No. 19-1390

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

COMMONWEALTH OF PUERTO RICO'S AMICUS BRIEF IN FAVOR OF DEFENDANT-APPELLEE AND FOR AFFIRMANCE OF THE JUDGMENT ENTERED BY THE DISTRICT COURT

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I. STATEMENT OF IDENTITY AND INTEREST OF AMICUS CURIAE

The Commonwealth of Puerto Rico respectfully submits this brief as *amicus curiae* in support of Appellee and for affirmance of the judgment of the district court. Puerto Rican United States citizens enjoy much lesser rights than those who reside in the States because of Puerto Rico's status as a territory. This unequal status is unconstitutional and unacceptable, and the public policy of the Government of Puerto Rico is that Puerto Ricans attain the same rights as those

enjoyed by their fellow United States citizens living in the States. It is also important to Puerto Rico that United States citizens who move there enjoy the same constitutional rights as those who reside in the States and other territories.

On August 25, 2017, Appellant, United States of America, commenced an action against Appellee, Jose Luis Vaello-Madero, a Social Security Administration (SSA) Title XVI Supplemental Security Income (SSI) disability beneficiary, to collect, *inter alia*, $28,081.00 in overpaid SSI benefits after he moved to Puerto Rico. (Dkt. # 1). In the Complaint, Appellant alleged that the SSI is a Federal income supplement program funded by general tax revenues (not Social Security taxes), requiring the beneficiary to be a U.S. resident in order to benefit from it, thus excluding Puerto Rico. (Id. at ¶ 2).

On May 22, 2018, the district court invited the Commonwealth to participate in this case as *amicus curiae*, or to otherwise intervene under F.R.C.P. 24 (Dkt. # 39). The Commonwealth accepted the court's invitation and appeared as *amicus curiae* on behalf of Appellee. (Dkt. # 47). Other amicus curiae appearances followed. (Dkt. ## 50, 61, 65).

This case involves issues of great importance to Puerto Rican United States citizens, who are subjected to unconstitutional disparate treatment by being excluded from the SSI program for the sole reason of their status as residents of

Puerto Rico. The Commonwealth respectfully submits to this honorable Court that the district court's decision to eliminate this unequal and unfair treatment should be affirmed.

Under Puerto Rico law, the Secretary of Justice has the authority to legally represent the Commonwealth of Puerto Rico. Laws of P.R. Ann., tit 3 §292a (1). The Office of the Solicitor General of Puerto Rico is part of the Department of Justice and it has authority to legally represent the Commonwealth in, among others, appellate cases before the United States Courts of Appeals. Laws of P.R. Ann., tit 3 §294l (1). The Secretary of Justice also has the authority to contract attorneys to perform the duties of the Department, and these attorneys may act as representatives or delegates of the Secretary in those matters that she determines. Laws of P.R. Ann., tit 3 §293(d). The undersigned counsel is appearing in this case pursuant to a professional services contract signed with the Puerto Rico Department of Justice to assist the Solicitor General of Puerto Rico, who, in turn, assigned this matter to him and authorized his appearance in this case as counsel of record for the Commonwealth.

In compliance with Fed. R, App. P. 29 (a) (2), the Commonwealth informs this Honorable Court that both parties to this appeal have consented to the filing of this *amicus curiae* brief.

II. STATEMENT ON AUTHORSHIP OF THE *AMICUS* BRIEF

This brief is authored entirely by the undersigned attorneys in representation of the Commonwealth of Puerto Rico. No person or entity has contributed any money intended to fund preparing or submitting this brief.

III. ARGUMENT

Introduction

Appellant's main argument is that the district court's judgment is foreclosed by two decisions of the United States Supreme Court, to wit, *Califano v. Torres*, 435 U.S. 1 (1978) and *Harris v. Rosario*, 446 U.S. 651 (1980). In both cases, the Court, in summary decisions bereft of any detailed argumentation by the parties, decided that, under the Territories Clause, Congress can discriminate against Puerto Rico if there is rational basis for this action. *Califano*, 435 U.S. at 5; *Rosario*, 446 U.S. at 651-652. A brief discussion of these two decisions is in order.

