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September 2, 2005

## **VIA COURIER**

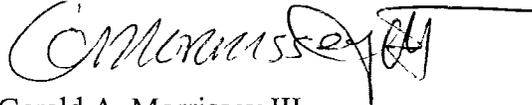
Bryant L. VanBrakle  
Secretary  
The Federal Maritime Commission  
800 North Capitol Street, N.W.  
Washington, DC 20573

**Re: *Odyssea Stevedoring of Puerto Rico, Inc. v. Puerto Rico Ports  
Authority, FMC No. 02-08;***

Dear Secretary VanBrakle:

Enclosed please find for filing one original and fifteen copies of Respondent's Supplement to Reply to Complainant's Petition for Official Notice, along with one unbound and fifteen bound sets of the PRFAA Reply brief referenced in the Supplement to Reply, filed on behalf of the Puerto Rico Ports Authority in the above referenced proceeding. As we discussed previously on the phone, and as reserved in the original Reply, the PRFAA Reply brief was filed on August 25, 2005, and is filed now as a supplement to the previous Reply in this matter containing the other PRFAA briefs. The Commission now has the complete set of appellate briefs from the PRFAA matter. Please contact me if you have any questions or concerns.

Respectfully submitted,

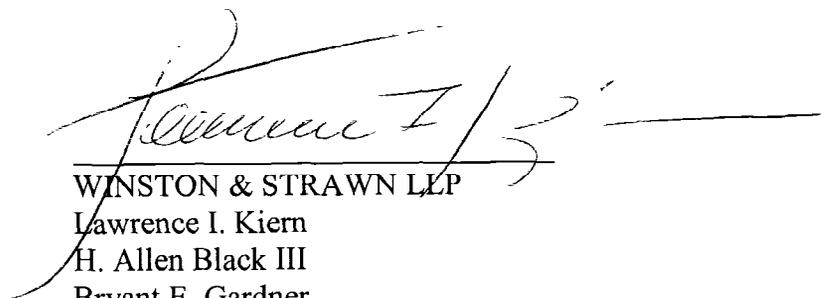


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Enclosures



Respectfully submitted,

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**CERTIFICATE OF SERVICE**

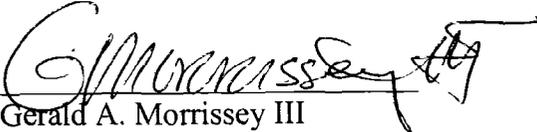
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No. 05-7029

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UNITED STATES COURT OF APPEALS  
FOR THE DISTRICT OF COLUMBIA CIRCUIT

---

PUERTO RICO FEDERAL AFFAIRS ADMINISTRATION,  
*and individual defendants*, MARI CARMEN APONTE,  
MAIRYM RAMOS, AIDA SANCHEZ, and MARCOS VILAR,

*Petitioners-Appellants,*

---

EMMA RODRIGUEZ, *individually and*  
*on behalf of others similarly situated,*

*Respondent-Appellee.*

---

Appeal from the United States District Court for the  
District of Columbia, No. 03-cv-2246 (JR)

---

**REPLY BRIEF**

---

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**REVISED CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED  
CASES**

**A. Parties, Intervenors, and Amici.**

Pursuant to Circuit Rules 5(a) and 28(a)(1)(A), Petitioner-Appellant Puerto Rico Federal Affairs Administration certifies the following:

The following list represents all parties, intervenors, and amici who have appeared before the District Court and all persons who are parties, intervenors, or amici in this Court to date.

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To date, no persons have appeared as amici.

Pursuant to Circuit Rule 26.1, Petitioner Puerto Rico Federal Affairs Administration certifies the following:

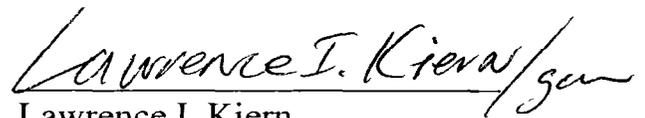
Petitioner Puerto Rico Federal Affairs Administration is an executive agency of the Commonwealth of Puerto Rico. The individual defendants are all either current or former employees of the agency.

**B. Rulings Under Review.**

The ruling at issue in this Court was rendered on September 30, 2004 in the United States District Court for the District of Columbia. The district court's order denied appellant's motion to dismiss on the grounds of sovereign immunity. The presiding judge was The Honorable James Robertson. The Memorandum and Order of September 30, 2004 ("Order") are located at pages 54-67 of the Appendix ("App."). The official citation for the Order is 338 F. Supp. 2d 125 (D.D.C. 2004).

**C. Related Cases.**

This case has not been before this Court or any other appellate courts. No related cases exist.

A handwritten signature in cursive script that reads "Lawrence I. Kiern/gan". The signature is written in black ink and is positioned above the typed name.

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**GLOSSARY**

Puerto Rico Federal Affairs Administration ..... PRFAA  
Puerto Rican Federal Relations Act ..... PRFRA  
Fair Labor Standards Act..... FLSA  
Commonwealth of the Northern Mariana Islands.....CNMI

## INTRODUCTION AND SUMMARY

The briefs filed by Appellee Rodriguez and the United States take radically different approaches to this case. Rodriguez cavalierly asserts that the First Circuit is simply wrong, both in its interpretations of the Puerto Rican Federal Relations Act ("PRFRA")<sup>1</sup> to preclude private Fair Labor Standards Act ("FLSA")<sup>2</sup> suits against Puerto Rico, and in its oft-stated view (and numerous holdings) that the Commonwealth enjoys sovereign immunity by virtue of both the 1952 Compact and the U.S. Constitution. The United States, on the other hand, expresses no view as to the correctness of the statutory interpretation we urge, and on which the First Circuit based its decision in a nearly identical case only five years ago. *Jusino Mercado v. Commonwealth of Puerto Rico*, 214 F.3d 34, 44 (1st Cir. 2000). Nor does the United States dispute that the decision below can be reversed on that ground alone. *See* Brief for the United States ("USB") at 11-12. It contests only the proposition that the Commonwealth enjoys sovereign immunity.

As shown below, Rodriguez's attempt to escape the requirement of the PRFRA that federal statutes must have "the same force and effect" in Puerto Rico as in the States makes no sense as a matter of statutory interpretation or history. The implication of Rodriguez's argument is that, in passing the FLSA, Congress

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<sup>1</sup> 48 U.S.C. §§ 731, *et seq.*

<sup>2</sup> 29 U.S.C. §§ 201, *et seq.*

violated its express legal commitments to respect the dignity and autonomy of the Commonwealth and to treat it on par with the States. In Rodriguez's view, Congress must be deemed to have subjected the Commonwealth to federal litigation burdens and financial liabilities of uncertain but potentially enormous magnitude that the States do not face. In so doing, Congress would also, in Rodriguez's view, have redirected the Commonwealth's 300,000-odd public employees away from the Commonwealth's own courts and into the federal courts. Rodriguez's argument further implies that Congress acted in disregard of the serious constitutional question presented whenever the judicial power of the United States is extended to suits against a sovereign within the federal system that enjoys common-law sovereign immunity—as the Commonwealth undoubtedly does.

