No. ________

In The
Supreme Court of the United States

PUERTO RICAN ASSOCIATION OF
BEER IMPORTERS, INC., ET AL.,

Petitioners,

v.

COMMONWEALTH OF PUERTO RICO, ET AL.,

Respondents.

**On Petition For A Writ Of Certiorari
To The Supreme Court Of The
Commonwealth Of Puerto Rico**

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the dormant commerce clause and dormant foreign commerce clause apply to Puerto Rico.

2. Whether the Federal Relations Act, which prohibits Puerto Rico from discriminating against mainland and foreign commerce, is violated by a Puerto Rico law that is protectionist in purpose and effect.

RULE 14.1(b) STATEMENT

The following are the parties to the proceeding in the Supreme Court of the Commonwealth of Puerto Rico:

1. The Puerto Rican Association of Beer Importers, Inc.
2. Heineken Brouwerijen B.V.
3. V. Suárez & Co., Inc.
4. Méndez & Co., Inc.
5. B. Fernández & Hnos., Inc.
6. Ballester Hermanos, Inc.
7. Commonwealth of Puerto Rico.
8. Juan A. Flores Galarza, in his official capacity as Secretary of the Treasury.
9. Cervecería India, Inc.
10. CC1 Beer Distributors, Inc.

RULE 29.6 STATEMENT

The "Asociación de Importadores de Cerveza de Puerto Rico, Inc." hereinafter "APIC," is a non- profit corporation organized and existing under the laws of the Commonwealth of Puerto Rico. It has no parent corporation or subsidiaries or affiliates, nor is any of its stock publicly traded or owned by any publicly held company.

V. Suárez & Company, Inc. is a corporation organized and existing under the laws of the Commonwealth of Puerto Rico. It has no parent corporation nor is any of its stock publicly traded or owned by any publicly held company.

Méndez & Company, Inc. is a corporation organized and existing under the laws of the Commonwealth of Puerto Rico. It has no parent corporation nor is any of its stock publicly traded or owned by any publicly held company.

B. Fernández & Hermanos, Inc. is a corporation organized and existing under the laws of the Commonwealth of Puerto Rico. It has no parent corporation nor is any of its stock publicly traded or owned by any publicly held company.

Ballester Hermanos, Inc. is a corporation organized and existing under the laws of the Commonwealth of Puerto Rico. It has no parent corporation nor is any of its stock publicly traded or owned by any publicly held company.

RULE 29.6 STATEMENT – Continued

Heineken Brouwerijen B.V. is a corporation organized and existing under the laws of The Netherlands. It is a subsidiary of Heineken N.V., a corporation organized and existing under the laws of The Netherlands. Heineken Holding NV owns a 50.005% interest in Heineken N.V. The shares of both Heineken Holding N.V. and Heineken N.V. are listed and traded on Euronext Amsterdam and options of both shares are traded on Euronext.Liffe. L'Arche Green N.V., a company established in The Netherlands, owns a 58.78% interest in Heineken Holding N.V. Heineken N.V bonds are listed at the Luxembourg Stock Exchange.

TABLE OF CONTENTS

	Page
OPINIONS BELOW	1
JURISDICTION	1
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	2
INTRODUCTION	2
STATEMENT OF THE CASE	4
A. Factual Background	4
B. The Acts at Issue: Laws No. 69 and 108	8
C. Proceedings Below	13
REASONS FOR GRANTING THE PETITION	16
I. The Court Should Grant Review to Resolve a Conflict Over Whether the Dormant Commerce Clause Applies to Puerto Rico	16
A. The Federal Courts	17
B. The Puerto Rico Courts	21
C. The Legal Status of Puerto Rico Under This Court's Precedents Dictates The Conclusion That The Dormant Commerce Clause Applies	25
II. This Court's Review Is Required To Ensure Uniform Enforcement Of The Federal Relations Act, The Fundamental Law That Governs United States-Puerto Rico Relationships	30

TABLE OF CONTENTS – Continued

Page

III. This Court's Review Is Particularly Warranted Because This Court Affords The Only Federal Forum In Which Federal Claims Against Protectionist Puerto Rico Tax-Code Provisions Can Ever Be Heard 33

CONCLUSION 38

TABLE OF AUTHORITIES

Page

CASES

Bacchus Imports Ltd. v. Dias, 468 U.S. 263 (1984).....34

Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663 (1974).....26, 31

Coors Brewing Co. v. Calderon, 225 F. Supp. 2d 22 (D. D.C. 2002).....36

Cordova & Simonpietri Ins. Agency Inc. v. Chase Manhattan Bank N.A., 649 F.2d 36 (1st Cir. 1981).....28, 29

Cruz v. Melecio, 204 F.3d 14 (1st Cir. 2000).....26

Examining Bd. v. Flores de Otero, 426 U.S. 572 (1976).....18, 26, 27, 29, 31

Garcia v. Bauzá-Salas, 686 F. Supp. 965 (D. P.R.), *rev'd on other grounds*, 862 F.2d 905 (1st Cir. 1988).....23

Goya de P.R., Inc. v. Santiago, 59 F. Supp. 2d 274 (D. P. R. 1999).....19

Granholm v. Heald, 544 U.S. 460 (2004).....8

Hunt v. Wash. State Apple Adver. Comm., 432 U.S. 333 (1977).....34

Japan Line, Ltd. v. County of Los Angeles, 441 U.S. 434 (1979).....16

Jusino Mercado v. Commonwealth of Puerto Rico, 214 F.3d 34 (1st Cir. 2000).....27

Kraft General Foods v. Iowa Dep't of Revenue and Fin., 505 U.S. 71 (1992).....16

TABLE OF AUTHORITIES – Continued

Page

Lugo v. Suazo, 59 F.2d 386 (1st Cir. 1932)................32

New Energy Co. of Indiana v. Limbach, 486 U.S. 269 (1988)..34

Posadas De Puerto Rico Assoc. v. Tourism Co. of Puerto Rico, 478 U.S. 328 (1986)........................27

Puerto Rico Dept. of Consumer Affairs v. Isla Petroleum Corp., 485 U.S. 495 (1988)....................26

Ramirez v. Puerto Rico Fire Serv., 715 F.2d 694 (1st Cir. 1983)..28

R.C.A. v. Gobierno de la Capital, 91 D.P.R. 416 (1964)..13, 21, 22, 24

Rodriguez v. Popular Democratic Party, 457 U.S. 1 (1982)...27

Rodriguez v. Puerto Rico Fed. Affairs Admin., 435 F.3d 378 (D.C. Cir. 2006), *cert. denied*, 127 S. Ct. 347 (2006)...27

San Juan Trading Co. v. Sancho, 114 F.2d 969 (1st Cir. 1940), *cert. denied*, 312 U.S. 702 (1941)...19, 31, 32

Sancho v. Corona Brewing Corp., 89 F.2d 479 (1st Cir.), *cert. denied*, 302 U.S. 699 (1937)...........32

Sea-Land Servs. v. Municipality of San Juan, 505 F. Supp. 533 (D. P.R. 1980) 23

Starlight Sugar Inc. v. Soto, 909 F. Supp. 853 (D. P.R. 1995)..18

Starlight Sugar Inc. v. Soto, 114 F.3d 330 (1st Cir. 1997) 18, 19

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TABLE OF AUTHORITIES – Continued

Page

Starlight Sugar Inc. v. Soto, 253 F.3d 137 (1st Cir.), *cert. denied*, 534 U.S. 1021 (2001)...........22, 23

