

SUPREME COURT OF THE UNITED STATES

IN THE SUPREME COURT OF THE UNITED STATES

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FINANCIAL OVERSIGHT AND MANAGEMENT)
BOARD FOR PUERTO RICO,)
Petitioner,)
v.) No. 22-96
CENTRO DE PERIODISMO INVESTIGATIVO,)
INC.,)
Respondent.)
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P R O C E E D I N G S

(10:04 a.m.)

CHIEF JUSTICE ROBERTS: We'll hear argument today in Case 22-96, Financial Oversight and Management Board for Puerto Rico versus Centro de Periodismo Investigativo.

Counsel.

ORAL ARGUMENT OF MARK D. HARRIS
ON BEHALF OF THE PETITIONER

MR. HARRIS: Mr. Chief Justice, and may it please the Court:

In 2016, Congress established the oversight board and assigned it the critical task of leading Puerto Rico back to fiscal health. Congress enacted a number of protections for the Board. One of them is Section 2126(a) of PROMESA, which gives the federal courts exclusive jurisdiction over any and all suits against the Board.

But the First Circuit below held that 2126(a) abrogated the Board's immunity, in fact, that it did so for every type of suit, federal and territorial. That decision was wrong and should be reversed.

In order to abrogate, a statute must be clear and unmistakable on its face. There is nothing in Section 2126(a) that even comes close.

1 This Court has held many times that
2 jurisdictional provisions do not abrogate because the
3 power to hear a case says nothing about the availability
4 of a defense, and mere textual inferences do not
5 qualify.

6 Separately, CPI has raised the issue of
7 whether Puerto Rico and, therefore, the Board is
8 entitled to sovereign immunity. The Board believes the
9 Court need not reach that issue, but, if it does, the
10 Court has repeatedly held for more than a hundred years
11 that Puerto Rico has immunity. It held that way before
12 Puerto Rico's constitutional assembly in the 1950s, and,
13 since then, it has said that Puerto Rico has a degree of
14 sovereignty -- excuse me, autonomy comparable to a
15 state.

16 CPI's theory that Puerto Rico has immunity
17 only in its own courts would mean that Puerto Rico or
18 its governor or other officials could be sued under
19 Puerto Rico's own law in federal court. That would be a
20 sea change for Puerto Rico and an extremely harmful one.

21 I welcome the Court's questions.

22 JUSTICE THOMAS: What would be the
23 difference if Puerto Rico were a state in your argument?

24 MR. HARRIS: I think, as far as this
25 argument would -- would be concerned, there would not be

1 a difference.

2 JUSTICE THOMAS: How would the Congress be
3 able to adopt or enact PROMESA and apply it to a state
4 in this manner?

5 MR. HARRIS: There may be a -- a -- a
6 difference in the source of authority that Congress
7 would rely on. It wouldn't be Article IV, of course.
8 But the Congress has the power to -- to abrogate in
9 appropriate circumstances as long as it has that power,
10 and the same rule would apply of clear and unmistakable
11 -- a clear and unmistakable statement of intent to
12 abrogate.

13 JUSTICE THOMAS: Just one final question.
14 The -- the -- would you -- I know you are -- your
15 preference is to assume immunity, but would you, since I
16 prefer not to assume immunity, would you tease out a bit
17 your basis for a territory having sovereign immunity?
18 And with respect to the applying sovereign immunity in
19 courts, are those federal courts, for example, a
20 superior court, or is it a territorial court or one of
21 the local courts?

22 MR. HARRIS: Sure. So our position is that
23 the sovereign immunity of a territory is part of a large
24 body, a large doctrine of constitutional common law or
25 common law sovereign immunity. It goes by different

1 names.

2 The idea behind it is that, once Congress
3 gives certain attributes of sovereignty through an
4 organic act, for example, to a territory, then the
5 common law basically dictates that as a result of the
6 sovereignty that it has, at that point, it's entitled to
7 immunity both in its own courts and in federal court.

8 There are two different strands, though,
9 which I want to emphasize, both of which are associated
10 with common -- with sovereign immunity, but they're
11 important -- the rationales are slightly different.

12 One of them is the principle that a
13 sovereign cannot be haled into -- into a court without
14 consenting to being haled that way. That principle
15 would mean that Puerto Rico could not be sued against --
16 without its consent in federal court.

17 But there's a second strand which I think is
18 even more powerful here, which is that a sovereign as a
19 lawmaker, part of the sovereignty or the -- the aspect
20 of being a lawmaker is the power and the autonomy to
21 decide who the law applies to. If Puerto Rico passes a
22 territorial law, Puerto Rico is able to decide that that
23 law should not apply to it.

24 On CPI's theory, if that sovereignty only
25 applies in territorial court, what that would mean would

1 be, as -- as happened -- as could happen here,
2 Puerto Rico could pass a law and, in federal court,
3 Puerto Rico could be sued under that very law. That
4 would be a serious invasion of Puerto Rico's sovereignty
5 and autonomy to hold it responsible that way.

6 CHIEF JUSTICE ROBERTS: You analogize in
7 your argument to the sovereign immunity of states, the
8 sovereign immunity of -- of tribes, and I wonder if
9 Puerto Rico's situation, though, is significantly
10 different both with respect to states and with respect
11 to tribes. They had sovereignty at the time of the
12 convention, and that carried forward just as the states'
13 carried forward, just as the tribes' carried forward.

14 Puerto Rico, obviously, at some point at --
15 at points in the past had the sovereignty of Spain, but
16 that did not carry over in any sense. It -- so the
17 question would be not to the -- the extent to which the
18 Constitution recognized the existing sovereignty. The
19 question would be, did they -- the Constitution in any
20 way confer sovereignty, create sovereignty, with respect
21 to Puerto Rico?

22 And, as far as the Plan of the Convention
23 goes, the Plan of the Convention was to cover the
24 territories with plenary authority on Congress's part,
25 not with any notion of sovereignty.

1 MR. HARRIS: So our position is that it --
2 the sovereignty should not depend on history. That
3 position was adopted by the Court, that history matters,
4 in the Sanchez Valle case, really only for the purpose
5 of a double jeopardy analysis. And I think the Court
6 went out of its way in Sanchez Valle to say this is not
7 the standard rule. In fact, I think the Court said the
8 ordinary meaning of sovereignty is not like what
9 happened there. The --

10 CHIEF JUSTICE ROBERTS: All right. I'll
11 give you -- I'll give you that.

12 MR. HARRIS: Okay. The question of whether
13 or not there is sovereign immunity, again, I think
14 there's two steps that are involved. One of them is
15 that Congress has to confer attributes of sovereignty
16 onto the entity. Usually, it does that by an organic
17 act. Here, there were several organic acts. But then
18 even more important than that was the constitutional
19 assembly in the 1950s, which, as this Court has said
20 many times, really made Puerto Rico unique and gave
21 it --

22 CHIEF JUSTICE ROBERTS: Well, that's right.
23 That's sort of my point, unique, and so I'm just
24 wondering how far you can stretch the analogy to state
25 sovereign immunity, to tribal sovereign immunity.

1 MR. HARRIS: Again, if it's unique, you
2 know, we would take the position that it's unique, you
3 know, in favor of -- of -- of sovereignty because of --

4 CHIEF JUSTICE ROBERTS: Right. But --

5 JUSTICE JACKSON: But isn't it your first
6 position that we should not really get into this? I
7 mean, I -- I didn't see it in the briefs. I am a little
8 concerned about relying on our own sort of views of it
9 based on other things when it hasn't really been
10 briefed. So could you talk a little bit about your
11 assumption position and whether and to what extent we
12 can assume for the purpose of answering the question
13 that we actually decided to take in this case?

