

No. 20-303

In the
Supreme Court of the United States

UNITED STATES OF AMERICA,
Petitioner,

v.

JOSE LUIS VAELLO-MADERO,
Respondent.

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

**BRIEF OF *AMICUS CURIAE* SENATE OF
PUERTO RICO 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, and the Northern Mariana Islands pursuant to a negotiated covenant, but not extending it to Puerto Rico.

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INTEREST OF THE *AMICUS CURIAE*¹

The Senate of Puerto Rico respectfully submits this brief as *amicus curiae* in support of Respondent and for affirmation of the judgment of the Court of Appeals for the First Circuit, hereinafter “First Circuit.” U.S. citizens in Puerto Rico enjoy much lesser rights than those residing in the mainland merely because Congressional authority over the Island stems from the Territorial Clause. U.S. Constitution, Art. IV, Section 3, Clause 2. This unconstitutional disparity has no place within American Democracy. It never has. Congressional authority over a territory cannot exist without the rest of the rights and protections afforded by the U.S. Constitution applying to and being enforced in favor of the citizens residing in that jurisdiction. The Senate of Puerto Rico contends that the 3.2 million U.S. citizens living in Puerto Rico must be afforded the rights and privileges they have earned and their fellow citizens living in the States enjoy. Anything less would be discriminatory. And unconstitutional.

On August 25, 2017, Petitioner, United States of America, commenced an action against Respondent, Jose Luis Vaello-Madero, a Social Security Administration (SSA) Title XVI Supplemental Security Income (SSI) disability beneficiary, to collect \$28,081.00 in overpaid SSI benefits after he moved to Puerto Rico. As the Petitioner alleged, the SSI is a federal income supplement program funded by general tax revenues (not Social Security taxes)

¹ Counsel for *amicus* certifies that this brief was not authored in whole or in part by counsel for any party and that no person or entity other than *amicus* or their counsel have made a monetary contribution to the preparation or submission of this brief. All parties have consented to the filing of this brief.

that require the beneficiary to be a U.S. resident to benefit from it, effectively excluding and discriminating against Puerto Rico. The district court and the First Circuit ruled that excluding U.S. citizens residing in Puerto Rico from the SSI program unconstitutionally goes against the Equal Protection component of the Fifth Amendment. This case involves issues of great importance to U.S. citizens residing in Puerto Rico who are constantly subjected to the unconstitutional act of being excluded from the SSI program for the sole reason of them being residents of Puerto Rico.

SUMMARY OF THE ARGUMENT

The Senate of Puerto Rico supports Respondent's position and the affirmance of the First Circuit who, in its decision, determined that excluding U.S. citizens residing in Puerto Rico from the SSI program constitutes a violation of their right to equal protection of the law under the Fifth Amendment.

Petitioner, seeking reversal of the First Circuit decision, alleges (1) that this case is governed by the opinions issued by this Court in the cases of *Califano v. Torres*, 435 U.S. 1 (1978) and *Harris v. Rosario*, 446 U.S. 651 (1980); and, (2) that, even if those decisions are not dispositive of this case, there is a rational basis for the classification created by Congress by excluding the U.S. citizens residing in Puerto Rico from the SSI program.

The Senate of Puerto Rico contends that the First Circuit correctly interpreted the proper applicability of the Torres and Rosario decisions to the question of whether excluding U.S. citizens residing in Puerto Rico

from the SSI program is constitutional. Furthermore, even when utilizing the very deferential rational-basis scrutiny, the exclusion test is not satisfied. To that effect, the Senate of Puerto Rico wholeheartedly disagrees with Petitioner and finds that its allegations are devoid of merit and posits that this court must affirm the judgment of the First Circuit.

Moreover, the Senate of Puerto Rico asserts that Congress has discriminated against U.S. citizens residing in the Commonwealth of Puerto Rico by excluding them just because they reside in Puerto Rico from the benefits of the SSI program.

ARGUMENT

I. Congress discriminates against U.S. citizens residing in Puerto Rico by excluding them from the SSI program based on race and/or national origin.

Petitioner's arguments are devoid of any merits. As explained further, the *Rosario* and *Torres* decisions rest on the obsolete, discriminatory, repugnant, and, above all, constructed and unfounded constitutional assertion that Congress's plenary powers over Puerto Rico and the millions of U.S. citizens that reside on the Island are akin to absolute, monarchical, or tyrannical power and can be exercised without any regard to the limits and protections imposed by the rest of the U.S. Constitution.

