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 THE NATIONAL DISABILITY RIGHTS NETWORK, DISABILITY RIGHTS CENTER OF THE VIRGIN ISLANDS, AND GUAM LEGAL SERVICES CORPORATION-DISABILITY LAW CENTER AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

JAMES T. CAMPBELL
77 Irving Place
New York, NY 10003
(310)318-4080
j.campbell@aya.yale.edu

ARCHIE JENNINGS
Counsel of Record
Disability Rights Center
of the Virgin Islands
9003 Havensight Mall
Suite 313
St. Thomas, VI 00802
(340)776-4303
archie@drcvi.org

Counsel for Amici Curiae
(Additional counsel on inside cover)

September 7, 2021

DAVID HUTT
National Disability Rights Network
820 First Street NE
Suite 7840
Washington, D.C. 20002
(202)408-9520
david.hutt@ndrn.org

JENNIFER MONTHIE
Disability Rights New York
725 Broadway
Suite 450
Albany, NY 12207
(518)432-7861
jennifer.monthie@drny.org

DANIEL SOMERFLECK
Guam Legal Services
Corporation-Disability Law Center
113 Bradley Place
Hagåtña, GU 96910
(671)477-9811
daniel.somerfleck@guamlsc.org

STEVEN TRAUBERT
Disability Law Center of Virginia
1512 Willow Lawn Drive
Suite 100
Richmond, VA 23230
(804)225-2042
steven.traubert@dlcv.org

QUESTION PRESENTED

Whether Congress violated the equal protection component of the Due Process Clause of the Fifth Amendment by excluding residents of Puerto Rico from Supplemental Security Income, a national program that provides support to low-income persons who are elderly, blind, or disabled in all fifty states, Washington D.C., and the Commonwealth of the Northern Mariana Islands.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

OTHER AUTHORITIES

INTEREST OF THE *AMICI CURIAE*[1]

The Disability Rights Center of the Virgin Islands (DRCVI) and Guam Legal Services Corporation-Disability Law Center (GLSC-DLC) are the protection and advocacy organizations serving individuals with disabilities in the U.S. Virgin Islands and Guam, respectively. As part of the federally mandated Protection and Advocacy (P&A) system, DRCVI and GLSC-DLC's core mission is to support individuals with disabilities so that they may exercise their rights to make decisions and participate equally in all aspects of society.

The National Disability Rights Network (NDRN) is the non-profit membership organization for the P&A and Client Assistance Program (CAP) agencies for individuals with disabilities. Congress established the P&A and CAP agencies to protect the rights of people with disabilities and their families through legal support, advocacy, referral, and education. There is a P&A and CAP organization in all fifty states, the District of Columbia, all U.S. territories (American Samoa, Guam, the Northern Mariana Islands, Puerto Rico, and the U.S. Virgin Islands), and one affiliated with the Native American Consortium, which includes the Hopi, Navajo and San Juan Southern Paiute Nations in the Four Corners region

---

[1] No counsel for any party authored this brief in whole or in part, and no person or entity other than the amici or their counsel made a monetary contribution intended to fund the preparation or submission of this brief. Petitioner and Respondent have consented to the filing of this brief.

of the Southwest. Collectively, the P&A and CAP agencies are the largest provider of legally based advocacy services to people with disabilities in the United States.

Like residents of Puerto Rico, DRCVI and GLSC-DLC's clients are excluded from Supplemental Security Income (SSI). The exclusion visits harsh outcomes upon their respective disability communities—and especially upon families caring for children with disabilities. In the course of their protection and advocacy work, DRCVI and GLSC-DLC encounter families that are forced to send children with disabilities away to jurisdictions where SSI is available.

INTRODUCTION

Congress's decision to exclude Puerto Rico's low-income residents who are elderly, blind, or disabled from Supplemental Security Income (SSI) is rooted in discriminatory purpose. The decisions below, while correct in holding that the instant law cannot survive rational basis scrutiny, failed to contemplate the full scope of 42 U.S.C. 1382c's text, which is directed at multiple U.S. territories—not just Puerto Rico. As a result, lower courts overlooked significant evidence of the instant law's invidious intent, which plainly commands strict scrutiny.

ARGUMENT

I. The Court's Analytical Scope Must Encompass All Four Territories Excluded by 42 U.S.C. 1382c's Text, Not Just Puerto Rico

While the United States frames this case as one that turns on imagined legislative judgments about a single territory in isolation, Pet. Br. 9-11, the relevant statutory provision, 42 U.S.C. 1382c, does not actually mention Puerto Rico by name. Instead, the text defines the term "United States" in a manner that simultaneously excludes four overseas territories—Puerto Rico, the U.S. Virgin Islands, Guam, and American Samoa—communities united by a common history of invidious discrimination under federal law and a lack of voting representation before the Congress that excluded them. *See* Act of Mar. 24, 1976, Pub. L. No. 94-241, 90 Stat. 263 (48 U.S.C. 1801 note) (extending SSI to the Northern Mariana Islands in fulfillment of a negotiated Covenant).

Accordingly, the Court's constitutional inquiry cannot artificially sever Puerto Rico from the broader arc of racial and ethnic discrimination spanning the nation's diverse territorial relationships. *See, e.g.*, *Rogers v. Lodge*, 458 U.S. 613, 618 (1982) (centering the Court's inquiry on the "totality of the relevant facts" and any available "circumstantial and direct evidence" of the law's intent). Congress deliberately crafted the statute to exclude Americans with disabilities across Puerto Rico, the U.S. Virgin Islands, Guam, and American Samoa. Focusing on any one of these territories in isolation would blind the Court to

the true nature of the statute's discriminatory purpose and effect: to exclude racial and ethnic minority Americans who cannot register objections at the ballot box.

The United States' autonomy- and tax-based justifications for excluding Puerto Rico collapse upon closer inspection of this broader history. Together, the experience of all four excluded territories reveals unique collateral harms traceable to 42 U.S.C. 1382c's discriminatory purpose, which has relegated the territories' disability community—and children with disabilities in particular—to an unconscionable second-class status.

