

No. 20-303

In The Supreme Court of the United States

UNITED STATES OF AMERICA, *Petitioner,*

v.

JOSÉ LUIS VAELLO-MADERO, *Respondent.*

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

**BRIEF FOR AMICI CURIAE AARP,
AARP FOUNDATION, JUSTICE IN AGING,
NATIONAL ORGANIZATION OF SOCIAL
SECURITY CLAIMANTS' REPRESENTATIVES IN
SUPPORT OF RESPONDENT**

BARBARA JONES*	KATHRYN LANG
DEAN GRAYBILL	JUSTICE IN AGING
WILLIAM ALVARADO RIVERA	1444 I St., N.W.
<i>*Counsel of Record</i>	Suite 1100
AARP FOUNDATION	Washington, D.C. 20005
601 E Street, N.W.	(202) 683-1997
Washington, D.C. 20049	klang@justiceinaging.org
(202) 434-6091	
bjones@aarp.org	

Counsel for Amici Curiae

ADDITIONAL COUNSEL NOTED ON BACK OF COVER

BARBARA SILVERSTONE
NATIONAL ORGANIZATION OF SOCIAL
SECURITY CLAIMANTS' REPRESENTATIVES
161 Airport Executive Park
Nanuet, NY 10954
(845) 682-1880
Barbara.Silverstone@nosscr.org

CODY MARVIN
THE LAW OFFICES OF BARRY A. SCHULTZ, P.C.
630 Davis St., Suite 300
Evanston, IL 60201
(847) 864-0224
cody@barryschultz.com

PEDRO G. CRUZ SÁNCHEZ
LAW OFFICE OF PEDRO CRUZ SÁNCHEZ
53 Manuel Corchado St.
Cayey, Puerto Rico 00736
(787) 263-7969
abogadocruzsanchez@gmail.com

TABLE OF CONTENTS

	PAGE
INTEREST OF AMICI CURIAE	1
SUMMARY OF ARGUMENT	3
ARGUMENT	4
I. By Definition, SSI Beneficiaries Have Limited Resources and Depend on SSI for their Survival	4
A. There are strict income and asset limits to qualify for SSI	4
B. There are strict and complex medical criteria to qualify for SSI disability benefits	6
C. Puerto Rico’s older residents need for SSI is particularly acute since over 40% of Puerto Rico’s older population live in poverty and Puerto Rico’s Medicaid program does not provide long-term care services	8
D. Puerto Rico residents’ exclusion from the SSI program is particularly harmful, given the island’s elevated rate of hunger	10

II.	Classifying a Group of the Nation’s Poor and Medically Needy as ‘Second Tier’ Simply Because They Reside in Puerto Rico is not Rational	11
A.	The exclusion of Puerto Rico residents from the SSI program, and severely limited funding for Medicaid, has seriously disrupted the Puerto Rican economy	14
B.	Discriminating against Puerto Rico residents does not promote “fiscal autonomy” or “self-governance”	16
C.	Increased cost does not justify invidious discrimination	17
III.	The Policy of Denying SSI to Puerto Rico Residents Has Caused Immeasurable Harm	18
	CONCLUSION	20

TABLE OF AUTHORITIES

	PAGE
 CASES	
<i>Amisub (PSL) Inc. v. State of Colo. Dept. of Soc. Servs.</i> , 879 F.2d 789 (10th Cir. 1989)	18
<i>Bolling v. Sharpe</i> , 347 U.S. 497 (1954)	11
<i>Califano v. Torres</i> , 435 U.S. 1 (1978)	12, 13
<i>Chu Drua Cha v. Noot</i> , 696 F.2d 594 (8th-Cir. 1982), <i>mod. on other grounds</i> , 701 F.2d 750 (8th Cir.1983)	19
<i>City of Cleburne v. Cleburne Living Ctr., Inc.</i> , 473 U.S. 432 (1985)	12
<i>Examining Bd. of Engineers, Architects & Surveyors v. Flores de Otero</i> , 426 U.S. 572 (1976)	11
<i>Financial Oversight and Management Bd. for Puerto Rico v. Aurelius Investment, LLC</i> , 140 S. Ct. 1649 (2020)	16

<i>Harris v. Rosario</i> , 446 U.S. 651 (1980)	12, 13
<i>Lyng v. Int'l Union, United Auto., Aerospace & Agric. Implement Workers of Am., UAW</i> , 485 U.S. 360 (1988)	17-18
<i>Mem'l Hosp. v. Maricopa Cty.</i> , 415 U.S. 250 (1974)	18
<i>Moore v. Miller</i> , 579 F. Supp. 1188 (N.D.Ill.1983)	19
<i>OfficeMax, Inc. v. United States</i> , 428 F.3d 583 (6th Cir. 2005)	13
<i>Paxton v. Secretary of Health and Hum. Servs.</i> , 856 F.2d 1352 (9th Cir.1988)	19
<i>Puerto Rico v. Valle</i> , 136 S.Ct. 1863 (2016)	16
<i>RAM v. Blum</i> , 533 F. Supp. 933 (S.D.N.Y.1982)	19
<i>Romer v. Evans</i> , 517 U.S. 620 (1996)	12
<i>Saenz v. Roe</i> , 526 U.S. 489 (1999)	18
<i>Sioux City Bridge Co. v. Dakota Cnty.</i> , 260 U.S. 441 (1923)	12

