No. 20-303

IN THE
Supreme Court of the United States

UNITED STATES OF AMERICA,

Petitioner,

v.

JOSE LUIS VAELLO-MADERO,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the First Circuit

BRIEF *AMICI CURIAE* OF THE SERVICE EMPLOYEES INTERNATIONAL UNION (SEIU), AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES (AFSCME), AMERICAN FEDERATION OF TEACHERS (AFT), AND INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA (UAW) SUPPORTING RESPONDENT

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INTERESTS OF AMICI CURIAE

The Service Employees International Union ("SEIU") is an international labor union with two million members in the United States, Canada, and Puerto Rico.[1] This includes tens of thousands of members in SEIU's Puerto Rico affiliates, Sindicato Puertorriqueño de Trabajadores y Trabajadoras, SEIU Local 1996 (in English, "Puerto Rico Workers' Union, SEIU Local 1996") and Unión General de Trabajadores, SEIU Local 1199 (in English, "General Workers' Union, SEIU Local 1199"). SEIU is committed to achieving racial and economic justice for all working people and has consistently advocated for a Puerto Rico that is economically sustainable, particularly throughout the island's bankruptcy proceedings.[2] More than 30,000 SEIU members work in Puerto Rico's public and healthcare sectors, serving in essential roles as, *inter alia*, hospital workers, school custodians, and street cleaners. SEIU's members firmly believe that ensuring the provision of Supplemental Security Income ("SSI") benefits to qualifying island residents is key to avoiding needless poverty and to putting Puerto Rico on an economically sustainable path.

The American Federation of State, County and Municipal Employees, AFL-CIO ("AFSCME") is a labor

[1] This brief was not authored in whole or in part by counsel for a party, and no one other than amici curiae and their counsel made a monetary contribution to the preparation or submission of this brief. All parties have consented to the filing of this brief.

[2] SEIU and the American Federation of Teachers, AFL-CIO, are members of the Official Committee of Unsecured Creditors in Puerto Rico's bankruptcy proceedings, but the unions submit this brief solely on their own behalf and not in their capacity as Committee members, nor in any way on behalf of the Committee.

union representing 1.4 million public service workers and retirees across the United States, including in Puerto Rico. AFSCME's Puerto Rico affiliate, Servidores Públicos Unidos de Puerto Rico, Concilio 95 AFSCME (in English, "United Public Servants, AFSCME Council 95") serves as the elected collective bargaining representative of more than 10,000 residents of the Commonwealth of Puerto Rico. Council 95's members service the Commonwealth and its localities in all manner of occupations, including as social workers, corrections officers, nurses, juvenile custodians and park rangers. In addition, AFSCME's separately chartered Capítulo de Retirados de SPU (in English, "SPU Retiree Chapter") comprises approximately 2,000 residents of Puerto Rico who are retired from public service and who advocate for fair and equitable treatment of public servants, particularly with respect to health and income security.

The American Federation of Teachers, AFL-CIO, ("AFT") is a labor union founded in 1916 and today represents 1.7 million members and nearly 250,000 retirees in more than 3,000 local affiliates nationwide, including in Puerto Rico. AFT members provide a broad spectrum of essential services including as educators, school paraprofessionals, higher education faculty and staff, nurses and healthcare professionals, and government employees. AFT's Puerto Rico affiliate, Asociación de Maestros de Puerto Rico (in English, "Association of Teachers of Puerto Rico"), represents more than 20,000 educators teaching and residing in Puerto Rico. Many of AFT's members residing in Puerto Rico and nationwide support providing SSI to the residents of Puerto Rico as a critical benefit for themselves and their families.

The International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW) (the "UAW") is a labor organization with more than 400,000 active and more than 580,000 retired members throughout the United States, Canada, and Puerto Rico. The UAW and its affiliated Local Unions represent more than 5,000 workers in the Commonwealth of Puerto Rico, including public sector workers at Puerto Rico's Departments of Education, Treasury, Agriculture, Transportation, Environmental Quality, Family Affairs, Youth Affairs, and Lottery, and private sector workers at AEELA—the Commonwealth's largest credit union—and at Pavia Hospital and Bacardi Corporation. These public and private sector workers and their fellow UAW retirees and their families seek to ensure that all qualifying island residents receive SSI benefits, benefits which will help sustain the Puerto Rican economy and alleviate poverty on the island.

SEIU, AFSCME, AFT and UAW submit this brief on behalf of both their members who currently live in Puerto Rico and their members within the 50 states who cannot return to the island without forfeiting SSI benefits. Thousands of union members in the mainland United States regularly choose to move to Puerto Rico upon their retirement or disability, and many more have family members who reside on the island. Thus, many union members living stateside are in a situation similar to respondent's. After having served the public faithfully, often in healthcare and public safety roles, they are unable to return home to Puerto Rico without losing SSI they need to survive.

