

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 *AMICI CURIAE* INSTITUTE FOR
ENERGY ECONOMICS AND FINANCIAL ANALYSIS,
CAMBIO PR, CITIZENS' COMMISSION FOR A
COMPREHENSIVE AUDIT OF THE PUBLIC
CREDIT, SEMBRANDO SENTIDO, INC., AND
LIGA DE CIUDADES DE PUERTO RICO, INC.
IN SUPPORT OF RESPONDENT**

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INTEREST OF THE *AMICI*¹

The appearing *amici* are non-profit organizations with a vested interest in transparency and access to information for the furtherance of their respective missions.

The Institute for Energy Economics and Financial Analysis (“IEEFA”) is a non-profit organization based in Ohio whose mission is to accelerate the transition to a diverse, sustainable, and profitable energy economy. Since 2015, IEEFA has been involved in Puerto Rico and published numerous reports related the electrical system and its debt restructuring. IEEFA seeks to contribute to public dialogue regarding electrical system transformation in Puerto Rico. Access to information is of fundamental importance to IEEFA’s goal.

To publish timely and accurate analysis, IEEFA relies on the availability of public data. This includes electrical system data published by the Puerto Rico Electric Power Authority (“PREPA”) and the Puerto Rico Energy Bureau (“PREB”); financial data and analysis published by the Puerto Rico Fiscal Agency and Financial Advisory Authority (“PRAFAA”) and the Financial Oversight and Management Board for Puerto Rico (“FOMB”); contracts published by PREPA, the

¹ Pursuant to Supreme Court Rule 37.6, *amici curiae* and its counsel state that none of the parties to this case nor their counsel authored this brief in whole or in part, and that no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. On November 8, 2022, the parties to this case filed their respective blanket consent for *amicus* briefs.

Comptroller of Puerto Rico and the FOMB; among others. However, access to information in Puerto Rico has been an ongoing challenge for IEEFA. Its reports have been critical of confidentiality barriers that limit access to information regarding the costs and/or savings of electrical system investments and privatization initiatives.²

CAMBIO PR (“CAMBIO”) is a non-profit organization based in Puerto Rico whose mission is to promote the development of a more equitable society with greater opportunities and resources. CAMBIO concentrates its efforts on research, design, education, and implementation of sustainable strategies and policies. Since 2018, CAMBIO has led the efforts of *Queremos Sol*, a multi-sectoral coalition that advocates for and published a proposal for a transformed public governance model for the electrical system. This model would provide new opportunities for public participation, shared governance and transparency in order to minimize the corruption and political interference that have long plagued Puerto Rico’s electrical system.

² See, for example, Cathy Kunkle & Tom Sanzillo, *Puerto Rico grid privatization flaws highlighted in the first two months of operation*, INSTITUTE FOR ENERGY ECONOMICS AND FINANCIAL ANALYSIS (August 1, 2021), <https://ieefa.org/resources/puerto-rico-grid-privatization-flaws-highlighted-first-two-months-operation>; Cathy Kunkle & Tom Sanzillo, *Paying for failure: High fees for consultants shortchange Puerto Rico electrical grid*, INSTITUTE FOR ENERGY ECONOMICS AND FINANCIAL ANALYSIS (April 29, 2021), <https://ieefa.org/resources/paying-failure-high-fees-consultants-shortchange-puerto-rico-electrical-grid>.

In short, CAMBIO views access to information as fundamental to the organization’s work of fostering public dialogue and education on electrical system transformation and promoting the transition towards a democratic and renewable energy-based system. CAMBIO has a long history of advocating for greater transparency and access to information related to the governance of Puerto Rico’s electrical system. Thus, it regularly invokes the constitutional principles of access to information through requests to government agencies, including the Public-Private Partnerships Authority (“P3”) and the PREPA.

In 2019, IEEFA and CAMBIO PR participated in a lawsuit to obtain publicly available electrical system data from PREPA, based on the same constitutional principles invoked in this case. The data obtained allowed the production and publication of a groundbreaking modeling analysis of Puerto Rico’s electrical system, showing the feasibility of reaching 75% renewable energy within fifteen years,³ as proposed in *Queremos Sol*. Additionally, one of CAMBIO’s requests to the P3 regarding the Luma Energy LLC (“LUMA”) grid privatization contract yielded information revealing major red flags in the contracting process.⁴ As

³ See *IEEFA: Puerto Rico can provide resiliency to 100% of homes through solar expansion*, INSTITUTE FOR ENERGY ECONOMICS AND FINANCIA ANALYSIS (March 10, 2021), <https://ieefa.org/articles/ieefa-puerto-rico-can-provide-resiliency-100-homes-through-solar-expansion>.

⁴ INGRID M. VILA BIAGGI, CAMBIO’S SUBMISSION FOR THE RECORD OF HOUSE COMMITTEE ON NATURAL RESOURCES HEARING: PUERTO RICO’S POST-DISASTER RECONSTRUCTION AND POWER

discussed below, the FOMB’s enormous power and impact on the future of the electrical system, paired with its complete lack of transparency and oversight substantially conflicts with IEEFA and CAMBIO’s goals in Puerto Rico. Thus, they have a vested interest in this Court holding that the FOMB is not immune to suits that seek access to information.

The Citizens’ Commission for a Comprehensive Audit of the Public Credit (“Commission”) is a non-profit organization created to conduct a comprehensive audit of the public debt on behalf of the people of Puerto Rico. It is composed of experts in economics, accounting, public finance, constitutional law, statistics, as well as civil society representatives.⁵ The Commission has published pre-audit reports that have argued that: (i) almost half of Puerto Rico’s public debt was issued in violation of its Constitution; (ii) public corporations illegally inflated their revenue reports to comply with statutory provisions that limit their ability to issue new debt if revenue thresholds were not met; and (iii) the Puerto Rico Sales Tax Financing Corporation (“COFINA” for its Spanish acronym) bond issuances were impermissibly excluded from the constitutional debt limit calculation, tripling the extraconstitutional

GRID DEVELOPMENT (November 17, 2022) (*available at* https://cambiopr.org/wp-content/uploads/2022/11/CAMBIO-Submission-for-the-Record_House-Congressional-Hearing-11_17_22.pdf).