Rosario and *Torres*, along with all the infamous and anachronistic Insular Cases, are a dark chapter in this Court's history. The Insular Cases, and their progeny, are an outdated judicial construction with no basis or

support in the plain and original text of the Territory Clause of the Constitution. Perhaps, this is the adequate opportunity for this Court to right a wrong and write a new chapter affirming the constitutional Equal Protection of rights for all U.S. citizens.

a. The Insular Cases

Puerto Rico became a territory of the United States because of the Spanish-American war, which concluded with signing the Paris Treaty. *Puerto Rico v. Sánchez Valle*, 136 S. Ct. 1863, 1868 (2016). Since the signing of the Treaty, Congress has been tasked with determining “[t]he civil rights and political status of its inhabitants.” *Treaty of Paris*, Art. 9, Dec. 10, 1898, 30 Stat. 1759. *See also Id.*

Congress assumed that prerogative with the adoption of organic acts for the internal governance of Puerto Rico in 1901, *P.L. 56-191, 31 Stat. 77 (1901)*, and 1917, *P.L. 64-368, 39 Stat. 951 (1917)*. This latter Act of Congress gave U. S. citizenship to the people residing in Puerto Rico at the time. Further federal legislation, namely the “Inmigration and Naturalization Act of 1952”, established that all persons born in Puerto Rico are natural-born U.S. citizens. *P.L. 82-414, 66 stat. 163 (1952)*.

When the two original organic acts were being adopted, a series of legal controversies regarding the status of those residing in Puerto Rico and the extent of the applicability of the Constitution to the Island arose and reached this honorable court. These are known as “the Insular Cases,” and, as this case shows,

they continue to be both a problem and a blemish to the democratic and egalitarian fabric of this Nation.

The Insular Cases set forth a precedent of discrimination towards the U.S. Citizens living in Puerto Rico based on race and national origin. In short, the Insular Cases concluded that Puerto Rico is a territory appurtenant and belonging to the United States, but not a part of the United States, *Downes v. Bidwell*, 182 U.S. 244 (1901), and that only the “guaranties of certain fundamental personal rights declared in the Constitution” applied to persons residing in Porto Rico.” (*Balzac v. Porto Rico*, 258 U.S. 298, 312-313 (1922)).

Even in its clearly discriminatory nature, this last Insular Case ends up having to recognize “that no person could be deprived of life, liberty, or property without due process of law, had from the beginning full application in the Philippines and Porto Rico.” Id at 313. Notwithstanding that exception, the blemish of this jurisprudence remains to this day. There is discrimination against U.S. citizens in their access to fundamental social programs solely because they reside in the Commonwealth of Puerto Rico.

b. Equal Protection

Equal protection is a component of the liberty interest protected by due process under the Fifth Amendment, coextensive with the Fourteenth Amendment. U.S. Const. Amend. V, XIV; *United States v. Windsor*, 570 U.S. 744, 774 (2013); *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 224 (1995); *Weinberger v. Wiesenfeld*, 420 U.S. 636, 638 n.2 (1975).

Equal protection “commands that no State shall ‘deny to any person within its jurisdiction the equal protection of the laws,’ which is essentially a direction that all persons similarly situated should be treated alike” *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 439 (1985) (internal citations omitted). Equal protection applies in Puerto Rico. *Examining Bd. of Engineers, Architects & Surveyors v. Flores De Otero*, 426 U.S. at 600.

When faced with legislation that establishes a classification on which to base disparate treatment of particular groups of people, courts must scrutinize it to determine if it violates equal protection. See *Pers. Adm’r of Mass. v. Feeny*, 442 U.S. 256, 271-272 (1979). Courts apply different levels of review, depending on the classification at issue. *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 439-441 (1985).

“Certain suspect classifications—race, alienage, and national origin—require what the Court calls strict scrutiny, which entails both a compelling governmental interest and narrow tailoring.” *Massachusetts v. United States HHS*, 682 F. 3d 1, 8-9 (1st Cir. 2012) (citing *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 227 (1995)); see also *Cleburne*, 473 U.S. at 439-441 (suspect classifications are often “deemed to reflect prejudice and antipathy, a view that those in the burdened class are not as worthy or deserving as others,” and because “such discrimination is unlikely to be soon rectified by legislative means.”); *Washington v. Davis*, 426 U.S. 229, 239 (1976) (noting that a “central purpose” of equal protection “is the prevention of official conduct

discriminating based on race”). Gender-based classifications invoke intermediate scrutiny and must be substantially related to achieving an important governmental objective. Both are far more demanding than the rational basis review conventionally applied in routine commercial, tax, and like regulation matters. *United States HHS*, 682 F. 3d at 9.

