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Panel: Puerto Rico Debt Crisis, Economic Turmoil Unveils Unveils Treatment of 2nd Class Citizens

CLE Materials

United States Court of Appeals For the First Circuit; Franklin California Tax-Free Trust, et al., Plaintiffs, Appellees, v. COMMONWEALTH OF PUERTO RICO, et al., Defendants, Appellants, PUERTO RICO ELECTRIC POWER AUTHORITY (PREPA), Defendant.

The Puerto Rico Supreme Court; The People of Puerto Rico Respondent v. Luis M. Sánchez Valle Petitioner

United States District Court District of Puerto Rico; ADA CONDE-VIDAL, ET AL.,Plaintiffs, v. ALEJANDRO GARCIA-PADILLA, et al., Defendants.

United States Court of Appeals For the First Circuit; ADA CONDE-VIDAL, ET AL.,Plaintiffs, v. ALEJANDRO GARCIA-PADILLA, et al., Defendants

Speaker Biographies

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United States Court of Appeals
For the First Circuit

Nos. 15-1218
15-1221
15-1271
15-1272

FRANKLIN CALIFORNIA TAX-FREE TRUST, et al.,

Plaintiffs, Appellees,

v.

COMMONWEALTH OF PUERTO RICO, et al.,

Defendants, Appellants,

PUERTO RICO ELECTRIC POWER AUTHORITY (PREPA),

Defendant.

APPEALS FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

[Hon. Francisco A. Besosa, U.S. District Judge]

Before

Howard, Chief Judge,
Torruella and Lynch, Circuit Judges.

Christopher Landau, with whom Margarita Mercado-Echegaray, Solicitor General for the Commonwealth of Puerto Rico, Beth A. Williams, Michael A. Glick, Claire M. Murray, and Kirkland & Ellis LLP were on brief, for the Commonwealth of Puerto Rico, Governor Alejandro García-Padilla, and César R. Miranda-Rodríguez, appellants.

Martin J. Bienenstock, with whom John E. Roberts, Andrea G. Miller, Proskauer Rose LLP, Mark D. Harris, Sigal P. Mandelker, Philip M. Abelson, and Ehud Barak were on brief, for Melba Acosta-Febo and John Doe, appellants.

Lewis J. Liman, with whom Jorge R. Roig, Joanne A. Tomasini-

Muñiz, González, Machado & Roig, LLC, Lawrence B. Friedman, Richard J. Cooper, Sean A. O'Neal, and Cleary Gottlieb Steen & Hamilton LLP were on brief, for the Puerto Rico Electric Power Authority (PREPA), amicus curiae.

Gabriel R. Avilés-Aponte and Tapia & Avilés on brief for Clayton P. Gillette and David A. Skeel, Jr., amici curiae.

Edilberto Berríos-Pérez and Berríos & Longo Law Office, P.S.C. on brief for Edilberto Berríos-Pérez, amicus curiae.

Matthew D. McGill, with whom David C. Indiano, Jeffrey M. Williams, Leticia Casalduc-Rabell, Indiano & Williams, PSC, Theodore B. Olson, Scott G. Stewart, Matthew J. Williams, and Gibson, Dunn & Crutcher LLP were on brief, for BlueMountain Capital Management, LLC, appellee.

Thomas Moers Mayer, with whom Kramer Levin Naftalis & Frankel LLP, Philip Bentley, David E. Blabey, Jr., Toro, Colón, Mullet, Rivera & Sifre, P.S.C., Manuel Fernández-Bared, and Linette Figueroa-Torres were on brief, for Franklin California Tax-Free Trust et al., appellees.

Marc E. Kasowitz, with whom Daniel R. Benson, Hon. Joseph I. Lieberman (ret.), Hon. Clarine Nardi Riddle (ret.), Andrew K. Glenn, and Kasowitz, Benson, Torres & Friedman LLP were on brief, for the Association of Financial Guaranty Insurers, amicus curiae.

Kate Comerford Todd, Steven P. Lehotsky, U.S. Chamber Litigation Center, Inc., William S. Consovoy, Thomas R. McCarthy, J. Michael Connolly, and Consovoy McCarthy PLLC on brief for the Chamber of Commerce of the United States of America, amicus curiae.

July 6, 2015

LYNCH, Circuit Judge. The defendants, the Commonwealth of Puerto Rico, its Governor, its Secretary of Justice, and the Government Development Bank ("GDB"), assert that Puerto Rico is facing the most serious fiscal crisis in its history, and that its public utilities risk becoming insolvent. Puerto Rico, unlike states, may not authorize its municipalities, including these utilities, to seek federal bankruptcy relief under Chapter 9 of the U.S. Bankruptcy Code. 11 U.S.C. §§ 101(40), 101(52), 109(c). In June 2014, the Commonwealth attempted to allow its utilities to restructure their debt by enacting its own municipal bankruptcy law, the Puerto Rico Public Corporation Debt Enforcement and Recovery Act ("Recovery Act"), which expressly provides different protections for creditors than does the federal Chapter 9.

Plaintiffs are investors who collectively hold nearly two billion dollars of bonds issued by one of the distressed public utilities, the Puerto Rico Electric Power Authority ("PREPA"). Fearing that a PREPA filing under the Recovery Act was imminent, they brought suit in summer 2014 to challenge the Recovery Act's validity and enjoin its implementation. The district court found in their favor and permanently enjoined the Recovery Act on the ground that it is preempted under 11 U.S.C. § 903(1). See Franklin Cal. Tax-Free Trust v. Puerto Rico, ___ F. Supp. 3d ___, Nos. 14-1518, 14-1569, 2015 WL 522183, at *1, *12-18, *29 (D.P.R. Feb. 6, 2015); Franklin Cal. Tax-Free Trust v. Puerto Rico, No. 14-

1518, 2015 WL 574008, at *1 (D.P.R. Feb. 10, 2015). That provision, § 903(1), ensures the uniformity of federal bankruptcy laws by prohibiting state municipal debt restructuring laws that bind creditors without their consent. 11 U.S.C. § 903(1); see S. Rep. No. 95-989, at 110 (1978).

The primary legal issue on appeal is whether § 903(1) preempts Puerto Rico's Recovery Act. That question turns on whether the definition of "State" in the federal Bankruptcy Code -- as amended in 1984 -- renders § 903(1)'s preemptive effect inapplicable to Puerto Rico. Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98-353, sec. 421(j)(6), § 101(44), 98 Stat. 333, 368-39 (codified as amended at 11 U.S.C. § 101(52)). The post-1984 definition of "State" includes Puerto Rico, "except" for the purpose of "defining" a municipal debtor under § 109(c). 11 U.S.C. §§ 101(52), 109(c) (emphasis added). All parties agree that Puerto Rico now lacks the power it once had been granted by Congress to authorize its municipalities to file for Chapter 9 relief.

We hold that § 903(1) preempts the Recovery Act. The prohibition now codified at § 903(1) has applied to Puerto Rico since the predecessor of that section's enactment in 1946. The statute does not currently read, nor does anything about the 1984 amendment suggest, that Puerto Rico is outside the reach of § 903(1)'s prohibitions. See Cohen v. de la Cruz, 523 U.S. 213,

221 (1998) ("We . . . 'will not read the Bankruptcy Code to erode past bankruptcy practice absent a clear indication that Congress intended such a departure.'" (citation omitted)); cf. Kellogg Brown & Root Servs. Inc. v. United States ex rel. Carter, 135 S. Ct. 1970, 1977 (2015) ("Fundamental changes in the scope of a statute are not typically accomplished with so subtle a move."). Indeed, the Recovery Act would frustrate the precise purpose underlying the enactment of § 903(1). Accordingly, we affirm.

Defendants argue that this leaves Puerto Rico without relief. Although § 101(52) denies to Puerto Rico the power to authorize its municipalities to pursue federal Chapter 9 relief, Puerto Rico may turn to Congress for recourse. Indeed, Congress preserved to itself that power to authorize Puerto Rican municipalities to seek Chapter 9 relief. Puerto Rico is presently seeking authorization or other relief directly from Congress. See Puerto Rico Chapter 9 Uniformity Act of 2015, H.R. 870, 114th Cong. (2015).

I.

Procedural History

Two groups of PREPA bondholders sued almost immediately following the Recovery Act's passage to prevent its enforcement. PREPA had issued their bonds pursuant to a trust agreement with the U.S. Bank National Association. The bondholders allege that the very enactment of the Recovery Act impaired these contractual

obligations by abrogating certain protections that were promised in the event of default.[1] The first group, the Franklin plaintiffs,[2] filed on June 28, 2014, and cross-motioned for summary judgment on August 11, 2014. The second group, BlueMountain Capital

[1] Compare, e.g., Puerto Rico Electric Power Authority Act ("Authority Act"), P.R. Laws Ann. tit. 22, § 207 (providing for a court-appointed receiver in event of default); Trust Agreement between PREPA & U.S. Bank National Association as Successor Trustee dated Jan. 1, 1974, as amended and supplemented through Aug. 1, 2011 ("Trust Agreement"), § 804 (permitting U.S. Bank National Association to seek court-appointed receiver pursuant to the Authority Act), with Recovery Act, § 108(b) ("This Act supersedes and annuls any insolvency or custodian provision included in the enabling or other act of any public corporation, including [Authority Act, P.R. Laws Ann. tit. 22, § 207] . . . .").

[2] We use "Franklin plaintiffs" to denote the plaintiffs who brought the first suit. The Franklin plaintiffs consist of two subsets of plaintiffs, referred to by the district court as the "Franklin plaintiffs" and the "Oppenheimer Rochester plaintiffs." The former are Delaware corporations or trusts that collectively hold about $692,855,000 of PREPA bonds. The latter are Delaware statutory trusts holding about $866,165,000 of PREPA bonds. For simplicity, we do not distinguish between these two subsets, but refer to both subsets collectively.

The individual parties who comprise the "Franklin plaintiffs" are: Franklin California Tax-Free Trust; Franklin New York Tax-Free Trust; Franklin Tax-Free Trust; Franklin Municipal Securities Trust; Franklin California Tax-Free Income Fund; Franklin New York Tax-Free Income Fund; Franklin Federal Tax-Free Income Fund; Oppenheimer Rochester Fund; Municipals Oppenheimer Municipal Fund; Oppenheimer Multi-State Municipal Trust; Oppenheimer Rochester Ohio Municipal Fund; Oppenheimer Rochester Arizona Municipal Fund; Oppenheimer Rochester Virginia Municipal Fund; Oppenheimer Rochester Maryland Municipal Fund; Oppenheimer Rochester Limited Term California Municipal Fund; Oppenheimer Rochester California Municipal Fund; Rochester Portfolio Series; Oppenheimer Rochester Amt-Free Municipal Fund; Oppenheimer Rochester Amt-Free New York Municipal Fund; Oppenheimer Rochester Michigan Municipal Fund; Oppenheimer Rochester Massachusetts Municipal Fund; Oppenheimer Rochester North Carolina Municipal Fund; and Oppenheimer Rochester Minnesota Municipal Fund.

Management, LLC ("BlueMountain"), for itself and on behalf of the funds it manages, filed on July 22, 2014. Together, the Franklin plaintiffs and BlueMountain hold nearly two billion dollars in PREPA bonds.

Both the Franklin plaintiffs and BlueMountain sought declaratory relief under 28 U.S.C. §§ 2201-02 that the Recovery Act is preempted by the federal Bankruptcy Code, violates the Contracts Clause, violates the Bankruptcy Clause, and unconstitutionally authorizes a stay of federal court proceedings. The Franklin plaintiffs (but not BlueMountain) also brought a Takings Claim under the Fifth and Fourteenth Amendments. And BlueMountain (but not the Franklin plaintiffs) brought a claim under the contracts clause of the Puerto Rico constitution. These claims were brought against the Commonwealth of Puerto Rico, Governor Alejandro García-Padilla, and various Commonwealth officials, including GDB agents.[3] The district court consolidated the cases and aligned the briefing on August 20, 2014, but did not merge the suits.

The district court issued an order and opinion in both cases on February 6, 2015, resolving the motions to dismiss and the

[3] The Franklin plaintiffs and BlueMountain named different Commonwealth defendants. Both sued the Governor and agents of the GDB. But only the Franklin plaintiffs (not BlueMountain) sued the Commonwealth itself, while BlueMountain (not the Franklin plaintiffs) named Puerto Rico's Secretary of Justice, César Miranda-Rodríguez, as a defendant.

The Franklin plaintiffs (not BlueMountain) had also sued PREPA itself, but those claims were dismissed for lack of standing.

Franklin plaintiffs' outstanding cross-motion for summary judgment. Franklin Cal. Tax-Free Trust, __ F. Supp. 3d __, 2015 WL 522183, at *1. It entered judgment in the Franklin case on February 10, 2015. Franklin Cal. Tax-Free Trust, 2015 WL 574008, at *1.

As relevant here, the district court held that the Recovery Act was preempted by federal law and permanently enjoined its enforcement. It also denied the motion to dismiss the Contracts Clause claim and one of the Franklin plaintiffs' Takings claims.[4]

The Commonwealth defendants appeal from the permanent injunction, the grant of summary judgment to the Franklin plaintiffs, and further argue that the district court erred by reaching the Contracts Clause and Takings Claims in its February 6 order.

II.

Because the appeal presents a narrow legal issue, we summarize only those facts as are necessary. We do not address in any detail the extent of the fiscal crisis facing the Commonwealth, PREPA, or other Commonwealth entities. We begin with the considerations shaping the state-authorization requirement of § 109(c)(2), the provision that presently, in combination with

[4] The district court dismissed without prejudice the remaining claims for lack of ripeness, and all claims asserted against PREPA for lack of standing.

§ 101(52), bars Puerto Rico from authorizing its municipalities to bring claims for federal Chapter 9 relief.

A. The History of Federal Municipal Bankruptcy Relief, and the State-Authorization Requirement

Modern municipal bankruptcy relief is shaped by two features: the difficulties inherent in enforcing payment of municipal debt, and the historic understanding of constitutional limits on fashioning relief. M.W. McConnell & R.C. Picker, When Cities Go Broke: A Conceptual Introduction to Municipal Bankruptcy, 60 U. Chi. L. Rev. 425, 426-28 (1993). The difficulties arise because municipalities are government entities, and so the methods for addressing their insolvency are limited in ways that the methods for addressing individual or corporate insolvency are not.[5] Id. at 426-50; see also 11 U.S.C. § 101(40) (defining "municipality" as "political subdivision[s]," "public agenc[ies],"

[5] For example, remedies traditionally available in bankruptcy, like seizing assets, corporate reorganization, liquidation, or judicial oversight of the debtor's day-to-day affairs, are traditionally unavailable in enforcing the payment of municipal debt. See McConnell & Picker, 60 U. Chi. L. Rev. at 426-50; see also City of East St. Louis v. United States ex rel. Zebley, 110 U.S. 321, 324 (1884) ("[W]hat expenditures are proper and necessary for the municipal administration, is not judicial; it is confided by law to the discretion of the municipal authorities. No court has the right to control that discretion, much less to usurp and supersede it."). The relative unavailability of these "bitter medicine[s]" makes it more difficult for municipal bankruptcy regimes to navigate the gauntlet between addressing the "holdout" problem that bankruptcy is designed to resolve, and limiting the "moral hazard" problem that is exacerbated by the availability of bankruptcy relief. McConnell & Picker, 60 U. Chi. L. Rev. at 426-27, 494-95.

and other "instrumentalit[ies] of a State"). Navigating these difficulties is further complicated, for state municipalities, by a two-prong dilemma created by the Contracts Clause and the Tenth Amendment. See McConnell & Picker, 60 U. Chi. L. Rev. at 427-28.

For these reasons, municipalities remained completely outside any bankruptcy regime for much of the nation's history. See id. at 427-28. Indeed, the prevailing assumption was that the constitutional limitations precluded either level of government, state or federal, from enacting a municipal bankruptcy regime. See id. States could not provide an effective solution to the "holdout problem" presented by insolvency because doing so "would [require] impair[ing] the obligation of contracts" in violation of the Contracts Clause.[6] See id. at 426-28. Federal intervention,

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[6] The holdout problem occurs in restructuring negotiations because creditors who refuse to capitulate early can often secure more favorable terms by "holding out." See, e.g., McConnell & Picker, 60 U. Chi. L. Rev. at 449-50. Municipal bankruptcy relief can ameliorate this problem by binding the dissenters -- the holdouts -- provided a large enough class of creditors agrees. See generally McConnell & Picker, 60 U. Chi. L. Rev. 425. Indeed, some have suggested that even the shadow of the law in this area can assist negotiations, and that its absence can hinder it. See, e.g., D.A. Skeel, Jr., States of Bankruptcy, 79 U. Chi. L. Rev. 677, 689-90 (2012) (suggesting that "a bankruptcy law could prove beneficial even if it is never used"). Compare id. at 720 & nn. 191 & 192 (discussing a series of studies concerning the effect on debt price of a bankruptcy alternative to the holdout problem, so-called "collective-action clauses" (citing, e.g., S.J. Choi, M. Gulati, & E.A. Posner, Pricing Terms in Sovereign Debt Contracts: A Greek Case Study with Implications for the European Crisis Resolution Mechanism *10-11 (U. Chi. John M. Olin L. & Econ. Working Paper No. 541, Feb. 1, 2011))), with Municipal Bankruptcy -- Preemption -- Puerto Rico Passes New Municipal Reorganization Act, 128 Harv. L. Rev. 1320, 1327 (2015) (suggesting that the

on the other hand, might interfere with states' rights under the Tenth Amendment in controlling their own municipalities. Id. at 427-28; see also Ashton v. Cameron Cnty. Water Improvement Dist. No. 1, 298 U.S. 513, 530-32 (1936) (striking down the first federal municipal bankruptcy law on federalism grounds).

The problems created by this absence of municipal bankruptcy relief became acute during the Great Depression. And so, in 1933, Congress enacted Chapter 9's predecessor to provide to states a mechanism for addressing municipal insolvency that they could not create themselves. See McConnell & Picker, 60 U. Chi. L. Rev. at 427-29, 450-54 (summarizing the history).

Although it had a rocky start, see, e.g., Ashton, 298 U.S. at 530-32 (invalidating the initial act), Congress eventually succeeded in avoiding a Tenth Amendment problem. It did so in part by requiring a state's consent in the federal municipal bankruptcy regime before permitting municipalities of that state to seek relief under it, and in part by emphasizing that the statute did not effect "'any restriction on the powers of the States or their arms of government in the exercise of their sovereign rights and duties.'" See, e.g., United States v. Bekins, 304 U.S. 27, 49-54 (1938) (quoting H.R. Rep. No. 75-517, at 2 (1937); S. Rep. No. 75-911, at 2 (1937)) (recognizing that this created a "cooperati[ve]" scheme); cf. McConnell & Picker, 60 U. Chi. L. Rev. at 452-53.

Recovery Act forced creditors to the negotiation table).

This is the origin of the state-authorization requirement of § 109(c).[7] That provision of the Code provides that a municipality may be a debtor under Chapter 9 only if it "is specifically authorized . . . to be a debtor under such chapter by State law, or by a governmental officer or organization empowered by State law to [so] authorize." 11 U.S.C. § 109(c)(2).

This requirement of state consent is based on reason: a state might instead decide to bail out an ailing municipality, if its own fiscal situation permits, to avoid the negative impact that a municipal bankruptcy would have on that state's economy and other municipalities. See C.P. Gillette, Fiscal Federalism, Political Will, and Strategic Use of Municipal Bankruptcy, 79 U. Chi. L. Rev. 281, 302-08 (2012) (explaining the problem of "debt contagion"). But allowing state municipalities to bypass the state and seek federal Chapter 9 relief would undermine a state's ability to do so. See id. at 285-86. In this way, the state-authorization

[7] This is the historical gloss given by courts and commentators alike because the Bekins Court declined to follow Ashton but without expressly overruling it. See Bekins, 304 U.S. at 49-54; see, e.g., In re Jefferson Cnty., Ala., 469 B.R. 92, 99 (N.D. Ala. 2012); McConnell & Picker, 60 U. Chi. L. Rev. at 452-53. A similar state-authorization requirement had been present in the original municipal bankruptcy act that the Court struck down in Ashton, but the Bekins Court recognized that state consent alleviates a potential "constitutional obstacle . . . in the right of the State to prevent a municipality from seeking bankruptcy protection," and makes the federal scheme a cooperative endeavor. See McConnell & Picker, 60 U. Chi. L. Rev. at 452-53 (discussing the cases and changes to the Act made in the interim between them); see also Bekins, 304 U.S. at 49-54.

requirement not only addresses constitutional difficulties by making Chapter 9 a "cooperati[ve]" state-federal scheme, Bekins, 304 U.S. at 49-54, it also promotes state sovereignty by preventing municipalities from strategically seeking (or threatening to seek) federal municipal relief to "reduce the conditions that states place on a proposed bailout," Gillette, 79 U. Chi. L. Rev. at 285-86.

B. Puerto Rico Municipalities Under the Code: 1938-1984

Puerto Rico was granted the authority to issue bonds, and to authorize its municipalities to issue bonds, in 1917.[8] See Act

[8] The authorizing act also created Puerto Rico's "triple tax-exempt" status by prohibiting federal, state, and local taxation of Puerto Rico's municipal bonds. See Act of Mar. 2, 1917, ch. 145, § 3, 39 Stat. at 953 (codified as amended at 48 U.S.C. § 745). This provision has not been amended since 1961, when limits on the amount of municipal debt that could be issued (as a percentage of the municipalities' property valuation) were removed, subject to approval by a vote in the Commonwealth. See Joint Resolution of Aug. 3, 1961, Pub. L. No. 87-121, sec. 1, § 3, 75 Stat. 245.

But Puerto Rico's status in this respect is not entirely remarkable. State and local bonds have enjoyed federal tax-exempt status "since the modern income tax system was enacted in 1913." Nat'l Assoc. of Bond Lawyers, Tax-Exempt Bonds: Their Importance to the National Economy and to State and Local Governments 5 (Sept. 2012) ("Tax-Exempt Bonds"); see also 26 U.S.C. § 103. The main difference is that states and local governments may not tax Puerto Rico municipal bonds, though they may tax their own or other states' municipal bonds. See T. Chin, Puerto Rico's Possible Statehood Could Affect Triple Tax-Exempt Status, 121 The Bond Buyer No. 213 (Nov. 5, 2012); see also Tax-Exempt Bonds, supra, at 5 (explaining that, until 1988, "the tax-exempt status of interest on state and local government bonds also was believed to be constitutionally protected under the doctrine of intergovernmental immunities"); Pollock v. Farmers' Loan & Trust Co., 157 U.S. 429, 583-86 (1895), modified, 158 U.S. 601 (1895), overruled in part by U.S. Const. amend. XVI, South Carolina v. Baker, 485 U.S. 505, 515-27 (1988).

of Mar. 2, 1917, ch. 145, § 3, 39 Stat. 951, 953 (codified as amended at 48 U.S.C. § 741). Like municipalities of a state, a municipality in Puerto Rico is excluded from bankruptcy relief under the Code's other chapters if it becomes unable to meet these bond obligations. See, e.g., 11 U.S.C. § 109; cf. McConnell & Picker, 60 U. Chi. L. Rev. at 426-50 (explaining the obstacles to treating municipal insolvency like corporate insolvency). And, at least from 1938 until the modern Bankruptcy Code was introduced in 1978, Puerto Rico, like the states, could authorize its municipalities to obtain federal municipal bankruptcy relief.[9] See 11 U.S.C. §§ 1(29), 403(e)(6) (1938); 48 U.S.C. § 734 (1934); Bekins, 304 U.S. at 49; accord 11 U.S.C. §§ 1(29), 404 (1976); 48 U.S.C. § 734 (1976); see also S.J. Lubben, Puerto Rico and the Bankruptcy Clause, 88 Am. Bankr. L.J. 553, 572 (2014). And

[9] From 1938 until the modern Code's enactment, state authorization was required for plan confirmation. See Act of Aug. 16, 1937, Pub. L. No. 302, ch. 657, sec. 83(e)(6), 50 Stat. 653, 658 (codified at 11 U.S.C. § 403(e)(6) (1937) (conditioning confirmation of a plan on, inter alia, petitioner being "authorized by law to take all action necessary to be taken by it to carry out the plan")); Bekins, 304 U.S. at 49 (holding that "law" in § 403(e)(6) refers to "state" law); accord 11 U.S.C. § 404 (1976). Puerto Rico's power to provide this authorization to its municipalities follows from two other statutory provisions: the Bankruptcy Act's definition of "State," in effect from 1938 to 1978, which defined "State" to include "the Territories and possessions to which this Act is or may hereafter be applicable," Act of June 22, 1938, Pub. L. No. 696, ch. 575, § 1(29), 52 Stat. 840, 842 (codified at 11 U.S.C. § 1(29) (1938)); accord 11 U.S.C. § 1(29) (1976); and the extension of United States laws to Puerto Rico "except as . . . otherwise provided," in effect from 1917 to the present, 48 U.S.C. § 734. See also S.J. Lubben, Puerto Rico and the Bankruptcy Clause, 88 Am. Bankr. L.J. 553, 572 (2014).

although the modern Code omitted a definition of the term "State" from its enactment in 1978 until it was re-introduced in 1984, most commentators agree that this did not affect Puerto Rico's ability during that time to provide its municipalities authorization.[10] See, e.g., Lubben, 88 Am. Bankr. L.J. at 572-73 & n.125; An Act to Establish a Uniform Law on the Subject of Bankruptcies ("Bankruptcy Reform Act of 1978"), Pub. L. No. 95-598, 92 Stat. 2549 (1978)

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[10] The omission of a definition of "State" from the modern Bankruptcy Code was recognized as an error almost as soon as the modern Code was enacted. See Lubben, 88 Am. Bankr. L.J. at 573-75. Most assumed that the Code would still apply to Puerto Rico because, despite the significant substantive and procedural changes that the Code made to pre-Code law, those changes were tangential to the continued applicability of the federal bankruptcy law to Puerto Rico. See, e.g., id. at 572-73 & n.125; see also In re Segarra, 14 B.R. 870, 872-73 (D.P.R. 1981) (finding nothing that "would indicate that anyone in the vast bureaucracy of the federal government has had the slightest doubt that Congress did not intend the Bankruptcy Code to extend to Puerto Rico"); cf. Cohen, 523 U.S. at 221-22 (explaining that the Code is not to be construed "to erode past bankruptcy practice absent a clear indication that Congress intended such a departure"); Wellness Int'l Network, Ltd. v. Sharif, 135 S. Ct. 1932, 1939 (2015) (describing the Code's expansion of power given to courts adjudicating bankruptcy cases).

Even so, this omission and others in the Code's early years led to at least some ambiguity about the Code's applicability to Puerto Rico. See Lubben, 88 Am. Bankr. L.J. at 572-73 & n.125 (explaining this was because both the definition of "State" and that of "United States" were absent in the original 1978 Code); see also In re Segarra, 14 B.R. at 872-73 (holding that the Code applied to Puerto Rico under 48 U.S.C. § 734). In addition to the general ambiguity about the applicability of the Code, in its entirety, to Puerto Rico, the applicability of Chapter 9 relief in particular was "further confused" by the inclusion of a definition for "governmental unit" that referenced both "State" and "Commonwealth" separately. Lubben, 88 Am. Bankr. L.J. at 572-73 n.125; An Act to Establish a Uniform Law on the Subject of Bankruptcies ("Bankruptcy Reform Act of 1978"), Pub. L. No. 95-598, § 101(21), 92 Stat. 2549, 2552 (1978) (codified as amended at 11 U.S.C. § 101(27)).

(codified as amended at 11 U.S.C. §§ 101 et seq.); see also Cohen, 523 U.S. at 221-22; In re Segarra, 14 B.R. 870, 872-73 (D.P.R. 1981).

This changed in 1984, when Congress re-introduced a definition of "State" to the Code.[11] Bankruptcy Amendments and Federal Judgeship Act of 1984, sec. 421(j)(6), § 101(44), 98 Stat. at 368-69 (codified as amended at 11 U.S.C. § 101(52)). This 1984 amendment is key to this case. Like previous definitions, § 101(52) defines "State" to "include[] . . . Puerto Rico." But importantly, and unlike previous versions of the definition, the re-introduced definition of "State" includes Puerto Rico "except for the purpose of defining who may be a debtor under chapter 9 of [the Bankruptcy Code]."[12] 11 U.S.C. § 101(52) (emphasis added).

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[11] Correcting the Code's omission of this definition was one of many changes made. Indeed, the primary purpose of the Act was entirely unrelated: Congress enacted the Bankruptcy Amendments and Federal Judgeship Act of 1984 in large part to "respond[]" to the Court's decision in Northern Pipeline Construction Co. v. Marathon Pipe Line Co., 458 U.S. 50 (1982), which had held parts of the Code's new system of bankruptcy courts and expanded bankruptcy jurisdiction to be unconstitutional. See Wellness Int'l Network, Ltd., 135 S. Ct. at 1939.

[12] The new version, unlike previous versions, also excludes the District of Columbia from the definition of "State" for purposes of defining Chapter 9 debtors. Compare 11 U.S.C. § 101(52), with Act of June 22, 1938, Pub. L. No. 696, ch. 575, § 1(29), 52 Stat. 840, 842.

And, unlike the previous version, the other territories are not expressly included for any purpose. 11 U.S.C. § 101(52). Only two definitions in § 101 refer to "territories": subsection (27), defining "governmental unit," and subsection (55), defining the geographical scope of the "United States." See 11 U.S.C. § 101(27) ("The term 'governmental unit' means United States; State;

Compare id., with Act of June 22, 1938, Pub. L. No. 696, ch. 575, § 1(29), 52 Stat. 840, 842. As a result of this exception, Puerto Rico municipalities became expressly (though indirectly) forbidden from filing under Chapter 9 absent further congressional action: the change deprived Puerto Rico of the power to grant its municipalities the authorization required by § 109(c)(2) to file for Chapter 9 relief. See 11 U.S.C. § 109(c) (defining who may be a Chapter 9 debtor). The two sides to this controversy dispute whether this change was also meant to transform the preemption provision of § 903(1) without Congress expressly saying so.

