No. 15-108

In The
Supreme Court of the United States

COMMONWEALTH OF PUERTO RICO,

*Petitioner*,

v.

LUIS M. SANCHEZ VALLE, ET AL.,

*Respondents.*

*On Writ of Certiorari to the Supreme Court of Puerto Rico*

# BRIEF OF CURRENT AND FORMER SENIOR PUERTO RICO OFFICIALS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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## INTEREST OF *AMICI CURIAE*[1]

*Amici curiae* are individuals who are currently serving or have served at the highest levels of Puerto

[1] This brief is filed with the written consent of all parties through universal letters of consent on file with the Clerk. No counsel for any party authored this brief in whole or in part, and no person or entity other than *amici curiae*, their counsel, or the Committee on Puerto Rico and the U.S. Constitution made a monetary contribution intended to fund its preparation or submission.

Rico's government, including two former Governors, three current or former Resident Commissioners, three former Senate Presidents, three former House Speakers, four former Attorneys General, and a former Puerto Rico appellate court judge. By virtue of their positions, *amici* have dealt firsthand with issues implicating the constitutional and political relationship between Puerto Rico and the federal government. *Amici* thus possess special insight into the ramifications of any decision implicating that relationship and have a substantial interest in the proper resolution of the question presented in this case.

Luis G. Fortuño served as the ninth elected Governor of Puerto Rico from 2009-2012. Prior to holding that Office, Governor Fortuño was Resident Commissioner of Puerto Rico from 2005-2008.

Carlos A. Romero-Barceló served as the fifth elected Governor of Puerto Rico from 1977-1985. Prior to holding that Office, he served as Mayor of the city of San Juan from 1969-1977, and after serving as Governor, he was Resident Commissioner of Puerto Rico from 1993-2000.

Pedro R. Pierluisi is the Resident Commissioner of Puerto Rico (2009-present), and served as Attorney General of Puerto Rico from 1993-1996.

Kenneth Davison McClintock-Hernández served as Secretary of State of Puerto Rico from 2009-2013. In addition, Secretary McClintock was elected to four consecutive terms in the Puerto Rico Senate beginning in 1992, serving as Minority Leader from 2001-2004 and as President from 2005-2008.

Thomas Rivera Schatz is a Puerto Rico Senator who also served as President of the Puerto Rico Senate (2009-2012).

Charles A. Rodríguez served as President of the Puerto Rico Senate (1997-2000).

Rolando A. Silva served in the Puerto Rico Senate from 1981-1997.

Rep. Jenniffer González is the Minority Leader of the Puerto Rico House of Representatives (2013-present) and a former Speaker (2009-2012).

Rep. José F. Aponte-Hernández is a former Speaker of the Puerto Rico House of Representatives (2005-2008), as well as a current Member (2000-present).

Zaida Hernández-Torres, Esq., is a former Puerto Rico Appellate Court Judge (1998-2008) and a former Speaker of the Puerto Rico House of Representatives (1993-1996).

Angel M. Cintrón-García, Esq., served in the Puerto Rico House of Representatives from 1989-2002, including as Majority Leader.

Carlos J. Méndez is the Minority Whip of the Puerto Rico House of Representatives (2013-present) and served as Majority Leader from 2011-2012.

Guillermo A. Somoza-Colombani served as Attorney General of Puerto Rico from 2009-2012.

Antonio M. Sagardía-De Jesús served as Attorney General of Puerto Rico during 2009.

José A. Fuentes Agostini served as Attorney General of Puerto Rico from 1997-1999.

Ana C. Alemañy served as Secretary of the Puerto Rico Housing Department from 1997-1999.

Dr. Norman Maldonado served as President of the University of Puerto Rico from 1993-2001.

Dr. José M. Saldaña served as President of the University of Puerto Rico from 1988-1993.

Joaquín A. Márquez, Esq., served as Director of the Puerto Rico Federal Affairs Administration—the executive agency of the Puerto Rico government that represents the territory before entities of or in the United States—from 1981-1985.

## INTRODUCTION AND SUMMARY OF ARGUMENT

*Amici* firmly believe that the territory of Puerto Rico is not a separate "sovereign" from the United States for purposes of the Double Jeopardy Clause—or for any other constitutional purpose. *Amici* therefore agree with Respondents that the decision of the Supreme Court of Puerto Rico should be affirmed.

