

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 OF U.S. CITIZENS FOR
EQUAL PROTECTION, INC.
AS *AMICUS CURIAE* IN SUPPORT
OF RESPONDENT

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QUESTION PRESENTED

Whether 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 extends it to Puerto Rico.

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ON WRIT OF CERTIORARI TO THE
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BRIEF OF U.S. CITIZENS FOR
EQUAL PROTECTION, INC.
AS *AMICUS CURIAE* IN
SUPPORT OF RESPONDENT

INTEREST OF THE *AMICUS CURIAE*¹

U.S. Citizens for Equal Protection, Inc. (hereinafter “USC”) is a non-profit corporation organized and existing under the laws of the

¹ The parties were notified and consented to the filing of this brief more than 10 days before its filing. See Sup. Ct. R. 37.2(a). No party’s counsel authored any of this brief; *amicus* alone funded its preparation and submission. See, Sup. Ct. R. 37.6.

Commonwealth of Puerto Rico (hereinafter, “P.R.”) since November 28, 2018.

Its objectives and purposes are to promote, educate, and pursue the recognition to all American citizens, wherever they may reside, but particularly in P.R., of all rights, privileges, and immunities provided under the Constitution of the United States (hereinafter, “Constitution”), United States (hereinafter, “U.S.”) statutes and court rulings.

In this case, the Supplemental Security Income for the Aged, Blind, and Disabled program (hereinafter “S.S.I.”),² among others, which excludes all citizens of the U.S. and all other persons residing in P. R. (hereinafter, collectively referred to as “P.R. U.S. citizens”) reaches this Court so that it may correct this wrong, under equal protection principles.

USC desires to participate in this case as *amicus curiae* in support of the applicability to P.R. U.S. citizens of the S.S.I. program, as decided by the U.S. District Court for the District of P.R. in 2019 and *Affirmed* by the Court of Appeals for the First Circuit in 2020.³

Therefore, as Respondent pursues the same rights and remedies as USC, the latter favors the

² See 42 U.S.C. §§ 1381-1383f.

³ The opinion of the court of appeals is part of this record at Pet. App. 1a-37, and the opinion and order of the district court is also part of this record at Pet. App. 38a-49a (hereinafter, “App.” or “D.C.”).

Affirmance of the decision below, and further supports Respondent’s position, as it is consistent with USC’s own mission and objectives. In addition, USC intends to bring to the attention of the Court relevant matters not discussed and others requiring corrections.

INTRODUCTION

P.R. has a rich tradition and history. The people of P.R., as P.R. U.S. citizens, have enhanced American society and culture.⁴

Among their many contributions, Puerto Ricans have been recognized by their service and sacrifice in the U.S. Armed Forces.⁵

Despite the status of Puerto Ricans as full-fledged P.R. U.S. citizens, and despite their service in the defense of this country, “[t]he federal safety net is flimsier and more porous in P.R. than in the rest of the nation,” because federal programs aimed at providing assistance to the nation’s low- and moderate-income individuals and families are more generously applied to U.S. citizens residing in the fifty states than they are to similarly situated

⁴ See Report by the President’s Task Force on Puerto Rico’s Status for December 2005 and December 2007, at p. 3, http://charma.uprm.edu/~angel/Puerto_Rico/reporte_status.pdf (last visited Aug. 30, 2021); <https://www.justice.gov/archive/opa/docs/2007-report-by-the-president-task-force-on-puerto-rico-status.pdf> (last visited Aug. 30, 2021).

⁵ *Id.*

P.R. U.S. citizens. See *Martínez v. U.S. Dep't of Health & Human Servs.*, Civil Action No. 18-01206-WGY at p. 1 (D.P.R. Aug. 3, 2020). **“To be blunt, the federal government discriminates against Americans who live in Puerto Rico.”** *Id.* (emphasis added).

It is generally recognized that citizenship concerns civil rights, economic rights, political rights and social rights, including health care, nutrition, education, housing, employment, and economic benefits and assistance. This case deals with the latter class of rights.

Federal law provides far fewer benefits⁶ for low-income P.R. U.S. citizens than it does to similarly situated U.S. citizens residing in the fifty states, and constitutes an especially grievous and invidious constitutional violation, as the Constitution does not allow Congress to pick and select which constitutional rights or programs apply to P.R. U.S. citizens.⁷

⁶ See Andrew Hammond, *Territorial Exceptionalism and the American Welfare State* (July 13, 2020). 119 Michigan Law Review, 1639 (2021); Staff, *A Reckoning for “Rational” Discrimination: Rethinking Federal Welfare Benefits in United States-Occupied Islands*, 43 U. Haw. L. Rev. [No. 1] (2020), 264.

⁷ See *Boumediene v. Bush*, 553 U.S. 723 (2008) and *United States v. Madero*, 356 F. Supp. 3d 208, 213 (D.P.R. 2019).

STATEMENT

I. Facts and Legal Proceedings.

The relevant facts and proceedings are not in dispute and are aptly summarized in the decision of the court of appeals.⁸

II. Legal and Economic Background.⁹

A. P.R.'s legal relationship with the U.S.

The U.S. took possession of P.R. by military means during the Spanish-American War of 1898. Consequently, Spain was forced to cede P.R. to the U.S. under the Treaty of Paris.¹⁰

After two years under a military government, Congress passed an act to temporarily provide revenues and a civil government for P.R. (the “Foraker Act”).¹¹ The Foraker Act provided that, among other things, **with the exception of the internal revenue laws**, the federal statutory laws were to have the same force and effect in P.R. as in the U.S.¹²

⁸ See *United States v. Vaello-Madero*, 956 F.3d 12 (1st Cir. 2020).

⁹The government’s brief on these topics require the consideration of the following additional facts, developments and corrections as to time, space and context.

¹⁰ See Treaty of Peace between the U.S. and the Kingdom of Spain, Apr. 11, 1899, 30 Stat. 1754 (1899).

¹¹ See 31 Stat. 77 (1900).

¹² See 31 Stat. 413 (1917).

The Foraker Act was superseded in 1917 by the Jones Act, which, among other provisions, provided a bill of rights, including due process and equal protection under the law, and granted U.S. citizenship by collectively nationalizing P.R. residents as U.S. citizens.¹³

The Nationality Act of 1940 considered P.R. part of the U.S. for citizenship purposes.¹⁴ People born in P.R. on or after January 13, 1941 and subject to the jurisdiction of the U.S. are recognized as citizens of the U.S. at birth,¹⁵ just as those born in the states.

