No. 22-484

IN THE

Supreme Court of the United States

HON. PEDRO PIERLUISI, ET AL.

Petitioners

v.

FINANCIAL OVERSIGHT AND MANAGEMENT BOARD FOR PUERTO RICO

Respondent

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

MOTION FOR LEAVE TO FILE OUT OF TIME AND BRIEF OF HON. JOSE LUIS DALMAU, PRESIDENT OF THE PUERTO RICO SENATE AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

EDWIN QUIÑONES, ESQ.
Counsel of Record
Quiñones, Arbona & Candelario
The Chubb Plaza, Suite 701-A
33 Resolution Street
San Juan, Puerto Rico 00920
(787) 620-6776
equinonez@gaclaw.com
Counsel for Amicus Curiae

February 16, 2023

MOTION FOR LEAVE TO FILE BRIEF OUT OF TIME OF AMICUS CURIAE

Pursuant to Supreme Court Rule 21, the President of the Senate of Puerto Rico ("Amicus"), respectfully move the Court for leave to file the brief of *amicus curiae* out of time, and to file the accompanying brief in support of Petitioners' Writ of Certiorari.

This is a very important case involving the extent of the federal powers bestowed upon the Federal Oversight and Management Board of Puerto Rico (the "Board") as allowed temporarily by the Puerto Rico Oversight, Management and Economic Stability Act ("PROMESA"), 48 U.S.C. § 2101 *et seq*. Amicus posits that this case involves crucial elements of self-government of Puerto Rico and provides a perspective that might assist the Supreme Court with the issue now pending before its consideration.

The Petition for a Writ of Certiorari filed by Governor Pedro Pierluisi involve four (4) legislative acts approved by the Legislative Assembly of the Commonwealth of Puerto Rico, all which were invalidated by the Board. As President of the Senate of Puerto Rico, one of the two constitutional bodies of Puerto Rico's Legislative Branch that approved those laws, I believe that similar lawsuits will be forthcoming if the powers of the Board remain unfettered. Under PROMESA "*it shall be the duty of…the Supreme Court of the United States to advance the docket and to expedite to the greatest extent possible the disposition of any matter brought under this [Act].*" 48 U.S.C. § 2126 (d). Therefore, it is proper for the President of the Puerto Rico Senate to be heard in this case as the presiding officer of one of the parties whose constitutional powers have

been afflicted by the actions of the Board and PROMESA.

Amicus regrets missing the deadline for filing at this early stage of the petition for certiorari. Further, *Amicus* apologizes for the late motion, and respectfully requests that this Court grant the motion for leave to file the brief of *amicus curiae* out of time. *Amicus* miscalculated the date for Amicus Briefs to be filed after the Court Requested a Response from Respondents on November 18, 2022, and then extended the time for Respondents to file their response until February 21, 2023. Since the Court modified its Rules effective January 1, 2023, Amicus was no longer required consent from the parties to file the *Amicus Curiae.*

In support of this motion, *amicus* asserts that PROMESA, as a remedial bankruptcy legislation enacted by Congress, was not intended to replace the principles of self-government of the Government of Puerto Rico and its progeny. Therefore, the Court must reflect on the temporary and remedial nature of the bankruptcy law adopted for the territories and avoid any interpretations that its enactment resulted in a permanent alteration of the constitutional government of Puerto Rico. *Amicus* requests that this motion to file the attached *amicus* brief be granted.

No counsel for a party authored this motion or the proposed amicus brief in whole or in part, and no person, other than amicus, its members, or its counsel made a monetary contribution to fund the motion or brief.

Dated: February 16, 2023

EDWIN QUIÑONES, ESQ.
Counsel of Record
Quiñones, Arbona & Candelario
The Chubb Plaza, Suite 701-A
33 Resolution Street
San Juan, Puerto Rico 00920
(787) 620-6776
equinonez@gaclaw.com

Counsel for Amicus Curiae

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INTEREST OF *AMICUS CURIAE*[1]

Amicus curiae is the President of the Puerto Rico Senate, elected pursuant to the mandates of the Commonwealth's Constitution.[2]

The Senate of Puerto Rico, pursuant the powers and prerogatives emanating from the Constitution of the Commonwealth of Puerto Rico passed four (4) bills which became law when the Petitioner, Governor Pedro Pierluisi, signed them, also pursuant to his constitutional authority. These are Act 82-2019, Act 138-2019, Act 172-2019, and Act 47-2020. All four were spurned by the Federal Oversight and Management Board of Puerto Rico (the "Board") as allowed temporarily by the Puerto Rico Oversight, Management and Economic Stability Act ("PROMESA"), 48 U.S.C. § 2101 *et seq*.

