No. 20-303

IN THE

SUPREME COURT OF THE UNITED STATES

UNITED STATES OF AMERICA,
Petitioner,

v.

JOSÉ LUIS VAELLO-MADERO
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the First Circuit

BRIEF AMICUS CURIAE FOR THE PUERTO RICO HOUSE OF REPRESENTATIVES IN SUPPORT OF RESPONDENT

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STATEMENT OF INTEREST OF *AMICUS CURIAE*[1]

The appearing *amicus curiae*, the Puerto Rico House of Representatives, is one of two legislative bodies created by Article III of the Constitution of the Commonwealth of Puerto Rico, composed of 51 members, 40 of whom are elected to represent representative districts with the remaining 11 being elected at large. The House of Representatives is the oldest democratic institution in Puerto Rico as it was created by the 1900 Organic Act, 31 Stat. 77[2]. This, the Nineteenth Legislative Assembly[3] is the most diverse in modern Puerto Rico history with 5 different political parties having elected members to the House. Pursuant to Article 5.2(p) of the current House Rules (House Resolution 161), the Speaker, Hon. Rafael Hernández-Montañez, is authorized to make court appearances on behalf of the legislative body. Because of the legal

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[1] Both the petitioner and the respondent have appeared in writing to state their blanket consent to the filing of *amici* memoranda in this very important litigation. *Amicus* hereby further certifies, as per this Honorable Court's Rule 37.6, that no party or counsel for a party has authored any part of the foregoing brief nor has any of the parties and/or their attorneys made a monetary contribution to fund the filing of this brief. No person other than the *amicus* or his counsel have made a monetary contribution to its preparation or submission.

[2] Under this legislation the "House of Delegates", as it was then called, was the only government institution whose members were selected through popular vote as all other components of the territorial government were either appointed by the President of the United States or by the Governor.

[3] Although the House has been in continuous operation since 1900, the Number Nineteen corresponds to the 4-year terms since the post-1952 constitutional era.

importance of the constitutional matters at issue in this case and because of the real-world consequences that the People of Puerto Rico would suffer if the discriminatory practice that the Government seeks to enforce is validated, the House feels compelled to appear before this Honorable Court in support of the respondents.

Within the Commonwealth's republican form of government, it ordinarily is incumbent upon the Legislative Assembly to formulate public policy in the best interests of its constituents. It is an important axiom of contemporary western philosophy that the most vulnerable citizens deserve a higher degree of protection from the state. These citizens prominently include those who are unable to procure a living through their work either because of them having reached retirement age or because of physical or mental disability. It was precisely to help such citizens lead a dignified life that Congress enacted the Social Security Act as the centerpiece of the New Deal reforms. In his speech on occasion of signing the bill into law, President Roosevelt observed that:

> The civilization of the past hundred years, with its startling industrial changes, had tended more and more to make life insecure.
>
> *Young people have come to wonder what will be there lot when they came to old age.*
>
> The man with a job has wondered how long the job would last.
>
> This social security measure gives at least some protection to 50 million of our

> citizens who will reap direct benefits through unemployment compensation, *through old-age pensions*, and through increased services for the protection of children and the prevention of ill health.
>
> We can never ensure 100 percent of the population against 100 percent of the hazards and vicissitudes of life, but we have tried to frame *a law which will give some measure of protection to the average citizen and to his family against the loss of a job and against poverty-stricken old age.*[4] (emphasis added)

The Government does not expressly dispute Puerto Rican's right to the dignity that President Roosevelt alluded to, but it seeks to deny that right all the same by seeking to uphold Congress' decision to discriminate against its own citizens, if they happen to live in a territory. In an intensely ironic choice of argument, the Government posits that because "Puerto Rico's status as a Commonwealth affords it a great degree of autonomy and self-determination", pursuant to that purported authority "the territorial government is best positioned to tailor its laws and programs to reflect 'local conditions'." *See* Brief for the Petitioner at 23-25. The House of Representatives would love to legislate a program that provides its most vulnerable constituents with the same benefits that are available under the Supplemental Social Security

[4] https://www.americanrhetoric.com/speeches/fdrsocialsecurityact.htm

Income Program (hereinafter referred to as "SSI")[5]. It however is unable to do so, not only because of the very well-documented insolvency of the Commonwealth's treasury but because in 2016, *Congress deprived Puerto Rico* of the "great degree of autonomy and self-determination" that the Government has strangely chosen to tout in its brief. We respectfully believe that the Government cannot invoke Article IV powers over the territory to deny it authority to legislate local solutions to its problems in the vast majority of cases[6] and then fallback on the existence of the very same autonomy that it usually works so hard to negate. In fact, as we will demonstrate, the Government argues both wide autonomy and the preeminence of Article IV limitations in one single brief, notwithstanding the contradictory nature of those contentions.

As this Honorable Court is well aware of, the Commonwealth's default on its bond obligations brought about the very unfortunate piece of legislation known as the Puerto Rico Oversight, Management and Economic Stability Act, 48 U.S.C. § 2101, et seq. (hereinafter referred as "PROMESA"), which severely impaired the House's ability to take care of the People's business, as many of the powers delegated to Puerto Rico's elective constitutional government have

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[5] This program was established through the 1972 amendments to the Social Security Act, 86 Stat. 1465 (1972).

