

In the Supreme Court of the United States

UNITED STATES OF AMERICA,
Petitioner,
v.
JOSE LUIS VAELLO MADERO,
Respondent.

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

**BRIEF OF THE DISTRICT OF COLUMBIA,
GUAM, CONNECTICUT, DELAWARE,
HAWAII, MARYLAND, MASSACHUSETTS,
MINNESOTA, NEVADA, NEW JERSEY,
NEW MEXICO, NEW YORK,
THE NORTHERN MARIANA ISLANDS,
OREGON, PENNSYLVANIA, RHODE ISLAND,
VERMONT, AND VIRGINIA AS AMICI CURIAE
IN SUPPORT OF RESPONDENT**

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QUESTION PRESENTED

Whether Congress violated the equal-protection component of the Fifth Amendment's Due Process Clause when it excluded Puerto Rico and other territories from the Supplemental Security Income program, which provides monthly benefits to needy aged, blind, and disabled individuals.

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**INTRODUCTION AND
INTEREST OF *AMICI CURIAE***

The District of Columbia, the States of Connecticut, Delaware, Hawaii, Maryland, Massachusetts, Minnesota, Nevada, New Jersey, New Mexico, New York, Oregon, Pennsylvania, Rhode Island, Vermont, and Virginia (“*Amici States*”), and the Territories of Guam and the Commonwealth of the Northern Mariana Islands, and (“*Amici Territories*”; altogether “*Amici Jurisdictions*”) submit this brief as *amici curiae* in support of respondent. Congress’s current, haphazard exclusion of certain territories from nationwide aid programs like Supplemental Security Income (“SSI”) burdens both territories and states. Moreover, the piecemeal exclusion of certain states or territories from such vital and otherwise nationwide aid programs should be viewed with suspicion.

In arguing that Congress has the power to discriminate against the territories, the United States argues that Congress also has that same power to single out states for disfavor with only a rational basis for doing so. U.S. Br. 31-32. The *Amici States* have a clear interest in showing that is wrong both as a matter of law and as a matter of policy. Moreover, the *Amici Jurisdictions* share a commitment to the equal protection of their residents in the contexts of nationwide aid programs.

Additionally, the *Amici States* and, when eligible, the *Amici Territories*, know firsthand the power of SSI and other federal benefits programs. These programs are critical to the *Amici States*’ efforts to alleviate poverty, hunger, and poor health in their

communities. And the *Amici* Territories can attest to the tremendous need for such assistance within their borders.

Lastly, the *Amici* States also understand the critical roles their territory colleagues play in multi-jurisdictional institutions and actions. The territories are the *Amici* States' partners in multi-jurisdiction investigations, litigation, and enforcement actions. The territories also participate in the major inter-jurisdiction institutions: the National Association of Attorneys General, the National Governors Association, the Council of State Governments, the National Conference of State Legislatures, and the Environmental Council of States. *See About NAAG*, Nat'l Ass'n of Att'ys Gen.;¹ *National Governors Association*, Nat'l Governors Ass'n;² *About Us*, Council of State Gov'ts;³ *Members*, Nat'l Conf. of State Legislatures (May 4, 2021);⁴ *Our Members*, Env't Council of States.⁵ And given these meaningful partnerships, the *Amici* States have a strong interest in ensuring that the territories do not face unwarranted Congressional discrimination.

SUMMARY OF ARGUMENT

Congress enacted SSI to provide poor senior, blind, and disabled Americans with monthly financial

¹ *Available at* <https://www.naag.org/about-naag> (last visited Sept. 7, 2021).

² *Available at* <https://www.nga.org/about> (last visited Sept. 7, 2021).

³ *Available at* <https://www.csg.org/about-us> (last visited Sept. 7, 2021).

⁴ *Available at* <https://bit.ly/2XVgzVn>.

⁵ *Available at* <https://www.ecos.org/members> (last visited Sept. 7, 2021).

assistance. But Congress explicitly decided that one's age or disability plus financial need would not be the only criteria—it would also matter where one lived. Residents of the 50 states, the District of Columbia, and the Commonwealth of the Northern Mariana Islands would be eligible, but Americans living in Puerto Rico, Guam, the U.S. Virgin Islands, and American Samoa would not. *See* 42 U.S.C. §§ 1381 note, 1382c(e).⁶

1. This Court should treat Congress's discrimination against any state or territory in the context of nationwide aid programs with suspicion. The United States argues that Congress has the power to discriminate not just against the territories—but also against *states* (or, as the United States puts it, “regions” or “geographi[es]”)—with only a rational basis for doing so. *See* U.S. Br. 30-32. That is not the law, especially after *Northwest Austin Municipal Utility District Number One v. Holder*, 557 U.S. 193 (2009), where the Court affirmed a higher level of scrutiny for Congress's singling out of states. *Id.* at 203.

But there are also powerful reasons to treat Congress's discrimination against the territories with skepticism. First, the ties between the United States and the territories have, over time, “strengthen[ed] in ways that are of constitutional significance.”

⁶ Although Congress periodically excludes the District of Columbia from nationwide aid programs like the territories, *see, e.g., infra* p.18, the District is not considered a “territory,” *cf.* U.S. Const. art. I, § 8, cl. 17. In fact, most of the time, Congress treats the District as a state. *See, e.g.,* 13 U.S.C. § 184(2); 18 U.S.C. §§ 4246(h), 4247(a)(3); 28 U.S.C. §§ 1451, 2113; 42 U.S.C. §§ 264(d)(1), 290ee-8(e)(3); 52 U.S.C. § 10702.

