No. 09-233

In the
Supreme Court of the United States

TRIPLE-S MANAGEMENT, CORP.;
TRIPLE-S SALUD, INC.,

Petitioners,

v.

MUNICIPAL REVENUE
COLLECTION CENTER (CRIM),

Respondent.

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

RESPONSE TO BRIEF OF THE UNITED STATES

PAUL D. CLEMENT
KING & SPALDING LLP
1700 Pennsylvania Ave., NW
Washington, DC 20006

PEDRO E. ORTIZ ALVAREZ
P.O. Box 9009
Ponce, PR 00732

RICHARD H. PILDES
Counsel of Record
Vanderbilt Hall Room 507
40 Washington Sq. So.
New York City, NY 10012
(212) 998-6377

Counsel for Petitioners

June 11, 2010

Blank Page

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

Blank Page

SUPPLEMENTAL RESPONSE

In response to this Court's invitation to file, the United States takes two remarkable positions. *First*, it asserts that the federal constitutional rights of residents of Puerto Rico can be denied without recourse to any federal court, including this Court, anytime the Puerto Rico Supreme Court declines to exercise discretion to hear those claims on the merits. *Second*, it argues that no constitutional limitations exist on the power of an administrative agency to change its interpretation of law retroactively—no matter how far back in time the agency reaches, no matter how onerous the consequences or how much that retroactive change defeats reasonable, investment-backed reliance, and no matter how formal, authoritative, or purportedly binding the agency's prior interpretation.

The breadth of these positions confirms the need for this Court's review. Both issues are of considerable importance. The jurisdictional issue goes to this Court's fundamental power to ensure uniformity of federal law throughout the United States. The merits issue affects the power of all agencies, federal and state, to impose unbounded retroactive obligations under the guise of reinterpreting law. On both issues, the United States is wrong. But at a minimum, before this Court were to accept either of the United States' positions on issues of such importance, it should grant plenary review.

I. This Court Has Jurisdiction Under 28 U.S.C. § 1258 And, To The Extent There Are Any Doubts, the Court Should Grant Review To Resolve Them.

The United States presents a new question for review: whether this Court lacks jurisdiction under 28 U.S.C. § 1258. The United States asserts that Congress has stripped this Court of jurisdiction to vindicate the federal constitutional and statutory rights of United States citizens in Puerto Rico, no matter how egregiously those rights are violated, if the Puerto Rico Supreme Court declines to exercise certiorari jurisdiction over a case.

A. Section 1258 Was Enacted to Extend Section 1257 to Puerto Rico.

1. Section 1258 provides that "[f]inal judgments or decrees rendered by the Supreme Court of the Commonwealth of Puerto Rico may be reviewed by the Supreme Court by writ of certiorari" where the petitioner asserts a claim under federal law. Congress enacted Section 1258 in 1961 for one simple purpose: to ensure that "the final judgments or decrees of the Supreme Court of the Commonwealth of Puerto Rico shall be reviewed by the Supreme Court of the United States on certiorari or appeal in the same way as judgments of the supreme or highest courts of the several States of the Union are now reviewed by that Court." H.R. Rep. No. 683, 87th Cong., 1st Sess. 2 (1961) (*see* Appendix).

This change was supported by the Judicial Conference of the United States and the United States Department of Justice. All understood the

design, text, and effect of Section 1258 in the same way. In a statement appended to the House Committee report, Deputy Attorney General Byron R. White, in endorsing the legislation on behalf of the Justice Department, wrote: "The bill would give litigants in the Supreme Court of the Commonwealth of Puerto Rico the same rights of appeal and certiorari directly to the U.S. Supreme Court as are permitted to litigants in the highest court of the various States under section 1257 ..., and would finalize all other decisions of the Supreme Court of Puerto Rico." *Id.* at 4. Similarly, the Administrative Office of the U.S. Courts, endorsing the bill, wrote: "The proposed legislation would provide that judgments of the Supreme Court of Puerto Rico shall hereafter be reviewed by the Supreme Court of the United States on certiorari or appeal in the same way as judgments of the supreme or highest courts of the several States of the Union are now reviewed by that Court." *Id.* at 3. Section 1258 was thus designed to extend Section 1257 on the same terms to Puerto Rico: that was its entire point. Not a single suggestion to the contrary was ever made.