In *Califano*, the Court reversed a decision made by a three-judge court in Puerto Rico which had invalidated the same provisions of the SSI program involved here, solely on the ground that they violated the plaintiffs' constitutional right to travel. The *Califano* court **did not** have before it a controversy regarding the Equal Protection component of the Fifth Amendment, as it clearly stated in

footnote 4 of its opinion. *Id,* at p. 3, n.4. It however, mentioned in that footnote that, given Puerto Rico's "unparalleled" relationship with the United States, Congress has the power to treat it differently and did not have to extend to it every Federal program. *Id.* At the end of the opinion, the Court stated that, even if the plaintiff could invoke his right to travel in this case, the law would be subjected to a rational basis review because it is "a law providing for governmental payments of monetary benefits", and such statutes enjoy a "strong presumption of constitutionality". *Id,* at p. 5. The Court made **no** analysis as to whether the law constituted invidious discrimination on the basis of race and/or national origin.

In *Rosario,* the Court faced a Fifth Amendment Equal Protection challenge to the Aid to Families with Dependent Children program, 42 U. S. C. § 601 *et seq.*, which provides federal financial assistance to States and Territories to aid families with needy dependent children, but in which Puerto Rico receives less assistance than do the States. *Id,* at 651. In a two-paragraph *per curiam* opinion, the Court stated that, pursuant to the Territory Clause of the Constitution, U. S. Const., Art. IV, § 3, cl. 2, Congress may "treat Puerto Rico differently from the States so long as there is a rational basis for its actions". *Id,* at 651-652. The Court cited no authority and made no developed discussion in support of this statement. Further, relying on *Califano*'s dictum, the Court decided that there was such a rational basis

to sustain this discriminatory treatment. Again, the Court failed to make any analysis as to whether the statute constituted invidious discrimination on the basis of race and/or national origin.

It is clear from the text of *Califano* and *Rosario* that these decisions are entirely based upon the plenary power granted to Congress over territories of the United States by the Territory Clause, *supra*, and the interpretation that the Court has given to that clause with respect to Puerto Rico. This interpretation, commonly known as the "incorporation doctrine", is the main cause of the gross inequality suffered by Puerto Rican United States citizens who live in Puerto Rico and is an essential part of this case.

The *Insular Cases*

Puerto Rico became a United States territory as a result of the Spanish-American War in 1898, through the Treaty of Paris. *Puerto Rico v. Sánchez Valle*, 136 S. Ct. 1863, 1868 (2016). Since then, Congress has been tasked with determining "[t]he civil rights and political status of its inhabitants". Treaty of Paris, Art. 9, Dec. 10, 1898, 30 Stat. 1759. *See also Id*. At the time, it was assumed that the Constitution applied to the United States territories. *Thompson v. Utah*, 170 U.S. 343, 346 (1898), reversed on other grounds by *Collins v. Youngblood*, 497 U.S. 37, 39 (1990). It was also thought that the Constitution did

not grant power to the Federal Government to acquire a territory to be held and governed permanently in that character, nor to hold establish and maintain colonies to be held and governed at its own pleasure. *Scott v. Sanford*, 60 U.S. (19 How.) 393, 447 (1857)[1]. It was therefore clear that territories acquired by the United States would only be in such status temporarily and that the protections of the Constitution extended to them.

This would change after the Treaty of Paris was signed. In the case of *De Lima v. Bidwell*, 182 U.S. 1, 197 (1901), the Court determined that the newly-acquired territory of Puerto Rico was no longer foreign upon the ratification of the Treaty of Paris. In so doing, the Court stated as follows:

> The theory that a country remains foreign with respect to the tariff laws until Congress has acted by embracing it within the Customs Union, presupposes that a country may be domestic for one purpose and foreign for another. It may undoubtedly become necessary for the adequate administration of a domestic territory to pass a special act providing the proper machinery and officers, as the President would have no authority, except under the war power, to administer it himself; but no act is necessary to make it domestic territory if once it has been ceded to the United States…. This theory also presupposes that territory may be held indefinitely by the United States; that it may be treated in every particular, except for tariff purposes, as domestic territory; that laws may be enacted and enforced by officers of the United States sent there for that purpose; that insurrections may be suppressed, wars carried on, revenues collected, taxes imposed; in short, that everything may be done which a government can do within its own boundaries, and yet that the

[1] This case is rightfully infamous for erroneously limiting the term "citizens" to a single race; however, it also illustrates the view that territories were to be held as such only temporarily.

