No. 17-8486

In the
Supreme Court of the United States

ÁNGEL RUÍZ RIVERA

Petitioner- Appellant

v.

ASSURED GUARANTY CORPORATION, ET AL.
Respondents - Appellees

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

RESPONSE IN OPPOSITION TO PETITION FOR CERTIORARI

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Dated: May 15, 2018

<u>COUNTERSTATEMENT OF QUESTION PRESENTED FOR REVIEW</u>

After the District Court of Puerto Rico denied Ángel Ruíz Rivera's ("Petitioner's") request to intervene in Respondent's action against several Commonwealth of Puerto Rico officials in *Assured Guaranty Corp. et al. v. García Padilla et al.*, Civil No. 16-1037) and Petitioner appealed that decision to the Court of Appeals for the First Circuit in *Assured Guaranty Corp. et al. v. García Padilla et al.*, Civil No. 16-2208, the case was stayed by virtue of the automatic stay provisions incorporated into the Puerto Rico Oversight, Management, and Economic Stability Act ("PROMESA"), 48 U.S.C. §§ 2101-2241. PROMESA was enacted by Congress to address the Commonwealth's financial crisis and incorporates by reference remedies and provisions similar to those found in the Bankruptcy Code, including certain automatic stay provisions. *See* 48 U.S.C. §2161(a).

The question before the Court is whether review of a denial of a motion to intervene is proper in the absence of a decision and judgment by the First Circuit, especially when no showing of the public importance of the case and the urgency for this Court's intervention has not been attempted by the Petitioner. Furthermore, issuance of the certiorari will be futile given that the automatic stay imposed by PROMESA will also apply to proceedings before this Court.

LIST OF THE PARTIES TO THIS PROCEEDING

Petitioner:

Ángel Ruíz Rivera

Respondents:

Assured Guaranty Corporation

Assured Guaranty Municipal Corporation

Ambac Assurance Corporation

Commonwealth of Puerto Rico ("Commonwealth") Respondents (who have not been replaced by current incumbents because of a stay of proceedings):

Alejandro J. García Padilla, in his official capacity as the Governor of the Commonwealth

Juan C. Zaragoza Gómez, in his official capacity as Secretary of Treasury of the Commonwealth

Ingrid Rivera Rocafort, in her official capacity as Executive Director of the Puerto Rico Tourism Company

Melba Acosta Febo, in her official capacity as President of the Government Development Bank for Puerto Rico

Luis G. Cruz Batista, in his official capacity as Director of the Commonwealth's Office of Management and Budget

Victor A. Suárez Meléndez, in his official capacity as Secretary of State of the Commonwealth

César A. Miranda Rodríguez, in his official capacity as Secretary of Justice of the Commonwealth and a member of the Working Group

Juan Antonio Flores Galarza, in his official capacity as Sub-Secretary of the Treasury of the Commonwealth

Alberto Bacó Bague, in his official capacity as Interim President of the Government Development Bank

CORPORATE DISCLOSURE STATEMENT

Assured Guaranty Corp. and Assured Guaranty Municipal Corp. (together, "Assured") hereby certify that they are both wholly owned indirect subsidiaries of Assured Guaranty Ltd., which is a public corporation whose stock is traded publicly.

This brief will refer to Assured as "Respondent."

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OPINIONS BELOW

No published or unpublished opinions have been issued by either District Court of Puerto Rico or by the Court of Appeals for the First Circuit in relation to the issue on appeal. The case stems from a District Court order denying Petitioner's request for intervention and to proceed *in forma pauperis*. The order denying the request to intervene was issued as a line order on September 6, 2016. Order, DE 53, Respondent's Appendix B-14.

COUNTER-JURISDICTIONAL STATEMENT

This Court lacks jurisdiction to entertain the Petition because the Court of Appeals has not yet entered judgment, and Petitioner failed to establish under Rule 11 of the Rules of the Supreme Court (i) that this case is of imperative public importance; (ii) and that review is warranted immediately, before there is a judgment by the Court of Appeals.

