No. 18-1389

IN THE

Supreme Court of the United States

THE FINANCIAL OVERSIGHT AND MANAGEMENT BOARD FOR PUERTO RICO, AS REPRESENTATIVE FOR THE EMPLOYEES RETIREMENT SYSTEM OF THE GOVERNMENT OF THE COMMONWEALTH OF PUERTO RICO,

Petitioner,

v.

ANDALUSIAN GLOBAL DESIGNATED ACTIVITY COMPANY, *et al.*,

Respondents.

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

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Did the First Circuit correctly conclude that amended Uniform Commercial Code financing statements filed in 2015 and 2016 satisfied the requirements for perfection under Puerto Rico law because the name of the Employees Retirement System of the Government of the Commonwealth of Puerto Rico remained unchanged when an English translation of a Spanish amendment to a statute used the English name that had been used for decades in multiple places throughout the amendment, including in a definitional section, but in some places transposed four words of the name, despite no difference in the as-enacted Spanish statute, and when virtually all of the collateral was acquired prior to the publication of the new English translation and there is therefore no realistic possibility that a creditor would search using only the purported new name?

CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29.6, each of the following entities states for itself as follows:

1. Andalusian Global Designated Activity Company is a designated activity company. It is a wholly owned subsidiary of Warlander SARL, which is in turn wholly owned by Nez Perce LLC. Nez Perce LLC is majority owned by a limited partnership; no corporation is a parent of Nez Perce LLC. No publicly held corporation owns 10% or more of Andalusian Global Designated Activity Company's stock.

2. Glendon Opportunities Fund, L.P., is a limited partnership. It is not a "nongovernmental corporation" for purposes of Rule 29.6. Rule 29.6 therefore does not require any disclosures with respect to it. Nonetheless, no publicly held corporation owns 10% or more of its stock.

3. Mason Capital Master Fund LP is a limited partnership. It is not a "nongovernmental corporation" for purposes of Rule 29.6. Rule 29.6 therefore does not require any disclosures with respect to it. Nonetheless, no publicly held corporation owns 10% or more of its stock.

4. Oaktree Opportunities Fund IX, L.P., is a limited partnership. It is not a "nongovernmental corporation" for purposes of Rule 29.6. Rule 29.6 therefore does not require any disclosures with respect to it. Nonetheless, no publicly held corporation owns 10% or more of its stock.

5. Oaktree Opportunities Fund IX (Parallel 2), L.P., is a limited partnership. It is not a "nongovernmental corporation" for purposes of Rule 29.6. Rule 29.6 therefore does not require any disclosures with respect

to it. Nonetheless, no publicly held corporation owns 10% or more of its stock.

6. Ocher Rose, L.L.C., is a limited liability company. Its sole members are King Street Capital, L.P., and King Street Capital Master Fund, Ltd. No publicly held corporation owns 10% or more of its stock.

7. SV Credit, L.P., is a limited partnership. It is not a "nongovernmental corporation" for purposes of Rule 29.6. Rule 29.6 therefore does not require any disclosures with respect to it. Nonetheless, no publicly held corporation owns 10% or more of its stock.

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INTRODUCTION

The Petition asks this Court to review the First Circuit's holding that amended financing statements filed in 2015 and 2016 satisfied the requirements for perfection under the Uniform Commercial Code ("UCC") because "the Employees Retirement System of the Government of the Commonwealth of Puerto Rico" was an appropriate name to include on those financing statements under the Commonwealth of Puerto Rico's version of Article 9 of the UCC. The question presented turns entirely on Puerto Rico law and is largely a question of fact that is unlikely to ever arise again. The First Circuit decided the question "narrowly" and recognized that the case "present[ed] a unique confluence of circumstances involving two languages and a translation." Pet.App. 17a.

Under Article 9 of the UCC, as enacted by the Commonwealth of Puerto Rico, a financing statement must contain the "name of the debtor" to be effective. P.R. Laws Ann. tit. 19, § 2322(a). If the debtor is a "registered organization," as the parties agree the Employees Retirement System of the Government of the Commonwealth of Puerto Rico ("ERS") is, the "name of the debtor" is the name "stated to be the registered organization's name on the public organic record most recently filed with or issued or enacted by the registered organization's jurisdiction of organization which purports to state, amend, or restate the registered organization's name." *Id.* § 2323(a)(1). By design, this standard is straightforward for the vast majority of debtor names.

But this case presents a unique situation: "Puerto Rico recognizes two official statutory languages," and

the relevant public organic record for ERS is "a statutory amendment from 2013 (officially translated in 2014) that variously uses two English terms when translating the same unvaried Spanish term for the name of the System," and "past official translations, and the System itself, have consistently used the ERS name (including in many court filings) for over sixty years." Pet.App. 17a. Indeed, ERS has consistently identified itself as ERS throughout this very proceeding, including in this Court.

Unsurprisingly, there is no authority that can be fairly described as contrary to the First Circuit's decision. Nor is a split in authority likely to develop—the First Circuit "craft[ed] [the] holding narrowly to accommodate the very unusual circumstances presented" in this case. *Id.* The First Circuit identified and applied the very legal standards that Petitioners concede apply to the question presented, and explained why its opinion was consistent with the authorities cited by Petitioners.

In an attempt to manufacture a divide, Petitioners point to cases where courts have found a financing statement ineffective because the name listed on the statement contained an error. But those cases are wholly inapposite here—the First Circuit held that there was no error in the name used in the relevant financing statements. *See* Pet.App. 52a n.23. Further distinguishing the "error" cases cited by Petitioner, the First Circuit explained that "any putative creditors would have had to search under [the ERS name] to find prior liens even if the System's name did change in 2014." *Id.* at 51a (citing P.R. Laws Ann. tit. 19, § 2327(c)). Reaching a different outcome in light of different facts does not create a split in authority.

