No. 20-303

In The
Supreme Court of the United States

UNITED STATES OF AMERICA,

Petitioner,

v.

JOSÉ LUIS VAELLO-MADERO,

Respondent.

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

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

DOMINGO EMMANUELLI-HERNÁNDEZ
Attorney General
FERNANDO FIGUEROA-SANTIAGO
Solicitor General
DEPARTMENT OF JUSTICE
COMMONWEALTH OF PUERTO RICO
P.O. Box 9020192
San Juan, PR 00902

CARLOS LUGO-FIOL
Counsel of Record
P.O. Box 260150
San Juan, PR 00926
(787) 645-4211
clugofiol@gmail.com

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

QUESTION PRESENTED

1. 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.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES—Continued

Page

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

OTHER AUTHORITIES

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." Puerto Rican United States citizens enjoy far lesser rights than other United States citizens merely because of Puerto Rico's status as an unincorporated territory. This inferiority 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 to Puerto Rico 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,

---

[1] Pursuant to Supreme Court Rule 37.3, the Commonwealth hereby informs that all parties have consented to the filing of this brief. *Amicus* and its counsel have authored the entirety of this brief, and no person other than *amicus* or its counsel has made a monetary contribution to the preparation or submission of this brief.

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 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 unconstitutionally unequal and inferior treatment, by being excluded from the SSI program for the sole reason of living in 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 residents of Puerto Rico from the SSI program violates their right to equal protection of the law under the Fifth Amendment.

Petitioner filed the instant petition seeking reversal of the First Circuit's decision. This court granted *certiorari* to decide the petition on the merits. In its Brief, Petitioner changed the structure of its argument, alleging, essentially, (1) that the First Circuit erred in determining that there is no rational basis to support Congress' decision to exclude residents of Puerto Rico from the SSI program; (2) that heightened scrutiny under the Equal Protection Clause is not warranted in this case; and (3) 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).

The Commonwealth disagrees with Petitioner. First, the doctrine of territorial incorporation created in *The Insular Cases*, which has placed Puerto Ricans in a grossly inferior position solely for reason of race and/or alienage, is the real basis for the classification established by Congress in excluding Puerto Ricans from the SSI program, which therefore merits heightened scrutiny under the Equal Protection Clause. Second, as the First Circuit correctly found, in a very thorough and careful analysis, even under the deferential rational-basis scrutiny, the exclusion of Puerto Ricans from the SSI program does not satisfy this test. Third, the decisions of this Court in *Torres* and *Rosario* do not dispose of the question of whether the exclusion of Puerto Rico residents from the SSI program is constitutional. Therefore, the judgment of the First Circuit should be affirmed.

ARGUMENT

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

The decision of Congress to exclude Puerto Rico residents from the SSI program is grounded 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, commonly known as the "incorporation doctrine," is a major cause of the gross inferiority suffered by Puerto Rican United States citizens who live in Puerto Rico and is an essential part of this case. Congress, enabled by this doctrine, has consistently exercised its powers under the Territory Clause in ways that have further placed Puerto Rican United States citizens in an inferior position to their peers in the States, and even in other territories.

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).[2] It was then clear that territories acquired by the United States would only be in such status temporarily and that the protections of the Constitution extended to the persons living therein.

In *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

[2] 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.

> 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.

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.

The *Insular Cases*, thus, established a new category of "unincorporated" territories, based solely on the race and/or alienage of its inhabitants, in which they would have substantially inferior rights to those of inhabitants of "incorporated" territories, until Congress saw fit to incorporate the territory. However, this Court set no time limit whatsoever for Congress to determine whether to incorporate a territory; thereby enabling it to hold unincorporated territories indefinitely.

In the Jones Act of 1917,[3] Congress, among others, granted United States citizenship to all inhabitants of Puerto Rico. This contradicted 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 persons born in 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

---

[3] *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.