C. The Recovery Act: Puerto Rico's Stated Attempt to "Fill the Gap"

Facing a fiscal crisis and lacking the power to authorize its municipalities to seek Chapter 9 relief, the Commonwealth enacted the Recovery Act in June 2014, to take effect immediately. Somewhat modeled after Chapter 9, but with significant differences, the Recovery Act "establish[ed] a debt enforcement, recovery, and restructuring regime for the public corporations and other

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Commonwealth; District; Territory; municipality; foreign state; department, agency, or instrumentality of the United States . . . , a State, a Commonwealth, a District, a Territory, a municipality, or a foreign state; or other foreign or domestic government."); 11 U.S.C. § 101(55) ("The term 'United States', when used in a geographical sense, includes all locations where the judicial jurisdiction of the United States extends, including territories and possessions of the United States."); cf. 11 U.S.C. § 109(a) ("Notwithstanding any other provision of this section, only a person that resides or has a domicile, a place of business, or property in the United States, or a municipality, may be a debtor under this title.").

instrumentalities of the Commonwealth of Puerto Rico during an economic emergency." Recovery Act, Preamble (translation provided by the parties); id., Stmt. of Motives, § E. In particular, the Act was intended to ameliorate the fiscal situations of several distressed Puerto Rican public corporations whose combined deficit in 2013 totaled $800 million, and whose combined debt reaches $20 billion: PREPA, the Aqueduct and Sewer Authority ("PRASA"), and the Highways and Transportation Authority ("PRHTA"). Id., Stmt. of Motives, § A.

The Recovery Act provides two methods for restructuring debt: Chapter 2 "Consensual Debt Relief," and Chapter 3 "Debt Enforcement." Id., Preamble. Although defendants say these serve as a substitute for Chapter 9, both Chapter 2 and Chapter 3 relief under the Recovery Act appear to provide less protection for creditors than the federal Chapter 9 counterpart. See L.S. McGowen, Puerto Rico Adopts a Debt Recovery Act for Its Public Corporations, 10 Pratt's J. Bankr. L. 453, 460-62 (2014). This is one form of harm that plaintiffs say the Recovery Act has caused them.

For example, Chapter 2 relief under the Recovery Act purports to offer a "consensual debt modification procedure" leading to a recovery plan that would only become binding "with the consent of a supermajority" of creditors. Recovery Act, Stmt. of Motives, § E. But this is belied by the provisions: Chapter 2

permits a binding modification, including debt reduction, to a class of debt instruments with the assent of creditors holding just over one-third of the affected debt.[13] Id. § 202(d)(2); see also id., Stmt. of Motives, § E. There is no analogous "consensual procedure" under federal law.

Chapter 3 relief, on the other hand, is a court-supervised process designed to mirror, in some ways, Chapter 9 and Chapter 11 of the federal Code. Id., Stmt. of Motives, § E. But while Chapter 3 debtors, like federal Chapter 9 debtors, may avoid certain contractual claims, protections for creditors are again reduced. Compare, e.g., id. §§ 325, 326, with 11 U.S.C. §§ 365(e), 901(a); see also McGowen, 10 Pratt's J. Bankr. L. at 461. For example, unlike in the federal Code, the Recovery Act does not provide a "safe harbor" for derivative contracts. Compare Recovery Act, § 325(a), with 11 U.S.C. § 365(e); see also Recovery Act, § 205(c); McGowen, 10 Pratt's J. Bankr. L. at 461.

Municipalities that the Commonwealth may not authorize for federal Chapter 9 relief are nonetheless purportedly made eligible by the Recovery Act to seek both Chapter 2 and 3 relief, either simultaneously or sequentially, with approval from the GDB.

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[13] Specifically, a proposed modification becomes binding on all creditors within a class of affected debt instruments if (1) creditors of at least 50% of the amount of debt in that class participate in a vote or consent solicitation; and (2) creditors of at least 75% of the amount of debt that participates in the vote or consent solicitation approves the proposed modifications. Recovery Act, § 202(d)(2).

Recovery Act, §§ 112, 201(b), 301(a). Unlike the federal Code, the Recovery Act also expressly permits the Governor to institute an involuntary proceeding if the GDB determines that doing so is in the best interest of both the distressed entity and the Commonwealth.[14] Recovery Act, §§ 201(b)(2), 301(a)(2).

Plaintiffs argue that the very enactment of these and other provisions cause them harm in several ways: by denying them the protection for which they bargained under the Trust Agreement, by denying them the protection to which they would be entitled under federal relief, and by injecting uncertainty into the bond market that reduces their bargaining position to address pending default. See McGowen, 10 Pratt's J. Bankr. L. at 460-61 (discussing other examples, including the lack of protection for holders of liens on revenue should the municipality need to obtain credit to perform public functions).

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[14] The federal Code does not permit involuntary Chapter 9 proceedings brought by creditors, see 11 U.S.C. § 303(a) (limiting involuntary petitions to cases under Chapter 7 or 11), and does not expressly address whether states may institute these quasi-involuntary proceedings on behalf of their municipalities. At least one commentator has suggested that states are prohibited from doing so by § 109(c)(4), which requires that a potential municipal debtor "desire[] to effect a plan to adjust such debts." See Gillette, 79 U. Chi. L. Rev. at 297.

By contrast, the Recovery Act similarly precludes involuntary proceedings brought by creditors, Recovery Act, § 301(c), but expressly allows these quasi-involuntary proceedings to be initiated by the government, see id. § 301(a)(2).

III.

A. Jurisdiction

We have appellate jurisdiction over the final judgment granting summary judgment and issuing a permanent injunction in favor of the Franklin plaintiffs under 28 U.S.C. § 1291. We have appellate jurisdiction over the injunction issued in favor of BlueMountain under 28 U.S.C. § 1292(a)(1).[15] Because we affirm the preemption ruling and attendant injunction, we decline to exercise jurisdiction over defendants' appeal of the district court's February 6, 2015 order denying the motions to dismiss the surviving Contracts Clause and Takings Claims. Cf. First Med. Health Plan, Inc. v. Vega-Ramos, 479 F.3d 46, 50 (1st Cir. 2007) (discussing an exception to the general rule that denials of 12(b)(6) motions to dismiss are interlocutory rulings outside the scope of appellate jurisdiction).[16]

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[15] This difference is an odd quirk of the procedure below: BlueMountain never moved for summary judgment, and so there is no final judgment from which to appeal, only the injunction from the order dated February 6, 2015.

[16] The defendants challenged the ripeness of the relevant claims before the district court, but not on appeal. "[A]lthough [they] do not press this issue on appeal, it concerns our jurisdiction under Article III, so we must consider the question on our own initiative." Metro. Wash. Airports Auth. v. Citizens for the Abatement of Aircraft Noise, Inc., 501 U.S. 252, 265 n.13 (1991) (citing Liberty Mut. Ins. Co. v. Wetzel, 424 U.S. 737, 740 (1976)).

We conclude that the defendants were correct in conceding ripeness: The plaintiffs allege that the Recovery Act itself impairs the terms of the agreements governing the PREPA bonds. Compare, e.g., Authority Act, P.R. Laws Ann. tit. 22, § 207

B. Preemption under § 903(1)

Puerto Rico may not enact its own municipal bankruptcy laws to cover the purported gap created by the 1984 amendment if such laws are preempted by the federal Bankruptcy Code. U.S. Const. art. VI, cl. 2; CSX Transp., Inc. v. Easterwood, 507 U.S. 658, 663 (1993). Thus, the issue on this appeal is whether 11 U.S.C. § 903(1) preempts Puerto Rico from enacting its own municipal bankruptcy law. Our answer to that question is largely driven by examining whether the 1984 amendment adding § 101(52)

(providing for a court-appointed receiver in event of default); Trust Agreement, § 804 (permitting U.S. Bank National Association to seek court-appointed receiver pursuant to the Authority Act), with Recovery Act, § 108(b) ("This Act supersedes and annuls any insolvency or custodian provision included in the enabling or other act of any public corporation, including [Authority Act, P.R. Laws Ann. tit. 22, § 207] . . . ."). That is, plaintiffs allege that the very enactment of the Recovery Act, rather than the manner of enforcement, impairs their contractual rights -- allegations that present purely legal issues or factual issues controlled by past events. Accordingly, the outcome of the case cannot be affected by subsequent events (except to be mooted), and so these issues satisfy the "fitness" prong of our ripeness inquiry. See Roman Catholic Bishop of Springfield v. City of Springfield, 724 F.3d 78, 89-93 (1st Cir. 2013). And because "the sought-after declaration" on the surviving Contracts Clause and preemption claims "would be of practical assistance in setting the underlying controversy to rest," a refusal to grant relief would result in hardship to the parties. See Rhode Island v. Narragansett Indian Tribe, 19 F.3d 685, 693 (1st Cir. 1994). This claim is ripe for review. See Mass. Delivery Ass'n v. Coakley, 769 F.3d 11, 16-17 (1st Cir. 2014) ("Basically, the question in each case is whether the facts alleged, under all the circumstances, show that there is a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment." (quoting MedImmune, Inc. v. Genentech, Inc., 549 U.S. 118, 127 (2007)) (internal quotation marks omitted)).

altered § 903(1)'s effect. See Dewsnup v. Timm, 502 U.S. 410, 419 (1992) ("When Congress amends the bankruptcy laws, it does not write 'on a clean slate.'" (quoting Emil v. Hanley (In re John M. Russell, Inc.), 318 U.S. 515, 521 (1943))); CSX Transp., 507 U.S. at 663-64 ("Where a state statute conflicts with, or frustrates, federal law, the former must give way."). Our review is de novo. Mass. Delivery Ass'n v. Coakley, 769 F.3d 11, 17 (1st Cir. 2014) (citing DiFiore v. Am. Airlines, Inc., 646 F.3d 81, 85 (1st Cir. 2011)).

Whether a federal law preempts a state law "is a question of congressional intent." Hawaiian Airlines, Inc. v. Norris, 512 U.S. 246, 252 (1994). We begin with the statutory language, which often "contains the best evidence of Congress' pre-emptive intent." Mass. Delivery Ass'n, 769 F.3d at 17 (quoting Dan's City Used Cars, Inc. v. Pelkey, 133 S. Ct. 1769, 1778 (2013)) (internal quotation marks omitted). We also consider "the clause's purpose, history, and the surrounding statutory scheme." Id.

The relevant provision, § 903(1), states in full: "a State law prescribing a method of composition of indebtedness of such municipality may not bind any creditor that does not consent

to such composition." 11 U.S.C. § 903(1).[17] This provision, by its plain language, bars a state law like the Recovery Act.

There is no disputing that the Recovery Act is a "law prescribing a method of composition of indebtedness" of eligible Puerto Rico municipalities that may "bind" said municipalities' creditors without those creditors' "consent." And, because "State" is defined to include Puerto Rico under § 101(52), the Recovery Act is a "State law" that does so. But this, under § 903(1), Puerto Rico "may not" do, and so we hold that the Recovery Act is preempted. Compare 11 U.S.C. § 903(1) ("[A] State law . . . may not bind any creditor that does not consent . . . ." (emphasis added)), with 49 U.S.C. § 14501(c)(1) ("[A] State . . . may not enact or enforce a law . . . related to a price, route, or service . . . ." (emphasis added)); Dan's City, 133 S. Ct. at 1778

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[17] This provision appears in § 903, which reads in full:

> This chapter does not limit or impair the power of a State to control, by legislation or otherwise, a municipality of or in such State in the exercise of the political or governmental powers of such municipality, including expenditures for such exercise, but--
>
> (1) a State law prescribing a method of composition of indebtedness of such municipality may not bind any creditor that does not consent to such composition; and
>
> (2) a judgment entered under such a law may not bind a creditor that does not consent to such composition.

(noting that this language in § 14501(c)(1) "prohibits enforcement of state laws 'related to a price, route or service . . . .'").

The context and history of this provision confirm this construction -- that this provision was intended to have a preemptive effect. Cf. Dan's City, 133 S. Ct. at 1778; Cohen, 523 U.S. at 221. Context and history also confirm that our construction is consistent with the previous constructions of this provision, and so, absent clear congressional intention to modify the bankruptcy law, we "will not read the Bankruptcy Code to erode past bankruptcy practice." Cohen, 523 U.S. at 221 (citation and internal quotation marks omitted); see also Dewsnup, 502 U.S. at 419 ("When Congress amends the bankruptcy laws, it does not write 'on a clean slate.'" (quoting Emil, 318 U.S. at 521)).

The Code, at § 903(1), "is derived, with stylistic changes, from" its precursor, Section 83(i). S. Rep. No. 95-989 at 110. The legislative history reveals, and the parties do not dispute, that the purpose of Section 83(i) was to overrule an early Supreme Court decision which had upheld a state law permitting the adjustment of municipal debt if the city and 85% of creditors agreed. See Faitoute Iron & Steel Co. v. City of Asbury Park, 316 U.S. 502, 504, 513-16 (1942).[18] Before Faitoute, most had assumed

[18] The GDB defendants, at oral argument, presented a strained reading of the manner in which Section 83(i) overruled Faitoute. They argued that the sole purpose of Congress in overruling Faitoute was to allow municipalities to convert to federal proceedings those state municipal bankruptcy proceedings that, like

that states could not themselves address the holdout problem that municipal bankruptcy relief is designed to resolve because they were barred from adjusting debt obligations (without all creditors' consent) under the Contracts Clause. See McConnell & Picker, 60 U. Chi. L. Rev. at 452-54.

Congress enacted Section 83(i) to restore what had been believed to be the pre-Faitoute status quo by expressly prohibiting state municipal bankruptcy laws adjusting creditors' debts without their consent.[19] See, e.g., H.R. Rep. No. 79-2246, at 4 (1946) ("State adjustment acts have been held to be valid, but . . . . [o]nly under a Federal law should a creditor be forced to accept such an adjustment without his consent." (emphasis added)). And Congress sought to preserve Section 83(i) when it re-codified

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the one in Faitoute, had arisen in the absence of a federal municipal bankruptcy regime from 1933-1937. We do not share this limited reading of Faitoute, which also does not comport with either the legislative history or the scholarship on the subject.

[19] The full text of Section 83(i) as enacted in 1946 reads:

> Nothing contained in this chapter shall be construed to limit or impair the power of any State to control, by legislation or otherwise, any municipality or any political subdivision of or in such State . . . Provided, however, That no State law prescribing a method of composition of indebtedness of such agencies shall be binding upon any creditor who does not consent to such composition, and no judgment shall be entered under such State law which would bind a creditor to such composition without his consent.

Act of July 1, 1946, Pub. L. No. 481, ch. 532, sec. 83(i), 60 Stat. 409, 415.

the section as § 903(1) in 1978. See S. Rep. No. 95-989 at 110 (noting that this was necessary to maintain the uniformity of the bankruptcy laws by preventing states from "'enact[ing] their own versions of Chapter IX'" (quoting L.P. King, Municipal Insolvency: Chapter IX, Old and New; Chapter IX Rules, 50 Am. Bankr. L.J. 55, 65 (1976))); cf. Kellogg, 135 S. Ct. at 1977 (explaining that retention of language indicates absence of alteration).[20]

These provisions on their face barred Puerto Rico and the Territories, just as they did the states, from enacting their own versions of Chapter 9 creditor debt adjustment. From the time of its enactment in 1946, Section 83(i)'s prohibition on "State law[s] prescribing a method of composition of indebtedness" expressly applied to Puerto Rico law because "State" had been defined to include the "Territories and possessions," like Puerto Rico, to which the Bankruptcy Act was applicable. See Act of June 22, 1938,

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[20] The Senate notes concerning the enactment of § 903 explain in relevant part:

> Section 903 is derived, with stylistic changes, from section 83 of current Chapter IX. It sets forth the primary authority of a State, through its constitution, laws, and other powers, over its municipalities. The proviso in section 83, prohibiting State composition procedures for municipalities, is retained. Deletion of the provision would "permit all States to enact their own versions of Chapter IX", Municipal Insolvency, 50 Am. Bankr. L.J. 55, 65, which would frustrate the constitutional mandate of uniform bankruptcy laws. Constitution of the United States. Art. I, Sec. 8.

S. Rep. No. 95-989 at 110.

Pub. L. No. 696, ch. 575, § 1(29), 52 Stat. at 842 (defining "States"); Act of July 1, 1946, Pub. L. No. 481, ch. 532, sec. 83(i), 60 Stat. 409, 415 (prohibiting "State law[s] prescribing a method of composition of indebtedness"); Act of Mar. 2, 1917, ch. 145, § 9, 39 Stat. 951, 954 (codified as amended at 48 U.S.C. § 734) ("[T]he statutory laws of the United States not locally inapplicable, except as . . . otherwise provided, shall have the same force and effect in Porto Rico as in the United States . . . .").

The re-codification of this provision, § 903(1), must continue to apply to Puerto Rico because there is no evidence of express modification by Congress. See Dewsnup, 502 U.S. at 419-20. The mere absence of a definition of "state" in the Code from 1978 until the 1984 amendment does not provide such evidence, nor does the legislative history.[21] Cf. id. "Fundamental changes in the scope of a statute are not typically accomplished with so subtle a move." Kellogg, 135 S. Ct. at 1977 (declining to find a significant change to a statute based on the removal of a small phrase while retaining the operative language).

[21] If anything, the legislative history suggests that the missing definition was a mistake, and so no alteration of § 903(1)'s or the rest of the Code's applicability to Puerto Rico was intended. See Lubben, 88 Am. Bankr. L.J. at 573 (explaining that adding a definition of "State" was among the proposed 1979 amendments "to 'clean up' errors in the original 1978 Code").

There is little doubt that § 903(1) would have pre-empted the Recovery Act, save for the questions occasioned by the 1984 amendment at issue. There is no disputing that the Recovery Act was a "State law" under Section 83(i), and so too under § 903(1) from 1978-1984. And there is no disputing that the Recovery Act binds creditors without their consent or that it is Puerto Rico's "own version[] of Chapter [9]," such that it directly conflicts with § 903(1)'s prohibition of such laws.[22] S. Rep. No. 95-989 at 110; Recovery Act, Stmt. of Motives, § E; see CSX Transp., Inc., 507 U.S. at 663 ("Where a state statute conflicts with . . . federal law, the former must give way.").

The question is whether the preemption provision of § 903(1) still applies in the face of the 1984 amendment. We hold that it does. The addition of the definition of "State" in 1984 does not, by its text or its history, change the applicability of § 903(1) to Puerto Rico.[23] 11 U.S.C. § 101(52). To the contrary,

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[22] For this reason, we need not address the exact scope of this preemption under either Section 83(i) or § 903(1). Cf. Dan's City, 133 S. Ct. at 1778 (noting that when "Congress has superseded state legislation by statute," the only task remaining is to "identify the domain expressly pre-empted" (quoting Lorillard Tobacco Co. v. Reilly, 533 U.S. 525, 541 (2001)) (internal quotation marks omitted)).

[23] The parties agree that there is nothing in the legislative history directly indicating a change to § 903(1), only a change to § 109(c). Amici bankruptcy law experts, Clayton Gillette and David Skeel, Jr., inform us that "almost the only reference to the new definition in the legislative history came in testimony by Professor Frank Kennedy . . . who stated: 'I do not understand why the municipal corporations of Puerto Rico are denied by the

because § 903(1) does not define who may be a debtor under Chapter 9, § 101(52) confirms that the "State law[s]" prohibited include those of Puerto Rico, as has always been the case. Cf. Dewsnup, 502 U.S. at 419 ("[T]his Court has been reluctant to accept arguments that would interpret the Code . . . to effect a major change in pre-Code practice that is not the subject of at least some discussion in the legislative history."); Kellogg, 135 S. Ct. at 1977 ("The retention of the same term in the later laws suggests that no fundamental alteration was intended."). If Congress had wanted to alter the applicability of § 903(1) to Puerto Rico, it "easily could have written" § 101(52) to exclude Puerto Rico laws from the prohibition of § 903(1), just as it had excluded Puerto Rico from the definition of debtor under § 109(c). See Burgess v. United States, 553 U.S. 124, 130 (2008). But Congress did not.

The legislative history is silent as to the reason for the exception set forth in the 1984 amendment. One apparent possibility concerns the different constitutional status of Puerto Rico. Because of this different status, the limitations on Congress's ability to address municipal insolvency in the states

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proposed definition of 'State' of the right to seek relief under Chapter 9, but the addition of the definition of 'State' is useful.'" Brief for C.P. Gillette & D.A. Skeel, Jr., as Amici Curiae Supporting Defendants-Appellants, at *8; see also Lubben, 88 Am. Bankr. L.J. at 575 (noting that the exception in § 101(52) says "nothing about how the word 'State' should be interpreted in section 903").

discussed above are not directly applicable to Puerto Rico. United States v. Rivera Torres, 826 F.2d 151, 154 (1st Cir. 1987); see also Harris v. Rosario, 446 U.S. 651, 651-52 (1980) (per curiam). Accordingly, Congress may wish to adopt other -- and possibly better -- options to address the insolvency of Puerto Rico municipalities that are not available to it when addressing similar problems in the states. See Rivera Torres, 826 F.2d at 154; cf. McConnell & Picker, 60 U. Chi. L. Rev. at 494-95 (arguing that because Chapter 9 "leaves control in the hands of the state" and because "[t]he bankruptcy court lacks the powers typically given to state municipal receivers," "[t]he structure for making decisions that led to financial problems continues").

Our construction is consistent with a congressional choice to exercise such other options "pursuant to the plenary powers conferred by the Territorial Clause." Rivera Torres, 826 F.2d at 154. If Puerto Rico could determine the availability of Chapter 9 for Puerto Rico municipalities, that might undermine Congress's ability to do so. Cf. Gillette, 79 U. Chi. L. Rev. at 285-86 (discussing the strategic use of municipal bankruptcy relief to avoid other solutions). Similarly, Congress's ability to exercise such other options would also be undermined if Puerto Rico could fashion its own municipal bankruptcy relief. Cf. id. The

1984 amendment ensures that these options remain open to Congress by denying Puerto Rico the power to do either.[24] Cf. id.

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[24] Defendants argue that we should not construe § 903(1) to continue to apply to Puerto Rico after the 1984 amendment because to do so creates a "no-man's land" that Congress did not intend and could not have created. We disagree both as to Congress's intent and as to whether a no-man's land is created. Our construction does not create one, because congressional retention of authority is not the same as a no-man's land. Further, defendants' argument fails in any event.

First, defendants' reliance on a congressional report stating that it was "not prepared to admit that the situation presents a legislative no-man's land" reveals nothing about Congress's intent in enacting § 101(52). Bekins, 304 U.S. at 51 (quoting H.R. Rep. No. 75-517, at 3 (1937)). Congress, in making the quoted statement, was concerned not with a lack of laws, but a lack of constitutional authority. That statement, made in the wake of the first municipal bankruptcy law's demise in Ashton, rejects the view that creation of a federal municipal bankruptcy regime was constitutionally impossible. See Bekins, 304 U.S. at 51-54; cf. Ashton, 298 U.S. at 530-32. Accordingly, the statement is inapposite; Congress's stated rejection of a legislative no-man's land and assertion of authority is entirely consistent with intending to retain that authority in deciding how to address municipal insolvency in Puerto Rico.

Second, any reliance on Guss v. Utah Labor Relations Board, 353 U.S. 1 (1957), is misplaced. Far from creating a rule against the creation of a no-man's land -- here, understood as the absence of laws providing relief -- the Supreme Court held that where "Congress' power in the area . . . is plenary, its judgment must be respected whatever policy objections there may be to [the] creation of a no-man's-land." Id. at 11.

The Court's reasoning in Guss is fully applicable here: Congress, through the provisions of § 109(c)(2) and § 903, "demonstrated that it knew how to cede jurisdiction to the states" and "demonstrated its ability to spell out with particularity those areas in which it desired state regulation to be operative." Guss, 353 U.S. at 9-10 (citation and internal quotation marks omitted). It prohibited states from enacting municipal insolvency laws that would "bind any creditor that does not consent," but not from devising other solutions or from controlling whether their municipalities could access a federal alternative. 11 U.S.C. §§ 109(c)(2), 903. Guss therefore supports our conclusion that "Congress has expressed its judgment" to retain its own authority by denying to Puerto Rico both the power to choose Chapter 9 relief

C. The Defendants' Creative But Unsound And Unsuccessful Alternative Readings

Our construction follows straightforwardly from the plain text and is confirmed by both statutory history and legislative history. Nonetheless, the defendants object to it on two grounds.

First, they offer a novel argument in light of the Bankruptcy Code's definition of "creditor" that the provision only applies to creditors of entities who have or could have filed for Chapter 9 relief: because Puerto Rico cannot authorize its municipalities to become "debtors," those municipalities' bondholders cannot be "creditors," and so the Recovery Act does not bind "creditors" in violation of § 903(1). That is, defendants argue that Congress, without saying so, did indirectly what it could have easily done directly but did not.

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and to enact its own version thereof. Guss, 353 U.S. at 10-11. Because "Congress' power" over Puerto Rico "is plenary," the Supreme Court dictates that Congress' "judgment [in this regard] must be respected." Id.; Rivera Torres, 826 F.2d at 154.

In any event, these cases do not provide a reason to construe the statute differently. However remarkable a no-man's land might be, assuming dubitante that there is one under our construction, it would be even more remarkable to find that Congress decided to abandon -- without comment and through a definition -- its forty-year old prohibition on local insolvency laws that bind creditors without their consent. See Cohen, 523 U.S. at 221-22. The former can at least be reconciled with congressional purpose to retain its authority, and, if the literature on incentives is correct, may have been the only way for Congress to do so efficaciously. Cf. Gillette, 79 U. Chi. L. Rev. at 285-86. Unlike defendants, we cannot "ignore[] [this] more plausible explanation" of Congress's decision. Kellogg, 135 S. Ct. at 1977-78.

Second, they make a structural argument that § 903(1) cannot apply to Puerto Rico because Chapter 9, of which § 903(1) is a part, does not apply to Puerto Rico.

Neither attempt succeeds. If Congress had wanted to exclude Puerto Rico from § 903(1), it would have done so directly without relying on the creativity of parties arguing before the courts. Cf. Kellogg, 135 S. Ct. at 1977 ("If Congress had meant to make such a change, we would expect it to have used language that made this important modification clear to litigants and courts."). Instead, as discussed above, Congress did the opposite.

1. Who May Be "Creditors" under § 903(1)

Ignoring other language in the Code, the defendants' first argument begins by observing that the Bankruptcy Code defines "creditor" in relation to "debtor." 11 U.S.C. § 101(10)(A) (defining "creditor" as an "entity that has a claim against the debtor that arose at the time of or before the order for relief concerning the debtor").[25] But a "debtor" is defined as a "person or municipality concerning which a case under [the Bankruptcy Code] has been commenced." 11 U.S.C. § 101(13) (emphasis added). Because Puerto Rico cannot authorize its municipalities to commence "a case under [the Bankruptcy Code]," the argument goes, creditors of Puerto Rico municipalities are not "creditors" within the

[25] Subsections (B) and (C) of § 101(10) provide additional definitions of "creditor" not relevant here.

meaning of § 101(10)(A), and so the Recovery Act does not bind "creditors" without their consent in violation of § 903(1).

This argument ignores congressional language choices, as well as context, and proves too much.[26] Although "'[s]tatutory definitions control the meaning of statutory words . . . in the usual case,'" Burgess, 553 U.S. at 129-30 (second alteration in original) (quoting Lawson v. Suwannee Fruit & S.S. Co., 336 U.S. 198, 201 (1949)), we should not apply statutory definitions in a manner that directly undermines the legislation, Philko Aviation, Inc. v. Shacket, 462 U.S. 406, 411-12 (1983) (citing Lawson, 336 U.S. at 201). But that is exactly what defendants ask us to do.[27]

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[26] The defendants are correct that their interpretation of "creditor" would not, as the Franklin plaintiffs contend, "reduce Section 903(1) to mere surplus." As Professors Gillette and Skeel explain in their amici curiae brief, their construction of § 903(1), which limits "creditor" to the statutory definition, makes clear that even though Chapter 9 does not infringe on the power of states to manage their own municipalities,

> a State composition law could not be used to alter a creditor's claim against a municipality that has filed for Chapter 9[:] [a]ny prior or concurrent State law composition proceeding would be superseded pursuant to section 903(1) [upon filing], and any judgment previously obtained would be reopened under section 903(2).

The difficulty is that the Professors' construction cannot be squared with either the history of this provision, or the legislative intent in enacting it, of barring states from enacting their own municipal bankruptcy laws. To the contrary, it would undermine the applicability of this provision to states.

[27] Defendants attempt to escape this conclusion by arguing, in the alternative, that "debtor" is a person against whom a claim "has been [or could be] commenced," and so "creditors" are those who have a claim against an entity eligible for Chapter 9 relief.

Construing "creditor" in § 903(1) so narrowly would undermine the stated purpose of the provision in prohibiting states from "enact[ing] their own versions of Chapter [9]." See S. Rep. No. 95-989, at 110; H.R. Rep. No. 79-2246, at 4. Under defendants' construction, any state could avoid the prohibition by denying its municipalities authorization to file under § 109(c)(2). State laws governing the adjustment of these municipalities' debts could not then, on defendants' reading, "bind any creditor" because there would be none: no case would "ha[ve] been commenced" concerning the municipalities because no case could commence under § 109(c)(2).

Nor does a reference to the changes in 1978 or 1984 make this argument any more plausible. The 1978 version similarly defined "debtor" as a "person or municipality concerning which a case under this title has been commenced," and "creditor" in relation to a "debtor" against whom the creditor had a claim "that arose at the time of or before the order for relief." Bankruptcy Reform Act of 1978, §§ 101(9), 101(12), 92 Stat. at 2550-51 (codified at 11 U.S.C. §§ 101(9), 101(12) (1977-1980)) (emphasis added). Defendant's reading undermines the express purpose, stated in 1978, of enacting § 903(1): to "prohibit[] State composition procedures for municipalities." S. Rep. No. 95-989, at 110. If we follow defendants' suggestion, then either Congress was directly

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There is no textual basis to do so. It is simply another gesture at their structural argument, which we address next.

self-defeating in enacting this legislation in 1978, or else in 1984 made a stark and drastic change -- without comment and in "an obscure way" -- to the law as previously enacted. Cf. Dewsnup, 502 U.S. at 419; Kellogg, 135 S. Ct. at 1977. But "[a] statutory definition should not be applied in such a manner." Philko Aviation, 462 U.S. at 412; see also Dewsnup, 502 U.S. at 419-20.

