No. 12-445

In the
Supreme Court of the United States

ESSO STANDARD OIL COMPANY (PUERTO RICO),

PETITIONER,

v.

JESUS F. TRILLA PINERO D/B/A PUERTO RICO MOTOR COACH, ET AL.,

RESPONDENTS.

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

REPLY BRIEF OF PETITIONER

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REPLY BRIEF

Respondents' brief in opposition offers no real defense to the grave due process violations that permeated the proceedings below, and with good reason. What transpired in the Puerto Rico courts is fundamentally incompatible with the most basic tenets of due process. The proceedings cannot be defended on the merits. Respondents do not meaningfully defend the courts' imposition of $70 million in retroactive liability, because Article 5A was expressly prospective and literally impossible to comply with unless and until regulations were promulgated. They do not defend the courts' imposition of double damages, because the relevant statute precludes it and had been interpreted to authorize only actual damages for some 40 years. And they do not defend the courts' decision to allow all this under a statute that provides no cause of action at all, as the legislature clarified and the Puerto Rico Supreme Court has acknowledged.

Rather than defend the indefensible, respondents spend the bulk of their brief rehashing meritless jurisdictional arguments that Esso fully anticipated and addressed in its petition. Suffice it to say that the Puerto Rico Supreme Court's refusal to address Esso's claims based on the inadvertent transposition of two letters in opposing counsel's e-mail address—an error deemed harmless by the court in which it occurred—is part and parcel of the due process violation that occurred below, and not a jurisdictional bar to correcting it. Nor did Esso waive its due process objections, which it expressly preserved even as it attempted to have the Puerto Rico courts eliminate or avoid the due process

problems by applying statutes as written or giving Esso the benefit of judicial decisions in other cases. In short, what transpired below is not recognizable as the result of a proceeding in a jurisdiction bound by the Due Process Clause of the United States Constitution, and nothing prevents this Court from vindicating that Clause.

As the remarkable proceedings below vividly illustrate, "every generation or so a case comes along when this Court needs to say enough is enough," if the Due Process Clause "is to retain any force in" Puerto Rico. *Armour v. City of Indianapolis, Ind.*, 132 S. Ct. 2073, 2087 (2012) (Roberts, C.J., dissenting). This is that case. The Court should grant certiorari and restore the Constitution's guarantee of due process of law to litigants in the commonwealth courts of Puerto Rico.

ARGUMENT

I. No Adequate and Independent Puerto Rico Law Ground Bars this Court's Review.

Respondents contend that the Puerto Rico Supreme Court's unexplained jurisdictional denial of Esso's petition rests on an adequate and independent ground that bars this Court's review. But Esso's petition fully anticipated this attack and explained that the court's unwillingness to hear the case—which would have required the court to explain why its own caselaw recognizing the absence of any private cause of action to enforce Article 5A did not compel complete reversal—is an integral part of the due process violation, not a bar to this Court's review. Pet.32-34. "The adequacy of state procedural bars to the assertion of federal

questions ... is not within the States' prerogative finally to decide; rather, adequacy itself is a federal question." *Lee v. Kemna*, 534 U.S. 362, 375 (2002). Thus, it is for this Court to decide whether the court's refusal to hear Esso's appeal rests on a Puerto Rico rule that "is firmly established and consistently followed." *Martinez v. Ryan*, 132 S. Ct. 1309, 1316 (2012). It manifestly does not.

According to respondents, the fatal error that deprived Esso of all opportunity for review was its unwitting transposition of two letters in the e-mail address of respondents' counsel when it timely served a timely motion in the court of appeals that was ultimately denied on the merits. Resp.Br.18. That contention is every bit as implausible as it sounds. Far from resting on a "firmly established and consistently followed" rule, *Martinez*, 132 S. Ct. at 1316, the refusal to hear Esso's appeal reflects an unexplained departure from well-established Puerto Rico law, which explicitly requires courts to provide parties with an opportunity to correct inadvertent and non-prejudicial service defects. Indeed, the court of appeals—the court in which the error occurred—recognized as much by *denying* respondents' motion to dismiss Esso's motion as untimely and instead rejecting Esso's motion on the merits. Pet.App.118, 121.

