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 OF MEDICAID AND MEDICARE ADVANTAGE PRODUCTS ASSOCIATION OF PUERTO RICO ("MMAPA") AS *AMICUS CURIAE* IN SUPPORT OF VAELLO-MADERO

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INTEREST OF THE AMICUS CURIAE[1]

Amicus Curiae, Medicaid and Medicare Advantage Products Association of Puerto Rico, Inc. ("MMAPA") is a non-for-profit organization founded in 2009, that advocates for increased federal government spending into Puerto Rico's healthcare system by tackling a long history of federal government underfunding and disparate treatment that impact the quality of care received by the American citizens residing in Puerto Rico.

MMAPA is deeply troubled with the position assumed by Appellant, Government of the United States of America, in that the U.S. Congress can invoke a rational basis to treat the residents of Puerto Rico disparately in need-based federal healthcare programs like SSI.

Such disparate treatment is not rational and it runs afoul the fundamental equal protection rights afforded by the United States Constitution to all United States citizens, including those living in Puerto Rico. Alternatively, a stricter scrutiny is warranted as the federal statute in question creates a suspect class that befalls entirely on a minority population of Hispanic American citizens residing in Puerto Rico with a history of past discrimination in

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[1] The parties were notified of the intention to file this brief as per Rule 37.2 (a) and all parties have consented. No counsel for any party authored this brief in whole or in part and no person or entity other than the amici curiae or its counsel made a monetary contribution toward its preparation or submission.

federal healthcare programs and who did not participate in the congressional enactment where those exclusions were imposed on them.

The *amicus curiae* brief is presented in support of respondent

SUMMARY OF THE ARGUMENT

The United States posits that Congress may deny Supplemental Social Security Income (SSI) benefits to aged, blind, or disabled U.S. citizens that reside in Puerto Rico, because Puerto Rican residents as a whole make a *reduced contribution* to the federal treasury. It argues that *Califano v. Torres,* 435 U.S. 1 (1978) and *Harris v. Rosario,* 446 U.S. 651 (1980) (per curiam) are controlling. These cases, however, only held that Congress may treat Puerto Rico differently in social programs under the premise that Puerto Rico "*residents do not contribute to the public treasury*." *Califano* at 5 n. 7; *Harris* at 652. The United States now acknowledges that Puerto Rico residents do contribute to the federal treasury, albeit in a reduced manner. The difference is material.

Discrimination on account of the level contributed to the federal treasury has no rational basis. California contributes 13.31% of total federal tax revenues, followed by New York and Texas with 8.60% and 8.24% respectively. At the other end are Wyoming and Vermont, each contributing 0.13. The same table shows Puerto Rico contributes 0.10% of federal tax revenues. Drawing a line between Wyoming's 0.13% and Puerto Rico's 0.10% is arbitrary.

The United States attempts to establish a rational distinction by arguing that Puerto Rico has a unique

tax status, its own fiscal autonomy, that allows it to retain tax revenues that would otherwise go to the federal treasury, and thus may allocate them as it deems fit. This argument ignores that Puerto Rico's fiscal autonomy was established on account of Puerto Rico's small tax base, it being a jurisdiction with a lower median household income than any state. Fiscal autonomy is not a congressional concession to allow Puerto Rico freedom to distribute its riches, it originated as a policy to allow Puerto Rico to make ends meet.

Equal protection analysis requires strict scrutiny of a legislative classification when the classification operates to the peculiar disadvantage of a suspect class. *Mass. Bd. of Ret. v. Murgia*, 427 U.S. 307, 312, 96 S. Ct. 2562, 2566 (1976). Residents of Puerto Rico should be considered a suspect class and all legislation that discriminates against them must be subject to strict scrutiny analysis.

Designation as a suspect class has mostly required that members of the class be considered saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process. *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 28, 93 S. Ct. 1278, 1294 (1973).

As residents of a jurisdiction within the United States with no voting representation in Congress, residents of Puerto Rico have been subject to discrimination in several federal social welfare programs, such as SSI at issue here, Medicaid, Medicare Part D Low-Income Subsidy and

Supplemental Nutritional Assistance Program. Also statutory payment policies for traditional Medicare and Medicare Advantage have impacted Puerto Rico disparately with significantly lower payment rates for eligible citizens and Hospitals in the Island.