Torres v. Puerto Rico, 442 U.S. 465 (1979).................27

Trailer Marine Transport Corp. v. Vazquez, 977 F.2d 1 (1st Cir. 1992).............................17, 18, 19, 22

United Egg Producers v. Dep't of Agric., 77 F.3d 567 (1st Cir. 1996)...18

United Haulers Ass'n v. Oneida-Herkimer Solid Waste Mgmt. Auth., 127 S. Ct. 1786 (2007) 34

United States v. Lopez Andino, 831 F.2d 1164 (1st Cir. 1987), *cert. denied*, 486 U.S. 1034 (1988)...28

United States v. Sanchez, 992 F.2d 1143 (11th Cir. 1993), *cert. denied*, 510 U.S. 1110 (1994) 28

United States Brewers Ass'n v. Perez, 592 F.2d 1212 (1st Cir. 1979), *cert. denied*, 444 U.S. 833 (1979)..35

United States Brewers Ass'n v. Perez, 455 F. Supp. 1159 (D. P.R. 1978) 35, 37

United States Brewers Ass'n v. Perez, 109 D.P.R. 456 (1980)...8, 35

Used Tire Intern., Inc. v. Diaz-Saldana, 155 F.3d 1 (1st Cir. 1998)...19

U.S.I. Properties Corp. v. M.D. Constr. Co., 230 F.3d 489 (1st Cir. 2000)..28

Wackenhut Corp v. Aponte, 386 U.S. 268 (1967) 26

F:\2007\2007 11 Nov Typeset Files\20180IN07.doc
Last saved by elise
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Attorney: Pildes

TABLE OF AUTHORITIES – Continued

Page

Wal-Mart Stores Inc. v. Rodriguez, 238 F. Supp.2d 395 (D. P.R. 2002), *vacated as moot*, 322 F.3d 747 (1st Cir. 2003) 20

Walgreen Co. v. Rullan, 405 F.3d 50 (1st Cir. 2005), *cert. denied*, 546 U.S. 1131 (2006) 18

West Lynn Creamery, Inc. v. Healy, 512 U.S. 186 (1994) 4

STATUTES AND REGULATIONS

28 U.S.C. § 1341 35

28 U.S.C. § 1343(3) 27

28 U.S.C. § 2281 26

48 U.S.C. § 741a 30

48 U.S.C. § 872 35

Pub. L. No. 81-600, 64 Stat. 319 (1952) 31

Pub. L. No. 89-571, 80 Stat. 764 (1966) 28

39 Stat. c. 145, p.951 *et seq*. (1917) 31

13 L.P.R.A. § 6001 *et seq.* 6

13 L.P.R.A. § 6006 4

13 L.P.R.A. § 6912a 5, 6, 7

Treasury Regulation No. 1894 of March 10, 1975 5

Treasury Regulation No. 3134 of August 2, 1984 5

Treasury Regulation No. 4745 of July 30, 1992 5

F:\2007\2007 11 Nov Typeset Files\20180IN07.doc
Last saved by elise
Last printed: 12/3/07 2:47 PM
Attorney: Pildes

TABLE OF AUTHORITIES – Continued

Page

MISCELLANEOUS

El Nuevo Dia, June 4, 2002 11

House Bill 2244, 14th Legis. Ass., 3rd Ord. Sess. (March 1, 2002) 8

Hearing Before the Treasury Committee of the House of Representatives on House Bill 2244 (April 23, 2002) 9, 10

Joint Resolutions of the House of Representatives and Senate No. 6 of July 7, 1971 4

Proceedings of the House of Representatives (May 2, 2002) 10

Resolution of the House of Representatives No. 15 of April 24, 1972 4

F:\2007\2007 11 Nov Typeset Files\20180IN07.doc
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PETITION FOR A WRIT OF CERTIORARI

Petitioners are Heineken Brouwerijen B.V. and the Asociación Puertorriqueña de Importadores de Cerveza, Inc. (Puerto Rican Association of Beer Importers or APIC), a non-profit Puerto Rico corporation whose members include the exclusive distributors in Puerto Rico for Coors Light, Miller Genuine Draft, Miller Draft, Heineken, Amstel Light, Bass Ale, Budweiser, Bud Light, Samuel Adams, Corona, and other beers. The local distributors of these beers are also, individually, petitioners. Petitioners respectfully petition for a writ of certiorari to review the judgment of the Supreme Court of the Commonwealth of Puerto Rico.

OPINIONS BELOW

The judgment of the Supreme Court of Puerto Rico is reported at 2007 TSPR 92 and is reprinted at App. 1-60. The opinions of the Court of First Instance and the Court of Appeals are unreported and are reprinted at App. 61-97.

JURISDICTION

The Supreme Court of Puerto Rico issued its decision on May 16, 2007. Petitioners' timely petition for rehearing was denied by order officially notified

and recorded on September 4, 2007. App. at 128. This Court has jurisdiction under 28 U.S.C. § 1258.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Relevant constitutional provisions and statutes are set forth at App. 131-46.

INTRODUCTION

This case presents a conflict between the federal courts and the Supreme Court of Puerto Rico over whether the dormant commerce clause applies to Puerto Rico. Every federal court to consider that question, including the First Circuit (the Court of Appeals with the most experience in legal issues concerning Puerto Rico), has held that the clause applies. The federal courts have struck down numerous Puerto Rican laws and regulations as unconstitutionally protectionist. In direct conflict, the Puerto Rico Supreme Court holds that the dormant commerce clause does not apply to Puerto Rico. That court has never held any law or regulation of Puerto Rico to violate the clause. Indeed, in this very case, a justice of that court chastised the First Circuit for having the "audacity to intrude" by holding, as the First Circuit repeatedly has, that the dormant commerce clause does constrain Puerto Rico.

The fundamental legal structure of the United States-Puerto Rico economic relationship is also governed by the Federal Relations Act (FRA). That Act further prohibits Puerto Rico from discriminating between goods imported from the United States or foreign countries and goods produced in Puerto Rico. But just as the Puerto Rico Supreme Court rejects the dormant commerce clause's application to Puerto Rico, and has never held a law or regulation of Puerto Rico to violate the clause, that court has also never held any action of the Puerto Rican government to violate the FRA.

The Puerto Rico courts dismissed petitioners' complaint at the pleading stage. There was no discovery and no evidentiary hearing. The federal legal issues are thus cleanly and squarely presented. In addition, this Court is the only federal forum in which petitioners' federal claims can be heard, because the Tax Injunction Act and Butler Act preclude jurisdiction in the lower federal courts over actions challenging protectionist provisions in Puerto Rico's tax code. For these reasons, this Court's intervention is required to resolve the conflict over application of the dormant commerce clause to Puerto Rico and to clarify the constitutional and statutory structure of the economic relationship between the United States and Puerto Rico.

STATEMENT OF THE CASE

A. Factual Background

Local producers in Puerto Rico enjoyed a virtual monopoly on the Puerto Rico beer market until the 1960s, when they began to face competition from imported beer, primarily beer imported from the mainland. Since the moment that competition began, Puerto Rico has adopted one measure after another to protect local producers from this competition. These measures initially included direct subsidies; then, when these subsidies proved insufficient or too costly, protectionist administrative regulations, which the government was forced to modify through federal court litigation; and finally, the differential taxation scheme at issue in this case. That scheme discriminates against mainland and foreign producers and has dramatically distorted the beer market in favor of Puerto Rico's one local producer of beer.

