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 *AMICI CURIAE* PLAINTIFFS IN *PEÑA MARTÍNEZ v. U.S. DEPARTMENT OF HEALTH & HUMAN SERVICES* IN SUPPORT OF RESPONDENT

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September 7, 2021

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INTERESTS OF *AMICI CURIAE*[1]

The nine individuals who submit this brief as *amici curiae* are Sixta Gladys Peña Martínez, Nélida Santiago Álvarez, María Luisa Aguilar Galíndez, Gamaly Vélez Santiago, Victor Ramón Ilarraza Acevedo, Maritza Rosado Concepción, Ramón Luis Rivera Rivera, Yomara Valderrama Santiago, and Rosa Maria Ilarraza Rosado. Each is a U.S. citizen who resides in Puerto Rico. Each has minimal (or no) income and negligible assets. And each is disabled or elderly, or both.

In *Peña Martínez v. U.S. Department of Health & Human Services*, 478 F. Supp. 3d 155 (D.P.R. 2020) (Young, J.), *amici* prevailed in their equal-protection challenge to the exclusion of Puerto Rico residents from federal Supplemental Security Income ("SSI") benefits (and two other federal programs). *Peña Martínez* was decided shortly after the decision below and is now pending on appeal to the First Circuit.[2] In *Peña Martínez*, as in the decision below, the district court held that exclusion of Puerto Rico residents from SSI violates the equal-protection guarantee of the Fifth Amendment's Due Process

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[1] Pursuant to Supreme Court Rule 37.3(a), all parties have consented to the filing of this brief through their blanket consents filed on the docket. Pursuant to Supreme Court Rule 37.6, counsel for *amici* state that no counsel for any party authored this brief in whole or in part, and no person or entity other than *amici* or their counsel made a monetary contribution intended to fund the preparation or submission of this brief.

[2] The First Circuit has stayed *Peña Martínez* pending this Court's decision here. *See Peña Martínez v. U.S. Dep't of Health & Human Servs.*, No. 20-1946, Doc. No. 00117724098 (1st Cir. Mar. 31, 2021).

Clause. Unlike the decision below, however, *Peña Martínez* rests on a complete factual record and comprehensive findings in support of the conclusion that discrimination against Puerto Rico residents in the provision of SSI benefits violates equal protection even under rational-basis review.

Amici file this brief in order to commend to the Court's attention the reasoning of and factual record in *Peña Martínez* as illuminating and helpful in deciding the question presented.

INTRODUCTION AND SUMMARY OF ARGUMENT

The Federal Government's exclusion of residents of Puerto Rico from SSI benefits violates equal protection even if that exclusion is reviewed only for a rational basis.

Califano v. Torres, 435 U.S. 1 (1978), and *Harris v. Rosario*, 446 U.S. 651 (1980), decided more than four decades ago, do not compel a contrary conclusion. As the district court correctly reasoned in *Peña Martínez*, neither decided an equal-protection challenge to the SSI exclusion, and in any event, intervening developments in the law of equal protection and conditions on the ground in Puerto Rico weaken any justification for reliance on those decisions now.

As the district court further correctly ruled in *Peña Martínez*, no rational basis exists for the exclusion of Puerto Rico residents from SSI. The rationales the Government advances here lack any foundation and cannot be reconciled with the Government's own premises and policies in providing

SSI benefits to residents of the fifty States and certain Territories other than Puerto Rico.

First, Puerto Rico's tax status supplies no rational basis for excluding Puerto Rico residents from SSI. Residents of Puerto Rico pay substantial federal taxes and do so in amounts higher than the contributions of residents of other States and Territories whose residents are eligible for SSI benefits. Moreover, SSI beneficiaries are by definition too poor to pay federal income taxes, and it is thus irrational to use relative tax contribution as a basis to exclude such persons from programs aimed at assisting them.

Second, the Government may not exclude Puerto Rico residents from SSI merely to save expenditures from the federal treasury. Even under rational-basis review, equal protection bars arbitrarily selecting one group rather than another similarly situated group to bear such fiscal burdens.

Third, there is no rational basis to suppose that denying impoverished Puerto Rico residents SSI benefits promotes the "autonomy" of Puerto Rico. And enactment of the Puerto Rico Oversight, Management, and Economic Stability Act ("PROMESA") belies the Government's argument that it has consistently pursued such an interest.

The irrationality of excluding Puerto Rico residents from SSI benefits is underscored by the extension of such benefits to residents of the District of Columbia and the Northern Mariana Islands, and by the history of invidious discrimination against residents of Puerto Rico more generally. For all these reasons, the Court should affirm the judgment below.

ARGUMENT

There is no dispute that the statutory scheme here facially discriminates against U.S. citizens solely by virtue of their residence in Puerto Rico. The Government provides SSI benefits to needy aged, blind, and disabled individuals who reside in the 50 States, the District of Columbia, and the Northern Mariana Islands, while facially excluding equally needy aged, blind, and disabled U.S. citizens who reside in Puerto Rico. No rational basis supports that exclusion.

