No. 15-108

In The

Supreme Court of the United States

COMMONWEALTH OF PUERTO RICO,

Petitioner,

v.

LUIS M. SÁNCHEZ VALLE AND
JAIME GÓMEZ VÁZQUEZ,

Respondents.

On Writ Of Certiorari To The Supreme Court Of Puerto Rico

BRIEF FOR *AMICUS CURIAE* FLORIDA ASSOCIATION OF CRIMINAL DEFENSE LAWYERS – MIAMI CHAPTER IN SUPPORT OF RESPONDENTS

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1 James Kent, *Commentaries of American Law* 374 (1826).....25

1 Joseph Chitty, *A Practical Treatise on the Criminal Law* 458 (1816).....25

2 William Hawkins, *A Treatise of the Pleas of the Crown* 372 (1721).....25

4 William Blackstone, *Commentaries on the Laws of England* 329 (1770).....25

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INTEREST OF *AMICUS CURIAE*[1]

Founded in 1963, the Miami Chapter of the Florida Association of Criminal Defense Lawyers (FACDL-Miami) is one of the largest bar associations in Miami-Dade County. The 450-plus attorneys in the Miami Chapter include private practitioners and public defenders who are committed to preserving fairness in the state and federal criminal justice systems and defending the rights of individuals guaranteed by the Constitution of the United States.

SUMMARY OF THE ARGUMENT

Puerto Rico (Petitioner) asks the Court to overrule *Puerto Rico v. Shell Co. (P.R.)*, 302 U.S. 253 (1937), so that it may prosecute two defendants (Respondents) for crimes for which they have already been convicted in federal court. Puerto Rico asserts that it is, like one of the fifty States, a "sovereign" distinct from the federal government, thus triggering the so-called "dual sovereignty" exception to the Double Jeopardy Clause of the Fifth Amendment. Petitioner's Brief at 22 ("[T]he Double Jeopardy Clause bars successive prosecution by the *same*

[1] The parties have consented to the filing of this brief, and their written consents are on file with the Clerk of this Court. No counsel for a party authored this brief in whole or in part, and no person other than *amicus* and its counsel has made any monetary contribution to the preparation or submission of this brief.

sovereign, but does not apply to successive prosecution by *different* sovereigns.").

But Petitioner's position is based on "this Court's precedents dating back well into the nineteenth century," *id.* (citing, *inter alia*, *Abbate v. United States*, 359 U.S. 187, 193-94 (1959); *Bartkus v. Illinois*, 359 U.S. 121, 128-39 (1959); *United States v. Lanza*, 260 U.S. 377, 382 (1922)), at a time when the Court's non-incorporation jurisprudence prevailed, and the constitutional prohibition against double jeopardy did not bar the States from twice prosecuting a defendant for the same offense. *See Palko v. Connecticut*, 302 U.S. 319 (1937). In *Benton v. Maryland*, 395 U.S. 784 (1969), however, the Court overruled *Palko*. Although the double jeopardy prohibition of the Fifth Amendment now applies to States through the Fourteenth Amendment, the Court has continued to apply the dual sovereignty doctrine in double jeopardy cases, *e.g.*, *Heath v. Alabama*, 474 U.S. 82, 88 (1985), without squarely addressing whether it continues to have force in light of *Benton*. Numerous judges of the federal courts of appeal have extended invitations to the Court to weigh in on the dual sovereignty question, particularly in light of its modern incorporation jurisprudence. *E.g.*, *United States v. Berry*, 164 F.3d 844, 847 n.4 (3d Cir. 1999) ("[W]e and other Courts of Appeal have suggested that the growth of federal criminal law has created a need for the Supreme Court to reconsider the application of

the dual sovereignty rule to situations such as this.").[2] They have noted decades worth of "judicial and

[2] *Accord United States v. Grimes*, 641 F.2d 96, 101 (3d Cir. 1981) ("[A] reexamination of *Bartkus* may be in order, since questions may be raised regarding both the validity of this formalistic conception of dual sovereignty and the continuing viability of the opinion's interpretation of the Double Jeopardy Clause with respect to the states."); *United States v. All Assets of G.P.S. Auto. Corp.*, 66 F.3d 483, 499 (2d Cir. 1995) (Calabresi, J., concurring) (welcoming "a new look by the High Court at the dual sovereignty doctrine and what it means today for the safeguards the Framers sought to place in the Double Jeopardy Clause."); *Turley v. Wyrick*, 554 F.2d 840, 842 (8th Cir. 1977) (Lay, J., concurring) ("I am not convinced that subsequent decisions of the Supreme Court have not fully eroded *Bartkus* and *Abbate* and that the double jeopardy defense should be sustained. . . . As an intermediate appellate judge I realize it is not my singular role to express opinion contrary to established law. However, recognition of this judicial discipline should not prevent one from expressing dismay in the use of stare decisis to perpetuate an injustice."); *see also United States v. Barrett*, 496 F.3d 1079, 1119 (10th Cir. 2007) ("To the extent Barrett questions the continued viability of the dual sovereignty doctrine . . . , this court is bound to follow *Lanza* and its progeny until such time as the Supreme Court overrules it."); *United States v. Jackson*, 327 F.3d 273, 295 (4th Cir. 2003) ("Unless and until the Supreme Court overrules its existing precedents, we are bound to conclude that the federal prosecution under federal law is not barred by the fact that the defendant was previously tried and convicted under State law on the basis of the same facts."); *United States v. Singleton*, 16 F.3d 1419, 1429 n.48 (5th Cir. 1994) ("[A]mici curiae[ ] invite us to reconsider the constitutionality of the 'dual sovereignty' exception to double jeopardy in this case. We decline the invitation. . . . Even if the constitutionality of the 'dual sovereignty' doctrine were properly before us, however, we are bound by Supreme Court precedent upholding the doctrine. . . . It is to that Court amici must address their arguments.").

scholarly criticism" of the doctrine. *United States v. Tirrell*, 120 F.3d 670, 677 (7th Cir. 1997).[3]

