No. 22-96

In the Supreme Court of the United States

FINANCIAL OVERSIGHT AND MANAGEMENT BOARD FOR PUERTO RICO
PETITIONER,

v.

CENTRO DE PERIODISMO INVESTIGATIVO, INC.
RESPONDENT.

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

BRIEF IN OPPOSITION

JUDITH BERKAN
BERKAN/MÉNDEZ
Calle O'Neill G-11
San Juan, PR 00918-2301
(787) 764-0814

RAFAEL E. RODRÍGUEZ RIVERA
STEVEN P. LAUSELL RECURT
LUIS J. TORRES ASENCIO
ACCESS TO INFORMATION CLINIC
INTER AMERICAN UNIVERSITY OF PUERTO RICO SCHOOL OF LAW
PO Box 194735
San Juan, PR 00919-4735
(787) 751-1600

LISA S. BLATT
SARAH M. HARRIS
Counsel of Record
KEES D. THOMPSON
IAN M. SWENSON
WILLIAMS & CONNOLLY LLP
680 Maine Avenue, S.W.
Washington, DC 20024
(202) 434-5000
sharris@wc.com
Counsel for Respondents

QUESTIONS PRESENTED

1. Whether Puerto Rico can assert state sovereign immunity.
2. If so, whether the Financial Oversight and Management Board is an arm of Puerto Rico entitled to assert such immunity.
3. Whether the First Circuit correctly held that Congress abrogated any sovereign immunity the Board may enjoy when Congress enacted legislation pursuant to the Territory Clause, U.S. Const. art. IV, § 3, cl. 2, directing that all actions against the Board must be brought in specified federal district courts. *See* 48 U.S.C. § 2126(a).

CORPORATE DISCLOSURE STATEMENT

Respondent Centro de Periodismo Investigativo has no parent corporation, and no publicly held corporation owns 10 percent or more of its stock.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

Cases:

Page

Cases—continued:

Page

Cases—continued:

Constitution and Statutes:

Other Authorities:

In the Supreme Court of the United States

No. 22-96

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

BRIEF IN OPPOSITION

INTRODUCTION

This case does not warrant this Court's review. The petition frames the question presented as whether the Puerto Rico Oversight, Management, and Economic Stability Act (PROMESA) clearly and unmistakably abrogates the sovereign immunity of petitioner the Federal Oversight Management Board, an entity Congress endowed with extraordinary authority to overhaul Puerto Rico's finances. To even reach that question, however, this Court would have to first navigate a host of weighty constitutional issues that the courts below did not analyze.

For starters, the question presented presupposes that Puerto Rico—a U.S. territory—is equivalent to a State for state sovereign immunity purposes. But this Court has never so held, and the Court's state sovereign immunity jurisprudence casts serious doubt on that premise. The question presented also presupposes that the Board is an arm of Puerto Rico that can share in whatever state sovereign immunity Puerto Rico possesses. That, too, is dubious given that Congress, not Puerto Rico, created the Board and vested it with the power to countermand the Puerto Rican government's economic decisions. On top of all that, this interlocutory appeal is procedurally messy, and granting review would only fragment this litigation more.

Scaling that Everest of vehicle problems is not worth the climb, because the decision below is correct and creates no conflict with other precedents. The First Circuit applied the same abrogation standard as every other court, looking for clear, unmistakable evidence of congressional intent to abrogate immunity. The Board complains that the First Circuit's application of that standard to PROMESA was too lax. But that narrow, as-applied quibble does not warrant this Court's intervention. Regardless, the First Circuit's holding that PROMESA abrogates whatever state sovereign immunity the Board could be said to possess is manifestly correct. Read together, various provisions of PROMESA make pellucid Congress' intent that federal courts would not only exercise jurisdiction over all claims against the Board, but could also hold the Board liable for all sorts of relief inconsistent with sovereign immunity.

The First Circuit's holding also carries limited consequences, notwithstanding the Board's dire warnings of

future dysfunction. Congress enacted PROMESA pursuant to its Territory Clause authority and limited its scope exclusively to territories. Thus, the specifics of the First Circuit's statutory analysis are unlikely to carry over elsewhere. The stakes of this case for the Board are also low: the upshot of the decision below is that the Board might have to continue to disclose non-privileged documents about how it is governing the Puerto Rican economy. The Board's portrayal of transparency as the death knell for its operations beggars belief. Puerto Rican governmental agencies, States, and the federal government all operate under extensive records-disclosure obligations and have somehow survived. The Board has already turned over 18,000 documents during this protracted litigation with no recorded calamities. The Court should deny the petition.

STATEMENT

A. Statutory and Factual Background

1. The United States acquired Puerto Rico—then a colony of Spain—in 1898 in the aftermath of the Spanish-American War. *Puerto Rico v. Sánchez Valle*, 579 U.S. 59, 63 (2016). Since then, Puerto Rico has been a colony of the United States, and Congress has exercised plenary authority over the island under the Constitution's Territory Clause, U.S. Const. art. IV, § 3, cl. 2. Pursuant to that authority, Congress "authorized and approved" the 1952 Puerto Rican Constitution, making Congress "the original source of power" for Puerto Rico's current system as a U.S. territory. *Sánchez Valle*, 579 U.S. at 73-77.

