

No. 20-303

IN THE
Supreme Court of the United States

UNITED STATES OF AMERICA,
PETITIONER,

v.

JOSÉ LUIS VAELLO-MADERO,
RESPONDENT.

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

**BRIEF *AMICUS CURIAE* OF THE UNIVERSITY
OF PUERTO RICO LAW SCHOOL *AMICUS
JUSTITIAE PROBONO* PROJECT
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 extending it to Puerto Rico.

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**STATEMENT OF IDENTITY AND INTEREST
OF *AMICUS CURIAE****

Amicus Justitiae is a Pro Bono project at the University of Puerto Rico Law School composed of upper-level law students promoting social justice, human dignity and equal treatment under the law through educational activities and intervention in public interest judicial cases with socially transformative potential. *Amicus Justitiae* enhances students' commitment to public service and aims to contribute a human rights and social justice perspective to legal problems pertaining to Puerto Rico. As an official section of the UPR Law School Pro Bono project, *Amicus Justitiae* is authorized by the Law School to file this Brief.

* All parties have provided written consent to the filing of this *Amicus* Brief. No party's counsel authored this brief in whole or in part; no party or party's counsel contributed money intended to fund the brief's preparation or submission; and no person other than *Amicus* contributed money intended to fund the brief's preparation or submission.

The *Amicus Justitiae* Pro Bono project is composed of the following current and former students, who contributed to this Brief while pursuing their Juris Doctor degree at the UPR: José Rivera Aparicio, Karleen Méndez, Carla Pérez Meléndez, Ricardo Rivera, Irving Rodríguez, Kheyris Nieves, Delfín Méndez, Julia Pagán, Laura Brenes, Sofía Matos, Ana Cabán, Lourdes Cortés, Gabriela Valentín, Hiyen Rosario, Alessandra Torres, Luz Clemente.

INTRODUCTION AND SUMMARY OF ARGUMENT

When a Court applies rational basis scrutiny the constitutional system deferentially points toward the political process that brought the challenged legislation to life and highlights the discretion exercised by political institutions. Yet, deference is not boundless. Discretion “is not tantamount to license, and does not exclude criticism”. Ronald Dworkin, *Taking Rights Seriously* 33 (1978). As the Supreme Court admonished in *Romer v. Evans*, 517 U.S. 620, 632 (1996):

Even in the ordinary equal protection case calling for the most deferential of standards, we insist on knowing the relation between the classification adopted and the object to be attained. The search for the link between classification and objective gives substance to the Equal Protection Clause; it provides guidance and discipline for the legislature, which is entitled to know what sorts of laws it can pass; and it marks the limits of our own authority.

In our system, the ultimate equality guarantee prevents arbitrary and irrational treatment in all domains of government activity, even when such activity does not establish a presumptively suspect classification nor affects a fundamental right. *Romer v. Evans, supra*; *City of Cleburne v. Cleburne*, 473 U.S. 432 (1985); *Plyler v. Doe*, 457 U.S. 202 (1982); *United*

States Dept. of Agriculture v. Moreno, 413 U.S. 528 (1973). See *Trump v. Hawaii*, 138 S. Ct. 2392, 2420–21 (2018) (recognizing these cases but declining to apply to the facts of that case). And, as Justice Jackson insisted, these constraints take particular importance when legislation discriminates against politically powerless minorities, as the political correctives that would usually come to their aid would be unavailable:

Nothing opens the door to arbitrary action so effectively as to allow Federal Government officials to pick and choose only a few to whom they will apply legislation and thus to escape the political retribution that might be visited upon them if larger numbers were affected. Courts can take no better measure to assure that laws will be just than to require that laws be equal in operation. *Railway Express Agency v. New York*, 336 U.S. 106, 113 (1949) (Jackson, J., concurring).

This case presents an opportunity for this Court to reiterate these basic principles, as applied to politically disenfranchised Puerto Ricans that are most in need and that are uniquely excluded from those societal benefits provided by the United States Government to similarly situated individuals.