The exclusion of U.S. citizens residing in Puerto Rico from SSI program benefits must be held to a stricter standard of review than rational basis. *Consejo de Salud Playa de Ponce v. Rullán*, 586 F. Supp. 2d 22, 44 (D.P.R. 2008). Courts will ordinarily review deferentially legislative classifications because “absent some reason to infer antipathy, even improvident decisions will eventually be rectified by the democratic process.” *FCC v. Beach Commc’ns, Inc.*, 508 U.S. 307, 314 (1993). However, a “more searching judicial inquiry” is warranted in cases of “prejudice against discrete and insular minorities” unable to effect change through the political process that prevents them from protecting their interests. *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938); see also *Cleburne*, 473 U.S. at 440; *Plyler v. Doe*, 457 U.S. 202, 216 n.14 (1982); *Toll v. Moreno*, 458 U.S. 1, 23 (1982) (Blackmun, J., concurring); *Personnel Adm’r v. Feeney*, 442 U.S. 256, 272 (1979).

II. *Califano v. Torres*, 435 U.S. 1 (1978) and *Harris v. Rosario*, 446 U.S. 651 (1980) are not dispositive in this case.

Petitioner erroneously argues that *Califano v. Torres*, 435 U.S. 1 (1978) and *Harris v. Rosario*, 446 U.S. 651 (1980) effectively shut out the First Circuit’s

decision. In the cases mentioned above, this Court, unfortunately, concluded that Congress, under the iron cloth of the Territory Clause of the United States Constitution,² can blatantly discriminate against Puerto Rico if the action is rationally based. *Torres*, 435 U.S. at 5; *Rosario*, 446 U.S. at 651-652.

The *Rosario* Court dealt with a Fifth Amendment Equal Protection challenge to the Aid to Families with Dependent Children program (AFDC program), 42 U.S.C. §601 et seq. The AFDC program provides federal financial assistance to families with needy and dependent children residing in States and Territories of the Union; however, Puerto Rico (a territory) receives less assistance than the States. *Id.*, at 651. The *Rosario* Court determined that, pursuant to the Territory Clause, Congress may “treat Puerto Rico differently from the States so long as there is a rational basis for its actions.” *Id.*, at 651-652. No authority was cited, no developed discussion in support of this statement was made. Moreover, relying on *Califano v. Torres*, the Court decided that this discriminatory treatment was grounded on a rational basis. No analysis of whether the statute constituted invidious discrimination based on race and/or national origin was made.

So, the question becomes obvious: Is the mere judicial intuition that there may be a rational base for discriminating against the U.S. citizens residing on the territory enough for that discrimination to stand constitutionally? Or does the rationale for congressional discrimination has to be asserted and

² U.S. Const., Art IV, §2 cl.2.

justified? The former seems outright unjustifiable. The latter is problematic under the Equal Protection standards previously discussed.

The *Torres* Court reversed a Puerto Rico decision that invalidated the same SSI program provisions that we discuss in this case because they violated the plaintiff's right to travel. The *Torres* Court stated by way of footnote that Congress has the power to discriminate against Puerto Rico because of the "unparalleled" relationship with the United States. The *Torres* Court also stated that, despite plaintiff invoking his right to travel, a rational basis would be used in order to review the law because it is "a law providing for governmental payments of monetary benefits," and those type of ostent statutes enjoy a "strong presumption of constitutionality." *Id.*, at p. 5. No analysis regarding the SSI's discriminatory provisions based on race and/or national origin or equal protection component of the Fifth Amendment was made.

Torres nor *Rosario* do not establish that excluding the U.S. citizens residing in Puerto Rico from the SSI program is constitutional. *Rosario* dealt with a different federal aid program for which a rational-basis review analysis under equal protection would be different. *Torres*, on the other hand, addresses the SSI program and that no argument was raised regarding the validity of this exclusion under the equal protection component of the Fifth Amendment.

When analyzing *Rosario* and *Torres*, the First Circuit stated that "What should be patently clear is that the Court ruled in [Torres] on the validity of SSI's treatment of the persons residing in Puerto Rico, as

affected by the right to travel, while in [Rosario] it was called to pass upon differential treatment of block grants under the AFDC program in light of the equal protection component of the Fifth Amendment. Contrary to Appellant's contention, the Court has never ruled on the validity of alleged discriminatory treatment of Puerto Rico residents as required by the SSI program under the prism of equal protection." *United States v. Vaello-Madero*, 956 F. 3d 12, 19-21 (1st Cir. 2020).

