

No. 20-303

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER,

v.

JOSÉ LUIS VAELLO-MADERO

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

**BRIEF OF THE AMERICAN BAR
ASSOCIATION AS AMICUS CURIAE
IN SUPPORT OF RESPONDENT**

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INTEREST OF AMICUS CURIAE¹

The American Bar Association (“ABA”) respectfully submits this brief as amicus curiae in support of respondent José Luis Vaello-Madero. The ABA is the largest voluntary association of attorneys and legal professionals in the world. Its members include attorneys in law firms, corporations, nonprofit organizations, and local, state, and federal governments, as well as judges, legislators, law professors, law students, and associates in related fields.² The ABA’s members come from all 50 states, the District of Columbia (“D.C.”), and the U.S. territories of Puerto Rico, American Samoa, Guam, the Northern Mariana Islands (“NMI”), and the U.S. Virgin Islands.

The ABA’s “mission is to serve equally our members, our profession and the public by defending liberty and delivering justice as the national representative of the legal profession.”³ The denial of Supplemental Security Income (“SSI”) benefits to the people of Puerto Rico affects many in the profession personally. More than 15,000 attorneys reside in the

¹ The parties have consented in writing to the filing of this brief. No counsel for any party authored this brief in whole or in part, and no person or entity other than amicus curiae’s pro bono counsel made a monetary contribution intended to fund the brief’s preparation or submission.

² Neither this brief nor the decision to file it should be interpreted to reflect the views of any judicial members of the ABA. No member of the Judicial Division Council participated in the adoption or endorsement of the positions in this brief, which was not circulated to any member of the Judicial Division Council prior to filing.

³ ABA, *About Us*, https://www.americanbar.org/about_the_aba/ (last visited Sept. 2, 2021).

(cont’d)

five major U.S. territories; 13,944 attorneys reside in Puerto Rico alone.⁴ ABA members also have family, friends, and neighbors who need SSI, yet are denied it because they reside in Puerto Rico. In addition to serving the interests of those thousands of attorneys and their families, this brief serves the interests of the ABA's nearly 400,000 members, who have agreed by representation in the ABA's House of Delegates that all territorial residents should receive uniformly available federal benefits.⁵

In addition, the ABA is dedicated to working for just laws and fair legal process, as well as protecting human rights and assuring meaningful access to justice for all people. As such, the ABA has a longstanding commitment to eliminating unfairness and inequity in the legal system. The ABA's Model Rules of Professional Conduct and Model Code of Judicial Conduct prohibit racially or ethnically based harassment or discrimination.⁶ Similarly, ABA model standards require judges to ensure that attorneys do not "manifest bias or prejudice."⁷

⁴ ABA National Lawyer Population Survey (2021), https://www.americanbar.org/content/dam/aba/administrative/market_research/2021-national-lawyer-population-survey.pdf.

⁵ ABA Resolution "10B20A" at 1 (2020), <https://www.americanbar.org/content/dam/aba/directories/policy/annual-2020/10b-annual-2020.pdf>.

⁶ Model Rules of Pro. Conduct r. 8.4(g) (Am. Bar Ass'n 1983); Model Code of Jud. Conduct 2.3 (1990) (Am. Bar Ass'n, amended 2010).

⁷ Model Code of Jud. Conduct 2.3, *supra note 6*; see also Criminal Justice Standards for the Prosecution Function, 3-1.6 (4th ed. 2017), https://www.americanbar.org/groups/criminal_justice/standards/ProsecutionFunctionFourthEdition/ (ABA *(cont'd)*)

Denying the residents of most U.S. territories the same rights and privileges enjoyed by state residents offends the principles of justice, fairness, and equality that the ABA strives to promote. The ABA has repeatedly advocated equal treatment for territorial residents. For example, the ABA has adopted multiple resolutions urging equal treatment, including a 2020 resolution that the equal-protection component of the Fifth Amendment “guarantees that all persons residing in a territory of the United States who are otherwise eligible to receive federal benefits shall receive them without regard to residence, including but not limited to, [SSI] benefits”⁸

In short, the ABA is fundamentally concerned with justice, fairness, and equality—for all Americans, regardless of geography—and urges the Court to hold that equal protection requires equal participation in the SSI program for Americans who reside in U.S. territories.

BACKGROUND AND SUMMARY OF ARGUMENT

Respondent José Luis Vaello-Madero, a U.S. citizen born in Puerto Rico, developed severe health

Criminal Justice Standards condemning prosecutorial actions animated by racial and other “historically persistent biases”).

⁸ ABA Resolution “10B20A,” *supra* note 5. The ABA has also passed resolutions advocating recognition of all persons born in the territories as natural-born citizens of the United States (ABA Resolution “20M10C” (2020)); urging that federal law be amended to grant each territory representation on its respective federal court of appeals (ABA Resolution “14A10A” (2014)); urging Congress to establish an Article III district court in the U.S. Virgin Islands (ABA Resolution “99M107” (1999)); and seeking to allow citizens of the territories to vote in national elections (ABA Resolution “92A10H” (1992)).

problems years after moving to New York. Pet. App. 3a. He qualified for and collected SSI for several years before moving back to Puerto Rico to care for his ailing wife. *Id.* The federal government then took away his SSI payments and sued him to recover \$28,081 that it deemed him to have improperly received while residing in Puerto Rico. Pet. App. 3a-4a.

