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 Writ of Certiorari
to the Supreme Court of Puerto Rico

BRIEF FOR *AMICI CURIAE* PROFESSORS CHRISTINA DUFFY PONSA AND SAM ERMAN IN SUPPORT OF RESPONDENTS

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INTERESTS OF *AMICI CURIAE*[1]

Amici curiae are scholars of the law and history of U.S. territories, U.S. sovereignty, and the place of Puerto Rico in the U.S. constitutional scheme. *Amici* have a professional interest in the doctrinal and historical issues involved in this Court's interpretation of the meaning of separate sovereignty for purposes of the Double Jeopardy Clause and the Constitution more broadly. Moreover, *amici* have a professional interest in historical conceptions of sovereignty and a general interest in the status and sovereignty of Puerto Rico.

Christina Duffy Ponsa is the George Welwood Murray Professor of Legal History at Columbia Law School. Professor Ponsa's scholarship examines the constitutional and international legal history of American territorial expansion and empire, with a particular focus on the late nineteenth and early twentieth centuries. She received her J.D. from Yale Law School and her Ph.D. (History) from Princeton University.

Sam Erman is an assistant professor at the USC Gould School of Law. A scholar of law and history, his research focuses on questions of status, including territorial status, especially in the years between the Civil War and World War II. He received his J.D. and Ph.D. (American Culture) from the University of Michigan.

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[1] The parties have consented to the filing of this brief. No party to this case or their counsel authored this brief in whole or in part, and no person other than *amici* and their counsel paid for or made a monetary contribution toward the preparation or submission of this brief.

SUMMARY OF ARGUMENT

The creation of the Constitution and Commonwealth of Puerto Rico in 1950-1952 was a tremendous political achievement. No prior U.S. territory had known such extensive autonomy. *See* José Trías Monge, *Puerto Rico: The Trials of the Oldest Colony in the World* 119 (1997). But that achievement does not mean that Puerto Rico became a separate sovereign. The history of territorial governance in the United States shows a clear distinction between autonomy and sovereignty: it is not only possible, but common, to have one without the other. Diverse forms of political autonomy have always existed in the U.S. territories. Like municipalities and the District of Columbia, U.S. territories are not subnational separate sovereigns within the United States. Yet, all these entities constitutionally can and do enjoy broad and varied powers. *See Avery v. Midland County, Tex.*, 390 U.S. 474, 481 (1968); *District of Columbia Home Rule Act*, Pub. L. No. 93–198, 87 Stat. 774 (1973); Arnold H. Leibowitz, *Defining Status: A Comprehensive Analysis of U.S. Territorial Relations* pt. II (1989). Conversely, American Indian tribes have been continuous sovereigns since the Founding, but nonetheless have endured periods of losses of self-government, territory, autonomy, police powers, legitimacy, and even life at the hands of the federal government. *See generally* Francis Paul Prucha, *The Great Father* (1986). Separate sovereignty is neither necessary nor sufficient to make the events of 1950-52 consequential.

The Commonwealth of Puerto Rico has not undergone the transformation from territory to State that is required for separate *sovereignty* in our

federal system. Although the Constitution permits many divisions of power within the United States, it provides but a single means of erecting separate sovereigns: "New States may be admitted by the Congress into this Union." U.S. Const. art. IV, § 3, cl. 3. Throughout the nineteenth century, it was conventional wisdom and practice that all U.S. territories would become sovereigns within the United States only by admission into statehood. Even the Insular Cases and their progeny, which envisioned U.S. territories that might one day leave the United States rather than transition to statehood, *see* Christina Duffy Burnett [Ponsa], Untied *States: American Expansion and Territorial Deannexation*, 72 U. Chi. L. Rev. 797 (2005), did not suggest that such territories could become separate sovereigns within the United States outside the framework of the Admission Clause.

