No. 10-74 JUL 9 2010

In the Supreme Court of the United States

JAVIER RIVERA AQUINO, SECRETARY,
PUERTO RICO DEPARTMENT OF AGRICULTURE,
ET AL., PETITIONERS

v.

SUIZA DAIRY, INC., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a federal court can order retrospective monetary relief against a sovereign as long as the necessary funds do not come directly from the general treasury.

PARTIES TO THE PROCEEDING

Petitioners are Javier Rivera Aquino, Secretary of the Puerto Rico Department of Agriculture, and Cyndia E. Irizarry, Administrator of the Puerto Rico Milk Industry Regulatory Administration. Respondents are Suiza Dairy, Inc., and Vaquería Tres Monjitas, Inc.

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Javier Rivera Aquino, Secretary of the Puerto Rico Department of Agriculture, and Cyndia E. Irizarry, Administrator of the Puerto Rico Milk Industry Regulatory Administration, respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the First Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-44a) is reported at 587 F.3d 464. The court of appeals' order denying rehearing (App., *infra*, 45a-68a) is reported at 600 F.3d 1. The district court's order denying petitioners' motion to dismiss (App., *infra*, 199a-218a)

and its order granting respondents' motion for preliminary injunction (App., *infra*, 69a-198a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on November 23, 2009. A petition for rehearing was denied on March 11, 2010 (App., *infra*, 45a-68a). On June 2, 2010, Justice Breyer extended the time within which to file a petition for a writ of certiorari to and including July 9, 2010. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. This case presents a question of sovereign immunity arising out of litigation concerning the Puerto Rico milk industry. In Puerto Rico, as in many States, the milk industry is regulated in order to ensure a consistent supply and stable prices for consumers and producers. Pursuant to statute, the primary regulatory agency is the Puerto Rico Milk Industry Regulation Administration (Oficina de Reglamentación de la Industria Lecheria or ORIL), a subdivision of the Puerto Rico Department of Agriculture. For many decades, ORIL has set both the minimum price at which fresh milk processors buy raw milk from dairy farmers and the maximum price at which those processors sell fresh milk to the public. App., *infra*, 5a.

There are three processors of milk in Puerto Rico: respondent Suiza Dairy, Inc. (Suiza); respondent Vaquería Tres Monjitas, Inc. (Tres Monjitas); and Industria Lechera de Puerto Rico, Inc. (Indulac). Suiza and Tres Monjitas buy raw milk and process it into fresh milk; they are the only sellers of fresh milk in Puerto Rico. Indulac buys surplus raw milk and, *inter alia*, processes it into ultra-high-temperature (UHT) milk, a type of milk that does not require refrigeration. Indulac

controls a majority of the market for UHT milk; the rest originates outside Puerto Rico. Although ORIL historically did not set the maximum price at which UHT milk was sold to the public, UHT milk was less expensive than, and thus gained market share relative to, fresh milk. App., *infra*, 5a-7a.

2. Petitioners are the Secretary of the Puerto Rico Department of Agriculture and the Administrator of ORIL. On August 13, 2004, respondents filed suit in the United States District Court for the District of Puerto Rico against, *inter alios*, petitioners in their official capacities. Respondents alleged that, by depriving them of a reasonable rate of return and favoring UHT milk produced by Indulac, Puerto Rico's regulatory scheme violated the Takings, Due Process, Equal Protection, and Commerce Clauses of the federal Constitution. App., *infra*, 11a. In the operative version of their complaint, respondents sought not only an injunction against continued enforcement of the regulatory scheme, but also the creation of a "temporary mechanism for [respondents] to recover the losses they have experienced on account of the unconstitutional acts and decisions herein under attack." Second Am. Compl. ¶ 92, at 39. Shortly after filing the complaint, respondents moved for a preliminary injunction. App., *infra*, 11a.

Petitioners moved to dismiss the complaint, raising a variety of defenses including sovereign immunity. The district court denied the motion. App., *infra*, 202a-221a. As is relevant here, the court reasoned that, "[i]n the instant case, [respondents] are seeking a prospective injunctive relief against [petitioners] to avoid insolvency[,] but they are not seeking damages nor a monetary compensation." *Id.* at 217a.