14 MR. HARRIS: Yes, Justice Jackson. We -- we
15 agree that the Court does not need to reach this issue.
16 The question presented only addressed the -- the issue
17 of whether Section 2126(a) abrogates. The issue of --
18 of sovereign immunity was -- was not -- was not raised
19 by us.

20 JUSTICE JACKSON: But what do you say about
21 the SG's position that we should go ahead and reach it
22 nonetheless? I mean, who -- who's got the better of the
23 argument regarding assumption?

24 MR. HARRIS: Our -- our position is that the
25 Court has in appropriate circumstances assumed that a

1 predicate issue like sovereign immunity exists. And the
2 Court should do that here, because, as CPI, I think,
3 acknowledged in their opposition to cert -- certiorari,
4 this really wasn't -- none of these arguments were made
5 below. The -- the two-tiered theory of sovereign
6 immunity which CPI is pressing now, that was not raised
7 below. The First Circuit was simply following its own
8 precedents really with no analysis.

9 I agree that this Court, as it's said many
10 times, is a court of review and not first view, and,
11 therefore, the Court doesn't need to reach that issue.

12 JUSTICE SOTOMAYOR: Counsel, if we reach
13 this issue, it has tremendous implications outside of
14 PROMESA, doesn't it?

15 MR. HARRIS: Yes, Justice Sotomayor.

16 JUSTICE SOTOMAYOR: Now let's go back to the
17 foundational question by Justice Thomas and Justice
18 Roberts. Territories like Louisiana and others didn't
19 have their own sovereignty before they became
20 territories of the United States, correct? They had --

21 MR. HARRIS: Correct.

22 JUSTICE SOTOMAYOR: -- they had sovereignty
23 of -- of France or of other countries, correct?

24 MR. HARRIS: In -- in most cases, yes.

25 JUSTICE SOTOMAYOR: And, historically, no

1 territory was dragged into federal or state -- or
2 territorial courts unless their sovereignty had been
3 waived, correct?

4 MR. HARRIS: Yes.

5 JUSTICE SOTOMAYOR: So, in 200 years of our
6 history, the Holmes -- Justice Holmes's proposition that
7 no sovereign, which I think we have given to mean no
8 governing entity, would be dragged into a court without
9 the consent of the sovereign, correct?

10 MR. HARRIS: Yes.

11 JUSTICE SOTOMAYOR: And so, to the extent
12 that the United States has not permitted, entertained,
13 looked at suits against these territories, they've acted
14 akin to states, correct?

15 MR. HARRIS: Yes.

16 JUSTICE SOTOMAYOR: That's what we said in a
17 long line of cases. In Rosaly, in Emadeline, we said
18 that Puerto Rico is like a state, correct?

19 MR. HARRIS: Correct.

20 JUSTICE SOTOMAYOR: All right. Having taken
21 those propositions as a given, assuming we have
22 sovereignty, the government -- not the government, but
23 your adversary says, okay, it acts like a state now
24 through the 1952-54 Act, but that means it only has
25 sovereignty in its territorial courts. It doesn't have

1 sovereignty in federal court.

2 Address that subset of the argument.

3 MR. HARRIS: Justice Sotomayor, it's our
4 position that this -- this two-tiered theory of -- of
5 sovereign immunity that Puerto Rico only has
6 sovereignty, has immunity in its own courts, that
7 there's no precedent for that and that, in fact, it
8 would be -- it's very counterintuitive or would lead to
9 very counterintuitive results.

10 There is -- there's no authority of a
11 situation we were able to find where -- where a court
12 has ever said it -- that a sovereign only has -- or this
13 Court has ever said that a sovereign only has immunity
14 in its own courts. And it would lead to a lot --

15 JUSTICE SOTOMAYOR: And, in fact, that's
16 what Holmes was talking about, that the general
17 proposition was broader, that you can't be haled into a
18 court.

19 MR. HARRIS: Yes, exactly. And the -- and
20 the -- and the second point is it would lead to some
21 very strange results. One of the results would be that
22 the territory, let's just say citizens of the territory
23 who tried to sue the territory in its own courts would
24 not be able to because it -- by -- by hypothesis, it
25 doesn't have immunity -- it does have immunity in that

1 situation, but then noncitizens taking advantage of the
2 diversity jurisdiction could sue under the exact same
3 law in federal court against the sovereign.

4 CHIEF JUSTICE ROBERTS: Does the --

5 MR. HARRIS: It really doesn't make sense.

6 CHIEF JUSTICE ROBERTS: -- does the Eleventh
7 Amendment say "states" or "things like states?"

8 MR. HARRIS: The Eleventh Amendment says
9 "states."

10 JUSTICE SOTOMAYOR: So what do you do with
11 that? Meaning the government itself is saying it's not
12 Eleventh Amendment immunity, which is what the First
13 Circuit has relied on, but it's common law foreign
14 sovereignty. Isn't that a reason to remand and let them
15 look at this issue more closely?

16 MR. HARRIS: No, I -- I don't think there's
17 a need to remand here. I think -- first of all, the --
18 the Eleventh Amendment analysis actually --

19 JUSTICE SOTOMAYOR: I don't mean remand. I
20 mean -- answer your question. Answer the question
21 presented. But that issue could be addressed more fully
22 below, correct?

23 MR. HARRIS: Yes, it could. And, in fact,
24 this Court has actually left open the question of
25 whether the Eleventh Amendment applies to Puerto Rico.

1 We're not relying on that argument here because we don't
2 need to, but the Court left it open in the Puerto Rico
3 Aqueduct case in -- in a footnote. But the --

4 CHIEF JUSTICE ROBERTS: Do you understand
5 the court of appeals to be relying on that argument?

6 MR. HARRIS: The court of appeals, through
7 its -- its series of its own holdings, I think the
8 original holding, when Justice Breyer was -- was on the
9 court, was that Eleventh Amendment principles apply.

10 I think, after that time, the Court said
11 that the Eleventh Amendment itself applies. That's a
12 longstanding precedent in the First Circuit. It's
13 been -- it's been applied. Again, we're not relying on
14 that argument because we don't think that we need it
15 here and it's an open question here.

16 We think the common law -- common --
17 sovereign immunity, which is the same principle that
18 the -- that the tribes rely on, is enough to -- to give
19 territories in general and Puerto Rico in specific
20 sovereign immunity here.

21 JUSTICE SOTOMAYOR: By the way, the tribes
22 are just like Puerto Rico in that Congress controls
23 their dependent sovereign nations and Congress can waive
24 their immunity as well, correct?

25 MR. HARRIS: Absolutely. Congress can --

1 JUSTICE SOTOMAYOR: And we have said that
2 tribes can't be sued in federal court, correct?

3 MR. HARRIS: That's correct. The plenary
4 power of Congress as far as the tribes are concerned is
5 exactly the same as it is with regard to a territory.
6 So it -- it can't prove because of that that there's no
7 sovereign immunity because the same would be true in --
8 in the tribes' case and the Court has held otherwise.

9 JUSTICE KAGAN: May -- may I take you back,
10 Mr. Harris, to Justice Jackson's questions about
11 assumption, and you rightly point out we assume
12 questions all the time on a way to a holding. But
13 usually we assume a question and then we say, well,
14 we're going to assume this because, anyway, you lose on
15 a different ground.

