No. 08-457

# 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*

## BRIEF IN OPPOSITION FOR RESPONDENT PUERTO RICO PORTS AUTHORITY

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## QUESTION PRESENTED

Whether the court below erred in concluding that the Puerto Rico Ports Authority is an arm of the state under the multi-factor test established by this Court in *Hess* v. *Port Authority Trans-Hudson Corp.*, 513 U.S. 30 (1994).

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## INTRODUCTION

Petitioner's arguments for review are based largely on a misreading of *Hess* v. *Port Authority Trans-Hudson Corp.*, 513 U.S. 30 (1994), and a failure to acknowledge that decision's apparent impact on the lower courts. As petitioner recognizes, *Hess* established a multi-factor test to determine whether an entity is entitled to sovereign immunity as an "arm of the state." Although the Court did not squarely hold that this inquiry is to be conducted on a "categorical" or entity-wide basis rather than a function-specific basis, the Court's analysis points strongly toward the categorical approach—at least where, as here, the state has indicated a categorical intention that the entity be treated as an arm of the state. In that respect, and in every other respect, the decision below is fully consistent with *Hess*.

Contrary to petitioner's contention that the decision below conflicts with decisions of the First Circuit, the decisions of that court conducting the inquiry on a function-by-function basis were both decided before *Hess*. And that court, while not acknowledging the change, appears to have applied a categorical approach in every case since *Hess*. If in some future case the First Circuit reverts to its pre-*Hess* approach, there will be ample opportunity to address the resulting circuit conflict then.

Nor is there any conflict between the decision below and the other circuit decisions petitioner cites. All those involved entities, unlike the Puerto Rico Ports Authority ("PRPA"), that have authority over a mere county—a context that demands a function-specific approach because counties as such possess no sovereign immunity.

## STATEMENT

This case involves three complaints for a total of $124 million filed in the Federal Maritime Commission ("FMC") against PRPA by private users of the Port of San Juan. The complaints challenge the land-use and economic development decisions of the Commonwealth and are framed as allegations of "unreasonable" practices by PRPA under the Shipping Act. An understanding of why the D.C. Circuit properly held that PRPA was an arm of the state, and thus immune from the FMC suit, requires some familiarity with (1) the nature of PRPA; (2) the Commonwealth's plan to develop the Port of San Juan through PRPA; (3) petitioner's challenge to the Commonwealth's plan; and (4) the decision below.

1. *The Puerto Rico Ports Authority.* A creature of statute, PRPA is a "public corporation and *government instrumentality* of the Commonwealth." Puerto Rico Ports Authority Act, 23 L.P.R.A. § 333(b) (the "Enabling Act") (emphasis added). First established in 1942 as the Puerto Rico Transportation Authority, PRPA is now and has always been "government controlled." See Act No. 125 of 1942, § 3(b); Act No. 65 of 1989, § 3(b); 23 L.P.R.A. § 333(b).

PRPA's principal purpose is to "manage any and all types of air *and* marine transportation facilities and services" so as to "promot[e] the general welfare and increas[e] commerce and prosperity" of the Commonwealth. 23 L.P.R.A. § 333 *et seq.*, § 336 (emphasis added). By statute, PRPA also acts as a "facilitator . . . of the development of the economic sectors that drive the present Puerto Rico Economy," including tourism. Act No. 65 of 1989. Not surprisingly, PRPA's purposes are deemed "public

purposes for the benefit of the people of Puerto Rico." 23 L.P.R.A. § 348. And all projects deemed necessary by PRPA are declared of "public utility." *Id.* § 349.

PRPA is governed by a Board appointed by the Governor. 23 L.P.R.A. § 334. And four of the five Board members are high-ranking Commonwealth officials who may be removed from their positions at will by the Governor: (1) the Secretary of Transportation and Public Works, the statutory Chairman; (2) the Secretary of Commerce; (3) the Economic Development Administrator; and (4) the Executive Director of the Tourism Company, also an arm of the Commonwealth. *Ibid.* The remaining member is a private citizen. 23 L.P.R.A. § 334. A majority of directors constitutes a quorum, *ibid.*; thus, Commonwealth officials control the Board.

