UNITED STATES DISTRICT COURT
DISTRICT OF PUERTO RICO

Sixta Gladys Peña Martinez; *et al.* Plaintiffs, **v.** **Alex Azar**, in his official capacity as Secretary of Health and Human Services; **U.S. Department of Health and Human Services;** *et al.* **Defendants.**	**Case No**. 18-cv-1206 (WGY)_____

CONGRESSWOMAN NYDIA M. VELÁZQUEZ'S *AMICUS CURIAE* BRIEF IN SUPPORT OF PLAINTIFFS' OPPOSITION TO DEFENDANTS' MOTION TO DISMISS

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INTRODUCTION

> "It is important to remember at the outset that Puerto Ricans are United States citizens . . . . [I]t is by no means clear that the discrimination at issue here could survive scrutiny under even a deferential equal protection standard."[1]

So cautioned Justice Marshall nearly forty years ago when challenging a majority opinion that has been relied upon to deprive millions of citizens residing in Puerto Rico of federal benefits equal to those available to their fellow citizens residing in the fifty States. *See Califano v. Gautier Torres*, 435 U.S. 1 (1978). His words have added significance today. Puerto Rico's need for federal benefits has never been greater, and the supposed constitutional justification for the discriminatory denial of equal benefits to Puerto Rico residents—if one ever existed—has only eroded with time.

United States citizens residing in Puerto Rico pay substantial federal taxes. They serve in the U.S. Armed Forces and have fought and died in every war since the U.S. occupation of Puerto Rico. And yet—despite an overwhelming need for federal assistance, especially in Hurricane Maria's wake—they are treated unequally in the provision of federal benefits. Congresswoman Nydia M. Velázquez of New York's 7th District has been a champion of the rights of Puerto Ricans since she was elected to office in 1992, and she has witnessed Congress, despite her own legislative efforts, repeatedly treat residents of the territories in an unequal manner.

Plaintiffs[2] in this action have asserted an equal protection challenge against three such federal programs that provide unequal benefits to U.S. citizens residing in Puerto Rico: namely, Social Security Income ("SSI"), Supplemental Nutrition Assistance Program ("SNAP"), and

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[1] *Harris v. Rosario*, 446 U.S. 651, 653, 656 (1980) (Marshall, J. dissenting).

[2] Capitalized terms not defined here are ascribed the meaning given to them in the Plaintiffs' Memorandum in Opposition to Defendants' Motion to Dismiss ("Plaintiffs' Opposition"), ECF No. 18.

Low Income Subsidy for Medicare Prescription Drug Program ("LIS") (the "Challenged Benefit Programs").[3] Congresswoman Velázquez supports the Plaintiffs in this action and offers arguments and authorities supporting the following reasons why the Complaint should proceed: (1) the legal justification for the discriminatory denial of equal federal benefits to Puerto Rico residents stems from dicta in an ill-supported footnote in a summarily decided Supreme Court opinion from forty years ago; (2) circumstances in Puerto Rico today prove that this discrimination is not rational now (if it ever was); and (3) the history of Congressional inaction over the past four decades to correct this discriminatory treatment, which has exacerbated economic hardships of a largely politically powerless population, justifies court intervention. For the reasons that follow, Congresswoman Velázquez urges this Court to allow Plaintiffs' meritorious constitutional challenge to proceed.

ARGUMENT

I. The Government's Legal Justification for the Discriminatory Treatment of U.S. Citizens Residing in Puerto Rico in the Provision of Federal Benefits is Based on a Flawed Premise.

The discriminatory treatment of U.S. citizens residing in Puerto Rico in federal benefit programs rises and falls on a footnote in a decades-old, *per curiam* Supreme Court opinion. The footnote purports to identify the legislative basis for the exclusion of Puerto Rico residents from the SSI program, but cites no evidence of Congress's actual rationale. Instead, the footnote cites to one page of an agency report as support for the exclusion. But only a cursory review of that report is necessary to see that it actually *condemns* discrimination against these citizens in benefits programs. Even worse, the Supreme Court's footnote has been used as a sword by other courts over the years (and the government here) to validate the discriminatory treatment of U.S.

[3] The Constitutional right to equal protection, of course, unquestionably applies to Puerto Rico. *See In re Conde Vidal*, 818 F.3d 765, 766 (1st Cir. 2016).

citizens residing in Puerto Rico. In fact, no court has seriously grappled with the reasons cited from the report to determine whether the underlying rationale is actually rational in the context of an equal protection challenge. As demonstrated below, the government's asserted constitutional justification for dismissal of Plaintiffs' Complaint rests on a shaky foundation. It should not continue to stand.