STATUTORY PROVISIONS INVOLVED

1. Section 301 of PROMESA, 48 U.S.C. § 2161 states in part:

> (a) Sections applicable to cases under this subchapter
>
> Sections 101 (except as otherwise provided in this section), 102, 104, 105, 106, 107, 108, 112, 333, 344, 347(b), 349, 350(b), 351, 361, **362**, 364(c), 364(d), 364(e), 364(f), 365, 366, 501, 502, 503, 504, 506, 507(a)(2), 509, 510, 524(a)(1), 524(a)(2), 544, 545, 546, 547, 548, 549(a), 549(c), 549(d), 550, 551, 552, 553, 555, 556, 557, 559, 560, 561, 562, 902 (except as otherwise provided in this section), **922**, 923, 924, 925, 926, 927, 928, 942, 944, 945, 946, 1102, 1103, 1109, 1111(b), 1122, 1123(a)(1), 1123(a)(2), 1123(a)(3), 1123(a)(4), 1123(a)(5), 1123(b), 1123(d), 1124, 1125, 1126(a), 1126(b), 1126(c), 1126(e), 1126(f), 1126(g), 1127(d), 1128, 1129(a)(2), 1129(a)(3), 1129(a)(6), 1129(a)(8), 1129(a)(10), 1129(b)(1), 1129(b)(2)(A), 1129(b)(2)(B), 1142(b), 1143, 1144, 1145, and 1146(a) of Title 11, apply in a case under this subchapter and section 930 of Title 11 applies in a case under this subchapter; however, section 930 shall not apply in any case during the first 120 days after the date on which such case is commenced under this subchapter.

2. Federal Rule of Civil Procedure 24(b) & (c) prescribe, in their pertinent parts, the following:

> (b) PERMISSIVE INTERVENTION.
>
> > (1) In General. On timely motion, the court may permit anyone to intervene who:
> >
> > > (A) is given a conditional right to intervene by a federal statute; or
> > > (B) has a claim or defense that shares with the main action a common question of law or fact.
> >
> > (2) By a Government Officer or Agency. On timely motion, the court may permit a federal or state governmental officer or agency to intervene if a party's claim or defense is based on:
> >
> > > (A) a statute or executive order administered by the officer or agency; or
> > > (B) any regulation, order, requirement, or agreement issued or made under the statute or executive order.
> >
> > (3) *Delay or Prejudice.* In exercising its discretion, the court must consider whether the intervention will unduly delay or prejudice the adjudication of the original parties' rights.

(c) NOTICE AND PLEADING REQUIRED. A motion to intervene must be served on the parties as provided in Rule 5. The motion must state the grounds for intervention and be accompanied by a pleading that sets out the claim or defense for which intervention is sought.

STATEMENT OF THE CASE

The Petition should be denied for lack of jurisdiction as there is no judgment from the Court of Appeals for the First Circuit, where Petitioner's appeal from the denial of a request for permissive intervention is pending. There is nothing in the Petition to justify the use of Sup. Ct. R. 11 as none of the factors that have rarely moved this Court to use such an extraordinary mechanism are present. And even more importantly, because it seeks review of a decision entered in an action stayed under Section 301(a) of PROMESA which imposed an automatic stay in all cases against the Commonwealth.[1] 48 U.S.C. § 2161(a). The stay is currently in effect in the appeal Petitioner seeks to bring before this Court. Respondent's Appendix A. The existence of the stay particularly weighs against the use of the Rule 11 mechanisms as the stay would apply to this case were the Petition granted thus preventing the proceedings before this Court to go forward.

This controversy began when Petitioner was denied a request under Fed.R.Civ. 24(b) to permissively intervene in the action filed by Respondent and Ambac Assurance Corporation against several officials of the Commonwealth of Puerto Rico for impairment of their contractual rights in violation of the Contracts Clause of the U.S. Constitution. Respondent is a monoline insurer who insures scheduled

[1] Title III of PROMESA incorporates the automatic-stay provisions under Section 362 and 922 of the federal Bankruptcy Code. Bankruptcy Code section 362(a) stays actions to enforce claims against the debtor and property of the estate, which under PROMESA section 301(c)(5) (48 U.S.C. § 2161(c)(5)) means property of the debtor. Bankruptcy Code Section 922(a)(1) also stays actions against an officer or inhabitant of the debtor that seek to enforce a claim against the debtor. See *Lex Claims, LLC v. Financial Oversight and Management Board*, 853 F.3d 548 (1st Cir. 2017)(interpreting the scope of PROMESA's automatic stay); *Peaje Investments LLC v. García Padilla, 845 F.3d 505* (1st Cir. 2017)(same).

payments of interest and principal on bonds issued by certain instrumentalities of the Commonwealth. Specifically, Respondent challenged Executive Orders issued by former Commonwealth of Puerto Rico Gov. Alejandro García Padilla in November and December of 2015 (the "Executive Orders"). These orders directed the Commonwealth's Secretary of Treasury and its Executive Director of the Tourism Company to retain or transfer (clawback) certain taxes and revenues pledged to secure the payment of bonds issued by Puerto Rico's Highways and Transportation Authority, its Convention Center District Authority and its Infrastructure Financing Authority ("PRIFA").

