No. 08-___

IN THE

Supreme Court of the United States

INTERNATIONAL SHIPPING AGENCY, INC.,
Petitioner,

v.

PUERTO RICO PORTS AUTHORITY,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether a state-created entity can be an arm of the state entitled to sovereign immunity under the Eleventh Amendment for some purposes but not for others.

2. Is the Puerto Rico Ports Authority, a public corporation created by the Commonwealth of Puerto Rico, an arm of the Commonwealth for Eleventh Amendment purposes where indicia of immunity point in different directions and the Commonwealth has no liability with respect to the claims being litigated?

PARTIES TO THE PROCEEDING

The Puerto Rico Ports Authority appeared before the United States Court of Appeals for the District of Columbia Circuit as the petitioner. The Federal Maritime Commission and the United States of America appeared before the court of appeals as respondents. Odyssea Stevedoring of Puerto Rico, Inc. and International Shipping Agency, Inc. appeared as respondent-intervenors.

RULE 29.6 STATEMENT

Petitioner International Shipping Agency, Inc. is a private corporation formed under the laws of the Commonwealth of Puerto Rico and owned by individual shareholders. Petitioner has no parent corporation, and no publicly held company owns ten percent (10%) or more of its stock.

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International Shipping Agency, Inc. respectfully petitions for a writ of certiorari to review the decision and judgment of the United States Court of Appeals for the District of Columbia Circuit in *Puerto Rico Ports Authority* v. *Federal Maritime Commission and United States of America,* No. 06-1407 (July 8, 2008).

OPINIONS BELOW

The opinion of the court of appeals is reported at 531 F.3d 868 (CADC 2008) and is reproduced as Appendix A in the appendix to this Petition ("Pet. App.") at 1a-29a. The opinion of the Federal Maritime Commission is unofficially reported at 30 Pike and Fischer Shipping Regulation Reports (S.R.R.) 1187 (FMC, 2006) and is reproduced as Appendix B at Pet. App. 30a-75a.

JURISDICTION

The court of appeals entered its judgment on July 8, 2008. The jurisdiction of this Court is invoked under 28 U.S.C. 2350(a) and 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Eleventh Amendment to the United States Constitution provides:

> The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another state, or by Citizens or subjects of any foreign state.

U.S. CONST., Amend XI.

The Puerto Rico Ports Authority Act, 23 L.P.R.A. 331 *et seq.*, and the Dock & Harbor Act of Puerto Rico of 1968, 23 L.P.R.A. 2101 *et seq.*, are reproduced as Appendix C at Pet. App. 76a-111a and Appendix D at Pet. App. 112a-146a, respectively.

STATEMENT

This case raises important, recurring questions about how the Eleventh Amendment applies to public corporations and other state-created entities. First, this case squarely presents the issue left undecided in *Regents of the University of California* v. *Doe*, 519 U.S. 425, 428 n. 2 (1997): whether an entity may be an arm of the state entitled to sovereign immunity for some purposes, but not for others. Second, it presents the more complex question, which circuits have struggled with in the aftermath of *Hess* v. *Port Authority Trans-Hudson Corp.*, 513 U.S. 30 (1994): what is the proper test for determining whether a

public corporation is an arm of the state where indicia of immunity point in different directions, but the state (here, the Commonwealth) has no legal or practical liability with respect to the claims being litigated.

On the first question, the D.C. Circuit held that a state-created body was either always immune or never immune, without regard to the activities or claims involved in a particular case. Pet. App. 8a. That holding conflicts with the four other circuits that have considered the question, including the First Circuit, which has addressed the issue twice with respect to the Puerto Rico Ports Authority. On the second question, the D.C. Circuit's test conflicts both with this Court's ruling in *Hess* and also with other circuits, because the D.C. Circuit failed to acknowledge conflicting indicators of immunity and failed to properly apply the public treasury factor to resolve the tension among the other factors. The D.C. Circuit also held that the "impact to the treasury" factor weighed in favor of immunity if the Commonwealth of Puerto Rico could *ever* be liable for the debts of the public corporation, regardless of whether the Commonwealth would be liable for any judgment arising out of the activities and claims in this case. Pet. App. 20a-22a. To our knowledge, no other federal appellate court has so held.