> territory may still remain a foreign country. That this state of things may continue for years, for a century even, but that until Congress enacts otherwise, it still remains a foreign country. To hold that this may be done as a matter of law we deem to be pure judicial legislation. We find no warrant for it in the Constitution or in the powers conferred upon this court. It is true the nonaction of Congress may occasion a temporary inconvenience, but it does not follow that courts of justice are authorized to remedy it by inverting the ordinary meaning of words.

De Lima, 182 U.S. at 198. The holding of *De Lima*, which prevented the imposition of tariffs upon goods imported from Puerto Rico into the United States after the ratification of the Treaty of Paris, seemed to be consistent with the treatment given thus far to territories. However, on the same date that the Supreme Court decided *De Lima*, it decided the case of *Downes v. Bidwell*, 182 U.S. 244 (1901). In *Downes*, the Court confronted the question whether the tariffs imposed by Congress upon goods imported from Puerto Rico in the Foraker Act of 1900 violated the provision of Art. 1 Sec. 8 of the Constitution which declares that "all duties, imposts and excises shall be uniform throughout the United States." *Id*, at 249. The Court, in a dramatic turn from its holding in *De Lima*, decided that Puerto Rico belongs to the United States, but is not a part of the United States. After a lengthy discussion, the Court concluded as follows:

> Patriotic and intelligent men may differ widely as to the desireableness of this or that acquisition, but this is solely a political

> question. We can only consider this aspect of the case so far as to say that no construction of the Constitution should be adopted which would prevent Congress from considering each case upon its merits, unless the language of the instrument imperatively demand it. A false step at this time might be fatal to the development of what Chief Justice Marshall called the American Empire. Choice in some cases, the natural gravitation of small bodies towards large ones in others, the result of a successful war in still others, may bring about conditions which would render the annexation of distant possessions desirable. **If those possessions are inhabited by alien races, differing from us in religion, customs, laws, methods of taxation and modes of thought, the administration of government and justice, according to Anglo-Saxon principles, may for a time be impossible; and the question at once arises whether large concessions ought not to be made for a time, that, ultimately, our own theories may be carried out, and the blessings of a free government under the Constitution extended to them.** We decline to hold that there is anything in the Constitution to forbid such action.
>
> We are therefore of opinion that **the Island of Porto Rico is a territory appurtenant and belonging to the United States, but not a part of the United States** within the revenue clauses of the Constitution; that the Foraker act is constitutional, so far as it imposes duties upon imports from such island, and that the plaintiff cannot recover back the duties exacted in this case.

Downes, 182 U.S. at 286-287 (Emphasis ours). These two paragraphs, at the very end of the majority opinion, establish the truth underlying the *Insular Cases*. In those cases, the Court gave preeminence to Congress' powers under the Territories Clause over the individual rights afforded by the Constitution for reason of the race and national ancestry of the inhabitants of the territories acquired by the Treaty of Paris. The *Insular Cases* mirror the categorizations made in the infamous case of

Plessy v. Ferguson, 163 U.S. 537, 544 (1896), *revoked* by *Brown v. Bd. of Educ*., 347 U.S. 483 (1954). There the Court said that "[t]he object of the amendment was undoubtedly to enforce the absolute equality of the two races before the law, but in the nature of things it could not have been intended to abolish distinctions based upon color, or to enforce social, as distinguished from political equality, or a commingling of the two races upon terms unsatisfactory to either. These distinctions, which were rightly revoked by the Court in *Brown*, are similar to the distinctions elaborated in the *Insular Cases*.

