No. 20-303

IN THE

Supreme Court of the United States

UNITED STATES,

Petitioner,

v.

JOSE LUIS VAELLO-MADERO,

Respondent.

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

BRIEF OF LATINOJUSTICE PRLDEF AND TEN *AMICI CURIAE* IN SUPPORT OF RESPONDENT

LOURDES ROSADO
President and General Counsel
JOSE PEREZ
LÍA FIOL-MATTA
LATINOJUSTICE PRLDEF
475 Riverside Drive, Suite 1901
New York, New York 10115
(212) 219-3360

HECTOR TORRES
Counsel of Record
DAVID J. ABRAMS
STEPHEN P. THOMASCH
KASOWITZ BENSON TORRES LLP
1633 Broadway
New York, New York 10019
(212) 506-1700
htorres@kasowitz.com

Counsel for Amici Curiae

306382

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

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INTEREST OF *AMICI CURIAE*[1]

Founded in 1972 as the Puerto Rican Legal Defense and Education Fund, LatinoJustice PRLDEF ("LatinoJustice") is a national civil rights organization that works to protect the civil, constitutional, and human rights of Puerto Ricans[2] and the wider Latino community. For nearly 50 years, LatinoJustice has advocated against injustice throughout the country by, among other things, defending the constitutional rights and equal protection of all Latinos under the law. The additional ten *amici* are listed in the attached Appendix and include some of the nation's most prominent Latino organizations and bar associations advocating for the rights and interests of all Latinos.

This case presents an issue of national importance—the scope of the equal protection rights afforded by the Due Process Clause of the Fifth Amendment within Puerto Rico. As leading public interest organizations and bar associations committed to advancing the civil and constitutional rights of all persons, including Puerto Ricans, LatinoJustice and the additional *amici* have a strong interest in ensuring that the rights afforded by the Constitution are enforced and applied fairly to all Americans.

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[1] Pursuant to Supreme Court Rule 37.3(a), all parties consented to the filing of this brief. No counsel for any party has authored this brief in whole or in part, and no person or entity, other than *amici* and their counsel, made a monetary contribution to the preparation or submission of this brief.

[2] The term "Puerto Ricans" refers herein to residents of Puerto Rico.

INTRODUCTION AND SUMMARY OF ARGUMENT

Under the Social Security Act (SSA), Congress grants disability benefits to residents of the fifty States and the District of Columbia, but deprives Puerto Ricans of those benefits on the purported basis that they are "outside the United States." This classification echoes the century of discrimination that Puerto Ricans have faced as a result of the *Insular Cases* and their progeny, which apply a lower level of constitutional protection to Puerto Rico because it is deemed an "unincorporated" territory that is "foreign to the United States in a domestic sense." This classification, which disparately impacts Puerto Ricans, violates the Fifth Amendment because it is premised on a suspect classification. Although framed in geographic terms, this classification impermissibly targets a discrete and powerless ethnic and racial minority—Puerto Ricans.

I. Since the United States' annexation of Puerto Rico in 1898, this Court has on various occasions considered the applicability and scope of the Constitution's protections to Puerto Ricans. In the *Insular Cases*, this Court adopted the so-called "incorporation doctrine." Under this doctrine, residents of territories deemed bound for statehood—"incorporated" territories—are afforded the Constitution's full panoply of protections, whereas residents of territories not bound for statehood—"unincorporated" territories—are afforded only the lesser protections of the Constitution's fundamental rights.

The *Insular Cases*—originally decided by largely the same court that adopted the "separate but equal" standard in *Plessy v. Ferguson*, 163 U.S. 537 (1896)—held that Puerto Rico was an unincorporated territory not entitled to full Constitutional protection. The assumptions and rationales underlying this distinction are rife with racial and ethnic animus against Puerto Ricans. Although heavily criticized and limited by subsequent decisions, the *Insular Cases* remain good law.

Petitioner's defense of the SSA's classification is premised directly on the *Insular Cases*. Due to the direct link between the *Insular Cases* and the merits of this action, the Court should make plain what is already obvious—the *Insular Cases* were wrongly decided, based on racial and ethnic animus, and have no place in modern American jurisprudence. Moreover, changed circumstances in the Puerto Rico-United States relationship reaffirm that they lack any validity. Instead, the *Insular Cases* and their progeny serve only to limit the constitutional and civil rights of Puerto Ricans, and to send the clear message that, in the eyes of the law, they are second-class citizens. As in *Trump v. Hawaii*, 138 S. Ct. 2392 (2018), where this Court overruled the infamous decision in *Korematsu v. United States*, 323 U.S. 214 (1944), the Court should unequivocally declare that the *Insular Cases* have "no place in law under the Constitution."

II. This Court should apply strict scrutiny review to the SSA's classification of Puerto Rico as "outside the United States." Under that standard, the classification is unconstitutional.

First, strict scrutiny applies to any classification based on race, ethnicity, or alienage. The distinction of Puerto Rico being "outside the United States" harkens back to the *Insular Cases*' notorious description of Puerto Rico as "foreign to the United States in a domestic sense" and is otherwise predicated on impermissible racial, ethnic, and alienage assumptions and justifications. That the SSA cloaks this classification in geographic terms rather than ones based on race, ethnicity, or alienage does not alter that fact or preclude a finding of improper purpose. Indeed, this nominally "geographic" classification cannot obscure the obvious point: that Puerto Rico is singled out precisely because of Puerto Ricans' race and ethnicity.

Second, as this Court recognized in *United States v. Carolene Products Co.*, 304 U.S. 144 (1938), heightened scrutiny is appropriate for classifications affecting "discrete and insular" minorities. Puerto Ricans are the quintessential discrete and insular minority; they cannot participate in the federal political process because they have no representation in Congress or the Electoral College—yet the federal government exercises plenary power over Puerto Rico.

Here, the SSA's classification fails any strict scrutiny analysis because it is not narrowly tailored to achieve any compelling state interest.

