No. _____

In The
Supreme Court of the United States

HERMANDAD DE EMPLEADOS DEL FONDO DEL SEGURO DEL ESTADO, ET AL.,

Petitioners,

v.

GOVERNMENT OF THE UNITED STATES OF AMERICA, ET AL.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The First Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Since 1952, Puerto Rico has had a form of self-government and a constitution of its own that states that the political power emanates from the People. However, in 2016, pursuant to the Territories Clause of the U.S. Constitution, Congress enacted PROMESA and imposed the Financial Oversight and Management Board ("FOMB") upon Puerto Rico to restructure the island's outstanding debt. Despite that the FOMB was not elected by the People of Puerto Rico, PROMESA empowered it to sidestep and override the decisions of the elected government officials of the Commonwealth. Therefore, the Commonwealth's self-government was torn apart by Congress, and the People of Puerto Rico were disenfranchised in violation of the 1st, 5th, 13th, 14th, and 15th Amendments of the U.S. Constitution. Even though Petitioners, two labor unions that represent their members, and a registered voter, are creditors of the Commonwealth under Title III of PROMESA, the District Court for the District of Puerto Rico and the U.S. Court of Appeals for the First Circuit determined that they do not have standing to challenge the constitutionality of the deprivation of their civil rights by PROMESA. Both courts determined that Petitioners' injury is a generalized grievance.

Thus, the questions presented for review are the following:

1. Whether Petitioners, as residents and registered voters in Puerto Rico, have suffered an

QUESTIONS PRESENTED—Continued

Article III injury in fact when Congress enacted PROMESA and disenfranchised them and the People of Puerto Rico in violation of the 1st, Amendment of the U.S. Constitution.

2. Whether the impairment of Petitioners' collective bargaining agreements is redressable by declaring PROMESA unconstitutional for violating the due process of law clauses of the 5th and 14th Amendments.

3. Whether Petitioners have standing to allege that PROMESA is unconstitutional under the 13th Amendment for being enacted pursuant to the Territories Clause as interpreted in the *Insular Cases*, which established a distinction between incorporated and unincorporated territories based on race.

4. Whether Petitioners have standing to allege that PROMESA is unconstitutional under the 15th Amendment for depriving them and the People of Puerto Rico of their voting rights based on race as interpreted in the *Insular Cases*.

5. Since Petitioners' disenfranchisement is a consequence of Puerto Rico's status as a colony, whether Petitioners have standing to request the court to declare that Puerto Rico is subject to be decolonized under international law.

PARTIES TO THE PROCEEDING

The parties to the proceedings below were as follows:

Petitioners here, Hermandad de Empleados del Fondo del Seguro del Estado, Inc., Unión de Médicos de la Corporación del Fondo del Seguro del Estado Corp., and Lizbeth Mercado-Cordero are parties in interest and filed an adversary complaint with the assigned case number Adv. Proc. No. 18-0066, related to case No. 17 BK-3283, initiated by Respondent, the Financial Oversight and Management Board for Puerto Rico (hereinafter, the "FOMB"), in the district court for the District of Puerto Rico, on behalf of the Commonwealth of Puerto Rico (hereinafter, the "Commonwealth").

Respondents, the Government of the United States of America, the FOMB, and the Commonwealth were defendants in the above referenced adversary proceeding. Also, they were appellees before the Court of Appeals for the First Circuit in the Case No. 19-2243, which is directly related to this case.

CORPORATE DISCLOSURE STATEMENT

Counsel for Petitioner certifies as follows:

Petitioners, Unión Hermandad de Empleados del Fondo del Seguro del Estado, Inc., and Unión de Médicos de la Corporación del Fondo del Seguro del Estado

CORPORATE DISCLOSURE STATEMENT—
Continued

Corp., are labor unions created as close corporations under the Laws of the Commonwealth of Puerto Rico. Their stocks are not traded, and they are not "nongovernmental corporate parties" for purposes of Rule 29.6, therefore, disclosures with respect to them are not required.

RELATED PROCEEDINGS

United States District Court for the District of Puerto Rico:

> *In re: Financial Oversight and Management Board for Puerto Rico, as representative of the Commonwealth of Puerto Rico, et al.* Ad. Proc. No. 18-00066 related to case, No. 17 BK-3283. Date of Judgment: November 15, 2019.

United States Court of Appeals for the First Circuit:

> *In re: Financial Oversight and Management Board for Puerto Rico, as representative of the Commonwealth of Puerto Rico, et al.* No. 19-2243. Date of Judgment: April 16, 2021.

TABLE OF CONTENTS

TABLE OF CONTENTS—Continued

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

OTHER AUTHORITIES

PETITION FOR WRIT OF CERTIORARI

Petitioners, Hermandad de Empleados del Fondo del Seguro del Estado, Inc. ("UECFSE"), Unión de Médicos de la Corporación del Fondo del Seguro del Estado Corp. ("UMCFSE"), and Lizbeth Mercado-Cordero (collectively as "Petitioners"), respectfully petition this Honorable Court for a writ of certiorari to review the judgement of the United States Court of Appeals for the First Circuit ("Court of Appeals" or "First Circuit") in the appeal No. 19-2243.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 995 F.3d 18. App. 1. The opinion of the United States District Court in Adv. Pro. No. 18-091 (D.P.R.), is unreported. App. 13.

JURISDICTION

The judgment of the Court of Appeals was entered on April 16, 2021. App. 11. Petitioners timely petitioned for Panel Rehearing or Rehearing e*n banc* on June 1, 2021. On June 15, 2021, the Court of Appeals denied the *Petition for Panel Rehearing or Rehearing En Banc*. App. 44. Therefore, Petitioners invoke the Jurisdiction of this Court under 28 U.S.C. §1254(1). Due to the COVID-19 pandemic, on March 19, 2020, this Honorable Court issued an Order extending the deadline to file any petition for writ of certiorari for 150

days from the date of the lower court judgment, order denying discretionary review, or order denying a timely petition rehearing. Such Order was rescinded on July 19, 2021. Nonetheless, this Court stated that "in any case in which the relevant court judgment, order denying discretionary review, or order denying a timely petition for rehearing was issued prior to July 19, 2021, the deadline to file a petition for a writ of certiorari remains extended to 150 days from the date of the judgment or order." Therefore, this petition is still timely.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The 1st Amendment of the U.S. Constitution states that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people to peaceably assemble, and to petition the Government for a redress of grievances." U.S. Const. Amend. I. The 5th Amendment, provides in its relevant part that "nor shall any person be [. . .] deprived of life, liberty or property without a due process of law [. . .]." U.S. Const. Amend. V. The 13th Amendment establishes that "[n]either slavery nor involuntary servitude [. . .] shall exist within the United States, or any place subject to their jurisdiction." U.S. Const. Amend. XIII, §1. The 14th Amendment states in its relevant part that "[n]or shall any State deprive any person of life, liberty, or property,

without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. Amend. XIV, §1. The 15th Amendment provides that "[t]he right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude." U.S. Const. Amend. XV, §1. The constitutionality of the Puerto Rico Oversight, Management, and Economic Stability Act ("PROMESA"), a federal law, is being questioned in this case under the 1st, 5th, 13th, 14th, and 15th Amendments of the U.S. Constitution.

