No. 20-303

In The

Supreme Court of the United States

UNITED STATES OF AMERICA,

Petitioner,

v.

JOSÉ LUIS VAELLO-MADERO,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The First Circuit

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BRIEF OF THE COMMONWEALTH OF PUERTO RICO AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

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QUESTION PRESENTED

Whether Congress violated the equal-protection component of the Due Process Clause of the Fifth Amendment by establishing Supplemental Security Income—a program that provides benefits to needy aged, blind, and disabled individuals—in the 50 States and the District of Columbia, and in the Northern Mariana Islands pursuant to a negotiated covenant, but not extending it to Puerto Rico.

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INTEREST OF THE *AMICUS CURIAE*[1]

The Commonwealth of Puerto Rico respectfully submits this brief as *amicus curiae* in support of Respondent and for affirmance of the judgment of the Court of Appeals for the First Circuit, hereinafter "First Circuit." United States citizens who reside in Puerto Rico enjoy much lesser rights than those who reside in the States merely because of Puerto Rico's status as a territory. This inequality is both unconstitutional and unacceptable. The public policy of the Government of Puerto Rico is that Puerto Ricans attain the same rights as those enjoyed by their fellow United States citizens living in the States, and that United States citizens who move there enjoy the same constitutional rights as those who reside in the States.

On August 25, 2017, Petitioner, United States of America, commenced an action against Respondent, Jose Luis Vaello-Madero, a Social Security Administration (SSA) Title XVI Supplemental Security Income (SSI) disability beneficiary, to collect, *inter alia*, $28,081.00 in overpaid SSI benefits after he moved to Puerto Rico. Petitioner alleged that the SSI is a Federal income supplement program funded by general tax revenues (not Social Security taxes), requiring the beneficiary to be a U.S. resident in order to benefit from it, thus excluding Puerto Rico. Both the district court and the First Circuit ruled that the exclusion of residents of Puerto Rico from the SSI program is contrary

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[1] The parties were notified of the intention to file this brief as per Rule 37.2(a).

to the Equal Protection component of the Fifth Amendment, and is thus unconstitutional.

This case involves issues of great importance to United States citizens residing in Puerto Rico, who are subjected to unconstitutional disparate treatment by being excluded from the SSI program for the sole reason of their status as residents of Puerto Rico.

SUMMARY OF THE ARGUMENT

The Commonwealth of Puerto Rico supports the position of Respondent and affirmance of the decision of the First Circuit. In its decision, the First Circuit, employing the rational-basis standard of review, determined that the exclusion of persons residing in Puerto Rico from the SSI program violates their right to equal protection of the law under the Fifth Amendment.

Petitioner has filed the instant petition seeking reversal of the First Circuit's decision. It alleges, essentially, (1) that this case is governed by the opinions issued by this Court in the cases of *Califano v. Torres*, 435 U.S. 1 (1978) and *Harris v. Rosario*, 446 U.S. 651 (1980); and, (2) that, even if those decisions are not dispositive of this case, there is rational basis for the classification created by Congress by excluding residents of Puerto Rico from the SSI program.

The Commonwealth disagrees with Petitioner. First, as the First Circuit correctly found, the decisions in *Torres* and *Rosario* do not dispose of the question of whether the exclusion of Puerto Rico residents

from the SSI program is constitutional. Second, even under the very deferential rational-basis scrutiny, this exclusion does not satisfy this test, as the First Circuit found in a very thorough and careful analysis. Therefore, Petitioner's allegations lack merit and this Court should affirm the judgment of the First Circuit.

Further, the Commonwealth asserts that the classification established by Congress, excluding Puerto Rico residents from the SSI program, is based upon race and/or national origin, and therefore, the proper Equal Protection analysis is strict scrutiny and not rational-basis review. This classification is thus constitutionally invalid.

ARGUMENT

I. The opinions of this Court in *Califano v. Torres*, 435 U.S. 1 (1978) and *Harris v. Rosario*, 446 U.S. 651 (1980) are not dispositive of this case.

