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 AMICUS CURIAE FOR THE SPEAKER OF THE PUERTO RICO HOUSE OF REPRESENTATIVES IN SUPPORT OF RESPONDENT

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
STATEMENT OF INTEREST OF AMICUS CURIAE	1
SUMMARY OF ARGUMENT	4
ARGUMENT	6
CONCLUSION	21

TABLE OF AUTHORITIES

Page

CASES:

Alabama v. Pugh, 438 U.S. 781, 782 (1978)..... 5

Alden v. Maine, 527 U.S. 706 (1999) 11

Allen v. Cooper, 140 S. Ct. 994 (2020) 16

Aquino v. Suiza Dairy, Inc., 563 U.S. 1001 (2011) 7-8

Atascadero State Hospital v. Scanlon, 473 U.S. 234 (1985) 17

Bd. of Trustees Univ. of Alabama v. Garrett, 531 U.S. 356 (2001) 17

Centro de Periodismo Investigativo, Inc. v. FOMB, 35 F.4th 1 (1st Cir. 2022).................. 7, 11

Detroit Free Press v. Ashcroft, 303 F.3d 681 (6th Cir. 2002) 22

Examining Bd. of Eng., Arch. & Surveyors v. Flores de Otero, 426 U.S. 572 (1976)........... 9

Fin. Oversight & Mgmt. Bd. for P.R. v. Aurelius Inv., LLC, 140 S. Ct. 1649 (2020)......... 2, 12

Hess v. Port Auth. Trans-Hudson Corp., 513 U.S. 30 (1994) 13

Kimel v. Fla. Bd. Of Regents, 528 U.S. 62 (2000) 17

Lewis v. Clarke, 581 U.S. 155 (2017)................ 9

Oklahoma Tax Comm'n v. *Citizen Band of Potawatomi Tribe of Okla.*, 498 U.S. 505 (1991) 4

TABLE OF AUTHORITIES—Continued

Page

Penhurst State School and Hospital v. Halderman, 465 U.S. 69 (1984) 3, 10

Port Auth. Trans. Hudson Corp. v. Feeney, 495 U.S. 299 (1990) 5

Puerto Rico Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc., 506 U.S. 139 (1993) 8, 11

Puerto Rico v. Franklin Cal. Tax Free Trust, 579 U.S. 115 (2016) 10

Puerto Rico v. Sánchez Valle, 579 U.S. 59 (2016) 4, 8

Puerto Rico v. Shell Co., 302 U.S. 253 (1937) .. 9

Ramírez v. Puerto Rico Fire Serv., 715 F.2d 694, 697 (1st Cir. 1983) 7

Regents of the Univ. of Cal. v. Doe, 519 U.S. 425 (1997) 13

Rodríguez v. Popular Democratic Party, 457 U.S. 1 (1982) 8

Seminole Tribe v. Florida, 517 U.S. 44 (1996) 17

Soto v. Giménez Muñoz, 12 P.R. Offic. Trans. 597, 112 D.P.R. 477 (1982)............... 3

Va. Office for Protection & Advocacy v. Stewart, 563 U.S. 247 (2011) 15-16

Page

Vaquería Tres Monjitas, Inc. v. Irizarry, 587 F.3d 464 (1st Cir. 2009) 7

U.S. CONSTITUTIONAL PROVISIONS:

U.S. Const. Art. I 10

U.S. Const. Art. II, § 2, cl. 2 2

U.S. Const., Art. III 5, 9, 10

U.S. Const., Art. IV.. 13, 16

U.S. Const. Amend. 14, § 5................................. 16

U.S. Const. Amend. 11....................................... *passim*

STATUTES:

31 Stat. 77 1

3 P.R. Laws Ann. § 9912 2

48 U.S.C. § 2101 2

3 P.R. Laws Ann. § 9911 2-3

3 P.R. Laws Ann. § 9913 3

80 Stat. 764 9

42 U.S.C. § 1983 11

48 U.S.C. § 2121(b)(2)....................................... 13, 14

48 U.S.C. § 2128(a)(1)....................................... 14

48 U.S.C. § 2149 14

11 U.S.C. § 1104 15

TABLE OF AUTHORITIES—Continued

Page

48 U.S.C. § 2126 .... 16, 18

29 U.S.C. § 621 17

42 U.S.C. § 12202 17

25 U.S.C. § 2710 17

48 U.S.C. § 2166 18

48 U.S.C. § 2124 .... 18, 19

48 U.S.C. §2125 18

3 P.R. Laws Ann. § 1451 .... 19, 20

OTHER LEGAL AUTHORITIES:

Chandler, A.D., *Puerto Rico's Eleventh Amendment Status Anxiety*, 120 Yale L.J. 2183 (2011)................. 7

STATEMENT OF INTEREST OF *AMICUS CURIAE*[1]