In the face of Petitioner's suggestions that "[t]his is the most important case on the constitutional relationship between Puerto Rico and the United States," Pet. 1, and that "Puerto Rico is in the same position as most of the States," Pet. Br. 44, *amici* write separately to reinforce established constitutional principles that should not—and need not—be disturbed by this case. Puerto Rico has been, and remains, a territory subject to Congress's plenary authority under the Territorial Clause. This Court's recognition that the current territorial government is "State-like" in some respects is the product of congressional action, not constitutional evolution. As

such, any appearance of "sovereignty" exercised by the territory of Puerto Rico is conferred statutorily and subject to revision by a future Congress.

In any event, however this Court ultimately resolves the narrow question presented, it can and should decline Petitioner's invitation to embroil itself in matters not before it. As Petitioner ultimately acknowledges, whether the territory of Puerto Rico can be treated as a "sovereign" separate from the federal government for double jeopardy purposes does not bear on the broader question of the territory's political status or relationship to the United States in other respects. Moreover, a ruling that even arguably suggests a federal constitutional notion of State-like sovereignty beyond the strictures of the Double Jeopardy Clause could have far-reaching and unintended consequences for the long-running political debate over Puerto Rico's status, as well as for other settled legal questions.

## ARGUMENT

### I. FUNDAMENTAL LEGAL PRINCIPLES CONTRAVENE THE NOTION OF PUERTO RICO "SOVEREIGNTY"

This case presents the narrow question of whether "Puerto Rico and the Federal Government are separate sovereigns *for purposes of the Double Jeopardy Clause of the United States Constitution*." Pet. Br. i (emphasis added). Despite Petitioner's appropriately tailored (albeit erroneous) answer to that question, *see, e.g.*, *id.* at 28-32, and its insistence that "[t]he extent of Congress' authority over Puerto Rico under the Territorial Clause has no bearing *** here," *id.* at 39-40, Petitioner encourages this Court

to place the territory of Puerto Rico on equal footing with the States and to circumscribe the power that the Constitution vests in Congress to regulate Puerto Rico under the Territorial Clause, *see, e.g.*, *id.* at 41-44.[2]

Doing so would be both incorrect as a legal matter and ill-advised as a practical matter. In the end, Petitioner does not dispute the basic principles of Puerto Rico's constitutional status as a territory subject to Congress's plenary power, or disputes them indirectly but claims the dispute is immaterial. Either way, Petitioner provides no basis to disturb those established constitutional principles in this case.

### A. Puerto Rico Is A Territory Subject To Congressional Control

**1.** As a matter of constitutional law, Puerto Rico has been—and remains—a territory of the United States. The Constitution recognizes only "States" and "Territor[ies]," and obviously Puerto Rico is not a "State[] *** admitted by the Congress into this union." U.S. CONST. art. IV, § 3.

This Court has declined to endorse the notion that, as a matter of constitutional law, the territory of Puerto Rico has attained "State" status. *See Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S.

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[2] Puerto Rico's exclusion from the federal democratic process renders complete equal footing with the States impossible. As *amici* explain below (*see* pp. 20-21, *infra*), discussions of Puerto Rico's "State-like" treatment at times glosses over the material point that, regardless of any "State-like" powers Congress may grant on a piecemeal basis, the territory's access to fundamental democratic rights is out of reach unless it becomes a State.

663, 672 (1974) ("Puerto Rico has thus not become a State in the federal Union like the 48 States[.]") (quoting *Mora v. Mejias*, 206 F.2d 377, 387 (1st Cir. 1953)); *see also District of Columbia v. Carter*, 409 U.S. 418, 424 n.11 (1973) ("[T]he Territories are not 'States' within the meaning of the Fourteenth Amendment.") (citing *South Porto Rico Sugar Co. v. Buscaglia*, 154 F.2d 96, 101 (1st Cir. 1946)). Likewise, in confronting a claim that the Extradition Clause should apply directly to the territory, the Court noted that "the words of the Clause apply only to 'States'" and reiterated that it has "never held that the Commonwealth of Puerto Rico is entitled to all the benefits conferred upon the States under the Constitution." *Puerto Rico v. Branstad*, 483 U.S. 219, 229 (1987).