Therefore, persons born in P.R. acquired a birthright or *jus soli* citizenship. In other words, they are considered under the laws as native or natural-born citizens of the U.S. Congress confirmed this interpretation with the 1948 Pagán/Fernós-Isern Amendment¹⁶ and the Immigration and Nationality

¹³ See 39 Stat. 951 (1917).

¹⁴ See 8 U.S.C. § 202, Nationality at Birth, Nationality Act of 1940. The Nationality Act of 1940 was repealed and superseded by the Immigration and Nationality Act of 1952., 66 Stat. 163, Sec. 403(a)(42), which was initially the same text.

¹⁵ See 8 U.S.C. § 1402. On October 3, 1965, Congress approved Pub. L. 89-236 to amend the Immigration and Nationality Act of 1952, 8 U.S.C. § 1151 *et seq.*, but no changes were made to Sec. 1402 above.

¹⁶ See 1948 Amendment of 1917 Jones Act and 1940 Nationality Act Pub. L. No. 80-776 [§5d & 404(c)], known as the “1948 Pagán-Fernós-Isern Amendment,” which reaffirmed the principle that after 1940, birth in P.R. was tantamount to birth in the U.S. and that Puerto Ricans were native-born citizens of the U.S.

Act of 1952.¹⁷ Congress has not enacted any other citizenship provision for P.R. since 1952, so this remains the law as of this date.

In 1947, Congress amended the Jones Act to not only give qualified voters of P.R. the right to elect their own Governor, but to mandate that the rights, privileges, and immunities of citizens of the U.S. be respected in P.R. to the same extent as though P.R. were a state and subject to the provisions of Cl. 1 of Sec. 2 of Article IV of the Constitution.¹⁸

In 1950, Congress enacted Public Law 600¹⁹ to allow P.R. to organize a government **for local matters** pursuant to a constitution of its own adoption. 48 U.S.C. § 731b. Upon approval by the qualified voters in a referendum, the legislature was authorized to call a constitutional convention to draft a constitution accordingly. 48 U.S.C. § 731c. The people of P.R. approved the proposal offered by Congress, and a Constitutional Convention was held from Sept. 17, 1951 to Feb. 6, 1952. The Convention drafted a constitution that was modified by

¹⁷ The accompanying House Report on the original legislation states that “[t]he citizenship status of persons born in and living in P.R. . . . is set out in the Nationality Act of 1940 and is carried forward in the bill.” See U.S. Congress 1952, H. Rept. 1365, 76.

¹⁸ See Pub. L. No. 80–362, 61 Stat. 74 (1947).

¹⁹ See Puerto Rico Federal Relations Act, Pub. L. No. 81-600, 64 Stat. 319 (1950).

Congress,²⁰ was then approved by the President, and submitted to the people of P.R. that approved it, as amended, in another referendum, on March 3, 1952.²¹

Because of the foregoing, many of the provisions of the prior Foraker and Jones Acts related to internal matters were repealed, but all other remaining provisions dealing with the legal relationship with the U.S. were maintained, and renamed as the Puerto Rican Federal Relations Act.²²

Thereafter, P.R. U.S. citizens continued to be subject to all federal laws not locally inapplicable, **except for the internal revenue laws; they also were required to pay federal taxes, except for those that Congress, by statute, exempted from federal taxation**, such as income from local sources.²³ These provisions remain relevant and effective as of this date.

B. General Economic Background.

From 1998 up until 2006, while P.R. was suffering from an economic recession, it consistently

²⁰ Congress made revisions, including deleting Sec. 20 that recognized a number of human rights, and approved it, as amended. See Pub. L. No. 82-447, 66 Stat. 327 (1952).

²¹ See generally, 48 U.S.C. §§ 731c and d.

²² *Id.*, §§ 731d and e.

²³ See 26 U.S.C. § 933.

contributed more than \$4 billion annually in federal taxes and impositions into the national fisc.²⁴

For many years now, all P.R. U.S. citizens have been excluded, limited, capped or subjected to special rules from federal benefit programs designed to raise people from levels of poverty, such as Medicaid, S.S.I., Supplemental Nutrition Assistance Program (“SNAP”), and Medicare Part D Low-Income Subsidies (“LIS”), among others.

However, if P.R. U.S. citizens move or relocate to any of the 50 states, after completing residency terms and/or other lenient requirements, they become entitled to receive all applicable federal programs for which they may qualify. To the contrary, if U.S. citizens residing in any of the 50 states and the District of Columbia with approved benefits under S.S.I. move to P.R. their benefits are terminated, as it happened to Mr. Vaello-Madero.

- C. P.R.’s economy has been, and continues to be, in crisis, as it lacks internal effective tools for recovery.

The Department of Health, Education and Welfare Report of the Undersecretary’s Advisory Group on P.R., Guam and the Virgin Islands

²⁴ See Internal Revenue Service (hereinafter, “I.R.S.”), SOI Tax Stats - *Gross Collections, by Type of Tax and State* – I.R.S. Data Book, Table 5, available at <https://www.irs.gov/statistics/soi-tax-stats-gross-collections-by-type-of-tax-and-state-irs-data-book-table-5> (last visited August 30, 2021).

expressly rejected concerns about an influx of aid disrupting the economy of P.R. since 1976.²⁵

P.R.'s economic model collapsed in the late 1990's. By the next decade tax incentives under Section 936 of the Internal Revenue Code (hereinafter, "I.R.C.") were terminated and phased out by Congress. In the meantime, government employment had increased to a historic maximum, federal grants to cover needs became erratic and contingent on the political dynamics in Washington, D.C., Congress had limited and/or reduced economic benefits to P.R., and public indebtedness had reached historic highs, causing budget deficits.²⁶

Thus, P.R. was left by U.S. policy with no significant tax advantages or other attractive enhancements to offer to investors, and was not able to create a strong local capital base to spur economic development.

In 2006, tax advantages that had previously led major businesses to invest in P.R. terminated by Congressional mandate. Many industries left the island, emigration increased, and the public debt of

²⁵ See *Vaello-Madero*, 956 F.3d at 22-23.