After more than fifty evidentiary hearings, the district court issued an order granting respondents' motion

for preliminary injunction. App., *infra*, 69a-198a. The court held that respondents not only were likely to succeed on their constitutional claims, but had in fact shown that they had suffered a past and ongoing "Due Process and Equal Protection violation reaching levels of a 'taking.'" *Id.* at 192a. After weighing the equities, the court determined that respondents were entitled to a preliminary injunction. *Id.* at 192a-194a. The court ordered the Administrator of ORIL not only to revise the regulatory scheme so as to allow respondents to recover a higher rate of return going forward, but also to "adopt a temporary mechanism that will allow [respondents] to recover the new rate of return * * * for the year 2003 * * * and up to the day when they begin to recover said rate." *Id.* at 197a. With regard to the latter remedy, the court provided that "[t]he Administrator may so act through regulatory accruals, special temporary rates of return or any other available mechanism of [the Administrator's] choosing." *Ibid.*

In compliance with the district court's order, the Administrator of ORIL promulgated a regulation and accompanying administrative order imposing a 1.5¢ surcharge on every quart of milk sold in Puerto Rico for the purpose of compensating respondents for their lost revenues. App., *infra*, 22a & n.17. The proceeds from the surcharge were to have been held in a segregated account by the Milk Industry Development Fund; in fact, some of the proceeds have been directly retained by respondents. *Id.* at 22a; Pet. D. Ct. Opp. to Mot. for Contempt 6-7.

3. Petitioners appealed the district court's order, contending, *inter alia*, that, by ordering retrospective monetary relief, the district court had violated Puerto Rico's sovereign immunity. The court of appeals affirmed. App., *infra*, 1a-44a.

As is relevant here, the court of appeals rejected petitioners' sovereign-immunity challenge. App., *infra*, 22a-28a. The court expressly declined to address whether the relief ordered was prospective or retrospective. *Id.* at 24a. Instead, the court asserted that "the source of relief [was] of paramount importance" to the sovereign-immunity inquiry. *Id.* at 25a. Focusing on that consideration, the court noted that "none of the compensation would come from the [Commonwealth's] treasury," *id.* at 24a, because "the money in question would come directly from consumers of milk in Puerto Rico" and "would be neither collected by government entities nor retained in the Commonwealth's treasury." *Id.* at 26a. On that basis, the court held that sovereign immunity "does not bar the form of relief granted by the district court." *Id.* at 28a.

4. Petitioners filed a petition for rehearing en banc. Over a lengthy dissent by Chief Judge Lynch, the court of appeals denied the petition. App., *infra*, 45a-68a.

a. In her dissent, Chief Judge Lynch stated that "the serious issues raised deserve greater attention from this Court and, failing that, from the Supreme Court." App., *infra*, 54a. She reasoned that, by upholding the district court's order simply because it "did not force the Commonwealth to satisfy the judgment with funds directly paid from or funneled through [its] treasury," *id.* at 55a, the panel's decision was "inconsistent with more than a decade's worth of * * * Supreme Court precedents," as well as "precedent from other circuits." *Id.* at 55a-56a.

Chief Judge Lynch explained that "[t]here can be no doubt that the injunction at issue makes the Commonwealth, through one of its administrative agencies, liable for retrospective monetary relief": specifically, by "allow[ing] [respondents] to recover the *past* profits they

say they lost between 2003 and the time of the injunction." App., *infra*, 60a, 61a. In her view, the panel "most likely depart[ed] from precedent when it h[eld] that [sovereign immunity] is not involved when the Commonwealth is ordered to raise money from individuals through mechanisms other than a general tax that produces funds for [its] treasury." *Id.* at 62a-63a. Such an approach, she continued, would "provide[] an easy mechanism for evasion" of sovereign immunity, *id.* at 63a, and "elevate[] form over substantive reality," *id.* at 66a.

