

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 FOR PUBLIC BENEFITS SCHOLARS
AS AMICI CURIAE IN
SUPPORT OF RESPONDENT**

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INTEREST OF AMICI CURIAE¹

Amici are law professors who specialize in public benefits. Their scholarship focuses on how public-benefits programs are structured and operate, as well as the values those programs serve and reflect. A full list of amici is attached as an appendix.

INTRODUCTION AND SUMMARY OF ARGUMENT

This case concerns a single program, Supplemental Security Income (SSI), and one territory, Puerto Rico. But the Court cannot appreciate the stakes of this case or evaluate the Government's rationales for excluding Puerto Rico residents from SSI, without understanding the broader public-benefits regime across the territories.

On the one hand, millions of American citizens are excluded from vital benefits (or receive less than their fair share) merely because they live in U.S. territories. For each affected person, the consequences can be dire, and a favorable ruling here would be life-changing. Our survey of the major benefits programs shows, however, that many are already open to territorial residents. Our survey also shows that many benefits programs were deliberately designed to operate differently in different places.

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

That is not the case for SSI—a feature that renders its exclusion from the territories especially irrational. Unlike programs (like Medicaid) that give states a substantial role in design and implementation, SSI is truly “national”: It is funded and administered by the federal government, has uniform eligibility criteria, and provides the same benefits nationwide. While the federal-state nature of other benefits programs does not excuse any discrimination against territorial residents, the thoroughly national character of SSI means that discrimination there is particularly inexcusable.

SSI’s national scheme reflects the fundamental notion—embraced by Congress and this Court—that people with disabilities are entitled to lead dignified lives no matter where they live. And it directly undermines one of the Government’s main defenses of the discriminatory exclusion of Puerto Rico from SSI—that it promotes Puerto Rico’s self-government. Congress already decided that, when it comes to disability assistance, national uniformity trumps local autonomy and experimentation. The Government’s defense rings hollow for the additional reason that being forced to do more with less hardly amounts to meaningful autonomy. For that, and other reasons, Congress’s decision to exclude Puerto Rico residents from SSI is irrational.

This brief proceeds in three parts. Part I identifies the major federal public-benefits programs and explains the extent to which they operate differently (or similarly) in the territories. The survey serves two purposes. The first is to inform the Court about the scope of the discrimination against territorial

residents in public benefits. The second is to lay a foundation for our main thesis—that SSI stands out among benefits programs as uniquely national, a feature that renders discrimination against territorial residents particularly indefensible. Part II turns to the state of need in the territories, with a spotlight on Puerto Rico. Americans there have substantially higher levels of need yet receive substantially lower levels of public support. Together, these Parts show that the universe of affected programs is not as vast as it might seem but that the consequences of sustaining the discriminatory regime are also more dire than might be apparent. Part III explains why the distinctive, highly nationalized nature of SSI renders the exclusion of Puerto Rico residents especially irrational, particularly in the name of self-governance.

ARGUMENT

I. A Broader Picture Of Public Benefits In The Territories Illuminates The Stakes Of This Case.

While this case is specifically about SSI in Puerto Rico, this Court’s decision may have consequences beyond that program and that territory. To assist the Court, we survey the major public-benefits programs and explain how they do or do not differ in the fifty states compared to the main U.S. territories.²

We first describe the major public-benefits programs that treat territorial residents meaningfully

² These territories are Puerto Rico, Guam, American Samoa, the U.S. Virgin Islands, and the Northern Mariana Islands.

worse than state residents, particularly when it comes to program funding, eligibility criteria, and benefit levels. Many of these programs are federal-state partnerships that afford participating states and territories flexibility in designing and administering the programs as they see fit. We next pivot to public-benefits programs that treat territorial residents on relatively equal footing with their mainland counterparts. That includes the largest set of government programs in the country—those that fall under the banner of Social Security. Together, these sections show that there is already parity in many public-benefits programs, and that, among those that discriminate against territorial residents, SSI stands out for its truly national character—a point we elaborate in Part III.

A. Programs that treat territorial residents meaningfully worse than state residents.

Supplemental Security Income (SSI). SSI is a means-tested, federal entitlement program that provides direct monthly cash benefits to qualifying low-income individuals who are over 65 years old, blind, or disabled. *See* 42 U.S.C. §§ 1381, 1382. A safety net of “last resort,” SSI was designed to guarantee a minimum income for individuals who cannot otherwise maintain a basic standard of living due to age or disability.³ SSI is “the only source of federal income

³ William R. Morton, Cong. Rsch. Serv., 7-5700, Memorandum: Cash Assistance for the Aged, Blind, and Disabled in Puerto Rico 1 (Oct. 26, 2016), <https://tinyurl.com/377v8pmv>.

support targeted to families caring for children with disabilities.”⁴

SSI is not available in the territories except for the Northern Mariana Islands. *See* 42 U.S.C. § 1382(f); 20 C.F.R. § 416.120(c)(10). In lieu of SSI, the other territories operate Aid to the Aged, Blind, and Disabled (AABD) programs. Morton, *supra*, at 3. Unlike SSI’s open-ended funding, AABD programs are financed by federal matching grants that cover 75 cents for every dollar of AABD benefits paid—up to a statutory cap.⁵ 42 U.S.C. §§ 1381-1385; Morton, *supra*, at 11-12. And in contrast to SSI’s nationally uniform eligibility standards, *see* 42 U.S.C. §§ 1381a, 1382(a), (d)-(e), AABD programs impose varying eligibility requirements (though, notably, they are stricter than SSI’s requirements). *See* Andrew Hammond, *Territorial Exceptionalism and the American Welfare State*, 119 Mich. L. Rev. 1639, 1674 (2021); Pet. App. 32a-33a. Finally, AABD benefits are more meager than SSI’s. In Puerto Rico, for example, the average monthly AABD benefit is less than \$100, while it is over \$500 under SSI. Morton, *supra*, at 12. In the states, an SSI beneficiary can receive a monthly

⁴ Kathleen Romig, *SSI: A Lifeline for Children with Disabilities*, Ctr. on Budget & Pol’y Priorities (May 11, 2017), <https://tinyurl.com/2k4ay3ja>.