The parties agree that before 1952, Puerto Rico was a U.S. territory, lacked separate sovereignty, and was subject to Congress's "plenary power" under the Territory Clause. This case raises the question of whether the events of 1950-52 made Puerto Rico a new sovereign in the constitutional system. History illuminates the answer to that question. *First*, the historical experience of territories that subsequently became states demonstrates that a territory does not become sovereign merely by adopting a constitution. Instead, it was admission into statehood rather than ratification of a constitution that marked the transition into separate sovereignty. Indeed, Congress consistently treated approval of territorial constitutions and admission into statehood as two distinct acts to be accomplished through separate statutory language. *Second*, Congress repeatedly extended to the territories extensive autonomy

without thereby transforming those territories into sovereigns. Prior to the events of 1950-1952, neither the adoption of a territorial constitution, whether alone or with congressional approval, nor the extension of autonomy to a territory, had ever transformed a territory into a separate sovereign within the U.S. constitutional system. For those events nonetheless to have transformed Puerto Rico into a separate sovereign, therefore, would have been both historically and constitutionally unprecedented.

Chief Justice Liana Fiol Matta of the Puerto Rico Supreme Court has equated recognizing Puerto Rican separate sovereignty with acknowledging that "the drafting and ratification of our Constitution by the People of Puerto Rico was not a marginal and insignificant event." *People of Puerto Rico v. Sánchez Valle*, P.R. Offic. Trans., slip op. at 131a (Mar. 20, 2015) (Fiol Matta, C.J., concurring). Separate sovereignty, however, is a sign of legal status, not a measure of political meaning. The significance of the events of 1950-1952 lies in their unprecedented enhancement of Puerto Rico's autonomy, not their implicit creation of a novel form of sovereignty.

ARGUMENT

I. IN TERRITORIES THAT BECAME STATES, IT WAS ADMISSION TO STATEHOOD, RATHER THAN CREATION OF A CONSTITUTION, THAT BROUGHT SEPARATE SOVEREIGNTY.

Nineteenth-century territorial history strongly suggests that constitutional self-proclamation does not a sovereign make. The U.S. territories were active sites of constitution-making throughout the nineteenth century. Residents revealed an almost

universal desire to achieve statehood eventually, be it to lock up local political power free from federal oversight, gain access to federal assistance and protection, or achieve the dignity that came with elevation to the rank of separate sovereign. *See generally The Uniting States: The Story of Statehood for the Fifty United States* vols. 1-3 (Benjamin F. Shearer ed., 2004). Had territories been able to achieve separate sovereignty through constitution-making, U.S. territorial history would look different indeed. Instead, culturally and geographically diverse territories proceeded on the implicit understanding that only admission into statehood could change their sovereign status. *See generally ibid.*

The consensus historical understanding of how to achieve separate sovereignty is at odds with arguments that Puerto Rico became a separate sovereign in 1952 by virtue of Puerto Rico's Constitution *alone*. According to Petitioner's account, transforming territories into separate sovereigns is simply what constitutions do, through their own declarative force: "[T]he people of Puerto Rico . . . engaged in an exercise of popular sovereignty in 1952 by adopting their *own* Constitution establishing their *own* government to enact their *own* laws. The Commonwealth of Puerto Rico is a creature of the people of Puerto Rico, not of Congress." Pet. Br. at 1–2. On this view, it is the adoption and ratification of a constitution, not any congressional action, that creates a separate sovereign.

But under similar circumstances, U.S. territories and the federal government have repeatedly recognized that it is admission to statehood, not creation of a constitution, that marks the culmination

of the process of achieving separate sovereignty. Both have treated adoption of a territorial constitution as a mere way station. Specifically, as discussed below, a number of nineteenth-century U.S. territories engaged in repeated episodes of constitution-making. Their efforts shared some or all of the features that Petitioner cites as evidence that Puerto Rico achieved separate sovereignty in 1950-1952. Pet. Br. at 29–30. These features include: constitutional conventions; foundational texts deploying the language of popular sovereignty and establishing governments of, by, and for the people; and ratification by popular vote. *Ibid.* Yet far from leading to separate sovereignty outside of statehood, some of these territorial constitutions simply led back to the drawing board. When that occurred, the territory remained a territory—even after adopting a constitution, sometimes even after the constitution had been ratified by popular vote, and always after the constitution invoked the venerable and time-tested language of popular sovereignty.