In 2016, Congress passed and the President signed the Puerto Rico Oversight, Management, and Economic Stability Act (PROMESA), 48 U.S.C. §§ 2101 *et seq*. Congress enacted PROMESA pursuant to its Territory Clause authority "to dispose of and make all needful rules and regulations for territories," *id.* § 2121(b)(2), and the

statute applies to five covered U.S. territories, not just Puerto Rico, *see id.* § 2104(8), (20). "PROMESA created mechanisms for restructuring the debts of U.S. territories and for overseeing reforms of their fiscal and economic policies." *In re Fin. Oversight & Mgmt. Bd. for P.R.*, 916 F.3d 98, 103-04 (1st Cir. 2019).

PROMESA provides that, whenever Congress designates a territory as in need of additional financial oversight, Congress will create an "Oversight Board" for that territory "within [its] territorial government." 48 U.S.C. § 2121(c)(1), (2). PROMESA designated Puerto Rico as such a territory, and thus created petitioner, the Oversight Board for Puerto Rico. *Id.* § 2121(b)(1). Congress vested the Board with extraordinary powers to "supervise and modify" a territory's laws and to oversee and manage its budgets. *Fin. Oversight & Mgmt. Bd. v. Aurelius Inv., LLC*, 140 S. Ct. 1649, 1655 (2020).

To check those powers, Congress dictated that "any action against the Oversight Board . . . shall be brought in a United States district court for the covered territory"—here, the U.S. District Court for Puerto Rico. 48 U.S.C. § 2126(a). Congress expressly contemplated that federal district courts might enter orders "to remedy constitutional violations . . . against the Oversight Board," as well as "declaratory or injunctive relief against the Oversight Board." *Id.* § 2126(c). Congress, however, delayed the effect of any such declaratory or injunctive relief until after the Board exhausts appeals. *Id.*

2. This case arises from document requests that respondent Centro de Periodismo Investigativo (CPI)—an award-winning non-profit media organization focused on investigative journalism and government transparency—filed regarding the Board's operations. Since 2007, CPI has published over 350 reports, and has been recognized as a key stakeholder in ensuring accountability in Puerto

Rico's economic restructuring process. *See Puerto Rico's Centro de Periodismo Investigativo wins Louis M. Lyons Award for Conscience and Integrity in Journalism at Harvard*, Dec. 19, 2019, https://tinyurl.com/2t4vv3h7.

In 2016, the Board held its first public meeting. There, the President of the Board described the selection process for Board members, and the Board requested from the Puerto Rican government documents pertaining to the Commonwealth's financial health. A CPI reporter then asked the Board to share the financial documents that it received from the Puerto Rican government. Pet.App.113a. CPI made that request pursuant to Article II, § 4 of the Puerto Rican Constitution, which the Supreme Court of Puerto Rico has long interpreted to enshrine a "fundamental right" to "access . . . public information." *Bhatia Gautier v. Rosselló Nevares*, 199 P.R. Dec. 59, 80 (P.R. 2017) (certified translation at 17) (citing *Soto v. Srio. de Justicia*, 112 P.R. Dec. 477 (P.R. 1982)).

CPI later added requests for communications between Board members and the federal and Puerto Rican governments; contracts granted by the Board to private entities; any rules for the Board's internal governance; minutes of Board meetings; and financial disclosure and conflict of interest documents that Board members submitted to the U.S. Department of Treasury during their selection process. Pet.App.113a-115a. PROMESA itself identifies some of those documents—such as the Board's "bylaws, rules, and procedures governing its activities"—as "public documents." 48 U.S.C. § 2121(h)(1). Nonetheless, the Board declined to provide substantive responses to CPI's requests. Pet.App.116a.

B. Proceedings Below

1. In June 2017, faced with the Board's nonresponsiveness, CPI sued the Board in the U.S. District Court

for Puerto Rico for violating the Puerto Rican Constitution's access-to-public-information guarantee. Pet.App.123a. CPI brought that claim in federal court because PROMESA channels "any action" against the Board to federal court. *See* 48 U.S.C. § 2126(a). The Board filed a motion to dismiss, arguing *inter alia* that state sovereign immunity barred CPI's suit.

The district court denied the Board's motion. The court recognized that First Circuit precedent treats Puerto Rico as a State for sovereign-immunity purposes. Pet.App.70a (citing, *e.g.*, *Jusino Mercado v. Puerto Rico*, 214 F.3d 34, 39 (1st Cir. 2000)).[1] The district court also assumed without deciding that the Board is an arm of the Commonwealth entitled to assert Puerto Rico's putative state sovereign immunity. The court then held that the Board was not entitled to sovereign immunity under PROMESA. First, the court reasoned, Congress, acting under its plenary powers vis-à-vis territories, waived the Board's sovereign immunity by stating in PROMESA that the Board could be sued in federal court for all claims against it. Pet.App.71a-74a. Alternatively, the court held, Congress abrogated the Board's sovereign immunity by making its intention that the Board could be sued "unmistakably clear." Pet.App.75a-76a.

The district court thus ordered the Board to produce the documents that CPI requested unless the Board could

---

[1] Both the district court and First Circuit referred to Puerto Rico's purported "Eleventh Amendment" immunity defense, *see, e.g.*, Pet.App.21a, 69a, but that is a misnomer. Because this suit was brought by a citizen of Puerto Rico against Puerto Rico, any claim of immunity must derive from inherent state sovereign immunity, not the Eleventh Amendment. *See Allen v. Cooper*, 140 S. Ct. 994, 1000 (2020); *PennEast Pipeline Co. v. New Jersey*, 141 S. Ct. 2244, 2264 (2021) (Gorsuch, J., dissenting) (distinguishing "structural immunity" from "Eleventh Amendment immunity").

demonstrate an entitlement to withhold the document under Puerto Rican law. Pet.App.99a-100a. Although the Board could have filed an interlocutory appeal, *see P.R. Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 146-47 (1993), the Board chose not to do so.