Instead, Chief Judge Lynch reasoned, "[w]hen a state raises revenues through the methods available to it as a sovereign—including taxation and regulatory orders—rather than by withdrawing existing funds in the state treasury, this surely does not remove the Eleventh Amendment's protections." App., *infra*, 64a. "Either way," she explained, "the state fisc is affected because the state is being required to use its own resources to replace the original source of the plaintiffs' profits." *Ibid.* (internal quotation marks omitted). Chief Judge Lynch concluded that, "[i]f courts can evade Eleventh Amendment constraints by dictating to states that they find ways in which state officials can use the state's regulatory money-raising powers to satisfy a money judgment, the Eleventh Amendment's bar against retrospective monetary relief becomes a nullity." *Id.* at 67a-68a.

b. Judge Torruella, who had written the panel opinion, concurred in the denial of rehearing en banc. App., *infra*, 46a-54a. He contended that the panel's decision was "eminently correct" because "well-established precedent * * * places decisive weight on the impact a judgment has on the state treasury." *Id.* at 47a. "In this case," he continued, sovereign immunity "poses no bar to relief because there is simply no impact on the [Commonwealth's] fisc, *at present or in the future*." *Ibid.* He

further explained that "[t]he Commonwealth simply has not been required to appropriate *its funds* to comply with the regulatory accrual." *Id.* at 50a. Because "[t]his case simply does not involve a monetary award against the [Commonwealth] that burdens [its] treasury," Judge Torruella concluded that it did not implicate Puerto Rico's sovereign immunity. *Id.* at 54a.

REASONS FOR GRANTING THE PETITION

In the decision below, the First Circuit held that a federal court could order retrospective monetary relief against a sovereign as long as the necessary funds do not come directly from the general treasury. The First Circuit's decision conflicts with the decisions of other circuits on the circumstances, if any, under which retrospective monetary relief may be awarded consistent with sovereign immunity. The First Circuit's decision, moreover, cannot be reconciled with this Court's sovereign-immunity jurisprudence. And the question presented by this case is undeniably one of great importance to Puerto Rico and other sovereigns. In sum, as Chief Judge Lynch stated in her dissent from the denial of rehearing en banc, this case presents "serious issues" that "deserve [the] attention" of the Court. App., *infra*, 54a.

A. Sovereign Immunity Generally Prohibits Suits Against Sovereigns Except For Suits Against Officials Seeking Prospective Relief

1. While it is codified in the Eleventh Amendment, the principle of sovereign immunity "derives * * * from the structure of the original Constitution itself." *Alden* v. *Maine*, 527 U.S. 706, 728 (1999).[1] In federal

[1] The lower courts in this case assumed that Puerto Rico, as a territory with substantial autonomy, is entitled to sovereign immunity.

court, that principle "limits the grant of judicial authority in Art[icle] III" by preventing sovereigns from being sued unless they have unambiguously consented to suit or Congress has expressly abrogated their immunity. *Pennhurst State Sch. & Hosp.* v. *Halderman*, 465 U.S. 89, 98 (1984). The principle of sovereign immunity protects not only sovereigns themselves, but also their officials when sued in their official capacities, because a suit against an official "is no different from a suit against the [sovereign] itself." *Will* v. *Michigan Dep't of State Police*, 491 U.S. 58, 71 (1989).

2. In *Ex parte Young*, 209 U.S. 123 (1908), this Court carved out the now-familiar exception to the principle of sovereign immunity for suits against officials to enjoin official actions that violate federal law. See *id.* at 159-160. In so doing, the Court stated that a sovereign "has no power to impart to [its official] any immunity from responsibility to the supreme authority of the United States." *Id.* at 160. The Court has since explained that the rationale for the *Ex parte Young* exception is that "[r]emedies designed to end a continuing violation of federal law are necessary to vindicate the federal interest in assuring the supremacy of that law." *Green* v. *Mansour*, 474 U.S. 64, 68 (1985).

In the century since *Ex parte Young* was decided, this Court has repeatedly made clear that its exception is

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Since its decision in *Erzatty* v. *Puerto Rico*, 648 F.2d 770, 776 n.7 (1981) (Breyer, J.), the First Circuit—the geographic circuit with jurisdiction over Puerto Rico—has so held in dozens of cases. Respondents have not disputed the proposition that Puerto Rico is entitled to sovereign immunity at any stage of this litigation, and the Court has previously decided at least one other case involving Puerto Rico on the same assumption. See *Puerto Rico Aqueduct & Sewer Auth.* v. *Metcalf & Eddy, Inc.*, 506 U.S. 139, 141 n.1 (1993).