SSI benefits "assist those who cannot work because of age, blindness, or disability." *Schweiker v. Wilson*, 450 U.S. 221, 223 (1981) (quoting S. Rep. No. 92–1230, at 4 (1972)). The governing statute restricts SSI benefits to "resident[s] of the United States," 42 U.S.C. § 1382c(a)(1)(B)(i), defined as "the 50 States and the District of Columbia," 42 U.S.C. § 1382c(e).[3] "Congress separately made SSI program benefits available to residents of the Commonwealth of the Northern Mariana Islands." *Peña Martínez*, 478 F. Supp. 3d at 165 n.5.[4]

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[3] *See* Social Security Amendments of 1972, Pub. L. No. 92-603, § 303(b), 86 Stat. 1329, 1484 (SSI "shall not be applicable in the case of Puerto Rico, Guam, and the Virgin Islands."); 42 U.S.C. § 1382(f) (excluding anyone "outside the United States" from SSI eligibility).

[4] *See* Joint Resolution To Approve the Covenant To Establish a Commonwealth of the Northern Mariana Islands in Political Union with the United States of America, Pub. L. No. 94-241, § 502(a)(1), 90 Stat. 263, 268 (1976) (codified at 48 U.S.C. § 1801 note, and implemented by 20 C.F.R. § 416.120(c)(10)); *see also* 20 C.F.R. §§ 416.215, 416.216(a),

In lieu of SSI, Puerto Rico operates a "less generous" Aid to the Aged, Blind, or Disabled program ("AABD"). *Peña Martínez*, 478 F. Supp. 3d at 165. While SSI establishes a "Federal guaranteed minimum income level for aged, blind, and disabled persons" that is uniform across the States and available to anyone who meets the eligibility criteria, *Schweiker*, 450 U.S. at 223 (citation omitted), AABD is funded by a block grant, so "the number of AABD beneficiaries is limited by its annual funding."[5] "Federal law caps the cumulative funding that Puerto Rico . . . receive[s] annually" for adult assistance, foster care, adoption assistance, and AABD at roughly $36 million, an amount that "is not indexed to inflation and hasn't changed since fiscal year 1997."[6] As a consequence, as the district court

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416.702, 416.1327(a)(1), 416.1603(c) (all defining "United States" for purposes of SSI to cover "the 50 States," "the District of Columbia," and "the Northern Mariana Islands").

[5] *Policy Basics: Aid to the Aged, Blind, and Disabled* ("*Policy Basics*") at 2, Ctr. on Budget & Policy Priorities (Jan. 15, 2021), https://tinyurl.com/355ute8n.

[6] *Policy Basics* at 2; *see* 42 U.S.C. § 1308(c)(4)(A) (setting "mandatory ceiling amount" of $107,255,000 on block payments to Puerto Rico for various programs, including AABD and Temporary Assistance for Needy Families ("TANF")); U.S. Dep't of Health & Human Servs., Office of Family Assistance, *TANF-ACF-PI-1997-11* (Nov. 21, 1997), https://tinyurl.com/ys778krs (full funding of the TANF block grant for Puerto Rico is $71,562,501); *see also* William R. Morton, Congressional Research Service, *Cash Assistance for the Aged, Blind, and Disabled in Puerto Rico*, at 7–8 (Oct. 26, 2016), https://tinyurl.com/y93wf9te (explaining that only $35,692,499 is available to Puerto Rico for AABD and other programs be-

found in *Peña Martínez*, "[t]he AABD program is less generous than SSI in two ways: the income and resource thresholds are higher, such that many poor people would be eligible for SSI but do not make the cutoff for AABD; and even for those who qualify, the average monthly benefit amount is smaller in the AABD program than in the SSI program." 478 F. Supp. 3d at 165.

I. The Court's Decisions In *Califano* And *Harris* Do Not Support Reversal

A. *Califano* and *Harris* Do Not Control

Neither *Califano v. Torres*, 435 U.S. 1 (1978), nor *Harris v. Rosario*, 446 U.S. 651 (1980), forecloses an equal-protection challenge to the exclusion of U.S. citizens from SSI benefits on the basis of their residence in Puerto Rico. *Califano* involved a challenge to Puerto Rico residents' exclusion from SSI, but it was decided solely "on issues related to the right to travel," so "there was no equal protection question before the Court in *Califano*." Pet. App. 12a–13a.

Harris involved an equal-protection claim, but it concerned block grants provided to Puerto Rico under the Aid to Families with Dependent Children program ("AFDC"), rather than an entitlement program like SSI. Pet. App. 13a–14a. Citing the Territory Clause, U.S. Const. art. IV, § 3, cl. 2, *Harris* held that Congress "may treat Puerto Rico differently from States" with respect to AFDC block grants. 446 U.S. at 651–52. That ruling does not

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cause $71,562,501 of the mandatory ceiling amount of $107,255,000 is allocated to the TANF block grant).

address whether Congress may, consistent with the equal-protection guarantee of the Fifth Amendment, establish a federal benefits program like SSI that treats *individuals* who reside in Puerto Rico differently from similarly situated individuals who reside in the 50 States, the District of Columbia, and the Northern Mariana Islands. Pet. App. 14a. *Califano* and *Harris* therefore do not answer the question presented.

B. The Court Should Not Expand *Califano* and *Harris*

The Court should not extend the reasoning of *Califano* and *Harris* to the distinct question presented here for at least four reasons.

First, both *Califano* and *Harris* were summary reversals. The Court has "felt less constrained to follow precedent where, as here, the opinion was rendered without full briefing or argument." *Hohn v. United States*, 524 U.S. 236, 251 (1998) (citation omitted); *see also Gray v. Mississippi*, 481 U.S. 648, n.1 (1987) ("summary action here does not have the same precedential effect as does a case decided upon full briefing and argument"); *United States v. Dixon*, 509 U.S. 688, 716 (1993) (Rehnquist, J., dissenting) ("A summary reversal . . . 'does not enjoy the full precedential value of a case argued on the merits.'") (quoting *Connecticut v. Doehr*, 501 U.S. 1, 12 n.4 (1991) and citing *Edelman v. Jordan*, 415 U.S. 651, 671 (1974)).

