No. 20-303

IN THE
Supreme Court of the United States

UNITED STATES OF AMERICA.
Petitioner,
v.
JOSE LUIS VAELLO-MADERO.
Respondent

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

BRIEF BY THE MAYOR OF THE MUNICIPALITY OF ISABELA, PUERTO RICO CARLOS DELGADO ALTIERI AS *AMICUS CURIAE* IN SUPPORT OF VAELLO-MADERO

JOSÉ A. HERNÁNDEZ MAYORAL
Counsel of Record
206 TETUÁN ST., STE 702
SAN JUAN, PR 00901
787-722-7782
jose@hernandezmayoral.com

ROBERTO PRATS PALERM
RPP Law PSC
1509 LOPEZ LANDRON
10TH FLOOR
SAN JUAN, PR 00911
787-721-6010
rprats@rpplaw.com

Counsel for Amicus Curiae

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INTEREST OF *AMICUS CURIAE*[1]

Amicus curiae Carlos Delgado Altieri is the mayor of the Municipality of Isabela, Puerto Rico, and president of the Popular Democratic Party.

Mr. Delgado Altieri is deeply troubled by the position assumed by the United States Government claiming that "Congress has a legitimate interest in avoiding a one-sided fiscal relationship under which Puerto Rico shares the financial benefits but not the financial burdens of statehood, and declining to include Puerto Rico in the SSI program is a rational means of furthering that interest." Pet. 12.

Mr. Delgado Altieri intends to bring before the Court the appropriate legal and historical background information relative to Puerto Rico's distinct tax treatment so that it may be properly briefed as to this critical and sensitive point.

The *amicus curiae* brief is presented in support of respondent.

SUMMARY OF THE ARGUMENT

The United States requests that this Court issue a writ of certiorari and summarily dismiss the First Circuit Court of Appeal's ruling so that it can proceed to demand the reimbursement of Supplemental

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[1] This brief filed by the Mayor of the Municipality of Isabela, Puerto Rico, as permitted under Rule 37.4, at least 10 days prior to the deadline which serves as notice. No counsel for any party authored this brief in whole or in part and no person or entity other than *amicus curiae* or its counsel made a monetary contribution toward its preparation or submission.

Security Income (SSI) payments made to an indigent American citizen after he moved from New York, where its residents are entitled to SSI payments, to Puerto Rico, where its residents are not entitled to SSI payments.

As rationale for the SSI program's discrimination against American citizens residing in Puerto Rico, the United States points to Puerto Rico's general fiscal autonomy and posits that: "Congress has a legitimate interest in avoiding a one-sided fiscal relationship under which Puerto Rico shares the financial benefits but not the financial burdens of statehood, and declining to include Puerto Rico in the SSI program is a rational means of furthering that interest." Pet. 12. This contention is both shameful and ignorant.

Puerto Rico's unique tax treatment resulted from the long recognized economic reality that its tax base is too small to support a dual–federal and state–system of taxation. It exempts most but not all income from federal taxation. Consequently, despite its different tax treatment, Puerto Rico contributes to the federal treasury in amounts similar to that of several states. Since SSI payouts to the states is not tied to the amounts contributed in taxes by the residents of each state–the poorer states receive SSI payments in higher proportions than their tax contributions–, it is not rational to exclude Puerto Rico residents simply on account of its different tax system.

This Court has recognized that Puerto Rico boasts a relationship to the United States that has no parallel in our history and that an integral aspect of that association has been the Commonwealth's wide-ranging self-rule, exercised under its own Constitution. *Puerto Rico v. Sánchez Valle*, 136 S. Ct.

1863, 1876 (2016). While the Commonwealth setup allows for its necessary fiscal autonomy, the absence of voting representation in Congress warrants that all laws that discriminate against residents of the Commonwealth of Puerto Rico be subject to a strict scrutiny analysis.

ARGUMENT

I. BACKGROUND

The Internal Revenue Code (IRC) has different tax for residents of Puerto Rico than it does for residents of the fifty states. Section 933 of the IRC provides that income derived from sources within Puerto Rico by an individual who is a resident of Puerto Rico generally will be excluded from gross income and exempt from U.S. taxation. 26 U.S.C. § 933. Section 933 does not exempt residents of Puerto Rico from paying federal taxes on U.S. source income and foreign source income. Nor does section 933 affect the federal payroll taxes that residents of Puerto Rico pay. Federal employment taxes for social security, Medicare, and unemployment insurance apply to residents of Puerto Rico on the same basis and over the same sources of income as they are applied to all other U.S. residents.

