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 OF PUERTO RICAN LEGAL SCHOLARS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

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INTEREST OF THE *AMICI CURIAE*

Amici curiae are law professors who teach in Puerto Rico. They have studied U.S. constitutional law and its effects on Puerto Rican law and society. *Amici* submit this brief to explain the nature and scope of sovereign immunity in Puerto Rico, and to emphasize the importance of the Puerto Rico Constitution's right of access to information against the local government.[1]

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[1] All parties have provided written blanket consents to the filing of *Amicus* Briefs. No party's counsel authored this brief in whole or in part. No party or party's counsel contributed money intended to fund the brief's preparation or submission; and no person other than *Amicus* contributed money intended to fund the brief's preparation.

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SUMMARY OF THE ARGUMENT

For Petitioner this controversy concerns abrogation of sovereign immunity under the Eleventh Amendment. But that is incorrect. This case is about inherent sovereign immunity, not about Eleventh

Amendment immunity. It is about a sovereign waiving its immunity to protect democratic rights, not about whether Congress abrogated the Board's so-called sovereign immunity. By adopting the right of access to public information under their Constitution (P.R. CONST., art. II, sec. 4.), the Puerto Rican people waived their inherent sovereign immunity and consented to right-of-access claims against the territorial government, which now includes the Financial Oversight and Management Board. 48 U.S.C. § 2121(c)(1), (2).

In *Aurelius*, Petitioner prevailed by arguing that it is an entity of the territorial government for purposes of the Appointments Clause. *Fin. Oversight & Mgmt. Bd. for P.R. v. Aurelius Inv., LLC*, 140 S. Ct. 1649, 1661 (2020). Here, however, Petitioner wants to be exempted from right of access claims that apply to the territorial government of which it is a part. This Janus-faced Board wants to be territorial one day and extraterritorial another. Puerto Rico waived its immunity by authorizing its citizens to demand access to public information. This democratic right is as important today as it was when the Supreme Court of Puerto Rico recognized it in a moment of political repression and violence. Petitioner as an entity of the territorial government is bound by it today and Congress has not said otherwise.

This Court should decide, for the first time, that the sovereign immunity of the Eleventh Amendment does not apply to Puerto Rico. First Circuit case law applying the Eleventh Amendment to Puerto Rico did not carefully consider its text and history. The application of the Amendment to Puerto Rico complicates the true nature and scope of Puerto

Rico's immunity. While a U.S. state may waive its immunity and Congress may abrogate it, in Puerto Rico, under the view of the District Court, Congress is the one that can both waive and abrogate Eleventh Amendment immunity. In the U.S. states abrogation by Congress is constitutionally limited. But in the U.S. territories, Congress does not face the same limitations. The problems of the territories require their own case law and considerations that cannot be answered by applying the Eleventh Amendment or the *Pennhurst* doctrine.

Detaching sovereign immunity from the Eleventh Amendment is the first step. The second step is recognizing that Puerto Rico, as a U.S. territory, still has inherent sovereign immunity, also known as common-law immunity. In the early twentieth century, this Court established this sovereign immunity for the Territory of Hawaii and soon after for the Territory of Puerto Rico. *Kawananakoa v. Polyblank*, 205 U.S. 349 (1907); *Porto Rico v. Rosaly y Castillo*, 227 U.S. 270 (1913). For this Court, the U.S. territories were sovereign in this respect, even if not sovereign for other purposes. *People of Puerto Rico v. Shell Co.*, 302 U.S. 253, 262, 264 (1937). Even the Supreme Court of Puerto Rico, when deciding the scope of Puerto Rico's immunity to civil actions, consistently applied this inherent sovereign immunity, and not the Eleventh Amendment. This is also the immunity so far acknowledged for other U.S. territories by all other courts beyond the First Circuit. Therefore, the First Circuit's treatment of Puerto Rico as a state for purposes of the Eleventh Amendment is inconsistent with its sister courts. Puerto Rico, through its own

legislature, can decide the full scope of that immunity and waive it as it deems necessary for democratic accountability.

The final step is deciding whether Puerto Rico waived its inherent sovereign immunity by recognizing a right of access to public information. According to the Supreme Court of Puerto Rico, this constitutional right follows from the freedoms of speech, assembly, and press, as well as the right to petition recognized in Puerto Rico's Constitution. Citizens can petition for a *mandamus* against the territorial government to compel the disclosure of public information. This is, therefore, one situation where Puerto Rico has waived its immunity for actions based on its Constitution. P.R. Laws Ann. 32 § 3077. While ordinarily these cases against the territorial government are filed in Puerto Rican courts, Section 106(a) of the Puerto Rico Oversight, Management, and Economic Stability Act ("PROMESA") requires Puerto Rican citizens, here the Centro de Periodismo Investigativo, to bring any suit against the Board in the U.S. District for the District of Puerto Rico. 48 U.S.C. § 2126(a). Petitioner contends that this section did not abrogate the Board's sovereign immunity. But the wrong question begets the wrong answer. Here, the true sovereign, the people of Puerto Rico, waived their immunity long before PROMESA by recognizing the right of access to public information. The Board, as an entity of the territorial government, cannot claim, in the name of sovereignty, a mightier immunity that overrules our democratic rights.