The appearing *amicus curiae*, the Hon. Rafael Hernández-Montañez, has held, since January 2021 the position of Speaker of the Puerto Rico House of Representatives. The House of Representatives is the oldest democratic institution in Puerto Rico, created by the 1900 Organic Act, 31 Stat. 77 (1900)[2]. This Nineteenth Legislative Assembly[3] is the most diverse in modern Puerto Rico's history with 5 different political parties having elected members to the House. Pursuant to Article 5.2(p) of the current House Rules (House Resolution 161), the Speaker is authorized to make court appearances on behalf of the legislative body. The instant brief constitutes the House's fourth amicus filing before this Honorable Court since the current legislature was inaugurated in January 2021.

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[1] As the record shows, both parties have issued blanket consent statements regarding the appearance of *amici*. *Amicus* hereby further certifies, as per this Honorable Court's Rule 37.6 that no party or counsel for a party has authored any part of the foregoing brief nor has any of the parties and/or their attorneys made a monetary contribution to fund the filing of this brief. No person other than the *amicus* or his counsel have made a monetary contribution to its preparation or submission.

[2] Under this legislation the "House of Delegates", as it was then called, was the only government institution whose members were selected through popular vote as all other components of the territorial government were either appointed by the President of the United States or by the Governor.

[3] Although the House has been in continuous operation since 1900, the Number Nineteen corresponds to the terms since the post-1952 constitutional era. Both houses of the Puerto Rico Legislature serve 4-year terms with elections held on November of every leap year and the elected bodies being inaugurated on January 2nd of the post-election year.

Under Speaker Hernández-Montañez' leadership, the House has been a staunch and passionate advocate of legislative prerogatives and a defender of the constitutional prerogatives of Puerto Rico's elected government, which in recent years have been subject to encroachment by the Financial Oversight and Management Board for Puerto Rico (hereinafter referred to as "FOMB" or "the Board"), created under the Puerto Rico Oversight, Management and Financial Stability Act, 48 U.S.C. § 2101, et seq. (hereinafter referred to as "PROMESA"). In this particular instance we are before an attempt by the FOMB to hold itself as a territorial entity that is above territorial law and to shield its conduct from judicial review.

Although at the time the House supported the contrary position both before the Court of Appeals and before this Honorable Court, there is no question that the FOMB, despite being a creature of federal law, is an entity within the Commonwealth's Government. *Fin. Oversight & Mgmt. Bd. for P.R. v. Aurelius Inv., LLC*, 140 S. Ct. 1649, 1661-1663 (2020). While in previous litigation the Board successfully trumpeted its territorial entity status to avoid the application of the Appointments Clause (U.S. Const. Art. II, § 2, cl. 2), in the instant case it desperately seeks to avoid complying with Puerto Rico law regarding the disclosure of official information that applies to *all* of the instrumentalities within the Commonwealth of Puerto Rico[4]. The right invoked by the respondent is now codified in a statute but has long been held by the Puerto Rico Supreme Court to emanate directly from the Commonwealth's Constitution. *See* 3 P.R. Laws Ann.

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[4] This legislation clearly provides that its provisions "shall apply to the Government of Puerto Rico, that is, the Legislative, the Judicial, and the Executive Branches, *as well as all government entities*, public corporations, and municipalities". 3 P.R. Laws Ann. § 9912 (emphasis added).

§ 9911, et seq.[5]; *Soto v. Giménez Muñoz*, 12 P.R. Offic. Trans. 597, 112 D.P.R. 477 (1982).

The thrust of petitioner's argument to avoid having to tender information to a legitimate investigative journalism organization is that there is no legal forum in which to seek a decree compelling it to comply with Puerto Rico law because the Eleventh Amendment (as per *Penhurst State School and Hospital v. Halderman*, 465 U.S. 69, 106 (1984))[6] bars such forms of equitable relief. In other words, the Board purports to be completely exempt from judicial review regarding its compliance with Puerto Rico law applicable on account of its identity as a territorial instrumentality. Needless to say, a government entity that is allowed to avoid the basic check of judicial review becomes an unaccountable actor vested with public authority.

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[5] The original complaint filed in the instant action could not directly invoke this statute, as it was filed before its enactment and therefore, the legal basis for the suit was the Commonwealth Constitution, as interpreted by the Puerto Rico Supreme Court. However, the 2019 bill incorporates as official public policy the preceding years of jurisprudence (3 P.R. Laws Ann. § 9913) and provides procedural tools for its implementation.

[6] Holding that:

> A federal court's grant of relief against state officials on the basis of state law, whether prospective or retroactive, does not vindicate the supreme authority of federal law. On the contrary, it is difficult to think of a greater intrusion on state sovereignty than when a federal court instructs state officials on how to conform their conduct to state law. Such a result conflicts directly with the principles of federalism that underlie the Eleventh Amendment.