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[3] Published critiques of the dual sovereignty doctrine date back to 1932 and have continued into this century. *E.g.*, J.A.C. Grant, *The Lanza Rule of Successive Prosecutions*, 32 COLUM. L. REV. 1309 (1932); Walter T. Fisher, *Double Jeopardy, Two Sovereignties and the Intruding Constitution*, 28 U. CHI. L. REV. 591 (1961); Lawrence Newman, *Double Jeopardy and the Problem of Successive Prosecution: A Suggested Solution*, 34 S. CAL. L. REV. 252 (1961); Harlan R. Harrison, *Federalism and Double Jeopardy: A Study in the Frustration of Human Rights*, 17 U. MIAMI L. REV. 306 (1963); George C. Pontikes, *Dual Sovereignty and Double Jeopardy: A Critique of* Bartkus v. Illinois *and* Abbate v. United States, 14 CASE W. RES. L. REV. 700 (1963); Note, *Double Prosecution by State and Federal Governments: Another Exercise in Federalism*, 80 HARV. L. REV. 1538 (1967); Richard D. Boyle, *Double Jeopardy and Dual Sovereignty: The Impact of* Benton v. Maryland *on Successive Prosecutions for the Same Offense by State and Federal Governments*, 46 IND. L.J. 413 (1971); James E. King, Note, *The Problem of Double Jeopardy in Successive Federal-State Prosecutions: A Fifth Amendment Solution*, 31 STAN. L. REV. 277 (1979); Note, *Double Jeopardy and Federal Prosecution After State's Jury Acquittal*, 80 MICH. L. REV. 1073 (1982); Ronald J. Allen & John P. Ratnaswamy, Heath v. Alabama*: A Case Study of Doctrine and Rationality in the Supreme Court*, 76 J. CRIM. L. & CRIMINOLOGY 801 (1985); Kenneth M. Murchison, *The Dual Sovereignty Exception to Double Jeopardy*, 14 N.Y.U. REV. L. & SOC. CHANGE 383 (1986); Evan Tsen Lee, *The Dual Sovereignty Exception to Double Jeopardy: In the Wake of* Garcia v. San Antonio Metropolitan Transit Authority, 22 NEW ENG. L. REV. 31 (1987); Michael A. Dawson, Note, *Popular Sovereignty, Double Jeopardy, and the Dual Sovereignty Doctrine*, 102 YALE L.J. 281 (1992); Daniel A. Braun, *Praying to False Sovereigns: The Rule Permitting Successive Prosecutions in the Age of Cooperative Federalism*, 20 AM. J. CRIM. L. 1 (1992); Paul G. Cassell, *The Rodney King Trials and the Double Jeopardy Clause: Some*

(Continued on following page)

Before the Court accepts Petitioner's invitation to re-examine (and overrule) *Shell*, which turns on the political question of Puerto Rico's status vis-a-vis the federal government and the fifty States, the Court should first re-examine the dual sovereignty doctrine, especially in light of the expanded federalization of crime, in an age of cooperative federalism between federal and state governments. *Amicus* submits, consistent with the observations of numerous jurists and commentators, that the Court should abandon the dual sovereignty doctrine and hold that the Fifth Amendment's Double Jeopardy Clause bars a successive prosecution for the same crime, even if initiated by a different prosecuting authority. In all events, recognizing Puerto Rico as a sovereign distinct from the federal government would be incompatible with a century of precedent from this Court, and a century of actions by both the Legislative and Executive Branches.

Observations on Original Meaning and the ACLU's Schizophrenic Views of the Dual Sovereignty Doctrine, 41 UCLA L. REV. 693 (1994); Sandra Guerra, *The Myth of Dual Sovereignty: Multijurisdictional Drug Law Enforcement and Double Jeopardy*, 73 N.C. L. REV. 1159 (1995); Edwin Meese III, *Big Brother on the Beat: The Expanding Federalization of Crime*, 1 TEX. REV. L. & POL. 1 (1997); Robert Matz, *Dual Sovereignty and the Double Jeopardy Clause: If At First You Don't Convict, Try, Try Again*, 24 FORDHAM URB. L.J. 353 (1997); David Bryan Owsley, *Accepting the Dual Sovereignty Exception to Double Jeopardy: A Hard Case Study*, 81 WASH. U.L.Q. 765, 767 (2003).

ARGUMENT

I. The Dual Sovereignty Doctrine Should Be Abandoned; The Double Jeopardy Clause Should Bar Successive Prosecutions for the Same Offense, Even if by Different Sovereigns[4]

The prohibition against being twice tried for the same offense is an ancient restraint on governmental power deeply entrenched in our legal history. *See* Peter Westen & Richard Drubel, *Toward a General Theory of Double Jeopardy*, 1978 S. CT. REV. 81. It developed as a basic notion of fairness with roots traceable to the Hebrew Talmud. *See* Lawrence Newman, *Double Jeopardy and the Problem of Successive Prosecution: A Suggested Solution*, 34 S. CAL. L. REV. 252 (1961).

The Fifth Amendment's prohibition against subjecting a person "for the same offence to be twice put in jeopardy" originated in the English common law pleas of *autrefois acquit* and *autrefois convict*, which allowed a defendant to plead a prior acquittal or conviction in bar of a present prosecution. *See*

[4] This section of the Argument draws from the briefs filed in earlier cases challenging the continued viability of the dual sovereignty doctrine. *See Roach v. Missouri*, 134 S. Ct. 118 (2013) (cert. denied) (Petition for Writ of Certiorari, No. 12-1394, 2013 WL 2352238); *United States v. Angleton*, 538 U.S. 946 (2003) (cert. denied) (Petition for Writ of Certiorari, No. 02-1233, 2003 WL 21699547); *United States v. Roman*, 608 F. App'x 694 (10th Cir. 2015) (successive federal conviction sustained) (Appellant's Opening Brief, No. 14-4126, 2015 WL 1508203).

United States v. Scott, 437 U.S. 82, 87 (1978). In 18th-century England, a criminal defendant could interpose these pleas regardless of whether the previous prosecution was brought by the same or different sovereigns. *See R. v. Roche*, 168 Eng. Rep. 169 (K.B. 1775) (holding that a Dutch acquittal for murder "would be a bar" to an English prosecution); *R. v. Hutchinson* (holding that an acquittal for murder in Portugal barred prosecution in England), *cited in Burrows v. Jemino*, 93 Eng. Rep. 815 (Ch. 1726) and *Beak v. Thyrwhit*, 87 Eng. Rep. 124, 125 (K.B. 1688) (both discussing *Hutchinson*, of which there is apparently no surviving report). English law remained the same into the twentieth century. *See R. v. Aughet*, 13 Cr. App. R. 101 (C.C.A. 1918).

The Framers included the Fifth Amendment's Double Jeopardy Clause in the Bill of Rights because they feared the specter of successive prosecutions. The first Congress decided that the provisions of the text should mirror the already well-established double-jeopardy principle. *See* 1 Annals of Cong. 781 (1789).

Notwithstanding the Double Jeopardy Clause's bar against twice subjecting a defendant to jeopardy for the same offense, the Court has permitted two prosecutions when brought by separate sovereigns – an application of the so-called dual sovereignty doctrine. Although "[t]o the Constitution of the United States the term SOVEREIGN is totally unknown," *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419, 454 (1793) (opinion of Wilson, J.) (all capitals in original), the

gist of the doctrine is that "two identical offenses are not the 'same offence' within the meaning of the Double Jeopardy Clause if they are prosecuted by different sovereigns." *Heath v. Alabama*, 474 U.S. 82, 92 (1985).

