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February 15, 2005

VIA COURIER

The Honorable 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; Int'l Shipping Agency v. Puerto Rico Ports Authority, FMC No. 04-01; San Antonio Maritime Corp., et. al. v. Puerto Rico Ports Authority, FMC No. 04-06*

Dear Secretary VanBrakle:

Enclosed please find an unbound original and copy as well as fifteen bound copies of RESPONDENT'S REPLY BRIEF REGARDING THE SOVEREIGN IMMUNITY OF THE COMMONWEALTH OF PUERTO RICO, submitted for filing this day in the above-captioned matters on behalf of our client, Respondent Puerto Rico Ports Authority.

If you have any questions, please feel free to contact me.

Respectfully submitted,



Daniel H. Charest

Enclosures

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**BEFORE THE
FEDERAL MARITIME COMMISSION**

**ODYSSEA STEVEDORING OF
PUERTO RICO, INC.,
Complainant,**

v.

**PUERTO RICO PORTS
AUTHORITY,
Respondent;**

* * * * *

**INTERNATIONAL SHIPPING
AGENCY, INC.,
Complainant,**

v.

**PUERTO RICO PORTS
AUTHORITY,
Respondent;**

* * * * *

**SAN ANTONIO MARITIME
CORPORATION,
Complainant,**

v.

**PUERTO RICO PORTS
AUTHORITY,
Respondent.**

* * * * *

Docket Nos. 02-08; 04-01
and 04-06

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**RESPONDENT'S REPLY BRIEF
REGARDING THE SOVEREIGN IMMUNITY OF
THE COMMONWEALTH OF PUERTO RICO**

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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 Federal Maritime Commission (the "Commission"): *Odyssea Stevedoring of Puerto Rico v. Puerto Rico Ports Auth.*, Docket No. 02-08; *International Shipping Agency v. Puerto Rico Ports Auth.*, Docket No. 04-01; and *San Antonio Maritime Corporation v. Puerto Rico Ports Auth.*, Docket No. 04-06. Pursuant to various orders, each action is stayed, pending the Commission's decision on the Ports Authority's sovereign immunity. Having concluded that "[t]he parties ha[d] provided adequate briefing on the issue of PRPA's status *vel non* as an arm of the state," the Commission ordered the parties to brief "the issue of whether the Commonwealth of Puerto Rico should be treated like a state for the purposes of constitutional sovereign immunity."¹

The briefing schedule, as initially established by the Commission on November 22, 2004, directed two rounds of briefs. The opening briefs were due January 7, 2005, and the reply briefs on January 28, 2005.² On December 10, 2004, Complainants filed a joint motion asking the Commission to reconsider its order and, in the alternative, requesting more time to address the issue raised in the FMC Order.³ The Ports Authority

¹ Order, *Odyssea Stevedoring v. Puerto Rico Ports Auth.*, Docket Nos. 02-08; 04-01; 04-06 at 4 (F.M.C. Nov. 22, 2004) ("FMC Order").

² *Id.* at 4.

³ See Joint Petition for Reconsideration of the Order of November 22, 2004, *Odyssea Stevedoring v. Puerto Rico Ports Auth.*, Docket Nos. 02-08; 04-01; 04-06 at 4 (Dec. 10, 2004) ("Joint Petition") (stating that the issue of the Commonwealth's sovereign immunity is "a complex and far-reaching question").

opposed Complainants' motion on December 15, 2004.⁴ The Commission denied Complainants' motion on December 22, 2004, but accommodated Complainants and delayed the briefing schedule.⁵ In accordance with the revised schedule, the parties submitted opening briefs on January 7, 2005.⁶

B. Summary of the Reply.

Rather than directly address the question that the Commission posed, Complainants persist in asserting the impropriety of the issue and revert to their erroneous "arm of the state" arguments. Complainants continue to urge precedent that the Commission has stated is not binding and seek to ignore recent Commission authority directly on point. Under the appropriate authority, the Ports Authority is an arm of the Commonwealth. As such, the Commonwealth's sovereign immunity is a threshold issue.

Two Complainants, San Antonio Maritime Corp. ("SAM") and International Shipping Agency, Inc. ("Intership"), concede that the Commonwealth of Puerto Rico ("Commonwealth") is entitled to statutory sovereign immunity⁷ and is therefore immune

⁴ See Opposition to Complainants' Joint Petition for Reconsideration of the Commission's Order to Brief the Sovereign Immunity Issue, *Odyssey Stevedoring v. Puerto Rico Ports Auth.*, Docket Nos. 02-08; 04-01; 04-06 (Dec. 15, 2004).

⁵ Order, *Odyssey Stevedoring v. Puerto Rico Ports Auth.*, Docket Nos. 02-08; 04-01; 04-06 (F.M.C. Dec. 22, 2004).

⁶ See Respondent's Brief Regarding the Sovereign Immunity of the Commonwealth of Puerto Rico, *Odyssey Stevedoring v. Puerto Rico Ports Auth.*, Docket Nos. 02-08; 04-01; 04-06 (Jan. 7, 2005) ("PRPA Brief"); Complainant's Opening Memorandum in Compliance with the Order of the Commission Served November 22, 2004, *Odyssey Stevedoring v. Puerto Rico Ports Auth.*, Docket No. 02-08 (Jan. 7, 2005) ("Odyssey Brief"); Complainant's Response to the Commission's Notice of November 22, 2004, *Int'l Shipping Agency v. Puerto Rico Ports Auth.*, Docket No. 04-01 (Jan. 7, 2005) ("Intership Brief"); Brief of San Antonio Maritime Corporation and Antilles Cement Corporation Pursuant to Order of November 22, 2004, *San Antonio Maritime Corp., et al. v. Puerto Rico Ports Auth.*, Docket No. 04-06 (Jan. 7, 2005) ("SAM Brief"). In addition, the Solicitor General of the Commonwealth of Puerto Rico filed a *Amicus Curiae* Brief on behalf of the Commonwealth. See Commonwealth of Puerto Rico's Brief on Its Entitlement to Sovereign Immunity from the Adjudication of Privately-Filed Complaints Alleging Violations of the Shipping Act, *Odyssey Stevedoring v. Puerto Rico Ports Auth.*, Docket Nos. 02-08; 04-01; 04-06 (Jan. 5, 2005) ("Commonwealth Brief").

⁷ The term statutory sovereign immunity, as used here and in the PRPA Brief, is based on congressional intent to treat the Commonwealth the same as the States in Federal matters of general applicability.

from Shipping Act private-party suit before the Commission. Odyssea Stevedoring of Puerto Rico, Inc. ("Odyssea") does not acknowledge the statutory aspect of the Commonwealth's sovereign immunity. Rather, Odyssea misinterprets the relevant statutes to arrive at a conclusion that contradicts both judicial opinion and the other Complainants' position.

Odyssea acknowledges the binding nature of the *compact*,⁸ but argues implausibly that the *compact* between the People of Puerto Rico and the United States waives the Commonwealth's sovereign immunity. Odyssea's novel argument both defies the very purpose of the *compact*, which expanded Puerto Rico's autonomy, and ignores longstanding post-*compact* authority recognizing that the Commonwealth enjoys the same autonomy, independence, and dignity as a State.

