P.R.O.M.E.S.A's STAY IN CIVIL RIGHTS CASES: *IN PRAXIS* VIEW OF VIOLATIONS TO PUERTO RICANS' CONSTITUTIONAL FUNDAMENTAL RIGHTS

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I. Introduction

Jean Baudrillard, in *Le Système des objets*[1] said: "[c]redit brings us back to a situation characteristic of feudalism, in which a portion of labor is owed in advance, as serf labor, to the feudal lord." Puerto Rican Government dependency in "credit over credit over credit" –and so on–, with unreal economic growth, all dependable of the United States imports and creditors, has led us to something worst; a new era of colonial-feudalism.

As regrettably Jean Baudrillard adds; there is a difference for our system, unlike feudalism, it reposes on complicity: modern consumers spontaneously embrace and accept the unending constraint that is imposed on them.[2] As such, our neoliberal

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[1] Jean Baudrillard, Le Système des objets 160, (Verso, ed., 1996) («The System Of Objects», English translation by James Benedict). *Originale,* Jean Baudrillard, Le Système des objets, (Gallimard ed., 1968).

[2] *Id.*

society is a growing cancer that gets bigger by the complicity of vulture creditors, together with the Puerto Rico and the U.S. Governments who have been perpetuating this economic and fiscal crisis. And, for a better understanding, this scenario: local government using debt "guaranteed by Puerto Rico's Constitution" to gain votes, with vulture "bonds" to finance said promises from the local government, with no regulations from the federal government –just like what happened in Wall Street with mortgages bubbles–, and one can see the result that is inevitable, an unpayable debt. Not from a county or a city like Detroit, but from a non-incorporated territory that had two recent referendums in which "statehood" won, but has never been granted although the current government is pro-statehood.

As such, a harsh colonial-feudalism example occurred on June 30, 2016, when Congress enacted the Puerto Rico Oversight, Management, and Economic Stability Act ("P.R.O.M.E.S.A.")[3], a bankruptcy-like statute designed to address the impending insolvency and the "humanitarian crisis" induced by it.[4] Surprisingly enough, a survey[5] at that time demonstrated that most residents in Puerto Rico supported the P.R.O.M.E.S.A. initiative. In sum, P.R.O.M.E.S.A. establishes a Financial Oversight and Management Board ("the Board") to "provide a method for the covered territory to achieve fiscal responsibility and access to the capital markets."[6] Title III creates a mechanism to allow the Board to restructure and adjust the Commonwealth's debt obligations.[7] In enacting P.R.O.M.E.S.A., Congress instituted a stay of all creditor litigation against the Commonwealth to allow a litigation free negotiation period.[8] While the P.R.O.M.E.S.A. stay is temporary but indefinite, its expiration is irrelevant, since then the automatic stay provisions of the Bankruptcy Code would get in.[9]

Now, what is happening with all civil rights cases brought forth, that can be filed under the Federal Civil Rights Act of 1964, 42 U.S.C. Section 1983? Believe it or not, P.R.O.M.E.S.A. allows the Commonwealth to automatically stay all civil rights litigation against it. One of the main reasons of P.R.O.M.E.S.A.'s creation is not only because of Puerto Rico's irresponsible Government transactions, it is also because the Bankruptcy Code does not allow a State to invoke Chapter 9 bankruptcy protection.

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[3] Puerto Rico Oversight, Management, and Economic Stability Act, 48 U.S.C. §§ 2102–2241 (2016).

[4] *See* Brief for Appellant, at 6, Pabón Ortega v. Llompart Zeno, No. 16-1599 (1st Cir. Jan. 31, 2018). *See generally* Peaje Inv. LLC v. García–Padilla, 845 F.3d 505, 509 (1st Cir. 2017) (discussing the statute's purpose).

[5] Keila López Alicea, *Intriga El Apoyo De La Junta De Control Fiscal*, EL NUEVO DÍA, (Aug. 19, 2016), https://www.elnuevodia.com/noticias/locales/nota/intrigaelapoyoalajuntadecontrolfiscal-2232357/. *See also Noticentro TV (18 feb 2018) [Violación a Derechos Civiles por PROMESA],* YOUTUBE (Feb. 18, 2018), https://youtu.be/bDr_MtUWGHU.

[6] 48 U.S.C. § 2121. *See also* Brief for Appellant, *supra* note 4, at 6-7.

48 U.S.C §§ 2161–77. *See also* Brief for Appellant, *supra* note 4, at 7.

[8] *Id*. § 405(b). *See also* Brief for Appellant, *supra* note 4, at 7.

