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 THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS AND 20 MEDIA ORGANIZATIONS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

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INTEREST OF *AMICI CURIAE*[1]

Lead *amicus* the Reporters Committee for Freedom of the Press is an unincorporated nonprofit association founded by journalists and media lawyers in 1970. Today, its attorneys provide pro bono legal representation, *amicus curiae* support, and other legal resources to protect First Amendment freedoms and the newsgathering rights of journalists. Other *amici* are news media organizations and organizations that defend the First Amendment and newsgathering rights of the press.

Amici submit this brief to urge the Court to affirm the First Circuit's judgment holding that the Financial Oversight and Management Board for Puerto Rico ("Board") cannot rely on sovereign immunity to evade Puerto Rico's public records law. As representatives and members of the news media who routinely rely on access to official records to keep the public informed, *amici* have a strong interest in ensuring the availability of a forum to challenge denials of public records requests. Access to information about the activities and expenditures of government bodies, including the Board, is essential to informing the public, fostering discourse, and maintaining a necessary check on government power. The Board cannot avoid public scrutiny by invoking sovereign immunity as a shield against lawsuits by the press and public to enforce their constitutional right to access government records.

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[1] Pursuant to this Court's Rule 37.6, *amici* state that no counsel for a party authored this brief in whole or in part, and no person or entity other than *amici* or their counsel made a monetary contribution to this brief's preparation or submission. All parties have consented to the filing of this brief.

SUMMARY OF ARGUMENT

Respondent Centro de Periodismo Investigativo, Inc. ("CPI"), a nonprofit news organization in Puerto Rico, sued the Board in federal court to compel compliance with the right of access to public records guaranteed in Article II, § 4 of Puerto Rico's constitution. The Puerto Rico Supreme Court has described this right as "a fundamental pillar in every democratic society" that "allows the citizens to evaluate and supervise" their government. *Bhatia Gautier* v. *Gobernador*, 199 P.R. Dec. 59, 80 (2017). The Board nonetheless sought to evade its disclosure obligations by interposing a sovereign immunity defense. The U.S. Court of Appeals for the First Circuit correctly rejected the Board's position, ensuring a federal forum where CPI and other members of the press can vindicate their fundamental rights. This Court should affirm.

I. Congress enacted the Puerto Rico Oversight, Management, and Economic Stability Act ("PROMESA"), 48 U.S.C. § 2101 *et seq.*, to bring financial stability and restore accountability to Puerto Rico's finances. The statute was intended to promote transparency, and it imposes reporting and disclosure requirements designed to keep the public informed about the Board's activities. Congress's concern with transparency "matters," *Alexander* v. *Sandoval*, 532 U.S. 275, 288 (2001), because it informs this Court's interpretation of the relevant text—48 U.S.C. § 2126(a). Interpreting that provision to permit public records claims against the Board in federal court complements Congress's disclosure regime and furthers its interest in transparency. Allowing the Board to

assert sovereign immunity to evade its disclosure obligations would thwart these important congressional objectives.

II. The Board's opening brief leapfrogs over the threshold questions of whether Puerto Rico may assert sovereign immunity in federal court at all and, if it can, whether the Board qualifies as an "arm" of Puerto Rico that shares in that immunity. But the Court must address whether the Board has sovereign immunity before it can reach the question presented—whether Congress made a sufficiently clear statement in 48 U.S.C. § 2126(a) of its intent to abrogate any such immunity. This Court cannot hold Congress to the clear statement rule if the Board was not entitled to immunity in the first place.

Amici take no position on whether Puerto Rico itself possesses sovereign immunity. Assuming it does, the Board cannot share in that immunity because it is not an "arm" of Puerto Rico. This Court evaluates whether an entity qualifies as an "arm of the State" by examining "the nature of the entity created by state law." *Mt. Healthy City Sch. Dist. Bd. of Educ.* v. *Doyle*, 429 U.S. 274, 280 (1977). Here, however, the Board does not derive its powers from Puerto Rico, but from the United States. Having displaced local rule with respect to Puerto Rico's finances, the Board cannot turn around and invoke Puerto Rico's dignitary interest as a shield from public records litigation in federal court.

If anything, permitting this lawsuit to proceed against the Board in federal court would *strengthen* the most important sovereignty interest of all. As

Puerto Rico's constitution declares, the territorial government's authority is "subordinate to the sovereignty of the people," *Puerto Rico* v. *Sanchez Valle*, 579 U.S. 59, 65 (2016), and the people have a constitutional right of access to government records. Permitting the Board to assert sovereign immunity as a shield against public records litigation would undermine the rights of the ultimate sovereign—the people. It would also frustrate the important work of journalists who act as the people's eyes and ears by monitoring the activities of their government, in part through public records litigation.

Nor is there merit to the Board's argument, at the certiorari stage, that it must be an "arm" of Puerto Rico because it exercises control over territorial finances. Although this Court has suggested that "the vulnerability of the State's purse" to federal court judgments is perhaps "the most salient factor" in the sovereign immunity analysis, *Hess* v. *Port Auth. Trans-Hudson Corp.*, 513 U.S. 30, 48 (1994), such concerns are not implicated here because CPI seeks only prospective injunctive and declaratory relief.

III. Even assuming the Board is an "arm" of Puerto Rico entitled to share in its immunity, Congress abrogated that immunity in 48 U.S.C. § 2126(a). That provision expressly provides federal jurisdiction for "any action against the Oversight Board." And this Court has repeatedly recognized that jurisdictional provisions that name a sovereign as a potential defendant are "unmistakably clear" expressions of Congress's intent to abrogate that sovereign's immunity. *See*, *e.g.*, *Seminole Tribe of Fla.* v. *Florida*, 517 U.S. 44, 55-56 (1996).