[6] For example, in *Puerto Rico v. Franklin Cal. Tax-Free Trust*, 136 S. Ct. 1938, 1942 (2016), the United States successfully appeared before this Honorable Court to argue that federal law "bars Puerto Rico from enacting its own municipal bankruptcy scheme to restructure the debt of its insolvent public utilities companies", thus having a legislated "local solution" struck.

now been vested on a Financial Oversight and Management Board (hereinafter referred to as "FOMB" or "the Board") composed of seven appointed individuals that are not accountable to the Puerto Rican electorate[7]. The House of Representatives has very actively and aggressively participated in litigation concerning the scope of PROMESA in an effort to salvage as much authority as possible from encroachment by the Board. Under the current scheme of severely limited territorial government in Puerto Rico, even assuming that it was possible to tailor an SSI-like program for the People of Puerto Rico that is tailored to local needs, such a program would necessarily need a nod from the FOMB. *See* 48 U.S.C. § 2141-2144. It is a safe bet that the Board, which is obsessed with imposing harsh austerity measures for everyone but itself, would never endorse such a program. Indeed, the FOMB's position on Puerto Ricans in their golden age is best exemplified by their current attack on Puerto Rico's unanimously approved Law No. 7-2021, which states a clear public policy against further reductions in the benefits of government retirees[8]. In sum, under PROMESA, Congress decided that an undemocratic bureaucracy of unelected appointees was better suited to handle the Commonwealth's public finances and

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[7] For a detailed description of how this reallocation of territorial governance conflicts with prior Congressional policy, *see Fin. Oversight & Mgmt. Bd. for P.R. v. Aurelius Inv., LLC*, 140 S. Ct. 1649, 1675-1683 (2020) (Sotomayor, J. concurring).

[8] We refer to the case of *FOMB v. Pierluisi-Urrutia, et al.*, Adv. Proc. No. 21-00072 (LTS), within the main debt restructuring case under Title III of PROMESA, Civil Case No. 17-3283 (LTS) before the U.S. District Court for the District of Puerto Rico. Speaker Hernández-Montañez is a co-defendant in that case, along with the President of the Senate and the Governor of Puerto Rico.

therefore must now own the logical consequences of that policy choice.

The First Circuit's decision correctly adjudicated the controversy regarding the viability of Congress' continued discrimination against Puerto Rico by excluding its residents from the SSI program, even after including another territory (the Northern Mariana Islands)[9] in said program's coverage. This decision was rendered even under the standard created by the Court's *summary* decisions in *Califano v. Gautier Torres*, 435 U.S. 1 (1978) (*per curiam*) and *Harris v. Rosario*, 446 U.S. 651 (1980) (per curiam).[10] While we respectfully believe that these decisions, along with the whole body of jurisprudence known as the "insular Cases" belong in the same graveyard in which decisions such as *Scott v. Sandford*, 60 U.S. 393 (1857) and *Plessy v. Ferguson*, 163 U.S. 537 (1896) were laid to rest, the First Circuit's judgment should be

[9] While the District of Columbia has always been considered as part of the United States for purposes of the Social Security Act, the Northern Mariana Islands were added, via amendment, in 1976, as a result of that territory's covenant with the United States. *See* 90 Stat. 263 (1976).

[10] In his dissent, the great Justice, Hon. Thurgood Marshall criticized the majority's haste to resolve the matter summarily, particularly where it relied mostly on "another summary decision by this Court" (i.e., *Califano*), going on to denounce that there was no biding legal authority supporting the conclusion that Puerto Rico could be treated differently to the states so long as there was a rational basis for doing so, particularly where such discrimination affects U.S. citizens, ending by noting that "this case raises the serious issue of the relationship of Puerto Rico, and the United States citizens who reside there, to the Constitution" and that therefore, "[a]n issue of this magnitude deserves far more careful attention than it has received in *Califano v. Torres* and in the present case". *Harris*, 446 U.S. at 652-656 (Marshall, J., dissenting).

affirmed even if the anachronistic imperial philosophy of the insular cases remains the Law of the Land, as it has for over a century.

Because the First Circuit's ruling contains the correct assessment of how the Equal Protection Clause bars the exclusion of Puerto Rico residents from SSI benefits and because it cannot currently legislate to resolve the problems of those residents, the House strongly urges the affirmance of the Court of Appeals' holding.