Appellant's main argument is that the judgment of the First Circuit is foreclosed by two decisions of this Court, to wit, *Califano v. Torres*, 435 U.S. 1 (1978) and *Harris v. Rosario*, 446 U.S. 651 (1980). In both cases, this Court, in summary decisions bereft of any detailed argumentation by the parties, stated that, under the Territory Clause of the United States Constitution,[2] Congress can discriminate against Puerto Rico if there is rational basis for this action. *Torres*, 435 U.S. at 5;

[2] U.S. Const., Art. IV, §3, cl. 2.

Rosario, 446 U.S. at 651-652. A brief discussion of these decisions is in order.

In *Torres*, this Court reversed a decision made by a three-judge court in Puerto Rico which had invalidated the same provisions of the SSI program involved here, solely on the ground that they violated the plaintiffs' constitutional right to travel. Indeed, this Court clearly stated in footnote 4 of its opinion that it **did not** have before it a case or controversy regarding the Equal Protection component of the Fifth Amendment. *Id.*, at p. 3, n.4. However, it stated in that footnote that, given Puerto Rico's "unparalleled" relationship with the United States, Congress has the power to treat it differently and did not have to extend to it every Federal program. *Id.* At the end of the opinion, this Court stated that, even if the plaintiff could invoke his right to travel in this case, the law would be subjected to a rational basis review because it is "a law providing for governmental payments of monetary benefits," and such statutes enjoy a "strong presumption of constitutionality." *Id.*, at p. 5. This Court made no analysis as to whether the SSI provisions constituted invidious discrimination on the basis of race and/or national origin, or otherwise violated the equal protection component of the Fifth Amendment.

In *Rosario*, this Court faced a Fifth Amendment Equal Protection challenge to the Aid to Families with Dependent Children program, 42 U.S.C. §601 *et seq.*, which provides federal financial assistance to States and Territories to aid families with needy dependent children, but in which Puerto Rico receives less

assistance than do the States. *Id.*, at 651. In a two-paragraph *per curiam* opinion, this Court stated that, pursuant to the Territory Clause, Congress may "treat Puerto Rico differently from the States so long as there is a rational basis for its actions." *Id.*, at 651-652. This Court, however, cited no authority and made no developed discussion in support of this statement. Further, relying on *Torres'* dictum, this Court decided that there was such a rational basis to sustain this discriminatory treatment. Again, this Court did not perform any analysis as to whether the statute constituted invidious discrimination on the basis of race and/or national origin.

In light of the above, it is clear that neither *Torres* nor *Rosario* established a binding precedent that the exclusion of Puerto Rico residents from the SSI program is constitutional. In *Torres*, which addressed the SSI program itself, this Court did not have before it a case or controversy on the question of the validity of this exclusion under the equal protection component of the Fifth Amendment. On the other hand, in *Rosario*, this Court did not have a case or controversy regarding the SSI program, but a different Federal program, for which an equal protection analysis, even under rational-basis review, would be different.

In its decision in this case, the First Circuit carefully considered whether *Torres* and *Rosario* were dispositive of this case. *United States v. Vaello-Madero*, 956 F. 3d 12, 19-21 (1st Cir. 2020). It summarized its conclusion in this regard as follows:

> What should be patently clear is that the Court ruled in [*Torres*] on the validity of SSI's treatment of the persons residing in Puerto Rico, as affected by the right to travel, while in [*Rosario*] it was called to pass upon differential treatment of block grants under the AFDC program in light of the equal protection component of the Fifth Amendment. Contrary to Appellant's contention, the Court has never ruled on the validity of alleged discriminatory treatment of Puerto Rico residents as required by the SSI program under the prism of equal protection. (Underline in text)

Therefore, Petitioner's allegation that the decisions of *Torres* and *Rosario* dispose of this case lacks merit. This case, which presents a very important constitutional question for United States citizens who reside in Puerto Rico, cannot be summarily dispatched by mere reference to those decisions; rather, it requires a thorough equal protection analysis.

II. The Court of Appeals for the First Circuit correctly determined that, even under rational-basis review, the exclusion of residents of Puerto Rico from the SSI program violated their right to equal protection under the Fifth Amendment.