While race or ethnicity are not bluntly expressed in the SSI classification that fences the resident of the Commonwealth of Puerto Rico from receiving the benefits available to other kindred American citizens, it need not be when its effects are tailored exclusively on a class of American citizens that belong to a distinct minority. The SSI classification discriminates against the poor living in Puerto Rico.

But discrimination here extends beyond the question of race or ancestry. If distinctions between citizens solely because of their ancestry are by the very nature odious to a free people whose institutions are founded upon the doctrine of equality, *Hirabayashi v. United States*, 320 U.S. 81, 100 (1943), classifications that single-out citizens who do not have a voting representation in Congress must be subject to the same close or even higher judicial scrutiny. These are a people subject to federal laws in general, that do not participate in the drafting or voting of the statute where they were "rationally" left out. Their designation as a separate class in the SSI program must be considered a suspect classification that receives this Court's most heightened judicial scrutiny. As birthright American citizens, residents of Puerto Rico must be free from the Congressional yoke that purports to discriminate against the neediest and poorest.

ARGUMENT

I. BACKGROUND

1. The development of fiscal autonomy in Puerto Rico

The thrust of the United States' argument is that Congress has a rational basis to exclude Puerto Rico from the SSI program because residents of Puerto Rico generally do not pay federal taxes. This ignores the history and policy considerations behind Puerto Rico's general tax exemption.

The policy foundations of this setup can be traced back to the beginning of the U.S. occupation of Puerto Rico after the Spanish American War in 1898.

After Spain formally ceded Puerto Rico to the United States under the Treaty of Paris signed in December 1898 and ratified in April 1899 (see Treaty of Peace between the United States of America and the Kingdom of Spain, Apr. 11, 1899, 30 Stat. 1754), the island came under the control of U.S. War Department. Military rule was established.

Secretary of War Elihu Root observed that the existing tax system in force at the time of American occupation "was so peculiar to the Spanish methods of administration, and so inapplicable to the new conditions under which the people of the island are to live, and to the ideas which we entertain for promoting their welfare, that a practically new system must be adopted." Philip C. Jessup, *Elihu Root,* vol. 1 (New York: Dodd Mead, 1938), 378. Root asked President Daniel Coit Gilman of the Johns Hopkins University, to give leave of absence to Dr. J. H. Hollander, then Associate Professor of Finance, in order to develop a

new and comprehensive tax system for Puerto Rico and become its treasurer. "*The general principle which Root laid down for him and under which he operated was that the revenues of the island should be used in Porto Rico for its benefit*." *Id.*

In 1900, Congress enacted the first organic act (widely known as the Foraker Act) to establish a civil government in Puerto Rico. *See* Organic Act of 1900, Ch. 191, 56th Cong., 1st Sess., 31 Stat. 77 (1900). The Act was similar to a great extent to those adopted for the continental territories in the previous century. It provided for an Executive Branch headed by a Governor and an Executive Council, both appointed by the President of the United States with the advice and consent of the Senate, a House of Delegates elected by qualified voters of Puerto Rico, and a district court of the United States for Puerto Rico with a district judge appointed by the President of the United States for a term of four years. *See id.* §§ 17, 18, 27, 34.

The Act differed from that of continental territories on the matter of taxation. When Senate Bill 2264 (which became the Foraker Act) was debated in the Senate, Puerto Rico's Military Governor George Davis advocated for the need to maintain Puerto Rico's fiscal autonomy as a necessary feature for a viable local government. In his testimony before the Senate's Committee on Pacific Islands and Puerto Rico, Davis explained that: "*If the change in status involves the application to Puerto Rico of the United States revenue laws–internal and customs–then the principal source of revenue that Puerto Rico has relied on will be lacking*." United States Senate, *Hearings Before the Committee on Pacific Islands and Puerto Rico, Senate Bill 2264,* Statement made by Brig. Gen. George W.

Davis, U.S.A. Military Governor of the Island of Puerto Rico (January 13, 1900), 39. When asked by the Chairman: "*You think the internal-revenue tax, as well as the tariff, should go to the insular treasury*?" General Davis responded: "Yes, sir. *I do not see how the island is to keep house without it*." *Id.* at 74.

These observations were reflected in the bill's report: "*These revenues are given to Porto Rico, not only because the necessities of the island are immediate and very great, but for the further reason that it seems only just that the island should have the full benefit of all such duties and taxes, inasmuch as they arise on account of the island alone* * * *." Report No. 249, 56th Congress, 1st Session (Feb. 5, 1900) About Temporary Civil Government for Porto Rico, 8.