<i>United States v. Vaello-Madero</i> , 936 F.3d 12 (1st Cir. 2020)	13
<i>United States Dept. of Agric. v. Moreno</i> , 413 U.S. 528 (1973)	12
<i>Vill. of Willowbrook v. Olech</i> , 528 U.S. 562 (2000)	12
<i>Williamson v. Gibbs</i> , 562 F. Supp. 687 (W.D.Wash.1983)	19
<i>Zobel v. Williams</i> , 457 U.S. 55 (1982)	12

STATUTES

42 U.S.C. § 1381	3
42 U.S.C. § 1381(a)	3
42 U.S.C. § 1382(a)(3)(A),(b)	5
48 U.S.C. 2121	16

REGULATIONS

20 C.F.R. § 416.920	6, 7
20 C.F.R. § 416.924	7

US CONSTITUTION

Amendment V	11
Amendment XI	19
Article IV, § 3, cl. 2	16

MISCELLANEOUS

AARP, <i>Who is eligible for SSI?</i> (Mar. 25 2020), https://www.aarp.org/retirement/social-security/questions-answers/ssi-eligible/	5
Amelia Cheatham, <i>Puerto Rico: A U.S. Territory in Crisis</i> , (Feb. 13, 2020), Council on Foreign Rels., https://perma.cc/A89Y-7X4Q	13, 18
Cristina Corujo, <i>COVID-19 has made Food insecurity worse in Puerto Rico</i> , ABC News (June 2, 2020, 12:26 AM), https://abcn.ws/2Wjz2KX	10
Cong. Rsch. Serv., <i>Cash Assistance for the Aged, Blind and Disabled in Puerto Rico</i> , (Oct. 26, 2016), https://fas.org/sgp/crs/row/cash-aged-pr.pdf	7

- Cong. Rsch. Serv.,
Poverty in the United States in 2019,
 (Apr. 13, 2021),
<https://crsreports.congress.gov/product/pdf/R/R46759> 19
- Ctr. on Budget & Pol’y Priorities,
Policy Basics: Aid to the Aged, Blind, and Disabled (Jan. 15, 2021),
<https://www.cbpp.org/research/aid-to-the-aged-blind-and-disabled> 7, 8, 18
- Ctr. on Budget and Pol’y Priorities,
Supplemental Security Income (Jan. 29, 2018)
<https://tinyurl.com/pr4dy88t> 7, 8
- Epstein, Becker & Green, P.C.,
Medicaid in Puerto Rico: Differences from the States (Mar. 15, 2021),
 HHRG-117-IF14-20210317-SD020.pdf
 (congress.gov) 9
- Rosario Fajardo,
Elderly Population in Puerto Rico Continues to Increase,
 The Weekly J. (June 28, 2019),
<https://tinyurl.com/ndfjacjk> 8
- Adrian Florido,
'Mamá, I'm Still Hungry': In Puerto Rico, Child Hunger Becomes a Flashpoint,
 NPR (May 13, 2020, 5:01 AM),
<https://tinyurl.com/PRHunger> 10

Christine L. Himes & Lillian Kilduff,
Population Reference Bureau,
Which U.S. States Have the Oldest Populations
(Mar. 16, 2019),
<https://www.prb.org/resources/which-us-states-are-the-oldest/> 8

Instituto Nueva Escuela
& George Washington Univ.,
*Food and Nutrition Security in Puerto Rico:
Pre and Post Coronavirus*, (July 2020),
<https://bit.ly/3zcNAKC> 10

Kaiser Family Found.,
*State Health Facts: Poverty Rate by
Age*, (2019),
<https://tinyurl.com/kffpovertyrate> 9

A. Matos-Moreno & C. Mendes de Leon,
*Social Determinants of Late-Life Disability in
Puerto Rico*,
Innovation in Aging 998 (2018),
https://academic.oup.com/innovateage/article/2/suppl_1/998/5183983 9

- Medicaid and CHIP Payment Access
Public Meeting, Session 4:
Medicaid in Puerto Rico: Financing
and Spending Data Analysis and
Projections 122, 126,
(Mar. 7, 2019),
[https://www.macpac.gov/wp-
content/uploads/2018/03/March-2019-
Meeting-Transcript.pdf](https://www.macpac.gov/wp-content/uploads/2018/03/March-2019-Meeting-Transcript.pdf)
(statement of Kacey Buder) 14
- Edwin Park,
*Addressing Puerto Rico's Medicaid
Funding Shortfalls Would Help
Ensure Fiscal Stability and Growth*,
Ctr. on Budget and Pol'y Priorities
(Sept. 19, 2016),
[https://www.cbpp.org/research/health/
addressing-puerto-ricos-medicaid-funding-
shortfalls-would-help-ensure-fiscal](https://www.cbpp.org/research/health/addressing-puerto-ricos-medicaid-funding-shortfalls-would-help-ensure-fiscal) 15
- Robin Respaut,
*The disabled in Puerto Rico fend for
themselves after decades of U.S. neglect*
Reuters Investigates
Dec. 9, 2016,
[https://www.reuters.com/investigates/special-
report/usa-puertorico-disability/](https://www.reuters.com/investigates/special-report/usa-puertorico-disability/) 14

