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 THE AMERICAN CIVIL LIBERTIES UNION FOUNDATION, ACLU OF PUERTO RICO, DĒMOS, EQUALLY AMERICAN LEGAL DEFENSE AND EDUCATION FUND, AND THE WASHINGTON LAWYERS' COMMITTEE FOR CIVIL RIGHTS AND URBAN AFFAIRS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

Adriel I. Cepeda Derieux
Counsel of Record
Alejandro A. Ortiz
Jennesa Calvo-Friedman
Samantha Osaki
AMERICAN CIVIL LIBERTIES UNION FOUNDATION
125 Broad Street
New York, NY 10004
(212) 549-2500
acepedaderieux@aclu.org

David D. Cole
AMERICAN CIVIL LIBERTIES UNION FOUNDATION
915 15th Street, NW
Washington, DC 20005

David M. Zionts
Megan O'Neill
Alexander Ely
COVINGTON & BURLING LLP
One CityCenter
850 Tenth Street, NW
Washington, DC 20001
(202) 662-6000
dzionts@cov.com

William Ramírez
Fermín Arraiza
ACLU OF PUERTO RICO
Union Plaza, Suite 1105
416 Ave. Ponce de Leon
San Juan, PR 00918

September 7, 2021

Counsel for *Amici Curiae*

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Constitution and Statutes

Other Authorities

INTEREST OF THE *AMICI CURIAE*[1]

The American Civil Liberties Union ("ACLU") is a nationwide, non-profit, non-partisan organization with approximately two million members and supporters dedicated to the principles of liberty and equality enshrined in the Constitution. The ACLU has an abiding interest in the civil and democratic rights of residents of Puerto Rico and other unincorporated U.S. Territories — including the almost 3.5 million U.S. citizens among them. As it explained in a report over 80 years ago, the ACLU is committed to the "[m]aintenance of civil liberties in the [Territories]," which it considers "essential to political or economic reforms of any sort." ACLU, *Civil Liberties in American Colonies* 7 (1939), https://tinyurl.com/pccjv9tp.

Dēmos is a dynamic think-and-do tank that powers the movement for a just, inclusive, multiracial democracy. Founded in 2000, Dēmos deploys litigation, original research, advocacy, and strategic communications to advance economic justice and remove barriers to political participation. The organization's economic justice work focuses on research and policy solutions to overcome racial economic inequality. Dēmos has a deep and longstanding engagement with challenging economic policies that flow from political disfranchisement and perpetuate racial discrimination, an intersection well

---

[1] Pursuant to Rule 37.6, *Amici* affirm that no counsel for a party authored this brief in whole or in part and that no person other than *Amici* or their counsel made any monetary contributions intended to fund the preparation or submission of this brief. Pursuant to Rule 37.3(a), all parties have given consent to the filing of this brief.

illustrated by the exclusion of residents of the Territories from benefits that residents of the fifty States and Washington, D.C. enjoy.

Equally American Legal Defense and Education Fund ("Equally American") is a non-profit, non-partisan organization working to advance equality and civil rights for the close to 3.5 million citizens living in U.S. Territories — 98 percent of whom are racial or ethnic minorities. Equally American has an interest in ensuring that the rights guaranteed by the Constitution and its limitations on government power do not depend on where one lives in the United States.

The Washington Lawyers' Committee for Civil Rights and Urban Affairs ("WLC"), founded in 1968, is a nonprofit, nonpartisan organization that works to create legal, economic, and social equity. WLC fights discrimination against all people, recognizing in particular the central role that current and historic race discrimination plays in sustaining inequity. As part of its work, WLC has combatted government policies that disproportionately exclude individuals of color from their benefits.

In *Amici's* view, the Constitution's protection of individual rights and limitations on government should apply fully to all federal Territories, regardless of whether they may or may not eventually become States or independent in the exercise of their right to self-determination. *Amici* take no position on those options. But they insist that the Territories' residents are entitled to equal constitutional protection regardless.

INTRODUCTION AND SUMMARY OF ARGUMENT

Residents of Puerto Rico, as well as those of American Samoa, Guam, and the U.S. Virgin Islands, are entitled to the equal protection of the laws of the United States. But instead of treating this group equally, Congress has overtly discriminated against them. It passed a national law granting Supplemental Security Income ("SSI") benefits to blind, disabled, and older residents of the fifty States and the District of Columbia (and extended those benefits to the Northern Mariana Islands), but withheld this benefit from identically situated blind, disabled, and older residents of American Samoa, Guam, Puerto Rico, and the U.S. Virgin Islands. In doing so, Congress quite literally denied the residents of these Territories equal protection.

The United States Government ("Government") does not deny that Congress withheld the benefits of this national law from residents of these Territories. Instead, it asks the Court to treat its discriminatory treatment as a garden-variety classification subject to the most deferential review. In lieu of meaningful judicial review, the Government offers that if residents of the Territories wish to share equally in a law protecting residents of the States, "the proper mechanism to effectuate such a change * * * is action by Congress." U.S. Br. at 11.

In many contexts this might be a valid answer to a litigant's request to invalidate a classification drawn by Congress. But here that reasoning betrays a glaring problem: the Territories' residents are not represented in the Congress that denied them the

protection of one of its laws, and to which the Government would now relegate them for relief. Historically marginalized and subordinated by the very institutions to which the Government suggests they turn, Mr. Vaello-Madero and others similarly situated have nowhere to turn for equal treatment but the courts.

