No. 22-096

In the

Supreme Court of the United States

FINANCIAL OVERSIGHT AND MANAGEMENT BOARD FOR PUERTO RICO,

Petitioner,

v.

CENTRO DE PERIODISMO INVESTIGATIVO, INC.,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the First Circuit

BRIEF FOR PETITIONER

Timothy W. Mungovan
John E. Roberts
William D. Dalsen
Kathleen M. Ritter
Proskauer Rose LLP
One International Place
Boston, MA 02110
(617) 526-9600

Martin J. Bienenstock
Counsel of Record
Mark D. Harris
Shiloh A. Rainwater
Proskauer Rose LLP
Eleven Times Square
New York, NY 10036
(212) 969-3000
mbienenstock@proskauer.com

Counsel for Petitioner

(For Continuation of Appearances See Inside Cover)

316169

Lucas Kowalczyk
Proskauer Rose LLP
70 West Madison Street,
Suite 3800
Chicago, IL 60602
(312) 962-3550

Counsel for Petitioner

QUESTION PRESENTED

It is a bedrock principle of federalism that a federal 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 has 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 court of appeals 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.

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?

TABLE OF CONTENTS

QUESTION PRESENTED i

INTRODUCTION 1

OPINIONS AND ORDERS BELOW 4

JURISDICTION 4

STATUTORY PROVISION INVOLVED 5

STATEMENT OF THE CASE 5

SUMMARY OF ARGUMENT 14

ARGUMENT 18

I. PROMESA CONTAINS NO CLEAR AND UNMISTAKABLE LANGUAGE SHOWING A CONGRESSIONAL INTENT TO ABROGATE THE BOARD'S SOVEREIGN IMMUNITY. 18

   A. To Abrogate Sovereign Immunity, a Statute Must Be Clear and Unmistakable on Its Face 19

   B. This Court Has Recognized Only Two Ways a Statute Can Express a Clear and Unmistakable Intent to Abrogate, Neither of Which Was Employed Here. 22

   C. The Court of Appeals Improperly Relied on Ordinary Principles of Statutory Construction to Divine Congress's Intent to Abrogate. 27

II. EVEN APPLYING ALL THE TOOLS OF STATUTORY CONSTRUCTION, PROMESA CONTAINS NO EVIDENCE OF AN INTENT TO ABROGATE..................30

A. There Is No Textual Support for Abrogation in PROMESA. 31

1. The Exceptions to Exclusive Jurisdiction in § 2126(a) Do Not Show Intent to Abrogate. 32

2. Section 2126(e) Does Not Show an Intent to Abrogate. 34

3. PROMESA's References to Declaratory and Injunctive Relief Do Not Show an Intent to Abrogate. 35

4. The Lack of Reference to Federal Law Does Not Show an Intent to Abrogate. 37

5. The Court of Appeals' Speculation About Congress's Awareness of the Puerto Rico Constitution Is Baseless and Unsupported by the Statutory Text. 38

B. There Is No Support for Abrogation in the Legislative History...40

C. Abrogation Conflicts with PROMESA's Purpose. 41

D. The Scope of Abrogation Found by the Court of Appeals Is Unprecedented. 43

CONCLUSION 44

TABLE OF AUTHORITIES

Page(s)

CASES

Alden v. Maine,
527 U.S. 706 (1999) 36

Allen v. Cooper,
140 S. Ct. 994 (2020) 15, 22

Atascadero State Hosp. v. Scanlon,
473 U.S. 234 (1985) .... passim

Bhatia Gautier v. Roselló Nevares,
199 D.P.R. 59 (P.R. 2017) 8

Blatchford v. Native Vill. of Noatak,
501 U.S. 775 (1991) .... passim

Bond v. United States,
572 U.S. 844 (2014) 21

Borrás-Borrero v. Corporación del Fondo del Seguro del Estado,
958 F.3d 26 (1st Cir. 2020) 9

Chisholm v. Georgia,
2 U.S. (2 Dall.) 419 (1793) 20

Dellmuth v. Muth,
491 U.S. 223 (1989) .... passim

Diaz-Fonseca v. Puerto Rico,
451 F.3d 13 (1st Cir. 2006) 10

Emps. of Dep't of Pub. Health & Welfare. v. Dep't of Pub. Health & Welfare,
411 U.S. 279 (1973) 40

Ex parte Young,
209 U.S. 123 (1908) 37

Ezratty v. Puerto Rico,
648 F.2d 770 (1st Cir. 1981) 9

FAA v. Cooper,
566 U.S. 284 (2012) 29, 30, 40

Facebook, Inc. v. Duguid,
141 S. Ct. 1163 (2021) 27

Fin. Oversight & Mgmt. Bd. for P.R. v. Aurelius Inv., LLC,
140 S. Ct. 1649 (2020) 5, 6, 33

Fitzpatrick v. Bitzer,
427 U.S. 445 (1976) 25, 36

Guerrero-Lasprilla v. Barr,
140 S. Ct. 1062 (2020) 34

Gundy v. United States,
139 S. Ct. 2116 (2019) 28

In re Fin. Oversight & Mgmt. Bd. for P.R.,
637 B.R. 223 (D.P.R. 2022) 7

Kimel v. Fla. Bd. of Regents,
528 U.S. 62 (2000) 15, 22, 29

King v. Burwell,
576 U.S. 473 (2015) 41

Koons Buick Pontiac GMC, Inc. v. Nigh,
543 U.S. 50 (2004) 28

Lane v. Pena,
518 U.S. 187 (1996) 16, 28

Lindh v. Murphy,
521 U.S. 320 (1997) 26

Méndez-Núñez v. Fin. Oversight & Mgmt. Bd. for P.R. (In re Fin. Oversight & Mgmt. Bd. for P.R.),
916 F.3d 98 (1st Cir. 2019) 34

Nev. Dep't of Hum. Res. v. Hibbs,
538 U.S. 721 (2003) 22, 25, 43

P.R. Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc.,
506 U.S. 139 (1993) 5, 10

Pennhurst State Sch. & Hosp. v. Halderman,
451 U.S. 1 (1981) 21

Pennhurst State Sch. & Hosp. v. Halderman,
465 U.S. 89 (1984) 4, 10, 18, 43

Port Auth. Trans-Hudson Corp. v. Feeney,
495 U.S. 299 (1990) 20

Puerto Rico v. Franklin Cal. Tax-Free Tr.,
136 S. Ct. 1938 (2016) 6

Quern v. Jordan,
440 U.S. 332 (1979) 40, 42

Seminole Tribe of Fla. v. Florida,
517 U.S. 44 (1996) 15, 25, 26, 43

Sossamon v. Texas,
563 U.S. 277 (2011) .... passim

Spector v. Norwegian Cruise Line Ltd.,
545 U.S. 119 (2005) 21

Thryv, Inc. v. Click-To-Call Techs., LP,
140 S. Ct. 1367 (2020) 34

Timmer v. Mich. Dep't of Com.,
104 F.3d 833 (6th Cir. 1997) 25

United States v. Bass,
404 U.S. 336 (1971) 21

United States v. Georgia,
546 U.S. 151 (2006) 22

United States v. Laboy-Torres,
553 F.3d 715 (3d Cir. 2009) 9

United States v. Nordic Vill., Inc.,
503 U.S. 30 (1992) 23, 29

Vázquez-Garced v. Fin. Oversight & Mgmt. Bd. for P.R. (In re Fin. Oversight & Mgmt. Bd. for P.R.), 945 F.3d 3 (1st Cir. 2019) 25, 36

West Virginia v. EPA, 142 S. Ct. 2587 (2022) 20

Will v. Mich. Dep't of State Police, 491 U.S. 58 (1989) 19

CONSTITUTIONS AND STATUTES

U.S. Const. art. IV, § 3 6

5 U.S.C. § 552(a)(3)(A) 9

8 U.S.C. § 1252(a)(2) 35

25 U.S.C. § 2710(d)(7) 25, 26

28 U.S.C. § 1254(1) 4

28 U.S.C. § 1334 .... 17, 24, 33

28 U.S.C. § 1362 23

35 U.S.C. § 314(d) 34

42 U.S.C. § 1983 42

48 U.S.C. § 2103 .... 7, 42

48 U.S.C. § 2121 .... passim

48 U.S.C. § 2124 .... passim

48 U.S.C. § 2125 .... 7, 41

48 U.S.C. § 2126 .... passim

48 U.S.C. § 2127(b) 6

48 U.S.C. § 2128 .... 7, 42

48 U.S.C. § 2141 35

48 U.S.C. § 2144 41

48 U.S.C. § 2148(b)(2) 8

48 U.S.C. § 2164(a) 6

48 U.S.C. § 2166 .... 17, 33

48 U.S.C. § 2172 6

48 U.S.C. § 2175 .... 6, 41

48 U.S.C. § 2194(m) 5, 6

P.R. Const. art. II, § 4 .... 8, 39

OTHER AUTHORITIES

Amy Coney Barrett, *Substantive Canons and Faithful Agency*, 90 B.U. L. Rev. 109 (2010) 20, 28, 29

Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* (2012) 20

David L. Shapiro, *Continuity and Change in Statutory Interpretation*, 67 N.Y.U. L. Rev. 921 (1992) 28

INTRODUCTION

This case concerns the standard for determining whether Congress intended to abrogate a sovereign entity's immunity from suit. For more than a century, this Court has applied a clear-statement rule to questions of abrogation. Under that standard, abrogation cannot occur absent statutory language making Congress's intent to abrogate "unmistakably clear." *Dellmuth v. Muth*, 491 U.S. 223, 228 (1989). The clear-statement rule safeguards constitutional norms by ensuring that sovereignty interests are not infringed unless Congress plainly evidences its determination to do so.

