No. 22-

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

It is a bedrock principle of federalism that a statute does not abrogate sovereign immunity unless Congress's intent to abrogate is "unmistakably clear" in the statutory text. *Dellmuth v. Muth*, 491 U.S. 223, 228 (1989). This Court and each of the other Circuits have held that a statute granting the federal courts jurisdiction over a category of claims without expressly addressing sovereign immunity does not abrogate. *See, e.g.*, *Blatchford v. Native Vill. of Noatak*, 501 U.S. 775, 786 & n.4 (1991).

The First Circuit nevertheless held, over a vigorous dissent, that 48 U.S.C. § 2126(a) of the Puerto Rico Oversight, Management, and Economic Stability Act (PROMESA)—which grants federal jurisdiction over claims against the Financial Oversight and Management Board for Puerto Rico and claims otherwise arising out of PROMESA, but says nothing about abrogation—eliminates the Board's immunity in its totality. While acknowledging that the statutory language "may not be as precise" as other instances of abrogation, the court held that certain provisions "impl[y]" that result. It did so even though jurisdiction was necessary for those claims not subject to immunity.

The Question Presented is: Does 48 U.S.C. § 2126(a)'s general grant of jurisdiction to the federal courts over claims against the Board and claims otherwise arising under PROMESA abrogate the Board's sovereign immunity with respect to all federal and territorial claims?

PARTIES TO THE PROCEEDING

The Financial Oversight and Management Board for Puerto Rico is Petitioner here and was Appellant below.

Centro de Periodismo Investigativo, Inc. is Respondent here and was Appellee below.

CORPORATE DISCLOSURE STATEMENT

Petitioner is not a nongovernmental corporation and is therefore not required to file a statement under Supreme Court Rule 29.6.

RELATED PROCEEDINGS

U.S. District Court for the District of Puerto Rico:

Centro de Periodismo Investigativo, Inc. v. Fin. Oversight & Mgmt. Bd. for P.R., No. 3:17-cv-01743 (orders entered May 4, 2018; March 23, 2021; March 24, 2021)

Centro de Periodismo Investigativo, Inc. v. Fin. Oversight & Mgmt. Bd. for P.R., No. 3:19-cv-01936 (consolidated with No. 3:17-cv-01743)

U.S. Court of Appeals for the First Circuit:

Centro de Periodismo Investigativo, Inc. v. Fin. Oversight & Mgmt. Bd. for P.R., No. 21-1301 (judgment entered May 17, 2022)

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PETITION FOR A WRIT OF CERTIORARI

The Financial Oversight and Management Board for Puerto Rico respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the First Circuit.

INTRODUCTION

This case presents an issue of exceptional importance concerning the standard for whether a federal statute abrogates Eleventh Amendment immunity. In a 2-1 decision, the First Circuit concluded the Puerto Rico Oversight, Management, and Economic Stability Act ("PROMESA"), which grants federal courts subject-matter jurisdiction over claims brought against the Board and all claims under PROMESA, strips the Board of its immunity against every type of lawsuit. The panel reached that conclusion based on statutory inferences, despite the absence of any express references in the text to immunity, abrogation, or similar concepts. Judge Lynch sharply dissented, stating that the decision "conflicts with Supreme Court precedent, First Circuit precedent, and precedent from other circuits, and will have dire consequences." App. 36a (Lynch, J., dissenting).

The established rule from this Court, reaffirmed many times, is that abrogation of sovereign immunity shall not be found unless a statute says so in "clear and unmistakable" language. The clear-statement test safeguards the paramount values of federalism embodied in the Constitution by avoiding

abrogation of an entity's sovereign immunity when Congress did not so intend. The First Circuit panel acknowledged the absence of any clear statement here. Instead, it decreed that Congress need "not be as precise" and "need not state its intent in any particular way." Notwithstanding that Congress expressly created the Board as an entity within the territorial government, the panel's holding eliminated the Board's immunity in federal court for all *territorial* claims, and the holding's language also eliminated the Board's immunity for *all* federal claims. Thus, a statute that did not even mention sovereign immunity was interpreted to eliminate the Board's immunity in federal court in all respects.

The panel's decision is irreconcilable with holdings of this Court and the other Circuits. If mere textual inferences—and unpersuasive ones, at that—can abrogate a state's or territory's immunity, then the clear-and-unmistakable test is meaningless. The panel departed so far from these governing principles that it overrode the Board's *Pennhurst* immunity—that is, its immunity to suit in federal court under territorial law—in what appears to be the first such abrogation of its kind.

The decision, which holds that the Board has no immunity to a claim under territorial law seeking the disclosure of a broad array of internal and sensitive documents, will create grave difficulties for the Board in carrying out its statutory mission. To provide a method for Puerto Rico to achieve fiscal responsibility and market access, the Board must make sensitive decisions in consultation with the Puerto Rico government and the federal government. Forcing the Board to divulge those communications

chills its ability to have such communications in the first place. Officials of the Puerto Rico government will not engage in written communications about how scarce resources are allocated between different government services, residents, and creditors if those writings are subject to public dissemination. This Court's intervention is thus critical to both reaffirming the correct test for abrogation and protecting the Board's ability to carry out its statutory mandate.

OPINIONS BELOW

The opinion of the court of appeals is reported at 35 F.4th 1 (1st Cir. 2022) and is reprinted in the Appendix ("App.") beginning at page 1a. The judgment of the court of appeals is reprinted at App. 50a–51a. The order denying the Board's timely petition for rehearing en banc is reprinted at App. 52a–53a.

The district court's orders were not reported and are reprinted at App. 54a–55a and 56a–57a. The district court's orders incorporate by reference an earlier decision by the same court. That earlier decision is not published and is reprinted beginning at App. 58a.

STATEMENT OF JURISDICTION

The court of appeals issued its judgment on May 17, 2022. App. 50a–51a. The Board timely petitioned for rehearing en banc on May 31, 2022; that petition was denied on June 7, 2022. App. 52a–

53a. This Court has jurisdiction to review this timely petition under 28 U.S.C. § 1254(1).

The district court lacked jurisdiction over the underlying lawsuit due to the Board's sovereign immunity as an entity within the Commonwealth government. *See Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 106 (1984); *see also* Point I, *infra*. The First Circuit had jurisdiction to review the district court's order denying the Board's sovereign-immunity defense under the collateral-order doctrine. *See P.R. Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 145 (1993); *see also* App. 16a.

STATUTORY PROVISION INVOLVED

Title 48 of the United States Code, Section 2126, provides in relevant part:

> (a) **Jurisdiction.** Except as provided in section 2124(f)(2) of this title (relating to the issuance of an order enforcing a subpoena), and subchapter III (relating to adjustments of debts), any action against the Oversight Board, and any action otherwise arising out of this chapter, in whole or in part, shall be brought in a United States district court for the covered territory or, for any covered territory that does not have a district court, in the United States District Court for the District of Hawaii.

STATEMENT OF THE CASE

1. In 2016, Congress enacted PROMESA to address what it found to be a "fiscal emergency" in Puerto Rico, stemming from Puerto Rico's massive debt and consequent inability to provide effective services to its citizens. 48 U.S.C. § 2194(m)(1). PROMESA established the Board as an entity within the territorial government and charged it with developing a "method for [Puerto Rico] to achieve fiscal responsibility and access to the capital markets." *Id.* § 2121(a), (c). To carry out that mission, Congress granted the Board broad powers over laws, budgets, and long-term fiscal plans in the Commonwealth and authorized the Board to commence debt-restructuring cases on behalf of the Commonwealth and its eligible instrumentalities. *See id.* §§ 2128(a), 2141, 2142, 2164(a). *See generally Fin. Oversight & Mgmt. Bd. for P.R. v. Aurelius Inv., LLC,* 140 S. Ct. 1649 (2020).

The Board's mission requires it to engage in sensitive discussions and negotiations with the Commonwealth government, creditors, and other stakeholders and to make difficult fiscal decisions that balance competing interests. Earlier this year, the Title III court confirmed the Board's plan of adjustment for the Commonwealth, which reduced the Commonwealth's debt by 80%, saved the Commonwealth more than $50 billion in debt-service payments, and addressed its $55 billion in unfunded pension liabilities. *See In re Fin. Oversight & Mgmt. Bd. for P.R.*, 636 B.R. 1 (D.P.R. 2022). As the Title III court found, the Plan was "a crucial step in the effort to achieve the economic recovery of the

Commonwealth of Puerto Rico and its instrumentalities." *In re Fin. Oversight & Mgmt. Bd. for P.R.*, 637 B.R. 223, 240 (D.P.R. 2022).

2. Respondent Centro de Periodismo Investigativo, Inc. ("CPI") describes itself as an investigative news organization. It brought this action pursuant to Article II, § 4 of the Puerto Rico Constitution, which has been interpreted to impose on the Puerto Rico government broad obligations to reveal documents in its possession, subject to certain privileges. *See Bhatia Gautier v. Roselló Nevares*, 199 D.P.R. 59, 80 (P.R. 2017).[1] CPI alleged the Board is subject to those disclosure obligations because it is an entity within the Puerto Rico government. App. 117a–19a.

In its complaint, CPI sought to compel the Board to produce sixteen broad categories of documents, including:

(a) all communications between any member of the Board or its staff and any official or member of the staff of the federal or Commonwealth governments, including all emails and text messages;

(b) all personal financial-disclosure documents that Board members submitted to the United States Department of Treasury while being vetted for the position; and

(c) various sensitive documents that the Board had previously received from the Commonwealth government, including bank-account

[1] Certified translation available at Dkt. No. 23-4, Case No. 3:19-cv-01936-ADC (D.P.R.).

data, payroll reports, and quarterly governmental and productivity reports belonging to the government. App. 121a–23a.

3. In the First Circuit, it is settled law that Puerto Rico enjoys sovereign immunity under the Eleventh Amendment. *See, e.g., Borrás-Borrero v. Corporación del Fondo del Seguro del Estado*, 958 F.3d 26, 33 (1st Cir. 2020); *accord P.R. Ports Auth. v. Fed'l Mar. Comm'n*, 531 F.3d 868, 872 (D.C. Cir. 2008) (Kavanaugh, J.). That includes immunity under *Pennhurst*, which holds that a federal court lacks jurisdiction to order a state entity to comply with state law. *See Diaz-Fonseca v. Puerto Rico*, 451 F.3d 13, 42–43 (1st Cir. 2006).

The Board thus moved to dismiss CPI's complaint on sovereign-immunity and other grounds. As the Board argued, CPI's complaint asked a federal district court to order a Puerto Rico governmental body to comply with burdensome disclosure obligations imposed by Puerto Rico law, placing it squarely within *Pennhurst*'s prohibition.

4. The district court denied the motion to dismiss. App. 58a–101a. It held that Congress "waived or abrogated" the Board's sovereign immunity when it enacted 48 U.S.C. § 2126(a), which states that "any action against the Oversight Board" or any claim brought under PROMESA "shall be brought in a United States district court . . . ." *See* App. 6a, 73a. In the district court's view, § 2126(a) showed "Congress meant to subject the Board to suits in federal court," in all cases, even those brought under territorial law. App. 73a. In reaching its conclusion, however, the district court relied on

the legislative history of the wrong statutory provision—11 U.S.C. § 106—which it mistakenly believed was the legislative history of 48 U.S.C. § 2126(a). *See* App. 46a n.24 (Lynch, J., dissenting).[2]

5. The Board was entitled to bring an immediate appeal of the order denying its motion to dismiss because the order rejected a sovereign-immunity defense. *See P.R. Aqueduct & Sewer Auth.*, 506 U.S. at 146–47. Nevertheless, in a good-faith effort to cooperate with CPI, the Board declined to appeal at that time and agreed to produce voluntarily thousands of documents without waiving its defenses, including its sovereign-immunity defense. To date, the Board has produced 18,419 documents to CPI, totaling 67,704 pages.

The Board objected to producing another 20,000 documents because their disclosure would have hindered the Board from carrying out its statutory mission. A magistrate judge recommended that only forty-seven of the 20,000 documents be shielded from disclosure. With respect to the other documents, the magistrate judge decided that the Board should create and produce a "detailed" privilege log. The Board objected to the magistrate's report and

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[2] The district court confused 48 U.S.C. § 2126(a)—which is § 106 of PROMESA—with § 106 of the Bankruptcy Code. *Id.* The legislative history of the latter confirms the Bankruptcy Code's waiver of sovereign immunity, but the text of the provision itself shows that the waiver is only from federal claims, not state or territorial claims. Thus, ironically, even if that had been the correct legislative history, it would not have supported the district court's conclusion that Congress waived sovereign immunity from territorial claims.

recommendation ("R&R"), citing again its sovereign-immunity defense.[3]

6. While the Board's objection to the R&R was pending, CPI filed a second complaint against the Board, seeking all communications between the Board and the Commonwealth and federal governments from April 30, 2018, to the present.[4] App. 125a–41a. That demand encompasses hundreds of thousands of additional documents. The Board moved to dismiss CPI's second complaint, once again asserting sovereign immunity as a jurisdictional bar.

7. On March 23, 2021, the district court overruled the Board's objections to the R&R in a minute order and ordered the Board to produce a privilege log. App. 54a–55a. The next day, the court denied the Board's motion to dismiss CPI's second complaint, also in a minute order entered on the docket without an accompanying opinion. App. 56a–57a. Citing its earlier decision, the court repeated its prior holding that "Congress waived, or in the alternative abrogated, the Board's sovereign immunity" when it enacted 48 U.S.C. § 2126(a). *Id.*

8. The Board timely appealed both of the district court's orders. A divided panel of the First Circuit affirmed.

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[3] As the First Circuit recognized, the Board at no point waived its sovereign immunity through its litigation conduct. App. 13a–14a.

[4] CPI had agreed to limit the documents sought in its original complaint to those created on or before April 30, 2018.

The panel majority rejected the district court's waiver theory. App. 11a–14a, 25a–26a. It agreed, however, that Congress abrogated the Board's sovereign immunity by enacting § 2126(a). App. 26a–34a. Although the majority conceded "the language in [§ 2126(a)] may not be as precise" as other statutes where Congress has abrogated immunity, it inferred from various provisions of PROMESA that § 2126(a) was intended to abrogate the Board's immunity from every type of lawsuit. App. 29a. According to the majority, Congress "need not state its intent" to abrogate "in any particular way" or "use magic words" when abrogating. App. 29a–30a (citing *In re Coughlin*, 33 F.4th 600 (1st Cir. 2022)). Instead, according to the majority, determining whether Congress intended to abrogate is a standard question of "statutory construction." App. 26a. The majority did not explain how interpreting a statute granting broad subject matter jurisdiction is equivalent to inferring an intent to abrogate sovereign immunity when sovereign immunity is nowhere mentioned.

Judge Lynch dissented. App. 36a–49a. Citing the well-established principle that Congress cannot abrogate by implication, but rather "abrogation must be express and clearly stated," App. 45a, she asserted that "[a]bsolutely nothing in the text of [§ 2126(a)] sets forth an intent to abrogate Eleventh Amendment immunity," App. 38a. As Judge Lynch observed, the Supreme Court and the Circuits have long held that mere "jurisdiction-granting clauses" like § 2126(a) do not abrogate. App. 40a–41a. And the textual inferences relied on by the majority did not support its conclusion. App. 44a–46a. She

concluded that the majority's decision "conflicts with Supreme Court precedent and . . . precedent from other circuits," and warned that it would have "dire consequences" for the Board and for Eleventh Amendment doctrine in general. App. 36a, 49a. She urged that "the decision should not go uncorrected." App. 49a.

9. The Board timely petitioned for rehearing en banc. The same three judges who sat on the panel decided the en banc petition alone because all the other active judges on the Circuit were recused. App. 52a–53a. The two judges in the panel majority voted to deny the petition. *Id.* Judge Lynch dissented from the denial of en banc review "for the reasons stated in [her] dissent from the majority opinion and in the [Board]'s petition." *Id.*

This timely petition for a writ of certiorari followed.[5]

[5] On June 21, 2022, the First Circuit issued an order staying the issuance of its mandate pending this Court's resolution of this Petition, so long as the Petition would be filed within thirty days of the order.

REASONS FOR GRANTING THE PETITION

I. THE DECISION BELOW CREATES A CIRCUIT SPLIT AND CONFLICTS WITH HOLDINGS OF THIS COURT THAT JURISDICTION-GRANTING STATUTES DO NOT ABROGATE SOVEREIGN IMMUNITY.

A. This Court and the Other Circuits Uniformly Hold that Abrogation Requires Clear and Unmistakable Statutory Language.

As this Court has repeatedly held, it is a foundational principle that a federal statute does not abrogate a state's Eleventh Amendment immunity unless Congress makes that intent "unmistakably clear" in the statutory text. *Dellmuth v. Muth*, 491 U.S. 223, 228 (1989); *see also Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 73–78 (2000) (statute abrogating sovereign immunity must not be susceptible to any other interpretation); *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 55 (1996) (intent to abrogate must be "unequivocal").

By definition, the clear-and-unmistakable rule is designed to avoid mistaken interpretations of congressional intent. For that reason, a mere "permissible inference" from the statute's language is not enough. *Dellmuth*, 491 U.S. at 232. Rather, "given the special constitutional concerns in this area," a court must have "perfect confidence" that Congress in fact intended to abrogate. *Id.* at 231. Accordingly, in the overwhelming majority of cases, abrogation is not found unless the statutory

provision expressly mentions sovereign immunity, abrogation, or equivalent concepts.[6] Again, that is so because "'nothing but express words, or an insurmountable implication' would justify the conclusion that lawmakers intended to abrogate the States' sovereign immunity." *West Virginia v. EPA*, 142 S. Ct. 2587, 2617 (2022) (Gorsuch, J., concurring) (quoting *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419, 450 (1793) (Iredell, J., dissenting)).

By contrast, ordinary jurisdiction-granting provisions, which merely authorize suit in federal court, do not contain the kind of "unequivocal statutory language sufficient to abrogate the Eleventh Amendment." *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 246 (1985). As this Court has explained, "[t]he 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) (emphasis in original) (rejecting argument that 28 U.S.C. § 1362, granting district courts jurisdiction over "all civil actions, brought by any Indian tribe . . . aris[ing] under the Constitution, laws, or treaties of

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[6] *See, e.g.*, 17 U.S.C. § 511(a) (a state "shall not be immune, under the Eleventh Amendment . . . from suit in Federal court by any person" for violations of certain copyright laws); 20 U.S.C. § 1403(a) ("A State shall not be immune under the eleventh amendment . . . from suit in Federal court for a violation of [the Education of the Handicapped Act]."); 42 U.S.C. § 12202 ("A State shall not be immune under the eleventh amendment" from an action in federal court for a violation of the Americans with Disabilities Act).

the United States," abrogated Alaska's immunity). Merely providing a remedy in federal court for those aggrieved under a federal statute does not show an intent to abrogate a state's immunity to a claim under that statute—let alone some other statute. *Atascadero*, 473 U.S. at 246; *see also United States v. Nordic Village, Inc.*, 503 U.S. 30, 34–38 (1992) (rejecting argument that 28 U.S.C. § 1334(d), a provision granting district courts exclusive jurisdiction in bankruptcy cases, abrogated sovereign immunity).

In accord with that precedent, all the other Circuits have held that jurisdiction-granting statutes do not abrogate sovereign immunity. *See, e.g.*, *Burnette v. Carothers*, 192 F.3d 52, 57 (2d Cir. 1999); *Richard Anderson Photography v. Brown*, 852 F.2d 114, 118 (4th Cir. 1988); *Hurst v. Tex. Dep't of Assistive & Rehab. Servs.*, 482 F.3d 809, 812 (5th Cir. 2007); *Thiokol Corp. v. Dep't of Treasury*, 987 F.2d 376, 382 (6th Cir. 1993); *Gary A. v. New Trier High Sch. Dist. No. 203*, 796 F.2d 940, 944 (7th Cir. 1986); *BV Eng'g v. UCLA*, 858 F.2d 1394, 1397–98, 1397 n.1 (9th Cir. 1988); *Mojsilovic v. Oklahoma ex rel. Bd. of Regents*, 841 F.3d 1129, 1132 (10th Cir. 2016); *Chew v. California*, 893 F.2d 331, 334–35 (Fed. Cir. 1990).

B. The Decision Below Conflicts with Those Holdings.

The decision below paid lip service to the clear-and-unmistakable rule but defied it in substance, holding that 48 U.S.C. § 2126(a), which the panel acknowledged was merely a "general grant of jurisdiction," abrogated the Board's sovereign

immunity. App. 28a–29a. Section 2126(a) grants jurisdiction to the federal courts to hear cases involving PROMESA. It states that, with certain exceptions, "any action against the Oversight Board, and any action otherwise arising out of this chapter" shall be brought in a federal district court. 48 U.S.C. § 2126(a). It says nothing whatsoever about sovereign immunity or abrogation. The panel did not even attempt to identify "unmistakable" or "clear and unequivocal" abrogation language in that provision, as there is none. Nor did the panel address *Blatchford*'s teaching that abrogation and jurisdiction are "wholly distinct," and its entire treatment of *Atascadero* was a single dismissive sentence in a footnote. *See* App. 32a–33a n.16.

Indeed, the panel went out of its way to deemphasize the requirements of clear and unmistakable language. App. 29a–30a. To be sure, when it comes to abrogation, "Congress need not state its intent in any particular way." *Id.* (quoting *FAA v. Cooper*, 566 U.S. 284, 291 (2012)). But that does not mean anything goes—or else the rule is meaningless. While magic words may not be required to abrogate, a statute needs *some* words making an intent to abrogate unmistakable. *See Sossamon v. Texas*, 563 U.S. 277, 291 (2011); *Dellmuth*, 491 U.S. at 227–28. There simply are no such words in 48 U.S.C. § 2126(a).[7]

[7] As the dissent explained, the absence of any such language in § 2126(a) shows that Congress affirmatively *rejected* the idea of abrogating the Board's Eleventh Amendment immunity. App. 39a (Lynch, J., dissenting).

The panel tried to analogize § 2126(a) to the statute at issue in *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 55 (1996), but the comparison is apples to oranges because the statute there created actions only against States. App. 30a–31a & n.14. *Seminole Tribe* concerned a jurisdictional provision in the Indian Gaming Regulatory Act ("IGRA") granting federal courts jurisdiction over "any cause of action initiated by an Indian tribe arising from the failure of a State to enter into negotiations with the Indian tribe for the purpose of entering into a Tribal–State compact." 517 U.S. at 49–50 (citing 25 U.S.C. § 2710(d)(7)(A)(i)). As the Court explained, the cause of action described in that provision of IGRA could be brought *only* against a State. If the statute did not abrogate a State's Eleventh Amendment immunity, then that provision—and IGRA in general—would have no purpose or effect. In that unique context, the Court (along with every Circuit that had considered the question) viewed the evidence of abrogation to be "indubitable." *Id.* at 57.

Here, by contrast, any such inference is chimerical. Section 2126(a) would not be meaningless in the absence of abrogation. It provides jurisdiction over several kinds of suits where the Board is not immune—for example, where the Constitution or other federal laws authorize causes of action to which the Board lacks immunity. *See, e.g.*, *Vázquez-Garced v. Fin. Oversight & Mgmt. Bd. for P.R. (In re Fin. Oversight & Mgmt. Bd. for P.R.)*, 945 F.3d 3, 5 (1st Cir. 2019) (claim against Board for exceeding its powers under PROMESA); *Méndez-Núñez v. Fin. Oversight & Mgmt. Bd. for P.R. (In re Fin. Oversight & Mgmt. Bd. for P.R.)*, 916

F.3d 98, 103 (1st Cir. 2019) (same). Indeed, subsection (c) of the very same provision expressly recognizes the possibility of actions to "remedy constitutional violations." 48 U.S.C. § 2126(c). Additionally, § 2126(a) provides jurisdiction where the Board would opt to waive its sovereign immunity. That there are federal claims to which the Board is not immune does not remotely suggest that Congress intended to abrogate the immunity the Board does have. *See* App. 43a–45a (Lynch, J., dissenting). Section 2126(a) grants jurisdiction over actions against the Board for which it has no sovereign immunity and over other actions against the Board for which it does have sovereign immunity. It thus does not provide an insurmountable, unmistakable implication of abrogation.

The panel attempted to shore up its conclusion with supposed textual inferences from § 2126. *See* App. 27a–32a. That was a losing proposition—and inconsistent with the jurisprudence from this Court and the other Circuits—because ordinary inferences are by definition no substitute for clear and unmistakable language. *Dellmuth*, 491 U.S. at 232. But even as "clues" about statutory meaning (App. 19a), none of them succeeded, as the dissent systematically showed.[8]

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[8] The majority below also ignored textual indications cutting against its conclusion. The title of § 2126 is "Treatment of actions arising from Act," meaning specifically PROMESA, not territorial law. And the heading of subsection (a) is "Jurisdiction," not "Abrogation of immunity." *Id.* § 2126(a). While titles do not change the plain meaning of the statutory

First, the panel argued that the words "any action against the [Board]" should be given their "plain meaning"—purportedly, to authorize any action under federal or territorial law notwithstanding sovereign immunity. That is exactly the kind of reading that *Blatchford* and the other precedents rejected. As this Court explained, 28 U.S.C. § 1331 grants federal courts jurisdiction over "all civil actions" arising under federal law, but "no one contends that § 1331 suffices to abrogate immunity for all federal questions." *Blatchford*, 501 U.S. at 786.

Second, the panel argued that because § 2126 contains three exceptions to its grant of jurisdiction, it follows that Congress "unequivocally" intended to allow the Board to be sued in federal court in any other situation. App. 28a–29a. That purported inference is simply a non-sequitur. All three exceptions concern federal claims under PROMESA or territorial claims that the statute sends to territorial courts. One is for actions to enforce subpoenas issued by the Board, which go to territorial court under 48 U.S.C. § 2124(f)(2), consistent with the Board being an entity within the territorial government. Another is for debt-adjustment matters governed by Title III of PROMESA. And the final exception is for challenges to the Board's certifications under PROMESA of fiscal plans and budgets, 48 U.S.C. § 2126(e).

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text, they may be helpful as an interpretive tool. *See Fla. Dep't of Revenue v. Piccadilly Cafeterias, Inc.*, 554 U.S. 33, 47 (2008).

Even if a grant of jurisdiction somehow negated immunity—which it does not—none of those exceptions would support the lower court's inference. The enforcement of Board subpoenas is an action *by* the Board, not *against* the Board, and therefore does not imply anything about the Board's sovereign immunity. Debt-adjustment matters were not carved out from the district court's subject-matter jurisdiction; that grant of jurisdiction was simply contained in a different provision of PROMESA (48 U.S.C. § 2166(a)). And the fact that Congress *shielded* the Board from challenges to its certifications governed by federal law, PROMESA, does not remotely imply it intended to *strip* the Board of immunity from territorial claims. In short, none of the three carve-outs, individually or in the aggregate, constitutes clear and unmistakable textual proof of a congressional intent to abrogate.