Robin Rudowitz, et al., <i>Medicaid Financing: The Basics</i> , Kaiser Family Found., (May 2, 2021), https://www.kff.org/medicaid/issue-brief/ medicaid-financing-the-basics/	9
Jorge L. Sanchez, <i>Long-Term Care in Puerto Rico</i> , Long-Term Health Care Continuum Summit (Mar. 14, 2013)	9
Soc. Sec. Admin., <i>Fast Facts & Figures about Social Security</i> , Preface (July 2020), https://www.ssa.gov/policy/docs/chartbooks /fast_facts/2020/fast_facts20.pdf	6
Soc. Sec. Admin., <i>Monthly Statistical Snapshot</i> , July 2021 at Table 3, https://www.ssa.gov/policy/docs/quickfacts/ stat_snapshot/#table3	5
Soc. Sec. Admin., <i>Spotlight on SSI Benefits for Noncitizens – 2021 Ed. (2021)</i> https://www.ssa.gov/ssi/spotlights/spot-non- citizens.htm	4
Soc. Sec. Admin., <i>You May Be Able to Get Supplemental Security Income (SSI)</i> (Jan. 2021), https://www.ssa.gov/pubs/EN-05-11069.pdf	5

Lina Stolyar, et al.,
*Challenges in the U.S. Territories: Covid-19
and the Medicaid Financing Cliff*,
(May 18, 2021),
<https://tinyurl.com/rjksuds5> 15

Myribel Santiago Torres, et al.,
Seguridad Alimentaria en Puerto Rico,
Instituto de Estadísticas de Puerto Rico
(June 2019) 10

INTEREST OF AMICI CURIAE¹

AARP is the nation's largest nonprofit, nonpartisan organization dedicated to empowering Americans 50 and older to choose how they live as they age. With nearly 38 million members and offices in every state, the District of Columbia, Puerto Rico, and the U.S. Virgin Islands, AARP works to strengthen communities and advocate for what matters most to families, with a focus on financial stability, health security, and personal fulfillment.

AARP's charitable affiliate, AARP Foundation, works to end senior poverty by helping vulnerable older adults build economic opportunity. AARP and AARP Foundation advocate to ensure access to Social Security and Supplemental Security Income (SSI) because older people rely heavily on those programs to stay out of poverty. AARP and AARP Foundation's efforts to increase the financial security of older individuals include litigation and participation as amici curiae in state and federal courts.

Justice in Aging is a national, nonprofit organization that uses the power of law to fight senior poverty by securing access to affordable health care, economic security, and the courts for older adults with limited resources. Justice in Aging focuses its

¹ Under Supreme Court Rule 37.6, Amici state that no counsel for any party authored this brief in whole or in part; and that no person or entity, other than Amici or their counsel, made a monetary contribution intended to fund the preparation and submission of this brief. The Petitioner and the Respondent have consented to Amici filing this brief.

advocacy on those who have been marginalized and excluded from justice, such as women, people of color, LGBTQ individuals, and people with limited English proficiency. Justice in Aging conducts training and advocacy regarding Supplemental Security Income (SSI) and Social Security benefits, and provides technical assistance to attorneys across the country on how to address problems arising under these programs and engages in litigation. Justice in Aging frequently appears as friend of the court on cases involving access to benefits for older adults.

The National Organization of Social Security Claimants' Representatives (NOSSCR) is a national membership organization comprising approximately 2,500 individuals, mostly attorneys, who represent individuals applying for and appealing claims for Social Security and Supplemental Security Income (SSI) benefits. NOSSCR members include employees of legal services organizations, educational institutions, and other non-profits; employees of for-profit law firms and other businesses; and individuals in private practice. NOSSCR members represent Social Security and SSI claimants before the Social Security Administration and in the courts. NOSSCR has a great interest in ensuring that its members' clients are awarded benefits when they satisfy the criteria under the Social Security Act and the Commissioner's regulations.

SUMMARY OF ARGUMENT

Congress created SSI “[f]or the purpose of establishing a national program to provide supplemental security income to individuals who have attained age 65 or are blind or disabled[.]” 42 U.S.C. § 1381. Congress envisioned that “[e]very aged, blind, or disabled individual who is determined . . . to be eligible on the basis of his income and resources shall . . . be paid benefits by the Commissioner of Social Security.” § 1381a. By definition, SSI beneficiaries have limited resources and depend on SSI for their survival.