STATEMENT OF THE CASE

A. Puerto Rico's form of self-government

On July 3, 1950, Congress enacted the *Federal Relations Act*, Pub. L. 81-100 ("Act 600") to establish a new form of self-government for Puerto Rico. Act 600 enabled Puerto Rico to draft its own Constitution, and in 1952, Congress approved it. Despite that the compact provided for Congress' approval, when the constitution went into effect, it became "a constitution under which the people of Puerto Rico organized a government of their own adoption." *Fin. Oversight & Mgmt. Bd. For P.R. v. Aurelius, LLC*, 140 S.Ct. 1649, 1672 (2020) (J. Sotomayor, concurring) ("*Aurelius*"). This enabled Puerto Rico "to choose [its] own officers for governmental administration." *Id*. at 1675.

Article I, Section 1 of the Commonwealth's Constitution establishes that "[i]ts political power emanates from the People and shall be exercised in accordance with their will, within the terms of the compact agreed upon between the People of Puerto Rico and the United States of America." P.R. Const. Art. I, §1. Additionally, it established that the right to vote is universal. *See* P.R. Const. Art. II, §2. It also stated that the Legislative and Executive Power shall be elected by the People of Puerto Rico. *See* P.R. Const. Art. III, §1 & Art. IV, §1. All of the rights that the Constitution conferred to its People—including the right to vote—cannot be suspended or altered unless the People of Puerto Rico voluntarily affirms it through a referendum. IV DIARIO DE SESIONES DE LA CONVENCIÓN CONSTITUYENTE DE PUERTO RICO 2378 (1952).[1]

The Commonwealth's Constitution states that the "Governor is the person who shall execute the laws and cause them to be executed." P.R. Const. Art. IV, §4. The executive branch of Puerto Rico, "shall present to the Legislative Assembly [. . .] a message concerning the affairs of the Commonwealth and a report concerning the state of the Treasury of Puerto Rico and the proposed expenditures for the ensuing fiscal year." P.R. Const. Art. IV, §4.

Regarding the powers of the Legislature, the Commonwealth's Constitution establishes that "[e]very bill which is approved by a majority of the total number of

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[1] Diary of Sessions of the Constituent Convention of Puerto Rico.

members of which each house is composed shall be submitted to the Governor and shall become law if he signs it or if he does not return it, with his objections [. . .]." P.R. Const. Art. III, §19, cl. 1. Finally, "[w]hen the Governor returns a bill to the house [. . .] [i]f approved by two-thirds of the total number of members of which each house is composed, said bill shall become law." P.R. Const. Art. III, §19, cl. 2.

Despite that the Governor and the members of the Legislature have the enumerated constitutional powers, Congress enacted PROMESA, which entitles the FOMB to override and sidestep the decisions of such Government officials. Since the Governor and the members of the Legislature are elected by the residents of Puerto Rico and the members of the FOMB are not, the People of Puerto Rico have been disenfranchised.

B. PROMESA

On June 30, 2016, the U.S. President signed PROMESA, 48 U.S.C. §2101 *et seq*., into law. PROMESA's purpose is to address the fiscal emergency in Puerto Rico, and it is designed to institute a "comprehensive approach to Puerto Rico's fiscal, management and structural problems and adjustments [. . .] involving independent oversight and a Federal statutory authority for the Government of Puerto Rico to restructure debts in a fair and orderly process." *Id.* §2194(m)(4).[2]

[2] The statute incorporated various sections of the Bankruptcy Code. Among them was §1109 of the Bankruptcy Code

The statute provides for the establishment of a non-voted seven-member Oversight Board for Puerto Rico appointed by the U.S. President with the purpose of providing a method for the island to achieve fiscal responsibility and access to the capital markets. *Id.* §2121(b)(1).

Pursuant to PROMESA, the FOMB is empowered to make determinations that bind the territory without providing for direction or supervision by Commonwealth's officers. *Id.* §2128(a). Also, in its sole discretion, it can determine the instrumentalities that will be covered by PROMESA. The FOMB has veto power over the Commonwealth's adoption of budgets, legislation, and fiscal plans, *id.* §§2141-42, 2144(a)(1) & 2144(a)(5). Also, it has unilateral power to rescind Puerto Rico laws, *id*. §2144(c)(3)(B), approve or disapprove fiscal plans for the Commonwealth and its instrumentalities, and issue its own fiscal plan if it rejects the Commonwealth's plan, to which the Governor and Legislature of the Commonwealth may not object. *Id*. §§2141(c)(3), (d)(2), (e)(2). PROMESA states that the U.S. District Court does not have jurisdiction to review challenges to the Oversight Board's certification determinations. *Id.* §2126(e).

Under PROMESA, neither the Governor nor the Legislature may exercise **any** control, supervision, oversight, or review **over the FOMB or its activities**. *Id*

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which states that parties in interest may raise and may appear and be heard on any issue in a case under this chapter. *See* Section 301 of PROMESA, 48 U.S.C. §2161.

§2128(a)(1). Neither can the government enact, implement, or enforce any statute, resolution, policy, or rule that would impair or defeat the purpose of PROMESA, **as determined by the Oversight Board**. *Id.* PROMESA also requires the Commonwealth to designate a dedicated funding source, **not subject to subsequent legislative appropriations**, sufficient to support the annual expenses of the Oversight Board **as determined in the FOMB's sole discretion**. *Id.* §2127(b)(1). Moreover, the FOMB's authorization is required to allow the Commonwealth to issue or guarantee new debt, or to exchange, modify, repurchase, redeem, or enter into any similar transactions regarding its outstanding debt. *Id.* §2147.

PROMESA also allows the FOMB to submit "recommendations to the Governor or the Legislature on actions the territorial government may take to ensure compliance with the Fiscal Plan, or to otherwise promote the financial stability, economic growth, management responsibility, and service delivery efficiency of the territorial government." *Id*. §2145. Regarding this section of PROMESA, the First Circuit extended the FOMB's power by deciding that "[t]here is no language at all in Section 205 suggesting that, by first seeking the Governor's agreement on a matter, the Board somehow loses whatever ability it otherwise had to act unilaterally on the matter." *In re Financial Oversight and Management Board for Puerto Rico*, 945 F.3d 3, 6 (1st Cir. 2019). Also, that "[t]o rule that the Board loses its power to act unilaterally on a matter by first seeking the Governor's agreement would be to discourage

the Board from first seeking common ground and listening to the Governor's reaction before finally deciding to act." *Id.* at 7. The First Circuit established that "even assuming that the Board first sought the Governor's agreement to adopt a policy [. . .], the Board in doing so certainly lost no power that it otherwise might have had to include that policy in the fiscal plan (or budget)," if the Governor rejects the FOMB's recommendation. *Id.*

Despite that the FOMB has broad powers upon Puerto Rico as a whole, the FOMB's members were not elected by the People of Puerto Rico. Neither were the federal officials that imposed PROMESA and appointed the members of the FOMB. Nonetheless, pursuant to PROMESA, the FOMB has overridden the elected Commonwealth officials' decisions and impacted drastically the lives of all the residents of Puerto Rico. Therefore, Petitioners, as registered voters in Puerto Rico, have been deprived of their right to vote for the officials in charge of ruling the Commonwealth's internal and financial affairs, in violation of the 1st Amendment.

