No. ________

In The
Supreme Court of the United States

FEDERACIÓN DE MAESTROS DE PUERTO RICO, INC.; GRUPO MAGISTERIAL EDUCADORES(AS) POR LA DEMOCRACIA, UNIDAD, CAMBIO, MILITANCIA Y ORGANIZACION SINDICAL, INC.; UNIÓN NACIONAL DE EDUCADORES Y TRABAJADORES DE LA EDUCACIÓN, INC.,

Petitioners,

v.

THE FINANCIAL OVERSIGHT AND MANAGEMENT BOARD FOR PUERTO RICO, AS REPRESENTATIVE FOR THE COMMONWEALTH OF PUERTO RICO, ET AL.,

Respondents.

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

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PETITION FOR A WRIT OF CERTIORARI VOLUME I OF II

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QUESTIONS PRESENTED

The Teachers' Associations were subjected to the unconstitutional displacement and amendment of their retirement laws, in a decision that can only be catalogued as an extension of the morally repugnant *Insular Cases.* Those laws that established the Teachers' Retirement System were undone by the Commonwealth's Plan of Adjustment, under the guise of preemption; a doctrine that establishes a presumption against preemption and, thus, strikes a balance between the supremacy of federal law over state law, which should be uniform in the interest of justice and clarity. The First Circuit's decision opened by stating that "[t]his case presents several issues of first impression." **App.11.** Nonetheless, after making this determination, the First Circuit shied away from the task of addressing those issues of first impression, preferring to defer to the Financial Oversight and Management Board for Puerto Rico's incorrect and convenience-oriented approach to the constitutional doctrine of preemption. The correct application of the doctrine required the analysis of whether preemption can occur when these retirement laws are outside de scope of PROMESA's supremacy clause and where the Oversight Board lacks the power to affirmatively legislate and amend laws.

Thus, the questions presented for review are the following:

1. Whether the preemption doctrine allows for the displacement and amendment of Puerto Rico laws

QUESTIONS PRESENTED—Continued

by the Oversight Board through a Plan of Adjustment confirmed pursuant to PROMESA, in absence of a correct constitutional analysis of the doctrine finding express, conflict or field preemption to justify such a result.

2. Whether the application of a new and different constitutional preemption doctrine with respect to Puerto Rico is an improper extension of the infamous *Insular Cases*.

3. Whether the *Insular Cases* should be overruled.

PARTIES TO THE PROCEEDING

1. The Parties to the proceedings below were as follows:

Petitioners here, Federación de Maestros de Puerto Rico, Inc.; Grupo Magisterial Educadores(as) por la Democracia, Unidad, Cambio, Militancia y Organización Sindical, Inc., and Unión Nacional de Educadores y Trabajadores de la Educación, Inc., (collectively the "Teachers' Associations"), are creditors and parties in interest which objected to the confirmation of the *Modified Eighth Amended Title III Joint Plan of Adjustment of the Commonwealth of Puerto Rico, et al.* ("Plan") of the Commonwealth of Puerto Rico ("Commonwealth") and was an appellant in the court of appeals.

Respondent is the Financial Oversight and Management Board for Puerto Rico ("Board") as a representative of the Commonwealth of Puerto Rico (the "Commonwealth"). While other parties participated as appellees before the court of appeals, their interests are no longer affected by the instant case although will receive notice pursuant to Rule 12.6 of the Supreme Court Rules. The Puerto Rico Fiscal Agency and Financial Advisory Authority ("AAFAF" by its Spanish acronym), Pedro R. Pierluisi-Urrutia ("Governor of Puerto Rico"), and Asociación de Maestros de Puerto Rico and Asociación de Maestros de Puerto Rico—Local Sindical, are listed as Respondents as Petitioners believe they have an interest in the outcome of the petition.

STATEMENT OF RELATED CASES

- *In Re: The Financial Oversight and Management Board for Puerto Rico, as representative for the Commonwealth of Puerto Rico, et al.* No. 17-BK-3283, U.S. District Court for the District of Puerto Rico. Judgment entered January 18, 2022.
- *The Financial Oversight and Management Board for Puerto Rico, as representative for the Commonwealth of Puerto Rico, et al. v. Federación de Maestros de Puerto Rico, Inc.; Grupo Magisterial Educadores(as) por la Democracia, Unidad, Cambio, Militancia y Organización Sindical, Inc., and Unión Nacional de Educadores y Trabajadores de la Educación, Inc.,* No. 22-1080, U.S. Court of Appeals for the First Circuit. Judgment entered April 26, 2022.

CORPORATE DISCLOSURE STATEMENT

Petitioners, the Teachers' Associations, are labor unions created as closed corporations under the laws of the Commonwealth of Puerto Rico. Their stocks are not traded, and they are not a "governmental corporate party" for purposes of Rule 29. Therefore, for purposes of Rule 29, there are no disclosures requirements with respect to them.

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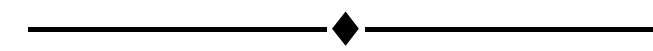
PETITION FOR A WRIT OF CERTIORARI

Petitioners, the Teachers' Associations, respectfully, petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the First Circuit in appeal No. 22-1080.

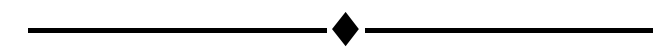


OPINIONS BELOW

The opinion of the Court of Appeals No. 22-1080 is reported at 32 F.4th 67. The opinion of the United States District Court for the District of Puerto Rico No. 17-BK-3283 (D.P.R.) is unreported.

JURISDICTION

The judgment of the Court of Appeals was entered on April 26, 2022. The petition for rehearing *en banc* filed by Petitioners was denied on May 13, 2022. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).



CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article IV of the Constitution provides, in its relevant part: "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 § 3, cl. 2.

Article VI of the Constitution provides: "This Constitution, and the laws of the United States which shall be made in pursuance thereof; . . . shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding." U.S. Const. Art. VI.

Relevant statutory provisions of the Puerto Rico Oversight, Management, and Economic Stability Act, 48 U.S.C. § 2101 *et seq*. ("PROMESA"):

Section 4 of PROMESA provides: "The provisions of this chapter shall prevail over any general or specific provisions of territory law, State law, or regulation that is inconsistent with this chapter." 48 U.S.C. § 2103.

Section 303 of PROMESA provides: "Subject to the limitations set forth in subchapters I and II of this chapter, this subchapter does not limit or impair the power of a covered territory to control, by legislation or otherwise, the territory or any territorial instrumentality thereof in the exercise of the political or governmental powers of the territory or territorial instrumentality, including expenditures for such exercise. . . ." 48 U.S.C. § 2163.

Section 314 of PROMESA provides in its relevant part: "The court shall confirm the plan if—. . . (3) the debtor is not prohibited by law from taking any action necessary to carry out the plan; . . . (5) any legislative, regulatory, or electoral approval necessary under applicable law in order to carry out any provision of the

plan has been obtained, or such provision is expressly conditioned on such approval. . . ." 48 U.S.C. § 2174(b).