²⁶ See Sergio M. Marxuach, *A Brief Economic History of Puerto Rico Since 1945*, Weekly Review, CNE's Team of Experts, (Sept. 17, 2020), <https://grupocne.org/2020/09/17/weekly-review-september-17-2020> (last visited August 30, 2021).

P.R.'s government and its instrumentalities increased exponentially.²⁷

Due to these and other events, P.R.'s economy entered a period of sustained decline that still exists.²⁸

A few²⁹ relevant specific economic indicators should be noted:

The Merchant Marine Act of 1920, Pub. L. 66-261, 41 Stat. 988, prohibits foreign vessels from transporting goods between two U. S. ports. Costs to Puerto Ricans are generally estimated to be \$1.5 billion annually.³⁰

By the summer of 2015, P.R. owed \$72 billion in bonded debt (exceeding its GNP) and another \$50

²⁷ *Id.*

²⁸ *Id.*

²⁹ For a more detailed study, see *The Impact of Disparities in SNAP and SSI on Puerto Rico's Poverty and Economic Growth*, Econometrika Corp. https://media.noticel.com/o2com/noti-media-us-east-1/document_dev/2019/03/09/Estudio%20sobre%20disparidades%20en%20beneficios%20del%20PAN%20y%20SSI_1552160521539_37305880_ver1.0.pdf (last visited on August 31, 2021).

³⁰ See *Studies peg cost of Jones Act on Puerto Rico at \$1.5 billion*, Caribbean Business, February 21, 2019, <https://caribbeanbusiness.com/studies-peg-cost-of-jones-act-on-puerto-rico-at-1-5-billion/> (last visited on August 30, 2021).

billion in unfunded pension liabilities and could no longer meet its financial obligations.³¹

Congress was forced to step in, as P.R. was not allowed to restructure its debt,³² and Congress had on its own, amended the Bankruptcy Code in 1981 to exclude P.R. from filing for relief thereunder,³³ leaving P.R. defenseless and subject to the mercy of its multi-billion-owed creditors.

As a result, on June 30, 2016, Congress enacted the P.R. Oversight, Management & Economic Stability Act (“PROMESA”) creating the Financial Oversight & Management Board for P.R. (hereinafter “FOMB”) to oversee its fiscal budget, balance its budget, oversee a bankruptcy-like process to restructure P.R.’s debts, and promote economic development, in order to allow it to return to capital markets. Bankruptcy proceedings commenced in May 2017, and proceedings continue to this day. A plan of reorganization is still being negotiated. Recovery is uncertain, but nevertheless, years ahead.

On September 20, 2017, Hurricane Maria devastated P.R., knocking out the electrical grid, disabling communications, flooding towns, homes, and buildings, destroying infrastructure island-wide, and killing nearly 3,000 people—one of the deadliest

³¹ See *Fin. Oversight & Mgmt. Bd. for Puerto Rico v. Aurelius Inv., LLC*, 140 S. Ct. 1649, 1655 (2020).

³² *Id.*

³³ See 11 U.S.C. § 903(1).

U.S. natural disasters in 100 years.³⁴ Estimates for Hurricane Maria damages ran in excess of \$115 billion—more than P.R.’s annual GDP.³⁵ In the months following Hurricane Maria, many citizens lacked necessities like power, running water, and shelter, and businesses remained closed.³⁶ The Hurricane caused the longest blackout in U.S. history.³⁷ It took nearly 11 months for the Puerto Rican Electric Power Authority to reconnect all 1.5 million customers who were impacted by the power outage.³⁸ Four years later, many U.S. P.R. citizens

³⁴ *Puerto Rico increases Hurricane Maria death toll to 2,975*, BBC News (Aug. 29, 2018), <https://www.bbc.com/news/world-us-canada-45338080> (last visited August 30, 2021).

³⁵ Rebecca Spalding, *Economists paint bleak picture for Puerto Rico’s Future*, Bloomberg News (Nov. 18, 2017, updated Dec. 25, 2017), https://www.sentinelsource.com/news/economy/economists-paint-bleak-picture-for-puerto-ricos-future/article_7d337278-4a06-575a-8536-fa2d4c3217a1.html (last visited August 30, 2021).

³⁶ Danica Coto, *6 months after Hurricane Maria, Puerto Rico pleads for help*, AP (Mar. 16, 2018), <https://apnews.com/article/hurricane-maria-puerto-rico-us-news-ap-top-news-hurricanes-aacab7041b4748408bd3911ad476d140> (last visited August 30, 2021).

³⁷ Frances Robles, *Contractors Are Leaving Puerto Rico, Where Many Still Lack Power*, N.Y. Times (Feb. 26, 2018), <https://www.nytimes.com/2018/02/26/us/puerto-rico-power-contractor.html> (last visited August 30, 2021); Kyla Mandel, *Puerto Rico Recovery Efforts Plagued by Power Company’s Financial Troubles* (Feb. 20, 2018) <https://tinyurl.com/y9gchp8w> (last visited August 30, 2021); C.K., *More Puerto Ricans Leaving for the Mainland*, The Economist (Mar. 16, 2018), <https://tinyurl.com/y8a6vxdj> (last visited August 30, 2021).

³⁸ Alexia Fernandez Campbell, *It took 11 months to restore power to Puerto Rico after Hurricane Maria. A similar crisis could*

are still awaiting the aid necessary to rebuild.³⁹ As of 2020, \$49.9 billion have been appropriated for relief, but only \$16.6 billion disbursed.⁴⁰ Even now, approximately 30,000 families are still living under plastic blue tarps instead of permanent roofs.⁴¹

More than two years later, Puerto Ricans still had not recovered from Hurricane Maria, when P.R. was hit by a series of earthquakes, 11 of which were of magnitude 5 or greater. A 6.4 magnitude earthquake struck P.R. on January 7, 2020, killing one person, injuring several, and resulting in power outages. That earthquake resulted in at least 51 aftershocks. On May 2, 2020, a 5.4 magnitude

happen again., Vox (Aug. 15, 2018), <https://www.vox.com/identities/2018/8/15/17692414/puerto-rico-power-electricity-restored-hurricane-maria> (last visited August 30, 2021).

