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IN THE SUPREME COURT OF THE UNITED STATES

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UNITED STATES, )  
Petitioner, )  
v. ) No. 20-303  
JOSE LUIS VAELLO-MADERO, )  
Respondent. )  
- - - - -

Washington, D.C.

Tuesday, November 9, 2021

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:00 a.m.

APPEARANCES:

CURTIS E. GANNON, Deputy Solicitor General,  
Department of Justice, Washington, D.C.; on behalf  
of the Petitioner.

HERMANN FERRE, ESQUIRE, New York, New York; on behalf  
of the Respondent.

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P R O C E E D I N G S

(10:00 a.m.)

CHIEF JUSTICE ROBERTS: We will hear argument first this morning in Case 20-303, Vaello-Madero -- United States versus Vaello-Madero.

Mr. Gannon.

ORAL ARGUMENT OF CURTIS E. GANNON  
ON BEHALF OF THE PETITIONER

MR. GANNON: Mr. Chief Justice, and may it please the Court:

The court of appeals erred in holding that Congress's decision not to extend its Supplemental Security Income program to Puerto Rico lacks a rational basis.

As this Court has recognized, Puerto Rico has a unique tax status vis-à-vis the federal government. Puerto Rico's residents and employers contribute to federal unemployment insurance and to the Social Security and Medicare trust funds, and they receive benefits from those programs, but Congress has expressly exempted them from the obligations to pay many forms of federal taxes, including federal income tax in most instances, excise taxes, gift taxes,

1 and estate taxes, which means that much of the  
2 revenue that would have flowed into the federal  
3 treasury can instead be tapped by territorial  
4 government, which therefore has greater leeway  
5 to make different fiscal or economic choices  
6 consistent with its distinctive status as a  
7 self-governing commonwealth.

8 Congress could reasonably take those  
9 considerations into account when deciding that  
10 Puerto Rico's residents would receive some  
11 federal benefits but not others. And this Court  
12 has already recognized as much when it concluded  
13 in *Torres and Rosario* that there is a rational  
14 basis for Congress to exclude Puerto Rico's  
15 residents from participation in a social welfare  
16 program.

17 Of course, it would also be rational  
18 for Congress to make changes on either side of  
19 its balance between taxes and benefits. And the  
20 President has already called on Congress to  
21 extend SSI benefits to the residents of Puerto  
22 Rico.

23 But whether and how to alter the  
24 balances underlying current social welfare  
25 policies are decisions that are left to Congress

1 and evaluated under a deferential rational basis  
2 standard that this Court should find has been  
3 satisfied here.

4 I welcome the Court's questions.

5 JUSTICE THOMAS: Mr. Gannon, do you  
6 think that the Territory Clause is enough of a  
7 -- a source of authority for the government or  
8 Congress to have a rational basis to do what  
9 it's doing?

10 MR. GANNON: We aren't resting just on  
11 the Territory Clause here, Justice Thomas. We  
12 agree that the equal protection principle in the  
13 Fifth Amendment's Due Process Clause applies  
14 here, and there does need to be a rational  
15 basis.

16 The fact that the Territory Clause  
17 gives Congress a different and unique source of  
18 authorities over territories does mean that it  
19 is inescapably the case that Congress often  
20 legislates differently with respect to a  
21 territory than it does with respect to the rest  
22 of the country and that --

23 JUSTICE THOMAS: Well, how much of  
24 your argument depends on that? I'm trying to  
25 sort of figure out whether or not just merely

1 under the Territory Clause you could -- how much  
2 could you do?

3 For example -- I'll give you a  
4 different approach -- could you do the same  
5 thing to Vermont?

6 MR. GANNON: The question would still  
7 be governed by rational basis, and I --

8 JUSTICE THOMAS: Well, I'm -- I guess  
9 would the test -- how different would the test  
10 be for Vermont versus Puerto Rico?

11 MR. GANNON: I don't think the  
12 rational basis test would be different. I think  
13 the Court would still be looking under that  
14 deferential screen into whether there is a  
15 legitimate governmental interest that's being  
16 served by drawing a different line there.

17 And there are federal laws that make  
18 state-by-state distinctions, but I do think that  
19 the Territory Clause means that it is natural  
20 that Congress has often legislated differently  
21 with respect to territories, and, therefore,  
22 there are -- it is going to be a more common  
23 break point in legislation.

24 But, here, we think that the reason is  
25 deeper because it relates to the balance of

1 federal benefits and burdens that apply in the  
2 territory differently than they do in the  
3 states.

4 And so, if Vermont had a different  
5 relationship with the federal government on the  
6 one side, then it might be easier for the  
7 federal government to alter it on the other  
8 side. And in this instance, it doesn't.

9 Now Congress always takes into  
10 account, it is always legitimate for Congress to  
11 take into account, the source of federal funding  
12 associated with a particular program. Sometimes  
13 that connection is obvious. In the case of the  
14 Medicare and Social Security trust funds, that  
15 -- that's something where there's a one-to-one  
16 relationship. For refundable tax credits, it --  
17 it's usually -- somebody needs to be filing a  
18 federal tax -- income tax return in order to be  
19 eligible for a refundable tax credit, and the  
20 connection is sometimes more obvious like that.

21 But, in this instance, we think that  
22 it is clear, as the Court recognized in Torres  
23 and Rosario, that Congress -- its relationship  
24 with the territory is different largely in this  
25 context of a social welfare benefit program



1 because of the different burdens that the tax --  
2 the federal tax structure opposes in Puerto  
3 Rico, and that means that there is a smaller tax  
4 bite being taken out of the Puerto Rico  
5 community by the federal government, which  
6 leaves Puerto Rico greater leeway than Vermont  
7 would have to deal with this problem in its own  
8 fashion.

9 JUSTICE THOMAS: Thank you.

10 JUSTICE SOTOMAYOR: I'm sorry, counsel  
11 --

12 CHIEF JUSTICE ROBERTS: Does the -- go  
13 ahead.

14 JUSTICE SOTOMAYOR: No, no, please.

15 CHIEF JUSTICE ROBERTS: Do the Insular  
16 Cases have anything to do with this litigation?

17 MR. GANNON: We don't think that they  
18 affect the analysis that the Court needs to  
19 apply here because we acknowledge that the equal  
20 protection component of the Fifth Amendment is  
21 applicable here. The Insular Cases were about  
22 whether there are different portions of the  
23 Constitution that apply differently to different  
24 territories.

25 And, here, everybody has acknowledged

1 this Court has previously held that the equal  
2 protection component of the -- of the Fifth  
3 Amendment applies to Puerto Rico. And,  
4 therefore, we don't think that the Court needs  
5 to address the Insular Cases here any more than  
6 it did last year in *Aurelius*, where it noted  
7 that the Court has repeatedly declined to extend  
8 the Insular Cases. It declared that in *Reid*  
9 against *Covert* in the 1950s. The --

10 JUSTICE GORSUCH: Counsel, if that's  
11 true, why -- why -- why shouldn't we just admit  
12 the Insular Cases were incorrectly decided?

13 MR. GANNON: Well, I -- I think that  
14 it -- that would not be the Court's normal  
15 course to just say that several cases were  
16 incorrect --

17 JUSTICE GORSUCH: I'm asking for the  
18 government's position. I'm not asking for  
19 thoughts about the Court's normal course.

20 From -- from the government's point of  
21 view, if the Insular Cases are wrong and if  
22 you're proceeding on a premise inconsistent with  
23 them, why shouldn't we just say what everyone  
24 knows to be true?

25 MR. GANNON: Well, I -- I don't think

1 we're proceeding on a premise that's  
2 inconsistent with the Insular Cases because --

3 JUSTICE GORSUCH: No, I -- I -- I -- I  
4 think you've said that you're proceeding on a  
5 premise that the Constitution applies fully and  
6 --

7 MR. GANNON: With --

8 JUSTICE GORSUCH: -- without exception  
9 in -- with -- in respect to this claim, right?

10 MR. GANNON: With respect to the equal  
11 protection claim, yes.

12 JUSTICE GORSUCH: So why not just --

13 MR. GANNON: But that -- I don't think  
14 that that's the only thing that the -- that the  
15 Insular Cases decided.

16 JUSTICE GORSUCH: What is the  
17 government's position on the Insular Cases?

18 MR. GANNON: The government's position  
19 on the Insular Cases is that some of the  
20 reasoning and rhetoric there is obviously  
21 anathema, has been for decades, if not from the  
22 outset, but that the -- that they are not at  
23 issue in this case because the conclusion that  
24 parts of the Constitution wouldn't apply to  
25 Puerto Rico doesn't decide anything that is

1 relevant to this case.

2           The equal protection component applies  
3 here, and -- and, therefore, just as in  
4 Aurelius, the Court doesn't need to say anything  
5 else about the Insular Cases in order to decide  
6 this case.