SSI is a program of last resort. Puerto Rico residents’ need for SSI is particularly acute given the island’s high disability and poverty rate. Classifying a group of the nation’s poor and medically needy as ‘second tier’ simply because they reside in Puerto Rico is not rational and serves no rational purpose.

The categorical exclusion of Puerto Rico’s impoverished older residents from SSI is particularly harmful given the island’s lack of long-term care service benefits under Medicaid. The federal government’s denial of SSI to Puerto Rico residents leaves thousands of qualified older, disabled, and blind citizens struggling to survive just because they live in Puerto Rico. Numerous federal courts have recognized that for people living at a subsistence level, the denial of federal benefits can cause irreparable harm.

ARGUMENT

I. **By Definition, SSI Beneficiaries Have Limited Resources and Depend on SSI for Their Survival.**

The SSI program was designed to provide cash assistance to the most vulnerable Americans who are disabled, blind, or elderly and have little or no income and few assets. Today, in addition to U.S. citizens, certain noncitizens who reside in one of the fifty states, the District of Columbia, or the Northern Mariana Islands can also qualify and receive benefits.² The program is unavailable in Puerto Rico, Guam, and the Virgin Islands (hereafter “the territories”). SSI benefits are essential to the economic well-being of its beneficiaries who depend heavily on the benefits to meet their basic needs.

A. **There are strict income and asset limits to qualify for SSI.**

SSI provides limited cash assistance. The maximum federal monthly SSI payment for an individual in 2021 is \$794. Married couples who are

² There are seven categories of noncitizens who may qualify for SSI if they have 40 qualifying quarters of work and meet additional criteria. See Soc. Sec. Admin., *Spotlight on SSI Benefits for Noncitizens – 2021 Ed.* (2021), <https://www.ssa.gov/ssi/spotlights/spot-non-citizens.htm> (last visited Aug. 27, 2021).

both on SSI can receive \$1,191.³ Individuals with other sources of income will receive less; the average monthly payments for all recipients is \$585. Average monthly payments vary by age group, ranging from \$693 for recipients under 18 to \$476 for those aged 65 and older.⁴

In addition to the strict income eligibility limits, SSI recipients must have assets below \$2,000 for an individual or \$3,000 for a married couple living together to qualify for the program.⁵ Those modest amounts are a cliff—even one dollar above those limits means failure to qualify or loss of eligibility until assets again meet those extremely strict limits.

³ Soc. Sec. Admin., *You May Be Able to Get Supplemental Security Income (SSI)* (Jan. 2021), <https://www.ssa.gov/pubs/EN-05-11069.pdf>.

⁴ Soc. Sec. Admin., *Monthly Statistical Snapshot*, July 2021 at Table 3, https://www.ssa.gov/policy/docs/quickfacts/stat_snapshot/#table3 (last updated Aug. 2021).

⁵ 42 U.S.C. § 1382(a)(3)(A),(b); Soc. Sec. Admin., *You May Be Able to Get Supplemental Security Income (SSI)* (Jan. 2021), <https://www.ssa.gov/pubs/EN-05-11069.pdf>; AARP, *Who is eligible for SSI?* (Mar. 25 2020), <https://www.aarp.org/retirement/social-security/questions-answers/ssi-eligible/>.

B. There are strict and complex medical criteria to qualify for SSI's disability benefits.

While applicants for SSI can qualify based on their indigent status and age (65 and older), in 2019 eighty-six percent of SSI beneficiaries qualified for benefits based on their disability.⁶ There are very strict and complex medical criteria to qualify for SSI disability benefits. Most applicants for SSI are denied because they do not meet the strict income and medical eligibility requirements.⁷ To qualify for SSI disability benefits, applicants must have a severe physical or mental disability (including blindness) expected to last at least 12 months or result in death, based on medical evidence. 20 C.F.R. § 416.920. Adults must also prove they can't earn substantial wages anywhere across the economy — regardless of whether such work exists where they live, whether a specific job vacancy exists, or whether they would be hired. Disabled children must have a medically determinable physical or mental impairment “that results in marked and severe functional limitations” that is expected to last for at least 12 months or to result in

⁶ Soc. Sec. Admin., *Fast Facts & Figures about Social Security*, Preface at ii, (July, 2020), https://www.ssa.gov/policy/docs/chartbooks/fast_facts/2020/fast_facts20.pdf.

⁷ Ctr. on Budget and Pol'y Priorities, *Supplemental Security Income* (Jan. 29, 2018) <https://tinyurl.com/pr4dy88t> (noting that only one in three SSI disability applications are ultimately approved).

death.⁸ Children must have severely limited functioning compared to peers.⁹

Precluding Puerto Rico’s residents from receiving SSI is particularly harmful given the island’s high disability rate. “Nearly 1 in 6 Puerto Rican residents (15.1 percent) are disabled, according to the Census Bureau, compared to 8.6 percent of the general U.S. population . . . Moreover, the factors contributing to Puerto Rico’s high poverty rate have disproportionately affected the disabled community. Nearly half of the island’s disabled residents live in poverty — twice the U.S. average.”¹⁰

While some territorial residents with a disability can qualify for limited government assistance through the Aid to the Aged, Blind and Disabled program (AABD), its benefits are a fraction of what SSI provides and are an inadequate substitute.¹¹ The Government Accountability Office

⁸ Cong. Rsch. Serv., *Cash Assistance for the Aged, Blind and Disabled in Puerto Rico 2* (Oct. 26, 2016), <https://fas.org/sgp/crs/row/cash-aged-pr.pdf>; see also 20 C.F.R. §§ 416.920, 416.924.