16 You want us to do something different. You
17 want us to assume the immunity question only to say,
18 well, you win with respect to abrogation. And -- and
19 that's a funny kind of posture, you know, because the
20 assumption will essentially determine the disposition of
21 the case. You're going to get immunity but only because
22 we've assumed that you should get immunity.

23 And I wonder if you have any precedent for
24 that, any cases in which we've done something similar,
25 any authority to suggest it's appropriate. I don't know

1 of any authority to say it's inappropriate. It just
2 seems quite weird to me.

3 MR. HARRIS: We -- we were not able to find
4 a case where it seemed that the existence of immunity
5 would not have mattered to the outcome where the Court
6 just assumed it. Nevertheless, as -- as -- as you
7 mentioned, Justice Kagan, the cases don't seem to give
8 that as the reason for why it's okay to assume. Several
9 of the cases we cited, I think the Feeney case, just
10 said we're going to assume it. It happened to be in
11 that case because there was consent to -- to
12 jurisdiction that it -- it didn't have an impact on the
13 outcome, but the Court didn't say that was the reason.

14 JUSTICE GORSUCH: Can you address the larger
15 question implicated by Justice Kagan, which is sovereign
16 immunity is at least an affirmative defense that would
17 normally be on -- the burden would be on the person
18 asserting it to establish. Does that make it a
19 particularly odd circumstance to assume its existence?

20 MR. HARRIS: I don't know if that -- if that
21 changes things. I think -- I think there have been
22 situations where a -- a party may bear the burden on a
23 particular question, the Court nevertheless assumes it.
24 Again, I -- I agree that there doesn't seem to be a case
25 where the Court has done that specifically with regard

1 to sovereign immunity, but I think the -- the principle
2 stands.

3 I mean, the other reason I'd mention as well
4 why it would be -- it may be appropriate to assume it
5 here is that the parties who -- other parties who you
6 would think would be most interested in the answer to
7 that question, for example, Puerto Rico authorities
8 themselves, are not present in this case. The -- the --
9 the -- the governor of Puerto Rico, there are no
10 Puerto Rico parties here. It would make sense to at
11 least let them weigh in perhaps in another case on that
12 question.

13 JUSTICE SOTOMAYOR: There is an alternative
14 ground that immunity could be found to have been waived
15 besides the PROMESA Act, and it would be that the
16 Puerto Rican constitution and laws waive sovereign
17 immunity from suits like this one. I know you say they
18 don't, but assuming that argument has not been
19 addressed, correct?

20 MR. HARRIS: That argument -- correct. That
21 argument was never raised below. It was never addressed
22 by the court below. It's simply not in the case.

23 JUSTICE SOTOMAYOR: But it -- well, it is
24 now because it came up before us. It's been raised by
25 Respondent now.

1 MR. HARRIS: Yes, it has been --

2 JUSTICE SOTOMAYOR: And they can be -- it
3 could be raised below, correct?

4 MR. HARRIS: It could be raised in -- in
5 another case, yes, it could.

6 CHIEF JUSTICE ROBERTS: Thank you, counsel.

7 Justice Thomas?

8 Justice Alito?

9 Anything further, Justice Sotomayor? No?

10 Justice Kagan?

11 JUSTICE GORSUCH: Just one question to
12 follow up on Justice Sotomayor's. We have received a
13 lot of briefing about Puerto Rico's constitution
14 promoting open records. I -- I understand your
15 procedural objections to addressing it in this case.

16 Do you want to say anything about the
17 substance of the argument?

18 MR. HARRIS: The -- the substance of -- of
19 --

20 JUSTICE GORSUCH: The merits of the -- the
21 argument, whether the Puerto Rico constitution favors
22 disclosure of cases like this.

23 MR. HARRIS: The -- the only thing I would
24 say about the waiver argument that I think is
25 significant is that it's not clear whether or not waiver

1 would even apply in federal court in the first place.
2 In other words, this -- the fact that Puerto Rico has
3 agreed or has consented to suits against governmental
4 entities in its own courts, it does not follow that it's
5 done so in federal court.

6 And, in fact, the statute which implements
7 that constitutional right, a statute called TEPPRA, which
8 is a Puerto Rico statute which gives a right to go
9 obtain document -- government records and go to court if
10 you don't get them, it's clearly written on the
11 assumption that you can only go to territorial court,
12 that the -- the section that says, you know, judicial
13 review says in the court of first instance.

14 JUSTICE GORSUCH: Thank you.

15 CHIEF JUSTICE ROBERTS: Justice Kavanaugh?

16 Justice Barrett?

17 Justice Jackson?

18 Thank you, counsel.

19 MR. HARRIS: Thank you.

20 CHIEF JUSTICE ROBERTS: Ms. Brown.

21 ORAL ARGUMENT OF AIMEE W. BROWN

22 FOR THE UNITED STATES, AS AMICUS CURIAE,

23 SUPPORTING VACATUR

24 MS. BROWN: Thank you, Mr. Chief Justice,

25 and may it please the Court:

1 For more than a century, this Court has
2 recognized that Puerto Rico is immune from being sued
3 without its consent. That immunity derives from the
4 nature of Puerto Rico's government, and it extends to
5 the sovereign's own court and to federal court. Just as
6 with federal, state, and tribal immunity, any waiver or
7 abrogation of Puerto Rico's sovereign immunity requires
8 a clear statement.

9 Section 106(a) of PROMESA does not include
10 that statement. It simply channels jurisdiction to
11 federal court for any claim against the Board under
12 federal or territorial law, and those claims can proceed
13 when the Board's immunity is elsewhere abrogated or
14 waived.

15 The only other provisions of PROMESA that
16 Respondent relies on likewise apply in that context,
17 most relevantly in Title 3 proceedings when the
18 Bankruptcy Code abrogates immunity. But nothing in
19 those provision indicate that Congress intended to make
20 the Board susceptible to suit for any and all claims
21 under federal and territorial law.

22 Because the Board's immunity is also subject
23 to waiver by the Commonwealth, so long as that waiver
24 doesn't conflict with PROMESA, the Court should remand
25 to allow the lower courts to address that issue.

1 I welcome the Court's questions.

2 JUSTICE THOMAS: You take a different
3 position with respect to assuming sovereign immunity in
4 your brief. So could you comment on the argument that
5 it could -- we could possibly or we should assume
6 sovereign immunity?

7 MS. BROWN: So our -- our position is kind
8 of consistent with what Justice Kagan was -- was
9 referencing earlier. Usually, when this Court has
10 assumed without deciding a question, it's because it
11 doesn't have an effect on the end outcome. So we think
12 it would be a little bit strange to assume that here if
13 you take the view that we think is -- is the correct
14 view, the correct reading of the statute, which is that
15 it clearly does not, does not abrogate that immunity.
16 And so I think it would be a little bit strange to -- to
17 not address the -- the existence of the immunity in the
18 first place.

19 We also think it's -- think it's not
20 necessary to try and avoid that question here when this
21 Court's precedents dating back for a century have
22 already decided that Puerto Rico is entitled to that
23 immunity. And -- and so we think it's appropriate to
24 address that question in the first instance.

25 JUSTICE THOMAS: Do you have a case in which

1 a territory has been granted or been said to have had
2 sovereign immunity in another sovereign's courts?

3 MS. BROWN: So I think that the closest case
4 that we have on that score is the Emmanuel case, and, of
5 course, the Court ended up holding that the -- the
6 territory had waived its immunity, and so it didn't
7 really -- it wasn't necessary to the outcome of that
8 case. But the Court certainly went into the discussion
9 of sovereign immunity in that case, and it seems that
10 the implication of that is that it applies equally in
11 territorial court and in federal court.

