

No. 18-331

IN THE
Supreme Court of the United States

RAFAEL PABÓN ORTEGA,

Petitioner,

v.

ISABEL LLOMPART-ZENO, *et al.*,
Respondents.

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

**BRIEF OF LATINOJUSTICE PRLDEF AND
LAMBDA LEGAL DEFENSE AND EDUCATION
FUND, INC. AS *AMICI CURIAE* IN SUPPORT
OF PETITIONER**

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QUESTION PRESENTED

Whether the automatic stay provisions of the Bankruptcy Code, 11 U.S.C. §§ 362, 922, as incorporated into PROMESA are unconstitutional as applied by the First Circuit to suspend—during the minimum 4 year life of the Commonwealth’s PROMESA’s petition—the prosecution of Petitioner’s First Amendment civil rights action under the Civil Rights Act of 1871, 42 U.S.C. § 1983; particularly where the § 1983 action: (a) does not pursue economic damages against the Commonwealth; and (b) solely seeks damages against the state official in her personal capacity and prospective equitable relief against the state official in his official capacity, consistent with *Ex parte Young* and its progeny.

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INTEREST OF *AMICI CURIAE*¹

This case presents an issue of considerable national importance, and proposed *amici curiae* LatinoJustice PRLDEF (“LatinoJustice”) and Lambda Legal Defense and Education Fund, Inc. (“Lambda Legal”) are particularly well-suited to provide additional insight into the broad implications of the decision below for the civil and constitutional rights of the United States citizens residing in Puerto Rico. *Amici Curiae* Latino Justice and Lambda Legal are two leading national, public interest legal organizations committed to advancing and protecting the civil and constitutional rights of all persons, including those from the Commonwealth of Puerto Rico. Both share a strong interest in opposing all forms of discrimination and ensuring that the rights protected by the United States Constitution and federal civil rights laws are enforced and applied fairly.

Founded in 1972 as the Puerto Rican Legal Defense and Education Fund, **LatinoJustice** works to create a more just society by using and challenging the rule of law to secure transformative, equitable and accessible justice, by empowering our community and by fostering leadership through advocacy and education. Its continuing mission is to protect the civil rights of all Latinos and to promote justice for the pan-

¹ Pursuant to Rule 37.2 counsel of record received timely notice of the intent to file this brief. Written consent of all parties has been provided. Pursuant to Rule 37.6, no counsel for a party authored this brief in whole or in part. No person or entity, other than *amici*, their members, or their counsel made a monetary contribution for the preparation or submission of this brief.

Latino community across the country. During its 45 year history, LatinoJustice has advocated for and defended the constitutional rights and the equal protection of all Latinos under the law, and has litigated numerous cases challenging multiple forms of discrimination including government misconduct, fair housing, employment, education, language rights, redistricting and voting rights. LatinoJustice has litigated and advocated on behalf of the civil and human rights of Puerto Ricans in Puerto Rico and the diaspora for 45 years.

Founded in 1973, **Lambda Legal** is the nation's oldest and largest nonprofit legal organization committed to achieving full recognition of the civil rights of lesbian, gay, bisexual, and transgender ("LGBT") people and everyone living with HIV through impact litigation, education, and public policy work. Lambda Legal has served as counsel of record or *amicus curiae* in some of the most important cases regarding the rights of LGBT people and people living with HIV, *see, e.g., Obergefell v. Hodges*, 135 S. Ct. 2584 (2015); *United States v. Windsor*, 570 U.S. 744 (2013); *Lawrence v. Texas*, 539 U.S. 558 (2003); *Bragdon v. Abbott*, 524 U.S. 624 (1998); *Romer v. Evans*, 517 U.S. 620 (1996), as well as served as counsel of record in cases seeking to vindicate the rights of LGBT Puerto Ricans. *See, e.g., Arroyo Gonzalez v. Rossello Nevares*, 305 F. Supp. 3d 327 (D.P.R. 2018); *In re Conde Vidal*, 818 F.3d 765 (1st Cir. 2016); *Ramos Padro v. Puerto Rico*, 100 F. Supp. 2d 99 (D.P.R. 2000), *aff'd as modified sub nom. Gay Officers Action League v. Puerto Rico*, 247 F.3d 288 (1st Cir. 2001). Lambda Legal actively litigates against state and other governmental entities in order to protect LGBT and HIV-affected individuals in all spheres of

