

Introduction and Overview

As explained herein, it has been well-settled law for nearly a century that Puerto Rico's government enjoys sovereign immunity from private lawsuits brought without the Commonwealth's consent. Thus, the issue at hand for the Commission therefore is not whether Puerto Rico enjoys sovereign immunity; rather, it is whether Congress, through the Shipping Act, has abrogated that immunity, thus allowing private parties to bring adjudicative complaint before the Commission against the Commonwealth without its consent.

A determination of Congressional abrogation of sovereign immunity must clear two hurdles: first, has Congress unequivocally expressed its intent to abrogate the immunity, and second, has Congress acted pursuant to a valid constitutional exercise of power in its effort to abrogate the immunity. *Seminole Tribe v. Florida*, 517 U.S. 44, 55 (1996), citing *Green v. Mansour*, 474 U.S. 64, 68 (1985).

Based on recent appellate precedent, it appears that the Commonwealth of Puerto Rico fully retains its sovereign immunity in Shipping Act cases. There is a strong general presumption, grounded both in statute and caselaw, that Puerto Rico is to be treated like a state for the purposes of federal statutes of general application. This presumption, combined with the Shipping Act's lack of clear language negating the Commonwealth's immunity, suggests that Congress has not acted unequivocally through legislation to abrogate Puerto Rico's immunity. *Accord Jusino Mercado v. Commonwealth of Puerto Rico*, 214 F.3d 34 (1st Cir. 2000).

Recent Jurisprudence Regarding State Sovereign Immunity

The Commission's request for additional briefing is made in light of the Supreme Court's recent decisions in *Seminole Tribe* and its progeny, including *Alden v. Maine*, 527 U.S. 706, 119 S.Ct. 2240, 2256, 144 L.Ed.2d 636 (1999) and, of course, *Federal Maritime Commission v.*

South Carolina State Ports Authority, 535 U.S. 743 (2002), in which the Supreme Court extensively refined or revised its analysis of the nature, source and scope of constitutional, (i.e., “Eleventh Amendment” immunity,) and Congress’ power to alter or overcome it.

The Eleventh Amendment forbids the extension of “[t]he Judicial power of the United States” to “any suit in law or equity” filed against an unconsenting State by a private litigant. However, courts have long held that the Eleventh Amendment’s narrowly-focused text does not represent the full scope of the states’ immunity. For example, in *Hans v. Louisiana*, 134 U.S. 1 (1890), the Court held that the Eleventh Amendment prevents federal courts from hearing suits against unconsenting States by the States’ own citizens, although the Amendment speaks only of suits by “Citizens of another State.” See also *Principality of Monaco v. Mississippi*, 292 U.S. 313 (1934) (barring suits by foreign states).

In *Seminole Tribe* and *Alden*, the Court made it clear that the immunity enjoyed by the states is quite broad, and – to the surprise of many – it is derived from the Constitution, rather than from the common law. In *Alden*, the Court explained that it is the Constitution’s structure, that is, the bargain of shared sovereignty struck between the states and the federal government, from which the states’ immunity derives. The Court in *Alden*, 527 US at 712, justified the somewhat abstract constitutional derivation of the immunity in this way:

The sovereign immunity of the States neither derives from, nor is limited by, the terms of the Eleventh Amendment. Rather, as the Constitution’s structure, its history, and the authoritative interpretations by this Court make clear, the States’ immunity from suit is a fundamental aspect of the sovereignty which the States enjoyed before the ratification of the Constitution, and which they retain today (either literally or by virtue of their admission into the Union upon an equal footing with the other States) except as altered by the plan of the Convention or certain constitutional Amendments.

Although the Constitution establishes a National Government with broad, often plenary authority over matters within its recognized competence, the founding document “specifically recognizes the States as sovereign entities.” *Seminole*

Tribe []; accord, *Blatchford v. Native Village of Noatak*, 501 U.S. 775, 779, 111 S.Ct. 2578, 115 L.Ed.2d 686 (1991) ("[T]he States entered the federal system with their sovereignty intact"). Various textual provisions of the Constitution assume the States' continued existence and active participation in the fundamental processes of governance. See *Printz v. United States*, 521 U.S. 898, 919, 117 S.Ct. 2365, 138 L.Ed.2d 914 (1997) (citing Art. III, § 2; Art. IV, §§ 2-4; Art. V). The limited and enumerated powers granted to the Legislative, Executive, and Judicial Branches of the National Government, moreover, underscore the vital role reserved to the States by the constitutional design, see, e.g., Art. I, § 8; Art. II, §§ 2-3; Art. III, § 2. Any doubt regarding the constitutional role of the States as sovereign entities is removed by the Tenth Amendment, which, like the other provisions of the Bill of Rights, was enacted to allay lingering concerns about the extent of the national power. The Amendment confirms the promise implicit in the original document: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. Const., Amdt. 10; see also *Printz*, supra, at 919, 117 S.Ct. 2365; *New York v. United States*, 505 U.S. 144, 156-159, 177, 112 S.Ct. 2408, 120 L.Ed.2d 120 (1992).