Mr. Vaello-Madero would have been entitled to continue receiving SSI benefits had he moved from New York to any other location within the 50 states, D.C., or even the NMI. But federal law provides that Americans who reside in Puerto Rico or the remaining U.S. territories may not receive SSI benefits. 42 U.S.C. § 1382(f)(1) (otherwise eligible individuals are not eligible “for any month during all of which such individual is outside the United States”); *id.* § 1382c(e) (defining “United States” as the 50 states and D.C.).⁹

In the government’s lawsuit against him, Mr. Vaello-Madero challenged the geographic limitation of the SSI program on equal-protection grounds. The district court agreed, granting summary judgment for Mr. Vaello-Madero. Pet. App. 49a. The First Circuit affirmed, holding that the denial of SSI to otherwise qualified residents of Puerto Rico violates the equal-protection guarantee of the Fifth Amendment because “[t]he categorical exclusion of otherwise eligible Puerto Rico residents from SSI is not rationally

⁹ Although the statute does not address the NMI specifically, the covenant defining the terms of the NMI’s transition to territorial status expressly extends Title XVI of the Social Security Act to the NMI, which includes SSI benefits. Pub. L. No. 94-241, § 502(a)(1), 90 Stat. 263 (1976).

related to a legitimate government interest.” Pet. App. 37a.

The First Circuit’s decision should be affirmed.

I. There is no rational basis for denying SSI to needy Puerto Rico residents who would otherwise qualify for it. Absent heightened scrutiny, a law drawing distinctions among persons “must bear a rational relationship to a legitimate governmental purpose.” *Romer v. Evans*, 517 U.S. 620, 635 (1996). But here, the government can offer no legitimate justification for treating individuals differently under the SSI program just because they reside in Puerto Rico.

As a threshold issue, all of the government’s justifications for the SSI law frame the equal-protection analysis as concerning how Congress may treat Puerto Rico as a “jurisdiction.” The government thus fails to adequately consider the particular individuals whose equal-protection rights are implicated in this case—specific Puerto Rico residents like Mr. Vaello-Madero, who need and would otherwise qualify for SSI if they lived on the mainland. All of the government’s justifications for the SSI discrimination fail to explain why *these particular individuals*—rather than the “territory” or “jurisdiction” of Puerto Rico as a whole—can rationally be treated differently from similarly situated individuals who reside elsewhere.

The government claims that the exclusion furthers local autonomy and respects local conditions. But the Puerto Rico government’s resources and autonomy to provide for its neediest residents are severely limited. If anything, local conditions suggest a dire need for *extension* of the SSI program.

The government additionally leans on Puerto Rico’s “unique tax status” and the potential cost of

extending the SSI program to Puerto Rico. But the residents of Puerto Rico who would otherwise qualify for SSI in part because of their low incomes do not meaningfully benefit from the federal tax exemptions the government identifies, such as exemptions from federal income or estate taxes. Moreover, the government's tax-based justification for withholding SSI from residents of Puerto Rico makes little sense given that residents of the NMI can receive SSI but also do not generally pay federal income tax. Finally, the potential cost of extending SSI to Puerto Rico is both irrelevant to the substance of the program and an incomplete metric considering the larger economic benefits that programs like SSI create.

II. The Court should also apply heightened scrutiny to the disparate treatment imposed on Puerto Rico residents and find it unconstitutional. This Court has noted that heightened equal-protection scrutiny should apply to groups that historically have been subject to discrimination and lack political power to protect their own interests. For those same reasons, greater judicial protection from discriminatory treatment should apply here, where Puerto Rican citizens who lack full representation in the federal political process have been singled out for disfavored treatment. And the discriminatory SSI regime cannot satisfy heightened scrutiny, because the government has not advanced any important interest that justifies the disparate exclusion, much less how that discrimination substantially advances any important governmental interest.

For all of these reasons, the ABA respectfully urges the Court to affirm the decision below.

ARGUMENT

I. There is no rational basis for denying respondent and other Puerto Rico residents equal participation in the SSI program.

To satisfy rational-basis review, “a law must bear a rational relationship to a legitimate governmental purpose.” *Romer v. Evans*, 517 U.S. 620, 635 (1996); accord *U.S. Dep’t of Agric. v. Moreno*, 413 U.S. 528, 534 (1973). Thus, “[t]he [government] may not rely on a classification whose relationship to an asserted goal is so attenuated as to render the distinction arbitrary or irrational.” *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 446 (1985).

Rational-basis review is “not [] toothless.” *Mathews v. Lucas*, 427 U.S. 495, 510 (1976). Indeed, this Court has invalidated laws as violating equal protection under rational-basis review on numerous occasions. See, e.g., *Romer*, 517 U.S. at 632 (invalidating state constitutional amendment barring action to protect gays and lesbians because “it lack[ed] a rational relationship to legitimate state interests”); *Cleburne*, 473 U.S. at 448-49 (finding application of local ordinance to deny permit to group home for intellectually disabled lacked “rational basis” in the “city’s legitimate interests”).

Under these principles, discriminatory classifications that are “totally irrelevant to” the purposes of a law do not survive rational basis-review. *Califano v. Jobst*, 434 U.S. 47, 53 (1977). For example, the Court held that a law that made households containing unrelated persons ineligible under the food stamp program violated equal protection because the classification was “clearly irrelevant to the stated purposes” of the Food Stamp Act since relationships between

household members had “nothing to do with their abilities to stimulate the agricultural economy by purchasing farm surpluses, or with their personal nutritional requirements.” *Moreno*, 413 U.S. at 534 (citation omitted). Similarly, laws that discriminate based on where a person resides violate equal protection when the distinction is “wholly arbitrary” and “bears no relation to the statutory purpose.” *Williams v. Vermont*, 472 U.S. 14, 23-24 (1985).

Here, excluding Puerto Rico residents from the SSI program is not rationally related to any legitimate interest identified by the government, for the following reasons.

A. The equal-protection analysis should focus on the people whose rights are at stake rather than political jurisdictions.