⁵ The Commission is a natural successor of a previously existing government commission, tasked with conducting a comprehensive audit of Puerto Rico’s bond issuances for the past five decades.

debt; they were also used to finance massive government layoffs and balance budgets. This work depends on access to public information.

In March 2018, the Commission requested access to public information pertaining to the finances for the Governmental Development Bank of Puerto Rico (“GDB”), PRAFAA, and COFINA. Because they failed to fully comply with the request, the Commission filed a lawsuit, in August 2018, demanding access to the GDB and COFINA advisors’ internal and external opinions and legal memorandums, as well as marketing documents on certain COFINA bond emissions.⁶ While PRAFAA disclosed some documents, the state court eventually dismissed the complaint, directing the Commission to seek all remaining documents from the FOMB, pursuant to a Court Order in the Puerto Rico debt restructuring proceedings under Title III of PROMESA.⁷ This partial disclosure allowed the Commission to publish a 48-page investigative report meticulously analyzing the issuances, purchasers, terms of issuance, revenue sources, and legal foundations of the COFINA debt.⁸ The report found that a significant

⁶ *Comisión Ciudadana para la Auditoría Integral del Crédito Público, Inc. v. Banco Gubernamental de Fomento para Puerto Rico, et al.*, SJ2018CV06428.

⁷ *In re: The Financial Oversight and Management Board for Puerto Rico*, No. 17 BK 3283-LTS (Doc. No. 3744) (Aug. 6, 2018 Order). *Comisión Ciudadana para la Auditoría Integral del Crédito Público, Inc. v. Banco Gubernamental de Fomento para Puerto Rico, et al.*, KLAN201801260 (December 19, 2018).

⁸ COMISIÓN CIUDADANA PARA LA AUDITORÍA INTEGRAL DEL CRÉDITO PÚBLICO, COFINA: DEUDA ILEGAL E ILEGÍTIMA (January

portion of this debt was illegal because it violated Puerto Rico's constitutional debt limit. However, if the Commission required additional information, a ruling in favor of the FOMB in this case would foreclose the possibility.

Without access to public information, the Commission's ability to publish timely and accurate analyses on Puerto Rico's debt crisis is hindered. A comprehensive and independent audit of Puerto Rico's debt must examine the process of contracting, refinancing or renegotiating public indebtedness, the origin and use of resources involved, and the execution of programs and projects financed with bond issuances. It must also consider its legal and financial aspects, as well as its economic and social impacts on the people. The audit must also evaluate the performance of public and private individuals and entities that advised or participated in the island's debt accumulation. Thus, shielding the FOMB from suit for access to information not only threatens Commission's work, but severely limits informed public discussion of Puerto Rico's public debt and the restructuring processes.

Sembrando Sentido Inc. ("Sembrando Sentido") is a non-profit organization that advocates for more transparent, responsible, inclusive, and efficient government practices in Puerto Rico. It promotes making

15, 2019), https://www.comisionauditoriapr.org/_files/ugd/6c1512_fbd4f3153bc14b3e84bef3abe4c03585.pdf (*cited in* CONGRESSIONAL RESEARCH SERVICE, PUERTO RICO'S PUBLIC DEBTS: ACCUMULATION AND RESTRUCTURING 48 fn. 297 (May 2, 2022) (*available at* <https://crsreports.congress.gov/product/pdf/R/R46788>)).

Puerto Rico's government data truly open, and building community power to improve, monitor and safeguard the use of public resources. Sembrando Sentido's work lies primarily in public contracting, an area with great risk of corruption and opportunity for savings and public service improvements. It carried out the first comprehensive evaluation on public contracting in Puerto Rico, analyzed compliance in contracting of local agencies, and have developed evaluations on how the lack of efficiency, transparency, and equity contribute to Puerto Rico's inability to build back better.⁹

Sembrando Sentido's public procurement monitoring system draws on studies of patterns of corruption and suspicious behavior in government contracting.¹⁰ This tool helps it identify red flags in public contracts, such as contracts with newly registered corporations, contracts with amendments that have over 30% increases in the original amount, contracts with political donors, etc.¹¹ Puerto Rico loses up to \$3.1 billion a year due to corruption and lax public contracting processes, resulting in low-quality, unreliable, unevenly distributed and unnecessarily expensive essential services, from our electricity, water, and transportation networks to our public education system. The FOMB

⁹ *Latest Reports*, CONTRATOS EN LEY, <https://contratosenley.org/en/evaluador> (last visit: December 17, 2022).

¹⁰ The system is a search engine available at the following site: <https://contratosenley.org/buscador>.

¹¹ SEMBRANDO SENTIDO, THE MEANING OF RED FLAGS (*available at* https://drive.google.com/file/d/1N1cbowPo3BxlC9sz_1H5DFqfRSDncLJt/view) (last visit: December 17, 2022).

manages issues and makes determinations that are instrumental for Puerto Rico's communities to hold institutions accountable. The financial and contractual decisions made by the FOMB have a great impact on the future of Puerto Rico. Additionally, the FOMB is responsible for reviewing and approving public contracts that reach or exceed \$10 million dollars. Moreover, the FOMB's lack of transparency and information disclosure affects local public entities' willingness to provide information as well. Without access to information, Sembrando Sentido's mission to help civil society organizations will be hindered, making it impossible to oversee government processes and present evidence-based solutions for promoting equitable, sustainable, ethical, and efficient government practices and spending. Reducing the accessibility of information inhibit organizations like this one from assessing the impact of policies, raise flags and advocate for changes needed to ensure the wellbeing of our communities and society.

Liga de Ciudades de Puerto Rico, Inc. ("Liga") is a non-profit and nonpartisan corporation composed of mayors of municipalities of Puerto Rico from diverse ideological persuasions. Its mission is "to strengthen the capacity of local governments and communities in order to better face the various social, structural, fiscal and governance challenges."¹² Liga develops and implements various initiatives, tempered to the needs and realities of municipal governments and their

¹² LIGA DE CIUDADES DE PUERTO RICO, <https://www.ligade-ciudadespr.com/> (last visit: December 17, 2022).

communities. The most recent initiative developed and adopted is the defense of municipal finances from the onslaught of austere measures imposed by the FOMB.