ARGUMENT

I. The Eleventh Amendment Does Not Apply to U.S. Territories

A. Text and History of the Eleventh Amendment

Inherent sovereign immunity, also known as common law immunity, precedes the Constitution. The Federalist No. 81, p. 548 (J. Cooke ed. 1961) (A. Hamilton) ("It is inherent in the nature of sovereignty not to be amenable to the suit of an individual without its consent."); *Alden v. Maine*, 527 U.S. 706, 713 (1999) ("the States' immunity from suit is a fundamental aspect of the sovereignty which the States enjoyed before the ratification of the Constitution."). Article III of the Constitution, however, extended federal jurisdiction to cases "between a State and Citizens of another State." U.S. CONST. art. III, sec. 2. Did this clause abrogate common law sovereign immunity? In *Chisholm v. Georgia*, 2 U.S. 419 (1793), this Court held that by authorizing federal courts from deciding these cases, in that case between a citizen of South Carolina and the State of Georgia, the states gave up their "right of sovereignty." *Id.* at 452 (Blair J., concurring).

Almost immediately, *Chisholm* was superseded by the Eleventh Amendment, which reads: "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." U.S. CONST., amend. XI. By its own terms ("against one of the United

States"), the Amendment only shields U.S. states, not U.S. territories. W. Baude & S.E. Sachs, *The Misunderstood Eleventh Amendment,* 169 U. Pa. L. Rev. 609, 624 (2021) ("[t]he Amendment protects states, and only states."). It also only applies in federal courts ("The Judicial Power of the United States"), not in state courts. *PennEast Pipeline Co., LLC v. New Jersey*, 141 S. Ct. 2244, 2264 (2020) (Gorsuch, J., dissenting). Finally, it only applies in diversity cases ("by Citizens or Subjects of any Foreign State."). Read alongside the Diversity Jurisdiction Clause, the Eleventh Amendment clarifies that diversity jurisdiction does not extend to cases against States by citizens of another state or by non-citizens. W.E. Fletcher, *A Historical Interpretation of the Eleventh Amendment*, 35 Stan. L. Rev. 1033 (1983); *Cf.* Baude & S.E. Sachs, *supra*, at 633 ("we find the diversity theory unpersuasive."). The Eleventh Amendment provides a constitutional immunity, different from the inherent sovereign immunity, that only applies in federal courts in diversity actions against state governments.

Could the phrase "United States" of the Eleventh Amendment mean any distinct political entity, including the U.S. territories? This Court did not decide this question until two opinions penned by Chief Justice Marshall held that the terms of the Diversity Jurisdiction Clause, which were reiterated by the Eleventh Amendment, did not include the District of Columbia or U.S. territories because "neither of them is a state." *Corporation of New-Orleans v. Winter*, 14 U.S. 91 (1816); *Hepburn & Dundas v. Ellzey*, 6 U.S. 445, 452-53 (1805) ("the members of the American confederacy only are the

states contemplated in the constitution."). If "state" in Art. III, Sec. 2 only meant the United States, then the phrase "United States" in the Eleventh Amendment does not include U.S. territories.[2] The text and history of the Eleventh Amendment and its intratextual comparison with the Diversity Jurisdiction Clause suggest that the Eleventh Amendment does not apply to U.S. territories.

B. The Reasoning of First Circuit Case Law

This Court has never decided that the Eleventh Amendment applies to Puerto Rico or any U.S. territory. Instead, it chose to reserve the question because its application went unchallenged. *P.R. Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 141 n.1 (1993) ("As the case comes to us, the law of the First Circuit—that the Commonwealth of Puerto Rico is treated as a State for purposes of the Eleventh Amendment—is not challenged here, and we express no view on this matter.") (citation omitted). This Court should settle the issue and disallow First Circuit case law that extended, without careful reasoning, the Eleventh Amendment to Puerto Rico.