Where statutory definitions give rise to such problems, a term may be given its ordinary meaning.[28] Philko Aviation, 462

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[28] The Code is replete with use of the term "creditor" in ways not limited by the statutory definition on which defendants rely. For example, § 502(a) uses creditor in a manner that is expressly inconsistent with the statutory definition because "a creditor of a general partner in a partnership that is a debtor" is not, itself, a holder of a "claim against the debtor" and so not a "creditor" under § 101(10)(A). See 11 U.S.C. § 502(a) ("A claim of interest . . . is deemed allowed, unless a party in interest, including a creditor of a general partner in a partnership that is a debtor in a case under Chapter 7 . . . objects." (emphasis added)).

Similarly, § 101(12A)(C) also uses "creditor" in a manner that is expressly inconsistent with § 101(10)(A). That provision, which defines "debt relief agency" to be "any person who provides any bankruptcy assistance to an assisted person . . . ," excludes "a creditor of such an assisted person." 11 U.S.C. § 101(12A)(C). But because an "assisted person" might never file for bankruptcy (presumably one of the goals of the agency), an "assisted person" might never become a debtor. "Creditor" here must have its plain meaning.

Following defendants' proffered strict construction would also create mischief for other portions of § 109 itself. For example, an entity may only be a Chapter 9 debtor if it has, inter alia, "obtained the agreement of [certain] creditors," "negotiated in good faith with creditors," or been "unable to negotiate with creditors," or else "reasonably believes that a creditor may attempt to obtain a[n] [avoidable] transfer." 11 U.S.C. § 109(c)(5). These requirements refer to the debtor's interactions with its "creditors" before filing. But if we mechanically apply the definitions in the manner suggested, we obtain an absurd result: there would have been no creditors with whom to negotiate

U.S. at 411-12. Doing so resolves the problem: a "creditor" is simply "[o]ne to whom a debt is owed."[29] Black's Law Dictionary 424 (9th ed. 2009). With this usage, states cannot escape the reach of § 903(1), in all or specific cases, merely by denying authorization. And so Congress's stated purpose, of preventing "States [from] enact[ing] their own versions of Chapter IX," is fulfilled. S. Rep. No. 95-989, at 110.

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because "creditors" only exist once a suit "has been commenced," and so all potential debtors would automatically satisfy § 109(c)(5) under the "unable to negotiate with creditors" prong.

The GDB defendants' argument that the district court erred by ignoring the "order for relief" language in the definition of creditor fails for similar reasons. 11 U.S.C. § 101(10)(A) (defining "creditor" as an "entity that has a claim against the debtor that arose at the time of or before the order for relief concerning the debtor" (emphasis added)). GDB argues that PREPA's creditors do not have claims that arose at or before "the order for relief" because PREPA is ineligible to receive an "order for relief." But there may never be an "order for relief" if a municipality fails to obtain agreement from, negotiate in good faith with, or show it is unable to negotiate with "creditors." 11 U.S.C. §§ 109(c)(5)(A)-(D). Indeed, other provisions of the Bankruptcy Code that use the term "creditor" expressly contemplate that there are "creditors" though there may never be an "order for relief." See, e.g., 11 U.S.C. § 303(c) ("After the filing of a petition . . . but before the case is dismissed or relief is ordered, a creditor holding an unsecured claim . . . may join in the petition . . . ." (emphasis added)).

[29] This definition of "creditor" is essentially the same as the prevailing definition when the prohibition was first enacted and when it was re-codified. See, e.g., Webster's New International Dictionary of the English Language 621 (2d ed. 1941) (defining "creditor" as "one to whom money is due"); Black's Law Dictionary 476 (3d ed. 1933) (defining "creditor" as "[a] person to whom a debt is owing by another person"); Webster's Third New International Dictionary of the English Language 533 (3d ed. 1976) (defining "creditor" as "one to whom money is due"); Black's Law Dictionary 441 (rev. 4th ed. 1968) (essentially same as 1933 definition).

As a final effort, the defendants resort to the presumption against preemption. See Antilles Cement Corp. v. Fortuño, 670 F.3d 310, 323 (1st Cir. 2012). But "[p]reemption is not a matter of semantics." Wos v. E.M.A. ex rel. Johnson, 133 S. Ct. 1391, 1398 (2013). Puerto Rico "may not evade the preemptive force of federal law by resorting to a creative statutory interpretation or description at odds with the statute's intended operation and effect." Id. This is particularly true where, as here, the presumption is weak, if present at all. See United States v. Locke, 529 U.S. 89, 108 (2000) (citing Jones v. Rath Packing Co., 430 U.S. 519, 525 (1977)) (holding that the presumption is weaker, if triggered at all, where there is not a tradition of state legislation); Ry. Labor Execs.' Ass'n v. Gibbons, 455 U.S. 457, 472-73 & n.14 (1982) (noting the nearly exclusive federal presence in the bankruptcy field because of Contracts Clause); see also McConnell & Picker, 60 U. Chi. L. Rev. at 427-28 (noting that for much of the nation's history it was thought that states were precluded from enacting municipal bankruptcy legislation). In any event, Congress was quite clear in the Bankruptcy Code that Puerto Rico was to be treated like a state, except for the power to authorize its municipalities to file under Chapter 9. 11 U.S.C. § 101(52). This is sufficient to overcome the presumption to the extent it applies. See Locke, 529 U.S. at 108 ("The question in each case is what the purpose of

Congress was." (quoting Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947)) (internal quotation marks omitted)).

2. "State law" under § 903(1)

Defendants' second argument is that Puerto Rico laws, like the Recovery Act, are not really "State law[s]" for purposes of § 903(1).[30] The argument begins with the observation that § 903(1) appears within the larger provision of § 903, and so is an exception to it.

The terms of § 903 clarify that the remedies of "[t]his chapter" (i.e., Chapter 9) do not alter the ordinary powers that states have over their municipalities. This provision, together with § 904, "carr[ies] forward doctrines of federal common law that had governed municipal insolvency before the first federal act, as well as the constitutional principle against federal interference in state and local governance." McConnell & Picker, 60 U. Chi. L. Rev. at 462-63 (footnote omitted). "The effect is to preserve the power of political authorities to set their own domestic spending priorities, without restraint from the bankruptcy court." Id.; cf.

[30] The argument that we should read "State" in § 903(1) differently from its statutory definition, as we do "creditor," is a nonstarter: unlike with "creditor," reading the definition mechanically into the provision does not create strange results or ones that are inconsistent with the historic purpose of § 903(1). To the contrary, it confirms that Congress did not intend to alter the historic applicability of § 903(1) to Puerto Rico. Cf. Cohen, 523 U.S. at 221; see also Kellogg, 135 S. Ct. at 1977 (noting that "[t]he retention of the same term in later laws suggests that no fundamental alteration was intended").

City of East St. Louis v. United States, 110 U.S. 321, 324 (1884) (holding that "[n]o court has the right to control [the] discretion [of municipal authorities]" as to "what expenditures are proper and necessary for the municipal administration").

Relying on the context of § 903, the defendants argue that § 903(1), rather than itself preempting state municipal bankruptcy laws (or similar), clarifies that the power to enact municipal bankruptcy laws is not one of the powers preserved once Chapter 9 is, or can be, invoked. Because Puerto Rico is already excluded from Chapter 9, the argument goes, § 903 -- including § 903(1) -- does not apply because there is no need to stipulate that the remedies of Chapter 9 do not undermine Puerto Rico's control over its own municipalities.

The defendants further argue that the presumption against preemption bolsters this reasoning and provides a reason to adopt this argument. See Antilles Cement, 670 F.3d at 323. Indeed, they argue that the presumption applies to this case with particular force because "Title 11 suspends the operation of state insolvency laws except as to those classes of persons specifically excluded from being debtors under the Code." In re Cash Currency Exch., Inc., 762 F.2d 542, 552 (7th Cir. 1985) (holding that currency exchanges were not excluded from being debtors under the Code, such that their filing under Chapter 11 was permitted, and rejecting the argument that a state insolvency law might preclude such exchanges

from filing). "[T]o permit the blocking of [a] state reorganization herein," defendants argue, "would be tantamount to imposing a federal reorganization which is clearly forbidden by the Act's exemption" of Puerto Rico municipalities, and is "inconsistent with the congressional scheme of the Bankruptcy Act" which sought to provide to states a mechanism that was unavailable under the Contracts Clause. In re Bankers Trust Co., 566 F.2d 1281, 1288 (5th Cir. 1978) (discussing the Bankruptcy Act's "exemption of savings and loan associations"); see generally McConnell & Picker, 60 U. Chi. L. Rev. 425 (explaining how the federal law attempts to provide states with a mechanism to solve the holdout problem of municipal bankruptcy).

To accept the defendants' reading, we must accept one of the two following propositions: Either states that do not authorize their municipalities to file for Chapter 9 relief are similarly "exempted," and so not barred by § 903(1) from enacting their own bankruptcy laws. Or the availability of Chapter 9 relief for state municipalities, regardless of whether a particular state chooses to exercise the option, occupies the field of nonconsensual municipal debt restructuring, and § 903(1) merely aims to clarify that the operative clause of § 903 does not undermine that background assumption. Thus, ironically, it is the defendants' argument which relies on the notion of field preemption.

We have already rejected the first proposition, for the reasons stated above. The second is undermined by the very presumption against preemption that defendants seek to employ: field preemption is generally disfavored absent clear intent, and is, in any event, unnecessary in light of § 903(1). See Arizona v. United States, 132 S. Ct. 2492, 2501 (2012); Mass. Ass'n of Health Maint. Orgs. v. Ruthardt, 194 F.3d 176, 178-79 & n.1 (1st Cir. 1999); cf. C. Nelson, Preemption, 86 Va. L. Rev. 225, 227-28 & n.12 (2000) ("The Court has grown increasingly hesitant to read implicit field-preemption clauses into federal statutes.").

Defendants' second argument fails for another, related reason. For if field preemption of municipal bankruptcy exists by virtue of the availability of Chapter 9, the defendants must show that it does not apply to Puerto Rico. This they cannot do.

Unlike state bankruptcy laws governing banks and insurance companies, which are not preempted by the federal Code in light of congressional language which directly and expressly excludes them from the Code, 11 U.S.C. § 109(b); see In re Cash Currency, 762 F.2d at 552, the exclusion of Puerto Rico municipalities is not direct and is of a different sort. Rather, Puerto Rico is precluded from granting its municipalities the required authorization, and so its municipalities fail to qualify for the municipal bankruptcy protection that is available. 11 U.S.C. §§ 101(52), 109(c)(2). But failure to qualify is not the

same as direct and express exclusion. On defendants' reasoning, states could offer bankruptcy relief to municipalities that fail to qualify for municipal bankruptcy protection for other reasons -- including, for example, municipalities that are not "insolvent" as required by § 109(c)(3), or that refuse to "negotiate[] in good faith" with creditors as required by § 109(c)(5). To exclude such municipalities from the preemptive scope of § 903(1) would be an absurd result. The terms of § 101(52) do not exclude Puerto Rico municipalities from federal relief; rather, they deny to Puerto Rico the authority to decide when they might access it. On this reading, absent further congressional action, § 903(1) still applies.

3. Conflict Preemption

Before moving on, we pause to note that defendants' arguments fail in any event, for they assume that a law containing the provisions of the Recovery Act, so long as it is passed by either Puerto Rico or the District of Columbia, is not otherwise preempted. But even where an express preemption provision does not apply, federal law preempts state laws that "stand[] as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." See Pac. Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm'n, 461 U.S. 190, 204 (1983) (quoting Hines v. Davidowitz, 312 U.S. 52, 67 (1941)) (internal quotation marks omitted). Where this occurs, conflict preemption also

applies. See In re Celexa & Lexapro Mktg. & Sales Practices Litig., 779 F.3d 34, 40 (1st Cir. 2015) (citing Freightliner Corp. v. Myrick, 514 U.S. 280, 287 (1995)).

Conflict preemption applies here because the Recovery Act frustrates Congress's undeniable purpose in enacting § 903(1). As discussed above, all of the relevant authority shows that Congress quite plainly wanted a single federal law to be the sole source of authority if municipal bondholders were to have their rights altered without their consent. See, e.g., H.R. Rep. No. 79-2246, at 4 ("Only under a Federal law should a creditor be forced to accept such an adjustment without his consent."). But the Recovery Act does just that: both Chapter 2 and Chapter 3 relief, the only forms of relief under the Recovery Act, bind creditors without their consent.[31] Thus, there is an independent basis to affirm, namely that the Recovery Act is also preempted under conflict preemption principles.

That conflict preemption applies confirms our conclusion that Congress did not remove Puerto Rico and the District of Columbia from the express reach of § 903 or § 903(1). See Pac.

[31] For this reason, we also reject the GDB defendants' contention that at least part of the Act is severable from any portion of the law so preempted. The GDB defendants point to two different areas of the Recovery Act, §§ 307-09, and § 135. On their face, these provisions are dependent on the sustainability of the remainder of the law, and so cannot survive independently of the Act. Nor, we note, have we found any other section which might stand alone.

Gas, 461 U.S. at 204. Defendants would have us hold that Congress somehow inadvertently introduced a provision into the Code that would fly in the face of its long-professed intent to ensure that all municipalities seeking reorganization must do so under federal law. See, e.g., H.R. Rep. No. 79-2246, at 4; S. Rep. 95-989, at 110. But we should not accept defendants' invitation to impute mistakes to Congress to reach defendants' desired result. Cf. Jackson v. Liquid Carbonic Corp., 863 F.2d 111, 114 (1st Cir. 1988) ("Our task in construing the statutory language is 'to interpret the words of the[] statute[] in light of the purposes Congress sought to serve.'" (alterations in original) (quoting Chapman v. Hous. Welfare Rights Org., 441 U.S. 600, 608 (1979))); Philko Aviation, 462 U.S. at 411 ("Any other construction would defeat the primary congressional purpose for the [provision's] enactment . . . ."); Demko v. United States, 216 F.3d 1049, 1053 (Fed. Cir. 2000) ("When a statute is as clear as a glass slipper and fits without strain, courts should not approve an interpretation that requires a shoehorn.").

D. Tenth Amendment Concerns

Finally, defendants argue that the canon of constitutional avoidance weighs against our view of congressional intent as to preemption. They argue that if § 903(1) bars the Recovery Act because it expressly preempts local municipal bankruptcy law, then it directly raises a constitutional question

under the Tenth Amendment of whether § 903(1) (and (2)) "constitute[s] an impermissible interference with a state's control over its municipalities." 6 Collier on Bankruptcy ¶ 903.03[2] (A.N. Resnick & H.J. Sommer, eds., 16th ed. 2015). The concern is that:

> If a state composition procedure does not run afoul of the [C]ontracts [C]lause, then municipal financial adjustment under a state procedure should be a permissible exercise of state power, and a congressional enactment prohibiting that exercise would be congressional overreaching in violation of the Tenth Amendment.

Id.; cf. City of Pontiac Retired Emps. Ass'n v. Schimmel, 751 F.3d 427, 430-31 (6th Cir. 2014) (en banc) (per curiam) (declining to reach the issue on appeal).

Our construction leaves this question open and we need not resolve it in this case.[32] The limits of the Tenth Amendment do not apply to Puerto Rico, which is "constitutionally a territory," United States v. Lopez Andino, 831 F.2d 1164, 1172 (1st Cir. 1987) (Torruella, J., concurring), because Puerto Rico's powers are not "[those] reserved to the States" but those specifically granted to it by Congress under its constitution. See

[32] For example, there may be a saving construction of § 903(1) that narrows its preemptive scope, an issue we did not reach because we were not called upon to define the limits of § 903(1)'s preemptive effect. Cf. City of Pontiac, 751 F.3d at 430-31. Or it may be the case that the Bankruptcy Clause permits this imposition on state sovereignty and that Ashton is no longer good law. Cf. McConnell & Picker, 60 U. Chi. L. Rev. at 451-52 (citing Ashton, 298 U.S. at 530-31); Lubben, 88 Am. Bankr. L.J. at 566.

U.S. Const. art. IV, § 3, cl. 2; id., amend. X; Davila-Perez v. Lockheed Martin Corp., 202 F.3d 464, 468 (1st Cir. 2000) (citing Harris, 446 U.S. 651). Accordingly, that § 903(1) expressly preempts a Puerto Rico law does not implicate these Tenth Amendment concerns.

IV.

We observe, in closing, that municipal bankruptcy regimes run a particularly difficult gauntlet between remedying the "holdout problem" among creditors that bankruptcy is designed to resolve, and avoiding the "moral hazard" problem presented by the availability of bankruptcy relief -- namely, "the tendency of debtors to prefer to devote their resources to their own interests instead of repaying their debts." See McConnell & Picker, 60 U. Chi. L. Rev. at 426.

In creating federal Chapter 9 relief for states, Congress's ability to effectively run this gauntlet was constrained by our federalist structure and the limitations posed by the Tenth Amendment. See id. at 428, 494. But Congress is not so constrained in addressing Puerto Rican municipal insolvency owing to Puerto Rico's different constitutional status. Cf. id.; Harris, 446 U.S. at 651-52. That is, other solutions may be available.

In denying Puerto Rico the power to choose federal Chapter 9 relief, Congress has retained for itself the authority to decide which solution best navigates the gauntlet in Puerto Rico's

case. The 1984 amendment ensures Congress's ability to do so by preventing Puerto Rico from strategically employing federal Chapter 9 relief under § 109(c), and from strategically enacting its own version under § 903(1), to avoid such options as Congress may choose. See Gillette, 79 U. Chi. L. Rev. at 285-86. We must respect Congress's decision to retain this authority.

We affirm. No costs are awarded.

- Concurring Opinion Follows -

TORRUELLA, Circuit Judge (Concurring in the judgment). Since at least 1938, the definition of the term "States" in § 1(29) of the Bankruptcy Act included the Territories and possessions of the United States, making Puerto Rico's municipalities eligible for federal bankruptcy protection.[33] All parties to this case agree that this is so. As provided in § 109(c)(2) of the Bankruptcy Reform Act of 1978, a municipality could be an eligible debtor under Chapter 9 if it was "generally authorized to be a debtor under such chapter by State law, or by a governmental officer or organization empowered by State law to [so] authorize."[34] This situation remained unchanged until 1984[35] when Congress enacted § 421(j)(6) of the Bankruptcy Amendments and Federal Judgeship Act of 1984[36] (the "1984 Amendments"), which -- for the first time -- eliminated Puerto Rico's decades-long power to seek federal bankruptcy protection for its municipalities by amending § 101(52) to exclude Puerto Rico's ability under § 109(c)(2) to authorize a "debtor" for purposes of Chapter 9.

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[33] See Act of June 22, 1938, Pub. L. No. 75-696, ch. 575, § 1(29), 52 Stat. 840, 842.

[34] Pub. L. No. 95-598, § 109(c)(2), 92 Stat. 2549, 2557. The current text requires "specific" authorization by State law rather than "general" authorization. 11 U.S.C. § 109(c)(2).

[35] The majority accurately recounts the legislative path of the predecessors to the bankruptcy section presently in controversy. See Maj. Op. at 13-16.

[36] Pub. L. No. 98-353, sec. 421(j)(6), § 101 (44), 98 Stat. 333, 368-69 (codified as amended at 11 U.S.C. § 101(52)).

Because there is no dispute that under the pre-1984 federal bankruptcy laws, Puerto Rico had -- as did all the states -- the power to authorize its municipalities to file for the protection of Chapter 9, I agree with the majority's conclusion that the 1984 Amendments are the "key to this case."

Although I also agree that Puerto Rico's Recovery Act contravenes § 903(1) -- which applies uniformly to Puerto Rico, together with the rest of Chapter 9 -- and thus is invalid, I am compelled to write separately in order to note that the 1984 Amendments are equally invalid. Not only do they attempt to establish bankruptcy legislation that is not uniform with regards to the rest of the United States, thus violating the uniformity requirement of the Bankruptcy Clause of the Constitution,[37] but they also contravene both the Supreme Court's and this circuit's jurisprudence in that there exists no rational basis or clear policy reasons for their enactment. See Harris v. Rosario, 446 U.S. 651, 651-52 (1980) ("Congress, which is empowered under the Territory Clause of the Constitution . . . to 'make all needful Rules and Regulations respecting the Territory . . . belonging to the United States,' may treat Puerto Rico differently from States so long as there is a rational basis for its actions." (emphasis added)) (per curiam); Califano v. Torres, 435 U.S. 1, 5 (1978) (per curiam); Córdova & Simonpietri Ins. Agency, Inc. v. Chase Manhattan

[37] U.S. Const. art. I, § 8, cl. 4.

Bank N.A., 649 F.2d 36, 41-42 (1st Cir. 1981) ("We believe that there would have to be specific evidence or clear policy reasons embedded in a particular statute to demonstrate a statutory intent to intervene more extensively into the local affairs of post-Constitutional Puerto Rico than into the local affairs of a state." (emphasis added)).

Furthermore, to assume that the 1984 Amendments are a valid exercise of Congress's powers to manage the local financial affairs of Puerto Rico's municipalities is inconsistent with this court's long-lasting Commonwealth-endorsing case law. Finally, I also take issue with the majority's proposal that Puerto Rico simply ask Congress for relief; such a suggestion is preposterous given Puerto Rico's exclusion from the federal political process.

I. Congress's Uniform Power under the Bankruptcy Clause

In enacting the 1984 Amendments, Congress acted pursuant to the power enumerated in the Bankruptcy Clause, which states that "Congress shall have the power . . . [t]o establish . . . uniform laws on the subject of bankruptcies throughout the United States." U.S. Const. art. I, § 8, cl. 4. The term "uniform" is unequivocal and unambiguous language, which is defined as "always the same, as in character or degree; unvarying,"[38] and as "[c]haracterized by a

[38] The American Heritage Dictionary of the English Language 1881 (4th ed. 2000).

lack of variation; identical or consistent."[39] Prohibiting Puerto Rico from authorizing its municipalities to request Chapter 9 relief, while allowing all the states to benefit from such power, is hardly in keeping with these definitions.[40] It would be absurd to argue that the exclusion of Puerto Rico from the protection of the Bankruptcy Code by the enactment of the 1984 Amendments is not prohibited by the unequivocal language of the Bankruptcy Clause of the Constitution. This should end the analysis of Congress's powers under the Constitution, as "reliance on legislative history is unnecessary in light of the statute's unambiguous language." Mohamad v. Palestinian Auth., 132 S. Ct. 1702, 1709 (2012) (quoting Milavetz, Gallop & Milavetz, P.A. v. United States, 559 U.S. 229, 236 n.3 (2010)); see also Circuit City Stores, Inc. v. Adams, 532 U.S. 105, 119 (2001) ("[W]e do not resort to legislative history to cloud a statutory text that is clear." (alteration in original) (quoting Ratzlaf v. United States, 510 U.S. 135, 147–148 (1994))).

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[39] Black's Law Dictionary, 1761 (10th ed. 2014).

[40] Any effort to understand rather than rewrite the Bankruptcy Clause must accept and apply the presumption that the lawmakers used words in "their natural and ordinary signification." Pensacola Tel. Co. v. W. Union Tel. Co., 96 U.S. 1, 12 (1878). Furthermore, it has long been established as a fundamental rule of statutory construction that lawmakers do not use terms in enactments that "have no operation at all." Marbury v. Madison, 1 Cranch 137, 174 (1803) ("[O]ur task is to apply the text, not to improve upon it."); see also Pavelic & LeFlore v. Marvel Entm't Grp. Div. of Cadence Indus. Corp., 493 U.S. 120, 126 (1989).

Even if we did turn to legislative history, there is little in the Federalist Papers, or elsewhere in our canonical sources, to aid us in finding any hidden meaning to the clear language of the Bankruptcy Clause.[41] This gives added weight to the conclusion that the language in the Clause means what it unequivocally states: bankruptcy laws must be uniform throughout the United States or else are invalid. See Daniel A. Austin, Bankruptcy and the Myth of "Uniform Laws", 42 Seton Hall L. Rev. 1081, 1141-47 (2012); Judith Schenck Koffler, The Bankruptcy Clause and Exemption Laws: A Reexamination of the Doctrine of Geographic Uniformity, 58 N.Y.U. L. Rev. 22, 99 (1983).

[41] See The Federalist No. 42, at 237 (James Madison) (Robert A. Ferguson, ed., 2006) ("The power of establishing uniform laws of bankruptcy is so intimately connected with the regulation of commerce, and will prevent many frauds where the parties or property may lie or be removed into different States, that the expediency of it seems not likely to be drawn into question."). No further comment is found before the Bankruptcy Clause was incorporated into the Constitution as it presently appears. It also bears noting that the Congressional powers to regulate commerce uniformly under the Commerce Clause -- which contains language identical to the Bankruptcy Clause -- apply in full force to Puerto Rico. See Trailer Marine Transp. Corp. v. Rivera Vázquez, 977 F.2d 1, 8 (1st Cir. 1992) ("The central rationale of [the] dormant Commerce Clause doctrine . . . is . . . to foster economic integration and prevent local interference with the flow of the nation's commerce. This rationale applies with equal force to official actions of Puerto Rico. Full economic integration is as important to Puerto Rico as to any state in the Union." (citation omitted)).

Although Congress's powers under the Bankruptcy Clause are broad,[42] they are nonetheless limited by the Clause's uniformity requirement, which is geographical in nature. Ry. Labor Execs, Ass'n v. Gibbons, 455 U.S. 457, 471 (1982) ("A law can hardly be said to be uniform throughout the country if it applies only to one debtor and can be enforced only by the one bankruptcy court having jurisdiction over the debtor." (citing In Re Sink, 27 F.2d 361, 363 (W.D. Va. 1928), appeal dismissed per stipulation, 30 F.2d 1019 (4th Cir. 1929))). "The uniformity requirement . . . prohibits Congress from enacting a bankruptcy law that . . . applies only to one regional debtor. To survive scrutiny under the Bankruptcy Clause, a law must at least apply uniformly to a defined class of debtors." Id. at 473; cf. Blanchette v. Conn. Gen. Ins. Corps., 419 U.S. 102, 159 (1974).

II. The 1984 Amendments Fail the Rational Basis Requirement

The non-uniform treatment of Puerto Rico under the bankruptcy laws not only violates the Bankruptcy Clause, but also fails the rational basis requirement. As explained above, Harris, 446 U.S. at 651-52, and Califano, 435 U.S. at 5, held that Congress may legislate differently for Puerto Rico, as long as it has a rational basis for such disparate treatment. These were equal protection and substantive due process cases brought by U.S.

[42] See Cont'l Ill. Nat'l Bank v. Chicago, R.I. & Pac. Ry. Co., 294 U.S. 648, 668 (1935).

citizens of Puerto Rico who challenged Congress's discriminatory treatment in certain welfare programs. The plaintiffs in these cases claimed to have been discriminated against based on their classification as Puerto Ricans, an insular minority purportedly subject to heightened scrutiny. However, the Supreme Court rejected their argument, holding that, pursuant to Congress's powers under the Territorial Clause, only rational basis review is warranted when considering the validity of a statute that treats Puerto Rico differently. Harris, 446 U.S. at 651-52; Califano, 435 U.S. at 5.[43]

It is black letter law that this tier of scrutiny "is a paradigm of judicial restraint," FCC v. Beach Commc'ns, Inc., 508 U.S. 307, 314 (1993), and courts should not question "[r]emedial choices made by . . . legislative . . . bod[ies] [unless] 'there exists no fairly conceivable set of facts that could ground a rational relationship between the challenged classification and the government's legitimate goals.'" Medeiros v. Vincent, 431 F.3d 25, 29 (1st Cir. 2005) (quoting Wine and Spirits Retailers, Inc. v. Rhode Island, 418 F.3d 36, 54 (1st Cir. 2005)).

[43] The same rational basis requirement that regulates disparate treatment of Puerto Ricans applies to the Commonwealth itself. See Jusino-Mercado v. Puerto Rico, 214 F.3d 34, 44 (1st Cir. 2000) (citing Harris, 446 U.S. at 651-52) (recognizing that Congress could have legislated differently for the Commonwealth).

This implies that Congress's justification for its legislative actions need not be expressly articulated, and thus the action of removing Puerto Rico's power to authorize its municipalities to file under Chapter 9 must be allowed if there is any set of conceivable reasons rationally related to a legitimate interest of Congress. See Beach Commc'ns, 508 U.S. at 313 ("[A] statutory classification that neither proceeds along suspect lines nor infringes fundamental constitutional rights must be upheld against equal protection challenges if there is any reasonably conceivable state of facts that could provide a rational basis for the classification."). Furthermore, in order to pass rational basis review, legislation cannot be arbitrary or irrational. See City of Cleburne, Tex. v. Cleburne Living Ctr., 473 U.S. 432, 446 (1985) ("The State may not rely on a classification whose relationship to an asserted goal is so attenuated as to render the distinction arbitrary or irrational."). Here, there is no conceivable set of facts rationally related to a legitimate purpose of Congress in these amendments, and thus these amendments are invalid.

This legislation unreasonably and arbitrarily removed a power delegated to Puerto Rico by the previous legislation. Had there been any justification for not granting Puerto Rico the managerial power to authorize its municipalities to seek bankruptcy protection before 1984, Congress certainly did not express or even

imply it at any time up to and including the present. How could such a justification arbitrarily materialize without explanation?

A. The 1984 Amendments Lack any Record or Justification

As previously stated, there is no legislative record on which to rely for determining Congress's reasons behind the 1984 Amendments. A tracing of its travels through the halls of Congress sheds less light than a piece of coal on a moonless night regarding the reason for its enactment. Thus, the majority's statement that "Congress [sought to] preserve to itself th[e] power to authorize Puerto Rican municipalities to seek Chapter 9 relief,"[44] is pure fiction. There is absolutely nothing in the record of the 1984 Amendments to justify this statement or Congress's legitimate purpose in adopting them.