[9] *Id*. § 2161(a) (incorporating 11 U.S.C. §§ 361-62 into Title III proceedings).

P.R.O.M.E.S.A., on the other hand, treats the Commonwealth as a potential debtor eligible to participate in the formal debt restructuring process. In doing so, as Professor Carlos Del Valle-Cruz says; "Congress gave the Commonwealth a mutant power alien to any State: the capacity to automatically stay for indefinite periods of time all litigation that seeks to establish liabilities against the Commonwealth. The Court, however, exceeded its hermeneutical authority, when it included § 1983 actions within PROMESA's grasp".[10] Quite simple, like Honorable Judge Torruella has stated, this "territorial federalism" without political power, and as such, is not federalism.[11] Puerto Rico is back to the "insular cases", and our rights are not equal to the U.S. citizens who reside in the mainland.

II. Puerto Rico's exclusion from the Bankruptcy Code: P.R.O.M.E.S.A.

History tells us that from 1938 to 1984, Puerto Rico enjoyed the protections of the U.S. Bankruptcy Code. This safeguard was blatantly removed in 1984, eliminating the power that Puerto Rico once had been granted by Congress to authorize its municipalities (read, public utilities) to file for Chapter 9 relief.[12] As a matter of fact, First Circuit Court Judge Torruella in *Franklin Cal. Tax-Free Trust v. Commonwealth*,[13] in concurrence opinion held that said exclusion of Puerto Rico by reason of territorial status violates the equal protection clause.

Nevertheless, Congress has failed to enact proposed legislation reauthorizing Puerto Rico to approve municipal bankruptcies. This situation, in turn, sparked an astronomic spike in bondholder's liability, such that Puerto Rico's accumulated debts have long surpassed its capacity to pay. At present, Puerto Rico's present public debt is approximately seventy-two billion, not counting the approximately

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[10] *See also* Brief for Appellant *supra* note 4, at 7.

[11] *See* Juan R. Torruella, *Why Puerto Rico Does Not Need Further Experimentation with Its Future: A Reply to the Notion of "Territorial Federalism"*, 131 HARV. L. REV. F. 65 (Jan. 26 2018) https://harvardlawreview.org/2018/01/a-reply-to-the-notion-of-territorial-federalism/ (P.R.O.M.E.S.A. represents a return to the Foraker era).

[12] *See,* Brief for Appellant, *supra* note 4, at 7. Pabón Ortega v. Llompart Zeno, No. 16-1599 (1st Cir. Jan. 31, 2018) (citing Commonwealth of P.R., Financial Information and Operating Data Report (2016)); *Congressional Task Force On Economic Growth in Puerto Rico*, U.S. SENATE (Dec. 20, 2016) https://www.finance.senate.gov/imo/media/doc/Bipartisan%20Congressional%20Task%20Force%20on%20Economic%20Growth%20in%20Puerto%20Rico%20Releases%20Final%20Report.pdf; Anne O. Krueger, Ranjit Teja & Andrew Wolfe, *Puerto Rico-– A Way Forward* (2015) DEVELOPMENT BANK OF PUERTO RICO, http://www.bgfpr.com/Documents/Puertoricoawayforward.Pdf; *Addressing Puerto Rico's Economic And Fiscal Crisis And Creating A Path To Recovery: Roadmap For Congressional Action* OBAMA WHITE HOUSE (Oct. 21, 2015), https://obamawhitehouse.archives.gov/sites/default/files/roadmap_for_congressional_action___puerto_rico_final.pdf; D. Andrew Austin, *Puerto Rico's Current Fiscal Challenges* FAS.ORG (June 3, 2016) https://fas.org/sgp/crs/row/R44095.pdf.

[13] 805 F.3d 322, 345-56 (1st Cir. 2015).

$164 billion that Puerto Rico's government has in deficits to its public health system and government employee pension plans.[14]

III. Pueblo v. Sánchez Valle:[15] the naked colonialism

In *Pueblo v. Sánchez Valle*, Luis Sánchez and Jaime Gómez each sold a gun to an undercover police officer and pled guilty to federal gun trafficking violations. Despite the federal conviction, the Commonwealth of Puerto Rico indicted them for selling a firearm without a permit in violation of the Puerto Rico Arms Act of 2000. They were later convicted of an analogous federal law based on the same conduct. Luis Sánchez and Jaime Gómez moved to dismiss the commonwealth charges on double jeopardy grounds. The trial court dismissed the charges, but the court of appeals reversed. The Puerto Rico Supreme Court[16] affirmed, holding that double jeopardy applied.[17]

The U.S. Supreme Court affirmed said holding, by finally concluding that dismissal of the pending Commonwealth charges was proper under the dual-sovereignty carve-out from the Double Jeopardy Clause, U.S. Const. amend. V, because the Double Jeopardy Clause barred both Puerto Rico and the United States from prosecuting a single person for the same conduct under equivalent criminal laws; and that the Commonwealth and the United States were not separate sovereigns because the ultimate source of Puerto Rico's prosecutorial power is the federal government.