Because the Petition seeks review of the First Circuit's narrow application of Puerto Rico law on which there is no conflict among the courts of appeals or courts of last resort of any state or territory, and the unusual circumstances of this case are unlikely to recur, it should be denied.

STATEMENT

1. In 1951, the Commonwealth of Puerto Rico created a system to provide for pension and retirement benefits for employees of the Commonwealth and its agencies and municipalities. Law No. 447 of May 15, 1951, 1951 P.R. Laws 1298 (the "ERS Enabling Act") (codified as amended at P.R. Laws Ann. tit. 3, §§ 761 *et seq*.). The ERS Enabling Act was amended many times throughout the ensuing decades, and several of these amendments directly changed the name of the retirement system. *See, e.g.*, P.R. Laws Ann. tit. 3, § 761 (2006) (replacing "Government of Puerto Rico" with "Government of the Commonwealth of Puerto Rico" in the system's name). However, throughout the amendments and to this day, the beginning of the name of the system, as codified, is and remains in Spanish "Sistema de Retiro de los Empleados." *See, e.g., id.*

2. Unlike the vast majority of states and territories in the United States, the Commonwealth of Puerto Rico recognizes two official statutory languages. P.R. Laws Ann. tit. 1, § 59. Pursuant to this policy, the Secretary of State of Puerto Rico is required by law to publish "in Spanish and English the texts of all laws and joint resolutions." P.R. Laws Ann. tit. 2, § 189. Thus, any legislation passed in Spanish receives an official English translation, although there may be a

substantial delay after a law is promulgated before the official translation is published. *See* Pet.App. 24a n.6 (noting that "the official English translation of the 2004 amendment of the ERS Enabling Act (passed on September 15, 2004), Law No. 296 of September 15, 2004, was certified and published on March 13, 2007)").

3. The ERS Enabling Act and its amendments were passed by the Legislative Assembly in Spanish, and official English translations were released later. Relevant here, until 2014, the term "Sistema de Retiro de los Empleados" was consistently translated to "Employees Retirement System" in every official English translation of the statutes. *See* P.R. Laws Ann. tit. 3, § 761 (2011); P.R. Laws Ann. tit. 3, § 761 (2006); P.R. Laws Ann. tit. 3, § 761 (1988); Law No. 447 of May 15, 1951, 1951 P.R. Laws 1298.

4. In 2013, decades after ERS first acquired the rights to receive employer contributions, the Puerto Rico Legislative Assembly amended the ERS Enabling Act to institute a number of changes to Puerto Rico's pension system. Nothing in the text of the amendment or the legislative history suggests that the Legislative Assembly intended to effect a name change for ERS. The Spanish statute passed by the Legislative Assembly continued to use "Sistema de Retiro de los Empleados" as ERS's name. But the English-language version (published more than ten months later) translates the phrase inconsistently. *See* Pet.App. 24a. For the first time, the 2014 translation introduced the phrase "Retirement System for Employees" as a translation for "Sistema de Retiro de los Empleados" in some provisions. *See* P.R. Laws Ann. tit. 3, § 761. But the same translation also used "Employees Retirement System" to translate the same Spanish

phrase in other provisions within the same document. *See* P.R. Laws Ann. tit. 3, §§ 761, 763(36). There is no apparent explanation for the choice of one translation versus the other throughout the statute, and the two appear to be used interchangeably. *See* Pet.App. 48a.

5. In the meantime, ERS's finances deteriorated, and the retirement system had an unfunded liability of nearly $10 billion by 2008. Seeking an infusion of funds, the system's Board of Trustees authorized ERS to issue bonds, as permitted by the ERS Enabling Act at the time. *See* P.R. Laws Ann. tit. 3, § 779(d) (2011). The Board's Pension Funding Bond Resolution[1] (the "Bond Resolution") specified that bondholders would receive security interests in and liens on defined "Pledged Property." The Pledged Property, in turn, was defined to include, among other things: all "Revenues" of ERS, including all employer contributions received by ERS; "[a]ll right, title and interest" of ERS to those Revenues; and "any and all cash and non-cash proceeds . . . from any of the Pledged Property" including proceeds from "the sale, exchange, transfer, collection, loss, damage, disposition, substitution, or replacement of" the property.

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[1] The Resolution was (and remains) a publicly available document, which can be found online on various government websites. *E.g.*, www.retiro.pr.gov/wp-content/uploads/PensionBondsOS-Jan08-final.pdf (ERS's website); https://emma.msrb.org/ES1028174-MS263144-MD507511.pdf (the Electronic Municipal Market Access System); www.bgfpr.com/pdfs/public_corp/PensionBondsOS-Jan08-final.pdf (Government Development Bank's website).

6. To secure the bonds, ERS executed a Security Agreement granting bondholders a security interest in the Pledged Property as defined in the Bond Resolution. The majority of ERS Bonds were sold to individual Puerto Rico residents and local businesses, and many are still held by those persons and entities.

7. To perfect a security interest under Puerto Rico law, a financing statement complying with Puerto Rico's version of Article 9 of the UCC must be filed on the registry maintained by the Commonwealth's Department of State. P.R. Laws Ann. tit. 19, § 2260 (stating the general rule and listing exceptions). The Security Agreement executed for the ERS Bonds required ERS to "cause UCC financing…statements to be filed, as appropriate." Pet.App. 20a. A total of six such filings were made. ERS filed two financing statements in June and July 2008 (the "2008 Financing Statements"), which "cover[ed] . . . [t]he pledged property described in the Security Agreement" that was attached as an exhibit to the filings. SA 1-2. Four amended financing statements, all of which further described the pledged property, were subsequently filed in December 2015 and January 2016 (the "Amended Financing Statements"). SA3-10. All six of the financing statements filed against ERS identified "Employees Retirement System of the Government of the Commonwealth of Puerto Rico" as the name of the debtor. SA 1-10.