As President of the Puerto Rico Senate, *Amicus Curiae* is deeply disturbed by the Board's invasive role in the constitutional powers of the Legislative Assembly of Puerto Rico. PROMESA is a federally enacted legislation with a sunset provision. Consequently, PROMESA cannot be construed as a permanent dismantlement or abridgment of the attributes of self-government earned and bestowed upon the people of Puerto Rico. The special temporary nature of

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[1] No counsel for a party authored this brief in whole or in part, and no person other than amicus and its counsel made any monetary contribution intended to fund the preparation or submission of this brief. Counsel for both parties were notified of amicus's intent to file this brief.

[2] Senator Jose Luis Dalmau has served in the Puerto Rico Senate from 2001 to the present and was elected its president in 2021.

PROMESA was designed to tackle an imminent humanitarian crisis resulting from the collapsing public finances of the Government of Puerto Rico. Once Puerto Rico achieves adequate access to credit markets and procures four (4) consecutives balance budgets, the Board ceases to exist. With it, its ominous power over the fiscal policies of the Commonwealth also vanishes. 48 U.S.C. § 2149. The statutory and temporary financial tutelage of PROMESA cannot overrule over 70 years of solid constitutional history constructed between Puerto Rico and the United States. Therefore, in considering the *Petition for Writ of Certiorari* submitted by the Governor of Puerto Rico, this High Court is conferred with the opportunity to express that the temporary nature of PROMESA, as a remedial bankruptcy legislation, was not intended by Congress to replace the principles of self-government of the Government of Puerto Rico.

The brief is filed in support of petitioner.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

In challenging the court of appeals' opinion that the Fiscal Oversight and Management Board has acted within its legal boundaries, petitioner Pedro Pierluisi posits that the standard of review of the Board's actions "must reflect the temporary fiscal goals of the statute as well as Puerto Rico's status as 'an autonomous political entity,' 'sovereign over matters not ruled by the Constitution.'" Pet. Br. 22 (quoting *Rodriguez v. Popular Democratic Party*, 457 U.S. 1, 8 (1982)). That is a matter of great importance for Puerto Rico's governance.

This Court has reiterated that in authorizing Puerto Rico to draft and adopt a constitution of its own providing for a republican form of government, Congress relinquished its powers over the Commonwealth's local affairs. *Puerto Rico v. Sanchez Valle*, 136 S. Ct. 1863, 1874 (2016). That necessarily meant a relinquishment of its powers over local legislation. That was done explicitly through Public Law 600's Section 5, repealing all provisions regarding local governance of the then in effect Organic Act. Pub. L. No. 81-600, 64 Stat. 319. Among the repealed provisions was section 34, that until then had granted Congressional review to all territorial legislation. Organic Act of 1917, Pub. L. No. 64-368, 39 Stat. 951, 961 (1917).

By 2016, the public debt of Puerto Rico had risen to $71 billion. Puerto Rico could not service that debt, nor could it easily restructure it. *Fin. Oversight & Mgmt. Bd. for P.R. v. Aurelius Inv.*, 140 S.Ct. 1649, 1655 (2020). In 2016, in response to Puerto Rico's fiscal crisis, Congress enacted the Puerto Rico Oversight,

Management and Economic Stability Act ("PROMESA"), 130 Stat. 549, 48 U.S.C. §§ 2101–2241.

PROMESA created the Financial Oversight and Management Board (the "Board") with authority to file for bankruptcy on behalf of Puerto Rico or its instrumentalities. 48 U.S.C. § 2164. To achieve its goals, PROMESA allows the Board to prevent the enforcement or application of any law to ensure that compliance with the approved Fiscal Plan is not affected. 48 U.S.C. § 2144(a)(5).

PROMESA is a temporary bankruptcy statute for territories and Puerto Rico. The Board shall terminate once Puerto Rico regains access to short-term and long-term credit markets at reasonable interest rates to meet its borrowing needs and it has successfully balanced four consecutive budgets. 48 USC § 2149.

As Governor Pierluisi has argued, the Board's power to stay the enforcement of Puerto Rico legislation must be interpreted for what it is, a temporary emergency power limited to PROMESA's remedial goals. It is not a new Organic Act that strips Puerto Rico of its state-like sovereignty.

ARGUMENT

I. BACKGROUND

The United States gained possession of Puerto Rico by military occupation during the Spanish-American War of 1898. Spain formally ceded the island under the Treaty of Paris signed in December 1898 and ratified in April 1899. *See* Treaty of Peace between the United States of America and the Kingdom of Spain, Apr. 11, 1899, 30 Stat. 1754.

