19-1390

IN THE

United States Court of Appeals

FOR THE FIRST CIRCUIT

UNITED STATES,

Plaintiff-Appellant,

—v.—

JOSE LUIS VAELLO-MADERO,

Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO
CASE NO. 17-CV-2133 (HON. GUSTAVO A. GELPI)

BRIEF OF DEFENDANT-APPELLEE

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STATEMENT IN SUPPORT OF ORAL ARGUMENT

Because this case implicates the fundamental constitutional rights of U.S. citizens in Puerto Rico and presents issues of "portentous" interest for the more than 3.4 million residents of the island, JA75, this Court and the general public would benefit from oral argument in Puerto Rico to clarify any questions that may arise beyond the written briefs.

"… *one Nation under God, indivisible, with liberty and justice for all.*"

PRELIMINARY STATEMENT

The island of Puerto Rico has been under the United States' total sovereign control since its annexation as a U.S. territory more than 120 years ago. Puerto Rico's native-born inhabitants have been U.S. citizens since 1917 and have been entitled to U.S. citizenship by birthright since 1941. In 1952, Congress established Puerto Rico as a U.S. Commonwealth. Today, the American flag flies over its government buildings. Generations of its children grew up reciting the Pledge of Allegiance, and hundreds of thousands of Puerto Ricans have served in the U.S. military. Article III judges sit on Puerto Rico's federal courts, and Puerto Ricans serve on the federal bench. Common law principles have been integrated into the territory's once purely civil law system, and the U.S. Supreme Court reviews the judgments of the Commonwealth's highest court. Even more, the Commonwealth's congressionally-approved constitution swears "loyalty" to the U.S. Constitution.

Yet the United States claims that Congress may treat Puerto Rico as if it were "outside the United States" for purposes of excluding Puerto Rico residents as a class from Supplemental Security Income ("SSI") under Title XVI of the Social Security Act – a federal benefits program intended to assist poor elderly, blind, and disabled individuals in the "United States" – because it would be too

costly to include Puerto Rico residents in the program and they do not fund SSI. As the court below found, these factually inaccurate pretexts fail to justify treating Puerto Rico residents as if their home on U.S. soil were situated outside their nation. Rather, the real reason Congress has been able to discriminate against Puerto Rico residents in geographic terms is that, more than a century ago, the island's inhabitants were branded with a badge of inferiority under a long-discredited, non-textual interpretation of the Territories Clause known as the Incorporation Doctrine.

A jurisprudential anomaly, the Incorporation Doctrine was built on the belief that the native inhabitants of "distant" territories like Puerto Rico belong to "uncivilized" and "alien races" who, unlike "native white inhabitants" in "contiguous" territories like Florida and Alaska, are supposedly "unfit" to handle the full rights and duties of a constitutional form of government. That belief gave rise to a system of territorial segregation between "incorporated" territories and so-called "unincorporated" territories that, although "belonging to the United States," are "not a part of the United States." Not surprisingly, the Incorporation Doctrine was created around the same time and by most of the same justices that decided *Plessy v. Ferguson*, which infamously held that States could segregate public spaces between the "white race" and the "colored race" as long as the facilities were equal. But while *Plessy*'s "separate but equal" doctrine has been entirely

disgraced, the "separate and unequal" regime of the Incorporation Doctrine persists to this day. That is what this case is about.

In June 2012, José Luis Vaello Madero, a U.S. citizen from Puerto Rico, qualified for SSI benefits while he was living in New York and suffering from severe health problems that left him unable to support himself. The Social Security Administration ("SSA") approved his application after determining that he met all of the program's requirements. A year later, Vaello Madero returned to Puerto Rico to better care for his ailing wife. He did not realize that his move made him ineligible for SSI benefits, and he did not inform SSA of his relocation until June 2016, around the time of his sixty-second birthday, when he was applying for Title II social security benefits in an SSA office in Puerto Rico.

The following month, SSA terminated Vaello Madero's SSI benefits solely because, after he moved to Puerto Rico, he was deemed to be residing "outside the United States." SSA also informed Vaello Madero that his SSI benefits were being adjusted retroactively to zero. More than a year later, the United States brought an action in the federal district court in Puerto Rico, seeking a judgment of $28,081 for benefits he was allegedly overpaid while residing on the island. Had Vaello Madero moved to another constituent State or the District of Columbia, or even another similarly-situated U.S. territory such as the Northern Mariana Islands (the "NMI"), the stated justification for ending his SSI benefits would not apply

because those places are deemed to be in the "United States" for purposes of the statute. In effect, the Government argued that Congress was allowed to deny SSI benefits to otherwise eligible U.S. citizens such as Vaello Madero simply because, as residents of Puerto Rico, they can be treated as residing "outside the United States."

The district court rejected that argument and held that Congress cannot discriminate against Puerto Rico residents as a class by treating them as if they were residing in a foreign country – producing the anomalous result of affording them lesser constitutional protection than is accorded to resident aliens in the United States – without violating their fundamental right to equal protection under the Fifth Amendment, which must be applied to Puerto Rico residents with strict scrutiny in light of the history of discrimination directed at the island's predominantly Hispanic population and its total disenfranchisement at the federal level. Indeed, by categorically denying them SSI benefits intended to assist individuals in need nationwide, Congress was treating the more than three million Americans in Puerto Rico as second-tier citizens. The district court further held that Congress cannot take cover behind the Territories Clause to "demean and brand" U.S. citizens with a "stigma of inferior citizenship" simply because they reside in a U.S. territory. To allow otherwise would be to endorse a "citizenship apartheid based on historical and social ethnicity within United States soil."

Now, the United States asks this Court to reverse the lower court's judgment on the grounds that Supreme Court precedent holds otherwise. But all that the Government points to are two inapt, summary dispositions, *Califano v. Gautier Torres* and *Harris v. Rosario*, neither of which tested the exclusion of Puerto Rico residents from SSI under the magnifying lens of an equal protection analysis. Instead, without full briefing or oral argument, the Court in those cases merely assumed that the unequal treatment of Puerto Rico was justified by reference to the Incorporation Doctrine.

While the United States may wish to brush away this inconvenient history by ignoring it entirely in its opening brief, the dead hand of the Incorporation Doctrine lies beneath the surface of the Government's core argument that, under *Califano* and *Harris*, Congress can discriminate against Puerto Rico residents as a class subject only to the most deferential of standards. Even so, as the district court held, the exclusion of Puerto Rico residents fails under any level of review. And when reviewed under the proper equal protection analysis to which Puerto Rico residents are entitled, there can be no doubt that the exclusion crumbles under the weight of strict scrutiny. Therefore, this Court should affirm the district court's judgment in favor of Vaello Madero.

JURISDICTIONAL STATEMENT

The United States commenced this action against Vaello Madero to collect alleged overpayments he received as part of his entitlement to SSI benefits. The district court had jurisdiction under 28 U.S.C. § 1345. On February 4, 2019, the court issued an opinion and order denying the United States' claim, and entered a final judgment dismissing the action. On April 3, the United States timely appealed. This Court has jurisdiction under 28 U.S.C. § 1291.

STATEMENT OF THE ISSUE

Whether Congress can exclude otherwise eligible residents of Puerto Rico, a U.S. territory, from the SSI disability program under the Social Security Act solely on the basis that they purportedly reside "outside the United States" without violating the equal protection guarantee of the Fifth Amendment.

STATEMENT OF THE CASE

The Social Security Act excludes Puerto Rico residents as a class from SSI because they are considered to be residing "outside the United States." 42 U.S.C. § 1382(f). Critical for understanding this legislative approach is the underlying belief that the term "United States" need not encompass a U.S. territory like Puerto Rico. As explained below, this view emerged in congressional debates regarding the status of the territories acquired by the United States in 1898 following the end of the Spanish-American War, and was endorsed at the turn of the 20th century by a series of Supreme Court decisions known as the *Insular Cases*. This history is

necessary for understanding Congress's decision to exclude Puerto Rico residents from SSI in geographic terms and for assessing its rationale in light of the program's purpose, funding model and eligibility criteria. That history also provides the context for the SSA's decision to terminate Vaello Madero's SSI payments and for the United States' decision to sue him to recover alleged overpayments he received while residing in Puerto Rico.

A. Historical Background

The history of the United States' treatment of Puerto Rico is well documented and uncontroverted. In 1900, following the acquisition of Puerto Rico, Congress passed the Foraker Act imposing duties on imports from the island to the United States to fund a civilian territorial government. Pub. L. No. 56–191, 31 Stat. 77 (1900). Its passage was justified by proponents on the ground that it would not "incorporate the alien races, and civilized, semi-civilized, barbarous, and savage peoples of these islands into our body politic." 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 (1978) (quoting 33 CONG. REC. 3622 (1900) (Remarks of Sen. Depew)). The apparent conflict between that legislation and the Uniformity Clause, requiring that "all duties, imposts and excises shall be uniform throughout the United States," U.S. CONST. art. I, § 8, cl. 1, was dismissed by Congress; Puerto Rico was not the United States.