Other provisions of PROMESA further confirm that Congress intended to abrogate the Board's immunity to claims for injunctive and declaratory relief. Section 105 provides a limited grant of immunity to the Board, a provision that would be superfluous if the Board already enjoyed complete immunity in federal court. But Congress expressly cabined that immunity to claims seeking to hold the Board "liable" for money damages, without foreclosing claims for prospective relief. 48 U.S.C. § 2125. In fact, Section 106(c) anticipates "declaratory or injunctive relief against the Oversight Board," including orders "to remedy constitutional violations." *Id.* § 2126(c). Read together, these provisions make pellucid that Congress intended to subject the Board to suit in federal court for the type of relief respondent seeks.

IV. If the Court concludes that the Board is an "arm" of Puerto Rico entitled to share in its immunity and that PROMESA has not abrogated that immunity, it has an alternative basis to affirm: Puerto Rico has waived its immunity in federal court to claims under Article II, § 4 of the territorial constitution. Puerto Rico has waived its immunity to such claims in territorial court, and there is no reason to assume that the waiver excludes claims in federal court. That claims under Article II, § 4 are infrequently litigated in federal court is not dispositive because litigants would have had no obvious basis for federal jurisdiction before Congress provided such jurisdiction for actions against the Board.

ARGUMENT

I. ALLOWING PUBLIC RECORDS SUITS AGAINST THE BOARD IN FEDERAL COURT FURTHERS PROMESA'S PURPOSE OF PROMOTING TRANSPARENCY.

Congress enacted PROMESA to remedy a fiscal crisis caused by years of mismanagement and return Puerto Rico to a state of "fiscal responsibility." 48 U.S.C. § 2121(a). Congress sought to address a root cause of that crisis—a lack of transparency—by forcing the Board to operate in the sunlight and make disclosures that promote accountability. That legislative purpose "matters" because it informs the meaning of the statutory text at issue here. *Alexander* v. *Sandoval*, 532 U.S. 275, 288 (2001). Specifically, Congress's stated concern for transparency confirms that it intended, in 48 U.S.C. § 2126, to subject the Board to suit in federal court for injunctive and declaratory relief—including suits to compel compliance with the Board's disclosure obligations under Puerto Rico law. Such lawsuits advance a core statutory purpose to open Puerto Rico's books to public scrutiny and thereby reinvigorate good government.

"Public disclosure . . . promotes transparency and accountability . . . to an extent that other measures cannot." *Doe* v. *Reed*, 561 U.S. 186, 199 (2010). Many such disclosures happen through the efforts of the press, whose "essential role in our democracy" is to "bare the secrets of government and inform the people." *N.Y. Times Co.* v. *United States*, 403 U.S. 713, 717 (1971) (Black, J., concurring). "[T]he press serves . . . as a powerful antidote to any abuses of power by

governmental officials and as a constitutionally chosen means for keeping officials elected by the people responsible to all the people." *Mills* v. *Alabama*, 384 U.S. 214, 219 (1966). Journalists fulfill that role in part by fighting for access to public records, aided by laws that guarantee such access. *See Cox Broad. Corp.* v. *Cohn*, 420 U.S. 469, 495 (1975) ("Public records by their very nature are of interest to those concerned with the . . . government, and a public benefit is performed by the reporting of the true contents of the records by the media.").

Congress recognized the significant value of public disclosure when it enacted PROMESA. Both the text of the Act and its legislative history make plain that promoting government transparency was Congress's guiding principle. In its statutory findings, Congress blamed the "fiscal emergency in Puerto Rico" on a "lack of financial transparency," among other factors. 48 U.S.C. § 2194(m)(1). Congress's remedy for that mismanagement was to create the Board as an "oversight mechanism to assist the Government of Puerto Rico in reforming its fiscal governance." *Id.* § 2194(m)(2), (n)(3). And Congress required that any plan of restructuring proposed by the Board "improve fiscal governance, accountability, and internal controls." *Id.* § 2141(b)(1)(F).

Congress advanced these good government principles by mandating specific disclosures from the Board. To promote "[t]ransparency in contracting," the Act directs the Board to comply with a Puerto Rico law requiring government agencies to "maintain a registry of all contracts executed" and "remit a copy to the office of the comptroller for inclusion in a comprehensive database available to the public." 48 U.S.C.

§ 2144(b)(1) (citing P.R. Laws Ann. tit. 2, § 97). Congress also subjected Board members to federal conflict-of-interest and financial-disclosure requirements. *Id.* § 2129(a)-(b); *see also id.* § 2124(e) (requiring Board members to disclose "gifts, bequests, or devises" and "the identities of the donors").

Moreover, the Board itself must comply with various reporting requirements concerning its activities and expenditures. *See* 48 U.S.C. § 2148(a)(1), (c) (requiring the Board to submit quarterly cash flow reports plus an annual report detailing "progress made . . . in meeting" statutory objectives); *see also id.* § 2124(p) (requiring the Board to "make public the findings of any investigation" related to bond sales). PROMESA also designates the Board's "bylaws, rules, and procedures" as "public documents" that must be turned over to the Puerto Rico and federal governments. *Id.* § 2121(h)(1).

