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

REPLY BRIEF FOR PETITIONER

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INTRODUCTION

Respondents' position boils down to the mantra that "States are sovereign, but Territories are not." Whatever the merits of that proposition as a matter of political philosophy, it has no bearing here. In the double jeopardy context, as this Court has long explained, two offenses are not the "same" if they are created by "entities [that] draw their authority to punish the offender from distinct sources of power." *Heath v. Alabama*, 474 U.S. 82, 88 (1985) (citing, *inter alia*, *United States v. Wheeler*, 435 U.S. 313, 320 (1978)); *see also United States v. Lara*, 541 U.S. 193, 199 (2004).

That principle controls here. The criminal laws of the Commonwealth of Puerto Rico emanate from authority delegated by the people of Puerto Rico through their own Constitution. Respondents and their *amici* dispute that point, asserting that the Puerto Rico Constitution itself emanates from delegated federal authority. But even cursory examination of the key legal documents from the 1950-52 era—including the federal statute that proposed a "compact" whereby "the people of Puerto Rico may organize a government pursuant to a constitution of their own adoption," Pub. L. No. 81-600, 64 Stat. 319 (1950), Pet. App. 353a, the Constitution thereafter adopted by the Puerto Rico Constitutional Convention and ratified by the people of Puerto Rico, *see* P.R. Const., Pet. App. 358-62a, and approval of that Constitution by both the President and Congress, including recognition that it provides a "republican form of government," Pub. L. No. 82-447, 66 Stat. 327 (1952), Pet. App. 355-56a—refutes that assertion. Pursuant to Congress'

invitation, and with Congress' consent, the people of Puerto Rico engaged in an exercise of popular sovereignty by creating their *own* government "within [their] union with the United States of America." P.R. Const. pmbl., Pet. App. 358a. Accordingly, the Commonwealth's "political power emanates from the people," not the federal government. *Id.* art. I, § 1, Pet. App. 359a.

That is why, as this Court has recognized, "Puerto Rico occupies a relationship to the United States that has no parallel in our history." *Examining Bd. of Eng'rs, Architects & Surveyors v. Flores de Otero*, 426 U.S. 572, 596 (1976); *see also Córdova & Simonpietri Ins. Agency, Inc. v. Chase Manhattan Bank, N.A.*, 649 F.2d 36, 41 (1st Cir. 1981) (Breyer, J.) (noting that, in 1950-52, "Puerto Rico's status changed from that of a mere territory to the unique status of Commonwealth"). The Commonwealth of Puerto Rico is unique insofar as it is not a State, but enjoys "government by consent," Pub. L. No. 81-600, Pet. App. 353a, under its own Constitution and laws in union with the United States.

Respondents and their *amici* are thus reduced to arguing that Puerto Rico's Commonwealth status is purely "symbolic." Resps. Br. 36. In their view, Congress *cannot* allow the people of a United States territory to exercise their own authority (as opposed to delegated federal authority) to create their own Constitution and laws. But that argument turns Congress' plenary power under the Territorial Clause upside down. The Commonwealth of Puerto Rico represents inventive statesmanship at its best, by allowing a government of the people, by the people, and for the people of Puerto Rico in union

with the United States. Nothing in the Federal Constitution bars such an arrangement, or condemns Puerto Rico to perpetual colonial status unless it becomes a State or independent nation.

At bottom, respondents and their *amici* invite this Court to tell the people of Puerto Rico—almost 64 years after the creation of the Commonwealth—that their Constitution and laws are not their own after all, that Puerto Rico law is nothing more than delegated federal law, and that their Constitution is thus "a monumental hoax." *Figueroa v. Puerto Rico*, 232 F.2d 615, 620 (1st Cir. 1956). This Court should decline that invitation and reverse the judgment.[1]

ARGUMENT

I. The Double Jeopardy Analysis Turns On The Source Of Authority Of Puerto Rico Law, Not Abstract Notions Of Sovereignty.

According to respondents, "[t]his case begins and ends with an unbroken line of cases from this Court ... holding that under the Double Jeopardy Clause, states are sovereign, and territories are not." Resps. Br. 7. In light of congressional authority under the Territorial Clause, U.S. Const. art. IV, § 3, they

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[1] *Amicus* The Virgin Islands Bar Association challenges this Court's jurisdiction on the ground that the decision below is not "final" under 28 U.S.C. § 1258. *See* VIBA Br. 7-17. That challenge is meritless. The double jeopardy issue here is a "federal issue, finally decided by the highest court in [Puerto Rico], [which] will survive and require decision regardless of the outcome of future state-court proceedings." *Cox Broad. Corp. v. Cohn*, 420 U.S. 469, 480 (1975). Although *Cox* involved the finality of a state-court judgment under 28 U.S.C. § 1257, the relevant finality language in § 1258 is identical.

declare, Puerto Rico *cannot* qualify as a "separate sovereign" under the Double Jeopardy Clause. *See id.* at 11-22. That would, in their view, result in the paradox of a "sovereign territory." *E.g.*, *id.* at 4.

These arguments show that respondents have fallen into the same semantic trap as the Puerto Rico Supreme Court below. The "dual sovereignty" doctrine is simply a convenient shorthand to describe the principle that two offenses are not the "same" for double jeopardy purposes if "'the source of the power to punish'" each offense is different. *Lara*, 541 U.S. at 199 (quoting *Wheeler*, 435 U.S. at 322); *see also Heath*, 474 U.S. at 88-91. It could just as well be called the "source of authority" doctrine, or a corollary of the *Blockburger* doctrine for determining whether two offenses are the "same," *see Blockburger v. United States*, 284 U.S. 299, 304 (1932). Contrary to respondents' assertion, the analysis does not require inquiry into whether an entity enjoys what respondents characterize as "fundamental attributes" of sovereignty, such as "equality" and a "political voice." Resps. Br. 18 (emphasis omitted).