Because the House is interested in the uniform application of Puerto Rico statutes that promote transparency and accountability, we have chosen to appear to urge the affirmance of the challenged decision. Furthermore, as a creature of the Puerto Rico Constitution, the House is always interested in matters pertaining to the Commonwealth Government's immunities and privileges under applicable federal constitutional provisions, some of which are implicated in the instant case.

SUMMARY OF ARGUMENT

One of the limitations to the authority of the federal judiciary is the Eleventh Amendment's bar from private suits against unconsenting states. Notwithstanding the express mention of "states" in the text of the constitutional provision, non-state entities such as Native American governments have been extended the benefit of sovereign immunity. *Oklahoma Tax Comm'n* v. *Citizen Band of Potawatomi Tribe of Okla.*, 498 U.S. 505, 509 (1991). Notwithstanding differences between the Commonwealth of Puerto Rico and tribal governments, four decades of First Circuit jurisprudence has steadfastly held the Commonwealth of Puerto Rico as also immune[7]. While this Honorable Court has never addressed the Commonwealth's entitlement to sovereign immunity, it need not do so here as petitioner would not be entitled to such immunity, even if it were to apply. To the extent that the Court decides to delve into the merits of the immunity question, the First Circuit's longstanding view should be upheld on account of: 1) general sovereignty and dignity attributes that this Honorable

[7] *See Puerto Rico v. Sánchez Valle*, 579 U.S. 59, 70 (2016) (noting distinctions between the original source of authority of tribal governments vis-à-vis territorial governments as relevant to a double jeopardy inquiry).

Court has recognized for territorial governments in general and for the Commonwealth of Puerto Rico in specific; and 2) the need for a uniform application of constitutional constraints on the judicial power of the United States, given the fact that the judges that sit in the District of Puerto Rico are appointed under Article III of the U.S. Constitution.

The scope of the Eleventh Amendment is limited to states and their agencies. *Alabama v. Pugh*, 438 U.S. 781, 782 (1978). Based on this, "[t]he Court developed the 'arm-of-the-State' doctrine as a tool for determining which entities created by a State enjoy its Eleventh Amendment protection and which do not". *Port Auth. Trans. Hudson Corp. v. Feeney*, 495 U.S. 299, 312 (1990). Petitioner makes no effort whatsoever to establish that it fits the "arm of the state" mold, as defined under applicable law. While the doctrine is particularly interested in avoiding the payment of judgments from the state coffers, which is not a consideration in the instant case, as plaintiff only seeks declaratory and equitable relief. In terms of the "arm of the state" analysis, the degree of control that the state exercises over the agency is of crucial importance, as the entity needs to be considered an appendix of the larger political body in order to share in its immunity. In the very *sui generis* case of the FOMB, it is considered "an entity within the territorial government" only because Congress willed it so, as it is funded with territorial monies and its actions have a direct effect over territorial governance. Having said this, far from exercising the degree of control that states typically exercise over its dependencies, in many relevant respects the Board acts without the Commonwealth's elected government having any authority to even lodge an objection. The FOMB is so far

removed from controlling this legal entity that it now claims to be an arm of, that Congress even proscribed it from exercising any *oversight* over the Board's operations. There is no possible analogy between the typical arm created by the state and a powerful independent and unaccountable body imposed by Congress. The FOMB simply cannot be deemed to be an appendage of the Commonwealth and therefore meant to share in its immunity.

In creating the unique creature that is the FOMB, Congress: 1) did not exempt it from the application of any Puerto Rico laws; 2) specifically mentioned several Puerto Rico statutes that applied to the Board and could be enforced by it; and 3) made a sweeping grant of jurisdiction to the district courts for actions arising under PROMESA in general and more specifically for *any* action against the FOMB. The type of actions allowed and the broad grant of jurisdiction, make it is crystal clear that Congress intended to abrogate any sovereign immunity considerations for actions arising in the context of PROMESA. Contrary to what petitioner and the United States posit, utterly specific, on-the-nose language is not required to infer an intent to abrogate immunity, particularly where -as here- the statute makes no sense absent abrogation being read into it.

ARGUMENT

A) Puerto Rico and Sovereign Immunity

While the House supports respondent's position that it is entitled to sue the FOMB in federal court to compel compliance with access to information legislation, we cannot endorse its position that the Commonwealth lacks recourse to any immunity from being sued in federal court. This is the one aspect of the case

in which we respectfully differ from the respondent. Fortunately, we need not take the "no immunity" position to defend the validity of the First Circuit's decision, as said Court found in favor of the respondent while following its own settled law to the effect that Puerto Rico enjoys the benefits of said constitutional provision or, at the very least enjoys the same protection, even if it does not emanate directly from the Constitution. *Centro de Periodismo Investigativo, Inc. v. FOMB*, 35 F.4th 1, 13-15 (1st Cir. 2022). In other words, this case is not about whether or not Puerto Rico or its "arms" enjoy immunity from suit in federal court. The question clearly is whether or not the FOMB may invoke that immunity and use it as a shield against suit in this particular case.