For almost a century, this Court's understanding of equal protection has focused on the political power — or powerlessness — of the group that a legislative classification disfavors. Where that group is not disenfranchised or politically marginalized, there is usually little reason to question the legislature's line-drawing. Regulation requires that lines be drawn, and legislatures are generally better situated than courts to draw them. But the situation is fundamentally different when the lines drawn disfavor a politically "locked out" class, or subject members of specific racial or ethnic groups to disfavored treatment. Even when suspect classifications are not involved, this Court carefully scrutinizes legislative classifications, like this one, that favor insiders over outsiders — for example, when one State's legislature imposes special burdens on other States' residents who are unrepresented in its legislature.

The common denominator in cases where this Court has found that even rational basis review cannot be satisfied is legislation that targets or disfavors a class of persons who lack the political recourse to protect themselves. That is precisely the case here.

In denying SSI benefits to residents of the Territories, Congress drew a line that singles out for disfavor a group that lacks voting representation in its chambers; has historically faced marginalization,

subordination, and outright bigotry; consists overwhelmingly of people of color; and to this day lacks economic opportunity and resources. These factors warrant careful judicial scrutiny. Yet the Government's two main justifications for this discrimination do not pass any level of review.

As a threshold matter, the Government errs in hypothesizing justifications for discriminating against residents of Puerto Rico specifically, because that is not the line Congress drew; its classification denies SSI benefits to residents of American Samoa, Guam, Puerto Rico, and the U.S. Virgin Islands. But even taking the Government's justifications on their own terms, they do not survive any form of scrutiny.

The Government first points to Congress's decision to exempt Puerto Rico residents from income taxes to justify its discriminatory SSI rule, but that cannot explain the lines Congress drew, as Congress did not otherwise make SSI benefit eligibility turn on a State's or an individual's contributions to the federal treasury. Some States are net recipients of federal funds, while others contribute far more to the public fisc in taxes, with no difference in the benefits those States' residents receive. In fact, Puerto Rico has historically contributed more in taxes to the federal government than some States. Moreover, most individuals who receive SSI benefits do not pay income tax, and an individual's eligibility is not contingent on past or future tax receipts. Puerto Rico's tax status bears no rational relationship to the discriminatory line Congress drew between residents of the fifty States and those of the Territories.

The Government also portrays Puerto Rico residents' exclusion from SSI benefits as an act of

legislative largesse, letting the Puerto Rico government choose for itself whether to allocate funds for similar benefits. But the Government does not explain how denying blind, disabled, and older residents SSI benefits furthers Puerto Rico's autonomy. The point of autonomy is to respect the wishes of the autonomous party, and there is no indication that the Puerto Rican government *wants* its residents to be denied assistance in service of some broader principle. And in any case, the picture that the Government paints obscures both the reality of circumstances on the ground and Congress's continued oversight authority over Puerto Rico's fiscal affairs.

ARGUMENT

I. Laws That Treat Residents of U.S. Territories Differently From Similarly Situated Residents of the States Warrant Meaningful Judicial Scrutiny.

A. This Court Treats With Suspicion Laws That Disfavor Politically Disenfranchised, Marginalized Groups.

"Under traditional equal protection principles," a legislature "retains broad discretion to classify as long as its classification has a reasonable basis." *Graham v. Richardson*, 403 U.S. 365, 371 (1971). The rule driving those principles is democratic at the root: typically, it is "the polls, not * * * the courts," to which "the people must resort" "[f]or protection against abuses by legislatures * * * *" *Williamson v. Lee Optical of Oklahoma Inc.*, 348 U.S. 483, 488

(1955) (quoting *Munn v. Illinois*, 94 U.S. 113, 134 (1876)).

Where, as here, Congress singles out residents of U.S. Territories,[2] a group that has no meaningful voice in the legislative process, good reasons exist to apply a "more rigorous scrutiny," even where rational basis applies. *Zobel v. Williams*, 457 U.S. 55, 60 (1982). The Equal Protection Clause particularly "protect[s] from the majoritarian political process"

---

[2] This brief uses the term "U.S. Territories" to refer to American Samoa, Guam, Puerto Rico, and the U.S. Virgin Islands. These territories are at times referred to as U.S. "insular areas." General Accounting Office, *U.S. Insular Areas: Application of the U.S. Constitution*, No. GAO/OGC-98-5, Report to the Chairman, Comm. on Resources, H.R. (Nov. 1997), www.gao.gov./assets/ogc-98-5.pdf. The Commonwealth of the Northern Mariana Islands is a U.S. territory, created through a 1975 Covenant "to establish a self-governing commonwealth for the Northern Mariana Islands * * * and to define the future relationship between the Northern Mariana Islands and the United States." Covenant to Establish a Commonwealth of the Northern Mariana Islands in Political Union with the United States of America, Pub. L. 94-241, 90 Stat. 263 (1976), codified at 48 U.S.C. § 1801. The Government explains that "[i]n the covenant, the United States committed, among other things, to extend" SSI benefits to that territory. U.S. Br. at 27. The Government does not suggest that it changes the constitutional analysis here that one territory, in its own unique circumstances, secured such a "negotiated commitment." *Id.* Nor could it: inclusion of some members of a marginalized group does not shield a law from scrutiny where it selectively discriminates against other members of the marginalized group — just as the fact that an employer has some Black workers does not insulate it from a charge of race discrimination. *See Connecticut v. Teal*, 457 U.S. 440, 442 (1982) (even "bottom line" of "appropriate racial balance" in workforce "does not preclude respondent employees from establishing a prima facie case [of race discrimination], nor does it provide petitioner employer with a defense to such a case").

those with no say in that process. *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 28 (1973).

This Court has long been skeptical of laws that discriminate against politically disadvantaged or disenfranchised groups. In *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938), the Court famously noted that "prejudice against discrete and insular minorities may" "call for a * * * more searching judicial inquiry" because it "tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities."[3]

The Court's concern about discrimination against those without a political voice covers those who as a formal matter are denied representation. No group lacks the opportunity to participate in the political process more clearly than the disenfranchised. As this Court has long recognized, "the political franchise of voting" is "preservative of all rights." *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886). The Court has at times applied heightened scrutiny to laws that single out the disenfranchised, including those that discriminate on the basis of alienage.