The legislative history underscores Congress's abiding concern for increasing government transparency. The House Committee on Natural Resources faulted "local politicians" for their "inability . . . to bring order and transparency," and lamented the "limited oversight and transparency of actions within Puerto Rico's governmental entities, such as the failure of Puerto Rico's government to provide any audited financials for the past two fiscal years." H.R. Rep. No. 114-602, at 40-41 (2016). Its report explained that PROMESA would "provide[ ] a workable solution that will ensure Puerto Rico regains access to capital markets and achieves fiscal responsibility and transparency." *Ibid.*

PROMESA's sponsors sounded the same theme. Representative Rob Bishop, one of the Act's cosponsors, argued that the Act would "instill principles of good governance and fiscal transparency to encourage private investment [in Puerto Rico] and promote sustainability." *U.S. Dep't of the Treasury's Analysis of the Situation in Puerto Rico: Oversight Hearing Before the H. Comm. on Nat. Res.*, 114th Cong. 2 (2016). Then-Senate Majority Leader Mitch McConnell championed PROMESA as bringing about "desperately needed transparency and reform to Puerto Rico's fiscal operations." 162 Cong. Rec. S4684 (daily ed. June 29, 2016). And Puerto Rico's delegate to Congress, Pedro Pierluisi, framed the statute as "a positive, pro-transparency measure" and emphasized that the Board would "help ensure the Puerto Rico government conducts itself in a responsible, transparent, and disciplined manner." H.R. Rep. No. 114-602, at 110, 114.

The vision of the Act's supporters, as reflected in PROMESA's text and legislative history, was to usher in a new era of government transparency. Consistent with that vision, Congress implemented measures to make sure the Board, too, would act in the open. One of those measures was 48 U.S.C. § 2126, which permits private litigants to obtain injunctive and declaratory relief against the Board in federal court—including for "constitutional violations," such as a failure to comply with the public's right to access government records enshrined in Article II, § 4 of the Puerto Rico constitution.

Permitting the Board to assert sovereign immunity to evade such claims would run headlong into PROMESA's promise of greater government transparency. A "basic purpose" of public records litigation "is

to ensure an informed citizenry, vital to the functioning of a democratic society, needed to check against corruption and to hold the governors accountable to the governed." *NLRB* v. *Robbins Tire & Rubber Co.*, 437 U.S. 214, 242 (1978); *see also U.S. Dep't of Just.* v. *Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 772-73 (1989) ("a democracy cannot function unless the people are permitted to know what their government is up to" (emphasis omitted)). "[I]f democracy is to work, there can be no holding back of information; otherwise ultimate decisionmaking by the people, to whom that function is committed, becomes impossible." *Soto* v. *Secretario de Justicia*, 12 P.R. Offic. Trans. 597, 617 (1982) (citation omitted). Public records litigation works in tandem with PROMESA's specific disclosure provisions to provide a check on the Board, in keeping with this Court's recognition that "[s]unlight is . . . the best of disinfectants." *Buckley* v. *Valeo*, 424 U.S. 1, 67 (1976) (per curiam).

The transparency objectives that animate PROMESA—and that underlie respondent's suit—should inform this Court's consideration of whether (1) the Board should be deemed an "arm" of Puerto Rico entitled to share in any sovereign immunity the territory possesses and (2) PROMESA abrogates any immunity that the Board would otherwise possess against claims under Puerto Rico's public records law. Both inquiries show the Board cannot rely on sovereign immunity to evade its disclosure obligations under Article II, § 4 of the Puerto Rico constitution.

II. THE BOARD IS NOT AN ARM OF PUERTO RICO AND DOES NOT SHARE IN WHATEVER IMMUNITY THE TERRITORY POSSESSES.

The Board cannot escape suit in federal court because it is not an "arm" of Puerto Rico. Sovereign immunity extends to States sued in their own name and to agencies that show they are an "arm of the State." *Mt. Healthy City Sch. Dist. Bd. of Educ.* v. *Doyle*, 429 U.S. 274, 280 (1977). The Board dodges the question of whether the Board is an "arm" of Puerto Rico that shares in any immunity the territory may have—instead skipping ahead to the secondary question of whether Congress abrogated whatever immunity the Board enjoys.[2] But the Court cannot "avoid" this threshold issue "entirely," as the Board suggests, *see* Cert. Reply Br. 4, because it bears directly on the question presented—whether Congress made a sufficiently clear statement in 48 U.S.C. § 2126(a) of its intent to abrogate any such immunity. The Board insists that Congress must state its intent in "unmistakably clear" language. Pet'r Br. 1. But no clear statement is necessary if the Board has no claim to sovereign immunity in the first place.

Nor is there any merit to the Board's assertion that CPI forfeited the argument that the Board is not an "arm" of the territory by failing to assert it in the courts below. Cert. Reply Br. 4 & n.3. As the party asserting immunity, the Board bears the burden of establishing it is an "arm" of Puerto Rico entitled to share in whatever immunity the territory possesses. *See Hutto* v. *S.C. Ret. Sys.*, 773 F.3d 536, 543 (4th Cir.

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[2] *Amici* take no position on whether Puerto Rico itself has sovereign immunity.

2014) (collecting cases); *Pastrana-Torres* v. *Corporacion de P.R. Para la Difusion PUBLICA*, 460 F.3d 124, 126-28 (1st Cir. 2006) (holding Puerto Rico's public broadcasting company to burden of showing it qualifies as an "arm" of the territory). And the Board has entirely failed to make that showing.

In evaluating whether an entity is an "arm of the State," the Court considers "the nature of the entity created by state law." *Mt. Healthy*, 429 U.S. at 280. Here, the Board's origin story demonstrates why it would be inappropriate for this Court to allow the Board to avail itself of whatever immunity Puerto Rico possesses. At the outset, Puerto Rico did not participate in the "creat[ion]" of the Board. *Ibid.* Congress superimposed the Board on the territory's existing government for the purpose of divesting local control over Puerto Rico's finances. Because the Board is a creature of federal law that overrides the territorial government and displaces its control of Puerto Rico's budget, the Board cannot share in any immunity Puerto Rico possesses.