³⁹ Arelis R. Hernández, *Puerto Ricans still waiting on disaster funds as Hurricane Maria's aftermath, earthquakes continue to affect life on the island*, Washington Post (January 19, 2020), https://www.washingtonpost.com/national/puerto-ricans-still-waiting-on-disaster-funds-as-hurricane-marias-atermath-earthquakes-continue-to-affect-life-on-the-island/2020/01/19/3864fcea-387f-11ea-bb7b-265f4554af6d_story.html (last visited August 30, 2021).

⁴⁰ Ayesa Díaz Rolón, *Apenas arrancan las obras de recuperación*, El Vocero, 18 de septiembre de 2020. See <https://www.elvocero.com/gobierno/apenas-arrancan-las-obras-de-recuperacion-articulo382622c-f956-11ea-9d06-db0f8320e0b.html> (last visited August 30, 2021).

⁴¹ Nicole Acevedo, *Stateside Puerto Ricans demand answers to unused hurricane aid to Puerto Rico*, NBC News (March 10, 2020), <https://www.nbcnews.com/news/latino/stateside-puerto-ricans-demand-answers-unused-hurricane-aid-puerto-rico-n1154236> (last visited August 30, 2021).

earthquake hit near southern P.R., and in July, two strong earthquakes were felt across P.R.. Because of the series of earthquakes this year, hundreds of homes have been damaged or destroyed.

Today, P.R.'s recession continues, and it is facing yet another dire financial crisis due to COVID-19. Experts predict that the pandemic's economic fallout has the potential to be "even more difficult than the one that followed Hurricane Maria."⁴² In July 2020, at least 300,000 Puerto Ricans had filed unemployment claims linked to the pandemic, and many others remained "ineligible for aid"—as they did not participate in P.R.'s taxable economy.⁴³

P.R.'s unemployment rate has soared in the last decade,⁴⁴ a situation that has only worsened from the impact that COVID-19 has had on P.R.,⁴⁵ and unemployment is now estimated at 8.2 percent.⁴⁶

⁴² Alexandra Rosa & Frances Robles, *Pandemic Plunges Puerto Rico Into Yet Another Dire Emergency*, NY Times (July 8, 2020), <https://www.nytimes.com/2020/07/08/us/coronavirus-puerto-rico-economy-unemployment.html> (last visited August 30, 2021).

⁴³ *Id.*

⁴⁴ Bureau of Labor Statistics, *Databases, Tables & Calculators by Subject, Puerto Rico* (Aug. 11, 2020), <https://data.bls.gov/timeseries/LASST720000000000003> (last visited August 30, 2021).

⁴⁵ Rosa & Robles, *Pandemic Plunges Puerto Rico Into Yet Another Dire Emergency*.

⁴⁶ Delgado, José A. *Puerto Rico solo ha recibido el tercio del dinero*, El Nuevo Día, 20 de septiembre de 2020. See

In the last decade, over 10% of P.R.'s population has emigrated, leaving behind a disproportionate number of impoverished residents. P.R. already has the highest poverty rate in the United States;⁴⁷ with the young and healthy fleeing the island, causing hope of economic re-growth in the near future diminished. In 2019, the U.S. Census Bureau's 2019 P.R. Community Survey found that a net of 35,000 Puerto Ricans immigrated to the states, reducing the population to 3,193,694, the largest decrease in modern history.⁴⁸

Even before COVID-19, P.R. faced a poverty rate of 43.1%, which almost triples the U.S. national rate of 13.1% and is more than twice the poverty rate of the most impoverished state, Mississippi (19.7%).⁴⁹ Of P.R. residents under age 18, 58.3% live below the federal poverty level, compared to a national average

<https://www.pressreader.com/puerto-rico/el-nuevo-dia/20200920/281578063091566> (last visited August 30, 2021).

⁴⁷ Rosa & Robles, *Id.*

⁴⁸ U.S. Census Bureau QuickFacts: Puerto Rico. <https://www.census.gov/quickfacts/PR> (last visited August 30, 2021); Christian G. Ramos Segarra, *Population Loss Threatens Puerto Rico's Debt Restructuring*, *The Weekly Journal* (Sep. 24, 2020), https://www.theweeklyjournal.com/online-features/population-loss-threatens-puerto-ricos-debt-restructuring/article_28cb17e4-fe6b-11ea-9093-df665e53cbf8.html (last visited August 30, 2021).

⁴⁹ Brian Glassman, *More Puerto Ricans Move to Mainland United States, Poverty Declines – A Third of Movers from Puerto Rico to the Mainland United States Relocated to Florida in 2018*, U.S. Census Bureau (Sept. 26, 2019), <https://www.census.gov/library/stories/2019/09/puerto-rico-outmigration-increases-poverty-declines.html> (last visited August 30, 2021).

of 20.7%.⁵⁰ Of children in P.R. under age 5, 63.7% live below the federal poverty level, compared to a national average of 22.8%.⁵¹

After the hurricanes and earthquakes, P.R.'s poverty rate is currently estimated by the 2019 U.S. Census at 43.5%,⁵² although for some economists it is near 44.1% and increasing, with a median household income of \$20,474.⁵³

Last, but not least, P.R. waits an I.R.S. ruling on its 4 percent tax credit for manufacturers. This is because there are serious concerns whether or not the I.R.S. will allow multinational companies operating in PR to apply this local excise levy as a credit against their federal taxes. Not surprisingly, there are serious concerns that the I.R.S. is posed to terminate the tax credit. This represents \$2 billion in tax income that P.R. may lose.⁵⁴

⁵⁰ Congressional Task Force on Economic Growth in Puerto Rico, Report to the House and Senate, 114th Congress (Dec. 20, 2016) at 10, <https://www.finance.senate.gov/imo/media/doc/Bipartisan%20Congressional%20Task%20Force%20on%20Economic%20Growth%20in%20Puerto%20Rico%20Releases%20Final%20Report.pdf> (last visited August 30, 2021).

⁵¹ *Id.*

⁵² See <https://www.census.gov/quickfacts/PR> (last visited August 30, 2021).

⁵³ See <https://datausa.io/profile/geo/puerto-rico> (last visited August 30, 2021).

⁵⁴ See Michelle Raske, *Puerto Rico awaits U.S. ruling on tax credit for manufacturers*, Bloomberg, Dolly Tax Report, Dec. 6, 2019.

