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FEDERAL MARITIME COMM

BEFORE THE
FEDERAL MARITIME COMMISSION

ODYSSEA STEVEDORING OF PUERTO RICO, INC.,	:	
Complainant,	:	
v.	:	
PUERTO RICO PORTS AUTHORITY	:	
Respondent;	:	
* * * * * *	:	
INTERNATIONAL SHIPPING AGENCY, INC.,	:	
Complainant,	:	
v.	:	**Docket Nos. 02-08; 04-01; and 04-06**
PUERTO RICO PORTS AUTHORITY	:	
Respondent;	:	
* * * * * *	:	
SAN ANTONIO MARITIME CORPORATION	:	
Complainant,	:	
v.	:	
PUERTO RICO PORTS AUTHORITY	:	
Respondent.	:	
* * * * * *	*	* * * * *

RESPONDENT'S BRIEF REGARDING
THE SOVEREIGN IMMUNITY OF
<u>THE COMMONWEALTH OF PUERTO RICO</u>

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ARGUMENT

I. INTRODUCTION.

A. Procedural Background.

The Puerto Rico Ports Authority (the "Ports Authority") is the Respondent in three proceedings pending before the Commission: *Odyssea Stevedoring of Puerto Rico v. Puerto Rico Ports Auth.*, Docket No. 02-08 ("*Odyssea*"); *International Shipping Agency v. Puerto Rico Ports Auth.*, Docket No. 04-01 ("*Intership*"); and *San Antonio Maritime Corporation v. Puerto Rico Ports Auth.*, Docket No. 04-06 ("*SAM*"). The complaints all derive from the decision of the Commonwealth of Puerto Rico (the "Commonwealth" or "Puerto Rico") to redevelop the waterfront of the Port of San Juan from cargo operations to tourism as part of the Golden Triangle urban redevelopment project and the order of the Commonwealth's Governor to demolish the warehouses along the Puerta de Tierra portion of the port.[1] In executing these land use and economic development functions, the Ports Authority acted as an arm of the state obeying *direct orders* by the Commonwealth's Governor.[2] Moreover, as explained in earlier submissions, the Ports Authority is an arm of the Commonwealth.[3]

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[1] Port of San Juan Strategic Master Plan, ODY000149 (May 1996) (Attachment 4 to Respondent's Reply to Complainant's Opposition to Respondent's Motion to Dismiss, *San Antonio Maritime Corp., et al. v. Puerto Rico Ports Auth.*, Docket No. 04-06); *see also* Complainant's (Odyssea Stevedoring) Answers and Objections to Respondent's First Interrogatories and Request for Production of Documents (Sept. 5, 2002) (Attachment 5 to Respondent's Reply to Complainant's Opposition to Respondent's Motion to Dismiss, *San Antonio Maritime Corp., et al. v. Puerto Rico Ports Auth.*, Docket No. 04-06); Hon. Pedro Rosselló, Governor of Puerto Rico, Keynote Address at 5 (Nov. 18, 1998) (Attachment 6 to Respondent's Reply to Complainant's Opposition to Respondent's Motion to Dismiss, *San Antonio Maritime Corp., et al. v. Puerto Rico Ports Auth.*, Docket No. 04-06); Deposition of Victor Carrión, Former Chief of the Maritime Bureau, at 68-73 ("The Governor told them 'I want everything torn down -- all the facilities from Pier 8 to the Frontier Base.' The next day the Executive Director of the Ports Authority ordered his staff to execute the Governor's orders.") (Attachment 7 to Respondent's Reply to Complainant's Opposition to Respondent's Motion to Dismiss, *San Antonio Maritime Corp., et al. v. Puerto Rico Ports Auth.*, Docket No. 04-06).

[2] *See* Respondent's Motion for Summary Judgment, *Odyssea Stevedoring of Puerto Rico, Inc. v. Puerto Rico Ports Auth.*, Docket No. 02-08 at 12-14 & 40-44 (Dec. 23, 2003). *See also* Respondent's Reply To Complainant's Opposition To Motion To Dismiss, Etc., *San Antonio Maritime Corp., et al. v. Puerto Rico*

Complainant Odyssea, a private party, filed a private complaint against the Ports Authority on May 31, 2002, asserting violations of the Shipping Act and seeking millions of dollars in damages and injunctive relief to compel the Ports Authority to favor Odyssea over other port users.[4] Odyssea's private complaint, derived from the Golden Triangle project, which was carried out at the specific direction of the Governor of Puerto Rico, directly offends the sovereignty of the Commonwealth. Following the close of discovery, the Ports Authority filed a summary judgment motion on December 23, 2003, asserting sovereign immunity among other defenses. On September 15, 2004, Administrative Law Judge ("ALJ") Trudell denied the summary judgment motion, a motion for leave to appeal to the Commission, and two motions for a stay pending appeal to the Commission and to the Federal courts. On September 16, 2004, the Commission, *sua sponte*, stayed the *Odyssea* action to review the ALJ's orders and the denial of the Ports Authority's sovereign immunity.[5]

Complainant Intership, a private party, filed a private complaint against the Ports Authority on December 29, 2003, alleging violations of the Shipping Act derived from the Golden Triangle Project and seeking over $50 million in damages and injunctive relief to compel the Ports Authority to favor Intership over other port users.[6] Intership's

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Ports Auth., Docket No. 04-06 at 2-18 (Sept. 17, 2004) (applying the "control test" of *Ceres Marine Terminals, Inc. v. Maryland Port Admin.*, Docket No. 94-01, 30 S.R.R. 358, 369 (F.M.C. Aug. 16, 2004)).

[3] *See, e.g.,* Respondent's Motion to Consolidate Proceedings and/or Common Issues and for Stay Pending Final Resolution, *Odyssea Stevedoring v. Puerto Rico Ports Auth.*, Docket Nos. 02-08; 04-01; 04-06 at 7-13 (Aug. 18, 2004). *See also* Respondent's Reply to Complainant's Opposition to Respondent's Motion to Dismiss, *San Antonio Maritime Corp., et al. v. Puerto Rico Ports Auth.*, Docket No. 04-06 at 8-18 (Sept. 17, 2004); Respondent's Motion to Dismiss, etc., *Int'l Shipping Agency v. Puerto Rico Ports Auth.*, Docket No. 04-01 at 10-15 (Mar. 5, 2004); Respondent's Motion for Summary Judgment, *Odyssea Stevedoring of Puerto Rico, Inc. v. Puerto Rico Ports Auth.*, Docket No. 02-08 at 40-44 (Dec. 23, 2003).

[4] Complaint, *Odyssea Stevedoring of Puerto Rico, Inc. v. Puerto Rico Ports Auth.*, Docket No. 02-08 at ¶¶ 28, 31, 35, and 41 (May 31, 2002).

[5] Notice, *Odyssea Stevedoring v. Puerto Rico Ports Auth.*, Docket No. 02-08 (F.M.C. Sept. 16, 2004).

[6] Complaint, *Int'l Shipping Agency v. Puerto Rico Ports Auth.*, Docket No. 04-01, Part VII.A-B (Dec. 29, 2003).

complaint similarly offends the sovereignty of the Commonwealth, alleging fault by the Ports Authority and other Commonwealth agencies, e.g. the Government Development Bank and the Highway Authority.[7] On March 5, 2004, the Ports Authority filed a motion to dismiss asserting sovereign immunity, among other defenses. On September 17, 2004, ALJ Trudell also denied this motion. On September 21, 2004, the Commission, again *sua sponte*, stayed the *Intership* proceeding in order to review the ALJ's denial of the Ports Authority's sovereign immunity.[8]

Complainant SAM, a private party, filed a private complaint against the Ports Authority with the Commission on April 21, 2004, alleging violations of the Shipping Act and seeking over $20 million in damages and injunctive relief to compel the Ports Authority to favor SAM over other port users.[9] SAM's allegations directly offend the sovereignty of the Commonwealth. SAM's allegations derive from the Golden Triangle Project, and in addition, specifically allege that the Commonwealth Government conspired "to obstruct and impede [its] business operations . . . in a concerted effort to protect domestic Puerto Rican cement producers."[10] On June 16, 2004, the Ports Authority filed a motion to dismiss asserting sovereign immunity, among other defenses. On September 27, 2004, ALJ Schroeder, *sua sponte*, referred the matter to the Commission for consideration of the sovereign immunity issue.[11]

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[7] Respondent's Motion to Dismiss, *Int'l Shipping Agency v. Puerto Rico Ports Auth.*, Docket No. 04-01 at 13-14 (Mar. 5, 2003).
[8] Notice, *Int'l Shipping Agency v. Puerto Rico Ports Auth.*, Docket No. 04-01 (F.M.C. Sept. 21, 2004).
[9] Complaint, *San Antonio Maritime Corp., et al. v. Puerto Rico Ports Auth.*, Docket No. 04-06, Part VI (Apr. 21, 2004).
[10] *Id.*, Part IV.A.2.
[11] Notice of Reference to the Commission, *San Antonio Maritime Corp., et al. v. Puerto Rico Ports Auth.*, Docket No. 04-06 (F.M.C. Sept. 27, 2004) (Schroeder, A.L.J.).

Complainants challenged the sovereign immunity of both the Ports Authority and the Commonwealth.[12] On November 22, 2004, the Commission ordered briefing on the threshold jurisdictional issue of the Commonwealth's constitutional sovereign immunity, an issue first raised by Complainant SAM.[13] Three weeks later, the Complainants jointly moved the Commission to reconsider its order asking the question that Complainants raised. The Ports Authority opposed the Complainants' motion on December 15, 2004. The Commission denied the Complainants' motion on December 22, 2004.[14]

B. Summary of the Argument.

Constitutional sovereign immunity is immunity from federal suit by private parties, e.g. Odyssea, Intership, and SAM. The question posed by the Commission, whether the Commonwealth is entitled to constitutional sovereign immunity,[15] can be answered on both statutory and constitutional grounds. Both the statutory and constitutional foundations conclusively establish that the Commonwealth enjoys sovereign immunity to the same extent as the States.