From 1971-73, Puerto Rico sought to protect local beer producers through the arguably constitutional means of approximately eight million dollars in direct economic subsidies.[1] When that failed or

[1] *See* General Program of Aid and Promotion of the Beer Industry ("the Programa") and Joint Resolutions of the House of Representatives and Senate No. 6 of July 7, 1971 and Resolution of the House of Representatives No. 15 of April 24, 1972. At the same time, Puerto Rico increased taxes on beer by 40%, Act No. 7 of July 2, 1971, 13 L.P.R.A. § 6006, so that the Programa subsidies were part of a taxation-subsidization scheme whose net effect was to offset the new, higher taxes for local beer producers. *Cf. West Lynn Creamery, Inc. v. Healy*, 512 U.S. 186

(Continued on following page)

was unsustainable, the Secretary of Treasury issued regulations that controlled the packaging, bottling, size, shape, color, and glass engraving of bottled beer. Treasury Regulation No. 1894 of March 10, 1975 and No. 3134 of August 2, 1984. These regulations effectively required all importers to make specially produced bottles only for Puerto Rico if they wanted to sell there. As a result, sixteen off-island brands abandoned the Puerto Rico market in one year. Complaint, at ¶30; App. at 227. As soon as these regulations were challenged in federal court as non-tariff trade barriers that violated the dormant commerce clause, the Puerto Rico Secretary of Treasury agreed to modify them (the Butler and Tax Injunction Acts permit federal court challenges to protectionist regulations, but not to tax provisions).[2] At the same time, Puerto Rico also enacted a protectionist scheme of differential excise taxation, at issue here.

The structure of this scheme was originally established in Act No. 37, enacted in 1978. 13 L.P.R.A. § 6912a (July 13, 1978). This Act imposed an excise tax of $1.60 per gallon of beer produced, but created a special "exemption" for brewers whose total

(1994) (holding dormant commerce clause violated when local subsidies are coupled with non-discriminatory taxes).

[2] These regulations have subsequently been amended but continue to include restrictions unfavorable to the importation of beer, such as a requirement that beer be sold in non-standard size cans. *See* Treasury Regulation No. 4745 of July 30, 1992.

worldwide production did not exceed 31 million gallons per year. Below this volume, producers paid only $1.05 per gallon. No Puerto Rico beer producer, then or now, has ever produced over 31 million gallons annually. In contrast, nearly all off-island producers who distribute beer in Puerto Rico produce more than this amount. Under Act No. 37, "larger producers" – i.e., mainland and foreign producers – thus paid a 52% higher tax than smaller producers – i.e., local producers. Before creating this differential tax scheme, Puerto Rico had first imposed in 1969 an excise tax on beer that equally taxed all beer, whether produced in Puerto Rico or imported. 13 L.P.R.A. § 6001 *et seq*.

In an extensive analysis of Act No. 37, the Superior Court of Puerto Rico made no pretense about the fact that the Act was adopted to protect the two local beer producers then existing in Puerto Rico against economic competition from mainland and foreign producers. Nonetheless, the court concluded that nothing in federal law or the Constitution precluded Puerto Rico from doing so.

Thus, that court found that Puerto Rico's government had taken measures to "address the crisis the local beer industry was going through when it was being gradually displaced by foreign beer." App. at 183. Referring repeatedly to the need to "remedy the situation of the Puerto Rican beer industry," the court noted the direct and indirect local employment benefits of "our industry" in beer production; the court found, for example, that "[i]t is estimated that

for each employment generated in the beer industry an additional employment is created in different sectors such as services, commerce and Government, among others." App. at 182. Indeed, Act No. 37 further required that producers favored by the lower tax rate agree to maintain their employment at the same level or higher as that which had prevailed on May 31, 1978. App. at 179.

The court concluded that the purely protectionist purpose of Act. No. 37 nonetheless was legitimate:

> We consider that the purpose which inspired the Act is legitimate; the wish to try to protect and achieve the welfare of an industry that is going through a critical situation. This Act not only attempts to protect the local beer industry but that jointly serves as a protectionist mechanism to other industries and the public treasury. App. at 186.

As the court further explained:

> The yearly production and consumption of each of our two (2) breweries show that economically they cannot subsist without help. The Legislative Assembly had before its consideration documents and information about the present state of the local beer industry. The crisis this industry is going through induced the Legislature to approve [the differential beer tax], being evident the desire to create a protectionist mechanism for local breweries. App. at 188.

The court concluded: "To try to help a local industry is not synonymous of discrimination."[3] App. at 188. The Supreme Court of Puerto Rico (three Justices recusing) affirmed. *U.S. Brewers Ass'n v. Secretary of the Treasury of the Commonwealth of Puerto Rico*, 109 D.P.R. 456 (1980), 1980 WL 138574 (P.R. Feb. 29, 1980).

B. The Acts at Issue: Laws No. 69 and 108

By 2002, only one Puerto Rican beer producer, Cervecería India (CI), remained. By early 2002, it enjoyed a $0.55 per gallon tax advantage over mainland and foreign competitors.[4] Then, in March 2002, in response to large budget deficits, the legislature proposed increasing the excise tax for all producers by 78%. *See* House Bill 2244, 14th Legis. Ass., 3d Ord. Sess. (March 1, 2002). The ensuing legislative process was dominated by efforts, ultimately successful, to modify this proposal in order to ensure even further economic protection for the remaining local beer producer.

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[3] The court buttressed its conclusion by holding that the Twenty-first Amendment, which it found applicable to Puerto Rico, specifically permitted this kind of protectionism with respect to alcoholic beverages. App. at 211. Of course, this Court has since rejected the basis for that conclusion. *Granholm v. Heald*, 544 U.S. 460 (2004).

[4] The excise tax had grown to $2.70 per gallon for producers of more than 31 million gallons a year worldwide and $2.15 for CI, which has never produced this amount.

Typical was the committee testimony of the Mayor of Mayaguez, where CI is located: "The proposed excise tax which affects and could affect our local Cervecería India, would represent not only a loss of the only domestic beer producer, but worse, a fatal blow to the economy of the entire western region of Puerto Rico, which can not withstand the loss of a single job more." Hearing Before the Treasury Committee of the House of Representatives on House Bill 2244, at 3 (April 23, 2002).[5] No witnesses representing small breweries other than CI appeared, presented testimony, or filed prepared statements; no legislator made any statement supporting any named small brewer other than CI.

As enacted, Law No. 69 reflected major amendments that transformed the originally proposed flat increase of 78% for all producers of beer into a gerrymandered scheme whose purpose and effect was to provide even further protectionist assistance to CI. As enacted, Law No. 69 has the aim and effect of using the tax code to provide even greater competitive advantages to CI as against its mainland and foreign competitors. Little about this design was obscured during the legislative process, in part because many legislators appear not to believe the dormant commerce clause binds Puerto Rico. Thus, for example, when the Chairman of the House Treasury Committee presented the reported bill to the full House, he noted that the bill "also contains an amendment aimed to

[5] The page numbers regarding the legislative proceedings are from a certified English translation of the legislative history, which petitioners will provide to the Court if requested.

maintain the protection of Cervecería India based on its production." Proceedings of the House of Representatives 14 (May 2, 2002). Similarly, the Speaker of the House explained on the floor: "[W]e are determined to help the Puerto Rican beer industry, in this case Cervecería India. It is the last bastion of the Puerto Rican beer industry." Statement of Rep. Carlos Vizcarronado Irizarry. *Id.* at 79-80. Members of the Puerto Rico House made floor statements such as, "I am all for discrimination in favor of Puerto Rican businesses, I want to be clear." Statement of Rep. Silva, Hearing Before the Treasury Committee of the House of Representatives on House Bill 2244, at 184 (April 23, 2002).