In spite of all of the above, federal statutory and regulatory provisions explicitly exclude or impermissibly limit approximately \$3.2 million P.R. U.S. citizens from receiving the same federal benefits under S.S.I. given to U.S. citizens of equal need who live in any of the fifty states and they are not required to pay federal taxes in order to qualify for benefits.

The above facts clearly show that it is federal policy towards P.R. what created, maintains and aggravates P.R.'s legal and economic problems.

D. Federal Benefits Programs.

Federal Benefit Programs (hereinafter collectively referred to as, "F.B.P.") are non-contributory and fit into 13 large categories focused on low-income individuals and families.⁵⁵ Together with Medicaid, F.B.P. are considered to be anti-poverty programs and the social safety net and are administered by the federal government or the various states.⁵⁶ F.B.P are means-tested; i.e., in order to qualify for benefits, the individual or family must have income from job(s) or self-employment below certain pre-defined level.⁵⁷ F.B.P. are free to low-income U.S. citizens—that is, there is no past

⁵⁵ See <https://www.federalsafetynet.com/welfare-definition.html> (last visited August 30, 2021).

⁵⁶ See <https://www.federalsafetynet.com/safety-net-programs.html> (last visited August 30, 2021).

⁵⁷ See <https://www.federalsafetynet.com/welfare-definition.html> (last visited August 30, 2021).

contribution or taxes paid that are necessary required to qualify. These two elements, means-tested and non-contributory, define the programs as welfare.⁵⁸ Additionally, these programs are generally independent of each other and cover a single aspect of poverty. Each has specific regulations, goals and own income qualification standards for participation, but none of those programs require payment of taxes in order to qualify. S.S.I. is one of those programs.

Each of these programs plays a critical role in attempting to ensure that P.R. U.S. citizens are able to live free from the hardships of poverty and can procure basic human needs such as food, shelter, and clothing.

Notwithstanding such clear and noble objectives set forth by Congress, the Offices of the Solicitor General and the Attorney General of the U.S. are fighting tooth and nail in this case to maintain P.R. U.S. citizens in a condition of disadvantage and hardship.

E. S.S.I.

S.S.I. provides benefits to low income individuals who are older than 65, blind or disabled, if their income and resources fall below specified limits, and after exhausting all other welfare benefits programs. This program, which is totally funded from the General Treasury of the U.S., is a means-tested

⁵⁸ *Id.*

program [Op. Ct. of Ap., p. 4; *Peña-Martínez v. Azar*, 376 F. Supp. 3d 191, 198 (D.P.R. 2019)], and does not require payment of taxes from applicants in order to qualify.

At the time Congress excluded S.S.I. from P.R., promising that in their next session, this omission would be considered and corrected, but that never happened. See ARGUMENT, Part IV.

Congress understood that the then existing program, Aid to the Aged, Blind or Disabled (“AABD”), was insufficient to cover the needs of the aged, blind or disabled U.S. citizens residing in the 50 states and the District of Columbia—thus approving S.S.I., a more generous program—but only for those U.S. citizens. Congress understood that P.R. U.S. citizens were sufficiently covered by the benefits provided under AABD, even though those P.R. U.S. citizens were precisely among the neediest ones when you use a means-tested criterion to decide who should receive benefits or not. It is not disputed that the AABD program is much less generous than S.S.I., among other reasons, because the income and resource thresholds are higher, writing-off many poor people that would not be eligible for AABD but that could qualify for S.S.I. and that the AABD monthly benefit amount is significantly smaller than the one received under S.S.I.⁵⁹

⁵⁹ During FY 2011, average AABD monthly payment was \$73.85 whereas it was \$438.00 under S.S.I.

In comparison, S.S.I. is an entitlement program (while AABD is a capped categorical matching grant), and as of FY 2011, only 34,401 persons in P.R. qualified to receive AABD benefits. By contrast, under S.S.I., if it would had been extended to P.R., it is estimated that from 305,000 to 354,000 would have been eligible. *Vaello-Madero*, 956 F.3d at 29-30.

As these facts show, AABD is not, and has never been, an apt program to attend P.R.'s poor, aged, blind and disabled population. This topic is further expanded at ARGUMENT, Part II below. However, the U.S. insists to the contrary.

ARGUMENT

I. **The U.S. raised new issues and arguments before this Honorable Court that it did not present before the District nor the Court of Appeals.**

The U.S. is now raising new issues and arguments that were not considered by the lower courts nor briefed by the parties.

The brief of the U.S. (hereinafter, "U.S. Brief") at Parts A.3, B.3 and throughout its brief, is now including and arguing "additional considerations" (U.S. Brief at p. 22) to further support its opposition to the extension of the S.S.I. program to P.R.⁶⁰ Those

⁶⁰ While admitting that the President has announced that the administration supports extending S.S.I. benefits to P.R. See U.S. Brief at p. 40. This contradictory position is unfathomable.

new considerations have to do with allegations that the existing structure with the AABD promotes P.R.'s ability to better govern itself as it is best positioned to tailor its laws and programs to reflect "local conditions." The U.S. also makes reference, as an additional consideration, to P.R.'s "unique degree of autonomy and its relationship to the U.S. that has no parallel in our history." U.S. Brief at pp. 22-27 and 34-36. Both topics, as they are discussed now, are nowhere to be found in the U.S.'s submissions below.

The general rule is that an appellate court will not consider an argument raised on the first time on appeal. However, this Court, in *Singleton v. Wulff*, 428 U.S. 106 (1976), avoiding the general rule, indicated that this issue should be left to the discretion of the courts of appeals, to be exercised on the facts of the individual cases. In the First Circuit, the leading case is *National Association of Social Workers v. Harwood*, 69 F.3d 622, 624-29 (1st Cir. 1995), which held that appealing courts could address an argument first raised on appeal only if "the equities heavily" favor doing so, developing six factors to consider in making this determination. Therefore, discretion should not be affirmatively exercised unless the equities are mainly in favor of allowing the new argument. Otherwise, the argument will be considered waived. This is founded upon considerations of fairness, judicial economy and practical wisdom, as it is essential to prevent prejudice to the adverse party and to allow the reviewing courts below, to consider all positions of the parties to rule on the matter in a complete fashion.