⁵ Under Section 1108 of the Social Security Act, each territory is subject to an annual limit in the federal grant money that it can receive for certain programs, including AABD and TANF. 42 U.S.C. § 1308(b). This is commonly called the “Section 1108 ceiling.”

benefit of up to \$794—no matter where she lives or what the cost of living is there.⁶

Medicaid. Medicaid is a means-tested, joint federal-state program that finances healthcare coverage for low-income individuals.⁷ To receive federal funding, states must enroll certain eligible populations, cover certain services, and follow statutory requirements. Beyond that, states have significant leeway to decide whom to cover, what benefits to provide, and how to deliver them. The result is variability across Medicaid programs.⁸

All five territories participate in Medicaid, *see* 42 U.S.C. § 1301(a)(1), but there are significant differences between the program’s structure in the states versus the territories.

First, financing. States receive open-ended matching funds from the federal government. The federal government reimburses a fixed percentage of each state’s Medicaid expenditures based on the state’s annual per capita income. *See* 42 U.S.C. § 1396d(b). This reimbursement rate, known as the Federal Medical Assistance Percentage (FMAP),

⁶ Soc. Sec. Admin., SSI Federal Payment Amounts for 2021, <https://tinyurl.com/ekn2uddz> (last visited Sept. 3, 2021).

⁷ Ctr. on Budget & Pol’y Priorities, *Policy Basics: Introduction to Medicaid* (Apr. 14, 2020), <https://tinyurl.com/4avscedn> (Medicaid Policy Basics).

⁸ Annie L. Mach, Cong. Rsch. Serv., R44275, Puerto Rico and Health Care Finance: Frequently Asked Questions 21-22 (2016), <https://tinyurl.com/3rm4wynv>.

ranges from 50% to 83%.⁹ *Id.* The lower a state’s per capita income, the higher its FMAP (and vice versa).¹⁰ Notably, while there is an upper limit on a state’s reimbursement *rate*, there is no upper limit on the total *amount* that the federal government will reimburse.

By contrast, Medicaid funding is not open-ended in the territories. The federal government reimburses Medicaid expenditures in the territories at a lower FMAP, which is set by statute at 55%—no matter the territory’s per capita income. 42 U.S.C. § 1396d(b). The federal government’s funding is also subject to an annual cap for each territory. *Id.* § 1308. Once a territory hits that cap, its FMAP is effectively *lower* than 55%, because the territory must continue to fund Medicaid with or without federal reimbursements.¹¹

⁹ As part of the Affordable Care Act (ACA), the federal government now pays an enhanced FMAP of 90% for Medicaid services for low-income adults covered by the ACA’s Medicaid expansion. See Medicaid Policy Basics.

¹⁰ U.S. Gov’t Accountability Off., *Puerto Rico: Information on How Statehood Would Potentially Affect Selected Federal Programs and Revenue Sources* 74 (Mar. 2014), <https://tinyurl.com/4t243tew> (GAO Report).

¹¹ See MACPAC, Fact Sheet, *Medicaid and CHIP in the Territories* 1 (Feb. 2021), <https://tinyurl.com/hyjkp9c8> (MACPAC Fact Sheet). Congress temporarily increased the annual cap for Medicaid funding in the territories as part of the ACA, and the FMAP for the territories was increased temporarily as part of recent coronavirus relief legislation. *Id.* at 4-6. With this additional funding, the FMAP in Puerto Rico for fiscal years 2020 and 2021 is expected to be around 82%. *Id.* at 6.

Second, eligibility. States are required to provide Medicaid for certain individuals, including qualifying pregnant women and children, based on their income in relation to the federal poverty level. *See* Mach, *supra*, at 21. Territories are not required to use the same poverty metric. In Puerto Rico, for example, income-based eligibility is based on the *local* poverty level, which is roughly 40% of the federal poverty level. Hammond, *supra*, at 1669 n.163. In other words, to qualify for Medicaid in Puerto Rico, your income must be significantly lower than if you lived on the mainland. *See* GAO Report at 73-74. This is particularly problematic for people with disabilities, who often have special healthcare needs.

Third, benefits. States are required to provide coverage for certain mandatory services (e.g., inpatient and outpatient hospital services), although they can define the amount, duration, and scope of coverage. *Id.* at 74. The territories, however, cannot provide all the same “mandatory” services due to deficient resources and healthcare infrastructure, so they do not follow all the same coverage requirements (e.g., Puerto Rico’s Medicaid program does not cover nursing home services or home health services). *Id.* Simply put, Medicaid beneficiaries in the territories are not, by default, entitled to the same basic services as beneficiaries on the mainland.

Supplemental Nutrition Assistance Program (SNAP). The states and territories provide food assistance to qualifying low-income individuals, but via meaningfully different programs. In the states, certain Indian reservations, Guam, and the U.S. Virgin Islands, food assistance is provided through SNAP.

See 7 U.S.C. §§ 2011, 2012(r), 2013(a). In Puerto Rico, American Samoa, and the Northern Mariana Islands, a block grant program, called the Nutrition Assistance Program (NAP), is available instead of SNAP. *Id.* § 2028. The two programs differ starkly in terms of funding, eligibility rules, and benefit amounts.

SNAP is administered by local governments, but benefits are funded entirely by the federal government. GAO Report at 78-79. As with Medicaid, the rules for determining eligibility and benefit amounts are generally uniform across the nation and are based on income and resource levels in relation to the federal poverty line. 7 U.S.C. § 2014(b)-(e). States do, though, have various policy options for tailoring the administration of SNAP to their local needs.¹²

Unlike SNAP funding, which adjusts to changing levels of need, NAP is funded by federal block grants that are capped at a set amount per year. *Id.* § 2028.¹³ Therefore, an increase in NAP participation generally results in a decrease in NAP benefits for each participating household. To accommodate this limited funding, the territories that administer NAP—Puerto Rico, American Samoa, and the Northern Mariana Islands—impose stricter eligibility requirements and confer reduced benefit amounts. Hammond, *supra*, at 1671-72. Accordingly, the maximum monthly food

¹² U.S. Dep’t of Agr., *SNAP: State Options Report* 6-33 (May 31, 2018), <https://tinyurl.com/y6kd6n7s>.