life, including education, employment, law enforcement, family recognition, and respect for an individual's identity and dignity. *See, e.g., Obergefell*, 135 S. Ct. 2584 (marriage and family recognition); *Hively v. Ivy Tech Cnty. Coll.*, 853 F.3d 339 (7th Cir. 2017) (en banc) (employment); *Rosati v. Igbinoso*, 791 F.3d 1037 (9th Cir. 2015) (prisoners' rights); *Adams v. Sch. Bd. of St. Johns Cty., Fla.*, 318 F. Supp. 3d 1293 (M.D. Fla. 2018) (education); *Arroyo Gonzalez*, 305 F. Supp. 3d 327 (identity recognition). Based on this experience, Lambda Legal has a strong interest in defending litigants' access to Article III courts, an essential venue for vindicating federally-guaranteed civil and constitutional rights, particularly for people of color, the financially-insecure, and other socially and economically marginalized groups.

Thus, the issue before the Court is of acute concern to LatinoJustice, Lambda Legal, and the communities they represent, who stand to be directly impacted by the Court's ruling.

INTRODUCTION AND SUMMARY OF ARGUMENT

Following nearly twenty years of economic recession, the Commonwealth of Puerto Rico's bankruptcy in 2016, and the heretofore unimaginable devastation brought by Hurricanes Irma and María in 2017, the people of Puerto Rico are experiencing an unprecedented socioeconomic crisis. Yet, on top of such extraordinary circumstances, the people of Puerto Rico now face an additional crisis of constitutional magnitude, for they now confront the prospect that deprivations of their civil and constitutional rights by the Commonwealth will go unaddressed for years on end and be allowed to

continue. Should automatic stays, pursuant to PROMESA, 48 U.S.C. §§ 2101-2241, become the rule in all civil and constitutional rights cases (regardless of the relief sought), the people of Puerto Rico would be left defenseless, with no recourse for the infringement of their civil and constitutional rights by the Commonwealth. Surely, the establishment of a “Constitution-free” zone in Puerto Rico cannot be what Congress intended when it enacted PROMESA, nor what the Constitution tolerates.

It has long been recognized that “there cannot exist under the American flag any governmental authority untrammelled by the requirements of due process of law as guaranteed by the Constitution of the United States.” *Mora v. Mejias*, 206 F.2d 377, 382 (1st Cir. 1953). Automatically staying all cases seeking to vindicate Puerto Ricans’ civil and constitutional rights – regardless of whether they seek damages or equitable relief – would, in practice, render Puerto Rico a lawless jurisdiction, virtually prohibiting civil rights cases and perpetuating the violation of civil and constitutional rights with no real recourse. This untenable scenario cannot be squared with the dictates of the Constitution.

The Court should grant the petition for a writ of *certiorari* in this case.

ARGUMENT

Amici appreciate the tremendous difficulties posed by the Commonwealth’s unprecedented fiscal situation, but the adjudication of that bankruptcy cannot come at the expense of a person’s federally-guaranteed civil and constitutional rights or the congressionally-prescribed remedies for their unlawful deprivation. “The very essence of civil liberty certainly

consists in the right of every individual to claim the protection of the laws, whenever he receives an injury.” *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803). *Amici* respectfully submit that the application of the automatic stay provision to actions involving deprivations of civil rights — particularly, those involving constitutional rights — by the Commonwealth that do not seek economic damages, violates both the intent and substance of PROMESA, and constitutional guarantees of an effective remedy for every right. The Commonwealth’s failure to safeguard the civil and constitutional rights of its residents, even as a debtor state, threatens to chill the expression and exercise of these rights, including, as is the case here, the fundamental right to free speech, the violation of which is often irreparable. Ensuring robust avenues to enforce these rights is particularly critical in Puerto Rico where their protection has been so woefully inadequate.

