with the precise factual situation presented here" because the decision was "a summary reversal . . . without the benefit of full briefs and oral argument" and did not address the equal protection argument).

Nor is *Rosario* dispositive of the issue in this case. *Rosario* did not involve SSI benefits. Rather, the program at issue in *Rosario*, the Aid to Families with Dependent Children ("AFDC") program, was fundamentally different from SSI. The AFDC program provided funds directly to the states which in turn then administered the program locally and determined eligibility

[2] Justice Marshall's statement on this point is not opinion (*cf.* Oral Arg. 48:8-17), but rather a statement of fact regarding the substantive issue considered by the Court (*see also* Oral Arg. 50:4-20).

requirements. *See Shea v. Vialpando*, 416 U.S. 251, 252-55 (1974). Because Puerto Rico is not a state, it may not have been eligible to receive funds allocated directly to states. However, *Rosario* does not control the right at issue here, which is the *individual right* of Puerto Rico residents to receive SSI benefits directly from the federal government. *See generally* Resident Commissioner's Amicus Br. 2-9.

And *Rosario* must be interpreted narrowly as the precedential value of summary dispositions is limited to the facts of that case. *See Illinois State Bd. of Elections v. Socialist Workers Party*, 440 U.S. 173, 182-83 (1979) ("A summary disposition affirms only the judgment of the court below . . . and no more may be read into our action than was essential to sustain that judgment. Questions which 'merely lurk in the record,' . . . are not resolved and no resolution of them may be inferred."); *Mandel v. Bradley*, 432 U.S. 173, 180 (1977) ("[Summary dispositions] should not be interpreted as deciding the constitutional questions unless no other construction of the disposition is plausible. In other words, after today, 'appropriate, but not necessarily conclusive weight' is to be given this Court's summary dispositions").

The Government is incorrect to rely on *Figueroa v. Rivera*, 147 F.3d 77, 81 n. 3 (1st Cir. 1998) for the proposition that it is the Supreme Court's sole prerogative to overrule *Califano* and *Rosario*. First, the precedent at issue in *Rivera* was not a summary disposition, as it is here. Second, *Rivera* considered only whether later Supreme Court dicta could invalidate the Court's earlier holdings, and this has no bearing on the present case. It does not bar courts from considering later *holdings* of the Court in determining whether earlier cases are still good law. Therefore, this Court must consider *Califano* and *Rosario* in light of the Court's evolving equal protection jurisprudence, which, as explained above, has subjected laws discriminating against marginalized groups to heightened scrutiny.

CONCLUSION

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

Date: January 28, 2019

Respectfully submitted,

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CERTIFICATE OF SERVICE

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

In San Juan, Puerto Rico, this 28th day of January, 2019.

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