Instead, discovery proceeded before a magistrate judge and focused on documents created before April 30, 2018. For a few months, the Board appeared to comply with its disclosure obligations. But by late 2018, it became clear that the Board had no intention of disclosing the vast majority of the requested documents, so CPI asked the district court to find the Board in contempt for failing to comply with court's order. Pet.App.145a. Ultimately, on March 23, 2021, the district court entered an order requiring the Board to produce a "comprehensive, legally-sufficient" privilege log identifying why it was invoking certain categories of privilege for the documents it was withholding. Pet.App.55a; *see* Pet.App.168a.

2. In the meantime, it became apparent that the Board would also refuse to disclose documents created after April 30, 2018. Thus, in September 2019, CPI filed another complaint seeking disclosure of post-April 2018 documents relating to communications between the Board and the federal and Puerto Rican governments. Pet.App.140a. The Board filed a motion to dismiss the 2019 complaint, again invoking sovereign immunity. The district court consolidated the 2017 and 2019 cases and denied the Board's motion to dismiss the 2019 complaint "for the reasons stated in the Court's Opinion and Order" in the 2017 case. Pet.App.56a.

The Board filed an interlocutory appeal of both the order denying its motion to dismiss the 2019 complaint and the order requiring the Board to compile and submit a privilege log in the 2017 case. In addition to its sovereign immunity claim, the Board argued that PROMESA

preempted CPI's disclosure claims against the Board via a general provision asserting PROMESA's supremacy over non-federal law, 48 U.S.C. § 2103. The Board also argued that PROMESA § 105, 48 U.S.C. § 2125, immunized the Board from CPI's claims by barring liability for claims against the Board based on "actions taken to carry out" PROMESA. The Board urged the First Circuit to consider all these arguments together as "inextricably intertwined with the Eleventh Amendment immunity issue." Pet.App.17a (internal quotation marks omitted).

3. The First Circuit affirmed in a 2–1 decision. The panel first addressed whether the Board had waived its sovereign-immunity defense through its litigation conduct, namely, by "engaging in the discovery process" and producing documents. Pet.App.14a. The panel concluded that the Board had preserved its sovereign-immunity objection by including a paragraph about "jurisdictional issues" in an initial scheduling memorandum and by including a footnote in one brief reserving the Board's right to argue that the district court was "without jurisdiction over this matter." Pet.App.13a-14a.

The panel also addressed its jurisdiction over the Board's interlocutory appeals of the two district-court orders. The panel held that the collateral-order doctrine permitted interlocutory review of the district court's order denying the Board's motion to dismiss the 2019 complaint. Pet.App.16a. But the panel held that it lacked jurisdiction over the Board's appeal of the district court's order to produce a privilege log, which did not qualify as an immediately appealable injunction under 28 U.S.C. § 1292(a)(1). Pet.App.20a. Further, the panel declined to exercise supplemental jurisdiction over the Board's statutory-immunity defense under § 105 and its argument that PROMESA preempts the Puerto Rican Constitution's right of access to information. Pet.App.17a-18a.

The petition omits the First Circuit's lengthy discussion of these jurisdictional issues. Pet. 9-11.

Only after resolving these threshold issues did the panel reach the merits of the sovereign-immunity issue. There too, the panel recognized two antecedent questions to the abrogation issue. First, the panel recognized the preliminary question whether Puerto Rico can claim state sovereign immunity at all. The panel observed that the First Circuit "has long treated Puerto Rico like a state for Eleventh Amendment purposes," but that this Court "has expressly reserved" on that question. Pet.App.22a (citing *P.R. Aqueduct*, 506 U.S. at 141 n.1).

Next, the panel flagged that Puerto Rico's ability to assert state sovereign immunity did not resolve whether the Board was an "arm of the state" entitled to share such immunity. Pet.App.23a. The panel explained that "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" because "neither the parties nor the district court" analyzed the issue in detail. Pet.App.23a-24a. The panel thus "assume[d] without deciding that the Board is an arm of Puerto Rico, shielded by general Eleventh Amendment immunity." Pet.App.24a.

Finally, the panel held that Congress, in PROMESA § 106, had validly abrogated the Board's assumed sovereign immunity. Pet.App.28a-29a. The panel held that § 106 made "unmistakably clear" Congress' intent to abrogate any claim of sovereign immunity by the Board. Pet.App.29a. The panel deemed that "strict" abrogation standard satisfied, Pet.App.34a, because § 106 provides that "any action against the Oversight Board" must be brought in United States District Court for the District of Puerto Rico. *See* 48 U.S.C. § 2126(a). Section 106 also withholds federal jurisdiction over a narrow range of

claims, demonstrating that Congress otherwise intended for federal courts to resolve claims over which they have jurisdiction. Pet.App.29a. The panel saw no reason to think Congress "channel[ed]" claims against the Board into federal court to "dictate [their] dismissal." Pet.App.32a n.16. Further, Congress "contemplated" potential "constitutional violations" by the Board and provided for "injunctive [and] declaratory relief against the Board." Pet.App.29a. The panel deemed this clear abrogation a valid exercise of Congress' authority under the Territory Clause. Pet.App.34a.