The Puerto Rico exception actually predates the 1984 Act. It appeared out of thin air during the 96th Congress in 1980 in a House Report, accompanying S. 658. See H.R. Rep. No. 96-1195, at 38 (1980). That proposal was a failed bill similar in substance to Pub. L. No. 98-353, which later became the Bankruptcy Amendments and Federal Judgeship Act of 1984, 98 Stat. 333. See 98 Stat. 368-69 (containing the Puerto Rico language under "Subtitle H - Miscellaneous Amendments to Title 11"). When S. 658 arrived in the House from the Senate, on September 11, 1979, it did not contain the Puerto Rico-excluding language. The Puerto Rico provision was,

[44] Maj. Op. at 5.

however, included in the version that emerged from the House Committee on the Judiciary on July 25, 1980. There is no legislative history on the Puerto Rico clause, as hearings from the House Committee on the Judiciary from 1979-1980 reveal nothing about the amendment's purpose or justification.

The story was not very different with regard to the 1984 Amendments. On March 21, 1984, the House passed H.R. 5174 without the Chapter 9 debtor eligibility exclusion for Puerto Rico. On that same day, Senator Strom Thurmond (R-SC) introduced S. Amdt. 3083. Subtitle I, section 421(j)(6) of the amendment proposed altering Section 101 of Title 11 to provide that "(44) 'State' includes the District of Columbia and Puerto Rico, except for the purpose of defining who may be a debtor under chapter 9 of this title." 130 Cong. Rec. S6118 (daily ed. May 21, 1984) (statements of Sen. Thurmond). And that is how we got the current text of 11 U.S.C. § 101(52). On the day that he introduced the amendment, Senator Thurmond addressed the Senate to explain several of its numerous stipulations, yet said little about the newly added Puerto Rico exemption. He noted, "Subtitles C through I contain the remaining substantive provisions passed by the Senate in S. 1013. These provisions were not in the House bill. They do, however, have broad support in the Senate and were therefor included in the substitute amendment." 130 Cong. Rec. S6083 (daily ed. May 21, 1984) (statement of Sen. Thurmond).

The original S. 1013 also did not contain the Puerto Rico exclusion when it was reported in the Senate on April 7, 1983. Senators Dole, Thurmond, and Hefflin introduced Amendment 1208 on April 27, 1983, which contained the Puerto Rico Chapter 9 debtor eligibility exclusion. 129 Cong. Rec. S5441 (daily ed. Apr. 27, 1983). The Senators gave no explanation for the Puerto Rico exclusion in S. 1013. Thurmond described Subtitle I of Amendment 3083 as "Technical Amendments to Title 11," which is consistent with the rest of the statute and gave no further reasons for its inclusion. 130 Cong. Rec. S6083 (daily ed. May 21, 1984) (Statement of Sen. Strom Thurmond). The Senate Amendments to H.R. 5174, including 3083, passed on June 20, 1984. The Congressional Record from the House on that day announced that "the Senate insists upon its amendments" and therefore it would have to conference with the House which was not in agreement with them. 130 Cong. Rec. H6085 (daily ed. June 20, 1984).

The House adopted the Conference Report, including the Puerto Rico exclusion, without specific mention or comment on June 28, 1984, with a vote of 394 yeas, 0 nays, and 39 abstentions. The Senate also voted for the Conference Report, thereby making H.R. 5174 into Public Law No. 98-353. Congress never articulated a reason for the Puerto Rico-excluding language.

To ignore this silence is striking given that the central task for courts when interpreting changes to the bankruptcy

statutes is to carefully examine Congress's statutory text and justifications. See Cohen v. de la Cruz, 523 U.S. 213, 221 (1998) ("We . . . 'will not read the Bankruptcy Code to erode past bankruptcy practice absent a clear indication that Congress intended such a departure.'" (citation omitted)); United Sav. Ass'n of Tex. v. Timbers of Inwood Forest Assocs., 484 U.S. 365, 380 (1980) ("Such a major change in the existing rules would not likely have been made without specific provision in the text of the statute; it is most improbable that it would have been made without even any mention in the legislative history." (citation omitted)); cf. Kellogg Brown & Root Servs. Inc. v. United States ex rel. Carter, 135 S. Ct. 1970, 1977 (2015) ("Fundamental changes in the scope of a statute are not typically accomplished with so subtle a move.").

Tellingly, the parties do not dispute this absolute lack of Congressional justification for the Puerto Rico language in the 1984 Amendments. See also Frank R. Kennedy, The Commencement of a Case under the New Bankruptcy Code, 36 Wash. & Lee L. Rev. 977, 991 n.75 (1979) ("While there may be special reasons why Washington, D.C., should not be eligible for relief under Chapter 9, it is not self-evident why all political subdivisions, public agencies, and instrumentalities in Puerto Rico, Guam, and other territories and possessions of the United States should be precluded from relief under the chapter.").

And yet, there is one undisputed fact that is self-evident in all this: no one proposed a need for the 1984 change, or protested the efficacy of the Code as it existed without this amendment. There is hermetic silence regarding all of the issues or questions that would normally arise and be discussed when a provision that was on the Bankruptcy Code for close to half a century, and whose elimination would affect millions of U.S. citizens, is deleted.

B. Congress's Power over Puerto Rico's Internal Affairs

The 1984 Amendments deprived Puerto Rico of a fundamental and inherently managerial function over its municipalities that has no connection to any articulated or discernible Congressional interest. See Bennet v. City of Holyoke, 362 F.3d 1, 12 (1st Cir. 2004) (explaining that "municipalities are creatures of the state" subject to control of the state's legislature). All the states and territories -- including Puerto Rico before 1984 -- had the power to control, manage, and regulate the local financial affairs of their municipalities. See Faitoute Iron & Steel Co. v. City of Asbury Park, 316 U.S. 502, 513-15 (1942); Armstrong v. Goyco, 29 F.2d 900, 902 (1st Cir. 1928) ("In the matter of local regulations and the exercise of police power Porto Rico possesses all the sovereign powers of a state, and any exercise of this power which is reasonable and is exercised for the health, safety, morals, or welfare of the public is not in contravention of the Organic Act

nor of any provision of the Federal Constitution."). As the Court explained in Faitoute Iron & Steel Co.,

> Can it be that a power that . . . was carefully circumscribed to reserve full freedom to the states, has now been completely absorbed by the federal government -- that a state which . . . has . . . elaborate[d] machinery for the autonomous regulation of problems as peculiarly local as the fiscal management of its own household, is powerless in this field? We think not.

316 U.S. at 508-09; see also New York v. United States, 505 U.S. 144, 156-57 (1992) (explaining that the structure of the Constitution protects the rights of the states to control their internal affairs). Puerto Rico has the same level of authority over its municipalities. See United States v. Laboy-Torres, 553 F.3d 715, 722-23 (3d Cir. 2009) (O'Connor, J., sitting by designation) ("[C]ongress has accorded the Commonwealth of Puerto Rico 'the degree of autonomy and independence normally associated with States of the Union.'") (quoting United States v. Cirino, 419 F.3d 1001, 1003-04 (9th Cir. 2005) (per curiam)).

When the Supreme Court held in 1976 that Puerto Rico has "[t]he degree of autonomy and independence normally associated with States of the Union,"[45] it reaffirmed this proposition, which had longstanding vitality even before the 1984 Amendments or the

[45] Examining Bd. of Eng'rs, Architects & Surveyors v. Flores de Otero, 426 U.S. 572, 594 (1976).

enactment of the Federal Relations Act[46] and the creation of the so-called "Commonwealth status." See Puerto Rico v. Shell Co., 302 U.S. 253, 261-62 (1937) ("The aim of the Foraker Act and the Organic Act was to give Puerto Rico full power of local self-determination with an autonomy similar to that of the states and incorporated territories.").

Even this court has questioned the basis for Congress's power to legislate over Puerto Rico local affairs. In one of its Commonwealth-endorsing decisions dealing with the question of whether Congress had the intention to limit Puerto Rico's powers to regulate internal antitrust violations through the Sherman Act's control of purely local affairs of the territories, the court held that "[t]he states are clearly able to adopt such variations as to purely local matters. And, there is no reason of policy discernible in the Sherman Act for treating Puerto Rico differently." Córdova, 649 F.2d at 42 (emphasis added).[47] The court went on to explain how Congress's power to legislate purely local affairs of Puerto Rico is constrained: "We believe that there

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[46] Act of July 3, 1950, Pub. L. No. 81-600, ch. 446, 64 Stat. 319 (codified at 48 U.S.C. § 731b et seq.); 48 U.S.C. § 821.

[47] As in Córdova, there is no discernible policy justification in the Bankruptcy Code to support the conclusion that Congress intended to control the purely local affairs of Puerto Rico. In fact, if anything, the policy reasons embodied in the constitutional requirement that bankruptcy legislation be uniform throughout the United States would support the opposite conclusion. The 1984 Amendments clearly violate the constitutional policy mandate.

would have to be specific evidence or clear policy reasons embedded in a particular statute to demonstrate a statutory intent to intervene more extensively into the local affairs of post-Constitutional Puerto Rico than into the local affairs of a state." Id. at 42 (emphasis added); see also Antilles Cement Corp. v. Fortuño, 670 F.3d 310, 322 (1st Cir. 2012).

In the instant case, there are no articulated or conceivable "clear policy reasons." And while the "specific evidence" requirement could be met by the clear statutory text of the 1984 Amendments, this court has stated that Congress's powers to legislate differently for Puerto Rico under the Territorial Clause are also subject to some "outer limits," in addition to the rational-basis constraints of Harris and Califano. See Jusino-Mercado, 214 F.3d at 44. At a minimum, there should be some explanation as to why Congress's enactment of the 1984 Amendments fits within those "outer limits" given the complete absence of clear policy reasons.

Congress has expressly delegated to Puerto Rico the power to manage its municipalities. Section 37 of the Federal Relations Act provides:

> That the legislative authority herein provided shall extend to all matters of a legislative character not locally inapplicable, including power to create, consolidate, and reorganize the municipalities so far as may be necessary, and to provide and repeal laws and ordinances therefor; also the power to alter, amend, modify, or repeal any or all laws and

> ordinances of every character now in force in Puerto Rico or municipality or district thereof, insofar as such alteration, amendment, modification, or repeal may be consistent with the provisions of this Act.

P.R. Laws Ann. tit. 1, Federal Relations Act § 37; Federal Relations Act, Pub. L. No. 64-368, § 37, 39 Stat. 951, 954 (1917), as amended by Act of July 3, 1950, Pub. L. No. 81-600, 64 Stat. 319 (codified at 48 U.S.C. § 821).[48]

This court has further reiterated the norm that Puerto Rico has authority to control its internal affairs in several other Commonwealth-endorsing decisions. See, e.g., United States v. Quiñones, 758 F.2d 40, 42 (1st Cir. 1985) ("Puerto Rico ceased being a territory of the United States subject to the plenary powers of Congress as provided in the Federal Constitution. . . . [T]he government of Puerto Rico is no longer a federal government agency exercising delegated power."); Córdova, 649 F.2d at 41. Because Congress was precluded from enacting the 1984 Amendments, they cannot serve a legitimate purpose and are therefore irrational.

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[48] For a more detailed description of Puerto Rico's powers to control its internal affairs, even before the "Commonwealth status," see, e.g., People of Porto Rico v. E. Sugar Assocs., 156 F.2d 316, 321 (1st Cir. 1946) ("[T]his grant of legislative power with respect to local matters . . . is as broad and comprehensive as language could make it. . . . [T]he legislative powers conferred upon the Insular Legislature by Congress are nearly, if not quite, as extensive as those exercised by the state legislatures." (citations and internal quotation marks omitted)); González v. People of Porto Rico, 51 F.2d 61, 62 (1st Cir. 1932) (quoting Armstrong, 29 F.2d at 902).

The degree of authority granted to Puerto Rico to regulate its local affairs is very different from Congress's exclusive powers over the District of Columbia, the other territory excluded by § 101(52) from authorizing its municipalities under § 109(c)(2) of the Bankruptcy Code. See Trailer Marine Transp. Corp., 977 F.2d at 8 ("If the government of Puerto Rico were nothing other than the alter ego or immediate servant of the federal government, then the dormant Commerce Clause doctrine would have no pertinence, for a doctrine designed to safeguard federal authority against usurpation has no role when the federal government itself is effectively the actor."); cf. Palmore v. United States, 411 U.S. 389, 397 (1973) ("Not only may statutes of Congress of otherwise nationwide application be applied to the District of Columbia, but Congress may also exercise all the police and regulatory powers which a state legislature or municipal government would have in legislating for state or local purposes."); Berman v. Parker, 348 U.S. 26, 31 (1954) ("The power of Congress over the District of Columbia includes all the legislative powers which a state may exercise over its affairs.").

Any comparison of Puerto Rico to the District of Columbia, therefore, including the proposition made by the majority that Congress may have intended to retain plenary powers to regulate the local affairs of Puerto Rico as it does for the seat of the Federal Government, fundamentally changes the current nature

of Puerto Rico-federal relations. To argue that Congress's rationale for the disparate treatment enacted in the 1984 Amendments is that it may have wanted to adopt "other -- and possibly better -- options to address the insolvency of Puerto Rico municipalities"[49] overturns over half a century of binding case law that purported to recognize that Congress delegated to Puerto Rico the power to control its municipalities and legislate for its local affairs. Congress's solution to the budgetary and fiscal crisis faced by the District of Columbia during the mid-1990s, through the enactment of the District of Columbia Financial Responsibility and Management Assistance Act of 1995, Pub. L. No. 104-8, 109 Stat. 97, could have been taken for granted considering that the Federal Government and Congress itself would be directly affected by the District's financial crisis. But, the circumstances here are very different, since no such sense of urgency is evident in Congress, nor is the requisite political clout available to Puerto Ricans. And, even if it were, instituting direct Congressional control of Puerto Rico's finances through a financial control board would require fundamentally redefining Puerto Rico's relationship to the United States. See Flores de Otero, 426 U.S. at 594.

Without an adequate explanation, the majority chooses to ignore our own binding case law and suggests that Congress chose to unreasonably interfere with a managerial decision affecting Puerto

[49] Maj. Op. at 31.

Rico's local municipal affairs. Although Congress may, in special circumstances, legislate to amend or repeal uniform bankruptcy legislation, such an act, on a totally silent record, cannot be rational considering the long and substantiated jurisprudence that militates to the contrary.

C. Rational Basis Review After Harris and Califano

This is an extraordinary case involving extraordinary circumstances, in which the economic life of Puerto Rico's three-and-a-half million U.S. citizens hangs in the balance; this court should not turn a blind eye to this critical situation by ignoring Congress's constraints to legislate differently for Puerto Rico.[50] Besides being irrational and arbitrary, the exclusion of Puerto Rico's power to authorize its municipalities to request federal bankruptcy relief, should be re-examined in light of more recent rational-basis review case law. In certain cases, where laws have been found to be arbitrary and unreasonable, and where minorities have been specifically targeted for discriminatory treatment, judicial deference -- even under such a deferential rational-basis standard -- must yield. See United States v. Windsor, 133 S. Ct. 2675, 2693 (2013) ("The Constitution's guarantee of equality 'must at the very least mean that a bare congressional desire to harm a politically unpopular group cannot' justify disparate treatment of that group.") (quoting Dep't of

[50] See Maj. Op. 8.

Agric. v. Moreno, 413 U.S. 528, 534-35 (1973)). Moreover, this Court has recognized that "Supreme Court equal protection decisions have both intensified scrutiny of purported justifications where minorities are subject to discrepant treatment and have limited permissible justification." Massachusetts v. Dep't of Health & Human Servs., 682 F.3d 1, 10 (1st Cir. 2012). "[T]he usually deferential 'rational basis' test has been applied with greater rigor in some contexts, particularly those in which courts have had reason to be concerned about possible discrimination." Id. at 11 (citing United States v. Then, 56 F.3d 464, 468 (2d Cir. 1995) (Calabresi, J., concurring)). Rightly so, because, when facing "historic patterns of disadvantage suffered by the group adversely affected by the statute . . . [t]he Court . . . undertake[s] a more careful assessment of the justifications than the light scrutiny offered by conventional rational basis review." Id. The 1984 Amendments are just another example of a historic pattern of disadvantage suffered by Puerto Rico, but no such careful assessment is performed. See Igartúa-De La Rosa v. United States, 626 F.3d 592, 612 (1st Cir. 2010) (Torruella, J., concurring in part, dissenting in part) ("This is a most unfortunate and denigrating predicament for citizens who for more than one hundred years have been branded with a stigma of inferiority, and all that follows therefrom.").

A less-deferential rational basis review should also be performed in light of the aforementioned considerations regarding the well-settled law of Puerto Rico's authority over its internal matters. See Dep't of Health & Human Servs., 682 F.3d at 11-12 ("Supreme Court precedent relating to federalism-based challenges to federal laws reinforce the need for closer than usual scrutiny . . . and diminish somewhat the deference ordinarily accorded.").

III. This Court Now Sends Puerto Ricans to Congress

The justification for the degree of judicial deference afforded by our constitutional jurisprudence under the typical rational basis review is founded on the basic democratic tenet that, "absent some reason to infer antipathy," courts should not intervene with legislative choices because "even improvident decisions will eventually be rectified by the democratic process . . . ." Beach Commc'ns, 508 U.S. at 314 (quoting Vance v. Bradley, 440 U.S. 93, 97 (1979)). And, while the democratic process was equally foreclosed to Puerto Ricans at the time Harris and Califano were resolved, here the situation is different because, contrary to the Supreme Court's statements in those two cases, we have not been presented with a single plausible explanation of why Congress opted for the disparate treatment of Puerto Rico.

The majority offers Puerto Rico the alternative to seek a political solution in Congress and cites proposed changes in the

relevant legislation pending before Congress to show that Puerto Rico is advancing in that direction. While I acknowledge that, in some contexts, the fact that Congress has taken steps to remedy a purportedly unfair statutory distinction may be relevant to avoiding judicial intervention under rational basis review, see Vance, 440 U.S. at n.12, when Puerto Rico is effectively excluded from the political process in Congress, this is asking it to play with a deck of cards stacked against it,[51] something this same panel of this court has previously recommended, but to no avail.[52]

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[51] Pursuant to the majority's construction of the statutory text, obtaining Congress's authorization to file for Chapter 9 protection would imply a procedure that need not require the enactment of a statute. Regardless of this, Puerto Rico has no political representation in Washington, other than a non-voting member of Congress. See, e.g., Igartúa-De La Rosa v. United States, 417 F.3d 145, 159 (1st Cir. 2005) (Torruella, J., dissenting); Juan R. Torruella, Hacia Dónde Vas Puerto Rico? Puerto Rico, 107 Yale L.J. 1503, 1519-20 (1998) (reviewing José Trías Monge, The Trials of the Oldest Colony in the World (Yale University Press, 1997)) ("[T]hat Puerto Rico has a 'representative' in Congress without a vote is not only a pathetic parody of democracy within the halls of that most democratic of institutions, but also a poignant reminder that Puerto Rico is even more of a colony now than it was under Spain.").

[52] See Sánchez ex rel. D.R.-S. v. United States, 671 F.3d 86, 103 (1st Cir. 2012) (stating in dismissing a claim against the United States for injuries caused by the Navy's pollution of Vieques, that "the plaintiffs' pleadings, taken as true, raise serious health concerns. [. . .] The Clerk of Court is instructed to send a copy of this opinion to the leadership of both the House and Senate."); see also id. at 120 (Torruella, J., dissenting) ("Access to the political forum available to most other citizens of the United States has already been blocked by this same Court." (citations omitted)).

IV. The "Business-as-Usual" Colonial Treatment Continues

The majority's disregard for the arbitrary and unreasonable nature of the legislation enacted in the 1984 Amendments showcases again this court's approval of a relationship under which Puerto Rico lacks any national political representation in both Houses of Congress and is wanting of electoral rights for the offices of President and Vice-President. That discriminatory relationship allows legislation -- such as the 1984 Amendments -- to be enacted and applied to the millions of U.S. citizens residing in Puerto Rico without their participation in the democratic process. This is clearly a colonial relationship, one which violates our Constitution and the Law of the Land as established in ratified treaties.[53] Given the vulnerability of these citizens before the political branches of government, it is a special duty of the courts of the United States to be watchful in their defense. As the Supreme Court pronounced in United States v. Carolene Products Co., 304 U.S. 144, 152 n.4 (1938), "prejudice against . . . insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry." I am

[53] See Igartúa-De La Rosa, 417 F.3d at 185-86 (Howard, J., dissenting) (questioning the U.S. Senate's declaration that the International Covenant on Civil and Political Rights, ratified by Congress in 1992, is not self-executing).

sorry to say this special duty to perform a "more searching inquiry" has been woefully and consistently shirked by this court when it comes to Puerto Rico, with the majority opinion just being the latest in a series of such examples.[54]

When the economic crisis arose, after considering Congress's cryptic revocation of Puerto Rico's powers to manage its own internal affairs through the 1984 Amendments, Puerto Rico looked elsewhere for a solution. It developed the Recovery Act enacted pursuant to the police powers this very court had sustained, to fill the black hole left by the 1984 Amendments introducing of the definition now codified in § 101(52). And while I agree with the majority that Puerto Rico could not take this step because Chapter 9 applies to Puerto Rico in its entirety, I commend the Commonwealth for seeking ways to resolve its predicament.

Even if one ignores the uncertain outcome of any proposed legislation, questions still remain: why would Congress intentionally take away a remedy from Puerto Rico that it had before 1984 and leave it at the sole mercy of its creditors? What legitimate purpose can such an action serve, other than putting

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[54] See, e.g., Igartúa-De La Rosa, 626 F.3d at 612; Igartúa-De La Rosa, 417 F.3d at 159; Igartúa-De La Rosa v. United States, 229 F.3d 80, 85 (1st Cir. 2000) (Torruella, J., concurring); López v. Arán, 844 F.2d 898, 910 (1st Cir. 1988) (Torruella, J., concurring in part and dissenting in part); see also Juan R. Torruella, The Insular Cases: A Declaration of Their Bankruptcy and My Harvard Pronouncement 61 (Gerald L. Neuman and Tomiko Brown-Nagin eds., 2015).

Puerto Rico's creditors in a position that no other creditors enjoy in the United States? While favoring particular economic interests -- i.e., Puerto Rico creditors -- to the detriment of three-and-a-half million U.S. citizens, is perhaps "business as usual" in some political circles, one would think it hardly qualifies as a rational constitutional basis for such discriminatory legislation.

V. Conclusion

The 1984 Amendments are unconstitutional. Puerto Rico should be free to authorize its municipalities to file for bankruptcy protection under the existing Chapter 9 of the Bankruptcy Code if that is the judgment of its Legislature.

I concur in the Judgment.

[CERTIFIED TRANSLATION]

IN THE PUERTO RICO SUPREME COURT

The People of Puerto Rico
Respondent
v.
Luis M. Sánchez Valle
Petitioner

The People of Puerto Rico
Respondent
v.
Jaime Gómez Vázquez
Petitioner

The People of Puerto Rico
v.
René Rivero Betancourt

The People of Puerto Rico
v.
Rafael A. Delgado Rodriguez

CC-2013-0068
CC-2013-0072

Opinion of the Court issued by Associate Judge Mr. MARTÍNEZ TORRES.

In San Juan, Puerto Rico, on March 20, 2015

To decide these consolidated cases, we must review the rule that we established in *Pueblo v. Castro García*, 120 P.R. Dec. 740 (1988). For the following reasons, we hereby overrule said precedent and hold that, pursuant to the constitutional protection against double jeopardy, and because Puerto Rico is not a federal state, a person who has been acquitted, convicted or prosecuted in federal court cannot be prosecuted for the same offense in the Puerto Rico courts.

I

A. CC-2013-0068

On September 28, 2008, the prosecution filed three charges against Mr. Luis M. Sánchez del Valle accusing him of: 1) a violation of Article 5.01 of the Puerto Rico Weapons Act, 25 P.R. Laws Ann. § 458, for selling a firearm without a permit; 2) a second violation of Article 5.01 of the Puerto Rico Weapons Act, *supra*, for selling ammunition without a permit; and 3) a violation of Article 5.04 of the Puerto Rico Weapons Act, 25 P.R. Laws Ann. § 458c, for illegally carrying a firearm.

Under the same facts, a federal grand jury indicted Mr. Sánchez del Valle of illegally trafficking in weapons and ammunition in interstate commerce. Specifically, he was accused of violating 18 U.S.C. §§ 922(a)(1)(A), 923(a), 924(a)(1)(D) and 2. In contrast to the state court, he was not changed with the offense of illegally carrying weapons. Eventually, the U.S. District Court for the District of Puerto Rico sentenced Mr. Sánchez del Valle to five

months of prison, five months of house arrest and three years of supervised release.

In light of that, Mr. Sánchez del Valle filed a motion to dismiss with the Court of First Instance, Carolina Part, alleging that, pursuant to the constitutional protection against double jeopardy, he could not be prosecuted in Puerto Rico for the same offenses for which he had been found guilty in federal court.

For its part, the prosecution argued that, according to the ruling in *Pueblo v. Castro García*, *supra*, the United States and the Commonwealth of Puerto Rico (the "Commonwealth") derive their authority from different sources and both have the power to punish offenses without infringing the constitutional safeguard against double jeopardy.

The Court of First Instance dismissed the accusations filed against Mr. Sánchez del Valle. It held that Mr. Sánchez del Valle could not be indicted twice for the same offenses and before the same sovereign entity. According to the Court of First Instance, Puerto Rico is not a different and separate jurisdiction from the United States inasmuch as the sovereignty of both arises from the same source, to wit, the United States Congress. It concluded that, given the federal court ruling, the indictments filed in state court violated the constitutional protection against double jeopardy.

Not satisfied, the prosecution turned to the Court of Appeals.

B. CC-2013-0072

On September 28, 2008, the prosecution filed three charges against Mr. Jaime Gómez Vázquez for offenses related to the previous case, accusing him of: 1) a violation of Article 5.01 of the Puerto Rico Weapons Act, 25 P.R. Laws Ann. § 458, for illegally selling and transferring a firearm; 2) a violation of Article 5.07 of the Puerto Rico Weapons Act, 25 P.R. Laws Ann. § 458f, for carrying a riffle; and 3) a violation of Article 5.10 of the Puerto Rico Weapons Act, 25 P.R. Laws Ann. § 458i, for transferring a mutilated weapon. On that same date, a finding of probable cause was made in his absence, a warrant was issued for his arrest and bail was set at $325,000.

Subsequently, before the U.S. District Court for the District of Puerto Rico, a grand jury filed five charges against Mr. Gómez Vázquez, Mr. Gómez Pastrana, Mr. Delgado Rodríguez and Mr. Rodríguez Betancourt for the same offenses for which they had been prosecuted in state court.[1] Specifically, Mr. Gómez Vázquez was accused of violating the following statutes: 18 U.S.C. §§ 922(a)(1)(A), 923(a), 924(a)(1)(D), for the illegal sale of weapons in interstate commerce. In contrast to the state court, he was not charged with illegally carrying long weapons or of weapon mutilation.

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[1] There is no question that the charges are for the same offenses. *Appendix*, at 205 and 214.

In March of 2010, Mr. Gómez Vázquez filed a plea bargain with the U.S. District Court for the District of Puerto Rico whereby he pleaded guilty of the charges filed against him. *Appendix*, at 205. On June 26, 2010, the federal court sentenced him to 18 months of prison and 3 years of supervised release.

On August 27, 2010, Mr. Gómez Vázquez filed with the Court of First Instance, Superior Court, Carolina Part, a motion to dismiss under Rule 64(e) of the Rules of Criminal Procedure, 34 P.R. Laws Ann. Ap. II. He claimed that the double jeopardy clause of the Fifth Amendment to the Constitution of the United States and Section 11 of Article 11 of the Constitution of the Commonwealth of Puerto Rico, P.R. Laws Ann., Volume I, protected him from being prosecuted in the Puerto Rico courts after being charged for the same offenses. Essentially, Mr. Gómez Vázquez argued that the United States and Puerto Rico were the same sovereign within the meaning of said constitutional clause and, therefore, could not submit him to two separate criminal prosecutions for the same offense or behavior. In other words, he argued that the exception to the constitutional protection against double jeopardy, known as the doctrine of "dual sovereignty," did not apply to Puerto Rico.

In response, the prosecution argued that, under this Court's holding in *Pueblo v. Castro García*, *supra*, conduct constituting an offense both in federal court and in state court could be penalized separately in both jurisdictions without violating the constitutional clause against double jeopardy or

implying multiple punishments for the same conduct or behavior. The prosecution argued that the sovereignty of the United States and the sovereignty of Puerto Rico were separate and different for purposes of the referenced constitutional clause. Thus, it stated that Mr. Gómez Vázquez could be tried in the Puerto Rico courts for the same offenses for which he was sentenced in federal court.

In a June 26, 2012 decision, the trial court granted the motion to dismiss filed by Mr. Gómez Vázquez. It ruled that the sovereignty or source of power of Puerto Rico to criminally prosecute its citizens resided and emanated from the federal government through Congress and that, for that reason, the doctrine of "dual sovereignty" did not apply. It concluded that the charges filed against Mr. Gómez Vázquez violated the constitutional protection against double jeopardy provided by the Constitution of the United States and the Puerto Rico Constitution. Not satisfied, the prosecution turned to the Court of Appeals.

The Court of Appeals consolidated the cases described above and reversed the trial court's rulings. It ruled that, under current law, a person could be submitted to criminal prosecution both in federal court and in state court for the same criminal behavior without violating the constitutional safeguard against double jeopardy. Judge González Vargas issued a dissenting vote and Judge Medina Monteserín issued a concurring vote.

Not satisfied with the decision, Mr. Sánchez del Valle and Mr. Gómez Vázquez filed separate

petitions before this Court. We issued the writs of *certiorari* and, because they raise the same controversy, we consolidated them. With the benefit of the appearance of all the parties involved, we hereby decide.