The statutory "default rule" requires the Commission to apply the statutes of the United States to the Commonwealth to the same extent as to the States. Under this rule, the Commonwealth warrants the same treatment as the States unless Congress expressly provides otherwise for the Commonwealth. The Shipping Act contains neither the

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[12] All of the Complainants opposed the Ports Authority's claim of sovereign immunity. In its response to PRPA's motion to dismiss, SAM also challenged the sovereign immunity of the Commonwealth arguing that the Supreme Court's decision in *South Carolina State Ports Auth.* is limited to "preserving the 'dignity' of the fifty states." Response to Respondent's Motion to Dismiss, *San Antonio Maritime Corp., et al. v. Puerto Rico Ports Auth.*, Docket No. 04-06 at 7 n.3 (Aug. 2, 2004).

[13] Order, *Odyssea Stevedoring v. Puerto Rico Ports Auth.*, Docket Nos. 02-08; 04-01; 04-06 (F.M.C. Nov. 22, 2004) [hereinafter FMC Order].

[14] Order, *Odyssea Stevedoring v. Puerto Rico Ports Auth.*, Docket No. 02-08; 04-01; 04-06 (F.M.C. Dec. 22, 2004).

[15] FMC Order at 6.

required express language nor suggests a compelling reason to treat the Commonwealth differently. Accordingly, the Commission must respect the sovereign immunity of the Commonwealth, long recognized by the Supreme Court and reaffirmed by Congress, and apply the Shipping Act to the Commonwealth and its "arm of the state," the Ports Authority, to the same extent it does to other State-run ports authorities. It need not reach the constitutional question.

Nevertheless, if the Commission decides to address the constitutional issue first raised by Complainants, it should conclude, in accord with the United States Supreme Court's analysis in *Seminole Tribe* and *Alden*, that the *compact* between the Commonwealth and the United States recognizes that the Commonwealth retains the same residuum of sovereignty as the States and is entitled to sovereign immunity the same as the States. Indeed, the Supreme Court has consistently held that the government of the People of Puerto Rico has enjoyed sovereign immunity from its inception over one hundred years ago. Moreover, fifty-two years ago the United States and the People of Puerto Rico joined in a *compact* that recognized their respective sovereignties, established the Commonwealth status, and satisfied the fundamental postulates highlighted in *Seminole Tribe* and *Alden*.

II. THE COMMISSION NEED NOT ADDRESS THE CONSTITUTIONAL SOVEREIGN IMMUNITY OF PUERTO RICO BECAUSE STATUTE ESTABLISHES COMMONWEALTH SOVEREIGN IMMUNITY THE SAME AS THE STATES.

When a dispute can be resolved without addressing a constitutional issue, the law favors avoiding the constitutional issue.[16] The Supreme Court's doctrine of avoidance of unnecessary constitutional adjudication is well-established:

> As we have explained: If there is one doctrine more deeply rooted than any other in the process of constitutional adjudication, it is that we ought not to pass on questions of constitutionality . . . unless such adjudication is unavoidable. It has long been the Court's considered practice not to decide abstract, hypothetical or contingent questions . . . or to decide any constitutional question in advance of the necessity for its decision . . . or to formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied . . . or to decide any constitutional question except with reference to the particular facts to which it is to be applied . . . . It is not the habit of the court to decide questions of a constitutional nature unless absolutely necessary to a decision of the case.[17]

When pressed to consider constitutional issues, an adjudicative body must first decide whether the dispute between the parties may be resolved without speaking to the constitutional question.[18]

This policy also applies to the review of administrative adjudications.[19] In *Edward J. DeBartolo Corp. v. NLRB*, the Supreme Court observed that instead of

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[16] *See Elk Grove Unified School Dist. v. Newdow*, -- U.S. --, 124 S. Ct. 2301, 2308 (2004) ("Even in cases concededly within our jurisdiction under Article III, we abide by 'a series of rules under which [we have] avoided passing upon a large part of all the constitutional questions pressed upon [us] for decision.'") (quoting *Ashwander v. TVA*, 297 U.S. 288, 346 (1936) (Brandeis, J., concurring)) (alterations in original).

[17] *Clinton v. Jones*, 520 U.S. 681, 690 n.11 (1997) (internal quotations and citations omitted) (alterations in original). *See also Lambrix v. Singletary*, 520 U.S. 518, 524 (1997) ("Constitutional issues are generally to be avoided"); *American Foreign Serv. Ass'n v. Garfinkel*, 490 U.S. 153, 161 (1989) ("courts should be extremely careful not to issue unnecessary constitutional rulings"); *New York City Transit Auth. v. Beazer*, 440 U.S. 568, 582 (1979) (recognizing the "settled federal practice" of avoiding consideration of unnecessary constitutional issues) (citing, *inter alia*, *Hayburn's Case*, 1 U.S. (1 Dall.) 408 (1792)).

[18] *See Lyng v. Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439, 446 (1988) ("This principle required the courts below to determine, before addressing the constitutional issue, whether a decision on that question could have entitled respondents to relief beyond that to which they were entitled on their statutory claims."); *Beazer*, 440 U.S. at 582 ("Before deciding the constitutional question, it [i]s incumbent on . . . courts to consider whether the statutory grounds might be dispositive.").

providing a statutory resolution, the agency had reached a constitutional issue.[20] The Court acknowledged the possible constitutional issue, but held that "[u]ntil the statutory question is decided, review of the constitutional issue is premature."[21] As a result, the Court vacated the opinion below and remanded for consideration of a statutory resolution.[22] Likewise, the Commission need not address the constitutional issue because the Commonwealth enjoys sovereign immunity affirmed by statute.

In *Maysonet-Robles v. Cabrero*, the Court of Appeals for the First Circuit adopted this approach in considering the sovereign immunity of the Commonwealth.[23] When faced with an argument that the Supreme Court's reasoning in *Seminole Tribe of Florida v. Florida*[24] and *Alden v. Maine*[25] undermined First Circuit precedent holding that the Commonwealth enjoys sovereign immunity, the First Circuit applied a statutory analysis. The *Maysonet-Robles* court held that in accord with the two-step approach in *Seminole Tribe* and *Alden*, the court must first address whether Congress expressly abrogated sovereign immunity before inquiring into the constitutional source of Congressional power to abrogate a State's immunity: "Even on the assumption that Congress acts pursuant to a valid exercise of power, it must still 'unequivocally express[ ] its intent to abrogate' a State's immunity."[26] Finding no abrogation of the Commonwealth's sovereign

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[19] *See Jean v. Nelson*, 472 U.S. 846, 857 (1985) (remanding for merits consideration on statutory rather than constitutional grounds) ("The fact that the protection results from the terms of a regulation or statute, rather than from a constitutional holding, is a necessary consequence of the obligation of all federal courts to avoid constitutional adjudication except where necessary.").
[20] 463 U.S. 147, 157 (1983).
[21] *Id.* at 158.
[22] *Id.*
[23] 323 F.3d 43, 53-54 (1st Cir. 2003).
[24] 517 U.S. 44 (1996).
[25] 527 U.S. 706 (1999).
[26] *Maysonet-Robles*, 323 F.3d at 54 (quoting *Seminole Tribe*, 517 U.S. at 55) (alteration in original).

immunity, the court declined to reach the constitutional issue.[27] Similarly, the Commission should avoid an unnecessary constitutional issue.

III. STATUTE REAFFIRMS THAT THE COMMONWEALTH OF PUERTO RICO ENJOYS THE SAME SOVEREIGN IMMUNITY AS THE STATES.

The Puerto Rico Federal Relations Act ("PRFRA") provides that federal statutes have the same force and effect in the Commonwealth as in the fifty States.[28] Courts uniformly apply the "default rule" that "[s]tatutes of general application would apply equally to Puerto Rico and to the fifty states *unless* Congress made specific provision for differential treatment."[29] Under the default rule, the Commission must accord the Ports Authority, as an arm of the Commonwealth, the same dignity as a State-run port authority. *Federal Maritime Commission v. South Carolina State Ports Authority* held State-run marine terminal operators immune from Commission adjudication of actions brought by private parties.[30] Like the States, Puerto Rico enjoys sovereign immunity as an inherent characteristic of its government.[31] Congress enacted no abrogation of the Commonwealth's sovereign immunity in the Shipping Act.[32] Accordingly, as a matter of

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[27] *See id.* ("We need not reach that constitutional question, however, because Plaintiffs' argument falls on its own weight. Whether or not Puerto Rico's long-held sovereign immunity is constitutional or common-law in nature, it has not been abrogated by Congress here.").

[28] 48 U.S.C. § 734 ("The statutory laws of the United States not locally inapplicable . . . shall have the same force and effect in Puerto Rico as in the United States . . . .").

[29] *Rodriguez v. Puerto Rico Federal Affairs Admin.*, 338 F. Supp. 2d 125, 128-129 (D.D.C. 2004) (citing *Jusino Mercado v. Commonwealth of Puerto Rico*, 214 F.3d 34, 42 (1st Cir. 2000)).

[30] 535 U.S. 743, 760 (2002).

[31] As discussed at length in Part IV, *infra*, the Supreme Court has long held that Puerto Rico enjoys sovereign immunity. *See People of Porto Rico v. Rosaly y Castillo*, 227 U.S. 270, 273 (1913) ("P[ue]rto Rico is of such nature as to come within the general rule exempting a government sovereign in its attributes from being sued without its consent."). *See also People of Puerto Rico v. Shell Co. (P.R.), Ltd.*, 302 U.S. 253, 261-62 (1937); *Sancho v. Yabucoa Sugar Co.*, 306 U.S. 505, 506 (1939).

[32] *See* 46 U.S.C. app. §§ 1701 *et. seq.*

statute, the Commonwealth-controlled Ports Authority enjoys the same sovereign immunity as a State-controlled port authority.[33]

A. The "Default Rule" of Statutory Construction Establishes that Federal Statutes Apply Equally to the Commonwealth and the States.

