No. 22-96

IN THE

Supreme Court of the United States

FINANCIAL OVERSIGHT AND MANAGEMENT BOARD FOR PUERTO RICO,

Petitioner,

v.

CENTRO DE PERIODISMO INVESTIGATIVO, INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

REPLY BRIEF FOR PETITIONER

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INTRODUCTION

Contrary to precedent from this Court as interpreted by other Circuits, the court below inferred abrogation from a general grant of jurisdiction that mentioned neither abrogation nor immunity and did not render abrogation "unmistakably clear." As explained in the Petition, that ruling warrants review. CPI's primary argument is that this case is not a good vehicle. That is inaccurate. The abrogation question raised in the Petition stands alone and is squarely presented. The Court can answer that question without resolving any antecedent questions, as it frequently does in the context of sovereign immunity. CPI's contention that this case poses "procedural roadblocks" mischaracterizes the record.

CPI's attempt to minimize the radical nature of the decision below fails. The decision is unprecedented, inferring an intent to abrogate from disparate statutory provisions saying nothing about abrogation. PROMESA § 106(a) merely empowers a forum for actions against the Board, some of which are federal actions not subject to immunity; it does not *create* such actions, unlike every case that found abrogation on which CPI relies.

CPI also fails to grapple with the fact that the decision below is the first in history to hold an entity's sovereign immunity was abrogated in its entirety. Review is warranted.

ARGUMENT

I. THIS CASE IS AN EXCELLENT VEHICLE FOR DECIDING THE QUESTION PRESENTED.

A. Questions Concerning Puerto Rico's Sovereign Immunity Do Not Create Vehicle Issues.

CPI is wrong that the Court must first decide whether Puerto Rico enjoys sovereign immunity before it can address the abrogation question. Opp. 11–14. Consistent with past practice, the Court can assume Puerto Rico possesses sovereign immunity and proceed directly to the abrogation question. For example, in *Port Authority Trans-Hudson Corp. v. Feeney*, the Court assumed "arguendo" that the bi-state corporation enjoyed sovereign immunity and proceeded directly to decide whether immunity had been waived. 495 U.S. 299, 305 (1990); *see also Petty v. Tenn.-Mo. Bridge Comm'n*, 359 U.S. 275, 279 (1959) (same). Similarly, in *Puerto Rico Aqueduct & Sewer Authority v. Metcalf & Eddy, Inc.*, the Court held that a Puerto Rico utility had the right to appeal an order denying its sovereign-immunity defense without first deciding whether a Puerto Rico entity could claim immunity in the first place. 506 U.S. 139, 141 n.1, 147 (1993). The Court can take the same approach here by assuming that Puerto Rico enjoys sovereign immunity and deciding only whether the language of PROMESA's jurisdictional provision is sufficiently clear and unequivocal to support a finding of abrogation.

Even if the Court elected to decide whether Puerto Rico enjoys sovereign immunity, there is no obstacle to doing so. Contrary to CPI's contention, the question of whether Puerto Rico possesses sovereign immunity was briefed and decided below. *See* App. 22a–23a; Opp. Br. for Plaintiff-Appellee in Case No. 21-1301 at 41–45 (1st Cir. Jun. 18, 2021); Reply Br. for Defendant-Appellant in Case No. 21-1301 at 13–17 (1st Cir. Jul. 9, 2021). And the question is not a close one. The First Circuit has recognized Puerto Rico's sovereign immunity for four decades. *See Ezratty v. Puerto Rico*, 648 F.2d 770, 776 n.7 (1st Cir. 1981). Every court to consider the issue has recognized Puerto Rico's sovereign immunity, including decisions by three Members of this Court. *See United States v. Laboy-Torres*, 553 F.3d 715, 721 (3d Cir. 2009) (O'Connor, J., sitting by designation); *P.R. Ports Auth. v. Fed. Mar. Comm'n*, 531 F.3d 868, 872 (D.C. Cir. 2008) (Kavanaugh, J.)[1]; *Ezratty*, 648 F.2d at 776 n.7 (Breyer, J.). And this Court has repeatedly held that Puerto Rico enjoys sovereignty akin to that of the States. *See Puerto Rico v. Sánchez Valle*, 579 U.S. 59, 74 (2016); *Rodriguez v. Popular Democratic Party*, 457 U.S. 1, 8 (1982).[2]

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[1] Although the D.C. Circuit relied on a federal statute, it squarely held that Puerto Rico enjoys the same immunity as the States.