The U.S. purported additional considerations deal with its justification that Congress acted rationally in not extending the S.S.I. program to P.R. In this sense, the U.S. presented to the courts below its classical arguments in connection thereof, to wit—P.R.’s tax status, “saving money” and “protecting the fiscal integrity of government programs,” among other peripheral, related arguments. U.S. Brief at pp. 17-22.⁶¹ Therefore, the Respondent and the courts below had the opportunity to consider, brief, argue and decide these specific issues, but not the two additional ones presented for the first time before this Court.

Nonetheless, as it will be shown hereinafter, those two additional arguments are not helpful at all to the U.S.

On its face, most of the factors identified in the *Hardwood* case are present here, as the two additional arguments, even as they are pure issues of law that can be decided without further fact-finding, are not issues of constitutional magnitude, but merely arguments to try to bolster the U.S.’s justification for the exclusion of P.R. under the S.S.I. program; do not threaten a miscarriage of justice as the U.S. did not find it necessary to include them in any of its prior submissions and much less deal with

⁶¹ The third classical argument, that is, that the S.S.I. program “might seriously disrupt the Puerto Rican economy” was deemed expressly waived by the court of appeals. *Vaello-Madero*, 956 F.3d at p. 22. Notwithstanding, the U.S. in fn. 2 of its Brief seems to try to resurrect this argument.

federalism, comity and respect for independent democratic institutions. Rather, it seems to have been done deliberately to yield a tactical advantage at this state of the proceedings, as the U.S. chose not to raise them before the courts below, courts that painstakingly, considered and analyzed every argument presented by the U.S. in reaching their decisions.

These two additional arguments of the U.S. should be deemed waived for the above-stated procedural grounds.

II. The AABD does not promote P.R.’s ability to govern itself, nor allows P.R. to tailor its laws and programs to reflect “local conditions”.

As mentioned earlier,⁶² the AABD program cannot be seriously compared with the S.S.I. Additionally, P.R.’s cap under the AABD is roughly \$36 million (yes, not billions), for adult assistance, foster care, and adoption assistance.⁶³ Moreover, this figure is not indexed to inflation and has not changed since 1997. The U.S. General Accounting Office (hereinafter, “GAO”) estimated that in 2011 federal spending on AABD was less than 2 percent of what it would have been if Puerto Rico received full S.S.I.

⁶² See STATEMENT, Part II.E.

⁶³ See Policy Basics – *Aid to the Aged, Blind and Disabled*, Center on Budget and Policy Priorities, updated Jan. 15, 2021 at p. 2. <https://www.cbpp.org/sites/default/files/atoms/files/12-18-20bud.pdf> (last visited August 30, 2021).

benefits.⁶⁴ Roughly 37,000 people participated in AABD in an average month in 2015 (latest year available) and received monthly benefits averaging \$75, including the basic benefit and shelter costs. Fifty-five (55) percent of AABD participants are disabled, while 44 percent are seniors and 1 percent are blind. Federal spending on AABD was \$26.5 million in 2015, with \$25.2 million for benefit payments and \$1.3 million for administrative costs. Based on this data, P.R.'s contributory spending portion was an estimated \$9.7 million, with \$8.4 million for benefits and \$1.3 million for administrative costs. Combined expenditures were an estimated \$36.2 million (\$33.6 million for benefits and \$2.6 for administration).⁶⁵ Federal matching grants are designed to augment territorial programs with federal funds, but as reflected above, are simply insufficient.⁶⁶

⁶⁴ The actual Puerto Rico AABD Monthly Benefits Data [numbers are for FY 2011] in billions is \$0.02 [34,401, average monthly participating individuals by \$58, average monthly federal income benefit]. See *Puerto Rico – Information on How Statehood Would Potentially Affect Selected Federal Programs and Revenue Sources*, GAO Report 14-31 to Congressional Requesters from GAO, March 14 at p. 84; <https://www.gao.gov/assets/gao-14-31.pdf> (last visited August 31, 2021).

⁶⁵ *Id.* at p. 3.

⁶⁶ See Memorandum from William R. Morton, Analyst in Income Security, 7-9453 from Congressional Research Service dated October 26, 2016 regarding Cash Assistance to the Aged, Blind and Disabled in Puerto Rico, p. 6. <https://sgp.fas.org/crs/row/cash-aged-pr.pdf> (last visited August 30, 2021).

The U.S. is cognizant of the fact that Puerto Rico has never been able to dedicate the sums needed to properly attend the needs that are addressed under this program. Moreso, today, when it is in bankruptcy under PROMESA, with specific budgets that cannot be modified as they are set forth by the FOMB and approved by the Bankruptcy Court.

Therefore, the representations and additional argument made by the U.S. in this regard are far from being neither correct nor feasible, as P.R. has no financial capacity to improve its meager AABD program. Moreover, the federal matching grant does not fill the gap.

III. P.R.'s unique degree of autonomy and relationship to the U.S. that has no parallel in our history, affords it a great degree of autonomy and self-determination to decide to use its money to find a territorial supplement outside the AABD program is not realistic, and fails to support the U.S. position.

Volumes of ink have been spilled on the legal and political relationship of P.R. with the U.S. Nevertheless, only the strictly relevant topics will be discussed hereunder in order to place this issue in its proper perspective.

To start with, and as shown above, P.R. has no resources to create new economic benefits programs

due to its insolvency status, and limited financial wherewithal. Moreover, the FOMB, under PROMESA, places strict budget limitations and controls thereof. It must be reckoned that the FOMB is mainly concerned with the repayment of the public debt, for which a significant part of P.R.'s foreseeable budgets will be used. This will not allow even a remote possibility of P.R. being able to create a new territorial welfare program that would cover the needs of its population. Therefore, this additional argument is impossible to be achieved, given existing circumstances.

Turning to the legal and political relationship of P.R. with the U.S., some legal corrections are in order to show that this additional argument of the U.S. to justify rationality for excluding P.R. from the S.S.I. program is also misplaced.