Third, the panel reasoned that § 2126(a) "doesn't explicitly limit the federal court's jurisdiction to federal law claims," and thus could include territorial claims. App. 31a–32a. That gets things precisely backwards. This Court does not require Congress to include a clear statement that it *does not* intend to abrogate Eleventh Amendment immunity. It requires the opposite—that Congress expressly state when it *does* intend to abrogate immunity. *Atascadero*, 473 U.S. at 246; *Sossamon*, 563 U.S. at 289. No such statement can be found in 48 U.S.C. § 2126(a). There was no need for Congress to say

anything about territorial claims in § 2126(a) because of *Pennhurst*.[9]

C. The Scope of Abrogation Decided by the Court Below Is Unprecedented.

Besides diluting the clear and unequivocal rule, the panel also expanded the scope of abrogation here to an unprecedented degree. In an ordinary case of abrogation, a federal statute creates a particular cause of action and then provides that a state may be sued under that same cause of action, notwithstanding an assertion of sovereign immunity. The abrogation is limited to the claims contained in the statute itself. *See, e.g.*, *Seminole Tribe*, 517 U.S. at 56–57.

The decision below went much further, holding that Congress in one blow abrogated the Board's sovereign immunity in all respects and in all cases. App. 32a. That is, abrogation was not limited to a specific cause of action but applies to *every* cause of

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[9] The panel posited that § 2126 is a "claim-channeling provision" that redirected territorial-law claims against the Board into federal court. App. 32a–33a n.16. It further posited, based on Congress's role in the development of the Puerto Rico Constitution in the 1950s, that Congress had Puerto Rico's constitutional provisions "in mind" when it passed PROMESA in 2011—and therefore Congress would have said so explicitly if it had meant to immunize the Board from actions based on those provisions of the constitution. *Id.* Those considerations are far too speculative to support a finding of abrogation. As the dissent put it succinctly: "Not only does the text not support this reading, no authority supports the proposition that a claim-channeling provision is a clear statement abrogating Eleventh Amendment immunity." App. 40a n.20.

action that could be brought against the Board. Such a sweeping conclusion is literally without precedent.

The decision is also unprecedented in abrogating the Board's sovereign immunity with respect to *territorial*-law actions notwithstanding the *Pennhurst* doctrine, which divests the federal courts of jurisdiction to hear a suit against a state or territorial entity under its own laws. *Pennhurst,* 465 U.S. at 106. The Board is unaware of any other case where a federal court held a State's or territorial entity's *Pennhurst* immunity was abrogated. As this Court has said, "it is difficult to think of a greater intrusion on state sovereignty." *Id.* That unique conclusion surely required unequivocal evidence of Congress's intent, which was entirely lacking here.

II. THE DECISION BELOW DILUTES BASIC PRINCIPLES OF SOVEREIGN IMMUNITY AND THREATENS THE BOARD'S STATUTORY MISSION.

In addition to its legal infirmities, the decision below portends "enormous adverse consequences" for state and territorial bodies that rely on sovereign immunity, as well as for the Board in particular. App. 47a (Lynch, J., dissenting). Sovereign immunity is one of the bulwarks of our system of federalism. By lowering the standard for courts to find abrogation, the First Circuit introduced uncertainty into this area of law and risked nullifying a basic protection in situations where Congress did not so intend. For the Board in particular, it is no exaggeration to say the decision below will impair the Board's ability to carry out its

critical mission. The Court's review is urgently needed to reaffirm the correct standard for finding abrogation.

A. The Decision Below Weakens Protections of Sovereign Immunity in Many Statutory Schemes.

"The implications [of the decision below] . . . for Eleventh Amendment doctrine going forward, are significant." App. 49a (Lynch, J., dissenting). By jettisoning the rule that abrogation requires unequivocal statutory language in favor of an abrogation-by-implication approach, the panel drastically watered down the standard for finding Congressional intent to abrogate. The decision will introduce confusion into the law, not limited to PROMESA, about which statutory schemes authorize suits against states and territories and which do not.

The whole point of a clear-statement rule is to prevent courts from mistakenly finding an intent to abrogate where none was intended and to promote predictability and certainty in this critical area of the law. "[A]brogation of sovereign immunity upsets the fundamental constitutional balance between the Federal Government and the States . . . placing a considerable strain on the principles of federalism that inform Eleventh Amendment doctrine." *Dellmuth*, 491 U.S. at 227 (citations, quotation marks, and emendations omitted). The "clear and unequivocal" standard for abrogation safeguards "the fundamental constitutional balance between the Federal Government and the States." *Port Auth.*

Trans-Hudson Corp. v. Feeney, 495 U.S. 299, 305 (1990). Indeed, such rules "help courts 'act as faithful agents of the Constitution.'" *West Virginia v. EPA*, 142 S. Ct. at 2616 (Gorsuch, J., concurring) (quoting Amy Coney Barrett, *Substantive Canons and Faithful Agency*, 90 B.U. L. Rev. 109, 169 (2010)).

If the language of § 2126(a) were sufficient to show an intent to abrogate sovereign immunity, then many of Congress's other general grants of jurisdiction—and, indeed, many other types of statutes—would do the same, thereby disrupting the balance of power in our federal system. It would represent a sea-change to the entire body of law.

The decision below cannot be dismissed as one aberrant ruling from the First Circuit. It follows on the heels of a different divided panel decision from that court holding that the Bankruptcy Code abrogated the sovereign immunity of Indian tribes with respect to certain Code provisions, even though there was no clear and unequivocal language to that effect. *See In re Coughlin*, 33 F.4th 600 (1st Cir. 2022); *id.* at 612–13 (Barron, C.J., dissenting). As in the case below, the *Coughlin* majority sidestepped the "clear and unequivocal" rule in favor of questionable inferences. Indeed, the majority below borrowed its "no-magic-words" slogan from *Coughlin*. *See* App. 29a–30a (quoting *Coughlin*, 33 F.4th at 605); *id.* at 39a n.19 (Lynch, J., dissenting). This case presents an opportunity for the Court to reestablish the primacy of the clear-statement requirement for abrogation, which has become expendable in substance in the First Circuit.

B. The Decision Imposes New Burdens on the Board that Will Interfere with Puerto Rico's Recovery.

The impact of the panel majority's decision on the Board's ability to carry out its statutory duties cannot be overstated. As the dissent stated: "The majority's holding that the Board cannot avail itself of Eleventh Amendment immunity will have implications far into the future, in addition to posing burdens on the Board in this case and beyond this case." App. 47a (Lynch, J., dissenting). Because of the expansive scope of the First Circuit's ruling, the Board will now be forced to defend against all kinds of claims to which the Eleventh Amendment would have provided a complete defense. That enhanced litigation burden will, in turn, divert the Board's attention and resources from its critical mission to restore Puerto Rico to "fiscal responsibility and access to the capital markets." 48 U.S.C. § 2121(a).

This case itself proves the point. Absent abrogation, the Eleventh Amendment would have barred CPI's two lawsuits. *See Pennhurst*, 465 U.S. at 106. Now, the suits will go forward, and the Board will be forced to review and potentially disclose hundreds of thousands of internal or otherwise sensitive documents. That herculean task will consume an enormous amount of time and money better spent on the residents of the Commonwealth. *See* 48 U.S.C. § 2127(b) (Board's expenses are paid out of the Commonwealth's treasury); *see also* App. 48a (Lynch, J., dissenting) ("As this case demonstrates, the majority's holding has allowed and will continue to allow the Board to

be drawn into lengthy litigation with heavy discovery burdens.").

But the ramifications extend far beyond this dispute. The decision opens the floodgates for new lawsuits similarly demanding vast tranches of the Board's internal documents.[10] Indeed, as the dissent pointed out, the cause of action CPI brings here has no statute of limitations. App. 48a (Lynch, J., dissenting). The Board will now be subject to all manner of other federal and territorial claims that would be barred by the Eleventh Amendment if brought against any other sovereign. *See* Point I.C, *supra.*[11]

Those implications are not merely hypothetical. Because of its broad mission to restructure Puerto Rico's debts and impose fiscal responsibility throughout the Commonwealth government, the Board is a frequent target of litigation by parties that would prefer business as usual in Puerto Rico.[12] The decision below eliminates one of the Board's

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[10] Indeed, in this very case, after the district court denied the Board's motion to dismiss on sovereign-immunity grounds, CPI filed a second complaint, increasing greatly the number of documents it sought.

[11] Moreover, the panel's abrogation ruling will apply not only to this Board but to any other territorial oversight board that Congress may establish under PROMESA.

[12] As the dissent observed, Puerto Rico frequently relies on the Eleventh Amendment as an immunity to suit. App. 47a–48a n.25 (Lynch, J., dissenting) (citing, among other cases, *In re San Juan Dupont Plaza Hotel Fire Litig.,* 888 F.2d 940 (1st Cir. 1989)).

most powerful shields against such litigation, all without any clear indication that Congress intended that outcome. Now more parties will be emboldened to sue the Board, and the Board will be forced to defend on the merits. The resulting increased litigation will serve only to distract the Board from its statutory mission and to impose significant additional legal costs on the taxpayers of Puerto Rico—results that will undercut Puerto Rico's ability to recover from its fiscal emergency. Those unfortunate consequences warrant the Court's review.

CONCLUSION

For the foregoing reasons, the Court should grant certiorari to review the decision of the court of appeals below.

July 20, 2022 Respectfully submitted,

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APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT, FILED MAY 17, 2022

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 21-1301

CENTRO DE PERIODISMO INVESTIGATIVO, INC.,

Plaintiff-Appellee,

v.

FINANCIAL OVERSIGHT AND MANAGEMENT BOARD FOR PUERTO RICO,

Defendant-Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF PUERTO RICO

[Hon. Jay A. García-Gregory, *U.S. District Judge*]
[Hon. Bruce J. McGiverin, *U.S. Magistrate Judge*]

Before Lynch, Thompson, and Kayatta, *Circuit Judges.*

May 17, 2022

THOMPSON, *Circuit Judge*. The Centro de Periodismo Investigativo ("CPI"), a non-profit media organization based in Puerto Rico, is on a quest to

obtain documents from the Financial Oversight and Management Board for Puerto Rico ("the Board") that the Board has not simply handed over upon request. The Board is resisting CPI's reliance on Puerto Ricans' general constitutional right to access public documents as the basis for why CPI is entitled to the documents it seeks. After CPI turned to the district court for assistance, the Board asked the district court to dismiss the litigation, arguing that it is immune from suit pursuant to both the Eleventh Amendment of the United States Constitution and the Puerto Rico Oversight, Management, and Economic Stability Act ("PROMESA"), 48 U.S.C. § 2101 et seq., and that PROMESA preempts the disclosure obligations within Puerto Rico Constitution Article II, section 4 ("P.R. Const. § 4"), the provision upon which CPI relies. The district court disagreed with the Board, allowing CPI's quest to proceed. The Board is before us now on interlocutory review of these weighty issues, asking us to reverse the district court. After careful consideration of the parties' arguments, we affirm with respect to constitutional immunity and decline to exercise pendent appellate jurisdiction over the remaining issues.

HOW WE GOT HERE

Before we delve into the travel of this case through the district court and start exploring the issues presented in this appeal, we lay out a brief description of PROMESA, the Board, and CPI. Congress, pursuant to its Territorial Clause power,[1] passed PROMESA in 2016 to address

1. The U.S. Constitution's Territorial Clause provides Congress with the "power to dispose of and make all needful Rules

Puerto Rico's "fiscal emergency" by creating "mechanisms for restructuring [its] debts . . . and for overseeing reforms of [its] fiscal and economic policies." *In re Fin. Oversight and Mgmt. Bd. for P.R.*, 916 F.3d 98, 103-04 (1st Cir. 2019). Congress created the Board in PROMESA "as an entity within the territorial government" of Puerto Rico to help the Commonwealth "achieve fiscal responsibility and access to the capital markets." 48 U.S.C. § 2121(a), (c)(1); *see In re Fin. Oversight and Mgmt. Bd. for P.R.*, 872 F.3d 57, 59 (1st Cir. 2017); *Peaje Invs. LLC* v. *García-Padilla*, 845 F.3d 505, 515 (1st Cir. 2017). PROMESA gave the Board the authority to, inter alia, "develop, approve, and certify Fiscal Plans and Territory Budgets, . . . §§ 2141-2142, negotiate with the Commonwealth's creditors, . . . § 2146, and, under Title III, to commence a bankruptcy-type proceeding on behalf of the Commonwealth, . . . § 2175." *In re Fin. Oversight and Mgmt. Bd. for P.R.*, 916 F.3d at 103-04. The Board has seven members, appointed by the President and supported by an executive director and staff (the precise number of whom were not set by the statute). 48 U.S.C. § 2121(e). The sections of PROMESA at the center of this appeal are:

> (1) PROMESA § 103: "The provisions of [PROMESA] shall prevail over any general or specific provisions of territory law, State law, or regulation that is inconsistent with [PROMESA]." Id. § 2103.

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and Regulations respecting the Territory . . . belonging to the United States," U.S. Const. art. IV, § 3, cl. 2, and Congress explicitly exercised this power when it enacted PROMESA, 48 U.S.C. § 2121(b)(2).

> (2) PROMESA § 105: "The Oversight Board, its members, and its employees shall not be liable for any obligation of or claim against the Oversight Board or its members or employees or the territorial government resulting from actions taken to carry out this chapter." *Id.* § 2125.
>
> (3) PROMESA § 106: "[A]ny action against the Oversight Board, and any action otherwise arising out of [PROMESA], in whole or in part, shall be brought in a United States district court for [Puerto Rico]." *Id.* § 2126.

CPI uses investigative journalism to access and distribute information about Puerto Rico to Puerto Ricans so they may be better informed about issues affecting them and may be better prepared to exercise their democratic rights. CPI initiated this litigation against the Board in June 2017, relying on PROMESA § 106 for jurisdiction and asking the district court to issue a declaratory judgment, injunctive relief, and writ of mandamus[2] forcing the Board to release documents about Puerto Rico's fiscal situation, communications among Board members, contracts, meeting minutes, and financial disclosure forms for the Board's members ("the 2017 Complaint").[3] CPI had requested these documents

2. CPI did not request an award of damages.

3. Specifically, CPI sought the Board's reports pertaining to: "cash flow," "compliance" with "approved budget by budgetary fund and by agency," the Commonwealth's Treasury Department's "revenues and a narrative about collective efforts," payroll,

directly from the Board to no avail. CPI alleged that the Board, by ignoring the requests or providing less than complete responses to CPI's requests, was violating P.R. Const. § 4.[4]

The Board filed a motion to dismiss for lack of subject-matter jurisdiction and for failure to state a claim, arguing that the Eleventh Amendment to the United States Constitution[5] bars CPI's quest to force the Board

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"federal funds received and disbursed by area and by agency," "debt obligations," and "agency[] productivity and performance with appropriate metrics." CPI also sought "bank account data and statements," "[q]uarterly report[s] on each agency's productivity and performance," financial statements and conflict of interest submissions by the Board members prior to their designations to the Board, communication records between the Board and the federal government, contracts between the Board and "private entities," Board work product such as "protocols, regulations, manuals or memorandums," and meeting minutes.

4. Article II, section 4 of Puerto Rico's Constitution provides, in relevant part, that "[n]o law shall be made abridging the freedom of speech or of the press, or the right of the people peaceably to assemble and to petition the government for a redress of grievances." The Puerto Rico Supreme Court recognizes this provision to include the public's right to access public information as "firmly related to the exercise of the rights" provided within this section. *Bhatia Gautier* v. *Rossello Nevares*, 199 P.R. Dec. 59 (P.R. 2017) (certified translation at 17) (citing *Trans Ad. de P.R.* v. *Junta de Subastas*, 174 P.R. Dec. 56 (P.R. 2008); *Ortiz* v. *Dir. Adm. de los Tribunales*, 152 P.R. Dec. 161 (P.R. 2000); and *Soto* v. *Srio. De Justicia*, 112 P.R. Dec. 477 (P.R. 1982)).

5. Much more on the Eleventh Amendment is coming. For now it's enough to know that this Amendment may provide

to comply with P.R. Const. § 4, and that PROMESA preempts the disclosure obligations within P.R. Const. § 4.[6] CPI opposed the motion, arguing that the Eleventh Amendment did not bar its suit, that PROMESA did not, in any way, preempt P.R. Const. § 4, and that PROMESA § 106 expressly provided that the federal district court is the only forum in which actions can be brought against the Board for matters arising out of PROMESA.

The district court judge denied the motion, assuming without deciding that the Board is an arm of the Commonwealth entitled to Eleventh Amendment immunity, concluding Congress (in PROMESA) waived or abrogated the Eleventh Amendment immunity, and also concluding that PROMESA did not preempt P.R.

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legal immunity to States -- and under some conditions, to State entities -- from lawsuits in federal court when the court is asked to enforce a state law against the sovereign State or state entity. *Pennhurst State Sch. & Hosp.* v. *Halderman*, 465 U.S. 89, 98-102, 117 (1984); *Grajales* v. *P.R. Ports Auth.*, 831 F.3d 11, 15 (1st Cir. 2016); *Espinal-Dominguez* v. *Puerto Rico*, 352 F.3d 490, 493–94 (1st Cir. 2003) ("This provision has been authoritatively interpreted to safeguard States from suits brought in federal court by their own citizens as well as by citizens of other States.").

6. This case was briefly stayed pursuant to an automatic stay provision within PROMESA, 48 U.S.C. § 2161 (incorporating the Bankruptcy Code's automatic stay provisions -- 11 U.S.C. §§ 362, 922), after the district court denied the Board's request to reassign the case to the Title III docket but granted the Board's request to apply an automatic stay. In August 2017, the bankruptcy court granted CPI's motion to lift the automatic stay, and the litigation resumed in district court. None of the procedural aspects of the stay or lift-stay proceedings are at issue in this case.

Const. § 4. We'll get into the judge's reasoning in a little bit -- for now we stay focused on summarizing the travel of the case through the district court before the case landed on our bench. After the denial of the Board's motion to dismiss, the district judge referred the case to a magistrate judge to set "case management deadlines for the production of the requested documents" and to preside over the discovery stage of the litigation.

The magistrate judge held a status conference and the parties thereafter filed a series of informative motions to keep the court apprised of the progress they were making towards the Board producing -- and CPI receiving -- the documents CPI requested. Over the following months, there was some progress. The Board produced some documents and continued to withhold some (the details of which are not relevant to the arguments and issues on appeal before us). CPI, however, became frustrated with the pace of the production process, and in October 2018 it started filing motions asking the court for help to speed up production. These motions included one requesting the court set a status conference date to address the Board's purported delays in producing the requested documents and another motion a few months later requesting the court compel the Board to produce the requested documents or assert a reason for withholding each document withheld as well as to impose a monetary sanction based on the Board's alleged contempt for its failure to produce the requested documents. The Board made assurances that the documents CPI wanted were to be delivered soon, so the court denied CPI's motions but ordered a status update and promised to schedule a status conference to resolve whatever production issues remained at that time.

The magistrate judge held this next status conference in March 2019; the parties identified categories of documents the Board was withholding, and the magistrate judge ordered the Board and CPI to work through the specific areas of dispute. The magistrate judge noted the parties had agreed that the documents to be produced were all created before a cut-off date of April 30, 2018 (the reason why this date is relevant will become clear in the next paragraph). The magistrate judge also ordered that the parties notify him two weeks later about the categories of documents still in dispute and each party's reasons why these categories should or should not be produced. The parties complied, and the magistrate judge issued a report and recommendation ("R&R") recommending the court (1) deny CPI's request for several draft reports and documents the Board had withheld under a claim of law enforcement privilege and (2) order the Board to produce a "comprehensive, legally-sufficient" privilege log identifying why it was invoking several other categories of privilege for the remaining documents it was withholding. Over the parties' objections, the district judge adopted the R&R in its entirety in a short order entered directly onto the docket (known in some courts as a "text order"), concluding the magistrate judge's recommendations were "well-grounded in both fact and law," and setting a deadline for the Board to produce the privilege log.[7]

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7. The magistrate judge also issued a separate R&R recommending the denial of CPI's motion to compel the disclosure of the Board's members' financial statements dating before each member's appointment to the Board. The district court adopted the R&R in its entirety (over the Board's limited objection based

After the magistrate judge issued the R&R and the parties filed their respective objections but before the district judge entered the order adopting the R&R, CPI started a second case in district court against the Board, seeking the production of documents related to communications between the Board and the federal government as well as between the Board and the Puerto Rico government created on April 30, 2018 and after ("the 2019 Complaint").[8] The Board filed a motion to dismiss the 2019 Complaint, restating its arguments from its first motion to dismiss (lack of subject matter jurisdiction and failure to state a claim) and adding a third reason CPI could not prevail in its quest for the Board's documents: PROMESA § 105 provided the Board with immunity from the relief CPI seeks. The district court consolidated this second case with the first case and denied the Board's motion to dismiss in a short text order "for the reasons stated in the Court's Opinion and Order" entered in the lead case about the 2017 Complaint, briefly listing its main conclusions from the Opinion and Order.

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on its contention that the magistrate judge misread PROMESA § 105). Neither party challenges this order in this appeal.

8. The 2019 Complaint echoed the 2017 Complaint, seeking an injunction and writ of mandamus ordering the Board to deliver

> records related to communications, inquiries or requests for information, documents, reports or data issued by any member of the Board and/or its staff to any federal [or Puerto Rico] government agency or federal [or Puerto Rico] government official, or by the federal [or Puerto Rico] government, its agencies or staff, to the Board, from April 30, 2018 until the delivery date, including, but not limited to, email and text messages through any digital messaging system.

The Board filed a notice of appeal to challenge both the order denying its motion to dismiss the 2019 Complaint and the order requiring it to compile and submit the detailed privilege log. This court granted the Board's motions to expedite the appeal as well as to stay the district court proceedings.

OUR TAKE[9]

Out of the gate, CPI contends we should not hear the Board's appeal because it has waived any appellate rights through conduct it engaged in before the district court during the 2017 suit, as we'll discuss momentarily. Not so, says the Board and urges us to conclude on the merits of its appeal that CPI cannot prevail in its quest for the documents it demands because constitutional and statutory immunity shield the Board from CPI's suit and because PROMESA preempts P.R. Const. § 4. Assuming we will reach the merits, CPI says it fully supports the district court's conclusions. We'll start with CPI's waiver contention before moving into the Board's arguments. For those who prefer to know the end result before reaching the end of the opinion, we conclude that: The Board properly availed itself of interlocutory review of the denial of its motion to dismiss only with respect to its Eleventh Amendment immunity argument and, in PROMESA

9. We appreciate the thoughtful submissions from the amici (their names are listed near the case caption up top) but we give the reader a heads up that we cannot consider any "arguments advanced only 'by amici and not by parties.'" *Mount Vernon Fire Ins. Co.* v. *VisionAid, Inc.*, 875 F.3d 716, 720 n.1 (1st Cir. 2017) (quoting *In re Sony BMG Music Ent.*, 564 F.3d 1, 3 (1st Cir. 2009)).

§ 106, Congress abrogated the Board's assumed Eleventh Amendment immunity. Read on for the details and the whys of these conclusions.

Availability of Interlocutory Review

As CPI tells it, we need not address either of the Board's immunity contentions raised in response to the 2019 Complaint because the Board has waived any right to prosecute an appeal of those issues. That is so for a couple of reasons: CPI says the Board missed its opportunity to challenge the district court's conclusions that the Board is neither immune from CPI's suit nor saved by preemption when the Board did not immediately appeal the denial of its motion to dismiss the 2017 Complaint. CPI also says the Board waived its appellate rights by producing documents in the first suit and by pretending it would ultimately comply with the agreed-upon documents production stipulations.

The Board replies that CPI is ignoring important facts: CPI filed not one but two separate complaints, and the Board's appeal here is from the district court's denial of its motion to dismiss the 2019 Complaint, not the 2017 Complaint. Continuing, CPI, says the Board, fails to explain why its participation in the first suit or why discovery orders from the first suit preclude it from appealing the district court's rejection of its second-suit jurisdictional challenges.

We first note that while CPI raises this waiver issue before us, arguing the Board's lack of diligence

in timely pursuing its Eleventh-Amendment-subject-matter-jurisdiction assertions bars this appeal, CPI did not provide any on-point or helpful case law to help us understand why it believes that is so. For support, CPI only cites cases dealing with lack of diligence in other contexts, such as juror disqualification, evidentiary issues during trial, and qualified immunity. The same holds true for why the Board's participation in suit one's discovery practices prevents this appeal -- CPI gives us no helpful case law applicable to its waiver contention. Regardless, we understand CPI's essential argument to be that because the Board slept on its rights in the first suit, it necessarily waived any immunity defense in the second. So we assess CPI's contention.[10]

Case law tells us an Eleventh Amendment sovereign immunity defense, as asserted here, is jurisdictional and therefore may be raised at any point during litigation, even for the first time on appeal. *R.I. Dep't of Env't Mgmt.* v. *United States*, 304 F.3d 31, 49 (1st Cir. 2002). However, a defendant can waive this immunity defense by participating in the litigation, thereby indicating its consent to suit. *Lapides* v. *Bd. of Regents of the Univ. Sys. of Ga.*, 535 U.S. 613, 619, 622 (2002). To constitute waiver, the sovereign's litigation conduct "must be unambiguous and must evince a clear choice to submit the state's rights for adjudication by the federal courts."*Ramos-Piñero* v. *Puerto Rico*, 453 F.3d 48, 52 (1st Cir. 2006) (cleaned up) (internal citations omitted).

10. Rather than deem CPI's contentions waived for failure of development, we address them because CPI indeed provided some case law in an effort to support its points, perhaps cited so we could reason by analogy to the situations presented in those cases.

For example, we held a defendant did waive its sovereign immunity when it argued this defense before the district court, did not raise it in a first appeal, then tried to resurrect the issue in a second appeal in the same matter. *See Aquinnah/Gay Head Cmty. Ass'n, Inc.* v. *Wampanoag Tribe of Gay Head (Aquinnah)*, 989 F.3d 72, 83 (1st Cir. 2021). Another example of waiver by litigation conduct: When a state entity engaged in litigation by filing a counterclaim and a third-party complaint before asserting sovereign immunity. *Davidson* v. *Howe*, 749 F.3d 21, 28 (1st Cir. 2014). Or, the slam dunk for waiver identified by the Supreme Court was when a state defendant -- sued in state court under a statute in which the state had waived immunity from suit -- removed a case to federal court then filed a motion to dismiss on the basis of sovereign immunity. *Lapides*, 535 U.S. at 619, 622. We have said there is no waiver, though, when the sovereign defendant "does nothing more than zealously defend against the [court's jurisdiction]whenever possible." *Consejo de Salud de la Comunidad de la Playa de Ponce, Inc.* v. *González-Feliciano*, 695 F.3d 83, 105 (1st Cir. 2012).