And this point is hardly novel. Indeed, the Ninth Circuit made the same mistake as respondents in 1976, when it held that the Navajo Tribe and the United States were not "dual sovereigns" under the Double Jeopardy Clause in light of plenary federal control over Indian tribes (which the Ninth Circuit contrasted to limited federal control over the States and, for that matter, Puerto Rico). *See United States v. Wheeler*, 545 F.2d 1255, 1257-58 & n.7 (9th Cir. 1976). This Court unanimously reversed, holding that the Ninth Circuit had focused on the wrong question. "[T]he Court of Appeals, in relying on

federal control over Indian tribes, ha[s] misconceived the distinction between those cases in which the 'dual sovereignty' concept is applicable and those in which it is not. ... What [matters is] not the extent of control exercised by one prosecuting authority over the other but rather the ultimate source of the power under which the respective prosecutions were undertaken." *Wheeler*, 435 U.S. at 319-20; *see also Lara*, 541 U.S. at 203 (characterizing Indian tribes as "dependent sovereign[s]"). Respondents thus err by insisting that "'sovereignty' [does] not carry any special meaning in the double jeopardy context," Resps. Br. 12; rather, as *Wheeler*, *Heath*, and *Lara* explain, it refers to the source of authority for the respective offenses and nothing more.

Not one of the "unbroken line of cases" invoked by respondents, Resps. Br. 7, addresses the dispositive question here—whether the criminal laws of the Commonwealth of Puerto Rico emanate from a different source of authority than the criminal laws of the United States. Contrary to respondents' assertion, *see* Resps. Br. 7-8, *Grafton v. United States*, 206 U.S. 333 (1907), does not hold, as an immutable and universal truth, that the laws of a federal territory invariably emanate from Congress. Rather, *Grafton* merely holds that, in light of "relations between the United States and the Philippines" at the time, when the Philippines had no constitution of its own, the Philippine territorial government "exert[ed] all [its] powers under and by authority of .... the United States." *Id.* at 354-55.

Similarly unavailing is respondents' reliance on *dicta* from *Puerto Rico v. Shell Co. (P.R.)*, 302 U.S. 253 (1937). *See* Resps. Br. 8-9. That case involved

the preemptive scope of the Sherman Act, and addressed double jeopardy only in passing to reject the suggestion that upholding a Puerto Rico antitrust law might raise double jeopardy concerns. *See* 302 U.S. at 264. The court noted that Puerto Rico's territorial government at the time "was, in all essentials, the same" as the Philippine government in *Grafton*. *Id.* at 265. Thus, the Court declared, "[t]he risk of double jeopardy does not exist" because "[b]oth the territorial and federal laws and the courts ... are creations emanating from the same sovereignty." *Id.* at 264.

Respondents vastly overread *Shell*. At the time of that decision, Puerto Rico was governed under an organic act of Congress, the Jones Act, Pub. L. No. 64-368, 39 Stat. 951 (1917), JA90-131. Respondents try to obscure that point by invoking *Shell*'s observation that the Jones Act gave Puerto Rico "an autonomy similar to that of the states and incorporated territories," and created "'a body politic'—a commonwealth." 302 U.S. at 262. But that is simply a colloquial use of the word "commonwealth" with a small "c," not a reference to the Commonwealth of Puerto Rico, a creation of the Puerto Rico Constitution that would not come into being for another 15 years. Respondents' suggestion that *Shell* addressed the status of the Commonwealth of Puerto Rico for double jeopardy purposes, *see* Resps. Br. 3, is thus misleading at best.

Nor did any of this Court's subsequent cases address the double jeopardy status of the Commonwealth of Puerto Rico. *See* Resps. Br. 9-11. Rather, those cases note that *Grafton* and *Shell* comport with the rule that the double jeopardy

inquiry turns on "the ultimate source of the power under which the respective prosecutions were undertaken"—the territorial laws in *Grafton* and *Shell* simply emanated from delegated federal power. *Wheeler*, 435 U.S. at 320; *see also Waller v. Florida*, 397 U.S. 387, 393-95 & n.5 (1970); *Heath*, 474 U.S. at 88-91. In short, *no* case of this Court—much less "an unbroken line of cases," Resps. Br. 7—holds that territorial law necessarily and invariably *must* emanate from delegated federal power, or that the laws of the Commonwealth of Puerto Rico do so.

II. Puerto Rico Law Emanates From A Different Source Of Authority Than Federal Law.

Respondents' position thus boils down to the startling proposition that "the Puerto Rican Constitution cannot genuinely be characterized as Puerto Ricans' *own* constitution." Resps. Br. 39 (emphasis in original; internal quotation omitted). But that proposition cannot be squared with the text, structure, and history of the key legal documents of the 1950-52 period, or contemporaneous and subsequent analysis thereof (including by this Court)—as indeed respondents' *amicus*, the United States, acknowledged for many years before filing its brief in this case, *see* Supp. App. 1-11a (excerpts from briefs of the United States in *United States v. López Andino*, 831 F.2d 1164 (1st Cir. 1987), and *United States v. Sánchez*, 992 F.2d 1143 (11th Cir. 1993)).

The Commonwealth's legal cornerstone is Public Law 600, enacted amid demands for decolonization after World War II and the creation of the United Nations. That Law, which "was intended to end [Puerto Rico's] subordinate status," *Córdova*, 649

F.2d at 40, did not simply propose to revise the existing organic act governing Puerto Rico. Rather, it proposed the creation of an entirely new government.

Public Law 600 sought "[t]o provide for the organization of a constitutional government *by the people of Puerto Rico*." Pub. L. No. 81-600 pmbl., Pet. App. 353a (emphasis added). The Law recognized that it was time for a new political order based upon "the principle of *government by consent*." *Id.* (emphasis added). Thus, Congress adopted the Law "in the nature of a *compact* so that *the people of Puerto Rico* may organize a government pursuant to *a constitution of their own adoption*." *Id.* (emphasis added). Accordingly, the Law called for a referendum for the people of Puerto Rico to decide whether "to call a constitutional convention to draft a constitution for the said island of Puerto Rico." *Id.* § 2. And Congress set no preconditions for that constitution other than to specify that it "shall provide a republican form of government and shall include a bill of rights." *Id.*

The people of Puerto Rico accepted that "compact," first convening a Constitutional Convention that drafted the Puerto Rico Constitution, and then endorsing that Constitution. The Puerto Rico Constitution is not at all ambiguous or subtle about the source of its power. It is adopted by "[w]e, the people of Puerto Rico ... in the exercise of our natural rights." P.R. Const. pmbl., Pet. App. 358a. It specifies that "[the Commonwealth's] political power *emanates from the people* and shall be exercised in accordance with their will." *Id.* art. I, § 1, Pet. App. 359a (emphasis added); *see also id.* pmbl., Pet. App.