The territory's constitutional status is further grounded in a longstanding line of cases—albeit with a deeply checkered historical, political, and legal legacy—dating back to its cession. In *Downes v. Bidwell*, 182 U.S. 244 (1901), this Court made clear that Puerto Rico was an "unincorporated" territory to which all provisions of the Constitution did not automatically extend. As Justice White's authoritative opinion concluded, Puerto Rico "had not been incorporated into the United States, but was merely appurtenant thereto as a possession" that "was subject to the sovereignty of and was *owned* by the United States." *Id.* at 341-342 (White, J., concurring) (emphasis added); *Balzac v. Porto Rico*, 258 U.S. 298, 305 (1922) ("[T]he opinion of Mr. Justice White of the majority, in *Downes v. Bidwell*, has become the settled law of the court."). In *Balzac*, the Court for the first time deemed a territory

"unincorporated" after Congress had conferred citizenship on its inhabitants. *See* 258 U.S. at 307 & n.1. *Balzac* thereby originated a legal distinction between the political status and rights of U.S. citizens in Puerto Rico, and that of U.S. citizens in "incorporated" territories (*e.g.*, Louisiana or Alaska). That "century-old" distinction survives to this day. *Boumediene v. Bush*, 553 U.S. 723, 757-759 (2008).

*Amici* fully recognize the imperialist context in which the *Insular Cases* were decided and the fundamentally anachronistic and flawed doctrine of territorial incorporation that those cases produced.[3] Nonetheless, as the issue of incorporation has become decidedly a political one for Congress and the U.S. citizens of Puerto Rico to address, *see* pp. 19-21, *infra*, this Court need not delve further into this fraught body of law.

**2.** As a territory, Puerto Rico is subject to Congress's "Power to dispose of and make all needful Rules and Regulations respecting the Territory *** belonging to the United States." U.S. CONST. art. IV, § 3, cl. 2. That grant of authority in the so-called "Territorial Clause" has long been understood to be plenary. *See Kansas v. Colorado*, 206 U.S. 46, 92 (1907) ("These arid lands are largely within the territories, and over them, by virtue of the [Territorial Clause] *** or by virtue of the power vested in the national government to acquire

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[3] *E.g.*, JUAN R. TORRUELLA, THE SUPREME COURT AND PUERTO RICO: THE DOCTRINE OF SEPARATE AND UNEQUAL 3 (1988) (arguing that *Insular Cases* "stand at a par with *Plessy v. Ferguson* in permitting disparate treatment by the government of a discrete group of [U.S.] citizens").

territory by treaties, Congress has full power of legislation, subject to no restrictions other than those expressly named in the Constitution[.]"); *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.").

Indeed, in discussing Puerto Rico specifically, the Court has acknowledged that "[t]he plenitude of the power of Congress *** has been manifest from the earliest days," and that "there is no express or implied limitation on Congress in exercising its power to create local governments for any and all of the territories," apart from the Constitution itself. *Downes*, 182 U.S. at 290-291 (White, J., concurring); *see id.* at 298-299 ("There can also be no controversy as to the right of Congress to locally govern the island of Porto Rico as its wisdom may decide[.]"); *see also Torres v. Puerto Rico*, 442 U.S. 465, 469 (1979) ("[T]he limitation on the application of the Constitution in unincorporated territories is based in part on the need to preserve Congress' ability to govern such possessions."). That constitutional authority "undoubtedly" includes "the right *** to change such local governments at [its] discretion." *Downes*, 182 U.S. at 290-291 (White, J., concurring).

Petitioner is therefore wrong to suggest—as it recognizes, unnecessarily—that Public Law 600 effected a permanent or partial relinquishment of the constitutional authority of each Congress to alter the powers exercised by the government of Puerto Rico.[4]

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[4] Public Law 600, Act of July 3, 1950, Pub. L. No. 81-600, 64 Stat. 319, "offered the people of Puerto Rico a compact whereby

*See* Pet. Br. 41-43. Territorial governments have an "ephemeral nature" and, under the Territorial Clause, Congress may confer "different forms of government" on a territory, *Downes*, 182 U.S. at 290-291, 293 (White, J., concurring) (discussing District of Columbia as "instance which exemplifies the exercise of the power [to create local governments for territories] substantially in all its forms"). That is precisely what Congress did with respect to the territory of Puerto Rico when it made several "significant changes [to] Puerto Rico's governmental structure" through amendments to Puerto Rico's various organic acts. *Calero-Toledo*, 416 U.S. at 671-672 (providing historical overview).