It is beyond dispute that P.R. has been, since 1898, an unincorporated territory of the U.S., subject to the plenary powers of Congress, except for fundamental rights that are defined by the federal judiciary, not by P.R. because it belongs to, but is not part of, the U.S. *Downey v. Bidwell*, 182 U.S. 244, 287 (1901). This category originally applied to newly acquired island territories with non-citizen populations. However, when in 1917 the Jones-Shafroth Act⁶⁷ collectively naturalized all residents of

⁶⁷ See Organic for Puerto Rico (Jones-Shafroth Act), Pub. L. No. 64-368, 39 Stat. 957 (1917). It also must be recognized that under the Jones Act some degree of self-governance was granted

P.R., excluding citizens of other countries, the U.S. should have recognized that it was now dealing with full-fledged U.S. citizens with constitutional rights, privileges and immunities emerging directly from the Constitution, and from clauses other than the Territory Clause of Art. IV, Sec. 3, Cl. 2.⁶⁸

In 1950, Congress passed Public Law 81-600,⁶⁹ which allowed P.R. to draft its own constitution, including a bill of rights, and to elect its own government, which it did two years later. Although the relationship of P.R. with the U.S. is labeled as a “commonwealth”, this did not change the inherent and still standing legal status of P.R. as an unincorporated territory, which allows Congress to exercise plenary control over it,⁷⁰ and the Territory Clause.

to P.R., while maintaining its status as a non-incorporated territory.

⁶⁸ As aptly stated by Judge Torruella: “The United States cannot continue its state of denial by failing to assert that its relationship with U.S. citizens who reside in Puerto Rico is an egregious violation of their civil rights.” See *Why Puerto Rico Does not Need Further Experimentation with its Future: A Reply to the Notion of “Territorial Federalism,”* 131 Harv. L. Rev. No. 3, p. 65 (2018).

⁶⁹ See Pub. L. No. 81-600, 64 Stat. 319 (1950).

⁷⁰ As examples of Congress’ exercise of its plenary powers upon P.R. even under the existing “commonwealth”, see *Puerto Rico v. Franklin California Tax-Free Trust*, 136 S.Ct. 1938, 1942-43 (2016) wherein this Court struck P.R.’s legislated debt-restructuring plan for its public utilities deciding that P.R. was preempted from legislating its own municipal bankruptcy and

The Congressional record of Law 600 is crystal clear; it did not change the status of Puerto Rico as an unincorporated territory, it did not alter the power of sovereignty acquired by the U.S. under the terms of the Treaty of Paris and did not change P.R.'s fundamental political, social and economic relationship to the U.S. The Puerto Rican leaders promoting the bill admitted so much at that time. The entire process was simply geared to provide P.R. with a greater degree for local self-government in internal matters. Achieving a constitution regarding matters of strictly local concern—rights that were not, at that time, been granted to any other territory—did create an illusion that something singular had been created, but in fact was not created.⁷¹ At most, as stated in *Rodríguez v. Popular Democratic Party*, 457 U.S. 1, 8 (1982), “Puerto Rico, like a state is an autonomous political entity, sovereign over matters not ruled by the [U.S.] constitution.”

unable to pursue remedies under Chapter 9 of the Bankruptcy Code. PROMESA is another dramatic example, as it creates a supra legislative body that can overrule P.R.'s elected officials under the existing commonwealth's constitution. Finally, reference was made earlier to the existing concerns regarding PR's tax credit for manufacturers. See p. 12 *ante*.

⁷¹ José Trías Monge. *Puerto Rico, the Trials of the Oldest Colony in the World*, pp. 111-120. Yale University Press 1997. Mr. Trías Monge was a direct participant in this process. The U.S. as *Amicus Curiae* supporting respondents in the case of *Commonwealth of Puerto Rico v. Sánchez-Valle*, 136 S. Ct. 1863 (2016) cannot be more specific on this subject.

Not satisfied with this legal reality, the proponents of the “commonwealth” formula further pursued their desire to achieve a true free and associated state with the U.S. Those efforts continue to date,⁷² but that are still to bear any fruits. *Sánchez-Valle* did not change this reality, as it held that P.R. still remains a territorial governance for Congress.⁷³

In sum, Law 600 and the P.R. constitution underscore the realities of the legal-political relationship of P.R. with the U.S. that exists since 1898. Moreover, and quite to the contrary, under PROMESA, P.R. has no control over its finances, which are committed mainly to pay creditors, as set forth in a plan of reorganization that is still in the making. This additional argument posed by the U.S. is, therefore, without any valid foundation.

IV. P.R. U.S. citizens pay all federal taxes required by the fiscal laws of the U.S.

At pp. 15-18 of its Brief, the U.S. insists upon its classical argument that given that P.R. U.S. citizens make a “reduced contribution to the federal treasury,” it should therefore receive a reduced share of the

⁷² *Ibid*, pp. 124-135.

⁷³ *Sanchez-Valle*, 136 S. Ct. at 1876. See, *U.S. Territories, Introduction, Developments in the Law*, 130 Harv. L. Rev. 1617, No. 6, (2017); and Judge Torruella’s commentary thereto on *Why Puerto Rico Does not Need Further Experimentation with its Future: A Reply to the Notion of “Territorial Federalism,”* 131 Harv. L. Rev. No. 3, p. 65 (2018).

benefits funded by the Treasury, making reference to isolated statements of members of Congress in that regard. The U.S. is wrong on both tenets.

As to statements of members of Congress, it should be noted that then Resident Commissioner of P.R., Mr. S. Iglesias-Pantín pleaded in 1935, together with other entities, for the inclusion of P.R. in what was to become the Social Security Act (hereinafter “S.S.A.”).⁷⁴ As a matter of fact, earlier bills did include P.R. within the definition of “State” and it was generally understood that an amendment to include P.R. would be submitted.⁷⁵

In reaction thereto, President Roosevelt acknowledged and regretted the omission, and asked his administration to secure the inclusion of P.R. within the provisions of the bill.⁷⁶ Although Chairman Doughton, of the Ways and Means Committee of the House of Representatives, acknowledged that P.R. had been originally included but later excluded due to tax issues, he stated later at

⁷⁴ Pub. L. 74-271, 49 Stat. 620. See *Reports, Bills, Debates, Act, and Supreme Court Decisions*, Social Security Act of 1935, Vol. I, H.R. 7260, 74th Congress, 1st Session, Public Law 271, Department of Health, Education and Welfare, Social Security Administration, at p. 6901.

https://books.google.com/books/about/Social_Security_Act_of_1935.html? (last visited August 31, 2021).

⁷⁵ See *Reports, Bills, Debates, Act, and Supreme Court Decisions*, Social Security Act of 1935, at pp. 6901-02.