SUMMARY OF ARGUMENT

Ever since the question first came to the Court's attention in 1978 up until the instant case, the issue of entitlement has been seen as one of territorial rather than individual rights, as evidenced by petitioner framing the question as "[w]hether Congress violated the equal-protection component of the Due Process Clause of the Fifth Amendment by establishing Supplemental Security Income—a program that provides benefits to needy aged, blind, and disabled individuals—in the 50 States and the District of Columbia, but not extending it to Puerto Rico". The fact is that SSI benefits never go through the coffers of states or territories but rather a check is delivered straight to the beneficiary's mailbox, or more likely these days, a direct deposit is wired into his/her bank account. Unlike block grants such as those under the jurisdiction of the U.S. Department of Housing and Urban Development, SSI benefits are not granted on the basis of a proposal submitted by a state or local government, as eligibility is based on an individual's specific circumstances, as disclosed to the Social Security Administration. Not only does focus on the territory instead of the individual recipients of the injury in fact tend to promote an analysis that is detached from the basic human tragedy involved, but it may also result in the application of the incorrect level of scrutiny. The plaintiff in this case has lost SSI benefits that he was

receiving as a resident in one of the states, over which this Honorable Court has recognized a property interest protected by the Due Process Clause.

On the other hand, petitioner props up the precedential value of the *Califano* and *Harris* summary decisions. While all opinions issued by this Honorable Court are of legal consequence, the case law recognizes that summary decisions do not carry the same precedential weight as fully briefed cases that are argued before the Court. Here we have an important constitutional question that involves the rights of millions of U.S. citizens and that remains unresolved four decades after the tandem of summary opinions were issued. Moreover, considering the First Circuit's thoughtful and solidly supported decisions, petitioner relies on a number of arguments that are not even mentioned in *Califano* or in *Harris* and are thus up for initial consideration.

In endeavoring to compel the continued application of rational basis scrutiny in this case, the Government predictably seeks support from the "plenary powers" doctrine championed by the discredited "Insular Cases". While there is no doubt that Puerto Rico's political history markedly differs from that of other territories (specially in relation to those acquired at the turn of the Twentieth Century) and that it has been granted (and then deprived again) of broad autonomy with regards to its internal affairs, it cannot be said that Congress at any time ceased to hold plenary powers or that those powers have been diminished. Having said this, plenary powers do not create an extra-constitutional dimension in which the rest of the Constitution ceases to apply. Thus, the Fifth Amendment undoubtedly limits Congress' ability to legislate classifications. Whether or not this case is viewed as the deprivation of benefits over which individuals have a property interest or as a classification affecting citizens of Puerto Rican national origin, strict scrutiny applies. The Government cannot meet

the rigors of strict scrutiny and does not event try to propose an argument that it does so. The petitioner also seeks support on a few cases regarding Congressional authority to create classifications based on differences between geographic locations. Nothing suggests that this criterion was considered by Congress in its decision to exclude Puerto Rico residents from SSI benefits nor does the Government articulate any relationship between differences in geographic locations and the challenged decision.

Finally, even if rational basis scrutiny is applied, no rational basis exists for the challenged exclusion. Petitioner does nothing to refute the First Circuit's fact-based arguments to reject the *Califano/Harris* factors. Instead, the Government now says that excluding Puerto Rico residents from SSI advances the important interest of promoting the Commonwealth's self-rule and allowing that entity to use its fiscal autonomy to appropriate funds to cover the needs that SSI would ordinarily provide for. This audacious proposition ignores the fact that: 1) in 2016 Congress legislated to effectively transfer financial control from the constitutional elected government to the FOMB; and 2) even if Puerto Rico retained the broad authority over its finances that it enjoyed prior to PROMESA, *as the vast majority of the states*, it clearly does not have and never has had the funds required to replace SSI with a locally designed program. Faced with the challenge presented by the inclusion of the Northern Mariana Islands' residents in the SSI program, petitioner merely points to the source of that decision (i.e., the 1976 covenant), without more. In any event, petitioner brief fails at achieving the Government's only goal under rational basis scrutiny, namely: establishing a causal relationship between the challenged classification and the goals of the legislation at issue.

ARGUMENT

A) SSI IS FOR INDIVIDUALS NOT FOR GOVERNMENTS

The SSI Program was created "[f]or the purpose of establishing a national program *to provide supplemental security income to individuals* who have attained age 65 or are blind or disabled, there are authorized to be appropriated sums sufficient to carry out this title". 42 U.S.C. § 1381 (emphasis added). Rather than setting forth what a state or a territory must do to qualify for SSI benefits, payments are based upon an evaluation of the "income and resources" of "aged, blind or disabled *individuals*". 42 U.S.C. § 1381a (emphasis added). This notwithstanding, ever since *Califano*, the legal question resolved by the courts has been centered on whether Congress can exclude the *political body* (in this case, territories) from receiving this benefit designed for *individual citizens*[11].

