No. 18A _____

In the Supreme Court of the United States

Roman Catholic Archdiocese of San Juan, Puerto Rico,
Petitioner,

v.

Yalí Acevedo Feliciano, Sonia Arroyo Velázquez, Elsie Alvarado Rivera, et al.,
Respondents

EMERGENCY APPLICATION FOR STAY OF THE JUDGMENT OF THE PUERTO RICO COURT OF FIRST INSTANCE PENDING APPEAL AND CERTIORARI

**Directed to the Honorable Stephen Breyer,
Justice of the Supreme Court of the United States and
Circuit Justice for the United States Court of Appeals for the First Circuit**

PEDRO A. BUSÓ-GARCÍA
SCHUSTER AGUILÓ LLC
221 Ponce de León Avenue
15th Floor
San Juan, PR 00917

GENE C. SCHAERR
Counsel of Record
MICHAEL T. WORLEY
SCHAERR | DUNCAN LLP
1717 K Street NW, Suite 900
Washington, DC 20006
(202) 787-1060
gschaerr@schaerr-duncan.com

August 28, 2018

PARTIES TO THE PROCEEDING

The name of the Applicant is listed on the cover. Because Respondents include some 180 current or former employees of various Catholic entities and their spouses (collectively "Plaintiffs"), a full list of Plaintiffs is included in the Appendix to this Application, at J-1. The Catholic Schools Education Pension Trust and three Catholic schools—Perpetuo Socorro Academy, San José Academy, and San Ignacio de Loyola Academy—were also adverse to Plaintiffs below, and are respondents here.

TABLE OF CONTENTS

LIST OF APPENDICES

Court Documents – in English

Court Documents – in Spanish

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

Constitutional Provisions

Applicant Roman Catholic Archdiocese of San Juan, Puerto Rico ("Archdiocese" or "Applicant") respectfully requests an immediate stay of the August 20 and August 22 orders of the Puerto Rico Court of First Instance pending appeal—and, if necessary, this Court's disposition of the certiorari petition Applicant will file if the orders are affirmed by the Puerto Rico Supreme Court.

INTRODUCTION

This case concerns an attempt by beneficiaries of a now-insolvent pension plan to obtain money not just from the plan or their former employers—a group of Catholic schools—but a wide swath of Catholic entities throughout the Archdiocese. The Puerto Rico trial court—the Court of First Instance—has violated the federal removal statute and the Due Process Clause in an effort to provide the recipients with immediate relief while their claims are adjudicated on the merits. And in furtherance of that unlawful scheme, the Court of First Instance has begun seizing the bank accounts of the Archdiocese and many of its parishes, thereby depriving all of them of the means necessary to pay their employees, and seriously undermining their ability to provide worship and other services for their parishioners. Moreover, just last night, as a result of the orders at issue here, Puerto Rico's largest bank announced that it is freezing the accounts of some 160 Catholic parishes.

The Archdiocese, along with the other dioceses in Puerto Rico (who are not applicants here), previously requested a stay pending certiorari of an earlier order in this case, a request this Court denied in June. See No. 17A1375. This application does not address the orders challenged in June, nor the legal issues raised in that application. Instead, *since* the previous application was denied, the Court of First

Instance, in two new orders, has resolved additional important questions of federal law in ways that impose additional serious harm on the Archdiocese, and that conflict with statutory interpretations of at least three courts of appeal, two state courts of last resort, and settled precedents of this Court.

The first issue concerns the proper interpretation of the federal removal statute, 28 U.S.C. 1446. That statute provides that, once a case has been removed to federal court—properly or not—the state or territorial court "*shall proceed no further* unless and until the case is remanded." Although this case was removed to federal court on February 6, 2018 and not remanded until August 20, the Puerto Rico courts continued to issue decisions and orders while the case was removed, including one critical order issued by the Court of First Instance earlier on August 20, 2018. Under the interpretation of Section 1446 in decisions by the First Circuit (including some in which then-Judge Breyer participated), the Puerto Rico courts had a duty to forbear from taking any action in the case. See, *e.g., Hyde Park Partners, L.P.* v. *Connolly*, 839 F.2d 837, 880 (1st Cir. 1988). But instead, while the case was still removed to federal court, the Court of First Instance issued a new order specifically directing a seizure of religious property. That order is and should be treated as a "nullity" under First Circuit law and the law of other circuits and state supreme courts. And the conflict on this important issue merits this Court's review.

The second issue concerns a straightforward issue of due process: May a court, in ordering a seizure of a bank account or other remedy, change the name of the defendant and the subject of the remedial order to match the name on an account

owned by *another* entity, without any notice to that entity or any kind of hearing? Given that this Court has long recognized notice and an opportunity to be heard as fundamental aspects of due process, this question also satisfies the "reasonable probability" and "fair prospect" requirements.

