No. 22-96

In the Supreme Court of the United States

FINANCIAL OVERSIGHT AND MANAGEMENT BOARD FOR PUERTO RICO,
PETITIONER,

v.

CENTRO DE PERIODISMO INVESTIGATIVO, INC.,
RESPONDENT.

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

BRIEF FOR RESPONDENT

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QUESTION PRESENTED

Whether the First Circuit correctly held that in the Puerto Rico Oversight, Management, and Economic Stability Act of 2016, *see* 48 U.S.C. § 2126, Congress abrogated any sovereign immunity the Board might enjoy from suits in federal court.

CORPORATE DISCLOSURE STATEMENT

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

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STATEMENT

State sovereign immunity belongs to States. And Territories are not States. Those constitutional truisms preclude the Financial Oversight and Management Board for Puerto Rico—which Congress designated part of Puerto Rico's territorial government—from invoking state sovereign immunity to avoid suits in federal court.

The statute at issue, the Puerto Rico Oversight, Management, and Economic Stability Act (PROMESA), applies only to territories and creates a territory-specific

judicial-review regime that envisions myriad actions against the Board. When subjecting territories to suit in federal court, Congress need not satisfy a clear-statement rule that requires Congress to express its intent to abrogate state sovereign immunity. There is thus no bar to federal courts entertaining respondent Centro de Periodismo Investigativo's suit against the Board requesting documents about how the Board runs Puerto Rico.

Indeed, the Board's assertions of state sovereign immunity beg substantial questions about the Board's own constitutionality. Congress installed the Board as the regent controlling Puerto Rico's laws and fiscal affairs, and the Board routinely blocks Puerto Rico's governors and legislatures from enacting laws. The Board's entire existence, not to mention the vast powers the Board wields over millions of Puerto Rico citizens, is constitutional only because of Puerto Rico's territorial status and its subordination to Congress' plenary powers under the Territory Clause, U.S. Const. art. IV, § 3, cl. 2.

Yet the Board seeks to shield itself from judicial, public, and press scrutiny by turning around and claiming a share of Puerto Rico's putative state sovereign immunity. The Board even portrays the clear-statement rule as necessary to "ensur[e] that sovereignty interests are not infringed" and to safeguard "the sovereignty and federalism issues at stake." Board Br. 1, 3. The Board cannot have it both ways. Puerto Rico cannot lack the kind of inviolable sovereign attributes necessary to block Congress from inserting the Board as the Commonwealth's overseer, yet possess just enough inviolable sovereignty for the Board to deflect federal suits brought to hold the Board accountable.

The Board pays no attention to this iceberg and asks the orchestra to play on, devoting its brief to challenging

whether PROMESA expresses Congress' intent to subject the Board to suit clearly enough. But the Board's authorities expose the cracks in the hull: the Board overwhelmingly invokes state sovereign immunity cases whose clear-statement rules all rest on States' unique stature in the constitutional firmament. The Board just elides the words "State" and "Eleventh Amendment." The Board's defense of a clear-statement rule as essential to preserve "federalism" underscores the problem.

The United States instead abandons ship. As the government rightly observes, "[t]o conclude that PROMESA does not abrogate the Board's immunity, the Court must determine that such immunity exists." U.S. Br. 15 n.2. And the government recognizes that, as "a territory, Puerto Rico is not encompassed within the Eleventh Amendment, which speaks to the sovereign immunity of States." U.S. Br. 11. But the government then urges this Court to hold that territories can invoke the same clear-statement rule that applies to States and other sovereigns for sovereign-immunity purposes. That novel theory misapprehends Congress' constitutional authority over territories. Congress can control territories' governments and force them to face federal suits for any reason, at any time. It is not plausible that the one place where federal courts must add extra hurdles is when Congress exercises its plenary powers to hale territories into federal court. And there is no generic immunity doctrine indifferent to who the sovereign is and where its sovereignty comes from.

Even assuming that Congress must clearly convey its intention to subject the Board to federal-court suits, PROMESA amply clears that bar. Congress enacted a judicial-review scheme that applies *only* to the Board, contemplates various claims against the Board, and

grants the Board specific protections from certain remedies and from liability for certain claims. Congress was even clearer in confirming that federal courts should entertain suits against the Board for injunctive and declaratory relief, like respondent seeks here.

Congress had good reason to open the Board to federal suits. PROMESA grants the Board extraordinary powers to countermand Puerto Rico governors and legislatures, but prescribes a detailed judicial review scheme channeling all litigation against the Board to specific federal courts to impose basic checks on the Board's powers. Tellingly, the Board no longer claims that facing federal suits would compromise its functions, instead (at 41) downgrading the consequences to the "distraction of litigation." But inconvenience is a small price to pay for preserving some modicum of oversight over the Oversight Board. Puerto Rico's constitution empowers its citizens to sue every other entity within Puerto Rico's government directly for constitutional violations, without immunity barring suit. PROMESA did not extinguish Puerto Rico citizens' right to hold the most powerful element of Puerto Rico's government accountable, least of all to vindicate the fundamental right of access to information enshrined in Puerto Rico's constitution. This Court should affirm.

A. Background

1. In 1898, the United States and Spain ended the Spanish-American War and signed the Treaty of Paris, which granted to the United States three of Spain's colonies: the Philippines, Guam, and Puerto Rico. Efrén Rivera Ramos, *American Colonialism in Puerto Rico: The Judicial and Social Legacy* 4-5 (2007).

Initially, the United States subjected Puerto Rico to military rule. But in 1900, Congress exercised its authority under the Territory Clause, U.S. Const. art. IV, § 3,

cl. 2, and established a territorial government in Puerto Rico. Organic Act of 1900, ch. 191, 31 Stat. 77 (1900).

Over the years, Congress gave Puerto Rico more autonomy over its internal affairs. In 1951, Congress approved Public Law 600, enabling the people of Puerto Rico to draft a constitution. But there was a catch: the constitution required final "approval by the Congress." *Puerto Rico v. Sánchez Valle*, 579 U.S. 59, 64 (2016) (citation omitted). And Congress redlined the constitution that the Puerto Rican people proposed, eliminating and amending sections of its Bill of Rights. With those changes, Puerto Rico's constitution became law in 1952 and created the Commonwealth of Puerto Rico, in which the archipelago's population elects its own government and enacts its own laws. *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 671 (1974).

2. Puerto Rico remains subject to Congress' plenary power and control. Congress can "legislate[] differently with respect to the territories, including Puerto Rico, than it does with respect to the States." *United States v. Vaello Madero*, 142 S. Ct. 1539, 1541 (2022). This case involves one such exercise of Congress' Territory Clause authority: the 2016 Puerto Rico Oversight, Management, and Economic Stability Act (PROMESA), 48 U.S.C. §§ 2101 *et seq*. *See id.* § 2121(b)(2).

For decades, Congress had granted companies operating in Puerto Rico preferential tax breaks. But after Congress in 2006 phased out these benefits, "[m]any industries left the island[,] [e]migration increased," and "the public debt of Puerto Rico's government and its instrumentalities soared." *Fin. Oversight & Mgmt. Bd. v. Aurelius Inv.*, 140 S. Ct. 1649, 1655 (2020). Puerto Rico could neither "service that debt" nor "restructure it." *Id.*

Congress enacted PROMESA in the wake of Puerto Rico's dire financial straits. Thus far, Congress has implemented PROMESA only in Puerto Rico, although the law applies to four other territories: Guam, American Samoa, the Northern Mariana Islands, and the United States Virgin Islands. 48 U.S.C. § 2104(20). Whenever Congress designates a territory as needing additional financial oversight, Congress will create an "Oversight Board" for that territory "within [its] territorial government." *Id.* § 2121(c)(1).

PROMESA designated Puerto Rico as a "covered territory" and thus created petitioner, the Financial Management and Oversight Board for Puerto Rico, as an entity "within the territorial government" of Puerto Rico. *Id.* § 2121(b)(1), (c)(1). The President—not the people of Puerto Rico—appoints all of the Board's voting members, although PROMESA disclaims that the Board is an "agency" or any other part of the federal government. *Id.* § 2121(c)(2); *see Aurelius*, 140 S. Ct. at 1655.

PROMESA vests the Board with extraordinary power over all aspects of Puerto Rico's governance. The Board has commenced and conducted bankruptcy proceedings on Puerto Rico's behalf. 48 U.S.C. §§ 2164(a), 2175(b); *see Aurelius*, 140 S. Ct. at 1655. The Board can "supervise and modify" all of Puerto Rico's laws and dictate its budgets and fiscal plans. *Aurelius*, 140 S. Ct. at 1655; *see* 48 U.S.C. §§ 2141, 2142. On that score, the Board has repeatedly imposed its own budget while rejecting the Puerto Rico government's proposals.[1] The Board has also dictated the government's spending, even denying the

[1] *See* José Alvarado Vega, *Puerto Rico Fiscal Board Budget Goes Into Effect for 4th year in a Row*, Caribbean Business (July 1, 2020), https://bit.ly/3PC7OGG.

government's request to use emergency funds to stabilize electricity rates and repair the energy grid.[2]

PROMESA also empowers the Board to block Puerto Rico's governor and legislature from enacting or implementing any Puerto Rico statutes, policies, or rules that would, in the Board's judgment, "impair or defeat the purposes" of PROMESA. 48 U.S.C. § 2128(a)(2). And the Board has done so frequently, for instance by forcing the government to nullify Puerto Rico laws involving pensions, health insurance, and workers' benefits.[3]

Puerto Rico's elected government exercises no reciprocal power over the Board. "Neither the Governor nor the Legislature may exercise any control, supervision, oversight, or review over the Oversight Board or its activities." 48 U.S.C. § 2128(a)(1). And PROMESA provides that "[t]he provisions of th[e Act] shall prevail over any general or specific provisions of territory law" that are "inconsistent" with PROMESA. *Id.* § 2103.