As written, Law No. 69 appears to be non-discriminatory. But Law No. 69 raised the tax on "large" producers by 50% while not increasing the tax on CI at all. Thus, distributors for large producers – i.e., mainland and foreign producers – began to pay an 88% higher excise tax than did the local producer, CI ($4.05 per gallon compared to $2.15 per gallon). The formal structure of Law No. 69 is a graduated tax system tied to production volume:

Gallon Range	Tax Per Gallon
0 to 9 million	$2.15
9 to 10 million	$2.36
10 to 11 million	$2.57
11 to 12 million	$2.78
12 to 31 million	$2.99
Over 31 million	$4.05

When Law No. 69 was enacted, CI produced 4.6 million gallons a year and was taxed at the lowest rate.

Law No. 69 took effect on June 14, 2002. Its effect on the market was immediate and dramatic, given the price sensitivity of the market for beer. Between FY 2002 and 2003, the market share of the one local producer, CI, more than doubled, from 7.1% to 17.6% of the market. Over time, the economic effects of this differential tax scheme continued to increase; from FY 2002 to 2006, the market share of imported beer fell from 92.9% to 74.1%. In that same period, CI's market share rose, accordingly, from 7.1% to 25.9%.[6]

CI also publicly proclaimed that it had pledged to the Puerto Rico legislature, as a quid pro quo for the legislature not raising the tax on "small" producers – i.e., on CI – that CI would not raise the retail price of its beer. Thus, a mere five days after Law No. 69 was enacted, CI took out full-page advertisements in a major local newspaper proclaiming that it had made a "commitment with the Legislature" not to raise its retail beer price in return for the economic protection that Law No. 69 gave it. *See* El Nuevo Dia, June 4, 2002.

[6] In the Puerto Rico courts, petitioners submitted an offer of proof and an affidavit from an expert economist, Dr. Jorge F. Freyre, documenting the effects of Laws 69 and 108 on the beer market. Should the Court require a certified English translation of this offer of proof, petitioners will provide one.

As CI's market share and production soared due to the first phase of this protectionist regime, the Puerto Rico legislature then enacted yet another measure to take this scheme to a further level. As a result of the competitive advantage Law No. 69 gave CI, its production volume more than doubled within a year to over 10.4 million gallons. Puerto Rico's Secretary of the Treasury then publicly indicated that, as he interpreted Act No. 69, CI was obliged to pay for each gallon it produced at the tax rate determined by its total annual production. Thus, if CI produced 10.4 million gallons, it would pay at the rate of $2.57 per gallon for each and every gallon of that production.

At this point, in response to further complaints from CI, the Puerto Rico legislature again intervened. It now enacted Law No. 108, May 6, 2004, which provides that any producer of less than 31 million gallons in a year – i.e., CI – will not be taxed based on its total volume of production. Instead, CI is to pay only $2.15 per gallon on its first 9 million gallons, even if it produces considerably more than that; $2.36 on its next million gallons produced; $2.57 on the next million, and so on. Put in other terms, distributors for large off-island producers must pay $4.05 per gallon for each and every gallon they produce; but CI will always pay only $2.15 for the first 9 million gallons it produces, except in the unlikely event its production comes to exceed 31 million gallons. Distributors for off-island producers thus pay nearly twice the tax for those same first 9 million gallons of production.

Every producer subject to the full, flat tax of $4.05 per gallon is a mainland or foreign producer, while virtually the only producer who benefits from the "special" rate of $2.15 per gallon is the local producer, CI. App. at 234.

C. Proceedings Below

Petitioners filed a complaint in the Puerto Rico courts seeking declaratory and injunctive relief against enforcement of Law No. 69 on the grounds that it violated the dormant commerce clause, the Federal Relations Act, and the dormant foreign commerce clause. The Puerto Rico trial court, the Court of First Instance (Superior Court, San Juan Part) dismissed petitioner's claims at the pleading stage, without any discovery.

That court did so on the ground, in part, that the Puerto Rico Supreme Court had long held that the dormant commerce clause does not apply to Puerto Rico. As the court of first instance held, "[t]he doctrine of *stare decisis* previously discussed also disposes of the claims as to the commerce clause of the federal Constitution, since our Supreme Court, in the case of *RCA v. Gobierno de la Capital*, 91 D.P.R. 416 (1964), decided that the federal commerce clause does not apply to Puerto Rico. . . ." App. at 111. The Court of Appeals affirmed. App. at 88.

Upon a petition for certiorari, the Puerto Rico Supreme Court also affirmed, 4-0, in a single sentence that did not state any reasons.[7] One concurring Justice, Justice Fuster Berlingeri, wrote a seventeen-page opinion focused solely on making clear that the dormant commerce clause does not apply to Puerto Rico. First, Justice Fuster noted – just as the trial court had noted – that the Puerto Rico Supreme Court had several times rejected the claim that the dormant commerce clause applies to Puerto Rico. As he put it, the Puerto Rico Supreme Court had "very deliberately resolved" numerous times that "*the so called 'dormant' aspect of the Commerce Clause of the Constitution of the United States did not apply to Puerto Rico.*" App. at 5 (emphasis in original). He cited several decisions of the Puerto Rico Supreme Court that have so held.

Second, Justice Fuster attacked the federal courts for having held instead that the dormant commerce clause does apply to Puerto Rico. He went on to "vehemently denounce" the unanimous conclusion of every federal court, including the First Circuit, that the clause does apply. As part of the justification for his court's decision not to apply the dormant commerce clause to Puerto Rico, he argued that Puerto Rico needs to be able to engage in economic protectionism in order "to successfully manage the

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[7] One Justice recused herself and another Justice did not participate.

serious financial problems of Puerto Rico," and he characterized as no more than "judicial whim" decisions of the First Circuit holding that the Constitution denies Puerto Rico this power.

Indeed, Justice Fuster criticized the First Circuit for having "had the audacity" to hold that the dormant commerce clause applies. He noted, correctly, that the United States Supreme Court has never directly addressed the issue. He also asserted that this Court's previous decisions addressing Puerto Rico's legal status under the Constitution and federal statutes were flatly inconsistent with holding that the dormant commerce clause applies. He condemned the First Circuit's contrary conclusion as "based on a very limited and superficial analysis." Finally, he characterized the unanimous position of the federal courts that the dormant commerce clause does apply as "a clearly inappropriate intervention" in a matter "that lies beyond [their] authority," based on his view that this Court's precedents do not support application of the clause to Puerto Rico.

Justice Rebollo Lopez wrote a lengthy concurring opinion which concluded that the dormant commerce clause *does* apply to Puerto Rico. The other two Justices stated no reasons for their affirmance. As noted above, the Puerto Rico Supreme Court has never found any Puerto Rico legislation or regulation challenged as protectionist to violate either the dormant commerce clause or the Federal Relations Act.