Moreover, a failure to grant the requested stay will trigger enormous irreparable injury to the Archdioceses, its parishes, their 1.5 million Catholics, and other citizens throughout Puerto Rico. For example, the immediate seizure of Catholic property pursuant to the two orders at issue here—including "motor vehicles, works of art, equipment, furniture, accounts, [and] real estate," App. B-1—will quickly interfere with the ability of Puerto Rican Catholics to access the basic rites of their faith. And the seizure of bank accounts pursuant to those orders will be especially devastating to very poor parishes, such as the Church of San Mateo in Santurce, which serves a large community of poor Haitian immigrants, and whose bank account was seized last week. Indeed, absent immediate intervention by this Court, the accounts of 160 additional parishes will be frozen or seized, devastating virtually the entire Catholic Church throughout the island.

The seizure of property pursuant to the August 20 and August 22 orders will also make it much more difficult for those parishes, the Archdiocese, and other Catholic entities to provide relief to victims of Hurricane Maria and the overwhelming poverty that pervades many parts of Puerto Rico. If enforced according to their terms, those orders will also render unavailable the assets that Catholic radio and television stations need to exercise their free speech rights and meet their charge to preach the

gospel. And the property seizure has already made it impossible for the Archdiocese to meet its payroll and pay medical insurance for the families of the seventy-five employees, mostly headed by women, who work for the Archdiocese. Absent a stay, similar effects will make it impossible for the Archdiocese's parishes, and other associated Catholic entities, to meet their payrolls and other financial obligations—including, among others, to many of the very school teachers who are plaintiffs in this case.

Despite all this, the Puerto Rico Supreme Court has denied the stay request and constructively denied the motion for expedited appeal that the Archdiocese has filed there. The two new orders at issue here squarely violate settled constitutional and statutory provisions, which make these orders, if affirmed by the Puerto Rico Supreme Court, likely to be reversed by this Court on certiorari.

QUESTIONS PRESENTED

The Court of First Instance's August 20 and August 22 decisions raise two important questions regarding the proper interpretation of the federal removal statute and the Due Process Clause:

1. Must a decision or order entered by a state or territorial court during the period in which a case has been removed to federal court under 28 U.S.C. 1446 be treated as a "nullity" and thus completely void, as the First Circuit has held, or may the state or territorial court ignore the removal if it believes the removal was improper?

2. Under the Due Process Clause, may a court add a new named defendant, and make it the target of a remedial order, without providing the newly named entity with notice and an opportunity to be heard?

BACKGROUND

A proper understanding of this dispute requires familiarity with the Catholic Schools' pension plan; the removal of the case and the subsequent remand, the August 20 order issued prior to the remand, and subsequent activities in the Court of First Instance and the Puerto Rico Supreme Court.

A. The Catholic Schools Employee Pension Plan

In 1979, the Superintendence of Catholic Schools of the Archdiocese of San Juan sponsored a pension plan and trust fund.

1. Some eighty-three Catholic institutions were originally part of this plan, including the Archdiocese (as an employer) and the three schools that are the subject of this litigation—Perpetuo Socorro Academy, San José Academy, and San Ignacio de Loyola Academy. The plan is known as the Catholic Schools Employee Pension Plan.

Under the plan, each participant organization contributes between two and six percent of its payroll to the fund. Employees are not asked to contribute—and, in fact, have never contributed. The beneficiaries of the plan include both retired and current teachers and other former and current employees of participating Catholic entities. The plan was designed to provide compensation above and beyond the Social Security and Medicare benefits that the teachers also receive.

2. The pension plan was successful for many years. However, for the past several years enrollment at hundreds of Puerto Rico schools—including Catholic schools—has declined because of reduced birthrates and migration of large numbers

of Puerto Ricans to other locations.[1] This also caused a stark reduction in the number of institutions participating in the Plan—from the original eighty-three down to forty-three.

As some Catholic schools have been forced to shut down and leave the plan, the Fund could no longer pay full pensions to its beneficiaries. As its liabilities increased, the Fund was eventually forced to cease distributing pensions.

B. Preliminary Trial Court Proceedings

Plaintiffs here—some of the plan's beneficiaries from the three schools listed above—seek to compel other Catholic entities to fund their pensions. To that end, Plaintiffs originally purported to sue an entity called "The Holy Catholic Apostolic Church in the Island of Puerto Rico, Inc." ("La Santa Iglesia Católica y Apostólica en la Isla de Puerto Rico, Inc." in Spanish). This is a legally recognized entity, but it is an Orthodox Christian entity, with no relation to the Roman Catholic Church.