This Court should not lightly infer either that Congress has broken its commitment to the people of Puerto Rico or that it has acted in disregard of the delicate constitutional issues governing the relationships among the various sovereigns in our federal system. Even if a straightforward statutory analysis were insufficient to defeat Rodriguez's claim, three settled principles would militate against any such conclusion: (1) the doctrine that resolution of constitutional questions should be avoided where a non-constitutional ground for decision is available; (2) the doctrine that a statute should be interpreted, if possible, in a way that avoids serious questions as to its constitutionality; and (3) the doctrine that if

Congress wishes to abrogate the immunity of a sovereign in the federal system, or if it intends to legislate contrary to its international obligations, it must make its intention to do so unmistakably clear. Like the decision below, Rodriguez's brief ignores all of these settled doctrines, each of which requires that the FLSA not be interpreted to single out the Commonwealth for damage suits in federal court, and each of which provides an ample basis for deciding this case on non-constitutional grounds.

If the Court nevertheless chooses to reach the issue of the Commonwealth's sovereign immunity under the Constitution, the Court should reject the arguments advanced by the United States and Rodriguez. Those arguments, like the district court's analysis, ignore the clear holdings of decisions such as *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996), that sovereign immunity from private suits in federal courts rests not so much on the Eleventh Amendment or on Article I, but on the nature of the judicial power granted to federal courts in Article III. Accordingly, the same reasoning that provides immunity to other sovereigns in the federal system—including both the States and the federal government—necessarily extends to the Commonwealth. Moreover, by holding that sovereign immunity cannot be overridden "through appeal to antecedent provisions of the Constitution," 517 U.S. at 66, *Seminole Tribe* and its successors foreclose the

argument here that Article IV gives Congress the authority to override the sovereign immunity that is implicit in Article III.

## ARGUMENT

As shown in our opening brief, the district court's Order manifests three distinct errors: (1) its misinterpretation of the PRFRA and that statute's interaction with the FLSA; (2) its failure to give proper effect to the Compact; and (3) its refusal to recognize that the Commonwealth enjoys the same constitutional sovereign immunity as the States from private damages suits in federal court. Neither Rodriguez nor the United States rescues the district court's Order from any of these errors, any one of which is a sufficient basis for reversal.

### **I. RODRIGUEZ HAS FAILED TO UNDERMINE APPELLANT'S SHOWING THAT IT ENJOYS IMMUNITY FROM FLSA CLAIMS AS A MATTER OF STATUTORY CONSTRUCTION.**

The most straightforward way to resolve this case is to adopt the holding of the First Circuit in *Jusino Mercado*. There, the First Circuit held that the PRFRA requires that federal statutes have "the same force and effect in Puerto Rico as in the United States," and, therefore, because the FLSA's private-suit provisions have been held not to apply to the States, they cannot apply to the Commonwealth either. Appellant's Brief ("OB") at 15-20. Rodriguez's attacks on the First Circuit's statutory construction are meritless and, in any event, should be rejected in light of the constitutional avoidance doctrine.

**A. Appellee's Criticisms of the First Circuit's Statutory Analysis in *Jusino Mercado* are Meritless.**

Rodriguez makes little effort to defend the district court's stated reasons for rejecting the First Circuit's statutory analysis. She does not defend, for example, the district court's principal theory that the appropriate inquiry is whether the FLSA enforcement provision can be "severed" into two provisions—one applying to the States and the other applying to other governments. *See* Appellee's Brief ("AB") at 19; OB at 24-25.

1. Rodriguez relies instead upon a "plain-language" argument that does not appear in the district court's opinion. She argues that, although the PRFRA "by its literal terms" states that "[t]he statutory laws of the United States . . . shall have the same force and effect in Puerto Rico as in the United States," that does not mean that the "converse" is true, i.e., that "laws *inapplicable* in the States are inapplicable in Puerto Rico." AB at 21. She also makes an even more tortured argument that, although the PRFRA requires that federal statutes have "the same force and effect *in* Puerto Rico as *in* the United States," that does not mean that laws "inapplicable *to* the states are inapplicable *to* Puerto Rico." *Id.*

But these semantic arguments not only contradict the First Circuit's conclusion, they defy logic. Given *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996) and *Alden v. Maine*, 527 U.S. 706 (1999), the FLSA private suit provision now has no effect at all on suits for damages against States and is thus

inapplicable "in" the States. Accordingly, if that provision is to have "the same force and effect in Puerto Rico," as the PRFRA requires, it must likewise have no effect in private suits for damages against the Commonwealth.<sup>3</sup> This is the direct, necessary and plain implication of the PRFRA's "same force and effect" language. And it is unaffected by Rodriguez's hair-splitting distinction between "to" and "in."

2. Rodriguez next argues that, under the canon of statutory construction that the specific governs the general, "[b]ecause Congress made Puerto Rico liable under the FLSA *specifically*, the default rule cannot trump Congress's specific instructions." AB at 22 (emphasis added). This argument is likewise misguided.

First, contrary to Rodriguez's assumption, the FLSA's pertinent provisions do not "specifically" impose any differential liability on the Commonwealth or, indeed, "specifically" apply distinctly to the Commonwealth at all. All that section 203(c) does is to broadly define the term "State"—which is a category of "covered employers" under Section 203(e)—to include "*any* State of the United States or the District of Columbia or *any* Territory or possession of the United States." 29 U.S.C. § 203(c) (emphasis added). Section 203(c) is thus very different from other provisions of the FLSA that deal specifically with the Commonwealth, but which

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<sup>3</sup> Rodriguez also incorrectly accuses the First Circuit of "wrongly constru[ing] *Alden* as holding that the FLSA does not apply to states *at all* and thus should not apply to Puerto Rico." AB at 23. For example, the First Circuit has not held that *Alden* disabled FLSA's enforcement provision to the extent it allows the United States to bring FLSA actions against the States.

are not at issue here. *See, e.g., id.* § 206(a)(2) (providing special provision for Commonwealth "home workers"); *id.* § 210 (providing specific review procedures in the Commonwealth). Accordingly, the "specific-governs-the-general" canon does not help Rodriguez's argument.

Second, if anything, that canon *supports* the First Circuit's decision. Unlike the FLSA's enforcement provision, which does not mention the Commonwealth specifically, the PRFRA does deal specifically—indeed uniquely—with the Commonwealth. Thus, of the two statutes, the PRFRA is the more specific and FLSA's enforcement provision the more general.