In *Ezratty v. Com. of Puerto Rico*, 648 F.2d 770 (1st Cir. 1981), the First Circuit held, for the first

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[2] In 1940, Congress extended diversity of citizenship jurisdiction to the District of Columbia and U.S. territories. 28 U.S.C. § 1332(d). In *National Mut. Ins. Co. v. Tidewater Transfer Co.*, 337 U.S. 582 (1949), a plurality upheld the constitutionality of the statute, but disagreed on whether U.S. territories can be considered a "state" pursuant to art. III, sec. 2. The decisions by Chief Justice Marshall that the word "state" in art. III, sec. 2 did not include D.C. or the territories were, therefore, not overruled.

time, that Puerto Rico was a state for purposes of Eleventh Amendment immunity. In a footnote, then-Judge Breyer stated as a matter of fact that "[t]he principles of the Eleventh Amendment, which protect a state from suit without its consent, are fully applicable to the Commonwealth of Puerto Rico." *Id.* at 776 n.7. The Court did not examine the text and history of the Eleventh Amendment or case law from other U.S. Court of Appeals. Instead, the First Circuit relied foremost on *Ursulich v. P.R. Nat'l Guard,* 384 F. Supp. 736 (D.P.R. 1974), a decision by the U.S. District Court for the District of Puerto Rico. But *Ursulich* only applied the inherent sovereign immunity recognized by this Court in *Porto Rico v. Rosaly y Castillo*, 227 U.S. 270 (1913), rather than Eleventh Amendment immunity. *See* A.D. Chandler, *Puerto Rico's Eleventh Amendment Status Anxiety*, 120 Yale L.J. 2183, 2191 (2011). The perplexing foundation for treating Puerto Rico like a state for purposes of the Eleventh Amendment is, therefore, a decision of this Court that understood Puerto Rican sovereign immunity to be inherent, not constitutional.

The First Circuit continues to treat Puerto Rico like a state for purposes of the Eleventh Amendment. *Borrás-Borrero v. Corporación del Fondo del Seguro del Estado*, 958 F.3d 26, 33 (1st Cir. 2020). While *Ezratty* might have relied on unsound reasoning, it was consistent with a constitutional embellishment that approximated the Commonwealth of Puerto Rico to a state of the Union. *Examining Board v. Flores de Otero*, 426 U.S. 572, 595 (1976) ("the purpose of Congress in the 1950 and 1952 legislation was to accord to Puerto Rico the degree of autonomy and

independence normally associated with States of the Union."). While this brief cannot address the merits of this constitutional understanding, this case illustrates its shortcomings. The District Court held that Congress waived or, in the alternative, abrogated the Eleventh Amendment immunity. While in the context of the states it makes no sense to say that Congress can waive the states' immunity, here, the Territories Clause is invoked to argue that Congress waived the Board's immunity by adopting Section 106(a) ("In this case, Congress exercised its plenary powers to act on behalf of Puerto Rico and waived the Board's Eleventh Amendment immunity."). Pet. App. 71a. Under this construction, it is now Congress who is sovereign and can waive Puerto Rico's immunity. By shoehorning the Eleventh Amendment, the First Circuit misses the obvious: Puerto Rico cannot be a "state" for purposes of the Eleventh Amendment, as long as the Territories Clause, and its construction by this Court, are part of the Constitution.

C. Detaching Sovereign Immunity from the Eleventh Amendment

If the Eleventh Amendment does not apply to the U.S. territories, Puerto Rico's immunity will not have a constitutional dimension. This does not mean that Puerto Rico lacks sovereign immunity. It only means that Puerto Rico and the other U.S. territories will not be bound by Eleventh Amendment precedents and structural considerations that are specific to the U.S. states and concerns of federalism. Ideally, Congress and federal courts will now listen to the people of the territories on the scope of their sovereign

immunity. By detaching sovereign immunity from the Eleventh Amendment, federal courts can develop distinct doctrines and standards concerning sovereign immunity for the territories. This frees Congress and federal courts from considering these issues exclusively from the perspective of federalism and states' rights. Petitioner's reliance on *Pennhurst State School & Hospital v. Halderman*, 465 U.S. 89 (1984), and *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44 (1996), demonstrates the limits of this automatism that ignores the differences between states and territorial governments.

In *Pennhurst State School & Hospital v. Halderman*, 465 U.S. 89 (1984), a resident of Pennhurst brought a class action in federal court over the precarious conditions and cruel treatment they suffered at the Pennsylvania institution. They claimed that Pennhurst violated their Eight and Fourteenth Amendment rights, as well as rehabilitation and disability rights under federal and state statutes. The District Court awarded injunctive relief based on a state law claim. The U.S. Court of Appeals affirmed and rejected Pennhurst's argument that the Eleventh Amendment barred a federal court from considering this pendent state-law claim. However, this Court decided that the Eleventh Amendment did in fact prohibit the District Court from awarding injunctive relief against state officials based on state law when the state is the substantial party in interest. The Court reasoned that allowing federal courts to grant relief on state-law claims would contravene "the principles of federalism that underlie the Eleventh Amendment", *Pennhurst*, 465 U.S. at 106, thus recognizing that sovereign

immunity is a constitutional limitation on federal judicial power.