A. The Unequal Treatment of U.S. Citizens in Puerto Rico in Benefits Programs Originates in Dicta that Has Improperly, Without Sufficient Scrutiny, Permeated Constitutional Jurisprudence.

The Defendants contend that the discriminatory treatment of U.S. citizens residing in Puerto Rico is rational, and therefore constitutional, relying on a pair of Supreme Court cases decided forty years ago, *Califano v. Gautier Torres*, 435 U.S. 1 (1978) and *Harris v. Rosario*, 446 U.S. 651 (1980). Defs.' Br. at 17–19. Courts have seized on concepts buried in a footnote in *Califano*—a five-page, *per curiam* opinion addressing an interstate travel challenge—to conclude that the Constitution's territory clause allows benefit programs to discriminate against Puerto Rico residents as long as Congress offers a rational explanation. 435 U.S. at 4.

But the support for this sweeping conclusion is thin, at best. In *Califano*, the Court held that the discriminatory treatment of residents of Puerto Rico under the SSI program did not violate the constitutional right of interstate travel. *Id.* In a brief footnote tacked on at the end of its opinion, the Court listed three reasons that "have been advanced" to explain the unequal treatment of Puerto Rico residents under the SSI Program: (1) its residents do not contribute taxes to the U.S. treasury; (2) it would be expensive to extend SSI benefits to the territory; and (3) inclusion in the SSI program could "seriously disrupt" Puerto Rico's economy. *Id.* at 5 n.7 ("Footnote Seven"). The Court offered as support for this assertion only a single citation to a report from the Department of Health, Education, and Welfare (the "HEW Report"), which

addressed the treatment of citizens residing in the territories in federal benefit programs.[4]

Two years later, the Court expanded the reach of *Califano*'s Footnote Seven in *Harris*—another short (two-page), *per curiam* opinion—by upholding Puerto Rico's receipt of lower levels of assistance in a benefit program than the States against an equal protection challenge, using as justification the three purported conclusions from the HEW Report. 446 U.S. at 652 (relying solely on *Califano*, 435 U.S. 1). Since *Califano* and *Harris* were decided decades ago, Courts have repeatedly relied on Footnote Seven as adopted in *Harris* to justify the disparate treatment of Puerto Rico residents, instead of applying fulsome rational basis analysis.[5]

B. The Reasoning of *Califano* and *Harris* Lacks Compelling Support.

The idea that the territory clause permits discrimination in the provision of federal benefits, no matter how arbitrary and unsupported, finds no compelling support in *Califano* and its progeny. Justice Marshall's dissent in *Harris* is instructive.

Marshall, who disagreed with the outcome in *Califano*, criticized the majority in both *Califano* and *Harris* for addressing important constitutional issues summarily, without oral argument, full briefing, or participation by any Puerto Rican officials. *Harris*, 446 U.S. at 652 (Marshall, J., dissenting). Justice Marshall addressed head-on the sparse support for Footnote

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[4] *Id.* at 5 n.7 (quoting Dep't of Health, Education, & Welfare, Report of the Undersecretary's Advisory Group on Puerto Rico, Guam and the Virgin Islands 6 (Oct. 1976)).

[5] *See, e.g.*, *Garcia v. Friesecke*, 597 F.2d 284, 293 (1st Cir. 1979) (using *Califano* to justify the exclusion of longshoremen injured on Puerto Rico's navigable waters from the Longshoreman's Act); *Besinga v. United States*, 14 F.3d 1356, 1360 (9th Cir. 1994) (*Califano* and *Rosario* demonstrated that differentiation in provision of federal veterans benefits to Puerto Rico residents was rational); *Quiban v. Veterans Admin*., 928 F.2d 1154, 1156, 1161 (D.C. Cir. 1991) (relying upon *Califano* and *Rosario* to validate the same veterans benefits statute at issue in *Besinga*: "The classifications in question, controlling authority instructs, have the requisite rationality."); *see also, e.g.*, *Consejo de Salud Playa de Ponce v. Rullan*, 586 F. Supp. 2d 22, 26 (D.P.R. 2008) (relying on *Califano* and *Rosario* to conclude: "In an unincorporated United States territory Congress can . . . discriminate against the territory and its citizens so long as there exists a rational basis for such disparate treatment.").