[2] In arguing to the contrary, CPI takes a footnote from *Sánchez Valle* out of context. Opp. 12. The footnote states that, for double-jeopardy purposes, a territory's prosecutorial powers derive from Congress—not that territories lack sovereignty. *Sánchez Valle*, 579 U.S. at 72 n.5.

CPI's reliance on summary orders denying certiorari is puzzling. Opp. 11–12. Such orders contain no rationale. It is thus conjecture for CPI to argue that the petitions were denied because they raised the threshold question of Puerto Rico's sovereign immunity. In all events, prior orders denying certiorari have no precedential effect, *Hopfmann v. Connolly*, 471 U.S. 459, 461 (1985), and do not dictate the outcome here.

B. There Is No Serious Question Concerning "Arm of the State."

Below, CPI did not dispute the Board's assertion that it is an arm of Puerto Rico entitled to the same immunity as the Commonwealth. *See* App 23a–24a. Yet now, in opposing certiorari, CPI contends the arm-of-the-state question is a thorny threshold issue that counsels against certiorari. Opp. 14–16. That is disingenuous.[3]

First, this Court can assume the Board is an arm of Puerto Rico, as the court below did, and avoid the issue entirely. *See, e.g.*, *Feeney*, 495 U.S. at 305 (assuming bi-state corporation was arm of the state to address waiver question); *Petty*, 359 U.S. at 279 (same); *see also N. Ins. Co. of N.Y. v. Chatham Cnty., Ga.*, 547 U.S. 189, 195 (2006) (assuming county was *not* an arm of the state to address question concerning immunity in admiralty cases); *College Sav. Bank v. Fla. Prepaid Postsecondary Educ.*

[3] CPI's criticism of the Board for failing to develop a factual record concerning arm of the state (Opp. 14) is misguided because CPI conceded the issue below.

Expense Bd., 527 U.S. 666, 691 (1999) (Stevens, J., dissenting) ("The procedural posture of this case requires the Court to assume that Florida Prepaid is an 'arm of the State' of Florida….").

Second, there is no serious question that the Board is an arm of Puerto Rico because it is an entity through which the Commonwealth acts. *See Feeney*, 495 U.S. at 313 (Brennan, J., concurring). The Board is part of the Puerto Rico government. 48 U.S.C. § 2121(c)(1). It has the power to impose its own fiscal plans and budgets, overriding the Governor and Legislature. *See id.* §§ 2128(a)(2), 2141, 2142, 2144. The Governor and Legislature are arms of the state; an entity that can overrule those branches is plainly an arm of the state as well.

Moreover, as this Court explained, the Board exercises local power to act on Puerto Rico's behalf, including by controlling the issuance of new debt, representing the Commonwealth in restructuring cases, and conducting investigations backed by Puerto Rico law. *Fin. Oversight & Mgmt. Bd. for P.R. v. Aurelius Inv., LLC*, 140 S. Ct. 1649, 1660–62 (2020). Perhaps most critically, the Board's liabilities are paid from the Commonwealth's coffers. *See* 48 U.S.C. § 2127; *see also Hess v. Port Auth. Trans-Hudson Corp.*, 513 U.S. 30, 48–49 (1994) (identifying state's vulnerability to money judgments against entity as the primary factor in an arm-of-the-state analysis). For these reasons, the Board is an arm of Puerto Rico, and it is not a close call.

CPI's attempts to make the arm-of-the-state question more complicated than it is do not

withstand scrutiny. CPI complains that the arm-of-the-state test is "murky" (Opp. 14) but does not explain why any "murkiness" matters given the Board easily qualifies as an arm of Puerto Rico under any articulation of the test.

CPI's reliance on *Hess* is misguided. Opp. 15. There, the bi-state corporation was not an arm of the state because it did not act on behalf of any one state, was not subject to control by any one state, generated its own revenues, and satisfied its own judgments. *Hess*, 513 U.S. at 42, 45–46, 48–49. None of those factors is present here.

CPI's observation that other oversight boards may be established in the future is irrelevant. Opp. 15. Any future board would be subject to the same PROMESA provisions and have the same powers as the Board here, so the arm-of-the-state analysis here would apply equally to other oversight boards.

Finally, CPI's contention that the Board is an arm of a territory, not a state, misses the point. Opp. 16. Since Puerto Rico enjoys sovereign immunity (*see* Point I.A, *supra*), being an arm of the Commonwealth is no different from being an arm of a State.