In *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44 (1996), the Seminole Tribe sued the State of Florida, pursuant to the Indian Gaming Regulatory Act, 25 U.S.C. § 2710(d)(1)(c), for failing to negotiate in good faith. The State argued that the suit violated Florida's sovereign immunity from suit in federal court. The District Court denied the motion, but the Court of Appeals reversed, finding that the Indian Commerce Clause does not grant Congress the power to abrogate the State's Eleventh Amendment immunity. This Court concluded that Congress may abrogate the State's sovereign immunity only if it has "unequivocally expressed its intent" to do so and "has acted pursuant to a valid exercise of power." *Id.* at 68. The Court also found that only constitutional provisions adopted after the Eleventh Amendment could grant Congress such power. The Court thus overruled *Pennsylvania v. Union Gas Co.,* 491 U.S. 1 (1989), which had held that states ceded their Eleventh Amendment Immunity when they gave Congress complete power to regulate commerce under the Interstate Commerce Clause.

For Petitioner this case is about the *Pennhurst* doctrine and abrogation under *Seminole*. Nothing could be further from the truth. The Board argues that *Pennhurst* "divests the federal courts of jurisdiction to hear a suit against a state or territorial entity under its own laws." Pet. 21. First things first, *Pennhurst* does not once discuss U.S. territories. The Court discussed Eleventh Amendment immunity as relating only to the States, yet the Board tries to stretch *Pennhurst's* applicability to territories as if it

were settled law. This case is not about a state law claim in federal court against state officials. Instead, it is about a territorial law claim in federal court simply because Congress foreclosed the avenue of Puerto Rico's own courts. In *Pennhurst*, this Court cited *Edelman v. Jordan*, 415 U.S. 651(1974), to recognize that state law claims could still be brought in state court. But here Congress requires that "any action against the Oversight Board" must be "brought in a United States district court for the covered territory." 48 U.S.C. § 2126(a). The claim cannot be brought in Puerto Rican courts, like in *Pennhurst*. In other words, if the Centro de Periodismo Investigativo cannot bring a right of access claim against the Board in federal courts, as Petitioner contends, it cannot bring it anywhere else. Petitioner distorts sovereignty to mean no judicial nor political review of its actions.[3]

The same goes for abrogation under *Seminole*. Petitioner argues that, according to *Seminole*, Congress must make manifestly clear its intent to abrogate Eleventh Amendment immunity. Pet. 25. And since PROMESA "contains no language clearly and unmistakably expressing Congress's intent to abrogate the Board's immunity," then Congress did not abrogate the Board's Eleventh Amendment immunity. *Id.* at 27. But *Seminole* is about overriding a state's Eleventh Amendment immunity. This Court decided that no matter how Congress manifests its intention, it cannot abrogate the immunity through the Commerce Clause. In the territorial context,

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[3] In *Diaz-Fonseca v. Puerto Rico*, 451 F.3d 13 (1st Cir. 2006), the First Circuit applied the *Pennhurst* doctrine in a case against Puerto Rico. In that case, however, Puerto Rican courts were not forbidden by federal law from deciding the territorial claim.

however, this Court has given Congress free rein to govern the U.S. territories. *Nat. Bank v. Yankton Cty.*, 101 U.S. 129 (1879). These plenary powers—the power to annul territorial laws and even change our local government—are not consistent with state sovereignty. The Board cannot masquerade as state sovereign while upholding plenary powers over U.S. territories. It would be hypocritical to apply *Pennhurst* and *Seminole*, but to justify further limiting the democratic rights of the people of Puerto Rico.

II. Puerto Rico has Inherent Sovereign Immunity

A. Inherent Sovereign Immunity of Puerto Rico

The U.S. territories do not have Eleventh Amendment immunity. Instead, they have an inherent sovereign immunity, also known as common law immunity. In the words of Justice Field, "[i]t is a familiar doctrine of the common law, that the sovereign cannot be sued in his own courts without his consent." *The Siren*, 74 U.S. 152, 153-154 (1868). In the states, this Court has conflated the common law immunity and the Eleventh Amendment. *See PennEast*, 141 S. Ct. at 2264 ("This Court, it seems, has contributed to the confusion.") (Gorsuch, J., dissenting). But with regards to U.S. territories and Indian Nations, inherent sovereign immunity is clearly distinct from Eleventh Amendment immunity. *Michigan v. Bay Mills Indian Community*, 572 U.S. 782, 803 (2014) ("Sovereignty implies immunity from lawsuits.").