Even assuming Public Law 600 "work[ed] a significant change in the relation between Puerto Rico and the rest of the United States," *Cordova & Simonpietri Ins. Agency Inc. v. Chase Manhattan Bank NA*, 649 F.2d 36, 39 (1st Cir. 1981), that change could not have altered their constitutional relationship. At the very least, it cannot be the case that "[i]n 1952, Puerto Rico ceased being a territory of the United States subject to the plenary powers of Congress as provided in the Federal Constitution," or that "[t]he authority exercised by the federal

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they might establish a government under their own constitution." *Calero-Toledo*, 416 U.S. at 671. After Puerto Rico accepted the compact, Congress amended and approved the local constitution. *See* 48 U.S.C. § 731d note. The effect of those events was "the repeal of numerous provisions of the Organic Act of 1917," with the "remainder becom[ing] known as the Puerto Rican Federal Relations Act." *Examining Bd. of Eng'rs, Architects & Surveyors v. Flores de Otero*, 426 U.S. 572, 594 (1976).

government emanated thereafter from the compact itself." Pet. Br. 42 (quoting *United States v. Quiñones*, 758 F.2d 40, 42 (1st Cir. 1985)). Such a position suffers from a myriad of flaws. It runs headlong into this Court's post-Public-Law-600 recognition that Congress continues to be "empowered *under the Territory Clause*" to enact legislation pertaining to Puerto Rico. *Harris v. Rosario*, 446 U.S. 651, 651 (1980) (per curiam) (emphasis added). It would put Puerto Rico in a constitutional "no-man's land" of being neither a territory nor a State. And it would mean that Congress's ongoing authority is "defined, and limited," by the compact with Puerto Rico, rather than by "the constitution." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 176 (1803).[5]

To be sure, by enacting Public Law 600, Congress in limited respects "relinquished its control

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[5] Petitioner's reliance (Br. 10, 37-38) on a Cold-War-era United Nations resolution proclaiming that the territory of Puerto Rico "achieved a new constitutional status," G.A. Res. 748 (VIII), at 26 (Nov. 27, 1953), is unavailing. Read in context, that statement "is best understood as an expression that the new relationship gave the people [of Puerto Rico] the ability to exercise self-determination and achieve independence at any time, or any other relationship to the U.S. to which agreement might be reached." H.R. REP. NO. 105-131, pt. 1, at 18 (1997). In any event, it is of little import because this Court—not the United Nations—is the final arbiter of the constitutional relationship between the United States and its territories. *See Torres*, 442 U.S. at 470 ("Congress generally has left to this Court the question of what constitutional guarantees apply to Puerto Rico."); *cf. Igartua de la Rosa v. United States* (*Igartua I*), 32 F.3d 8, 10 n.1 (1st Cir. 1994) (per curiam) ("Nor could the [International Covenant on Civil and Political Rights] override the constitutional limits discussed above.").

over the organization of the local affairs of the island." *Examining Bd. of Eng'rs,* 426 U.S. at 597. But for the reasons just explained, Congress in no way irrevocably surrendered its constitutional power to regulate Puerto Rico as a territory—including with respect to the form of its government. To hold otherwise would contravene the settled principle "that one legislature is competent to repeal any act which a former legislature was competent to pass; and that one legislature cannot abridge the powers of a succeeding legislature." *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87, 135 (1810); *see also Reichelderfer v. Quinn*, 287 U.S. 315, 318 (1932) ("By dedicating the lands thus acquired to a particular public use, Congress declared a public policy, but did not purport to deprive itself of the power to change that policy by devoting the lands to other uses.").

Notably, the U.S. Department of Justice has concluded "that there could not be an enforceable vested right in political status" because a "mutual consent" provision attempting to create such a right "would not bind a subsequent Congress." Office of Legal Counsel, Mutual Consent Provisions in the Guam Commonwealth Legislation: Memorandum Opinion for the Special Representative for Guam Commonwealth 1 n.2 (July 28, 1994) ("OLC Memo"). At bottom,

> Congress *** has no authority to enact legislation under the Territory Clause that would limit the unfettered exercise of its power to amend or repeal. *** The plenary power of Congress over a non-state area persists as long as the area remains in that condition and terminates only when the

> area becomes a State or ceases to be under United States sovereignty. There is no intermediary status as far as the Congressional power is concerned.

