

# SUPREME COURT OF THE UNITED STATES

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IN THE SUPREME COURT OF THE UNITED STATES

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FINANCIAL OVERSIGHT AND MANAGEMENT )  
BOARD FOR PUERTO RICO, )  
Petitioner, )  
v. ) No. 22-96  
CENTRO DE PERIODISMO INVESTIGATIVO, )  
INC., )  
Respondent. )  
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Pages: 1 through 56  
Place: Washington, D.C.  
Date: January 11, 2023

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5    Petitioner,                    )  
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7           CENTRO DE PERIODISMO INVESTIGATIVO,   )  
8           INC.,    )  
9    Respondent.                    )  
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11  
12    Washington, D.C.  
13    Wednesday, January 11, 2023  
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15           The above-entitled matter came on for  
16           oral argument before the Supreme Court of the  
17           United States at 10:04 a.m.  
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4 AIMEE W. BROWN, Assistant to the Solicitor General,  
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6 United States, as amicus curiae, supporting  
7 vacatur.

8 SARAH M. HARRIS, ESQUIRE, Washington, D.C.; on behalf  
9 of the Respondent.

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7	For the United States, as amicus	
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P R O C E E D I N G S

(10:04 a.m.)

CHIEF JUSTICE ROBERTS: We'll hear argument today in Case 22-96, Financial Oversight and Management Board for Puerto Rico versus Centro de Periodismo Investigativo.

Counsel.

ORAL ARGUMENT OF MARK D. HARRIS

ON BEHALF OF THE PETITIONER

MR. HARRIS: Mr. Chief Justice, and may it please the Court:

In 2016, Congress established the oversight board and assigned it the critical task of leading Puerto Rico back to fiscal health. Congress enacted a number of protections for the Board. One of them is Section 2126(a) of PROMESA, which gives the federal courts exclusive jurisdiction over any and all suits against the Board.

But the First Circuit below held that 2126(a) abrogated the Board's immunity, in fact, that it did so for every type of suit, federal and territorial. That decision was wrong and should be reversed.

In order to abrogate, a statute must be clear and unmistakable on its face. There is nothing in Section 2126(a) that even comes close.

1           This Court has held many times that  
2 jurisdictional provisions do not abrogate because the  
3 power to hear a case says nothing about the availability  
4 of a defense, and mere textual inferences do not  
5 qualify.

6           Separately, CPI has raised the issue of  
7 whether Puerto Rico and, therefore, the Board is  
8 entitled to sovereign immunity. The Board believes the  
9 Court need not reach that issue, but, if it does, the  
10 Court has repeatedly held for more than a hundred years  
11 that Puerto Rico has immunity. It held that way before  
12 Puerto Rico's constitutional assembly in the 1950s, and,  
13 since then, it has said that Puerto Rico has a degree of  
14 sovereignty -- excuse me, autonomy comparable to a  
15 state.

16           CPI's theory that Puerto Rico has immunity  
17 only in its own courts would mean that Puerto Rico or  
18 its governor or other officials could be sued under  
19 Puerto Rico's own law in federal court. That would be a  
20 sea change for Puerto Rico and an extremely harmful one.

21           I welcome the Court's questions.

22           JUSTICE THOMAS: What would be the  
23 difference if Puerto Rico were a state in your argument?

24           MR. HARRIS: I think, as far as this  
25 argument would -- would be concerned, there would not be

1 a difference.

2 JUSTICE THOMAS: How would the Congress be  
3 able to adopt or enact PROMESA and apply it to a state  
4 in this manner?

5 MR. HARRIS: There may be a -- a -- a  
6 difference in the source of authority that Congress  
7 would rely on. It wouldn't be Article IV, of course.  
8 But the Congress has the power to -- to abrogate in  
9 appropriate circumstances as long as it has that power,  
10 and the same rule would apply of clear and unmistakable  
11 -- a clear and unmistakable statement of intent to  
12 abrogate.

13 JUSTICE THOMAS: Just one final question.  
14 The -- the -- would you -- I know you -- your preference  
15 is to assume immunity, but would you, since I prefer not  
16 to assume immunity, would you tease out a bit your basis  
17 for a territory having sovereign immunity? And with  
18 respect to the applying sovereign immunity in courts,  
19 are those federal courts, for example, a superior court,  
20 or is it a territorial court or one of the local courts?

21 MR. HARRIS: Sure. So our position is that  
22 the sovereign immunity of a territory is part of a large  
23 body, a large doctrine of constitutional common law or  
24 common law sovereign immunity. It goes by different  
25 names.

1           The idea behind it is that, once Congress  
2 gives certain attributes of sovereignty through an  
3 organic act, for example, to a territory, then the  
4 common law basically dictates that as a result of the  
5 sovereignty that it has, at that point, it's entitled to  
6 immunity both in its own courts and in federal court.

7           There are two different strands, though,  
8 which I want to emphasize, both of which are associated  
9 with common -- with sovereign immunity, but they're  
10 important -- the rationales are slightly different.

11           One of them is the principle that a  
12 sovereign cannot be haled into -- into a court without  
13 consenting to being haled that way. That principle  
14 would mean that Puerto Rico could not be sued against --  
15 without its consent in federal court.

16           But there's a second strand which I think is  
17 even more powerful here, which is that a sovereign as a  
18 lawmaker, part of the sovereignty or the -- the aspect  
19 of being a lawmaker is the power and the autonomy to  
20 decide who the law applies to. If Puerto Rico passes a  
21 territorial law, Puerto Rico is able to decide that that  
22 law should not apply to it.

23           On CPI's theory, if that sovereignty only  
24 applies in territorial court, what that would mean would  
25 be, as -- as happened -- as could happen here,



1 Puerto Rico could pass a law and, in federal court,  
2 Puerto Rico could be sued under that very law. That  
3 would be a serious invasion of Puerto Rico's sovereignty  
4 and autonomy to hold it responsible that way.

5 CHIEF JUSTICE ROBERTS: You analogize in  
6 your argument to the sovereign immunity of states, the  
7 sovereign immunity of -- of tribes, and I wonder if  
8 Puerto Rico's situation, though, is significantly  
9 different both with respect to states and with respect  
10 to tribes. They had sovereignty at the time of the  
11 convention, and that carried forward just as the states'  
12 carried forward, just as the tribes' carried forward.

13 Puerto Rico, obviously, at some point at --  
14 at points in the past had the sovereignty of Spain, but  
15 that did not carry over in any sense. It -- so the  
16 question would be not to the -- the extent to which the  
17 Constitution recognized the existing sovereignty. The  
18 question would be, did they -- the Constitution in any  
19 way confer sovereignty, create sovereignty, with respect  
20 to Puerto Rico?

21 And, as far as the Plan of the Convention  
22 goes, the Plan of the Convention was to cover the  
23 territories with plenary authority on Congress's part,  
24 not with any notion of sovereignty.

25 MR. HARRIS: So our position is that it --

1 the sovereignty should not depend on history. That  
2 position was adopted by the Court, that history matters,  
3 in the Sanchez Valle case, really only for the purpose  
4 of a double jeopardy analysis. And I think the Court  
5 went out of its way in Sanchez Valle to say this is not  
6 the standard rule. In fact, I think the Court said the  
7 ordinary meaning of sovereignty is not like what  
8 happened there. The --

9 CHIEF JUSTICE ROBERTS: All right. I'll  
10 give you -- I'll give you that.

11 MR. HARRIS: Okay. The question of whether  
12 or not there is sovereign immunity, again, I think  
13 there's two steps that are involved. One of them is  
14 that Congress has to confer attributes of sovereignty  
15 onto the entity. Usually, it does that by an organic  
16 act. Here, there were several organic acts. But then  
17 even more important than that was the constitutional  
18 assembly in the 1950s, which, as this Court has said  
19 many times, really made Puerto Rico unique and gave  
20 it --

21 CHIEF JUSTICE ROBERTS: Well, that's right.  
22 That's sort of my point, unique, and so I'm just  
23 wondering how far you can stretch the analogy to state  
24 sovereign immunity, to tribal sovereign immunity.