In three pre-Civil War cases (all decided before the Bill of Rights were held to apply to the States), the Court laid the foundation for the dual sovereignty doctrine in the context of successive prosecutions, but none of those cases involved actual – as opposed to hypothetical – successive prosecutions. *See Fox v. Ohio*, 46 U.S. (5 How.) 410 (1847); *United States v. Marigold*, 50 U.S. (9 How.) 560 (1850); *Moore v. Illinois*, 55 U.S. (14 How.) 13 (1852). Indeed, the first case, *Fox*, was based on *Barron v. City of Baltimore*, 32 U.S. (7 Pet.) 243 (1833), and the now-defunct view that the Double Jeopardy Clause placed no limits on state-government actions. And while the second case, *Marigold*, referenced "an offence against both the State and Federal governments," it stated that the same offense could be prosecuted by "either" rather than "both." In the third case, *Moore*, the Court rejected the argument that a prosecution under state law for harboring a fugitive slave was preempted by a federal statute, and only addressed the dual sovereignty doctrine in *dicta* while pondering the possibility that the defendant could be prosecuted by the federal government following his prosecution by the state government:

> 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. He could not plead the punishment by one in bar to a conviction by the other.

Moore, 55 U.S. (14 How.) at 20 (emphasis added).

The dual sovereignty doctrine, discussed as theoretical *dicta* in these antebellum opinions, was first squarely confronted in *United States v. Lanza*, 260 U.S. 377 (1922). The federal government indicted five defendants for bootlegging under the National Prohibition Act after they had been previously convicted for similar violations of state law. *See id.* at 378-79. The Court rejected the defendants' claim that successive prosecution was barred by the Double Jeopardy Clause. Borrowing *Barron*'s proposition that the Double Jeopardy Clause did not apply to the States, the Court concluded that the defendants committed two different offenses by the same act.

> It follows that an act denounced as a crime by both national and state sovereignties is an offense against the peace and dignity of both and may be punished by each. The Fifth Amendment, like all the other guaranties in the first eight amendments, applies only to proceedings by the federal government, . . . and the double jeopardy therein forbidden is a second prosecution under authority of the

> federal government after a first trial for the same offense under the same authority.

Lanza, 260 U.S. at 382.

The Court again addressed the dual sovereignty doctrine in the double jeopardy context when it decided *Bartkus v. Illinois*, 359 U.S. 121 (1959), and *Abbate v. United States*, 359 U.S. 187 (1959). In *Bartkus*, the Court held that the Fourteenth Amendment did not bar a state prosecution following a prior federal conviction. And *Abbate* found that the Fifth Amendment did not prevent a federal prosecution following a state trial for the same offense. Both noted the then-prevailing view that the Fifth Amendment Double Jeopardy Clause did not bar the States from twice prosecuting a defendant for the same offense. In *Abbate*, the Court embraced the dual sovereignty doctrine as a necessary corollary to the federal system and expressly declined to overrule *Lanza*:

> Undesirable consequences would follow if *Lanza* were overruled. The basic dilemma was recognized over a century ago in *Fox v. State of Ohio*. As was there pointed out, if 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. . . . But no one would suggest that, in order to maintain the effectiveness of federal law enforcement, it is desirable completely to displace state power to prosecute crimes based on acts which

> might also violate federal law. This would bring about a marked change in the distribution of powers to administer criminal justice, for the States under our federal system have the principal responsibility for defining and prosecuting crimes. Thus, unless the federal authorities could somehow insure that there would be no state prosecutions for particular acts that also constitute federal offenses, the efficiency of federal law enforcement must suffer if the Double Jeopardy Clause prevents successive state and federal prosecutions. Needless to say, it would be highly impractical for the federal authorities to attempt to keep informed of all state prosecutions which might bear on federal offenses.

Abbate, 359 U.S. at 195 (citations omitted); *accord Bartkus*, 359 U.S. at 137 ("Were the federal prosecution of a comparatively minor offense to prevent state prosecution of so grave an infraction of state law, the result would be a shocking and untoward deprivation of the historic right and obligation of the States to maintain peace and order within their confines. It would be in derogation of our federal system to displace the reserved power of States over state offenses by reason of prosecution of minor federal offenses by federal authorities beyond the control of the States."). Concerns about federalism, States' rights and the distinct federal-state interests animated those majority opinions.

Justice Black dissented in both cases, not convinced "that a State and the Nation can be considered

two wholly separate sovereignties for the purpose of allowing them to do together what, generally, neither of them can do separately." *Abbate*, 359 U.S. at 203 (Black, J., dissenting). He observed that the dual sovereignty doctrine was not imported from English law's double jeopardy jurisprudence. It was judicially conjured in *Fox* and *Marigold* to accommodate coexisting sovereigns in the American federal system.

> *Lanza* . . . seemed rather to rely on dicta in a number of past cases in this Court. These had assumed that identical conduct of an accused might be prosecuted twice, once by a State and once by the Federal Government, because the "offense" punished by each is in some, meaningful, sense different. The legal logic used to prove one thing to be two is too subtle for me to grasp.

Abbate, 359 U.S. at 202 (Black, J., dissenting). Concerned that the doctrine supplanted the individual's right to avoid successive prosecutions, Justice Black wrote:

> The Court apparently takes the position that a second trial for the same act is somehow less offensive if one of the trials is conducted by the Federal Government and the other by a State. Looked at from the standpoint of the individual who is being prosecuted, . . . it hurts no less for two "Sovereigns" to inflict it than for one.

Bartkus, 359 U.S. at 155 (Black, J., dissenting). Observing that "the Court's reliance on federalism

amounts to no more than the notion that, somehow, one act becomes two because two jurisdictions are involved," Justice Black implored that it be "discarded as a dangerous fiction." *Id.* at 158. He dismissed the majority's concern that "failure to allow double prosecutions would seriously impair law enforcement in both State and Nation" as premised on the "unwarranted assumption that State and Nation will seek to subvert each other's laws." *Id.* at 156. Drawing on principles of preemption, he explained that

> [t]he Federal Government is given power to act in limited areas only, but in matters properly within its scope it is supreme. It can retain exclusive control of such matters, or grant the States concurrent power on its own terms. If the States were to subvert federal laws in these areas by imposing inadequate penalties, Congress would have full power to protect the national interest, either by defining the crime to be punished and establishing minimum penalties applicable in both state and federal courts, or by excluding the States altogether.