See Cabranes, *supra* at 433 (citing 33 CONG. REC. 3690 (1900) (remarks of Sen. Foraker)).

The Supreme Court adopted this theory and the racial anxiety undergirding the Foraker Act in *Downes v. Bidwell*, 182 U.S. 244 (1901), arguably the most influential of the *Insular Cases*. Decided by nearly the same justices that decided *Plessy v. Ferguson*, 163 U.S. 537 (1896), the *Downes* Court held that the constitutional requirement of uniformity "throughout the United States" did not apply to the Foraker Act because Puerto Rico, even though a U.S. territory, was "foreign * * * in a domestic sense." 182 U.S. at 341 (White, J., concurring). Like Congress, the Court was concerned that under a broader construction of the term "United States," children born in Puerto Rico, "whether savages or civilized," could become "entitled to all the rights, privileges and immunities of citizens" by birth. *Id.* at 279 (Brown, J.). The concurring opinion noted that such an approach risked "inflict[ing] grave detriment on the United States" if territories inhabited by people of "uncivilized" and "alien races," as opposed to the "native white inhabitants" of "contiguous" territories like Florida or Alaska, were automatically incorporated into the Union, because this would result in the "bestowal of citizenship on those absolutely unfit to receive it[.]" *Id.* at 306, 314, 319 (White, J., concurring). To address this concern, the Court departed from longstanding precedent under the Territories Clause and created a category of so-called

"unincorporated" territories that, although "belonging to the United States," could be treated as if they were "not a part of the United States."[1] *Id.* at 287, 311.

By 1917, the Jones Act extended American citizenship to Puerto Ricans, and that statute was amended to entitle Puerto Ricans born in the Territory on or after 1941 to birthright citizenship. A6.[2] The debate leading up to the enactment of the Jones Act again concerned whether Puerto Ricans were racially similar enough to white Americans to warrant this privilege. Proponents of citizenship emphasized that Puerto Ricans were two-thirds "white, of Spanish origin," while opponents claimed that at least three quarters of the population "was pure African or had an African strain in their blood." Cabranes, *supra* at 462, 481 (citing S. REP. NO. 1300, 62nd Cong., 3d Sess. 2 (1913) and 53 CONG. REC. 1036 (1916) (remarks of Rep. Cannon)). On either view, members of Congress drew comfort from the consideration that an extension of citizenship would not give Puerto Ricans "any rights that the American people do not want them to have," because it would not incorporate the territory or provide a route to statehood. *Id.* at 487 (citing 33 CONG. REC. 2473 (1900) (remarks of Sen. Foraker)).

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[1] Up until then, the term "United States" had been understood to refer to one, indivisible nation. *See Loughborough v. Blake*, 18 U.S. 317, 319 (1820) ("Does this term designate the whole, or any particular portion of the American empire? Certainly this question can admit of but one answer. It is the name given to our great republic, *which is composed of States and territories*." (emphasis added)).

[2] Citations to pages A1-A9 of the Government's brief are references to the district court's opinion and order.

The Supreme Court later held that the extension of citizenship to Puerto Ricans did not "incorporate" Puerto Rico into the United States. *Balzac v. Porto Rico*, 258 U.S. 298, 311 (1922) (noting a presumption against inferring incorporation of "these distant ocean communities of a different origin and language from those of our continental people"). However, the Jones Act had the effect of tying Puerto Rico to the United States both legally and culturally over the ensuing decades.

Most saliently, in 1950, pursuant to the Puerto Rico Federal Relations Act ("PRFRA"), which defines the current relationship between Puerto Rico and the United States, the island became a "commonwealth," a designation affirmed by Congress. Pub. L. No. 81-600, pmbl., 64 Stat. 319, 319 (1950); Act of July 3, 1952, Pub. L. No. 82-447, 66 Stat. 327. The Commonwealth's constitution affirms its "loyalty" to the U.S. Constitution, and requires employees of the Puerto Rican government to swear to uphold the U.S. Constitution. P.R. CONST. pmbl, art. VI, § 16.

Notwithstanding the Commonwealth's authority under the PRFRA, the "ultimate source" of any powers held by the Puerto Rican government is Congress, and Puerto Rico remains entirely subject to the United States' sovereignty and control. *Puerto Rico v. Sanchez Valle*, 136 S. Ct. 1863, 1875 (2016).

B. Statutory Background

Against this historical backdrop, Congress passed the 1972 amendments to the Social Security Act implementing the SSI program for aged, blind, and disabled individuals in need. Pub. L. No. 92–603, 86 Stat. 1465 (1972) (codified as amended at 42 U.S.C. § 1381 *et seq.*). SSI replaced a State-by-State federal reimbursement model with a nationwide program administered by the federal government under national regulations governing eligibility for federal payments directly to individual beneficiaries.[3] JA91, 99.

SSI Funding Model. SSI is not an insurance program under which individuals or groups pay into a fund that later disburses their benefits. Thus, unlike Social Security Disability Insurance or Medicare, which are funded by beneficiaries' payroll taxes, SSI beneficiaries do not necessarily fund SSI. *See* JA91, 97; *compare* 42 U.S.C. § 401(b) *and* 42 U.S.C. § 1395i *with* 42 U.S.C. § 1381. Instead, SSI is funded through mandatory appropriations from the general fund of the U.S. Treasury. JA97; 42 U.S.C. § 1381.

Contributions to the general fund come from numerous sources, including federal income tax, excise taxes, commodity taxes, and estate taxes. JA55–56; s*ee*

[3] Before then, federal disability aid was provided in the form of reimbursements to States and territories that paid benefits according to their own plans under programs like the Aid to the Aged, Blind, and Disabled. JA99. That program still applies in Puerto Rico, providing substantially lower payments to a much smaller pool of eligible beneficiaries. JA99-100, 108-109.

U.S. DEP'T OF THE TREASURY, *Resource Center*, https://www.treasury.gov/resource-center/faqs/Budget/Pages/us-budget.aspx (last visited August 1, 2019). Puerto Rico residents pay federal taxes on income derived from outside the island and from federal employment within the island, as well as excise, estate, commodity, and other federal taxes that flow into the general fund of the U.S. Treasury. JA85–87; *see* IRS, STATISTICS OF INCOME TAX, GROSS COLLECTIONS, BY TYPE OF TAX AND STATE AND FISCAL YEAR (2016), https://www.irs.gov/statistics/soi-tax-stats-gross-collections-by-type-of-tax-and-state-irs-data-book-table-5 (stating that in 2016 alone Puerto Rico paid $3.479 billion into the U.S. Treasury).

SSI Eligibility Criteria: SSI is a program of last resort, meaning applicants must first seek all other benefits for which they may be eligible. JA93. SSI benefits follow a uniform national scale. JA109. Individuals are eligible for SSI benefits if they have income below a certain threshold, and are aged, blind, or disabled as defined in federal regulations. JA94–96; *see* 42 U.S.C. § 1382 (setting out eligibility criteria). SSI is also "the only source of federal income support targeted to families caring for children with disabilities." JA98. Because no other program meets that need on the island, no such support is available for disabled children in Puerto Rico. JA124-28.

Eligibility for SSI or the amount of benefits awarded is not tied to an individual's history of income tax payments. Nor is the level of benefits tied to income tax receipts associated with an individual's place of residence. Qualified individuals are eligible to receive SSI payments, irrespective of whether their State or territory of residence is a net contributor to or recipient of the general fund of the U.S. Treasury. JA85; *see* 42 U.S.C. § 1382(a); SOCIAL SECURITY ADMINISTRATION, SSI FEDERAL PAYMENT AMOUNTS FOR 2019, https://www.ssa.gov/oact/cola/SSI.html (last visited August 1, 2019).

Although SSI benefits are paid directly to eligible individuals by the federal government, Puerto Rico residents as a class are ineligible to receive these benefits.[4] Section 1382(f) states that no adult is eligible for benefits during any month in which he or she resides "outside the United States." 42 U.S.C. § 1382(f). And section 1382c(e), in turn, defines the "United States" only as "the 50 States and the District of Columbia." 42 U.S.C. § 1382c(e). SSA regulations issued pursuant to the Social Security Act define the "United States" to include "the 50 States, the District of Columbia, and the Northern Mariana Islands." 20 C.F.R. § 416.215. Because Puerto Rico is a U.S. territory rather than one of the fifty States, and because it is not expressly included in the definition of the "United

[4] Puerto Rico's population is almost 100 percent Hispanic or Latino. *See* A6; U.S. CENSUS BUREAU, QUICK FACTS, PUERTO RICO, https://www.census.gov/quickfacts/fact/table/pr/ PST045217 (last visited August 1, 2019).

States," the Social Security Act facially excludes Puerto Rico residents from receiving SSI benefits.

C. Factual Background

Vaello Madero suffers from severe health problems that prevent him from supporting himself. JA31 ¶ 7. While residing in New York, he applied for SSI disability benefits. *Id.* SSA determined Vaello Madero met all of the eligibility requirements for SSI and, in June 2012, approved his application. JA68-69 ¶¶ 4-5.