It is true that the scope of Puerto Rico's immunity has not been the subject of much discussion before this Honorable Court. Nonetheless, the existence of some form of immunity has long been a staple of First Circuit jurisprudence. As far back as almost four decades ago, a First Circuit panel that included recently retired Justice, Hon. Stephen Bryer, observed that "Puerto Rico, despite the lack of formal statehood, enjoys the shelter of the Eleventh Amendment in all respects". *Ramírez v. Puerto Rico Fire Serv.*, 715 F.2d 694, 697 (1st Cir. 1983). Puerto Rico is unique among the territories in this regard. *See* Chandler, A.D., *Puerto Rico's Eleventh Amendment Status Anxiety*, 120 Yale L.J. 2183 (2011). It bears noting that this Honorable Court has declined to issue certiorari in cases offering an opportunity to halt the First Circuit's decades-long application of Eleventh Amendment doctrine to Puerto Rico, the most recent of which was *Vaquería Tres Monjitas, Inc. v. Irizarry*, 587 F.3d 464 (1st Cir. 2009), rehearing *en banc* denied at 600 F.3d 1 (1st Cir. 2010), certiorari denied at *Aquino v.*

Suiza Dairy, Inc., 563 U.S. 1001 (2011), a case in which the petitioner raised, *inter alia*, the validity of Puerto Rico's assertion of sovereign immunity.

While respondent is correct that the first footnote in *Puerto Rico Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc.*, 506 U.S. 139 (1993) notes that the merits of Puerto Rico's assertion of Eleventh Amendment immunity was not properly before it, that case does go on to find that the denial of such immunity is immediately appealable under the "collateral order doctrine". *Id.* at 147. Had the Court viewed Puerto Rico's assertion of immunity as far-fetched, it would have very likely not issued certiorari to decide the matter in that particular case and instead chosen to decide the matter in a case originated in a federal court sitting in a state.

Notwithstanding the fact that Puerto Rico remains a territory and Congress retains its broad Article IV authority, this Honorable Court has held that, the enactment of the Commonwealth's Constitution, *made Puerto Rico 'sovereign' in one commonly understood sense of that term*". *Sánchez Valle*, 579 U.S. at 74 (emphasis added); *see also Rodríguez v. Popular Democratic Party*, 457 U.S. 1, 8 (1982) (deferring to Puerto Rico's power to enact electoral legislation while observing that "Puerto Rico, *like a state*, *is an autonomous political entity, 'sovereign over matters not ruled by the Constitution*'") (emphasis added). We respectfully posit that there is simply no way to harmonize these holdings with the Commonwealth being subjected to unconsented federal lawsuits.

Even *before* Congress provided for the process that ended in the ratification of the Commonwealth's 1952 Constitution, this Honorable Court had observed that:

> The aim of the Foraker Act and the Organic Act was to give Puerto Rico full power of local self-determination, with an autonomy similar to that of the states and incorporated territories. *Gromer v. Standard Dredging Co.*, 224 U.S. 362, 370; *Porto Rico* v. *Rosaly y Castillo, supra*, p. 274. 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*.

Puerto Rico v. Shell Co., 302 U.S. 253, 261-262 (1937) (emphasis added)

In challenging longstanding First Circuit precedent, respondent relies on the plain language of the amendment (i.e., the reference to "*states*")[8] and notions of residual state sovereignty within the Union. As we will show, the case of Puerto Rico requires the consideration of several additional factors.

Since 1966, federal courts in Puerto Rico have operated with judges appointed under Article III of the Constitution. 80 Stat. 764 (1966). The 1966 bill created in Puerto Rico a scheme of federal courts that is identical to that which exists on the states. *Examining Bd. of Eng., Arch. & Surveyors v. Flores de Otero*, 426 U.S. 572, 594 n. 26 (1976). Hence, Puerto Rico's immunity from unconsented federal suits need not necessarily emanate from the U.S. Constitution, as it is enough that such immunity is necessary to

[8] Such hyper-literal reading of the amendment is easily discarded by looking into settled case law affording immunity to entities that are distinctly not states, such as native American tribal governments. *Lewis v. Clarke*, 581 U.S. 155, 157 (2017).

maintain the effectiveness of the existing statutory scheme. While the law does make salient distinctions between the authority of Article I and Article III federal judges, *all* Article III district judges are treated *exactly the same*, *regardless of where they sit*. 28 U.S.C. §§ 132-144.