II

The constitutional safeguard against double jeopardy protects every person charged with an offense by guaranteeing that he or she will not be "placed at risk of being punished twice for the same offense." P.R. Const. Art. II § 10, P.R. Laws Ann., Vol. 1. *See Pueblo v. Santos Santos*, 189 P.R. Dec. 361 (2013). Likewise, the Fifth Amendment to the Constitution of the United States establishes that "no person may be submitted to trial twice for the same offense."[2] U.S. Const. amend. V, P.R. Laws Ann., Vol. 1. *See Pueblo v. Santiago*, 160 P.R. Dec. 618 (2003); *Pueblo v. Martínez Torres*, 126 P.R. Dec. 561 (1990); *Ohio v. Johnson*, 467 U.S. 493 (1984); E.L. Chiesa Aponte, *Derecho Procesal Penal de Puerto Rico y Estados Unidos*, Colombia, Ed. Forum, 1992, Vol. II § 16.1 (B), at 354.

For the constitutional protection against double jeopardy to apply, several requirements must be met. *Pueblo v. Santos Santos, supra*, at 367. First of all, the proceedings held against the accused must be criminal in nature. *Pueblo v. Santiago, supra*, at

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[2] The original text in English reads: *"nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb."*

628. It is necessary, also, for a first trial to have been initiated or held under a valid indictment and in a court with jurisdiction. *Pueblo v. Martínez Torres, supra*, at 568. Lastly, the second process to which the person is being subjected must be for the same offense for which he or she has already been convicted, acquitted, or prosecuted. *Pueblo v. Santiago, supra*, at 629.

In order to assess whether it is the same offense for purposes of the double jeopardy clause, we have employed the rule adopted by the United States Supreme Court in *Blockburger v. United States*, 284 U.S. 299 (1932). *See Pueblo v. Rivera Cintrón*, 185 P.R. Dec. 484, 494 (2012). Under that, the same act, or transaction, constitutes a violation of two different legal provisions if each penal provision breached requires evidence of an additional fact not demanded by the other. *Pueblo v. Rivera Cintrón, supra*, at 494.

In other words, that rule "demands that the court compare [the] definitions [of the offenses] in order to make sure that each one requires, as a minimum, one element not required by the other. If that is the case, there can be punishment for more than one offense." *Id.* at 494, quoting J.P. Mañalich Raffo, *El concurso de delitos: bases para su reconstrucción en el derecho penal de Puerto Rico*, 74 Rev. Jur. UPR 1021, 1068 (2005). We emphasize, however, that "if the definition of one of the offenses incorporates all of the elements required by the definition of the other, then it is only one offense, inasmuch as the second one

constitutes a lesser included offense." *Pueblo v. Rivera Cintrón, supra*, at 495.

Upon studying the offenses involved in this case, we note that one of the offenses for which the petitioners were charged in state court constitutes a lesser offense included in one of the federal offenses.

Article 5.01 of the Puerto Rico Weapons Act, 25 P.R. Laws Ann. § 458, establishes the following:

> It shall be necessary to hold a license issued pursuant to the requirements set forth in this chapter to manufacture, import, offer, sell or have available for sale, rent or transfer any firearms or ammunition, or that portion or part of a firearm on which the manufacturer of the same places the serial number of the firearm. Any infraction of this section shall constitute a felony. *[official translation]*

For its part, the federal statute, 18 U.S.C. § 922(a) (1) (A), establishes that:

> It shall be unlawful—for any person—except a licensed importer, licensed manufacturer, or licensed dealer, to engage in the business of importing, manufacturing, or dealing in firearms, or in the course of such business to ship, transport, or receive any firearm in interstate or foreign commerce.

Notice that Article 5.01 of the Puerto Rico Weapons Act, *supra*, contains all of the elements of 18 U.S.C. § 922(a)(1)(A), to wit, that a person without a license may not import, manufacture, sell or deal in firearms or ammunition. We do not find in the state offense any element that is different from those contained in the federal offense. The only difference is that that the state offense does not require for the events to have been committed in the course of interstate or international commerce. But the truth is that upon proving the federal offense, each one of the elements of the state offense is proven as well. In other words, the state offense is a lesser offense included in the federal offense. Therefore, the constitutional clause of double jeopardy provided by the Fifth Amendment to the Constitution of the United States is triggered.

The rest of the offenses charged at the state level are actually different and separate offenses. Article 5.04 of the Puerto Rico Weapons Act, *supra*, typifies the offense of [illegally] carrying and transporting weapons, and the petitioners were not prosecuted at the federal level for a similar offense. The same is true of the violations of Article 5.07 of the Puerto Rico Weapons Act, *supra*, and Article 5.10 of the Puerto Rico Weapons Act, *supra*. The prosecution in federal court was limited to violations for selling weapons and ammunition without a license.

This means that the constitutional issue is limited to the indictments charging Mr. Sánchez del Valle and Mr. Gómez Vázquez with the illegal sale of weapons and ammunition.

III

It is a basic principle of law that the Constitution of the United States established a system of dual sovereignty between the states and the federal government. *Gregory v. Ashcroft*, 501 U.S. 452 (1997). Prior to the adoption of the Constitution, the states came together under the Articles of Confederation. *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 803 (1995). In that system, the states retained the larger part of their sovereignty as if they were independent nations united only by treaties. *Id.* Following the Constitutional Convention, the Founding Fathers adopted a plan, not to amend the Articles of Confederation, but to create a new national government with its own government branches. *Id.* In adopting this new system, they conceived a uniform national system and rejected the idea that the United States was a group of independent nations. *Id.* To the contrary, they created a system in which there was a direct link between the people of the United States and the new national government. *Id.* ("In adopting that plan, the Framers envisioned a uniform national system, rejecting the notion that the Nation was a collection of States, and instead creating a direct link between the National Government and the people of the United States."). Thus, the citizens of a state are part of the people of that sovereign state and, simultaneously, are part of the People of the United States.

That new system did not contemplate a full consolidation of the states, but rather a partial

consolidation whereby the state governments would clearly retain all of the attributes of sovereignty that they already possessed and that were not delegated exclusively to the federal government. *Id*. at 801 ("[T]he Constitutional Convention did not contemplate "[a]n entire consolidation of the States into one complete national sovereignty," but only a partial consolidation in which "the State governments would clearly retain all the rights of sovereignty which they before had, and which were not, but that act, exclusively delegated to the United States.").

Thus, in our system of government, the states retain a substantial sovereign authority within the constitutional system. In the words of James Madison:

> The powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite …. The powers reserved to the several States will extend to all the objects which, in the ordinary course of affairs, concern the lives, liberties, and properties of the people, and the internal order, improvement, and prosperity of the State. The Federalist No. 45, pp. 292-293 (C. Rossiter ed. 1961) (cited in *Gregory v. Ashcroft, supra*, at 458).

Although at the time of the creation of this new system there were only 13 states, the same concepts applied to all of the states that subsequently became part of the Union. As summarized by the U.S. Supreme Court in one of the most important cases of American constitutional law, *M'Culloch v. State*, 17 U.S. 316, 410 (1819):

> In America, the powers of sovereignty are divided between the government of the Union, and those of the states. They are each sovereign, with respect to the objects committed to it, and neither sovereign, with respect to the objects committed to the other. **We cannot comprehend that train of reasoning, which would maintain, that the extent of power granted by the people is to be ascertained, not by the nature and terms of the grant, but by its date**. Some state constitutions were formed before, some since that of the United States. We cannot believe, that their relation to each other is in any degree dependent upon this circumstance. Their respective powers must, we think, be precisely the same, as if they had been formed at the same time. (emphasis added)

This federal system was not a mere whim of the Founding Fathers, but rather a system conceived so that, through the balance of power between the

federal government and the state governments, the most basic liberties would be protected. *Atascadero State Hospital v. Scanlon*, 473 U.S. 234, 242 (1985). Additionally, this system promotes decentralized governments that are more attuned to the diverse needs of a heterogeneous society, increases opportunity for the people to get involved in the democratic process, allows for greater innovation and experimentations in the government, and makes the governments more responsive because they will have to compete for a mobile population. *See* McConnell, *Federalism: Evaluating the Founders' Design*, 54 U. Chi. L. Rev. 1484, 1491-1511 (1987); Merritt, *The Guarantee Clause and State Autonomy: Federalism for a Third Century*, 88 Colum. L. Rev. 1, 3-10 (1988).

The spheres of action of those two entities often create friction between what each of them can or cannot do. *Gregory v. Ashcroft, supra*, at 461. In order to address certain concerns that could arise within the criminal justice systems coexisting in the United States, the U.S. Supreme Court created the doctrine of dual sovereignty.

A. The doctrine of dual sovereignty

The doctrine of dual sovereignty is an exception to the application of the protection against double jeopardy. Under that doctrine, if two separate sovereign entities criminally prosecute a person for the same offense, the constitutional protection against double jeopardy is not triggered. Hollander, Bergman and Stephenson, *Wharton's Criminal Procedure*, 13th ed., New York, Lawyers Cooperative, 2010, Vol. 3 § 13:12 ("The Fifth Amendment's Double

Jeopardy Clause is not violated by multiple prosecutions for the same offense when those prosecutions are undertaken by separate sovereigns.").

The U.S. Supreme Court applied the doctrine of dual sovereignty for the first time in *United States v. Lanza*, 260 U.S. 377 (1922).[3] In that case, certain people were charged in federal court with manufacturing, transporting and possessing intoxicating liquors in violation of the National Prohibition Act. The defendants argued that a state court in Washington had sentenced them for the same offense for which they were being prosecuted in federal court, and they argued that this constituted double jeopardy. The federal lower court accepted the arguments and dismissed the charges. The Supreme Court eventually reversed that decision

[3] The controversy was not new; although it had not been resolved definitively, it had been recognized in previous cases. *See, e.g., Moore v. Illinois*, 55 U.S. 13, 20 (1852) ("An offence, in its legal signification, means the transgression of a law… Every citizen of the United States is also a citizen of a State or territory. He may be said to owe allegiance to two sovereigns, and may be liable to punishment for an infraction of the laws of either. The same act may be an offence or transgression of the laws of both… That either or both may (if they see fit) punish such an offender, cannot be doubted. Yet it cannot be truly averred that the offender has been twice punished for the same offence; but only that by one act he has committed two offences, for each of which he is justly punishable."). *See also Cross v. North Carolina*, 132 U.S. 131 (1889); *United States v. Marygold*, 50 U.S. 257 (1850); *Fox v. Ohio*, 46 U.S. 410 (1850).

and declared that they were two actions by two different sovereigns:

> We have here two sovereignties, **deriving power from different sources**, capable of dealing with the same subject-matter within the same territory. Each may, without interference by the other, enact laws to secure prohibition, with the limitation that no legislation can give validity to acts prohibited by the amendment. Each government in determining what shall be an offense against its peace and dignity **is exercising its own sovereignty, not that of the other**. *Id.* at 382 (emphasis added).

It concluded that an action defined as an offense at the federal and state levels is an offense against the peace and dignity of both sovereigns and can be punishable by federal court or by the state court, or by both. The defendants committed two different offenses in a single act; one against the peace and dignity of the State of Washington and another against the United States. That did not constitute double jeopardy. *Id.* at 382.[4]

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[4] The English-language text reads: "It follows that an act denounced as a crime by both national state sovereignties is an offense against the peace and dignity of both and may be punished by each …. The defendants thus committed two different offenses by the same act, and a conviction by a court of

Later, the U.S. Supreme Court reaffirmed the doctrine of dual sovereignty in two cases decided on the same day: *Bartkus v. Illinois*, 359 U.S. 121 (1959) and *Abbate v. United States*, 359 U.S. 187 (1959). In the first, it was ruled that acquittal in federal court did not prevent a second criminal prosecution for the same offenses in state court.[5] *Wharton's Criminal Procedure, op. cit.*, Sec. 13:12. On the other hand, in *Abbate v. United States, supra*, the U.S. Supreme Court faced the opposite situation and held that the doctrine of dual sovereignty allows for a person to be indicted in federal court, even if he or she has been convicted in state court. *See* LaFave, Israel, King and Kerr, *Criminal Procedure*, 3d ed., Minnesota, Ed. West Publishing Co., 2007, Vol. 3, Sec. 25.5 (a).

Washington of the offense against that state is not a conviction of the different offense against the United States, and so is not double jeopardy."

[5] The court invoked the due process clause of the Fourteenth Amendment, because at that time the protection against double jeopardy provided by the Fifth Amendment did not apply to the States. *Palko v. Connecticut*, 302 U.S. 319 (1937). That is why a large part of the discussion in that case is centered on whether the alleged act infringed the due process of law ("With this body of precedent as irrefutable evidence that state and federal courts have for years refused to bar a second trial even though there had been a prior trial by another government for a similar offense, it would be disregard of a long, unbroken, unquestioned course of impressive adjudication for the Court now to rule that due process compels such a bar."). *Bartkus v. Illinois, supra*, at 136. In *Benton v. Maryland*, 395 U.S. 784 (1969), the protection against double jeopardy provided by the Fifth Amendment was finally applied to the states.

The Supreme Court expressly declined to overrule *United States v. Lanza, supra*, and stated the following: "[I]f the States are free to prosecute criminal acts violating their laws, and the resultant state prosecutions bar federal prosecutions based on the same acts, federal law enforcement must necessarily be hindered." *Abbate v. United States, supra*, at 671.

In *United States v. Wheeler*, 435 U.S. 313 (1978), the U.S. Supreme Court explained in detail the foundations of the doctrine of dual sovereignty. In that case, the Navajo tribe accused one of its members, in a tribal court, of disorderly conduct. The tribal court sentenced him. One year later, a federal grand jury in the State of Arizona indicted him for related acts. The defendant alleged that the prosecution in the tribal court prevented the second prosecution in federal court. The federal court dismissed the charges. The Supreme Court ruled that Native-American tribes, for purposes of the double jeopardy clause, were separate sovereigns from the United States, so that the person could also be charged in federal court.

The Supreme Court framed the dispute as follows: "the controlling question in this case is the source of this power to punish tribal offenders." *Id.* at 322. Thus, the Supreme Court assessed whether that power to punish the offenders arose from any inherent sovereignty or if it was the exercise of the

sovereignty of the federal government by delegation of Congress.[6] *Id.*

The Court held that Native-American tribes in the United States have an original inherent sovereignty that existed prior to the arrival of the Europeans to the New World. *Id.* Upon incorporation to the territory of the United States, the tribes were stripped of certain attributes of their original sovereignty, but retained others. *Id.* The authority to punish offenders was one of those attributes that the tribes did not surrender to the United States Congress. *Id.* For that reason, the Supreme Court concluded that "when the Navajo Tribe exercises this power, it does so as part of the sovereignty retained and not as an arm of the Federal Government." *Id.* at 328. *See also* D.S. Rudstein, *Double Jeopardy: A Reference Guide to the United States Constitution*, Connecticut, Praeger Publishers, 2004, at 87.

That case shows that, for the U.S. Supreme Court, what is crucial is not whether the entity has its own government or the power to enact a criminal code or the authority to charge people for violations of its laws. Rather, the determining factor for the doctrine of dual sovereignty to apply, is the ultimate source of the power under which the indictments were undertaken ("[T]he ultimate source of the

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[6] ("Is it a part of inherent tribal sovereignty, or an aspect of the sovereignty of the Federal Government which has been delegated to the tribes by Congress?"). *United States v. Wheeler, supra*, at 322.

power under which the respective prosecutions were undertaken."). *United States v. Wheeler, supra*, at 320 (emphasis added). If it is a power delegated by Congress, the doctrine of dual sovereignty does not apply.

That is precisely the analysis that the U.S. Supreme Court has used repeatedly to resolve this type of case. The use of the word "sovereignty" in other contexts and for other purposes is irrelevant in solving the controversy at bar. For a more comprehensive study, *see* Z.S. Price, *Dividing Sovereignty in Tribal and Territorial Criminal Jurisdiction*, 113 Colum. L. Rev. 657 (2013).

Likewise, in *Heath v. Alabama*, 474 U.S. 82 (1985), the U.S. Supreme Court applied the doctrine of dual sovereignty to criminal prosecutions for the same offense in two different states. *Wharton's Criminal Procedure, op. cit.* § 13:12. In that case, the Court upheld an indictment by a grand jury of the State of Alabama against a person who had been convicted in Georgia based upon the same facts. The Court reaffirmed the analysis in *United States v. Wheeler, supra*, at 320 and held that in applying the dual sovereignty doctrine, the crucial determination is whether the two entities draw their authority to punish the offender from distinct sources of power. *Heath v. Alabama, supra*, at 88 ("In applying the dual sovereignty doctrine, then, the crucial determination is whether […] **the two entities draw their authority to punish the offender from distinct sources of power."**) (emphasis

added). *See also Wharton's Criminal Procedure, op. cit.* § 13:12.

The Supreme Court held that the states are separate sovereigns from the federal government, given that their powers to undertake criminal prosecutions derive from separate and independent sources of authority originally belonging to them before admission to the Union and preserved to them by the Tenth Amendment. *Heath v. Alabama, supra*, at 89 ("Their powers to undertake criminal prosecutions derive from separate and independent sources of power and authority originally belonging to them before admission to the Union and preserved to them by the Tenth Amendment.").

In *United States v. Lara*, 541 U.S. 193 (2004), the U.S. Supreme Court again addressed a controversy related to Native-American tribes. In this case, a tribe judged a Native-American that, contrary to *United States v. Wheeler, supra*, was not one of its members. Subsequently, a federal court prosecuted him for the same offense. In order to determine whether the second prosecution was in violation of the double jeopardy clause, the Supreme Court stated that the main question was whether the source of the power to punish someone who was not a member of the tribe derived from inherent tribal sovereignty or whether it was a power delegated by the federal government. *Id.* at 199 ("What is 'the source of [the] power' to punish nonmember Indian offenders, 'inherent tribal sovereignty' or delegated federal authority?") (emphasis in original).

The problem in that case was that the Supreme Court had ruled in *Duro v. Reina*, 495 U.S. 676, 691-92 (1990), that tribes did not possess sovereign authority to criminally prosecute Indian persons also were not members of the prosecuting tribe. Nevertheless, in reaction to the ruling in *Duro v. Reina, supra*, Congress passed new legislation recognizing and asserting the inherent power of Indian tribes to prosecute Native American people regardless of whether they belonged to the same tribe or not. *See* 25 U.S.C. § 1301 ("means the inherent power of Indian tribes, hereby recognized and affirmed, to exercise… criminal jurisdiction over all Indians.").

The Supreme Court ruled that in allowing the aforementioned to the tribes, Congress did not delegate authority belonging to the federal government, but it rather recognized authority that the tribes possessed as sovereigns. *United States v. Lara, supra*, at 209 ("[T]he Constitution authorizes Congress to permit tribes, as an exercise of their inherent tribal authority, to prosecute nonmember Indians."). *See also United States v. Wheeler, supra.* In other words, Congress, through legislation, can recognize additional attributes appurtenant to an entity that already possesses prior sovereignty. *United States v. Lara, supra*, at 207 ("Congress has enacted a new statute, relaxing restrictions on the bounds of the inherent tribal authority that the United States recognizes."). This case shows that the fact that Congress may add, remove or modify said attributes is not relevant in determining what is the tribe's ultimate source of power. For that reason, the

Court applied the doctrine of dual sovereignty and found that there had been no violation of the right against double jeopardy.

B. Situations in which the doctrine of dual sovereignty has not been applied

The U.S. Supreme Court has refused to apply the doctrine of dual sovereignty in certain cases where the different entities carry out multiple prosecutions for the same offenses. In these cases, the U.S. Supreme Court has ruled that although the entities are nominally different, they derive their authority to prosecute from the same source. *Heath v. Alabaman, supra*, at 90 ("In those instances where the Court has found the dual sovereignty doctrine inapplicable, it has done so because the two prosecuting entities did not derive their powers to prosecute from independent sources of authority.").

In *Grafton v. United States*, 206 U.S. 333 (1907), the Court found that a territory of the United States is not a sovereign for purposes of the clause against double jeopardy. It reasoned that the government of a territory owes its existence wholly to the federal government, and its tribunals exert all of their powers by authority of the United States. *Id.* at 354 ("[O]wes its existence wholly to the United States, and its judicial tribunals exert all their powers by authority of the United States."). In other words, a territorial court and a federal court exercise the authority of the same sovereign: the United States. *Id.* at 355 ("the two tribunals that tried the accused exert all their powers under and by authority of the same government,—that of the United States."). *See*

also Rudstein, *op. cit.*, at 88. For that reason, successive prosecutions between a federal court and a court of a territory constitute double jeopardy. *See also United States v. Wheeler, supra*, at 321 ("City and State, or **Territory and Nation, are not two separate sovereigns** […] but one alone. And the "dual sovereignty" concept […] does not permit a single sovereign to impose multiple punishments for a single offense merely by the expedient of establishing multiple political subdivisions with the power to punish crimes.") (emphasis added).

Of particular importance to us, in *Puerto Rico v. Shell Co.*, 302 U.S. 253 (1937), the U.S. Supreme Court applied to Puerto Rico the rule established in *Grafton v. United States, supra*. Specifically, the U.S. Supreme Court stated that Puerto Rico, being a territory of the United States, is not a sovereign for purposes of the double jeopardy clause. In that case, a Puerto Rico prosecutor accused a company of violating local antitrust laws. The defendants claimed that the local laws were null and void because Congress had preempted them with the Sherman Act. Initially, we ruled in favor of the defendants. *See Pueblo v. The Shell Co. Ltd.*, 49 P.R. Dec. 226 (1935). However, the U.S. Supreme Court reversed our ruling and concluded that the antitrust laws passed by the Puerto Rico legislature were valid.

The controversy regarding the double jeopardy clause arose from allegations by the defendant company. The company, which had not been previously prosecuted, claimed that if the Court

upheld the validity of the state antitrust law, it would be placing the defendant company at risk of being punished twice for the same offenses, that is, first in the Puerto Rico courts under local law and a second time in federal court under the federal antitrust law. The U.S. Supreme Court concluded that such risk was not present, inasmuch as the territory's power to legislate was derived from the same source as that of the United States. Thus, it stated as follows:

> It likewise is clear that the legislative duplication gives rise to no danger of a second prosecution and conviction, or of double punishment for the same offense. The risk of double jeopardy does not exist. Both the territorial and federal laws and the courts, whether exercising federal or local jurisdiction, are creations emanating from the same sovereignty. Prosecution under one of the laws in the appropriate court, necessarily, will bar a prosecution under the other law in another court. *Puerto Rico v. Shell Co., supra*, at 264 (citations omitted).

The Supreme Court has also refused to extend the doctrine of dual sovereignty to municipalities. *Waller v. Florida*, 397 U.S. 387 (1970). *See also* LaFave, Israel, King and Kerr, *op. cit.*, Vol. 3, Sec. 25.5 (c). Municipalities are not sovereign entities; rather, they are subordinate entities of the government, created by the state to assist in its

government functions. *Waller v. Florida, supra*, at 392, citing *Reynolds v. Sims*, 377 U.S. 533, 575 (1964).[7] The Court analyzed the controversy in the following way:

> [T]he apt analogy to the relationship between municipal and state governments is to be found in the relationship between the government of a Territory and the Government of the United States. **The legal consequence of that relationship was settled in *Grafton v. United States*, ... [*supra*] where this Court held that a prosecution in a court of the United States is a bar to a subsequent prosecution in a territorial court,** since both are arms of the same sovereign. *Waller v. Florida, supra*, at 393 (emphasis added).

In *Government of the Virgin Islands v. Dowling*, 633 F.2d 660, 667 (3rd Cir. 1980), *cert. denied*, 449 U.S. 960 (1980), the Court of Appeals for the Third Circuit asserted that the Territory of the U.S. Virgin Islands and the United States Government constitute a single sovereignty for purposes of the clause against double jeopardy. *Id.* at 669. In

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[7] It is true that some have advocated for a more practical focus instead of the "sovereignty" criterion. *See, e.g., Price, supra.* But the truth is that the U.S. Supreme Court has never abandoned the ultimate source of power criterion.

keeping with that statement, the court of appeals concluded that the accused could not be declared guilty of the same offense both under the federal jurisdiction and under the jurisdiction of the Virgin Islands. *See Blockburger v. United States, supra*, at 304. Specifically, it was said that it cannot be concluded that the U.S. Virgin Islands have a sovereignty separate and independent from that of the United States Government. *See also Government of Virgin Islands v. Brathwaite*, 782 F.2d 399, 406 (3rd Cir. 1986). Note that this is nothing more that the application of the rule already established in *Grafton v. United States, supra*, and reaffirmed in *Puerto Rico v. Shell Co., supra.*

The case of the Commonwealth of the Northern Mariana Islands, although it has not been resolved definitively by a court with jurisdiction, seems to be the same. The federal law that regulates its relationship to the federal government establishes that the Mariana Islands are an unincorporated territory of the United States. *Saipan Stevedore Co. Inc. v. Director, Office of Workers' Compensation Programs*, 133 F.3d 717 (9th Cir. 1998) ("The Covenant to Establish a Commonwealth of the Northern Mariana Islands in Political Union with the United States of America ("Covenant"), ratified by Congress by joint resolution, established the Commonwealth as a unincorporated territory of the United States."). In other words, the government of the Northern Mariana Islands, in accordance with the doctrine of dual sovereignty outlined by the

Supreme Court, is not a separate sovereign from the federal government.[8] Guam's case seems to be similar. *See United States v. Carriage*, 117 F.3d 1426 (9th Cir. 1997) (No. 96-10427) (unpublished) ("The government concedes that Guam and the federal government are a single sovereign.").[9]

Regarding Washington D.C., other courts have found that, in accordance with the constitutional clause prohibiting double jeopardy, an individual cannot be punished for the same offense typified both

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[8] But see the unpublished judgment of the Court for the District of the Northern Mariana Islands, *United States ex rel. Richards v. De Leon Guerrero*, Misc. No. 92000001 ((D. N. Mar. I. 1992), *aff'd*, 4 F.3d 749 (9th Cir. 1993) ("For purposes of criminal double jeopardy, the federal courts, state [and Commonwealth of the Northern Mariana Islands] courts, and courts martial are considered courts of separate 'sovereigns'."). This unpublished judgment is not in keeping with the ruling of the U.S. Supreme Court in *Grafton v. United States, supra*, and *Puerto Rico v. Shell Co., supra.* That is why we are not persuaded by the cited dictum.

[9] *See* 48 U.S.C. § 1704 ("A judgment of conviction or acquittal on the merits under the laws of Guam, the Virgin Islands or American Samoa shall be a bar to any prosecution under the criminal laws of the United States for the same act or acts, and a judgment of conviction or acquittal on the merits under the laws of the United States shall be a bar to any prosecution under the laws of Guam, the Virgin Islands, or American Samoa for the same act or acts.") The fact that Puerto Rico is not mentioned in that law in no way means that, as a territory, the doctrine of dual sovereignty does not apply to it. The doctrine of dual sovereignty is a constitutional matter over which the pronouncements of the U.S. Supreme Court have precedence.

in a federal law and in the Penal Code of the District of Columbia, because both codes are approved by Congress. *See United States v. Sumler*, 136 F.3d 188, 191 (D.C. Cir. 1998); *United States v. Weathers*, 186 F.3d 948, 951 n.3 (D.C. Cir. 1999).

IV

A. The doctrine of dual sovereignty and the Commonwealth of Puerto Rico, according to federal courts

In *United States v. López Andino*, 831 F.2d 1164 (1st Cir. 1987), the First Circuit Court of Appeals faced the controversy of whether the Commonwealth of Puerto Rico was a sovereign for purposes of the doctrine of dual sovereignty. There, Mr. Luis López Andino and Mr. Israel Méndez Santiago were convicted of several offenses in the United States District Court for the District of Puerto Rico. As relevant here, the convicted defendants argued that their convictions in said federal forum were invalid because they had already been prosecuted for the same offenses under Puerto Rico law. *United States v. Lopez Andino, supra*, at 1167. For that reason, they alleged that the federal constitutional clause barring double jeopardy in criminal proceedings applied. U.S. Const. amend. V, *supra*.

The Court of Appeals for the First Circuit concluded that the Puerto Rico [Federal] Relations Act and the creation of the Constitution of the Commonwealth of Puerto Rico altered the relationship between Puerto Rico and the United States. *United States v. López Andino, supra*, at

1168. To said court, Puerto Rico became a sovereign for purposes of the dual sovereignty doctrine. *Id.*

Judge Torruella concurred in the result, believing that the offenses charged in the Puerto Rico courts **were different** than the offenses charged in the Federal District Court. *Id.* at 1172-77. That made the clause against double jeopardy inapplicable in the criminal sphere. However, Judge Torruella opined that Puerto Rico currently continues to be a territory of the United States and, therefore, the doctrine of dual sovereignty does not apply to it.

The Court of Appeals for the Eleventh Circuit faced the same controversy in *United States v. Sánchez*, 992 F.2d 1143 (11th Cir. 1993), *cert. denied*, 510 U.S. 1110 (1994). Contrary to the First Circuit, the Court of Appeals for the Eleventh Circuit concluded that Puerto Rico is a territory of the United States for purposes of Art. IV, Sec. 3 of the Constitution of the United States, P.R. Laws Ann. Vol. I, and not a separate sovereign. In that case, Mr. Rafael Sánchez and Mr. Luis Sánchez were prosecuted in a Federal District Court in Florida. The defendants alleged that they had already been prosecuted for the same offenses in the Puerto Rico General Court of Justice.

In an exercise of intellectual honesty, the Court of Appeals cited the ruling in *Puerto Rico v. Shell Co., supra*, approvingly, and concluded that that was the precedent that should be followed. It immediately discussed why the establishment of the Constitution of the Commonwealth of Puerto Rico did not alter the ruling in *Puerto Rico v. Shell Co., supra.* In

particular, the court held that in *United States v. Wheeler, supra*, decided 25 years after the establishment of the Commonwealth of Puerto Rico, the U.S. Supreme Court used *Puerto Rico v. Shell Co., supra*, to distinguish between the dependent status of a territory and the separate and sovereign status of the Native-American tribes. It also held that the development of the Commonwealth of Puerto Rico had not granted our courts a source of punitive authority derived from an inherent sovereignty. *United States v. Sánchez, supra*, at 1152.

After that study, the Court of Appeals for the Eleventh Circuit analyzed the offenses charged and determined that the clause barring double jeopardy prevented prosecution for one of the offenses charged (murder for hire), 18 U.S.C. § 1958, because the defendants had been prosecuted for an identical offense in the Puerto Rico courts. *United States v. Sánchez, supra*, at 1159.