3. Congress did, however, provide for a comprehensive judicial review scheme in federal court to check the Board. Section 2126 prescribes that "any action against the Oversight Board, and any action otherwise arising out of [PROMESA] … shall be brought in … [the] United States district court for the covered territory." *Id.*

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[2] *Fiscal Board Denies Gov't Request for $200 Million from Emergency*, San Juan Daily Star (Mar. 18, 2022), https://bit.ly/3Wp3eh1; *Fiscal Board Nixes Use of Emergency Reserve to Stabilize Energy Grid,* San Juan Daily Star (Dec. 16, 2022), https://bit.ly/3VbLhBv.

[3] *E.g.*, Gloria Ruiz Kuilan, *Labor Reform: Litigation Between the Board and the Puerto Rico Government Seems Unavoidable*, El Nuevo Día (Aug. 30, 2022), https://bit.ly/3W6ViBs; Jim Wyss, *Puerto Rico Oversight Board Sues To Stop New Pension Benefits*, Bloomberg.com (Dec. 21, 2021), https:// bit.ly/3WrZFXG; *Fiscal Board Sues To Halt Implementation of Retirement Law*, San Juan Daily Star (July 6, 2021), https://bit.ly/3Yzyrjp.

§ 2126(a). Congress specifically recognized that some federal judicial orders might be "entered to remedy constitutional violations," and that other federal-court orders might "grant[] declaratory or injunctive relief against the Oversight Board." *Id.* § 2126(c). Congress provided that while orders remedying "constitutional violations" could take immediate effect, "declaratory or injunctive relief" against the Board can take effect only after the Board exhausts appeals. *Id.*

Congress carved out two exceptions to federal-court jurisdiction. The Board can seek orders enforcing its subpoenas in territorial court under § 2124(f)(2). And civil actions related to debt-adjustment petitions under Title III of PROMESA can proceed in non-federal courts, similar to federal jurisdiction under the Bankruptcy Code. *Id.* § 2126(a).

Congress also gave the Board additional protections within this judicial-review scheme. Congress stripped federal district courts of any "jurisdiction … to review challenges to the Oversight Board's certification determinations"—*i.e.*, the Board's approval or rejection of a territorial government's fiscal plans and budgets. *Id.* § 2126(e). Congress also excepted the Board from liability for certain claims: "The Oversight Board, its members, and its employees shall not be liable for any obligation of or claim against the Oversight Board or its members … or the territorial government resulting from actions taken to carry out [PROMESA]." *Id.* § 2125.

B. Procedural History

1. This case arises from document requests regarding the Board's operations filed by respondent Centro de Periodismo Investigativo (CPI), an award-winning nonprofit media organization focused on government transparency in Puerto Rico. Since 2007, CPI has published

over 350 reports and has established itself as a key stakeholder in ensuring accountability in Puerto Rico's economic restructuring process. *See Puerto Rico's Centro de Periodismo Investigativo wins Louis M. Lyons Award for Conscience and Integrity in Journalism at Harvard*, Nieman (Dec. 19, 2019), https://bit.ly/3v0rafe.

Since 2016, CPI has sought transparency for the Board's decisionmaking. CPI has requested documents from the Board concerning the Commonwealth's financial health; communications between Board members and the federal and Puerto Rico governments; details of contracts the Board awarded to private entities; the Board's internal governance rules; minutes of Board meetings; and financial-disclosure and conflict-of-interest documents that Board members submitted to the U.S. Department of Treasury during their selection process. Pet.App.113a-115a. The Board declined to respond to CPI's requests beyond pointing to general information posted on the Board's website. Pet.App.104a, 116a.

2. Faced with the Board's noncompliance, CPI sued the Board in the U.S. District Court for Puerto Rico for violating Puerto Rico's constitution's access-to-public-information guarantee in Article II, § 4. Pet.App.118a. The Supreme Court of Puerto Rico has recognized that the freedoms of speech and press cannot be "effectively exercise[d]" without the right to access public documents. *Bhatia Gautier v. Rosselló Nevares*, 199 P.R. Dec. 59, 80 (P.R. 2017) (certified translation at J.A.96a). Article II, § 4 enshrines a "fundamental right" to "access … public information," under which government-created documents are presumptively subject to disclosure. *Bhatia Gautier*, J.A.95a; *see* P.R. Laws Ann. tit. 32, § 1781. However, contrary to the Board's representations (at 9), Puerto Rico law contains various specific exceptions that allow the government to withhold documents implicating

evidentiary privileges, law-enforcement investigations, deliberative processes, and third-party privacy interests, among others. *See Bhatia Gautier*, J.A.98a-99a.

CPI sought declaratory and injunctive relief, including a writ of mandamus ordering the Board to produce requested documents. Pet.App.121a-123a. That request tracks how Puerto Rico citizens typically enforce constitutional rights against the Puerto Rico government: They sue governmental entities in territorial court directly under Puerto Rico's constitution, and the government is not immune from such claims. *See Ortiz v. Bauermeister*, 152 P.R. Dec. 161, 177 (P.R. 2000); *Figueroa Ferrer v. E.L.A.*, 7 P.R. Offic. Trans. 278, 283 (P.R. 1978). So, for access-to-information claims, if the Puerto Rico government does not provide a requested record, the government cannot claim immunity and plaintiffs can petition in territorial court for review or mandamus relief. P.R. Laws Ann. tit. 3, §§ 9912, 9919.

3. CPI sued the Board in federal court because PROMESA channels "any action" against the Board to federal court. *See* 48 U.S.C. § 2126(a). The Board moved to dismiss CPI's suit as barred by the Board's "Eleventh Amendment immunity," and invoked no other type of immunity at any point.[4]

The district court denied the Board's motion to dismiss and rejected the Board's claim of Eleventh Amendment immunity. The court recognized that First Circuit precedent treats Puerto Rico as a State for sovereign-immunity purposes and assumed that the Board is

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[4] Mot. to Dismiss at 5-7, ECF No. 22, *Centro de Periodismo Investigativo v. Fin. Oversight & Mgmt. Bd. for Puerto Rico*, No. 3:17-cv-1743-JAG-BJM (D.P.R. 2017); *accord* Pet. 12-14, 21; Board Br. 9-10, 14-15, 43-44; Pet. C.A. Br. 21-22, 30 (1st Cir. May 19, 2021); Pet. Reply C.A. Br. 13-17 (1st Cir. July 9, 2021).

an arm of Puerto Rico entitled to putative state sovereign immunity. Pet.App.70a-71a.

But the court held that Congress, acting under its plenary Territory Clause powers, waived the Board's putative Eleventh Amendment immunity by authorizing federal-court suits against the Board in § 2126. Pet.App.71a-74a. Alternatively, the court held that § 2126 abrogated the Board's Eleventh Amendment immunity by making "unmistakably clear" that the Board could be sued. Pet.App.75a-77a. The court also rejected the Board's arguments that PROMESA preempted Article II, § 4 of Puerto Rico's constitution. Pet.App.80a-98a.

In May 2018, the district court ordered the Board to produce documents that CPI requested, unless the Board could establish that the documents fell within recognized exceptions to disclosure. Pet.App.99a-100a. The parties agreed to limit disclosure to documents created before April 30, 2018. J.A.121a-122a.

For a few months, the Board complied and disclosed over 18,000 documents. But by late 2018, it became clear that the Board intended to withhold the vast majority of requested documents. After CPI moved to compel production, the district court ordered the Board to produce a "comprehensive, legally-sufficient" privilege log explaining the basis for withholding documents. Pet.App.55a; *see* Pet.App.143a.

In the meantime, CPI filed another complaint in September 2019, seeking disclosure of documents generated after April 30, 2018. Pet.App.125a. The Board moved to

dismiss the second complaint, again invoking "the Eleventh Amendment's protection."[5] The district court consolidated both cases and denied the Board's motion to dismiss the second complaint "for the reasons stated in the Court's Opinion and Order" in the first case. Pet.App.56a.

4. The Board filed an interlocutory appeal in the First Circuit of the order requiring the Board to compile and submit a privilege log and the order denying the motion to dismiss the second complaint.

The First Circuit affirmed in a 2–1 decision. As relevant here, the court held that its jurisdiction extended only to the state-sovereign-immunity question, and declined jurisdiction over the Board's arguments that § 2126 immunizes the Board from liability and that PROMESA preempts the Puerto Rico constitution's right to access information. Pet.App.11a-20a.

As to state sovereign immunity, the First Circuit recognized the preliminary question whether Puerto Rico can claim state sovereign immunity at all. The panel observed that the First Circuit "has long treated Puerto Rico like a state for Eleventh Amendment purposes," but that this Court "'has expressly reserved'" judgment on that question. Pet.App.22a (quoting *P.R. Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 141 n.1 (1993)). The panel also "assume[d] without deciding that the Board is an arm of Puerto Rico" that shares "general Eleventh Amendment immunity." Pet.App.23a-24a.

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[5] Mot. to Dismiss at 13, *Centro de Periodismo Investigativo v. Fin. Oversight & Mgmt. Bd. for Puerto Rico*, No. 3:19-cv-01936-JAG-BJM (D.P.R. 2019), ECF No. 10.

Finally, the panel held that Congress validly and clearly abrogated the Board's assumed Eleventh Amendment immunity. Pet.App.26a-34a. The panel explained that § 2126(a) made "unmistakably clear" Congress' intent to abrogate the Board's immunity by providing that "any action against the Oversight Board" must be brought in federal district court in Puerto Rico. 48 U.S.C. § 2126(a). The same provision withholds jurisdiction over specified claims, demonstrating Congress' intent for federal courts to hear other claims over which they have jurisdiction. The panel found it inconceivable that Congress "channel[ed]" claims against the Board into federal court to "dictate [their] dismissal." Pet.App.33a n.16.