7           JUSTICE SOTOMAYOR: Counselor, can I  
8 unpackage your argument? Let's start with  
9 Justice Thomas's question.

10           If Congress said, Vermont, you have  
11 too many needy people, the cost is going to be  
12 too great to us, we're not going to pass this  
13 law on to Vermont, would that pass equal  
14 protection?

15           MR. GANNON: I think it might, and --

16           JUSTICE SOTOMAYOR: Under what theory?

17           MR. GANNON: Under -- under the theory  
18 of -- if there is a -- I mean, it wouldn't be  
19 the theory that we're using here, which is that  
20 there is a different relationship between --

21           JUSTICE SOTOMAYOR: Well, but I'm --  
22 I'm trying to figure out the different  
23 relationship for this reason. You -- it seems  
24 to be that what you're saying -- and correct me  
25 if I'm wrong -- cost alone is not enough. Cost

1 plus something else is.

2 MR. GANNON: Yes.

3 JUSTICE SOTOMAYOR: Correct?

4 MR. GANNON: That's correct. We think  
5 that that --

6 JUSTICE SOTOMAYOR: All right. So  
7 let's look at the plus of that. This program is  
8 fully funded by the federal government, fully  
9 administered by the federal government. There's  
10 no cost to Puerto Rico. There's no cost to any  
11 state. And so I don't understand what the  
12 different relationship with Puerto Rico has to  
13 do with this program because there's no cost to  
14 the government.

15 It's not as if it could take this  
16 federal money, Puerto Rico, and distribute it in  
17 some other way or put this money to use in some  
18 other way because the money's going directly to  
19 the people, not to the government. So I don't  
20 see how that can be a plus with respect to the  
21 self-governance of Puerto Rico.

22 MR. GANNON: That -- that's true,  
23 Justice Sotomayor, with respect to the money  
24 that's coming back from the federal government  
25 to the recipients --

1 JUSTICE SOTOMAYOR: Well, it's not --

2 MR. GANNON: -- of the program.

3 JUSTICE SOTOMAYOR: -- coming back.

4 Well, let's go back to that point, okay?

5 As the courts below noted, most of the  
6 SSI recipients, if not all of them, don't pay  
7 taxes. So it's not as if the recipients of this  
8 money are any different among themselves.  
9 Puerto Ricans are citizens, and the Constitution  
10 applies to them. Their needy people are being  
11 treated different than the needy people in the  
12 50 states, the District of Columbia, and the  
13 Northern Mariana Islands.

14 So explain how those people, none of  
15 whom pay taxes to the federal government, how  
16 are they different?

17 MR. GANNON: They are different --  
18 first of all, there may be some taxes from which  
19 they are exempt, like the excise taxes, as we do  
20 point out, but the reason -- the primary reason  
21 why they are different is because they live in a  
22 community, in a locality where there is less tax  
23 money being taken by the federal government out  
24 of that community to be -- being taken into the  
25 general revenues at the federal level, which is

1 then distributed through various federal benefit  
2 programs --

3 JUSTICE SOTOMAYOR: So what do I do --

4 MR. GANNON: -- and other ways, and --

5 JUSTICE SOTOMAYOR: -- with the record  
6 that I see in the First Circuit case, Peña, that  
7 shows that Puerto Ricans pay, maybe not excise  
8 tax, maybe not income tax, but that they pay as  
9 much taxes, other combined taxes, as other  
10 states in the union, meaning it's nice to sort  
11 of cherry-pick one tax, but that's true around  
12 the country.

13 The government gives some tax benefits  
14 to some things and not others. You've got to  
15 look at the structure as a whole to see is there  
16 a really substantial difference. But I'm  
17 looking at that record, and it shows Puerto  
18 Ricans as a community, and all the other taxes  
19 they pay, pay more than many states of the  
20 union.

21 So I don't know how exempting out one  
22 or two taxes gets you away from seeing whether  
23 the government's distinction is rational, based  
24 on the need of the citizens who are supposed to  
25 receive the money.

1 MR. GANNON: And the -- it -- the tax  
2 bite that the federal government is taking from  
3 the entire community is lower. And so, on a per  
4 capita basis, they're --

5 JUSTICE SOTOMAYOR: It's not. I mean,  
6 the Peña case showed it exceeds some other  
7 states.

8 MR. GANNON: The -- the aggregate  
9 amount of money that is being sent to Washington  
10 is greater than in some states, but there are --  
11 there's a larger community in Puerto Rico that's  
12 being taxed.

13 JUSTICE BREYER: Well, are they  
14 holding --

15 MR. GANNON: And they are, of course,  
16 getting benefits under many federal programs.

17 JUSTICE BREYER: Yeah.

18 MR. GANNON: So our point here is not  
19 --

20 JUSTICE SOTOMAYOR: So are the  
21 states --

22 MR. GANNON: Yes.

23 JUSTICE SOTOMAYOR: -- under many  
24 other programs. So you can't compare apples and  
25 oranges. I'm sorry, Justice Breyer.



1 JUSTICE BREYER: No, no. I just  
2 wonder, is -- is that a reasonable, rational, or  
3 arbitrary thing to do for Congress to say, you  
4 know what, we discovered a state over here,  
5 maybe it's Mississippi or maybe it's California  
6 for all I know, that when you look at how much  
7 money they contribute to Washington,  
8 proportionate to the number of SSI things, it's  
9 greater than 14 other states, so we cut them out  
10 of the program.

11 How long do you think that would last?

12 MR. GANNON: Well, I don't know how  
13 long that would last, Justice Breyer.

14 JUSTICE BREYER: All right. But, I  
15 mean, what's your rationale?

16 MR. GANNON: But -- but the --

17 JUSTICE BREYER: Why is that a  
18 rational thing?

19 MR. GANNON: The rationale is that  
20 this is -- it is always appropriate for Congress  
21 to take account of the general balance of  
22 benefits and burdens associated with a  
23 particular federal program.

24 And, here, this -- this program is  
25 funded out of general federal revenues. And

1 when the locality at issue pays in less into  
2 that income stream than others do, that means  
3 that there is --

4 JUSTICE BREYER: Okay. That's --

5 MR. GANNON: -- more money left --

6 JUSTICE BREYER: -- rational? Okay.

7 That --

8 MR. GANNON: -- that is more money  
9 left in the community --

10 JUSTICE BREYER: Has it ever happened?

11 MR. GANNON: Pardon?

12 JUSTICE BREYER: Has it ever happened?

13 MR. GANNON: Has which ever happened?

14 JUSTICE BREYER: What I was -- what  
15 we're talking about, that they cut out a state  
16 because the proportionate amount is greater.

17 MR. GANNON: I -- they have not done  
18 that --

19 JUSTICE BREYER: No? That's never  
20 happened?

21 MR. GANNON: -- with respect to this  
22 program. No.

23 JUSTICE BREYER: Never happened?

24 MR. GANNON: But -- but -- but I --

25 JUSTICE BREYER: Now let me add one

1 thing. The thing I would add is there's not a  
2 word about Puerto Rico in this statute. It has  
3 a definition of the United States, doesn't say  
4 anything about Puerto Rico.

5 But there is a relevant sentence in  
6 the Federal Relations Act, I think, but you can  
7 tell me I'm wrong. It said federal laws not  
8 locally inapplicable shall apply to Puerto Rico.  
9 Okay?

10 Why is this law locally inapplicable  
11 when, even if your theory is right, it's never  
12 happened in the case of a state and there is  
13 good reason for applying it? There are a lot of  
14 SSI people who -- you know, in Puerto Rico. And  
15 there is no real connection between the SSI  
16 beneficiaries and federal taxes, and they pay a  
17 lot of taxes.

18 So what's your best argument, no, this  
19 is locally inapplicable? Why?

20 MR. GANNON: It's locally inapplicable  
21 because the statutory definition makes it  
22 inapplicable. It defines the program as being  
23 available in the United States.

24 Congress then, as it routinely does  
25 with respect to different programs, has

1 specified what that means in this particular  
2 context.

3           And I don't think that you should draw  
4 any particular inference from the fact that the  
5 statutory definition that they used there has to  
6 do with the United States. Sometimes, when  
7 Puerto Rico is included in a program, it's  
8 defined as being a state, and sometimes it's  
9 defined as not. And --

10           JUSTICE BREYER: What I'm actually  
11 thinking is -- is -- I'm not thinking something  
12 that simple, and I haven't got it quite worked  
13 out, but those words "locally inapplicable" and  
14 the Federal Relations Act were designed to put  
15 Puerto Rico in a status that isn't in practice  
16 quite that of a territory, although it's not a  
17 state. It's a commonwealth.

