No. 15-108

IN THE
Supreme Court of the United States

THE COMMONWEALTH OF PUERTO RICO,

Petitioner,

v.

LUIS M. SÁNCHEZ VALLE AND
JAIME GÓMEZ VÁZQUEZ,

Respondents.

On Petition for Writ of Certiorari to the Supreme Court of Puerto Rico

REPLY TO BRIEF IN OPPOSITION

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INTRODUCTION

Respondents do not, and cannot, deny that this case presents a direct and acknowledged conflict between the Puerto Rico Supreme Court and the Eleventh Circuit, on the one hand, and the First Circuit, on the other, on the question whether Puerto Rico and the Federal Government are separate sovereigns for purposes of the Double Jeopardy Clause of the Federal Constitution. Rather, respondents attempt to shield that conflict from this Court's review by arguing that (1) there is "a strong prospect that the First Circuit will reconsider and formally overrule" its position, Opp. 16, (2) "the decision below is plainly correct" on the merits, *id.* at 24, and (3) "the decision below carries no practical consequences on Puerto Rican criminal justice," *id.* at 1, but reviewing it "could have a profound and destabilizing effect on the debate over Puerto Rico's status," *id.* at 21-22. Each of these arguments is manifestly incorrect.

ARGUMENT

I. Respondents' Efforts To Downplay The Direct And Acknowledged Conflict Are Unavailing.

Respondents lead with the remarkable argument that this Court should leave undisturbed the direct and acknowledged conflict on the question presented here because the First Circuit's decision in *United States v. López Andino*, 831 F.2d 1164 (1st Cir. 1987), "may no longer be good law." Opp. 1. According to respondents, that decision rests on "a muddled, perfunctory analysis" that has been called into "serious doubt" by more recent decisions of that

court. *Id.* at 11-12. Respondents are wrong on all scores.

The reasoning of *López Andino* is entirely clear. As that decision recognizes, the question whether Puerto Rico and the Federal Government are separate sovereigns for federal double jeopardy purposes turns on whether "they derive their power from different sources." 831 F.2d at 1167 (citing *Heath v. Alabama*, 474 U.S. 82, 88 (1985), and *United States v. Wheeler*, 435 U.S. 313, 319-22 (1978)). In light of Public Law 600 of 1950 and the subsequent adoption of the Puerto Rico Constitution, it is clear that "[Puerto Rico's] criminal laws, like those of a state, emanate from a different source than the federal laws," *id.* at 1168—namely, "'the people of Puerto Rico,'" who engaged in an exercise of popular sovereignty in 1952 by "'organiz[ing] a government pursuant to a constitution of their own adoption,'" *id.* (quoting Pub. L. No. 81-600, 64 Stat. 319 (1950), Pet. App. 353a). It follows, as *López Andino* holds, that the federal Double Jeopardy Clause poses no barrier to successive prosecutions under Commonwealth and federal law. *Id.*

In this regard, *López Andino* follows a long and unbroken line of First Circuit precedent. That court has consistently recognized that the enactment of Public Law 600 and the Puerto Rico Constitution "work[ed] a significant change in the relation between Puerto Rico and the rest of the United States." *Córdova & Simonpietri Ins. Agency, Inc. v. Chase Manhattan Bank, N.A.*, 649 F.2d 36, 39 (1st Cir. 1981) (Breyer, J.). In particular, "'the constitution of the Commonwealth is not just another Organic Act of the Congress,'" but "'an

expression of the will of the Puerto Rican people.'" *United States v. Quiñones*, 758 F.2d 40, 42-43 (1st Cir. 1985) (quoting *Figueroa v. People of Puerto Rico*, 232 F.2d 615, 620 (1st Cir. 1956)). In light of that Constitution, "the government of Puerto Rico is no longer a federal government agency exercising delegated power." *Id.* at 42; *see also Mora v. Mejías*, 206 F.2d 377, 387 (1st Cir. 1953) (recognizing that the Commonwealth was "organized as a body politic by the people of Puerto Rico under their own constitution, pursuant to the terms of the compact offered to them in Pub. L. 600, and by them accepted").

Respondents insist, however, that "[s]ubsequent developments in the First Circuit cast doubt on *López Andino*'s continuing viability." Opp. 13 (citing *Igartúa-de la Rosa v. United States*, 417 F.3d 145 (1st Cir. 2005) (*en banc*), *Igartúa v. United States*, 626 F.3d 592 (1st Cir. 2010), and *Franklin Cal. Tax-Free Trust v. Puerto Rico*, No. 15-1218, __ F.3d __, 2015 WL 4079422 (1st Cir. July 6, 2015)). But none of those cases casts any doubt on *López Andino* or the other First Circuit precedents recognizing that the people of Puerto Rico, through their own Constitution, are the source of authority for the Commonwealth's laws.