PRPA's chief executive officer is its Executive Director. 23 L.P.R.A. § 335. By statute, the Board appoints the Executive Director, *id.* § 334, but as a practical matter, the Board appoints the person recommended by the Governor. And both the Executive Director and the Board report to the Governor. App. 354-356.[1]

PRPA also enjoys sweeping governmental powers. These include the authority to (1) "prescribe . . . such rules and regulations as may be necessary and proper for the exercise and performance of its powers and duties," 23 L.P.R.A. § 336(d); (2) conduct investigations, issue subpoenas, and levy fines, *id.* §§ 2109, 2203, 2205, 2603; (3) "exercise the power of eminent domain, *id.* §§ 336(h), 339, 339(a); and (4) hold hear-

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[1] Unless otherwise noted, all citations are to the appendix on appeal ("App.") or to the Petitioner's Appendix ("Pet. App.").

ings and enact "rate regulations," *id.* § 336. Moreover, all Puerto Rico harbors, waters, submerged lands, and the terrestrial maritime zone, including all buildings and structures built thereon, are under PRPA's "control, jurisdiction, and administration." *Id.* §§ 2202, 2602. PRPA thus controls not only all air traffic into and out of the Commonwealth, but also the movement of ships, passengers, and cargo into and out of Puerto Rico's harbors. *Id.* §§ 2401, 2501. Because Puerto Rico is an island, these powers are central to its economic health.

In keeping with its extensive powers, PRPA is also subject to extensive control and accountability by the Commonwealth. For example, PRPA must submit annual reports of "all its undertakings and activities" to the Legislature and the Governor. *Id.* § 345. Other statutes govern its administrative procedures, *id.* § 336; specify its procurement processes, *id.* § 341; require it to maintain accounts in Commonwealth-approved depositories, *id.* § 345; and submit to audits by the Commonwealth Controller, which are reported to the Governor and Legislature, *id.* § 338. PRPA is further subject to the mandates of the Commonwealth's Code of Ethics. 3 L.P.R.A. §§ 1755, 1758, 1831.

PRPA also enjoys governmental privileges in litigation, even in Commonwealth courts. *First*, injunctions cannot be entered against PRPA. 23 L.P.R.A. § 351, 32 L.P.R.A. § 3524. *Second*, while PRPA may issue bonds, 23 L.P.R.A. § 349, a creditor may not interfere with PRPA's operations or liquidate its assets. *Id.* § 343(e). And *third*, an action alleging fault or negligence against PRPA acting as an agent of the Commonwealth must be brought against the Commonwealth itself. 23 L.P.R.A. § 2303(b).

For all these reasons, in the proceedings below the Commonwealth Solicitor General expressed the sovereign's unequivocal view that "the Ports Authority is an arm of the Commonwealth for purposes of sovereign immunity from suits under federal law." App. 300.

2. *The Commonwealth's Port of San Juan Redevelopment Project.* In 1996, having concluded that tourism represented the driving force for future economic development, the Commonwealth began to redevelop the waterfront bordering historic Old San Juan and began plans to construct a new convention center, creating a tourist-friendly "Golden Triangle." App. 363-366. (Hon. Pedro Rosselló, Governor of Puerto Rico, Keynote Address at 4-7 ("Governor's Address") (Nov. 18, 1998)). The project required demolition of Port warehouses and relocation of cargo operations. It also called for the use of waterfront and adjoining land for tourism-related facilities, including cruise ship terminals and a convention center. App. 228-229; App. 362-366.