Boumediene v. Bush, 553 U.S. 723, 758 (2008). Second, the doctrine permitting Congress to single out territories for disparate treatment was “strongly influenced by racially motivated biases and by colonial governance theories,” Juan R. Torruella, *The Insular Cases: The Establishment of a Regime of Political Apartheid*, 29 U. Pa. J. Int’l L. 283, 286 (2007)—ideas that have no place in today’s equal protection jurisprudence.

2. Congress’s exclusion of the territories from certain nationwide aid programs like SSI is not rational. For one, there is little pattern or sense to how Congress decides which federal programs will apply in which territories. And the haphazardness has consequences: it burdens states as well as the territories. In the meantime, it withholds effective solutions from where they are, arguably, needed most. SSI and other federal benefits programs are very effective at sustaining, feeding, and treating those in need. The territories suffer staggering levels of poverty—higher than even the most poverty-stricken states. Given the important role these programs can play in alleviating poverty, the disproportionate need for such intervention in the territories, and the negative externalities of the current haphazard system, Congress should not be permitted to exclude the territories without good reason.

ARGUMENT**I. The Court Subjects Congress's Discrimination Against States To Heightened Scrutiny, And It Should Extend Similar Suspicion To Congress's Discrimination Against The Territories.**

In its brief, the United States claims that Congress has the power to discriminate against any territory, and, for that matter, any state, with but the slimmest of rationales. The Court should reject these assertions of Congressional power. To begin, this Court has made clear that Congress must meet more than simple rational basis review to discriminate among states. As for the territories, over the past century, they have become more tightly woven into the fabric of the national community. And besides, Congress's alleged power to discriminate against territories and their residents in the context of nationwide programs should be treated with suspicion if only because of the troubling origins of that power.

A. Congress does not have the power to discriminate against states with a mere rational basis.

The United States proclaims that "the equal-protection component of the Due Process Clause allows Congress to treat one geographic area differently than another if Congress has a rational basis to do so." U.S. Br. 30. This principle, the United States claims, applies not only to territories and the District, U.S. Br. 31-32, but also to states, U.S. Br. 32-33 (citing *Hodel v. Indiana*, 452 U.S. 314, 330-33 (1981)); see *Hodel*, 452 U.S. at 331 (rejecting an equal

protection argument that a statute “impermissibly discriminates against . . . States in the Midwest.”). The United States is mistaken as to the latter and, as discussed in the next section, misguided as to the former.

This Court made clear recently that something greater than mere rational basis review is warranted when Congress decides to treat one state differently than another. Although “[d]istinctions can be justified in some cases,” “a departure from the fundamental principle of equal sovereignty requires a showing that a statute’s disparate geographic coverage is sufficiently related to the problem that it targets.” *Nw. Austin*, 557 U.S. at 203. Indeed, in *Shelby County v. Holder*, 570 U.S. 529 (2013), the Court struck down a decades-old act of Congress because it found that the proffered reasons for singling out certain states for disfavored treatment no longer justified the deviation from the “fundamental principle of equal sovereignty.” *Id.* at 544.

Compare the *Northwest Austin* formulation to the Court’s rational-basis test: a law must be upheld “if there is any reasonably conceivable state of facts that could provide a rational basis for the classification.” *FCC v. Beach Commc’ns, Inc.*, 508 U.S. 307, 313 (1993). As the United States points out, that test “begins with ‘a strong presumption of validity,’” and Congress need not even produce a legislative record in support of the classification; “a classification may instead rest on ‘rational speculation unsupported by evidence or empirical data.’” U.S. Br. 13-14 (quoting *Beach Commc’ns*, 508 U.S. at 314-15). By contrast, the *Northwest Austin* rule begins with the presumption that states, as equal sovereigns, must be

treated equally. *See* 557 U.S. at 203 (describing the fundamental principle of equal sovereignty). And when Congress elects to depart from that “fundamental principle,” it must make a “showing” that its reasons are “sufficiently related”—or, tailored—to the problem at hand. *Id.*

Accordingly, were Congress to exclude Nevada or Virginia from SSI for the reasons the United States gives here, this Court would no doubt treat that discrimination with great suspicion.

For example, the United States primarily cites Puerto Rico’s “unique tax status,” as a rational basis for Congress to treat the territory differently than states. U.S. Br. 15 (quoting *Califano v. Gautier Torres*, 435 U.S. 1, 5 n.7 (1978) (per curiam)). In the United States’ view, “Congress could rationally conclude that a jurisdiction that makes a reduced contribution to the federal treasury should receive a reduced share of the benefits funded by that treasury.” U.S. Br. 17-18. But this reason is neither rational, nor—if invoked to exclude a state—would it “show[] that [the] statute’s disparate geographic coverage is sufficiently related to the problems that it targets.” *Nw. Austin*, 557 U.S. at 203.

