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*

## AMICUS BRIEF FOR PUERTO RICO GOVERNOR PEDRO PIERLUISI AND THE NEW PROGRESSIVE PARTY IN SUPPORT OF RESPONDENT


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## INTEREST OF AMICI CURIAE[1]

Pedro Pierluisi is the elected Governor of Puerto Rico and the President of the New Progressive Party (also known as "Partido Nuevo Progresista" or "PNP").[2] Governor Pierluisi began his governorship on January 2, 2021. From 2009 to 2016, he served as Puerto Rico's Resident Commissioner in the U.S. House of Representatives, a non-voting position. Before that, from 1993 to 1996, Governor Pierluisi served as Puerto Rico's Secretary of Justice.

The PNP was founded in 1967 with the objective of promoting statehood, equality, security, and progress for all Puerto Ricans. Throughout its history, the political party has actively participated in the public debate at the national level and has incessantly denounced the federal government's unfair treatment of Puerto Ricans as a matter of civil rights. Recently, in 2012, 2017, and 2020, Puerto Ricans expressed their political will through referendums in which the majority favored statehood as the most adequate political formula to resolve the island's complex issues.

Amici recognize that the question of Puerto Rico's political status is not before this Court. Notwithstanding, the crux of this case is deeply related to the fundamentally unfair nature of Puerto Rico's relationship with the

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[1] Petitioner and respondent have consented to the filing of this brief. Pursuant to Rule 37.6, amici affirm that no counsel for a party authored this brief in whole or in part and that no person other than amici or their counsel have made any monetary contributions intended to fund the preparation or submission of this brief.

[2] Governor Pierluisi participates as amicus in his capacity as President of the PNP.

United States of America. The PNP's existence is predicated on the imperative fight to denounce lack of equal treatment and parity to Puerto Rico's American citizens and to promote statehood. It should be crystal clear that, even when Amici appears herein to defend the right of all Puerto Ricans to obtain SSI benefits independent of their place of residency, the PNP's political position is that Puerto Rico admission as a state is the appropriate and only cure for all of the injustices that are derived from Puerto Rico's unconstitutional second-class citizenship, including those injustices suffered by Mr. Vaello-Madero.

As a result of the 2020 election, the PNP currently holds the seats of both the Governor and the Resident Commissioner. The political party, as representative of the majority of the citizenry, has a compelling interest in ensuring that all Puerto Ricans—including its most vulnerable—have access to the same rights and benefits as other U.S. citizens. The consequences of Puerto Ricans' exclusion from the Supplemental Security Income (SSI) program are devastating. Unlike with SSI, federal funding for adult assistance, including benefits under the Aid to the Aged, Blind, and Disabled (AABD) program, in Puerto Rico is capped at $107,255,000. William R. Morton, Cong. Rsch. Serv., *Cash Assistance for the Aged, Blind, and Disabled in Puerto Rico* 7 (Oct. 26, 2016). The AABD's funding cap is not indexed for inflation and has remained the same for nearly twenty-five years, since 1997. *Id.*

Under the AABD's compensation regime, disabled Puerto Ricans recover only a fraction of what they would be entitled to if they resided elsewhere in the United States. "Recipients receive $74 monthly on average for living expenses, compared to the $733 a disabled person

can collect in the states." Robin Respaut, *Deserted Island: The Disabled in Puerto Rico Fend for Themselves After Decades of U.S. Neglect*, Reuters (Dec. 9, 2016). As a result of this inequality, nearly half of Puerto Rico's disabled individuals live in poverty—twice the rate of those on the mainland. *Id.*

The government's position subjects Puerto Ricans to a scheme of second-class citizenship that has no basis in the Constitution. The Court should reject this unconstitutional exclusion on several grounds, including those advanced by respondent and the Commonwealth of Puerto Rico in its own brief as amicus curiae. Additionally, and as amici write to explain here, Congress' categorical exclusion of Puerto Rico residents from the SSI program unconstitutionally encumbers Puerto Ricans' fundamental rights to travel and to choose where they reside. Amici have an interest in guaranteeing that Puerto Ricans can fully exercise their civil and constitutional rights as U.S. citizens without sacrificing benefits to which every other citizen in the mainland United States enjoys.

## SUMMARY OF ARGUMENT

Puerto Rico is home to 3.2 million U.S. citizens—making it more populous than 21 U.S. states. San Juan, its capital, is much like any other American city. Residents live, work, and pay taxes. They serve their communities and churches, and many serve and have honorably served in the U.S. military. They vote in local elections, although they are represented in Congress only by an elected Resident Commissioner with no right to vote on the House floor. As in other American cities, several Social Security Administration offices in the San Juan area provide vital services to residents. One office is in a squat office building off a frontage road to Highway 1; another shares a

parking lot with a PetSmart, Panda Express, and Old Navy.

