No. 22-096

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

REPLY BRIEF FOR PETITIONER

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INTRODUCTION

CPI devotes most of its brief to a point that the court below barely addressed: whether Puerto Rico has sovereign immunity. Although one would hardly know from CPI's telling, this Court has spoken plainly on that subject for more than a century. In 1913, it called Puerto Rico's immunity from suit without its consent a matter "beyond question."[1] In 1937, it stated that Congress had conferred on the territory the attributes of "quasi sovereignty" possessed by the States—such as immunity from suit without consent.[2] In 1982, it said that Puerto Rico, like a State, was "an autonomous political entity, sovereign over matters not ruled by the Constitution."[3] And just a few years ago, it described the Commonwealth's "distinctive, indeed exceptional status as a self-governing Commonwealth."[4] The unique degree of autonomy and self-determination possessed by Puerto Rico shows that the Commonwealth (and therefore the Board) possess sovereign immunity from suits like the instant one.

These cases, and many others like them, pose a major problem for CPI. Thus, CPI invents a theory to minimize them—that Puerto Rico enjoys sovereign immunity only in its *own courts*, but not in federal court. According to CPI, territories are the only type of sovereign possessing "immunity-lite." States, In-

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[1] *Porto Rico v. Rosaly y Castillo,* 227 U.S. 270, 274 (1913).

[2] *Puerto Rico v. Shell Co.*, 302 U.S. 253, 262 (1937).

[3] *Rodriguez v. Popular Democratic Party*, 457 U.S. 1, 8 (1982).

[4] *Puerto Rico v. Sánchez Valle*, 579 U.S. 59, 63 (2016).

dian tribes, and the federal government all boast immunity in both their own courts and those of other sovereigns.

This Court, however, has never recognized a two-tiered approach to immunity, and CPI provides no reason for the Court to start now. Moreover, CPI's proposed rule would have far-reaching, negative consequences not only for the Board, but also for the Commonwealth and its officials, who—if CPI prevails—could be dragged into federal court to defend against any type of federal or territorial claim as long as the plaintiff could establish diversity or another basis for federal jurisdiction.

When CPI finally gets around to addressing the question presented—whether PROMESA abrogates the Board's immunity—its arguments are unpersuasive. Nothing in PROMESA shows a clear intent to abrogate. Instead, CPI relies on textual "inferences" and the canon against superfluity. That entire approach is flawed from the start. "Inferences" dreamed up by lawyers are no substitute for clear and unmistakable statutory language.

CPI's inferences are unpersuasive in any event. In each instance, CPI cites a provision in PROMESA that has nothing to do with immunity or abrogation and speculates about what Congress had in mind when the provision was enacted. The reality is that Congress knew how to abrogate the Board's immunity if it wanted. PROMESA contains no language abrogating the Board's immunity—let alone language abrogating that immunity *for all federal and territorial actions*, as the court of appeals held. The decision below should be reversed.

ARGUMENT

I. BOTH PUERTO RICO AND THE BOARD POSSESS SOVEREIGN IMMUNITY FROM SUIT IN FEDERAL COURT.

Long-standing precedent and first principles about sovereignty establish Puerto Rico's immunity from suit in federal court. CPI's theory that there are two types of sovereign immunity—the full-blown, traditional type that applies in all courts, which CPI calls "state sovereign immunity," and a watered-down, trivial type that applies only in the sovereign's own courts—is made out of whole cloth. The cases do not support it. It would lead to anomalous and inconsistent results. And CPI offers no good reason to adopt it.

A. The Court Should Not Address the Question of Puerto Rico's Sovereign Immunity.

As an initial matter, the Court need not address the question of Puerto Rico's sovereign immunity. The sole question on which the Court granted certiorari is whether the court of appeals' abrogation ruling was correct. Pet. at i. As CPI noted in opposing certiorari, the court below did not analyze the immunity issue, "merely citing earlier cases holding that Puerto Rico should be treated as a State for sovereign-immunity purposes." Cert. Opp. 13. Neither the Governor nor the Commonwealth is a party here, notwithstanding the titanic impact a ruling in CPI's favor would have on them. The Court can leave the immunity question for another day, after a party has raised appropriate challenges before the courts below.

B. Sovereign Governments Are Immune from Compulsory Process in All Courts.

If the Court does reach the question, it should hold that Puerto Rico (and the Board) enjoy sovereign immunity in both territorial and federal courts and reject CPI's theory.