Section 1123 of the Bankruptcy Code, as incorporated into PROMESA, reads in its relevant part: "Notwithstanding any otherwise applicable nonbankruptcy law, a plan shall . . . provide adequate means for the plan's implementation. . . ." 11 U.S.C. § 1123(a)(5).

STATEMENT

With the enactment of PROMESA in 2016, came the imposition of the Board. Its objective was for Puerto Rico to gain access to capital markets at a reasonable cost, but all at the expense of the Puerto Rican People. While the Board celebrates the confirmation of the Plan for the Commonwealth as a victory, the Teachers' Associations vehemently opposed its confirmation based on various issues of constitutional and legal interpretation which resulted in the gutting of their pension system and condemned approximately 30,000 teachers to a miserable existence in their most vulnerable years. As warned against in the filings below, prior to the Effective Date of the Plan 2,800 teachers submitted their application for retirement, which represented 1,000 more applications than in previous years. Thus, the implementation of the Plan resulted in a mass exodus of public-school teachers and contributed to the hardships of Puerto Rico's public education system.

As relevant to this writ of *certiorari*, Petitioners challenged the preemption analysis that the Board promoted to displace and amend the Teachers Retirement System's ("TRS") laws ("Retirement Laws"). However, the District Court concluded that the will of the Board, as channeled through the Plan, had the preemptive force of a federal law, running contrary to the presumption against preemption and the well-settled jurisprudence on the matter. Moreover, the Court of Appeals confirmed the District Court's judgment and with it the dangerous proposition that the Board has the power to preempt and amend laws, which is nothing more than the power to affirmatively legislate. This conclusion was only possible because it was based pursuant to the morally repugnant doctrine of the *Insular Cases.*[1]

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[1] *See Downes v. Bidwell*, 182 U.S. 244, 287 (1901) (establishing the distinction between incorporated and unincorporated territories based on race). *See also, De Lima v. Bidwell*, 182 U.S. 1, 200 (1901); *Goetze v. United States*, 182 U.S. 221 (1901); *Crossman v. United States*, 182 U.S. 221 (1901); *Dooley v. United States*, 182 U.S. 222 (1901); *Armstrong v. United States*, 182 U.S. 243 (1901); *Huus v. New York & Porto Rico S.S. Co.*, 182 U.S. 392 (1901); *Dooley v. United States*, 183 U.S. 151 (1901); *Fourteen Diamond Rings v. United States*, 183 U.S. 176 (1901).(string cite of the original *Insular Cases*). *See* EFRÉN RIVERA RAMOS, DECONSTRUCTING COLONIALISM: THE "UNINCORPORATED TERRITORY" AS A CATEGORY OF DOMINATION, *IN* FOREIGN IN A DOMESTIC SENSE: PUERTO RICO, AMERICAN EXPANSION AND THE CONSTITUTION (2001). *See also, Hawaii v. Mankichi*, 190 U.S. 197 (1903); *Gonzalez v. Williams*, 192 U.S. 1 (1904); *Kepner v. United States*, 195 U.S. 100 (1904); *Dorr v. United States*, 195 U.S. 138 (1904); *Mendezona v. United States*, 195 U.S. 158 (1904); *Rasmussen v. United States*, 197 U.S. 516 (1905); *Trono v. United States*, 199 U.S. 521 (1905); *Kent v. Porto Rico*, 207 U.S. 113 (1907); *Kopel v.*

1. The Commonwealth of Puerto Rico was established in 1952 through Pub. L. 81-600, based upon the principles of self-government.[2] However, in 2016, Congress enacted the *Puerto Rico Oversight, Management and Economic Stability Act* ("PROMESA") with the purpose of restructuring Puerto Rico's outstanding debt. *See* 48 U.S.C. § 2194(m)(4). Nonetheless, the statute was not limited to the creation of a restructuring process applicable to territories, like Puerto Rico.

2. With the enactment of PROMESA, pursuant to Congress' plenary powers under Article IV of the U.S. Constitution, as interpreted by this Court in the infamous and racially motivated *Insular Cases*, Congress imposed a Board composed of seven non-elected members upon Puerto Rico and its residents and tasked it with handling Puerto Rico's fiscal recovery and the debt restructuring. However, the Board itself is not subject to oversight, nor is it accountable to the People of Puerto Rico. As a result, the Board has consistently exceeded the scope of its authority, replacing its judgment on public policy and substantive legislative affairs unrelated to budgetary issues, without any safeguards to rein it in. Even the Board's legal

Bingham, 211 U.S. 468 (1909); *Dowdell v. United States*, 221 U.S. 325 (1911); *Ochoa v. Hernández*, 230 U.S. 139 (1913); *Ocampo v. United States*, 234 U.S. 91 (1914); *Balzac v. Porto Rico*, 258 U.S. 298 (1922) (second wave of *Insular Cases*). Some might argue that Puerto Rico is facing the third wave at present.

[2] Pub. L. 81-600, 64 Stat. 319, *An Act to provide for the organization of a constitutional government by the people of Puerto Rico*. Act 600 established that Congress has recognized Puerto Rico's right of self-government.

counsel expressed before this Court, in oral arguments for *Fin. Oversight & Mgmt. Bd. for P.R. v. Aurelius Inv., LLC*, 140 S. Ct. 1649 (2020), that "what the Board is actually charged with doing is acting in the shoes of the government of Puerto Rico. . . ."[3]

3. To accomplish PROMESA's purpose, the Board was bestowed with significant authority over the Government and the People of Puerto Rico. The exorbitant powers vested upon the Board override most, if not all, constitutional powers of the Commonwealth Government. The only power that was reserved for the People of Puerto Rico was the power to legislate affirmatively. *See* 48 U.S.C. §§ 2163, 2174(b)(5). *See also, Rosselló Nevares v. Fin. Oversight & Mgmt. Bd. for P.R. (In re Fin. Oversight & Mgmt. Bd. for P.R.)*, 330 F. Supp. 3d 685, 701 (D.P.R. 2018).

4. On July 30, 2021, the Board filed a proposed plan of adjustment for the Commonwealth. This proposal included substantial amendments to the TRS, which were submitted as an exhibit consisting of a table of short bullet points. The proposed plan also contained an exhibit with a list of preempted laws. After various contested matters, on December 14, 2021, the District Court issued a memorandum order where it identified problematic aspects of the proposed plan, which included

[3] Expressions of Donald B. Verilli (Counsel for the Board), U.S. Supreme Court's Oral Argument on *Fin. Oversight & Mgmt. Bd. for P.R. v. Aurelius Inv., LLC*, 140 S. Ct. 1649 (2020), Oct. 15th, 2019, at pgs. 22-23. (*available at*: https://www.supremecourt.gov/oral_arguments/argument_transcripts/2019/18-1334_ljgm.pdf) (last visit February 25, 2022).

the scope of the proposed preemption provisions. On December 21, 2021, the Board provided a table with the sections of laws that were preempted, including some sections of the Retirement Laws. The Board also filed another modified plan. On December 23, 2021, Petitioners filed their opposition, arguing, among other issues, that preemption was improper, and the Board exceeded the scope of PROMESA's provisions, in a manner akin to the organic laws and the *Insular Cases*.

