No. 18-1389

IN THE

# Supreme Court of the United States

THE FINANCIAL OVERSIGHT AND MANAGEMENT BOARD FOR PUERTO RICO, AS REPRESENTATIVE FOR THE EMPLOYEES RETIREMENT SYSTEM OF THE GOVERNMENT OF THE COMMONWEALTH OF PUERTO RICO,

*Petitioner,*

*v.*

ANDALUSIAN GLOBAL DESIGNATED ACTIVITY COMPANY, *et al.*,

*Respondents.*

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

## REPLY BRIEF


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## PRELIMINARY STATEMENT

The court below committed blatant errors of law that threaten the ability of creditors across the nation to engage in secured lending. Review is warranted because the Question Presented involves an issue of national significance. Specifically, review or summary reversal is warranted to require compliance with the UCC's objective standard, which the court below abandoned in favor of a misguided notion that in certain "unique" circumstances an incorrect name can be sufficient for UCC filing purposes even if it is not "the name . . . stated to be" the debtor's name in the public organic record. The lower court sought to justify this result on the basis that purportedly "reasonable" creditors would subjectively conclude that the incorrect name was sufficient. The lower court's holding flies directly in the face of the text of the UCC's Article 9 and undermines the UCC's objective rules critical to the operation of the nationwide secured lending system. As a result of the decision below, no putative lender in the First Circuit or in the rest of the United States, being concerned that other courts will adopt the First Circuit's patently wrong reasoning, will know in advance when a court will decide an already-filed financing statement containing an incorrect name is sufficient for perfection. The putative lender will be at a loss as to which names to search under for other UCC filings.

Seeking to avoid this Court's review, Respondents Andalusian Global Designated Activity Company ("Andalusian") and Puerto Rico AAA Portfolio Bond Fund, Inc. ("AAA," and collectively with Andalusian,

"Respondents") mischaracterize the issue as one of fact. But the underlying issue is the legal question whether a court may disregard the requirement of UCC § 9-503(a)(1) that a financing statement is sufficient "only" if it contains the registered organization debtor's name "stated to be" its name in its public organic record.[1] That question will arise every time the lender gets it wrong. Applying the holding below, in the vast majority of secured transactions, every time a putative lender formulates a UCC search, the lender will be unable to determine with certainty whether there are "unique" circumstances that allow the use of a name that is not the "stated" name, and the lender will have to guess at additional names that should be searched.

Respondents fare no better with their attempt to downplay the importance of this issue. Contrary to Respondents' assertions, the decision below does not rest on a statute unique to Puerto Rico but rather concerns a provision with nationwide force. Article 9—which has been enacted in substantially similar form in all states and territories—plays a critical role in secured lending transactions across the nation by prescribing objective perfection rules and thus ensuring certainty and predictability. The decision below abandoned those objective rules in favor of a subjective test specifically eliminated from Article 9 because it introduced uncertainty into searching the UCC filing system. The decision below undermines

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[1] "Registered organization" includes every corporation, LLC, limited partnership, and government entity (at all levels), anywhere in the United States. UCC § 9-102(a)(71), P.R. Laws Ann. tit. 19, § 2212(a)(71).

the ability of potential lenders to rely with certainty on search results from the UCC database. The Court's review is needed to ensure a single, nationwide standard governing secured transactions, to restore the certainty on which the UCC is premised, and to eliminate the subjectivity inherent in the approach followed below.

## ARGUMENT

### I. THE COURT BELOW MADE A FUNDAMENTAL ERROR OF LAW.

Respondents oppose certiorari because they contend the decision below turns on a "unique confluence of circumstances" that is "unlikely to arise again." Andalusian Opp'n 10 (some capitalization omitted); *see* AAA Opp'n 2, 18, 28–29. That is false. At its core, the holding below turns on a fundamental error of law that a court may deviate from the statute when it determines that lenders might deviate too. The court below held a registered organization debtor's name for UCC purposes can be something other than the name "stated to be" its name in its public organic record. That legal holding applies to all registered organizations and is not limited to the facts here.