The Court in *Alden* went on to explain that the Constitution preserves the sovereign status of the States in two ways. First, it reserves to them a substantial portion of the Nation's primary sovereignty, together with the dignity and essential attributes inhering in that status. The States "form distinct and independent portions of the supremacy, no more subject, within their respective spheres, to the general authority than the general authority is subject to them, within its own sphere." 527 US at 714, quoting *The Federalist* No. 39, p. 245 (C. Rossiter ed. 1961) (J. Madison). Second, it explained that the constitutional design rejected the concept of a central government that would act hierarchically upon and through the States; instead, it adopts "a system in which the State and Federal Governments would exercise concurrent authority over the people--who were, in Hamilton's words, 'the only proper objects of government.'" *Id.* Based on these structural factors (coupled with the understandings of the framers and ratifying conventions), the Court held that the Constitution itself provides the source of the states immunity.

The Court's seemingly academic conclusion regarding the origin of state immunity

actually had startling practical impact, as the Court reasoned that if the states' immunity is constitutional, then it is inviolable, and Congress is powerless to abrogate it. Thus, in *Seminole Tribe*, the Court invalidated a congressional effort to abrogate the states' sovereign immunity in the Indian Gaming Act, which on its face permitted tribes to sue states to force compliance. In so doing, the Court reversed *Pennsylvania v. Union Gas Co.*, 491 U.S. 1, 13- 23, 109 S.Ct. 2273, 105 L.Ed.2d 1 (1989) (plurality opinion), which had held that Congress had the power to remove the states' immunity when acting pursuant to its Article I Commerce Clause power. This negated long-held views that Congress had the authority to remove state immunity in areas where its legislative power was plenary, such as interstate commerce. The Supreme Court's holding represented "a sea change in prevailing Eleventh Amendment jurisprudence," because of the fundamental shift in the balance of authority between the states and Congress it effected. *Jusino Mercado*, 214 F. 3d at 38 (examining the impact of *Seminole Tribe* on Puerto Rico's sovereign immunity).

Alden, in turn, confirmed that the constitution's grant of state immunity extends past the federal courthouse; in that case, the Court found that a suit against Maine brought by state employees under the federal Fair Labor Standards Act was barred by sovereign immunity from going forward in Maine state Court. Finally, in *South Carolina*, the Court found that the states' constitutional immunity extends beyond any courthouse, shielding them from complaint cases brought by private parties before the Commission, an independent agency, under the Shipping Act.

Puerto Rico's Sovereign Immunity

Background Regarding of Puerto Rico's Status

Puerto Rico was ceded to the United States by Spain under the Treaty of Paris of December 10, 1898, 30 Stat. 1754, 1755 (1899), after the Spanish-American War. In 1900, Congress established a temporary civil government for Puerto Rico to administer local affairs and to provide revenue, under the Foraker Act, 31 Stat. 77, April 12, 1900. The inhabitants of Puerto Rico were declared to be citizens of Puerto Rico, but afforded protections of the Constitution and laws of the United States.

The Foraker Act was superseded by the Jones Act in 1917, 39 Stat. 951, 48 U.S.C.A. Section 731 et seq., which vested further local legislative powers in the government of Puerto Rico, including a bicameral legislature. Under that act, nearly all inhabitants of Puerto Rico were declared to be citizens of the United States. That act, which provided a substantial degree of autonomy over local governance, remained as Puerto Rico's primary organizing legislation, with minor amendments, until 1950.