Complainants argue that the Commonwealth does not enjoy constitutional sovereign immunity⁹ because it is not a State. This superficial approach ignores a century of undisturbed Supreme Court authority acknowledging Puerto Rico's sovereign immunity and erroneously presumes an underlying rationale that constitutional sovereign immunity is limited *only* to States. The Supreme Court's analysis articulates postulates, which Complainants entirely ignore. These postulates, when applied to the history and

Statutory sovereign immunity derives from statute and statutory interpretation as reflected in the default rule. *See* PRPA Brief at 9.

⁸ For a discussion of the history and establishment of the *compact*, see PRPA Brief at 14-18.

⁹ The term constitutional sovereign immunity, as used here and in the PRPA Brief, is the same kind of sovereign immunity enjoyed by the States, i.e. immunity from private-party suit in Federal fora. The term Eleventh Amendment immunity has been used by the courts as a shorthand although the Eleventh Amendment is not the source of constitutional sovereign immunity. The Supreme Court has held that the Eleventh Amendment serves as a recognition of the preexisting conception of sovereignty and dignity. As explained in the PRPA Brief, for the States, constitutional sovereign immunity derives from the preexisting sovereign immunity that survived the agreement between the original States and, later, between a new State and the United States. For the Commonwealth, its constitutional sovereign immunity derives from the preexisting sovereign immunity that survived the agreement, the *compact*, between the People of Puerto Rico and the United States. *See* PRPA Brief at 18-21.

political status of the Commonwealth, show that the Commonwealth enjoys constitutional sovereign immunity the same as the States.

The Commonwealth enjoyed the protections of sovereign immunity before entering the *compact*. The terms of the *compact* do not waive the Commonwealth's sovereign immunity. Since the *compact*, the courts have treated the Commonwealth with the same dignity as a State and have specifically held that the Commonwealth was entitled to constitutional sovereign immunity.

Complainants are unable to avoid the impact of the wealth of judicial authority, legislative treatment, and executive directives¹⁰ that accord the Commonwealth the same dignity as the States. The Commission should comply with the overwhelming weight of authority and conclude that the Commonwealth enjoys constitutional sovereign immunity from private-party suit in a Federal forum, the same as a State, because of the *compact*.

II. COMPLAINANTS ARGUE INCORRECTLY THAT THE COMMISSION ERRED BY CONSIDERING THE QUESTION POSED.

Complainants have asserted various claims, in excess of \$70 million, against the Ports Authority.¹¹ They dispute the wisdom of the decisions of the Governor and the Commonwealth to redevelop the Port of San Juan for tourism. And, Complainants have sought to force the adjudication of local matters into a Federal forum. These matters go

¹⁰ Complainants fail to consider either the Executive Orders or the legislative treatment relating to the Commonwealth. For a discussion of both, see PRPA Brief at 35-37.

¹¹ 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"). Odyssea's complaint failed to specify the amount sought, but its principal testified that the improvements it seeks the Commission to order amount to approximately \$2 million. Odyssea also has other claims it has declined to quantify. See Complaint, *Odyssea Stevedoring of Puerto Rico, Inc. v. Puerto Rico Ports Auth.*, Docket No. 02-08 at ¶¶ 28, 31, 35, 41 (May 31, 2002).

to the heart of the power of a democratic sovereign in the American system to govern itself.¹²

Even after the Commission denied Complainants' motion to withdraw the question that Complainants first posed,¹³ they persist in arguing the point.¹⁴ Recognizing the weakness of their collective position on the Commonwealth's sovereign immunity, Complainants attempt to divert the Commission's focus and re-argue their "arm of the state" position.¹⁵

A. Commonwealth Sovereign Immunity is Ripe for Decision.

Having contested the Commonwealth's constitutional sovereign immunity from private-party suit in a proceeding before the Commission, Complainants are estopped from asserting that the question "need not be resolved by the Commission."¹⁶ Since the sovereign immunity of the Ports Authority as an "arm of the state" derives from the sovereign immunity of the Commonwealth, this is a threshold issue. Moreover,

¹² The Supreme Court warned that a federal power to adjudicate private-party 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." *Alden v. Maine*, 527 U.S. 706, 750-51 (1999). The Court also noted that a federal power to levy damages upon the treasuries of the States "could create staggering burdens" resulting in "leverage over the States that is not contemplated by our constitutional design." *Id.* at 750. These considerations apply acutely in these proceedings.

¹³ See Order, *Odyssea Stevedoring v. Puerto Rico Ports Auth.*, Docket Nos. 02-08; 04-01; 04-06 (F.M.C. Dec. 22, 2004) (denying Complainants' Joint Petition).

¹⁴ See SAM Brief at 1, 15 (renewing its request that the Commission rule only on the "arm of the state" grounds); Intership Brief at 6 (asking the Commission to "rule solely on the issue of whether or not PRPA is an arm of the state"); *Odyssea* Brief at 2 n.2 (arguing against the Ports Authority's status as an "arm of the state"). Rather than simply comply with the order they decry the question as "irrelevant," SAM Brief at 15, "needless[,] . . . improper[,] . . . quite surprising[,] . . . premature[,] . . . unnecessary[,] . . . [an] unusual exercise of authority[,] . . . extremely inefficient[,] . . . ha[ing] no relevance to these proceedings," Intership Brief at 3, 4, 5 & n.4, 6, 9, "an overly broad exercise and inappropriate," *Odyssea* Brief at 1 n.1.

¹⁵ See SAM Brief at 1, 15; Intership Brief at 4 n.2; *Odyssea* Brief at 2 n.2. Intership's call to strike the Ports Authority's reference to its status as an "arm of the state" is incongruous when juxtaposed with its own argument, in the very next lines, that the Ports Authority is not an "arm of the state." See Intership Brief at 4 n.2.

¹⁶ Intership Brief at 3.

Complainants ignore the obvious efficiency and economy the Commission achieves by resolving the question now rather than on remand.

B. Commission Precedent Controls the "Arm of the State" Analysis.

Loath to answer the question posed by the Commission, Complainants reprise their arguments that the Court of Appeals for the First Circuit's "arm of the state" authority binds the Commission.¹⁷ Leaving aside Complainants' erroneous understanding of this First Circuit authority, the Commission has already firmly rejected Complainants' approach.¹⁸ Undaunted, Complainants continue to insist that "the law of the First Circuit is controlling on the sovereign immunity issues presented in this case."¹⁹

In support of its view that the "First Circuit is controlling" Intership points out that "[t]he Presiding Officer agreed with the First Circuit and other relevant jurisprudence" in denying the Ports Authority's Motion to Dismiss.²⁰ Intership fails to mention the Presiding Officer's remarkable failure to consider the Commission's decision and analysis in *Ceres Marine Terminals, Inc. v. Maryland Port Administration*.²¹ After more than six months of deliberation, the Presiding Officer did little more than cut and paste Intership's Opposition into her order.²² It is no wonder that the Presiding Officer failed to consider the Commission's August 2004 decision in *Ceres Marine Terminals*—it does not appear in Intership's Opposition, which predated the Commission's decision.

¹⁷ See SAM Brief at 15; Intership Brief at 9-10.

¹⁸ See FMC Order at 5 ("the Commission has explained that it is 'an agency with nationwide regulatory authority over the shipping industry' and that it 'cannot routinely apply the legal standards of a particular circuit in its decisionmaking'" (quoting *Ceres Marine Terminals, Inc. v. Maryland Port Admin.*, Docket No. 94-01, 30 S.R.R. 358, 366 n.4 (F.M.C. Aug. 16, 2004))).