Petitioner filed a motion to intervene on September 1, 2016. Motion to Intervene, DE 51, Respondent's Appendix C. He did not accompany his motion to intervene with a pleading setting forth a claim or defense for which intervention was sought. *See* Fed.R.Civ.P. Rule 24 (c) ("The motion must state the grounds for intervention and be accompanied by a pleading that sets out the claim or defense for which intervention is sought"). Instead, he attached as an exhibit to the motion to intervene copy of a complaint in the Spanish language that he filed in Commonwealth court on October 14, 2015. He also failed to include a certified English translation, but nonetheless asked the district court to consider the complaint as "part" of his motion to intervene. Motion to Intervene, DE 51, ¶ 4, Respondent's Appendix C-2. The District Court and the First Circuit require litigants to submit certified translation of Spanish language documents in order to ensure that all proceedings and records are conducted and kept in the English language.[2]

In his request for intervention, Petitioner, who appeared, as he does now, *pro se* and *in forma pauperis*, did not allege that he owns any bonds subject to the clawback provisions of the Executive Orders. He also failed to allege having any particular duty or interest in defending or challenging the Executive Orders. Instead Petitioner asserts a generalized claim on behalf of the People of Puerto Rico. The only argument Ruiz offered in support of his request is that the bonds that Assured insures are null and void under Article VI, Section 2 of the Constitution of Puerto Rico.[3] This constitutional provision limits the borrowing capacity of the Commonwealth of Puerto Rico by providing that the government cannot issue general obligation bonds or guarantee other bonds if the combined debt service of the general

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[2] Local Rule 5 (e) of the District Court of Puerto Rico and Local Rule 30.0 (e) of the First Circuit Rulebook require litigants to submit English translations. The requirement is strictly enforced because proceedings must be conducted in the English language. 48 U.S.C. § 864. Also, "[t]he policy interest in keeping the District of Puerto Rico as an integrated part of the federal judiciary is too great to allow parties to convert that court into a Spanish language court at their whim." *United States v. Rivera–Rosario*, 300 F.3d 1, 8 n.9 (1st Cir. 2002). The exhibit should have been stricken because no certified translation was attached.

[3] "[N]o direct obligations of the Commonwealth for money borrowed directly by the Commonwealth evidenced by bonds or notes for the payment of which the full faith, credit and taxing power of the Commonwealth shall be pledged shall be issued by the Commonwealth if the total of (i) the amount of principal of and interest on such bonds and notes, together with the amount of principal of and interest on all such bonds and notes theretofore issued by the Commonwealth and then outstanding, payable in any fiscal year and (ii) any amounts paid by the Commonwealth in the fiscal year next preceding the then current fiscal year for principal or interest on account of any outstanding obligations evidenced by bonds or notes guaranteed by the Commonwealth, shall exceed 15 percent of the average of the total amount of the annual revenues ... in the two fiscal years next preceding the then current fiscal year". Puerto Rico Constitution, Article VI, Section 2 (Power of taxation; power to contract debts).

obligation and guaranteed bonds exceeds 15% of the budget for the previous two years. According to Ruiz, the "People of Puerto Rico should not be legally liable for at least a portion of the debt that was unconstitutionally issued, insured and sold in the corresponding financial markets." Motion to Intervene, DE 51, ¶ 6, Respondent's Appendix C-2.

ARGUMENT

I. THE WRIT OF CERTIORARI SHOULD NOT BE ISSUED AS THIS IS NOT A CASE WHERE EXPEDITED RESOLUTION IS WARRANTED

Rule 11 of the Rules of this Court represents an extraordinary mechanism through which a case pending before a Court of Appeals may be brought before this Court for consideration before a judgment has been issued. The rule requires that *certiorari* in such cases be granted only when a petitioner shows that the case is of "imperative public importance as to justify deviation from normal appellate practice and to require immediate determination in this Court." U.S.Sup.Ct.R. 18. Cases in which this Court has exercised its power under Rule 11 are exceptional.

As Justice Renquist noted in *Coleman v. PACCAR, Inc.*, 424 U.S. 1301, 1304 (1976), "the exercise of such power is an extremely rare occurrence." One such rare example is *Carter v. Carter Coal Co.*, 298 U.S. 238, 285 (1936), where the writs were granted "[b]ecause of the importance of the question and the advantage of a speedy final determination thereof." *Carter* involved the constitutionality of the Bituminous Coal Conservation Act, which regulated wages, hours, price fixing and working conditions of coal miners across the country. Another such case was *U.S. v. Mine Workers of America*, 330 U.S. 258 (1947), where "[p]rompt settlement of this case being in the public interest." That case related to the prosecution of the organizers of a nationwide coal miners' strike. Five years later, another labor dispute threatened the national economy and the Court granted certiorari prior to the judgment of a Court of Appeals in *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952).