In its opinion, the First Circuit applied rational basis review to Respondent's claims under the equal protection component of the Fifth Amendment. After careful analysis of the allegations of petitioner on appeal, the First Circuit determined that exclusion of

residents of Puerto Rico from the SSI program does not satisfy such review. This decision is correct.

In *Rosario*, the rational bases identified by this Court in the context of the Aid to Families with Dependent Children program (AFDC) were that: "Puerto Rican residents do not contribute to the federal treasury; the cost of treating Puerto Rico as a State under the statute would be high; and greater benefits could disrupt the Puerto Rican economy." *Rosario*, 446 U.S. at 652. For the following reasons, the Commonwealth asserts that these premises are erroneous.

First, this Court can take judicial notice that many residents of Puerto Rico ***do*** pay federal taxes, some of which residents of other jurisdictions do not pay.[3] Federal law generally requires individuals and businesses in Puerto Rico to pay federal tax on income they earn outside of Puerto Rico, whether in the United States or in a foreign country. Federal law also requires employers and employees in Puerto Rico to pay all federal payroll taxes, which fund Social Security, the Medicare hospital insurance program,[4] and the federal unemployment compensation program.

Second, generally, "SSI makes monthly payments to people who have low income and few resources, and

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[3] For example, premiums on policies issued by insurers and reinsurers from Puerto Rico for risks located in Puerto Rico pay a federal excise tax ranging from 1% to 4%, which is inapplicable in the remaining U.S. jurisdictions. *See* 26 U.S.C. §4371.

[4] 26 U.S.C. §§3101, 3121(b)(i) and 3121(e)(1).

who are: Age 65 or older; blind; or disabled."[5] Also, "SSI is commonly known as a program of 'last resort' because claimants must first apply for all other benefits for which they may be eligible; cash assistance is awarded only to those whose income and assets from other sources are below prescribed limits."[6] Thus, the SSI program benefits individuals who do not pay Federal income taxes because their income is too low. Moreover, the beneficiaries of SSI do not pay federal taxes, regardless of the state they reside in. Additionally, even non-citizens may qualify for SSI benefits from which the U.S. citizens of Puerto Rico are excluded.[7] In fact, in 2017, 6% of all SSI beneficiaries were noncitizens.[8] In 1995, that percentage was as high as 12.1% which represented a total of 785,410 beneficiaries.[9]

According to the U.S. Governments Accountability Office (GAO),[10] in 2010, Puerto Rico taxpayers reported paying $20 million to the United States, its possessions, or foreign countries in individual income tax. Also, the 2015 Internal Revenue Service Data Book

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[5] SSI Booklet, https://www.ssa.gov/pubs/EN-05-11000.pdf.

[6] *Cash Assistance for the Aged, Blind, and Disabled in Puerto Rico* Congressional Research Service, October 26, 2016, Page 1, https://fas.org/sgp/crs/row/cash-aged-pr.pdf.

[7] Supplemental Security Income for Non-Citizens, https://www.ssa.gov/pubs/EN-05-11051.pdf.

[8] SSI Annual Statistical Report, 2017, https://www.ssa.gov/policy/docs/statcomps/ssi_asr/2017/sect05.pdf.

[9] *Id.*

[10] U.S. Governments Accountability Office, GAO-14-31.

reveals that the IRS collected $3.52 billion in federal taxes on individuals and businesses in Puerto Rico in Fiscal Year 2015.[11]

In terms of corporate income tax, in 2009, U.S. corporations paid about an estimated $4.3 billion in tax on income from their affiliates in Puerto Rico.[12] Comparing this to SSI benefits, if Puerto Ricans qualified, the "estimated federal spending would have ranged from $1.5 billion to $1.8 billion."[13]

This information demonstrates that, although United States citizens residing in Puerto Rico generally do not pay federal income taxes like those in the states, it is entirely incorrect that they "do not contribute to the federal treasury." The information provided by the GAO, presented above, also disproves the belief that treating Puerto Rico as a state under this statute would be too costly.