Seven's purported "rational" justifications for the discriminatory treatment of residents of Puerto Rico. *Id.* at 655. He noted that the *Califano* majority's rationale contains "troubling overtones," in that it suggests that the cost of helping the poor can justify their exclusion from or unequal treatment under benefits programs designed to assist needy populations. *Id.* at 655–56. He faulted the majority for failing to cite legislative history or find proof in the record that Congress actually applied the reasoning from Footnote Seven when enacting the challenged legislation. *Id*.

As noted above, *Califano's* reliance on an agency report, in dicta, has permeated equal protection jurisprudence. *See supra* note 5. This is particularly problematic considering both Footnote Seven's cursory treatment of the HEW Report and the content of the report itself. The HEW Report was prepared in 1976 by an agency advisory group convened to specifically study "the relationship of [the territories] to the programs operated by the Department of Health, Education and Welfare," including the programs offered under the Social Security Act. HEW Report at 1 (attached as Ex. 1). After a two-year examination, the HEW Report's authors recommended changes to the treatment of the territories under the Social Security Act, concluding that "the current fiscal treatment of Puerto Rico and the territories under the Social Security Act is **unduly discriminatory** and undesirably restricts the ability of these jurisdictions to meet their public assistance needs." *Id.*at 7 (emphasis added).

The HEW Report *did* address the three justifications that the Supreme Court subsequently cited in *Califano* as support for the disparate treatment of Puerto Rico under the SSI program: (i) the "special tax status of these jurisdictions;" (ii) the "budgetary impact of increased funding;" and (iii) "the fear that a sudden influx of Federal SSI and other public assistance dollars into the local economy would be disruptive." HEW Report at 6; *see also Califano*, 435 U.S. at 5 n.7

(citing *id.*). But even a summary review of the HEW Report reveals that the report's authors did *not* find these justifications persuasive. HEW Report at 6. As for the "principal justification"—tax status—the advisory group stated: "there is little justification for addressing [any tax disparities between the territories and the States] within the context of the Social Security Act." *Id.* The budgetary impact and economic disruption arguments fared little better, as "the budgetary impact can be minimized in relation to a growing economy," and "the Food Stamp implementation in Puerto Rico has shown that a large influx of assistance does not necessarily disrupt the economy." *Id.*

The Report summarizes the deleterious effects disparate treatment in benefits programs has had on Puerto Rico and the other territories, including "deni[al of] a higher standard of living to a large number of elderly and disabled persons in these jurisdictions," exacerbated by "high levels of inflation and unemployment." *Id.* at 5–6. Overall, the Report found the existing legislative framework to be "unduly discriminatory" and recommended that the agency take steps to "increase the level of funding for Puerto Rico" under the SSI program. *Id.* at 7; *id.* at 32. To be sure, the HEW Report's conclusions were not reflected in Footnote Seven of the *Califano* opinion, and no other support was identified supporting a rational basis.[6]

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[6] A delegate in Congress from the Virgin Islands, in fact, found that the HEW Report supported his plea to Congress to expand SSI benefits for the territories. He stated:

> The principle justification for discriminatory treatment of the Virgin Islands under the Social Security act has been . . . its special tax status. However, in October of 1976, the HEW Under Secretary's Advisory Group on Puerto Rico, Guam, and the Virgin Islands issued a report which concluded that "the current fiscal treatment of Puerto Rico and the territories under the Social Security Act is unduly discriminatory and undesirably restricts the ability of these jurisdictions to meet their public assistance needs.

See Increase Medicaid Assistance to Puerto Rico, the Virgin Islands, and Guam: Hearing Before Subcomm. on Health & the Environment of the Committee on Interstate and Foreign Commerce

In sum, the constitutional justification for the discriminatory treatment of U.S. citizens residing in Puerto Rico in the challenged federal benefits programs stems entirely from dicta, which identifies no support in the legislative history and instead relies solely on the HEW Report. The Court relied on that dicta in *Harris*, and it has since been used to perpetrate discriminatory treatment of Puerto Rico residents in a variety of federal programs. But the HEW Report itself—the sole support cited in Footnote Seven—reveals that it recited the three proffered justifications only to validate the exact opposite conclusion: that differentiating between U.S. citizens residing in the States and those residing in the territories is "unduly discriminatory." HEW Report at 7. "[I]t is by no means clear that th[is] discrimination . . . could survive scrutiny under even a deferential equal protection standard." *Harris*, 446 U.S. at 656 (Marshall, J., dissenting). The Plaintiffs' Complaint should be allowed to proceed for this Court to test the rationality of the continued discrimination in the benefits programs at issue.