A. The Board Cannot Be An "Arm" Of Puerto Rico Because It Is A Creation Of Federal Law That Displaces Local Control Of Territorial Finances.

The Board does not qualify as an "arm" of Puerto Rico because it weakens the sovereign "integrity" of the territorial government. *Hess* v. *Port Auth. Trans-Hudson Corp.*, 513 U.S. 30, 39 (1994). Sovereign immunity reinforces the dignitary interest of the States—what this Court has called the "residuary and inviolable sovereignty" the States retained even as they "surrendered many of their powers to the new Federal Government." *Printz* v. *United States*, 521

U.S. 898, 918-19 (1997). The Board neither arises from nor exercises the territory's autonomous powers of self-government, but instead represents an imposition of federal power. The Board's "nature," *Mt. Healthy*, 429 U.S. at 280, as an entity that wrested control of Puerto Rico's finances from local officials precludes it from claiming whatever sovereign dignity Puerto Rico possesses.

To the extent Puerto Rico itself is entitled to sovereign immunity—a question on which *amici* take no position—that immunity derives from the constitution Puerto Rico ratified in 1952 with authorization from Congress. That constitution "created a new political entity, the Commonwealth of Puerto Rico." *Puerto Rico* v. *Sanchez Valle*, 579 U.S. 59, 65 (2016). The Board, however, did not arise from Puerto Rico's constitution, nor does it source its powers from that charter or from any branch of the territorial government.

The Board, instead, is a creation of federal law. Congress imposed the Board on Puerto Rico's people by legislative fiat, exercising its plenary power under the Territory Clause to wrest control over Puerto Rico's budget from local officials in order to restore federal oversight of the territory's finances. *See* 48 U.S.C. § 2121(b)(2) (naming U.S. Const. art. IV, § 3, cl. 2 as the "[c]onstitutional basis" for the Board's creation); *Fin. Oversight & Mgmt. Bd. for P.R.* v. *Aurelius Inv., LLC*, 140 S. Ct. 1649, 1655-56 (2020) (recounting Board's creation).

Although Congress ensconced the Board as "an entity within the territorial government," 48 U.S.C.

§ 2121(c)(1), the Board stands apart from that government in important respects. Multiple provisions of PROMESA insulate the Board from both Puerto Rico's voters and territorial officials. Board members are not popularly elected; they are appointed by the President from a list of names selected by leaders in Congress. *Id.* § 2121(e). Nor can voters oust ineffectual Board members from office; they are removable only by the President for cause. *Id.* § 2121(e)(5)(B). Puerto Rico's governor and legislature have no greater power to influence Board members than voters do. Congress barred them from exercising "any control, supervision, oversight, or review over the . . . Board or its activities." *Id.* § 2128(a)(1). Although the Board has substantial control over Puerto Rico's budget, *id.* §§ 2141-2147, Puerto Rico lacks similar authority over the Board's spending, which Congress entrusted to the Board's "sole and exclusive discretion," *id.* § 2127(b)(1).

As these provisions illustrate, the Board's creation represents a substantial retrenchment in the autonomy Puerto Rico has enjoyed since the 1950s, when Congress "authorized the island's people to organize a government pursuant to a constitution of their own creation" and "relinquished its control over the Commonwealth's local affairs." *Sanchez Valle*, 579 U.S. at 64, 74 (alteration omitted). "Following 1952, Puerto Rico became a new kind of political entity . . . exercising self-rule through[ ] a popularly ratified constitution." *Id.* at 73. In PROMESA, however, Congress reasserted its authority under the Territory Clause and installed the Board to superintend Puerto Rico's finances and file for bankruptcy on Puerto Rico's behalf. *Aurelius*, 140 S. Ct. at 1655.

The United States argues that the Board must be an "arm" of Puerto Rico because Congress installed it "within the territorial government" and tasked it with fiscal responsibilities previously undertaken by territorial officials. U.S. Br. 22. But the fact that Congress created the Board to displace local control undermines rather than supports the notion that the Board may assert any sovereign immunity that Puerto Rico possesses in federal court. Although the Board controls Puerto Rico's purse and manages aspects of its government, its work is an expression of federal control, not of Puerto Rico's sovereign will.[3]

This history demonstrates that it would be no affront to Puerto Rico's dignitary interest if private litigants could sue the Board in federal court for access to public records. Puerto Rico lost a measure of self-governance when, pursuant to its Territory Clause powers, Congress disempowered local officials and handed control of the territory's finances to the Board. Having supplanted local rule, the Board may not turn around and point to Puerto Rico's dignity as a self-governing territory to avoid answering for lawsuits in federal court. Puerto Rico's dignitary interest is not impugned when a federally created entity that displaced local rule is called to account in federal court. *See P.R. Aqueduct & Sewer Auth.* v. *Metcalf & Eddy, Inc.*, 506 U.S. 139, 146 (1993).

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[3] The Board's nature as the creature of a separate sovereign is also "forcefully demonstrated by the fact" that the Board has "resorted to litigation" against Puerto Rico to "impose its will on," and override the decisions of, the territory's popularly elected officials. *Lake Country Ests., Inc.* v. *Tahoe Reg'l Planning Agency*, 440 U.S. 391, 402 (1979); Resp't Br. 7 & n.3 (collecting examples).