Our dive into CPI's and the Board's back-and-forth during the 2017 case's discovery proceedings reveals the Board indicated in its filings that it was not conceding its immunity defenses. Soon after the district court judge denied the Board's motion to dismiss CPI's 2017 Complaint, the parties submitted a joint initial scheduling memorandum to the magistrate judge to kick off the discovery process. In a section called "Statement of Jurisdictional Issues" the Board asserted that the court lacks jurisdiction on both constitutional and statutory

immunity grounds (as well as that P.R. Const. § 4 preempts CPI's claims). Later on, when the Board filed a limited objection to the R&R about the privilege log, the Board included a statement that it was reserving its right to assert "its position that th[e] [c]ourt is without jurisdiction over this matter" and was not waiving any of its arguments about either sovereign or statutory immunity. With these rights-preservation filings in the record and our prior discussions of waiver by conduct in mind, we conclude that the Board did not waive its immunity arguments by engaging in the discovery process before CPI filed the 2019 Complaint.

That being said, because the district court explicitly incorporated its legal reasoning from the 2018 order denying dismissal of the 2017 Complaint into the order denying dismissal of the 2019 Complaint, our review of the later order will necessarily have to examine the fully articulated reasoning in the first order.

Therefore, we move on to consider whether CPI's other jurisdictional challenges have merit. CPI objects to the Board's assertion of interlocutory appellate jurisdiction pursuant to the collateral order doctrine, arguing that the Board's challenge to the denial of Eleventh Amendment immunity can wait until the district court enters a final judgment. The same holds for the district court's order for production of documents.

In general, this court only allows appeals from final judgments. 28 U.S.C. § 1291. As with any rule, however, there are exceptions, and the Board says two apply

here. First, an interlocutory appeal of the order denying dismissal of the 2019 Complaint is properly before this court pursuant to the collateral order doctrine. Second, an interlocutory appeal of the order directing the Board to create a privilege log is an immediately appealable injunction pursuant to § 1292(a).

The collateral order doctrine allows an order issued by a district court to be appealed immediately when the order "finally determines claims of right separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated." *Asociación De Subscripción Conjunta Del Seguro De Responsabilidad Obligatorio* v. *Flores Galarza*, 484 F.3d 1, 13 (1st Cir. 2007) (alteration adopted) (quoting *Espinal-Dominguez* v. *Puerto Rico*, 352 F.3d 490, 495 (1st Cir. 2003)); *Nieves-Márquez* v. *Puerto Rico*, 353 F.3d 108, 122 n.11 (1st Cir. 2003). Stated differently, the collateral order doctrine applies when the trial court's decision is sufficiently final, urgent, important, and separable. *Espinal-Dominguez*, 352 F.3d at 496 (citing *In re Rectical Foam Corp.*, 859 F.2d 1000, 1004 (1st Cir. 1988)). This court has previously held that a district court's denial of a state or state entity's claim that the Eleventh Amendment provides full immunity from suit meets the elements of the collateral order doctrine because: (1) the decision "conclusively determines that the State [or state entity] can be subjected to the coercive processes of the federal courts" (finality), (2) "the principal benefit conferred by the Eleventh Amendment -- an immunity from suit -- will be 'lost as litigation proceeds

past motion practice'" (urgency), (3) the decision "involves an important legal question (the existence and extent of a 'fundamental constitutional protection')" (importance), and (4) the "question has no bearing on the substantive merits of the case" (separability). *Id.* at 496-97 (quoting *P.R. Aqueduct & Sewer Auth.* v. *Metcalf & Eddy, Inc.*, 506 U.S. 139, 145 (1993)).

CPI says these elements aren't met because "[t]here would [be] no immediate harm to the Board if this case proceeds to final judgment" and that there could be "effective review" after the Board produces the requested documents or identifies the documents it thinks should be protected from disclosure. But CPI does not attempt to distinguish our case law applying the collateral order doctrine to denials of Eleventh Amendment protection or show, beyond its broad argument, why the collateral order doctrine elements aren't met here. In any event, we agree with the Board that the district court's order denying its claim of Eleventh Amendment immunity may be appealed now pursuant to the collateral order doctrine. *See P.R. Aqueduct & Sewer Auth.*, 506 U.S. at 141, 147 (holding States and state entities that are (or claim to be) "arms of the State" may appeal a district court decision denying Eleventh Amendment immunity pursuant to the collateral order doctrine) (citing *Cohen* v. *Beneficial Indus. Loan Corp.*, 337 U.S. 541 (1949)); *cf. Espinal-Dominquez*, 352 F.3d at 499 (dismissing an interlocutory appeal for want of appellate jurisdiction because the collateral order doctrine could not make one part of a case reviewable when the Commonwealth of Puerto Rico had also acknowledged that the other remedies the plaintiff

sought in the same cause of action would not be shielded by Eleventh Amendment immunity).

The Board claims that its other arguments -- statutory immunity and preemption -- are also properly before us now because these are "inextricably intertwined with the Eleventh Amendment immunity issue," though it does not tell us how. We have indeed recognized that pendent appellate jurisdiction "exists" "when an issue is 'inextricably intertwined' with a denial of immunity, and [when] review of the pendent issue 'was necessary to ensure meaningful review' of immunity." *Lopez* v. *Massachusetts*, 588 F.3d 69, 81-82 (1st Cir. 2009) (quoting *Swint* v. *Chambers Cnty. Comm'n*, 514 U.S. 35, 51 (1995), and citing *Suboh* v. *Dist. Attorney's Office*, 298 F.3d 81, 97 (1st Cir. 2002), and *Fletcher* v. *Town of Clinton*, 196 F.3d 41, 55 (1st Cir. 1999)); *see also Nieves-Márquez*, 353 F.3d at 123. Such intertwinement is not present here, however. An examination of our prior exercises of pendent appellate jurisdiction reveals we have done so in situations where the statutory questions presented were central to answering the sovereign immunity question. *See, e.g.*, *Lopez*, 588 F.3d at 82 (exercising pendent appellate jurisdiction because whether the state agency involved was an "employer" within the meaning of Title VII "was both determinative and factually and legally entwined with the Eleventh Amendment question") (citing *Nieves-Márquez*, 353 F.3d at 123-24); *see also Nieves-Márquez*, 353 F.3d at 123 (stating the answer to whether any of the causes of action pled allowed for damages as opposed to equitable remedies only was "inextricably intertwined with the issue of Eleventh Amendment immunity"). In contrast

here, we can (and do) resolve the Eleventh Amendment immunity issue 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. And the Board does not suggest any other viable legal theory that would allow us to review these issues now. For these reasons stated, we decline to exercise pendent jurisdiction over the statutory immunity and preemption issues.

CPI's final objection to the Board seeking interlocutory appellate review of the two orders now is based on CPI's contention that neither order can be properly labeled an injunction as the Board claims. The Board indeed asserts in its brief-in-chief that the privilege log order (but not the order denying its motion to dismiss) is an immediately appealable injunction, arguing that if this court makes it wait to challenge the privilege log order until after the log is completed, the proverbial cat will be "out of the bag" and CPI will know what documents the Board has in its possession. The Board wants us to rely on a case from the District of Columbia Circuit Court of Appeals where that court held that the district court's order requiring the defendant CIA to confirm or deny whether it had the records the plaintiffs requested pursuant to the Freedom of Information Act ("FOIA") was injunctive in nature and appealable under 28 U.S.C. § 1292(a)(1). *See Leopold* v. *Cent. Intel. Agency*, 987 F.3d 163, 169 (D.C. Cir. 2021) ("There is no doubt that orders requiring the disclosure of documents are appealable injunctions." (internal quotation marks and citation omitted)). The D.C. Circuit Court

recognized that "[t]he absence of particular evidence may sometimes provide clues as important as the presence of such evidence." *Id.* at 167.

The D.C. Circuit Court distinguished the situation in *Leopold* from an order examined in a prior case in which the district court had ordered the Secret Service to process a FOIA request for visitor logs to the White House and the Vice President's residence. *Id.* (citing *Citizens for Resp. & Ethics in Wash.* v. *U.S. Dep't of Homeland Sec.* ("*CREW*"), 532 F.3d 860, 862-63 (D.C. Cir. 2008)). The court held that the order in the Secret Service case had not been immediately reviewable as an injunction because the agency had not yet been forced to disclose any documents, instead only to process the FOIA request, during which the agency would have the opportunity "to withhold some or all of the documents under one or more of FOIA's nine exemptions," *CREW*, 532 F.3d at 863, at which point, the district court "may agree with the agency, allowing it to withhold the requested records, in which case the government would have no cause to appeal," *Leopold*, 987 F.3d at 169 (quoting *CREW*, 532 F.3d at 864).

Not surprisingly, the Board would like us to find the district court's privilege log order akin to *Leopold* whereas CPI emphasizes the reasoning in *CREW*. True, the production of the detailed privilege log will tip off CPI to the names of the documents in the Board's possession, but CPI is demanding specific categories of reports and other documents (*see supra* notes 3 and 8) it already knows are in the Board's possession. The

kinds of documents CPI seeks to obtain (such as financial reports and statements related to the Board and the Commonwealth as well as communications between the Board and various entities) do not, in our view, have the same degree of national security sensitivity upon which the CIA relies to carry out its responsibilities related to national security, the disclosure of which would "reveal intelligence sources and methods." *Leopold*, 987 F.3d at 169. As such, contrary to what the Board wants us to believe, the content of the privilege log would not let the cat "out of the bag" in the same way as the information the CIA would have been forced to disclose if it had been forced to admit or deny possessing various documents. Instead, we think the Board's situation is more akin to that in *CREW* -- to ask us to review the privilege log order before the Board has complied and asserted claims of privilege for each document CPI requested that the Board wants to withhold would be premature. *See* 532 F.2d at 864. Effective review of the district court's ultimate determination about which documents the Board may withhold based on a specific claim of privilege can occur after the Board has produced the privilege log and makes these assertions in the first instance. We conclude, therefore, that the privilege log order is not reviewable in this interlocutory appeal as an injunction pursuant to 28 U.S.C. § 1292(a)(1). For the reasons we have explained throughout this section, the only merits issue we will proceed to examine is Eleventh Amendment sovereign immunity.

Appendix A

Sovereign Immunity

The Eleventh Amendment provides that "[t]he Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." U.S. Const. amend. XI. According to the Supreme Court, "a federal suit against state officials on the basis of state law contravenes the Eleventh Amendment when . . . the relief sought and ordered has an impact directly on the State itself." *Pennhurst State Sch. & Hosp.* v. *Halderman*, 465 U.S. 89, 117 (1984). The Board argues that the Eleventh Amendment shields it from this litigation full stop because "CPI is asking a federal court . . . to enforce territorial law . . . against an entity within the Commonwealth's government . . . ." The Board contends this court has repeatedly stated this immunity applies to the Commonwealth of Puerto Rico and that, in PROMESA, Congress neither waived nor abrogated this immunity. CPI responds that the Board is not entitled to this constitutional immunity because the Supreme Court has not yet said this immunity applies to this territory. But, if this court decides the Eleventh Amendment applies, says CPI, then PROMESA § 106(a) abrogates the immunity from suit.[11] The district court assumed the Board was entitled to Eleventh Amendment immunity

11. Although CPI argues the Eleventh Amendment does not apply to Puerto Rico and that Congress neither waived nor abrogated this immunity as to Puerto Rico, we understand CPI's counterarguments to be about the Board as an entity of Puerto Rico's government.

but concluded Congress, in PROMESA § 106, both waived and abrogated the immunity. Our review of this issue is de novo. *Grajales* v. *P.R. Ports Auth.*, 831 F.3d 11, 15 (1st Cir. 2016).

As the district court and the Board point out, this court has long treated Puerto Rico like a state for Eleventh Amendment purposes, including recently. *See Borrás-Borrero* v. *Corporación del Fondo del Seguro del Estado*, 958 F.3d 26, 33 (1st Cir. 2020) (noting "Puerto Rico is treated as a state for Eleventh Amendment purposes" but avoiding consideration of the constitutional immunity question because the state entity clearly prevailed on the merits (quoting *Fresenius Med. Care Cardiovascular Res., Inc.* v. *P.R. and Caribbean Cardiovascular Ctr. Corp.*, 322 F.3d 56, 61 (1st Cir. 2003))); *see also Grajales*, 831 F.3d at 15 (acknowledging Puerto Rico "enjoys" sovereign immunity in the same way as the states (citing *Jusino Mercado* v. *Puerto Rico*, 214 F.3d 34, 39 (1st Cir. 2000))); *González-Feliciano*, 695 F.3d at 103 n.15; *Maysonet-Robles* v. *Cabrero*, 323 F.3d 43, 50 (1st Cir. 2003); *De Leon Lopez* v. *Corporacion Insular de Seguros*, 931 F.2d 116, 121 (1st Cir. 1991). The Supreme Court, for its part, "has expressly reserved on the question whether Eleventh Amendment immunity principles apply to Puerto Rico." *Grajales*, 831 F.3d at 15 n.3 (citing *P.R. Aqueduct & Sewer Auth.*, 506 U.S. at 141 n.1 (acknowledging this court's treatment of Puerto Rico as a State for Eleventh Amendment purposes but not reaching the issue of whether the defendant agency was entitled to the immunity as a state entity because this court had not reached the issue)). The Supreme Court has only once directly addressed whether Puerto Rico

is a separate sovereign from the federal government, in a criminal case. In *Puerto Rico* v. *Sánchez Valle*, 579 U.S. 59 (2016), the Court held that while each State is a separate sovereign from the federal government for purposes of the Fifth Amendment's Double Jeopardy Clause, Puerto Rico is not because the historical source of Puerto Rico's prosecutorial power was derived from the federal government. *Id.* at 68-69, 75. The Court did not, however, address whether Puerto Rico enjoyed general sovereign immunity.

That this court has a long history of treating Puerto Rico as a state for Eleventh Amendment purposes doesn't resolve whether the Board itself is also entitled to immunity, however. We have said "[a]rms of a state" may be entitled to immunity, *Pastrana-Torres* v. *Corporación De P.R. Para La Difusión Pública*, 460 F.3d 124, 126 (1st Cir. 2006) (citing *Metcalf & Eddy, Inc.* v. *P.R. Aqueduct & Sewer Auth.*, 991 F.2d 935, 939 (1st Cir. 1993)), but this court has not had an opportunity to examine whether the Board is an "arm" of Puerto Rico and this appeal does not appear to drop the question squarely on our bench for us to decide: The Board asserts "[t]here can be no reasonable dispute that the Board is an 'arm of the state' entitled to immunity" because, the Board says, "Congress clearly established the Board as an entity within the Puerto Rico government." For its part, CPI doesn't dispute this statement. Indeed, throughout the dispositive motion briefing below, the parties repeatedly referred to the Board as "an entity within the territorial government" of Puerto Rico, and PROMESA clearly

defines the Board this way.[12] 48 U.S.C. § 2121(c)(1). The district court noted that neither party addressed whether the Board "should be considered an 'arm' of Puerto Rico for Eleventh Amendment purposes," then proceeded to assume without deciding the Board is an "arm" because "the Commonwealth funds it." Because neither the parties nor the district court thought this point to be worth debating or examining in detail, we shall also assume without deciding that the Board is an arm of Puerto Rico, shielded by general Eleventh Amendment immunity, especially because, as we explain below, Congress abrogated, in part, the Board's immunity.

As we've already previewed, the Eleventh Amendment shield is not impenetrable. Sovereign immunity is a privilege which the holder of the immunity can voluntarily waive. *Arecibo Cmty. Health Care, Inc.* v. *Puerto Rico*, 270 F.3d 17, 24 (1st Cir. 2001) (citing *Clark* v. *Barnard*, 108 U.S. 436, 447 (1883) and *Coll. Sav. Bank* v. *Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 675 (1999)). In addition to the waiver-by-

12. The Supreme Court's only comment to date about the Board's status vis-à-vis Puerto Rico has been to acknowledge PROMESA defining the Board as "an entity within" Puerto Rico's government, § 2121(c)(1), and saying "Congress did not simply state that the Board is part of the local Puerto Rican government. Rather, Congress also gave the Board a structure, a set of duties, and related powers all of which are consistent with this statement." *Fin. Oversight & Mgmt. Bd. for P.R.* v. *Aurelius Inv., LLC*, 140 S. Ct. 1649, 1661 (2020) (deciding whether the appointment of the Board's members without Senate confirmation violated the Appointments Clause, U.S. Const. Art. II, § 2, cl. 2).

litigation-conduct we discussed *supra*, a sovereign can waive its immunity in one of two other ways: either by a "clear declaration" in a statute or constitutional provision that the sovereign "intends to submit itself to the jurisdiction of the federal courts," *id.* (quoting *Coll. Sav. Bank*, 527 U.S. at 676), or by "participat[ing] in a federal program for which waiver of immunity is a stated condition," *id.* (citing *Mills* v. *Maine*, 118 F.3d 37, 50 (1st Cir. 1997)). Alternatively, "Congress may abrogate the States' constitutionally secured immunity from suit in federal court . . . by making its intention unmistakably clear in the language of the statute," *Kimel* v. *Fla. Bd. of Regents*, 528 U.S. 62, 73 (2000) (quoting *Dellmuth* v. *Muth*, 491 U.S. 223, 228 (1989)), and "act[ing] pursuant to a valid grant of constitutional authority," *Arecibo Cmty. Health Care, Inc.*, 270 F.3d at 24 n.9 (citing *Laro* v. *New Hampshire*, 259 F.3d 1, 5 (1st Cir. 2001)); *see also Arecibo Cmty. Health Care*, 270 F.3d at 24 n.9 (describing the expression of intention to abrogate as having to be "unequivocal"); *Maysonet-Robles* v. *Cabrero*, 323 F.3d 43, 49 (1st Cir. 2003) ("Congress may abrogate [Eleventh Amendment] immunity by expressly authoriz[ing] such a suit pursuant to a valid exercise of power.") (citing *Coll. Sav. Bank*, 527 U.S. at 670).

The district court concluded that Congress, pursuant to its plenary power to legislate on behalf of Puerto Rico as a United States territory (*see supra* note 1), included an express waiver of sovereign immunity in PROMESA § 106. Our prior definitions of -- and discussions about -- waiver of Eleventh Amendment immunity, however, indicate that waiver is accomplished by the sovereign holding

the privilege of immunity. *See, e.g.*, *Maysonet-Robles*, 323 F.3d at 50 (to establish waiver of Eleventh Amendment immunity the plaintiffs had to show Puerto Rico waived its own immunity); *Arecibo Cmty. Health Care*, 270 F.3d at 24 (noting Eleventh Amendment waiver is a privilege for the sovereign to waive). We understand the district court's point to be that Congress, using its power to act on behalf of Puerto Rico, could have elected to waive immunity on behalf of the Board, but, as we next explain, under these circumstances, our view is that the district court was on much surer footing with its conclusion that PROMESA § 106 abrogated (rather than waived) the Board's sovereign immunity. We therefore focus our attention on this method of thwarting the Eleventh Amendment shield.

Whether Congress abrogated the Board's sovereign immunity in PROMESA § 106 is an issue of first impression for this court. We have not yet closely examined this part of PROMESA, in which Congress said that "any action against the . . . Board, [or] . . . otherwise arising out of [PROMESA] . . . shall be brought in [the district court for the district of Puerto Rico]." 48 U.S.C. § 2126(a). While we write on a blank slate with respect to this part of PROMESA, however, we are guided by long-standing and well- settled principles of statutory construction. "[T]he critical first step in any statutory-interpretation inquiry" is to "closely examine the statutory text." *Oliveira* v. *New Prime, Inc.*, 857 F.3d 7, 19 (1st Cir. 2017), *aff'd*, 139 S. Ct. 532 (2019). We give the phrases or words Congress did not specifically define within PROMESA their "ordinary

meaning."[13] *Id.* (quoting *United States* v. *Stefanik*, 674 F.3d 71, 77 (1st Cir. 2012)). As we have previously noted when interpreting PROMESA, "[c]ourts interpret statutes to 'give effect, if possible, to every word Congress used,' and . . . reject 'interpretation[s] of the statute that would render an entire subparagraph meaningless.'" *In re Fin. Oversight & Mgmt. Bd. for P.R.*, 7 F.4th 31, 37 (1st Cir. 2021) (quoting *Nat'l Ass'n of Mfrs.* v. *Dep't of Def.*, 138 S. Ct. 617, 632 (2018) (second alteration in original)). This court "indeed prefer[s] 'the most natural reading' of a statute, one that 'harmonizes the various provisions in [it] and avoids the oddities that [a contrary] interpretation would create.'" *N.H. Lottery Comm'n* v. *Rosen*, 986 F.3d 38, 58 (1st Cir. 2021) (quoting *Republic of Sudan* v. *Harrison*, 139 S. Ct. 1048, 1057, 1060 (2019) (second and third alterations in original)).

The full text of PROMESA § 106(a) states:

> Except as provided in section 2124(f)(2) of this title (relating to the issuance of an order enforcing a subpoena), and subchapter III (relating to adjustments of debts), any action against the Oversight Board, and any action otherwise arising out of this chapter, in whole or in part, shall be brought in a United States district court for the covered territory or, for any covered territory that does not have a district court, in the United States District Court for the District of Hawaii.

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13. Neither party contends the PROMESA language at issue or salient to this issue is ambiguous.

48 U.S.C. § 2126(a). Paragraph (c) clearly contemplates that declaratory and injunctive relief may be ordered against the Board, as well as orders related to alleged constitutional violations:

> Except with respect to any orders entered to remedy constitutional violations, no order of any court granting declaratory or injunctive relief against the Oversight Board, including relief permitting or requiring the obligation, borrowing, or expenditure of funds, shall take effect during the pendency of the action before such court, during the time appeal may be taken, or (if appeal is taken) during the period before the court has entered its final order disposing of such action.

Id. § 2126(c). And paragraph (e) -- "[t]here shall be no jurisdiction in any United States district court to review challenges to the Oversight Board's certification determinations under this chapter" -- plainly provides a limit on the general jurisdiction of the federal district court set out in paragraph (a). *Id.* § 2126(e); *In re Fin. Oversight & Mgmt. Bd. for P.R.*, 916 F.3d at 112 (acknowledging "PROMESA's general grant of jurisdiction at § 106(a)" when it explained paragraph (e) serves as an exception to it).

The Board says the general grant of jurisdiction in PROMESA § 106(a) is insufficiently direct to conclude Congress intended to abrogate the Board's sovereign immunity. We disagree; instead, we agree with the district

court that, by including § 106, Congress unequivocally stated its intention that the Board could be sued for "any action . . . arising out of [PROMESA]," but only in federal court. Congress was unmistakably clear that it had contemplated remedies for constitutional violations and that injunctive or declaratory relief against the Board may be granted, *see* PROMESA § 106(c). Congress also provided three clear exceptions to the grant of general jurisdiction -- two in paragraph (a) and one regarding certification orders in paragraph (e). This implies the remainder of paragraph (a) serves as establishing general jurisdiction over all other matters not specifically excepted elsewhere in the section. *See In re Fin. Oversight & Mgmt. Bd. for P.R.*, 7 F.4th at 37 (emphasizing the court's obligation to "give effect . . . to every word Congress used"). "Any action . . . arising out of [PROMESA]" is certainly broad, but given the limitations included within the same section, we have every reason to give paragraph (a) its plain meaning. *See Oliveira*, 857 F.3d at 19.

True, the language in PROMESA § 106 may not be as precise as when Congress has written "[a] State shall not be immune under the eleventh amendment . . . from an action in a Federal or State court of competent jurisdiction for a violation of this chapter." *Bd. of Trs. of Univ. of Ala.* v. *Garrett*, 531 U.S. 356, 364 (2001) (citing 42 U.S.C. § 12202 -- Equal Opportunity for Individuals with Disabilities) (holding no dispute that Congress intended to abrogate immunity). But, as this court recently highlighted, "[t]o abrogate sovereign immunity 'Congress need not state its intent in any particular way.' . . . The Supreme Court

has 'never required that Congress use magic words' to make its intent to abrogate clear." *In re Coughlin*, No. 21-1153, 2022 WL 1438867, at *2 (1st Cir. May 6, 2022) (quoting *FAA* v. *Cooper*, 566 U.S. 284, 291 (2012)). "To the contrary, it has explained that the requirement of unequivocal abrogation 'is a tool for interpreting the law and that it does not displace the other traditional tools of statutory construction.'" *Id.* (quoting *Richlin Sec. Serv. Co.* v. *Chertoff*, 553 U.S. 571, 589 (2008)) (cleaned up). Indeed, the Supreme Court has previously deemed broad, "any cause of action arising from" language as "unmistakably clear," signaling Congress's intent to abrogate sovereign immunity from suit. *See Seminole Tribe of Fla.* v. *Florida*, 517 U.S. 44, 56-57 (1996) (examining tribal gaming ordinances "vest[ing] jurisdiction in 'the United States district courts . . . over any cause of action [initiated by an Indian tribe] arising from the failure of a State to enter into negotiations [with the Indian tribe] . . . or to conduct such negotiations in good faith'" (quoting 25 U.S.C. § 2710)). In *Seminole Tribe*, § 2710(d)(7)(A)(ii) and (iii) also granted jurisdiction to the district courts over "any cause of action" initiated by either a State or Indian tribe over certain activity or by the Secretary of the Interior to enforce some of the statutory procedures. *Id.* at 57. As the district court in our case pointed out, the language in PROMESA § 106(a) is similar to the statutory language at issue in *Seminole Tribe*, though the latter specified the plaintiff while PROMESA does not, but PROMESA provides specific exceptions to jurisdiction whereas the tribal gaming regulations did not.[14]

14. Our reliance on the Supreme Court's reasoning in *Seminole Tribe* is not, as our dissenting colleague claims,

The district court also concluded that to consider PROMESA § 106 anything but clear language of Congress's intent to abrogate the Board's sovereign immunity would render § 106 superfluous. Not so, says the Board, because an action could still be brought under federal law. We note, however, that § 106 doesn't explicitly limit the federal court's jurisdiction to federal law claims. Congress could have included such a limitation, as it included other limitations in § 106(a) and (e), but it did not and, unlike our dissenting colleague who repeatedly asserts § 106 is intended to provide jurisdiction over

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misplaced. The dissent emphasizes the nature of the section of the Indian Gaming Regulatory Act in question -- 25 U.S.C. § 2710(d)(7)(A) -- as a "remedial scheme." Indeed, this part of the Act provided jurisdiction in the federal district courts over a claim that a state had not negotiated a Tribal-State compact in good faith, as required by the Act. *See* 517 U.S. at 49-50. But the designation of this section as "remedial" did not factor into the Court's reasoning about Congress's explicit intent to abrogate sovereign immunity and does not detract from its precedential value to us here. *Seminole Tribe* stands as a clear and fairly applicable principle that Congress need not expressly say that a "state shall not be immune under the Eleventh Amendment" in order for the Court to find clear language of its intent to abrogate sovereign immunity. *See* 517 U.S. at 56; *see also In re Coughlin*, 2022 WL 1438867, at *2 (stating there are no "magic words" for the unequivocal expression of intent to abrogate (quoting *FAA*, 566 U.S. at 291)). The dissent cannot deny that the Supreme Court held Congress's intent to abrogate sovereign immunity was "unmistakably clear" even though Congress did not so explicitly state in § 2710(d)(7)(A). *See Seminole Tribe*, 517 U.S. at 56.

federal claims only, we decline to read it in.[15] *See In re Fin. Oversight & Mgmt. Bd. for P.R.*, 7 F.4th at 37; *N.H. Lottery Comm'n*, 986 F.3d at 58. We conclude "any action" includes claims based on either federal or state law.[16]

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15. While Congress did not qualify "claims" as state, federal, or both, it is important to remember that Congress did provide a couple of other limits within PROMESA on the ways in which the Board's actions may be challenged in federal court. To wit, Congress exempted the Board from liability for some types of claims: PROMESA § 105, titled "Exemption from liability for claims," provides that "[t]he Oversight Board, its members, and its employees shall not be liable for any obligation of or claim against the Oversight Board or its members or employees or the territorial government resulting from actions taken to carry out this chapter." 48 U.S.C. § 2125. While we do not reach the merits of the parties' arguments about the scope of this section, there is no doubt that it serves as a limit on the kinds of claims that may be brought against the Board.

