NO. 20-303

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

JOSE LUIS VAELLO-MADERO

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

BRIEF FOR RESPONDENT

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QUESTION PRESENTED

Whether aged, blind, and disabled citizens who satisfy the need-based eligibility criteria for Supplemental Security Income (SSI) are deprived of equal protection under the Fifth Amendment when Congress excludes them from this uniform national program solely because they reside in Puerto Rico, a U.S. territory that has been held without federal voting power for more than 120 years.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Constitution

Statutes and Regulations

Legislation

Miscellaneous

INTRODUCTION

Respondent José Luis Vaello Madero is a U.S. citizen who suffered a serious illness while living in New York that left him unable to support himself. He applied for and began receiving SSI. A year later, he returned to Puerto Rico to be closer to family, as any person with a disability might do, and continued to receive SSI. About three years later, the Social Security Administration notified him that it was revoking his benefits retroactively to the date he established residency on the island, because he was supposedly "outside the United States." J.A.39, 45.

The government sued respondent in the U.S. District Court for the District of Puerto Rico, invoking civil and criminal statutes to recover $28,081 in alleged overpayments. Respondent disputed the liability, asserting that denying SSI to eligible citizens solely because they reside in Puerto Rico violated equal protection under the Fifth Amendment. The First Circuit agreed that there was no rational basis for excluding otherwise-eligible Puerto Rico residents from SSI, a uniform national program.

Petitioner now seeks to overturn that decision, arguing that Congress can treat Puerto Rico differently solely because of the island's "unique" status and "unparalleled" relationship with the United States. Petitioner claims that Puerto Rico's "unique" status benefits its residents because it means that they pay less federal taxes and can take care of their own. According to petitioner, Congress can legitimately deny the neediest citizens in Puerto Rico equal access to federal benefits as a "price" for this local autonomy. Not only is this explanation wildly out of touch with Puerto Rico's political and

fiscal reality, but it also fails to explain why poor and disabled Americans in Puerto Rico must carry this burden when similarly situated Americans in the most autonomous jurisdictions in our federated system, states, are not required to make this sacrifice.

More fundamentally, petitioner's argument shows that the exclusion of otherwise-eligible citizens in Puerto Rico is not only arbitrary, but also invidious.

Puerto Rico's "unique" status means only one thing: Although Puerto Rico is a U.S. territory that has been subject to U.S. control for more than 120 years, the people of Puerto Rico (U.S. citizens by birth) have no federal voting power and lack the political power to set their own destiny. That political powerlessness was built on a quagmire of racial and ethnic discrimination. In fact, Congress's decision to exclude Puerto Rico from SSI solely on the premise that it is "outside the United States" can be traced directly to a historical desire to single out the people of Puerto Rico for lesser treatment because of their mixed race and Hispanic ancestry.

In *Downes* v. *Bidwell*, 182 U.S. 244 (1901), a fractured majority of this Court held that there was a distinction between "incorporated" territories, integral to the United States, and so-called "unincorporated" territories that, although "belonging to the United States," could nevertheless be treated as "foreign to the United States." *Downes* was the first of a series of Supreme Court decisions known as the *Insular Cases*, which adopted what became known as the Incorporation Doctrine. That doctrine was founded on the theory that the United States could acquire Spanish territories like Puerto Rico without integrating them into the Union out of

concern that their inhabitants belonged to "uncivilized" and "alien races" who were "unfit" to handle the full rights and duties of citizenship.

Downes was decided by nearly all of the same Justices as *Plessy* v. *Ferguson*, 163 U.S. 537 (1896). Yet, while this Court has definitively rejected *Plessy*'s "separate but equal" doctrine, the "separate and unequal" regime of the Incorporation Doctrine and its statutory legacy persists to this day. Juan R. Torruella, The Supreme Court and Puerto Rico: The Doctrine of Separate and Unequal 5 (1985).

Ignoring this history, petitioner relies primarily on two inapt, summary dispositions, *Califano* v. *Gautier Torres*, 435 U.S. 1 (1978), and *Harris* v. *Rosario*, 446 U.S. 651 (1980), to argue that Congress can treat Puerto Rico differently subject only to rational basis review, which, according to petitioner, is satisfied by invoking the constitutional distinction between states and territories. In effect, no review at all.

The Fifth Amendment demands more than that. This Court has consistently applied strict scrutiny to strike down laws that discriminate against *noncitizens*, who also lack voting power, even though the Constitution itself distinguishes between citizens and noncitizens. The district court was thus correct to conclude that strict or heightened scrutiny applied to the exclusion of Puerto Rico from SSI and that this exclusion served no other purpose than to "impose inequality" and "demean" a politically powerless, Hispanic group of citizens with "a stigma of inferior citizenship." Pet.App.38a, 44a–48a.

This Court should also reject *Califano* and *Harris*. Those cases attributed Congress's power to

discriminate against Puerto Rico to the island's "unparalleled" relationship with the United States under the *Insular Cases*—the very cases that relegated Puerto Rico's inhabitants to an indefinite state of political powerlessness and created the framework that treats them as "second-class citizens." Press Release, Statement by President Joseph R. Biden, Jr. on Puerto Rico (June 7, 2021) ("Biden Statement").

In the end, petitioner's argument is exposed for what it is: an attempt to rewrite history and wash the Incorporation Doctrine with polite language. Indeed, reversing the decision below would be a reaffirmation of the *Insular Cases*' foundational premise that the Constitution recognizes two "United States," one in which indigent and disabled citizens and noncitizens are guaranteed a minimum standard under national welfare laws and another in which similarly situated U.S. citizens who have experienced a history of discrimination can be denied the bare minimum without any voting power to change this.

It is time to put an end to that injustice.

STATEMENT OF THE CASE

A. Historical Background

A brief history of U.S.-Puerto Rico relations is necessary for understanding why Congress excluded respondent from SSI on the fiction that he is "outside the United States" and why petitioner now argues that Puerto Rico's "unique" and "unparalleled" status justifies that exclusion.

1. Through the end of the 19th century, there was no doubt that territories, like states, were "part of" the "United States." See *Cross* v. *Harrison*, 57 U.S.

164, 198 (1854); *Loughborough* v. *Blake*, 18 U.S. 317, 319–20 (1820). Discussion about the place of territories in the nation instead sought to reconcile the Constitution's republican ideals, see Federalist No. 39 (James Madison 1788), with Congress's plenary power over territories without voting rights. Sensitive to concerns about despotism, Congress and the courts justified this condition as a temporary step on the path to statehood. See *O'Donoghue* v. *United States*, 289 U.S. 516, 537 (1933); *Loughborough* 18 U.S. at 324; see also H.R. Rep. No. 577, 28th Cong., 1st Sess. 3 (1844) (rejecting a resolution that would have delayed Florida's admission as a state "for an indefinite period," because the "territorial organization * * * [was] never designed for other than a temporary purpose"); Carman F. Randolph, *Constitutional Aspects of Annexation*, 12 Harv. L. Rev. 291, 292 (1898).

Territories would not be held *indefinitely* without political rights.[1] The Northwest Ordinance tied the evolution into statehood to objective population levels in the territories, setting a precedent that was followed throughout the 19th century. See An Act to provide for the Government of the Territory Northwest of the river Ohio (Northwest Ordinance), Pub. L. No. 1-8, 1 Stat. 50 (1789); see also *Shively* v. *Bowlby*, 152 U.S. 1, 49 (1894) ("[T]he Territories acquired by Congress, whether by deed of cession from the original States, or by treaty with a foreign country, are held with the object, as soon as their population and condition justify it, of being admitted

[1] Although residents of the territories lacked *political* rights (voting power), their *personal and civil* rights were at all times fully protected "by the principles of constitutional liberty." *Murphy* v. *Ramsey*, 114 U.S. 15, 44 (1885).

into the Union as States."); see generally Arnold H. Liebowitz, Defining Status: A Comprehensive Analysis of U.S. Territorial Policy 6–10 (1989) ("This evolutionary pattern served as a check on the exercise of unrestrained Federal power and prevented exploitative Congressional action.").

2. Congress and the Court departed from this original paradigm after the United States acquired Puerto Rico, Guam and the Philippines at the end of the Spanish-American War in 1898. A vigorous national debate ensued over the status of these new "possessions." Juan R. Torruella, *The Insular Cases: The Establishment of a Regime of Political Apartheid*, 29 U. Pa. J. Int'l L. 283, 291–300 (2007). Members of Congress were deeply concerned about extending citizenship to the "alien races, and civilized, semi-civilized, barbarous, and savage peoples of these islands." José A. Cabranes, *Citizenship and the American Empire: Notes on the Legislative History of the United States Citizenship of Puerto Ricans*, 127 U. Pa. L. Rev. 391, 432–433 (1978) (quoting 33 Cong. Rec. 3622 (1900) (remarks of Sen. Depew)).

These concerns figured prominently during congressional debates leading up to the passage of the Foraker Act, Pub. L. No. 56-191, 31 Stat. 77 (1900), which imposed duties on imports from Puerto Rico to the United States to fund a territorial government. The Foraker Act was premised on the notion that Puerto Rico was not a "part of" the "United States," and so was not subject to the constitutional requirement that "all duties, imposts and excises shall be uniform throughout the United States." U.S. Const. Art. I, § 8, Cl. 1; see Cabranes,

127 U. Pa. L. Rev. at 433 (citing 33 Cong. Rec. 3690 (1900) (remarks of Sen. Foraker)).

The Court upheld the Foraker Act in *Downes* v. *Bidwell*, 182 U.S. 244 (1901). Despite contrary precedent, a divided majority affirmed Congress's views that Puerto Rico was "not a part of the United States" and so not subject to all the provisions of the Constitution. *Id*. at 287. In concurrence, Justice White reasoned that Puerto Rico was "foreign to the United States in a domestic sense, because the island had not been incorporated into the United States, but was merely appurtenant thereto as a possession." *Id*. at 341–342. Setting out views which the full Court later adopted, he concluded that Puerto Rico would not be "a part of the American family" unless Congress provided otherwise. *Id*. at 339; see *Balzac* v. *Porto Rico*, 258 U.S. 298 (1922).

