NO. 20-303

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

JOSE LUIS VAELLO-MADERO

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

BRIEF IN RESPONSE

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QUESTIONS PRESENTED

The Social Security Act categorically excludes residents of Puerto Rico from receiving supplemental security income (SSI) on the premise that they are residing "outside the United States." 42 U.S.C. § 1382(f)(1); see also 42 U.S.C. § 1382c(e). That classification of Puerto Rico—a U.S. territory for more than 120 years—can be traced to the Incorporation Doctrine, a jurisprudential gloss on the Territories Clause, U.S. Const. Art IV, § 3, Cl. 2, that blessed Congress's desire to segregate the United States into so-called "incorporated" and "unincorporated" territories along racial and alienage lines. Affirming the U.S. District Court for the District of Puerto Rico, a unanimous panel of the U.S. Court of Appeals for the First Circuit held that excluding otherwise eligible individuals from the SSI program solely because of their status as Puerto Rico residents violated equal protection under the Fifth Amendment of the Constitution.

The Government's petition raises two questions that warrant plenary review:

1. Whether the classification of Puerto Rico residents as being "outside the United States" triggers stricter scrutiny than rational basis review under the Fifth Amendment.

2. Whether under the Fifth Amendment Puerto Rico's territorial status allows Congress to treat Puerto Rico residents less favorably than residents of States and other U.S. territories for purposes of uniform national welfare laws.

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INTRODUCTION AND SUMMARY

José Luis Vaello Madero is a disabled, indigent, sixty-six-year-old man who qualified for and received SSI disability payments while residing in New York. After moving to Puerto Rico to be closer to family, the Social Security Administration notified him that it was revoking his SSI benefits retroactively to the date when he established residence in Puerto Rico, solely on the basis that he was residing "outside the United States."

The Government then sued Vaello Madero in the District of Puerto Rico to recover $28,081 in SSI payments he received while residing on the island. Vaello Madero disputed the alleged liability on the basis that denying SSI benefits to eligible individuals solely because of their status as Puerto Rico residents violated equal protection under the Fifth Amendment. The district court agreed.

A unanimous First Circuit panel comprised of Chief Judge Howard, Judge Torruella, and Judge Thompson affirmed, holding that there is no rational basis for excluding otherwise eligible Puerto Rico residents from a uniform national program intended to benefit the neediest individuals in the nation.

In striking down the categorical exclusion of Puerto Rico residents from SSI on equal protection grounds, the lower courts ended a forty-eight-year history of unjust discrimination against some of the nation's poorest disabled Americans whose only disqualifying characteristic was their place of residence (or place of origin). That discrimination was the product of a 120-year-old congressional practice of segregating the United States into so-called "incorporated" and "unincorporated" territories

based on demoded beliefs about the racial and ethnic composition of their populations.

Those views were foisted onto the Constitution as the Incorporation Doctrine in what are known as the Insular Cases, starting with *Downes* v. *Bidwell*, 182 U.S. 244 (1901). The *Downes* Court held that Puerto Rico is property of the United States but "not a part of the United States," because it is supposedly populated by "alien races" and "uncivilized" peoples who, unlike the "native white inhabitants" in territories such as Florida and Alaska, are "unfit" to handle the full duties and benefits of citizenship. Since then, Congress has singled out Puerto Rico residents for less favorable treatment under national laws such as the Social Security Act on the premise that Puerto Rico is "outside the United States" and so its residents are not entitled to benefits on equal terms with other residents of the "United States."

The Government now petitions this Court to overturn the decision below on the grounds that it conflicts with two per curiam, summary dispositions in *Califano* v. *Gautier Torres*, 435 U.S. 1 (1978), and *Harris* v. *Rosario*, 446 U.S. 651 (1980). But those two cases do not control the disposition of the question presented here: whether the exclusion of otherwise eligible Puerto Rico residents from a uniform national welfare program survives equal protection review under the Fifth Amendment.

Unlike the court of appeals, which determined that it was bound to apply rational basis review under *Califano* and *Harris*, this Court is not so constrained. Those cases were decided without the benefit of full briefing or oral argument on critical issues raised in this case, including the proper level

of scrutiny for reviewing the classification at issue, and so their precedential reach is limited.

More importantly, the legal foundation upon which *Califano* and *Harris* are built is not good law. Those cases attributed Congress's power to discriminate against Puerto Rico to the island's territorial status under the Insular Cases—a much-criticized line of cases that are long overdue to be overruled. Indeed, the Government has struggled throughout this litigation to rationalize *Califano* and *Harris* without relying on the Incorporation Doctrine. The Government attempts a new approach in this Court by arguing that constitutional distinctions between U.S. territories and States allow Congress to single out Puerto Rico residents for less favorable treatment *vis-à-vis* similarly situated residents of States under national welfare programs. There are good reasons to reject that view. If the Court wishes to consider that issue, it should do so only after full briefing and oral argument.

Otherwise, this Court does not need to review the court of appeals' well-reasoned rational basis determination. The First Circuit did not break new ground. It interpreted and applied *Califano* and *Harris* in light of well-settled equal protection principles. Its reasoning relates specifically to SSI and does not implicate every legal distinction between States and U.S. territories. And any concerns about the decision's potential effects on the public fisc can be more appropriately and equitably addressed by Congress or the Social Security Administration.

This Court should thus deny certiorari or grant plenary review.

STATEMENT OF THE CASE

A. Historical Background

The Government's brief largely ignores the well-documented and uncontroverted history of the United States' relationship with Puerto Rico. A brief recounting of this history is necessary for understanding the exclusion of Puerto Rico residents from SSI on the fiction that they reside "outside the United States." 42 U.S.C. § 1382(f)(1); see also 42 U.S.C. § 1382c(e).

The acquisition of Puerto Rico and other Spanish colonies at the conclusion of the Spanish-American war generated vigorous national debate, including on the Senate floor, about the status of these new territories. Much of the debate centered around the perceived risks of extending citizenship to the "alien races, and civilized, semi-civilized, barbarous, and savage peoples of these islands." José A. Cabranes, *Citizenship and the American Empire: Notes on the Legislative History of the United States Citizenship of Puerto Ricans*, 127 U. Pa. L. Rev. 391, 432–433 (1978) (quoting 33 Cong. Rec. 3622 (1900) (remarks of Sen. Depew)).