Judge Lynch dissented, reasoning that Congress' intent to abrogate the Board's assumed immunity was insufficiently clear. Pet.App.36a-49a.

The First Circuit denied rehearing en banc. The three judges who sat on the panel decided the en banc petition because all other active judges were recused. Judge Lynch dissented from denial of rehearing en banc.

REASONS FOR DENYING THE PETITION

This Court's review is unwarranted. To even reach the question whether Congress validly abrogated Puerto Rico's putative state sovereign immunity in PROMESA, the Court would have to tackle multiple complex antecedent constitutional questions that went unexamined below, while wading through a procedural morass. Those rampant vehicle problems should bar further review, especially because the decision below creates no circuit split and applies the same standard for abrogation that this Court and all other circuits employ. Finally, the Board cries wolf in implausibly threatening that records disclosures pose an existential threat to the Board's operations or to Puerto Rican economic recovery.

I. Multiple Antecedent Questions Impede Resolution of the Question Presented

The Board asks this Court to resolve whether Congress, in PROMESA, "abrogate[d] the Board's sovereign immunity with respect to all federal and territorial claims." Pet. i. But this case is a manifestly inappropriate vehicle for resolving that question.

1. This Court has never decided whether Puerto Rico can invoke state sovereign immunity. *See P.R. Aqueduct*, 506 U.S. at 141 n.1. Whether Puerto Rico can assert such immunity is an unavoidable threshold question that should bar further review. The Court could not hold that Congress improperly abrogated Puerto Rico's state sovereign immunity, as the Board urges, without implicitly holding that Puerto Rico enjoys such immunity. And if Puerto Rico lacks such immunity, that alternative ground would obviate any need to resolve the question presented.

This Court has repeatedly denied petitions involving inescapable antecedent questions as to whether Puerto Rico can claim state sovereign immunity. *E.g.*, *Atl. Med. Ctr., Inc. v. Feliciano*, 571 U.S. 816 (2013) (No. 12-1043) (denying review of whether Puerto Rico waived sovereign immunity through litigation conduct); *Aquino v. Suiza Dairy, Inc.*, 563 U.S. 1001 (2011) (No. 10-74) (denying review of whether state sovereign immunity barred federal-court injunction requiring Puerto Rican official to adopt certain regulatory policies); *Univ. of P.R. v. Toledo*, 549 U.S. 1301 (2007) (No. 06-779) (denying review of whether Congress validly abrogated state sovereign immunity under Title II of the ADA for damages claims against public university in Puerto Rico); *Puerto Rico v. Fresenius Med. Care Cardiovascular Ctr. Corp.*, 540 U.S. 878 (2003) (No. 03-129) (denying review of whether entity was arm of Puerto Rican government shielded by sovereign immunity); *Puerto Rico v. Arecibo Cmty. Health Care, Inc.*, 537

U.S. 813 (2002) (No. 01-1545) (denying review of validity of provision requiring States to waive sovereign immunity over counterclaims in bankruptcy, where Puerto Rico filed claim in proceeding).

Those denials are for good reason. Under this Court's precedents, it is highly unlikely that the territory of Puerto Rico can assert state sovereign immunity. States enjoy sovereign immunity because the Constitution "protected the sovereign prerogatives of States within our government," so they entered the Union with "their sovereign immunity[] intact." *Torres v. Tex. Dep't of Pub. Safety*, 142 S. Ct. 2455, 2461 (2022) (internal quotations omitted). Unlike States, "territories are not distinct sovereigns from the United States because the powers they exercise are delegations from Congress." *Sánchez Valle*, 579 U.S. at 72 n.5. As the Board has previously conceded, "the very point of this Court's ruling in *Sánchez Valle*" is that "[t]erritories, unlike States or tribes, have no independent sovereignty that predates the formation of the United States in the Constitution." Fin. Oversight and Mgmt. Bd. Br. 18, *Aurelius Inv.*, *supra*, Nos. 18-1334, 18-1475, 18-1496, 18-1514, 18-1521 (U.S. Sept. 19, 2019).

In short, as the United States has explained, "as a territory, petitioner does not enjoy . . . Eleventh Amendment immunity," and the First Circuit's contrary case law "finds no home in the text of that Amendment, its historical genesis, or purpose." United States Br. 7, *Univ. of P.R. v. Toledo*, No. 06-779 (Feb. 5, 2007). The United States has thus consistently counseled against using a case involving Puerto Rico to address broader sovereign-immunity principles, including abrogation. *See* United States Amicus Br. 16-17, *Aquino v. Suiza Dairy, Inc.*, No. 10-74 (Apr. 7, 2011) ("[T]he unusual context of Puerto Rico" made the case a "particularly poor vehicle" to decide if state sovereign immunity barred the relief ordered);

United States Br. 7-8, *Univ. of P.R. v. Toledo*, No. 06-779 (Feb. 5, 2007) (difficult "constitutional questions" as to Puerto Rico's entitlement to sovereign immunity posed "significant, and perhaps insurmountable, threshold barriers" to resolving Congress' authority to abrogate immunity); Fed. Resp'ts Br. 4, *P.R. v. Arecibo Cmty. Health Care, Inc.*, 01-1545 (Jun. 17, 2002) ("Because the applicability of the Eleventh Amendment to Puerto Rico is unsettled and could provide an alternative basis for affirming the judgment below, this case is a particularly poor vehicle for resolving the question presented.").