As a result, Article 14 of the Foraker Act provided:

> That the statutory laws of the United States not locally inapplicable, except as hereinbefore or hereinafter otherwise provided, shall have the same force and effect in Porto Rico as in the United States, *except the internal-revenue laws, which, in view of the provisions of section three, shall not have force and effect in Porto Rico.*

Organic Act of 1900, Ch. 191, 56th Cong., 1st Sess., 31 Stat. 77 (1900) (emphasis supplied).

In 1914, as Congress debated a new organic act for Puerto Rico, Felix Frankfurter, then Law Officer at the War Department, reiterated the need for Puerto Rico to retain all tax collections in order to be viable:

> As a matter of finance, *the conditions operative at the time of the Foraker Act, which made it needed justice for Porto Rico not to include it within the general taxing legislation of this country, still prevail in the Island.* Porto Rico still needs the receipts under the Federal Tariff and internal revenues collected at Porto Rico; in other words, she must be treated differently than and outside of the provisions applicable to incorporated territories.

Memorandum for the Secretary of War, in Hearings on S. 4604 before the Senate Committee on Pacific Islands and Porto Rico, 63d Cong., 2d Sess., 23 (1914).

A new organic act (widely known as the Jones Act) was finally adopted in 1917. It created an elected Senate and gave the people of Puerto Rico a bill of rights and United States citizenship. *See* Organic Act of 1917, Pub. L. No. 64-368, 39 Stat. 951 (1917). The right to elect their own Governor was granted by amendment in 1947. *See* Pub. L. No. 80-362, 61 Stat. 770 (1947).

The Jones Act of 1917, maintained the cited Foraker Act provision, now under section 9:

> SEC.9. That the statutory laws of the United States not locally inapplicable, except as hereinbefore or hereinafter otherwise provided, shall have the same force and effect in Porto Rico as in the United States, *except the internal-revenue laws*: Provided, however, That hereafter all taxes collected under the internal-revenue laws of the United States on articles produced in Porto Rico and transported to the United States, or consumed

> in the island shall be covered into the treasury of Porto Rico.

Section 9, Organic Act of 1917, Pub. L. No. 64-368, 39 Stat. 951 (1917).

In 1950, Congress enacted Public Law 600. Pub. L. No. 81-600, 64 Stat. 319. That statute offered the people of Puerto Rico the authority to "organize a government pursuant to a constitution of their own adoption." 48 U.S.C. § 731b.

The Puerto Rico Constitution created a new political entity, the Commonwealth of Puerto Rico—or, in Spanish, Estado Libre Asociado de Puerto Rico. *Puerto Rico v. Sánchez Valle*, 136 S.Ct. 1863, 1869 (2016). As a result, all provisions concerning local governance in the Jones Act of 1917 were repealed, and the remaining provisions, mainly regarding the relationship between Puerto Rico and the Federal Government, were renamed the Federal Relations Act and assumed the nature of a compact. *See* Pub. L. No. 81-600 §§ 4, 5, 64 Stat. at 319-20 (1950).

One of the surviving provisions was section 9, that now read:

> The statutory laws of the United States not locally inapplicable, except as hereinbefore or hereinafter otherwise provided, shall have the same force and effect in Puerto Rico as in the United States, *except the internal revenue laws* * * *: Provided, however, That after May 1, 1946, all taxes collected under the internal revenue laws of the United States on articles produced in Puerto Rico and transported to the United States, or consumed in the island shall be covered into the treasury of Puerto Rico.

48 U.S.C. § 734.

The conditions that made it necessary for Puerto Rico to maintain its fiscal autonomy still prevailed as of 1950, and arose in the congressional debates that year discussing whether to include Puerto Rico and the Virgin Islands in the insurance and assistance programs of the Social Security program. Senator Lehman reminded all of the origin of that exemption:

> It is true that Puerto Rico and the Virgin Islands do not pay taxes into the United States Treasury on the same basis as the States of the Union. But this is not a failure on their part. It is a waiver on the part of the Federal Government in recognition of the peculiar economic conditions pertaining in those islands.