INTRODUCTION AND SUMMARY OF ARGUMENT

Amici submit this brief to respond in particular to the United States' inaccurate and patronizing claims that denying SSI benefits to needy Puerto Ricans furthers the island's fiscal "autonomy," is justified by the island's ability to allocate its own tax revenue to provide benefits instead, and serves the purpose of avoiding disruption to the island's economy. None of these claims is true, and none provides a rational basis for denying SSI benefits to Puerto Rico's residents.

First, Puerto Rico is a de facto colony, notwithstanding the United States' platitudes about "mutual respect," and any fiscal autonomy the island once maintained was stripped by enactment of the Puerto Rico Oversight, Management, and Economic Stability Act ("PROMESA"), which created an unelected, presidentially appointed Oversight Board (known as "la Junta") with authority to dictate Puerto Rico's fiscal policy. The Oversight Board retains ultimate control over Puerto Rico's budget and spending and actively seeks court intervention to prevent the island's elected government from taking steps that conflict with the Board's own priorities, including steps to allocate funds for social programs rather than debt service. Whatever may have been the case with respect to Puerto Rico's fiscal autonomy when this Court issued its decisions in *Califano v. Torres*, 435 U.S. 1 (1978) (per curiam), and *Harris v. Rosario*, 446 U.S. 651 (1980) (per curiam), Puerto Rico no longer controls its own budget or spending, negating one of the United States' principal arguments.

Second, nothing about Puerto Rico's tax status justifies continued SSI discrimination. Puerto Ricans pay more than $4 billion annually in federal taxes, and data show that more than one-third of all U.S. states and the District of Columbia receive a higher net federal outflow per capita, i.e., federal expenditures minus federal taxes, than Puerto Rico. Nor is it possible for the island to raise additional revenue in order to fund increased benefits: There are no meaningful additional taxes that can be wrung from the already highly taxed and comparatively poor residents of Puerto Rico, and, in any event, the Oversight Board (not Puerto Rico) controls the island's tax and spending policies.

Finally, to the extent the United States continues to advance an avoid-economic-disruption theory, that theory also provides no rational basis for discriminating against poor and disabled island residents. The United States has always disrupted, and continues to this day to disrupt, Puerto Rico's economy on a massive scale, and nothing about ending SSI discrimination against island residents will have any meaningful effect with respect to that metric. To the extent the United States equates disruption with economic harm, the truth is that extending SSI benefits to Puerto Ricans will only improve the island's economy. Indeed, ending SSI discrimination might go at least some small way toward remedying the various economic disasters caused in Puerto Rico by failed United States interventions of the past.

ARGUMENT

I. Puerto Rico's Purported "Fiscal Autonomy" Does Not Provide a Rational Basis for Denying SSI Benefits.

The United States' brief is riddled with cynical claims that denying aid to needy Puerto Rico residents is a measure of the federal government's "respect" for the island's "fiscal autonomy." Pet'rs' Br. 2, 10, 15, 23, 24 n.2. But as the United States knows, PROMESA stripped island residents and elected officials of control over Puerto Rico's fiscal policy, including with respect to social welfare spending.

A. Under PROMESA, a Federally Appointed Oversight Board Deprives Puerto Rico of Fiscal Autonomy and Sets the Island's Spending Priorities.

Whatever may have been said about Puerto Rico's "fiscal autonomy" when this Court decided *Torres* and *Rosario*, reality today is that PROMESA has stripped Puerto Rico of control over its own fiscal policy.

Under PROMESA, Puerto Rico's assets and budget are controlled by a federally appointed Oversight Board. The Oversight Board consists of seven unelected members appointed by the President. 48 U.S.C. §2121(e). The Governor of Puerto Rico sits as an ex officio member of the Board but has no voting power. *Id*. The Oversight Board has been given broad authority to "supervise and modify Puerto Rico's laws (and budget)." *Fin. Oversight & Mgmt. Bd for P.R. v. Aurelius Inv.*, 140 S. Ct. 1649 (2020) (citations omitted).

In particular, the Oversight Board determines Puerto Rico's "fiscal plan," which accounts for all island revenues and expenditures and "shall provide a method" to achieve the Board's vision of "fiscal responsibility." 28 U.S.C. §2141(b). Puerto Rico's governor is allowed to draft a proposed fiscal plan of his or her own, but the governor must submit any proposed plan to the Oversight Board, which retains "sole discretion" either to approve or disapprove it. *Id*. §2141(c). If the Oversight Board disapproves the governor's plan, the Board issues a "notice of violation" to the governor who must then try again. *Id*. If the Oversight Board is still not satisfied, it may replace the Government of Puerto Rico's plan with one of its own. *Id*. §2141(d)(2);

see also Ambac Assurance Corp. v. Commonwealth of P.R. (In re Fin. Oversight & Mgmt. Bd.), 297 F. Supp. 3d 269, 284 (D.P.R. 2018) (holding that the court lacks jurisdiction to review the Board's certification of the island's fiscal plan).