The traditional justifications for this discriminatory treatment date back to *Harris v. Rosario*, 446 U.S. 651 (1980) and *Califano v. Torres*,

43 U.S. 1 (1978).¹ Over 40 years ago, this Court considered these justifications and believed them to be rational enough. However, since then there have been four decades worth of economic, environmental, and demographic changes in Puerto Rico. Thus, in its evaluation of the present case, the Court should take into account updated information that bears upon the purported justifications for the challenged exclusion.

In this vein, this Brief brings into focus current information about the context in which the discriminatory structures of the challenged law operates. It also highlights some of the dramatic events that have occurred in Puerto Rico, while supporting Appellees' position that the governmental justifications for excluding Puerto Ricans from desperately needed economic assistance are not rationally related to any purported and legitimate Government interest.

¹ The justifications used in these cases are that "Puerto Rican residents do not contribute to the federal treasury; the cost of treating Puerto Rico as a State under the statute would be high; and greater benefits could disrupt the Puerto Rican economy." *Harris v. Rosario*, 446 U.S. 651, 652 (1980). *See also Califano v. Torres*, 435 U.S. 1, 5 n. 7 (1978) ("First, because of the unique tax status of Puerto Rico, its residents do not contribute to the public treasury. Second, the cost of including Puerto Rico would be extremely great Third, inclusion in the SSI program might seriously disrupt the Puerto Rican economy").

ARGUMENT**IN AFFIRMING THE LOWER COURT'S
DECISION, THIS COURT SHOULD CONSIDER
THE HISTORIC, POLITICAL, ECONOMIC AND
DEMOGRAPHIC CONTEXT IN WHICH THE
CHALLENGED DISCRIMINATORY PROGRAM
OPERATES**

The constitutional foundations of the island's relationship with the United States (U.S.) are at the heart of its economic reality. After the U. S. acquired Puerto Rico in the aftermath of the Hispanic-American War, this Court addressed how new possessions and their populations would fit in the U.S. constitutional system. By labeling Puerto Rico as an unincorporated territory, the island became "a territory ... belonging to ..., but not a part of the United States". *Downes v. Bidwell*, 182 U.S. 244, 287 (1901). As a result, many U.S. constitutional provisions are inapplicable to Puerto Rico, including the requirement that Congress exercise its taxing authority "uniform[ly] throughout the United States" U.S. Const. art. I, §8, cl. 1. Because of the territorial label, Congress is able to establish a different tax regime for Puerto Rico *vis-à-vis* States. For a good part of the twentieth century U.S. corporations in the island received favorable tax treatment for their territorial earnings and, since 1917, all bonds issued by Puerto Rico are exempt from federal, state and municipal taxes anywhere in the U.S., which made them attractive to investors. Furthermore, as an unincorporated territory, Puerto Rico is subject to

breathtaking Congressional authority under the Territorial Clause of the U.S. Constitution.²

While most U.S. federal laws are fully applicable to the territory and its population, Puerto Ricans cannot vote for the President, nor can they choose voting representation in Congress and are subjected to broad policymaking authority of unelected members of the Financial Oversight Management Board (hereinafter “FOMB”), pursuant to the *Puerto Rico Oversight, Management and Economic Stability Act* (PROMESA, Public Law 114-187). Puerto Ricans are, thus, prevented from engaging in basic political self-governance.

The linkages between Puerto Rico’s territorial status and its current economic situation are noticeable. For more than one hundred years, Puerto Rico’s economic model has been based on U.S. investment, rather than developing a solid domestic economic foundation. U.S. controlled sugar production was the gravitational center of the island’s economy for more than 30 years at the beginning of the twentieth century, to be later replaced by U.S. manufacturing companies. Since the mid 1940s, and through the end of the century, the main development strategy was to attract economic investment from U.S. corporations. However, Puerto Rico’s seemingly prosperous growth was built upon hollow foundations