1. The common-law doctrine of sovereign immunity, originating in English law and the general law of nations, held that sovereigns enjoyed a broad exemption from compulsory judicial process. *Franchise Tax Bd. of Cal. v. Hyatt*, 139 S. Ct. 1485, 1493–94 (2019). As Hamilton wrote, it is "inherent in the nature of sovereignty not to be amenable to the suit of an individual *without its consent*." *The Federalist* No. 81, at 487 (C. Rossiter ed., 1961) (emphasis in original). Respect for the dignity and autonomy possessed by a sovereign body that makes laws governing its citizens commands this result. *Alden v. Maine*, 527 U.S. 706, 715 (1999). "This is the general sense and the general practice of mankind." *The Federalist* No. 81, at 487.

Accordingly, since the earliest days of the Nation, this Court has recognized as the "established principle of jurisprudence in all civilized nations" that a "sovereign cannot be sued in its own courts, or *in any other*, without its consent and permission." *Beers v. Arkansas*, 61 U.S. (20 How.) 527, 529 (1858) (emphasis added); *see also United States v. Lee*, 106 U.S. 196, 226 (1882) (Gray, J., dissenting) (noting that common-law immunity applies in "any judicial tribunal"). The Court has repeatedly affirmed that "fundamental aspect" of sovereignty as inherent and applying in any court. *Hyatt*, 139 S. Ct. at 1493; *see also Allen v.*

Cooper, 140 S. Ct. 994, 1000 (2020) (describing immunity as "inherent in the nature of sovereignty"); *Alden*, 527 U.S. at 748–49 (noting that the "principle of sovereign immunity" applies "regardless of the forum").

2. This Court has never distinguished among sovereigns to hold that some are entitled to this traditional form of immunity, while others enjoy only a lesser, truncated form. Immunity is not reserved exclusively to States but is inherent in "every sovereign power." *Nichols v. United States*, 74 U.S. (7 Wall.) 122, 126 (1869); *see also Memphis & C. R.R. Co. v. Tennessee*, 101 U.S. 337, 339 (1880) (describing immunity as a "privilege of sovereignty"). For example, Indian tribes possess the "common-law immunity from suit traditionally enjoyed by sovereign powers," including in federal court. *Michigan v. Bay Mills Indian Cmty.*, 572 U.S. 782, 788 (2014). Such immunity is "inherent," *Okla. Tax Comm'n v. Citizen Band Potawatomi Indian Tribe*, 498 U.S. 505, 509 (1991), existing as a "necessary corollary to Indian sovereignty and self-governance," *Three Affiliated Tribes of Fort Berthold Res. v. Wold Eng'g, P.C.*, 476 U.S. 877, 890 (1986). That tribes lack statehood is irrelevant to the scope of their immunity.[5]

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[5] CPI's claim that the Board below argued only for "state sovereign immunity," not "territorial immunity," is bogus. The Board never used the former term. It followed longstanding First Circuit precedent recognizing Puerto Rico's sovereign immunity and referring to it in shorthand as "Eleventh Amendment immunity." *See* Pet. App. 22a (citing cases). The lower court's agreement with the Board on that question, *id.*, defeats any insinuation that the Board waived this argument, Resp. Br. 23–25.

Even with regard to the States, the basis for their immunity—including in federal court—is their sovereignty, not their statehood. *See Alden*, 527 U.S. at 715 (noting the "close and necessary relationship" the Founders "understood to exist between sovereignty and immunity"); *see also Hyatt*, 139 S. Ct. at 1493. Hamilton, for example, argued that the States are inherently immune in both state and federal courts because of their "attributes of sovereignty." *The Federalist* No. 81, at 487–88. James Madison and John Marshall made similar arguments in pre-ratification debates. 3 *Debates on the Constitution* 533 (J. Elliot ed. 1876) (J. Madison); *id.* at 555–56 (J. Marshall). Pennsylvania's Attorney General in 1781 summarized the prevailing view that "all sovereigns are in a state of equality and independence" and "accountable to no power on earth, unless with their own consent." *Nathan v. Virginia*, 1 U.S. (1 Dall.) 77, 78 (C.P. Phila. Cnty. 1781). "[E]very kind of process . . . against a sovereign" is thus "a violation of the laws of nations." *Id.*

The same logic animates this Court's repeated holdings that States are immune from claims asserted by their own citizens in federal court. Invoking Hamilton's conception of "inherent" immunity and the "jurisprudence in all civilized nations," the Court long ago held that States are immune from such claims. *Hans v. Louisiana*, 134 U.S. 1, 12–13, 15, 17 (1890). Their immunity derives from the "inherent nature of sovereignty," not statehood. *Great N. Life Ins. Co. v. Read*, 322 U.S. 47, 51 (1944). Building on that fundamental rule, the Court subsequently held that States and their officials are immune from actions by their

citizens seeking to vindicate state-law claims in federal court. *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 98–99 (1984) (quoting *Ex parte New York*, 256 U.S. 490, 497 (1921)). CPI dismisses those cases as involving principles "unique to States," Resp. Br. 32, ignoring the "fundamental postulates" of the common law on which they rely, *Alden*, 527 U.S. at 728–29 (observing that *Pennhurst* grounded its holding in the common-law doctrine).