The same outcome should apply here, especially given how undeveloped this issue was below. The panel did not analyze this question, merely citing earlier cases holding that Puerto Rico should be treated as a State for sovereign-immunity purposes—a holding the First Circuit reached in a single sentence in a footnote. Pet.App.22a-23a; *see Ezratty v. Puerto Rico*, 648 F.2d 770, 777 n.7 (1st Cir. 1981). Indeed, "there is no rigorous discussion or defense of [state sovereign immunity for Puerto Rico] in any of the First Circuit's case law." Adam D. Chandler, *Puerto Rico's Eleventh Amendment Status Anxiety*, 120 Yale L.J. 2183, 2191 (2011). This Court does not ordinarily review constitutional questions that courts below have not thoroughly aired and parties have not briefed.

Nor has any other circuit addressed this question. Contrary to the Board's fleeting citation (at 7), the D.C. Circuit has stated that it "need not decide" whether Puerto Rico is akin to States for sovereign-immunity purposes. Instead, the D.C. Circuit has only applied one particular federal statute that expressly grants Puerto Rico the same immunity as States for limited purposes not relevant here. *See P.R. Ports Auth. v. Fed. Mar. Comm'n*, 531 F.3d 868, 872 n.1 (D.C. Cir. 2008) (Kavanaugh, J.). This Court should not grant a case that would require

wading into a splitless, outcome-determinative constitutional question before the Court could even reach the question presented.

2. Even if Puerto Rico could assert state sovereign immunity, this case presents the additional antecedent question of whether the *Board* could do so. Only "arm[s] of the State" can claim state sovereign immunity. *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 280 (1977). If the Board would not qualify as an "arm of the State," addressing whether Congress properly abrogated the Board's putative sovereign immunity would amount to an advisory opinion.

Here again, the decisions below sidestepped this threshold issue. Like the district court, Pet.App.70a n.6, the First Circuit "assume[d] without deciding" that the Board is an arm of Puerto Rico. Pet.App.24a. But this Court is "a court of review, not of first view." *Cutter v. Wilkinson*, 544 U.S. 709, 718-19 n.7 (2005). And applying an arm-of-the-state inquiry would be difficult here. As the party asserting immunity, the Board bore "the burden of production and persuasion." *Maliandi v. Montclair State Univ.*, 845 F.3d 77, 82 (3d Cir. 2016) (citation omitted); *accord Woods v. Rondout Valley Cent. Sch. Dist. Bd. of Educ.*, 466 F.3d 232, 237 (2d Cir. 2006) (collecting cases). Yet the Board created no record before the district court to establish the necessary structural connections to the Commonwealth.

Complicating matters further, the test for identifying arms of the State is murky. This Court has recognized that "the Board is part of the local Puerto Rican government," which pays its expenses and for which it can develop a budget and "control[] the issuance of new debt." *Aurelius Inv.*, 140 S. Ct. at 1661-62. But it is unclear whether those facts suffice. *Compare P.R. Ports Auth.*, 531 F.3d at 880 (under three-factor test focused on intent,

control, and financial liability, Puerto Rico Ports Authority is arm of Puerto Rico), *with Grajales v. P.R. Ports Auth.*, 831 F.3d 11, 21 (1st Cir. 2016) (under two-step framework analyzing structural factors and risk to state's treasury, that same entity is not arm of Puerto Rico).

That Congress—not Puerto Rico—created the Board throws a further spanner in the works. Even entities that States create with congressional consent, like interstate-compact entities, do not qualify as "arms of the State" for sovereign-immunity purposes because such "entities owe their existence to state and federal sovereigns acting cooperatively," so "their political accountability is diffuse." *Hess v. Port Auth. Trans-Hudson Corp.*, 513 U.S. 30, 42 (1994). Here, the Board is entirely a creature of Congress, making it even more dubious that the Board is an "arm" of the Commonwealth. This Court should not stretch to reach a question about abrogating state sovereign immunity that depends on so many underlying assumptions about whether that immunity exists here.

Finally, PROMESA presents an especially bizarre setting for evaluating Puerto Rico's and the Board's entitlement to sovereign immunity. PROMESA applies to other U.S. territories, not just Puerto Rico. 48 U.S.C. § 2104(8), (20). Thus, § 106 does not differentiate between Puerto Rico's Oversight Board and any Boards that Congress might create for other territories going forward. It would be exceedingly odd to resolve whether § 106 validly abrogates the Puerto Rican Board's putative sovereign immunity when § 106 also governs all other territories' Boards, were Congress to create them.

PROMESA's exclusive application to territories also highlights the internally contradictory nature of the Board's position. The Board owes its existence to Congress' plenary power under the Territory Clause—power that Congress plainly could not exercise over a State. The

Board can "substitute its own judgment for the considered judgment of the Governor and other elected officials" of Puerto Rico, but Congress could never subject State governments to such extraordinary interference. *See Aurelius Inv.*, 140 S. Ct. at 1662. Puerto Rico can have its internal economic affairs managed by a Board precisely because Puerto Rico is a territory, not a State. So it is hard to fathom why that Board could turn around and claim state sovereign immunity as if the Board were an arm of a State, not a territory.