ARGUMENT

I. This Court Should Overrule The *Insular Cases*

At the turn of the twentieth century, in the wake of the Spanish American War and the United States'

acquisition of geographically distant territories, this Court wrestled with the scope and applicability of the Constitution to the newly-acquired territories. In a series of decisions known as the "*Insular Cases*,"[3] the Court created out of whole cloth the "incorporation doctrine." This doctrine, unsupported by the text of the Constitution and directly contrary to long-established Supreme Court precedent, created two categories concerning U.S. territories, incorporated and unincorporated. The former category encompasses "those Territories destined for statehood . . . and the Constitution was applied to them with full force . . . . The latter category included those Territories" that presumably Congress determined, according to some unspecified and undefined criteria, did "not possess[]that anticipation of statehood." *Examining Bd. of Eng'rs, Architects & Surveyors v. Flores de Otero*, 426 U.S. 572, 599 n.30 (1976) (citations omitted). As to them, the Constitution was not fully applicable—"only 'fundamental' constitutional rights were guaranteed to the inhabitants." *Id.*

The *Insular Cases*—which created a lower standard of constitutional protection for Puerto Ricans and were predicated on overt racial and ethnic

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[3] There is no universally-adopted definition of the *Insular Cases*. This Court has defined the *Insular Cases* as including *De Lima v. Bidwell*, 182 U.S. 1 (1901), *Dooley v. United States*, 182 U.S. 222 (1901), *Armstrong v. United States*, 182 U.S. 243 (1901), *Downes v. Bidwell*, 182 U.S. 244 (1901), *Hawaii v. Mankichi*, 190 U.S. 197 (1903), *Dorr v. United States*, 195 U.S. 138 (1904), *Ocampo v. United States*, 234 U.S. 91 (1914), and *Balzac v. Porto Rico*, 258 U.S. 298 (1922). *See Boumediene v. Bush*, 553 U.S. 723, 756 (2008); *United States v. Verdugo-Urquidez*, 494 U.S. 259, 268 (1990).

animus—directly implicate whether the SSA classification violates Respondent's constitutional rights.

A. The Equal Protection Analysis In This Action Directly Implicates The *Insular Cases*

The dual standard of constitutional rights created by the *Insular Cases* and reaffirmed by their progeny act as the primary basis for Petitioner's support of the SSA classification. Accordingly, this action is an appropriate vehicle for the Court to reconsider—and overrule—the *Insular Cases*.

The SSA deprives individuals residing "outside the United States" for more than thirty consecutive days from receiving benefits under the supplemental security income (SSI) program. 42 U.S.C. § 1382(f)(1). In turn, the SSA defines the term "United States" to mean "the 50 States and the District of Columbia." 42 U.S.C. § 1382c(e). This classification, which categorically excludes Puerto Ricans from receiving SSI benefits, reflects the dual constitutional standard created in the *Insular Cases* to provide a lower level of constitutional protections to certain citizens of the United States—Puerto Ricans.

Petitioner's lead argument in support of Puerto Rico's second-class status is that "this Court's decisions in *Califano v. [Gautier] Torres*, 435 U.S. 1 (1978) (per curiam), and *Harris v. Rosario*, 446 U.S. 651 (1980) (per curiam), establish that Puerto Rico's unique tax status provides a rational basis for excluding it from programs such as SSI." Pet. Br. 9. What Petitioner mostly ignores, and impliedly asks

the Court to ignore, is that *Califano* and *Harris* directly rely on the *Insular Cases*.

In *Harris*, the petitioner contended that the Aid to Families with Dependent Children program violated the Fifth Amendment's equal protection guarantee because it provided lower levels of assistance to Puerto Ricans. 446 U.S. at 651. In rejecting this conclusion, this Court held that Congress is "empowered under the Territory Clause of the Constitution . . . to 'make all needful Rules and Regulations respecting the Territory . . . belonging to the United States,'" and "may treat Puerto Rico differently from States so long as there is a rational basis for its actions." *Id.* The sole precedent cited in support of that holding was the decision in *Califano*. *See* 446 U.S. at 652.

In *Califano*, the Court rejected the argument that denying SSI benefits to Puerto Ricans was an unconstitutional violation of the petitioner's right to travel. 435 U.S. at 4. In dicta, the Court referenced—but did not decide—the argument that challenging the exclusion on equal protection grounds implicated the *Insular Cases*:

> [T]he District Court apparently acknowledged that Congress has the power to treat Puerto Rico differently, and that every federal program does not have to be extended to it. Puerto Rico has a relationship to the United States 'that has no parallel in our history.' *Examining Board v. Flores de Otero*, 426 U.S. 572, 596 (1976). *Cf. Balzac v. Porto Rico*, 258 U.S. 298 (1922); *Dorr v. United States*, 195 U.S. 138 (1904); *Downes v. Bidwell*, 182 U.S. 244 (1901).

Id. at 3 n.4. *Balzac*, *Dorr*, and *Downes* are core *Insular Cases*, which created the current constitutional standard applicable to Puerto Rico.[4]

Petitioner's brief quotes *Califano*'s statement concerning Congress' purported "power to treat Puerto Rico differently[,]" but studiously ignores that this rule derives from the *Insular Cases*. Pet. Br. 5. In doing so, Petitioner attempts to avoid the need to confront directly its reliance on the *Insular Cases* that provide the only substantive basis for differential treatment between Puerto Rico on the one hand, and the 50 states and the District of Columbia on the other.

Petitioner also claims there is no "tie" between *Califano*, *Harris*, the *Insular Cases*, and this action. Cert. Reply Br. 9. But despite Petitioner's best efforts to divorce its argument from the *Insular Cases*, Petitioner has not and cannot deny that the *Insular Cases* provided the basis for the ruling in *Califano* that "Congress has the power to treat Puerto Rico differently, and that every federal program does not have to be extended to it"—a ruling that was adopted by reference in *Harris*. Moreover, Petitioner's reliance on *Ocampo v. United States*, 234 U.S. 91 (1914)—

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[4] Petitioner argued to the District Court that the "*cf.*" cite in *Califano* referred only to the statement concerning the U.S.-Puerto Rico relationship and not congressional treatment of Puerto Rico. *United States v. Vaello-Madero*, No. 3:17-cv-02133-GAG, ECF 77, at 8 n.2. That contention, which Petitioner tellingly abandoned on appeal, is belied by the fact that *Dorr* concerns the Philippines and has no bearing on the U.S.-Puerto Rico relationship. The "*cf.*" citation instead is intended to show support by analogy for the erroneous proposition that Congress has the power to treat Puerto Rico differently.

another of the *Insular Cases*—for the proposition that the Constitution's guarantee of equal protection under the law "does not require territorial uniformity" further undercuts any effort to dispel the ties between this case and the *Insular Cases*. *See* Cert. Pet. 10.