CPI contends that States are "special" because of their "constitutional status." Resp. Br. 28. But the only thing "special" about States is that the Eleventh Amendment may prevent waiver or abrogation of immunity in some situations—an issue not relevant here. *See PennEast Pipeline Co. v. New Jersey*, 141 S. Ct. 2244, 2264 (2021) (Gorsuch, J., dissenting); *see generally* William Baude & Stephen E. Sachs, *The Misunderstood Eleventh Amendment*, 169 U. Pa. L. Rev. 609 (2021). The Constitution merely preserves States' common-law immunity—including in federal court—rather than confers it. *Alden*, 527 U.S. at 724.

3. Aside from a general exemption regarding compulsory process, there is another aspect of immunity in play here. An irreducible core meaning of sovereignty is that a sovereign cannot be held accountable to a citizen *under its own law,* without its consent. For if the sovereign can make the law, it must be able to exempt itself too. Thus, sovereigns have been categorically immune from such claims "since before the days of Hobbes" on the "logical and practical ground that there can be no legal right as against the authority that makes the law on which the right depends." *Kawananakoa v. Polyblank*, 205 U.S. 349, 353 (1907) (Territory of Hawaii) (Holmes, J.). This principle has

nothing to do with the forum in which the action is brought, but rather the source of the rights at issue. *Contra* Resp. Br. 30. If the sovereign cannot be sued in its own courts under its own laws, then it cannot be sued in federal court for the same violations.

C. Puerto Rico Enjoys Immunity in Federal Court.

That the common-law doctrine of immunity applies in both state and federal court ends the inquiry. The "territories have always been held to possess" common-law immunity by virtue of their autonomy over local affairs. *Porto Rico v. Rosaly y Castillo*, 227 U.S. 270, 274 (1913); *see also Sancho Bonet v. Yabucoa Sugar Co.*, 306 U.S. 505, 506 (1939). Puerto Rico is no exception; indeed, this Court has deemed Puerto Rico's immunity "beyond question" for over a century. *Rosaly*, 227 U.S. at 274. Puerto Rico's evolution into a "constitutional democracy exercising local self-rule" since becoming a territory cements its entitlement to such immunity. *Puerto Rico v. Sánchez Valle*, 579 U.S. 59, 63 (2016).[6]

1. This Court recognized Puerto Rico's sovereign immunity from practically the first days of its territorial status. The Foraker Act of 1900 established a tri-

[6] CPI criticizes the Board for invoking federalism as a justification for applying the clear-statement rule here. Resp. Br. 24. The Board used that term in the same manner as this Court in *FOMB v. Aurelius Investment, LLC*, 140 S. Ct. 1649 (2020): "The Constitution envisions a federalist structure, with the National Government exercising limited federal power and *other, local governments—usually state governments*—exercising more expansive power." *Id.* at 1658 (emphasis added).

partite civil government in Puerto Rico with substantial authority over internal affairs. *Sánchez Valle*, 579 U.S. at 63. Soon after, this Court announced that "a mere consideration of the nature of [that] . . . government" left "no doubt" that Puerto Rico enjoyed immunity from suit. *Rosaly*, 227 U.S. at 274. Congress subsequently enacted the Jones Act of 1917, which granted Puerto Rico "additional autonomy." *Sánchez Valle*, 579 U.S. at 63. Construing that enactment along with the Foraker Act, the Court held that it gave Puerto Rico the same attributes of sovereignty possessed by the States—including "immunity from suit without their consent." *Puerto Rico v. Shell Co. (PR), Ltd.*, 302 U.S. 253, 262 (1937). All of this was so even though Congress retained "major elements" of sovereignty. *FOMB v. Aurelius Inv., LLC*, 140 S. Ct. 1649, 1672 (2020) (Sotomayor, J., concurring).