The *Downes* Court was clear about the racial concerns motivating its reasoning. Writing for the Court, Justice Brown worried that children born in Puerto Rico, "whether savages or civilized," could become "entitled to all the rights, privileges and immunities of citizens" by birth. 182 U.S. at 279. Similarly, Justice White noted that incorporating territories inhabited by "uncivilized" and "alien races," as opposed to "native white inhabitants" in territories such as Florida or Alaska, risked "inflict[ing] grave detriment on the United States" because this would supposedly result in the "bestowal of citizenship on those absolutely unfit to receive it[.]" *Id*. at 306, 313, 319.

The majority in *Downes* was comprised largely of the same Justices who decided *Plessy* v. *Ferguson*, which infamously held that racial segregation through "separate but equal" facilities did not violate

equal protection. 163 U.S. 537, 552 (1896) (Harlan, J., dissenting). The result of *Downes* and the ensuing *Insular Cases* was a doctrine of "separate and unequal" treatment of unincorporated territories. Torruella, The Supreme Court and Puerto Rico 5.

Four Justices dissented in *Downes*. Chief Justice Fuller, writing for all four, concluded that the theories of the majority "substitute[d] for the present system of republican government a system of domination over distant provinces in the exercise of unrestricted power." 182 U.S. at 373. Justice Harlan wrote a separate dissent, warning that the "idea that this country may acquire territories anywhere upon the earth, by conquest or treaty, and hold them as mere colonies or provinces—the people inhabiting them to enjoy only such rights as Congress chooses to accord to them—is wholly inconsistent with the spirit and genius as well as with the words of the Constitution." *Id.* at 380.

Justice Harlan also noted a conflict between the Court's decision in *Downes* and its decision in *De Lima* v. *Bidwell*, 182 U.S. 1 (1901), which was decided on the same day. *Downes*, 182 U.S. at 385. He explained that in *De Lima*, the Court had held that Puerto Rico was no longer a "foreign country" after the United States acquired it from Spain, and that the federal government therefore could not collect "import" duties on goods shipped from Puerto Rico to the mainland. *Downes*, 182 U.S. at 385–386. He found it incomprehensible that Puerto Rico could now "be a domestic territory of the United States," while "not embraced by the words 'throughout the United States.'" *Id.* at 386. Yet, when read together, the *Downes* and *De Lima* decisions indicate that

Puerto Rico is neither a "foreign territory" nor "part of the United States."

Eventually, the Court took up the concerns expressed by Chief Justice Fuller and Justice Harlan, limiting the reach of the Incorporation Doctrine. See *Reid* v. *Covert*, 354 U.S. 1, 21–23 (1954) ("[N]either the [Insular] cases nor their reasoning should be given any further expansion."). Since *Reid*, the Court has never held that a provision of the Constitution does not apply in Puerto Rico.

Despite *Reid*'s admonition, however, the Court gave the Incorporation Doctrine new life in *Califano* and *Harris*, blessing discrimination against Puerto Rico in national legislation. *Califano* held that the exclusion of Puerto Rico from SSI did not violate the right to travel. The Court cited *Downes* and other *Insular Cases* to hold that "Congress has the power to treat Puerto Rico differently, and that every federal program does not have to be extended to it." *Califano* v. *Torres*, 435 U.S. 1, 3 n.4 (1978). Two years later, *Harris* relied on *Califano* to deny an equal protection challenge to the lower levels of funding provided to Puerto Rico under a block grant program. *Harris* v. *Rosario*, 446 U.S. 651 (1980).

3. In parallel with this jurisprudence, Congress has taken action affecting Puerto Rico's place within the Union, simultaneously cementing its social, economic and political ties to the United States, while reaffirming its "unique" status. *Puerto Rico* v. *Sánchez Valle*, 136 S. Ct. 1863, 1868 (2016).

In 1917, Congress enacted the Jones-Shafroth Act, extending U.S. citizenship to Puerto Ricans and providing that all U.S. laws would apply to Puerto Rico unless otherwise specified. Organic Act for

Puerto Rico, Pub. L. No. 64-368, 39 Stat. 951 (1917). In 1940, Congress recognized Puerto Ricans' birthright citizenship, further tying together the futures of the territory and the nation. Nationality Act, Pub. L. No. 76-853, 54 Stat. 1137 (1940).

In 1950, Congress passed Public Law 600 "so that the people of Puerto Rico may organize a government pursuant to a constitution of their own adoption." Puerto Rico Federal Relations Act (Law 600), Pub. L. No. 81-600, 64 Stat. 319 (1950). Law 600 was intended to give the people of Puerto Rico "a measure of autonomy comparable to that possessed by the States." *Examining Bd. of Eng'rs, Architects, & Surveyors* v. *Flores de Otero*, 426 U.S. 572, 597 (1976). After two years of preparation, and several changes imposed by Congress, Puerto Rico adopted a constitution and Congress approved it.[2] Act of July 3, 1952, Pub. L. No. 82-447, 66 Stat. 327. The Puerto Rican Constitution established a "commonwealth * * * within our union with the United States of America." P.R. Const. Art. I. It affirmed loyalty to the U.S. Constitution. P.R. Const. Pmbl.

The prevailing view among members of Congress was that Law 600 "would not change Puerto Rico's fundamental political, social, and economic relationship to the United States." S. Rep. No. 1779, 81st Cong., 2d Sess. 3 (1950); 82 Cong. Rec. 7844 (1952) ("They will still be under the control of Congress.") (remarks of Sen. Johnston). The

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[2] The people of Puerto Rico sought to include social and economic rights in the Commonwealth's constitution, namely rights "to social protection in the event of unemployment, sickness, old age or disability," but Congress was unwilling to grant Puerto Ricans the autonomy to do so. P.R. Const. Art. II § 20; S. Rep. No. 1720, 82d Cong., 2d Sess. 1 (1952).

Executive Branch continues to express the same view. See, *e.g.*, Report of the President's Task Force on Puerto Rico's Status 26 (2011); see also Br. for United States as Amicus Curiae 22, *Puerto Rico* v. *Sánchez Valle*, 136 S. Ct. 1863 (2016), No. 15-108 ("Federal and Puerto Rico officials understood that Puerto Rico's adoption of a constitution would not change its status under the federal Constitution."). Law 600 was used as the basis to describe Puerto Rico's relationship to the United States as "unique" among the territories. See Letter from Vernon D. Northrop, Acting Sec'ry of the Interior to the Sec'ry of State regarding Law 600 (October 9, 1952), https://history.state.gov/historicaldocuments/frus1952-54v03/d902.

Puerto Ricans have contributed in meaningful ways to the nation during the past century. Puerto Ricans have served in the United States military since World War I, with one of the largest per capita enlistments in the United States Armed Forces. See *Hearing on H.R. 856 and S. 472 Before the Comm. on Energy and Nat. Res. U.S. Senate*, 105 Cong. 92 (1998) (Statement of Hon. Carlos Romero-Barceló, Res. Comm'r of P.R.). Today, Puerto Ricans serve throughout the federal government as agency employees, ambassadors, and federal judges.

4. Congressional policy has also ensured that the economic fate of Puerto Rico's inhabitants is intertwined with, and determined by, the United States, "usually to their detriment." Liebowitz, Defining Status 29 (reviewing federal social and economic programs and how they "consistently single out the territories and their inhabitants, whether citizens or not, for special treatment").

That is particularly true with respect to Puerto Rico's neediest residents, who are categorically ineligible for many federal benefits programs targeted to low-income individuals. See, *e.g.*, 7 U.S.C. 2012(r) (Supplemental Nutrition Assistance Program, which provides food security); 42 U.S.C. 1395w-114 (Medicare Part D, which subsidizes the purchase of prescription drug plans).

Substitute programs for Puerto Rico receive less funding, have stricter eligibility requirements, and provide lower benefits. See, *e.g.*, 7 U.S.C. 2028 (funding Puerto Rico's Nutrition Assistance Program through block grants); 42 U.S.C. 1396u-5(e) (funding Puerto Rico's Medicaid program to support prescription drug insurance); see also U.S. Dep't of Agric. Food and Nutrition Serv., Implementing Supplemental Nutrition Assistance Program in Puerto Rico: A Feasibility Study 11–12 (2010); see generally Andrew Hammond, *Territorial Exceptionalism and the American Welfare State*, 119 Mich. L. Rev. 1639, 1663–1676 (2021) (providing overview of the disparate treatment of Puerto Rico in various federal welfare programs).