¹⁹ Intership Brief at 9.

²⁰ Intership Brief at 3.

²¹ Docket No. 94-01, 30 S.R.R. 358 (F.M.C. Aug. 16, 2004).

²² Compare Order, *Int'l Shipping Agency v. Puerto Rico Ports Auth.*, Docket No. 04-01 at 31-39 (Sept. 17, 2004) (Trudelle, A.L.J.) with Reply to Respondent's Motion and Memorandum of Law in Support of Motion to Dismiss the Complaint, etc., *Int'l Shipping Agency v. Puerto Rico Ports Auth.*, Docket No. 04-01 at 9-14 (Apr. 16, 2004).

The Presiding Officer's order denying the Ports Authority's Motion to Dismiss Intership's Complaint should be accorded no weight because it is riddled with plain error and failed to consider the Commission's "arm of the state" analysis set forth in *Ceres Marine Terminals*.

C. The Ports Authority is an Arm of the Commonwealth.

1. The Commonwealth Exercised Control over the Ports Authority.

Intership took the opportunity to re-argue its position on "arm of the state" in its last submission, despite its protestations of foul play.²³ Intership stubbornly refuses to acknowledge the undisputed testimony in the public record that the Governor ordered the demolition of the warehouses at the Puerto de Tierra waterfront as part of the Commonwealth's Golden Triangle urban redevelopment project. Intership's assertion that "there is no evidence in the record that any such order was given"²⁴ is a blatant refusal to concede the obvious fact established by both Commonwealth documents and the testimony of Victor Carrión who attended the meeting with the Governor and witnessed the order and its execution.²⁵

²³ See Intership Brief at 4 n.2. The Ports Authority must respond to Intership's arguments out of an abundance of caution.

²⁴ Intership Brief at 4 n.2.

²⁵ Intership fails to appreciate that the Ports Authority properly referenced uncontested evidence of the Governor's order in both the SAM and Intership proceedings. See, e.g., Respondent's Motion and Memorandum of Law in Support of Motion to Dismiss the Complaint, etc., *Int'l Shipping Agency v. Puerto Rico Ports Auth.*, Docket No. 04-01 at 13 (Mar. 5, 2004) (discussing the Governor's order and referring to 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) ("Odyssea MSJ"). The Odyssea MSJ contains excerpts of corroborated testimony relating the Governor's involvement and control over the challenged Ports Authority actions. The Odyssea MSJ documents exist in the public record and the Ports Authority properly referenced them in both the SAM and Intership proceedings. No credible objection has been raised to prevent their consideration. Accordingly, they are properly in the record of each of the proceedings. See *Henson v. CSC Credit Servs.*, 29 F.3d 280, 284 (7th Cir. 1994) (court may treat documents from prior proceedings as public records); *Waterson v. Page*, 987 F.2d 1, 3-4 (1st Cir. 1993) (court may look to matters of public record in deciding a motion to dismiss). Intership complained of its relocation from the San Juan waterfront that was redeveloped as part of the Golden Triangle Project. Yet, Judge Trudelle observed that "[t]here is no competent evidence that the Golden Triangle project had any

Intership's position conflicts with its constant admonition to avoid "unnecessary cost and delay for the parties"²⁶ by demanding that the Ports Authority must begin an entire discovery process anew over the same issues, with the same witnesses, about the same order to show, once again, that the Governor ordered the demolition as part of the Commonwealth's Golden Triangle Project. As troublesome as they are to Complainants, the facts are uncontested—the Ports Authority is an "arm of the state."

2. *The Ports Authority is Vested with Land Use Regulation Authority.*

Odyssea similarly mounts yet another attack on the Ports Authority's status as an "arm of the state" in its most recent filing.²⁷ Odyssea errs in arguing "that 'Land Development' is the sole responsibility and under the control of the Puerto Rico 'Land Authority.'"²⁸ The Commonwealth legislature granted "control and administration" of "the public property docks . . . , the terrestrial maritime zone comprised within every port zone . . . , and all buildings and structures built therein" to the Ports Authority.²⁹

Moreover, the Ports Authority's organic Act specifically provides: "All personal and real properties and any right or interest thereon that the [Ports] Authority deems

impact on PRPA issues in this proceeding." Order, *Int'l Shipping Agency v. Puerto Rico Ports Auth.*, Docket No. 04-01 at 37 (Sept. 17, 2004) (Trudelle, A.L.J.). This is plain error. Moreover, Judge Trudelle failed to enunciate any reasons or supporting law for this assertion. Odyssea's own principals testified to the Governor's involvement and control. See Odyssea MSJ at 14 (describing the position of Odyssea's principals). In the order denying the Ports Authority's Motion to Dismiss, the ALJ did engage in a confused discussion of *ex parte* communication, *see id.* at 70-74, but that discussion, however erroneous, involved unrelated documentary evidence. There is no sound ruling on the record, nor should there be, in either the Odyssea, SAM, or Intership proceedings that calls the reliability or relevance of the Odyssea MSJ evidence into question. Complainants have opted to ignore what they cannot refute.

²⁶ Intership Brief at 2.

²⁷ See Odyssea Brief at 2 n.2. Again, the Ports Authority must respond to Odyssea's arguments out of an abundance of caution.

²⁸ Odyssea Brief at 2 n.2.

²⁹ 23 L.P.R.A. § 2202. See also 23 L.P.R.A. § 2602 ("The Authority shall have the control, jurisdiction and administration of every part of the maritime-terrestrial zone included in a harbor zone, and of said zone and all buildings and structures built thereon that are under the control and administration of the Authority, as provided by § 2202 of this title.").

necessary to acquire to carry out its purposes are hereby declared of *public utility* and same *may be condemned by the [Ports] Authority.*"³⁰ Whatever power the Land Authority has, it does not have the "exclusive power to engage in land condemnation" of Ports Authority property as Odyssea's subterfuge suggests.³¹ There is simply no question that the Ports Authority possesses and exercises the power of land use regulation in these matters.

The reason for Complainants' reluctance to heed the Commission's admonition against relying exclusively on First Circuit "arm of the state" authority is clear: they cannot escape the inevitable conclusion that under the relevant test, articulated in *Ceres Marine Terminals*, the Ports Authority is plainly an "arm of the state." Both the law and the evidence show the requisite control over the Ports Authority and make the resolution of the Commonwealth's sovereign immunity imperative.

III. COMPLAINANTS CONCEDE THE COMMONWEALTH'S STATUTORY SOVEREIGN IMMUNITY.

Complainants SAM and Intership concede that the Commonwealth enjoys statutory sovereign immunity from private-party suit under the Shipping Act. Odyssea does not address the issue, but does acknowledge that the *compact* controls the relationship between the Commonwealth and the United States. Odyssea plainly misinterprets the terms and misapprehends the goal of the *compact*.

³⁰ 23 L.P.R.A. § 339a (emphasis added). The Ports Authority's organic Act generally delineates the power granted to the Ports Authority by the Commonwealth legislature. *See* 23 L.P.R.A. §§ 336, 339a. Section 336 provides that the purpose of the Ports Authority is to "*develop and improve, own, operate, and manage any and all types of air and marine transportation facilities and services, . . . and make available the benefits thereof in the most extensive and least costly manner, thereby promoting the general welfare and increasing commerce and prosperity [of the Commonwealth].*" 23 L.P.R.A. § 336 (emphasis added).