Additionally, PROMESA allows the FOMB to, in its sole discretion, certify fiscal plans and budgets for the Commonwealth and its instrumentalities, and such certification decisions cannot be judicially reviewed. *See* 48 U.S.C. §2126(e). Through these certified fiscal plans and budgets, particularly the

Commonwealth's Fiscal Plan,[3] the FOMB has imposed austerity measures taking away Petitioners' property and vested rights contained in the collective bargaining agreements of UCFSE and UMCFSE, with their employer, the State Insurance Fund Corporation ("CFSE" for its Spanish acronym). Thus, PROMESA violates the due process of law under the 5th and 14th Amendments for barring judicial review of the certification determinations of the FOMB that took away Petitioners' property and vested rights.

C. Puerto Rico's territorial status

PROMESA was enacted by Congress pursuant to its plenary powers under Article IV of the U.S. Constitution, which states that "Congress shall have power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States." U.S. Const. Art. IV, §2, cl. 1. This constitutional provision was further interpreted by the Supreme Court in the racist and infamous *Insular Cases*, which established a distinction between incorporated and unincorporated territories based on race. *See Downes v. Bidwell*, 182 U.S. 244, 287 (1901) (Justice Brown observed that because the "**alien**

[3] 2020 Fiscal Plan for Puerto Rico: Restoring Growth and Prosperity. As certified by the [FOMB], on May 27, 2020. Available at: https://drive.google.com/file/d/1ayjLxr74cKpFo4B2sAToSjOeJOYvFO5/view (Last visit: September 29, 2021). The Second Amended Adversary Complaint only makes reference to the Commonwealth's Fiscal Plan for 2018 because the 2020 Fiscal Plan had not been certified by the time that the complaint was filed.

races" that inhabited the new territories that the U.S. had acquired differed from other Americans in "religion, customs, laws, methods of taxation, and modes of thought, the administration of government and justice, according to Anglo-Saxon principles, may for a time be impossible."). (emphasis added). Additionally, the *Insular Cases* established that unincorporated territories belong to but are not part of the U.S., and that the U.S. Constitution does not apply automatically, except the fundamental rights and what Congress deems appropriate. *Balzac v. Porto Rico*, 258 U.S. 298, 312-13 (1922). Thus, the *Insular Cases* "constitutionalized" the illegal colonial regime and Puerto Rico's treatment as "property" based on racial distinctions, just like slaves that belonged to their owners with no voting rights.

It is notable that the plurality opinion of the first two *Insular Cases—De Lima v. Bidwell*, 182 U.S. 1 (1901) and *Downes v. Bidwell*, 182 U.S. 244 (1901)—were written by Justice Brown, which is the same Justice that decided *Plessy v. Ferguson*, 163 U.S. 537 (1896). Thus, these cases must be overruled for being "morally repugnant." *See Trump v. Hawaii*, 138 S.Ct. 2392, 2423 (2018) (overruling *Korematsu v. United States*, 323 U.S. 214 (1944) for being "**morally repugnant**" since allowed the "forcible relocation of U.S. citizens to concentration camps, solely and explicitly on the basis of race [. . .]."). (emphasis added).

PROMESA was enacted pursuant to the Territories Clause as interpreted in the racist *Insular Cases*. Thus, it violates the 13th Amendment, which was enacted to end slavery and its lingering effects, such as

actions based on racial discrimination. Additionally, PROMESA violates the 15th Amendment for disenfranchising the residents of Puerto Rico, based on the racist *Insular Cases*.

The *Insular Cases* and PROMESA also violate the customary international rule of the right to self-determination, which is binding upon the U.S.

D. Procedural Background

On May 30, 2018, UECFSE, UMCFSE, and *Asociación de Empleados Gerenciales del Fondo Del Seguro del Estado* ("AEGFSE") filed an *Adversary Complaint* against the Government of the United States of America, the FOMB, the Commonwealth of Puerto Rico, and the now, former Governor of Puerto Rico, Ricardo Antonio Rosselló-Nevares. On August 17, 2018, UECFSE, UMCFSE, AEGFSE, Francisco J. Reyes-Márquez, Lizbeth Mercado-Cordero, José Ortiz-Torres, and Eva E. Meléndez-Fraguada filed a *First Amended Adversary Complaint* against the Government of the United States of America, the FOMB, and the Commonwealth of Puerto Rico (together as "Respondents").[4] On October 5, 2018, Petitioners and Francisco J. Reyes[5] filed

[4] José Ortiz Torres, Eva Meléndez Fraguada, and AEGFSE voluntarily withdrew their claims from the present case.

[5] Francisco J. Reyes Márquez passed away on December 27, 2019—before the filing the notice of Appeal at the First Circuit. The deceased has no personal representative that may be substituted in this action.

a *Second Amended Adversary Complaint* ("SAC") against Respondents.

In the SAC, Petitioners sought an order declaring that the Universal freedoms, the right to vote, and the right to have full political participation are integrated in international law sources that are binding upon the U.S. and are embodied in the Bill of Rights of the U.S. Constitution. Also, an order declaring that PROMESA and the FOMB's actions pursuant to PROMESA, violate the 1st, 5th, 13th, 14th, and 15th Amendments of the U.S. Constitution and the right to self-determination under international law. Additionally, an order overruling the *Insular Cases* for being unconstitutional and unlawful under international law. Finally, an order declaring that Puerto Rico is subject to an illegal colonial regime that must be decolonized pursuant to the procedures enacted by the General Assembly of the United Nations ("U.N.") through the *Declaration on the Granting of Independence to Colonial Countries and Peoples*, Resolution 1514 (XV) of December 14, 1960.

On December 19, 2018, Respondents moved the District Court for the District of Puerto Rico ("District Court") to dismiss the SAC for lack of Article III standing. On November 15, 2019, the District Court erroneously dismissed the SAC for lack of Article III standing because it concluded that Petitioners' injury in fact was a generalized grievance. App. 13.

On November 26, 2019, Petitioners filed a Notice of Appeal and on March 23, 2020, filed their Opening

Brief before the First Circuit. Petitioners alleged in the First Circuit that the District Court erred because they do have Article III standing to pursue the claims in the SAC. UCFSE and UMCFSE are two labor unions that presented this adversary proceeding on behalf of their members. Both unions' members and Lizbeth Mercado-Cordero had a legally protected interest that was violated by PROMESA. Petitioners had the right to vote for the Government officials in charge of ruling the Commonwealth's financial and internal affairs, but through PROMESA, Congress deprived them from fully exercising that right in violation of the 1st, 5th, and 14th Amendments. Also, Petitioners alleged that this injury in fact is not a generalized grievance because it is particular to the residents of Puerto Rico, and not shared among the residents of the States of the Union. Chapter 9 of the Bankruptcy Code, which is the statute that governs the debt restructuring and bankruptcy process for States and its municipalities, does not impose an unelected entity such as the FOMB. Additionally, Petitioners alleged that PROMESA violates the 13th and 15th Amendments, and international law, and that such injury is particular to them because the States of the Union are not subject to an illegal colonial regime based on racism. Therefore, Petitioners asserted that they have Article III standing to pursue the claims in the SAC.