These concerns figured prominently during congressional debates leading up to the enactment of the Foraker Act, Pub. L. No. 56-191, 31 Stat. 77 (1900), which imposed duties on imports from Puerto Rico to the United States to fund a territorial government. Ultimately, the Foraker Act was premised on the contested notion that Puerto Rico, although a U.S. possession, was not a part of the United States, and so was not subject to the constitutional requirement that "all duties, imposts and excises shall be uniform throughout the United

States." U.S. Const. Art. I, § 8, Cl. 1; see Cabranes, *supra*, at 433 (citing 33 Cong. Rec. 3690 (1900) (remarks of Sen. Foraker)). Prior to the acquisition of Puerto Rico, the term "United States" as used in the Constitution did not designate "any particular portion" of the nation, but rather designated "the whole" of "our great republic, *which is composed of States and Territories*." *Loughborough* v. *Blake*, 18 U.S. 317, 319 (1820) (emphasis added).

In *Downes* v. *Bidwell*, 182 U.S. 244 (1901), the Court departed from its original understanding of U.S. territories and adopted Congress's novel view of Puerto Rico as an unincorporated territory. The Court reasoned that, although Puerto Rico "belong[ed] to the United States," it was "not a part of the United States." *Id.* at 287. Comprised largely of the same justices who decided *Plessy* v. *Ferguson*, 163 U.S. 537 (1896), the *Downes* Court was concerned that, under its prior view of territorial expansion, children born in Puerto Rico, "whether savages or civilized," could become "entitled to all the rights, privileges and immunities of citizens" by birth. 182 U.S. at 279.

A concurring opinion noted that such an approach risked "inflict[ing] grave detriment on the United States" if territories inhabited by people of "uncivilized" and "alien races," as opposed to the "native white inhabitants" of territories such as Florida or Alaska, were automatically incorporated into the Union. *Id.* at 306, 313, 319 (White, J., concurring). This would supposedly result in the "bestowal of citizenship on those absolutely unfit to receive it[.]" *Id.* at 306.

The Court thus upheld the Foraker Act, concluding that Puerto Rico, though a U.S. territory,

was "foreign to the United States in a domestic sense." *Id.* at 341. Justice White's view gave birth to the Incorporation Doctrine. See *Balzac* v. *Porto Rico*, 258 U.S. 298, 304–305 (1922).

The relationship between the United States and Puerto Rico evolved substantially following *Downes*. In 1917, the Jones Act extended U.S. citizenship to Puerto Ricans just in time for them to fight in World War I. Organic Act for Puerto Rico, Pub. L. No. 64-368, ch. 145, § 5, 39 Stat. 951, 953 (1917). In 1941, native-born Puerto Ricans were granted birthright U.S. citizenship. 8 U.S.C. § 1402. In 1952, Congress recognized the island as a "commonwealth" and gave the Puerto Rican government more local autonomy. Act of July 3, 1952, Pub. L. No. 82-447, 66 Stat. 327, 327; see also Puerto Rico Federal Relations Act (PRFRA), Pub. L. No. 81-600, 64 Stat. 319, 319 (1950). Still, the "ultimate source" of any powers held by the Puerto Rican government is Congress, and Puerto Rico remains entirely within the United States' territorial sovereignty and control. *Puerto Rico* v. *Sánchez Valle*, 136 S. Ct. 1863, 1875 (2016) (internal quotation marks omitted).[1]

B. Statutory Background

In 1972, Congress amended the Social Security Act to create the SSI program. Pub. L. No. 92-603, 86 Stat. 1329, 1465 (codified as amended at 42 U.S.C. § 1381 *et seq.*). Congress sought to create "a national program to provide supplemental security

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[1] To this day, Puerto Rico's population is almost 100% Hispanic or Latino. See App. 45a; *Quick Facts, Puerto Rico,* U.S. Census Bureau, https://www.census.gov/quickfacts/fact/table/pr/PST045217.

income to individuals who have attained age 65 or are blind or disabled." 42 U.S.C. § 1381; App. 9a.

Although SSI benefits are paid directly to eligible individuals by the federal government without regard to income tax receipts or economic conditions associated with their place of residence, Puerto Rico residents as a class are ineligible to receive these benefits. Section 1382(f)(1) states that no adult is eligible for benefits during any month in which he or she resides "outside the United States." 42 U.S.C. § 1382(f)(1). And section 1382c(e), in turn, defines the "United States" only as "the 50 States and the District of Columbia." 42 U.S.C. § 1382c(e). Regulations issued under the Act define the "United States" to include "the 50 States, the District of Columbia, and the Northern Mariana Islands." 20 C.F.R. § 416.215; see also 48 U.S.C. § 1801; Covenant to Establish a Commonwealth of the Northern Mariana Islands in Political Union with the United States of America, Pub. L. No. 94-241, § 502(a)(1), 90 Stat. 263, 268 (1976). Puerto Rico is not included in the definition of the "United States" for purposes of the Act.[2]

C. Factual Background

Vaello Madero suffers from severe health problems that prevent him from supporting himself. While residing in New York, he was approved for and received SSI disability benefits. App. 3a.

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[2] The only other U.S. jurisdictions left out of the Act's definition of "United States" are other "unincorporated" territories, namely Guam, American Samoa, and the U.S. Virgin Islands, all of which are populated predominantly by racial and ethnic minorities. See App. 45a n.3; Gov't C.A. Br. 2.

A year later, he moved to Loiza, Puerto Rico, to help care for his ailing wife. *Ibid.* Vaello Madero continued to receive SSI disability payments in his New York bank account. Pet. 5. He first learned that his move to Puerto Rico made him ineligible to continue receiving SSI benefits in June 2016, when he was about to turn sixty-two and registered for Title II retirement benefits in a Social Security office in Carolina, Puerto Rico. App. 3a.

Within two months, the Administration sent him two notices retroactively lowering his SSI benefits to $0 effective August 2013 solely because he was deemed to be "outside the United States" by virtue of his move to Puerto Rico. See *id.* at 4a.