available only where "[the] complaint alleges an ongoing violation of federal law and seeks relief properly characterized as prospective." *Verizon Md. Inc.* v. *Public Service Comm'n*, 535 U.S. 635, 645 (2002) (internal quotation marks and citation omitted). Accordingly, the Court has consistently rejected efforts to "extend the reasoning of [*Ex parte*] *Young* * * * to claims for retrospective relief." *Green*, 474 U.S. at 68; see *Quern* v. *Jordan*, 440 U.S. 332, 337 (1979) (confirming that "[t]he distinction between that relief permissible under the doctrine of *Ex parte Young*" and relief barred by sovereign immunity is "the difference between prospective relief on one hand and retrospective relief on the other"). The Court has justified that limitation on the reach of *Ex parte Young* on the ground that permitting retrospective relief "would effectively eliminate the constitutional immunity of the States." *Pennhurst*, 465 U.S. at 105; see *Edelman* v. *Jordan*, 415 U.S. 651, 653, 663 (1974). And the Court has urged lower courts, in engaging in that "straightforward inquiry," *Verizon*, 535 U.S. at 645, to "look to the substance rather than the form of the relief sought," *Papasan* v. *Allain*, 478 U.S. 265, 279 (1986)—and to bar claims for "[r]elief that in essence serves to compensate a party injured in the past." *Id.* at 278; see, *e.g.*, *Edelman*, 415 U.S. at 666; *Ford Motor Co.* v. *Department of Treasury*, 323 U.S. 459, 464 (1945).

3. Critically for purposes of this case, the Court has made clear that, where a plaintiff is seeking retrospective monetary relief, the defense of sovereign immunity is available regardless of the source of the funds that would be used to discharge any judgment. Most notably, in *Regents of University of California* v. *Doe*, 519 U.S. 425 (1997), the Court unanimously held that a state agency possessed sovereign immunity even though the federal government had agreed to indemnify the agency

in the event of an adverse judgment. *Id.* at 431. The Court explained that, for purposes of sovereign immunity, "it is the entity's potential legal liability, rather than its ability or inability to require a third party to reimburse it, or to discharge the liability in the first instance, that is relevant." *Ibid.*

B. The Court Of Appeals' Decision Conflicts With The Decisions Of Other Courts Of Appeals

In the decision below, the First Circuit held that a federal court could order retrospective monetary relief against a sovereign as long as the necessary funds do not come directly from the general treasury. See App., *infra*, 25a-26a. No other court of appeals has adopted such a narrow view of the doctrine of sovereign immunity since this Court's decision in *Doe*, and several other courts of appeals have held that the defense of sovereign immunity is available whenever a plaintiff is seeking retrospective monetary relief, regardless of the effect of any judgment on the sovereign's treasury. The resulting conflict warrants this Court's review.

1. Four courts of appeals—the Fifth, Seventh, Tenth, and Eleventh—have held that sovereign immunity bars any suit in which the plaintiff is seeking retrospective monetary relief. In *Esparza* v. *Valdez*, 862 F.2d 788 (1988), the Tenth Circuit specifically rejected the contention that a suit seeking retrospective monetary relief for unemployment benefits should be allowed to proceed because the funds to satisfy any judgment would have come from "a special, segregated fund as distinguished from a general revenue fund." *Id.* at 794. The court held that the proposed distinction was irrelevant because, whatever the source of the funds, "an injunction ordering retroactive benefits effectively would be an award of money damages for past violations of federal

law that is precluded" by sovereign immunity. *Ibid.* (internal quotation marks and citation omitted).[2]

Relying on *Esparza*, the Seventh Circuit reached the same conclusion in another suit seeking retrospective monetary relief for unemployment benefits. See *Paschal* v. *Jackson*, 936 F.2d 940 (1991). Like the Tenth Circuit, the Seventh Circuit expressed "great difficulty with the view that a state's fiscal structure is dispositive of whether one can sue the state for accrued benefits." *Id.* at 944. The court "disregard[ed] the source of state funds" on the ground that "[w]here [the state] gets the money to satisfy a judgment is no concern of the plaintiff or the court." *Ibid.* (citation omitted). Instead, "what matters is that the judgment runs against the state." *Ibid.* (citation omitted).