After a brief period of military rule, Congress enacted an organic act (widely known as the Foraker Act) to establish a civil government in Puerto Rico. *See* Organic Act of 1900, Ch. 191, 56th Cong., 1st Sess., 31 Stat. 77 (1900). That Act provided for an Executive Branch headed by a Governor and an Executive Council, both appointed by the President of the United States with the advise and consent of the Senate, a House of Delegates elected by qualified voters of Puerto Rico, and a district court of the United States for Puerto Rico with a district judge appointed by the President of the United States for a term of four years. *See id.* §§ 17, 18, 27, 34.

Section 27 of the Foraker Act of 1900 was explicit in that legislative acts would be performed by Congressional authorization: "That all local legislative powers hereby granted shall be vested in a legislative assembly * * *." Organic Act of 1900, Ch. 191, 56th Cong., 1st Sess., 31 Stat. 77 (1900). And through section 31 Congress reserved the right to review local legislation: "That all laws enacted by the legislative assembly shall be reported to the Congress of the United States, which hereby reserves the power and authority, if deemed advisable, to annul the same." *Id.*

The Foraker Act was replaced in 1917 by a new organic act (widely known as the Jones Act), which created an elected Senate and gave the people of Puerto Rico a bill of rights and United States citizenship. *See* Organic Act of 1917, Pub. L. No. 64-368, 39 Stat. 951 (1917).

The Jones Act maintained through section 34, the language of the Foraker Act granting Congressional review to all territorial legislation: "All laws enacted by the legislature of Porto Rico shall be reported to the

Congress of the United States, as provided in section twenty-three of this Act, which hereby reserves the power and authority to annul the same." 39 Stat. 951, 961.

In 1950, confronting the tensions stemming from the post Second World War climate, facing growing dissatisfaction with the prevailing colonial structures, even serious eruptions of violence, Congress enacted Public Law 600, a landmark legislation that transformed the governance of Puerto Rico. *See* Pub. L. No. 81-600, 64 Stat. 319. That statute, "[f]ully recognizing the principle of government by consent," offered the people of Puerto Rico "in the nature of a compact" the authority to "organize a government pursuant to a constitution of their own adoption." 48 U.S.C. § 731b. Upon approval of the statute by the qualified voters of Puerto Rico in a referendum, the legislature was authorized to call a constitutional convention to draft a constitution for Puerto Rico. 48 U.S.C. § 731c.

In a popular referendum held on June 4, 1951, the people of Puerto Rico overwhelmingly accepted the compact offered by Congress, and a Constitutional Convention was held from September 1951 to February 1952. That Convention drafted the Puerto Rico Constitution. The proposed Constitution was then submitted to the people of Puerto Rico and again overwhelmingly approved (with over 80% of the vote) in another popular referendum on March 3, 1952.

The Puerto Rico Constitution is ordained and established by "[w]e, the people of Puerto Rico." P.R. Const. pmbl. It created a new political entity, the Commonwealth of Puerto Rico ("*Estado Libre Asociado de Puerto Rico*"), and specifies that the Commonwealth's "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 (emphasis added); *see also id.* pmbl. ("We understand that the democratic system of government is one in which the will of the people is the source of public power.").

Under the Puerto Rico Constitution all three branches of the government of the Commonwealth are "subordinate to the sovereignty of the people of Puerto Rico." P.R. Const. art. I § 2.

Pursuant to Public Law 600, the Constitution was submitted to the President of the United States, who—after duly finding, among other things, that it provided for a republican form of government—in turn submitted it to Congress for review. *See generally* 48 U.S.C. §§ 731c, d. Congress considered the proposed Constitution, likewise found that it provided for a republican form of government, and approved it conditioned on minor revisions to provisions addressing compulsory school attendance and the process for constitutional amendments, and the elimination of section 20 recognizing a number of then-novel human rights. *See* Pub. L. No. 82-447, 66 Stat. 327. The Senate report accompanying that legislation explained that the Constitution's approval would mean that "the people of Puerto Rico will exercise self-government." S. Rep. No. 82-1720, at 6, 7 (1952).

President Truman echoed that view both when transmitting the Puerto Rico Constitution to Congress and when signing the Joint Resolution by which Congress approved the Constitution. Under the new Constitution, in President Truman's view, "[t]he Commonwealth of Puerto Rico will be a government which is

truly by the consent of the governed. No government can be invested with a higher dignity and greater worth than one based upon the principle of consent." *Public Papers of the Presidents, Harry S. Truman 1952-53*, at 471 (1966). He recognized that with the constitution: "full authority and responsibility of local self-government will be vested in the people of Puerto Rico." *Id.*, *quoted in Córdova & Simonpietri Ins. Agency, Inc. v. Chase Manhattan Bank, N.A.*, 649 F.2d 36, 40 (1st Cir. 1981).