II. Across Four U.S. Territories, Exclusion from SSI Relegates Low-Income Children with Disabilities to an Unconscionable Second-Class Status

Over the past half-century, Congress has transformed how we care for, accommodate, and educate individuals with disabilities. Today, federal law secures a substantive promise of autonomy, education, and equal participation to our nation's children with disabilities—all except the children of Puerto Rico, the U.S. Virgin Islands, Guam, and American Samoa. Shut off from basic supports in their birthplace, these latter children are relegated to an entirely separate, lesser paradigm of care. In many instances, to receive necessary care, these children have no option but to be uprooted from their family and community settings and relocated to the U.S. mainland.

Set in motion by nationwide reforms like SSI (1972), Medicare and Medicaid eligibility for individuals with disabilities (1973) and the Education for All Handicapped Children Act (EHA) (1975), the modern framework of American disability rights put an end to "discriminatory benefits . . . forc[ing] needy families, millions of children, and the needy aged, blind and disabled into a web of . . . economic contradictions." Richard Nixon, *Special Message to the Congress on Welfare Reform* (Mar. 27, 1972). Rejecting a once-pervasive emphasis on isolation and institutionalization, federal law now supplies an array of rights and programs that affirmatively support individual autonomy and decision-making within the family-community setting. *See* 42 U.S.C. 12101(b)(1) (describing the overarching purpose of the Americans with Disabilities Act as "a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities"); *id.* § 12101(a)(3) (including within "discrimination" those practices that "isolate and segregate individuals with disabilities").

Federal support across several domains—particularly income support (SSI), medical support (Medicaid), and special education (EHA, and now the Individual with Disabilities Education Act (IDEA))—has enabled historic advances in political and economic participation by the nation's disability community, unlocking a brighter future for millions of children long denied the opportunity to reach their full potential. *See, e.g.*, John Shattuck & Mathias Risse, *Disability Rights*, Reimagining Rts. & Resps. in the U.S., Jan. 21, 2021, at 4-7, 20-24. Those reforms align with federal law's wider recognition that

removing individuals with disabilities from their family and community settings portends "a massive curtailment of liberty," *Vitek v. Jones*, 445 U.S. 480, 491-92 (1980), and that the Americans with Disabilities Act secures individuals a broad substantive right to be free from "[u]njustified isolation." *Olmstead v. L.C.*, 527 U.S. 581, 597 (1999). Indeed, between 1955 and 1994, American public hospitals' institutionalization rate declined ninety-two percent. *See* E. Fuller Torrey, *Out of the Shadows: Confronting America's Mental Illness Crisis* 8-9 (1997).

SSI, our nation's largest federal income assistance program, is the cornerstone of that promise. Without it, millions of Americans would be unable to provide for basic necessities of community living: home modifications, medically prescribed diets, therapies not covered by Medicaid, or costs associated with assistive technology. Even with access to SSI benefits, an estimated forty percent of people with disabilities experience material hardship because of the extra cost of living with a disability. *See* Julia A. Rivera Drew, *Disability, Poverty, and Material Hardship Since the Passage of the ADA*, 35 Disability Stud. Q. 4947 (2015).

To deny a life-changing nationwide benefit to four isolated communities that demonstrate (1) the greatest economic need and (2) the least access to political channels capable of amending the law is a constitutional infirmity by any measure. *See United States v. Carolene Prods. Co.,* 304 U.S. 144, 152 n.4 (1938). More than that, exclusion from SSI visits unique collateral harms upon the people of U.S. territories on

account of historical discrimination in adjacent areas of federal law. Here, too, the Court must reject a narrow analytical lens that restricts the merits of this case to the condition of one territory (Puerto Rico) in order to observe the extent to which the territories' disability communities have been relegated to a separate paradigm of care.

A. Access to SSI is Especially Urgent in U.S. Territories, Where Key Medicaid Services Remain Unavailable

Access to SSI is especially urgent for individuals with disabilities in U.S. territories on account of these islands' diminished access to various Medicaid services that are widely available across all fifty states and Washington D.C. Their limited access reflects a parallel history of discrimination under federal Medicaid laws, which—until recently—singled out territorial governments for reduced reimbursement formulas and harsh funding caps that do not apply to states. *See* Disability Rights Center of the Virgin Islands, *Shadow Citizens: Confronting Federal Discrimination in the U.S. Virgin Islands* 14-30 (2021) ("*Shadow Citizens*"). Since 2017, Congress has ameliorated that condition with temporary increases to the territories' Medicaid reimbursement rates, easing some of the accumulating financial burden from preceding decades of discrimination. However, on account of decades-long disparate treatment, numerous basic, nonspecialized medical services that are essential to individuals with disabilities are now wholly unavailable in U.S. territories.

For example, the U.S. Virgin Islands is presently without any Medicare- or Medicaid-certified nursing facilities. In early 2020, St. Croix's only hospital had to transfer numerous elderly patients to the mainland United States for basic nursing care because "the territory has no skilled senior living facilities which can care for the needs of these vulnerable seniors around the clock." Maxiene K. Cabo, *Families Are Abandoning Seniors at Hospitals as Pandemic Hits Aging Population and Poor Hard*, V.I. Consortium (Sept. 22, 2020) (quoting interim hospital CEO). Similarly, there is zero inpatient psychiatric care available on St. Croix, where the hospital's psychiatric unit has been closed since 2012. While Medicaid funding levels have recently increased, a desert of locally accessible services forces the Virgin Islands Government to spend an estimated $20 million of their newly enhanced funding to send adults, children and adolescents away from the Virgin Islands for mental health care (approximately $270,000 per patient per year). *See Shadow Citizens* at 27.