Congress also included a supremacy clause: "The provisions of this chapter shall prevail over any general or specific provisions of territory law, State law, or regulation that is inconsistent with this chapter." 48 U.S.C. § 2103. This shield from compliance with inconsistent territory laws and regulations assists the Board as it formulates and executes its plans for Puerto Rico's fiscal recovery, and, though not a limit on the federal court's jurisdiction over claims against it, provides a defense to the Board for use against claims that its actions are in conflict with territorial laws and regulations.

16. We also note that, before PROMESA was enacted, the status quo ante was that persons in Puerto Rico could sue the Commonwealth for damages in Commonwealth courts, but not in federal courts. PROMESA effectively reversed this

As to the second necessary part of abrogation in the Context of sovereign immunity (abrogation through a "valid exercise of power," *Arecibo Cmty. Health Care*, 270 F.3d at 24 n.9), Congress expressly enacted PROMESA using its power pursuant to the Territorial Clause (again,

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venue regime by barring suit in Commonwealth courts while simultaneously allowing suits against the Commonwealth to be brought in federal court. Nothing in the language of § 106 suggests or even implies any intent to affect the merits of such re-routed claims. The Board urges a different view. It would have us find that PROMESA essentially wiped out all such suits by deeming them dead on arrival at the federal forum. But § 106 is not merely a "general authorization for suit in federal court." *Atascadero State Hosp.* v. *Scanlon*, 473 U.S. 234, 246 (1985). Rather, it is a claim-channeling provision which requires that claims against the Board that are otherwise cognizable in Commonwealth court must be brought in federal court. This is no reason to think that Congress intended this channeling to dictate the dismissal of such claims. Had Congress intended to bring about such a change in substance rather than venue we think it would have done so expressly. This is so especially for claims of violation of the Commonwealth's constitution because Congress had a direct role in the development of Puerto Rico's Constitution, authorizing the "constitution- making process," amending the draft constitution, and ultimately approving the final Constitution. *Sánchez Valle*, 579 U.S. at 76; *see In re Fin. Oversight & Mgmt. Bd. for P.R.*, 916 F.3d at 104 (citing *Sánchez Valle* for its recognition of Congress's role in the creation of Puerto Rico's constitution). Therefore, Congress was certainly familiar with all the provisions within Puerto Rico's Constitution -- including the right to access public documents found in P.R. Const. § 4 (recall this is the right at the center of CPI's suit against the Board) -- and we can expect that Congress had Puerto Rico's constitutional provisions in mind when it was designing the legislation to help Puerto Rico navigate its fiscal crisis.

see supra note 1), 48 U.S.C. § 2121(b)(2); an exercise of power that neither party has questioned here and that the Board has not challenged in other litigation, *see Fin. Oversight & Mgmt. Bd. for P.R.* v. *Aurelius Inv., LLC*, 140 S. Ct. 1649, 1679 (2020) (Sotomayor, J., concurring) ("[T]he parties here do not dispute Congress' ability to enact PROMESA under the Territories Clause in the first place; nor does it seem strictly necessary to call that matter into question to resolve the Appointments Clause concern presented here.").

The Board puts forth some additional arguments about why it thinks the district court erred by concluding PROMESA § 106 constituted a waiver or abrogation of immunity, including that the district court relied on the wrong statute's legislative history, that the district court should not have been swayed by CPI not having any forum in which to sue the Board if the Board was immune from all causes of actions based on territorial law, and that the district court should not have put any stock in the Board's appearances in the PROMESA Title III restructuring cases. We do not address these arguments because none change our conclusion that, based on our de novo review of PROMESA § 106 and the application of the strict abrogation elements, Congress abrogated the Board's sovereign immunity in PROMESA § 106 for the reasons we've stated, to the extent not excepted within this statutory section.

Appendix A

FINAL WORDS

For the reasons stated above, the district court's order denying the Board's motion to dismiss CPI's 2019 Complaint on the basis of sovereign immunity is **affirmed**. Costs to CPI.

- DISSENTING OPINION FOLLOWS -

LYNCH, *Circuit Judge, dissenting.* With respect, I dissent. The Board is correct that it is entitled to Eleventh Amendment immunity and the case must be dismissed. The majority's conclusion to the contrary conflicts with Supreme Court precedent, First Circuit precedent, and precedent from other circuits, and will have dire consequences.

I.

We have long recognized that Puerto Rico is entitled to Eleventh Amendment immunity. *See, e.g.*, *Borrás-Borrero* v. *Corporación del Fondo del Seguro del Estado*, 958 F.3d 26, 33 (1st Cir. 2020); *Grajales* v. *P.R. Ports Auth.*, 831 F.3d 11, 15 (1st Cir. 2016); *Fresenius Med. Care Cardiovascular Res., Inc.* v. *P.R. & Caribbean Cardiovascular Ctr. Corp.*, 322 F.3d 56, 61 (1st Cir. 2003).[17] The Board is part of the Puerto Rico government. 48 U.S.C § 2121(c)(1). The relevant question is whether Congress in § 106 of PROMESA, 48 U.S.C. § 2126, has expressly abrogated that immunity.[18]

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17. The D.C. Circuit has also held that the Eleventh Amendment applies to Puerto Rico; it found that the Puerto Rican Federal Relations Act, 48 U.S.C. § 734, granted Puerto Rico the same sovereign immunity that states possess. *See P.R. Ports Auth.* v. *Fed'l Maritime Comm'n*, 531 F.3d 868, 872 (D.C. Cir. 2008) (Kavanaugh, J.).

18. We have interlocutory appellate jurisdiction to consider whether the district court's denial of Eleventh Amendment immunity was error. *See Nieves-Márquez* v. *Puerto Rico*, 353 F.3d 108, 123 (1st Cir. 2003).

In my view it is clear that the Board is protected by Eleventh Amendment immunity under numerous doctrines and Eleventh Amendment principles, including that abrogation of Eleventh Amendment immunity must be clearly and unequivocally stated; that grants of jurisdiction to Article III courts alone do not abrogate Eleventh Amendment immunity; that federal courts are prohibited from ordering state officials to conform their conduct to state law under *Pennhurst State School & Hospital* v. *Halderman*, 465 U.S. 89 (1984); and that courts may not second-guess Congress where the text of a statute is clear. Further, the provisions of PROMESA on which the majority relies, which provide remedies and instructions as to the exercise of jurisdiction over federal claims, do not support the majority's conclusion that Congress intended to abrogate the Board's Eleventh Amendment immunity. In fact, the other provisions of PROMESA reinforce that Congress did not intend to abrogate immunity.

The majority and the plaintiffs argue that § 106 expressly abrogates Puerto Rico's Eleventh Amendment immunity. "In order to determine whether Congress has abrogated the States' sovereign immunity, we ask two questions: first, whether Congress has unequivocally expressed its intent to abrogate the immunity, and second, whether Congress has acted pursuant to a valid exercise of power[.]" *Seminole Tribe of Fla.* v. *Florida*, 517 U.S. 44, 55 (1996) (cleaned up).

In my view, the majority violates the rule that abrogation of Eleventh Amendment immunity will only be found where Congress has unequivocally expressed

its intent to abrogate that immunity. *See Kimel* v. *Fla. Bd. of Regents*, 528 U.S. 62, 73 (2000) ("Congress may abrogate the States' constitutionally secured immunity from suit in federal court only by making its intention unmistakably clear in the language of the statute." (quoting *Dellmuth* v. *Muth*, 491 U.S. 223, 228 (1989))); *see also Mjosilovic* v. *Oklahoma ex rel. Bd. of Regents.*, 841 F.3d 1129, 1131 (10th Cir. 2016); *Burnette* v. *Carothers*, 192 F.3d 52, 57 (2d Cir. 1999); *Mills* v. *Maine*, 118 F.3d 37, 41 (1st Cir. 1997).

Section 106(a) is not an abrogation of Eleventh Amendment immunity. It reads:

> (a) Jurisdiction
>
> Except as provided in section 2124(f)(2) of this title (relating to the issuance of an order enforcing a subpoena), and subchapter III (relating to adjustments of debts), any action against the Oversight Board, and any action otherwise arising out of this chapter, in whole or in part, shall be brought in a United States district court for the covered territory or, for any covered territory that does not have a district court, in the United States District Court for the District of Hawaii.

48 U.S.C. § 2126. From the text of § 106(a) alone, the majority's conclusion is error. Absolutely nothing in the text of this section sets forth an intent to abrogate Eleventh Amendment immunity.

Indeed, the text reveals the choice by Congress not to include language abrogating Eleventh Amendment immunity. In *Allen* v. *Cooper*, the Supreme Court held that Congress's intent to abrogate a state's Eleventh Amendment immunity was express where the 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." 140 S. Ct. 994, 999, 1001 (2020) (alteration in original) (quoting 17 U.S.C. § 511(a)). Such language is conspicuously absent from PROMESA § 106.[19] The *Allen* Court found that intent to abrogate was furthered by the language "that in such a suit a State will be liable, and subject to remedies, 'in the same manner and to the same extent as' a private party." 140 S. Ct. at 999, 1001 (quoting 17 U.S.C. § 501(a)). Such language is also absent from PROMESA § 106. Significantly, as noted in *Allen*, this language was "essentially verbatim" the language the Court recognized as expressly abrogating Eleventh Amendment immunity in *Florida Prepaid Postsecondary Education Expense Board* v. *College Savings Bank*, 527 U.S. 627 (1999), which was decided before PROMESA was enacted. 140 S. Ct. at 1001.

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19. The majority cites to *In re Coughlin*, No. 21-1153, 2022 WL 1438867 (1st Cir. May 6, 2022) for the correct proposition that Congress need not invoke any particular "magic words" in order to abrogate sovereign immunity, but misses the key language of abrogation Congress used in that case. *See id.* at *2. In *Coughlin*, the provision of the Bankruptcy Code at issue stated "sovereign immunity is abrogated as to a governmental unit" with respect to certain provisions of the Code, which we found was a clear statement that the Code abrogated tribal sovereign immunity. *Id.* at *2, *4 (quoting 11 U.S.C. § 106(a)).

The majority goes on to reason that if Congress had wished to bar the assertion of Puerto Rico state law claims, it would have explicitly added more language to § 106 to make that clear. This proposition is wrong. *See Blanciak* v. *Allegheny Ludlum Corp.*, 77 F.3d 690, 696 (3rd Cir. 1999) (noting that where the statutory text does not evince a clear intent to abrogate, the court may not act as a "super legislature" and find an intent to abrogate in order to avoid outcomes which seem "unjustifiable on policy grounds"). An exclusive grant of jurisdiction to federal courts for claims against the Board does not constitute a clear statement abrogating Eleventh Amendment immunity. *See United States* v. *Nordic Vill., Inc.*, 503 U.S. 30, 37-38 (1992) (rejecting argument that provision granting district courts exclusive jurisdiction in bankruptcy proceedings waived sovereign immunity). In essentially requiring Congress to include a clear statement that it did not intend to abrogate Eleventh Amendment immunity -- rather than finding abrogation only in the presence of an unmistakably clear express statement -- the majority turns the longstanding rule on its head.

Section 106(a) is a limited jurisdiction-granting provision.[20] The Supreme Court has repeatedly held that jurisdiction-granting clauses like § 106 do not abrogate Eleventh Amendment immunity. *See Atascadero State*

20. The majority argues that § 106(a) is actually a "claim-channeling" provision. Not only does the text not support this reading, no authority supports the proposition that a claim-channeling provision is a clear statement abrogating Eleventh Amendment immunity.

Hosp. v. *Scanlon*, 473 U.S. 234, 246 (1985) ("A general authorization for suit in federal court is not the kind of unequivocal statutory language sufficient to abrogate the Eleventh Amendment."); *Blatchford* v. *Native Vill. of Noatak & Circle Vill.*, 501 U.S. 775, 786 n.4 (1991) ("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."); *see also Mojsilovic*, 841 F.3d at 1132 ("A general authorization for suit is insufficient to abrogate the States' sovereign immunity."); *BV Eng'g* v. *UCLA*, 858 F.2d 1394, 1397-98, 1397 n.1 (9th Cir. 1988). In each of the cases in which the Supreme Court and our court have recognized Eleventh Amendment immunity, there was a federal statute granting federal jurisdiction. *Pennhurst* itself involved a grant of jurisdiction under § 504 of the Rehabilitation Act of 1973. 465 U.S. at 92. This must be so, as federal courts exercise jurisdiction only insofar as Congress extends it by statute. *See Sheldon* v. *Sill*, 49 U.S. 441, 449 (1850); *see also* R. Fallon, et al., *Hart & Wechsler's The Federal Courts and the Federal System* 295-97 (7th ed. 2015). The majority errs in treating the statutory grant of jurisdiction in § 106 as not only a necessary but also a sufficient condition to hale Puerto Rico into federal court.

The majority tries to justify its reliance on a jurisdiction-granting provision to find an intent to abrogate by citing to a single case, *Seminole Tribe*. In *Seminole Tribe*, the Supreme Court considered the Indian Gaming Regulatory Act's remedial scheme for ensuring the formation of Tribal-State compacts, which grants federal courts jurisdiction over "any cause of action

initiated by an Indian tribe arising from the failure of a State to enter into negotiations with the Indian tribe for the purpose of entering into a Tribal–State compact," and only after the tribe has made good-faith efforts to engage in such negotiations. 517 U.S. at 49-50 (quoting §§ 2710(d)(7)(A)(i) and (B)(i)). The Court found that this grant of jurisdiction over a single type of lawsuit between a tribe and a state, after elaborate statutory criteria had been met, clearly demonstrated Congress's intent to abrogate states' Eleventh Amendment immunity in such suits. *Id.* at 56-57. In contrast, § 106(a) grants federal district courts jurisdiction over actions against the Board without reference to any particular type of action. The majority incorrectly suggests that the Court in *Seminole Tribe* was considering a similarly broad provision, when in fact, as the Court there made clear, the grant of jurisdiction in that case was circumscribed and accompanied by an "elaborate remedial scheme." *Id.* at 50. *Seminole Tribe* does not, contrary to the majority, provide justification for a departure from the usual rule that a general grant of jurisdiction is not sufficient to abrogate Eleventh Amendment immunity, and is certainly not an adequate foundation for its argument that § 106(a) does so.

The majority's conclusion also violates the holding of *Pennhurst*. In *Pennhurst*, the Supreme Court considered an action against state officials brought under the *Ex Parte Young* doctrine, which allows suits for constitutional violations to be brought against state officials that the Eleventh Amendment would normally bar. 465 U.S. at 102. The Supreme Court found that the *Ex Parte Young* exception does not apply in suits brought against state officials for violations of state law, because Article

III courts ordering state officials to comply with state law "conflicts directly with the principles of federalism that underlie the Eleventh Amendment." 465 U.S. at 106; *see also Cuesnongle* v. *Ramos*, 835 F.2d 1486, 1496 (1st Cir. 1987) ("[S]overeign immunity prohibits federal courts from ordering state officials to conform their conduct to state law."). Yet that is now precisely what the majority holds is required in this case. The majority is ordering the Board to comply with Puerto Rico disclosure laws despite the Board's Eleventh Amendment immunity. *Pennhurst* clearly bars this outcome.

Where the language of a provision has a plain and unambiguous meaning, "the sole function of the courts is to enforce it according to its terms." *See Stauffer* v. *IRS*, 939 F.3d 1, 7 (1st Cir. 2019) (quoting *In re Fin. Oversight & Mgmt. Bd. for P.R.*, 919 F.3d 121, 128 (1st Cir. 2019)). "[C]ourts must presume that a legislature says in a statute what it means and means in a statute what it says there." *Owner-Operator Indep. Drivers Ass'n, Inc.* v. *Supervalu, Inc.*, 651 F.3d 857, 862 (8th Cir. 2011) (quoting *United States* v. *I.L.*, 614 F.3d 817, 820 (8th Cir. 2010)). It is clear from § 106(a) that this section of PROMESA does not abrogate Eleventh Amendment immunity. The majority's attempts to read abrogation into this provision by relying on other provisions of PROMESA are unavailing. The majority argues that the fact that Congress in § 106(c)[21]

21. Section 106(c) reads:

(c) Timing of relief

Except with respect to any orders entered to remedy constitutional violations, no order of any court granting

contemplates remedies for constitutional violations somehow supports its abrogation holding. That is not so. Such remedies are made available as to the federal causes of action over which § 106 provides jurisdiction. The Rehabilitation Act of 1973, which the Court found not to abrogate Eleventh Amendment immunity in *Atascadero*, provided that "[t]he remedies, procedures, and rights set forth in title VI of the Civil Rights Act of 1964 shall be available to any person aggrieved" under the statute. *Atascadero*, 473 U.S. at 245 (quoting 29 U.S.C. § 794a). The provision of remedies for federal claims is not evidence of abrogation. The majority's argument is also unconvincing because PROMESA does not provide any remedies.

The majority attempts to justify its abrogation conclusion with reference to the "except as provided" clause of § 106(a) and the limitation on jurisdiction contained in § 106(e).[22] These provisions cabining the general grant of jurisdiction in § 106(a) do not support the

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> declaratory or injunctive relief against the Oversight Board, including relief permitting or requiring the obligation, borrowing, or expenditure of funds, shall take effect during the pendency of the action before such court, during the time appeal may be taken, or (if appeal is taken) during the period before the court has entered its final order disposing of such action.

48 U.S.C. § 2126(c).

22. Section 106(e) states, "There shall be no jurisdiction in any United States district court to review challenges to the Oversight Board's certification determinations under this chapter."

majority's position on abrogation. Abrogation must be express and clearly stated, and may not, as a matter of law, be found by implication.[23] *See Kimel*, 528 U.S. at 73. Further, to the extent that the majority purports to be relying on the canon that all words must be given effect, the Board's reading gives effect to all of the clauses. The Board may be sued, in federal court only, for violations of PROMESA and for violations of the federal constitution.

The majority's reading is not consistent with other provisions of PROMESA, under which Congress has created federal law obligations for the Board, to the exclusion of state law obligations. Read in concert with § 106, these provisions, contrary to the majority's reading, demonstrate that Congress indeed intended for the Eleventh Amendment to operate to shield the Board from the Puerto Rico disclosure obligations here at issue. Congress, in enacting PROMESA, worked to strike a balance between transparency, necessary to permit public oversight and maintain public confidence, and confidentiality, necessary to permit the Board to work effectively at its difficult and often unpopular tasks.

For example, PROMESA requires the Board to make public the findings of certain investigations, *see* 48 U.S.C. § 2124(p) and any "gifts, bequests or devises and the identities of the donors," *see* 48 U.S.C. § 2124(e), and it requires the Board to "submit a report to the President,

23. The majority's argument that Congress's involvement in the development of Puerto Rico's constitution somehow supports its abrogation holding is another instance of inferential reasoning in lieu of finding a clear statement.

Congress, the Governor and the Legislature" "[n]ot later than 30 days after the last day of each fiscal year," 48 U.S.C. § 2148(a). It bars other disclosures, forbidding the Board to disclose the contents of certain tax reports. *See* 48 U.S.C. § 2148(b)(2). PROMESA gives a great degree of independence to the Board to determine what materials should be disclosed, allowing the Board to hold executive sessions which are closed to the public, *see* 48 U.S.C. § 2121(h)(4); specifying that "[n]either the Governor nor the Legislature may[] . . . exercise any control, supervision, oversight, or review over the Oversight Board or its activities," 48 U.S.C. § 2128(a)(1); and directing that "[t]he Oversight Board may incorporate in its bylaws, rules, and procedures . . . such rules and regulations of the territorial government as it considers appropriate to enable it to carry out its activities under this Act with the greatest degree of independence practicable," 48 U.S.C. § 2121(h)(3). Far from "giv[ing] effect to every word and phrase" of the statute, *see City of Providence* v. *Barr*, 954 F.3d 23, 37 (1st Cir. 2020) (quoting *Narragansett Indian Tribe* v. *Rhode Island*, 449 F.3d 16, 26 (1st Cir. 2006) (en banc)), the majority's interpretation of § 106 as abrogating Eleventh Amendment immunity renders these provisions less meaningful.[24]

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24. We focus our attention on the majority's reasoning, but the district court opinion reaching the same conclusion is also in error. The district court found that to grant recognition of the Board's Eleventh Amendment immunity would render PROMESA § 106 "superfluous." *Centro de Periodismo Investigativo* v. *Fin. Oversight & Mgmt. Bd.*, No. 17-1743, 2018 WL 2094375, at *6 n.12 (D.P.R. May 4, 2018). That is plainly not so. Section 106 permits suit against the Board in federal court for federal law claims against it,

II.

There are enormous adverse consequences which flow from the majority's reading of § 106 as an abrogation of the Board's Eleventh Amendment immunity. The majority's holding that the Board cannot avail itself of Eleventh Amendment immunity will have implications far into the future, in addition to posing burdens on the Board in this case and beyond this case.[25]

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including claims that the Board has exceeded its authority under PROMESA, *see, e.g.*, *In re Fin. Oversight & Mgmt. Bd. for P.R.*, 945 F.3d 3, 5 (1st Cir. 2019), and claims for injunctive relief for violations of the federal constitution, *see Ex Parte Young*, 209 U.S. 123, 160 (1908). Section 106 ensures that claims against the Board, which might otherwise be brought in the commonwealth courts, are the exclusive province of the federal courts.

The district court's conclusion, that Congress waived the Board's Eleventh Amendment immunity, which the plaintiffs also have argued on appeal, is both wrong and misguided. *Centro de Periodismo*, 2018 WL 2094375, at *5. It is wrong for the same reason that the abrogation holding is wrong: the statute does not clearly evince an intent to waive Eleventh Amendment immunity. Moreover, the district court mistakenly cited the legislative history of a bankruptcy provision rather than PROMESA § 106, describing the provision as a "waiver of sovereign immunity." *Centro de Periodismo*, 2018 WL 2094375, at *6 (quoting D. Austin, Cong. Rsch. Serv., R44532, The Puerto Rico Oversight, Management, and Economic Stability Act (PROMESA; H.R. 5278, S. 2328) 36 (2016)).

25. Puerto Rico, for example, has successfully claimed Eleventh Amendment immunity in numerous cases in a variety of contexts. *See, e.g.*, *In re San Juan Dupont Plaza Hotel Fire Litig.*, 888 F. 2d 940, 943 (1st Cir. 1989) (affirming dismissal,

In this case, the Board has been ordered to produce privilege logs demonstrating why tens of thousands of documents fall under various privileges that it has claimed. The Board's brief explains why this is an enormous burden and interferes with the serious tasks Congress has given it. Because this Puerto Rico cause of action is not limited by a statute of limitations, it is predictable that litigants will try to seek documents created or relied on by the Board since its creation in 2016. As this case demonstrates, the majority's holding has allowed and will continue to allow the Board to be drawn into lengthy litigation with heavy discovery burdens.

III.

Eleventh Amendment protection reflects the Constitution's structural design, and where, as here,

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on Eleventh Amendment grounds, of claims against the Tourism Company of Puerto Rico in mass tort action); *Llewellyn-Waters* v. *Univ. of P.R.*, 56 F. Supp. 2d 159, 161-62 (D.P.R. 1999) (dismissing claims against University of Puerto Rico in negligence action on Eleventh Amendment grounds); *Dogson* v. *Univ. of P.R.*, 26 F. Supp. 2d 341, 341, 344 (D.P.R. 1998) (dismissing breach of contract, negligence, and sex discrimination claims brought under Puerto Rico law against the University of Puerto Rico on Eleventh Amendment grounds); *Trans Am. Recovery Servs.* v. *Puerto Rico Mar. Auth.*, 820 F. Supp. 38, 38-39 (D.P.R. 1993) (dismissing, on Eleventh Amendment grounds, breach of contract action against Puerto Rico's Maritime Shipping Authority); *Rodriguez Diaz* v. *Sierra Martinez*, 717 F. Supp. 27, 29, 31 (D.P.R. 1989) (dismissing medical negligence claims against University of Puerto Rico and the Puerto Rico Medical Services Administration on Eleventh Amendment grounds).

Congress has not expressly abrogated Eleventh Amendment immunity and the sovereign has not waived it, the federal courts must honor that protection and dismiss the case. The majority today finds congressional intent to abrogate absent any express indication of such intent in the text of the statute, violating the Supreme Court's mandate not to do so. *See, e.g.*, *Seminole Tribe*, 517 U.S. at 55-56. The majority decision finds an intent to abrogate in a general grant of jurisdiction, contrary to decisions of the Supreme Court and other circuits. *See, e.g.*, *Atascadero*, 473 U.S. at 246; *see also Burnette*, 192 F.3d at 57; *BV Engineering*, 858 F.2d at 1397-98; *Gary A.* v. *New Trier High Sch. Dist. No. 203*, 796 F.2d 940, 944 (7th Cir. 1986). It violates the well-established principle of *Pennhurst*, that federal courts may not order state officials to comply with state law, a principle which our circuit and our sister circuits repeatedly have upheld. *See, e.g.*, *Vega* v. *Semple*, 963 F.3d 259, 284 (2d Cir. 2020); *Doe* v. *Regents of the Univ. of Cal.*, 891 F.3d 1147, 1152-53 (9th Cir. 2018); *O'Brien* v. *Mass. Bay Transp. Auth.*, 162 F.3d 40, 44 (1st Cir. 1998). The implications, not only for the Board's future liability, but for Eleventh Amendment doctrine going forward, are significant, and today's decision should not go uncorrected.

