

In The
Supreme Court of the United States

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FRANK PEAKE,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

—◆—
**On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The First Circuit**

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SUPPLEMENTAL BRIEF OF PETITIONER

—◆—
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SUPPLEMENTAL BRIEF OF PETITIONER

Pursuant to Rule 15.8, Petitioner Frank Peake respectfully submits this supplemental brief to call the Court's attention to how this case is impacted by the Court's recent decision in *Commonwealth of Puerto Rico v. Sanchez Valle*, No. 15-108, 2016 WL 3189527 (June 9, 2016). Issued after the filing of the Petition in this case, *Sanchez-Valle* holds that the Commonwealth of Puerto Rico cannot pursue a successive prosecution against an individual previously prosecuted by the United States government because, unlike the States, the Commonwealth of Puerto Rico is not a separate sovereign. In light of *Sanchez Valle*, the Court should grant certiorari, vacate the judgment in *United States v. Peake*, No. 14-1088, 804 F.3d 81 (1st Cir. 2015) (holding that Puerto Rico is a State), and remand to the First Circuit for further consideration. In the alternative, the Court should grant certiorari and consider the case on the merits.

Sanchez Valle impacts the first of two issues raised in Peake's Petition, specifically:

Whether the First Circuit erred in determining that Puerto Rico is a State for purposes of the Sherman Act.

The Indictment in this case charged Peake with one count of conspiracy to suppress and eliminate competition in freight shipping "between various states and Puerto Rico" in violation of the Sherman Act, Title 15 U.S.C. §1. The First Circuit found that Puerto Rico correctly was treated as a State under Section 1 of the

Sherman Act (even though the Sherman Act confines conspiracies related to territories to be charged under Section 3). For the reasons set forth in detail in Peake's Petition for Certiorari, this conclusion was incorrect.

After Peake's Petition for Certiorari was filed on March 9, 2016, this Court issued its opinion in *Sanchez Valle*. In light of *Sanchez Valle*, it is clear that the lower court's ruling cannot stand. Because Puerto Rico is not a State, and instead remains a territory, Frank Peake cannot have been charged under Section 1, but rather could only have been charged under Section 3.

In *People of Puerto Rico v. Shell*, 302 U.S. 253, 259 (1937), this Court construed Section 3 of the Sherman Act to include Puerto Rico, which was (and is) a territory subject to the Territories Clause. The Court determined that the word "territory" in Section 3 (which is not defined in the Act) possesses its full constitutional meaning. Despite Puerto Rico's considerable autonomy, the Court found that Puerto Rico properly should be treated as a territory and not a State under the Act. *Id.* at 259.

In 1952, Puerto Rico adopted a constitution and was given further control over its affairs. In 1981, the First Circuit concluded that as a result of these changes to Puerto Rico's governance in 1952, it became sufficiently autonomous to be treated like a State. *Cordova & Simonpietri Ins. Agency Inc. v. Chase Manhattan Bank N.A.*, 649 F.2d 36, 38, 41-42 (1st Cir. 1981).

The *Cordova* opinion was the basis of the First Circuit’s opinion below that Peake properly was charged under Section 1.

Sanchez Valle eviscerates *Cordova* and the First Circuit’s decision against Peake. In *Sanchez Valle*, the Court established that Puerto Rico did not become a State despite the changes to its structure and status in 1952.¹ See, e.g., *Sanchez Valle*, Case No. 15-108 at 4 (adoption of Puerto Rican constitution in 1952 created “a new political entity, the Commonwealth of Puerto Rico”); *id.* at 12 (“Puerto Rico today has a distinctive, indeed exceptional, status as a self-governing Commonwealth.”); *id.* at 16 (“We agree that Congress has

¹ The United States Government agrees. Despite the contrary positions taken against Peake by the antitrust division below, in *Sanchez Valle* the U.S. Government vigorously argued for the Court to conclude that Puerto Rico is not a State, asserting that “as a constitutional matter, Puerto Rico remains a territory subject to Congress’s authority under the Territory Clause.” Brief for the United States as Amicus Curiae Supporting Respondents, at 3-4, available at: <http://www.scotusblog.com/wp-content/uploads/2015/12/US-amicus-brief-in-Valle-15-108.pdf> (the “Sanchez Valle Brief for the United States”). The Government also acknowledged that the opposite position it took many years ago in the First Circuit on this issue does “not reflect the considered view of the Executive Branch” any longer. *Id.* at n. 6. The Government has similarly argued that Puerto Rico is not a State in other cases. See, e.g., Brief of the United States in *United States v. Mercado-Flores*, Case No. 15-1859, Document Number 00116950970 (1st Cir. January 27, 2016) (“*Shell Co.* recognized that Puerto Rico remained a territory. Puerto Rico’s transition to self-government in 1952 further increased its autonomy, but, as *Torres*, *Harris*, and *Califano* in made clear, it did not change Puerto Rico’s constitutional status as a U.S. territory.”) (citation omitted).

broad latitude to develop innovative approaches to territorial governance, . . . [and] that Congress may thus enable a territory’s people to make large-scale choices about their own political institutions.”); *id.* at 14 (“For starters, no one argues that when the United States gained possession of Puerto Rico, its people possessed independent prosecutorial power, in the way that the States or tribes did upon becoming part of this country.”).

The *Sanchez Valle* majority explained that newly-admitted States (including those that originally were territories) “necessarily become[] vested with all the legal characteristics and capabilities of the first 13,” and therefore are treated as separate sovereigns from the federal government with the right to pursue successive prosecutions. *Id.* at 8-9 n. 4. The Court held, however, that Puerto Rico is different from the States – i.e., it is *not* a State. Puerto Rico, unlike the States, lacks separate sovereign status. *Id.* at 14-15.

Given that Puerto Rico is not a State despite its adoption of a constitution in 1952, as *Sanchez Valle* made clear and as the U.S. Government emphatically argues in every case but this one, then under *Shell* Puerto Rico cannot be considered a State under the Sherman Act. For as *Shell* established, Puerto Rico’s constitutional legal status dictates its statutory status under the Act.² *Id.* See also, e.g., *Harris v. Rosario*, 446

² Unlike the Bankruptcy Code, which expressly defines the term “State” to include Puerto Rico, see *Commonwealth of Puerto Rico v. Franklin California Tax-Free Trust*, No. 15-233, 2016 WL 3221517 (June 13, 2016), the Sherman Act (which distinguishes

U.S. 651, 651-52 (1980); *Califano v. Torres*, 435 U.S. 1 (1978). In light of *Sanchez Valle*, the First Circuit's determination that Peake properly was charged under Section 1 cannot stand.

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CONCLUSION

For the foregoing reasons, this Court should grant the petition, vacate the decision below, and remand for reconsideration consistent with *Sanchez Valle*. In the alternative, the Court should grant certiorari and consider the case on the merits.

Respectfully submitted,

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July 1, 2016

between States and territories in Section 1 and Section 3) does not define the term State. As a result, as set forth in *Shell*, the term must be given the same meaning as it otherwise enjoys under the Constitution. *Shell*, 302 U.S. at 259. Under *Sanchez Valle*, Puerto Rico does not qualify as a State under that definition.