Years ago, it was not uncommon for Puerto Rico courts to dismiss otherwise timely claims for inadvertent service errors. But the legislature put an end to that pointless practice when it enacted the Judiciary Act of 2003. The Act directed the Puerto Rico Supreme Court to adopt new procedural rules that, among other things, "shall"

be "aimed at reducing to a minimum the number of appeals dismissed due to procedural defects or defects in service of process," including "rules that provide a reasonable opportunity for the correction of such defects that do not affect the rights of the parties." 4 L.P.R.A. § 24w. In response to that mandate, the court adopted Rule 12.1, which instructs that "notification requirements to the parties and the Court ... should be construed so that the rejection of actions is reduced to a minimum. For duly justified reasons, *the Court of Appeals shall provide reasonable opportunity to correct defects of form or notice without prejudice to the rights of the parties.*" P.R. Ct. App. R. 12.1 (emphasis added). Rule 2 further instructs that all rules must "be construed" in accordance with "the guiding principle that legal disputes are addressed on the merits and actions are not overlooked by defects of form or notice without prejudice to the rights of the parties." P.R. Ct. App. R. 2.

This policy of expressly disfavoring "utilizing defects of form as a subterfuge to deny appellate justice to citizens with valid claims," *Fraya v. Autoridad de Carretereas Y Transportación*, 162 D.P.R. 182, 193 (2004), is the "firmly established and consistently followed" rule in Puerto Rico, *Martinez*, 132 S. Ct. at 1316; *see, e.g.*, *AAA v. HIEPPAAA*, 2011 WL 4005267, at *4 (P.R. Ct. App. June 29, 2011) (excusing notice delay caused by unintentional and non-prejudicial zip code mix-up); *Hous. Dev. Assocs., S.E. v. Aministración de la Industria*, 2006 WL 908120, at *2 (P.R. Ct. App. Mar. 30, 2006) (excusing service delay caused by unintentional and non-prejudicial address mix-up);

Morales Rodriguez v. Departamento de Educación del E.L.A., 2006 WL 548420, at *2 (P.R. Ct. App. Jan. 31, 2006) (excusing service delay caused by unintentional and non-prejudicial zip code mix-up). Because the Puerto Rico Supreme Court's treatment of Esso's petition is an unexplained and arbitrary departure from that rule, it cannot bar this Court's review. And, of course, this unexplained refusal obviated the need for the court to explain why its precedent recognizing the complete absence of a private cause of action did not compel dismissal of this case in toto. Thus, this unexplained departure is not only no bar to review, but also part and parcel of the due process violation that cries out for this Court's correction.

Tellingly, respondents make no mention of the Judiciary Act or the revised rules, and instead rely on outdated pre-2003 cases. Resp.Br.17-18. And the sole post-2003 decision they cite only reinforces the conclusion that the rigid approach applied below is neither firmly established nor consistently followed. *S.L.G. Szendrey Ramos v. F. Castillo Family Props. Inc.*, 169 D.P.R. 873 (2007), involved an appeal filed before the trial court had resolved a dispute over whether a service delay should be excused for just cause. *Id.* at 885. Rather than declare the court of appeals *permanently* without jurisdiction in that context—the necessary result if service errors irrevocably deprive Puerto Rico courts of jurisdiction—the supreme court held only that the appeal should have been dismissed as *premature*, since the trial court had not yet decided whether to excuse the non-jurisdictional service defect. *Id.*

In short, no "firmly established and consistently followed" Puerto Rico law compelled dismissal of Esso's petition. *Martinez*, 132 S. Ct. at 1316. To the contrary, the applicable post-2003 Puerto Rico law compelled a reasonable opportunity to correct any minor service errors, P.R. Ct. App. R. 12.1, and directed that "legal disputes are [to be] addressed on the merits" and "not overlooked by defects of form or notice without prejudice to the rights of the parties," P.R. Ct. App. R. 2. The unexplained departure from these principles—the result of which was to sustain a massive retroactive exaction under a statute that the Puerto Rico Supreme Court has already recognized provides no private cause of action whatsoever—is wholly "inadequate to block adjudication of [Esso's] federal claim." *Kemna*, 534 U.S. at 381. Indeed, that unexplained departure is the final consummation of the flagrant due process violation worked by the proceedings below.