18           It's the Estado Libre Asociado, and no  
19 one knows exactly what that is. And so  
20 shouldn't we, in fact, look at the purpose of  
21 the Federal Relations Act and say it takes a  
22 little bit more -- a little bit more in terms of  
23 a good reason to exclude Puerto Rico from a  
24 benefit than it would the Marianas and Guam and  
25 the other territories that have no such act? Or

1 is it totally irrelevant? Did we tell the  
2 United Nations something that wasn't true?

3 MR. GANNON: We did not tell the  
4 United Nations something that wasn't true. And  
5 we've said that we think that one of the reasons  
6 why this is justified is because it does,  
7 indeed, help promote territorial autonomy  
8 because it is related to the fact that, as  
9 Congress is taking fewer federal tax dollars  
10 from the Puerto Rico economy, it leaves greater  
11 leeway for the territorial government to have --

12 JUSTICE BREYER: The -- the  
13 government?

14 MR. GANNON: -- its own tax structure.

15 JUSTICE BREYER: Is this the same  
16 government that is bankrupt and that is being  
17 run, the economy, by people, some of them  
18 anyway, not from Puerto Rico but from -- under a  
19 law that applies from the mainland, to the  
20 mainland? And is this the same program that  
21 would, in fact, give the people on average who  
22 need it \$418 a month, as opposed to what Puerto  
23 Rico can afford to give them, which is \$58 a  
24 month?

25 MR. GANNON: It -- it is the same

1 program. We think that the PROMESA statute,  
2 which was enacted about two months before the  
3 benefits that are actually at issue in this  
4 case, but we don't -- we don't think that that  
5 affects the analysis here -- PROMESA itself is a  
6 temporary bankruptcy measure that was intended  
7 to assist in restoring Puerto Rico's fiscal  
8 economy and its security. It is itself intended  
9 to promote autonomy by restoring Puerto Rico's  
10 fiscal footing.

11 And, therefore, as here, Congress is  
12 seeking to make locally applicable laws. It has  
13 made the determination -- the federal  
14 relationship principle here is something that's  
15 been overridden by Congress's specific  
16 determination with respect to the applicability  
17 of this program.

18 Nobody has ever thought that -- that  
19 Puerto Rico might have been implicitly included  
20 by virtue of the statute that you -- that you  
21 cite, Justice Breyer, and that's why this Court  
22 decided in the 1970s that -- that this  
23 particular exclusion was constitutional in  
24 Torres.

25 And -- and so, in -- in this context,

1 we think that Puerto Rico does have extra  
2 autonomy to deal with this problem precisely  
3 because the federal government has taken fewer  
4 tax dollars out of that local economy.

5 JUSTICE BARRETT: Mr. Gannon --

6 CHIEF JUSTICE ROBERTS: How -- how  
7 much has the federal government -- maybe there  
8 aren't statistics on this -- provided assistance  
9 and revenue to Puerto Rico? Do -- do you have  
10 any information on that?

11 MR. GANNON: I -- I don't have  
12 aggregate information about how much federal  
13 revenues have -- have gone to Puerto Rico,  
14 especially in recent years. There are some  
15 figures in the SEIU amicus brief that -- that  
16 parse data from 2004 and 2010 about the net  
17 federal expenditures in different jurisdictions.

18 And I think what they show is that  
19 Puerto Rico is not being treated as an extreme  
20 outlier. They -- they show that if you take  
21 into account federal expenditures in a  
22 jurisdiction, subtract out federal taxes that  
23 were collected from that jurisdiction, so that's  
24 the net expenditures in -- in the jurisdiction,  
25 on a per capita basis, Puerto Rico is receiving

1 less back from the federal government than the  
2 District and 17 states, but it's receiving more  
3 than 33 other states.

4 And so it's not being treated here as  
5 an extreme outlier, but we think it is always  
6 appropriate for Congress to take into account  
7 this balance of payments consideration,  
8 especially against the backdrop of the fact that  
9 Puerto Rico, as a territory, does have its own  
10 government. It does have --

11 JUSTICE SOTOMAYOR: Excuse me. Could  
12 you --

13 MR. GANNON: -- greater wherewithal to  
14 --

15 JUSTICE SOTOMAYOR: It's hard to  
16 imagine that Puerto Rico has the ability, given  
17 that it's in temporary bankruptcy, to do what  
18 you say to be able to raise taxes to help the  
19 needy.

20 But what do I do with the fact that  
21 the findings, when Puerto Rico was given federal  
22 tax exemption, were based on the fact that  
23 Congress recognized that the Commonwealth's  
24 economy could not sustain further taxation? So  
25 Congress itself, when it exempted federal income



1 tax, made a finding that there isn't the ability  
2 to do what you say.

3 MR. GANNON: It --

4 JUSTICE SOTOMAYOR: There isn't -- you  
5 know, it's illusory to think that the -- Puerto  
6 Rico's local economy could match the federal  
7 economy and give those tax resources to its  
8 needy.

9 MR. GANNON: That -- that was the  
10 reason why there shouldn't be two separate tax  
11 bites out of the Puerto Rican economy. And so  
12 that's why Congress --

13 JUSTICE SOTOMAYOR: No, it said that  
14 it couldn't sustain --

15 MR. GANNON: It --

16 JUSTICE SOTOMAYOR: -- further  
17 taxation.

18 MR. GANNON: -- it couldn't sustain  
19 the additional layer of federal taxation and,  
20 therefore, have the same reduced capacity to  
21 issue income taxes that states would have  
22 because they have to add on top of what the  
23 federal taxes would otherwise be.

24 And this is why the income taxes in  
25 Puerto Rico that the territorial government

1 raises are at -- generally at higher rates than  
2 states are able to raise, because they don't  
3 have to take after the federal government has  
4 already taken out of that population. Of  
5 course, that's not true with respect to FICA.  
6 There are still some federal taxes that are  
7 being taken out, but they're -- they're getting  
8 full benefits back.

9           And so, here, we think, in the  
10 aggregate, it's appropriate for Congress to take  
11 account of the fact that when there is less  
12 total share going into the federal -- federal  
13 treasury, that there is less of a total share  
14 coming back to the community.

15           JUSTICE KAGAN: Mr. Gannon --

16           JUSTICE BARRETT: Mr. Gannon --

17           JUSTICE KAGAN: -- am I right that  
18 that theory would enable Congress to exclude  
19 Puerto Rico from any benefits program?

20           MR. GANNON: Well, I -- I do think  
21 that there are other benefits programs that we  
22 have not sought to distinguish from this one.  
23 There's a case pending in the First Circuit that  
24 involves not just SSI but also SNAP and also the  
25 low-income subsidy under Medicare Part D.

1                   We have not sought to distinguish  
2 those particular benefit programs.

3                   JUSTICE KAGAN: I mean, I'm wondering,  
4 on your theory, how any such distinction could  
5 be made. It seems as though it's a theory that  
6 would apply equally well to any benefits  
7 program, so the -- if -- if -- if you are  
8 correct, the lesson going forward -- and maybe  
9 Congress does this and maybe it doesn't, and you  
10 might say it's up to them -- but the lesson  
11 going forward is Congress can do this whenever  
12 it wants.

13                   MR. GANNON: We think that here, it --  
14 it -- the rational basis standard that the Court  
15 articulated in Torres and applied in Rosario  
16 would allow Congress to take into account this  
17 consideration that -- that there is less tax  
18 revenue coming in. There's also the cost of the  
19 program. That's the other side of the coin.

20                   And we think here it is also promoting  
21 local autonomy because this is the type of  
22 program that, setting aside current -- the  
23 straitened attitude of the current economy  
24 there, it is still true as a general matter that  
25 there is more autonomy in Puerto Rico to have

1 more tax money available for designing different  
2 social benefit programs in a different way than  
3 the federal government would otherwise  
4 necessarily impose or allow --

5 JUSTICE BARRETT: Mr. Gannon, that --

6 MR. GANNON: -- in that context.

7 JUSTICE BARRETT: -- that answer that  
8 you're giving Justice Kagan, it -- it's similar  
9 to the one that you keep saying about Congress  
10 taking into account revenues coming in and then  
11 benefits going out.

12 And I guess I was surprised. When  
13 Justice Thomas asked you about how much the  
14 Territories Clause bore on this, you seemed to  
15 kind of back away a little bit from what you  
16 said in your brief.

17 And I understand you're not resting  
18 entirely on the Territories Clause, but your  
19 answers seem to take account of the status of  
20 Puerto Rico as a territory, because, otherwise,  
21 I don't see why your argument doesn't lead  
22 exactly to what Justice Breyer said, which is,  
23 well, we're looking at it here and, you know,  
24 Mississippi is a poorer state, and so the  
25 revenues going into the federal treasury, you

1 know, are really low compared to the others, and  
2 we'd be paying, you know, a -- a -- a lot out.

3 I mean, I guess I had understood in  
4 your brief to say Mississippi would be  
5 distinguishable from Puerto Rico based on  
6 statehood. Am I -- I just want to know based --  
7 what your position is. Am I misunderstanding  
8 your argument?