D. Procedural History

More than a year later, the Government brought this action to collect $28,081 in alleged overpayments received by Vaello Madero after he moved to Puerto Rico. *Ibid.* The Government asserted jurisdiction under 28 U.S.C. § 1345, which applies to any case "commenced by the United States," and under a criminal statute, 42 U.S.C. § 408(a)(4), which provides for penalties including up to five years in prison. App. 4a. Under the specter of criminal prosecution and as his community was preparing for Hurricane Irma, which days later caused extensive damage to Loiza, a Social Security investigator approached Vaello Madero without the presence of any attorneys and asked him to sign a stipulation for consent judgment. *Id.* at 5a.

After the stipulation was filed, the district court appointed *pro bono* counsel for Vaello Madero. With the assistance of counsel, Vaello Madero moved to withdraw the stipulation and answered the

complaint. *Id.* at 51a. His answer raised three affirmative defenses including a defense to liability on the grounds that the exclusion of Puerto Rico residents from SSI violates the equal protection guarantee of the Fifth Amendment. *Id.* at 53a.

The United States responded by moving for voluntary dismissal without prejudice. The Government agreed to withdraw the stipulation but argued that the court lacked jurisdiction to decide Vaello Madero's constitutional defense unless and until he had exhausted administrative remedies. *Id.* at 51a. The court rejected that argument and denied voluntary dismissal, concluding that jurisdiction was proper under 28 U.S.C. § 1345, because the United States had brought this action, and that dismissing the case would unfairly prejudice the defendant. *Id.* at 53a–54a.

Because no material factual disagreements existed, the parties agreed to cross-move for summary judgment. *Id.* at 39a. Following extensive briefing and oral argument, the district court rejected the Government's claim and entered summary judgment for Vaello Madero. *Id.* at 49a.

The district court held that Congress cannot deny SSI benefits to otherwise eligible individuals "simply because they reside in Puerto Rico." *Id.* at 45a. The court indicated that the classification of Puerto Rico residents failed strict or heightened scrutiny, because it is directed at a predominantly Hispanic population that is disenfranchised at the federal level despite the fact that they are U.S. citizens by birthright. *Id.* at 45a–46a. It also determined that the exclusion of Puerto Rico residents failed rational basis review because it served no other purpose than to "demean and brand" the more than three million

Americans living in Puerto Rico with "a stigma of inferior citizenship" *vis-à-vis* other residents of the United States. *Id.* at 38a, 44a–48a. The court rejected the Government's argument that Congress's "plenary powers under the Territories Clause," U.S. Const. Art. IV, § 3, Cl. 2, permitted the disparate treatment of Puerto Rico. *Id.* at 42a.

The Government appealed.

The First Circuit affirmed. Judge Torruella wrote for a unanimous panel. Relying on *Harris* for the applicable level of scrutiny, the court found that no legitimate government interest had any rational nexus to the statutory classification at issue, and thus held that the categorical exclusion of Puerto Rico residents from SSI is unconstitutional. *Id.* at 37a.

The court of appeals considered each of the supposed "justifications" proffered by the Government. *Id.* at 20a–37a. The court determined that cost savings, although a legitimate interest, does not alone justify an otherwise irrational classification. *Id.* at 31a. It also rejected the suggestion that the excluded class differed from SSI beneficiaries because its members supposedly do not pay federal taxes. *Id.* at 21a–23a. The court noted that neither present nor past income tax obligations differentiated the excluded class from the eligible class. *Id.* at 26a–27a. It also cited decisions in which this Court repeatedly rejected the argument that benefit levels could properly be set by reference to individuals' prior "contributions." *Id.* at 26a. Even focusing on Puerto Rico more broadly, rather than the class at issue, the court found that Puerto Rico residents as a whole make substantial contributions to the U.S. treasury. *Id.* at 21a. Lastly, although in

the court of appeals the Government avoided the argument that giving benefits to Puerto Rico residents would have a disruptive effect on the labor supply, the court recognized that this "economic disruption" theory did not provide a rational basis for the exclusion. *Id.* at 16a. That theory lacked any coherent formulation, had troubling overtones, and in any event did not distinguish Puerto Rico residents from SSI beneficiaries in the Northern Mariana Islands or other jurisdictions in the United States. *Id.* at 16a–19a.

The Government filed a petition for a writ of certiorari.

ARGUMENT

The Government seeks summary reversal or plenary review. The petition is based on the premise that *Califano* and *Harris* are good law and control the disposition of this case. Pet. 9. Vaello Madero has consistently disputed those propositions and respectfully requests the opportunity to fully argue his case, if the Court is inclined to review the decision below.

Otherwise, the First Circuit's rational basis determination itself does not warrant review because it does not conflict with this Court's jurisprudence. Nor is it a candidate for "the bitter medicine of summary reversal," which normally applies when a decision is clearly erroneous and there are no colorable grounds for plenary review. *Spears* v. *United States*, 555 U.S. 261, 268 (2009) (Roberts, C.J., dissenting); see *Pavan* v. *Smith*, 137 S. Ct. 2075, 2079 (2017) (Gorsuch, J., dissenting). As set forth below, there are good reasons to affirm the lower court decision in addition to its rational basis

analysis, including by overruling *Califano* and *Harris*.

I. If Review Is Granted, This Case Presents a Vehicle to Reconsider *Califano* and *Harris*

Absent *Califano* and *Harris*, this Court has not decided the level of scrutiny that applies to the disparate treatment of Puerto Rico residents. Nor is there any Supreme Court precedent for the proposition that the Territories Clause and other constitutional distinctions between U.S. territories and States allow Congress to circumvent the requirements of the Fifth Amendment and treat Puerto Rico residents less favorably than other similarly situated residents of the United States under uniform national laws. The Government's petition presents these issues and, if there were doubts about the decision below, the Court should consider them on plenary review.

A. This Case Presents the Question of Whether Strict Scrutiny Applies to the Classification of Puerto Rico Residents at Issue

The petition raises the threshold question of the applicable level of scrutiny for reviewing the classification at issue: individuals who are eligible to receive SSI benefits but for their status as residents of Puerto Rico.