Justice Breyer filed a dissenting opinion by which Justice Sotomayor joined.[18] Together:

> The dissenting justices took issue with the Court's sovereignty analysis and with its failure to consider the context of the 1952 Puerto Rico Constitution. First, under the Court's analysis, the source of power for the Indian tribes, the 37 states to join the Union after the constitution, or even the Philippines, likewise ultimately stems from Congress. Second, the context surrounding the creation and approval of the Puerto Rico Constitution illustrates that both Congress and Puerto Rico intended the grant of a right of self-government to Puerto Rico.[19]

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[14] *See* Brief for Appellant, *supra* note 4, at 8; Pabón Ortega v. Llompart Zeno, No. 16-1599 (1st Cir. Jan. 31, 2018) (citing Torruella, *supra* note 11 at IV. (The Fourth Experiment: Puerto Rico's Financial Fiasco and Congress's PROMESA)).

[15] Pueblo v. Sánchez Valle, 136 S. Ct. 1863 (2016)

[16] Pueblo v. Sánchez Valle, 192 DPR 594 (2015).

[17] Cam Barker et al., *U.S. Supreme Court Update*, 28 APP. ADVOC. 451, 462-63 (2016).

[18] *Id*. at 463.

[19] *Id*.

This decision certainly broke the "in a nature of a compact" paradigm of two alleged "nations" that have a "special relationship" with economic growth and success that showed to Latin America that there was a "window of democracy" in Puerto Rico. This naked truth of colonialism, was only the beginning of the actual reality: a fiscal crisis with no economic growth that is totally dependable in imports and the worst happened thereafter: P.R.O.M.E.S.A.

IV. "Quiebra Criolla": unconstitutional?

Author Natasha Lycia Ora Bannan explains in sum that, days before Puerto Rico enacted its "*quiebra criolla"* law on June 28, 2014, which allowed its municipalities and agencies to access a debt restructuring regime identical to Chapter 9 of the federal Bankruptcy Code, a hedge fund filed suit challenging the constitutionality of the law and Puerto Rico's ability to implement its own domestic version of bankruptcy protections.[20] This "quiebra criolla" law caused the desperate move of other hedge funds to file and join the suit against Puerto Rico.[21]

The case finally went all the way up to the U.S. Supreme Court. In *Puerto Rico v. Franklin Cal. Tax-Free Trust*,[22] the U.S. Supreme Court concluded that Congress' use of "who may be a debtor" in 11 U.S.C.S. § 101(52) was interpreted to mean that Congress intended to exclude Puerto Rico from the gateway provision delineating who was eligible to be a debtor under Chapter 9, and thus, Puerto Rico was not a state for purposes of 11 U.S.C.S. § 109(c) and could not perform the single function of the states under that provision. In addition, the U.S. Supreme Court concluded that Puerto Rico remained a state for other purposes related to Chapter 9, including 11 U.S.C.S. § 903(1), and that provision barred Puerto Rico from enacting its own municipal bankruptcy scheme to restructure the debt of its insolvent public utilities companies. And, due to this decision, P.R.O.M.E.S.A. was enacted on June 30, 2016.

V. Are exceptions to P.R.O.M.E.S.A., real options?

A. In general

Section 404 of P.R.O.M.E.S.A. reads as follows:

> (b) IN GENERAL
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> .—Except as provided in subsection (c) of this section, the establishment of an Oversight Board for Puerto Rico (i.e., the enactment

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[20] Natasha Lycia Ora Bannan, *Puerto Rico Odious Debt: The Economic Crisis of Colonialism*, 19 CUNY L. REV. 287, 301 (2016) (citing Franklin Cal. Tax-Free Tr. v. Puerto Rico*,* 85 F. Supp. 3d 577 (D.P.R. 2015)).

[21] Bannan, *supra* note 20, at 301 (citing Franklin Cal. Tax-Free Tr., 85 F. Supp. 3d at 584-85, nn.1-2).