I respectfully dissent.

APPENDIX B — JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT, FILED MAY 17, 2022

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 21-1301

CENTRO DE PERIODISMO INVESTIGATIVO, INC.,

Plaintiff-Appellee,

v.

FINANCIAL OVERSIGHT AND MANAGEMENT BOARD FOR PUERTO RICO,

Defendant-Appellant.

JUDGMENT

Entered: May 17, 2022

This cause came on to be heard on appeal from the United States District Court for the District of Puerto Rico and was argued by counsel.

Upon consideration whereof, it is now here ordered, adjudged and decreed as follows: The district court's order denying the Financial Oversight and Management Board for Puerto Rico's motion to dismiss Centro De Periodismo Investigativo, Inc.'s 2019 complaint on the basis of sovereign immunity is affirmed. Costs to Centro De Periodismo Investigativo, Inc.

Appendix B

By the Court:

Maria R. Hamilton, Clerk

APPENDIX C — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT DENYING REHEARING EN BANC, FILED JUNE 7, 2022

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 21-1301

CENTRO DE PERIODISMO INVESTIGATIVO, INC.,

Plaintiff - Appellee,

v.

FINANCIAL OVERSIGHT AND MANAGEMENT BOARD FOR PUERTO RICO,

Defendant - Appellant.

Before

Barron, *Chief Judge*,*
Lynch, Thompson, Kayatta, and Gelpí,*
Circuit Judges.

ORDER OF COURT

Entered: June 7, 2022

Pursuant to First Circuit Internal Operating Procedure X(C), the petition for rehearing en banc has also been treated as a petition for rehearing before the

* Chief Judge Barron and Judge Gelpí are recused and did not participate in the consideration of this matter.

original panel. The petition for rehearing having been denied by the panel of judges who decided the case, and the petition for rehearing en banc having been submitted to the active judges of this court and a majority of the judges not having voted that the case be heard en banc, it is ordered that the petition for rehearing and petition for rehearing en banc be denied.

LYNCH, *Circuit Judge*, dissenting. I dissent from the denial of en banc rehearing for the reasons stated in my dissent from the majority opinion and in the FOMB's petition.

By the Court:

Maria R. Hamilton, Clerk

APPENDIX D — DOCKET ENTRY FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF PUERTO RICO, FILED MARCH 23, 2021

Date Filed	#	Docket Text
3/23/2021	131	ORDER denying Plaintiff's 109 Objection to the Report and Recommendation; denying Defendant's 110 Limited Objection to the Report and Recommendation; and adopting the 108 Report and Recommendation. After considering the Parties' objections and a *de novo* review of the record, the Court determines that the Magistrate Judge's 108 Report & Recommendation is well grounded in both fact and law, including PROMESA §105 which "ought not be considered without the tempering effects of § 106." Docket No. 100 at 6 (citing Docket No. 36 at 12) (adopted by the Court at Docket No. 130). Therefore, the Court hereby ADOPTS in its entirety the Magistrate Judge's 108 Report & Recommendation for the reasons stated therein, and accordingly denies Plaintiff's 69 motion to compel with respect to the production of: (i) the law enforcement documents, Docket No. 108 at 6; and (ii) the fourteen drafts withheld pursuant to PROMESA §208(b), *id.*

at 14. **The Court hereby set 4/23/2021 as the deadline for Defendant to comply with the Magistrate Judge's order** to "produce a comprehensive, legally-sufficient privilege log to justify its invocation of privilege for each document which it seeks to withhold: documents with claimed deliberative process privilege, common interest privilege, Title III mediation privilege, PROMESA § 208 protections, and official information privilege." Docket No. 108 at 16. In light of the above, Defendant's 111 and 117 Motion to Stay are rendered moot. Signed by Judge Jay A. Garcia-Gregory on 3/23/2021. (ERC) (Entered: 03/23/2021)

APPENDIX E — DOCKET ENTRY FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF PUERTO RICO, FILED MARCH 24, 2021

Date filed	#	3/24/2021
3/24/2021	133	ORDER denying 10 Defendant's Motion to Dismiss for Failure to State a Claim, Civ. No. 19-1936, for the reasons stated in the Court's Opinion and Order, Docket No. 36, and the Report and Recommendation, Docket No. 100 (adopted by this Court at Docket No. 130). *Cf. Fin. Oversight & Mgmt. Bd. For P.R. v. Aurelius Inv., LLC*, 140 S. Ct. 1649, 1661 (2020) (holding that Defendant is a part of the local Puerto Rican government). In short, (i) "§ 105 ought not be considered without the tempering effects of § 106," Docket No. 100 at 6 (citing Docket No. 36 at 12), § 105 does not provide Defendant with wholesale immunity from disclosures pursuant to Puerto Rico law, *id.*; (ii) while the right to inspect public documents is not absolute, Plaintiff has the right to examine public documents in Defendant's possession pursuant to Puerto Rico law, *id.* at 36 (citations omitted); (iii) "[p]ursuant to its plenary powers, Congress waived, or in the

alternative abrogated, the Board's sovereign immunity," Docket No. 36 at 2; and (iv) "PROMESA does not preempt Puerto Rico law granting access to public documents under the Board's control," *id.* **Defendant's Answer to Plaintiff's Complaint, Civ. No. 19-1936, Docket No. 1, is due by 4/9/2021.** Signed by Judge Jay A. Garcia-Gregory on 3/24/2021. (ERC) (Entered: 03/24/2021)

APPENDIX F — OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF PUERTO RICO, FILED MAY 4, 2018

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

CIVIL NO. 17-1743 (JAG)

CENTRO DE PERIODISMO INVESTIGATIVO,

Plaintiff,

v.

FINANCIAL OVERSIGHT AND MANAGEMENT BOARD FOR PUERTO RICO,

Defendant.

May 4, 2018, Decided
May 4, 2018, Filed

JAY A. GARCIA-GREGORY, United States District Judge.

OPINION AND ORDER

GARCIA-GREGORY, D.J.

Congress giveth, Congress taketh away. This case is about the applicability of Puerto Rico law to the Financial Oversight and Management Board for Puerto Rico (the

"Board"), and the extent of federal congressional power to make "needful rules and regulations" regarding the territories of the United States. Although an emotionally charged subject, the Puerto Rico Oversight, Management, and Economic Stability Act ("PROMESA" or the "Act")[1] exemplifies Congress's broad powers to pass laws that affect territories where more than four million American citizens live.

Plaintiff Centro de Periodismo Investigativo ("CPI") brought suit against the Board seeking access to documents within the Board's control pursuant to the First Amendment of the Constitution of the Commonwealth of Puerto Rico ("Commonwealth" or "Puerto Rico"). Docket No. 1 at 2. Before the Court is the Board's Motion to Dismiss based on two grounds. Docket No. 22. First, the Board argues that under *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 92 (1984), it is immune in federal court from claims seeking injunctive relief pursuant to Puerto Rico law. *Id.* at 5. Second, the Board contends that the right to access and inspect public documents pursuant to Puerto Rico law is preempted by PROMESA. *Id.* at 9. The Court holds that: (1) pursuant to its plenary powers, Congress waived, or in the alternative abrogated, the Board's sovereign immunity; and (2) PROMESA does not preempt Puerto Rico law granting access to public documents under the Board's control.

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1. PROMESA is codified at 48 U.S.C. § 2101 *et seq.* References to "PROMESA" in the remainder of this Opinion and Order are to the uncodified version of the legislation (i.e. reference to the uncodified sections).

For the reasons stated below, the Court **DENIES** the Board's Motion to Dismiss. This case will be referred to a Magistrate Judge to establish case management deadlines for the production of the documents requested by CPI.

BACKGROUND

In June 2016, Congress enacted PROMESA to address the ongoing financial crisis in Puerto Rico. *In re The Fin. Oversight & Mgmt. Bd. for P.R.*, 872 F.3d 57, 59 (1st Cir. 2017). The Act created the Board as an oversight entity designed to help Puerto Rico restructure its debts and regain fiscal stability. PROMESA §§ 101(a)-(b), 304(a). Pursuant to PROMESA, the Board was created as an entity within the Commonwealth. *Id.* § 101(c)(1). Among other things, PROMESA empowers the Board to oversee the development and execution of a "fiscal plan," and to commence quasi-bankruptcy proceedings to restructure Puerto Rico's debt under Title III. *In re The Fin. Oversight & Mgmt. Bd. for P.R.*, 872 F.3d at 59.

The Board must comply with several disclosure requirements under PROMESA. For example: (1) Section 101(h)(1) requires the disclosure of the bylaws, rules, and procedures adopted by the Board; (2) Section 104(e) requires the disclosure of "[a]ll gifts, bequests or devises and the identities of the donors . . . within 30 days of receipt;" (3) Section 104(p) requires the disclosure of the findings of any investigation made pursuant to Section 104(o); and (4) Section 109(b) requires the disclosure of the financial interests of the Board's members and its staff. Finally, and perhaps the most important disclosure,

the Board is required by Section 208 to submit an annual report to the executive and legislative branch of both the federal and local governments.

STANDARD OF REVIEW

A defendant may move to dismiss an action against it for lack of federal subject-matter jurisdiction. Fed. R. Civ. P. 12(b)(1); *accord FDIC v. Caban-Muniz*, 216 F. Supp. 3d 255, 257 (D.P.R. 2016). Since federal courts are courts of limited jurisdiction, the party asserting jurisdiction has the burden of demonstrating its existence by a preponderance of the evidence. *U.S. ex rel. Ondis v. City of Woonsocket*, 587 F.3d 49, 54 (1st Cir. 2009). In assessing a motion to dismiss for lack of subject-matter jurisdiction, a district court "must construe the complaint liberally, treating all well-pleaded facts as true and drawing all reasonable inferences in favor of the plaintiffs." *Viqueira v. First Bank*, 140 F.3d 12, 16 (1st Cir. 1998) (citing *Royal v. Leading Edge Prods., Inc.*, 833 F.2d 1, 1 (1st Cir. 1987)); *see Calderon-Serra v. Wilmington Tr. Co.*, 715 F.3d 14, 17 (1st Cir. 2013). Additionally, a court may review any evidence, including submitted affidavits and depositions, to resolve factual disputes bearing upon the existence of jurisdiction. *See Land v. Dollar*, 330 U.S. 731, 735 n.4 (1947); *Acosta-Ramirez v. Banco Popular de P.R.*, 712 F.3d 14, 18 (1st Cir. 2013).

"Federal courts are obliged to resolve questions pertaining to subject-matter jurisdiction before addressing the merits of a case." *Acosta-Ramirez*, 712 F.3d at 18. A court must dismiss the action if, at any time, it determines

that it lacks subject-matter jurisdiction. Fed. R. Civ. P. 12(h)(3). "A case is properly dismissed for lack of subject-matter jurisdiction under Rule 12(b)(1) when the Court lacks the statutory or constitutional power to adjudicate the case." *Nowak v. Ironworkers Local 6 Pension Fund*, 81 F.3d 1182, 1187 (2d Cir. 1996); *accord Prestige Capital Corp. v. Pipeliners of P.R., Inc.*, 849 F. Supp. 2d 240, 247 (D.P.R. 2012).

ANALYSIS

The Board argues that dismissal is warranted based on two grounds. First, it argues that this Court lacks subject matter jurisdiction under the Eleventh Amendment. Docket No. 22 at 10. Second, even if this Court has jurisdiction, the Board argues that the right to access public documents pursuant to Puerto Rico's Constitution is preempted by PROMESA. *Id.* at 14. For the reasons stated below, the Court holds that: (1) Congress waived the Board's sovereign immunity; (2) in the alternative, the Board's sovereign immunity was abrogated by Section 106(a) of PROMESA; and (3) the right to inspect public documents pursuant to Puerto Rico's Constitution is not preempted by PROMESA.

In order to understand how Congress can create legislation like PROMESA for Puerto Rico, and to serve as a foundation to the sections below, the Court finds it necessary to explain Congress's sweeping power under the Territorial Clause of the U.S. Constitution.

Appendix F

I. Congress's Plenary Powers over the Territories

In relevant part, Article IV of the U.S. Constitution states that "Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States . . . ." U.S. Const. art IV, § 3, cl. 2. The Supreme Court has interpreted this clause to give Congress plenary[2] powers over the territories. *See Commonwealth of Puerto Rico v. Sanchez Valle*, 136 S. Ct. 1863, 1876 (2016) (noting that pursuant to U.S. Const., art. IV, § 3, cl. 2, "Congress has broad latitude to develop innovative approaches to territorial governance."); *Harris v. Rosario*, 446 U.S. 651, 651-52 (1980) (per curiam) (finding that, under the powers vested in art. IV, § 3, cl. 2, Congress "may treat Puerto Rico differently from States so long as there is a rational basis for its actions."); *Torres v. Commonwealth of Puerto Rico*, 442 U.S. 465, 470 (1979) ("Congress may make constitutional provisions applicable to territories in which they would not otherwise be controlling.") (citation omitted); *Examining Bd. of Eng'rs, Architects & Surveyors v. Flores de Otero*, 426 U.S. 572, 586 n.16 (1976) ("The powers vested in Congress by Const., Art. IV, § 3, cl. 2, to govern Territories are broad.") (citations omitted); *Palmore v. United States*, 411 U.S. 389, 403 (1973) ("In legislating for [territories], Congress exercises the combined powers of the general, and of a state government.") (quotation marks and citation omitted); *De Lima v. Bidwell*, 182 U.S. 1, 196 (1901) ("Congress has

2. "Plenary" is defined as "[f]ull; complete; entire." PLENARY, BLACK'S LAW DICTIONARY (10th ed. 2014).

full and complete legislative authority over the people of the territories and all the departments of the territorial governments.") (internal quotation marks and citation omitted); *United States v. Kagama*, 118 U.S. 375, 379–80 (1886) (noting that the powers conferred to a territorial government by Congress could "be withdrawn, modified, or repealed at any time."); *First Nat. Bank v. Yankton Cty.*, 101 U.S. 129, 133 (1879) (noting that Congress "has full and complete legislative authority over the people of the Territories and all the departments of the territorial governments."); *United States v. Gratiot*, 39 U.S. 526, 537 (1840) (noting that "power over the [territories] is vested in Congress by the Constitution, without limitation."). Thus, our jurisprudence makes it clear that Congress's power over Puerto Rico is plenary.

Congressional plenary power over the territories can be delegated to the local territorial government, but can never be relinquished. *See Cincinnati Soap Co. v. United States*, 301 U.S. 308, 318 (1937) (explaining that, while the power of the federal government decreases when the powers of a territory increase, "the authority which confer[s] additional power" to the territory can "at any time" be withdrawn). Congress can enact a federal statute that organizes a territory and delegate power to the territorial government, but cannot renounce its powers over the territories forever. *See Dorsey v. United States*, 567 U.S. 260, 274 (2012) ("[S]tatutes enacted by one Congress cannot bind a later Congress, which remains free to repeal the earlier statute, to exempt the current statute from the earlier statute, to modify the earlier statute, or to apply the earlier statute but as modified.") (citations omitted).

The Territorial Clause is not just a grant of power, but also a constitutional mandate to enact essential legislation for the U.S. territories. *Bidwell*, 182 U.S. at 196–97 (finding that congressional authority over territories "arises, not necessarily from the territorial clause of the Constitution, but from the necessities of the case, and from the inability of the states to act upon the subject.").

II. PROMESA

Puerto Rico has been in "dire financial straits" for several years. *Wal-Mart P.R., Inc. v. Zaragoza-Gomez*, 834 F.3d 110, 112 (1st Cir. 2016) (citations omitted). Armed with plenary powers, Congress responded to Puerto Rico's crushing public debt by enacting PROMESA as a needful rule and regulation, pursuant to art. IV, § 3, cl. 2 of the U.S. Constitution, "to provide a method for Puerto Rico to achieve fiscal responsibility and access to the capital markets." PROMESA § 101(a).

The Act also created the Board, which is composed of seven voting members and one non-voting member—the Governor of Puerto Rico or his designee—serving *ex officio*. PROMESA §§ 101(e)(1), 101(e)(3). The Board operates as an entity within the government of Puerto Rico, *id.* § 101(c)(1), and is funded out of the Commonwealth's public fisc, *id.* § 107(b). The Board is tasked with several responsibilities and endowed with several powers. Among those responsibilities, the Board is in charge of the approval of fiscal plans, § 201(a); approval of budgets for Puerto Rico, § 202(a); reviewing territorial legislation to ensure that they are in compliance with the current

fiscal plan, § 204(a)(1); and serving as the representative of the Commonwealth in Title III proceedings, § 315(b). Additionally, if the Board finds, in its sole discretion, that the government of Puerto Rico is not in compliance with PROMESA, it can develop its own fiscal plan, § 201(d)(2); and in case of a noncompliant budget, could make reductions or modifications to the proposed budget it as it sees fit, § 203(d).

With such power comes great responsibility and, accordingly, great oversight. That is why PROMESA requires the Board and its entire staff to comply with federal conflict of interest requirements, § 109(a), and financial disclosure requirements, § 109(b). In addition, the Board must prepare an annual report to the President, Congress, and the Governor and Legislature of Puerto Rico. PROMESA § 208(a). In this report, the Board must describe, among other requirements, Puerto Rico's progress in meeting the objectives of the Act, the assistance provided by the Board to the government of Puerto Rico, and the precise manner in which funds provided to the Board have been spent. *Id.*

Most salient to this case is Section 106(a) of PROMESA, which states in relevant part that "any action against the Oversight Board, and any action otherwise arising out of this Act in whole or in part, shall be brought in a United States district court for the covered territory . . . ." Puerto Rico is a "covered territory" under PROMESA. PROMESA §§ 5(8), 101(b)(1). Thus, interpreting the statute under its plain meaning, PROMESA authorizes this Court to hear any suit brought against the Board.

See Penobscot Nation v. Mills, 861 F.3d 324, 330 (1st Cir. 2017) ("Where the meaning of the statutory text is plain and works no absurd result, the plain meaning controls.") (citation omitted). Accordingly, given PROMESA's broad jurisdictional grant, the proper jurisdiction, and in fact, the only jurisdiction, for any claims against the Board is the U.S. District Court for the District of Puerto Rico. *See* PROMESA § 106(a); *see also* H.R Comm. on Natural Resources, Puerto Rico Oversight, Management, and Economic Stability Act, H.R. Rep. No. 114-602, at 44 (2016) (explaining that "in the case of Puerto Rico, any non-Title III or non-subpoena related action must be brought in the U.S. District Court for the District of Puerto Rico.").

Section 106(a)'s jurisdictional grant does not go beyond Congress's powers over the territories. As explained above, Congress has plenary powers over the territories and, therefore, can treat the territories differently than States when enacting laws. *Harris*, 446 U.S. at 651–52, ("[T]o make all needful Rules and Regulations respecting the Territory . . . belonging to the United States, [Congress] may treat Puerto Rico differently from States so long as there is a rational basis for its actions.") (internal quotation marks and citation omitted). As a result, Congress's authority in enacting laws dealing with territories is not restrained the same way as it is when enacting laws at the national level. *Torres*, 442 U.S. at 470 ("Congress may make constitutional provisions applicable to territories in which they would not otherwise be controlling."). For example, when enacting laws at the national level, Congress can only legislate pursuant to the powers conferred to it by Article I of the U.S. Constitution.

See United States v. Lopez, 514 U.S. 549, 552 (1995) (citing U.S. CONT. ART. I, § 8) ("The Constitution creates a Federal Government of enumerated powers."). In contrast, when legislating for the territories, Congress can go beyond its constitutional limitations, absent a few exceptions, that would otherwise limit it if enacting laws for the states.[3] *See Palmore*, 411 U.S. at 403 (explaining that "[i]n legislating for [territories], Congress exercises the combined powers of the general, and of a state government."); *First Nat. Bank*, 101 U.S. at 133 (noting that "[c]ongress may not only abrogate laws of the territorial legislatures, but it may itself legislate directly for the local government."); *Palmore*, 411 U.S. at 403 (explaining that Congress may legislate for the territories "in a manner . . . that would exceed its powers or at least would be very unusual, in the context of national legislation enacted under other powers delegated to it.").[4]

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3. For example, Congress cannot make any laws that violate fundamental constitutional rights of U.S. citizens living in Puerto Rico. *See United States v. Lebron-Caceres*, 157 F. Supp. 3d 80, 89 (D.P.R. 2016), *amended*, No. CR 15-279 (PAD), 2016 WL 204447 (D.P.R. Jan. 15, 2016).

4. Although the Supreme Court's opinion in *Palmore* involved the District of Columbia, Congress's power when legislating for the territories is almost identical to its powers when legislating for the District of Columbia under Article I, § 8 of the U.S. Constitution. *See District of Columbia v. John R. Thompson Co.*, 346 U.S. 100, 109 (1953)(explaining that under the D.C. home rule, the delegation of power of self-government to territories, remains subject to the power of Congress to revise, alter, or revoke the authority granted at any time).

Thus, Congress is well within its powers to authorize any action against the Board to be brought in federal court. Accordingly, taking into account the potentially devastating effect that Puerto Rico's insolvency could bring to the U.S. municipal Bond market,[5] Congress created the Board to help Puerto Rico get back on its financial feet, and gave this Court jurisdiction to hear any cases against it.

III. Eleventh Amendment Immunity

The Board argues that the claims against it must be dismissed, since it was created as an entity within the Commonwealth entitled to Eleventh Amendment immunity. The Court disagrees.

The Eleventh Amendment states that "[t]he Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." U.S. Const. amend. XI. The Supreme Court has interpreted the Eleventh Amendment to mean "that each State is a sovereign entity in our federal system; and second, that [i]t is inherent in the nature of sovereignty not to be amenable to the suit of an individual without its consent." *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 54 (1996) (internal quotation marks and citation omitted). The

5. Nathan Bomey, *Puerto Rico declares bankruptcy. Here's how it's going to unfold*, USA TODAY, (Mar. 9, 2018, 5:15 PM), https://www.usatoday.com/story/money/2017/05/03/puerto-rico-bankruptcy/101243686/.

Court has long recognized that the Eleventh Amendment's "greater significance lies in its affirmation that the fundamental principle of sovereign immunity limits the grant of judicial authority in Art. III." *Pennhurst*, 465 U.S. at 98. As a result, the Eleventh Amendment not only protects a state's treasury, but also a state's "dignity interest as a sovereign in not being [hauled] into federal court." *Fresenius Med. Care Cardiovascular Res., Inc. v. P.R. & Caribbean Cardiovascular Ctr. Corp.*, 322 F.3d 56, 63 (1st Cir. 2003).

The First Circuit Court of Appeals has consistently held that Puerto Rico is to be treated like a state for Eleventh Amendment purposes. *Grajales v. P.R. Auth.*, 831 F.3d 11, 15 n.3 (1st Cir. 2016); *Jusino Mercado v. Commonwealth of Puerto Rico*, 214 F.3d 34, 39 (1st Cir. 2000) (collecting cases). Thus, at first glance, it would seem that the Board is entitled to Eleventh Amendment immunity because it is an entity within the territorial government funded by the Commonwealth.[6] *See Metcalf & Eddy, Inc. v. P.R. Aqueduct & Sewer Auth.*, 991 F.2d 935, 939 (1st Cir. 1993), *holding modified by Fresenius*

6. The parties did not address whether the Board should be considered an "arm" of Puerto Rico for Eleventh Amendment purposes. Docket Nos. 22, 25. The Court assumes without deciding that the Board is an "arm of Puerto Rico" because the Commonwealth funds it. *See Pastrana-Torres v. Corporacion De P.R. Para La Difusion Publica*, 460 F.3d 124, 126 (1st Cir. 2006) (noting that one of the factors to determine whether Eleventh Amendment immunity applies to a government entity "focuses on the risk that money damages will be paid from the state's treasury if the entity is found liable.") (citation omitted).

Med. Care Cardiovascular Res., Inc., 322 F.3d at 56 ("Generally, if a state has a legal obligation to satisfy judgments against an institution out of public coffers, the institution is protected from federal adjudication by the Eleventh Amendment."). The Court finds, however, that Congress acted on behalf of Puerto Rico to waive Eleventh Amendment protection as to the Board, and alternatively, abrogated the Board's sovereign immunity.[7]

A. Congress Waived Eleventh Amendment Immunity as to the Board

Generally, a state can consent to be sued in federal court and waive its Eleventh Amendment immunity by passing a "state statute or constitutional provision." *Arecibo Cmty. Health Care, Inc. v. Commonwealth of Puerto Rico*, 270 F.3d 17, 24 (1st Cir. 2001); *see Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 238 n.1 (1985). A waiver of sovereign immunity "must be stated by the most express language or by such overwhelming implications from the text as [to] leave no room for any other reasonable construction." *Arecibo Cmty. Health Care, Inc.*, 270 F.3d at 24 (quoting *Edelman v. Jordan*, 415 U.S. 651, 673 (1974)) (internal quotation marks omitted).

In this case, Congress exercised its plenary powers to act on behalf of Puerto Rico and waived the Board's Eleventh Amendment immunity. *See* PROMESA § 106(a).

7. In this Opinion and Order, the Court does not opine on the availability of Eleventh Amendment immunity to Puerto Rico and its instrumentalities. The holding today is confined to the Board and its lack of access to Eleventh Amendment protection.

The Territorial Clause gives Congress the power to enact statutes on behalf of the territories. *See Simms v. Simms*, 175 U.S. 162, 168 (1899) ("In the territories of the United States, Congress has the entire dominion and sovereignty, national and local, Federal and state, and has full legislative power over all subjects upon which the legislature of a state might legislate within the state; and may, at its discretion, intrust that power to the legislative assembly of a territory.") (citations omitted). Here, Congress, in its function as administrator of the territories enacted PROMESA, which created an oversight board subject to suit in federal court. *See First Nat. Bank*, 101 U.S. at 133 (noting that "Congress may not only abrogate laws of the territorial legislatures, but it may itself legislate directly for the local government."). This needful legislation is within Congress's power as it can directly legislate for the territories, and in the rarest of cases, act as their legislature. *Id.* (noting that Congress "may make a void act of the territorial legislature valid, and a valid act void . . . it has full and complete legislative authority over the people of the Territories and all the departments of the territorial governments.").[8]

8. The Court also notes other possible waiver arguments. First, the Court could find that the Board waived any immunity by making appearances in all the restructuring cases. *See Arecibo Cmty. Health Care, Inc.*, 270 F.3d at 25 (noting that "a state may waive its immunity through its affirmative conduct in litigation.") (citation omitted). Second, because PROMESA could be interpreted as a bankruptcy law and some adversarial proceedings in bankruptcy court can proceed against states despite sovereign immunity, then Eleventh Amendment immunity might not apply to the Board as this suit could be construed as an adversarial proceeding. *See Cent. Va.*

It is evident from Section 106(a) that Congress meant to subject the Board to suits in federal court. Section 106(a) states, in relevant part, that "any action against the Oversight Board . . . shall be brought in a United States district court for the covered territory . . . ." Congress, therefore, clearly indicated that any action against the Board must be litigated in this Court. The congressional record supports this interpretation. Appendix B of the Congressional Research Service's[9] ("CRS") report on PROMESA describes Section 106 as a "[w]aiver of sovereign immunity" section and further explains that this section limits "the extent to which a government unit can assert sovereign immunity." D. Andrew Austin, Cong. Research Serv., R44532, The Puerto Rico Oversight, Management, and Economic Stability Act (PROMESA; H.R. 5278, S. 2328) 36 (2016). Thus, the CRS's report is further evidence of Congress's intent to waive the Board's sovereign immunity.