96 Cong. Rec. 8891 (1950) (statement Sen. Lehman).

As a result of this long history, Section 933 of the IRC provides that income derived from sources within Puerto Rico by an individual who is a resident of Puerto Rico generally will be excluded from gross income and exempt from U.S. taxation. 26 U.S.C. § 933. Section 933 does not exempt residents of Puerto Rico from paying federal taxes on U.S. source income and foreign source income. Nor does section 933 affect the federal payroll taxes that residents of Puerto Rico pay. Federal employment taxes for social security, Medicare, and unemployment insurance apply to residents of Puerto Rico on the same basis and over the same sources of income as they are applied to all other U.S. residents.

Presidents and Congress have been aware of the problems that would ensue if Puerto Rico were to be subjected to a uniform federal tax treatment under its

current Commonwealth status. President John F. Kennedy's briefing papers squarely framed the issue:

> If the U.S. Government were to impose its income taxes in Puerto Rico, the Commonwealth would have to reduce its tax rates to something more like those prevailing in our states. The people would not be able to pay their current Commonwealth taxes and our Federal taxes at the same time. As a result, the Commonwealth would suffer a severe loss in revenue and presumably would have to receive financial assistance to maintain itself.

Presidential Press Conference Material, May 8, 1963, 44: https://www.jfklibrary.org/asset viewer/archives/ JFKPOF/059/JFKPOF-059-010

2. The exclusion of Puerto Rico in the adoption of SSI.

In 1972, Congress created the Supplemental Security Income (SSI) program, an entitlement program that provides monthly cash payments in accordance with uniform, nationwide eligibility requirements to needy aged, blind and disabled persons. *See* Social Security Amendments of 1972, Tit. III, § 301, 86 Stat. 1465-1478.

For the States and the District of Columbia, the SSI Program replaced the Federal-State programs of old age assistance and aid to the blind established by the original Social Security Act of 1935 as well as the program of aid to the permanently and totally disabled established by the Social Security amendments of 1950.

Puerto Rico's disabled and blind residents remained under the old Aid to the Aged, Blind and Disabled (AABD) program. 41 U.S.C. §§ 1382c(a)(1)(B)(i) and 1382(c)(e).

As a result, the aged, blind and disabled residents of Puerto Rico receive an average monthly benefit of $58, instead of an average $418 under SSI. U.S. Gov't Accountability Off., GAO–14–31, *Puerto Rico: Information on How Statehood Would Potentially Affect Selected Federal Programs and Revenue Sources*, 14 (2014), 84.

SSI was later extended through compact to the Commonwealth of the Northern Mariana Islands (CNMI), 48 U.S.C. § 1801, to Iraqi and Afghan refugees, P.L. No- 110-161, and other aliens, P.L. No. 105-306.

The United States argues that Puerto Rico residents were excluded from SSI because "Congress could rationally conclude that a jurisdiction that makes a reduced contribution to the federal treasury should receive a reduced share of the benefits funded by that treasury. Congress has a legitimate interest in maintaining a balanced fiscal relationship with the Territories. The Constitution does not require Congress to grant the Territories the full fiscal benefits that it has chosen to accord the States even though they do not bear the full fiscal burdens." Pet. Br. 17-18.

The IRS statistics relied on by the Court of Appeals show that the percentage of total federal tax revenues contributed by each state varies considerably. On one end of this spectrum is California, contributing 13.31% of total federal tax

revenues, followed by New York and Texas with 8.60% and 8.24% respectively. At the other end are Wyoming and Vermont, each contributing 0.13. The same table shows Puerto Rico contributes 0.10% of federal tax revenues.[2] https://www.irs.gov/statistics/soi-tax-stats-gross-collections-by-type-of-tax-and-state-irs-data-book-table-5.

Official statistics also show that SSI payments in a State bears no relationship to the amounts contributed in taxes by the State. While Mississippi contributes 0.32% of federal tax revenues, its residents receive 1.43% of all SSI payments. Similarly, while West Virginia contributes 0.20% of all federal tax revenues, its residents get 0.88% of all SSI payments.[3] SSA Publication No. 13-11976, October 2020.

II. TO DENY VAELLO-MADERO SSI PAYMENTS BECAUSE OF HOW PUERTO RICO CONTRIBUTES TO THE FEDERAL TREASURY HAS NO RATIONAL BASIS

The United States argues that the law excluding residents of Puerto Rico from the SSI program needs only meet a rational basis standard, a test satisfied "*if there is any reasonably conceivable state of facts that could provide a rational basis for the classification*." Pet. Br. 13 (quoting *FCC* v. *Beach Communications, Inc.*, 508 U.S. 307, 313 (1993). It initially finds that rational basis in the four-decades old summarily

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[2] The percentages provided here were calculated by dividing the amount paid by each state and Puerto Rico according to the table by the total revenues for all states and territories.