The Oversight-Board-determined "fiscal plan" in turn controls Puerto Rico's budget, including with respect to revenue sources and public expenditures. The island's governor and legislature must submit any proposed budget to the Board, which has authority either to certify the budget as consistent with its approved fiscal plan or to determine that the budget is "not compliant" with the fiscal plan's requirements. 28 U.S.C. §2142(c), (d); *see also Fin. Oversight & Mgmt. Bd. v. Vazquez Garced (In re Fin. Oversight & Mgmt. Bd.)*, 616 B.R. 238, 253–54 (D.P.R. 2020) (according *Chevron* deference to the Board's determinations regarding compliance with its plan). If the governor and legislature persist in submitting non-compliant budgets, the Oversight Board may set the budget itself. 28 U.S.C. §2142(c), (d). And if the island's elected officials later approve any spending that is inconsistent with the Board-certified budget, the Board has statutory authority effectively to take over the island's expenditures and reduce any spending other than for debt service. *Id.* §2143.

B. Contrary to the United States' Claim, Puerto Rico's Government Cannot Expand Social Welfare Benefits.

The United States claims that the current system advances legitimate interests in "local self-rule" and "self-governance" because it leaves Puerto Rico's government free to "use [its] money to increase benefit levels in the AABD [Aid to the Aged, Blind, and Disabled] program" or "use [its] money to fund a territorial supplement outside the AABD program." Pet'rs' Br. 23. These arguments fly in the face of reality: Puerto Rico is not free to do either of these things because the federally appointed Oversight Board has sole discretion over the island's fiscal plan. And if the Puerto Rican government ever tried to expand social welfare benefits inconsistently with that plan, the Board would seek and obtain an injunction to block the additional spending.

The Court need not speculate as to what might happen if Puerto Rico's government sought to expand social welfare spending because it has already tried—and been blocked by the Oversight Board. In 2016, the Board exercised its authority under PROMESA to place Puerto Rico in bankruptcy proceedings, in which the Board serves as trustee. *See* 48 U.S.C. §2124(j); Pet. for Relief Pursuant to Title III of PROMESA, *In re Fin. Oversight & Mgmt. Bd. for P.R.*, No. 3:17-bk-03283 (Bankr. D.P.R. May 03, 2017). In that role, the Oversight Board has sought injunctive relief to block increased social welfare spending supported by the people of Puerto Rico and their elected representatives. For example, when the island's elected leaders recently attempted to implement a statute that would have increased spending on pensions for municipal employees, the Oversight Board sought and obtained an injunction blocking implementation. *Vazquez Garced*, 616 B.R. at 256. Similarly, when Puerto Rico's elected leaders acted to increase reimbursements to island pharmacies for their purchase of medications, the Oversight Board obtained an injunction blocking the government's efforts. *Vazquez Garced v. Fin. Oversight & Mgmt. Bd. (In re Fin. Oversight & Mgmt. Bd.)*, 511 F. Supp. 3d 90, 100 (D.P.R 2020).

The Oversight Board's previous actions, approved by the bankruptcy court, show what would happen if Puerto Rico sought to expand the AABD program. The island's government would enact a bill to increase funding for AABD, either to increase monthly benefits, expand eligibility, or both. The government would then have to seek Oversight Board approval for its additional expenditures, and, because the Board's stated goals focus on debt repayment and balanced budgets, the Oversight Board would almost certainly refuse to certify a fiscal plan containing the increased AABD spending.[3] If the government persisted, the Board would likely follow its past practice and seek injunctive relief to block the government's action. The presiding court, in turn, would likely follow its past practice and enjoin Puerto Rico from enforcing its statutory enactment, as happened in the cases already discussed.[4]

In sum, the United States' assertions that denying aid to Puerto Rican residents furthers island autonomy are simply not true. A federally appointed Oversight Board controls the island's budget and, as it has before, can block any local effort to expand social welfare spending. The government's fantasy of an independent, fiscally autonomous Puerto Rico cannot provide a rational basis for discriminating against poor and disabled island residents because it is not supported by fact. *See FCC v. Beach Communications, Inc.*, 508 U.S. 307, 313 (1993).

[3] This is particularly likely given the cost of AABD expansion in Puerto Rico to match SSI. *See infra* section II.A.