---

[3] Well before *Carolene Products*, courts long recognized the importance of protecting the politically powerless from discrimination by the majority. In 1851, the Supreme Court of Pennsylvania explained that when laws are enacted affecting "individuals * * * selected from the mass * * * [t]hey have no refuge but in the courts, the only secure place for determining conflicting rights by due course of law." *Appeal of Ervine*, 16 Pa. 256, 268, 1851 WL 5776, at *10 (1851). That is because laws that do not "bear on the whole community" do not have the "security for just and fair legislation" that if the law is "unjust and against the spirit of the constitution, the whole community will be interested to procure their repeal by a voice potential." *Id.*

For instance, in *Hampton v. Wong*, 426 U.S. 88 (1976), the Court invalidated a regulation excluding otherwise qualified noncitizens from employment in the federal civil service. *See id.* at 116–17. Because noncitizens "are not entitled to vote," the Court explained, they are "an identifiable class of persons who * * * are already subject to disadvantages not shared by the remainder of the community." *Id.* at 102. As a result, the Constitution "mandated" "[s]ome judicial scrutiny," and the law was struck down. *Id.* at 102–03. The same was true in *Graham v. Richardson*, where "heightened judicial solicitude" was "appropriate" to review laws excluding noncitizens — a "prime example of a 'discrete and insular' minority" — from certain State assistance programs. 403 U.S. at 372 (quoting *Carolene Prods.*, 304 U.S. at 152 n.4).

The same principle has led the Court to find that a variety of State laws that discriminate in favor of longtime residents and against newcomers or out-of-staters violate equal protection. In *Zobel v. Williams*, 457 U.S. 55 (1982), for example, the Court invalidated an Alaskan statutory scheme that distributed unequal amounts of funds to citizens depending on the length of their residence in the State. The Court noted that the scheme's "only apparent justification" was the "'favoring [of] established residents over new residents,'" *id.* at 65 (quoting *Vlandis v. Kline*, 412 U.S. 441, 450 (1973)), a rationale it rejected as "constitutionally unacceptable." *Id.*

Three years later, in *Hooper v. Bernalillo County Assessor*, 472 U.S. 612 (1985), the Court relied on *Zobel* to hold unconstitutional a New Mexico statute that gave favorable tax treatment to State-resident

war veterans, but only if they had lived in the State since before a certain date. *See id.* at 614. This statute, the Court wrote, "suffer[ed] from the same constitutional flaw as the Alaska statute in *Zobel*," in that it "favor[ed] established residents over new residents" in an attempt to "take care of 'its own,'" thereby "creat[ing] two tiers of resident[s]" that "identifi[ed]" newer residents "as * * * 'second-class citizens.'" *Id.* at 622–23.

Similarly, in *Williams v. Vermont*, 472 U.S. 14 (1985), the Court struck down a Vermont law that provided a tax credit to motor vehicle registrants who purchased their cars in Vermont, but not to registrants who purchased their cars out-of-state. *See id.* at 15–16. The law impermissibly favored in-staters, who have a voice in the legislature, over out-of-staters, who generally do not. *See id.* at 21–27. And in *Metropolitan Life Ins. Co. v. Ward*, 470 U.S. 869 (1985), the Court struck down as violative of equal protection an Alabama statute that taxed out-of-state insurance companies at a higher rate than their in-state competitors. *See id.* at 871. The Court made clear that the Alabama statute — because it was "designed only to favor domestic industry within the State, no matter what the cost to foreign corporations" — "constitute[d] the very sort of parochial discrimination that the Equal Protection Clause was intended to prevent." *Id.* at 878.[4]

---

[4] The concern that members of one polity will selectively disadvantage those who lack a political voice also animates the Court's dormant Commerce Clause jurisprudence. *See, e.g.*, *City of Philadelphia v. New Jersey*, 437 U.S. 617 (1978) (holding that Commerce Clause generally prohibits one State from discriminating against out-of-staters).

The common thread running through all of these equal protection decisions is sensitivity to legislative classifications that benefit the enfranchised at the expense of the disenfranchised. "Out-of-state-residents" are not a suspect class for purposes of the tiers of scrutiny this Court often employs. But the Court nonetheless recognizes that more meaningful scrutiny is warranted when an "in" group enacts rules that benefit themselves at the expense of outsiders.

The law at issue here is a paradigmatic instance of insiders discriminating against outsiders. It selectively denies valuable benefits to people who are blind, elderly, or disabled, and have limited resources, based solely on the fact that they reside in the Territories, thereby discriminating against a group without a voice in Congress. A person who is blind and has limited resources in Puerto Rico or Guam is every bit as disadvantaged as a person who is blind and has limited resources in Connecticut — with the added disadvantage of having no voting representation in the national legislature. Yet one may receive SSI benefits; the other cannot. Such discrimination has no rational basis.

The fact that the excluded group is overwhelmingly made up of people of color and has historically been the subject of discrimination only underscores the need for careful judicial scrutiny, as "state action" that carries "the serious risk * * * of causing specific injuries on account of race" warrants searching review. *Schuette v. Coal. to Defend Affirmative Action, Integration & Immigrant Rights & Fight for Equality By Any Means Necessary*, 572 U.S. 291, 305 (2014) (plurality opinion).