The centrality of the *Insular Cases* to this action stands in stark contrast to *Financial Oversight and Management Board for Puerto Rico v. Aurelius Investment, LLC*, 140 S. Ct. 1649 (2020). *Aurelius* considered whether "the Constitution's Appointment Clause applies to the appointment of officers of the United States with powers and duties in and in relation to Puerto Rico[.]" 140 S. Ct. at 1665. Because of the narrow scope of *Aurelius*, the Court determined that it was not necessary to "consider the request by some of the parties that we overrule the much-criticized 'Insular Cases' and their progeny." *Id.* Unlike *Aurelius*, this case is not limited to the narrow question of whether a constitutional provision applies to certain government officers, but instead, concerns whether Puerto Ricans must be afforded the same rights and level of protection as residents of the fifty States—which directly implicates the holdings and reasoning of *Califano* and *Harris*, and their reliance on the *Insular Cases*.[5]

[5] The SSA's classification of Puerto Rico as outside the United States is a direct parallel to Justice White's concurring opinion in *Downes*—the opinion that provided the basis for the incorporation doctrine—that Puerto Rico "was foreign to the United States in a domestic sense[.]" 182 U.S. at 341.

B. The *Insular Cases* Are Premised On Racist Assumptions And Rationales

The Court should overrule the *Insular Cases* because they are predicated on racist assumptions and rationales that indisputably have no place in modern American jurisprudence.

From the founding of the United States through the Spanish American War in 1898, "save for a few notable (and notorious) exceptions, *e.g.*, *Dredd Scott v. Sandford*, 19 How. 393, 15 L. Ed. 691 (1857) . . . there was little need to explore the outer boundaries of the Constitution's geographic reach." *Boumediene v. Bush*, 553 U.S. at 723, 755 (2008). This is because, during that time, "[w]hen Congress exercised its power to create new territories, it guaranteed constitutional protections to the inhabitants by statute." *Id.* at 755–76. In turn, the Court recognized that the new territories were fully part of the United States. *See Loughborough v. Blake*, 18 U.S. 317, 319 (1820) (Marshall, C.J.) (holding that the Constitution's use of the term "United States" was not in reference to "any particular portion" of the country, but instead that "[i]t is the name given to our great republic, which is composed of States and territories").

This pattern abruptly ended with the annexation of new territories inhabited by predominantly non-Anglo Saxon residents in 1898. *Boumediene*, 553 U.S. at 756 ("At this point Congress chose to discontinue its previous practice of extending constitutional rights to the territories by statute[.]"); *see also* José A. Cabranes, *Citizenship and the American Empire*, 127 U. Pa. L. Rev. 391, 411 (1978) ("For the first time in American history, in a treaty

acquiring territory for the United States, there was no promise of citizenship . . . nor any promise, actual or implied, of statehood.") (citation and internal quotations omitted). Unlike previously-annexed territories, such as the Louisiana Territory, which were "large areas of mostly uninhabited land masses," "[t]he new lands were non-contiguous islands separated by thousands of miles of ocean from the U.S. continental mainland." Juan R. Torruella, *Ruling America's Colonies: The Insular Cases*, 32 Yale L. & Pol'y Rev. 57, 62 (2013). And, "[p]erhaps more importantly[,]" they "were instead populated by established communities whose inhabitants differed from the dominant state-side societal structure with respect to their race, language, customs, cultures, religions, and even legal systems." *Id.* at 62–63.

Specifically, in 1898, the United States annexed Puerto Rico, Guam, the Philippines, and Hawaii, and became responsible for determining the civil rights of Puerto Ricans through the Treaty of Paris. *Puerto Rico v. Sanchez Valle*, 136 S. Ct. 1863, 1878 (2016). The *Insular Cases* directly arose from racially motivated concerns about extending civil and constitutional rights to the predominantly non-Anglo Saxon residents of these new territories.

The first of the *Insular Cases*, *De Lima v. Bidwell*, 182 U.S. 1 (1901), held that goods shipped from Puerto Rico to New York were not subject to tariffs because Puerto Rico was not a foreign country following its annexation. 182 U.S. at 196. In a dissent, however, Justice McKenna injected the newly-contrived concept of territorial incorporation. He wrote that Puerto Rico had not been incorporated into the United States

because "the treaty with Spain, instead of providing for incorporating the ceded territory into the United States . . . expressly declares that the status of the ceded territory is to be determined by Congress." *Id.* at 214. Fixated squarely on Puerto Ricans, he elaborated on his invidious reasoning—because Congress had not expressly provided for incorporation, "the danger of the nationalization of savage tribes cannot arise." *Id.* at 219.

Similar reasoning informed *Downes v. Bidwell*, 182 U.S. 244 (1901)—according to this Court, the "most significant of the *Insular Cases*." *Flores de Otero*, 426 U.S. at 599 n.30 (1976). There, Justice Henry Billings Brown, the author of *Plessy*, wrote for a fractured Court that Puerto Rico was not a part of the United States for purposes of the Uniformity Clause. *Downes*, 182 U.S. at 287. Justice Brown held that "the annexation of outlying and distant possessions[,]" like Puerto Rico, created "grave questions . . . from differences of race, habits, laws, and customs of the people . . . which may require action on the part of Congress that would be quite unnecessary in the annexation of contiguous territory inhabited only by people of the same race . . . ." *Id.* at 282. Due to the "grave questions" caused by the fact Puerto Rico was inhabited by "alien races" with different religions and customs, Justice Brown declined to hold that the Constitution "forbid[s]" the government from making "large concessions" in the administration of law. *Id.* at 287.