² This provision allows Congress to “make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States” U.S. Const. art. IV, §3, cl. 2. *See generally*, Rivera Ramos, E., *The Legal Construction of Identity: The Judicial and Social Legacy of American Colonialism in Puerto Rico* (2001); Duffy Burnett, C. et al., *Foreign in a Domestic Sense: Puerto Rico, American Expansion, and the Constitution* (2001).

laid by Congressional territorial powers: tax exemptions to U.S. corporations underwrote U.S. industries in the island at the expense of local industrial development. James Dietz, *Historia Económica de Puerto Rico* (1989); Carlos Díaz Olivo, *La autonomía de Puerto Rico y sus lecciones en términos fiscales y económicos, in L'abast de l'autonomia política de Puerto Rico / El alcance de la autonomía política de Puerto Rico* 26-39 (2005). While many factors (political, institutional, demographic, financial) have contributed to Puerto Rico's economic decline, Congressional repeal of those tax incentives in 1996 with a 10-year transition phase-out played a role in dismantling Puerto Rico's fragile economic foundations. Krueger, et al., *Puerto Rico—A Way Forward* (2015); Alameda, J., et al., *Propuesta para una Nueva Estrategia de Desarrollo para Puerto Rico: Sustentabilidad, Equidad y Seguridad Social* 10-13 (2013).

The reasons for Puerto Rico's indebtedness are manifold, but it is clear that a "major driver of public-sector debt was the stagnation of the economy". Federal Reserve Bank of New York, *An Update on the Competitiveness of Puerto Rico's Economy* 10 (2014). In this economic context, debt issuances became an important source of income to finance public projects and operational expenses. Puerto Rico's highly coveted triple tax-exempt bonds — also enacted pursuant to Congressional territorial authority — allowed easy access to borrowed dollars. As a result, public debt grew dramatically from 63.2% of Puerto Rico's GNP in 2000 growing, to 100.2% by 2015. Krueger, et al. *supra*. Puerto Rico's debt swelled from roughly 16 billion USD in 1995, to 40 billion in 2005 and 72 billion in 2015. Joffe & Martínez, *Origins of*

the Puerto Rico Fiscal Crisis 30-33 (Mercatus Center, George Mason University 2016). In addition, pension systems are effectively insolvent: as of 2016 total pension liabilities amounted to 49 billion USD, with a funded ratio of 1.6%. Commonwealth of Puerto Rico, *Financial Information and Operating Data Report* 209-246 (2016). A 2019 FOMB report indicates that Puerto Rico's pension systems have the lowest funding ratio, when compared to the fifty states. FOMB, *PROMESA Section 211 Report on the Puerto Rico Retirement Systems* 20-21 (September 2019).

Compounding Puerto Rico's gradual economic troubles, since the tax incentive phase-out the island experienced the direct impact of the financial crisis of 2008, and the aftermath of hurricanes Irma and María in 2017. With a death toll nearing 3,000 people,³ hurricanes Irma and María had a substantial effect on the island's economy, housing security and unemployment rates. To make matters worse, since the end of 2019, Puerto Rico has been suffering from an ongoing seismic sequence that caused a 6.4 earthquake resulting in severe damage on many municipalities. U.S. Geological Survey, *Magnitude 6.4 Earthquake in Puerto Rico*, (January 29, 2020).⁴ As a result, many families lost their homes, and now face even more dire economic situations.⁵ The United

³ See Milken Institute School of Public Health, *Ascertainment of the Estimated Excess Mortality from Hurricane Maria in Puerto Rico* (August 2018), available at <https://prstudy.publichealth.gwu.edu/>

⁴ Available at <https://www.usgs.gov/news/magnitude-64-earthquake-puerto-rico>

⁵ On the recent natural disasters and their social effects, see generally, Ayuda Legal Puerto Rico, *Second Report: Towards a*