The FOMB represents a financial threat to municipalities, as well as the central government. Liga is particularly concerned that the government would be left without recourse to challenge the FOMB's decisions if it is allowed to invoke sovereign immunity to avoid litigation, creating crisis in the already debilitated governance structure of Puerto Rico. In 2021, Liga filed a lawsuit against the FOMB and several state agencies, positing that while PROMESA allows the FOMB to block or enjoin the enforcement of new legislation that is contrary to PROMESA, nothing empowers it to erase the law's existence, much less invalidate retroactively all acts taken in reliance to the subsequently enjoined statute.¹³

For all these reasons, the appearing *amici* appear in support of the Centro de Periodismo Investigativo, Inc.'s ("CPI") position in this case.

◆

SUMMARY OF ARGUMENT

While the FOMB hopes to limit the scope of this case to an issue of statutory interpretation in the context of abrogation of Eleventh Amendment sovereign immunity, the appearing *amici* agree with the CPI in

¹³ *La Liga de Ciudades de Puerto Rico v. The Financial Oversight and Management Board for Puerto Rico, et al.*, Adv. Proc. No. 21-00026.

this case regarding the true questions before the Court. As the CPI has argued, the question of abrogation of the FOMB's Eleventh Amendment sovereign immunity stands on a shaky foundation. Before the issue of abrogation becomes relevant, it is necessary to evaluate whether the FOMB is entitled to claim Puerto Rico's Eleventh Amendment sovereign immunity, despite being a federally imposed non-democratic entity. Even before that, it is essential to determine whether Puerto Rico itself has any claim to Eleventh Amendment sovereign immunity. Both of these questions should be answered in the negative under the clear precedents of this Supreme Court and the underlying principles of the Eleventh Amendment. Nonetheless, once more Puerto Rico is on the verge of being subject to a disparate treatment under a constitutionally based doctrine. Yet another example of the improper extension of the infamous *Insular Cases* and their racially motivated biases, wherein the whims of Congress surpass the will of the people. While it has not been raised by the parties in this case, the Court once again has the opportunity to overrule the *Insular Cases* and should do so whether it has been prompted to or not, as they have no place in our legal system nor democratic society.



ARGUMENT

I. Puerto Rico does not have a claim to Eleventh Amendment sovereign immunity.

Pursuant to the Eleventh Amendment of the Constitution, “[t]he 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. This is a byproduct of the federalist system and relies on the concept of dual sovereignty, wherein the accepted legal fiction establishes that individual states retained their sovereignty despite conceding some powers to the union. *See Sossamon v. Texas*, 563 U.S. 277, 283 (2011). Thus, the Eleventh Amendment provides that each state is a sovereign entity and therefore “not amenable to suit without its consent.” *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 54 (1996).¹⁴ In other words, states are immune from suit in federal court. The purpose of this immunity is “to prevent the indignity of subjecting a State to the coercive process of judicial tribunals at the instance of private parties.” *Puerto Rico Aqueduct and Sewer Authority v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 146

¹⁴ Although it will be discussed further on, it bears remembering that, usually, when a determination is made that an entity is immune from suit in federal court because of sovereign immunity, **the state courts remain available to the plaintiffs**. This is not the case with the Oversight Board, **given that PROMESA established exclusive jurisdiction for the district court in suits involving the Oversight Board** and arising under PROMESA.

(1993) (*quoting In re Ayers*, 123 U.S. 443, 505 (1887)). Based on this definition, the first question that this Court should address is whether Puerto Rico has a claim to Eleventh Amendment immunity, which would mean that its relationship with the United States is one of dual sovereignty.

A. Puerto Rico’s Prior Claim to Eleventh Amendment Immunity

The foundation of Puerto Rico’s currently recognized Eleventh Amendment sovereign immunity is questionable at best. Since 1981, the First Circuit has held that Puerto Rico enjoys this immunity; however, it has not provided any legal reasoning to sustain it. The issue has never been thoroughly discussed. It has been presumed, due to Puerto Rico’s similarities to the states, without consideration of the many distinctions between a state and a territory, including the considerations of dual sovereignty.¹⁵ In fact, most of the First Circuit’s declarations are based on a footnote of a prior case rather than an outright holding.¹⁶

¹⁵ See Adam D. Chandler, *Puerto Rico’s Eleventh Amendment Status Anxiety*, 120 *YALE L. J.* 2183, 2188 (2011).

¹⁶ See, for example, *Maysonet-Robles v. Cabrero*, 323 F.3d 43, 48 fn. 3 (1st Cir. 2003) (“This circuit has consistently held that Puerto Rico enjoys immunity from suit equivalent to that afforded to the States under the Eleventh Amendment.”); *Arecibo Community Health Care, Inc. v. Cmmw. of Puerto Rico*, 270 F.3d 17, 21 f.n. 3 (1st Cir. 2001) (“It is well settled in this circuit that the Commonwealth of Puerto Rico ‘is protected by the Eleventh Amendment to the same extent as any state. . . .’”); *Ortiz-Feliciano v. Toledo-Dávila*, 175 F.3d 37, 39 (1st Cir. 1999) (“This circuit has

Meanwhile, this Supreme Court has not had occasion to express itself regarding Puerto Rico's sovereignty for purposes of the Eleventh Amendment. While it once held that Puerto Rico had common law sovereign immunity, this holding dates to 1913, before the Commonwealth of Puerto Rico was established. It was not until 1952 that the current relationship between Puerto Rico and the United States was formally defined. *See Porto Rico v. Rosaly Castillo*, 227 U.S. 270 (1913).¹⁷

However, the Supreme Court has recently determined that Puerto Rico does not have a dual sovereignty opposite the federal government. This analysis considered the current territorial relationship between Puerto Rico and the United States as of 1952. In *Puerto Rico v. Sánchez Valle*, this Court concluded that Puerto Rico does not have a separate sovereignty from the federal government, because their powers originate from the same source. 136 S. Ct. 1863 (2016). In that case, this Court ruled that a dual-sovereignty test does not consider whether there is self-rule, but where the power of the entity comes from. The same analysis should be employed here.

already decided that the Commonwealth is protected by the Eleventh Amendment to the same extent as any state. . . ."); *Metcalf & Eddy, Inc. v. Puerto Rico Aqueduct and Sewer Auth.*, 991 F.2d 935, 939 fn. 3 (1st Cir. 1993) ("We have consistently treated Puerto Rico as if it were a state for Eleventh Amendment purposes.").