9 MR. GANNON: Well, I mean, I think  
10 there are two ways in which Mississippi is  
11 distinguishable. One is that they don't have  
12 the differential treatment on the tax side.

13 But, secondly, I'd -- it is the case  
14 that the Territory Clause matters because it  
15 means that it is routine for Congress to draw  
16 some distinctions with respect to the  
17 territories. And the Constitution itself  
18 recognizes this as a legitimate dividing line.

19 But, if we -- if we look back at other  
20 equal protection cases, we do think that the  
21 Court has acknowledged that Congress can  
22 distinguish even among the states. A case like  
23 Hodel, the Surface Mining Act case, had  
24 differential effect in different states on the  
25 basis of geographic criteria that were defined

1       there, and the Court said that that was just  
2       subject to rational basis review.

3                   JUSTICE SOTOMAYOR:   How does the fact  
4       that Puerto Rico residents are a politically  
5       powerless minority -- you're just telling us  
6       that, can't protect itself the way Mississippi  
7       can -- and has been subject to, by your own  
8       admission right now, a history of  
9       discrimination -- the Insular Cases are a prime  
10      example of that; just look at their language --  
11      how does this factor into your argument on  
12      rational basis?   The --

13                   MR. GANNON:   Well, we don't think that  
14      there is any heightened scrutiny here.

15                   First, the benefit that's at issue  
16      here is not something to which there's a  
17      fundamental right.   The Court made that clear in  
18      Schweiker, which was an SSI case.   It made it  
19      clear that -- that the only question there is  
20      whether there was a suspect class --

21                   JUSTICE SOTOMAYOR:   No, but equal  
22      protection is.

23                   MR. GANNON:   Yes.

24                   JUSTICE SOTOMAYOR:   They -- Puerto  
25      Ricans are U.S. citizens.

1           MR. GANNON: They are U.S. citizens,  
2 but there is no evidence here linking this  
3 exclusion to ethnicity or --

4           JUSTICE SOTOMAYOR: Well, it's --

5           MR. GANNON: -- a history of  
6 discrimination.

7           JUSTICE SOTOMAYOR: How do you  
8 separate it out?

9           MR. GANNON: I -- I --

10          JUSTICE SOTOMAYOR: Puerto Ricans are  
11 Puerto Ricans. They're Hispanic, and they are  
12 routinely denied a political voice. They're  
13 powerless politically.

14          All you have to do is, well, listen to  
15 some of the rhetoric about Puerto Rico and you  
16 know there has been discrimination shown.

17          Why shouldn't that add to the  
18 scrutiny?

19          MR. GANNON: Well, this is a -- this  
20 statute classifies on the basis of location, not  
21 ethnicity or race. That's why Respondent was  
22 able to get these benefits while he was living  
23 in New York. He's not able to get them while  
24 he's living in Puerto Rico.

25          There's no evidence that anyone on the

1 other side has cited that ties this  
2 determination in the 1970s about how Puerto Rico  
3 would be treated in this benefits program to any  
4 of the troubling statements in the Insular Cases  
5 from the early 20th Century that came from this  
6 Court.

7 If you thought that that history  
8 prevented Congress from drawing any distinctions  
9 with respect to the territories, that would --  
10 that would be a sea change --

11 JUSTICE SOTOMAYOR: No, not -- Counsel  
12 --

13 MR. GANNON: -- in equal --

14 CHIEF JUSTICE ROBERTS: Thank you,  
15 counsel.

16 MR. GANNON: -- protection law as --

17 CHIEF JUSTICE ROBERTS: Thank you,  
18 counsel.

19 Justice Thomas?

20 Justice Breyer?

21 Justice Alito?

22 Justice Sotomayor?

23 JUSTICE SOTOMAYOR: Just to finish  
24 that thought, no, but a distinction based on  
25 citizenship, period, needy is needy, whether in



1 Puerto Rico or in the mainland.

2 None of the people who receive it on  
3 the mainland pay taxes. None of the money is or  
4 would go to Puerto Rico for its self-governance.  
5 I do think that restrictions have to be  
6 rational. And I'm just not quite sure --

7 MR. GANNON: Well, we --

8 JUSTICE SOTOMAYOR: -- why one would  
9 say that it's rational to treat a -- a group of  
10 people, of citizens, differently from other  
11 citizens on the mainland when the need is the  
12 same.

13 MR. GANNON: And we think that's  
14 because they're situated in a community where  
15 Congress has left more tax revenue there, and  
16 that makes a difference. And there's nothing  
17 that ties the history of discrimination on the  
18 basis of ethnicity to this decision that  
19 happened in the 1970s.

20 If it -- if that were thought to be a  
21 through line throughout the 20th Century, then,  
22 presumably, Congress would not in 1950 have  
23 extended ordinary Social Security to residents  
24 of Puerto Rico.

25 CHIEF JUSTICE ROBERTS: Justice Kagan?

1 JUSTICE KAGAN: Mr. Gannon, you've  
2 gone this whole argument barely mentioning  
3 Torres or Rosario. Is that because you think  
4 that they do not have any precedential effect?

5 MR. GANNON: Not at all. We think  
6 that even summary reversals of this Court have  
7 precedential effect. We think that they are  
8 correctly decided.

9 Obviously, we have relied on the  
10 holding that rational basis review applies here  
11 and that the differential tax treatment and the  
12 costs of the program are a rational basis.  
13 That's something that Congress has relied on for  
14 decades, not just with respect to continuing --

15 JUSTICE KAGAN: And -- and yet --

16 MR. GANNON: -- this treatment on SSI.

17 JUSTICE KAGAN: -- and yet, never once  
18 did you say to any of these questions: Well,  
19 that's been asked and answered already by this  
20 Court?

21 MR. GANNON: Well, I think it has  
22 implicitly been asked and answered by this Court  
23 in those two cases. Obviously, to the extent  
24 that there are arguments that PROMESA or other  
25 things have changed, we don't think that they

1 change the underlying considerations that make  
2 this rational, which is the balance of benefits  
3 and burdens and respecting local autonomy that  
4 derives from allowing Puerto Rico to have less  
5 of a federal tax bite and, therefore, an ability  
6 to come up with a different system if it chooses  
7 to deal with this particular problem.

8 JUSTICE KAGAN: And -- and one other  
9 quick question. I understand that there's  
10 legislation in Congress now that would remove  
11 this exclusion. Were Congress to pass that, how  
12 would it affect this case?

13 MR. GANNON: I don't think it would  
14 moot this case. I mean, I'm not sure what form  
15 it will ultimately pass in. If it were to be  
16 retroactively applicable and -- and extend back  
17 to benefits that -- that were owed between 2013  
18 and 2016, maybe there would be an argument for  
19 mootness.

20 I think that it doesn't otherwise  
21 affect the constitutional analysis here. I  
22 think it would indicate that it's not true to  
23 say that the residents of Puerto Rico are  
24 politically powerless if Congress were to pass a  
25 statute like that.

1                   And -- but I think that there is still  
2                   a need for the Court to decide whether rational  
3                   basis is the appropriate standard here and  
4                   whether these types of considerations would  
5                   satisfy rational basis because this isn't the  
6                   only benefit program that would be covered by  
7                   the First Circuit's analysis.

8                   JUSTICE KAGAN: Thank you.

9                   CHIEF JUSTICE ROBERTS: Justice  
10                  Gorsuch?

11                  JUSTICE GORSUCH: I -- I'd like to  
12                  follow up on Torres and Rosario for just a  
13                  moment. You cited them in your brief as  
14                  pointing out that distinctions based on  
15                  territory status are generally subject to  
16                  rational basis review because that distinction  
17                  between territories and states is in the  
18                  Constitution. Okay.

19                  Is it always the case in the  
20                  government's view that rational basis applies to  
21                  distinctions based on territorial status?

22                  What if, for example, hypothetically,  
23                  a -- a statute discriminating against  
24                  territories could be shown to be the product of  
25                  invidious racial discrimination? Wouldn't we

1 subject that to strict scrutiny?

2 MR. GANNON: I think you would. And I  
3 -- I -- I -- I think that the -- the -- what the  
4 Court said in those cases is that Congress may  
5 treat -- the rational basis applies. And the  
6 reason it's applying differently -- why it's  
7 rational basis is because there's no fundamental  
8 right to this particular social welfare benefit.

9 If there were allegations of racial  
10 discrimination or other things that trigger  
11 heightened scrutiny, then that would be a reason  
12 for the Court to take the analysis differently.

13 JUSTICE GORSUCH: Even if the statute  
14 on its face distinguished between states and  
15 territories only?

16 MR. GANNON: I mean, I think that you  
17 would need a pretty strong record to overcome  
18 the -- the other reasons that -- that would --  
19 might justify that -- that treatment. But, if  
20 there were evidence that this were based on  
21 racial or ethnic considerations, then the Court  
22 would obviously view that differently than it  
23 does here. And as I was --

24 JUSTICE GORSUCH: You don't see  
25 anything in Rosario or Torres that foreclosed

1 that conclusion, do you?