The court below flouted the clear-statement rule. Over a vigorous dissent, it employed what it called "traditional tools of statutory construction" to conclude that Congress intended to abrogate the immunity of the Financial Oversight and Management Board for Puerto Rico in its entirety. The court reached that conclusion by making a series of unwarranted inferences based on provisions of the Puerto Rico Oversight, Management, and Economic Stability Act ("PROMESA") that do not mention sovereignty, immunity, or abrogation.

The court of appeals cited 48 U.S.C. § 2126(a) as evidence of Congress's supposed intent to abrogate. But § 2126(a) is a general grant of federal-court jurisdiction for actions against the Board and actions otherwise arising out of PROMESA. It does not even purport to address defenses such as sovereign immunity. It is well established that "[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). Section 2126(a) by its terms merely prescribes where certain actions "shall be brought"—*i.e.*, where they must be initiated. It does not limit the defenses that are available once an action is commenced.

The court of appeals reasoned that two technical statutory exceptions to § 2126(a)'s grant of exclusive federal jurisdiction imply that every other type of action can be maintained against the Board. That reasoning would be unpersuasive in an ordinary case of interpretation; it is certainly insufficient to show an "unequivocal" congressional intent to abrogate. All that the exceptions show is that Congress wanted (*i*) the Board to enforce in Commonwealth court its subpoenas issued under Commonwealth law and (*ii*) Title III debt restructurings to be governed by conventional jurisdictional rules that apply in other bankruptcy cases. The exceptions do not remotely raise an inference that Congress intended to abrogate the Board's immunity in federal court. Other statutory inferences made by the court of appeals are equally spurious.

The abrogation-by-implication approach taken below is precisely what the clear-statement rule is intended to avoid. There is zero evidence in the text or legislative history of PROMESA that Congress ever considered abrogating or intended to abrogate the Board's immunity. Yet the court below conjured up such an intent by misapplying ordinary canons of statutory construction and reading an intent to abrogate into provisions having nothing to do with abrogation or immunity.

More disturbing, the scope of the abrogation found below is without precedent. In every other abrogation case before this Court, the question was whether Congress intended to abrogate a sovereign's immunity with respect to a specific cause of action. The court below nevertheless found that Congress intended to abrogate the Board's immunity *in its entirety*. In other words, according to the court below, the Board cannot assert an immunity defense to *any* cause of action, federal or territorial—even causes of action to which every other sovereign entity in the United States would be immune. That Congress would have intended such a sweeping abrogation is far-fetched; that it carried out that abrogation using a statute that does not even mention abrogation or immunity is completely implausible.

This Court should reverse the decision below and reaffirm that the clear-statement rule means what it says. Given the sovereignty and federalism issues at stake, a court should not find abrogation absent clear evidence in the statutory text that Congress considered whether to abrogate the sovereign's immunity and determined to do so. There is nothing approaching such evidence in PROMESA. Congress is well aware of the clear-statement standard and has shown time and again that it knows how to draft a statute to clearly state its intent to abrogate immunity. The lack of any language in PROMESA addressing immunity or abrogation is dispositive and confirms that Congress did not intend to abrogate the Board's immunity.

OPINIONS AND ORDERS BELOW

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

The district court's orders were not reported and are reprinted at Pet. 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 Pet. App. 58a. One of the district court's orders (Pet. App. 54a–55a) adopts a magistrate's report and recommendation, which is reprinted in the Supplemental Appendix to the Board's petition for certiorari ("Pet. Suppl. App.") at pages 142a–69a.

JURISDICTION

The court of appeals issued its judgment on May 17, 2022. Pet. App. 50a–51a. The Board timely petitioned for rehearing en banc on May 31, 2022. Joint Appendix ("JA") 11a. That petition was denied on June 7, 2022. Pet. App. 52a–53a.

The Board timely filed a petition for a writ of certiorari on July 20, 2022. JA13a. This Court granted the petition on October 3, 2022. The jurisdiction of this Court rests on 28 U.S.C. § 1254(1).

As explained below, the district court lacked jurisdiction over the underlying lawsuits 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) ("*Pennhurst II*"). The court of appeals 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).

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. a. In 2016, Congress enacted PROMESA to address what it found to be a "fiscal emergency" in Puerto Rico, stemming from Puerto Rico's massive public debt and severe economic decline that left the Commonwealth unable to provide its residents with basic essential services. 48 U.S.C. § 2194(m)(1)–(2); *see also Fin. Oversight & Mgmt. Bd. for P.R. v. Aurelius Inv., LLC*, 140 S. Ct. 1649, 1655 (2020). Congress enacted PROMESA pursuant to its authority under

the Territories Clause, which grants Congress the plenary power "to dispose of and make all needful rules and regulations" for territories. U.S. Const. art. IV, § 3; *see also* 48 U.S.C. § 2121(b)(2); *Aurelius*, 140 S. Ct. at 1658–59.

To implement PROMESA, Congress established the Board, 48 U.S.C. § 2121(c)(1), granted it "independent oversight" of Puerto Rico's "fiscal, management, and structural problems and adjustments," *id.* § 2194(m)(4), and tasked it with providing the Commonwealth a "method . . . to achieve fiscal responsibility and access to the capital markets," *id.* § 2121(a). The Board has final authority over budgets and fiscal plans for Puerto Rico and its covered instrumentalities. *Id.* §§ 2141–2142. Further, because Puerto Rico and its instrumentalities cannot file a bankruptcy petition under Chapter 9 of the Bankruptcy Code, *see Puerto Rico v. Franklin Cal. Tax-Free Tr.*, 136 S. Ct. 1938, 1942 (2016), Congress authorized the Board to commence debt-restructuring cases on their behalf under Title III of PROMESA, 48 U.S.C. § 2164(a). The federal district court overseeing those restructuring cases is known as the Title III court. The Board serves as the sole representative of the debtor in a Title III case and has the sole authority to file a debt-adjustment plan for a Title III debtor. *Id.* §§ 2172, 2175(b).

b. Congress established the Board as "an entity within the territorial government," rather than a "department, agency, establishment, or instrumentality of the Federal Government." *Id.* § 2121(c)(1), (2). Its operations are funded exclusively by the territorial government. *Id.* § 2127(b).

At the same time, PROMESA contains several provisions shielding the Board from obligations imposed by Commonwealth law. For example, PROMESA provides that the Board and its members "shall not be liable for any obligation of or claim against the . . . Board or its members or employees . . . resulting from actions taken to carry out [the statute]." *Id.* § 2125. It further preempts any local laws inconsistent with PROMESA and prevents the territorial government from exercising any control or oversight of the Board's activities. *Id.* §§ 2103, 2128. It also insulates the Board's certification decisions from judicial review. *Id.* § 2126(e). Pertinent to this appeal, PROMESA grants the federal courts exclusive jurisdiction over claims against the Board with two narrow exceptions. *Id.* § 2126(a).

c. The Board's mission to restore Puerto Rico to financial stability 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. Indeed, before the Board proposed a confirmable plan adjusting the Commonwealth's debts, it spent several years negotiating with numerous stakeholders to build support for the plan and its underlying agreements. *See In re Fin. Oversight & Mgmt. Bd. for P.R.*, 637 B.R. 223, 240, 253, 272, 309 (D.P.R. 2022). That plan reduced the Commonwealth's debt by 80%, saved it more than $50 billion in debt-service payments, and addressed its $55 billion in unfunded pension liabilities. *See id.* at 240 (finding that the plan was "a crucial step in the effort to achieve the economic recovery" of the Commonwealth and its instrumentalities).