[22] 136 S. Ct. 1938, 195 L. Ed. 2d 298 (2016).

of this Act) in accordance with section 101 operates with respect to a Liability as a stay, applicable to all entities (as such term is defined in section 101 of title 11, United States Code), of—

(1) the commencement or continuation, including the issuance or employment of process, of a judicial, administrative, or other action or proceeding against the Government of Puerto Rico that was or could have been commenced before the enactment of this Act, or to recover a Liability Claim against the Government of Puerto Rico that arose before the enactment of this Act;

(2) the enforcement, against the Government of Puerto Rico or against property of the Government of Puerto Rico,

of a judgment obtained before the enactment of this Act;

(3) any act to obtain possession of property of the Government of Puerto Rico or of property from the Government of Puerto Rico or to exercise control over property of the Government of Puerto Rico;

(4) any act to create, perfect, or enforce any lien against property of the Government of Puerto Rico;

(5) any act to create, perfect, or enforce against property of the Government of Puerto Rico any lien to the extent that such lien secures a Liability Claim that arose before the enactment of this Act;

(6) any act to collect, assess, or recover a Liability Claim against the Government of Puerto Rico that arose before the enactment of this Act; and

(7) the setoff of any debt owing to the Government of Puerto Rico that arose before the enactment of this Act against any Liability Claim against the Government of Puerto Rico.

(c) STAY NOT OPERABLE

.—The establishment of an Oversight Board for Puerto Rico in accordance with section 101 does not operate as a stay—

(1) solely under subsection (b)(1) of this section, of the continuation of, including the issuance or employment of process, of a judicial, administrative, or other action or proceeding against the Government of Puerto Rico that was commenced on or before December 18, 2015; or

(2) of the commencement or continuation of an action or proceeding by a governmental unit to enforce such governmental unit's or organization's police and regulatory power, including the enforcement of a judgment other than a money judgment, obtained in an action or proceeding by the

> governmental unit to enforce such governmental unit's or organization's police or regulatory power.[23]

In several cases, the U.S. Supreme Court recognizes the police power of public services corporations like in the energy public corporations. For example, in *Arkansas Electric Cooperative Corp. v. Arkansas Public Service Commission,*[24] the U.S. Supreme Court held that; "[t]he regulation of utilities is one of the most important of the functions traditionally associated with the police power of the states." In *Pacific Gas & Electric Co. v. State Energy Resources Conservation & Development Commission*,[25] the U.S. Supreme Court adds that; "[n]eed for new power facilities, their economic feasibility, and rates and services, are areas that have been characteristically governed by the States."[26] At the same time, however, in *Arkansas Electric* the U.S. Supreme Court concluded that the "[p]roduction and transmission of energy is an activity particularly likely to affect more than one State, and its effect on interstate commerce is often significant enough that uncontrolled regulation by the States can patently interfere with broader national interests."[27]

B. "Cause" for relief from stay

Similar to Section 404 of P.R.O.M.E.S.A., Section 362 of the Bankruptcy Code provides that the court may grant relief from the automatic stay to a party in interest "for cause".[28] However, like P.R.O.M.E.S.A., Section 362 does not provide concrete guidance on how that term ought to be construed and applied in practice.[29] In reviewing motions to vacate the Bankruptcy Code's automatic stay pursuant to Section 362(d) the United States Courts of Appeals have consistently found that the decision to grant that relief is largely discretionary with the court.[30] To help guide

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[23] 48 U.S.C. § 2194.

[24] 461 U.S. 375, 377 (1983).

[25] 461 U.S. 190, 205 (1983); *see also* Central Hudson Gas & Electric Corp. v. Public Service Commission, 447 U.S. 557, 569 (1980) ("The state's concern that rates be fair and efficient represents a clear and substantial governmental interest.").

[26] *Pacific Gas*, 461 U.S. at 205.

[27] *Arkansas Electric*, 461 U.S. at 377.

[28] United States Bankrupcty Code, 11 U.S.C. § 362(d)(1).

[29] Peaje Invs. LLC v. Garcia-Padilla, Civil No. 16-2365; Civil No. 16-2384; Civil No. 16-2696, 2016 U.S. Dist. LEXIS 153711 at *12 (DPR Nov. 2, 2016).