A year later, in July 2013, Vaello Madero moved to Loiza, Puerto Rico, to help care for his wife, who had previously moved there due to her own health issues. JA31 ¶ 9. Vaello Madero continued to receive SSI disability payments through direct deposit into his New York bank account. JA31 ¶ 9. He was not aware that his move to Puerto Rico made him ineligible to continue receiving SSI benefits, and he did not inform SSA of his move until he applied for Title II social security benefits in an SSA office in Carolina, Puerto Rico, in June 2016 when he was about to turn sixty-two. JA31 ¶¶ 10–12.

Within the next two months, SSA sent two written notices to Vaello Madero advising him that the agency was discontinuing his SSI benefits. JA69 ¶ 9. The first notice stated that SSA was retroactively lowering his monthly benefit to $0 effective August 2014. JA41, 69 ¶ 10. The second notice informed him that his monthly SSI benefits were being retroactively lowered to $0 effective August

2013. JA45, 69 ¶ 12. Both notices provided only one reason for the adjustment and termination of his SSI benefits: Vaello Madero had become ineligible to receive SSI benefits because he was "outside the United States."

D. Procedural History

More than a year later, the United States brought an action for collection of an alleged overpayment of $28,081 in SSI benefits received by Vaello Madero after he moved to Puerto Rico. *See* JA17–18. The Government asserted jurisdiction under 28 U.S.C. § 1345, which applies to any case "commenced by the United States," and under a criminal statute, 42 U.S.C. § 408(a)(4), which provides for criminal penalties including up to five years in prison. JA17 ¶ 1. Under the specter of criminal prosecution and as his community was preparing for Hurricane Irma, which days later caused extensive damage to Loiza, an SSA investigator approached Vaello Madero without the presence of any attorneys and asked him to sign a Stipulation for Consent Judgment. JA25–28; *see* JA39 ¶ 4.

After the stipulation was filed, the district court appointed *pro bono* counsel for the defendant, making reference to the impacts of Hurricane Irma and a second hurricane, Hurricane Maria. JA29. With the assistance of counsel, Vaello Madero moved to withdraw the stipulation because he never intended to consent to its terms and did not understand its full legal effects. JA39 ¶¶ 4–5. That same day, Vaello Madero answered the complaint. JA30–33. The answer raised three

affirmative defenses, including a defense to liability on the premise that the exclusion of Puerto Rico residents from the SSI program violates the equal protection guarantee of the Fifth Amendment. JA32 ¶¶ 14–16.

In a sudden change of heart, the United States moved for voluntary dismissal without prejudice. JA8. The Government agreed, "out of an abundance of caution," to withdraw the stipulation, and conceded that the criminal statute did not confer jurisdiction over a civil collection action. DE23 at 13.[5] It tried to re-cast Vaello Madero's constitutional defense as a counterclaim and argued that the court lacked jurisdiction over that claim unless and until the defendant had exhausted administrative remedies. *Id.* at 6–13.

The court denied voluntary dismissal and approved withdrawal of the stipulation. JA51. The court explained that it would "not allow the United States to avoid judicial review of an unsympathetic topic using jurisdictional pretexts." JA59.[6]

Because no material factual disagreements existed and the merits of the Government's overpayment claim hinged on the constitutionality of the Social Security Act's exclusion of Puerto Rico from the SSI program as a matter of law,

[5] References to "DE" indicate the Docket Entry number of the cited document on the record below.
[6] Shortly thereafter, the Commonwealth appeared as amicus, citing "the *portentous* impact" of this case on the island's residents. JA62. Puerto Rico's only representative in Congress, the resident commissioner, also appeared as amicus. JA64.

the parties agreed that the case was ripe for summary judgment. JA70. Following extensive briefing and oral argument in the U.S. courthouse in Ponce, Puerto Rico, the district court denied the United States' claim and entered summary judgment in favor of Vaello Madero. JA15; A1-9.

STANDARD OF REVIEW

A district court's decision to grant summary judgment is reviewed *de novo* and may be affirmed on any grounds supported by the record. *Johnson v. Gordon*, 409 F.3d 12, 16–17 (1st Cir. 2005). A court of appeals may take judicial notice of indisputable facts for purposes of affirming a district court's judgment. *See Aguilar v. United States Immigration and Customs Enforcement*, 510 F.3d 1 n.1 (1st Cir. 2007); *see also Zalewski v. Cicero Builder Dev. Inc.*, 754 F.3d 95 n.20 (2d Cir. 2014); Fed. R. Evid. 201(b).

SUMMARY OF ARGUMENT

1. The district court correctly determined that the exclusion of Puerto Rico residents as a class from the SSI program violates equal protection under the Fifth Amendment. Through this exclusion, Congress singled out U.S. citizens and other residents of Puerto Rico – a predominantly Hispanic, historically disfavored, and politically powerless group – for disparate treatment based on a legacy of treating them as if they were "alien races" on foreign land under the reasoning of the *Insular Cases*. Because classifications based on race, alienage, and national

origin are inherently suspect, the exclusion of Puerto Rico residents as residing "outside the United States" is properly reviewed under strict scrutiny. And because the classification is neither necessary nor narrowly tailored to meet a compelling government objective, the exclusion of Puerto Rico residents from SSI must be struck down. Regardless, under the program's own eligibility criteria, there is no rational link between SSI expenditures and tax revenues collected on a geographic basis or between reducing costs and excluding individuals based on their residence in Puerto Rico. Rather, by excluding Puerto Rico residents from accessing a nationwide benefits program on the same terms as citizens and alien residents on the mainland, the exclusion functions only to demean Americans in Puerto Rico as inferior citizens and therefore fails under any standard of review.

2. Although the Government has abandoned and therefore waived the argument that the Territories Clause alone justifies the disparate treatment of Puerto Rico residents, any attempt to revive that argument on reply would also fail on the merits. As the First Circuit recently confirmed, the Territories Clause grants Congress the power to enact legislation for the territories as a State does for its municipalities. It is not a magic wand to wave away constitutional limitations on congressional power; nor is it a license to discriminate against residents of the territories. Although under the *Insular Cases*' interpretation of the Territories Clause the United States has been divided into two geographic realms, one in

which the Constitution applies with full force and another in which Congress dictates its applicability through territorial designations, the Supreme Court and this Circuit have made clear that the Constitution follows Congress wherever it legislates and its terms cannot be switched on and off at will. The Supreme Court has further affirmed that the equal protection component of the liberty interest protected by the Fifth Amendment's due process clause does not permit arbitrarily separating out historically disfavored minorities into unequal legal regimes. Because excluding Puerto Rican Americans or any other discrete and insular minority as a class on the mainland from SSI would certainly violate their right to equal protection, the exclusion of Puerto Rico residents as a class must also fail.

ARGUMENT

I. The District Court Correctly Held That the Exclusion of Puerto Rico Residents as a Class from the SSI Program Violates the Equal Protection Guarantee of the Fifth Amendment

Equal protection is a component of the liberty interest protected by the Due Process Clause of the Fifth Amendment, which is coextensive with the Fourteenth Amendment's Equal Protection Clause. U.S. CONST. amend. V, XIV; *United States v. Windsor*, 570 U.S. 744, 774 (2013); *Weinberger v. Wiesenfeld*, 420 U.S. 636, 638 n.2 (1975); *United States v. Mass. Mar. Acad.*, 762 F.2d 142, 153 (1st Cir. 1985) ("[T]he standards for determining an equal protection claim under the fifth and fourteenth amendments are the same."). The Equal Protection Clause

"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 principles, whether under the Fifth or Fourteenth Amendment, apply in Puerto Rico. *In re Conde-Vidal*, 818 F.3d 765, 766 (1st Cir. 2016) (per curiam) (citing *Examining Bd. of Eng'rs, Architects, & Surveyors v. Flores de Otero*, 426 U.S. 572, 600 (1976)).

A. Strict Scrutiny Applies to the Classification of Puerto Rico Residents as Residing "Outside the United States"

When legislation singles out a class of people for disparate treatment, courts must scrutinize the classification to determine if it violates equal protection. *See Pers. Adm'r of Mass. v. Feeney*, 442 U.S. 256, 271-72 (1979). Depending on the classification at issue, courts apply different levels of review. *Id.* at 272; *Cleburne*, 473 U.S. at 439-41. Statutes that discriminate based on race, alienage and national origin are considered inherently "suspect" and therefore subject to "strict scrutiny" because these classifications are often "deemed to reflect prejudice and antipathy – a view that those in the burdened class are not as worthy or deserving as others." *Id.* at 440; *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 224 (1995); *Washington v. Davis*, 426 U.S. 229, 239 (1976) (noting that a "central purpose" of equal protection "is the prevention of official conduct discriminating on the basis of race"); *Bruns v. Mayhew*, 750 F.3d 61, 66 (1st Cir. 2014) ("[A]lienage-based

classifications inherently raise concerns of invidious discrimination and are therefore generally subject to strict judicial scrutiny.").