As the First Circuit in *Jusino Mercado v. Commonwealth of Puerto Rico*[34] held, and as the District Court for the District of Columbia in *Rodriguez v. Puerto Rico Federal Affairs Administration*[35] recognized, the "default rule" accords the Commonwealth sovereign immunity co-extensive with that of the fifty States, unless a statute specifically provides otherwise.[36]

The PRFRA provides: "The statutory laws of the United States not locally inapplicable, except as hereinbefore or hereinafter otherwise provided, *shall have the same force and effect in Puerto Rico as in the United States* . . . ."[37] The PRFRA, coupled with the Supreme Court's decision in *Examining Board of Engineers, Architects and Surveyors v. Flores de Otero*,[38] recognized a "default rule" of statutory construction that the Commonwealth's sovereign immunity remains co-extensive with that of the States, and that "courts will not ordinarily construe statutes to treat Puerto Rico one way and the states another unless the language of the statute demands that result."[39]

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[33] *Ceres Marine Terminals, Inc. v. Maryland Port Admin.*, Docket No. 94-01, 30 S.R.R. 358, 366 (F.M.C. Aug. 16, 2004) (FMC may not adjudicate private actions against a ports authority controlled by a State).
[34] 214 F.3d 34 (1st Cir. 2000).
[35] 338 F. Supp. 2d 125 (D.D.C. 2004).
[36] *See Jusino Mercado*, 214 F.3d at 42; *Rodriguez*, 338 F. Supp. 2d at 128-129 (citing *Jusino Mercado*, 214 F.3d at 42).
[37] 48 U.S.C. § 734 (emphasis added).
[38] 426 U.S. 572, 594 (1976) (PRFRA's purpose was to "accord to Puerto Rico the degree of *autonomy* and *independence* normally associated with the States of the Union.") (emphasis added).
[39] *Jusino Mercado*, 214 F.3d at 42.

B. Congress Did Not Abrogate the Commonwealth's Sovereign Immunity.

Jusino Mercado held, and *Rodriguez*, recognized that the default rule of statutory construction could be overcome only when there is either:

(i) an "express direction in the statutory text" to treat Puerto Rico differently than the states; or

(ii) "some other compelling reason" were a statute exhibited "specific evidence or clear policy reasons embedded in a particular statute to demonstrate a statutory intent to intervene more extensively into the local affairs of post-Constitutional Puerto Rico than into the local affairs of a state."[40]

The Shipping Act accomplishes neither.

1. The Shipping Act Applies Equally to the Commonwealth and the States.

The Shipping Act applies uniformly to marine terminal operators in the States and the Commonwealth, and nothing therein treats the Commonwealth differently from the States.[41] Section 4(b) of the Shipping Act authorizes the regulation of marine terminal operators generally, without any differentiation between the States and the Commonwealth.[42] The definition of a marine terminal operator, "a person engaged in the United States in the business of furnishing wharfage, dock, warehouse, or other terminal facilities in connection with a common carrier" similarly does not distinguish between the States and the Commonwealth.[43] The Shipping Act only mentions "Puerto Rico" in the definition of "United States," which rather than specifying different treatment, equates

[40] *Id.* at 42-43; *Rodriguez*, 338 F. Supp. 2d at 128-129.
[41] *See* 46 U.S.C. app. §§ 1701 *et. seq.*
[42] 46 U.S.C. app. § 1703(b).
[43] 46 U.S.C. app. § 1702(14).

Puerto Rico and the States.[44] The plain language of the Shipping Act reaffirms Congressional intent to treat the Commonwealth as a State.

In 1984, when Congress passed the Shipping Act, the PRFRA had applied for over thirty years. A decade before Congress passed the Shipping Act, the Supreme Court held that Congress intended the PRFRA to "accord to Puerto Rico the degree of autonomy and independence normally associated with the States of the Union."[45] Congress is presumed to know of federal court interpretations pertinent to statutes it passes.[46] Thus, in 1984, if Congress had intended to treat the Commonwealth differently from the States, Congress would have explicitly treated the Commonwealth differently. It did not.

2. *No "Other Compelling Reasons" Require Different Treatment for the Commonwealth.*

There are no compelling reasons under the Shipping Act to treat the Commonwealth differently from the States. As the *Jusino Mercado* court noted, for the "rare" compelling-reason exception to apply, "there would have to be specific evidence or clear policy reasons embedded in a particular statute to demonstrate a statutory intent to intervene more extensively into the local affairs of post-Constitutional Puerto Rico than

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[44] "United States" is defined as "the several States, the District of Columbia, the Commonwealth of Puerto Rico, the Commonwealth of the Northern Marianas, and all other United States territories and possessions." 46 U.S.C. app. § 1702 (25). The fact that the Shipping Act is "applicable" to States and Puerto Rico has no significance. The federal government can enforce the statute against sovereign entities. *See South Carolina State Ports Auth.*, 535 U.S. at 768 (FMC retains the means to investigate and enforce the Shipping Act against marine terminals otherwise immune from private Shipping Act suits). However, this does not permit a private party to maintain a suit for damages against the sovereign; such a claim is barred by sovereign immunity regardless of the fact that the statute may "apply." Accordingly, the fact that the Shipping Act is "applicable" to Puerto Rico is irrelevant to a proper analysis.

[45] *Examining Board of Engineers, Architects and Surveyors v. Flores de Otero*, 426 U.S. 572, 594 (1976).

[46] *See Goodyear Atomic Corp. v. Miller*, 486 U.S. 174, 184-85 (1988) ("[w]e generally presume that Congress is knowledgeable about existing law pertinent to the statutes it enacts").

into the local affairs of a state."[47] No such evidence or policy reasons arise under the Shipping Act.

Instead, the Commission has already demonstrated that its application of the Shipping Act makes no distinction between the sovereignty enjoyed by the Commonwealth and the States. In *Port of Ponce v. Puerto Rico Ports Authority*, the Commission held:

> Our jurisdiction over terminal activities in Puerto Rico is not diminished by Puerto Rico's legal status. FMC consideration of Puerto Rican practices affecting terminal operations is no more an intrusion into Puerto Rico's sovereignty than the Commission's responsibilities concerning ports and port authorities on the mainland.[48]

Therein, the Commission acknowledged as indistinguishable the coercive nature of its intrusion on the sovereignty of Commonwealth-run and State-run ports.

C. The *Rodriguez* Analysis Confirms the Commonwealth Enjoys Immunity From Suits Under the Shipping Act.

The Commission, in the FMC Order, cited to *Rodriguez* for the proposition that "[a]t least one federal district court outside of the First Circuit has found that Puerto Rico is not entitled to sovereign immunity."[49] Setting aside the merits of *Rodriguez's* erroneous conclusion that the Commonwealth is not entitled to constitutional sovereign immunity[50] arising from the structure of the Constitution of the United States, the decision plainly recognized that the Commonwealth is entitled to sovereign immunity by

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[47] *Jusino Mercado*, 214 F.3d at 43.
[48] *Port of Ponce v. Puerto Rico Ports Auth.*, Docket No. 88-5, 25 S.R.R. 883 (F.M.C. Apr. 25, 1990).
[49] FMC Order at 5.
[50] The order denying sovereign immunity to the Puerto Rico Federal Affairs Administration has recently been certified for interlocutory appeal under 28 U.S.C. § 1292(b). *See* Order, *Rodriguez v. Puerto Rico Federal Affairs Admin.*, Docket No. CIV.A.03-2246(JR) (D.D.C. Dec. 13, 2004).

operation of statute in circumstances such as those presented here under the Shipping Act.[51]

In *Rodriguez*, a former employee of an executive agency of the Commonwealth sued the agency under the Federal Labor Standards Act ("FLSA"). In 1974, Congress amended the FLSA specifically to permit a private cause of action for money damages against a public agency. Congress defined "Public agency" to include Federal or State governments, and in turn defined "State" in a manner intended to include Puerto Rico.[52] Congress specifically sought to pierce the shield of sovereign immunity. However, the Supreme Court held that Congress lacked the power to abrogate the States' sovereign immunity in *Alden v. Maine*.[53] The question in both *Jusino Mercado* and *Rodriguez* was whether the shield of sovereign immunity applied to the Commonwealth.[54]

Both *Jusino Mercado* and *Rodriguez* addressed the statutory question.[55] *Rodriguez* recognized the default rule enunciated by the First Circuit in *Jusino Mercado*, and in both cases the decisive issue concerned whether Congress, in the FLSA amendments, specifically abrogated the default rule that the Commonwealth is accorded the same treatment as the States.[56] On this issue, the *Jusino Mercado* and *Rodriguez* decisions differ not about the validity of the default rule, but whether the FLSA amendments trumped it. This difference is irrelevant here because the Shipping Act does not implicate the FLSA amendments or any similar provisions.

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[51] *Rodriguez*, 338 F. Supp. 2d at 128-29 (restating with approval the default rule and *Jusino Mercado* analysis of that rule).
[52] 29 U.S.C. §§ 216(b); 203(x); 203(c) ("State" is defined to mean: any State of the United States or the District of Columbia or any Territory or possession of the United States).
[53] 527 U.S. 706, 754 (1999) .
[54] *See, e.g., Jusino Mercado*, 214 F.3d at 36.
[55] *See id.* at 44 ("we ground our holding in statutory construction rather than constitutional capacity"); *Rodriguez*, 338 F. Supp. 2d at 128-130 (recognizing the statutory default rule, but applying principles of statutory construction to infer that the rule had been abrogated).
[56] *Jusino Mercado*, 214 F.3d at 42; *Rodriguez*, 338 F. Supp. 2d at 128-29.

Both *Jusino Mercado* and *Rodriguez* agreed that the Commonwealth retains sovereign immunity by statute unless Congress specifically abrogates that immunity.[57] The Shipping Act does not include FLSA-like amendments, manifesting Congress's specific intent to override sovereign immunity. Neither express language nor compelling policy reasons in the Shipping Act abrogate the Commonwealth's sovereign immunity. Therefore, applying the *Rodriguez* approach to the Shipping Act yields the same result as the First Circuit rendered in *Jusino Mercado*. The Commonwealth enjoys the same sovereign immunity from private actions under the Shipping Act as the States.

IV. THE COMMONWEALTH OF PUERTO RICO ENJOYS CONSTITUTIONAL SOVEREIGN IMMUNITY.

The body politic known as the People of Puerto Rico has evolved from a territorial possession into a self-governing sovereign Commonwealth—*El Estado Libre Asociado de Puerto Rico*.[58] The government of the People of Puerto Rico has enjoyed immunity from suit without consent from the start. Growing popular control over internal matters reinforced this inherent governmental characteristic. When the People of Puerto Rico established a Constitution, it was part of a *compact* with the United States. The *compact*, which may not be unilaterally revoked or amended,[59] immutably joined the

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[57] *Jusino Mercado*, 214 F.3d, at 42-43; *Rodriguez*, 338 F. Supp. 2d at 128-129. *See also Maysonet-Robles*, 323 F.3d at 54 (quoting *Seminole Tribe*, 517 U.S. at 55).