Justice White's concurrence, echoing the racial animus underlying Justice Brown's opinion, set forth the rationale for the newly-created incorporation

doctrine. Justice White wrote that "where a treaty contains no conditions for incorporation . . . that incorporation does not arise until in the wisdom of Congress it is deemed that the acquired territory has reached that state where it is proper that it should enter into and form a part of the American family." *Downes*, 182 U.S. at 339. Based on the absence of such language in the 1898 Treaty of Paris, Justice White wrote that Puerto Rico remained "foreign to the United States in a domestic sense[.]" *Id.* at 341–42. Overtly racial prejudice motivated Justice White's conclusion—specifically that "millions of inhabitants of alien territory," *id.* at 313, people of "an uncivilized race," *id.* at 306, who "are a fierce, savage and restless people," *id.* at 302, and purportedly "absolutely unfit" to receive "citizenship of the United States," *id.* at 306, would be incorporated into the United States. To prevent such an outcome, Justice White reasoned that the nation that "conquered" them may "govern them with a tighter rein, so as to curb their impetuosity, and to keep them under subjection." *Id.* at 302 (internal quotation marks omitted).

The specious reasoning underlying the racist *Downes* holding was readily apparent at that time, as was the absence of any Constitutional support or Court precedent for the proposition that Congress had the absolute power to determine whether the Constitution applied to residents of any U.S. territory. In dissent, Justice Harlan wrote that Justice Brown's concern that "a particular race will or will not assimilate with our people . . . cannot be made the ground for violating the Constitution or refusing to give full effect to its provisions." *Id.* at 384. Instead, Justice Harlan recognized that "[t]he People have

decreed that [the Constitution] shall be the supreme law of the land at all times" and that "[w]hen the acquisition of territory becomes complete, by cession, the Constitution necessarily becomes the supreme law of such new territory[.]" *Id.*

The constitutional right to trial by jury, according to another of the *Insular Cases*, *Dorr v. United States*, 195 U.S. 138 (1904), did not apply in the Philippines, another "unincorporated" territory." Racial animus again informed the Court's ruling, holding that the Philippines—the purportedly "uncivilized parts of the archipelago"—was "peopled by savages" who "were wholly unfitted to exercise the right of trial by jury." *Id.* at 145, 148.

The Court also decided two cases concerning "incorporated" territories—Hawaii and Alaska—that highlight the racial ideology permeating the *Insular Cases*. The Court held that Hawaii and Alaska, respectively, were incorporated upon the grant of citizenship to their residents. *Hawaii v. Mankichi*, 190 U.S. 197, 210–11 (1903); *Rassmussen v. United States*, 197 U.S. 516, 522 (1905). In supporting this conclusion in *Mankichi*, Justice Brown rationalized that Hawaii "had enjoyed the blessing of a civilized government" since 1847 because it had "attracted thither large numbers of people from Europe and America, who brought with them political ideas and traditions." 190 U.S. at 211. Likewise, in *Rassmussen*, the Court expressly adopted the rationale first articulated in *Downes* that distinguished between the territories "which lie within the United States, as bounded by the Atlantic and Pacific Oceans . . ." and the territories "acquired

by the United States by war with a foreign state" (*e.g.*, Puerto Rico). 197 U.S. at 523.

Puerto Ricans were not entitled to any rights under the Sixth Amendment, even after they were granted American citizenship by the Jones-Shafroth Act of 1917 (Jones Act). *Balzac v. Porto Rico*, 258 U.S. 298 (1922). Unlike Hawaii and Alaska, according to Chief Justice Taft, writing for a unanimous Court, the grant of citizenship to Puerto Ricans had not resulted in its incorporation (and, with it, the right to a jury trial). *Id.* Chief Justice Taft reasoned that "Alaska was a very different case from that of Porto [sic] Rico" because it was "very sparsely settled" and "offering opportunity for . . . settlement by American Citizens"—unlike Puerto Rico, which was already settled by an established Hispanic community. 258 U.S. at 309. In the view of Chief Justice Taft, "a people like the . . . Porto [sic] Ricans," who lived in "compact and ancient communities, with definitely formed customs" may not "adopt this institution of Anglo-Saxon origin." *Id.* at 310. Accordingly, the Court found no "intention to incorporate in the Union these distant ocean communities of a different origin and language from those of our continental people." *Id.* at 311.

In the century since their issuance, courts and commentators widely have agreed that the *Insular Cases* were predicated on overt racial animus against the non-white residents of the newly-acquired territories, including Puerto Rico. *See, e.g.*, *Ballentine v. United States*, 2006 WL 3298270, at *4 (D.V.I. 2006) (recognizing that the *Insular Cases* have "racist underpinnings"), *aff'd*, 486 F.3d 806 (3d Cir.

2007); *see also* Adriel I. Cepeda Derieux & Neil C. Weare, *After Aurelius: What Future for the Insular Cases?*, 130 Yale L.J. 284, 289 (2020) ("[T]he core defect of the *Insular Cases*—their original sin" is that they "sprang from the desire to keep the mostly nonwhite people who lived there outside the national polity").

While this Court expressly has limited the application of the *Insular Cases*, they remain good law. *Reid v. Covert*, 354 U.S. 1, 14 (1957) ("[I]t is our judgment that neither the [*Insular Cases*] nor their reasoning should be given any further expansion"); *Aurelius*, 140 S. Ct. at 1665 ("whatever their continued validity we will not extend them in these cases").

The time has come for the *Insular Cases* to be overruled, consistent with this Court's overruling of analogous cases "rooted in dangerous stereotypes about . . . a particular group's supposed inability to assimilate." *Trump v. Hawaii*, 138 S. Ct. 2392, 2447 (2018) (Sotomayor, J., dissenting); *see, e.g.*, *Brown v. Board of Ed. Of Topeka, Shawnee Cnty., Kansas*, 347 U.S. 483 (1954) (overruling *Plessy*). Indeed, in *Trump*, despite holding that *Korematsu v. United States*, 323 U.S. 214 (1944) "has nothing to do with this case[,]" this Court took "the opportunity to make express what is already obvious"—that *Korematsu*, which upheld an executive order allowing the military to remove people of Japanese ancestry from designated areas in the United States—was "gravely wrong the day it was decided, has been overruled in the court of history, and—to be clear—'has no place in law under the constitution." *Trump*, 138 S. Ct. at

2423 (quoting *Korematsu*, 323 U.S. at 248 (Jackson, J., dissenting)). Like *Korematsu*, the *Insular Cases* were "gravely wrong on the day [they were] decided" and should be overruled as an invidious relic of the past.