¹⁷ *See also*, Chandler, *supra* note 15, at 2188.

B. Puerto Rico's Claim to Eleventh Amendment Immunity after *Sánchez Valle*

In *Sánchez Valle*, this Court stated that when dual sovereignty is the issue in question, “the inquiry is . . . historical, not functional. . . .” *Id.* at 1871. Under that purview, this Court resolved that “Congress conferred the authority to create the Puerto Rico Constitution,” therefore, Puerto Rico’s authority derives from Congress, not of its own history. *Id.* at 1872. This was distinguished from the sovereignty of the states which expressly retained their original sovereignty upon entering the union by virtue of the Tenth Amendment and the legal fiction that followed new states into the fold. *Id.* at 1871. Thus, Puerto Rico, under a dual sovereignty analysis, is more akin to a city or municipality than a state. The concerns of federalism are not present when Puerto Rico is the object of analysis. The same is true for the Eleventh Amendment sovereign immunity analysis relevant to this case.

In *Sánchez Valle*, the Supreme Court unequivocally held that Puerto Rico’s Constitution is derivative of an act of Congress; which means that, from a historical standpoint, Puerto Rico does not have a separate sovereignty from the federal government. **Thus, it “cannot benefit from [the] dual-sovereignty doctrine.”** *Id.* at 1875 (emphasis added). The Eleventh Amendment immunity’s dual sovereignty test seeks to prevent the state from being subject to the indignity of being taken to federal court without its consent, because it has a sovereignty separate from the United States, which it retained despite joining the union. *See*

Puerto Rico Aqueduct and Sewer Authority v. Metcalf & Eddy, Inc., 506 U.S. 139, 146 (1993).

Without a dual sovereignty, Puerto Rico has no claim to any form of sovereign immunity in federal court. Thus, the Eleventh Amendment cannot shield it from suit in this case. This conclusion destroys any claim the FOMB may have to Eleventh Amendment sovereign immunity, as Puerto Rico cannot extend what it does not have. However, even if this Court decided to ignore the issue or twist it in favor of extending Eleventh Amendment protection to Puerto Rico, using its unbounded discretion to interpret the Territories Clause under the *Insular Cases*, it still would not extend to the FOMB.

II. FOMB cannot claim Puerto Rico’s Eleventh Amendment sovereign immunity without an improper extension of the *Insular Cases*.

As previously explained, Eleventh Amendment sovereign immunity is initially reserved for the states. However, through case law, it has been expanded from the literal text of the constitutional amendment to include other entities, where there is a common interest between it and the sovereign. This includes state agents and instrumentalities, particularly “arms of the state.” See *Regents of the University of California v. Doe*, 519 U.S. 425, 429 (1997). See also, *Northern Ins.*

Co. of New York v. Chatham County, Ga. 547 U.S. 189, 190 (2006).¹⁸

As such, when it is not the actual state that is sued in federal court, it is necessary to engage in an “arm of the state” analysis. An entity that is not the state may be shielded by the state’s immunity if it meets certain criteria. The main point of contention are the twin pillars of the doctrine: the state’s dignity interest and the vulnerability of the state’s public treasury. See *Hess v. Port Auth. Trans-Hudson Corp.*, 513 U.S. 30, 52 (1994). In fact, “[t]he preeminent purpose of state sovereign immunity is to accord States the dignity that is consistent with their status as sovereign entities.” *FMC v. S.C. State Ports Auth.*, 535 U.S. 743, 760 (2002) (citation omitted).

A. The FOMB’s Claims to Eleventh Amendment Immunity as an Arm of the State

Before deciding whether Congress abrogated the FOMB’s Eleventh Amendment sovereign immunity protection, this Court needs to consider whether the FOMB ever had a claim to that immunity through an “arm of the state” analysis, which yields unsurprisingly complex results. The FOMB is an unprecedented entity in our legal system.

¹⁸ See Katherine Florey, *Sovereign Immunity’s Penumbra: Common Law, “Accident,” and Policy in the Development of Sovereign Immunity Doctrine*, 43 WAKE FOREST L. REV. 765, 784, 821-35 (2008).

The FOMB was created pursuant to Congress's powers under the Territories Clause. 48 U.S.C. § 2121(b)(2). It is composed of seven members that are appointed by the President from a list of candidates compiled by Congress. *Id.* § 2121(e). Furthermore, PROMESA itself established exclusive jurisdiction for the federal court in suits involving the Oversight Board and arising under PROMESA. *Id.* § 2166(a). While Congress determined that the FOMB would be an entity "within the territorial government for which it is established[,]" *id.* § 2121(c), there is no involvement of the people of Puerto Rico nor their elected representatives. They have no say or participation in the process of selecting these members, just as they had no say or participation in the approval of PROMESA. Therefore, federal law imposes the FOMB as an ambiguous part of Puerto Rico's government structure. This was only possible because of the sweeping powers of Congress under the Territories Clause as interpreted by the infamous *Insular Cases*. No such beast could have been created in relation to a state and there is no on point precedent to determine whether the FOMB is an "arm of the state" for purposes of the Eleventh Amendment. Nonetheless, there is precedent that is illustrative to the issue of whether a federally created entity may shield itself behind a state's immunity. *See Hess v. Port Auth. Trans-Hudson Corp.*, 513 U.S. 30 (1994).