The two *Igartúa* cases hold that residents of Puerto Rico do not have the right to vote in federal elections, either for president or for members of Congress, because Puerto Rico is not a State. *See* 417 F.3d at 147-48; 626 F.3d at 594. Respondents assert that "these cases are difficult to reconcile with *López Andino*'s reasoning that Puerto Rico 'is treated as a state' for constitutional purposes." Opp. 13

(quoting 831 F.2d at 1168). But *López Andino* did not hold that "Puerto Rico 'is treated as a state' for constitutional purposes" generally, *id.*; rather, *López Andino* held only that "Puerto Rico is to be treated as a state *for purposes of the double jeopardy clause*," because its criminal laws emanate from a different source than federal criminal laws. 831 F.2d at 1168 (emphasis added). Indeed, *Igartúa* cited *López Andino* for the proposition that "for some constitutional purposes Puerto Rico has been treated as the functional equivalent of a state." 626 F.3d at 598-99. Whether Puerto Rico is treated as the functional equivalent of a State for purposes of a particular constitutional provision depends on the relevant provision. *See id.*

The First Circuit's recent *Franklin* decision is to the same effect. The First Circuit there rejected a request to interpret a federal bankruptcy statute to avoid Tenth Amendment concerns. *See* 2015 WL 4079422, at *14. According to the court, "[t]he limits of the Tenth Amendment do not apply to Puerto Rico" because that provision protects powers "'reserved to the States'" and Puerto Rico is not a State. *Id.* (quoting U.S. Const. amend. X). Nothing in the *Franklin* decision purported to address the source of authority for Puerto Rico law. Thus, contrary to respondents' assertion, nothing in that decision "establishe[d] that Puerto Rico is *not* a separate sovereign" for federal double jeopardy purposes or "created an intra-circuit conflict on Puerto Rico's sovereign status." Opp. 13, 15 (emphasis in original).

In short, respondents' assertion that "recent authority from the First Circuit casts serious doubt

on the continuing viability of *López Andino*," Opp. 11, is based on nothing more than their own grossly inaccurate characterization of that authority. Indeed, although *López Andino* has been on the books for almost thirty years, respondents cannot point to a *single* First Circuit majority, concurring, or dissenting opinion in all of those years that either criticizes *López Andino* or suggests that the court should revisit that decision.* There is thus no reason to think that the stark conflict on the federal constitutional question presented by this case will go away on its own. Only this Court can ensure the uniform application of the federal Double Jeopardy Clause in the federal and Commonwealth courts of Puerto Rico.

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* Similarly, respondents err by asserting that "the First Circuit will have an opportunity to weigh in on the continuing viability of *López Andino* very soon." Opp. 16 (citing *United States v. Mercado-Flores*, No. 14-cr-466, __ F. Supp. 3d __, 2015 WL 3764518 (D.P.R. June 4, 2015)). Once again, the cited case has nothing to do with the Double Jeopardy Clause or the source of authority for Puerto Rico's laws. Rather, that case presents the far more mundane question whether a federal statute that applies to "any Territory, or Possession of the United States," but not to a "Commonwealth," applies to Puerto Rico. *See* 2015 WL 3764518, at *1. It is thus fanciful for respondents to assert that "the First Circuit will ... soon clarify whether and to what extent *López Andino* remains binding precedent," Opp. 17, in that case. As the district court there explained, "'whether and how a federal statute applies to Puerto Rico is a question of Congressional intent.'" 2015 WL 3764518, at *6 (quoting *Antilles Cement Corp. v. Fortuño*, 670 F.3d 310, 320 (1st Cir. 2012)). Indeed, respondents themselves acknowledge that whether Puerto Rico is covered by any particular federal statute is necessarily "based on the particular statutory context at issue." Opp. 29.

II. Respondents' Efforts To Defend The Decision Below Are Unavailing.

Respondents also contend that "[r]eview is unwarranted here for the additional reason that the decision below is plainly correct." Opp. 24. In their view, Puerto Rico cannot be a separate sovereign under the Double Jeopardy Clause if it is subject to congressional control under the Territorial Clause. *See id.* at 24-28; *see generally* Pet. App. 65-66a. As they put it, "States are sovereign, but Territories are not." Opp. 24.