⁹ 20 C.F.R. §§ 416.920, 416.924; Ctr. on Budget and Pol’y Priorities, *Supplemental Security Income*, (Jan. 2018), <https://tinyurl.com/pr4dy88t>.

¹⁰ Ctr. on Budget and Pol’y Priorities, *Policy Basics: Aid to the Aged, Blind, and Disabled* (Jan. 15, 2021), <https://www.cbpp.org/research/aid-to-the-aged-blind-and-disabled>.

¹¹ *Id.*

estimated that monthly benefits for adults that averaged \$58 in AABD in 2011 would have been \$418 if the beneficiary received SSI.¹² Additionally, not all residents with disabilities qualify for AABD. Unlike SSI, which is available to anyone who meets the eligibility criteria, the number of AABD beneficiaries is limited by its annual funding. Additionally, disabled children under age 18 who would qualify for SSI are ineligible for AABD.¹³

C. Puerto Rico’s older residents need for SSI is particularly acute since over 40% of Puerto Rico’s older population live in poverty and Puerto Rico’s Medicaid program does not provide long-term care services.

Puerto Rico has a higher percentage of older residents than any state.¹⁴ People 60 and older “constituted . . . 26.1 percent of the population in 2017,” and the older population is increasing.¹⁵

¹² *Id.* at 2.

¹³ *Id.*

¹⁴ Christine L. Himes & Lillian Kilduff, Population Reference Bureau, *Which U.S. States Have the Oldest Populations* (Mar. 16, 2019), <https://www.prb.org/resources/which-us-states-are-the-oldest/>.

¹⁵ Rosario Fajardo, *Elderly Population in Puerto Rico Continues to Increase*, *The Weekly J.* (June 28, 2019), <https://tinyurl.com/ndfjacjk>.

Similar to Puerto Ricans of all ages, a large percentage of the older population is impoverished. The percentage of Puerto Rico's residents 65 and older living in poverty is 40.2 percent.¹⁶ In addition to suffering from a high level of poverty, Puerto Rico's older residents have one of the highest disability rates in the United States and its territories.¹⁷ Puerto Rico is not equipped to meet the needs of its increasingly elderly and disabled population without access to SSI. Due to federal caps on Puerto Rico's Medicaid program, there is no coverage of long-term care services under Puerto Rico's Medicaid program, making the need for SSI even more compelling.¹⁸ In contrast, Medicaid's long-term care coverage represents nearly one-third of Medicaid expenditures in the 50 states.¹⁹

¹⁶ Kaiser Family Found., *State Health Facts: Poverty Rate by Age*, (2019), <https://tinyurl.com/kffpovertyrate>.

¹⁷ A. Matos-Moreno & C. Mendes de Leon, *Social Determinants of Late-Life Disability in Puerto Rico*, 2 *Innovation in Aging* 998 (2018), https://academic.oup.com/innovateage/article/2/suppl_1/998/5183983.

¹⁸ Epstein, Becker & Green, P.C., *Medicaid in Puerto Rico: Differences from the States* (Mar. 15, 2021), HHRG-117-IF14-20210317-SD020.pdf (congress.gov); Jorge L. Sanchez, *Long-Term Care in Puerto Rico*, Long-Term Health Care Continuum Summit (Mar. 14, 2013).

¹⁹ Robin Rudowitz, et al., *Medicaid Financing: The Basics*, Kaiser Family Found., (May 2, 2021), <https://www.kff.org/medicaid/issue-brief/medicaid-financing-the-basics/>.

D. Puerto Rico residents' exclusion from the SSI program is particularly harmful, given the island's elevated rate of hunger.

A study by the Puerto Rico Institute of Statistics in 2015 found that approximately twenty-two percent of adults in Puerto Rico reported skipping meals or eating smaller portions because they did not have money for food.²⁰ That was before the island's current economic crisis, two devastating hurricanes, and the more recent coronavirus lockdown. A 2020 survey found that food insecurity was as high as 40 percent.²¹ Monthly demand at the Food Bank of Puerto Rico nearly doubled from 1 million pounds of food distributed per month pre-pandemic to 1.9 million pounds distributed per month during the pandemic.²²

²⁰ Adrian Florido, *'Mamá, I'm Still Hungry': In Puerto Rico, Child Hunger Becomes a Flashpoint*, NPR (May 13, 2020, 5:01 AM), <https://tinyurl.com/PRHunger>, citing Myribel Santiago Torres, et al., *Seguridad Alimentaria en Puerto Rico*, Instituto de Estadísticas de Puerto Rico 5 (June 2019).