25 MR. HARRIS: Again, if it's unique, we would

1 take the position that it's unique, you know, in favor  
2 of -- of -- of sovereignty because of --

3 CHIEF JUSTICE ROBERTS: Right. But --

4 JUSTICE JACKSON: But isn't your first  
5 position that we should not really get into this? I  
6 mean, I -- I didn't see it in the briefs. I am a little  
7 concerned about relying on our own sort of views of it  
8 based on other things when it hasn't really been  
9 briefed. So could you talk a little bit about your  
10 assumption position and whether and to what extent we  
11 can assume for the purpose of answering the question  
12 that we actually decided to take in this case?

13 MR. HARRIS: Yes, Justice Jackson. We -- we  
14 agree that the Court does not need to reach this issue.  
15 The question presented only addressed the issue of  
16 whether Section 2126(a) abrogates. The issue of -- of  
17 sovereign immunity was -- was not -- was not raised by  
18 us.

19 JUSTICE JACKSON: But what do you say about  
20 the SG's position that we should go ahead and reach it  
21 nonetheless? I mean, who -- who's got the better of the  
22 argument regarding assumption?

23 MR. HARRIS: Our position is that the Court  
24 has in appropriate circumstances assumed that a  
25 predicate issue like sovereign immunity exists. And the

1 Court should do that here, because, as CPI, I think,  
2 acknowledged in their opposition to cert, certiorari,  
3 this really wasn't -- none of these arguments were made  
4 below. The two-tiered theory of sovereign immunity  
5 which CPI is pressing now, that was not raised blow.  
6 The First Circuit was simply following its own  
7 precedents really with no analysis.

8 I agree that this Court, as it's said many  
9 times, is a court of review and not first view, and,  
10 therefore, the Court doesn't need to reach that issue.

11 JUSTICE SOTOMAYOR: Counsel, if we reach  
12 this issue, it has tremendous implications outside of  
13 PROMESA, doesn't it?

14 MR. HARRIS: Yes, Justice Sotomayor.

15 JUSTICE SOTOMAYOR: Now let's go back to the  
16 foundational question by Justice Thomas and Justice  
17 Roberts. Territories like Louisiana and others didn't  
18 have their own sovereignty before they became  
19 territories of the United States, correct? They had --

20 MR. HARRIS: Correct.

21 JUSTICE SOTOMAYOR: -- they had sovereignty  
22 of France or of other countries, correct?

23 MR. HARRIS: In -- in most cases, yes.

24 JUSTICE SOTOMAYOR: And, historically, no  
25 territory was dragged into federal or state -- or

1 territorial courts unless their sovereignty had been  
2 waived, correct?

3 MR. HARRIS: Yes.

4 JUSTICE SOTOMAYOR: So, in 200 years of our  
5 history, the Holmes -- Justice Holmes's proposition that  
6 no sovereign, which I think we have given to mean no  
7 governing entity, would be dragged into a court without  
8 the consent of the sovereign, correct?

9 MR. HARRIS: Yes.

10 JUSTICE SOTOMAYOR: And so, to the extent  
11 that the United States has not permitted, entertained,  
12 looked at suits against these territories, they've acted  
13 akin to states, correct?

14 MR. HARRIS: Yes.

15 JUSTICE SOTOMAYOR: That's what we said in a  
16 long line of cases. In Rosaly, in Emadeline, we said  
17 that Puerto Rico is like a state, correct?

18 MR. HARRIS: Correct.

19 JUSTICE SOTOMAYOR: All right. Having taken  
20 those propositions as a given, assuming we have  
21 sovereignty, the government -- not the government, but  
22 your adversary says, okay, it acts like a state now  
23 through the 1952-54 Act, but that means it only has  
24 sovereignty in its territorial courts. It doesn't have  
25 sovereignty in federal court.

1                   Address that subset of the argument.

2                   MR. HARRIS: Justice Sotomayor, it's our  
3 position that this -- this two-tiered theory of -- of  
4 sovereign immunity that Puerto Rico only has  
5 sovereignty, has immunity in its own courts, that  
6 there's no precedent for that and that, in fact, it  
7 would be -- it's very counterintuitive or would lead to  
8 very counterintuitive results.

9                   There is -- there's no authority of a  
10 situation we were able to find where -- where a court  
11 has ever said it -- that a sovereign only has -- or this  
12 Court has ever said that a sovereign only has immunity  
13 in its own courts. And it would lead to a lot --

14                   JUSTICE SOTOMAYOR: And, in fact, that's  
15 what Holmes was talking about, that the general  
16 proposition was broader, that you can't be haled into a  
17 court.

18                   MR. HARRIS: Yes, exactly. And the -- and  
19 the -- and the second point is it would lead to some  
20 very strange results. One of the results would be that  
21 the territory, let's just say citizens of the territory  
22 who tried to sue the territory in its own courts would  
23 not be able to because it -- by -- by hypothesis, it  
24 doesn't have immunity -- it does have immunity in that  
25 situation, but then noncitizens taking advantage of the

1 diversity jurisdiction could sue under the exact same  
2 law in federal court against the sovereign.

3 CHIEF JUSTICE ROBERTS: Does the --

4 MR. HARRIS: It really doesn't make sense.

5 CHIEF JUSTICE ROBERTS: -- does the Eleventh  
6 Amendment say states or things like states?

7 MR. HARRIS: The Eleventh Amendment says  
8 states.

9 JUSTICE SOTOMAYOR: So what do you do with  
10 that? Meaning the government itself is saying it's not  
11 Eleventh Amendment immunity, which is what the First  
12 Circuit has relied on, but it's common law foreign  
13 sovereignty. Isn't that a reason to remand and let them  
14 look at this issue more closely?

15 MR. HARRIS: No, I -- I don't think there's  
16 a need to remand here. I think -- first of all, the --  
17 the Eleventh Amendment analysis actually --

18 JUSTICE SOTOMAYOR: I don't mean remand. I  
19 mean -- answer your question. Answer the question  
20 presented. But that issue could be addressed more fully  
21 below, correct?

22 MR. HARRIS: Yes, it could. And, in fact,  
23 this Court has actually left open the question of  
24 whether the Eleventh Amendment applies to Puerto Rico.  
25 We're not relying on that argument here because we don't

1 need to, but the Court left it open in the Puerto Rico  
2 Aqueduct case in a footnote. But --

3 CHIEF JUSTICE ROBERTS: Do you understand  
4 the court of appeals to be relying on that argument?

5 MR. HARRIS: The court of appeals, through  
6 its -- its series of its own holdings, I think the  
7 original holding, when Justice Breyer was -- was on the  
8 court, was that Eleventh Amendment principles apply.

9 I think, after that time, the Court said  
10 that the Eleventh Amendment itself applies. That's a  
11 longstanding precedent in the First Circuit. It's  
12 been -- it's been applied. Again, we're not relying on  
13 that argument because we don't think that we need it  
14 here and it's an open question here.

15 We think the common law common immune --  
16 sovereign immunity, which is the same principle that  
17 the -- that the tribes rely on, is enough to -- to give  
18 territories in general and Puerto Rico in specific  
19 sovereign immunity here.

20 JUSTICE SOTOMAYOR: By the way, the tribes  
21 are just like Puerto Rico in that Congress controls  
22 their dependent sovereign nations and Congress can waive  
23 their immunity as well, correct?

24 MR. HARRIS: Absolutely. Congress can --

25 JUSTICE SOTOMAYOR: And we have said that



1 tribes can't be sued in federal court, correct?

2 MR. HARRIS: That's correct. The plenary  
3 power of Congress as far as the tribes are concerned is  
4 exactly the same as it is with regard to a territory.  
5 So it -- it can't prove because of that that there's no  
6 sovereign immunity because the same would be true in --  
7 in the tribes' case and the Court has held otherwise.