12 JUSTICE SOTOMAYOR: Have you ever heard of a
13 case in which we're deciding the sovereignty of an
14 entity where that entity is not before us?

15 MS. BROWN: No, I -- I have not. But it is
16 just kind of the -- the nature of this case. This was
17 -- this was set out in, I think, the cert papers, so I
18 think the Court was aware when it granted that this was
19 an issue that the Respondent intended to -- to -- to
20 take issue on.

21 JUSTICE JACKSON: And when we granted, I
22 understood that there was at least some question about
23 whether or not we should also consider the sovereignty
24 point, and we didn't grant cert on that issue. So it
25 seemed as though the Court was isolating abrogation.

1 MS. BROWN: If the Court chooses to -- to
2 consider only that issue and decide it on that basis, I
3 think -- I -- I don't have a precedent for you that says
4 that it -- it's impossible to do that.

5 JUSTICE JACKSON: So there's no legal
6 impediment that you can identify?

7 MS. BROWN: Not that I'm aware of. Again, I
8 just think that it is -- it is kind of a strange thing
9 to do in a case where, if it -- if it does end up
10 mattering to the outcome, it starts to look a little bit
11 more like an advisory opinion in the event that --

12 JUSTICE JACKSON: But, wait, why -- why does
13 it matter -- I mean, it's not intertwined. I could -- I
14 could totally understand the concern about assumption if
15 the only way that we could possibly answer the
16 abrogation question, it would be based on particular
17 findings that we made relative to sovereign immunity,
18 and then you're sort of like how did you even reach that
19 answer, because these two things are so intertwined.

20 I understood it to be antecedent, the "it"
21 being the sovereign immunity question, but independent
22 in the sense that it doesn't rely on the same factors at
23 all.

24 MS. BROWN: So I think that's generally
25 correct. The statutory interpretation could be

1 affected, I think, in some ways by the fact -- the
2 existence or not of immunity here. So, to the extent
3 that you are kind of looking at the -- at the statutory
4 language and think that some provisions only have
5 meaning to the extent that there is a waiver of
6 sovereign immunity under territorial law for certain
7 provisions, it could end up affecting the way that the
8 Court views the statute there. So I think it does kind
9 of balance out.

10 JUSTICE KAGAN: Do you think that there's
11 any difference in the kind of clear statement rule you
12 could come up with depending on what -- what the basis
13 for the immunity was or -- this is going to the question
14 of whether it's intertwined or not. You know, depending
15 on what the basis for sovereign immunity is in this
16 case, could it possibly lead to a different clear
17 statement rule?

18 MS. BROWN: So I think that the same clear
19 statement rule has been applied in every context
20 involving sovereign immunity. I think it is just kind
21 of this necessary corollary to the existence of
22 self-government in the first instance. That's the way
23 that the Court has described it. In -- in Bay Mills,
24 for example, the Court said once, you know, when we have
25 self-government that exists, we're -- we're particularly

1 hesitant to conclude that Congress is acting to
2 undermine that self-government. So I think that same
3 analysis applies here. Of course, the tribes are under
4 the plenary authority of Congress in the same way that
5 the territories are. So I -- so I think that this --
6 the analysis would likely be the same regardless.

7 JUSTICE GORSUCH: Counsel, have you
8 considered how your sovereign immunity argument might
9 apply to other territories besides Puerto Rico and what
10 their views may be?

11 MS. BROWN: So I think that all of the
12 territories likely have the same kind of baseline level
13 of self-governance that the Court recognized in Rosaly
14 as sufficient and necessarily leads to sovereign
15 immunity. There have been some courts -- there's a
16 Ninth Circuit opinion, I believe, that holds that, with
17 respect to the Northern Mariana Islands, there are
18 provisions within the compact with Congress or the
19 covenant with Congress in that case that -- that waive
20 sovereign immunity in particular instances. So there
21 might be some differences with -- with respect to the --
22 the terms of their sovereign immunity, but the -- the
23 baseline existence, I think, is the same.

24 JUSTICE GORSUCH: So ruling for you in this
25 case would effectively decide not just Puerto Rico but

1 other territories who aren't before us as well?

2 MS. BROWN: That's -- that's likely the
3 case, I think, based on their self-government.

4 JUSTICE GORSUCH: Thank you.

5 JUSTICE JACKSON: If we --

6 CHIEF JUSTICE ROBERTS: I --

7 JUSTICE JACKSON: -- if we -- if we reach --

8 MS. BROWN: If you reach the sovereign --

9 JUSTICE JACKSON: -- the sovereign immunity?

10 MS. BROWN: Yes. Exactly.

11 JUSTICE JACKSON: All right.

12 JUSTICE SOTOMAYOR: Counsel, we --

13 CHIEF JUSTICE ROBERTS: I -- I get the --

14 JUSTICE SOTOMAYOR: I'm sorry.

15 CHIEF JUSTICE ROBERTS: No, go ahead.

16 JUSTICE SOTOMAYOR: We have had cases
17 involving jurisdiction where we've addressed whether one
18 jurisdictional ground is present or not and remanded to
19 see when we said no, but there could be others, correct?
20 Or yes, or there could be other --

21 MS. BROWN: Yes, I believe -- I believe
22 that's the case.

23 CHIEF JUSTICE ROBERTS: I -- I had the same
24 question that Justice Gorsuch had, and part of your
25 answer was you think all of the territories have the

1 same level of self-government. Is -- is that true?

2 MS. BROWN: They have the same -- the -- a
3 sufficient baseline level. I think that Puerto Rico
4 kind of stands apart from them in having additional
5 immunity -- or additional sovereignty, additional
6 self-governance separate and apart from that. But their
7 -- their immunity was decided back in 1913, when only
8 the Foraker Act was -- was implemented at that point,
9 and I think that all the territories have at least that
10 baseline level, which is the -- the level that has given
11 rise to -- to sovereign immunity.

12 JUSTICE SOTOMAYOR: And that was the level
13 the Court looked at in Rosaly, correct?

14 MS. BROWN: That's correct, yes.

15 JUSTICE SOTOMAYOR: And said that these
16 islands were like sovereigns in the sense of not being
17 haled into a court?

18 MS. BROWN: Yes.

19 JUSTICE SOTOMAYOR: And then --

20 JUSTICE KAGAN: And -- and you --

21 CHIEF JUSTICE ROBERTS: And Rosaly was --

22 JUSTICE SOTOMAYOR: -- in Emmanuel, we said
23 it was federal court as well, correct?

24 MS. BROWN: Emmanuel was, yes, the following
25 year, which -- which applied the same kind of reasoning

1 to a federal court.

2 CHIEF JUSTICE ROBERTS: Well, but, I mean,
3 Rosaly itself was simply the courts of Puerto Rico,
4 right?

5 MS. BROWN: That -- that was the court that
6 was at issue in Rosaly, yes.

7 JUSTICE KAGAN: And you would define that
8 baseline level of sovereignty that you think gives rise
9 to immunity as what?

10 MS. BROWN: So the Court in -- in Rosaly and
11 then in Shell Co. has -- has kind of just described it
12 as this self-governance and -- and autonomy over all
13 matters of local concern. The -- the Court there
14 compared the government or the legislative power that
15 was granted to the territories to those that were
16 granted to organized and incorporated territories and
17 found them to be essentially identical. So I think it's
18 just this -- this general you are the -- you're
19 governing yourselves under -- under all of these -- all
20 issues of local concern.