5. On January 14, 2022, the Board filed the Plan. On January 18, 2022, the District Court issued the Confirmation Order and its Findings of Fact and Conclusions of Law ("FFCL"). App. 45. The District Court included an Exhibit A identical to the Board's table of preempted provisions. App. 260. Thus, the District Court determined that "[p]rovisions of the Commonwealth laws that are inconsistent with PROMESA are preempted for the reasons, and to the extent set forth in ***Exhibit A*** hereto." App. 175.

6. The Court did not, however, address the depth of the arguments presented in the filings regarding the Board's inability to preempt the Retirement Laws through the Plan.

7. On January 28, 2022, Petitioners filed a notice of appeal. On February 1, 2022, they filed a motion for stay pending appeal. By February 15, 2022, this issue was submitted before the District Court.

8. On February 28, 2022, the Court of Appeals granted Petitioners' request for an expedited schedule. Pursuant to that schedule, on March 1, 2022, Petitioners filed their opening brief. On

March 3, 2022, the District Court denied the stay. On the same day, Petitioners filed a request for stay pending appeal before the Court of Appeals. On March 9, 2022, the Panel held a hearing on the matter, but denied the stay on March 11, 2022. By March 15, 2022, the opposing parties had filed their response briefs and the Plan became effective. On March 21, 2022, Petitioners filed a reply brief.

9. On April 26, 2022, the Panel entered its Opinion affirming the District Court. App. 1. The First Circuit stated:

> PROMESA includes an express preemption provision, which provides that: "The provisions of this chapter shall prevail over any general or specific provisions of territory law, State law, or regulation that is inconsistent with this chapter." 48 U.S.C. § 2103. See In re Fin. Oversight & Mgmt. Bd. for P.R., 916 F.3d at 104 (explaining that "PROMESA's provisions preempt any inconsistent 'general or specific provisions of territory law'" (quoting 48 U.S.C. § 2103)). **While this provision need not necessarily mean that every Commonwealth law inconsistent with the Plan is also inconsistent with PROMESA**, the Plan's treatment of the Teachers Retirement System participants' claims makes clear that the portions of existing laws that enshrine defined-benefit plan accruals and cost-of-living adjustments are preempted. App. 20 (emphasis added) (underline in the original).

10. Nonetheless, the decision's ultimate result was in fact "that every Commonwealth law inconsistent with the Plan is also inconsistent with PROMESA," contrary to the lower courts' own initial premise. The First Circuit mistakenly reduced the Teachers' Associations appeal to a matter of rejected and discharged claims, completely ignoring the preemption arguments and the Board's inability to legislate, which were presented before that Court. As a result, and as Petitioners had repeatedly advanced in their filings, the First Circuit inevitably extended the reach of the *Insular Cases* by establishing a new and particular preemption doctrine for Puerto Rico under PROMESA.

11. On May 10, 2022, Petitioners filed a request for rehearing *en banc* which was denied on May 13, 2022. In its denial, the First Circuit incorrectly asserted that the Teachers' Associations "never attempted to develop any such contentions in the Title III court[,]" specifically referring to the issue of the improper extension of the *Insular Cases.* App. 422. However, from the very beginning Petitioners argued that the misapplication of the preemption doctrine and incorrect interpretation that the Plan allows the Board to affirmatively legislate was **only** possible based on the deep-rooted inequality promoted by the *Insular Cases*. Of course, while this issue was present in the initial filings, it snowballed out of control until it became unavoidable and was fully addressed before the Court of Appeals. The expansion of the *Insular Cases* was most express and evident when the First Circuit, in its Opinion, engaged in an abnormal preemption analysis. Thus, it was more

extensively and expressly argued in the *en banc* petition.

12. This Honorable Court's review is warranted because the Court of Appeals decided an important question of federal law in a way that conflicts with the relevant decisions of this Court. Firstly, the First Circuit engaged in an analysis that can only be considered a new preemption doctrine because it deviates so drastically from the standards set by this Court's jurisprudence. Moreover, the First Circuit interpreted Section 1123(a)(5) of the Bankruptcy Code, which was incorporated into PROMESA, in a way that could affect even regular bankruptcies all over the United States by allowing the preemption and amendment of state laws where they conflict with confirmed plans of debt adjustment. Secondly, this new preemption doctrine results in an extension of the morally repugnant *Insular Cases*, which is contrary to this Court's determination that the *Insular Cases* should not be extended anymore. Additionally, if this Court reaffirmed that the First Circuit's interpretation of Section 1123 of the Bankruptcy Code is specific to PROMESA, it would also be extending the reach of the *Insular Cases*, by applying the federal law in a discriminatory fashion for the territory.

13. Furthermore, the Court of Appeals for the First Circuit decided an important question of federal law that has not yet been settled, though it should. The issue of the scope of preemption under PROMESA has not been settled by this Court, and it is a question that will have repercussions well beyond this single appellate procedure, as there

are other Title III cases in progress, where local laws are in danger, and PROMESA's provisions are applicable to other territories as well.

14. Lastly, this Court should grant the writ of certiorari so it may finally overrule the *Insular Cases*, which are the driving force of this case and the reason it has come to this.

REASONS FOR GRANTING THE PETITION FOR WRIT OF CERTIORARI

I. THE FIRST CIRCUIT DECIDED AN IMPORTANT FEDERAL QUESTION IN A WAY THAT CONFLICTS WITH RELEVANT DECISIONS OF THIS COURT.

A. A NEW PREEMPTION DOCTRINE

In the instant case, **the lower courts used the preemption doctrine as a means to an end**. They issued an interpretation of the preemption doctrine that warped it beyond recognition. Truly, the exercise that these courts engaged in is a new, different preemption doctrine from the one this Court has established. For instance, the District Court determined that the Board had "sufficiently demonstrated that express recognition of the preemptive effect of section 4 of PROMESA **is crucial to accomplishing the Plan's goals and ensuring its feasibility**." App. 175. Therefore, it concluded that the Retirement Laws were inconsistent with PROMESA "for the reasons, and to the extent, set forth in ***Exhibit A*** hereto." App.

175 (footnote omitted) (emphasis in the original). In summary, the District Court determined that PROMESA's supremacy clause preempted **the laws** that gave rise to obligations discharged by the Plan. This analysis reduced preemption to a method of justifying the displacement and amendment of laws to remove inconveniences from the path of the Plan. The First Circuit affirmed this analysis.

