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 CLEMENTE PROPERTIES, INC.; 21 IN RIGHT, INC.; ROBERTO CLEMENTE JR.; LUIS ROBERTO CLEMENTE AND ROBERTO ENRIQUE CLEMENTE AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

TANAIRA PADILLA-RODRÍGUEZ
Counsel of Record
Ave. Ponce de León 1225
VIG Tower, Suite 1500
San Juan, Puerto Rico 00907
(787) 620-0527
tanairapadilla@yahoo.com

Counsel for Amici Curiae

December 27, 2022

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D.C. 20002

CORPORATE DISCLOSURE STATEMENT

Clemente Properties, Inc. and 21 In Right, Inc. do not have parent corporations, and no publicly held company has a 10% or greater ownership interest in them.

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INTEREST OF *AMICI CURIAE*[*]

Clemente Properties, Inc.; 21 In Right, Inc. and Roberto Clemente's sons, Roberto Clemente Jr., Luis Roberto Clemente and Roberto Enrique Clemente (hereinafter "Amici") are the Plaintiffs in the case *Clemente Properties, Inc. et al. v. Pierluisi, et al*., 3:22-cv-01373-ADC, filed in the United States District Court, District of Puerto Rico due to the unauthorized use of the Roberto Clemente trademark. The Defendants are Hon. Pedro R. Pierluisi Urrutia, Governor of Puerto Rico and other local government officers in their official and individual capacities, the Puerto Rico Convention District Authority and the Commonwealth of Puerto Rico. It is a civil action for declarative relief, injunctive relief and damages, brought pursuant to the Lanham Act, also known as Trademark Act, the Takings Clause, the Due Process Clause, Puerto Rico Laws 139-2011, 169-2009, Article 1536 of the Puerto Rico Civil Code. 28 U.S.C.A. § 2201 and 2202 and Fed. R. Civ. P. 65.

The Roberto Clemente trademark has been in use since 1955 and it is registered at the United States Patent and Trademark Office. Clemente Properties, Inc. is the owner of the trademark and 21 In Right, Inc. is the corporation with the right to license it. Both corporations are totally owned by Roberto Clemente's sons and heirs. In Puerto Rico, there is a whole governmental scheme to misappropriate the Roberto Clemente trademark and the products, goods and services backed by it. Laws were enacted pursuant to

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[*] Blanket letters of consent to the filing of *amici* briefs were filed in this case on November 8, 2022 by both parties. No counsel for any party authored this brief in whole or in part and no party made a monetary contribution to fund the preparation or submission of this brief.

that purpose. After being sued to rectify its actions, Defendants have raised the sovereign immunity provided by the Eleventh Amendment of the United States Constitution as a defense.

In light of the above stated, Amici will limit their discussion in this brief to the issue of the Eleventh Amendment applicability to Puerto Rico, because it is significant to their case in the United States District Court, District of Puerto Rico. The issue is also relevant for the resolution of this case because Petitioner's legal position is based on the argument that Puerto Rico's Eleventh Amendment immunity was not abrogated.

SUMMARY OF ARGUMENT

The United States of America and each of the States enjoy sovereign immunity. The Eleventh Amendment is a constitutional recognition of the States inherent sovereignty that predated the Founding of the country. It encompasses the limits of the federal judicial power over the States.

Puerto Rico is a Territory of the United States, not a State. Consequently, Puerto Rico does not fall into the reign of the Eleventh Amendment. Furthermore, there is no legal basis to determine that Puerto Rico is entitled to immunity similar or parallel to the sovereign immunity of the United States, the States, and Indian Tribes.

Puerto Rico does not enjoy any immunity opposable to federal legislation and there is no restriction to the exercise of the federal judicial power over Puerto Rico.

ARGUMENT

I. SOVEREIGN IMMUNITY AND THE ELEVENTH AMENDMENT

The Eleventh Amendment of the Constitution of the United States provides:

> 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.

More than a century ago, this Honorable Court stated the limitation imposed by the Eleventh Amendment to the federal judicial power, and it remains an accurate description up to this day. *In re State of New York*, 256 U.S. 490, 497 (1921), established that "the entire judicial power granted by the Constitution does not embrace authority to entertain a suit brought by private parties against a state without consent given; not one brought by citizens of another state, or by citizens or subjects of a foreign state, because of the Eleventh Amendment; and not even one brought by its own citizens, because of **the fundamental rule of which the amendment is but an exemplification**". (Emphasis added.) *In re State of New York*, 256 U.S. 490, 497 (1921); *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 99 (1984). This Court also stated "[t]hat a state may not be sued without its consent is a fundamental rule of jurisprudence". *Id.* The Eleventh Amendment portrays the original understanding of the States' constitutional immunity from suit and the importance of sovereign immunity. *Alden v. Maine*, 527 U.S. 706,

726–27 (1999). The Constitution does not strip States and their courts of their sovereign authority "except as expressly provided by the Constitution itself." *Atascadero State Hospital v. Scanlon*, 473 U.S. 234, 239, n. 2 (1985).