States Geological Service estimates that “[a]ftershocks will persist for years to decades, although with decreasing frequency”. N.J. van der Elst, J.L. Hardebeck, and A.J. Michael, *Potential duration of aftershocks of the 2020 southwestern Puerto Rico earthquake: U.S. Geological Survey Open-File Report 2020-1009* (2020).⁶

Moreover, the effects of the humanitarian crisis that has built up in Puerto Rico are now being compounded by the current COVID-19 epidemic. As elsewhere, the Puerto Rican economy has been severely impacted by the pandemic. FOMB, *2021 Certified Fiscal Plan for the Commonwealth of Puerto Rico* 30 (April 23, 2021).⁷ And while extraordinary Federal Government support has “played an essential role in helping to mitigate the unprecedented economic damage from the sudden economic shock caused by the pandemic”, *Id.* at 36, most of that funding will be spent in a few years, *Id.* at 38-39, and its impact will be short lived. The FOMB projects “a post-pandemic recovery in FY2021 and FY2022, followed by limited real growth between FY2023 and FY2029”, *Id.* at 59. Yet, “[a]s disaster relief funding and the spending of COVID-19 federal and local stimulus funds drop off considerably and structural reform growth rates are muted, GNP growth returns to its historical negative trend starting in FY2030.” *Id.* See also *id.* at pages 62-63.

Just Recovery, The response in the face of disasters and the Puerto Rico that is possible, September 2020 (available at <https://www.ayudalegalpuertorico.org/publicaciones/>)

⁶ Available at <https://pubs.er.usgs.gov/publication/ofr20201009>

⁷ Available at <https://oversightboard.pr.gov/fiscal-plans-2/>

Of course, the brunt of this social and economic debacle falls on the most vulnerable. For example, Puerto Ricans who are older than 60 years of age and mostly retired or about to retire, end up living on pensions and retirement plans that provide mostly fixed incomes. Puerto Rico Department of Labor, *Personas de 60 años y más: Estado de Empleo y Desempleo* 3 (July 2019).⁸ Yet, with a retirement system under stress, public pension systems have been amended in recent years impacting employees' benefits. FOMB, *PROMESA Section 211 Report on the Puerto Rico Retirement Systems*, 11-13 (September 2019).⁹ Additionally, the current FOMB fiscal plan establishes an 8.5 percent reduction to all government retirees who receive more than \$1,500 per month. FOMB, *2021 Certified Fiscal Plan for the Commonwealth of Puerto Rico* 275-276 (April 23, 2021).¹⁰

Facing the economic difficulties described above, between the years 2010 and 2019, about six hundred and seven (607,000) people moved from Puerto Rico to the United States. Alberto L. Velázquez-Estrada, *Perfil del Migrante 2018-2019*, Instituto de Estadísticas de Puerto Rico (June 1, 2021).¹¹ The effect of recent natural disasters has

⁸ Available at <http://www.mercadolaboral.pr.gov/lmi/pdf/Grupo%20Trabajador/2018/PERSONAS%20DE%2060%20A%c3%91OS%20Y%20MÁS.pdf>

⁹ Available at https://drive.google.com/file/d/1eJGQ-gRaSci1T_IxTqHzjLoRxExEkX1/view

¹⁰ Available at <https://oversightboard.pr.gov/fiscal-plans-2/>

¹¹ Available at

been an important catalyst for outward migration, impacting the already existing movement patterns from Puerto Rico to the United States. The hurricanes alone resulted in an approximate net migration of 112,551 Puerto Ricans to the United States during 2018 (the year following these natural disasters). Instituto de Estadísticas de Puerto Rico, *Migración neta alcanzó unas 113 mil personas en el 2018*, (Sept. 26 2019).¹²

Several studies reaffirm that the economic factor is the most influential for those considering emigrating to the mainland. Lara Merling and Jake Johnston, *More Trouble Ahead: Puerto Rico's Impending Medicaid Crisis*, Center for Economic and Policy Research (October 2017);¹³ José Aníbal Flecha Ortiz et. al., *Un análisis de factores sobre la crisis de la migración calificada de talentos en Puerto Rico*, (November 26, 2016);¹⁴ Luis García Pelatti, et al., *Suplemento Especial: Migración, Informe de la Junta de Planificación al Gobernador, Hon. Alejandro García Padilla* (March 2014).¹⁵ It is, thus, possible