2 MR. GANNON: I don't think so.

3 JUSTICE GORSUCH: Thank you.

4 CHIEF JUSTICE ROBERTS: Justice  
5 Kavanaugh?

6 JUSTICE KAVANAUGH: In addition to the  
7 constitutional text that Justice Thomas and  
8 Justice Barrett mentioned, there's also the  
9 precedent that Justice Kagan mentioned. I just  
10 want to follow up on that and nail down how much  
11 you're relying on that.

12 Are you saying that we couldn't rule  
13 the other way without overruling those cases?

14 MR. GANNON: I think that's basically  
15 true, Justice Kavanaugh. I don't think that  
16 there are meaningful differences. Obviously,  
17 the reasoning was brief.

18 We don't think -- we don't agree with  
19 the First Circuit's conclusion that the holdings  
20 there are inapplicable either because the second  
21 case involved a block grant. Even Justice  
22 Marshall's dissent didn't consider that to be a  
23 sufficient distinction between AFDC and SSI for  
24 purposes of the difference between those two  
25 cases.

1                   And we also don't think that the --  
2                   the argument that the Court listed three  
3                   different reasons in its footnote in Torres that  
4                   were then repeated in Rosario means that -- that  
5                   we would need to have evidence about the  
6                   particular type of economic disruption that  
7                   would be affected in the local economy in order  
8                   to rest on those cases.

9                   We think that the holding is that  
10                  rational basis is applicable, and these reasons,  
11                  especially the benefit of the tax and burdens,  
12                  the cost and benefits analysis associated with  
13                  local autonomy, is sufficient to say that this  
14                  satisfies the type of rational basis review that  
15                  the Court applied in those two cases.

16                  JUSTICE KAVANAUGH: And then one  
17                  factual question. The Respondent here is still  
18                  eligible for a waiver from paying the \$28,000,  
19                  correct?

20                  MR. GANNON: Under the regulations, he  
21                  could seek a waiver. There are different  
22                  criteria for the waiver. He has not --

23                  JUSTICE KAVANAUGH: I just want to  
24                  make sure he's still eligible for the waiver?

25                  MR. GANNON: I -- yes, I think he

1 would be able to -- to seek the waiver. This  
2 case arises in an unusual procedural context.  
3 And as made -- was made clear at the district  
4 court level, we did not -- the SSA did not send  
5 him a notice of overpayment, which would have  
6 triggered his ability to -- to respond in the  
7 administrative context, but the regulations  
8 would still allow that. Exactly.

9 JUSTICE KAVANAUGH: Thank you.

10 CHIEF JUSTICE ROBERTS: Justice  
11 Barrett?

12 JUSTICE BARRETT: I just have a -- a  
13 factual question. So you said the First  
14 Circuit's reasoning would -- would require  
15 extending not only SSI benefits to Puerto Ricans  
16 but a variety of other federal benefit programs,  
17 you know, that -- for which they may not be  
18 currently eligible.

19 And I assume that the reasoning would  
20 also require the extension of benefits to some  
21 other territories who don't currently receive  
22 them. You know, I know the Mariana Islands are  
23 getting SSI, maybe not TANF, you know, Guam,  
24 etcetera.

25 SSI, I gather, is about a \$2 billion



1 expense roughly to send it?

2 MR. GANNON: In Puerto Rico.

3 JUSTICE BARRETT: In Puerto Rico?

4 MR. GANNON: Yes.

5 JUSTICE BARRETT: Do you have a number  
6 on what the implications would be of the First  
7 Circuit's reasoning if, you know, everything  
8 that I just said, extending more benefits to  
9 Puerto Rico and to other territories?

10 MR. GANNON: I -- I don't have a  
11 number. The number on SSI for the other  
12 territories is -- is cited, and -- and -- and  
13 that's actually much smaller. But I don't know  
14 what the cost of the other benefits programs  
15 are. And the challenges there are sometimes  
16 going to follow from complete exclusions, and  
17 sometimes they might just follow from  
18 significantly differential treatment.

19 And so the SNAP program and the -- the  
20 low-income subsidy in Medicare Part D are the  
21 two other issues that are at stake in a pending  
22 First Circuit case where we have not sought to  
23 draw distinctions between SSI and those  
24 programs. We have repeated and preserved the  
25 arguments that we're making here.

1 JUSTICE BARRETT: Uh-huh.

2 MR. GANNON: But -- but we have not  
3 tried to otherwise distinguish them. And we  
4 don't understand the other side's arguments here  
5 to be drawing a line between, for instance,  
6 individual benefit programs or block grants that  
7 are jointly administered by the federal  
8 government and states and territories.

9 JUSTICE BARRETT: Thank you, Mr.  
10 Gannon.

11 CHIEF JUSTICE ROBERTS: Thank you,  
12 counsel.

13 Mr. Ferre.

14 ORAL ARGUMENT OF HERMANN FERRE  
15 ON BEHALF OF THE RESPONDENT

16 MR. FERRE: Mr. Chief Justice, and may  
17 it please the Court:

18 Not long ago, Americans with  
19 disabilities, especially the poor, were  
20 practically excluded from society. The SSI  
21 program helped change that, replacing an uneven  
22 patchwork of programs with a uniform standard of  
23 national support, guaranteeing poor and disabled  
24 Americans the autonomy to buy their own food and  
25 clothing, move more freely, and live with

1 dignity.

2           But that guarantee is not enjoyed by  
3 all Americans. Some are excluded because of  
4 where they live in the country. My client, Mr.  
5 Vaello-Madero, an American citizen, qualified  
6 for SSI after suffering a debilitating illness  
7 while living in New York. His benefits were  
8 then revoked solely because he moved to Puerto  
9 Rico.

10           We're here today because the  
11 government have sued him to recover payments he  
12 received while living there, even though he  
13 remained disabled and unable to work.

14           Congress's decision to exclude the  
15 poor and disabled in Puerto Rico is based on the  
16 false premise that they are outside the U.S.  
17 The Downes Court, the same Court that decided  
18 Plessy, deemed Puerto Rico foreign for domestic  
19 purposes because of the race and ancestry of its  
20 people.

21           And as was made clear in *Califano v.*  
22 *Gautier Torres*, that premise from Downes  
23 continues to provide an excuse for Congress to  
24 deny equal treatment. As such, the proper basis  
25 to examine the exclusion here is heightened

1 scrutiny.

2 But it is also simply irrational to  
3 treat Mr. Vaello-Madero differently just because  
4 he's now in Puerto Rico. That is what the lower  
5 courts unanimously held. For all relevant  
6 purposes, he is the same as similarly situated  
7 individuals in the states and the Northern  
8 Mariana Islands. Tax status is irrelevant.  
9 Those poor enough to qualify for SSI pay no  
10 federal tax, and they don't have to to qualify.

11 I welcome your questions.

12 JUSTICE THOMAS: Counsel, just to help  
13 clarify things for me, the -- we're talking a  
14 lot here about Puerto Rico, but if you -- in  
15 equal protection clay -- cases, we normally  
16 attach the classification to the individual.

17 So let's assume that I concede that  
18 Mr. Madero would be classified, let's say, in an  
19 ethnic group and, hence, you get an --  
20 heightened scrutiny. But can you transfer the  
21 treatment -- the concerns that you have about  
22 the treatment of Puerto Rico to a citizen of  
23 Puerto Rico or a resident of Puerto Rico for  
24 equal protection analysis purposes?

25 MR. FERRE: Yes, Your Honor. I -- I

1 believe that treating a citizen as though  
2 they're foreign because they happen to reside in  
3 Puerto Rico is the issue.

4 JUSTICE THOMAS: Okay. So let's  
5 assume that someone who is of Italian descent  
6 has lived in New York City all of his life and  
7 decides: You know, Puerto Rico's really a nice  
8 place. I think I'm going to move to Puerto  
9 Rico. And assume after that that the exact same  
10 thing happens to him as happened to Respondent  
11 here, but he's Italian.

12 How would you analyze that? Would it  
13 be any different?

14 MR. FERRE: No. The analysis would be  
15 the same. He's being --

16 JUSTICE THOMAS: So you are  
17 transferring the relationship with Puerto Rico  
18 to the individual who happens to reside in  
19 Puerto Rico?

20 MR. FERRE: Yes. That's correct, Your  
21 Honor.

22 JUSTICE THOMAS: Do you have any cases  
23 in which that has been the case, where you have  
24 equal protection cases involving women or Blacks  
25 or members of Hispanic groups, et cetera, Native

1 Americans, in other words, characteristics that  
2 attach to the individual? Do you have any where  
3 we have transferred the treatment of a state to  
4 an individual?