The policy foundations of this setup can be traced back to the beginning of the U.S. occupation of Puerto Rico after the Spanish American War in 1898.

After Spain formally ceded Puerto Rico to the United States under the Treaty of Paris signed in December 1898 and ratified in April 1899 (see Treaty of Peace between the United States of America and the Kingdom of Spain, Apr. 11, 1899, 30 Stat. 1754), the

island came under the control of U.S. War Department. Military rule was established.

Secretary of War Elihu Root observed that the existing tax system in force at the time of American occupation "was so peculiar to the Spanish methods of administration, and so inapplicable to the new conditions under which the people of the island are to live, and to the ideas which we entertain for promoting their welfare, that a practically new system must be adopted." Philip C. Jessup, *Elihu Root,* vol. 1 (New York: Dodd Mead, 1938), 378. Root asked President Daniel Coit Gilman of the Johns Hopkins University, to give leave of absence to Dr. J. H. Hollander, then Associate Professor of Finance, in order to develop a new and comprehensive tax system for Puerto Rico and become its treasurer. "The general principle which Root laid down for him and under which he operated was that the revenues of the island should be used in Porto Rico for its benefit." *Id.*

In 1900, Congress enacted the first organic act (widely known as the Foraker Act) to establish a civil government in Puerto Rico. *See* Organic Act of 1900, Ch. 191, 56th Cong., 1st Sess., 31 Stat. 77 (1900). The Act was similar to a great extent to those adopted for the continental territories in the previous century. It provided for an Executive Branch headed by a Governor and an Executive Council, both appointed by the President of the United States with the advice and consent of the Senate, a House of Delegates elected by qualified voters of Puerto Rico, and a district court of the United States for Puerto Rico with a district judge appointed by the President of the United States for a term of four years. *See id.* §§ 17, 18, 27, 34.

The Act differed from that of continental territories on the matter of taxation. When Senate Bill 2264 (which became the Foraker Act) was debated in the Senate, Puerto Rico's Military Governor George Davis advocated for the need to maintain Puerto Rico's fiscal autonomy as a necessary feature for a viable local government. In his testimony before the Senate's Committee on Pacific Islands and Puerto Rico, Davis explained that: "If the change in status involves the application to Puerto Rico of the United States revenue laws–internal and customs–then the principal source of revenue that Puerto Rico has relied on will be lacking." United States Senate, *Hearings Before the Committee on Pacific Islands and Puerto Rico, Senate Bill 2264,* Statement made by Brig. Gen. George W. Davis, U.S.A. Military Governor of the Island of Puerto Rico (January 13, 1900), 39. When asked by the Chairman: "You think the internal-revenue tax, as well as the tariff, should go to the insular treasury?" General Davis responded: "Yes, sir. *I do not see how the island is to keep house without it*." *Id.* at 74.

These observations were reflected in the bills' report: "These revenues are given to Porto Rico, not only because the necessities of the island are immediate and very great, but for the further reason that it seems only just that the island should have the full benefit of all such duties and taxes, inasmuch as they arise on account of the island alone * * *." Report No. 249, 56th Congress, 1st Session (Feb. 5, 1900) About Temporary Civil Government for Porto Rico, 8.

As a result, Article 14 of the Foraker Act provided:

> That the statutory laws of the United States not locally inapplicable, except as hereinbefore

> or hereinafter otherwise provided, shall have the same force and effect in Porto Rico as in the United States, *except the internal-revenue laws, which, in view of the provisions of section three, shall not have force and effect in Porto Rico.*

Organic Act of 1900, Ch. 191, 56th Cong., 1st Sess., 31 Stat. 77 (1900) (emphasis supplied).