II. Changed Circumstances Justify a Departure from the *Califano*/*Harris* Framework Because No Rational Basis for Discrimination in Federal Benefits Exists Today.

The economic realities facing Puerto Rico make it all the more urgent to reexamine Congress's decision to discriminate against U.S. citizens residing there in the Challenged Benefit Programs. Even assuming that the *Califano* and *Harris* majorities reached the correct conclusion decades ago, no rational basis exists today for continued discrimination.

A. The Rational Basis Test Accounts for Changed Circumstances.

Rational basis is a flexible test that allows courts to consider legislation in social context. Courts applying the rational basis test consider equitable principles and social circumstances as they currently exist:

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on H.R. 3871, H.R. 4999, and H.R. 6745, 95th Cong. 53–54 (1977) (statement of Hon. Ron De Lugo, delegate in Congress from the Virgin Islands).

> [H[istory makes clear that constitutional **principles of equality, like constitutional principles of liberty, property, and due process, evolve over time**; what once was a "natural" and "self-evident" ordering **later comes to be seen as an artificial and invidious constraint on human potential and freedom**. Compare *Plessy v. Ferguson,* 163 U.S. 537 . . . (1896), and *Bradwell v. Illinois, supra,* 16 Wall., at 141 (Bradley, J., concurring in judgment), with *Brown v. Board of Education,* 347 U.S. 483 . . . (1954), and *Reed v. Reed,* 404 U.S. 71 . . . (1971). **Shifting cultural, political, and social patterns at times come to make past practices appear inconsistent with fundamental principles upon which American society rests, an inconsistency legally cognizable under the Equal Protection Clause**.

See City of Cleburn, Tex v. Cleburne Living Ctr., 473 U.S. 432, 466 (1985) (emphasis added) (refusing to apply heightened scrutiny to "developmentally disabled persons" but holding unconstitutional a zoning ordinance that deprived such persons a home). More recently, one Sixth Circuit Judge observed in *United States v. Blewett*, that "our system of tiered scrutiny need not be unyielding in the face of recognized injustice," and "judges . . . should no longer remain wedded to that which experience shows is neither rational nor fair." 746 F.3d 647, 674 (6th Cir. 2013) (Cole, J., dissenting). *See also* Opinion & Order, *United States v. Vaello-Madero*, No. 3:17-cv-01211-GAG, ECF No. 97 at 8 n.7 (D.P.R. Feb. 4, 2019) ("*Vaello-Madero Op.*") (federal courts have found irrational laws that were previously constitutional); Katie R. Eyer, *The Canon of Rational Basis Review*, 93 Notre Dame L. Rev. 1317, 1333–34 (2018) ("It is widely acknowledged that judges . . . share the social context of the society that they are a part of—the very society that has perpetrated discrimination against the group seeking constitutional protections.").

Further, the rational basis test is not without teeth—indeed, it is under this test that the Supreme Court first struck down laws differentiating between the sexes in a manner that is discriminatory under today's standards. *See, e.g.*, *Reed v. Reed*, 404 U.S. 71, 76 (1971) (Idaho statute that preferred men over women of equal qualifications in the administration of estates violated equal protection; justification that the law simplified the work of probate courts was not

rational); *see also, e.g.*, Eyer, *supra*, at 1334 ("[M]ost modern social movements have experienced their initial successes in the iterative process of undermining the presumptive constitutionality of group discrimination via rational basis review."). Contrary to the government's position in this litigation, rational basis review is a demanding standard that requires a much greater showing than has been put forth here.

B. Economic Devastation in Puerto Rico Evinces the Irrationality of the Continued Discriminatory Treatment in the Challenged Benefits Programs.