The initial shift of focus from the individual to the collective may very well stem from the fact that, to qualify, the flesh and blood applicants must be "a resident of the United States. 42 U.S.C. § 1382c(a)(1)(B)(i). That same statute goes on to define the "United States" as the 50 states and the District of Columbia. 42 U.S.C. § 1382c(e). As previously stated, residents of the Northern Mariana Islands also qualify as inclusion in SSI is one of the benefits contemplated in the 1976 "Covenant to Establish a Commonwealth of the Northern Mariana Islands in Political Union with the United States of America". This notwithstanding, where a 90-year-old resident of San Juan is denied his application to obtain SSI

[11] To be sure, there are several federal programs that appropriate funds directly to state/territorial and local governments based on proposals submitted by qualifying government entities. This has never been the case with Social Security benefits which have always been delivered directly from the U.S. Treasury to the individual beneficiaries.

benefits and thus escape poverty is denied by the Social Security Administration, a discriminatory act has been committed against that citizen, not against the Commonwealth of Puerto Rico. Approaching this subject from the perspective of whether or not Congress may invoke rational basis scrutiny to discriminate against its territories with regards to the participation in federal programs is both inaccurate and dehumanizing to the actual victims of that policy, as the real question is whether or not that least restrictive standard justifies discrimination against individual citizens solely on the basis of their having taken up residence in a territory.

The very limited discussion by the *Califano* Court inexplicably approached the matter as a "right to travel" issue. *Califano*, 435 U.S. at 4-5. The *Harris* Court relied on *Califano* without any further analysis. *Harris*, 446 U.S. at 651-652. Just as Mr. José Luis Vaello-Madero, the plaintiffs in both cases were *individual citizens* who lost federal benefits for which they were otherwise qualified. The Commonwealth of Puerto Rico, as that political body, was not deprived of anything and therefore did not suffer an injury in fact that would allow it to seek judicial redress. Focusing on the disparate treatment of the territory however meant that the aggrieved individuals were never able to avail themselves to this Honorable Court's determination that "*the 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) (emphasis added)[12]; *see also Walter v. National Association of Radiation Survivors*, 473 U.S. 305, 333 (1985) (noting a property interest in the continued receipt of certain benefits from the Veterans' Administration). If the analysis is, as it should, centered on

[12] This case involved the termination of respondent's Social Security disability benefits. *Id.* at 321-324.

the individual applicant rather than on the territory in which he or she resides, it becomes harder to dispatch the matter as just another run-of-the-mill statutory classification to be upheld against an Equal Protection Challenge.

As observed by the District Judge who originally decided this case (since appointed and confirmed to the Court of Appeals for the First Circuit), "residents of Puerto Rico pay federal payroll taxes to finance Social Security and Medicare, equally to their stateside brethren". *United States v. Vaello-Madero*, 313 F. Supp.3d 370, 374 (D.P.R. 2018). How could this not be about individuals, as they are the ones who must contribute a portion of their earnings for decades only to have full benefits conditioned upon living in a state, the District of Columbia, or a series of small Islands in the Pacific Ocean in order to receive full benefits?

Once again, this Honorable Court has before it a case brought by an individual who was deprived of a constitutionally protected right to the continued receipt of federal benefits. Although the Commonwealth of Puerto Rico and its entitlement to funds has been the focus of analysis up until this point, it is not the real party of interest in this case, which is reflected by its appearance as *amicus curiae* rather than as one of the respondents. A spade deserves to be called a spade and this case needs to be decided exactly as what it is: an evaluation of Congress' right to discriminate against SSI recipients and/or applicants based solely on their status as residents of a U.S. territory.

B) PRECEDENTIAL VALUE OF *CALIFANO* AND *HARRIS*

Beginning at page 36 of its brief, the Government demands the strict application of *stare decisis* with regards to the continued precedential force of the *Califano* and *Harris* summary opinions. As this Honorable Court recently explained:

> Even if we accepted the premise that *Apodaca* established a precedent, no one on the Court today is prepared to say it was rightly decided, and *stare decisis isn't supposed to be the art of methodically ignoring what everyone knows to be true*. Of course, the precedents of this Court warrant our deep respect as embodying the considered views of those who have come before. But *stare decisis* has never been treated as "an inexorable command." And *the doctrine is "at its weakest when we interpret the Constitution" because a mistaken judicial interpretation of that supreme law is often "practically impossible" to correct through other means. To balance these considerations, when it revisits a precedent this Court has traditionally considered "the quality of the decision's reasoning; its consistency with related decisions; legal developments since the decision; and reliance on the decision." In this case, each factor points in the same direction*.

Ramos v. Lousiana, 140 S. Ct. 1390, 1404-1405 (2020) (emphasis added)

Not all legal decisions carry equal precedential value. The Government is not relying on widely accepted true and tried legal precent as, for example, *Miranda v. Arizona*, 384 U.S. 436 (1966)), but rather on a tandem of divided, summary opinions. In other words, the doctrine being propped up as venerable precedent has not even been put to the test in an oral argument session before the Highest Court in the Land. The Court has, in the past, recognized the

obvious underlying weaknesses of summarily issued decisions.

The case of *Edelman v. Jordan*, 415 U.S. 651 (1974), is one of the leading cases regarding the scope of relief that the Eleventh Amendment allows against states sued in federal court. Referring to prior decisions in which the pertinent Eleventh Amendment considerations were decided, the Court held that:

> This case, therefore, is the first opportunity the Court has taken to fully explore and treat the Eleventh Amendment aspects of such relief in a written opinion. *Shapiro v. Thompson* and these three summary affirmances obviously are of precedential value in support of the contention that the Eleventh Amendment does not bar the relief awarded by the District Court in this case. Equally obviously, *they are not of the same precedential value as would be an opinion of this Court treating the question on the merits*. Since we deal with a constitutional question, we are less constrained by the principle of stare decisis than we are in other areas of the law. *Having now had an opportunity to more fully consider the Eleventh Amendment issue after briefing and argument, we disapprove the Eleventh Amendment holdings of those cases to the extent that they are inconsistent with our holding today*.