Congress dictates important aspects of Puerto Rico's economy. Congress places economic burdens on Puerto Rico, such as by restricting shipping to and from the island under the Jones Act, see 46 U.S.C. 55102; John Dunham & Assocs., The Jones Act: A Legacy of Economic Ruin for Puerto Rico 3 (Feb. 2019), and by imposing unfunded mandates such as costly environmental regulations, see U.S. Gov't Accountability Off., GAO-18-387, Puerto Rico: Factors Contributing to the Debt Crisis and Potential Federal Actions to Address Them 68 (May 2018). In addition to exempting Puerto Rico from certain (but

not all) federal taxes, Congress in 1976 extended a substantial tax credit to U.S. manufacturing companies that opened operations on the island. 26 U.S.C. 936(a)(1) (1976). Then, in 1996, Congress repealed Section 936, phasing it out for existing beneficiaries over ten years. Small Business Job Protection Act of 1996, Pub. L. No. 104-188, Tit. I(f), § 1601(a), 110 Stat. 1827.

Over time, these federal actions contributed to an extended economic recession driving Puerto Rico to rely increasingly on debt financing. See *Financial Oversight & Mgmt. Bd.* v. *Aurelius Inv., LLC*, 140 S. Ct. 1649, 1655 (2020); see also *id.* at 1673 (Sotomayor, J., concurring). This overreliance on debt financing was itself driven by federal law exempting Puerto Rico government bonds from federal, as well as any state or municipal taxes. 48 U.S.C. 745; see U.S. Gov't Accountability Off., Puerto Rico: Factors Contributing to the Debt Crisis 34. Between 2006 and 2016, Puerto Rico's debt nearly doubled, to a point where it was "not payable" by the Commonwealth. *Aurelius*, 140 S. Ct. at 1655. Because Congress made Puerto Rico's municipalities ineligible for federal bankruptcy relief and federal bankruptcy law preempts municipal law, Puerto Rico was not able to pursue its own debt relief plan. See *Puerto Rico* v. *Franklin Cal. Tax-Free Tr.*, 136 S. Ct. 1938 (2016).

5. The resulting impasse led Congress to enact PROMESA, 48 U.S.C. 2101 *et seq.*, which created a seven-member oversight board (the "Board") with authority "to supervise and modify Puerto Rico's laws (and budget) to achieve fiscal responsibility and access to the capital markets." *Aurelius*, 140 S. Ct. at 1655 (internal quotation marks omitted); 48 U.S.C.

2121(e)(1)(a). The President appoints all the voting members of the Board. The Governor of Puerto Rico is an *ex officio* member, but cannot vote. 48 U.S.C. 2121(e)(3).

The Board was initially appointed in 2016 and remains in place. *Aurelius*, 140 S. Ct. at 1655. "[I]n its sole discretion," the Board may reject any budget proposed by the Commonwealth as not "compliant" with the Board's fiscal plan. 48 U.S.C. 2142(c). The Board may then develop and submit its own budget that is "deemed to be approved by the Governor and the Legislature." 48 U.S.C. 2142(e)(3)–(4). The Board has imposed serious austerity measures in Puerto Rico, including with respect to healthcare. *Aurelius*, 140 S. Ct. at 1674 (Sotomayor, J., concurring).

Under PROMESA, Puerto Rico is once again subject to the control of federally appointed officers, as under the Foraker Act. While the Executive Branch has long expressed support for Puerto Rican self-determination, Congress has never committed to bind itself to the outcome of a status referendum.

B. Statutory Background

Consistent with Congress's historical practice of treating Puerto Rico differently, Puerto Rico residents are categorically excluded from SSI under the Social Security Act.

1. In 1972, Congress created SSI, "a national program to provide supplemental security income to individuals who have attained age 65 or are blind or disabled." Social Security Amendments of 1972, Pub. L. No. 92-603, 86 Stat. 1329, 1465 (codified as amended at 42 U.S.C. 1381 *et seq.*).

SSI is a program of last resort. It provides benefits directly from the federal government to

qualifying individuals under uniform national criteria. Individuals are eligible for SSI if, after applying for any other benefits for which they may be eligible, their personal and household incomes are below certain thresholds, and they are aged, blind, or disabled as defined in federal regulations. See 42 U.S.C. 1382. The annualized monthly income threshold is lower than the standard deduction that individuals are eligible to claim on their tax returns, meaning that SSI beneficiaries as a class are generally too poor to pay federal income tax. See Soc. Sec. Admin., Annual Report of the Supplemental Security Income Program 7 (2020); Rev. Proc. 2020-45, 2020-46 I.R.B. 1016.

Individuals who reside "outside the United States" for thirty days or more are ineligible for benefits. 42 U.S.C. 1382(f). For purposes of SSI, the "United States" includes only the 50 states, the District of Columbia and the Northern Mariana Islands (NMI). 42 U.S.C. 1382c(e); 20 C.F.R. 416.215; see also 48 U.S.C. 1801; Covenant to Establish a Commonwealth of the Northern Mariana Islands in Political Union with the United States of America, Pub. L. No. 94-241, § 502(a)(1), 90 Stat. 263, 268 (1976). The people of Puerto Rico are thus excluded from SSI solely on the premise that they reside "outside the United States."

2. Prior to SSI, states and territories could choose to participate in a federal block grant program known as Aid to the Aged, Blind and Disabled (AABD). 42 U.S.C. 1381 note. Under AABD, states and territories submitted "State plans" to support their residents "as far as practicable under the conditions in such State." *Ibid*. States and territories funded these plans jointly with the federal

government. 42 U.S.C. 1383 note (a). States and territories were also required to fund 50 percent of administrative costs. 42 U.S.C. 1383 note (a)(4).

Flexibility over state plans was cabined by federal eligibility requirements. See, *e.g.*, 42 U.S.C. 1382 note (a)(12), (14); 42 U.S.C. 1382 note (b)(1) (barring plans that set an age requirement higher than 65). The restrictions built into AABD were stricter for territories such as Puerto Rico, which remains subject to lower reimbursement rates and an overall annual cap on federal grants. 42 U.S.C. 1308, 1383 note (a)(2)(A), (B). The PROMESA Board currently supervises Puerto Rico's AABD expenditures. See Letter from the Fin. Oversight & Mgmt. Board to the Governor of P.R. (July 1, 2021), Ex. A at 41.[3]

3. In contrast to AABD, SSI is funded solely through mandatory appropriations from the general fund of the U.S. treasury. 42 U.S.C. 1381. States may choose to provide supplementary payments to SSI-eligible individuals or administer programs similar to the federal AABD program without those payments counting towards SSI income limits. 42 U.S.C. 1382(e). In 2019, the federal government paid out $56.2 billion in SSI benefits. Soc. Sec. Admin., 2020 SSI Annual Report 2.

SSI provides a substantially higher level of benefits to a substantially greater number of people than AABD. Br.4. Under AABD, approximately 34,401 Puerto Rico residents receive an average monthly payment of $58, while under SSI an

[3] Puerto Rico administers block grant assistance programs, including AABD, under the rubric of TANF. See Memorandum from William R. Morton, Cong. Rsch. Serv., on the Cash Assistance for the Aged, Blind, and Disabled in Puerto Rico 8 (October 26, 2016).

estimated 354,000 Puerto Rico residents would receive an average monthly benefit of $418. Ctr. on Budget and Pol'y Priorities, Policy Basics: Aid to the Aged, Blind, and Disabled 2 (January 15, 2021), https://www.cbpp.org/research/aid-to-the-aged-blind-and-disabled (estimates based on 2011 figures). SSI is the only program that provides targeted assistance to disabled children, meaning that low-income families in Puerto Rico receive no government assistance to help with the cost of caring for disabled children. *Ibid.*; see C.A. App.126–127.

C. Factual and Procedural Background

1. Respondent is a U.S. citizen who was born in Puerto Rico. In 1985, he moved to New York, where he was living when he suffered a debilitating illness that prevented him from supporting himself. With the assistance of a non-profit organization, he applied for and began receiving SSI via direct deposit into a bank account opened for this purpose with the help of the same organization. Pet.App.3a; C.A. App.31. A year later, in 2012, he moved to Loiza, Puerto Rico to be closer to family and better care for his ailing wife. He continued to receive SSI benefits. He first learned that his move made him ineligible for SSI when he registered for retirement benefits in a Social Security office in Carolina, Puerto Rico. Pet.App.3a.

Within two months, the Social Security Administration sent him two notices retroactively lowering his SSI benefits to $0 effective August 2013 solely because, by virtue of establishing residency in Puerto Rico, he was deemed to be "outside the United States." See Pet.App.4a; J.A.39, 45.

The Administration never sent a notice of overpayment, which would have allowed respondent to dispute the liability administratively.[4] J.A.52. Instead, a year later, petitioner brought suit in the U.S. District Court for the District of Puerto Rico to recover $28,081 in SSI payments that respondent had allegedly "misappropriated." J.A.19. Petitioner asserted jurisdiction under 28 U.S.C. 1345, which applies to any case "brought by the United States," and a criminal statute, 42 U.S.C. 408(a)(4), which provides for up to five years in prison. J.A.18. Under the specter of criminal prosecution, and only days after Hurricane Irma had caused extensive damage to Loiza, an SSA investigator approached respondent without the presence of attorneys in violation of SSA regulations, and asked him to sign a Stipulation for Consent Judgment. J.A.25, 37; 20 C.F.R. 422.850(a)(4)(iii). The Stipulation was presented in English, although respondent's native language is Spanish and he has only a limited understanding of English. J.A.25, 37.

2. The district court appointed *pro bono* counsel for respondent. Through counsel, respondent moved to withdraw the stipulation and asserted as a defense to liability that the exclusion of Puerto Rico residents from SSI violates equal protection under the Fifth Amendment. J.A.32–36. On cross-motions for summary judgment, the district court held that Congress cannot deny SSI benefits to otherwise-eligible individuals "simply because they reside in Puerto Rico." Pet.App.45a. It saw no purpose in the exclusion other than to "impose inequality" and

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[4] See Soc. Sec. Admin., Understanding Supplemental Security Income Overpayments, https://www.ssa.gov/ssi/text-overpay-ussi.htm.