1. CONSTITUTIONAL PREEMPTION DOCTRINE

Pursuant to the U.S. Constitution, federal laws are the supreme law of the land. U.S. Const. Art. VI. Rooted in this supremacy clause, Congress has the power to preempt state law. *See Arizona v. United States*, 567 U.S. 387, 398-99 (2012). Thus, preemption is the name given to the precedence that federal law takes over state law. This Court has stated that a preemption question must be guided by two cornerstones:

> First, the purpose of Congress is the ultimate touchstone in every pre-emption case. Second, in all pre-emption cases, and particularly in those in which Congress has legislated in a field which the States have traditionally occupied, we **start with the assumption** that the historic police powers of the States **were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress**. *Wyeth v. Levine*, 555 U.S. 555, 565 (2009) (citations, quotation marks, ellipsis and brackets omitted) (emphasis added).

"[D]espite the variety of these opportunities for federal preeminence, we have never assumed lightly that Congress has derogated state regulation, but instead have **addressed claims of pre-emption with the starting presumption that Congress does not intend to supplant state law**." *N.Y. State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645, 654 (1995) (emphasis added) (citation omitted). Thus, there is a presumption against preemption in the absence of a clear and manifest purpose of Congress.

This Court has stated that preemption occurs in three circumstances: (1) express preemption, where there is an express provision of preemption; (2) field preemption, where Congress intended federal law to occupy the field; and (3) conflict preemption, where there is a direct conflict between state and federal law. *See Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 372 (2000). However, because preemption turns on the intent of Congress, it requires the "exercise of statutory construction with the text of the provision in question. . . ." *N.Y. State Conference of Blue Cross & Blue Shield Plans*, 514 U.S. at 655. **Even where there is a finding of express preemption**, the courts "**must**, nonetheless, identify the domain **expressly preempted by the statutory language**. . . ." *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 484 (1996) (emphasis added) (citations and quotation marks omitted). In this analysis, the presumption in favor of state law still applies, because Congress does not cavalierly preempt state law. *See id.* at 485.

2. STATUTORY PREEMPTION UNDER PROMESA

In the case of PROMESA, the statute contains an express preemption clause. However, this section only preempts "general or specific provisions of territory law, State law, or regulation that [are] **inconsistent with this chapter**." 48 U.S.C. § 2103 (emphasis added). While this language is an example of express preemption, it only preempts those provisions that are inconsistent with PROMESA's text. It cannot be interpreted in such a broad manner as to preempt any and all state laws. Therefore, before a state law can be deemed preempted by PROMESA, there must be an analysis regarding whether and how that state law is **inconsistent with PROMESA and its provisions**, which is the domain expressly preempted. *See Medtronic, Inc.*, 518 U.S. at 484. Moreover, PROMESA and the Bankruptcy Code cause field preemption, but it is only with respect to the restructuring proceedings for municipalities and territories. This preemption affects legislation that attempts to create a different restructuring process or affect that restructuring directly. *See*, *for example, Puerto Rico v. Franklin Cal. Tax-Free Tr.*, 579 U.S. 115 (2016). Therefore, the existence of PROMESA is not a blanket preemption on local legislation that may in some way coincide with or indirectly affect the instant proceedings.

3. PREEMPTIVE EFFECT OF A CONFIRMED PLAN IN BANKRUPTCY

In the context of regular bankruptcies, the circuit courts have discussed the preemptive effects of a confirmed plan, pursuant to Section 1123 of the Bankruptcy Code, which is incorporated into PROMESA. Pursuant to such section, a plan of adjustment may preempt non-bankruptcy laws **to an extent**. *See* 11 U.S.C. § 1123. In absence of binding precedent, Petitioners opt for the illustrative and persuasive analysis provided by the First Circuit Bankruptcy Appellate Panel ("BAP") on this matter. Upon analyzing the approaches in different circuits, the First Circuit BAP arrived at the conclusion that Section 1123 does have a preemptive effect.

> **However**, for this very reason, § 1123(a)(5) also **reads like a debtor's license to rewrite the law to its liking—in ways far outside the comfort zone inhabited by the unobjectionable staples of chapter 11 plans and, more to the point, *beyond what Congress can plausibly have intended***. Freedom from regulation, from taxation, from the laws of property and contract: these and many other horrible imaginings, **preemptive effects *that Congress cannot plausibly have intended*, might be justified as conferring an advantage needed to implement a plan**. Therefore, when they have acknowledged the preemptive effect of § 1123(a)(5), **courts have routinely hastened to add, as do we, that it is not unbounded**. *Irving Tanning Co. v. Me.*

> *Superintendent of Ins.*, 496 B.R. 644, 663 (B.A.P. 1st Cir. 2013) (citations and quotation marks omitted) (emphasis added).

Therefore, the First Circuit BAP concluded that even when express preemption operates, including the preemption of Section 1123, a traditional preemption analysis is necessary to determine the scope of preemption. The First Circuit BAP's analysis can be summarized as follows: (1) First, a plan must comply with applicable non-bankruptcy laws that are not preempted by the Bankruptcy Code. *See id*. at 660. Second, where there is preemption, we must determine its scope and limits. The preemption should be limited to what is **adequate and sufficient** for the implementation of the Plan, no more or less. Therefore, the preemptive scope cannot be insufficient **nor superfluous**. *See id.* at 663-64. Third, there are certain situations where the preemptive effect cannot operate. For example: (1) state laws concerned with protecting public health, safety, or welfare, cannot be preempted; and (2) state laws that define and protect the property rights of third parties cannot be preempted. *See id.* at 64.

Even so, it bears highlighting that the intent of Congress was not for a bankruptcy debtor to preempt laws themselves, but to be free from the claims that arose from those laws. Therefore, there is no displacement of the law by the Bankruptcy Code, there is only a discharge of the obligation that the law created in relation to the specific debtor. This conceptual difference was lost on the courts below and is the crux of the

Teachers' Association's plight: The Plan did not just reject and/or discharge their claims, it displaced and amended their Retirement Laws.

4. LEGAL ANALYSIS AND ARGUMENT

As previewed above, the lower courts engaged in a backwards analysis of preemption. Because the courts below have missed the mark repeatedly, Petitioners wish to be detailed in their representation of the issue before this Court. Petitioners have consistently argued that the issue in this case is **not** whether PROMESA allows the Board to reject or discharge pension claims, but **whether PROMESA allows the Board to preempt and amend laws through the Plan**. To understand this issue, we must refer to three documents produced in the District Court: (1) Exhibit K of the Plan, (2) Exhibit F-1 of the Plan, and (3) Exhibit A of the FFCL. *See* App. 407, 398, 260, respectively.