In June 1998, Governor Rosselló summoned PRPA's Executive Director, the Maritime Bureau Chief, and members of the PRPA's Board of Directors (the "Board"), including its chairman, the Secretary of the Department of Transportation, and others to the Governor's mansion. There, as part of the Golden Triangle project, he ordered the removal of warehouses along the San Antonio Channel to permit redevelopment of the waterfront for cruise ships. App. 339-343. The next day, PRPA's Executive Director instructed his staff to execute the Governor's orders. App. 342-343 (The Executive Director said, "I want this done as you heard yesterday"). Then, Maritime Bureau Chief Carrión met with Port users,

including petitioner, and informed them that PRPA was carrying out the Governor's orders regarding the Golden Triangle. *Ibid.* In November 1998, the Governor's aides and other officials, including the Secretary of Transportation, met again with PRPA's Executive Director to "fast track" the Golden Triangle. App. 343-344.

Around this same time, Governor Rosselló discussed the Golden Triangle project at a public meeting, stating that "[n]umerous government agencies will support this initiative under the watchful eye of our Department of Economic Development and Commerce," including: (1) the Department of Transportation and Public Works, (2) the Tourism Company, and (3) the PRPA. Regarding the PRPA, he explained:

> [PRPA] . . . will be . . . improving the aesthetics and the efficiency of our ship-handling activity by relocating cargo operations away from Old San Juan and Puerta de Tierra, so that none of our cruise-line passengers will find themselves boarding or disembarking amid piers that are utilized by freighters and tankers.

App. 364.

3. *Petitioner's Challenge To The Commonwealth's Economic Development Plan.* In the wake of these decisions, private parties, including petitioner, filed actions in the FMC challenging the Commonwealth's decisions, including the Governor's order to demolish warehouses. Petitioner admitted that PRPA is engaged in development of the Port, including the development of a public terminal funded by the Government Development Bank for Puerto Rico ("GDB"), to "better serve the economy of Puerto Rico."

App. 40. Moreover, although petitioner did not use the words "Golden Triangle" in its complaint, the events complained of directly related to that project and the Governor's order to demolish warehouses.[2]

PRPA moved for summary judgment on the ground that it was immune from suit as an arm of the Commonwealth. A bare majority (3-2) of the FMC held that PRPA was not an arm of the state.

4. *The Decision Below.* A unanimous panel of the D.C. Circuit reversed. Relying chiefly upon *Hess*, the court examined whether PRPA was an arm of the state using three factors: "(1) the State's intent as to the status of the entity; (2) the State's control over the entity; and (3) the entity's overall effects on the state treasury." Pet. App. 8a (citing *Hess*, 513 U.S. at 44-66) (other citations omitted). At the outset, the court observed that under this test, "an entity either is or is not an arm of the State"; that is, "the status of an entity does not change from one case to the next based on the nature of the suit." *Ibid.*

Considering the Commonwealth's *intent*, the Court observed that Puerto Rico law describes PRPA as a "government instrumentality of the Commonwealth of Puerto Rico" and a "government controlled corporation." Pet. App. 11a (citations omitted). While PRPA's functions included managing transportation facilities, which *Hess* notes "are not readily classified as typically state" functions, the court ob-

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[2] Specifically, petitioner alleges that PRPA (1) "forcibly evicted it from facilities; (2) unlawfully refused to lease land "because it had been designated for Puerto Rico government projects"; and (3) "unlawfully den[ied] petitioner berthing." App. 408, 414-415. All of these alleged actions were components of the Golden Triangle project.

served that PRPA performed these functions to "promote 'the general welfare'" and to increase "commerce and prosperity for the benefit of the people of Puerto Rico." Pet. App. 13a (citations omitted). Further, the court noted that other Puerto Rico laws, such as the Commonwealth's Administrative Procedures Act, suggested that PRPA was an arm of the state, as did the Commonwealth's representations in court. *Ibid.*

The Commonwealth's *control* over PRPA, the court held, also "weighs heavily" in favor of immunity. Pet App. 16a. In particular, the court found it significant that four of five PRPA directors were government officials, served by virtue of their offices, and "perform[ed] their services for PRPA as part of their official government duties; they receive no extra or separate compensation." *Ibid.* This, the court reasoned, shows "that the Commonwealth (which can act only through its officers) directly controls PRPA." *Ibid.*