Further, Congress "contemplated" potential "constitutional violations" by the Board and provided for "injunctive [and] declaratory relief against the Board." Pet.App.29a. The panel concluded that these components together demonstrated Congress' clear intent to permit claims to proceed in federal court. *Id.*

Judge Lynch dissented, reasoning that Congress' intent to abrogate the Board's assumed immunity was insufficiently clear. Pet.App.36a-49a. She characterized § 2126(a) as merely a jurisdiction-granting provision, and explained that "an exclusive grant of jurisdiction to federal courts for claims against the Board does not constitute a clear statement abrogating Eleventh Amendment immunity." Pet.App.40a.

The First Circuit denied rehearing en banc, with Judge Lynch again dissenting. Pet.App.52a-53a.

SUMMARY OF ARGUMENT

I. No clear-statement rule constrains Congress when it subjects territories to suit.

A. State sovereign immunity reflects States' special place in the United States' constitutional order, and does not translate to other contexts. As this Court's precedents explain, States' immunity from suit in federal court is part of States' pre-existing sovereignty that States retained under the Constitution. States' privileged status also grants them enhanced protection against federal legislation and federal jurisdiction. Congress thus must use unequivocal statutory language before abrogating States' immunity from suit based on constitutional concerns: such abrogation risks upsetting the federal-state balance.

By contrast, the Constitution subordinates territories to Congress' plenary authority under the Territory Clause. Territories lack inherent sovereignty of their own; Congress ultimately controls territorial autonomy and governance. PROMESA's creation of the Board illustrates the point: Congress installed the Board within Puerto Rico's government as the territory's fiscal regent. Congress' Territory Clause power likewise lets Congress subject territories to suit in any court, for any claim—without the speedbumps Congress faces when abrogating States' sovereign immunity.

Those principles resolve this case. The Board's lone basis for asserting immunity has always been that the Board purportedly shares Puerto Rico's state sovereign immunity from suit in federal court. But Puerto Rico has no *state* sovereign immunity. And as the government agrees, this Court has never extended to territories the protections of *state* sovereign immunity.

B. The government alternatively contends that, while Puerto Rico is not entitled to state sovereign immunity, territories are entitled to analogous immunity in federal court and that Congress must surmount a similar clear-statement rule to subject territories to federal-court suits.

But no clear-statement rule constrains Congress in subjecting territories to suit.

Congress' plenary power over territories is incompatible with forcing Congress to convey an unequivocal intent to abrogate before it can subject territories to suit. This Court tellingly has never suggested that Congress must satisfy clear-statement guardrails before intruding even more dramatically on territorial autonomy by reconfiguring territorial governments or redlining territorial constitutions.

The government is also wrong to craft a novel theory of "territorial immunity" in federal court that the Board has not endorsed. Territories do not enjoy inherent immunity in federal court. They merely enjoy immunity in *territorial* courts under the longstanding rule that entities that are sufficiently governmental to enact their own laws and administer their own courts are sufficiently sovereign-like to claim immunity in those courts.

II. Even if a clear-statement rule applied, PROMESA unambiguously expresses Congress' intent that the Board face all sorts of suits in federal court as a defendant.

A. Congress enacted a judicial-review scheme that applies only to the Board and presupposes that the Board cannot assert sovereign immunity. Section 2126(a) grants federal-court jurisdiction over "any action against" the Board and channels all such claims there. Exceptions to jurisdiction over claims against the Board in §§ 2126(a) and 2126(e) would be unnecessary were the Board otherwise immune. Congress also clearly recognized that the Board would face orders for "declaratory" and "injunctive relief" in § 2126(c). And Congress granted the Board statutory protections against liability in § 2125 that would be

superfluous if the Board were immune generally. Reading the relevant provisions in tandem, as this Court has done in similar cases, confirms Congress' clear intent to subject the Board to suit in federal court.

B. The Board's and the government's strained readings do not square with the text, and would render several provisions superfluous. The readings cannot account for the enforcement limitations on declaratory and injunctive relief in § 2126(c). And these explanations fail to justify how the Board can face suits for "constitutional claims" and claims that the Board "exceeded its powers," which the Board concedes are permissible.

C. Abrogation also aligns with PROMESA's mission to impose limited judicial review as a key check on the Board's vast powers. Congress expressly placed the Board within the territorial government, and the Puerto Rico constitution applies to *all* Commonwealth entities. Congress did not make the Board the only entity within Puerto Rico's government immune from the Puerto Rico constitution. Congress certainly did not authorize the Board to violate the fundamental right of access to information without giving Puerto Rico residents any recourse in any forum. Congress gave the Board enormous power, but Congress drew the line at letting the Board suspend Puerto Rico's constitution and its well-established enforcement directly against the government.

D. Remand is unnecessary. No one has contested that Puerto Rico's constitution permits suit against entities within the Puerto Rico government, and PROMESA plainly does not let the Board unilaterally extinguish the constitutional access-to-information claim here. This Court should affirm the First Circuit.

I. Congress Is Not Subject to a Clear-Statement Rule Before Subjecting Territories to Suit in Federal Court

Puerto Rico, as a territory, by definition cannot claim state sovereign immunity. That principle resolves the case, so this Court need not address the government's novel theory that Congress must pass an analogous clear-statement rule before Congress can subject territories to suit in federal court. This Court has never embraced the government's theory for good reason: the government misapprehends the nature of territorial immunity and Congress' plenary powers over territories.

A. Rules Governing State Sovereign Immunity Do Not Apply to Territories

Throughout this litigation, the Board has pressed one theory of immunity only: Puerto Rico can assert *state* sovereign immunity (or, as the Board and First Circuit call it, "Eleventh Amendment immunity"). *Supra* pp. 10-13; Pet. 7; Cert. Reply 3.[6] The Board self-identifies as an arm of Puerto Rico sharing "Eleventh Amendment immunity." Cert. Reply 4-6; Pet. C.A. Br. 22 & 23 n.3. Ergo, the Board maintains, Congress must speak clearly to abrogate the Board's Eleventh Amendment immunity. Pet. 12. Though the Board's opening brief expunges mentions of *state* sovereign immunity or the Eleventh Amendment, that changes nothing. The Board's abrogation arguments

[6] This Eleventh Amendment immunity defense is a misnomer. That amendment divests federal courts of jurisdiction over suits against a State brought by citizens of another State. The Eleventh Amendment would not apply here, because respondent is a Puerto Rico entity suing a putative arm of Puerto Rico. Any claim of immunity must derive from inherent state sovereign immunity, not the Eleventh Amendment. *See Allen v. Cooper*, 140 S. Ct. 994, 1000 (2020); *PennEast Pipeline Co. v. New Jersey*, 141 S. Ct. 2244, 2264 (2021) (Gorsuch, J., dissenting).

still rest on state sovereign immunity cases, and (at 18) even invoke "paramount values of federalism."

This Court has never extended state sovereign immunity to territories. *See P.R. Aqueduct*, 506 U.S. at 141 n.1 (reserving the question). This Court should not start now. Under the constitutional framework, *state* sovereign immunity belongs to States, not territories. *Accord* U.S. Br. 15.

1. As the name suggests, state sovereign immunity—which immunizes States from suits in federal, state, or other courts without their consent—flows from "each State['s]" unique status as "a sovereign entity in [the] federal system." *Allen*, 140 S. Ct. at 1000 (citations omitted). That historically grounded origin story precludes carrying state sovereign immunity over to other governmental bodies. Like the separate-sovereign doctrine in the double-jeopardy context, state sovereign immunity simply does not depend on "[t]he degree to which an entity exercises self-governance." *Sánchez Valle*, 579 U.S. at 67.

Start with the basics: States are inherently immune from suits in their own courts. *Alden v. Maine*, 527 U.S. 706, 754 (1999). Further, this Court has reiterated, States possess immunity from private suits in *other* sovereigns' courts—including federal court—because States possessed that immunity before the Founding and the Constitution embedded that immunity within the constitutional structure. "After independence, the States considered themselves fully sovereign nations," and "[a]n integral component of the States' sovereignty was their immunity from private suits," both in their own courts and other sovereigns. *Franchise Tax Bd. of Cal. v. Hyatt*, 139 S. Ct. 1485, 1493 (2019) (cleaned up). States' immunity from suit in the proposed federal courts was part of the price the original States demanded to form the Union. *Alden*, 527 U.S. at 718-19. Indeed, "[t]he Constitution's

use of the term 'States' reflects both of these kinds of traditional immunity." *Hyatt*, 139 S. Ct. at 1494. Thus, "[g]enerally speaking, the States entered the federal system with their sovereignty, including their sovereign immunity, intact." *Torres v. Tex. Dep't of Pub. Safety*, 142 S. Ct. 2455, 2461 (2022) (cleaned up).

Precisely because States retain so much of their "residuary and inviolable sovereignty," *Alden*, 527 U.S. at 715 (citation omitted), the Constitution "constrains federal judicial authority" and bars some suits against States entirely, *Allen*, 140 S. Ct. at 1000 (cleaned up). The Eleventh Amendment strips federal courts of jurisdiction over suits against States brought by other States' citizens. U.S. Const. amend. XI. But, because state sovereign immunity is a fundamental attribute of state sovereignty baked into the constitutional structure, such immunity extends well beyond the Eleventh Amendment's text. *Hyatt*, 139 S. Ct. at 1496.

Thus, even when the Constitution does not categorically prohibit suits against States, the Constitution makes congressional overrides difficult. Before abrogating States' sovereign immunity, Congress must invoke "some constitutional provision" that "allow[s] Congress to … encroach[] on the States' sovereignty" that way. *Allen*, 140 S. Ct. at 1001. None of Congress' Article I powers qualify. *Id.* at 1003. The Fourteenth Amendment authorizes abrogation, but even then, Congress must satisfy a "means-end test." *Id.* at 1004.