I. This case presents a question of national importance because a government’s bankruptcy proceeding cannot bar claims for vindication of constitutional rights.

Citizens of the Commonwealth of Puerto Rico, by virtue of their status as United States citizens, possess fundamental rights guaranteed by the United States Constitution, *see Boumediene v. Bush*, 553 U.S. 723, 758 (2008) (citing *Balzac v. Porto Rico*, 258 U.S. 298, 312 (1922)); *Examining Bd. of Eng’rs, Architects & Surveyors v. Flores de Otero*, 426 U.S. 572, 600 (1976); *In re Conde Vidal*, 818 F.3d 765, 766 (1st Cir. 2016), as well as rights guaranteed by federal civil rights laws, *see, e.g.*, 42 U.S.C. § 1981 (“All persons within the

jurisdiction of the United States shall have the same right in every State and Territory . . . to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.”). No governmental authority – federal, state, or territorial – may subvert these rights; this principle is axiomatic in constitutional law. *Marbury*, 5 U.S. at 176-78. Even in situations involving bankruptcies, state actors must operate within these constitutional bounds. *See Wright v. Union Cent. Life Ins. Co.*, 311 U.S. 273, 278 (1940). Yet, disregarding those boundaries, the Court of Appeals for the First Circuit *sua sponte* stayed the appeal in this case, which sought to remedy the alleged deprivation of Petitioner’s First Amendment rights, based on the filing of the Commonwealth’s petition “under Title III of PROMESA, 48 U.S.C. §§ 2161, et seq., for adjustment of its debts.” App. 1; *see also* App. 3.

The First Circuit’s automatic stay, pursuant to PROMESA, would grant the Commonwealth license to continue to violate the Constitution, and prevent the effective vindication of its citizens’ constitutional rights. In such a case, the Constitution must reign supreme. Bankruptcy is not a license to violate the Constitution. As the U.S. District Court for the District of Puerto Rico held, “an overbroad application of the automatic stay would risk transgressing PROMESA’s statutory framework and the boundaries of the Constitution.” *Atiles-Gabriel v. Puerto Rico*, 256 F. Supp. 3d 122, 128 (D.P.R. 2017). There should be no doubt that PROMESA does not authorize the Commonwealth to continue an ongoing violation of

constitutional rights, but without a remedy such violations would be allowed to continue and with little to no consequences. In these circumstances, the Court should, *at a minimum*, allow a plaintiff's equitable claims to proceed. Declaring bankruptcy does not – and cannot – eliminate a governmental entity's requirement to act constitutionally and within the bounds set by federal civil rights laws.

The Court should grant this petition and make clear that legal claims for civil and constitutional rights, like Petitioner's, must be allowed to proceed. To let the decision below go unaddressed would deprive the people of Puerto Rico of the ability to enforce their civil and constitutional rights while concurrently granting the Puerto Rican government a license to violate those rights. In such an unconstitutional and lawless vacuum, Puerto Rican residents, like those that *amici* regularly represent, will have no recourse for violations of their fundamental rights.

A. Neither traditional bankruptcy protections nor PROMESA were intended to bar constitutional claims from proceeding.

Not all harms are created equal, and PROMESA did not intend to treat them as though they were. The purpose of an automatic stay is to protect estate assets for creditors. The stay is not designed to grant the bankrupt debtor license to engage in unlawful conduct, especially unconstitutional conduct, or to continue to injure a third party. Even in ordinary bankruptcy litigation, it is well-established that claims seeking to prevent continuing violations of rights are not subject to a stay. *See, e.g., Am. Auto. Ass'n v. Lodge*, No. 1:12-cv-0854 LJO-BAM, 2012 WL 6608600 (E.D. Cal Dec.

18, 2012) (trademark infringement); *Voice Sys. & Servs. Inc. v. VMX Inc.*, 26 U.S.P.Q.2d 1106, 1113, 1116 (N.D. Okla. 1992) (patent infringement); *Amplifier Research Corp. v. Hart*, 144 B.R. 693, 694 (E.D. Pa. 1992) (defamation). And even damages claims for post-petition conduct have, on occasion, been found to be exempt from the stay. *See, e.g.*, *Larami Ltd. v. Yes! Entm't Corp.*, 244 B.R. 56 (D.N.J. 2000).