Faced with this problem, the Plaintiffs asserted that they were really suing the "Roman Catholic and Apostolic Church in Puerto Rico"— which was not included as a defendant, but which they claimed to be a distinct legal entity with supervisory authority over all Roman Catholic entities in the Commonwealth. In fact, however, there is no Puerto Rican Roman Catholic entity with supervisory authority over all such entities. App. G-1 (Archbishop Affidavit). The only Roman Catholic entity with such general oversight responsibility is the Holy See, headquartered at the Vatican,

[1] *See*, *e.g.*, Jens Manuel Krogstad, et al., *Puerto Rico's losses are not just economic, but in people, too*, Pew Research (July 1, 2015), *available at*: http://www.pewresearch.org/fact-tank/2015/07/01/puerto-ricos-losses-are-not-just-economic-but-in-people-too/.

which can only be sued pursuant to the Foreign Sovereign Immunities Act (FSIA). *Id.*

Nevertheless, in an apparent effort to find a "deep pocket" on which to impose liability, Plaintiffs claimed that the Archdiocese of San Juan, the Superintendence of Catholic Schools for the Archdiocese of San Juan, the Superintendence of Catholic Schools of Caguas, and the named schools (among others) were in fact dependents of a Commonwealth-wide Catholic entity. Moreover, to secure payment of their claims, Plaintiffs made a sweeping request for "seizure of the assets of the Roman Catholic and Apostolic Church in Puerto Rico[.]"

As explained more fully in the prior stay application in No. 17A1375, the Court of First Instance granted this request, which was appealed through the Puerto Rico court system, and affirmed. That decision will be the subject of a separate petition for certiorari, and is not at issue here.

C. The Trial Court's Rulings at Issue Here

Meanwhile, on February 6, 2018, the Archdiocese removed this case to federal court to be heard with a federal bankruptcy proceeding involving the pension plan and trust. The case was remanded from federal court at 7:23 PM on August 20, 2018. See Docket, *Acevedo-Feliciano et al.* v. *Archidiocese of San Juan*, No. 3:18-cv-01060 (D. P.R.) While the federal district court purported to make its August 20 remand retroactively effective, it did not cite any precedent for its supposed authority to do so, nor did it distinguish First Circuit law—including decisions joined by then-Judge Breyer—that explain that state courts have a *duty* to abstain even during an improper removal. See *id.*

However, before the federal remand, the Puerto Rico Court of First Instance issued a ruling ordering at 5:16 PM on August 20 a seizure of Catholic properties. App A.[2] Specifically, the Court of First Instance ordered the court's Marshall "to seize assets [] of the Holy Roman and Apostolic Catholic Church in an amount of $4,700,000 to secure the payment of plaintiffs' pensions." See App. A, B (amended version); K, L (Spanish). This seizure includes the right to confiscate "bonds, values, motor vehicles, works of art, equipment, furniture, accounts, real estate and any other asset belonging to the Holy Roman and Apostolic Catholic Church, and any of its dependencies, which is located in Puerto Rico." App. A, B-2, K, L (Spanish).

When the Marshall used this order in attempting to seize the Archdiocese's main bank account, he was told that there were no accounts under the name "Holy Roman and Apostolic Catholic Church." However, the Marshall also learned that there were accounts under the name "Roman Catholic Church in Puerto Rico"—the official name of the Archdiocese when it was the only diocese on the Island.

In response to this development, the Court of First Instance issued a new order two days later, on August 22. That order added a new named defendant, to match the name on the Archdiocese's bank account. App. B, L (Spanish). The court did this without providing the Archdiocese any notice or opportunity to be heard.

D. Stay Proceedings

Recognizing both the legal errors and destructive consequences of the Court of First Instance's Orders, Applicant sought an urgent stay from the Puerto Rico

[2] Certified copies of the translation of this and other documents will be filed as soon as they are available, presumably later today.

Supreme Court. App. C. This request was denied on August 27, 2018. App. E, M (Spanish). Applicant also asked that Court to take jurisdiction of the appeal of both orders, and to expedite the corresponding appeal. App. D. The Court has not acted on those applications, which, in the context of the urgent ongoing nature of the seizure, amounts to a constructive denial. See App. D (asking Court to rule by close of business on Monday, August 27, 2018).

After close of business on August 27, 2018, a bank filed a motion in the Court of First Instance, explaining that it had identified 160 parishes from the Dioceses that collectively have millions of dollars of assets. Absent a stay, the Court of First Instance will very likely order the seizure of all of these assets, devastating just under half of Puerto Rico's 338 parishes in the process.

JURISDICTION

Under 28 U.S.C. 2101(f), 1257(3) and the All Writs Act, 28 U.S.C. 1651, this Court may stay a decision of a state or territory's trial court if either of two conditions are met. First, the state or territory court of last resort has refused to stay the order or provide other appropriate relief. *M.I.C. Ltd.* v. *Bedford Tp.*, 463 U.S. 1341 (1983) (Brennan, J., in chambers); *National Socialist Party of America* v. *Village of Skokie*, 432 U.S. 43, 44 (1977). Second, when "each passing day may constitute a separate and cognizable infringement," this Court may consider a trial court order final. *Neb. Press Asso.* v. *Stuart*, 423 U.S. 1327, 1329 (1975) (free press violation).

Both conditions are comfortably met here: The Puerto Rico Supreme Court has denied a stay and constructively denied a request to take an expedited appeal of two final orders by the Court of First Instance that are ultimately "subject to review by [this] Court on writ of certiorari." 28 U.S.C. 2101(f). Moreover, as explained below, each new day brings new permanent harm to the Archdiocese, its parishes, employees, and others.