First, Exhibit K of the Plan is titled *Schedule of Preempted Statutes*. App. 407. It lists the statutes that are preempted pursuant to the Plan, and it includes the Retirement Laws as wholes. Second, Exhibit F-1 of the Plan is titled *Modifications to TRS Pension Benefits (Without AMPR PSA)*. App. 545. It consists of a table with changes to TRS, from benefits to retirement eligibility requirements. App. 298. Finally, Exhibit A of the FFCL, which was originally submitted by the Board and incorporated in the District Court's FFCL, is a table of specific sections that are supposedly preempted by the Plan, including those related to the Retirement

Laws. App. 260. The Plan was not amended to include Exhibit A.

Through Exhibit K of the Plan, the Board declared the Retirement Laws preempted in their entirety, to replace them with Exhibit F-1. Then, to "narrow" the scope of preemption, the District Court incorporated Exhibit A, the list of specific sections, in the FFCL. However, many **changes incorporated in Exhibit F-1 of the Plan are not in sections that were listed in Exhibit A** of the FFCL as preempted. For example, the changes in retirement eligibility, such as retirement age, are modified in Exhibit F-1 of the Plan while those sections of the Retirement Laws are not included in Exhibit A of the FFCL. The practical result of this convoluted patchwork is that the Retirement Laws have been replaced by Exhibit F-1 of the Plan, which displaces and amends substantive provisions of the Retirement Laws, **not the claims**.

To illustrate the point, the best example is the change of retirement eligibility. Under Exhibit F-1, teachers will only be eligible to retire if they reach age 63 and have served for ten years. App. 403-04. These provisions amend the eligibility requirements for retirement that were established under the Retirement Laws, which allowed teachers to retire at age 55 with 30 years of service or age 60 with 5 years of service. Thus, the Plan institutes substantive changes to the statutes that cannot be mistaken for the treatment of the claim. These changes force teachers to work longer in order to qualify for retirement, for lower pension benefits. For teachers, this is no small matter. The

physical and emotional toll of teaching Puerto Rico's youth, without proper compensation or resources is draining and leads to serious health issues that only increase with age. This is an amendment to the law. This is legislation. Furthermore, it should be noted that these sections regarding retirement eligibility were not included in Exhibit A of the FFCL, which brings us back to Exhibit K which must truly have preempted the whole law, otherwise these changes would be impossible. App. 261-69.

As described in detail above, statutory preemption must be analyzed within the confines of the doctrine. Therefore, first we must identify whether there is preemption. The lower courts understood that PROMESA's supremacy clause provided express preemption of the Retirement Laws. Nonetheless, pursuant to the preemption doctrine, we must determine the scope of that express preemption. The language of PROMESA's express preemption clause does not displace the Retirement Laws. Using the example of the changes in retirement age, these provisions of the law, undoubtedly, do not conflict with PROMESA in any way. Therefore, they are not preempted by the clause. Additionally, the age for public-school teachers' retirement is not an amendment or modification of the Commonwealth's debt restructuring proceedings, so these provisions are not displaced by field preemption. However, the lower courts reasoned that PROMESA's supremacy clause enveloped the Retirement Laws because they were inconsistent with the Plan, which operationalizes PROMESA. But how does changing

the retirement age from 55 to 63 operationalize PROMESA? It does not. Unless we read PROMESA to mandate the Board's micromanagement of the public retirement systems and power to amend laws, there is no way to justify the preemption.

Furthermore, even under the premise of preemption pursuant to the implementation of the Plan, as previously discussed, the scope of preemption is not unbounded. Firstly, the preemption pursuant to Section 1123 of the Bankruptcy Code does not preempt or amend laws. It merely impedes the application of these laws to a debtor whose obligations under that law were discharged. Secondly, a Plan can only cause preemption to the extent that it is necessary for the implementation of its provisions. Returning to the example of the retirement age modification, this undoubtedly exceeds the scope of necessary and adequate means of implementation and spills over into superfluous use of the preemptive effect of a Plan. To the extent that the Board has stated that even the return to a defined-benefit retirement system would not make the Plan unfeasible,[4] it cannot be argued that the change of retirement age is necessary for the implementation of the Plan. The proper course of action would have been to move the legislature to amend the laws, pursuant to Section 314(b)(5) of PROMESA. Thus, to say that

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[4] "[I]f the Plan goes effective without delay, but this Court orders the Associations' defined benefit plans reinstated, the Board will manage to balance budgets by making substantial cuts in other government services." Case No. 22-1080, Document: 00117849198 at 14.

preemption was necessary, also negates this shared responsibility contained in PROMESA. Lastly, the Retirement Laws are welfare laws that define the property rights of third parties. Thus, they cannot be preempted by a plan of adjustment.

While the change in the retirement age is not the only provision of the Retirement Laws that was displaced and amended by the Plan, without the benefit of a correct preemption analysis pursuant to this Court's jurisprudence, it is by far the best example to lead this Court to the inevitable conclusion that the lower courts acted incorrectly, and their preemption doctrine is not the same one espoused by this Court.

If the First Circuit's interpretation of Section 1123 of the Bankruptcy Code is allowed to prevail, it will have repercussions in other bankruptcy proceedings, even outside of PROMESA. Specifically, in Chapter 9 and 11 bankruptcies, Section 1123 would become a "debtor's license to rewrite laws to its liking[.]" *Irving Tanning Co.*, 496 B.R. at 663. This Court cannot condone such a result. Therefore, a writ of *certiorari* is warranted, so this Court may see the case on its merits and address this issue. If this Court determined that these broader consequences are unlikely because this interpretation is limited to PROMESA, then we would undoubtedly be before a case of discriminate treatment and expansion of the *Insular Cases*, as argued below.

B. IMPROPER EXPANSION OF THE *INSULAR CASES*

Before discussing the improper expansion of the *Insular Cases* that is the object of this Petition, we must address the First Circuit's erred perception that this issue was never raised before the *en banc* petition and, therefore, not before them to consider. From the very beginning, when the Teachers' Associations first requested a stay pending appeal to pursue these arguments, they argued before the District Court that "[t]o allow [the] course of action [explained in this Petition] would result in the very abusive dictatorial worst-case scenarios that many have cautioned could be perpetrated under the interpretative rule of the *Insular Cases*. . . ."[5] Additionally, before the First Circuit, Petitioners cautioned that "[t]he result of confirming the Board's actions is to extend the inequities of the *Insular Cases*."[6] While the *Insular Cases* were not the main focus of the filings below, Petitioners repeatedly warned the lower courts that acting in accordance with the Board's proposal, misapplying the preemption doctrine and reading the Board's inexistant power to affirmatively legislate into the Plan would be an improper expansion of the *Insular Cases*. However, it was not until the First Circuit's opinion that the issue became unavoidable, and Petitioners were in the position to challenge the expansion rather than warn against it. Thus, the *Insular Cases* figured most prominently in Petitioners' *en banc* petition. It is precisely the Court

[5] Case No. 17-BK-3283-LTS, Docket 49969 at 8.