3. This case poses other procedural roadblocks against review. For example, the First Circuit held that the only order subject to interlocutory review is the district court's denial of the Board's motion to dismiss the 2019 complaint. Pet.App.20a. The Board's petition does not challenge that holding. And the 2019 complaint just covers requests for documents created after April 2018. In the meantime, the district court has resolved document productions and assertions of privilege for thousands of pre-April 2018 documents, because the Board opted against an interlocutory appeal of the district court's order denying the Board's motion to dismiss CPI's 2017 complaint. It would make little sense to dive into complex sovereign-immunity questions now when this case will involve piecemeal litigation regardless.

Further, the Board below argued that its other defenses are inextricably bound up with sovereign-immunity questions. Specifically, the Board argued, PROMESA § 106 preempts CPI's Puerto Rican constitutional claims against the Board, and § 105 immunizes the Board from those claims. CPI obviously disagrees with those defenses, and the district court rejected them. Pet.App.56a-57a, 80a-98a. But the Board may reassert those defenses in a later appeal, underscoring that review here would be premature. At a minimum, resolving other

statutory defenses that the Board considers related to sovereign immunity could shed further light on state sovereign immunity issues.

II. The Decision Below Is Correct and Creates No Split

1. The Board (at 12-20) chiefly contends that the First Circuit defied this Court's abrogation case law and created a circuit split. But the First Circuit applied the same standard this Court prescribes for determining whether Congress has abrogated a State's sovereign immunity from suit in federal court. Other circuits are in accord.

This Court requires that Congress "make[] its intention to abrogate unmistakably clear in the language of the statute and act[] pursuant to a valid exercise of its power." *Nev. Dep't of Hum. Res. v. Hibbs*, 538 U.S. 721, 726 (2003). Courts look for "unequivocal statutory language," *Allen v. Cooper*, 140 S. Ct. 994, 1000 (2020) (citation omitted), but "Congress need not state its intent in any particular way." *FAA v. Cooper*, 566 U.S. 284, 291 (2012). And courts read multiple statutory provisions "as a whole" to determine whether Congress' intent is sufficiently clear. *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 74 (2000).

In keeping with those precedents, the First Circuit correctly framed the inquiry as whether Congress "ma[de] its intention" to abrogate state sovereign immunity "unmistakably clear in the language of the statute." Pet.App.25a (internal quotation omitted). Hewing to "well-settled principles of statutory construction," the panel first "closely examin[ed] the statutory text," including §§ 106(a), 106(c), and 106(e). Pet.App.25a-28a (internal quotations omitted). And, like this Court did in *Kimel*, the panel examined the text as a whole, noting the interplay between the provisions and their collective effect. Pet.App.28a-29a.

Every other circuit formulates the abrogation standard similarly. All the circuits look to a statute's provisions to see if there are express words or an unmistakable implication that Congress intended abrogation. And, when Congress does not expressly say it is abrogating state sovereign immunity, courts look to the statute as a whole to understand whether Congress unmistakably but indirectly signaled abrogation.

Take the Ninth Circuit's analysis of whether Congress abrogated state sovereign immunity in the Government Employee Rights Act. *See Alaska v. EEOC*, 564 F.3d 1062 (9th Cir. 2009). The Ninth Circuit found that "Congress's intent to abrogate" was "both unequivocal and textual" by piecing together several statutory provisions that, as a whole, revealed that authorization to sue one's "employer" necessarily included government employers. *Id.* 1066 (internal quotation marks omitted). While "Congress could have been clearer" by "say[ing] 'this act abrogates state sovereign immunity' . . . the Supreme Court has made it quite plain that such magic words are unnecessary." *Id.* 1066-67 (citation omitted).

Other circuits perform the same analysis. The Fourth Circuit concluded that "the language of the Copyright Act, considered as a whole, does not clearly and unequivocally indicate Congress's intent to" abrogate state sovereign immunity. *Richard Anderson Photography v. Brown*, 852 F.2d 114, 120 (4th Cir. 1988) (cited at Pet. 14). The Fourth Circuit did not stop once it determined that one provision was merely a "general authorization" for suit. *Id.* at 118. That did "not . . . end the matter," because the "inquiry must focus on the language of the statute as a whole," and courts "are not limited in [their] inquiry to the core provisions authorizing suit and generally describing those who may sue and be sued." *Id.* Only after looking to the rest of the statute—

and rejecting plaintiff's argument that non-abrogation would render a provision superfluous—did the Fourth Circuit reject congressional intent to abrogate. *Id.* at 120.

The Fifth Circuit recognized Congress' clear intent to abrogate immunity in Title VII by looking at the enforcement section and definitional provisions that defined government "employees" and "employers." *Ussery v. Louisiana ex rel. La. Dep't of Health & Hosps.*, 150 F.3d 431, 435 (5th Cir. 1998). "[D]efinitional and enforcement provisions" together "contain[ed] the necessary 'clear statement' of Congress's intent." *Id.* (citation omitted).

The Sixth Circuit likewise put together "the definitional and enforcement provisions applicable to the" Equal Pay Act to find "the necessary clear statement of Congress' intent to abrogate." *Timmer v. Mich. Dep't of Com.*, 104 F.3d 833, 837 (6th Cir. 1997).

So too, the Eighth Circuit examined definitional provisions in the Equal Employment Opportunity Act to confirm that Congress "unmistakably expressed" its intent to abrogate. *Okruhlik v. Univ. of Ark. ex rel. May*, 255 F.3d 615, 622 (8th Cir. 2001). "Read as a whole, the plain language of the[] provisions demonstrate[d]" the intent. *Id.* at 623. The circuits are uniform.