Puerto Rico's Constitutional Convention thereafter accepted Congress' conditions "in the name of the people of Puerto Rico," *Resolution No. 34 of the Constitutional Convention: To Accept, on Behalf of the People of Puerto Rico, the Conditions of Approval of the Constitution of the Commonwealth of Puerto Rico Proposed by the Eighty-Second Congress of the United States through Public Law 447 approved July 3, 1952*, P.R. Laws Ann. Hist. (Hist. L.P.R.A.) § 9, and the Governor issued a formal proclamation to that effect, *see Proclamation: Establishing the Commonwealth of Puerto Rico*, P.R. Laws Ann. Hist. (Hist. L.P.R.A.) § 10. The Puerto Rico Constitution was accordingly amended by the Constitutional Convention and took effect on July 25, 1952. The amendments were overwhelmingly ratified by the people of Puerto Rico in yet another referendum on November 4, 1952. *See generally Proclamation: Amendments to the Constitution of the Commonwealth of Puerto Rico*, P.R. Laws Ann. Hist. (Hist. L.P.R.A.) § 11.

Core to the 1950s compact between the Federal Government and Puerto Rico was that Puerto Rico's eventual constitution "shall provide a republican form of government." 48 U.S.C. § 731c. Thus, "resonant of

American founding principles," the Puerto Rico Constitution set forth a tripartite government "'republican in form' and 'subordinate to the sovereignty of the people of Puerto Rico.'" *Puerto Rico v. Sanchez Valle*, 136 S.Ct. 1863, 1869 (2016), (quoting P. R. Const., Art. I, §2); *see also Torres* v. *Puerto Rico*, 442 U.S. 465, 470 (1979); *Fin. Oversight & Mgmt. Bd. for P.R. v. Aurelius Inv.*, 140 S. Ct. 1649, 1675 (2020) (Sotomayor, J., concurring).

"[T]he distinguishing feature" of such "republican form of government," this Court has recognized, "is the right of the people to choose their own officers for governmental administration, and pass their own laws in virtue of the legislative power reposed in representative bodies, whose legitimate acts may be said to be those of the people themselves." *In re Duncan*, 139 U.S. 449, 461 (1891) (discussing the republican governments of the States); *see also Pacific States Telephone & Telegraph Co. v. Oregon*, 223 U.S. 118, 149 (1912) (same). *See also*, The Federalist No. 39, at 251 (J. Madison) ("[W]e may define a republic to be * * * a government which derives all its powers directly or indirectly from the great body of the people").

Consistent with allowing Puerto Rico to adopt their own constitution and establish a republican form of government, Public Law 600 repealed all provisions of the Jones Act regarding local governance. One of the expressly repealed provisions was section 34 that had granted congressional review of Puerto Rico legislation. *See* Pub. L. 81-600, Sec. 5 (2). From then on the people of Puerto Rico, through their Constitution, vested "[t]he legislative power * * * in a Legislative Assembly * * *." P.R. Const. art. III § 1. The surviving

provisions continued in force as the Puerto Rico Federal Relations Act. *See* Pub. L. No. 81-600 §§ 4, 5, 64 Stat. at 319-20 (1950).

As this Court has recognized, the process initiated by Public Law 600 was "Puerto Rico's transformative constitutional moment," *Sanchez Valle*, 136 S.Ct. at 1875, through which Congress "relinquished its control over [the Commonwealth's] local affairs[,] grant[ing] Puerto Rico a measure of autonomy comparable to that possessed by the States." *Id. at* 1874 (quoting *Examining Board of Engineers, Architects & Surveyors v. Flores de Otero*, 426 U.S. 572, 579 (1976)).

In 2006, tax advantages that had previously led major businesses to invest in Puerto Rico expired. *See* Small Business Job Protection Act of 1996, §1601, 110 Stat. 1827. Many industries left the island. Emigration increased. And the public debt of Puerto Rico's government and its instrumentalities soared, rising from $39.2 billion in 2005 to $71 billion in 2016. *Fin. Oversight & Mgmt. Bd. for P.R. v. Aurelius Inv.*, 140 S. Ct. at 1655.