Among the relevant initiatives stifled by past Medicaid discrimination are access to Medicaid's Intermediate Care Facilities for Persons with Intellectual Disability (ICF/ID) program and Home and Community Based Services (HCBS) waiver program. ICF/ID is a Medicaid benefit that funds comprehensive and individualized health care and rehabilitation services to promote functional status and independence. HCBS waivers enable Medicaid recipients who would otherwise require care in a nursing home or institution to receive services like home health aides, personal care, adult daycare, and homemaker services within their own home or community set-

ting. Both ICF/ID and HCBS waivers, although optional under federal Medicaid law, have been implemented across all fifty states and the District of Columbia. But the U.S. Virgin Islands, Puerto Rico, Guam, and American Samoa have access to neither. *See* Administration for Community Living, *Services for People with Intellectual And/Or Developmental Disabilities in the U.S. Territories*, U.S. Dep't of Health & Hum. Servs. 40-41 (May 2015); *cf.* Amber Christ & Natalie Kean, *Medicaid Home- and Community- Based Services for Older Adults with Disabilities*, Justice in Aging 5 (Apr. 2021) (finding that the territories' lack of HCBS coverage is "likely due to the caps on federal funding for Medicaid in the territories").

The absence of home- and community-integrated Medicaid services renders access to SSI's income supports all the more urgent. Without it, Puerto Rico, Guam, the U.S. Virgin Islands, and American Samoa are cast out of the national mandate to end the disability community's "relegation to lesser services, programs, activities, benefits, jobs, or other opportunities[.]" 42 U.S.C. 12101(a)(5).

B. SSI Discrimination Uproots Children with Disabilities from Their Family-Community Settings

For children with disabilities, the territories' exclusion from the American disability rights framework amounts to caste treatment. Income assistance for children with disabilities is the most critical function of the SSI program. Even with access to SSI,

families at or near the federal poverty level are significantly more likely to experience food insecurity and extreme economic hardship when they have one or more children with a disability. Even with one or more working parents, childhood disability frequently results in losses to household income as parents are forced to cut back on work to provide care. Kathleen Romig, *SSI: A Lifeline for Children with Disabilities*, Ctr. for Budget & Policy Priorities (May 11, 2017), at 10-11. Nearly forty percent of children receiving SSI benefits require extra help with daily life activities, such as "mobility, using the toilet, eating, bathing, and dressing." *Id.* at 11. Accordingly, families caring for children with disabilities are "twice as likely as families with nondisabled children and with the same level of income to face material hardships such as food insecurity . . . and housing and utility hardships[.]" *See* Rebecca Vallas & Shawn Fremstad, *Maintaining and Strengthening Supplemental Security Income for Children with Disabilities*, Ctr. for Am. Progress 3-4 (Sept. 10, 2012).

Meanwhile, none of the territories' alternative income assistance programs under Old Age Assistance (OAA), Aid to the Totally and Permanently Disabled (ATPD), and Aid to the Aged Blind, and Disabled (AABD)—programs that receive only a tiny fraction of the federal support available through SSI to begin with—offers benefits to families with children with disabilities. *See* William R. Morton, Cong. Research Serv., *Cash Assistance for the Aged, Blind, and Disabled in Puerto Rico* 4-5 (Oct. 26, 2016); 42 U.S.C. 1355. Thus, while SSI benefits lift "half of otherwise-poor child beneficiaries out of poverty," Romig at 1, federal law sanctions unconscionable hardships for the children of Puerto Rico, Guam, American Samoa, and the U.S. Virgin Islands.

Even before 2017 Hurricanes Irma and Maria devastated Puerto Rico and the U.S. Virgin Islands, the Virgin Islands' per capita income lagged thirty-four percent behind the poorest U.S. state and fifty-one percent behind the national average. *Shadow Citizens* at 7. Meanwhile, cost-of-living ballooned to forty to fifty percent above the national average (presently, cost-of-living on the island of St. Thomas is comparable to that of Washington D.C.). *Id.* at 7 n.1. According to the 2010 Census, the percentage of Virgin Islanders living below the Federal Poverty Level was nearly double that of the United States overall. Electricity costs, which have soared to nearly quadruple the national average in recent years, have become an outsized threat to individuals requiring assistive technologies like an electric wheelchair. *See* USVI Hurricane Recovery and Resilience Task Force, *Report 2018*, at 154 (2018).

In the course of their disability protection and advocacy mission, *amici* encounter families of children with disabilities faced with no choice but to consider relocation as a means of securing access to basic and necessary care. For example, one of DRCVI's recent representations involved a child born in the Virgin Islands with cerebral palsy and other disabilities who has since been relocated to the U.S. mainland on the advice of doctors. After birth complications left the child's mother in a persistent vegetative state, the child's grandmother assumed guardianship and remained with the child for several months in the U.S. Virgin Islands. However, following several surgeries and medical appointments requiring the child to travel back and forth between the U.S. Virgin Islands and southeastern United States, medical pro-

fessionals advised the child's grandmother that her only viable choice was to relocate to the mainland United States, where the child would have access medical care, income supports, and other assistance unavailable in the U.S. Virgin Islands.

Together, the parallel challenges of poverty and disability can be irreparably damaging to these children's adult prospects. According to the National Academy of Sciences Institute of Medicine (IOM), "[p]overty is a risk factor for child disability" while "[a]t the same time, child disability is a risk factor for family poverty." IOM, *Mental Disorders and Disabilities Among Low-Income Children* 7-8 (2015). The decision to exclude these children from SSI unless they flee their birthplace robs them of a fair opportunity to transition into adulthood, enter our nation's workforce, and generally lead healthy and independent lives within their own communities.

Children with disabilities in Puerto Rico, the U.S. Virgin Islands, Guam, and American Samoa are being denied the fundamental supports that allow millions of Americans with disabilities to thrive. SSI enables Americans with disabilities to remain in their family and community settings, access special education, and eventually become contributing members in all aspects of our society. But across these four territories, exclusion from SSI imposes a legal burden on children with disabilities based on characteristics wholly outside their control. As this Court noted in *Plyler v. Doe*, 457 U.S. 202 (1982), legislation imposing special burdens on the health and education of a disfavored group of children "poses an affront to one

of the goals of the Equal Protection Clause: the abolition of governmental barriers presenting unreasonable obstacles to advancement on individual merit." *Id.* at 221-22. For children with disabilities, the territories' exclusion from SSI is precisely the sort of discrimination that raises the "specter of a permanent caste" or "shadow population" within our nation, "foreclos[ing] the means by which that group might raise the level of esteem in which it is held by the majority." *Id.* at 217 n.14, 221-22.