Congress recognized the need to balance transparency with the Board's ability to engage in negotiations and deliberations outside the public purview. To that end, Congress imposed rules in PROMESA concerning when the Board is required to disclose its documents to the public. For example, PROMESA requires the Board to disclose to the public its bylaws, rules, and procedures governing its activities, 48 U.S.C. § 2121(h)(1); all gifts to the Board and donors thereof, *id.* § 2124(e); and the findings of certain investigations, *id.* § 2124(o), (p). Conversely, PROMESA expressly bars certain Board documents from public disclosure, such as reports on tax abatements. *Id.* § 2148(b)(2). For everything else, PROMESA authorizes the Board to adopt bylaws governing when disclosure is appropriate, *id.* § 2121(h)(1), with the sole proviso that any rules it adopts should "enable it to carry out its activities . . . *with the greatest degree of independence practicable*," *id.* § 2121(h)(3) (emphasis added). Pursuant to that authority, the Board has enacted bylaws providing for the disclosure of certain Board materials and not others.

2. Respondent Centro de Periodismo Investigativo, Inc. ("CPI") describes itself as an investigative news organization. Pet. App. 106a. It brought this action in federal district court pursuant to Article II, § 4 of the Puerto Rico Constitution, Pet. App. 117a–18a, which has been interpreted to impose on the Puerto Rico government broad obligations to disclose 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 that the Board is subject to those disclosure obligations because it is part of the Puerto Rico government. Pet. App. 117a–19a.

Puerto Rico law seemingly does not place any restrictions on the scope of documents that a party can demand.[2] As a result, CPI sought to compel the Board to disclose sixteen broad categories of documents, including: 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; all personal financial-disclosure documents that Board members submitted to the United States Department of Treasury while being vetted for the position; and various sensitive documents that the Board had previously received from the Commonwealth government, including bank-account data and payroll and productivity reports belonging to the government. Pet. App. 121a–23a.

3. In the First Circuit, it is settled law that Puerto Rico enjoys sovereign immunity. *See, e.g.*, *Borrás-Borrero v. Corporación del Fondo del Seguro del Estado*, 958 F.3d 26, 33 (1st Cir. 2020); *Ezratty v. Puerto Rico*, 648 F.2d 770, 776 n.7 (1st Cir. 1981) (Breyer, J.); *accord United States v. Laboy-Torres*, 553 F.3d 715, 721

---

[1] Certified translation available at JA72a–117a.

[2] By contrast, requests under the Freedom of Information Act ("FOIA") must "reasonably describe[]" the records sought and must be "made in accordance with published rules stating the time, place, fees (if any), and procedures to be followed." 5 U.S.C. § 552(a)(3)(A). That requirement is intended to reduce the time, expense, and burden on the responding agency in FOIA cases.

(3d Cir. 2009) (O'Connor, J., sitting by designation). That includes immunity under *Pennhurst II*, 465 U.S. at 106, 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).

Accordingly, the Board moved in the district court to dismiss CPI's complaint on sovereign-immunity grounds.[3] 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 Board's motion to dismiss. Pet. 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 provides that any action against the Board or any claim otherwise arising under PROMESA "shall be brought in a United States district court . . . ." *See* Pet. App. 6a, 73a. In the district court's view, § 2126(a) showed that "Congress meant to subject the Board to suits in federal court" in all cases, even those brought under territorial law. Pet. App. 73a.

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

[3] The Board also asserted other defenses not at issue here.

documents without waiving its sovereign-immunity defense. *See* JA123a; JA143a. To date, the Board has produced to CPI 18,419 documents, totaling 67,704 pages. *See* JA123a.

The Board objected to producing another 20,000 documents because their disclosure would have hindered the Board from carrying out its statutory mission. *See* Pet. Suppl. App. 165a; *see also* JA124a. A magistrate judge recommended that only forty-seven of the 20,000 documents be shielded from disclosure. *See* Pet. Suppl. App. 148a–51a; 168a. With respect to the remainder, the magistrate ordered the Board to create and produce a "detailed" privilege log. Pet. Suppl. App. 143a. The Board objected to the magistrate's report and recommendation ("R&R"), again raising its sovereign-immunity defense. *See* Pet. App. 54a–56a.[4]

6. While the Board's objection to the R&R was pending, CPI filed a second complaint, seeking all communications between the Board and the Commonwealth and federal governments from April 30, 2018, to the present.[5] Pet. App. 125a–41a. That demand encompasses hundreds of thousands of additional documents. *See* Pet. App. 139a–40a. The Board moved to dismiss CPI's second complaint, once again asserting sovereign immunity as a bar. The two CPI actions were subsequently consolidated.

---

[4] As the court of appeals recognized, the Board at no point waived its sovereign immunity through its litigation conduct. Pet. App. 13a–14a.

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

7. On March 23, 2021, the district court issued a minute order overruling the Board's objections to the R&R and ordering the Board to produce a privilege log. Pet. App. 54a–55a. The next day, the court denied the Board's motion to dismiss CPI's second complaint, also in a minute order without an accompanying opinion. Pet. App. 56a–57a. Citing its earlier decision, Pet. App. 58a–101a, 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). Pet. App. 56a–57a.

8. The Board timely appealed both of the district court's orders. A divided panel of the First Circuit affirmed. Pet. App. 1a–49a.

While rejecting the district court's waiver theory, Pet. App. 11a–14a, 25a–26a, the panel majority agreed that Congress abrogated the Board's sovereign immunity. Pet. App. 26a–34a.[6] The majority primarily relied on what it called the "plain meaning" of 48 U.S.C. § 2126(a), titled "Jurisdiction," which grants a federal forum for "any action against the Oversight Board." The court interpreted that language expansively to cover all federal and territorial claims, of whatever type. Pet. App. 29a–32a. In the court's view, the fact that Congress created exclusive federal jurisdiction over all claims against the Board somehow implied an intent to abrogate the Board's sovereign immunity. *Id.* The court did not address

[6] The majority reiterated the First Circuit's settled view that Puerto Rico is entitled to the protections of sovereign immunity. Pet. App. 22a. It also assumed without deciding that the Board is an arm of Puerto Rico, as the Board asserted and CPI did not dispute. Pet. App. 22a–23a.

the rule that jurisdictional provisions do not abrogate sovereign immunity. *See Blatchford*, 501 U.S. at 786 & n.4. The court also did not acknowledge that Congress had to grant jurisdiction over actions against the Board because some actions are not subject to sovereign immunity.

The majority also relied on the two stated exceptions to exclusive federal jurisdiction in § 2126(a), which it believed "implies" that the remainder of the provision "establish[es] general jurisdiction over all other matters[.]" Pet. App. 29a. The court made a series of other inferences as well, including one based on Congress's involvement in the Puerto Rico Constitution in the 1950s. Pet. App. 32a–33a n.16.

Although the majority conceded that the language in § 2126(a) "may not be as precise" as other statutes where Congress has abrogated immunity, it explained that Congress need not state its intent to abrogate "in any particular way" or "use magic words." Pet. App. 29a–30a. Rather, in the court's view, determining whether Congress intended to abrogate sovereign immunity is a run-of-the-mill question of statutory interpretation that requires courts to give words their "ordinary meaning" and to employ "traditional tools of statutory construction." Pet. App. 26a–27a, 30a.

Judge Lynch dissented. Pet. App. 36a–49a. Citing the well-established principle that Congress cannot abrogate by implication, but rather "[a]brogation must be express and clearly stated," Pet. App. 45a, she concluded that "[a]bsolutely nothing in the text of [§ 2126(a)] sets forth an intent to abrogate . . . immunity," Pet. App. 38a. As Judge Lynch observed, this Court has long held that mere "jurisdiction-granting

clauses" like § 2126(a) do not abrogate. Pet. App. 40a–41a (citing *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 246 (1985); *Blatchford*, 501 U.S. at 786 & n.4)). And the textual inferences relied on by the majority did not support its conclusion in any event. Pet. App. 44a–46a. Judge Lynch concluded that the majority's decision "conflicts with Supreme Court precedent" and warned that it would have "dire consequences" for the Board and for sovereign-immunity doctrine in general. Pet. App. 36a, 49a. She urged that "the decision should not go uncorrected." Pet. App. 49a.

9. The Board petitioned for rehearing en banc. The same three judges who sat on the panel decided the en banc petition because all the other active judges on the Circuit were recused. Pet. 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.*

10. The Board moved to stay the appellate mandate pending final disposition of a petition for a writ of certiorari in this Court. The court of appeals granted the stay. JA13a.