Cmty. Coll. v. Katz, 546 U.S. 356, 379 (2006) (holding that Congress may treat states the same way it treats any other creditor with respect to "Laws on the subject of Bankruptcies" and haul them into federal court pursuant to the Bankruptcy Clause).

9. The CRS is an arm of U.S. Congress that provides policy and legal analysis to committees and members of Congress on legislative matters. The CRS prepared a report to Congress on PROMESA that includes a section-by-section description of the bill. D. Andrew Austin, Cong. Research Serv., R44532, The Puerto Rico Oversight, Management, and Economic Stability Act (PROMESA; H.R. 5278, S. 2328) (2016), https://fas.org/sgp/crs/row/R44532.pdf (last visited Apr. 26, 2018).

When enacting PROMESA, Congress knew of Puerto Rico's dual system of federal and territorial courts. *See Examining Bd. of Eng'rs*, 426 U.S. at 587. Thus, Congress, knowing the Eleventh Amendment implications in creating an entity within the government of Puerto Rico,[10] decided under its plenary powers to give this Court exclusive jurisdiction over cases, like this one, brought against the Board. *See Miles v. Apex Marine Corp.*, 498 U.S. 19, 32 (1990) ("We assume that Congress is aware of existing law when it passes legislation.").

Accordingly, the Court finds that Congress waived the Board's Eleventh Amendment immunity.

Assuming *arguendo* that Congress did not waive the Board's Eleventh Amendment immunity on behalf of the Commonwealth, the Court finds that Congress abrogated the Board's immunity to suit through PROMESA.

B. Congress Abrogated Eleventh Amendment Immunity as to the Board

"Congress may abrogate [a state's] Eleventh Amendment immunity when it both unequivocally intends to do so and act[s] pursuant to a valid grant of constitutional authority." *Laro v. New Hampshire*, 259 F.3d 1, 5 (1st Cir. 2001) (quoting *Bd. of Tr. of Univ. of Ala. v. Garrett*, 531 U.S. 356, 363 (2001) (internal quotation marks omitted)).

10. Indeed, Congress declined to make the Board part of the Federal government. PROMESA § 101(c)(2) (stating that the Board "shall not be considered to be a department, agency, establishment, or instrumentality of the Federal government.").

Appendix F

1. Intent to Abrogate

Congress unequivocally intends to abrogate a state's Eleventh Amendment immunity if it makes "its intention unmistakably clear in the language of the statute." *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 73 (2000) (internal quotation marks and citation omitted). Here, it is "unmistakably clear" that Congress abrogated the Board's Eleventh Amendment immunity. *Seminole Tribe of Fla.*, 517 U.S. at 57. Section 106(a) of PROMESA states that "any action against the Oversight Board . .. shall be brought in a United States district court for the covered territory . . . ." The statute makes it abundantly clear that the Board is not immune from suit and grants the U.S. District Court for the District of Puerto Rico exclusive jurisdiction over any suit brought against the Board.

Moreover, the Supreme Court has held that a similar provision that conferred jurisdiction to a district court unequivocally showed Congress's intention to abrogate a state's sovereign immunity. *See Seminole Tribe of Fla.*, 517 U.S. at 57; *compare* 25 U.S.C. § 2710(d)(7)(A)(i)[11] *with* PROMESA § 106(a). Thus, the Court finds that Congress unambiguously intended to abrogate the Board's

11. 25 U.S.C. § 2710(d)(7)(A)(i) provides that "The United States district courts shall have jurisdiction over any cause of action initiated by an Indian tribe arising from the failure of a State to enter into negotiations with the Indian tribe for the purpose of entering into a Tribal-State compact under paragraph (3) or to conduct such negotiations in good faith . . . ."

Eleventh Amendment immunity through Section 106(a) of PROMESA.[12]

2. Power to Abrogate

Concluding that Congress intended to abrogate the Board's Eleventh Amendment protection, the Court finds that Congress has the power to abrogate the Board's sovereign immunity pursuant to the Territorial Clause of Article IV of the U.S. Constitution.

The Court notes that abrogation via the Territorial Clause is an issue of first impression. Typically, and almost exclusively, the Supreme Court has held that Congress has the power to abrogate sovereign immunity pursuant to sections 1 and 5 of the Fourteenth Amendment. *Seminole Tribe of Fla.*, 517 U.S. at 59 (noting that "§ 1 of the Fourteenth Amendment contained prohibitions expressly directed at the States and that § 5 of the Amendment expressly provided that [t]he Congress shall have power to enforce, by appropriate legislation, the provisions of this article.") (internal quotation marks and citation omitted). However, Congress has plenary powers over the territory of Puerto Rico so, the Court must determine whether Congress also has the power, under the Territorial Clause, to abrogate the Board's sovereign immunity as an entity of Puerto Rico. In doing so, the Court walks between two constitutional planes, as the First Circuit Court of

12. Holding otherwise would render Section 106(a) of PROMESA superfluous. *See Lowe v. S.E.C.*, 472 U.S. 181, 207 n.15 (1985) (Courts "must give effect to every word that Congress used in the statute.").

Appeals has considered Puerto Rico a state for Eleventh Amendment purposes, *Jusino Mercado*, 214 F.3d at (collecting cases), but is also a territory under Congress's control and administration. The Court holds that it does.

As stated above, it is well-settled that Congress has plenary powers over the territories. *See Palmore*, 411 U.S. at 403 ("In legislating for [the territories], Congress exercises the combined powers of the general, and of a state government.") (citation omitted); *see also Downes v. Bidwell*, 182 U.S. 244, 268 (1901) ("The power of Congress over the territories of the United States is general and plenary . . . .") (citations omitted). Congress has the power to legislate for Puerto Rico and even abrogate local legislation. *First Nat. Bank*, 101 U.S. at 133 ("[Congress] may make a void act of the territorial legislature valid, and a valid act void."). Indeed, Congress is at the zenith of its power when legislating for the territories. This power comes for a constitutional mandate to oversee the territories and make any regulations to help administer them. Thus, Congress's plenary power must be, at the very least, equal to Congress's power to abrogate a state's sovereign immunity under sections 1 and 5 of the Fourteenth Amendment.

Accordingly, the Court finds that Congress can abrogate the Board's Eleventh Amendment immunity through the Territorial Clause.

C. Territorial Federalism

The Board argues that, notwithstanding the issue of sovereign immunity, CPI's claim against the Board under Puerto Rico law "conflicts directly with the principles of federalism that underlie the Eleventh Amendment" pursuant to the holding in *Pennhurst*. The Court disagrees.[13]

In *Pennhurst*, the Supreme Court decided that sovereign immunity prohibits federal courts from instructing state officials on how to conform their conduct to state law, for it would intrude on state sovereignty and conflict "directly with the principles of federalism that underlie the Eleventh Amendment." 465 U.S. at 106. The Court further noted that the Eleventh Amendment "deprives a federal court of power to decide certain claims against States that otherwise would be within the scope of Art. III's grant of jurisdiction." *Id.* at 119–20.

Unlike *Pennhurst*, this case does not involve federalism concerns because the Board is an entity within the Puerto Rico territorial government and not a

13. The Board's interpretation of *Pennhurst* would leave CPI without any judicial forum to file this suit. *See* Docket No. 22 at 7. The Court declines to adopt such a harsh interpretation absent explicit authorization by Congress. *Cf. Johnson v. Robison*, 415 U.S. 361, 373-74 (1974) (a federal statute will not be construed to preclude judicial review of constitutional challenges absent clear and convincing evidence of congressional intent).

state.[14] Eleventh Amendment immunity is derived from the power retained by the states when they entered the Union. *See Printz v. United States*, 521 U.S. 898, 919 (1997). This "residual sovereignty" comes from the notion that, while states surrender many of their powers to the federal government when they joined the Union, they retained "a residuary and inviolable sovereignty." *Id.* (quoting The Federalist No. 39, at 245 (J. Madison)). Puerto Rico has never entered the Union as a state or been considered a sovereign distinct from the United States. *Sanchez Valle*, 136 S. Ct. at 1873. Thus, since the Board was created as an entity within Puerto Rico, a territory of the United States, the idea of "dual sovereignties" under federalism is not violated. *Printz*, 521 U.S. at 932-33 (quoting *New York v. United States*, 505 U.S. 144, 187 (1992) (explaining that the U.S. Constitution established a system of "dual sovereignty" that divided power among state and federal government "so that we may resist the temptation to concentrate power in one location as an expedient solution to the crisis of the day."); *see also Sanchez Valle*, 136 S. Ct. at 1876 ("Because the ultimate source of Puerto Rico's prosecutorial power is the Federal Government—because when we trace that authority all the way back, we arrive at the doorstep of the U.S. Capitol—the Commonwealth and the United States are not separate sovereigns.").

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14. As stated above, the Court is not opining on the applicability of Eleventh Amendment immunity to Puerto Rico. Rather, today's holding is only applicable to cases brought against the Board pursuant to Puerto Rico law.

Accordingly, the Court finds that *Pennhurst* is inapplicable to the case at hand.

With the sovereign immunity issue laid to rest, the Court now turns to preemption.

IV. Preemption[15]

The Board argues that the public's right to inspect public documents pursuant to Puerto Rico's Constitution is preempted by PROMESA. Docket No. 22 at 14-18. The Court finds the Board's arguments unavailing.

Federal preemption is rooted in the Supremacy Clause, which states that federal law "shall be the supreme Law of the Land . . . any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. Const. art. VI, cl. 2; *see also Altria Grp., Inc. v. Good*, 555 U.S. 70, 76 (2008). Pursuant to the Supremacy Clause, Congress has the power to preempt state law. *See Tobin v. Fed. Exp. Corp.*, 775 F.3d 448, 452 (1st Cir. 2014). When determining if federal law preempts state law, courts look to the intent of Congress. *Grant's Dairy—Me., LLC v. Comm'r of Me. Dep't of Agric., Food & Rural Res.*, 232 F.3d 8, 14 (1st Cir. 2000) ("Congressional intent is the touchstone of preemption analysis.").

15. "For preemption purposes, the laws of Puerto Rico are the functional equivalent of state laws." *Antilles Cement Corp. v. Fortuño*, 670 F.3d 310, 323 (1st Cir. 2012). Additionally, the Court stresses the fact that Congress created the Board within the Commonwealth and, thus, as part of the government of Puerto Rico. PROMESA § 101(c)(1). It is through this lens that the Court undertakes the preemption analysis.

Appendix F

Federal law can preempt a state law in one of two ways: express preemption or implied preemption. *Grant's Dairy*, 232 F.3d at 15. "Express preemption occurs only when a federal statute explicitly confirms Congress's intention to preempt state law and defines the extent of that preclusion." *Id.* Implied preemption can occur through field preemption or conflict preemption. Field preemption occurs when Congress creates "a federal regulatory scheme [] so pervasive as to warrant an inference that Congress did not intend the states to supplement it." *Id.* Conflict preemption has been found where "it is impossible for a private party to comply with both state and federal requirements or where state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *English v. Gen. Elec. Co.*, 496 U.S. 72, 79 (1990) (internal quotation marks and citations omitted).

Courts "start with the assumption that the historic police powers of the States [are] not to be superseded by" a federal statute "unless that [is] the clear and manifest purpose of Congress." *Grant's Dairy*, 232 F.3d at 14–15 (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)) (alterations in original). Courts have cautioned that "[p]reemption is strong medicine, not casually to be dispensed." *Id.* at 18 (citation omitted).

Because the Board raises arguments under all three preemption doctrines, the Court shall address each in turn.

Appendix F

A. Express Preemption

The Board argues that Section 4 of PROMESA expressly preempts the right to inspect public documents pursuant to Puerto Rico's Constitution. Docket No. 22 at 15. Specifically, the Board claims that no additional disclosures are required because "Congress enumerated the limited circumstances where the Board is affirmatively required to disclose information to the public." *Id.* at 15-16. The Board further contends that since PROMESA includes an express preemption provision, the presumption against preemption is inoperative. *Id.* at 17. The Court disagrees.

Express preemption occurs when federal legislation contains language expressly addressing the subject of preemption. *See, e.g., Jones v. Rath Packing Co.*, 430 U.S. 519, 538 (1977). If the statute "contains an express pre-emption clause, [courts] do not invoke any presumption against pre-emption but instead focus on the plain wording of the clause, which necessarily contains the best evidence of Congress'[s] pre-emptive intent.'" *Puerto Rico v. Franklin Cal. Tax-Free Tr.*, 136 S. Ct. 1938, 1946 (2016) (internal quotation marks omitted) (quoting *Chamber of Commerce of U.S.A. v. Whiting*, 563 U.S. 582, 594 (2011)). The First Circuit has also noted that "although an express preemption clause may indicate congressional intent to preempt 'at least some state law,' courts nonetheless must 'identify the domain expressly pre-empted by that language.'" *Mass. Ass'n of Health Maint. Orgs. v. Ruthardt*, 194 F.3d 176, 179 (1st Cir. 1999) (quoting *Medtronic, Inc. v. Lohr*, 518 U.S. 470 (1996)).

Appendix F

As a preliminary note, the Court finds that no provision in PROMESA clearly and manifestly makes all Puerto Rico law inapplicable to the Board. The only provision that comes close is Section 4 of PROMESA. We begin our analysis guided by the plain meaning of that clause.

Section 4 of PROMESA states: "The provisions of this Act shall prevail over any general or specific provisions of territory law, State law, or regulation that is *inconsistent* with this Act."[16] (emphasis added). Pursuant to its plain meaning, this clause preempts any Puerto Rico law that is inconsistent with PROMESA. However, because it is a seemingly broad preemption clause it is crucial to first examine the scope of this preemption provision. *Good*, 555 U.S. at 76 ("If a federal law contains an express pre-emption clause, it does not immediately end the inquiry because the question of the substance and scope of Congress'[s] displacement of state law still remains."); *see Riegel v. Medtronic, Inc.*, 552 U.S. 312, 334-35 (2008).

To determine if Puerto Rico laws are inconsistent with PROMESA context is required. For example, a Puerto Rico law would be inconsistent with PROMESA if it contravenes PROMESA's stated purpose, which is "to provide a method for a covered territory to achieve fiscal responsibility and access to the capital markets." PROMESA § 101(a). Complying with Puerto Rico's

16. Black's Law Dictionary defines the term "inconsistent" as "[l]acking agreement among parts; not compatible with another fact or claim." INCONSISTENT, BLACK'S LAW DICTIONARY (10th ed. 2014).

disclosure requirements would not impede or frustrate the purpose of PROMESA.

The Supreme Court has declined to find express preemption of state law in analogous federal statutory language. For example, in *Bates v. Dow Agrosciences LLC*, 544 U.S. 431, 447 (2005), peanut farmers sent an intent to sue letter to a pesticide manufacturer, arguing that the use of a pesticide caused severe crop losses in violation of a state consumer protection law. *Id.* at 434-35. The manufacturer of the pesticide filed a declaratory judgment action in federal court claiming that any state tort claim based on the labeling and packaging of the pesticide was preempted under the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA). *Id.* at 435-36. The preemptive language in FIFRA provided that "[s]uch State shall not impose or continue in effect any requirements for labeling or packaging *in addition to or different from* those required under this subchapter." *Id.* at 443 (emphasis added). The pesticide manufacturers argued that state law claims were preempted because a verdict against the pesticide manufacturers based on the labeling of the pesticide might motivate changing a label and, thus, would qualify as a "requirement" that would be "in addition to" the ones articulated in FIFREA. *Id.* at 436-37. The Supreme Court found that "[a]n occurrence that merely motivates an optional decision does not qualify as a requirement" under FIFRA. *Id.* at 443. Thus, it held that the state law tort based on defective manufacturing and negligent testing was not preempted. *Id.* 445-46. As to the state law claims based on violations of labeling and packaging, the Court held that those claims

were not necessarily preempted under FIFRA if they are "equivalent to, and fully consistent with, FIFRA's misbranding provisions." *Id.*

Here, Section 4 does not preempt Puerto Rico disclosure law. Similar to the *Bates* case, where the federal statute expressly prohibited state law imposing labeling and packaging requirements that are "in addition to or different from" FIFRA, Section 4 of PROMESA supersedes Puerto Rico laws only if they are *inconsistent* with the Act. As PROMESA was enacted to restructure Puerto Rico's debt, and not to dictate the way Puerto Rico's government discloses information to the public, Puerto Rico law requiring disclosure of public information cannot be said to be inconsistent with PROMESA.

Congress could have added language specifically preempting Puerto Rico law on disclosure, but opted not to do so. However, Congress did use clear preemptive language in other sections of PROMESA. For example, PROMESA § 303(3) preempts the Commonwealth government from enacting restructuring laws or issuing "unlawful executive orders that alter, amend, or modify the rights of holders of any debt of the territory or territorial instrumentality, or that divert funds from one territorial instrumentality to another or to the territory." Similarly, Section 504 preempts Puerto Rico laws or regulations concerning the approval process for critical infrastructure projects. *Id.* § 504(b), (e). Congress, however, did not include specific preemptive language referring to disclosure of information.

Accordingly, PROMESA does not expressly preempt the public's right to access and inspect public documents pursuant to Puerto Rico's Constitution.

B. Implied Preemption

Absent an express preemption provision, or when a preemption provision lacks legislative precision, the question turns on whether preemption is implied. *Riegel*, 552 U.S. at 334-35. "More often, explicit pre-emption language does not appear, or does not directly answer the question. In that event, courts must consider whether the Federal statutes 'structure and purpose,' or nonspecific statutory language, nonetheless reveal a clear, but implicit, pre-emptive intent." *Barnett Bank of Marion Cty., N.A. v. N.A. v. Nelson*, 517 U.S. 25, 31 (1996) (citations omitted). Thus, when express preemption is not clear from the statute, "courts . . . face the task of determining the substance and scope of Congress'[s] displacement of state law." *Riegel*, 552 U.S. at 334-35 (citing *Bates,* 544 U.S. at 449).

The doctrine of implied preemption is further divided into two groups: field preemption and conflict preemption.

1. Field Preemption

The Board asserts that any disclosure requirement under Puerto Rico law would be preempted under field preemption because (1) Congress has plenary powers over the needful rules and regulation of the territories, and (2) PROMESA "is part of a single integrated and

all-embracing system . . . to govern debt restructuring for all United States territories—not merely Puerto Rico . . . thereby preempt[ing] the field of disclosure and non-disclosure for the Board." Docket No. 22 at 18 (citation omitted). The Court disagrees.

Under field preemption, "state law is pre-empted where it regulates conduct in a field that Congress intended the Federal Government to occupy exclusively." *English*, 496 U.S. at 79. Congress's intention is inferred when "a federal regulatory scheme is so pervasive as to warrant an inference that Congress did not intend the states to supplement it." *Grant's Dairy*, 232 F.3d at 15. "The question in each [implied preemption] case is what the purpose of Congress was." *Rice*, 331 U.S. at 230.

The Court finds that PROMESA does not preempt Puerto Rico disclosure law under field preemption for various reasons.

First, the right to access and inspect public documents in Puerto Rico is not an area where the federal government has played a large role. Field preemption is reserved for areas of the law and public administration where the federal government has traditionally held exclusive authority like, for example, immigration, foreign policy, or bankruptcy. *Accord Hines v. Davidowitz*, 312 U.S. 52, 74 (1941) (immigration); *Am. Ins. Ass'n v. Garamendi*, 539 U.S. 396, 420 (2003) (foreign policy); *Franklin Cal. Tax-Free Tr.*, 136 S. Ct. at 1947 (bankruptcy).

In contrast, access to public information has been traditionally a local affair. *See Bhatia-Gautier v. Rosello-Nevares*, 2017 TSPR 173, 2017 WL 4975587 at *10 (P.R. 2017) ("Bhatia").[17] Thus, as an area that normally is reserved to the states, and in this case, the territory of Puerto Rico, the Court shall not assume that a federal statute has supplanted Puerto Rico law in this matter unless Congress makes such an intention "clear and manifest." *N.Y. State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645, 655 (1995) (quoting *Rice*, 331 U.S. at 230) (internal quotation marks omitted). The Board has not shown this to be the case here. Congress has not expressed a desire, neither in PROMESA nor in its legislative history, to have federal law be exclusive in the area of disclosures by the Board. As stated above, PROMESA's purpose is to help Puerto Rico achieve fiscal responsibility and access to capital markets. To achieve this, Congress created the Board, but did not choose to shield it from all local laws.[18]

Second, subjecting the Board to Puerto Rico's disclosure requirements would not interfere with comprehensive federal regulatory efforts. PROMESA

17. A certified translation of Bhatia can be found in PROMESA's Title III bankruptcy case, BK No. 17-03283(LTS) at Docket No. 2702-3.

18. PROMESA does exempt the Board from certain local laws. *See, e.g.*, PROMESA §§ 103(c), 504(b). The fact that Congress specifically chose to render certain Puerto Rico laws inapplicable to the Board, but makes no mention of the disclosure laws at issue here, further supports the Court's analysis that the Board did not intend these laws to be preempted by PROMESA.

includes the following disclosure provisions: (1) Section 104(e), requiring the disclosure of "[a]ll gifts, bequests or devises and the identities of the donors . . . within 30 days of receipt;" (2) Section 109(b), requiring the disclosure of any financial interests of the Board's members and its staff;[19] (3) Section 104(p), requiring the disclosure of the findings of any investigation made pursuant to Section 104(o); and (4) Section 101(h)(1), requiring the disclosure of the bylaws, rules, and procedures adopted by the Board. The Board is also required by Section 208 to submit an annual report to the President, Congress, and Puerto Rico's Governor and Legislature.[20] These provisions do not create a comprehensive statutory scheme that is so pervasive to leave no room for Puerto Rico law on public disclosure of information. PROMESA's disclosure framework pales in comparison with the comprehensiveness of frameworks such as the Federal Aviation Act ("FAA") or the Bankruptcy Code. *Cf. City of Burbank v. Lockheed Air Terminal Inc.*, 411 U.S. 624, 638 (1973) (noting that although noise control is deeply rooted in the police powers of a state, the pervasive control vested in the FAA leaves no room for local noise

19. The content of such disclosure is governed by Section 102 of the Ethics in Government Act of 1978. PROMESA § 109(b).

20. This report must include: (1) the progress made by Puerto Rico's government towards the objectives of PROMESA; (2) the actions taken by the Board to assist in this process; (3) recommendations on legislative changes or federal actions needed to assist the Commonwealth in complying with the certified Fiscal Plan; (4) a precise description of the Board's expenses; and (5) "any other activities of the Oversight Board during the fiscal year." PROMESA § 208.

curfews or other local controls); *see Franklin Cal. Tax-Free Tr. v. Puerto Rico*, 805 F.3d 322, 341 (1st Cir. 2015), *aff'd*, 136 S. Ct. 1938 (2016) (precluding Puerto Rico "from strategically enacting its own version" of municipal bankruptcy provisions under 11 U.S.C. § 903(1) of the bankruptcy code).

Third, the public's right to inspect public documents in Puerto Rico serves an important local interest. The Puerto Rico Supreme Court has found in a litany of cases that the public's right to access information possessed by the government is closely related to freedom of speech and freedom of the press and, accordingly, should be highly protected. *See Soto v. Srio. de Justicia*, 12 P.R. Offic. Trans. 597, 607-608 (P.R. 1982); *accord*[21] *Trans Ad de P.R. v. Junta de Subastas*, 174 D.P.R. 56, 67-68 (2008); *Colon Cabrera v. Caribbean Petroleum*, 170 D.P.R. 582, 590-91 (2007); *Ortiz v. Directora Administrativa de los Tribunales*, 152 D.P.R. 161, 175 (2000). The reasoning is very simple: "It is impossible to pass judgment on something without knowledge of the facts; neither may redress from government damages be claimed through judicial proceedings or at the polls every four (4) years." *Soto*, 12 P.R. Offic. Trans. at 608. Thus, in Puerto Rico, the public's right to information is not only found in local First Amendment jurisprudence, but is also stitched in the very fabric of Puerto Rico's democratic ideals.

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21. The cases cited here are in the Spanish language. The Court, however, did not rely on these untranslated cases when reaching its decision in this case.

Likewise, as the CPI correctly pointed out, "[w]hile PROMESA may be extremely comprehensive with respect to matters such as debt restructuring and access to markets . . . this is a far cry from preemption on public access to documents." Docket No. 25 at 17-18. If Congress had intended such result, it could have indicated so explicitly. *See Rice*, 331 U.S. at 230; *see also Lamie v. U.S. Tr.*, 540 U.S. 526, 537 (2004) (noting that courts should not add an "absent word" to a statute because "[t]here is a basic difference between filling a gap left by Congress'[s] silence and rewriting rules that Congress has affirmatively and specifically enacted.").

Accordingly, the factors analyzed above weigh in favor of finding that PROMESA does not occupy the field of public disclosures by Puerto Rico government entities.[22]

2. Conflict Preemption

Finally, the Board briefly argues that Puerto Rico's public disclosure requirement conflicts with PROMESA's own disclosure procedures. Docket No. 22 at 18. According to the Board, "[w]here Congress exercises its plenary power over the territories, there is less reason to conclude that it intended its law to be supplemented by territorial law." Docket No. 22 at 18. The Court disagrees.

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22. Additionally, PROMESA did not displace all Puerto Rico law. Although PROMESA changed the responsibilities and power delegated by Congress to the territorial government, Section 303 of PROMESA reserved some powers to the local government to continue managing the affairs of the Commonwealth.

Appendix F

Under the conflict preemption doctrine, "state law is . . . pre-empted to the extent it actually conflicts with federal law, that is, when compliance with both state and federal law is impossible, or when the state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Fitzgerald v. Harris*, 549 F.3d 46, 53 (1st Cir. 2008) (quoting *Good v. Altria Group, Inc.*, 501 F.3d 29, 47 (1st Cir. 2007)). When conducting conflict preemption analysis, it "must be applied sensitively . . . so as to prevent the diminution of the role Congress reserved to the States while at the same time preserving the federal role." *Nw. Cent. Pipeline Corp. v. State Corp. Com'n of Kan.*, 489 U.S. 493, 515 (1989). The Supreme Court has established "that a high threshold must be met if a state law is to be preempted for conflicting with the purposes of a federal Act." *Whiting*, 563 U.S. at 607 (internal quotation marks and citation omitted).