For one, Puerto Rico’s “unique tax status” is by no means an immutable characteristic; it is entirely the product of Congress’s prior discrimination against the territory. Under any level of scrutiny—but especially under the *Northwest Austin* rule—Congress should not be entitled to point to a distinguishing characteristic of its own creation as the justification for further discrimination. Also, as respondent ably explains, Resp’t’s Br. 34-35, this rationale does little

to explain Congress’s decision to withhold from certain Americans anti-poverty benefits, like SSI, the recipients of which earn too little income to owe federal taxes anyway.

The United States also argues that withholding SSI benefits from residents of Puerto Rico “promote[s] [the territory’s] ability to govern itself,” and makes sense “because the territorial government is best positioned to tailor its laws and programs to reflect local conditions.” U.S. Br. 22-23 (internal quotation marks and citation omitted). But neither explanation distinguishes Puerto Rico—the same excuses could be invoked to justify singling out a state, where there could be just as much, if not more, motivation to preserve a state’s sovereignty to govern its own affairs or handle a given issue in a way suitable for local conditions. Moreover, these explanations ring especially hollow in light of the flexibility permitted by the SSI program for states, the District, and the Northern Mariana Islands to determine how much to pay individuals and how to administer the funds. See *Supplemental Security Income (SSI) Benefits*, Soc. Sec. Admin. (2021) (describing optional state supplements and whether benefits are disbursed by state or federal agencies).⁷ Thus, the very structure of SSI preserves some local control, and those are not sufficient justifications for excluding a jurisdiction from the program.

All in all, the United States’ rationales, if offered to justify excluding a state from SSI, would not satisfy the *Northwest Austin* rule. And for the reasons given below, similar suspicion should be afforded to

⁷ Available at <https://bit.ly/2Wt106y>.

Congress's discrimination against the territories in the context of nationwide aid programs like SSI.

B. The Court should treat Congress's exclusion of the territories from nationwide benefits programs with skepticism.

1. This Court once surmised that “over time the ties between the United States and . . . its unincorporated Territories [will] strengthen in ways that are of constitutional significance.” *Boumediene*, 553 U.S. at 758. The *Amici* States can attest that, regardless of the territories' histories of acquisition by the United States, those ties have strengthened. The territories today play critical roles in multi-jurisdiction efforts, at virtually every level.

The territories participate in most major multi-jurisdiction enforcement actions. For example, a coalition of state and territory attorneys general pursued remedial funds from the perpetrators of the opioid crisis, securing billions of dollars for victims and their families. *See* Press Release, D.C. Off. of the Att'y Gen., *AG Racine Announces McKinsey & Company Will Pay \$573 Million for its Role in Turbocharging the Opioid Crisis* (Feb. 4, 2021);⁸ Press Release, Guam Off. of the Att'y Gen., *AG Camacho Announces Historic \$26B Proposed National Opioid Settlement, Guam Could Receive Upwards of \$10M in Additional Resources to Combat Drug Problem* (July 22, 2021).⁹ These efforts resemble the actions brought over 20 years ago, also by state and territory attorneys general, that led to a massive settlement

⁸ Available at <https://bit.ly/363Rk48>.

⁹ Available at <https://bit.ly/3ykVzUA>.

agreement with cigarette manufacturers, securing billions of dollars to combat the negative effects of smoking. *See The Master Settlement Agreement*, Nat'l Ass'n of Att'ys Gen.¹⁰

Coalitions of state and territory attorneys general have also recently pursued actions to ensure driver safety, vindicate data security breaches, and safeguard search-engine competition. *See* Press Release, N. Mar. I. Off. of the Att'y Gen., *AG Manibusan Announces \$85M Multistate Settlement with American Honda Motor Company, Inc. and Honda of America Mfg., Inc.* (Aug. 28, 2020);¹¹ Press Release, D.C. Off. of the Att'y Gen., *50 Attorneys General Secure \$600 Million from Equifax in Largest Data Breach Settlement in History* (July 22, 2019);¹² Press Release, Colo. Off. of the Att'y Gen., *Colorado Attorney General Phil Weiser Leads Multistate Lawsuit Seeking to End Google's Illegal Monopoly in Search Market* (Dec. 17, 2020).¹³ These efforts allow states and territories to pool their resources and expertise to protect and vindicate the rights of all Americans, regardless of where they live.

These multi-jurisdiction coalitions also regularly petition the federal government on matters of critical importance, whether through lobbying Congress to pass certain legislation, *see, e.g.*, Press Release, Kan. Off. of the Att'y Gen., *AG Derek Schmidt Leads Bipartisan Coalition Pressing Congress to Support*

¹⁰ Available at <https://bit.ly/2UlhMny> (last visited Sept. 7, 2021).

¹¹ Available at <https://bit.ly/3gA2Zxc>.

¹² Available at <https://bit.ly/3sOBAfQ>.

¹³ Available at <https://bit.ly/2SXLNt4>.

Efforts to Fight Hate Crimes (Apr. 14, 2021),¹⁴ or urging agencies to take certain action, *see, e.g.*, Press Release, Guam Off. of the Att’y Gen., *Attorney General Camacho Urges FCC to Provide E-Rate Funds to Increase Students’ Internet Access During the Pandemic* (Feb. 26, 2021);¹⁵ *Camacho and 37 Other AGs Urge FDA to Provide Guidance on CBD Risks*, Guam Daily Post (July 22, 2019);¹⁶ Press Release, D.C. Off. of the Att’y Gen., *AG Racine Leads 21-State Coalition Opposing USDA Rule that Would Unlawfully Strip Residents of Food Stamp Benefits* (Apr. 3, 2019).¹⁷

The territories also author and join multi-jurisdiction *amicus* briefs, like this one, before this and other appellate courts. *See, e.g.*, Brief of *Amici Curiae* States and Territories, *Guam v. United States*, No. 20-382 (Mar. 1, 2021).