To be sure, every territory annexed prior to 1898 eventually gained admission into statehood and concomitant separate sovereignty after adopting a constitution that would become the state constitution. *See generally Uniting States*, *supra*, vols. 1–3. But the historical record suggests that neither Congress nor the territories ever understood a territorial constitution as an end in itself: the end was always statehood, and the separate sovereignty that only statehood could confer. The examples below illustrate the general point.

Consider Arizona. It held its first constitutional convention in 1891—over two decades before its admission into statehood in 1912 (at which time a

second constitution, adopted and ratified in 1911, became the state constitution). *Uniting States*, *supra*, vol. 1 at 88-97. The delegates to Arizona's 1891 constitutional convention drafted a text that invoked the language of popular sovereignty: "*We, the People* of Arizona… in order to form a more *independent* government . . . *do ordain and establish* the Constitution of the State of Arizona." *Constitution for the State of Arizona, as Adopted by the Constitutional Convention, Friday, October 2d, 1891, and Address to the People of the Territory* 7 (1891) (emphases added). The 1891 Arizona constitution established a government consisting of three separate branches, set forth a bill of rights, and provided amendment procedures. *Id*. at 7–28. And in December 1891, the people of Arizona ratified their constitution by popular vote. *Uniting States*, *supra*, vol. 1 at 88. Statehood did not ensue for another twenty-one years. In the interim, it was congressional supremacy as usual. *See* Max Farrand, *The Legislation of Congress for the Government of the Organized Territories of the United States, 1789-1895* 92 (1896) (listing congressional legislation for the territories, expressly including Arizona, after 1891, in Appendix B). The separate sovereignty that Arizona sought remained to be won.

In Colorado, it took six constitutions to get to statehood. Three were adopted, and two ratified by popular vote, before Congress even passed the organic act forming the Territory of Colorado in 1861. *See* Daniel A. Oesterle & Richard B. Collins, *The Colorado State Constitution: A Reference Guide* 2–6 (2002); *Colorado Organic Act*, ch. 59, 212 Stat. 172 (1861). Yet the organic act contained no sign that Congress intended to strip the people of the territory of any constitutionally achieved separate sovereignty.

Separate sovereignty had to wait until Colorado's admission into statehood in 1876. *See Uniting States*, *supra*, vol. 1 at 186.

New Mexico's first constitution, adopted in 1850 and ratified by an overwhelming majority of the vote, began with the language of popular sovereignty as well: "*We, the People* of New Mexico . . . do *ordain and establish* the following Constitution . . . and do mutually agree with each other to form ourselves into a *free and independent* State." *Constitution of the State of New Mexico*, *1850*, at 13 (1965) (emphases added). Yet the 1850 constitution did not lead to statehood. Instead, in its wake, Congress passed an organic act creating a government for the Territory of New Mexico. *See* Chuck Smith, *The New Mexico State Constitution: A Reference Guide* 4 (1996); *An Act . . . to establish a territorial Government for New Mexico*, ch. 49, 9 Stat. 446 (1850). Once again, the act contained no sign that Congress believed it was stripping the people of New Mexico of any separate sovereignty they had achieved through a constitution. New Mexico continued to seek the separate sovereignty of statehood, which it secured in 1912, more than six decades later. Smith, *supra*, at 13.

South Dakota saw its share of pre-statehood constitutional activity as well, including three constitutional conventions and at least one constitution that did not ultimately become the state constitution. *See Uniting States*, *supra*, vol. 3 at 1113–22. Like Arizona's 1891 constitution, South Dakota's 1883 constitution was adopted and popularly ratified, but then discarded. *Id*. at 1116. Its lengthy preamble of course invoked popular sovereignty: "*We, the People* of South Dakota . . . in order to form a more perfect and *independent*