None of those cases expresses or implies any limitation on the scope of Puerto Rico's immunity. One early case "reserved the question" whether Puerto Rico's immunity applied in federal court, Resp. Br. 29 (citing *Porto Rico v. Ramos*, 232 U.S. 627 (1914)), but the Court effectively answered that question six months later in *Porto Rico v. Emmanuel*, 235 U.S. 251 (1914). There, a citizen of France sued Puerto Rico in federal court asserting claims under Puerto Rico law. *Id.* at 252–53. The Court stated that Puerto Rico's "general immunity" applied and that the plaintiff could recover only if Puerto Rico consented. *Id.* at 257. The Court ultimately held that the claim was time-barred, but not before recognizing Puerto Rico's immunity as a predicate hurdle to recovery. Not surprisingly, a leading contemporaneous authority understood *Emmanuel* and other decisions as establishing

that the territories, including Puerto Rico, have the same immunity as States and cannot be sued in any court without their consent. 1 Roger Foster, *A Treatise on Federal Practice* § 95 at 593 (6th ed. 1920).

2. Whatever degree of sovereignty Puerto Rico possessed up to that point, the events of the 1950s were a watershed. In 1950, Congress enacted Public Law 600, "enabl[ing] Puerto Rico to embark on the project of constitutional self-governance." *Sánchez Valle*, 579 U.S. at 64. Following a popular referendum, Puerto Rico and Congress in 1952 ratified the Puerto Rico Constitution in the form of a compact. *Id.* at 64–65. The process created a brand-new entity: the Commonwealth of Puerto Rico. *Id.* at 65. "[R]esonant of American founding principles," the Commonwealth divides power among a tripartite, republican form of government "subordinate to the sovereignty of the people of Puerto Rico." *Id.* (quoting P.R. Const. art. I, § 2). And, similar to the States, the Commonwealth entered into a union with the United States under the terms of a compact. *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 672 (1974).

This Court has repeatedly described the resulting government as possessing the same degree of sovereignty as the States. *E.g.*, *Rodriguez v. Popular Democratic Party*, 457 U.S. 1, 8 (1982); *Examining Bd. of Eng's, Architects & Surveyors v. Flores de Otero*, 426 U.S. 572, 597 (1976). The Puerto Rico Constitution "altered the relationship between the Federal Government and Puerto Rico," conferring on Puerto Rico the same power of "self-government" as the States. *See Aurelius*, 140 S. Ct. at 1677 (Sotomayor, J., concurring). That relationship "has no parallel in our history." *Examining Bd.*, 426 U.S. at 596. And, as CPI's

own *amici* recognize, Puerto Rico's sovereignty necessarily confers immunity in federal court. *See* Speaker of the P.R. House of Reps. Br. 6–11.

3. None of the distinctions CPI attempts to draw between the immunity of territories and that of States or Indian tribes holds up.

First, CPI would reduce the entire immunity question to a governmental body's "historically grounded origin story." Resp. Br. 18. In CPI's telling, sovereign immunity does not depend on the body's present degree of autonomy, but solely on what it had when it came into existence, like the dual-sovereign test under the Double Jeopardy Clause. *Id.* That is a baffling claim because this Court has insisted that the historical approach to sovereignty applied in the double-jeopardy context is the exception, not the rule. The Court candidly described that approach as "counterintuitive, even legalistic," inconsistent with "the ordinary meaning" of sovereignty, and followed for reasons "the Court has never explained." *Sánchez Valle*, 579 U.S. at 67, 68 n.3.[7]

History does not provide the guide to determine immunity. And CPI offers no reason why it should. Even several of CPI's own *amici* disavow its history-based approach. *See* P.R. Legal Scholars Br. 18. If immunity is the core attribute of sovereignty, then the

[7] Even if *Sánchez Valle* supplied the test for sovereign immunity, it would not help CPI. Treating the federal government and the territory as the same sovereign would just mean that the latter partakes of the former's sovereignty. CPI's "one-way ratchet" cannot be correct or there would be no arm-of-the-state doctrine. *Contra* Resp. Br. 31.

test is "whether a government possesses the usual attributes, or acts in the common manner, of a sovereign entity"—stated in the present tense. *Sánchez Valle*, 579 U.S. at 67.

Second, it is irrelevant that Congress has plenary authority over Puerto Rico pursuant to the Territories Clause. *Contra* Resp. Br. 20–23. It may be true that Congress could replace the government of a territory if it so chose. But the same is true of the Indian tribes, and it is well established that tribes have common-law immunity in federal court as a "necessary corollary to Indian sovereignty and self-governance." *Three Affiliated Tribes*, 476 U.S. at 890. Congress may have the *power* to replace a territorial or tribal government, but unless and until it does, the governmental structure in place enjoys sovereign immunity. *See Bay Mills*, 572 U.S. at 788.