9. On June 30, 2016, Congress enacted the Puerto Rico Oversight, Management, and Economic Stability Act ("PROMESA"), 48 U.S.C. §§ 2101–2241. PROMESA created the Financial Oversight and Management Board for Puerto Rico (the "Oversight Board" or the "Board"), the Petitioner here on behalf

of ERS, and granted it broad powers to file restructuring petitions for the Commonwealth and its instrumentalities. *See, e.g., id*. §§ 2124(j), 2164, 2172.

10. PROMESA's enactment triggered a temporary stay on creditors' remedies against the Commonwealth and its instrumentalities. *Id*. § 2194(a)-(b). Respondents moved to lift that stay after ERS and the Commonwealth refused to provide adequate protection to account for certain diversions of Respondents' collateral. *See Peaje Invs. LLC v. García-Padilla*, 845 F.3d 505, 510 (1st Cir. 2017). That motion was denied by the district court, but the First Circuit vacated and remanded for further proceedings. *Id*. at 511-12, 516. On remand, the parties reached a stipulation regarding adequate protection. Pet.App. 27a.

11. On May 21, 2017, the Oversight Board filed a petition under Title III of PROMESA on behalf of ERS, listing the "Employees Retirement System of the Government of the Commonwealth of Puerto Rico" as the "Debtor's name," and listing only a Spanish name in response to a question asking for "[a]ll other names Debtor used in the last five years." Pet.App. 50a-51a. The Title III filing triggered an automatic stay of litigation against ERS under § 362 of the Bankruptcy Code. *Id*. Respondents moved to lift the stay, and the parties again reached a stipulation resolving the motion. *Id*. That stipulation required ERS to file an adversary proceeding limited in scope to the "validity, priority, extent, and enforceability" of Respondents' security interests. *Id*. at 27a.

12. On July 21, 2017, ERS filed the agreed-to adversary proceeding, and Respondents asserted

certain counterclaims. *Id.* at 27a-28a. Both parties moved for summary judgment. *Id.* at 28a. The district court granted ERS's motion in part and denied Respondents' cross-motion in its entirety. *Id.* As relevant here, the district court held that the 2008 Financing Statements did not perfect Respondents' security interests because they did not adequately describe the collateral. Further, the district court held that the Amended Financing Statements did not perfect the security interests because they contained an incorrect name for the debtor. The district court found that the correct name for ERS in English began with "Retirement System for Employees," rather than "Employees Retirement System," at the time the Amended Financing Statements were filed.

13. The First Circuit affirmed in part, reversed in part, and remanded for further proceedings. Specifically, the First Circuit agreed that the 2008 Financing Statements insufficiently described the collateral, and so did not perfect Respondents' security interests. However, the First Circuit concluded that the Amended Financing Statements were effective to perfect the security interests. As the First Circuit explained, "'Employees Retirement System of the Government of the Commonwealth of Puerto Rico' remained a valid name for UCC purposes when the Financing Statement Amendments were filed." Pet.App. 52a. Therefore, "[b]ecause the Financing Statement Amendments used [that name], they contained an appropriate name of the debtor under the Commonwealth's Article 9." *Id.* (citing P.R. Laws Ann. tit. 19, §§ 2322(a), 2323(a)(1), 2404(3)(B)). Buttressing the conclusion that ERS remained an appropriate name for UCC purposes, the First Circuit noted that

"there is no realistic likelihood that anyone would search the Department of State of the Government of Puerto Rico's (the "P.R. Department of State") records only under one of the two forms of the name that appear in the English translation of the amended statute." *Id.* at 18a. And because the Amended Financing Statements also satisfied the other UCC requirements, the security interests were perfected when the Amended Financing Statements were filed. *Id.*

REASONS FOR DENYING THE PETITION

This Court's review is unwarranted for three reasons. First, the question presented is unlikely to recur, because the First Circuit's decision was an extremely narrow ruling based on Puerto Rico law and a unique set of facts. Second, there is no conflict in authority regarding the question presented. The First Circuit's interpretation of Puerto Rico's version of the Uniform Commercial Code is not inconsistent with the interpretation of other courts. Finally, the decision below is correct. The name used on the Amended Financing Statements remained a valid name for ERS at the time of the filings. In any event, the issue is unimportant as a practical matter, as any creditor would have had to search using the ERS name to ensure its search identified all relevant liens even if the name had changed in 2014.

I. THE PETITION PRESENTS NO IMPORTANT, RECURRING ISSUE OF FEDERAL LAW.

The question presented in this case does not implicate any question of federal law, much less an important, recurring issue of federal law. The court below "craft[ed] [its] decision narrowly to

accommodate the very unusual circumstances" of the case, and this Court need not review that narrow decision interpreting the application of Puerto Rico law to a unique set of facts.

A. The Narrow, Fact-Bound Issue Decided Below Is Unlikely To Arise Again.

As the First Circuit explained, "this case presents a unique confluence of circumstances involving two languages and a translation." Pet.App. 17a. The First Circuit's decision, on its terms, "narrowly . . . accommodate[s] the very unusual circumstances presented" of whether the English-language name for a Puerto Rico government agency was proper for use on a UCC financing statement in light of "a new translation [of an amendment of the agency's enabling act] that is, on its face, inconsistent, that varies from every other formal version both before and after its presentation, and that arises in a context in which there is no realistic likelihood that anyone would search the Department of State of the Government of Puerto Rico's . . . records only under one of the two forms of the name that appear in the English translation of the amended statute." Pet.App. 17a-18a.

The First Circuit's narrow resolution of this question is unlikely to be of any importance to litigants beyond this specific case. Indeed, it is unlikely that any court will be required to consider this question again. For the issue to present itself, several uncommon factors will have to align.