These children—born citizens of the United States in the case of Guam, Puerto Rico, and the U.S. Virgin Islands—bear every imaginable mark of political disenfranchisement and discrimination that call for this Court's most rigid scrutiny. The Constitution's promise of equal protection cannot be reconciled with legislation that refuses an isolated group of low-income children the support they need to succeed at home and in their neighborhood schools. These children face more than the stigma and marginalization of disability, minority, or family poverty; they face unique barriers to the political process by virtue of the territories' disenfranchisement and history of pervasive racial and ethnic discrimination. At the local level, excluding these children from the nation's disability supports ensures that future generations of Americans with disabilities will remain further shut off from political life. *See* Charles P. Sabatino, *Guardianship and the Right to Vote*, ABA Human Rts. Mag. Vol. 45, No. 3 (June 26, 2020) (discussing the relationship between material and practical supports and legal capacity for voting purposes). The political branches cannot be allowed to engineer cost savings at the expense of those who

will be unable to hold them accountable at the ballot box—both now and in adulthood. In no interpretive universe can the Constitution's promise of Equal Protection accommodate democratic failures that rob from such children's future. *Cf.* John Hart Ely, *Democracy and Distrust* 104 (1980) (underscoring the need for judicial intervention in policing discrimination that obstructs the "channels of political change").

III. Autonomy- and Tax-Based Justifications Are a Thin Rationalization for Policy Plainly Rooted in Discriminatory Purpose

Congress's decision to exclude Puerto Rico and other territories from SSI benefits commands strict scrutiny as a law motivated by invidious discriminatory purpose. *See Washington v. Davis*, 426 U.S. 229, 242 (1976). When confronting the prospect of discriminatory purpose in legislation, the Court makes a "sensitive inquiry into such circumstantial and direct evidence of intent as may be available." *Rogers v. Lodge*, 458 U.S. 613, 618 (1982) (quoting *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 266 (1977)). Relevant factors include "historical background . . . particularly if it reveals a series of official actions taken for invidious purposes" and whether "a clear pattern, unexplainable on grounds other than race, emerges . . . even when the governing legislation appears neutral on its face." *Arlington Heights*, 429 U.S. at 266-67; *Yick Wo v. Hopkins*, 118 U.S. 356 (1886). Here, the "totality of relevant facts" necessarily includes the shared history and circumstances of all territorial communities

simultaneously excluded by 42 U.S.C. 1382c's plain text. *Washington*, 426 U.S. at 242 ("[A]n invidious discriminatory purpose may often be inferred from the totality of the relevant facts, including . . . that the law bears more heavily on one race than another.").

A. U.S. Territories' Exclusion from SSI Flows from Shared History of Racial and Ethnic Discrimination Under Federal Law

The history of the Social Security Act and other federal benefits programs in the United States' so-called unincorporated territories is defined by far-reaching racial and ethnic judgments about native populations. Across those territories—and in the U.S. Virgin Islands in particular—native populations have been branded as both unfit for political rights and undeserving of the economic supports that lift millions of other Americans out of extreme poverty. Although the contours of each territory's relationship to federal infrastructure and benefits programs diverge, a history of invidious exclusion unites the present mosaic of territorial exceptionalism across federal programs. *See* Andrew Hammond, *Territorial Exceptionalism and the American Welfare State*, 119 Mich. L. Rev. 1639, 1675 tbl.1 (2021) (showing, for example, how the Commonwealth of the Northern Mariana Islands is included in SSI but excluded from SNAP while the reverse is true in the U.S. Virgin Islands).

Evidence of common discriminatory purpose across multiple territories also extends beyond the *Insular Cases*. *Cf.* Resp. Br. 2-3 (citing the *Insular Cases* to link Puerto Rico's exclusion from SSI to a broader historical desire to single out the people of Puerto Ricans on account of racial and ethnic animus). Those cases, for all their abhorrent language concerning "alien races," "savage peoples," and inferior "blood" thought to inhabit the nation's new overseas possessions, are merely a starting point. The *Insular Cases* broke ground for a much deeper foundation of invidious policy laid by the *political branches* over the coming century. Unyoked from perceived constitutional impediments to "the orderly administration of justice" where the United States, "impelled by its duty and advantage, shall acquire territory peopled by savages," the political branches hardened those theories of racial and ethnic inferiority into a concrete political-administrative order. *Dorr v. United States*, 195 U.S. 138, 145 (1904); *see also* Juan R. Torruella, *The* Insular Cases*: The Establishment of a Regime of Political Apartheid*, 29 U. Pa. J. Int'l L. 283 (2007). Thus, to properly evaluate the constitutionality of this far-reaching separate-and-unequal regime, the Court must look beyond the *Insular Cases* and the judicial sphere towards the long and varied history of federal administration across these different territories.

In the U.S. Virgin Islands, where the overall population is more than seventy-five percent Black, this racial and ethnic discrimination traces back to the dawn of U.S. naval rule, a period marked not only by policymaking grounded in overt racial stereotyping, but by regular episodes of race violence and threats

of lynching. J. Antonio Jarvis, *Brief History of the Virgin Islands* 141 (1938). Following a familiar playbook of committing "all military, civil, and judicial powers" to the discretion of an appointed Governor, Congress licensed territorial officials' racial and ethnic prejudice as the foundation of new economic and political relationships with territorial populations. *See An Act to Provide a Temporary Government for the West Indian Islands Acquired by the United States from Denmark*, Mar. 3, 1917, Sess. II, Ch. 170, 171; 48 U.S.C. 1661(c) (American Samoa). In the case of the Virgin Islands, this enabled insular authorities to embark on an official policy of committing "[e]very effort . . . to solve the problem of getting the people of the Virgin Islands back to the land," Waldo A. Evans, *The Virgin Islands of the United States: A General Report by the Governor* 62-63 (1928) ("1928 Evans Report"), an endeavor that would transparently require a multigenerational strategy of racial subordination. *See, e.g.*, Sumner Kittelle, Governor of the Virgin Islands, to Warren Harding, President of the United States (Feb. 27, 1922) (NARS, RG 55.2, File 62-1) ("I cannot too strongly urge that there be no change made in the organic law until a full generation has elapsed . . . and above all the white element must remain in the lead and in supreme control.").