Id. at 157; *see also id.* at 156 ("[M]ost civilized nations do not and have not needed the power to try people a second time to protect themselves even when dealing with foreign lands.").

From *Fox* in 1847 to *Bartkus* and *Abbate* in 1959, the dual sovereignty doctrine was formulated in an era when the Bill of Rights did not bind the States. The Court's non-incorporation jurisprudence controlled,

and the constitutional prohibition against double jeopardy did not yet bar the States from twice prosecuting or punishing a defendant for the same offense. *Palko v. Connecticut*, 302 U.S. 319 (1937). The Constitution was indifferent to successive State prosecutions.

But then came *Benton v. Maryland*, 395 U.S. 784 (1969), one of a series of post-*Bartkus* cases in which the Court held that protections in the Bill of Rights were applicable to the States through the Due Process Clause of the Fourteenth Amendment:

> [T]he double jeopardy prohibition of the Fifth Amendment represents a fundamental ideal in our constitutional heritage, and that it should apply to the States through the Fourteenth Amendment. Insofar as it is inconsistent with this holding, *Palko v. Connecticut* is overruled.

Id. at 794.

Outside of the double jeopardy context, the Court began to recognize that the application of individual rights to the States "operated to undermine the logical foundation" for a dual sovereignty rule. *Elkins v. United States*, 364 U.S. 206, 214 (1960).

For example, after holding that the Fourth Amendment applied to the states, *see Wolf v. Colorado*, 338 U.S. 25 (1949), the Court held that evidence obtained in unlawful searches by state officials was inadmissible in federal criminal trials. *See Elkins*, 364 U.S. at 223. Echoing Justice Black's dissents in

Bartkus and *Abbate*, the Court reasoned that evidence seized illegally by one sovereign could not be turned over to another sovereign: "[t]o the victim it matters not whether his constitutional right has been invaded by a federal agent or by a state officer." *Elkins*, 364 U.S. at 215.

And in *Malloy v. Hogan*, 378 U.S. 1 (1964), and *Murphy v. Waterfront Comm'n*, 378 U.S. 52 (1964), the Court discarded the separate-sovereignty theory of self-incrimination. The Court explained that "there is no continuing legal vitality to, or historical justification for, the rule that one jurisdiction . . . may compel a witness to give testimony which could be used to convict him of a crime in another jurisdiction." *Murphy*, 378 U.S. at 77. The policies behind the privilege would be frustrated by the dual-sovereignty doctrine, which allowed a defendant to be "whipsawed into incriminating himself under both state and federal law even though the constitutional privilege against self-incrimination applied to each." *Id.* at 55 (quoting *Knapp v. Schweitzer*, 357 U.S. 371, 385 (1958) (Black, J., dissenting)).

Even after *Murphy* seemingly "abolished the two sovereignties rule," *Stevens v. Marks*, 383 U.S. 234, 250 (1966) (Harlan, J., concurring in part and dissenting in part), the Court continued to apply the dual sovereignty doctrine in the double jeopardy context. *See, e.g.*, *Heath v. Alabama*, 474 U.S. 82 (1985) (authorizing successive prosecutions by two different states); *see also*, *e.g.*, *United States v. Lara*, 541 U.S. 193, 199 (2004) ("We assume, as do the

parties, that Lara's double jeopardy claim turns on the answer to the 'dual sovereignty' question."); *Waller v. Florida*, 397 U.S. 387 (1970) (state and its municipality not separate sovereigns under the doctrine). The Court reaffirmed the holdings of *Lanza*, *Bartkus*, and *Abbate* without addressing the effect of its incorporation decisions in *Elkins*, *Malloy*, *Murphy*, and *Benton* on the continuing viability of the dual sovereignty doctrine. As one commentator explained:

> Whereas *Elkins* consciously built on *Wolf*'s application of Fourth Amendment principles against states to overturn the silver platter doctrine, and *Murphy* explicitly built on *Malloy*'s incorporation of the Incrimination Clause to overturn *Feldman*, the Court never chose to build on *Benton*'s incorporation of the Double Jeopardy Clause to overturn *Bartkus* and *Abbate*. The Court has never explained – or even focused on – this anomaly.
>
> The Supreme Court, in decisions such as *Elkins* and *Murphy*, appeared to be moving steadily towards Justice Black's position, but never took the final step of discarding the dual sovereignty doctrine altogether. As we have seen, incorporation undermined a central justification for the dual sovereignty doctrine. Indeed, *Elkins* and *Murphy* stand for the propositions that (1) the Fourteenth Amendment's emphasis on individual rights against all government trumps abstract notions of federalism, and (2) the federal and state governments should not be allowed to

> do in tandem what neither could do alone. Yet the dual sovereignty doctrine is still alive and well in double jeopardy cases, in seeming violation of these propositions.

Akhil Reed Amar & Jonathan L. Marcus, *Double Jeopardy Law After Rodney King*, 95 COLUM. L. REV. 1, 15-16 (1995).

In an opinion authored by Judge Adams, the Third Circuit explicitly encouraged reconsideration of the dual sovereignty "construct," which the Court had previously "deemed necessary in order to protect arguably separate governmental interests in law enforcement." *United States v. Grimes*, 641 F.2d 96, 101 (3d Cir. 1981). Judge Adams argued that *Bartkus* "appears open to question from two perspectives one of evolving constitutional principle; one of historical precedent." *Id.* at 101. Suggesting that the Court consider a "retreat from a rigid doctrine of dual sovereignty," *id.* at 102, Judge Adams opined that "an important predicate of the *Bartkus* opinion that the Fifth Amendment Double Jeopardy provision does not bind the states has been undercut by subsequent constitutional developments." *Id.* at 101.

> The question becomes, therefore, whether successive federal or successive state proceedings can be validly distinguished from successive federal-state proceedings. And in the wake of *Benton*, which entails the equivalent enforcement of the Double Jeopardy Clause against state and federal governments, any conceptual difference is difficult to support.

* * *

> Whenever a constitutional provision is equally enforceable against the state and federal governments, it would appear inconsistent to allow the parallel actions of state and federal officials to produce results which would be constitutionally impermissible if accomplished by either jurisdiction alone.

Id. at 102.

Judge Adams observed that *Bartkus* relied on case law pre-dating the Fourteenth Amendment, and long before "the present reality of a greatly expanded federal criminal law." *Id.* Most of the old cases, including *Fox*, "did not actually involve multiple prosecutions but simply raised the question whether both state and federal governments could make the same conduct a crime." *Id.* at 102-03. He found problematic the *Bartkus* Court's reliance on *Moore v. Illinois*, a case that "concerned the validity of state fugitive slave legislation . . . a politically freighted issue," leading him to conclude that "the Court's statement that a citizen owes allegiance to two sovereigns and may be liable to punishment for an infraction of the laws of either should be read with considerable caution." *Id.*

And Judge Adams described *Lanza* as "circumscribed by historical peculiarities,"

> an anomaly from the perspective of federalism because it involved the Eighteenth (Prohibition) Amendment . . . unique in having

> established a hybrid terrain an area of concurrent state and national power where the federal government could not, should it desire, assert its supremacy. Extrapolation or generalizations regarding double jeopardy law created in such an unusual context would therefore appear unwarranted.