A. Procedural History

The Puerto Rico Ports Authority ("PRPA") is a marine terminal operator subject to regulation by the Federal Maritime Commission ("FMC") under the Shipping Act of 1984, 46 U.S.C. 40101 *et seq.* Petitioner International Shipping Agency, Inc. ("Intership"), also a marine terminal operator, leases land and facilities from PRPA at the Port of San

Juan. On December 29, 2003, Intership filed a private complaint against PRPA at the FMC alleging that PRPA had committed various violations of the Shipping Act of 1984 in connection with its terminal leasing activities. The allegations all arose out of PRPA's operation and maintenance of the piers and facilities in San Juan Harbor. For example, the complaint alleged that PRPA breached its lease obligations regarding the construction and development of Intership's terminal facilities; failed to timely deliver all land required under the lease agreement; negligently accepted faulty construction resulting in damage to Intership's piers and gantry cranes; and allowed other terminal operator lessees to interfere with Intership's terminal operations.

PRPA moved to dismiss the complaint on grounds of sovereign immunity. A divided FMC denied the motion, holding that when acting as a marine terminal operator PRPA is not an arm of the Commonwealth entitled to share in Puerto Rico's sovereign immunity. Pet. App. 30a. PRPA appealed the FMC decision to the U.S. Court of Appeals for the District of Columbia Circuit.

B. The Decision Below

The D.C. Circuit reversed the FMC and held that PRPA is an arm of the Commonwealth of Puerto Rico. On September 16, 2008, the D.C. Circuit stayed issuance of its mandate pending resolution of this petition.

The D.C. Circuit ruled that an entity cannot be an arm of the state for some purposes but not for others. Pet. App. 8a. According to the D.C. Circuit's opinion, the analysis is not affected in any way by the nature of the claims or activities of the public corporation

involved in the litigation. That holding conflicts with four circuits, including the First Circuit, which has specifically held that PRPA is an arm of the Commonwealth for some purposes but not others. *See Puerto Rico Ports Auth.* v. *M/V Manhattan Prince*, 897 F.2d 1, 10 (CA1 1990); *Royal Caribbean Corp.* v. *Puerto Rico Ports Auth.*, 973 F.2d 8, 9 (CA1 1992).

The D.C. Circuit also failed to follow the mandate of *Hess* to look first at whether structural indicators of immunity point in the same or different directions and then, if the indicators point in different directions, to examine the risk to the public fisc as the deciding factor. Rather than engaging in this type of balancing test, the D.C. Circuit's test relies on certain language and factors that, if present, decide the matter notwithstanding the presence or strength of contrary factors. Pet. App. 11a-12a. Finally, the D.C. Circuit held that immunity should attach because there are some circumstances under which the Commonwealth could be called upon to pay the debts of the PRPA, even though those circumstances are unrelated to this litigation. *Id.* 20a-22a.

REASONS FOR GRANTING THE PETITION

The decision below creates a conflict between the D.C. Circuit and the First, Seventh, Ninth, and Eleventh Circuits on the issue that the Court reserved in *Regents of the Univ. of Cal.* v. *Doe*, 519 U.S. 425, 428 n.2 (1997): "whether there may be some state instrumentalities that qualify as 'arms of the State' for some purposes but not others." The decision below also exemplifies how circuit courts have struggled with the proper application and weight to be given to various factors enumerated by this Court in *Mt. Healthy City School District Board of Education*

v. *Doyle*, 429 U.S. 274 (1977); *Lake Country Estates, Inc.* v. *Tahoe Regional Planning Agency*, 440 U.S. 391 (1979); *Hess* v. *Port Authority Trans-Hudson Corp.*, 513 U.S. 30 (1994); and *Federal Maritime Commission* v. *South Carolina State Ports Authority*, 535 U.S. 743 (2002).