SUMMARY OF ARGUMENT

I. It is a foundational principle that a federal statute does not abrogate sovereign immunity unless Congress makes its intent to abrogate "unmistakably clear" in the statutory text. Dellmuth, 491 U.S. at 228. A "permissible inference" from the statute's language is not enough. Id. at 232. Rather, "given the special constitutional concerns in this area," a court

must have "perfect confidence" that Congress intended to abrogate. Id. at 231.

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 court acknowledged was merely a "general grant of jurisdiction," abrogated the Board's sovereign immunity. Pet. App. 28a. That provision states that, with certain exceptions, "any action against the [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, as the dissent below observed. Pet. App. 38a (Lynch, J., dissenting).

Section 2126(a) contains none of the textual indicia that Congress uses to clearly and unmistakably express an intent to abrogate. It does not mention immunity, abrogation, or equivalent concepts. *See, e.g.*, *Allen v. Cooper*, 140 S. Ct. 994, 999, 1001 (2020). And it does not identify the Board as a potential defendant against any particular type of claim—let alone a claim under territorial law, like the one at issue here. *See, e.g.*, *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 74 (2000); *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 57 (1996). Instead, § 2126(a) merely grants the federal courts jurisdiction over claims against the Board and claims otherwise arising under PROMESA. As this Court has repeatedly held, a general grant of jurisdiction does not clearly express an intent to abrogate an immunity defense. *See Blatchford*, 501 U.S. at 786 & n.4. "The issues are wholly distinct." *Id.*

The court of appeals went out of its way to deemphasize the clear-statement rule, asserting that

whether Congress intended to abrogate the Board's immunity is a garden-variety question of "statutory construction" that permitted the court to parse the statutory language in § 2126(a), looking to the plain meaning of certain terms and drawing inferences from stated exceptions and qualifiers. Pet. App. 26a–27a. That approach to finding abrogation was fundamentally flawed. By definition, "permissible inferences" cannot meet the stringent clear-statement standard. *Dellmuth*, 491 U.S. at 232; *Lane v. Pena*, 518 U.S. 187, 192 (1996). Under the clear-statement rule, the court's role was limited to looking for clear and unmistakable language in PROMESA showing an intent to abrogate. No such language exists. By purportedly employing traditional canons of construction to find a supposed intent to abrogate, the court of appeals violated the clear-statement rule.

II. The statutory analysis conducted below was unsound in any event. Nothing in the text, history, or purpose of PROMESA remotely suggests that Congress intended to abrogate the Board's immunity.

Starting with the plain text, PROMESA contains no language addressing sovereignty, immunity, or abrogation. The obvious implication is that Congress did not consider abrogating the Board's sovereign immunity and certainly did not intend to do so.

Bereft of support in the express text, the court of appeals resorted to drawing inferences from the interplay among § 2126(a) and other PROMESA provisions. Each of those inferences was based on a fundamental misunderstanding of how PROMESA operates. For example, the court of appeals inferred a congressional intent to abrogate from the fact that

PROMESA grants the federal courts exclusive jurisdiction over all claims against the Board with two exceptions. The court interpreted those two exceptions as showing that Congress must have intended to abrogate the Board's immunity defense in all cases that fall outside the exceptions. That logic simply does not follow. An exception to exclusive federal jurisdiction merely shows that Congress intended certain claims to be brought outside federal court. It says nothing about the defenses that would be available to the Board in an action brought in federal court.

The two exceptions to exclusive federal jurisdiction have no connection to immunity in any event. The first concerns actions by the Board to enforce subpoenas, which must be brought in Commonwealth court. *See* 48 U.S.C. § 2126(a) (citing 48 U.S.C. § 2124(f)). The second concerns Title III restructuring cases, where PROMESA adopts the jurisdictional scheme of the Bankruptcy Code. *Compare* 48 U.S.C. § 2166(a) *with* 28 U.S.C. § 1334(a). The facts that the Board must enforce subpoenas in local courts and Title III cases have the same jurisdictional rules as cases under the Bankruptcy Code have nothing to do with abrogation. That the court of appeals thought these exceptions evinced a congressional intent to abrogate the Board's immunity shows how far afield its statutory analysis was. The court's other statutory inferences were equally spurious, as discussed below. *See* Point II, *infra*.

The bottom line is that there is no indication in the text of PROMESA or its legislative history that Congress even considered abrogating the Board's sovereign immunity—let alone that Congress clearly intended to do so. And without evidence that Congress

"specifically considered" sovereign immunity and "intentionally legislated on the matter," a finding of abrogation is improper. *Sossamon v. Texas*, 563 U.S. 277, 290 (2011).

ARGUMENT

I. PROMESA CONTAINS NO CLEAR AND UNMISTAKABLE LANGUAGE SHOWING A CONGRESSIONAL INTENT TO ABROGATE THE BOARD'S SOVEREIGN IMMUNITY.

This Court has historically insisted upon an "unmistakably clear" expression of congressional intent in the statutory text before it will find an abrogation of sovereign immunity. *Atascadero*, 473 U.S. at 242. That clear-statement rule safeguards the paramount values of federalism embodied in the Constitution by ensuring that abrogation will not be found unless Congress "specifically considered" sovereign immunity and "intentionally legislated on the matter." *Sossamon*, 563 U.S. at 290. The rule has the salutary effect of focusing Congress's attention on "the vital role of the doctrine of sovereign immunity in our federal system" before it undertakes to alter the fundamental federalist balance through abrogation. *Pennhurst II*, 465 U.S. at 99. The burden of complying with the rule is negligible, while the dangers to federalism threatened by any relaxation of the clear-statement requirement are substantial.

The court of appeals defied the clear-statement rule by holding that 48 U.S.C. § 2126(a)—a jurisdiction-granting provision of PROMESA that says nothing about abrogation—eliminated the Board's sovereign immunity in its totality. The court found an in-

tent to abrogate the Board's immunity not in any unmistakably clear language in § 2126(a) (because there is none), but instead based on superficial statutory inferences drawn from the purported interplay among several PROMESA provisions, each of which says nothing about abrogation, immunity, or related concepts. The conclusion below runs headlong into this Court's abrogation jurisprudence because inferential reasoning is by definition no substitute for clear and unmistakable language. *See Dellmuth*, 491 U.S. at 228.

Section 2126(a) is textually unlike any statute that this Court has found to contain an unmistakably clear expression of congressional intent to abrogate. There is no reason to conclude that Congress in enacting PROMESA decided to ignore this Court's longstanding guidance on the requisite clarity of expression required to abrogate immunity and instead "drop coy hints" without "making its intention manifest." *Id.* at 230–31. This Court's precedent and the plain text of § 2126(a) refute any notion that PROMESA contains an unmistakably clear expression of Congress's intent to abrogate the Board's immunity.

A. To Abrogate Sovereign Immunity, a Statute Must Be Clear and Unmistakable on Its Face.

This Court has developed clear-statement rules in certain "traditionally sensitive areas" of the law where important constitutional principles are at stake, such as federalism or separation of powers. *Will v. Mich. Dep't of State Police*, 491 U.S. 58, 65 (1989). These rules help courts "'act as faithful agents

of the Constitution.'" *West Virginia v. EPA*, 142 S. Ct. 2587, 2616 (2022) (Gorsuch, J., concurring) (quoting Amy Coney Barrett, *Substantive Canons and Faithful Agency*, 90 B.U. L. Rev. 109, 169 (2010) ("Barrett")).

One of the most deep-rooted clear-statement rules is that Congress must speak clearly and unambiguously if it intends to abrogate another sovereign's immunity. *See* Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 288–89 (2012). The rule dates back to Justice Iredell's opinion in *Chisholm v. Georgia*, where he contended that "nothing but express words, or an insurmountable implication" may authorize federal courts to entertain citizen suits against the states. 2 U.S. (2 Dall.) 419, 450 (1793) (Iredell, J., dissenting); *see also West Virginia v. EPA*, 142 S. Ct. at 2616 (Gorsuch, J., concurring) (endorsing Justice Iredell's formulation). More recently, the Court has reiterated that the standard is "particularly strict," *Port Auth. Trans-Hudson Corp. v. Feeney*, 495 U.S. 299, 305 (1990), requiring statutory language that is "unmistakably clear," *id.,* and "unequivocal," *Dellmuth*, 491 U.S. at 230.

Like all clear-statement rules, this one serves several critical purposes. First, it protects vital constitutional norms. Because abrogation "upsets the fundamental constitutional balance" between the national and local governments and places "a considerable strain on the principles of federalism," courts presume that Congress did not intend that result unless it says so clearly and unmistakably. *Id.* at 227 (quotation marks and emendations omitted).