But residents of Puerto Rico, though citizens of the United States, are categorically ineligible for SSI because Congress excluded them from the program based solely on their residency. Congress instead kept Puerto Rico's residents subject to SSI's predecessor, the AABD program. If disabled Puerto Ricans wish to receive SSI—which provides substantially greater benefits than the antiquated AABD program—they must relocate to the mainland United States. For many individuals who would qualify for SSI assistance, who are among Puerto Rico's most vulnerable residents, this move is financially impossible. Other Puerto Ricans have left their homes and moved to the mainland to obtain SSI benefits. And anyone who receives SSI but then relocates to Puerto Rico—like respondent—does so at the cost of their benefits. Moving to Puerto Rico makes U.S. citizens immediately ineligible for SSI, solely by reason of their Puerto Rican residency.

This discrimination on the basis of residency is unconstitutional. Congress first extended citizenship to Puerto Ricans in 1917, and since 1940, individuals born in Puerto Rico are automatically U.S. citizens. Like all U.S. citizens, the residents of Puerto Rico enjoy a fundamental right to travel, which is "a privilege of national citizenship" and "an aspect of liberty that is protected by the Due Process Clauses of the Fifth and Fourteenth Amendments." *Jones v. Helms*, 452 U.S. 412, 418-19 (1981). The right to travel includes the right of citizens to choose where they reside—whether on the mainland or in Puerto Rico.

The Court has repeatedly held that the Constitution subjects residency-based distinctions to strict scrutiny,

even when the government attempts to justify those distinctions on concerns about the cost or distribution of welfare benefits. Puerto Ricans' status as political outsiders further bolsters the reasons for applying strict scrutiny, as Puerto Ricans have no access to the political process to rectify their discriminatory treatment. For the reasons ably explained by respondent and Puerto Rico, the distinction here cannot satisfy strict scrutiny.

The government leans heavily on the Territory Clause to defend application of rational-basis review, but the power conferred by that clause is not an unrestricted license to violate separate constitutional limitations. At least when Congress is acting as a national legislature—rather than as a territorial government—its power to govern territories as a local government does not allow it to override constitutional provisions that would otherwise limit its *national* legislative powers. The government also relies on cases upholding geographic-based distinctions, but none burdened the exercise of fundamental rights, as here.

Finally, *Califano v. Torres*, 435 U.S. 1 (1978) (per curiam), and *Harris v. Rosario*, 446 U.S. 651 (1980) (per curiam)—both of which sprouted from the discredited *Insular Cases*—provide no reason to reach a different result. But if the Court considers itself bound by those cases' cursory reasoning, it should overrule them.

## ARGUMENT

### I. CONGRESS MADE PUERTO RICANS U.S. CITIZENS MORE THAN A CENTURY AGO.

It is said that the relationship between the United States and Puerto Rico is "unique." U.S. Br. 2; *Puerto Rico v. Sanchez Valle*, 136 S. Ct. 1863, 1868 (2016). But "unique," too often, is a euphemism for "unequal."

1. After the United States acquired Puerto Rico from Spain in the aftermath of the Spanish-American War, the *Insular Cases* formed the basis for Puerto Rico's relationship to the federal government. Those cases, decided in the early twentieth century, developed the atextual doctrine of "incorporated" and "unincorporated" territories. *See Examining Bd. of Eng'rs, Architects & Surveyors v. Flores de Otero*, 426 U.S. 572, 599 n.30 (1976). In incorporated territories—those "destined for statehood from the time of acquisition," such as Alaska—the full protections of the Constitution applied. *Id.* In unincorporated territories, by contrast, "only 'fundamental' constitutional rights were guaranteed to the inhabitants." *Id.* The Court deemed Puerto Rico to be an unincorporated territory. *Downes v. Bidwell*, 182 U.S. 244, 287 (1901); *see also* Puerto Rico Amicus Br. 4-9.

The distinction between incorporated and unincorporated territories has no origin in the Constitution's text. Instead, the *Insular Cases* sprouted from a more pernicious seed: prejudice. The Court determined that Puerto Rico, like other territories acquired from Spain, was "inhabited by alien races, differing from us in religion, customs, laws." *Downes*, 182 U.S. at 287. In the words of one Justice, Puerto Rico was not a "foreign country," but it was "foreign . . . in a domestic sense." *Id.* at 341 (White, J., concurring). For that reason, the Court thought governance in Puerto Rico "according to Anglo-Saxon principles, may for a time be impossible." *Id.* at 287 (maj. op.). Under the *Insular Cases*, then, Puerto Ricans' participation in the United States' shared heritage "does not arise until in the wisdom of Congress it is deemed that the acquired territory has reached that state where it is proper that it should enter into and form a part of the American family." *Id.* at 339 (White, J., concurring).