Puerto Rico found that it could not service that debt. Yet Puerto Rico could not easily restructure it. The Federal Bankruptcy Code's municipality-related Chapter 9 did not apply to Puerto Rico (or to the District of Columbia). *See* 11 U.S.C. § 109(c), § 101(52). But at the same time, federal bankruptcy law invalidated Puerto Rico's own local "debt-restructuring" statutes. *Puerto Rico* v. *Franklin Cal. Tax-Free Trust*, 136 S. Ct. 1938 (2016); *Fin. Oversight & Mgmt. Bd. for P.R. v. Aurelius Inv.*, 140 S. Ct. at 1655.

In June 2016, Congress enacted and President Obama signed Pub. L. No. 114-187, the Puerto Rico

Oversight, Management, and Economic Stability Act (PROMESA), 48 U.S.C. § 2101 *et seq*., which Congress found necessary to deal with Puerto Rico's "fiscal emergency" and to help mitigate the Island's "severe economic decline." *See* 48 U.S.C. § 2194(m)(1).

To implement PROMESA, Congress created the Financial Oversight and Management Board of Puerto Rico (the "Board"). Congress charged the Board with providing independent supervision and control over Puerto Rico's financial affairs and helping the Island "achieve fiscal responsibility and access to the capital markets." 48 U.S.C. § 2121(a).

PROMESA's Title III created a special bankruptcy regime allowing the territories and their instrumentalities to adjust their debt. 48 U.S.C. §§ 2161–77.

In furtherance of PROMESA's goals, Congress granted the authority to stay the enforcement of new legislation.

> Sec. 204. (5) FAILURE TO COMPLY.—If the territorial government fails to comply with a direction given by the Oversight Board under paragraph (4) with respect to a law, the Oversight Board may take such actions as it considers necessary, consistent with this Act, to ensure that the enactment or enforcement of the law will not adversely affect the territorial government's compliance with the Fiscal Plan, including preventing the enforcement or application of the law.

48 U.S.C. § 2144(5).

II. PUERTO RICO POSSESSES STATE-LIKE SOVEREIGNTY OVER ITS LOCAL AFFAIRS

The Commonwealth's legal cornerstone is Public Law 600 of 1950, enacted amid demands for decolonization after World War II and the creation of the United Nations. That Law, which "was intended to end [Puerto Rico's] subordinate status," *Córdova*, 649 F.2d at 40, did not simply propose to revise the existing organic act governing Puerto Rico. Rather, it proposed the creation of an entirely new government.

Public Law 600 "fully recognizing the principle of government by consent" offered the people of Puerto Rico a "compact" under which they could "organize a government under a constitution of their *own* adoption." 48 U.S.C. § 731b (emphasis added). The people of Puerto Rico overwhelmingly accepted that compact, and convened a Constitutional Convention that drafted the Puerto Rico Constitution.

Public Law 600 on its face specifies that the Puerto Rico Constitution "shall provide a republican form of government." 48 U.S.C. § 731c. As this Court has long explained, "the distinguishing feature of that form is the right of the people to choose their own officers for governmental administration, and pass their own laws in virtue of the legislative power reposed in representative bodies, whose legitimate acts may be said to be those of the people themselves." *In re Duncan*, 139 U.S. at 461. In a republican form of government, in other words, "the people are * * * the source of political power." *Id.*

Congress hardly would have insisted that Puerto Rico adopt a republican form of government, and the

President and Congress hardly would have confirmed that Puerto Rico had in fact done so, if that government exercised authority delegated by Congress, as opposed to the people of Puerto Rico.

Congress approved the proposed Constitution conditioned on minor revisions to provisions addressing compulsory school attendance and the process for constitutional amendments, and the elimination of section 20 recognizing a number of then-novel human rights. *See* Pub. L. No. 82-447, 66 Stat. 327. By approving the Constitution, Congress necessarily recognized that the people of Puerto Rico had exercised their *own* sovereignty to establish their *own* government to enact their *own* laws.

After the Puerto Rico Constitutional Convention formally accepted—"in the name of the people of Puerto Rico"—the conditions set by Congress and amended the Constitution, the Governor issued a proclamation, and the Puerto Rico Constitution took effect on July 25, 1952. Since that day, Puerto Rico governors and legislators have been elected pursuant to the sovereign authority delegated by the people of Puerto Rico, not from Congress.

The Constitution itself leaves no doubt about the source of its authority. The Preamble disavows the contention that the powers provided in the Constitution are delegated from Congress. It declares that "[we] the people of Puerto Rico in order to organize ourselves politically on a fully democratic basis, to promote the general welfare—do ordain and establish this Constitution for the commonwealth which in the exercise of our natural rights, we now create within our union with the United States of America." P.R. Const. pmbl.