Specifically in the context of PROMESA, in recognizing the importance of protecting Puerto Ricans' constitutional rights, the District Court for the District of Puerto Rico had previously determined that several suits seeking equitable relief from ongoing constitutional violations were not subject to an automatic stay pursuant to PROMESA. *E.g.*, *Cruz-Rodriguez v. Administración de Corrección*, No. 3:17-cv-01464-WGY, (D.P.R. March 30, 2018) ("Among other claims for relief, the plaintiff seeks to have his liberty restored. Economic considerations cannot bar the plaintiff's right to have this aspect of his claim promptly adjudicated."); *Atiles-Gabriel*, 256 F. Supp. 3d (writ of habeas corpus); *Vázquez-Carmona v. Dep't of Educ.*, 255 F. Supp. 3d 298 (D.P.R. 2017) ("The relief requested is not monetary damages; rather, Plaintiff seeks injunctive and declaratory relief to enforce a federally protected right."). The bankruptcy stay "does not grant a debtor greater rights than those it would receive outside of bankruptcy," and cannot, therefore, license the debtor to commit a tort or violate another's constitutional or statutory rights. *In re Synergy Dev. Corp.*, 140 B.R. 958, 959 (Bankr. S.D.N.Y. 1992) (citing *Butner v. United States*, 440 U.S. 48, 55 (1979)). As such, a stay simply cannot apply to prevent the

equitable relief sought by a plaintiff, such as Petitioner.

B. The importance of adjudicating, ending, and preventing violations of civil and constitutional rights is paramount, even during a government's bankruptcy proceedings.

The nature of civil and constitutional rights, like the First Amendment rights at stake here, are unique and their importance is unparalleled. They should not be ignored or equated with other creditor statutory rights. An automatic stay pursuant to PROMESA imposes significant, irreparable harm to a plaintiff's constitutional rights, forcing the plaintiff to continue enduring an unconstitutional deprivation of his rights, including the silencing of his speech as alleged here. The loss of constitutionally-protected freedoms "for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373 (1976). It is even more important to allow a plaintiff's claim to proceed when the plaintiff has no other method of gaining equitable or other relief for the infringement of his right.

The continued enforcement of the federally-guaranteed civil and constitutional rights of Puerto Rico's people, even during the Commonwealth's bankruptcy, "reflects the [government]'s strong historical commitment to eliminating discrimination and assuring its citizens equal access" and opportunity—a compelling governmental interest of the highest order. *Roberts v. U.S. Jaycees*, 468 U.S. 609, 624 (1984). These statutory and constitutional rights cannot be subordinated to the bankruptcy policy of providing a debtor with a "fresh start." *In re UNR*

Indus., Inc., 29 B.R. 741, 748 (N.D. Ill. 1983), *appeal dismissed*, 725 F.2d 1111 (7th Cir. 1984). They are too precious, and their purposes too compelling, for them to go unenforced during the Commonwealth's bankruptcy.

Section 1983 was enacted “to *deter* state actors from using the badge of their authority to deprive individuals of their federally guaranteed rights and to *provide relief* to victims if such deterrence fails.” *Wyatt v. Cole*, 504 U.S. 158, 161 (1992) (emphasis added). Similarly, federal anti-discrimination laws serve the “central statutory purposes” of “eradicating discrimination throughout the economy and *making persons whole* for injuries suffered through past discrimination,” *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 421 (1975) (emphasis added) (addressing Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*); *see also Texas Dep’t of Hous. & Cnty. Affairs v. Inclusive Cmtys. Project, Inc.*, 135 S. Ct. 2507, 2521 (2015) (purpose of the Fair Housing Act, 42 U.S.C. § 3601 *et seq.*, was “to eradicate discriminatory practices within a sector of our nation’s economy”); 42 U.S.C. § 12101(b) (purpose of the American with Disabilities Act of 1990 is “to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities.”).