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 (1922), this Court reaffirmed the distinction between incorporated and non-incorporated territories, notwithstanding the grant of United States citizenship to persons born in Puerto Rico in the Jones Act. In *Balzac*, this Court recognized that, when Congress grants United States citizenship to natives of a territory, this usually entails its incorporation, as was the case for Alaska. See *Rasmussen v. United States*, 197 U.S. 516 (1905). However, in *Balzac* this Court distinguished the situation of the Puerto Rico territory, 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. 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 to one of the States if they want 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*, supplemented by *Balzac*, established a class of "unincorporated territories" which places Puerto Rican United States citizens in a separate and inferior status to that of other United States citizens solely on the basis of their race and national origin. 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*,[4] this Court, in sustaining racial segregation in public schools, had stated that "[t]he

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

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." In *Brown*, this Court determined that racial segregation in public schools is constitutionally unacceptable, stating that "[t]o separate [children in grade and high schools] from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone." *Brown*, 347 U.S. at 494.

The principles articulated by this Court in *Brown* are equally applicable in this case. The Commonwealth asserts that the notion of Puerto Rico being "unincorporated" because of cultural and racial differences establishes a status of inferiority which offends our nation's post *Brown v. Board of Education* view of equality before the law. This situation becomes worse when it is also considered that Congress is being allowed under the incorporation doctrine to hold Puerto Ricans in this situation indefinitely. The Commonwealth respectfully suggests that in this case, this Court may remedy this situation.

Equal Protection

The Commonwealth has already established in this brief that the doctrine of incorporation established in the *Insular Cases* have placed Puerto Rican United States citizens who live in Puerto Rico in a separate, disadvantaged class—in effect, a second-class citizenship—on the sole basis of race and/or alienage, and that Congress may maintain this inequality indefinitely. The Commonwealth submits that, in light of this situation, the exclusion of Puerto Rico from the SSI program must be examined under the Equal Protection Clause using strict scrutiny.

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 any analysis 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).

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 this 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 stated 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.[5]

---

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

Decades later, Puerto Ricans deserve a fresh look at the basis for this discrimination.

On Equal Protection, this Court's 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, 371-372 (1971).

However, in *Rosario*, this Court stated that all classifications established by Congress under the Territory Clause should be examined under the rational basis standard. This has the consequence of abridging the right of inhabitants of territories to equal protection of the laws, against acts of Congress, regardless of whether they affect a "discrete and insular" minority, as Puerto Rican residents have shown to be in this brief. That is, Congress legislation which would not otherwise survive strict or intermediate Equal Protection scrutiny because it discriminates against suspect classes, would be allowed in Puerto Rico merely because it is an "unincorporated territory." The Commonwealth respectfully asserts that such a result is untenable.

Strict scrutiny should be applied in this case to eliminate the exclusion of Puerto Rico from the SSI program, and to begin to correct more than 120 years of discrimination and inequality against Puerto Rican United States citizens.

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.[6] 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,[7] and the federal unemployment compensation program

According to the U.S. Government Accountability Office (GAO),[8] 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 reveals that the IRS collected $3.52 billion in federal taxes on individuals and businesses in Puerto Rico in Fiscal Year 2015.[9]

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."[10] Comparing this to SSI benefits, if Puerto Ricans qualified,

---

[6] 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.

[7] 26 U.S.C. §§3101, 3121(b)(i) and 3121(e)(1).

[8] U.S. Government Accountability Office, GAO-14-31.

[9] *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.

[10] *Id*.

the "estimated federal spending would have ranged from $1.5 billion to $ 1.8 billion."[11]

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.

Further, generally, "SSI makes monthly payments to people who have low income and few resources, and who are: Age 65 or older; blind; or disabled."[12] 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."[13] Clearly, the SSI is a program that benefits individuals who do not pay federal income taxes anyway because their income is too low.

The third factor, regarding the supposed disruption of Puerto Rico's economy as a result of including it

---

[11] *Id.*

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

[13] *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.

in the SSI program,[14] differs from the current economic facts. According to another recent Government 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 it 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

---

[14] 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*, 905 F. 3d 26, 32 (1st Cir. 2018); *Landrau-Romero v. Banco Popular de Puerto Rico*, 212 F. 3d 607, 616 (1st Cir. 2000). At page 24, n.2 of its Brief, Petitioner states that this allegation has been disputed as an empirical matter, but does not clearly reject it. Therefore, although the Commonwealth respectfully asserts that this Court should also deem this issue waived; it will briefly discuss.

[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.

benefits.[16] The objection to extending SSI benefits to Puerto Rico because they do not pay Federal income taxes 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.