However, on April 16, 2021, the First Circuit confirmed the District Court's decision of dismissing the SAC for lack of standing. In a 6-page Opinion, the First Circuit erroneously determined that PROMESA's

disenfranchisement is a generalized grievance. It determined that the "plaintiffs do not contend that any of these limits have diluted their voting power within Puerto Rico vis-á-vis others in Puerto Rico." App. 8. In other words, it decided that Petitioners or any other resident of Puerto Rico cannot claim for their constitutional rights to be restored, since the injury is always going to be shared among the People of Puerto Rico. Regarding Petitioners' claim that PROMESA violates the due process of law under the 5th and 14th Amendments, the First Circuit decided that the relief sought is not redressable. App. 7. Finally, the First Circuit decided that "[t]he issues that the plaintiffs' complaint raises concerning the legal status of Puerto Rico are weighty ones. But, to be fit for adjudication in federal court, they must be raised in a suit that satisfies the requirements of Article III." App. 9.

After the First Circuit entered its *Opinion*, Petitioners filed a *Petition for Panel Rehearing or Rehearing En Banc* on June 1st, 2021. However, on June 15, 2021, the Court of Appeals denied the *Petition for Panel Rehearing or Rehearing En Banc*. App. 44.

The First Circuit's determination is contrary to this Court's case-law on standing. Although Petitioners' injury is shared with the citizens/residents of Puerto Rico, it is not shared with the citizens/residents on the States of the Union. In the present case, Congress—through PROMESA—rather than the Commonwealth, diluted the voting rights of the residents of Puerto Rico vis-à-vis the residents of the 50 states. Chapter 9 of the Bankruptcy Code, which is the

restructuring statute that applies to the States and municipal governments of the U.S. (except Puerto Rico), does not impair the voting rights of the residents of the States of the Union, since it does not impose an unelected entity such as the FOMB, with the authority to override and sidestep the decisions of the elected government officials of the States. Regarding Petitioners' claims on the illegal colonial regime that exists in Puerto Rico in violation of the 13th and 15th Amendments and the right to self-determination, it is an injury that it is equally shared only among the residents of Puerto Rico and those similarly situated, which are the residents of the unincorporated territories of the U.S. Also, it is even more evident that Petitioners have standing since the judicial forum is the only one available to vindicate their rights because the only "representation" that Puerto Rico has in Congress is the Resident Commissioner who has no voting rights amongst Congress members. Thus, the political process is not available for Petitioners.

Likewise, Petitioners are parties in interest in the Commonwealth's debt restructuring case pursuant to Section 1109(b) of the Bankruptcy Code, which grants statutory standing to "anyone who has a legally protected interest that could be affected by a bankruptcy proceeding." *In re Thorpe Insulation*, 677 F.3d 869, 884 (9th Cir. 2012). Parties in interest may appear and be heard on any issue in a bankruptcy case, including to challenge the constitutionality of a bankruptcy statute. *See Northern Pipeline Const. Co. v. Marathon Pipeline Co*., 458 U.S. 50 (1982), and *Stern v. Marshall*,

564 U.S. 462 (2011) for examples of creditors challenging the constitutionality of statutes granting jurisdiction to bankruptcy judges in violation of Art. III of the U.S. Constitution.

Regarding Petitioners' due process of law claims, there is no doubt that it is redressable by the relief sought. Declaring PROMESA unconstitutional would eliminate its Section 106, which is the statutory provision that allows the FOMB to take away Petitioners' property rights through the certification of fiscal plans and budgets that are not subject to judicial review. Additionally, invalidating all of the FOMB's actions taken pursuant to PROMESA redresses Petitioners' injury since it will nullify the certified fiscal plans for the Commonwealth that have deprived Petitioners from their property rights under their collective bargaining agreements.

Finally, PROMESA is based on the racist *Insular Cases*, which are morally repugnant, and thus must be overruled for establishing Puerto Rico's status as an unincorporated territory on racial discrimination. Also, PROMESA was enacted by Congress pursuant to Puerto Rico's status as an unincorporated territory that belongs to, but it is not part of the U.S. In other words, Congress has the authority to impose PROMESA upon Puerto Rico because the latter is a colony of the U.S., which is illegal under the customary norm of the right to self-determination. This case constitutes an opportunity for this Court to review the constitutionality of the *Insular Cases* and the lawfulness of Puerto Rico's colonial status. Thus, Petitioners respectfully

request this Court to grant this petition for writ of *Certiorari* since this case raises important and novel issues that must be addressed by this Court.

REASONS FOR GRANTING THE PETITION FOR WRIT FOR CERTIORARI

A. The First Circuit's determination conflicts with this Court's case-law on standing because the disenfranchisement caused by PROMESA is particular to Petitioners and the People of Puerto Rico.

As explained, the First Circuit decided that Petitioners' injury in fact—the disenfranchisement—is a generalized grievance, and therefore, that they lack Article III standing. Article III of the U.S. Constitution limits the jurisdiction of federal courts to "Cases" and "Controversies." *Lujan v. Defenders of Wildlife*, 540 U.S. 555, 579 (1992). As such, for a plaintiff to have standing, it "must have suffered an 'injury in fact'—an invasion of a legally protected interest"—which is concrete and particularized, and actual or imminent, not conjectural or hypothetical. *Id.* at 560.

This Court established that when the harm is widely shared, but concrete, the "injury in fact" element of the standing analysis is met. *FEC v. Akins*, 524 U.S. 11, 24 (1998). Also, that an alleged harm that is widely shared is concrete, "**where a large number of voters suffer interference with voting rights**

conferred by law." *Id.* (emphasis added). "Intangible harms," such as the abridgment of free speech, constitute a concrete injury in fact. *TransUnion LLC v. Ramirez*, 141 S.Ct. 2190, 2204 (2021) (citations omitted).

Here, Petitioners are two labor unions that represent their members, whom are employees of CFSE and Lizbeth Mercado-Cordero, who is a member of UECFSE and an employee of CFSE. Both labor unions' members and Lizbeth Mercado-Cordero are registered voters in Puerto Rico. Prior to the enactment of PROMESA, Petitioners had the legally protected interest of voting for the Government that, pursuant to the Commonwealth's Constitution, had autonomy to govern Puerto Rico on ***all*** local matters.