Government . . . *do ordain and establish* this constitution for the State of South Dakota." *South Dakota Constitution of 1883, Printed in Dakota Constitutional Convention, Held at Sioux Falls, September 1885* vol. I at 9 (1907) (emphases added). Admittedly, this constitution was the product of a constitutional convention held in defiance of the wishes of the territorial governor. That said, arguably this defiance constituted an even more robust exercise of popular sovereignty at the local level, insofar as the territorial governor was a federally appointed official. Moreover, residents of South Dakota expressly claimed that in the absence of congressional action, they could achieve separate sovereignty via self-proclamation by declaring themselves a state; yet as a leading historian of the effort reports, "[n]ot many legal scholars, politicians, and impartial observers outside the territory were much impressed by the reasoning involved." *Uniting States*, *supra*, vol. 3 at 1114. When statehood advocates from South Dakota presented the 1883 Constitution to the U.S. Congress later that year, the Senate took it seriously enough to vote in favor of statehood, though the House declined to follow suit. Patrick M. Garry and Candice Spurlin, *History of the 1889 South Dakota Constitution*, 59 S.D. L. Rev. 14, 29 (2014); S. Rep. No. 15, at 4 (1st Sess. 1886) (describing the adoption and ratification of the 1883 Constitution). Rebuffed, South Dakota went on to hold its 1885 and 1889 constitutional conventions, adopt a second constitution, and finally gain separate sovereignty as a state in 1889. *See Uniting States*, *supra*, at 1121.

In Utah, it took seven constitutions over a period of nearly fifty years to get to statehood. These began with the Constitution of the State of Deseret in 1849

and ended with the Constitution of the State of Utah in 1896. *See* Jean Bickmore White, *The Utah State Constitution: A Reference Guide* 2–3 (2002); *see also* Peter Crawley, *The Constitution of the State Deseret*, 29:4 BYU Studies 7, 13–14 (1989). Although the Constitution of Deseret was adopted by the Mormon Council of Fifty rather than by constitutional convention, it nonetheless served as the organic law of the self-denominated "State of Deseret" for a year—until Congress adopted an organic act for the Territory of Utah. *An Act to Establish a Territorial Government for Utah*, ch. 51, 9 Stat. 453 (1850). During that year, the Constitution of Deseret provided a structure of government, qualifications for voting and holding public office, and rights of citizens. *See* White, *supra*, at 2–3. Indeed, both before and after the adoption of the Constitution of the State of Deseret, the Council exercised full local self-government powers: it "drafted laws, levied taxes, apportioned land to settlers, issued water and timber rights, located a cemetery, and imposed fines and punishments for criminal offenses." Crawley, *supra*, at 8. It may well be that some Utah residents wished they were "sovereign" in various ways, but as a federal constitutional matter, there is no question that the United States exercised sole sovereignty over this territory upon its annexation in the Treaty of Guadalupe Hidalgo. *See* Treaty of Peace, Friendship, Limits and Settlement between the United States of America and the Mexican Republic, Mex.-U.S., May 30, 1848, 9 Stat. 922. Congress acted accordingly: the federal act remained Utah's organic law even as another five constitutions were adopted by constitutional convention in the years 1856, 1862, 1872, 1882, and 1887. *See* White, *supra*, at 3–8; Farrand, *supra*, at 74–93 (listing congressional acts

between 1850 and 1894 affecting the territories, including Utah, in Appendix B). These repeated efforts to achieve statehood finally succeeded in 1896, after Utah adopted its seventh constitution. *See Uniting States*, *supra*, vol. 3 at 1190–1211.

As these episodes of territorial constitution-making suggest, nineteenth-century territorial constitutions aimed to persuade Congress into admitting territories into statehood. It was a territory's admission into statehood, not its adoption of a constitution, that culminated in its separate sovereignty.

II. CONGRESS HAS CONSISTENTLY DISTINGUISHED BETWEEN ITS DELEGATION OF EXTENSIVE AUTONOMY TO TERRITORIES AND ITS ADMISSION OF TERRITORIES INTO STATEHOOD.