[4] Should the island's government attempt to expand AABD spending outside the legislative process, PROMESA allows the Oversight Board to override any attempt to reprogram budgetary expenditures. *See* 48 U.S.C. §§2142(d)(2), 2143(d)(1), 2144.

II. Puerto Rico's Purportedly "Unique" Tax Status Also Does Not Justify Discrimination Against Island Residents.

The United States' two-part tax argument is that Puerto Rican residents pay little in federal tax, which itself justifies their exclusion from SSI, and that Puerto Ricans' low federal tax payments leave money available to fund replacement welfare benefits. The United States is wrong on both counts.

A. Island Residents Pay Much More in Federal Taxes Than It Would Cost To Extend SSI Benefits.

Torres's forty-three-year-old dicta about SSI discrimination being rational due to Puerto Rico's "unique tax status" is no longer grounded in fact. Island residents consistently contribute more in federal taxes than it would cost to extend SSI benefits—and more than many other states whose residents are covered by the SSI program.

Specifically, Puerto Rico's residents contribute more than $4 billion annually to the federal treasury in the form of Social Security, Medicare, and payroll taxes. Pet. App. 21a. That is much more than the $1.8 billion estimated cost of extending SSI benefits to Puerto Rico—a cost that must in any event be shared between the federal and island governments. *See* U.S. Gov't Accountability Office, *Puerto Rico: Information on How Statehood Would Potentially Affect Selected Federal Programs and Revenue Sources, GAO-14-31*, at 82 (March 2014). Puerto Rico's $4 billion in annual payments is also more than the tax contribution of a number of states, including Vermont, Wyoming, South Dakota, North Dakota, Montana, and Alaska, as well as the Northern Mariana Islands. Pet. App. at 22a

(Court of Appeals analysis of characterization of Puerto Rico's tax contributions).

The flaw in the United States' argument becomes even clearer when one looks at net federal transfers per capita, i.e., the amount that the federal government sends to a particular state or territory, less the amount that that state or territory sends to the federal government in taxes, adjusted for population. Experts who examined the most recent available data regarding net per capita outflow found that "in more than one-third of all the states, . . . the net amount per capita received from the federal government—federal expenditures minus federal taxes—was greater than the net amount per capita received in Puerto Rico from the federal government." Arthur MacEwan & J. Thomas Hexner, *Puerto Rico: Quantifying Federal Expenditures*, Ctr. for Glob. Dev. & Sustainability, Brandeis Univ., 3–4 (Oct. 11, 2016), available at https://heller.brandeis.edu/gds/pdfs/working-papers/puerto-rico-quantifying-federal-expenditures.pdf. Maryland, Virginia, and the District of Columbia all receive more in net per capita federal transfers than Puerto Rico, as do fifteen other states as well. *Id.*

Thus, "the reality . . . belies the conventional wisdom," parroted in the government's brief, that Puerto Rico receives a "unique" level of financial assistance from the federal government. *Id.* at 2. On the contrary, hard data show that by "a reasonable comparative standard, Puerto Rico is not treated 'generously' by the federal government" and receives less per capita than many other states. *Id*; *see also* Nelson A. Denis, Editorial, *Taxing Puerto Rico To Death*, Orlando Sentinel (Jan. 10, 2018) (notwithstanding the "national misperception" that "taxpayers in Puerto Rico . . . pay less than their fair share[,]" "Puerto Ricans on the island are the most heavily taxed of all U.S. citizens"), https://www.orlandosentinel.com/opinion/os-ed-taxing-puerto-rico-to-death-20180110-story.html.

It is also important to note that when *Torres* was decided, Congress had recently enacted Section 936 of the Internal Revenue Code, which exempted American firms in Puerto Rico from federal taxes on their Puerto Rican profits, even if those profits were returned to the United States. Section 936, passed in 1976, was a benefit to firms in Puerto Rico and helped to generate growth that improved economic and social conditions on the island—for a time. *See* César J. Ayala, *The Decline of the Plantation Economy and the Puerto Rican Migration of the 1950s*, 7 Latino Studies J. 61, 70 (1996). As this Court explained in its recent *Aurelius Investment* decision, however, Congress ended application of Section 936 to Puerto Rico via a 1996 statute that set a 2006 sunset date for the provision. *Aurelius Inv.*, 140 S. Ct. at 1655.