Second, factual developments in the 40-plus years since *Califano* and *Harris* were decided counsel against reading those decisions broadly. A statute that "imposes current burdens . . . must be justified by current needs," and it is "irrational for Congress

to" rely "on 40-year-old data, when today's statistics tell an entirely different story." *Shelby Cnty. v. Holder*, 570 U.S. 529, 536, 556 (2013) (citation omitted); *see United States v. Carolene Prods. Co.*, 304 U.S. 144, 153 (1938) ("[T]he constitutionality of a statute predicated upon the existence of a particular state of facts may be challenged by showing to the court that those facts have ceased to exist."); *Nashville, C. & St. L. Ry. v. Walters*, 294 U.S. 405, 415 (1935) ("A statute valid when enacted may become invalid by change in the conditions to which it is applied.").

In the 40-plus years since Congress excluded residents of Puerto Rico from SSI benefits and this Court decided *Califano* and *Harris*, "the island's economic status and its political and financial relationship to the federal government have . . . been tossed and turned by the repeal of the corporate tax credit, numerous devastating hurricanes and earthquakes, a slide into bankruptcy, . . . the creation of a federal board governing the island's financial affairs," and the COVID-19 pandemic. *Peña Martínez*, 478 F. Supp. 3d at 176 (citing *Fin. Oversight & Mgmt. Bd. for P.R. v. Aurelius Inv., LLC*, 140 S. Ct. 1649, 1673–74 (2020) (Sotomayor, J., concurring in the judgment)). Partly as a result of these overlapping crises, "Puerto Rico's poverty rate" is a staggering "43.1%, which is far worse than the national rate of 13.1% and more than double the 19.7% rate of Mississippi, the nation's poorest state." *Id.* at 168. These developments erode any possible factual basis to exclude U.S. citizens resident in Puerto Rico from SSI benefits today, and the Court should consider the Government's supposed justifications afresh.

Third, the Court has refined the law governing equal-protection claims in the decades since *Califano* and *Harris*. The Court has repeatedly held in subsequent cases that statutes violate equal protection where they distribute benefits to groups in an unequal and irrational fashion. *E.g.*, *Hooper v. Bernalillo Cnty. Assessor*, 472 U.S. 612, 624 (1985) (deeming unconstitutionally irrational a state tax preference distinguishing between long-term and short-term resident veterans); *Zobel v. Williams*, 457 U.S. 55, 65 (1982) (deeming unconstitutionally irrational the distribution of dividends from state resources on the basis of length of state residency). The same result is warranted here.

The Court has also held that, even without applying heightened scrutiny, a classification violates equal protection when it targets a particular group for reasons not plausibly supported by a valid public purpose. *E.g.*, *Obergefell v. Hodges*, 576 U.S. 644, 672–76 (2015) (denial of state recognition to same-sex marriage); *Romer v. Evans*, 517 U.S. 620, 634–35 (1996) (denial of antidiscrimination protections on the basis of sexual orientation); *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 446–50 (1985) (denial of zoning permit to group home for the developmentally disabled). When the distinctions at issue are so arbitrary as to "raise the inevitable inference that the disadvantage imposed is born of animosity toward the class of persons affected," *Romer*, 517 U.S. at 634, this Court scrutinizes the reasons the Government offers with greater vigor—it applies rational-basis review with bite.

Applying rational basis with bite is particularly appropriate here because U.S. citizens who reside in Puerto Rico are denied federal political representation. The "community of 3.5 million United States citizens who reside in Puerto Rico" suffer from "total national disenfranchisement and lack of national political clout." *Igartúa v. Trump*, 868 F.3d 24, 25–26 (1st Cir. 2017) (Torruella, J., dissenting from denial of rehearing en banc). Despite being U.S. citizens since 1917, *see* Jones-Shafroth Act, Pub. L. No. 64-368, § 5, 39 Stat. 951, 953 (1917), residents of Puerto Rico cannot vote for President or Vice President, *see* U.S. Const. art. II, § 1; *Igartúa-de la Rosa v. United States*, 417 F.3d 145 (1st Cir. 2005) (en banc), have no representation in the House of Representatives, *see* U.S. Const. art. I, § 2; *Igartúa v. United States*, 626 F.3d 592 (1st Cir. 2010), and have no representation in the Senate, *see* U.S. Const. art. I, § 3; U.S. Const. amend. XVII. As a consequence, they have "virtually no access to 'the operation of those political processes ordinarily to be relied upon to protect minorities.'" *Lopez v. Aran*, 844 F.2d 898, 913 (1st Cir. 1988) (Torruella, J., concurring in part and dissenting in part) (quoting *Carolene Prods.*, 304 U.S. at 152 n.4). That lack of representation in the political process supports applying more searching scrutiny than the Court applied in *Harris* and *Califano* because Puerto Rico lacks the ordinary protections for minorities that the political process affords.