358a ("[T]he democratic system of government is one in which *the will of the people is the source of public power*.") (emphasis added); *id.* art. I, § 2, Pet. App. 359a (all branches of the Commonwealth's government "shall be equally subordinate to *the sovereignty of the people of Puerto Rico*") (emphasis added). And, as particularly relevant here, the Constitution specifies that "[a]ll criminal actions in the courts of the Commonwealth shall be conducted in the name and *by the authority of* 'The People of Puerto Rico.'" *Id.*, art. VI, § 18, Pet. App. 362a (emphasis added).

Both the President and Congress then reviewed and approved the proposed Puerto Rico Constitution. In light of that document's explicit language regarding the source of its authority, they must have understood that they were not merely reviewing another organic act of Congress. To the contrary, both the President and Congress specifically determined that the Puerto Rico Constitution created "a republican form of government." Pub. L. No. 82-447, Pet. App. 355-56a. Although respondents never engage on this point, that is a term of art with respect to a form of government, and "the distinguishing feature of that form is the right of the people to choose *their own* officers for governmental administration, and pass *their own* laws in virtue of the legislative power reposed in representative bodies, whose legitimate acts may be said to be those of *the people themselves*." *Duncan v. McCall*, 139 U.S. 449, 461 (1891) (emphasis added). In a republican form of government, in other words, "the people are ... the source of political power." *Id.*; *see also Public Papers of the Presidents, Harry S. Truman 1952-53*, 472 (1966) ("[T]his constitution is

the product of the people of Puerto Rico.") (statement upon signing Joint Resolution approving Puerto Rico Constitution).

And the United States did not stop there. Rather, it represented to the United Nations that, in light of the Puerto Rico Constitution, the "'political power [of the Commonwealth] *emanates from the people*,'" and thus characterized that Constitution as "similar to that of a State of the Federal Union." Mem. by U.S. Gov't to U.N., JA141 (quoting P.R. Const. art. I, § 1) (emphasis added). It emphasized that the Puerto Rico Legislative Assembly "has full legislative authority in respect to local matters," and contrasted Puerto Rico with such United States territories as Alaska and Hawaii, then governed by "organic acts as enacted by the Congress." JA142, 146. "The people of Puerto Rico have complete autonomy in internal economic matters and in cultural and social affairs under a Constitution adopted by them and approved by the Congress." JA146. In short, the United States explained, the adoption of the Puerto Rico Constitution and the establishment of the Commonwealth represented a "change in the *constitutional position and status* of Puerto Rico," JA135 (emphasis added)—hardly the description of another organic act of Congress.

In response, the United Nations recognized that the United States had fulfilled its "sacred trust" under Article 73, JA132, and that Puerto Rico was no longer a "non-self-governing territory," General Assembly Res. 748, JA148-51. In particular, the United Nations recognized that "the people of the Commonwealth of Puerto Rico, by expressing their will in a free and democratic way, have achieved a

new constitutional status," and that by "choosing their constitutional ... status, the people of the Commonwealth of Puerto Rico have effectively exercised their right to self-determination." JA149-50; *see also id.* at 150 ("[I]n the framework of their Constitution and of the compact agreed upon with the United States of America, the people of the Commonwealth of Puerto Rico have been invested with attributes of political sovereignty which clearly identify the status of self-government attained by the Puerto Rican people as that of an autonomous political entity.").

Contemporary observers well understood, as this Court later confirmed, that the Commonwealth of Puerto Rico was "'organized as a body politic by *the people of Puerto Rico* under their *own* constitution.'" *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 672 (1974) (emphasis added; quoting *Mora v. Mejías*, 206 F.2d 377, 387 (1st Cir. 1953)). One particularly keen observer was Chief Judge Calvert Magruder of the First Circuit, who was uniquely familiar with Puerto Rico by virtue of that court's appellate jurisdiction at the time over decisions not only from the federal district court in Puerto Rico, but also from the Puerto Rico Supreme Court. In a comprehensive essay that this Court has frequently cited with approval, *see*, *e.g.*, *Flores de Otero*, 426 U.S. at 594; *Calero-Toledo*, 416 U.S. at 672; *Katzenbach v. Morgan*, 384 U.S. 641, 658 & n.19 (1966), Chief Judge Magruder heralded the Commonwealth's "unique constitutional status," which is "unprecedented in our American history and has no exact counterpart elsewhere in the world." Calvert Magruder, *The Commonwealth Status of Puerto Rico*, 15 U. Pitt. L. Rev. 1, 1, 5 (1953). In this

regard, Chief Judge Magruder characterized the Puerto Rico Constitution as the "constituent act of a people who have freely determined to organize themselves in a body politic and to prescribe for themselves a basic framework of self-government." *Id.* at 1, 14. "Whereas the power of the United States exercised over Puerto Rico previously had been based upon the force of conquest from Spain, the new political status of the island within the American system rests upon the consent of its people." *Id.* at 9.