As explained in the Petition, the nationwide secured lending system depends on lenders following Article 9's simple, objective rules when filing their financing statements. Pet. 12–14. One of those rules is that when the debtor is a registered organization, the financing statement must provide "*only* . . . the name that is stated to be the registered organization's

name" in its public organic record. UCC § 9-503(a)(1), P.R. Laws Ann. tit. 19, § 2323(a)(1) (emphasis added). Here, there is only one name "stated to be" the System's name in its public organic record (the Enabling Act), and that name is RSE. P.R. Laws Ann tit. 3, § 761 ("A retirement and benefit system *to be designated* the 'Retirement System for Employees of the Government of the Commonwealth of Puerto Rico,' … is hereby created." (emphasis added)).[2] The Enabling Act emphasized that designation by putting "RSE" in quotation marks and in the first section of the statute. *Id.*[3]

The lower court's legal error was in disregarding the requirement of UCC § 9-503(a)(1) that a financing statement is sufficient "only" if it contains the registered organization debtor's name "stated to be" its name in its public organic record and holding the System had a name in addition to the name "designated" in the Enabling Act. According to the court below, "ERS" was an equally "valid name" for the System for Article 9 purposes because the ERS name appears elsewhere in the official translation of the Enabling Act—even though it was not "the name . . . stated to be" the System's name. App. 45a–52a. The lower court effectively read the phrase "stated to

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[2] AAA accuses Petitioner of cherry-picking and unduly focusing on § 761's designation clause, AAA Opp'n 25, but it is undisputed that no other section of the Enabling Act designates the System's name. The exact point of the Article 9 rule is that a putative lender would need to focus on only the "stated" name.

[3] Respondents do not contend ERS was "stated to be" the debtor's name.

be the registered organization's name" out of UCC § 9-503(a)(1) and held a filer may provide *any* name contained somewhere in the organic statute (even in a superseded version). That was a fundamental misapplication of the UCC, not an erroneous factual finding.

The lower court compounded that legal error with a second legal error—holding that a "reasonable creditor" would have considered ERS a valid name under Article 9. App. 48a–52a. As explained by amicus Consumer Finance Association ("CFA"), the national secured lending system works only if there are objective rules for determining the names of debtors. CFA Br. 8–10. That is why the UCC deliberately jettisoned the "reasonable creditor" test in favor of objective rules for determining a debtor's name. Pet. 18–19. The court below's reliance on a "reasonable creditor" test is anathema to the UCC's objective rules because a potential lender will never know with certainty what names to search for in the Article 9 filing system. The potential lender could never rely on its search results when making lending decisions. The lower court's decision to resurrect the "reasonable creditor" test was an error of law, not an erroneous finding of fact.[4]

[4] AAA argues that the court below did not rely on the reasonable-creditor test "because [it] did not dictate what a reasonable creditor *should* do . . . but rather assessed what a realistic creditor *would* do." AAA Opp'n 24. That misses the point. The court *approved* the use of a name otherwise insufficient for filing purposes based on speculation about how "a realistic creditor"

For these reasons, Respondents' contention that the decision below applies only in an exceedingly narrow factual context is incorrect. While the court below took great pains to try to cabin its holding to the facts of the case, *e.g.*, App. 17a, in reality, the court made two erroneous legal rulings that apply broadly to any dispute over perfection involving a registered organization debtor's name. Both holdings disregard the plain text of UCC § 9-503(a) and undermine the objective rules critical to the operation of the nationwide secured lending system.

It is irrelevant that the System's public organic record is an English translation of a statute. *See* Andalusian Opp'n 10–12; AAA Opp'n 18; 20–22. The court below's holding that a debtor's name can be something other than the name "stated to be" its name in its public organic document would apply no matter what form the public organic record takes—whether it is an English translation of a Puerto Rico statute, articles of incorporation, an LLC's certificate of formation, a statute enacted in English, or any other type of public organic record.