[58] Translated literally, "The Associated Free State of Puerto Rico."

[59] According to the Supreme Court, a compact is a binding obligation that cannot be abrogated absent mutual consent of the parties. *See Lessee of William Pollard's Heirs v. Kibbe*, 39 U.S. (14 Pet.) 353, 417-18 (1840) (discussing the mutually binding nature of the "articles of compact" comprising the Northwest Ordinance of 1787). Regarding the PRFRA and the Commonwealth Constitution, which Congress expressly offered "in the nature of a compact," Act of July 3, 1950, c. 446, § 1, 64 Stat. 319 (1950), the Supreme Court plainly considers that Congress entered into a "*compact*" with the People of Puerto Rico. *See Calero-Toledo v. Pearson Yacht Leasing*, 416 U.S. 663, 671 (1974); *Examining Board of Engineers, Architects and Surveyors v. Flores de Otero*, 426 U.S. 572, 594 (1976). To suggest that Congress may unilaterally amend the *compact* would be to reduce the Commonwealth Constitution to a nullity. The First Circuit rejected this argument: "[T]he constitution of the Commonwealth is not just another Organic Act of

two mutually consenting parties in a unique relationship. Subsequent to the *compact*, the Supreme Court has consistently found that the Commonwealth possesses the same dignity, autonomy, and sovereignty as the States. The considerations at stake for the Commonwealth are the same as the States, e.g. assaults on its dignity, intervention in the processes of government, threats to financial integrity, and disruption of public priorities. Further, the Legislative and Executive branches of the Federal government have treated the Commonwealth as if it were a State. Because of the *compact* between the Commonwealth and the United States, the Commonwealth, like the States, does not have complete authority over all matters, but like the States, the Commonwealth retains its inviolate sovereign immunity from suit without its consent.

A. The Development of the Commonwealth of Puerto Rico.

For over 100 years, Puerto Rico has enjoyed sovereign immunity as a natural and logical attribute of its governmental powers since the formation of the first civic government following the Treaty of Paris.[60] In 1900, under the Foraker Act, Congress extended "the protection of the United States" to the inhabitants of Puerto Rico and provided for direct election of the House of Delegates by the People of Puerto Rico.[61] The Foraker Act recognized that inhabitants of Puerto Rico "constitute[d] body politic under the name of The People of P[ue]rto Rico"[62] that possessed all of the fundamental characteristics of a government, specifically including sovereign immunity from suit.[63]

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the Congress. We find no reason to impute to the Congress the perpetration of such a monumental hoax." *Figueroa v. People of Puerto Rico*, 232 F.2d 615, 620 (1st Cir. 1956).

[60] *See People of Porto Rico v. Rosaly y Castillo*, 227 U.S. 270, 273 (1913).

[61] Act of April 12, 1900, c. 191, § 7, 31 Stat. 77 (1900) ("Foraker Act").

[62] *Id.*

[63] *See Rosaly y Castillo*, 227 U.S. at 273 (holding that the government of Puerto Rico was immune from suit without consent). Under the Foraker Act, the Federal Government retained control over other areas of government. All justices on the Supreme Court of Puerto Rico were appointed by the President with the

Congress understood that in 1913 the Supreme Court confirmed Puerto Rico's sovereign immunity under the Foraker Act.[64] In 1917, Congress enlarged popular control of Puerto Rico's internal affairs by enacting the Jones Act, but Congress did not attempt to challenge or otherwise tamper with the Supreme Court's ruling that Puerto Rico enjoyed sovereign immunity.[65] In this legislation, Congress divested itself of control of Puerto Rico's legislative bodies, vesting local control over "all matters of legislative character not locally inapplicable."[66] In 1947, Congress recognized even greater local autonomy with the Elective Governor Act.[67] The Act vested in the People of Puerto Rico full control over the executive branch of their government, resulting in popular control of two of three branches of the government of Puerto Rico.[68]

Importantly, during the first fifty years of its relationship with Puerto Rico, Congress never sought to retreat from the Supreme Court's unambiguous recognition of Puerto Rico's inherent sovereign immunity in 1913. Both in 1917 and 1947 Congress

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advice and consent of the Senate. Foraker Act § 33. The executive branch consisted of a Governor and an Executive Counsel, all appointed by the President with advice and consent from the Senate. *Id.* §§ 17, 18. The legislative branch was comprised of a two-houses. *Id* § 27. The Executive Counsel served as one house and the popularly elected House of Delegates formed the second house. *Id.* Further, Congress retained the right to annul any law that the legislative assembly enacted. *Id.* § 31. Additionally, Congress could legislate directly. *See id.* § 12.

[64] *See Rosaly y Castillo*, 227 U.S. at 273. Congress is presumed to understand the Supreme Court's holdings. *See Goodyear Atomic Corp.*, 486 U.S. at 184-85 ("[w]e generally presume that Congress is knowledgeable about existing law pertinent to the statutes it enacts").

[65] Act of March 2, 1917, c. 145, 39 Stat. 951 (1917) ("Jones Act").

[66] *Id.* § 37 (noting that any modification to existing laws must "be consistent with the provisions of th[e] [Jones] Act"). Under the Jones Act, the Executive Counsel's legislative role was eliminated and it became, essentially, the Governor's cabinet. *See id.* §§ 26, 13. As a result, the legislative branch remained a two-house system, but both houses were directly elected by the People of Puerto Rico. *See id.* §§ 25 (Senate), 26 (House of Representatives). The Governor remained under the control of the President. *See id.* § 12 (Governor appointed by the President with advice and consent of the Senate, and "hold[ing] office at the pleasure of the President"). Despite the complete delegation of local legislative authority to the People of Puerto Rico, Congress expressly "reserve[d] the power and authority to annul" laws enacted by the Legislature of Puerto Rico. *Id.* § 34.

[67] Act of August 5, 1947, c. 490, 61 Stat. 770 (1947).

[68] The Elective Governor Act amended section 12 of the Jones Act and provided for a general popular election of the Governor of Puerto Rico, *see id.* § 1, and further provided for the appointment by the Governor of all members of the Executive Counsel. *See id.* § 2.

enlarged popular control of Puerto Rico's government while implicitly acknowledging its sovereign immunity.

On July 3, 1950, in response to popular pressure from Puerto Rico for greater political autonomy, Congress enacted Public Law 600.[69] The legislation offered the People of Puerto Rico a *compact* within which they might establish a government of their own constitution.[70] The *compact* was an agreement between Congress and the People of Puerto Rico. The People of Puerto Rico accepted the offer, convened a constitutional convention, drafted a proposed Constitution, and on March 3, 1952, submitted the constitution to Congress. Congress approved of the Commonwealth Constitution without reserving for itself any rights to amend or veto future amendments and returned the constitutional *compact* to the People of Puerto Rico for consideration and ratification.[71] The People of Puerto Rico ratified the constitutional *compact* and established the Constitution of Puerto Rico on July 25, 1952.[72]

The Commonwealth Constitution explained that the People of Puerto Rico formed "the commonwealth which, in the exercise of our natural rights, we now create within our

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[69] Act of July 3, 1950, c. 446, 64 Stat. 319 (1950) ("Public Law 600"). In 1948, the successful candidates for Governor and Resident Commissioner had run on a platform calling for a Constitution drafted by the People of Puerto Rico, and for a continued relationship with the United States to be consented to by the People of Puerto Rico. *See* Hon. Calvert Magruder, *The Commonwealth Status of Puerto Rico*, 15 U. Pitt. L. Rev. 1, 9 (1953).

[70] *See Examining Board of Engineers, Architects and Surveyors v. Flores de Otero*, 426 U.S. 572, 593 (1976). The sole substantive requirement for the new Constitution was that it "shall provide a republican form of government and shall include a bill of rights." Public Law 600 § 2.

[71] To this end, Congress adding only the following language to Article VII:

> Any amendment or revision of this constitution shall be consistent with the resolution enacted by the Congress of the United States approving this constitution, with the applicable provisions of the Constitution of the United States, with the Puerto Rican Federal Relations Act, and with Public Law 600, Eighty-first Congress, adopted in the nature of a compact.

J. Res. of July 3, 1952, c. 567, 66 Stat. 327 (1952). The Supreme Court explained that the purpose of the amendment was to ensure that "the people of Puerto Rico will exercise self-government. As regards local matters, the sphere of action and the methods of government bear a resemblance to that of any State of the Union." *Examining Bd.*, 426 U.S. at 594 (quoting S. Rep. No. 82-1720 (1952)).

[72] *See* Magruder, *supra* n.69, at 12.

union with the United States of America."[73] The Commonwealth Constitution, accepted by Congress, declared that "political power [of the Commonwealth of Puerto Rico] emanates from the people and shall be exercised in accordance with their will, within the terms of the compact agreed upon between the people of Puerto Rico and the United States of America."[74] By this *compact* with Puerto Rico, the United States reaffirmed the sovereign immunity long-recognized by the Supreme Court.

B. The *Compact* Enshrines Sovereign Immunity for the Commonwealth as for the States.

1. The Commonwealth's Sovereign Immunity Accords with Alden v. Maine.

In *Alden v. Maine*, the Supreme Court restated the well-known process by which the States entered the Union while maintaining their sovereignty, giving up certain aspects of authority, but "retain[ing] 'a residuary and inviolable sovereignty.'"[75] The retention of sovereign immunity as a condition of the agreement to enter into the Union is paramount to the Supreme Court's sovereign immunity analysis. *Alden* neither diminishes the focus on the retention of common law sovereign immunity within the terms of the agreement, nor establishes that the Constitution is the only possible agreement. It is not the merger into the "constitutional compact"[76] of the States that confers sovereign immunity onto the body politic, it is the pre-existing sovereign immunity that survives that merger. In *Alden*, the Supreme Court highlighted the

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[73] P.R. Const. pmbl.
[74] *Id.* art. 1, § 1.
[75] 527 U.S. 706, 715 (1999) (quoting The Federalist No. 39 (James Madison)). *See also Seminole Tribe*, 517 U.S. at 69-70 (quoting The Federalist No. 81 (Alexander Hamilton) (sovereign immunity "is the general sense and the general practice of mankind")); *Principality of Monaco v. Mississippi*, 292 U.S. 313, 321-23 (1934) (State sovereign immunity arises from attributes of sovereignty and is a constitutionally grounded limit on the federal judiciary).
[76] *Alden*, 527 U.S. at 741.