The Eleventh Amendment does not create sovereign immunity. It is a constitutional recognition of the States inherent sovereignty unconnected to, and indeed pre-existing, the U.S. Congress. *Puerto Rico v. Sánchez Valle*, 136 S. Ct. 1863, 1871 (2016). It encompasses the limits of the federal judicial power over the States.

As a sovereign nation, the United States of America also enjoys sovereign immunity. "It is elementary that '[t]he United States, as sovereign, is immune from suit save as it consents to be sued . . ., and the terms of its consent to be sued in any court define that court's jurisdiction to entertain the suit.'" *United States v. Mitchell*, 445 U.S. 535, 538 (1980), *citing, United States v. Sherwood*, 312 U.S. 584, 586 (1941). Therefore, the Eleventh Amendment sets the basic rule of interaction between the sovereign immunity of the States and the sovereignty of the federal government.

II. PUERTO RICO

Puerto Rico is a Territory of the United States, not a State. *United States v. Vaello Madero*, 142 S. Ct. 1539, 1541 (2022). The Constitution of the United States describes a Territory as "Property belonging to the United States". U.S. Const. art. IV, § 3, cl. 2. Consequently, Puerto Rico, as a Territory, does not fall into the reign of the Eleventh Amendment. As explained, the Eleventh Amendment refers only to the States and involves their inherent sovereignty.

Furthermore, there is no legal basis to determine that Puerto Rico is entitled to immunity similar or parallel to the sovereign immunity of the United States, the States, and Indian Tribes.

This Honorable Court, has acknowledged that Puerto Rico enjoys the attribute of immunity from suit in the context of self-government. Particularly, "the government which the organic act established in 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 Porto Rico v. Rosaly y Castillo*, 33 S. Ct. 352, 353 (1913). When a Territory is empowered to create its local self-government, "immunity from suit without its consent is necessarily inferable." *Id*. "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." (Empahasis added.) *People of Puerto Rico v. Shell Co*., 82 L. Ed. 235, 58 S. Ct. 167, 171 (1937).

Puerto Rico's immunity from suit, was based on *Kawananakoa v. Polyblank*, 205 U.S. 349 (1907), a case recognizing the immunity from suit of the then Territory of Hawaii. There, it was explained 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. [..] As the ground is thus logical and practical, **the doctrine is not confined to powers that are sovereign in the full sense of juridical theory**, **but naturally is extended to those that, in actual administration, originate and change at their will the law of contract and property, from which persons within the jurisdiction**

derive their rights." (Internal citation omitted. Emphasis added.) *Kawananakoa v. Polyblank*, at 353. A Territory with self-government has immunity from suit "because the territory itself is the fountain from which rights ordinarily flow. It is true that Congress might intervene, just as, in the case of a state, the Constitution does, and the power that can alter the Constitution might. But the rights that exist are not created by Congress or the Constitution, except to the extent of certain limitations of power." *Id.*

Therefore, the Puerto Rico's immunity from suit that has been recognized by this Court is the one necessarily inferable from the delegated power to create a self-government. As the governmental entity that creates local laws that apply to its citizens and create rights, Puerto Rico necessarily has immunity from suits arising from the same laws it enacts. The power to enact laws necessarily encompasses the power to decide the application of such laws to the authority that makes them.

The Puerto Rico's limited immunity from suit that this Court acknowledged in *Rosaly* is not the inherent immunity of a sovereign State that the Eleventh Amendment recognizes. The Court only applied to Puerto Rico the principle -generally applied to sovereign States as the makers of laws- that there can be no legal right against the authority that makes the law on which the right depends, nothing more.

Congress granted greater autonomy for Puerto Rico with the Act of July 3, 1950 (Pub. L. 81-600), ch. 446, § 1, 64 Stat. 319, and the approval of the Constitution of Puerto Rico of 1952. "[T]he 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."