Third, and most important, the PRFRA, like other foundational federal statutes such as the Dictionary Act, 1 U.S.C. § 1, *et seq.*, the Administrative Procedure Act ("APA"), 5 U.S.C. § 551, *et seq.*, the Religious Freedom Restoration Act ("RFRA"), 42 U.S.C. § 2000bb, *et seq.*, the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552, and the National Environmental Policy Act ("NEPA"), 42 U.S.C. § 4321 *et seq.*, the PRFRA is expressly designed to govern the interpretation and application of subsequently passed federal statutes. Indeed, as we showed in our opening brief (at 26-29), and as Rodriguez does not dispute, the PRFRA establishes a broad national policy of transcendent importance to the relationship between the Commonwealth and United States. Thus, absent a clear, express indication from Congress in a later statute that it intends a different

result, federal laws enacted after PRFRA must be read consistently with PRFRA. This clear statement requirement applies to the FLSA, just as the FLSA must be read consistently with such statutes as the APA, absent a clear Congressional statement to the contrary. *See, e.g., Int'l Ladies Garment Workers' Union v. Donovan*, 722 F.2d 795, 807 (D.C. Cir. 1983) (Right to APA review applicable absent "clear or convincing" evidence otherwise).

3. Finally, Rodriguez asserts that *Jusino Mercado* is "also contrary to the law of the Ninth Circuit," AB at 23, by which Rodriguez presumably means the Ninth Circuit's decisions in *Norita v. Commonwealth of the Northern Mariana Islands*, 331 F.3d 690, 692 (9th Cir. 2003), and *Fleming v. Dep't of Public Safety*, 837 F.2d 401 (9th Cir. 1988). Neither decision, however, has any relevance to the First Circuit's statutory analysis in *Jusino Mercado*.

To the contrary, both decisions addressed whether the Commonwealth of the Northern Mariana Islands ("CNMI") enjoys *constitutional* sovereign immunity under what *Fleming* characterized as the "*sui generis*" legal scheme governing the CNMI. 837 F.2d at 404. Because they addressed only constitutional sovereign immunity, i.e., whether the agreement between the CNMI and the United States requires an exemption from a federal law once the States (as in *Alden*) have been exempted from that law, neither *Norita* nor *Fleming* considered the kind of statutory interpretation issue decided in *Jusino Mercado*.

To be sure, both decisions recognized that the CNMI's governing law—the Covenant to Establish a Commonwealth of the Northern Mariana Islands in Political Union with the United States of America ("Covenant"), Public Law 94-241, 90 Stat. 263 (1976), *reprinted as amended in* 48 U.S.C. § 1801—"expressly makes those laws ... 'of general application to the several States' applicable to the [CNMI]." *Fleming*, 837 F.2d at 404 (quoting Covenant § 502(a)(2)). *Accord Norita*, 331 F.3d at 963. But that provision does not require, as the PRFRA does, that federal law have "the *same* force and effect," 48 U.S.C. § 734, in the CNMI as it does in the States. Nor has federal policy for the CNMI been based for years on treating the CNMI on par with the States, as has national policy for Puerto Rico and judicial interpretation of the PRFRA. *See* OB at 45-53. Thus, *Fleming* and *Norita* are easily distinguished based upon the pivotal differences between the CNMI Covenant and the Puerto Rico Compact.

In short, Rodriguez has failed to offer any plausible reason for this Court to create a conflict with the First Circuit, the appellate court with primary responsibility over Puerto Rico issues, especially where such a conflict would encourage Commonwealth employees to bring their employment disputes to the federal courts rather than the Commonwealth courts.<sup>4</sup>

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<sup>4</sup> Rodriguez herself points out that, under the Commonwealth Constitution, employees have wage-hour protections. *See* AB at 12 n.8. In addition to that constitutional protection, the Commonwealth legislature has provided a statutory

**B. The Constitutional Doubts Doctrine and Congress's Consistent Expression of Intent to Treat the Commonwealth No Worse than a State Also Strongly Favor the First Circuit's Interpretation.**

Even if the proper interpretation of the PRFRA as applied to the FLSA enforcement provision were a close question—and we submit it is not—the doctrine of constitutional avoidance strongly favors the First Circuit's interpretation. As the Court is aware, the doctrine requires that, "where a statute is susceptible of two constructions, by one of which grave and doubtful constitutional questions arise and by the other of which such questions are avoided, our duty is to adopt the latter." *Jones v. United States*, 529 U.S. 848, 857 (2000) (quoting *United States ex rel. Attorney General v. Delaware & Hudson Co.*, 213 U.S. 366, 408 (1909)). The doctrine is a special case of the general principle that courts should "not pass on the constitutionality of an Act of Congress if a construction of the Act is fairly possible, or some other nonconstitutional ground fairly available, by which the constitutional question can be avoided." *United States v. Locke*, 471 U.S. 84, 92 (1985).

Here, the First Circuit has provided what all must concede is a plausible construction of the PRFRA that precludes application of FLSA's private suit

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remedy for unpaid overtime and related employment claims for private and government employees. *See* Public Service Human Resources Administration Act of 2004, Act No. 184 of August 3, 2004 (not yet codified). PRFAA employees like Rodriguez, have similar protections through an administrative process, subject to judicial review. Thus, if Rodriguez's substantive claims are to be believed, her recovery was readily available in the Commonwealth system.

provision to the Commonwealth. In a host of other decisions, moreover, the First Circuit has also concluded that the Commonwealth is entitled to *constitutional* sovereign immunity the same as the states. *See* OB at 8, 43-44; *infra* at 25 n.14. The mere existence of these decisions by the Court of Appeals with principal responsibility for interpreting federal laws applicable to Puerto Rico means that the issue of the Commonwealth's constitutional sovereign immunity, and the consequent inability of private plaintiffs to sue it under the FLSA, is *at a minimum* a serious constitutional issue.

Neither Rodriguez nor the United States disputes this. Nor do they dispute that this Court's adoption of the First Circuit's construction of the PRFRA will avoid the necessity of deciding whether the Commonwealth enjoys constitutional immunity from private FLSA suits. For all these reasons, the district court's Order should be reversed on the ground that it misinterpreted and misapplied the PRFRA.

## **II. RODRIGUEZ AND THE UNITED STATES HAVE FAILED TO UNDERMINE THE PRFAA'S SHOWING THAT IT IS ENTITLED TO SOVEREIGN IMMUNITY UNDER THE COMPACT.**

Even if the PRFRA did not foreclose the application of the FLSA private suit provision to the Commonwealth, the Compact would provide another way to resolve this case without confronting the constitutional question. *See* OB at 21-36. Although Rodriguez does not deny the Compact's binding effect, *see* AB at 28, and agrees that the Commonwealth "enjoys common law sovereign immunity," AB at

13, she and the United States deny that the Compact actually imposes any restraints on Congress's ability to override that immunity. Here again, their arguments fall short and, in all events, are foreclosed by the principle that a covenant such as the Compact requires, at a minimum, a clear statement of Congressional intent to treat the Commonwealth differently from the States and violate an essential attribute of Puerto Rico's self-governing autonomy, its sovereign immunity.