In the early twentieth century, the Supreme Court decided that the territories of Hawaii and Puerto Rico are entitled to sovereign immunity. The first case was *Kawananakoa v. Polyblank*, 205 U.S. 349 (1907). It concerned the foreclosure and sale of a mortgaged land that was conveyed to the Territory of Hawaii. The territory objected to the proceedings and raised its immunity. Justice Holmes, speaking for the Court, addressed the question of the source of this immunity. Instead of quoting the Eleventh Amendment, this Court clarified that "[a] sovereign is exempt from suit, not because of any formal conception or obsolete theory, but on the logical and practical ground that there can be no legal right as against the authority that makes the law on which the right depends." *Id.* at 353. The Supreme Court also cited prior cases from territorial courts that recognized sovereign immunity for the territories. *Wisconsin v. Doty*, 1 Wis. 396, 407 (1844); *Langford v. King, 1 Mont.* 33, 38 (1868). These cases held that while Congress was sovereign over the territories, the territories, as sovereign, could not be sued without their consent. Sovereign immunity, in the words of Justice Holmes, applied to the territories, even if they are not "sovereign in the full sense of juridical theory." *Kawananakoa*, 205 U.S. at 353. Thus, sovereign immunity existed in the territories, regardless of the Eleventh Amendment or formal sovereignty.

In *Porto Rico v. Rosaly y Castillo*, 227 U.S. 270, 273 (1913), the holding of *Kawananakoa* was extended to the Territory of Puerto Rico. The Supreme Court of Puerto Rico had decided that the Government of Puerto Rico could be sued without its consent because it was not a sovereign. *Rosaly v.*

Pueblo, 116 P.R. Dec. 508 (1910). Dissenting, Judge Macleary, argued that while the Eleventh Amendment does not apply to U.S. territories, the Territory of Puerto Rico was a sovereign, just as the Territory of Hawaii. Without mentioning the Eleventh Amendment, this Court then held that "the government of Puerto Rico was of such nature as to come within the general rule exempting a government sovereign in its attributes from being sued without its consent." *Rosaly y Castillo*, 227 U.S. at 273. This "general rule" applied to Puerto Rico as an organized territory with local self-government, even if it was not incorporated. *Id.* at 274.

From 1913 to 1939, this Court reaffirmed Puerto Rico's sovereign immunity four different times. *Porto Rico v. Ramos*, 232 U.S. 627, 632 (1914) ("the immunity of sovereignty from suit without its consent cannot be carried so far as to permit it to reverse the action invoked"); *Porto Rico v. Emmanuel*, 235 U.S. 251, 257 (1914) ("We have recently decided that the Government of Porto Rico is of such nature as to come within the general rule exempting a government, sovereign in its attributes, from being sued without its consent"); *People of Puerto Rico v. Shell Co.*, 302 U.S. 253, 262 (1937) ("The effect was to confer upon the territory many of the attributes of quasi sovereignty possessed by the states—as, for example, immunity from suit without their consent."); *Bonet v. Yabucoa Sugar Co.*, 306 U.S. 505, 506 (1939) ("this suit cannot be maintained unless authorized by a Puerto Rican law, because Puerto Rico cannot be sued without its consent."). None of these cases mention or discuss the Eleventh Amendment.

This Court also understood this territorial sovereign immunity as different from the dual sovereignty doctrine of the Double Jeopardy Clause. While Puerto Rico, as "quasi-sovereign," could be immune from suit without its consent, *Shell Co.*, 302 U.S. at 262, for purposes of double jeopardy "territorial and federal laws . . . are creations emanating from the same sovereignty." *Id.* at 264. This reiterated the approach of the previous territorial cases cited in *Kawananakoa*: Congress was sovereign, but the territories had sovereign immunity. That Puerto Rico is not a separate sovereign for purposes of the Double Jeopardy Clause, *Puerto Rico v. Sánchez Valle*, 579 U.S. 59 (2016), is, therefore, not a limit to its sovereign immunity.

B. Sovereign Immunity of the other U.S. Territories

PROMESA applies to all five covered U.S. territories, not just Puerto Rico. 48 U.S.C. § 2104(8), (20). Any decision concerning sovereign immunity could, therefore, affect the U.S. territories of Guam, the U.S. Virgin Islands, the Commonwealth of the Northern Mariana Islands, and American Samoa. In all of these U.S. territories, federal courts have decided that Eleventh Amendment immunity does not apply, but they still have the inherent sovereign immunity recognized in the cases cited above. While the First Circuit originally applied inherent sovereign immunity, *A.J. Tristani, Suc'rs, Inc., v. Buscaglia, Treasurer of Puerto Rico*, 166 F.2d 966, 967 (1st Cir. 1948), it later abandoned that approach and attached Puerto Rico's sovereign immunity to the Eleventh

Amendment. *Ezratty*, 648 F.2d at 776 n.7. In the other U.S. territories, however, federal courts have been more faithful to *Kawananakoa* and *Rosaly y Castillo*.