*Id.* at 4-5.[6]

Petitioner's (needless) bid to have this Court circumscribe the application of the Territorial Clause to Puerto Rico thus finds no support in law or history.

### B. Any Sovereign-Like Powers Exercised By Puerto Rico Are Statutorily Authorized By Congress

The fact that, as a matter of constitutional law, Puerto Rico is a territory subject to Congress's plenary power is in no way at odds with this Court's observation that Puerto Rico "would seem to have become a State within a common and accepted meaning of the word." *Calero-Toledo*, 416 U.S. at 672 (citation and quotation marks omitted); *see, e.g.*, *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 and internal quotation marks omitted). Under the Territorial Clause, Congress is free as a matter of statutory law to grant

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[6] Although Petitioner is correct (Br. 42 n.5) that "[t]he general rule that one Congress cannot bind a later one *** is not absolute," the available exceptions to the rule are inapposite here. As the Office of Legal Counsel memorandum explains at length, the limitations imposed by the Fifth Amendment's Due Process Clause do not "preclude[] a subsequent Congress from repealing legislation for the governance of non-state areas enacted by an earlier Congress under the Territory Clause." OLC Memo, *supra*, at 6-10.

Puerto Rico State-like authority with respect to particular matters. But that grant cannot and does not make Puerto Rico an entity with the constitutional sovereignty of a State; to the contrary, it reinforces the fact that any "sovereignty" is legislatively conferred by Congress.

The sovereignty exercised by the States is profoundly different than any indicia of "sovereignty" exercised by the territory of Puerto Rico. "As every schoolchild learns, our Constitution establishes a system of dual sovereignty between the *States* and the Federal Government," wherein "'[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the *States* respectively, or to the people.'" *Gregory v. Ashcroft*, 501 U.S. 452, 457 (1991) (emphasis added) (quoting U.S. CONST. amend. X). By contrast, from the time Puerto Rico became a territory of the United States, the extent of its autonomy has been determined solely by Congress. "A brief interlude of military control was followed by congressional enactment of a series of Organic Acts for the government of the island," which ultimately resulted in Congress "offer[ing] the people of Puerto Rico a compact" in response to "pressures for greater autonomy." *Calero-Toledo*, 416 U.S. at 671; *see also Examining Bd. of Eng'rs*, 426 U.S. at 592-593 ("Congress responded to demands for greater autonomy *** [and] authorized [the people of Puerto Rico] to draft their own constitution[.]"). Petitioner is thus wrong to suggest that the territory "retained sovereignty" when it was ceded by Spain to the United States, that the territory's criminal laws are "'like those of a state,'" or that the Founders' decision

to "'split the atom of sovereignty'" has anything to do with the territory. Pet. Br. 25, 27, 28 (citations omitted).

Public Law 600 and the Federal Relations Act reflect that essential distinction between the territory of Puerto Rico and the States. "[T]he purpose of Congress in the 1950 and 1952 legislation was to accord to Puerto Rico the degree of autonomy and independence normally *associated with* States of the Union," *Examining Bd. of Eng'rs*, 426 U.S. at 594 (emphasis added), not to recognize that the territory possessed the same residual sovereignty that the States enjoy. *See id.* at 593 (noting that 1950s provisions were adopted "in the '*nature* of a compact'") (emphasis added) (quoting 48 U.S.C. § 731b). As Congress explained when it enacted those laws, the exercise of self-government over local affairs would occur "'[w]ithin th[e] framework'" of the U.S. Constitution and the Federal Relations Act, *id.* at 593 n.25 (quoting S. REP. NO. 82-1720, at 6 (1952)), and thus would "not change Puerto Rico's fundamental political, social, and economic relationship to the United States," H.R. REP. NO. 81-2275, at 3 (1950).