8 JUSTICE KAGAN: May -- may I take you back,  
9 Mr. Harris, to Justice Jackson's questions about  
10 assumption, and you rightly point out we assume  
11 questions all the time on a way to a holding. But  
12 usually we assume a question and then we say, well,  
13 we're going to assume this because, anyway, you lose on  
14 a different ground.

15 You want us to do something different. You  
16 want us to assume the immunity question only to say,  
17 well, you win with respect to abrogation. And -- and  
18 that's a funny kind of posture, you know, because the  
19 assumption will essentially determine the disposition of  
20 the case. You're going to get immunity but only because  
21 we've assumed that you should get immunity.

22 And I wonder if you have any precedent for  
23 that, any cases in which we've done something similar,  
24 any authority to suggest it's appropriate. I don't know  
25 of any authority to say it's inappropriate. It just

1 seems quite weird to me.

2 MR. HARRIS: We -- we were not able to find  
3 a case where it seemed that the existence of immunity  
4 would not have mattered to the outcome where the Court  
5 just assumed it. Nevertheless, as -- as -- as you  
6 mentioned, Justice Kagan, the cases don't seem to give  
7 that as a reason for why it's okay to assume. Several  
8 of the cases we cited, I think the Feeney case, just  
9 said we're going to assume it. It happened to be in  
10 that case because there was consent to -- to  
11 jurisdiction that it -- it didn't have an impact on the  
12 outcome, but the Court didn't say that was the reason.

13 JUSTICE GORSUCH: Can you address the larger  
14 question implicated by Justice Kagan, which is sovereign  
15 immunity is at least an affirmative defense that would  
16 normally be on -- the burden would be on the person  
17 asserting it to establish. Does that make it a  
18 particularly odd circumstance to assume its existence?

19 MR. HARRIS: I don't know if that -- if that  
20 changes things. I think -- I think there have been  
21 situations where a -- a party may bear the burden on a  
22 particular question, the Court nevertheless assumes it.  
23 Again, I -- I agree that there doesn't seem to be a case  
24 where the Court has done that specifically with regard  
25 to sovereign immunity, but I think the -- the principle

1 stands.

2 I mean, the other reason I'd mention as well  
3 why it would be -- it may be appropriate to assume it  
4 here is that the parties who -- other parties who you  
5 would think would be most interested in the answer to  
6 that question, for example, Puerto Rico authorities  
7 themselves, are not present in this case. The -- the --  
8 the governor of Puerto Rico, there are no Puerto Rico  
9 parties here. It would make sense to at least let them  
10 weigh in perhaps in another case on that question.

11 JUSTICE SOTOMAYOR: There is an alternative  
12 ground that immunity could be found to have been waived  
13 besides the PROMESA Act, and it would be that the  
14 Puerto Rican constitution and laws waive sovereign  
15 immunity from suits like this one. I know you say they  
16 don't, but assuming that argument has not been  
17 addressed, correct?

18 MR. HARRIS: That argument -- correct. That  
19 argument was never raised below. It was never addressed  
20 by the court below. It's simply not in the case.

21 JUSTICE SOTOMAYOR: But it -- well, it is  
22 now because it came up before us. It's been raised by  
23 Respondent now.

24 MR. HARRIS: Yes, it has been --

25 JUSTICE SOTOMAYOR: And they can be -- it

1 could be raised below, correct?

2 MR. HARRIS: It could be raised in -- in  
3 another case, yes, it could.

4 CHIEF JUSTICE ROBERTS: Thank you, counsel.

5 Justice Thomas?

6 Justice Alito?

7 Anything further, Justice Sotomayor? No?

8 Justice Kagan?

9 JUSTICE GORSUCH: Just one question to  
10 follow up on Justice Sotomayor's. We have received a  
11 lot of briefing about Puerto Rico's constitution  
12 promoting open records. I -- I understand your  
13 procedural objections to addressing it in this case.

14 Do you want to say anything about the  
15 substance of the argument?

16 MR. HARRIS: The -- the substance of -- of  
17 --

18 JUSTICE GORSUCH: The merits of the  
19 argument, whether the Puerto Rico constitution favors  
20 disclosure of cases like this.

21 MR. HARRIS: The only thing I would say  
22 about the waiver argument that I think is significant is  
23 that it's not clear whether or not waiver would even  
24 apply in federal court in the first place. In other  
25 words, this -- the fact that Puerto Rico has agreed or

1 has consented to suits against governmental entities in  
2 its own courts, it does not follow that it's done so in  
3 federal court.

4                   And, in fact, the statute which implements  
5 that constitutional right, a statute called TEPPRA, which  
6 is a Puerto Rico statute which gives a right to go  
7 obtain government records and go to court if you don't  
8 get them, it's clearly written on the assumption that  
9 you can only go to territorial court, that the section  
10 that says, you know, judicial review says in the court  
11 of first instance.

12                   JUSTICE GORSUCH: Thank you.

13                   CHIEF JUSTICE ROBERTS: Justice Kavanaugh?  
14 Justice Barrett?

15 Justice Jackson?

16 Thank you, counsel.

17 MR. HARRIS: Thank you.

18 CHIEF JUSTICE ROBERTS: Ms. Brown.

19 ORAL ARGUMENT OF AIMEE W. BROWN

20 FOR THE UNITED STATES, AS AMICUS CURIAE,  
21 SUPPORTING VACATUR

22 MS. BROWN: Thank you, Mr. Chief Justice,  
23 and may it please the Court:

24 For more than a century, this Court has  
25 recognized that Puerto Rico is immune from being sued

1 without its consent. That immunity derives from the  
2 nature of Puerto Rico's government, and it extends to  
3 the sovereign's own court and to federal court. Just as  
4 with federal, state, and tribal immunity, any waiver or  
5 abrogation of Puerto Rico's sovereign immunity requires  
6 a clear statement.

7           Section 106(a) of PROMESA does not include  
8 that statement. It simply channels jurisdiction to  
9 federal court for any claim against the Board under  
10 federal or territorial law, and those claims can proceed  
11 when the Board's immunity is elsewhere abrogated or  
12 waived.

13           The only other provisions of PROMESA that  
14 Respondent relies on likewise apply in that context,  
15 most relevantly in Title 3 proceedings when the  
16 Bankruptcy Code abrogates immunity. But nothing in  
17 those provision indicate that Congress intended to make  
18 the Board susceptible to suit for any and all claims  
19 under federal and territorial law.

20           Because the Board's immunity is also subject  
21 to waiver by the Commonwealth, so long as that waiver  
22 doesn't conflict with PROMESA, the Court should remand  
23 to allow the lower courts to address that issue.

24           I welcome the Court's questions.

25           JUSTICE THOMAS: You take a different

1 position with respect to assuming sovereign immunity in  
2 your brief. So could you comment on the argument that  
3 we could possibly or we should assume sovereign  
4 immunity?

5 MS. BROWN: So our -- our position is kind  
6 of consistent with what Justice Kagan was -- was  
7 referencing earlier. Usually, when this Court has  
8 assumed without deciding a question, it's because it  
9 doesn't have an effect on the end outcome. So we think  
10 it would be a little bit strange to assume that here if  
11 you take the view that we think is -- is the correct  
12 view, the correct reading of the statute, which is that  
13 it clearly does not, does not abrogate that immunity.  
14 And so I think it would be a little bit strange to -- to  
15 not address the -- the existence of the immunity in the  
16 first place.

17 We also think it's -- think it's not  
18 necessary to try and avoid that question here when this  
19 Court's precedents dating back for a century have  
20 already decided that Puerto Rico is entitled to that  
21 immunity. And so we think it's appropriate to address  
22 that question in the first instance.

23 JUSTICE THOMAS: Do you have a case in which  
24 a territory has been granted or been said to have had  
25 sovereign immunity in another sovereign's courts?