If anything, permitting this lawsuit to proceed against the Board in federal court—the only forum where it may be sued, 48 U.S.C. § 2126(a)—is more respectful of Puerto Rico's dignity as a self-governing territory. As Puerto Rico's constitution declares, the authority of the territorial government "emanates from the people," and it is "subordinate to the sovereignty of the people." *Sanchez Valle*, 579 U.S. at 65 (quoting P.R. Const. art. I, § 2). And the people of Puerto Rico have a fundamental right of access to government records under the territorial constitution. *See Soto*, 12 P.R. Offic. Trans. at 613 (interpreting P.R. Const. art. II, § 4). As the Supreme Court of Puerto Rico has recognized, access to public records serves the public's right of "self-govern[ance]" because it "constitute[s] an effective bulwark against unresponsive leadership." *Id.* at 608 (emphasis omitted). To allow the Board to wield its alleged sovereign immunity as a shield in right-of-access litigation would subvert the very sovereignty Puerto Rico's constitution aims to protect—that of the people. *See id.* at 613 ("The Government, as keeper of the functions stemming from the sovereignty of the people, cannot whimsically and without apparent justification deny access to information gathered through its public undertakings." (emphasis omitted)).

The Board's immunity defense, if sustained, would seriously undercut the people's sovereign right to know about the workings of their government. Because Puerto Rico's people cannot hold Board members accountable at the ballot box, the press—and the disclosure laws on which it depends—serves as a key check on the Board's power, as CPI has done through its important work spotlighting the Board's spending

on security details, *see* Joel Cintrón Arbasetti, *El Cinturón de Seguridad de la Junta de Control Fiscal*, CPI (Dec. 5, 2018), https://perma.cc/6LGA-G26J, and outside contractors, *see* Luis J. Valentín Ortiz, *Puerto Rico's Fiscal Control Board: Parallel Government Full of Lawyers and Consultants*, CPI (Aug. 1, 2018), https://perma.cc/6M2F-EYSF, among other revelations. Barring public records litigation against the Board on immunity grounds would close this principal avenue of accountability.

B. The Board's Control Of Puerto Rico's Finances Does Not Render It An "Arm" Of The Territory.

At the certiorari stage, the Board argued that there could be "no serious" question it is an "arm" of Puerto Rico because it wields control over the territory's finances. Cert. Reply Br. 5. Although this Court has suggested that "the vulnerability of the State's purse" to federal court judgments is perhaps "the most salient factor in Eleventh Amendment determinations," *Hess*, 513 U.S. at 48, that concern is not implicated here for at least two reasons.

First and foremost, this case involves no claim for monetary relief. As discussed below, the Board may well have arguments that Congress insulated it from suits for money damages that would need to be paid from the territorial purse. *See* 48 U.S.C. § 2125. But here respondent seeks only prospective injunctive and declaratory relief to force the Board to comply with its public record obligations. And States cannot claim immunity based on the incidental costs they incur from complying with federal court injunctions. *See Edelman* v. *Jordan*, 415 U.S. 651, 667 (1974).

Second, the Eleventh Amendment's bar on private damages actions against the States in federal court is grounded in a concern with "the potentially undemocratic effects of private litigation." Katherine Florey, *Sovereign Immunity's Penumbras: Common Law, "Accident," and Policy in the Development of Sovereign Immunity Doctrine*, 43 Wake Forest L. Rev. 765, 790 (2008). State spending decisions, in other words, should be driven by "the democratic process" rather than unelected federal judges. *Ibid.* Here, however, the Board's spending decisions already operate at a far remove from Puerto Rico's voters, who lack even a voting delegate in Congress, where Board members are nominated. *See* 48 U.S.C. § 2121(e). Suits against the Board in federal court may, if anything, be one of the only means to hold the Board accountable and thereby protect Puerto Rico's treasury. Indeed, with no other check on the Board, it has largely fallen to members of the news media, like CPI, to monitor the Board's actions. *See* pp. 16-17, *supra*.

In sum, the traditional considerations supporting States' sovereign immunity are manifestly inapplicable to the Board.

III. PROMESA ABROGATES WHATEVER IMMUNITY THE BOARD POSSESSES.

Even if the Court accepts that the Board is an "arm" of the Puerto Rico government with a claim to sovereign immunity, respondent's suit may still proceed in federal court because Congress abrogated that immunity in PROMESA. Multiple provisions—including a subsection employing language this Court has already interpreted as "an 'unmistakably clear'

statement of [Congress's] intent to abrogate," *Seminole Tribe of Fla.* v. *Florida*, 517 U.S. 44, 56 (1996)—demonstrate that Congress intended to permit private litigation "against the Oversight Board" in federal court. 48 U.S.C. § 2126(a). These provisions abrogate any immunity the Board may possess in a cohesive effort to foster the accountability and transparency that Congress sought to achieve.

To the extent that the Board is entitled to sovereign immunity, neither the Board nor the United States contests that Congress may abrogate that immunity. *See* U.S. Br. 12; Pet'r Br. 18. Animated by the federalism concerns reflected in the Eleventh Amendment, this Court has found abrogation only when Congress "mak[es] its intention unmistakably clear in the language of the statute." *Kimel* v. *Fla. Bd. of Regents*, 528 U.S. 62, 73 (2000). PROMESA contains precisely the type of language that this Court has read to satisfy the clear statement test.[4]

In enacting PROMESA, Congress anticipated the potential for litigation against the Board and provided a carefully crafted pathway for suits to proceed, subject to specific limitations. The only coherent way to read the Act—and the only way to give all of its provisions meaning—is to interpret PROMESA to abrogate any immunity the Board may have. *See Liu* v. *SEC*,

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[4] Because Puerto Rico is a territory that remains subject to Congress's plenary power under the Territory Clause, *see Sanchez Valle*, 579 U.S. at 71, a clear statement may not be required to abrogate whatever immunity Puerto Rico possesses. But even assuming the clear statement rule applies here, Congress satisfied it in Section 106(a).