21 CHIEF JUSTICE ROBERTS: Justice Thomas?

22 Justice Alito?

23 Justice Sotomayor, anything further?

24 Justice Kavanaugh?

25 JUSTICE KAVANAUGH: On -- on the remand

1 point that you make, the other side says there's no need
2 for that remand because that issue was never raised
3 previously in the lower courts. So can you respond to
4 that?

5 MS. BROWN: So I think that there was -- we
6 haven't taken an -- a -- a position on whether that
7 issue is -- is forfeited or not. I think that on remand
8 the Court could decide that as well.

9 There were certainly, I think, references in
10 the briefing to the fact that this was a constitutional
11 right that was generally available in the territories
12 themselves, and so perhaps that would -- that would be
13 sufficient to raise it. But we don't think it would be
14 appropriate or necessary for the Court to actually reach
15 and decide the -- the full extent of Commonwealth law
16 here.

17 We think that there are some questions as to
18 whether those laws are -- are -- or that the right to
19 access to these documents is generally brought in
20 actions against the government itself or just against
21 territory -- or territorial officers under something
22 like an Ex Parte Young suit.

23 I think there's a -- a -- an amicus brief
24 from Espacios Abiertos that kind of discusses the -- the
25 general writ of mandamus there and -- and notes that

1 that is generally applied to -- to officers and not the
2 territory itself.

3 JUSTICE KAVANAUGH: Thank you.

4 CHIEF JUSTICE ROBERTS: Justice Barrett?
5 Justice Jackson?

6 Thank you, counsel.

7 MS. BROWN: Thank you.

8 CHIEF JUSTICE ROBERTS: Ms. Harris?

9 ORAL ARGUMENT OF SARAH M. HARRIS

10 ON BEHALF OF THE RESPONDENT

11 MS. HARRIS: Mr. Chief Justice, and may it
12 please the Court:

13 Congress did not need to surmount a clear
14 statement rule to subject the Board to suit for
15 violating Puerto Rico's constitution.

16 This Court has required some historical or
17 constitutional basis for clear statement rules.
18 Puerto Rico is a territory, so the clear statement rule
19 for abrogating state sovereign immunity is out.

20 But, unlike for states and tribes, this
21 Court has never imposed clear statement rules before
22 Congress can curtail territorial autonomy, nor has this
23 Court ever imposed clear statement rules for waivers or
24 abrogations of territorial immunity.

25 Clear statement rules would conflict with

1 Congress's plenary powers over territories. And
2 adopting the other side's one-size-fits-all theory of
3 immunity would be a drastic and unnecessary way to
4 protect Puerto Rico, which will not be flooded with
5 federal suits no matter what.

6 The Federal Relations Act already gives
7 Puerto Rico the benefits of state sovereign immunity for
8 generally applicable federal laws, and there is no
9 diversity jurisdiction for suits against territories.

10 Regardless, the Board is not immune because
11 PROMESA's text clearly says the Board will be a
12 defendant in all kinds of actions, especially
13 constitutional ones. 2126(a) creates a reticulated
14 federal review scheme for any action against the Board.
15 Congress created a forum for the Board to face suit, not
16 some generic class of defendants, and 2126(c) prescribes
17 when court orders against the Board, including for
18 constitutional violations, will take effect.

19 Federal courts couldn't issue orders against
20 the Board or immune and constitutional violations under
21 2126(c) cover Puerto Rico's constitution.

22 PROMESA shunts all federal and territorial
23 claims against the Board to federal court, but by doing
24 so, Congress didn't suspend Puerto Rico's constitution
25 or its waiver of immunity. The unelected board is not

1 the one part of Puerto Rico's government entitled to an
2 immunity that the people of Puerto Rico withdrew from
3 everyone else.

4 I welcome the Court's questions.

5 JUSTICE THOMAS: Ms. Harris, could you
6 comment on the argument that we've heard or suggestion
7 that we can bypass sovereign immunity and simply decide
8 abrogation?

9 MS. HARRIS: I don't think that is plausible
10 here because, in order to rule against us at least, the
11 Court would have to say there is some sort of clear
12 statement that applies to the abrogation analysis and
13 then apply it to PROMESA. So that just begs the
14 question, where does that clear statement rule come from
15 and is there some underlying immunity that is protected?

16 As Justice Gorsuch noted, it's all the more
17 strange to assume all that because sovereign immunity is
18 an affirmative defense, but, again, the opinion would
19 have to read something like there is a clear statement
20 rule based on, what, I mean, state sovereign immunity
21 cases? That's what the Board relied on in its briefing
22 in the First Circuit and below and also in -- in this --
23 its opening brief in this Court. But I don't think --

24 JUSTICE JACKSON: I don't understand --

25 JUSTICE GORSUCH: Ms. --

1 JUSTICE JACKSON: -- why you lead with the
2 clear statement rule. I thought we could just -- that
3 assumes that there are circumstances in which you could
4 have sovereignty without a clear statement rule. So why
5 doesn't the -- the sort of initial question -- rather
6 than clear statement, the initial question is, does
7 Puerto Rico -- are they entitled to the status of a
8 sovereign?

9 We assume that because the First Circuit was
10 relying on its own precedent with -- with respect to it,
11 the Court's cases have suggested it, and, in any event,
12 every time there is a recognition of sovereign immunity,
13 a clear statement rule follows.

14 Why wouldn't the opinion read like that?

15 MS. HARRIS: So that bakes in a lot of
16 assumptions with respect to the idea that clear
17 statement rules are sort of like a buy one, get one free
18 if you are sufficiently sovereign to have some form of
19 immunity that I think are refuted by this Court's
20 own cases about territories.

21 JUSTICE JACKSON: So you have cases that --
22 no, no, not about territories. Do you have a case that
23 suggests that if we find that sovereign immunity
24 applies, there's another set of analyses to determine
25 whether clear statement follows?

1 MS. HARRIS: So, yes, I would say Jinks is a
2 good example at least with respect to counties which are
3 immune in state court, and this Court said, you don't
4 need a clear statement rule to abrogate the immunity
5 that counties have. It's a common law immunity.

6 And while this Court's cases don't sort of
7 squarely say there -- I -- I think the problem is the
8 Court's cases don't sort of squarely, like, ever say
9 that there is just a universal unified theory of
10 sovereign immunity. What the Court's --

11 JUSTICE JACKSON: I don't understand.

12 JUSTICE GORSUCH: Ms. --

13 JUSTICE JACKSON: I don't understand. Is it
14 or is it not the case that every time we've found
15 sovereign immunity we say a clear statement rule
16 follows?

17 MS. HARRIS: It is not the case. And one
18 case I would point to is actually Rosaly itself, because
19 I think everyone agrees there that the Court is saying
20 there is absolutely and certainly sovereign immunity for
21 Puerto Rico in its own courts, but that case also
22 involves a question of waiver, which is whether the
23 Foraker Act waived Puerto Rico's immunity in its own
24 courts, and even if you assume there's some immunity
25 elsewhere, whether it was waived.

1 The Court did not apply a clear statement
2 rule in that case and instead looked at just ordinary
3 principles of statutory interpretation. What actually
4 the case came down to was the Court's conclusion that
5 the design of the Foraker Act in its grant of coequal --
6 three coequal branches to Puerto Rico would be
7 inconsistent with reading in a waiver.