In addition, courts apply a "more searching judicial inquiry" in cases of "prejudice against discrete and insular minorities" as these factors create a "special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities." *United States v. Carolene Products Co.*, 304 U.S. 144, 152 n.4 (1938); *see also Feeney*, 442 U.S. at 272; *Cleburne*, 473 U.S. at 440 (stating that laws targeting racial or ethnic minorities are suspect also because "such discrimination is unlikely to be soon rectified by legislative means."); *Toll v. Moreno*, 458 U.S. 1, 23 (1982) (Blackmun, J., concurring) (observing that "the fact of powerlessness is crucial, for in combination with prejudice it is the minority group's inability to assert its political interests" that inhibits a political solution). For example, strict scrutiny applies to classifications based on citizenship status because 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). Here, the exclusion of Puerto Rico residents from SSI is subject to strict or heightened scrutiny both because of the history of racial discrimination

directed at Puerto Rico's predominantly Hispanic population and because of their political powerlessness at the federal level.

The Social Security Act classifies Puerto Rico residents in geographic terms, *i.e.*, as residing "outside the United States." That classification is directly traceable to a historical desire to discriminate based on race, alienage and national origin. In assessing whether a discriminatory purpose is present, a court may consider any "circumstantial and direct evidence of intent as may be available." *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 266 (1977); *see In re Subpoena to Witzel*, 531 F.3d 113, 120 (1st Cir. 2008). Factors establishing a discriminatory purpose include (1) whether "a clear pattern, unexplainable on grounds other than race, emerges from the effect of the state action even when the governing legislation appears neutral on its face"; (2) the "historical background of the decision * * * particularly if it reveals a series of official actions taken for invidious purposes"; (3) "[t]he specific sequence of events leading up to the challenged decision"; (4) "[d]epartures from the normal procedural sequence * * * if the factors usually considered important by the decisionmaker strongly favor a decision contrary to the one reached"; and (5) "[t]he legislative or administrative history * * * especially where there are contemporary statements by members of the decisionmaking body, minutes of its meetings, or reports." *Arlington Heights*, 429 U.S. at 266–68.

Applying this analysis to the exclusion of Puerto Rico from SSI reveals that the geographic classification of Puerto Rico residents as being "outside the United States" is the product of a pattern of purposeful discrimination, unexplainable on grounds other than race. As the district court found, Puerto Rico's population is "overwhelmingly" Hispanic. A6. And the political and legal foundation for treating Puerto Rico differently because it is "foreign * * * in a domestic sense" was laid on the express belief that the island is inhabited by "alien races" and "semi-civilized, barbarous, and savage peoples" of mixed Spanish and African "blood," as opposed to "native white inhabitants." *See supra* pp. 7–9. In fact, the first laws treating Puerto Rico as "outside the United States," and the *Insular Cases* that sustained them, were established on racial terms that shock the conscience of most people today. Needless to say, this race-based reasoning – adopted early on both by members of Congress and the Supreme Court – has been discredited as reflecting a "prejudice and antipathy" that was prevalent at the time. *Cleburne*, 473 U.S. at 440.

As Judge Torruella has noted: "There is no question that the *Insular Cases* are on par with the Court's infamous decision in *Plessy v. Ferguson* in licencing the downgrading of the rights of discrete minorities within the political hegemony of the United States." *Igartua-de la Rosa v. United States*, 417 F.3d 145, 162 (1st Cir. 2005) (Torruella, J., dissenting) (citing RUBIN FRANCIS WESTON, RACISM IN

U.S. IMPERIALISM: THE INFLUENCE OF RACIAL ASSUMPTIONS ON AMERICAN FOREIGN POLICY, 1893–1946 15 (1972)). Other federal judges have likewise found the geographic exclusion of Puerto Rico to have been motivated by express racial animus:

> [C]omments regarding the annexation of Puerto Rico and its citizens, such as those made in the Harvard Law Review articles, the very Floor of Congress, and in the *Insular Cases* themselves, would constitute direct *prima facie* evidence of intentional discrimination based on race and ethnic origin.

Consejo de Salud v. Rullan, 586 F. Supp. 2d 22, 41 (D.P.R. 2008) (Gelpí, J.) (citing Juan R. Torruella, *The Insular Cases: The Establishment of a Regime of Political Apartheid*, 29 U. PA. J. INT'L L. 283, 347 (2007)); *see also Ballentine v. United States*, Civ. No. 1999-130, 2001 U.S. Dist. LEXIS 16856, at *23 (D.V.I. Oct. 15, 2001) ("Not surprisingly, the *Insular Cases* have been, and continue to be, severely criticized as being founded on racial and ethnic prejudices that violate the very essence and foundation of our system of government[.]").

The jurisprudential offspring of this explicit animus, the Incorporation Doctrine, continues to be used as the legal justification for excluding Puerto Rico residents from federal entitlement programs like SSI on the basis that Congress has opted not to "incorporate" Puerto Rico into the Union. In *Califano v. Torres*, for instance, the Supreme Court acknowledged that the unequal treatment of Puerto Rico can be justified only by reference to the Incorporation Doctrine and the

Insular Cases. 435 U.S. 1, 3 n.4 (1978) (per curiam) (citing the *Insular Cases* and a secondary source discussing the Incorporation Doctrine, and no other authority). SSA still explicitly relies on *Califano* as the reason for treating SSI beneficiaries who move to Puerto Rico as residing "outside the United States" – as if they had moved to a foreign country – and therefore ineligible to continue receiving SSI benefits. *See* OFFICE OF THE INSPECTOR GEN., SSA, AUDIT REPORT: SUPPLEMENTAL SECURITY INCOME RECIPIENTS RECEIVING PAYMENTS IN BANK ACCOUNTS OUTSIDE THE UNITED STATES 1 & n.6 (2015), *available at* https://oig.ssa.gov/sites/default/files/audit/full/pdf/A-06-14-14037.pdf (stating that, if SSI beneficiaries "*leave the country* for longer than 30 consecutive days, SSA should suspend their SSI payments," and noting that "[t]hese provisions also apply to Puerto Rico") (citing *Califano*, 435 U.S. at 4) (emphasis added). It is no coincidence that the populations of the U.S. territories excluded by the Social Security Act's definition of "United States" are the same racial and ethnic groups that were targeted for "unincorporated" status under the *Insular Cases* on the basis of their racial and ethnic composition.[7] Opening Br. at 2; A6. For this reason

[7] The territories excluded from the Social Security Act's definition of "United States" are Puerto Rico, Guam, American Samoa, and the U.S. Virgin Islands, Opening Br. at 2, all of which are populated predominantly by native racial and ethnic minorities. A6.

alone, the district court was correct to conclude that strict or "heightened scrutiny" applies to classifications based on residency in a U.S. territory. A7.

But there is an additional and independent reason for applying strict scrutiny. Puerto Rico residents are a quintessential example of a politically powerless class that constitutes a "discrete and insular" minority. *Lopez v. Aran*, 844 F.2d 898, 913 (1st Cir. 1988) (Torruella, J., concurring in part, dissenting in part) ("It would be difficult to imagine a more 'discrete and insular' minority, both geographically and constitutionally, than the residents of Puerto Rico." (internal citations omitted)). Puerto Rico residents have no direct influence in the establishment and implementation of the SSI program. Puerto Rico has no Electoral College votes and consequently its residents play no role in electing the U.S. president. Puerto Rico has no senators and its sole representative in Congress is a non-voting resident commissioner. A6-7. The lack of voting power in Congress means Puerto Rico residents cannot use the legislative process to assert their interests. JA128-31; *see Cleburne*, 473 U.S. at 440. Thus, redress in the courts is the only means by which Puerto Rico residents can seek to remedy violations of their rights.

In short, the exclusion of Puerto Rico residents targets a politically powerless minority for disparate treatment and does so out of a historical desire to

discriminate based on race, alienage and national origin. Therefore, strict scrutiny applies.[8]

In arguing for a lower standard of review, the United States does not dispute that the exclusion of Puerto Rico from the SSI program impacts a population that is nearly 100 percent Hispanic or that the history of excluding Puerto Rico as being "outside the United States" has been marred by the desire to exclude "alien races" from the Union. Nor does the Government contest that Puerto Rico residents constitute a "discrete and insular minority" with no voting power in the federal government. In fact, the United States recognizes that Puerto Rico residents are entitled to the same equal protection right as residents of the States under the Fifth Amendment, Opening Br. at 11, and all but concedes that racially motivated classifications of Puerto Rico residents would be subject to strict scrutiny, *id*. at 13–14.