Similarly, in *Cronen* v. *Texas Department of Human Services*, 977 F.2d 934 (1992), the Fifth Circuit held that sovereign immunity barred a suit seeking retrospective monetary relief for welfare benefits. *Id.* at 938. The court reasoned that, although the benefits the plaintiff was seeking "would be paid entirely by the federal government," "the source of the damages is irrelevant when the suit is against the state itself or a state agency." *Ibid.*[3]

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[2] Since its decision in *Esparza*, the Tenth Circuit has reiterated that, in analyzing whether an entity was an arm of the State for sovereign-immunity purposes, it "focus[es] on the legal incidence * * * of the liability" and not on "the practical effect" on the sovereign's treasury. *Sturdevant* v. *Paulsen*, 218 F.3d 1160, 1165 (2000).

[3] Although the court did leave open the possibility, in dicta, that a similar claim could proceed against a state official, it did not elaborate on why the identity of the named defendant would matter as long as the suit was seeking retrospective rather than prospective relief. See *Cronen*, 977 F.2d at 938.

Finally in this category of cases, the Eleventh Circuit held that a district court violated a State's sovereign immunity in a suit in which disabled individuals initially sought injunctive relief for alleged violations of a federal statute. See *Florida Association of Rehabilitation Facilities, Inc.* v. *Florida Dep't of Health & Rehabilitative Services*, 225 F.3d 1208 (2000). The court reiterated the principle that the availability of the exception of *Ex parte Young* "turns, in the first place, on whether the plaintiff seeks retrospective or prospective relief." *Id.* at 1219. Applying that principle, the court of appeals held that, when the district court ordered state officials "to redress inequities in their *past* reimbursement payments * * * and potentially to reimburse [p]laintiffs for those past deficiencies," it violated the State's sovereign immunity. *Id.* at 1220. The court explained that "[t]he fact that harm is ongoing in the sense that [p]laintiffs are continuing to suffer the effects of [d]efendants' prior failure to reimburse them adequately does not make the relief any less retrospective." *Id.* at 1221. In addition, the court rejected the plaintiffs' contention that the outcome should be different because the federal government would provide offsetting funds and the State's treasury would therefore not be affected. *Id.* at 1225. The court reasoned that such a principle "cannot readily be squared with the Supreme Court's Eleventh Amendment jurisprudence." *Ibid.*

2. The Sixth Circuit has taken a subtly different approach, although the result of that approach is seemingly the same: *i.e.*, to bar suits in which the plaintiff is seeking retrospective monetary relief. In *Ernst* v. *Rising*, 427 F.3d 351 (2005) (en banc), the Sixth Circuit considered whether sovereign immunity barred a suit seeking retrospective monetary relief for retirement benefits. *Id.* at 354-355. In the context of analyzing whether a

state retirement system was an arm of the State for sovereign-immunity purposes, the court rejected the plaintiffs' contention that any judgment in their favor would be paid out of funds belonging to the retirement system, rather than the State's general treasury. *Id.* at 361-362. Writing for the court, Judge Sutton reasoned that the proper inquiry was not "whether the state treasury would be liable in *this* case," but rather "whether, hypothetically speaking, the state treasury would be subject to potential legal liability *if* the retirement system did not have the money to cover the judgment." *Id.* at 362 (internal quotation marks and citation omitted). As a practical matter, the Sixth Circuit's approach is not materially different from that of the other circuits discussed above, because it focuses on the legal incidence of any liability for retrospective monetary relief—and bars suit where the liability falls on the sovereign.

3. In this case, the First Circuit took a dramatically different approach, holding that a federal court could order retrospective monetary relief against a sovereign as long as the necessary funds do not come directly from the general treasury. See App., *infra*, 25a-26a. That approach simply cannot be reconciled with the approaches of the circuits discussed above, which focus on the legal incidence of any liability rather than on the source of the funds used to satisfy any judgment in the plaintiff's favor.