In *Dorr v. United* States, 195 U.S. 138, 142-43 (1904), in which the Court followed *Downes*, the Court said that "[u]ntil Congress shall see fit to incorporate territory ceded by treaty into the United States, we regard it as settled by that decision that the territory is to be governed under the power existing in Congress to make laws for such territories and subject to such constitutional restrictions upon the powers of that body as are applicable to the situation." However, in *Downes*, the Court did not specify what are those constitutional restrictions, except for a statement that inhabitants of Puerto Rico, "[e]ven if regarded as aliens, they are entitled under the principles of the Constitution to be protected in life, liberty and property". *Downes*, 182 U.S. at 283.

In the Jones Act of 1917[2], Congress, among others, granted United States citizenship to all inhabitants of Puerto Rico. This directly contradicts the holding of the *Downes* Court that Puerto Rico belongs to but is not a part of the United States, since Congress unequivocally established that the People of Puerto Rico are citizens of the United States and do not merely belong to it. It would therefore seem clear that, if Puerto Ricans are citizens of the United States, they would be entitled to the same rights as all other United States citizens. The rights of United States citizens are the same regardless of whether they were born as such or naturalized, except that only "natural born" citizens are eligible to be President. *Schneider v. Rusk*, 377 U.S. 163, 165 (1964); *Knauer v. United States*, 328 U.S. 654, 658 (1946). Further, the Fourteenth Amendment prevents Congress from abridging, affecting, restricting the effect of or taking away citizenship. *Afroyim v. Rusk*, 387 U.S. 253, 267 (1967); *United States v. Klimavicius*, 847 F. 2d 28, 32 (1st Cir. 1988).

Unfortunately, in *Balzac v. Porto Rico*, 258 U.S. 298 (1923), the Court reaffirmed the distinction between incorporated and non-incorporated territories. The Court expressed therein that, although the intention by Congress to confer United States citizenship to a territory's inhabitants may be interpreted as its incorporation, and such was the case for Alaska in *Rasmussen v. United States*, 197

[2] *Jones Act of 1917*, 64 P.L. 368, 39 Stat. 951, 64 Cong. Ch. 145, 64 P.L. 368, 39 Stat. 951, 64 Cong. Ch. 145.

U.S. 516 (1905), the situation of the Puerto Rico territory was different, in that Alaska is an "enormous territory, very sparsely settled and offering opportunity for immigration and settlement by American citizens". *Balzac*, 258 U.S. at 309.

This is an entirely arbitrary distinction. The geographical or demographic differences between Alaska and Puerto Rico do not explain why granting United States citizenship to Alaskans meant incorporation and granting such citizenship to Puerto Ricans did not. The reason the *Balzac* Court distinguished Alaska from Puerto Rico was illustrated by the Court as follows: "[w]hen Porto Ricans passed from under the government of Spain, they lost the protection of that government as subjects of the King of Spain, a title by which they had been known for centuries. They had a right to expect, in passing under the dominion of the United States, a status entitling them to the protection of their new sovereign". *Balzac*, 258 U.S. at 308. This explanation, however, is pretextual, since, such a right of protection by their new sovereign would have accrued immediately upon the change of sovereignty, and not necessarily through a grant of United States citizenship. In essence, the distinction is one entirely based **on alienage or race**, and is no different from the one established in *Downes*.

Further, the *Balzac* Court stated the following regarding the nature and reach of the United States citizenship granted to Puerto Ricans in the Jones Act:

> It became a yearning of the Porto Ricans to be American citizens, therefore, and this act gave them the boon. What additional rights did it give them? **It enabled them to move into the continental United States and becoming residents of any State there to enjoy every right of any other citizen of the United States, civil, social and political**.

Balzac, 258 U.S. at 308 (emphasis ours). The Court openly stated that Puerto Rican United States citizens who lived in Puerto Rico would have to abandon their homes and move into the continental United States in order to enjoy the full rights of citizenship, effectively abridging their citizenship and establishing a second-class citizenship not warranted in the Constitution. As stated before, the Court established in *Afroyim v. Rusk*, *supra*, that this is not permitted.