[6] Case No. 22-1080, Document 00117854651 at 29.

of Appeals' holding that requires Petitioners to raise the *Insular Cases* directly and without reservation.

In its opinion, the First Circuit expressly stated:

> Here, we need not dwell any longer on the appropriate limits of section 1123(a) preemption in the context of Title III, for Title III was designed by Congress with the clear purpose of facilitating the adjustment of the Commonwealth's debt obligations. PROMESA therefore preempts Commonwealth law insofar as that law purports to dictate (contrary to the Plan) the adjustment of the Commonwealth's financial obligations to participants in its pension plans. App. 21.

This language undoubtedly establishes, as argued in the lower courts, that the First Circuit's decision is an unapologetic expansion of the *Insular Cases*. To begin with, the First Circuit extended the reach of the inequities of the *Insular Cases* when it affirmed the decision to treat Puerto Rico differently under the preemption doctrine, a constitutional doctrine which is rooted in the supremacy of federal law but recognizes the limits of that supremacy. As previously argued, the preemption analysis that the lower courts engaged in drastically deviates from the doctrine that is well-settled in this Court. The First Circuit went as far as to say that, despite the Board's arguments based on Section 1123 of the Bankruptcy Code, this discussion was unnecessary because Congress intended for PROMESA to preempt every law in its path. With a tone that is not so distant from the insidious remarks

that sustain the *Insular Cases* themselves, the First Circuit nonchalantly manifests:

> The Teachers' Associations say that "Congress enacted [PROMESA] with the purpose of restructuring the island's outstanding debt." This is true, but incomplete. Congress also enacted PROMESA because it found that "[a] comprehensive approach to fiscal, management, and structural problems and adjustments . . . is necessary." 48 U.S.C. § 2194(m)(4). And in creating the Board as a part of the Commonwealth government, Congress sought "to provide a method for a covered territory to achieve fiscal responsibility and access to the capital markets." 48 U.S.C. § 2121(a). App. 22.

While the language seems cautious, Petitioners' familiarity with the colonial system that plagues every aspect of their daily lives leads them to read this paragraph to say that Congress clearly intended for the Board to take control over the territory, because of Puerto Rico's inability to manage its own affairs. The echoed agreement with the *Insular Cases* biased portrayal of "savages" born in territories and the "alien races" unable to adapt American systems is impossible to miss. Thus, when applied to the Title III proceedings, the treatment must be different and discriminatory. The worth of Puerto Rico's laws is less than that of the states because it is a territory, subject to the will and whims of the Board pursuant to PROMESA and the doctrine espoused by the *Insular Cases.* This

disparate colonial treatment is the heart of the new preemption doctrine.

On the other hand, the First Circuit's decision also expanded the reach of the *Insular Cases* in that it ratified the notion that the Board has the power to legislate in Puerto Rico if such action is necessary or even just convenient for the implementation of the Plan. This case presented an unexpected controversy regarding the Board's ability to legislate. For the first time, the Board adopts the position that it can legislate and destroys the premise behind the District Court's "awkward power sharing arrangement" doctrine, and further disenfranchises the People of Puerto Rico, and other territories.

Under PROMESA, Congress expressly allowed the Board a host of broad and imposing powers, among which is the power to review and annul legislation. 48 U.S.C. § 2144. However, Congress did not give the Board the power to affirmatively legislate. The Board's budgetary powers do not grant it the ability to legislate. *Id.* § 2142. Congress expressly limited those powers. Moreover, Congress provided a method to annul legislation, but not to create it. As a result, the District Court defined the "awkward power-sharing arrangement" as the only thing preventing the Board from usurping the remaining powers of the Commonwealth. *See Rosselló Nevares v. Fin. Oversight & Mgmt. Bd. for P.R. (In re Fin. Oversight & Mgmt. Bd. for P.R.)*, 330 F. Supp. 3d 685, 701 (D.P.R. 2018). *See also*, 48 U.S.C. § 2163. It was said that this arrangement would "motivate the parties to work together, quickly, for positive

change within the statutory structure in which **neither of them holds all of the cards**." *Rosselló Nevares*, 330 F. Supp. 3d at 702 (emphasis added). *See also, Fin. Oversight & Mgmt. Bd. for P.R. v. Pierluisi Urrutia (In re Fin. Oversight & Mgmt. Bd. for P.R.)*, 634 B.R. 187, 194 (D.P.R. 2021).

Specifically, the District Court stated that "**the Oversight Board has not been given power to affirmatively legislate**." *Rosselló Nevares*, 330 F. Supp. 3d at 701 (emphasis added). *See also, Pierluisi Urrutia*, 634 B.R. at 194 (emphasis added) (citations and quotation marks omitted). Moreover, it has said that "**with respect to policy measures *that would require the adoption of new legislation or the repeal or modification of existing Commonwealth law*, the Oversight Board has *only* budgetary tools and negotiations to use to elicit any necessary buy-in from the elected officials and legislators**." *Rosselló Nevares*, 330 F. Supp. 3d at 701 (emphasis added). This arrangement extends to the Plan:

> **The provisions governing the formulation and confirmation of plans of adjustment under PROMESA further reflect this division of responsibilities** between the Oversight Board and the Commonwealth government. Only the Oversight Board may file a plan of adjustment. **Yet, the statute also provides that a plan of adjustment cannot be confirmed *unless the Oversight Board obtains legislative, regulatory or electoral approval necessary under applicable law in order to carry out any***

> ***provision of the plan or confirmation is expressly conditioned on such approval*. This provision gives the Commonwealth government the ability to obstruct implementation or complicate the Oversight Board's efforts to produce a confirmable plan of adjustment**. *Pierluisi Urrutia*, 634 B.R. at 194 (emphasis added) (citations and quotation marks omitted).

This is the effect of Section 314(b)(5). *See* 48 U.S.C. § 2174(b)(5) (conditioning the approval of a Plan to whether "any legislative, regulatory, or electoral approval necessary under applicable law in order to carry out any provision of the plan has been obtained, or such provision is expressly conditioned on such approval"). The District Court had understood, until now, that PROMESA does not allow the Board to legislate. A contrary interpretation would render Section 314(b)(5) futile. This was not the intent of Congress.

Nonetheless, the decisions of the lower courts in this case seem to forget this "awkward power sharing arrangement" and set aside the Board's inability to legislate, so long as it happens through the Plan. Unless this Court affirms the "awkward power sharing arrangement" in this case, and decides that the Board cannot legislate, it will be extending the reach of the *Insular Cases*. *See Fin. Oversight & Mgmt. Bd. for P.R. v. Aurelius Inv., LLC*, 140 S. Ct. 1649, 1665 (2020).

First, it would mean that, even in absence of express authorization of Congress, we must infer from the Board's broad powers that it can also legislate

through the Plan. Second, it would mean that the preemption doctrine does not apply to Commonwealth laws the same way it applies elsewhere, because the Board's word is enough to preempt local laws. The presumption against preemption would not apply. Thus, the preemption doctrine would be altered to accommodate the Board's micromanagement of the TRS, that might be based on ideological leanings, with a new power to legislate.