Federal courts have consistently extended sovereign immunity to the Territory of Guam. In *Crain v. Gov't of Guam*, 195 F.2d 414 (9th Cir. 1952), the Ninth Circuit affirmed a judgment dismissing an action against the Government of Guam because it has sovereign immunity from such suits. While Guam, is "subordinate to the United States," noncontiguous U.S. territories have sovereign immunity from actions without their consent. *Id.* at 416-417. Decades later, in *Marx v. Gov't of Guam*, 866 F.2d 294, 297 (9th Cir. 1989), the Ninth Circuit described the sovereign immunity of *Kawananakoa* and *Rosaly y Castillo*, as "a form of inherent or common law sovereign immunity." While these cases did not discuss the Eleventh Amendment, in a dissent in *Ngiraingas v. Sánchez*, 495 U.S. 182 (1990), Justice Brennan clarified that the Eleventh Amendment did not apply to the territories. *Id.* at 202 ("Territories have never possessed the type of immunity thought to be enjoyed by States.") (Brennan, J., dissenting). Instead, citing, once again, *Kawananakoa* and *Rosaly y Castillo*, Justice Brennan concluded that U.S. territories, including Guam, "may retain common-law sovereign immunity."[4] Justice Brennan, therefore, synthesized the two parts of the argument: the

[4] For Justice Brennan, common law immunity does not apply to suits in federal courts based on federal law. *Ngiraingas v. Sánchez*, 495 U.S. 182, 205 (1990). Since this narrow view of inherent sovereign immunity is not at issue here, we take no position on the scope of inherent sovereign immunity.

Eleventh Amendment does not apply to U.S. territories, but inherent sovereign immunity does.

Similarly, in 1954, two years after *Crain*, the Third Circuit concluded that the U.S. Virgin Islands, just like Puerto Rico and Guam, could not be sued without its consent. *Harris v. St. Thomas & St. John*, 212 F.2d 323 (3d Cir. 1954). While the Eleventh Amendment does not attach to the U.S. Virgin Islands, it is shielded "by virtue of the inherent or common law sovereign immunity recognized by the courts as attaching to territorial governments." *Sunken Treasure v. Unidentified*, 857 F. Supp. 1129, 1134 n.10 (D.V.I. 1994). Detaching sovereign immunity from the Eleventh Amendment is, therefore, only the first step; recognizing inherent sovereign immunity is the second one.

Neither does the Eleventh Amendment apply to the Commonwealth of the Northern Mariana Islands. *Fleming v. Dep't of Pub. Safety, Com. of N. Mariana Islands*, 837 F.2d 401 (9th Cir. 1988), decided that the Northern Mariana Islands did not enjoy Eleventh Amendment immunity from suits under 42 U.S.C. § 1983. The Ninth Circuit went one step further and decided that in the Covenant to Establish the Commonwealth, the Northern Mariana Islands waived any common law sovereign immunity from federal suit. While the territory "cannot be sued on the basis of its own laws without its consent," it can be sued pursuant to federal law in federal courts. *Id.* at 408. In 2003, the Ninth Circuit noted the contradictions between *Fleming* (Northern Mariana Islands) and *Ezratty* (Puerto Rico) over whether the Eleventh Amendment applies to the U.S. territories. *Norita v. N. Mariana Islands*, 331 F.3d 690 (9th Cir.

2003). The Court reasoned that, under First Circuit precedent, the Northern Mariana Islands would be entitled to Eleventh Amendment immunity. *Id.* at 696. However, since no Supreme Court decision questioned *Fleming's* holding, the Ninth Circuit continued to detach sovereign immunity from the Eleventh Amendment, just as the other U.S. territories.

Finally, in a case concerning American Samoa, the U.S. District Court of Hawaii stated that the "Eleventh Amendment to the United States Constitution protects only states, not territories." *Meaamaile v. American Samoa*, 550 F. Supp. 1227, 1231 n.5 (D. Haw. 1982).

Consistent with its text and history, federal courts have repeatedly decided that the Eleventh Amendment does not shield U.S. territories. But following *Kawananakoa* and *Rosaly y Castillo* they also have recognized a sovereign immunity, now termed inherent sovereign immunity. This Court should reaffirm, once and for all, that this is the sovereign immunity that Puerto Rico enjoys, not Eleventh Amendment immunity.

C. Sovereign Immunity in Puerto Rican Laws and Cases

For Justice Holmes, sovereign immunity depended upon a "logical and practical ground," not upon any "formal conception or obsolete theory." *Kawananakoa*, 205 U.S. at 353. If the territorial government can "originate and change at their will the law of contract and property," these rights cannot be enforced against the territory without its consent.

Id. While First Circuit precedent focuses on the Eleventh Amendment immunity, this more logical and practical approach has prevailed in Puerto Rican law and cases.