B. The dual sovereignty controversy before the Puerto Rico Supreme Court

Finally, in *Pueblo v. Castro García, supra*, this Court adopted the view of the court of Appeals for the First Circuit and held that the Commonwealth of Puerto Rico was a sovereign for purposes of the double jeopardy clause. *See* J. J. Álvarez González, *Derecho Constitucional de Puerto Rico y Relaciones Constitucionales con los Estados Unidos*, Bogotá, Editorial Temis S.A., 2009, at 536-537. We specifically stated that "the power of the Commonwealth of Puerto Rico to create and enforce

offenses emanates, not only from Congress, but also from the consent of the People and, therefore, from itself, so the doctrine of dual sovereignty applies to it." *Id.* at 779-81. Associate Judge Mr. Rebollo López issued a dissenting opinion in which, in summary, he argued that Puerto Rico is not a sovereign, but rather, under the constitutional scheme of the United States, it is a territory subject to the legislative power of Congress, as established by the territorial clause of Art. IV, Sec. 3 of the United States Constitution.

This Court relied on two main premises in conclude that the doctrine of dual sovereignty applies to the Commonwealth of Puerto Rico. First, after studying all of the caselaw on the matter, the court applied a reasoning that the U.S. Supreme Court has never used. On that occasion, we reiterated once and again that the Commonwealth of Puerto Rico enjoys a degree of sovereignty equal to that of the states of the Union and, therefore, the doctrine of dual sovereignty should be applied to it. *See, e.g., Pueblo v. Castro García, supra*, at 765 ("Puerto Rico obtained a similar sovereignty to that of the states of the Union in extremely basic aspects."). *See also id.* at 769-71, 773, 775-76.

The second premise that we used in *Pueblo v. Castro García, supra*, is that after the enactment of the Constitution of the Commonwealth of Puerto Rico in 1952, "the political power of the island emanates from the consent and will of the People of Puerto Rico." *Id.* at 765. For that reason, it was concluded that, after 1952, Puerto Rico is in a legal

and political situation very different from the situation when the U.S. Supreme Court decided the case of *Puerto Rico v. Shell Co., supra*. *See Pueblo v. Castro García, supra*, at 778-79.

The petitioners in the present case ask us to overrule *Pueblo v. Castro García, supra*, and hold the doctrine of dual sovereignty inapplicable to Puerto Rico. After analyzing the controversy, we conclude that the petitioners are right. The grounds used by this Court on that occasion are wrong from a strictly legal point of view. It is now our duty to analyze whether in 1952 Puerto Rico acquired an original sovereignty or an independent sovereignty from that of Congress—a sovereignty granted, not delegated—that makes the 1937 ruling in *Puerto Rico v. Shell Co., supra*, inapplicable today.

V

A. Puerto Rico and the territorial clause of the Constitution of the United States

Contrary to Native-American tribes or to the states of the Union, Puerto Rico has never exercised an original or primary sovereignty. In order to end the Spanish-American War of 1898, through the Treaty of Paris, Spain ceded the island of Puerto Rico to the United States, as well as others that were under its sovereignty in the West Indies and the Pacific. Art. II, Treaty of Paris, P.R. Laws Ann., Vol. 1. *See also* J. Trías Monge, *Historia Constitucional de Puerto Rico,* Rio Piedras, Ed. UPR, 1980, Vol. I, at 144-48. It was specified that "the civil rights and the political status of the inhabitants of …" Puerto Rico

would be determined by the United States Congress. Art. IX of the Treaty of Paris, *supra*.

In 1900, after two years of military government, a civil government was established in Puerto Rico by means of the Organic Charter of April 12, 1900, known as the Foraker Act. P.R. Laws Ann., Vol. 1. This congressional statute provided for a governor appointed by the President of the United States, a bicameral legislature, a supreme court and other tax-related matters.

The controversy regarding the constitutional validity of the acquisition of Puerto Rico and other possessions quickly reached the United States Supreme Court. J.R. Torruella, *The Insular Cases: The Establishment of a Regime of Political Apartheid*, 77 Rev. Jur. UPR 1 (2007). On the same day, May 27, 1901, the Court decided several cases involving different controversies regarding the possession and administration of the new territories. *See The Diamond Rings*, 183 U.S. 176 (1901); *Huus v. New York & Porto Rico S.S. Co.*, 182 U.S. 392 (1901); *Downes v. Bidwell*, 182 U.S. 244 (1901); *Armstrong v. United States*, 182 U.S. 243 (1901); *Dooley v. United States*, 182 U.S. 221 (1901); *Goetze v. United States*, 182 U.S. 221 (1901); *Dooley v. United States*, 183 U.S. 151 (1901); *De Lima v. Bidwell*, 182 U.S. 1 (1901). Of these cases, which later became known as the Insular Cases, the most important one is *Downes v. Bidwell, supra*. *See* Alvarez González, *op. cit.*, at 388.

In *Downes v. Bidwell, supra*, the constitutional validity of one of the sections of the Foraker Act

establishing an excise tax barrier between United States and Puerto Rico commerce was questioned. Alvarez González, *op. cit.*, at 388. The plaintiffs alleged that the tax breached the Uniformity Clause of the Constitution. C. Duffy Burnett & A. I. Cepeda Derieux, *Los casos insulares: Doctrina desanexionista,* 78 Rev. Jur. UPR 661, 667 (2009). That clause states: "all Duties, Imposts and Excises shall be uniform throughout the United States." U.S. Const. Art. I § 8, P.R. Laws Ann., Vol. I. The Supreme Court, without being able to come up with an opinion endorsed by a majority of the justices, ruled in favor of the validity of the tax. *Downes v. Bidwell, supra*, at 287.

The Court concluded that Puerto Rico is a territory that belongs to the United States but is not part of the phrase "United States" for purposes of Art. 1, Sec. 8 of the Constitution of the United States. *Id. See also* E. Rivera Ramos, *The Legal Construction of Identity: The Judicial and Social Legacy of American Colonialism in Puerto Rico*, Baltimore, American Psychological Association, 2001, at 80. According to Justice Brown, the power to acquire territories included the power to govern them, to establish the terms under which their inhabitants would be received and what their status would be. Those plenary powers over the territories would be subject to fundamental limitations in favor of personal rights. *Downes v. Bidwell, supra*, at 780.

Justice White issued a concurring opinion and outlined the theory that would later become the definitive legal rule for territories: the doctrine of

incorporation. J.R. Torruella, *The Supreme Court and Puerto Rico: The Doctrine of Separate & Unequal*, Río Piedras, Ed. UPR, 1985, at 53. Justice White agreed that Congress has plenary powers over the territories and that those powers are subject to certain basic principles that, although not expressed in the Constitution, could not be transgressed. *Downes v. Bidwell, supra*, at 289-90.[10]

However, Justice White proposed that when a constitutional clause is invoked, the fundamental question is not whether the Constitution operates *ex proprio vigore*, but whether the invoked clause is applicable to that territory in particular.[11] *Id.* at

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[10] The original text reads: "The Constitution has undoubtedly conferred on Congress the right to create such municipal organizations as it may deem best for all the territories of the United States, whether they have been incorporated or not, to give to the inhabitants as respects the local governments such degree of representation as may be conducive to the public well-being, to deprive such territory of representative government if it is considered just to do so, and to change such local governments at discretion." *Id.* at 289-90. Justice White also stated: "While, therefore, there is no express or implied limitation on Congress in exercising its power to create local governments for any and all of the territories, by which that body is restrained from the widest latitude of discretion, it does not follow that there may not be inherent, although unexpressed, principles which are the basis of all free government which cannot be with impunity transcended." *Id.* at 290-91.

[11] "In the case of the territories, as in every other instance, when a provision of the Constitution is invoked, the question which arises is, not whether the Constitution is operative, for

292. The applicability of the clauses would depend, then, on the particular status of the territory and its relationship with the United States.[12]

Justice White stated that in order to determine whether the uniformity clause applied to Puerto Rico, it must be determined whether Puerto Rico had been incorporated to the United States and had become an integral part of the same, as stated in the Constitution. He concluded that, based on the terms of the Treaty of Paris, Puerto Rico had not been incorporated to the United States. Therefore, only those constitutional provisions that were considered basic or fundamental applied to Puerto Rico.

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that is self-evident, but whether the provision relied on is applicable." *Id.* at 292.

[12] *See* Duffy Burnett & Cepeda Derieux, *supra*, at 667-68 ("According to Judge White, some of the territories subject to the sovereignty of the United States had been incorporated into the nation and were already, at that time, an integral part of the United States. Other territories had been annexed to the United States but had not been formally incorporated; they simply belonged to the United States or, in White's own words, were 'appurtenant thereto as possessions'. White described those territories as 'foreign to the United States in a domestic sense'. Eventually, those territories acquired the not-so-elegant title of "unincorporated territories.") However, Justice White clarified that, to all other nations, as a matter of international law, Puerto Rico is not a foreign country, but is part of the United States ("in an international sense Porto Rico was not a foreign country, since it was subject to the sovereignty of and was owned by the United States."). *Downes v. Bidwell, supra*, at 341.

From 1903 to 1914, the U.S. Supreme Court decided another series of cases dealing with different matters of the territories. *See Ocampo v. United States*, 234 U.S. 91 (1914); *Ochoa v. Hernández*, 230 U.S. 139 (1913); *Dowdell v. United States*, 221 U.S. 325 (1911); *Kopel v. Bingham*, 211 U.S. 468 (1909); *Kent v. Porto Rico*, 207 U.S. 113 (1907); *Trono v. United States*, 199 U.S. 521 (1905); *Rasmussen v. United States*, 197 U.S. 516 (1905); *Dorr v. United States*, 195 U.S. 158 (1904); *Kepner v. United States*, 195 U.S. 158 (1904); *González v. Williams*, 192 U.S. 1 (1904); *Hawaii v. Mankichi*, 190 U.S. 197 (1903). *See* Rivera Ramos, *op. cit.* at 75. During that period, a ruling was made in *Grafton v. United States, supra*, establishing the rule that was previously discussed, stating that a territory is not a sovereign for purposes of the constitutional clause against double jeopardy ("a territorial government is entirely the creation of Congress, 'and its judicial tribunals exert all their powers by authority of the United States'."). *See also United States v. Wheeler, supra*, at 322.

In 1917, the United States Congress enacted a new Organic Charter known as the Jones-Shafroth Act, 1 P.R. Laws Ann. See Trías Monge, *op. cit.*, Vol. II, at 88. The most important change brought about by said law was that it granted United States citizenship to Puerto Ricans. That forced the U.S. Supreme Court to determine whether the grant of American citizenship to Puerto Ricans was the equivalent of incorporating Puerto Rico.

In *Balzac v. Porto Rico*, 258 U.S. 298 (1922), a person was sentenced to nine months in prison for

making certain comments against the governor that were considered libelous. The defendant alleged that, under the Sixth Amendment to the U.S. Constitution, he had the right to a trial by jury. The Supreme Court rejected that argument.

The Supreme Court unanimously adopted Judge White's theory of territorial incorporation and stated that the right to trial by jury did not apply to those territories that had not been incorporated into the Union.[13] The Supreme Court then proceeded to analyze whether the Jones Act finally incorporated Puerto Rico. Its answer was no.

Among other things, it concluded that if Congress had intended to incorporate the territory it would have clearly stated its intention to do so and would not have left it up to mere inference. *Balzac v. Porto Rico, supra*, at 306 ("Had Congress intended to take the important step of changing the treaty status of Porto Rico by incorporating it into the Union, it is reasonable to suppose that it would have done so by the plain declaration, and would not have left it to mere inference.").

Many scholars on the subject summarize the doctrine on Puerto Rico in the following way: "The

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[13] In *Pueblo v. Santana Vélez*, 177 P.R. Dec. 61 (2009), we concluded, citing Professor Alvarez González, that notwithstanding the ruling in *Balzac*, " '[s]ince *Duncan v. Louisiana*, 391 U.S. 145 (1968), determined that [the right to trial by jury] is 'basic' and, as such, applicable to the states… it seems reasonable to conclude that said right applies to Puerto Rico under the doctrine of territorial incorporation.".

Constitution applies in its entirety within the United States (if said phrase is defined to include only the states of the Union, Washington D.C., and the incorporated territories), while in the unincorporated territories only the basic provisions of the Constitution apply." Duffy Burnett & Cepeda Derieux, *supra*, at 667-668.

Despite the criticism of its disdainful and contemptuous tone towards the inhabitants of the territories, and of the obsolescence of much of the holdings of the Insular Cases, the core part of the doctrine has continued to be used. *See, e.g., Boumediene v. Bush*, 553 U.S. 723, 759 (2008) ("the Court devised in the Insular Cases a doctrine that allowed it to use its power sparingly and where it would be most needed. This century-old doctrine informs our analysis in the present matter."); *United States v. Verdugo-Urquidez*, 494 U.S. 259, 268 (1990) ("The global view taken by the Court of Appeals of the application of the Constitution is also contrary to this Court's decisions in the Insular Cases, which held that not every constitutional provision applies to governmental activity even where the United States has sovereign power."). For a discussion about these last cases, *see* G.A. Gelpí, *Los casos insulares: Un estudio histórico comparativo de Puerto Rico, Hawái y las Islas Filipinas,* 45 Rev. Jur. U. Inter. P.R. 215, 223-224 (2011) ("In light of *Boumediene*, in the future, the Supreme Court will have to reexamine the doctrine of the Insular Cases with regards to its application to Puerto Rico and other territories of the U.S."); C. Saavedra Gutiérrez, *Incorporación de jure o incorporación de facto: Dos*

propuestas para erradicar fantasmas constitucionales, 80 Rev. Jur. UPR 967, 981 (2011) ("with respect to the territories, the doctrine of the insular cases has not emerged intact from the constant constitutional attacks that it suffered during the Twentieth century.").

B. The status of Puerto Rico after the enactment of the Constitution of the Commonwealth of Puerto Rico

After many years during which different sectors demanded greater autonomy for Puerto Rico over its internal affairs, on March 13, 1950, a bill was presented to Congress to enable the adoption of a constitution. Trías Monge, *op. cit.*, Vol. III, at 40. Said bill later became Public Law 600, 48 U.S.C. § 731b *et seq*. The legislative history clearly reveals that the adoption of that constitution did not represent a change in the territorial status of Puerto Rico.

During the hearings in Congress before the Committee on Public Lands of the House of Representatives, the then-Governor of Puerto Rico, Luis Muñoz Marín, stated the following:

> You know, of course, that if the people of Puerto Rico should go crazy, Congress can always get around and legislate again. But I am confident that the Puerto Ricans will not do that, and invite congressional legislation that would take back something that was given to the people of Puerto Rico as good United

> States citizens. A. Leibowitz, *The Commonwealth of Puerto Rico: Trying to Gain Dignity and Maintain Culture*, 17 Rev. Jur. U. Inter. P.R. 1, 23 (1982), citing *Puerto Rico Constitution: Hearings on H.R. 7674 and S. 3336 Before the House Comm. on Public Lands*, 81st Cong., 1st & 2nd Sess. 63 (1949-1950).

Antonio Fernós Isern, then-Resident Commissioner of Puerto Rico in Washington D.C., stated, in the same line, the following:

> As already pointed out, H.R. 7674 would not change the status of the island of Puerto Rico relative to the United States. It would not commit the United States for or against any specific future form of political formula for the people of Puerto Rico. It would not alter the powers of sovereignty acquired by the United States over Puerto Rico under the terms of the Treaty of Paris. Leibowitz, *supra*, 23. *See also Pueblo v. Castro García, supra*, at 790 (Dissenting opinion of Associate Judge Mr. Rebollo López).

Mr. Fernós Isern added:

> I would like to make two comments: One, the road to the courts would always be open to anybody who found that an amendment to the constitution

> went beyond the framework laid down by Congress; and, secondly, the authority of the Government of the United States, of the Congress, to legislate in case of need would always be there. Trías Monge, *op. cit.*, Vol. III, at 45.

The report by the Secretary of the Interior also established clearly that there would be no change in the relationship between the federal government and Puerto Rico. Thus, he affirmed that:

> It is important at the outset to avoid any misunderstanding as to the nature and general scope of the proposed legislation. Let me say that enactment of S. 3336 will in no way commit the Congress to the enactment of statehood legislation for Puerto Rico in the future. Nor will it in any way preclude a future determination by the Congress of Puerto Rico's ultimate political status. The bill merely authorizes the people of Puerto Rico to adopt their own constitution and to organize a local government which, under the terms of S. 3336, would be required to be republican in form and contain the fundamental civil guaranties of a bill of rights …. The bill under consideration would not change Puerto Rico's political, social, and economic relationship to the

> United States. Leibowitz, *supra*, at 24.

Each of the reports of the U.S. House of Representatives and the U.S. Senate on the bill endorsed the views of the Department of the Interior. Thus, the reports stated the following:

> The bill under consideration would not change Puerto Rico's fundamental political, social and economic relationship to the United States …. This bill does not commit the Congress, either expressly or by implication, to the enactment o statehood legislation for Puerto Rico in the future. Nor will it in any way preclude a future determination by Congress of Puerto Rico's ultimate political status. *Id.* at 24. *See also* Trías Monge, *op. cit.*, Vol. III, at 51-54.

Both houses of Congress approved the measure and on July 3, 1950, Public Law 600 took effect. Trías Monge, *op. cit.*, Vol. III, at 56. The statute established that the [Puerto Rico] Constitution was being enacted as a new agreement that, as we will see, did not mean that Puerto Rico would cease to be a territory of the United States. The statute repealed multiple aspects of the Organic Jones-Shafroth Act of 1917 and provided for those provisions that were still in force to be cited as the Puerto Rico Federal Relations Act. Trías Monge, *op. cit.*, Vol. III, at 38. In fact, the statute kept Art. 1 of the Organic Jones-Shafroth Act of 1917 in force,

which establishes that its provisions "will apply to the Island of Puerto Rico and the adjacent islands belonging to the United States, and to the waters of said islands." Federal Relations Act, Sec. 1, 1 P.R. Laws Ann., 48 U.S.C. § 731.

Public Law 600 had to be approved by a majority of the Puerto Rico voters, which happened. Trías Monge, *op. cit.*, Vol. III, at 62. The Constitutional Convention met from September 17 to February 6, 1952. *Id.* at 78. A majority of the delegates approved the draft of the Constitution on March 3, 1952 and it was submitted for approval by Congress. *Id.* at 270-73.

The report on the ratification of the Constitution by the Commission on the Interior and Insular Affairs of the House of Representatives again repeated that the new constitution did not alter the fundamental political, social and economic relationships between the United States and Puerto Rico. Trías Monge, *op. cit.*, Vol. III, at 278-79. The report by the Senate, although it did not include such a categorical provision, also alluded to the fact that the exercise of federal authority in Puerto Rico was not affected by the Puerto Rico Constitution. *Id.* at 300.[14]

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[14] The English-language text reads: "The enforcement of the Puerto Rican Federal Relations Act and the exercise of Federal Authority in Puerto Rico under its provisions are in no way impaired by the Constitution of Puerto Rico, and may not be affected by future amendments to that constitution, or by any law of Puerto Rico adopted under its constitution."

Congress approved the [Puerto Rico] Constitution, but required the removal of Section 20 of Art. II, which established certain economic rights, and requested clarification of another provision that required attendance to public elementary schools to the extent allowed by the possibilities of the State. *Id.* Additionally, it demanded the inclusion of a section that specified that any amendment to the Constitution should be in keeping with the federal Constitution, the Puerto Rico Federal Relations Act and Public Law 600. *Id.* President Truman signed the resolution whereby the Constitution was approved. Then, the Constitutional Convention did its part. *Id.* The Constitution of the Commonwealth of Puerto Rico took force and effect on July 25, 1952. *Id.*

C. Judicial interpretation of the relationship between the Commonwealth of Puerto Rico and the federal government

The legal analysis of the relationship between the United States and Puerto Rico after the creation of the Commonwealth did not reach the U.S. Supreme Court immediately. Álvarez González, *op. cit.*, at 473. It was not until 1970 that the Court expressed itself. *Id.* Since then, the Court has tried the matter several times. *See, e.g., Examining Bd. of Engineers, Architects and Surveyors v. Flores de Otero*, 426 U.S. 572 (1976); *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663 (1974). An analysis of these opinions confirms that, to the United States Supreme Court, the [Puerto Rico] Constitution did

not represent a change in the fundamental basis of the constitutional relations between Puerto Rico and the United States. The Supreme Court continued to treat Puerto Rico as a political entity subject to the territorial clause of the Constitution of the United States.

The first case that reached the U.S. Supreme Court was *Fornaris v. Ridge Tool Co.*, 400 U.S. 41 (1970). In that case, the U.S. Court of Appeals for the First Circuit concluded that a law enacted by the Puerto Rico legislature violated the Constitution of the United States, without specifying whether it violated the Fourteenth or the Fifth Amendments. The Supreme Court reversed and decided to remand the case to the Puerto Rico courts because there were no clear precedents by which to solve the dispute.

In *Calero-Toledo v. Pearson Yacht Leasing Co., supra*, a person questioned the constitutional validity of a seizure made by the Puerto Rico Police without notice. Although the Court ruled on the merits in favor of the validity of the seizure, it did not specify whether the constitutional provision applicable to Puerto Rico was the Fifth Amendment or the Fourteenth Amendment to the federal Constitution.[15] *Id.* at 669 n. 5.

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[15] "Regarding the Fifth Amendment, the problem consisted in that the requirements of the due process of law apply to the states by means of the Fourteenth Amendment, while applying to the federal government and its agencies, as well as to territories and possession, by means of the Fifth Amendment."

Most of the expressions regarding the status of Puerto Rico had to do with the jurisdiction of the Supreme Court to entertain the case. The controversy was whether Puerto Rico could be considered a state for purposes of a statute that created a three-judge court (Three-Judge Court Act), 28 U.S.C. § 2281. The Court concluded that, although it had not become a state of the Union, Puerto Rico could be considered a state for purposes of that law. *Id.* at 672, citing *Mora v. Mejías*, 206 F.2d 377 (1st Cir. 1953) ("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."). To reach that conclusion, the Court made reference, among other things, to one of the articles of Public Law 600 that states that "this Law is approved, as an agreement or compact, so that the People of Puerto Rico may organize a government based on a constitution adopted by them." *Id.* at 672 (citing *Mora v. Mejías, supra*) ("It is a political entity created 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.").

On certain occasions, an extremely broad scope has been given to that phrase that mentions a pact or covenant. *See, e.g., Ramírez de Ferrer v. Mari Brás*, 144 P.R. Dec. 141, 154-69 (1997). See, also, R. Hernández Colón, *Hacia la meta final: el nuevo*

J. Trías Monge, *El Estado Libre Asociado ante los tribunales, 1952-1954,* 64 Rev. Jur. UPR 1 (1995).

pacto-un paso adelante (J. Hernández Mayoral, P. Hernández Rivera, eds.), San Juan, Ed. Calle Sol, 2011, at 8. However, it is clear today that the only thing covered by that pact or covenant to which Public Law 600 referred was that if Puerto Ricans continued the process provided therein and approved the statute, it would take effect and Congress would approve a constitution for Puerto Rico drafted by the inhabitants of the territory. Congress so clarified when it followed a similar process for the establishment of the Commonwealth of the Northern Mariana Islands. *See* S. Rep. No. 94-596, at 1 (1976) ("The essential difference between the Covenant and the usual territorial relationship… is the provision in the Covenant that the Marianas constitution and government structure will be a product of a Marianas constitutional convention, as was the case with Puerto Rico, rather than through an organic act of the United States Congress.").

That process, additionally, is similar to the process that Congress has used with other territories since the early years of the Union.[16] E. Biber, *The*

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[16] Biber, *supra*, at 125-129 ("Admission of a territory to statehood requires at least one Act of Congress (or an equivalent thereof, such as a joint resolution). The process usually begins with Congress passing an enabling act which establishes a process by which a territory can hold a constitutional convention to draft a state constitution and elections for the first state officers and Congressional representatives. An enabling act can be prompted by petitions from the territory or by Congress's own initiative. The enabling act is important because it is usually the bill which spells out the conditions that Congress expects the new state to meet

Price of Admission: Causes, Effects, and Patterns of Condition Imposed on States Entering the Union, 46 Am. J. Legal Hist. 119, 125-129 (2004). *See also* Ohio Enabling Act § 1, 4-5, 2 Stat. 173 (1802); Louisiana Enabling Act § 1-4, 2 Stat. 641 (1811); Illinois Enabling Act § 1, 3-4, 3 Stat. 429 (1818); Omnibus Enabling Act, 25 Stat. 676 (1889). Congress, through enabling acts, authorizes the territory to hold a constitutional convention and draft a constitution. Biber, *supra*, at 127. If the territory follows the established process, it may remit that constitution to Congress for its approval. *Id.* at 128. Congress can approve the constitution, reject it, modify it, or condition it. *Id.* It is at that point that Congress decides whether it will accept the territory as a federal state or not. If it does not accept the territory as a state of the Union, it will remain a territory. *See National Bank v. County of Yankton*, 101 U.S. 129, 133 (1879) ("All territory within the jurisdiction of the United States not included in any State must necessarily be governed by or under the authority of Congress.") That stage of acceptance as a federal state has not taken place with Puerto Rico; it was not contemplated as part of the process established by Congress in Public Law 600.

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before (and after) admission; these conditions are often required to be drafted into the new state constitution itself and/or to be part of an "irrevocable" ordinance passed by the state constitutional convention.").

For its part, Sec. 2 of Art. I of the Constitution of the Commonwealth of Puerto Rico, which establishes that "[t]he government of the Commonwealth of Puerto Rico and its Legislative, Executive and Judicial Powers … will be equally subordinated to the sovereignty of the people of Puerto Rico," does not mean that Puerto Rico has been invested with its own sovereignty or that Congress has lost its own. It only means that Congress delegated to Puerto Ricans the power to manage the government of the Island and its own internal affairs, subject to the will of the people.[17] In that sense, the People of Puerto Rico is a sovereign only for purposes of local matters that are not governed by the Constitution of the United States. *Calero-Toledo v. Pearson Yacht Leasing Co., supra*, at 673. Nevertheless, that does not mean that Puerto Rico ceased to be, as a matter of constitutional law, a territory of the United States; there was never a transfer of sovereignty, only a

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[17] On November 25, 1953, the General Assembly of the United Nations (UN) decided that the United States could stop sending information about Puerto Rico, according to the scheme of international law that prevailed at that time. Subsequently, the UN adopted specific criteria to determine when a member State has the obligation to transmit information about a non-autonomous territory. Res. 1541 (XV) of 1960. This does not affect the effectiveness of the actions taken prior to the approval of said criteria. About this matter, Trías Monge himself has stated that "Congress would not give any weight in the coming years to what the United Nations has done." IV Trías Monge, *op. cit.*, at 57. What is relevant here is that the efforts at the UN did not alter the status of Puerto Rico within the constitutional scheme of the United States.

delegation of powers. That would be made clear in the cases that would follow.

In *Examining Bd. of Engineers, Architects and Surveyors v. Flores de Otero, supra*, the validity of a Puerto Rico law requiring American citizenship in order to obtain an engineering license was questioned. The U.S. Supreme Court invalidated it again without specifying pursuant to which provision of the U.S. Constitution it was acting, whether the equal protection clause of the Fourteenth Amendment or the due process clause of the Fifth Amendment. However, the Court recognized the application and validity of the insular cases and approvingly cited *Downes v. Bidwell, supra*, and *Balzac v. Porto Rico, supra*. It went further and stated that what it did in *Calero-Toledo v. Pearson Yacht Leasing Co., supra*, was reassert the doctrine of the insular cases.[18] In other words,

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[18] The U.S. Supreme Court stated the following: "It is clear now, however, that the protections accorded by either the Due Process Clause of the Fifth Amendment or the Due Process and Equal Protection Clauses of the Fourteenth Amendment apply to residents of Puerto Rico. The Court recognized the applicability of these guarantees as long ago as its decisions in *Downes v. Bidwell*, 182 U.S. 244, 283-284, 21 S. Ct. 770, 785, 45 L. Ed. 1088 (1901), and *Balzac v. Porto Rico*, 258 U.S. 298, 312-313, 42 S.Ct. 343, 348, 66 L.Ed. 627 (1922). The principle was reaffirmed and strengthened in *Reid v. Covert*, 354 U.S. 1, 77 S. Ct. 1222, 1 L.Ed.2d 1148 (1957), and then again in *Calero-Toledo*, 426 U.S. 663, 94 S. Ct. 2080, 40 L.Ed.2d 452 (1974), where we held that inhabitants of Puerto Rico are protected, under either the Fifth Amendment or the Fourteenth Amendment, from the official taking of property without due

by determining whether certain provisions of the U.S. Constitution applied to Puerto Rico, the Supreme Court continued to treat Puerto Rico as a territory.

But it was not until *Torres v. Puerto Rico*, 442 U.S. 465 (1979), that the Supreme Court was straightforward in its use of the doctrine of the insular cases to see if one of the clauses of the Constitution of the United States applied to Puerto Rico. That case had to do with the validity of a search conducted by a state police officer on a person at the Isla Verde airport. The Court concluded that the search had been unreasonable. In order to decide whether the protection of the Fourth Amendment against unreasonable searches and seizures applied to Puerto Rico, the Court studied the entire doctrine of the insular cases and subsequently applied it:

> Congress may make constitutional provisions applicable to territories in which they would not otherwise be controlling… Congress generally has left to this Court the question of what constitutional guarantees apply to Puerto Rico… However, because **the limitation on the application of the Constitution in unincorporated territories is based in part on the need to**

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process of law." *Examining Bd. of Engineers, Architects and Surveyors v. Flores de Otero, supra*, at 600.

> **preserve Congress' ability to govern such possessions**, and may be overruled by Congress, a legislative determination that a constitutional provision practically and beneficially may be implemented in a territory is entitled to great weight. (emphasis added) *Id.* at 470.