Id. at 103-04. To Judge Adams's view, "developments in the application of the Bill of Rights to the states, consequent alterations in the system of dual sovereignty, and the historic idiosyncracies of various of the precedents upon which *Bartkus* relie[d] may deprive the opinion of much of its force." *Id.* at 104; *see also United States v. Frumento*, 563 F.2d 1083, 1092 (3d Cir. 1977) (Aldisert, J., dissenting) ("I am of the view that *Abbate* was wrongly decided in 1959. The majority opinion never came to grips with Justice Black's analysis in dissent, joined by Chief Justice Warren and Justice Douglas, and no developing doctrine in the intervening eighteen years has persuaded me to alter my original views.").

A decade later, Judge Calabresi penned a concurrence in *United States v. All Assets of G.P.S. Auto. Corp.*, 66 F.3d 483 (2d Cir. 1995), which he titled, *Rethinking the Dual Sovereignty Doctrine*. *Id.* at 496-97 and n.13. Judge Calabresi began by observing that "since its very first application in *Lanza*, the dual sovereignty doctrine has been strongly criticized . . . from an originalist point of view[, for] its jurisprudential flaws[, as] unfaithful to the Fifth Amendment's

historical roots [and] for relying on a notion of federalism that is inconsistent with other Supreme Court holdings." *Id.* at 497. He observed further that the doctrine emerged "during prohibition when there was considerable fear of state attempts to nullify federal liquor laws, as well as the doctrine's rebirth just at the time when state attempts to nullify federal desegregation laws and orders were at their height." *Id*. Admitting the important interest in a "sovereign's ability to enforce its own laws as it wishes," Judge Calabresi concluded nevertheless that "it is hard to justify limiting the reach of the Bill of Rights, adopted as it was to protect individual rights and liberties against governmental encroachment, on no stronger grounds than the relative cumbersomeness of plausible alternative measures that would protect the interests of the sovereigns involved." *Id.* at 498. He found it "difficult to accept generalized statements of sovereign interests as justifying the Clause's inapplicability to successive prosecutions by different governments." *Id.*

Judge Calabresi explained that his views were influenced by "the dramatic changes that have occurred in the relationship between the federal government and the states since the time of *Bartkus* and *Abbate*, changes that have made what was then perhaps acceptable, or at least tolerable, far more dangerous today." *Id.* at 498. Since 1959, "the scope of federal criminal law has expanded enormously. And the number of crimes for which a defendant may be made subject to both a state and a federal prosecution

has become very large." *Id.* Quoting generously from Judge Adams's opinion in *Grimes* a decade earlier, Judge Calabresi wrote:

> the recent expansion of federal criminal jurisdiction magnifies the impact of *Bartkus* and *Abbate*, thus rendering a reassessment of those decisions timely from a practical standpoint as well, since permitting successive state-federal prosecutions for the same act appears inconsistent with what is a most ancient principle in western jurisprudence – that the government may not twice place a person in jeopardy for the same offense.

Id. at 498-99 (quotation marks omitted). As well, "[t]he degree of cooperation between state and federal officials in criminal law enforcement has . . . reached unparalleled levels in the last few years," which "should cause one to wonder whether it makes much sense to maintain the fiction that federal and state governments are so separate in their interests that the dual sovereignty doctrine is universally needed to protect one from the other." *Id.* at 499. Judge Calabresi concluded his concurrence by welcoming "a new look by the High Court at the dual sovereignty doctrine and what it means today for the safeguards the Framers sought to place in the Double Jeopardy Clause." *Id.*

Indeed, joint efforts between state and local authorities have increased exponentially in recent years, fueled by Congressional expansion of federal law into state-enforcement areas. An American Bar

Association task force concluded that "[a] complex layer is being added to the overall criminal justice scheme, dramatically superimposing federal crimes on essentially localized conduct already criminalized by the states." James A. Strazzella, *Task Force on Federalization of Criminal Law*, 1998 A.B.A. CRIM. JUSTICE SEC. REP. 18.

Congress encourages state and federal law enforcement to function as a unit, bound together by information, technology, financial incentives, contractual arrangement, and statutory mandate. Congress adopted the Comprehensive Crime Control Act of 1984, federalizing many offenses that were traditionally enforced by state officials and expanding the roles of joint-jurisdictional task forces. *See also* 21 U.S.C. § 873 (authorizing the Attorney General to transfer forfeited property to any federal, state, or local agency that participated directly in the seizure or forfeiture of the property). Courts have approved such collaboration. *See United States v. Davis*, 906 F.2d 829, 831 (2d Cir. 1990) ("[C]ooperation between federal and local agencies has become increasingly important and increasingly commonplace."); *United States v. Jordan*, 870 F.2d 1310, 1313 (7th Cir. 1989) (finding nothing more than "commendable cooperation between state and federal law enforcement officials"); Daniel A. Braun, *Praying to False Sovereigns: The Rule Permitting Successive Prosecutions in the Age of Cooperative Federalism*, 20 AM. J. CRIM. L. 1, 77, n.351 (1992).

Dual sovereignty is an out-of-date judicial construct fashioned in an era when the states and the federal government acted as two separate sovereigns pursuing *conflicting* criminal-law interests. Each had a different focus and agenda in law enforcement. Now, joint task forces, shared resources and combined training are common. In this new "age of 'cooperative federalism,' where the federal and state governments are waging a united front against many types of criminal activity," *Murphy*, 378 U.S. at 55-56, state and federal law enforcement routinely work as partners, not as competing sovereigns. "[A] sweeping post-incorporation assault on dual sovereignty might insist that in a world where federal and state governments generally are presumed to, and do indeed, cooperate in investigating and enforcing criminal law, they should also be obliged to cooperate in hybrid adjudication to prevent ordinary citizens from being whipsawed." Akhil Reed Amar & Jonathan L. Marcus, *Double Jeopardy Law After Rodney King*, 95 COLUM. L. REV. 1, 48 (1995).