However, through PROMESA, Congress imposed the unelected members of FOMB upon Puerto Rico, which has the power to override the Government's officials' decisions, rescind laws and public contracts, etc. All these actions that the FOMB is authorized to make, affect the lives of all the residents of Puerto Rico. For example, on July 2, 2021, the FOMB initiated an adversary proceeding (and won) to rescind the *Dignified Retirement Act*, Act 7-2021, which was enacted by the Commonwealth to protect the pensions and retirement benefits of Puerto Rico's public employees, which include Petitioners.[6]

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[6] Av. Proc. No. 21-00072-LTS. Available at: https://cases.primeclerk.com/puertorico/Home-DocketInfo?DocAttribute=4492

The FOMB's "decisions have affected the island's entire population, particularly many of its most vulnerable citizens. The Board has ordered pensions to be reduced by as much as 8.5 percent, a measure that threatens the sole source of income for thousands of Puerto Rico's poor and elderly." *Aurelius*, at 1674 (J. Sotomayor, concurring). Moreover, "[o]ther proposed cuts take aim at already depleted healthcare and educational services. It is under the yoke of such austerity measures that the island's 3.2 million citizens now chafe." *Id*.

Furthermore, despite that this Court decided that the members of the FOMB are territorial officers of the Government of Puerto Rico, they were not elected by the People of Puerto Rico. *Id.* However, "[w]hen Puerto Rico and Congress entered into a compact and ratified a constitution of Puerto Rico's adoption, Congress explicitly left the authority to choose Puerto Rico's governmental officers to the people of Puerto Rico." *Id*. at 1674 (J. Sotomayor, concurring). Consequently, there are serious questions "as to whether the Board members may be territorial officers of Puerto Rico when they are not elected nor approved, directly or indirectly, by the People of Puerto Rico." *Id*. at 1677 (J. Sotomayor, concurring). There is no doubt that Petitioners have been disenfranchised by Congress through PROMESA, in violation of the right to vote embedded in the Commonwealth's Constitution and the 1st Amendment, which includes the right to vote

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&DocAttrName=ADV.CASENO.21-00072_Q&MenuID=8010 (Last visit: October 14, 2021).

as a form of expression. *See Wesberry v. Sanders*, 376 U.S. 1, 17 (1964); *Norman v. Reed*, 502 U.S. 279, 288 (1992).

Nonetheless, relying on *Baker v. Carr*, 369 U.S. 186, 204 (1962), the First Circuit decided that the "plaintiffs do not contend that any of these limits have diluted their voting power within Puerto Rico vis-á-vis others in Puerto Rico." App. 8. However, in *Baker*, the plaintiffs sued **state officials** and challenged the constitutionality of a 1901 **statute of Tennesse**e for the "debasement of their votes." *Baker*, 369 U.S. at 187-88. Through this statute, the State of Tennessee created a gross disproportion of representation in the voting population of Tennessee. The plaintiffs' alleged injury was that "this classification disfavors the voters in the counties in which they reside, placing them in a position of constitutionally unjustifiable inequality vis-à-vis voters in irrationally favored counties." *Id.* at 207-08.

Here, through PROMESA, **Congress**, rather than the Commonwealth, "diluted" the voting rights of the residents of Puerto Rico vis-à-vis the residents of the 50 states. For instance, Chapter 9 of the Bankruptcy Code, does not impair the voting rights of the residents of the States, since it does not impose an unelected entity such as the FOMB, with the authority to override and sidestep the decisions of the elected government officials of such States. Thus, although it is true that Petitioners' injury in fact is shared with all the residents of Puerto Rico, it is not shared with the other American citizens that live in the States of the Union.

Therefore, as in *Baker v. Carr*, Petitioners "seek relief in order to protect or vindicate an interest of their own, and of those similarly situated." *Baker*, 369 U.S. at 207. Also, Petitioners "are asserting a plain, direct, and adequate interest in maintaining the effectiveness of their votes, not merely a claim of the right, possessed by every [American] citizen, to require that the Government be administered according to law [. . .]." *Id.*

Petitioners' disenfranchisement is particular to Petitioners and the residents of Puerto Rico, because if a statute like PROMESA is imposed upon the States it would violate principles of federalism contained in the 10th Amendment. The powers that Congress gave to the FOMB would meddle with the powers reserved for the States; "if a power is an attribute of state sovereignty reserved by the 10th Amendment, it is necessarily a power the Constitution has not conferred on Congress." *New York v. United States*, 505 U.S. 144, 156 (1992) (citations omitted). Thus, a statute like PROMESA cannot be imposed on the States because it would be forbidden by the 10th Amendment, which bars Congress from destroying the self-government of the States. Consequently, Petitioners' injury in fact is particular to them and the residents of Puerto Rico, and not a generalized grievance.

Therefore, Petitioners' injury—disenfranchisement—is concrete for Article III purposes. Also, it is even more evident that Petitioners have standing since the judicial forum is the only one available to vindicate their right, given that the only representation that Puerto Rico has in Congress is a Resident

Commissioner with no voting rights. Moreover, in *FEC v. Akins*, 524 U.S. 11, 24 (1998), this Court stated that "the fact that a political forum may be more readily available where an injury is widely shared [. . .] does not by itself, automatically disqualify an interest for Article III purposes."

There are two other requirements of the doctrine of standing, which are that the injury in fact suffered by the plaintiffs must be fairly traceable to the defendants and must be redressable by the relief sought. *Lujan v. Defenders of Wildlife*, 540 U.S. 555, 579 (1992). There is no doubt that Petitioners' injury in fact is fairly traceable to Respondents, which are the Government of the U.S. and the FOMB, since the former enacted PROMESA and the latter is the unelected entity sidestepping the Commonwealth's officials' decisions and actions. The Commonwealth is a defendant in this case because it is an indispensable party due to the implications that a judgment in favor of Petitioners would have on Puerto Rico. Declaring PROMESA unconstitutional under the 1st Amendment for the grounds asserted in Petitioners' complaint would redress Petitioners' injury in fact because it would invalidate and nullify PROMESA. Neither the FOMB nor another unelected entity, would be able to continue harming the voting rights of Petitioners and the residents of Puerto Rico. Petitioners' and the People of Puerto Rico's voting rights would be restored. Consequently, Petitioners have standing to challenge PROMESA under the 1st Amendment of the U.S. Constitution.

B. Petitioners' claim that PROMESA violates their due process of law is redressable by the relief sought.

The First Circuit erroneously determined that Petitioners' claims under the due process clauses of the 5th and 14th Amendments, although are concrete injuries, are not redressable by the relief sought and that therefore, they lack Article III standing.

Petitioners alleged that the Commonwealth enacted four laws[7] that impaired their collective bargaining agreements with CFSE that were incorporated into the Commonwealth's certified fiscal plans. Also, that through these fiscal plans, the FOMB is depriving Petitioners from their property without a due process of law, since those discretional, unilateral certification decisions, cannot be judicially reviewed nor questioned as barred by Section 106 of PROMESA.[8] While Congress may elect not to confer a property interest, it may not constitutionally authorize the deprivation of the once conferred interest, "without appropriate procedural safeguards." *Cleveland Bd. of Ed. v. Loudermill*,

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[7] These four laws are: the *Government of the Commonwealth of Puerto Rico Special Fiscal and Operational Sustainability Act*, Act No. 66-2014; the *Act to Attend to the Economic, Fiscal, and Budget Crisis and to Guarantee the Functioning of the Government of Puerto Rico*, Act No. 3-2017; the *Administration and Transformation of the Human Resources of the Government of Puerto Rico Act*, Act No. 8-2017 and; the *Fiscal Plan Compliance Act*, Act No. 26-2017.