140 S. Ct. 1936, 1948 (2020) ("courts must give effect, if possible, to every clause and word of a statute").

Section 106(a) directs that "any action against the Oversight Board, and any action otherwise arising out of this chapter, in whole or in part, shall be brought in a United States district court for the covered territory." 48 U.S.C. § 2126(a). That section further provides that, "[e]xcept with respect to any orders entered to remedy constitutional violations, no order of any court granting declaratory or injunctive relief against the Oversight Board . . . shall take effect during the pendency of the action . . . before the court has entered its final order disposing of such action." *Id.* § 2126(c). Section 106(e) strips federal courts of jurisdiction "to review challenges to the Oversight Board's certification determinations." *Id.* § 2126(e). And Section 105 states that "[t]he Oversight Board . . . shall not be liable for any obligation of or claim against the Oversight Board . . . resulting from actions taken to carry out this chapter." *Id.* § 2125.

The text of Section 106 expressly and repeatedly contemplates litigation "*against the Oversight Board*." The limitations on damages, preliminary equitable remedies, and reviewability found in Sections 105, 106(c), and 106(e), respectively, would hardly be necessary if the Board and its members could invoke sovereign immunity. Taken together, these subsections reflect Congress's intent to permit judicial remedies against the Board and abrogate any immunity the Board may otherwise have. In fact, these provisions in PROMESA echo other statutes that this Court has found to be a "clear statement of abrogation." *Kimel*, 528 U.S. at 74.

In *Kimel*, this Court examined provisions in the Age Discrimination in Employment Act ("ADEA") dictating that the statute could be enforced "against any employer (including a public agency) in any Federal or State court of competent jurisdiction." 528 U.S. at 73-74 (quoting 29 U.S.C. § 216(b)). The statute then went on to define a public agency to include "any agency of . . . a State, or a political subdivision of a State." 29 U.S.C. § 203(x). Read together, these provisions "unequivocally expressed [Congress's] intent to abrogate the States' Eleventh Amendment immunity." *Kimel*, 528 U.S. at 78. Applying *Kimel* in a later case, the Court similarly found abrogation in nearly identical language in the Family and Medical Leave Act. *Nev. Dep't of Human Res.* v. *Hibbs*, 538 U.S. 721, 726 (2003).

So too in *Seminole Tribe*, where this Court reviewed a provision of the Indian Gaming Regulatory Act ("IGRA") that "vests jurisdiction in '[t]he United States district courts over any cause of action arising from the failure of a State'" to comply with the Act's negotiation procedures. 517 U.S. at 56-57 (alteration in original) (quoting 25 U.S.C. § 2710(d)(7)). This jurisdiction-vesting clause—read in combination with other subsections contemplating court orders directed at "the State" and placing the burden of proof on "the State"—"provided an 'unmistakably clear' statement of [Congress's] intent to abrogate." *Ibid.*

The same is true of PROMESA. Like the ADEA and IGRA, PROMESA contains a jurisdictional clause empowering federal courts to hear actions "against the Oversight Board." 48 U.S.C. § 2126(a). Critically, each of these jurisdiction-vesting provisions specifi-

cally identifies the sovereign as a defendant and expressly contemplates an action against the sovereign. By naming the sovereign entity, these provisions dispel "[a]ny conceivable doubt *as to the identity of the defendant,*" indicating Congress's choice to subject the sovereign to suit. *Seminole Tribe*, 517 U.S. at 57 (emphasis added).

Section 106(a) is even more straightforward than the provision in *Seminole Tribe*. There, the Court acknowledged room for doubt as to whether "any cause of action . . . arising from the failure of a State" necessarily referred to a cause of action *against* a State. *Seminole Tribe*, 517 U.S. at 57 (ellipsis in original). PROMESA is more explicit, creating federal jurisdiction over "any action against the Oversight Board." 48 U.S.C. § 2126(a). This is abrogation. *See United States* v. *Greene*, 26 F. Cas. 33, 34 (No. 15,258) (C.C.D. Me. 1827) (Story, J.) (remarking that the "general rule in the interpretation of legislative acts not to construe them to embrace the sovereign power" gives way when the sovereign is "expressly named or included by necessary implication").

The Board characterizes Section 106 as a mere "jurisdictional provision[ ]" that does not "express an intent to abrogate sovereign immunity." Pet'r Br. 23; *see also* U.S. Br. 25-28. The Board relies on *Blatchford* v. *Native Village of Noatak*, 501 U.S. 775 (1991), and *Atascadero State Hospital* v. *Scanlon*, 473 U.S. 234 (1985), which declined to interpret general jurisdiction-creating provisions as abrogating sovereign immunity. *E.g.*, *Blatchford*, 501 U.S. at 783, 786 n.4 (holding that 28 U.S.C. § 1362, which creates federal jurisdiction over "all civil actions, brought by [particular] Indian tribe[s] or band[s]" arising "under the

Constitution, laws, or treaties of the United States," did not abrogate immunity).[5] But the statutes in *Atascadero*, *Blatchford*, and *Nordic Village* made no reference to a sovereign defendant; they referred broadly to "claims" without identifying defendants.

The statute here, by contrast, leaves no doubt as to which defendant can be sued in federal court: It creates federal jurisdiction over "any action *against the Oversight Board*." 48 U.S.C. § 2126(a) (emphasis added). That language sets PROMESA, like IGRA and the ADEA, apart from the non-abrogating provisions in *Atascadero*, *Blatchford*, and *Nordic Village*. Neither the Board nor the United States identifies a single case in which the Court held that a jurisdiction-granting provision that explicitly named a sovereign defendant did *not* abrogate sovereign immunity.