5 MR. FERRE: I think, Your Honor, that  
6 this is a circumstance in which, because of the  
7 characterization of territories -- these  
8 unincorporated territories, anyone who now moves  
9 to these unincorporated territories is deemed  
10 now to be in a foreign country.

11 And so that is the issue here. So I  
12 think that that does highlight that even if a  
13 non-Puerto Rican moves to Puerto Rico, they are  
14 now treated as being outside of their nation.

15 JUSTICE THOMAS: Thank you.

16 CHIEF JUSTICE ROBERTS: Counsel, is  
17 there any reason that your argument would not  
18 apply to every federal benefit program? In  
19 other words, Puerto -- Puerto Rico, for whatever  
20 reason is offered, is excluded from some federal  
21 benefit program. It doesn't matter, does it,  
22 that this is SSI?

23 MR. FERRE: Well, I -- we -- we do  
24 think that it matters that this program, which  
25 is a federal program administered by the federal

1 government and directed at individuals and --  
2 and has absolutely no component that takes into  
3 account local conditions or state -- whether the  
4 state can assist or cannot assist. In fact, if  
5 states decide that they want to add additional  
6 assistance, this program permits them to do  
7 that. This program is unique in that it is a  
8 federal program directed at individuals without  
9 needing a cooperation from --

10 CHIEF JUSTICE ROBERTS: Is --

11 MR. FERRE: -- local jurisdictions.

12 CHIEF JUSTICE ROBERTS: When you say  
13 "unique," does that mean -- I mean, I know what  
14 "unique" means, but do you really mean to say  
15 that there is no federal benefit program like  
16 this one?

17 MR. FERRE: Well, this one is unique  
18 in that it is -- it is exclusively federal.  
19 There are other programs, for example, the SNAP  
20 program that requires a partnership between the  
21 federal government and the local jurisdictions.

22 And so those programs might be seen  
23 differently because Congress then has the  
24 ability with respect to the territories to act  
25 on both sides of that partnership. That creates

1 another problem because, of course, when  
2 Congress is acting on behalf of the territories,  
3 there is no political fallout if it acts  
4 contrary to the interests of the people of those  
5 -- of the territories.

6 JUSTICE KAGAN: Mr. Ferre, to -- to --  
7 to go back to some questions that we asked Mr.  
8 Gannon about the effect of the Territories  
9 Clause here, it -- it -- it does seem as though  
10 that clause, which Mr. Gannon relied on as part  
11 of a larger package, but if we just take that  
12 piece of it, that that clause goes pretty far  
13 towards authorizing Congress to make rules about  
14 the territories, which inevitably means or may  
15 inevitably mean to make distinctions between the  
16 territories and other parts of the United  
17 States.

18 So why shouldn't we understand the  
19 clause essentially to resolve this matter?

20 MR. FERRE: Well, we believe the  
21 Territory Clause was intended for Congress to  
22 have the power to provide all rules and  
23 regulations respecting the territory, acting as  
24 a state would within the jurisdiction of a  
25 state, and we believe that that was intended to



1 be temporary while the territory was in  
2 pupilage.

3           The problem here is that the Insular  
4 Cases has created a circumstance in which that  
5 temporary period has become indefinite. So  
6 there is a concern that the Territory Clause  
7 could potentially be abused in the sense that  
8 Congress can step in for an indefinite period  
9 without actually guiding the territory towards  
10 statehood or, if it decides that a territory is  
11 to be disposed, to --

12           JUSTICE KAGAN: So do -- do I  
13 understand that -- that argument to be that the  
14 Territory Clause has a -- a sort of implicit  
15 expiration date attached to it?

16           MR. FERRE: Well, I think that the  
17 early Court decisions certainly viewed the  
18 Territory Clause as being temporary and that the  
19 purpose of the Territory Clause was for Congress  
20 to guide those territories towards statehood.

21           So -- and -- and the Court changed  
22 that view in the Insular Cases, for the first  
23 time deeming these territories, the territories  
24 acquired from Spain, to now be unincorporated  
25 and, therefore, not destined for statehood.

1 JUSTICE KAGAN: That's -- that's a big  
2 claim. Do we need to accept it to rule for you?

3 MR. FERRE: No, I don't believe so,  
4 but I think that it informs the analysis as to  
5 how the people of the territories have been  
6 excluded. They've been excluded because they  
7 are deemed to be outside the United States.

8 There's a contrast between, for  
9 example, how Hawaii and Alaska was treated when  
10 those states were territories. We can see that,  
11 for example, when the Social Security Act was  
12 first passed, and provisions that provided for  
13 assistance included individuals in Hawaii and  
14 Alaska but excluded the people of the  
15 unincorporated territories.

16 JUSTICE BARRETT: Mr. Ferre, do we  
17 need to overrule Torres and Rosario?

18 MR. FERRE: Well, I think that the --  
19 certainly, with respect to the applicable  
20 standard, I think that Harris seems to make a  
21 blanket statement that just the mere fact that  
22 the Territory Clause applies means that any  
23 congressional action with respect to Puerto Rico  
24 is entitled to rational basis review.

25 I don't think that follows.

1 JUSTICE BARRETT: So, yes, you can't  
2 win unless we overrule them or at least Harris  
3 versus Rosario?

4 MR. FERRE: There is -- there is a --  
5 yes, I -- I -- I believe that they should be  
6 over -- certainly, this case has received  
7 attention that the Gautier Torres and Harris  
8 cases just did not receive. So whatever the  
9 outcome --

10 JUSTICE BARRETT: So yes? Just yes or  
11 no. So --

12 MR. FERRE: Yes. Yes, Your Honor.

13 JUSTICE BARRETT: Okay. Thank you.

14 JUSTICE BREYER: Well, that's why I --  
15 I wondered. You heard I -- I was -- you lose if  
16 it is true, I think, that Congress could exclude  
17 Wyoming, Mississippi, any state where the amount  
18 of revenue that comes to the federal government  
19 from that state divided by what they'll have to  
20 pay out in SSI is smaller than most states  
21 because that's the situation that they say  
22 justifies Puerto Rico being treated differently.

23 I don't know about that one. I  
24 haven't -- I haven't really thought through  
25 that.

1           Second, if you don't lose on that, you  
2     lose on Rosario and -- and so forth, unless  
3     there's something different about this, all  
4     right?

5           At that stage, I thought there are two  
6     different things. One is your argument about  
7     the Insular Cases, and that's a big bite in this  
8     case, where it isn't fully argued and so forth,  
9     but the other ground was the Federal Relations  
10    Act, which was designed to create a special  
11    status for Puerto Rico.

12           What I have not done is think that  
13    through. And so the government correctly says:  
14    Well, no one's really argued that here. If you  
15    think about it, it doesn't create that big a  
16    difference from the standard in Rosario. Why  
17    should it? And they have a series of arguments.

18           So there we are. Now what do you say?

19           MR. FERRE: Your Honor, so earlier you  
20    indicated that the Law 600 expressly provides  
21    that federal laws are -- are to apply to Puerto  
22    Rico, unless not local -- not locally  
23    applicable.

24           And I think that's -- I think that's  
25    correct that there are no local conditions that

1 would warrant not extending SSI to Puerto Rico.  
2 But, in addition, local conditions was just not  
3 the line that was drawn with respect to the  
4 program.

5 So the program is entirely unrelated  
6 to local conditions. It's also entirely  
7 unrelated to the balance of payments between  
8 local jurisdictions and the federal government.  
9 So that is just not the line that Congress drew  
10 when it put in place the SSI program.

11 JUSTICE SOTOMAYOR: Counsel, our  
12 precedent in the Harris case had to do with a  
13 different program than this SSI. So you said to  
14 Justice Barrett that we have to overturn that  
15 precedent. But why?

16 MR. FERRE: Well, with re- --

17 JUSTICE SOTOMAYOR: You said you had  
18 two grounds, one that rational basis should not  
19 apply. There, we might have to overturn it.

20 But even if we kept rational basis,  
21 isn't your argument that this is just  
22 fundamentally different --

23 MR. FERRE: Yeah.

24 JUSTICE SOTOMAYOR: -- program, and so  
25 you have to view it under rational basis as a

1 different program?

2 MR. FERRE: Yes, Justice Sotomayor.  
3 The -- if -- if -- if we look at the program as  
4 a partnership, which is the type of program that  
5 was dealt with in Harris, as a partnership  
6 between the federal government and the local  
7 jurisdictions to be administered by local  
8 jurisdictions, well, then it is distinct.

9 It's -- it's not the same case that we  
10 have here, where this program is entirely run by  
11 the federal government and is directed at  
12 individuals, not directed at states and  
13 territories.