The circumstances that exist in Puerto Rico *now*—especially following the devastation caused by Hurricane Maria in September 2017—demonstrate that the continued discrimination against U.S. citizens residing in Puerto Rico in the provision of federal benefits is plainly "invidious." *City of Cleburne, Tex.*, 473 U.S. at 447. *See* Pls.' Mem. at 21–24 (demonstrating why each purported justification contained in Footnote Seven and the HEW Report fails in light of changed circumstances). Hurricane Maria exacerbated Puerto Rico's already bleak economic outlook. The island has been facing a recession and job losses since 2006. *See* Nathan Bomey, *Six Reasons Why Puerto Rico Slid Into Financial Crisis*, CNBC (Oct. 5, 2017), https://www.cnbc.com/2017/10/05/behind-puerto-rico-financial-crisis-before-hurricane-maria.html. Even before Hurricane Maria hit, more than 45% of Puerto Rico's population lived below the Federal poverty level (more than three times the U.S. national poverty rate). U.S. Dep't of Agriculture, *Examination of Cash Nutrition Assistance Program Benefits in Puerto Rico* 3 (Aug. 2015), https://fns-prod.azureedge.net/sites/default/files/ops/PuertoRico-Cash.pdf. And the unemployment rate was 18.1 % (more than twice that of the United States and nearly 8% higher than Mississippi at the time). *See id*. at 2. The need for expanded benefits is dire.

A decision from Judge Gustavo Gelpi in this District decided just today found that changed circumstances justify departing from the findings of rational basis in *Califano* and

Harris. In *Vaello-Madero*, the government brought a collection action against an SSI beneficiary who moved from New York to Puerto Rico. *Vaello-Madero Op.* at 2. The court granted summary judgment in the beneficiary's favor, holding that the exclusion of U.S. citizens residing in Puerto Rico violates the equal protection clause. *Id.* at 8–9. The court observed that a departure from the holdings in *Califano* and *Harris* resembled a departure from *Plessy v. Ferguson*: "This Court, however, cannot simply bind itself to the legal *status quo* of 1980 [when *Califano* and *Harris* were decided], and ignore important subsequent developments in the constitutional landscape." *Id.* at 8 n.7. Because "[t]he authority to treat the territory of Puerto Rico itself unlike the States does not stretch as far as to permit the abrogation of fundamental constitutional protections to United States citizens as Congress sees fit," *id.* at 5, the court ultimately dismissed the government's claims, *id.* at 8–9.

In an earlier opinion, the *Vaello-Madero* court had emphasized that circumstances have indeed changed for Puerto Rico in the last forty years. For example, contrary to the Supreme Court's conclusory statements in Footnote Seven, residents of Puerto Rico *are* subject to various federal taxes and contribute substantial sums to the U.S. Treasury. *See* 313 F. Supp. 3d 370, 374 (D.P.R. 2018). In fact, Puerto Rico contributed more than $3.4 billion in gross collections to the U.S. Treasury in 2016.[7] Prior to its economic downturn in 2006, Puerto Rico had paid more in federal taxes than Vermont, Wyoming, South Dakota, North Dakota, Montana, and Alaska each individually paid in almost every year.[8]

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[7] *See* Internal Revenue Servs, Statistics of Income Tax, Gross Collection by Type of Tax and State And Fiscal Year (2016), https://www.irs.gov/statistics/soi-tax-stats-gross-collections-by-type-of-tax-and-state-irs-data-book-table-5.

[8] *See* Internal Revenue Servs, Statistics of Income Tax, Gross Collection by Type of Tax and State And Fiscal Year (1998–2005), https://www.irs.gov/statistics/soi-tax-stats-gross-collections-by-type-of-tax-and-state-irs-data-book-table-5.

The court in *Vaello-Madero* also emphasized the severity of Puerto Rico's economic crisis and the effects of Hurricane Maria: "[t]he hurricane blew away the mainland's lack of awareness regarding the inequality that United States citizens suffer just for residing in Puerto Rico." 313 F. Supp. 3d at 374. Indeed, Hurricane Maria has had an estimated $100 billion in damages and a $43 billion impact on Puerto Rico's already struggling economy—worsening the situation on the Island. *See* Danica Coto, *Report: Maria Had $43B Impact on Puerto Rico's Economy*, AP News (Dec. 3, 2018), https://www.apnews.com/5e29ec136509469cb548e0f88cf1c815.

Califano and *Harris*—even assuming they were correctly decided—provide no continued support for the "invidious" discriminatory treatment of impoverished and vulnerable populations of U.S. citizens residing in Puerto Rico in the provision of federal benefits programs. *City of Cleburne, Tex.*, 473 U.S. at 446. Rationality is far from presumed at this early stage of the litigation.

III. Congress's Inconsistent Treatment of Puerto Rico in the Challenged Benefits Programs Over Time Has Eroded Any Perception of Rationality.