[8] "There shall be no jurisdiction in any United States district court to review challenges to the Oversight Board's certification determinations under this chapter." 48 U.S.C. §2126(e).

470 U.S. 532, 541 (1985). However, the First Circuit concluded that:

> The problem with plaintiffs' contention is that none of the relief that they seek would prevent any of the laws that they contend caused them pecuniary harm from continuing to have full force and effect. For that reason, it is entirely speculative on this record that any of that relief would spare the plaintiffs the pecuniary harm that they trace back to those laws. App. 7.

According to PROMESA, every policy included in the certified fiscal plans cannot be amended or rescinded by the Legislature. Therefore, since the laws in question were included in the certified fiscal plans, the Legislature cannot rescind or modify them, despite that the members of the Legislature are the political body that respond to the People of Puerto Rico.

Hence, Petitioners' harm would be redressed by declaring PROMESA unconstitutional under the 5th and 14th Amendments. PROMESA's Section 106 would not exist anymore, which means that the FOMB will not certify fiscal plans that cannot be judicially reviewed. Also, all the FOMB's actions would be declared null and void—that includes the Commonwealth Fiscal Plan of 2018. Even if the FOMB's actions are not declared null and void, and the decision on the constitutionality of PROMESA is prospective, the FOMB would be enjoined of certifying fiscal plans that are not judicially reviewable pursuant to PROMESA. It is a fact that the Commonwealth's fiscal plans after 2018

have deprived Appellants of their property rights without a due process of law.[9] Without PROMESA, the Legislature of Puerto Rico, which is the political body that responds to the People of Puerto Rico, would be free to rescind or amend the laws in question. Therefore, contrary to what the First Circuit decided, Petitioners' harm is redressable by the relief sought since the FOMB would not be allowed to certify fiscal plans without judicial review.

Additionally, Petitioners alleged that they were deprived of their liberty interests without a due process of law, and the First Circuit did not address it in its *Opinion*. The FOMB was imposed without the People of Puerto Rico's consent, infringing upon the fundamental right to vote for the officials in charge of Puerto Rico's fiscal affairs. When a law infringes a fundamental right, it is unconstitutional unless it is necessary to pursue a compelling governmental interest. *See Harper v. Virginia State Bd. of Elections*, 383 U.S. 663 (1966). The U.S. might have a compelling interest in addressing Puerto Rico's fiscal crisis. However, Chapter 9 of the Bankruptcy Code does not impair voting rights. Therefore, PROMESA violates the due process of law, and declaring it unconstitutional would

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[9] *See* for example 2019 Fiscal Plan for Puerto Rico, Restoring Growth and Prosperity, as certified by the FOMB, May 9, 2019, at 84. Available at: https://drive.google.com/file/d/13wuVn04--JKMEPKu-u-djZJHqTK-55aV/view (Last visit: October 12, 2021), and 2020 Fiscal Plan for Puerto Rico, Restoring Growth and Prosperity, as certified by FOMB, May 27, 2020, at 150-51. Available at: https://drive.google.com/file/d/1ayjLxr74cKpFo4B2sAToSj-OeJOYvFO5/view (Last visit October 12, 2021).

redress Petitioners' injury in fact. Consequently, the First Circuit's decision is contrary to this Court's case-law on standing.

C. This is the perfect case for this Court to revisit the constitutionality of the *Insular Cases* for the implications that have had upon Puerto Rico and the other Territories.

Congress enacted PROMESA pursuant to the Territories Clause of the U.S. Constitution as interpreted in the *Insular Cases*. Therefore, Petitioners' injury in fact traces back to the 1900's when this Court "constitutionalized" the colonial relationship between Puerto Rico and the U.S. through the *Insular Cases.*

The Territories Clause established that "Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States [. . .]." Art. IV, cl. 2, U.S. The *Insular Cases* interpreted this clause and established the doctrine of the unincorporated territory that **belongs** to, but it is not part of the U.S., and to whom only applies the fundamental constitutional rights and what Congress deems appropriate. *Balzac v. Porto Rico*, 258 U.S. 298, 312-13 (1922). Thus, under the Territories Clause and the *Insular Cases*, territories like Puerto Rico are **property** of the U.S. subject to the rules and regulations of Congress.

The *Insular Cases* established a difference between incorporated and unincorporated territories

based on **race**. In *Downes v. Bidwell*, 182 U.S. 244, 287 (1901), Justice Brown observed that because the "**alien races**" that inhabited the new territories that the U.S. had acquired differed from other Americans in "religion, customs, laws, methods of taxation, and modes of thought, the administration of government and justice, according to Anglo-Saxon principles, may for a time be impossible." Also, Justice Brown established that:

> It is obvious that in the annexation of outlying and distant possessions grave questions will arise from differences of race, habits, laws, and customs of the people [. . .] which may require an action on part of Congress that would be quite unnecessary in the annexation of contiguous territory inhabited only by people of the same race [. . .]. *Id.* at 282.

Indeed, the plurality opinion of the first two *Insular Cases—De Lima v. Bidwell*, 182 U.S. 1 (1901) and *Downes v. Bidwell*, 182 U.S. 244 (1901)—were written by Justice Brown, which is the same Justice that decided *Plessy v. Ferguson*, 163 U.S. 537 (1896). Thus, the *Insular Cases* "constitutionalized" the illegal colonial regime and Puerto Rico's treatment as "property" based on racial distinctions, just like slaves that belonged to their owners with no voting rights. Therefore, PROMESA—as enacted pursuant to the Territories Clause and its interpretation in the *Insular Cases*—violates the 13th Amendment.

The 13th Amendment was enacted to end slavery and its lingering effects. *Badges of slavery* is defined as

"any act of racial discrimination—public or private—that Congress can prohibit under the 13th Amendment."[10] Hence, the 13th Amendment abolished slavery and established universal freedoms, such as the right to vote, own property—rather than being property—etc. *Civil Rights Cases*, 109 U.S. 3, 20 (1875). As Congress disenfranchised Petitioners and the People of Puerto Rico through PROMESA pursuant to the Territories Clause and the *Insular Cases*, PROMESA violates the 15th Amendment which states that "[t]he right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude." U.S. Const. Amend. XV, §1.

Consequently, the *Insular Cases* must be overruled by this Court for being "morally repugnant." *See Trump v. Hawaii*, 138 S.Ct. 2392, 2423 (2018) (overruling *Korematsu v. United States*, 323 U.S. 214 (1944) for being "morally repugnant" since allowed the "forcible relocation of U.S. citizens to concentration camps, solely and explicitly on the basis of race [. . .]."). *Stare decisis* does not require the retention of the *Insular Cases*.