Congress' final hurdle for abrogating state sovereign immunity is the clear-statement rule at issue here. Even when Congress picks constitutionally valid means, legislation must use "'unequivocal statutory language'" to validly "abrogat[e] the States' immunity from the suit." *Allen*, 140 S. Ct. at 1000 (quoting *Seminole Tribe of Fla.*

v. Florida, 517 U.S. 44, 56 (1996)). That extra hoop reflects that "abrogation of sovereign immunity upsets the fundamental constitutional balance between the Federal Government and the States" and "plac[es] a considerable strain on the principles of federalism that inform Eleventh Amendment doctrine." *Dellmuth v. Muth*, 491 U.S. 223, 227-28 (1989) (cleaned up); *accord Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 99-100 (1984) (clear-statement rule rooted in "problems of federalism"); *Sossamon v. Texas*, 563 U.S. 277, 290-91 (2011) (similar); Board Br. 20-21.

2. By contrast, territories are not "state[s] in the sense in which that term is used in the [C]onstitution." *Corp. of New Orleans v. Winter*, 14 U.S. (1 Wheat.) 91, 94 (1816); *see* U.S. Const. art. IV, § 3, cl. 2; U.S. Const. amend. XXI (distinguishing the two). Because state sovereign immunity comes from States' primordial immunity from suit, it is irrelevant how similarly States and territories function in practice. As the Board has previously noted in this Court, "[t]erritories, unlike States or tribes, have no independent sovereignty that predates the formation of the United States in the Constitution." Fin. Oversight and Mgmt. Bd. Br. 18, *Fin. Oversight & Mgmt. Bd. v. Aurelius Inv., LLC*, Nos. 18-1334, 18-1475, 18-1496, 18-1514, 18-1521 (U.S. Sept. 19, 2019). That remains true for Puerto Rico, despite the autonomy Congress has granted. *Cf. Rodríguez v. Popular Democratic Party*, 457 U.S. 1, 8 (1982).

Moreover, by vesting Congress with plenary power over territories, the Territory Clause precludes any notion that territories retain separate, residual sovereignty the way States do. The Constitution describes territories as "Property belonging to the United States," subject to Congress' plenary "[p]ower to dispose of and make all needful Rules and Regulations" for the territory. U.S.

Const. Art. IV, § 3, cl. 2. Rather than retaining some quantum of inviolable sovereignty, "U.S. territories—including an earlier incarnation of Puerto Rico itself—are not sovereigns distinct from the United States." *Sánchez Valle*, 579 U.S. at 71. Under the Court's cases, territorial governments are "the creations, exclusively, of [Congress], and subject to its supervision and control." *Benner v. Porter*, 50 U.S. (9 How.) 235, 242 (1850). Likewise, the Court has repeatedly held that "Congress has the entire dominion and sovereignty, national and local, Federal and state, and has full legislative power over all subjects upon which the legislature of a state might legislate within the state." *Simms v. Simms*, 175 U.S. 162, 168 (1899); *accord First Nat'l Bank v. Yankton County*, 101 U.S. (11 Otto) 129, 133 (1879); *Grafton v. United States*, 206 U.S. 333, 354 (1907); *Shively v. Bowlby*, 152 U.S. 1, 48 (1894); U.S. Br. 20.[7]

Thus, whereas state sovereignty creates constitutional do-not-cross lines that restrict Congress' authority to abrogate state sovereign immunity, territories are hostage to Congress' whims. Where States are concerned, it might be "difficult to think of a greater intrusion on state sovereignty" than allowing federal courts to hear state-law claims against States. *Pennhurst*, 465 U.S. at 106; *see* Board Br. 43-44. But the Territory Clause subjects territories to greater indignities every day of the week and claims no offense.

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[7] Of course, Congress' plenary authority under the Territory Clause does not empower Congress to flout "such restrictions as are expressed in the Constitution or are necessarily implied in its terms." *Murphy v. Ramsey*, 114 U.S. 15, 44 (1885). Congress remains "subject to those fundamental limitations in favor of personal rights which are formulated in the [C]onstitution and its amendments." *Late Corp. of the Church of Jesus Christ of Latter-Day Saints v. United States*, 136 U.S. 1, 44 (1890).

For instance, Congress can dictate territorial constitutions, even vetoing provisions of Puerto Rico's constitution that the people of Puerto Rico had embraced. *Sánchez Valle*, 579 U.S. at 64-65. Congress can and does "abrogate the laws of the territorial legislatures" and legislate in their stead. *Yankton*, 101 U.S. at 133. Territorial governors have been axed at will; as the Northwest Territory's first governor discovered, publicly proclaiming that acts of Congress cannot bind territories was a firing offense. *Builders of Ohio: A Biographical History* 60-62 (Warren VanTine & Michael Pierce eds., 2003). Congress also controls territorial courts. For 50 years, Congress made decisions of Puerto Rico courts directly reviewable in the First Circuit, which could reject Puerto Rico courts' interpretation of Puerto Rico law and hear territorial-law claims against Puerto Rico and its officials—a regime that would blatantly violate *Pennhurst* if applied to States. *See* U.S. Br. 21. With those great powers comes the authority to subject territories to suit in any court, for any claim. *See* U.S. Br. 19 ("Congress is not limited in its ability to abrogate Puerto Rico's sovereign immunity").

Finally, Congress must surmount a clear-statement barrier before abrogating state sovereign immunity to mitigate the constitutional harm to the federal-state balance. *Supra* pp. 19-20. But the Territory Clause enshrines imbalance between Congress and territories. To put it mildly, the "concerns of federalism" animating this Court's state sovereign immunity jurisprudence "are inapplicable to territories." U.S. Br. 16.

This case illustrates the point, as well as the perversity of transplanting state sovereign immunity to Puerto Rico. The Board could not exist without Congress' plenary powers over territories. Congress could never install an unelected, federally appointed Board atop a

state government, let alone endow that Board with discretionary powers to nullify state laws, dictate state budgets, and operate outside state control. *See* 48 U.S.C. §§ 2141, 2142. So it takes some chutzpah for the Board to claim that state sovereign immunity insulates its regency over Puerto Rico from accountability and that Congress must speak clearly before subjecting the Board to federal suit to protect "sovereignty and federalism." That position is especially ironic in a suit that seeks to hold the Board to the same standard as all other governmental entities in Puerto Rico, which must face suit if they refuse to disclose documents about their operations.

Either Puerto Rico is state-like enough to avoid suffering the indignity of having its government commandeered by Congress—in which case the Board is unconstitutional. Or Puerto Rico is indeed a territory, subject to Congress' plenary territorial powers—in which case, the Board is not inherently immune from suit in federal court. What the Board cannot do is shield the vast authority Congress granted the Board under the Territory Clause with *state* sovereign immunity.

3. This Court need go no further. The Board, as the party invoking state sovereign immunity, bears the burden of establishing that defense. *See Hutto v. S.C. Ret. Sys.*, 773 F.3d 536, 543 (4th Cir. 2014) (collecting cases). Throughout this litigation, the Board has invoked state sovereign immunity alone. *Supra* pp. 17-18. The petition's asserted circuit split rests on state sovereign immunity cases. Pet. 14. And, as the government (at 15 n.2) observes, deciding whether Puerto Rico can claim state sovereign immunity is unavoidable: "To conclude that PROMESA does not abrogate the Board's immunity, the Court must determine that such immunity exists." *Accord* Cert. Reply 3 (asserting "no obstacle" to reaching this threshold question). The Board's arguments (at 20)

linking the stringency of the abrogation standard to "constitutional norms" and "federalism" reinforce the point.

The Board's brief never justifies why Puerto Rico could invoke the same sovereign immunity rules as States. Instead, the Board excises the word "state" and invokes a mysteriously generic "sovereign immunity" doctrine. But, beneath the hood, nearly every case the Board cites for a clear-statement rule involves *state* sovereign immunity. *E.g.*, Board Br. 14-15 (citing, *e.g.*, *Dellmuth*, 491 U.S. at 228; *Allen*, 140 S. Ct. at 999, 1001; *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 74 (2000); *Seminole Tribe*, 517 U.S. at 57; *Blatchford v. Native Vill. of Noatak & Circle Vill.*, 501 U.S. 775, 786 & n.4 (1991)).[8] Likewise, the Board's repeat warnings (at 18-20, 44) of "dangers to federalism" do not compute for territories. U.S. Br. 12.

The First Circuit's caselaw extending state sovereign immunity to Puerto Rico—which the Board (at 12 n.6) notes but does not defend—is equally conclusory and "incorrect." U.S. Br. 15. That caselaw originated in a 1981 footnote: "The principles of the Eleventh Amendment, which protect a state from suit without its consent, are fully applicable to the Commonwealth of Puerto Rico." *Ezratty v. Puerto Rico*, 648 F.2d 770, 776 n.7 (1st Cir. 1981). For decades, the First Circuit has simply reiterated that footnote, eschewing any "rigorous discussion or defense of [state sovereign immunity for Puerto Rico] in any of the First Circuit's case law." Adam D. Chandler, *Puerto Rico's Eleventh Amendment Status Anxiety*, 120 Yale L.J. 2183, 2191 (2011).

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[8] The only exceptions are stray citations to federal sovereign immunity cases to explain how the clear statement rule operates. Board Br. 16, 28 (citing *Lane v. Peña*, 518 U.S. 187 (1996)); *id.* 23, 29 (citing *United States v. Nordic Vill., Inc.*, 503 U.S. 30 (1992)); *id.* 29-30, 40 (citing *FAA v. Cooper*, 566 U.S. 284 (2012)).