For those who argue that Puerto Rico became a separate sovereign in 1952, the alternative to resting on the Puerto Rico Constitution alone is to argue that Congress conferred separate sovereignty on Puerto Rico. *See, e.g.*, Pet. Br. at 8–9, 31–32. This argument requires that Congress possessed both the constitutional power to transform Puerto Rico into a separate sovereign and the intent to do so. As noted above, there are good textual, doctrinal, and historical reasons to think that Congress lacks this power. Congress historically has erected separate sovereigns by admitting territories into statehood, the only method the Constitution expressly provides. Any creation of a non-state separate sovereign within

the United States would be a revolution in the practice and doctrine of U.S. sovereignty.[2]

There are also good reasons to infer that Congress did not intend to transform Puerto Rico into a separate sovereign. No federal law expressly purports to confer U.S. sovereignty on Puerto Rico. Proponents of this view nonetheless argue that Congress conferred U.S. sovereignty by implication. As evidence, they cite Congress's decisions to treat Puerto Rico in a manner similar to other territories that achieved separate sovereignty, and to grant Puerto Rico unprecedented autonomy. *See, e.g.*, Pet. Br. at 30–39, 44. But history shows that these factors are not sufficient to create sovereignty.

A. Congress's Approval of the Puerto Rico Constitution Is Not Analogous to the Admission of Territories into Sovereign Statehood

One version of the argument that Congress transformed Puerto Rico into a separate sovereign in

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[2] The only separate sovereigns within the United States other than States are the American Indian tribes, which prior to the creation of the United States held a sovereignty that they have continually retained ever since. *See United States v. Lara*, 541 U.S. 193, 199 (2004); *United States v. Wheeler*, 435 U.S. 313, 322–23, 326–29 (1978), *superseded by statute on other grounds as recognized in United States v. Lara*, 541 U.S. 193 (2004). As Petitioner recognizes, Pet. Br. at 5, Puerto Rico can claim no such continuous, preexisting sovereignty. Spanish sovereignty over Puerto Rico was transferred in full to the United States via the Treaty of Paris in 1899. *See* Treaty of Peace between the United States of America and the Kingdom of Spain, Spain-U.S., Apr. 11, 1899, 30 Stat. 1754, 1755 ("Article II. Spain cedes to the United States the island of Porto Rico . . . .").

1950-1952 proceeds by analogy to the three-step process whereby twenty-one prior U.S. territories became States. *See, e.g.,* Pet. Br. at 32–33. In those territories, Congress passed an "enabling act" authorizing the adoption of a local constitution; the territory then adopted a constitution pursuant to this congressional authorization; and Congress subsequently passed an "admission act" approving the constitution and admitting the territory into statehood. Once a territory becomes a state, it unquestionably becomes a separate sovereign. Similarly, in Puerto Rico, Congress passed a statute authorizing the adoption of a local constitution; Puerto Rico then adopted a constitution pursuant to this authorization; and Congress subsequently passed a statute approving the constitution of the Commonwealth of Puerto Rico. *See, e.g.,* Pet. Br. at 8–9.

But the analogy is fatally inexact. True enough, prior territories and Puerto Rico adopted constitutions that Congress had authorized and later approved. But before any territory became a state, Congress always took the further step of formal admission. Crucially, Congress consistently distinguished between its approval of a proposed state constitution and its admission of the territory into statehood. The Admission Acts for Louisiana (in the early nineteenth century) and Idaho (in the late nineteenth century) provide representative examples:

> Whereas the representatives of the people [of Louisiana] did . . . form for themselves a constitution and state government, . . . And the said constitution having been transmitted to Congress, and by them being hereby approved; therefore

> *Be it enacted*. . . , That the said state shall be one, and is hereby declared to be one of the United States of America, and admitted into the Union on an equal footing with the original states in all respects whatever.

An Act for the Admission of the State of Louisiana into the Union, and to extend the laws of the United States to the said State, ch. 50, 2 Stat. 701 (1812).

> *Be it enacted*. . . , That the state of Idaho is hereby declared to be a state of the United States of America, and is hereby declared admitted into the union on an equal footing with the original states in all respects whatever; and that the constitution which the people of Idaho have formed for themselves be, and the same is hereby, accepted, ratified and confirmed.