³¹ Odyssea Brief at 2. n.2.

A. SAM and Intership Embrace the Same Position on Statutory Sovereign Immunity as the Ports Authority.

Both SAM and Intership acknowledge that the Commonwealth is entitled to statutory sovereign immunity from private-party suits brought under the Shipping Act. No other reasonable interpretation is possible. As SAM concedes: "[T]he Commonwealth of Puerto Rico fully retains its sovereign immunity in Shipping Act cases," and "Congress has in no way acted to divest the Commonwealth of its long-recognized sovereign immunity."³²

B. By Espousing the Import and Validity of the Compact, Odyssea Cannot Deny Its Effect.

Odyssea does not specifically address the statutory source of the Commonwealth's sovereign immunity, but it expressly relies on the *compact*.³³ Odyssea describes the Puerto Rico Federal Relations Act (the "PRFRA")³⁴ as a part of the *compact* between the United States and the People of Puerto Rico.³⁵ Specifically, Odyssea relies on section 734 of title 48 of the U.S. Code in support of its core argument.³⁶ What Odyssea fails to

³² SAM Brief at 2, 12. See also Intership Brief at 8 ("Puerto Rico is entitled to sovereign immunity"). The Ports Authority agrees that the Commonwealth's sovereign immunity "work[s] in parallel with the states' immunity," SAM Brief at 10, but the Ports Authority does *not* agree with SAM's assertion that in *Rodriguez v. Puerto Rico Federal Affairs Administration*, 338 F. Supp. 2d 125 (D.D.C. 2004), the Commonwealth agreed that "Puerto Rico's sovereign immunity only 'emanates from a statute.'" SAM Brief at 11. In *Rodriguez*, the Commonwealth argued *in the alternative* for both constitutional *and* statutory sovereign immunity. See *Rodriguez*, 338 F. Supp. 2d at 127-129 (discussing the constitutional sovereign immunity argument), 129-130 (discussing the statutory sovereign immunity argument). The Commonwealth has consistently maintained that it enjoys the same constitutional sovereign immunity as the States. See Commonwealth Brief at 27-47 (discussing the constitutional aspect of the Commonwealth's sovereign immunity). While Complainants concede the Commonwealth's statutory sovereign immunity, both Intership and SAM attempt to limit the First Circuit's recognition of the Commonwealth's constitutional sovereign immunity, but fail in their efforts. Complainants' arguments mischaracterize both the Commonwealth's position on constitutional sovereign immunity and the First Circuit's holdings. For a full response to Complainants' efforts to avoid the weight of First Circuit authority, see Part V.B.1, *infra*.

³³ See Odyssea Brief at 8 (discussing the *compact*).

³⁴ 48 U.S.C. §§ 731 *et seq.*

³⁵ See Odyssea Brief at 4, 5, 6, 7-9 (discussing the PRFRA).

³⁶ See Odyssea Brief at 4 (quoting a portion of 48 U.S.C. § 734). Odyssea's central argument attempts to transform a provision that makes the laws of the United States applicable to Puerto Rico to the same extent

appreciate is that section 734, when quoted in full,³⁷ supports Commonwealth statutory sovereign immunity. Odyssea relies on only the first part of section 734, but ignores the second part. However, it is the second part that courts find relevant to the issue of the Commonwealth's statutory sovereign immunity.

For example, in *Jusino Mercado v. Commonwealth of Puerto Rico*, the First Circuit specifically relied on section 734 as the source of the default rule that "statutes of general application . . . apply equally to Puerto Rico and to the fifty states *unless* Congress made specific provision for differential treatment."³⁸ No case contradicts this position. The Commission described *Rodriguez v. Puerto Rico Federal Affairs Administration*³⁹ as calling into doubt the existence of the Commonwealth's constitutional sovereign immunity.⁴⁰ However, even *Rodriguez* accepted that section 734 established a default rule, just as the First Circuit recognized in *Jusino Mercado*, which requires that Federal law presumptively applies the same way in the Commonwealth as in the States.⁴¹

Odyssea's analysis shows that it concedes that section 734 controls. However, its mistaken interpretation of section 734 represents a radical departure from the accepted meaning that every court has ever given to the provision. Once Odyssea's idiosyncratic

as to the States into a waiver of sovereign immunity. This argument is as novel as it is outlandish. For a full response to Odyssea's waiver argument, see Part IV, *infra*.

³⁷ The full text of the operative portion of section 734 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. . . ." 48 U.S.C. § 734 (emphasis added).

³⁸ 214 F.3d 34, 42 (1st Cir. 2000) (quoting 48 U.S.C. § 734).

³⁹ 338 F. Supp. 2d 125 (D.D.C. 2004).

⁴⁰ See FMC Order at 2. Since that time, the order denying the Commonwealth's sovereign immunity, in *Rodriguez*, has 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). Currently, the decision of whether to accept the petition for permission to appeal pending before the Court of Appeals for the District of Columbia Circuit, case number 04-8012.

⁴¹ Compare *Jusino Mercado*, 214 F.3d at 42 (describing the default rule) with *Rodriguez*, 338 F. Supp. 2d at 128-29 (citing *Jusino Mercado*, 214 F.3d at 42 and adopting the default rule).

interpretation is rejected, no valid dispute remains over the Commonwealth's statutory sovereign immunity.

IV. THE *COMPACT* DOES NOT WAIVE SOVEREIGN IMMUNITY.

Odyssea's opposition to the Commonwealth's constitutional sovereign immunity is unsupported by statutory text, case law, or history. Odyssea undertakes a fantastic reading of the PRFRA and misconstrues the terms to such an extent that it arrives at a conclusion directly counter to the position taken by each court to address the issue and by every other party to this action. The implausible argument that the *compact* represents a *waiver* of the Commonwealth's sovereign immunity has never been advanced or adopted in any jurisprudence or proposed in any scholarly writing regarding the Commonwealth in the fifty-three years since the *compact*.⁴²

Odyssea misunderstands or misstates the proper function of section 734.⁴³ The operative language in section 734 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. . . ." ⁴⁴ It is true that, by this provision, Federal laws apply generally to the Commonwealth. There is no question that the Shipping Act applies in the Commonwealth. However, that does not end the inquiry. Odyssea ignores the phrase "the same force and effect." Thus, while the

⁴² Such controversy as there is on this point is only whether Congress sought, by later legislation, to abrogate the Commonwealth's statutory sovereign immunity. That is a contested issue in *Rodriguez*, but not here. Congress did not attempt to abrogate the Commonwealth's sovereign immunity in the Shipping Act. See PRPA Brief at 10-12. See also SAM Brief at 12-13; Intership Brief at 8-9.

⁴³ The entirety of Part III of the Odyssea Brief argues that the statutory laws of the United States apply in the Commonwealth. See Odyssea Brief at 7-10. But, this is not in dispute. Odyssea confuses the question of whether a particular Federal statute is applicable to the Commonwealth at large, i.e. "not locally applicable," with whether the Commonwealth enjoys constitutional sovereign immunity, i.e. immunity from the adjudication of private-party suits in Federal fora.

⁴⁴ 48 U.S.C. § 734.