I. THE D.C. CIRCUIT'S HOLDING THAT AN ENTITY'S RIGHT TO CLAIM SOVEREIGN IMMUNITY DOES NOT VARY DEPENDING ON THE CLAIMS AND ACTIVITIES INVOLVED IN THE CASE CONFLICTS WITH OTHER CIRCUITS.

A fundamental premise of the decision below was the D.C. Circuit's conclusion that whether an entity is an arm of the state is an all-or-nothing proposition:

> [A]n entity either is or is not an arm of the State: The status of an entity does not change from one case to the next based on the nature of the suit, the State's financial responsibility in one case as compared to another, or other variable factors. Rather, once an entity is determined to be an arm of the State under the three-factor test, that conclusion applies unless and until there are relevant changes in the state law governing the entity.

Pet. App. 8a.

This holding conflicts with other circuits that have considered this question and that have acknowledged that states, which have the freedom to create entities in any manner they desire, may create entities to have multiple roles. Because the state's intent with respect to immunity may vary according to the particular role played by a public corporation, the court

must consider the entity's particular purpose or function implicated by the litigation when deciding whether the entity is an arm of the state in any given case.

The decision below conflicts with the First Circuit, which has held that the PRPA is an arm of the Commonwealth for some purposes, but not for others. The First Circuit has twice considered whether PRPA is an arm of the Commonwealth of Puerto Rico entitled to share in its sovereign immunity. The first time, the First Circuit held that: "After examining the pertinent statutes, we conclude that whether the PRPA is entitled to eleventh amendment protection depends upon the type of activity it engages in and the nature of the claim asserted against it." *Manhattan Prince*, 897 F.2d at 10. The second time, in *Royal Caribbean*, the court stated that "[w]e must answer this question in respect to the particular 'type of activity' by the Ports Authority that is the object of the plaintiff's claims." 973 F.2d at 9 (Breyer, C.J.) (citation omitted).[1]

In these two cases, the First Circuit held that PRPA was an arm of the Commonwealth when it regulated harbor pilots (a function that has now been transferred to the Puerto Rico Harbor Pilotage Commission),[2] *see Manhattan Prince,* 897 F.2d at 12, but that it was not an arm of the Commonwealth when it engaged in the "operation and upkeep of the piers

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[1] *See also Canadian Transport Co.* v. *Puerto Rico Ports Auth.*, 333 F. Supp. 1295 (D.P.R. 1971).

[2] *See* 23 L.P.R.A. § 361 *et seq;. see also Camacho* v. *Puerto Rico Ports Auth.,* 254 F. Supp. 2d 220, 226 (D.P.R. 2003) (noting that *Manhattan Prince* has been superseded by statute), rev'd on other grounds, 369 F.3d 570 (CA1 2004).

and various other facilities in San Juan harbor." *See Royal Caribbean*, 973 F.2d at 9.

The D.C. Circuit held that its decision here is not in conflict with the First Circuit because the First Circuit "expressly departed" from *Royal Caribbean* and *Manhattan Prince* in *Fresenius Medical Care Cardiovascular Resources, Inc.* v. *Puerto Rico & the Caribbean Cardiovascular Center. Corp.*, 322 F.3d 56 (CA1 2003). *See* Pet. App. 10a, n. 3. In fact, *Fresenius* did not overrule or otherwise contradict *Royal Caribbean*. To the contrary, *Royal Caribbean* is cited with approval throughout *Fresenius*, and the First Circuit even noted that *Fresenius* was a "closer case" than *Royal Caribbean*. *See Fresenius*, 322 F.2d at 69; *see also Pastrana-Torres* v. *Corp. de Puerto Rico Para La Difusión Pública*, 460 F.3d 124, 127 (CA1 2006) (relying on *Royal Caribbean*). While it is true that *Fresenius* "reshaped" the First Circuit test "in light of intervening Supreme Court precedent," *Fresenius*, 322 F.3d at 59, the reshaping consisted only of dividing the existing factors into two categories—structure and treasury—to comport with *Hess*. *Fresenius* did not in any way suggest that the restructured test should not be applied to the activities and claims at issue in accordance with existing First Circuit precedent.