From the above it is clear that the *Insular Cases* have established a regime that discriminates against Puerto Rican United States citizens on the basis of their race and national origin. It should be underlined in this context that "[w]ith the exception of two of its members, all justices of the Court that decided the *Insular Cases* had in 1896 also joined the Court's decision in *Plessy v. Ferguson*".[3] The Commonwealth asserts that the notion of a territory being "unincorporated" for cultural and racial differences would rightfully offend our nation's post *Brown v. Board of Education* view of equality before the law. However, the courts have kept away from engaging in this discussion, perhaps awaiting the right case. If so, the Commonwealth respectfully suggests that this is such a case.

[3] *Consejo de Salud Playa de Ponce v. Rullan*, 586 F. Supp. 2d 22, 28 (D.P.R. 2008).

Equal Protection

When legislation establishes a classification on which to base disparate treatment of particular groups of people, courts must scrutinize it to determine if it violates equal protection. *See Pers. Adm'r of Mass. v. Feeney*, 442 U.S. 256, 271-72 (1979). Depending on the classification at issue, courts apply different levels of review. *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 439-441 (1985).

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

the rational basis review conventionally applied in routine matters of commercial, tax and like regulation. *United States HHS*, 682 F.3d at 9.

The exclusion of Puerto Rico residents from the SSI program is subject to a stricter standard of review than rational basis. *Consejo de Salud Playa de Ponce v. Rullán*, 586 F. Supp. 2d 22, 44 (D.P.R. 2008) (Gelpí, J.). By excluding Puerto Rico residents as a class, the SSA singles out and discriminates against an entire group of people on the premise that they belong to a class of "alien races." S*ee Bruns v. Mayhew*, 750 F.3d 61, 66 (1st Cir. 2014) ("[A] state's alienage-based classifications inherently raise concerns of invidious discrimination and are therefore generally subject to strict judicial scrutiny."). Because this exclusion serves no legitimate governmental end under any standard of review, it must fail. However, the constitutional interpretation crafted in the *Insular Cases* has been applied to justify unequal treatment of U.S. citizens residing in Puerto Rico.

In this case, defendant's residency in Puerto Rico was the only reason for denial of SSI benefits. Specifically, in a brief *Per Curiam* opinion in *Torres*, the Court validated the geographical limitations on SSI benefits,[4] and decided that such a regulation was not unconstitutional so long as there is a rational basis for it.[5]

[4] 42 U.S.C.S. § 1382 **(e)** For purposes of this title [42 USCS §§ 1381 et seq.], the term "United States", when used in a geographical sense, means the 50 States and the District of Columbia.

[5] *Califano v. Torres*, 435 U.S. 1, 5 (1978)

This expression by the Court was later reaffirmed in *Rosario*.[6] Under this relaxed standard, a law is constitutionally valid if "there is a plausible policy reason for the classification, the legislative facts on which the classification is apparently based rationally may have been considered to be true by the governmental decision maker, and the relationship of the classification to its goal is not so attenuated as to render the distinction arbitrary or irrational." *Armour v. City of Indianapolis, Ind*., 566 U.S. 673, 681 (2012) (citations omitted).

However, the analysis performed above of the *Insular Cases*, upon which both *Torres* and *Rosario* were based, clearly indicates that these decisions were entirely based on alienage and/or racial and cultural differences, and therefore the statutes in question should have been subjected to strict scrutiny and examined with a presumption of unconstitutionality. On this matter the Court has explained that:

> A core purpose of the Fourteenth Amendment was to do away with all governmentally imposed discrimination based on race. See *Strauder* v. *West Virginia*, 100 U.S. 303, 307-308,310 (1880). Classifying persons according to their race is more likely to reflect racial prejudice than legitimate public concerns; the race, not the person, dictates the category. See *Personnel Administrator of Mass*. v. *Feeney*, 442 U.S. 256, 272 (1979). Such classifications are subject to the most exacting scrutiny; to pass constitutional muster, they must be justified by a compelling governmental interest and must be

[6]*See Harris*, 446 U.S. at 653-54 (Justice Marshall Dissenting) questioning the validity of some earlier opinions by the Supreme Court—*Downes* and *Balzac*– suggesting that various protections of the Constitution do not apply to Puerto Rico, citing *Torres* v. *Puerto Rico*, 442 U.S. 465, 475-476 (1979) (BRENNAN, J., concurring in judgment).