An Act to provide for the admission of the State of Idaho into the Union, ch. 656, 26 Stat. 215 (1890); *cf*. Pet. Br. at Appendix B (quoting "approval" language but omitting "admission" language for Arkansas, California, Florida, Idaho, Illinois, Indiana, Iowa, Kansas, Louisiana, Minnesota, Mississippi, Oregon, Wisconsin, and Wyoming).

The distinction between admission to statehood and constitutional approval tracks the text of section 3 of Article IV of the U.S. Constitution. Clause 3 specifically confers upon Congress the power to admit a State. Otherwise, Congress proceeds under its plenary Clause 2 power to govern territories. On a number of occasions, Congress approved a proposed state constitution even as it imposed conditions on an entering State; the territory—still a territory—

then had to comply with those congressional conditions before its subsequent admission. As these examples make clear, until it formally admits a territory into statehood, Congress is exercising its plenary Clause 2 power over territories. *Cf. Coyle v. Smith*, 221 U.S. 559, 579–80 (1911) (holding that a State, once admitted, may refuse to comply with certain congressionally imposed conditions on its admission, due to its having become a separate sovereign on an equal footing with other States). Meanwhile, every time Congress admitted a State, it was exercising its specific Clause 3 power. If Petitioner's analogy holds, Congress was exercising its plenary Clause 2 power to govern territories when it approved Puerto Rico's Constitution. Puerto Rico remained one crucial step shy of achieving the separate sovereignty that previous territories had attained only when Congress exercised its specific Clause 3 power: the power to admit a State.

B. Congress's Grant of Extensive Autonomy to Territories Was Not a Congressional Grant of Sovereignty

The other version of the argument that Congress extended Puerto Rico separate sovereignty rests on the extensive autonomy that Puerto Rico enjoys. *See, e.g.*, Pet. Br. at 29–31. Surely Congress would not permit a non-sovereign such self-direction. *Ibid*. Yet, Congress has throughout history repeatedly done just that.

Congress has long extended non-sovereign territories extensive powers to choose their leaders and make their laws, albeit while retaining and sometimes exercising plenary power over those territories. *See generally* Jack Ericson Eblen, *The*

First and Second United States Empires: Governors and Territorial Government, 1784-1912 (1968); John Welling Smurr, Territorial Constitutions: A Legal History of the Frontier Governments Erected By Congress in the American West, 1790-1900 (1960) (Ph.D. dissertation, Indiana University).[3] While it periodically exercised its "Power . . . to make all needful Rules and Regulations for the Territories . . . of the United States," U.S. Const. art. IV, § 3, cl. 2, from early on, Congress mostly left the territories alone to govern themselves. *See* Eblen, *supra*, at 301–02; *see also id.* at 323 (listing compilations of laws enacted by territorial legislatures); Farrand, *supra*, at 57–93 (listing congressional acts affecting the territories in Appendix B). This Court has long and consistently confirmed both that Congress wields plenary power to govern the territories, *see American Ins. Co. v. 356 Bales of Cotton*, 26 U.S. 511, 546 (1828); *United States v. Gratiot*, 39 U.S. 526, 537 (1840); *First Nat'l Bank v. Yankton*, 101 U.S. 129, 133 (1879); *Harris v. Rosario*, 446 U.S. 651, 651–52 (1980) (per curiam); *see generally* Sarah H. Cleveland, *Powers Inherent in Sovereignty: Indians, Aliens, Territories, and the Nineteenth Century Origins of Plenary Power over Foreign Affairs*, 81 U. Texas L. Rev. 1, 163–250 (2002), and that the territories enjoy something akin to a qualified form of sovereignty, *see Cowell v. Colorado Springs Co.*, 100 U.S. 55, 59–60 (1879); *De Geofroy v. Riggs*, 133 U.S. 258, 268–69 (1890); *Davis v. Beason*, 133 U.S. 333,

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[3] The precise extent of Congress's power over territories was the subject of debate, of course, due to divisions over slavery. *See generally* Don E. Fehrenbacher, *The Dred Scott Case: Its Significance in American Law and Politics* ch. 6–7 (1978).