As a threshold issue, all of the government’s justifications for the SSI law start from the premise that it has legitimate interests in treating Puerto Rico differently because of its territorial status. For example, the government argues that when deciding whether to extend social benefits, “Congress may consider factors such as what kind of relationship the Territory has with the United States, how much fiscal and other governmental autonomy it exercises, how close its economic and political ties to the United States should be, what its economic and social conditions are, and whether the Territory may move toward statehood or independence over time.” Brief for the United States (“U.S. Br.”) 14. Specifically with respect to taxation, the government argues that “Congress could rationally conclude that a jurisdiction that makes a reduced contribution to the federal treasury should receive a reduced share of the benefits funded by that treasury.”

Id. at 17-18. And when discussing the cost of extending SSI to Puerto Rico, the government refers only to aggregate cost. *Id.* at 18-19.

However, “[i]t is well settled that the Equal Protection Clause ‘protects persons, not groups.’” *Engquist v. Or. Dep’t of Agric.*, 553 U.S. 591, 597 (2008) (citing *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 227 (1995)). The “persons” whose equal-protection rights are implicated in this case are the particular Puerto Rico residents such as Mr. Vaello-Madero who would otherwise qualify for SSI, which is only a subset of Puerto Rico residents as a “group” or “jurisdiction.” The government’s justifications for the law must supply a rational basis for treating *these particular individuals* differently than similarly situated individuals who do qualify for SSI because they reside elsewhere. But because the government only focuses on how *all* Puerto Rico residents can be treated as a group, it fundamentally fails to provide a rational basis for discriminating against Mr. Vaello-Madero and similarly situated individuals who happen to reside in Puerto Rico.¹⁰

¹⁰ The United States abandons the argument, previously asserted in its cert. petition but empirically unsupported, that receiving SSI discourages people from working. U.S. Br. 24 n.2. That contention was puzzling, because the basic purpose of SSI is to help people who are *unable* to work, such as adults and children living with disabilities and the elderly poor. In addition, denying SSI to residents of Puerto Rico because it would discourage working would require assuming that residents of Puerto Rico are more likely than residents of states to not work once they receive SSI. Even if the government produced any empirical support for this claim—and it has not—it would not rationally justify the discrimination here.

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The U.S. jurisdiction in which a person happens to reside has no rational relationship to the substantive purposes or requirements of the SSI law. For one thing, SSI benefits are provided by the federal government from the United States treasury pursuant to nationally uniform standards. Nothing about the program is state-dependent except to the extent states choose to supplement the federal benefit with their own funds.¹¹

Further, every substantive requirement of the SSI program is individualized and not dependent on where within the country a person lives. Every person must qualify for SSI on account of his or her own income level and age, blindness, or disability. At the same time, the SSI benefit itself is calculated individually, with SSI payments specifically calculated based on each individual recipient's existing income.¹² Thus, two people living in the same state will not necessarily both receive SSI; nor would two people of the same state who do both qualify for SSI likely receive identical benefits.

¹¹ See U.S. Soc. Sec. Admin. (“SSA”), *SSI Annual Statistical Report, 2019* (“SSI Statistical Report”), at 1, https://www.ssa.gov/policy/docs/statcomps/ssi_asr/2019/ssi_asr19.pdf (explaining that “[t]he SSI program replaced the state-run assistance programs with a program having nationally uniform standards and objective eligibility criteria” and that this “was historic in that it shifted from the states to the federal government the responsibility for determining who would receive assistance and how much assistance they would receive”).

¹² See SSA, *Understanding Supplemental Security Income SSI Income – 2021 Edition* (“Understanding SSI Income”), <https://www.ssa.gov/ssi/text-income-ussi.htm>.

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Finally, as explained further below, the ultimate purpose of the SSI program is to provide basic financial support to particularly needy Americans who cannot support themselves—and this fundamental purpose simply has nothing to do with where particular Americans reside. In this vein, the current SSI regime strikingly treats U.S. citizens residing in Puerto Rico less favorably than many *noncitizens* residing in the states, who often can qualify for SSI.¹³

In short, the general characteristics of a jurisdiction, or even of its general population, are not relevant to the substance of the SSI program. As explained below, the justifications for the SSI law that the government has supplied fail to show otherwise.

B. Local conditions in Puerto Rico illustrate a dire need for extending SSI to otherwise qualifying Puerto Rico residents, not withholding it.

The government argues that excluding residents of territories other than the NMI is justified because it promotes autonomy and takes account of local conditions. U.S. Br. 22-24. But that argument is not rational. If anything, those considerations counsel *against* excluding needy Puerto Rico residents from the SSI program.

1. Excluding Puerto Rico residents undermines the goals and purposes of the SSI program. These benefits supply essential income to millions of Americans, and the SSI program has lifted millions of

¹³ See SSA, *Understanding Supplemental Security Income SSI Eligibility Requirements – 2021 Edition*, <https://www.ssa.gov/ssi/text-eligibility-ussi.htm> (providing criteria under which non-citizen aliens can qualify for SSI).

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Americans out of poverty.¹⁴ The program is “[a]n assistance source of last resort for the aged, blind, or disabled whose income and resources are below specified levels.”¹⁵ The funds that SSI provides to qualifying individuals are modest—the current maximum individual benefit is approximately \$794 per month (amounting to \$9,530.12 per year)¹⁶—but they are, by definition, essential to those individuals.¹⁷

¹⁴ Katherine Giefer, *A Profile of SSI Recipients: 2017*, at 8, Current Population Reports, P70BR-171, U.S. Census Bureau (May 2021), <https://www.census.gov/content/dam/Census/library/publications/2021/demo/p70br-171.pdf> (“Estimates from the Current Population Survey Annual Social and Economic Supplement (CPS ASEC) show SSI benefits brought the incomes of roughly 3.2 million people over the supplemental poverty threshold in 2017.”).

¹⁵ SSI Statistical Report, *supra* note 11, at 1.