Second, the rule promotes deliberative policymaking by ensuring that Congress does not legislate inadvertently or without due deliberation. *Spector v. Norwegian Cruise Line Ltd.*, 545 U.S. 119, 139 (2005) (plurality opinion). The requirement thus encourages Congress to make a thoughtful, considered decision about the extent to which it wants to depart from constitutional status quo, "assur[ing]" courts that "Congress has specifically considered . . . and has intentionally legislated on the matter." *Sossamon*, 563 U.S. at 290; *see also Bond v. United States*, 572 U.S. 844, 858 (2014).

Third, the rule promotes predictability, ensuring that those affected by congressional acts have notice of Congress's intended consequences. *See Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17 (1981) (explaining that in the context of waivers of immunity, the clear-statement rule is intended to prevent situations where "a State is unaware . . . or is unable to ascertain what is expected of it"); *cf. United States v. Bass*, 404 U.S. 336, 347–48 (1971) (clear-statement rules in the criminal context rest largely on the need to give fair notice to individuals considering undertaking prohibited activity).

These purposes are especially crucial to the Board. Given the importance, scope, and complexity of its statutory mission, the Board has a unique interest in the clarity of the legal framework to which it is subject, especially its exposure to suit.

B. This Court Has Recognized Only Two Ways a Statute Can Express a Clear and Unmistakable Intent to Abrogate, Neither of Which Was Employed Here.

This Court's substantial body of abrogation jurisprudence has recognized only two ways for Congress to express a clear and unmistakable intent to abrogate. Both approaches leave no room for doubt about Congress's intent. Neither is present here.

First, a statute may expressly mention sovereign immunity, abrogation, or related concepts. *See, e.g.*, *Allen*, 140 S. Ct. at 999 (statute providing that a state "shall not be immune, under the Eleventh Amendment or any other doctrine of sovereign immunity, from suit in Federal court" (emendations omitted)); *United States v. Georgia*, 546 U.S. 151, 154 (2006) (statute providing that "[a] State shall not be immune under the eleventh amendment" from an action in federal court is "an unequivocal expression of Congress's intent to abrogate state sovereign immunity"). That category is elementary; if a statute provides in plain terms that a government's sovereign immunity is abrogated, there can be no room for doubt about Congress's intent. *See Sossamon*, 563 U.S. at 287. Obviously, § 2126(a) by its terms does not mention sovereign immunity, abrogation, or any related concept.

Second, the statute may explicitly identify a government entity as a potential defendant of a cause of action created by the statute. *See, e.g.*, *Kimel*, 528 U.S. at 74 (statute allowed a cause of action to be brought against a "public agency," defined to include "the government of a State"); *Nev. Dep't of Hum. Res. v. Hibbs*, 538 U.S. 721, 726 (2003) (statute provided

for enforcement "against any employer (including a public agency)," defined as "the government of a State or political subdivision thereof"). Again, that makes sense. Even where a statute does not specifically mention abrogation, if it unambiguously provides that a governmental entity may become a defendant in a suit brought under a particular cause of action, perforce it makes clear and unmistakable that the entity does not enjoy immunity with respect to that cause of action.

PROMESA contains no language providing that the Board can be sued for any particular cause of action—let alone for a violation of territorial law. Thus, Congress did not express in PROMESA an unmistakable intent to abrogate the Board's immunity.

To be sure, § 2126(a) provides that "any action against the Oversight Board . . . shall be brought" in federal court. The court of appeals thought that language was unmistakably clear as signaling Congress's intent to abrogate. Pet. App. 28a–29a. That is incorrect because those words create only exclusive federal *jurisdiction* over claims against the Board. This Court has repeatedly held that jurisdictional provisions do not express an intent to abrogate sovereign immunity. *See, e.g.*, *Atascadero*, 473 U.S. at 246. That is because "[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*, 501 U.S. at 786 n.4 (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 the United States," abrogated Alaska's immunity); *see also United States v. Nordic Vill., Inc.*,

503 U.S. 30, 34–38 (1992) (rejecting argument that 28 U.S.C. § 1334(d), which grants district courts exclusive jurisdiction in bankruptcy cases, abrogated sovereign immunity); *Atascadero*, 473 U.S. at 246 (holding that "[a] general authorization for suit in federal court" does not abrogate immunity).

The majority ignored the rule from *Blatchford* and its progeny throughout its opinion. It referred to § 2126(a) as a jurisdictional provision at least half a dozen times but somehow reasoned that the text constituted "clear language of Congress's intent to abrogate the Board's sovereign immunity." Pet. App. 31a. The majority never even mentioned *Blatchford* or the point that jurisdiction and immunity are two separate concepts, even though they were discussed at length by the dissent and by the Board below. *See* Pet. App. 41a.[7]

The court of appeals reasoned that unless the phrase "any action against the Oversight Board" abrogated immunity, § 2126(a) would have no application. Pet. App. 31a. But that is plainly not so. Section

[7] Indeed, it appears that the majority conflated the two concepts at various points in its analysis. After introducing the exceptions listed in § 2126(a), the majority contended that their existence "implies the remainder of paragraph (a) serves as *establishing general jurisdiction* over all other matters not specifically excepted elsewhere in the section." Pet. App. 29a (emphasis added). That is true as a matter of jurisdiction, but it does not advance the majority's position that the Board's *immunity* was eliminated. Likewise, at the end of the majority's analysis, it contended that § 2126(a) "doesn't explicitly limit the federal court's jurisdiction to federal law claims." Pet. App. 31a. Again, as a matter of jurisdiction, that is correct, but it also does not yield any conclusion about abrogation of immunity.

2126(a) supplies a federal forum for claims to which the Board is not immune. For example, a claim that the Board exceeded its powers under PROMESA can be brought in federal court under § 2126(a). *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). Likewise, Congress independently abrogated state and territorial immunity for other types of actions, such as Title VII, *see Fitzpatrick v. Bitzer*, 427 U.S. 445, 457 (1976), the Family and Medical Leave Act, *see Hibbs*, 538 U.S. at 726, and the Equal Pay Act, *see Timmer v. Mich. Dep't of Com.*, 104 F.3d 833, 837–38 (6th Cir. 1997). Section 2126(a) ensures that such claims will be litigated in federal court. Additionally, § 2126(a) provides jurisdiction in a situation where the Board opts to waive its sovereign immunity.

The court of appeals tried to analogize the language in § 2126(a) to statutory language found to abrogate in *Seminole Tribe,* 517 U.S. 44. *See* Pet. App. 30a & n.14. That case concerned the Indian Gaming Regulatory Act ("IGRA"), which required states to negotiate with Indian tribes concerning the availability of gambling on tribal land. A provision in IGRA granted 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)). Although that provision was jurisdictional in nature, the Court explained that other parts of the statute left no "conceivable doubt" that Congress unequivocally intended for states to be sued under IGRA. *Id.* at 57. For example, one section

of IGRA provided that if the suing tribe meets its burden of proof, then the "burden of proof shall be upon the State . . . ." *Id.* (quoting 25 U.S.C. § 2710(d)(7)(B)(ii)(II)).[8] Obviously, only litigants have a burden of proof. Thus, it was not the "any action" language in the jurisdictional provision that demonstrated abrogation, but the explicit textual references to the state as a defendant. *See Lindh v. Murphy*, 521 U.S. 320, 328 n.4 (1997) (characterizing *Seminole Tribe* as a case where "the federal statute went beyond granting federal jurisdiction to hear a claim and explicitly contemplated 'the State' as defendant in federal court in numerous provisions of the Act").[9]

---

[8] Other examples included language stating that if the court "finds that the State has failed to negotiate in good faith . . . , the court shall order the State . . . ," 25 U.S.C. § 2710(d)(7)(B)(iv); "the State shall . . . submit to a mediator appointed by the court," *id.* § 2710(d)(7)(B)(iv); and the mediator "shall submit to the State," *id.* § 2710(d)(7)(B)(v). From these remedial provisions, it is self-evident that the state was the original defendant in the lawsuit. According to the Court, other sections also referred to the state in a context that "makes it clear that the state is the defendant to the suit brought by an Indian tribe" under § 2710(d)(7)(A)(i). *Seminole Tribe*, 517 U.S. at 57 (citing 25 U.S.C. §§ 2710(d)(7)(B)(vi) and (vii)).

[9] The court of appeals suggested that PROMESA was clearer than IGRA in one respect, namely that the former provided specific exceptions to jurisdiction that the latter did not. Pet. App. 30a. As discussed below, those exceptions do not support the court's theory. *See* Point II.A.1, *infra.* A more important distinction is that IGRA's jurisdictional grant would have no meaning or application if the statute could not be enforced against noncompliant states. By contrast, § 2126(a) grants jurisdiction over several types of federal claims for which the Board has no immunity; thus, there is no argument that the provision would be

PROMESA simply contains no language clearly and unmistakably expressing Congress's intent to abrogate the Board's immunity. That should have been the end of the inquiry below.