And "[w]here [a law's] distinction" "is drawn against a historically disadvantaged group [with] no other basis," the Court's "precedent marks this as a reason undermining rather than bolstering the distinction." *Massachusetts v. U.S. Dep't of Health & Hum. Servs.*, 682 F.3d 1, 14 (1st Cir. 2012) (Boudin, J.). As with the disenfranchised, the historically marginalized warrant solicitude from the Judiciary because they "ha[ve] historically been less able to protect [them]sel[ves] through the political process." *Id.*

For example, in *U.S. Dep't of Agric. v. Moreno*, 413 U.S. 528 (1973), the Court struck down a section of the Food Stamp Act of 1964 that excluded from benefits any household containing unrelated individuals. As part of its reasoning, the Court explained that the law evinced a "bare congressional desire to harm a politically unpopular group." *Id.* at 534. Twelve years later, in *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432 (1985), the Court held that a Texas city violated an organization's equal protection rights when it denied it a special use permit to operate a group home for people with mental disabilities. The Court observed that the city's decision had been motivated by "negative attitudes" and "unsubstantiated" "fear" of people with disabilities. *Id.* at 448; *see also United States v. Windsor*, 570 U.S. 744, 770 (2013) (explaining that the Court gives "careful consideration" to "discriminations of an unusual character") (alterations and internal quotation marks omitted).

The classification challenged here irrationally denies a resident of the Territories with a disability the benefits granted to a resident of one of the fifty States with the identical disability. Indeed, as this very case

illustrates, the same person, eligible for benefits while residing in New York, is denied the same benefits if he moves to Puerto Rico — a truly arbitrary result.[5] *See* Pet. App. 3a–4a. Even if the classification is subject only to rational basis review, the fact that it disfavors outsiders, and that these particular outsiders are overwhelmingly people of color who have historically been discriminated against and disadvantaged, warrants careful application of such scrutiny.

B. Residents of U.S. Territories Are A Marginalized Group, Politically Powerless At The Federal Level, And Comprised Largely Of People Of Color.

Residents of U.S. Territories such as Mr. Vaello-Madero share all the characteristics of marginalized

---

[5] Congress's decision to exclude certain territorial residents from SSI benefits also implicates the right to travel, by disfavoring certain Americans who move from an eligible jurisdiction to American Samoa, Guam, Puerto Rico, or the U.S. Virgin Islands. The Government misreads *Califano v. Torres*, 435 U.S. 1 (1978) (per curiam), to establish a bright-line rule that denying SSI benefits to Puerto Rico residents cannot burden the constitutional right to travel of otherwise-eligible residents who move to Puerto Rico from a covered jurisdiction. *Califano* was a per curiam opinion that summarily reversed a district judge's ruling; it was not accompanied by full briefing or oral argument. The Court has "felt less constrained to follow precedent where, as here, the opinion was rendered without full briefing or argument." *Hohn v. United States*, 524 U.S. 236, 251 (1998); *see also Cent. State Univ. v. Am. Ass'n of Univ. Professors, Cent. State Univ. Chapter*, 526 U.S. 124, 129 (1999) (Ginsburg, J., concurring) ("[O]pinions rendered without full briefing or argument have muted precedential value."). But whether or not the exclusion burdens the right to travel, it is irrational, as explained *infra*.

groups: they lack access to the political system that makes many of the laws they must follow; are largely people of color and suffer from a long history of subordination, in turn experiencing disfavor as perceived second-class members of the U.S. polity; and suffer disproportionately from economic disadvantage. These factors all underscore the need for this Court's careful review.

First, like out-of-staters targeted by a State legislature, residents of U.S. Territories have limited or no recourse to the political system that enacted the national law that discriminates against them. Most obviously, residents of U.S. Territories lack voting representation in Congress. In the Senate, they have no representation at all. In the House of Representatives, the Territories each have a single delegate — in Puerto Rico's case, a resident commissioner — *who cannot vote on legislation*.[6] In addition, because Puerto Rico has more than three million residents, its resident commissioner represents five times as many citizens as the average House Member.[7] Residents of

---

[6] *See* Christopher M. David, *Delegates to the U.S. Congress: History and Current Status*, CONG. RES. SERV. (Aug. 25, 2015), https://fas.org/sgp/crs/misc/R40555.pdf; *see also Romeu v. Cohen*, 265 F.3d 118, 123 (2d Cir. 2001) (The "Resident Commissioner * * * is entitled to receive official recognition by all of the departments of the Government of the United States, but * * * is not granted full voting rights.") (alterations and internal quotation marks omitted); 48 U.S.C. § 891.

[7] *See* U.S. Congresswoman Jenniffer González-Colón, *What is the Resident Commissioner?*, www.gonzalez-colon.house.gov/about/what-resident-commissioner (last visited Sept. 2, 2021).

U.S. Territories also cannot participate in the electoral college that casts ballots for President or Vice President of the United States.[8]

Accordingly, it is beyond dispute that residents of U.S. Territories, because they have no say in who makes up the Legislature and Executive who together make and implement federal laws, do not enjoy what this Court has described as the "mo[st] precious" "right * * * in a free country." *Wesberry v. Sanders*, 376 U.S. 1, 17 (1964). Without the courts, residents of U.S. Territories have nowhere in the federal government to which they can effectively "resort * * * [f]or protection against abuses by [the] legislature[]" — they cannot "resort to [] polls" that are not open to them. *Williamson*, 348 U.S. at 488 (quoting *Munn*, 94 U.S. at 134). It is hard to imagine a group more "relegated to * * * a position of political powerlessness," *Rodriguez*, 411 U.S. at 28, or more at risk of "be[ing] controlled as Congress may see fit, [and] not * * * as the people governed may wish." *Hawaii v. Mankichi*, 190 U.S. 197, 240 (1903) (Harlan, J., dissenting). Laws that discriminate against residents of U.S. Territories, passed by a Congress in which those residents lack representation, therefore

---

[8] *See* U.S. Const., art. II ("Each State shall appoint, in such Manner as the Legislature therefore may direct, a number of Electors, equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress"); *see also Igartua De La Rosa v. United States*, 32 F.3d 8, 9–10 (1st Cir. 1994) ("Since Puerto Rico [and the other territories are] * * * not * * * state[s] * * * [they are] not entitled under Article II to choose electors for the President, and residents of [the territories] have no constitutional right to participate in that election.").

deserve this Court's "rigorous scrutiny." *Zobel*, 457 U.S. at 60.