Even in Congress, although they cannot vote, the territories’ representatives actively participate in some of the most solemn of legislative duties. *See, e.g.*, Brakkton Booker, *Stacey Plaskett is 1st Nonvoting House Delegate to Argue an Impeachment Trial*, NPR (Feb. 10, 2021).¹⁸

As these examples illustrate, “the ties between the United States and . . . its unincorporated Territories [have] strengthen[ed].” *Boumediene*, 553 U.S. at 758. And if the Court’s prediction that such changes would have “constitutional significance,” *id.*, bears any

¹⁴ Available at <https://bit.ly/2WOjkrw>.

¹⁵ Available at <https://bit.ly/2Y2j2xu>.

¹⁶ Available at <https://bit.ly/2XVXouF>.

¹⁷ Available at <https://bit.ly/3jqKm0N>.

¹⁸ Available at <https://n.pr/3ym6Ynl>.

meaning, it should be that Congress's haphazard decisions to exclude the territories from nationwide aid programs be viewed with suspicion.

2. The Court should also view the present issue with suspicion because the doctrinal source of Congress's power to discriminate against the territories originated in notions of racial superiority.

The rule that Congress can discriminate with impunity against "unincorporated" territories, like Puerto Rico, arose in the *Insular Cases*. Before the 1899 Treaty of Paris with Spain, which ended the Spanish American War and resulted in American control over Puerto Rico and other lands, every territory had been structured to be "incorporated" into the United States for future admission as a state" and the inhabitants were "afforded the rights and privileges of Citizenship." Sarah H. Cleveland, *Powers Inherent in Sovereignty: Indians, Aliens, Territories, and the Nineteenth Century Origins of Plenary Power over Foreign Affairs*, 81 Tex. L. Rev. 1, 209-10 (2002). But through the *Insular Cases*, as Judge Cabranes once explained, "the Court upheld the power of Congress to treat the islands acquired from Spain differently from the 'incorporated territories.'" José A. Cabranes, *Citizenship and the American Empire: Notes on the Legislative History of the United States Citizenship of Puerto Ricans*, 127 U. Pa. L. Rev. 391, 436 (1978). It is now widely accepted that the *Insular Cases* were, as Judge Torruella once wrote, "strongly influenced by racially motivated biases and by colonial governance theories." Torruella, *supra*, at 286.

Indeed, these biases played a central role in the Court's reasoning. For example, Justice Brown concluded his opinion announcing the Court's judgment in *Downes v. Bidwell*, 182 U.S. 244 (1901), with the following: "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." *Id.* at 287 (Brown, J., announcing the judgment). Then, in *Dorr v. United States*, 195 U.S. 138 (1904), in explaining why it was neither unreasonable nor unconstitutional for Congress to deprive territory residents of the right to trial by jury, the Court described the territories as "peopled by savages." *Id.* at 148.

The United States does not cite the *Insular Cases*, but instead encourages the Court to apply two more recent cases—*Califano v. Gautier Torres*, 435 U.S. 1 (1978) (per curiam), and *Harris v. Rosario*, 446 U.S. 651 (1980) (per curiam). U.S. Br. 36. But those cases themselves relied, albeit obliquely, on the *Insular Cases*.

The United States maintains that in *Harris*, this Court established the principle that Congress's discrimination against Puerto Rico and other territories "triggers [only] rational-basis review." U.S. Br. 13; see U.S. Br. 36. To be sure, the Court said in *Harris*, a summary reversal, that Congress may, without violating the equal protection clause, "treat

Puerto Rico differently from States so long as there is a rational basis for its actions.” 446 U.S. at 651-52 (per curiam). Although “[n]o authority is cited for this proposition,” *id.* at 653 (Marshall, J., dissenting), the Court appeared to derive it from *Califano*, *see id.* at 652 (citing *Califano*, 435 U.S. at 5 & n.7), an earlier summary reversal in which the Court applied rational basis review to reject the claim that excluding Puerto Rico from SSI violated one’s right-to-travel, 435 U.S. at 4-5. In that case, the Court observed, in discussing the district court’s holding, that “Congress has the power to treat Puerto Rico differently, and that every federal program does not have to be extended to it.” *Id.* at 3 n.4. For that proposition, the Court cited to some of the most notorious *Insular Cases*—*Balzac v. Porto Rico*, 258 U.S. 298 (1922), *Dorr*, and *Downes*. *See id.*

The “validity of those decisions [was] questionable,” even at the time *Califano* and *Harris* were decided. 446 U.S. at 653 (Marshall, J., dissenting). In fact, before *Califano* and *Harris*, a plurality of this Court stated that “neither the [*Insular Cases*] nor their reasoning should be given any further expansion.” *Reid v. Covert*, 354 U.S. 1, 14 (1957) (plurality opinion). And recently, the Court also questioned the “much-criticized” *Insular Cases*’ “continued validity.” *Fin. Oversight & Mgmt. Bd. for P.R. v. Aurelius Inv., LLC*, 140 S. Ct. 1649, 1665 (2020). To that end, this Court should not permit the United States to perpetuate the discriminatory principles of the *Insular Cases* by laundering the doctrine through less overtly objectionable cases like *Califano* and *Harris*.