In its Brief, Petitioner argues that Congress had a rational basis to treat the Northern Mariana Islands differently from Puerto Rico because it reached a treaty with that territory to form a Commonwealth and it has such power under the Territory Clause. This allegation, however, does not refute that, in this regard, Congress has placed Puerto Rican United States citizens in an inferior position to that of other United States citizens by generally excluding them from the SSI program. Rather, it exemplifies the arbitrary conduct of Congress in this matter.

Finally, Petitioner argues, for the first time, that Congress had a rational basis to exclude Puerto Rico from the SSI program because this would promote Puerto Rico's ability to govern itself. Presenting a rosy picture of the political relationship between Puerto Rico and the United States, Petitioner explains that Puerto Rico's status as a "Commonwealth" affords it a great degree of autonomy and self-determination,

---

[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.

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

particularly on fiscal matters, and that excluding it from the SSI, which is totally controlled by the Federal government, would respect and advance Puerto Rico's "local self-rule" and "self-government."

The Commonwealth disagrees. First, as Petitioner itself admitted in its Brief, the program which presently applies to Puerto Rico, the Aid to the Aged, Blind and Disabled (AABD), provides less funding than the SSI. Petitioner, however, does not tell how much less. In fact, the First Circuit stated in its Opinion that, during fiscal year 2011, the average AABD monthly payment was $73.85, while for that year, the average SSI payment in the States and the District of Columbia was of $438.05 and of $525.69 in the Northern Mariana Islands (App. Pet. 32a). The Commonwealth submits that no amount of territorial autonomy or "local self-rule" can compensate for this abysmal difference in benefits for individuals in dire economic need, and for the total lack of say that Puerto Ricans have had in this matter.

Petitioner has also described the relationship between Puerto Rico and the United States after enactment of Public Law 600 as "unique," because, for the first time, it provided a territory the opportunity to draft and approve its own constitution. This allegation is belied, however, by Congress' enactment on October 21, 1976 of Public Law 94-584, as amended, in which it authorized the territories of the United States Virgin Islands and Guam to call constitutional conventions to draft, within the existing territorial-federal relationship, a constitution for local self-government of their

people. Therefore, Puerto Rico is only the first, not the only, territory to have been authorized to draft a constitution to govern its local affairs, always within the confines of the Territory Clause.

More importantly, however, the sobering history of Congress' actions with regard to Puerto Rico since 1898 leaves no doubt that Petitioner's allegation that Puerto Rico enjoys a great degree of autonomy and self-determination is incorrect.

As stated before, Puerto Rico became a territory of the United States in 1898. In 1900, Congress enacted an Organic Act (Foraker Act) in which it established a civil government for Puerto Rico for which the President and Congress appointed the governor, the supreme court and the upper house of the legislature, and only the lower house was elected by Puerto Ricans. *Sánchez Valle*, 136 S. Ct. at 1868. Notably, although Congress in the Foraker Act allowed the Puerto Rico legislature to enact local laws, *id.*, the fact that the upper house was appointed by the Federal Government ensured Federal control over the Puerto Rico laws enacted, as well as the appointment of the Governor and the supreme court.

In 1917, Congress enacted another Organic Act (Jones Act), in which it granted United States citizenship to inhabitants of Puerto Rico and allowed them to elect the members of the Senate. *Id*. However, Congress retained control of the Puerto Rico government by the appointments of the President-appointed governor and supreme court.

In 1950, Congress approved Public Law 600, which authorized the people of Puerto Rico to "organize a government pursuant to a constitution of their own adoption," but reserved for itself the ultimate right of approval of this constitution. *Id.*, quoting Act of July 3, 1950, 64 Stat. 319. In accordance with the process set by Congress, Puerto Ricans first voted to accept Public Law 600, then a constitutional convention drafted a constitution, which was later approved by Puerto Rican voters. *Id*., at 1868-1869. Congress then reviewed and amended the draft constitution before approving it, and the document became final once the convention formally accepted Congress' conditions and the Puerto Rico governor issued a proclamation to that effect. *Id*., at 1869.

It must be emphasized that, in the process set forth under Public Law 600, Congress always acted in the exercise of its plenary powers over the territory of Puerto Rico. *Id*., at 1875-1876. Further, the process of consultation to the people of Puerto Rico, performed by Congress under Act 600, never offered to Puerto Ricans any alternative but to accept or reject Congress' proposal. Of course, rejection would have resulted in the continuation of the regime established by the Jones Act, in which case Puerto Ricans would not have been able to draft their own constitution or attain any increased measure of self-government, however limited.