No other court of appeals has permitted a federal court to order retrospective monetary relief against a sovereign since this Court's decision in *Doe*. Even before *Doe*, only two courts of appeals had so held. In *Brown* v. *Porcher*, 660 F.2d 1001 (1981), the Fourth Circuit held—in circumstances materially identical to the Tenth Circuit's decision in *Esparza* and the Seventh Circuit's decision in *Paschal*—that sovereign immunity did

not bar a judgment awarding retrospective monetary relief for unemployment benefits. *Id.* at 1003. In the Fourth Circuit's view, the judgment was not barred because the funds the plaintiffs were seeking were "insulated" and "separately financed" from the State's general treasury. *Id.* at 1007. Notably, although this Court ultimately denied review, three Justices dissented from the denial of certiorari. See 459 U.S. 1150 (1983) (opinion of White, J., joined by Powell and Rehnquist, JJ.). In his dissent—written even before *Doe*—Justice White explained that the distinction drawn by the Fourth Circuit was "certainly questionable under this Court's previous cases." *Id.* at 1153. He added that "whether there are some state funds that do not enjoy Eleventh Amendment immunity" was an "important" question that merited the Court's review. *Ibid.*

Similarly, the Third Circuit held—in circumstances materially identical to the Fifth Circuit's decision in *Cronen* and the Eleventh Circuit's decision in *Florida Association of Rehabilitation Facilities*—that sovereign immunity did not bar the award of retrospective monetary relief for benefits "to the extent that [the state agency] will be reimbursed by the United States." *Bennett* v. *White*, 865 F.2d 1395, 1408 (1989). Although the Third Circuit relied on that holding in a subsequent case, see *Robinson* v. *Block*, 869 F.2d 202, 214 n.11 (1989), it has not done so in any case since *Doe*.[4] Regardless of the ongoing vitality of that holding in the Third Circuit, how-

[4] To the contrary, in analyzing whether an entity was an arm of the State for sovereign-immunity purposes, the Third Circuit has noted that a "key factor" was "the potential legal liability of the Commonwealth for [the defendant's] debts" in the event the defendant were unable to pay. *Cooper* v. *Southeastern Pennsylvania Transp. Auth.*, 548 F.3d 296, 304 (2008) (citation omitted).

ever, the First Circuit's decision in this case confirms the existence of a live circuit conflict—a conflict that warrants the Court's review.

C. The Court Of Appeals' Decision Is Erroneous

The First Circuit erred in holding that a federal court could order retrospective monetary relief against a sovereign as long as the necessary funds do not come directly from the general treasury. As Chief Judge Lynch noted in her dissent from the denial of rehearing en banc, "[t]hat is not * * * the appropriate test under the Supreme Court's Eleventh Amendment jurisprudence." App., *infra*, 55a. In fact, the First Circuit's holding is so out of step with this Court's sovereign-immunity precedents that the Court may wish to consider the possibility of summary reversal.

1. The First Circuit correctly understood that, because respondents had brought suit against Puerto Rico officials in their official capacities, the relevant question was whether respondents could invoke the exception to sovereign immunity for such suits set out in *Ex parte Young*. See App., *infra*, 23a-24a.[5] The First Circuit erred, however, when it declined to address whether the relief ordered was prospective or retrospective. *Id.* at 24a. As noted above, this Court's precedents make clear that the exception of *Ex parte Young* is available where, and only where, the plaintiff is seeking prospective relief. See pp. 8-9, *supra*.

There can be no doubt that the relief which the plaintiffs in this case were seeking, and which the district

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[5] Respondent Suiza conceded below that respondents were pursuing "an *Ex [p]arte Young* type of action" and that the exception to sovereign immunity set out in *Ex parte Young* was "[t]he exception that mainly concerns us here." Suiza C.A. Br. 35.

court ordered, was retrospective in nature. In the operative version of their complaint, respondents specifically sought to "recover the losses they have experienced on account of the unconstitutional acts and decisions herein under attack." Second Am. Compl. ¶ 92, at 39. And in the order under review, the district court ordered ORIL to compensate respondents for lost profits from the beginning of 2003—*i.e.*, more than eighteen months before respondents filed suit—to the date on which ORIL ultimately adopts a revised regulatory scheme. See App., *infra*, 197a. Although respondents contended below that the relief was prospective on the ground that its purpose was to "rebuild their capital bases," *id.* at 24a, that contention could almost always be made when a court awards retrospective monetary relief, as Chief Judge Lynch noted in dissent. See *id.* at 60a n.8. And this Court has previously expressed its disapproval of efforts to relabel as prospective what is functionally retrospective relief. See, *e.g.*, *Papasan*, 478 U.S. at 278 (noting that sovereign immunity is triggered "if the relief is tantamount to an award of damages for a past violation of federal law, even though styled as something else").