On July 3, 1950, the President approved Public Law 600, an Act "To provide for the organization of a constitutional government by the people of Puerto Rico." 64 Stat. 319, 48 U.S.C.A. Sections 731b-731e. This Act enabled Puerto Rico and the United States to enter a compact, whereby the people of Puerto Rico could organize a government pursuant to a constitution of their own adoption. The compact was approved by the voters of Puerto Rico on June 4, 1951; a constitutional convention was convened, and the constitution drafted by it was ratified by the people of Puerto Rico on March 3, 1952, 48 U.S.C.A. Section 731d note. The President submitted it to Congress which, with minor amendments, approved it by Joint Resolution of Congress, 66 Stat. 327, on July 3, 1952. The Governor of Puerto Rico proclaimed

the constitution of the Commonwealth of Puerto Rico to be in force on July 25, 1952.

The nature of Puerto Rico's sovereignty and relationship with the United States is vastly more complex than the above narrative suggests, however. There continues to be ample debate as to what the exact legal effect the Compact, the related federal legislation, and the Puerto Rico and United States Constitution have with regard to the intersecting sovereignty of the two entities. See, e.g., *Proceedings of the First Circuit Judicial Conference - Applicability of The United States Constitution And Federal Laws To The Commonwealth Of Puerto Rico*, 110 F.R.D. 449 (1985) (providing an overview of several areas of dispute or uncertainty surrounding the application of federal authority to Puerto Rico).

Since 1952, the federal courts have had several occasions to review the applicability of federal laws to Puerto Rico, and have generally approached these inquiries on a case-by-case basis. As a general matter, the Supreme Court clarified in *Harris v. Santiago Rosario*, 446 U.S. 651 (1980), that Congress is empowered under the Territorial Clause of the Constitution, U.S. Const. Art. IV, s 3, Cl. 2, to "make all needful Rules and Regulations" respecting Puerto Rico, and that Puerto Rico may be treated differently than a state for cause (in that case, with regard to the administration of Aid to Families With Dependent Children benefits). However, the issue as to whether Puerto Rico is treated as a "state" or as a "territory" for the purposes of a particular piece of legislation tends to vary from statute to statute, based inter alia on the Courts' reading of Congress' intent in that law. Whether Puerto Rico is to be treated as a state or a territory for purposes of a particular statute that does not mention it specifically "depends upon the character and aim of the act." *Jusino-Mercado*, 214 F. 3d at 40, quoting *Puerto Rico v. Shell Co.*, 302 U.S. 253, 258, 58 S.Ct. 167, 82 L.Ed. 235 (1937); accord *Cordova & Simonpietri Ins. Agency, Inc. v. Chase Manhattan Bank*, 649 F.2d 36, 38 (1st Cir. 1981).

Longstanding Precedent Regarding Puerto Rico's Sovereign Immunity

In 1913, the Supreme Court addressed directly the issue of Puerto Rico's sovereign immunity, in *Porto Rico v. Rosaly y Castillo*, 227 U.S. 270 (1913). In that case, the Court found that Puerto Rico enjoyed immunity from suit brought by private parties without its consent. The Court's decision appears to suggest that the basis for the immunity was traditional common law immunity principles, or, put another way, Congress' apparent intent in the Foraker Act that traditional principles of common law sovereignty apply to the territory. The Court examined the Foraker Act's efforts to vest certain state-like characteristics and local self-governance on (then-named) Porto Rico, and concluded that "the government which the organic act established in Porto 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." *Id.* at 273. Since that time, the First Circuit repeatedly has held, with little or no discussion, that Puerto Rico's sovereign immunity in federal courts parallels the states' Eleventh Amendment immunity. See, e.g., *Ortiz-Feliciano v. Toledo-Davila*, 175 F.3d 37, 39 (1st Cir.1999); *Torres*, 175 F.3d at 3; *Metcalf & Eddy, Inc. v. Puerto Rico Aqueduct & Sewer Auth.*, 991 F.2d 935, 939 n. 3 (1st Cir.1993), *aff'd* 506 U.S. 139, (1993); *De Leon Lopez v. Corporacion Insular de Seguros*, 931 F.2d 116, 121 (1st Cir.1991); *Fred v. Roque*, 916 F.2d 37, 38 (1st Cir.1990); *Ezratty v. Puerto Rico*, 648 F.2d 770, 776 n. 7 (1st Cir.1981). In *Metcalf & Eddy*, the Supreme Court declined to review the First Circuit's extension of Eleventh Amendment immunity to Puerto Rico, noting that it was a longstanding position of that Circuit and was not contested by the parties.¹ This tacit acceptance

¹ See also *Ursulich v. Puerto Rico Nat. Guard*, 384 F.Supp. 736 (DCPR 1974). (tort claim against Puerto Rico National Guard was suit against Commonwealth, barred by sovereign immunity), in which the court explains: "It is an established principle of law in our system, which rests on grounds of public policy, that the sovereign cannot be sued in its own courts or any other court without its consent and permission. It is inherent in the nature of the sovereignty not to be amenable to a suit by an individual without its consent. This principle applies with full force to the several states of the Union. See 57 Am.Jur.2d, S. 24. See also

of the First Circuit's position, while not binding in nature, illustrates the well-established nature of the circuit court's precedent.