To be sure, Puerto Ricans do not pay federal income tax (unless they are federal employees), but focusing on that one fact as the United States does is misleading in the extreme. Poverty on the island is so widespread that average per capita income is only $12,914, *see* U.S. Census Bureau, *Quick Facts: Puerto Rico*, https://www.census.gov/quickfacts/PR (last visited Aug. 31, 2021), which, for a single income tax filer, would result in tax of only $51, TaxAct, Tax Bracket Calculator, https://www.taxact.com/tools/tax-bracket-calculator (last visited Aug. 30, 2021). Various polices imposed by the United States on Puerto Rico more than offset that minimal loss to the federal treasury: U.S. law makes consumer goods significantly more expensive on the island than on the mainland, which amounts to an effective $500 per person tax, *see*

Denis, *supra*, and goods exported from Puerto Rico through U.S. corporations are subject to an extra 12.5% tax, imposing yet another burden on island residents, *see* Brittany De Lea, *Tax Reform in US "Hinders" Puerto Rico Recovery: Gov. Rosello*, Fox Business (Feb. 15, 2018) (summarizing 12.5% tax added as part of the Tax Cuts & Jobs Act of 2017), https://www.foxbusiness.com/politics/tax-reform-in-us-hinders-puerto-rico-recovery-gov-rossello.

The notion that Puerto Ricans pay less and take more is a myth, not fact. The United States might traffic in that myth to support its policy of SSI discrimination, but myth does not provide a rational basis.

B. Puerto Rico Has No Excess Tax Revenue Available To Expand Non-SSI Benefits.

The second part of the United States' tax theory is that Puerto Rico is left with significant tax revenue that it can re-allocate to social welfare spending in order to match SSI. *See* Pet'rs' Br. 9–10. Part I of this brief gave one reason why that is wrong: namely, the island's spending is controlled by a federally appointed Oversight Board, not Puerto Rico itself. The argument is also wrong for the second, equally fundamental reason that Puerto Rico has no excess tax revenue available to expand AABD benefits and no prospect of generating sufficient additional funds to do so in the near future.

Despite government spending that has not kept up with inflation,[5] Puerto Rico is impoverished. The

[5] Contrary to claims that Puerto Rico has engaged in profligate spending, the island has not increased its budget enough to keep up with inflation. To do so, the government would have had to spend about 9% more in 2018 than it did in 2008, but it did not.

island is currently in bankruptcy, and in fiscal year 2015 spent only $8.4 million on AABD benefits and $1.3 million on associated administrative costs. William R. Morton, Cong. Research Serv., 7-9453, *Cash Assistance for the Aged, Blind, and Disabled in Puerto Rico* 10 (2016). There is simply no money available that could come close to providing the $1.8 billion in benefits that island residents would receive via SSI. *See Puerto Rico: Information on How Statehood Would Potentially Affect Selected Federal Programs and Revenue Sources, GAO-14-31*, *supra*, at 82.

Nor is it possible for Puerto Rico to raise taxes to generate additional revenue. Puerto Rico has a poverty rate of 43.5%, *see Quick Facts: Puerto Rico*, *supra*, which is more than twice the poverty rate in the poorest state, Mississippi, *see* U.S. Census Bureau, *Quick Facts: Mississippi*, https://www.census.gov/quickfacts/MS (last visited Aug. 26, 2021). Median income on the island is only $20,539, compared to $45,081 in Mississippi. *Compare Quick Facts: Puerto Rico*, *supra*, *with Quick Facts: Mississippi*, *supra*. At the same time, Puerto Rico's residents pay a sales tax of 11.5%, which is the highest in the United States, *see* Sales Tax Inst., *State Sales Tax Rates* (Sept. 1, 2021), https://www.salestaxinstitute.com/resources/rates, and their Puerto Rico income tax rates are similar to those applied at the federal level, *compare* PricewaterhouseCoopers,

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See U.S. Bureau of Labor Statistics, CPI Inflation Calculator, (accounting for inflation, the island's $9.5 billion budget in 2012 should have grown to approximately $10.5 billion in 2018), https://www.bls.gov/data/inflation_calculator.htm (last visited Aug. 8, 2021); *see also* Banco de Desarrollo Económico para Puerto Rico [Economic Development Bank for Puerto Rico], *Puerto Rican Economic Data* (Apr. 2021), https://www.bde.pr.gov/BDESite/PRED.html (click "Government Revenues" tab, then click the "GR01" sheet, for data regarding Puerto Rico's General Fund).