The third factor, regarding the supposed disruption of Puerto Rico's economy as a result of including it in the SSI program,[14] differs from the current economic

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[11] *See* Internal Revenue Service Data Book, at page 12, Table 5. Retried on July 25, 2016 from https://www.irs.gov/pub/irs-soi/15databk.pdf.

[12] *Id.*

[13] *Id.*

[14] Notably, Petitioner failed to advance this argument in its appeal before the First Circuit. *Vaello-Madero*, 956 F. 3d at 21. Therefore, the court stated that it was not called to resolve this rationale as it had been abandoned. *Id.*, at 23. It is a well-settled principle that arguments not raised by an appellant in its opening brief on appeal are waived. *United States v. Mayendia-Blanco*,

facts. According to another recent Governments Accountability Office report, the issue of lack of SSI, and other federal benefits in general, has been seen by different political administrations as contributing to "outmigration" to the states, which actually adversely affects the economy.[15] The only scenario in which such a benefit may disrupt Puerto Rico's economy is if its disincentives work. However, the beneficiaries of the SSI program are elderly and/or disabled, and thus generally unable to work anyway. Second, if this was a problem in the application of the SSI program, it would present itself wherever the SSI was implemented, not just Puerto Rico. Therefore, it does not justify, even under a rational basis standard, the exclusion of U.S. citizens in Puerto Rico from the SSI program.

Further, residents of the Northern Mariana Islands, an unincorporated territory, receive SSI benefits.[16] The objection to extending SSI benefits to Puerto Rico because they do not pay Federal income taxes

905 F. 3d 26, 32 (1st Cir. 2018); *Landrau-Romero v. Banco Popular de Puerto Rico*, 212 F. 3d 607, 616 (1st Cir. 2000). The Commonwealth respectfully asserts that this Court should also deem this issue waived; however, it will discuss this matter on the merits in this *amicus curiae* brief.

[15] *Factors Contributing to the Debt Crisis and Potential Federal Actions to Address Them*, GAO-18-387, Page 27, May 2018, https://www.gao.gov/assets/700/691675.pdf.

[16] *See Cash Assistance for the Aged, Blind, and Disabled in Puerto Rico*, Congressional Research Service, October 26, 2016, Page 3, https://fas.org/sgp/crs/row/cash-aged-pr.pdf.

should also apply to the Northern Mariana Islands.[17] Therefore, Petitioner's position is further undermined by this inconsistency. *Vaello*, 956 F. 3d at 30-31.

The rational-basis analysis performed by the First Circuit in this case is correct. Petitioner does not show a rational basis for exclusion of residents of Puerto Rico from the SSI program. As a consequence of this exclusion, a group of United States citizens with a population higher than 19 States, the District of Columbia, and all other territories, is being subjected to an inferior standard of review and no benefits under the SSI program without any rational basis to support this classification. This is constitutionally unacceptable.

III. The classification established by Congress, excluding Puerto Rico residents from the SSI program, is based on race and/or national origin; thus, the proper Equal Protection analysis is strict scrutiny and not rational-basis review.

Thus far, it has been demonstrated that Petitioner's allegations lack merit. The decisions of *Torres* and *Rosario* are entirely based upon the plenary power granted to Congress over territories of the United States by the Territory Clause of the Constitution, and the interpretation that this Court has given to that clause with respect to Puerto Rico. This interpretation,

[17] *See Congressional Task Force on Economic Growth in Puerto Rico*, Report to the House and Senate, December 20th, 2016, at 54.

commonly known as the "incorporation doctrine," is the main cause of the gross inequality suffered by Puerto Rican United States citizens who live in Puerto Rico and is an essential part of this case. The Commonwealth respectfully asserts that this doctrine should be reexamined and abrogated.