"history, practice, precedent, and the structure of the Constitution"[77] as evidence of the agreement among the original States and, later, the joining States and the Federal government.

The Commission's observation that *Alden* "emphasized that the immunity of States from coercive process arises by constitutional design, not as a mere continuation of the states' common law immunity from suit"[78] accords with the sovereign immunity of the Commonwealth. As *Alden* explained, the Eleventh Amendment is not the source of sovereign immunity.[79] Rather, the scope of sovereign immunity from suit "is demarcated not by [the Eleventh Amendment] but by *fundamental postulates implicit in the constitutional design.*"[80] It is those postulates that inform the meaning of *Alden's* use of the term "constitutional design."

The fundamental postulates cited by *Alden* defining the scope of sovereign immunity are: "[1] States of the Union, still possessing attributes of sovereignty, shall be immune from suits, without their consent, [2] save where there has been a 'surrender of this immunity in the plan of the convention.'"[81] The first postulate is the recognition of the existence of common law sovereignty.[82] The second postulate is the recognition of retention of sovereignty (or lack thereof) in the agreement of union.[83]

In *Alden*, the Supreme Court explained that sovereign immunity is not derived from the Constitution in the abstract. Rather, in conjunction with common law sovereign

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[77] *Id.*
[78] FMC Order at 4.
[79] 527 U.S. at 722 ("The text and history of the Eleventh Amendment also suggest that Congress acted not to change but to restore the original constitutional design.").
[80] *Id.* at 729 (emphasis added).
[81] *Id. See also Seminole Tribe*, 517 U.S. at 68 (quoting *Principality of Monaco*, 292 U.S. at 329-330 (Hughes, C.J.)).
[82] *Alden*, 527 U.S. at 729-30.
[83] *Id.* at 730.

immunity, it is derived from the specific terms of the agreement of union that satisfy the fundamental postulates: "We do not contend the Founders could not have stripped the States of sovereign immunity and granted Congress power to subject them to private suit but only that they did not do so."[84] The Founders did not do so, and the agreement ratified by the original thirteen sovereign colonies and the same agreement later offered and accepted by certain territories and republics attaining statehood thereafter, recognized and satisfied those postulates.

The context of *Seminole Tribe* and *Alden*, i.e. suits against States in Federal and State courts respectively, naturally implicated the discussion of sovereign immunity as it pertains to the States, including the form of the constitutional compact between the States and the federal government. However, *Seminole Tribe* and *Alden* manifestly do not stand for the proposition that *only* States are entitled to constitutional sovereign immunity. For the *Seminole Tribe* and *Alden* courts, the two key postulates of present-day constitutional sovereign immunity are (1) a pre-existing sovereign immunity and (2) an agreement or *compact* with the United States which does not extinguish that sovereign immunity.[85] The *Seminole Tribe* and *Alden* analysis, applied to the Commonwealth of Puerto Rico, does not ask whether Puerto Rico partook of the same bargain entered into by the States. To ask that question is to answer it: Puerto Rico is not a State. Rather, the *Seminole Tribe* and *Alden* analysis asks whether (1) Puerto Rico had common law sovereign immunity, and (2) whether by entering into the *compact* with the United States, the

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[84] *Id.* at 734.

[85] *Id. See also Seminole Tribe*, 517 U.S. at 68 (quoting *Principality of Monaco*, 292 U.S. at 329-330 (Hughes, C.J.)).

Commonwealth of Puerto Rico "retain[ed] the dignity, though not the full authority, of sovereignty."[86]

2. *Puerto Rico Had Sovereign Immunity* Before *Entering the* Compact.

The United States Supreme Court has consistently held that Puerto Rico has enjoyed common law sovereign immunity from suit since 1900.[87] In *Rosaly y Castillo*, the Court determined that the government of the People of Puerto Rico "conforming to the American system" was immune from suit under the doctrine of sovereign immunity:[88]

> It is not open to controversy that, aside from the existence of some exception, the government which the organic act [i.e. the Foraker Act] established in P[ue]rto Rico is of such nature as to come within the general rule exempting a government sovereign in its attributes from being sued without its consent.[89]

According to the *Rosaly y Castillo* Court, the conclusion that Puerto Rico enjoyed "immunity from suit without its consent is necessarily inferable from the nature of the P[ue]rto Rican government,"[90] and that "[t]he purpose of the [Foraker Act] was to give local self-government conferring an autonomy similar to that of the states."[91] The Supreme Court has long described immunity from suit without consent as "one of the attributes of sovereignty,"[92] explaining that "[i]t is an established principle of jurisprudence in all civilized nations that *the sovereign cannot be sued in its own courts, or in any other, without its consent and permission. . . .*"[93]

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[86] *Id.* at 715.
[87] *See People of Porto Rico v. Rosaly y Castillo*, 227 U.S. 270, 273 (1913).
[88] *Id.* at 275-77
[89] *Id.* at 273.
[90] *Id.* at 274.
[91] *Id.* (internal quotation omitted).
[92] *Hans v. Louisiana*, 134 U.S. 1, 13 (1890) (quoting The Federalist No. 81 (Alexander Hamilton)). *See also South Carolina State Ports Auth.*, 535 U.S. at 752 (quoting *Hans*, 134 U.S. at 13); *Alden*, 527 U.S. at 729 (quoting *Hans*, 134 U.S. at 13); *Seminole Tribe*, 517 U.S. at 54 (quoting *Hans*, 134 U.S. at 13).
[93] *Hans*, 134 U.S. at 17 (emphasis added).

The Supreme Court has consistently applied the *Rosaly y Castillo* holding since it was announced nearly a century ago and has not questioned the existence of Puerto Rico's sovereign immunity.[94] In *People of Puerto Rico v. Shell Co. (P.R.), Ltd.*, the Supreme Court explained:

> The aim of the Foraker Act and the Organic Act [i.e. Jones Act] was to give Puerto Rico full power of local self-determination with an autonomy similar to that of the states and incorporated territories. The effect was to confer upon the territory many of the attributes of quasi sovereignty possessed by the states--as, for example, immunity from suit without their consent.[95]

In 1939, the Supreme Court once again reaffirmed its longstanding ruling that "P[ue]rto Rico cannot be sued without its consent."[96]

Before entering into the *compact* with the United States, the government of Puerto Rico plainly enjoyed sovereign immunity protection against assaults on its dignity, intervention in the processes of government, threats to financial integrity, and disruption of public priorities.[97] As the Supreme Court explained, "we are of [the] opinion that it cannot be supposed that Congress intended by the clause in question to destroy the government which it was its purpose to create."[98] Unquestionably, Puerto Rico satisfies the first postulate of the *Seminole Tribe* and *Alden* analysis.

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[94] *See People of Puerto Rico v. Shell Co. (P.R.), Ltd.*, 302 U.S. 253, 261-62 (1937) (citing, *inter alia*, *Rosaly y Castillo*, 227 U.S. at 274); *Sancho v. Yabucoa Sugar Co.*, 306 U.S. 505, 506 (1939) (citing *Rosaly y Castillo*, 227 U.S. at 274 and *Puerto Rico v. Shell Co.*, 302 U.S. at 262).
[95] 302 U.S. at 261-62 (citing, *inter alia*, *Rosaly y Castillo*, 227 U.S. at 274).
[96] *Sancho*, 306 U.S. at 506 (citing *Rosaly y Castillo*, 227 U.S. at 274 and *Puerto Rico v. Shell Co.*, 302 U.S. at 262).
[97] *See Rosaly y Castillo*, 227 U.S. at 277. *See also Sancho*, 306 U.S. at 506 ("this suit cannot be maintained unless authorized by P[ue]rto Rican law, because P[ue]rto Rico cannot be sued without its consent"); *Puerto Rico v. Shell Co.*, 302 U.S. at 262 (noting that the Foraker Act conferred, *inter alia*, "immunity from suit without their consent.").
[98] *Rosaly y Castillo*, 227 U.S. at 277.

3. *Post-*Compact *Puerto Rico—Treated as a State for the Purposes of Constitutional Sovereign Immunity.*

The second postulate of the *Seminole Tribe* and *Alden* analysis is that the body politic must retain its dignity and inherent sovereign immunity. Upon entering into the *compact*, the People of Puerto Rico became a Commonwealth. Under the *compact*, the Commonwealth of Puerto Rico is not a State, but is not less than a State. The Supreme Court, since the advent of the *compact* and the Commonwealth Constitution, has unfailingly described the Commonwealth in terms befitting its sovereignty over local matters in the same manner as a State. The approach of both the Legislative and Executive branches to issues involving Commonwealth status recognizes the same interests of dignity, autonomy, and sovereignty enunciated by the Supreme Court. As a result of the *compact* concluded by the United States and the People of Puerto Rico, the Commonwealth of Puerto Rico must be afforded the dignity due to it as a Commonwealth—*not less than a State.*

a. The Supreme Court Considers the Commonwealth's Sovereign Immunity the Same as a State.