Shipping Act applies in the Commonwealth, it does so with "the same force and effect" as it would in any State, no more and no less.⁴⁵

The *compact* does not operate as a waiver of sovereign immunity simply because the *compact* acknowledges that the laws of the United States apply in the Commonwealth. The laws of the United States apply in the fifty States as well, yet there is no doubt that the States enjoy constitutional sovereign immunity unless expressly waived. Nowhere in the *compact* is there any hint of waiver language vis-à-vis the Commonwealth's constitutional sovereign immunity. While it is true that a government *may* waive sovereign immunity,⁴⁶ only a sovereign's "clear declaration that it intends to submit itself to the federal courts" properly constitutes a waiver.⁴⁷ 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 as [will] leave no room from any other reasonable construction."⁴⁸ Not only is any "clear declaration" of intent to waive the Commonwealth's sovereign immunity absent from the *compact*, but the delegates of the Commonwealth Constitutional Convention specifically considered and rejected three different amendments proposing to waive the Commonwealth's sovereign immunity.⁴⁹

Odyssea contends that, after more than fifty years of increasing autonomy within the American system leading up to the *compact*, the People of Puerto Rico then decided

⁴⁵ See *Jusino Mercado*, 214 F.3d at 42 (describing the origin of the default rule); *Rodriguez*, 338 F. Supp. 2d at 128-29 (citing *Jusino Mercado*, 214 F.3d at 42 and adopting the default rule).

⁴⁶ See *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)).

⁴⁷ *College Sav. Bank v. Florida Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 676 (1999).

⁴⁸ *Edelman v. Jordan*, 415 U.S. 651, 673 (1974) (quotations omitted).

⁴⁹ See *Defendini Collazo v. Commonwealth of Puerto Rico*, 134 D.P.R. 28, 57-59 (P.R. 1993) (Naveira De Rodon, J.) (discussing the debates and concluding that 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).

to reverse course.⁵⁰ This defies the entire context of the *compact*, which was to enlarge Puerto Rico's autonomy and independence. It also defies the Supreme Court's clear understanding of the very purpose of the *compact*: "the 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."⁵¹ Odyssea's wholly implausible argument finds no support in the language of the *compact*, the law, judicial authority, or history.⁵²

Odyssea's additional arguments are based on false premises, misinterpretations of case law, and slight-of-hand. For example, Odyssea cites *Stainback v. Mo Hock Ke Lok Po*,⁵³ in support of the proposition that the territory clause allows Congress to "treat territories, including Puerto Rico differently from 'States of the Union.'"⁵⁴ Odyssea stated:

In *Stainback* to [sic] Court again exposed the legal distinction between territories and 'States.' The court [sic] noted that our dual system of government, which requires deference to a State legislative action, is "beyond that required for the laws of a territory." The reason being that "A territory is subject to Congressional regulation."⁵⁵

What Odyssea fails to mention is that the Supreme Court, after the *compact*, expressly held that the rationale of *Stainback* no longer applied to the Commonwealth—the Commonwealth does not fit into the *Stainback* mold, according to the Court, because

⁵⁰ Odyssea Brief at 3.

⁵¹ *Examining Board of Engineers, Architects and Surveyors v. Flores de Otero*, 426 U.S. 572, 594 (1976).

⁵² See Commonwealth Brief at 8-16 (describing the "political and juridical relationship between the Commonwealth of Puerto Rico and the United States"). *Accord* PRPA Brief at 15-18 (history and development of the Commonwealth), 33-35 (history of the *compact*).

⁵³ 336 U.S. 368, 378 (1948).

⁵⁴ See Odyssea Brief at 7 n.5.

⁵⁵ Odyssea Brief at 7 n.5.

"Puerto Rico is to be deemed 'sovereign over matters not ruled by the Constitution' and thus a State" for the purposes of the *Stainback* analysis.⁵⁶

Odyssea similarly misrepresents *Torres v. Puerto Rico*,⁵⁷ in support of the proposition "that 'Puerto Rico has no sovereign authority' to control its own borders such activities being reserved to the U.S. federal government."⁵⁸ Somehow, Odyssea thinks it remarkable that the Commonwealth does not have authority to control its own borders. But, of course, none of the States have such authority either. *Torres'* limited role in the jurisprudence relating to the Commonwealth shows that the Commonwealth is bound by the same Fourth Amendment limitations as the States.⁵⁹ *Torres'* only contribution to the question posed shows yet another example of the Supreme Court treating the Commonwealth the same as the States. Odyssea's desperate attempt to derive support from *Torres* speaks volumes about the lack of authority for Odyssea's position.

The remaining arguments that Odyssea poses support the Ports Authority's position. The Ports Authority agrees that the *compact* controls the relationship between the United States and the Commonwealth.⁶⁰ A review of the *compact* under both the recent and past Supreme Court case law shows that the Commonwealth is entitled to constitutional sovereign immunity as a result of the *compact* and statutory sovereign immunity as a result of the default rule.

⁵⁶ *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 670-73 (1974).

⁵⁷ 442 U.S. 465, 472-73 (1979).

⁵⁸ Odyssea Brief at 6 n.4.

⁵⁹ *See Torres*, 442 U.S. at 471.

⁶⁰ *Compare* PRPA Brief at 23 (discussing the effect of the *compact*) with Odyssea Brief at 6 (the *compact* control the relationship between the United States and the Commonwealth).

V. FOLLOWING THE POSTULATES ARTICULATED IN *ALDEN* THE COMMONWEALTH ENJOYS CONSTITUTIONAL SOVEREIGN IMMUNITY AS A RESULT OF THE *COMPACT*.

Ultimately, the distinction between the two different sources of sovereign immunity, by force of (1) statute and (2) the *compact*, becomes decisive only if Congress seeks to abrogate the immunity.⁶¹ Complainants argue that the Commonwealth does not enjoy constitutional sovereign immunity because it is not a State and that Congress can abrogate the Commonwealth's sovereign immunity. This mistaken view that Congress can abrogate the Commonwealth's sovereign immunity undermines the very nature and viability of the *compact*. Complainants' approach tracks the District Court's anomalous and flawed analysis in *Rodriguez*.⁶² As the Ports Authority has shown, Judge Robertson failed to understand the legal significance of the *compact* or of the Commonwealth status and relied incorrectly on *Harris v. Rosario*.⁶³ Like *Rodriguez*, Complainants' conclusion ignores the unique relationship between the United States and the Commonwealth embodied in the *compact*.

A. Claimants Fail to Follow the Postulates Set Out by the Supreme Court.

Intership asserts that the Commonwealth is not entitled to constitutional sovereign immunity simply because it is not a State⁶⁴ SAM takes the position that the Commonwealth's immunity derives from statute, and does not articulate an argument

⁶¹ The Ports Authority has shown and Complainants agree that Congress did not attempt to abrogate the Commonwealth's sovereign immunity in the Shipping Act. *See supra* n.42 (citing PRPA Brief at 10-12; SAM Brief at 12-13; Intership Brief at 8-9.)

⁶² 338 F. Supp. 2d at 128 (noting that the Commonwealth is not a State).

⁶³ *See* PRPA Brief at 27-29 (discussing *Rodriguez* and *Harris v. Rosario*, 446 U.S. 651, 651-52 (1981) (per curiam)). As noted, *supra* n.40, the order denying the Commonwealth's sovereign immunity, in *Rodriguez*, has been certified for interlocutory appeal under 28 U.S.C. § 1292(b).