<https://estadisticas.pr/index.php/en/publicaciones/perfil-del-migrante>

¹² Available at

https://censo.estadisticas.pr/sites/default/files/Comunicados/CP_2018_ACS_PRC_9_26_2019.pdf

¹³ Available at <https://cepr.net/images/stories/reports/puerto-rico-medicaid-2017-10.pdf>

¹⁴ Available at

<https://www.redalyc.org/jatsRepo/2250/225051546005/html/index.html>

¹⁵ Available at

<http://gis.jp.pr.gov/Externo/Econ/Reto%20Demogr%C3%A1fico/Suplemento%20de%20Migracion%20-%20rev.3-mar-2014.pdf>

that Puerto Ricans who have emigrated could become a spending increase for federal programs. Puerto Rican migration to Florida, Texas, Connecticut, Pennsylvania, Massachusetts, New Jersey, Ohio, North Carolina, Georgia and Virginia constituted 71% of all Puerto Rican migration to the states during 2019. Alberto L. Velázquez-Estrada, *Perfil del Migrante 2018-2019*, Instituto de Estadísticas de Puerto Rico 20 (June 1, 2021).¹⁶ Florida is the state with the largest migration with 44,710 and 14,657 Puerto Ricans moving to that state during 2018 and 2019, respectively. *Id.* According to the Puerto Rico Institute of Statistics, for 2019 there was an approximate total of thirty-five thousand (35,000) net migration from Puerto Rico to the United States. *Id.* at 4.

Of course, migration patterns have an impact on total population, albeit they are not the only agent of population change. Jaison R. Abel and Richard Deitz, *The Causes and Consequences of Puerto Rico's Declining Population*, Federal Reserve Bank of NY, Current Issues in Economics and Finance, Vol 20, Number 4 (2014).¹⁷ And “while net migration is a larger driver of population change in the short term, this factor is volatile; in the long run, net migration is projected to return to more balanced trends.” FOMB, *2021 Certified Fiscal Plan for the Commonwealth of*

¹⁶ Available at

<https://estadisticas.pr/index.php/en/publicaciones/perfil-del-migrante>

¹⁷ Available at

https://www.newyorkfed.org/medialibrary/media/research/current_issues/ci20-4.pdf

Puerto Rico 41 (April 23, 2021).¹⁸ Yet, “natural population change is not guaranteed to rebalance at any point, and births are likely to continue declining, while deaths are projected to slowly rise in the mid-term”. *Id.* According to the most recent Puerto Rico Fiscal Plan, “by FY2026, there will be almost 10% fewer people living on the Island than in FY2019, and that by FY2051, the drop will grow to 33%. *Id.* In fact, between the 2010 and the 2020 Census, the population of Puerto Rico decreased by a net amount of 439,915, a reduction of 11.8%.¹⁹

Furthermore, as shown by a recent analysis commissioned by the FOMB, Puerto Rico’s demographic changes have altered the Island’s age distribution. Puerto Rico’s median age increased from 32.1 in 2000, to 43.2 in 2019. FOMB, *Human Capital Development in Puerto Rico: An Overview* 19 (2020). This reflects “a decline in younger populations (age groups ranging from 0 to 44) and an increase in older age groups (55 and over)”. *Id.* In fact, the 2020 decennial Census reflects a net reduction of 342,324 individuals under the age of 18, as compared with the total amount of that population in the 2010 Census.²⁰

¹⁸ Available at <https://oversightboard.pr.gov/fiscal-plans-2/>

¹⁹ U.S. Department of Commerce, U.S. Census Bureau, 2020 Census Apportionment Results: Table E. Numeric and Percent Change in Resident Population of the 50 States, the District of Columbia, and Puerto Rico: 2020 Census and 2010 Census, April 26, 2021, available at <https://www.census.gov/data/tables/2020/dec/2020-apportionment-data.html>