²¹ Instituto Nueva Escuela & George Washington Univ., *Food and Nutrition Security in Puerto Rico: Pre and Post Coronavirus*, (July 2020), <https://bit.ly/3zcNAKC>.

²² Cristina Corujo, *COVID-19 has made food insecurity worse in Puerto Rico*, ABC News (June 2, 2020, 12:26 AM), <https://abcn.ws/2Wjz2KX>.

II. Classifying a Group of the Nation's Poor and Medically Needy as 'Second Tier' Simply Because They Reside in Puerto Rico is not Rational.

The Fifth Amendment protects the due process rights of residents of Puerto Rico, including the right to equal protection under federal law. *Examining Bd. of Engineers, Architects & Surveyors v. Flores de Otero*, 426 U.S. 572, 599-601 (1976). Petitioner has violated Mr. Vaello-Madero's rights to equal protection of the laws under the Fifth Amendment of the United States Constitution by creating an arbitrary distinction based on territorial residence, and the distinction serves no rational purpose.²³

The due process clause of the Fifth Amendment requires the federal government to accord every person within its jurisdiction equal protection of the laws. U.S. Const. amend. V; *Bolling v. Sharpe*, 347 U.S. 497, 499-500 (1954). Government agencies may not draw arbitrary distinctions among similarly situated individuals. Differential treatment violates equal protection when it does not serve a rational purpose. When considering rationality, courts look at the goal of the underlying actions; a classification

²³ Mr. Vaello-Madero and multiple *amici* have argued that the proper review standard is either a heightened review or strict scrutiny. Those compelling arguments are not duplicated here. *See, e.g.*, Resp. Br.; Br. of Amicus Curiae Commonwealth of Puerto Rico. Instead, amici focus on the rational basis argument, under which the federal government's discrimination against residents of Puerto Rico is still unconstitutional.

cannot be so attenuated to a given goal “as to render the distinction arbitrary or irrational.” *United States Dept. of Agric. v. Moreno*, 413 U.S. 528, 535 (1973).

The purpose of equal protection is to protect “against intentional and arbitrary discrimination, whether occasioned by express terms of a statute or by its improper execution through duly constituted agents.” *Vill. of Willowbrook v. Olech*, 528 U.S. 562, 564 (2000) (quoting *Sioux City Bridge Co. v. Dakota Cnty.*, 260 U.S. 441, 445 (1923)). Absent a suspect class or a fundamental right, differential treatment violates equal protection when it does not serve a rational purpose. See *Romer v. Evans*, 517 U.S. 620, 631 (1996) (classification must bear “a rational relation to some legitimate end”). When considering rationality, courts look at the goal of the underlying actions; a classification cannot be so attenuated to a given goal “as to render the distinction arbitrary or irrational.” *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 446 (1985) (citing *Zobel v. Williams*, 457 U.S. 55, 61-63 (1982); *Moreno*, 413 U.S. at 535).

The federal government argues that this case is controlled by this Court’s summary reversals in *Califano v. Torres*, 435 U.S. 1 (1978) and *Harris v. Rosario*, 446 U.S. 651 (1980). While neither case involved an equal protection analysis, the Court concluded in a footnote that there was a rational basis for excluding residents of Puerto Rico from federal benefit programs because:

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 at 652 (citing *Califano*, 435 U.S. at 5 n. 7).

As the First Circuit notes, the use of the word “and” before the last factor indicates that no one factor alone suffices to form a rational basis. *United States v. Vaello-Madero* 936 F.3d 12, 20 n. 8 (1st Cir. 2020); see also *OfficeMax, Inc. v. United States*, 428 F.3d 583, 589 (6th Cir. 2005). The federal government has abandoned the argument that increased government benefits might discourage people from working and hurt the local economy, Pet’r’s Br. at 24, n.2. To the contrary, denying residents equal access to ogovernment benefits, particularly Medicaid, has significantly hurt the Puerto Rican economy.²⁴ Thus, to the extent that the impact of residents’ benefit levels on the Puerto Rican economy remains relevant, the denial of SSI benefits is demonstrably irrational.

²⁴ See, e.g., Amelia Cheatham, *Puerto Rico: A U.S. Territory in Crisis*, (Feb. 13, 2020), Council on Foreign Rels., <https://perma.cc/A89Y-7X4Q> (Experts say the island’s economic crisis is rooted in...twentieth century legislation that encouraged Puerto Rico’s reliance on debt to fill federal funding gaps.”).

A. The exclusion of Puerto Rico residents from the SSI program, and severely limited funding for Medicaid, has seriously disrupted the Puerto Rican economy.