C. Changed Circumstances Reaffirm That The *Insular Cases* Lack Any Validity

Even by their own flawed terms, the *Insular Cases* were expressly intended by the Court to make certain temporary allowances for governance of the unincorporated territories. Changed circumstances in the century since the issuance of the *Insular Cases* further affirm the invalidity of those decisions. Instead, they and their progeny serve only to deprive Puerto Ricans of the full protection of the Constitution and federal laws, and impose on them the stigma of second-class citizenship.

In *De Lima v. Bidwell*, the first of the *Insular Cases*, the Court addressed the theory that "a country remains foreign with respect to the tariff laws until Congress has acted by embracing it within the customs union." *De Lima*, 182 U.S. at 198. The Court observed that this theory "presupposes that territory may be held indefinitely by the United States"—something the Court rejected because it would allow "this state of things" to "continue for years, *for a century even*[,]" which would constitute "pure judicial legislation." *Id.* (emphasis added). Thus, the Court found "no warrant for it in the Constitution" and while "the nonaction of Congress may occasion a *temporary* inconvenience . . . it does not follow that courts of justice are authorized to remedy it by inverting the ordinary meaning of words." *Id.* (emphasis added).

The temporary intent of the incorporation doctrine was also acknowledged by the Court in *Downes v. Bidwell*. In reference to the territories, Justice Brown held that "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[.]" 182 U.S. at 287 (emphasis added). Thus, Justice Brown held that the Constitution did not "forbid" the government from making "large concessions . . . *for a time*[.]" *Id.* (emphasis added). Similarly, Justice White's concurrence expressly recognized that "it would be a violation of duty under the Constitution for [Congress], in the exercise of its discretion, to accept a cession of and *permanently hold* a territory which is not intended to be incorporated." *Id.* at 343–44 (emphasis added).

This Court subsequently reaffirmed that the *Insular Cases* were intended to allow the United States to temporarily govern its territories. *See Reid*, 354 U.S. at 14 (holding that the *Insular Cases* "involved the power of Congress to provide rules and regulations to govern *temporarily* territories with wholly dissimilar traditions and institutions") (emphasis added); *Boumediene*, 553 U.S. at 768–69 (characterizing the *Insular Cases* as holding "that there was no need to extend full constitutional protections to territories the United States did not intend to govern *indefinitely*") (emphasis added); *see also Torres v. Commonwealth of Puerto Rico*, 442 U.S. 465, 475 (1979) (Brennan, J. concurring) ("Whatever the validity of the [*Insular Cases*], in the particular [historical] context in which they were decided, those

cases are clearly not authority for questioning the application of the Fourth Amendment—or any other provision of the Bill of Rights—to the Commonwealth of Puerto Rico in the 1970's."); *Harris*, 465 U.S. at 653 (Marshall, J., dissenting) ("the present validity of [the *Insular Cases*] is questionable"). Now, more than forty years after the decisions in *Torres* and *Harris*, no basis has been, or can be, present for applying the invidious racial reasoning of the *Insular Cases* to the rights of Puerto Ricans.

This Court recently acknowledged that precedent may be overturned where "subsequent developments have eroded its underpinnings" and thus provided "special justifications" for overruling it. *Janus v. Am. Fed. of State, Cnty., & Mun. Emps.*, 138 S. Ct. 2448, 2486 (2018) (overruling *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209 (1977)); *see also* David A. Strauss, *The Living Constitution* 90 (2010) (the Court's decision in *Brown v. Board of Education*, 347 U.S. 483 (1954), did not happen overnight, instead—"a progression of precedents" over twenty years "had left [the] separate but equal [doctrine] hanging by a thread."). Indeed, in *Boumediene*, this Court acknowledged that the passage of time could affect Puerto Rico's constitutional status when it held that "it may well be that over time the ties between the United States and any of its unincorporated Territories strengthen in ways that are of constitutional significance." *Boumediene*, 553 U.S. at 758.

The passage of time, and constitutionally-significant structural changes in the Puerto Rico-United States relationship, have eroded whatever practical concerns may have informed the *Insular*

Cases and now provide the "special justifications" needed to overrule them. *Janus*, 138 S. Ct. at 2486. These changes include: (1) in 1917, the United States enacted the Jones Act, which granted statutory citizenship to Puerto Ricans and provided for the establishment of a bicameral legislature (Ch. 145 § 25, 39 Stat. 951 (1917)); (2) in 1941, native-born Puerto Ricans were granted birthright U.S. citizenship (8 U.S.C. § 1402); (3) in 1947, Puerto Rico was empowered to elect its own governor (*see Sanchez Valle*, 136 S. Ct. at 1868); (4) in 1950, Congress adopted Public Law 600, which authorized Puerto Rico to adopt a constitution and provided additional governmental autonomy (*see Aurelius*, 140 S. Ct. at 1660); (5) in 1952, the United States and Puerto Rico ratified Puerto Rico's constitution, which, among other things, created the Commonwealth of Puerto Rico (Pub. L. No. 82-447, 66 Stat. 327); and (6) in 2016, Congress enacted the Puerto Rico Oversight, Management, and Economic Stability Act (48 U.S.C. § 2101). This Court has acknowledged that some of these "constitutional developments were of great significance." *Sanchez Valle*, 136 S. Ct. at 1874.