In 1914, as Congress debated a new organic act for Puerto Rico, Felix Frankfurter, then Law Officer at the War Department, reiterated the need for Puerto Rico to retain all tax collections in order to be viable:

> As a matter of finance, *the conditions operative at the time of the Foraker Act, which made it needed justice for Porto Rico not to include it within the general taxing legislation of this country, still prevail in the Island.* Porto Rico still needs the receipts under the Federal Tariff and internal revenues collected at Porto Rico; in other words, she must be treated differently than and outside of the provisions applicable to incorporated territories.

Memorandum for the Secretary of War, in Hearings on S. 4604 before the Senate Committee on Pacific Islands and Porto Rico, 63d Cong., 2d Sess., 23 (1914). Because of that need to maintain Puerto Rico outside of the U.S. tax system, Frankfurter expressed that:

> [C]ertainly for the present at least, statehood is not the form which such relationship is intended to take. Therefore, the conventional step toward statehood, the creation of an

> "inchoate State," the technical incorporation into the United States, is sought to be avoided.

Id.

A new organic act (widely known as the Jones Act) was finally adopted in 1917. It created an elected Senate and gave the people of Puerto Rico a bill of rights and United States citizenship. *See* Organic Act of 1917, Pub. L. No. 64-368, 39 Stat. 951 (1917). The right to elect their own Governor was granted by amendment in 1947. *See* Pub. L. No. 80-362, 61 Stat. 770 (1947).

The Jones Act of 1917, maintained the cited Foraker Act provision, now under section 9:

> SEC.9. That the statutory laws of the United States not locally inapplicable, except as hereinbefore or hereinafter otherwise provided, shall have the same force and effect in Porto Rico as in the United States, *except the internal-revenue laws*: Provided, however, That hereafter all taxes collected under the internal-revenue laws of the United States on articles produced in Porto Rico and transported to the United States, or consumed in the island shall be covered into the treasury of Porto Rico.

Section 9, Organic Act of 1917, Pub. L. No. 64-368, 39 Stat. 951 (1917).

In 1945, after the Second World War, the United States contracted through the treaty establishing the United Nations Charter the obligation to develop the self-government of territories, including Puerto Rico,

and to assist them in the progressive development of their free political institutions, *according to the particular circumstances of each territory and its peoples and their varying stages of advancement*. U.N. Charter art. 73.

In 1950, pursuant to that obligation, Congress enacted Public Law 600, a landmark legislation that transformed the governance of Puerto Rico. *See* Pub. L. No. 81-600, 64 Stat. 319. That statute, "[f]ully recognizing the principle of government by consent," offered the people of Puerto Rico "in the nature of a compact" the authority to "organize a government pursuant to a constitution of their own adoption." 48 U.S.C. § 731b. Puerto Rico accepted the offer and called for a constitutional convention, finally adopting a constitution in 1952.

The Puerto Rico Constitution created a new political entity, the Commonwealth of Puerto Rico—or, in Spanish, Estado Libre Asociado de Puerto Rico. *Puerto Rico v. Sánchez Valle*, 136 S.Ct. 1863, 1869 (2016). As a result, all provisions concerning local governance in the Jones Act of 1917 were repealed, and the remaining provisions, mainly regarding the relationship between Puerto Rico and the Federal Government, were renamed the Federal Relations Act and assumed the nature of a compact. *See* Pub. L. No. 81-600 §§ 4, 5, 64 Stat. at 319-20 (1950).

One of the surviving provisions was section 9, that now read:

> The statutory laws of the United States not locally inapplicable, except as hereinbefore or hereinafter otherwise provided, shall have the same force and effect in Puerto Rico as in the

> United States, *except the internal revenue laws* * * *: Provided, however, That after May 1, 1946, all taxes collected under the internal revenue laws of the United States on articles produced in Puerto Rico and transported to the United States, or consumed in the island shall be covered into the treasury of Puerto Rico.

48 U.S.C. § 734.

The conditions that made it necessary for Puerto Rico to maintain its fiscal autonomy still prevailed as of 1950, and arose in the congressional debates that year discussing whether to include Puerto Rico and the Virgin Islands in the insurance and assistance programs of the Social Security program. Senator Lehman reminded all of the origin of that exemption:

> 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. But 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.