Indeed, it is precisely because the Commonwealth of Puerto Rico differs significantly from a territory governed by an organic act of Congress that this Court has repeatedly concluded that the Commonwealth should be treated like a State for various purposes. Thus, this Court held that the Commonwealth qualifies as a "State" under the Three-Judge Court Act, 28 U.S.C. § 2281, because "Puerto Rico is to be deemed sovereign over matters not ruled by the [Federal] Constitution," as opposed to a mere territory governed by an organic act of Congress. *Calero-Toledo*, 416 U.S. at 673 (internal quotation omitted; distinguishing *Stainback v. Mo Hock Ke Lo Po*, 336 U.S. 368 (1949), on this ground). And this Court characterized Puerto Rico law as "State" law within the meaning of a jurisdictional provision governing federal civil-rights cases, 28 U.S.C. § 1343, because the people of Puerto Rico had "draft[ed] *their own* constitution," and their legislature now "amends *its own* civil and criminal code." *Flores de Otero*, 426 U.S. at 593-94 (emphasis added); *see also Rodríguez v. Popular Democratic Party*, 457 U.S. 1, 8 (1982) (noting that the Commonwealth is "'sovereign over matters not ruled

by the [Federal] Constitution.'") (quoting *Calero-Toledo*, 416 U.S. at 673).

Respondents and their *amici* never seriously respond to any of the foregoing. Rather, they compare the relationship between Puerto Rico and the United States to the relationship between a municipality and a State. *See, e.g.*, Resps. Br. 23-24 (citing *Waller*, 397 U.S. at 393). But the case on which they rely, *Waller*, stands only for the proposition that "municipalities *that derive their power to try a defendant from the same organic law that empowers the State to prosecute* are not separate sovereigns with respect to the State." *Heath*, 474 U.S. at 90 (emphasis added; citing *Waller*). The Commonwealth of Puerto Rico, in sharp contrast, does not "derive [its] power to try a defendant from the same organic law that empowers [the Federal Government] to prosecute." *Id.* Accordingly, *Waller* has no bearing here.

In this regard, the Commonwealth of Puerto Rico differs markedly from such territories as the Virgin Islands, Guam, and American Samoa, which explains its "unique status" within the American political family. *Córdova*, 649 F.2d at 41. Those territories—like the District of Columbia—enjoy "home rule" under delegated federal law, but lack their own constitutions adopted by their own people and approved by Congress. *See* Petr. Br. 38-39 n.4. Indeed, the United Nations continues to view those territories—in sharp contrast to Puerto Rico (and, for that matter, the Northern Mariana Islands)—as non-self-governing. *See* United Nations, *The United Nations and Decolonization: Non-Self-Governing*

Territories, *available at* http://bit.ly/Lbb0GY (last visited Jan. 5, 2016).

Accordingly, it is unsurprising that courts have concluded that the laws of those territories and the District of Columbia emanate from the same source of authority as federal law for double jeopardy purposes. *See* Petr. Br. 38-39 n.4. Respondents thus err by asserting that petitioner "is unable to offer a clear rule" in this context. Resps. Br. 53. Puerto Rico differs from those territories (and municipalities) for double jeopardy purposes because it does not merely enjoy "home rule"; rather, it enjoys "government by consent" under its own Constitution approved by Congress. *See* Pub. L. No. 81-600, Pet. App. 353a; Pub. L. No. 82-447, Pet. App. 355-56a; *cf. Lara*, 541 U.S. at 199 (upholding Congress' power to recognize exercise of sovereignty). Respondents' contrary "clear rule" is nothing more than the *ipse dixit* that the Federal Government, the States, and the Indian tribes are sovereign, while every other governmental entity is not. *See*, *e.g.*, Resps. Br. 52; *see also* U.S. Br. 12.

Respondents' reliance on "the legislative history of the 1950-1952 legislation," Resps. Br. 36, is equally unavailing. In their view, that history "reveal[s] a consensus that the enactment would not alter Puerto Rico's fundamental political status." *Id.*; *see also* U.S. Br. 22-24. But their cherry-picked quotes simply underscore that Public Law 600 was neither "a statehood bill" nor "an independence bill." S. Rep. No. 1779, 81st Cong., 2d Sess. 4 (1950); *see also* S. Rep. No. 1720, 82d Cong., 2d Sess. 6 (1952). Nothing in the legislative history denies that the people of Puerto Rico exercised their *own* political

rights to create their *own* Constitution and laws in union with the United States. To the contrary, the legislative history confirms—in the words of House Majority Leader John McCormack—that the Puerto Rico Constitution "is a new experiment; it is a turning away from the territorial status; it is something intermediary between the territorial status and statehood." 98 Cong. Rec. 5128 (1952); *see also id.* at 6184 ("This procedure is something entirely new in the history of the Government of the United States. We are not treating Puerto Rico as a State and we are not treating Puerto Rico as a possession.") (statement of Rep. Aspinall).

Respondents insist, however, that the Puerto Rico Constitution cannot be attributed to the people of Puerto Rico because Congress invited it in the first instance and then approved it with conditions. *See* Resps. Br. 23-26, 39-44; *see also* U.S. Br. 22-24. Both assertions miss the mark; indeed, if Congress had *not* invited and approved this exercise of popular sovereignty, respondents would have denounced it as a rogue usurpation of authority. Concerns about conflicting "internal and external intentions," Resps. Br. 54, or unilateral territorial action "creat[ing] a separate sovereign," Profs.' *Amicus* Br. 5, are accordingly misplaced. The people of Puerto Rico are the ultimate source of authority for their Constitution and laws in light of action by the people *and* Congress.

The fact that Congress invited the people of Puerto Rico to adopt their own Constitution, *see* Pub. L. No. 81-600, Pet. App. 353-54a, hardly means that the Constitution is based on delegated federal power. To the contrary, Congress also invited the people of

many territories that became States to draft their own constitutions, *see* Petr. Br. App. A, and those constitutions are not thereby based on delegated federal power.

Nor does Congress' approval of the Puerto Rico Constitution prove that it is based on delegated federal power; to the contrary, as noted above, the Constitution specifies that its political power "emanates from the people," in "the exercise of [their] natural rights." P.R. Const. pmbl., art. I, § 1, Pet. App. 358-59a. Respondents err by asserting that the Constitution was "unilaterally revised by Congress to remove Section 20, and then put into effect without after-the-fact ratification by the Puerto Rican people." Resps. Br. 42-43. Rather, Congress conditioned its approval of the Constitution on "acceptance" of certain proposed changes by "the Constitutional Convention of Puerto Rico ... *in the name of the people of Puerto Rico*." Pub. L. No. 82-447, Pet. App. 357a (emphasis added). The Convention accepted those changes, and the people subsequently ratified them, in their own name, by popular vote. *See* Petr. Br. 9-10.[2]

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[2] Congress followed a similar procedure when conditionally approving numerous state constitutions, including those of Arizona, Missouri, Nebraska, and West Virginia. *See* Petr. Br. 34-36 & App. B. Respondents counter that those conditions were either unconstitutional *ab initio* or retroactively vanished once Statehood was achieved. *See* Resps. Br. 43-44. But that misses the point: Congress routinely reviews and approves state constitutions, sometimes conditionally, and such review and approval does not thereby mean that such constitutions are based on delegated federal power.