1                   MS. BROWN: So I think that the closest case  
2 that we have on that score is the Emmanuel case, and, of  
3 course, the Court ended up holding that the -- the  
4 territory had waived its immunity, and so it didn't  
5 really -- it wasn't necessary to the outcome of that  
6 case. But the Court certainly went into the discussion  
7 of sovereign immunity in that case, and it seems that  
8 the implication of that is that it applies equally in  
9 territorial court and in federal court.

10                   JUSTICE SOTOMAYOR: Have you ever heard of a  
11 case in which we're deciding the sovereignty of an  
12 entity where that entity is not before us?

13                   MS. BROWN: No, I -- I have not. But it is  
14 just kind of the -- the nature of this case. This was  
15 -- this was set out in, I think, the cert papers, so I  
16 think the Court was aware when it granted that this was  
17 an issue that the Respondent intended to -- to take  
18 issue on.

19                   JUSTICE JACKSON: And when we granted, I  
20 understood that there was at least some question about  
21 whether or not we should also consider the sovereignty  
22 point, and we didn't grant cert on that issue. So it  
23 seemed as though the Court was isolating abrogation.

24                   MS. BROWN: If the Court chooses to -- to  
25 consider only that issue and decide it on that basis, I



1 think -- I -- I don't have a precedent for you that says  
2 that it -- it's impossible to do that.

3 JUSTICE JACKSON: So there's no legal  
4 impediment that you can identify?

5 MS. BROWN: Not that I'm aware of. Again, I  
6 just think that it is -- it is kind of a strange thing  
7 to do in a case where, if it -- if it does end up  
8 mattering to the outcome, it starts to look a little bit  
9 more like an advisory opinion in the event that --

10 JUSTICE JACKSON: But, wait, why -- why does  
11 it matter -- I mean, it's not intertwined. I could -- I  
12 could totally understand the concern about assumption if  
13 the only way that we could possibly answer the  
14 abrogation question, it would be based on particular  
15 findings that we made relative to sovereign immunity,  
16 and then you're sort of like how did you even reach that  
17 answer, because these two things are so intertwined.

18 I understood it to be antecedent, the "it"  
19 being the sovereign immunity question, but independent  
20 in the sense that it doesn't rely on the same factors at  
21 all.

22 MS. BROWN: So I think that's generally  
23 correct. The statutory interpretation could be  
24 affected, I think, in some ways by the fact -- the  
25 existence or not of immunity here. So, to the extent

1 that you are kind of looking at the -- at the statutory  
2 language and think that some provisions only have  
3 meaning to the extent that there is a waiver of  
4 sovereign immunity under territorial law for certain  
5 provisions, it could end up affecting the way that the  
6 Court views the statute there. So I think it does kind  
7 of balance out.

8 JUSTICE KAGAN: Do you think that there's  
9 any difference in the kind of clear statement rule you  
10 could come up with depending on what -- what the basis  
11 for the immunity was or -- this is going to the question  
12 of whether it's intertwined or not. You know, depending  
13 on what the basis for sovereign immunity is in this  
14 case, could it possibly lead to a different clear  
15 statement rule?

16 MS. BROWN: So I think that the same clear  
17 statement rule has been applied in every context  
18 involving sovereign immunity. I think it is just kind  
19 of the necessary corollary to the existence of  
20 self-government in the first instance. That's the way  
21 that the Court has described it. In -- in Bay Mills,  
22 for example, the Court said once, you know, when we have  
23 self-government that exists, we're -- we're particularly  
24 hesitant to conclude that Congress is acting to  
25 undermine that self-government. So I think that same

1 analysis applies here. Of course, the tribes are under  
2 the plenary authority of Congress in the same way that  
3 the territories are. So I -- so I think that the  
4 analysis would likely be the same regardless.

5 JUSTICE GORSUCH: Counsel, have you  
6 considered how your sovereign immunity argument might  
7 apply to other territories besides Puerto Rico and what  
8 their views may be?

9 MS. BROWN: So I think that all of the  
10 territories likely have the same kind of baseline level  
11 of self-governance that the Court recognized in Rosaly  
12 as sufficient and necessarily leads to sovereign  
13 immunity. There have been some courts -- there's a  
14 Ninth Circuit opinion, I believe, that holds that, with  
15 respect to the Northern Mariana Islands, there are  
16 provisions within the compact with Congress or the  
17 covenant with Congress in that case that -- that waive  
18 sovereign immunity in particular instances. So there  
19 might be some differences with -- with respect to the --  
20 the terms of their sovereign immunity, but the -- the  
21 baseline existence, I think, is the same.

22 JUSTICE GORSUCH: So ruling for you in this  
23 case would effectively decide not just Puerto Rico but  
24 other territories who aren't before us as well?

25 MS. BROWN: That's -- that's likely the

1 case, I think, based on their self-government.

2 JUSTICE JACKSON: If we --

3 CHIEF JUSTICE ROBERTS: I --

4 JUSTICE JACKSON: -- if we -- if we reach --

5 MS. BROWN: If you reach the sovereign --

6 JUSTICE JACKSON: -- the sovereign immunity?

7 MS. BROWN: Yes. Exactly.

8 JUSTICE JACKSON: All right.

9 JUSTICE SOTOMAYOR: Counsel, we --

10 CHIEF JUSTICE ROBERTS: I -- I get --

11 JUSTICE SOTOMAYOR: I'm sorry.

12 CHIEF JUSTICE ROBERTS: No, go ahead.

13 JUSTICE SOTOMAYOR: We have had cases  
14 involving jurisdiction where we've addressed whether one  
15 jurisdictional ground is present or not and remanded to  
16 see when we said no, but there could be others, correct?  
17 Or yes, or there could be other --

18 MS. BROWN: Yes, I believe -- I believe  
19 that's the case.

20 CHIEF JUSTICE ROBERTS: I -- I had the same  
21 question that Justice Gorsuch had, and part of your  
22 answer was you think all of the territories have the  
23 same level of self-government. Is -- is that true?

24 MS. BROWN: They have the same -- the -- a  
25 sufficient baseline level. I think that Puerto Rico

1 kind of stands apart from them in having additional  
2 immunity -- or additional sovereignty, additional  
3 self-governance separate and apart from that. But their  
4 -- their immunity was decided back in 1913, when only  
5 the Foraker Act was -- was implemented at that point,  
6 and I think that all the territories have at least that  
7 baseline level, which is the -- the level that has given  
8 rise to -- to sovereign immunity.

9 JUSTICE SOTOMAYOR: And that was the level  
10 the Court looked at in Rosaly, correct?

11 MS. BROWN: That's correct, yes.

12 JUSTICE SOTOMAYOR: And said that these  
13 islands were like sovereigns in the sense of not being  
14 haled into a court?

15 MS. BROWN: Yes.

16 JUSTICE SOTOMAYOR: And then --

17 JUSTICE KAGAN: And -- and you --

18 CHIEF JUSTICE ROBERTS: And Rosaly was --

19 JUSTICE SOTOMAYOR: -- in Emmanuel, we said  
20 it was federal court as well, correct?

21 MS. BROWN: Emmanuel was, yes, the following  
22 year, which -- which applied the same kind of reasoning  
23 to a federal court.

24 CHIEF JUSTICE ROBERTS: Well, but, I mean,  
25 Rosaly itself was simply the courts of Puerto Rico,

1 right?

2 MS. BROWN: That -- that was the court that  
3 was at issue in Rosaly, yes.

4 JUSTICE KAGAN: And you would define that  
5 baseline level of sovereignty that you think gives rise  
6 to immunity as what?

7 MS. BROWN: So the Court in -- in Rosaly and  
8 then in Shell Co. has kind of just described it as this  
9 self-governance and -- and autonomy over all matters of  
10 local concern. The -- the Court there compared the  
11 government or the legislative power that was granted to  
12 the territories to those that were granted to organized  
13 and incorporated territories and found them to be  
14 essentially identical. So I think it's just this --  
15 this general you are the -- you're governing yourselves  
16 under -- under all of these -- all issues of local  
17 concern.