First, one would need a statute creating a government body to be enacted in one language and later officially translated to another language by the government. Puerto Rico law requires that all statutes

be published in both Spanish and English, ensuring that the ERS Enabling Act and its amendments were officially translated. P.R. Laws Ann. tit. 2, § 189. This requirement is rare among the states and territories; few states or territories have more than one official language, and even those jurisdictions with more than one official language do not necessarily require official translations of all statutes. *See, e.g.,* Alaska Stat. § 44.12.310(b) ("The designation of languages other than English as official languages of [Alaska] under (a) of this section does not require . . the state . . . to print a document or record . . . in any language other than English."); 1 Guam Code Ann. § 706 ("English and Chamorro are the official languages of Guam, provided, however, that the Chamorro language shall not be required for official recording of public acts and transactions."); Haw. Rev. Stat. § 1-13 ("English and Hawaiian are the official languages of Hawaii. . . . Hawaiian shall not be required for public acts and transactions."). Much more common are state laws designating English the sole official language of the state. *See* Ala. Const. Art. I, § 360.01; Ariz. Const. Art. 28 § 2; Ark. Code Ann. § 1-4-117; Cal. Const. Art. 3, § 6; Colo. Const. Art. 2, § 30a; Fla. Const. Art. 2 § 9; Ga. Code Ann. § 50-3-100; Idaho Code Ann. § 73-121; 5 Ill. Comp. Stat. 460/20; Ind. Code Ann. § 1-2-10-1; Iowa Code Ann. § 1.18; Kan. Stat. Ann. § 73-2801; Ky. Rev. Stat. Ann. § 2.013; Miss. Code Ann. § 3-3-31; Mo. Const. Art. 1, § 34; Mont. Code Ann. § 1-1-510; N.C. Gen. Stat. § 145-12; N.D. Cent. Code § 54-02-13; Neb. Const. Art. I, § 27; N.H. Rev. Stat. Ann. § 3-C:1; Okla. Const. Art. 30, § 1; S.C. Code Ann. § 1-1-696; S.D. Codified Laws § 1-27-20; Tenn. Code Ann. § 4-1-404;

Utah Code Ann. § 63G-1-201; Va. Code Ann. § 1-511; W. Va. Code § 2-2-13; Wyo. Stat. § 8-6-101.

Second, Article 9 of the UCC would need to be applicable to government entities in the relevant jurisdiction. Most states expressly exempt government entities from Article 9's requirements. *See, e.g.,* Ala. Code § 7-9A-109(d)(14) ("This article does not apply to . . . to a security interest created in connection with any of its securities by this State, any municipal corporation, county, public authority, public corporation or other similar public or governmental agency or unit in this State, or any political subdivision of any thereof."); Alaska Stat. Ann. § 45.29.109(d)(14) ("This chapter does not apply to . . . a transfer by a government or governmental subdivision or agency."); Ariz. Rev. Stat. § 47-9109(D)(14); Ark. Code Ann. § 4-9-109(d)(14); Cal. Com. Code § 9109(d)(17); Colo. Rev. Stat. § 4-9-109(e); Conn. Gen. Stat. § 42a-9-109(d)(14); Fla. Stat. Ann. § 679.1091(n); Ga. Code Ann. § 11-9-109(d)(16); Haw. Rev. Stat. § 490:9-109(d)(14); 810 Ill. Comp. Stat. § 5/9-109(d)(13); Ind. Code Ann. § 26-1-9.1-109(d)(14); Iowa Code Ann. § 554.9109(4)(n); Kan. Stat. Ann. § 84-9-109(d)(15); Ky. Rev. Stat. Ann. § 355.9-109(4)(q); Mich. Comp. Laws Ann. § 440.9109(4)(m); Miss. Code Ann. § 75-9-109(d)(13); Mo. Ann. Stat. § 400.9-109(d)(16); Mont. Code Ann. § 30-9A-109(4)(m); Nev. Rev. Stat. Ann. § 104.9109 4.(n); N.J. Stat. Ann. § 12A:9-109(d)(14); N.M. Stat. Ann. § 55-9-109(d)(14); N.C. Gen. Stat. § 25-9-109(d)(14); N.D. Cent. Code § 41-09-09(4)(m); Ohio Rev. Code Ann. § 1309.109(D)(14); S.C. Code Ann. § 36-9-109(d)(14); S.D. Codified Laws § 57A-9-109(d)(13); Vt. Stat. Ann. tit. 9A, § 9-109(d)(14); Va. Code Ann. § 8.9A-109(d)(14); Wash.

Rev. Code Ann. § 62A.9A-109(d)(14); W. Va. Code § 46-9-109(d)(14); Wyo. Stat. Ann. § 34.1-9-109(d)(xiv); *see also* 13 Guam Code Ann. § 9104(d); 5 N. Mar. I. Code § 9104(e). In fact, Puerto Rico is the *only* state or territory that *both* applies Article 9 of the UCC to government entities *and* has more than one official language. These two factors alone, then, ensure that this case is a rarity.

Third, that government body would need to issue bonds that grant a security interest or lien to the bondholders, implicating the UCC's rules for financing statements. Government bonds are often issued as general obligation bonds, which do not create a security interest in any collateral but are instead backed by the full faith and credit of the issuing jurisdiction. *See, e.g.,* 5 Norton Bankr. L. & Prac. 3d § 90:12 (explaining that general obligation bonds "are not secured by a lien on specific revenue or other assets" and that "the holders of general obligation bonds often assume the role of the major unsecured creditor body" in municipal bankruptcies); *Hayes v. State Property and Bldgs. Com'n*, 731 S.W.2d 797, 802 (Ky. 1987) (explaining the types of bonds a municipality may issue). Because general obligation bonds typically do not create a security interest, no financing statement would be necessary to perfect a security interest, and the question of the proper name for a financing statement under the UCC would not arise.