When legislation singles out a class of people for disparate treatment, courts must scrutinize the specific classification to determine if it violates equal protection. See *Personnel Adm'r of Mass.* v. *Feeney*, 442 U.S. 256, 271–272 (1979) (*Feeney*). Depending on the nature of the classification, courts apply

different levels of scrutiny. *Id.* at 272; *City of Cleburne* v. *Cleburne Living Ctr.*, 473 U.S. 432, 439–441 (1985). While Congress enjoys latitude in setting social and economic policy, strict scrutiny applies to distinctions drawn "along suspect lines." *FCC* v. *Beach Commc'ns, Inc.*, 508 U.S. 307, 313 (1993); *Cleburne*, 473 U.S. at 439–441; see also *United States* v. *Windsor*, 570 U.S. 744, 774 (2013). Under strict scrutiny, a suspect classification must be invalidated unless it is necessary and "narrowly tailored to achieve a compelling government interest." *Parents Involved in Cmty. Schs.* v. *Seattle Sch. Dist. No. 1*, 551 U.S. 701, 720 (2007) (internal quotation marks omitted).[3]

Statutes that discriminate based on race or national origin are considered inherently "suspect," and therefore subject to strict scrutiny, because these classifications often "reflect prejudice and antipathy – a view that those in the burdened class are not as worthy or deserving as others." *Cleburne*, 473 U.S. at 440; see *Adarand Constructors, Inc.* v. *Pena*, 515 U.S. 200, 224 (1995). This Court has also applied strict scrutiny to laws that discriminate based on alienage. *Hampton* v. *Mow Sun Wong*, 426 U.S. 88, 116–117 (1976) (invalidating federal regulations barring noncitizens from employment in the civil service); *Graham* v. *Richardson*, 403 U.S. 365, 376 (1971) (invalidating laws that excluded alien residents from receiving the same welfare benefits as citizens). In assessing whether a discriminatory purpose is present in the classification, a court may consider any "circumstantial and direct evidence of intent as may be available." *Village of Arlington*

[3] Vaello Madero maintains that the classification at issue also fails intermediate or heightened scrutiny.

Heights v. *Metropolitan Hous. Dev. Corp.*, 429 U.S. 252, 266 (1977).

Applying this analytical framework, Congress's decision to classify Puerto Rico residents in geographic terms, i.e., as being "outside the United States," is inherently suspect. The political and legal foundation for treating Puerto Rico as "foreign * * * in a domestic sense" was laid on the express belief that Puerto Rico, a predominantly Hispanic/Latino population, was inhabited by "alien races" and "semi-civilized, barbarous, and savage peoples" of mixed Spanish and African "blood," who were "unfit" to receive the full benefits of the law. See pp. 4–6, *supra*. Needless to say, this sort of race-based segregation has since been rejected as reflecting the sort of "prejudice and antipathy" that the Constitution forbids. *Cleburne*, 473 U.S. at 440; see *Brown* v. *Board of Educ.*, 347 U.S. 483, 493 (1954). By linking the exclusion of Puerto Rico residents to the geographic definition of "United States," Congress explicitly invoked the historically race-motivated practice of singling out residents of "unincorporated" territories such as Puerto Rico for less favorable treatment.

The fact that the exclusion of Puerto Rico residents is framed in geographic terms, as opposed to some other generally applicable eligibility criteria, reflects the historical desire to treat the inhabitants of Puerto Rico as alien to the United States and so not entitled to equal treatment. See *Gomillion* v. *Lightfoot*, 364 U.S. 339, 344–346 (1960); *Missouri* v. *Lewis*, 101 U.S. 22, 32 (1879) ("It is not impossible that a distinct territorial establishment and jurisdiction might be intended as, or might have the effect of, a discrimination against a particular race or

class, where such race or class should happen to be the principal occupants of the disfavored district. Should such a case ever arise, it will be time enough then to consider it."); see also *Lewis* v. *Ascension Parish Sch. Bd.*, 662 F.3d 343, 354 (5th Cir. 2011) (Jones, J., concurring) ("To allow a school district to use geography as a virtually admitted proxy for race, and then claim that strict scrutiny is inapplicable because [the classification] designated geographical lines * * * with no mention of race is inconsistent with the Supreme Court's holdings." (internal quotation marks omitted)).

The Government has never offered any other explanation for why Congress would use the formulation "outside the United States" to exclude U.S. territories from SSI. There is none. Strict scrutiny therefore applies.

In addition to this history of race and alienage-based discrimination, there is a second interrelated but independent reason for applying a stricter form of scrutiny to the classification at issue. Courts apply a "more searching judicial inquiry" in cases of "prejudice against discrete and insular minorities" whose inability to effect change through the "political process" prevents them from protecting their interests. *United States* v. *Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938); see also *Cleburne*, 473 U.S. at 440 (noting that laws targeting racial or ethnic minorities are also suspect because "such discrimination is unlikely to be soon rectified by legislative means"); *Toll* v. *Moreno*, 458 U.S. 1, 23 (1982) (Blackmun, J., concurring) (observing that "powerlessness is crucial, for in combination with prejudice it is the minority group's inability to assert its political interests" that inhibits a political

solution); *Feeney*, 442 U.S. at 272. For example, strict scrutiny applies to classifications based on citizenship status because, among other reasons, noncitizens are "an identifiable class of persons who * * * are already subject to disadvantages not shared by the remainder of the community" in that they are "not entitled to vote." *Hampton*, 426 U.S. at 102; see *Graham*, 403 U.S. at 372.

Puerto Rico residents are a quintessential example of a "discrete and insular" minority. See *Lopez* v. *Aran*, 844 F.2d 898, 913 (1st Cir. 1988) (Torruella, J., concurring in part and dissenting in part). By virtue of its status as a U.S. territory, Puerto Rico has no Electoral College votes and consequently its residents play no role in electing the U.S. president. Puerto Rico has no senators and its sole representative in Congress is a non-voting resident commissioner. App. 45a. The lack of voting power at the federal level means Puerto Rico residents have no direct influence in the establishment or modification of the SSI program. *Ibid.*; see *Cleburne*, 473 U.S. at 440. Their categorical exclusion from SSI is therefore suspect and subject to a more searching inquiry than rational basis review.

B. The Petition Raises the Question of Whether Puerto Rico's Territorial Status Allows Congress to Treat Puerto Rico Residents Less Favorably under Uniform National Laws

The Government has never engaged directly with the analysis above nor disputed the facts underlying it. Rather, it relies on *Califano* and *Harris* to argue that only rational basis review applies to

classifications of Puerto Rico residents under national welfare laws. See Pet. 10.