345–46 (1890), *abrogated in part on other grounds by Romer v. Evans*, 517 U.S. 620, 634 (1996); *Puerto Rico v. Shell Co.*, 302 U.S. 253, 260–62 (1937); *Rodríguez v. Popular Democratic Party*, 457 U.S. 1, 8 (1982); *see generally* Smurr, *supra*, at 430–60.

Indeed, as one study of local territorial government has explained, the territories always exercised state-like "police powers." Smurr, *supra*, at 941; *see also id.* at 941–46. Although they had federally appointed governors, their legislatures were elected, and these elected bodies enacted territorial laws, including criminal laws, which were enforced in the name of the People of the territory. *See* Eblen, *supra*, at ch. 5; Smurr, *supra,* at 941–46. Territories were treated as states for certain purposes. *See, e.g.*, *De Geofroy*, 133 U.S. at 269 (while discussing "the organized municipalities known as 'territories' and the 'District of Columbia,'" noting two prior decisions by the Court "that the District of Columbia, being a separate political community, is in a certain sense a state"); Smurr, *supra*, at 430–60. They were sometimes even described as wielding certain powers associated with "sovereignty," although when the odd nineteenth-century territorial court mistook a territory's colloquial sovereignty for the formal separate sovereignty needed to qualify for the dual sovereign exception to the Double Jeopardy Clause, this Court identified the error. *See Shell*, 302 U.S. at 267–68 (describing *In re Murphy*, 40 P. 398 (Wyo. 1895), and similar decisions as "erroneous"); Resp. Br. at 9 n.1; *cf.* Pet. Br. at 23-24.

But no degree of territorial self-government stripped Congress of its plenary power over the territories. As this Court confirmed in *First National Bank v. Yankton*, when the Court was describing

Congress's power to amend the acts of the territorial legislature:

> Such a power is an incident of sovereignty, and continues until granted away. Congress may not only abrogate laws of the territorial legislatures, but it may itself legislate directly for the local government. It may make a void act of the territorial legislature valid, and a valid act void.

101 U.S. at 133.

Throughout the nineteenth and twentieth centuries, territorial non-sovereignty and territorial autonomy simply co-existed. *First*, this Court recognized the distinction between autonomy and sovereignty in *De Geofroy*, 133 U.S. 258, an 1890 case concerning whether the phrase "states of the Union" in a treaty encompassed the District of Columbia. Answering in the affirmative, the Court began by describing "those political communities exercising various attributes of sovereignty which compose the United States, as distinguished from the organized municipalities known as 'territories' and the 'District of Columbia.'" *Id.* at 268. Yet, it continued, lack of sovereignty did not mean lack of self-government. It explained that

> separate communities, with an independent local government, are often described as 'states,' though the extent of their political sovereignty be limited by relations to a more general government, or to other countries. The term is used in general jurisprudence, and by writers on public law, as denoting organized political societies with an established government.

Ibid. Since the District of Columbia fit the latter description despite its lack of separate sovereignty, the treaty encompassed it. *Id*. at 272.

Second, congressional and territorial practices in the nineteenth century support the same conclusion. The territories had extensive self-government, *see* Eblen, *supra*, at 301 ("As territorial home rule developed, the federal government increasingly limited itself to general supervision and left strictly internal affairs to the territorial governments, except when their action constituted an extreme misuse of power or threatened some vital national policy."), but that was not equivalent to sovereignty. The experiences of California and Indiana dramatically illustrate the phenomenon. Each of these territories not only adopted and ratified a constitution before the territory's admission into statehood, but put it into effect immediately, forming a government under it and electing a governor and legislature, all of whom took office before the territory's admission into statehood. *See* Joseph R. Grodin, Calvin R. Massey, and Richard B. Cunningham, *The California State Constitution: A Reference Guide* 8–9 (1993); William P. McLauchlan, *The Indiana State Constitution: A Reference Guide* 4 (1996); James H. Madison, *The Indiana Way: A State History* 54 (1986); *cf.* Pet. Br. at 7. Yet Congress's admission act for California included the usual conditions on statehood, *see An Act for the Admission of the State of California into the Union*, ch. 50, § 3, 9 Stat. 452 (1850), while the formulaic language of Indiana's gave no sign that Congress believed the territory had attained an intermediate stage of separate sovereignty prior to its admission, *see Resolution for Admitting the State of Indiana into the Union*, 3 Stat. 399 (1816). It was admission into statehood, not territorial autonomy,