Fourth, the financing statement for that security interest would need to be filed in the language of the official translation, rather than the original language of the relevant statute. In this case, had the Amended Financing Statements been filed in Spanish, rather

than English, there would have been no dispute over the appropriate name, as only one name was used in the Spanish statute enacted by the Puerto Rico Legislative Assembly. On the other hand, had the 2013 Amendment been passed in English, the First Circuit's decision would have no occasion to consider "the Commonwealth law that, in a case of a discrepancy between the English and Spanish, when the legislation originated in Spanish 'the Spanish text shall be preferred to the English.'" Pet.App. 48a (quoting P.R. Laws Ann. tit. 31, § 13). Had the original language of the statute matched the language in the Amended Financing Statements, then, a different question would have been presented.

Fifth, after consistently translating a particular phrase in the original statute in a particular way, one official translation of an amendment—potentially issued nearly a year after that amendment was enacted, as was the case here—would need to inconsistently use both the longstanding translation of the phrase and a new, different translation. The First Circuit relied on both the complete absence of evidence that the Puerto Rico Legislative Assembly intended to change ERS's name and the fact that "Employees Retirement System" continued to be used in the official translation. See Pet.App. 46a, 49a-50a. A different statutory history, or a consistent change in the translation, would present a different question that might have a different answer.

Finally, the government body would need to become insolvent or otherwise default on its debt obligations. Perfection is typically relevant when a debtor is unable to repay all of its creditors, as it determines the relative priority of creditors and, in bankruptcy,

whether a debtor's estate can avoid a security interest. *See In re Supplies & Services Inc.*, 461 B.R. 699, 707 (1st Cir. Bankr. 2011) (explaining the difference between perfection and validity of a security interest). Government bonds are considered safe investments precisely because they very rarely go into default. Indeed, over the 47-year period from the start of 1970 to the end of 2016, Moody's Investors Service reports only 103 total defaults on municipal bonds.[2] By contrast, Moody's reports nearly 150 defaults on corporate bonds in 2016 alone.[3]

Further, for any of this to have practical implications for creditors, there would have to be no reason for searchers to perform a search under the original name. Yet under P.R. Laws Ann. tit. 19, § 2327(c), a financing statement remains effective after a name change as to collateral acquired before or up to four months after the name change. As the First Circuit recognized, this means that recognizing ERS as a correct name as of 2015 had no practical effect on the search creditors would have been required to perform at that time: "any putative creditors would have had to search under [the ERS name] to find prior liens even if the System's name did change in 2014." Pet.App. 51a (citing P.R. Laws Ann. tit. 19, § 2327(c)).

A perfect storm of all of these factors would be required for the issue in this case to arise again. Each factor is independently rare, and this case is seemingly

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[2] https://www.researchpool.com/download/?report_id=1412208&show_pdf_data=true.

[3] https://www.researchpool.com/download/?report_id=1751185&show_pdf_data=true.

the first time they have all occurred together. There is little reason to believe they will ever occur together again. The First Circuit "decide[d] narrowly on the particular facts presented" and was careful to "craft [the] holding narrowly to accommodate the very unusual circumstances." Pet.App. 17a. There is no need for the Court to engage in a fact-bound review of that modest holding.

B. The Question Presented Turns On The Interpretation Of Puerto Rico Law And Does Not Implicate Federal Law.

No question of federal law is presented in the Petition. In reaching its decision, the First Circuit interpreted various provisions of Puerto Rico law, some of which are unique to Puerto Rico and some of which are similar to the laws of other states. Petitioners acknowledged as much in the Petition when they noted that the "Statutory Provisions Involved" are provisions of the UCC, as enacted by the Commonwealth of Puerto Rico. Pet. 2; Pet.App. 103a-106a. The Petition does not even cite any federal statutes or constitutional provisions except in recounting the history of the case. In urging that the Court grant certiorari, the Petition discusses only the proper interpretation of Puerto Rico law.

This Court therefore cannot provide a definitive answer to the question of law at issue—the Supreme Court of Puerto Rico is the ultimate authority in interpreting the laws of Puerto Rico. *See, e.g., Santana v. Calderon*, 342 F.3d 18, 29 (1st Cir. 2003) ("Only the Supreme Court of Puerto Rico can provide the definitive answer on [a question of Puerto Rico law]."); *Gibbs v. Paley*, 354 F. Supp. 270, 272 (D.P.R. 1973)

(explaining that federal courts are "bound by definitive interpretations of [Puerto Rico law] by the Supreme Court of Puerto Rico, unless they conflict with federal rules, statutes, or constitutional provisions"). Amicus's request for this Court to "make clear, in an absolute and unwavering way, that the statutory UCC filing requirements must be . . . uniformly applied to foster certainty in secured credit transactions," Am. Br. 7, would therefore be better directed to Congress or the states. This Court cannot make "absolute" pronouncements on issues of state law, and certainly cannot mandate uniformity in state law when, as Amicus itself advises practitioners, "[l]aws governing key aspects of secured transactions vary from state-to-state."[4]

As explained above, the issue in this case is unlikely to arise again. If Petitioners were correct, though, that the First Circuit's decision misinterpreted Puerto Rico law in a way that is relevant to future cases, Puerto Rico courts are free to reject the First Circuit's interpretation of Puerto Rico's statutes. *See Leavitt v. Jane L.*, 518 U.S. 137, 146 (1996) (Stevens, J., dissenting) ("[T]he decision of a federal court (even [the United States Supreme] Court) on a question of state law is not binding on state tribunals."); *Ohio ex rel. Skaggs v. Brunner*, 549 F.3d 468, 472 (6th Cir. 2008) ("No federal court has the final say on what Ohio law means. Even a decision by the highest federal court, the United States Supreme Court, about the meaning of an Ohio law has no more binding authority on the Ohio Supreme Court than a decision of the Michigan Supreme Court or for that matter any other

[4] https://community.cfa.com/publications/compendium.

court."). And no other state or federal court is bound to interpret a separate jurisdiction's implementation of the UCC differently based on the First Circuit's interpretation of Puerto Rico's UCC. Thus, Petitioners' over-heated prediction of "profound effects" from the First Circuit's decision relies on dozens of courts independently choosing to follow an interpretation of the UCC that Petitioners contend is "plainly wrong." Pet. 5. The Supreme Court need not weigh in on the interpretation of various provisions of Puerto Rico law to avoid such an unlikely result.