Andalusian further errs when it contends the "precise issue here" is application of Article 9 to a government body. Andalusian Opp'n 19 n.5. Nothing in the logic of the decision below turned on that particular detail. Although the case below happened to involve a governmental debtor, the lower court's ruling that a debtor's name can be something other

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would search the filing system—thereby resurrecting the very essence of the test the UCC abandoned.

than the name "stated to be" its name in its public organic record applies broadly to every kind of registered organization debtor. The decision has serious implications throughout the commercial lending industry.

## II. THE DECISION BELOW WILL HAVE FAR-REACHING CONSEQUENCES.

Respondents try to minimize the impact of the decision below by arguing it interpreted "various provisions of Puerto Rico law, some of which are unique to Puerto Rico and some of which are similar to the laws of other states." Andalusian Opp'n 16; *see* AAA Opp'n 28–29. The provision that was misapplied below—UCC § 9-503(a)—has been adopted into state codes throughout the United States, including Puerto Rico. Pet. 12. The decision below does not involve a statute unique to Puerto Rico but rather concerns a provision having nationwide force.

The decision below binds all First Circuit litigations, including bankruptcies. Perfection issues often arise within bankruptcy cases and have arisen throughout the Title III cases filed in Puerto Rico—which together constitute the largest municipal bankruptcy in American history. Courts across the nation frequently look to federal court decisions when interpreting the UCC. Pet. 24 (collecting cases). Putative secured parties, as a matter of prudence, will have no choice but to assume courts in their jurisdictions may apply a similar, erroneous rule. The decision below is not a one-off. As explained by amicus curiae CFA—which represents the largest commercial lenders in the United States—the decision below

poses an existential threat to the secured lending system nationwide.

Respondents acknowledge this Court can and does grant certiorari to review strictly questions of state law. Andalusian Opp'n 18; AAA Opp'n 19 n.8. They argue that the Court does so only where "the alternative is allowing blatant federal-court nullification of state law," AAA Opp'n 19 n.8 (citation omitted), or when "the interpretation of the state law at issue involves some *interaction* of federal and state law," Andalusian Opp'n 18. Even if that were accurate, the Petition satisfies those standards. First, by abandoning the UCC's objective rules in favor of a subjective test, the decision below effectively nullifies Puerto Rico's own, uniform version of Article 9, not to mention the nationwide standard necessary for the secured lending system to function. Second, the UCC perfection question is intertwined with questions of federal law—most notably, the question whether as part of the System's Title III restructuring under the federal PROMESA statute, the Oversight Board can avoid Respondents' security interest pursuant to 11 U.S.C. § 544, a federal provision incorporated into the Title III case by 48 U.S.C. § 2161(a). App. 29a, 86a–93a. The Oversight Board's ability to avoid Respondents' security interest under federal law turns on whether that security interest was perfected, which in turn depends on the Question Presented.

Respondents' attempt to distinguish *Flagg Brothers, Inc. v. Brooks*, 436 U.S. 149 (1978), misses the mark. *See* Andalusian Opp'n 18–19; AAA Opp'n 18. The issue in *Flagg Brothers* was whether a warehouse selling an evicted party's goods pursuant

to UCC § 7-210 acted under color of state law for purposes of 42 U.S.C. § 1983. 436 U.S. at 153–54. *Flagg Brothers* turned entirely on the Court's interpretation of the UCC provision. The Petition similarly presents an important question concerning the meaning and application of the UCC, and, as in *Flagg Brothers*, certiorari is warranted.