C. There Are No "Procedural Roadblocks."

CPI's contention that the case's posture counsels against review mischaracterizes the record. Opp. 16–17. Below, CPI brought two nearly identical complaints seeking documents from two different

time periods. App. 102a–141a. The Board asserted a sovereign-immunity defense in both lawsuits. The sovereign-immunity defense was addressed by the court of appeals in an appeal of an order denying a motion to dismiss CPI's second complaint. App. 21a–34a. If this Court were to grant certiorari and hold that CPI's second complaint should be dismissed on sovereign-immunity grounds, it would necessarily require the dismissal of both lawsuits because the identical sovereign-immunity issues are presented in each. CPI is thus wrong that "piecemeal litigation" would continue "regardless" of the outcome of this appeal. Opp. 16. A ruling for the Board would terminate both cases below.

CPI's assertion that developments below could "shed further light on state sovereign immunity issues" is unsupported. Opp. 17. The Petition presents a clean question of law: Did Congress intend to abrogate the Board's sovereign immunity when it enacted 48 U.S.C. § 2126(a)? The answer does not turn on facts that may be developed below, and it is unrelated to the Board's other defenses. Indeed, the court below found the abrogation question can be resolved "without any need to explore or resolve either the Board's arguments about statutory immunity pursuant to PROMESA § 105 or its arguments about how PROMESA preempts the disclosure obligations in P.R. Const. § 4." App. 17a–18a.

II. THE DECISION BELOW CREATES A CIRCUIT SPLIT.

CPI contends that the decision below merely involves the application of settled rules for abrogation. That is false. As the dissent observed, the decision departed dramatically from this Court's and every other circuit's jurisprudence. App. 36a (Lynch, J., dissenting).

This Court has recognized three ways Congress can unequivocally abrogate sovereign immunity. First, it can expressly mention abrogation. *See, e.g.*, *Allen v. Cooper*, 140 S. Ct. 994, 999, 1001 (2020) (statute provided that a state "shall not be immune, under the Eleventh Amendment [or] any other doctrine of sovereign immunity, from suit in Federal court"). Second, it can identify states as potential defendants of a cause of action created by the statute. *See, e.g.*, *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 74 (2000) (statute expressly allows cause of action to be brought against a "public agency," defined to include "the government of a State"). Third, Congress may create a statutory scheme having no purpose if states were not defendants. *See Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 57, 72 (1996). All three approaches leave no room for doubt that abrogation was intended, through either express language or necessary logic, not inferences.

The circuit cases cited by CPI (Opp. 18–19) all fall into the second category—the statutes created causes of action for which states were expressly listed as potential defendants. For example, *Alaska v. EEOC*, 564 F.3d 1062 (9th Cir. 2009) (en banc),

concerned the Government Employee Rights Act of 1991 (GERA), which expressly covers state workers, 42 U.S.C. § 2000e-16c(a)(1), guarantees them a workplace free of discrimination, *id.* § 2000e-16b(a)(1), and authorizes them to collect damages "payable by the employer," *id.* § 2000e-5(g)(1), which means the State. That is a clear and unmistakable acknowledgement that states can be sued for GERA violations. *Alaska*, 564 F.3d at 1066. CPI's other cases are similar. *See Timmer v. Mich. Dep't of Com.*, 104 F.3d 833, 837–38 (6th Cir. 1997) (Equal Pay Act abrogates immunity by providing for enforcement against "any employer (including a public agency)," which "is defined as 'the government of a State or political subdivision thereof' and any agency of a State"); *Ussery v. Louisiana*, 150 F.3d 431, 434–35 (5th Cir. 1998) (looking to definitions of "employee" and "employer" under Civil Rights Act of 1964 to conclude that the Act abrogates immunity by authorizing courts to award monetary relief against state defendants); *Okruhlik v. Univ. of Ark. ex rel. May*, 255 F.3d 615, 622 (8th Cir. 2001) (same).

The decision below does not fit into that box. Section 2126(a) does not authorize any specific type of action against the Board. Instead, it merely supplies a federal forum for a miscellany of causes of action against the Board that were created elsewhere, some of which are subject to sovereign immunity and some not. It does not address substantive elements or defenses but merely provides jurisdiction which was necessary to handle, for instance, actions against the Board alleging the Board exceeded its powers. CPI thinks it significant that § 2126(a) not only "grants," but also "curtails"

and "channels" jurisdiction, Opp. 21, but that misses the point. There is no basis to think Congress intended to override whatever immunity was or was not provided in those laws. "The fact that Congress grants *jurisdiction* to hear a claim does not suffice to show Congress has abrogated all *defenses* to that claim. The issues are wholly distinct." *Blatchford v. Native Vill. of Noatak*, 501 U.S. 775, 786 n.4 (1991).