That Congress never relinquished any of its plenary powers over Puerto Rico as an unincorporated territory is conclusively proven by the enactment of PROMESA on June 30, 2016. Pub. Law 114-187, 48

U.S.C. §2101 *et seq*. Congress enacted PROMESA in response to Puerto Rico's financial crisis. *Financial Oversight and Management Board for Puerto Rico v. Aurelius Investment, LLC*, ___ U.S. ___, 140 S. Ct. 1649, 1655 (2020). PROMESA allowed Puerto Rico and its entities to file for bankruptcy protection, by means of a special procedure before a United States District Court. *Id.* However, it also established a Financial Oversight and Management Board ("FOMB") for Puerto Rico.

The enormous extent of the FOMB's powers over Puerto Rico becomes apparent from a review of PROMESA. It reserves the power of Puerto Rico to control its territory by legislation or otherwise, but only to the extent such power is not limited by Titles I and II of the act. *Méndez-Nuñez v. Financial Oversight and Management Board for Puerto Rico*, 916 F. 3d 98, 104 (1st Cir. 2019), quoting 48 U.S.C. §2163. Further, PROMESA's provisions preempt "any inconsistent 'general or specific provisions of territory law', including provisions of Puerto Rico's Constitution." *Id.*, quoting 48 U.S.C. §2103.

Congress created the FOMB as an entity of the Puerto Rico government, and not as a federal entity. *Aurelius*, 140 S. Ct. at 1661, quoting 48 U.S.C. §2121(c). The FOMB, in its sole discretion, may designate, or exclude, any territorial instrumentality as a covered territorial instrumentality subject to the requirements of the act. 48 U.S.C. §2121(d)(1)(A) and (d)(2). It can also require the Governor to submit such budgets or

quarterly reports as it may require. 48 U.S.C. §2121(d)(1)(B).

The FOMB shall be composed of seven members appointed by the President as established in the act. 48 U.S.C. §2121(e). The Governor, or the Governor's designee, shall be an ex-officio member of the Board, but with no voting rights. 48 U.S.C. §2121(e)(3). All of the FOMB's expenses, including the salaries of its employees, are paid from Puerto Rico's funds. *Aurelius*, 140 S. Ct. at 1661.

The FOMB has ample investigatory powers. It can request and obtain any information, record, documents, data or metadata from any Puerto Rico governmental entity necessary to enable it to carry out its responsibilities. 48 U.S.C.A. §2124(c)(2). The FOMB also has subpoena power, enforceable pursuant to Puerto Rico laws and procedures, to obtain any information or testimony it may require from any person or entity. 48 U.S.C.A. §2124(f).

Where the FOMB's powers are greater in Puerto Rico is with regards to fiscal matters. In PROMESA, Congress provided for the preparing of fiscal plans to "provide roadways . . . to achieve fiscal responsibility and access to the capital markets." *Méndez-Nuñez*, 916 F. 2d at 104-105, citing 48 U.S.C. §2141(b)(1). The FOMB has the exclusive authority to review, approve and certify those fiscal plans. *Id.*, at 105, citing 48 U.S.C. §2141(c)-(e). The certification process runs on a timetable set by the FOMB, and begins with the submission of a proposed fiscal plan by the Governor. *Id.*,

citing 48 U.S.C. §2141(c). Then, the FOMB reviews the plan and determines whether it complies with the requirements established in 48 U.S.C. §2141(b)(1)(A)-(N). *Id.* If the Governor fails to submit a plan that the FOMB determines, in its sole discretion, that satisfies all the requirements by the time it had established, the FOMB will develop and submit to the Governor and the Legislature a fiscal plan that satisfies the requirements. *Id.*, at 106.

With regards to the yearly Commonwealth budgets, PROMESA grants the FOMB the exclusive authority to review, approve and certify them. *Id.*, at 109, citing 48 U.S.C. §2142. In this regard, the Legislature's sole responsibility is to "submit to the Oversight Board the territorial Budget adopted by the Legislature." *Id.*, quoting 48 U.S.C. §2142(c)(1).