Respondents thereby miss the point. As this Court has explained, the "extent of control exercised by one prosecuting authority over the other" is not the touchstone of the dual sovereignty analysis. *Wheeler*, 435 U.S. at 320. Rather, that analysis turns on "the ultimate *source* of the power under which the respective prosecutions were undertaken." *Id.* (emphasis added); *see also United States v. Lara*, 541 U.S. 193, 199 (2004); *Heath*, 474 U.S. at 88-90. Because the laws of Puerto Rico flow from authority delegated by the people of Puerto Rico through their own Constitution, *see* P.R. Const. pmbl., Pet. App. 358a; *id.* art. I § 1, Pet. App. 359a, not from authority delegated by Congress, it follows that Puerto Rico and the Federal Government are separate sovereigns for double jeopardy purposes, *see López Andino*, 831 F.2d at 1167-68.

Respondents insist, however, that "this Court held in 1937 that Puerto Rico was not a separate sovereign from the United States for purposes of double jeopardy because they 'exert all their powers under and by authority of the same government.'" Opp. 24-25 (quoting *Puerto Rico v. Shell Co. (P.R.)*,

302 U.S. 253, 265 (1937)). As a threshold matter, the holding of that case had nothing to do with double jeopardy, because it was a statutory case involving the preemptive scope of the Sherman Act. *See* 302 U.S. at 255. And the dictum on which respondents rely predates the enactment of Public Law 600 and the Puerto Rico Constitution, and thus sheds no light on the question presented here. As explained above, it has been clear since 1952 that the people of Puerto Rico, through their Constitution, are the source of authority for Puerto Rico's laws. It follows that respondents' reliance on *Shell*, a pre-1952 case, is unavailing. Indeed, that is the very lesson of then-Judge Breyer's opinion for the First Circuit in *Córdova*, which recognized that the result in *Shell* had been rendered obsolete by the enactment of Public Law 600 and the Puerto Rico Constitution. *See* 649 F.2d at 38-42.

Respondents' reliance on "the legislative history of the 1950-52 legislation," Opp. 30, is similarly unavailing. According to respondents, that history "makes clear that Congress never intended to transform Puerto Rico into a new sovereign." *Id.* But, once again, that is nothing more than a play on the word "sovereign." The legislative history cited by respondents simply underscores that Congress did not intend to grant Puerto Rico independence from the United States. *See id.* at 30-31. Nothing in that history casts any doubt on the proposition that, as a result of Puerto Rico's adoption of its own Constitution, the laws of Puerto Rico would henceforth flow from authority delegated by the people of Puerto Rico, not by Congress. Indeed, Public Law 600 by its terms authorized "*the people of Puerto Rico* [to] organize a government pursuant to a

constitution *of their own adoption*." Pub. L. No. 81-600, 64 Stat. 319 (1950), Pet. App. 353a (emphasis added). Since the people of Puerto Rico democratically enacted their own Constitution in 1952, the laws of the Commonwealth have flowed from a different source of authority than federal laws, and Puerto Rico and the Federal Government have been separate sovereigns for federal double jeopardy purposes. *See López Andino*, 831 F.2d at 1167-68 (citing *Heath*, 474 U.S. at 88, and *Wheeler*, 435 U.S. at 319-22); *see also Lara*, 541 U.S. at 199.

III. Respondents' Efforts To Distort The Ramifications Of This Case Are Unavailing.

Respondents finally urge this Court to deny review by downplaying the significance of the decision below to the administration of justice in Puerto Rico, *see* Opp. 17-20, while exaggerating the supposedly destabilizing effects of reversing that decision in other contexts, *see id.* at 20-24. Neither set of arguments withstands scrutiny.

A. This Case Will Significantly Affect The Administration Of Justice In Puerto Rico.

Respondents contend that "the decision below carries no practical consequences on Puerto Rican criminal justice," because "[a] reversal by this Court will almost certainly result in the Puerto Rico Supreme Court reaching the identical result based on the Puerto Rico Constitution." Opp. 1. That contention is wrong in every respect.