18 CHIEF JUSTICE ROBERTS: Justice Thomas?

19 Justice Alito?

20 Justice Sotomayor, anything further?

21 Justice Kavanaugh?

22 JUSTICE KAVANAUGH: On -- on the remand  
23 point that you make, the other side says there's no need  
24 for that remand because that issue was never raised  
25 previously in the lower courts. So can you respond to

1 that?

2 MS. BROWN: So I think that there was -- we  
3 haven't taken an -- a -- a position on whether that  
4 issue is -- is forfeited or not. I think that on remand  
5 the Court could decide that as well.

6 There were certainly, I think, references in  
7 the briefing to the fact that this was a constitutional  
8 right that was generally available in the territories  
9 themselves, and so perhaps that would -- that would be  
10 sufficient to raise it. But we don't think it would be  
11 appropriate or necessary for the Court to actually reach  
12 and decide the -- the full extent of Commonwealth law  
13 here.

14 We think that there are some questions as to  
15 whether those laws are -- are -- or that the right to  
16 access to these documents is generally brought in  
17 actions against the government itself or just against  
18 territory -- territorial officers under something like  
19 an Ex Parte Young suit.

20 I think there's a -- a -- an amicus brief  
21 from Espacios Abiertos that kind of discusses the -- the  
22 general writ of mandamus there and -- and notes that  
23 that is generally applied to -- to officers and not the  
24 territory itself.

25 JUSTICE KAVANAUGH: Thank you.

1 CHIEF JUSTICE ROBERTS: Justice Barrett?

2 Justice Jackson?

3 Thank you, counsel.

4 MS. BROWN: Thank you.

5 CHIEF JUSTICE ROBERTS: Ms. Harris?

6 ORAL ARGUMENT OF SARAH M. HARRIS

7 ON BEHALF OF THE RESPONDENT

8 MS. HARRIS: Mr. Chief Justice, and may it  
9 please the Court:

10 Congress did not need to surmount a clear  
11 statement rule to subject the Board to suit for  
12 violating Puerto Rico's constitution.

13 This Court has required some historical or  
14 constitutional basis for clear statement rules.  
15 Puerto Rico is a territory, so the clear statement rule  
16 for abrogating state sovereign immunity is out.

17 But, unlike for states and tribes, this  
18 Court has never imposed clear statement rules before  
19 Congress can curtail territorial autonomy, nor has this  
20 Court ever imposed clear statement rules for waivers or  
21 abrogations of territorial immunity.

22 Clear statement rules would conflict with  
23 Congress's plenary powers over territories. And  
24 adopting the other side's one-size-fits-all theory of  
25 immunity would be a drastic and unnecessary way to



1 protect Puerto Rico, which will not be flooded with  
2 federal suits no matter what.

3           The Federal Relations Act already gives  
4 Puerto Rico the benefits of state sovereign immunity for  
5 generally applicable federal laws, and there is no  
6 diversity jurisdiction for suits against territories.

7           Regardless, the Board is not immune because  
8 PROMESA's text clearly says the Board will be a  
9 defendant in all kinds of actions, especially  
10 constitutional ones. 2126(a) creates a reticulated  
11 federal review scheme for any action against the Board.  
12 Congress created a forum for the Board to face suit, not  
13 some generic class of defendants, and 2126(c) prescribes  
14 when court orders against the Board, including for  
15 constitutional violations, will take effect.

16           Federal courts couldn't issue orders against  
17 the Board or immune and constitutional violations under  
18 2126(c) cover Puerto Rico's constitution.

19           PROMESA shunts all federal and territorial  
20 claims against the Board to federal court, but by doing  
21 so, Congress didn't suspend Puerto Rico's constitution  
22 or its waiver of immunity. The unelected board is not  
23 the one part of Puerto Rico's government entitled to an  
24 immunity that the people of Puerto Rico withdrew from  
25 everyone else.

1 I welcome the Court's questions.

2 JUSTICE THOMAS: Ms. Harris, could you  
3 comment on the argument that we've heard or suggestion  
4 that we can bypass sovereign immunity and simply decide  
5 abrogation?

6 MS. HARRIS: I don't think that is plausible  
7 here because, in order to rule against us at least, the  
8 Court would have to say there is some sort of clear  
9 statement that applies to the abrogation analysis and  
10 then apply it to PROMESA. So that just begs the  
11 question, where does that clear statement rule come from  
12 and is there some underlying immunity that is protected?

13 As Justice Gorsuch noted, it's all the more  
14 strange to assume all that because sovereign immunity is  
15 an affirmative defense, but, again, the opinion would  
16 have to read something like there is a clear statement  
17 rule based on, what, I mean, state sovereign immunity  
18 cases? That's what the Board relied on in its briefing  
19 in the First Circuit and below and also in -- in its  
20 opening brief in this Court. But I don't think --

21 JUSTICE JACKSON: I don't understand --

22 JUSTICE GORSUCH: Ms. --

23 JUSTICE JACKSON: -- why you lead with the  
24 clear statement rule. I thought we could just -- that  
25 assumes that there are circumstances in which you could

1 have sovereignty without a clear statement rule. So why  
2 doesn't the -- the sort of initial question -- rather  
3 than clear statement, the initial question is, does  
4 Puerto Rico -- are they entitled to the status of a  
5 sovereign?

6 We assume that because the First Circuit was  
7 relying on its own precedent with -- with respect to it,  
8 the Court's cases have suggested it, and, in any event,  
9 every time there is a recognition of sovereign immunity,  
10 a clear statement rule follows.

11 Why wouldn't the opinion read like that?

12 MS. HARRIS: So that bakes in a lot of  
13 assumptions with respect to the idea that clear  
14 statement rules are sort of like a buy one, get one free  
15 if you are sufficiently sovereign to have some form of  
16 immunity that I think are refuted by this Court's  
17 own cases about territories.

18 JUSTICE JACKSON: So you have cases that --  
19 no, no, not about territories. Do you have a case that  
20 suggests that if we find that sovereign immunity  
21 applies, there's another set of analyses to determine  
22 whether clear statement follows?

23 MS. HARRIS: So, yes, I would say Jinks is a  
24 good example at least with respect to counties which are  
25 immune in state court, and this Court said, you don't

1 need a clear statement rule to abrogate the immunity  
2 that counties have. It's a common law immunity.

3 And while this Court's cases don't sort of  
4 squarely say there -- I -- I think the problem is the  
5 Court's cases don't sort of squarely, like, ever say  
6 that there is just a universal unified theory of  
7 sovereign immunity. What the Court's --

8 JUSTICE JACKSON: I don't understand.

9 JUSTICE GORSUCH: Ms. --

10 JUSTICE JACKSON: I don't understand. Is it  
11 or is it not the case that every time we've found  
12 sovereign immunity we say a clear statement rule  
13 follows?

14 MS. HARRIS: It is not the case. And one  
15 case I would point to is actually Rosaly itself, because  
16 I think everyone agrees there that the Court is saying  
17 there is absolutely and certainly sovereign immunity for  
18 Puerto Rico in its own courts, but that case also  
19 involves a question of waiver, which is whether the  
20 Foraker Act waived Puerto Rico's immunity in its own  
21 courts, even if you assume there's some immunity  
22 elsewhere, whether it was waived.

23 The Court did not apply a clear statement  
24 rule in that case and instead looked at just ordinary  
25 principles of statutory interpretation. What actually

1 the case came down to was the Court's conclusion that  
2 the design of the Foraker Act in its grant of coequal --  
3 three coequal branches to Puerto Rico would be  
4 inconsistent with reading in a waiver.