[3] The percentages of SSI payments in a state provided here were calculated by dividing the amount paid to residents of each sample state by the total payments in all states and the CNMI.

disposed cases of *Califano v. Torres,* 435 U.S. 1 (1978) and *Harris v. Rosario,* 446 U.S. 651 (1980) (per curiam) where this Court highlighted that Puerto Rico "*residents do not contribute to the public treasury*." *Califano* at 5 n. 7; *Harris* at 652.

The statements in *Califano* and *Harris* that Puerto Rico does not contribute to the federal treasury cannot withstand contemporary scrutiny. As Justice Marshall complained in *Harris*, the Court *"rushe[d] to resolve important legal issues without full briefing or oral argument*." *Harris*, 446 U.S. at 65 (Marshall, J., dissenting). The reality is that, as the Court of Appeals noted, Puerto Ricans contribute to the federal treasury, *United States v. Vaello-Madero,* 956 F.3d 12, 24 (1st Cir. 2020), albeit under different rules due to different historical, political and economic realities.

The United States acknowledges this when it categorically states that "*[s]ome Puerto Rico residents do pay some federal income taxes*." Pet. Br. 20. It thus nuances its invocation of *Califano* and *Harris* by saying that: "Congress could rationally conclude that a jurisdiction that makes *a reduced contribution to the federal treasury* should receive a reduced share of the benefits funded by that treasury." Pet. Br. 17-18. But while the United States would hope the correction from this Court's "*no contribution*" to the actualized "*reduced contribution*" is subtle and would go unnoticed, its recognition that Puerto Rico residents do contribute to the federal treasury obliterates all rationality.

Some States are poorer or smaller than others and thus contribute less to the federal treasury. *See* SSA Publication No. 13-11976, October 2020 and https://www.irs.gov/statistics/soi-tax-stats-gross-

collections-by-type-of-tax-and-state-irs-data-book-table-5. Those official statistics show that for the same year California contributed 13.31% of total federal tax revenues, whereas Wyoming and Vermont, each contributed 0.13%. In turn, Puerto Rico contributed 0.10% of total tax revenues.

Despite Wyoming and Vermont's reduced contribution to the federal treasury *viz a viz* California, any eligible resident of either state may receive SSI benefits. But although Puerto Rico's contribution is only 0.03% smaller than Vermont and Wyoming's, none of its residents may receive SSI benefits.

If that line-drawing seems intuitively troubling, there is a deeper problem here. The total tax contributions by the residents of a State are not directly related to the SSI payments to qualifying residents of that State. For example, Mississippi contributes 0.32% of total federal tax revenues, but its qualifying residents receive 1.43% of all SSI payments. Similarly, while West Virginia contributes 0.20% of all federal tax revenues, its qualifying residents get 0.88% of all SSI payments. SSA Publication No. 13-11976, October 2020.

SSI payments throughout the fifty states are distributed based on the needs of the individuals residing in each State, regardless of the level of tax contributions of its residents. It does not matter how much the State's residents contribute to the federal treasury, it can be California's 13.31% California or Wyoming's 0.13%, what matters is that the person is aged, blind, or disabled. After all, the program seeks to aid the needy who are equally blind or disabled wherever in the United States they may be found. But

for the United States, it all changes somewhere between contributing 0.13% and contributing 0.10%.

To get around this quagmire, the United States argues that this Court has held that Congress can rely on generalizations and make rough accommodations. Pet. Br at 21. (quoting *Dandrige v. Williams*, 397 U.S. 471, 485 (1970)). It is hard to see how excluding *all* otherwise qualifying residents of Puerto Rico from SSI is a "*rough accommodation*."

In *Danbridge*, the Court evaluated the method used by Maryland to distribute its finite resources among its needy citizens in the Federal Aid to Families with Dependent Children program. The state imposed a maximum grant that limited the total amount of money any one family unit could receive. The standard of need increased based on the number of children, but the increments became proportionately smaller. A "*rough accommodation*" was required to make the finite resources available to all. Contrary to here, however, no one was excluded. *Danbridge* would be apposite if Maryland had ruled that the funds would only be distributed to families with up to, say, four children, and those with five or more children would not receive any aid, and this Court would have found that not to violate equal protection. But that is not the case.