REASONS FOR GRANTING THE PETITION

I. The Court Should Grant Review to Resolve a Conflict Over Whether the Dormant Commerce Clause Applies to Puerto Rico

The question whether the dormant commerce clause applies to Puerto Rico is fundamental to the legal relationship between Puerto Rico and the United States. If the United States and Puerto Rico are part of an integrated economic system for constitutional purposes, Puerto Rico, like the States, is prohibited from enacting trade barriers that are protectionist in purpose, structure, and effect. Yet on this most fundamental constitutional question, the federal courts and the Puerto Rico Supreme Court are directly in conflict.[8]

The conflict on that question alone warrants this Court's review. But the significance of this conflict goes beyond the immediate issue of the dormant commerce clause. It has radiating effects on related

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[8] Petitioners' First Question presented includes whether the dormant foreign commerce clause, see *Kraft General Foods v. Iowa Dep't of Revenue and Finance*, 505 U.S. 71 (1992), applies to Puerto Rico. Because the same arguments and facts apply in this case regarding both the dormant commerce clause and dormant foreign commerce clause claims, the arguments regarding the former are meant to apply to the latter as well. The dormant foreign commerce clause, of course, is more restrictive of state power than its domestic counterpart. *See Japan Line, Ltd. v. County of Los Angeles*, 441 U.S. 434, 445-46 (1979).

legal questions, such as ones of qualified immunity and res judicata. In the face of the ongoing conflict between the federal and Puerto Rico courts on the dormant commerce clause, the federal courts cannot apply personal immunity and res judicata doctrines in the normal fashion. As detailed below, the federal courts have had to deform these doctrines to deal with the fact that the federal courts and the Puerto Rico Supreme Court are in conflict over application of the dormant commerce clause to Puerto Rico.

Even in the absence of the direct conflict at issue in this case, this Court has acted numerous times to clarify issues concerning Puerto Rico's legal status in the federal system. *See infra* at IC. Given the importance of the question whether the dormant commerce clause applies, the fact of a conflict between the First Circuit and the Puerto Rico Supreme Court, and the ancillary legal issues that this unresolved conflict affects, this Court's review to resolve this conflict and clarify whether the dormant commerce clause applies to Puerto Rico is warranted.

A. The Federal Courts

Every federal court to consider the question has concluded that the dormant commerce clause applies to Puerto Rico. As Judge Boudin put it in *Trailer Marine Transport Corp. v. Vazquez*, 977 F.2d 1 (1st Cir. 1992), the leading case on the issue, the rationale for the dormant commerce clause doctrine – "to foster economic integration and prevent local interference

with the flow" of commerce – "applies with equal force to official actions of Puerto Rico. Full economic integration is as important to Puerto Rico as to any state in the Union." *Id.* at 8. In reaching this conclusion, the First Circuit relied centrally on this Court's analysis that "the purpose of Congress in [the 1950s legislation that created the modern Commonwealth of Puerto Rico] was to accord to Puerto Rico the degree of autonomy and independence normally associated with States of the Union. . . ." *Examining Board v. Flores de Otero*, 426 U.S. 572, 594 (1976).

Indeed, Puerto Rico, with a more state-centered[9] and state-managed economy, has often enacted blatantly protectionist legislation. Until recently, for example, Puerto Rico law required all pharmacies seeking to open or relocate within Puerto Rico to obtain a certificate of necessity and convenience. *See Walgreen Co. v. Rullan*, 405 F.3d 50 (1st Cir. 2005) (holding this law to violate the dormant commerce clause), *cert. denied,* 546 U.S. 1131 (2006). Puerto Rico agriculture regulations required imported eggs to be stamped with a two-letter postal code for their state of origin. *See United Egg Producers v. Dep't of Agric.*, 77 F.3d 567, 569 (1st Cir. 1996) (holding these

[9] For example, when economic competition drove the private sector out of the sugar-production industry, the Commonwealth government established the government-owned Sugar Corporation of Puerto Rico in response. *Starlight Sugar Inc. v. Soto*, 909 F. Supp. 853, 855-56 (D. P.R. 1995), *aff'd*, 114 F.3d 330 (1st Cir. 1997).

regulations unconstitutional). In *Trailer Marine* itself, the First Circuit invalidated a Puerto Rico law that permitted special premiums to be assessed on van trailer vehicles engaged in maritime transportation. *See also Used Tire Intern., Inc. v. Diaz-Saldana*, 155 F.3d 1 (1st Cir. 1998) (holding unconstitutional as facially discriminatory against interstate commerce Puerto Rico law regulating imported used tires).[10]

The federal district courts in Puerto Rico have similarly found numerous, recent instances of classic dormant commerce clause violations. *See, e.g., Starlight Sugar Inc. v. Soto,* 909 F. Supp. 853 (D. P.R. 1995), *aff'd,* 114 F.3d 330 (1st Cir. 1997) (holding that dormant commerce violated by regulations prohibiting sugar from being shipped to Puerto Rico in bulk and instead requiring sugar to be packaged in two- and five-pound bags before arrival in Puerto Rico); *Goya de P.R., Inc. v. Santiago*, 59 F. Supp. 2d 274, 276-78 (D. P.R. 1999) (clause violated by regulations that required inspection on imported pigeon peas but not locally-produced ones). Indeed, in one case, the Puerto Rico Department of Justice, in settling an

[10] Before the First Circuit recognized that the dormant commerce clause applied, it invalidated as protectionist Puerto Rico taxes that differentiated between round matches (locally produced) and square matches (mainland and foreign produced), as well as licensing and tax provisions on coffee that favored Puerto Rico producers. These provisions were invalidated under the Federal Relations Act. *See San Juan Trading Co. v. Sancho*, 114 F.2d 969, 974-75 (1st Cir. 1940), *cert. denied*, 312 U.S. 702 (1941); *Lugo v. Suazo*, 59 F.2d 386, 389 (1st Cir. 1932).

antitrust claim, forced Wal-Mart to adopt purchasing and employment practices that favored Puerto Rico businesses. *See Wal-Mart Stores Inc. v. Rodriguez*, 238 F. Supp. 2d 395, 414-15 (D. P.R. 2002), *vacated as moot*, 322 F.3d 747 (1st Cir. 2003). The federal court issued a preliminary injunction that enjoined the Puerto Rico Department of Justice from pursuing this antitrust claim, after the court found the antitrust claim to be retaliation meant to coerce Wal-Mart into accepting conditions that would otherwise violate the dormant commerce clause. As the federal district court put it, the Puerto Rico Department of Justice was "engaging in state protectionism prohibited by the federal constitution." *Id.* at 416.

With respect to the beer market, the Puerto Rico Treasury Department, as noted above, promulgated regulations that required beer bottles to be embossed (i.e., the slogans had to be raised on the glass surface of the bottle, rather than being produced on a printed label) with the slogans "Proteja el Ambiente" (Protect the Environment) and "No la Tire" (Don't Throw Out). App. at 259. These regulations further required all bottles to be amber colored. The effect of these regulations, which led sixteen off-island manufacturers to abandon the market within a year, was to require special bottles to be produced only for the Puerto Rico market and to undermine the brand recognition of off-island producers, such as Heineken, whose product was associated with bottles of distinctive color.

These cases and history not only establish that the federal courts uniformly hold that Puerto Rico is

bound by the dormant commerce clause. They also document that Puerto Rico has a long record of economically protectionist action against mainland and foreign competition. At every level of the Puerto Rican government – the legislature, the administrative agencies, the Department of Justice – there is resistance to the fundamental constitutional principle that the dormant commerce clause constrains Puerto Rico. That resistance is further encouraged and validated by the judicial branch of Puerto Rico, as we now show.

B. The Puerto Rico Courts

The Puerto Rico Supreme Court maintains that the dormant commerce clause does not apply to Puerto Rico. The holding of the Puerto Rico Supreme Court on this issue was first stated in *R.C.A. v. Gobierno de la Capital*, 91 D.P.R. 416, 418 (1964) and continues to be the controlling view:

> [T]he constitutional provision which reserves to Congress the power to regulate commerce with foreign nations, between the states and with the Indian tribes, has not only not governed, nor governs, by its own force in Puerto Rico. . . .