"demean" a politically powerless, predominantly Hispanic group with "a stigma of inferior citizenship." Pet.App.38a, 44a–48a.

A unanimous panel of the First Circuit comprised of Chief Judge Howard, the late Judge Torruella, and Judge Thompson affirmed. Relying on *Harris* for the applicable level of scrutiny, the court found no rational basis for the categorical exclusion of Puerto Rico residents from SSI. Pet.App.37a.

SUMMARY OF ARGUMENT

This case asks whether, under the Fifth Amendment's equal protection guarantee, Congress may exclude otherwise-eligible U.S. citizens from SSI solely because they reside in Puerto Rico. It may not.

I. Under well-settled equal protection principles, strict scrutiny should apply to the classification of Puerto Rico residents because they are an easily identifiable, politically powerless minority that has experienced a history of racial and ethnic discrimination. Indeed, by designating Puerto Rico residents as "outside the United States," Congress invoked the historical practice of treating Puerto Rico's inhabitants less favorably on the premise that they are "foreign to the United States" because of their mixed race and Hispanic ancestry. Congress continues to hold Puerto Rico in an open-ended state of political powerlessness. This "unique" status bolsters the case for applying strict scrutiny as a check against unrestricted congressional power. Nothing in the Territories Clause changes that analysis. When Congress enacts a national welfare law and excludes only residents of so-called unincorporated territories, that exclusion is suspect.

II. The exclusion of Puerto Rico residents from SSI fails because it is not rationally related to any legitimate government interest, let alone narrowly tailored to further a compelling interest. Equal protection analysis turns on a comparison of the groups actually treated differently under a statute. Income tax exposure does not differentiate SSI-eligible individuals in Puerto Rico from SSI beneficiaries elsewhere because both groups generally earn too little to owe federal income tax. Moreover, Congress may not restrict access to public goods, including public benefits, only to those who make adequate "contributions." While local autonomy is a legitimate objective, it is not rationally related to denying SSI to the neediest Americans in Puerto Rico. SSI is a "national program" intended to alleviate poverty across the country. By eliminating local government involvement through direct federal payments to individuals, SSI fosters greater autonomy than AABD because states and territories are freed to use their own funds as they wish. Given that Congress has created a federally appointed board to oversee the Commonwealth's finances, it is implausible that Congress is attempting to promote local autonomy by continuing to deny SSI to Puerto Rico residents. Any risk of economic disruption is no greater in Puerto Rico than elsewhere.

III. To the extent *Califano* and *Harris* control, they should be overruled. Those cases were decided without full briefing or argument, and their legal and factual premises were flawed or no longer hold. Even more troubling, the only authority these cases cite in support of Congress's power to discriminate against Puerto Rico is the Incorporation Doctrine established in *Downes* and its progeny. But *Downes* belongs in the anti-canon of constitutional law; the "separate

and unequal" regime that it birthed cannot be allowed to persist. Congress does not have a legitimate reliance interest in the historical practice of maintaining substandard conditions in Puerto Rico on the fiction that it is "outside the United States." The only reliance interests worthy of protection are those of citizens like respondent, who legitimately expect that their birthright citizenship entitles them to the same SSI benefits in Puerto Rico to which they are otherwise entitled on the mainland.

ARGUMENT

Equal protection is a component of the liberty interest protected by due process under the Fifth Amendment, which is 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. *Pena*, 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. Br.12; *Examining Bd.*, 426 U.S. at 600.

I. Strict Scrutiny Should Apply to the Exclusion of Puerto Rico Residents from SSI

A. Puerto Rico Residents Are Politically Powerless and Have Suffered a History of Discrimination Based on Race and Ancestry

1. Ordinarily this Court will deferentially review 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 required in cases of "prejudice against discrete and insular minorities" whose inability to effect change through the political process 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). For instance, strict scrutiny applies to classifications based on alienage because, among other reasons, noncitizens are "an identifiable class of persons who * * * are already subject to disadvantages not shared by the remainder of the community" in that they are "not entitled to vote." *Hampton* v. *Mow Sun Wong*, 426 U.S. 88, 102 (1976); see *Graham* v. *Richardson*, 403 U.S. 365, 372 (1971).

Puerto Rico residents are a quintessential example of a politically powerless "discrete and insular" minority. See *Lopez* v. *Aran*, 844 F.2d 898, 913 (1st Cir. 1988) (Torruella, J., concurring in part and dissenting in part). By virtue of its status as a territory, Puerto Rico has no Electoral College votes and consequently its residents do not vote in Presidential elections. Puerto Rico has no senators and its sole representative in Congress is a non-voting resident commissioner. Pet.App.45a. This lack of voting power means Puerto Rico residents were not able to vote for or against their exclusion from SSI, and they cannot vote to modify it. *Ibid.*; see *Cleburne*, 473 U.S. at 440. Although constitutionally designed, these voting restrictions were only meant

to be temporary because territories were traditionally "destined for Statehood." *Boumediene* v. *Bush*, 553 U.S. 723, 757 (2008). But Congress's ambivalence towards Puerto Rico has led to its "unique" status—an indefinite state of limbo in which more than three million Americans on U.S. soil lack federal voting power and the ability to change this situation on their own.[5]

While Law 600 was intended to provide a degree of local self-rule similar to what is available in the states, *Examining Board*, 426 U.S. at 597, this Court has made clear that Congress, not the people of Puerto Rico, remains the "ultimate source" of Puerto Rico's power. *Puerto Rico* v. *Sánchez Valle*, 136 S. Ct. 1863, 1876 (2016). Indeed, Congress has unilaterally replaced local self-rule with a federally appointed Board under PROMESA. The only locally elected official on the Board, the Governor of Puerto Rico, cannot vote. Today, the Board "supervise[s]" the Commonwealth's finances. *Financial Oversight & Mgmt. Bd.* v. *Aurelius*, 140 S. Ct. 1649, 1649 (2020). The Board has the power to determine Puerto Rico's budget and override laws with a mission to achieve "fiscal responsibility," which would preclude any

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[5] Commentators have criticized a common misperception that political divides on the island, rather than in Congress, inhibit self-determination. See Joseph Blocher & Mitu Gulati, *What Does Puerto Rican Citizenship Mean for Puerto Rico's Legal Status?*, 67 Duke L.J. Online 122, 126 (2018) (noting that unincorporated territories lack the same constitutional trajectory as other territories, "leaving serious questions about what they can demand or reject"); Christina Duffy Burnett & Burke Marshall, *Between the Foreign and the Domestic: The Doctrine of Territorial Incorporation, Invented and Reinvented*, *in* Foreign in a Domestic Sense: Puerto Rico, American Expansion, and the Constitution 1, 14–16 (2001).

local efforts to expand benefits to SSI-eligible residents. *Aurelius*, 140 S. Ct. at 1655, 1661–1662. In fact, among other austerity measures, the Board already ordered a steep 8.5 percent reduction in pensions, "threaten[ing] the sole source of income for thousands of Puerto Rico's poor and elderly." See *id.* at 1674 (Sotomayor, J., concurring). The people of Puerto Rico can do nothing to stop or replace the Board. Because the ordinary democratic process is unavailable to Puerto Rico residents, the Court should closely scrutinize federal welfare laws that discriminate against them. See *Cruzan* v. *Missouri Dep't of Health*, 497 U.S. 261, 300 (1990) (Scalia, J., concurring) ("Our salvation is the Equal Protection Clause, which requires the democratic majority to accept for themselves and their loved ones what they impose on you and me.")

2. In addition, when Congress draws distinctions "along suspect lines," *Beach Commc'ns*, 508 U.S. at 313, this Court subjects those classifications to strict scrutiny. *Cleburne*, 473 U.S. at 439–441; see also *Windsor*, 570 U.S. at 774. In deciding whether to apply strict scrutiny, this Court focuses on the nature of the particular classification. See *Feeney*, 442 U.S. at 271–272; *Cleburne*, 473 U.S. at 439–441. While disparate impact on a protected class is a relevant consideration, "purposeful discrimination is 'the condition that offends the Constitution.'" *Feeney*, 442 U.S. at 274 (quoting *Swann* v. *Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 16 (1971)). A court may consider any "circumstantial and direct evidence of intent as may be available." *Village of Arlington Heights* v. *Metropolitan Hous. Dev. Corp.*, 429 U.S. 252, 266 (1977).

Still, "regardless of purported motivation," some classifications are "presumptively invalid." *Feeney*, 442 U.S. at 272. That presumption applies to discrimination based on race, alienage or national origin, because those classifications often "reflect prejudice and antipathy – a view that those in the burdened class are not as worthy or deserving as others." *Cleburne*, 473 U.S. at 440; *Rice* v. *Cayetano*, 528 U.S. 495, 514 (2000) ("Ancestry can be a proxy for race."); *Adarand*, 515 U.S. at 224; *Washington* v. *Davis*, 426 U.S. 229, 239 (1976); *Graham*, 403 U.S. at 376; see also *Hampton*, 426 U.S. at 116–117; *Hernandez* v. *Texas*, 347 U.S. 475, 479 (1954).