Ultimately, respondents and their *amici* fall back on the argument that Congress remains "the ultimate source of the power" of the laws of Commonwealth of Puerto Rico, Resps. Br. 4, 7, 22, 23 (quoting *Wheeler*, 435 U.S. at 320), on the theory that Congress retains plenary authority over Puerto Rico under the Territorial Clause, U.S. Const. art. IV, § 3, and could "amend or repeal its 1950-1952 legislation" at any time. Resps. Br. 27; *see also* U.S. Br. 8-9, 24-25. But that is simply a reprise of the argument this Court unanimously *rejected* in *Wheeler*: that "the extent of *control* exercised by one prosecuting authority over the other" determines whether a successive prosecution implicates the Double Jeopardy Clause. 435 U.S. at 320 (emphasis added). It was "undisputed" in *Wheeler* that "Congress has plenary authority to legislate for the Indian tribes in all matters, including their form of government," so that the tribes were "subject to ultimate federal control." *Id.* at 319, 322. But that point was irrelevant to the double jeopardy analysis, because the tribal laws at issue did not emanate from Congress. *See id.* at 322.

Similarly, regardless of the extent of congressional control over Puerto Rico under the Territorial Clause—and respondents tellingly fail to address this Court's recognition that Congress in 1952 "relinquished its control over the organization of the local affairs of the island," *Flores de Otero*, 426 U.S. at 597—there can be no question that the Commonwealth laws at issue here do *not* emanate from Congress. Rather, they emanate from the Puerto Rico Legislative Assembly, in the exercise of authority delegated by the people of Puerto Rico through their Constitution. That point resolves this

case. *See Lara*, 541 U.S. at 199; *Heath*, 474 U.S. at 88-91; *Wheeler*, 435 U.S. at 319-20.

III. The Federal Constitution Allows Congress To Recognize Democratic Self-Governance By The People Of Puerto Rico.

Ultimately, respondents and their *amici* contend that whatever was said and done in the 1950-52 era does not matter, because Congress *cannot* constitutionally allow the people of Puerto Rico to provide the authority for their own Constitution and laws. *See*, *e.g.*, Resps. Br. 4, 11-15; U.S. Br. 7, 9, 15-19, 25, 31-33. Under this view, the Territorial Clause places Congress in a constitutional straightjacket whereby it *must* govern territories via direct or delegated federal power unless and until it grants them Statehood or independence. *See, e.g.*, U.S. Br. 32. That position turns the Territorial Clause on its head.

Respondents and their *amici* concede, as they must, that the Territorial Clause vests Congress with "plenary power" over the territories. *See, e.g.*, Resps. Br. 4; *see generally Kansas v. Colorado*, 206 U.S. 46, 92 (1907); *Downes v. Bidwell*, 182 U.S. 244, 268 (1901); *United States v. Gratiot*, 39 U.S. (14 Pet.) 526, 537-38 (1840). They argue, however, that the Constitution nonetheless bars Congress from allowing the people of a territory to exercise their *own* political rights to establish their *own* Constitution and laws; that would create the anomaly of a "sovereign territory," Resps. Br. 4, and impermissibly "divest a future Congress of its constitutional power to administer that territory," U.S. Br. 25. Those arguments are baseless.

To the contrary, at least with respect to unincorporated territories, Congress' plenary power necessarily includes the power to develop inventive approaches to territorial governance, including the power to allow the people of a territory to exercise their own political rights. As Felix Frankfurter, then the Law Officer in the Bureau of Insular Affairs at the Department of War, wrote over a century ago:

> C. The form of the relationship between the United States and unincorporated territory is solely a problem of statesmanship.
>
> 1. History suggests a great diversity of relationships between a central government and dependent territory. The present day shows a great variety in actual operation. One of the great demands upon inventive statesmanship is to help evolve new kinds of relationship so as to combine the advantages of local self-government with those of a confederated union. Luckily, our Constitution has left this field of invention open. The decisions in the Insular cases mean this, if they mean anything, that there is nothing in the Constitution to hamper the responsibility of Congress in working out, step by step, forms of government for our Insular possessions responsive to the largest needs and capacities of their inhabitants, and ascertained by the best wisdom of Congress.

Felix Frankfurter, *Memorandum for the Secretary of War Re: The Political Status of Porto Rico*, at 3 (Mar.

11, 1914), *available at* http://tinyurl.com/hsd4xof (last visited Jan. 5, 2016); *see also* Office of Legal Counsel, *Memorandum re: Power of the United States to Conclude with the Commonwealth of Puerto Rico a Compact Which Could Be Modified Only By Mutual Consent*, at 3-6 (July 23, 1963), *available at* http://tinyurl.com/pdooszy (last visited Jan. 5, 2016); 3 Joseph Story, *Commentaries on the Constitution of the United States* § 1319 (1st ed. 1833) ("What shall be the form of government established in the territories depends exclusively upon the discretion of congress.").