Both the federal courts and the Puerto Rico courts recognize that this is the position of the Puerto Rico Supreme Court. Thus, writing for the First Circuit, Judge Torruella noted that *R.C.A. v. Gobierno de la Capital* established that the Puerto Rico

Supreme Court "took a different view" of the applicability of the dormant commerce clause to that of the First Circuit in the seminal *Trailer Marine* case, *supra*. *See Starlight Sugar Inc. v. Soto*, 253 F.3d 137, 144 (1st Cir.), *cert. denied,* 534 U.S. 1021 (2001). The First Circuit concluded that in the same situation in which a state would be found in violation of the clause, the Puerto Rico Supreme Court would not find Puerto Rico to be in violation. *Id.* at 143. As the Puerto Rico Supreme Court itself said in *R.C.A.*, the Commonwealth may exercise its taxing power in a manner that "would not be permissible to a state covered by the provisions of the Federal Constitution." 91 D.P.R. at 419.

Starlight Sugar involved a blatantly protectionist administrative regulation that the First Circuit found unconstitutional. Nonetheless, given the First Circuit's recognition that the Puerto Rico courts hold the dormant commerce clause inapplicable, the First Circuit held that the official who promulgated this protectionist regulation was immune to suit in his personal capacity. The First Circuit concluded that this federal-local judicial conflict made it impossible to hold it "clearly established" that the dormant commerce clause applies to Puerto Rico. Even though the applicability of the clause to Puerto Rico *is* clearly established law in the First Circuit, it is not in the Puerto Rico Supreme Court. Hence, the First Circuit was required to conclude that personal immunity still attaches even when governmental actors undertake

blatantly protectionist action. *Starlight Sugar,* 253 F.3d at 145.

Similarly, the federal district court in Puerto Rico has recognized that, "under Puerto Rican law, as exposed by the Puerto Rico Supreme Court, the [dormant commerce] clause is inapplicable to the Island." *Garcia v. Bauzá-Salas*, 686 F. Supp. 965, 967 (D. P.R.), *rev'd on other grounds*, 862 F.2d 905 (1st Cir. 1988) (holding Anti-Injunction Act barred District Court injunction). After the Puerto Rico courts, including the Supreme Court, rejected a business owner's equal protection and due process challenges to an economic regulation, the federal district court permitted him to challenge the same regulation under the dormant commerce clause. The federal court held that res judicata could not bar the dormant commerce clause claim because the Puerto Rico Supreme Court rejects the dormant commerce clause altogether. On the merits, the district court went on to hold the regulation to be protectionist and unconstitutional. *Id. See also Sea-Land Services v. Municipality of San Juan*, 505 F. Supp. 533, 542 (D. P.R. 1980) (holding that "we must disagree with the holding of [the Puerto Rico Supreme Court in] *RCA*" and concluding that dormant commerce and foreign commerce clauses apply to Puerto Rico).

The local courts also expressly recognize that the Puerto Rico Supreme Court holds the dormant commerce clause inapplicable to Puerto Rico. As the trial court in this case stated, *stare decisis* bound that court to reject petitioners' dormant commerce claims

because "our Supreme Court, in the case of *RCA v. Gobierno de la Capital*, 91 D.P.R. 416 (1964), decided that the federal commerce clause does not apply to Puerto Rico. . . ." App. at 111. Also in this case, Justice Fuster of the Puerto Rico Supreme Court made clear that the Puerto Rico Supreme Court had several times rejected the claim that the dormant commerce clause applies to Puerto Rico. As he put it, the Puerto Rico Supreme Court had "very deliberately resolved" numerous times that "*the so called 'dormant' aspect of the Commerce Clause of the Constitution of the United States did not apply to Puerto Rico.*" App. at 5 (emphasis in original). Moreover, the Puerto Rico Supreme Court has never, as far as petitioners are aware, held *any* Puerto Rico law, regulation, or act to be illegal protectionism under either the dormant commerce clause or the FRA.

Nonetheless, in an apparent effort to evade this Court's review, the Puerto Rico Supreme Court in recent years has cagily avoided expressly stating yet again that the dormant commerce clause does not apply. In this case, that court affirmed the lower court, 4-0, in a single sentence that stated no reasons for its decision. The court refused to explain its decision despite the fact that two of the four Justices wrote lengthy, diametrically opposed, concurring opinions on just this issue. The issue of whether the dormant commerce clause applies to Puerto Rico was obviously central to the case and squarely presented. For many years, the federal courts have made clear their understanding that the Puerto Rico Supreme

Court does not recognize the dormant commerce clause's applicability to Puerto Rico – yet the Puerto Rico Supreme Court has said nothing to contradict that understanding.

No case will present this issue more directly than this one. This case involves one of the most significant dormant commerce clause challenges to a law of Puerto Rico that the Puerto Rico Supreme Court has addressed. For over 25 years, the protectionist purpose and effect of the "special exemption" from excise taxes for "small" beer manufacturers – i.e., CI – has been an open and notorious secret in Puerto Rico. The federal courts cannot be turned to for an adjudication of this federal claim, because the Butler Act and Tax Injunction Act preclude federal jurisdiction. *See infra* at III. The amount at stake is substantial: since 2002, CI has paid approximately $100 million less in taxes than if Puerto Rico had taxed local producers at the same rate as off-island producers.[11]

C. The Legal Status of Puerto Rico Under This Court's Precedents Dictates The Conclusion That The Dormant Commerce Clause Applies

On the merits, the federal courts' conclusion that the dormant commerce clause applies to Puerto Rico is the only result consistent with this Court's precedents concerning the legal status of Puerto Rico. The

[11] *See supra* note 6.

contrary position of the Puerto Rico Supreme Court is at odds with these precedents and the more general case law that defines Puerto Rico's legal status.

As this Court has recognized many times, the purpose of Congress in creating the Commonwealth of Puerto Rico, through legislation in 1950 and 1952, "was to accord to Puerto Rico the degree of autonomy and independence normally associated with States of the Union. . . ." *Examining Board*, 426 U.S. at 594. Thus, this Court and the lower federal courts accord Puerto Rico the same immunities, powers, and dignity under numerous federal doctrines and statutes as those of the States. After Puerto Rico became a Commonwealth, this Court held that it should be treated as a state for purposes of the three-judge court act, 28 U.S.C. § 2281. *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663 (1974); *see also Wackenhut Corp v. Aponte*, 386 U.S. 268 (1967) (summarily affirming district court decision that required abstention regarding interpretation of Puerto Rico law); *Cruz v. Melecio,* 204 F.3d 14, 25 (1st Cir. 2000) (requiring abstention). This Court applies the same test for federal preemption of a law of Puerto Rico under the Supremacy Clause as it does for pre-emption of the law of a State. *P.R. Dept. of Consumer Affairs v. Isla Petroleum Corp.*, 485 U.S. 495, 499 (1988).

Just as Puerto Rico benefits from being treated as a State in cases such as these, this Court has also recognized that Puerto Rico operates under similar constitutional and federal statutory constraints as

the States. This Court has held that the First Amendment free speech clause, the Fourth Amendment, the Due Process clause (of either the Fifth or Fourteenth Amendments), and the Equal Protection clause (of either the Fifth or Fourteenth Amendments), apply directly to Puerto Rico of their own force. *See generally Posadas De P.R. Assoc. v. Tourism Co. of P.R.*, 478 U.S. 328, 328 n.1 (1986); *Torres v. Puerto Rico*, 442 U.S. 465 (1979). Similarly, "the voting rights of Puerto Rico citizens are constitutionally protected to the same extent as those of all other citizens of the United States." *Rodriguez v. Popular Democratic Party*, 457 U.S. 1, 8 (1982). This Court has also held that Puerto Rico is a "State" for purposes of the jurisdictional provision in 28 U.S.C. § 1343(3), which grants federal jurisdiction for federal civil-rights claims alleging deprivation under "color of any State law." *Examining Board*, 426 U.S. at 597. In that case, the Court went on to hold unconstitutional a Puerto Rico law that permitted only United States citizens to obtain licenses to practice civil engineering.