The Supreme Court then concluded that the intent of Congress, as evidenced by the Jones-Shafroth Act (now known as the Federal Relations Act) and by Public Law 600, was for the protections of the Fourth Amendment to apply to Puerto Rico. *Id.* at 470 ("Both Congress' implicit determinations in this respect and long experience establish that the Fourth Amendment's restrictions on searches and seizures may be applied to Puerto Rico without danger to national interests or risk of unfairness.").[19]

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[19] "From 1917 until 1952, Congress by statute afforded equivalent personal rights to the residents of Puerto Rico. Act of Mr. 2, 1917, § 2, cl. 13-14, 39 Stat. 952, repealed, Act of July 3, 1950, § 5(1), 64 Stat. 320 (effective July 25, 1952). When Congress authorized the people of Puerto Rico to adopt a constitution, its only express substantive requirements were that the document should provide for a republican form of government and "include a bill of rights." Act of July 3, 1950, § 2, 64 Stat. 319, 48 U.S.C., § 731c. A constitution containing the language of the Fourth Amendment, as well as additional language reflecting this Court's exegesis thereof, P.R. Const., Art. II, § 10, was adopted by the people of Puerto Rico and approved by Congress. See Act of July 3, 1952, 66 Stat. 327. That constitutional provision remains in effect." *Torres v. Puerto Rico, supra*, at 270.

It is unquestionable that in *Torres v. Puerto Rico, supra*, the Court treated Puerto Rico as a territory.[20] *See* Alvarez González, *op. cit.*, at 510.

In another line of cases questioning the validity of certain federal rules related to Puerto Rico, it also arises clearly that Puerto Rico continued to be a territory. Alvarez González, *op. cit.*, at 510. In *Califano v. Torres*, 435 U.S. 1 (1978), a federal aid program that excluded the residents of Puerto Rico was challenged and the Supreme Court upheld its validity.

In *Harris v. Rosario*, 446 U.S. 651-52 (1980), which presented a similar controversy, the Supreme Court clarified the grounds for said unequal treatment of Puerto Rico:

> Congress, which is empowered under the Territory Clause of the Constitution, to "make all needful Rules and Regulations respecting the Territory … belonging to the United States," may treat Puerto Rico differently from States so long as there

[20] The difference between an incorporated territory and an unincorporated territory is inconsequential for the analysis that must be done in this case. The caselaw of the U.S. Supreme Court, by concluding that territories derive their authority from the same sovereign as the United States, does not make that distinction.

> is a rational basis for its actions. (Citations omitted.)[21]

What is clear from these cases is that the U.S. Supreme Court continued to treat Puerto Rico as a territory subject to the territorial clause and, therefore, to the powers of Congress. In exercising its power over the territory, Congress provided that the effectiveness of Public Law 600 would be contingent, inasmuch as it would take effect only if the People of Puerto Rico agreed to it, which in effect happened. That is why that authority is exercised today within the parameters of Public Law 600 and the Constitution approved by Congress pursuant to its plenary power over the territory. As Judge Breyer, now an Associate Justice of the U.S. Supreme Court, pointed out in *Córdova & Simonpietri Ins. Agency Inc. v. Chase Manhattan Bank N.A.*, 649 F.2d 36, 41 (1st Cir. 1981), after the creation of the Commonwealth, relations between the United States and Puerto Rico ceased to be subject only to the territorial clause, and new legal restrictions, self-imposed by Congress, were added ("the federal government's relations with Puerto Rico changed from being bounded merely by the

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[21] The Supreme Court concluded that, as in *Califano*, there are three reasons that justify the action by Congress: "Puerto Rican residents do not contribute to the federal treasury; the cost of treating Puerto Rico as a State under the statute would be high; and greater benefits could disrupt the Puerto Rican economy." *Harris v. Rosario, supra*, at 652. For a critique of these cases *see*, J. Trías Monge, *El Estado Libre Asociado ante los tribunales, 1952-1994,* Rev. Jur. UPR 1 (1995).

territorial clause, and the rights of the people of Puerto Rico as United States citizens, to being bounded by the United States and Puerto Rico Constitutions, Public Law 600, the Puerto Rican Federal Relations Act and the rights of the people of Puerto Rico as United States citizens.").

Nevertheless, far from representing an irrevocable renunciation of its power over the territory, those legal limitations approved by Congress are part of the exercise of said legislative power. Thus, in the same way that relations between the District of Columbia ceased to be subject merely to the will of Congress authorized by Art. I, § 8, Cl. 17 of the Constitution upon the approval of legislation giving the District an elective municipal government, relations between Puerto Rico and the federal government are governed not only by Art. I, § 8, of the Constitution, but also by the legislation approved by Congress. *See* District of Columbia Home Rule Act, D.C. Code §§ 1-201.01-1-207.71 (2001); *Washington, D.C. Ass'n of Realtors, Inc. v. District of Columbia*, 44 A.3d 299 (D.C. 2012).

That delegation of power does not constitute an irrevocable renunciation nor a termination of the power of Congress. The People of the United States granted Congress, through the Constitution, ample power to manage the territories. For this reason, Congress cannot irrevocably renounce a power that was conferred on it by the People of the United States. *See Clinton v. City of New York*, 524 U.S. 417, 452 (1998) ("The Constitution is a compact enduring for more than our time, and one Congress

cannot yield up its own powers, much less those of other Congresses to follow."). *See also* R.S. Mariani, *Sovereignty At Issue, Supreme Court's Ambiguity and the Circuits' Conflict on the Application of the Dual Sovereignty Doctrine to Puerto Rico*, 63 Rev. Jur. UPR 807 (1993); E. Rivera Pérez, *Puerto Rico: Tres caminos hacia un futuro*, Publicaciones Puertorriqueñas, San Juan, 1991, at 25-26.[22] That is why the alternate proposal of some authors is not persuasive. *See* D.M. Helfeld, *Understanding United States-Puerto Rico Constitutional and Statutory Relations Through Multidimensional Analysis*, 82 Rev. Jur. UPR 841, 874-875 (2013);[23] Hernández Colón, *op. cit*.

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[22] The case with the Northern Mariana Islands is a clear example of how Congress can grant certain attributes to a territory and later suppress them at will. The Mariana Islands used to manage their own immigration system, even after becoming the Commonwealth of the Northern Mariana Islands. However, in 2008, Congress, by means of the Consolidated Natural Resources Act of 2008, Pub. L. No. 110-229, 122 Stat. 754-876, stripped it of all power to manage its own immigration system. *See* R. J. Misulich, *A Lesser-Known Immigration Crisis: Federal Immigration Law in the Commonwealth of the Northern Mariana Islands*, 20 Pac. Rim L. & Pol'y J. 211 (2011).

[23] *But see* D. M. Helfeld, *Congressional Intent and Attitude Toward Public Law 600 & the Constitution of the Commonwealth of Puerto Ric*o, 21 Rev. Jur. UPR 255, 307 (1952) ("Though the formal title has changed, in constitutional theory Puerto Rico remains a territory. This means that Congress continues to possess plenary but unexercised authority over Puerto Rico. Constitutionally, Congress may repeal Public Law 600, annul the Constitution of Puerto Rico

It is true, as well, that some U.S. Supreme Court Justices have stated that the doctrine of the insular cases must be revised. *See Harris v. Rosario, supra*, at 653 (Dissenting opinion of Associate Justice Marshall) ("While some early opinions of this Court suggested that various protections of the Constitution do not apply to Puerto Rico,… the present validity of those decisions is questionable."); *Torres v. Puerto Rico, supra*, at 475 (Concurring opinion of Associate Justice Brennan) ("Whatever the validity of the [Insular Cases] in the particular historical context in which they were decided, those cases are clearly not authority for questioning the application of the Fourth Amendment—or of any other provision of the Bill of Rights—to the Commonwealth of Puerto Rico in the 1970's."). However, it has not been stated that Puerto Rico has ceased to be a territory subject to the plenary powers of Congress.

D. Position of the U.S. Executive Branch

The Executive Branch of the federal government has also confirmed that Puerto Rico continues to be a territory of the United States, which leaves unaltered the sovereign authority exercised by Congress. In 2000, the President of the United States, Bill Clinton, established by decree the Presidential Task Force on the Status of Puerto Rico, with the purpose of studying a future status for

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and veto insular legislation which it deems unwise or improper.").

Puerto Rico.[24] The Presidents who followed, George W. Bush and Barack Obama, renewed the task force during their respective administrations. These groups completed several reports on Puerto Rico. Their findings confirm that Puerto Rico continues to be a territory of the United States.

Specifically, the Task Force Reports of December 2007, at 19-20, and of March 2011, at 3, acknowledge that the Constitution approved by Puerto Rico was subject to conditions by Congress. Both the 2007 and the 2011 Reports explain that current relations between Puerto Rico and the United States are still defined by the Constitution of the United States and the Federal Relations Act. Presidential Task Force Report of March 2011, at 20; Presidential Task Force Report of December 2007, at 5. That statement clearly shows that the Commonwealth of Puerto Rico does not have any authority to change its relationship with the United States. The legal status of Puerto Rico is that of a territory subject to the plenary power of Congress. Presidential Task Force Report of December 2007, at 5. Its official name (Commonwealth of Puerto Rico) does not define or change its territorial status.

When discussing Puerto Rico's current political status, the Report of March 2011, at 28, affirms that the Commonwealth of Puerto Rico is governed by the Territorial Clause of the Constitution of the United

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[24] *http://www.whitehouse.gov/sites/default/files/uploads/Puerto_Rico_Report_Espanol.pdf* (last visit, March 20, 2015).

States. Consequently, it is subject to the plenary powers of Congress. It is also asserted in the document that it is impossible to establish a relationship between the territory and the federal government that may only be altered by mutual consent. *Id.* *See also* Presidential Task Force Report of December 2007, at 6. This relationship cannot be put into practice "because a future Congress could decide to modify the relationship unilaterally." *Id.*

That means that Congress can allow for the Commonwealth to remain as a political system indefinitely and, on the other hand, it has the constitutional authority to amend or revoke the powers exercised by the Government of Puerto Rico to manage its internal affairs. Presidential Task Force Report of December 2007, at 6. In other words, Puerto Rico's internal government system is entirely subject to the political will and legal authority of Congress. *Id.* That explains why, by mandate of federal law, federal service of process is still made to the "United States of America, SS the President of the United States." Federal Relations Act, § 10, P.R. Laws Ann., Vol. I, 48 U.S.C. § 874.

All of the above leads us to conclude that the approval of a constitution for Puerto Rico did not represent a change in the basis of its relationship with the United States and, therefore, Puerto Rico continues to be a territory subject to the territorial clause of the Constitution of the United States. The legislative history of Public Law 600 and its subsequent interpretation by the U.S. Supreme Court so reveal. It is also thusly interpreted by the

federal Executive Branch. In short, there is unanimity among the three branches regarding this matter.

VI

The Commonwealth of Puerto Rico has a unique relationship, unparalleled in the history of the United States,[25] as the first territory the inhabitants of which have drafted their own constitution to manage their local affairs. However, based on all of the foregoing, we must conclude that the power that Puerto Rico undoubtedly exercises in prosecuting crime really emanates from the sovereignty of the United States and not from an original sovereignty. *Grafton v. United States, supra*; *Puerto Rico v. Shell Co., supra*. Nevertheless, the Court of Appeals concluded that the doctrine of dual sovereignty applies to Puerto Rico and it determined that Mr. Sánchez del Valle and Mr. Gómez Vázquez could be prosecuted in the Puerto Rico courts, even after they had been indicted in federal court for the same offense. Those conclusions are wrong.

It is true that the U.S. Supreme Court has stated repeatedly that Puerto Rico enjoys a degree of autonomy and independence normally associated with the states of the Union. *See, e.g., Examining Bd. of Engineers, Architects & Surveyors v. Flores de Otero, supra*, at 595 ("the purpose of Congress in the 1950 and 1952 legislation was to accord to Puerto

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[25] *See Examining Bd. of Engineers, Architects & Surveyors v. Flores de Otero, supra*, at 596.

Rico the degree of autonomy and independence normally associated with States of the Union."). We have also stated the same. *See E.L.A. v. Northwestern Selecta*, 185 P.R. Dec. 40 (2012).

Other cases in which the Supreme Court treated the Commonwealth of Puerto Rico as if it were a state of the Union are: *El Vocero de Puerto Rico (Caribbean Intern. News Corp.) v. Puerto Rico*, 508 U.S. 147 (1993) (First Amendment); *P.R. Aqueduct and Sewer Auth. v. Metcalf & Eddy, Inc.*, 506 U.S. 139 (1993) (Eleventh Amendment immunity); *P.R. Dept. of Consumer Affairs v. Isla Petroleum*, 485 U.S. 495 (1988) (preemption); *Puerto Rico v. Branstad*, 483 U.S. 219 (1987) (extradition); *Posadas de Puerto Rico Assoc. v. Tourism Co. of Puerto Rico*, 478 U.S. 328 (1986) (commercial expression pursuant to the First Amendment); *Alfred L. Snapp & Son, Inc. v. Puerto Rico*, 458 U.S. 592 (1982) (*parens patriae* power over migrant workers); *Rodríguez v. Popular Democratic Party*, 457 U.S. 1 (1982) (equal protection of the law); *Chardón v. Fernández*, 454 U.S. 6 (1981) (statute of limitations); *Torres v. Puerto Rico, supra*, (Fourth Amendment); *Calero-Toledo v. Pearson Yacht Leasing Co., supra*, (allowing the appeal of a controversy involving the validity of a Puerto Rico law as if it were the law of a state).

In fact, prior to the creation of the Commonwealth, the U.S. Supreme Court had already held that "[t]he objective of the Foraker Act and of the Organic [Jones] Act was to give Puerto Rico the full power of local self-determination, with an autonomy similar to that of the states and

incorporated territories." *Puerto Rico v. Shell Co., supra*, at 261-262 *[translation ours]. See also* in the same sense, in effect Jones-Shafroth Act, *Bacardi Corp. of America v. Domenech*, 311 U.S. 150 (1940). The same was said while the Foraker Act was in force: *Porto Rico v. Rosaly y Castillo*, 227 U.S. 270 (1913); *Gromer v. Standard Dredging Co.*, 224 U.S. 362 (1912). That shows that, by 1952, that language was not new.

The allegation of the Solicitor General is also correct, in the sense that Puerto Rico has the capacity to adopt and enact its own civil and criminal laws. *See Calero-Toledo v. Pearson Yacht Leasing Co., supra*, at 671, citing A. Leibowitz, *The applicability of Federal Law to the Commonwealth of Puerto Rico*, 56 Geo. L. J. 219, 221 (1967) ("Pursuant to that constitution, the Commonwealth now 'elects its Governor and legislature; appoints its judges, all cabinet officials, and lesser officials in the executive branch; sets its own educational policies; determines its own budget; and amends its own civil and criminal code'.").

However, the analysis that must be performed to determine whether there are two different sovereigns under the constitutional double jeopardy clause is not whether the entity is similar to, acts like or has certain attributes of a true sovereign. The fundamental question, according to the U.S. Supreme Court, is whether the two entities derive their authority from the same ultimate source of power. *United States v. Wheeler, supra; Waller v. Florida, supra.* In other words, the question is not

whether the entity can exercise a given power, but rather under whose authorization does it ultimately exercise that power.

After an objective analysis of the history and immense juridical literature on the subject, we must conclude that, with the adoption of a constitution, Puerto Rico did not cease to be a territory of the United States subject to the powers of Congress, as provided in the territorial clause of the federal Constitution (Art. IV, § 3).

Puerto Rico's authority to prosecute individuals is derived from its delegation by United States Congress and not by virtue of its own sovereignty. As we have seen, and contrary to the Native-American tribes or the states of the Union, **Puerto Rico never had original or prior sovereignty under which it delegated powers to Congress. <u>It is the other way around.</u>** Spain's sovereignty over Puerto Rico was formally transferred to the United States in 1899 with the Treaty of Paris. Since then, the United States has managed Puerto Rico through legislation passed pursuant to the territorial clause of the federal Constitution. The adoption of a constitution, by delegation of Congress, to organize a local government, replacing a large part of the organic act in effect at that time, did not represent a transfer of sovereignty to Puerto Rico. To the contrary, Puerto Rico did not cease to be a territory of the United States. Therefore, the rule established in *Grafton v. United States, supra*, and reaffirmed in *Puerto Rico v. Shell Co., supra*, applies to it.

In conclusion, the Commonwealth of Puerto Rico is not a sovereign entity inasmuch as, being a territory, its ultimate source of power to prosecute offenses is derived from the United States Congress. *See United States v. Lara, supra*, at 226 (Dissenting opinion of Associate Justice Thomas) (citations omitted) ("[T]he Court has held that the Territories are the United States for double jeopardy purposes… It is for this reason as well that the degree of autonomy of Puerto Rico is beside the point"). It exercises its power as part of a **delegation** of powers and not based on a **transfer** of sovereignty by the United States Congress.

Therefore, the grounds used in *Pueblo v. Castro García, supra*, and the result reached therein, are not based on federal constitutional law. We have acknowledged the importance of precedents in the development of our caselaw (*stare decisis*). However, that general principle cannot lead us to wrongfully perpetuate doctrinal mistakes. Our decisions do not have "the scope of a dogma that must be blindly followed even when the court is subsequently convinced [that] its prior decision is wrong." *Am. Railroad Co. v. Comisión Industrial*, 61 P.R. Dec. 314, 326 (1943). For that reason, we have identified three circumstances that, as exceptions, justify setting a precedent aside: "(1) if the previous decision was clearly wrong; (2) if it has adverse effects on the rest of the laws, and (3) if the number of persons who relied upon the decision is limited." *Pueblo v. Camacho Delgado*, 175 P.R. Dec. 1, 20 n. 4 (2008). *See also Fraguada Bonilla v. Hosp. Aux. Mutuo*, 186 P.R. Dec. 365, 391 (2012); *E.L.A. v. Crespo Torres*,

180 P.R. Dec. 776, 796-797 (2011); *Pueblo v. Díaz de León*, 176 P.R. Dec. 913, 920 (2009); *San Miguel, etc. & Cía v. Guevara*, 64 P.R. Dec. 966, 974 (1945).

The first of these principles solves the matter at hand. Applying it, we overrule *Pueblo v. Castro García, supra*, and conclude that a person who was prosecuted in federal court cannot be prosecuted for the same offense in the Puerto Rico courts because that would constitute a violation of the constitutional protection against double jeopardy, as provided in the Fifth Amendment to the Constitution of the United States. The arguments raised by the Government necessarily entail rejecting the application of a clear and precise constitutional right, such as the prohibition of double jeopardy in penal cases.

Prohibiting the prosecution of a defendant in both jurisdictions is limited to charges for the same offense. That limitation does not arise as a consequence of our decision, but rather from the territorial status of Puerto Rico. That being said, this does not mean that the government of Puerto Rico and the federal government cannot work together and reach collaborative agreements to fight crime.

We agree that if Puerto Rico were a state of the Union, the dual sovereignty rule would apply and the local government would be able to move forward with the criminal case against petitioners. However, declaring statehood is not one of our constitutional powers. As a territory, Puerto Rico does not have an original

sovereignty separate from that of the federal government. Therefore, the doctrine of dual sovereignty does not provide an exemption from the application, in cases such as this one, of the constitutional guarantee against double jeopardy. It was thus held in *Puerto Rico v. Shell Co., supra*, and *Grafton v. United States, supra*. The delegation of congressional power with the creation of the government of the Commonwealth of Puerto Rico did not alter that objective legal reality.

That is the current state of law. We cannot reverse a decision of the United States Supreme Court or refuse to abide by it, especially if just for mere convenience. "'Convenience and efficiency,' […] 'are not the primary objectives' of our constitutional framework." *N.L.R.B. v. Noel Canning*, 573 U.S. __, __, 134 S. Ct. 2550, 2598 (2014) (Concurring opinion of Associate Justice Scalia). Furthermore, as stated by Associate Judge Rebollo López:

> Even when in our personal character we have the absolute constitutional right to create and think according to our particular view of life and the world in which we live, as members of this Court we cannot afford to decide the matters before our consideration based on those personal beliefs or desires, with complete abstraction from the legal reality that surrounds us. *Pueblo v. Castro García, supra*, at 790 (Dissenting opinion of Associate Judge Mr. Rebollo López).

The precedents of the U.S. Supreme Court are binding on us and the Government has not presented a convincing argument that renders them inapplicable. It is our precedent that is clearly erroneous and fails to recognize petitioners' constitutional right. That is why it cannot prevail. Thus, Mr. Sánchez del Valle and Mr. Gómez Vázquez cannot be prosecuted in the Puerto Rico courts for the same offense (or for a lesser included offense) for which they have already been sentenced by the U.S. District Court for the District of Puerto Rico.

VII

Based on all of the foregoing, we hereby reverse the decision of the Court of Appeals and order the dismissal of the claims filed pursuant to Article 5.01 of the Puerto Rico Weapons Act, *supra*, against Mr. Sánchez del Valle and Mr. Gómez Vázquez.

Judgment will be entered accordingly.

[signed: *Rafael L. Martínez Torres*]
RAFAEL L. MARTÍNEZ TORRES
Associate Judge

UNITED STATES DISTRICT COURT
DISTRICT OF PUERTO RICO

ADA CONDE-VIDAL, ET AL., Plaintiffs, v. ALEJANDRO GARCIA-PADILLA, ET AL. Defendants.	Civil No. 14-1253 (PG)

OPINION AND ORDER

Article 68 of the Puerto Rico Civil Code defines marriage as "originating in a civil contract whereby a man and woman mutually agree to become husband and wife" and it refuses recognition of "[a]ny marriage between persons of the same sex or transsexuals contracted in other jurisdictions." P.R. LAWS ANN. tit. 31, § 221. This case challenges the constitutionality of Puerto Rico's codification of opposite-gender marriage.

I. BACKGROUND

The plaintiffs' case. The plaintiffs include three same-gender couples who live in Puerto Rico and are validly married under the law of another state; two same-gender couples who seek the right to marry in Puerto Rico; and Puerto Rico Para Todos, a Lesbian, Gay, Bisexual, Transvestite, and Transsexual (LGBTT) nonprofit advocacy organization.

As the plaintiffs see it, the liberty guaranteed by the Constitution includes a fundamental right to freely choose one's spouse and Article 68 of the Puerto Rico Civil Code unlawfully circumscribes this fundamental right and violates Equal Protection and Due Process. Because the Equal Protection Clause prohibits discrimination on the basis of sexual orientation and gender, Puerto

Rico would no more be permitted to deny access to marriage than it would be to permit, say, racial discrimination in public employment. And because the substantive component of the Due Process Clause protects fundamental rights from government intrusion, including issues of personal and marital privacy, see, e.g., Lawrence v. Texas, 539 U.S. 558 (2003), the Commonwealth must articulate a compelling governmental interest that justifies its marriage laws — a burden that, according to the plaintiffs, simply cannot be met. The plaintiffs contend that recent developments at the Supreme Court, United States v. Windsor, 570 U.S. ___, 133 S.Ct. 2675 (2013), endorse their understanding of Equal Protection and Due Process. By recognizing only opposite-gender marriage, Commonwealth law deprives gay and lesbian couples of the intrinsic societal value and individual dignity attached to the term "marriage".

The Commonwealth's case. Article 68 stands as a valid exercise of the Commonwealth's regulatory power over domestic relations. Because the federal Constitution is silent on the issue of marriage, Puerto Rico is free to formulate its own policy governing marriage. See Rodriguez v. Popular Democratic Party, 457 U.S. 1, 8 (1982)("Puerto Rico, like a state, is an autonomous political entity 'sovereign over matters not ruled by the Constitution.'")(citation omitted).

As Puerto Rico sees it, the Supreme Court has said as much: in Baker v. Nelson, 409 U.S. 810 (1972), the Supreme Court held that it lacked jurisdiction over a constitutional challenge to Minnesota's marriage laws. The ancient understanding and traditional doctrine of

marriage and family life expressed by Article 68 offends neither Equal Protection nor Due Process.

The plaintiffs seek a declaratory judgment invalidating Article 68. (Docket No. 7.) Puerto Rico moved to dismiss. (Docket No. 31.) The plaintiffs responded. (Docket No. 45.) Puerto Rico replied. (Docket No. 53.) The plaintiffs sur-replied. (Docket No. 55-1.)

II. LEGAL STANDARD

To survive a Rule 12(b)(6) motion to dismiss, a plaintiff's complaint must contain "'a short and plain statement of the claim.'" Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555 (quoting Conley v. Gibson, 355 U.S. 41, 47 (1957)); see also FED.R.CIV.P. 8(a)(2). While a complaint need not contain detailed factual allegations, Rodriguez-Vives v. Puerto Rico Firefighters Corps of Puerto Rico, 743 F.3d 278, 283 (1st Cir.2014), a plaintiff must provide "more than labels and conclusions" or "a formulaic recitation of the elements of a cause of action." Twombly, 550 U.S. at 555 (internal quotation marks omitted). In assessing a claim's plausibility, we must construe the complaint in the plaintiff's favor, accept all non-conclusory allegations as true, and draw any reasonable inferences in favor of the plaintiff. Ashcroft v. Iqbal, 556 U.S. 662, 678 (citing Twombly, 550 U.S. at 570); accord Maloy v. Ballori-Lage, 744 F.3d 250, 252 (1st Cir.2014). When reviewing a motion to dismiss, we "must consider the complaint in its entirety, as well as other sources ordinarily examined when ruling on Rule 12(b)(6) motions to dismiss, in particular, documents incorporated into the complaint by reference, and matters of which a court may take judicial notice." Tellabs, Inc. v. Makor Issues &

Rights, Ltd., 551 U.S. 308, 322 (2007). Finally, determining the plausibility of a claim for relief is a "context-specific task that requires the reviewing court to draw on its judicial experience and common sense." Iqbal, 556 U.S. at 679.

III. DISCUSSION

A. Standing

Standing is a "threshold question in every federal case." Warth v. Seldin, 422 U.S. 490, 498 (1975). Article III of the Constitution limits the jurisdiction of federal courts to "Cases" and "Controversies," U.S. CONST. art. III, § 2. The doctrine of standing serves to identify those disputes that are of the "justiciable sort referred to in Article III" and which are thus "'appropriately resolved through the judicial process,'" Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 (1992)(quoting Whitmore v. Arkansas, 495 U.S. 149, 155 (1990)). In assessing standing, the Court focuses on the parties' right to have the Court decide the merits of the dispute. Warth, 422 U.S. at 498.

To establish the irreducible constitutional minimum of standing, a plaintiff must prove that "he has suffered a concrete and particularized injury that is fairly traceable to the challenged conduct, and is likely to be redressed by a favorable judicial decision." Hollingsworth v. Perry, 570 U.S. ___, 133 S. Ct. 2652, 2661 (2013)(citing Lujan, 504 U.S. at 560–61 (1992)).

The Commonwealth argues that the plaintiffs lack standing because they have no injury traceable to the defendants and because they never applied for a marriage license. But the plaintiffs have alleged a

sufficient injury, and it is not necessary for them to apply for a marriage license given the clarity of Puerto Rican law. See Cook v. Dept. of Mental Health, Retardation, & Hosps., 10 F.3d 17, 26 (1st Cir. 1993)(rejecting proposition "that the law venerates the performance of obviously futile acts").

The plaintiffs have satisfied the Court of their standing to sue.

Each of the plaintiffs wishes to marry and obtain the Commonwealth's "official sanction" of that marriage — a form of recognition unavailable to them given that Article 68 permits "marriage" in Puerto Rico solely between one man and one woman. (Docket No. 7 at 3.) The plaintiffs have identified several harms flowing from Article 68, including the inability to file joint tax returns or to take advantage of certain legal presumptions, particularly as relates to adopting and raising children. (Id. at 18-21.) The plaintiffs have sued the Commonwealth officials responsible for enforcing Article 68. Ex parte Young, 209 U.S. 123, 157 (1908)(holding a state official sued in his official capacity must "have some connection with the enforcement" of a challenged provision). And should the plaintiffs prevail against these defendants, an injunction preventing the Commonwealth from enforcing Article 68 would redress their injuries by allowing them to marry as they wish and gain access to the benefits they are currently denied. All of that is sufficient to establish that the plaintiffs have a legally cognizable injury, redressable by suing these defendants.

B. Burford Abstention

The Burford abstention doctrine stands as a narrow exception to the rule that federal courts "have a strict duty to exercise the jurisdiction that is conferred upon them by Congress." Quackenbush v. Allstate Ins. Co., 517 U.S. 706, 716 (1996). Burford abstention is proper where a case involves an unclear state-law question of important local concern that transcends any potential result in a federal case. Burford v. Sun Oil Co., 319 U.S. 315, 332–34 (1943). However, "abstention is ... 'the exception, not the rule.'" Colo. River Water Conservation Dist. v. United States, 424 U.S. 800, 813 (1976), and "there is, of course, no doctrine requiring abstention merely because resolution of a federal question may result in the overturning of a state policy." Zablocki v. Redhail, 434 U.S. 374, 379 n.5 (1978).

The Commonwealth contends that this Court should refrain from ruling on the constitutionality of Article 68 in the interest of allowing for the implementation of a coherent marriage policy. The Court is not persuaded.

Contrary to its contentions, the Commonwealth's marriage policy is neither unclear nor unsettled. In 1889, royal decree brought Puerto Rico within the ambit of the Spanish Civil Code. Title IV of that code governed marriage, including the "[r]ights and obligations of husband and wife." See Title IV "Marriage" of the Spanish Civil Code of 1889, see Attachment 1. The United States recognizes Puerto Rico's legal heritage, including its historical adherence to the Spanish Civil Code. See, e.g., Ponce v. Roman Catholic Apostolic

Church, 210 U.S. 296, 309 (1908)(holding that the legal and political institutions of Puerto Rico prior to annexation are, *pro tanto,* no longer foreign law).

Shortly after Puerto Rico became an unincorporated insular territory of the United States, see Treaty of Paris, Dec. 10, 1898, U.S.-Spain, Art. II 30 Stat. 1755, T.S. No. 343, Congress enacted the Foraker Act to establish the governing legal structure for the Island. See 31 Stat. 77 1900 [repealed]. The Act created a commission to draft several key pieces of legislation. Id. at Section 40. The ultimate result of the commission's work was the enactment of the Civil Code of 1902, which included Article 129:

> Marriage is a civil institution that emanates from a civil contract by virtue of which a man and a woman are mutually obligated to be husband and wife, and to fulfill for one another all the duties that the law imposes. It will be valid only when it is celebrated and solemnized in accordance with such provisions of law and may only be dissolved before the death of any of the spouses in those instances expressly provided for in this Code.