The articles of the Constitution of Puerto Rico go on to make abundantly clear that the source of power creating the Commonwealth is the people of Puerto Rico. It creates a new political entity, the Commonwealth of Puerto Rico, and specifies 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 by the people of Puerto Rico and the United States of America." *Id.,* art. I § 1 (emphasis added). It creates the "legislative, judicial and executive branches" of the Commonwealth government, and provides that all three branches "shall be equally subordinate to the *sovereignty of the people of Puerto Rico*." *Id.*, art. I § 2 (emphasis added). It vests "[t]he executive power" of the Commonwealth "in a Governor," *id.* art. IV § 1, "[t]he legislative power" of the Commonwealth "in a Legislative Assembly," *id.,* art. III § 1, and "[t]he judicial power" of the Commonwealth in "a Supreme Court, and in such other courts as may be established by law," *id.*, art. V § 1.

Neither Congress nor the President plays any role whatsoever in the selection of a Governor of Puerto Rico. Nor does the President have any power to select or remove any of the persons who enforce the laws of Puerto Rico, thereby underscoring that such persons cannot possibly be deemed to be exercising delegated federal power. *See*, *e.g.*, *United States v. Lara*, 541 U.S. 193, 216 (2005) (Thomas, J., concurring in the judgment).

The fact that Congress authorized the exercise of popular sovereignty that led to the adoption of the Puerto Rico Constitution in the first place does not render it any less an exercise of popular sovereignty.

As professor Samuel Issacharoff has observed: "Congress may have initiated the constitutional writing process, but the voters of Puerto Rico made it a reality." Samuel Issacharoff, Alexandra Bursak, Russell Rennie & Alec Webley, *What is Puerto Rico?*, 94 Ind. L. J. 1, 10 (2019).

When conditionally approving the Puerto Rico Constitution, Congress did not simply impose the changes it desired. Instead, it specified that "the Constitution of the Commonwealth of Puerto Rico hereby approved shall become effective when the Constitutional Convention of Puerto Rico shall have declared in a formal resolution its acceptance *in the name of the people of Puerto Rico* of the conditions of approval herein contained," and when the Governor of Puerto Rico shall issue a proclamation to that effect. Pub. L. No. 82-447, 66 Stat. at 327-28 (emphasis added). Without this final sovereign act of acceptance by the people of Puerto Rico, the Puerto Rico Constitution never would have taken effect.

Post-1952 decisions of this Court involving Puerto Rico confirm that the Commonwealth's laws derive from sovereign authority delegated by the people of Puerto Rico, not from Congress.

In *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663 (1974), the Court addressed the question as to whether the Three Judge Court Statute, 28 U.S.C. § 2281, requiring a three-judge panel whenever the constitutionality of a state statute was challenged in federal court, applied to the laws of the Commonwealth of Puerto Rico. The Court had ruled that the law did not apply to territories because: "In our dual system of government, the position of the state as sov-

ereign over matters not ruled by the Constitution requires a deference to state legislative action beyond that required for the laws of a territory." *Stainback v. Mo Hock Ke Lok Po*, 336 U.S. 368, 378 (1949). The First Circuit Court of Appeals had likewise ruled in 1919 as to Puerto Rico. *Benedicto v. West India & Panama Tel. Co.*, 256 F. 417, 419 (1st Cir. 1919).

The Court held that with the advent of commonwealth status, *Stainback* and *Benedicto* could no longer apply. The Court noted that significant changes had occurred in the structure of government in Puerto Rico and quoted with approval from an opinion of the First Circuit contemporary with the creation of the Commonwealth, *Mora v. Mejias*, 206 F.2d 377 (1953), stating that:

> [I]t may be that the Commonwealth of Puerto Rico—"El Estado Libre Asociado de Puerto Rico" in the Spanish version—organized as a body politic by the people of Puerto Rico under their own constitution, pursuant to the terms of the compact offered to them in Pub. L. 600, and by them accepted is a State within the meaning of 28 U.S.C. § 2281. The preamble to this constitution refers to the Commonwealth * * * which "in the exercise of our natural rights, we (the people of Puerto Rico) now create within our union with the United States of America." Puerto Rico has thus not become a State in the federal Union like the 48 States, but it would seem to have become a State within a common and accepted meaning of the word, *Cf. State of Texas v. White*, 1868, 7 Wall. 700, 721, 74 U.S. 700, 19 L.Ed. 27 * * * It is a political entity cre-

> ated by the act and with the consent of the people of Puerto Rico and joined in union with the United States of America under the terms of the compact.

Calero-Toledo, 416 U.S. at 672 *(*quoting *Mora v. Mejias,* 206 F.2d at 387.)