2. A fundamental change in Puerto Rico's status occurred in 1917: Congress enacted the Jones Act to make Puerto Ricans U.S. citizens. The Act granted citizenship to Puerto Rico residents unless they publicly rejected citizenship before a district court. Organic Act of 1917, Pub. L. No. 64-368, § 5, 39 Stat. 951, 953. The Jones Act also extended most U.S. laws, except for tax laws, to have the same force and effect in Puerto Rico as in the rest of the United States. *Id.* § 9, 39 Stat. at 951-52, 954.

While Puerto Ricans were previously limited in their ability to travel within the United States, the Jones Act permitted Puerto Ricans to live in any other part of the country. The last of the *Insular Cases*, which post-dated the Jones Act, concluded that the Jones Act did not itself render Puerto Rico an incorporated territory. *Balzac v. Porto Rico*, 258 U.S. 298, 307 (1922). But the Court acknowledged that in making Puerto Ricans citizens in the Jones Act, Congress nonetheless desired "to put them as individuals on an exact equality with citizens from the American homeland," and "to give them an opportunity, should they desire, to move into the United States proper, and there without naturalization to enjoy all political and other rights." *Id.* at 311. Among these "civil, social, and political" rights, the Jones Act "enabled them to move into the continental United States and becom[e] residents of any State there." *Id.* at 308; *see* Puerto Rico Amicus Br. 10-11.

For various reasons, the Jones Act's conferral of citizenship did not apply to all Puerto Ricans. In the following years, Congress passed a series of amendments extending citizenship to those not covered by the Jones Act. *See* Act of March 4, 1927, Pub. L. No. 69-797, § 5a, 44 Stat. 1418, 1418-19; An Act to Provide a Civil Government for Puerto Rico, and for Other Purposes, Pub. L. No. 73-477,

§ 5b, 48 Stat. 1245, 1245 (1934). Twenty years after the Jones Act, Congress ensured that no Puerto Rican would be left stateless by enacting the Nationality Act of 1940, which granted birthright citizenship to Puerto Ricans. Nationality Act of 1940, Pub. L. No. 76-853, § 202, 54 Stat 1137, 1139. Congress reaffirmed this grant of birthright citizenship in the Immigration and Nationality Act of 1952. Pub. L. No. 82-414, § 302, 66 Stat. 163, 236; *see also* 8 U.S.C. § 1402.

With Congress' grant and reaffirmation of birthright citizenship, every child born in Puerto Rico today is a U.S. citizen. Each is accordingly entitled to the fundamental rights that accompany that precious designation.

## II. U.S. CITIZENS' FUNDAMENTAL RIGHT TO TRAVEL INCLUDES THE RIGHT TO RESIDE WHERE THEY CHOOSE.

Citizenship "is no light trifle." *Afroyim v. Rusk*, 387 U.S. 253, 267 (1967). It is "man's basic right[,] for it is nothing less than the right to have rights." *Fedorenko v. United States*, 449 U.S. 490, 522 (1981) (Blackmun, J., concurring) (citation omitted). Having extended citizenship, Congress is bound to honor the rights that come with it. Even when Congress naturalizes a citizen by legislation, "the act does not proceed to give, to regulate, or to prescribe his capacities[:] He becomes a member of the society, possessing all the rights of a native citizen, and standing, in the view of the constitution, on the footing of a native." *Osborn v. Bank of the U.S.*, 22 U.S. (9 Wheat.) 738, 827 (1824). "The constitution does not authorize Congress to enlarge or abridge those rights." *Id.*

One of the rights fundamental to U.S. citizenship is the right to travel and to reside domestically, which is "a privilege of national citizenship" and "an aspect of liberty that

is protected by the Due Process Clauses of the Fifth and Fourteenth Amendments." *Jones*, 452 U.S. at 418-19. As this Court has explained, the right to travel and choose where to reside is central to national identity: "We are all citizens of the United States; and, as members of the same community, must have the right to pass and repass through every part of it without interruption, as freely as in our own States." *Smith v. Turner*, 48 U.S. (7 How.) 283, 492 (1849). The right is "a virtually unconditional personal right, guaranteed by the Constitution to us all." *Saenz v. Roe*, 526 U.S. 489, 498 (1999) (quoting *Shapiro v. Thompson*, 394 U.S. 618, 643 (1969)).