The Court finds no conflict between Puerto Rico's law on disclosure of public documents and PROMESA. It is possible for the Board to comply with both sets of law. The Board assumes PROMESA's disclosure provisions dictate the only way that the Board can publicly disclose information. However, Puerto Rico law can supplement the Board's disclosure requirements. While PROMESA requires certain documents and meetings to be publicly disclosed, it does not prevent additional disclosures by the Board.

The Board also contends that the public disclosure requirements under Puerto Rico's Constitution are

contrary to PROMESA, because "PROMESA permits the Board to conduct its business in executive session protected from public view." Docket No. 22 at 18. The Court finds the Board's arguments unpersuasive. That PROMESA authorizes some of the Board's meetings to be held outside of public view, PROMESA § 101(h)(4), does not mean that the right to access public documents is inconsistent with PROMESA. When addressing access to public information in so-called "Executive Sessions," state courts with similar laws and disclosure issues have granted access to documents discussed in those sessions subject to the removal of confidential and privileged information. *See generally Atl. City Convention Ctr. Auth. v. S. Jersey Pub. Co.*, 135 N.J. 53, 57 (1994) (holding that "media representatives are entitled to access to such records of official public action, subject before disclosure to the removal of any confidential or privileged information that may be withheld under our principles of common-law access to public records or related principles of the Open Public Meetings Act"); *V.I. Daily News v. Gov't of Virgin Islands,* 2005 WL 3663481, at *3 (V.I. Super. Dec. 19, 2005) (rejecting the argument that the government did not have to produce any transcript of their "Executive Session" because it was closed to the public); *State ex rel. Marshall Cty. Comm'n v. Carter*, 225 W. Va. 68, 75 (2010) (noting that the Open Governmental Proceedings Act, which gives the public a right to inspect public documents, "and its executive session exception are concerned with the public's access to government meetings, not what may or may not be obtained by means of civil discovery.").

In this case, when facing a request for public documents pursuant to Puerto Rico law, the Board could, for example, disclose documents deemed discoverable and deny access to others explaining the basis for the denial pursuant to applicable privilege and confidentiality laws. *See Soto,* 12 P.R. Offic. Trans. at 617 (listing the limitations on the right of access to public information). If unsatisfied with the Board's reasoning for denying the requested documents, the requesting party may seek judicial review. S*ee, e.g., De J. Cordero v. Prensa Insular de P.R., Inc.*, 169 F.2d 229, 232 (1st Cir. 1948) (explaining that, in that case, a writ of mandamus was filed in state court to compel the production of records). Nonetheless, potential disclosure of confidential or privileged material discussed in those sessions does not go towards finding a conflict with PROMESA, but towards denial of the requested material and, if necessary, a motion for a protective order under Fed. R. Civ. P. 26(c). Thus, the Court finds that it is possible for the Board to comply with PROMESA and Puerto Rico disclosure laws.[23]

Tracking the conflict preemption test, the Board also argues that Puerto Rico's Constitution disclosure requirement "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress . . . as it conflicts with PROMESA's express provisions." Docket No. 22 at 18. The Court finds that requesting documents from the Board pursuant to Puerto Rico's Constitution does not stand as an obstacle to the proper execution of PROMESA.

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23. To comply with Puerto Rico's disclosure requirements, the Board, in its sole discretion could create or adopt rules and regulations under Puerto Rico law. *See, e.g.*, PROMESA § 101(h)(3).

Appendix F

Pursuant to PROMESA, the Board was established to develop "a method [for Puerto Rico] to achieve fiscal responsibility and access to capital markets." PROMESA § 101(a). "Among other things, PROMESA (i) establishes a process for the [] Board to approve fiscal plans . . . and budgets of the [Commonwealth] and its instrumentalities . . . (ii) establishes a process for the [] Board to file a bankruptcy-type petition on behalf of the Commonwealth and its instrumentalities . . . and (iii) establishes an alternative mechanism for adjusting the Commonwealth's bond debt or the bond debt of its instrumentalities outside of a bankruptcy proceeding . . . ." *In re Fin. Oversight and Mgmt. Bd. for P.R.*, No. 17 BK 3283 (LTS), 2018 WL 1033299, at *2 (D.P.R. Jan. 30, 2018). Complying with requests for public documents pursuant to Puerto Rico law in no way impedes these objectives. Accordingly, the Court finds that there is no conflict between Puerto Rico law on disclosure of public documents and PROMESA.

Contrary to the Board's erroneous interpretation, PROMESA established a dual regulatory scheme in which the authority over certain financial matters is divided between Puerto Rico and the Board. *See* PROMESA § 303 (reserving powers to exercise political and governmental control of the territory to the government of Puerto Rico except in specific enumerated situations). Throughout PROMESA's provisions, moreover, there are several allusions to the Constitution of Puerto Rico and territorial laws. *See, e.g.,* PROMESA §§ 101(d)(1)(B), 101(d)(1)(C), 104(f)(1), 104(f)(2), 104(f)(3), 106(c), 201(b)(1)(M), 201(b)(1)(N), 204(c)(3)(A), 204(c)(3)(A)(ii), 314(b)(6), 410(3), 602.

Thus, Congress did not enact PROMESA to the exclusion of Puerto Rico law, but divided the recovery efforts and management responsibilities between the Board and the territorial government. *See In re Fin. Oversight & Mgmt. Bd. for P.R.*, No. 17 BK 3283 (LTS), 2017 WL 7160982, at *7 (D.P.R. Nov. 16, 2017) ("Congress might have chosen to make the [Board]'s job easier in the short term by granting it direct control and disabling the Commonwealth government's ability to dissent, but it did not do so. Congress deliberately divided responsibility and authority between the two.").

The fact that it may be somewhat costly or inconvenient to comply with the disclosure requirements does not make the Board's task to enforce PROMESA impossible.[24] The Board is an entity of the Commonwealth paid for by the Puerto Rican people and, as such, must comply with Puerto Rico law that is not inconsistent with its mandate. PROMESA § 4. Congress, pursuant to its plenary powers, could have drafted PROMESA in many ways. However, it chose to create the Board as an entity within the Commonwealth and, therefore, it must be treated accordingly.

Finally, a citizen's right to access public documents goes hand in hand with PROMESA's purpose. When enacting the Act, Congress expressed concern with Puerto Rico's lack of transparency and unaudited financial

24. In all actuality, costs should not be an issue as the government of Puerto Rico funds the Board and all its operational expenses. PROMESA § 107(b).

information.[25] PROMESA's provisions and its legislative history are evidence of this concern. *See* PROMESA §§ 204(b)(3), 405(m)(1); *see also* H.R Comm. on Natural Resources, Puerto Rico Oversight, Management, and Economic Stability Act, H.R. Rep. No. 114-602, at 40-46 (2016) (finding that PROMESA was a necessary legislation "[d]ue to the realities facing the island, and the inability of its local politicians to bring order and transparency.").[26] Thus, Puerto Rico disclosure law actually helps PROMESA's legislative purpose by shining light into the Board's dealings with the government of Puerto Rico. After all, "[s]unlight is said to be the best of disinfectants." L. Brandeis, Other People's Money 62 (1933).

If Congress wanted Puerto Rico's disclosure laws to be inapplicable to the Board, they could have explicitly said so, as it did with certain local laws. Congress could have protected the Board from any additional disclosures, as it has done in other statutes. *See, e.g.*, 50 U.S.C. § 3141 (2010) (allowing the exemption of Central Intelligence Agency operational files from FOIA); PROMESA § 103(c). However, Congress was silent as to the applicability of Puerto Rico disclosure requirements to the Board. Thus,

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25. *See* House Committee on Natural Resources, Bishop Statement on Senate Passage of PROMESA (June 29, 2016), https://naturalresources.house.gov/newsroom/documentsingle.aspx?DocumentID=400886 ("[PROMESA] is a framework for the Commonwealth to restore accountability in government, impose fiscal discipline and build a foundation for future prosperity.").

26. A copy of the full report can be access at https://www.congress.gov/114/crpt/hrpt602/CRPT-114hrpt602-pt1.pdf.

the Court cannot read into PROMESA an exemption from the Puerto Rico's constitutional right to access public documents. *See Franklin Cal. Tax-Free Tr.*, 136 S. Ct. at 1947 ("Congress, does not, one might say, hide elephants in mouseholes.") (citation omitted).

Accordingly, the Court finds that Puerto Rico law regarding the public's right to access and inspect public documents is not preempted by PROMESA.

V. A Citizen's Right to Access Public Documents pursuant to Puerto Rico's Constitution

Due to its close relationship with the First Amendment's freedom of speech and association, and the right to seek redress from the government, the Supreme Court of Puerto Rico has declared access to public information a fundamental right under Puerto Rico's Constitution. *See Soto*, 12 P.R. Offic. Trans. at 607-09; *see also Bhatia*, 2017 WL 4975587 at *10.

The Bill of Rights incorporated into Puerto Rico's Constitution "recognizes and grants some fundamental rights with a more global and protective vision than does the United States Constitution." *López Vives v. Policía de P.R.*, 19 P.R. Offic. Trans. 264, 273 (1987); *see also* P.R. Laws Ann. tit. 32, § 1781 (codifying "the right to inspect and take a copy of any public document of Puerto Rico"). Years after its adoption, the Supreme Court of Puerto Rico recognized "the constitutional right to examine information held by the State. . . . [as] a necessary corollary to the freedom of speech consecrated

in Art. II, Sec. 4 of the Commonwealth Constitution." *Id.* at 275. Puerto Rico's Supreme Court has reasoned that access to public information allows citizens to adequately evaluate and supervise the public duty of the government, and contributes to an effective participation of citizens in the governmental processes that affect their social environment. *See Bhatia*, 2017 WL 4975587 at *10.

In this case, the Board has in its possession a variety of public documents.[27] Pursuant to Puerto Rico law, CPI, as an organization that disseminates news, has a right to inspect these documents. *Id.* at *11 (noting that "if the people are not duly informed of the way in which the public duty is performed, their liberty to express, through vote or otherwise, their satisfaction or lack of satisfaction with the people, rules or procedures that govern them, will be impaired."). Thus, the Board must produce the documents requested.

Nevertheless, the right to public documents is not absolute and is subject to certain limitations. *See Bhatia,*

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27. Puerto Rico's legal system defines the term "public document" as follows:

> [A]ny document which originates or is kept or received in any dependency of the Commonwealth of Puerto Rico according to the law or in relation to the management of public affairs and that pursuant to the provisions of § 1002 of this title is required to be permanently or temporarily preserved as evidence of transactions or for its legal value.

P.R. Laws Ann. tit. 3, § 1001(b) (2011).

2017 WL 4975587 at *11. However, a denial of access to public documents has to be properly supported and justified, and cannot be denied arbitrarily and capriciously. *Id.* (citing *Colon Cabrera v. Caribbean Petroleum*, 170 D.P.R. 582, 590 (2007)). In Puerto Rico, there is not a specific law that limits the public's access public documents. *Id.* at *11. Instead, Puerto Rico's Supreme Court has listed several instances when the Commonwealth can validly claim confidentiality over information that would otherwise have to be disclosed. *Id.* These are: 1) when a law so declares; 2) when the communication is protected by an evidentiary privilege that a citizen may invoke; 3) when the disclosure may injure the fundamental rights of third parties; 4) when it deals with the identity of a confidant; and 5) when it is "official information" pursuant to[28] Puerto Rico Rule of Evidence 514, P.R. Laws Ann., tit. 32, Ap. VI (2010). *Id.* Therefore, any attempt by the Board to protect documents from disclosure must be adequately supported by Puerto Rico law on this subject.

28. This holding goes in line with the Federal government's respect for the First Amendment as evidenced in the Freedom of Information Act, 5 U.S.C. § 552, *et. seq.* Although Puerto Rico's First Amendment extends greater protection to speech, Congress's silence in PROMESA specifically preempting Puerto Rico's disclosure law can be reasonably interpreted as implicit recognition of the protection afforded by Puerto Rico's Supreme Court to the First Amendment. *See generally Elkins v. Moreno*, 435 U.S. 647, 666 (1978), *certified question answered sub nom. Toll v. Moreno*, 284 Md. 425 (1979) ("Congress'[s] silence is therefore pregnant").

Appendix F

CONCLUSION

In view of the foregoing, the Court **DENIES** the Board's Motion to Dismiss. This case will be referred to a Magistrate Judge to establish case management deadlines for the production of the requested documents. The Magistrate Judge will handle discovery disputes, provided the parties have complied with the meet and confer requirements of Local Rule 26(b) and have adequately justified any request for a protective order.

IT IS SO ORDERED.

In San Juan, Puerto Rico, this Friday, May 04, 2018.

s/ Jay A. Garcia-Gregory
JAY A. GARCIA-GREGORY
United States District Judge

APPENDIX G — COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF FILED IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF PUERTO RICO ON JUNE 1, 2017 IN CASE NO. 3:17-CV-01743

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

CENTRO DE PERIODISMO INVESTIGATIVO,

Plaintiff,

v.

FINANCIAL OVERSIGHT AND MANAGEMENT BOARD FOR PUERTO RICO,

Defendant.

CIVIL NO. 2017-

COMPLAINT FOR DECLARATORY RELIEF; PRELIMINARY AND PERMANENT INJUNCTION; MANDAMUS

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

"To permit the government to manage public affairs under the mantle of secretiveness is to invite arbitrary actions, poor administration, governmental indifference, public irresponsibility and corruption. A citizenry which is alert and militant against these

> potential evils of all government machinery can perform its fiscalizing function only if it has possession of the information which will permit it to discover the potential dangers in a timely manner and demand responsible action. To deprive the citizenry of this information is equivalent to producing an aggravated collective paralysis attributable to civil myopia of a citizenry which knows only part of the actions of its government or knows only half-truths related thereto."
>
> Efrén Rivera Ramos, *La libertad de información: Necesidad de su reglamentación en Puerto Rico*,44 REV. JUR. UPR 67, 69 (1975) (translation provided)

TO THE HONORABLE COURT:

NOW COMES the plaintiff CENTRO DE PERIODISMO INVESTIGATIVO, (*hereinafter "CPI"*) represented by the undersigned attorneys and respectfully states and prays as follows:

I. INTRODUCTION

1.1 This action for declaratory, injunctive and mandamus relief seeks access to information necessary to inform the citizenry of the workings of the government

of Puerto Rico and to allow citizens to make informed decisions about their future.

1.2 This **action is** brought before this court pursuant to the Declaratory Judgment Act, 28 U.S.C. §2201 and the All Writs Act, 28 U.C. §1651, well as the specific jurisdictional provisions of the "Puerto Rico Oversight, Management and Economic Stability Act of 2016.

1.3 Plaintiff **Centro de Periodismo Investigativo ("CPI")** is a non-profit organization dedicated to investigative reporting, access to information litigation and journalist's training, as ways to obtain information necessary for the people of Puerto Rico to make informed decisions and better understand the realities of the current climate, wherein determinations are being made behind closed doors, or by people who have not been elected by the people of Puerto Rico.

1.4 Through this action, the **CPI** seeks access to documents which are within the power and possession of the **Financial Oversight and Management Board of Puerto Rico** (hereinafter, *the Junta,* for its Spanish first name), an organism promulgated by the United States Congress, which granted *the Junta* plenary powers in Puerto Rico, including the power to supersede many actions taken by Puerto Rico officials elected by the citizenry.

1.5 **CPI** has previously made requests to the **Junta** for the documents sought through this action, but the **Junta** has either ignored the requests or provided inadequate or incomplete documentation through its website.

1.6 The actions of the **Junta** violate the Constitution of Puerto Rico, which guarantees access to government documents and information.

1.7 The granting of the relief sought herein will advance the interest of the people of Puerto Rico, who have a right to know the events which will affect their daily lives and the future of Puerto Rico.

1.8 The plaintiff is seeking solely declaratory, injunctive and mandamus relief, requesting access to information. No damages are sought herein.

1.9 Accordingly, the current action bears no relationship to the recent "Petition for Covered Territory or Covered Instrumentality," presented by the Commonwealth of Puerto Rico on May 3, 2017 pursuant to Title III of the "Puerto Rico Oversight Management and Stability Act" or "PROMESA," hereinafter referred to as the "Law Creating the Junta." *See, Case No. 17-01578, before Judge Laura Taylor Swain, appointed by the Chief Judge of the United States of America.*

II. JURISDICTION

2.1 The jurisdiction of this court is invoked pursuant to Law Creating the Junta, which in its Section 106, 48 U.S.C. §2126, provides in relevant part that "... any action against the Oversight Board .... shall be brought in a United States district court for the covered territory..." (i.e Puerto Rico).

2.2 This is an action "against the Oversight Board" (otherwise known as the **"Junta"**).

2.3 Jurisdiction is also founded on the All Writs Act, 28 U.S.C. §1651(a), which provides for all courts established by Act of Congress to issue writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law, including the Writ of Mandamus.

2.4 Venue is proper in this court pursuant to the above-cited Section 106.

III. PARTIES

The Centro de Periodismo Investigativo

3.1 The plaintiff **Centro de Periodismo Investigativo ("CPI")** is a non-profit organization which was founded in 2007.

3.2 It is a news organization which engages in investigative journalism and has won more than 15 national awards for its work in this field.

3.3 The **CPI** has a website, *www.periodismoinvestigativo.com*, where citizens *inter alia* can access its investigative pieces, and which is visited by some 500,000 unique users on an annual basis.

3.4 Since its inception, the **CPI** has published articles which are available for free to interested readers and

which have been reproduced by more than 25 other news media outlets in Puerto Rico, the United States and beyond.

3.5 In addition to its work as a news medium, the **CPI** has two other important missions: to assure that the citizens of Puerto Rico have access to the information they require to exercise their basic rights as citizens, and to monitor "fiscalizar" those governmental bodies which make decisions affecting the rights and the future of the public.

3.6 These two areas of work are related to litigation to assure proper access to information, and education and training of both professionals in the field of journalism and lay-people as to the right to access to information and the methods for assuring compliance with these rights.

3.7 Among the employees, contractors and Board members of the **CPI** are dedicated journalists and attorneys who engage in work designed to assuring that the citizenry in Puerto Rico has access to the information necessary to the exercise of democratic rights.

3.8 As stated on its website, "the **CPI** recognizes that the fundamental requirement for a true democracy is that the citizenry be well informed ..." The CPI engages in work to avoid the citizens being "ill informed, unaware of important truths, and limited in their capacity to democratically monitor those who hold power. Being convinced that these tendencies have to be combated, this is the vision that nourishes the **CPI** and all of its work." (Translation supplied)

3.9 "With this vision in mind, [the **CPI**] was organized as an autonomous non-profit entity, which allows it to act with independence from political and commercial interests." (*Id., Translation supplied).*

The Financial Oversight and Management Board for Puerto Rico

3.10 The Financial Oversight and Management Board for Puerto Rico ("the **Junta"**) was created by virtue of the provisions of the "Puerto Rico Oversight, Management, and Economic Stability Act," Public Law 114-187, approved by the 114th Congress of the United States on June 30,2016, and signed by then President Barack Obama. *48 U.S.C. §2121(b)(1).*

3.11 The **Junta** was established pursuant to Congress's invocation of its power under Article IV §3 of the Constitution of the United States, commonly known as the Territorial Clause. This Clause grants plenary power to the Congress of the United States to dispose of and make all "needful Rules and Regulations" for the territory held by the United States.

3.12 According to Public Law 114-187, "the purpose of the Oversight Board is to provide a method for [Puerto Rico] to achieve fiscal responsibility and access to the capital markets." *48 U.S.C §2121(a).*

3.13 Public Law 114-187 provides that the **Junta** is to be considered "an entity within the territorial government for which it is established..." (i.e. Puerto Rico), *48 U.S.C*

§2121(c)(1), and all expenses of the Junta are paid for by the Government of Puerto Rico. *48 U.S.C §2127(b).*

3.14 Congress has provided that the **Junta** "shall not be considered to be a department, agency, establishment, or instrumentality of the Federal Government." *48 U.S.C §2121(c)(2).*

3.15 The seven members of the **Junta** were all appointed by the President of the United States. Two members of the **Junta** were selected from a list submitted by the Speaker of the House of Representatives, Paul Ryan. Two were selected from a list submitted by the Majority Leader of the Senate, Mitch McConnell. Two others were selected from a list submitted by the Minority Leader of the House of Representatives, Nancy Pelosi, and two were selected from a list submitted by the Minority Leader of the Senate of the United States, Harry Reid. The final member was selected by then President Barack Obama. *See, 48 U.S.C §2121(e)*

3.16 The Governor of Puerto Rico is an *ex officio* member of the Junta, without any voting rights. *48 U.S.C §2121(e)(3).*

3.17 Among other things, the **Junta** has the power to "secure copies, whether written or electronic, of such records, documents, information, data or metadata from the territorial government (Puerto Rico) necessary to enable the Oversight Board to carry out its responsibilities ... At the request of the Oversight Board [it[shall be granted direct access to such information systems,

records, documents, information or data as will enable [it] to carry out its responsibilities under this Act." *48 U.S.C §2124(c).*

IV. FACTS

4.1 For the first several months after Public Law 114-187 was passed, there was a lengthy process of selecting the members of the **Junta**.

4.2. After the **Junta's** members were selected, it held its first meeting in the City of New York on September 30, 2016, where the President of the **Junta** was selected and its By-laws were adopted.

4.3 Although the September 30th meeting was open to the public, the determinations reached therein had been previously agreed to by the **Junta.**

4.4 As part of the first public meeting of the **Junta** on September 30, 2016, the President of the Junta, José Carrión stated during the press conference that the members of the Junta had gone through a "rigorous process" with the United States Department of the Treasury, prior to their selection as members of the Junta, during which they submitted financial disclosure and conflict of interest documents.

4.5 During that same meeting, the **Junta** requested the Government of Puerto Rico a number of documents, including the following:

a. Weekly cash flow reports, including all revenues received and all expenses paid (including any debt service) and broken down by main categories;

b. Monthly downloads of bank account data and statements of all principal banking accounts (provided directly to the Board of each bank);

c. Monthly and year to date report of compliance with the current approved budget by budgetary fund and by agency (including local special funds and federal funds);

d. Monthly and year to date detailed report on revenues and a narrative about collection efforts and main initiatives of the Puerto Rico Treasury Department;

e. Monthly detailed payroll reports by agency;

f. Monthly reports on federal funds received and disbursed by area and by agency;

g. Monthly reports of all debt obligations due this current fiscal year and which have been paid; and

h. Quarterly report on each agency's productivity and performance with appropriate metrics and a narrative description.

i. Quarterly report on key Puerto Rico economic, financial, social and labor statistics.

4.6 On October 24, 2017, the **Junta** contracted the services of **Forculus PR** (also known as **Forculus Strategic Communications**), a firm specializing in communications, public relations and media management services, with a Resident Agent in the Beverly Hills sector in Puerto Rico.

4.7 This firm, whose employees and/or contractors include Edward Zayas and José Cedeño, was hired by the Junta to *inter alia* develop and market the "reputation (branding) of the **Junta** and its members." (Parenthesis in the original).

4.8 As set forth in the website for **Forculus PR,** this firm has performed communications, public relations and media management services for the Government of Puerto Rico, including the Government Development Bank of Puerto Rico, and its "Public-Private Partnership Arm, the Puerto Rico Industrial Development Company" (Fomento), as well as "the Office of the Governor of Puerto Rico and the Office of Management and Budget."

4.9 In communications with José Cedeño, the **CPI** was informed that all press requests had to be made through Forculus, PR using official emails *jcedeno@forculuspr.com* and *ezayas@forculuspr.com*.

4.10 At all times relevant to this complaint and as to the matters set forth herein, **Forculus PR,** and its agents, including employees and/or contractors Edward Zayas and José Cedeño, acted as agents of the Junta.

4.11 On November 16, 2016, Joel Cintrón Arbasetti, a reporter with the **CPI**, made a request to Edward Zayas, of **Forculus, PR**, to be given to access to any and all of the documents listed in ¶4.5 above, which were supposed to be provided by the Government of Puerto Rico to the Junta.

4.12 Since September 30, 2016, Carla Minet, a veteran journalist who is the Executive Director of the **CPI**, requested the federal Office of Government Ethics (OGE) to provide the **CPI** with all financial disclosure and conflict of interest documents which the seven members of the Junta were supposed to submit during their evaluation process. Ms. Minet also submitted the request to the United States Department of Treasury and to The White House, as suggested by **Junta** President Carrión and the OGE.

4.13 Ms. Minet was informed by the OGE on a follow-up phone conversation that the documents had to be requested from the **Junta**, rather than from the federal agencies.

4.14 On December 12, 2016, Ms. Minet directed an email to Edward Zayas and José Cedeño of **Forculus PR**, in which, on behalf of the **CPI**, she requested all financial disclosure and conflict of interest documents which the seven members of the Junta submitted to the United States Department of Treasury, as stated by Junta President Carrión during the September 30th meeting referenced at ¶¶4.2 – 4.4 above.

4.15 Ms. Minet indicated to Messrs. Zayas and Cedeño that a prompt response was required, since the **CPI** was working on a news article for which the information was required.

4.16 On that same day, Mr. Cedeño responded to Ms. Minet that her request would be "processed" and that a response "would be offered as soon as possible." (Translation provided).

4.17 Subsequent emails with respect to these matters yielded no response from the **Junta**.

4.18 On February 9, 2017, **CPI** Executive Director Carla Minet did additional follow-up with respect to the requests made on November 16, 2016 by **CPI** reporter Joel Cintrón Arbasetti.

4.19 At that time, Ms. Minet also followed up with respect to a separate communication which had been sent on December 12th, 2016, wherein Ms. Minet solicited additional documents and information from the **Junta**, via Edward Zayas, from **Forculus PR**.

4.20 The documents requested in the February 9th communication included the following: (a) records relating to communications, inquiries or requests for information, documents, reports or data by any member of the **Junta** and/or its staff to any agency of the federal government or federal government official, or by the federal government, its agencies or staff, to the **Junta**; (b) communications, reports, consultations, updates, documents or information

provided by any member of the **Junta** and/or its staff to La Fortaleza, its officers, or any other agency or official of the Government of Puerto Rico, or by the Government of Puerto Rico to the **Junta**, its members or staff; (c) contracts granted by the **Junta** to private entities (also originally requested on November 11, 2016); (d) protocols, regulations, manuals or memorandums generated by the **Junta** to conduct its work; and (e) minutes of meetings held by the **Junta** and its committees or its members.