REASONS FOR GRANTING A STAY

The standards for granting a stay pending review are "well settled." *Deaver* v. *United States*, 483 U.S. 1301, 1302 (1987) (Rehnquist, C.J., in chambers). Preliminarily, the applicant must show that "the relief sought is not available from any other court or judge," Sup. Ct. R. 23.3—a conclusion established here by the fact that the Puerto Rico Supreme Court denied the Archdiocese's requests to stay the August 20 and 22 Orders as well as its constructive denial of the Archdiocese's

request for an expedited appeal of those orders. And even with an expedited appeal potentially pending, a stay is necessary because new harms are accruing every day.

A stay is then appropriate if there is "(1) a reasonable probability that four Justices [of this Court] will consider the issue sufficiently meritorious to grant certiorari; (2) a fair prospect that a majority of the Court will vote to reverse the judgment below; and (3) a likelihood that irreparable harm will result from the denial of a stay." *Hollingsworth* v. *Perry*, 558 U.S. 183, 189 (2010) (per curiam). Moreover, in close cases the Circuit Justice or the Court will "balance the equities" by exploring the relative harms to applicant and respondent, as well as the interests of the public at large. *Rostker* v. *Goldberg*, 448 U.S. 1306, 1308 (1980) (Brennan, J., in chambers). When a stay is sought pending appeal, the same standards are applied, assuming the appeals prior to seeking certiorari affirm the decision below. *San Diegans for the Mt. Soledad Nat'l War Mem'l* v. *Paulson*, 548 U.S. 1301, 1302 (2006) (Kennedy, J., in chambers)

Each of these considerations points decisively toward issuing a stay of the August 20 and 22 Orders pending appeal and, if necessary, certiorari review.

I. If the Puerto Rico courts affirm the Court of First Instance's orders, there is a reasonable probability that four Justices will vote to grant certiorari, and a fair prospect the Court will reverse.

As to the first two requirements: If the Puerto Rico Supreme Court affirms the Court of First Instance, there is a reasonable probability that four Justices will vote to grant certiorari on each question addressed in this Application, and a fair prospect this Court will reverse the Puerto Rico Supreme Court on both questions. *A fortiori,*

there is at least a fair prospect of certiorari and reversal—perhaps even summary reversal—on at least one of those issues.

A. The decision of the Puerto Rico court to issue orders despite its duty not to act while the case has been removed satisfies the "reasonable probability" and "fair prospect" standards.

Consistent with statutory language, a number of courts have held that, when a case in state or territorial court has been removed to federal court, the state or territorial court has "a duty ... to proceed no further in the cause" until jurisdiction is restored by a remand. *E.g. Hyde Park Partners, L.P.* v. *Connolly*, 839 F.2d 837, 842 (1st Cir. 1988) (Coffin, Bownes, and Breyer, JJ). However, the Puerto Rico Supreme Court takes a contrary view; in allowing the August 20 order to stand, the Puerto Rico Supreme Court did not even acknowledge—let alone fulfil—its statutory duty to comply with the removal statute. This conflict with the First Circuit—as well as other circuits and state courts of last resort—creates at least a reasonable probability of certiorari and a fair prospect of reversal.

1. This case comfortably satisfies the reasonable probability criterion because the Puerto Rico Supreme Court and the First Circuit differ on an important question of law: whether Puerto Rico courts have an affirmative duty to not act in a case that has been removed and not remanded. And this Court's precedents establish that the urgency of resolving a conflict is enhanced when it is between a circuit court and a state or territorial court of last resort within that circuit. *E.g. Johnson v. California*, 545 U.S. 162, 164 (2005).

The conflict here centers on the federal removal statute, which provides:

> Promptly after the filing of such notice of removal of a civil action the defendant or defendants shall give written notice thereof to all adverse parties and shall file a copy of the notice with the clerk of such State court, which shall effect removal and *the State court shall proceed no further unless and until the case is remanded.*

28 U.S.C. 1446 (emphasis added). This provision was interpreted in *Hyde Park Partners, L.P.* v. *Connolly*, in a decision by Judge Coffin, joined by Judge Bownes and then-Judge Breyer. 839 F.2d 837 (1st Cir. 1988). The panel faced a situation where a state court case was removed to federal court to be heard with a pending federal case. 839 F.2d at 840–841. However, as the First Circuit described it, "[n]otwithstanding the removal petition, the state court proceeded to its hearing on [one party's] motion for a temporary restraining order." *Id.* at 841. After the hearing, but before the order was issued, the same party amended its state court complaint to attempt to end federal diversity jurisdiction. *Id.* The state court then entered a temporary restraining order, and, a week later, the federal judge denied the motion for remand. *Id.*

On appeal, the First Circuit concluded that the temporary restraining order "was a nullity anyway, *with or without the order against further [state] proceedings*." *Id.* at 842. In doing so, the panel opinion quoted another opinion by Justice Coffin and joined by Justice Breyer, which held that the same was true for Puerto Rico courts: "any action taken by the Puerto Rico court after removal was effected was a nullity anyway, with or without the order against further proceedings." *Polyplastics, Inc.* v. *Transconex, Inc.*, 713 F.2d 875, 880 (1st Cir. 1983).

