

U.S. House of Representatives
Committee on Natural Resources
Washington, DC 20515

March 10, 2021

Attorney General Merrick Garland
U.S. Department of Justice
950 Pennsylvania Avenue, NW
Washington, DC 20530-0001

Acting Solicitor General Elizabeth Prelogar
U.S. Department of Justice
950 Pennsylvania Avenue, NW
Washington, DC 20530-0001

Dear Attorney General Garland and Acting Solicitor General Prelogar:

The Supplemental Security Income (SSI) program is one of our Nation’s most successful social safety net programs, recognizing the inherent dignity of millions of the most vulnerable, low-income Americans who are aged, blind, or disabled by providing them with a basic income. Today, more than 8 million U.S. citizens receive SSI benefits of up to \$783 a month, creating a critical lifeline for them and their families to avoid extreme poverty. Yet, should any of these Americans move to certain U.S. territories, their SSI benefits automatically stop, even as the personal financial challenges they face due to age or disability do not.¹ This is not just wrong, it is unconstitutional. Arbitrarily denying our most vulnerable citizens their inherent dignity based on their Zip Code cannot be squared with the principles of equality enshrined in our Constitution. That is why we are asking the U.S. Department of Justice (“DOJ”) to stop defending this inequality in court, even as we continue to work with the Biden-Harris Administration towards possible legislative solutions.

Over the last several years, multiple federal courts have stepped in to rule that arbitrarily excluding U.S. citizens who live in the territories from being able to participate in national federal benefits programs is unconstitutional. In *United States v. Vaello Madero*, the U.S. Court of Appeals for the First Circuit unanimously upheld a district court decision that rejected attempts by the United States to collect \$28,081 in SSI benefits that it had paid to Jose Luis Vaello-Madero after he moved from New York to Puerto Rico, holding that the denial of these benefits based solely on his residence in Puerto Rico would violate his constitutional guarantee to equal protection of the laws.² In *Schaller v. U.S. Social Security Administration*, a federal district court judge in Guam similarly ruled that it violated the Constitution’s guarantee of equal protection to deny SSI benefits to a disabled woman on Guam while providing SSI benefits to her similarly disabled twin in Pennsylvania, and also to residents of the Northern Mariana Islands, a U.S. territory only 60 miles north of Guam.³ In *Peña Martínez v. U.S. Department of Health & Human Service*, a federal district court judge in Puerto Rico struck down as unconstitutional not just the denial of SSI benefits, but also the exclusion of Puerto Rico

¹ Andrew Hammond, *Americans Outside the Welfare State*, 119 MICH. L. REV. __ (forthcoming 2021), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3650434.

² *United States v. Vaello Madero*, 956 F.3d 12 (1st Cir. 2020), affirming *United States v. Vaello Madero*, 356 F.Supp.3d (D.PR 2019).

³ *Schaller v. U.S. Social Security Administration*, No. 18-00044 (D.Guam June 19, 2020).

residents from the Supplemental Nutrition Assistance Program (“SNAP”) and Medicare Part D low-income subsidies (“LIS”).⁴

On March 1, 2021, the Supreme Court granted review in *Vaello Madero*, meaning that DOJ will have to decide soon how it will proceed on these issues before the Supreme Court. DOJ’s position has been to seek reversal in each of these cases, arguing that the unanimous view of the six federal judges that have ruled in these cases is wrong. While we recognize it is the role of DOJ to defend federal statutes, the offensive and illogical arguments DOJ has made to justify the second-class treatment of U.S. citizens living in the territories highlight why it would be appropriate for DOJ to stop defending this ongoing discrimination, which harms U.S. citizens in Puerto Rico and other territories every day.

First, DOJ has justified denying equality in federal benefits programs because territorial residents are exempt from certain federal taxes. This not only fails to recognize that territorial residents actually do pay *billions* of dollars in federal taxes each year,⁵ but that it is illogical to exclude a class of low-income citizens from means-tested programs because they or their neighbors did not pay enough taxes. *Second*, DOJ has justified denying equal treatment in national social safety net programs for territorial residents based on cost alone. This is irrational not just because the marginal cost of extending these programs to citizens in the territories would be a small fraction of the overall costs of these programs, but because cost alone cannot be a way to distinguish between otherwise similarly situated citizens. *Third*, DOJ has absurdly argued that this inequality can be justified because providing territorial residents these benefits would somehow disrupt territorial economies or discourage citizens in these areas from working. This is a cruel justification for denying benefits to citizens whose physical restrictions actually limit their ability to work and whose communities are in a financial crisis in significant part because of harmful federal policies.