Puerto Rico, Civil Code 1902, title 4, chap. 1, § 129, see Attachment 2. A revised Code was approved in 1930 that incorporated the 1902 code's definition of marriage as Article 68. See P.R. LAWS ANN. tit. 31, § 221. Two amendments were later added but the Code's original definition of marriage as between "a man and a woman" did not change. This long-standing definition, stretching across two distinct legal traditions, rules out animus as the primary motivation behind Puerto Rico's marriage laws.

From the time Puerto Rico became a possession of the United States its marriage laws have had the same consistent policy:

marriage is between one man and one woman. For that reason, Puerto Rico's marriage policy is neither unclear nor unsettled.

Besides, there is neither a parallel case in commonwealth court nor any legislation currently pending, so this Court has no legitimate reason to abstain. A stay of these proceedings is neither required nor appropriate.

C. Baker v. Nelson

The plaintiffs have brought this challenge alleging a violation of the federal constitution, so the first place to begin is with the text of the Constitution. The text of the Constitution, however, does not directly guarantee a right to same-gender marriage, for "when the Constitution was adopted the common understanding was that the domestic relations of husband and wife and parent and child were matters reserved to the States." See Windsor, 133 S.Ct. at 2691—92, (citing Ohio ex rel. Popovici v. Agler, 280 U.S. 379, 383-384 (1930)).

Without the direct guidance of the Constitution, the next source of authority is relevant Supreme Court precedent interpreting the Constitution. On the question of same-gender marriage, the Supreme Court has issued a decision that directly binds this Court.

The petitioners in Baker v. Nelson were two men who had been denied a license to marry each other. They argued that Minnesota's statutory definition of marriage as an opposite-gender relationship violated due process and equal protection – just as the plaintiffs argue here. The Minnesota Supreme Court rejected the petitioners' claim, determining that the right to marry without regard to gender was not a fundamental right and that it was neither irrational nor

invidious discrimination to define marriage as requiring an opposite-gender union. Baker v. Nelson, 191 N.W.2d 185 (Minn. 1971).

The petitioners' appealed, pursuant to 28 U.S.C. § 1257(2) [repealed], presenting two questions to the Supreme Court: (1) whether Minnesota's "refusal to sanctify appellants' [same-gender] marriage deprive[d] appellants of their liberty to marry and of their property without due process of law under the Fourteenth Amendment"; and (2) whether Minnesota's "refusal, pursuant to Minnesota marriage statutes, to sanctify appellants' marriage because both are of the male sex violate[d] their rights under the equal protection clause of the Fourteenth Amendment." Jackson v. Abercrombie, 884 F.Supp.2d 1065, 1087 (citing Baker, Jurisdictional Stmt., No. 71-1027 at 3 (Feb. 11, 1971)). The Supreme Court considered both claims and unanimously dismissed the petitioners' appeal "for want of [a] substantial federal question." Baker, 409 U.S. at 810.

Decided five years *after* the Supreme Court struck down race-based restrictions on marriage in Loving v. Virginia, 388 U.S. 1 (1967), Baker was a mandatory appeal brought under then-28 U.S.C. § 1257(2)'s procedure. The dismissal was a decision on the merits, and it bound all lower courts with regard to the issues presented and necessarily decided, Mandel v. Bradley, 432 U.S. 173, 176 (1977) (per curiam); see also Ohio ex. Rel. Eaton v. Price, 360 U.S. 246, 247 (1959) ("Votes to affirm summarily, and to dismiss for want of a substantial federal question, it hardly needs comment, are votes on the merits of a case…").

Today, when the Supreme Court's docket is almost entirely discretionary, a summary dismissal or affirmance is rare. In fact, the very procedural mechanism used by the Baker petitioners to reach the Supreme Court has since been eliminated. See Public Law No. 100-352 (effective June 27, 1988). That, however, does not change the precedential value of Baker. This Court is bound by decisions of the Supreme Court that are directly on point; only the Supreme Court may exercise "the prerogative of overruling its own decisions." Rodriguez de Quijas v. Shearson/Am. Express, Inc., 490 U.S. 477, 484 (1989). This is true even where other cases would seem to undermine the Supreme Court's prior holdings. Agostini v. Felton, 521 U.S. 203, 237 (1997)("We do not acknowledge, and we do not hold, that other courts should conclude our more recent cases have, by implication, overruled an earlier precedent..."). After all, the Supreme Court is perfectly capable of stating its intention to overrule a prior case. But absent an express statement saying as much, lower courts must do as precedent requires. State Oil Co. v. Khahn, 522 U.S. 3, 20 (1997) (noting that the "Court of Appeals was correct in applying" a decision even though later decisions had undermined it); see also Day v. Massachusetts Air Nat. Guard, 167 F.3d 678, 683 (1st Cir. 1999)(reiterating the Supreme Court's admonishment that circuit or district judges should not pioneer departures from Supreme Court precedent). The Supreme Court, of course, is free to overrule itself as it wishes. But unless and until it does, lower courts are bound by the Supreme Court's summary decisions "'until such time as the Court informs [them] that [they]

are not.'" Hicks v. Miranda, 422 U.S. 332, 344 (1975)(citation omitted).

Thus, notwithstanding, Kitchen v. Herbert, 961 F.Supp.2d 1181, 1195 (D. Utah 2013) (Baker no longer controlling precedent), aff'd 755 F.3d 1193, 1204-08 (10th Cir. 2014); Bostic v. Schaefer, 970 F.Supp.2d 456, 469–70 (E.D. Va. 2014)(same), aff'd 760 F.3d 352, 373-75 (4th Cir. 2014); Baskin v. Bogan, --- F.Supp.2d ----, 2014 WL 2884868 at *5 (S.D. Ind. June 25, 2014)(same), aff'd, 766 F.3d 648, 659-60 (7th Cir. 2014); Wolf v. Walker, 986 F.Supp.2d 982, 988–92 (W.D. Wisc. 2014)(same), aff'd 766 F.3d 648, 659-60 (7th Cir. 2014); Latta v. Otter, --- F.Supp.2d ----, 2014 WL 1909999, at **7–10 (D. Idaho May 13, 2013)(same) aff'd, --- F.3d ----, 2014 WL 4977682 **2-3 (9th Cir. October 7, 2014); Bishop v. U.S. ex rel. Holder, 962 F.Supp.2d 1252, 1274–77 (N.D. Okla.2014)(same), aff'd, Bishop v. Smith, 760 F.3d 1070, 1079-81 (10th Cir. 2014); McGee v. Cole, 993 F.Supp.2d 639, 649 (S.D. W.Va. 2014)(same); DeLeon v. Perry, 975 F.Supp.2d 632, 648 (W.D. Tex. 2014)(order granting preliminary injunction)(same); DeBoer v. Snyder, 973 F.Supp.2d 757, 773 n.6 (E.D. Mich. 2014)(same); Brenner v. Scott, 999 F.Supp.2d 1278, 1290-1 (N.D. Fl. 2014)(same); Love v. Beshear, 989 F.Supp.2d 536, 541-2(W.D. Ky. 2014)(same); Whitewood v. Wolf, 992 F.Supp.2d 410, 419-21 (M.D. Pa. 2014)(same); Geiger v. Kitzhaber, 994 F.Supp.2d 1128, 1132 (D. Or. 2014)(same), this Court will apply Baker v. Nelson, as the Supreme Court has instructed it to do. As a result, the plaintiffs' constitutional claims challenging the Puerto Rico Civil Code's recognition of opposite-gender marriage fail to present a substantial federal question, and this Court must dismiss them.

The plaintiffs would have this Court ignore Baker because of subsequent "doctrinal developments." Specifically, the plaintiffs see the Supreme Court's decisions in Romer, Lawrence, and Windsor as limiting Baker's application, as most other courts to consider the issue have held. But see, e.g., Sevcik v. Sandoval, 911 F.Supp.2d 996 (D. Nev. 2012)(holding Baker precludes equal protection challenge to existing state marriage laws) *overruled by* Latta v. Otter, --- F.3d ---, 2014 WL 4977682, at **2-3 (9th Cir. 2014); Jackson, 884 F.Supp.2d at 1086—88 (holding that Baker is the last word from Supreme Court regarding the constitutionality of a state law limiting marriage to opposite-gender couples); Wilson v. Ake, 354 F.Supp.2d 1298, 1304—05 (M.D. Fla. 2005)(holding Baker required dismissal of due process and equal protection challenge to Florida's refusal to recognize out-of-state same-gender marriages). The Court cannot agree.

For one thing, the First Circuit has spared us from the misapprehension that has plagued our sister courts. The First Circuit expressly acknowledged – a mere two years ago – that Baker remains binding precedent "unless repudiated by subsequent Supreme Court precedent." Massachusetts v. U.S. Dept. of Health and Human Services, 682 F.3d 1, 8 (1st Cir. 2012). According to the First Circuit, Baker prevents the adoption of arguments that "presume or rest on a constitutional right to same-sex marriage." Id. Even creating "a new suspect classification for same-sex relationships" would "imply[ ] an overruling of Baker," – relief that the First Circuit acknowledged is beyond a lower court's power to grant. This Court agrees, and even if this Court disagreed, the First Circuit's decision would tie this

Court's hands no less surely than Baker ties the First Circuit's hands.

Nor can we conclude, as the plaintiffs do, that the First Circuit's pronouncements on this subject are dicta. Dicta are those observations inessential to the determination of the legal questions in a given dispute. Merrimon v. Unum Life Ins. Co. of America, 758 F.3d 46, 57 (1st Cir. 2014)(citation omitted); see also Dedham Water Co. v. Cumberland Farms Dairy, Inc., 972 F.2d 453, 459 (1st Cir. 1992)("Dictum constitutes neither the law of the case nor the stuff of binding precedent."). Or, said another way, "[w]henever a question fairly arises in the course of a trial, and there is a distinct decision of that question, the ruling of the court in respect thereto can, in no just sense, be called mere *dictum.*" See Union Pac. R. Co. v. Mason City & Ft. D.R. Co., 199 U.S. 160, 166 (1905).

In Massachusetts v. HHS, the defendants argued that Baker foreclosed the plaintiff's claims. The First Circuit concluded that Baker was binding but that it did not address all of the issues presented in the particular dispute. The conclusion that Baker was binding precedent was a considered legal pronouncement of the panel. Without that conclusion, the remainder of the argument – that Baker nevertheless did not control the case at hand – would have been unnecessary. That the panel engaged in a deliberate discussion shows that their conclusion about Baker's "binding" nature carried practical and legal effect in their opinion — in other words, it was necessary to the outcome. If the plaintiffs' reading of Massachusetts v. HHS were correct, any opinion rejecting a constitutional argument but

deciding the case on another ground would be dicta as to the constitutional question, because only the non-constitutional argument was "necessary" to resolve the case. That is hardly the way courts understand their rulings to work. In Massachusetts v. HHS, the First Circuit decided the case the way that it did in part because Baker foreclosed other ways in which it might have decided the same question. That considered holding binds this Court.

Nor is this Court persuaded that we should follow the Second Circuit's opinion about what the First Circuit said in Massachusetts v. HHS. See Windsor v. United States, 699 F.3d 169, 179 (2d Cir. 2012)("The First Circuit has suggested in dicta that recognition of a new suspect classification in this context would 'imply an overruling of Baker.'"). In fact the utterings of the Second Circuit were a bit more developed than what the plaintiffs let on. The Second Circuit recognized that Baker held that the use of the traditional definition of marriage for a state's own regulation of marriage did not violate equal protection. Id. at 194. But it distinguished Section 3 of the Defense of Marriage Act (DOMA), asserting "[t]he question whether the federal government may constitutionally define marriage as it does . . . is sufficiently distinct from the question . . . whether same sex marriage may be constitutionally restricted by the *states*." Id. at 178. Nothing in the Second Circuit's opinion addressed the First Circuit's explicit holding that Baker remains binding precedent. More importantly, only the First Circuit's opinions bind this court.

Even if the First Circuit's statements about Baker were dicta, they would remain persuasive authority, and as such, they further

support the Court's independent conclusions about, and the impact of subsequent decisions on, Baker.

And even if the Court assumes for the sake of argument that the First Circuit has not determined this issue, the Court cannot see how any "doctrinal developments" at the Supreme Court change the outcome of Baker or permit a lower court to ignore it.

The plaintiffs' reliance on Romer v. Evans, 517 U.S. 620 (1996) and Lawrence v. Texas, 539 U.S. 558 (2003) is misplaced. Romer invalidated a state law repealing and barring sexual-orientation discrimination protection. Lawrence involved the very different question of a state government's authority to criminalize private, consensual sexual conduct. Neither case considered whether a state has the authority to define marriage.

Judge Boudin, writing for the three-judge panel in Massachusetts v. HHS, likewise recognized that Romer and Lawrence do not address whether the Constitution obligates states to recognize same-gender marriage. Judge Boudin explained that, while certain "gay rights" claims have prevailed at the Supreme Court, e.g., Romer and Lawrence, those decisions do not mandate states to permit same-gender marriage. Massachusetts v. HHS, 682 F.3d at 8. The Court agrees and notes that the First Circuit's understanding comports with the explicit statements of the Supreme Court. See Lawrence, 539 U.S. at 578 ("[t]he present case does not involve ... whether the government must give formal recognition to any relationship that homosexual persons seek to enter.") (Op. of Kennedy, J.).

Windsor does not – cannot – change things. Windsor struck down Section 3 of DOMA which imposed a federal definition of marriage, as an impermissible federal intrusion on state power. 133 S. Ct. at 2692. The Supreme Court's understanding of the marital relation as "a virtually exclusive province of the States," Id. at 2680 (quoting Sosna v. Iowa, 419 U.S. 393, 404 (1975)), led the Supreme Court to conclude that Congress exceeded its power when it refused to recognize state-sanctioned marriages.

The Windsor opinion did not create a fundamental right to same-gender marriage nor did it establish that state opposite-gender marriage regulations are amenable to federal constitutional challenges. If anything, Windsor stands for the opposite proposition: it reaffirms the States' authority over marriage, buttressing Baker's conclusion that marriage is simply not a federal question. Windsor, 133 S. Ct. at 2691-93 ("[t]he definition of marriage is the foundation of the State's broader authority to regulate the subject of domestic relations with respect to the '[p]rotection of offspring, property interests, and the enforcement of marital responsibilities'"); accord Massachusetts v. HHS, 682 F.3d at 12 ("DOMA intrudes into a realm that has from the start of the nation been primarily confided to state regulation – domestic relations and the definition and incidents of lawful marriage – which is a leading instance of the states' exercise of their broad police-power authority over morality and culture.") Contrary to the plaintiffs' contention, Windsor does not overturn Baker; rather, Windsor and Baker work in tandem to emphasize the States' "historic and essential authority to define the marital

relation" free from "federal intrusion." Windsor, 133 S.Ct. at 2692. It takes inexplicable contortions of the mind or perhaps even willful ignorance – this Court does not venture an answer here – to interpret Windsor's endorsement of the state control of marriage as eliminating the state control of marriage.

The plaintiffs contend, as well, that the Supreme Court's recent denial of *certiorari* in three cases where Baker was expressly overruled is tantamount to declaring that Baker is no longer good law. The denial of *certiorari* is not affirmation. See Maryland v. Baltimore Radio Show, 338 U.S. 912, 919 (1950)(holding that denial of petition for *certiorari* "does not remotely imply approval or disapproval" of lower court's decision); Hughes Tool Co. v. Trans World Airlines, Inc., 409 U.S. 363, 365 n.1 (1973)(holding denial of certiorari imparts no implication or inference concerning the Supreme Court's view of the merits). That the Supreme Court denied *certiorari* in Baskin, Bostic, and Kitchen speaks more to the fact that there is not, as of yet, a split among the few circuit courts to consider this issue. See SUP. CT. R. 10. For now, if presumptions must be made about the unspoken proclivities of the Supreme Court, they ought to be governed by the prudent injunction that "a denial of certiorari on a novel issue will permit the state and federal courts to 'serve as laboratories in which the issue receives further study before it is addressed by this Court.'" Lackey v. Texas, 514 U.S. 1045 (1995)(Stevens, J. respecting denial of *certiorari*)(citation omitted).

Nor does the procedural outcome of Hollingsworth v. Perry, imply that the Supreme Court has overruled Baker. The plaintiffs creatively

argue that when the Supreme Court dismissed Hollingsworth, its judgment had the effect of vacating the Ninth Circuit's opinion and leaving the district court's opinion intact. Because the district court's opinion (which struck down California's ban on same-gender marriage) was allowed to stand, the plaintiffs say the Supreme Court tacitly recognized that the right to same-gender marriage presents a federal question. But that outcome was entirely caused by California's decision not to appeal the district court's adverse ruling. A group of intervenors appealed the case when the state would not, and those intervenors lost again at the Ninth Circuit. They appealed to the Supreme Court, which concluded that they lacked standing to appeal. Because the intervenors lacked standing, the portion of the litigation that they pursued (the Ninth Circuit and Supreme Court appeals) was invalid. The district court's judgment remained intact, not because the Supreme Court approved of it — tacitly or otherwise — but because no party with standing had appealed the district court's decision to the Supreme Court such that it would have jurisdiction to decide the dispute. Thus, nothing about the Hollingsworth decision renders Baker bad law.

Lower courts, then, do not have the option of departing from disfavored precedent under a nebulous "doctrinal developments" test. See National Foreign Trade Council v. Natsios, 181 F.3d 38, 58 (1st Cir. 1999) ("[D]ebate about the continuing viability of a Supreme Court opinion does not, of course, excuse the lower federal courts from applying that opinion.")(Op. of Lynch, J.); see also, Scheiber v. Dolby Labs., Inc., 293 F. 3d 1014, 1018 (7th Cir. 2002) ("[W]e have no

authority to overrule a Supreme Court decision no matter how dubious its reasoning strikes us, or even how out of touch with the Supreme Court's current thinking the decision seems.")(Op. of Posner, J.). Consequently, neither Romer, Lawrence, nor Windsor, wreck doctrinal changes in Supreme Court jurisprudence sufficient to imply that Baker is no longer binding authority. See U.S. v. Symonevich, 688 F.3d 12, 20 n. 4 (1st Cir. 2012) (holding that, generally, an argument that the Supreme Court has implicitly overruled one of its earlier decisions is suspect).

Baker, which necessarily decided that a state law defining marriage as a union between a man and woman does not violate the Fourteenth Amendment, remains good law. Because no right to same-gender marriage emanates from the Constitution, the Commonwealth of Puerto Rico should not be compelled to recognize such unions. Instead, Puerto Rico, acting through its legislature, remains free to shape its own marriage policy. In a system of limited constitutional self-government such as ours, this is the prudent outcome. The people and their elected representatives should debate the wisdom of redefining marriage. Judges should not.

IV. CONCLUSION

That this Court reaches its decision by embracing precedent may prove disappointing. But the role of precedent in our system of adjudication is not simply a matter of binding all succeeding generations to the decision that is first in time. Instead, *stare decisis* embodies continuity, certainly, but also limitation: there are some principles of logic and law that cannot be forgotten.

Recent affirmances of same-gender marriage seem to suffer from a peculiar inability to recall the principles embodied in existing marriage law. Traditional marriage is "exclusively [an] opposite-sex institution . . . inextricably linked to procreation and biological kinship," Windsor, 133 S. Ct. at 2718 (Alito, J., dissenting). Traditional marriage is the fundamental unit of the political order. And ultimately the very survival of the political order depends upon the procreative potential embodied in traditional marriage.

Those are the well-tested, well-proven principles on which we have relied for centuries. The question now is whether judicial "wisdom" may contrive methods by which those solid principles can be circumvented or even discarded.

A clear majority of courts have struck down statutes that affirm opposite-gender marriage only. In their ingenuity and imagination they have constructed a seemingly comprehensive legal structure for this new form of marriage. And yet what is lacking and unaccounted for remains: are laws barring polygamy, or, say the marriage of fathers and daughters, now of doubtful validity? Is "minimal marriage", where "individuals can have legal marital relationships with more than one person, reciprocally or asymmetrically, themselves determining the sex and number of parties" the blueprint for their design? See Elizabeth Brake, *Minimal Marriage: What Political Liberalism Implies for Marriage Law*, 120 ETHICS 302, 303 (2010). It would seem so, if we follow the plaintiffs' logic, that the fundamental right to marriage is based on "the constitutional liberty to select the partner of one's choice." (Docket No. 7 at 4.)

Of course, it is all too easy to dismiss such concerns as absurd or of a kind with the cruel discrimination and ridicule that has been shown toward people attracted to members of their own sex. But the truth concealed in these concerns goes to the heart of our system of limited, consent-based government: those seeking sweeping change must render reasons justifying the change and articulate the principles that they claim will limit this newly fashioned right.

For now, one basic principle remains: the people, acting through their elected representatives, may legitimately regulate marriage by law. This principle

> is impeded, not advanced, by court decrees based on the proposition that the public cannot have the requisite repose to discuss certain issues. It is demeaning to the democratic process to presume that the voters are not capable of deciding an issue of this sensitivity on decent and rational grounds . . . Freedom embraces the right, indeed the duty, to engage in a rational, civic discourse in order to determine how best to form a consensus to shape the destiny of the Nation and its people.

Schuette v. Coalition to Defend Affirmative Action, 572 U.S. __, 134 S.Ct. 1623, 1637 (2014)(Op. of Kennedy, J.).

For the foregoing reasons, we hereby **GRANT** the defendants' motion to dismiss. (Docket No. 31.) The plaintiffs' federal law claims are **DISMISSED WITH PREJUDICE.**

IT IS SO ORDERED.

San Juan, Puerto Rico, this 21st day of October, 2014.

S/ JUAN M. PÉREZ-GIMÉNEZ
JUAN M. PÉREZ-GIMÉNEZ
UNITED STATES DISTRICT JUDGE

United States Court of Appeals
For the First Circuit

No. 14-2184

ADA MERCEDES CONDE-VIDAL; MARITZA LOPEZ-AVILES; IRIS DELIA RIVERA-RIVERA; JOSE A. TORRUELLAS-IGLESIAS; THOMAS J. ROBINSON; ZULMA OLIVERAS-VEGA; YOLANDA ARROYO-PIZARRO; JOHANNE VELEZ-GARCIA; FAVIOLA MELENDEZ-RODRIGUEZ; PUERTO RICO PARA TOD@S; IVONNE ALVAREZ-VELEZ,

Plaintiffs, Appellants,

v.

DR. ANA RIUS-ARMENDARIZ, in her official capacity as Secretary of the Health Department of the Commonwealth of Puerto Rico; WANDA LLOVET DIAZ, in her official capacity as the Director of the Commonwealth of Puerto Rico Registrar of Vital Records; ALEJANDRO J. GARCIA-PADILLA, in his official capacity as Governor of the Commonwealth of Puerto Rico; JUAN C. ZARAGOSA-GOMEZ, in his official capacity as Director of the Treasury in Puerto Rico,

Defendants, Appellees.

Before

Torruella, Thompson and Kayatta,
Circuit Judges.

JUDGMENT

Entered: July 8, 2015

Upon consideration of the parties' Joint Response Pursuant to Court Order filed June 26, 2015, we vacate the district court's Judgment in this case and remand the matter for further consideration in light of Obergefell v. Hodges, -- S. Ct. -, 2015 WL 2473451 (Nos. 14-556, 14-562, 14-571, 14-574, June 26, 2015). We agree with the parties' joint position that the ban is unconstitutional. Mandate to issue forthwith.

By the Court:

/s/ Margaret Carter, Clerk

cc: Honorable Juan M. Perez-Gimenez
Frances Rios de Moran, Clerk of Court
Felicia H. Ellsworth
Ada M. Conde Vidal
Rachel I. Gurvich
Celina Romany Siaca
Mark Christopher Fleming
Karen Lee Loewy
Alan Evan Schoenfeld
Gary W. Kubek
Harriet M. Antczak
Jing Kang
Ryan M. Kusmin
Hayley J. Gorenberg
Jael Humphrey-Skomer
Omar Gonzalez-Pagan
Paul R.Q. Wolfson
Jose L Nieto-Mingo
Idza Diaz-Rivera
Tanaira Padilla-Rodriguez
Margarita Luisa Mercado-Echegaray
Andres Gonzalez-Berdecia
Benjamin Gross Shatz
Abbe David Lowell
Christopher Dowden Man
Andrew John Davis
Rocky Chiu-Feng Tsai
Suzanne B. Goldberg
Paul Victor Holtzman
Paul March Smith
Aaron M. Panner
Diane M. Soubly
Maura T. Healey
Jonathan B. Miller
Janet T. Mills
Joseph A. Foster
Susan Leann Baker Manning
Michael Louis Whitlock
George Patrick Watson

Claire Laporte
Stephen Thomas Bychowski
Sarah Burg
Rose Ann Saxe
William Ramirez-Hernandez
Catherine Emily Stetson
Mary Helen Wimberly
Joseph F. Tringali
Hunter Thompson Carter
Marjory A. Gentry
Jeffrey S. Trachtman
Kurt Michael Denk
Jason Michael Moff
Norman Christopher Simon
Edward Francis Foye
Howard M. Cooper
Tristan Purdy Colangelo
Emily Martin
Marcia D. Greenberger
David Ramos-Pagan
Anita Leigh Staver
Mathew D. Staver
Mary Elizabeth McAlister
Horatio Gabriel Mihet
Thomas Michael Harvey
Kevin Trent Snider
Lawrence John Joseph
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Ruben T. Nigaglioni-Mignucci Sr.
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James Andrew Campbell
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Neysa Alsina

Neysa Alsina is Counsel with the New York City Bar Association, which was founded in 1870 and has approximately 24,000 members. Prior to joining the New York City Bar Association, she served as in-house counsel with the Municipal Credit Union ("MCU"). She was also employed with Citigroup and MetLife. She began her legal career as an associate with Nixon Peabody LLP. Currently, Ms. Alsina serves as the Hispanic National Bar Association Region II (NY) President. In this position, she leads the HNBA New York Region in creating opportunities for Hispanic law students, attorneys and judges throughout the State, and advocates on issues that impact the Latino community. In addition, she is a Vice President of the Sonia & Celina Sotomayor Judicial Internship Program, and a 2015 Council of Urban Professionals fellow as well as a member of several bar associations, including the Network of Bar Leaders, the New York State Bar Association, the New York County Lawyers Association, the Puerto Rican Bar Association, and the New York City Bar's Committee to Enhance Diversity in the Profession. In addition, she is a Director of the Sonia and Celina Sotomayor High School Judicial Internship Program. She is a member of the New York and New Jersey bars and admitted to practice before the U.S. District Courts for the Southern, Eastern and Western Districts of New York and the District of New Jersey. She is a graduate of Rutgers College at New Brunswick and Fordham University School of Law, and is admitted to practice law in New York and New Jersey.

Rafael Arrillaga-Romany

Mr. Rafael Arrillaga-Romany is currently managing member of RAR Consulting Group, LLC. In this role, he is currently advising the Commonwealth of Puerto Rico's Senate President, Mr. Eduardo Bhatia Gautier, on fiscal policy matters. Prior to founding the RAR Consulting Group to provide consulting services in the areas of public policy and corporate and loan restructurings. He served as Executive Director of the Puerto Rico Tourism Development Fund and as Special Advisor to the President of the Government Development Bank for Puerto Rico. In the latter role, he served on the GDB President's behalf as a member of the Board of Directors of the Puerto Rico Municipal Revenue Collection Center (CRIM by its Spanish name) and was one of the principal liaisons between the GDB and the group of former IMF economists responsible for the "Krueger Report." He is an attorney with extensive experience in the areas of banking, securities and commercial law, and has served as lead attorney in some of the most significant loan restructurings in Puerto Rico. In 1997, he earned an A.B. in Economics and Political Science from the University of Michigan- Ann Arbor, and in 2000 a J.D. from Fordham University School of Law.

Julio Cabral Corrada

Julio A. Cabral Corrada is an Investment Associate at Stone Lion Capital Partners L.P. in New York. Julio currently performs financial analysis on credit, equity, financing, and investments in Latin America and Emerging Markets. He also works on Stone Lion's investments in Puerto Rico. Prior to Stone Lion, Julio was an Institutional Analyst with Series 3, 55, 63, & 7 at Morgan Stanley in New York, where he was part of the North America Equity Trading Group--covering alternative funds, mutual funds and pension funds. He graduated from Cornell University ILR School with concentrations in business and government, including a semester at the London School of Economics. In 2013, he was a World Affairs Conference Scholarship recipient and in 2012, he was named a Hansard Scholar.

Nelson Denis

Nelson A. Denis is a writer, film director, and former New York State Assemblyman (1997-2001). His award-winning films premiered at the Tribeca Film Festival and screened throughout the U.S. and Puerto Rico. He has written for the New York Daily News, Newsday, the New York Sun, and Harvard Political Review. He was the editorial director of El Diario/La Prensa, the largest Spanish-language newspaper in

NYC, where he published over 300 editorials and won the Best Editorial Writing award from the National Association of Hispanic Journalists. He is the writer of eight feature-length screenplays, writer/director of the feature film Vote For Me!, and author of the book War Against All Puerto Ricans. His screenplays have won awards from the New York State Council on the Arts (NYSCA), the New York Foundation for the Arts (NYFA), and CineFestival. He also wrote and directed the feature film VOTE FOR ME!, which premiered in the Tribeca Film Festival. He is a graduate of Harvard University and Yale Law School.

Margarita Mercado Echegaray

Margarita Mercado Echegaray is the Procuradora General (Solicitor General) for the Department of Justice of the Commonwealth of Puerto Rico. Prior to her appointment as Procuradora General, she served as a litigation association at Pietrantoni Mendez & Alvarez LLC. She also served as a law clerk for Hon. Juan R. Torruella at the United States Court of Appeals for the First Circuit, and as a law clerk for Hon. Anabelle Rodriguez in the Supreme Court of Puerto Rico. She received a bachelor's degree in political science and history of the Americas. She earned a Juris Doctor degree from the University of Puerto Rico and her master of laws in constitutional law and civil rights from Columbia University Law School.