Neither should this Court take comfort in the United States’ assertion that the “congressional practice of treating Territories differently in federal benefits programs is as old as federal benefits programs themselves.” U.S. Br. 25. Surely there are times when it is informative and appropriate for the “Court [to] put[] significant weight upon historical practice,” *NLRB v. Noel Canning*, 573 U.S. 513, 514 (2014), but here, the historical record only makes plain Congress’s troubling past of discriminating against the unincorporated territories. For example, the United States cites Congress’s decision to extend Social Security in 1935 to states, the District of Columbia, and the incorporated territories—Alaska and Hawaii—but not Puerto Rico and the other unincorporated territories. *See* U.S. Br. 25. That initial decision to exclude Puerto Rico from Social Security was made just over 10 years after the last of the *Insular Cases* was decided—a case in which the Court described the “Filipinos” and “Porto Ricans” as “living in compact and ancient communities” that were as yet unprepared to “adopt” jury trials, an “institution of Anglo-Saxon origin.” *Balzac*, 258 U.S. at 310. Accordingly, it is precisely *because* of this history of Congressional discrimination against the territories—not in spite of it—that this Court should treat Puerto Rico’s exclusion from SSI with suspicion.

II. Excluding Territory Residents From SSI And Other Nationwide Aid Programs Is Not Rational.

SSI is not the only program that operates in some territories but not others. And yet there is no discernable pattern to Congress’s decision to extend a nationwide aid program to one territory but not

another. This haphazard discrimination against territories generates unnecessary costs, even for states, and fails to extend federal aid to some of the neediest Americans. In other words, even if the Court employs rational-basis review, there is nothing rational about Congress's exercise of power here.

A. Congress's discriminatory treatment of the territories is haphazard and harmful.

1. Congress has excluded the territories from other nationwide aid programs beyond SSI. Whereas the Northern Mariana Islands is the only territory in which residents can receive SSI, it is also the only territory excluded from Temporary Assistance for Needy Families ("TANF"), a program that provides grants to states and territories to help low-income families with children achieve economic independence. 42 U.S.C. §§ 601, 619(5); *see* H. Comm. on Ways & Means, 115th Cong., 2d Sess., *Green Book: Background Material and Data on the Programs Within the Jurisdiction of the Committee on Ways and Means* app. A tbl.A-2 (Oct. 2018) (indicating American Samoa is eligible but does not participate).¹⁹ The Supplemental Nutrition Assistance Program ("SNAP") operates in Guam and the U.S. Virgin Islands, but not Puerto Rico, American Samoa, or the Northern Mariana Islands. 7 U.S.C. § 2012(r); *Green Book, supra*, app. A tbl.A-2. And only Puerto Rico and the U.S. Virgin Islands are eligible to participate in the federal unemployment compensation program. 42 U.S.C. § 503 note (Effective Date of 2004 Amendment; Definitions); *Green Book, supra*, app. A tbl.A-2.

¹⁹ Available at <https://bit.ly/2Y1YSDR>.

In other programs, Congress included the territories but singled them out for disparate treatment. For example, although territory residents are eligible to receive Medicare, Congress expressly excluded them from a Medicare program that subsidizes prescription-drug insurance plans for low-income individuals. 42 U.S.C. § 1395w-114(a)(3)(F); *Peña Martínez v. U.S. Dep’t of Health & Hum. Servs.*, 478 F. Supp. 3d 155, 167 (D.P.R. 2020). Similarly, the territories participate in Medicaid, but Congress placed a ceiling on the amount of federal funds that each territory can receive annually through the program, whereas states have no such cap. MACPAC, *Medicaid and CHIP in the Territories* 1 (Feb. 2021);²⁰ see 42 U.S.C. § 1308(g).

The recent Coronavirus Aid, Relief, and Economic Security (“CARES”) Act—which, in part, provided assistance to state and local governments to address the COVID-19 pandemic—also singled out the territories, and in this case, the District of Columbia, for disparate treatment: while \$139 billion was allocated for state governments, with no state receiving less than \$1.25 billion, regardless of size, only \$3 billion was allocated to the District and the territories *combined*. 42 U.S.C. § 801(a), (c); Grant A. Driessen, Cong. Rsch. Serv., R46298, *General State and Local Fiscal Assistance and COVID-19: Background and Available Data* 1-3 (Feb. 8, 2021).²¹ That meant, for instance, that the District, which has roughly the same or a greater population than Alaska, Wyoming, and Vermont, received \$495 million rather than the \$1.25 billion it would have received if it were

²⁰ Available at <https://bit.ly/3DmQe2P>.