For those reasons, it is only in a limited sense that the territory of Puerto Rico exercises "a measure of autonomy comparable to that possessed by the States." *Examining Bd. of Eng'rs*, 426 U.S. at 597. Each time this Court has determined that Puerto Rico should be treated as a State, it has done so in the context of interpreting the scope of a federal statute. *See id.* at 597 ("Whether Puerto Rico is now considered a Territory or a State, *for purposes of the specific question before us*, makes little difference

because each is included within § 1983 and, therefore, 28 U.S.C. § 1343(3)."); *Calero-Toledo*, 416 U.S. at 675 (upholding "judicial practice of treating enactments of the Commonwealth of Puerto Rico as 'State statute[s]' *for purposes of the Three-Judge Court Act*") (emphasis added); *accord Cordova & Simonpietri Ins. Agency Inc.*, 649 F.2d at 38 (considering "[w]hether Puerto Rico is now to be treated as a state or a territory *for purposes of the Sherman Act*") (emphasis added).[7]

Accordingly, contrary to Petitioner's insistence (Br. 35), the "[p]ost-1952 decisions of this Court involving Puerto Rico" by no means suggest—let alone "confirm"—that "the Commonwealth's laws emanate from sovereign authority delegated by the people of Puerto Rico." Quite the opposite: any such authority derives ultimately from Congress.

## II. AT MOST, THE COURT SHOULD EXPRESSLY CONFINE ANY DISCUSSION OF PUERTO RICO'S "SOVEREIGNTY" TO THE DOUBLE JEOPARDY CLAUSE

Because the territory of Puerto Rico *by statute* exercises authority that is *like* a State in some respects, even Petitioner agrees—stray suggestions aside—that the Court need not disturb more than a

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[7] *Puerto Rico v. Franklin California Tax-Free Trust*, No. 15-233, in which this Court has granted certiorari, raises a similar question of statutory interpretation: the extent to which a provision of Chapter 9 of the federal Bankruptcy Code, which refers only to a "State" and "State law," 11 U.S.C. § 903, applies to Puerto Rico in light of Congress's decision to define "State" to "include[] *** Puerto Rico, except for the purpose of defining who may be a debtor under chapter 9 of this title," *id.* § 101(52).

century of precedent regarding Congress's constitutional authority over Puerto Rico to decide this case. *See* Pet. Br. 43. To the extent the Court is inclined to resolve this case in Petitioner's favor, it should make clear that any notion of Puerto Rico's "sovereignty" is limited to the double jeopardy context. Cabining the scope of the Court's opinion in that respect is essential in light of the doctrinally distinct nature of the dual sovereignty inquiry and the political and legal ramifications of any broader statements.

### A. The "Dual Sovereignty" Issue Is Distinct From The Issue Of "Sovereignty" Writ Large

Although the doctrine at issue in this case has been cast in terms of "dual sovereignty," that doctrine implicates "sovereignty"—if at all—only in a narrow sense unique to the Double Jeopardy Clause. As this Court has explained, the dual sovereignty doctrine does not concern "the extent of control exercised by one prosecuting authority over the other but rather the ultimate source of the power under which the respective prosecutions were undertaken." *United States v. Wheeler*, 435 U.S. 313, 320 (1978). The inquiry into the authority under which a criminal prosecution was taken thus does not require passing judgment on whether a prosecuting entity is "sovereign" in the sense of having "[s]upreme dominion, authority, or rule." *Sovereignty*, BLACK'S LAW DICTIONARY (10th ed. 2014).

Indeed, under this Court's precedent, it makes no difference to the applicability of the Double Jeopardy Clause whether an entity is "sovereign" in

some respect. In *Waller v. Florida*, the Court determined that Florida and its municipality were not "dual sovereigns" for double jeopardy purposes even though Florida law "treat[ed] municipalities and the State as separate sovereign entities." 397 U.S. 387, 391 (1970). Conversely, any "sovereignty" attributed to a prosecuting authority for purposes of the double jeopardy analysis bears no relation to the traditional concept of sovereignty.

Petitioner agrees that "sovereignty" for double jeopardy purposes is a separate issue from whether an entity is sovereign in a fuller sense. In its view, to confuse the "sovereignty" required to avoid application of the Double Jeopardy Clause with Puerto Rico sovereignty would be a "semantic trap" that overreads the fact that "the relevant doctrine is called the dual *sovereignty* doctrine." Pet. Br. 40 (criticizing Puerto Rico Supreme Court and 11th Circuit for "conclud[ing] that Puerto Rico could not invoke th[e] [dual sovereignty] doctrine unless it could claim to be a 'sovereign' for all purposes"). Thus, while *amici* and Petitioner disagree on the ultimate source of Puerto Rico's prosecutorial authority, there is no dispute that a double jeopardy analysis keyed to pronouncements of sovereignty writ large would be an "approach [that] cannot be squared with this Court's dual sovereignty jurisprudence." Pet. Br. 40.