¹⁶ See SSA, *SSI Federal Payment Amounts For 2021*, <https://www.ssa.gov/oact/cola/SSI.html>. Individual SSI payments are determined by calculating a person’s “countable income” (which can include both “earned income” from employment and “unearned income” from other benefit programs such as Social Security and state disability) and deducting it from the maximum \$794 monthly benefit. Understanding SSI Income, *supra* note 12. As a result, many SSI recipients do not receive the maximum possible monthly benefit. See SSI Statistical Report, *supra* note 11, at Highlights (average monthly payment in December 2019 was \$566).

¹⁷ As this Court has repeatedly recognized, welfare benefits like SSI merit constitutional protection. “[T]he interest of an individual in continued receipt of these benefits is a statutorily created ‘property’ interest protected by the Fifth Amendment.” *Mathews v. Eldridge*, 424 U.S. 319, 332 (1976) (citation omitted) (Social Security disability benefits). Accrued welfare benefits are afforded such constitutional protections because, “[f]or qualified recipients, welfare provides the means to obtain essential food, clothing, housing, and medical care.” *Goldberg v. Kelly*, 397 U.S. 254, 264 (1970). Given the recognized importance of such

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According to a 2013 report from the U.S. Bureau of Labor Statistics, families receiving “means-tested government assistance,” such as SSI and Medicaid, spend approximately 77% of their family budget on essentials such as housing, food, and transportation.¹⁸

Against this backdrop, the current law thwarts its stated objective by denying essential SSI benefits to many Americans who need it most by excluding residents of territories other than the NMI. There is an extreme level of poverty in Puerto Rico. The U.S. Census Bureau reported that in 2019, 43.5% of Puerto Ricans lived below the poverty line.¹⁹ By contrast, the national percentage (excluding Puerto Rico) was 12.3% in 2019, and the state with the highest percentage was Mississippi, with 19.6%.²⁰ Puerto Rico was

benefits once extended, the Court should carefully evaluate governmental justifications for their withdrawal.

¹⁸ Ann C. Foster & William R. Hawk, *Spending patterns of families receiving means-tested government assistance*, U.S. Bureau of Labor Statistics (December 2013), <https://www.bls.gov/opub/btn/volume-2/spending-patterns-of-families-receiving-means-tested-government-assistance.htm>.

¹⁹ Craig Benson, *Poverty: 2018 and 2019*, at 5, American Community Survey Briefs (Sept. 2020), <https://www.census.gov/content/dam/Census/library/publications/2020/acs/acsbr20-04.pdf>.

²⁰ *Id.*; see also U.S. Gov’t Accountability Off. (“GAO”), GAO 14-31, *Puerto Rico: Information on How Statehood Would Potentially Affect Selected Federal Programs and Revenue Sources*, at 9 n.19, Full Report (Mar. 4, 2014), <https://www.gao.gov/products/gao-14-31> (“In 2011, 45.6% of Puerto Rico’s population was below the federal poverty threshold, compared to 22.6% in Mississippi, the state with the largest percentage of its population below the poverty threshold.”).

(cont’d)

the only jurisdiction studied²¹ where the poverty percentage *increased* from 2018 to 2019 (although the 2018 and 2019 rates were statistically similar).²² Further, available data suggest that the cost of certain essentials, such as groceries and utilities, is higher in Puerto Rico than in the mainland United States.²³

In short, to deprive the people of Puerto Rico of SSI benefits that they desperately need and qualify for, merely because they happen to live in a certain U.S. jurisdiction, undermines rather than advances the stated purposes of the law. It is irrational.

2. The government defends the exclusion of Puerto Rico residents as a means of promoting local control, arguing that Congress’s decision to not extend the SSI program to Puerto Rico gives Puerto Rico’s government greater “autonomy and self-determination” in deciding how to care for the island’s neediest residents in light of “local conditions.” *See* U.S. Br. 22-24. Assuming for the sake of argument that Congress has a legitimate government interest deciding (paradoxically) how Puerto Rico should be able to exercise its autonomy, disparate treatment as to SSI benefits does not advance that interest.

Initially, denying the extension of SSI benefits to Puerto Rico residents disregards rather than

²¹ The report looked at the 50 states, D.C., and Puerto Rico.

²² Benson, *supra* note 19, at 6.

²³ *See* Mario Marazzi-Santiago, *Puerto Rico and the Jones Act*, at 9, American Society of Hispanic Economists, *Hispanic Economic Outlook* (Spring 2018), <https://asheweb.org/wp-content/uploads/2018/05/HEOReport-Spring-2018-PR-Edition.pdf> (finding prices of supermarket items 23% higher and utilities prices 85% higher in Puerto Rico than in the mainland United States).

promotes local choice. The government of Puerto Rico has made clear in its amicus brief that it wants SSI extended to its citizens. *See* Br. of the Commonwealth of Puerto Rico as *Amicus Curiae* in Support of Respondent. The federal government continues to disregard that preference and, by extension, Puerto Rico’s “autonomy.”

Moreover, given the reality of economic constraints in Puerto Rico, and the fact that a federal oversight board currently controls Puerto Rico’s finances, the Puerto Rico government lacks both the resources and autonomy necessary to provide comparable benefits to those in need of SSI.