The First Circuit is not alone in looking at the specific claims made and activities involved in deciding on immunity. The Eleventh Circuit has also stated that "[w]hether a defendant is an 'arm of the State' must be assessed in light of the particular function in which the defendant was engaged when taking the actions out of which liability is asserted to arise." *Manders* v. *Lee*, 338 F.3d 1304, 1308 (CA11 2003); *see also Abusaid* v. *Hillsborough Cty. Brd. of*

Cty. Comm'rs, 405 F.3d 1298, 1303 (CA11 2005) ("The more difficult question – whether the entity sued is an arm of the state – 'must be assessed in light of the particular function in which the defendant was engaged when taking the actions out of which liability is asserted to arise.'" (citation omitted)).

The Seventh and Ninth Circuits have likewise held that certain entities are arms of the state only with respect to certain functions. *See, e.g., DeGenova* v. *Sheriff of DuPage Cty.*, 209 F.3d 973, 975 (CA7 2000) ("[W]hether a sheriff acts for the state or a local entity is not an 'all or nothing' determination. Rather, the question is whether, when the Sheriff acts *in a particular area or on a particular issue*, he acts for the State or a local entity." (emphasis added) (citations omitted)). *See also Scott* v. *O'Grady*, 975 F.2d 366, 371 (CA7 1992) ("The fact that [the defendants] normally act as county officials does not mean that they can *never* act as an arm of the state." (emphasis in original)); *Streit* v. *Cty. of Los Angeles*, 236 F.3d 552, 567 (CA9 2001) ("[W]e hold that the [defendant] is not an arm of the state of California in its administration of the local county jails.").

Although the Supreme Court has not addressed the issue in the Eleventh Amendment context, in an analogous analysis of a civil rights claim under 42 U.S.C. 1983, the Court stated that "the question is not whether Sheriff Tate acts for Alabama or Monroe County in *some categorical, 'all or nothing' manner.* Our cases on the liability of local governments under § 1983 instruct us to ask whether governmental officials are final policymakers for the local government in a particular area, or on a particular issue." *McMillian* v. *Monroe Cty.*, 520 U.S. 781, 785 (1997) (emphasis added) (citation omitted). The Court

further cautioned that application of an "all or nothing" approach in the interest of uniformity would run the risk of disregarding the states' prerogative to create entities in the manner desired. *See id.* at 795 ("while it might be easier to decide cases arising under § 1983 and *Monell* if we insisted on a uniform, national characterization for all sheriffs, such a blunderbuss approach would ignore a crucial axiom of our government: *the States have wide authority to set up their state and local governments as they wish.*" (emphasis added)); *see also Fresenius*, 322 F.3d at 64 ("[S]tates set up entities for many reasons. An erroneous arm-of-the-state decision may frustrate, not advance, a state's dignity and its interests."); *Pastrana-Torres*, 460 F.3d at 126 ("We perform the arm-of-the-state analysis with 'caution, [as] it would be * * * an affront to the state's dignity and fiscal interests were a federal court to find erroneously that an entity was an arm of the state, when the state did not structure the entity to share its sovereignty.'" (ellipses and brackets in original) (citations omitted)).

II. THE ARM OF THE STATE TEST APPLIED BY THE D.C. CIRCUIT CONFLICTS WITH PRIOR SUPREME COURT PRECEDENT.

The Supreme Court's most recent explanation of the test for determining whether a particular entity is an arm of the state is set forth in *Hess* v. *Port Authority Trans-Hudson Corp.*, 513 U.S. 30 (1994). Although *Hess* involved a bi-state compact, most of its analysis is equally relevant to any state-created entity. In *Hess,* the Court emphasized the twin purposes of the Eleventh Amendment—protection of the states' dignity and protection of the states' treasuries. This Court then held that courts must

first ask whether the state clearly structured the entity to share in its immunity and then, if indicators of immunity point in different directions, look to the vulnerability of the State's purse, which is "the most salient factor in Eleventh Amendment determinations." *Id.* at 48.