1. The "freedom to travel throughout the United States has long been recognized as a basic right under the Constitution." *United States v. Guest*, 383 U.S. 745, 758 (1966) (citing *Williams v. Fears*, 179 U.S. 270, 274 (1900)); *Twining v. New Jersey*, 211 U.S. 78, 97 (1908); *Edwards v. California*, 314 U.S. 160, 177 (1941) (Douglas, J., concurring); *New York v. O'Neill*, 359 U.S. 1, 6-8 (1959); *id.* at 12-16 (Douglas, J., dissenting).[3]

To be sure, many of this Court's cases have focused on what Justice Washington famously called the fundamental "right of a citizen of one state to pass through, or to reside in any other state." *Corfield v. Coryell*, 6 F. Cas. 546, 552 (Cir. Ct. E.D. Pa. 1825). Inherent in that right to travel, however, is the right to choose one's residence anywhere in the United States—whether in one's native

[3] Even the *Insular Cases*, while drawing an atextual and politically motivated distinction between incorporated and unincorporated territories, recognized that "fundamental" rights must apply in unincorporated territories. *Supra* p. 6. Because the right to travel is "fundamental," it applies regardless of territorial residence. *Infra* pp. 11-12.

state or elsewhere. The fundamental rights of citizens include both the right "peacefully to dwell within the limits of their respective states," and the right "to have free ingress thereto and egress therefrom." *United States v. Wheeler*, 254 U.S. 281, 293 (1920); *see also Martinez v. Bynum*, 461 U.S. 321, 346 n.14 (1983) (Marshall, J., dissenting) ("We have made clear in the past that the right to travel includes the right to reside in the state in order to take advantage of particular state benefits.").

2. The right to travel and reside springs from several sources. *Saenz*, 526 U.S. at 500-04. The Due Process Clause of the Fifth Amendment limits Congress' ability to abridge or penalize the right to travel and to choose where to reside. *Shapiro*, 394 U.S. at 641-42. The Equal Protection Clause of the Fourteenth Amendment also forbids the disparate treatment of citizens based on the exercise of their fundamental right to travel—for example, by cabining state benefits based on the duration of a citizen's residency in a State. *Saenz*, 526 U.S. at 507-11, 508. And the Equal Protection Clause applies to the federal government as well, incorporated by the Due Process Clause. *Bolling v. Sharpe*, 347 U.S. 497, 499-500 (1954).

The right also derives, in part, from the Citizenship Clause of the Fourteenth Amendment, which "is a limitation on the powers of the National Government as well as the States." *Saenz*, 526 U.S. at 508. The Citizenship Clause prevents citizenship, once acquired, from being "shifted, canceled, or diluted at the will of the Federal Government, the States, or any other governmental unit." *Afroyim*, 387 U.S. at 262.[4]

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[4] Although the Equal Protection Clause applies to the federal government by reverse incorporation, *see Bolling*, 347 U.S. at 500, the Citizenship Clause applies by its own force to federal action because it

The right to travel and choose where to reside therefore limits the federal government's ability to restrict citizens' ability to choose their places of residence within the United States. In *Shapiro*, for example, the Court invalidated a District of Columbia welfare provision requiring citizens to wait a year before receiving welfare benefits. Though "adopted by Congress as an exercise of federal power," the provision was unconstitutional because it "violate[d] the Due Process Clause of the Fifth Amendment" by deterring needy individuals from moving to the District, which unreasonably burdened or restricted the right to migrate interstate. 394 U.S. at 641-42.

3. Because the right to travel and reside is fundamental, it accrues equally to U.S. citizens in both States and territories even under the *Insular Cases*' atextual distinction between "incorporated" and "unincorporated" territories. Under the *Insular Cases*, "fundamental" rights apply in Puerto Rico. *Dorr v. United States*, 195 U.S. 138, 147 (1904).

Thus, when Congress conferred U.S. citizenship upon Puerto Ricans in 1917, or at minimum once it conferred birthright citizenship upon Puerto Ricans in 1940, Puerto Ricans acquired the same fundamental rights of citizenship as all other U.S. citizens.[5] To be sure, the Constitution reserves some rights of citizenship—for example, the right to elect Senators—to residents of particular States.

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"was intended to bind both state and federal actors" when enacted, Ryan C. Williams, *Originalism and the Other Desegregation Decision*, 99 Va. L. Rev. 493, 578-79 (2013); *see id.* at 500 n.29 (citing Professors Akhil Reed Amar, Jack M. Balkin, Drew S. Days III, and Bruce Ackerman).

[5] The Court need not decide whether residents of U.S. territories who are not citizens possess the fundamental right to choose to reside anywhere in the United States, including in the territories.

But other fundamental rights, including the right to dwell anywhere in the United States, accrue to all citizens.

When Congress made Puerto Ricans citizens, they became vested with all fundamental rights of citizenship. To the extent the Court held otherwise in *Balzac* (which was the only *Insular Case* post-dating the Jones Act), the Court should overrule *Balzac*. But even under *Balzac*'s otherwise problematic reasoning, *supra* pp. 6-7, the Court acknowledged that Puerto Ricans possess the fundamental right to travel freely. The Court emphasized that the Jones Act enabled Puerto Ricans who became U.S. citizens to "move into the continental United States and becom[e] 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. And as support for this proposition, the Court cited section 5 of the Jones Act, which granted citizenship, *id.* at 307 n.1—thus confirming the inherent link between citizenship and the right to travel. Revealingly, the government has not challenged the propositions that Puerto Rico is part of the United States, and that Puerto Ricans possess the fundamental right to travel and choose their residence anywhere within the United States. Nor could it.