The *Insular Cases*

Puerto Rico became a United States territory as a result of the Spanish-American War in 1898, through the Treaty of Paris. *Puerto Rico v. Sánchez Valle*, 136 S. Ct. 1863, 1868 (2016). Since then, Congress has been tasked with determining "[t]he civil rights and political status of its inhabitants." Treaty of Paris, Art. 9, Dec. 10, 1898, 30 Stat. 1759. *See also Id*. At the time, it was assumed that the Constitution applied to the United States territories. *Thompson v. Utah*, 170 U.S. 343, 346 (1898), reversed on other grounds by *Collins v. Youngblood*, 497 U.S. 37, 39 (1990). It was also thought that the Constitution did not grant power to the Federal Government to acquire a territory to be held and governed permanently in that character, nor to hold establish and maintain colonies to be held and governed at its own pleasure. *Scott v. Sanford*, 60 U.S. (19 How.) 393, 447 (1857).[18] It was then clear that territories acquired by the United States would only be in such

[18] This case is rightfully infamous for erroneously limiting the term "citizens" to a single race; however, it also illustrates the view that territories were to be held as such only temporarily.

status temporarily and that the protections of the Constitution extended to them.

In the case of *De Lima v. Bidwell*, 182 U.S. 1, 197 (1901), this Court determined that the newly-acquired territory of Puerto Rico was no longer foreign upon the ratification of the Treaty of Paris. In so doing, this Court stated as follows:

> The theory that a country remains foreign with respect to the tariff laws until Congress has acted by embracing it within the Customs Union, presupposes that a country may be domestic for one purpose and foreign for another. It may undoubtedly become necessary for the adequate administration of a domestic territory to pass a special act providing the proper machinery and officers, as the President would have no authority, except under the war power, to administer it himself; but no act is necessary to make it domestic territory if once it has been ceded to the United States. . . . This theory also presupposes that territory may be held indefinitely by the United States; that it may be treated in every particular, except for tariff purposes, as domestic territory; that laws may be enacted and enforced by officers of the United States sent there for that purpose; that insurrections may be suppressed, wars carried on, revenues collected, taxes imposed; in short, that everything may be done which a government can do within its own boundaries, and yet that the territory may still remain a foreign country. That this state of things may continue for

> years, for a century even, but that until Congress enacts otherwise, it still remains a foreign country. To hold that this may be done as a matter of law we deem to be pure judicial legislation. We find no warrant for it in the Constitution or in the powers conferred upon this court. It is true the nonaction of Congress may occasion a temporary inconvenience, but it does not follow that courts of justice are authorized to remedy it by inverting the ordinary meaning of words.

De Lima, 182 U.S. at 198. The holding of *De Lima*, preventing the imposition of tariffs upon goods imported from Puerto Rico into the United States after the ratification of the Treaty of Paris, was consistent with the treatment given thus far to territories. However, on the same date this Court decided *De Lima*, it also decided *Downes v. Bidwell*, 182 U.S. 244 (1901). In *Downes*, this Court confronted the question whether the tariffs imposed by Congress upon goods imported from Puerto Rico in the Foraker Act of 1900 violated the provision of Art. 1 Sec. 8 of the Constitution, which declares that "all duties, imposts and excises shall be uniform throughout the United States." *Id.*, at 249. This Court, in a dramatic turn from its holding in *De Lima*, decided that Puerto Rico belongs to, but is not a part of, the United States. After a lengthy discussion, this Court concluded as follows:

> Patriotic and intelligent men may differ widely as to the desirableness of this or that acquisition, but this is solely a political question. We can only consider this aspect of the

case so far as to say that no construction of the Constitution should be adopted which would prevent Congress from considering each case upon its merits, unless the language of the instrument imperatively demand it. A false step at this time might be fatal to the development of what Chief Justice Marshall called the American Empire. Choice in some cases, the natural gravitation of small bodies towards large ones in others, the result of a successful war in still others, may bring about conditions which would render the annexation of distant possessions desirable. **If those possessions are inhabited by alien races, differing from us in religion, customs, laws, methods of taxation and modes of thought, the administration of government and justice, according to Anglo-Saxon principles, may for a time be impossible; and the question at once arises whether large concessions ought not to be made for a time, that, ultimately, our own theories may be carried out, and the blessings of a free government under the Constitution extended to them.** We decline to hold that there is anything in the Constitution to forbid such action.