Second, residents of U.S. Territories are overwhelmingly people of color, and have long been subjected to race-based discriminatory treatment. Nearly 99 percent of the more than three million residents of Puerto Rico are Hispanic.[9] Over 92 percent of Guam's residents are non-White, primarily CHamoru, Asian, and other indigenous Pacific Islanders.[10] Approximately 93 percent of American Samoa's population is Pacific Islander, the vast majority of whom are indigenous Samoan people.[11] And over three quarters of the U.S. Virgin Islands' population is Black.[12]

The Territories' demographics stand in marked contrast to those of the fifty States. Whereas none of the Territories is majority or plurality non-Hispanic

---

[9] U.S. Census Bureau, *QuickFacts Puerto Rico*, https://www.census.gov/quickfacts/PR (last visited Sept. 2, 2021). *See Keyes v. School Dist. No. 1, Denver, Colo.*, 413 U.S. 189, 197 (1973) ("[Hispanics] constitute an identifiable class for purposes of the Fourteenth Amendment."); *see also* Pet. App. 45a ("An overwhelming percentage of the [U.S.] citizens residing in Puerto Rico are of Hispanic origin and are regarded as such despite their birthright [] citizenship.").

[10] Cent. Intelligence Agency, *World Factbook*: *Guam*, www.cia.gov/the-world-factbook/countries/guam/ (last updated Aug. 24, 2021).

[11] Cent. Intelligence Agency, *World Factbook: American Samoa*, https://www.cia.gov/the-world-factbook/countries/american-samoa/ (last updated Aug. 19, 2021).

[12] Cent. Intelligence Agency, *World Factbook: Virgin Islands*, www.cia.gov/the-world-factbook/countries/virgin-islands/ (last updated Aug. 24, 2021).

White, 47 out of the 50 States are majority or plurality non-Hispanic White.[13] The classification before the Court is not explicitly race-based, but it should not escape attention that Congress's classification singles out for disfavor the parts of the U.S. polity that are overwhelmingly comprised of people of color. Congress's decision to exclude residents of the Territories from SSI benefits at a minimum carries "the serious risk * * * of causing specific injuries on account of race," *Schuette*, 572 U.S. at 305, in addition to the other reasons it ought to spark judicial concern.

Residents of U.S. Territories have suffered through a stark and well-known history of subordination, much of it predicated on racial stereotypes. That history is illustrated by the debate in Congress over the Foraker Act in 1900, which among other things established a civil government and federal court in Puerto Rico. At the time, Senator Chauncey Depew of New York declared that the United States would not "incorporate the alien races, and * * * semicivilized, barbarous, and savage peoples of" "Puerto Rico, * * * Guam, [and] [American Samoa]" "into our body politic."[14] Around the same time, in the Harvard Law Review's pages, constitutional scholar and

---

[13] *See* U.S. Census Bureau, *QuickFacts California*, https://www.census.gov/quickfacts/CA (last visited Sept. 2, 2021); U.S. Census Bureau, *QuickFacts Hawaii*, https://www.census.gov/quickfacts/HI (last visited Sept. 2, 2021); U.S. Census Bureau, *QuickFacts New Mexico*, https://www.census.gov/quickfacts/NM (last visited Sept. 2, 2021).

[14] 33 Cong. Rec. 3622 (1900). Senator Depew's remarks, like those of other legislators who debated the Foraker Act, also addressed residents of Hawaii and the Philippines with similar

later Governor of Connecticut Simeon Baldwin captured the spirit of the age in arguing against extending "[o]ur Constitution," "made by a civilized and educated people," to the "ignorant and lawless brigands that infest Puerto Rico."[15]

This Court's *Insular Cases* reflected and perpetuated the same stereotypes. In *Downes v. Bidwell*, Justice Brown, who authored the Court's decision in *Plessy v. Ferguson* just five years earlier, warned that applying the Constitution's full protections to Puerto Rico would cause "grave questions * * * aris[ing] from differences of race, habits, laws, and customs of the people." 182 U.S. 244, 282 (1901). Justice White's concurring opinion — joined by Justices Shiras and McKenna — referred to the residents of the Territories as "a fierce, savage, and restless people," *id.* at 302, who were "absolutely unfit to receive [citizenship]," *id.* at 306, and needed to be

vulgarity. The United States acquired the Philippines (alongside Puerto Rico and Guam) from Spain at the conclusion of the Spanish-American War of 1898, and in August of that year a joint resolution of Congress made Hawaii a U.S. territory. *See* Department of State, Office of the Historian, *The Spanish-American War, 1898*, https://history.state.gov/milestones/1866-1898/spanish-american-war (last visited Sept. 2, 2021). The manner in which American congressmen spoke of Filipinos on the Senate floor is appalling; for instance, Senator William Bate of Tennessee referred to Filipinos as "physical[] weaklings of low stature, with black skin, closely curling hair, flat noses, thick lips, and large, clumsy feet. In the matter of intelligence they stand at or near the bottom of the human series, and they are believed to be incapable of any considerable degree of civilization or advancement." 33 Cong. Rec. 3613 (1900).