2. The First Circuit fundamentally erred, moreover, when it proceeded to hold that, even assuming that the relief at issue was properly characterized as retrospective monetary relief, a federal court could order such relief against a sovereign as long as the necessary funds do not come directly from the general treasury. See App., *infra*, 25a-26a. Since its decision in *Green*, *supra*, this Court has consistently held that, in determining whether the relief at issue is impermissibly retrospective for purposes of *Ex parte Young*, a court should not consider whether the relief has an effect on the sovereign's treasury. Most notably, in *Doe*, the Court specifically held that, where a plaintiff is seeking retrospective monetary

relief, the source of the funds that would be used to discharge any judgment is irrelevant for purposes of sovereign immunity. See 519 U.S. at 431. Instead, the Court made clear that the appropriate inquiry focuses on "the entity's potential legal liability"—*i.e.*, the legal *incidence* of any liability—"rather than its ability or inability to require a third party to reimburse it." *Ibid.*

In this case, there can be no doubt that the liability for retrospective monetary relief falls on the Commonwealth, regardless of how it comes up with the necessary funds. In the operative version of their complaint, respondents specifically sought to "recover [their] losses" from ORIL. Second Am. Compl. ¶ 92, at 39. And in the order under review, the district court directed ORIL to compensate respondents—even if the court "did not force the Commonwealth to satisfy the judgment with funds directly paid from or funneled through [its] treasury," App., *infra*, 55a (Lynch, C.J., dissenting from denial of rehearing en banc), but instead allowed ORIL to raise the funds "through * * * any * * * available mechanism of [the Administrator's] choosing," *id.* at 197a.

As Chief Judge Lynch noted in dissent, if ORIL had been unable to raise sufficient funds to compensate respondents from the surcharge it imposed, it would have been obligated to find another means of doing so. See App., *infra*, 64a. Just as the defendant in *Doe* could not be sued for retrospective monetary relief simply because it had taken steps *ex ante* to limit its exposure by means of an indemnification agreement, so too petitioners cannot be sued here simply because ORIL took steps *ex post* to limit its exposure by means of a revenue-raising surcharge. Cf. *Doe*, 519 U.S. at 431 (noting that "[s]urely if the sovereign State of California should buy insurance to protect itself against potential tort liability * * * it

would not cease to be 'one of the United States'"). In short, this case is indistinguishable from *Doe*. The First Circuit clearly erred by extending *Ex parte Young* to permit a claim for retrospective relief and holding that the district court's order awarding retrospective relief did not violate Puerto Rico's sovereign immunity.

3. In rejecting petitioners' sovereign-immunity defense, the First Circuit heavily relied on decisions in which this Court has considered whether an entity constitutes an arm of the State (and is therefore entitled to invoke the State's sovereign immunity). See, *e.g.*, App., *infra*, 25a-26a (citing *Hess* v. *Port Authority Trans-Hudson Corp.*, 513 U.S. 30 (1994)). As a preliminary matter, those cases are inapposite here for the simple reason that respondents brought suit against Puerto Rico officials in their official capacities—not against any particular entity. Even if respondents had brought suit directly against the Puerto Rico Department of Agriculture or ORIL, however, each of those entities would "clearly" qualify as an arm of the State. *Id.* at 60a (Lynch, C.J., dissenting from denial of rehearing en banc). Like its federal counterpart, the Department of Agriculture is a full-fledged department of the executive branch, see P.R. Const. Art. IV, § 6, and ORIL is a subdivision of that department, see P.R. Laws Ann. tit. 5, § 1093 (2009).[6]

But in any event, this Court's cases involving the arm-of-the-State doctrine do not support the court of appeals' holding. To be sure, in those cases, this Court ex-

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[6] Notably, in arguing before the court of appeals that the district court's order did not violate sovereign immunity, respondent Suiza assumed, *arguendo*, that ORIL was an arm of the State. See Suiza C.A. Br. 33 n.22.