That insight governs this case. Nothing in the text, structure, or history of the Constitution requires Congress to follow a one-size-fits-all approach to the governance of territories—or conversely bars Congress from "fully recognizing the principle of government by consent" in a territory. Pub. L. No. 81-600, Pet. App. 353a; *see generally United States v. De Leon Guerrero*, 4 F.3d 749, 754 (9th Cir. 1993); *Cincinnati Soap Co. v. United States*, 301 U.S. 308, 319 (1937) (during transition to Philippine independence, "the power of the United States has been modified, [but] not abolished"). Respondents' assertion that petitioner "finds in the Territory Clause a *hidden authorization* for Congress to create two fundamentally different types of territories," Resps. Br. 13, thus gets matters backwards: respondents purport to find in that Clause a *hidden limitation* on Congress' plenary power. If Congress could grant independence to the Philippines, *see* Pub. L. No. 73-127, 48 Stat. 456 (1934), or cede the Canal Zone to Panama, *see* Panama Canal Treaty, 33 U.S.T. 141 (1977), surely it could allow the people of Puerto Rico to exercise their

own political rights to create their own Constitution and laws in union with the United States. Here, as noted above, Congress unmistakably did just that. *See* Pub. L. No. 81-600, Pet. App. 353-54a; Pub. L. No. 82-447, Pet. App. 355-57a.

In curious juxtaposition to their restrictive gloss on Congress' authority under the Territorial Clause to recognize democratic political rights, respondents and their *amici* take a freewheeling approach to Congress' authority under that Clause to ignore the separation of powers. Congress, they assert, has free rein under the Territorial Clause to delegate federal power, including the quintessentially *executive* federal power of enforcing the criminal laws, to territorial officials free of federal executive control. *See* Resps. Br. 35 n.6; U.S. Br. 21-22 n.4. But this Court has long applied separation-of-powers principles to the territories. *See, e.g.*, *Springer v. Philippine Islands*, 277 U.S. 189, 200-07 (1928). If the Puerto Rico prosecutors in this case were exercising delegated federal power, they would be doing so in a constitutionally unknown fashion, completely free of any and all federal control. *See generally Lara*, 541 U.S. at 216 (Thomas, J., concurring in the judgment) (concluding that tribal prosecutors exercised inherent tribal power, rather than delegated federal power, because otherwise "grave constitutional difficulties" would be presented). And because the separation of powers protects the liberty of the people, not just the prerogatives of the Executive Branch, this Court must vindicate these principles even when the Executive Branch does not. *See, e.g.*, *Metropolitan Wash. Airports Auth. v. Citizens for Abatement of*

Aircraft Noise, Inc., 501 U.S. 252, 263-64, 271-77 (1991).

The Commonwealth of Puerto Rico represents "inventive statesmanship" at its best: it allows Puerto Rico to remain in democratic union with the United States without becoming a State (and thereby subjecting itself to the uniformity requirements that Statehood would entail, which might conflict with Puerto Rico's distinctive history, economy, and society).[3] Commonwealth status, under which the people of Puerto Rico govern themselves under their own Constitution and laws, has provided certainty and stability for the better part of a century. Respondents and their *amici* are obviously free to advocate other political status options. But make no mistake—they are asking this Court, after 64 years, to hold the Commonwealth option either illusory or unconstitutional, and thereby to return the island to colonial status. This Court should decline that far-reaching and unsettling request.

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[3] Ironically, respondents suggest that Puerto Rico's position in this case might subject the Commonwealth to "the Constitution's requirement that taxes be uniform nationwide." Resps. Br. 57. That suggestion is baseless. Puerto Rico does not contend that it is a State; rather, the Territorial Clause applies under the terms of the "compact" offered by Public Law 600 and accepted by the people of Puerto Rico. *See, e.g.*, *Harris v. Rosario*, 446 U.S. 651, 651-52 (1980) (*per curiam*). Congress has always engaged in "inventive statesmanship" by recognizing that "[t]he welfare of Porto Rico forbids" the inflexible application of federal law to the island; thus—in 1914 as now—"to include [Puerto Rico] within the general taxing legislation of this country" would be to devastate the local economy. Frankfurter, *Memorandum*, at 5.

* * *

In his seminal essay, Chief Judge Magruder quoted the Commonwealth's great proponent, Governor Luis Muñoz Marín, as declaring that this new constitutional status "will proclaim to the world that Democracy declares all peoples, as all men, equal in dignity." Magruder, *Commonwealth Status*, 15 U. Pitt. L. Rev. at 20. Chief Judge Magruder ventured to predict that "the United States will *never* take any action to crush or dampen the spirit of these eloquent words spoken by the chosen leader of the Puerto Rican people." *Id.* (emphasis in original).

Respondents and their *amici*, including the United States, now ask this Court to do just that, arguing that the United States *did* not and *could* not allow the people of Puerto Rico to provide the authority for their own Constitution and laws. They are wrong. Accordingly, respondents' convictions under federal criminal law, which emanates from Congress, pose no double jeopardy bar to their prosecution under Commonwealth criminal law, which emanates from the people of Puerto Rico.

CONCLUSION

For the foregoing reasons, this Court should reverse the judgment.

Respectfully submitted,

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SUPPLEMENTAL APPENDIX

Supp. App. 1

Nos. 86-1583, 86-1584

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

UNITED STATES OF AMERICA,

Appellee

v.

HECTOR LUIS LOPEZ ANDINO,
ISRAEL MENDEZ SANTIAGO,

Defendants-Appellants

On Appeal from the United States District Court for the District of Puerto Rico

BRIEF FOR THE UNITED STATES

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* * *

IV

DEFENDANTS' PROSECUTION IN FEDERAL COURT FOLLOWING PROSECUTION IN A PUERTO RICAN COURT ARISING FROM THE SAME ACTS DID NOT VIOLATE THEIR FIFTH AMENDMENT RIGHT AGAINST DOUBLE JEOPARDY

Defendant Mendez Santiago also complains (Br. 22-25) that his federal civil rights trial subjected him to double jeopardy in violation of the Fifth Amendment to the United States Constitution because he was previously convicted of involuntary manslaughter in a Puerto Rican court for the same acts as formed the basis for the federal conviction.[11] Although it is uniformly recognized "that a federal prosecution does not bar a subsequent state prosecution of the same person for the same acts, and a state prosecution does not bar a federal one," *United States v. Wheeler,* 435 U.S. 313, 317 (1978); *Bartkus v. Illinois,* 359 U.S. 121 (1959); *Abbate v. United States,* 359 U.S. 187 (1959), defendant argues (Br. 24) that the "dual sovereignty" doctrine does not apply because Puerto Rico is not one of the states of the Union.