Puerto Rico's status within the federal legal system also has changed substantially since the *Insular Cases*. In 1966, Congress adopted legislation providing that the federal district court in Puerto Rico received Article III status commensurate with federal district courts in the fifty States. *See Flores de Otero*,

426 U.S. at 594 n.2. Today, the First Circuit Court of Appeals sits in Puerto Rico on a part-time basis.[6]

The passage of time has demonstrated that the *Insular Cases* and the incorporation doctrine have no utility. Since the 1922 *Balzac* decision, the Court has not found any constitutional right inapplicable to unincorporated territories. Cepeda Derieux & Weare, 130 Yale L.J. Forum at 292 n.53 (collecting cases). Moreover, since Hawaii's admission as a state on August 21, 1959, there are no remaining populated incorporated territories; only unincorporated territories, like Puerto Rico, that are subject to discriminatory treatment by the Federal government, and one incorporated territory with no permanent population.[7]

Puerto Rico's continuing status as an unincorporated territory, even though Puerto Ricans are U.S. citizens, is no accident. Indeed, it forms the

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[6] United States Court of Appeals for the First Circuit, *About the Court*, https://www.ca1.uscourts.gov/directions.

[7] Palmyra Atoll's status as the sole incorporated territory vividly underscores the constitutionally groundless nature of the incorporation doctrine and its reservation of incorporated status only to territories destined for Statehood. Originally part of the Territory of Hawaii, Palmyra Atoll was separated from it in 1959 when Hawaii became a State. *Rosario v. Fin. Oversight & Mgmt. Bd. for P.R.*, 2020 WL 7689592, at *1 (D.P.R. Dec. 23, 2020). Palmyra Atoll is considered the United States' "only current incorporated territory," *id.*, even though it is "unpopulated," *id.*, "has only a small transient population of scientists and visitors," Allan Erbsen, *Constitutional Spaces*, 95 Minn. L. Rev. 1168, 1267 (2011), and "did not become a state, nor will it ever likely become one." *Consejo de Salud Playa Ponce v. Rullan*, 593 F. Supp. 2d 386, 391 (D.P.R. 2009).

basis of its position as a *de facto* colony of the United States. *See* Torruella, 32 Yale L. & Pol'y Rev. at 58 ("A colony is a territory, subordinate in various ways . . . . That the relationship between the United States and Puerto Rico falls squarely within this definition—and is thus a colonial one—cannot seriously be questioned.") (internal quotations omitted). The United States' treatment of Puerto Rico—both past and present—contains the "fundamental markers" of a colonial relationship, including "the historical imposition of strict agricultural quotas, the modern-day economic dependencies created by unbalanced imports and exports, and the long-unfettered appropriation of both the island's land and the life of its citizens for strategic military use." *Id.* at 82.[8]

The *Insular Cases*' incorporation doctrine is an unfortunate relic of a bygone era. The indignities that the *Insular Cases* have inflicted on Puerto Ricans far transcend the racist reasoning undergirding those decisions. Puerto Rico's status as an unincorporated territory compounds the dilemma of these American citizens: they are not entitled to the full force of protections guaranteed by the Constitution, justifying discriminatory treatment in federal legislation, but

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[8] Despite this colonial mistreatment of their homeland, Puerto Ricans proudly serve in the U.S. military in large numbers. As of 2010, there were 116,029 Puerto Rican veterans and more than 1,225 Puerto Ricans have paid the ultimate sacrifice while serving in the U.S. military. Shannon Collins, Department of Defense News, *Puerto Ricans Represented Throughout U.S. Military History*, https://www.defense.gov/Explore/News/Article/Article/974518/puerto-ricans-represented-throughout-us-military-history/.

also are not free to vote for the government that enacts legislation that materially affects their lives. Instead, it renders Puerto Ricans "second-class citizens"—something the Constitution does not abide. *Hooper v. Bernalillo Cnty. Assessor*, 472 U.S. 612, 623 (1985).

The "second-class" nature of Puerto Rican citizenship is made evident by the recent holding in *Fitisemanu v. United States*, 1 F.4th 862 (10th Cir. 2021). In *Fitisemanu*, the Tenth Circuit found that the *Insular Cases*' incorporation doctrine governed whether birthright citizenship applied in unincorporated territories, and declined to hold that birthright citizenship was automatically applicable in the unincorporated territories, instead leaving it to the discretion of Congress. *Id.* at 874, 877–79.[9] This ruling places Puerto Ricans' rights in a precarious state, as it signifies that, while Puerto Ricans currently hold birthright citizenship as granted by Congress, that citizenship is subject to the whims of Congress and could be revoked at any time.[10]

The second-class treatment of Puerto Ricans by the federal government serves only to exacerbate the

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[9] In so ruling, the Tenth Circuit relied on the Government of American Samoa's argument that the separation from the United States created by the incorporation doctrine and their lack of birthright citizenship was important for maintaining their cultural identity. *Fitisemanu*, 1 F.4th at 866. That argument, however well-intended, is unfounded. Puerto Rico indisputably has maintained its vibrant culture, ethnic identity, and language despite the grant of birthright citizenship 70 years ago.

[10] This risk further jeopardizes Puerto Rico's own elections because Puerto Rico limits voting rights to American citizens. 16 L.P.R.A. § 4063.

continuing hardships experienced by Puerto Ricans. Puerto Rico's historical "dynamic growth" dating to 1950 and "robust pharmaceutical and manufacturing sectors" were decimated as a result of Congressional tax legislation in 1976, which "precipitat[ed] a long recession" and high unemployment. *Aurelius*, 140 S. Ct. at 1673 (Sotomayor, J., concurring). This has contributed substantially to Puerto Rico's poverty rate of 43.5%—more than four times the national rate.[11] Compounding this Congressionally-induced economic and social devastation, the federal government not only disqualifies the neediest Puerto Ricans from SSI benefits, but also discriminates against them in other national programs that would help alleviate their plight. *See, e.g.*, 7 U.S.C. § 2012(r) (excluding Puerto Ricans from receiving benefits under the Supplemental Nutrition Assistance Program); 42 U.S.C. § 1395w-114(a)(3)(F) (excluding Puerto Ricans from Lower Income Subsidy); 26 U.S.C. § 32 (limiting Earned Income Tax Credit to residents of United States).[12]

Outmigration has been another manifestation of the financial hardship imposed on Puerto Rico; the

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[11] *Compare* U.S. Census Bureau, *Quick Facts Puerto Rico* https://www.census.gov/quickfacts/PR (reflecting Puerto Rico's poverty rate) *with* U.S. Census Bureau, *Quick Facts United States*, https://www.census.gov/quickfacts/fact/table/US/PST045219 (reflecting the United States' poverty rate).