Discrimination “both deprives persons of their individual dignity and denies society the benefits of wide participation in political, economic, and cultural life.” *Roberts*, 468 U.S. at 625. As such, this Court has recognized the “compelling interest in eliminating discrimination[.]” *Bd. of Dirs. of Rotary Int’l v. Rotary Club of Duarte*, 481 U.S. 537, 549 (1987), as well as the

vital importance of protecting our constitutional rights.

Moreover, typically, the purpose of a case against a governmental entity seeking to remedy the violation of a person's constitutional rights is to obtain *prospective* equitable relief that would stop an unconstitutional policy, custom, or usage from continuing. Equitable relief of that nature has no bearing on the financial assets or obligations a debtor, as is the Commonwealth under PROMESA. Should a plaintiff prevail on his claims for equitable relief, the governmental entity or official at issue would only be required to comply with its obligations under the United States Constitution and federal civil rights laws. *See 42 U.S.C. §1983 (“Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress[.]”* (emphasis added)). Surely, the obligation to comply with the Constitution is not unduly harmful. *See In re City of Detroit*, 524 B.R. 147, 265-66 (E.D. Mich. 2014) (over City's objections, § 1983 claims against city officials in their personal capacity permitted to proceed despite City's “obligation to defend and indemnify these claims”). Quite the contrary, in fact: failure to remedy constitutional violations in a timely fashion and via the appropriate remedy creates the conditions for a “Constitution-free” zone, where violations of citizens' rights can occur with no real consequences.

In addition, the vindication of these critical rights is sufficiently important that an automatic stay should not be entered in civil and constitutional rights cases even if the plaintiff seeks damages or attorney's fees, let alone damages from a defendant sued in their individual capacity. "A damages remedy against the offending party is a *vital component* of any scheme for vindicating cherished constitutional guarantees[.]" *Owen v. City of Independence*, 445 U.S. 622, 651 (1980) (emphasis added). This holds even more true when a plaintiff seeks damages to remedy the violation of their rights from a governmental official in their *individual* capacity.² But even if a government undergoing a bankruptcy is subjected to a damages or attorney's fees award, the rights at stake are so important that the deterrence of such unlawful and unconstitutional actions through such awards is necessary and vital notwithstanding that it bears upon the government's bankruptcy. For decades, courts have recognized that: (1) in civil rights actions, plaintiffs are securing "important social benefits . . . not reflected in nominal or relatively small damages awards," and that the public has an interest in the vindication of civil rights, *City of Riverside v. Rivera*, 477 U.S. 561, 574 (1986); (2) that damage recovery "contributes significantly to the deterrence of civil

² Indeed, in order for a plaintiff to be entitled to damages from a governmental official sued in their individual capacity, that official must have "violate[d] clearly established statutory or constitutional rights of which a reasonable person would have known." *Pearson v. Callahan*, 555 U.S. 223, 231 (2009) (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982)). That is in part because of the "important interest[]" "to hold public officials accountable when they exercise power irresponsibly[.]" *Pearson*, 555 U.S. at 231.

rights violations in the future,” *id.* at 575 (citing *McCann v. Coughlin*, 698 F.2d 112, 129 (2d Cir. 1983) (emphasis omitted); and (3) that full fee recovery is necessary to attract qualified counsel and “contingent fee arrangements that make legal services available to many victims of personal injuries” have become the ‘norm’ in civil rights cases, *see* Minna J. Kotkin, *Invisible Settlements, Invisible Discrimination*, 84 N.C. L. Rev. 927, 937-38, 940-42 (2006) (quoting *Rivera*, 561 U.S. at 574); *see also generally* Julie Davies, *Federal Civil Rights Practice in the 1990’s: The Dichotomy Between Reality and Theory*, 48 Hastings L.J. 197 (1997). And, as Justice Brennan has noted, there is immense value in being able to attract counsel to take on civil rights cases, as these cases are intended to protect the public interest through widespread enforcement of the laws “over and above the value of a civil rights remedy to a particular plaintiff.” *Evans v. Jeff D.*, 475 U.S. 717, 752, 761-62 (1986) (Brennan, J., dissenting).