II. Esso's Federal Due Process Challenge Was Both Pressed and Passed Upon Below.

Respondents' alternative contention that Esso's due process claims are inadequately preserved is equally unavailing. At the outset, respondents' objections to the extent of Esso's preservation efforts in the trial and appellate courts are beside the point, as "[i]t is irrelevant to this Court's jurisdiction whether a party raised below and argued a federal-law issue that" the court in question "actually considered and decided." *Cohen v. Cowles Media Co.*, 501 U.S. 663, 667 (1991). The court of appeals explicitly acknowledged Esso's argument that "Article 5A of Law 3, as applied,

violates the limitations of the Due Process Clause of the Fifth and Fourteenth Amendments of the Constitution of the United States" and rejected it on the merits. Pet.App.29, 47. Because "[t]here can be no question as to the proper presentation of a federal claim when the highest state court passes on it," *Raley v. Ohio*, 360 U.S. 423, 436 (1959), respondents' preservation arguments as to the lower courts necessarily fail.

And a court's decision to pass on an argument is often the best evidence that a party, in fact, pressed it. That is certainly the case here. The court of appeals did not address the federal due process question *sua sponte*, but did so because Esso plainly raised it, both in that court and in its answer on remand. *See* Dec. 3, 2003 Answer to Amended to Complaint ¶ 12. Esso also plainly preserved its federal due process rights in the Puerto Rico Supreme Court. Esso's petition for review asserted that "Art. 5A, as applied in this case, violates the constraints of the Due Process Clause of the Fifth and Fourteenth Amendments of the Constitution of the United States," and explained that "wholesalers understood that their duty did not begin until DACO approved the regulation establishing the mechanism for the transfer," which "was more than reasonable, as that is what Art. 5A literally says." Resp.App.94-95. That is the very crux of the claim Esso now presents.

Respondents complain that Esso did not specifically preserve the various strands of its due process arguments separately and framed its argument more in vagueness terms than in fair

notice or retroactivity language. But they ignore the fact that certain aspects of the massive due process violation that transpired below did not even arise until later in the proceedings. The Puerto Rico's unexplained departure from settled law and refusal even to address its no-private-cause-of-action precedent did not arise until its unexplained dismissal. The unprecedented doubling of damages did not occur until the court of appeals' decision.

Moreover, while Esso's due process objections were sometimes framed in vagueness terms, they also invoked concepts of notice. *See* Resp.App.139 ("*wholesalers did not have adequate notice* with respect to being obliged to transfer the temperature adjustment ... as of January 1, 1997"); Resp.App.101 (wholesalers were "informed of how to comply with their duty to transfer ... only *after* Regulation PM-12 came into effect"). And it could hardly be otherwise. Vague laws are problematic precisely because they fail to give notice as to how to come into compliance, *see, e.g., FCC v. Fox Television Stations, Inc.*, 132 S. Ct. 2307, 2317 (2012), and the ultimate case of vagueness is a law that provides no guidance whatsoever because it explicitly specifies that no obligation even arises unless and until regulations are promulgated directing how to comply. That is, and always has been, the gravamen of Esso's complaint. The doubling of damages and refusal to dismiss even after the Puerto Rico Supreme Court recognized the absence of any private cause of action are simply the icing on the cake that makes the due process violation too egregious to ignore.

In all events, respondents' complaints about how Esso framed its due process objections are ultimately beside the point, because however formulated the due process claim was preserved. "[O]nce a federal claim is properly presented, a party can make any argument in support of that claim; parties are not limited to the precise arguments they made below." *Lebron v. Nat'l R.R. Passenger Corp.*, 513 U.S. 374, 379 (1995).

III. Respondents Offer No Meaningful Defense of the Proceedings Below as Comporting with Due Process.

Respondents do not seriously dispute Esso's central contention that due process does not allow imposition of retroactive liability under a law that expressly provided that no obligation would arise until after the promulgation of regulations that provided a means of compliance. Nor could they, as "[t]o punish a person because he has done what the law plainly allows him to do is a due process violation of the most basic sort." *Bordenkircher v. Hayes*, 434 U.S. 357, 363 (1978). That is exactly what happened here: Notwithstanding Article 5A's express disclaimer of any obligation to transfer the temperature adjustment unless and until DACO adopted a mechanism for doing so, the Puerto Rico courts held Esso liable for failing to transfer the adjustment during the nine years *before* DACO did so. That result cannot be reconciled with the Due Process Clause or allowed to stand.