Throughout this case, the Government has offered different theories in support of that view.[4] In its petition for certiorari, it argues for the first time that, by virtue of the Territories Clause and other constitutional provisions distinguishing between territories and States, "the Constitution allows Congress to recognize that difference" when enacting national welfare laws. See Pet. 11, 14, 17, 19. The petition therefore raises the issue of whether Puerto Rico's territorial status has any bearing on whether Congress can treat Puerto Rico residents less favorably than similarly situated residents in States under the SSI program.

If the Court wishes to review the decision below on that basis, it should do so on plenary review to allow Vaello Madero the opportunity to respond fully to the Government's new theory.

It seems that the Government has struggled to articulate a consistent position on the relevance of Puerto Rico's territorial status because it wishes to draw on Congress's unfettered power to treat Puerto Rico differently, without having to address the historical source of that power: the Incorporation Doctrine. But the Government cannot escape that reality, because the two principal cases upon which its relies, *Califano* and *Harris*, are an extension of

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[4] In the district court, the Government attempted to rationalize the disparate treatment of Puerto Rico residents by reference to Congress's "plenary powers" under the Territories Clause. App. 42a. After the district court rejected that view, the Government rowed back from that argument in the court of appeals and focused exclusively on Congress's "wide latitude" to enact social and economic legislation. App. 29a.

the Insular Cases. See *Califano*, 435 U.S. at 3 n.4 (attributing Congress's power to treat Puerto Rico differently to a federal-territorial "relationship * * * 'that has no parallel in history,'" citing only the Insular Cases and a secondary source discussing the Incorporation Doctrine); *Harris*, 446 U.S. at 651–652 (citing only the Territories Clause and *Califano* for the same proposition); see also *id.* at 653–655 (Marshall, J., dissenting) (noting that the majority offered no authority for that proposition other than *Califano*, which, in turn, relied on the Insular Cases). This case thus presents an opportunity to reconsider these two per curiam decisions and their reliance on the Insular Cases.[5]

Puerto Rico's territorial status cannot be the *ipse dixit* justification for any and all disparate treatment of Puerto Rico residents. Put differently, the power to discriminate against Puerto Rico residents under national welfare laws does not follow from the Territories Clause or any constitutional distinction between States and U.S. territories. Nothing in the Constitution gives Congress that power.

As this Court recently confirmed, the Territories Clause empowers Congress to make needful rules and regulations acting as a local legislator, the same way a State governs its own municipalities. See *Financial Oversight & Mgmt. Bd. for P.R.* v. *Aurelius Inv., LLC*, 140 S. Ct. 1649, 1658 (2020) (*Aurelius*);

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[5] Notably, the Government could not avoid citing one of the Insular Cases for the proposition that the Fifth Amendment's equal protection guarantee does not require uniformity between States and territories. Pet. 10 (citing *Ocampo* v. *United States*, 234 U.S. 91, 98 (1914) (holding that the Fifth Amendment's presentment requirement did not apply in an unincorporated territory, there, the Philippines)).

National Bank v. *County of Yankton*, 101 U.S. 129, 133 (1879). That power is analogous to Congress's power in the District of Columbia, U.S. Const. Art. I, § 8, Cl. 17; *Aurelius*, 140 S. Ct. at 1658, where "Congress possesses not only the power which belongs to it in respect to territory within a State but the power of the State as well," *Keller* v. *Potomac Elec. Power Co.*, 261 U.S. 428, 442–443 (1923); see also *Palmore* v. *United States*, 411 U.S. 389, 397 (1973) (describing Congress's power to legislate for the District of Columbia as "plenary").

Pursuant to that power, Congress can enact territorial laws specifically for Puerto Rico in the same way that States enact different laws within their own territory. For example, Congress may create local institutions and provide for local needs through measures that might otherwise be beyond its Article I powers. The principal example of Congress's power in Puerto Rico is the PRFRA, which allows for the creation of an entire system of territorial government in lieu of a State government. See 48 U.S.C. § 731b *et seq.*; *Aurelius*, 140 S. Ct. at 1660.

But the situation is fundamentally different when Congress acts as a national legislator, *Aurelius*, 140 S. Ct. at 1661, for instance, by enacting federal laws intended to create nationwide standards, see *United States* v. *Thompson*, 452 F.2d 1333, 1339 (D.C. Cir. 1971) ("The passage of such a law implies a threshold decision to override regional differences in favor of a uniform standard that will govern the entire country."), *abrogated on other grounds by United States* v. *Cohen*, 733 F.2d 128, 136 (D.C. Cir. 1984) (en banc). Thus, when Congress legislates in a national capacity but singles out residents of the

District of Columbia, the D.C. Circuit has scrutinized Congress's decision under an equal protection analysis with the same stringency that "would apply to any legislative effort to preclude some, but not all, citizens' participation." *D.C. Fed'n of Civic Ass'ns* v. *Volpe*, 434 F.2d 436, 441–442 (D.C. Cir. 1970) (reviewing legislation denying only D.C. residents the right to a hearing on proposed federal highway projects).

Here, there is no indication that Congress was acting pursuant to its local, *territorial* powers when enacting the Social Security Act or any provision thereof. Rather, it was acting as a national legislator, seeking to create a national minimum standard for poor, aged, and disabled individuals across the country without regard to variations in local conditions. No longer drawn against the local needs of different jurisdictions, territorial distinctions raise valid equal protection concerns. See *Thompson*, 452 F.2d at 1339 (reviewing legislation creating an exception for defendants in D.C. to the nationally applicable Bail Reform Act).

To categorically exempt national laws from strict or heightened scrutiny only with respect to classifications of unincorporated territories such as Puerto Rico would require an affirmation of the Insular Cases and the Incorporation Doctrine. Recall in *Downes*, the first of the Insular Cases, the Court circumvented the constitutional requirement of uniformity throughout the United States by determining that Puerto Rico, although a U.S. territory, was "not a part of the United States." 182 U.S. at 287; *id.* at 311 (White, J., concurring). That theory was deployed in later cases to create disparate constitutional regimes in Puerto Rico and the States.