Rather, the United States argues that, despite these considerations, the exclusion of Puerto Rico residents from SSI is subject to the least rigorous standard of review for two reasons: (i) Congress has unfettered discretion to draw lines in

[8] If a person's status as a resident of Puerto Rico is not sufficiently "suspect" to warrant strict scrutiny, it is nevertheless "quasi-suspect" and must be analyzed under the next highest level of review, "intermediate scrutiny." For instance, gender and "illegitimacy" at birth are quasi-suspect because, like being a resident of a U.S. territory like Puerto Rico, these characteristics bear "no relation to the individual's ability to participate in and contribute to society." *Cleburne*, 473 U.S. at 441. These classifications fail unless they are "substantially related to a sufficiently important governmental interest." *Id*.

federal legislation when cast in terms of "social and economic policy," regardless of any suspect classifications; and (ii) in any event, classifying U.S. citizens on the basis of their residency in a U.S. territory like Puerto Rico is not suspect because it is framed in geographic rather than racial terms and there is no evidence of racial animus. The court below considered each of these arguments and properly rejected them. A5–8.

As the United States' own authorities acknowledge, it is well settled that whatever flexibility Congress has to allocate government resources must give way to strict scrutiny precisely when it "proceeds along suspect lines." *FCC v. Beach Commc'ns, Inc.*, 508 U.S. 307, 313 (1993); *Cleburne*, 473 U.S. at 439–41; *see also Windsor*, 570 U.S. at 774 ("[T]hough Congress has great authority to design laws to fit its own conception of sound national policy, it cannot deny the liberty protected by the Due Process Clause of the Fifth Amendment.").[9] For instance, the Supreme Court has applied strict scrutiny to review the disparate treatment of alien residents, even when the laws at issue involved social and economic policy, because classifications based on alienage are inherently suspect. *Hampton*, 426 U.S. at 116–17 (invalidating federal regulations barring noncitizens from

[9] Neither *Weinberger v. Salfi*, 422 U.S. 749 (1975), nor *Baker v. Concord*, 916 F.2d 744, 751 (1st Cir. 1990), involved a suspect classification. In fact, both cases confirm that Congress cannot "pursue its objectives mindlessly or by invidious discrimination against individuals or groups of individuals." *Baker*, 916 F.2d at 751; *Weinberger*, 422 U.S. at 772.

employment in the civil service); *Graham*, 403 U.S. at 376 (invalidating laws that excluded alien residents from receiving the same welfare benefits as U.S. citizens).

The fact that the exclusion of Puerto Rico residents is framed in terms of geography rather than race does not render the classification facially neutral. To the contrary, by linking the exclusion of Puerto Rico residents and residents of other "unincorporated" territories to the geographic definition of "United States," as opposed to some other generally applicable eligibility criteria, the classification is explicitly adopting the historical desire to isolate "alien races" in U.S. territories for disparate treatment by excluding them from the term "United States" in a geographic sense. *See* A7.

In any event, geographic classifications are subject to a heightened level of scrutiny if they have a disparate impact on racial minorities and that impact can be traced to a discriminatory purpose. *See 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."); *N.C. State Conf. of the NAACP v. McCrory*, 831 F.3d 204, 238 (4th Cir. 2016) (reversing a district court's factual determination that legislative restrictions on voting practices lacked discriminatory intent because the restrictions

targeted voting practices used disproportionately by African-American voters); *cf.* *Gomillion v. Lightfoot*, 364 U.S. 339, 344–46 (1960) ("When a legislature thus singles out a readily isolated segment of a racial minority for special discriminatory treatment, it violates the Fifteenth Amendment.").

The United States is turning a blind eye to the reality of the situation by asserting that there is no evidence of racial animus. That is not what the record shows. The Social Security Act itself provides only one reason for excluding Puerto Rico residents from SSI: Puerto Rico is not part of the United States and therefore Puerto Rico residents can be treated as if they live "outside the United States" even though their homes are on U.S. soil. As the congressional history regarding Puerto Rico and the *Insular Cases* make explicitly clear, the legislative classification that Puerto Rico is not part of the "United States" was motivated by anxieties about admitting "alien races" into the Union and has been repeatedly deployed by Congress to extend fewer rights and privileges to Puerto Rico residents – facts that the United States has never disputed.[10] Viewed through this lens, Congress's decision to classify only "unincorporated" U.S. territories like Puerto Rico as being geographically "outside the United States" cannot be fully

[10] For years, Puerto Rico has been treated disadvantageously as being "outside the United States," for instance, under federal assistance programs for highway construction, public schools serving low income children, and families with dependent children. *See* Arnold Liebowitz, *The Applicability of Federal Law to the Commonwealth of Puerto Rico*, 37 REV. JUR. U.P.R. 615, 672–674 (1968).

understood without reference to race, and the discriminatory intent behind the exclusion becomes as obvious as if a State government excluded only municipalities with predominantly African-American populations from receiving certain social and economic benefits – which would be a blatant violation of equal protection. *See Davis*, 426 U.S. at 242; *Arlington Heights*, 429 U.S. at 266; *see also Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954).

Therefore, the district court correctly held that heightened scrutiny applies to classifications based on residency in a U.S. territory like Puerto Rico.

B. The Exclusion of Puerto Rico Residents Is Not Rationally Related to Any Legitimate Objective, Much Less Narrowly Tailored to Achieve a Compelling Government Interest

Under strict scrutiny, a suspect classification must be invalidated unless it is necessary and "narrowly tailored to achieve a compelling government interest." *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 720 (2007) (internal quotation marks omitted). The district court found it unnecessary to delve into that analysis because the exclusion of Puerto Rico residents fails even under the least rigorous standard advocated by the Government: rational basis. A7.

Under rational basis, courts will ordinarily uphold a legislative classification "so long as it bears a rational relation to some legitimate end." *Romer v. Evans*, 517 U.S. 620, 631 (1996). However, "'[d]iscriminations of an unusual character'" always "require careful consideration." *Windsor*, 570 U.S. at 770 (quoting *U.S.*

Dep't of Agric. v. Moreno, 413 U.S. 528, 534–535 (1973)). Thus, when a legislative distinction "is drawn against a historically disadvantaged group and has no other basis," courts look more critically at the proposed rationales rather than accept them at face value. *Massachusetts v. U.S. Dep't of Health and Human Svcs.*, 682 F.3d 1, 14 (1st Cir. 2012).

In *Windsor*, the Court struck down provisions of a federal statute that defined "marriage" as referring only to a legal union between one man and one woman, because it improperly excluded same-sex couples from federal benefits associated with marriage including under the Social Security Act. As here, the government in *Windsor* cited, *inter alia*, "unpredictable (but presumed negative) effects on the federal fisc" to justify the contested classification. Br. on the Merits for Resp. Bipartisan Legal Advisory Gp. of the U.S. House of Reps. at 37–41, *Windsor*, 570 U.S. 744 (No. 12-307). The Court rejected that generic rationale. It reasoned that, by excluding same-sex couples from the same benefits afforded to opposite-sex couples, the law served the "principal purpose and the necessary effect of * * * demean[ing]" individuals in same-sex marriages, for instance, by "putting them in the unstable position of being in a second-tier marriage," "bring[ing] financial harm to children of same-sex couples," and disparately "burden[ing]" them and their families. 570 U.S. at 772–774. In effect, by excluding same-sex couples from generally available benefits, Congress was

sending the message that "their marriage [was] less worthy than the marriages of others" and denying them "equal dignity" under the law. *Id.* at 771, 775; *see Obergefell v. Hodges*, 135 S. Ct. 2584, 2601, 2608 (2015) (overturning State laws restricting same-sex marriage because, by denying gays and lesbians the "constellation of benefits" linked to marriage, those laws taught that same-sex couples were "unequal in important respects.").

Like the exclusion of same-sex couples from federal benefits in *Windsor*, which demeaned them relative to opposite-sex couples, the exclusion of Puerto Rico residents from SSI benefits demeans them relative to similarly-situated Americans in the United States. A1. It does so, as in *Windsor*, by imposing social and economic "burdens" and creating "financial instability" for them and their families, hardships not faced by individuals residing on the mainland. And by denying Puerto Rico residents the same benefits to which they would otherwise be entitled on the mainland, Congress is perpetuating the message that their place of residence (and place of origin) makes them less deserving of national support. A7. Thus, as in the same-sex marriage cases, the exclusion here also teaches that Puerto Rico residents are "unequal in important respects," and serves no other purpose than to strip them of their dignity in violation of their right to equal protection. A1.

The Government does not engage with the substance of the district court's *Windsor* analysis and instead asserts that it is rational to exclude Puerto Rico

residents from the SSI program as a class. But rather than defend the statute's only stated purpose for disqualifying Puerto Rico residents from SSI benefits, *i.e.*, that they reside "outside the United States," the Government offers two alternative justifications: (i) Puerto Rico's unique tax status in that its residents are not subject to federal income tax and therefore supposedly do not fund SSI and (ii) the supposedly high cost of including Puerto Rico residents in the SSI program. The district court considered each of these justifications and concluded that neither sufficed to show that the geographical exclusion of Puerto Rico residents advanced any legitimate purpose, much less that it was necessary or "narrowly tailored to achieve a compelling government interest." A5–8 (internal quotations marks omitted).

First, the tax status of Puerto Rico as a territory bears no relation to the exclusion of Puerto Rico residents from SSI under the program's own criteria. SSI is a national program in which funds raised from across the nation are used to support eligible beneficiaries nationwide according to a uniform federal schedule. The federal appropriations out of which SSI is funded are not earmarked with reference to the State or territory from which they are raised, there are no caps on the benefits that residents from a given State or territory may receive in aggregate, and the disbursements to individuals do not vary with respect to the contributions of the individual's State or territory of residence.