A. The D.C. Circuit's test does not balance all structural indicators of immunity.

Reviewing the decision below, one could easily conclude that all structural indicators of Eleventh Amendment immunity pointed in the same direction for PRPA. A review of the relevant statutes and the First Circuit's decisions regarding PRPA, however, demonstrates that this is not the case. In both *Royal Caribbean* and *Manhattan Prince*, the First Circuit found numerous factors in the Puerto Rico statutes that weigh against immunity. *See, e.g., Royal Caribbean*, 973 F.2d at 10-11 (citing to 23 L.P.R.A. 333(b), 336(d), 336(e), 336(f), 336(i), 336(j), 336(*l*)(i), 336(n), 336(o), 336(q), 336(s), 336(v) (formerly 336(u)), 338, 2505); *Manhattan Prince*, 897 F.2d at 9-10. Since Puerto Rico is located within the First Circuit, that circuit has more experience and expertise in analyzing Puerto Rican laws and should therefore be accorded considerable deference in its reading of the PRPA enabling statutes. *See McMillian*, 520 U.S. at 786 ("Since the jurisdiction of the Court of Appeals includes Alabama, we defer considerably to that court's expertise in interpreting Alabama law."); *see also Rodriguez v. Puerto Rico Fed'l Affairs Admin.*, 435 F.3d 378, 382 (CADC 2006) (describing the First Circuit as "the Court most expert on Puerto Rico's status"). The D.C. Circuit, however, completely disregarded the First Circuit analysis, and gave no consideration to these indicia.

Instead of considering and balancing all of the structural factors found in PRPA's enabling statute, the D.C. Circuit's test looked for key language and specific indicators that it considered dispositive with respect to the elements or sub-elements of its test.[3] For example, the D.C. Circuit looked to the use of the phrase "government instrumentality" in the Puerto Rico Ports Authority Act as clear evidence of Puerto Rico's intent for PRPA to be an arm of the state. *See* Pet. App. 11a. ("We assess Puerto Rico's intent by examining whether Puerto Rico law expressly characterizes PRPA as a governmental instrumentality * * * .") There is, however, no support for the proposition that by using the words "government instrumentality" the Puerto Rico legislature necessarily intended PRPA to be an arm of the state. The

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[3] The D.C. Circuit applied a "three part test," which actually examines six factors divided into three categories as follows:

1. State Intent:

   a. whether the statutes characterize the entity as a "governmental instrumentality";

   b. whether the entity ever performs state governmental functions;

   c. whether the entity is treated as a governmental instrumentality for purposes of other state laws; and

   d. the state's representation in the instant litigation about the status of the entity.

2. State Control:

   a. whether the state appoints and removes the officers and directors.

3. Risk to the treasury:

   a. whether the state could ever be responsible for a judgment against the entity.

Pet. App. 11a-22a.

words could have several different meanings. The Supreme Court's use of the words suggests that "government instrumentality" is a generic phrase meant to refer to any state-created entity that may or may not be an arm of the state. *See, e.g., Regents of the Univ. of Cal.* v. *Doe*, 519 U.S. at 429 ("When deciding whether a *state instrumentality* may invoke the State's immunity, our cases have inquired into the relationship between the State and the entity in question." (emphasis added)).