8 And I think that underscores all the more
9 Rosaly was focused on the idea that if you are the
10 Puerto Rico legislature or another political branch and
11 constantly haled before the courts of Puerto Rico, that
12 would be inconsistent with the -- the government that
13 Congress was trying to set up. Emmanuel --

14 JUSTICE GORSUCH: Ms. --

15 JUSTICE SOTOMAYOR: Counsel --

16 JUSTICE GORSUCH: Ms. Harris --

17 JUSTICE SOTOMAYOR: Go ahead.

18 JUSTICE GORSUCH: I'm sorry.

19 JUSTICE SOTOMAYOR: No, no, go ahead.

20 JUSTICE GORSUCH: I -- I -- I just wanted to
21 explore the suggestion by Petitioners that we should
22 avoid this issue altogether and assume the existence of
23 sovereign immunity for purposes of this case.

24 And some of the arguments I -- I think that
25 are strong for that are that we don't have Puerto Rico

1 before us. We have this Board that may expire and was a
2 creation of Congress. We don't have the other
3 territories before us as -- as well.

4 And it's a rather large and important
5 constitutional question that really may only be relevant
6 in a small number of cases too, given that, by statute,
7 Congress has effectively given Puerto Rico sovereign
8 immunity for purposes, as you point out, of -- of
9 general purpose federal statutes.

10 And then we have in -- in -- in your
11 opposition to cert your client stated that the First
12 Circuit correctly framed the inquiry as whether Congress
13 used "unmistakably clear language" to abrogate sovereign
14 immunity in this case.

15 Why aren't all those just good reasons to
16 defer this question for another day, if it ever becomes
17 relevant again, given, again, Congress's statute saying
18 that Puerto Rico generally has sovereign immunity?

19 MS. HARRIS: So, first of all, it would be a
20 little bit ironic for the Board to say it is entitled to
21 share in Puerto Rico's sovereign immunity because it's
22 part of that government and then just say --

23 JUSTICE GORSUCH: Ironies aside, is there
24 any legal impediment to -- to proceeding that way?

25 MS. HARRIS: Yes. I think it -- there --

1 the other legal impediment just to go on the cert papers
2 is we weren't conceding that a clear statement rule
3 applies. What we're saying is, in a universe where you
4 are asking did the -- the First Circuit misapply that
5 standard, it doesn't apply.

6 And the other impediment would be that,
7 again, the opinion would --

8 JUSTICE GORSUCH: I'm not sure I understand
9 that as an impediment. Can you explain how to -- I
10 mean, how that's an --

11 MS. HARRIS: So it's not a concession. The
12 impediment would be just in the way that the opinion
13 would have to be framed.

14 JUSTICE GORSUCH: So you say it's not a -- a
15 concession? Fine, I'll -- I'll -- I will spot you
16 without granting that.

17 MS. HARRIS: Okay.

18 JUSTICE GORSUCH: Okay? I'm looking for a
19 legal impediment to proceeding as Petitioner suggests.

20 MS. HARRIS: Yes. And the legal impediment
21 would be that you would have to be writing an opinion
22 that says we're assuming there's a clear statement rule,
23 and to hold that there is a clear statement rule is to
24 be essentially saying, yes, there is some sort of basis
25 in the Court's cases historically or as a constitutional

1 matter that it should actually apply to Puerto Rico and
2 the other territories at all.

3 If you're concerned about that sort of
4 inquiry, I mean, it seems like maybe one of the better
5 ideas would be to consider whether this case either
6 should be resolved at all or also to look at many of the
7 alternative off-ramps in this case, including the waiver
8 question with respect to Puerto Rico constitution's
9 structural waiver of immunity in the circumstances.

10 You could also say that PROMESA itself is
11 clear enough in terms of its terms in it -- in being an
12 entirely reticulated and specific judicial review scheme
13 for the Board itself that only has meaning if the
14 remedies for constitutional violations are, in fact,
15 what we say they --

16 JUSTICE SOTOMAYOR: That just goes back to
17 the ultimate question of what do we mean by clear rule
18 when a sovereign -- when you're waiving sovereign
19 immunity.

20 You're analogizing Puerto Rico to a
21 municipality, but it's not. You yourself see the irony
22 in anybody claiming that Puerto Rico and -- and the
23 United States are the same sovereign for purposes of
24 self-government. So you agree they're not, correct?

25 MS. HARRIS: The United States and Puerto

1 Rico -- so the Court's cases say the sovereignty of
2 Puerto Rico comes from the United States, and the other
3 important difference is --

4 JUSTICE SOTOMAYOR: So -- well, so do the
5 territories that became states.

6 MS. HARRIS: But when the --

7 JUSTICE SOTOMAYOR: Everybody gets their
8 sovereignty from the United States, including tribes,
9 because we have determined not to take it away.

10 MS. HARRIS: So just to be very clear, the
11 -- there is a fundamental difference between states that
12 come into the union under the equal footing doctrine and
13 tribes and territories here that I think is significant
14 both with respect --

15 JUSTICE SOTOMAYOR: And Indians and
16 everybody else, but the question is we've announced a
17 clear statement rule with respect to waiver, and you've
18 not given me a reason why Puerto Rico should be treated
19 differently than Indians, why it should be treated
20 differently than territories, why somehow that -- that
21 clear statement rule shouldn't apply.

22 Rosaly, by the way, was in the
23 nineteen-teens sometime, decades before we started with
24 the clear statement rule, but that's what we've got now.

25 MS. HARRIS: So --

1 JUSTICE SOTOMAYOR: So Rosaly was addressing
2 a theory that -- or a doctrine that wasn't in existence
3 yet.

4 MS. HARRIS: A few points on that, just
5 starting with the last one. Rosaly actually was at the
6 exact same time that this Court was articulating clear
7 statement rules for federal waivers of immunity and
8 state sovereign immunity. And so the Marie case that is
9 cited in the briefing is an example of the clear
10 statement rule for abrogating state sovereign immunity.
11 The Schillinger case for the United States is an example
12 for the federal government. And it's really telling
13 that there are several cases in the territories that are
14 about waivers or abrogation of immunity at that time
15 that do not mention a clear statement rule.

16 And I think the reason, one among many, is
17 that the basis for the clear statement rules and for the
18 immunity of states and tribes in the United States is
19 fundamentally different.

20 So let me just start with tribes because
21 that's been sort of the most bandied about analogy.
22 Tribes differ in three ways. First of all, their
23 sovereignty is akin to the sovereignty of a foreign
24 nation because that is what tribes were before the
25 founding, and until 1871, the government, in fact, dealt

1 with tribes through treaties. And they retained that
2 status of having the so-called "law of nations
3 immunity," immunity in other people's courts, by virtue
4 of that.

5 The reason for the clear statement rule for
6 tribes sort of flows from that a bit, which is, while
7 Congress has plenary power over tribes, there is a
8 strong understanding, because the United States
9 functions at least, as the Court has said, like a
10 trustee over tribes, you assume that Congress is not
11 trying to eliminate autonomy of tribes. Those
12 assumptions go obviously out the window with respect to
13 territories.

14 And the third thing about tribes is there is
15 a longstanding history of related canons for tribes in
16 which there is a discussion of various other canons for
17 construing statutes that are ambiguous in the tribes'
18 favor to preserve their sovereignty. Again, you can
19 look through all of the territory cases, of which there
20 are many dating back to the 19th Century. You will not
21 find a clear statement rule for them.

22 And both Rosaly and Emmanuel, which has come
23 up in the discussion, are good examples of
24 considerations of waivers of immunity. Emmanuel is sort
25 of assuming that there could be immunity. But there is

1 no discussion, even in parsing statutes in those cases,
2 as to whether there needs to be a satisfied clear
3 statement. I don't think there's any way you could say
4 that the inquiry in Emmanuel came close to satisfying a
5 clear statement rule.