Third, CPI relies on a handful of dissenting opinions embracing an obsolete conception of the common-law doctrine. *See* Resp. Br. 30–32. Those opinions reason that immunity applies only in a sovereign's own courts because immunity in a second sovereign's courts depends on the latter's law—a rationale rooted in this Court's prior holding that interstate immunity is a "matter of comity." *Nevada v. Hall*, 440 U.S. 410, 416 (1979). But the Court overruled *Hall* in *Hyatt*, 139 S. Ct. at 1499. And even if the standard were based in comity, the relationship between the federal government and Puerto Rico also bears features of comity. CPI's failure to adduce any binding authority purporting to limit the common-law immunity doctrine to a sovereign's own courts betrays the artificiality of its theory.

D. CPI's Rule Would Yield Perverse and Destabilizing Results.

CPI's two-tiered approach to immunity would create numerous anomalous outcomes. For example, citizens of a territory would be unable to sue the territory in its own courts under territorial law (where the territory had not waived immunity), nor could they go to federal court because they lacked diversity. But *non-citizens* could prosecute the very same causes of action by invoking diversity jurisdiction in federal court. That would make no sense.

Moreover, a territory would always be amenable to suit in federal court, meaning that every time it passed a law, it would paint a target on its own back. CPI's logic would thus open the floodgates to federal-court actions against the Commonwealth, its Governor, and other territorial officials in any case involving diversity or federal questions.

E. The Clear-Statement Rule Applies to Puerto Rico.

Because Puerto Rico enjoys common-law immunity, Congress is assumed not to abrogate that immunity unless it uses clear and unmistakable language. Contrary to CPI's contention (Resp. Br. 28), the clear-statement rule is not rooted in the States' "special constitutional status." *See Bay Mills*, 572 U.S. at 790 (applying clear-statement rule to question of abrogation of tribal sovereign immunity); *FAA v. Cooper*, 566 U.S. 284, 290 (2012) (applying the rule to waiver of federal sovereign immunity). Instead, the rule safeguards the dignity interests of entities like Puerto Rico that possess inherent attributes of sovereignty. *See Bay Mills*, 572 U.S. at 790; *Iowa Mut. Ins. Co. v. LaPlante*,

480 U.S. 9, 18 (1987); *Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261, 268 (1997); U.S. Br. 21–22. The rule also serves the important functions of promoting clarity, predictability, and deliberative policymaking. *See* William N. Eskridge, Jr. & Philip P. Frickey, *Foreword: Law as Equilibrium*, 108 Harv. L. Rev. 26, 66, 86 (1994).

The clear-statement rule does not detract from Congress's plenary control over territories. This Court long ago held that, although Congress has "complete power" to repeal territorial law, "an intention to supersede the local law (of a territory) is not to be presumed, *unless clearly expressed*." *Inter-Island Steam Nav. Co. v. Territory of Haw.*, 305 U.S. 306, 312 (1938) (quotations omitted) (emphasis added); *see also France v. Connor*, 161 U.S. 65, 72 (1896) (imposing clear-statement requirement even though Congress "has the undoubted power to annul or modify at its pleasure the statutes of any territory"). CPI buries these cases in a footnote, mischaracterizing them as merely reflecting the rule against repeals by implication of a governmental body's own laws. Resp. Br. 27 n.9. But even if that were their holding, it would only prove that PROMESA should not be construed to diminish Puerto Rico's (or the Board's) sovereignty in the absence of a clear statement.[8]

[8] That the immunity of counties may be abrogated without a clear statement is irrelevant. *Contra* Resp. Br. 29. Counties typically are not arms of the state and possess no inherent attributes of sovereignty.

II. PROMESA CONTAINS NO CLEAR AND UNMISTAKABLE LANGUAGE SHOWING A CONGRESSIONAL INTENT TO ABROGATE SOVEREIGN IMMUNITY.

A. Inferential Arguments Cannot Satisfy the Clear-Statement Rule.

CPI acknowledges that the clear-statement rule requires unequivocal statutory language showing Congress's intent to abrogate immunity. Resp. Br. 33–34. Yet in fifteen pages of briefing, CPI fails to identify any text in PROMESA stating—plainly and directly—that the Board may be sued for violations of territorial law. *See id.* at 35–50. That's because there is no such text. Instead, CPI tries every other interpretive trick in the book to conjure up some wisp of intent: arguments about what Congress "expected" (*id.* at 36); inferences that other provisions would be "pointless" or "incompatible" absent abrogation (*id.* at 38); speculation about what Congress had "in mind" (*id.* at 40, 42); and appeals to PROMESA's design (*id.* at 44–47). The sheer length of CPI's argumentation defeats the exercise.