96 Cong. Rec. 8891 (1950) (statement Sen. Lehman).

During that period, the House and Senate Interior and Insular Affairs Committees had been holding hearings on statehood for Hawaii. In addressing the territory's readiness for statehood, the House Report stated:

> The Constitution of the United States sets no specific requirements for statehood, but throughout our history the standards required for admission have been–

> (1) That the inhabitants of the proposed new State are imbued with and sympathetic toward the principles of democracy as exemplified in the American form of government.
>
> (2) That a majority of the electorate desire statehood; and
>
> *(3) That a proposed new State has sufficient population and resources to support State government and to provide its share of the cost of the Federal Government.*

H.R. REP. NO. 86-32 at 13-14. (1959). Hawaii comfortably met that third criteria. Its 1955 per capita income exceeded that of 26 states. *Id.* at 7.

Although Puerto Rico was not requesting statehood, it was evident nonetheless that it could not meet that third criteria, as can be inferred from Governor Davis' testimony before the Senate in 1900, Frankfurter's 1914 memorandum, and Senator Lehman's statement in 1950.

Public Law 600 was meant as a point of inflection in United States territorial policy. This Court had expressed in the mid-nineteenth century that territory is acquired to become a state, and not to be held as a colony and governed by Congress with absolute authority. *Scott v. Sanford*, 60 U.S. (19 How.) 393, 447 (1857). That basic premise of eventual statehood changed with the doctrine of non-incorporation that finds its origin in the so-called *Insular Cases. See generally Downes v. Bidwell*, 182 U.S. 244 (1901); *Dooley v. United States*, 182 U.S. 222 (1901); *De Lima v. Bidwell*, 182 U.S. 1 (1901). The United States now held Territories "not possessing that anticipation of

statehood." *Examining Bd. of Eng'rs, Architects & Surveyors v. Flores De Otero*, 426 U.S. 572, 599 n.30, 96 S. Ct. 2264, 2280 (1976). If Puerto Rico would remain a territory indefinitely and not become a state, how could it cease to be governed by Congress with absolute authority? The solution sought by Public Law 600 was through the relinquishment of powers under the Territory Clause. *See Fin. Oversight & Mgmt. Bd. for P.R. v. Aurelius Inv., LLC*, 140 S. Ct. 1649, 1676 (2020) (Sotomayor, J., concurring).

The process initiated by Public Law 600 was "Puerto Rico's transformative constitutional moment," *Puerto Rico v. Sanchez Valle*, 136 S.Ct. 1863, 1875 (2016). It caused a paradigm shift in relations between Puerto Rico and the Federal Government. *Fin. Oversight & Mgmt. Bd. for P.R. v. Aurelius Inv., LLC*, 140 S. Ct. 1649, 1676 (2020) (Sotomayor, J., concurring). This Court has recognized that through this process, Congress relinquished its control over the Commonwealth's local affairs; *Sanchez Valle*, 136 S.Ct. *at* 1874 (quoting *Flores de Otero*, 426 U.S. at 579); and that those constitutional developments made Puerto Rico "sovereign" in one commonly understood sense of that term, as Puerto Rico achieved a degree of autonomy comparable to that possessed by the States. *Id.* at 1866.

For that relinquishment to have real meaning, Public Law 600 and the Federal Government's recognition of Puerto Rico's sovereignty must be seen as irrevocable, at least in the absence of mutual consent. *See Fin. Oversight & Mgmt. Bd. for P.R. v. Aurelius Inv., LLC*, 140 S. Ct. 1649, 1678 (2020) (Sotomayor, J., concurring).

With the creation of the Commonwealth, Puerto Rico boasts a relationship to the United States that has no parallel in our history. *Puerto Rico v. Sánchez Valle*, 136 S.Ct. 1863 (2016) (quoting *Flores de Otero*, 426 U.S. at 597). Public Law 600 allowed Puerto Rico to obtain state-like sovereignty through a popularly adopted constitution, while preserving its fiscal autonomy indispensable to maintain its government.

Presidents and Congress have been aware of the problems that would ensue if Puerto Rico were to be subjected to a uniform federal tax treatment. President John F. Kennedy's briefing papers squarely framed the issue:

> If the U.S. Government were to impose its income taxes in Puerto Rico, the Commonwealth would have to reduce its tax rates to something more like those prevailing in our states. The people would not be able to pay their current Commonwealth taxes and our Federal taxes at the same time. As a result, the Commonwealth would suffer a severe loss in revenue and presumably would have to receive financial assistance to maintain itself.

