No. 20-8072

IN THE

Supreme Court of the United States

BYRON MONTIJO–MAYSONET,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

REPLY BRIEF FOR THE PETITIONER

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REPLY BRIEF FOR THE PETITIONER

The government's brief confirms that the Court should grant the petition for writ of certiorari and review the court of appeals opinion, which held, first, that 18 U.S.C. § 2422(b)'s enticement element was satisfied by the transmission of non-specific, non-sexual text messages and, second, that 18 U.S.C. § 2423(a)'s Puerto Rico-focused application does not violate the equal protection component of the Due Process Clause of the Fifth Amendment and the Commerce Clause.

As to the first question, the government has no answer to Mr. Montijo's argument that the First Circuit's definition of enticement stretches too far into non-criminal activity or conduct left for regulation by Puerto Rico authorities. *See* Pet. 19–22; *Bond v. United States*, 572 U.S. 844, 846 (2014).

As to the second question, the government does not dispute the fact that this important question will not percolate through any other circuits and presents a nuance to the standard-of-review question taken up in *United States v. Vaello–Madero*, 956 F.3d 12 (1st Cir. 2020), cert. granted, 20-303, 141 S. Ct. 1462 (Mem.). The technicality the government invokes, namely that the constitutional question was not reached in the district court, should not impede this Court's review especially given the detailed treatment the claim received in the First Circuit and its legal — not factual — nature.

The enticement issue here is critical given the ubiquity of internet-based communications in modern society. The constitutional scope of § 2423(a) is critical given the need for

uniformity of federal law and the need to uphold the rights of U.S. citizens in Puerto Rico. The Court should therefore grant review in order to state what the law is on these two important questions.

A. The question of what conduct suffices as internet-based enticement under 18 U.S.C. § 2422(b) is of critical importance in this modern era of ubiquitous internet connectivity.

Mr. Montijo has sought review of his § 2422(b) conviction not only because of a disagreement about the sufficiency of the evidence — as the government suggests, Opp. 9 — but because the First Circuit applied a definition of federal criminal conduct that reaches too far into areas of behavior that are non-criminal or beyond the scope of federal regulation.

Indeed, the government's opposition does not address Mr. Montijo's principal signaling of error: that the First Circuit drew a line in the sand that is not sustainable in an era in which the divide between in-person and virtual communications is inextricably blurred. Pet. 16–21. Nor does the government have an answer to Mr. Montijo's claim that the First Circuit's definition bursts across the boundary between federal and state conduct. *See* Pet. 19–22; *Bond*, 572 U.S. at 846.

Within the First Circuit, and more specifically within Puerto Rico, state statutory rape offenses stand to be roped into federal prosecutions without rhyme or reason. The government errs in assessing the decision based on the

appellate court's own definition of enticement, while implicitly conceding — by failing to answer — the consequences of the court's finding that a crime was committed based merely upon non-specific, non-sexual text messaging between two people who had already met in person. Pet. App. 8–10.

The government's lack of an answer to Mr. Montijo's claims, along with the imperative of drawing a line between innocuous internet communication and unlawful enticement, underscores the importance of the Court's review.

B. There is not a preservation issue regarding Mr. Montijo's jurisidictional challenge to 18 U.S.C. § 2423(a).

The government complains there is a vehicle problem for certiorari review of his challenge to § 2423(a)'s Puerto Rico-only discrimination. This Court should nevertheless grant review for three reasons.

1. This strictly legal challenge was decided by the First Circuit after robust argument in this case and in *United States v. Cotto–Flores*, 970 F.3d 17, 30 (1st Cir. 2020), cert. denied, 141 S. Ct. 1121 (Mem.) (Jan. 11, 2021). This is not a situation in which the government was denied the opportunity to develop a different factual record or present different arguments on appeal.

2. By the time Mr. Montijo's case was decided, First Circuit precedent foreclosed his jurisdictional equal-protection claim. As the court of appeals stated, based on precedent, it could not find that Congress lacked a rational basis for § 2423(a) because, *like in Cotto–Flores*, the differential treat-

ment could have been because Congress simply lacked the authority to regulate the same conduct in the States. *See* Pet. App. 12.

Now that the First Circuit has twice ruled on the issue, in *Cotto–Flores* and here, and has declined to hear this claim *en banc*, any further record development would have been futile. *See* Pet. App. 23 (pet. reh'g denied). The government's opposition is, essentially, a merits brief, a lengthy defense of the First Circuit's standard for evaluating § 2422(b)'s sufficiency and the jurisdictional reach of § 2423(a) within Puerto Rico. Thus, the government's argument about vehicle issues amount to a superficial technicality that should be overcome to reach this important issue.

3. As Mr. Montijo argued — and the government does not dispute — the circuits will never study this issue because Puerto Rico is the only commonwealth included in § 2423(a)'s reference to commonwealths. Pet. 25, 29–30.

The First Circuit's interpretation stands to affect over three million U.S. citizens in Puerto Rico subject to Puerto Rico-only legal provisions. A determination by the Court will settle uncertainty, provide guidance to law enforcement and citizenry, and will guide federal and Puerto Rico legislators.

C. Rational basis review is in dispute in *Vaello–Madero* and is of even greater importance for a criminal law discriminating against Puerto Rico residents.