It is even harder to see how this is simply Congress permissibly using different programs –SSI for the States, AABD for Puerto Rico– to address similar issues among different categories, as the United States says *United States Railroad Retirement Board* v. *Fritz*, 449 U.S. 166, 174- 179 (1980) allows. *See* Pet. Br. 25. In *Fritz*, this Court analyzed the reasonableness of employee classifications in the

Railroad Retirement Act of 1974: those who had worked less than ten years, those already retired at the time of the act, those that qualified for both railroad and social security benefits. It found that Congress did not act in a patently arbitrary of irrational way, in drawing those lines. *Id*. at 177.

Similarly. in *Vance* v. *Bradley*, 440 U.S. 93, 108 (1979), the Court examined a mandatory retirement age for the Foreign Service that did not apply to the Civil Service. The fact that some, very few, in the Civil Service worked abroad under similar conditions as those in the Foreign Service but were not subject to the same early retirement rules did not violate equal protection, for equal protection does not require perfection or mathematical nicety. *Id*. at 108. *Vance* had a clearly identifiable dividing line between the existing categories of the Foreign and the Civil Service.

Applying *Fritz* and *Vance* to the case at hand loops us back to the reduced contributions argument. The United States has not shown why it is not arbitrary and irrational to draw a line between Vermont's reduced contribution of 0.13% and Puerto Rico's 0.10%.

That being the case, discriminating against Puerto Rico residents, under the rationale that Puerto Rico in general contributes less to the federal treasury means excluding the individually poor for living in a generally poor area in a program aimed at aiding the poor. That is irrational and cruel, as it is not the application used for delivering SSI benefits to the rest of the poor residents of the United States. It discriminates only against the poor living in Puerto Rico.

The United States argues that the line is not drawn on account of the percentage contribution made by Puerto Rico to the federal treasury *viz a viz* the States. That, instead, it is drawn on account of its "unique tax status," Pet. Br. 15, that allows Puerto Rico to replace inapplicable federal taxes with its own. Pet. Br. 17. According to the United States, its residents benefit from living in a jurisdiction that retains its own tax revenues, and its government can use that money to fund various governmental services, Pet. Br. 22. In other words, Puerto Rico could use the money it generates as an "*autonomous fiscal unit to increase the benefit levels in the AABD program*." Pet. Br. 23. This argument ignores the policy considerations behind Puerto Rico's fiscal autonomy.

Puerto Rico's fiscal autonomy grew out of Congress's belief that Puerto Rico has too small a tax base and thus needs to retain all tax revenues to make ends meet. See pp. 2-8, *supra*. Puerto Rico has a median household income of $18,660, compared to a median household income of $50,502 in the states, and lower than in any state. U.S. Gov't Accountability Off., GAO–14–31, *Puerto Rico: Information on How Statehood Would Potentially Affect Selected Federal Programs and Revenue Sources* 14 (2014), 10. Its fiscal autonomy simply allows the island to generate tax revenues that are similar to those raised with lower tax rates by richer states. It does not put Puerto Rico in the position of funding social welfare programs comparable to those provided at the federal level by the richest country in the world.

III. DISCRIMINATION AGAINST THE RESIDENTS OF THE COMMONWEALTH OF PUERTO RICO, AS U.S. CITIZENS IN AN AUTONOMOUS REGION OF THE UNITED STATES WITHOUT VOTING REPRESENTATION IN CONGRESS, MUST BE SUBJECT TO STRICT SCRUTINY ANALYSIS.

The people in nonstate areas of the United States, including Puerto Rico, do not have voting representation in Congress, yet federal legislation affect them. Elemental principles of fairness and equal protection demand that any discrimination in the application of federal programs to Puerto Rico and other nonstate areas with no voting representation in Congress be subject to strict scrutiny analysis.

Equal protection analysis requires strict scrutiny of a legislative classification when the classification operates to the peculiar disadvantage of a suspect class. *Mass. Bd. of Ret. v. Murgia*, 427 U.S. 307, 312, 96 S. Ct. 2562, 2566 (1976). Designation as a suspect class has mostly required that members of the class be considered saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process. *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 28, 93 S. Ct. 1278, 1294 (1973).