We are therefore of opinion that **the Island of Porto Rico is a territory appurtenant and belonging to the United States, but not a part of the United States** within the revenue clauses of the Constitution; that the Foraker act is constitutional, so far as it imposes duties upon imports from such

> island, and that the plaintiff cannot recover back the duties exacted in this case.

Downes, 182 U.S. at 286-287 (emphasis ours). These two paragraphs, at the very end of the majority opinion, establish the truth underlying the *Insular Cases*. In those cases, this Court gave preeminence to Congress' powers under the Territory Clause over the individual rights afforded by the Constitution, for reason of the race and national ancestry of the inhabitants of the territories acquired by the Treaty of Paris. These cases mirror the categorizations made in the infamous case of *Plessy v. Ferguson*, 163 U.S. 537, 544 (1896), *revoked* by *Brown v. Bd. of Educ*., 347 U.S. 483 (1954). In *Plessy*, this Court had stated that "[t]he object of the amendment was undoubtedly to enforce the absolute equality of the two races before the law, but in the nature of things it could not have been intended to abolish distinctions based upon color, or to enforce social, as distinguished from political equality, or a commingling of the two races upon terms unsatisfactory to either." These distinctions, rightly revoked by this Court in *Brown*, are similar to the distinctions elaborated in the *Insular Cases*.

In *Dorr v. United* States, 195 U.S. 138, 142-143 (1904), in which this Court followed *Downes*, it stated that "[u]ntil Congress shall see fit to incorporate territory ceded by treaty into the United States, we regard it as settled by that decision that the territory is to be governed under the power existing in Congress to make laws for such territories and subject to such constitutional restrictions upon the powers of that body as

are applicable to the situation." However, in *Downes*, the Court did not specify what those constitutional restrictions are, except for a statement that inhabitants of Puerto Rico, "[e]ven if regarded as aliens, [they] are entitled under the principles of the Constitution to be protected in life, liberty and property." *Downes*, 182 U.S. at 283.

In the Jones Act of 1917,[19] Congress, among others, granted United States citizenship to all inhabitants of Puerto Rico. This contradicts the holding of the *Downes* Court that Puerto Rico belongs to but is not a part of the United States, since Congress unequivocally established that the People of Puerto Rico are citizens of the United States. It would therefore seem clear that, if Puerto Ricans are citizens of the United States, they would be entitled to the same rights as all other United States citizens. The rights of United States citizens are the same regardless of whether they were born as such or naturalized, except that only "natural born" citizens are eligible to be President. *Schneider v. Rusk*, 377 U.S. 163, 165 (1964); *Knauer v. United States*, 328 U.S. 654, 658 (1946). Further, the Fourteenth Amendment prevents Congress from abridging, affecting, restricting the effect of or taking away citizenship. *Afroyim v. Rusk*, 387 U.S. 253, 267 (1967); *United States v. Klimavicius*, 847 F. 2d 28, 32 (1st Cir. 1988).

Unfortunately, in *Balzac v. Porto Rico*, 258 U.S. 298 (1923), this Court reaffirmed the distinction between

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[19] Jones Act of 1917, 64 P.L. 368, 39 Stat. 951, 64 Cong. Ch. 145, 64 P.L. 368, 39 Stat. 951, 64 Cong. Ch. 145.

incorporated and non-incorporated territories. This Court expressed therein that, although the intention by Congress to confer United States citizenship to a territory's inhabitants may be interpreted as its incorporation, and such was the case for Alaska in *Rasmussen v. United States*, 197 U.S. 516 (1905), the situation of the Puerto Rico territory was different, in that Alaska is an "enormous territory, very sparsely settled and offering opportunity for immigration and settlement by American citizens." *Balzac*, 258 U.S. at 309.

This is an entirely arbitrary distinction. The geographical or demographic differences between Alaska and Puerto Rico do not explain why granting United States citizenship to Alaskans meant incorporation and granting such citizenship to Puerto Ricans did not. The reason the *Balzac* Court distinguished Alaska from Puerto Rico was illustrated by the Court as follows: "[W]hen Porto Ricans passed from under the government of Spain, they lost the protection of that government as subjects of the King of Spain, a title by which they had been known for centuries. They had a right to expect, in passing under the dominion of the United States, a status entitling them to the protection of their new sovereign." *Balzac*, 258 U.S. at 308. This explanation is pretextual, since such a right of protection by their new sovereign would have accrued immediately upon the change of sovereignty, and not necessarily through a grant of United States citizenship. In essence, the distinction between Alaska and Puerto Rico in *Balzac* is entirely based on alienage or race, just like the one established in *Downes*.