6 CHIEF JUSTICE ROBERTS: You -- you --

7 JUSTICE BARRETT: Ms. --

8 CHIEF JUSTICE ROBERTS: -- you began -- in
9 your opening statement, you said that a clear statement
10 rule would interfere with Congress's powers. I don't
11 understand quite how that is. It's a clear statement
12 rule. It says they have to be clear. Maybe we should
13 apply that rule across the board. But it doesn't
14 prevent Congress from doing whatever it wants. It just
15 has to make it clear. So why -- sort of like why is all
16 the fuss about whether that's a significant infringement
17 on Congress's power?

18 MS. HARRIS: Well, there is, I think, a lot
19 of fuss, which is a lot of statutes would otherwise be
20 applicable to territories without the -- without the
21 additional hoop of a clear statement rule. I mean,
22 again, the clear statement rule is a departure of the
23 ordinary understanding that you're simply parsing the
24 text and looking for the best reading. And that is why
25 the Court has historically required some constitutional

1 basis or some at least historical pedigree to foist on a
2 clear statement rule in the cases. And so --

3 JUSTICE JACKSON: But isn't that -- isn't
4 that a constraint on the courts? It's not really about,
5 you know, putting an impediment or -- or -- or
6 restraining Congress in any way.

7 I understood the clear statement rule to be
8 about preventing us from finding something when it's not
9 crystal-clear that Congress intended it.

10 MS. HARRIS: I think it's both. So, for --
11 certainly, for the state sovereign immunity cases, it is
12 absolutely framed as a constraint on Congress. The idea
13 is that because it is a very constitutionally sensitive
14 ground, you shouldn't -- you should hold Congress to a
15 higher standard before Congress sort of --

16 JUSTICE JACKSON: Well, not holding them to
17 a standard. I mean, I agree -- you know, the Chief
18 Justice makes a good point. This is -- Congress does
19 what it wants. It does policy. It makes its
20 determinations. And things like clear statement rules
21 are about preventing the Court from foisting its own
22 view of what Congress has done by -- when a statute
23 isn't crystal-clear and when the implications are so
24 severe, when we have a situation in which, you know, the
25 -- the implication of the Court doing something that

1 Congress didn't intend is stripping a territory of
2 perhaps intended sovereign immunity.

3 MS. HARRIS: So I think the problem with
4 that is the text -- the -- the -- the -- the text of the
5 statute itself is normally what stops courts from doing
6 that. Adding on an additional layer, a clear statement
7 rule, is doing something much more than that. It is
8 requiring a degree of specificity and clarity that is
9 unusual for statutes. And until this point, the Court
10 has demanded some sort of historical pedigree or some
11 sort of reason for constitutional avoidance to impose
12 that additional barrier.

13 So, whether you look at this as a need to
14 make sure that courts aren't going into sensitive areas
15 by accident or as a guardrail against Congress, I don't
16 think it matters. The key thing here is that there is
17 no constitutional imperative, unlike for states or the
18 federal government, to guard sovereign immunity, and
19 unlike the tribes, there is no historical pedigree or
20 other basis for foisting on a clear statement rule. It
21 would be very --

22 JUSTICE BARRETT: Ms. --

23 MS. HARRIS: -- unusual.

24 JUSTICE KAGAN: I --

25 JUSTICE BARRETT: Go ahead.

1 JUSTICE KAGAN: No, go ahead.

2 JUSTICE BARRETT: Go ahead. It's fine.

3 CHIEF JUSTICE ROBERTS: Justice Kagan.

4 JUSTICE KAGAN: You know, I'm curious -- and
5 this is as much a question for Mr. Harris as it is for
6 you, but I've lost my opportunity with him.

7 What do you think Congress currently
8 understands about Puerto Rico's immunity? Because,
9 usually, clear statement rules operate against a
10 backdrop of congressional understanding of what it needs
11 to be clear about. And the clear statement rule of --
12 of, you know, you have to be clear about abrogation, if
13 Congress doesn't think Puerto Rico has immunity, why
14 would it think that abrogation is even in the picture?

15 So what -- is there evidence about what
16 Congress understands about sovereign immunity that would
17 enable us to read this statute better?

18 MS. HARRIS: I think the best and perhaps
19 only evidence is the text of the Federal Relations Act,
20 which actually recurs -- there's similar language for
21 some other territories, which is that there was some
22 need to say that the generally applicable federal laws
23 have the same force and effect in the states as they do
24 in the -- in -- in Puerto Rico, which suggests that
25 Congress may have thought that there was some reason to

1 think that, for instance, there should be a reciprocity.
2 If states have immunity, give that same statutory
3 benefit to Puerto Rico. Again, that would sort of seem
4 to suggest Congress understands that Puerto Rico would
5 not have that immunity of its own force.

6 I mean, I think the other indication is
7 Congress seems to understand that the Eleventh Amendment
8 is, in fact, just for states, because Congress, when it
9 is doing the super clear types of abrogation that the
10 other side seems to embrace, says that states shall not
11 be immune under the Eleventh Amendment. It's not
12 talking about territories.

13 Now that does create some oddities, I think,
14 under their view because I'm not sure if you had a clear
15 statement rule for territories, like, how that language
16 would then abrogate for territories, which will create
17 some sort of oddities for federal statutes.

18 But -- but that's all we have. And I think
19 the fact that Congress does not seem to be operating on
20 a baseline of sovereign immunity is reflective of this
21 Court's cases, which have never said that in federal
22 courts Puerto Rico, in fact, enjoys this immunity. They
23 are at best very muddy and muddied yet further by the
24 fact that federal courts were directly reviewing
25 decisions of Puerto Rico courts and other territorial

1 courts on territorial claims, like -- well into the 20th
2 Century.

3 JUSTICE BARRETT: Ms. Harris, why not just
4 vacate and remand to the First Circuit, given the
5 complexities of this question? You raise good points,
6 the government's raised good points, on this common law
7 immunity question and the question of whether
8 territories have it. Why not just vacate and let the
9 First Circuit, you know, which has -- has this long line
10 of precedent, but it hasn't really fully engaged the
11 question? Why not let them do it?

12 MS. HARRIS: Well, I think it would be
13 unfair to give the other side a mulligan when the --
14 when the Board's argument all along -- I mean, we have
15 argued -- we've argued all along that Puerto Rico does
16 not have Eleventh Amendment immunity. It is their
17 affirmative burden to show that there is immunity. And
18 they've written up this case all along on just the sole
19 ground that the Eleventh Amendment and Pennhurst are the
20 things they want to point at.

21 And so it would be a little unfair to say
22 we're just going to vacate, you know, First Circuit, do
23 it over, and I think especially unnecessary, given that
24 everyone appears to firmly agree that the Puerto Rico
25 constitution includes a waiver of immunity in this

1 particular case for constitutional claims.

2 So just all the more reason to say, look, I
3 mean, if you're -- if you're just saying, like, do it
4 over, that might just counsel in favor of dismissing as
5 improvidently granted instead of just getting rid of the
6 First Circuit's opinion.

7 JUSTICE KAVANAUGH: On the posture and
8 what -- what's proper before us, if the First Circuit
9 had said there is immunity and the statute does not
10 abrogate the immunity, and you had been Petitioner in
11 this Court and come up with two questions here, the
12 first being there's no sovereign immunity for
13 Puerto Rico, and, second question, even if sovereign
14 immunity, the statute has a clear statement abrogating
15 it, so you'd raise those two questions in the cert
16 petition, would it have been improper for us to just
17 grant the second question and not grant the first
18 question?