In 1916, only three years after *Rosaly y Castillo*, Puerto Rico authorized lawsuits against the Puerto Rican government. Law Num. 76, April 13, 1916, 1916 Laws of P.R. 155-157. This law was consistent with sovereign immunity: Puerto Rico could not be sued without its consent, but the people could waive their sovereign immunity through legislation. In 1955, three years after the adoption of the Constitution of Puerto Rico, this law was repealed and replaced with the Act on Claims and Suits against the Commonwealth. P.R. Laws Ann. tit. 32 § 3077 ("Ley de reclamaciones y demandas contra el Estado" in Spanish). This law, which was last amended in August of 2022, states that the government can be held liable for tort claims, in rem actions, and civil actions based on the Constitution, and any law, regulation or contract. *Id.*

In tort claims, for example, for a claim to be brought, the cause of the damage must be, or have been, an employee, agent or official of the Commonwealth, and have acted in their official capacity and within their duties. The government in these claims may only be liable for negligent, not intentional, conduct. This law establishes a limited liability for up to $75,000 per cause of action, with a total of up to $150,000 for all causes of action resulting from the same negligent action or omission. Municipalities are equally protected under the Puerto Rico Municipal Code, P.R. Laws Ann. tit. 21 §§ 7082-7083. ("Código Municipal de Puerto Rico" in Spanish).

Thus, by setting aside the government's inherent sovereignty to be held liable for tort claims, the Commonwealth of Puerto Rico waived its sovereign immunity without renouncing it.

Interpreting this statute, the Supreme Court of Puerto Rico has discussed the nature and scope of Puerto Rico's sovereign immunity. Unsurprisingly, it has emphasized *Rosaly y Castillo* and inherent sovereign immunity, rather than *Ezratty* and Eleventh Amendment immunity. From 1913 to as recently as 2020, the Supreme Court of Puerto Rico has cited *Rosaly y Castillo* to recognize the doctrine of sovereign immunity in Puerto Rico. *Hubert v. El Pueblo*, 19 P.R. Dec. 919, 925 (P.R. 1913); *ELA v. El Ojo de Agua*, 205 P.R. Dec. 502, 515 (P.R. 2020). According to these cases, because Puerto Rico cannot be sued without its consent, since 1912 the legislature of Puerto Rico has authorized civil actions against the government. *Defendini Collazo v. Estado Libre Asociado*, 134 P.R. Dec. 28, 47 (P.R. 1993). Puerto Rican law and cases have, therefore, not attached sovereign immunity to the Eleventh Amendment. Instead, since *Rosaly y Castillo*, Puerto Rico has applied the logic and practice of inherent sovereign immunity.

III. Right of Access to Public Information as a Waiver of Sovereign Immunity

Through the right of access to public information, as a democratic and constitutional right, the people of Puerto Rico waived their sovereign immunity. Section 4 of the Bill of Rights reads: "No law shall be made abridging the freedom of speech or

of the press, or the right of the people peaceably to assemble and to petition the government for a redress of grievances." P.R. CONST., art. II, sec. 4. These freedoms of speech, assembly, and press, and the right to petition include a right to access and inspect public documents. Together with the Act on Claims and Suits against the Commonwealth, P.R. Laws Ann. tit. 32 § 3077, which authorizes civil actions "based on the Constitution," the Government of Puerto Rico consented to right to access claims against its government and its entities, which now includes the Board. 48 U.S.C. § 2121(c)(1), (2) (the Board "shall be created as an entity within the territorial government.").

In 1982, the Supreme Court of Puerto Rico delivered a landmark decision in *Soto v. Srio. de Justicia*, 112 P.R. Dec. 477 (P.R. 1982). The Court found that the freedoms of speech, assembly, and press, and the right to petition of the Constitution of Puerto Rico establish a fundamental, corollary right of access to public information. This case involved the infamous shooting in Cerro Maravilla, a mountain in Puerto Rico, where two young men died at the hands of the Puerto Rican police. *Id.* at 480-84. The father of one of these young men asked to inspect the documents related to the shooting after the officers involved were exonerated, but the government denied his request. *Id.* The decision in *Soto* was based on the "simple premise" that democracy requires the press and the public to access public information. *Id.* at 485-86. This right is essential for the public will to express itself—via voting and other democratic participation—and for government to be held accountable. While the court conceded that the right

of access to information, as well as the right to freedom of speech and press, is not absolute, any attempts to limit it would be subject to the strict scrutiny afforded to other fundamental constitutional rights. *Id.* at 493, 497. This affirmed the constitutional rank and value of the right to access information in the Puerto Rican democratic system.