Puerto Rico has had to issue bonds and has gone deeply into debt to cover a greater share of health and welfare expenses, especially Medicaid, than states do. At times, the federal contribution for Medicaid has dropped below 16 percent of total Medicaid spending. Puerto Rico has historically had to take on a much greater share of the Medicaid program than would be expected of a state or that their 55 percent FMAP [Federal Medical Assistance Percentage] would normally require.²⁵ As a Reuters investigation noted: “For years, Puerto Rico sought help from the municipal bond market to shore up its Medicaid budget. Over time, healthcare-related debt grew to constitute an estimated one-third of Puerto Rico’s massive \$70 billion of outstanding bonds.”²⁶

²⁵ See, e.g., Medicaid and CHIP Payment Access Comm’n, Public Meeting, Session 4: Medicaid in Puerto Rico: Financing and Spending Data Analysis and Projections 122, 126, (Mar. 7, 2019), <https://www.macpac.gov/wp-content/uploads/2018/03/March-2019-Meeting-Transcript.pdf> (statement of Kacey Buder).

²⁶ Robin Respaut, *The disabled in Puerto Rico fend for themselves after decades of U.S. neglect*, Reuters Investigates, Dec. 9, 2016, <https://www.reuters.com/investigates/special-report/usa-puertorico-disability/>.

Differences in the structure of Medicaid financing, including a cap that limits federal spending, have contributed to broader fiscal and health systems challenges.²⁷

“Notwithstanding temporary relief funds, once a territory exhausts its capped federal funds, it no longer receives federal financial support for its Medicaid program during that fiscal year,” thus placing additional stress on limited territorial resources.²⁸

While the federal government now advises the Court that “economic conditions in Puerto Rico are more appropriately considered as a further justification of Congress’s decision to respect Puerto Rico’s fiscal autonomy,” Pet’r’s Br. at 24, n.2., it ignores the grave injustice that the substantial financial trade-offs impose on low-income residents of Puerto Rico. Forcing Puerto Rico to continue to pick up a higher percentage of the cost of federal benefits than any State will push Puerto Rico’s economy further into a downward spiral.²⁹

²⁷ See e.g., Lina Stolyar, et al., *Challenges in the U.S. Territories: Covid-19 and the Medicaid Financing Cliff*, Kaiser Family Found. (May 18, 2021), <https://tinyurl.com/rjksuds5>.

²⁸ *Id.*

²⁹ See, e.g., Edwin Park, *Addressing Puerto Rico’s Medicaid Funding Shortfalls Would Help Ensure Fiscal Stability and Growth*, Ctr. On Budget and Pol’y Priorities (Sept. 19, 2016), <https://www.cbpp.org/research/health/addressing-puerto-ricos-medicaid-fung-shortfalls-would-help-ensure-fiscal>.

B. Discriminating against Puerto Rico residents does not promote “fiscal autonomy” or “self-governance.”

Without citing any legislative history, Petitioner opines that Congress “could rationally conclude” that denying Puerto Rico residents SSI, “could promote Puerto Rico’s ability to govern itself,” and this provides a rational basis not to extend the SSI program to Puerto Rico. Pet’r’s Br. at 22. Petitioner also argues that Puerto Rico is unique in its ability to self-govern. Pet’r’s Br. at 35. That argument disregards present day reality. While it is true that Puerto Rico once had a certain level of autonomy, it was not particularly “unique,” but rather comparable to the measure of autonomy possessed by the States. *Puerto Rico v. Sanchez Valle*, 136 S. Ct. 1863, 1874 (2016).

More recently, Puerto Rico’s autonomy has been severely limited. In 2016, in response to the fiscal crisis in Puerto Rico, Congress invoked its Article IV power to “make all needful Rules and Regulations respecting the Territory . . . belonging to the United States,” U.S. Const. art. IV, § 3, cl. 2, to enact the Puerto Rico Oversight, Management, and Economic Stability Act (PROMESA).” *Financial Oversight and Mgmt. Bd. for Puerto Rico v. Aurelius Investment, LLC*, 140 S. Ct. 1649, 1651 (2020). PROMESA established the Financial Oversight and Management Board (FOMB) to oversee Puerto Rico’s finances and restructuring of its debt. *Id.*; 48 U.S.C. § 2121.

The FOMB and Puerto Rico's government develop fiscal plans, which the FOMB then certifies, that serve as blueprints for annual budgets and long-term economic projections. Over the past several years, the fiscal plans have assumed deep cuts in federal benefits, including Medicaid. Petitioner postulates that Congress "could rationally conclude" that Puerto Rico should make its own spending decisions regarding government benefits and fund them. Pet'r's Br. at 23. Puerto Rico simply does not have that autonomy. The FOMB has rejected Puerto Rico's proposed Medicaid plan and other fiscal plans because the plans did not include what the FOMB regarded as sufficiently large cuts to meet fiscal goals. *Id.* The FOMB has pushed the Commonwealth, contrary to its governor's proposals, to institute large cuts to its Medicaid program over the next several years, which would exacerbate the problems in delivering health services to the island. *Id.* at 7.