In *Hess*, this Court analyzed whether bistate entities created pursuant to the Interstate Compact Clause of the Constitution are an "arm of the state." A

bistate entity “is an agency created by an agreement, or compact, between two or more states, which is approved by Congress.”¹⁹ Thus, there are entities with three sources of original power, including the federal government. The *Hess* Court stressed that these bistate entities should not be grouped with other state entities for purposes of immunity because a “[s]uit in federal court **is not an affront to the dignity** of a Compact Clause entity.” *Id.* at 42. **A federal court does not represent “the instrument of a distant, disconnected sovereign.”** *Id.* at 41 (emphasis added). Rather, **“the federal court is ordained by one of the entity’s founders.”** *Id.* (emphasis added).

The *Hess* Court reasoned that because Congress has approval power over bistate entities and their existence depended on the cooperation of different sovereigns, **“their political accountability is diffuse; they lacked the tight tie to the people of one State than an instrument of a single State has. . . .”** *Id.* at 42 (emphasis added). A bistate entity, because its inception is tied to the federal government through Congress, is not an extension of a state or an expression of the state’s sovereign power. Thus, the *Hess* court said, “within any single State in our representative democracy, voters may exercise their political will to direct state policy; bistate entities created by compact, however, **are not subject to the unilateral control of any one of the States that compose the**

¹⁹ Matthew S. Tripolitsiotis, *Bridge over Troubled Waters: The Application of State Law to Compact Clause Entities*, 23 YALE L. & POL’Y REV. 163, 165 (2005).

federal system.” *Id.* (emphasis added). This weighs heavily against the entity being an “arm of the state.” Moreover, while the vulnerability of the public treasury is also a factor to consider, it is tied to “the idea that **sovereign immunity offers a protection against the potentially undemocratic effects of private litigation.**”²⁰ The real issue is that “it allocates public funds [as] determined by the judiciary, **not the democratic process.** . . .”²¹

The discussion of sovereign immunity presented above reveals the absurd Catch-22 that the FOMB’s invocation of sovereign immunity causes. While Congress designated the FOMB as an entity within the Puerto Rico government, the FOMB is a creature of Congress. It is created and acts pursuant to federal law. Its members are appointed by the federal government and, while the entity is ambiguously shoved into the structure of Puerto Rico’s governance structure, its members do not have any political accountability to Puerto Rico nor its elected representatives. Additionally, Congress established exclusive jurisdiction over the entity in federal court. It is unprecedented, but Supreme Court jurisprudence is not devoid of illustrative analysis, as shown by the treatment of the bistate entities. Although the situation is not identical, the reasoning is most definitely applicable and perhaps more so.

²⁰ Florey, *supra* note 18, at 790 (emphasis added).

²¹ *Id.* (emphasis added).

Like the bistate entity, the FOMB is not a state created entity but a federally created entity. Moreover, the FOMB and its members were imposed by the federal government unto the people of Puerto Rico. This imposition came with a series of powers over Puerto Rico's budget and is being funded from Puerto Rico's own treasury. Thus, the nature and origins of the FOMB make it more foreign to Puerto Rico than a bistate entity is to the states that compact it. Puerto Rico does not have any power over the selection of the FOMB's members nor the decisions they make in the execution of their duties. However, Puerto Rico's treasury is affected by the mere presence of the FOMB because Congress decided that Puerto Rico would foot the bill. It is impossible, under these circumstances, to speak of any dignity interest being affected by allowing a suit against the FOMB in federal court. Moreover, while the treasury would be vulnerable if the FOMB were subject to a money judgment, the FOMB's operations are already a burden on Puerto Rico's taxpayers because of federal intervention and not as a result of the democratic will of the people of Puerto Rico and their elected representatives.²² This means that the federal court's intervention would be no more invasive to Puerto Rico's treasury and dignity than the FOMB's daily operations and existence in Puerto Rico.

²² *Puerto Rico's Bankruptcy Fees Seen Hitting \$1.6 Billion (1)*, BLOOMBERG (August 1, 2022), <https://news.bloomberglaw.com/bankruptcy-law/puerto-rico-debt-restructuring-fees-forecast-to-hit-1-6-billion?context=search&index=0>.

Using Puerto Rico’s alleged sovereign immunity to shield the FOMB which imposed upon it by Congress would be another example of the improper extension of the infamous *Insular Cases*. It is yet another expression of the discriminatory and racist case law that allows disparate treatment of the territories under constitutional doctrines that apply to the states as well.

B. The FOMB’s Claims to Eleventh Amendment Immunity as an extension of the *Insular Cases*

This Court has consistently expressed that the *Insular Cases* doctrine should not be expanded beyond where it stands. See *Reid v. Covert*, 354 U.S. 1, 14 (1957).²³ More recently, relying on *Reid v. Covert*, this Court declared that “whatever [the *Insular Cases*] continued validity **we will not extend them in these cases.**” *Fin. Oversight & Mgmt. Bd. for P.R. v. Aurelius Inv., LLC*, 140 S. Ct. 1649, 1665 (2020) (emphasis added). While this Court has fallen short of overruling the *Insular Cases*, so far, it has stated that that the further expansion of the doctrine is improper.

In view of the foregoing, it is evident that the purposes of sovereign immunity are not served by extending it to the FOMB. In fact, the underlying purposes are destroyed. Puerto Rico’s dignity is further

²³ See also, Adriel I. Cepeda Derieux & Neil C. Weare, *After Aurelius: What Future for the Insular Cases?*, 130 YALE L. J. 284 (2020).

tarnished by the FOMB's claim to immunity from suit where Puerto Rico's citizens are attempting to exercise their constitutional right to access public information and defend transparency and democracy in the territory. Allowing the FOMB's pretension would further aggravate the colonial situation of Puerto Rico and impermissibly extend the *Insular Cases*.

III. Granting the FOMB immunity deprives Puerto Ricans of their constitutional right to access to information and destroy the purposes of the appearing *amici*.