For example, while Americans residing on the mainland could assert a constitutional right to trial by jury, the same Americans could not do so in Puerto Rico unless Congress decided to incorporate the island into the United States.[6] See *Balzac*, 258 U.S. at 309.

Against this background of constitutional inequality, the Government argues that *Califano* and *Harris* held that classifications based on residence in U.S. territories such as Puerto Rico are subject only to rational basis review and suggests that Puerto Rico's territorial status may factor into the justification for extending less favorable treatment to its residents under uniform national welfare laws. Under that theory, if Congress had explicitly recorded that it was excluding Puerto Rico residents from SSI benefits because it believed that, as an "alien" Hispanic population, they were less deserving of national support, the Government could escape a higher level of scrutiny by merely invoking Puerto Rico's territorial status. Taken literally, the Government's view would mean that "[h]eightened scrutiny under the equal protection component of the Fifth Amendment * * * is simply unavailable to protect Puerto Rico or the citizens who reside there

[6] Over the years, the arbitrary nature of that distinction became even starker as courts continued to rule that U.S. citizens (and even non-citizens) were entitled to a jury trial in U.S. judicial proceedings regardless of where they were held. See *Reid* v. *Covert*, 354 U.S. 1, 14 (1957) (plurality opinion) (upholding the right to a jury trial in U.S. military bases in England and Japan); *United States* v. *Tiede*, 86 F.R.D. 227 (U.S.C.B. 1979) (holding that German citizens who had hijacked an airplane and landed on a U.S. air force base were entitled to a jury trial in Berlin). Yet this right has never been extended to Puerto Rico residents.

from discriminatory legislation, as long as Congress acts pursuant to the Territory Clause." *Harris*, 446 U.S. at 654 (Marshall, J., dissenting).

In effect, the United States' theory creates parallel constitutional regimes on U.S. soil, one in which the categorical denial of SSI benefits to Puerto Rican Americans residing in the States would be subject to strict scrutiny, and another in which the categorical exclusion of Puerto Rican Americans residing in Puerto Rico is not. Even more bizarre, subjecting the exclusion of Puerto Rico residents as a class only to rational basis review creates the anomalous result of granting greater constitutional protection to resident aliens on the mainland, who are entitled to strict scrutiny when legislation discriminates against them, but not to U.S. citizens when treated as non-residents because of their residence in a U.S. territory. Compare *Hampton*, 426 U.S. at 102–103, and *Graham*, 403 U.S. at 372, with *Califano*, 435 U.S. at 3 n.4, and *Harris*, 446 U.S. at 651–652. These disparate outcomes are an emanation of the Insular Cases and, as such, are no longer tenable.

As Vaello Madero has consistently argued, the Incorporation Doctrine is dead. While this Court has yet to pronounce the time of death, it has made clear that this jurisprudential anomaly is on its dying breaths. See *Aurelius*, 140 S. Ct. at 1665 (noting the clamor to overrule the "much-criticized 'Insular Cases' and their progeny" (citing, among others, *Reid* v. *Covert*, 354 U.S. 1, 14 (1957) (plurality opinion) (concluding that neither the Insular Cases "nor their reasoning should be given any further expansion," because they created "a very dangerous doctrine [that] if allowed to flourish would destroy the benefit

of a written Constitution and undermine the basis of our Government")).

Indeed, *Downes* v. *Bidwell* was wrong on the day it was decided. Not only is there no textual support for the territorial classifications created by the Incorporation Doctrine anywhere in the Constitution, *Downes*, 182 U.S. at 377–378 (Harlan, J., dissenting), but also the basis for creating this classification system harkens back to a disgraced period of this country's history when invidious racial segregation was allowed to persist, see *Igartúa de la Rosa* v. *United States*, 417 F.3d 145, 162 (1st Cir. 2005) (Torruella, J., dissenting) ("There is no question that the *Insular Cases* are on par with the Court's infamous decision in *Plessy* v. *Ferguson* in licencing the downgrading of the rights of discrete minorities").

Furthermore, recent Supreme Court precedent has eroded the constitutional foundations of the Incorporation Doctrine. Thus, where *Downes* and *Balzac* once empowered Congress to contract or expand the reach of the Constitution in the insular territories through incorporation, this Court in *Boumediene* v. *Bush* advanced the opposite rule:

> The Constitution grants Congress and the President the power to acquire, dispose of, and govern territory, not the power to decide when and where its terms apply. * * * To hold the political branches have the power to switch the Constitution on or off at will * * * would * * * lead[] to a regime in which [they], not this Court, say "what the law is."

553 U.S. 723, 765 (2008) (quoting *Marbury* v. *Madison*, 5 U.S. (1 Cranch) 137, 177 (1803)). Further, this Court has emphasized that the "impos[ition of] inequality" through "contradictory [legal] regimes" on U.S. soil is anathema to equal protection. *Windsor*, 570 U.S. at 772. Under these principles, which have crystallized since *Califano* and *Harris*, Congress cannot operate under different equal protection standards in different parts of the country by simply being able to classify some U.S. territories as "incorporated" and others as "unincorporated."

* * *

In sum, if this Court is inclined to review the decision below, it should grant plenary review to consider these issues.[7]

II. The First Circuit's Rational Basis Determination Does Not Warrant Review

Absent consideration of the questions above, the First Circuit's rational basis analysis does not warrant review. Contrary to the Government's contention, the lower court decision is consistent with well-settled equal protection principles and applies them correctly.

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[7] This case presents an excellent vehicle to resolve these issues. It deals with only one program and one beneficiary, and there are no material factual disputes or other superfluous issues such as administrative exhaustion that unduly complicate the analysis. A decision from this Court in this case could set the proper analytical framework for resolving similar challenges that are currently working their way through the courts. This case does not need be held for consideration pending appeal in any other case.

A. The First Circuit Applies the Rational Basis Test Correctly

The First Circuit correctly held that the SSI exclusion is irrational. It reasoned, "[t]he problem with this categorical exclusion is not that it is drawn without 'mathematical nicety,' but 'wholly without any rational basis.'" App. 28a (citations omitted).