In *Mark Janus v. American Federation of State, County, and Municipal Employees, Council 31*, 138 S.Ct. 2448 (2018) ("*Janus*"), this Court stated that "*stare decisis* applies with perhaps least force of all decisions that wrongly denied First Amendment rights."

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[10] *Badge of Slavery*, Black's Law Dictionary 4334 (8th ed. 2004).

Id. at 2478 (citations omitted). As explained, the *Insular Cases* were fundamentally based on racial distinctions, and badges and incidents of slavery forbidden by the 13th and 15th Amendments of the U.S. Constitution. Moreover, pursuant to the Territories Clause as interpreted in the *Insular Cases*, Congress enacted PROMESA and disenfranchised Petitioners and the residents of Puerto Rico in violation of the Commonwealth's Constitution and the 1st Amendment. Therefore, *stare decisis* does not apply to the *Insular Cases*.

According to *Janus*, the factors that can be considered when determining to overrule a past decision are the quality of the *Insular Cases*' reasoning, the workability of the rule established, its consistency with other related decisions, developments since the decision was handed down, and reliance on the decision. *Id*. at 2478-79. Considering the first factor, the *Insular Cases* rule is not reasonable. There is no basis for establishing or maintaining Puerto Rico and its residents as property of the U.S., nor disenfranchising them based on racial distinctions.

As to the workability, the *Insular Cases* established a rule that it is so broad that allows Congress to enact statues like PROMESA and deprive the residents of Puerto Rico of their political rights and destroy Puerto Rico's self-government that was already granted through Act 600. Also, the *Insular Cases* are not consistent with other decisions like *Brown v. Board of Education*, which overruled *Plessy v. Ferguson* for basically legalizing racial discrimination. The *Insular*

Cases have the same reasoning of *Plessy v. Ferguson* because, for example, are based on racism.

Additionally, big developments in Puerto Rico's relationship with the U.S. have happened that are inconsistent with the *Insular Cases*, which were decided in the period of 1901-1922. For example, Act 600 granted Puerto Rico a form of self-government similar to the one possessed by the States of the Union. *Examining Bd. of Engineers v. Flores de Otero*, 426 U.S. 572, 597 (1976). Likewise, federal officials certified to the U.N. that, regarding Puerto Rico, the U.S. did not need to comply with its reporting obligations under the U.N. Charter as to territories "whose people have not yet attained a full measure of self-government." Charter of the U.N., 59 Stat. 1048, Art. 73, June 26, 1945, T. S. No. 993. Accordingly, the U.N. General Assembly declared that the People of Puerto Rico "ha[d] been invested with attributes of political sovereignty which clearly identify the status of self-government attained . . . as that of an autonomous political entity." *Aurelius*, at 1676 (J. Sotomayor, concurring) (*quoting* G. A. Res. 748, U. N. GAOR, 8th Sess., Supp. No. 17, U. N. Doc. A/2630 (Nov. 27, 1953)). Being held as property that belongs to, but it is not part of the U.S. according to the doctrine of the unincorporated territory elaborated by the *Insular Cases*, is also contrary to developments in international law regarding the right to self-determination, as it will be explained in detail in the next section.

The doctrine of the unincorporated territory that belongs to, but it is not part of the U.S., established by the *Insular Cases* is so anti-democratic and colonialist,

that such cases have not been relied on by this Court in the last decade despite that there has been, at least, three cases about Puerto Rico's differences with the States of the Union before this Court. *See Puerto Rico v. Sánchez Valle*, 136 S.Ct. 1863 (2016); *Puerto Rico v. Franklin Cal. Tax-Free Trust*, 136 S.Ct. 1938 (2016); *Fin. Oversight & Mgmt. Bd. For P.R. v. Aurelius, LLC*, 140 S.Ct. 1649 (2020). Nevertheless, the lingering effects of the *Insular Cases* are still present and constitute the foundation for the discriminatory treatment of Puerto Rico by Congress.

Here, Petitioners claim that they and the residents of Puerto Rico have been disenfranchised by Congress through PROMESA's enactment and the FOMB's imposition, in violation of the 1st, 5th, 13th, 14th, and 15th Amendments for the grounds explained before, and because Congress acted pursuant to the Territories Clause, as interpreted in the *Insular Cases*. In other words, Petitioners' injury in fact traces back to the *Insular Cases*. Therefore, there is no doubt that the *Insular Cases* must be overruled, and this is the perfect case to do so.

It should be noted that despite that Petitioners discussed thoroughly the harm that the *Insular Cases* have done and their relation with the disenfranchisement caused by PROMESA, the First Circuit did not discuss the 13th and 15th Amendment claims of Petitioners. Respondents will argue that Petitioners lack standing to bring these claims because their injuries are generalized grievances. Nonetheless, the same reasoning of the disenfranchisement claim applies here.

Petitioners share their 13th and 15th Amendment injuries with the residents of Puerto Rico, but not with the residents of the States of the Union. Puerto Rico's status as an unincorporated territory has been Congress' weapon to discriminate against residents of Puerto Rico and treat them differently in comparison with the residents of the States of the Union. *See Balzac v. Porto Rico*, 258 U.S. 298, 312-13 (1922); *Califano v. Torres*, 435 U.S. 1 (1978); *Harris v. Rosario*, 446 U.S. 651 (1980); *Puerto Rico v. Franklin Cal. Tax-Free Trust*, 136 S.Ct. 1938 (2016). Therefore, Petitioners have Article III standing to bring their claims on the unconstitutionality of PROMESA and the *Insular Cases* under the 13th and 15th Amendments.

D. This case brings a novel issue before this Court, and that is the lawfulness of Puerto Rico's status as a colony of the U.S.

Puerto Rico's "status" as an unincorporated territory that belongs to, but it is not part of the U.S. has not been addressed by this Court. The importance of reviewing the lawfulness of the Commonwealth's status is evident given that Congress destroyed Puerto Rico's self-government through PROMESA, despite that Congress granted autonomy to Puerto Rico in 1952. Justice Sotomayor stated that:

> [. . .] the longstanding compact between the Federal Government and Puerto Rico raises grave doubts as to whether the Board members are territorial officers not subject to the

Appointments Clause. When Puerto Rico and Congress entered into a compact and ratified a constitution of Puerto Rico's adoption, Congress explicitly left the authority to choose Puerto Rico's governmental officers to the people of Puerto Rico. That turn of events seems to give to Puerto Rico, through a voluntary concession by the Federal Government, the exclusive right to establish Puerto Rico's own territorial officers.

[. . .]

At a minimum, the post-compact developments, including this Court's precedents, indicate that **Congress placed in the hands of the Puerto Rican people the authority to establish their own government, replete with officers of their own choosing**, and that this grant of self-government was not an empty promise. That history prompts serious questions as to whether the Board members may be territorial officers of Puerto Rico when they are not elected or approved, directly or indirectly, by the people of Puerto Rico.