**A. Having Conceded the Commonwealth's Common Law Sovereign Immunity and that the Compact is Binding on Congress, Rodriguez Improperly Seeks to Narrow the Compact's Scope.**

Rodriguez first contends that "[t]he compact says nothing about sovereign immunity apart from anything contained in the PRFRA," AB at 25, and that the specific provisions that the Supreme Court has previously held to evidence common law sovereign immunity "are part of the PRFRA, not the compact." AB at 26. The United States also argues that the Compact's legislative history shows that it was not intended to confer sovereign immunity on the Commonwealth. USB at 16-17. They are wrong on all counts.

1. There can be no doubt that the PRFRA is an integral part of the Compact. When the Commonwealth Constitution went into force, Public Law 600<sup>5</sup> repealed specific portions of the Jones Act.<sup>6</sup> See Public Law 600 § 5 (listing

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<sup>5</sup> Act of July 3, 1950, c. 446, 64 Stat. 319 (1950) ("Public Law 600").

repealed provisions of the Jones Act). The remaining portions of the Jones Act were "continued in force" by Public Law 600. Public Law 600 § 4 ("Except as provided in section 5 of this Act, the [Jones Act] is hereby continued in force and effect and may be hereafter cited as the 'Puerto Rican Federal Relations Act.'"). As a result, the remaining portions of the Jones Act were codified as one in the PRFRA.

The United States and Rodriguez claim that because the *codification* of Public Law 600 states that "sections 731b to 731e of this title are now adopted in the nature of a compact," the codification of Section 7 of the Foraker Act<sup>7</sup> at 48 U.S.C. § 733, and the provision codified at 48 U.S.C. § 734, were therefore excluded. *See* AB at 26. Rodriguez and the United States ignore the plain language of Public Law 600 itself, which provides that "this *Act* is now adopted in the nature of a Compact . . . ." Public Law 600. That language makes clear that the entire Act, not just selective portions of it, are part of the Compact.<sup>8</sup>

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<sup>6</sup> Act of March 2, 1917, c. 145, 39 Stat. 951 (1917) ("Jones Act").

<sup>7</sup> Act of April 12, 1900, c. 191, 31 Stat. 77 (1900).

<sup>8</sup>The United States and Rodriguez also misunderstand the effect of including Section 7 of the Foraker Act in the Compact. As explained by the Supreme Court in *Porto Rico v. Rosaly y Castillo*, 227 U.S. 270 (1913), prior to the Compact, Puerto Rico was entitled to sovereign immunity by virtue of "the nature and character of the government of [Puerto] Rico," and the "sue and be sued" provision in the Foraker Act did not abrogate Puerto Rico's sovereign immunity. *Rosaly*, 227 U.S. at 275. Indeed, Section 7 embodied a recognition of Puerto Rico's

Moreover, consistent with the proper reading of Public Law 600, 48 U.S.C. § 731c provides that "Sections 731b to 731e of this title shall be submitted to the qualified voters of Puerto Rico for acceptance or rejection through a[] . . . referendum . . . ." Section 731e, in turn, incorporates the *entirety* of Chapter 4 of Title 48 by providing that "[t]his chapter is continued in force and effect." Thus, the entire chapter was submitted to the people of Puerto Rico as part of the Compact, and Sections 733 and 734 are, therefore, part of the Compact.

Finally, notwithstanding Rodriguez's and the United States' novel and ahistorical reading, the First Circuit has consistently considered the terms of the Compact to include the substantive portions of the PRFAA. *See, e.g., Garcia v. Friesecke*, 597 F.2d 284, 293 n.11 (1st Cir. 1979); *Cordova & Simonpietri Insurance Agency Inc. v. Chase Manhattan Bank N.A.*, 649 F.2d 36, 38, 39-41 (1st Cir. 1981) (Breyer, J.).

2. The United States also attempts to characterize the Compact as a simple statute that became effective when Congress passed it, and which can be unilaterally revoked or amended at any time. USB at 21. But the Government's premise is wrong. The Compact's language and history show that it did *not* become effective as between the United States and Puerto Rico until it not only (a) had been approved by Congress, but also (b) ratified and adopted by the people and sovereignty. OB at 23-24, 30. By including Section 7 in the same form in the

the government of Puerto Rico. *Examining Board of Engineers, Architects & Surveyors v. Flores De Otero*, 426 U.S. 572, 592-593 (1976) (the Compact was mutually negotiated). Indeed, Public Law 447 states expressly that the Compact would become effective only upon its "acceptance in the name of the people of Puerto Rico . . . and when the Governor of Puerto Rico . . . issue[d] a proclamation to that effect." 66 Stat. 327-328 (1952).

In this respect, then, the Compact differs from a treaty. While a treaty stands on the same footing as a statute and may be "overridden by subsequent inconsistent statutes," even then, courts will not construe later statutes to override a treaty obligation unless Congress has expressed its intent to do so in clear, express terms. *Comm. of U.S. Citizens Living in Nicar. v. Reagan*, 859 F.2d 929, 936 (D.C. Cir. 1988); *Trans World Airlines, Inc. v. Franklin Mint Corp.*, 466 U.S. 243, 252 (1984) ("A treaty will not be deemed to have been abrogated or modified by a later statute unless such purpose on the part of Congress has been clearly expressed.").

By contrast, an agreement vesting rights—which the Compact unmistakably does—is binding on future Congresses. *See, e.g., Perry v. United States*, 294 U.S. 330, 353 (1935) (rejecting the argument that the government cannot by contract restrict the exercise of sovereign power, and holding that while "[h]aving this power to authorize . . . obligations, . . . the Congress has not been vested with

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Compact, Congress maintained and reaffirmed the Commonwealth's sovereignty.

authority to alter or destroy those obligations." ).<sup>9</sup> This conclusion is confirmed in a 1971 Justice Department memorandum addressing Puerto Rico's status and approved by then-Assistant Attorney General Rehnquist. There, the Department acknowledged its position, previously expressed in 1963, that "one Congress c[an] bind subsequent ones where it creates interests in the nature of vested rights, e.g. where it makes a grant or brings about a change in status. Thus we concluded in the early 1960's that a statute agreeing that the United States would not unilaterally change the status of Puerto Rico would bind subsequent Congresses." U.S. Department of Justice, Office of Legal Counsel Memorandum, at 1, Aug. 13, 1971 (citing U.S. Department of Justice, Office of Legal Counsel Memorandum, at 3-6, July 23, 1963).