5           And I think that underscores all the more  
6 Rosaly was focused on the idea that if you are the  
7 Puerto Rico legislature or another political branch and  
8 constantly haled before the courts of Puerto Rico, that  
9 would be inconsistent with the government that Congress  
10 was trying to set up. Emmanuel --

11           JUSTICE GORSUCH: Ms. --

12           JUSTICE SOTOMAYOR: Counsel --

13           JUSTICE GORSUCH: Ms. Harris --

14           JUSTICE SOTOMAYOR: Go ahead.

15           JUSTICE GORSUCH: I'm sorry.

16           JUSTICE SOTOMAYOR: No, no, go ahead.

17           JUSTICE GORSUCH: I -- I -- I just wanted to  
18 explore the suggestion by Petitioner that we should  
19 avoid this issue altogether and assume the existence of  
20 sovereign immunity for purposes of this case.

21           And some of the arguments I -- I think that  
22 are strong for that are that we don't have Puerto Rico  
23 before us. We have this Board that may expire and was a  
24 creation of Congress. We don't have the other  
25 territories before us as -- as well.

1                   And it's a rather large and important  
2 constitutional question that really may only be relevant  
3 in a small number of cases too, given that, by statute,  
4 Congress has effectively given Puerto Rico sovereign  
5 immunity for purposes, as you point out, of -- of  
6 general purpose federal statutes.

7                   And then we have in -- in your opposition to  
8 cert your client stated that the First Circuit correctly  
9 framed the inquiry as whether Congress used  
10 "unmistakably clear language" to abrogate sovereign  
11 immunity in this case.

12                   Why aren't all those just good reasons to  
13 defer this question for another day, if it ever becomes  
14 relevant again, given, again, Congress's statute saying  
15 that Puerto Rico generally has sovereign immunity?

16                   MS. HARRIS: So, first of all, it would be a  
17 little bit ironic for the Board to say it is entitled to  
18 share in Puerto Rico's sovereign immunity because it's  
19 part of that government and then just say --

20                   JUSTICE GORSUCH: Ironies aside, is there  
21 any legal impediment to -- to proceeding that way?

22                   MS. HARRIS: Yes. I think it -- the other  
23 legal impediment just to go on the cert papers is we  
24 weren't conceding that a clear statement rule applies.  
25 What we're saying is, in a universe where you are asking

1 did the -- the First Circuit misapply that standard, it  
2 doesn't apply.

3 And the other impediment would be that,  
4 again, the opinion would --

5 JUSTICE GORSUCH: I'm not sure I understand  
6 that as an impediment. Can you explain how to -- I  
7 mean, how that's an --

8 MS. HARRIS: So it's not a concession. The  
9 impediment would be just in the way that the opinion  
10 would have to be framed.

11 JUSTICE GORSUCH: So you say it's not a -- a  
12 concession? Fine, I'll -- I'll -- I will spot you  
13 without granting that.

14 MS. HARRIS: Okay.

15 JUSTICE GORSUCH: Okay? I'm looking for a  
16 legal impediment to proceeding as Petitioner suggests.

17 MS. HARRIS: Yes. And the legal impediment  
18 would be that you would have to be writing an opinion  
19 that says we're assuming there's a clear statement rule,  
20 and to hold that there is a clear statement rule is to  
21 be essentially saying, yes, there is some sort of basis  
22 in the Court's cases historically or as a constitutional  
23 matter that it should actually apply to Puerto Rico and  
24 the other territories at all.

25 If you're concerned about that sort of

1 inquiry, I mean, it seems like maybe one of the better  
2 ideas would be to consider whether this case either  
3 should be resolved at all or also to look at many of the  
4 alternative off-ramps in this case, including the waiver  
5 question with respect to Puerto Rico constitution's  
6 structural waiver of immunity in the circumstances.

7           You could also say that PROMESA itself is  
8 clear enough in terms of its terms in -- in being an  
9 entirely reticulated and specific judicial review scheme  
10 for the Board itself that only has meaning if the  
11 remedies for constitutional violations are, in fact,  
12 what we say they --

13           JUSTICE SOTOMAYOR: That just goes back to  
14 the ultimate question of what do we mean by clear rule  
15 when a sovereign -- when you're waiving sovereign  
16 immunity.

17           You're analogizing Puerto Rico to a  
18 municipality, but it's not. You yourself see the irony  
19 in anybody claiming that Puerto Rico and -- and the  
20 United States are the same sovereign for purposes of  
21 self-government. So you agree they're not, correct?

22           MS. HARRIS: The United States and Puerto  
23 Rico -- so the Court's cases say the sovereignty of  
24 Puerto Rico comes from the United States, and the other  
25 important difference is --



1 JUSTICE SOTOMAYOR: So -- well, so do the  
2 territories that became states.

3 MS. HARRIS: But when the --

4 JUSTICE SOTOMAYOR: Everybody gets their  
5 sovereignty from the United States, including tribes,  
6 because we have determined not to take it away.

7 MS. HARRIS: So just to be very clear, there  
8 is a fundamental difference between states that come  
9 into the union under the equal footing doctrine and  
10 tribes and territories here that I think is significant  
11 both with respect --

12 JUSTICE SOTOMAYOR: And Indians and  
13 everybody else, but the question is we've announced a  
14 clear statement rule with respect to waiver, and you've  
15 not given me a reason why Puerto Rico should be treated  
16 differently than Indians, why it should be treated  
17 differently than territories, why somehow that -- that  
18 clear statement rule shouldn't apply.

19 Rosaly, by the way, was in the  
20 nineteen-teens sometime, decades before we started with  
21 the clear statement rule, but that's what we've got now.

22 MS. HARRIS: So --

23 JUSTICE SOTOMAYOR: So Rosaly was addressing  
24 a theory that -- or a doctrine that wasn't in existence  
25 yet.

1 MS. HARRIS: A few points on that, just  
2 starting with the last one. Rosaly actually was at the  
3 exact same time that this Court was articulating clear  
4 statement rules for federal waivers of immunity and  
5 state sovereign immunity. And so the Marie case that is  
6 cited in the briefing is an example of the clear  
7 statement rule for abrogating state sovereign immunity.  
8 The Schillinger case for the United States is an example  
9 for the federal government. And it's really telling  
10 that there are several cases in the territories that are  
11 about waivers or abrogation of immunity at that time  
12 that do not mention a clear statement rule.

13 And I think the reason, one among many, is  
14 that the basis for the clear statement rules and for the  
15 immunity of states and tribes in the United States is  
16 fundamentally different.

17 So let me just start with tribes because  
18 that's been sort of the most bandied about analogy.  
19 Tribes differ in three ways. First of all, their  
20 sovereignty is akin to the sovereignty of a foreign  
21 nation because that is what tribes were before the  
22 founding, and until 1871, the government, in fact, dealt  
23 with tribes through treaties. And they retained that  
24 status of having the so-called law of nations immunity,  
25 immunity in other people's courts, by virtue of that.

1           The reason for the clear statement rule for  
2 tribes sort of flows from that a bit, which is, while  
3 Congress has plenary power over tribes, there is a  
4 strong understanding, because the United States  
5 functions at least, as the Court has said, like a  
6 trustee over tribes, you assume that Congress is not  
7 trying to eliminate the autonomy of tribes. Those  
8 assumptions go obviously out the window with respect to  
9 territories.

10           And the third thing about tribes is there is  
11 a longstanding history of related canons for tribes in  
12 which there is a discussion of various other canons for  
13 construing statutes that are ambiguous in the tribes'  
14 favor to preserve their sovereignty. Again, you can  
15 look through all the territory cases, of which there are  
16 many dating back to the 19th Century. You will not find  
17 a clear statement rule for them.

18           And both Rosaly and Emmanuel, which has come  
19 up in the discussion, are good examples of  
20 considerations of waivers of immunity. Emmanuel is sort  
21 of assuming that there could be immunity. But there is  
22 no discussion, even in parsing statutes in those cases,  
23 as to whether there needs to be a satisfied clear  
24 statement. I don't think there's any way you could say  
25 that the inquiry in Emmanuel came close to satisfying a

1 clear statement rule.