C. The Court of Appeals Improperly Relied on Ordinary Principles of Statutory Construction to Divine Congress's Intent to Abrogate.

Because PROMESA contains no clear and unmistakable language evincing a congressional intent to abrogate, the court of appeals resorted to employing "traditional tools of statutory construction," including textual inferences from one or another portion of PROMESA, the history of congressional involvement in Puerto Rico's adoption of a constitution, and comparisons to other statutes. *See* Pet. App. 28a–32a. None of those forms of analysis satisfies the clear-statement rule. Accordingly, even putting aside their lack of persuasive force, *see* Point II, *infra,* the inferences reached by the court below cannot support a finding of abrogation.

Under the clear-statement rule, the process of determining whether a statute abrogates sovereign immunity is fundamentally different from ordinary statutory construction. With the latter, a court applies the full interpretive toolbox to discern the "most natural" meaning of the statute. *Facebook, Inc. v. Duguid*, 141 S. Ct. 1163, 1169 (2021). Typically, implications and inferences—as well as other clues derived from context, legislative purpose, and legislative

---

meaningless unless it abrogated sovereign immunity against territorial-law actions.

history—play a large role in the determination of meaning. *Gundy v. United States*, 139 S. Ct. 2116, 2126 (2019) (examining "context and structure" as well as "'history [and] purpose' to divine the meaning of language"); *Koons Buick Pontiac GMC, Inc. v. Nigh*, 543 U.S. 50, 60 (2004) ("Statutory construction is a 'holistic endeavor.'"). Courts apply interpretive canons because statutory ambiguity is itself an "instruction[] . . . that Congress left the problem" of "unclear text" for the courts to resolve. Barrett, *supra*, at 123.

Determining whether a statute is clear and unmistakable is an entirely different exercise. The whole point of a clear-statement rule is to pretermit recourse to the techniques of statutory construction. *See* David L. Shapiro, *Continuity and Change in Statutory Interpretation*, 67 N.Y.U. L. Rev. 921, 958 (1992) (clear-statement rules "exclude the kind of purposive analysis that permits a court to find a result implicit in a statutory enactment" and "may lead to rejection of the ordinary meaning of the words used"). The goal of a clear-statement rule is not to find the statute's "most natural" reading—or to parse its meaning at all—but rather to decide whether it is absolutely clear on its face. *Dellmuth*, 491 U.S. at 230–32; *see also* Barrett, *supra*, at 123–24. For that reason, statutory language must be "strictly construed," and any doubt about Congress's intent must be resolved against a finding that Congress intended to interfere with constitutional norms. *Lane*, 518 U.S. at 192.

Accordingly, inferences from statutory text are by definition insufficient to meet the clear-and-unmistakable standard when sovereignty issues are at stake. *Dellmuth*, 491 U.S. at 232. Indeed, even "the most textually plausible meaning of a statute" may

not suffice. Barrett, *supra*, at 123–24. Rather, "given the special constitutional concerns in this area," a court must have "perfect confidence" that Congress in fact intended to abrogate. *Dellmuth*, 491 U.S. at 231. Accordingly if a statute is susceptible to multiple plausible interpretations, a court must adopt the reading that preserves immunity. *See Kimel*, 528 U.S. at 73; *see also Sossamon*, 563 U.S. at 287; *Nordic Vill.*, 503 U.S. at 37.

The court of appeals mistakenly believed that determining whether Congress intended to abrogate was a garden-variety question of "statutory construction," requiring the court to give words their "ordinary meaning" in a quest for "the most natural reading" of the statute. Pet. App. 26a–27a. Consistent with that approach, the court parsed PROMESA's statutory language, trying to draw inferences from stated exceptions and qualifiers. *See* Pet. App. 27a–32a. At one point, the court even posited that because Congress had approved Puerto Rico's constitution in the 1950s—which included the provision giving rise to the right to disclosure at issue here—"we can expect that Congress had Puerto Rico's constitutional provisions in mind when it was designing the legislation to help Puerto Rico" more than sixty years later. Pet. App. 33a n.16.

That form of analysis is the epitome of what clear-statement rules forbid. To hold otherwise is to dilute the clear-statement rule until it has no function.

The court of appeals justified its approach with the truism that Congress need not use "magic words" when abrogating sovereign immunity. Pet. App. 30a (quoting *FAA v. Cooper*, 566 U.S. 284, 291 (2012)).

While that is correct as far as it goes, the court of appeals misapplied the principle. In *Cooper,* the statute at issue clearly expressed Congress's intent to waive sovereign immunity by authorizing a plaintiff to recover "actual damages" from the Government. 566 U.S. at 291. The dispute concerned the scope of that waiver—namely, whether a plaintiff could recover from the Government damages for mental distress. *Id.* at 290. The Court held that Congress did *not* waive the Government's immunity to that type of damages because it did not say so "unequivocally"—even though it was "plausible" to read the statute as authorizing such damages. *Id.* at 299.

Cooper thus shows that, although "magic words" may not be necessary to find a waiver, clear and unmistakable words expressing an intent to waive sovereign immunity *are* required. The decision below cannot be reconciled with those principles because PROMESA contains no words—magic or otherwise—that come close to showing that Congress intended to abrogate the Board's sovereign immunity.

II. EVEN APPLYING ALL THE TOOLS OF STATUTORY CONSTRUCTION, PROMESA CONTAINS NO EVIDENCE OF AN INTENT TO ABROGATE.

Even if it were permissible to glean a congressional intent to abrogate using "traditional tools of statutory construction," Pet. App. 30a, the court of appeals' attempt at statutory construction was defective in every respect. Nothing in the text, history, or purpose of PROMESA comes close to suggesting that Congress even considered abrogating the Board's sovereign immunity—let alone that it clearly intended to

do so. Each of the purported "inferences" drawn by the court below turns on a fundamental misunderstanding of the relevant PROMESA provisions.

The decision below shows why a clear-statement rule is necessary when sovereign immunity interests are at stake. Without a bright-line standard for finding abrogation, courts can mistakenly tread on sensitive areas of immunity and conjure up a congressional intent to abrogate where none exists. That is precisely what happened below.

A. There Is No Textual Support for Abrogation in PROMESA.

It is common ground that Congress is presumed *not* to intend to abrogate sovereign immunity unless it clearly states such an intent in the text of a statute. *See, e.g.*, *Dellmuth*, 491 U.S. at 231. As a textual matter, PROMESA contains no language that overcomes the strong presumption against abrogation. In fact, by its plain terms, PROMESA says *nothing* about abrogation or sovereign immunity.

The court of appeals cited 48 U.S.C. § 2126(a) as purportedly expressing congressional intent to abrogate the Board's immunity. Pet. App. 25a–29a. But § 2126(a) says no such thing. Instead, it merely prescribes the venue where certain claims "shall be brought." 48 U.S.C. § 2126(a). By its terms, § 2126(a) accomplishes two things: (*i*) It grants the federal courts jurisdiction over claims against the Board and claims otherwise arising under PROMESA; and (*ii*) it makes the federal courts the exclusive venue for those claims (with two exceptions discussed below).

Lacking express textual support for abrogation, the court of appeals resorted to drawing a series of inferences from other PROMESA subsections. Not only did that abrogation-by-implication approach violate the clear-statement rule, but each of the inferences drawn by the court below fails as a matter of logic.

1. The Exceptions to Exclusive Jurisdiction in § 2126(a) Do Not Show Intent to Abrogate.

Section 2126(a) lists two exceptions to the federal courts' exclusive jurisdiction over claims against the Board and claims otherwise arising under PROMESA: (*i*) the enforcement in Commonwealth court of Board subpoenas issued in accordance with Commonwealth law, as provided in 48 U.S.C. § 2124(f)(2); and (*ii*) debt adjustments under Title III of PROMESA. *See* 48 U.S.C. § 2126(a). The court of appeals inferred from those two exceptions that § 2126(a) "establish[es] general jurisdiction over all other matters not specifically excepted elsewhere in the section." Pet. App. 29a. Even if that were true, it has nothing to do with abrogation. A provision establishing general jurisdiction over all claims against the Board not subject to an exception does not abrogate the Board's defenses to those claims. *See Atascadero*, 473 U.S. at 246; *Blatchford*, 501 U.S. at 786 & n.4. It would be counterintuitive for Congress to enumerate in § 2126(a) claims that could be brought *outside* federal court as a means of limiting the defenses that the Board could raise *in* federal court.