> "necessary . . . to the accomplishment" of their [*433] legitimate purpose, *McLaughlin* v. *Florida*, 379 U.S. 184, 196 (1964). See *Loving* v. *Virginia*, 388 U.S. 1, 11 (1967).

Palmore v. Sidoti, 466 U.S. 429, 432-33 (1984). In *United States v. Windsor*, 570 U.S. 744, 774 (2013), the Court reiterated that:

> The liberty protected by the Fifth Amendment's Due Process Clause contains within it the prohibition against denying to any person the equal protection of the laws. *See Bolling*, 347 U.S., at 499-500; *Adarand Constructors, Inc.* v. *Peña*, 515 U.S. 200, 217-218 (1995). While the Fifth Amendment itself withdraws from Government the power to degrade or demean in the way this law does, the equal protection guarantee of the Fourteenth Amendment makes that Fifth Amendment right all the more specific and all the better understood and preserved.

It should be stressed that "[t]he Equal Protection Clause directs that "all persons similarly circumstanced shall be treated alike." *Plyler v. Doe*, 457 U.S. 202, 216, (1982), quoting *F.S. Royster Guano Co.* v. *Virginia*, 253 U.S. 412, 415 (1920)". In this matter, Puerto Ricans are similarly situated to other United States citizens. In *Harris v. Rosario*, these questions were cursorily addressed without benefit of briefing or argument.[7] Decades later, Puerto Rican American citizens deserve a fresh look at the basis for this discrimination.

On the Equal Protection issue, the Court has stated that inhabitants of territories, "even if regarded as aliens, they are entitled under the principles of the Constitution to be protected in life, liberty and property". *Downes*, 182 U.S. at 283.

[7] *Rosario*, 446 U.S. at, 653-54 (Justice Marshall Dissenting).

The Court's decisions have established that classifications based on alienage, like those based on nationality or race, are inherently suspect and subject to close judicial scrutiny. Aliens as a class are a prime example of a 'discrete and insular' minority (see *United States* v. *Carolene Products Co*., 304 U.S. 144, 152-153, n. 4 (1938)) for whom such heightened judicial solicitude is appropriate. Accordingly, it was said in *Takahashi v. Fish and Game Commission*, 334 U.S. 410, 420 (1948), that 'the power of a state to apply its laws exclusively to its alien inhabitants as a class is confined within narrow limits.'" *Graham v. Richardson*, 403 U.S. 365, 371-72 (1971). This analysis was not applied in *Rosario.*

Further, the supposedly rational basis identified by the Court was that: "Puerto Rican residents do not contribute to the federal treasury; the cost of treating Puerto Rico as a State under the statute would be high; and greater benefits could disrupt the Puerto Rican economy." *Rosario*, 446 U.S. at 652. These premises are erroneous.

First, this Honorable Court can take judicial notice of the fact that many residents of Puerto Rico ***do*** pay federal taxes, some of which residents of other jurisdictions do not pay.[8] Federal law generally requires individuals and businesses in Puerto Rico to pay federal tax on income they earn outside of Puerto Rico,

[8] For example, premiums on policies issued by insurers and reinsurers from Puerto Rico for risks located in Puerto Rico pay a federal excise tax ranging from 1% to 4% which is inapplicable in the remaining U.S. jurisdictions. *See* 26 U.S.C. § 4371.

whether in the United States or in a foreign country. Federal law also requires employers and employees in Puerto Rico to pay all federal payroll taxes, which fund Social Security, the Medicare hospital insurance program[9], and the federal unemployment compensation program.