Just as this Court has concluded that classifications based on alienage, like those based on nationality or race, discrete and insular minorities, are considered inherently suspect, *Graham v. Richardson*, 403 U.S. 365, 372, 91 S. Ct. 1848, 1852

(1971), so to it must conclude that classifications that group U.S. citizens without voting representation in the Congress be inherently suspect, and subject to close judicial scrutiny.

The rationale is the same. First, racial classifications are inherently suspect because minorities have, by definition, less political power in Congress. It should go without saying that U.S. citizens in Puerto Rico, with no voting representation in Congress, has even less.

Second, racial classifications are inherently suspect because history provides a long list of discrimination on account of race. Historical discrimination is relevant to suspect classification insofar as it demonstrates a lack of political power over time and a failure of the legislative process to provide adequate protection against discrimination. Marcy Strauss, *Reevaluating Suspect Classifications*, 35 Seattle U. L. Rev 135, 150 (2011). On this subject, Puerto Rico can provide its own list:

a) The Medicaid Program in Puerto Rico has a restrictive statutory ceiling amount. 42 U.S.C.A. § 1308. Conversely, State Medicaid programs in the fifty states and the District of Colombia are provided an unlimited amount of available federal matching.

b) Residents of Puerto Rico are not eligible for the Medicare Part D Low-Income Subsidy ("LIS"). Social Security Act § 1860D-14(a)(3)(F); Social Security Act § 1935 (e)(1)(A). The LIS is available to low-income Medicare beneficiaries in the States with incomes up to 150% of the federal poverty level and provides and approximate $5,000 annual value to

assist beneficiaries in affording prescription drug. https://www.ssa.gov/pubs/EN-05-10508.pdf.

c) The Supplemental Nutrition .Assistance Program is a federal benefits program that provides nutrition assistance to low-income individuals benefits available to residents of the 50 States, the District of Columbia, Guam, and the U.S. Virgin Islands, but not to residents of Puerto Rico, whose government runs an inferior program

Tellingly, the lower Courts have been eloquent in addressing a long history of statutory discrimination against the residents of the Commonwealth. In addressing the question of disparate treatment, federal Judge, Hon. Young, D.J. recently said it best: "The federal safety net is flimsier and more porous in Puerto Rico that in the rest of the nation…To be blunt, the federal government discriminates against Americans who live in Puerto Rico," *Peña Martínez* v. *U.S. Department of Health and Human Services*, 478 F.Supp.3d 155 (D.P.R. 2020).

The government posits that "this congressional practice of treating Territories differently in federal benefits program is as old as federal benefits themselves." Pet. Br. 25. The long-standing practice of Congress treating the American Citizens of Puerto Rico differently does not make it rational. Even rationale-basis review has limits as the rationale basis is not "a toothless one" (standard). *Peña Martínez v. U.S. Department of Health and Human Services,* 478 F.Supp 3d 155 (D.P.R. 2020) quoting *Schweicker vs. Wilson*, 450 U.S. 221, 234 (1981); *Matthew v. Lucas*, 427 U.S. 495, 510 (1976).

The aim of these programs is to provide for the sick and needy. Yet, while U.S. citizens of Puerto Rico have the highest diabetes prevalence in the Nation,[4] 7% cardiovascular prevalence compared to 5% of the national average,[5] hypertension prevalence at 42% compared to 32% the national average, [6] and 42% high cholesterol compared to a 37% of the National average,[7] Puerto Rico has the lowest Per Capita Federal Spending in Medicaid.

The legality of discrimination against the residents of Puerto Rico from receiving equal healthcare benefits is defended by the United States on the principle that, "*the Equal Protection Component of the Due Process Clause concerns unequal treatment of classes of persons, not unequal treatment of regions.*"

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[4] State wide 2015 diabetes prevalence in adults, Center of Disease Controls. https://gis.cdc.gov/grasp/diabetes/DiabetesAtlas; https://data.medicaid.gov/Uncategorized/FY2016-Financial-Management-Data

[5] State wide 2015 cardiovascular prevalence in adults, Center of Disease Controls. https://gis.cdc.gov//BRFSSPrevalence/ ; https://data.medicaid.gov/Uncategorized/FY2016-Financial-Management-Data

[6] State wide 2015 high cholesterol prevalence in adults, Center of Disease Controls. https://gis.cdc.gov//BRFSSPrevalence/ ; https://data.medicaid.gov/Uncategorized/FY2016-Financial-Management-Data

[7] State wide 2015 high cholesterol prevalence in adults, Center of Disease Controls. https://gis.cdc.gov//BRFSSPrevalence/ ; https://data.medicaid.gov/Uncategorized/FY2016-Financial-Management-Data

Pet. Br. 30. Here the geographical class covers an entire population of a non-state jurisdiction that did not participate in the crafting of the law in Congress that excluded them from the benefits of SSI.