Presidential Press Conference Material, May 8, 1963, 44: https://www.jfklibrary.org/asset viewer/archives/ JFKPOF/059/JFKPOF-059-010

In 1990, the Congressional Budget Office concluded that a potential economic implication of statehood for Puerto Rico, and thus of uniform federal taxation, would be that: "Unless Puerto Rican taxes are reduced, the combination of federal and Puerto Rican income taxes would result in high income tax rates on the island." *Potential Economic Impacts of*

Changes in Puerto Rico's Status Under S. 712, CBO Papers, Congressional Budget Office, April 1990, 12.

The consequences of reducing Puerto Rico's tax rates to accommodate uniform federal taxation under statehood were addressed by the General Accountability Office in 2014:

> [S]tatehood could result in reduced Puerto Rico tax revenue. For example, Puerto Rico's individual and corporate income tax rates are relatively high in comparison to those in the states. If Puerto Rico's government wished to maintain pre-statehood tax burdens for individuals and corporations, it would need to lower its tax rates, which could reduce tax revenue.

U.S. Gov't Accountability Off., GAO–14–31, *Puerto Rico: Information on How Statehood Would Potentially Affect Selected Federal Programs and Revenue Sources* 14 (2014), 31-32. Consequently, it "could ultimately affect the government's efforts to maintain a balanced budget." *Id.,* 31.

In 1972, Congress created the Supplemental Security Income (SSI) program, a benefits program that provides monthly cash payments to aged, blind, and disabled individuals who lack the financial means to support themselves. *See* Social Security Amendments of 1972, Tit. III, § 301, 86 Stat. 1465-1478. The law made the program available only to residents in the fifty states and the District of Columbia. 41 U.S.C. §§ 1382c(a)(1)(B)(i) and 1382(c)(e).

SSI was later extended through compact to the Commonwealth of the Northern Mariana Islands

(CNMI). 48 U.S.C. § 1801. While the CNMI does not have fiscal autonomy as Puerto Rico has (Puerto Rico legislates its own tax code, whereas the U.S. tax code applies in the CNMI), Federal taxes collected in the CNMI are covered directly upon collection into the treasury of the CNMI. 48 U.S.C § 1842.

The United States argues that Puerto Rico residents were excluded from SSI because "Congress has a legitimate interest in avoiding a one-sided fiscal relationship under which Puerto Rico shares the financial benefits but not the financial burdens of statehood." Pet. 12.

Because residents of Puerto Rico are generally exempt from federal taxation but they are not absolutely exempt, the Court of Appeals disagreed with the United States, noting that: "[t]he residents of Puerto Rico * * * make substantial contributions to the federal treasury." *United States v. Vaello-Madero,* 956 F.3d 12, 24 (1st Cir. 2020).

The IRS statistics relied on by the Court of Appeals show that the percentage of total federal tax revenues contributed by each state varies considerably. On one end of this spectrum is California, contributing 13.31% of total federal tax revenues, followed by New York and Texas with 8.60% and 8.24% respectively. At the other end are Wyoming and Vermont, each contributing 0.13. The same table shows Puerto Rico contributes 0.10% of federal tax revenues.[2] https://www.irs.gov/statistics/soi-tax-stats-

[2] The percentages provided here were calculated by dividing the amount paid by each state and Puerto Rico according to the table by the total revenues for all states and territories.

gross-collections-by-type-of-tax-and-state-irs-data-book-table-5.

Official statistics also show that SSI payments in a state bears no relationship to the amounts contributed in taxes by the state. While Mississippi contributes 0.32% of federal tax revenues, its residents receive 1.43% of all SSI payments. Similarly, while West Virginia contributes 0.20% of all federal tax revenues, its residents get 0.88% of all SSI payments.[3] SSA Publication No. 13-11976, October 2020.