2 CHIEF JUSTICE ROBERTS: You -- you --

3 JUSTICE BARRETT: Ms. --

4 CHIEF JUSTICE ROBERTS: -- you began -- in  
5 your opening statement, you said that a clear statement  
6 rule would interfere with Congress's powers. I don't  
7 understand quite how that is. It's a clear statement  
8 rule. It says they have to be clear. Maybe we should  
9 apply that rule across the board. But it doesn't  
10 prevent Congress from doing whatever it wants. It just  
11 has to make it clear. So why -- sort of like why is all  
12 the fuss about whether that's a significant infringement  
13 on Congress's power?

14 MS. HARRIS: Well, there is, I think, a lot  
15 of fuss, which is a lot of statutes would otherwise be  
16 applicable to territories without the -- without the  
17 additional hoop of a clear statement rule. I mean,  
18 again, the clear statement rule is a departure of the  
19 ordinary understanding that you're simply parsing the  
20 text and looking for the best reading. And that is why  
21 the Court has historically required some constitutional  
22 basis or some at least historical pedigree to foist on a  
23 clear statement rule in the cases. And so --

24 JUSTICE JACKSON: But isn't that -- isn't  
25 that a constraint on the courts? It's not really about,

1 you know, putting an impediment or -- or restraining  
2 Congress in any way.

3 I understood the clear statement rule to be  
4 about preventing us from finding something when it's not  
5 crystal-clear that Congress intended it.

6 MS. HARRIS: I think it's both. So, for --  
7 certainly, for the state sovereign immunity cases, it is  
8 absolutely framed as a constraint on Congress. The idea  
9 is that because it is a very constitutionally sensitive  
10 ground, you should -- you should hold Congress to a  
11 higher standard before Congress sort of --

12 JUSTICE JACKSON: Well, not holding them to  
13 a standard. I mean, I agree -- you know, the Chief  
14 Justice makes a good point. This is -- Congress does  
15 what it wants. It does policy. It makes its  
16 determinations. And things like clear statement rules  
17 are about preventing the Court from foisting its own  
18 view of what Congress has done by -- when a statute  
19 isn't crystal-clear and when the implications are so  
20 severe, when we have a situation in which, you know, the  
21 implication of the Court doing something that Congress  
22 didn't intend is stripping a territory of perhaps  
23 intended sovereign immunity.

24 MS. HARRIS: So I think the problem with  
25 that is the text -- the -- the -- the -- the text of the

1 statute itself is normally what stops courts from doing  
2 that. Adding on an additional layer, a clear statement  
3 rule, is doing something much more than that. It is  
4 requiring a degree of specificity and clarity that is  
5 unusual for statutes. And until this point, the Court  
6 has demanded some sort of historical pedigree or some  
7 sort of reason for constitutional avoidance to impose  
8 that additional barrier.

9           So, whether you look at this as a need to  
10 make sure that courts aren't going into sensitive areas  
11 by accident or as a guardrail against Congress, I don't  
12 think it matters. The key thing here is that there is  
13 no constitutional imperative, unlike for states or the  
14 federal government, to guard sovereign immunity, and  
15 unlike the tribes, there is no historical pedigree or  
16 other basis for foisting on a clear statement rule. It  
17 would be very --

18           JUSTICE BARRETT: Ms. --

19           MS. HARRIS: -- unusual.

20           JUSTICE KAGAN: I --

21           JUSTICE BARRETT: Go ahead.

22           JUSTICE KAGAN: No, go ahead.

23           JUSTICE BARRETT: Go ahead. It's fine.

24           CHIEF JUSTICE ROBERTS: Justice Kagan.

25           JUSTICE KAGAN: You know, I'm curious -- and

1 this is as much a question for Mr. Harris as it is for  
2 you, but I've lost my opportunity with him.

3           What do you think Congress currently  
4 understands about Puerto Rico's immunity? Because,  
5 usually, clear statement rules operate against a  
6 backdrop of congressional understanding of what it needs  
7 to be clear about. And the clear statement rule of --  
8 of, you know, you have to be clear about abrogation, if  
9 Congress doesn't think Puerto Rico has immunity, why  
10 would it think that abrogation is even in the picture?

11           So what -- is there evidence about what  
12 Congress understands about sovereign immunity that would  
13 enable us to read this statute better?

14           MS. HARRIS: I think the best and perhaps  
15 only evidence is the text of the Federal Relations Act,  
16 which actually recurs -- there's similar language for  
17 some other territories, which is that there was some  
18 need to say that the generally applicable federal laws  
19 have the same force and effect in the states as they do  
20 in -- in -- in Puerto Rico, which suggests that Congress  
21 may have thought that there was some reason to think  
22 that, for instance, there should be a reciprocity. If  
23 states have immunity, give that same statutory benefit  
24 to Puerto Rico. Again, that would sort of seem to  
25 suggest Congress understands that Puerto Rico would not

1 have that immunity of its own force.

2 I mean, I think the other indication is  
3 Congress seems to understand that the Eleventh Amendment  
4 is, in fact, just for states, because Congress, when it  
5 is doing the super clear types of abrogation that the  
6 other side seems to embrace, says that states shall not  
7 be immune under the Eleventh Amendment. It's not  
8 talking about territories.

9 Now that does create some oddities, I think,  
10 under their view because I'm not sure if you had a clear  
11 statement rule for territories, like, how that language  
12 would then abrogate for territories, which will create  
13 some sort of oddities for federal statutes.

14 But -- but that's all we have. And I think  
15 the fact that Congress does not seem to be operating on  
16 a baseline of sovereign immunity is reflective of this  
17 Court's cases, which have never said that in federal  
18 courts Puerto Rico, in fact, enjoys this immunity. They  
19 are at best very muddy and muddied yet further by the  
20 fact that federal courts were directly reviewing  
21 decisions of Puerto Rico courts and other territorial  
22 courts on territorial claims well into the 20th Century.

23 JUSTICE BARRETT: Ms. Harris, why not just  
24 vacate and remand to the First Circuit, given the  
25 complexities of this question? You raise good points,



1 the government's raised good points, on this common law  
2 immunity question and the question of whether  
3 territories have it. Why not just vacate and let the  
4 First Circuit, you know, which has -- has this long line  
5 of precedent, but it hasn't really fully engaged the  
6 question? Why not let them do it?

7 MS. HARRIS: Well, I think it would be  
8 unfair to give the other side a mulligan when the --  
9 when the Board's argument all along -- we have argued --  
10 we've argued all along that Puerto Rico does not have  
11 Eleventh Amendment immunity. It is their affirmative  
12 burden to show that there is immunity. And they've  
13 written up this case all along on just the sole ground  
14 that the Eleventh Amendment and Pennhurst are the things  
15 they want to point at.

16 And so it would be a little unfair to say  
17 we're just going to vacate, you know, First Circuit, do  
18 it over, and I think especially unnecessary, given that  
19 everyone appears to firmly agree that the Puerto Rico  
20 constitution includes a waiver of immunity in this  
21 particular case for constitutional claims.

22 So just all the more reason to say, look, I  
23 mean, if you're -- if you're just saying, like, do it  
24 over, that might just counsel in favor of dismissing as  
25 improvidently granted instead of just getting rid of the

1 First Circuit's opinion.

2 JUSTICE KAVANAUGH: On the posture and  
3 what -- what's proper before us, if the First Circuit  
4 had said there is immunity and the statute does not  
5 abrogate the immunity, and you had been Petitioner in  
6 this Court and come up with two questions here, the  
7 first being there's no sovereign immunity for  
8 Puerto Rico, and, second question, even if sovereign  
9 immunity, the statute has a clear statement abrogating  
10 it, so you'd raise those two questions in the cert  
11 petition, would it have been improper for us to just  
12 grant the second question and not grant the first  
13 question?