A classification is arbitrary when it discriminates between two classes who are "similarly situated for all relevant purposes." See *Williams* v. *Vermont*, 472 U.S. 14, 23–24 (1985) (invalidating state residency requirement to qualify for exemption from use tax when registering a car purchased out of state); *Cleburne*, 473 U.S. at 446–447; see also *Jimenez* v. *Weinberger*, 417 U.S. 628, 637 (1974) (invalidating exclusion of certain classes of illegitimate children from Social Security benefits). Here, the statutory class subject to disparate treatment consists of individuals who would receive SSI benefits but for their Puerto Rico residency.

This classification does not serve the statutory purpose of "establishing a national program to provide supplemental security income to individuals who have attained age 65 or are blind or disabled." 42 U.S.C. § 1381. Because the classification does not relate to this statutory purpose, the Government offers three other rationales: (1) extending benefits to Puerto Rico residents would be costly; (2) most Puerto Rico residents do not pay federal income taxes; and (3) extending benefits to Puerto Rico may depress the labor supply. See Pet. 12–13 (citing *Harris*, 446 U.S. at 652). The First Circuit properly determined that none of these supposed rationales had any nexus to the relevant classification.

First, the Government has a legitimate interest in reducing costs. But this interest, on its own, does not advance the analysis. Cost savings may justify the inherently arbitrary process of setting eligibility thresholds at *some* level, see *Carmichael* v. *Southern Coal & Coke Co.*, 301 U.S. 495, 511 (1937) ("Administrative convenience and expense in the collection or measurement of the tax are alone a sufficient justification for the difference *between the treatment of small incomes or small taxpayers and that meted out to others*") (emphasis added), but "cost alone does not support differentiating individuals." App. 31a. The Government recognizes as much. Pet. 17 ("[A] desire to save money might not justify 'random' measures."). The question remains whether the exclusion of otherwise eligible Puerto Rico residents as a means of saving money is arbitrary.

Second, *Califano* and *Harris* stated that "Puerto Rican residents do not contribute to the federal treasury." *Harris*, 446 U.S. at 652 (citing *Califano*, 435 U.S. 1). The Government relies on this statement to assert that it has a legitimate interest in avoiding a one-sided fiscal relationship with Puerto Rico, an interest that it says justifies denying disability benefits to disabled, indigent individuals in Puerto Rico when those same benefits are paid to similarly situated individuals on the mainland and elsewhere. Pet. 12.

The Government's attempt to tie the constitutionality of the SSI exclusion to independent tax provisions lacks merit. Federal income tax liability does not differentiate Puerto Rico residents who are otherwise eligible for SSI benefits from those residents elsewhere who receive SSI benefits. App. 28a; see *Hooper* v. *Bernalillo Cty. Assessor*, 472 U.S.

612, 622–623 (1985) (invalidating under rational basis a statute where the statutory "distinction * * * is not rationally related to the State's asserted legislative goal"); see also *Zobel* v. *Williams*, 457 U.S. 55, 63 (1982) (holding that "reward[ing] citizens for past contributions" through higher benefit levels "is not a legitimate state purpose"). Both groups make too little income by definition to pay federal income tax. App. 27a.

Nor do prior differences in income tax payments matter. Eligibility for SSI benefits does not turn on current or past contributions like some insurance programs. See 42 U.S.C. § 1382 (setting out general eligibility requirements); compare 42 U.S.C. § 401(b), and 42 U.S.C. § 1395i, with 42 U.S.C. § 1381. It is irrelevant to SSI eligibility whether an individual resides in New York and pays federal income tax for much of their adult life before moving to Puerto Rico (like Vaello Madero), or whether they live in Puerto Rico their entire life before moving to New York, where they would be eligible for SSI benefits.

In its petition, the Government suggests that the equal protection analysis should turn not on consideration of the actual statutory exclusion at issue but on the neighbors of those excluded. Pet. 17. But "[w]hen a state distributes benefits unequally, *the distinctions it makes* are subject to scrutiny under the Equal Protection Clause." *Hooper*, 472 U.S. at 618 (emphasis added). In any event, the statute does not draw classifications based on regional, State, or territorial contributions to the general fund of the Treasury, likely because estimates of individuals' contributions to the nation are an improper basis for withholding welfare benefits. See *Zobel*, 457 U.S. at 63. If the statute did

make such distinctions, Puerto Rico residents might well be included, while residents of other States might not. As the First Circuit found, Puerto Rico has regularly contributed more to the U.S. treasury than many States (although unlike those States, it does not have representatives who can vote in Congress). App. 20a–23a (noting that, from 1998 until 2006, Puerto Rico contributed more annually to the federal treasury than "Vermont, Wyoming, South Dakota, North Dakota, Montana, and Alaska, as well as the Northern Mariana Islands" and continues to "pay substantial sums into the federal treasury through the IRS").

Moreover, nothing in the statute links SSI eligibility to any provision of the tax code. Congress could decide tomorrow to extend all federal income tax obligations to Puerto Rico, and Puerto Rico residents would remain ineligible for SSI.[8] Congress can and has unilaterally extended additional tax burdens to Puerto Rico residents at will, including after the enactment of the Social Security Act. Compare 26 U.S.C. § 933 (exempting Puerto Rico residents from federal income taxes *only* as to income "from sources within Puerto Rico"), with Revenue Act of 1918, ch. 18, § 261, 40 Stat. 1057, 1087–1088 (1919) (exempting Puerto Rico residents from federal income taxes on income from sources within Puerto Rico *and* from foreign jurisdictions); see also Small Business Job Protection Act of 1996, Pub. L. No. 104-188, Tit. I(f), § 1601(a), 110 Stat. 1755, 1827 (phasing out over ten years a business income tax credit for Puerto Rico that had thereunto been available under

[8] Likewise, Congress could exempt any State or the District of Columbia from federal income tax, and their residents would remain eligible for SSI under current eligibility requirements.

26 U.S.C. § 936). Even so, the Government would likely continue to argue that the exclusion is constitutional.

Finally, after neglecting the issue before the court of appeals, the Government again attempts to invoke the supposed economic disruption that would result from giving benefits to the poor. Pet. 13. The Government's theory is that it is rational to deny these benefits because people in Puerto Rico, more so than elsewhere, will not work if governmental benefits are available. As Justice Marshall noted in dissent in *Harris*, "[t]his rationale has troubling overtones." 446 U.S. at 655 (Marshall, J., dissenting). Although the Government's reluctance to lean directly on this theory before the First Circuit seems to be a recognition that this contention is irrational (and perhaps invidious), the First Circuit in any event adequately explicated that this "rationale" holds no explanatory power.