The Supreme Court has specifically explained that post-*compact* "Puerto Rico, like a state, is an autonomous political entity, 'sovereign over matters not ruled by the Constitution.'"[99] In *Calero-Toledo v. Pearson Yacht Leasing*, the United States Supreme Court addressed the effect of the *compact*.[100] The decision reviewed a three-judge panel's

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[99] *Rodriguez v. Popular Democratic Party*, 457 U.S. 1, 8 (1982) (quoting *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 673 (1974)).
[100] 416 U.S. 663, 671 (1974).

opinion[101] that required the Supreme Court to determine whether the three-judge panel had jurisdiction.[102]

According to the Court, three-judge panels were reserved for the review of *State* laws only and the State-law requirement had been interpreted narrowly in the past.[103] Three-judge panels minimized the offense to the dignity of the States when Federal courts reviewed the constitutionality of State laws.[104] The *Calero-Toledo* Court pointed out that, according to Supreme Court precedent, the laws of territories merited no such respect and were not reviewed by the three-judge panel.[105] The reason for the distinction between the laws of territories and States was because:

> the predominant reason for the enactment of [the Three-Judge Court Act] does not exist [in] respects [to] territories. This reason was a congressional purpose to avoid unnecessary interference with the laws of a sovereign state. *In our dual system of government, the position of the state as sovereign over matters not ruled by the Constitution requires a deference to state legislative action beyond that required for the laws of a territory.* A territory is subject to congressional regulation.[106]

Accordingly, only if the "statutes of Puerto Rico [were] 'State statute(s)' for the purposes of the Three-Judge Court Act" could the Supreme Court entertain the appeal.[107] To answer the question of whether the Commonwealth of Puerto Rico possessed the same dignity as the States, the Court looked to the *compact* and its effect on the status of Puerto Rico.[108] After a discussion of the history and maturation of self-rule in the

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[101] The three-judge panel was convened under 28 U.S.C. § 1281 (repealed) to review the constitutionality of a Commonwealth law. *See id.* at 669.
[102] *See Calero-Toledo* at 670-71.
[103] *See id.* at 670.
[104] *See id.* 670-71.
[105] *See id.*
[106] *Id.* at 670-71 (quoting *Stainback v. Mo Hock Ke Lok Po*, 336 U.S. 368, 377-78 (1949) (holding that the laws of the Territory of Hawaii were not entitled to review by a three-judge panel)) (emphasis added).
[107] *Id.* at 670.
[108] *See id.* at 671-73 (reviewing the development and history of the Commonwealth of Puerto Rico and the terms and effect of the *compact*).

Commonwealth, the Supreme Court relied on the seminal First Circuit post-*compact* analysis and quoted it at length:

> These significant changes in Puerto Rico's governmental structure formed the backdrop to Judge Magruder's observations in *Mora v. Mejias*:[109]
>
> > [I]t may be that the Commonwealth of Puerto Rico—'El Estado Libre Asociado de Puerto Rico' in the Spanish version—organized as a body politic by the people of Puerto Rico under their own constitution, pursuant to the terms of the compact offered to them in [Public Law 600], and by them accepted, is a State within the meaning of [the Three-Judge Court Act]. The preamble to this constitution refers to the Commonwealth . . . which "in the exercise of our natural rights, we [the people of Puerto Rico] now create within our union with the United States of America." Puerto Rico has thus not become a State in the federal Union like the 48 States, but it would seem to have become a State within a common and accepted meaning of the word . . . . It is a political entity created by the act and with the consent of the people of Puerto Rico and joined in union with the United States of America under the terms of the compact.
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> > A serious argument could therefore be made that the Commonwealth of Puerto Rico is a State within the intendment and policy of [the Three-Judge Court Act] . . . . If the constitution of the Commonwealth of Puerto Rico is really a "constitution"—as the Congress says it is—and not just another Organic Act approved and enacted by the Congress, then the question is whether the Commonwealth of Puerto Rico is to be deemed "sovereign over matters not ruled by the Constitution" of the United States and thus a "State" within the policy of [the Three-Judge Court Act], which enactment, in prescribing a three-judge federal district court, expresses "a deference to state legislative action beyond that required for the laws of a territory" whose local affairs are subject to congressional regulation.
>
> Lower federal courts since 1953 have adopted this analysis and concluded that Puerto Rico is to be deemed 'sovereign over matters not ruled by the

[109] 206 F.2d 377, 387-88 (1st Cir. 1953).

> Constitution' and thus a State within the policy of the Three-Judge Court Act.[110]

In *Calero-Toledo*, the Supreme Court specifically considered whether the Commonwealth of Puerto Rico should enjoy the dignity due a State under the dual-sovereignty system of government and determined that because of the *compact* and the Commonwealth Constitution, "Puerto Rico is to be deemed 'sovereign over matters not ruled by the Constitution.'"[111]

The decisive factors in the *Calero-Toledo* analysis, the effect of the *compact* and Commonwealth constitution, retains its analytical vitality today. In *Examining Board of Engineers, Architects and Surveyors v. Flores de Otero*, the Supreme Court followed the *Calero-Toledo* approach by basing its conclusion on a thorough analysis of the history of the relationship between Puerto Rico and the United States.[112] In view of the history, the Court "readily concede[d] that Puerto Rico occupies a relationship to the United States that has no parallel in our history."[113] The Court concluded that when the Commonwealth constitutional convention approved the final version of the Commonwealth Constitution, "the compact became effective, and Puerto Rico assumed 'Commonwealth' status."[114] The Court reemphasized in *Examining Board* what it had explained earlier in *Calero-Toledo*: "[T]he purpose of Congress in the 1950 and 1952 legislation [i.e. the *compact*] was to *accord to Puerto Rico the degree of autonomy and independence normally associated with States of the Union*."[115] In further support of the proposition that the Commonwealth of Puerto Rico enjoys the same autonomy and

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[110] *Calero-Toledo*, 416 U.S. at 672-73 (quoting *Mora*, 206 F.2d at 387-88) (internal citations omitted).
[111] *Id.* at 673 (quoting *Mora*, 206 F.2d at 387-88).
[112] 426 U.S. 572, 586-94 (1976) (discussing the history of the relationship between Puerto Rico and the United States).
[113] *Id.* at 596.
[114] *Id.* at 593-94.
[115] *Id.* at 594 (discussing the *Calero-Toledo* analysis) (emphasis added).

independence of a State, the Court highlighted the form and structure of the Commonwealth government and the extent of popular control.[116]

More recently the Supreme Court reaffirmed its rationale, in the joint holdings of *Calero-Toledo* and *Examining Board*, for treating the Commonwealth in the same manner as the States. In *Rodriguez v. Popular Democratic Party*, the Court relied on *Calero-Toledo* and *Examining Board* to decide that Puerto Rico was entitled to the same latitude in elections as the States.[117] Similarly, the Supreme Court in *Posadas de Puerto Rico Assocs. v. Tourism Co. of Puerto Rico*, applied the same rules to Puerto Rico that normally apply to the States regarding constitutional challenges of statutes, specifically because of its Commonwealth status.[118]

Rodriguez v. Puerto Rico Federal Affairs Administration, the only judicial opinion to hold that Puerto Rico's sovereign immunity protection is in any way different than that of the States, disregarded this compelling Supreme Court authority and the consistent line of First Circuit cases that steadfastly upheld sovereign immunity for the Commonwealth.[119] In *Rodriguez*, Judge Robertson declared: "What Congress giveth, Congress may take away, fully consistent with the Territory Clause of the Constitution."[120] The *Rodriguez* court's sole support for this statement is a citation to

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[116] *See id.* ("Puerto Rico now elects its Governor and legislature; appoints its judges, all cabinet officials, and lesser officials in the executive branch; sets its own educational policies; determines its own budget; and amends its own civil and criminal code.") (internal quotations omitted).
[117] 457 U.S. 1, 8 (1982) (quoting *Calero-Toledo*, 416 U.S. at 673).
[118] 478 U.S. 328, 339 (1986) ("we believe that Puerto Rico's status as a Commonwealth dictates application of the same rule") (citing *Calero-Toledo*, 416 U.S. at 672-73).
[119] 338 F. Supp. 2d 125, 127 (D.D.C. 2004) (conceding that "virtually every court that has addressed the issue has found Puerto Rico immune from suit in parallel with the states").
[120] 338 F. Supp. 2d at 128 (citing U.S. Const. art. IV, § 3, cl. 2). As noted, *supra* n.50, the order denying sovereign immunity to the Puerto Rico Federal Affairs Administration has recently been certified for interlocutory appeal under 28 U.S.C. § 1292(b). *See* Order, *Rodriguez v. Puerto Rico Federal Affairs Admin.*, Docket No. CIV.A.03-2246(JR) (D.D.C. Dec. 13, 2004).

Harris v. Rosario, which does not support the proposition.[121] *Harris*, by holding that Congress may treat Puerto Rico differently than the States, simply affirms Congress' power to regulate matters of Federal concern in Puerto Rico.[122] It does not suggest that Congress has the authority to unilaterally alter the fundamental relationship embodied in the *compact*.[123]

The First Circuit has rejected the manner in which *Rodriguez* misapplies *Harris*. After *Harris* was decided, now-Justice Breyer spoke for the First Circuit in *Cordova & Simonpietri Ins. Agency Inc. v. Chase Manhattan Bank, N.A.*, which reaffirmed and relied on the *compact* relationship between the United States and the Commonwealth.[124] In *United States v. Quinones*, the First Circuit again reaffirmed the *compact* relationship by recognizing that "the creation of the Commonwealth granted Puerto Rico authority over its own local affairs," and that "Congress maintains similar powers over Puerto Rico as it possesses over the federal states."[125]

Harris did not change the Supreme Court's view of the *compact*. Only two years after *Harris*, the Court specifically held that "Puerto Rico, like a state, is an autonomous

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[121] *See* 338 F. Supp. 2d at 128 (citing *Harris v. Rosario*, 446 U.S. 651, 651-52 (1981) (per curiam)).

[122] *See Harris*, 446 U.S. at 652 (per curiam). *See also United States v. Vega Figueroa*, 984 F. Supp. 71, 77 (D.P.R. 1997) ("The holding of the Court in *Harris* was limited to the narrow holding that Congress can treat the Commonwealth of Puerto Rico differently from the fifty states *for the purposes of an entitlement program*.") (emphasis added).

[123] Reliance upon *Harris* in the *Rodriguez* decision misapplies the discredited doctrine of the *Insular Cases*. The early jurisprudence of the Supreme Court relating to the newly acquired territories under the Treaty of Paris, is referred to collectively as the *Insular Cases*. While there are more, the major cases that comprise the *Insular Cases* are *De Lima v. Bidwell*, 182 U.S. 1 (1901), *Armstrong v. United States*, 182 U.S. 243 (1901), *Downes v. Bidwell*, 182 U.S. 244 (1901), *Dooley v. United States*, 183 U.S. 151 (1901), *Dorr v. United States*, 195 U.S. 138 (1904), and *Balzac v. Porto Rico*, 258 U.S. 298 (1922). The *Insular Cases* have been substantially discredited in *Reid v. Covert*, 354 U.S. 1, 5-6 (1957) (plurality) (describing the "very dangerous doctrine [which] if allowed to flourish would destroy the benefit of a written constitution and undermine the basis of our government"). The *Reid* Court stated that "it is our judgment that neither the [*Insular Cases*] nor their reasoning should be given any further expansion." *Id.* at 14. Both *Reid* and Supreme Court decisions specific to the Commonwealth of Puerto Rico after *Harris* establish that any attempt to revive the dormant *Insular Cases'* to deny Puerto Rico's sovereign immunity is unwarranted.