Puerto Rico’s Aid to the Aged, Blind, and Disabled Program (“AABD”) concretely illustrates this reality. The federal government suggests that the AABD program is an equal substitute for SSI, but it concedes that AABD both “covers fewer people and provides a lower level of benefits than SSI would if it were available in Puerto Rico.” U.S. Br. 4. In fact, the benefits available under AABD are remarkably limited compared to those available under SSI. For example, in 2011, the average monthly SSI payment was \$483.05 in the 50 states and \$525.69 in the NMI, but just \$73.85 under AABD in Puerto Rico.²⁴

In addition, Puerto Rico lacks both the autonomy and economic stability to remedy the situation. Since at least 2006, Puerto Rico has experienced huge financial turmoil, when “tax advantages that had previously led major businesses to invest in Puerto

²⁴ *See* Mem. of William R. Morton, Analyst in Income Security, *Cash Assistance for the Aged, Blind, and Disabled in Puerto Rico*, at 21, Cong. Rsch. Serv. (Oct. 26, 2016), <https://fas.org/sgp/crs/row/cash-aged-pr.pdf>.

Rico expired.” *Fin. Oversight & Mgmt. Bd. for P.R. v. Aurelius Inv., LLC*, 140 S. Ct. 1649, 1655 (2020). Following the lapse of these tax advantages, which led to businesses leaving the island en masse, “the public debt of Puerto Rico’s government and its instrumentalities soared, rising from \$39.2 billion in 2005 to \$71 billion in 2016.” *Id.* (citation omitted).

Those economic woes led to federal intervention stripping Puerto Rico of any autonomous choice it might have to augment the AABD program. In order to provide economic relief to the island, in 2016, Congress enacted the Puerto Rico Oversight, Management, and Economic Stability Act (“PROMESA”), which allowed Puerto Rico government entities to declare bankruptcy. *See id.* In light of its bankruptcy and enactment of PROMESA, Puerto Rico’s budget is currently controlled by a federally appointed oversight board that has limited the availability of social welfare programs. *See id.* at 1661-62 (explaining that the oversight board can substitute its own judgment for that of local officials).²⁵

As a result, contrary to the federal government’s suggestion, it is simply not true as a practical matter

²⁵ *See also* Cynthia López Cabán, *Welfare Reform: A Work In Progress*, *The Weekly Journal* (Nov. 6, 2019), https://www.theweeklyjournal.com/business/welfare-reform-a-work-in-progress/article_34bcf6ec-0012-11ea-8c87-5f0ff1a1cd8b.html (discussing a work requirement for welfare introduced by the oversight board); Hazel Bradford, *Oversight board sues to stop Puerto Rico pension law*, *Pensions & Investments* (July 7, 2021), <https://www.pionline.com/courts/oversight-board-sues-stop-puerto-rico-pension-law> (reporting that the oversight board recently filed suit to block a law that would have guaranteed public pensions). Of course, the fiscal crisis in Puerto Rico and resulting bankruptcy are not the fault of the island’s impoverished residents who need SSI.

that Puerto Rico can “make its own judgments about how best to promote the general welfare in light of local conditions, including deciding for itself how much money is called for to aid needy, aged, blind and disabled people in the Commonwealth.” U.S. Br. 24. Nor could Puerto Rico realistically allocate its local tax revenue to increase AABD benefits. The government’s suggestions are illusory and cannot supply a rational basis for the law.

3. Ultimately, the broader context belies any suggestion that a purpose of the SSI program is to promote local autonomy because the same rationale would apply with essentially equal force in every U.S. jurisdiction where SSI is available. Local conditions affecting the needs of local residents who are poor, elderly, or living with disabilities are surely different from Alaska to Hawaii to New York (where Mr. Vaello-Madero used to live and receive benefits) to the NMI. Yet federal SSI benefits are uniformly available in all those places. Although the government asserts that “[e]conomic and other conditions in Puerto Rico differ from those in the States,” U.S. Br. 23, it does not identify any local conditions in Puerto Rico that rationally justify treating needy Puerto Rico residents differently—much less *worse*—than other U.S. residents. If anything, local economic conditions in Puerto Rico show an enormous *need* for SSI.

Indeed, while many U.S. states choose to adjust to their local conditions by supplementing SSI benefits with their own funds, Puerto Rico is powerless to do so because it does not receive SSI in the first instance. Accordingly, to the extent “local conditions” matter, they would rationally only *favor* extending SSI to Puerto Rico.

In sum, there is a substantial need for SSI in Puerto Rico, no adequate substitute for the SSI program there, and no realistic way for Puerto Rico to exercise “autonomy” to develop a substitute for the SSI benefits its residents cannot access. Excluding Puerto Rico residents from the SSI program does not rationally advance the program’s purposes or any other legitimate government interest.

C. Puerto Rico’s “unique tax status” does Not justify denying SSI to its residents.

To justify the SSI law’s disparate treatment, the government argues that Puerto Rico has a “unique tax status.” In the government’s view, it was rational for Congress to withhold SSI benefits from Puerto Rico residents because it exempted Puerto Rico residents from a number of federal tax obligations. *See* U.S. Br. 9, 15-22. But Puerto Rico’s tax status does not provide a rational basis to deny SSI to otherwise qualifying residents of the island.

1. The taxation justification is the best example of the flaw in the government’s approach of defending differential treatment of Puerto Rico as a whole rather than addressing the individuals in Puerto Rico affected by the law. Just as rights are enjoyed individually, taxes are paid individually, and the individual Puerto Rico residents who need and would otherwise qualify for SSI do not benefit from the federal tax exemptions the government identifies in any meaningful way, as the government’s examples make clear. *See* U.S. Br. 16. As such, the government fails to rationally connect its decision to give tax benefits to some residents of Puerto Rico to denying SSI to an entirely different group of the island’s residents. The

SSI discrimination is thus too “imprecise” to satisfy rational-basis review. *See Moreno*, 413 U.S. at 538.²⁶

Federal income tax. The government asserts that Puerto Rico residents save “an estimated \$2 billion a year” through exemption from federal income tax. U.S. Br. 16. But the Puerto Rico residents who require SSI are not the ones saving \$2 billion a year since their incomes are so low that they would have little if any tax liability if they lived on the mainland.