Given that the centuries-old protection against Double Jeopardy is "intrinsically personal," *United States v. Halper*, 490 U.S. 435, 447 (1989), the interest in allocating criminal law enforcement between federal and state power – if it ever justified the dual-sovereignty doctrine – must now give way. This is particularly true given the historical circumstances surrounding so many of the Court's dual sovereignty cases. *Moore* involved the "politically freighted" issue of fugitive slave laws, for which the Court may have

been concerned about exacerbating sectional tension between the North and South. *See Grimes*, 641 F.2d at 103. *Lanza* centered on a federal bootlegging prosecution at a time "when there was considerable fear of state attempts to nullify federal liquor laws." *G.P.S. Auto.*, 66 F.3d at 497. *Bartkus* and *Abbate* were handed down at the same time the Court, in *Cooper v. Aaron*, 358 U.S. 1 (1958), was confronting state recalcitrance in enforcing federal desegregation decrees.

The double jeopardy bar was always historically understood to *encompass*, *not exempt*, prosecutions by separate sovereigns. Two prosecutions for the same crime, even if by different sovereigns, is contrary to millennia of jurisprudence. "Even in the Dark Ages, when so many other principles were lost, the idea that one trial and one punishment were enough remained alive through the canon law and the teachings of early Christian writers." *Bartkus*, 359 U.S. at 151-52 (Black, J., dissenting).

Dual sovereignty dogma overlooks the lengthy and significant evidence suggesting that English common law, as well as colonial American laws, did not permit retrial by another sovereign. *E.g.*, Paul G. Cassell, *The Rodney King Trials and the Double Jeopardy Clause: Some Observations on Original Meaning and the ACLU's Schizophrenic Views of the Dual Sovereignty Doctrine*, 41 UCLA L. REV. 693, 714-15 (1994) (noting that "[i]t seems reasonably clear that at the time of the framing of the Double Jeopardy Clause, the general view of the common-law

cases [ ] was that they allowed a defendant to plead an acquittal as a bar in a latter case" and that "a good case can be made that the Framers of the Double Jeopardy Clause did not intend to permit each of two sovereigns to prosecute a defendant for the same offense").[5]

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[5] *Accord* Ronald J. Allen & John P. Ratnaswamy, Heath v. Alabama*: A Case Study of Doctrine and Rationality in the Supreme Court*, 76 J. CRIM. L. & CRIMINOLOGY 801, 810 (1985) (suggesting that "it was the intention of the framers to implement their understanding of the common law of Great Britain and the former colonies" and "the available evidence suggests that at the time of the adoption of the Constitution and the Bill of Rights, the common law was understood to apply the double jeopardy bar to successive prosecutions by different sovereigns"); Francis Wharton, *A Treatise on the Criminal Law of the United States* 137 (1846) (prosecution "will be sufficient to preclude any subsequent proceedings before every other court"); 1 James Kent, *Commentaries of American Law* 374 (1826) (where state and federal courts have concurrent jurisdiction, "the sentence of either court, whether of conviction or acquittal, might be pleaded in bar of the prosecution before the other"); 1 Joseph Chitty, *A Practical Treatise on the Criminal Law* 458 (1816) (expressly noting that an acquittal or conviction "will be sufficient to preclude any subsequent proceedings before every other tribunal"); Leonard MacNally, *The Rules of Evidence on Pleas of the Crown* 428 (1802); 4 William Blackstone, *Commentaries on the Laws of England* 329 (1770) ("[A]ny court having competent jurisdiction of the offence" could support a double jeopardy bar.); 2 William Hawkins, *A Treatise of the Pleas of the Crown* 372 (1721) ("[A]n Acquittal in any Court whatsoever, which has a Jurisdiction of the Cause, is as good a Bar of any subsequent Prosecution for the same Crime, as an Acquittal in the Highest Court.").

The criticism of the dual sovereignty doctrine is exemplified in the commentary of former Attorney General Edwin Meese, who points out that it not only "violates the spirit of the Double Jeopardy Clause, especially when one considers the original intent of our Constitutional Framers," but it is also inconsistent with the evolution of this Court's incorporation of the Bill of Rights as binding upon the States. *See, e.g.*, Edwin Meese III, *Big Brother on the Beat: The Expanding Federalization of Crime*, 1 TEX. REV. L. & POL. 1, 8, 14, 18, 21-22 (1997). "By ignoring the common law rule and the original intent of the Constitutional Framers, the Supreme Court has misconstrued and weakened one of America's most important constitutional protections." *Id.* at 22. The former Attorney General and state prosecutor assailed the doctrine as fundamentally "unfair," and a violation of "the spirit of the Double Jeopardy Clause," and urged that "the Supreme Court should abolish the dual sovereign exception to the Double Jeopardy Clause." *Id.* at 9, 18, 23.

II. The Dual Sovereignty Doctrine Does Not Apply to Puerto Rico

To the extent that the dual sovereignty doctrine permits successive prosecutions for the same crime by different sovereigns, recognizing Puerto Rico as a sovereign distinct from the federal government would be incompatible with a century of precedent from this Court, and a century of actions by both the Legislative and Executive Branches.

Since 1907, this Court has consistently held that the double jeopardy protections of the Fifth Amendment bar multiple prosecutions by federal and territorial prosecutors for the same offense. *See, e.g.*, *Grafton v. United States*, 206 U.S. 333, 354-55 (1907) (Philippines); *Puerto Rico v. Shell Co. (P.R.)*, 302 U.S. 253, 264-65 (1937) (Puerto Rico). This Court has cited, and relied upon these rulings, in numerous double jeopardy cases. *See, e.g.*, *Heath v. Alabama*, 474 U.S. 82, 88-89 (1985); *United States v. Wheeler*, 435 U.S. 313, 320-21 (1978) ("When a territorial government enacts and enforces criminal laws . . . it is not acting as an independent political community like a State, but as 'an agency of the federal government.'") (quoting *Domenech v. Nat'l City Bank*, 294 U.S. 199, 204-05 (1935) ("Puerto Rico, an island possession, like a territory, is an agency of the federal government, having no independent sovereignty comparable to that of a state in virtue of which taxes may be levied.")); *Waller v. Florida*, 397 U.S. 387, 393 (1970) ("The legal consequence of that [territorial] relationship was settled in *Grafton* . . ., 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.").[6]

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[6] As noted by the Puerto Rico Supreme Court, Pet. App. 29a, federal courts in the District of Columbia have likewise concluded that the Double Jeopardy Clause bars successive criminal prosecutions of federal and District of Columbia offenses in district courts because such prosecutions emanate from the same sovereign – namely, the federal government. *E.g.*,

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"Territory and Nation[ ] are not two separate sovereigns to whom the citizen owes separate allegiance in any meaningful sense, but one alone." *Wheeler*, 435 U.S. at 321. Indeed, in *Waller*, a unanimous Court found that the 1907 *Grafton* precedent applicable to territories like Puerto Rico "control[led]," and precluded recognition of municipalities as separate sovereigns. *Waller*, 397 U.S. at 394.[7] Just as the Puerto Rico Supreme Court was bound to follow this Court's precedent in arriving at its decision below, the application of *stare decisis* principles compels the affirmance of that decision.