While we have found no cases from this circuit discussing whether Puerto Rico should be treated as

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[11] The double jeopardy issue was not raised in the district court and nothing in the record reflects the disposition of the Puerto Rican prosecution. The government was aware, however, of the Puerto Rican prosecution before the federal indictment was sought and that defendants were convicted of involuntary manslaughter and given suspended sentences.

a state for purposes of the dual sovereignty doctrine, this Court applied the doctrine in upholding a federal prosecution following a Puerto Rican prosecution for the same acts. *United States v. Benmuhar,* 658 F.2d 14, 18 (1st Cir. 1981), *cert. denied sub nom. Nieves v. United States,* 457 U.S. 1117 (1982). This case is consistent with the rationale consistently followed by the Supreme Court for over one hundred years. Whether a governmental entity represents a sovereign distinct from the national government depends upon whether it has governmental authority distinct from that of the federal government to denounce acts as criminal and to bring criminal prosecutions. *Heath v. Alabama,* 54 U.S.L.W. 4016 (U.S. Dec. 3, 1985). As explained in *United States v. Wheeler*, *supra*, and *Heath, supra,* a state's authority to bring criminal prosecutions rests upon its own sovereignty and not on authority delegated to it by the federal government. A state prosecution does not, therefore, bar prosecution by another "sovereign," *e.g.*, another state (*Heath*), an Indian tribe (*Wheeler*) or the federal government (*Abbate v. United States, supra*).

Since 1952, Puerto Rico has operated under a Constitution adopted by the people of Puerto Rico pursuant to the Puerto Rican Federal Relations Act, 48 U.S.C. 731b-734. The Act, "recognizing the principle of government by consent" offered the Puerto Rican people a relationship with the United States "in the nature of a compact." 48 U.S.C. 731b. The Supreme Court has recognized that "the purpose of Congress in the 1950 and 1952 legislation was to accord to Puerto Rico the degree of autonomy and independence normally associated with States of the

Union." *Examining Board v. Otero,* 426 U.S. 572, 594 (1976).

When Congress approved the Puerto Rican Constitution, it understood that "[a]s regards local matters, the sphere of action and the methods of government bear a resemblance to that of any State of the Union." S. Rep. No. 1720, 82d Cong., 2d Sess. 6 (1952). This Court has consistently dealt with Puerto Rico as "'sovereign over matters not ruled by the Constitution' of the United States." *Mora v. Mejias,* 206 F.2d 377, 387 (1st Cir. 1953); see *Puerto Rico v. Branstad,* No. 85-2116 (U.S. June 23, 1987) (Puerto Rico has same right to extradition of fugitives as states); *Alcoa Steamship Co. v. Perez*, 424 F.2d 433 (1st Cir. 1970) (Puerto Rico has same sovereign immunity as states). Thus, the source of the Commonwealth's authority to prosecute defendants for local crimes is its own popularly adopted Constitution. Under the doctrine of *Abbate v. United States, supra,* such a prosecution does not bar a subsequent federal prosecution under a federal statute for the same acts.

Puerto Rico's present political autonomy is distinguishable from its pre-1952 status. As an "insular dependency," its former government derived all its powers from Congress acting under the Treaty of Paris of 1898. See *Puerto Rico v. Shell Co., supra.* A prosecution by such a government might bar a subsequent federal prosecution. See *Grafton v. United States,* 206 U.S. 333 (1907). In any event, the consistent recognition of Puerto Rican autonomy in nonfederal matters since the adoption of its Constitution demonstrates that defendants' prior prosecution was based as much upon "sovereignty"

separate from that of the federal government as would be a prosecution by any of the states. Such a prosecution does not depend upon authority delegated by Congress.

If, as defendant suggests (Br. 24-25), Puerto Rico possesses autonomy comparable to the nations of the British Commonwealth, such as Canada, Australia, or New Zealand, its "sovereignty" would be enhanced, not lessened, under the rationale of *Heath*, *Wheeler, Bartkus* and *Abbate*. Defendant's argument, in essence, is that this Court should follow common law opinions of British, or British Commonwealth, courts rather than Constitutional rulings of the United States Supreme Court.[12] Under American Constitutional law, prosecution by a "sovereign" separate from the federal government does not bar a subsequent federal prosecution for the same acts. Since Puerto Rico has possessed "sovereignty" comparable to the states since, at least, 1952, defendant's double jeopardy argument should be rejected.

* * *

[12] The sole authority cited by defendant in support of his thesis, J.A.C. Grant, *Successive Prosecutions by State and Nation: Common Law and British Empire Comparisons*. 4 U.C.L.A. L. Rev. 1 (1956), argues for elimination of the dual sovereignty doctrine because it is inconsistent with the common law rule allegedly followed outside the United States.

United States Court of Appeals,
Eleventh Circuit.

UNITED STATES OF AMERICA, Appellee,

v.

Rafael SANCHEZ and Luis SANCHEZ, Appellants.

No. 90-5749
April 13,1992.

On Appeal from the United States District Court for the Southern District of Florida

Brief for the United States

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* * *

ARGUMENT

I

THE DISTRICT COURT PROPERLY DENIED APPELLANTS' JOINT MOTION TO DISMISS THE INDICTMENT BASED ON ALLEGED DOUBLE JEOPARDY AND COLLATERAL ESTOPPEL.

Appellants were charged in the Commonwealth of Puerto Rico with first degree murder, destruction, conspiracy, attempted murder, unlawful use of explosives and unlawful possession of explosives

(R:). They were acquitted of those charges prior to the return of the indictment in this case. Appellants filed numerous motions and supplemental pleadings in the trial court to persuade the magistrate judge and the district judge that this federal case was barred by double jeopardy because they had been acquitted in Puerto Rico of charges arising out of the same murder contract.

The magistrate judge in this case held hearings, considered the written and oral arguments of counsel, and issued an extensive report and recommendation denying the motion to dismiss based on *Blockburger* v. *United States,* 284 U.S. 299 (1932) and the dual sovereignty doctrine (R61:14). The trial court adopted that ruling and issued its own opinion consistent with that ruling. *United States v. Sanchez,* 741 F. Supp. 215 (S.D. Fla. 1990).