¹³ Congress authorized temporary supplemental funding for NAP following natural disasters and the coronavirus pandemic. See *Peña Martínez v. Dep’t of Health & Hum. Servs.*, 478 F. Supp. 3d 155, 167 n.9 (D.P.R. 2020).

assistance benefit under NAP is roughly 60% of the maximum monthly benefit under SNAP. *Id.*

Temporary Assistance for Needy Families (TANF). Through TANF, the federal government provides block grants to states, Indian tribes, and certain territories to fund a wide range of welfare programs serving low-income families with children. See 42 U.S.C. § 601 *et seq.*; *id.* §§ 603, 619(5). TANF’s “overall purpose is to ‘increase the flexibility of states’ to meet four statutory goals: (1) provide assistance to needy families so that children may remain in their homes; (2) reduce dependency of needy parents on government benefits through work, job preparation, and marriage; (3) reduce out-of-wedlock pregnancies; and (4) promote the formation and maintenance of two-parent families.”¹⁴

Several territories—including Puerto Rico, Guam, and the U.S. Virgin Islands—participate in TANF. 42 U.S.C § 619(5). American Samoa is eligible but does not participate.¹⁵ The Northern Mariana Islands are ineligible. 42 U.S.C. § 619(5). Although participating territories receive TANF grants just like

¹⁴ Cong. Rsch. Serv., In Focus: The Temporary Assistance for Needy Families (TANF) Block Grant 1 (Jan. 28, 2021), <https://tinyurl.com/2h5vew94> (In Focus: TANF).

¹⁵ *Id.*; House Comm. on Ways & Means, 115th Cong., 2d Sess., *Green Book*, ch. 7 (2018), <https://tinyurl.com/y7u9ryuw> (*Green Book*).

states, their funding is subject to the same Section 1108 ceiling that limits AABD funding. *See supra* 5.¹⁶

Other Programs. There are several other programs that are available in only some territories and, even then, operate on different terms than in the states. For instance, only Puerto Rico and the U.S. Virgin Islands are eligible to participate in federal unemployment insurance, 26 U.S.C. § 3306(j)(1), though all five territories are treated like states under the new Pandemic Unemployment Assistance program.¹⁷ Federal foster care, adoption assistance, and other child welfare services are also available in some, but not all of, the territories; like TANF and AABD, this support is subject to the Section 1108 ceiling.¹⁸ Refundable tax credits, like the Child Tax Credit (CTC)

¹⁶ Congress recently authorized additional, temporary TANF funding that states, tribes, and territories can utilize to provide non-recurrent, short-term benefits. *See* Gene Falk & Patrick A. Landers, Cong. Rsch. Serv. R46692, Temporary Assistance for Needy Families and Proposed COVID-19 Pandemic Economic Relief: In Brief 2-6 (Mar. 18, 2021), <https://tinyurl.com/4kjxbedu>. These funds are not subject to the Section 1108 ceiling. *Id.* at 3 n.9.

¹⁷ Advisory Letter No. 16-20 from John Pallasch, Assistant Sec’y, U.S. Dep’t of Labor, to State Workforce Agencies, Unemployment Insurance Program 5 (Apr. 5, 2020), <https://tinyurl.com/vxb2sdhv>.

¹⁸ *See Green Book*, app. A, <https://tinyurl.com/4yhajcr6>; Cong. Rsch. Serv., R43458, Child Welfare: An Overview of Federal Programs and Their Current Funding 14-15 (Jan. 2, 2018), <https://tinyurl.com/heb44a8p>.

and Earned Income Tax Credit (EITC), are also available in patchy fashion across the territories.¹⁹

B. Programs that treat territorial residents similarly or equal to state residents.

While federal statutes treat territorial residents differently when it comes to several public-benefits programs, for others—including some of the largest and most significant programs—there is parity (or at least near-parity).

Medicare. “Medicare is a federally funded medical insurance program for the elderly and disabled,” which consists of four Parts. *Fischer v. United States*, 529 U.S. 667, 671 (2000). Territorial residents have access to Medicare just like those on the mainland, subject to a few distinctions discussed below—including an important one concerning subsidies for low-income individuals.

Medicare Part A provides coverage for certain hospital inpatient, skilled nursing, home health, and hospice services and generally does so on the same terms for state and territorial residents. Mach, *supra*, at 9. But one disparity bears mention: Under Medicare, hospitals serving a significant portion of low-income inpatients receive reimbursement payments based on a formula that takes into account the number of patients who receive SSI benefits. *Asociación Hosp. Del*

¹⁹ Sean Lowry, Cong. Rsch. Serv., R44651, Tax Policy and U.S. Territories: Overview and Issues for Congress 11-14 (Oct. 7, 2016), <https://tinyurl.com/29cku5uk>; Hammond, *supra*, at 1664, 1689 (noting that Congress recently extended the EITC to Puerto Rico and the CTC to all five territories).

Maestro, Inc. v. Becerra, 19-1475, 2021 WL 3660816, at *1 (1st Cir. Aug. 18, 2021). The reimbursement payments are therefore lower in territories whose citizens are excluded from SSI. *Id.*

Medicare Part B covers hospital outpatient services, physician services, durable medical equipment, and other general medical services. Mach, *supra*, at 13. Territorial residents are covered by Part B on generally the same terms as state residents. In Puerto Rico, however, residents must affirmatively enroll in the program (whereas state and other territorial residents are automatically enrolled), 42 U.S.C. § 1837(f)(3), and, unlike their state counterparts, they cannot qualify for “Medicare Savings Programs” that subsidize the costs of Part B premiums, Mach, *supra*, at 13-14.