Federal officials' attitudes towards the profitability of native labor illuminate the invidious intent underlying unincorporated territories' exclusion from the fruits of national legislation like SSI. Despite broad recognition of appalling conditions and widespread starvation facing Virgin Islands laborers and their families in the years immediately following annexation, American officials insisted that the real ob-

stacle to the Territory's economic self-sufficiency was the makeup of the laborers themselves. *See, e.g.*, *Report of Joint Commission on Conditions in the Virgin Islands*, H.R. Doc. No. 734, 66th Cong., 2d Sess. 17-18 (1920). The United States' initial assessments of general economic conditions in the U.S. Virgin Islands reflect federal officials' preoccupation with the racial composition of the native population. Detailing the native workers' supposedly inferior intelligence, work ethic, and disposition, the U.S. Treasury Department's 1925 assessment of the Islands rated the Black Virgin Islander as worth "one-fifth to one-half" the "ordinary" laborer in measures of efficiency. *Economic Conditions of the Virgin Islands*, S. Doc. No. 41, 69th Cong., 1st Sess. 6 (1925) ("Tucker Report"). The assessment attributes this gap not to "inadequate muscular strength," but to the Virgin Islander's "disposition to loaf" and "apparent inability to carry out instructions unless constantly supervised." *Id.* Painting colorful images of "men, women and children sucking canes at all hours," Treasury's report warned that investments in agriculture would likely suffer on account of "native depredations" and "natives . . . too lazy to pick." *Id.* at 6-8, 13, 19.

Pervasive racial and ethnic hostility towards the nation's territorial subjects also runs deeper than just anti-Black or anti-Hispanic sentiment. In 1928, Virgin Islands Governor Waldo A. Evans reported to Washington about a community of patois-speaking "cha-chas," a distinct ethnic group "of French origin" comprised largely of migrants from St. Barthelemy. Waldo A. Evans, 1928 Evans Report at 6. Although Evans classified this group as separate and apart from the islands' "colored population," *id.* at 6-8, he

subjected them to the same prejudicial gaze on account of their ethnic origin, describing them as "frail and puny from years of intermarriage" and "show[ing] but little ambition and initiative." *Id.* at 8. The same Governor Evans, selected for duty in the Virgin Islands on account of his previous experience as naval governor of American Samoa, displayed a strikingly similar mode of judgment towards the native Samoan. While declaring his Samoan subjects to be "the true Polynesians . . . the finest physical specimens of the race"—a conclusion informed by the "distinctive marks of the European" that he observed in Samoan faces—Evans ultimately reported to Washington D.C. that the Samoan, by nature, "does not like to work." Waldo A. Evans, *American Samoa: A General Report by the Governor* 23 (1922).

Congressional recognition of U.S. Virgin Islanders' birthright citizenship in 1927 renewed attention to the question of whether the islands' severe poverty and lack of self-government could be reconciled with American ideals. Three years before Congress formally conferred U.S. citizenship on native Virgin Islanders, Labor Secretary James J. Davis commissioned a panel of prominent Black scholars from the mainland United States to investigate the Virgin Islands' industrial and economic conditions. The Commission reported that the situation of the Virgin Islands laborer was "one to appall the most casual observer," urging that "something must be done at once, if these people are not to sink to an economic level abhorrent to American standards of civilization." *Report of the Federal Commission Appointed by the Secretary of Labor to Investigate Industrial and Economic Conditions in the Virgin Is-*

lands, U.S.A. 23 (1924). Rejecting "that complaint frequently voiced by employers"—that is, Virgin Islanders' supposed disinclination to work—the Commission reported instead that a "lack of nutrition . . . reflected in the weakened physical condition of both infants and adults . . . appears to be one reason why the laborers can not [sic] give better results." *Id.* The Commission called for federal appropriations to raise the conditions of Virgin Islands laborers, arguing that "[c]ivic rights give small comfort to women and children poorly housed and underfed" in a Territory where "[u]nemployment, inadequate wages, and even hunger appear on every hand." *Id.*

In 1929, the Secretary of the Navy commissioned another panel of Black scholars from the U.S. mainland with "knowledge of Negro educational institutions" to investigate the Territory's educational outlook. *Tuskegee-Hampton Report of the Educational Survey of the Virgin Islands* 24 (1929). The 1929 Tuskegee-Hampton Report observed the "striking fact that the Virgin Islands are the only place in the [United States] where expenditures for education have recently gone backwards instead of forwards." *Id.* at 22. For context, in 1933, Congress spent more on a government-owned St. Thomas hotel—a hotel that refused to serve Blacks guests, *see* Eric Williams, *Race Relations in Puerto Rico and the Virgin Islands*, Foreign Affs., Jan. 1945, at 9-10—than it did on health, education, or sanitation for the island's entire native population during the following year. *See Annual Report of the Governor of the Virgin Islands* 12 (1933); *Annual Report of the Governor of the Virgin Islands* 6 (1934).