Fourth, the language of *Harris* and *Califano* counsels a narrow reading of those cases. In *Harris*, the Court found there were three "considerations" listed in *Califano* that "suffice to form a rational basis." *See Harris*, 446 U.S. at 652. As the district

court in *Peña Martínez* observed in denying the Government's motion to dismiss, this Court "list[ed] one reason after another, connected by an 'and.'" *Peña Martínez v. Azar*, 376 F. Supp. 3d 191, 208 (D.P.R. 2019) (quoting *Harris*, 446 U.S. at 652). The Court's use of the conjunctive "and" "indicate[s] that no one 'consideration' independently sufficed to justify the exclusion" at issue there. *Id.* (citing *OfficeMax, Inc. v. United States*, 428 F.3d 583, 589 (6th Cir. 2005) (Sutton, J.); Antonin Scalia & Bryan A. Garner, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 116–25 (2012)). Thus, it was the confluence of the three rationales cited in *Califano* and *Harris* that supplied a rational basis. To the extent any one of those three considerations no longer obtains, *Califano* and *Harris* no longer provide precedent for finding a rational basis as to the programs at issue in those cases.

II. The Exclusion Of Puerto Rico Residents From SSI Violates Equal Protection Even Under Rational-Basis Review

A. Puerto Rico's Tax Status Does Not Supply A Rational Basis

1. Residents Of Puerto Rico Pay Substantial Federal Taxes

As the First Circuit correctly observed in the decision below, Puerto Rico residents "not only make substantial contributions to the federal treasury, but in fact have consistently made them in higher amounts than taxpayers in at least six states, as well as the territory of the Northern Mariana Islands." Pet. App. 21a. Indeed, Puerto Rico "[r]esidents pay most federal taxes," Amelia Cheatham, Council on Foreign Relations, *Puerto Rico: A U.S. Territory in*

Crisis (Nov. 25, 2020), https://tinyurl.com/mhpknhs, including "federal income taxes" if "they are employed by the federal government or have income from sources outside Puerto Rico," as well as federal "business income taxes, payroll taxes, unemployment insurance taxes, estate and trust income taxes, estate taxes, gift taxes, and excise taxes," *Peña Martínez*, 478 F. Supp. 3d at 168.

Below are three charts depicting the federal taxes the IRS has collected from Puerto Rico and certain other States and Territories. As Chart 1 shows, the IRS has collected over $79.9 billion in federal taxes from Puerto Rico since 2000.

As Chart 2 shows, the amount of federal taxes collected from Puerto Rico since 2000 ($79.9 billion) is comparable to the amounts collected from other States during the same timeframe, such as Vermont ($79 billion) and Wyoming ($84.5 billion). Drawing on this data, the district court in *Peña Martínez* found that, "[f]rom 2000 to 2005, residents of Puerto Rico paid more in federal taxes than did residents of six states (Alaska, Montana, North Dakota, South Dakota, Vermont, and Wyoming)." *Id.* And since 2005 (the first year for which data is readily available),[7] federal tax collections from Puerto Rico ($56.8 billion) have dwarfed collections from the Northern Mariana Islands and all other Territories combined ($14.5 billion).

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[7] The IRS did not separate out collections from other Territories before 2005. *See* 2000–2005 IRS Data Books at tbl. 6, https://www.irs.gov/statistics/soi-tax-stats-all-years-irs-data-books.

Chart 1: IRS Gross Collections from Puerto Rico, FY2000–FY2020[8]

Type of Federal Tax	Amount Collected
Corporation or Business Income Tax	$9.304 billion
Individual Income Tax & Federal Insurance Contributions Act ("FICA") Tax	$62.176 billion
Individual Income Tax & Self-Employment Insurance Contributions Act ("SECA") Tax	$7.029 billion
Unemployment Insurance Tax	$0.704 billion
Estate & Trust Income Tax	$0.008 billion
Estate Tax	$0.066 billion
Gift Tax	$0.003 billion
Excise Taxes	$0.646 billion
Total	**$79.936 billion**

[8] Sources: 2000–2005 IRS Data Books at tbl. 6 and 2006–2020 Data Books at tbl. 5, https://www.irs.gov/statistics/soi-tax-stats-all-years-irs-data-books.

Chart 2: IRS Gross Collections from Certain Places, FY2000–FY2020[9]

Place	Amount Collected
Alaska	$95.3 billion
Montana	$97.4 billion
North Dakota	$103.7 billion
Other Territories[10]	$14.5 billion since FY2005
Puerto Rico	$79.9 billion ($56.8 billion since FY2005)
Vermont	$79.0 billion
Wyoming	$84.5 billion

As Chart 3 shows, the IRS collected over $3.5 billion in federal taxes from Puerto Rico in fiscal year 2020. *See also Peña Martínez*, 478 F. Supp. 3d at 168 (same for FY2019). That compares to the amounts collected from other States, and it continues to vastly exceed the amount collected from the

[9] Sources: 2000–2005 IRS Data Books at tbl. 6 and 2006–2020 Data Books at tbl. 5, https://www.irs.gov/statistics/soi-tax-stats-all-years-irs-data-books.

[10] "Other Territories" overstates the collections from Other Territories, as it covers collections not only from "Territories other than Puerto Rico," but also from "U.S. Armed Service members oversees." *E.g.*, 2020 IRS Data Book at tbl. 5, https://www.irs.gov/pub/irs-pdf/p55b.pdf.