Strict scrutiny is also warranted where members of "the group affected by a law," like "those who have been discriminated against on the basis of race or national origin," have "experienced a 'history of purposeful unequal treatment' or been subjected to unique disabilities on the basis of stereotyped characteristics not truly indicative of their abilities." *Cleburne*, 473 U.S. at 441 (quoting *Massachusetts Bd. of Ret.* v. *Murgia*, 427 U.S. 307, 313 (1976)).

The people of Puerto Rico have experienced a history of purposeful discrimination on account of their mixed race and Hispanic ancestry. By treating Puerto Rico as "outside the United States," Congress deployed the historical practice of singling out Puerto Rico's inhabitants for less favorable treatment on the basis that they are "foreign to the States." The legal foundation for this designation was expressly laid on the belief that Puerto Ricans belonged to "alien races" and "semi-civilized, barbarous, and savage peoples" of mixed Spanish and African "blood," who were "unfit" to be fully integrated into the Union. See supra at 6. Needless to say, this sort of invidious

discrimination—attributing someone's ability to contribute to society to their race or ethnicity—has since been rejected as reflecting the sort of "prejudice and antipathy" that the Constitution forbids. *Cleburne*, 473 U.S. at 440; see *Fisher* v. *University of Tex.*, 570 U.S. 297, 309 (2013) ("Distinctions between citizens solely because of their ancestry are by their very nature odious to a free people."); *Brown* v. *Board of Educ.*, 347 U.S. 483, 493 (1954); *Korematsu* v. *United States*, 323 U.S. 214, 242 (1944) (Murphy, J., dissenting) ("Racial discrimination in any form and in any degree has no justifiable part whatever in our democratic way of life."). Congress expressly invoked this history when it chose to link Puerto Rico's exclusion from SSI to the definition of "United States," rather than to any other statutory provision, thereby equating Puerto Rico to a foreign country and its inhabitants to "alien races." See S. Rep. No. 1230, 92d Cong., 2d Sess. 182 (1972) (discussing the exclusion of "Puerto Rico and foreign countries" from SSI concurrently).

The fact that Puerto Rico remains populated almost exclusively by Hispanic Puerto Ricans, and that the only other territories excluded from the definition of "United States" are also overwhelmingly populated by racial or ethnic minorities, further calls into question Congress's decision to exclude only these U.S. jurisdictions from SSI.[6] See *Gomillion* v. *Lightfoot*, 364 U.S. 339, 344–346 (1960); *Missouri* v. *Lewis*, 101 U.S. 22, 32 (1880) ("It is not impossible

[6] To this day, Puerto Rico's population is almost 100 percent Hispanic. See U.S. Census Bureau, *Quick Facts: Puerto Rico*, https://www.census.gov/quickfacts/fact/table/pr/ PST045217. The other excluded territories are Guam, American Samoa, and the U.S. Virgin Islands, all of which are populated predominantly by racial and ethnic minorities. Pet.App.45a.

that a distinct territorial establishment and jurisdiction might be intended as, or might have the effect of, a discrimination against a particular race or class, where such race or class should happen to be the principal occupants of the disfavored district. Should such a case ever arise, it will be time enough then to consider it."). This obvious disparate impact cannot be ignored.

B. Puerto Rico's "Unique" Status Does Not Preclude, but Rather Compels, Strict Scrutiny

The Government has never engaged directly with the analysis above nor disputed the underlying facts. Nevertheless, it continues to argue that only rational basis review can apply to any and all disparate treatment of Puerto Rico residents.

1. For the first time in this litigation, petitioner argues that, because of Puerto Rico's "unique" status and "unparalleled" relationship with the United States, Congress can discriminate against the island's residents without regard to the heightened protection ordinarily afforded to politically powerless groups that have experienced a history of discrimination. Br.28. Not so.

Far from justifying rational basis review, Puerto Rico's "unique" status compels a more searching judicial inquiry of national welfare laws that discriminate against its residents. This "unique" status is the result of being a possession, but not a part, of the "United States." Neither foreign, nor domestic. Neither free, nor equal. It is a reminder that Puerto Rico is not fully included in the American family and so its people can be treated as "second class citizens." Biden Statement.

This "unparalleled" relationship is also what creates the condition of political powerlessness with no end in sight. It is what allows Congress to extend and repeal federal tax provisions at will, while subjecting Puerto Rico's neediest residents to a level of poverty that is below the national minimum—and then point to that poverty as a basis for withholding national economic support. See Pet.13–14. It is what gives Congress the power to displace the island's locally elected representatives with federally appointed officials, all without any democratic accountability to the people of Puerto Rico. It is this colonial relationship—undergirded by a history of invidious discrimination—that triggers strict scrutiny.

2. Contrary to the Government's contention, the Territories Clause in Article IV has no bearing on the applicable level of scrutiny. That provision empowers Congress to "make all needful rules and regulations respecting the Territory." U.S. Const. Art. IV, § 3, Cl. 2. Pursuant to this power, Congress can enact territorial laws that might otherwise be beyond its Article I powers, such as laws regulating commerce or criminalizing conduct within the territory. See *Aurelius*, 140 S. Ct. at 1658; *National Bank* v. *County of Yankton*, 101 U.S. 129, 133 (1880). As this Court recently confirmed, when Congress acts as a territorial legislator under Article IV, its concerns are "primarily local." *Aurelius*, 140 S. Ct. at 1658.

But when Congress enacts laws that are "primarily federal" in nature, it does not draw from its power under Article IV, but draws from its power under Article I. *Aurelius*, 140 S. Ct. at 1661, 1663. Nothing in the Territories Clause states or implies that ordinary equal protection principles do not

apply when Congress exercises those Article I powers. Just as Congress is subject to the strictures of the Appointments Clause in appointing a federal prosecutor for the District of Puerto Rico notwithstanding the Territories Clause, *Aurelius*, 140 S. Ct. at 1656, Congress is also prohibited by the Fifth Amendment from singling out politically powerless minorities for disparate treatment in national welfare legislation, especially when those minorities happen to also be residing in unincorporated territories. See *Harris*, 446 U.S. at 654 (Marshall, J., dissenting) (cautioning against reading the Fifth Amendment and the Territories Clause to mean that heightened scrutiny "is simply unavailable to protect Puerto Rico or the citizens who reside there from discriminatory legislation").

Here, there is no indication that Congress was acting pursuant to its *territorial* powers when it created SSI. Rather, it was acting as a *national* legislator, seeking to create a "national program" setting a minimum standard for indigent, disabled individuals without regard to local conditions. No longer drawn against the variable needs of different jurisdictions or tied to the cooperation of local governments, territorial distinctions in uniform national laws raise valid equal protection concerns.

It is of no moment that the Constitution recognizes a difference between states and territories for specified purposes. That does not mean that all territorial distinctions are permissible. Nothing in the Constitution requires that interpretation. To the contrary, it conflicts with well-settled equal protection principles. On numerous occasions, this Court has ruled that social and economic laws discriminating against noncitizens, who lack voting

power, are "inherently suspect" and therefore subject to strict scrutiny, *Graham*, 403 U.S. at 372, even though the Constitution itself also differentiates between citizens and noncitizens for certain purposes.

3. Finally, petitioner's distinction between "personal" and "geographic" classifications is illusory here. Br.30–31. The exclusion at issue does not target a place *per se*, but rather a class of individuals *because of* where they live. Legislation that targets a geographic region violates equal protection when residents of that region are impermissibly targeted for disparate treatment.

To illustrate, *Griffin* v. *County Sch. Bd.* held that a state's closure of public schools in only one county, as part of an effort to prevent racial integration, violated the equal protection rights of children in that county. 377 U.S. 218, 231 (1964). *Griffin* reasoned that the "law, as here applied, unquestionably treats *the school children of Prince Edward* differently from the way it treats the *school children of all other Virginia counties*." *Id.* at 230 (emphasis added). It did not matter that the classification was drawn in geographic terms, because it ultimately discriminated against individuals on the basis of race. See *Moore* v. *Ogilvie*, 394 U.S. 814, 818–819 (1969); *Reynolds* v. *Sims*, 377 U.S. 533, 583 (1964); *Gray* v. *Sanders*, 372 U.S. 368, 379–380 (1963)); see also *Papasan* v. *Allain*, 478 U.S. 265, 287–288 (1986); *Long* v. *Robinson*, 316 F. Supp. 22, 26–28 (D. Md. 1970), aff'd, 436 F.2d 1116, 1117–1118 (4th Cir. 1971).

Moreover, none of the cases applying rational basis review to geographic classifications addressed issues of political powerlessness or a history of

discrimination affecting residents of those places. See *San Antonio Indep. Sch. Dist.* v. *Rodriguez*, 411 U.S. 1, 28 (1973) (finding "none of the traditional indicia of suspectness * * * as to command extraordinary protection from the majoritarian political process").[7] To the contrary, a "geographic" classification that serves as a proxy for race, or that targets a politically powerless group, warrants strict scrutiny. See *Lewis*, 101 U.S. at 32; *Griffin*, 377 U.S. at 231; *Plyler*, 457 U.S. at 216 n.14; see also *Lewis* v. *Ascension Parish Sch. Bd.*, 662 F.3d 343, 354 (5th Cir. 2011) (Jones, J., concurring) ("To allow a school district to use geography as a virtually admitted proxy for race, and then claim that strict scrutiny is inapplicable because [the classification] designated geographical lines * * * with no mention of race is inconsistent with the Supreme Court's holdings." (internal quotation marks omitted)).

In brief, strict scrutiny should apply to the classification of Puerto Rico residents at issue here.