[124] 649 F.2d 36, 39-42 (1st Cir. 1981) (Breyer, J.) ("Puerto Rico's status changed from that of a mere territory to the unique status of Commonwealth.").

[125] 758 F.2d 40, 43 (1985).

political entity, 'sovereign over matters not ruled by the Constitution.'"[126] Thus, because *Harris* did not add anything substantive to the topic of the Commonwealth's sovereignty or sovereign immunity, reliance on *Harris* for anything more than Congress' ability to regulate Puerto Rico differently regarding Federal matters is misplaced.[127]

As a result of the mutually binding *compact* entered into between the United States and the People of Puerto Rico, Congress is without power to abrogate the Commonwealth's sovereign immunity to any extent greater than the States. Only by mutual consent of both parties may the relationship that was cemented in 1952 be undone.[128]

The Supreme Court has already outlined an analytical framework for considering whether the *compact* revoked or repealed the autonomy and dignity enjoyed by Puerto Rico prior to the *compact*. In *Examining Board*, the question was presented whether the *compact* altered pre-*compact* federal district court jurisdiction over 42 U.S.C. § 1983 actions.[129] The Court answered the question by analyzing "whether Congress, by entering into the compact, intended to repeal" the existing jurisdiction to enforce section

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[126] *Rodriguez v. Popular Democratic Party*, 457 U.S. 1, 8 (1982) (quoting *Calero-Toledo*, 416 U.S. at 673). *See also Vega Figueroa*, 984 F. Supp. at 78 ("in all the cases after *Harris* in which the Supreme Court has been confronted with an issue regarding the constitutional nature of the Commonwealth of Puerto Rico, the Court has in effect validated the existence of the compact").

[127] Justice Marshall's dissent in *Harris* predicted that the Court's unqualified expression of congressional power would be misused as it was in *Rodriguez*. *See Harris* at 656 (Marshall, J., dissenting). Indeed, Justice Marshall attacked the very statement that the *Rodriguez* court relied on:

> The first question that merits plenary attention [of the Court] is whether Congress, acting pursuant to the Territory Clause of the Constitution, U.S. Const., Art. IV, § 3, cl. 2, "may treat Puerto Rico differently from States so long as there is a rational basis for its actions." *No authority is cited for this proposition. Our prior decisions do not support such a broad statement.*

Id. at 652-53 (Marshall, J., dissenting) (emphasis added). The Marshall dissent went on to describe why the broad proposition announced by the Court was not merited by the authority cited. *Id.* at 653-56 (Marshall, J., dissenting). Whatever its force, *Harris* cannot be read as allowing Congress to alter the terms of the *compact* or alter the constitutional design.

[128] *See generally Calero-Toledo*, 416 U.S. at 671-74; *Examining Bd.*, 426 U.S. at 586-94.

[129] *Examining Bd.*, 426 U.S. at 594.

1983 actions.[130] No such intent was found, in light of the purpose of the *compact* to afford Puerto Rico the same autonomy as states, and "more importantly" because Congress had not specifically changed the relevant jurisdictional provisions in the PRFRA.[131]

The Supreme Court's approach in *Examining Board* leads to the inescapable conclusion that the Commonwealth enjoys the same constitutional sovereign immunity as the States. There is no evidence that Congress intended to repeal the sovereign immunity enjoyed by the Commonwealth since 1900. To the contrary, the purpose of the *compact* was specifically to maintain and bolster the dignity of the Commonwealth, "accord[ing] Puerto Rico the degree of autonomy and independence normally associated with States."[132] As the Supreme Court has articulated, "[i]t is an established principle of jurisprudence in all civilized nations that *the sovereign cannot be sued in its own courts, or in any other, without its consent and permission . . . .*"[133] It is untenable to suggest that Congress sought to repeal the sovereign immunity of the Commonwealth with a *compact* plainly intended to treat the Commonwealth the same as the States.

This analytical approach also mirrors the well-accepted doctrine concerning waiver of sovereign immunity. It has been long-held that sovereign immunity may be waived,[134] but only upon a sovereign's "clear declaration that it intends to submit itself to the federal courts."[135] The Supreme Court has held that such a declaration must be "stated by the most express language or by such overwhelming implications from the text

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[130] *Id.*
[131] *Id.*
[132] *Id.*
[133] *Hans v. Louisiana*, 134 U.S. 1, 17 (1890).
[134] *Arecibo Community Health Care, Inc. v. Commonwealth of Puerto Rico*, 270 F.3d 17, 24 (1st Cir. 2001) (citing *Clark v. Barnard*, 108 U.S. 436, 447 (1883)).
[135] *College Savings Bank v. Florida Prepaid Postsecondary Education Expense Bd.*, 527 U.S. 666, 676 (1999).

as [will] leave no room from any other reasonable construction."[136] No such declaration exists in the *compact*.[137] Again, to the contrary, the context and the purpose of the *compact* was to enhance the sovereignty of the Commonwealth, not to subject it to private suits in Federal courts. According to the Supreme Court of Puerto Rico, the doctrine of sovereign immunity remains an integral part of the Commonwealth Constitution.[138]

The Commission asked, "whether Puerto Rico holds the same constitutional dignity interest held by the states."[139] The Commission cited *South Carolina State Ports Authority* for the proposition that the "preeminent purpose of state sovereign immunity is to accord States the dignity that is consistent with their status as sovereign entities."[140] As the Supreme Court in *Alden* explained, the purpose of sovereign immunity is the protection of sovereign dignity: "immunity from private suits [is] central to sovereign dignity."[141] Sovereign immunity is essential to sovereign dignity. And since the Commonwealth of Puerto Rico is entitled to the same dignity as the States, perforce it enjoys the same sovereign immunity.

The Commission also asked whether the First Circuit authority survives *Alden*.[142] Yet, there is no difficulty in reconciling the First Circuit's decisions regarding the Commonwealth's sovereign immunity with recent Supreme Court decisions concerning

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[136] *Edelman v. Jordan*, 415 U.S. 651, 673 (1974) (quotations omitted).
[137] Not only is such a "clear declaration" absent from the *compact*, but the delegates of the Commonwealth Constitutional Convention specifically considered and debated three different amendments proposing to waive the Commonwealth's sovereign immunity, but rejected each amendment. *See Defendini Collazo v. Commonwealth of Puerto Rico*, 134 D.P.R. 28, 57-59 (P.R. 1993) (discussing the debates).
[138] *See id.* (Naveira De Rodon, J.) (sovereign immunity is part of the constitutional structure); *id.* at 109 (Fuster Berlingeri, J., concurring) (noting that the decision not to waive sovereign immunity in the Constitutional Convention of Puerto Rico reflects the intent of the drafters and the fundamental law of the Commonwealth).
[139] FMC Order at 4.
[140] *Id.* (citing *Federal Maritime Comm'n v. South Carolina State Ports Auth.*, 535 US 743, 760 (2002).
[141] *See Alden*, 527 U.S. at 715.
[142] FMC Order at 5.

sovereign immunity.[143] The Supreme Court's own description of Puerto Rico's sovereignty comports with the dignity interests explained by the First Circuit analysis.

Calero-Toledo adopted the reasoning of *Mora* that developed into the First Circuit precedents that specifically hold Puerto Rico enjoys the same sovereign immunity as the States because of its status as a Commonwealth.[144] The two lines of authority do not conflict; they harmonize. *Seminole Tribe* and *Alden* identified as the *sine qua non* of sovereign immunity the dignity afforded the States under the dual system of government and the preexisting sovereign immunity of the States. *Calero-Toledo* achieves the same for the Commonwealth of Puerto Rico.

The manner in which the *Calero-Toledo* Court reached its conclusion is equally significant. The Supreme Court looked to the *compact* and the Commonwealth Constitution and found the attributes of sovereignty that merited the same respect due to the States in the dual system of government.[145] According to the Supreme Court, the dignity and sovereign immunity interests of the Commonwealth warrant the same respect as that of a State.

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[143] Following *Alden*, the First Circuit has continued to hold that the Commonwealth of Puerto Rico continues to enjoy sovereign immunity protection from suit in Federal courts, whether by "constitutional design" or by statute. *See Arecibo Community Health Care, Inc. v. Commonwealth of Puerto Rico*, 270 F.3d 17, 21 n.3 (1st Cir. 2001) ("the Commonwealth of Puerto Rico is protected by the Eleventh Amendment to the same extent as any state") (internal quotations omitted). *See also Jusino Mercado v. Commonwealth of Puerto Rico*, 214 F.3d 34, 39 (1st Cir. 2000) ("Since [the *compact*] we consistently have held that Puerto Rico's sovereign immunity in federal courts parallels the states' Eleventh Amendment immunity.") (ultimately relying on statutory sovereign immunity); *Maysonet-Robles v. Cabrero*, 323 F.3d 43, 54 (1st Cir. 2003) ("We need not reach that constitutional question, however, because Plaintiffs' argument falls of its own weight. Whether or not Puerto Rico's long-held sovereign immunity is constitutional or common-law in nature, it has not been abrogated by Congress here.").

[144] The First Circuit has clearly and unequivocally held that the Commonwealth of Puerto Rico is entitled to protection from suit under the doctrine of sovereign immunity to the same extent as the States in an unbroken and consistent line of cases. *See Jusino Mercado*, 214 F.3d at 39 (citing a "phalanx of cases" in support of the Commonwealth's sovereign immunity). After *Alden*, the First Circuit remained committed to its reasoning. *See*, *supra* n.143.

[145] *See Calero-Toledo*, 416 U.S. at 671-74.