And indeed, for these very reasons, this Court rarely grants certiorari to review pure questions of state law. When it does so, the interpretation of the state law at issue invariably involves some *interaction* of federal and state law.

The cases cited by Petitioners are not to the contrary. For example, Petitioners cite *Leavitt v. Jane L.*, 518 U.S. 137, 137-38 (1996), for the proposition that the Court will review purely state-law questions "where the issue is of national significance and the court of appeals' ruling is 'plainly wrong.'" Pet. 5 (quoting *Leavitt*, 518 U.S. at 144-45). Although this case would not merit review even under that standard, *Leavitt* does not stand for that proposition. As explained in *Leavitt*, this Court may grant certiorari to review a lower federal court's interpretation of state law "when what is at issue is the total invalidation of a state-wide law" or "where the alternative is allowing blatant federal-court nullification of state law." 518 U.S. at 144-45.

Similarly, the Petition provides a quote from *Flagg Brothers, Inc. v. Brooks*: "'We granted certiorari to

resolve the conflict over this provision of the Uniform Commercial Code, in effect in 49 States and the District of Columbia . . . .'" Pet. 6 (quoting 436 U.S. 149, 155 (1978) (ellipsis in original)).[5] Although the Petition ends the quotation there, the sentence in *Flagg Brothers* continues ". . . and to address the important question it presents concerning the meaning of 'state action' as that term is associated with the Fourteenth Amendment." 436 U.S. at 155. At issue in *Flagg Brothers*, as in *Leavitt*, was the potential invalidation of a state statute. *Id.* at 153.

This case presents no similar issue regarding the potential invalidation of state law. If the First Circuit's

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[5] Notably, while it is true that the UCC has been broadly adopted by the states, the precise issue here—application of Article 9 to a government body—could never arise in the 32 states that have expressly exempted government bodies from Article 9's requirements. *See* Ala. Code § 7-9A-109(d)(14); Alaska Stat. Ann. § 45.29.109(d)(14); Ariz. Rev. Stat. § 47-9109(D)(14); Ark. Code Ann. § 4-9-109(d)(14); Cal. Com. Code § 9109(d)(17); Colo. Rev. Stat. § 4-9-109(e); Conn. Gen. Stat. § 42a-9-109(d)(14); Fla. Stat. Ann. § 679.1091(n); Ga. Code Ann. § 11-9-109(d)(16); Haw. Rev. Stat. § 490:9-109(d)(14); 810 Ill. Comp. Stat. § 5/9-109(d)(13); Ind. Code Ann. § 26-1-9.1-109(d)(14); Iowa Code Ann. § 554.9109(4)(n); Kan. Stat. Ann. § 84-9-109(d)(15); Ky. Rev. Stat. Ann. § 355.9-109(4)(q); Mich. Comp. Laws Ann. § 440.9109(4)(m); Miss. Code Ann. § 75-9-109(d)(13); Mo. Ann. Stat. § 400.9-109(d)(16); Mont. Code Ann. § 30-9A-109(4)(m); Nev. Rev. Stat. Ann. § 104.9109 4.(n); N.J. Stat. Ann. § 12A:9-109(d)(14); N.M. Stat. Ann. § 55-9-109(d)(14); N.C. Gen. Stat. § 25-9-109(d)(14); N.D. Cent. Code § 41-09-09(4)(m); Ohio Rev. Code Ann. § 1309.109(D)(14); S.C. Code Ann. § 36-9-109(d)(14); S.D. Codified Laws § 57A-9-109(d)(13); Vt. Stat. Ann. tit. 9A, § 9-109(d)(14); Va. Code Ann. § 8.9A-109(d)(14); Wash. Rev. Code Ann. § 62A.9A-109(d)(14); W. Va. Code § 46-9-109(d)(14); Wyo. Stat. Ann. § 34.1-9-109(d)(xiv); *see also* 13 Guam Code Ann. § 9104(d); 5 N. Mar. I. Code § 9104(e).

interpretation of Puerto Rico law is incorrect, Puerto Rico's courts are more than capable of correcting the error. And this Court's holding would be no more binding on the courts of Puerto Rico than the First Circuit's ruling is. This Court should not grant certiorari under these circumstances.

II. THERE IS NO CONFLICT OF AUTHORITY FOR THIS COURT TO RESOLVE.

Unsurprisingly, given the "unique confluence of circumstances" involved in this case, Pet.App. 17a, the First Circuit's decision is not in conflict with any other court. First, a true conflict would require a divide regarding the interpretation of *Puerto Rico's* UCC—the UCC is a creature of state law, and it is perfectly possible for one state's interpretation to differ from another state's. Even setting aside this issue, though, and expanding the question to all of the jurisdictions that have enacted some version of the UCC, Petitioners are unable to provide a single example of a case involving similar facts that reached a different result.