However, long before *Soto* and even before the enactment of the Constitution of Puerto Rico, the right to access public documents was a valued part of the Puerto Rican political and judicial system. In 1905, article 47 of the Law of Evidence stated that "every citizen has a right to inspect and take a copy of any public document of Puerto Rico, except as otherwise expressly provided by law." *Vidal v. Marrero*, 20 P.R. Dec. 264 (1914). The Law of Evidence was later repealed, but this article was adopted verbatim as article 409, still in effect today, of the Code of Civil Procedure of 1933, reinforcing the importance Puerto Ricans place on the right of access to public documents. P.R. Laws Ann. tit. 32 § 1781.

In *Bhatia Gautier v. Gobernador*, 199 P.R. Dec. 59 (P.R. 2017), the Puerto Rico Supreme Court again had the opportunity to express itself regarding the right of access to information. A Puerto Rican senator petitioned the government to produce the proposed budget it submitted to the Financial Oversight Management Board. The Supreme Court restated the vital importance of the right to access information and its position as "a fundamental pillar in every democratic society." *Id.* at 80. Because a democratic government exists because of and for the people it serves, their governance would not work "if the people were not aware of what happened in the management

of their matters." *Id.* at 81 (quoting E. Rivera Ramos, *La libertad de información: Necesidad de su reglamentación en Puerto Rico*, 44 Rev. Jur. UPR 69 (1975)). This is especially true "[i]n times of crisis, [when] access to public information becomes even more important." *Id.* at 120 (Oronoz, C.J., dissenting). Through the right to inspect and access public documents, therefore, the people of Puerto Rico, as sovereign, exercise democratic self-government.

In 2019, Puerto Rico's legislature enacted two laws—the Transparency and Expedited Procedure for Public Records Access Act ("Ley de transparencia y procedimiento expedito para el acceso a la información pública" in Spanish), P.R. Laws Ann. tit. 3 § 9911, and the Open Government Data Act ("Ley de datos abiertos del Gobierno de Puerto Rico" in Spanish), P.R. Laws Ann. tit. 3 § 9891,—that codify the right of access to public information and provide a process for producing public information. They established the proactive divulgation and the effective management of public information as a principle of public policy. Although these laws were enacted in 2019, after the events of the present case, they illustrate, like *Soto* and *Bhatia*, that the purpose of these laws is to facilitate public participation and government accountability, and to promote transparency in the fiscal and administrative branches. They exemplify how important and vital the constitutional right of access to public information is in Puerto Rico even four decades after *Soto*, in a much changed political and social environment.

In *Fin. Oversight & Mgmt. Bd. for P.R. v. Aurelius Inv., LLC*, 140 S. Ct. 1649, 1661 (2020), this Court decided that the members of the Board were

"local officers" of the territorial government, not "Officers of the United States." Because of the Board's structure, responsibilities, and faculties, it is a "part of the local Puerto Rican government." *Id.*; 48 U.S.C. § 2121(c)(1) ("an entity within the territorial government."). As part of the Puerto Rican government, then, it is subject to our right of access to public information. Without that right, the Board would exercise its powers—investigatory powers, developing fiscal plans, reviewing Puerto Rican laws, issuance of new debt—without public knowledge and democratic accountability. The citizens of Puerto Rico are not asking the Board to comply with a special requirement, only to respect the same right of access to information that applies against all other agencies of the local government, of which it is a part. The fact that the Board was not appointed or elected by Puerto Ricans only accentuates the importance of this democratic right.

To add insult to injury, the Board claims that federal courts are forbidden from enforcing territorial law against territorial officials. But the only reason this action is in federal court is that Section 106(a) of PROMESA requires it. 48 U.S.C. § 2126(a). The people of Puerto Rico waived its sovereign immunity for right of access claims against the local government. Since Congress foreclosed access to its own courts, they must be exercised in federal courts, but this does not retract Puerto Rico's waiver of sovereign immunity.

The people of Puerto Rico, through the political branches of their government, are the ones who decide the scope of their sovereign immunity. This should be a collective decision because sovereign

immunity "runs counter to modern democratic notions of the moral responsibility of the State." *Great Northern Life Ins. Co. v. Read*, 322 U.S. 47, 59 (1944) (Frankfurter, J., dissenting). When the exercise of constitutional rights is involved, especially democratic rights, sovereign immunity should reach its limits. *See* A. Amar, *Of Sovereignty and Federalism*, 96 Yale L.J. 1425, 1487 n.246 (1987) (arguing that sovereign immunity "should yield" before "full remedies for violations of constitutional rights."); J. Pfander, *Sovereign Immunity and the Right to Petition*, 91 Nw. U. L. Rev. 899, 899 (1997) (asserting that the right to petition is "a constitutional antidote to the familiar doctrine of sovereign immunity."). To allow the Board to shield itself from a right to access claim that guarantees public participation and democratic accountability would contradict constitutional democracy itself. Sovereignty would mean non-sovereignty, and immunity would mean unchecked power. That is not what sovereign immunity stands for. That is not what democratic governance can tolerate.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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