Part C provides all-in-one private health insurance plans (called Medicare Advantage plans) as an alternative to the original Medicare plan provided in Parts A and B.²⁰ Funding for, and coverage under, these private plans vary by locality, and Medicare Advantage plans are not available in all of the territories.²¹

²⁰ *How Do Medicare Advantage Plans Work?*, Medicare.gov, <https://tinyurl.com/bbta6c5s> (last visited Sept. 3, 2021).

²¹ Mach, *supra*, at 15-18 (discussing Part C funding); Jeanne Fuglesten Biniek et al., Kaiser Family Found., *Medicare Advantage 2021 Spotlight: First Look* (Oct. 29, 2020), <https://tinyurl.com/pda3v96k> (Puerto Rico is the only territory that offers Medicare Advantage).

Part D provides coverage for prescription drugs. It is largely funded by the federal government. Mach, *supra*, at 19. Territorial and state residents alike participate in Part D, but the former cannot receive means-tested, low-income subsidies (or LIS), which reduce the costs of prescription drugs for qualifying beneficiaries on the mainland. *Id.* at 19-20; 42 U.S.C. § 1395w-114.

In lieu of LIS, Congress provides additional Medicaid funding for territories to support prescription drug coverage for low-income Medicare beneficiaries. 42 U.S.C. § 1396u-5(e). This funding is capped each year and does not come close to matching the LIS funds that support low-income beneficiaries on the mainland.²² Further, territories must match this federal funding at the same FMAP rate that applies under Medicaid. Mach, *supra*, at 28.

Old-Age, Survivors, and Disability Insurance (Social Security). Old-Age, Survivors, and Disability Insurance, commonly known as Social Security, is a federal program that provides monthly cash benefits to qualifying retired or disabled workers and their families, and to the families of qualifying deceased workers.²³ It is one of the largest federal

²² *Peña Martínez*, 478 F. Supp. 3d at 167; Mach, *supra*, at 27-28; Emily Barson, Dep't of Health & Hum. Servs., *White House Task Force on Puerto Rico: End of Administration Report* 5-6 (Nov. 18, 2016), <https://tinyurl.com/yam3w8g8> (“CMS acknowledges that this benefit is substantially smaller than the LIS benefit available to low-income beneficiaries in the states.”).

²³ Cong. Rsch. Serv., *In Focus: Social Security Overview* 1 (May 7, 2020) <https://tinyurl.com/7y8f8ycf> (SS Overview).

programs, reaching 178 million workers, 64.5 million beneficiaries, and holding \$2.9 trillion in trust funds.²⁴ All of the territories are included in Social Security. *See* 42 U.S.C. § 410(h) (defining “State” to include Puerto Rico, Guam, U.S. Virgin Islands, and American Samoa); *Fang Lin Ai v. United States*, 809 F.3d 503, 508 (9th Cir. 2015) (Northern Mariana Islands).

Social Security is financed primarily by mandatory payroll taxes paid by workers and their employers, and replaces part of workers’ earnings when they lose income due to retirement, disability, or death, so long as they (or a qualifying family member) has enough work credits. SS Overview at 1-2. In general, eligibility and benefit rules operate uniformly across the states and territories. 42 U.S.C. § 410(h).²⁵

State Children’s Health Insurance Program (CHIP). CHIP is a federal-state program, much like Medicaid, that provides health coverage for an otherwise vulnerable population: low-income children and pregnant women in families who do not have health insurance but whose income exceeds the eligibility threshold for Medicaid.²⁶ All five territories are

²⁴ *Id.*

²⁵ *See* Lowry, *supra*, at 8-9.

²⁶ Alison Mitchell, Cong. Rsch. Serv., R43949, Federal Financing for the State Children’s Health Insurance Program (CHIP) 1 (May 23, 2018), <https://tinyurl.com/hmv3fkyc>.

generally treated like states for purposes of CHIP. *See* MACPAC Fact Sheet at 1.²⁷

As is often the case with federal-state partnerships, CHIP eligibility and benefits vary widely across states and territories. Local governments can design their CHIP programs in several different ways. *See* Mitchell, *supra*, at 1. Many—including all five territories—use CHIP funds to expand their Medicaid programs for children. MPACPAC Fact Sheet at 2. Depending on the design of their programs, states and territories may be required to cover certain eligible populations or provide certain mandatory services. *Id.* at 1-3.

Special Supplemental Nutrition Program for Women, Infants, and Children (WIC). The federal government provides grants to states and all five territories to fully fund the Special Supplemental Nutrition Program for Women, Infants, and Children. *See* 7 C.F.R. § 246 *et seq.*²⁸ WIC provides supplemental nutritious foods, nutrition education, breastfeeding support, and health and social-service referrals at no cost to low-income pregnant, breast-

²⁷ Although CHIP's financing structure operates the same in the territories and states, territories typically receive less aggregate funding because they are reimbursed according to matching rates that are based on their Medicaid FMAPs. Mitchell, *supra*, at 1; *supra* 6-7 (explaining territories' lower FMAPs). Like their Medicaid FMAPs, the territories' reimbursement rates under CHIP were increased in coronavirus relief legislation. MACPAC Fact Sheet at 6.

²⁸ Ctr. on Budget & Pol'y Priorities, *Policy Basics: Special Supplemental Program for Women, Infants, and Children* (Apr. 26, 2017), <https://tinyurl.com/3yx89kzm> (WIC Policy Basics).

feeding, and postpartum women, infants, and children up to age five who are at nutritional risk. WIC Policy Basics. WIC operates equally in the states and territories. 7 C.F.R. § 246.2. Income-eligibility is pegged to the federal poverty level and is generally uniform across the nation. *Id.*; WIC Policy Basics.

Veterans Benefits. Veterans residing in all five territories are eligible for (among other things) veteran pension and disability benefits and healthcare provided by the Department of Veterans Affairs.²⁹ Distance from VA hospitals or specialists, however, may make some healthcare benefits harder for residents of some territories to access.³⁰ And, of course, while veterans in the territories have access to these veteran-specific benefits, many are excluded from programs like SSI and SNAP, just as their civilian counterparts are.