[15] Simeon E. Baldwin, *The Constitutional Questions Incident to the Acquisition & Government by the U.S. of Island Territory*, 12 Harv. L. Rev. 393, 415 (1899).

"govern[ed] * * * with a tighter rein, so as to * * * keep them under subjection." *Id.* at 302 (White, J., concurring) (internal quotation marks omitted). And more than twenty years later, in *Balzac v. Porto Rico*,[16] Chief Justice Taft concluded that the right to a jury trial did not apply to Puerto Rico residents, in part because they "liv[ed] in compact and ancient communities, with definitely formed customs and political conceptions" distinct from American "institution[s] of Anglo-Saxon origin." 258 U.S. 298, 347 (1922).

There have been increasing calls to overrule the *Insular Cases*, and the Court has rightly refused to "extend" these "much-criticized" decisions. *Fin. Oversight & Mgmt. Bd. for P.R. v. Aurelius Inv., LLC*, 140 S. Ct. 1649, 1665 (2020). But whatever the future of this line of cases, as a matter of historical fact they reflect the unfortunate reality that the United States' relationship with these Territories was forged in a spirit of bigotry and subordination.

---

[16] The U.S. Government misspelled Puerto Rico as "Porto Rico" in most official contexts between 1898 and 1932. *See* Foraker Act, ch. 191, 31 Stat. 77 (1900). Congress later changed the name, by statute, to its correct spelling, 48 U.S.C. § 731a, over members' objections that the switch would create needless "expense of changing * * * postage stamps * * * currency [and] bonds * * * merely to gratify the sentimental whim of the local inhabitants." H. Comm. on Insular Affairs, Correct the Spelling of the Name of the Island of Porto Rico, H.R. 585, 72nd Cong., at 2 (1st sess. 1932); *see also* 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, 392 n.1 (1978).

And while the days of speaking of the Territories' residents as "savages" should be behind us, there is no denying the continued second-class status that residents of the Territories experience to this day. The seemingly indefinite political "lockout" and democratic disadvantages discussed above are markers of this disfavored rank. Moreover, recent events, such as the federal government's patently inadequate response to Hurricane Maria and its widespread destruction in Puerto Rico, demonstrate the unequal footing on which residents of the Territories stand vis-à-vis residents of the States.[17] Although Hurricane Harvey — which hit Texas and Louisiana only one month before Hurricane Maria — was similar in severity, the level of federal aid was drastically different. Within nine days post-landfall of each hurricane, Maria survivors had received only $6 million in individual aid, in stark contrast to the over $100 million received by survivors of Harvey; by 150 days after landfall, total federal aid reached $14.3 billion for Harvey, as opposed to a mere $3.2 billion for Maria.[18]

Third, residents of U.S. Territories are profoundly economically disadvantaged as compared to residents of the States. The Territories each carry significant

---

[17] *See* Charley E. Willison, *et al.*, *Quantifying Inequities in US Federal Response to Hurricane Disaster in Texas and Florida Compared with Puerto Rico*, BMJ Global Health (2019), https://gh.bmj.com/content/bmjgh/4/1/e001191.full.pdf.

[18] *See id.* at 2–3.

amounts of public debt, which hinders their economies.[19] The Territories also greatly lag behind the States in per capita gross domestic product ("GDP"); for example, in a 2012 U.S. government study discussing American Samoa, Guam, and the U.S. Virgin Islands, all three territories had a per capita GDP considerably below the national per capita GDP, and two of the three ranked below *all* fifty States.[20]

Puerto Rico, in particular, has been in economic distress since 2006, with "the public debt of [its] government and its instrumentalities soar[ing], rising from $39.2 billion in 2005 to $71 billion in 2016." *Aurelius*, 140 S. Ct. at 1655. And by 2019, 43 percent of residents of Puerto Rico lived in poverty, in comparison to 19.6 percent of residents of Mississippi, the poorest of the States.[21]

* * *

Residents of the Territories bear the hallmarks of a group requiring the Court's careful scrutiny in assessing a legislative classification. They are outsiders to the political system that enacted the challenged national law, no less than the out-of-staters targeted in *Williams*. *See* 472 U.S. at 15–16.

---

[19] *See* Gov't Accountability Office, *U.S. Territories: Public Debt Outlook – 2021 Update*, GAO-21-508 (Jun 30, 2021), https://www.gao.gov/products/gao-21-508.

[20] *See* Wali M. Osman, *Economic Structure of American Samoa, Commonwealth of Northern Mariana Islands (CNMI), Guam and the U.S. Virgin Islands (USVI)*, DEP'T OF THE INTERIOR, OFFICE OF INSULAR AREAS at 9 (Oct. 2012), https://www.doi.gov/sites/doi.gov/files/uploads/Economic_Structure_of_Territories.pdf.

[21] *See* Cong. Res. Serv., *Poverty in the United States in 2019* at 10–11 (Apr. 13, 2021), https://fas.org/sgp/crs/misc/R46759.pdf.

They are overwhelmingly people of color; have been subordinated and disparaged for decades because of their race or ethnicity; and are economically marginalized. These characteristics should inform the Court's analysis of the legislative classification that excludes this class from SSI benefits.

II. The Government's Justifications for Discriminating Against Residents of Puerto Rico Fail Any Form Of Rational Basis Scrutiny.

Attempting to explain why Congress would deny a blind resident of Puerto Rico the benefits provided to a similarly situated blind resident of Pennsylvania, the Government proffers two justifications. Neither is sufficient to satisfy rational basis review in the context of this case. *See Moreno*, 413 U.S. at 533.