Pursuant to PROMESA, the FOMB is tasked, among other things, with elaborating the Fiscal Plans that govern the use of Puerto Rico's economic resources. As such, it holds principal authority over the public budget. Moreover, these Fiscal Plans are beyond judicial review under PROMESA, *see* 48 U.S.C. § 2126(e), and later establish the base for debt adjustment plans, which define a decades-long plan to repay the public debt based upon certain assumptions about debt sustainability and future fiscal health. All the information contributing and leading up to the elaboration of Fiscal Plans—such as communications with internal and external consultants; communications with the government and agencies; methodologies adopted to make fiscal projections, etc.—is critically important to the people of Puerto Rico. Without this information, fully grasping the implications of public policy reforms and budgetary cuts and allocations emanating from the Fiscal Plans is impossible. Access to

those background sources and the data relied on to justify debt restructuring is necessary to scrutinize the FOMB's representations that the government will successfully meet its future obligations without defaulting, becoming bankrupt or negatively impacting the provision of essential services.

Because the FOMB is minimally transparent about its analyses and public records, many of its communications, decisions and publications are a source of contention. For example, this year, the FOMB announced that its plan of adjustment for the Commonwealth achieved an 80% reduction of the debt.²⁴ However, the plan's data, as well as independent research reports on the topic, revealed that the debt reduction was in fact much less, and the confirmed plan lacks the sustainability required to prevent falling into another future bankruptcy.²⁵

PROMESA establishes that “[t]he district courts shall have . . . original and exclusive jurisdiction of all cases arising under [PROMESA.]” 48 U.S.C. § 2166(a). Furthermore, at the FOMB's request, the Title III Court established an alternative procedure for the disclosure of information on Puerto Rico's public debt which included around 200,000 documents, over 100 interviews with current and former state officials, as well as memoranda and reports on the origins of

²⁴ See *Brief for Petitioner* at 7.

²⁵ *Lee la más reciente ponencia sobre el P. de la C. 1003 sobre el Plan de Ajuste de Deuda*, ESPACIOS ABIERTOS (September 29, 2021), <https://espaciosabiertos.org/lee-la-mas-reciente-ponencia-sobre-el-p-de-la-c-1003-sobre-el-plan-de-ajuste-de-deuda/>.

Puerto Rico's indebtedness.²⁶ The FOMB paid \$16 million in public funds for a private firm to produce them. In other words, these were all documents of the utmost public interest. Yet, under this alternative procedure, the FOMB would manage every request for disclosure and be entitled to challenge requests related to Puerto Rico's public debt restructuring. This procedure is inadequate, complex, costly and does not observe Puerto Rico's constitutional right to access public information. It forces non-governmental agencies to endure additional costs when requesting information from the FOMB, which would severely hinder their ability to successfully perform *amici's* citizen-led, investigative tasks. Specifically, the FOMB's exemption from suit jeopardizes the Commission's mission to audit the public debt.

Because PROMESA deprives Puerto Rican Courts of jurisdiction over lawsuits against the FOMB, granting it immunity would shield it from any record-seeking litigation, leaving *amici*, or any other interested party, with no other forum to request disclosure of public information. As previously mentioned, in 2018, one of the appearing *amici*, the Commission, brought suit against three territorial entities for failure to disclose public information and one of the defendants alleged that a portion of the requested documents were in the FOMB's hands, which meant it must be requested through the Title III court, through a special procedure

²⁶ *In re: The Financial Oversight and Management Board for Puerto Rico*, No. 17 BK 3283-LTS (Doc. No. 3744) (Aug. 6, 2018 Order).

controlled by the FOMB. This procedure is inadequate, complex, costly and does not abide by Puerto Rico's constitutional access public information. Forcing organizations to use this process would severely hinder their ability to successfully perform citizen-led, investigative tasks.

Without access to information that the FOMB now controls, the appearing *amici* cannot pursue their mission. The *amici* have long criticized the FOMB's failure to disclose information. For instance, IEEFA takes issue with FOMB's failure to disclose basic budgetary assumptions, of the type that enable watchdog organizations, such as IEEFA, to track budgetary savings initiatives and determine whether progress has been made towards the FOMB's objectives under PROMESA.²⁷ Additionally, IEEFA criticizes the FOMB's contract review process for lacking transparency, preventing the public from understanding

²⁷ See Cathy Kunkle & Tom Sanzillo, *IEEFA: Proposed budget for Puerto Rico's electricity system fails test of balance, compliance and transparency*, INSTITUTE FOR ENERGY ECONOMICS AND FINANCIA ANALYSIS (June 10, 2021), <https://ieefa.org/resources/ieefa-proposed-budget-puerto-ricos-electricity-system-fails-test-balance-compliance-and>; TOM SANZILLO & CATHY KUNKEL, THE PUERTO RICO ELECTRIC POWER AUTHORITY'S FLAWED FISCAL PLAN: BUDGET SHORTFALLS AND WEAK IMPLEMENTATION PLAN CREATE SUBSTANTIAL RISK (May 2018) (*available at* https://ieefa.org/wp-content/uploads/2018/05/The-Puerto-Rico-Electric-Power-Authoritys-Flawed-Fiscal-Plan_May-2018.pdf); TOM SANZILLO, PUERTO RICO ELECTRIC POWER AUTHORITY DEBT RESTRUCTURING: A WEAK DEAL PLAGUED BY SCANDAL (August 2019) (*available at* https://ieefa.org/wp-content/uploads/2019/08/Puerto-Rico-Electric-Power-Authority-Debt-Restructuring_August-2019.pdf).

whether million dollar electrical system professional services contracts are actually consistent with the certified fiscal plans.²⁸ The FOMB's complete lack of transparency hinders IEEFA's work towards monitoring and evaluating the progress made in restoring Puerto Rico's electrical system to fiscal health, including meeting renewable energy targets, achieving savings initiatives, establishing transparent and accurate financial reporting, and regaining access to capital markets.

CAMBIO has also criticized the FOMB for failing to provide any analysis or assessment of LUMA's first year of operations, while it argues for the continued privatization of the electrical system. Furthermore, CAMBIO has noted that the FOMB's contract with one of its main financial advisors includes a multi-million-dollar bonus to be paid upon the successful consummation of electrical system privatization.²⁹ The FOMB's ongoing failure to disclose the analysis and assumptions that underlie the projections and mandates contained in its certified fiscal plans undermines public confidence that its actions are in the public interest. The lack of public information also creates greater challenges for CAMBIO and other organizations that seek to educate the public and create more

²⁸ See Kunkle & Sanzillo, *Paying for failure*, *supra* note 2.