The Court built upon *Calero-Toledo* two years later in *Flores de Otero*, 426 U.S. 572 (1976). The issue there was whether a federal statute giving federal district courts jurisdiction over actions "to redress the deprivation, under color of any *State* law * * * of any right, privilege or immunity" secured by federal law, applied to actions challenging laws of the Commonwealth of Puerto Rico. *Id*. at 574-75 & n.1 (emphasis added). In answering that question in the affirmative, the Court emphasized that Public Law 600 had authorized the people of Puerto Rico "to draft their *own* constitution," and that, in light of that Constitution, "Puerto Rico now elects its Governor and legislature; appoints its judges, all cabinet officials, and lesser officials in the executive branch; * * * and amends its *own* civil and criminal code." 426 U.S. at 593, 594 (emphasis added; internal quotation omitted); *see also id*. at 597 ("[A]fter 1952, * * * Congress relinquished its control over the organization of the local affairs of the island and granted Puerto Rico a measure of autonomy comparable to that possessed by the States.").

In 1982, this Court upheld "[t]he methods by which the people of Puerto Rico and their representatives have chosen to structure the Commonwealth's electoral system" against a federal constitutional challenge. *Rodriguez v. Popular Democratic Party*, 457 U.S. 1, 8 (1982). In so ruling, this Court held that those

methods are entitled to "substantial deference" precisely because "Puerto Rico, like a state, is an autonomous political entity, '*sovereign* over matters not ruled by the [federal] Constitution.'" *Id.* (emphasis added; quoting *Calero-Toledo*, 416 U.S. at 673, and citing *Córdova*, 649 F.2d at 39-42).

In 2016, this Court "readily acknowledge[d]" that the Puerto Rico Constitution was a democratic manifestation of the people's will. *Sanchez Valle*, 136 S. Ct. at 1876. Viewing the constitutional process as transformative, the Court observed that: "[t]hose constitutional developments were of great significance—and, indeed, made Puerto Rico 'sovereign' in one commonly understood sense of that term." *Id.*, at 1866. And added that, "[a]t that point, Congress granted Puerto Rico a degree of autonomy comparable to that possessed by the States." *Id.*

The Puerto Rico Constitution establishes a government of the people, by the people, and for the people of Puerto Rico. In this regard, the Constitution of Puerto Rico is no different than the constitutions of the fifty States; the latter simply led to Statehood, whereas the former led instead to the affiliated status of a Commonwealth (*Estado Libre Asociado*, or literally "Free Associated State").

As mentioned above, this Court has described the 1952 constitutional process as a relinquishment of powers by Congress. *See Sanchez Valle*, 136 S. Ct. at 1874; *Flores de Otero*, 426 U.S. at 59. Nothing in the text of the Territory Clause prevents Congress from partial relinquishment of powers, as was recognized in a memorandum prepared by the U.S. Department of Justice's Office of Legal Counsel in 1963:

> [T]he Constitution does not inflexibly determine the incidents of territorial status, *i.e.*, that Congress must necessarily have the unlimited and plenary power to legislate over it. Rather, Congress can gradually relinquish those powers and give what was once a Territory an ever-increasing measure of self-government. Such legislation could create vested rights of a political nature, hence it would bind future Congresses and cannot be "taken backwards" unless by mutual agreement.

Memorandum, Re: Power of the United States to conclude with the Commonwealth of Puerto Rico a compact which could be modified only by mutual consent, 6 (July 23, 1963), https://www.justice.gov/olc/file/796061/download.

In *Sanchez Valle*, this Court recognized "that Congress has broad latitude to develop innovative approaches to territorial governance" and invited territorial peoples to make "large-scale choices about their own political institutions." *Sanchez-Valle*, 136 S. Ct. at 1876. In that spirit, it recognized the unique relationship between the United States and Puerto Rico as a prime example of "inventive statesmanship." *Id*.

Indeed, the Commonwealth of Puerto Rico represents "inventive statesmanship" at its best: it allows Puerto Rico to remain in democratic union with the United States without becoming a State (and thereby subjecting itself to the uniformity requirements that Statehood would entail, which might conflict with Puerto Rico's distinctive history, economy, and society). As the leading scholars of federalism at the time saw it: the Commonwealth of Puerto Rico created "a new dimension of the federal principle, in that it

places the old principle of 'unity with diversity' on a new basis." Robert R. Bowie & Carl J. Friederich, *Studies in Federalism* 715 (1954).

In light of that Constitution, Puerto Rico legislation are the result of the sovereign will of the people of Puerto Rico.