Corporate income tax. The government notes that businesses incorporated in Puerto Rico typically do not owe federal tax on income that is not connected to the mainland United States. But again, Puerto Rico residents who are poor and elderly or living with disabilities are unlikely to be the owners of corporations that would benefit from this tax provision.

Estate and gift taxes. The government observes that certain Puerto Rico residents owe no federal estate or gift taxes on property on the island. It is virtually impossible that these exemptions would benefit impoverished residents of Puerto Rico who would otherwise qualify for SSI, considering that mainland Americans are also exempt from these taxes for inheritances and gifts under \$11 million.

Excise taxes. The government notes that “Congress has declined to extend most federal excise taxes

²⁶ The government also ignores Puerto Rico residents’ aggregate contribution to the federal treasury through federal taxes on income from outside the island; taxes paid by federal employees in Puerto Rico; and the same Social Security, Medicare, and Unemployment taxes that are levied on the mainland. *See* Pet. App. 22a-23a. As the First Circuit explained, residents of Puerto Rico through these taxes contribute billions of dollars to the federal treasury—and more than is contributed by residents of a number of states. *Id.*

to Puerto Rico,” referring to federal taxes on goods and services such as gas, guns, telephone lines, aviation, health insurance, alcohol, and tobacco, and that this exemption benefits even low-income residents. U.S. Br. 16, 22. But the government fails to show that the tax exemptions benefit the residents of Puerto Rico that SSI would help. For example, the government points to a lack of an excise tax on aviation in Puerto Rico, *id.* at 16, but it is unlikely that a substantial number of Puerto Rico residents who are both poor and elderly or living with a disability fly with great frequency.

The government also fails to show that any savings gained from the inapplicability of excise taxes in Puerto Rico would come anywhere close to matching the funds that would be available under the SSI program. To give just one example, the federal excise tax on cigarettes is “just over \$1.00 per pack.”²⁷ A resident of Puerto Rico would need to smoke more than 700 packs of cigarettes a month to come close to saving an amount comparable to the maximum SSI benefit—and only about 10% of Puerto Rican residents smoke.²⁸

In sum, the fact that *some* Puerto Rico residents benefit from the island’s “unique tax status” is not rationally related to the decision to not extend SSI to the *different* subset of the island’s residents who need and would otherwise qualify for SSI—residents who do not reap those tax benefits in any meaningful way.

²⁷ Cong. Budget Off., *Increase Excise Taxes on Tobacco Products* (Dec. 9, 2020), <https://www.cbo.gov/budget-options/56869>.

²⁸ Centers for Disease Control and Prevention (CDC), *Map of Current Cigarette Use Among Adults* (Sept. 14, 2020), <https://www.cdc.gov/statesystem/cigaretteuseadult.html>.

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2. The government’s inclusion of residents of the NMI in the SSI program further confirms that territorial tax status is irrelevant to the purposes of the SSI program, since NMI residents likewise do not pay federal income tax.²⁹ Even assuming that there might be legitimate reasons for a law to treat residents of different U.S. territories differently where the differential treatment is rationally related to the different residents’ different circumstances, here the government identifies no distinction between residents of the NMI who are poor, elderly, or living with a disability, on the one hand, and similarly situated residents of Puerto Rico, on the other, that is relevant to the purposes of the SSI program, or to any other legitimate government purpose.

The government argues only that this distinction is rational because the NMI “became a commonwealth pursuant to a negotiated covenant with the United States” that included a commitment to provide SSI, whereas Puerto Rico did not. U.S. Br. 27. But the circumstances under which the NMI and Puerto Rico became associated with the United States have no relation at all to the purposes of the SSI program.

Specifically, in the 1970s, the NMI voluntarily sought a political union with the United States and negotiated the Covenant to Establish a Commonwealth of the Northern Mariana Islands in Political Union with the United States of America (“Covenant”). *U.S. ex rel. Richards v. De Leon Guerrero*, 4

²⁹ See IRS Publication 570, *Tax Guide for Individuals With Income From U.S. Possessions*, at 15, 20 (2020), <https://www.irs.gov/pub/irs-pdf/p570.pdf> (“The CNMI has its own tax system” in which “bona fide residents of the CNMI . . . do not generally have an income tax filing requirement with the IRS.”).

F.3d 749, 751 (9th Cir. 1993). The Covenant was “unanimously endorsed by the NMI legislature” and “approved by 78.8% of NMI plebiscite voters.” *Id.* The Covenant was also the product of “two years of earnest and intense negotiations,” *U.S. ex rel. Richards v. Sablan*, No. 89-0008, 1989 WL 158917, at *3-4 (D. N. Mar. I. Oct. 27, 1989), which resulted in a commitment by the U.S. government, among other things, to provide SSI to the people of the NMI.

The people of Puerto Rico did not have the same opportunity to negotiate the terms of their affiliation with the United States. Puerto Rico became a U.S. territory in 1898 after Spain ceded it by treaty following the Spanish-American war. *See Puerto Rico v. Sanchez Valle*, 136 S. Ct. 1863, 1868 (2016). In 1950, more than 50 years later, Congress passed a statute granting the people of Puerto Rico an opportunity to develop and ratify their own constitution, subject to Congress’s veto power. *See id.* at 1868-69 (“The people of Puerto Rico would be the first to decide . . . whether to adopt that convention’s proposed charter. But Congress would cast the dispositive vote [and] [t]he constitution . . . would become effective only ‘upon approval by the Congress.’” (quoting Pub. L. No. 600, § 3, 64 Stat. 319)). The people of Puerto Rico agreed to this arrangement and ratified a constitution, whereupon “Congress then took its turn on the document” and “*removed a provision recognizing various social welfare rights* (including entitlements to food, housing, medical care, and employment) [and] added a sentence prohibiting certain constitutional amendments, *including any that would restore the welfare-rights section.*” *Id.* at 1869 (emphases added).