C. Increased cost does not justify invidious discrimination.

While the government can certainly consider cost in creating or maintaining government benefit programs, the cost of a program does not justify invidious discrimination. While "protecting the fiscal integrity of government programs, and of the Government as a whole, 'is a legitimate concern of the State,'" that "does not mean that Congress can pursue the objective of saving money by discriminating against individuals or groups." *Lyng v. Int'l Union, United Auto., Aerospace & Agric.*

Implement Workers of Am., UAW, 485 U.S. 360, 373 (1988). In short, the legitimate interest in saving money provides no justification for discrimination among equally eligible citizens. See *Saenz v. Roe*, 526 U.S. 489, 507 (1999); *Mem'l Hosp. v. Maricopa Cty.*, 415 U.S. 250, 263 (1974) (“[A] State may not protect the public fisc by drawing an invidious distinction between classes of its citizens . . . so appellees must do more than show that denying [the benefit] saves money”); *Amisub (PSL) Inc. v. State of Colo. Dept. of Soc. Servs.*, 879 F.2d 789, 789-800 (10th Cir. 1989) (holding that budgetary constraints alone cannot excuse noncompliance with federal law). Increased cost cannot justify invidious discrimination against residents of Puerto Rico.

III. The Policy of Denying SSI to Puerto Rico Residents has Caused Immeasurable Harm.

Denying residents of Puerto Rico SSI is particularly harmful given the island’s high disability and poverty rates. Puerto Rico is still suffering from an economic crisis and recession that began in 2006, bankruptcy, two devastating hurricanes and earthquakes.³⁰

³⁰ Cheatham, *supra*, n. 24; Ctr. on Budget & Pol’y Priorities, *Policy Basics: Aid to the Aged, Blind, and Disabled* (Jan. 15, 2021), <https://www.cbpp.org/research/aid-to-the-aged-blind-and-disabled>. The harm to territorial residents who need these benefits is not limited to Puerto Rico, but extends to other territories. See, e.g., Amicus Br. of the Virgin Islands Bar Association.

In 2019, the poverty rate in Puerto Rico was a shocking 43.5 percent, approximately four times the 10.5 percent average for the 50 states and the District of Columbia.³¹

Numerous federal courts have held that reduced federal benefits to those living in poverty can cause irreparable harm. *See, e.g., Chu Drua Cha v. Noot*, 696 F.2d 594, 599 (8th Cir.1982) (“We have no doubt that irreparable harm is occurring to the plaintiff class as each month passes ... [even if the 11th amendment would permit a court order requiring retroactive benefits payments, because] [f]or people at the economic margin of existence, the loss of \$172 a month and perhaps some medical care cannot be made up by the later entry of a money judgment.”), *mod. on other grounds*, 701 F.2d 750 (8th Cir.1983); *Moore v. Miller*, 579 F. Supp. 1188, 1191-92 (N.D. Ill. 1983) (“For those in the grip of poverty, living on the financial edge, even a small decrease in payments can cause irreparable harm.”); *Williamson v. Gibbs*, 562 F. Supp. 687, 688 (W.D. Wash. 1983); *RAM v. Blum*, 533 F. Supp. 933, 940 (S.D. N.Y. 1982); *Paxton v. Secretary of Health and Hum. Servs.*, 856 F.2d 1352, 1354 (9th Cir. 1988) (“When a family is living at subsistence level, the subtraction of any benefit can make a significant difference to its budget and to its ability to survive.”). Discrimination in SSI eligibility is particularly invidious, given the vulnerable population that it serves.

³¹ Cong. Rsch. Serv., *Poverty in the United States in 2019*, 1-2; 10 (Apr. 13, 2021), <https://crsreports.congress.gov/product/pdf/R/R46759>.

CONCLUSION

The categorical exclusion of otherwise eligible Puerto Rico residents from SSI is not rationally related to a legitimate government interest. The decision of the First Circuit should be affirmed.

Respectfully Submitted,

BARBARA JONES*	PEDRO G. CRUZ SÁNCHEZ
DEAN GRAYBILL	THE LAW OFFICES OF
WILLIAM ALVARADO RIVERA	PEDRO CRUZ SÁNCHEZ
<i>*Counsel of Record</i>	53 Manuel Corchado St.
AARP FOUNDATION	Cayey, Puerto Rico 00736
601 E Street, N.W.	(787) 263-7969
Washington, D.C. 20049	abogadocruzsanchez@
(202) 434-6091	gmail.com
bjones@aarp.org	

CODY MARVIN	KATHRYN LANG
The Law Offices of	JUSTICE IN AGING
Barry A. Schultz, P.C.	1444 I St., N.W., Ste. 1100
630 Davis St., Ste. 300	Washington, D.C. 20005
Evanston, IL 60201	(202) 683-1997
(847) 864-0224	klang@justiceinaging.org
cody@barryschultz.com	

BARBARA SILVERSTONE
NATIONAL ORGANIZATION OF SOCIAL
SECURITY CLAIMANTS' REPRESENTATIVES
161 Airport Executive Park
Nanuet, NY 10954
(845) 682-1880
Barbara.Silverstone@nosscr.org