By its plain language[9], and as noted many times by this Honorable Court, "the fundamental principle of sovereign immunity limits the grant of judicial authority in Art. III". *Penhurst*, 465 U.S. at 98. It thus follows that limiting the jurisdiction of Article III judges in Puerto Rico in the same way that the Eleventh Amendment limits their counterparts in the states is consistent with the clear Congressional intent of treating Puerto Rico as a state with regards to the constitutional source of authority of the federal judges that sit in said jurisdiction. This in turn allows Eleventh Amendment immunity to be applied *in pari materia* to cases brought before the Article III judges that sit in Puerto Rico. Puerto Rico is treated as a state for purposes of most forms of constitutional analysis including preemption, in which case Puerto Rico law is treated as if it were state law. *Puerto Rico v. Franklin Cal. Tax Free Trust*, 579 U.S. 115, 126-127 (2016).

To be sure, if the Commonwealth and its arms could be sued in federal court, the result would be an unmanageable federal docket and substantial additional expenditure of scarce Commonwealth

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[9] The amendment provides that "*[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" (emphasis added).

resources. As it stands, the District of Puerto Rico is a jurisdiction that handles a substantial amount of claims for civil rights violations under 42 U.S.C. § 1983, in which now Puerto Rico's treasury could be at risk were it a potential defendant instead of the current state of affairs, in which only *individuals* who act under color of state law are subject to suit. In addition to this, the District of Puerto Rico would probably have to handle a fair amount of collection and breach of contract claims against the government that come its way via diversity jurisdiction, something that federal judges in the states are never called upon to deal with. Not only would this create a docket that is impossible for the judges to manage but it would require the Commonwealth to considerably increase its roster of attorneys admitted to federal court which is not an easy task in a jurisdiction in which the language barrier greatly diminishes the size of the federal bar. The federal judiciary would also likely have to retain additional support personnel to handle the new, larger caseload.

Just as in *Puerto Rico Aqueduct & Sewer Auth.*, this case can be decided without resolving the thornier constitutional question as existing Eleventh Amendment law does not favor petitioner's position. In any event, there are cogent legal grounds to adjudicate this matter just as the First Circuit has for years.

B) CONGRESS NEVER INTENDED THE FOMB TO BE AN "ARM" OF THE COMMONWEALTH

The FOMB is not, nor does it purport to be, an *alter ego* of the Commonwealth of Puerto Rico. Hence, to benefit from any immunity prerogatives enjoyed by the Commonwealth of Puerto Rico, the Board must meet the "arm of the state" standard. *Alden v. Maine*, 527 U.S. 706, 756 (1999) ("The immunity does not

extend to suits prosecuted against a municipal corporation or other governmental entity which is not an arm of the State"). As noted by the First Circuit, this analysis has not been performed in this case. *Centro de Periodismo Investigativo, Inc.*, 35 F.4th at 14. Ordinarily, arms of the state are appendixes of the state government that are financially and operationally *subservient to the underlying state government*. The FOMB clearly does not fit this mold as, rather than relying on authority delegated by the Commonwealth's government, "the Board possesses considerable power—including the authority to substitute its own judgment for the considered judgment of the Governor and other elected officials". *Fin. Oversight & Mangt. Bd. for Puerto Rico*, 140 S.Ct. at 1662. In other words, the Board is not subservient to the Commonwealth and any monetary judgment against it (and no monetary relief is being sought in this case) would be paid from the territory's treasury not because of any vicarious liability scheme but because the Board has the ultimate control of the government's budget. In any event, even if the plaintiff was to prevail in the instant case, no monetary award would ensue as the respondent is only seeking declaratory and equitable relief.

Both petitioner and the United States attempt to avail themselves to general Eleventh Amendment jurisprudence that is applicable to states and arms of the state with without acknowledging the glaring differences between the FOMB and any other state or arm-of-the-state government bodies. The Oversight Board created by PROMESA is unlike any other entity that has ever claimed Eleventh Amendment immunity before this Honorable Court.

As previously stated, the FOMB is not the Commonwealth. The FOMB is neither a Commonwealth agency such as the Puerto Rico Fire Corps or the Puerto Rico Treasury Department would be. This requires the petitioner to meet the arm of the state standard to be able to invoke any immunity considerations.