CPI's contention that the clear-statement rule can be satisfied "via inferences" (*id.* at 34) rather than express statutory text has been rejected in many cases. *E.g.*, *Dellmuth v. Muth,* 491 U.S. 223, 230–32 (1989). None of CPI's authorities (*see* Resp. Br. 34–35) found a clear-statement requirement satisfied "via inferences." In *Kimel v. Florida Board of Regents*, the Court determined that the Age Discrimination in Employment Act ("ADEA") authorized employees to sue "any employer (including a public agency)," and "public agency" was defined to include a State. 528 U.S.

62, 73–74 (2000). There was no "statutory mosaic" (Resp. Br. 35), unless two sections make a mosaic. The entire abrogation analysis spanned half a paragraph, and all the relevant words were spelled out in the statute. The same is true of *Nevada Department of Human Resources v. Hibbs*, 538 U.S. 721, 726 (2003), because the Family Medical Leave Act features "identical language" to the ADEA.[9]

In addition to deploying "inferences," CPI resorts to "traditional interpretive tools" like the canon against superfluity. Resp. Br. 35; *see also id.* at 38, 39, 40. But canons are used to determine the meaning of *ambiguous* statutory text, whereas the clear-statement test requires the statutory text to be *unambiguous*. *See* Amy Coney Barrett, *Substantive Canons and Faithful Agency*, 90 B.U. L. Rev. 109, 117–19 & n.28 (2010) (contrasting clear-statement rules with "linguistic canons" like the rule against surplusage); *see also Corley v. United States*, 556 U.S. 303, 325 (2009) (Alito, J., dissenting) (explaining that the "antisuperfluousness canon" is useful "in close cases, or when statutory language is ambiguous"). It is difficult to understand how CPI thinks the clear-statement rule works if it permits the same "interpretive rules" used to construe ambiguous statutes.

Although CPI seizes on an isolated phrase from *FAA v. Cooper* discussing "traditional interpretive tools," Resp. Br. 35, *Cooper* is not an abrogation case,

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[9] Contrary to CPI's contention, the Board agrees that abrogation can arise from an "insurmountable implication" of the statutory text. *See* Opening Br. 20. CPI has not pointed to any insurmountable implication, however, but instead relies on ordinary inferences about the statutory text.

and it does not sanction use of the canon against superfluity to infer a congressional intent to abrogate. *Cooper* concerned the scope of a waiver of the federal government's immunity. 566 U.S. 284, 291 (2012). The Court held that because the statutory language could be construed in more than one way, the language did not support a finding of waiver with respect to damages for emotional harm. *Id.* at 291–99. *Cooper* at most suggests that, in a waiver case, "traditional interpretive tools" can be used to show that statutory language is *ambiguous*. But *Cooper* did not suggest that interpretive canons can be used to infer an *unambiguous* intent to abrogate.

B. CPI's Arguments Do Not Show an Intent to Abrogate.

Even if it were permissible to glean a congressional intent to abrogate via inferences, the inferences proposed by CPI do not begin to make the necessary showing.

Section 2126's "Exclusive Application" to the Board. CPI contends that § 2126's "exclusive" focus on the Board's actions as the subject of "judicial review" somehow shows an intent to abrogate. Resp. Br. 36. That argument is misguided in every respect. For starters, the premise is false: Section 2126 is not limited to actions by the Board. It covers both actions "against the Oversight Board, *and any action otherwise arising out of this Act*." 48 U.S.C. § 2126(a) (emphasis added). CPI simply ignores the latter category, which is presumably the larger of the two. The very title of the section—"Treatment of actions arising from Act"—rebuts CPI's claim that § 2126 applies ex-

clusively to Board actions. *Id.* Nor does § 2126 concern "judicial review." It is a jurisdictional provision, as the title of § 2126(a) indicates, not an authorization for challenges against the Board.

CPI describes Congress as "obsessive" about subjecting the Board to judicial review. Resp. Br. 36. The text shows just the opposite. In every provision CPI cites, Congress *limited* possible litigation against the Board: Suits against the Board can be brought *only* in certain federal courts; *no* order granting declaratory or injunctive relief can take immediate effect, except to remedy constitutional violations; and *no* liability may be assessed against the Board, its members, or employees based on the statute. 48 U.S.C. §§ 2125–2126. If Congress intended to enact a broad-based abrogation of the Board's immunity, it could hardly have chosen a more counterintuitive way to do it.