[30] *Id.* (citing In re Myers, 491 F.3d 120, 130 (3d Cir. 2007) (commenting on the "wide latitude accorded to the Bankruptcy Court to balance the equities when granting relief from the automatic stay.")); Brown v. Chesnut (*In re Chesnut*), 422 F.3d 298, 303-04 (5th Cir. 2005) (noting that 11 U.S.C. § 362 gives the bankruptcy court broad discretion to vacate the automatic stay and "flexibility to address specific exigencies on a case-by-case basis"); Claughton v. Mixson, 33 F.3d 4, 5 (4th Cir. 1994) (noting that Congress "has granted broad discretion to bankruptcy courts to lift the automatic stay" and that "the

their analysis of whether to enforce or vacate the stay, some courts, including those in this district, have relied upon a laundry list of assorted factors.[31] In the end, however, the process of evaluating whether there is sufficient "cause" to vacate the automatic stay in bankruptcy cases requires the court to engage in an equitable, case-by-case balancing of the various harms at stake.[32]

Suffice is to say that automatic stay imposed by section 405(b) of P.R.O.M.E.S.A. is not absolute in nature. No law or right can be absolute. Even tough Congress unambiguously unilaterally imposed their view that the stay is needed to "provide the Government of Puerto Rico with the resources and the tools it needs to address an immediate existing and imminent crisis," P.R.O.M.E.S.A. section 405(n)(1), it also appeared to anticipate that certain circumstances might justify relief from the stay's significant and static effects. It therefore included a form of safety zone in section 405(e) of P.R.O.M.E.S.A. to allow certain holders of "liability claims" against the Government of Puerto Rico to proceed with their actions, provided that they could effectively demonstrate "cause" for doing so. But, is claiming constitutional rights under the Federal Civil Rights Act by Puerto Rican residents sufficient to be a "cause" for not applying the stay?

P.R.O.M.E.S.A. does not successfully indicate what, exactly, a party in interest must do to establish "cause" for relief from the automatic stay. Nevertheless, it is the

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courts must determine when discretionary relief is appropriate on a case-by-case basis."); Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 814 F.2d 844, 847 (1st Cir. 1987) (applying abuse of discretion standard to court's decision granting relief from the automatic stay); Matter of Holtkamp, 669 F.2d 505, 507 (7th Cir. 1982) (emphasizing that Section 362(d) "commits the decision of whether to lift the stay to the discretion of the bankruptcy judge.")

[31] Peaje Invs. LLC, 2016 U.S. Dist. LEXIS 153711, at *13 (citing Sonnax Industries, Inc. v. Tri Component Prods. Corp.). (*In re Sonnax Industries, Inc*.), 907 F.2d 1280, 1286 (2d Cir. 1990) (enumerating 12 different factors to be utilized in determining whether there is "cause" to vacate a bankruptcy stay, including the "impact of the stay on the parties and the balance of harms"); *see also* C&A, S.E. v. P.R. Solid Waste Mgmt. Auth., 369 B.R. 87, 94-95 (DPR 2007) (considering factors similar to those spelled out in *Sonnax*).

[32] Peaje Invs. LLC, 2016 U.S. Dist. LEXIS 153711, at *13-14, (citing Peerless Ins. Co. v. Rivera, 208 B.R. 313, 315 (D.R.I. 1997)). (Suggesting that cause generally exists "when the harm that would result from a continuation of the stay would outweigh any harm that might be suffered by the debtor . . . if the stay is lifted."); In re Robinson, 169 B.R. 356, 359 (E.D. Va. 1994) (noting that, "in deciding whether 'cause' has been shown, the bankruptcy court must balance the potential hardship that will be incurred by the party seeking relief if the automatic stay is not lifted, against the potential prejudice to the debtor" if it is.); In re Turner, 161 B.R. 1, 3 (Bankr. D. Me. 1993) ("Cause may exist for lifting the stay whenever the stay harms the creditor and lifting the stay will not unduly harm the debtor."); In re Harris, 85 B.R. 858, 860 (Bankr. D. Colo. 1988) (holding that vacating the automatic stay is appropriate where "no great prejudice will result to the debtor" and "the hardship to the creditor resulting by continuing the stay considerably outweighs the hardship to the debtor by modification of the stay."); In re Opelika Mfg. Corp., 66 B.R. 444, 448 (Bankr. N.D. Ill. 1986) ("Cause to lift the stay exists when the stay harms the creditor and lifting the stay will not unjustly harm the debtor or other creditors.").

author's position that a case under the Federal Civil Rights Act must not be stayed, since said civil action is against "state actors" in their individual capacities, not against the Commonwealth of Puerto Rico itself. Now, P.R.O.M.E.S.A. leaves the task of defining the boundaries of that specific term to the discretion of the courts. Thus, before it can proceed to review any arguments and evidence presented by the parties involved, the district court must first attempt to clarify the meaning and parameters of the governing principle of "for cause shown", within the meaning and purpose of the Federal Civil Rights Act to Puerto Rican residents.