²¹ Available at <https://bit.ly/2WFIVCm>.

treated equally as similarly populous states. Driessen, *supra*, at 5; U.S. Census Bureau, *State Population Totals: 2010-2020* tbl. (July 27, 2021);²² see Press Release, D.C. Off. of the Att’y Gen., *36 Democrat & Republican AGs Join AG Racine Requesting D.C. Be Treated As a State For Purposes of Receiving State Level Allocation For Coronavirus Relief Funding* (Mar. 26, 2020).²³

The chaos of navigating which nationwide aid program applies in which territory and how is well illustrated—albeit only in part—in a single “Definitions” provision in the U.S. Code pertaining to social security programs:

The term “State”, except where otherwise provided, includes the District of Columbia and the Commonwealth of Puerto Rico, and when used in subchapters IV, V, VII, XI, XIX, and XXI includes the Virgin Islands and Guam. Such term when used in subchapters III, IX, and XII also includes the Virgin Islands. Such term when used in subchapter V and in part B of this subchapter also includes American Samoa, the Northern Mariana Islands, and the Trust Territory of the Pacific Islands. Such term when used in subchapters XIX and XXI also includes the Northern Mariana Islands and American Samoa. In the case of Puerto Rico, the Virgin Islands, and Guam, subchapters I, X, and XIV, and subchapter XVI (as in effect without regard to the amendment made by section 301 of the Social Security

²² Available at <https://bit.ly/3mO5Bvg>.

²³ Available at <https://bit.ly/3z6tBxa>.

Amendments of 1972) shall continue to apply, and the term “State” when used in such subchapters (but not in subchapter XVI as in effect pursuant to such amendment after December 31, 1973) includes Puerto Rico, the Virgin Islands, and Guam. Such term when used in subchapter XX also includes the Virgin Islands, Guam, American Samoa, and the Northern Mariana Islands. Such term when used in subchapter IV also includes American Samoa.

42 U.S.C. § 1301(a)(1).

The United States, for its part, points to the “prevalence” of this “[d]ifferential treatment of Territories in federal benefits programs” as a feature rather than a flaw. U.S. Br. 26. The fact that Congress’s discrimination against the territories is so “commonplace,” the United States argues, makes Congress’s exclusion of Puerto Rico from SSI rational. U.S. Br. 26. But the opposite is true. That Congress’s exclusion of Puerto Rico from SSI is part of this haphazard pattern of discrimination further demonstrates how irrational it is. And worse than irrational, as discussed below, this random patchwork has consequences for states and territories alike.

2. The lack of rhyme or reason in the application of a given nationwide aid program to a given territory imposes preventable harms on states. For example, state agencies often endeavor to inform their residents about the ways in which moving or traveling to other states or territories will affect their federal benefits. *See, e.g., Supplemental Security Income*

(SSI), Md. Workforce Exch.;²⁴ *Are you Eligible?*, Pa. Dep't of Lab. & Indus.;²⁵ *What to Do if You've Worked in or Are Moving to Another State*, Wash. Emp. Sec. Dep't;²⁶ Wis. Dep't of Health Servs., Div. of Medicaid Servs., *Your Wisconsin QUEST Card 4* (Feb. 2017).²⁷ But the random application of programs to territories makes it harder and costlier to publish accurate information.

It is also extremely confusing for recipients and governments alike. The present dispute illustrates this: respondent continued to collect SSI benefits for three years after moving from New York to Puerto Rico because he “was unaware that his relocation would affect his SSI disability entitlement.” *United States v. Vaello Madero*, 356 F. Supp. 3d 208, 211 (D.P.R. 2019). And naturally, this thorny system yields errors—one state communicates on one of its websites that residents *can* use their SNAP benefits in Puerto Rico, while another website of the same state indicates that SNAP benefits *cannot* be used in Puerto Rico. *Compare California Electronic Benefit Transfer (EBT)*, Cal. EBT Project Off. (“EBT is used here in California, and is also used in the other 49 states, the District of Columbia, Puerto Rico, the Virgin Islands, and Guam.”),²⁸ *with Frequently Asked Questions*, Cal. Dep't of Soc. Servs. (“Currently,

²⁴ Available at <https://bit.ly/3jgeQ5j> (last visited Sept. 7, 2021).

²⁵ Available at <https://bit.ly/3mBqucZ> (last visited Sept. 7, 2021).

²⁶ Available at <https://bit.ly/38vhZrL> (last visited Sept. 7, 2021).

²⁷ Available at <https://bit.ly/3jwsq18>.

²⁸ Available at <https://www.ebtproject.ca.gov> (last visited Sept. 7, 2021).

California EBT cardholders cannot use their EBT cards in Puerto Rico.”).²⁹ Another state erroneously reports that “SNAP recipients can use their EBT benefits in all 50 states and US territories.” *Cardholders*, W.V. Dep’t of Health & Hum. Res., Off. of EBT.³⁰

And yet another consequence is illustrated by Congress’s discrimination against the District and the territories in the CARES Act: such discrimination can make states’ residents less safe. In the context of a global pandemic, the consequences of exclusion from benefits are an increase in public health risks to the states. After all, viruses do not respect borders, so the relative inability of one American jurisdiction to effectively address the pandemic threatens the health and safety of other states. As a bipartisan coalition of 37 Attorneys General explained in a letter to the President and Congress, the “deadly virus is not limited to any particular geographical boundary,” so hobbling, for example, the District’s resources to “respond to the crisis puts not only District residents but all Americans at an increased risk.” Letter from 37 Att’ys Gen. to Donald J. Trump, President of the U.S., et al. 2 (Mar. 26, 2020).³¹

As these examples show, Congress’s haphazard discrimination against the territories is not just an insular issue.