[. . .]

Plausible reasons may exist to treat Public Law 600 and the Federal Government's recognition of Puerto Rico's sovereignty as similarly **irrevocable, at least in the absence of mutual consent**. *Aurelius*, at, 1675, 1677, 1678 (J. Sotomayor, concurring). (emphasis added).

As explained, PROMESA was enacted by Congress pursuant to the Territories Clause and the racist *Insular Cases* which established that Puerto Rico is property that belongs to, but it is not part of the U.S. It is notable that an unincorporated territory is synonym of a colony. For instance, in *De Lima v. Bidwell*, 182 U.S. 1, 198 (1901), this Court expressed the following regarding what it means to be an unincorporated territory:

> This theory also presupposes that territory may be held indefinitely by the United States; that it may be treated in every particular, except for tariff purposes, as domestic territory; **that laws may be enacted and enforced by officers of the United States sent there for that purpose**; that insurrections may be suppressed, wars carried on, revenues collected, taxes imposed; in short, **that everything may be done which a government can do within its own boundaries, and yet that the territory may still remain a foreign country**. That this state of things may continue for years, for a century even, but that until Congress enacts otherwise, it still remains a foreign country. (emphasis added).

Meanwhile, "colonialism" has been defined as "domination of people from another culture."[11] It is the control by a collectivity over the territory of another

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[11] Michael Sommer, *Colonies—Colonisation—Colonialism: A Typological Reappraisal*, Ancient West & East Journal, Vol. 10 at 189 (2011).

collectivity.[12] It implies that the rulers deprive the ruled of its potential for autonomous development; that the ruled are remotely controlled by the rulers and reconfigured according to the colonial rulers; that the dominant and the dominated are permanently divided by a cultural gap, and **that the ruled will remain culturally "foreign"** and unwilling to assimilate.[13] Thus, Puerto Rico and its residents are a colony and property of the U.S. This colonial regime is unlawful under international law, specifically, under the customary norm of the right to self-determination of the peoples, which is binding upon the U.S. Indeed, Justice Harlan stated that "[t]he idea that this country may acquire territories anywhere upon the earth, by conquest or treaty, and hold them as mere colonies or provinces—the people inhabiting them to enjoy only such rights as Congress chooses to accord them—is wholly inconsistent with the spirit and genius as well as with the words of the Constitution." *Downes v. Bidwell*, 182 U.S. 244, 381 (1901) (J. Harlan, dissenting).

The right to self-determination is a fundamental human right that has become a customary international norm, as has been interpreted by the International Court of Justice in *Legal Consequences for States of the Continued Presence of South Africa in Namibia*,

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[12] Ronald J. Horvath, *A Definition of Colonialism*, Current Anthropology 13, no. 1 (Feb., 1972): 45-57.

[13] Michael Sommer, *Colonies—Colonisation—Colonialism: A Typological Reappraisal*, Ancient West & East Journal, Vol. 10, 189 (2011).

197 ICJ 16 (Jun. 1)[14] and in the *Legal Consequences of the Separation of the Chagos Archipelago. From Mauritius in 1965*, Advisory Opinion (Feb. 25, 2019).[15] Moreover, state practice and a sense of legal obligation of the international community—which are the two elements of a customary norm[16]—reflect that the right to self-determination has become a customary rule.[17] As

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[14] The ICJ expressed that "the subsequent development of international law in regard to non-self-governing territories, as enshrined in the Charter of the [UN], made the principle of self-determination **applicable to all of them**." *Legal Consequences for States of the Continued Presence of South Africa in Namibia*, Advisory Opinion, 1971 ICJ 16, ¶ 52 (Jun. 1). (emphasis added).

[15] The ICJ stated that the adoption of resolution 1514 (XV) "represents a defining moment in the consolidation of State practice on decolonization." *Legal Consequences of the Separation of the Chagos Archipelago. From Mauritius in 1965*, Advisory Opinion ¶ 150 (Feb. 25, 2019). Furthermore, the ICJ expressed that Resolution 1514 (XV) has a declaratory character with regard to the right to self-determination as a customary norm. *Id.* at ¶ 152. As a matter of fact, the right to self-determination is one of the basic principles of international law. *Id.* at ¶ 155

[16] RESTATEMENT (THIRD) FOREIGN RELATIONS LAW §102(2) (AM. LAW INST. 1987)

[17] Since the UN was established more than **80 former colonies have gained their independence**. The UN and Decolonization, available at: https://www.un.org/dppa/decolonization/en/about (Last visit: October 13, 2021). As a matter of fact, according to the UN, there are 17 non-self-governing territories left, which their administering powers are United Kingdom (10 colonies), France (2 colonies), New Zealand (1 colony), and the U.S. (3 colonies not counting the Northern Mariana Islands and Puerto Rico). The UN and Decolonization, Available at: https://www.un.org/dppa/decolonization/en/nsgt (Last visit: October 13, 2021). Regarding the "sense of a legal obligation" element The Resolution 1514 (XV), the *Declaration on the Granting of Independence to Colonial Territories and Peoples* was passed by 89 votes on the General

a customary norm, it is binding upon the U.S., and thus, applies **domestically**. *See The Paquete Habana*, 175 U.S. 677, 700 (1900); *Filártiga v. Peña-Irala*, 630 F.2d 876, 881-84 (2d Cir. 1980); *Roper v. Simmons*, 543 U.S. 551 (2005); *Graham v. Florida*, 560 U.S. 48 (2010), for examples of Circuit Courts and this Court applying customary international law domestically.

Consequently, reviewing the status of Puerto Rico as an unincorporated territory/colony is urgent. Nonetheless, the First Circuit decided that "[t]he issues that the plaintiffs' complaint raises concerning the legal status of Puerto Rico are weighty ones. But, to be fit for adjudication in federal court, they must be raised in a suit that satisfies the requirements of Article III." App. 9. However, Petitioners and the People of Puerto Rico are entitled to exercise their right to self-determination since they have been kept as a colony since 1898. This represents a concrete harm that it is only shared among the People of Puerto Rico and not the citizens that live in the States of the Union. It is unquestionable that this injury has been caused by the U.S. and exacerbated through Congress' enactment of PROMESA. Declaring the existence of an illegal colonial regime subject to be decolonized under international law will redress Petitioners' injury. Thus, Petitioners have standing to bring this claim.

Assembly and 9 abstentions, which constitutes evidence of the element of the "sense of a legal obligation." In the time that the Resolution 1514 (XV) was adopted the UN had a total of 99 members. Growth in U.N. Membership, 1945-present. Available at: https://www.un.org/en/about-us/growth-in-un-membership (Last visit: October 13, 2021).

It is notable that the U.S. was a conglomerate of thirteen British colonies. Thus, the people that lived within those colonies suffered the same injuries that Petitioners claim in this case and that led the U.S. to fight England to obtain freedom. Therefore, it is completely contradictory and an imperial action for the First Circuit to state that Petitioners do not have standing to vindicate their political rights and their right to self-determination.

CONCLUSION

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

Respectfully submitted,

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