As summarized above, Section 405 of P.R.O.M.E.S.A. was patterned on the automatic stay provision of the United States Bankruptcy Code in 11 U.S.C. § 362. Indeed, the two provisions are, in some respects, nearly identical. Similar to section 405 of P.R.O.M.E.S.A., section 362 of the United States Bankruptcy Code provides that courts may grant relief from the automatic stay to a party in interest "for cause."[33] Also like PROMESA, however, section 362 does not provide concrete guidance on how that term ought to be construed and applied in practice. As set forth in the following decisions, the United States courts of appeals reviewing motions to vacate the Bankruptcy Code's automatic stay pursuant to section 362(d) have consistently found that the decision to grant that relief is largely discretionary with the court.

For example, *In re Myers*,[34] the Third Circuit Court of Appeals used the term "wide latitude" according to the Bankruptcy Court to balance the equities when granting relief from the automatic stay. Likewise, in *Brown v. Chestnut* (*In re Chestnut*),[35] the Fifth Circuit noted that 11 U.S.C. § 362 gives the bankruptcy court broad discretion to vacate the automatic stay and "flexibility to address specific exigencies on a case-by-case basis". Similarily, in *Claughton v. Mixson,*[36] the Fourth Circuit concluded that Congress "has granted broad discretion to bankruptcy courts to lift the automatic stay" and that "the courts must determine when discretionary relief is appropriate on a case-by-case basis."

In the case of *In re Ulpiano Unanue-Casal*,[37]—a district court decision that the First Circuit affirmed—the court took guidance from the following factors:

> (1) Whether the relief will result in a partial or complete resolution of the issues; (2) The lack of any connection with or interference with the bankruptcy case; (3) Whether the non-bankruptcy proceeding involves the

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[33] 11 U.S.C. § 362(d)(1).

[34] 491 F.3d 120, 130 (3d Cir. 2007).

[35] 422 F.3d 298, 303-04 (5th Cir. 2005).

[36] 33 F.3d 4, 5 (4th Cir. 1994). *See also* Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 814 F.2d 844, 847 (1st Cir. 1987).

[37] 159 B.R. 90, 95-96 (DPR 1993) *aff'd* by 23 F.3d 395 (1st Cir. 1994). The court also relied on two additional factors; namely, the misconduct of the debtor and whether the creditor has a probability of prevailing on the merits. *Id*. at 96.

> debtor as a fiduciary; (4) Whether a specialized tribunal has been established to hear the particular cause of action and that tribunal has the expertise to hear such cases; (5) Whether the debtor's insurance carrier has assumed full financial responsibility for defending the litigation; (6) Whether the action primarily involves third parties; (7) Whether litigation in another forum would prejudice the interests of other creditors, the creditors' committee or other interested parties; (8) Whether the judgment claim arising from the foreign action is subject to equitable subordination under Section 510(c); (9) Whether movant's success in the foreign proceeding would result in a judicial lien avoidable by the debtor under Section 522(f); (10) The interest of judicial economy and the expeditious and economical determination of litigation for the parties; (11) Whether the non-bankruptcy proceedings have progressed to the point where the parties are prepared for trial; and (12) The impact of the stay on the parties and the "balance of hurt."[38]

As can be noted, "courts must determine whether discretionary relief is appropriate on a case-by-case basis",[39] but regarding civil rights cases, the U.S. Constitution is way ahead of the "lift of stay" exception explained above in Section 405 of P.R.O.M.E.S.A.

VI. Recommendations

As it is known, the Civil Rights Act, specifically Section 1983 of Title 42, "is not itself a source of substantive rights," but merely provides "a method for vindicating federal rights elsewhere conferred." "The first step in any such claim is to identify the specific constitutional right allegedly infringed".[40] Authors *Ivan E. Bodensteiner* and *Rosalie Berger Levinson*,[41] explain that while preparing the caption and pleadings in a Section 1983 complaint, plaintiff should care to designate whether government officials are being sued in their official or individual capacity. When the plaintiff names an official in his individual capacity, she seeks "to impose personal liability upon a government official for actions he takes under the color of state law." When officials are sued in their personal capacity, they may raise qualified and/or absolute immunity as a defense. When a government official is sued in his official capacity,

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[38] *Id.* at 95-6.

[39] In re Laguna Assocs. Ltd. P'ship, 30 F.3d 734, 737 (6th Cir. 1994).

[40] José Enrico Valenzuela-Alvarado, *Federal Civil Rights In Puerto Rico, General Pre Trial Theory And Praxis In The New Century*, 44 REV. JUR. UIPR 197, 200 (2010) (citing *Albright v. Oliver,* 510 U.S. 266, 271 (1994)).