²⁹ Available at <https://bit.ly/3BeOoPJ> (last visited Sept. 7, 2021).

³⁰ Available at <https://bit.ly/3td5Txa> (last visited Sept. 7, 2021).

³¹ Available at <https://bit.ly/38hTm1C>.

B. SSI and other federal benefits programs are powerful anti-poverty measures, which are much needed in the territories.

1. Congress enacted SSI in the early 1970s to “guarantee[] [a] minimum income” for seniors and individuals who are blind or have disabilities. *Sullivan v. Zebley*, 493 U.S. 521, 524 (1990). Since then, SSI has done just that. It provides over 8 million of the neediest Americans—those who due to age, blindness, or disability have little or no other income—with monthly cash assistance. See Soc. Sec. Admin., Pub. No. 13-11976, *SSI Recipients by State and County, 2019*, at ii, 1 tbl.1 (Oct. 2020).³² More than 2.2 million SSI recipients are seniors; over 1.1 million are children with significant disabilities. *Id.* at 1 tbl.1.

Researchers at the United States Census Bureau estimate that SSI lifted 3.2 million people out of poverty in 2017. Liana Fox, U.S. Census Bureau, P60-265, *The Supplemental Poverty Measure: 2017*, at 10 fig.8, 29 tbl.A-7 (Sept. 2018).³³ A Social Security Administration study estimated that, at one point, SSI payments helped more than 20 percent of its recipients stay above the poverty line. Michelle Stegman Bailey & Jeffrey Hemmeter, Soc. Sec. Admin., No. 2015-02, *Characteristics of Noninstitutionalized DI and SSI Program Participants, 2013 Update 5* (Sept. 2015) (calculating the poverty rate to be 63 percent when SSI payments were excluded from family income, compared to the

³² Available at <https://bit.ly/2Y0sDVA>.

³³ Available at <https://bit.ly/3yuN5ul>.

actual rate of 42 percent).³⁴ The impact is even greater for child recipients: 41 percent of children whose family income would fall below the poverty line without SSI payments are kept out of poverty because of the monthly benefits. *Id.* Even where it does not alone lift individuals out of poverty, the monthly allowance “is instrumental in reducing the number of people in extreme poverty, and it greatly lessens the burden on other family members.” Ctr. on Budget & Pol’y Priorities, *Introduction to the Supplemental Security Income (SSI) Program* 5 (Feb. 27, 2014).³⁵ Stated empirically, SSI reduced the aggregate poverty gap—or the “difference between family income and the poverty threshold for a family in poverty”—by over two-thirds. Bailey & Hemmeter, *supra*, at 28 tbl.14.

Other programs that apply differentially to the territories are also effective at addressing poverty. Census Bureau researchers estimate that SNAP lifted 3.4 million people—including 1.5 million children—out of poverty in 2017. Fox, *supra*, at 29 tbl.A-7. Other researchers, correcting for underreporting and the like, estimate that SNAP removed 8.4 million individuals from poverty in 2015, reducing the child-poverty rate by 28 percent. Laura Wheaton & Victoria Tran, *The Antipoverty Effects of the Supplemental Nutrition Assistance Program*, Urban Inst. 8-9 (Feb. 2018).³⁶ Either way, the program is extremely effective at alleviating poverty.

³⁴ Available at <https://bit.ly/3mG6Qg3>.

³⁵ Available at <https://bit.ly/3sOgwq1>.

³⁶ Available at <https://urbn.is/38gWmvh>.

Together, federal unemployment compensation and TANF lifted another one million individuals out of poverty. Fox, *supra*, at 29 tbl.A-7. And Medicaid, researchers estimate, kept 2.6 million out of poverty in 2010. Benjamin D. Sommers & Donald Oellerich, *The Poverty-Reducing Effect of Medicaid*, 32 J. of Health Econ. 816, 827 (2013).³⁷ All in all, the *Amici* States can attest that these programs are essential in combating poverty, hunger, and poor health among their residents.

2. The exclusion of various territories from these nationwide aid programs—despite their effectiveness—results in significantly less assistance for Americans in the territories who are in need.

For example, excluding Puerto Rico, Guam, the U.S. Virgin Islands, and American Samoa from SSI results in less assistance to low-income elderly, blind, and disabled residents of those territories. Currently, a patchwork of legacy programs persists in Puerto Rico, Guam, and the U.S. Virgin Islands to provide some aid to the elderly and to adults with blindness or disabilities. *See* 42 U.S.C. § 1381 note (preserving preexisting programs in Puerto Rico, Guam, and U.S. Virgin Islands); *see also id.* § 1381 note (Aid to the Aged, Blind, or Disabled); *id.* §§ 301-306 (Old-Age Assistance); *id.* §§ 1201-1206 (Aid to Blind); *id.* §§ 1351-1355 (Aid to the Permanently and Totally Disabled). Not even those programs are available in American Samoa. *See* 42 U.S.C. § 1301(a)(1); William R. Morton, Cong. Res. Serv. Memorandum, *Cash*

³⁷ Available at <https://bit.ly/3zpmkIM>.