Put simply, the compelling purpose served by the enforcement of federally-guaranteed civil and constitutional rights provides more than sufficient cause to allow constitutional damages claims to proceed, particularly where the claim involves a continuing constitutional violation.

II. The automatic stay of civil rights cases pursuant to PROMESA would perpetuate an incessant “Constitution-free” zone in Puerto Rico.

Automatically staying all cases seeking to vindicate Puerto Ricans’ civil and constitutional rights would, in practice, render Puerto Rico a lawless jurisdiction – one in which civil rights cases would be

virtually prohibited – and perpetuate the violation of civil and constitutional rights with no real opportunity for recourse. This untenable scenario certainly cannot be what Congress intended when it enacted PROMESA, nor can it be squared with the dictates of the Constitution.

Staying civil rights cases compounds the obstacles already faced by Puerto Ricans seeking to protect their civil rights, including a sparsity of counsel willing to litigate cases without any practical means to receive attorney's fees, and the inability to secure and enforce judgments or demand an enforcement of the laws in a timely, equitable, and safe manner. The result is a massive disruption to the social fabric of Puerto Rican society and an ever-fading trust in Puerto Rican public institutions.

A. Delayed adjudication of civil rights claims will further deteriorate trust in public institutions to protect and enforce the rights of the public.

Puerto Rico has a nefarious legacy of repression against protected First Amendment activity. For example, just as “Hurricane María caused deaths and widespread damage to infrastructure, housing and essential services” in Puerto Rico, “[p]rotections for transgender people and of freedoms of expression and association suffered setbacks,” “[a]usterity measures put human rights at risk,” and “[p]olice used excessive force to quell protests on International Workers’ Day.” Amnesty Int’l, *Puerto Rico 2017/2018*, <https://goo.gl/8mVukZ> (last visited Oct. 10, 2018).

Indeed, the suppression of protected First Amendment activity has a long history in Puerto Rico, where attempts to chill speech by law enforcement and

public entities have often been found to be unconstitutional, including freedom of speech, expression and assembly. *See, e.g.*, Am. Civil Liberties Union, *Island of Impunity: Puerto Rico's Outlaw Police Force* (June 2012), <https://goo.gl/1KBQ4L> ; U.S. Dep't of Justice, Civil Rights Div., *Investigation of the Puerto Rico Police Department*, (Sept. 5, 2011), <https://goo.gl/HXnuoi> (finding that the Puerto Rico Police Department engaged in a pattern and practice of Fourth Amendment violations, including excessive force, unreasonable force designed to suppress the exercise of protected First Amendment rights, and unlawful searches and seizures). As such, the Commonwealth's Police Department remains under a consent decree with the U.S. Department of Justice due to its history of police brutality and repression of the First Amendment activity. *See* Agreement for the Sustainable Reform of the Puerto Rico Police Department, *United States v. Puerto Rico*, Case No. 3:12-cv-02039-GAG (D. P.R. 2013) (Docket No. 57-1).

The legacy of political discrimination among public employees – including claims of discrimination based on political speech – in Puerto Rico is exceptional among all jurisdictions: over eight times more employees are fired for political affiliation in Puerto Rico than in the next closest jurisdiction, and on average they are fired fifty-five times higher than in other U.S. jurisdictions. Alexandra Sabater Baerga & Jean R. Santiago Cruz, *A Spoiled Spoils System: Puerto Rico's Epidemic of Political Discrimination and the Federal Courts*, 85 Rev. Jur. U.P.R. 1327, 1347-52 (2016). The culture of targeting political speech and assembly by various sectors of Puerto Rican civil society has had a chilling effect on public expression, and by punishing those who are courageous enough to

pursue their grievances in judicial forums by an elongated and uncertain delay will only further discourage others from doing the same when they feel similarly silenced for engaging in protected activity.