Instead, Petitioners attempt to manufacture a divide by pointing out that courts addressing *different* facts reached a *different* result. First, Petitioners cite cases in various jurisdictions holding that "even the slightest error in the name [used in a financing statement] defeats perfection." Pet. 13. But those cases are all beside the point—this case has never been about what happens when a financing statement contains an error. The parties have disputed *whether* there was an error in the first place, and the First Circuit held there was *no error*. As the First Circuit explained: "The situation here is clearly unlike, for

example, a filer misspelling the name of a tractor seller as 'Roger' rather than 'Rodger.'" Pet.App. 52a n.23 (citing *Pankratz Implement Co. v. Citizens Bat. Bank*, 130 P.3d 57, 59 (Kan. 2006)). Thus, the Petition misstates the First Circuit's holding when it asserts that "[t]he decision below stands for the proposition that . . . a court can allow a financing statement containing an incorrect debtor's name to perfect a security interest." Pet. 17. Amicus makes a similar mistake when, through misleading use of brackets, it asserts that "the First Circuit reasoned that 'a searcher, whether another creditor or merely an interested party, would conclude that a search under the [debtor's former/trade] name was required [and] a reasonable filer would have concluded that the [debtor's former/trade] name was a correct name for the debtor for UCC purposes." Amicus Br. 3. The First Circuit's opinion simply does not address that situation, as the First Circuit did not consider ERS to be "an incorrect name" or a "former/trade" name. *See* Pet. App. 52a n.23 ("Even were we to accept that '[t]he majority of cases decided under . . . Article 9 are unforgiving of even minimal errors [for the name of the debtor],' *In re John's Bean Farm of Homestead, Inc.*, 378 B.R. 385, 391 (Bankr. S.D. Fla. 2007), a filing under the ERS name is not such an error.").

Next, Petitioners assert that the First Circuit ignored other courts by adopting a "reasonable creditor" test, citing various cases explaining that the UCC is intended to provide objective rules. *See* Pet. 18. Amicus, similarly, asserts that the First Circuit test "[r]esort[s] to what any given 'reasonable' filer might subjectively conclude was *a* correct name for the debtor" Am. Br. 4. Not so. The First Circuit simply

followed the instructions in the UCC itself to identify the name of the organization from the "public organic record." Here, as explained above, the First Circuit found that the public organic record effectively offered two names—the English document translated ERS's name two different ways, even though the original Spanish document used only one name. In these circumstances, the First Circuit concluded that ERS remained a valid name, a conclusion that was only strengthened by its acknowledgment that any reasonable creditor would have read the public organic record that way. Contrary to Amicus's assertion, no individual or entity's subjective perspective was considered by the First Circuit. Petitioners cite no cases adopting a different standard for interpreting the public organic record where it is arguably inconsistent in the manner presented by the facts of this case.

In short, the First Circuit applied uncontroversial legal principles to a unique factual context. There is no division of authority for this Court to resolve.

III. THE FIRST CIRCUIT'S DECISION WAS CORRECT.

Finally, the First Circuit correctly resolved the question presented. The 2013 Amendment to the ERS Enabling Act did not change ERS's name, and the name used on the Amended Financing Statements was a correct name under Puerto Rico's UCC. Further, Respondents will prevail in this case on independent grounds regardless of the resolution of the question presented, further undermining the need for this Court's review.

A. As The First Circuit Held, The Amended Financing Statements Were Effective Under The UCC.

The Petition challenges the First Circuit's conclusion that "[b]ecause the Financing Statement Amendments used 'Employees Retirement System of the Government of the Commonwealth of Puerto Rico,' they contained an appropriate name of the debtor under the Commonwealth's Article 9." Pet.App. 52a (citing P.R. Laws Ann. tit. 19, §§ 2322(a), 2323(a)(1), 2404(3)(B)). That conclusion was correct.

As explained above, Puerto Rico's Article 9 requires a financing statement to "provide[] the name that is stated to be the registered organization's name on the public organic record most recently filed with or issued or enacted by the registered organization's jurisdiction of organization which purports to state, amend, or restate the registered organization's name" to be effective. P.R. Laws Ann. tit. 19, § 2323(a)(1). Both parties and the First Circuit agree that this is the relevant standard. Both parties and the First Circuit also agree that the 2013 Amendment to the ERS Enabling Act was the most recent public organic record at the time the Amended Financing Statements were filed.[6] The sole question, then, is whether the 2013 Amendment rendered the name "the Employees Retirement System of the Government of the

[6] Amicus incorrectly asserts that "[t]he Opinion found, and the parties do not appear to dispute, that the 'public organic record' here is the 2014 English translation of the amendment to the 1951 Enabling Act. App. 45a." Am. Br. 8 n.5. The relevant public organic record is the 2013 Amendment, which was officially translated into English in 2014. *See* Pet.App. 44a.

Commonwealth of Puerto Rico" or "ERS" an improper name for UCC filing purposes.

The First Circuit correctly decided that it did not. As that court explained, the "official English translation [of the amendment], on its face, repeatedly translates the exact same Spanish name in two different ways" and the "Spanish language at issue did not change in the 2013 amendment." Pet.App. 46a & n.20. Further, "Retirement System for Employees" is used only three times in the translation, *id.* at 47a (citing P.R. Laws Ann. tit. 3 §§ 761, 763(1), 779), while "Employees Retirement System" is used more than thirty-five times. *Id.* at 48a (citing P.R. Laws Ann. tit. §§ 761, 761a, 762, 763, 764, 765, 765a, 766, 766a, 766b, 766c, 766d, 768, 768a, 769, 769a, 770, 770a, 771, 772, 773, 774, 775, 776, 777, 778, 779, 779a, 779b, 779c, 781a, 782, 783, 784, 785, 786, 786a, 786b, 787, 788). The sections using "Employees Retirement System" include the primary definition of "System" in the translation. *Id*. (citing P.R. Laws Ann. tit. § 763(36)).