The Board concedes that a statute may abrogate sovereign immunity when it "explicitly identif[ies] a government entity as a potential defendant" but attempts to cabin this rule to apply only to "a cause of action created by the [same] statute." Pet'r Br. 22. But there is no basis for that distinction. In *Kimel*, *Hibbs*, and *Seminole Tribe*, the Court found congressional intent to abrogate because the "numerous references to the 'State' in the text . . . make it indubita-

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5 *See also United States* v. *Nordic Vill., Inc.*, 503 U.S. 30, 37-38 (1992) (28 U.S.C. § 1334(d), which grants the district court hearing a bankruptcy case "exclusive jurisdiction of all of the property . . . of the debtor as of the commencement of such case, and of property of the estate"); *Atascadero*, 473 U.S. at 245-46 (29 U.S.C. § 794a, which permits suits by "any person aggrieved by any act or failure to act by any recipient of Federal assistance or Federal provider of such assistance").

ble that Congress intended through the Act to abrogate the States' sovereign immunity from suit." *Seminole Tribe*, 517 U.S. at 57.

None of these cases drew the distinction the Board makes—none found it relevant that the abrogation involved a particular cause of action created by the same statute that created federal jurisdiction. That Section 106 channels "any claim" against the Oversight Board rather than a specific claim simply denotes the breadth of Congress's abrogation; it does not indicate that no abrogation has occurred. "Congress generally intends the full consequences of what it says." *Thacker* v. *Tenn. Valley Auth.*, 139 S. Ct. 1435, 1441 (2019) (alterations omitted).

As this Court has repeatedly recognized, "the word 'any' has an expansive meaning, that is, 'one or some indiscriminately of whatever kind.'" *See, e.g.*, *Ali* v. *Fed. Bureau of Prisons*, 552 U.S. 214, 218-19 (2008) (finding that "broad meaning" appropriate even when interpreting a waiver of the United States' sovereign immunity, which is construed narrowly). Section 106(a)'s sweeping reference to "any action" is narrowed only by Section 106(e), which denies federal jurisdiction to "challenges to the Oversight Board's certification determinations." 48 U.S.C. § 2126(a), (e). The Act therefore guarantees that every other kind of potential claim against the Board will be heard in a federal forum.

Section 106 also expressly contemplates suits against the Board for injunctive and declaratory relief—the only remedy respondent seeks here. Section 106(c) specifies that an "order of any court granting declaratory or injunctive relief against the Oversight

Board" cannot take effect until after the conclusion of the litigation, except for orders "entered to remedy constitutional violations." 48 U.S.C. § 2126(c).[6]

Section 105 of PROMESA provides further textual evidence that Congress intended to permit suits against the Board for equitable relief. That provision states that the Board "shall not be *liable* for any obligation of or claim against the Oversight Board . . . or the territorial government resulting from actions taken to carry out" PROMESA. 48 U.S.C. § 2125 (emphasis added). This language protects the Board—and Puerto Rico's treasury—from financial harm by limiting their exposure to *damages* actions. *See Liability*, Black's Law Dictionary (11th ed. 2019) ("[a] financial or pecuniary obligation in a specified amount").[7] But this statutory text does not foreclose suits seeking prospective equitable relief.

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[6] This section contemplates remedies for "constitutional violations" under both the U.S. and Puerto Rico constitutions. Other provisions of PROMESA specify either "the Constitution of the United States," *e.g.*, 48 U.S.C. § 2121(b)(2); *id.* § 2191(1), or "the constitution . . . of the territory," *id.* § 2141(b)(1); *id.* § 2144(c)(3); *id.* § 2174(b)(6); *see also id.* § 2141(b)(1)(N) ("constitution . . . of a covered territory"); *id.* § 2144(c)(3)(A) ("constitution . . . of the territory"). Section 106(c) makes no distinction. It therefore encompasses claims under *either* the federal or territorial constitution. Allowing preliminary relief for public records claims under Article II, § 4 of Puerto Rico's constitution is particularly appropriate because that constitutional right enjoys a "position of highest sanctity." *Soto*, 12 P.R. Offic. Trans. at 608 (emphasis omitted).

[7] Similarly, other provisions of PROMESA that refer to "liability," "claim," or "obligation" contemplate monetary responsibilities. *See, e.g.*, 48 U.S.C. § 2194(a)(1) ("'Liability' means a bond,

The most straightforward way to give effect to all of Sections 105 and 106 is to read them to authorize exclusive federal jurisdiction over a broad swath of claims brought against the Board under both federal and territorial law, with specific limitations on the remedies the court can order and a limited and explicit grant of immunity from actions seeking money damages. Such a reading also ensures that the people of Puerto Rico—through the press—will have *some* measure of supervision over the Board, furthering our "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open." *N.Y. Times Co.* v. *Sullivan*, 376 U.S. 254, 270 (1964).

The Board invokes "the fundamental federalist balance" to urge a narrow reading of Section 106(a). Pet'r Br. 18 (citing *Pennhurst State Sch. & Hosp.* v. *Halderman*, 465 U.S. 89 (1984)). But none of the underpinnings in *Pennhurst* exists here: this is a suit against a public entity, not against individual government officials, and there is no reason to presume that permitting an entity created by Congress to be sued in federal court would offend the principles of federalism. *See* U.S. Br. 30. *Pennhurst*'s exception to the

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loan, letter of credit, . . . or other financial indebtedness for borrowed money"); *id.* § 2150(a) (United States is "not . . . liable for the payment of any principal of or interest on any bond, note, or other obligation"); *id.* § 2150(b) ("Any claim to which the United States is determined to be liable . . . shall be subject to appropriations"). Under the "normal rule of statutory construction that identical words used in different parts of the same act are intended to have the same meaning," Section 105 insulates the Board from financial burdens, not equitable relief of the form ordered here. *Taniguchi* v. *Kan Pac. Saipan, Ltd.*, 566 U.S. 560, 571 (2012).

rule of *Ex Parte Young*, 209 U.S. 123 (1908), has no bearing because this lawsuit does not rest on *Young*. *Contra* Pet'r Br. 37 n.10. Indeed, by acknowledging the possibility of injunctive relief directly *against the Board*, and permitting preliminary relief in cases raising constitutional claims, Section 106(c) specifically envisions that the type of claims at issue here will be litigated in federal court.