The recent experience of *amicus* Lambda Legal speaks to the importance of seeking vindication of the constitutional rights of LGBT people in Puerto Rico, including their First Amendment rights, for example. *See, e.g., Arroyo Gonzalez v. Rossello Nevares*, 305 F. Supp. 3d 327 (D.P.R. 2018) (finding unconstitutional the Commonwealth's policy prohibiting transgender Puerto Ricans from obtaining accurate birth certificates); *In re Conde Vidal*, 818 F.3d 765 (noting the Court's agreement that "that the Commonwealth's ban on same-sex marriage was unconstitutional"); *Ramos Padro v. Puerto Rico*, 100 F. Supp. 2d 99 (D.P.R. 2000) (noting successful lawsuit "on First Amendment and equal protection grounds" and the permanent injunction of the Commonwealth's Police Department "from punishing any member of the Police Department because that person had associated with a person who is homosexual"), *aff'd as modified sub nom. Gay Officers Action League v. Puerto Rico*, 247 F.3d 288 (1st Cir. 2001). Permitting the automatic stay of all civil and constitutional rights cases in Puerto Rico would effectively negate the ability of *amici* to vindicate the rights of the people of Puerto Rico.

B. The lack of access to justice and ability to receive an effective remedy for civil rights violations disincentivizes aggrieved citizens from asserting their rights.

The lack of access to justice is one of the affronts to civil and political rights and continues to plague

Puerto Rico, particularly among vulnerable populations. Access to justice entails not only the availability of the judiciary to adjudicate claims, but the ability of the litigant to receive an effective and meaningful remedy. As recently as 2017, the Puerto Rico Supreme Court entered into an agreement with leading legal services organizations to address the gaps in access to justice for impoverished communities.³ P.R. Sup. Ct., *Rama Judicial Firma Acuerdos Para Ampliar Acceso a la Justicia a Poblaciones Vulnerables* (June 14, 2017), <https://goo.gl/oU3Wph>. The failure to ensure adequate and meaningful access to justice for citizens violates the United States' obligations under the International Covenant on Civil and Political Rights, of which the U.S. is a signatory. International Covenant on Civil and Political Rights, arts. 2(1), 3, 6(1), 7, 17, 18, 19, 26, *opened for signature* Dec. 16, 1966, 999 U.N.T.S. 171, (entered into force Mar. 23, 1976).⁴ As First Circuit Judge Juan R. Torruella points out, the Covenant requires that state parties must ensure that “any person whose rights or freedoms as herein recognized

³ Residents of Puerto Rico are statistically poorer than residents of the rest of the United States. Nearly half of the island lives at or below the federal poverty line and in 2015, the median household income of Puerto Ricans living on the island was \$18,626. See U.S. Census Bureau, *Quick Facts: Puerto Rico (2012 – 2016)*, <https://goo.gl/iiwBBa> (last visited Oct. 10, 2018); Jens Manuel Krogstad, et al., Pew Research Center, *Key Findings About Puerto Rico* (Mar. 29, 2017), <https://goo.gl/744MEU>.

⁴ Art. 1(3) clarifies that the Covenant applies to the state party, which is responsible for compliance in all territories found within its jurisdiction, including Non-Self-Governing Territories, which Puerto Rico is considered to be.

are violated shall have an effective remedy,” and “that anyone claiming such a remedy have the right to be by a “competent [] authorit[y].” Juan R. Torruella, *Why Puerto Rico Does Not Need Further Experimentation with Its Future: A Reply to the Notion of “Territorial Federalism,”* 131 Harv. L. Rev. F. 65, 99 (2018).⁵ As this Court’s jurisprudence has shown, an effective remedy must mean the ability of a citizen whose rights were violated to access justice via a competent judicial process that can differentiate between the types of harms being alleged among competing interests and provide appropriate relief when sought and merited. *Guardians Ass’n v. Civil Serv. Comm’n*, 463 U.S. 582, 626 (1983) (noting “a right without an effective remedy has little meaning”); *see also Marbury*, 5 U.S. at 147 (“[E]very right, when withheld, must have a remedy, and every injury its proper redress.”). To the extent that the court feels that Congress did not explicitly carve out an exception for civil and constitutional rights violations, this Court has previously constructed its own when justice so requires. *See, e.g., Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971).