II. Under Any Standard of Review, This Exclusion Fails

Petitioner does not argue that the SSI exclusion is narrowly tailored to further a compelling government interest. *Fisher*, 570 U.S. at 310. It is not. Nor does it survive even rational basis review.

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[7] Strict scrutiny was not raised in *Secretary of Agric.* v. *Central Roig Refin. Co.*, 338 U.S. 604 (1950), nor was the doctrine sufficiently developed at that point. Moreover, *Central Roig* involved commercial regulation balancing competing hardships among different areas based on geographic variations. *Id.* at 607–608, 619. That is different from the outright exclusion of a class of otherwise-eligible individuals from a national program using uniform eligibility criteria and setting a minimum standard.

1. Rational basis is not "toothless." *Mathews* v. *Lucas*, 427 U.S. 495, 510 (1976). Even neutral classifications must "rationally advance a reasonable and identifiable government objective." *Nordlinger* v. *Hahn*, 505 U.S. 1, 16 (1992); see also *Logan* v. *Zimmerman Brush Co.*, 455 U.S. 422, 439 (1982) (Blackmun, J. concurring). Where the relationship between a statutory classification and its goal is "so attenuated as to render the distinction arbitrary or irrational," that distinction violates equal protection. *Cleburne*, 473 U.S. at 446; *Lindsey* v. *Normet*, 405 U.S. 56, 77 (1972); *Logan*, 455 U.S. at 439–440 (Blackmun, J. concurring) (citing *Rinaldi* v. *Yeager*, 384 U.S. 305, 310 (1966)) (finding that agency processing times were not a meaningful proxy for the merits of a party's discrimination claim); *Logan*, 455 U.S. at 444 (Powell, J., concurring).

A classification is arbitrary when it discriminates between individuals who are "similarly situated for all relevant purposes." *Williams* v. *Vermont*, 472 U.S. 14, 23–24 (1985); *Cleburne*, 473 U.S. at 446–447; see also *Jimenez* v. *Weinberger*, 417 U.S. 628, 637 (1974). Consider *Shapiro* v. *Thompson*, 394 U.S. 618 (1969). There, a statute distinguished between longtime state residents and newly arrived residents in allocating welfare benefits. The state justified this distinction on the basis that longtime residents had made greater tax contributions. But because both groups were indigent and so generally did not pay taxes, this distinction was arbitrary. *Id.* at 632 & n.9. For purposes of the proffered justification, the two groups were indistinguishable.

Here, the exclusion of otherwise-eligible citizens in Puerto Rico is arbitrary and irrational because it discriminates between individuals who are similarly

situated for all relevant purposes. Congress's express goal for SSI was to treat disabled and indigent individuals uniformly pursuant to a "national program" with consistent need-based eligibility criteria and a minimum standard of support. 42 U.S.C. 1381; S. Rep. No. 1230 at 383–384. The exclusion of Puerto Rico residents contravenes those goals because it creates an arbitrary gap in national support, as experienced most starkly by individuals like respondent who move between the mainland and Puerto Rico. See *Allegheny Pittsburgh Coal Co.* v. *County Comm'r*, 488 U.S. 336, 345 (1989) (striking down an appraisal method in light of a goal of "uniformity" in the tax system).

This discontinuity cannot be justified by Congress's traditional latitude in social and economic legislation. To be sure, Congress may prioritize among different needs. See *Jefferson* v. *Hackney*, 435 U.S. 535, 549 (1972); *Richardson* v. *Belcher*, 404 U.S. 78, 82 (1971). It may elect to keep benefits within the United States. See *Califano* v. *Aznavorian*, 439 U.S. 170, 178 (1978); see also *Fleming* v. *Nestor*, 363 U.S. 603, 612 (1960). And it may set eligibility criteria at *some* objective level, for instance in defining qualifying levels of blindness or income under SSI. *United States R. Ret. Bd.* v. *Fritz*, 449 U.S. 166, 179 (1980); *Carmichael* v. *Southern Coal & Coke Co.*, 301 U.S. 495, 511 (1937). But no one now contends that any of these traditional line-drawing exercises bear on the categorical exclusion of otherwise-eligible Puerto Rico residents from SSI, who by definition face the same needs as SSI beneficiaries elsewhere. As residents of a U.S. territory, SSI-eligible citizens in Puerto Rico will spend their benefits in the United States. Petitioner once suggested that "cost alone" was a sufficient justification for this exclusion,

Pet.App.29a, but it no longer argues that costs savings in itself justifies otherwise arbitrary classifications. See *Shapiro*, 394 U.S. at 633.

2. Petitioner advances two alternative rationales. First, it argues that extending SSI benefits to Puerto Rico residents would be one-sided, given that Puerto Rico residents do not generally pay federal income tax. Second, and for the first time, it argues that excluding Puerto Rico residents from SSI is intended to foster local autonomy. Neither explanation is sound.

2a. Equal protection analysis turns on comparing the groups that are actually treated differently by a statute. *Hooper* v. *Bernalillo Cnty. Assessor*, 472 U.S. 612, 618 (1985) ("When a state distributes benefits unequally, the distinctions it makes are subject to scrutiny."); see also *Rinaldi* v. *Yeager*, 384 U.S. 305, 308–309 (1966). For instance, in *Weber* v. *Aetna Cas. & Surety Co.*, 406 U.S. 164 (1972), a statute provided survivor benefits to children, so long as they had been "dependent" on a deceased worker. Among these dependent children, it allocated greater benefits to "legitimate" than to "illegitimate" children. *Id.* at 168. Applying rational basis, the Court rejected an argument that "legitimacy" could serve as a rational proxy for a child's dependency on a parent. "Whatever the merits elsewhere of" using legitimacy as a proxy for dependency, it did not serve that function under "a statutory compensation scheme where dependency on the deceased is a prerequisite to anyone's recovery." *Id.* at 173.

Residency in Puerto Rico is not a meaningful proxy for the tax liability of individuals who are poor enough to qualify for SSI. As petitioner acknowledges, by virtue of SSI's income

requirements, eligible individuals anywhere generally earn too little to owe federal taxes. Br.21; see also *Shapiro*, 394 U.S. at 632. Inversely, individuals who benefit from federal income tax exemptions in Puerto Rico would not qualify for SSI regardless of where they reside.

Petitioner asserts that, because permissible statutory classifications may be overinclusive or underinclusive, Congress "may rationally choose to concentrate on the tax status of the Commonwealth and its population as a whole" rather than of the actual groups treated differently under a statute. Br.21. In essence, petitioner argues that a rational basis need not relate to the legislative classification at issue.

Precedent does not support that approach. Even petitioner's own cases upholding laws that make "rough accommodations" turned on an accurate characterization of the legislative classification at issue. See, *e.g.*, *Califano* v. *Jobst*, 434 U.S. 47, 53–54 (1977) (finding that a worker-funded benefit program for dependent children could rationally rely on the child's marital status as a proxy for dependency even though married children could also be dependent). If an asserted government interest bears no relation to the groups treated differently under the statue, treating those groups differently is arbitrary and the Court will strike down the distinction. See, *e.g.*, *Williams*, 472 U.S. at 24; *Cleburne*, 472 U.S. at 448; *Zobel* v. *Williams*, 457 U.S. 55, 61 (1982); *Lindsey*, 405 U.S. at 77; *Weber*, 406 U.S. at 173–174. Here, petitioner's asserted interest in tying expenditures to tax contributions has nothing to do with differentiating groups of individuals who earn too little to pay taxes. As the First Circuit recognized, it

is thus arbitrary for Congress to point to taxes it chooses not to collect from one group of Puerto Rico residents to justify denying SSI to a different group of individuals who meet the same need and income-based criteria as SSI beneficiaries elsewhere. Pet.App.27a–28a.

Petitioner argues that Puerto Rico is able to collect more revenues locally as a result of these federal tax exemptions and so Congress could rationally conclude that Puerto Rico "should bear primary responsibility for providing benefits to needy aged, blind, and disabled residents." Br.19.

But this justification begs the question: why Puerto Rico? For every other jurisdiction whose residents receive SSI, Congress took the burden of caring for the neediest on itself. Those jurisdictions include poor states that are net recipients of federal transfers, wealthy states that could afford to take care of their neediest residents, and the NMI, which benefits from similar tax exemptions as Puerto Rico. See Pet.34a & n.28.

Indeed, that is how SSI works. SSI is a national poverty relief program designed to provide a minimum standard of support for the country as a whole. It is not designed to place the burden of caring for the aged and disabled on the jurisdictions where they reside. Nor does it condition this national support on local contributions. By enacting SSI, Congress relieved localities of that burden and opted to use national resources to take care of the neediest Americans equally, regardless of how much their local neighbors contribute to the Treasury.

Furthermore, as the First Circuit observed, this Court has repeatedly stated that tax or other

"contributions" are an improper basis for discriminating among similarly situated individuals in allocating public goods, including public benefits. See Pet.App.26a–27a; *Zobel*, 457 U.S. at 63 (holding that "reward[ing] citizens for past contributions" through higher benefit levels "is not a legitimate state purpose"); *Hooper*, 472 U.S. at 622–623; *Shapiro*, 394 U.S. at 33. Indeed, SSI benefits are not allocated based on individual or geographic contributions. While certain federal *insurance* programs are funded by their beneficiaries, SSI is not. Compare 42 U.S.C. 401(b), and 42 U.S.C. 1395i, with 42 U.S.C. 1381. It is irrelevant to SSI eligibility whether an individual resides in New York and pays federal income tax before moving to Puerto Rico (like respondent), or whether they live in Puerto Rico before moving to New York to receive SSI.