Puerto Rico—Personal Income Tax Rates (Aug. 3, 2021), https://taxsummaries.pwc.com/puerto-rico/individual/taxes-on-personal-income, *with* PricewaterhouseCoopers, *United States—Personal Income Tax Rates* (Aug. 2, 2021), https://taxsummaries.pwc.com/united-states/individual/taxes-on-personal-income. To make matters worse, island residents pay very high gasoline taxes, *see* 13 P.R. Laws Ann. §31626, 13 P.R. Laws Ann. §31627, and, in recent years, have seen a 60% water rate increase and skyrocketing electricity rates, *see* Lizette Alvarez, *Economy and Crime Spur New Puerto Rican Exodus*, N.Y. Times, at A1 (Feb. 9, 2014) (describing water rate increase), *available at* https://www.nytimes.com/2014/02/09/us/economy-and-crime-spur-new-puerto-rican-exodus.html?referringSource=articleShare; Patricia Mazzei et al., *With Earthquakes and Storms, Puerto Rico's Power Grid Can't Catch a Break*, N.Y. Times, at A1 (Jan. 11, 2020) (stating that "Puerto Ricans already pay among the highest [electricity] rates in the nation" with an average monthly bill of $250), *available at* https://www.nytimes.com/2020/01/10/us/puerto-rico-electricity-power-earthquake.html.[6]

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[6] For more about the cost of living in Puerto Rico, see also: Bureau of Econ. Analysis, U.S. Dep't of Commerce, *Prototype Econ. Statistics for Puerto Rico, 2012-2017* (Oct. 15, 2019), https://www.bea.gov/news/2019/prototype-economic-statistics-puerto-rico-2012-2017 (explaining that consumer prices in Puerto Rico have "continued to increase" even as wages have dropped); Nicole Acevedo, *Puerto Ricans Already Pay High Energy Prices. They Could Go Higher*, NBC News (May 10, 2019) ("Puerto Rico residents, who already pay almost twice as much for electricity as U.S. customers, are facing a 13 percent spike under [a government agreement]."), https://www.nbcnews.com/news/latino/puerto-ricans-already-pay-high-energy-prices-it-could-get-n1003971; Scott Beyer, *Puerto Rico, At 11.5%, Has America's Highest Sales Tax*, Forbes (Aug. 17, 2015), https://www.forbes.com/sites/scottbeyer/2015/08/17/puerto-rico-at-11-5-has-americas-highest-sales-tax/?sh=3f56126a308f.

Given the poverty rate in Puerto Rico and the tax burden already borne by island residents, it is not rational to believe that Puerto Rico's government could raise enough in additional tax revenue to fund benefits equal to those provided by the SSI program. And any effort to do so would be inconsistent with the fiscal plan adopted by the Oversight Board and therefore could not be implemented.

III. Concern About "Disrupt[ing]" Puerto Rico's Economy Does Not Provide a Rational Basis for Denying SSI Benefits.

The United States repeatedly cites language in *Torres* about SSI benefits potentially "disrupt[ing]" Puerto Rico's economy, although in a footnote the United States suggests it may now disavow that theory. Pet'rs' Br. 5, 6, 8, 24 n.2.[7] Regardless, the avoiding-disruption theory makes no sense given that the United States has always disrupted (and continues to disrupt) Puerto Rico's economy without hesitation and given that extending SSI to island residents could only *benefit* Puerto Rico economically.

[7] We understand the United States to be abandoning any argument that discrimination in aid to poor and disabled Puerto Ricans is justified by the racist and unsupported notion that needy island residents are more likely than other Americans to choose not to work. *See* Pet'rs' Br. 24 n.2. To the extent concern about a lower minimum wage in Puerto Rico was ever cited in support of that notion, *see, e.g.*, S. Rep. No. 92-1230, at 429 (1972), we note that Puerto Rico matched the federal rate by 1983.

A. The United States Has Always Disrupted—and Continues To Disrupt—Puerto Rico's Economy.

The United States has always interfered in Puerto Rico's economy and continues to do so today. Any suggestion that the federal government wants to (or could) avoid disrupting the island's economy cannot withstand scrutiny.

Internal Revenue Code §936, referenced above, is one prominent example of United States' interference in Puerto Rico's economic development, though by no means the only one.[8] When originally enacted in 1976, §936 worked together with Puerto Rico's own economic-incentive legislation to move the island away from its former dependence on a volatile sugar monoculture and toward other industries. *See, e.g.*, Nydia R. Suarez, U.S. Dep't of Agric., *The Rise and Decline of Puerto Rico's Sugar Economy* (Dec. 1998); Ayala, *supra*, at 70. This interference, while initially positive, created a new economy that leaned heavily on employers, especially in the pharmaceutical sector, who were motivated by and dependent upon the §936 tax incentive. *See generally* U.S. Gov't Accountability Office, *Tax Policy: Puerto Rico and the Section 936 Tax Credit, GAO-93-109* (1993).