[41] Valenzuela-Alvarado, *supra* note 40, at 200 (citing IVAN E. BODENSTEINER & ROSALIE BERGER LEVINSON, STATE AND LOCAL GOVERNMENT CIVIL RIGHTS LIABILITY § 1:8 (2009)).

this is the equivalent to naming the government entity itself as a defendant. Where that governmental entity is a state, the plaintiff poses an absolute barrier unless the official capacity suit seeks only prospective relief. Where the governmental entity is a local or county unit, the plaintiff must establish official policy or custom.[42]

Now, what about the argument that the Government of Puerto Rico will ultimately pay any judgment against government officials in their personal capacities? The response is very simple. Act No. 104 in no way waives the Commonwealth's Eleventh Amendment immunity in such suits; because said statute explicitly states that its provisions "shall not be construed . . . as a waiver of the sovereign immunity of the Commonwealth."[43] In ***Ortíz-Feliciano v. Toledo-Dávila***,[44] the First Circuit held that the indemnification provisions of Puerto Rico law certainly do not comprise such a waiver of the Eleven Amendment Immunity. Puerto Rico's Act. No. 104 provides that the Secretary of Justice shall decide in which cases the Commonwealth shall assume representation and "subsequently, after considering the findings of the court or which arise from the evidence presented," whether it is "in order" to pay the judgment.[45] Only limited standards are provided for granting or refusing indemnification, but they go to the merits of the Secretary of Justice's decision. Nonetheless, the Eleventh Amendment issue is addressed directly by section 3085 of Act No. 104, which permits the request for indemnification in civil rights actions; it says that its provisions "shall not be construed . . . as a waiver of the sovereign immunity of the Commonwealth." The only remedy provided for reviewing the refusal of the Secretary of Justice to order indemnification is by "petition for review" before "the Superior Court" limited solely to questions of law.[46]

Based on the above discussion, recently, the U.S. District Court for the District of Puerto Rico in *Colón-Colón v. Negrón Fernández*,[47], Honorable Judge Gustavo A. Gelpí explained in this decision our main argument. In said case, Plaintiff sued José Aponte-Caro, in his official capacity as acting Secretary of the Department of Corrections of Puerto Rico; José R. Negrón-Fernández, in his individual and official capacity as Secretary of the Department of Corrections of Puerto Rico; Dr. Alina Pradere, in her individual and official capacity as former Director of Clinical Services for the Bayamón Correctional Facility; Wanda Montañez, the Superintendent of the

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[42] Valenzuela-Alvarado, *supra* note 40, at 201, (citing 1999 Laws P.R. 177, Act. No. 104 of June 29, 1955, as amended by Act No. 9 of November 26, 1977, and Act No. 12 of July 21, 1977 [hereinafter "Act No.104"]).

[43] Valenzuela-Alvarado, *supra* note 40, at 201 (citing U.S. CONST. amend. XI; CÓD. ENJ. CIV. PR arts. 12, 14, 32 LPRA §§ 3085, 3087 (2017)).

[44] 175 F.3d 37, 40 (1st Cir. 1999).

[45] Valenzuela-Alvarado, *supra* note 40, at 201 (citing CÓD. ENJ. CIV. PR art. 14, 32 LPRA § 3087 (2017)).

[46] *Id*.

[47] No. 14-1300, 2018 WL 2208053 (DPR May 14, 2018).

Bayamón Correctional Facility; Gladys S. Quiles-Santiago, the Medical Director of the Bayamón Health Clinical Services Facility; and Correctional Health Services Corp., a non-profit corporation. Plaintiff filed claims under the Eighth Amendment to the U.S. Constitution and Article 1802 of the Puerto Rico Civil Code seeking compensatory damages and prospective injunctive relief.[48] The Commonwealth assumed Defendants Aponte-Caro and Negrón-Fernández's representation under Law 9.[49] Dr. Pradere, the other official sued in her personal capacity, was never served with the complaint.[50] Montañez was served and defaulted.[51] Finally, Quiles-Santiago and Correctional Health Services Corporation were represented by the same counsel.[52] Hence, the only government official sued in his individual capacity that the Commonwealth represented was Defendant Negrón-Fernández.[53]

After almost three years, Plaintiff settled his claims.[54] On March 30, 2017, Plaintiff informed the Court that he had "accepted the $50,000.00 settlement offer tendered by the defendants."[55] He did not inform how Defendants split the amount or other settlement terms.[56] On April 19, the Court ordered Defendants to pay $50,000.00 within ninety days "as per the settlement terms."[57] Two weeks later, on May 3, 2017, Puerto Rico's Financial Oversight Board filed a petition on behalf of Puerto Rico under Title III of P.R.O.M.E.S.A.[58] After the Commonwealth filed for Title III protection, on May 31, Defendants Correctional Health Services, Corp. and Quiles-Santiago deposited $40,000, and stated in their motion that the Commonwealth had agreed to pay the remaining $10,000.[59] The Commonwealth did not object to this statement, but months passed and it did not deposit the remaining $10,000.[60]