Similarly, since Congress enacted Section 1258 in 1961, authoritative commentators have also recognized it to do exactly what Congress intended: to extend Section 1257 on the same terms to Puerto Rico. Thus, the United States cites certain passages from "Stern and Gressman" but neglects to cite the section that directly addresses Section 1258. The opening line of that section states: "Since 1961, when 28 U.S.C. § 1258 was enacted, final judgments and decrees of the Supreme Court

of Puerto Rico have been reviewable in the same way as judgments of the highest courts of the various states are reviewable under 28 U.S.C. § 1257." GRESSMAN, *ET AL.*, SUPREME COURT PRACTICE 293 (9th ed. 2007). Similarly, Hart and Wechsler note that in 1961, "separate provisions parallel to § 1257 were adopted for review of the Supreme Court of the Commonwealth of Puerto Rico. See 28 U.S.C. § 1258." RICHARD H. FALLON, *ET AL.*, HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 494 n. 10 (4th ed. 1996).

The reason for Section 1258's enactment was straightforward and recognized by all: in the 1950s, Congress had changed Puerto Rico's political and legal status from a territory to a self-governing Commonwealth. *See Examining Board v. Flores de Otero*, 426 U.S. 572, 594 (1976); *Cordova & Simonpietri Ins. Agency Inc. v. Chase Manhattan Bank N.A.*, 649 F.2d 36, 41-42 (1st Cir. 1981) (Breyer, J.). As this Court has recognized many times, Congress's purpose in creating the Commonwealth "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. Since the Commonwealth's creation, this Court has routinely treated Puerto Rico like a State under numerous federal statutes and doctrines. *See id.* (Puerto Rico is a "state" for purposes of 28 U.S.C. 1343(3)); *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663 (1974) (same for purposes of three-judge court Act); *Puerto Rico Dept. of Consumer Affairs v. Isla Petroleum Corp.*, 485 U.S. 495, 499 (1988).

Section 1258 was enacted in 1961 to affirm that Puerto Rico's status had also become equivalent to that of a State for purposes of this Court's review. Before then, decisions of the Puerto Rico Supreme Court were reviewable in the First Circuit initially and only then in this Court. *See* GRESSMAN, at 293. The entire context, history, and purpose for Section 1258's enactment makes clear that Section 1258 was designed to transform Puerto Rico's status to that of a State, for purposes of this Court's review, by extending Section 1257 to Puerto Rico.

2. The United States offers no intelligible reason why Congress would have wanted to strip this Court of jurisdiction—uniquely—over federal constitutional claims arising in Puerto Rico. *See* U.S. Br. 8 (the House Committee "did not explain its reasoning" for creating this hole in this Court's jurisdiction). As a substitute, the United States offers ahistorical speculation. Citing a 1923 decision, the United States argues that the system in Puerto Rico is different "from that which prevails here." *Id.* But while that was true in 1923, by 1961 the United States government, through all three of its branches, had recognized that Puerto Rico's relationship with the United States should be treated, for most legal purposes, as that of a State.

The United States offers only one piece of purported evidence to support its position. In his letter to the House Judiciary Committee, Deputy Attorney General White "suggested that it might be advisable to consider amending the bill in one respect," to clarify that Section 1258, like Section 1257, would grant this Court jurisdiction even

when the Puerto Rico Supreme Court had denied discretionary review (if the Puerto Rico Supreme Court had such discretion, a point on which he was uncertain). But the United States fails to note that Deputy Attorney General White endorsed the bill *as written* on the express understanding that it created exactly the same system of review as under Section 1257. As this Court has noted often, any number of reasons can explain why Congress fails to act in response to proposed amendments—let alone to suggested revisions offered by executive branch officials not as a condition of support but out of an abundance of caution.

The United States' construction of Section 1258 would, moreover, create strange anomalies. The statutes that govern review of the courts of Guam and of the Commonwealth of the Northern Mariana Islands permit this Court to exercise jurisdiction over a case such as this one, in which the local supreme court had denied certiorari and federal issues are presented. 48 U.S.C. §§ 1424-2, 1824. No conceivable explanation suggests why Congress would have treated Puerto Rico differently not only from the fifty States, but from Guam and the Northern Mariana Islands as well, with regard to this Court's ability to ensure uniform application of federal constitutional law.