SSI eligibility is similarly divorced from individuals' tax payment history. Eligibility for SSI is based on need, not on an individual's contributions into the program. In fact, any individual with earnings low enough to qualify for SSI will not be paying federal income tax regardless of where they reside. JA85. In this context, a geographical exclusion is nonsensical: there is no guarantee that recipients of SSI benefits in the States will have paid any more federal income tax than SSI recipients who reside in Puerto Rico. An impoverished, disabled U.S. citizen who lived his entire life in Puerto Rico and never paid a cent of federal taxes could move to a State and immediately qualify for SSI payments, but a U.S. citizen who lived most of his life in a State and paid federal income taxes would not be eligible for the same benefits within a month of moving to Puerto Rico (as was the case with Vaello Madero). Indeed, "outmigration" by disabled Puerto Rico residents to the mainland, incentivized by the SSI exclusion, is a source of real economic anxiety both for the Commonwealth and United States governments. JA87.

Further undercutting this purported reason is the situation of another U.S. territory: the NMI. NMI residents are not excluded from the SSI program although they, too, do not pay federal income tax. *See* SEAN LOWRY, CONG. RESEARCH SERV., R44651, TAX POLICY AND U.S. TERRITORIES: OVERVIEW AND ISSUES FOR CONGRESS 5 (2016). In fact, the NMI receives more favorable tax treatment than

Puerto Rico as all income earned by its *bona fide* residents (including territory- and non-territory source income) are taxable only to the NMI. *Id.* at 23. By contrast, Puerto Rico residents' non-territory source income and any income from federal employment within the island are taxed and payable to the U.S. Treasury. *Id.* at 24.[11]

Even if Puerto Rico's tax contributions were a basis for determining its residents' SSI entitlements, the district court found that Puerto Rico residents do, in fact, contribute to SSI. A8 n.9. Although Puerto Rico residents do not pay federal income tax on most earnings local to the island, they pay many types of federal taxes, including import/export taxes, commodity taxes, income taxes on money earned outside of Puerto Rico, and income tax on income from federal employment within the island – all of which flows into the general revenue stream that funds SSI. JA85–87; *see also Consejo*, 586 F. Supp. 2d. at 38. Yet Puerto Rico residents receive no benefit from the portion of those revenues allocated to SSI.

Second, the costs of extending SSI benefits to Puerto Rico residents cannot justify their wholesale exclusion from the program. Otherwise, Congress could arbitrarily exclude the residents of any State or municipality to reduce cost, but that

[11] The Government asserts without citing any authority that this inconsistency is justified by the *sui generis* nature of the United States' relationship with each territory. Regardless, the relevant point is that there is no rational link between a territory's tax status and its residents' SSI eligibility.

would be obviously improper. *See Windsor v. United States*, 833 F. Supp. 2d 394, 406 (S.D.N.Y. 2012) [hereinafter "*Windsor I*"] (noting that excluding "any arbitrarily chosen group of individuals from a government program conserves government resources," but an "interest in conserving the public fisc alone * * * can hardly justify the classification used in allocating those resources" (internal quotations omitted)), *aff'd*, 699 F.3d 169 (2d Cir. 2012), *aff'd*, 570 U.S. 744 (2013).[12]

In reality, the United States' *post hoc* justifications for excluding Puerto Rico from SSI are pretexts to distract from the statute's explicit reason, *i.e.*, Congress's judgment that U.S. citizens in territories like Puerto Rico are not entitled to equal treatment because they are not in the United States. There is no rational connection between that classification and the SSI program's purpose or the Government's purported objectives. *See Moreno*, 413 U.S. at 534 (finding no rational connection between classifications based on biological kinship and the food stamp program's purpose and need-based eligibility requirements). If Congress wanted to reduce costs, it could have included Puerto Rico residents in

[12] In the past, the Government has offered a third justification, *i.e.*, that the inclusion of Puerto Rico in the SSI program "might seriously disrupt the Puerto Rican economy." *Califano*, 435 U.S. at 5 n.7. The United States has now abandoned this rationale, all but admitting that it was never a proper basis for excluding Puerto Rico residents from SSI to begin with. This concession provides yet another indication that the exclusion was not instituted to advance a legitimate purpose. In any event, this third rationale would also fail because the Government has never provided any "evidence in the record supporting the notion that such a speculative fear of economic disruption is warranted." *Harris*, 446 U.S. at 656.

the program and cut benefits across the board or improved the program's efficiency. *Windsor I*, 833 F. Supp. 2d at 406. It did not do that. If Congress wanted to link disbursements to tax receipts, it could have included Puerto Rico residents and conditioned eligibility under the statute on individual contributions, or it could have linked the level of benefits to the amount of taxes contributed by the individual's State or territory of residency. It did not do that either. Instead, it categorically excluded otherwise eligible Puerto Rico residents from the program on the outdated, race-based fiction that they reside "outside the United States." Hence, the district court correctly concluded that the "'principal purpose [of this exclusion] is to impose inequality, not for other reasons like governmental efficiency.'" A7 (quoting *Windsor*, 570 U.S. at 772).

C. Neither *Califano* nor *Harris* Is Directly Applicable Here, and Their Holdings Should Not Be Expanded Any Further

In the end, the Government's only support for its position that the exclusion of Puerto Rico residents from SSI survives rational basis review is *Califano* and *Harris v. Rosario*, 446 U.S. 651 (1980) (per curiam). Neither of these two inapposite, outdated decisions is binding here.

Califano and *Harris* were both summary dispositions decided without the benefit of "full briefing or oral argument," 446 U.S. at 652 (Marshall, J., dissenting), and therefore should be viewed with the "customary skepticism" that courts adopt "toward *per curiam* dispositions that lack the reasoned consideration

of a full opinion." *U.S. Bancorp Mortg. Co. v. Bonner Mall P'ship*, 513 U.S. 18, 24 (1994). Furthermore, the First Circuit has held that, when the Supreme Court summarily disposes of a case, lower courts are only prevented from "coming to opposite conclusions on the precise issues presented and necessarily decided by those actions." *Massachusetts*, 682 F.3d at 8 (internal quotation marks omitted).

Even when cases have been fully briefed and argued, Supreme Court precedent binds lower courts only on the "precise issue" decided. *Crossman v. Marcoccio*, 806 F.2d 329, 333 (1st Cir. 1986); *cf. Gately v. Massachusetts*, 2 F.3d 1221, 1226 (1st Cir. 1993) ("The essential principles of *stare decisis* may be described as follows: (1) an issue of law must have been heard and decided; (2) if an issue is not argued, or though argued is ignored by the court, or is reserved, the decision does not constitute a precedent to be followed[.]").

Neither *Califano* nor *Harris* heard, much less answered, the equal protection issue presented here. In *Califano*, the Court held that terminating the SSI benefits of a person who moved to Puerto Rico did not violate the right to travel under the Privileges and Immunities Clause. 435 U.S. at 4–5. Although the Court referenced equal protection in a footnote, "no equal protection question was before th[e] Court." *Harris*, 446 U.S. at 654–55 (Marshall, J. dissenting). And because it was only addressing the right of U.S. citizens to move to Puerto Rico, the *Califano* Court was not presented with the equal protection implications of classifying

Puerto Rico residents as being "outside the United States." Thus, *Califano*'s holding did not foreclose lower courts from addressing that analytically distinct issue or determining the proper level of review for that classification.

Harris is equally inapposite. There, the Court held that Congress could treat Puerto Rico itself differently under a program known as Aid to Families with Dependent Children ("AFDC"). 446 U.S. at 651. AFDC disbursed block grants directly to States that then administered those benefits to their residents under their own eligibility criteria. JA99. However, unlike AFDC, SSI is not a block grant program but rather a national program that distributes federal benefits directly to individuals under federal eligibility criteria. *See supra*, pp. 11–14. Thus, at most, *Harris* suggests that it may be constitutional to exclude Puerto Rico itself from receiving the same block grants as States because Puerto Rico is not a State. 446 U.S. at 651. But it has no bearing on the precise issue here, *i.e.*, the *individual right* of Puerto Rico residents to be treated on equal terms as other residents of the United States for purposes of receiving benefits directly from the federal government under federal law. In short, the United States has cited no case reviewing, much less upholding, the exclusion of Puerto Rico residents as a class from SSI under the Fifth Amendment.