These arguments—that any group of low-income or disabled citizens should be denied equal benefits in national programs because of the amount of taxes they pay, the marginal cost they would add to the program, or that in the abstract there could be unintended economic consequences—would be unthinkable for DOJ to make with respect to the citizens of any state. It should be no different for citizens in the territories. Further, none of these arguments explain why residents of different territories can be treated differently for purposes of national benefits programs. For example, residents of the Northern Mariana Islands are eligible to receive SSI and residents of Guam and the Virgin Islands of the U.S. eligible for SNAP, while residents of other territories are arbitrarily denied these benefits.

That is not to say that Congress does not have broad powers with respect to the territories; we do. But Congress does *not* have the power to treat residents of the territories arbitrarily when it is acting as a national legislature to enact national social safety net programs. The power to discriminate against residents of the territories under national welfare laws simply does not follow from the Territories Clause or any constitutional distinction between states and territories.

⁴ *Peña Martínez v. U.S. Department of Health & Human Service*, 478 F. Supp. 3d 155 (D.P.R. 2020).

⁵ 2019 IRS Data Book at Table 5, available at <https://www.irs.gov/pub/irs-pdf/p55b.pdf>.

More broadly, this systemic discrimination against the 3.5 million Americans living in the territories—more than 95 percent of whom are racial or ethnic minorities—is rooted in a series of racist, *Plessy*-era Supreme Court decisions known collectively as the *Insular Cases*, which established a controversial legal doctrine of “separate and unequal” status for residents of overseas territories. The *Insular Cases* have been called “central documents in the history of American racism,”⁶ with Justices in those cases calling the people of Puerto Rico and other newly acquired territories “half-civilized,” “savage,” “ignorant and lawless,” and “alien races.” While in *Vaello Madero* DOJ has properly disclaimed that the *Insular Cases* limit the application of equal protection in the territories, it nonetheless still continues to embrace their flawed logic that the Constitution applies “only in part” in so-called “unincorporated” territories. Ultimately, the ongoing discrimination against Americans in the territories in federal benefits programs cannot be separated from the harmful legacy of the *Insular Cases*.⁷ DOJ’s actions moving forward in *Vaello Madero*, *Peña Martínez*, and *Schaller* will either serve to reject or contribute to that dark legacy.

DOJ should stop defending the challenged discrimination in *Vaello Madero*, *Peña Martínez*, *Schaller*, and other pending cases⁸ that deny equal dignity to citizens in the territories by excluding them from SSI and other federal programs that all other Americans fully enjoy as part of our basic social contract. As DOJ has done in the past with respect to other controversial discriminatory statutes,⁹ and as it has done recently with respect to a number of positions taken by DOJ during the prior administration,¹⁰ DOJ should inform the Supreme Court and lower courts that its position has changed with respect to federal statutes that continue to arbitrarily deny equal access in critical federal programs to U.S. citizens in Puerto Rico and other territories based solely on where they happen to live.

As you stated during your confirmation hearing, General Garland, “we do not yet have equal justice. Communities of color and other minorities still face discrimination.” You also evoked in your testimony the mission of DOJ’s Civil Rights Division, which is “to uphold the civil and constitutional rights of all Americans, particularly some of the most vulnerable members of our society.” As DOJ celebrates its 150th Anniversary this year, standing up for the equal treatment and dignity of U.S. citizens in Puerto Rico and other territories is necessary if DOJ is to remain true to these principles.

Thank you for considering this request, and we would welcome the opportunity to engage with you and others at DOJ further on these issues. Please contact Margarita Varela-Rosa with

⁶ Sanford Levinson, *Why the Canon Should Be Expanded to Include the Insular Cases and the Saga of American Expansionism*, 17 CONST. COMMENT. 241, 245 (2000).

⁷ Neil Weare, Rosa Hayes, and Mary Charlotte Carroll, *The Constitution, COVID-19, and Growing Healthcare Disparities in U.S. Territories*, ACS Expert Forum (April 28, 2020), available at <https://www.acslaw.org/expertforum/the-constitution-covid-19-and-growing-healthcare-disparities-in-u-s-territories/>.

⁸ See, e.g., *Rivera-Fuentes v. Commissioner of the Social Security Administration*, No. 3:20-cv-01444 (D.PR filed August 26, 2020).

⁹ See, e.g., *Statement of the Attorney General on Litigation Involving the Defense of Marriage Act*, February 23, 2011.

¹⁰ Jacqueline Thomsen, *How the Biden Justice Department Is Untangling the Legal Fights It Inherited From Trump*, Law.com (February 26, 2021), available at, <https://www.law.com/nationallawjournal/2021/02/26/how-the-biden-justice-department-is-untangling-the-legal-fights-it-inherited-from-trump/?slreturn=20210201115053>.

the Committee's Office of Insular Affairs at Margarita.Varela-Rosa@mail.house.gov or (202) 748-2828 if you have any questions about this request.

Sincerely,



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Chair
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Cc:

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