Neither the United States nor Rodriguez expressly contest Congress's ability to bind future Congresses to the terms of a mutually binding compact. Their arguments, however, strongly imply that conclusion. *See e.g.* USB at 21 (arguing that "assuming *arguendo* that Congress *could* divest itself, by "compact" or some

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<sup>9</sup> Also inapposite is the Government's citation to *Bowen v. Public Agencies Opposed to Social Security Entrapment*, 477 U.S. 41 (1986). The statute at issue in *Bowen* contained an express retention of amendment authority warranting the court's reluctance to construe the statute as binding. 477 U.S. at 54, 55. No such provision is present in the Compact. To the contrary, rejecting the Senate-passed Johnston Amendment during the conference on P.L. 447, Congress explicitly rejected a proposed reservation of power to disapprove amendments to the Commonwealth constitution. Conference Report, No. 2350, to accompany H.J. Res. 430, 82nd Cong., 2nd. Sess. (June 28, 1952).

other kind of agreement"). In all events, their apparent view that a sovereign cannot voluntarily relinquish or restrict its own power has been rejected by the Supreme Court as one that "cannot be seriously entertained by any American statesman or jurist." *Green v. Biddle*, 21 U.S. (8 Wheat.) 1, 88 (1821); *see also United States v. Bekins*, 304 U.S. 27, 53 (1938).

Indeed, to argue that Congress has "plenary power" under Article IV in all ways—except the power to make a binding commitment that transformed a former territory into a self-governing entity—is inherently self-contradictory. Moreover, such a conclusion would be particularly perverse here: Under the United States' view, Article IV grants Congress the plenary power to treat Puerto Rico as a non-self-governing entity and the power to grant it statehood or independence, but not the power to make a binding commitment that transformed Puerto Rico into a self-governing entity. Article IV cannot and should not be construed to produce such a bizarre result.

3. Rodriguez and the United States also argue that, because the Compact does not expressly mention sovereign immunity, the Commonwealth does not enjoy such immunity. AB at 28. But that argument defies the very purpose of the compact which, as the Supreme Court has explained, "was to accord to Puerto Rico the degree of autonomy and independence normally associated with States of the Union." *Examining Bd.*, 426 U.S. at 594; *see also* OB at 21-29. Indeed, there was

no reason for Congress to state expressly that Puerto Rico was entitled to sovereign immunity because Congress and the Supreme Court had *already* recognized as much since at least 1913. *People of Porto Rico v. Rosaly y Castillo*, 227 U.S. 270, 273 (1913); *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).<sup>10</sup>

Essentially, Rodriguez and the United States argue that, after more than fifty years of increasing autonomy within the American system leading up to the Compact, including the Commonwealth's well-established, pre-existing sovereign immunity, the people of Puerto Rico silently reversed course in the Compact and surrendered this essential attribute of autonomy. But neither the Supreme Court nor the First Circuit has ever suggested that the Compact contemplated such a reversal of Puerto Rico's autonomy. To the contrary, as the First Circuit said in rejecting that proposition, "the constitution of the Commonwealth is not just another Organic Act of 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).

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<sup>10</sup> Accordingly, if Congress now sought to repeal the Commonwealth's sovereign immunity (assuming it could do so constitutionally), it would have to do so in "unmistakable terms." As the Supreme Court held in *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130 (1982), "[w]ithout regard to its source, sovereign power, even when unexercised, is an enduring presence . . . and will remain intact unless surrendered in unmistakable terms." *Id.* at 148.

4. Relying upon a law review article by Professor David Helfeld, speculating on the "mood"<sup>11</sup> of Congress and divining intent from a "hypothetical legislator,"<sup>12</sup> the United States further argues that the Compact's legislative history "makes clear" that Congress did not intend to bind itself. USB at 16. But Helfeld and the Government misread the cited legislative history by confusing the central distinction between national and local sovereignty. The Compact enlarged the degree of local autonomy of the People of Puerto Rico by according them the same measure of sovereignty over *local* affairs as a state. *Examining Bd.*, 426 U.S. at 594.

Even a casual reading of the hearing testimony cited by the Government shows that the statements stand for the unremarkable proposition that the Compact did not alter the power of the *national* sovereign—the United States—over non-local matters, but moreover, that the witnesses considered the Compact to effect a pivotal change toward local sovereignty and away from national control of internal affairs. A. Cecil Snyder, Associate Justice of the Supreme Court of Puerto Rico, stated that "Puerto Rico is granted liberty and freedom in its local affairs, although it remains within the framework of the United States. It becomes a democracy

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<sup>11</sup> David M. Helfeld, *Congressional Intent and Attitude Toward Public Law 600 and the Constitution of the Commonwealth of Puerto Rico*, 21 Rev. Jur. U.P.R. 255, 293 (1952).

<sup>12</sup> *Id.* at 271.

within a larger democracy." Hearing Before the House Comm. on Public Lands on H.R. 7674 and S. 3336, 81st Cong., 2d Sess. 54 (May 16, 1950). Antonio Fernós-Isern, Resident Commissioner of Puerto Rico, stated that "The local constitution would, of course, be comparable with State a constitution," and noting that "[t]he word 'needful' in the territorial provisions of the Federal Constitution is packed with significance," that "it does not any longer appear to be 'needful' for Congress to adopt rules and regulations in what concerns the local government organization of the people of Puerto Rico . . ." *Id.* at 63. Thus, the fact that the Compact did not confer nationhood on the Commonwealth obviously does not undermine the conclusion that it recognized the Commonwealth's sovereignty with respect to local matters, just as States have sovereignty over local matters.

In addition, the United States' analysis ignores the contemporaneous and repeated statements of the United States expressing the Government's view of the binding nature of the Compact. *See* OB at 35-37. The Government's only effort to address the legislative history cited by PRFAA concerns a House Resolution that was *rejected* but which, if passed, would have expressly maintained Congress's plenary authority under the territory clause of Article IV. In a footnote, and again relying solely on Helfeld, the United States suggests that the rejection of the amendment validates the United States' current arguments because the amendment was not rejected more resoundingly! USB at 18 n.6.

Finally, the United States ignores the fact that the Compact embodied a major foreign policy commitment as well as a fundamental political commitment to the citizens of the Commonwealth. Reflecting the realities of the post-World War II world, including international concerns about colonialism, the United States unambiguously stated:

[T]here exist[s] between the people of Puerto Rico and the United States a bilateral compact of association which had been accepted by both and which, in accordance with judicial decisions, *could not be amended without common consent.*

The nature of the relations established by the compact, far from preventing the existence of the Commonwealth of Puerto Rico as a fully self-governing entity, gave the necessary guarantees for the untrammelled development and the exercise of political authority by that State. The authority of the Commonwealth of Puerto Rico was not more limited than that of any state of the Union; in fact in certain respects it was much wider.