In sum, "Puerto Rico currently isn't 'one of the United States,' and so any immunity it might possess must come from some other source." William Baude & Stephen E. Sachs, *The Misunderstood Eleventh Amendment*, 169 U. Pa. L. Rev. 609, 658 (2021) (quoting U.S. Const. amend. XI). Having hitched itself to the state sovereign immunity bandwagon, the Board cannot belatedly change course. The Board for years has chosen to litigate this case as state sovereign immunity or bust, and state sovereign immunity plainly does not apply.

B. No Other Clear-Statement Rule Constrains Congress in Subjecting Territories to Suit

The government (at 15, 19-20) agrees state sovereign immunity is a nonstarter for Puerto Rico. But instead of stopping there, the government presses a novel theory of territorial immunity that the Board has never embraced. In the government's telling, "Puerto Rico is a territory subject to Congress' plenary control," including "full and complete legislative authority over the people … and all the departments of the territorial governments." U.S. Br. 19, 20 (citations omitted). That plenary power, the government says (at 12, 20) lets Congress "abrogate Puerto Rico's sovereign immunity as [Congress] determines appropriate." Congress can nix territorial constitutions and commandeer territorial courts, apparently without any clear-statement rule. But the one red line Congress purportedly cannot cross without a clear statement, out of "respect for an inherent attribute of sovereignty," is to abrogate territories' supposed inherent immunity from suit in federal court. U.S. Br. 21-22. For good reason, this Court has never restricted Congress' plenary territorial power with that hidden catch.

1. Congress' plenary power over territories is incompatible with forcing Congress to express its intent unequivocally before subjecting territories to federal

suits. Such clear-statement rules stop Congress from plunging headlong into constitutional trouble by making Congress unambiguously telegraph its intent first.

Thus, Congress must speak loud and clear before abrogating state sovereign immunity or invading traditional areas of state concern, so that Congress does not carelessly topple the federal-state balance. *E.g.*, *Gregory v. Ashcroft*, 501 U.S. 452, 461 (1991); *Dellmuth*, 491 U.S. at 227-28; Board Br. 18. Likewise, Congress must be pellucid before delegating decisions of vast economic and political significance to administrative agencies to "ensure that the government does 'not inadvertently cross constitutional lines.'" *West Virginia v. EPA*, 142 S. Ct. 2587, 2620 (2022) (Gorsuch, J., concurring) (quoting Amy Coney Barrett, *Substantive Canons and Faithful Agency*, 90 B.U. L. Rev. 109, 175 (2010)).

No such guardrails apply when Congress invokes the Territory Clause. *Supra* pp. 17-25. The concept of plenary power refutes the idea that federal courts can fashion atextual preconditions to its exercise. The government's acknowledgement (at 19) that "Congress is not limited in its ability to abrogate Puerto Rico's sovereign immunity" fits uncomfortably with the added hurdle of a clear-statement rule. So does PROMESA's rule of construction disclaiming any intent "to limit the authority of Congress to exercise legislative authority over the territories" under the Territory Clause. 48 U.S.C. § 2191.

This Court has never imposed clear-statement rules before letting Congress control territorial governments or reject territorial constitutions. It defies credulity that the one area where federal courts should apply the brakes is Congress' plenary power to subject territories to federal lawsuits. And it is highly implausible that this

supposed clear-statement rule for territorial immunity has lurked undetected for more than two centuries.[9]

The government (at 21-22) nonetheless posits a transcendental clear-statement rule for abrogating or waiving sovereign immunity that applies across "various governments within our constitutional structure," "regardless of the source of the immunity" and who waives it. In the government's view, territorial immunity "parallels the sovereign immunity of the United States, the States, and Indian Tribes," and thus requires the same congressional "clear statement" to abrogate. U.S. Br. 11, 21.

Territories, however, differ in a key respect: they possess no independent sovereignty of their own for constitutional purposes. So a prophylactic clear-statement rule to protect territories' "inherent attribute[s] of sovereignty" against Congress, U.S. Br. 22, makes no sense. "Strictly speaking," this Court has said, "there is no sovereignty in a Territory of the United States but that of the United States itself." *Snow v. United States*, 85 U.S. (18 Wall.) 317, 321 (1873). Thus, not long ago, the government averred that even Puerto Rico's constitution and self-governance "did not transform Puerto Rico into a sovereign," and that "[t]he ultimate source of sovereign

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[9] Two cases state that Congress' "intention to supersede [territorial] law is not to be presumed, unless clearly expressed." *France v. Connor*, 161 U.S. 65, 72 (1896); *Inter-Island Steam Nav. Co. v. Territory of Hawaii*, 305 U.S. 306, 312 (1938). The government rightly does not rely on those cases, because they just reflect the ordinary rule that "absent clearly expressed congressional intention, repeals by implication are not favored." *Branch v. Smith*, 538 U.S. 254, 273 (2003) (citation omitted). That rule guides courts in interpreting overlapping laws (like whether Congress implicitly repealed a territorial law that it had approved, and whether Congress' legislation for Utah applied elsewhere).

power in Puerto Rico … remains the United States." U.S. Br. 7-8, *Puerto Rico v. Sánchez Valle*, No. 15-108 (2015).

The government's position is even more dubious because States, the United States, and Indian Tribes are not similarly situated for sovereign-immunity purposes. As discussed, state sovereign immunity and the associated clear-statement rule for abrogation reflects States' special constitutional status, pre-existing sovereignty, and federalism concerns. *Supra* pp. 18-20.

By contrast, the United States' sovereign immunity in federal court reflects the rule that sovereigns cannot be sued in their own courts. *See Alden*, 527 U.S. at 715, 735; *infra* p. 30. The basis for the clear-statement rule for waiving the United States' immunity is longstanding but unclear. *E.g.*, *U.S. Dep't of Energy v. Ohio*, 503 U.S. 607, 615 (1992) (reciting "common rule" that "any waiver of the National Government's sovereign immunity must be unequivocal"); John Copeland Nagle, *Waiving Sovereign Immunity in an Age of Clear Statement Rules*, 1995 Wis. L. Rev. 771, 774 (1995) ("The Court has not explained why it created such a strong clear statement rule for waivers of federal sovereign immunity."). But one obvious rationale is to guard separation-of-powers interests, since federal sovereign immunity often protects Executive Branch agencies sued for implementing the law.

Meanwhile, the Court has rooted Tribes' sovereign immunity and the accompanying clear-statement rule for abrogation in the notion that Tribes possessed pre-existing sovereignty that was transferred to the United States to dispense in a form of stewardship. *See Michigan v. Bay Mills Indian Cmty.*, 572 U.S. 782, 788-89 (2014); *but see Kiowa Tribe of Okla. v. Mfg. Techs., Inc.*, 523 U.S. 751, 756-58 (1998) (questioning basis for such immunity). And, notwithstanding this Court's recognition of plenary congressional power over Tribes, this Court has expressed

qualms about congressional actions that would intrude on core aspects of tribal self-governance. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 59-60 (1978); *cf. United States v. Lara*, 541 U.S. 193, 215 (2004) (Thomas, J., concurring in the judgment). Whatever the contours of these immunity doctrines, the Court's cases certainly do not rest on an identical "respect for an inherent attribute of sovereignty" as a common thread, *contra* U.S. Br. 22.

The government's universal theory of clear-statement immunity rules also breaks down for other entities. Contrary to the government's assertion (at 21), clear-statement rules do not invariably constrain Congress any time Congress waives or abrogates an entity's immunity. For instance, Congress need not speak unequivocally to abrogate the immunity counties normally enjoy in state court so that counties face federal-law claims in state court. *Jinks v. Richland County*, 538 U.S. 456, 466 (2003). Because a county "do[es] not enjoy a constitutionally protected immunity from suit," *id.*, no clear-statement rule is needed. The same goes for territories.

2. The government's baseline premise that territories inherently possess immunity from federal-court suits is also faulty. Territories are immune from suit in their *own* courts, not federal courts. This Court has never held that Puerto Rico or other territories are "entitled to sovereign immunity that prevents the territorial government from being sued without its consent" in "federal court," not just territorial court. *Contra* U.S. Br. 11; *see id.* 15-17, 25. Indeed, a case the government omits, *People of Porto Rico v. Ramos*, expressly reserved the question. 232 U.S. 627, 632 (1914). There, the Court held that Puerto Rico's "consent … to be made a party defendant" to the federal-court case was dispositive. The Court disclaimed any "impli[cation] that Porto Rico could not have been made a

party without its consent … As to that *we express no opinion*." *Id.* (emphasis added).

The government's citations (at 16-17) repeat the unexceptional proposition that Puerto Rico and other territories are sufficiently sovereign-like in their governmental structure to invoke the "general rule exempting a government sovereign in its attributes from being sued without its consent." *Porto Rico v. Rosaly*, 227 U.S. 270, 273 (1913); *accord Kawananakoa v. Polyblank*, 205 U.S. 349, 353 (1907); *Puerto Rico v. Shell Co.*, 302 U.S. 253, 261-62 (1937); *Sancho Bonet v. Yabucoa Sugar Co.*, 306 U.S. 505, 506 (1939). That common-law type of immunity "applies automatically, on the theory that it is simply 'inherent in the nature of sovereignty,' The Federalist No. 81, p. 548 (J. Cooke ed. 1961)." *Bay Mills*, 572 U.S. at 815-16 (Thomas, J, dissenting); *accord Hyatt*, 139 S. Ct. at 1493; U.S. Br. 17.