[12] Puerto Rico also receives capped Medicaid block grants that cover a lower level of costs than the States' matching rates irrespective of need. Judith Solomon, Medicaid Funding Cliff Approaching for U.S. Territories, Ctr. on Budget and Policy Priorities, https://www.cbpp.org/blog/medicaid-funding-cliff-approaching-for-us-territories.

island experienced a population decrease of 11.8% between 2010 and 2020,[13] with the number moving to the continental United States growing by over 36% in recent years.[14] Absent steps to ameliorate this pernicious trend, including the termination of Puerto Ricans' second-class status, Puerto Ricans' hardships will only continue to increase.[15]

Accordingly, based on the changes in the U.S.-Puerto Rico relationship, and the detrimental effects of Puerto Rico's status as an unincorporated territory on its residents, the Court should overrule the *Insular Cases*.

II. The SSA's Race, Ethnicity, And Alienage-Based Classification Is Subject To, And Fails, Strict Scrutiny Review

The SSA's classification of Puerto Rico as "outside the United States"—which categorically excludes Puerto Ricans from receiving SSI benefits—should be reviewed under strict scrutiny. Under this standard,

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[13] U.S. Census Bureau, 2020 Apportionment Data Table E, https://www2.census.gov/programs-surveys/decennial/2020/data/apportionment/apportionment-2020-tableE.pdf.

[14] U.S. Census Bureau, *A Third of Movers from Puerto Rico to Mainland United States Relocated to Florida in 2018*, https://www.census.gov/library/stories/2019/09/puerto-rico-outmigration-increases-poverty-declines.html.

[15] The *Insular Cases* disproportionately affect minorities because all populated U.S. territories have majority non-white populations. U.S. Census Bureau, Recent Population Trends for U.S. Island Areas: 2000 to 2010, figures 10–11, https://www.census.gov/content/dam/Census/library/publications/2015/demo/p23-213.pdf.

the classification violates Respondent's constitutional rights.

The Fifth Amendment's Due Process Clause governs the equal protection analysis of federal legislation. *Sessions v. Morales-Santana*, 137 S. Ct. 1678, 1686 n.1 (2017). The equal protection component of the Due Process Clause applies to Puerto Rico. *Flores de Otero*, 426 U.S. at 600. "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." *United States v. Windsor*, 570 U.S. 744, 774 (2013); *see also City of Cleburne, Tex. v. Cleburne Living Ctr.*, 473 U.S. 432, 439 (1985).

When assessing whether a classification violates an individual's equal protection rights, courts apply one of three standards of review—rational basis, intermediate scrutiny, and strict scrutiny. *City of Cleburne*, 473 U.S. at 439–41. "The purpose of strict scrutiny is to 'smoke out' illegitimate uses" of suspect classifications. *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493 (1989).

"[A] s a historical matter[,]" suspect classes are those that have "been subjected to discrimination," "exhibit obvious, immutable, or distinguishing characteristics that define them as a discrete group," and are "a minority or politically powerless." *Lyng v. Castillo*, 477 U.S. 635 (1986). Classifications based on race, alienage, ethnicity, and national origin are inherently suspect. *Graham v. Richardson*, 403 U.S. 365 (1971); *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 219 (1995).

Strict scrutiny review requires the government to demonstrate that the challenged classification is "narrowly tailored to achieve a compelling government interest." *Parents Involved in Community Schools v. Seattle School Dist. No. 1*, 551 U.S. 701, 720 (2007). Here, strict scrutiny is applicable to the SSA's classification of eligibility for SSI benefits, and that classification fails to meet its rigorous standards.

A. The SSA's Classification's Exclusion Of Puerto Ricans Is Grounded On Impermissible And Invidious Race, Ethnicity, And Alienage Animus

The SSA's classification of Puerto Rico as "outside the United States" is an inherently suspect classification based on race, ethnicity, and alienage considerations. The ostensibly neutral, geographical nature of the classification cannot mask the reality of a classification scheme that impermissibly targets with great precision a politically powerless group—Puerto Ricans.

Puerto Ricans have characteristics that this Court has previously acknowledged support a finding of a suspect class, including (1) a history of being "subjected to discrimination," (2) having "distinguishing characteristics that define them as a discrete group," and (3) status as "a minority or politically powerless" group. *See Lyng*, 477 U.S. 635.

Approximately 99% of Puerto Ricans identify as Hispanic or Latino. *Quick Facts Puerto Rico*, *supra*. This identification is so ubiquitous that courts repeatedly have found that Puerto Ricans are a

distinct ethnic group. *Zappa v. Cruz*, 30 F. Supp. 2d 123 (D.P.R. 1998) ("Courts in the United States have long held that Puerto Ricans comprise a distinct ethnicity, and any classification based on that ethnicity is invidious") (collecting cases).

Puerto Ricans also overwhelmingly speak Spanish as their primary language, a characteristic often associated with racial or ethnic classifications. Census data reveals that 94.5% of Puerto Rico's residents speak a language other than English at home. *Quick Facts Puerto Rico*, *supra.* Spanish is the official language of Puerto Rico, and is the most commonly spoken language there. *Mata-Cabello v. Thula*, 2021 WL 3040959, at *2 n.2 (D.P.R. June 8, 2021) ("Puerto Rico has a predominant amount of U.S. citizens that only speak Spanish, as Spanish is the official language of the U.S. territory."). The use of a particular language is one of the defining characteristics of a suspect classification. *Hernandez v. New York*, 500 U.S. 352, 371–72 (1991) ("It may well be, for certain ethnic groups and in some communities, that proficiency in a particular language . . . should be treated as a surrogate for race under an equal protection analysis."); *United States v. Uvalde Consol. Indep. Sch. Dist.*, 625 F.2d 547, 553 (5th Cir. 1980).