14 JUSTICE SOTOMAYOR: So, in that case,  
15 there's no need to overturn our precedent?

16 MR. FERRE: That's correct. Thank  
17 you.

18 JUSTICE ALITO: If a person who is a  
19 resident of one of the states brought an action  
20 claiming that that person's equal protection  
21 rights were violated because he or she was  
22 required to pay federal income tax and residents  
23 of Puerto Rico are not, what would be the  
24 standard of review? Would it be rational basis,  
25 or would it be something else?

1           MR. FERRE: Well, I think that under  
2           our heightened scrutiny analysis, if the  
3           territory is being treated differently  
4           specifically because it's an unincorporated  
5           territory and deemed foreign, I would -- I would  
6           say that that distinction should then be  
7           entitled to heightened scrutiny.

8           And it may very well pass a heightened  
9           scrutiny analysis because there might be a  
10          compelling reason for treating that territory  
11          differently. It might be because it is such a  
12          poor jurisdiction. It might be that Congress  
13          takes into account that the citizens of that  
14          jurisdiction are politically powerless.

15          JUSTICE ALITO: Does it matter for  
16          your argument that the geographic scope of the  
17          SSI program is defined the way it is?

18          Suppose it were defined this way:  
19          Suppose that a person would be eligible for  
20          benefits -- would -- would be ineligible for  
21          benefits if the person resided in a state or  
22          other part of the United States that was exempt  
23          from the federal income tax.

24          Would that be different?

25          MR. FERRE: Well, if -- if the -- I'm

1       sorry, if the program were specified?

2                   JUSTICE ALITO:   Right.

3                   MR. FERRE:    So --

4                   JUSTICE ALITO:   It says nothing about  
5       that it applies to only -- only to the states  
6       and not to unincorporated territories any place  
7       else within the United States.

8                   It simply says that it applies -- that  
9       benefits are available only to persons who  
10      reside in a state where they are required to pay  
11      federal income tax.

12                  MR. FERRE:    If that's the line that  
13      was drawn in the statute, then it might very  
14      well pass a rational basis review.  But this  
15      program is meant to assist poor individuals, who  
16      in all likelihood are not the ones that are  
17      paying the tax.

18                  JUSTICE KAVANAUGH:  Counsel, can I ask  
19      a bigger-picture question about the text of the  
20      Constitution and our role with respect to the  
21      structure?  Because I think that's the source of  
22      some of the concern here as well as the  
23      precedent.

24                  You -- you made compelling policy  
25      arguments, but there are parts of the



1 Constitution's structure that people would want  
2 to change. The two senators per -- per state  
3 discriminates against people in larger states.  
4 Many of -- and some of those larger states have  
5 more minority population.

6           The Electoral College gives you a  
7 slight, just a slight, but a slight advantage if  
8 you're in a smaller state. Delaware and Rhode  
9 Island, your vote for president counts a little  
10 more than your vote if you live in -- in New  
11 York or California, for example.

12           And Article IV is -- is similar. I  
13 mean, it would take a constitutional amendment  
14 to change the first two that I mentioned, and,  
15 actually, the Constitution purports to change --  
16 prohibit changes to the Senate, but we'll put  
17 that aside. But, here, it leaves it up to  
18 Congress. And Congress has the ability, the  
19 role to make changes over time, does not give  
20 that authority to this Court.

21           So that's a really big-picture concern  
22 that I think is reflected then in the precedent  
23 about what is our role with respect to the  
24 Territory Clause in terms of structures in the  
25 Constitution that may seem anachronistic to

1 some, and the other two I mentioned are things  
2 that also seem anachronistic to some. Just your  
3 big-picture thoughts on that.

4 MR. FERRE: I -- I think the big  
5 picture is that the Constitution promised to  
6 citizens a republican form of government, and  
7 the intention certainly from the cases that --  
8 the -- the Court's early cases, were that the  
9 problem of a non-republican form of government  
10 in the territories was a temporary one which  
11 would be resolved as these territories were  
12 populated and organized and then became states.

13 The -- that changed with the Insular  
14 Cases and has created a system in which  
15 populations now are held in an indefinite state  
16 of territorial status. So the Court essentially  
17 blessed the possibility of territories remaining  
18 territories in an indefinite state without full  
19 participation, without a full seat at the table,  
20 if you will.

21 JUSTICE KAVANAUGH: So it's kind of  
22 the -- the purpose of the clause, not reflected  
23 in the text necessarily, but the purpose of the  
24 clause was a time limit --

25 MR. FERRE: I think --

1 JUSTICE KAVANAUGH: -- of sorts?

2 MR. FERRE: -- I -- I would agree with  
3 you, Justice Kavanaugh, in that it's also in  
4 that section of the Constitution dealing with  
5 new states.

6 JUSTICE KAVANAUGH: Right. I agree  
7 with that. How do we then figure out that when  
8 -- when the time has run? I guess you would say  
9 it long since ran in your case.

10 MR. FERRE: Well, the --

11 JUSTICE KAVANAUGH: I understand that.

12 MR. FERRE: -- the -- certainly, it is  
13 up to Congress to -- to make states, but I think  
14 that, here, the -- the Court in the Insular  
15 Cases essentially stopped the clock so that  
16 Congress just did not have to consider the path  
17 of these unincorporated territories.

18 CHIEF JUSTICE ROBERTS: Have we ever  
19 held that the republican form of government  
20 provision is judicially enforceable?

21 MR. FERRE: I -- I believe so. I  
22 think it's a -- it's a -- it's a --

23 CHIEF JUSTICE ROBERTS: What -- what  
24 -- what case?

25 MR. FERRE: I -- I can't -- I can't

1 say.

2 JUSTICE BREYER: Rhode Island? Wasn't  
3 there something in Rhode Island or --

4 CHIEF JUSTICE ROBERTS: There was  
5 something. I'm not sure what it --

6 JUSTICE ALITO: Well, that one held  
7 that it wasn't.

8 MR. FERRE: Yes. I --

9 JUSTICE KAGAN: We'll go back and  
10 look.

11 (Laughter.)

12 CHIEF JUSTICE ROBERTS: Something  
13 happened in Rhode Island, Justice Breyer and I  
14 agree, but I'm not sure what the result of that  
15 case was I -- if -- if -- we'll -- look.

16 MR. FERRE: It -- it -- it -- it's --

17 CHIEF JUSTICE ROBERTS: It's another  
18 small state.

19 MR. FERRE: Right. But it -- it's  
20 certainly a basic premise of the Constitution.

21 CHIEF JUSTICE ROBERTS: Well, I -- I  
22 don't know that it follows from that that it's  
23 judicial -- judicially enforceable. I'm -- but  
24 we'll -- we'll check.

25 JUSTICE ALITO: Would you like us to

1 hold that all federal laws, whether they provide  
2 benefits or impose obligations or whether they  
3 apply to citizens or to a governmental unit,  
4 must apply equally to residents of Puerto Rico  
5 and residents of the states across the board,  
6 equal treatment in every respect?

7 MR. FERRE: I think -- I think that  
8 there is a -- certainly a due process right to  
9 equal treatment, equal protection. So, if we're  
10 looking at how individuals are being treated,  
11 yes, then I would say that -- that it -- it  
12 would apply.

13 JUSTICE KAGAN: Can -- can I -- so one  
14 way to frame your argument -- and -- and tell me  
15 if I'm mischaracterizing it in any way -- is  
16 because of how you think the Territory Clause  
17 should be understood and the -- and -- and --  
18 and -- and that it -- it -- that we should view  
19 it as limited, that, essentially, the question  
20 before us is the exact same as if Congress  
21 excluded Mississippi from SSI. Is -- is that  
22 correct?

23 MR. FERRE: Yes, Justice Kagan. Yes.

24 JUSTICE KAGAN: And -- and -- and then  
25 we would go through whatever analysis we would

1 go through with respect to deciding what the  
2 proper standard of review was and how it  
3 applied, but, essentially, your claim is that  
4 these are -- are two equivalent cases?

5 MR. FERRE: That's correct.

6 JUSTICE KAGAN: And -- and --

7 MR. FERRE: I think that the source of  
8 power just doesn't -- shouldn't figure in. I  
9 think that, here, we're looking at the equal  
10 protection component of the Due Process Clause.

11 JUSTICE KAGAN: And -- and tell me  
12 once more briefly why you think that's true, you  
13 know, your best statement as to why the  
14 exclusion of Puerto Rico should be treated the  
15 same way as the exclusion -- hypothetical  
16 exclusion of Mississippi.

17 MR. FERRE: Because the source of  
18 power can't override the rights enshrined in the  
19 Constitution. So congressional power under the  
20 Territory Clause can't somehow override these  
21 protections in the Constitution.

22 JUSTICE BARRETT: Mr. Ferre, can I  
23 follow up on Justice Kagan's questions and  
24 Justice Alito's questions? So you're  
25 maintaining that there should be equal treatment

1 across the board, whether you live in  
2 Mississippi or Puerto Rico. And Justice Alito  
3 asked you if you maintain that benefits,  
4 burdens, et cetera, should be the same.