But that doctrine involves whether entities function enough like sovereigns to claim common-law immunity in the entity's *own* courts. If an entity is governmental enough to enact its own laws and operate courts, the theory goes, it is governmental enough to be immune in those courts. *See Polyblank*, 205 U.S. at 353; *Coffield v. Territory of Hawaii*, 13 Haw. 478, 479-81 (1901); *Territory of Wisconsin v. Doty*, 1 Pin. 396, 406-07 (Wis. 1844). This Court has "long recognized that in *the sovereign's own courts*, 'the sovereign's power to determine the jurisdiction of its own courts and to define the substantive legal rights of its citizens adequately explains the lesser authority to define its own immunity." *Bay Mills,* 572 U.S. at 816 (Thomas, J., dissenting) (quoting *Kiowa*, 523 U.S. at 760 (Stevens, J., dissenting)) (emphasis added).

Unquestionably, Puerto Rico exercises more than enough self-governance to assert this common-law immunity in territorial courts. U.S. Br. 16-18; *see Rosaly*,

227 U.S. at 273-74. But, no matter how autonomous the territory, that common-law immunity applies only "as a defense in [the sovereign's] own courts." *Bay Mills*, 572 U.S. at 816 (Thomas, J., dissenting). "Sovereign immunity is not a freestanding 'right' that applies of its own force when a sovereign faces suit in the courts of another." *Id.* Rather, the sovereign's immunity "in the courts of another has often depended in part on comity or agreement." *Alden*, 527 U.S. at 749.

That distinction between immunity in one's own courts versus elsewhere dooms the government's theory that territories are inherently immune in federal courts. The rule that sovereigns are inherently immune in their own courts is limited to courts the sovereign controls, *i.e.*, territorial courts here. In federal court, territorial immunity is for Congress to create or withhold. Territories cannot borrow the United States' immunity in its own courts, because the Territory Clause is a one-way ratchet. Congress dictates how territories can govern, but territories do not get to claim some of the United States' own sovereign attributes in return. Indeed, PROMESA underscored this point by expressly disclaiming that the Board is in any way part of the federal government. 48 U.S.C. § 2121(c)(2); *Aurelius*, 140 S. Ct. at 1661.[10]

[10] Considering federal courts as home courts for territories, on the theory that the United States and Puerto Rico are not separate sovereigns, would still not help the Board. The government concedes (at 32) that "Puerto Rico … appears to have waived its sovereign immunity" for the type of access-to-information claims at issue here, "or otherwise rendered immunity inapplicable" in territorial courts. If Puerto Rico's purported inherent immunity applied in both territorial and federal courts on the theory that they are the *same* sovereign's courts, so should Puerto Rico's nullifications of immunity.

All the government's citations involve Puerto Rico's immunity from suit in *territorial* court.[11] None mention a clear-statement rule that Congress supposedly must follow to affect a territory's immunity. And justices of this Court have uniformly interpreted those cases as holding just that "a Territory may retain common-law sovereign immunity against claims raised in its own courts under its own *local* laws." *Ngiraingas v. Sánchez*, 495 U.S. 182, 205 (1990) (Brennan, J., dissenting); *see Kiowa*, 523 U.S. at 760 (Stevens, J., dissenting). And the government's explanation (at 17-18) for why this common-law immunity should expand to include "suits in federal court" as an inherent "attribute of sovereignty" gives up the game. The government invokes "background principles of immunity" from *Hans v. Louisiana*, 134 U.S. 1 (1890). But those "background principles" are unique to States, which are immune beyond their own courts only because the Constitution "embeds" their immunity in federal and other state courts "within the constitutional design." *Hyatt*, 139 S. Ct. at 1497; *supra* pp. 18-19. The government's misunderstanding of territorial immunity is all the more reason to reject a theory apparently invented for this case.

3. Wading into the government's territorial-immunity theory is also practically unnecessary. Holding that Puerto Rico lacks state sovereign immunity means the Board is subject to suit in this case. But, whatever happens here, Puerto Rico has *statutory* immunity from federal suits involving generally applicable federal claims.

The Puerto Rico Federal Relations Act provides that "[t]he statutory laws of the United States not locally inapplicable … shall have the same force and effect in Puerto

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[11] *Rosaly*, 227 U.S. at 273; *Shell Co.*, 302 U.S. at 261-62 (affirming *Rosaly*); *Sancho Bonet*, 306 U.S. at 506 (same); *Polyblank*, 205 U.S. at 349 (involving Hawaii's immunity from suit in territorial court).

Rico as in the United States." 48 U.S.C. § 734. The D.C. and First Circuits have interpreted the Act to mean that, where generally applicable federal statutes are concerned, Puerto Rico gets the benefit of whatever immunity from federal statutory claims that the States enjoy. Plaintiffs who sue Puerto Rico under a generally applicable federal statute (like Title VII) can maintain that suit only if the statute validly authorizes claims against States. If sovereign immunity otherwise bars the suit as to States, Puerto Rico cannot be sued either. *See Rodríguez v. P.R. Fed. Affs. Admin.*, 435 F.3d 378, 381-82 (D.C. Cir. 2006); *Jusino Mercado v. Puerto Rico*, 214 F.3d 34, 42 (1st Cir. 2000). The Federal Relations Act simply does not protect the Board under PROMESA, which applies only to territories.

II. Under Any Standard, Congress Abrogated Whatever Immunity the Board Enjoys

Even were Congress subject to a clear-statement rule when subjecting territories to federal suits, PROMESA clears that bar. Congress enacted a judicial-review scheme that applies *only* to the Board, expressly contemplates that the Board will face various federal-law claims, and grants the Board broad protection from liability on the merits. Congress was even clearer in expressing its intent that federal-court suits against the Board for injunctive and declaratory relief could proceed—and those are the very claims at issue here.

A. At Most, PROMESA Must Evince the Unmistakable Implication that Congress Intended Abrogation

Assuming that the clear-statement rule for state sovereign immunity applies, Congress must "unequivocally express[] its intent to abrogate" immunity. *Seminole Tribe*, 517 U.S. at 55 (cleaned up). Congress must make

that "intention to abrogate unmistakably clear in the language of the statute." *Nev. Dep't of Human Res. v. Hibbs*, 538 U.S. 721, 726 (2003). But "Congress need not state its intent in any particular way." *Cooper*, 566 U.S. at 291; *accord Dellmuth*, 491 U.S. at 233 (Scalia, J., concurring).

Thus, Congress can abrogate immunity by "expressly mention[ing] sovereign immunity, abrogation, or related concepts." Board Br. 22. But Congress can also clearly evince its intent to abrogate immunity via inferences from the statutory text, so long as the text generates an "unmistakably clear" expression of Congress' intent to abrogate. *Kimel*, 528 U.S. at 74; *Seminole Tribe*, 517 U.S. at 56-57; *Hibbs*, 538 U.S. at 726. The Board previously conceded the point, yet now denies this principle. *Compare* Cert. Reply 8 ("ways Congress can unequivocally abrogate sovereign immunity" include "creat[ing] a statutory scheme having no purpose if states were not defendants"), *with* Board Br. 22 (no longer).

For instance, Congress clearly abrogated state sovereign immunity in the Indian Gaming Regulatory Act (IGRA) by granting federal 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 specified purposes. *Seminole Tribe*, 517 U.S. at 49 (quoting 25 U.S.C. § 2710(d)(7)(A)(i)). The Court held that the "jurisdictional" provision did not merely open the federal courts to such claims. The provision, read alongside others, clearly abrogated States' immunity, because *only* States could fail to negotiate. Without abrogation, the provision would be a nullity. *Id.* at 57.

Likewise, the Court held that various provisions of the Age Discrimination in Employment Act (ADEA), taken together, clearly evinced Congress' intent to abrogate state sovereign immunity. *Kimel*, 528 U.S. at 74. *Kimel* started with the ADEA's mandate that its provisions "be

enforced in accordance with [specified] powers, remedies, and procedures," including 29 U.S.C. § 216(b). *Id.* at 73 (quoting 29 U.S.C. § 626(b)). Section 216(b), *Kimel* observed, authorized employee actions for backpay "against any employer (including a public agency) in any Federal or State court of competent jurisdiction." *Id.* at 73-74. Finally, *Kimel* turned to the definition of a "public agency" in another provision, § 203(x), to include "any agency of … a State, or a political subdivision of a State." *Id.* at 74. By fitting pieces of the statutory mosaic together, *Kimel* concluded, "the plain language of these provisions clearly demonstrate[d] Congress' intent" to abrogate state sovereign immunity. *Id.*

These cases disprove the Board's assertions (at 27-30, 40-41) that applying a clear-statement rule for abrogation transports courts to an "entirely different" universe where normal interpretive rules of gravity disappear and a lack of legislative history showing that members of Congress discussed abrogation is dispositive. Courts simply ask whether abrogation is "clearly discernable from the statutory text in light of traditional interpretive tools." *Cooper*, 566 U.S. at 291; *see Kimel*, 528 U.S. at 73-74. If Congress' intent to abrogate is unmistakably clear, immunity disappears. "If it is not, then ... the interpretation most favorable to the Government" litigant prevails. *Cooper*, 566 U.S. at 291; *accord* U.S. Br. 25-26; Pet.App.30a.

B. PROMESA Clearly Intended to Eliminate Any Immunity Against Federal-Court Suits

Read together, multiple provisions of PROMESA are incompatible with sovereign immunity and unmistakably show that Congress intended to channel all claims against the Board to federal court and abrogate whatever immunity the Board might claim there.

§ 2126's Exclusive Application to the Board. In virtually every other abrogation case, this Court confronted generally applicable statutes and asked whether Congress was focused enough on the consequences for States to abrogate their immunity. PROMESA unambiguously dispels that concern. Here, Congress had a one-track mind: the relevant subchapter applies exclusively to the Board and its members. Congress endowed only the Board with special powers and protected only the Board from oversight by territorial governments. And Congress prescribed judicial review only for claims against the Board or otherwise arising under PROMESA.