Memorandum by the Government of the United States of America concerning the Cessation of Transmission of Information under Article 73(e) of the Charter with regard to the Commonwealth of Puerto Rico, 8 UN GAOR, C.4 (348th mtg.) 215, U.N. Doc. A/C.41/SR.348 (1953) [hereinafter U.N. Memorandum]. *See also Cordova & Simonpietri*, 649 F.2d at 40-41. The United States' position here—that Congress's power remains unaffected by the Compact—disavows the unambiguous covenant of the United States with the People of Puerto Rico and contradicts the pronouncement of the United States to the world that it has committed itself to

allow the People of Puerto Rico to govern themselves with “authority . . . much wider” than “any state.” U.N. Memorandum.

In short, the Compact's legislative history supports the conclusion that the Compact solidified the Commonwealth's status as a self-governing, sovereign entity within the federal system.<sup>13</sup>

**B. Neither Rodriguez nor the United States Disputes that, in Light of the Compact, Congress Must Make a Clear Statement of Intent to Treat the Commonwealth Differently than a State.**

At a minimum, the Compact and its history provide ample basis for requiring a clear statement of congressional intent to treat the Commonwealth differently than the States, particularly where issues going to the heart of sovereignty are at stake. *See* OB at 31-33. Because courts must not lightly infer

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<sup>13</sup> Rodriguez also relies upon the Ninth Circuit's decisions in *Norita* and *Fleming* in arguing that the Compact did not enshrine the Commonwealth's sovereign immunity. AB at 28. However, as explained above (at 9-10), the CNMI Covenant is very different from Puerto Rico's Compact. Most importantly, the Covenant expressly lists the provisions of the U.S. Constitution applicable to the CNMI, but the Eleventh Amendment is "conspicuously absent." *Fleming*, 837 F.2d at 405. Based on that, the Ninth Circuit concluded that "its drafters intended that the [CNMI] not enjoy such immunity." *Id.* By contrast, the Compact includes no such list or exclusion. *See* OB at 26-31. Thus, as the Supreme Court has recognized, "Puerto Rico occupies a relationship to the United States that has no parallel in our history." *Examining Board*, 426 U.S. at 596.

Contrary to another of Rodriguez's arguments, at AB at 27 n.24, the fact that, in the 1910's, the Supreme Court of Puerto Rico concluded that the government was not entitled to sovereign immunity should carry little if any weight in light of the Supreme Court of Puerto Rico's 1993 decision to the contrary in *Defendini Collazo v. Commonwealth of Puerto Rico*, 134 D.P.R. 28, 57-59 (P.R. 1993).

that Congress has "upset the usual constitutional balance" between federal and state powers, the Supreme Court requires a "plain statement" from Congress if it intends to change that balance. *Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991). The rationale for this rule is "an acknowledgment that the States retain substantial sovereign powers . . . powers with which Congress does not readily interfere." *Id.*

As a matter of logic and common sense, that same principle applies to Puerto Rico. In *Maysonet-Robles*, for example, the First Circuit held that Congress "must still 'unequivocally express[ ] its intent to abrogate'" the sovereign immunity of Puerto Rico. *Maysonet-Robles v. Cabrero*, 323 F.3d 43, 54 (1st Cir. 2003).

No such intention appears in the FLSA. According to Rodriguez and the United States, the Compact is "simply silent" on the sovereign immunity issue. AB at 25. But silence does not provide the requisite "plain" or "unmistakably clear" expression of intention to treat the Commonwealth differently from the States with regard to the application of FLSA's enforcement provision. *See, e.g., Trans World Airlines, Inc. v. Franklin Mint Corp.*, 466 U.S. 243, 252 (1984) (finding that a statute did not abrogate an earlier treaty where the statute made no reference to the treaty). The absence of a clear statement of Congressional intent, in the text or even in the history of the FLSA, to single Puerto Rico out for differential abrogation of sovereign immunity provides a sufficient basis to reverse the decision below.

### III. NEITHER THE UNITED STATES NOR RODRIGUEZ UNDERMINES THE COMMONWEALTH'S ENTITLEMENT TO CONSTITUTIONAL IMMUNITY FROM SUIT IN FEDERAL COURT.

If the Court nevertheless decides to reach the question of the Commonwealth's constitutional sovereign immunity, the Court should hold that the Commonwealth enjoys constitutional sovereign immunity from private damages suits in federal court to the same extent as the States. The United States does not dispute our showing that the First Circuit has consistently adhered to that position, and Rodriguez is simply wrong in suggesting (AB at 18) that the First Circuit has "abandoned" it.<sup>14</sup> Thus, a decision that Puerto Rico is *not* entitled to constitutional sovereign immunity would bring this Court in square conflict with the First Circuit in this respect as well. And contrary to Rodriguez's suggestion—which, again, the

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<sup>14</sup> In *Jusino Mercado*, for example, the First Circuit noted that it has consistently held that the Commonwealth is entitled to the same sovereign immunity as the States. *See Jusino Mercado*, 214 F.3d at 39 ("Since [the Compact] we consistently have held that Puerto Rico's sovereign immunity in federal courts parallels the states' Eleventh Amendment immunity.") (citing a "phalanx of cases"). Even after *Alden*, which Rodriguez argues held that Eleventh Amendment sovereign immunity only applies to States, the First Circuit expressly confirmed that "it is the settled law of [the First] Circuit that Puerto Rico enjoys the same immunity from suit that a State has under the Eleventh Amendment." *Maysonet-Robles v. Cabrero*, 323 F.3d 43, 53, 54 n.8 (1st Cir. 2003) (reviewing the effect of *Alden* on First Circuit authority). *See also, e.g., Redondo Constr. Corp. v. Puerto Rico Highway & Transp. Auth.*, 357 F.3d 124, 125 n.1 (1st Cir. 2004); OB at 18.

United States does not endorse—there is no conflict between the First and Ninth Circuits on this issue.<sup>15</sup>

More importantly, neither the Government nor Rodriguez articulates a sufficient legal basis for breaking ranks with the First Circuit. Like the district court below, both the United States and Rodriguez make two serious errors. First, they ignore the fact that the rationale for immunity, as articulated by the Supreme Court in *Seminole Tribe*, *Alden* and other decisions, applies with as much force to the Commonwealth as to the States. Second, they incorrectly assume that Congress has "plenary power" under Article IV to subject the Commonwealth to private suits in federal court, notwithstanding the Supreme Court's consistent holdings that powers granted to Congress in the original Constitution are not a basis for abrogating sovereign immunity.