Id. at 670-671 (emphasis added)[13]

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[13] *See also Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 14 (1976) ("Several questions presented here - most notably those of retroactivity and preclusion of sole reliance on X-ray testimony evidence - were raised and decided in *National Independent Coal Operators Assn. v. Brennan*, *but having heard oral*

Later, in *Bowers v. Hardwick*, 478 U.S. 186, 189 n. 4 (1986), the Court refused to rely on its summary affirmance in *Doe v. Commonwealth Attorney for Richmond*, 425 U.S. 901 (1976)[14], preferring to make an independent, more carefully reasoned decision after allowing briefing and hearing oral argument.

Not only are *Califano* and *Harris* weakened by their summary nature but neither of those cases contain any language supporting what seems to the Government's main thesis. At pages 28-34, the United States makes the argument that the constitutional text itself and Congressional authority to draw geographic distinctions support the *Califano/Harris* rational basis scrutiny theory. Of course, these *per curiam* majority opinions do not mention any of these concepts. They instead merely apply rational basis scrutiny on the basis of the general presumption of constitutionality enjoyed by all legislative enactments, as well as a generalized assertion of Congressional authority under U.S. Const., Art. IV, § 3, cl. 2. *Califano*, 435 U.S. at 5; *Harris*, 446 U.S. at 651-652. If the Government wishes for this Honorable Court to validate its constitutional text/geographic distinctions theory, it must do it the hard way by persuading a majority of the Court without any prior precedential support or at least, not by relying on the very discrete summary dispositions in *Califano* and *Harris*.

We urge this Honorable Court to follow Justice Thomas' sound advice to eschew a view of *stare decisis* that "elevates demonstrably erroneous decisions—meaning decisions outside the realm of permissible interpretation—over the text of the Constitution and

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argument and entertained full briefing on these issues together with the other questions raised in the case, we proceed to treat them here more fully") (emphasis added).

[14] Needless to say, *Bowers* was overruled on other grounds in the Court's landmark decision of *Lawrence v. Texas*, 539 U.S. 558 (2003).

other duly enacted federal law", and thus reject the Government's invitation to give "the veneer of respectability to our continued application of demonstrably incorrect precedents". *Gamble v. United States*, 139 S. Ct. 1960, 1981 (2019) (Thomas, J., concurring).

In sum, *Califano* and *Harris* stand on very shaky grounds and there is good reason for overturning them. More importantly, the arguments brought forth by the petitioner to support the application of rational basis scrutiny demanded by these cases is not so much as mentioned in those decisions and thus constitute a matter of first impression not the revisitation of a previously decided matter.

C) CONGRESSIONAL TEXT AND GEOGRAPHIC DISTINCTIONS

At the time when Puerto Rico was invaded by U.S. troops in 1898, as part of the Spanish-American War, the residents of that Spanish colony had developed a national identity and a desire for self-rule that had resulted in the birth of pro-autonomy political movements and prompted Spain to issue a Declaration of Autonomy for Puerto Rico through a royal decree signed on December 1897. The Treaty of Paris ended the war on December 10, 1898, (30 Stat. 1759 (1989)), whereupon Puerto Rico went from an autonomous Spanish province to a territory under Congress' broad authority under the provisions of the U.S. Const., Art. IV, § 3, cl. 2. After two years of ineffectual military rule, Congress began exercising its Article IV authority to incrementally empower Puerto Ricans with authority to decide their internal affairs, beginning with the Organic Act of 1900 (31 Stat. 77 (1900)), which was replaced by the Organic Act of 1917 and its grant of U.S. citizenship to those born in Puerto Rico (64 Stat. 319 (1917)), which was amended in 1947 to change the position of Governor from a presidential appointee to an elective office (61 Stat. 771 (1947)); which culminated in a law allowing Puerto Rico to

become a constitutional regime (64 Stat. 314 (1950)). The trend of expanding and respecting Puerto Rico's right to decide its internal affairs abruptly ended in 2016 with the enactment of PROMESA, which in many respects marked a return to pre-1900 times.