2. The Board's real objection is to how the First Circuit applied standard abrogation principles to assess PROMESA § 106. But that as-applied concern is no basis for further review. The First Circuit's statutory-specific analysis does not readily translate into other statutory contexts, and is correct regardless.

Congress clearly intended for PROMESA to abrogate any immunity the Board possesses against federal-court suits. Litigants in Puerto Rico can generally sue the Commonwealth for damages in Commonwealth courts,

but not in federal courts. Pet.32a-33a n.16. Section 106(a) flips the script for actions involving the Board, stating:

> 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 . . . *shall be* brought in . . . United States district court [in Puerto Rico].

48 U.S.C. § 2126(a) (emphases added). This paragraph establishes federal court as the exclusive forum to hear any suit against the Board or involving PROMESA, except for two specific carveouts—debt-adjustment matters and actions to enforce subpoenas issued by the Board. Thus, § 106 does not just grant jurisdiction. Section 106 also channels certain claims against the Board for federal courts to actively adjudicate, while barring others.

Section 106(c) reinforces that Congress expressly contemplated all sorts of relief against that Board that sovereign immunity would ordinarily prohibit. For instance, Congress expected federal district courts might enter "orders . . . to remedy constitutional violations . . . against the Oversight Board" and "grant[] declaratory or injunctive relief against the Oversight Board." *Id.* § 2126(c). Congress sought to mitigate the consequences of such orders for the Board by delaying enforcement of declaratory or injunctive relief until after the Board exhausts appeals, *id.*, again evincing Congress' expectation that federal courts could and would enter judgments against the Board.

Finally, § 105 provides that the Board "shall not be liable for any obligation of or claim against the Oversight Board" or others "resulting from actions taken to carry

out" PROMESA. *Id.* § 2125. That limited grant of immunity would be superfluous if sovereign immunity already categorically immunized the Board from suit.

"Read as a whole, the plain language of these provisions clearly demonstrates Congress' intent to subject" the Board to *any* suit in federal court, regardless of whether it involves federal- or territorial-law claims. *See Kimel*, 528 U.S. at 74. As the Board admits (at 15), no "magic words" of express abrogation are required. There is nothing anti-textual about reading PROMESA's provisions together. *Contra* Pet. 17. That is exactly what this Court and other circuits routinely do to ascertain whether Congress intended to abrogate sovereign immunity. *E.g.*, *Kimel*, 528 U.S. at 74; *Alaska*, 564 F.3d at 1066; *Brown*, 852 F.2d at 120; *Ussery*, 150 F.3d at 435; *Timmer*, 104 F.3d at 837; *Okruhlik*, 255 F.3d at 622-23.

As the First Circuit explained, if § 106 did not mandate that the Board would face suit in federal court, PROMESA would perversely insulate the Board from facing non-federal claims in *any* forum. Pet.App.33a n.16. Section 106 would channel "any action" against the Board to federal court, only for federal courts to apparently lack any power to proceed. The only exception would be the three narrow categories of claims that Congress excluded from federal jurisdiction. *See* 48 U.S.C. § 2126(a), (e).

The Board (at 12-15) tries to muddy the waters by labeling § 106(a) a "jurisdiction-granting statute" and faulting the First Circuit for purportedly treating a mere jurisdictional grant as abrogating sovereign immunity. That argument mischaracterizes the decision below. The First Circuit held that "§ 106 *is not merely* a general authorization for suit in federal court." Pet.App.33a n.16 (emphasis added). Instead, the First Circuit held that § 106 grants jurisdiction, curtails some jurisdiction, channels actions into federal court, and contemplates federal-

court remedies against the Board—all of which combined to clearly indicate Congress' intent to abrogate immunity. Nothing about that analysis contravenes the rule that a grant of jurisdiction *alone* does not abrogate sovereign immunity. *See Blatchford v. Native Vill. of Noatak & Circle Vill.*, 501 U.S. 775, 786 n.4 (1991); *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 246 (1985). Indeed, this Court has read similarly broad language in a jurisdictional statute to help provide the "unmistakably clear" signal of Congress' intent to abrogate state immunity. *Seminole Tribe v. Florida*, 517 U.S. 44, 56-57 (1996).

3. The Board (at 20-21) objects to the "unprecedented" scope of Congress' abrogation under the panel's reading, because § 106 authorizes federal-court suits against the Board for claims arising under territorial law, not just federal law. In particular, the Board asserts (at 21) that reading § 106 as abrogating the Board's immunity for territorial claims would contravene *Pennhurst State School & Hospital v. Halderman*, 465 U.S. 89 (1984).

But *Pennhurst* held that sovereign immunity generally prohibits federal courts from ordering state officials to conform their conduct to state law. *Id.* at 105-06. The Board's rewrite of that holding (at 21)—that *Pennhurst* purportedly "divests the federal courts of jurisdiction to hear a suit against . . . a territorial entity under its own laws"—gives away the game. Congress' plenary power to review and modify territorial laws and regulate territorial courts under the Territory Clause places territorial claims and state-law claims on vastly different footing. Tellingly, no circuit has held that special concerns arise from haling territories into federal court to face claims arising under territorial law.