plained that, in determining whether an entity is an arm of the State, a court should give substantial weight to the effect of any judgment on the State's treasury. See, *e.g.*, *Hess*, 513 U.S. at 48. In *Doe*, however, this Court made clear that, in assessing that factor in the arm-of-the-State inquiry (as in determining more generally whether sovereign immunity is available), a court should focus on the legal incidence of the liability, not on the source of the funds that would be used to discharge it. See 519 U.S. at 431; see *id.* at 430 (citing *Hess* for the proposition that "the question whether a money judgment against a state instrumentality or official would be *enforceable* against the State is of considerable importance to any evaluation of the relationship between the State and the entity or individual being sued") (emphasis added). Because there can be no doubt here that the district court awarded retrospective monetary relief or that the legal incidence of that liability falls on the Commonwealth, the First Circuit's decision cannot be reconciled with this Court's precedents. The Court should either grant plenary review or reverse outright to correct the First Circuit's seriously flawed approach.

D. The Question Presented Is An Exceptionally Important One That Merits The Court's Review

Finally, the question presented in this case warrants the Court's review. The Court has long recognized the central importance of the doctrine of sovereign immunity as a means of protecting the power and dignity of sovereigns in our constitutional structure. See, *e.g.*, *Alden*, 527 U.S. at 715 (noting that "[t]he generation that designed and adopted our federal system considered immunity from private suits central to sovereign dignity"). Accordingly, the Court has granted review in recent years in numerous cases involving various aspects of so-

vereign immunity—including twice already in cases to be heard this Term. See, *e.g.*, *Virginia Office for Protection & Advocacy* v. *Reinhard*, cert. granted, No. 09-529 (June 21, 2010); *Sossamon* v. *Texas*, cert. granted, No. 08-1438 (May 24, 2010).

If allowed to stand, the First Circuit's decision will substantially undermine the vitality of this foundational principle of constitutional structure. The decision below allows a federal court to award retrospective monetary relief against any sovereign as long as the necessary funds do not come directly from the sovereign's general treasury. As Chief Judge Lynch noted in her dissent from the denial of rehearing en banc, that holding "provides an easy mechanism for evasion" of sovereign immunity, because a court need only direct a sovereign to generate the funds necessary to satisfy its liability by means of a tax in order to circumvent the traditional prohibition on retrospective relief. App., *infra*, 63a.

Indeed, under the First Circuit's approach, it will be impossible for sovereigns to seek dismissal of claims seeking retrospective monetary relief, because of the potential that a court will craft its relief in such a way as to avoid taking funds directly from the sovereign's general treasury. See, *e.g.*, *Federal Maritime Comm'n* v. *South Carolina Ports Auth.*, 535 U.S. 743, 765 (2002) (noting that "[s]overeign immunity does not merely constitute a defense to monetary liability or even to all types of liability" but instead "provides an immunity from suit"). If allowed to stand, therefore, the First Circuit's decision will enable plaintiffs to use *Ex parte Young* to seek retrospective as well as prospective relief—and thereby "effectively eliminate the constitutional immunity" of Puerto Rico and other sovereigns. *Pennhurst*, 465 U.S. at 105; see App., *infra*, 68a (Lynch, C.J., dissenting from denial of rehearing en banc) (noting that, under the First

Circuit's approach, "the Eleventh Amendment's bar against retrospective monetary relief [will] become[] a nullity").

Given "[the] stakes for the states in the many cases in which individuals seek compensation for past constitutional violations," Chief Judge Lynch correctly noted that this case presents "serious issues" that "deserve [the] attention" of the Court. App., *infra*, 54a, 56a (opinion dissenting from denial of rehearing en banc). The First Circuit's decision in this case authorizes the imposition on Puerto Rico of substantial monetary liability for past constitutional violations.[7] That decision is of enormous practical and conceptual importance to the Commonwealth of Puerto Rico. And it will have profound consequences for other sovereigns confronted in the future with similar claims. As explained above, the First Circuit's decision conflicts with the decisions of other circuits and cannot be reconciled with this Court's decisions. The Court should grant review and reaffirm the core constitutional principle that a sovereign may not be sued for retrospective monetary relief.

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[7] Respondents lost more than $10 million, allegedly as a result of Puerto Rico's regulatory scheme, in 2003 alone. See App., *infra*, 10a n.10.

CONCLUSION

The petition for a writ of certiorari should be granted. The Court may wish to consider summarily reversing the judgment of the court of appeals; in the alternative, the Court should set the case for briefing and oral argument.

Respectfully submitted.

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