The two exceptions make perfect sense in the statutory scheme for reasons having nothing to do with abrogation or sovereign immunity. The first exception

does not even concern actions brought *against* the Board but rather actions brought *by* the Board under PROMESA to enforce its subpoena power. *See* 48 U.S.C. § 2126(a) (citing 48 U.S.C. § 2124(f)(2)). The obvious purpose of that exception is to avoid clogging the federal courts with subpoena enforcement and contempt actions involving local issues the Board investigates in the Commonwealth. *See* 48 U.S.C. § 2124(f)(2); *see also Aurelius*, 140 S. Ct. at 1661 (explaining that the Board's investigatory powers are "subject to Puerto Rico's limits on personal jurisdiction and enforceable under Puerto Rico's laws" (citing 48 U.S.C. § 2124(f)(2))). The fact that Congress wanted the Board to enforce its subpoenas in Commonwealth courts does not begin to suggest that it intended to eliminate the Board's immunity defense in federal court.

The second exception was designed to ensure that the jurisdictional rules in restructuring cases under Title III of PROMESA mirror those of the Bankruptcy Code. Under the Bankruptcy Code, federal courts have exclusive jurisdiction over cases "under" the Code (*i.e.*, the bankruptcy case itself) and concurrent jurisdiction over "all civil proceedings arising under [the Bankruptcy Code], or arising in or related to" a bankruptcy case. 28 U.S.C. § 1334(a)–(b). Title III of PROMESA contains a nearly identical jurisdictional provision that grants the federal courts exclusive jurisdiction over cases "under" Title III of PROMESA (*i.e.*, the restructuring case itself) and original but not exclusive jurisdiction over "all civil proceedings arising under [Title III of PROMESA], or arising in or related to" a Title III restructuring case. 48 U.S.C. § 2166(a).

The reason for the second exception is simply to clarify that for certain restructuring-related proceedings, jurisdiction is not exclusive to the federal court, but shared concurrently with local courts. For the court of appeals to infer anything to do with sovereign immunity or abrogation from the substitution of one federal jurisdictional statute for another reveals a fundamental misunderstanding of how PROMESA and the Bankruptcy Code operate.

2. Section 2126(e) Does Not Show an Intent to Abrogate.

The court of appeals further erred when it cited 48 U.S.C § 2126(e) as evidence of a congressional intent to abrogate the Board's sovereign immunity. Pet. App. 28a–29a. By its terms, § 2126(e) insulates from judicial review certification decisions by the Board. *See* 48 U.S.C. § 2126(e) ("There shall be no jurisdiction in any United States district court to review challenges to the Oversight Board's certification determinations under [PROMESA]."); *see also Méndez-Núñez v. Fin. Oversight & Mgmt. Bd. for P.R. (In re Fin. Oversight & Mgmt. Bd. for P.R.)*, 916 F.3d 98, 113 (1st Cir. 2019) (discussing § 2126(e)). It serves the same purpose as other statutory provisions that bar judicial review of certain agency decisions. *See, e.g.*, *Thryv, Inc. v. Click-To-Call Techs., LP*, 140 S. Ct. 1367, 1370 (2020) (discussing the bar on judicial review of certain Patent and Trademark Board decisions in 35 U.S.C. § 314(d)); *Guerrero-Lasprilla v. Barr*, 140 S. Ct. 1062, 1074 (2020) (Thomas, J., dissenting) (discussing the

bar on judicial review of certain agency decisions under Immigration and Naturalization Act contained in 8 U.S.C. § 1252(a)(2)).

The court of appeals somehow read § 2126(e) as a third exception to the exclusive jurisdiction provided to the federal courts by § 2126(a), from which it inferred that Congress intended to abrogate the Board's immunity in all other cases brought in federal court. *See* Pet. App. 28a–29a. That is doubly wrong. Section 2126(e) is not an exception to exclusive federal jurisdiction; it is a provision insulating certain Board decisions from judicial review. Moreover, even if it were an exception to exclusive federal jurisdiction, it still would have nothing to say about sovereign immunity because jurisdiction and immunity are distinct concepts. *See* pages 23–24, *supra*.

Moreover, the Board's certifications are governed by PROMESA, which is a federal statute. *See, e.g.*, 48 U.S.C. § 2141. The court of appeals thus treated the exclusion of a federal question from federal review as supporting an inference that Congress intended to abrogate the Board's immunity to claims under territorial law. Such an inference is illogical.

3. PROMESA's References to Declaratory and Injunctive Relief Do Not Show an Intent to Abrogate.

The court of appeals also mistakenly viewed the references in 48 U.S.C. § 2126(c) to the possibility of declaratory and injunctive relief being ordered against the Board as evidence of Congress's intent to abrogate. Pet. App. 28a. According to the court, Congress must have intended to abrogate the Board's sovereign immunity because otherwise there could *never*

be injunctive or declaratory relief ordered against the Board, and the references to declaratory and injunctive relief in § 2126(c) would be meaningless. Pet. App. 29a.

The obvious flaw in that reasoning is that sovereign immunity is not an all-or-nothing proposition. Although the Board possesses sovereign immunity as a general matter, there are any number of claims to which the Board cannot assert an immunity defense. Section 2126(c) is merely addressing the situation where injunctive or declaratory relief is ordered against the Board in a suit in which the defense is unavailable.

For example, Congress abrogated sovereign immunity when it enacted Title VII. *See Fitzpatrick*, 427 U.S. at 457. Accordingly, if a Title VII claim were brought against the Board, an immunity defense would not prevent a federal court from ordering declaratory or injunctive relief against the Board. Similarly, claims asserting that the Board exceeded its statutory authority may not be subject to an immunity defense. *See, e.g.*, *Vázquez-Garced*, 945 F.3d 3. And the Board can always choose to waive its sovereign immunity. *See Alden v. Maine*, 527 U.S. 706, 737 (1999).

In any of those circumstances, a federal court could order declaratory or injunctive relief against the Board because an immunity defense would be unavailable. There is thus nothing inconsistent between the Board possessing sovereign immunity as a general matter and § 2126(c)'s reference to the possibility of a

federal court ordering injunctive and declaratory relief against the Board.[10]

4. The Lack of Reference to Federal Law Does Not Show an Intent to Abrogate.

The lower court's final "textual" inference concerns the fact that § 2126(a) grants the federal courts jurisdiction over "any action" against the Board—not only actions under federal law. Pet. App. 31a–32a. According to the court, if Congress had intended for the Board to retain its sovereign immunity—including *Pennhurst* immunity to territorial-law claims—it would have drafted § 2126(a) to cover only "federal claims" rather than "any action" against the Board. *Id.*

That reasoning turns the abrogation analysis on its head. It is not Congress's responsibility to include prophylactic language indicating a *lack* of intent to abrogate. An intent *not* to abrogate is presumed. *See, e.g.*, *Dellmuth*, 491 U.S. at 231. The question is whether Congress included clear statutory language evincing an affirmative intent to abrogate the Board's sovereign immunity. And PROMESA contains no such language. *See* Pet. App. 38a ("Absolutely nothing in the text of this section sets forth an intent to abrogate" immunity.) (Lynch, J., dissenting).

---

[10] For the same reasons, § 2126(c)'s reference to the possibility of constitutional claims being brought against the Board does not show an intent to abrogate. *Contra* Pet. App. 29a. There are well-known vehicles for bringing constitutional claims against entities possessing sovereign immunity. *See Ex parte Young*, 209 U.S. 123 (1908).

5. The Court of Appeals' Speculation About Congress's Awareness of the Puerto Rico Constitution Is Baseless and Unsupported by the Statutory Text.

The court of appeals also reasoned that Congress must have intended to abrogate the Board's immunity for territorial-law claims, or else § 2126(a) would have the effect of sending territorial-law claims to federal court only to be dismissed. In a long footnote, the court explained why it believed that outcome was implausible. Pet. App. 32a–33a n.16. The footnote is riddled with errors, and the theory it articulates is not only speculative but also completely unmoored from PROMESA's text.

The court began with the claim that before PROMESA was enacted, the "status quo ante" was that persons in Puerto Rico could sue the Commonwealth in Commonwealth court, but not in federal court. *Id.* The court claimed that "PROMESA effectively reversed this venue regime" by sending such suits exclusively to federal court. *Id.* That is incorrect. Section 2126(a) does not address claims against the *Commonwealth*, only the *Board*. And as far as the Board is concerned, there was no "status quo ante." Upon its creation, Congress decided where it could be sued.