Hyde Park Partners further explained that "the state court had a '*duty* ... to proceed no further in the cause. Every order thereafter made in that court was *coram non judice*, unless its jurisdiction was actually restored.'" 839 F.2d at 842 (emphasis added). *Hyde Park Partners* thus rejected the argument that proceedings occurring outside the federal district court—there, amending the complaint in state court—can restore jurisdiction to the state court before remand is issued.

The Puerto Rico Supreme Court and Court of First Instance have violated their duty, creating a square split on this issue and violating 28 U.S.C. 1446 in the process. This case was removed to federal court on February 6, and was still removed at 5:16pm on August 20, when the order that the Marshall used to seize the assets at issue here was issued. Under First Circuit law, those decisions "[were] a nullity anyway, with or without" a district court "order against further proceedings." As that order in the Puerto Rico courts was a nullity, the order issued by the Court of First Instance after the August 20 remand are also a nullity, as it was based on the August 20 order and other decisions and orders issued during the removal period. The orders of the Puerto Rico Supreme Court squarely conflict with First Circuit precedent by violating the duty—under the federal removal statute—to refrain from action during removal.

2. Assuming the Puerto Rico Supreme Court follows its own precedent and affirms, this case will conflict not only with the First Circuit, but with other courts as well. For example, the Eleventh Circuit has held that state and territorial courts have an affirmative duty to refrain from action during removal. *Maseda* v. *Honda Motor*

Co., 861 F.2d 1248, 1254 (11th Cir. 1988) ("Hence, after removal, the jurisdiction of the state court absolutely ceases and the state court has a duty not to proceed any further in the case."). And the Fourth Circuit in *South Carolina* v. *Moore* rejected the argument that the "continuing proceedings in the state court should be held voidable rather than void and validated if the case is subsequently remanded to the state court." 447 F.2d 1067, 1072 (4th Cir. 1971). The Fourth Circuit joined other courts in holding that "any proceedings in the state court after the filing of the petition and prior to a federal remand order are absolutely void, despite subsequent determination that the removal petition was ineffective." *Id.* at 1073. Other courts to reach this result include the Idaho[3] and Indiana[4] Supreme Courts and the Fifth[5] Circuit. The Puerto Rico Supreme Court's view conflicts with all these decisions.

3. To be sure, Respondents may argue that, because the Puerto Rico federal district court subsequently remanded this case "nunc pro tunc," the August 20 order is merely voidable, not void. But this ignores the law. Besides being entirely unprecedented, the district court's "retroactive" remand violates First Circuit precedent that even an improper removal stays the case *until remand is issued*, not until the basis for the removal no longer stands. And, as noted, the Fourth Circuit in

---

[3] *Hopson* v. *N. Am. Ins. Co.,* 233 P.2d 799, 802 (Idaho 1951) ("Congress has thereby expressly effected the removal of the cause to the Federal Court irrespective of the ultimate determination of the question as to whether or not it is removable; it is not thereafter in the State court for any purpose until and unless the cause is remanded; for that reason the State court is expressly prohibited from proceeding further until and unless it is so remanded[.]")

[4] *Schuchman* v. *State*, 236 N.E.2d 830, 833 (Ind. 1968) ("In any event, the state court in this case had lost jurisdiction when it commenced the trial of this cause. This is not affected by the fact that the cause was subsequently remanded.").

[5] *Lowe* v. *Jacob*s, 243 F.2d 432, 433 (5th Cir. 1957) ("[T]he state court now loses all jurisdiction after compliance with the removal statute, until there has been a remand.").

Moore expressly rejected the void/voidable distinction, and held instead that "*any* proceedings in the state court after the filing of the petition and prior to a federal remand order are absolutely void, despite subsequent determination that the removal petition was ineffective." 447 F.2d at 1072. Thus, even if the *basis* for federal jurisdiction ended on March 11, as the district court said (erroneously), the subsequent orders were just as void as the temporary restraining order that the company in *Hyde Park Partners* obtained after it had attempted to modify its complaint to end federal jurisdiction.

4. The status of a court order issued during removal but before remand is a question of immense practical importance: Allowing such a court to continue its proceedings during that period, and to treat as valid any orders issued during that period, would defeat one of the main purposes of removal—i.e., to avoid the risk and costs of being forced to litigate the same case in two courts simultaneously. See, *e.g., Pierpoint* v. *Barnes,* 94 F.3d 813, 818 (2d Cir. 1996); *Rothner* v. *Chicago*, 879 F.2d 1402, 1411 n.7 (7th Cir. 1989). Allowing such a result is also an affront to the dignity of federal courts. See, *e.g., Wecker* v. *Nat'l Enameling & Stamping Co.*, 204 U.S. 176 (1907).