The first U.S. President to visit the Virgin Islands, Herbert Hoover, remarked upon his March 1931 visit to St. Thomas that he viewed the Virgin Islands as an "effective poorhouse." Herbert Hoover, *Statement on Porto Rico and the Virgin Islands* 1 (Mar. 26, 1931) ("Hoover Statement"). Hoover felt that even though Virgin Islanders had recently been made U.S. citizens by birth, it was ultimately "unfortunate that we ever acquired these islands." *Id.* Still, despite his apparent regrets, President Hoover acknowledged that "having assumed responsibility [for the Virgin Islands], we must do our best to assist the inhabitants." *Id.*

American officials were not blind to the likely financial implications of such a promise. In 1926, Virgin Islands Governor Captain Martin E. Trench reported that any prospect of "civil government approximating [American ideals]" would necessarily produce sizable budget deficits "for the foreseeable future." *Annual Report of the Governor of the Virgin Islands* 11 (1926). At the same time, Trench's conclusion that the "government's desire to Americanize the islands must conform with budgetary possibilities" foreshadowed a coming century in which financial expediency would be allowed to prevail over outward promises of equality before the law. *Id.* at 2. Even President Hoover's conception of the nation's duty to its newest citizens was tempered by an immediate desire to "relieve us of the present costs and liabilities in support of the population or the local government from the Federal Treasury." Hoover Statement at 1. It was along such an azimuth that the U.S. Virgin Islands, like neighboring Puerto Rico,

embarked down the path towards second-class citizenship.

It was for these reasons that Congress originally excluded Puerto Rico, Guam, American Samoa, and the U.S. Virgin Islands from the Social Security Act of 1935, which defined "United States" in the very manner that now excludes these same four territories from SSI. *See* Social Security Act of 1935, Pub. L. No. 74-271, § 1101(2), 49 Stat. 620, 647 (extending benefits, however, to Hawaii and Alaska, which would not become states until 1959). And just like SSI, the 1935 Act fashioned alternative assistance programs for unincorporated territories delivering a small fraction of the support promised to stateside Americans. *See, e.g.*, José Trías Monge, *Puerto Rico: The Trials of the Oldest Colony in the World* 88-98 (1997). Indeed, the only thing that has changed about the controlling logic of exclusion is the rhetoric invoked to defend it.

B. Petitioner's Imagined Legislative Judgments About Puerto Rico Collapse in View of the Territories' Shared History of Racial-Ethnic Discrimination and Disenfranchisement

The United States' ostensibly race-neutral autonomy- and tax-based arguments are thin cover for a policy plainly motivated by invidious discriminatory purpose. These justifications collapse upon closer inspection of the history of the federal government's ever-changing rhetoric.

During the first half of the twentieth century, justifications for excluding unincorporated territories from national benefits were overtly grounded in race. Virgin Islands officials routinely argued against greater material supports for native workers by warning of the "danger of spoiling" Black laborers, Tucker Report at 8, and "the effects of a slavery and semi-slavery culture . . . readily observable in the necessary paternalism of government and the widespread dependence on government of all classes." *Annual Report of the Governor of the Virgin Islands* 6 (1931). One Treasury official opined that Virgin Islanders show "little inclination to aid themselves" and "everywhere a lack of independent spirit or the desire to wage their own battle." Luther H. Evans, *The Virgin Islands, From Naval Base to New Deal* 313 (1945) (quoting Treasury official Paul D. Banning).

The United States has until recently gestured towards a rationale grounded in supposed "economic disruption" that could result from granting Americans in U.S. territories equal access to nationwide benefits. *See* Pet. Br. 24 n.2; *Peña Martínez v. U.S. Dep't of Health & Hum. Servs.*, No. 18-01206-WGY (D.P.R. Aug. 3, 2020), at 29. These arguments sound in the same register as those locating the productivity of native labor in race stereotypes and warning of "spoiling" certain races with too much equality. *Annual Report of the Governor of the Virgin Islands* 6 (1931). Instead of looking to whether eligibility is rationally linked to work requirements, graduated benefit levels, or other tailoring mechanisms often employed in national legislation, *see, e.g.*, 7 U.S.C. 2015(o), the United States has asked courts to accept

at face value the proposition that these populations warrant separate judgments about the individual's capacity for and inclination to work.

In this case, the United States refashions its uncomfortable argument yet again, this time under the heading of "respecting and advancing" Puerto Rico's autonomy and self-government. Pet. Br. 23, 24n.2. But the new version of the argument remains divorced from the administrative and budgetary realities of the territories' alternatives to SSI under programs like OAA, APTD, and AABD. Under current law, territorial governments have almost no discretion within the sphere of federal support for disability benefits. *See* 42 U.S.C. 1308(c)(4) (singling out the territories for an overall funding cap that encompasses assistance programs like OAA, APTD, and AABD, as well as Temporary Assistance for Needy Families (TANF), adoption assistance, foster care, and other programs); Morton at 7-8 (showing how in 2011 more than eighty percent of the U.S. Virgin Islands' Section 1108 cap, which has not increased since 1997, was consumed by the non-discretionary TANF block grant, leaving the territorial government with discretion over a mere $707,436 across all other programs). Abandoning its cost-based justifications, *see* Br. of United States at 7, *United States v. Vaello Madero*, 956 F.3d 12 (1st Cir. 2020) (No. 19-1390), and repackaging fear of "economic disruption" as "respect" for Puerto Rico's autonomy, Pet. Br. 24 n.2, the United States here advances a new, marginally politer way of asking the Court to mistake separate for equal. *See* Resp. Br. 3.

This shift in justification from overtly racial to facially race-free is now primarily centered on the tax status of persons residing in U.S. territories. *See* Pet. Br. 9. But this argument too is historically and substantively linked to deliberate racial exclusion: the vocabulary of taxation and property ownership became a shorthand for concerns over racial inclusion in territorial governance.

The Treasury Department's 1925 report on Virgin Islands economic conditions spelled out the link between tax-conditioned rights and race-based objectives. The same report depicting Virgin Islanders as "not as happy and care-free by nature as the Black laborers in the United States," Tucker Report at 7, defended property and taxpaying restrictions for local voting as a way of achieving racial ends. *Id.* at 7, 49 (arguing that "nontaxpayers" interests would not be served by allowing them to elect their own representatives). When pressed about this view in a U.S. Senate hearing, the report's principal author elaborated on the purpose of such voting qualifications: "The situation with regard to suffrage is briefly this: Nine-tenths of the people there—at least nine-tenths of the people—are colored." *See Permanent Government for the Virgin Islands*, *Hearings Before the S. Comm. on Territories and Insular Possessions*, 69th Cong. 60 (1926) (Statement of Dr. Rufus Tucker) ("1926 Tucker Testimony").