Consistent with this Court's decisions, the courts of appeals have treated Puerto Rico as legally equivalent to a state in numerous contexts touching on the powers and duties of state sovereignty. Like the states, Puerto Rico is immune in the federal courts from damages suits under the Fair Labor Standards Act. *Rodriguez v. P.R. Federal Affairs Administration*, 435 F.3d 378 (D.C. Cir. 2006), *cert. denied*, 127 S. Ct. 347 (2006); *Jusino Mercado v. Commonwealth of P.R.*, 214

F.3d 34 (1st Cir. 2000). The First Circuit has held also that the Commonwealth enjoys Eleventh Amendment immunity from suit in federal court. *Ramirez v. P.R. Fire Serv.,* 715 F.2d 694, 697 (1st Cir. 1983). Puerto Rico, like the states, is not subject to the diversity jurisdiction statute. *U.S.I. Properties Corp. v. M.D. Construction Co.*, 230 F.3d 489, 499 (1st Cir. 2000). Since Puerto Rico became a Commonwealth, the First Circuit has also considered it an "independent sovereign" for purposes of dual-sovereignty doctrine under the Double Jeopardy clause. *See United States v. Lopez Andino*, 831 F.2d 1164, 1168 (1st Cir. 1987), *cert. denied*, 486 U.S. 1034 (1988). *But see United States v. Sanchez*, 992 F.2d 1143, 1151 (11th Cir. 1993) (reaching contrary conclusion), *cert. denied*, 510 U.S. 1110 (1994). In an opinion by then-Judge Breyer, the First Circuit held that after Puerto Rico became a Commonwealth, it was to be treated as a State, not a territory, for purposes of the Sherman Antitrust Act. *Cordova & Simonpietri Insurance Agency Inc. v. Chase Manhattan Bank N.A.*, 649 F.2d 36, 42 (1st Cir. 1981). Congress has also enacted additional laws, since creating the Commonwealth, further expressing federal policy that Puerto Rico ought to be treated equivalently to a State. *See* Pub. L. No. 89-571, 80 Stat. 764 (1966). Thus, unlike federal judges in the territories of the United States, federal district judges in Puerto Rico are Article III judges, identical to federal district judges in the states.

"Puerto Rico occupies a relationship to the United States that has no parallel in our history. . . ." *Examining Board*, 426 U.S. at 596. Puerto Rico is not a state, but federal policy and this Court's doctrines have recognized since Puerto Rico became a Commonwealth that, for virtually all purposes this Court has addressed, Puerto Rico's legal status should be understood similarly to that of a State. As then-Judge Breyer wrote for the First Circuit:

> In sum, Puerto Rico's status changed from that of a mere territory to the unique status of a Commonwealth. And the federal government's relations with Puerto Rico changed from being bounded merely by the territorial clause, and the rights of the people of Puerto Rico as United States citizens, to being bounded by the United States and Puerto Rico Constitutions, Public Law 600 [creating the Commonwealth], the Puerto Rico Federal Relations Act and the rights of the people of Puerto Rico as United States citizens. *Cordova,* 649 F.2d at 41.

The Puerto Rico Supreme Court's refusal to recognize the dormant commerce clause as binding on Puerto Rico is inconsistent with the basic legal structure reflected in these precedents and in Congress's policies concerning Puerto Rico. Just as the First and Fourth Amendments apply of their own force in Puerto Rico, so too does the dormant commerce clause, as the federal courts have concluded uniformly. The Commonwealth and the United States are part of an integrated economic union; Puerto Rico

cannot enact, facially or by stealth, protectionist legislation that discriminates in purpose and effect against mainland and foreign producers vis a vis their local economic competitors. This Court's review is necessary to clarify that Puerto Rico's legal status requires Puerto Rico to comply with the dormant commerce clause and thereby accept the duties as well as the benefits of the state-like status recognized in these numerous precedents.

II. This Court's Review Is Required To Ensure Uniform Enforcement Of The Federal Relations Act, The Fundamental Law That Governs United States-Puerto Rico Relationships

The Puerto Rico Federal Relations Act (FRA) is the fundamental statutory charter that governs United States-Puerto Rico relations. Section 3 of the FRA forbids the Commonwealth from discriminating "between the articles imported from the United States or foreign countries and similar articles produced or manufactured in Puerto Rico." 48 U.S.C. § 741a (2000). Even if the dormant commerce clause does not apply, this Court's intervention is warranted to ensure that the Puerto Rico courts honor the basic federal statutory framework that defines Puerto Rico's powers, obligations, and relationship to the United States.

The FRA embodies the terms on which Congress, in the 1950s, recognized the transformation of Puerto

Rico from the status of an ordinary territory to that of a Commonwealth. *See* Act of July 3, Pub. L. No. 81-600, § 4, 64 Stat. 319 (1950); *Examining Board*, 426 U.S. at 593; *Calero-Toledo*, 416 U.S. at 674 n.9. Within the framework of the FRA and the United States Constitution, Puerto Rico is now self-governing. *Examining Board*, 426 U.S. at 594.

The FRA, like the dormant commerce clause, bars Puerto Rico from enacting facially neutral statutes whose intent and effect is nonetheless protectionist. Thus, even before the Commonwealth's existence, the First Circuit had held, under the predecessor provision in the Organic Act of Puerto Rico (drafted in identical terms to § 3 of the FRA[12]), that "[w]here a statute in terms is non-discriminatory but its avowed intent and necessary effect is to favor local products over similar foreign products, it is the duty of the courts to declare the statute void." *San Juan Trading Co. v. Sancho*, 114 F.2d 969, 974 (1st Cir. 1940) (holding illegal a Puerto Rico statute that imposed differential taxes on round and square matches), *cert. denied*, 312 U.S. 702 (1941).

In words that apply directly here, the First Circuit concluded that Puerto Rico cannot "impose a discriminatory excise tax designed to foster Island

[12] Section 3 of the Organic Act of Puerto Rico provided that "no discrimination be made between the articles imported from the United States or foreign countries or manufactured in Porto Rico." Act of March 2, 1917, 39 Stat. c. 145, p.951 *et seq.*

industry at the expense of that of the continental United States or foreign countries." *Id.* at 973. *See also Lugo v. Suazo*, 59 F.2d 386, 389 (1st Cir. 1932) (holding illegally discriminatory a Puerto Rico Act that required dealers in foreign coffee to pay a licensing fee that could not be justified as necessary to defray inspection and enforcement costs); *cf. Sancho v. Corona Brewing Corp.*, 89 F.2d 479, 481 (1st Cir.), *cert. denied*, 302 U.S. 699 (1937) (refusing to construe Puerto Rico ten-year tax exemption for "properties" of new industries to extend to the products such industries produced on the ground that otherwise the exemption would violate the non-discrimination provisions of federal law).