III. PROMESA IS A TEMPORARY BANKRUPTCY STATUTE, NOT A NEW ORGANIC ACT.

Finding Puerto Rico to be amid a fiscal emergency, Congress enacted PROMESA in 2016. PROMESA created mechanisms for restructuring the debts of U.S. territories and for overseeing reforms of their fiscal and economic policies. *See* 48 U.S.C. § 2121(a) (stating this purpose). The Board established "as an entity within the territorial government" of Puerto Rico, 48 U.S.C. § 2121(c)(1), was empowered by PROMESA to, among other things, develop, approve, and certify Fiscal Plans and Territory Budgets, 48 U.S.C. §§ 2141–2142, negotiate with the Commonwealth's creditors, *id.* § 2146, and, under Title III, to commence a bankruptcy-type proceeding on behalf of the Commonwealth, 48 U.S.C. § 2175.

In determining that the Members are not federal officer subject to the Appointment Clause of the United States Constitution, Art. II, § 2, cl.2, this Court held that the Board possesses considerable power, yet they are powers related to local fiscal responsibility. *Financial Oversight and Management Board for Puerto Rico v. Aurelius*, 140 S. Ct. at 1662. PROMESA

is not a new Organic Act by Congress to supplant previously enacted rules of self-government. Clearly, Congress mandated that this local duty to be exercised by the Board was limited to local fiscal responsibility amidst a fiscal crisis of a temporary nature. There is no reason, in law or in logic, to understand that the Board, is roughly a replacement or an alteration of the constitutional government of Puerto Rico.

PROMESA is a *sui generis* Federal bankruptcy statute tailored for territories. Congress may have drawn its authority to enact PROMESA from the Territory Clause's power to "make all needful rules and regulations respecting the territory," U.S. Const. art. IV, § 3, cl. 2, but where that clause comes into play here is in allowing Congress to treat Puerto Rico differently than a State *in the application of federal law*. *See Harris v. Rosario*, 446 U.S. 651, 651-52 (1980) (*per curiam*); *Califano v. Torres*, 435 U.S. 1 (1978).

PROMESA explicitly recognizes Puerto Rico's power to legislate, except as that power is limited by Titles I and II of PROMESA:

> 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, but whether or not a case has been or can be commenced under this subchapter-

48 U.S.C. § 2163.

Truth be told, PROMESA results in a federally appointed Board exercising controls over matters entrusted by the people of Puerto Rico through their Constitution to elected officials. That brings two features of American federalism into collision: bankruptcy regulation and the state-like sovereignty this Court has recognized Puerto Rico acquired in 1952.

PROMESA parallels the norms set forth in international law for similar situations. The International Covenant on Civil and Political Rights allows for the temporary derogation of civil and political rights "[i]n time of public emergency which threatens the life of the nation" but only "to the extent strictly required by the exigencies of the situation." International Covenant on Civil and Political Rights, art. 4, U.N, General Assembly resolution 2200A (XXI) of 16 December 1966, 999 U.N.T.S. 17.

All parties agree that Puerto Rico faced a humanitarian crisis. Its impending fiscal collapse was a public emergency. To fully match the covenant, the powers conferred on the Board, or the manner in which it exercises them, must fall within the limits dictated by the exigencies of the situation, which happens to be the crux of the petition for certiorari.

In furtherance of PROMESA's goals, Congress granted the Board the authority to stay the enforcement of certain new legislation when enacted in a manner not consistent with approved Fiscal Plan.

> Sec. 204. (5) FAILURE TO COMPLY.—If the territorial government fails to comply with a direction given by the Oversight Board under paragraph (4) with respect to a law, the Oversight

> Board may take such actions as it considers necessary, consistent with this Act, to ensure that the enactment or enforcement of the law will not adversely affect the territorial government's compliance with the Fiscal Plan, including preventing the enforcement or application of the law.

48 U.S.C. § 2144(5)

As Governor Pierluisi has argued, the Board 's power to stay the enforcement of Puerto Rico legislation must be interpreted for what it is, a temporary emergency power limited to PROMESA's remedial goals. It is not a new Organic Act that strips Puerto Rico of its state-like sovereignty. As a temporary remedial measure, PROMESA cannot be said to *reorganize* Puerto Rico's government structure. It *intervenes* until fiscal stability is restored. No more, no less.

CONCLUSION

For the foregoing reason, Amicus requests that this Court rule that Puerto Rico's constitutional self-government and home rule are not abridged because of the temporary nature of PROMESA.

Respectfully submitted,

EDWIN QUIÑONES, ESQ.
Counsel of Record
Quiñones, Arbona & Candelario
The Chubb Plaza, Suite 701-A
33 Resolution Street
San Juan, Puerto Rico 00920
(787) 620-6776
equinonez@gaclaw.com

Counsel for Amicus Curiae

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