This case illustrates these harms to litigants as well as the federal court system. The Puerto Rico courts have now signaled that they believe they are free to proceed with a suit—and order the seizure of millions of dollars of assets—even if the case is currently on removal to federal court under federal statute. By refusing to grant a stay, the Puerto Rico Supreme Court has once again refused to acknowledge

these harms. If it ultimately affirms, there is a reasonable probability that four justices will vote to grant certiorari, and a fair prospect that five Justices will vote to reverse—perhaps summarily.

B. The Court of First Instance's recklessness in failing to provide notice or a hearing before adding the Archdiocese to the August 20 and 22 Orders also violates due process.

In its August 22 order, the Court of First Instance has also violated the federal Constitution's Due Process Clause by specifically adding the Archdiocese to the August 20 Order. That action was based on that court's erroneous conclusion—in an *ex parte* proceeding that occurred without notice or a hearing—about the intentions of the Archdiocese in its conduct of the litigation.

1. This Court has determined that either the Due Process Clause of the Fifth Amendment or the Due Process Clause of the Fourteenth Amendment protects Puerto Rican residents and entities from Due Process violations. See, *e.g.*, *Examining Bd. of Eng'rs, Architects & Surveyors* v. *Flores De Otero*, 426 U.S. 572, 600 (1976). Both amendments prohibit government actors from "depriv[ing]" a person of his "life, liberty, or property, without due process of law." U.S. Const. amend. V; U.S. Const. amend XIV.

As this Court has long held, "[t]he fundamental requisite of due process of law is the opportunity to be heard." *Grannis* v. *Ordean*, 234 U.S. 385, 394 (1914). This right is no mere technicality: "due process does not countenance such swift passage from pleading to judgment in the pleader's favor." *Nelson* v. *Adams USA, Inc.*, 529 U.S. 460, 465 (2000). Rather, notice and a hearing are required before rights are

stripped: This Court has found it wrong to rule against parties that "[were not] ever afforded a proper opportunity to respond to the claim against [them]." *Id.* at 468.

Here, the Court of First Instance gave no notice to the Archdiocese—nor an opportunity to respond—before it *sua sponte* added to the name of the lead defendant—an Orthodox entity—the name of a Roman Catholic entity. After the August 20 order was issued, the court's Marshall attempted to execute that order against the Orthodox entity, but was informed the Archdiocese was not the Orthodox entity. In response, the Court of First Instance amended the August 20 order, adding the "Roman Catholic Church in Puerto Rico" as a Defendant *and* as a target of its earlier order. The court failed to provide the Archdiocese with notice or a hearing before taking this action.

To be sure, Plaintiffs claimed that, rather than sue the Orthodox entity, they really *meant* to sue the Archdiocese. But wishing does not make it so. Any change to the defendants in this case must follow basic due process protections that apply to any order. The August 22 order did not do so.

As a direct result, the Archdiocese and a number of its parishes have had more than $1 million of their assets seized or frozen, leaving them unable to fulfill their financial obligations to pay dozens of employees, carry out religious functions, or continue providing hurricane relief to millions of Puerto Ricans. And millions of dollars in additional assets are certain to be seized shortly absent a stay. Given that this gross deprivation of property took place without the Archdiocese even receiving notice, let alone a hearing, or other due process protection, there is a reasonable

probability this Court will conclude that the Court of First Instance erred in adding the name of the Archdiocese—the "Roman Catholic Apostolic Church in Puerto Rico"—without first giving notice to the parties.

* * * * *

In short, if the Court of First Instance is affirmed on appeal, there is a reasonable likelihood of certiorari and a fair prospect of reversal on the questions that the Applicant intend to present in a subsequent petition. Indeed, as shown above each of these issues would be an appropriate basis for summary reversal. It follows that there is at least a reasonable likelihood of certiorari, and a fair prospect of reversal on at least one of those questions.

II. Without a stay, the Archdiocese, its 1.5 million Catholic members, and many other Puerto Rico residents will suffer irreparable harm.

Not only is there a sufficient probability of review and reversal, but there is no doubt that the August 20 and 22 Orders will produce irreparable harm of various kinds.

First, the continuing seizures will burden the free exercise rights of all Catholics in the Archdiocese. Burdens on free exercise rights, like free speech rights, cause irreparable harm. See *Elrod*, 427 U.S. at 373 ("The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury."). *E.g., Kikumura* v. *Hurley*, 242 F.3d 950, 963 (10th Cir. 2001); *Jolly* v. *Coughlin*, 76 F.3d 468, 482 (2d Cir. 1996). And of course, free exercise rights have special force when the burden is shouldered by only one faith, and when only that

faith's religious rites are affected. See *Church of Lukumi Babalu Aye* v. *City of Hialeah*, 508 U.S. 520 (1993).

Here, the seizure of funds and property will likely devastate more than 160 parishes. Left without funding, each of these parishes will find it difficult or impossible to operate. Moreover, the Dioceses' vehicles for evangelization work—their television stations, radio stations, and newspapers—will be impacted, causing irreparable harm to the Dioceses' religious mission. Moreover, as the Archbishop and Vicar General note, "the seizure of funds … will even impair the parishes' ability to hold their scheduled masses[.]" App. G-2; see also App. H-2. Such actions will also impair the parishes' ability to "conduct marriages, baptisms and first communions." App. G-2; see also App. H-2.