Finally, the only time Congress has intended to strip this Court of jurisdiction in similar circumstances, it has done so through a clear statement in the text of a statute and for acknowledged reasons. Congress has provided that this Court "may not review by a writ of certiorari ... any action of the Court of Appeals for the Armed

Forces in refusing to grant a petition for review." 10 U.S.C. § 867a(a). In light of the special role of military courts, and the fact that collateral attacks on court-martial convictions remain available, Congress had recognizable reasons for limiting this Court's review. *See* GRESSMAN, at 127–34. But as Chief Justice Marshall established, this Court has never ruled that statutory ambiguities suffice to immunize a non-Article III court from even this Court's discretionary review in cases in which issues of federal law have been properly raised. *Durousseau v. United States*, 6 Cranch 307, 314 (1810) (any such withdrawal of jurisdiction must be "founded on the manifest intent of the legislature" and "can be made only where that manifest intent appears"). That powerful presumption of Article III review recognizes "the importance, and even necessity of uniformity of decisions throughout the whole United States, upon all subjects within the purview of the constitution." *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304, 347–48 (1816).

Consistent with this long history, the Court should require a clear statutory statement (a "manifest intent") before concluding that a statute strips this Court of jurisdiction to protect constitutional rights. Section 1258 lacks any such clear statement.

B. Should the Court Have Any Doubt Concerning Its Jurisdiction, It Should Grant Certiorari.

If this Court is inclined to give credence to the position of the United States on the limited scope of Section 1258, petitioners respectfully suggest that

the Court should grant certiorari and address this question fully. If the Court were to conclude that Section 1258 creates a legal black hole for federal rights in Puerto Rico, it should be in an express opinion that puts the current Congress, as well as other interested actors, on notice of this jurisdictional lacuna. If the Court simply denies certiorari in all cases in which the Puerto Rico Supreme Court has denied certiorari, those with a stake in this important issue will be left guessing as to whether such denials reflect the peculiar reading of Section 1258 the United States urges here or some other reason. This Court's important role in clarifying the meaning of federal law argues in favor of granting certiorari on the question the United States has presented and resolving that issue in a full, public opinion.

II. Due Process Imposes Limits on Retroactive Changes in Agency Interpretations of Law.

The United States acknowledges that the Puerto Rico courts and Respondent ran roughshod over Puerto Rico's statutes of limitations by reaching back 15 years. U.S. Br. 21 (calling lower court decisions "questionable"). The United States attests further that "it would be *extraordinary* for the" Internal Revenue Service to reach back 15 years to impose retroactive taxation, as in this case. *Id.* at 17 (emphasis added). We learn later, however, that this is solely a matter of executive grace. The United States maintains that Due Process does not impose any limits on an agency's power to change its mind retroactively about the

meaning of law. That is a dangerous misunderstanding that the Court should correct.

1. The United States suggests that retroactive agency interpretations of law should be treated identically to judicial adjudications, invoking cases from the 1930s, 1950s, and 1960s. *See id.* at 12. But these cases long pre-date this Court's modern understanding of the large discretion agencies have to make policy when they interpret law. *See Chevron U.S.A., Inc. v. Natural Resources Defense Council,* 467 U.S. 837 (1984). For at least four reasons, the United States fails to appreciate the differences this Court has come to recognize between judicial and administrative interpretations of law, and the special risks agencies pose to the principles that inform this Court's retroactivity jurisprudence.

First, whether engaged in rulemaking or adjudication, agencies (unlike courts) are free to give a statute any of a number of reasonable interpretations, as long as not inconsistent with the statute's plain language. *See FCC v. Fox Television Stations, Inc.,* 129 S. Ct. 1800 (2009). Indeed, the Puerto Rico courts give *Chevron*-like deference to agency interpretations of law. *See P.C.M.E. Commercial, S.E. v. Junta de Calidad Ambiental,* 166 D.P.R. 599, 614–618 (2005).

Second, and related, agencies have the power to make policy, and to change their policy views, when they engage in statutory interpretation. *See National Cable & Telecomms. Assn. v. Brand X Internet Services,* 545 U.S. 967 (2005). In this very case, the agencies expressly acknowledged that

they were adopting a "new public policy" in deciding that Triple-S would no longer be tax exempt. Pet. 18. When an agency adopts a new public policy in the guise of interpreting a statute, whether in adjudication or rulemaking, it is acting more like a legislature than a court.