CPI argues that, if § 2126(a) does not abrogate, there would be no forum for non-federal claims against the Board. Opp. 21. CPI never explains why it believes Congress would not have intended that precise outcome. The Board is a unique entity established by Congress to perform critical tasks that often require it to clash with the territorial government. The idea that Congress would not want the Board hamstrung by local regulations is far from outlandish. Indeed, Congress included various provisions in PROMESA immunizing the Board from liability and review to ensure the Board's autonomy from local law. *See, e.g.*, 48 U.S.C. §§ 2104, 2128. Regardless, the standard for abrogation requires unequivocal statutory language. Speculation about whether Congress might want to entertain territorial actions against the Board is insufficient. App. 40a n.20 (Lynch, J., dissenting).

CPI contends that § 2126(c)'s references to declaratory and injunctive relief prove that § 2126(a) must allow *some* actions to be brought against the Board. Opp. 20. No one is arguing otherwise. As explained in the Petition, claims that the Board exceeded its powers have been brought without running afoul of sovereign immunity. *See, e.g.*,

Vázquez-Garced v. Fin. Oversight & Mgmt. Bd. for P.R., 945 F.3d 3, 5 (1st Cir. 2019). And other types of claims may also be brought. For example, Congress abrogated state immunity in Title VII, *see Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976), and the Equal Pay Act, *see Ussery*, 150 F.3d at 435. One purpose of § 2126(a) is to prescribe the forum for such claims if they are brought against the Board.

CPI's position that § 2126(a) abrogates the Board's immunity leads to anomalous results. For example, Congress has created federal causes of action that it did not intend to be brought against *any* State entity. *See, e.g.*, *Quern v. Jordan*, 440 U.S. 332, 342–45 (1979) (42 U.S.C. § 1983 does not abrogate a State's sovereign immunity). Yet CPI's position is that Congress intended that such claims *could* be brought against the Board.

CPI also fails to respond to the Board's observation that the decision below represents the first time in history that an entity's sovereign immunity has been abrogated *in its entirety* and the first time *Pennhurst* immunity has ever been abrogated. The decision below is a radical departure from precedent and warrants immediate review.

III. THE QUESTION PRESENTED IS IMPORTANT.

CPI fails to grapple with the "dire consequences" that flow from the decision below. App. 36a (Lynch, J., dissenting). The decision is the culmination of a trend in which the First Circuit has reduced the "clear and unmistakable" standard for abrogation to

a meaningless slogan. *See In re Coughlin*, 33 F.4th 600, 621 (1st Cir. 2022) (Barron, C.J., dissenting). CPI is wrong that the decision will have no "spillover effects" beyond PROMESA (Opp. 24) because the decision provides a blueprint for inferring an intent to abrogate in other statutes containing no language addressing abrogation but granting broad jurisdiction.

CPI argues the Court should wait until *Coughlin* to address the problems with the First Circuit's abrogation jurisprudence. Opp. 24. But the First Circuit's flawed approach to abrogation is presented more squarely here. In *Coughlin*, the statute at least contained the word "abrogate" (although it did not expressly abrogate the immunity of Indian tribes). *See* 33 F.4th at 605 (citing 11 U.S.C. § 106(a)). Here, the First Circuit inferred congressional intent to abrogate from a statute containing *no language* addressing abrogation. At a minimum, the Court should hold this Petition pending resolution of the petition in *Coughlin*.

CPI's attempt to analogize the Board to a federal agency subject to the Freedom of Information Act (FOIA) fails because the obligations imposed by FOIA are less onerous than those under Puerto Rico law. *See, e.g.*, *Soto v. Srio. de Justicia*, 12 P.R. Offic. Trans. 597, 607–08 (1982) (discussing the limited exceptions to disclosure available under Puerto Rico law). Moreover, the Board is not a federal agency but a collection of seven unpaid members and a small staff that lack the resources to respond to sweeping document requests.

CPI does not meaningfully respond to the Board's showing that the decision below opens the floodgates of litigation. It is already happening: The Board was recently again sued under Puerto Rico's disclosure law. *See Miya Water Projects Netherlands B.V. v. Fin. Oversight & Mgmt. Bd. for P.R.*, No. 22-cv-1358 (D.P.R. Jul. 27, 2022). CPI also ignores that the decision below eliminates the Board's immunity in its *entirety*, leaving it vulnerable to all types of federal and territorial claims to which sovereign immunity should pose a complete bar.

CONCLUSION

The Petition should be granted.

September 7, 2022 Respectfully submitted,

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