That the SSA's classification is framed in geographic—rather than racial, ethnic, or alienage terms—does not preclude a finding that it is subject to strict scrutiny. *See Missouri v. Lewis*, 101 U.S. 22, 32 (1879) ("It is not impossible that a distinct territorial establishment and jurisdiction might be intended as, or might have the effect of, a discrimination against a

particular race or class, where such race or class should happen to be the principal occupants of the disfavored district.").[16]

It is well-established that where a facially-neutral statute has an underlying "discriminatory purpose," strict scrutiny is applicable. *See, e.g.*, *Washington v. Davis*, 426 U.S. 229 (1976) (holding that even where a statute is "otherwise neutral on its face," it "must not be applied so as to invidiously to discriminate on the basis of race"); *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252 (1977) (allowing consideration of "circumstantial and direct evidence of intent"). Here, the discriminatory purpose can be seen through the language of the classification and the historical discrimination faced by Puerto Ricans.

The SSA's very definition of Puerto Rico as "outside the United States" directly harkens to the *Insular Cases'* infamous characterization of Puerto Rico as "foreign to the United States in a domestic sense." *Downes*, 182 U.S. at 341. Despite this clear parallel, Petitioner's merits brief makes no attempt to justify the classification of Puerto Rico as "outside the United States."

Moreover, the refusal by the Court to renunciate the *Insular Cases*—with their overtly discriminatory language and impact on the civil and constitutional

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[16] The Territories Clause provides no basis for the SSA's classification also because the SSA constitutes national—not local, territorial—legislation. *Aurelius*, 915 F.3d at 850 (Territories Clause provides Congress with "the power to make rules and regulations such as a state government may make within its state").

rights of Puerto Ricans—engenders and exacerbates the racism that Puerto Ricans historically have encountered and continue to face in this country. *See supra* § I. This historical and continuing discrimination is circumstantial evidence of intent, whereas the geographical classification is a smokescreen for the underlying institutional discrimination predicated on race, ethnicity, and alienage.

B. Heightened Review Is Warranted Because Puerto Ricans Are A "Discrete And Insular" Minority

The Court should also apply a heightened standard of review to the SSA's classification of Puerto Rico as "outside the United States" because Puerto Ricans are a "discrete and insular" minority in the American political process.

In *United States v. Carolene Products Co.*, 304 U.S. 144 (1938), the Court held that "discrete and insular" minorities may require additional protection of the courts. Specifically, the Court found that "prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry." 304 U.S. at 153 n.4.

Courts have subsequently expanded this principle to protect groups that are politically powerless and thus unable to protect themselves through the standard political process. *See Graham*, 403 U.S. at 372 ("[a]liens as a class are a prime example of a

'discrete and insular' minority for whom such heightened judicial solicitude is appropriate") (citations omitted); *Hampton v. Wong*, 426 U.S. 88, 102 (1976) (aliens are "an identifiable class of persons who . . . are already subject to disadvantages not shared by the remainder of the community" because they "are not entitled to vote"); *Plyler v. Doe*, 457 U.S. 202, 217 n.14 (1982) ("certain groups . . . have historically been relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process").

Puerto Ricans are a clear example of the type of "discrete and insular" minority whose political powerlessness requires heightened levels of judicial protection. Unlike the fifty states and the District of Columbia, Puerto Rico has neither voting representation in Congress nor the ability to vote for the President through the Electoral College. Thus, with regard to federal legislation like the SSA, Puerto Rico cannot participate in the political process to attempt to protect its residents against discriminatory classifications.[17] Juan R. Torruella, *¿Hacia Dónde Vas Puerto Rico?*, 107 Yale L.J. 1503, 1519 (1998) ("[The United States] is . . . at the controlling end of a political equation in which 3.7 million [of its]

[17] This inability to affect the political process regularly harms Puerto Ricans through the enforcement of detrimental federal legislation governing, among other things, shipments of goods, that has a disproportionately adverse economic impact on Puerto Ricot. *See* Gabriela Valentín Diaz, *The Right to Food in Puerto Rico: Where Colonialism and Disaster Meet*, 52 U. Miami Inter-Am. L. Rev. 105, 115–16 (2021) ("[r]equiring shipment of goods on protected ships rather than allowing competition unnecessarily increases the price of goods in Puerto Rico relative to the price points in the U.S. and other locations").

citizens . . . have no substantial say regarding the truly fundamental issues that control their daily lives."). This political powerlessness makes Puerto Rico exactly the type of "discrete and insular" minority envisioned in *Carolene Products*. Accordingly, this Court should apply strict scrutiny to the classification of Puerto Rico as "outside the United States."

C. The SSA Classification Fails Strict Scrutiny Review

A classification will only survive strict scrutiny review if it "advance[s] a compelling state interest by the least restrictive means available." *Bernal v. Fainter*, 467 U.S. 216, 219 (1984). Here, Petitioner contends the SSI classification is supported by Puerto Rico's tax status (Pet. Br. 15–22), the United States' interest in advancing self-government by Puerto Rico (*id.* at 22–27), and the United States' interest in negotiating a treaty with the Northern Mariana Islands (*id.* at 27–28). For the reasons identified by Respondent (Resp. Br. 21–27*),* the classification of Puerto Rico as being "outside the United States" does not meet strict scrutiny's rigorous standards.

CONCLUSION

Based on the foregoing, *amici* respectfully request that the Court overrule the *Insular Cases* and affirm the judgment of the Court of Appeals.

Respectfully submitted,

Hector Torres
Counsel of Record
David J. Abrams
Stephen P. Thomasch
KASOWITZ BENSON TORRES LLP
1633 Broadway
New York, New York 10019
(212) 506-1700
htorres@kasowitz.com

Lourdes Rosado
President and
General Counsel
Jose Perez
Lía Fiol-Matta
LATINOJUSTICE PRLDEF
475 Riverside Drive, Suite 1901
New York, New York 10115
(212) 219-3360

Counsel for Amici Curiae

September 7, 2021

APPENDIX

List of Amici Curiae

Dominican Bar Association

Hispanic Bar Association of New Jersey

Hispanic Federation

Hispanic National Bar Association

Hudson Valley Hispanic Bar Association

Latino Lawyers Association of Queens County

Long Island Hispanic Bar Association

Puerto Rican Bar Association, Inc. (NY)

Puerto Rican Bar Association of Florida

Puerto Rican Bar Association of Illinois