The legislative history of the Challenged Benefit Programs demonstrates that Congress has at times recognized a great need for increased or equalized benefits treatment of citizens residing in Puerto Rico, but has consistently failed to treat Puerto Rico residents comparatively to residents of the States and other territories. Worse, and *irrationally*, Congress has used the extreme need for these benefits in the territories (and Puerto Rico in particular) to justify its continued discriminatory treatment of these citizens. The repeated failures to act and inconsistencies are particularly problematic, given Puerto Rico's lack of federal political representation, and further demonstrate that discrimination in the Challenged Benefit Programs is devoid of a rational basis.

Congress has long been aware of the economic hardship U.S. citizens in Puerto Rico face. For example, stakeholders presented evidence to Congress of Puerto Rico's high poverty rates and other issues in hearings leading up to the passage of the Social Security Amendments Act of 1972. Then Resident Commissioner of Puerto Rico, Hon. Jorge L. Córdova, testified that Puerto Rican citizens "participate fully in the burdens of the social security program," and noted that in Puerto Rico "per capita income, is very low, . . . unemployment is very high and, accordingly, our poverty is very high. So our problems are much greater than those of any State in the Union."[9] In addition, around the time the Challenged Benefit Programs were enacted or amended, Congress was advised of Puerto Rico's significant need for equal benefits, as the following few examples illustrate:

- "[W]e very strongly urge you to expand the territorial coverage of this bill to include Puerto Rico, the Virgin Islands, Guam, and the Trust Territories of the Pacific. There are approximately 500,000 people in those areas now receiving commodities and they, too, deserve food stamps." *General Farm Program and Food Stamp Program, Hearings before the H. Agriculture Committee, Part 2*, 91st Cong. 746 (1969) (statement of John R. Kramer, Executive Dir., Nat'l Counsel on Hunger & Malnutrition in the U.S.).

- "There is a close relationship between citizens of the territories, and of Puerto Rico in particular, and those of the states, and poverty is a problem which is shared by American citizens no matter where they happen to reside. Where extreme need is established, rates should not be arbitrarily lowered." 117 Cong. Rec. 20,739 (1971) (remarks on welfare reform).

- "It is no secret to the Members in this Chamber that Puerto Rico presently has one of the highest levels of foods stamp participants, and that this program has helped Puerto Rico immensely through our most recent and severe recession in years." 123 Cong. Rec. 24,090 (1977) (statement of Resident Commissioner Baltazar Corrada-Del Río).

Despite being confronted with these stark realities, Congress has failed to pass legislation giving residents of Puerto Rico equal treatment in the provision of federal benefits, treating them

[9] *Social Security Amendments of 1970, Hearings before the Senate Finance Committee on H.R. 17550, Part 2*, 91st Cong. 389, 405 (1970) (statement of Hon. Jorge L. Cordova, Resident Commissioner of Puerto Rico, Accompanied by Dr. Ernesto Colon Yordan, Secretary of Health of Puerto Rico).

at times even worse than U.S. citizens residing in other territories. With respect to SSI, for example, Congress has declined to pass legislation that would equalize treatment of Puerto Rico residents. *See, e.g.*, H.R. 1, 92nd Cong. (1972); Pub. L. No. 92-603, 86 Stat. 1329 (1972); H.R. 8911, 94th Cong. (1976); H.R. 7200, 95th Cong. (1977). But U.S. citizens residing in the Northern Mariana Islands are permitted full participation in the SSI program. *See* Pub. L. No. 94-241, § 502(a)(1), 90 Stat. 263, 268 (1976).

Likewise, Congress has treated Puerto Rico inconsistently under the SNAP program. Congress extended SNAP benefits to Puerto Rico residents, along with residents of Guam and the Virgin Islands in the 1970s. *See* Pub. L. No. 91-671, § 2(c), 4, 84 Stat. 2048, 2050 (1971); Pub. L. No. 95-113, 91 Stat. 913 (1977). But in 1981, Congress revoked those benefits for Puerto Rico residents, *see* Pub. L. No. 97-35, § 116, 95 Stat. 357, 364 (1981), while allowing continued participation in the program for citizens residing in Guam and the Virgin Islands. *See* 7 U.S.C. § 2013(a); 7 U.S.C. § 2012(r). The primary rationale for revoking Puerto Rico residents' SNAP participation was the level of need on the island: the Senate Conference Report accompanying the bill cites, without further explanation or analysis, "concern about the size and expense of the food stamp program in Puerto Rico and the dislocated effect the massive flow of food stamps may have on the Puerto Rican economy." S. Rep. 97-139 (1981) (Conf. Rep.), *as reprinted in* 1981 U.S.C.C.A.N. 396, 458.