The Court has never wavered in its holding that Puerto Rico is a territory of the United States subject to the Territories Clause. In the *Shell* opinion of 1937, the Court held that Puerto Rico is a territory, notwithstanding its status as an unincorporated territory,[8]

United States v. Sumler, 136 F.3d 188, 191 (D.C. Cir. 1998); *United States v. Jones*, 527 F.2d 817, 821 (D.C. Cir. 1975) (citing *Waller*, 397 U.S. 387).

[7] Justice Black joined the opinion, while adhering to his original objection to the dual sovereignty doctrine as expressed in his dissenting opinions in *Bartkus* and *Abbate*. *Waller*, 397 U.S. at 395 (Black, J., concurring).

[8] Under the Court's doctrine of territorial incorporation, residents of unincorporated territories lack the complete array of constitutional rights otherwise enjoyed by residents of incorporated territories, and the Court has continued to classify Puerto Rico as an unincorporated territory. *Shell*, 302 U.S. at 257-58 (citing *Balzac v. Puerto Rico*, 258 U.S. 298, 304-05 (1922), and noting that the Court had held that Puerto Rico "is not a territory within the reach of the Sixth and Seventh

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for purposes of falling under the territorial section (§ 3) of the 1890 Sherman Act. 302 U.S. at 256-57.[9]

Significantly, the Court in *Shell* acknowledged that Congress had passed several laws to give Puerto Rico "an autonomy similar to that of the states and incorporated territories." 302 U.S. at 262. Included among "[t]his comprehensive grant of legislative power made by Congress," was the "responsibility of searching out local offenses and prosecuting them in local tribunals." *Id.* Congress did so to "confer upon the territory many of the attributes of quasi sovereignty possessed by the states," and "*[b]y those acts . . . '[a] body politic' – a commonwealth – was created*." *Id.* (quoting 48 U.S.C. § 733) (emphasis added). The *Shell* opinion rejected outright the argument that local Puerto Rico prosecutions presented a danger of successive federal and territorial criminal prosecutions because the courts "whether exercising federal or local jurisdiction, are creations emanating from the same sovereignty." *Id.* at 264. "Prosecution under one of the laws in the appropriate court, necessarily, will

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Amendments"); *see also* Pet. App. 40a (citing this Court's reaffirmation of doctrine); *Boumediene v. Bush*, 553 U.S. 723, 757-58 (2008); *Torres v. Puerto Rico*, 442 U.S. 465, 470 (1979).

[9] The Court reached this conclusion in part by construing the legislative intent of the Sherman Act drafters as co-extensive with their power under the Territories Clause, *Shell*, 302 U.S. at 259, and in part by construing their intent to make the statutory status of Puerto Rico under the Sherman Act be derivative of its constitutional status as a territory.

bar a prosecution under the other law in another court." *Id*. (citing *Grafton*, 206 U.S. 333).[10]

Even though these comprehensive prior Congressional enactments had already transformed Puerto Rico into a "commonwealth" by 1937, capable of prosecuting local crime, *Shell* held that Puerto Rico was, for constitutional purposes, still a territory of the United States, because Puerto Rico was a "creation[ ] emanating from the same sovereignty" – the federal government. 302 U.S. at 264.[11] Accordingly, *Shell* held that the Congressionally-conferred status of Puerto Rico as a "commonwealth" does not alter its constitutional status as a territory under the Constitution.[12] Hence, further Congressional enactments in

[10] The Court would later, in a footnote in *Waller*, describe the *Shell* opinion's approval of *Grafton* as "dicta." 397 U.S. at 393 n.5. But *Waller* nonetheless affirmatively held that *Grafton*'s territorial sovereignty ruling "controls" the double jeopardy question placed before it – whether municipalities are the same sovereign as their corresponding state in the same manner as territories are the same sovereign as the federal government – which presupposes that *Grafton* controls the territory of Puerto Rico.

[11] In 1972, this Court re-affirmed, and extended, the *Shell* antitrust holding to the unincorporated territory of American Samoa. *United States v. Standard Oil Co. of Cal.*, 404 U.S. 558, 559-60 (1972).

[12] As Justice Thomas noted in his concurrence in *Lara*, because "the Territories are the United States for double jeopardy purposes . . . the degree of autonomy of Puerto Rico is beside the point." *United States v. Lara*, 541 U.S. 193, 226 (2004) (Thomas, J., concurring) (citing *Wheeler*, 435 U.S. at 321-22; *Shell*, 302 U.S. at 264-66). Further, as correctly noted by the

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the early 1950s expanding the autonomy of Puerto Rico's territorial government did not *transform* Puerto Rico into a "commonwealth" – it already was one.

The journey from (non-sovereign) territory to (sovereign) State is a well-established path that has been followed by the majority of States since the beginning of the Republic pursuant to Article IV, § 3, cl. 1 of the Constitution. Its *sine qua non* is an act of Congress. As the Puerto Rico Supreme Court accurately observed below, Congress has not embarked upon the preliminary steps for such a path by Puerto Rico. Pet. App. 50a. Congress has considered, but not yet passed, legislation to make Puerto Rico a State. *See, e.g.*, H.R. 727, "Puerto Rico Statehood Procedure Act," 114th Cong. (March 16, 2015).

After *Shell*, this Court has consistently held that Puerto Rico is a "territory" for constitutional purposes. *See, e.g*., *Harris v. Rosario*, 446 U.S. 651, 651-52 (1980) (per curiam); *Califano v. Torre*s, 435 U.S. 1 (1978). Moreover, this Court has done so for the purpose of upholding the constitutional authority of Congress under the Territory Clause to accord different or inferior legislative treatment for Puerto Rico's residents. *Harris*, 446 U.S. at 651-52.

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opinion below, Puerto Rico lacks the original or prior sovereignty over its affairs enjoyed by Indian Tribes, as it was subject to the Spanish monarchy prior to becoming a United States territory. Pet. App. 66a (citing Justice Thomas' *Lara* concurrence).