While federal officials already maintained a literacy test for voting in the U.S. Virgin Islands, Treasury's representative concluded that literacy tests alone would prove insufficient to exclude Black Virgin Islanders from voting because of the Territory's

already high literacy rates. *See Census of the Virgin Islands of the United States* 70-73 (1917) (showing that in spite of the widespread characterizations of Virgin Islanders as savage and uncivilized, the literacy rate among the Territory's "Negro" population was 70.3% at the time of U.S. annexation, surpassing the literacy rate of the U.S. Black population overall at that time). On Dr. Tucker's estimate, using a literacy test alone would leave "approximately three-fourths of the people there, or possibly four-fifths" eligible to vote, an outcome that would fail to achieve the racial goal of protecting "white people . . . afraid that if anything resembling universal suffrage were granted that there would be a race discrimination[.]" *See* 1926 Tucker Testimony at 60. Thus, in the U.S. Virgin Islands, tax-based arguments became the centerpiece of a strategy to exclude Black voters notwithstanding the commands of the Fifteenth Amendment.

The legislative history of New Deal support programs follows this pattern. Beyond the realm of voting rights, tax-based arguments would also launder a range of policy choices unmistakably grounded in racial animus. Tax-status justifications became an important tool for rationalizing the selective inclusion of the Hawaii and Alaska territories in national legislation while excluding disfavored groups in the "unincorporated" possessions. During debate on the Social Security Act of 1935, Interior Secretary Harold Ickes advocated for including both Puerto Rico and the U.S. Virgin Islands in the law's new nationwide support programs, including old-age assistance, aid to dependent children, maternal and child welfare, and public-health work. *See* Letter from Harold Ick-

es, Sec'y of the Interior, to Pat Harrison, Chair, U.S. Senate Comm. on Fin. (Apr. 24, 1935), *in Hearings Before the S. Comm. on Fin. on H.R. 7260*, 74th Cong. 22-23 (1935). Noting that Alaska and Hawaii were already included in the House version of the Bill, Ickes questioned the rationale for excluding other territories, since "[t]he need for aid of this sort in those possessions is at least as great as in . . . [Hawaii and Alaska]," and "very much greater than in any state of the Union." *Id.* at 23. He also found that Puerto Rico "suffered particularly from legislation designed to benefit the American people as a whole, to the cost of which Puerto Rico has contributed but the benefits of which were not applicable to its citizens." *Id.* Ickes maintained that Congress had a duty to be "particularly solicitous that [Puerto Ricans] do not suffer economically" as a result of their "lesser political status." *Id.*

In the House, Ways and Means Chairman R.L. Doughton explained that the 1935 Social Security Act's definition of "United States" had been amended in executive session to exclude Puerto Rico because "Puerto Rico has its own tax law and does not pay any taxes into the Treasury of the United States." Letter from R.L. Doughton, Chair, H. Comm. on Ways & Means, to William Green, President, Am. Fed'n of Lab. (Apr. 19, 1935), *in* 74 Cong. Rec. 6902 (1935) ("Doughton Letter"). But when faced with subsequent objections to Puerto Rico's exclusion before the Senate, lawmakers reverted to explanations grounded in race and ethnicity, downplaying Secretary Ickes' characterization of the islands' economic need. When considering the Interior Department's proposed amendment that would have added Puerto

Rico and the Virgin Islands to the final version of the 1935 Act, none of the Senators on the Finance Committee commented on the territories' unique income tax status, instead asking questions like: "What proportion of the population is colored? . . . Does that include the mulattoes?" *Hearings Before the S. Comm. on Fin. on H.R. 7260*, 74th Cong. 26 (1935).

Thus, from the earliest days of federal income taxation, tax-based justifications for excluding U.S. territories have served as a rhetorical veil for a regime of second-class citizenship. Today, these arguments fail not only because of the sizable tax contributions now made by territorial residents to the federal treasury, *see Shadow Citizens* at 10-12, or because they are antithetical to programs whose core premise is to support people whose incomes are so low that they do not contribute federal income taxes. Resp. Br. 34-38. They also fail because they misrepresent the structure and history of the tax relationships themselves.

In this case, the United States' arguments carry an unquestioned assumption that the territories' "special" income tax relationships necessarily equate to an economic advantage not enjoyed by federal-income-tax-paying Americans in the states. This assumption is unfounded. The territories' federal income tax status, although "special" in form, says little about the substance of the territories' relationship to the federal treasury. For example, Chairman Doughton's suggestion that Puerto Rico had "its own tax law" when Congress enacted the Social Security Act of 1935 disregards the fact that *all taxation* in U.S. territories was functionally under federal con-

trol. Doughton Letter. Despite institutional relationships mimicking American federalism at the surface, Puerto Rico's citizenship-without-sovereignty meant that the federal government could unilaterally alter the territory's revenue regime at any time.[2] Congress, claiming power under the *Insular Cases*, could exempt territories from "federal" taxes while shifting the same tax burden into the domain of "local" tax laws. Insofar as new commercial activities in Puerto Rico and other territories had yet to produce a profitable tax base, Congress would necessarily incur financial obligations in excess of collectible revenues—just as some states today have a negative balance of payments into the federal treasury. *See, e.g.*, Laura Schultz & Michelle Cummings, *Giving or Getting? New York's Balance of Payments with the Federal Government* 12 (2019) ("New York is one of the ten states that had a negative balance of payments in 2017."). Congress's decision to meet some of that shortfall in the form of a "federal" tax expenditure (as opposed to using "local" tax incentives or increasing direct annual appropriations after having collected territories' taxes into the federal treasury), is a matter of form and not of substance.