The inexorable result of these principles is clear: when Congress confers citizenship, it confers all fundamental rights of citizenship to all citizens. Congress cannot pick and choose. Put more simply still: The Constitution does not recognize second-class citizenship.

## III. THE SSI EXCLUSION IS SUBJECT TO—AND FAILS—STRICT SCRUTINY.

The federal government excludes U.S. citizens residing in Puerto Rico from SSI because of where they choose to reside. An individual like respondent who elects to exercise his right to move to Puerto Rico does so at the price of his federal SSI benefits. Conversely, U.S. citizens in Puerto Rico are punished for the exercise of their fundamental right to choose to live in Puerto Rico rather than the mainland United States because that choice requires them to forego SSI benefits.

Such classifications abridge the right to travel and offend the Equal Protection Clause, the Due Process Clause, and the Citizenship Clause. No matter the "label" governing the analysis—"right to migrate or equal protection"—"once [the Court] find[s] a burden on the right to migrate the standard of review is the same." *Att'y Gen. of N.Y. v. Soto-Lopez*, 476 U.S. 898, 904 n.4 (1986) (plurality op.). "Laws which burden that right must be necessary to further a compelling state interest." *Id.* As a result, "strict judicial scrutiny" applies to laws burdening "the right of interstate travel," according that right "no less protection than the Constitution itself demands." *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 31 (1973) (citation omitted).[6]

[6] The SSI exclusion is subject to—and fails—strict scrutiny for other reasons as well, including that the exclusion discriminates against Puerto Ricans on the basis of race and alienage. Puerto Rico Amicus Br. 13-18.

### A. Congressional Action Discriminating Against U.S. Citizens Based on Residency Within the United States Is Subject to Strict Scrutiny.

Absent a compelling interest, the federal government cannot burden the fundamental right to choose where to reside or discriminate among citizens based on the exercise of that right. Strict scrutiny is always required when the government burdens the fundamental right to travel, but Puerto Ricans' status as political outsiders—*i.e.*, "discrete and insular minorities"—amplifies the justifications for strict scrutiny because their outsider status "tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities." *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938).

1. A "law implicates the right to travel when it actually deters such travel, when impeding travel is its primary objective, or when it uses 'any classification which serves to penalize the exercise of that right.'" *Soto-Lopez*, 476 U.S. at 903 (plurality op.) (citations omitted) (quoting *Dunn v. Blumstein*, 405 U.S. 330, 340 (1972)). Residency requirements infringe the right to travel, violating the Equal Protection Clause, when they distinguish impermissibly between different classes of citizens, dividing them into groups of "legitimate" and "illegitimate" citizens receiving different benefits. "[S]ince the right to travel [is] a constitutionally protected right, 'any classification which serves to penalize the exercise of that right, unless shown to be necessary to promote a compelling governmental interest, is unconstitutional.'" *Dunn*, 405 U.S. at 339 (quoting *Shapiro*, 394 U.S. at 634).

This Court has consistently rejected legislative attempts to discriminate against citizens' right to reside where they choose, even where the government invoked

financial interests to defend its laws. In *Edwards*, for example, this Court invalidated a California statute making it a crime knowingly to bring an indigent into the State, over objections by the State that extensive immigration posed a substantial financial burden. As Justice Jackson noted in his concurring opinion, such a law conflicts with one of the central promises of U.S. citizenship:

> Any measure which would divide our citizenry on the basis of property into one class free to move from state to state, and another class that is poverty-bound to the place where it has suffered misfortune, is . . . at war with the habit and custom by which our country has expanded . . . .

314 U.S. at 185 (Jackson, J., concurring).

In *Shapiro*, this Court applied strict scrutiny to invalidate a D.C. law imposing a one-year residency requirement for the receipt of welfare benefits, holding that the residency requirement unduly burdened the right to travel by disadvantaging migrants and thus violated the Due Process Clause. 394 U.S. at 638. The Court rejected the economic justification for the durational requirement, explaining that distinguishing between new and old residents on the basis of their tax contributions "would logically permit the State to . . . apportion all benefits and services according to the past tax contributions of its citizens." *Id.* at 632-33. The Due Process Clause therefore "prohibit[ed] Congress from denying public assistance to poor persons otherwise eligible solely on the ground that they ha[d] not been residents of the District of Columbia for one year at the time their applications are filed." *Id.* at 642.