Thus, historical and geopolitical forces beyond the control of anyone who currently needs SSI benefits

allowed the NMI to negotiate for those benefits, while Puerto Rico could not.³⁰ It is not rational—or right—to deny needy and otherwise eligible residents of Puerto Rico equal access to SSI benefits simply because Puerto Rico had limited bargaining power many decades ago.

D. The cost of providing needy Puerto Rico residents with SSI does not rationally support denying them SSI.

The government additionally contends that the potential cost of providing SSI benefits to needy Puerto Rico residents, “around two billion dollars each year,” supplies a rational basis for withholding those benefits. U.S. Br. 9, 18-19. But singling out residents of certain territories for exclusion from the SSI program does not rationally advance either the aims of the SSI program or the goal of avoiding costs.

Most obviously, if the cost of providing SSI to an entire jurisdiction were a legitimate factor in making decisions about where to make the program available, Puerto Rico would be far from the best choice to exclude from the program—and the remaining, less populous U.S. territories would be even less worthy candidates for omission. Instead, it would be far more rational to deny SSI to residents of the largest states, such as California, New York, and Texas, whose

³⁰ American Samoa also voluntarily joined the United States in the early 1900s, before the SSI program existed. See U.S. Dep’t of the Interior: Office of Insular Affairs, *American Samoa*, <https://www.doi.gov/oia/islands/american-samoa> (last visited Sept. 2, 2021). The people of American Samoa thus similarly lacked an opportunity to seek SSI coverage as part of their agreement to join the United States.

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resident SSI recipients spend federal dollars far faster than Puerto Rico ever could.³¹ Yet nobody would seriously argue that Congress could constitutionally deny SSI benefits to the residents of these states because it would save money.

The mere fact that excluding needy Puerto Rico residents saves money does not make it rational. The choice to single out and exclude residents of Puerto Rico and other territories—as opposed to Texas residents, or all residents at the top of the existing eligibility bracket, for example—is arbitrary. It is entirely unrelated to the stated purpose of saving money, for many other distinctions would save costs in equal or far greater measure; it is therefore not rational under this Court’s precedents.

In *Moreno*, for example, legislation excluded individuals residing in group homes from food stamp benefits, ostensibly to reduce fraud. 413 U.S. at 535-36. But “in practical operation,” the law excluded “not those persons who are ‘likely to abuse the program,’ but, rather, 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. Partially on that basis, the Court concluded that “the classification [was] not only ‘imprecise,’ it [was] wholly without any rational basis.” *Id.*; see also, e.g., *Shapiro v. Thompson*, 394 U.S. 618, 633 (1969) (saving money was not a legitimate reason under equal-protection principles for denying benefits

³¹ See SSA, *SSI Monthly Statistics* (Jan. 2021), https://www.ssa.gov/policy/docs/statcomps/ssi_monthly/2021-01/table06.html (SSI expenditures of approximately \$790 million, \$354 million, and \$357 million for January 2021 alone, in California, New York, and Texas, respectively).

to class of needy residents who had recently moved to a state). Just so here. The principal costs of the SSI program would not emanate from Puerto Rico or the other territories. Territorial residents' disparate exclusion thus fails to rationally advance the government's posited cost-saving purpose.

Further, the cost of extending SSI benefits to Puerto Rico residents cannot be rationally related to decisions about how far to extend the program because cost has not stopped the government from providing SSI to millions of new enrollees over the last half century.³² Needless to say, if every resident of Puerto Rico who meets the non-geographic requirements to receive SSI benefits were suddenly dispersed throughout the 50 states, the cost of covering those individuals would not change, but the cost-based rationale for denying the benefit would disappear.

Finally, and in any event, SSI benefits should be seen as an investment in economic and public health rather than a cost. Benefits from social programs like SSI stimulate the economy because the recipients of such funds tend to promptly spend them on essential goods and services.³³ That spending creates a

³² See SSI Statistical Report, *supra* note 11, at 25 (table showing that enrollment approximately doubled from 1974 to 2019).

³³ See Gary Koenig & Al Myles, *Social Security's Impact on the National Economy*, at 6, AARP Public Policy Inst. (Oct. 2013), https://www.aarp.org/content/dam/aarp/research/public_policy_institute/econ_sec/2013/social-security-impact-national-economy-AARP-ppi-econ-sec.pdf ("Because Social Security beneficiaries tend to have lower incomes, and their benefits account for a significant part of those incomes, we expect them to have a higher than average marginal propensity to consume.").

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“multiplier or ripple effect,” since “businesses that receive these dollars use them to pay their employees, their operating costs and their suppliers” who “in turn use the money they receive to pay their employees, their operating costs and their suppliers, and so on.”³⁴ To take a concrete example, “[e]very dollar of Social Security benefits generates about \$2 of economic output.”³⁵

There is similar evidence suggesting that robust SSI benefits foster a healthier population.³⁶ That makes sense, considering that giving people who are poor, elderly, or living with a disability basic funding is likely to improve their access to food and other essentials. These are particularly important considerations here given Puerto Rico’s pervasive poverty and dire financial situation, as discussed above.

In sum, the cost of supplying SSI to residents of Puerto Rico is not rationally related to the goal of

³⁴ *Regional Economic Impacts of Social Security Benefits and Other Government Transfer Payment Programs*, Sch. of Bus. and Econ., King Univ., at 7 (Feb. 2016), <https://www.king.edu/wp-content/uploads/2019/06/kires-report-15.pdf> (emphasis omitted).

³⁵ Koenig & Myles, *supra* note 33, at 1.