To take just one example, if the August 20 and 22 Orders stand, 75 employees—many of them women who head families almost in poverty—will continue to be deprived of their salaries for the foreseeable future. App. I

And if the order stands, pregnant mothers and their families may lose access to the sacred rite of baptism when their babies are born. Given an annual birth rate of 8.1 births per one thousand Puerto Ricans,[6] during the next year the Catholic mothers of some twenty thousand Puerto Rican babies will face this risk. Likewise, the marriage rate of 4.9 marriages per one thousand Puerto Ricans[7] means that over

[6] Central Intelligence Agency, The World Factbook: Birth Rate, https://www.cia.gov/library/publications/the-world-factbook /fields/2054.html

[7] World in Figures, *Lowest Marriage Rates*, The Economist, available at: https://worldinfigures.com/rankings/ index/218.

twelve thousand Catholic couples annually—twenty-four thousand individuals—would risk losing access to the Catholic rite of marriage. Moreover, nearly 1 million of Puerto Rico's Catholics will also face the risk of being unable to attend church services once the seizure of Archdiocese assets makes their parishes unable "to hold their scheduled masses[.]" App. G-2.[8]

It is difficult to imagine a more direct attack on free exercise rights than preventing followers of a single faith from participating in their faith's sacred rites. For this reason alone, there is a likelihood of irreparable harm absent a stay.

Second, the August 20 and 22 Orders will suppress the Dioceses' free speech rights, which itself constitutes irreparable harm. As Justice Blackmun noted, irreparable harm occurs whenever the "suppression of protected speech" occurs. *CBS* v. *Davis*, 510 U.S. 1315, 1318 (1994) (Blackmun, J., in chambers). And, of course, religious speech is protected under the First Amendment in its own right. Cf., *e.g.*, *Widmar* v. *Vincent*, 454 U.S. 263, 276 (1981). Violations of this right likewise create irreparable harm. See *Elrod* v. *Burns*, 427 U.S. 347, 373 (1976) ("The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury.").

Here, the seizure of property for an extended period of time will make it impossible for the Archdiocese's radio and television stations, and their newspapers,

[8] All Catholics will also face disrupted access to their spiritual leaders if "Catholic clergy, nuns, [and] monks" are displaced from their dwellings as a result of the August 20 and 22 Orders. App. G-2. Such displacement may make such Catholic spiritual leaders and teachers incapable of ministering to the faithful—again, both a Free Exercise Clause and Establishment Clause violation. Cf. *Hosanna-Tabor*, 565 U.S. at 195.

to "preach[] the gospel to Puerto Rico's residents." See App. G-2. This loss of ability to engage in protected speech will thus hurt the Archdiocese's religious missions, causing more irreparable harm.

Third, under this Court's decisions, irreparable harm necessarily occurs when a party is forced to pay money that is unlikely to be returned if the party ultimately prevails. See *Teva Pharm. USA, Inc.* v. *Sandoz, Inc.*, 134 S. Ct. 1621, 1621 (2014) (Roberts, C.J., in chambers); *Philip Morris USA Inc.* v. *Scott*, 561 U.S. 1301, 1304–1305 (2010) (Scalia, J., in chambers). Indeed, if "it appears that, before this Court will be able to consider and resolve Applicant' claims, a substantial portion of the fund established by [Applicant'] payment will be irrevocably expended," the applicant for a stay has established a likelihood of irreparable harm. *Id.*

In this case, it would be unrealistic (to say the least) to anticipate that Plaintiffs and other non-party recipients of pensions under the pension plan will be able to repay if the orders below are eventually reversed. Thus, the $4.7 million in assets that the August 20 and August 22 orders require the Marshall to seize will almost certainly be "irrevocably expended." This too constitutes irreparable injury.

Fourth, there is a likelihood of harm to the dozens of individuals "who currently live and/or sleep on property owned by the Archdiocese, its parishes or other affiliated institutions." App. G-2. The safety of these "Catholic clergy, nuns, monks, employees and otherwise homeless people," as well as seminarians—will be put in jeopardy if the August 20 and 22 Orders are enforced. App. G-2.[9]

[9] There is also a likelihood of harm to the public safety—which the Chief Justice has recognized as a distinct type of irreparable harm. *Maryland* v. *King*, 133 S. Ct. 1, 3 (2012) (Roberts, C.J., in chambers).

Fifth, those orders interfere with the duty of priests and nuns to collect offerings for the benefit of the Church and their local parishes and other organizations. These priests have a religious obligation—protected by the Free Exercise Clause—to collect money to meet the needs of the Church and its members. With the seizure in place, however, church leaders cannot collect funds without risking those funds being seized—thereby discouraging donations of all kind.

Each of these harms—never mind their combination—establishes a strong likelihood of irreparable harm if the orders at issue are not stayed.