⁶⁴ *See* Intership Brief at 8.

against the constitutional nature of the Commonwealth's immunity.⁶⁵ Finally, Odyssea argues that "[t]he case law plainly recognizes that Puerto Rico is not a 'State' of the Union," and concludes that the "plain wording of the Eleventh Amendment therefore excludes Puerto Rico from Eleventh Amendment analysis."⁶⁶

Complainants mistakenly assume that because *Alden v. Maine*⁶⁷ discussed the "constitutional design" in reference to the States' sovereign immunity, only a State may enjoy constitutional sovereign immunity. Moreover, Complainants fail to pay attention to the reasoning of *Alden*, and, as a result, fail to consider the profound effect of the *compact* in light of the underlying postulates that give rise to constitutional sovereign immunity as articulated in *Alden*.

1. The Postulates Demarcate the Scope of Constitutional Sovereign Immunity.

The Eleventh Amendment is not the source of sovereign immunity and its terms do not define the scope of sovereign immunity.⁶⁸ This has been understood from the beginning—both *Alden* and *Seminole Tribe of Florida v. Florida*⁶⁹ reiterated *Hans v. Louisiana*⁷⁰ and the *Hans* Court based its conclusions squarely on the Federalist Papers.⁷¹

⁶⁵ See SAM Brief at 9-12. Despite the Commission's order to submit briefs on the question of the constitutional sovereign immunity of the Commonwealth, SAM did not address the issue of whether the Commonwealth was *also* entitled to sovereign immunity strictly in the constitutional sense. SAM's approach to the issue tends to follow that in *Maysonet-Robles v. Cabrero*, 323 F.3d 43, 54 (1st Cir. 2003), because having concluded that the Commonwealth was entitled to some form of sovereign immunity, SAM looked only to whether or not Congress attempted to abrogate the immunity. See SAM Brief at 12-14 (finding no attempt to abrogate).

⁶⁶ Odyssea Brief at 2.

⁶⁷ 527 U.S. 706 (1999).

⁶⁸ See *Alden*, 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."). Both SAM and Intership agree. See SAM Brief at 3 ("the Eleventh Amendment's narrowly-focused text does not represent the full scope of the states' immunity"); Intership Brief at 7 ("the right does not derive exclusively from the Eleventh Amendment and extends beyond that provision's explicit terms").

⁶⁹ 517 U.S. 44 (1996).

⁷⁰ 134 U.S. 1 (1890).

As the Supreme Court explained in *Alden*, the actual scope of constitutional sovereign immunity "is demarcated not by [the Eleventh Amendment,] but by *fundamental postulates implicit in the constitutional design*."⁷² *Alden* reaffirmed two postulates.⁷³ The first postulate is the recognition of the existence of common law sovereign immunity.⁷⁴ The second postulate is the recognition of retention of sovereign immunity (or lack thereof) in the agreement.⁷⁵

2. *Constitutional Sovereign Immunity is Not Limited to States.*

Complainants incorrectly conclude that because *Alden*, *Seminole Tribe*, and even *Hans* discuss only States, which were the subjects of those cases, that constitutional sovereign immunity cannot extend to other political components of the United States.⁷⁶ By stopping at the question of whether the Commonwealth is a State, Claimants mistakenly truncate the proper analysis developed by the Supreme Court. The Court has not limited constitutional sovereign immunity only to States.

As the Supreme Court explained, the States did not *obtain* sovereign immunity by joining the Union; their sovereign immunity *survived* the merger into the Union, according to the terms of their agreement.⁷⁷ Indeed, the Supreme Court pointed to the

⁷¹ See *Alden*, 527 U.S. at 723-24 (quoting *Hans*, 134 U.S. at 14-15); *Seminole Tribe*, 517 U.S. at 54 (citing *Hans*, 134 U.S. at 13, as first observing that the terms of the Eleventh Amendment do not limit the scope of constitutional sovereign immunity).

⁷² *Alden*, 527 U.S. at 729 (emphasis added). See also *Seminole Tribe*, 517 U.S. at 54 ("[W]e have understood the Eleventh Amendment to stand for . . . the presuppositions . . . which it confirms.' That presupposition has two parts: first, that each State is a sovereign entity in our federal system, and second, that '[i]t is inherent in the nature of sovereignty not to be amenable to the suit of an individual without its consent.'")

⁷³ *Id.* See also *Seminole Tribe*, 517 U.S. at 68 (quoting *Principality of Monaco v. Mississippi*, 292 U.S. 313, 329-330 (1934) (Hughes, C.J.)).

⁷⁴ *Alden*, 527 U.S. at 729-30.

⁷⁵ *Id.* at 730.

⁷⁶ See, e.g., Intership Brief at 8; Odyssey Brief at 2.

⁷⁷ See *Alden*, 527 U.S. at 715 (the terms of the Constitution allowed the States to enter into a Union, yet "retain 'a residuary and inviolable sovereignty'" (quoting *The Federalist* No. 39 (James Madison))). See

constitutional structure and design as *evidence* that the States' pre-existing sovereign immunity survived the agreement.⁷⁸ The Court did not suggest that every entity seeking constitutional sovereign immunity must be a State.

As the Ports Authority explained in its initial brief,⁷⁹ the Supreme Court applies the two postulates by asking: (1) whether there exists a pre-existing sovereign immunity and (2) whether by the act of joining with the United States that sovereign immunity remained. Under this analysis, it is clear that the Commonwealth's sovereign immunity was among the attributes of sovereignty that were retained post-*compact*.⁸⁰ Likewise, the Commission should follow *Alden* and its predecessors and look to Puerto Rico's agreement, the *compact*, to determine the nature of the Commonwealth's sovereign immunity.⁸¹

Intership cites two cases as an example of "another territory" that is "not entitled to sovereign immunity."⁸² But these cases *support* the Commonwealth's constitutional sovereign immunity and follow the same analysis as *Alden*. Rather than simply inquiring whether the Commonwealth of the Northern Mariana Islands (the "CNMI") was a State, the Court of Appeals for the Ninth Circuit looked to the agreement between the CNMI and the United States to deduce whether the terms allowed for the survival of the CNMI's sovereign immunity.⁸³ If Complaints' arguments had merit, the Ninth Circuit would not

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*, 292 U.S. at 321-23 (constitutional sovereign immunity arises from original attributes of sovereignty).

⁷⁸ *Alden*, 527 U.S. at 741.

⁷⁹ See PRPA Brief at 20-21.

⁸⁰ For a full application of the postulates to the Commonwealth, see PRPA Brief at 21-37.

⁸¹ *Accord Odyssey* Brief at 6.

⁸² Intership Brief at 8 n.6 (citing *Norita v. Northern Mariana Islands*, 331 F.3d 960 (9th Cir. 2001) and *Fleming v. Dept. of Public Safety*, 837 F.2d 401, 403 (9th Cir. 1988)).

⁸³ See *Norita*, 331 F.3d at 694; *Fleming*, 837 F.2d at 405. In both *Norita* and *Fleming*, the Ninth Circuit found an *express waiver of sovereign immunity* in the agreement between the CNMI and the United States.

have considered the terms of the agreement. Moreover, if Complainants' view were correct, every court to consider the fundamental question of a non-State's constitutional sovereign immunity, including both the First and Ninth Circuits, would have undertaken an analysis that is both unnecessary and flawed.⁸⁴ To the contrary, Complainants' oversimplified approach exhibits the flaw.