After other procedural steps, as of the date of the Opinion and Order rendered on May 14, 2018, the remaining $10,000.00 have not been deposited. Due to that, Honorable Judge Gustavo A. Gelpí concluded the following:

> First, the Court disagrees that PROMESA contemplated the stay of suits against government officials in their personal capacity, much less the

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[48] *Id.* at *2.
[49] *Id*. at *3.
[50] *Id*.
[51] *Id*.
[52] *Id*.
[53] *Id*.
[54] *Id*.
[55] *Id*.
[56] *Id*.
[57] *Id*.
[58] *Id*.
[59] *Id*. at *3-4.
[60] *Id*. at *4.

> enforcement of settlements against these officials entered before Title III. As discussed above, the "debtor" in a case between a plaintiff and a government official sued in his personal capacity is the government official. If the Commonwealth opts to represent the government official under Law 9, the Commonwealth is a "debtor" of the government official, not the plaintiff. Even if the practical arrangement has been for the Commonwealth to pay the plaintiff directly on the government official's behalf, the practical arrangement does not change the underlying structure. The party indebted to the plaintiff is the government official, not the Commonwealth representing the government official.
>
> Second, the Court understands the public policy concern regarding recruitment, but will not second-guess the Commonwealth's public policy decisions. Here, the Commonwealth settled the case five weeks before filing the Title III petition. Unless the left hand did not know what the right hand was doing, the Court has a hard time believing that the Commonwealth did not settle this case knowing that it would file a Title III petition shortly after. The Commonwealth chose not to pay Plaintiff on Defendant Negrón-Fernández's behalf before the stay came into effect. As a result, unless the Commonwealth pays, Defendant Negrón-Fernández is personally liable to Plaintiff, and must wait in line to recover his agreed-upon indemnification from the Commonwealth. Whatever effect this may have on the Commonwealth's recruitment efforts is a matter for the Commonwealth to consider when agreeing to represent officials under Law 9 and settling on their behalf—not the Court.[61]

The above decision is very important for civil rights cases for the following reason. In Puerto Rico, Author Guillermo A. Baralt in his book, History of the Federal Court in Puerto Rico, 1899-1999,[62] explains that there was an increase in the number of cases that came before the federal court during the first half of the seventies. There is no doubt that the actions filed under the 1964 Civil Rights Act explain part of this increase regarding public employees that have been removed from their jobs by their political affiliation. As such, staying civil rights cases make the situation much worse, since it gives *carte blanche* to Puerto Rico's officials in their personal capacities to discriminate and to act against the U.S. Constitution.

Based on the above, Professor Carlos A. Del Valle Cruz recommends that the automatic stay provisions at issue here must be read in light of Section 2106, which provides that P.R.O.M.E.S.A. "shall [not] be construed as impairing or in any

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[61] *Id*. at *13-14.

[62] Valenzuela-Alvarado, *supra* note 40, at 197 (citing GUILLERMO A. BARALT, HISTORY OF THE FEDERAL COURT IN PUERTO RICO 1899-1999, 428-30 (2004)).

manner relieving a territorial government, or any territorial instrumentality thereof, from compliance with Federal laws ….”[63] He further adds that “[w]e read the reference to “compliance with Federal laws” to encompass the Constitution. Thus, neither the nature of a § 1983 action, which does not expose the Commonwealth to monetary liability, nor P.R.O.M.E.S.A.’s statutory language, warrant extending the stay provisions to § 1983 actions seeking to enforce fundamental constitutional rights […]”.[64]

The author agrees with said recommendation, and further adds that all attorneys handling civil rights cases under the Federal Civil Rights Act must be acting together as an army as one, with the core of the arguments set forth in this and other law review articles asking for the same remedy, to lift the stay as soon as possible, based on constitutional violations against U.S. citizens residing in Puerto Rico.

The author’s main concern is the following, the People of Puerto Rico cannot be treated as foreigners when we are U.S. citizens, not by choice, but by imposition. We, as Puerto Ricans, cannot tolerate that the federal judiciary validates the abuse of power of Congress and the executive branch’s creation and implementation of P.R.O.M.E.S.A. Courts must be independent, by being an apolitical branch of the government, that serves as a careful and determined check against the excesses of any Government. These are “my 2 cents”.

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[63] 48 U.S.C. § 2106.

[64] *See,* Brief for Appellant, *supra* note 4, at 15.