Section 2126(a)'s "Channeling" of Federal Jurisdiction. CPI contends that because § 2126(a) requires actions against the Board to be brought in federal court, the Board's immunity must be abrogated in its entirety, because Congress would not channel claims to one forum only for them to be dismissed. Resp. Br. 36–37. That is a conclusion masquerading as an argument. CPI provides no basis for its speculation about Congress's motives.

CPI's argument appears to be based in part on a misunderstanding of the Board's position. The Board agrees that § 2126(a) provides exclusive federal jurisdiction over *every* action against the Board—including actions under Puerto Rico law. *Contra* Resp. Br. 37.[10]

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[10] The United States makes the same error. U.S. Br. 29–30. CPI cites pages 43–44 of the Board's opening brief as evidence of a

Exclusive jurisdiction ensures that the Board will never be subject to suit in Commonwealth court. But the conferral of jurisdiction says nothing about the defenses that the Board can assert in federal court. *See Blatchford v. Native Vill. of Noatak*, 501 U.S. 775, 786 n.4 (1991); *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 246 (1985). The same is true of § 2126(a)'s two exceptions to jurisdiction, which CPI only fleetingly mentions, despite their central role in the decision below. Resp. Br. 37.

Section 2126(e). CPI argues that § 2126(e) would be superfluous if the Board could assert an immunity defense. Resp. Br. 38. Notably, CPI does not argue that § 2126(e) contains the requisite clear and unmistakable language abrogating the Board's immunity because it plainly does not. Again, jurisdictional limitations say nothing about abrogation.

CPI's argument that § 2126(e) would be superfluous absent abrogation fails anyway. Section 2126(e) serves two important purposes that do not depend on whether the Board can assert an immunity defense. First, it applies when a party sues someone other than the Board seeking to challenge a certification determination by the Board. *See, e.g.*, *Asociación Puertorriqueña De Profesores Universitarios v. Univ. of P.R.*, 632 B.R. 1, 5–6 (D.P.R. 2021) (dismissing under § 2126(e) claim against the University of Puerto Rico because it ultimately challenged a fiscal-plan certification); *UTIER v. Ortiz Vazquez*, 435 F. Supp. 3d 377, 384–85 (D.P.R. 2020) (dismissing under § 2126(e)

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supposed change of position (*see* Resp. Br. 37), but those pages do not discuss the scope of § 2126(a).

claim brought against Puerto Rico Electric Power Authority). Second, it pretermits challenges to Board certification determinations that could otherwise be brought under an *Ex parte Young* theory. Without § 2126(e), a party could potentially sue the Board and its members in their official capacities for violating PROMESA's standards when certifying a fiscal plan or budget. *See* 48 U.S.C. § 2141 (enumerating statutory requirements for certification of a fiscal plan); *id.* § 2142 (same for budgets). Section 2126(e) ensures that such challenges cannot be brought. It is far from superfluous.

Section 2126(c). CPI trots out arguments about § 2126(c) that were already refuted in the Board's opening brief and in Judge Lynch's stinging dissent below. *See* Opening Br. 35–37; Pet. App. 43a–44a. There is no "mystery" how constitutional claims are brought against the Board despite sovereign immunity, *see* Resp. Br. 43; there have been numerous examples arising out of adversary proceedings within the Title III cases, where immunity is expressly abrogated.[11] Parties have also sought declaratory and injunctive relief in Title III adversary proceedings.[12]

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[11] *See* 48 U.S.C. § 2161(a) (incorporating 11 U.S.C. § 106); *Aurelius*, 140 S. Ct. at 1654 (Appointments Clause); *Ambac Assurance Corp. v. FOMB*, 20-ap-68 (D.P.R.) (Bankruptcy Uniformity Clause); *Autonomous Mun. of San Juan v. FOMB*, 19-cv-01474 (D.P.R.) (non-delegation doctrine); *Hernández-Montañez v. FOMB*, 18-ap-90 (D.P.R.) (separation-of-powers principles).