²⁹ See CATHY KUNKEL & INGRID M. VILA BIAGGI, EL PLAN FISCAL DE LA AUTORIDAD DE ENERGÍA ELÉCTRICA PROFUNDIZA LOS PROBLEMAS DEL SISTEMA ELÉCTRICO (August 2022) (*available at* https://cambiopr.org/wp-content/uploads/2022/08/CAMBIO_Informe_plan_fiscal_JCF_AEE_08_22.pdf).

opportunities for informed public dialogue over the future of the electrical system.

Moreover, Sembrando Sentido's work reviewing and scrutinizing public contracts requires access to information. Under Title II of PROMESA, the FOMB has ample discretion over financial and contractual decisions for the government of Puerto Rico and its instrumentalities. Public contracting represents around 50% of Puerto Rico's annual expenditures.³⁰ The FOMB is responsible for the approval of the Executive Branch's Annual Procurement Plan; reviewing and approving public contracts that reach or exceed \$10 million dollars; and, potentially, halting the execution of contracts in public instrumentalities.³¹

According to the Registry of Contracts of the Puerto Rico Comptroller, since December 2017, around 630 contracts have been awarded for quantities that reach or exceed \$10 million dollars. Of those, approximately 173 contracts—totaling \$35,733,933,427.85—raised flags for potential corruption risks through Sembrando Sentido's public procurement monitoring system. Without access to information from the FOMB, Sembrando Sentido is unable to inquire further, bring these risks to light and propose preventive action as

³⁰ See ISSEL MASSES FERRER, JUAN JOSÉ JIMÉNEZ & RACHEL A. ROMÁN VILLALOBOS, EVALUATION OF PUBLIC PROCUREMENT PROCESSES IN PUERTO RICO (2022) (available at https://drive.google.com/file/d/1eGB101-HCieJGEkObt0-ooTxiIG_RpBN/view).

³¹ See FOMB POLICY: REVIEW OF CONTRACTS 2-3 (2021) (available at <https://drive.google.com/file/d/1ujjQKj5z120V0J2TQ07sa8CpR9ATrObsJ/view>) (last visit: December 17, 2022).

needed. If state and local entities can argue the information requested is part of the restructuring process managed by the FOMB and exempt from transparency requirements, the outcome will be further disenfranchisement that prevents true oversight and participation to ensure the fair and efficient use of public resources.

Moreover, exempting the FOMB from access to information requirements also prevents citizens from holding the FOMB accountable for its own contractor selections, such as those with bad performance records and/or extensive conflicts of interest. This is the case with the consulting firm McKinsey & Company. Since 2016, this contractor has benefited from the FOMB's procurement of professional services, billing close to \$72 million by August 2019. While the company may be a creditor in Puerto Rico's Title III Case, it has also consulted on the review of contracts with companies that are its clients including Quanta Services Inc., Puma Energy Caribe LLC., New Fortress Energy LLC, Geoelectrical LP, Naturgy Group SA, Molina Healthcare and Manpower Group.³²

³² See Andrew Wise & Luis Valentín, *The McKinsey Way to Save an Island: Why is a bankrupt Puerto Rico spending more than a billion dollars on expert advice?*, NEW YORK MAGAZINE (April 17, 2019), <https://nymag.com/intelligencer/2019/04/mckinsey-in-puerto-rico.html>; Alexander Gladstone, *McKinsey Clients Won Puerto Rico Contracts as Firm Advised Government*, THE WALL STREET JOURNAL (June 27, 2022); Mary Williams Walsh, *McKinsey Advises Puerto Rico on Debt. It May Profit on the Outcome*, THE NEW YORK TIMES (September 26, 2018).

In Liga's case, the main concern of shielding the FOMB from suit is that the entity continuously oversteps its role, without any consideration to the rule of the law that created it or to the needs, realities and wants of the community. While PROMESA has no provision granting any authority to the FOMB over democratically elected mayors, municipalities, who are the first line of service and support to communities in Puerto Rico, have borne the brunt of the FOMB's unilaterally imposed austerity measures. The nefarious decisions of the FOMB have impoverished the municipalities and are leading forty-three municipalities to become fiscally unviable by the end of the next fiscal year. This represents a third of the Puerto Rican population, where the poverty level is 7.5 points higher than the median in Puerto Rico.³³

While each of the appearing *amici* has its own role in civil society and advocacy efforts, they represent a cross-section of the issues at play in this case. Granting the FOMB Eleventh Amendment sovereign immunity from suit in federal court leaves citizens and organizations such as the *amici* without any choices when faced with the entity's lack of transparency. The federal court has exclusive jurisdiction over issues arising from PROMESA, such as suits against the FOMB. Thus, without access to federal courts, the FOMB has near absolute immunity from suit. Plaintiffs cannot turn to the state courts for remedies against the

³³ LIGA DE CIUDADES DE PUERTO RICO, RADIOGRAFÍA MUNICIPAL (2020), <https://www.yumpu.com/es/document/read/65735131/radiografia-municipal-2020>.

FOMB. The result is a catastrophic blow to the rights of these organizations and the constitutional doctrine of access to information in general.

IV. The *Insular Cases* should be overruled.

While none of the parties have raised the issue, the appearing *amici* find that this Court has enough leeway with which to overrule the *Insular Cases*. No question of law regarding the FOMB and Puerto Rico's sovereignty is independent from the *Insular Cases* because the territorial status established in the Constitution and the jurisprudential interpretation given to the plenary powers of Congress over territories are at the heart of these issues. Without the *Insular Cases* and their twisted interpretation of the Territories Clause, neither PROMESA nor the FOMB would exist. As such, this case stands on the foundation of the *Insular Cases*, like so many others. It is time to put a stop to the extension of the colonial rule through Supreme Court precedent.

In 1898, the United States invaded Puerto Rico. To make matters worse, the Supreme Court imposed the ignominious colonial judicial doctrine of the *Insular Cases*. These cases embodied and legitimized the colonial relationship between the United States and Puerto Rico. Such cases determined that Puerto Rico is an unincorporated territory, which belongs to, but is not part of, the United States. Therefore, Puerto Rico's residents required different treatment from residents of the continental United States. These cases "stand at

par with *Plessy v. Ferguson* in permitting disparate treatment by the government of a discrete group of citizens.”³⁴ See also, *United States v. Vaello-Madero*, 142 S. Ct. 1539 (2022) (J. Gorsuch, concurring).