4.21 On or about February 28, 2017, the **Junta** published on its website certain financial information forms regarding the individual members of the **Junta**. The documents of the seven board members were dated in February 2017.

4.22 On the following day, March 1, 2017, Ms. Minet, on behalf of the CPI**,** directed a number of questions to the Junta regarding the documents published on the website.

4.23 In her March 1st email to Edward Zayas, of **Forculus PR**, Ms. Minet requested *inter alia* the following information: whether the published documents were the same ones submitted to the U.S. Department of the Treasury, as part of the "rigorous process" referred to by **Junta** President José Carrión in the meeting in New York on September 30, 2016, as set forth in ¶¶4.2 to 4.4 above; to which agency the documents were submitted; why there was missing information on the documents, including but not limited to the signatures of the Ethics official, salary information for some of the Junta member, and financial information concerning spouses of the Board members.

4.24 Ms. Minet indicated to Mr. Zayas that the inquiries were urgent, since the information was needed for a deadline for publication later that day.

4.25 To date, neither **Forculus PR** nor the Junta has provided any substantive response to the inquiries and document requests set forth at ¶¶4.5 and ¶¶4.11-4.21 above.[11]

4.26 To date, the **CPI** has received no response to the inquiries made in Ms. Minet's email of March 1, 2017.

V. CAUSE OF ACTION

5.1 In declarations made when he announced the appointment of the seven members to the **Junta**, then President Barack Obama stated that "[i]n order to be successful, the Financial Oversight and Management

11. On February 10th, 2017, the CPI received from the Commonwealth of Puerto Rico certain documents, in response to similar requests for information which had been directed to the Commonwealth itself. The documents are as follows: Letter to Governor and to newly elected Governor, December 20, 2016; Press Communiqué of the Junta, January 18, 2017; Letter from the Junta to Governor Rosselló, January 18, 2017; Press Communiqué, January 20, 2017; Letter from Governor Rosselló a the Junta, January 21, 2017; Letter from Governor R osselló to the Junta, January 23, 2017; Liquidity Plan, January 28, 2017; Puerto Rico fiscal update, January 28, 2017; Debt service payments, February 1, 2017; Letter from the Junta to Elías Sánchez, February 7, 2017. With the exception of the document related to debt service payments, all of these documents can be found on the website of the Junta.

Board will need to establish an open process for working with the people and Government of Puerto Rico... [in order to build] a better future for all Puerto Ricans."

5.2 Since the Junta is not considered a federal organism, but rather is "an entity within the territorial government for which it is established..." (i.e. Puerto Rico), *48 U.S.C §2121(c)(1),* and all expenses of the Junta are paid for by the Government of Puerto Rico, *48 U.S.C §2127(b),* the Constitution and laws of the Commonwealth of Puerto Rico apply to its operations.

5.3 Pursuant to Section 4 of the "Puerto Rico Oversight, Management, and Economic Stability Act," *48 U.S.C §2103*, Puerto Rico law applies with respect to the operation of the Junta, as long as it is not "inconsistent with [the] Act."

5.4 There is nothing inconsistent between the right of access to information and the Act establishing the Junta.

5.5 In point of fact, providing access to the requested documents would further the purpose of the Financial Oversight and Management Board, as publicly stated by the then President of the United States, Barack Obama, set forth in ¶5.1 above.

5.6 Under the Constitution of Puerto Rico, there exists an undisputed right of the people to access information produced or in the power of the Government of Puerto Rico.

5.7 This right derives from the Constitution of Puerto Rico and is considered a fundamental human right. *See, for example, Trans Ad PR v. Junta Subastas*, 174 DPR 56, 67 (2008); *Colón Cabrera v. Caribbean Petroleum*, 170 DPR 582, 590 (2007); *Ortiz v. Dir. Adm. Tribunales*, 152 DPR 161, 175 (2000).

5.8 The Supreme Court of Puerto Rico has observed that this right is a critical component of the rights of free speech, free press and freedom of association set forth explicitly in the Bill of Rights, Article II of the Constitution of the Commonwealth of Puerto Rico. *See, eg., Soto v. Srio. Justicia*, 12 P.R. Offic. Trans. 597, 607-608 (1982).

5.9 As expressed by the Puerto Rico Supreme Court, access to information constitutes an important component of a democratic society, in which the citizen can issue an informed judgment regarding the actions of the government. *Colón Cabrera*, 170 DPR at 590. The right to redress grievances is also implicated, in that without knowledge of the facts, one cannot judge, nor demand remedies with respect to grievances against the government either through judicial or electoral processes.

5.10 Given the importance of this right under the Constitution of Puerto Rico, the Government cannot deny access to documents capriciously.

5.11 The **Junta**, as an organism "within" the government of Puerto Rico, has a ministerial duty to comply with the Constitution of Puerto Rico with respect

to the public nature of the information and documents sought herein.

5.12 The critical role of the press in guaranteeing access to information has also been recognized in the Constitutional law of Puerto Rico. "[T]he press constitutes a vehicle of information and opinion to inform and educate the public, to offer criticism, to provide a forum for discussion and debate, and to act as a surrogate to obtain for readers news and information that individual citizens could not or would not gather on their own." *Santiago v. Bobb y El Mundo*, 17 P.R. Offic. Trans. 182, 190 (1986) (*citing* B. F. Chamberlain & J. Brown, *The First Amendment Reconsidered* 110, New York, Longman (1982)).

5.13 The right of access to information is also codified in Article 409 of the Código de Enjuiciamiento Civil, 32 LPRA § 1781 (2015), which provides for access to "public documents" in Puerto Rico.

5.14 To date, the Junta has held seven (7) public meetings on the following dates: October 14, 2016 (New York); November 18, 2016 (Fajardo, Puerto Rico); January 28, 2017 (Fajardo, Puerto Rico); March 13, 2017 (New York); March 31, 2017 (San Juan, Puerto Rico); and April 28, 2017 (New York).

5.15 Other than the brief public sessions, largely to reaffirm decisions already made, and the placement of some selected documents on its website, the **Junta** has not provided the citizenry of Puerto Rico with substantive

access to the proceedings of the **Junta**, which take place behind closed doors.

5.16 The **Centro de Periodismo Investigativo** has attempted to obtain documents which are critical for providing the citizens of Puerto Rico with the access to information guaranteed under the Constitution and Laws of Puerto Rico and to allow the CPI, as an important and respected news organization, to provide information to the citizens regarding the operations of the **Junta**.

5.17 These efforts by the **CPI** have been met with stonewalling on the part of the **Junta** and its designated marketing and branding group. **Forculus PR.**

5.18 Access to the information requested by the CPI is essential to assure an informed citizenry and the validation of the rights existing under the Constitution and laws of Puerto Rico.

5.19 The aforementioned rights apply to the **Junta**, as they are not inconsistent with Law 114-187.

5.20 Since Congress designated the Junta not only to be paid for by the people of Puerto Rico, but also to be an entity "within" the government of Puerto Rico, the Constitution and laws of the Commonwealth of Puerto Rico apply to the Junta.

5.21 There is no adequate remedy at law to address the fundamental constitutional harms for which redress is sought herein.

5.22 The citizens of Puerto Rico and the population served by the investigative and reporting work done by the CPI will be irreparably harmed if the relief requested herein is not granted.

5.23 The public interest will be served by the granting of the relief requested herein, be it in the form of injunctive relief or through the issuance of a writ of Mandamus.

5.24 Mandamus is an appropriate writ to assure that **Junta** exercises its ministerial duty to assure compliance with the Constitution and laws of Puerto Rico.

WHEREFORE, the plaintiff **Centro de Periodismo Investigativo** hereby requests the following relief:

1. A Declaratory Judgment that the actions of the Junta in effectively denying access to the documents and information set forth in ¶¶4.4 to 4.26 above.

2. Issue a preliminary injunction and a permanent injunction ordering the **Junta** to deliver to the **Centro de Periodismo Investigativo** the following documents:

a. Weekly cash flow reports, including all revenues received and all expenses paid (including any debt service) and broken down by main categories;

b. Monthly downloads of bank account data and statements of all principal banking accounts (provided directly to the Board of each bank);

c. Monthly and year to date report of compliance with the current approved budget by budgetary fund and by agency (including local special funds and federal funds);

d. Monthly and year to date detailed report on revenues and a narrative about collection efforts and main initiatives of the Puerto Rico Treasury Department;

e. Monthly detailed payroll reports by agency;

f. Monthly reports on federal funds received and disbursed by area and by agency;

g. Monthly reports of all debt obligations due this current fiscal year and which have been paid; and

h. Quarterly report on each agency's productivity and performance with appropriate metrics and a narrative description.

i. Quarterly report on key Puerto Rico economic, financial, social and labor statistics.

j. All financial statements and other financial and conflict of interest submissions made by the members of the Junta prior to their designations or subsequent thereto.

k. Records relating to communications, inquiries or requests for information, documents, reports or data by any member of the **Junta** and/or its staff to any agency of the federal government or federal government official,

or by the federal government, its agencies or staff, to the **Junta**;

l. Communications, reports, consultations, updates, documents or information provided by any member of the Board and/or its staff to La Fortaleza, its officers, or any other agency or official of the Government of Puerto Rico, or by the Government of Puerto Rico to the **Junta**, its members or staff;

m. Contracts granted by the **Junta** to private entities;

n. Protocols, regulations, manuals or memorandums generated by the **Junta** to conduct its work;

o. Minutes of meetings held by the **Junta**, its committees or its members;

p. Complete financial disclosure forms for all **Junta** members.

3. Issue a Writ of Mandamus requiring the **Junta** to comply with its ministerial duty to provide the information and documents set forth in the previous paragraph.

4. Issue whatever other relief this court deems just and appropriate.

In San Juan Puerto Rico, this 1st day of June, 2017.

Appendix G

Respectfully Submitted

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APPENDIX H — COMPLAINT FOR DECLARATORY, INJUNCTIVE AND MANDAMUS RELIEF FILED IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF PUERTO RICO ON SEPTEMBER 30, 2019 IN CASE NO. 3:19-CV-01936

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

CIVIL NO. 2019-

CENTRO DE PERIODISMO INVESTIGATIVO,

Plaintiff,

v.

FINANCIAL OVERSIGHT AND MANAGEMENT BOARD FOR PUERTO RICO,

Defendant.

COMPLAINT FOR DECLARATORY RELIEF; PRELIMINARY AND PERMANENT INJUNCTION; MANDAMUS

COMPLAINT FOR DECLARATORY, INJUNCTIVE AND MANDAMUS RELIEF

> "To permit the government to manage public affairs under the mantle of secrecy is to invite arbitrary actions, poor administration, governmental indifference, public irresponsibility

> and corruption. A citizenry which is alert and militant against these potential evils of all government machinery can perform its oversight function only if it has possession of the information which will permit it to discovery the potential dangers in a timely manner and demand responsible action. To deprive the citizenry of this information is equivalent to producing an aggravated collective paralysis attributable to civil myopia of a citizenry which knows only part of the actions of its government or knows only half-truths related thereto."
>
> Efrén Rivera Ramos, *La libertad de información: Necesidad de su reglamentación en Puerto Rico*,44 REV. JUR. UPR 67, 69 (1975) (translation provided)

TO THE HONORABLE COURT:

NOW COMES the plaintiff CENTRO DE PERIODISMO INVESTIGATIVO (*hereinafter "CPI"*), represented by the undersigned attorneys and respectfully states and prays as follows:

I. INTRODUCTION

1.1 This is a civil action for declaratory and injunctive relief and for a writ of Mandamus arising under the Constitution of Puerto Rico. It is brought before this court pursuant to the provisions of 42 U.S.C. §1983 and 1988, the

Declaratory Judgment Act, 28 U.S.C. §2201, the specific jurisdictional provision in Section 106 of the "Puerto Rico Oversight, Management and Economic Stability Act" of 2016, and Chapter 283 of the "Código de Enjuiciamiento Civil" of Puerto Rico, *32 LPRA Section 3421 et seq.*, relative to the *Mandamus* remedy.

1.2 Plaintiff **Centro de Periodismo Investigativo ("CPI")** is a non-profit organization dedicated to investigative reporting, access to information litigation and training of journalists, for the purpose of obtaining information necessary for the People of Puerto Rico to make informed decisions about the future of Puerto Rico and better understand the realities of the current climate, wherein decisions are being made behind closed doors by people who have not been elected by the People of Puerto Rico.

1.3 In this civil action, the CPI seeks access to documents which are within the power and possession of the **Financial Oversight and Management Board of Puerto Rico** (*hereinafter, "the FOMB" or "the Board"*), an organism created by Congress, with plenary powers in Puerto Rico, including the power to supersede many actions taken by Puerto Rico officials elected by the citizenry.

1.4 In mid-August of this year, CPI made a formal request to the Board for the documents now being sought through this action.

1.5 In response, the Board refused to provide the requested documentation alleging that the right of access to public documents under the Constitution of Puerto Rico does not apply to the Board.

1.6 The actions of the Board violate the Constitution of Puerto Rico, which guarantees access to government documents.

1.7 The granting of the relief sought herein will advance the interest of the People of Puerto Rico, who have a right to know the events which will affect their daily lives and the future of Puerto Rico.

1.8 The current case is solely for declaratory, injunctive and mandamus relief, requesting access to information.

1.9 The current action bears no relationship to the "Petition for Covered Territory or Covered Instrumentality," presented by the Commonwealth of Puerto Rico on May 3, 2017 pursuant to Title III of the "Puerto Rico Oversight, Management and Economic Stability Act". *See, Case No. 17-01578, before Judge Laura Taylor Swain, appointed by the Chief Judge of the United States of America. See also, Memorandum Order Granting Motion of Centro de Periodismo Investigativo for Relief from the Automatic Stay, Docket No. 1084, Case No. 17-03283, before Judge Laura Taylor Swain.*

II. JURISDICTION

2.1 The jurisdiction of this court is invoked exclusively pursuant to the "Puerto Rico Oversight, Management and

Economic Stability Act" of 2016, which in Section 106, 48 U.S.C. §2126, provides in relevant part that "... any action against the Oversight Board .... shall be brought in a United States district court for the covered territory..." (i.e. Puerto Rico).

2.2 This is an action "against the Oversight Board" (otherwise known as "the FOMB" or "the Board").

2.3 Venue is proper in this court pursuant to the above-cited Section 106.

II. PARTIES

Centro de Periodismo Investigativo

3.1 The plaintiff **Centro de Periodismo Investigativo ("CPI")** is a non-profit organization which was founded in 2007.

3.2 It is a news organization which engages in investigative journalism and has won more than 20 national and international awards for its work in this field.

3.3 The CPI has a website, *www.periodismoinvestigativo.com*, where citizens *inter alia* can access its investigative articles and related documents, and which has been visited by more than 1 million unique users in the past year.

3.4 Since its inception, the CPI has published articles which are available for free to interested readers and which

have been reproduced by more than 25 other news media outlets in Puerto Rico, the United States and beyond.

3.5 In addition to its work as a news medium, the CPI has two other important missions: to assure that the People of Puerto Rico have access to the information they require to exercise their basic rights, and to provide oversight ("*fiscalizar*") of those governmental bodies which make decisions affecting the rights and the future of the public.

3.6 These two areas of work are related to litigation to assure proper access to information, as well as the education and training of both professionals in the field of journalism and lay-people as to the right of access to information and the methods for assuring compliance with this right.

3.7 Among the employees, contractors and board members of the CPI are dedicated journalists, attorneys and law professors who engage in work designed to assuring that the People of Puerto Rico have access to the information necessary for the exercise of their democratic rights.

3.8 As stated on its website, "the CPI "recognizes that the fundamental requirement for a true democracy is that the citizenry be well informed ...". The CPI engages in work to avoid the people being, "ill-informed, unaware of important truths, and limited in their capacity to democratically monitor those who hold power. Being convinced that these tendencies have to be combatted, this is the vision that nourishes the CPI and all of its work." (Translation supplied)

3.9 "With this vision in mind, [the CPI] was organized as an autonomous non- profit entity, which allows it to act with independence from political and commercial interests." (Id., Translation supplied).

Financial Oversight and Management Board for Puerto Rico

3.10 The Financial Oversight and Management Board for Puerto Rico was created by virtue of the provisions of the "Puerto Rico Oversight, Management, and Economic Stability Act" of 2016, Public Law 114-187, approved by the 114th Congress of the United States on June 30, 2016, and signed by then President Barack Obama. 48 U.S.C. §2121(b)(1).

3.11 The Board was established pursuant to Congress's invocation of its power under Article IV §3 of the Constitution of the United States, commonly known as the Territorial Clause. This Clause grants plenary power to the Congress of the United States to dispose of and make all "needful Rules and Regulations" for the territories held by the United States.

3.12 According to Public Law 114-187, "the purpose of the Oversight Board is to provide a method for [Puerto Rico] to achieve fiscal responsibility and access to the capital markets." 48 U.S.C. §2121(a).

3.13 Public Law 114-187 provides that the Board is to be considered "an entity within the territorial government for which it is established..." (i.e. Puerto Rico), 48 U.S.C.

§2121(c)(1), and all expenses of the Board are paid for by the Government of Puerto Rico. 48 U.S.C. §2127(b).

3.14 Congress has provided that the Board "shall not be considered to be a department, agency, establishment, or instrumentality of the Federal Government." 48 U.S.C. §2121(c)(2).

3.15 The seven members of the Board were all appointed by the President of the United States. Two members of the Board were selected from a list submitted by the then Speaker of the House of Representatives, Paul Ryan. Two were selected from a list submitted by the Majority Leader of the Senate, Mitch McConnell. Two others were selected from a list submitted by the then Minority Leader of the House of Representatives, Nancy Pelosi, and two were selected from a list submitted by the then Minority Leader of the Senate of the United States, Harry Reid. The final member was selected by then President Barack Obama. See 48 U.S.C. §2121(e).

3.16 The Governor of Puerto Rico is an *ex officio* member of the Board, without any voting rights. 48 U.S.C. §2121(e)(3).

IV. FACTS

4.1 On August 9, 2019, Carla Minet, a veteran journalist and the current Executive Director of the CPI, directed an email to Edward Zayas, press contact for the Board, and José Luis Cedeño of Forculus PR, in which, on behalf of the CPI, she requested the following:

Appendix H

(a) Records related to communications, inquiries or requests for information, documents, reports or data issued by any member of the Board and/or its staff to any federal government agency or federal government official, or by the federal government, its agencies or staff, to the Board, from April 30, 2018 until the delivery date, including, but not limited to, email and text messages through any digital messaging system.

(b) Communications, reports, inquiries, updates, documents or information provided by any member of the Board and/or its staff to La Fortaleza, its officers, or any other agency or official of the government of Puerto Rico, or by the government of Puerto Rico to the Board, its members or staff, from April 30, 2018 until the delivery date, including, but not limited to, email and text messages through any digital messaging system.

4.2 Since late 2017, the Board has utilized the services of Forculus PR (also known as Forculus Strategic Communications), a firm specializing in communications, public relations and media management services.

4.3 In prior communications with José Luis Cedeño, a representative of Forculus PR, the CPI was informed that all press requests to the Board had to be made through the official email addresses of José Luis Cedeño and Edward Zayas, the Board's press contact.

4.4 At all times relevant to this complaint and as to the matters set forth herein, Forculus PR, and its agents, including employees and/or contractors Edward Zayas and José Luis Cedeño, acted as agents of the Board.

4.5 Ms. Minet's August 9th email indicated to Messrs. Zayas and Cedeño that acknowledgement of receipt of the email and a prompt response would be appreciated.

4.6 Having received no response, on August 12, 2019 Ms. Minet sent a follow-up email requesting confirmation of receipt.

4.7 Again receiving no response, on August 13, 2019 Ms. Minet sent a second follow-up email requesting confirmation of receipt.

4.8 On August 14, 2019, Edward Zayas sent a response indicating that the request for information had been referred to legal counsel, whom would be formally responding to the request.

4.9 On September 4, 2019, Guy Brenner, attorney for the Board in Case No. 17-1743, sent a letter to the undersigned as legal representatives of the CPI in response to Ms. Minet's request for information.

4.10 As stated in the document, it was addressed to the undersigned counsel because of pending litigation in a previous access to information case between the CPI and the Board.

4.11 Mr. Brenner's September 4th letter stated, *inter alia*, that "the right to access documents under the Puerto Rico Constitution does not apply to the Oversight Board", and declined to provide the requested information.

4.12 Mr. Brenner also stated that the current request for information "appears to be an improper attempt to amend the complaint" in the aforementioned Case No. 17-1743, currently before Judge Jay García Gregory.

V. CAUSE OF ACTION

5.1 In declarations made when he announced the appointment of the seven members to the Board, then President Barack Obama stated that "[i]n order to be successful, the Financial oversight and management Board will need to establish an open process for working with the people and Government of Puerto Rico... [in order to build] a better future for all Puerto Ricans."

5.2 Since the Board is not considered a federal organism, but rather is "an entity within the territorial government for which it is established..." (i.e. Puerto Rico), 48 U.S.C. § 2121(c)(1), and all expenses of the Board are paid for by the Government of Puerto Rico, 48 U.S.C. § 2127(b), the Constitution and laws of the Commonwealth of Puerto Rico apply to its operations.

5.3 Pursuant to Section 4 of the "Puerto Rico Oversight, Management, and Economic Stability Act", 48 U.S.C. § 2103, Puerto Rico law applies with respect to the operation of the Board, as long as it is not "inconsistent with [the] Act".

5.4 There is nothing inconsistent between the right of access to information and the Act establishing the Board.

5.5 In point of fact, providing access to the requested documents would further the purpose of the Financial Oversight and Management Board, as publicly stated by the then President of the United States, Barack Obama, set forth in ¶5.1 above.

5.6 Under the Constitution of Puerto Rico, there exists an undisputed right of the people to access information produced or in the power of the Government of Puerto Rico.

5.7 This right derives from the Constitution of Puerto Rico and is considered a fundamental human right. *See, for example*, *Trans Ad PR v. Junta Subastas*, 174 DPR 56, 67 (2008); *Colón Cabrera v. Caribbean Petroleum*, 170 DPR 582, 590 (2007); *Ortiz v. Dir. Adm. Tribunales*, 152 DPR 161, 175 (2000).

5.8 The Supreme Court of Puerto Rico has observed that this right is a critical component of the rights of free speech, free press and freedom of association set forth explicitly in the Bill of Rights, Article II of the Constitution of the Commonwealth of Puerto Rico. *See, eg., Soto v. Srio. Justicia*, 12 P.R. Offic. Trans. 597, 607-608 (1982).

5.9 As expressed by the Puerto Rico Supreme Court, access to information constitutes an important component of a democratic society, in which the citizen can issue an informed judgment regarding the actions of the government. *Colón Cabrera*, 170 DPR at 590. The right to redress grievances is also implicated, in that without knowledge of the facts, one cannot judge, nor

demand remedies with respect to grievances against the government either through judicial or electoral processes.

5.10 Given the importance of this right under the Constitution of Puerto Rico, the Government cannot deny access to documents capriciously.

5.11 The Board, as an organism "within" the government of Puerto Rico, has a ministerial duty to comply with the Constitution of Puerto Rico with respect to the public nature of the information and documents sought herein.

5.12 The critical role of the press in guaranteeing access to information has also been recognized in the Constitutional law of Puerto Rico. "[T]he press constitutes a vehicle for information and opinion to inform and educate the public, to offer criticism, to provide a forum for discussion and debate, and to act as a surrogate to obtain for readers news and information that individual citizens could not or would not gather on their own." *Santiago v. Bobb y El Mundo*, 17 P.R. Offic. Trans. 182, 190 (1986) (*citing* B.F. Chamberlain & J. Brown, *The First Amendment Reconsidered* 110, New York, Longman (1982)).

5.13 The right of access to information is also codified in Article 409 of the Código de Enjuiciamiento Civil, 32 LPRA § 1781 (2015), which provides for access to "public documents" in Puerto Rico.

5.14 The Centro de Periodismo Investigativo has attempted to obtain documents which are critical for providing the People of Puerto Rico with the access to information guaranteed under the Constitution and Laws of Puerto Rico and to allow the CPI, as an important and respected news organization, to provide information to the people regarding the operations of the Board.

5.15 The right of access under the Puerto Rico Constitution applies to the public documentation requested by the CPI since early August of 2019 and addressed in this Complaint, independently of any prior requests in any other litigation, including Case No. 17-1743.

5.16 The CPI's current request for access to information does not represent an "improper attempt" to amend the pleadings in Case No. 17-1743.

5.17 These efforts by the CPI have been met with a denial on the part of the Board.

5.18 Access to the information requested by the CPI is essential to assure an informed citizenry and the validation of the rights existing under the Constitution and laws of Puerto Rico.

5.19 As previously decided by Judge García Gregory, in an extensive Opinion and Order at Docket No. 36, Case No. 17-1743, the aforementioned rights apply to the Board, as they are not inconsistent with Public Law 114-187.

5.20 Also as previously decided by Judge García Gregory, since Congress designated the Board not only to be paid for by the People of Puerto Rico, but also to be an entity "within" the government of Puerto Rico, the Constitution and laws of the Commonwealth of Puerto Rico apply to the Board.

5.21 There is no adequate remedy at law to address the fundamental constitutional harms for which redress is sought herein.

5.22 The People of Puerto Rico and the population served by the investigative and reporting work done by the CPI will be irreparably harmed if the relief requested herein is not granted.

5.23 The public interest will be served by the granting of the relief requested herein.

5.24 *Mandamus* is an appropriate writ to assure that the Board exercises its ministerial duty to assure compliance with the Constitution and laws of Puerto Rico.

5.25 CPI has complied with all the prerequisites for the issuance of *Mandamus* relief.

WHEREFORE, the plaintiff **Centro de Periodismo Investigativo** hereby requests the following relief:

1. A Declaratory Judgment that the actions of the Board are effectively denying access to the documents set forth in ¶4.1.

2. Issue a preliminary injunction and a permanent injunction, as well as a writ of *mandamus*, ordering the Board to deliver to the **Centro de Periodismo Investigativo** the following documents:

> (a) Records related to communications, inquiries or requests for information, documents, reports or data issued by any member of the Board and/or its staff to any federal government agency or federal government official, or by the federal government, its agencies or staff, to the Board, from April 30, 2018 until the delivery date, including, but not limited to, email and text messages through any digital messaging system.
>
> (b) Communications, reports, inquiries, updates, documents or information provided by any member of the Board and/or its staff to La Fortaleza, its officers, or any other agency or official of the government of Puerto Rico, or by the government of Puerto Rico to the Board, its members or staff, from April 30, 2018 until the delivery date, including, but not limited to, email and text messages through any digital messaging system.

3. Issue whatever other relief this court deems just and appropriate. In San Juan Puerto Rico, this 30th day of September 2019.

Appendix H

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