Third, agencies are not bound by values of consistency or *stare decisis* in deciding whether new public-policy considerations warrant changing their interpretation of law. *See Fox Television, supra.* But courts operate under different rule-of-law constraints: *stare decisis* has exceptional force for courts once they have interpreted a statute, even more so when reliance interests are burdened. *Patterson v. McLean Credit Union*, 491 U.S. 164, 175 n.1 (1989).

Finally, agencies are permitted greater flexibility because of their greater political accountability, but that accountability presents risks of its own. Indeed, the Municipal Revenue Collection Center is governed by a nine-member Board, seven of whom are elected mayors (chosen through an election among all incumbent mayors). Four mayors are selected from the political party that won a majority of mayoralities throughout Puerto Rico; three come from the minority party. The remaining two members are existing officeholders of other offices to which the Governor has appointed them. 21 L.P.R.A. § 5804.

For these reasons, agency retroactivity poses greater risks than judicial adjudication, including risks analogous to those this Court has identified with legislative retroactivity. Given the political

environment in which they sometimes operate, as in this case, agencies, like legislatures, may be "tempt[ed] to use retroactive legislation as a means of retribution against unpopular groups or individuals." *Landgraf v. USI Film Prods.*, 511 U.S. 244, 266 (1994). Similarly, if retroactive agency interpretations, like retroactive laws, "change the legal consequences of transactions long closed, the change can destroy the reasonable certainty and security which are the very objects of property ownership." *Eastern Enters. v. Apfel*, 524 U.S. 498, 548–49 (1998) (Kennedy, J., concurring in the judgment and dissenting in part). In the face of these risks, it would make little sense for the Court to enforce limits on legislative retroactivity, but to give agencies carte blanche to change their legal interpretations retroactively, regardless of justification or circumstance.

2. The United States inaccurately suggests that Triple-S makes no effort to explain how it could have qualified for tax exempt status in the original agency rulings. U.S. Br. 13. But, as the petition explains, Triple-S was originally organized to provide pre-paid, low-cost medical and hospital insurance in Puerto Rico, a service strongly supported by the government of Puerto Rico. Despite operating as a non-profit in fact, Triple-S was forced to incorporate formally as a for-profit entity by then-existing law regarding insurance providers. Pet. 4. Taking a purposive approach to interpreting the tax code, the Puerto Rico Department of Treasury concluded that, as long as Triple-S complied with dozens of conditions to ensure it continued to operate in fact as a non-

profit, the health insurance services Triple-S provided qualified it for tax-exempt status.

The United States also suggests that petitioner is just an unfortunate victim of a mistaken statute of limitations ruling. But the question is not what limits government imposes on its own efforts to collective retroactive levies, but whether the Constitution places any limits on the government's ability to impose retroactive obligations anytime the government has changed its mind. As the *amicus curiae* brief of the Council on State Taxation explains (and as this case confirms), statutes of limitations or appeals to regulatory mercy and discretion are insufficient in many contexts. Constitutional Due Process constraints, in the retroactivity context as in others, exist when ordinary legal mechanisms fail to protect the investment-backed reliance and fairness interests central to this Court's retroactivity cases.

Finally, the suggestion that petitioners are seeking "a categorical ban on retroactive revocation of letter rulings," U.S. Br. 17, gets matters backwards. It is the United States that takes a categorical position, arguing that Due Process imposes no constraints, under any circumstances, when an agency retroactively changes its legal interpretation. That is a dangerous proposition for the branch of government responsible for all federal agencies to embrace. The case for this Court's plenary review was set forth in the petition. That the Executive Branch believes its agencies are unconstrained by the Constitution in their power to change course retroactively only underscores the need for this Court's review.

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted,

Richard H. Pildes
Counsel of Record
Vanderbilt Hall Room 507
40 Washington Sq. So.
New York City, NY 10012
(212) 998-6377

Paul D. Clement
KING & SPALDING LLP
1700 Pennsylvania Ave., NW
Washington, DC 20006

Pedro E. Ortiz Alvarez
P.O. Box 9009
Ponce, PR 00732

June 11, 2010

Blank Page