Further, in general terms, "SSI makes monthly payments to people who have low income and few resources, and who are: Age 65 or older; blind; or disabled".[10] Also, "SSI is commonly known as a program of 'last resort' because claimants must first apply for all other benefits for which they may be eligible; cash assistance is awarded only to those whose income and assets from other sources are below prescribed limits".[11] Thus, the SSI program clearly aims at individuals who do not pay Federal income taxes because their income is too low. Moreover, the beneficiaries of SSI do not pay federal taxes, regardless of the state they reside in. Additionally, even non-citizens may qualify for SSI benefits from which the U.S citizens of Puerto Rico are excluded.[12] In fact, in 2017, 6% of all SSI beneficiaries were noncitizens.[13] In 1995, that percentage was as high as 12.1% which represented a total of 785,410 beneficiaries.[14] .

[9] 26 U.S.C. §§3101, 3121 (b)(i) and 3121 (e)(1)

[10] SSI Booklet: https://www.ssa.gov/pubs/EN-05-11000.pdf.
[11] *Cash Assistance for the Aged, Blind, and Disabled in Puerto Rico* Congressional Research Service, October 26, 2016, Page 1. https://fas.org/sgp/crs/row/cash-aged-pr.pdf.
[12] Supplemental Security Income for Non-Citizens. https://www.ssa.gov/pubs/EN-05-11051.pdf.
[13] SSI Annual Statistical Report, 2017, https://www.ssa.gov/policy/docs/statcomps/ssi_asr/2017/sect05.pdf.
[14] *Id.*

Moreover, the residents of the Northern Mariana Islands, an unincorporated territory, do receive SSI benefits.[15] The objection to extending SSI benefits to Puerto Rico because they do not pay Federal income taxes should also apply to the Northern Mariana Islands.[16] According to the U.S. Governments Accountability Office (GAO),[17] in 2010, Puerto Rico taxpayers reported paying $20 million to the United States, its possessions, or foreign countries in individual income tax. "According to officials from Puerto Rico's Department of Internal Revenue, most of these payments would have been to the United States. The report also explains that "[i]f Puerto Rico had been a state in 2010, estimated individual income tax revenue from Puerto Rico taxpayers would have ranged from $2.2 billion to $2.3 billion (after accounting for estimated payments in excess of tax liability from refundable tax credits, such as the earned income tax credit)".[18] Also, the 2015 Internal Revenue Service Data Book reveals that the IRS collected $3.52 billion in federal taxes on individuals and businesses in Puerto Rico in Fiscal Year 2015.[19]

[15] See *Cash Assistance for the Aged, Blind, and Disabled in Puerto Rico*, Congressional Research Service, October 26, 2016, Page 3. https://fas.org/sgp/crs/row/cash-aged-pr.pdf.
[16] See *Congressional Task Force on Economic Growth in Puerto Rico,* Report to the House and Senate, December 20th, 2016, at 54.
[17] U.S. Governments Accountability Office, GAO-14-31.
[18] *Id.*
[19] *See* Internal Revenue Service Data Book, at page 12, Table 5. Retried on July 25, 2016 fromhttps://www.irs.gov/pub/irs-soi/15databk.pdf.

In terms of corporate income tax, in 2009, U.S. corporations paid about an estimated $4.3 billion in tax on income from their affiliates in Puerto Rico".[20] "If Puerto Rico had been a state in 2009, estimated corporate income tax revenue from businesses that filed a Puerto Rico tax return for that year (or their parent corporations in the United States) would have ranged from $ 5.0 to $ 9.3 billion.[21] Comparing this to SSI benefits, if Puerto Ricans qualified, the "estimated federal spending would have ranged from $ 1.5 billion to $ 1.8 billion".[22]

This information demonstrates that, although Puerto Rican United States citizens residing in Puerto Rico do not pay federal income taxes like those in the states, it is entirely incorrect that they "do not contribute to the federal treasury", as the Court stated in *Harris*. The information provided by the GAO, presented above, also disproves the belief that treating Puerto Rico as a state under this statute would be too costly.