This Court has consistently expressed that the *Insular Cases* doctrine should not be expanded beyond where it stands. *See Reid v. Covert*, 354 U.S. 1, 14 (1957).[7] More recently, relying on *Reid v. Covert*, this Court declared that "whatever [the *Insular Cases']* continued validity **we will not extend them in these cases**." *Fin. Oversight & Mgmt. Bd. for P.R. v. Aurelius Inv., LLC*, 140 S. Ct. 1649, 1665 (2020) (emphasis added). While this Court has fallen short of overruling the *Insular Cases*, so far, it has stated that that the further expansion of the doctrine is improper.

This case presents the exact situation that *Reid v. Covert* cautioned against where "**constitutional protections against arbitrary government are inoperative when they become inconvenient or when expediency dictates otherwise**. . . ." *Reid*, 354 U.S. at 14 (emphasis added). By allowing convenience and expediency to prevail over the legislative and political

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[7] *See also*, ADRIEL I. CEPEDA DERIEUX & NEIL C. WEARE, AFTER *Aurelius:* WHAT FUTURE FOR THE *Insular Cases?*, 130 YALE L. J. 284 (2020).

powers of a People, the lower courts effectively extended the reach of the *Insular Cases* to apply a different form of preemption to Puerto Rico and expand the already overwhelming powers of the Board. Rather than apply the well-settled preemption doctrine, the District Court and the First Circuit applied a completely different analysis through which it used preemption to justify the Board's arguments rather than test whether the Board's arguments passed muster using the established doctrine. That is, rather than analyze whether preemption occurred, the lower courts based themselves on the premise that the Retirement Laws were preempted because the Board said so, and then proceeded to justify it. As discussed above, this resulted in a drastic deviation of the preemption doctrine which can only be seen as a brand new doctrine, applicable only in the context of Puerto Rico's subjugation to the Board, pursuant to PROMESA and the Territory Clause. Moreover, to the extent that the Plan established details such as the retirement age for public-school teachers and displaced the corresponding laws that said otherwise, the same decision grants the Board the power to legislate.

II. THE FIRST CIRCUIT DECIDED AN IMPORTANT QUESTION OF FEDERAL LAW THAT HAS NOT BEEN BUT SHOULD BE SETTLED BY THIS COURT.

Up until this point, the question of the scope of PROMESA's preemptive effect has not been addressed by this Court. The First Circuit, therefore, has issued

the first opinion on the matter and provided an extremely broad scope of preemption for the Board to act on pursuant to PROMESA. Prior to this case, the extension of PROMESA's supremacy clause through the Plan of Adjustment had not been so profoundly discussed or litigated. This decision will undoubtedly become the bedrock to future cases under PROMESA, in Puerto Rico and other territories. As it stands, the precedent set by the First Circuit's decision provides that PROMESA's supremacy clause allows the Board to preempt any and every state law that is inconsistent with their will, so long as they express it through the Plan of Adjustment. For example, in the pending Title III case for the Puerto Rico Electric Power Authority ("PREPA"), numerous laws regarding environmental and public policy, including those that protect ratepayers from the unreasonable increase of rates, stand in the way of a plan of adjustment that prioritizes debt service over other more human issues. PREPA also has a retirement system being attacked in those proceedings, where around 17,000 families will be impacted by similar actions by the Board in absence of an opinion clarifying the scope of PROMESA's supremacy clause and preemptive effect. Therefore, the risk of the Board applying this new preemption doctrine again is imminent.

Additionally, while it has been widely accepted that the Board cannot affirmatively legislate outside of the budgetary process, this decision proves this limit to the Board's power to be purely nominal. While the Board cannot legislate in name, it can change Puerto

Rico's laws through a Plan of Adjustment. These are the dangers of the First Circuit's decision, which merit the intervention of this Court to adjudicate the true scope of preemption under PROMESA and settle once and for all that the Board does not have the power to legislate.

III. THIS CASE PRESENTS THE PERFECT OPPORTUNITY TO OVERRULE THE *INSULAR CASES*.

In 1898, the United States invaded Puerto Rico. To make matters worse, the Supreme Court imposed the ignominious colonial judicial doctrine of the *Insular Cases*, referenced above. These cases embodied and legitimized the colonial relationship between the United States and Puerto Rico. Such cases determined that Puerto Rico is an unincorporated territory, which belongs to, but is not part of, the United States. Therefore, Puerto Rico's residents required different treatment from residents of the continental United States. These cases "stand at par with *Plessy v. Ferguson* in permitting disparate treatment by the government of a discrete group of citizens."[8] *See also, United States v. Vaello-Madero*, 142 S. Ct. 1539 (2022) (J. Gorsuch, concurring).

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[8] JUAN R. TORRUELLA, THE SUPREME COURT AND PUERTO RICO, THE DOCTRINE OF SEPARATE AND UNEQUAL 3 (1985). *See also*, JUAN R. TORRUELLA, THE *Insular Cases:* THE ESTABLISHMENT OF A REGIME OF POLITICAL APARTHEID, 29:2 U. PA. J. INT'L L. 283, 286 (2007).

> The concept that the Bill of Rights and other constitutional protections against arbitrary government are inoperative when they become **inconvenient or when expediency dictates otherwise** is a very dangerous doctrine and **if allowed to flourish would destroy the benefit of a written Constitution** and undermine the basis of our Government. *See Reid*, 345 U.S. at 14 footnotes omitted) (emphasis added).

"[T]he time has come to recognize that the Insular Cases rest on a rotten foundation." *Vaello-Madero*, 142 S. Ct. at 1557 (J. Gorsuch, concurring). The day has come for the Court to squarely overrule them. *See id.* Even if the *Insular Cases* were wholly unrelated to this case, which they are not, this Court has "the opportunity to make express what is already obvious: [The *Insular Cases* were] gravely wrong the day [they were] decided . . . [and have] no place in law under the Constitution." *Trump v. Hawaii*, 138 S. Ct. 2392, 2423 (2018) (citation omitted) (overruling *Korematsu* even though it "ha[d] nothing to do with [the] case. . . ."). While these words were uttered by this Court in relation to the also infamous case of *Korematsu v. United States*,[9] they hold true in this context. The subjugation of a whole class of people under racially motivated colonial rule is "morally repugnant", *see id.*, and should be overruled.

[9] *Korematsu v. United States*, 323 U.S. 214 (1944).

The judicial doctrine of the *Insular Cases* determined that Puerto Rico is not a foreign country in relation to the United States, but an unincorporated territory, which belongs to, but is not part of, the United States, and to which only a few fundamental constitutional rights of the Federal Constitution apply. That imposed the abhorrent condition of the deprivation of fundamental human rights upon the Puerto Rican People that is contrary to binding international law,[10] and the democratic principles the United States flaunts before the international community. The *Insular Cases* show the United States as an empire with complete control over its colonial subjects in Puerto Rico.