While petitioner titles its argument as one that is supported by constitutional *text*, what said party really does is rely on historical precedent regarding the "plenary" nature of Congressional authority over the territories and the distinctions between territories and states. The fact is that the text that was written in 1787 is quite troubling for 2021, particularly insofar as it groups territories with "*other Property belonging to the United States*" (emphasis added). The Thirteenth Amendment precisely sought to dispel the notion (which of course was not foreign to the Founding Father, many of them slave owners) that people may be deemed as property. It is also indefensible in these modern times to read that clause as meaning that there is no such thing as private property ownership in the territories. While the law has greatly evolved in those areas in which the Founders' thinking was not as advanced as ours (for, example, women's' suffrage), the so-called "Territorial Clause" retains language that reflects the accepted principle of the times that empires expand their power through colonization. The young republic had just gained independence from the British Empire which, at the time, maintained colonies in all continents, which explains why its architects would follow that model[15]. In our era, the evils of colonialism are well known and

[15] A more contemporary point of view reads the Territorial Clause as enabling the creation of transitory systems of government to be used during the period of transitioning between being a territory and becoming a state or otherwise being disposed of. *District of Columbia v. Carter*, 409 U. S. 418, 431-432 (1973) (distinguishing the District of Columbia from this general rule of territorial existence).

universally condemned. Replacing the term "colony" with "territory" is little more than using a more palatable euphemism that does not make the practice any more acceptable. The "plenary powers" precedent that begun with *Downes v. Bidwell*, 182 U.S. 244 (1901) and has come to be known as the "Insular Cases" vests Congress with powers akin to those exercised in centuries past by the British, the French and other European crowns. Just as importantly, these cases are intimately related to racist[16] and condescending[17] beliefs which they help perpetuate.

Because of its very particular nature of having a defined, strong national identity, the Insular Cases

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[16] For example, the Downes Court observed that "in the annexation of outlying and distant possessions *grave questions will arise from differences of race*, habits, laws and customs of the people, and from differences of soil, climate and production, which may require action on the part of Congress that would be quitted unnecessary in the annexation of contiguous territory inhabited only by people of the same race, or by scattered bodies of native Indians". *Downes*, 182 U.S. at 282 (emphasis added).

[17] We refer to language describing Puerto Rico as being "*inhabited by alien races, differing from us in religion, customs, laws, methods of taxation and modes of thought, the administration of government and justice, according to Anglo-Saxon principles, may for a time be impossible*". *Downe*s, 182 U.S. at 287 (emphasis added). Similarly, in denying Puerto Ricans the Sixth Amendment right to a trial by jury, the Court remarked that the jury system "postulates a conscious duty of participation in the machinery of justice *which it is hard for people not brought up in fundamentally popular government at once to acquire*", thus concluding that "people like the Filipinos or the Porto [sic] Ricans, trained to a complete judicial system which knows no juries, living in compact and ancient communities, with definitely formed customs and political conceptions, *should be permitted themselves to determine how far they wish to adopt this institution of Anglo-Saxon origin, and when*". *Balzac v. Porto Rico*, 258 U.S. 298, 300 (1922).

notwithstanding, Puerto Rico has traditionally been treated as a special case. This Honorable Court's latest significant ruling on the matter was issued a few years ago in *Puerto Rico v. Sánchez Valle*, 136 S. Ct. 1863 (2016). In that case, the Court upheld a finding that the Commonwealth did not enjoy separate sovereignty for purposes of double jeopardy. *Id*. at 1876-1877. The majority opinion reiterated that Puerto Rico's relationship to the United States is unparalleled in American history and that "since the events of the early 1950's, an integral aspect of that association has been the Commonwealth's wide-ranging self-rule, exercised under its own Constitution", meaning that "Puerto Rico today can avail itself of a wide variety of futures". *Id.* at 1877. This recognition of self-rule is however couched in the salient fact that "the ultimate source of Puerto Rico's prosecutorial power is the Federal Government — because *when we trace that authority all the way back, we arrive at the doorstep of the U. S. Capitol* —". *Id.* (emphasis added). Puerto Rico's limited autonomy is presented as a Congressional grace and not as a right emanating directly from its people. *Id*. at 1875-1876. In fact, on June 30, 2016, three weeks after the *Sánchez Valle* decision was issued, Congress drastically reduced the scope of Puerto Rico's self-rule by enacting PROMESA. *See Aurelius Investment, LLC*, 140 S. Ct. at 1656 ("Congress created the Board pursuant to its power under Article IV of the Constitution to 'make all needful Rules and Regulations respecting the Territory . . . belonging to the United States'").

Having provided the preceding necessary historical background, the long line of cases asserting the "plenary" nature of Congressional authority to provide for territorial governance is not something that the petitioner may ride all the way to its desired conclusion. For starters, as explained in the first section of an argument, SSI does not involve a relationship between the federal government and its

state/territorial/local counterparts but rather exists in a direct line between the U.S. Social Security Administration and individual citizens. It is axiomatic that Fourteenth Amendment provisions, including the right to due process and equal protection apply to Puerto Rico. *Examining Bd. of Engineers, Architects & Surveyors v. Flores De Otero*, 426 U.S. 572, 599-600 (1976). As we have explained, the plaintiff in this case, Mr. Vaello-Madero was an SSI recipient who was deprived of that benefit over which this Honorable Court has held that he has a property interest. Hence, "plenary powers" are inapposite to a determination of whether or not an individual suffered a constitutional deprivation.