The third factor, regarding the supposed disruption of Puerto Rico's economy, differs from the current economic facts. According to another recent Governments Accountability Office report, the issue of lack of SSI, and other federal benefits in general, has been seen by different political administrations as attributing to "outmigration" to the states, which actually adversely affects the

[20] *Id*
[21] *Id.*
[22] *Id.*

economy.[23] The only scenario in which such a benefit may disrupt the economy is if it disincentives work. However, the beneficiaries of the SSI program are elderly and/or disabled, and thus generally unable to work anyway. Second, if this was a problem in the application of the SSI program, it would present itself wherever the SSI was implemented in the Nation, not just Puerto Rico. Therefore, it **does not justify**, even under a rational basis standard, the exclusion of U.S citizens in Puerto Rico from the SSI program. A group of American citizens with a population higher than 19 States, the District of Columbia, and all other territories is being subjected to an inferior standard of review and no disability benefits under the SSA just because of Puerto Rico's classification as an "unincorporated territory", which is constitutionally unacceptable.

The constitutional theory discussed in this *amicus* has practical effects and ramifications. In striking down the Defense of Marriage Act (DOMA) in U.S. v. Windsor, 570 U.S. 744 (2013), the Supreme Court took into consideration the practical effects of leaving the discriminatory law in place. For example, the Court established that DOMA prevented same-sex married couples from obtaining healthcare benefits they would otherwise receive; deprived same-sex married couples from the Bankruptcy Code's special protections for domestic-support

[23] *Factors Contributing to the Debt Crisis and Potential Federal Actions to Address Them*, GAO-18-387 Page 27, May 2018. https://www.gao.gov/assets/700/691675.pdf.

obligations; required a complicated procedure to file taxes jointly and precluded those couples from being buried together in veteran's cemeteries. See *Id.*, at 772-773. Furthermore, DOMA raised the cost of health care for families by taxing health benefits provided by employers to their workers' same-sex spouses and served to deny or reduce "benefits allowed to families upon the loss of a spouse and parent, benefits that are an integral part of family security" afforded by the Social Security Administration. *Id.*, at 773. As the Supreme Court stated invalidating DOMA the "practical effect of the law here in question [is] to impose a disadvantage, a separate status, and so a stigma upon all" who reside in the territory of Puerto Rico by depriving them of benefits they would otherwise receive in the continental United States or in the territory of the Northern Mariana Islands. *Id.*, at 770. Lastly, Congress may have plenary power over the territories, but that power does not trump the Due Process Clause of the Fifth Amendment, a premise recognized by the Supreme Court even in the *Insular Cases*.

IV. CONCLUSION

The Commonwealth respectfully submits that the exclusion of Puerto Rican United States citizens living in Puerto Rico from receiving SSI benefits should be subject to strict scrutiny under the Equal Protection Clause of the Fifth and Fourteenth Amendments. The Incorporation Doctrine generated by the *Insular*

Cases creates an impermissible suspect classification of U.S. citizens for alienage and/or racial and cultural reasons that is constitutionally impermissible. The distinction amongst U.S. citizens using the incorporated and unincorporated territory distinction as a foundation for discrimination is shockingly similar to the idea of "separate but equal." This notion of the Territories Clause, insofar as it denies Puerto Rican United States citizens their right to equal protection of the laws, applying to people, should be abandoned. Even under a more relaxed scrutiny, there is no rational basis to support the disparate treatment in the legislation currently in effect on the basis of ethnicity and race. Therefore, the denial to Defendant of SSI benefits in this case is unconstitutional. The district court's judgment should therefore be affirmed.

WHEREFORE, the appearing amicus curiae Government of Puerto Rico very respectfully requests this Honorable Court to take notice of the above-stated and in considering this case on its merits, affirm the judgment of the district court.

RESPECTFULLY SUBMITTED.

In San Juan, Puerto Rico this 8th day of August, 2019.

ISAÍAS SÁNCHEZ-BÁEZ
Solicitor General of Puerto Rico

s/Carlos Lugo-Fiol
CARLOS LUGO-FIOL

CERTIFICATE OF FILING AND SERVICE

I HEREBY CERTIFY that on this same date I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to all counsel of record.

In San Juan, Puerto Rico this 8th day of August, 2019.

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Dated: August 8, 2019