The real reason the United States cites *Califano* and *Harris* is to imply that discrimination against Puerto Rico residents as a class is inherently rational and

therefore self-justifying, even when motivated by racial animus, because Congress can treat Puerto Rico itself differently. *See* Opening Br. at 9, 11. That unnecessarily "broad" reading of *Califano* and *Harris* hinges on the continued viability of the *Insular Cases*' interpretation of the Territories Clause, U.S. CONST. art. IV, § 3, cl. 2, as embodied in the Incorporation Doctrine. *See Harris*, 446 U.S. at 653, 654–55 (Marshall, J., dissenting) (noting the majority's reliance on the Territories Clause and *Califano*'s footnote 4, which, in turn, relied on the *Insular Cases* and the Incorporation Doctrine). As explained more fully in Section II below, this conception of the United States' relationship to Puerto Rico is one of unrestrained power that is unchecked by the normal safeguards of the Constitution, namely here the fundamental right to equal protection under the Fifth Amendment. This position is the logical endpoint of the views expressed in the *Insular Cases*, which more than a century ago established a framework to allow for colonial rule over the territories without accepting them as fully part of the United States. But such a broad reading of *Califano* and *Harris* is no longer tenable under the law of this Circuit.

Indeed, earlier this year, the First Circuit confirmed that the Incorporation Doctrine and the *Insular Cases* are an aberration that should not be expanded any further. *Aurelius Inv., LLC v. Puerto Rico*, 915 F.3d 838, 855 (1st Cir. 2019) (citing *Reid v. Covert*, 354 U.S. 1, 14 (1957) [hereinafter "*Reid II*"] ("It is our

judgment that neither the [*Insular Cases*] nor their reasoning should be given any further expansion.")). In *Aurelius*, this Court described the *Insular Cases* as a "discredited lineage of cases" and the Incorporation Doctrine as a "dark cloud" looming over the constitutional landscape. 915 F.3d at 854–55. It further explained that the *Insular Cases* are "historically and juridically, an episode of the dead past about as unrelated to the world of today as the one-hoss shay is to the latest jet airplane." *Id*. at 855 (quoting *Reid v. Covert*, 351 U.S. 487, 492 (1956) (Frankfurter, J., reserving judgment)); *see Reid II*, 354 U.S. at 14 (cautioning that the Incorporation Doctrine was "a very dangerous doctrine [that] if allowed to flourish would destroy the benefit of a written Constitution and undermine the basis of our Government."). Thus, the *Aurelius* court held that, under *Reid*, the proper course is to cabin the *Insular Cases* and the Incorporation Doctrine to their historical circumstances. 915 F.3d at 855. In light of this more recent binding precedent, this Court should reject any attempt to wash the Incorporation Doctrine through *Califano* and *Harris*, and decline to extend it any further into the equal protection context.[13]

[13] Neither *United States v. Ríos-Rivera*, 913 F.3d 38 (1st Cir. 2019), nor *Franklin Cal. Tax-Free Trust v. Puerto Rico*, 805 F.3d 322 (1st Cir. 2015), expanded the reach of the Incorporation Doctrine. In *Franklin*, the court faced a federal preemption issue, not an equal protection issue, 805 F.3d at 332–33, and the majority cites *Harris* only for the proposition that the Commonwealth is not a State and therefore has different powers than those reserved to States under the Tenth Amendment – a proposition that has nothing to do with the Incorporation Doctrine. *Id.* at 337; 344–345. Nor did the court in *Ríos-Rivera* "affirm" or "apply" *Califano*

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In brief, the district court was correct to conduct its own equal protection analysis, to hold that strict scrutiny applies, and to conclude that the exclusion fails under any level of review. This Court should affirm.

II. The District Court Correctly Held That the Territories Clause Does Not Authorize Congress to Exclude Puerto Rico Residents as a Class from Federal Benefits Programs

Unlike in the court below, the United States has not argued here that the Territories Clause, U.S. CONST. art. IV, precludes the application of a heightened level of review to legislation excluding residents of a territory as a class. That argument is therefore waived. *Young v. Wells Fargo Bank, N.A.*, 717 F.3d 224, 239 (1st Cir. 2013). Regardless, that argument also fails on the merits.

A. The Territories Clause Has No Relevance to Uniform National Legislation Like the Social Security Act

Under the Territories Clause, "Congress has not only its customary power, but also the power to make rules and regulations *such as a state government may make within its state*." *Aurelius*, 915 F.3d at 850 (emphasis added). In other words, Congress's power in the territories is "plenary" only insofar as it is acting in the capacity of a State or local legislator. *Id.*; *see also Nat'l Bank v. Cty. of*

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and *Harris*, as the Government claims. Rather, it merely held that it was not "obvious error" for a district court to fail to distinguish *Harris sua sponte*. 913 F.3d at 44. And the court's principal holding – that Congress may criminalize conduct within Puerto Rico – is based on Congress's power to act generally as a territorial legislator and does not depend on the Incorporation Doctrine.

Yankton, 101 U.S. 129, 133 (1879) (explaining that a federal territory's "relation to the general government is much the same as that which counties bear to the respective States, and Congress may legislate for them as a State does for its municipal organizations").

As this Circuit has recognized, Congress's powers under the Territories Clause are analogous to its powers over the District of Columbia. *Aurelius*, 915 F.3d at 852; *see* U.S. CONST. art. I, § 8, cl. 17 (granting Congress the power "[t]o exercise exclusive legislation in all cases whatsoever"); *Palmore v. United States*, 411 U.S. 389, 397 (1973) (describing Congress's power to legislate for the District of Columbia as "plenary"); *Keller v. Potomac Elec. Power Co.*, 261 U.S. 428, 442–43 (1923) (explaining that, in the District of Columbia, "Congress possesses not only the power which belongs to it in respect to territory within a State but the power of the State as well."). This plenary power is due to Congress's duty to "provide a comprehensive body of legislation" to govern non-State territories, *United States v. Thompson*, 452 F.2d 1333, 1338 (D.C. Cir. 1971), which, under the Territories Clause, was historically tied "to manag[ing] a transition from federal to home rule" to prepare the territories for statehood. *Aurelius*, 915 F.3d at 853.

The principal example of Congress's plenary power in Puerto Rico is the PRFRA, which provides for an entire system of territorial government in lieu of a

State government. *See* 48 U.S.C. ¶ 731(b) *et seq.* Furthermore, under Article IV, Congress has a duty to enact "all needful rules and regulations" to care for the residents of Puerto Rico as a State would for its own residents by, for example, creating a public school system, public utilities, and other local services through measures that might otherwise be beyond its Article I powers – all with an eye towards preparing the territory for statehood. *See Aurelius*, 915 F.3d at 853.

However, "when Congress decides to enact national legislation, the situation is fundamentally different." *Thompson*, 452 F.2d at 1339. This is because "[t]he passage of such a law implies a threshold decision to override regional differences in favor of a uniform standard that will govern the entire country." *Id.* No longer ascertained with reference to plenary local power, the exclusion of "one small isolated group" from that national standard is "highly suspect." *Id.* Thus, when confronted with national legislation that treated D.C. residents differently, the D.C. Circuit "closely scrutinized" the laws with the same stringency that "would apply to any legislative effort to preclude some, but not all, citizens' participation." *D.C. Fed'n of Civic Ass'ns v. Volpe*, 434 F.2d 436, 441–42 (D.C. Cir. 1970) (applying enhanced scrutiny to legislation denying only D.C. residents' right to a hearing on proposed federal highway projects); *Thompson*, 452 F.2d at 1340; *but see United States v. Cohen*, 733 F.2d 128, 135 (D.C. Cir. 1982) (en banc) (holding that D.C. residents did not have the characteristics of a politically powerless suspect class).

Accordingly, in assessing uniform national legislation like the Social Security Act, courts must apply ordinary equal protection principles to determine whether the residency-based classification is suspect.

Here, there is no indication that Congress was acting pursuant to its powers as a local, *territorial* legislator under Article IV when enacting the Social Security Act or any provisions thereof. Rather, it was acting in its capacity as a federal legislator to address social and economic issues at a national level pursuant to its Article I powers. *See Binns v. United States*, 194 U.S. 486, 496 (1904) (upholding license taxes upon citizens of Alaska only after determining that these were local taxes intended to support the territorial government, and stating that the holding should not be extended to cases in which Congress taxes citizens of a territory to raise revenue for the nation); *Cincinnati Soap Co. v. United States*, 301 U.S. 308, 323 (1937) (holding the same regarding tax on Philippine coconut oil). Thus, applying ordinary equal protection principles for the reasons set forth in Section I above, a stricter standard of review than basic rational basis is necessary here.

B. The Territories Clause Cannot Be Used to Limit the Scope of Puerto Rico Residents' Right to Equal Protection

Even if the Social Security Act – or the exclusion of Puerto Rico itself – were territorial legislation (which it is not), the Territories Clause does not allow Congress to circumvent ordinary equal protection requirements and create a

parallel, second-tier constitutional regime in which suspect classifications are subject only to bare rational basis. *See Cleburne*, 473 U.S. at 440.