The Court reached a similar result in *Zobel v. Williams*, 457 U.S. 55, 60-61 (1982), striking down an Alaskan

plan to distribute oil proceeds based on the duration of state residency. There, the Court did not decide what standard of review to apply because the residency requirement failed even the lowest standard, *id.*, but Justice Marshall later observed that the case applied at least "intermediate review," *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 459 n.4 (1985) (Marshall, J., concurring in part and dissenting in part). The Court held that the Alaskan plan was "clearly impermissible" because "[i]t would permit the states to divide citizens into expanding numbers of permanent classes." *Zobel*, 457 U.S. at 64. Concurring, five Justices emphasized that the restriction also abridged the "right to travel or migrate interstate." *Id.* at 78 (O'Connor, J., concurring); *id.* at 69 (Brennan, J., concurring) (observing that the Citizenship Clause "does not provide for, and does not allow, degrees of citizenship based on length of residence").

And in *Saenz*, the Court vindicated the right to travel by striking down a California law that limited the receipt of welfare benefits for newly arrived citizens. The Court emphasized that the dual nature of citizenship—both state and federal—"adds special force to [citizens'] claim that they have the same rights as others who share their citizenship." 526 U.S. at 504. The Court held that "[n]either mere rationality nor some intermediate standard of review" applied. *Id.* The Court thus applied strict scrutiny to invalidate the law and rejected California's argument that extending benefits equally would pose an unreasonable fiscal burden on the treasury. *Id.* at 506-07.

The Court also rejected out of hand California's suggestion that Congress had blessed its residency requirement in Social Security legislation, because the Citizenship Clause of the Fourteenth Amendment "is a limitation on the powers of the National Government as well as the

States." *Id.* at 508. Despite Congress' "broad power" to legislate, "[t]hose legislative powers are . . . limited not only by the scope of the Framers' affirmative delegation, but also by the principle 'that they may not be exercised in a way that violates other specific provisions of the Constitution.'" *Id.* (citation omitted).

The same rationale applies here. Congress cannot exclude Puerto Rico residents from SSI by implementing a program that arbitrarily determines that U.S. citizens choosing to reside on the island are less worthy of benefits than those on the mainland. Nor can Congress arbitrarily discriminate between U.S. citizens on the basis of their residency just to save money.

In each of the cases just discussed, this Court found a desire to protect the treasury insufficient to abridge the right of citizens to reside in the place of their choosing, or to divide U.S. citizens into classes for purposes of welfare benefits. The law at issue here has the same pernicious effect. Disabled Puerto Ricans with some financial resources have moved to the mainland to obtain SSI benefits. Less fortunate disabled Puerto Ricans have no choice but to remain in Puerto Rico and continue to suffer "misfortune" caused by their disparate treatment. *Edwards*, 314 U.S. at 185 (Jackson, J., concurring).

2. Puerto Ricans' status as political outsiders provides all the more reason to apply strict scrutiny.

In general, this Court defers to a legislature's judgment because the political process is a "powerful safeguard against legislative abuse." *W. Lynn Creamery, Inc. v. Healy*, 512 U.S. 186, 200 (1994) (citation omitted). In dormant Commerce Clause cases, however, the Court conducts more exacting review where "the burden of state regulation falls on interests outside the state," because in

that situation "it is unlikely to be alleviated by the operation of those political restraints normally exerted when interests within the state are affected." *S. Pac. Co. v. Arizona ex rel. Sullivan*, 325 U.S. 761, 767 n.2 (1945); *see also, e.g.*, *Kassel v. Consol. Freightways Corp. of Del.*, 450 U.S. 662, 675-76 (1981) ("Less deference to the legislative judgment is due, however, where the local regulation bears disproportionately on out-of-state residents and businesses."); *S.C. Hwy. Dep't v. Barnwell Bros.*, 303 U.S. 177, 184 n.2 (1938).

Importantly, the Court applied this rationale to justify close scrutiny where the statute at issue restricted the welfare benefits of new residents. In *Edwards*, the Court invalidated welfare restrictions because the targets of the legislation were not California residents and therefore had no "opportunity to exert political pressure upon the . . . legislature in order to obtain a change in policy." 314 U.S. at 174 (citing *S.C. Hwy. Dep't*, 303 U.S. at 185 n.2).

These principles reaffirm the need for strict scrutiny in this related context. As political outsiders, Puerto Ricans are akin to a "discrete and insular minorit[y]." *Carolene Prods.*, 304 U.S. at 152 n.4. Despite being U.S. citizens, Puerto Ricans have no vote on final federal legislation. They are represented in Congress by a Resident Commissioner who cannot vote on the House floor. Puerto Ricans cannot elect representatives or senators. They cannot vote in the U.S. general election for President. Just as in *Edwards*, "the indigent . . . who are the real victims of the statute" excluding them from the SSI program and consigning them to the AABD program are "deprived of the opportunity" to participate equally in the legislative process. 314 U.S. at 174.