The Board and the United States strain to offer a reading of Sections 105 and 106(a) that does not abrogate immunity yet gives "effect . . . to all [the Act's] provisions." *Corley* v. *United States*, 556 U.S. 303, 314 (2009); *see* Pet'r Br. 24-25; U.S. Br. 28-29. They suggest that if the Board waives its immunity, or if other statutes such as Title VII separately abrogate that immunity, Section 106(a) ensures that the case will be heard in federal court. But nothing in the text of the Act suggests that Congress enacted Section 106 to cover only the rare case where the Board has waived its immunity. The statute's sweeping application to "*any* action against the Oversight Board," 48 U.S.C. § 2126(a) (emphasis added), suggests Congress did not intend for this provision to have the vanishingly narrow scope the Board urges. *See Biden* v. *Missouri*, 142 S. Ct. 647, 652 (2022) (per curiam) (rejecting "a narrower view" of statute's applicability given its "seemingly broad language").

Nor is there any indication that Congress planned to give the Board a federal forum in suits under completely unrelated statutes, such as Title VII, for which immunity has already been abrogated and where removal to federal court would be possible regardless under 28 U.S.C. § 1331. The Board's reading here also conflicts with its concession that "a claim that the

Board exceeded its powers under PROMESA" would not be barred by immunity. Pet'r Br. 25. The Board offers no reason why it would not be immune from such a claim while maintaining immunity against other kinds of federal or territorial claims. And the Board's reading leaves little function for the Board's protection from preliminary injunctive relief, from which it would already be largely immune.

The natural reading of Sections 105 and 106 is, as usual, the correct one: these provisions permit litigants to bring claims against the Board while instructing them to do so in a particular forum with specific protections for the Board. This interpretation allows the Board the limited immunity against money damages that Congress intended without undermining the right of the "[t]he public, as sovereign," to "have all information available in order to instruct its servants, the government." *Soto*, 12 P.R. Offic. Trans. at 617 (citation omitted).

IV. PUERTO RICO HAS WAIVED IMMUNITY FROM RIGHT-OF-ACCESS CLAIMS.

Ruling that the Board has immunity from public records claims would obliterate the public's right to know about their own government. Such a reading would also be inconsistent with PROMESA and Puerto Rico's robust constitutional right of access. But if the Court nonetheless concludes both that the Board enjoys sovereign immunity and that Section 106(a) does not abrogate that immunity, then the Court has an alternative basis to affirm: Puerto Rico has waived its immunity in federal court as to access claims based on Article II, § 4 of Puerto Rico's constitution. *See* U.S. Br. 31-33.

Puerto Rico has waived its immunity to such claims in territorial courts, which routinely order public agencies to produce documents. *See*, *e.g.*, *Lopez Vives* v. *Policia de P.R.*, 18 P.R. Offic. Trans. 264, 285 (1987) (ordering disclosure of public records to plaintiff); *Eng'g Servs. Int'l, Inc.* v. *Autoridad de Energia Electrica de P.R.*, 205 P.R. Dec. 136, 162 (2020) (ordering territorial entity to make files available for public inspection); *Serrano* v. *Comision Estatal de Elecciones*, 2021 WL 4191113, at *6 (P.R. Cir. Aug. 17, 2021) (permitting inspection of records). There is no reason to believe that Puerto Rico would have limited its waiver of immunity to territorial courts alone.

That few examples of such claims appear on the federal docket is not dispositive. Before Congress enacted PROMESA, private parties seeking records under the Puerto Rico constitution would have had no obvious jurisdictional hook to assert those claims in federal court. Claims under territorial law present no federal question, *see Ortiz-Bonilla* v. *Federacion de Ajedrez de P.R., Inc.*, 734 F.3d 28, 37 (1st Cir. 2013), and Puerto Rico's citizens would not have diversity jurisdiction in actions against their own government. Congress has now reversed that jurisdictional default, channeling all actions against the Board to federal court. 48 U.S.C. § 2126(a). But *Congress*'s judgment that claims against the Board should proceed in a federal forum does not suggest any limit on *Puerto Rico*'s unlimited waiver of immunity from claims to enforce the fundamental right of access to public records.

CONCLUSION

Amici respectfully urge this Court to affirm the judgment below.

Respectfully submitted,

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APPENDIX

List of *Amici Curiae*

In addition to the Reporters Committee for Freedom of the Press, the following media organizations join this brief:

Californians Aware

The Center for Investigative Reporting (d/b/a Reveal)

CNN en Español

First Look Institute, Inc.

Freedom of the Press Foundation

Fundamedios Inc.

Institute for Nonprofit News

Inter American Press Association

The McClatchy Company, LLC

The Media Institute

Media Law Resource Center

Mother Jones

National Freedom of Information Coalition

National Press Club Journalism Institute

National Press Photographers Association

The News Leaders Association

News/Media Alliance

Radio Television Digital News Association

Society of Environmental Journalists

Tully Center for Free Speech