The *Insular Cases* reflect outdated theories of imperialism and racial inferiority.[11] Initially, the issue arose to answer the question of whether a tax law complied with the Constitution, but:

> To answer the question whether the Act complied with the Constitution, **the Court resolved that it first had to decide whether the Constitution applied *at all* in Puerto Rico**. Ultimately, a fractured set of opinions emerged. Employing arguments similar to

[10] "This Constitution, and the laws of the United States which shall be made in pursuance thereof; **and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land**; and the judges in every state shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding." U.S. Const. Art. VI (emphasis added).

[11] *See* Torruella, *The Insular Cases*, *supra* note 8, at 286-87.

> those advanced by Professors Langdell and Thayer, Justice Brown saw things in the starkest terms. Applying the Constitution made sense in contiguous territories inhabited only by people of the same race, or by scattered bodies of native Indians. **But it would not do for islands inhabited by alien races, differing from us in religion, customs, laws, methods of taxation, and modes of thought**. There, Justice Brown contended, the administration of government and justice, according to Anglo-Saxon principles, may for a time be impossible. On his view, the Constitution should reach Puerto Rico only if and when Congress so directed. *Vaello-Madero*, 142 S. Ct. at 1553 (J. Gorsuch, concurring) (emphasis added) (italics in the original) (citations and quotation marks omitted).

Thus, the *Insular Cases* stand for the notion that the **alien races** that inhabited Puerto Rico were too different to live under the principles of the United States Constitution. *See Downes v. Bidwell*, 182 U.S. 244, 287 (1901) (emphasis added). The result was for Congress to "keep a Territory, like a disembodied shade, in an intermediate state of ambiguous existence for an indefinite period." *Vaello-Madero*, 142 S. Ct. at 1554 (J. Gorsuch, concurring) (citations and brackets omitted). Moreover, the decision engrafted "a colonial system such as exists under monarchical governments." *Id.* (citations omitted). Furthermore, the subjugation of a people without representation, echoes the badges and

incidents of slavery in the United States forbidden by the U.S. Constitution.[12]

Under the Territories Clause and the *Insular Cases*, Puerto Rico continues to be a colony inhabited by millions of second-class American citizens who do not have the same political or economic rights as the resident citizens of the states. Puerto Rico is subject to the will of Congress and the Federal Government, although its resident citizens cannot vote in federal elections, do not have federal representatives with a vote in Congress, receive discriminate treatment in federal funding and are in numerous ways unable to exercise any sovereignty that would allow them to develop their economy and society. Rather than amend the Bankruptcy Code to include Puerto Rico and other territories in Chapter 9, Congress called upon its extraordinary and violent powers pursuant to the *Insular Cases* to pass new legislation which would only allow Puerto Rico to reorganize its debts under the conditions unilaterally established by an unelected board with powers superior to its own Government. As this case and many others show, the Board is currently the deciding voice over law and public policy in Puerto Rico, circumventing the elected Government in practically all fundamental issues.

Additionally, the doctrine of *stare decisis* is no impediment here. This very year, this Court stated:

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[12] *See Civil Rights Cases*, 109 U.S. 3, 4, 3 S. Ct. 18, 27 L. Ed. 835 (1883) and *Hodges v. United States*, 203 U.S. 1, 27 S. Ct. 6, 51 L. Ed. 65 (1906).

We have long recognized, however, that *stare decisis* is not an inexorable command, and it is at its weakest when we interpret the Constitution. It has been said that it is sometimes more important that an issue be settled than that it be settled right. **But when it comes to the interpretation of the Constitution**—the great charter of our liberties, which was meant to endure through a long lapse of ages,—**we place a high value on having the matter settled right**. In addition, when one of our constitutional decisions goes astray, the country is usually stuck with the bad decision unless we correct our own mistake. An erroneous constitutional decision can be fixed by amending the Constitution, but our Constitution is notoriously hard to amend. **Therefore, in appropriate circumstances we must be willing to reconsider and, if necessary, overrule constitutional decisions**.

Some of our most important constitutional decisions have overruled prior precedents. We mention three. In *Brown* v. *Board of Education*, 347 U. S. 483, 74 S. Ct. 686, 98 L. Ed. 873 (1954), **the Court repudiated the separate but equal doctrine, which had allowed States to maintain racially segregated schools and other facilities. In so doing, the Court overruled the infamous decision in *Plessy* v. *Ferguson***, 163 U. S. 537, 16 S. Ct. 1138, 41 L. Ed. 256 (1896), along with six other Supreme Court precedents that had applied the separate-but-equal rule. *Dobbs v. Jackson Women's Health*

> *Org.*, 142 S. Ct. 2228, 2262 (2022) (emphasis added) (citations and quotation marks omitted).

Thus, this Court can and should overrule the morally repugnant interpretation given by this Court to the Territories Clause in the *Insular Cases*. This interpretation was wrongly decided and has dragged on for over a century keeping Puerto Rico's resident citizens in the throes of colonialism. The colonial status of Puerto Rico and the racist determinations of the *Insular Cases* do not reflect the contemporary political standards of civil and human rights under international law.

As Justice Gorsuch recently expressed:

> **The flaws in the Insular Cases are as fundamental as they are shameful**. Nothing in the Constitution speaks of "incorporated" and "unincorporated" Territories. Nothing in it extends to the latter only certain supposedly "fundamental" constitutional guarantees. **Nothing in it authorizes judges to engage in the sordid business of segregating Territories and the people who live in them on the basis of race, ethnicity, or religion**.
>
> The Insular Cases can claim support in academic work of the period, **ugly racial stereotypes**, and the theories of social Darwinists. But they have no home in our Constitution or its original understanding. *Vaello-Madero*, 142 S. Ct. at 1554 (J. Gorsuch,

concurring) (emphasis added) (citations omitted).

CONCLUSION

This Court must determine that the actions taken by the Board and ratified by the lower courts are inconsistent with the constitutional doctrine of preemption and PROMESA and, therefore, invalid. The displacement and amendment of the Retirement Laws, in prejudice of the rights and livelihood of the teachers of Puerto Rico's public school system, was outside of the Board's authority and the abnormal preemption analysis used to justify it was incorrect. At this point, the Teachers' Associations are not requesting the Plan be voided, because the Board has repeatedly represented that there is no need to undo the work put into the Plan and its disbursement. On the contrary, the remedy the Board suggested in the alternative was for the Retirement Laws to be returned to their former status and accommodations to be made around that.

Additionally, this Court must rule that the creation of the new preemption doctrine was rooted in the *Insular Cases* and, thus, was an improper extension of these morally repugnant cases. Finally, this Court should take this opportunity to overrule the *Insular Cases* for the reasons stated above.

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

Respectfully submitted,

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