Further, there is no evidence that the Puerto Rico Legislative Assembly intended to change the English name for ERS. As the First Circuit explained, the "Spanish language at issue did not change in the 2013 amendment." *Id*. at 46a n.20. And the law of Puerto Rico provides that "when the legislation originated in Spanish 'the Spanish text shall be preferred to the English.'" *Id*. at 48a (quoting P.R. Laws Ann. tit. 31, § 13). The Statement of Motives to the 2013 Amendment, which explains "[e]ach one of the amendments" made by the legislation, also provides no evidence of an intention to change the system's name. *Id*. at 49a (quoting Law No. 3 of April 4, 2013, 2013 P.R. Laws 58). This absence of legislative intent to

change the name is particularly significant given that, for over 60 years prior to the 2013 Amendment, ERS had consistently used the phrase "Employees Retirement System." *Id*. (citing Law No. 447 of May 15, 1951, 1951 P.R. Laws 1298 ; P.R. Laws Ann. tit. 3, § 761 (1988); *id*. (2006), *id*. (2011)).

Because the Puerto Rico Legislative Assembly had no intention of changing ERS's name, holding otherwise would empower Puerto Rico administrative employees charged with translating legislative documents to subvert the legislative process. Here, the English translation, issued more than 10 months after the 2013 Amendment was passed, was never presented to the Puerto Rico Legislative Assembly and never enacted into law. Rather, a translator certified to the Secretary of State only that the amendment "had been translated from Spanish to English and that the English version is correct." Act No. 3-2013, at Certification (English translation). To conclude that the translator somehow possessed the unilateral authority to effect a name change for ERS not contemplated by the Legislative Assembly is, of course, antithetical to the concept of representative democracy.

Nothing about Puerto Rico's implementation of the UCC requires this result. The UCC simply instructs filers, creditors, and courts to look to the public organic record to ascertain a debtor's name. Where, as here, that record is arguably inconsistent, the UCC does not require a court to choose an obscure name of unclear accuracy over the long-established name also used in the same organic record.

In short, "there is no doubt that the ERS name was the official and only name of the System for over sixty years." Pet.App. 51a. The First Circuit correctly held that a single English translation's inconsistent use of a different name, despite the Legislative Assembly's continued use of the same Spanish name, did not render the name "ERS" improper for purposes of the UCC.

B. Petitioners Cannot Prevail In This Case Regardless Of The Resolution Of The Question Presented.

This case is particularly unworthy of the Court's review given that, even if Petitioners prevail on the question presented, Respondents will nonetheless prevail on remand on a number of independent grounds, including the following, among others.

First, regardless of whether its name in fact changed in 2013 or 2014, ERS is bound by its prior judicial admissions that its name is ERS. It is axiomatic that a "party's assertion of fact in a pleading is a judicial admission by which it normally is bound throughout the course of the proceeding." *Pruco Life Ins. Co. v. Wilmington Tr. Co.*, 721 F.3d 1, 11 (1st Cir. 2013) (internal quotation marks omitted). Thus, where, as here, one party asserts a fact in a pleading, "that plaintiff should not be allowed to contradict its express factual assertion in an attempt to avoid summary judgment." *Schott Motorcycle Supply, Inc. v. Am. Honda Motor Co.*, 976 F.2d 58, 61 (1st Cir. 1992).

In its complaint in this adversary proceeding, ERS alleged that it was "the Employees Retirement System of the Government of the Commonwealth of Puerto Rico." Pet.App. 50a. The Respondents' counterclaims

likewise identified the retirement system as "ERS," and ERS admitted this allegation in its answer. *Id.* And ERS has repeatedly referred to itself as "ERS" in court filings (including its Title III Petition, its Bar Date Order, and briefing) and has otherwise verified under penalty of perjury that documents using the name "Employees Retirement System of the Government of the Commonwealth of Puerto Rico (ERS)" were "true and correct." *Id.* at 50a-51a. Having admitted that its name is, in fact, ERS, ERS is precluded from taking a different position now. *See, e.g., Schott*, 976 F.2d at 61.

Second, any purported change in ERS's name is irrelevant because ERS acquired substantially all of the Pledged Property before it occurred. Under Puerto Rico's Article 9, "[i]f the name that a filed financing statement provides for a debtor becomes insufficient as the name of the debtor . . . so that the financing statement becomes seriously misleading . . . the financing statement *is effective* to perfect a security interest in collateral acquired by the debtor *before*, or within four months after, the filed financing statement becomes seriously misleading." P.R. Laws Ann. tit. 19, § 2327(c)(1) (emphasis added); P.R. Laws Ann. tit. 19, § 2152(7) (2008) (same). In other words, for all property acquired by a debtor before it changes its name, Article 9 absolves creditors with a security interest in that property from any duty to monitor the continued identity of the debtor. Consistent with this statutory text, a debtor's name change only affects the effectiveness of a financing statement if that financing statement purports to announce a security interest in property acquired by the debtor more than four months after it changed its name. A financing

statement announcing a security interest in property acquired *before the name change* can be filed with the debtor's original name at any time, including after the name change occurred. Any other interpretation would read the present tense phrase "is effective" out of the statute altogether.

ERS acquired materially all of the Pledged Property subject to Respondents' liens long before the 2013 Amendment to the ERS Enabling Act. Thus, Puerto Rico law imposed no obligation to file a financing statement using ERS's "new" name to perfect the liens and security interests. To the contrary, any filing which otherwise met the requirements of Puerto Rico's UCC "is effective" to perfect those interests. The Amended Financing Statements, either individually or taken together with the 2008 financing statements, are such filings regardless of whether ERS's name changed in 2013 or 2014.

In any event, the fact that financing statements remain effective as to collateral acquired before a name change means that anyone performing a search "would have had to search under [the ERS name] to find prior liens even if the System's name did change in 2014." Pet.App. 51a (citing P.R. Laws Ann. tit. 19, § 2327(c)). For this reason alone, Amicus's concerns regarding increased search costs for creditors as a result of the First Circuit's opinion are completely misplaced. No competent creditor would have failed to search under ERS even if the name had changed, so the First Circuit's decision creates absolutely no additional burden for searchers.

CONCLUSION

The petition for certiorari should be denied.

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