Not surprisingly, none of the cases cited above engaged in any in-depth analysis of Puerto Rico's immunity, i.e., whether it was constitutional, statutory, or common law in nature, or whether it could be abrogated by the Congress. Such issues were not generally matters of concern in the era before *Seminole Tribe*, in which the Court radically altered Congress' authority to negate state immunity from suit. Instead, it was simply taken on principle that Puerto Rico enjoyed immunity parallel to the states.

The First Circuit's Opinion in *Jusino-Mercado*

In *Jusino-Mercado*, the First Circuit confronted for the first time the potential inconsistency between its view of Puerto Rican sovereign immunity as parallel to the states, and the Supreme Court's pronouncements in *Seminole Tribe* and *Alden* that found that the states' immunity is rooted in the Constitution's structure.

In the *Jusino Mercado* case, the plaintiffs recognized that Puerto Rico enjoys immunity from suit, but asserted that Congress had abrogated Puerto Rico's immunity to suit, under the plain language of the Fair Labor Standards Act (FLSA), which expressly permits suits against states and territories. In so doing, plaintiffs made an "arresting argument" that Puerto Rico's immunity (unlike the states') could be abrogated by Congressional statute, because Puerto Rico's immunity was based in common law principles, rather than the Constitution.

Eleventh Amendment to the Constitution of the United States of America. That the principle is, likewise, applicable to the Commonwealth of Puerto Rico is clear, for the Commonwealth possesses many of the attributes of sovereignty, and has full power of local self-determination similar to the one the states of the Union have. See e.g. *Krisel v. Durand* (D.C.P.R.1966), 258 F.Supp. 845, *aff'd.* (1st Cir. 1967), 386 F.2d 179; *Salkin v. Commonwealth of Puerto Rico* (1st Cir. 1969), 408 F.2d 682; *In Re Northern Transatlantic Carriers Corp.* (D.C.P.R.1969), 300 F.Supp. 866. Immunity from suit without its consent is one of those attributes. Such was the state of the law even prior to the creation of the Commonwealth of Puerto Rico, *Porto Rico v. Rosaly*, 227 U.S. 270, 33 S.Ct. 352, 57 L.Ed. 507 (1913); *Puerto Rico v. Shell Co.*, 302 U.S. 253 (1937); *Bonet v. Yabucoa Sugar Co.*, 306 U.S. 505 (1938).

The court, however, rejected the plaintiff's position, and held that Congress did not abrogate Puerto Rico's immunity through passage of the FLSA. Rather than confronting the constitutional issue of whether Congress had the authority to void the state's immunity, the court used ordinary tools of statutory construction to conclude that Congress did not intend in the FLSA to strip the Commonwealth's immunity to suit. The Court explained:

Let us be perfectly clear. We do not gainsay that, under the Territorial Clause, Congress may legislate for Puerto Rico differently than for the states. See *Harris v. Rosario*, 446 U.S. 651, 651-52, 100 S.Ct. 1929, 64 L.Ed.2d 587 (1980). Here, however, we need neither speculate about that aspect of the matter nor attempt to map the outer limits of Congress's power under the Territorial Clause. We ground our holding in statutory construction rather than constitutional capacity: given the language of the FLSA, the context in which Congress amended it to reach public agencies, and the guidance provided by the Federal Relations Act, reading the law to intrude more profoundly on Puerto Rico's sovereignty than on that of the states would contradict what we discern to be Congress's manifest intent. To harmonize our reading of the statute with this intent and to maintain the parallelism that Congress sought to achieve, we construe the FLSA as failing to overcome Puerto Rico's immunity.