Other Programs. There are several other public-benefits programs that treat territorial residents on generally equal footing with state residents. The Section 8 housing-choice voucher program, for instance, provides rental assistance to low-income individuals and families in the territories and states alike. 42 U.S.C. § 1437a(b)(7). Pell Grants are likewise available to assist students with higher-education expenses on and off the mainland. 20 U.S.C. § 1003(21); *Green Book*, app. A. All five territories participate in the

²⁹ *Green Book*, app. A, table a-1, <https://tinyurl.com/e769cpjf>.

³⁰ Emma Moore & Brent Peabody, *Veteran Benefits in U.S. Territories*, Ctr. for a New Am. Sec. (Feb. 25, 2020), <https://tinyurl.com/7kdr96dh>.

National School Lunch Program, which provides food donations and cash subsidies to reimburse local governments for providing nutritious meals to school children from qualifying low-income households, based on nearly the same funding and eligibility criteria. 42 U.S.C. §§ 1760(d)(8), 1760(f).³¹ And all territories are eligible to participate in the federal-state Child Support Enforcement program, though not all of them do. *Green Book*, app. A.

* * *

As the above survey shows, some critical public-benefits programs discriminate against Americans in the territories—either excluding them altogether or providing them with lower levels of support than Americans who reside in the states. But other programs—including some of the most important ones—discriminate only in relatively minor ways (like Medicare) or not (effectively) at all (like Social Security). Parity in the provision of public benefits, then, may not be as disruptive, system-wide, as the Government suggests it would be. But, as the next Part shows, the failure to extend equal treatment has tremendous consequences for the Americans denied their fair and full share of assistance.

³¹ See Child Nutrition Programs: Income Eligibility Guidelines, 84 Fed. Reg. 12,596 (Mar. 4, 2021), <https://tinyurl.com/3mvnu29c>.

II. High Levels Of Deprivation In The Territories Justify Higher, Not Lower, Levels Of Public Benefits.

Congress's refusal to extend full federal benefits to the territories comes at great cost to the health and welfare of the American citizens who reside there. The need in the territories is profound—and along some metrics, even greater than in the states—yet territorial residents are afforded substantially lower levels of support. Contrary to what the Government claims, this undermines rather than rationalizes Congress's decision to exclude territorial residents from SSI and other assistance programs.

A. Need in the territories is high but benefit levels are lower.

Levels of deprivation are high across the territories. Taken together, people in the territories suffer from the highest unemployment rates, lowest median and per capita income, and the lowest standards of living of all U.S. citizens. Hammond, *supra*, at 1661; Tom C.W. Lin, *Americans, Almost and Forgotten*, 107 Cal. L. Rev. 1249, 1270 (2019). Public infrastructure—including critical resources like power plants, water systems and roads—are also weaker relative to the rest of the United States. *Id.* And each territory “has severely onerous debt obligations that impede their fiscal and economic futures.” *Id.* at 1271. Extreme weather events—like the hurricanes, cyclones, and typhoons that struck Puerto Rico, American Samoa, and the Northern Mariana Islands in 2017 and 2018—have put additional pressure on already strained economies and are unlikely to subside as the

planet continues to warm. As a result of this economic and environmental stress, “there has been a sense of hopelessness in the Territories as evidenced in part by the alarmingly high rates of suicide attempts and mass migration of people away from their homeland.” *Id.*

Taking the territories individually, things look no better. Consider Puerto Rico. It is enduring a profound economic crisis—one “rooted in twentieth century legislation that encouraged Puerto Rico’s reliance on debt to fill federal funding gaps.”³² Since 2006, “[m]any industries left the island. Emigration increased. And the public debt of Puerto Rico’s government and its instrumentalities soared....” *Fin. Oversight & Mgt. Bd. for P.R. v. Aurelius Inv., LLC*, 140 S. Ct. 1649, 1655 (2020). The human toll is striking: The poverty rate in 2018 was 43.1%—dwarfing the 13.1% national rate. *Peña Martínez*, 478 F. Supp. 3d at 168.

To focus on just one measure of deprivation, food insecurity is pervasive. Even before the 2017 hurricanes devastated the island, “hunger and food insecurity were much more common among Puerto Ricans than among their fellow U.S. citizens in the 50 states.”³³ Yet despite the greater need, food assistance levels are dramatically lower. When Puerto Rico was removed from SNAP and relegated to block grants

³² Amelia Cheatham, *Puerto Rico: A U.S. Territory in Crisis*, Council on Foreign Rels., <https://tinyurl.com/p7v9mhss> (last updated Nov. 25, 2020).

³³ Bread for the World, Fact Sheet, *Hunger and Poverty in Puerto Rico* 1 (2019), <https://tinyurl.com/3p8mchhp>.

under NAP, participation rates dropped from 60% to 30%.³⁴ That wasn't because Puerto Ricans became less hungry; it was because the program, with its diminished funding, couldn't afford to help the same number of people.³⁵ And the families that do receive assistance get less than their mainland counterparts: A family of three in the lower 48 can receive up to \$535 in food assistance while that same family in Puerto Rico can receive only \$315. Hammond, *supra*, at 1676-77. The average benefit is even smaller—just \$149.51. *Id.* at 1676.

The picture doesn't look any better when it comes to health. Puerto Ricans have higher rates of health issues, including disability, than Americans elsewhere.³⁶ Pair that with higher rates of poverty, and a substantially larger portion of the population depends on Medicaid and CHIP.³⁷ But territory-specific caps on Medicaid funding mean that Puerto Ricans miss out on critical care, including mandatory services. Hammond, *supra*, at 1669 (“Given the funding constraints, Puerto Rico is only able to provide ten of Medicaid’s seventeen mandatory services.”).

³⁴ *Id.* at 2.

³⁵ U.S. Gov't Accountability Off., GAO-92-114, Food Assistance: Nutritional Conditions and Program Alternatives in Puerto Rico 2-3, 10 (July 1992), <https://tinyurl.com/9vhud3st>.