Recognizing that the United States retained functional control over all territorial revenues (and to shift tax collections between the "federal" and "local" domains), it is far more instructive to examine the

---

[2] Even today, the substance of income tax collections in Guam and the U.S. Virgin Islands—collections paid into those territories' respective local treasuries—is determined by Congress. *See* 48 U.S.C. 1421i; 48 U.S.C. 1397.

history of the territories' aggregate tax burden and balance of payments to the federal treasury. For example, in 1922, one year after Congress enacted the statute providing that the U.S. Virgin Islands' "federal" income taxes would be paid into the Territory's local treasury, the combined individual tax burden (federal, state, and local) on Virgin Islanders was greater than that on residents of Alabama, even with the Virgin Islands' exemption from paying income taxes into the federal treasury. Tucker Report at 53-54. Similarly, as of 1930, Puerto Rico had a higher tax-to-income ratio than the United States overall. Victor S. Clark et al., *Porto Rico and Its Problems* 158 (1930) (noting that Puerto Rico "has achieved a position comparable with that of the United States as to the weight of the tax burden, but far below the United States as to the support of public activities").

Excepting U.S. territories from the standard modes of federal income taxation operative in the states hardly yielded the advantages that are implied by the federal government. *See* Resp. Br. 12-13, 28. In the U.S. Virgin Islands, the initial decision to reroute federal income taxes to the local treasury hardly affected territorial ledgers. In 1923, only 111 people on St. Thomas paid income tax of any kind, and in 1924, the "federal income taxes" collected into the Virgin Islands treasury under the new law amounted to a mere $25,105.63. Roswell F. Magill, *Recommendations for Revenue Legislation in the Virgin Islands*, U.S. Dep't of Treas. (1925), *in Hearing Before the H.R. Comm. on Insular Affs. on H.R. 10865,* 35-39 (1926). Two years later, Governor Trench testified to Congress that that Virgin Is-

landers would be unable to shoulder any increases to their already significant tax burden. *Id.*

By the 1940s, the United States' foregone tax revenues attributable to "special treatment accorded Puerto Rico under the Federal revenue laws" had grown significantly. William M. Requa, *Federal Expenditures in Puerto Rico* (1943), *in Investigation of Political, Economic, and Social Conditions in Puerto Rico, Hearings Before the H.R. Comm. on Insular Affs.*, 78th Cong. 1921 (1944). By 1943, foregone federal tax revenues from Puerto Rico were estimated at "more than $250,000,000" in total since 1900. *Id.* at 1924. However, these special tax "savings" were more than offset by accompanying reductions in federal assistance for Americans in Puerto Rico. Even though the federal government had formally surrendered claims to some "$231,000,000 under the internal revenue laws that would normally be covered into the general fund," Congress had gutted Puerto Rico's access to federal benefits so much that it produced "a net saving to the Federal Treasury of some $392,000,000, notwithstanding the inclusion of indirect assistance." *Id.* at 1921-24. Thus, even while lawmakers described Puerto Rico as an outsized drain on the federal treasury in 1943, actual estimates suggest that its net federal outlay was less than that of thirty-four states. *See id.* at 1908 (foreword). Armed with the increasingly misleading argument that "Puerto Rico doesn't pay federal taxes," Congress has been able to shift even greater financial burdens onto these unrepresented communities by writing them out of legislation like SSI. The Court should recognize these tax-status arguments for what they are: a discursive shell game.

This broader history of discrimination against residents of U.S. territories in national legislation cannot be explained by anything other than a policy of racial and ethnic exclusion. The Fifth Amendment's promise of equal protection, if it is to mean anything at all to those living in U.S. territories, commands judicial intervention where the objects of legislative discrimination are groups shut off from political channels—and whose exclusion and disenfranchisement bear every mark of racial and ethnic prejudice. *See* Adriel I. Cepeda Derieux, Note, *A Most Insular Minority: Reconsidering Judicial Deference to Unequal Treatment in Light of Puerto Rico's Political Process Failure*, 110 Colum. L. Rev. 797 (2010).

Just two terms ago, the Court countenanced the troubling history of promise-breaking incident to our nation's westward expansion. In this unfortunate chapter, Congress was allowed to break "more than a few of its promises" with impunity, *McGirt v. Oklahoma,* 591 U.S. __, __ (2020) (slip op., at 6), bending our rule of law to transfer outsized burdens onto peoples once viewed as firmly outside our political community. *See Johnson v. M'Intosh*, 21 U.S. (8 Wheat.) 543, 590-91 (1823) (describing Indians as "fierce savages" and likening their place on the American continent to that of "game . . . fled into thicker and more unbroken forests"); *McGirt*, 591 U.S. at __ (slip op., at 42) ("[M]any of the arguments before us today follow a sadly familiar pattern. Yes, promises were made, but the price of keeping them has become too great, so now we should just cast a blind eye. We reject that thinking.").

Here, the Court should consider promises broken in the name of expansion beyond the North American continent, where equal protection of the laws has bowed to extralegal judgments about the makeup of native populations.

CONCLUSION

The Court should uphold the judgment of the Court of Appeals.

Respectfully submitted,

JAMES T. CAMPBELL
77 Irving Place
New York, NY 10003
(310)318-4080
j.campbell@aya.yale.edu

DAVID HUTT
National Disability Rights Network
820 First Street NE
Suite 7840
Washington, D.C. 20002
(202)408-9520
david.hutt@ndrn.org

JENNIFER MONTHIE
Disability Rights New York
725 Broadway
Suite 450
Albany, NY 12207
(518)432-7861
jennifer.monthie@drny.org

ARCHIE JENNINGS
Counsel of Record
Disability Rights Center of the Virgin Islands
9003 Havensight Mall
Suite 313
St. Thomas, VI 00802
(340)776-4303
archie@drcvi.org

DANIEL SOMERFLECK
Guam Legal Services Corporation-Disability Law Center
113 Bradley Place
Hagåtña, GU 96910
(671)477-9811
daniel.somerfleck@guamlsc.org

STEVEN TRAUBERT
Disability Law Center of Virginia
1512 Willow Lawn Drive
Suite 100
Richmond, VA 23230
(804)225-2042
steven.traubert@dlcv.org

Counsel for Amici Curiae
September 7, 2021