### B. A Narrow Ruling Avoids Unintended Consequences

Given Petitioner's concession that no pronouncement on Puerto Rico's constitutional status as a territory or on Congress's plenary authority to

govern is necessary to resolve this case, the Court should be careful to confine its resolution to the narrow question presented. A broader ruling—or even dicta—that disturbs the settled constitutional principles governing the territory of Puerto Rico, or otherwise opines on issues of sovereignty writ large, could have far-ranging political and legal consequences, some of which *amici* underscore below. Those consequences are easily avoided by an opinion, to the extent it recognizes any measure of dual sovereignty at all, that hews in no uncertain terms to the double jeopardy analysis—and goes no further.

*1. Political Consequences*

As Petitioner openly acknowledges (Br. 45), there is a "lively debate" in the territory regarding "the island's political status." The vigor of that debate, as well as its political nature, can hardly be overstated. *See, e.g.*, Pet. App. 241a (Rodríguez Rodríguez, J., dissenting) (asserting that "majority's objective is to advance its ideology on the status of Puerto Rico"). "The issue of Puerto Rico's status has been discussed and debated as far back as the Treaty of Paris"—including through four plebiscites, presidential ad hoc advisory groups and task forces, and legislative proposals. REPORT BY THE PRESIDENT'S TASK FORCE ON PUERTO RICO'S STATUS 19-21 (2011); *see, e.g.*, H.R. 856, 105th Cong. (1997) (providing "a process leading to full self-government for Puerto Rico"). And each plebiscite has spawned further debate over the meaning of the status options presented on the ballot and the meaning of the results. *See* R. SAM GARRETT, CONG. RESEARCH SERV., RL32933, POLITICAL STATUS OF PUERTO RICO: OPTIONS FOR CONGRESS 33 (2011) (documenting, in

notes d, g, and i, the "arguabl[e]" level of sovereignty contained in various status options presented to voters in 1967, 1993, and 1998).

Most recently, in a 2012 plebiscite, the U.S. citizens of Puerto Rico rejected their current territorial status (54% to 46%) and chose statehood from among the alternatives by 61%. R. SAM GARRETT, CONG. RESEARCH SERV., R42765, PUERTO RICO'S POLITICAL STATUS AND THE 2012 PLEBISCITE: BACKGROUND AND KEY QUESTIONS 8 (2013). Congress in 2014 appropriated $2.5 million to the territory for "objective, nonpartisan voter education about, and a plebiscite on, options that would resolve Puerto Rico's future political status." Consolidated Appropriations Act, 2014, Pub. L. No. 113-76, 128 Stat. 5, 61.

The territory's status thus "remains of overwhelming importance to the people of Puerto Rico, and there remains a great deal to be said on the topic." REPORT, *supra*, at 23. That is for good reason. Congressional authorization of a territorial constitution for self-government in local civil affairs not otherwise governed by federal law has not changed the historically and legally unprecedented political condition in which *Balzac* left the territory 93 years ago. *See* pp. 7-8, *supra*. Whether the territory is treated by federal statute or federal judicial rulings "like a sovereign" or "like a State," *Balzac* defines the political status and civil rights of U.S. citizens in the territory in terms that deny permanent incorporation into the Union, application of the Constitution by its own force, and the right to participate meaningfully in federal governance—all paramount rights of U.S. citizenship enjoyed by citizens in the 50 States.

This Court has long made clear that the resolution of the status debate is "wholly a political question" that falls exclusively within Congress's province. "It cannot be denied that *** the sovereignty of the United States may be extended over foreign territory to remain paramount until, *in the discretion of the political department of the government of the United States*, it be relinquished." *Downes*, 182 U.S. at 312, 344 (White, J., concurring) (emphasis added). Indeed, were the Court to wade into this debate, it would be "an act of usurpation [of] purely political functions." *Id.* at 344. There is thus no legal basis—and given the ongoing political dialogue, no compelling reason—for this Court to enter that debate through this case. As a practical matter, any statement the Court makes suggesting something beyond territorial status for Puerto Rico—no matter how indirect or unintentional—is fraught with potential political ramifications and jeopardizes the effectiveness of Puerto Rico's next plebiscite.