For its part, Congress has taken no legislative step since 1898 to alter Puerto Rico's status from that of a territory to a state under Article IV, § 3, cl. 1 of the Constitution. To the contrary, Congress has continued to enact legislation that treats Puerto Rico differently than the States, including the disparate treatment accorded Puerto Rico in the Bankruptcy Code which is the subject of two pending cases in this Court. *Franklin California Tax-Free Trust v. Puerto Rico*, 805 F.3d 322, 344-45 (1st Cir. 2015) (Puerto Rico "is 'constitutionally a territory,' because Puerto Rico's powers are not '[those] reserved to the States' but those specifically granted to it by Congress under its constitution. *See* U.S. Const. art. IV, § 3, cl. 2; . . . *Harris*, 446 U.S. 651"), *cert. granted*, 2015 WL 5005197 (Dec. 4, 2015).

To the extent that Petitioner perceives that Puerto Rico has experienced a transformation from territory to sovereign, it apparently went unnoticed by the court in the best position to perceive such a change: the Puerto Rico Supreme Court. After conducting a comprehensive analysis of the Federal Relations Act, the Puerto Rico Constitution, and the history of uniform treatment of Puerto Rico as a territory by the federal Executive, Legislative, and Judicial Branches over the last century, that court concluded:

> [T]he 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.

Pet. App. 61a-62a.

Insofar as that holding constitutes an interpretation of Puerto Rican law by the highest court of Puerto Rico, it is subject to the "rigid rule of deference" owed that Court. *Posadas de Puerto Rico Assoc. v. Tourism Co. of Puerto Rico*, 478 U.S. 328, 339 n.6 (1986); *Sancho v. Texas Co.*, 308 U.S. 463, 471 (1940) (rejecting "mere lip service" to this rule). Interpretations of the Puerto Rico Constitution by its highest court are worthy of such deference, as is the considered conclusion of that court regarding the Puerto Rican sovereignty that document secures. Because Puerto Rico is a necessary participant in its own liberation, the view of its highest court on the matter is entitled to deference.

Petitioner fails to identify any other example in our Nation's history where the sovereignty of a non-State was created – or even recognized – by Congress or the Constitution. *Compare Wheeler*, 435 U.S. at 321 ("[A] territorial government is entirely the creation of Congress, 'and its judicial tribunals exert all their powers by authority of the United States.'") (quoting *Grafton*, 206 U.S. at 354). Other than

through the formal mechanism of admission to statehood set forth in U.S. Const. art. IV, § 3, cl. 1, there is no constitutional or other authority for Congress to authorize a territory to become a sovereign or *de facto* state.

Had Congress chosen to travel the untrod path of granting sovereignty to any territory without formally admitting it as a State, it would need to speak clearly, and Congress has not done so here. Indeed, this Court would be the ultimate arbiter of the constitutionality of Congress conferring such *de facto* statehood status upon a territory, including whether Congress even has the authority to delegate sovereignty to a territory, incorporated or not.

There are multiple independent constitutional reasons why Puerto Rico is neither a State nor a *de facto* State: First, Puerto Rico's unambiguous constitutional status is that of a territory and not a State.[13] Second, Puerto Rico is not a *de facto* State because this Court has rejected such a *de facto* statehood status, which also would be inconsistent with the history of Puerto Rico's relations with the United

[13] *See Igartua v. United States*, 626 F.3d 592, 595 (1st Cir. 2010) ("[T]he constitutional text is entirely unambiguous as to what constitutes statehood; the Constitution explicitly recites the thirteen original states as being the states and articulates a clear mechanism for the admission of other states, as distinct from territories. Puerto Rico does not meet these criteria.").

States.[14] Third, Article III does not empower federal courts to declare Puerto Rico a State.[15] Finally, the separation of powers doctrine dictates that only Congress can make Puerto Rico a State, and in the absence of Congressional action, the separation of powers doctrine – which an accused has standing to invoke, *see Bond v. United States*, 131 S. Ct. 2355, 2365 (2011) – prevents the Executive and Judicial Branches from usurping this unique constitutional prerogative.[16]

As recently as 2012, the Solicitor General represented to this Court:

> [N]either this Court nor the court of appeals has concluded that Puerto Rico is a State under the Constitution. . . . The Framers did not anticipate that the federal courts would decide, under any rubric of de facto or

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[14] This Court's precedent has been interpreted by both the First Circuit and the Supreme Court of Puerto Rico as "plainly reject[ing] the 'de facto' approach." *Igartua*, 626 F.3d at 601 (citing *Adams v. Clinton*, 90 F. Supp. 2d 35 (D.D.C. 2000) (per curiam), *aff'd*, 531 U.S. 941 (2000); *Hepburn & Dundas v. Elzey*, 6 U.S. 445 (1805) (Marshall, J.)); *accord* Pet. App. 57a-59a.

[15] *Igartua*, 626 F.3d at 599 ("No constitutional text vests the power to amend or the power to create a new state in the federal courts. No such power is granted to the courts by Article III, which creates and limits the jurisdiction of the federal courts.").

[16] *Igartua-De La Rosa v. United States*, 417 F.3d 145, 148 (2005) ("The path to changing the Constitution lies . . . through the constitutional amending process, U.S. Const. art. V; and the road to statehood – if that is what Puerto Rico's citizens want – runs through Congress. U.S. Const. art. IV, § 3, cl. 1.").

> functional statehood, whether a particular territory should be entitled to claim the privileges of membership in the Union. *The Constitution commits that quintessentially political question to Congress.*

Igartua v. United States, Case No. 11-876, Solicitor General Brief, at 16 (emphasis added).[17]

Rather than entangle this Court in a political question, risk usurping constitutional powers uniquely assigned to Congress, or limn the borders of this Court's Article III powers, the more prudent course would be to preserve the double jeopardy rights that this Court has recognized since 1907, and not extend a judicial exception to double jeopardy whose continued vitality has been long criticized by many respected jurists.

[17] *See also* Report by the President's Task Force on Puerto Rico's Status (2007), at 5-6 ("The Commonwealth system does not, however, describe a *legal* status different from Puerto Rico's constitutional status as a 'territory' subject to Congress's plenary authority under the Territory Clause. . . . [T]he Department of Justice concluded in 1959 that Puerto Rico remained a territory, and as noted above, the Supreme Court, while recognizing that Puerto Rico exercises substantial political autonomy under the current commonwealth system, has held that Puerto Rico remains fully subject to congressional authority under the Territory clause. *See Harris*, 446 U.S. at 651.") (emphasis in original), *available at* http://goo.gl/NYl83n.

CONCLUSION

Petitioner asks this Court to recognize the sovereignty of Puerto Rico in order to deprive Respondents of the double jeopardy protections that the Court has previously recognized for Puerto Rico residents since 1907. Absent clear authorization from Congress, however, this Court cannot recognize Puerto Rico as an independent sovereign.

What the Court can do is reexamine the continuing viability of the judicially-created dual sovereignty doctrine. And what it should do is abandon it.

The judgment of the Puerto Rico Supreme Court should be affirmed.

Respectfully submitted,

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