The FRA replaced the Organic Act and is now the fundamental statutory framework that defines United States-Puerto Rico relations. Yet, as this case demonstrates, the Supreme Court of Puerto Rico has never given effective content to § 3 of the FRA. Despite numerous federal court decisions invalidating Puerto Rico laws and regulations as protectionist, the Puerto Rico Supreme Court has never found any law or regulation of Puerto Rico to be illegal protectionism in violation of § 3. Indeed, although this case obviously involves a major dormant commerce clause and FRA challenge to a differential tax scheme, whose effect is dramatically to alter the beer market in favor of the one local producer, the Puerto Rico Supreme Court refused even to write an opinion addressing the merits.

Moreover, the Puerto Rico courts dismissed petitioners' complaint based on nothing more than a motion to dismiss. If the complaint in this case can be dismissed at that stage, it means that no challenge to a facially neutral law, based either on the dormant commerce clause or FRA or both, can ever be maintained successfully in the Puerto Rico courts.

III. This Court's Review Is Particularly Warranted Because This Court Affords The Only Federal Forum In Which Federal Claims Against Protectionist Puerto Rico Tax-Code Provisions Can Ever Be Heard

On the merits, the decision of the Puerto Rico courts to dismiss petitioners' dormant commerce clause and FRA claims at the pleading stage is wrong and should be reversed. Petitioners alleged that the differential taxation scheme, while neutral on its face, was protectionist in purpose, structure, and effect. Their offers of proof included ample evidence of protectionist purpose and effect: the testimony of an expert economist regarding the structure of the Puerto Rico beer market and the protectionist effect Law No. 69 had on that market, as well as evidence concerning the general context in which this law was enacted and its legislative process and history, which would show that it was adopted for a protectionist purpose. *See* Complaint ¶¶ 23, 25, 26, 29, 31, 33, 39, 42, 43, 44, 47, 51, 61; App. at 225-39. Other than through exactly these sorts of proofs of effects, purpose, and context, there is no other way to establish

that a facially neutral law is a pretext for economically protectionist legislation.

If petitioners are able to prove their factual allegations, there is no question that their claims would establish constitutional and FRA violations, despite the facial neutrality of Law No. 69. *See, e.g., New Energy Co. of Indiana v. Limbach*, 486 U.S. 269, 273 (1988) (explaining that dormant commerce clause "prohibits economic protectionism – that is, regulatory measures designed to benefit in-state economic interests by burdening out-of-state competitors"); *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263 (1984); *Hunt v. Wash. State Apple Adver. Comm.,* 432 U.S. 333 (1977). Indeed, even under the narrowest understanding of the dormant commerce clause, petitioners' claims and offers of proof adequately state a dormant commerce clause (and FRA) claim. As a law that is neutral on its face but whose purpose and effect is to protect a local private industry against its out-of-state competitors, Law No. 69 is "indistinguishable from a type of law previously held unconstitutional by the Court." *See United Haulers Ass'n v. Oneida-Herkimer Solid Waste Mngmt. Authority*, 127 S. Ct. 1786, 1798 (2007) (Scalia, J., concurring in part).

Finally, this Court's intervention is particularly warranted because this Court is the only federal court able to review any of petitioners' federal claims. In cases challenging provisions in Puerto Rico's tax code as protectionist, no federal court jurisdiction exists over original actions to enforce the dormant commerce clause or the FRA. The Butler Act, a statute

analogous to the Tax Injunction Act, 28 U.S.C. § 1341, specifically denies federal district courts in Puerto Rico the power to hear any suit "for the purpose of restraining the assessment or collection of any tax imposed by the laws of Puerto Rico. . . ." 48 U.S.C. § 872. Petitioners and other off-island producers of beer have tried for over 25 years to get to a federal forum for adjudication of their federal claims, but have been unable to do so. The Butler and Tax Injunction Acts have precluded the lower federal courts from hearing dormant commerce clause and FRA challenges to the very protectionist excise tax scheme at issue here and to its predecessors.

Thus, when Puerto Rico enacted Act No. 37 in 1978, which first created the differential tax scheme that favored local beer producers, off-island beer producers and their trade association challenged the Act in federal court on commerce clause and FRA grounds. And indeed, the federal district court in Puerto Rico (Torruella, J.) described Act No. 37 as a "prima facie" violation of the FRA. *U.S. Brewers Ass'n v. Perez*, 455 F. Supp. 1159, 1162 (D. P.R. 1978). Nonetheless, the First Circuit reversed and held that the Butler Act denied federal courts jurisdiction to adjudicate that claim. *U.S. Brewers Ass'n v. Perez*, 592 F.2d 1212 (1st Cir. 1979), *cert. denied*, 444 U.S. 833 (1979). When the plaintiffs were then forced to litigate in the local courts, the Puerto Rico Supreme Court rejected their federal claims, *U.S. Brewers Ass'n v. Perez,* 109 D.P.R. 456 (1980), just as it has rejected every other challenge alleging that actions of

the Puerto Rican government violate the commerce clause or FRA.

Similarly, when Puerto Rico expanded the protectionist effect of this scheme and enacted Laws No. 69 and 108 in 2002 and 2004, Coors Brewing Co. challenged those laws as protectionist in federal district court (Coors argued that it was "futile" to pursue its federal claims in the Puerto Rico courts, precisely because those courts refused to recognize the dormant commerce clause's applicability[13]). But the federal district court held that the Butler and Tax Injunction Acts, again, precluded federal jurisdiction. *Coors Brewing Co. v. Calderon*, 225 F. Supp. 2d 22 (D. D.C. 2002). There continues to be no federal forum, other than this Court on review of the Puerto Rico Supreme Court's decision, in which petitioners' federal claims can be adjudicated.

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[13] *See* Plaintiff's Memorandum of Law in Support of Motion for Summary Judgment at 2, *Coors Brewing Co. v. Torres* (Civ. No. 06-2150) (D. P.R. 2007). Coors initially filed its federal action in the federal district court for the District of Columbia, which dismissed that complaint due to the Butler and Tax Injunction Acts. Coors then filed a second action in the federal district court in Puerto Rico. That court likewise dismissed Coors' federal claims on the ground that the district court in the District of Columbia had already determined that the Butler and Tax Injunction Acts barred the suit. Thus, as has been true since Puerto Rico's differential taxation scheme was first created in 1978, the federal courts remain unavailable to hear federal constitutional and statutory challenges to this scheme. It remains the case that this Court is the only federal Court able to hear petitioners' federal claims.

Absent this Court's review, then, the Puerto Rico courts are the only forum in which protectionist uses of the Puerto Rico tax code can be challenged. Yet the Puerto Rico courts refuse to recognize the applicability of the dormant commerce clause to Puerto Rico, are in direct conflict with the federal courts on this issue, have never found an act of the Puerto Rican government to violate either the dormant commerce clause or the FRA, and in this case – obviously a substantial and important challenge to a scheme the federal district court in Puerto Rico has characterized as a "prima facie" violation of the FRA – dismissed the federal claims at the pleading stage. Rather than faithful enforcers of federal constitutional and statutory law, the Puerto Rico courts appear to be willing agents in the protectionist schemes of the Puerto Rican legislative and executive branches.

As then-District Judge Torruella predicted, if federal courts lack jurisdiction over FRA claims which allege that Puerto Rico tax code provisions are illegally protectionist, "the clear congressional policy envisaged in Section 3 of [the FRA]" would be rendered "virtually inoperative." *U.S. Brewers Ass'n v. Perez*, 455 F. Supp. at 1162. That is precisely what has happened. To resolve the conflict over the dormant commerce clause and to ensure that the Puerto Rico courts faithfully honor that clause and the FRA, this Court's review is necessary.

CONCLUSION

The petition for certiorari should be granted.

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