*2. Legal Consequences*

Beyond the potential political consequences, a broad ruling could call into question several long-settled legal conclusions grounded in Puerto Rico's territorial status under the Constitution. *Amici* provide here just a few examples.

*First*, a suggestion that the territory of Puerto Rico exercises State-like sovereignty under the Constitution would undermine the beleaguered-yet-entrenched legal distinction between unincorporated and incorporated territories. *See* pp. 7-8, *supra*. As a result, this Court could be called upon to revisit the

extent to which provisions of the federal Constitution applicable to States are relevant to the territory.

Take one example: for nearly a century, Congress has declined to extend federal "internal revenue" laws to the territory of Puerto Rico, 48 U.S.C. § 734; *see Examining Bd. of Eng'rs*, 426 U.S. at 589-590 & n.22, despite the fact that the Tax Uniformity Clause of the Constitution requires that "all Duties, Imposts and Excises shall be uniform throughout the United States," U.S. CONST. art. I, § 8, cl. 1. That legislative choice is grounded in this Court's determination that the Tax Uniformity Clause "was not applicable to Congress in legislating for Porto Rico" because Puerto Rico "had not been incorporated into the United States, but was merely appurtenant thereto as a possession." *Downes*, 182 U.S. at 342 (White, J., concurring). A decision that casts doubt on Puerto Rico's status as an unincorporated territory in turn casts doubt on Puerto Rico's longstanding taxation regime.

*Second*, this Court has held that the territory of Puerto Rico lacks authority over foreign affairs. *See Torres*, 442 U.S. at 473 ("Puerto Rico has no sovereign authority to prohibit entry into its territory; as with all international ports of entry, border and customs control for Puerto Rico is conducted by federal officers."). Yet, at times, the territorial government has presented itself to foreign countries as a sovereign entity.

In 2003, for example, negotiations between the "unincorporated territory" of Puerto Rico and Belize prompted the following response from the U.S. Department of State: "The U.S. federal government

has full responsibility for the conduct of foreign relations of all areas subject to United States jurisdiction, including all U.S. states, territories, and possessions. Accordingly, the Department reviews any proposed participation by a U.S. territory or possession in international bodies, or signing of documents (including agreements) with other nations." Memorandum from Colin Powell, U.S. Secretary of State, to the Embassy of Belize (May 16, 2003). Any language that could be interpreted to imbue Puerto Rico with independent sovereignty would be at odds with those authorities.

*Third*, over the past two decades, the First Circuit has confronted a series of challenges by U.S. citizens-residents of Puerto Rico claiming that they are constitutionally entitled to vote in the presidential election and for members of the U.S. House of Representatives with full voting privileges. Each time, the First Circuit has rejected those challenges on the straightforward ground that "Puerto Rico is concededly not a state." *Igartua I*, 32 F.3d at 9-10. With respect to the election of the President and Vice-President, the court reasoned that "Article II of the Constitution explicitly provides that the President of the United States shall be elected by electors who are chosen *by the States*." *Igartua de la Rosa v. United States*, 229 F.3d 80, 83-84 (1st Cir. 2000) (applying *Igartua I*); *Igartua-de la Rosa v. United States*, 417 F.3d 145, 146-148 (1st Cir. 2005) (en banc) (same). Likewise, with respect to members of Congress, the court reasoned that "the text of the Constitution, in several provisions, plainly limits the right to choose members of the House of Representatives to citizens of a state," which Puerto

Rico is not. *Igartua v. United States* (*Igartua IV*), 626 F.3d 592, 595 (1st Cir. 2010).

As the First Circuit emphasized, "these provisions of the constitutional text are deliberate and go to the heart of the Constitution," and "may not be upset." *Igartua IV*, 626 F.3d at 595. This Court should avoid any statements comparing Puerto Rico to States that could muddy those constitutional principles and their application to an otherwise settled issue.

## CONCLUSION

For the foregoing reasons, the decision of the Puerto Rico Supreme Court should be affirmed. To the extent this Court is inclined to reverse, it should expressly confine any suggestion of the territory's "sovereignty" to the unique double jeopardy context.

Respectfully submitted.

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December 23, 2015