B. Complainants Cannot Avoid the Impact of Judicial Authority Holding that the Commonwealth Enjoys Constitutional Sovereign Immunity.

In each of their briefs, Complainants attempt to avoid the force of judicial authority in support of the Commonwealth's constitutional sovereign immunity. Complainants either mischaracterize, misinterpret, or simply ignore the line of First Circuit authority holding that the Commonwealth enjoys constitutional sovereign immunity, the same as the States and the holdings of the Supreme Court recognizing Puerto Rico's preexisting sovereign immunity and post-*compact* dignity, the same as the States.

1. Complainants Mischaracterize the First Circuit's Treatment of the Commonwealth's Constitutional Sovereign Immunity.

One Complainant would have the Commission believe that *Alden* was rendered in a historical vacuum.⁸⁵ Other Complainants characterize the more recent decisions of *Alden* and *Seminole Tribe* as "startling" and having the effect of "negat[ing] long-held

See Norita, 331 F.3d at 694; *Fleming*, 837 F.2d at 405. No such express waiver exists in the *compact* between the Commonwealth of Puerto Rico and the United States. *See supra* Part IV.

⁸⁴ It is also doubtful that the Supreme Court would have reserved judgment on the Commonwealth's constitutional sovereign immunity in *Puerto Rico Aqueduct and Sewer Auth. v. Metcalf & Eddy*, 506 U.S. 139, 142 n.1 (1993), if the inquiry truly is as shallow as Complainants suggest.

⁸⁵ *See* *Odyssey* Brief at 2-3, 4-5 (discussing only *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419 (1793) and *Alden* and arguing that *Federal Maritime Commission v. South Carolina State Ports Authority*, 535 U.S. 743 (2002) is "not applicable").

views that Congress had the authority to remove state immunity in areas where its legislative power was plenary."⁸⁶ In addition, Complainants mischaracterize the actual holdings of post-*Alden* First Circuit cases. Complainants' portrayal and treatment of the jurisprudence of constitutional sovereign immunity is a desperate rhetorical device to overcome the long-standing First Circuit precedent holding that the "Commonwealth enjoys Eleventh Amendment immunity from suit in federal court."⁸⁷

a. Alden does Not Undermine Prior First Circuit Authority.

Contrary to Complainants' view that a "fundamental shift" took place,⁸⁸ the position of the Supreme Court in *Seminole Tribe* and *Alden* plainly does not represent a "startling" change. Rather, as Chief Justice Rehnquist explained for the Court, these decisions were only the latest in a long and consistent line of Eleventh Amendment jurisprudence,⁸⁹ including seminal cases such as *Hans* and *Principality of Monaco v. Mississippi*.⁹⁰

SAM represents that *Pennsylvania v. Union Gas*⁹¹ exhibited "long-held views" on congressional power to abrogate States' sovereign immunity.⁹² But the Court expressly held that the plurality decision in *Union Gas* was merely "a solitary departure from established law."⁹³ The Court concluded:

Never before the decision in *Union Gas* had [the Court] suggested that the bounds of Article III could be expanded

⁸⁶ SAM Brief at 5. See also Intership Brief at 7 ("The concept of constitutional sovereign immunity is somewhat new.").

⁸⁷ *U.S.I. Properties Corp. v. M.D. Construction Co.*, 230 F.3d 489, 495 n.3 (1st Cir. 2000) (citing *Ramirez v. Puerto Rico Fire Serv.*, 715 F.2d 694, 697 (1st Cir. 1983)).

⁸⁸ SAM Brief at 5.

⁸⁹ *Seminole Tribe*, 517 U.S. at 63-66 (discussing the line of "decisions since *Hans*").

⁹⁰ 292 U.S. 313 (1934) (Hughes, C.J.).

⁹¹ 491 U.S. 1 (1989) (plurality).

⁹² SAM Brief at 5 (arguing that overturning *Union Gas* "negated long-held views" of congressional power).

⁹³ *Seminole Tribe*, 517 U.S. at 66 (overruling *Union Gas* only five years after it was announced).

by Congress operating pursuant to any constitutional provision other than the Fourteenth Amendment. Indeed, it had seemed fundamental that Congress could not expand the jurisdiction of the federal courts beyond the bounds of Article III.⁹⁴

Far from being a "fundamental shift," *Alden* and *Seminole Tribe* embody the longstanding authority on constitutional sovereign immunity and apply Supreme Court jurisprudence to new circumstances. Thus, SAM's contention that *Alden* or *Seminole Tribe* undermined prior First Circuit and Supreme Court authority with respect to the sovereign immunity of Puerto Rico lacks merit.

b. The First Circuit has Never Held that Congress may Abrogate the Commonwealth's Constitutional Sovereign Immunity.

Intership also mischaracterizes First Circuit authority by stating that "the First Circuit has acknowledged that Puerto Rico's sovereign immunity, unlike the states', could be abrogated by Congress."⁹⁵ It is not surprising that Intership fails to point to any language supporting this proposition because the First Circuit acknowledged no such thing. Indeed, the *Jusino Mercado* court expressly identified the *compact* and cited a "phalanx of cases" from the First Circuit holding that the Commonwealth's sovereign immunity is the same as that of the States.⁹⁶ The First Circuit recognized that, in addition to constitutional sovereign immunity, the Commonwealth also enjoyed sovereign immunity by force of statute. Contrary to Intership's assertion, the court exercised judicial restraint and "ground[ed] [its] holding in statutory construction rather than

⁹⁴ *Id.* (citing *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803)).

⁹⁵ Intership Brief at 8 (citing *Jusino Mercado*).

⁹⁶ *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.").

constitutional capacity" and held that Congress did not intend to treat the Commonwealth differently than the States.⁹⁷

The First Circuit's post-*Alden* position on the constitutional aspect of the Commonwealth's sovereign immunity is clearly stated in *Maysonet-Robles v. Cabrero*.⁹⁸ There the court explained: "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."⁹⁹ Complainants' urge the Commission to reject long established First Circuit authority on the Commonwealth's constitutional sovereign immunity. The Commission should reject this invitation, especially given the First Circuit's expertise with respect to the Commonwealth.

2. *The Supreme Court's Holding that the Government of Puerto Rico Enjoys Sovereign Immunity Remains Valid.*

Claimants uniformly recognize that the Supreme Court has held, on multiple occasions, that Puerto Rico is entitled to sovereign immunity.¹⁰⁰ Nonetheless, they attempt to avoid the impact of these Supreme Court decisions on various grounds.

a. *The Supreme Court has Not Retreated from Its Holding on Puerto Rico's Sovereign Immunity.*

Intership seeks to cast doubt on the continued viability of the line of cases following *People of Porto Rico v. Rosaly y Castillo*¹⁰¹ because "the Supreme Court expressly reserved deciding the issue" of the Commonwealth's constitutional sovereign

⁹⁷ *Id.* at 44.

⁹⁸ 323 F.3d 43, 53 (1st Cir. 2003).

⁹⁹ *Id.*

¹⁰⁰ See SAM Brief at 8 (citing *People of Porto Rico v. Rosaly y Castillo*, 227 U.S. 270 (1913)); Intership Brief at 9 (citing *Rosaly y Castillo*; *People of Puerto Rico v. Shell Co. (P.R.), Ltd.*, 302 U.S. 253 (1937); *Sancho v. Yabucoa Sugar Co.*, 306 U.S. 505 (1939)). See also *Odyssey* Brief at 7.