Again, this disruption theory overlooks the fact that SSI recipients (disabled, blind, and elderly individuals) generally are not able to work. See App. 27a; see also *Peña Martinez* v. *United States Health & Human Sevs.*, No. 18-01206-WGY, 2020 U.S. Dist. LEXIS 138894, at *30 (D.P.R. Aug. 3, 2020). More broadly, there is no statutory connection between eligibility for SSI benefits and local economic conditions. Similar contemporaneous concerns about the effects of extending SSI benefits to Alabama and Mississippi were expressed by the legislature, although those States were ultimately included in the program. *Briefing on Puerto Rico Political Status by the General Accounting Office & the Cong. Research Serv.: Hearing Before the Subcomm. of Insular & Int'l Affs. of H. Comm. on Interior &*

Insular Affs., 101st Cong. 34 (1990) (statement of Carolyn Merk, Specialist in Social Legislation) (noting concerns during the passage of the 1972 SSA Amendments about extending federal benefits to low income States such as Alabama and Mississippi).

Aside from being irrational, the only support provided in *Califano* or *Harris* for this supposed justification is a reference to a 1976 congressional report that expressly rejects it. See App. 18a (citing Dep't of Health, Educ., & Welfare, *Report of the Undersecretary's Advisory Group on Puerto Rico, Guam and the Virgin Islands* 6–7 (1976) ("[T]he current fiscal treatment of Puerto Rico * * * is unduly discriminatory and undesirably restricts the ability of these jurisdictions to meet their public assistance needs.")). The Government refers to the work of labor economists who have applied general concepts applicable in low income areas to an assessment of Puerto Rico, an exercise shedding no light on the relative local economies of Puerto Rico, the Northern Mariana Islands, or various other indigent regions in the United States.

No rational basis exists for the classification at issue. Instead, it is what it appears to be: the singling out of a discrete and insular minority for second-class treatment that gives lie to their status as equal Americans. *Carolene Prods.*, 304 U.S. at 152 n.4. As in *Windsor*, the use of this classification to "impose a disadvantage, a separate status, and so a stigma" on the relevant class through the withholding of benefits is inconsistent with the constitutional guarantee of equal protection. 570 U.S. at 770. The principal purpose of the SSI exclusion is "to impose inequality." *Id.* at 772. The "bare * * * desire to harm" embedded in the exclusion

of Puerto Rico residents is unconstitutional, and the courts below were correct to strike it down. *United States Dep't of Agric.* v. *Moreno*, 413 U.S. 528, 534 (1973).

B. The First Circuit's Rational Basis Analysis Is Consistent with This Court's Jurisprudence

The First Circuit's analysis does not conflict with this Court's precedent.

The First Circuit relied on *Califano* and *Harris* to determine that rational basis review applied and to identify considerations relevant under that level of scrutiny, see, *e.g.*, App. 19a., even though it recognized that those two summary dispositions have limited precedential scope, see *id.* at 14a–16a.[9] Because those cases were premised on truncated factual records in the context of summary proceedings, and because neither decided the validity of the SSI exclusion under equal protection principles, the court below properly based its analysis not on the assumption that the facts as stated in those decisions remained correct, but on the undisputed facts before it. See, *e.g.*, *id.* at 14a–15a.

Neither case controls the outcome here. *Califano* is not an equal protection case. It is a right-to-travel case. The *Califano* Court determined outright that the SSI exclusion did not implicate the respondent's right to travel, and so declined to scrutinize it. 435 U.S. at 4 ("This Court has never held that the constitutional right to travel embraces any such

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[9] This precedential limitation applies to summary per curiam opinions like those in *Califano* and *Harris*. See, *e.g.*, *U.S. Bancorp Mortg. Co.* v. *Bonner Mall P'ship*, 513 U.S. 18, 24 (1994).

doctrine [of retaining benefits that an individual received in a prior state of residence], and we decline to do so now."). Not all legislation is subject to review under the right to travel. See *United Bldg. & Constr. Trades Council* v. *Camden*, 465 U.S. 208, 218 (1984).

By contrast, it is undisputed that the classification of Puerto Rico residents under the SSI program is subject to equal protection review. Under rational basis, this analysis asks whether the categorization itself, rather than any burden it places on an individual's ability to travel, is rationally related to a legitimate government interest. *Moreno*, 413 U.S. at 533; see also *Zobel*, 457 U.S. at 60. This Court has applied rational basis review under equal protection principles to strike down legislation that would have survived a right-to-travel challenge because it did not burden interstate travel. See*, e.g.*, *Moreno*, 413 U.S. at 538 (striking down a restriction on access to food stamps by any household with unrelated individuals). As such, *Califano* provides little guidance.

Harris is also unilluminating. *Harris* addressed federal-territorial relations in the context of a program expressly tied to local conditions and contributions, the Aid to Families with Dependent Children (AFDC) program. 446 U.S. at 651; see Social Security Act, Pub. L. No. 74-271, Tit. IV, § 401, 49 Stat. 620, 627 (1935) (stating that the purpose of AFDC block grants was to "enabl[e] each State to furnish financial assistance and rehabilitation and other services, as far as practicable under the conditions in such State"). By contrast, the SSI program provides uniform federal payments according to uniform national criteria.

Finally, the Government cites decisions upholding laws that establish different governmental institutions in different regions, *Lewis*, 101 U.S. at 29, or that make geographic location an element of a crime, see, *e.g.*, *McGowan* v. *Maryland*, 366 U.S. 420, 427 (1960) among others. None of these cases, however, held that geographic distinctions are immune from review altogether. To the contrary, on several occasions, this Court has invalidated territorial distinctions on equal protection grounds. See *Reynolds* v. *Sims*, 377 U.S. 533, 583 (1964); *Griffin* v. *County School Bd.*, 377 U.S. 218, 231 (1964); *Gray* v. *Sanders*, 372 U.S. 368, 379–380 (1963). The First Circuit was correct to do so here, and this Court's precedent compels it.

CONCLUSION

For the reasons above, the Court should deny certiorari or grant plenary review.

Respectfully submitted,

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