Appellants now argue that in *Grady v. Corbin,* 495 U.S. 508 (1990), decided after the trial in this case, the Supreme Court changed the test for double jeopardy and now they are entitled to dismissal. *Grady,* however, does not control the outcome here where the trials were conducted by two separate sovereigns, the federal government and the Commonwealth of Puerto Rico, because the dual sovereignty doctrine provides an exception to the Fifth Amendment bar against double jeopardy where the subsequent prosecution is conducted by a distinctly different sovereign. *Heath v. Alabama,* 474 U.S. 82, 93 (1985); *United States v. Wheeler,* 435 U.S. 313, 317 (1978); *Abbate v. United States,* 359 U.S. 187 (1959).

The Supreme Court has repeatedly held that a single act can violate both state and federal laws

and, since these separate sovereigns have separate interests to protect in enacting their criminal statutes, successive prosecutions for the same offense is not barred by the double jeopardy clause. The critical determination is whether the two entities derive their authority to punish from distinct sources of power. *Bartkus v. Illinois,* 359 U.S. 121 (1959); *Heath v. Alabama,* 474 U.S. 82 (1985).

Here, the first prosecution was conducted by the Commonwealth of Puerto Rico; the second by the United States government. As the Supreme Court stated in *United States v. Lanza,* 260 U.S. 377 (1922):

> Each government in determining what shall be an offense against its peace and dignity is exercising its own sovereignty, not that of the other. 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.

260 U.S. at 383; *see also Heath,* 474 U.S. at 89; *Abbate,* 359 U.S. at 194.

Appellants do not contest the vitality of the dual sovereignty doctrine (Br. at 22-23). Rather, they argue that the Commonwealth of Puerto Rico and the federal government are the alter ego of one another, insisting that Puerto Rico is still a territory and not a separate state for purposes of double jeopardy. That argument is without legal or factual support and was properly rejected by the magistrate judge (R61:7-14) and the trial court below. *United States v. Sanchez,* 741 F. Supp. 215, 218-219 (S.D. Fla. 1990).

The First Circuit has consistently held that Puerto Rico is a state for purposes of double jeopardy. *E.g., United States v. Morales-Diaz,* 925 F.2d 535, 540 (1st Cir. 1991); *see United States v. Bonilla-Romero,* 836 F.2d 39, 41 (1st Cir. 1987), *cert. denied,* 488 U.S. 817 (1988) (holding that, for purposes of further state prosecution, Puerto Rico is a separate sovereign from the federal government for the limited purposes of the double jeopardy clause); *United States v. Lopez-Andino,* 831 F.2d 1164 (1st Cir. 1987), *cert. denied,* 468 U.S. 1034 (1988) (holding that double jeopardy clause did not bar federal prosecution of policemen for civil rights violations following their conviction of aggravated battery and involuntary manslaughter in commonwealth court because it is established that Puerto Rico is to be treated as a state for purposes of the double jeopardy clause ...); *United States v. Benhumar,* 658 F.2d 14 (1st Cir. 1981) (finding that federal prosecution for arson conspiracy following, dismissal of state charges of substantive arson for lack of evidence not barred by double jeopardy as a single act can violate both state and federal law and can thus create two separate offenses), *cert. denied,* 457 U.S. 1117 (1982); *Cf. United States v. Quiñones,* 758 F.2d 40 (1st Cir. 1985).

In *Bonilla-Romero,* the court interpreted *Lopez-Andino* as holding that "despite Puerto Rico's constitutional status as a territory, it is a separate sovereign for the limited purpose of the double jeopardy clause." The court further explained that:

> [*Lopez-Andino*] recognized that Puerto Rico has been given such complete control over its local criminal affairs that it may freely prosecute criminal behavior under

> its own laws regardless of whether the federal government prosecutes the same behavior under federal law.

Bonilla-Romero, 836 F.2d at 42.

While appellants are correct that the Supreme Court held in *People of Puerto Rico v. Shell,* 302 U.S. 253 (1937), that Puerto Rico does not constitute a distinct sovereign for double jeopardy purposes, that decision preceded the passage of the Puerto Rican Federal Relations Act, Publ. L. No. 600, 64 Stat. 319 (1950), the statute that established Puerto Rico as a Commonwealth rather than a territory. That statute overrides the Court's holding in *Shell.* Thus, cases cited by appellants, including *Waller v. Florida,* 397 U.S. 387 (1970), analogizing to the power of states and municipalities, and *United States v. Wheeler,* 435 U.S. 313 (1978), considering the relationship of tribal governments to the federal government, are irrelevant because Puerto Rico is a Commonwealth and has been clearly held to be a state for double jeopardy purposes.[7]

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[7] The decision in *Harris v. Rosario*, 446 U.S. 651 (1980), does not compel a different result either, because it has no application to the double jeopardy clause of the constitution. As the magistrate judge here correctly noted, *Harris v. Rosario* merely held that in apportioning federal funds to families with dependent children, Congress could treat Puerto Rico differently from a state in ruling on an equal protection challenge because there was a rational basis for providing less funding to Puerto Rico. The court specifically noted that Puerto Rico does not contribute to the federal treasury. Likewise, appellants' reliance upon *Detres v. Lions Building Corp.*, 234 F.2d 596 (7th Cir. 1956), is misplaced. *Detres* merely held that Public Law 600, in naming Puerto Rico as a Commonwealth,

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did not remove it from territorial status for purposes of civil diversity jurisdiction. In fact, the court upheld Puerto Rico's separate existence from the federal government and held it should be treated like a state for purposes of diversity jurisdiction. 234 F.2d at 603. Moreover, no comments, even by Department of Justice officials in GAO reports, have the force of law. Accordingly, appellants' reliance on GAO Report, U.S. Insular Areas: Applicability of Relevant Provisions of the U.S. Constitution, Appendix IV, "Comments from the Assistant Attorney general for Administration, U.S. Department of Justice" (June 1991) is misplaced.