Further, the *Balzac* Court stated the following regarding the nature and reach of the United States citizenship granted to Puerto Ricans in the Jones Act:

> It became a yearning of the Porto Ricans to be American citizens, therefore, and this act gave them the boon. What additional rights did it give them? **It enabled them to move into the continental United States and becoming residents of any State there to enjoy every right of any other citizen of the United States, civil, social and political**.

Balzac, 258 U.S. at 308 (emphasis ours). This Court openly stated that Puerto Rican United States citizens who lived in Puerto Rico would have to abandon their homes and families and move into the continental United States to enjoy the full rights of citizenship, effectively abridging their citizenship and establishing a second-class citizenship not supported in the Constitution. As stated before, this Court established in *Afroyim v. Rusk*, *supra*, that this is not permitted.

The *Insular Cases* have established a regime that discriminates against Puerto Rican United States citizens on the basis of their race and national origin. It should be underlined in this context that "[w]ith the exception of two of its members, all justices of the Court that decided the *Insular Cases* had in 1896 also joined the Court's decision in *Plessy v. Ferguson*."[20] The

[20] *Consejo de Salud Playa de Ponce v. Rullán*, 586 F. Supp. 2d 22, 28 (D.P.R. 2008).

Commonwealth asserts that the notion of a territory being "unincorporated" for cultural and racial differences would rightfully offend our nation's post-*Brown v. Board of Education* view of equality before the law. However, courts have not engaged in this discussion, perhaps awaiting the right case. If so, the Commonwealth respectfully suggests that this is such a case.

Equal Protection

When legislation establishes a classification on which to base disparate treatment of particular groups of people, courts must scrutinize it to determine if it violates equal protection. *See Pers. Adm'r of Mass. v. Feeney*, 442 U.S. 256, 271-272 (1979). Depending on the classification at issue, courts apply different levels of review. *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 439-441 (1985).

"Certain suspect classifications—race, alienage and national origin—require what the Court calls strict scrutiny, which entails both a compelling governmental interest and narrow tailoring." *Massachusetts v. United States HHS*, 682 F. 3d 1, 8-9 (1st Cir. 2012) (*citing Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 227 (1995)); *see also Cleburne*, 473 U.S. at 439-441 (suspect classifications are often "deemed to reflect prejudice and antipathy, a view that those in the burdened class are not as worthy or deserving as others," and because "such discrimination is unlikely to be soon rectified by legislative means."); *Washington v. Davis*, 426 U.S. 229, 239 (1976) (noting that a "central purpose" of

equal protection "is the prevention of official conduct discriminating on the basis of race"). Gender-based classifications invoke intermediate scrutiny and must be substantially related to achieving an important governmental objective. Both are far more demanding than the rational basis review conventionally applied in routine matters of commercial, tax and like regulation. *United States HHS*, 682 F. 3d at 9.

The exclusion of Puerto Rico residents from the SSI program should be subject to a stricter standard of review than rational basis. *Consejo de Salud Playa de Ponce v. Rullán*, 586 F. Supp. 2d 22, 44 (D.P.R. 2008). By excluding Puerto Rico residents as a class, it singles out and discriminates against an entire group of people on the premise that they belong to a class of "alien races." *See Bruns v. Mayhew*, 750 F. 3d 61, 66 (1st Cir. 2014) ("[A] state's alienage-based classifications inherently raise concerns of invidious discrimination and are therefore generally subject to strict judicial scrutiny."). Because this exclusion serves no legitimate governmental end under any standard of review, it must fail.