14 MS. HARRIS: I don't think so, because  
15 often -- often as petitioners do and respondents in  
16 their alternative questions do a belt-and-suspenders  
17 approach to try to clarify what's really at issue, but I  
18 don't think we have conceded or nor would you fairly say  
19 that there is no embedded question of immunity within a  
20 clear statement rule. I mean, I think that's what this  
21 Court's cases are essentially talking about.

22 There's no talking about clear statement  
23 rules in this Court's other immunity cases without  
24 talking about the reason for it, which is state  
25 sovereign immunity, the federal government's immunity

1 from suit, tribes' immunity from suit. It is truly  
2 inextricably linked, because, again, the clear statement  
3 rule begs the question why, why are you distorting  
4 ordinary sort of -- why are you -- why are you putting a  
5 thumb on a scale that wouldn't otherwise apply and --

6 JUSTICE SOTOMAYOR: Counsel, if we DIG,  
7 we're just creating two layers of issues that will never  
8 get resolved because others are going to sue Puerto Rico  
9 on other claims besides the ones you're raising, and now  
10 that the First Circuit has said there's been a clear  
11 abrogation, that issue will control.

12 At least if we note the differences here,  
13 address the question presented, and remand for  
14 consideration of the other issues, we can at least say  
15 that those are open questions and that they should be  
16 reviewed or looked at. But a DIG is not going to get us  
17 there.

18 MS. HARRIS: So --

19 JUSTICE SOTOMAYOR: It's only going to  
20 invite more lawsuits and different kinds of lawsuits,  
21 both of them controlled by precedent that nobody has  
22 said should be looked at.

23 MS. HARRIS: So, just to be very clear, the  
24 lawsuits that would be -- the universe of lawsuits  
25 really would be specific to PROMESA. And so the Board

1 would be --

2 JUSTICE SOTOMAYOR: Well, that's not  
3 unimportant.

4 MS. HARRIS: It's not unimportant, but I do  
5 think it -- it -- it does counter the argument that, you  
6 know, the Court -- the Commonwealth of Puerto Rico isn't  
7 here, other people aren't here. I think this case  
8 indicated that people could participate. The Board is  
9 claiming to be Puerto Rico. And in terms of --

10 JUSTICE SOTOMAYOR: We don't invite amici.  
11 We say that if you choose, you can, but we don't tell  
12 them they have to. In fact, we discourage them.

13 MS. HARRIS: But, respectfully, I think,  
14 with respect to the question of PROMESA, yes, you  
15 could -- you could reserve all these questions and that  
16 would be fine. I mean, I think they're open questions  
17 no matter what. But you would still have to decide, I  
18 think, to get in a position of vacating the First  
19 Circuit's decision that there is some sort of abrogation  
20 here that is sufficiently clear.

21 And so, at a minimum, you're going to be  
22 addressing the question of how can a statute that refers  
23 to orders for constitutional violations that are clearly  
24 taking effect against the Board, how can you have that  
25 if there is not abrogation for constitutional

1 violations? And I don't think there's any way to say  
2 that that happens without some sort of abrogation  
3 happening in PROMESA even under a clear statement rule.

4           The other side has pointed to the Title 3  
5 bankruptcy proceedings, and that is simply incorrect.  
6 That cannot be the answer to how there is abrogation for  
7 constitutional violations for two reasons.

8           First of all, if Congress wanted to refer to  
9 Title 3 as the basis for these orders against  
10 constitutional violations, it presumably would have done  
11 what it did in Section 2126(a), which is to actually  
12 refer expressly to the carveout for Title 3, which has  
13 its own very reticulated judicial review scheme of its  
14 own.

15           And second of all, there is no abrogation  
16 for the type of claims that the Board is pointing to  
17 here that would get you to an abrogation under Title 3  
18 for orders remedying constitutional violations.

19           Let me explain why. The Title 3 discussion  
20 incorporates by reference Section 106 of the Bankruptcy  
21 Code, which only abrogates sovereign immunity for 59  
22 different types of bankruptcy proceedings.

23           We looked at them. None of them include a  
24 cause of action for standalone separate proceedings of  
25 the type the Board is pointing to for sort of standalone

1 actions of the type against the Board that would result  
2 in a remedy for constitutional violations.

3 The Board has pointed to cases in which it  
4 didn't actually raise immunity in the Title 3 context,  
5 and until now, the government seemed to have some  
6 discomfort with hanging the case on that ground.

7 So just the PROMESA abrogation question I  
8 think is, at a minimum, very complicated and, if  
9 anything, tilts in our favor given that there is  
10 language even under a clear statement rule that you  
11 cannot explain under the other side's view unless there  
12 is some abrogation for constitutional violations of the  
13 type here.

14 Again, it would be even more curious to  
15 think that PROMESA, while giving the Board lots of other  
16 powers in many other respects, sub silentio essentially  
17 overruled the Puerto Rico constitution and its  
18 structural waiver of immunity for all of the other parts  
19 of Puerto Rico's government and that that was not  
20 something that could be brought against the Board.

21 CHIEF JUSTICE ROBERTS: Justice Thomas?

22 Justice Sotomayor?

23 Justice Kavanaugh?

24 JUSTICE KAVANAUGH: No.

25 CHIEF JUSTICE ROBERTS: Justice Barrett?

1 Justice Jackson?

2 Thank you, counsel.

3 Mr. Harris, rebuttal?

4 REBUTTAL ARGUMENT OF MARK D. HARRIS

5 ON BEHALF OF THE PETITIONER

6 MR. HARRIS: Yes, thank you.

7 The only question on which this Court  
8 granted certiorari was whether Section 2126(a)  
9 abrogates, and there's a straightforward answer to that  
10 question, which is that it does not because there is  
11 nothing even approaching a clear and unmistakable  
12 statement.

13 Even if the Court didn't apply a clear  
14 statement test here, I don't think this would pass even  
15 under regular rules of statutory construction. There's  
16 no mention of abrogation, the word or the concept.  
17 There's no mention that -- that the -- that the Board  
18 wouldn't have immunity in this situation. There's just  
19 nothing.

20 And as I -- as we said in our brief, the  
21 fact that it takes 15 pages to identify the arguments  
22 for why there's a clear statement tells you there isn't  
23 a clear statement.

24 It would not help to DIG this case for the  
25 simple reason that there's a First Circuit ruling on the

1 books right now which says that 2126 abrogates all kinds  
2 of actions, every possible action against the Board,  
3 both under federal law and under territorial law.  
4 That's an enormous decision.

5           It's very counterintuitive to think Congress  
6 would have wanted that, that even situations where the  
7 Board or a -- or a governmental entity in Puerto Rico  
8 may have had immunity on its own if it were part of the  
9 territory, now when it's a suit against the Board in  
10 federal court, the Board has a target on its back. Any  
11 single -- any type of action can be brought.

12           That -- that simply doesn't make sense.  
13 That ruling would still be there unless the Court  
14 decides that that was incorrect because the  
15 interpretation of 2126(a) is not correct.

16           I also have not heard from the other side  
17 really any defense of the actual reasons that the First  
18 Circuit gave here. The First Circuit relied on certain  
19 exceptions that it read into or -- or that were in  
20 Section 2126(a), other provisions. This Court's  
21 precedents make it clear that's not a clear and  
22 unmistakable statement or -- or anything close to that.

23           I -- I really have not heard either any kind  
24 of rebuttal to the general rule, which is that  
25 jurisdictional provisions do not abrogate for the reason



1 I said up front, which is that jurisdiction is simply  
2 the ability for a court to hear a case. It doesn't say  
3 anything about the availability of defense.

4 For all those reasons, we'd ask the Court to  
5 reverse. Thank you.

6 CHIEF JUSTICE ROBERTS: Thank you, counsel.  
7 The case is submitted.

8 (Whereupon, at 11:00 a.m., the case was  
9 submitted.)

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