Northern Mariana Islands and all other Territories combined ($897 million):

Chart 3: IRS Gross Collections from Certain Places, FY2020[11]

Place	Amount Collected
Alaska	$5.506 billion
Montana	$6.603 billion
North Dakota	$6.895 billion
Other Territories[12]	$0.897 billion
Puerto Rico	$3.594 billion
Vermont	$4.476 billion
Wyoming	$4.860 billion

Thus, Puerto Rico residents pay substantial federal taxes.

2. Puerto Rico Residents' Payment Of Substantial Federal Taxes Makes Their Exclusion From SSI Irrational

Because Puerto Rico residents pay substantial federal taxes, the Government's arguments based on Puerto Rico's supposed tax status are unpersuasive. Puerto Rico residents pay most federal taxes and pay even some federal taxes that residents of other

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[11] *See* 2020 IRS Data Book at tbl. 5, https://www.irs.gov/pub/irs-pdf/p55b.pdf.

[12] "Other Territories" overstates the collections from Other Territories. *See* footnote 10, above.

jurisdictions do not. *See* Brief Of The Commonwealth Of Puerto Rico As *Amicus Curiae* In Support Of Respondent at 7 & n.3 (Nov. 9, 2020) (citing 26 U.S.C. § 4371).

It is true that Puerto Rico residents not employed by the Federal Government do not pay federal *income* taxes on income from sources within Puerto Rico (though they do pay federal income tax on income from sources outside Puerto Rico). *Peña Martínez*, 478 F. Supp. 3d at 168. But "it is irrational to tie SSI benefits to Puerto Rico's federal income tax exemption because SSI is a means-tested program benefiting the poor, a population that generally does not pay income tax even on the mainland." *Id.* at 175. "[T]he idea that one needs to earn their eligibility by the payment of federal income tax is antithetical to the entire premise of the program," Pet. App. 27a, which is to provide a "Federal guaranteed minimum income level for aged, blind, and disabled persons," *Schweiker*, 450 U.S. at 223. "Moreover, if residency in Puerto Rico was selected as a proxy for past payment of income tax, that is an unacceptably arbitrary choice of proxy when Congress could directly have tied benefits to past income tax payments." *Peña Martínez*, 478 F. Supp. 3d at 175.

It is arbitrary and irrational that those who most need these benefits—namely people who qualify for SSI benefits because they lack both significant assets and income and who, because they are aged, blind, or disabled, are unlikely to be able to support themselves through work, *id.* at 173–75—are excluded from these benefits precisely because they or their neighbors do not contribute enough in

federal income taxes. The Court has repeatedly held that it is irrational and unconstitutional for the Government to apportion governmental benefits "according to the past tax contributions of its citizens." *Saenz v. Roe*, 526 U.S. 489, 507 (1999) (quoting *Shapiro v. Thompson*, 394 U.S. 618, 632–33 (1969)); *accord, e.g.*, *Zobel*, 457 U.S. at 63–64; *Mem'l Hosp. v. Maricopa Cnty.*, 415 U.S. 250, 266 (1974); *Vlandis v. Kline*, 412 U.S. 441, 450 n.6 (1973).

Furthermore, although *some* of the federal taxes paid by Puerto Rico residents "fund specific programs" (Pet. Br. 20), that is not true of all federal taxes Puerto Rico residents pay. Many excise taxes, for example, do not fund specific programs. The revenue from those taxes goes into the Treasury's General Fund,[13] from which the funding for SSI is drawn. *Peña Martínez*, 478 F. Supp. 3d at 165. And even when taxes "fund" specific government programs like Medicare via trust funds, this is "simply an accounting mechanism." Peter G. Peterson Foundation, *Budget Basics: Federal Trust Funds* (June 25, 2020), https://tinyurl.com/yzx4ckn7. How the Federal Government chooses to account for the substantial revenue it collects from residents of Puerto Rico is not constitutionally significant. What matters for the constitutional analysis is simply *that* the Federal Government collects such revenue.

That residents of Puerto Rico receive some federal benefits is also beside the point. Residents of the States, the District of Columbia, and the Northern

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[13] *See, e.g.*, Tax Policy Center, Briefing Book, *What are the major federal excise taxes, and how much money do they raise?* (May 2020), https://tinyurl.com/ep9d63ap.

Mariana Islands receive these benefits *and* SSI. Yet Puerto Rico residents are excluded from SSI, even though their contributions to the federal treasury exceed that of many residents of the States and Territories, such as the Northern Mariana Islands.

3. Puerto Rico's Tax Status Has Changed Substantially Since *Califano* And *Harris*

Congress's interest in achieving a "balanced fiscal relationship" with Puerto Rico (Pet. Br. 18) supports extending SSI benefits to Puerto Rico residents because Puerto Rico's tax status has changed substantially since Congress excluded Puerto Rico residents from SSI. From 1921 through 2005, Congress provided a federal corporate tax incentive that significantly benefitted Puerto Rico's economy. *See* Juan C. Méndez-Torres, *The Internal Revenue Code's Role in Puerto Rico's Economic Development*, 15 J. Int'l Tax'n 22, 25–28 (2004) (discussing enactment, amendments, and repeal of this incentive). When Congress decided to exclude Puerto Rico residents from SSI benefits in 1972, the Commonwealth was experiencing "dramatic economic growth." Samuel Issacharoff *et al.*, *What is Puerto Rico?*, 94 Ind. L.J. 1, 26 (2019). Puerto Rico's gross national product "increased more than four-fold from 1947 to 1993," and the federal tax code's treatment of Puerto Rico was "one of the central drivers" of this growth. *Id.* at 26–27.