The Territories Clause only grants Congress the same powers reserved to the States "in all cases where legislation is possible." *Cincinnati Soap Co.*, 301 U.S. at 317. Hence, territorial legislation is subject to the same equal protection standards that apply to State legislation. *See Calero v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 668 n.5 (1974) (holding that the Fifth or Fourteenth Amendment applies in Puerto Rico because "there cannot exist under the American flag any governmental authority untrammeled by the requirements of due process of law"); *Flores de Otero*, 426 U.S. at 599–601 (applying strict scrutiny to strike down a Puerto Rico statute prohibiting aliens from engaging in the private practice of engineering). And because all territorial legislation ultimately derives its legal effect from the congressional authority delegated pursuant to the PRFRA, *see Sanchez Valle*, 136 S. Ct. at 1875, it makes no sense to apply a different standard when Congress itself enacts the legislation. Thus, the district court correctly held that Congress cannot take cover behind the Territories Clause to enact legislation that discriminates against a racial minority without it being subject to the heightened demands of the Fifth Amendment. A4.

To reach the opposite conclusion would require an endorsement of the *Insular Cases* and the Incorporation Doctrine. *See* A8–9. Recall in *Downes*, the

first of the *Insular Cases* and the progenitor of the Incorporation Doctrine, a plurality of the Court circumvented the constitutional requirement of uniformity by determining that Puerto Rico, a U.S. territory, was "possessed by" but "not a part of the United States." 182 U.S. at 287, 311. That theory was then deployed in later cases to create a disparate constitutional regime in so-called "unincorporated" territories like Puerto Rico. For example, while Puerto Rican Americans residing on the mainland could assert a constitutional right to trial by jury, the same Puerto Rican Americans in Puerto Rico could not unless Congress decided to incorporate the island into the United States. *See Balzac*, 258 U.S. at 309.

Over the years, the arbitrary nature of that distinction became even starker as courts continued to rule that U.S. citizens (and even non-citizens) were entitled to a jury trial in U.S. judicial proceedings no matter where in the world they were held. *See Reid II*, 354 U.S. at 14 (upholding that right to a jury trial in U.S. military bases in England and Japan); *United States v. Tiede*, 86 F.R.D. 227 (U.S.C.B. 1979) (holding that German citizens who had hijacked an airplane and landed on a U.S. air force base were entitled to a jury trial in Berlin).

It is on this legacy of inequality that the United States has implied that discrimination against Puerto Rico residents is subject only to rational basis review because Puerto Rico is a territory. Under that theory, if Congress had clearly recorded that it was excluding Puerto Rico residents from SSI benefits because it

believed that, as an "alien" Hispanic population, they were inferior and therefore less deserving of national support, Congress could nevertheless avoid heightened scrutiny by merely invoking Puerto Rico's status as a territory. Although shocking and intolerable, this theory is not surprising when considered in light of the precedent on which the United States relies, *Califano* and *Harris*.[14] Taken literally, the Government's reading of these two cases would mean that "[h]eightened scrutiny under the equal protection component of the Fifth Amendment * * * is simply unavailable to protect Puerto Rico or the citizens who reside there from discriminatory legislation, as long as Congress acts pursuant to the Territory Clause." *Harris*, 446 U.S. at 654 (Marshall, J., dissenting). In effect, the United States' theory creates parallel constitutional regimes on U.S. soil: one in which Puerto Rican Americans are entitled to full equal protection when they are excluded as a class on the mainland, and another in which they are only entitled to rational basis when they are excluded as a class in Puerto Rico. Even more appalling, subjecting the exclusion of Puerto Rico residents as a class only to rational basis review would create the anomalous result of granting greater constitutional rights to resident aliens on the mainland, who are entitled to strict scrutiny when legislation discriminates against them as a class, but not to U.S.

[14] Again, *Califano* relied directly on the *Insular Cases*, specifically the Incorporation Doctrine. 435 U.S. at n.4. And *Harris*, in turn, based its use of rational basis review on the Territories Clause and the reasoning in *Califano*'s footnote 4. 446 U.S. at 651-52.

citizens when treated as "alien races" because of their residence in a U.S. territory. *Compare Hampton*, 426 U.S. at 102, *and Graham*, 403 U.S. at 372, *with Califano*, 435 U.S. at n.4, *and Harris*, 446 U.S. at 651-52.

In no other context would a historical legacy of discriminatory animus, coupled with ongoing social and political subjugation, be a basis for treating a particular classification with leniency. *See Arlington Heights*, 429 U.S. at 266. But that is precisely what the United States' theory yields. Consider an island off the coast of Massachusetts that was inhabited predominantly by gays and lesbians all of whom are U.S. citizens, and consider that the island had been historically treated as belonging to but not a part of the United States because, unlike the heterosexual peoples of the mainland, its residents were supposedly "savages" and "uncivilized" peoples. Now, imagine a history of excluding that island from national benefits programs like SSI on the premise that its residents were "outside the United States," and the Government claimed it was doing so for cost-savings and tax reasons. There is no doubt that this exclusion would be subject to a stricter standard of review than bare rational basis. And under twenty-first century equal protection principles, the exclusion would fail under any level of review because it would be understood as nothing more than a naked attempt to demean and brand residents of such an island as inferior citizens – "unequal in important respects." *Obergefell*, 135 S. Ct. at 2602; *Windsor*, 570 U.S. at 773.

The United States offers no reason to apply a different standard to the exclusion of Puerto Rico residents, a predominantly Hispanic population that has been historically targeted for disparate treatment on account of their race, alienage and national origin. Instead, it emphatically argues that *Califano* and *Harris* are controlling; two cases that explicitly rely on this disgraced history to suggest, in a circular fashion, that Puerto Rico as a territory may be treated differently because Puerto Rico, as a territory, is different. That is nothing more than a restatement of the Incorporation Doctrine. That argument is no longer tenable, if it ever was.

Neither the Territories Clause nor the *Insular Cases* have any direct bearing on the level of scrutiny applicable to congressional action in the territories. *See Harris*, 446 U.S. at 653 (Marshall, J. dissenting) (observing that "[n]o authority is cited for th[e] proposition" that Puerto Rico residents may be treated differently subject only to rational basis review). Earlier this year, the First Circuit elaborated on the proper construction of the Territories Clause *vis-à-vis* other constitutional imperatives. It held that provisions of the Constitution that deal with specific restraints on congressional power trump the general powers of the Territories Clause. *Aurelius*, 915 F.3d at 853–55. Here, Congress cannot avoid the Fifth Amendment's specific directive that "no person shall be * * * deprived of * * *liberty" simply by invoking its general powers to govern "territories" and other "property" under Article IV. A1, 5, 8-9.

More importantly, under Supreme Court and First Circuit precedent, the Incorporation Doctrine is dead. Thus, where *Downes* and *Balzac* once empowered Congress to contract or expand the reach of the Constitution in the territories through incorporation, the Supreme Court in *Boumediene v. Bush* advanced the opposite principle:

> The Constitution grants Congress and the President the power to acquire, dispose of, and govern territory, not the power to decide when and where its terms apply. * * * * To hold the political branches have the power to switch the Constitution on or off at will * * * would * * * lead[] to a regime in which [they], not this Court, say 'what the law is.'

553 U.S. 723, 765 (2008); *see Aurelius*, 915 F.3d at 855.[15] Furthermore, the "impos[ition of] inequality" through "contradictory [legal] regimes" on U.S. soil is anathema to equal protection principles under the Fifth Amendment. *Windsor*, 570 U.S. at 772. As the district court correctly grasped, under these principles, which have crystallized since *Califano* and *Harris*, the notion that the United States can possess territories in which Congress may switch the Constitution's requirements off and create a system of "citizenship apartheid" simply by virtue of territorial status is precisely the sort of unconstitutional action that the Supreme Court rejected in *Boumediene* and *Windsor*. A8–9; *see Auburn Police Union v.*

[15] Similarly, *Balzac*'s narrow construction of constitutional rights in the territories has been restricted. *Calero*, 416 U.S. at n.5 (1974); *Flores de Otero*, 426 U.S. at 599–601.

Carpenter, 8 F.3d 886, 894 (1st Cir. 1993) (holding that Supreme Court precedent is binding "subject, of course, to any later developments that alter or erode its authority"); *Windsor*, 699 F.3d at 179 (departing from Supreme Court precedent where in the forty years since that decision, "there ha[d] been manifold changes to the Supreme Court's equal protection jurisprudence." (internal quotations omitted)).

Thus, like the court below, this Court should reject the second-tier citizenship imposed on Puerto Rico residents through their exclusion from SSI, and dump the segregationist reasoning of *Downes* and the Incorporation Doctrine where it belongs: in history's graveyard where *Plessy*'s "separate but equal" doctrine was laid to rest more than sixty years ago. *See Brown*, 347 U.S. at 493.

CONCLUSION

There is only one United States and everyone residing on U.S. soil lives only in that United States – "one Nation under God, indivisible, with liberty and justice for all." For the reasons set forth above, this Court should affirm the district court's judgment.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(g), I hereby certify that the foregoing brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7) because it contains 12,995 words, excluding the parts of the document exempted by Fed. R. App. P. 32(f).

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CERTIFICATE OF SERVICE

I hereby certify that on the 1st day of August, 2019, I caused a copy of the foregoing document to be filed with the Clerk of the Court of the United States Court of Appeals for the First Circuit via the Court's Electronic Filing System, and to be served electronically through that system to the following:

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