

SCOTUS Rules That PROMESA Does Not Abrogate Puerto Rico Oversight Board's Sovereign Immunity—If It Has Any

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On May 11, 2023, the U.S. Supreme Court announced its [decision](#) in *Financial Oversight and Management Board (Board) for Puerto Rico v. Centro de Periodismo Investigativo (CPI)*. The case [presented](#) the question of whether the Puerto Rico Oversight, Management, and Economic Stability Act of 2016 ([PROMESA](#)) abrogated (i.e., [eliminated](#)) any [sovereign immunity](#) that the Board (which PROMESA established) might otherwise enjoy as part of the Puerto Rico government.

This Sidebar provides a brief introduction to PROMESA, an overview of the legal dispute giving rise to this case, and a summary of the Supreme Court's opinion, followed by considerations for Congress.

Background on PROMESA

Prior to 2016, Puerto Rico and many of its instrumentalities experienced [significant difficulties](#) paying their debts. Instrumentalities of States may [sometimes](#) obtain relief from debts by filing for bankruptcy under [Chapter 9](#) of the Federal [Bankruptcy Code](#). The Bankruptcy Code, however, [excludes](#) Puerto Rico from the definition of “State” for Chapter 9 eligibility purposes. (In that respect, the Bankruptcy Code differs from its [predecessor](#), the [Bankruptcy Act](#), which included “the Territories” in its definition of “State.”) Thus, for several decades, federal law provided no process by which Puerto Rico could obtain debt relief. Puerto Rico tried to surmount this obstacle by [passing its own statute](#) in 2014 to create a bankruptcy-like debt restructuring procedure for its public utilities. However, the Supreme Court [ruled in 2016](#) that federal law [preempted](#) that statute, leaving Puerto Rico with no valid avenue for debt relief.

Congress responded in 2016 by [invoking](#) the U.S. Constitution's [Territorial Clause](#) (also known as the Territories Clause)—which empowers Congress to “make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States”—to [enact PROMESA](#) and [establish the Board](#). Among other things, PROMESA grants the Board various [powers](#) and [responsibilities](#) to provide Puerto Rico “a method to achieve fiscal responsibility and access to the capital markets,” including authority to review and either approve or force revisions to the territory's annual fiscal plans.

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PROMESA defines the Board as an “entity within the territorial government,” rather than a federal entity. In 2020, the Supreme Court determined that the Board’s members were territorial officers to whom the Appointments Clause did not apply and that “the Board’s structure, duties, and powers make it ‘part of the local Puerto Rican government.’”

Additionally, Section 106 of PROMESA requires actions arising under PROMESA to be brought in the Puerto Rico federal district courts.

Legal Background

In 2016, shortly after Congress enacted PROMESA, CPI requested a variety of Board materials, including communications with both local and federal officials. The Board did not provide the requested materials, so CPI sued in federal court, citing a guarantee of a “right of access to public records” under the Constitution of the Commonwealth of Puerto Rico. The Board moved to dismiss CPI’s suit, arguing that it enjoyed sovereign immunity as part of the Puerto Rico government.

The U.S. District Court for the District of Puerto Rico held that Congress had either waived or abrogated the Board’s sovereign immunity and that Puerto Rico law required public access to documents under the Board’s control. The Board appealed that decision to the U.S. Court of Appeals for the First Circuit (First Circuit), which agreed that Congress—specifically, by enacting PROMESA Section 106—had abrogated the Board’s “assumed” sovereign immunity. The court noted that, while many courts had long acknowledged Puerto Rico to have sovereign immunity on the same basis as the States, the Supreme Court had “expressly reserved . . . the question whether Eleventh Amendment immunity principles apply to Puerto Rico.” The First Circuit thus concluded that *if* Puerto Rico has sovereign immunity, and *if* that immunity extends to the Board, then Congress abrogated that immunity by enacting PROMESA. Accordingly, the Board could not invoke sovereign immunity to refuse to provide documents to CPI.

The Supreme Court’s Opinion

CPI appealed to the U.S. Supreme Court. In an 8-1 opinion authored by Justice Elena Kagan, the Court made clear that it *was not deciding* whether either Puerto Rico or the Board is entitled to sovereign immunity. Because the other courts had “barely addressed” those questions, the Court explained that it would “assume without deciding that Puerto Rico is immune from suit in federal district court, and that the Board partakes of that immunity” and instead “address only whether, accepting those premises, PROMESA effects an abrogation.”

Turning to the question of abrogation, the Court rejected the district court’s and First Circuit’s analyses of PROMESA. The Court explained that, with one unrelated exception, “PROMESA says nothing explicit about abrogating sovereign immunity.” Citing *Kimel v. Florida Board of Regents*, an earlier Supreme Court case establishing that Congress’s intent to abrogate sovereign immunity in statute must be “unmistakably clear,” the Court gave three reasons why PROMESA did not satisfy that standard:

1. PROMESA does not explicitly deprive the Board of sovereign immunity;
2. PROMESA does not expressly authorize legal claims against the Board; and
3. PROMESA’s “judicial review provisions and liability protections are compatible with” the Board retaining any sovereign immunity it might have.

Justice Thomas filed a dissent, arguing that the Court should have resolved the antecedent question of whether Puerto Rico has any sovereign immunity to abrogate. Given the Court’s 2015 decision in *Puerto Rico v. Sanchez Valle*, which ruled that Puerto Rico’s sovereignty for Fifth Amendment purposes came from Congress (rather than being inherent like the States’ sovereignty), Justice Thomas wrote that “it is difficult to see how the same inherent sovereign immunity that the States enjoy in federal court would

apply to Puerto Rico.” The Board’s argument that it enjoys sovereign immunity, he wrote, “appears untenable,” so he would have ruled in CPI’s favor.

Considerations for Congress

If Congress disagrees with the Court’s decision or wishes to settle the question before the First Circuit or the district court do so, it could clarify through legislation whether it intends the Board to enjoy sovereign immunity from requests like CPI or to what extent it wishes to abrogate that immunity, if it exists.

Congress could also consider requiring, expressly permitting, or prohibiting the public dissemination of Board materials such as those requested by CPI in this case. In the absence of congressional action, the case will return to the federal district court in Puerto Rico to resolve remaining claims between CPI and the Board, consistent with the Supreme Court’s opinion that PROMESA does not abrogate whatever sovereign immunity the Board may have.

That broader, unanswered question—whether Puerto Rico, as a territory, enjoys sovereign immunity on the same basis as States under the Eleventh Amendment—is a constitutional question that Congress may not affirmatively answer through ordinary legislation. However, Congress could enact legislation to expressly waive or decline to waive any sovereign immunity that otherwise exists for Puerto Rico, either broadly or in particular contexts.

Congress has also periodically considered changing, or permitting a change to, Puerto Rico’s territorial status, which could dramatically change the landscape of Puerto Rico’s rights. For example, the Puerto Rico Status Act introduced in the two most recent Congresses—[H.R. 2757](#) in the 118th, [H.R. 8393](#) in the 117th—would permit Puerto Rico voters to choose (1) independence, (2) sovereignty in free association with the United States, or (3) statehood. Each of those options, if implemented, would significantly alter Puerto Rico’s treatment under the U.S. Constitution: as a state, Puerto Rico would have sovereign immunity on an equal footing with other States under the Eleventh Amendment, while as an independent or freely associated nation, its sovereign immunity would likely be equivalent to that of other [foreign countries](#).

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