At bottom, there is nothing anomalous about Congress' decision to channel *all* claims against the Board—a congressionally created entity—to federal court. Again,

PROMESA applies to multiple territories, not just Puerto Rico, and those territories vary in their territorial court systems. 48 U.S.C. § 2104(8); *see, e.g.*, *Pichardo v. V.I. Comm'r of Lab.*, 613 F.3d 87, 93-94 (3d Cir. 2010) (describing unique aspects of U.S. Virgin Islands' judicial system). Given that the Board enjoys broad powers to override decisions by territorial governments, Congress may well have concluded that federal court would be a better forum for all claims against whatever Oversight Boards Congress creates. Channeling all claims against all Boards to federal courts also promotes uniformity.

The Board finds it "difficult to think of a greater intrusion on state sovereignty" than facing territorial-law claims in federal court, Pet. 21 (quoting *Pennhurst*, 465 U.S. at 106). That statement rings hollow given that the Board is a creature of federal law, vested by Congress with the extraordinarily broad power to override decisions by democratically elected leaders of Puerto Rico. Anyway, that objection just underscores the square-peg, round-hole problem underlying the petition. If Puerto Rico is not a State for sovereign-immunity purposes, there is no anomaly to see here. And, given how often the Board conflates States and territories, that lurking issue is an unavoidable facet of this case. *See, e.g.*, Pet. 20, 22.

III. The Board Vastly Overstates the Consequences of the Decision Below

1. The Board (at 22-23) claims that the decision below threatens to upend sovereign immunity in the First Circuit across other statutory contexts, sowing doubt as to "which statutory schemes authorize suits against states and territories and which do not." But that assertion again rests on the Board's mischaracterization of the decision below, which emphatically did not hold that every statute that confers jurisdiction also abrogates sovereign immunity. *Supra* p. 22; Pet.App.28a-29a. PROMESA's

exclusive application to territories, not States, mitigates the spillover effects of the decision below further still.

The Board (at 23) points to *In re Coughlin*, 33 F.4th 600 (1st Cir. 2022), as evidence of broader problems with the First Circuit's sovereign-immunity abrogation jurisprudence. But that case recited the same basic standard that abrogations of sovereign immunity must be unmistakably clear (or, as *Coughlin* put it, "unequivocally express[ed]," *id.* at 604-05). And *Coughlin* applied that standard in the vastly different setting of tribal immunity in the bankruptcy context. *Id.* at 604-08. Regardless, *Coughlin* is no reason to grant review here; this Court will have the chance to review a cert petition in *Coughlin* soon enough. *See Lac du Flambeau Band of Lake Superior Chippewa Indians v. Coughlin*, No. 22A23 (Jul. 13, 2022) (extending cert petition deadline to Sept. 8, 2022).

2. The Board (at 2-3) threatens grave consequences for Puerto Rico's economic recovery if the Board must review its own documents and disclose those that are not privileged or exempted. The Board even warns that "[o]fficials 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." Pet. 3. The notion that sunlight on the Board's operations will function more like kryptonite than disinfectant defies credulity.

To begin, the Board conspicuously omits that it opted not to pursue an interlocutory appeal of the district court's denial of its motion to dismiss the 2017 lawsuit covering all pre-April 2018 records requests. If disclosure obligations really jeopardized the Board's mission and Puerto Rico's recovery, one would expect the Board to have appealed immediately. Instead, the Board has turned over 18,000 documents without signs of disaster.

See Pet. 8. Puerto Rican law further protects the Board by affording reasonable exceptions to the fundamental right of access to information in Article II, § 4. *See Bhatia Gautier*, 199 P.R. Dec. at 82 (certified translation at 18).

The Board's fear (at 25) that the decision below will embolden other litigants to file overwhelming disclosure requests is equally specious. Federal agencies, including agencies involved in financial regulation, must comply with the Freedom of Information Act, 5 U.S.C. § 552. The sky has not fallen at the Department of Treasury. Nor have citizens with the audacity to seek public documents taken down the many States that subject their agencies to extensive public-disclosure requirements. *See* Thomson Reuters, *Freedom of Information Acts*, 50 State Statutory Surveys: Government: Privacy (February 2022). Every Puerto Rican governmental agency is subject to the very same disclosure requirements that the Board now resists, and that government has not toppled. *Bhatia Gautier*, 199 P.R. Dec. at 80 (certified translation at 17). Accountability may be inconvenient. But if the Board truly considers transparency laws a mission-critical threat and will halt written communications just to evade scrutiny, Pet. 3, the Board has bigger problems than the prospect of federal litigation over records requests.

CONCLUSION

For the foregoing reasons, the Court should deny the petition.

Respectfully submitted,

JUDITH BERKAN
BERKAN/MÉNDEZ
Calle O'Neill G-11
San Juan, PR 00918-2301
(787) 764-0814

RAFAEL E. RODRÍGUEZ RIVERA
STEVEN P. LAUSELL RECURT
LUIS J. TORRES ASENCIO
ACCESS TO INFORMATION CLINIC
INTER AMERICAN UNIVERSITY OF
PUERTO RICO SCHOOL OF LAW
PO Box 194735
San Juan, PR 00919-4735
(787) 751-1600

LISA S. BLATT
SARAH M. HARRIS
Counsel of Record
KEES D. THOMPSON
IAN M. SWENSON
WILLIAMS & CONNOLLY LLP
680 Maine Avenue, S.W.
Washington, DC 20024
(202) 434-5000
sharris@wc.com

Counsel for Respondents

AUGUST 23, 2022