

# **Bond Case Briefs**

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## **U.S. Supreme Court Issues Two Significant Cases On Puerto Rico's Sovereignty.**

In the first decision, on June 9, 2016, the United States Supreme Court affirmed the judgment of the Supreme Court of Puerto Rico that Puerto Rico and the United States are not separate sovereigns for purposes of the Double Jeopardy Clause contained in the Fifth Amendment of the U.S. Constitution in the appeal styled under the caption Commonwealth of Puerto Rico v. Sanchez Valle, No. 15-108. Opinion. Sanchez Valle was the first of two appeals heard by the U.S. Supreme Court this term involving Puerto Rico.

On June 13, 2016, the US Supreme Court also confirmed the decisions by the Court of Appeals for the First Circuit and by the United States District Court for the District of Puerto Rico that Puerto Rico's Debt Enforcement & Recovery Act (DERA) was unconstitutional in the appeals styled under the caption Puerto Rico v. Franklin California Tax-Free Trust, 15-233, and Acosta-Febo v. Franklin California Tax-Free Trust, 15-255 (the "Franklin Fund Appeals"). Opinion. We previously covered the First Circuit's decision here.

### **Puerto Rico Is Not a Separate Sovereign for Purposes of Double Jeopardy Clause**

In Sanchez Valle, the US Supreme Court found that "the ultimate source of Puerto Rico's prosecutorial power is the Federal Government—because when we trace that authority all the way back, we arrive at the doorstep of the U.S. Capitol—the Commonwealth and the United States are not separate sovereigns." Op. at 17-18. Here, Puerto Rico's authority to enact and enforce criminal law ultimately comes from Congress. Accordingly, the Double Jeopardy Clause bars both Puerto Rico and the United States from prosecuting a single person for the same conduct under equivalent criminal laws. The Supreme Court noted that "[t]he degree to which an entity exercises self-governance—whether autonomously managing its own affairs or continually submitting to outside direction—plays no role in the analysis." Op. at 6-7. The test, the Supreme Court indicated, is "whether [the prosecuting entities] draw their authority to punish the offender from distinct sources of power. The inquiry is thus historical, not functional—looking at the deepest wellsprings, not the current exercise, of prosecutorial authority." Op. at 7. The Supreme Court recognized that Congress authorized Puerto Rico to create the Puerto Rico Constitution. The Supreme Court also recognized Puerto Rico's special relationship with the United States and its wide-ranging self-rule under its own constitution, but these facts do not factor into the analysis. While recognizing that "Congress has broad latitude to develop innovative approaches to territorial governance", Op. at 16, "[b]ut ... Congress ... has no capacity ... to erase or otherwise rewrite its own foundational role in conferring political authority. Or otherwise said, the delegator cannot make itself any less so—no matter how much authority it opts to hand over." Op. at 16-17.

### **Bankruptcy Code Preempts Puerto Rico's Recovery Act**

In Franklin California Tax-Free Trust, the US Supreme Court found that section 903(1) of the Bankruptcy Code preempts the Puerto Rico Debt Enforcement and Recovery Act (the "Recovery Act"). Recognizing that the Bankruptcy Code had long included Puerto Rico as a "State," but in 1984

Congress amended the definition of “State” to exclude Puerto Rico “for the purpose of defining who may be a debtor under chapter 9.” Op. at 1. Rejecting the Commonwealth’s arguments that the 1984 amendments made the preemption provisions of section 903(1) of the Bankruptcy Code inapplicable, the Court stated that “Puerto Rico remains a ‘State’” for other purposes related to Chapter 9, including that chapter’s pre-emption provision. That provision bars Puerto Rico from enacting its own municipal bankruptcy scheme to restructure the debt of its insolvent public utilities companies.” Op. at 1-2. The Supreme Court stated that “[b]arring Puerto Rico from ‘defining who may be a debtor under chapter 9’ is tantamount to barring Puerto Rico from ‘specifically authorizing’ which municipalities may file Chapter 9 petitions under the gateway provision. The amended definition of ‘State’ unequivocally excludes Puerto Rico as a ‘State’ for purposes of the gateway provision.” Op. at 10. The Supreme Court held that the text of the definition extends no further. “The Code’s pre-emption provision has prohibited States and Territories defined as ‘States’ from enacting their own municipal bankruptcy schemes for 70 years. Had Congress intended to ‘alter this fundamental detail of municipal bankruptcy, we would expect the text of the amended definition to say so” Op. at 11. “Puerto Rico is no less a ‘State’ for purposes of the pre-emption provision than it was before Congress amended the definition.” Op. at 10-11.

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### **Orrick**

*The content of this article is intended to provide a general guide to the subject matter. Specialist advice should be sought about your specific circumstances.*