³⁶ Samantha Artiga et al., *Health Care in Puerto Rico and the U.S. Virgin Islands: A Six-Month Check-Up After the Storms* (Report), Kaiser Family Found. (Apr. 24, 2018), <https://tinyurl.com/afpc7j6j>.

³⁷ *Id.* (for 2015, 49% of the population was covered by those programs compared to 20% in the states).

The disparity in disability assistance is also striking. Despite the greater need, Puerto Rico residents receive severely curtailed benefits due to Congress's discriminatory regime. For example, "[a]n American who receives SSI in the fifty states and the District of Columbia would receive \$783 in monthly benefits. In Puerto Rico, a family would receive \$75 plus a small housing-related benefit." Hammond, *supra*, at 1677. To take an individual example, when Sixta Gladys Peña Martínez moved from New York to Puerto Rico, she saw her disability benefits fall from \$735 per month to \$40 simply because her residency changed. *Peña Martínez*, 478 F. Supp. 3d at 169. The notion that a nearly \$700 drop in cash assistance is offset by the savings Ms. Peña Martínez sees from an absence of "excise taxes on motor fuel and telephone lines" strains credulity. Gov't Br. 22.

B. It is not rational to deny Puerto Rico residents equal benefits on account of their greater need.

The Government tries to spin Puerto Rico's greater need as a justification for denying Americans there greater (really, equal) benefits. Gov't Br. 23. Equality, the Government says, would be too expensive. Gov't Br. 18-19. But "[w]anting to cut costs cannot explain who gets cut." *Peña Martínez*, 478 F. Supp. 3d at 163. And it would hardly be rational for Congress to exclude Mississippi from SSI just because Mississippi has the highest poverty rate among the 50

states—almost three times higher than the state with the lowest rate (New Hampshire).³⁸

Still, the Government might say, Puerto Rico’s poverty level is substantially higher than that of Mississippi, the poorest state. But Congress has not denied residents of states or other jurisdictions access to public benefits because there is too much need where they live. For instance, SNAP is available on tribal reservations, even though many have poverty rates akin to Puerto Rico’s. *Peña Martínez*, 478 F. Supp. 3d at 181. What is more—and as we elaborate below (§ III.B.)—the fact that conditions in Puerto Rico may vary from the states in some ways should make no difference to a program like SSI that provides “uniform benefits nationwide no matter the local poverty rate or other economic variations.” *Peña Martínez*, 478 F. Supp. 3d at 163.

Next, the Government argues that, were SSI extended to Puerto Rico, Americans there would draw more in benefits than they contribute to the federal fisc. Gov’t Br. 17-18, 20. But, in the past, Puerto Rico has contributed approximately \$4 billion in annual tax revenue to the federal government, exceeding the contributions of several states. Pet. App. 21a-22a. And most states “do not bear the full fiscal burdens” of the federal expenditures they receive, Gov’t Br. 18, yet their residents are still entitled to benefits on

³⁸ U.S. Census Bureau, 2019 Poverty Rate in the United States (Sept. 17, 2020), <https://tinyurl.com/4pvn6yvb>.

equal terms with others.³⁹ For instance, per capita, residents of Kentucky receive far more in federal expenditures than they contribute to the federal government—indeed, they rank last when it comes to the balance of payments.⁴⁰ Surely Congress wouldn't be justified in cutting Kentucky off from federal aid programs for that reason.

The Government would say that this analogy is inapt because there is no principle requiring parity between states and territories, as there is among states. Gov't Br. 28. But it is the Government's analogy that is inapt: It "misapprehends the unit of analysis—it is not the territory, but the American citizen who resides there." Hammond, *supra*, at 1685.

At any rate, the Government's cost- and contribution-based justifications are flawed in a more fundamental way. The whole point of means-tested programs like SSI is to extend benefits based on need, not past or present tax contributions. Indeed, individuals are eligible for SSI only because they can't get by on contribution-based Social Security programs and earn too little to owe any income tax.⁴¹ The Government's contributory logic simply doesn't make sense in this noncontributory context. Pet. App. 24a.

³⁹ Rockefeller Inst. of Gov't, *Who Gives and Who Gets? Explore the Balance of Payments between States and the Federal Government*, <https://tinyurl.com/a2ej4pju> (last visited Sept. 3, 2021).

⁴⁰ *Id.*

⁴¹ Soc. Sec. Admin, *Understanding Supplemental Security Income SSI Eligibility Requirements—2020 Edition*, <https://tinyurl.com/4z5ym297>; Pet. App. 24a.

Similar arguments have failed in the past, and they fail here, too. *See Zobel v. Williams*, 457 U.S. 55, 63 (1982) (“Appellants’ reasoning would ... permit the State to apportion all benefits and services according to the past tax [or intangible] contributions of its citizens. *The Equal Protection Clause prohibits such an apportionment of state services.*” (quoting *Shapiro v. Thompson*, 394 U.S. 618, 632-33 (1969))); *Saenz v. Roe*, 526 U.S. 489, 507 (1999) (equal protection prohibits the government from apportioning benefits and services “according to the past tax contributions of its citizens” because it “would logically permit the State to bar new residents from schools, parks, and libraries or deprive them of police and fire protection” (quoting *Shapiro*, 394 U.S. at 632-33)).⁴²

III. Excluding Puerto Rico From SSI Is Particularly Irrational Because SSI Is Designed To Be, And Operates As, A National Program.

We have already explained why several of the Government’s justifications for excluding residents of Puerto Rico from SSI don’t pass muster. Two of the Government’s other defenses warrant special attention.

The first is the Government’s contention that the “prevalence” of “[d]ifferential treatment of Territories in federal benefits programs” beyond SSI “confirms that Congress did not lack a rational basis in

⁴² The Court in *Califano v. Gautier Torres*, 435 U.S. 1, 4 (1978), thought *Shapiro* inapt. But much has changed since then. *See infra* § III.B.2.

declining to extend the SSI program to Puerto Rico.” Gov’t Br. 26. But, of course, there is no bulk discount for discrimination. At any rate, SSI has special features that render discrimination based on residency particularly indefensible. While many benefits programs are structured as federal-state partnerships, devolving much authority and responsibility to states and territories, SSI is a uniform, national program designed to transcend subnational borders. *See infra* § A.