The First Circuit agrees. *See Pastrana-Torres*, 460 F.3d at 126 n.2 (noting that "government instrumentality" language appears in various Puerto Rico statutes and is not considered dispositive of a legislative intent to create an arm of the state). In order to determine the intent of the legislature, the language of the statute as a whole must be considered. The D.C. Circuit's focus on the instrumentality language alone caused it to improperly disregard other language evidencing legislative intent for PRPA to be an independent entity, separate and apart from the Commonwealth government. *See, e.g.,* 23 L.P.R.A. 333 (describing PRPA as a "body corporate and politic," and a "public corporation," with a "legal existence and personality separate and apart from those of the Government and any officials thereof"); 23 L.P.R.A. 333(b) (separating the obligations, debts, and undertakings of PRPA from the Commonwealth government); 23 L.P.R.A. 2303(b) (stating that the Commonwealth will not be responsible for damages caused by PRPA when PRPA exercises its property rights as a public corporation). Pet. App. at 79a, 127a.

Similarly, the D.C. Circuit deemed PRPA to be controlled by the Commonwealth as a result of the

governor's appointment of directors. *See* Pet. App. 15a ("In considering [the control] factor, we look primarily at how the directors and officers of PRPA are appointed."). This emphasis on appointment authority to the exclusion of other indicia that demonstrate a lack of governmental control over PRPA's daily activities is inconsistent with *Hess* and other Supreme Court and circuit authorities. Although other courts have considered appointment authority as a factor weighing in favor of immunity, none has treated it as the "primary" consideration evidencing control. *See, e.g., Hess*, 513 U.S. at 36 (finding no immunity where "[t]welve commissioners, six selected by each state, govern the Port Authority."); *Auer* v. *Robbins*, 519 U.S. 452, 456 n.1 (1997) ("While the Governor appoints four of the board's five members, the city of St. Louis is responsible for the board's financial liabilities, and the board is not subject to the State's direction or control in any other respect." (citations omitted)); *Fresenius*, 322 F.3d at 71 ("The governor's appointment power over the board is not enough in itself to establish that PRCCCC is an arm of the state."); *Takle* v. *Univ. of Wis. Hosp. & Clinics Auth.*, 402 F.3d 768, 770 (CA7 2005) ("[T]he power to appoint is not the power to control.").

These are only two examples of how the D.C. Circuit failed to appropriately consider all factors relevant to how Puerto Rico intended to structure the PRPA. By failing to give consideration and effect to all structural indicators of immunity, the D.C. Circuit's test is in conflict with the Supreme Court's analysis in *Hess* and with the balancing tests applied by other circuit courts.

B. The D.C. Circuit did not properly consider whether any judgment would be paid out of the Commonwealth treasury.

Had the D.C. Circuit considered all structural indicators of immunity, it would have concluded that they pointed in different directions and then moved on to consider, as *Hess* requires, whether any judgment against PRPA would be paid out of the Commonwealth treasury, either because the Commonwealth is legally obligated for judgments against PRPA or because the Commonwealth provides general funding for PRPA's activities that would be tapped to pay the judgment. The D.C. Circuit did look at whether any judgment against PRPA would be paid by the Commonwealth, but in doing so, took the "any judgment" concept too far. Rather than looking at any judgment that might be awarded *in the case being litigated*, the D.C. Circuit looked at whether the Commonwealth could be liable for judgments against PRPA under *any* circumstances, expressly including situations not implicated by the litigation at the FMC. Pet. App. 20a-22a.

The Commonwealth would not be liable for any judgment against PRPA in this case. Like the Port Authority of New York and New Jersey in *Hess*, PRPA is financially self sufficient. PRPA receives no funding from the Commonwealth. It finances its activities with fees and charges, including rents and other charges collected from lessees such as Intership, as well as the issuance of bonds. 23 L.P.R.A. 336(*l*)(1), 342. Pet. App. at 85a, 98a. The Puerto Rico Ports Authority Act states that PRPA's "debts, obligations, contracts, bonds, notes, debentures, receipts, expenditures, accounts, funds, undertakings

and properties of the Authority, its officers, agents or employees, shall be deemed to be those of said government controlled corporation, and not those of the Commonwealth of Puerto Rico, or any office, bureau, department, commission, dependency, municipality, branch, agent, officials or employees thereof." 23 L.P.R.A. 333(b). Pet. App. 79a. *See also* 23 L.P.R.A. 336(v) and 346 (stating that the Commonwealth, municipalities and other political subdivisions are not liable on bonds issued by the Port Authority). Pet. App. at 92a, 107a. Moreover, although the Dock and Harbor Act does provide for the Commonwealth to be responsible for damages caused by PRPA employees in those instances where an employee is acting as an agent on behalf of the Commonwealth, the legislature expressly distinguished such acceptance of responsibility from PRPA's activities as a public corporation:

> The damages caused through the action or omission of the Administrator or of any officer, employee or agent of the authority, while acting in his official capacity and within the scope of his function, employment or commitment as an agent of the Government of the Commonwealth of Puerto Rico under the provisions of this chapter (*in contraposition as when acting in the exercise of the property rights of the Authority as a public corporation*) intervening fault or negligence, shall exclusively be requirable [sic] to the Commonwealth of Puerto Rico as provided by law.

23 L.P.R.A. 2303(b) (emphasis added). Pet. App. 127a.

This statutory provision evidences a clear intent on the part of the Puerto Rico legislature to create an

entity that would act as an agent of the Commonwealth for some purposes (thus rendering the Commonwealth liable for damages), but that would also act as an independent public corporation separate and apart from the government of Puerto Rico for other purposes (in which case the Commonwealth would not be liable for damages). The D.C. Circuit's "all or nothing" approach, applied here to its analysis of the risk to the treasury, completely disregards this legislative distinction. By ignoring the intent of the Puerto Rico legislature, the D.C. Circuit not only fails to properly determine whether the treasury is at risk, it also fails to respect the dignity of the Commonwealth by ignoring the right of the legislature to create and structure PRPA as it saw fit. Its analysis is contrary to the holding and principles established in *Hess*.

CONCLUSION

The questions presented raise important issues that are likely to recur. The first question, whether an entity can be an arm of the state for some purposes but not others, presents a fundamental difference between the circuits in how to apply the arm of the state test. The Supreme Court recognized the existence of this open issue in *Regents of the University of California* v. *Doe*, 519 U.S. 425 (1997), but specifically declined to answer the question because it was not necessary to do so in that case. What had been an interesting question has now ripened into a substantial conflict. This case squarely presents the issue and provides the Court with an appropriate opportunity to resolve the matter.

The second question presented arises from the D.C. Circuit's failure to follow *Hess*. The D.C. Circuit's

failure to give weight to the conflicting indicia of immunity and its failure to properly analyze the impact on the Commonwealth's treasury in order to resolve the tensions between the other factors are indicative of how circuit courts have struggled to apply the factors enumerated in *Mt. Healthy*, *Lake Country Estates*, and *Hess*. This case starkly illustrates the practical problem created by this confusion in the lower courts. Having applied their own arm of the state tests, the D.C. Circuit and the First Circuit have arrived at opposite conclusions regarding the status of PRPA when it acts as a marine terminal operator and lessor. As a result, private parties can file complaints against PRPA in federal court in Puerto Rico pursuant to First Circuit precedent, but where, as here, a private party files a complaint against PRPA with a federal agency, its ability to pursue the claim depends upon the reviewing court (which could be courts in the D.C. Circuit or the First Circuit).

The circuit conflict and the conflict between the D.C. Circuit and this Court's guidance in *Hess* are reason enough to warrant review. The importance of the issues presented here is amplified by the fact that the opinion below was issued by the D.C. Circuit. Because a large number of federal agency cases are brought to the D.C. Circuit, there is a significant risk of additional entities being treated as arms of the state in the D.C. Circuit while at the same time being treated as independent entities in their home circuits. The D.C. Circuit's approach creates the rather unusual situation in which a plaintiff would be better off to have its complaint dismissed at the agency level on the ground of sovereign immunity in order to have its choice of forum for appeal. That result is symptomatic of an area of the law in need of prompt

guidance from this Court, and this case presents an opportunity for the Court to address several important and related questions at once. The petition for a writ of certiorari should be granted.

Respectfully submitted,

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