Moreover, PROMESA's attentiveness to judicial review of the Board's actions borders on the obsessive. Congress prescribed a reticulated, Board-specific process whereby only specific federal courts can entertain claims against the Board, § 2126(a), only specific forms of relief can take immediate effect against the Board, § 2126(c), and only specific claims against the Board can proceed on the merits, § 2125. Congress even addressed which lawyers the Board could retain to defend "action[s] brought … against the Oversight Board." § 2128(b).

Because the Board is the be all and end all of PROMESA's judicial-review scheme, the unambiguous implication is that Congress did not just endow federal courts with jurisdiction over claims arising from the Board's operations. Congress fully expected federal courts to resolve the merits of those claims and grant relief against the Board. Congress unequivocally did *not* expect the Board to enjoy sovereign immunity that would stop those merits resolutions from ever happening.

§ 2126(a)'s Channeling of Federal Jurisdiction. Section 2126(a), PROMESA's principal judicial-review provision, clearly contemplates that the Board will face all

sorts of claims, and that all such suits must proceed in federal court:

> Except as provided in section 2124(f)(2) of this title (relating to the issuance of an order enforcing a subpoena), and subchapter III (relating to adjustments of debts), *any action* against the Oversight Board, and *any action* otherwise arising out of this chapter … *shall be* brought in … United States district court [in Puerto Rico].

48 U.S.C. § 2126(a) (emphases added).

Congress did not just confer federal jurisdiction over federal claims against the Board. C*ontra* Board Br. 43-44. Nor does CPI contend that § 2126(a) evinces Congress' intent to abrogate immunity just by granting federal jurisdiction. *Contra* Board Br. 18-19. Critically, Congress granted federal courts exclusive jurisdiction and channeled virtually *all* types of claims that the Board could face in any other court, including territorial courts, to federal court instead. *Accord* U.S. Br. 27. That channeling includes Puerto Rico-law claims like CPI's claim here; as the government (at 30) observes, "*any* action against the Oversight Board" means all, "not simply those based on federal law."

Thus, Congress deliberately prescribed that for the vast majority of suits against the Board, it is federal court or nothing. Congress does not go to the trouble of channeling particular claims to a particular forum only for sovereign immunity to block them. And Congress' two express exceptions to federal jurisdiction—for suits in territorial courts to enforce subpoenas, and for actions under Title III involving restructuring of a territory's debt—reinforce Congress' understanding that federal court is home for all other claims against the Board.

§ 2126(e)'s Jurisdiction-Stripping Exception. Section 2126(e) unambiguously manifests Congress' understanding that the Board would not enjoy immunity from claims over which Congress granted federal jurisdiction in § 2126(a). Section 2126(e) strips federal district courts of "jurisdiction … to review challenges to the Oversight Board's certification determinations"—*i.e.*, the Board's approval or rejection of territorial governments' fiscal plans and budgets.

That provision would be pointless if sovereign immunity already insulated the Board from challenges to any certification determinations. *See* Pet.App.28a. The Board (at 35) responds that jurisdiction and immunity are "distinct concepts" and portrays this provision as a bar on "judicial review." But § 2126(e) grants the Board an express protection that would be superfluous were the Board already immune from federal-court certification challenges. The government ignores § 2126(e).

§ 2126(c)'s Rules for Orders Against the Board. Section 2126(c)'s express recognition that federal courts could and would enter orders against the Board "to remedy constitutional violations" and "order[s] … granting declaratory or injunctive relief against the Oversight Board" is blatantly incompatible with immunity. By definition, immunity from suit forecloses federal-court remedies of any stripe. Yet Congress acknowledged and effectively endorsed federal courts' authority to impose remedies against the Board, merely delaying the effect of some orders to blunt their impact on the Board.

Section 2126(c) thus unmistakably permits *some* suits against the Board, namely for "constitutional violations" and "declaratory or injunctive relief." And language "explicitly contemplat[ing] 'the State' as defendant in federal court" is unambiguous evidence of an intent to abrogate immunity. *Lindh v. Murphy*, 521 U.S. 320, 328 n.4 (1997)

(quoting *Seminole Tribe*, 517 U.S. at 56). That feature of PROMESA should be dispositive here, because CPI's access-to-information suit *is* for declaratory and injunctive relief. CPI seeks an order compelling the Board to produce various documents, subject to withholding exceptions. Pet.App.121a-123a.

The Board (at 36) and the government (at 28-29) counter that § 2126(c) governs cases only where the Board is *otherwise* not immune and the suits involve "constitutional violations" or "declaratory or injunctive relief." That interpretation is untenable, not least because they identify no other source of law that would abrogate the Board's putative immunity in suits alleging constitutional violations. *Infra* pp. 43-44.

§ 2125's Protections Against Liability. Section 2125 unambiguously evinces Congress' expectation that the Board would ordinarily face myriad claims without protection. Section 2125 provides that the "Board, its members, and its employees shall not be liable for any obligation of or claim against the Oversight Board" or others "resulting from actions taken to carry out" PROMESA. Congress had no need to grant such protection if sovereign immunity already prevented the Board from facing such claims. The Board's list (at 41-42) of provisions granting the Board autonomy, §§ 2125, 2126(e), barring application of inconsistent territorial laws, §§ 2103, 2128, and other protections shows that Congress indeed "went to the trouble of granting the Board shields to litigation"—but the Board would never need those shields if sovereign immunity nipped all claims in the bud.

Meanwhile, the government's understanding of § 2125 (at 30-31) is difficult to parse. The government hazards this provision "may also bar monetary liability of the Board … for actions taken under PROMESA," but immunity would already prevent such liability. The

government suggests that § 2125 protects the Board from claims arising in Title III adversary proceedings, involving restructuring territorial debt. True enough, but when Congress wanted to carve out exclusions, Congress did so explicitly—like in § 2126(a)'s exception to federal jurisdiction over Title III actions. Clearly, Congress had a bigger target in mind for § 2125's liability protections.

In sum, "[r]ead as a whole, the plain language of these provisions clearly demonstrates Congress' intent to subject" the Board to suits in federal court, whether the suit involves federal-law or territorial-law claims. *See Kimel*, 528 U.S. at 74. Indeed, *Seminole Tribe* employed a similar analysis to find abrogation. *Seminole Tribe* held that IGRA clearly abrogated States' immunity from suit because IGRA granted federal jurisdiction over "any cause of action initiated by an Indian tribe arising from the failure of a State to enter into" specified negotiations. 517 U.S. at 49, 57. Because States were the only possible defendants to such claims, and because other provisions implicitly assumed States were defendants (for instance, by referring to remedial orders courts might impose on States), this Court found no "conceivable doubt" that Congress meant to abrogate state sovereign immunity. *Id.* at 57.[12] If anything, PROMESA's even more pointed references to "action[s] against the Board" and remedial orders against the Board make this an easier case.

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[12] The government (at 26-27) reframes *Seminole Tribe* as establishing that the statute at issue "itself" must create an "accompanying cause of action that is specific to a government entity." But the key in *Seminole Tribe* was that Congress enacted provisions that presupposed States could and would be sued. Whether a statute creates the cause of action or abrogates immunity for preexisting causes of action is irrelevant; either way, Congress expressed its intent for States specifically to defend against those actions. *See Lindh*, 521 U.S. at 328 n.4.

C. The Board's and Government's Contrary Interpretations Lack Merit

The Board and the government press a nonsensical reading of PROMESA's judicial-review scheme for the Board. They primarily contend that PROMESA does not eliminate any of the Board's immunity. They agree that § 2126(a) grants federal jurisdiction over "any action against the Board" and routes virtually all actions involving the Board to federal court, and that § 2126(c) structures the timing and effect of various remedies against the Board. They thus agree that PROMESA expressly contemplates that the Board will face *some* claims in federal court. Board Br. 25, 36; U.S. Br. 28-29.

But they argue that PROMESA's references to actions proceeding against the Board just mean actions where the Board independently lacks immunity—namely, when the Board waives immunity, or where Congress validly abrogated immunity elsewhere (specifically: Title VII, the Family and Medical Leave Act, and the Equal Pay Act). Board Br. 25; U.S. Br. 13-14, 28-29. The government (at 29) adds that PROMESA operates on claims where Puerto Rico validly waived or abrogated immunity, but questions (at 29, 33) whether PROMESA allows such actions to proceed against the Board.

Under these interpretations, § 2126(e), which strips federal-court jurisdiction over claims challenging the Board's decisions certifying territorial fiscal and economic plans, would be superfluous. Under the Board's and government's reading, the Board already enjoys immunity against all claims involving such decisions. Congress had no need to protect the Board against claims it already could not face. *Supra* p. 38.

The other side's readings also relegate PROMESA's elaborate judicial-review scheme to fringe cases, directly

conflicting with multiple provisions. To start, cases where the Board elects to waive immunity do not count for purposes of parsing whether statutory language presupposes abrogation. This Court has rejected the notion that Congress legislates with States' ability to waive immunity in mind. *See Kimel*, 528 U.S. at 75. That leaves PROMESA's entire, reticulated judicial-review scheme for channeling claims and delaying the effect of various orders against the Board to operate upon a spoonful of federal employment-law claims where Congress validly abrogated immunity in other statutes (and maybe, the government suggests, some territorial-law claims).

That interpretation cannot explain § 2126(c)'s limitations on enforcing declaratory and injunctive relief. Congress had no idea how many employees the Board would hire. Yet the Board's and government's readings assume Congress was so acutely concerned by the specter of declaratory or injunctive employment relief against the Board that Congress delayed any enforcement until the Board exhausts appeals. Those readings also clash with § 2126(c)'s delay of "relief permitting or requiring the obligation, borrowing, or expenditure of funds." No employment-discrimination remedy compels the Board to borrow funds, underscoring that Congress had broader injunctive actions in mind—and clearly contemplated that the Board's amenability to suit would not be so limited.