PROMESA even prohibits the territorial government from reprogramming funds not spent in prior fiscal years in a subsequent budget, except with authorization of the FOMB. *Vázquez-Garced v. The Financial Oversight and Management Board for Puerto Rico (In re The Financial Oversight and Management Board for Puerto Rico)*, 945 F. 3d 3, 8 (1st Cir. 2019). Moreover, the FOMB's decisions on the certification of fiscal plans and territory budgets are completely immune from judicial review. *Méndez-Nuñez*, at 112, citing 48 U.S.C. §2126(e).

Therefore, PROMESA grants the FOMB exclusive authority to approve and certify both the fiscal plans provided by PROMESA and the territorial budgets of

the Commonwealth. *Ambac Assurance Corp. v. Commonwealth of Puerto Rico (In re Financial Oversight and Management Board for Puerto Rico)*, 927 F. 3d 597, 602 (1st Cir. 2019). The roles of the Governor and the Legislature under PROMESA have been reduced to prepare budgets subject to the approval or rejection of the FOMB, with no opportunity for the judicial branch to resolve any controversies that may arise between the Commonwealth and the FOMB on these matters. The control exercised by Congress through the FOMB over the Commonwealth in fiscal matters is now almost absolute.

Indeed, even the debt restructuring procedure set forth in Title III of PROMESA is controlled by the FOMB. Before an action may be filed under that Title, it must be certified by the FOMB. 48 U.S.C. §2124(j)(1) and (j)(2)(A). Further, it is the FOMB who files the action before the district court on behalf of the debtor territory. 48 U.S.C. §2146. During the Title III process, it is the FOMB who represents the territory, submits the debt restructuring plans and performs other filings. 48 U.S.C. §2175.

In light of the above, clearly the allegations made by Petitioner in its Brief that Puerto Rico presently enjoys great "local self-rule," "self-government" and "fiscal autonomy" are not correct. Although Puerto Rico still has the authority to govern, regulate and legislate over non-fiscal matters, the crude reality is that, without any control of fiscal matters and its budget, the Commonwealth's ability to formulate and implement public policy for the benefit of Puerto Ricans is severely

limited. In PROMESA, Congress partially overruled the Puerto Rico Constitution and inserted in the Puerto Rico government an entity with almost unlimited power to supervise it in all fiscal matters, which, in turn, affects the entire functioning of the Puerto Rico government.

The approval of PROMESA by Congress conclusively establishes that the regime established by Public Act 600 is not nearly as autonomous as the Petitioner alleges it to be. Pursuant to the Territory Clause, Congress has always retained its full plenary power over the people of Puerto Rico, and delegated none of it by approving Public Act 600. Even the most salient feature of Public Act 600, allowing the people of Puerto Rico to draft and approve their own constitution, which is the basis for Petitioner's assertion that the relationship between Puerto Rico and the United States is "unique," has been shown to be limited to the will of Congress. In approving PROMESA, Congress has effectively overruled the Puerto Rico Constitution and replaced it with a regime that has greatly limited Puerto Rico's ability to govern itself. Therefore, the new "rational basis" alleged by Petitioner, that, by excluding Puerto Rico from the SSI program, Congress was fostering Puerto Rico's self-rule and fiscal autonomy, is simply nonexistent, and utterly fails to justify such exclusion under the Equal Protection Clause.

The rational-basis analysis performed by the First Circuit in this case is correct. Petitioner has not shown 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 discriminatory classification. This is constitutionally unacceptable.

III. 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.

Petitioner'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,[18] Congress can discriminate against Puerto Rico if there is rational basis for this action. *Torres*, 435 U.S. at 5; *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**

[18] U.S. Const., Art. IV, §3, cl. 2.

not have before it a case or controversy regarding the equal protection component of the Fifth Amendment. *Id.*, at 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 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)

In their Brief, Petitioner does not adequately rebut the First Circuit's conclusion; therefore, its allegation that the decisions of *Torres* and *Rosario* dispose of this case lacks merit.

CONCLUSION

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

Respectfully submitted,

DOMINGO EMMANUELLI-HERNÁNDEZ
Attorney General
FERNANDO FIGUEROA-SANTIAGO
Solicitor General
DEPARTMENT OF JUSTICE
COMMONWEALTH OF PUERTO RICO
P.O. Box 9020192
San Juan, PR 00902

CARLOS LUGO-FIOL
Counsel of Record
P.O. Box 260150
San Juan, PR 00926
(787) 645-4211
clugofiol@gmail.com

Dated: September 2, 2021