First, as a sovereign, the Commonwealth shares with the States the common characteristic "inherent in the nature of sovereignty not to be amenable to the suit of an individual without its consent."[146] "The principle of immunity from litigation assures the states and the nation from unanticipated intervention in the processes of government."[147] Likewise, federal power to authorize private suits "would place unwarranted strain on the States' ability to govern in accordance with the will of their citizens" at a time when "the allocation of scarce resources among competing needs and interests lies at the heart of the political process."[148] Finally, a federal power to levy damages upon the treasurers of the States "could create staggering burdens" resulting in "leverage over the States that is not contemplated by our constitutional design."[149] These considerations apply acutely in these proceedings where the private parties dispute the wisdom of the decisions of the Governor and the Commonwealth to redevelop the port for tourism and have brought private suits in a federal forum for over $70 million[150] against the Ports Authority and the Commonwealth.

b. The Compact *Puts the Commonwealth of Puerto Rico on Par with the States.*

A plain reading of Public Law 600 is sufficient to understand the *compact*. Public Law 600 states that, in keeping with "the principle of government by consent, this Act is now adopted in the nature of a compact so that the people of Puerto Rico may organize a

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[146] *Seminole Tribe*, 517 U.S. at 54 (quoting *Hans v. Louisiana*, 134 U.S. 1, 13 (1890) (quoting The Federalist No. 81 (Alexander Hamilton))).
[147] *Alden*, 527 U.S. at 750 (quoting *Great Northern Life Ins. Co. v. Read*, 322 U.S. 47, 53 (1944)).
[148] *Id.* at 750-51.
[149] *Id.* at 750.
[150] This figure represents only two of the three claims pending before the Commission. *See* Complaint, *Int'l Shipping Agency v. Puerto Rico Ports Auth.*, Docket No. 04-01, Part VII.A-B (Dec. 29, 2003) (seeking "an amount exceeding" $51.3 million); Complaint, *San Antonio Maritime Corp., et al. v. Puerto Rico Ports Auth.*, Docket No. 04-06, Part VI (Apr. 21, 2004) ("not less than $20 million"). The third complaint failed to specify the amount sought, instead preferring to determine the amount after a hearing before the Commission. Complaint, *Odyssea Stevedoring of Puerto Rico, Inc. v. Puerto Rico Ports Auth.*, Docket No. 02-08 at ¶¶ 28, 31, 35, and 41 (May 31, 2002).

government pursuant to a constitution of their own adopting."[151] The Act does not contain any language that can reasonably be read as a reservation of Congressional power to unilaterally abrogate the *compact*. While the language is so clear as to make it unnecessary to look to its legislative history, the history amply supports the joint nature of the *compact*.[152]

The Commonwealth Constitution provides, in its preamble, that it was established by the People of Puerto Rico "for the commonwealth which, in the exercise of our natural rights, we now create within our union with the United States of America."[153] The Constitution also declares that "political power [of the Commonwealth of Puerto Rico] emanates from the people and shall be exercised in accordance with their will, within the terms of the compact agreed upon between the people of Puerto Rico and the United States of America."[154]

Through the *compact*, including its acceptance of the Commonwealth Constitution, Congress divested itself of the authority to control local governance of Puerto Rico. The People of Puerto Rico controlled their own local government—within

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[151] Act of July 3, 1950, c. 446, § 1, 64 Stat. 319 (1950).

[152] In the debates leading up to the enactment of Public Law 600, the question was posed whether Congress's approval of the proposed Commonwealth Constitution would result in "an irrevocable delegation of authority to Puerto Rico, similar to that granted to a state." Cong. Rec. 6189-90 (daily ed. May 28, 1952) (comments of Representative Meader). The response was: "Yes, in my interpretation, I think we are doing that. I think that is what we should be doing for Puerto Rico." *Id.* at 6190 (comments of Representative Bentsen). Furthermore, an amendment to the House Resolution was introduced which contained language declaring "[t]hat nothing herein contained shall be construed as an irrevocable delegation, transfer, or release of the power of the Congress granted by Article IV, section 3, of the Constitution of the United States." *See id.* at 6203-04. The amendment suggesting that Congress intended to maintain plenary authority under the territory clause, despite the existence of the *compact*, was rejected and never even came to a vote. *See id.* Testifying before the Senate Committee on Insular Affairs, Governor Muñoz-Marín explained: "Nothing short of self-government can be by its own nature, and by the dignity of human freedom a subject for a solemn agreement. We are establishing a status that is not federated statehood, but is not less than federated statehood." Hearings before the Senate Comm. on Interior and Insular Affairs on S.J. Res. 151, 82nd Cong., 2nd Sess. 13 (Apr. 29, May 6, 1952).

[153] P.R. Const. pmbl.

[154] *Id.* art. 1, § 1.

the terms of the *compact*. After the *compact*, no unilateral action on the part of Congress may alter the fundamental relationship between the United States and the Commonwealth of Puerto Rico. Federal recognition of the Commonwealth's sovereign immunity, which was part of the *compact* between the United States and Puerto Rico, cannot be rescinded by Congress or abrogated to any extent greater than it could be for a State.[155]

c. *The Legislative and Executive Branches of the Federal Government Treat the Commonwealth of Puerto Rico the Same as the States.*

Congress has structured the federal judiciary to treat the Commonwealth as if it were a State. In 1961, Congress amended title 28 of the United States code to provide for "review [of] final judgments or decrees of the Supreme Court of Puerto Rico on certiorari or appeal in the same manner as judgments from the highest courts of the several States of the Union are now reviewed by th[e] [United States Supreme] Court."[156] In Congress' view the similarity of treatment between the Commonwealth and the States was "appropriate in view of the change of the status of Puerto Rico from that of a territory to that of an associated Commonwealth under the Act of Compact."[157] In 1966 Congress amended title 28 again,[158] providing for federal judges in Puerto Rico to enjoy life tenure, unlike the federal judges in the territories of the United States.[159] Congress reaffirmed the relationship between the Commonwealth government and the Federal government as on par with that of the Federal government and the States:

> The U.S. district court in Puerto Rico is in its jurisdiction, powers, and responsibilities the same as the U.S. district courts in the several States. It

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[155] *See supra* nn.59 & 152 and associated text.
[156] S. Rep. No. 87-735 (1961), *reprinted in* 1961 U.S.C.C.A.N. 2448, 2449 (discussing Pub. L. No. 87-189 (1961) (amending 28 U.S.C. § 1257)).
[157] *Id.*
[158] Pub. L. No. 89-571 (1966).
[159] *See* S. Rep. No. 89-1504 (1966), *reprinted in* 1966 U.S.C.C.A.N. 2786, 2786-87 (discussing Pub. L. No. 89-571 (1966)).

> exercises only Federal jurisdiction, the local jurisdiction being exercised by a system of local courts headed by a Supreme Court of the Commonwealth of Puerto Rico.
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> ***
>
> Finally, the Commonwealth of Puerto Rico is a free state associated with and subject to the Constitution and laws of the United States, but not a State of the Union. It has virtually complete local autonomy and it seems proper, therefore, to accord it the same treatment as a State by conferring upon the Federal district court there the same dignity and authority enjoyed by the other Federal district courts.[160]

Congress considered the nature of the Commonwealth of Puerto Rico as compared to the States and expressly concluded that, because of their common characteristics, including dignity, the status of the Federal judiciary should be the same as the States.

Likewise, the Executive branch has consistently treated the Commonwealth of Puerto Rico the same as the States. When President Truman received the Commonwealth Constitution and transmitted it to Congress, he noted that the *compact* "was the last in a series of enactments through which the United States has provided ever-increasing self-government in Puerto Rico."[161] President Truman emphasized the joint nature of the *compact* and its import:

> With its [i.e. the Commonwealth Constitution] approval, full authority and responsibility for local self-government will be *vested* in the people of Puerto Rico. The Commonwealth of Puerto Rico will be a government which is truly by the consent of the governed. *No government can be invested with higher dignity* and greater worth than one based upon the principle of consent.
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> *The people of the United States and the people of Puerto Rico are entering into a new relationship* that will serve as an inspiration to all who love freedom and hate tyranny.[162]

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[160] *Id.* at 2787-88.
[161] Executive Memorandum to the United States Congress, Harry S. Truman, Apr. 22, 1952, *reprinted in* 1952 U.S.C.C.A.N. 1899, 1901 (1952).
[162] *Id.* at 1902 (emphasis added).

Subsequent Presidents have amplified President Truman's position. In 1961, President John F. Kennedy discussed the relationship between the United States and the Commonwealth of Puerto Rico:

> The Commonwealth structure, and its relationship to the United States which is in the nature of a compact, provide for self-government in respect of internal affairs and administration subject only to applicable provisions of the Federal Constitution, the Puerto Rican Federal Relations Act, and the acts of Congress authorizing and approving the constitution.
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> ***
>
> All departments, agencies, and officials of the executive branch of the Government should faithfully observe and respect this arrangement in relation to all matters affecting the Commonwealth of Puerto Rico.[163]

Most recently, President George H.W. Bush reaffirmed the consistent mandate of his predecessors that "all Federal departments, agencies, and officials" must "treat Puerto Rico administratively as if it were a State."[164] For over fifty years, America's Presidents have repeatedly reaffirmed that the Commonwealth of Puerto Rico is not less than a State.

V. CONCLUSION.

The Commonwealth enjoys sovereign immunity to the same extent as the States. The statutory "default rule" requires the Commission to apply the statutes of the United States to the Commonwealth to the same extent as to the States. And the *compact* between the Commonwealth and the United States recognizes that the Commonwealth retains the same residuum of sovereignty as the States and is entitled to the same constitutional sovereign immunity as the States.

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[163] Executive Memorandum of July 25, 1961, John F. Kennedy, 26 Fed. Reg. 6695.

[164] Executive Memorandum on the Commonwealth of Puerto Rico, George H.W. Bush, Nov. 30, 1992, 57 Fed. Reg. 57093. This Executive Memorandum remains in effect, binding all "Federal departments, agencies, and officials" including the Commission. *Id.*

For the foregoing reasons, the Commission must acknowledge the constitutional sovereign immunity of the Commonwealth and dismiss the complaints which offend the Commonwealth's dignity.

Dated: January 7, 2004.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I have on this, a copy of the foregoing RESPONDENT'S BRIEF REGARDING THE SOVEREIGN IMMUNITY OF THE COMMONWEALTH OF PUERTO RICO upon the following persons by first class mail:

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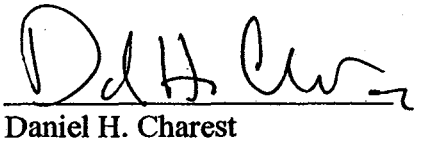

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