Congress's rationale in this respect is backwards—it specifically singled out Puerto Rico in its discriminatory legislation precisely because Puerto Rico residents have an urgent need for federal assistance. *See id.* Such legislative action is neither fair nor rational by any measure. Justice Marshall called this type of justification "troubling" and "not so clearly rational": "It suggests that programs designed to help the poor should be less fully applied in those areas

where the need may be the greatest, simply because otherwise the relative poverty of recipients compared to other persons in the same geographic area will somehow be upset." *Harris*, 446 U.S. at 656. Justice Marshall expressed skepticism that this rationale could withstand "even a deferential equal protection standard." *Id.* The authors of the HEW Report echoed these sentiments, noting that the fiscal treatment of the territories "unfairly penalizes low income persons." HEW Report at 6. Thus, even where Congress *has* offered a rationale for the unequal treatment of Puerto Rico residents in the Challenged Benefit Programs, its reasoning is not logical or supported.

Congress's inconsistent treatment of Puerto Rico and ongoing failure to correct recognized inequity undercuts a finding of rationality. Equal protection analysis takes into account the legislature's past "action, or conscious inaction." *United States v. Then*, 56 F.3d 464, 468 (2d Cir. 1995) (Calabresi, J., concurring) (courts, with appropriate analysis, may reverse findings of rationality when new evidence commands a different result); *see also Vaello-Madero*, 313 F. Supp. 3d at 373–74 (courts may reject as "irrational" proffered "rational" reasons). Congress's history of disregarding Puerto Rico's need for federal benefits—and even using that need to justify its discriminatory treatment—exemplifies conscious inaction. This unfair treatment of Puerto Rico is especially suspect given the disenfranchisement of citizens residing in Puerto Rico in the federal political system: indeed, these citizens cannot vote in presidential elections and lack full representation in Congress. *See Romeu v. Cohen*, 265 F.3d 118, 123 (2d Cir. 2001) (citing 48 U.S.C. § 891).[10]

[10] Plaintiffs argue that this Court should apply heightened scrutiny to their equal protection challenge—a position also endorsed by the *Vaello-Madero* court—in part because of the political powerlessness of U.S. citizens residing in Puerto Rico. *See* Pls.' Mem. at 16–19; *Vaello-Madero Op*. at 7 (SSI exclusion "is not narrowly tailored to achieve a 'compelling government interest'"). Congresswoman Velázquez agrees with this position, and additionally posits that

The Court may question Congresswoman Velázquez's endorsement of judicial intervention when she has the forum to advocate for Puerto Rico residents in Congress (and indeed, has frequently done so). True, Congresswoman Velázquez and some other Members of Congress strive to protect the rights of these citizens through the legislative process. But the legislative history of the Challenged Benefit Programs underscores the stark political realities these citizens face—they simply do not have representation at the federal level commensurate with their fellow citizens in the States. At this point, "[b]ureaucratic inertia, combined with the powerlessness and distance of the territories has given this discriminatory treatment a lifespan that approaches *Plessy's*." *Vaello-Madero*, 313 F. Supp. 3d at 376 (quotations omitted). Judicial scrutiny of these laws is essential to protect Puerto Rico residents in the political process.

In sum, Congress's history of inaction and inconsistency undermines the government's assertion that Congress has acted rationally in depriving Puerto Rico residents of equal treatment under the Challenged Benefit Programs. Plaintiffs' claims are meritorious and should be allowed to proceed to discovery and decided based on a full evidentiary record.

CONCLUSION

For the reasons addressed above and those articulated in Plaintiffs' Opposition, Congresswoman Velázquez urges this Court to do what Congress has proven unwilling to accomplish: foreclose the discriminatory treatment of a population of U.S. citizens in Puerto Rico who need equal rights in the provision of federal benefits. Plaintiffs have stated a viable equal protection claim that should be allowed to proceed.

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regardless of the level of scrutiny applied, the political disenfranchisement of this population coupled with facially discriminatory treatment demonstrates an equal protection violation.

Respectfully submitted,

February 4, 2019

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CERTIFICATE OF SERVICE

I hereby certify that on this 4th day of February 2019, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to all parties.

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