Essentially, the First Circuit used tools of statutory construction to ensure Puerto Rico's common law immunity worked in parallel with the states' constitutional immunity. The opinion relied on the Puerto Rican Federal Relations Act, 48 U.S.C. § 734, for the proposition that “[t]he 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” Further, it noted that Congress intended Puerto Rico's commonwealth status “to accord to Puerto Rico the degree of autonomy and independence normally associated with States of the Union.” *Jusino-Mercado*, 214 F.3d at 42 (quoting *Examining Bd. of Eng'rs, Architects & Surveyors v. Flores de Otero*, 426 U.S. 572, 594 (1976)). Thus, the First Circuit determined that, “long before Congress enacted the relevant provision of FLSA, it had put firmly in place a default rule: statutes of general application would apply equally to Puerto Rico and to the fifty

states *unless* Congress made specific provision for differential treatment,” *Id.* (emphasis in original). To overcome this “default” presumption, the First Circuit held, Congress must be unmistakably clear about its intention to treat Puerto Rico unequally. No such intention was found in this case.

Rodriguez v. Puerto Rico Federal Affairs Administration

In *Rodriguez v. Puerto Rico Federal Affairs Admin.*, 338 F.Supp.2d 125 (D.D.C. 2004) the federal District Court for the District of Columbia faced an issue nearly identical to that *Jusino-Mercado*, i.e., whether Congress abrogated the Commonwealth’s immunity in the FLSA. On brief in that case, the Commonwealth conceded that Puerto Rico’s sovereign immunity “emanates from a statute,” and is not rooted in the Constitution like state sovereign immunity. (Defendant’s Reply in Support of Motion to Dismiss at 4.) Nevertheless, the Commonwealth urged the court to follow the First Circuit’s example in *Jusino-Mercado*, and use statutory construction and legislative intent to conclude that Congress had not eliminated Puerto Rico’s immunity to suit.

The D.C. District Court declined, however, to follow *Jusino-Mercado*, holding that the plain language of the FLSA (allowing suits against states and territories) simply could not bear the weight of the intent-based interpretation that the First Circuit sought to impose on it. “The First Circuit’s inability to conceive that Congress would have chosen to impose FLSA on Puerto Rico had it known that it could not do so for the states, and its purported certainty about what Congress meant when it enacted the 1974 amendments, amount to, I respectfully suggest, (i) speculation, (ii) about legislative intent, (iii) in the face of unambiguous statutory language requiring a different result.” *Id.* Accordingly, the Court held that the plain language of FLSA

abrogates Puerto Rico's immunity from suit, even though the statute fails in its attempt to similarly abrogate the states' immunity.

Application of Puerto Rico's Sovereign Immunity to Shipping Act Proceedings

Applying the reasoning of *Jusino-Mercado* to the Shipping Act context, it is clear that Puerto Rico retains its immunity from private actions arising under the Act. Simply put, Congress has in no way acted to divest the Commonwealth of its long-recognized sovereign immunity.

As discussed above, it is beyond dispute that Puerto Rico enjoys sovereign immunity from suit similar to the states, based upon long-recognized common law and statutory foundations. However, both the First Circuit and the Commonwealth itself (on brief in *Rodriguez*) seem to recognize that, in the wake of *Seminole Tribe* and *Alden*, Puerto Rico's immunity seems to spring from a different source, i.e., federal statutes and common law, than state immunity, which is enshrined in the Constitution itself. This is hardly fatal to the Commonwealth position, however, as the Commonwealth's immunity can continue to "parallel" the states, even if it originates from a different source, unless Congress expressly directs otherwise.

For a court to find that Congress has abrogated sovereign immunity, it must find that (1) Congress unequivocally expressed its intent to abrogate the immunity, and (2) Congress acted pursuant to a valid constitutional exercise of power in its effort to abrogate the immunity. *Seminole Tribe*, 517 U.S. at 55. As in *Jusino-Mercado*, there is no need to dwell on the second point, the scope of Congress' power in the post-*Alden* era, when under the first point it is clear: regardless of whether Congress could abrogate the states' immunity, the fact is, Congress has not legislated in the Shipping Act to negate the Commonwealth's immunity to suit.

To determine whether a federal statute properly subjects States to suits by individuals, courts apply a "simple but stringent test: 'Congress may abrogate the States' constitutionally secured immunity from suit in federal court only by making its intention unmistakably clear in the language of the statute.'" *Kimel v. Florida Bd. of Regents*, 528 U.S. 62, 73 (2000), quoting *Dellmuth v. Muth*, 491 U.S. 223, 228 (1989) and *Atascadero State Hospital v. Scanlon*, 473 U.S. 234, 242, (1985)).