Two decades later, in *U.S. v. Nixon*, 418 U.S. 683 (1974), this Court granted *certiorari* on petitions for writ of certiorari filed by both the special prosecutor and, subsequently, by President Nixon, before a judgment had been issued by the District of Columbia Circuit. That seminal case involved the denial of a request by President Nixon to quash a subpoena mandating the production of certain documents Nixon claimed were privileged, among other matters. This Court stated that it had granted certiorari before judgment "because of the public importance of the issues presented and the need for their prompt resolution." *Id.* at 687. Indeed, as the Court explained in reference to the separate issue of the appealability of the order denying Nixon's request:

> To require a President of the United States to place himself in the posture of disobeying an order of a court merely to trigger the procedural mechanism for review of the ruling would be unseemly, and would present an unnecessary occasion for constitutional confrontation between two branches of the Government. Similarly, a federal judge should not be placed in the posture of issuing a citation to a President simply in order to invoke review. The issue whether a President can be cited for contempt could itself engender protracted litigation.

418 U.S. at 691-92.

In *Dames & Moore v. Regan*, 453 U.S. 654, 659 (1981), this Court dealt with questions that "touching fundamentally upon the matter in which our Republic is to be governed" and which related to a possible international crisis with Iran if no decision was issued promptly. Indeed, the Court stated that it acted immediately because "the Solicitor General informed us, [that] unless the Government acted by July 19, 1981, Iran could consider the United States to be in breach of the Executive Agreement." *Id.* at 660. Other examples include *U.S. v. Booker*, 543 U.S. 220 (2005)(severing parts of the Sentencing Act of 1984 as unconstitutional); *Mistretta v. U.S.*, 488 U.S. 361 (1989)(finding that Sentencing Reform Act of 1984 was constitutional); *Nixon v. Warner Communications, Inc.*, 435 U.S. 589 (1978)(First Amendment did not require district court to release copies of the Watergate tapes admitted into evidence during a criminal trial).

The ultimate question in the appeal is whether the District Court erred in denying the request for permissive intervention filed by Petitioner. As explained above, he failed to comply with both the procedural requirements of Fed.R.Civ.P. 24(c): (i) he did not include a pleading setting forth his claim for which intervention is sought; and (ii) the substance of his purported claim, as may be discerned from his motion, differs materially to the claims raised by Respondent in its complaint. This glaring failure would be reason enough to deny a certiorari if Petitioner were requesting review of a judgment from the Court of Appeals affirming the district court decision. Here, the failure is compounded by the fact that only a passing mention of Rule 11 was made in the Petition, all of which is far from the rule's requirement that a petitioner make a showing that his case has imperative public importance and that an immediate intervention by this Court is necessary.

Whether the district court erred in denying intervention is clearly not an issue of imperative public importance. Unlike the type of uncommon cases described above, this case does not involve an impending turmoil to the national economy like *Carter*, *Mine Workers of America* or *Youngstown Sheet*. This case will not lead to a constitutional crisis between a sitting president and the judiciary if not resolved immediately like *U.S. v. Nixon* and it will surely not lead to an international crisis with a foreign power, like could have happened in *Dames* if the Court had not acted promptly. This case certainly does not deal with questions that "touch[] fundamentally upon the matter in which our Republic is to be governed." *Dames & Moore*, 453 U.S. at 659. Petitioner's intervention has no public impact whatsoever.

Furthermore, Rule 11 places the burden on the Petitioner to show that immediate determination in this Court is required. Petitioner has not complied with this requirement. No mention is made in the Petition regarding intervention by the Court being a time sensitive matter. Indeed, nothing in this case demands urgency given that the case is stayed by virtue of Section 301 of PROMESA, 48 U.S.C. § 2161(a), which incorporates the automatic stay provisions of Section 362 of Chapter 11 of the Bankruptcy Code to proceedings under Title III of PROMESA. *See* 11 U.S.C. § 362.

If the Court were to issue the certiorari, no briefing or hearing on the merits could take place because the stay would apply to the proceeding before this Court. Even if the proceedings were exempt from the application of the automatic stay (which they are not), a decision by this Court would have no practical effect because the case is stayed at the District Court level and will continue to be stayed in the foreseeable future. There is simply no scenario in which an immediate decision by this Court regarding Petitioner's intervention in the District Court case would have a real life impact.

CONCLUSION

For the above stated reasons, this Court should **deny** the petition for certiorari.

Respectfully submitted, from San Juan, Puerto Rico, on May 15, 2018.

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