⁵ Indeed, “[i]t is a matter of record that the United States has not only failed to comply with the obligations that it has agreed to in the ICCPR, but has vehemently and consistently prevented its citizens from exercising the rights encompassed in the ICCPR by engaging in obstructionist legal maneuvers in the courts of the United States.” Torruella, *supra*, at 100–01.

C. Failure to ensure adequate access to justice exacerbates Puerto Rico's ongoing human rights crisis and perpetuates violations of the United States' human rights obligations.

In the past several years, there has been growing concern and attention paid among the international community to the human rights situation in Puerto Rico, particularly as a result of the economic depression and then, subsequently, after Hurricanes Irma and María devastated the island in 2017. Several independent experts have openly expressed concern about the deteriorating human rights situation on the island, and specifically cited PROMESA and its various elements as a source of concern. *See* Juan Pablo Bohoslavsky, Office of the High Comm'r for Human Rights, United Nations, *Puerto Rico's Debt Crisis: UN Expert Warns Human Rights Cannot be Side-Lined* (Jan. 9, 2017), <https://goo.gl/3wPyh6>; *cf.* Human Rights Council, United Nations Gen. Assembly, *Report of the Special Rapporteur on Extreme Poverty and Human Rights on his Mission to the United States of America*, para. 70 (May 4, 2018). The obligation of a debtor state to its creditors cannot infringe upon the fundamental human rights of its citizens, especially those which the United States has openly recognized and codified. Human rights bodies in both international and regional systems have expressed deep concerns about the effect that the crippling debt is having on the full expression and realization of civil and human rights, including access to justice. *See, e.g.*, Office of the High Comm'r on Human Rights, United Nations, *Puerto Rico: Human Rights Concerns Mount in Absence of Adequate Emergency Response* (Oct. 30, 2017),

<https://goo.gl/HpggKv>; Inter-Am. Comm'n on Human Rights, Org. of Am. States, *Report on Session 157*, at 13 (April 2016). The United Nations special procedures mechanism, which includes independent mandate holders for various human rights issues, has repeatedly cautioned debtor states facing staggering public debt against implementing policies that will interfere with, suppress or openly challenge the full realization of human rights. *See also* International Covenant on Economic, Social and Cultural Rights, *adopted* Dec. 16, 1966, 999 U.N.T.S. 3 (entered into force Jan. 3, 1976); Comm. on Econ., Soc., & Cultural Rights, United Nations, *Public Debt, Austerity Measures and the International Covenant on Economic, Social and Cultural Rights* (July 22, 2016). Imposing an automatic stay on cases asserting challenges to the violation of civil and human rights that will unduly delay the adjudication of these rights cannot be squared with the United States' and the Commonwealth's obligation to judiciously and expeditiously adjudicate such cases and provide an appropriate remedy.

CONCLUSION

The application of an automatic stay to civil rights cases, pursuant to PROMESA, profoundly impacts the enforcement of the civil and constitutional rights of the people of Puerto Rico. It will necessarily affect whether and how civil rights actions – on issues ranging from special education, criminal justice, and employment discrimination to prisons conditions and LGBT equality – can be brought in Puerto Rico while these PROMESA bankruptcy proceedings are ongoing, a process that is likely to take years. If the Commonwealth's bankruptcy can foil enforcement of

civil and constitutional rights, the residents of the Commonwealth will be deprived not only of the basic means of protecting and enforcing these rights, but of their most fundamental rights and liberty. The purposes of our civil rights laws and constitutional protections would be frustrated if the people of Puerto Rico could not remedy the violation of their rights in light of a bankruptcy proceeding (both legally and practically). The Commonwealth's obligation to respect its citizens' constitutional rights is absolute, and is neither discharged nor dischargeable in bankruptcy. At minimum, a plaintiff's equitable claims should be allowed to go forward.

For the foregoing reasons, the petition for a writ of *certiorari* should be granted.

Respectfully submitted,

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