Building on the previous point, the court described § 2126(a) as a "claim-channeling provision" because it grants the federal courts exclusive jurisdiction over claims against the Board. *Id.* The court asserted that "this is no reason to think" Congress intended for that channeling function 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." *Id.* That reasoning is muddled. Again, there was no "change in substance" for the Board. Nor did the court offer any support for its speculation about what Congress would have done, expressly or otherwise. And, in any event, the whole framing is backward. The clear-and-unmistakable rule means that sovereign entities are presumed to *retain* their immunity unless Congress unequivocally provides differently, not that those entities lose their immunity unless Congress says so clearly. As the dissent summed up these flaws, "no authority supports the proposition that a claim-channeling provision is a clear statement abrogating . . . immunity." Pet. App. 40a n.20.

Finally, the court drew support from the fact that Congress played a role in the development of Puerto Rico's constitution, which included the provision (Art. II, § 4) that CPI invokes here. Pet. App. 32a–33a n.16. In light of Congress's supposed familiarity with the constitution, the court posited that "we can expect" Congress had § 4 "in mind" when it was designing PROMESA. *Id.* That theory is a tower of speculation. In effect, the court claimed that because Congress was involved in the constitutional process in Puerto Rico in the 1950s, *sixty years later* the members of Congress who drafted PROMESA must have considered the impact of one specific provision. And if that were not implausible enough, Article II, § 4 was not interpreted to guarantee a broad right to disclosure of governmental documents until a series of Puerto Rico Supreme Court decisions in the 1980s—originally published in Spanish. *See* Transparency and Expedited

Procedure for Public Records Access Act, Act 141-2019, Statement of Motives at 4. The notion that Congress had any of these developments "in mind" is pure fiction. As the dissent observed, this is yet "another instance of inferential reasoning in lieu of finding a clear statement." Pet. App. 45a n.23 (Lynch, J., dissenting).

B. There Is No Support for Abrogation in the Legislative History.

Legislative history is never sufficient to establish a clear and unmistakable congressional intent to abrogate sovereign immunity. *See Cooper*, 566 U.S. at 290. Nonetheless, the *absence* of any discussion of abrogation or sovereign immunity in PROMESA's legislative history strongly suggests that Congress did *not* intend to abrogate the Board's immunity.

A court may not find abrogation absent evidence that Congress "specifically considered" sovereign immunity" and "intentionally legislated on the matter." *Sossamon*, 563 U.S. at 290. Here, there is no evidence in PROMESA's legislative history that Congress discussed or considered abrogating the Board's sovereign immunity when it enacted § 2126(a) or any other PROMESA provision. That is powerful evidence that Congress never "specifically considered" or intentionally decided to abrogate the Board's immunity. *Sossamon*, 563 U.S. at 290. And in the absence of any specific consideration by Congress, a finding of abrogation is improper. *Cf. Quern v. Jordan*, 440 U.S. 332, 343 (1979) (declining to find abrogation of sovereign immunity where "not one Member of Congress" mentioned the issue); *Emps. of Dep't of Pub. Health & Welfare v. Dep't of Pub. Health & Welfare*, 411 U.S. 279,

285 (1973) (finding no waiver of immunity where the Court "found not a word in the [legislative] history . . . to indicate" Congress intended that result).

C. Abrogation Conflicts with PROMESA's Purpose.

In addition to lacking support in the statutory text and legislative history, the holding that § 2126(a) abrogates the Board's sovereign immunity conflicts with PROMESA's purpose. *See King v. Burwell*, 576 U.S. 473, 498 (2015). Congress enacted PROMESA to establish the Board and to empower it to restore Puerto Rico to "fiscal responsibility and access to the capital markets." 48 U.S.C. § 2121(a). The Board is comprised of seven unpaid members who have been tasked with (among other things): certifying budgets and fiscal plans for the Commonwealth and its covered instrumentalities, *see id.* §§ 2141–42; representing the Commonwealth and insolvent instrumentalities in restructuring cases, *id.* § 2175; and ensuring that all legislation enacted by the Commonwealth is consistent with the applicable fiscal plans, *see id.* § 2144.

Given the gravity of those responsibilities and the need for the Board to make difficult and politically unpopular decisions, Congress included in PROMESA several provisions designed to protect the Board from the distraction of litigation. For example, § 105 of PROMESA provides that the Board shall not be liable for any claim or obligation arising from actions taken to carry out PROMESA. 48 U.S.C. § 2125. Moreover, as already mentioned, PROMESA divests the federal courts of jurisdiction to review the Board's certifica-

tion decisions. *Id.* § 2126(e). Congress further provided that any inconsistent Commonwealth laws are preempted by PROMESA. *Id.* § 2103. And, in a section titled "Autonomy of Oversight Board," Congress provided that the Commonwealth government cannot enact or enforce any law that would impair or defeat the purposes of PROMESA as determined by the Board. *Id.* § 2128. Taken together, those provisions show that Congress intended to curtail significantly the types and amount of litigation that could be brought against the Board. It would be highly anomalous to suppose that Congress went to the trouble of granting the Board shields to litigation while at the same time eliminating the Board's immunity from litigation wholesale. As the dissent noted, these "other provisions of PROMESA reinforce that Congress did not intend to abrogate immunity." Pet. App. 37a (Lynch, J., dissenting).

The decision below actually makes the Board more vulnerable to suit than any other state or territorial entity in the United States. For example, this Court has held that 42 U.S.C. § 1983 does not abrogate a state's sovereign immunity. *Quern*, 440 U.S. at 342–45. That means that any state or territorial entity can generally assert an immunity defense to a § 1983 claim. But, according to the court below, the Board's immunity has been abrogated *in toto*, meaning that it could *not* assert an immunity defense to a § 1983 claim. Given the lengths that Congress went to insulate the Board from litigation, that cannot be the result it intended.

D. The Scope of Abrogation Found by the Court of Appeals Is Unprecedented.

The unprecedented scope of abrogation found below further underscores the fallacy of the court of appeals' statutory analysis. Typically, when a court finds a congressional intent to abrogate, the abrogation is limited to a specific cause of action. For example, in *Seminole Tribe*, the Court found that Congress intended to abrogate the states' sovereign immunity with respect to a particular type of claim brought under the Indian Gaming Regulatory Act. *See* 517 U.S. at 56–57. And in *Hibbs*, the Court found that Congress had abrogated sovereign immunity to claims brought under the Family and Medical Leave Act. 538 U.S. at 726.

The decision below sweeps far more broadly, holding that Congress in one blow abrogated the Board's sovereign immunity in all respects and in all cases. Pet. App. 32a. That is, abrogation was not limited to a specific cause of action but applies to every cause of action that could be brought against the Board. Such a sweeping finding of abrogation is literally without precedent. It is implausible that Congress intended for PROMESA to carry out such an all-encompassing and unprecedented abrogation without even mentioning the words "abrogation" or "sovereign immunity."

The court of appeals' conclusion that Congress abrogated the Board's sovereign immunity with respect to territorial-law actions is even more extreme and exceptional. The *Pennhurst* doctrine divests the federal courts of jurisdiction to hear a suit against every other state or territorial entity under its own laws. *Pennhurst II*, 465 U.S. at 106. As this Court said, "it

is difficult to think of a greater intrusion on . . . sovereignty." *Id.* The Board is unaware of any other case where a federal court held that a state's or territorial entity's *Pennhurst* immunity was abrogated. Again, it is thoroughly implausible that Congress intended that result given that PROMESA does not even mention abrogation or sovereign immunity.

CONCLUSION

The decision below drastically waters down the standard for finding a congressional intent to abrogate. By jettisoning the rule that abrogation requires clear and unequivocal statutory language in favor of an abrogation-by-implication approach, the court of appeals inferred a congressional intent to abrogate that lacks any textual support whatsoever. If the language of § 2126(a) is 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.

For those reasons, the judgment of the court of appeals should be reversed and the case remanded with instructions for the district court to dismiss the two litigations below.

November 17, 2022 Respectfully submitted,

MARTIN J. BIENENSTOCK
Counsel of Record
MARK D. HARRIS
SHILOH A. RAINWATER
PROSKAUER ROSE LLP
Eleven Times Square
New York, NY 10036
Phone: (212) 969-3000
Fax: (212) 969-2900
mbienenstock@proskauer.com

TIMOTHY W. MUNGOVAN
JOHN E. ROBERTS
WILLIAM D. DALSEN
KATHLEEN M. RITTER
PROSKAUER ROSE LLP
One International Place
Boston, MA 02110
Phone: (617) 526-9600
Fax: (617) 526-9899

LUCAS KOWALCZYK
PROSKAUER ROSE LLP
70 W. Madison St., Suite 3800
Chicago, IL 60602
Phone: (312) 962-3521
Fax: (312) 962-3551