19 MS. HARRIS: I don't think so, because
20 often -- often as petitioners do and respondents in
21 their alternative questions do a belt-and-suspenders
22 approach to try to clarify what's really at issue, but I
23 don't think we have conceded or nor would you fairly say
24 that there is no embedded question of immunity within a
25 clear statement rule. I mean, I think that's what this

1 Court's cases are essentially talking about.

2 There's no talking about clear statement
3 rules in this Court's other immunity cases without
4 talking about the reason for it, which is state
5 sovereign immunity, the federal government's immunity
6 from suit, tribes' immunity from suit. It is truly
7 inextricably linked, because, again, the clear statement
8 rule begs the question why, why are you distorting
9 ordinary sort of -- why are you -- why are you putting a
10 thumb on a scale that wouldn't otherwise apply and --

11 JUSTICE SOTOMAYOR: Counsel, if we DIG,
12 we're just creating two layers of issues that will never
13 get resolved because others are going to sue Puerto Rico
14 on other claims besides the ones you're raising, and now
15 that the First Circuit has said there's been a clear
16 abrogation, that issue will control.

17 At least if we note the differences here,
18 address the question presented, and remand for
19 consideration of the other issues, we can at least say
20 that those are open questions and that they should be
21 reviewed or looked at. But a DIG is not going to get us
22 there.

23 MS. HARRIS: So --

24 JUSTICE SOTOMAYOR: It's only going to
25 invite more lawsuits and different kinds of lawsuits,

1 both of them controlled by precedent that nobody has
2 said should be looked at.

3 MS. HARRIS: So, just to be very clear, the
4 lawsuits that would be -- the universe of lawsuits
5 really would be specific to PROMESA. And so the Board
6 would be --

7 JUSTICE SOTOMAYOR: Well, that's not
8 unimportant.

9 MS. HARRIS: It's not unimportant, but I do
10 think it -- it -- it does counter the argument that, you
11 know, the Court -- the Commonwealth of Puerto Rico isn't
12 here, other people aren't here. I think this case
13 indicated that people could participate. The Board is
14 claiming to be Puerto Rico. And in terms of --

15 JUSTICE SOTOMAYOR: We don't invite amici.
16 We say that if you choose, you can, but we don't tell
17 them they have to. In fact, we discourage them.

18 MS. HARRIS: But, respectfully, I think,
19 with respect to the question of PROMESA, yes, you
20 could -- you could reserve all these questions and that
21 would be fine. I mean, I think they're open questions
22 no matter what. But you would still have to decide, I
23 think, to get in a position of vacating the First
24 Circuit's decision that there is some sort of abrogation
25 here that is sufficiently clear.

1 And so, at a minimum, you're going to be
2 addressing the question of how can a statute that refers
3 to orders for constitutional violations that are clearly
4 taking effect against the Board, how can you have that
5 if there is not abrogation for constitutional
6 violations? And I don't think there's any way to say
7 that that happens without some sort of abrogation
8 happening in PROMESA even under a clear statement rule.

9 The other side has pointed to the Title 3
10 bankruptcy proceedings, and that is simply incorrect.
11 That cannot be the answer to how there is abrogation for
12 constitutional violations for two reasons.

13 First of all, if Congress wanted to refer to
14 Title 3 as the basis for these orders against
15 constitutional violations, it presumably would have done
16 what it did in Section 2126(a), which is to actually
17 refer expressly to the carve-out for Title 3, which has
18 its own very reticulated judicial review scheme of its
19 own.

20 And second of all, there is no abrogation
21 for the type of claims that the Board is pointing to
22 here that would get you to an abrogation under Title 3
23 for orders remedying constitutional violations.

24 Let me explain why. The Title 3 discussion
25 incorporates by reference Section 106 of the Bankruptcy

1 Code, which only abrogates sovereign immunity for 59
2 different types of bankruptcy proceedings.

3 We looked at them. None of them include a
4 cause of action for standalone separate proceedings of
5 the type the Board is pointing to for sort of standalone
6 actions of the type against the Board that would result
7 in a remedy for constitutional violations.

8 The Board has pointed to cases in which it
9 didn't actually raise immunity in the Title 3 context,
10 and until now, the government seemed to have some
11 discomfort with hanging the case on that ground.

12 So just the PROMESA abrogation question I
13 think is, at a minimum, very complicated and, if
14 anything, tilts in our favor given that there is
15 language even under a clear statement rule that you
16 cannot explain under the other side's view unless there
17 is some abrogation for constitutional violations of the
18 type here.

19 Again, it would be even more curious to
20 think that PROMESA, while giving the Board lots of other
21 powers in many other respects, sub silentio essentially
22 overruled the Puerto Rico constitution and its
23 structural waiver of immunity for all of the other parts
24 of Puerto Rico's government and that that was not
25 something that could be brought against the Board.

1 CHIEF JUSTICE ROBERTS: Justice Thomas?

2 Justice Sotomayor? No?

3 Justice Kavanaugh?

4 JUSTICE KAVANAUGH: No.

5 CHIEF JUSTICE ROBERTS: All right. Justice
6 Barrett?

7 Justice Jackson? No?

8 Thank you, counsel.

9 Mr. Harris, rebuttal?

10 REBUTTAL ARGUMENT OF MARK D. HARRIS

11 ON BEHALF OF THE PETITIONER

12 MR. HARRIS: Yes, thank you.

13 The only question on which this Court
14 granted certiorari was whether Section 2126(a)
15 abrogates, and there's a straightforward answer to that
16 question, which is that it does not because there is
17 nothing even approaching a clear and unmistakable
18 statement.

19 Even if the Court didn't apply the -- a
20 clear statement test here, I don't think this would pass
21 even under regular rules of statutory construction.
22 There's no mention of abrogation, the word or the
23 concept. There's no mention that -- that the -- that
24 the Board wouldn't have immunity in this situation.
25 There's just nothing.

1 And as I -- as we said in our brief, the
2 fact that it takes 15 pages to identify the arguments
3 for why there's a clear statement tells you there isn't
4 a clear statement.

5 It would not help to DIG this case for the
6 simple reason that there's a First Circuit ruling on the
7 books right now which says that 2126 abrogates all kinds
8 of actions, every possible action against the Board,
9 both under federal law and under territorial law.
10 That's an enormous decision.

11 It's very counterintuitive to think Congress
12 would have wanted that, that even situations where the
13 Board or a -- or a governmental entity in Puerto Rico
14 may have had immunity on its own if it were part of the
15 territory, now when it's a suit against the Board in
16 federal court, the Board has a target on its back. Any
17 single -- any type of action can be brought.

18 That -- that simply doesn't make sense.
19 That ruling would still be there unless the Court
20 decides that that was incorrect because the
21 interpretation of 2126(a) is not correct.

22 I also have not heard from the other side
23 really any defense of the actual reasons that the First
24 Circuit gave here. The First Circuit relied on certain
25 exceptions that it read into or -- or that were in

1 Section 2126(a), other provisions. This Court's
2 precedents make it clear that's not a clear and
3 unmistakable statement or -- or anything close to that.

4 I -- I really have not heard either any kind
5 of rebuttal to the general rule, which is that
6 jurisdictional provisions do not abrogate for the reason
7 I said up front, which is that jurisdiction is simply
8 the ability for a court to hear a case. It doesn't say
9 anything about the availability of defense.

10 For all those reasons, we'd ask the Court to
11 reverse. Thank you.

12 CHIEF JUSTICE ROBERTS: Thank you, counsel.
13 The case is submitted.

14 (Whereupon, at 11:00 a.m., the case was
15 submitted.)

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