The positive side of this new economy came to an abrupt end when Congress enacted the Small Business Job Protection Act of 1996, Pub. L. 104-188, which ended the application of Section 936's favorable tax treatment to Puerto Rico, effective 2006. Begin-

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[8] For another, see, e.g., the Jones Act, 46 U.S.C. §50101 *et seq.* *See also* U.S. Gov't Accountability Office, *Puerto Rico: Characteristics of the Island's Maritime Trade and Potential Effects of Modifying the Jones Act, GAO-13-260*, at 5 (2013).

ning in February 2006, Puerto Rico's official economic activity index showed sustained decline caused by the departure of investment and industrial employment. Econ. Dev. Bank for P.R., *The Puerto Rico Economic Activity Index* 18 (May 2021), https://www.bde.pr.gov/BdeSite/PREDDOCS/EDB-EAI.pdf. Tax revenues declined significantly as well because even though pharmaceutical-industry employers had paid few taxes themselves, their presence on the island supported employees and local suppliers who were key income-tax contributors. Since 2012, Puerto Rico's economy has continued to shrink or at best remain stagnant in every year other than 2013. *Id.* at 18.

Section 936's whipsaw effect on Puerto Rico's economy left the island unable to fund its operating expenses and planted the seeds for today's crisis. Puerto Rico's government soon began turning to alternative financing sources, including the securitization of sales-tax-revenue streams (similar to steps taken by the City of Detroit) to circumvent constitutional debt limits. Puerto Rico's public debt soared from $39.2 billion in 2005, shortly before the §936 sunset, to $71 billion in 2016. *See Aurelius Inv.*, 140 S. Ct. at 1655 (citations omitted). Eventually the island could no longer service its debt, but federal law at that time did not allow Puerto Rico to restructure, *see* 11 U.S.C. §§101(40), 101(52), 109(c), yet simultaneously invalidated Puerto Rico's own local debt-restructuring statutes, *Puerto Rico v. Franklin Cal. Tax-Free Trust*, 136 S. Ct. 1938 (2016). All this prompted yet another massive federal disruption in Puerto Rico's economy when, in 2016, Congress enacted PROMESA and empowered the Oversight Board to exercise fiscal control and, if necessary, initiate bankruptcy proceedings. 48 U.S.C. §2121(b)(1)(2).

Together, the repeal of §936 and enactment of PROMESA have unleashed waves of austerity with further contractive effects on Puerto Rico's economy. For example, the island's government enacted Law 7 in 2009, which led to the termination of more than 10% of the public workforce and almost immediately raised unemployment from 10% to 13%. *See Ley 7 Fue Adversa para la Economía*, Primera Hora (Apr. 18, 2011), https://www.primerahora.com/noticias/gobierno-politica/notas/ley-7-fue-adversa-para-la-economia/; *see also UAW v. Fortuño*, 633 F.3d 37, 39 (1st Cir. 2011). Then, in 2013, the local legislature significantly cut public sector employee benefits, and, from 2013 through 2017, significantly curtailed vested retirement benefits. *See* 2013 P.R Laws 3; 2017 P.R. Laws 106. Meanwhile, the Puerto Rico legislature passed multiple tax increases in an attempt to raise revenue, including an increase in the sales tax rate, which is by far higher than in any U.S. state. *Compare* 2014 P.R. Laws 66 *with* Janelle Cammenga, Tax Fdn., *State and Local Sales Tax Rates, Midyear 2021* (July 2021), https://taxfoundation.org/2021-sales-taxes-midyear/.

Caught in all this are the people of Puerto Rico who, among other things, have had to face the devastation of Hurricanes Irma and María, the federal government's at-best anemic response to those storms, serious earthquakes in January 2020, and the coronavirus pandemic. The island's residents are dealing with natural disaster, high taxes, a high cost of living, and crumbling public services all at once, while those now in charge of Puerto Rico's economy push for ever more drastic cuts that the island's elected leaders oppose. Those who can afford to do so leave the island,[9] but many of the poorest do not have that option.

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[9] *See, e.g.*, Jason Schachter & Antonio Bruce, *U.S. Census Bu-*

B. Extending SSI Benefits To Puerto Rico Could Only Benefit Its Economy.

In sharp contrast to the United States' many damaging policy interventions in Puerto Rico, ending SSI discrimination and extending benefits to island residents will actually bolster the economy.