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<sup>15</sup>The First and the Ninth Circuits have approached the issue of non-State entities' constitutional sovereign immunity in the same way—i.e., looking to the CNMI Covenant to ascertain whether the terms allowed for the survival of CNMI's sovereign immunity. See *Norita*, 331 F.3d at 694; *Fleming*, 837 F.2d at 405. The result in the Ninth Circuit was based on factors not present here—such as the Covenant's conspicuous omission of the Eleventh Amendment from the list of constitutional provisions applicable to the new government, and the court's finding that the CNMI had waived any claim to sovereign immunity it might otherwise have enjoyed. See *Norita*, 331 F.3d at 693-94, 699; *Fleming*, 837 F.2d at 405, 407.

**A. The Supreme Court's Reasons for Recognizing the States' Constitutional Immunity from Unconsented Suits in Federal Court Apply with Equal Force to the Commonwealth.**

Citing *Alden* and *Seminole Tribe*, Rodriguez and the Government argue that *only* the States may enjoy constitutional sovereign immunity. See AB at 14-15; USB at 23-24. That conclusion, however, not only is contrary to the First Circuit authority cited above, but finds no support in the Supreme Court's decisions. Indeed, neither *Seminole Tribe* nor *Alden*, nor any other Supreme Court decision, has held that *only* States are entitled to constitutional sovereign immunity. To the contrary, their reasoning necessarily extends to any sovereign within the federal system—including the federal government, which (as the United States also does not dispute) enjoys no *express* immunity from private suits either.

1. In both *Seminole Tribe* and *Alden*, the Supreme Court explained that two elements suffice to establish constitutional sovereign immunity: (1) a preexisting common law sovereign immunity and (2) an agreement or compact with the United States which either accepts or at least does not extinguish that immunity. See *Alden*, 527 U.S. at 729-30; *Seminole Tribe*, 517 U.S. at 68 (quoting *Principality of Monaco v. Mississippi*, 292 U.S. 313, 329-330 (1934) (Hughes, C.J.)).<sup>16</sup> As to the first element, Rodriguez concedes, and the United States does

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<sup>16</sup> Rodriguez's discussion of foreign sovereigns' immunity is irrelevant to the issue presented. AB at 12. The Supreme Court "sharply distinguished . . . a sovereign's immunity from suit in the courts of another sovereign" from sovereign immunity within the federal system. *Alden*, 527 U.S. at 738. The Constitution obviously

not dispute, that the Supreme Court has long held that Puerto Rico enjoys common law sovereign immunity. *See* AB at 7-9 ("Puerto Rico has common law sovereign immunity"); OB at 22-26; *supra* at 19.

As to the second element, as we have shown at length (OB at 45-50), a series of post-Compact Supreme Court cases holds that in the Compact, Congress intended "to accord to Puerto Rico the degree of autonomy and independence normally associated with States of the Union." *Examining Bd.*, 426 U.S. at 594 (citing *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 673 (1974)). And the Court has specifically explained that, especially after the Compact, "Puerto Rico, *like a state*, is an autonomous political entity, 'sovereign over matters not ruled by the Constitution.'" *Rodriguez v. Popular Democratic Party*, 457 U.S. 1, 8 (1982) (quoting *Calero-Toledo*, 416 U.S. at 673). Because States are likewise sovereign only as to "matters not ruled by the Constitution," this statement clearly indicates that the Commonwealth enjoys a degree of sovereignty that is at least comparable to that of the States. Accordingly, *Alden's* analysis supports the recognition of the Commonwealth's constitutional sovereign immunity, notwithstanding the arguments by the United States and Rodriguez that the Compact is "silent" on the issue of sovereign immunity (AB at 28; USB at 28).

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does not require the United States to accept or recognize the sovereign immunity of foreign governments. Such matters are resolved by treaty and comity.

Rodriguez nevertheless argues that "no aspect" of the history of the founding States "can be said to apply to Commonwealths." AB at 15; *see also* USB at 23-24. But that misses the point. *Alden* did not hold or suggest that a body politic must once have been an independent, national "sovereign" to enjoy sovereign immunity now. 527 U.S. at 715. Rather, as the Court put it in *Seminole Tribe*, 517 U.S. at 69 (quoting The Federalist No. 81 (Alexander Hamilton)), sovereign immunity "is the general sense and the general practice of mankind"—not just in the original thirteen states. *See also* *Principality of Monaco*, 292 U.S. at 321-23 (State sovereign immunity arises from attributes of sovereignty and is a constitutionally grounded limit on the federal judiciary). Thus, the fact that the Commonwealth was not one of the original States does not diminish its entitlement to sovereign immunity under the *Alden* analysis.<sup>17</sup>

2. At a minimum, *Seminole Tribe* and *Hans v. Louisiana*, 134 U.S. 1 (1890), on which it was based, leave no doubt about the Commonwealth's constitutional entitlement to immunity from suit *in federal court*. Like this case, and unlike *Alden*, *Seminole Tribe* dealt with Congress's authority to subject sovereigns to suit in federal court. Its holding rested, not on an interpretation of Article I (as the district court and the United States assume), or even of the

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<sup>17</sup> The practical considerations underlying the Supreme Court's recognition of sovereign immunity for the States also apply with equal force to the Commonwealth, for example, strain on governance and the treasury. *Id.* at 750-51.

Eleventh Amendment, but of Article III. And the Court's analysis applies with full force to the Commonwealth.

In reaffirming *Hans* (and overruling *Pennsylvania v. Union Gas Co.*, 491 U.S. 1 (1989)), the majority in *Seminole Tribe* held that Article III contains an implicit "presupposition" that States would not be subject to suits by individuals in Article III courts: "That presupposition, first observed over a century ago in *Hans*, ..., has two parts: first, that each State is a sovereign entity in our federal system; and second, [quoting Hamilton in *The Federalist*] that '[it] is inherent in the nature of sovereignty not to be amenable to the suit of an individual without its consent.'" 517 U.S. at 54 (quoting *Hans*, 134 U.S. at 13, in turn quoting Hamilton's statement in *The Federalist* No. 81, p. 487 (C. Rossiter ed. 1961)). Indeed, *Hans* went on to quote *The Federalist* to the effect that immunity from suit "is the general sense and the general practice of mankind; and ... one of the attributes of sovereignty." 134 U.S. at 13. *Hans* then quoted the statement by John Marshall, during the debates in Virginia surrounding Article III, that "[i]t is not rational to suppose that *the sovereign power* should be dragged before a court." *Id.* at 14 (quoting 3 Elliott, *Debates*, at 533) (emphasis added).

As the Court in *Seminole Tribe* noted, it was on this basis that the Court in *Hans* held that suits against sovereigns in Article III courts were "unknown to the law, and forbidden by the law," and therefore, except where expressly authorized,

were "not contemplated by the Constitution when establishing the judicial power of the United States" in Article III. 134 U.S. at 15; *see Seminole Tribe*, 517 U.S. at 55 (quoting the latter phrase). For that reason, according to the Court in *Seminole Tribe*, "the fundamental principle of sovereign immunity ... *limits the grant of judicial authority in Article III.*" *Id.* at 64 (quoting *Pennhurst State School and Hospital v. Halderman*, 465 U.S. 89, 97-98 (1984) (emphasis added)).