In fact, SSI operates independently from the Internal Revenue Code.[8] Congress could decide tomorrow to extend all federal income tax obligations to Puerto Rico, and Puerto Rico residents would remain ineligible for SSI. Congress has extended additional tax burdens to Puerto Rico residents at will (and without their consent), without providing offsetting benefits, including after enacting the Social Security Act. Revenue Act of 1950, Pub L. No.

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[8] The few references to the Internal Revenue Code in the SSI statute are not relevant here. They: (i) define terms by cross-referencing the Internal Revenue Code, *see* 42 U.S.C. 1382(d), 1382a(b)(19), (22), (ii) discuss the treatment of a Child Tax Credit refund for eligibility determinations, 42 U.S.C. 1382b(a)(11), (13), (iii) provide a revenue-code related carve-out to the Commissioner's duty to cooperate with law enforcement (42 U.S.C. 1382(e)(5), 1383(a)(2)(B)(xiv), and (iv) entitle the Commissioner to access IRS records in reviewing individual SSI eligibility, 42 U.S.C. 1383(e)(1)(B)(i).

81-814, § 221, 64 Stat. 944 (extending federal income tax to the income earned by Puerto Rico residents from foreign sources); see also Small Business Job Protection Act of 1996, Pub. L. No. 104-188, Tit. I(f), § 1601(a), 110 Stat. 1827. Similarly, Congress exempts regions within states from certain federal taxes (*e.g.*, "Qualified Opportunity Zones") and their residents remain eligible for SSI. Rev. Proc. 2018-16, 2018-9 I.R.B. 383.

The original premise for this "contribution" rationale is also factually flawed. In *Califano* and *Harris*, the Court found that it was rational to exclude Puerto Rico from federal welfare programs because "Puerto Ricans do not contribute to the Treasury." *Harris*, 446 U.S. at 652 (citing *Califano*, 435 U.S. at 5 n.7). That is not true. Petitioner concedes (as it must) that Puerto Rico contributes to the general treasury in substantial amounts, often exceeding the net contributions made by states. Br.19; see Pet.App.20a–23a. Instead, it quibbles with these comparisons, pointing out that some of those contributions include taxes such as FICA, which fund specific insurance programs such as Medicare. Br.19–20. Yet petitioner ignores that, even under Medicare, Puerto Rico residents receive reduced benefits. See U.S. Gov't Accountability Off., GAO-14-31, Puerto Rico: Information on How Statehood Would Potentially Affect Selected Federal Programs and Revenue Sources 65 (May 2014).

2b. For the first time in this litigation, petitioner argues that denying SSI benefits to Puerto Rico residents can plausibly be understood as an effort to promote "local self-rule." This argument is illogical and pretextual.

Again, SSI is not about local government. It is a federally administered national program that bypasses local governments to provide direct payments to individuals. SSI does not interfere with a state or territory's autonomy. To the contrary, it frees them to do more with their budgets. Petitioner recognizes that promoting local self-rule entails giving the territory "choices" about whether to spend funds on benefits for disabled individuals or whether to "spend the money on something else." Br.23. But those are the choices that Congress left to the states, the District of Columbia, and the NMI under SSI. H.R. Rep. No. 231, 92d Cong., 1st Sess. 5 (1971); see also Soc. Sec. Admin., 2020 SSI Annual Report at 21–22. Under SSI, those jurisdictions have discretion over whether and how to spend their own funds, without risking federal support for their disabled residents. In fact, four states that had participated in AABD no longer provide payments to supplement federal benefits under SSI. See Soc. Sec. Admin., Understanding SSI, https://www.ssa.gov/ssi/text-benefits-ussi.htm; see S. Rep. No. 1230 at 398–399.

By contrast, under AABD, federal funding is conditioned on Puerto Rico administering a disability benefits program and funding a substantial portion of its costs. Unlike residents in other jurisdictions, Puerto Rico's neediest residents would lose all support if the Commonwealth chose to "spend the money on something else." Puerto Rico's "freedom" to modify income thresholds and benefit amounts within its AABD plan is thus nothing more than an obligation to determine how to distribute fewer resources to fewer people. As petitioner acknowledges, the capped federal AABD grant is inadequate, even with local funding, to meet the needs of individuals such as respondent, "forcefully

illustrat[ing] the case for enhancing aid to needy individuals in Puerto Rico." Br.39, 40.

The notion that Congress intended to give greater autonomy to Puerto Rico by denying SSI to its residents is particularly implausible in light of PROMESA. Decisions about AABD expenditures are not ultimately made by local elected officials, but by the Board. See Fin. Oversight & Mgmt. Bd., 2020 Fiscal Plan for Puerto Rico 82, 206 (May 27, 2020) (implementing Medicaid cuts and new restrictions on food aid). Given the Board's mandate to reduce government spending, it is unlikely that it would authorize a major new program intended to replace unavailable federal SSI benefits even if doing so had widespread popular support. The more fundamental issue is that this choice does not rest with the people of Puerto Rico. It is surprising that petitioner presses this new autonomy theory without even acknowledging the existence of PROMESA.

Moreover, the NMI has not lost any local autonomy by virtue of its residents receiving SSI. In fact, in entering into a Covenant with the United States, the NMI exercised its autonomy *to demand SSI*.[9] Covenant to Establish a Commonwealth of the Northern Mariana Islands, 90 Stat. 268. And in the wake of PROMESA, the NMI enjoys greater "local

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[9] SSI did not exist at the time Puerto Rico was annexed. Nor could Puerto Rico have made any similar demands because, unlike the NMI, Puerto Rico did not become a territory by consent but by conquest. However, when SSI was enacted, the Commonwealth and Puerto Rico's non-voting Resident Commissioner protested Puerto Rico's exclusion and they have consistently supported extending SSI to Puerto Rico, including in amicus briefs filed in this case. See P.R. Amicus Cert. Br.1; J.A.2.

self-rule" than Puerto Rico, and NMI residents still receive SSI while Puerto Rico residents do not.

Petitioner recognizes that Puerto Rico pays a "price" for the exclusion of its residents from SSI by having to fund a substantial portion of AABD. Br.24. Petitioner then argues that Congress can extract that price because it may use different programs to address "similar issues among different categories." Br.25. That argument has no connection to local autonomy. And, again, it begs the question: why are Puerto Rico residents in a "different category"? Nothing distinguishes otherwise-eligible Puerto Rico residents from SSI beneficiaries elsewhere. Congress cannot give a pittance to some small subset of an excluded class on the pretense that it is merely trying different approaches. See *Weber*, 406 U.S. at 173. Gross disparities in treatment, such as that between the $36 million in federal support to Puerto Rico under AABD and the upwards of $2 billion that would be available under SSI, raise grave equal protection concerns. *Allegheny Pittsburgh*, 488 U.S. at 341 (relying on eight- to twenty-fold disparities in the tax assessments of similar properties to strike down a county assessment practice). The exclusion of Puerto Rico from SSI is thus not a matter of respecting autonomy, but of arbitrary neglect.

3. Petitioner no longer asserts that, because the Commonwealth is very poor and its residents would be disincentivized to work, extending SSI to Puerto Rico residents could disrupt the local economy. Br.24 n.2; Pet.13–14. Indeed, this argument undercuts petitioner's suggestion that Puerto Rico's tax status allows it to fund its own benefits. Instead, petitioner states that this point is "more appropriately considered" as relevant to the promotion of Puerto

Rico's self-rule. *Ibid*. Petitioner's shifting position highlights the rationale's "troubling overtones." *Harris*, 446 U.S. at 655 (Marshall, J., dissenting).[10] Even considered independently, the First Circuit adequately explained that this "rationale" holds no explanatory power.

There is no statutory connection between eligibility for SSI benefits and local economic conditions. SSI recipients anywhere (disabled, blind, and aged) are generally unable to work. See Pet.App.27a. At the same time, payment schedules are nationally uniform, so as to provide a minimum standard regardless of the local cost of living. Similar contemporaneous concerns about the effects of extending SSI benefits to Alabama and Mississippi were expressed by the legislature, yet those states were included in the program. *Briefing on Puerto Rico Political Status: Hearing Before the Subcomm. of Insular & Int'l Affs. of H. Comm. on Interior & Insular Affs.*, 101st Cong. 34 (1990) (statement of Carolyn Merk, Specialist in Soc. Legis.). So are residents of Qualified Opportunity Zones, which receive special tax treatment in an effort to stimulate struggling local economies. See Rev. Proc. 2018-16, 2018-9 I.R.B. 383. These disruption concerns also shed no light on the inclusion of the NMI, which

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[10] Aside from being irrational, the only support provided in *Califano* or *Harris* for this supposed justification is a reference to a 1976 congressional report that expressly rejects it, in part for the obvious reason that need is greatest in the poorest jurisdictions. See Pet.App.18a (citing Dep't of Health, Educ., & Welfare, Report of the Undersecretary's Advisory Group on Puerto Rico, Guam and the Virgin Islands 6–7 (1976) ("[T]he current fiscal treatment of Puerto Rico * * * is unduly discriminatory and undesirably restricts the ability of these jurisdictions to meet their public assistance needs.")).

faces greater poverty than Puerto Rico. Whatever the general merits of these considerations may be, they do not distinguish Puerto Rico residents from SSI beneficiaries elsewhere. See *Weber*, 406 U.S. at 173–174.