³⁶ See Pamela Herd, Robert F. Schoeni & James S. House, *Upstream Solutions: Does the Supplemental Security Income Program Reduce Disability in the Elderly?*, 86 *Milbank Q.* 5, 25-26 (2008), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC2690339/> (giving elderly individuals an additional \$100 a month in their SSI benefit led “to a 1.8 percentage point decline (from 39 to 37.2 percent) in the probability of having a mobility limitation among these low-income individuals”).

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saving costs, which if anything is ultimately undermined by the discriminatory law.³⁷

II. The denial of SSI benefits to residents of Puerto Rico should be struck down under heightened scrutiny.

Even if this Court were to determine that excluding Puerto Rico's residents from SSI benefits somehow satisfies rational-basis review, the Court should nevertheless strike down this discrimination as unconstitutional under a heightened standard of review. At the very least, the Court should apply an intermediate level of scrutiny requiring the government to demonstrate an important interest that the exclusionary treatment of Puerto Rico residents substantially (not just rationally) advances. *See, e.g., United States v. Virginia*, 518 U.S. 515, 533 (1996). The Court's longstanding justifications for applying

³⁷ This Court has also held that the "right to travel" between states should not be infringed. *See Saenz v. Roe*, 526 U.S. 489, 498 (1999); *accord Sup. Ct. of N. H. v. Piper*, 470 U.S. 274 (1985); *see also Edwards v. California*, 314 U.S. 160 (1941). This Court has assumed the same right applies to travel between states and territories. *Califano v. Gautier Torres*, 435 U.S. 1, 4 n.6 (1978). By penalizing American citizens who move from the states to Puerto Rico by withdrawing eligibility for SSI benefits, the law also impermissibly infringes on the right to travel. *Gautier Torres* is not to the contrary. In that summary decision, the Court concluded that a person moving to Puerto Rico has no greater rights than other Puerto Rico residents to SSI benefits. But that conclusion simply did not consider the impact on a federal right to travel within the United States. The proper question here is whether Congress is free to withhold the benefits of a nationally applicable program to create burdens on citizens who exercise their right of interstate travel to the disfavored territories. For many of the same reasons set forth in this brief on the equal-protection question, the answer should be no.

elevated scrutiny to suspect or quasi-suspect government classifications apply as forcefully to Congress's discrimination against residents of Puerto Rico when denying important government benefits like SSI.

This Court has long recognized that heightened scrutiny should be applied to individuals who “have historically ‘been relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process.’” *Plyler v. Doe*, 457 U.S. 202, 216 n.14 (1982) (citation omitted). That is especially so for individuals with group affiliations that have historically subjected them to intentional unequal treatment, as the government, too, has recognized. *See Brief for the U.S. as Amicus Curiae Supporting Petitioners*, Nos. 14-556, 14-562, 14-571, 14-574, 2015 WL 1004710, at *16, *Obergefell v. Hodges*, 576 U.S. 644 (Mar. 6, 2015) (arguing that this Court has recognized as a relevant factor “whether the class in question has suffered a history of discrimination”). Thus, discriminations based on ethnicity, language, or race have traditionally been subjected to heightened scrutiny.

Residents of Puerto Rico share these attributes. Because they cannot vote in federal elections, they constitute a “political[ly] powerless[]” minority that cannot realistically influence “the majoritarian political process” at the federal level, where decisions about SSI benefits are made. This is a characteristic that as a practical matter is impossible to change for many residents—especially the neediest residents who would otherwise qualify for SSI benefits—who lack the resources necessary to move to another part of the United States where greater resources for the needy may be available.

Further, there is no question that residents of Puerto Rico and other American territories have historically been subject to purposeful unequal treatment, if only in the many ways in which they have been excluded from federal benefits and programs precisely like those extended under the SSI program solely by virtue of their geographic residence. The Court need look no further than the Insular Cases, which still loom over the federal territories, to see the historical evidence of racial animus and use thereof to justify the unequal application of constitutional protections. *See, e.g., Dorr v. United States*, 195 U.S. 138, 148 (1904) (denying the right to jury trials for a “territory peopled by savages”); *Downes v. Bidwell*, 182 U.S. 244, 282 (1901) (stating “in the annexation of outlying and distant possessions grave questions will arise from differences of race, habits, laws, and customs of the people . . . which may require action on the part of Congress that would be quite unnecessary in the annexation of contiguous territory inhabited only by people of the same race”).

While *amicus* acknowledges that Congress has traditionally been afforded some deference when legislating in areas touching on the territories, it agrees with respondent that the precedents for such deference (including *Califano v. Gautier Torres*, 435 U.S. 1 (1978), and *Harris v. Rosario*, 446 U.S. 651 (1980)), should not control the issue here. Those cases were short summary orders that did not adequately address the important equal-protection concerns implicated by laws that withhold key rights from residents of territories. *See Rosario*, 446 U.S. at 654 (Marshall, J., dissenting) (“Heightened scrutiny under the equal protection component of the Fifth Amendment, the Court concludes, is simply unavailable to

protect Puerto Rico or the citizens who reside there from discriminatory legislation, as long as Congress acts pursuant to the Territory Clause. Such a proposition surely warrants the full attention of this Court before it is made part of our constitutional jurisprudence.”). These cases also relied on the Insular Cases, which “should [not] be given any further expansion.” *Reid v. Covert*, 354 U.S. 1, 14 (1957) (plurality).

The exclusion of Puerto Rico residents from SSI benefits cannot survive heightened scrutiny. The government cannot identify any compelling or substantial government interest advanced by the disparate treatment, much less explain how that exclusionary treatment is substantially tailored to advance any such interest.

CONCLUSION

The ABA respectfully urges the Court to find the exclusion of needy Puerto Rico residents from the SSI program unconstitutional, and to affirm the decision of the First Circuit.

Respectfully submitted.

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