that brought separate sovereignty to California and Indiana.

Third, in the twentieth century, this Court reaffirmed the compatibility of territorial autonomy and non-sovereignty in a case specifically concerning Puerto Rico: *Shell*, 302 U.S. 253. *Shell* was decided fifteen years *before* Puerto Rico became a "Commonwealth," and therefore during the period in which no one disputes Puerto Rico was a territory. The Court was explicit that Puerto Rico both enjoyed extensive self-government and was not then a separate sovereign. It explained:

> [T]he theory upon which [the] territories have been organized "has ever been that of leaving to the inhabitants all the powers of self-government consistent with the supremacy and supervision of National authority, and with certain fundamental principles established by Congress" . . . "The powers thus exercised by the Territorial legislatures are nearly as extensive as those exercised by any State legislature."

Id. at 260 (quoting *Clinton v. Englebrecht*, 80 U.S. 434, 441 (1871); *Hornbuckle v. Toombs*, 85 U.S. 648, 655 (1873)). Accordingly, in Puerto Rico's case, "[t]he aim of [the organic acts] was to give Puerto Rico full power of local self-determination, with an autonomy similar to that of the states and incorporated territories." *Shell*, 302 U.S. at 261-62. "The effect was to confer upon the territory many of the attributes of quasi sovereignty possessed by the states," and "so far as local matters are concerned . . . , legislative powers . . . nearly, if not quite, as extensive as those exercised by the state legislatures." *Id*. at 262. This "comprehensive grant

of legislative power made by Congress plainly recognizes the great desirability of devolving upon [Puerto Rico's] local government the responsibility of searching out local offenses and prosecuting them in the local tribunals." *Id.* at 262. These offenses, the Court noted, were even at that time prosecuted in the name of the "The People of Puerto Rico," a fact entirely consistent with Puerto Rico's status as a territory. *Ibid*.

The Court acknowledged that successive prosecutions under the local law and the Sherman Antitrust Act would violate the prohibition against double jeopardy. "Both the territorial and federal laws and the courts, whether exercising federal or local jurisdiction, are creations emanating from the same sovereignty." *Id*. at 264. Even so, absent an "actual conflict," a territory had a distinct and independent interest in creating and prosecuting offenses under local law. *Id*. at 270–71. For this reason, it could enact and prosecute offenses that overlapped with federal law, so long as the defendants had not already been prosecuted for the same offense. *Id.* at 266–70.

In short, remarkably high levels of autonomy have always coexisted with ultimate federal sovereignty in the U.S. territories. In 1950-1952, Congress acted on this understanding when it sought to authorize in Puerto Rico the greatest possible degree of self-government it could allow in a territory, short of admitting it into statehood. To do so, Congress had no need to establish Puerto Rico as a separate sovereign.

Contrary to the First Circuit's suggestion, to acknowledge that Congress retained full federal sovereignty over Puerto Rico when it followed

longstanding historical practice by allowing Puerto Rico to achieve robustly autonomous self-government is *not* "to impute to the Congress the perpetration of . . . a monumental hoax." *Figueroa v. Puerto Rico*, 232 F.2d 615, 620 (1st Cir. 1956) (quoted in Pet. Br. at 2). Rather, it is to recognize that Congress accomplished a momentous transformation of Puerto Rico's political autonomy within the U.S. constitutional framework.

CONCLUSION

For the foregoing reasons, the judgment of the Supreme Court of Puerto Rico should be affirmed.

Respectfully submitted,

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