However, the constitutional interpretation crafted in the *Insular Cases* has been applied to justify unequal treatment of U.S. citizens residing in Puerto Rico. In *Rosario*, 446 U.S. at 651-652, this Court determined that Congress, pursuant to the territory Clause, "may treat Puerto Rico differently from States so long as there is a rational basis for its actions," without regard as to whether the equal protection component of the Fifth Amendment mandates a stricter scrutiny. Under

this standard, a law is constitutionally valid if "there is a plausible policy reason for the classification, the legislative facts on which the classification is apparently based rationally may have been considered to be true by the governmental decision maker, and the relationship of the classification to its goal is not so attenuated as to render the distinction arbitrary or irrational." *Armour v. City of Indianapolis, Ind.*, 566 U.S. 673, 681 (2012) (citations omitted).

However, the analysis performed above of the *Insular Cases*, which laid the groundwork for the decisions of *Torres* and *Rosario*, indicates that these decisions were entirely based on alienage and/or racial and cultural differences, and therefore the statutes in question should have been subjected to strict scrutiny and examined with a presumption of unconstitutionality. On this matter, the Court has explained that:

> A core purpose of the Fourteenth Amendment was to do away with all governmentally imposed discrimination based on race. *See Strauder v. West Virginia*, 100 U.S. 303, 307-308, 310 (1880). Classifying persons according to their race is more likely to reflect racial prejudice than legitimate public concerns; the race, not the person, dictates the category. *See Personnel Administrator of Mass. v. Feeney*, 442 U.S. 256, 272 (1979). Such classifications are subject to the most exacting scrutiny; to pass constitutional muster, they must be justified by a compelling governmental interest and must be "necessary . . . to the accomplishment" of their legitimate purpose,

> *McLaughlin v. Florida*, 379 U.S. 184, 196 (1964). *See Loving v. Virginia*, 388 U.S. 1, 11 (1967).

Palmore v. Sidoti, 466 U.S. 429, 432-433 (1984). In *United States v. Windsor*, 570 U.S. 744, 774 (2013), this Court reiterated that:

> The liberty protected by the Fifth Amendment's Due Process Clause contains within it the prohibition against denying to any person the equal protection of the laws. *See Bolling*, 347 U.S., at 499-500; *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 217-218 (1995). While the Fifth Amendment itself withdraws from Government the power to degrade or demean in the way this law does, the equal protection guarantee of the Fourteenth Amendment makes that Fifth Amendment right all the more specific and all the better understood and preserved.

It should be stressed that "[t]he Equal Protection Clause directs that 'all persons similarly circumstanced shall be treated alike.' *Plyler v. Doe*, 457 U.S. 202, 216 (1982), quoting *F.S. Royster Guano Co*. *v. Virginia*, 253 U.S. 412, 415 (1920)." In this matter, Puerto Ricans are similarly situated to other United States citizens. In *Rosario*, this question was cursorily addressed without benefit of briefing or argument.[21] Decades later, Puerto Ricans deserve a fresh look at the basis for this discrimination.

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[21] *Rosario*, 446 U.S. at 653-654 (Justice Marshall, dissenting).

On Equal Protection, this Court has stated that inhabitants of territories, "even if regarded as aliens, they are entitled under the principles of the Constitution to be protected in life, liberty and property." *Downes*, 182 U.S. at 283. Its decisions have established that classifications based on alienage, nationality or race, are inherently suspect and subject to close judicial scrutiny. Aliens as a class are a prime example of a "discrete and insular" minority (*see United States v. Carolene Products Co.*, 304 U.S. 144, 152-153, n. 4 (1938)) for whom such heightened judicial solicitude is appropriate. "Accordingly, it was said in *Takahashi* [*v. Fish and Game Commission*, 334 U.S. 410, 420 (1948)] that 'the power of a state to apply its laws exclusively to its alien inhabitants as a class is confined within narrow limits.'" *Graham v. Richardson*, 403 U.S. 365, 372 (1971).

The Equal Protection analysis set forth in this brief was not applied in *Rosario.* It should be applied in this case, to correct more than 120 years of discrimination and inequality against Puerto Rican United States citizens.

CONCLUSION

The judgment of the Court of Appeals for the First Circuit should be affirmed.

Respectfully submitted,

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