3. For the reasons ably explained by respondent and Puerto Rico, the SSI exclusion fails even rational-basis review. *See* Resp. Br. 31-44; Puerto Rico Amicus Br. 18-31. It necessarily fails strict scrutiny as well.

**B. The Government's Counterarguments Fail.**

The government's arguments for a lesser degree of scrutiny provide no basis to reverse.

The government's primary contention is that Congress may disadvantage the residents of Puerto Rico because Puerto Rico is a territory, and Congress possesses broad powers under the Territory Clause of the Constitution. But the power conferred by the Territory Clause, just like the power conferred by the Commerce Clause, is not a license to violate separate constitutional limitations like the Equal Protection and Due Process Clauses. Despite Congress' "broad power" to legislate, "[t]hose legislative powers are . . . limited not only by the scope of the Framers' affirmative delegation, but also by the principle 'that they may not be exercised in a way that violates other specific provisions of the Constitution.'" *Saenz*, 526 U.S. at 508 (citation omitted).

Thus, the Territory Clause cannot authorize Congress to pass unconstitutional laws in the District of Columbia, nor to suspend the Constitution in federal parks. The same principle applies here—Congress cannot invoke the Territory Clause as free license to burden U.S. citizens' constitutionally protected choice to reside in Puerto Rico. "The Constitution grants Congress and the President the power to acquire, dispose of, and govern territory, not the power to decide when and where its terms apply." *Boumediene v. Bush*, 553 U.S. 723, 765 (2008).

To be sure, when Congress legislates with respect to the District of Columbia or Puerto Rico, it does so in two

capacities, "exercis[ing] the combined powers of the general, and of a state government." *Am. Ins. Co. v. 356 Bales of Cotton*, 26 U.S. (1 Pet.) 511, 546 (1828); *Fin. Oversight & Mgmt. Bd. v. Aurelius Inv., LLC*, 140 S. Ct. 1649, 1658 (2020). But whatever Congress' authority when acting as a state government, when it is acting as a national legislature, as it did when enacting the SSI program, its separate power to govern territories as a local government does not allow it to override constitutional protections that would otherwise apply to limit its national legislative powers.

The government (at 33) also invokes cases applying rational-basis review to "geographic classifications," but those cases are inapposite. The principal case it cites, *San Antonio Independent School District v. Rodriguez*, concerned a claim that *intra*state funding disparities between school districts in Texas violated the Equal Protection Clause. 411 U.S. 1 (1973). In applying rational-basis review, the Court expressly distinguished the alleged right at issue—a right to public education—from the "fundamental" "right of interstate travel"—to which the Court acknowledged "strict judicial scrutiny" applied. *Rodriguez*, 411 U.S. at 31, 34-35. As the Court acknowledged, strict scrutiny applies when the government infringes a "fundamental" right protected by the Equal Protection Clause, including the right to travel. *Id.* at 33-34. *Rodriguez* did not implicate the right to travel, because the Constitution guarantees only the right to travel interstate—it does not prohibit variations *within* each state.

More broadly, the government's cases establish only that a regulation is not suspect *merely* because it draws a geographic distinction. But while "[t]he Fourteenth Amendment does not prohibit legislation merely because it is special, or limited in its application to a particular geographical or political subdivision of [a] state," *Kadrmas*

*v. Dickinson Pub. Schs.*, 487 U.S. 450, 462 (1988), such legislation is still subject to strict scrutiny if its geographic classification burdens a fundamental right or is otherwise impermissible. Thus, for example, in *Griffin v. County School Board*, 377 U.S. 218 (1964), the Court acknowledged that intrastate geographic variation in school funding was *generally* permissible, but held that the school board's treatment of schoolchildren in different districts impermissibly reflected racial distinctions in that case: "Whatever nonracial grounds might support a State's allowing a county to abandon public schools, the object must be a constitutional one, and grounds of race and opposition to desegregation do not qualify as constitutional." *Id.* at 231.

Many of the government's cases are thus distinguishable because their geographic distinctions did not burden any identifiable fundamental right. For example, in several cases, the Court upheld geographic variations in the procedures governing access to the judicial system and the courts. *North v. Russell*, 427 U.S. 328 (1976); *Ohio ex rel. Bryant v. Akron Metro. Park Dist.*, 281 U.S. 74 (1930); *Gardner v. Michigan*, 199 U.S. 325 (1905); *Chappell Chem. & Fertilizer Co. v. Sulphur Mines Co. (No. 3)*, 172 U.S. 474 (1899); *Missouri v. Lewis*, 101 U.S. 22 (1880). These variations, however, did not deny access to the courts based on geography. By contrast, here the SSI exclusion renders Puerto Rico residents *categorically* ineligible for SSI based solely on their residency.