The nationalized character of SSI undermines the Government’s next defense—that excluding Americans residing in Puerto Rico from SSI somehow furthers Puerto Rico’s self-determination or reflects its status as a “self-governing Commonwealth.” *Puerto Rico v. Sanchez Valle*, 136 S. Ct. 1863, 1874 (2016); *see* Gov’t Br. 22-25. States, too, have considerable “independent power” when it comes to welfare. *Torres*, 435 U.S. at 4-5. But Congress has already decided that, for SSI, national uniformity trumps local autonomy and variation. And for good reason: The whole point of disability assistance is to provide a baseline of support to ensure that people with disabilities aren’t left behind and may lead dignified lives wherever they choose to live. *See infra* § B.

For that and other reasons (*see infra* § C), excluding Puerto Rico residents from SSI cannot be justified in terms of advancing Puerto Rico’s independence.

A. Congress chose a nationalized, uniform system for disability assistance.

1. Prior to SSI's enactment in 1972, benefits programs for the aged, blind, and disabled largely operated as partnerships between the federal government and the states, with states largely determining the terms and conditions of eligibility. “[F]ederal matching funds were offered to the states to enable them to give cash relief, ‘as far as practicable’ in each state, to eligible persons whom the states deemed needy. The states set benefit levels and administered these programs.”⁴³

When Congress decided to update the program, it considered—and rejected—versions that “would have kept the programs of aid to the aged, blind, and disabled as State-administered programs,” “would ... have retained the current law matching provisions under which the Federal Government pays a portion ... of the total assistance payment,” and “would have left to the States the determination of such eligibility requirements as the level of allowable resources.”⁴⁴

Congress instead chose a program that “displaced the States,” *Schweiker v. Gray Panthers*, 453 U.S. 34, 38 (1981), “replac[ing] the cooperative federal program” that existed before 1972 “with the nationalized [SSI] program,” *Nat’l Fed’n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 630 n.16 (2012) (Ginsburg, J.,

⁴³ *Green Book*, ch. 3, <https://tinyurl.com/4bzk3ath>.

⁴⁴ S. Comm. on Fin., Material Related to H.R. 1: Aid to the Aged, Blind, and Disabled: Social Services; Fiscal Relief for States, 92d Cong., 1st Sess. 10 (July 22, 1971) (Committee Print).

concurring). The new program made assistance to the aged, blind, and disabled “a wholly Federal responsibility with Federal administration and Federal determination of all conditions of eligibility,” which was “financed entirely from Federal funds.” Committee Print 10 (describing a “nationally uniform minimum assistance level”). In other words, as a “totally Federal” program,⁴⁵ SSI is operated and funded by the federal government; it generally does not rely on states or other subdivisions for administration; it follows uniform, nationwide eligibility criteria; and it provides the same benefits for individuals no matter where in the country they reside—unless, that is, they live in Puerto Rico or the other excluded territories.

2. The “totally Federal” SSI system stands out among other major benefits programs that, as state-federal partnerships, are jointly funded by the federal government and states, rely on state governments for administration, or give states a say in program design, eligibility criteria, or benefit amounts.

Medicaid, for instance, is jointly funded and administered by state governments. *Supra* 6. Medicaid “offers states a menu of options and requires them to submit ‘state plans’ that memorialize their elections [and] describe how they will implement the program.” Bridget Fahey, *Federalism by Contract*, 129 Yale L.J. 2326, 2340 (2020).

⁴⁵ Robert M. Ball, Soc. Sec. Admin., *Legislative History: 1972 Social Security Amendments*, <https://tinyurl.com/5eknszd6> (last visited Sept. 3, 2021).

TANF also involves state-federal cooperation. *Supra* 10. TANF employs a mixed federal and state funding scheme, in which the federal government provides a basic block grant and states are required to contribute a certain amount on top, which results in a wide range of benefit amounts. *See In Focus: TANF, supra*, at 1. Indeed, the federal government’s “overall purpose” in providing these block grants is “to increase the flexibility of states” to “address both the effects and root causes of childhood economic disadvantage.” *Id.*

CHIP and SNAP are also structured as federal-state partnerships. CHIP is jointly funded by federal and state governments, and the latter have several different options for designing their CHIP programs. *Supra* 15-16. As for SNAP, the federal government funds the benefits, but participating states (and territories) are in charge of administration and eligibility certification. *See supra* 9; 7 U.S.C. §§ 2013, 2020; 7 C.F.R. § 271.4; *see also SNAP: State Options Report, supra*, at 6 (“States have flexibility to adapt their organizational structure to administer SNAP, which allows the States to serve the unique needs of their populations.”).

Finally, child welfare programs, including foster care and adoption assistance, require a mix of federal and state funding and afford significant flexibility to states (and participating territories) to decide how best to protect and promote the welfare of local children. Cong. Rsch. Serv., R43458, *supra*, at 1, 6, 18-19.

B. Puerto Rico’s political self-governance does not justify excluding it from the nationalized SSI system.

1. Because Congress chose to make SSI “totally Federal” and specifically rejected a partnership or grant model, it is irrational to exclude Puerto Ricans from SSI to promote “local control” and respect “local conditions.” Gov’t Br. 23-24. When Congress creates a partnership or block-grant program, it is recognizing that its partner, the state or territory, plays an important role in shaping the program. It is inviting differentiation among subdivisions. But the point of SSI is to provide uniform protections for citizens regardless of their residence. Congress, in other words, has already recognized to some degree that national control outweighs local autonomy and that local variation must give way to a uniform federal standard, at least when it comes to disability insurance.