But Congress repealed that incentive in 1996 with a ten-year phase-out period. *See Aurelius*, 140 S. Ct. at 1655. That decision plunged Puerto Rico into a "prolonged recession," from which it has never recovered. Issacharoff, *supra*, at 27. Thus, the

"balance" between taxes and benefits that existed when Congress denied SSI benefits to Puerto Rico residents no longer exists. And because Puerto Rico no longer receives the benefit of special tax treatment, it is no longer rational to withhold benefits on this basis.

B. The Government's Interest In Cost Saving Cannot Supply A Rational Basis

The Government's interest in "saving money" (Pet. Br. 18 (quoting *Lyng v. Int'l Union, United Auto., Aerospace & Agric. Implement Workers of Am., UAW*, 485 U.S. 360, 373 (1988)) also does not supply a rational basis for excluding Puerto Rico residents from SSI. As the First Circuit correctly ruled, "cost *alone* does not support differentiating individuals" in this context. Pet. App. 31a. That is because "the State's legitimate interest in saving money provides no justification for its decision to discriminate among equally eligible citizens." *Saenz*, 526 U.S. at 507. Indeed, in *Lyng*, the Court observed that, while "protecting the fiscal integrity of government programs, and of the Government as a whole, 'is a legitimate concern of the State,'" that "does not mean that Congress can pursue the objective of saving money by discriminating against individuals or groups." 485 U.S. at 373 (citation omitted); *see Mem'l Hosp.*, 415 U.S. at 263 ("[A] State may not protect the public fisc by drawing an invidious distinction between classes of its citizens, so appellees must do more than show that denying free medical care to new residents saves money.") (citation omitted); *Shapiro*, 394 U.S. at 633 ("[A State] may legitimately attempt to limit its expenditures, whether for public assistance, public

education, or any other program. But a State may not accomplish such a purpose by invidious distinctions between classes of its citizens."), *overruled in part on other grounds by Edelman*, 415 U.S. 651.

Excluding from a benefits program *any* arbitrarily chosen group of individuals (red-haired or left-handed persons, Leos or Scorpios) would save money, but drawing such arbitrary distinctions as a basis for cost saving is incompatible with the Fifth Amendment's guarantee of equal protection of the laws. For example, in *United States Department of Agriculture v. Moreno*, 413 U.S. 528 (1973), the Court struck down under rational-basis review the statutory exclusion of unrelated persons living in the same household from the federal food stamp program; only households of related persons were eligible for those federal benefits. The Government contended that the exclusion was rational because it saved money, but the Court rejected this purported rationale, concluding that the classification "excludes from participation in the food stamp program . . . *only* those persons who are so desperately in need of aid that they cannot even afford to alter their living arrangements so as to retain their eligibility." *Id.* at 538 (emphasis added). Such an exclusion was "wholly without any rational basis" and therefore unconstitutional under the Fifth Amendment. *Id.*

C. The Government's Supposed Interest In Promoting Puerto Rico's Autonomy Does Not Supply A Rational Basis

Although this Court is a "court of review, not of first view" (*Cutter v. Wilkinson*, 544 U.S. 709, 719 n.7 (2005)), the Government raises for the first time in

this Court a new purported rationale to justify the exclusion of Puerto Rico residents from SSI benefits: the supposed advancement of "self-government" in Puerto Rico. Pet. Br. 22; *see also id.* at 15 (arguing that exclusion promotes Puerto Rico's "fiscal autonomy"). Even assuming that argument has not been waived or forfeited, it is unpersuasive because excluding Puerto Rico residents from SSI is not a rational means of pursuing the Federal Government's supposed interest in promoting self-governance in Puerto Rico.

1. Excluding Puerto Rico Residents From SSI Is Not A Rational Means Of Promoting "Local Control"

The structure of the SSI program undermines the Government's argument that Congress may rationally exclude Puerto Rico residents from SSI because local governments are best positioned to "tailor [their] laws and programs to reflect 'local conditions.'" Pet. Br. 23 (quoting *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 41 (1973)). Congress chose to set *uniform* resource thresholds and benefit amounts for SSI—to establish "a *Federal* guaranteed minimum income level for aged, blind, and disabled persons," *Schweiker*, 450 U.S. at 223 (emphasis added; citation omitted)—even though the Government's "local conditions" argument would apply just as forcefully (if not more so) to the States as to Puerto Rico. That the Government has chosen to pursue its purported interest in promoting "local control" *only* in certain Territories belies its assertion that excluding Puerto Rico residents from SSI benefits is a rational means of promoting this interest. It is irrational to "'singl[e] out'" Puerto Rico

residents "for unfavorable treatment based on a posited theory that obviously is not being applied to the rest of the country." *Peña Martínez*, 478 F. Supp. 3d at 181 (quoting *Cleburne*, 473 U.S. at 450); *see also James v. Strange*, 407 U.S. 128, 140 (1972) ("[T]he Equal Protection Clause 'imposes a requirement of some rationality in the nature of the class singled out.'") (quoting *Rinaldi v. Yeager*, 384 U.S. 305, 308–09 (1966)).[14]

The Government's argument that excluding Puerto Rico residents from SSI promotes self-government because Puerto Rico can "decide[] for itself" how much to spend on disability benefits (Pet. Br. 23) is no more convincing. Puerto Rico spent an estimated $9.7 million on AABD in 2015, *Policy Basics* at 2, or about 0.1% of its $9.56 billion budget.[15] The Government estimates (Pet. Br. 18) that it would pay benefits totaling $1.8 to $2.5 *billion* per year if residents of Puerto Rico were eligible for SSI benefits. For Puerto Rico's AABD program to