In the end, the government is left to argue that Puerto Rico's neediest residents deserve exclusion from the SSI program because of Puerto Rico's "unique tax status." U.S. Br. 15-17. On any level of scrutiny, and particularly on strict scrutiny, that argument lacks merit. As an initial matter, as already discussed, this Court has repeatedly

rejected purely fiscal rationales for such exclusions. *Shapiro*, 394 U.S. at 633; *Saenz*, 526 U.S. at 506-07. In any event, Puerto Rico contributes approximately $3.4 billion to the federal treasury. Pet.App.22a. Before the 2006 recession, Puerto Rico consistently contributed more than $4 billion in taxes annually—more than the total amounts for some states. Pet.App.21a-22a. Puerto Ricans and local corporations pay business income taxes, income tax on income federal sources, FICA taxes, self-employment taxes, unemployment insurance taxes, estate and trust taxes, and excise taxes. As the court found below, and as respondent persuasively explains, Congress' tax treatment of Puerto Ricans provides no basis to exclude U.S. citizens from the SSI program based on their decision to reside in Puerto Rico. Resp. Br. 34-38.

### C. *Torres* and *Harris* Do Not Control and, in Any Event, Should Be Overruled.

Finally, *Torres* and *Harris* are no obstacle to affirming the decision below. *Contra* U.S. Br. 36-39. Each of those cases—decided without the benefit of full briefing and argument—is distinguishable. And to the extent the Court concludes otherwise, those cases are based on the rotted foundations of the *Insular Cases* and should be overruled.

1. In *Torres*, the lower court held that "the Constitution requires that a person who travels to Puerto Rico must be given benefits superior to those enjoyed by other residents of Puerto Rico if the newcomer enjoyed those benefits in the State from which he came." *Califano v. Torres*, 435 U.S. 1, 4 (1978) (per curiam). Amici do not contend that newcomers to Puerto Rico should receive greater benefits than Puerto Rico residents. Rather, amici contend that all U.S. citizens residing in Puerto Rico should receive the same benefits available to all other U.S.

citizens. The issue here is whether Congress, by categorically excluding all Puerto Ricans from the SSI program on the basis of their residency, unconstitutionally burdened citizens' right to travel and choose their residency. For the reasons set forth above, the answer to that distinct question is yes.

If the Court nonetheless considers itself bound by *Torres*, it should overrule *Torres*. Although *Torres* held the SSI exclusion did not violate the right to travel, it did so only in a summary opinion without the benefit of argument. This Court has previously acknowledged the limited precedential value of summary decisions on the merits, finding itself "less constrained" when an opinion "was rendered without full briefing or argument." *See Hohn v. United States*, 524 U.S. 236, 251 (1998); *see also McCutcheon v. FEC*, 572 U.S. 185, 202 (2014) (declining to rely on prior decision decided without full briefing and argument).

Moreover, *Torres* relied at its core on the discredited *Insular Cases*, which the government does not try to defend (or even acknowledge) in its brief. The government's jurisdictional statement in *Torres* cited the *Insular Cases* for the central premise that the federal government can treat residents of Puerto Rico differently. U.S. Jurisdictional Statement at 7, *Califano v. Torres*, 435 U.S. 1 (1978) (No. 77-88). This Court recently acknowledged the *Insular Cases* are "much-criticized" and declined to extend them unnecessarily. *Fin. Oversight & Mgmt. Bd.*, 140 S. Ct. at 1665. As explained above, those cases reflect odious and outdated notions of white supremacy and colonial rule. And the distinction those cases drew between "incorporated" and "unincorporated" territories was based

on political expedience, not the text or history of the Constitution. *See supra* pp. 5-6. Because *Torres* springs from the same rotten seed, it should be overruled.

2. Nor does *Harris* foreclose relief. *Harris* involved a claim that the denial to Puerto Ricans of federal financial assistance for dependent children violated the Equal Protection Clause. Lacking the benefit of full briefing, and relying heavily on *Torres*, the Court did not consider the effect of Puerto Ricans' status as citizens or the Citizenship Clause. Justice Marshall argued in dissent that, because "Puerto Ricans are United States citizens," "discrimination against Puerto Rico . . . must also operate as . . . discrimination against United States citizens residing in Puerto Rico." *Harris v. Rosario*, 446 U.S. 651, 653 & n.1 (1980) (per curiam) (Marshall, J., dissenting). Justices Brennan and Blackmun would have set the case for argument rather than issuing a summary disposition. *Id.* at 652 (Brennan and Blackmun, JJ., noting probable jurisdiction).

Because the Court did not consider the effect of Puerto Ricans' U.S. citizenship, *Harris* cannot control here. In any event, because *Torres* was "the only authority" on which the *Harris* Court relied, *id.* at 654 (Marshall, J., dissenting), *Harris* should be overruled for the same reasons as *Torres*.

## CONCLUSION

The judgment should be affirmed.

Respectfully submitted,

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