At the threshold, the Government's justifications for its discriminatory SSI classification are limited to Puerto Rico; they do not address residents of other similarly excluded territories — American Samoa, Guam, and the U.S. Virgin Islands. As a result, *Amici* focus on the Puerto Rico-specific justifications offered by the Government. But the classification that Congress drew, and that must be justified here, excludes *all* territorial residents (except residents of the Commonwealth of the Northern Mariana Islands). A State could not justify a law that denied benefits to all women by noting that a subclass of women do not need the benefits. Therefore any explanation for why it would have been rational to exclude residents of Puerto Rico specifically cannot be a sufficient rational basis for the actual classification that Congress made here.

In any event, the Government's two Puerto Rico-specific justifications fail even if the classification at issue excluded only Puerto Rico residents.

A. Congress's Decision to Exempt Residents of Puerto Rico from Some Federal Taxes Does Not Justify Those Residents' Exclusion from SSI Benefits.

The Government first contends that Congress's decision to exclude Puerto Rico residents from receiving SSI benefits follows from the Commonwealth's "unique tax status and resulting fiscal autonomy." U.S. Br. at 15. The Government notes that with some exceptions, "internal revenue laws" are not applicable in Puerto Rico. 48 U.S.C. § 734. From there, it argues that "Congress could rationally conclude that a jurisdiction [making] a reduced contribution to the federal treasury should receive a reduced share of the benefits funded by that treasury." U.S. Br. at 17–18 (also asserting that the decision furthers Congress's "legitimate interest in maintaining a balanced fiscal relationship" with Puerto Rico).

But Congress has *not* made such distinctions with respect to the States. Residents of the States are eligible for SSI benefits without regard to their home jurisdictions' "contribution to the federal treasury" or "fiscal relationship" with Congress. For example, Alabama and California contribute vastly different amounts to the federal government through taxation;[22] Alabama is a net recipient of federal funds to

---

[22] *See* Internal Revenue Service, *SOI Tax Stats - Gross Collections, by Type of Tax and State - IRS Data Book Table 5*,

the tune of $33 billion, while California is a net contributor of approximately $6 billion.[23] But Congress decided that a blind Alabama resident should participate in the SSI program on equal footing to a blind resident of California. When it comes to groups that do not have all the hallmarks of marginalized status discussed above, *see supra* Part I.B, Congress has decidedly not made the judgment that jurisdictions that "make[] a reduced contribution to the federal treasury," or that lack a "balanced fiscal relationship" with the federal government, "should receive a reduced share of the benefits funded by that treasury." U.S. Br. at 17–18.

If a jurisdiction's contributions to the federal fisc were the basis for eligibility, residents of Alaska, Montana, North Dakota, South Dakota, Vermont, and Wyoming would presumably have been denied SSI benefits before Puerto Rico residents. Those States historically have made "less of a contribution" to the federal treasury than Puerto Rico.[24] But Congress has not curtailed eligibility for SSI benefits for

---

https://www.irs.gov/statistics/soi-tax-stats-gross-collections-by-type-of-tax-and-state-irs-data-book-table-5 (last updated June 24, 2021).

[23] *See* Laura Schultz, *Giving or Getting? New York's Balance of Payments with the Federal Government: 2021 Report*, ROCKEFELLER INST. at 12–14 (Jan. 2021), https://rockinst.org/wp-content/uploads/2021/01/2021-Balance-of-Payments-Report-web.pdf.

[24] *See* Internal Revenue Service, *SOI Tax Stats - Gross Collections, by Type of Tax and State - IRS Data Book Table 5*, https://www.irs.gov/statistics/soi-tax-stats-gross-collections-by-type-of-tax-and-state-irs-data-book-table-5 (last updated June 24, 2021) (spreadsheets for years 1998 through 2005).

residents of these States. Nor has it taken into consideration the federal government's balance of payments with any States when determining entitlement to SSI benefits. Because Congress does not tie jurisdiction-level contributions to individual eligibility for SSI benefits in other jurisdictions, it is irrational to do so for individuals who reside in Puerto Rico. *See City of Cleburne*, 473 U.S. at 446 ("[Governments] may not rely on a classification whose relationship to an asserted goal is so attenuated as to render the distinction arbitrary or irrational.").

The Government's asserted justification is particularly arbitrary because the focus of the policy in question is the needs of *individuals*, not of the jurisdiction where they happen to reside. Most individuals who receive SSI benefits do not pay any income taxes at all, and a person's eligibility for SSI benefits is not contingent on his or her contributions to the federal treasury. *See* 42 U.S.C. § 1382. Instead, the relationship between any potential recipient of SSI benefits and the federal treasury is one-sided: the federal government provides a financial benefit in order to ensure "a minimum level of income" to certain persons the government has deemed to be in need. *See* 42 U.S.C. § 1381; Soc. Sec. Handbook, § 2102.1. Distinguishing between residents of Puerto Rico who are blind and residents of other jurisdictions who are blind on the basis that residents of Puerto Rico *generally* are exempt from income taxes — a criterion that has nothing to do with any individual's eligibility for SSI benefits — is irrational. *See Zobel*, 457 U.S. at 63.

B. Congress's Denial of SSI Benefits to Residents of Puerto Rico Does Not Rationally Advance Puerto Rico's Interest in Self-Government.

The Government also asserts that Congress acted rationally because its exclusion of Puerto Rico residents from receiving SSI benefits "promote[s] Puerto Rico's ability to govern itself." U.S. Br. at 22. In its view, Congress's decision to deny SSI benefits to blind, disabled, and older Puerto Rico residents somehow furthers Puerto Rico's ability to decide for itself how to spend its own limited resources. *Id.* at 22–23. But there is no reason to believe that denying federal aid to needy Puerto Rico residents furthers the local government's interests.