II. TO DENY VAELLO-MADERO SSI PAYMENTS BECAUSE OF HOW PUERTO RICO CONTRIBUTES TO THE FEDERAL TREASURY HAS NO RATIONAL BASIS

The United States argues that the law excluding residents of Puerto Rico from the SSI program needs only meet a rational basis standard, a test satisfied if the legislative classification is "rationally related to furthering a legitimate state interest." Pet. 11 (quoting *Massachusetts Board of Retirement v. Murgia*, 427 U.S. 307, 312 (1976) (per curiam)). It finds that rational basis in the four-decades old summarily disposed cases of *Califano v. Torres,* 435 U.S. 1 (1978) and *Harris v. Rosario,* 446 U.S. 651 (1980) (per curiam) where this Court highlighted that Puerto Rico "residents do not contribute to the public treasury." *Califano* at 5 n. 7; *Harris* at 652. Riding on that statement, the United States posits that

[3] The percentages of SSI payments in a state provided here were calculated by dividing the amount paid to residents of each sample state by the total payments in all states and the CNMI.

"Congress has a legitimate interest in avoiding a one-sided fiscal relationship under which Puerto Rico shares the financial benefits but not the financial burdens of statehood." Pet. 12.

The statements in *Califano* and *Harris* that Puerto Rico does not contribute to the federal treasury cannot withstand contemporary scrutiny. As Justice Marshall complained in *Harris*, the Court "rushe[d] to resolve important legal issues without full briefing or oral argument." *Harris*, 446 U.S. at 65 (Marshall, J., dissenting). The reality is that, as the Court of Appeals noted, Puerto Ricans make substantial contributions to the federal treasury, *United States v. Vaello-Madero,* 956 F.3d 12, 24 (1st Cir. 2020), albeit under different rules due to different historical, political and economic realities.

The United States does not deny this. *See* Pet. 16. It even appears to concede the point when it argues that although some Puerto Rico residents pay at least some federal taxes, under the rational-basis review Congress can rely on generalizations and make rough accommodations. *Id.* (quoting *Dandrige v. Williams*, 397 U.S. 471, 485 (1970)). Adding that even if the classification involved results being both underinclusive and overinclusive, it would still not violate the rational basis test. *Id.* (quoting *Vance v. Bradley*, 440 U.S. 93, 108 (1979)).

It is hard to see how excluding *all* otherwise qualifying residents of Puerto Rico from SSI is a "rough accommodation." In *Danbridge*, the Court evaluated the method used by Maryland to distribute its finite resources among its needy citizens in the Federal Aid to Families With Dependent Children program. The state imposed a maximum grant that

limited the total amount of money any one family unit could receive. The standard of need increased based on the number of children but the increments became proportionately smaller. A "rough accommodation" was required to make the finite resources available to all. Contrary to here, however, no one was excluded. *Danbridge* would be apposite if Maryland had ruled that the funds would only be distributed to families with up to, say, four children, and those with five or more children would not receive any aid, and this Court would have found that not to violate equal protection. But that is not the case.

It is even harder to see how this is simply an issue of a line drawn with imperfect underinclusive results. In *Vance* the Court examined a mandatory retirement age for the Foreign Service that did not apply to the Civil Service. The fact that some, very few, in the Civil Service worked abroad under similar conditions as those in the Foreign Service but were not subject to the same early retirement rules did not violate equal protection, for equal protection does not require perfection or mathematical nicety. *Vance*, 440 U.S. at 108, 99 S. Ct. at 948.

Vance had a clearly identifiable dividing line between the existing categories of the Foreign and the Civil Service. Here, however, the dividing line is drawn arbitrarily on account of the level of contribution to the federal treasury. Puerto Rico residents contribute 0.10% of total federal tax revenues, whereas Wyoming and Vermont residents contribute 0.13% each. Drawing a line somewhere in between 0.13% and 0.10% does not follow any rational principles, it is arbitrary.

The United States would argue that the line is not drawn on account of the percentage contribution made by Puerto Rico to the federal treasury *viz a viz* the States. That, instead, it is drawn on account of its different tax treatment, a system that creates "a one-sided fiscal relationship under which Puerto Rico shares the financial benefits but not the financial burdens of statehood." Pet. 11. Accepting such rationale, of course, requires this Court to turn a blind eye to the fact the SSI program applies in the CNMI who on account of the tax cover over also has a one-sided fiscal relationship. But there is more.