It is settled law that "arms" of the state are created by state legislatures and their entitlement to immunity requires an analysis of the characteristics which the states decided to design those entities. *Regents of the Univ. of Cal. v. Doe*, 519 U.S. 425, 429-430 (1997). In the case of the FOMB, the Puerto Rico Legislature did not have a say in neither its creation nor its design. The Board is an imposition for which Congress expressly invoked its Article IV authority to "to dispose of and make all needful rules and regulations for territories". 48 U.S.C. § 2121(b)(2). It is therefore counterintuitive to deem the FOMB to be an "arm" of the Commonwealth that shares in its immunity, where one of the key factors to examine is the state's *control* over the entity. *Hess v. Port Auth. Trans-Hudson Corp.*, 513 U.S. 30, 47-48 (1994) (finding the issue of control to be relevant, if not dispositive)[10]. Rather

[10] It bears noting that this was a 5-4 decision in which Justice O'Connor wrote a thoughtful dissent that was joined by then Chief Justice Rehnquist as well as Associate Justices Scalia and Thomas. These justices advocated for the degree of control that a state exercises over an entity to have played a larger role and indeed dispositive role in that case. *Hess*, 513 U.S. at 62-63 (O'Connor, J. dissenting). In any event, the *Hess* majority decided to deny immunity based on the fact that an eventual judgment against the multi-state entity at issue would not be paid from the participating states' coffers. *Id.*, at 52-53. However, the protection of the public finances is inapposite to the instant case, in which plaintiff is only seeking equitable relief.

than placing the Board under Puerto Rico's control, the unfortunate fact is that any unbiased observer could reasonably conclude that it is the other way around. So much so that Section 108(a)(1) of PROMESA, 48 U.S.C. § 2128(a)(1), proscribes the Executive and Legislative branches of the Commonwealth's government from "exercise[ing] any control, supervision, oversight, or review over the Oversight Board or its activities". Neither the petitioner nor the United States make any attempt to explain how an entity that cannot be controlled, supervised, overseen or reviewed by the political branches of the larger political body can be deemed to be an "arm" of that body. There is absolutely nothing that Puerto Rico's elected government can do to stop any action that the Board undertakes while the PROMESA regime is in place.

Whereas both states and its "arms" are meant to enjoy a continued and indefinite existence, the FOMB is an inherently *transitory* body, the existence of which ends *ipso jure*, upon the completion of certain financial milestones. 48 U.S.C. § 2149. This is so because while states and their dependencies carry out multi-pronged missions and are responsible over a wide range of matters, Congress limited the Board's task to "provid[ing] a method for a covered territory to achieve fiscal responsibility and access to the capital markets", all within the restructuring and budgeting tools provided within PROMESA. 48 U.S.C. § 2121(a). The FOMB only exists because of the fiscal crisis and cannot exist beyond it.

There is simply no analogy to be made between the FOMB and those entities that are normally considered to be "arms of the state" for purposes of immunity. Accordingly, a much more apt analogy of the relationship between the Commonwealth's

government and the FOMB would be that between a Chapter 11 debtor and a court-appointed trustee, as per 11 U.S.C. § 1104. Just as the creation of the Board (at least in paper) is an extraordinary measure focused on asset preservation and the protection of creditor's interest by depriving the debtor of his right to administer the estate pending reorganization, a trustee temporarily assumes control of the debtor's finances. Likewise, in the creation of the FOMB, as in the appointment of a trustee, the debtor does not have a say in the ultimate decision. Just as the Board, the trustee is not under the debtor's control yet owes a strict fiduciary duty to it.

The FOMB is a unique body imposed upon Puerto Rico by federal law with a very distinct transitory function. The fact that because of mostly funding considerations, Congress chose to deem the Board "as an entity within the territorial government for which it is established in accordance with this title", without more, is plainly insufficient to conclude that the entity is an arm of the Commonwealth that joins in its immunity. Attempting to place the Board as an entity entitled to immunity is simply a classic attempt to fit a "square peg in a round hole" type of scenario.

C) CONGRESS CLEARLY MEANT FOR THE BOARD TO BE SUED IN FEDERAL COURT UNDER FEDERAL OR PUERTO RICO LAW

As previously stated, the Board is not an arm of the Commonwealth entitled to immunity. However, The above notwithstanding, assuming, *in arguendo*, that the FOMB is a *sui generis* arm of the Commonwealth, the fact remains that "[a] State may waive its sovereign immunity at its pleasure, and in some circumstances, *Congress may abrogate it by appropriate legislation*". *Va. Office for Protection & Advocacy v.*

Stewart, 563 U.S. 247, 253-254 (2011) (internal citation omitted; emphasis added). To be sure, abrogation is traditionally viewed in the context of an exercise of Congressional authority under U.S. Const. Amend. 14, § 5 to force state to guarantee federal rights that extend to them pursuant to the post-Civil War constitutional reform. *Allen v. Cooper*, 140 S. Ct. 994, 1003-1004 (2020). We could not be further removed from a traditional scenario.