As discussed previously, Puerto Rico has an extraordinarily high poverty rate: 43.5% compared to an average of 10.5% for the 50 states and District of Columbia. *Compare* Quick Facts: Puerto Rico, *supra*, *with* Jessica Semega et al., U.S. Census Bureau, *Income and Poverty in the United States: 2019* (Sept. 15, 2020), https://www.census.gov/library/publications/2020/demo/p60-270.html. Puerto Rico's child poverty rate is an extremely alarming 57%. *See* Brian Glassman, U.S. Census Bureau, *A Third of Movers from Puerto Rico to the United States Relocated to Florida in 2018* (Sept. 26, 2019), https://www.census.gov/library/stories/2019/09/puerto-rico-outmigration-increases-poverty-declines.html. One-sixth of all Puerto Ricans are disabled, including tens of thousands of children. Ctr. for Budget & Policy Priorities, *Aid to the Aged, Blind and Disabled* 1 (Jan. 15, 2021), https://www.cbpp.org/sites/default/files/atoms/files/12-18-20bud.pdf. That percentage (15.1%) is much higher than the U.S. average, which is 8.6%, but consistent with data elsewhere in the country showing that disability rates tend to be higher in areas with an older, less well-educated, and low-immigrant pop-

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reau, Revising Methods to Better Reflect the Impact of Disaster (Aug. 19, 2020) (net outmigration following Hurricane María stood at 115,626 as of 2020), https://www.census.gov/library/stories/2020/08/estimating-puerto-rico-population-after-hurricane-maria.html.

ulation. *Id.* Nearly half of disabled Puerto Ricans live in poverty, which is twice the U.S. average. *Id.*

Poor and disabled residents in Puerto Rico receive much less assistance than similarly situated citizens in the rest of the United States. Unlike SSI, the AABD program provides *no* benefits whatsoever to disabled children. *Id.* at 2–3. The disability and income requirements for AABD are also stricter. *Id.* at 3. For those who actually qualify to participate in the AABD program, the amount received is much less as well. The maximum AABD benefit is $164 per month, and, according to the GAO, the average benefit in 2011 was only $77. *See Puerto Rico: Information on How Statehood Would Potentially Affect Selected Federal Programs and Revenue Sources, supra*, at 82–83.

If SSI discrimination is ended, and poor and disabled residents of Puerto Rico are able to receive the same benefits available to their fellow citizens, the U.S. government has estimated that as many as 435,000 people will qualify for the SSI program—about 10 times as many Puerto Ricans as receive AABD benefits. Rosanna Torres, Ctr. for a New Economy, *Impact of the Supplemental Security Income in Puerto Rico* (June 25, 2020), https://grupocne.org/2020/06/25/impact-of-the-ssi-in-puerto-rico/. Benefit amounts will increase dramatically because SSI's maximum monthly benefit is $794, compared to $164 for AABD. *See* Ctr. for Budget & Policy Priorities, *supra*, at 3.

The end of SSI discrimination would have major, salutary effects on Puerto Rico's economy. Perhaps most obviously, extending SSI to Puerto Rico would lower the island's poverty rate, likely by more than seven percentage points. Econometrika Corp., *The Impact of Disparities in SNAP and SSI on Puerto Rico's Poverty and Economic Growth* 4 (Feb. 2019), https://www.researchgate.net/publication/340610699_The_impact_of_disparities_in_SNAP_and_SSI_on_Puerto_Rico's_poverty_and_economic_growth. This reduction in poverty would in turn help to stem out-migration, which drains the island's tax base and imposes economic strain on those states to which Puerto Ricans move. *See* Suzanne Gamboa, *Puerto Rico's Population Fell 11.8% to 3.3 million, Census Shows*, NBC News (Apr. 26, 2021), https://www.nbcnews.com/news/latino/puerto-ricos-population-fell-118-33-million-census-shows-rcna767; *see also* Andrew Boryga, *How the Turmoil in Puerto Rico Affects Florida*, S. Fla. Sun Sentinel (Jul. 26, 2019), https://www.sun-sentinel.com/news/florida/fl-ne-what-to-know-about-florida-puerto-ricans-20190726-pc3ijrxonbdg7pd2vterwvn3wu-story.html.

In addition, because SSI recipients qualify for assistance due to their extremely low income levels, Puerto Ricans who receive SSI benefits would likely spend their funds quickly and locally to purchase necessities like food, electricity, and housing. According to a recent study by the Econometrika Corporation, SSI parity for Puerto Rico would encourage on-island spending, resulting in tens of millions of additional dollars in sales tax revenue. Econometrika Corp., *supra*, at 5. Together, SSI and nutrition assistance parity would also create 39,026 new jobs. *Id.* at 4.

Simply put, there is no reason to believe that extending SSI benefits to Puerto Rico will have a negative, disruptive effect on the island's economy. To the contrary, extension of SSI benefits to Puerto Rico's population will simultaneously reduce poverty and increase consumer spending. Only one who believes, irrationally and unjustifiably, that "programs designed to help the poor should be less fully applied in those areas where the need may be the greatest" could conclude otherwise. *Rosario*, 446 U.S. at 655 (Marshall, J., dissenting).

CONCLUSION

For the foregoing reasons, the First Circuit's decision should be affirmed.

Respectfully submitted,

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