Some States are richer than others and contribute more to the federal treasury, but SSI payments throughout the fifty states are distributed based on the needs of the individuals residing in each State. *See* SSA Publication No. 13-11976, October 2020 and https://www.irs.gov/statistics/soi-tax-stats-gross-collections-by-type-of-tax-and-state-irs-data-book-table-5. There is no correlation between the tax contributions by a State and SSI payments to the residents of that State. In that respect, tax payers residing in Connecticut who pay more but need less are contributing to funding SSI payments to residents of Mississippi that pay less but need more. How then, can a line be rationally drawn to exclude Puerto Rico?

Puerto Rico's fiscal autonomy grew out of an economic reality. While Puerto Rico perennially debates whether it should remain a commonwealth, seek being admitted as a State or become an independent nation, that discussion occurs at an ideological level. The hard-fact remains that Puerto Rico lacks sufficient resources to support a State government and to provide its share of the cost of the

Federal Government. That being the case, discriminating against Puerto Rico residents under the rationale that Puerto Rico in general is not sharing the financial burdens of statehood–as the United States frames it–means excluding the individually poor for living in a generally poor area in a program aimed at aiding the poor. That is irrational and cruel.

III. DISCRIMINATION AGAINST RESIDENTS OF THE COMMONWEALTH OF PUERTO RICO, AS U.S. CITIZENS IN AN AUTONOMOUS REGION OF THE UNITED STATES WITHOUT VOTING REPRESENTATION IN CONGRESS, MUST BE SUBJECT TO STRICT SCRUTINY ANALYSIS.

As a Commonwealth, Puerto Rico boasts a relationship to the United States that has no parallel in our history. *Puerto Rico v. Sánchez Valle*, 136 S.Ct. 1863 (2016) (quoting *Flores de Otero*, 426 U.S. at 597). Public Law 600 allowed Puerto Rico to obtain state-like sovereignty through a popularly adopted constitution, while preserving its fiscal autonomy indispensable to maintain its government. But, as established in the U.S. Constitution, only people of the states elect representatives and senators. U.S. Const. art. I, § 2 & amend. XVII. Consequently, people in nonstate areas, including Puerto Rico, do not have voting representation in Congress. Elemental principles of fairness and equal protection demand that any discrimination in the application of federal programs to Puerto Rico and other nonstate areas with no voting representation in Congress be subject to strict scrutiny analysis.

Equal protection analysis requires strict scrutiny of a legislative classification when the classification operates to the peculiar disadvantage of a suspect class. *Mass. Bd. of Ret. v. Murgia*, 427 U.S. 307, 312, 96 S. Ct. 2562, 2566 (1976). Designation as a suspect class has mostly required that members of the class be considered saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process. *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 28, 93 S. Ct. 1278, 1294 (1973). This has meant that classifications based on alienage, like those based on nationality or race, discrete and insular minorities, are considered inherently suspect and subject to close judicial scrutiny. *Graham v. Richardson*, 403 U.S. 365, 372, 91 S. Ct. 1848, 1852 (1971). Distinctions between citizens solely because of their ancestry are by their very nature odious. *Adarand Constructors v. Pena*, 515 U.S. 200, 215, 115 S. Ct. 2097, 2107 (1995).

The purpose of strict scrutiny is to "smoke out" illegitimate uses of suspect classifications by assuring that the legislative body is pursuing a goal important enough to warrant use of a highly suspect tool. *City of Richmond v. J. A. Croson Co.,* 488 U.S. 469, 493 (1989). This follows a concern that a political majority will more easily act to the disadvantage of a minority based on unwarranted assumptions or incomplete facts. *Id.* The test ensures that the means chosen fit a compelling goal so closely that there is little or no possibility that the motive for the classification was illegitimate racial prejudice or stereotype. *Id.*

There is no denying that the doctrine of nonincorporation had racist origins. In *Balzac v. Porto Rico,* 258 U.S. 298, 42 S. Ct. 343 (1922), the Court justified considering Alaska as incorporated because "it was an enormous territory, very sparsely settled *and offering opportunity for immigration and settlement by American citizens*." *Id. at* 258 U.S. 298, 309, 42 S. Ct. 343, 347 (1922). Thus, the Court said, "[i]t involved none of the difficulties which incorporation of the Philippines and Porto Rico presents," *Id.,* those difficulties evidently being that Puerto Rico was full of Puerto Ricans with little space left for a civilizing migration and settlement of white American citizens.