As part of the plentiful litigation arising since Puerto Rico came under the PROMESA regime, the FOMB has steadfastly attempted to justify all instances in which the government elected by the People of Puerto Rico is undermined as a result of Congress' exercise of its "plenary powers" over the territory pursuant to U.S. Const. Art. IV, cl. 2. In this case the Board has abandoned its traditional mantra that Congress may legislate whatever it wants with regards to the territory in favor of a different approach in which federal legislation may only abrogate the Commonwealth's immunity from being sued in federal court by meeting the exact strictures applicable to states. In doing so, petitioner is completely silent on how it is that it shares in the sovereignty and dignity attributes alluded to in the jurisprudence upon which it relies.

In any event, we agree with the First Circuit's finding that Section 106(a) of PROMESA, 48 U.S.C. § 2126(a), clearly abrogated any immunity that the Board might have purported to enjoy.

Petitioner, the United States and the dissenting First Circuit Judge, Hon. Sandra Lynch, all challenge that Court's majority holding by alluding to a legal precept that is not contested by the respondent, namely, that "Congress may abrogate the States'

constitutionally secured immunity from suit in federal court *only by making its intention unmistakably clear in the language of the statute*". *Atascadero State Hospital v. Scanlon*, 473 U.S. 234, 242 (1985) (emphasis added). The thesis being promoted by the Board and its *amicus*, with no support from binding legal authority, posits that clear intent may only be shown by the recitation of certain liturgical phrasing or at least direct allusion to the Eleventh Amendment[11].

It is enough for the statute to authorize private suits against states, without the need of express reference to the Eleventh Amendment. *Kimel v. Fla. Bd. Of Regents*, 528 U.S. 62, 73-74 (2000) (finding that the language in the enforcement provisions of the Age Discrimination in the Employment Act, 29 U.S.C. § 621, et seq., clearly provided for individual suits against states). Furthermore, the use of broad language allowing suit in federal court has also been held to show sufficient congressional intent to abrogate immunity. For instance, in *Seminole Tribe v. Florida*, 517 U.S. 44 (1996), the Court found that statutory language conferring jurisdiction over the district courts "over *any* cause of action" within the scope of several aspects of gaming within native American territory[12].

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[11] Of course, showing a clear intent to abrogate does not necessarily mean that a finding of abrogation will ensue. For example, there is no ambiguity in Congress assertion in 42 U.S.C. § 12202 that it intended to abrogate immunity for purposes of Title I of the Americans with Disabilities Act, yet this Honorable Court held that the legislative record did not sufficiently support a valid abrogation. *Bd. of Trustees Univ. of Alabama v. Garrett*, 531 U.S. 356, 373-374 (2001).

[12] The statute at issue in that case was 25 U.S.C. § 2710(d)(7)(A)(i).

Id. at 56-57 (emphasis added). Similarly, the statute at issue here provides that:

> Except as provided in section 104(f)(2) (relating to the issuance of an order enforcing a subpoena), and title III (relating to adjustments of debts), *any action against the Oversight Board*, and any action otherwise arising out of this Act, in whole or in part, *shall be brought in a United States district court for the covered territory* or, for any covered territory that does not have a district court, in the United States District Court for the District of Hawaii.

48 U.S.C. § 2126(a) (emphasis added)

As correctly noted by the respondent in its brief, Section 106(a) is not a general grant of jurisdiction regarding PROMESA litigation but a *specific* instruction regarding where *the Board* is to be sued. As a matter of fact, there is a whole *separate* section regarding jurisdiction and venue over actions arising in the context of proceedings pursuant to the debt restructuring provisions in Title III of PROMESA. 48 U.S.C. § 2166.

While Congress chose to allow the Board to file suit in the courts of Puerto Rico to enforce subpoenas (48 U.S.C. § 2124(f)(2)), it decided that said entity could be sued exclusively in federal court, and therefore, only federal judges would handle *any* action filed against the Board.

Although the phrase "any action against the Oversight Board" is as self-explanatory as a concept gets, full context may be gleaned by reading Section 105 of PROMESA, 48 U.S.C. § 2125, which provides

that "The Oversight Board, its members, and its employees shall not be liable for any obligation of or claim against the Oversight Board or its members or employees or the territorial government *resulting from actions taken to carry out this Act*" (emphasis added). If the Board is immune from actions arising out of the discharge of its duties under PROMESA, what other claims against the FOMB are contemplated in § 106(a)? The answer must necessarily be that the jurisdictional grant extends over the Board's breach of its duties under sources other than PROMESA, which is precisely what respondent is claiming in this case. We also have a general grant of jurisdiction to remedy any constitutional violations by the FOMB with an indication that equitable and injunctive relief is available against that entity, albeit unenforceable (except in the case of constitutional violations) until appellate review is finished. 48 U.S.C. § 2126(c).