Even if we were to continue ignoring that this case is about discrimination against individual, *similarly-situated*, American citizens, rather than about treating a territory differently from the states and from other territories, the "plenary powers" of Article IV would be of little help to the Government. In the recent *Aurelius Investment, LLC* litigation, both the FOMB and the United States maintained that under Article IV, Congress could be compelled to guarantee fundamental rights to individuals but need not extend what said parties referred to as "structural provisions" of the U.S. Constitution to the territories, which included the Appointments Clause, U.S. Const., Art. II, § 2, cl. 2. In rejecting this argument, this Honorable Court held that those structural provisions "*apply to all exercises of federal power, including those related to Article IV entities*". *Aurelius Investment, LLC*, 140 S. Ct. at 1657 (emphasis added). Ample as it may be, Congress' authority to legislate with regards to territories does not operate in an isolated, extra-constitutional dimension that is divorced from other constitutional provisions. Legislation enacted under the Territorial Clause is defective if it contains a constitutional vice that would invalidate an enactment made under Article I powers. This being the case, Article IV

does not authorize the creation of a "caste-based and invidious class-based legislation". *Pyler v. Doe*, 457 U.S. 202, 213 (1982).

Regardless of whether the challenged exclusion from SSI benefits is viewed as being aimed at individual citizens (as we posit) or against the collective of individuals within a territory, this Courts before it the basic ingredients of an equal protection case namely, the disparate treatment of similarly situated individuals (i.e., citizens or a community of citizens who paid into Social Security and otherwise qualify for SSI). *Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432, 439 (1985) (observing that the constitutional equal protection provision ""is essentially a direction that all persons similarly situated should be treated alike"). The criterion upon which similarly situated individuals receive different treatment will determine the standard of review to be applied. To pinpoint the cause of the challenged classification what we need to ask is: what is it that distinguishes qualified individuals who receive SSI benefits and the plaintiff in this case? The obvious answer is that benefits are denied to those who have chosen to reside in Puerto Rico. By and large, people who reside in Puerto Rico are *Puerto Rican nationals*. In the case of *Alfred L. Snapp & Son v. Puerto Rico*, 458 U.S. 592 (1982), the Court allowed the Commonwealth to file a lawsuit in the exercise of its *parens patria* prerogatives against several apple growers in the state of Virginia who engaged in discrimination against Puerto Rican farm workers in violation of federal regulations requiring that preference be given to the hiring of U.S. Citizens and that hiring decisions be made without regard to *national origin*. *Id.* at 595-599. Being Puerto Rican has long been considered sufficient for promoting a national origin discrimination claim under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e, et seq. *See e.g. Mulero-Rodríguez v. Ponte, Inc.*, 98 F.3d 670, 674-676 (1st Cir. 1996).

Classifications based on national origin are subject to the plaintiff-friendly highest tier of analysis, strict scrutiny. *Clark v. Jeter*, 486 U.S. 456, 461 (1988). In a nutshell under strict scrutiny, the challenged state action will be upheld only if the classification at issue was created to advance a compelling interest of the government by employing the least restrictive means available. *Janus v. AFSCME, Council 31*, 138 S. Ct. 2448, 2464, 2465 (2018). Petitioner would have no opportunity of prevailing if strict scrutiny was to be applied, as it has not even bothered to suggest how excluding Puerto Rican nationals from SSI benefits advances a compelling interest of the United States and that there are no less restrictive means to advance that compelling interest.

Moving on to the classifications based on geographic differences. For starters, the first problem faced by this strained argument is that neither the congressional record leading to the creation of the SSI program, nor the program's operating regulations nor the record in this case even remotely suggest that geographic differences were used to determine where an applicant needs to reside in order to qualify for benefits. The few cases invoked by the petitioner involve legislation regarding agricultural production quotas. For instance, in *Secretary of Agriculture v. Central Roig Refining Co.*, 338 U.S. 604 (1950), rather than involving the wholesale exclusion of the citizens that reside in a territory from a federal program, the Court simply validated Congressional authority under the Commerce Clause to allow the Secretary of Agriculture to assign sugar production quotas based on a thorough analysis of the complex variants of that market for a particular year. *Id.* at 616-619. Likewise, notwithstanding the fact that, as the Government

points out, precedent involving the District of Columbia has been used in cases involving Puerto Rico, the decision in *Swain v. Pressley*, 430 U.S. 72 (1977), a case involving the sufficiency under U.S. Const., Art. I, § 9, cl. 2, of *habeas corpus* remedies on convictions rendered by the District's own court system. *Id.* at 381-383. *Swain* does not even seem to belong to the family of cases applying the doctrine invoked by the Government. The bottom line is that the record does not suggest that the difference between geographic regions was considered in the exclusion to exclude Puerto Ricans from SSI benefits and, while the petitioner invites the Court to adopt this criterion to justify the application of rational basis scrutiny, it utterly fails to identify any geographic differences that Congress considered in its decision to limit SSI benefits.