Because the Supreme Court has held repeatedly that the Commonwealth enjoys common-law sovereignty (*see* OB at 22-26, *supra* at 19)—or "the sovereign power," as Marshall put it—the Commonwealth necessarily enjoys the "attributes of sovereignty." *Hans*, 134 U.S. at 13-14. As a result, the "fundamental principle" of immunity from individual suits (*Seminole Tribe*, 517 U.S. at 64) applies to the Commonwealth, just as it does to the States. That same "fundamental principle" necessarily "limits the grant of judicial authority in Article III" so as to bar unconsented private suits against the Commonwealth, just as it bars unconsented private suits against the States.

**B. Contrary to the Arguments Advanced By Rodriguez and the United States, Article IV Does Not Authorize Congress to Abrogate the Immunity of Any Sovereign in the Federal System from Suit in Federal Court.**

Finally, there is no basis for the suggestion by Rodriguez and the United States that Congress's power under Article IV authorizes it to abrogate the Commonwealth's sovereign immunity. USB at 22, 24-25.

1. First, the Supreme Court made clear in *Seminole Tribe* that the principle of sovereign immunity "embodied in the Eleventh Amendment" cannot be abrogated "through appeal to *antecedent* provisions of the Constitution." 517 U.S. at 66 (quoting *Union Gas*, 491 U.S. at 42 (Scalia, J., dissenting)). That was the rationale for the Supreme Court's conclusion in *Seminole Tribe* that neither the Interstate Commerce Clause nor the Indian Commerce Clause in Article I gives Congress the authority to abrogate the States' sovereign immunity. *Id.*; accord *Alden*, 527 U.S. at 712. But that same rationale obviously applies to Article IV, which likewise is "antecedent" to the Eleventh Amendment. Accordingly, Congress has no more authority to abrogate sovereign immunity under Article IV than it has under Article I.

Indeed, consistent with the limitation recognized in *Seminole Tribe*, the only provision that the Court has recognized as providing Congress with the power to abrogate sovereign immunity is Section 5 of the Fourteenth Amendment, which was adopted more than 60 years *after* the Eleventh Amendment. *See, e.g., Nevada Dep't of Human Resources v. Hibbs*, 538 U.S. 721 (2003); *Tennessee v. Lane*, 541 U.S. 509 (2004). The United States has not attempted to rely upon Section 5 as a basis for the FLSA.

The argument that Article IV provides a basis for abrogating sovereign immunity is particularly misplaced with respect to suits in federal court. *Seminole*

*Tribe* held that Congress cannot rely upon Article I to "expand the scope of the federal courts' jurisdiction" because, as the Court put it, Article III "'set[s] forth the *exclusive* catalog of permissible federal-court jurisdiction.'" 517 U.S. at 65 (quoting *Union Gas*, 491 U.S. at 39 (Scalia, J., dissenting) (emphasis in original)). The same reasoning forecloses any attempt to abrogate the Commonwealth's immunity from suit in federal court through Congress's Article IV powers.

2. In light of this background, it is significant that neither the district court nor Rodriguez nor the United States has cited a single case holding, or even suggesting, that constitutional sovereign immunity can be overridden by an exercise of Congress's Article IV powers. Instead, they rely principally upon the Supreme Court's per curiam decision in *Harris v. Rosario*, which held that, in structuring federal benefit programs, "Congress may . . . treat Puerto Rico differently from the states." 446 U.S. 651 (1980) (per curiam). See AB at 2, 23-24; USB at 15. Their reliance upon *Harris* is misplaced for at least two reasons.

First, *Harris* did not address the question at issue here, namely, whether Article IV gives Congress the authority to override the Commonwealth's immunity from suits by private parties. Whatever authority Congress may have to treat the Commonwealth differently for purposes of spending programs, that authority has nothing to do with Congress's power to override the Commonwealth's sovereign immunity. Much less does it authorize Congress to invest the *federal* courts with a

power that Article III does not give them, namely, the power to hear private suits against an unconsenting sovereign.

Second, aside from its irrelevance to the issue of sovereign immunity, *Harris* does not sweep as broadly as the United States contends. *Harris* merely addressed whether Congress can "treat Puerto Rico differently from the states" for purposes of federal *entitlement* programs, given that Commonwealth residents do not pay federal income taxes and differ from residents of the states in other ways. 446 U.S. at 651. For Equal Protection purposes, Congress can treat different geographic jurisdictions—including different States—differently if it has a rational basis for doing so, as long as it does not employ invidious classifications such as race or ethnicity. *Harris* confirms this is true for spending programs, as it is for some other forms of federal legislation. See *Califano v. Torres*, 435 U.S. 1, 5 (1978) (per curiam); *United States v. Cohen*, 733 F.2d 128, 134-36 (D.C. Cir. 1984) (Scalia, J.) (en banc). But that authority is fully consistent with the Compact and with the Commonwealth's status as a sovereign in the federal system.<sup>18</sup>

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<sup>18</sup> Alternatively, the Government suggests that it has the power to override the Commonwealth's sovereign immunity because the matter at issue—the relationship between the Commonwealth and its employees—"is a quintessential matter of federal concern," USB at 15-16, citing *United States v. Darby*, 312, U.S. 100 (1941). But *Darby*, which addressed regulation of private sector wages, has no bearing on the special immunity that protects the States and Puerto Rico from private damages suits in federal court.

Like the arguments adopted by the district court, the arguments advanced by Rodriguez and the United States ignore the reasoning of the Supreme Court's decisions on sovereign immunity. Accordingly, we respectfully suggest that the Court, either through statutory construction or constitutional interpretation, reject the effort to redefine the fundamental relationship between the United States and the Commonwealth in a way that conflicts with decisions of the First Circuit on this important and sensitive issue.

### **CONCLUSION**

For these reasons and those in our opening brief, the Court should grant PRFAA's petition to appeal, hold that the Commonwealth is immune from private suit under the FLSA, and reverse the district court's Order with instructions to dismiss the case.

Respectfully submitted,

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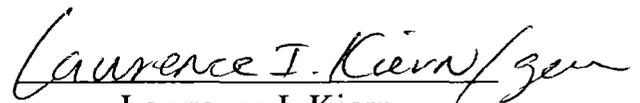
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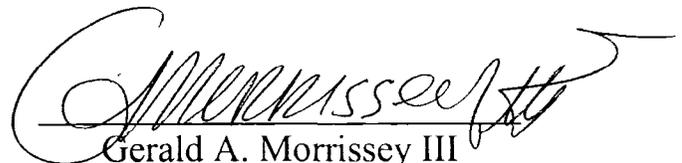
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