The purpose of strict scrutiny is to "*smoke out*" illegitimate uses of suspect classifications by assuring that the legislative body is pursuing a goal important enough to warrant use of a highly suspect tool. *City of Richmond v. J. A. Croson Co.,* 488 U.S. 469, 493 (1989). This follows a concern that a political majority will more easily act to the disadvantage of a minority based on unwarranted assumptions or incomplete facts. *Id.* The test ensures that the means chosen fit a compelling goal so closely that there is little or no possibility that the motive for the classification was illegitimate racial prejudice or stereotype. *Id.*

There is no denying that the doctrine of non-incorporation had racist origins. In *Balzac v. Porto Rico,* 258 U.S. 298, 42 S. Ct. 343 (1922), the Court justified considering Alaska as incorporated because "it was an enormous territory, very sparsely settled *and offering opportunity for immigration and settlement by American citizens*." *Id.* at 309.Thus, the Court said, "[i]t involved none of the difficulties which incorporation of the Philippines and Porto Rico presents," *Id.,* those difficulties evidently being that Puerto Rico was full of Puerto Ricans with little space left for a civilizing migration and settlement of white American citizens.

And there is no denying that by invoking Puerto Rico's fiscal autonomy–that originated through the doctrine of non-incorporation–as a rational basis for discrimination, the United States has established a

classification that applies to a population that is 98.9% Latino. https://www.census.gov/quickfacts/PR. Indubitably, the members of that class–the American citizens residing in the Commonwealth of Puerto Rico–come from an entirely different tradition and history, from an entirely different cultural origin than that of the mainland United States, and, thus are regarded as belonging to a minority group in American society.

Legal scholars have pointed that the rational criteria utilized by the Court—which allowed for discrimination in *Califano* and *Harris*—overlooked those racial premises. Rafael Hernández Colón, *The Evolution of Democratic Governance Under the Territorial Clause of the U.S. Constitution*, 50 Suffolk U. L. Rev. 587, 606 (2017). While race or ethnicity are not bluntly expressed in the SSI classification that fences the resident of the Commonwealth of Puerto Rico from receiving the benefits available to other kindred American citizens, it need not be when its effect are tailored exclusively on a class of American citizens that belong to a distinct minority.

But the argument here goes beyond the question of race or ancestry. If distinctions between citizens solely because of their ancestry are by the very nature odious to a free people whose institutions are founded upon the doctrine of equality, *Hirabayashi v. United States*, 320 U.S. 81, 100 (1943), classifications that single-out citizens who do not have a voting representation in Congress must be subject to the same close judicial scrutiny. These are a people subject to federal laws in general, that did not participate in the making of the statute where they were "rationally"

left out. Their designation as a separate class in the SSI program must be considered a suspect classification that receives this Court's most heightened judicial scrutiny. As birthright American citizens, residents of Puerto Rico must be free from the Congressional yoke that purports to discriminate against the neediest and poorest.

The district court eloquently addressed the long history of statutory discrimination against the residents of the Commonwealth: "Congress * * * cannot demean and brand said United States citizens while in Puerto Rico with a stigma of inferior citizenship to that of his brethren nationwide. To hold otherwise would run afoul of the sacrosanct principle embodied in the Declaration of Independence that 'All Men are Created Equal.'" *United States v. Vaello-Madero*, 356 F.Supp 3d 208 (D.P.R. 2019).

IV. CONCLUSION

For all the foregoing reasons, MMAPA requests that the Court finds that there is no rational basis to support the statutory exclusion of the United States birth citizens of Puerto Rico from receiving SSI benefits. Alternatively, MMAPA petitions the Court to adopt a heighten scrutiny when the description of a class befalls entirely on a minority people of Hispanic descend, who live in an Island, that have a history of statutory exclusion from federal healthcare benefits as American Citizens and did not partake in the congressional enactment where those exclusions were imposed on them.

Respectfully Submitted,

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