4. Finally, in applying rational basis review, this Court routinely considers exceptions to challenged classifications in striking them down as irrational. See, *e.g.*, *Williams*, 472 U.S. at 19, 25. As the First Circuit correctly noted, and as surveyed above, the provision of SSI benefits to residents of the NMI is inconsistent with each of petitioner's stated rationales for excluding Puerto Rico residents. Pet.App.34a–37a. As far as the SSI program is concerned, residents of both Puerto Rico and the NMI are the same in all relevant respects, and yet they are treated differently.

Petitioner's only response is that Congress can treat each territory differently and treat territories differently from states because Congress can treat territories differently. That is the definition of arbitrary. See *Williams*, 472 U.S. at 27 (classifications cannot be "supported by only their own bootstraps"). This case is not about equality among territories or among states and territories, but about the equal treatment of U.S. citizens under a national program.

In the end, the SSI exclusion is what it appears to be: the singling out of a politically powerless, historically mistreated minority for second-class treatment that gives lie to their status as equal Americans. In fact, in this case, the Administration sent a notice to respondent telling him that, notwithstanding his needs, notwithstanding that he was born a U.S. citizen and that he resides in a U.S.

territory, his SSI benefits were being rescinded because he was "outside the United States" (J.A.39), a resounding echo from *Downes*' pronouncement that he is "foreign to the United States in a domestic sense." 182 U.S. at 341–342. Being defined out of the "United States" because his place of residence (and place of origin) is a so-called unincorporated territory serves no other purpose than to "impose a disadvantage, a separate status, and so a stigma" on the relevant class through the withholding of benefits. *Windsor*, 570 U.S. at 770. The "bare * * * desire to harm" embedded in the exclusion of Puerto Rico residents is unconstitutional, and the courts below were correct to strike it down. *United States Dep't of Agric.* v. *Moreno*, 413 U.S. 528, 534 (1973).

III. *Califano* and *Harris* Should Be Overruled

Neither *Califano* nor *Harris* controls, because as the First Circuit unanimously concluded, those cases did not address, let alone resolve, the equal protection concerns presented here. Pet.App.10a–16a. Nevertheless, to the extent these decisions are applicable, they should be overturned.

Stare decisis "has never been treated as an inexorable command." *Ramos* v. *Louisiana*, 140 S. Ct. 1390, 1405 (2020). The doctrine is "at its weakest when we interpret the Constitution" because there is no other effective recourse against an erroneous interpretation. *Ibid.* (citing *Agostini* v. *Felton*, 521 U.S. 203, 235 (1997)). In deciding whether to follow a past decision, the Court considers the quality of the decision's reasoning; its consistency with related decisions; developments since the decision; and legitimate reliance interests. *Ramos*, 140 S. Ct. at 1405; *Janus* v. *AFSCME Council*, 138 S. Ct. 2448, 2478 (2018).

As per curiam, summary dispositions issued without the benefit of full briefing or argument, *Califano* and *Harris* carry little precedential weight and are devoid of meaningful reasoning. *United States Bancorp. Mortg. Co.* v. *Bonner Mall P'Ship*, 513 U.S. 18, 23–24 (1994); see also *Hohn* v. *United States*, 524 U.S. 236, 251 (1998). *Califano* is a right-to-travel case that did not involve equal protection. It contains confusing logic, suggesting that the constitutionality of one statute, the SSI exclusion, turns on the content of another statute, the Internal Revenue Code, 435 U.S. at 5 n.7, even though they operate independently and Congress often modifies the tax treatment of Puerto Rico without adjusting SSI benefits. *Harris*'s extension of *Califano* to the equal protection context was criticized as unreasoned at the time, in part because equal protection and right to travel analyses differ significantly. 446 U.S. at 654 (Marshall, J., dissenting) ("[T]he only authority upon which the majority relies [*Califano*], does not stand for the proposition the Court espouses today.").

Both cases rely on the factually erroneous premise that Puerto Rico "residents do not contribute to the federal treasury." *Califano*, 435 U.S. at 5 n.7; *Harris*, 446 U.S. at 652. Both also rely on at least one premise that has always had "troubling overtones," namely that individuals in Puerto Rico, more so than elsewhere, would be unwilling to work if SSI benefits were available there. *Harris*, 446 U.S. at 655 (Marshall, J., dissenting). Indeed, petitioner has now distanced itself from that rationale. See *Citizens United* v. *FEC*, 558 U.S. 310, 362 (2010) ("When neither party defends the reasoning of a precedent, the principle of adhering to that precedent through stare decisis is diminished.").

More importantly, *Califano* and *Harris* set an unclear precedent in an area of great significance for millions of Americans residing in the territories and therefore warrant clarification. Petitioner construes these cases as establishing that national legislation discriminating against territorial residents is per se constitutional. Br.39 (citing *Quiban* v. *Veteran's Administration*, 928 F.2d 1154, 1161 (D.C. Cir. 1991)). But that cannot be correct. As explained above, equal protection analysis turns on the content of particular statutes and the purposes served by their classifications. Americans residing in the territories deserve not only clarity on the outer limits of Congress's ability to exclude them from national programs, but also recognition that arbitrary discrimination will run afoul of their right to equal protection.

Califano and *Harris* also stand in stark contrast with this Court's recent jurisprudence. Most egregious is their express reliance on the *Insular Cases* to justify the notion that Puerto Rico may be excluded from national programs, even though the Court had already determined that the logic of separate and unequal treatment underlying the Incorporation Doctrine should not be extended any further. See *Harris*, 446 U.S. at 653 (Marshall, J., dissenting) (questioning "the present validity" of *Downes* and its progeny); *Reid* v. *Covert*, 354 U.S. 1, 21–23 (1954). The *Insular Cases* have come under increasingly severe criticism since. See *Boumediene*, 553 U.S. at 765; *Aurelius*, 140 S. Ct. at 1665.

Other foundations of these two cases have likewise "eroded." *Agostini*, 521 U.S. at 236. *Harris* relies on the Territories Clause to establish Congress's power to treat Puerto Rico differently in

national legislation. However, this Court has since clarified that the Territories Clause applies when Congress acts in a "primarily local" rather than in a "primarily federal" capacity. *Aurelius*, 140 S. Ct. at 1661, 1663; *id.* at 1688 (Thomas, J., concurring) ("The powers vested in territorial governments are distinct from the powers of the National Government."). Moreover, while *Califano* and *Harris* tied reduced welfare benefits to what Puerto Ricans "contribute to the federal treasury," this Court has expressly rejected conditioning public benefits on some ill-defined notion of historical "contributions" in a well-reasoned line of cases both preceding and following *Califano*. See *Shapiro*, 395 U.S. at 632; *Zobel*, 457 U.S. at 63.

Califano and *Harris* do not reflect the reality of Puerto Rico's current place in the United States, as this Court's recent jurisprudence has highlighted. Congress has effectively repealed Law 600 by enacting PROMESA. See *Aurelius*, 140 S. Ct. at 1655; see also *id.* at 1674, 1863 (Sotomayor, J., concurring) (highlighting the breadth of the Board's authority, the absence of Puerto Rican democratic input into its decisions, and resulting constitutional questions about its validity). It has done so both as a consequence of and consistent with a longstanding practice of dictating Puerto Rico's fiscal and economic policies. These recent changes highlight, in ways that may not have been apparent in 1978 or 1980, the necessity of judicial oversight when Congress singles out Puerto Rico residents for disparate treatment in national welfare laws. See *South Dakota* v. *Wayfair, Inc.*, 138 S. Ct. 2080, 2097 (2018) (justifying overruling precedent where there have been "far-reaching systemic and structural changes").

Petitioner draws almost entirely on a supposed reliance interest in *Califano* and *Harris*. In effect, it argues that Congress neglects Puerto Rico so routinely in federal welfare programs that it must be allowed to continue doing so because it would be too disruptive to change course. Br.25, 37–38. But petitioner has no reliance interest in maintaining unconstitutional statutes, and no legitimate interest in maintaining a system in which Puerto Rico residents are treated as "second class citizens." Biden Statement; *Citizens United*, 558 U.S. at 365 (noting that a legislature's enactment of unconstitutional laws "is not a compelling interest for *stare decisis*"); *Wayfair*, 138 S. Ct. at 2098 ("*[S]tare decisis* accommodates only legitimate reliance interests.") (internal quotation marks omitted); see also *Janus*, 138 S. Ct. at 2486 (comparing the costs to certain parties of overruling precedent with the benefits they had unjustifiably received under prior, erroneous precedent). If a historical practice of unlawful discrimination could be self-justifying or allowed to persist because change would be too cumbersome, then *Plessy* would still be good law.[11]

Left out of petitioner's calculus altogether is the legitimate reliance interest of Puerto Ricans like respondent, who expect that their U.S. citizenship and attendant right to move freely throughout the nation will entitle them to the same federal benefits in Puerto Rico that they are entitled to on the

[11] Petitioner exaggerates the disruptive effects of any decision in respondent's favor, ignoring the distinctive features of the SSI program that make Congress's exclusion of Puerto Rico residents untenable. Petitioner also ignores that stricter scrutiny of uniform national programs would not interfere with Congress's powers as a territorial legislator any more than it does with the power of States within their own borders.

mainland. That reliance is frustrated when those benefits are denied to them unless they abandon their homes and their families and move to the mainland, or when national benefits that they lawfully received while residing on the mainland are stripped from them simply for returning to Puerto Rico—their home on U.S. soil.

CONCLUSION

For these reasons, the Court should affirm the judgment below.

Respectfully submitted,

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