Examining Bd. of Engineers, Architects & Surveyors v. Flores de Otero, 96 S. Ct. 2264, 2277, 49 L. Ed. 2d 65 (1976). It was an expansion of Puerto Rico self-government that solidified the limited immunity previously recognized. But that expansion of self-government did not entail a recognition of an immunity that parallels the sovereign immunity of the United States and the States. "The degree to which an entity exercises self-governance—whether autonomously managing its own affairs or continually submitting to outside direction—plays no role in the analysis" of sovereign power. *Puerto Rico v. Sánchez Valle*, at 1870-71. Congress has no capacity to erase its own foundational role as a sovereign in conferring political authority and as "the delegator cannot make itself any less so—no matter how much authority it opts to hand over." *Id.* at 1876.

Puerto Rico limited immunity from suit is not even parallel to the immunity enjoyed by Indian tribes. "Indian tribes have long been recognized as possessing the common-law immunity from suit traditionally enjoyed by sovereign powers." *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978). "As separate sovereigns pre-existing the Constitution, tribes have historically been regarded as unconstrained by those constitutional provisions framed specifically as limitations on federal or state authority." *Id.* at 56; *Puerto Rico v. Sánchez Valle,* at 1872. "[U]nless and until Congress withdraws a tribal power […] the Indian community retains that authority in its earliest form." *Id.* On the contrary, Puerto Rico has never been recognized as a sovereign power unconstrained by constitutional provisions and has no similar authority that the Congress needs to withdraw. Hence, absent an act of Congress, Puerto Rico still does not have any sovereign power or immunity.

A Congressional act of abrogation of sovereign immunity has no place in the context of Puerto Rico because it would be inconsequential.

Repeatedly, this Court has established that Puerto Rico's government is resultant of the sovereignty of the United States. "Both the territorial and federal laws and the courts, whether exercising federal or local jurisdiction, are creations emanating from the same sovereignty." *People of Puerto Rico v. Shell Co.*, at 172. U.S. Territories, including Puerto Rico, "are not sovereigns distinct from the United States." *Puerto Rico v. Sánchez Valle*, at 1873. A Territory derives its powers from the United States. *Id.*

Puerto Rico's limited immunity pertains only to the laws created by the Territory, and once the Congress acts, it vanishes. The Constitution of the United States provides that "Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States…." U.S. Const. art. IV, § 3, cl. 2. Therefore, once Congress enacts legislation respecting the Territory, it becomes the authority that makes them, and the Territory does not enjoy any immunity opposable to such legislation, because it is not the originator of the law and does not have any sovereign authority.

Likewise, the Constitution of the United States provides that "[t]he judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority…" U.S. Const. art. III. Accordingly, the federal courts have jurisdiction over the cases arising from any law enacted by Congress. The limited immunity of Puerto Rico regarding its own laws, does

not constitute any obstacle to the exercise of such jurisdiction. Only States, as provided in the Eleventh Amendment, can rely on their sovereign immunity to limit the federal judicial power. "A State's constitutional interest in immunity encompasses not merely whether it may be sued, but where it may be sued." *Pennhurst State Sch. & Hosp. v. Halderman*, at 99. "Because of the problems of federalism inherent in making one sovereign appear against its will in the courts of the other, a restriction upon the exercise of the federal judicial power has long been considered to be appropriate…." *Id., citing Employees v. Missouri Public Health & Welfare Dep't*, 411 U.S. 279, 294 (1973) (MARSHALL, J., concurring in result). But regarding Puerto Rico, "[b]oth the territorial and federal laws and the courts, whether exercising federal or local jurisdiction, are creations emanating from the same sovereignty." *People of Puerto Rico v. Shell Co*., at 172. With only the sovereign power of the federal government at stake, there is no restriction upon the exercise of the federal judicial power over Puerto Rico.

CONCLUSION

Puerto Rico possesses no sovereign immunity from federal law or federal-court suits. In this case, Petitioner's legal position is based on the argument that Puerto Rico's Eleventh Amendment immunity was not abrogated. Given that the Eleventh Amendment does not apply to Puerto Rico and Puerto Rico is not entitled to immunity similar or parallel to the sovereign immunity of the United States, the States, and Indian Tribes, this Honorable Court should rule in favor of Respondent.

Respectfully submitted,

TANAIRA PADILLA-RODRÍGUEZ
Counsel of Record
Ave. Ponce de León 1225
VIG Tower, Suite 1500
San Juan, Puerto Rico 00907
(787) 620-0527
tanairapadilla@yahoo.com

Counsel for Amici Curiae

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