We respectfully believe that Section 104(h) of PROMESA, 48 U.S.C. § 2124(h) is relevant to this case as it provides that:

> The Oversight Board shall ensure the purposes of this Act are met, including *by ensuring the prompt enforcement of any applicable laws of the covered territory prohibiting public sector employees from participating in a strike or lockout*. In the application of this subsection, with respect to Puerto Rico, the term "applicable laws" refers to 3 L.P.R.A. 1451q and 3 L.P.R.A. 1451r, as amended. (emphasis added)

It necessarily follows that, since the FOMB does not command any police-like force, the only way

in which it may enforce Puerto Rico's prohibition against public employees going on strike or against *government agencies* with unionized workforces declaring lockdowns would be by filing a lawsuit. Under Section 106(a), this legal action would have to be filed in federal court. The authorization of such litigation is plainly inconsistent with the idea of PROMESA litigation being subject to sovereign immunity. This is so because, in the case of a claim filed by the Board to avoid or dissolve a lockdown that is in violation of 3 P.R. Laws Ann. § 1451r, the defendant would necessarily have to be *an agency* (i.e., an arm) of the Commonwealth's Government. *See* 3 P.R. Laws Ann. § 1451a(b) (defining the term "agency" within the context of the Puerto Rico Labor Relations in the Public Service Act as "[a]ny subdivision of the Executive Branch of the Government of Puerto Rico, such as departments, boards, commissions, administrations, offices, banks and public corporations that do not operate as private businesses; or any of their respective heads, directors, executives or persons that act in their representation"). If the Board were an arm of the Commonwealth entitled to raise sovereign immunity whenever it is sued, the defendants in the previously described action would also be able to raise the very same defense and § 104(h) would be rendered meaningless, as it would be absurd for one arm of the state to be entitled to immunity and another one to be subject to unconsented federal suits.

There is absolutely no support for petitioner's bold statement that the phrase "any action against the Oversight Board" extends only to claims under federal law. Moreover, while the FOMB has presented its case as if though it were an immune state actor, it has failed to note a material distinction

between it and run-of-the-mill state actors. While unconsenting states cannot be sued in federal court by private individuals seeking to enforce state laws, they may be and routinely are sued *in state court* for those purposes. Hence compliance with state law is ultimately enforced through that mechanism. While the Florida Department of State may not be sued by private voters from Dade County in the U.S. District Court for the Southern District of Florida for violations of state electoral law, they have recourse to state courts to obtain relief for such violations. Plaintiff herein however cannot go before the Puerto Rico Court of First Instance, San Juan Superior Section to enforce local transparency legislation, as Congress has said that the Board may only be sued in federal court. The FOMB therefore does not seek to be treated the same as a state entity, it seeks to be treated *better*, as the end result would be a lack of accountability for compliance with the laws of the larger political body of which it is a part of.

CONCLUSION

A special entity created by Congress to serve a very narrowly defined mission, upon the completion of which it will cease to exist, does not look as any of the entities that have been granted "arm-of-the-state" status in the vast body of federal Eleventh Amendment jurisprudence. That the enabling statute provides that the FOMB is to be considered as "an entity within the territorial government", when viewed through the lens of the entire legislative scheme is reduced to the Board having ultimate control of the Commonwealth's finances. An arm of the state is an entity under the control of the larger political body, not the other way around. If the FOMB were to be considered as an arm of the Commonwealth for immunity purposes, such

holding would create a whole new legal rule that is unmoored from existing precedent.

This Honorable Court should not lose sight of how this case got here. Exercising fundamental First Amendment freedom of the press liberties, respondent asked for public documents that would allow the People of Puerto Rico to evaluate the work of the entity that has made decisions that would shape their lives in decades to come. As aptly expressed by the Sixth Circuit, "[d]emocracies die behind closed doors", and "[w]hen government begins closing doors, it selectively controls information rightfully belonging to the people", and obviously "[s]elective information is misinformation". *Detroit Free Press v. Ashcroft*, 303 F.3d 681, 683 (6th Cir. 2002), rehrg. denied at 2003 U.S. App. LEXIS 1278 (6th Cir. 2003). Puerto Rico law requires that *all* of its entities turn over public documents while providing a mechanism for exceptions to be recognized. When sued in the only Court in which it may be sued, rather than raising any recognized privileges or exemptions from the production requirement, petitioner countered with a broad assertion of immunity.

None of the protections of the public treasury, federalism and dignity interests that inspire sovereign immunity are present in this case. The only reason why the Board seeks to resist the progression of the instant action is because it wishes to avoid the accountability that comes from the general public having access to government documents that are neither privileged nor exempted from disclosure.

Because the Board is not an arm of the state and because Congress did not exempt that body from complying with laws that apply to other territorial

entities while expressly authorizing *any* action against the FOMB to be filed in federal court, the First Circuit's judgment should be affirmed and the matter remanded to the district court for a determination of which of the requested documents, if any, are exempt from disclosure.

Respectfully submitted,

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