¹⁰¹ 227 U.S. 270, 274 (1913) (Puerto Rico is immune from private-party suit without its consent).

immunity.¹⁰² That the Supreme Court declined to reach a constitutional question that was not presented or contested can hardly cast the underlying line of cases into doubt.¹⁰³ To the contrary, as SAM argues and the Ports Authority agrees, the Supreme Court has tacitly accepted the First Circuit's position on the Commonwealth's sovereign immunity.¹⁰⁴

Since the time the Supreme Court first spoke on the issue in 1913, no Supreme Court decision does anything to draw the conclusion in *Rosal y Castillo* into doubt. Indeed, subsequent to the *compact*, the Supreme Court has consistently found that the Commonwealth possesses the same dignity, autonomy, and sovereignty as the States.¹⁰⁵

b. The Compact does Not "Supersede" the Supreme Court Holdings on Puerto Rico's Sovereign Immunity.

Odyssea advances the argument that the *compact* served to cut-off the effect of the Supreme Court's holding that the Commonwealth is entitled to sovereign immunity.¹⁰⁶ In fact, the exact opposite is true. Odyssea's erroneous conclusion stems from its confusion about the history of the PRFRA and the two prior organic acts for

¹⁰² See Intership Brief at 9 (citing *Metcalf & Eddy*, 506 U.S. at 142 n.1).

¹⁰³ Intership's conclusion is undermined by its own position that "courts must consider non-constitutional grounds for decision before considering any constitutional issues." Intership Brief at 4 (citing *Clinton v. Jones*, 520 U.S. 681, 690 n.11 (1997); *Jean v. Nelson*, 472 U.S. 846, 854 (1985); *American Foreign Serv. Ass'n v. Garfinkel*, 490 U.S. 153, 161-62 (1989)).

¹⁰⁴ See SAM Brief at 8-9 ("This tacit acceptance of the First Circuit's position . . . illustrates the well-established nature of the [First Circuit's] precedence.") (discussing the proper interpretation of *Metcalf & Eddy*, 506 U.S. at 142 n.1). See also PRPA Brief at 22.

¹⁰⁵ *Rodriguez v. Popular Democratic Party*, 457 U.S. 1, 8 (1982) ("Puerto Rico, like a state, is an autonomous political entity, 'sovereign over matters not ruled by the Constitution.'"); *Examining Board*, 426 U.S. at 594 ("[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.") (emphasis added). See also *Posadas de Puerto Rico Assocs. v. Tourism Co. of Puerto Rico*, 478 U.S. 328, 339 (1986); *Calero-Toledo*, 416 U.S. at 673. Not surprisingly, Complainants' arguments all lack discussion of this line of authority, which addresses the effect of the *compact* on the Commonwealth and its relationship with the United States.

¹⁰⁶ See Odyssea Brief at 7 ("In any event, these pre-1952 Supreme Court cases, as well as prior law, have been superseded by the 1952 Compact.").

Puerto Rico.¹⁰⁷ It is *not* true that the Foraker Act was entirely repealed by the Jones Act, *nor* is it true that the Jones Act was in turn entirely repealed by the *compact* and the PRFRA.

The Supreme Court, in *Rosal y Castillo*, relied on the "the nature of the government" of Puerto Rico to determine that it was immune from suit without its consent.¹⁰⁸ As a part of its analysis of whether the Foraker Act included "any ground which removes [Puerto Rico] from the general rule [of sovereign immunity]," the Court considered section 7 of the Foraker Act.¹⁰⁹ The Court concluded, without reservation, that the language in section 7 of the Foraker Act reinforced the principle of Puerto Rico's sovereign immunity. According to the Supreme Court, the proper interpretation of the provision was that the government of Puerto Rico could "be sued consistent[] with the nature and character of the government; that is, *only in the case of consent duly given*."¹¹⁰ Based on this combined analysis—a review of the nature of the government coupled with the specific terms of the Act—the Supreme Court recognized the sovereign immunity of Puerto Rico.

This provision, first written as section 7 of the Foraker Act, survived the passage of the Jones Act.¹¹¹ Moreover, the identical language, specifically relied on by the Supreme Court to support the notion of Puerto Rico's sovereign immunity, appears in the

¹⁰⁷ See *Odyssey Brief* at 7 (incorrectly stating that the two organic acts, Act of April 12, 1900, c. 191, § 7, 31 Stat. 77 (1900) ("Foraker Act") and Act of March 2, 1917, c. 145, 39 Stat. 951 (1917) ("Jones Act"), were "superceded by the 1952 Compact").

¹⁰⁸ 227 U.S. at 274.

¹⁰⁹ *Id.* The operative portion of section 7 of the Foraker Act provides: "[The inhabitants of Puerto Rico] shall constitute a body politic under the name of The People of Puerto Rico, with governmental powers as hereinafter conferred, and with the power to sue and be sued as such." Foraker Act § 7, 31 Stat. 77, 79. See also *Rosal y Castillo*, 227 U.S. at 275 (quoting and analyzing the Foraker Act § 7).

¹¹⁰ See *Rosal y Castillo*, 227 U.S. at 276-77.

¹¹¹ See Jones Act § 58, 39 Stat. 951, 968 ("all laws or parts of laws applicable to P[ue]rto Rico not in conflict with any provisions of this Act, including [the Foraker Act], are hereby continued in effect").

PRFRA.¹¹² The language that the Supreme Court expressly considered has been preserved over time and was incorporated in the terms of the *compact*. Odyssea's argument that the PRFRA and the *compact* somehow "superceded"¹¹³ the holding in *Rosaly y Castillo* both misstates the law and ignores the nature of the government of the Commonwealth warranting sovereign immunity as part of the American system.

VI. 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. Under the *compact* between the Commonwealth and the United States, the Commonwealth retains the same residuum of sovereignty as the States and is entitled to the same constitutional sovereign immunity as the States.

Complainants' arguments against the Commonwealth's constitutional sovereign immunity are fatally flawed because they ignore the Presidential directives, which bind the Commission, and misread the PRFRA, which requires the Commonwealth be accorded the same autonomy and independence as the States. Moreover, Complainants completely fail to consider the impact of the *compact* and judicial authority, which support the Commonwealth's sovereign immunity, and ultimately misapply Supreme Court authority by ignoring the postulates that give rise to constitutional sovereign immunity.

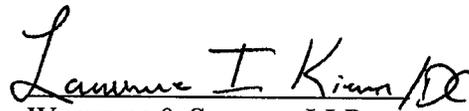
¹¹² See PRFRA § 733 ("[the people of Puerto Rico] shall constitute a body politic under the name of The People of Puerto Rico, with governmental powers as hereinafter conferred, and with the power to sue and be sued as such.").

¹¹³ Odyssea Brief at 7.

For the foregoing reasons, the Commission should acknowledge the constitutional sovereign immunity of the Commonwealth and dismiss the Complaints which offend the Commonwealth's dignity and strike at the heart of self-government in the American system.

Dated: February 15, 2005.

Respectfully submitted,



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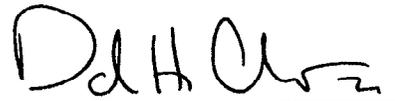
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