The government's brief mistakenly posits that the Court is not poised to reexamine its terse pro-rational-basis deci-

sions in *Califano* v. *Torres*, 435 U.S. 1 (1978) (per curiam) and *Harris* v. *Rosario*, 446 U.S. 651 (1980) (per curiam). Opp. 10–11. The better argument is that these decisions are implicated in *Vaello–Madero*, a civil case, and the reach of § 2423(a), a criminal provision, provides a complementary basis to revisit these anachronistic decisions. *United States v. Vaello–Madero*, 956 F.3d 12 (1st Cir. 2020), cert. granted, 20-303, 141 S. Ct. 1462 (Mem.).

1. The *Vaello–Madero* decision will likely revisit *Torres* and *Harris*. In pre-certiorari briefing, briefs for Mr. Vaello–Madero, the government of Puerto Rico and the United States debated the import of *Torres* and *Harris*. Though the government has argued that these two *per curiam* opinions "control" in *Vaello–Madero*, that proposition is front-and-center in the litigation. Since Mr. Montijo filed his petition, the government's merits briefing continues to debate whether the precedential force of these cases warrants reconsideration.

In *Vaello–Madero*, the government complains that the Puerto Rico government and Mr. Vaello–Madero do not address stare decisis. But the two cases have been on shaky footing since their inception, and the federal-Puerto Rico relationship has remained in flux ever since. *See Puerto Rico v. Sánchez Valle*, 136 S. Ct. 1863, 1876–77 (2016).

2. Applying limited scrutiny to the Puerto Rico-residents-only provision of § 2423(a) is not necessarily encompassed by *Torres* and *Harris*. Even the First Circuit's recent *Cotto–Flores* decision *assumed* that Congress still had plenary power over Puerto Rico under the Territorial Clause. *Id.* at

30–31. But that assumption has too much to unpack when a discriminatory law leads to disparate prosecution and imprisonment of U.S. citizens merely based on their geographic residency. It is not a given that the Territorial Clause trumps the governmental arrangement between Congress and Puerto Rico one hundred percent of the time.

Justice Marshall's concerns, expressed in *Harris*, are still paramount: "It [remains] important to remember . . . that Puerto Ricans are United States citizens, . . . and that different treatment to Puerto Rico under [the law in question] may well affect the benefits" enjoyed by these citizens. 446 U.S. at 653–54 (Marshall, J., dissenting) (footnote omitted).

3. While the Puerto Rico-specific federal benefits at issue in *Vaello–Madero may* be ultimately subject to less scrutiny in federal territories, Puerto Rico's state-like law enforcement authority must not be taken lightly. As the First Circuit acknowledged, in 1950 and 1952, Congress accorded "'Puerto Rico the degree of autonomy and independence normally associated with States of the Union.'" *United States v. Maldonado–Burgos*, 844 F.3d 339, 341 (1st Cir. 2016) (citation omitted).

The equal-protection claim that § 2423(a) discriminates against Puerto Rico residents strikes at the heart of the governmental balance between Puerto Rico and the federal government. Despite this Court's decision in *Sánchez Valle* and legal developments such as the Puerto Rico Oversight, Management, and Economic Stability Act, Pub. L. No. 114-187, 130 Stat. 549 (2016) (codified at 48 U.S.C. § 2101-2241),

the Commonwealth of Puerto Rico continues to enjoy a status formed through the consent of Congress and the people of Puerto Rico following the creation of the Commonwealth in 1952. *See Developments in the Law — The U.S. Territories*, 130 Harv. L. Rev. 1616, 1632–35 (2017).

Thus, as some scholars have argued, the federal-territory relationship between Congress and Puerto Rico "has more or less gradually progressed toward functionally mimicking the federal-state structural relationship." *Id.* at 1632; *see id.* at 1632–33 n. 6 (listing works contemplating the evolving relationship between Congress and Puerto Rico). This Court has remarked on many occasions that since 1952 "Congress relinquished its control over [Puerto Rico's] local affairs . . . and granted Puerto Rico a measure of autonomy comparable to that possessed by the States." *Examining Bd. of Eng'rs, Architects & Surveyors v. Flores de Otero*, 426 U.S. 572, 597 (1976).

The notion of state-like autonomy must not be taken lightly given the historic division between state and federal law enforcement. Nevertheless, in this regard, the First Circuit diminishes the complexities of Puerto Rico's zones of autonomy to quickly proclaim it is beyond question that rational-basis review applies to discriminatory laws. *See* Pet. App. 12; *Vaello–Madero*, 956 F.3d at 18.

Individual freedoms and due process of law are fundamental principles built into the federalist form of government, which were incorporated in the recognition of Puerto Rico's state-like administration of criminal laws. To simply conclude

Congress nakedly discriminated because it lacked the same authority to similarly regulate States threatens this Court's protection of U.S. citizens under the Equal Protection Clause of the Fifth Amendment.

In sum, at this early stage of briefing in *Vaello–Madero*, this Court should exercise caution to either grant certiorari here or hold the case should one or more Justices of the Court offer any guidance that could alter the extraordinary holding below that federal laws can discriminate against U.S. citizens in Puerto Rico anytime rational basis review is satisfied. *See* Pet. App. 12.

For as Mr. Montijo stated in his petition, this case presents an opportunity for this Court to expound upon its *per curiam* opinions in *Harris* and *Califano* by more closely evaluating what level of scrutiny must be applied when a criminal law — not merely a civil law allocating federal funding — discriminates against U.S. citizens who reside in Puerto Rico.

CONCLUSION

For the foregoing reasons, and those stated in the petition for a writ of certiorari, the petition should be granted.

Respectfully submitted.

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