At its core, the Government's claim is that denying Puerto Rico's poorest residents a benefit intended to help them meet their most basic needs promotes Puerto Rico's autonomy. This is a non sequitur. The Government does not and cannot explain how providing a social safety net for blind, disabled, and older persons with extremely low income would interfere in any way with Puerto Rico's ability to govern and make decisions for itself. *See City of Cleburne*, 473 U.S. at 446. This is especially true in light of the absence of any showing that the government of Puerto Rico has ever objected to its residents receiving SSI benefits. *See* Commonwealth of Puerto Rico Br. at 1–2 (supporting the decision of the court of appeals in this case).

The Government argues that withholding SSI benefits from Puerto Rico residents allows Puerto Rico to decide to increase benefits in the Aid to the Aged, Blind, and Disabled program, a program for

certain low-income Puerto Rico residents, or to spend its own funds "on something else." U.S. Br. at 4, 22–23. Yet again, the point of autonomy is to respect the wishes of the autonomous party, and there is no indication that the Puerto Rican government *wants* its residents to be denied assistance in service of some broader principle.

Moreover, the Government's contention that it is safeguarding Puerto Rico's budgetary autonomy bears no relationship to reality. In fact, the Government has absolute — or "plenary" — power over Puerto Rico's affairs. U.S. Br. at 29; *see also Puerto Rico v. Sanchez Valle*, 136 S. Ct. 1863, 1873 (2016) ("[T]his Court concluded * * * that U.S. territories * * * are not sovereigns distinct from the United States."). And Congress has long *denied* Puerto Rico the very autonomy the Government invokes, most recently through restrictions placed on its ability to financially govern itself by the Puerto Rico Oversight, Management, and Economic Stability Act ("PROMESA"). *See* Pub. L. 114-187 (2016), codified at 48 U.S.C. § 2101 *et seq*.[25]

---

[25] PROMESA established an unelected board — whose members are appointed by the President — to make financial decisions for Puerto Rico. 48 U.S.C. § 2121. The board "can supervise and modify Puerto Rico's laws (and budget) * * * *" *Aurelius Inv.*, 140 S. Ct. at 1656. It wields veto power over any decisions of the Puerto Rican government that it believes are inconsistent with PROMESA or fiscal plans developed pursuant to this statutory regime. *See* 48 U.S.C. § 2144; *see also id.* § 2128(a). PROMESA is the latest, and most severe, example of Congress's intervention in Puerto Rican affairs, and it refutes the Government's assertion that Puerto Rico could actually make decisions for itself with respect to the budgetary matters the Government

The Government proposes that, in denying SSI benefits to residents of Puerto Rico, Congress concluded that Puerto Rico "is best positioned to tailor its laws and programs to reflect 'local conditions.'" U.S. Br. at 23. But this is also true of the States: each and every State could in theory be better positioned than Congress to craft legislation that reflects the unique circumstances of its residents. Yet Congress decided that SSI benefits apply uniformly to residents of those jurisdictions. *See* 42 U.S.C. § 1382.

And while the Government briefly tries to justify this distinction on "[e]conomic and other conditions" that "differ" in Puerto Rico "from those in the States," U.S. Br. at 23, this vague and conclusory reasoning is insufficient. *See Moreno*, 413 U.S. at 535–36 (expressing concern with "the Government's wholly unsubstantiated assumptions concerning the differences" between two classes). Economic conditions in Texas are very different from those in Kentucky, Virginia, or Oregon. Congress did not draw lines based on the "economic conditions" of the States, and the Government proffers no legitimate reason why it would have classified only the Territories in that way.

Finally, the Government pleads that Puerto Rico's "increased local control comes at a price." U.S. Br. at 24. In this view, Puerto Rico has obtained greater "autonomy" in exchange for fewer benefits for its people. *See id.* However, whatever level of autonomy Puerto Rico currently has was bestowed upon it —

---

cites. *See* Vaello-Madero Br. at 16, 40 (noting that decisions regarding expenditures for the Aid to the Aged, Blind, and Disabled program are ultimately made by the board, rather than local elected officials).

and can be unilaterally taken away — by Congress, through that body's constitutionally provided plenary authority over Puerto Rico. *See* U.S. Const., art. IV, sec. 3, cl. 2; U.S. Br. at 29; *see also* R. Sam Garrett, *Political Status of Puerto Rico: Options for Congress* CONG. RES. SERV. at Summary, 10–11 (June 7, 2011), https://sgp.fas.org/crs/row/RL32933.pdf. The notion of choice that undergirds the Government's justification is illusory — the "price" Puerto Rico paid was one Congress dictated to it in the first place. Any consequence of that forced arrangement cannot have any rational relationship to Puerto Rico's autonomy or ability to govern itself — much less to the selective denial of aid to people who are elderly, blind, or disabled.

CONCLUSION

For the foregoing reasons, the judgment of the First Circuit should be affirmed.

Respectfully submitted,

Adriel I. Cepeda Derieux
Counsel of Record
Alejandro A. Ortiz
Jennesa Calvo-Friedman
Samantha Osaki
AMERICAN CIVIL LIBERTIES UNION FOUNDATION
125 Broad Street
New York, NY 10004
(212) 549-2500
acepedaderieux@aclu.org

David D. Cole
AMERICAN CIVIL LIBERTIES UNION FOUNDATION
915 15th Street, NW
Washington, DC 20005

David M. Zionts
Megan O'Neill
Alexander Ely
COVINGTON & BURLING LLP
One CityCenter
850 Tenth Street, NW
Washington, DC 20001
(202) 662-6000
dzionts@cov.com

William Ramírez
Fermín Arraiza
ACLU OF PUERTO RICO
Union Plaza, Suite 1105
416 Ave. Ponce de Leon
San Juan, PR 00918

Counsel for Amici Curiae

September 7, 2021