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[14] *Califano* asserted as part of the rational basis for "the exclusion of persons in Puerto Rico from the SSI program" that "inclusion in the SSI program might seriously disrupt the Puerto Rican economy." 435 U.S. at 5 n.7. In a Delphic footnote, the Government apparently abandons that rationale. Pet. Br. 24 n.2. But the Government asserts in that footnote, in conclusory fashion, that "economic conditions in Puerto Rico" are a "further justification" for Congress's alleged decision to promote fiscal autonomy in Puerto Rico by excluding Puerto Rico residents from SSI. As noted above, however, "economic conditions" vary widely across the mainland, and it is irrational to single out residents of Puerto Rico to promote this supposed interest.

[15] Reuters Staff, *Puerto Rico governor signs $9.56 bln budget for 2015*, Reuters (July 1, 2014), https://tinyurl.com/4r5t46vr.

reach parity with SSI, the Commonwealth would need to increase its spending from about 0.1% of its total budget to almost *20%* of its total budget on AABD alone—a two-hundred-fold increase. Puerto Rico cannot "choose" to spend billions of dollars it does not have.

2. PROMESA Belies The Asserted Government Interest In Puerto Rico's Fiscal Autonomy

Congress's 2016 enactment of the Puerto Rico Oversight, Management, and Economic Stability Act ("PROMESA"), 130 Stat. 549, 48 U.S.C. § 2101 *et seq.*, undermines any suggestion that it has consistently pursued any purported interest in promoting fiscal autonomy in Puerto Rico. Under PROMESA, Congress has largely withdrawn whatever fiscal autonomy it had previously granted to Puerto Rico and vested it in the newly created Financial Oversight and Management Board ("the Board").

The Board has broad authority over Puerto Rico's financial affairs. It can "supervise and modify Puerto Rico's laws (and budget)." *Aurelius*, 140 S. Ct. at 1655. And the Board is not accountable to anyone in "Puerto Rico itself." *Id.* at 1683 (Sotomayor, J. concurring in the judgment); *see id.* at 1674 ("No individual within Puerto Rico's government plays any part in" selecting members of the Board.). PROMESA provides that neither Puerto Rico's Governor nor its Legislature "may (1) exercise any control, supervision, oversight, or review over the Oversight Board or its activities; or (2) enact, implement, or enforce any statute, resolution, policy, or rule that would impair or defeat the purposes of

this chapter, as determined by the Oversight Board." 48 U.S.C. § 2128(a). In the words of Puerto Rico's own elected officials, "[PROMESA] establish[ed] a new governance regime that severely undermined, not only the Governor's executive authority but also the Legislature's policy-making prerogatives." Br. of Elected Officers of the Commonwealth of Puerto Rico, *Fin. Oversight & Mgmt. Bd. for P.R. v. Aurelius Inv., LLC*, Nos. 18-1334, 18-1475, 18-1496, 18-1514 & 18-1521, at 1–2 (Aug. 28, 2019); *see also* Rafael Hernández Colón, *The Evolution of Democratic Governance Under the Territorial Clause of the U.S. Constitution*, 50 Suffolk U. L. Rev. 587, 614 (2017) ("For up to ten years, Puerto Rico will be governed in fundamental areas by the [Board], not by elected representatives of the people.").

The Board's power over Puerto Rico's budget is more than theoretical. Exercising that authority, the Board has pushed "pension cuts, elimination of workers' protections, public school closures, and staff reductions at police stations in violent areas," all against the wishes of elected officials. Laura Mearns, *State Bankruptcy, COVID-19, and the United States Trustee Program: The Executive Branch's Role in the Oversight of a State's Financial Restructuring*, 73 Ad. L. Rev. 195, 208–09 (2021). Puerto Rico and its residents do not have "autonomy" over these decisions.

Tellingly, the Government does not even mention PROMESA in its brief. But the Government cannot "rely simply on the past" to justify the challenged exclusion; that exclusion "must be justified by current needs." *Shelby Cnty.*, 570 U.S. at 536, 553. And PROMESA undermines many of the

Government's assertions. For example, contrary to the Government's suggestion (Pet. Br. 22–23), Puerto Rico cannot "increase benefit levels in the AABD program" or "fund a territorial supplement outside the AABD program" without Board approval. The Government's failure to account for PROMESA undermines its attempt to rely on the "fiscal autonomy" of Puerto Rico as a rational basis for excluding Puerto Rico residents from SSI.

D. Extending SSI Benefits To Some Territories But Not Others Underscores The Irrationality Of The Challenged Exclusion

Congress's decision to extend SSI benefits in a scattershot fashion underscores the irrationality of the exclusion of Puerto Rico residents. The fact that residents of the District of Columbia and the Northern Mariana Islands are eligible for SSI benefits—even though neither is a State—provides additional reason why excluding Puerto Rico residents from SSI is irrational. Pet. App. 34a–36a.

In response, the Government notes (at 27) that Congress extended SSI to the Northern Mariana Islands "pursuant to a negotiated covenant" and argues that this "difference provides a rational basis for extending the SSI program to the Northern Mariana Islands but not Puerto Rico." But under the Supremacy Clause, the Constitution trumps any negotiated agreements. U.S. Const. art. VI; *Reid v. Covert*, 354 U.S. 1, 16–18 (1957). So the Government cannot justify the unconstitutionally unequal distribution of federal benefits based on the fact that it codified part of that unconstitutional distribution system in a negotiated agreement.