And there is no denying that by invoking Puerto Rico's fiscal autonomy–that originated through the doctrine of nonincorporation–as a rational basis for discrimination, the United States has established a classification that applies to a population that is 98.9% Latino. https://www.census.gov/quickfacts/PR. Indubitably, the members of that class–the American citizens residing in the Commonwealth of Puerto Rico–come from an entirely different tradition and history, from an entirely different cultural origin than that of the mainland United States, and, thus are regarded as belonging to a minority group in American society.

Legal scholars have pointed that the rational criteria utilized by the Court—which allowed for discrimination in *Califano* and *Harris*—overlooked those racial premises. Rafael Hernández Colón, *The Evolution of Democratic Governance Under the Territorial Clause of the U.S. Constitution*, 50 Suffolk

U. L. Rev. 587, 606 (2017). While race or ethnicity are not bluntly expressed in the SSI classification that fences the resident of the Commonwealth of Puerto Rico from receiving the benefits available to other kindred American citizens, it need not be when its effect are tailored exclusively on a class of American citizens that belong to a distinct minority.

But the argument here goes beyond the question of race or ancestry. If distinctions between citizens solely because of their ancestry are by the very nature odious to a free people whose institutions are founded upon the doctrine of equality, *Hirabayashi v. United States*, 320 U.S. 81, 100 (1943), classifications that single-out citizens who do not have a voting representation in Congress must be subject to the same close judicial scrutiny. These are a people that did not participate in the making of the statute where they were "rationally" left-out. Their designation as a separate class in the SSI program must be considered a suspect classification that receives this Court's most heightened judicial scrutiny. As birthright American citizens, residents of Puerto Rico must be free from the Congressional yoke that purports to discriminate against the neediest and poorest.

The district court eloquently addressed the long history of statutory discrimination against the residents of the Commonwealth: "Congress * * * cannot demean and brand said United States citizens while in Puerto Rico with a stigma of inferior citizenship to that of his breathren nationwide. To hold otherwise would run afoul of the sacrosanct principle embodied in the Declaration of Independence that 'All Men are Created Equal.'" *United States v.*

Vaello-Madero, 356 F.Supp 3d 208 (D.P.R. 2019). It has further recognized that: "The federal safety net is flimsier and more porous in Puerto Rico that in the rest of the nation * * * To be blunt, the federal government discriminates against Americans who live in Puerto Rico." *Martínez v. United States HHS,* No. 18-01206-WGY, 2020 U.S. Dist. LEXIS 138894 (D.P.R. Aug. 3, 2020)

This Court has recognized that pursuant to the Commonwealth's wide-ranging self-rule, exercised under its own Constitution, Puerto Rico today can avail itself of a wide variety of futures. *Puerto Rico v. Sánchez Valle*, 136 S. Ct. 1863, 1876 (2016). A ruling that discrimination against Puerto Rico on account of its Commonwealth status will be measured under a strict scrutiny standard, would constitute a congressional power adjustment that will greatly contribute to the long-awaited realization of the rights of liberty and consent of the governed within the relationship between the United States and nonstate areas, and follow the democratic path of creative statesmanship chartered by this Court in *Sanchez Valle*. Rafael Hernández Colón, *The Evolution of Democratic Governance Under the Territorial Clause of the U.S. Constitution*, 50 Suffolk U. L. Rev. 587, 605 (2017).

CONCLUSION

For the foregoing reasons, Amicus requests that this Court rule that Puerto Rico's fiscal autonomy is not a rational basis for discrimination against residents of Puerto Rico and that, furthermore,

discrimination against residents of Puerto Rico will be subject to a strict scrutiny analysis.

Respectfully submitted,

JOSÉ A. HERNÁNDEZ MAYORAL
Counsel of Record
206 TETUÁN ST., STE 702
SAN JUAN, PR 00901
787-722-7782
jose@hernandezmayoral.com

ROBERTO PRATS PALERM
RPP Law PSC
1509 LOPEZ LANDRON
10TH FLOOR
SAN JUAN, PR 00911
787-721-6010
rprats@rpplaw.com

Counsel for Amicus Curiae

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