Andalusian also puts too much weight on the fact that a decision by this Court would lack binding force because the Puerto Rico Supreme Court generally has the final say in interpreting a Puerto Rico statute. Certiorari is proper to overturn the decision below because the decision is blatantly wrong and has the potential to displace the objective, nationwide standards necessary for the secured lending system to function. Pet. 12–24. A decision by this Court overturning the decision below would reinforce the importance of applying Article 9's objective rules without exception and would prevent other courts from relying on the decision below to craft fact-specific exceptions to Article 9's strict filing rules.[5]

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[5] For example, *Barnhill v. Johnson*, 503 U.S. 393 (1992), discussed in the Petition at 6, 12, which was largely based on the Court's interpretation of UCC Article 3, has been followed by at least four state courts, and no state court has deviated from it. *See Burns v. Neiman Marcus Grp., Inc.*, 173 Cal. App. 4th 479 (2009); *Ex parte Ellis*, 279 S.W.3d 1 (Tex. App. 2008); *Levan v. Indep. Mall*, No. CIV.A. 06A-05-006MMJ, 2007 WL 914905 (Del. Super. Ct. Mar. 28, 2007); *Messing v. Bank of Am., N.A.*, 373 Md. 672 (2003).

## III. REVERSAL BY THIS COURT WILL AFFECT THE OUTCOME OF THE CASE.

Finally, Andalusian is wrong when it argues this Court cannot affect the outcome of the underlying case regardless of whether it grants certiorari. Andalusian Opp'n 26–28.

Andalusian first contends the System is bound by its "judicial admission" that its name is ERS because it identified itself as ERS in the Complaint and in the Title III petition. Andalusian Opp'n 26–27. However, even if the System admitted that it goes by ERS when conducting business or litigation, the System has never admitted that its name is ERS *for Article 9 purposes*, which is the only relevant question in the case below. A registered organization's name for Article 9 purposes is often different from the name it uses to conduct business, as the UCC recognizes. For example, a financing statement containing only a trade name is insufficient under Article 9. UCC § 9-503(c), P.R. Laws Ann. tit. 19, § 2323(a)(1). Even the court below did not accept Andalusian's "admission" argument, which would have provided a much simpler basis for its holding had it been persuasive.

Andalusian next contends the System acquired substantially all the collateral before the Enabling Act designated the System as RSE in 2013. Andalusian Opp'n 27–28. Andalusian thus argues that even if the post-2013 financing statements used the wrong name for the System, the original financing statements filed prior to 2013 used the then-correct name and thus

perfected Respondents' security interest in the majority of the System's collateral. *Id.*[6]

Andalusian's argument is built on the flawed premise that Respondents' security interest was perfected prior to 2013. As both the district court and the court below held, the financing statements filed before 2013 failed to describe the collateral as required by the UCC and thus did not perfect Respondents' security interest. App. 30a–36a, 74a–80a. Consequently, if this Court grants certiorari and reverses the decision below, Respondents will not have a perfected security interest in *any* of the System's collateral and the Oversight Board will avoid their security interest entirely.[7]

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[6] The court below observed seven months passed between the statute's effective date and publication of the English translation changing the name to RSE to support the supposed "uniqueness" of the circumstances. App. 24a. However, the UCC requires secured parties to check public records and to amend their UCC filings on a routine basis. The definition of "public organic record" anticipates a time lag and provides the new name does not become effective until the new name is "available to the public for inspection." UCC § 9-102(a)(68), P.R. Laws Ann. tit. 19, § 2212(a)(68). Secured parties must constantly check for their debtors' name changes and amend their financing statements with the new names pursuant to UCC § 9-509.

[7] The Petition does not assert there is a circuit split on the Question Presented. Thus, the discussion on pages 20–22 of Andalusian's opposition and pages 13–16 of AAA's opposition is irrelevant. AAA also argues review is unwarranted because the decision below merely corrected the district court's "departures . . . which had allowed [Petitioners] to raise the name-change argument for the first time in [their] motion for summary judgment." AAA Opp'n 17. The decision below said nothing about correcting the district court's alleged "departures"; rather,

## CONCLUSION

For the foregoing reasons and those set forth in the Petition, certiorari should be granted. In view of the manifest and blatant errors in the decision below, the Court should consider summary reversal.

July 16, 2019

Respectfully submitted,

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the holding below was based entirely on the First Circuit's fundamental error of law in holding a registered organization debtor's name for UCC purposes can be something other than the name "stated to be" its name in its public organic record.

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