The Board and the government's interpretations also render § 2125's protection against liability inexplicable. If the Board had sovereign immunity, Congress would not need to add redundant protections insulating the Board from "any obligation of or claim against the" Board relating to its operations. Section 2125 also applies to claims against the Board "resulting from actions taken to carry out" PROMESA, and it is hard to see how employment-related actions qualify. Section 2125 presupposes there

are some other claims out there to block—which would be true only if PROMESA itself exposed the Board to suit for those claims.

Likewise, § 2126 contemplates that PROMESA's scheme will operate on actions where PROMESA supplies the basis for federal jurisdiction. Thus, § 2126(b) governs appeals of orders issued "pursuant to an action *brought under* subsection (a)," and § 2126(d) expedites consideration of "of any matter *brought under* this chapter." But the Board's limited examples of non-barred suits (*e.g.*, Title VII) all have their own jurisdictional provisions independent of § 2126(a), making it unclear when these parts of § 2126 would ever operate.

On the other hand, the Board and the government sometimes acknowledge that the Board may also face claims for "constitutional violations." Board Br. 37 n.10; U.S. Br. 13, 28. As noted, PROMESA expressly contemplates that federal courts will enter orders against the Board for "constitutional violations," and authorizes such orders to take immediate effect. § 2126(c). The Board also concedes that it must face claims that it "exceeded its powers." Board Br. 25; *see* U.S. Br. 28 n.6. In fact, the Board has faced federal-court suits seeking injunctive relief to redress the Board's violating its statutory mandate and has not asserted immunity there. *E.g.*, *R&D Master Enters. v. Fin. Oversight & Mgmt. Bd.*, No. 21-137, 2022 WL 1092697 (D.P.R. Apr. 12, 2022).

Where the Board's amenability to such suits comes from, if not PROMESA, is a mystery. The government does not explain. The Board offers no justification for suits involving exceeding its authority, and implausibly speculates (at 37 n.10) that "constitutional claims" under § 2126(c) might mean *Ex parte Young* actions. But § 2126(c) contemplates constitutional claims *against the*

Board, whereas *Ex parte Young* actions enjoin state *officers* from ongoing violations of federal law, on the theory that such officers are not the sovereign in those circumstances. *Cf.* U.S. Br. 28 n.6 (demurring whether *Ex parte Young*-style suits could be brought).

D. Abrogation Fits with PROMESA's Design

1. Congress enacted PROMESA to help Puerto Rico "achieve fiscal responsibility and access to the capital markets." 48 U.S.C. § 2121(a). To that end, Congress created the Board as an "entity within the territorial government," empowered to oversee Puerto Rico's system of governance. *Id.* § 2121(c)(1); *supra* pp. 6-7. Congress even authorized the unelected Board to "supervise and modify" all territorial laws and prevent Puerto Rico's democratically elected governor or legislature from enacting laws that would frustrate the Board's mission. *Id.* § 2128. Congress disempowered territories' political branches to leave politically difficult but (in Congress' judgment) financially necessary decisions to the Board.

The upshot of the Board's sweeping powers is not that Congress intended the Board to enjoy blanket federal-court immunity on top, *contra* Board Br. 42. Congress balked at creating an Oversight Board that would lack any meaningful oversight of its own, and imposed restricted judicial review to provide *some* accountability. Congress did not leave sovereign immunity as an escape hatch for the Board to evade any responsibility for decisions affecting the fate of millions of residents of Puerto Rico, while holding the Board's feet to the fire in the off-chance the Board denies its employees adequate time off under the Family and Medical Leave Act.

2. The Board (at 43-44) expresses particular umbrage at lacking immunity from territorial claims in federal

court. But the Board's assertions of "*Pennhurst* immunity" for territorial-law claims are non-sequiturs. *Supra* pp. 21-22. *Pennhurst* concerns *States*—not territories, as the Board (at 43) misrepresents—and state *officers*—not "state entit[ies]" (at 10). *Pennhurst*, 465 U.S. at 106; *accord* U.S. Br. 20-21 & n.4. And the Board's contention that the decision below finds an "unprecedented scope of abrogation" that will cascade across other statutes rings hollow given that PROMESA is a territory-specific statute that is exceptional in every other way.

More broadly, PROMESA's text reinforces that Congress wanted to hold the Board accountable for territorial claims, especially claims arising under Puerto Rico's constitution. Congress applied PROMESA's judicial-review scheme to "any action" against the Board, not just federal-law claims. 48 U.S.C. § 2126(c); U.S. Br. 29-30. And, despite granting the Board immense authority, Congress withheld the power to defy territorial constitutions. The Board can block the Governor and Legislature from "enact[ing], implement[ing], or enforc[ing] any statute, resolution, policy, or rule that would impair" the Board's work. 48 U.S.C. § 2128(a)(2). But Congress denied the Board the power to thwart constitutional commands that the people ratified and Congress endorsed.

At a minimum, PROMESA does not let the Board claim sovereign immunity to defeat claims arising under Puerto Rico's constitution. Congress designated the Board "an entity within the territorial government," 48 U.S.C. § 2121(c)(1), and the Board relies on that designation for its putative immunity. But being part of Puerto Rico's territorial government entails being subject to Puerto Rico's constitution. And that constitution is largely self-executing, meaning that the constitution authorizes suit directly against the government for

numerous claims, without any immunity considerations.[13] With the bitter comes the sweet: if the Board wants to associate with the Puerto Rico government so as to share its immunity, the Board must live with the corresponding lack of immunity for constitutional claims. PROMESA did not render the Board the only entity within the Puerto Rico government whose constitutional violations cannot face scrutiny. *Contra* Board Br. 38-40.[14]

This case is illustrative. As the government (at 32) acknowledges, "[t]he Puerto Rico Supreme Court has long recognized a constitutional right of citizens to have access to public records." Further, the government concedes, citizens enforce the public right of access against the Commonwealth in territorial courts without immunity considerations, and Puerto Rico "appears to have waived its sovereign immunity for such suits, or otherwise rendered immunity inapplicable." U.S. Br. 32. Not only that, the Board allowed a 2019 Puerto Rico law to take effect that codified Puerto Rico's access-to-information caselaw and reiterates that all parts of Puerto Rico's government must face suit for access-to-information claims. P.R. Laws Ann. tit. 3, § 9912. By its terms, that statute covers the Board, as an entity within Puerto Rico's government.

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[13] For example, the Puerto Rico Supreme Court has recognized that "Secs. 1 and 8 of Art. II of the Constitution of the Commonwealth," involving the right to privacy and "dignity of the human being" "are self-executing" and directly enforceable against the government. *Figueroa Ferrer*, 7 P.R. Offic. Trans. at 283. So too for suits for access to government documents. *Bhatia Gautier*, J.A. 83a-85a; *Bauermeister*, 152 P.R. Dec. at 177.

[14] The Commonwealth of Puerto Rico agrees: "The Board's unique role as a territorial agency created by federal statute also indicates that Congress intended it to be subject to at least the level of judicial review imposed on territorial agencies." Pet. 24, *Pierluisi v. Fin. Oversight & Mgmt. Bd.*, No. 22-484, (U.S. Nov. 18, 2022).

Every other entity within the territorial government routinely faces the access-to-information claim CPI brought here. *See Bhatia Gautier*, J.A. 95a-96a. The sky has not fallen, and the Board has abandoned its earlier assertions that complying with Puerto Rico's constitution's sunshine requirements would somehow thwart its mission or prompt telephone-only operations. *See* Pet. 24-26; *contra* U.S. Br. 33 (asserting unraised "special needs for confidentiality" for the Board). The only downside the Board (at 41-42) now identifies to lacking immunity in federal court is "the distraction of litigation." But Congress reasonably considered distraction a small price to pay for holding Puerto Rico's regent responsible in some way, shape, or form for far-flung decisions on pensions, pay, and the availability of electricity that have upended millions of residents' lives. *Supra* pp. 6-7.

E. Remand Is Unwarranted

The government (at 31-33) urges a remand to determine whether this case falls within the government's permitted category of cases where Puerto Rico's constitution or another territorial law provides for suit against the Commonwealth and does not otherwise run afoul of PROMESA.

But that territorial-authorization theory *is* this case. As noted, the government rightly concedes (at 32) that CPI's access-to-information claim arises under Puerto Rico's constitution, and that Puerto Rico has apparently "waived its sovereign immunity … or otherwise rendered immunity inapplicable" for access-to-information suits. PROMESA did not negate that feature of Puerto Rico law by channeling the claim to federal court. *Supra* pp. 45-46.

The government (at 31-32) ironically urges a remand for party briefing and more lower-court review. But if this Court is willing to wade through the government's never-

before-aired theory of territorial immunity, then a "long recognized" aspect of Puerto Rico constitutional law, U.S. Br. 32, should not be the sticking point. The government's observation (at 32) that waivers of sovereign immunity in one court do not necessarily transfer to other sovereigns' courts is no bar, either. If (as the government posits) Puerto Rico's purported immunity applies equally in territorial and federal courts, so should its negations of immunity. *Supra* p. 31 n.10. Finally, the government erroneously suggests (at 32-33) that "PROMESA's limits" might trump Puerto Rico's constitution. But PROMESA allows the Board to overrule Puerto Rico's governor and legislature, 48 U.S.C. § 2128(a), not Puerto Rico's constitution or its Supreme Court. *Supra* pp. 45-46.

Ultimately, this Court need not wade into the government's elaborate detours. The best route through this case is the simplest one. Puerto Rico—and thus, the Board—cannot claim state sovereign immunity, and that is the only shield the Board has raised.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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