Congress knew—rightly so—that geographic or subdivision-based differentiation doesn’t make sense in disability assistance. Legal protections for people with disabilities aim to eliminate the obstacles “that impede people with some present, past, or perceived impairments from contributing, according to their talents, to our Nation’s social, economic, and civic life.” *Tennessee v. Lane*, 541 U.S. 509, 535-36 (2004) (Ginsburg, J., concurring) (describing the Americans with Disabilities Act). And cash assistance, housing assistance, health insurance, and other social supports make it possible for people with disabilities to achieve greater independence and inclusion—social, economic, and political. See generally Samuel R. Bagenstos, *The Future of Disability Law*, 114 Yale L.J. 1

(2004). That is, disability-assistance programs (like other federal spending programs) “function to establish a set of baseline protections that can be constitutive of citizenship.” Olatunde C.A. Johnson, Essay, *Stimulus and Civil Rights*, 111 Colum. L. Rev. 154, 166 (2011). One of those baseline protections is dignity—a value that knows no geographic bounds. See 20 C.F.R. § 416.110(c) (“Under [SSI], payments are made under conditions that are as protective of people’s dignity as possible.”).

A truly national disability-assistance program does not just protect a baseline of national citizenship (for some, anyway), it makes it portable. A portable baseline of national citizenship has long been understood as a basic promise of the Constitution. “Citizens of the United States, whether rich or poor, have the right to choose” their place of residence without jeopardizing their eligibility for welfare assistance. *Saenz*, 526 U.S. at 510. Were it otherwise (and as it is now in the territories), “[a]n indigent who desires to migrate, resettle, find a new job, and start a new life will doubtless hesitate if he knows that he must risk making the move without the possibility of falling back on state welfare assistance.” *Shapiro*, 394 U.S. at 629. And a system in which people with disabilities could not realistically “seek[] new horizons in other States” would “withhold from large segments of our people that mobility which is basic to any guarantee of freedom of opportunity.” *Edwards v. California*, 314 U.S. 160, 181 (1941) (Douglas, J., concurring).

The freedom that SSI’s nationalized structure protects is no less important for residents of Puerto Rico than other Americans. Even the *Insular Cases*

recognized that extending American citizenship to Puerto Rico residents “enabled them to move into the continental United States and becom[e] residents of any State there to enjoy every right of any other citizen of the United States, civil, social and political.” *Balzac v. Porto Rico*, 258 U.S. 298, 308 (1922). Indeed, “[i]f national citizenship means less than this, it means nothing.” *Edwards*, 314 U.S. at 183 (Jackson, J., concurring).

2. This Court’s summary disposition in *Torres* failed to appreciate the uniquely federal, uniform nature of SSI. That feature means that ruling for Respondent will not, as *Torres* feared, “destroy the independent power of each State under our Constitution to enact laws uniformly applicable to all its residents.” 435 U.S. at 4-5. It would recognize that excluding some Americans from an otherwise nationalized assistance program based on where they live within the United States makes no sense.

Moreover, whatever precedential force *Torres* may have as to whether the exclusion of Puerto Rico from SSI violates the constitutional right asserted in that litigation (the right to travel), the decision simply did not address the issue relevant here: whether it is rational under the Equal Protection Clause to deny SSI benefits to a subset of Americans based on their territorial residence. The answer is no—and certainly not because of the importance of Puerto Rico’s home rule. The very purpose of SSI was to create a “totally Federal” program and nationalize standards for eligibility and benefits, thus empowering people with disabilities to carry on lives of national scope free from the interference of state or territorial borders.

Torres has also been eclipsed by changes in the law. Since 1978, there has been a fundamental shift in disability-rights law, with both Congress and the Court coming to recognize the vital importance of affording individuals with disabilities a full and meaningful opportunity to participate in society. For example, Congress enacted the Americans with Disabilities Act of 1990 in response to the “compelling need for a clear and comprehensive national mandate to eliminate discrimination against disabled individuals, and to integrate them into the economic and social mainstream of American life.” *PGA Tour, Inc. v. Martin*, 532 U.S. 661, 675 (2001) (quotation marks and citation omitted). Congress chose a “dignity-respecting national solution,” reflecting the reality that “in diverse parts of our Nation, ... persons with disabilities encounter access barriers to public facilities and services” and one’s ability to overcome those access barriers should not depend on one’s place of residence. *Lane*, 541 U.S. at 538 (Ginsburg, J., concurring). And in more recent years, Congress has maintained the national character of SSI even as it has devolved more authority to states in the provision of welfare in other programs. See Andrew Hammond, *Welfare and Federalism’s Peril*, 92 Wash. L. Rev. 1721, 1729-41 (2017). The idea that a nationalized system best serves the goals of disability assistance has only grown stronger over time.

C. The Government’s self-rule defense of SSI discrimination fails for additional reasons.

The Government’s self-rule defense fails to hold water for additional reasons, including that

discrimination in public benefits actually makes it harder for Puerto Rico to serve its people. AABD's funding caps force the local government to cover fewer people and at lower benefit levels. Gov't Br. 4. Given the dearth of local resources, increasing eligibility and benefit levels would mean taking away resources for other desperately needy residents. This dilemma is hardly the kind of "choice[]" that empowers Puerto Rico or helps "promote the general welfare" there. Gov't Br. 23-24. And making it harder for Puerto Ricans to escape poverty certainly doesn't make Puerto Rico more free. Without adequate resources to fill the gap Congress has left for Puerto Rico, the Government's promise of autonomy is an empty one.

The appeal to autonomy rings especially hollow at a time when a federal oversight board is exercising enormous authority over Puerto Rico's fiscal and governmental affairs—belying the Government's claim that "the Commonwealth functions as a largely autonomous fiscal unit" that "decides for itself how to spend the revenue it receives," Gov't Br. 22-23. *See* Resp. Br. 23-24, 40. As some have said, the current restructuring process "undermines the territory's already weak self-rule and ... its actions, including cuts to health care and education, further compromise the island's frail institutions." Cheatham, *supra*.

Finally, neither the local Puerto Rican government nor residents of Puerto Rico had the option to decide whether they would sacrifice parity in public benefits for the supposed self-governance the Government touts. Puerto Rico did not choose to have its present system instead of SSI; the decision was made in Washington without Puerto Ricans' participation.

CONCLUSION

For the foregoing reasons, and those in Respondent's brief, the Court should affirm the judgment of the First Circuit.

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