Moreover, the Government's logic does not extend to the exclusion of Puerto Rico residents from other benefits programs, such as the Supplemental Nutrition Assistance Program ("SNAP"). *Peña Martínez*, 478 F. Supp. 3d at 166–67. Residents of Puerto Rico, the Northern Marina Islands, and American Samoa are excluded from SNAP, 7 U.S.C. § 2012(r); residents of Guam and the U.S. Virgin Islands are included, *id.*, even though the Government lacks negotiated commitments with these Territories. The following chart summarizes the eligibility of residents of different Territories for SSI and SNAP benefits:

Place	**SSI Eligibility**	**SNAP Eligibility**
States	Eligible	Eligible
American Samoa		
District of Columbia	Eligible	Eligible
Guam		Eligible
Northern Mariana Islands	Eligible	
Puerto Rico		
U.S. Virgin Islands		Eligible

See Peña Martínez, 478 F. Supp. 3d at 166–67; Andrew Hammond, *Territorial Exceptionalism and the American Welfare State*, 119 Mich. L. Rev. 1639, 1675–76 (2021). Where Congress allocates federal benefits to different Territories' residents in such a

seemingly random patchwork, the exclusion of Puerto Rico residents lacks any rational basis.[16]

E. The Irrationality Of The SSI Exclusion Permits An Inference Of Impermissible Animus

Where government rationales for schemes of arbitrary discrimination are so implausible as to belie any rational basis, the Court has repeatedly drawn the inference that they have been motivated by illegitimate animus toward the disfavored group. *E.g.*, *United States v. Windsor*, 570 U.S. 744, 769–70 (2013); *Romer*, 517 U.S. at 635; *Cleburne*, 473 U.S. at 447–49; *Moreno*, 413 U.S. at 535–37. And the Court has not hesitated to invalidate such discriminatory schemes under Fifth and Fourteenth Amendment equal-protection guarantees even under rational-basis review. While *amici* agree with the grounds for strict scrutiny advanced in the Brief of Respondent, these decisions support affirmance of the judgment below even if the Court declines to apply such scrutiny and instead requires only a rational basis.

A long history of pervasive discrimination against Puerto Rico residents strengthens the inference that animus has played a part in the exclusion of Puerto

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[16] The Government also contends that the Equal Protection Clause "does not prohibit legislation merely because it is special, or limited in its application to a particular geographical or political subdivision." Pet. Br. 33 (quoting *Kadrmas v. Dickinson Pub. Sch.*, 487 U.S. 450, 462 (1988)). But the cases the Government cites to support that argument concern a State's authority to legislate within its own boundaries, not the Federal Government's authority to treat residents of different jurisdictions differently, based solely on geographical residency.

Rico residents from SSI. Since the United States overtook Puerto Rico in 1898, the island has been subject to an "unequal colonial relationship" with the United States, which has "perpetuated the inherent inequality of the United States citizens who reside in Puerto Rico as compared to the rest of the nation." Juan R. Torruella, *Why Puerto Rico Does Not Need Further Experimentation with Its Future*, 131 Harv. L. Rev. F. 65, 66 (2018). In the early 1900s, this Court decided the *Insular Cases*, which held that the Federal Government could treat Puerto Rico differently than other places under its jurisdiction. Discriminatory premises permeate these opinions. As Justice Brown wrote in the lead opinion in *Downes v. Bidwell*, places like Puerto Rico could be treated unequally because they were "inhabited by alien races, differing from us in religion, customs, laws, methods of taxation, and modes of thought." 182 U.S. 244, 272 (1901). Nowadays, "[t]here is no question that the *Insular Cases* are on par with the Court's infamous decision in *Plessy v. Ferguson* in licencing the downgrading of the rights of discrete minorities within the political hegemony of the United States." *Igartúa-de la Rosa*, 417 F.3d at 162 (Torruella, J., dissenting).

Yet the proposition uniting these discredited judicial decisions—that residents of Puerto Rico may constitutionally be treated separately and unequally—has found root in legislative discrimination against residents of Puerto Rico ever since. The statutory exclusion of residents of Puerto Rico from SSI benefits is just one example of at least 40 federal programs in which the U.S. Government

treats Puerto Rico residents differently.[17] This framework of federal laws that discriminate against U.S. citizens in Puerto Rico solely on the basis of residence contributes to a lower quality of life for residents of Puerto Rico, especially those in dire need who would benefit greatly from federal assistance. In short, as the late Judge Torruella explained, "we are dealing with a gross civil rights violation perpetrated for over a century against several million U.S. citizens. They have been denied equality with the rest of the nation for the absurd reason that they reside in a different geographic area than the great majority of their fellow citizens." Torruella, *supra*, 131 Harv. L. Rev. F. at 97.

Because sheer residency in Puerto Rico likewise provides an "absurd" reason for discrimination in the distribution of SSI benefits to equally needy and otherwise eligible citizens, the decision below should be affirmed.

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[17] *See* Congressional Task Force on Economic Growth in Puerto Rico, *Report to the House and Senate*, at Appendix 2 (Dec. 20, 2016), https://tinyurl.com/y8j59b3k.

CONCLUSION

The Court should affirm the judgment below.

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September 7, 2021