The decision below has already had a profound impact on the administration of justice in Puerto Rico. Criminal defendants in cases pending in Commonwealth courts are moving for (and

obtaining) dismissal of charges based on that decision. *See, e.g.*, *Pueblo v. Natal Bracetti*, No. KLCE2015-01026 (P.R. Cir.) (Commonwealth appeal from order granting dismissal); *Pueblo v. Ramírez Berríos*, No. VP-2008-2705-2735 (P.R. Super.) (dismissal granted); *Pueblo v. Román Vega*, No. ALA2015G0043 *et al.* (P.R. Super.) (same); *Pueblo v. Lasalle González*, No. C VI2014G0038 *et al.* (P.R. Super.) (same); *Pueblo v. Carrión Cruz*, No. NSCR2012-1433 (P.R. Super.) (motion pending). Similarly, criminal defendants convicted in Commonwealth courts are demanding relief based on the decision below. *See, e.g.*, *Pueblo v. Santiago Otero*, No. J SC2014G0219 *et al.* (P.R. Super.) (motion pending); *Pueblo v. Belardo Colón*, No. NSCR201200137 (P.R. Super.) (same). Meanwhile, the Commonwealth is limited in its ability to prosecute defendants previously prosecuted in federal court, and faces the prospect that defendants in pending proceedings may plead guilty to federal charges to avoid potentially more serious punishment under Commonwealth law (as respondents here did).

This Court has previously characterized this situation as "'shocking and untoward.'" *Wheeler*, 435 U.S. at 318 n.8 (quoting *Bartkus v. Illinois*, 359 U.S. 121, 128-39 (1959)). It is no consolation for respondents to suggest that Puerto Rico could try to "arrange with [federal prosecutors] to bring its prosecution first." Opp. 19. As respondents themselves acknowledge, federal prosecutors may "insist[] on bringing [their] prosecution first," *id.*, and in any event Puerto Rico should not have to obtain permission from federal officials to enforce its own criminal laws in its own courts.

Nor is it any answer to predict, as respondents do, that the Puerto Rico Supreme Court "would likely grant respondents the same relief under the Puerto Rico Constitution" if this Court were to reverse the decision below. Opp. 17. There is absolutely no basis for that prediction; to the contrary, if the Puerto Rico Supreme Court had wanted to rest its holding on Commonwealth law, it could have done so. But it did just the opposite, conspicuously resting its holding exclusively on federal constitutional law, and insisting that *this* Court's precedents compelled its decision. *See* Pet. App. 62-69a. Indeed, respondents concede that "the justices in the majority *did not address*" double jeopardy under the Puerto Rico Constitution. Opp. 18 (emphasis added).

As explained in the petition, it is "anomalous and untenable" for the Double Jeopardy Clause of the Federal Constitution to be applied differently in the federal and Commonwealth courts of Puerto Rico. Pet. 3. The same provision of the Federal Constitution cannot possibly prevent the Commonwealth from prosecuting a defendant who has been prosecuted in federal court while allowing the Federal Government to prosecute a defendant who has been prosecuted in Commonwealth court. But that is precisely the situation now, given the direct and acknowledged conflict between the Puerto Rico Supreme Court and the Eleventh Circuit, on the one hand, and the First Circuit, on the other, on the federal constitutional question presented here.

The fact that several States have construed the double jeopardy provisions of their *own* constitutions to bar successive prosecutions by different sovereigns, *see* Opp. 18-19, has no bearing on this

anomaly. Puerto Rico, like a State, is free to provide rights beyond those provided by the Federal Constitution. But that is a far cry from having the application of a *federal* constitutional provision in Puerto Rico turn on whether a defendant is prosecuted first in federal or Commonwealth court.

B. This Case Will Not "Destabilize" Other Areas Of The Law.

Finally, respondents contend that "perhaps the strongest reason to deny certiorari in this case" is that a decision by this Court may "resolve the controversial political debate over the status of Puerto Rico." Opp. 20 (emphasis omitted). In particular, they warn that "[a] declaration by this Court that Puerto Rico is, or is not, a 'sovereign,' could have a profound and destabilizing effect on the debate over Puerto Rico's status," and "could have dramatic effects on other Puerto Rican status litigation." Opp. 21-22.

But no one is asking this Court to "resolve the controversial political debate over the status of Puerto Rico," or to "declar[e] ... that Puerto Rico is, or is not, a 'sovereign'" for any and all purposes. Opp. 20, 21-22. Rather, the Commonwealth is simply asking this Court to exercise its traditional authority "to say what the law is," *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803), by resolving a direct and acknowledged conflict among the lower courts on a question of federal constitutional law. Having sought and obtained a ruling on that question below, respondents are in no position now to shield that ruling from this Court's review as too "controversial." Opp. 20. It is inaccurate and offensive for respondents to suggest that this Court cannot

resolve the legal question presented here without "wad[ing] into the divisive debate over Puerto Rico's constitutional status in the United States," or triggering "complex and unpredictable consequences" on a variety of other constitutional questions not presented by this case. *Id.* at 1, 21.

CONCLUSION

For the foregoing reasons, and those set forth in the petition, this Court should grant review.

Respectfully submitted,

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