[12] *See, e.g.*, *Vázquez Garced v. FOMB*, 20-ap-80 (D.P.R.) (Governor seeking declaration concerning territorial law's compliance with PROMESA); *Rivera-Schatz v. FOMB*, 18-ap-81 (D.P.R.) (Legislature seeking declaration concerning Board's authority);

Contrary to CPI's contention, the Board faces more than employment-law claims. Immunity can be abrogated for non-employment claims. *See, e.g.*, 42 U.S.C. § 2000d-7(a)(1) (Title VI); 20 U.S.C. § 1403(a) (Education of Handicapped Act). And there are cases where immunity is waived[13] and *Ex parte Young* cases. *See* Opening Br. 35–37 & n.10.

CPI's quotation of *Lindh v. Murphy*, 521 U.S. 320, 328 n.4 (1997), is misleading. Resp. Br. 38–39, 40 n.12. CPI cites *Lindh* as holding that any statute "contemplating" a sovereign as a defendant abrogates that sovereign's immunity. *Id.* But *Lindh*—which was a criminal case, not an abrogation case—says nothing of the sort. The quoted language comes from a parenthetical discussing *Seminole Tribe,* where the statute (the Indian Gaming Regulatory Act) made it clear that a *specific* cause of action could be brought against a State. *See Lindh*, 521 U.S. at 328 n.4. The critical difference here is that § 2126 does not make the Board amenable to any *particular* cause of action. Instead, it merely establishes federal jurisdiction over a multiplicity of actions.

Section 2125. Finally, CPI invokes 48 U.S.C. § 2125, titled "Exemption from liability for claims,"

Rosselló Nevares v. FOMB, 18-ap-80 (D.P.R.) (Governor seeking declaration that fiscal plan provisions were void).

[13] CPI asserts that *Kimel* "rejected the notion that Congress legislates with States' ability to waive immunity in mind." Resp. Br. 42. That is sophistry. *Kimel* held that statutory language showed Congress's intent to abrogate immunity to ADEA claims. 528 U.S. at 75. The Court made no grand pronouncements about whether Congress considers the possibility of waiver when legislating.

claiming it would be unnecessary if the Board had immunity from suit. Resp. Br. 39. The irony of that argument should not be overlooked. CPI's burden is to cite statutory text evincing Congress's intent to *eliminate* the Board's immunity. *See Dellmuth*, 491 U.S. at 228. Yet CPI relies on a provision that expressly *grants* the Board (and others) immunity from liability.

In any event, § 2125 provides additional protections that sovereign immunity does not. While sovereign immunity protects the Board, § 2125 primarily protects the Board's *members and employees* from personal liability and applies whether or not immunity has been waived or abrogated, as well as in Title III cases.

C. CPI's "Design" Argument Is Misguided.

Finally, CPI argues that abrogation would be consistent with PROMESA's "design." Resp. Br. 44–47. Needless to say, consistency with statutory design cannot substitute for clear and unmistakable statutory language.

The design argument is misguided in any event. CPI contends that, absent abrogation, the Board would lack any "meaningful oversight." Resp. Br. 44. But Congress crafted PROMESA to grant the Board broad powers. If the Board were to exceed its authority under PROMESA, it could presumably be sued under an *Ex parte Young* theory to ensure that it exercises only the authority Congress intended.

In a final thrust, CPI argues that Congress somehow abrogated the Board's immunity to claims under the Puerto Rico Constitution even if it did not abrogate with respect to other claims. *Id.* at 45–46. That

new-fangled theory was never raised below or passed on by the court of appeals. It also makes little sense. Section 2126(a) does not distinguish between claims under the Puerto Rico Constitution and claims under other sources of Puerto Rico law. There is no logical basis for reading PROMESA to abrogate specifically with respect to claims under the Puerto Rico Constitution.

The scope of abrogation proposed by CPI and found by the court of appeals is unprecedented. The court below held that § 2126(a) abrogates the Board's immunity for *all* actions, federal or territorial. Thus, even where a federal law has been held not to abrogate, § 2126(a) would override and abrogate. The Board would be the only state or territorial entity nationwide subject to that law. It is implausible that Congress intended such a result and yet expressed its intent so unclearly.

CONCLUSION

The decision of the court of appeals that PROMESA abrogates the Board's sovereign immunity should be reversed.

The Board agrees with CPI that a remand is not warranted. The issue briefed and decided below was whether PROMESA abrogates the Board's sovereign immunity. Because the answer is "no," there is nothing more for this Court or the lower courts to decide. CPI has never argued (either below or in this Court) that the Board's immunity was waived under Puerto Rico law. Its position is that *PROMESA* eliminates the Board's immunity. Any waiver argument based on Puerto Rico law is thus itself waived. Moreover,

any waiver under Puerto Rico law would be inconsistent with PROMESA.

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