“[T]he time has come to recognize that the Insular Cases rest on a rotten foundation” and should be overruled. *Id.* at 1557 (J. Gorsuch, concurring). Even if the *Insular Cases* were wholly unrelated to this case, which they are not, this Court has “the opportunity to make express what is already obvious: [The *Insular Cases* were] gravely wrong the day [they were] decided . . . [and have] no place in law under the Constitution.” *Trump v. Hawaii*, 138 S. Ct. 2392, 2423 (2018) (citation omitted) (overruling *Korematsu* even though it “ha[d] nothing to do with [the] case. . .”). While these words were uttered by this Court in relation to the also infamous case of *Korematsu v. United States*, 323 U.S. 214 (1944), they hold true in this context. The subjugation of a whole class of people under racially motivated colonial rule is “morally repugnant”, see *id.*, and should be overruled.

The judicial doctrine of the *Insular Cases* determined that only a few fundamental constitutional rights of the Federal Constitution apply to Puerto Rico. That imposed the abhorrent condition of the deprivation of fundamental human rights upon the Puerto

³⁴ JUAN R. TORRUELLA, THE SUPREME COURT AND PUERTO RICO, THE DOCTRINE OF SEPARATE AND UNEQUAL 3 (1985). See also, Juan R. Torruella, *The Insular Cases: The Establishment of a Regime of Political Apartheid*, 29:2 U. PA. J. INT’L L. 283, 286 (2007).

Rican People that is contrary to binding international law, and the democratic principles the United States flaunts before the international community. The *Insular Cases* show the United States as an empire with complete control over its colonial subjects in Puerto Rico.

The *Insular Cases* reflect outdated theories of imperialism and racial inferiority.³⁵ While they were initiated to answer the question of whether a tax law was constitutional, they stand for the notion that the **alien races** that inhabited Puerto Rico were too different to live under the principles of the United States Constitution. See *Downes v. Bidwell*, 182 U.S. 244, 287 (1901). The result was for Congress to “keep a Territory, like a disembodied shade, in an intermediate state of ambiguous existence for an indefinite period.” *Vaello-Madero*, 142 S. Ct. at 1554 (J. Gorsuch, concurring) (citations and brackets omitted). Moreover, the decision engrafted “a colonial system such as exists under monarchical governments.” *Id.* (citations omitted). Furthermore, the subjugation of a people without representation, echoes the badges and incidents of slavery in the United States forbidden by the U.S. Constitution.³⁶

Under the Territories Clause and the *Insular Cases*, Puerto Rico continues to be a colony inhabited

³⁵ See Torruella, *The Insular Cases*, *supra* note 34, at 286-287.

³⁶ See *Civil Rights Cases*, 109 U.S. 3, 4, 3 S. Ct. 18, 27 L. Ed. 835 (1883); *Hodges v. United States*, 203 U.S. 1, 27 S. Ct. 6, 51 L. Ed. 65 (1906).

by millions of second-class American citizens who do not have the same political or economic rights as the resident citizens of the states. Puerto Rico is subject to the will of Congress, although its resident citizens cannot vote in federal elections, do not have federal representatives with a vote in Congress, receive discriminatory treatment in federal funding and are in numerous ways unable to exercise any sovereignty that would allow them to develop their economy and society. Congress called upon its extraordinary and violent powers pursuant to the *Insular Cases* to pass legislation which would only allow Puerto Rico to restructure its debts under the conditions unilaterally established by an unelected board with powers superior to its own government and, at the same time, granted that unelected board the power to veto legislation and control government operations. Now, this board wants to be immune from judgement by the People.

Additionally, the doctrine of *stare decisis* is no impediment here. This very year, this Court stated that **“when it comes to the interpretation of the Constitution—the great charter of our liberties, which was meant to endure through a long lapse of ages,—we place a high value on having the matter settled right.”** *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228, 2262 (2022) (emphasis added) (citations and quotation marks omitted). **“The flaws in the Insular Cases are as fundamental as they are shameful . . . Nothing in it authorizes judges to engage in the sordid business of segregating**

Territories and the people who live in them on the basis of race, ethnicity, or religion.” *Vaello-Madero*, 142 S. Ct. at 1554 (J. Gorsuch, concurring) (emphasis added) (citations omitted). Thus, this Court can and should overrule the morally repugnant interpretation given by this Court to the Territories Clause in the *Insular Cases*. This interpretation was wrongly decided and has dragged on for over a century keeping Puerto Rico’s resident citizens in the throes of colonialism. This Court should take any opportunity to settle the question right.

◆

CONCLUSION

In view of the foregoing, the appearing *amici* request that this Court consider the arguments previously expressed and rule in favor of the CPI. Puerto Rico does not have a claim to Eleventh Amendment sovereign immunity and, if it did, the FOMB would not be entitled to share it. Any determination to the contrary would continue the tradition of the *Insular Cases*, sinking Puerto Rico further into colonialism without hopes of emerging from the tyranny of Congressional rule. Moreover, the practical effect of granting the FOMB Eleventh Amendment sovereign immunity is not an issue of changing forum, but a near blanket immunity from suit. Without a space to challenge the FOMB and request transparency where the FOMB wants obscurity, the appearing *amici* would see their purposes defeated. The FOMB has garnered near total control over Puerto Rico’s elected officials and

public agencies. To spare them from accountability, in the form of transparency and access to public information, would deal a great blow to the people of Puerto Rico who are only asking to know what these proconsuls are planning and how they justify it. Granting the FOMB Eleventh Amendment sovereign immunity runs contrary to the constitutional text and the precedents of this Court on the matter, twisting the doctrine to accommodate the unthinkable. If this Court rules in favor of the FOMB in this case, it will be impermissibly extending the *Insular Cases*, contrary to its own warnings in prior opinions.

Respectfully submitted,

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