In the end, *Rosario* and *Torres* are not the correct case law to challenge the First Circuit's decision. They lack merit because, ultimately, they rely solely on the previously questioned Insular Cases. The constitutional question presented in this case cannot be casually cast away without a thorough equal protection analysis.

III. The First Circuit is correct in determining that U.S. citizens residing in Puerto Rico have been discriminated against when excluded from the SSI program.

As the Commonwealth of Puerto Rico correctly states in their Amicus Curiae brief before this Court, the First Circuit applied a rational basis review to the controversy it was presented with, a controversy of claims under the equal protection component of the Fifth Amendment. To that effect, the Appellate Court determined that excluding U.S. citizens residing in Puerto Rico from the SSI program did not satisfy its standard of review. The Senate of Puerto Rico contends that the First Circuit made the correct determination.

The *Rosario* Court stated that the rational basis for the disparate treatment against Puerto Rico regarding the AFDC program was 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 Rico economy.” *Rosario*, 446 U.S. at 652. The Senate of Puerto Rico proceeds to explain why the *Rosario* Court erred in its analysis.

The U.S. Government Accountability Office (GAO) reported³ that in 2010, taxpayers in Puerto Rico informed payments of \$20 million to the United States. Moreover, the Internal Revenue Service Data Book revealed that the IRS collected \$3.25 billion in federal taxes on individuals and businesses in Puerto Rico during the 2015 Fiscal Year.⁴

This information corroborates the fact that U.S. citizens residing in Puerto Rico are paying federal taxes. Furthermore, by general rule, federal law requires that individuals and businesses in Puerto Rico pay federal tax on income earned outside the territory, be it in foreign countries or the United States. Federal law also requires employers and employees in Puerto Rico to pay all federal payroll taxes used to fund Social

³ U.S. Government Accountability Office, GAO-14-31.

⁴ See Internal Revenue Service Data Book, at page 12, Table 5. Retrieved on July 25, 2016, from <https://www.irs.gov/pub/irs-soi/15databk.pdf>.

Security, the Medicare hospital insurance program⁵, and the federal unemployment compensation program.

While not all U.S. citizens residing in Puerto Rico pay federal taxes in the same manner as their counterparts in the mainland, it would be negligent in arguing that there are no contributions to the federal treasury on their part.

As for the argument that the Puerto Rico economy would be disrupted if Puerto Rico were to be included in the SSI program, the Senate of Puerto Rico points to a GAO report⁶ also cited by the Commonwealth stating that the only way the program could disrupt the economy would be if it disincentivized work. The Senate of Puerto Rico contends, and joins the Commonwealth's argument, that the SSI is directed towards the elderly and/or disabled, a population either retired or not able to work. If these arguments were a problem in applying for the SSI program, they would equally affect U.S. citizens in and out of the mainland. This does not justify excluding the U.S. citizens residing in Puerto Rico from the SSI program, not even under a rational basis standard.

In contrast to the situation that U.S. citizens residing in Puerto Rico are suffering, the Northern Mariana Islands residents receive SSI benefits⁷. According to Petitioner, this inconsistent treatment is based on Congress' power under the Territory clause to reach a treaty between it and Puerto Rico to form a

⁵ 26 U.S.C. §§3101, 3121(b)(i) and 3121(e)(1).

⁶ <https://www.gao.gov/assets/gao-18-387.pdf>.

⁷ <https://sgp.fas.org/crs/row/cash-aged-pr.pdf>.

Commonwealth. However, Petitioner does not challenge that by excluding Puerto Rico from the SSI program, Congress effectively placed millions of U.S. citizens residing in Puerto Rico at a disadvantageous position in comparison to U.S. citizens because of the Island's territorial status.

In arguing Congress' rational basis for excluding Puerto Rico from SSI benefits, Petitioner describes its relationship with the Island in a very different light from what it is. By arguing that Congress and Puerto Rico reached a treaty that converted the territory into a Commonwealth, Petitioner neglects the decades of disparity that the Island has suffered. For almost a century and two decades, the U.S. citizens residing in Puerto Rico have been subjected to disparity and discrimination. For the reasons stated above, the Senate of Puerto Rico understands that this Court has before it the opportunity to rectify the errors of the insular cases and begin to bring justice and equality to the millions of U.S. citizens that reside in Puerto Rico.

CONCLUSION

The judgment of the Court of Appeals for the First Circuit should be affirmed.

Respectfully submitted,

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Dated: September 7, 2021