A careful reading of the language of the Shipping Act shows that nowhere in the statute has Congress expressly indicated an intent that Puerto Rico (or other territories or states) be held answerable to private complaints brought before the agency by aggrieved parties. Unlike statutes such as the Age Discrimination in Employment Act (at issue in *Kimel*) and the Fair Labor Standards Act (at issue in *Jusino-Mercado* and *Rodriguez*), there is no language in the Shipping Act's substantive or enforcement provisions specifically applying them to states or territories. Rather, the Act applies in generic terms to "marine terminal operators" ("a person engaged in the United States in the business of furnishing in wharfage, dock, warehouse or other terminal facilities") 46 App. USC § 1702(14). The adjudicative provisions in section 11 of the Shipping Act contemplate complaints against "persons," defined as "individuals, corporations, partnerships, and associations existing under or authorized by the laws of the United States or a Foreign Country." *Id.* at § 1710(b), 1702(18). There is no explicit inclusion of states or territories in the text.² Accordingly, there can be no conclusion that Congress meant to strip Puerto Rico of its sovereign protections.

² As the Commission noted in its Order, the Supreme Court has held that the Shipping Act applies to states entities that are engaged in marine terminal and other regulated activities. *California v. United States*, 320 U.S. 577 (1944). However, this clearly is not the same as finding that Congress intended to subject sovereign entities to private complaint proceedings. Private complaints are but one means of enforcing the Shipping Act, as the Supreme Court in *South Carolina* emphasized. 535 U.S. at 768. States

The conclusion that the text of the Shipping Act does not abrogate the Commonwealth's immunity is bolstered by the additional factors cited in *Jusino-Mercado*, that is, the strong legislative and judicial policy favoring equal treatment of Puerto Rico and the states. The court in that case explained:

Congress has advised us with uncharacteristic bluntness that it does not intend a generally applicable statute to regulate Puerto Rico to the full extent allowed by the Constitution unless it either specifically singles out Puerto Rico or imposes similar regulations on the states. *See 48 U.S.C. § 734*. In other words, it has instructed us to refrain from inferring that statutes which have limited effect upon the fifty states silently apply with greater force to Puerto Rico. *See id.* To cinch matters, strong policy considerations--especially those involving Congress's efforts to fulfill the promise of Federal Relations Act and to ensure Puerto Rico a degree of autonomy normally associated with the states, *see [Examining Bd. of Eng'rs, Architects & Surveyors v. Flores de Otero, 426 U.S. 572, 594 (1976)]* -- counsel against reading the FLSA in a parochial fashion. *See Cordova & Simonpietri, 649 F.2d at 42.*

214 F.3d at 44.³

In this instance, there is no indication whatsoever, in the Shipping Act or elsewhere, that Congress meant the Shipping Act to apply differently to Puerto Rico than to the states. Accordingly, it would violate the strong judicial and legislative policy of non-discrimination against Puerto Rico to read into the Shipping Act an intent to abrogate Puerto Rico's immunity, when there is no corresponding divestiture of the states' sovereign defenses.

and Territories can maintain their sovereign immunity and still remain fully subject to the Shipping Act, and party to Commission investigations and penalty-assessment proceedings.

³ *See also Mullaney v. Anderson, 342 U.S. 415, 419-420 (1952)*. In that case, the Court noted a statutory requirement that "all the laws thereof which are not locally inapplicable, shall have the same force and effect within the said territory as elsewhere in the United States." From that, Court rejected the presumption that that Congress authorized the Territorial Legislature to treat citizens of States the way States cannot treat citizens of sister States, holding that "only the clearest expression of Congressional intent could induce such a result." Clearly such a strong intent is not present in the Shipping Act. *Cf. Torres v. Com. of Puerto Rico, 442 U.S. 465 (1979)*.

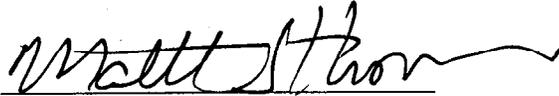
Conclusion

We renew our request that the Commission simply adopt the First Circuit's holdings that PRPA is not an arm of the state, and leave aside the nature of Puerto Rico's sovereign immunity. In our view, the Commonwealth's status is irrelevant here, as PRPA does not share in the Commonwealth's immunity.

If the Commission is determined to reach the issue of the Commonwealth's sovereign immunity, we would respectfully urge the Commission, based on the foregoing, to recognize that Puerto Rico continues to enjoy sovereign immunity from suit, and nothing in the Shipping Act operates to abrogate that immunity.

This 7th day of January 2005.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that on this 7th day of January 2005, a copy of the foregoing Second Response to Respondent's Motion To Dismiss was served on the following persons:

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