5 So what are the implications of that  
6 position for, you know, policies like Puerto  
7 Ricans not paying federal income tax? If we  
8 accept your position, would that mean that the  
9 burdens that Mississippians bear, et cetera,  
10 also have to apply to Puerto Ricans?

11 MR. FERRE: I think that the analysis  
12 would be the same; in other words, the Court  
13 would look at that exclusion with heightened  
14 scrutiny and determine whether there's a  
15 compelling interest for treating that  
16 jurisdiction differently, in the same way that  
17 Congress could decide to -- to treat certain  
18 regions of the U.S. differently for tax purposes  
19 in order to encourage development, for -- for  
20 instance.

21 JUSTICE BREYER: But you see that's  
22 exactly why -- Justice Barrett's question was  
23 exactly why what came into my mind are these  
24 words "not locally inapplicable," which is  
25 different. But I don't know what to do them --

1 you see, I don't know what to do with them once  
2 they're in my head.

3 I mean, it's fairly easy to think of  
4 things you might say. You might say Puerto Rico  
5 was designed in Law 600 to maintain a kind of  
6 independent status but not totally. No -- and,  
7 therefore, this isn't applicable locally given  
8 that purpose. Or you might say that purpose  
9 wasn't the overarching purpose in this instance.

10 So, while I often like to look at  
11 purposes, I'm at sea in this one, and I -- and I  
12 don't know how you do this thing comparing  
13 Mississippi and Puerto Rico and when it is and  
14 when it isn't.

15 MR. FERRE: Well, I think Law 600 was  
16 intended to give a measure of autonomy to Puerto  
17 Rico, akin to the states, without actually  
18 extending the full participation available to  
19 states. So, with respect to local self-rule, if  
20 you will, there was that autonomy.

21 Now, obviously, Congress has seen fit  
22 to take some of that autonomy back, and it did  
23 so with the PROMESA Act. So this illustrates  
24 that Congress certainly had or believes it  
25 continues to have that power to provide --



1 delegate its ability to provide needful rules  
2 and regulations respecting Puerto Rico, and it  
3 can also take some of that back.

4 JUSTICE ALITO: I don't know how often  
5 Congress enacts a statute that explicitly  
6 distinguishes residents of one state from  
7 another state, but it certainly does enact laws  
8 that have the effect of strongly favoring  
9 residents of some states and strongly  
10 disfavoring residents of -- of other states.

11 The one that's been controversial in  
12 recent years is the deductibility of state and  
13 local taxes. That strongly disfavored my home  
14 state of New Jersey, strongly -- strongly  
15 favored it when they were deductible; strongly  
16 disfavored the President's home -- home state of  
17 Delaware, where there's no income tax.

18 So what is the difference between that  
19 and -- and this?

20 MR. FERRE: That -- that -- that  
21 change in the SALT deductions was enacted across  
22 the board. So the fact that local conditions  
23 then -- you know, the -- the result of the  
24 uniform application across the board created  
25 differences in local conditions doesn't mean

1 that that statute didn't provide equal  
2 treatment.

3 CHIEF JUSTICE ROBERTS: Thank you,  
4 counsel. I feel a little more comfortable now  
5 saying that the guarantee clause, which  
6 guarantees the republican form of government,  
7 we've said it presents a political question.

8 And I wonder if your -- the extent to  
9 which you relied on it in one of your prior  
10 answers, to -- to what extent is it -- is it key  
11 to your argument?

12 MR. FERRE: I -- I don't -- I don't  
13 know that it's key to the argument, but I think  
14 that the Court should take and the Court has in  
15 the past certain -- certainly taken into account  
16 the fact of a -- an individual or a group's  
17 political powerlessness.

18 So -- so to the extent that the group  
19 that has been targeted is politically powerless,  
20 I think, has informed the Court in the past and  
21 -- and should do so here.

22 CHIEF JUSTICE ROBERTS: Justice  
23 Thomas?

24 JUSTICE THOMAS: So, if I move from  
25 Virginia to Puerto Rico, how do I -- and -- and

1 -- and lose a certain benefit, how do I -- how  
2 could I claim powerlessness?

3 I understand your argument if you have  
4 a life-long resident of Puerto Rico, but you're  
5 saying your arguments also apply to anyone who  
6 chooses to locate or relocate to Puerto Rico,  
7 and that's the part I don't understand,  
8 particularly in the context of your power --  
9 powerlessness argument.

10 MR. FERRE: When -- when the resident  
11 from Virginia decides to move to Puerto Rico,  
12 they thereby lose the ability to participate in  
13 the -- the -- the -- the federal elections that  
14 would -- would result in a representative in  
15 Congress, representative in -- in the Senate,  
16 and also the ability to vote for president and  
17 vice president, all of which then means that  
18 that individual has no representative protecting  
19 his or her interests while in Puerto Rico.

20 CHIEF JUSTICE ROBERTS: Justice  
21 Breyer?

22 Justice Sotomayor?

23 Justice Kagan?

24 Justice Gorsuch?

25 JUSTICE KAVANAUGH: Just one quick

1 question on the waiver. That's still possible,  
2 correct?

3 MR. FERRE: The government has pursued  
4 my client and has never indicated that it is  
5 inclined to grant a waiver. But, certainly, if  
6 -- if we were in an administrative proceeding,  
7 that is a possibility.

8 The -- the -- the government early on  
9 sought to withdraw with prejudice and was not  
10 even clear as to whether potential criminal  
11 charges were still a possibility. So there was  
12 no indication that the government was inclined  
13 to consider waiver.

14 JUSTICE KAVANAUGH: Might you still  
15 apply for the waiver if you don't prevail in  
16 this case?

17 MR. FERRE: I -- I -- I would hope so,  
18 yes.

19 JUSTICE KAVANAUGH: Thank you.

20 CHIEF JUSTICE ROBERTS: Justice  
21 Barrett? No.

22 Thank you, counsel.

23 Rebuttal, Mr. Gannon?

24

25

1 REBUTTAL ARGUMENT OF CURTIS E. GANNON

2 ON BEHALF OF THE PETITIONER

3 MR. GANNON: Thank you, Mr. Chief  
4 Justice. If I could just make three points:

5 First, the territories clause -- the  
6 Territory Clause does not have an except -- an  
7 -- an expiration date, and, if it did, the  
8 Court's analysis in cases like *Aurelius* would  
9 have been completely different. But the fact  
10 that Puerto Rico and other current territories  
11 have uncertain future status vis-à-vis the  
12 United States is one thing that we think  
13 promotes the idea that Congress must necessarily  
14 take into account that, among other things, when  
15 it is deciding whether to deal differently with  
16 territories.

17 So Puerto Rico may be on its way to  
18 statehood. It may be on its way to  
19 independence. It may be on its way to some  
20 other status.

21 But those are -- that is relevant to  
22 Congress being able to continue to calibrate the  
23 degree of relationship between the federal and  
24 territorial polities and economies and FISCs.

25 And so that's another reason why being

1 able to promote local autonomy by having a  
2 smaller federal tax bite and, therefore, maybe a  
3 faller -- a smaller share in federal benefits is  
4 something that is appropriate for Congress to do  
5 in this context.

6 Second, my friend on the other side  
7 has still not, I think, given any reason why  
8 there's a special justification for overruling  
9 Torres and Rosario. We do think that those  
10 would be controlling here.

11 Torres was about this particular  
12 benefit, and Rosario, I think, the fact that it  
13 involved a block grant program doesn't  
14 meaningfully distinguish it and it didn't  
15 suggest, since it was drawing from Torres, which  
16 was not a block grant program, but actually  
17 about this program, SSI, an individual benefit  
18 program, the Court didn't seem to think that  
19 that was a -- a -- a reason to draw a  
20 distinction, and -- and, as I mentioned before,  
21 neither did Justice Marshall's dissent.

22 And so, finally, my friend has  
23 forcefully given reasons why SSI should be  
24 extended to residents of Puerto Rico because he  
25 thinks that would better promote one of the main

1 purposes of the program. And we don't have a  
2 quarrel about that.

3 The only question is whether it could  
4 be rational for Congress to have taken into  
5 account other considerations and decided in this  
6 instance that there was a basis for drawing a  
7 different line with respect to Puerto Rico.

8 And unless and until Congress alters  
9 Puerto Rico's distinct tax treatment, which  
10 Respondent and his amici have pointedly not said  
11 that it is required to do, we think there is a  
12 plausible, rational, and non-invidious basis for  
13 Puerto Rico's residents to be excluded from SSI.

14 We urge the Court to reverse the  
15 judgment of the court of appeals.

16 CHIEF JUSTICE ROBERTS: Thank you,  
17 counsel, counsel. The case is submitted.

18 (Whereupon, at 11:14 a.m., the case  
19 was submitted.)

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## Official

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