D) NO RATIONAL BASIS EXISTS FOR EXCLUDING PUERTO RICO RESIDENTS FROM SSI BENEFITS

The challenged First Circuit Opinion was the last great contribution of the outstanding Puerto Rican jurist, the Hon. Juan V. Torruella, who passed away a few months after the Court's decision. The First Circuit's analysis on how the exclusion of citizens domiciled in Puerto Rico fails to meet rational basis scrutiny, even under the highly questionable factors outlined in *Califano* and *Harris* is a master class on this type of constitutional inquiry. *See United States v. Vaello-Madero*, 956 F.3d 12, 23-32 (1st Cir. 2020). The aforementioned Opinion demolishes the economy/tax based arguments invoked in the 1978 and 1980 summary decisions by using irrefutable statistical data of which it took judicial notice and highlighting how indefensible such arguments are in light of the inclusion of Norther Mariana Islands residents

in the SSI program. Indeed, it is a tall order to justify the exclusion from the program based on the payment of federal income tax, where that criterion is not applied to those residing in the states or to argue that the Commonwealth would suffer a disruption of its economy from payments to be ultimately made directly to needy qualified individuals[18]. We thus focus on other important aspects of the inquiry.

It is understandable that the Government would so vehemently advocate for rational basis scrutiny instead of strict scrutiny, as the latter is impossible to meet in the instant case. Rational basis scrutiny is however not a guaranteed path to victory for the party defending the constitutionality of any given classification. That the standard is deferential to the Government does not mean that it is "toothless". *Mathews v. Lucas*, 427 U. S. 495, 510 (1976). This is so because 'the classification must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike". *Royster Guano Co. v. Virginia*, 253 U.S. 412, 415 (1920). It has been observed that "[t]he search for the link between classification and objective [of the legislation] gives substance to the Equal Protection Clause; it provides guidance and discipline for the legislature, which is entitled to know what sorts of laws it can pass; and it marks the limits of our own authority". *Romer v. Evans*, 517 U.S. 620, 632 (1996). As previously noted, Congress made the purpose of the SSI quite explicit by announcing that it seeks "*to provide supplemental*

[18] Up until now the Government had not raised this argument below and now do so in a footnote at page 24 of its brief, without any effort at a developed argument.

security income to individuals who have attained age 65 or are blind or disabled". 42 U.S.C. § 1381 (emphasis added). How exactly does excluding Puerto Rico residents from the program achieve the goal of providing supplemental social security income to the elderly, the blind and the disabled? The petitioner does not bother to answer this crucial question, so we do it for said party: said exclusion in no way advances the stated legislative purpose. Moroever, this exclusion policy conflicts with this Honorable Court's holding that "[c]entral both to the idea of the rule of law and to our own Constitution's guarantee of equal protection is *the principle that government and each of its parts remain open on impartial terms to all who seek its assistance*". *Romer*, 517 U.S. at 633 (emphasis added). At page 27 of its brief, petitioner argues without much development that the rational basis for including the Northern Mariana Islands in the SSI program while having Puerto Rico remain excluded was because such inclusion was part of a covenant between the people of that territory and the United States. We are at a loss to come up with a plausible connection between negotiations between the United States and a territorial government and the SSI statutory goal of protecting needy, qualified U.S. citizens.

Aside from its -in our view insufficient- attempt to justify the *Califano/Harris* criteria, the Government has chosen to propose the novel notion that "Congress could rationally conclude that these arrangements promote Puerto Rico's ability to govern itself". Petitioner's Brief at 22. As intimated in the introductory section of the foregoing brief, given the Article IV arguments advanced by the Government in this very same case as well as in other recent litigation and, most importantly its concrete actions under

PROMESA, this argument comes with a considerable amount of chutzpah. Specifically, petitioner suggests that the Commonwealth "imposes its own taxes in lieu of inapplicable federal taxes, receives the covered-over proceeds of some federal taxes that do apply there, and decides for itself how to spend the revenue it receives". Petitioner's Brief at 23. This is only true if Congress repeals PROMESA or at least Sections 201-204 thereof. Otherwise, petitioner is talking about a reality that ceased to exist in 2016 because Congress willed it so. Likewise, the suggestion that "Puerto Rico could use the money [from its revenues] to increase benefit levels in the AABD program, the cooperative territorial-federal benefits program that applies in Puerto Rico instead of SSI"[19], fails to provide an iota of data (data that does not exist) suggesting that, even without the undemocratic limitations imposed by PROMESA, Puerto Rico has the financial capacity to undertake such reforms. Justice Brennan was correct in observing that rational basis scrutiny "will not be satisfied by flimsy or implausible justifications for the legislative classification, proffered after the fact by Government attorneys". *United States R. Ret. Bd. v. Fritz*, 449 U.S. 166, 184 (1980) (Brennan, J., dissenting). Without supporting context, Puerto Rico's maligned self-rule cannot be invoked as a rational basis for exclusion from SSI.

Without a rational basis for the wholesale exclusion of Puerto Rico residents from the SSI program being identified, this Honorable Court has to concur with the First Circuit's disposition.

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[19] Appellants Brief at 23.

CONCLUSION

Insofar no rational basis exists -let alone a compelling state interest- for discriminating against hard working qualified U.S. citizens in relation to SSI benefits, the First Circuit's Opinion must be affirmed.

Respectfully submitted,

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