III. The balance of equities strongly favors a stay.

The balance of equities also tips decidedly in favor of a stay. As noted above, in close cases the Circuit Justice or the Court will "balance the equities" to explore "the relative harms to applicant and respondent, as well as the interests of the public at large." *Rostker* v. *Goldberg*, 448 U.S. 1306, 1308 (1980) (Brennan, J., in chambers).

Here, as explained, the Archdiocese, its parishes, other Catholic entities, the Archdiocese's 1.5 million Catholics, and many other Puerto Rico residents will suffer irreparable injury absent a stay. And the August 20 and 22 Orders have already harmed applicants by taking more money from them than plaintiffs ever requested.

By contrast, moreover, the August 20 and 22 Orders will likely hurt many of the Plaintiffs themselves—those who are still employees. Drained of their resources,

---

Here, Puerto Rico is facing a massive humanitarian crisis. As the Archbishop explained below, "[a] freeze"—or seizure—"will … make it difficult if not impossible for the Archdiocese, parishes and other Catholic entities to provide ongoing relief to victims of Hurricane Maria and of the general poverty that pervades some parts of Puerto Rico." App. G-2. Fighting poverty and disasters enhances public safety. As the Catholic Church is the largest religion in Puerto Rico and a major source of relief for the many poor and needy in the Commonwealth, the public will face greater safety risks if the church is unable to provide humanitarian relief.

their Catholic employers will be forced to close their doors for inability to pay wages, which are much more valuable than the modest pensions these employees receive.

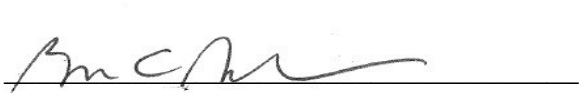
In short, any harm to the Plaintiffs if the stay is granted simply does not compare to the harms the Archdiocese, Catholic Puerto Ricans—and, indeed, all Puerto Ricans—will face if the stay is denied. Thus, the balance of the equities tips decidedly in favor of a stay.

CONCLUSION

Under the lower court's August 20 and August 22 Orders, all the assets of *all* Roman Catholic entities in the Archdiocese of Puerto Rico—including the modest bank accounts of poor parishes, radio and television stations, and even money set aside for teacher salaries—are now subject to seizures, which have already begun. That court has accomplished this astounding feat by ignoring that it lacked jurisdiction to issue the orders and eliminating the Due Process rights of the Archdiocese to be heard before it was named as a defendant and a subject of the seizure order.

The August 20 and 22 orders of the Court of First Instance should be stayed pending disposition of the Archdiocese's appeals and, if necessary, a subsequent petition for certiorari.

Respectfully submitted,



GENE C. SCHAERR
Counsel of Record
MICHAEL T. WORLEY
SCHAERR | DUNCAN LLP
1717 K Street NW, Suite 900
Washington, DC 20006
(202) 787-1060
gschaerr@schaerr-duncan.com

PEDRO A. BUSÓ-GARCÍA
SCHUSTER AGUILÓ LLC
LITTLER GLOBAL
221 Ponce de León Avenue
15th Floor
San Juan, PR 00917

August 2018

CERTIFICATE OF SERVICE

I hereby certify that on August 28, 2018, I caused to be sent by United States mail as well as email a copy of the foregoing to the following counsel of record:

JOSÉ R. RIVERA-MORALES
JIMÉNEZ, GRAFFAM & LAUSELL
PO Box 366104
San Juan, Puerto Rico 00936-6104
rrivera@jgl.com

FRANK ZORRILLA-MALDONADO
PO Box 191783
San Juan, Puerto Rico 00919-1786
fzorrilla@fzmlaw.com

EDA MARIEL AYALA-MORALES
PO Box 360481
San Juan, Puerto Rico 00936-4428
emayalam@hotmail.com

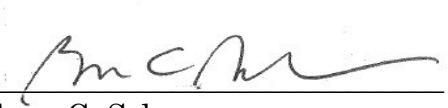
JESÚS R. RABELL-MÉNDEZ
PO Box 195580
San Juan, Puerto Rico 00919-5580
jesusrabell@gmail.com

CÉSAR ROSARIO VEGA
ADSUAR MUÑIZ GOYCO SEDA & PEREZ-OCHOA, P.S.C.
PO Box 70294
San Juan PR 00936-8294
rosario@amgprlaw.com

ANTONIO BAUZA
GERMAN BRAU
GUILLERMO SILVA
PO Box 13369
Santurce Station
San Juan, PR 00908
antonio.bauza@bioslawpr.com
german.brau@bioslawpr.com
gsilva@bioslawpr.com

CARLOS A. PADILLA-VÉLEZ
PO Box 194109
San Juan, Puerto Rico 00919-4109

JESÚS M. JIMÉNEZ GONZÁLEZ-RUBIO
PO Box 3025
Guayama, Puerto Rico 00785
jimesensei@yahoo.com



Gene C. Schaerr
Counsel for Applicant