Rather than insist otherwise, respondents resort to the implausible suggestion that the notice Esso and every other wholesaler missed could have

been divined by examining the entrails of an earlier unsuccessful legislative proposal. Specifically, respondents suggest Esso should have foreseen the Puerto Rico courts' textually unsustainable conclusion that Article 5A disclaims an immediate transfer obligation only for *retailers* not *wholesalers* because an earlier version of the law that imposed the transfer obligation solely on wholesalers did not render it contingent on the adoption of implementing regulations. Resp.Br.4. The notion that an unenacted proposal provided adequate notice of an obligation expressly disclaimed by the enacted law is truly astounding—particularly when both Esso *and every other wholesaler in Puerto* missed that purportedly clear signal for nine years.

Respondents' remarkable argument also ignores that the legislature *rejected* that earlier version because it wanted wholesalers to transfer the adjustment to retailers *only if* that transfer would inure to the benefit of consumers, not retailers, and *only if* DACO established a mechanism to guarantee just that. That neither obligation would—or even could—commence until DACO did so is readily apparent from the court of appeals' explanation for rejecting Esso's substantial compliance argument: Article 5A "does not define with precision the manner of carrying out the temperature adjustment" because "the legislator [*sic*] *entrusted on DACO* the duty to approve a regulation through which that procedure is set forth." Pet.App.36 (emphasis added). In other words, substantial compliance was not a defense because any compliance was impossible unless and until DACO acted.

More to the point, whether "an unforeseeable and retroactive judicial expansion of narrow and precise statutory language," *Bouie v. City of Columbia*, 378 U.S. 347, 352 (1964), has occurred depends on what the statute actually says, not on whether Esso should have anticipated that a court might ignore it. Article 5A does not say that the transfer *from retailers to consumers* is contingent on adoption of implementing regulations. It says "that *the transfer for temperature adjustments* shall not commence until this mechanism has been established." 23 L.P.R.A. § 1105a (emphasis added). That Esso "was an active participate throughout the legislative process" is therefore irrelevant, Resp.Br.5, as its participation simply makes it highly likely that Esso knew exactly what the final enacted text actually said—namely, that no obligation existed until DACO promulgated a means for compliance. The Due Process Clause protects against unforeseeable and unavoidable imposition of retroactive liability under such a statute.

Other than implausibly insisting Esso should have seen the constitutional violations coming, respondents claim only that this case "is not sufficiently important." Resp.Br.32. But, with all due respect, that appears to be precisely the principle that drove the courts below to deny Esso any semblance of due process. Providing Esso—a company that had already discontinued operations in Puerto Rico—with the same legal protections as everyone else does not appear to have been very important to the Puerto Rico courts. Without continuing operations or the threat to withdraw from the Commonwealth, Esso had no guarantee of

fair treatment save for the Due Process Clause. The fact that Esso—and Esso alone—is subject to retroactive liability and double damages, while every other litigant is protected by a decision holding that there is no private cause of action to enforce Article 5A in the first place, does not render this case unimportant; it renders this Court's intervention especially important. Esso's *amici* before the Puerto Rico Supreme Court and this Court have recognized as much. The lower courts' repeated and blatant refusal to abide by the Due Process Clause and Puerto Rico law is tremendously detrimental to the stability of the Commonwealth's justice system and economy. *See* Pet.34-37. Rather than address those concerns, respondents refused to consent to *amicus* briefs in support of Esso's petition from the Puerto Rico Chamber of Commerce and Manufacturer's Association. Resp.Br.32-33 n.8. Respondents' efforts are unavailing, as, at bottom, the importance of the case could not be clearer: This Court's review and reversal of the judgment below is essential to the continued guarantee of due process of law in the commonwealth courts of Puerto Rico.

CONCLUSION

The Court should grant the petition.

Respectfully submitted,

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