²⁰ Compare 874 individuals under the age of 18 in the 2020 Census (Stella U. Ogunwole, Megan A. Rabe, Andrew W. Roberts, and Zoe Caplan, Population Under Age 18 Declined Last Decade,

Whereas in 2010 the population under 18 years consisted of 24.2% of the total population, today this group is reduced to 17.1%.²¹ The FOMB study shows that:

In 2000, 39.9% of the population was 24 years old or younger, while those over 65 years of age comprised 11.2%. By 2019, the 0-24 age group made up only 27.4% of the population, and individuals aged 65 and over almost doubled its share to 21.3% of total population. FOMB, *Human Capital Development in Puerto Rico: An Overview* 19 (2020)

To the extent there is a link between the strengthening of human capital and economic growth, these demographic changes present crucial challenges for present day Puerto Rico, deepening its current and future challenges. *Id.* at page 19 (“If turning Puerto Rico into a learning society is an important objective in strengthening human capital,

<https://www.census.gov/library/stories/2021/08/united-states-adult-population-grew-faster-than-nations-total-population-from-2010-to-2020.html>) with 903,295 individuals in the 2010 Census (US Department of Commerce, United States Census 2010, Puerto Rico 2010: Summary Population and Housing Characteristics (September 2012)). See also Ricardo Cortés Chico, *Puerto Rico pierde su población de menores*, El Nuevo Día, August 24, 2021.

²¹Stella U. Ogunwole, Megan A. Rabe, Andrew W. Roberts, and Zoe Caplan, Population Under Age 18 Declined Last Decade, <https://www.census.gov/library/stories/2021/08/united-states-adult-population-grew-faster-than-nations-total-population-from-2010-to-2020.html>

... then the age composition becomes critical because a younger population can be more conducive to learning and innovation”).²²

Evidently, the economic and political situation in Puerto Rico is not the same as when *Harris, supra*, and *Califano, supra*, were decided. People living in Puerto Rico have suffered dramatic changes in their living conditions and have shown great resilience. However, with a poverty rate of 44%, and 57% of children in poverty,²³ the prospects of economic recovery are uncertain, to say the least, and the Island is experiencing a wave of outward migration and population change that could further negatively impact the economy and people’s wellbeing in the long term.

²² See also Maricarmen Rivera Sánchez, *Siguen a la baja los nacimientos*, February 1, 2021, https://www.elvocero.com/gobierno/siguen-a-la-baja-los-nacimientos/article_62080376-644d-11eb-8206-73098e6373c1.html (interviewing experts on the economic effects of population decline).

²³ Puerto Rico State Data Center, *En pobreza el 50% o más de la población en 36 Municipios de Puerto Rico*, SDC-PR (Dec. 19, 2019), available at <https://censo.estadisticas.pr/Comunicado-de-prensa/2019-12-19t145558>; Instituto para el Desarrollo de la Juventud, *Youth and Children Wellbeing Index* (2021), available at <http://juventudpr.org/bienestarinicio.html>; The Annie E. Casey Foundation, *2021 Kids Count Data Book: State Trends in Child Well-Being*, Appendix B, page 33 (2021), available at <https://www.aecf.org/resources/2021-kids-count-data-book>.

CONCLUSION

Under a rational basis test, this Court is tasked with determining whether the governmental justifications for excluding Puerto Ricans from desperately needed economic assistance are rationally related to any purported and legitimate Government interest or not. This *Amicus* has provided information on the socioeconomic context in which this exclusion is occurring. Despair, destruction, poverty, inequality and political subordination are part of the structural backdrop for the unequal treatment that the challenged programs establish. This context cannot be ignored as this Court evaluates the irrationality of the severe disparate treatment to Puerto Ricans that is challenged in this case.

For the foregoing reasons, the judgment below should be affirmed.

Respectfully submitted,

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