Assistance for the Aged, Blind, and Disabled in Puerto Rico 4 (Oct. 26, 2016).³⁸

But where they operate, those programs are inadequate; after all, Congress passed SSI in the 1970s to replace them. *See* Morton, *supra*, at 4. For one, the programs cover fewer individuals—for example, they exclude children. *See* 42 U.S.C. § 1381 note (covering only those who “are 18 years of age or over and permanently and totally disabled”). Also, the program’s recipients receive less assistance. In Guam, for example, the average senior, blind, or disabled beneficiary received \$173 per month in 2019. *See* Off. of the Governor of Guam, Bureau of Stats. & Plans, *2019 Guam Statistical Yearbook* 351 tbl.18-10 (2021) (averaging monthly benefits in 2019 across programs for elderly, blind, and disabled).³⁹ In Puerto Rico, the average monthly federal benefit paid is \$77. U.S. Gov’t Accountability Off., GAO-14-31, *Puerto Rico: Information on How Statehood Would Potentially Affect Selected Federal Programs and Revenue Sources* 84 tbl.5 (Mar. 2014).⁴⁰ By comparison, the average monthly federal payment for SSI is \$550. U.S. Soc. Sec. Admin., Pub. No. 13-11700 *Annual Statistical Supplement to the Social Security Bulletin, 2020* § 7, at 18 tbl.7.B3 (Feb. 2021);⁴¹ *cf.* Morton, *supra*, at 11-12 tbl.5 (comparing Aid to the Aged, Blind, and Disabled program in Puerto Rico to SSI).

The United States argues that an advantage of the current system is that it preserves more local control

³⁸ Available at <https://bit.ly/3sO3B7k>.

³⁹ Available at <https://bit.ly/38jsWfT>.

⁴⁰ Available at <https://bit.ly/3gDHQ5j>.

⁴¹ Available at <https://bit.ly/3jyRUyf>.

over aid programs. But “local control,” in this case, is simply a euphemism for appropriating significantly less federal funding for needy individuals living in the territories. In 2019, the federal government’s bill for providing benefits to the elderly, blind, and disabled individuals living in Guam, Puerto Rico, and the Virgin Islands totalled \$35 million. *See* U.S. Dep’t of Health & Hum. Servs., Admin. for Child. & Fams., *Justification of Estimates for Appropriations Committee* 246 (2021).⁴² By comparison, the State of Wyoming—a State with just 18 percent of the population of Puerto Rico alone, U.S. Census Bureau, *State Population Totals, supra*, tbl.—received more than \$45 million in federal SSI funding, *Annual Statistical Supplement, supra*, § 7, at 17 tbl.7.B1.

If Congress were to include the territories in the SSI program, it would increase the program’s annual budget by just 3 percent a year. *See* Memorandum from Michael Stephens, Supervisory Actuary, to Steve Goss, Chief Actuary, Soc. Sec. Admin. 2 (June 11, 2020) (projecting \$1.9 billion change in federal SSI payments in 2021 if territories were included);⁴³ *Annual Statistical Supplement, supra*, § 7, at 17 tbl.7.B1 (reflecting \$55.9 billion in total federal SSI expenditures in 2019). But it would make a huge difference in the lives of territory residents—for example, the average monthly benefits in Puerto Rico would increase from \$77 to over \$420. Gov’t Accountability Off., *Puerto Rico, supra*, at 84 tbl.5. And many more individuals would become eligible to receive the benefits. For instance, the number of

⁴² Available at <https://bit.ly/3mzyDPI>.

⁴³ Available at <https://bit.ly/3mC4lvh>.

Puerto Ricans receiving benefits could increase nearly tenfold. *Id.*

3. The territories suffer disproportionately high levels of poverty and would benefit from participating in these programs. The national poverty rate hovers around 10.5 percent, and the neediest states—Louisiana and Mississippi—have poverty rates of around 19 percent. *Dashboard—United States: Persons in Poverty, Percent*, U.S. Census Bureau (Sept. 2020).⁴⁴ By contrast, 43.5 percent of Puerto Ricans live in poverty, *id.*; as of 2009, 57.8 percent of American Samoans lived in poverty, *see* U.S. Gov. Accountability Off., GAO-20-467, *American Samoa: Economic Trends, Status of the Tuna Canning Industry, and Stakeholders' Views on Minimum Wage Increases* 6 (June 2020);⁴⁵ and Northern Mariana Islands residents suffered a poverty rate of 56 percent in 2015, N. Mar. I. Dep't of Com., *HIES 2016: Population*.⁴⁶ The poverty rates in Guam (22.6 percent) and the U.S. Virgin Islands (25 percent) are lower than the other territories, but still higher than even the most impoverished states. *2019 Guam Statistical Yearbook*, *supra*, at 468 tbl.22-10; Frank L. Mills et al., *2015 United States Virgin Islands Community Survey* 32 tbl.P1-16 (July 2018).⁴⁷

The need in the territories is clear and the effectiveness of national aid programs is indisputable. Therefore, Congress's decision to haphazardly

⁴⁴ Available at <https://bit.ly/3BCRaP3>.

⁴⁵ Available at <https://bit.ly/3kvOKdR>.

⁴⁶ Available at <https://bit.ly/3ykBz4G> (last visited Sept. 7, 2021).

⁴⁷ Available at <https://bit.ly/3ykBQoe>.

exclude the territories from the very programs that could most help them is far from rational.

CONCLUSION

This Court should affirm the judgment of the court of appeals.

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