⁷⁶ *Id.*, p. 6901.

that time that those issues would be “ironed out later”.⁷⁷

It must be emphasized, however, that since the Foraker Act, Congress exempted PR from the applicability of the federal tax laws. This resulted thereafter in I.R.S. Section 933 that excludes income from local sources from federal income tax. This was recognized in Congress at the time of the 1950 bill to extend the Social Security Law to P.R. The following partial excerpts of the transcript⁷⁸ are right on point:

MR. LEHMAN: Mr. President, I call up my amendment marked “5-22-50-A,” being the amendment to include Puerto Rico and the Virgin Islands along with the States, which are to receive assistance.

THE VICE PRESIDENT. The amendment will be stated.

[See p. 8891 for a transcript of the amendment.]

⁷⁷ *Id.*, p. 6902. The ironing-out finally occurred in 1939 and 1950. No serious concern was raised then as to tax issues. See *Public Assistance in Puerto Rico*,* Social Security Bulletin, July 1949 [*Prepared in the Statistics and Analysis Division, Bureau of Public Assistance.] This summarizes operations under the island’s public assistance law and calls attention to the increasing need for more adequate provisions. <https://www.ssa.gov/policy/docs/ssb/v12n7p.10.pdf> (last visited on August 31, 2021).

⁷⁸ At 96 Cong. Rec. 8891-8894 (June 20, 1950).

MR. LEHMAN: Mr. President, no geographic area in the United States more urgently needs the public assistance provisions of House bill 600 than Puerto Rico and the Virgin Islands.

My amendment is a very simple one, in that it includes Puerto Rico and the Virgin Islands in the definition of States. I believe that all the titles of the S.S.A. should be applicable to Puerto Rico and the Virgin Islands on the same basis on which they are applicable to the States.

...

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

...

We dare not forfeit our obligations to these American citizens.

...

MR. LEHMAN. I realize that; but those taxes are retained in Puerto Rico for the support of the government there; they are not used for old-age pensions or public assistance.

Mr. President, as I just said, we dare not forfeit our obligations to these American citizens. They are American citizens just as much as are the citizens of San Diego, Chicago, or New York. In fact, when Puerto Ricans or Virgin Islanders come to New York, they are automatically eligible for public-assistance payments. There is no reason for considering them less eligible when they are in Puerto Rico or the Virgin Islands.

I urge with all conviction at my command that we approve the pending amendment and that we make these islands eligible for public-assistance grants on the same basis as any other part of the United States is eligible.

...

MR. O'MAHONEY. Mr. President, if the Senator from New York had not himself offered this amendment, I am sure that I should have done so.

The Committee on Interior and Insular Affairs has immediate concern over the peoples and the government of Puerto Rico and the Virgin Islands. Both these areas were brought into the United States by the action of our Government, not primarily by the action of the people of those islands. The Virgin Islands were purchased by the Government of the

United States. Puerto Rico was taken over by the United States as a result of the Spanish-American War.

I think the Government and the people of the United States owe an absolute obligation to the peoples of those islands to treat them in the way that the amendment proposed by the Senator from New York provides. I certainly hope that this amendment will be adopted, so that the Government of the United States may carry out its full responsibility toward the peoples of these islands.

The same situation occurred when the 1972 Amendments to the S.S.A., that repealed the state programs of aid to the aged, blind and disabled with S.S.I., was deemed a landmark legislation that would end many old inequities and would provide a new uniform system of well-earned benefits for older American, the blind and the disabled.”⁷⁹ Yet, once again, P.R. was excluded.

However, on the floor, the issue of P.R.’s exclusion was raised by Mr. Burdick, who represented that Mr. Long had assured him that in

⁷⁹ See *Statement on Signing the Social Security Amendments of 1972—October 30, 1972*, President Richard M. Nixon, Historical Links, SSA, No. 8, <https://www.ssa.gov/history/nixstmts.html> (last visited on August 31, 2021).

the next session that matter would be considered and corrected. Mr. Long confirmed that assurance.⁸⁰

It should then be noted that the Congressional intent at that time was in favor of extending these programs to P.R. Therefore, contrary to the assertions of the U.S., although P.R. was originally excluded from the S.S.A., it was done under an unfulfilled promise to correct the error in the next Congressional Session. This occurred in 1939 and 1950, notwithstanding P.R.'s tax situation. As to the S.S.I., P.R. is still excluded thereunder, even though it was to be promptly corrected.

In sum, Congressional intent to both bills was in favor of including P.R., without concern to its tax structure, created by Congress. If P.R. has not paid more in income taxes throughout the years, it is only as a consequence of Congress' own decision to exclude income from P.R. local sources as taxable federal income.

It is then utterly unfair and improper for the U.S. to charge P.R. with generally paying fewer taxes than other states, and to use it to justify the exclusion under S.S.I., when P.R. had no say as to these matters, could not act otherwise, and was obligated to follow federal law.

⁸⁰ 118 Cong. Rec. 33,999 (1970).

CONCLUSION

Considering Respondent's and *Amicus* briefs altogether, and the facts and data included above, it should be concluded that P.R. U.S. citizens are in urgent need of federal programs of social assistance, the same that are available to all other U.S. citizens, such as S.S.I. and that the Government of P.R. has been and continues to be unable to financially attend to the grave necessities of this particularly needy population. This is an issue of a constitutional right—equal protection of the law—and not related in any way to Territory law (which is irrelevant and stands unchanged since 1898).

Further, the U.S. position in this case is contrary to the position of the current administration.

Finally, the U.S. efforts in this case to support exclusion of P.R. from the S.S.I. program defies any rational, logical, legal, fair nor factual justification—more than all of this, it cannot be comprehended why the U.S. still, at this time and age, insists in treating P.R. U.S. citizens unequally⁸¹ from those in the rest of the nation solely by reason of locality.

⁸¹ See *Plessy v. Ferguson*, 163 U.S. 537, 552 (1896) and Juan R. Torruella, *The Supreme Court and Puerto Rico: The Doctrine of Separate and Equal* (Rio Piedras: Editorial de la Universidad de Puerto Rico (1985), at p. 7 (advocating equality for Puerto Rican peoples).

PRAYER FOR RELIEF

The judgment of the court of appeals for the first circuit should be affirmed.

Dated: September 7, 2021.

Respectfully submitted,

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