Finally, the Court looked to PRPA's "overall effects" on the Commonwealth's *treasury*. Pet. App. 19a. Though PRPA's debts are not the Commonwealth's, the court observed, it is financed largely through fees and bonds "like many similarly created governmental entities." Pet. App. 20a. Further, the Commonwealth is "directly liable for certain torts committed by PRPA's officers . . . when they are acting in their official capacity and within the scope" of their work. Pet. App. 21a (citation omitted). Hence, "[s]ome of PRPA's actions can give rise to legal liability for the Commonwealth, and payment for judgments in those suits comes out of the Commonwealth's coffers." *Ibid.* According to the court, therefore, the "treasury" factor likewise favored treating PRPA as an arm of the state. Pet. App. 22a.

Taking these factors together, the court concluded, PRPA was an arm of the Commonwealth. *Ibid.*

## REASONS FOR DENYING THE PETITION

### I. There Is No Present Conflict Among The Circuits On The Categorical Approach To Determining Whether An Entity Is An Arm Of The State

Petitioner errs first in asserting that the decision below conflicts with decisions in other circuits on the categorical nature of the "arm-of-the-state" inquiry. Pet. 8-9. As we will show, although a couple of First Circuit decisions issued before *Hess* take a function-specific approach, the First Circuit has declined to follow that approach in its four decisions since *Hess*. And the other circuit decisions petitioner cites deal with the sovereign immunity of county sheriffs—a context where a functional approach is necessary simply because *county* sheriffs cannot categorically be arms of the *state*.

#### A. The First Circuit has applied the categorical approach to state-wide entities since *Hess*, and should it change course this Court will have ample opportunity to correct the error.

Before *Hess*, the First Circuit employed a function-specific approach in two cases, both of them involving PRPA. See *Puerto Rico Ports Auth.* v. *M/V Manhattan Prince*, 897 F.2d 1, 10 (1st Cir. 1990) ("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"); *Royal Caribbean Corp.* v. *Puerto Rico Ports Auth.*, 973 F.2d 8, 9 (1st Cir. 1992) (court

"must" answer Eleventh Amendment question in respect to the particular "type of activity"). But then came *Hess*, and the First Circuit silently changed course. In four published cases, the Court has decided whether an entity was an arm of the state as a categorical matter. For example, in *Fresenius Medical. Care Cardiovascular Resources, Inc.* v. *Puerto Rico & The Caribbean Cardiovascular Center Corp.*, 322 F.3d 56, 75 (1st Cir. 2003), the court considered whether a state-created medical center, as such, was an arm of state. Thus, it examined the "[s]tructuring of PRCCCC" (the entity at issue) and whether "the Commonwealth's [t]reasury [would] [b]e [o]bligated to [p]ay a [j]udgment [a]gainst PRCCCC," and concluded that "PRCCCC is not an arm of the state"—all without giving any weight to the specific function at issue. 322 F.3d at 68, 72, 75.

The First Circuit has taken the same approach in the following cases, all decided after *Hess*:

- *Breneman* v. *United States ex rel. Federal Aviation Administration*, 381 F.3d 33, 39 (1st Cir. 2004), which analyzed whether a state aeronautics commission was "an arm of the state," without considering its specific function in that case;
- *Redondo Construction Corp.* v. *Puerto Rico Highway & Transportation Authority.*, 357 F.3d 124, 128-29 (1st. Cir. 2004), which affirmed "the district court's decision that the Puerto Rico Highway and Transportation Authority is not an arm of the state," without considering its specific functions; and again in
- *Pastrana-Torres* v. *Corporacion de Puerto Rico Para La Difusion Publica*, 460 F.3d 124, 125, 128

> (1st Cir. 2006), which affirmed the lower court's ruling that a state-created broadcasting station "is not an arm of the Commonwealth."

In short, if the function-specific test in the First Circuit is not dead, it is in deep dormancy.

Despite the First Circuit's consistent failure to apply the function-specific test since *Hess*, petitioner asks this Court to grant review because the First Circuit *might* suddenly revive that test in a suit involving the PRPA. But that is pure speculation. It is true, as petitioner notes, that the First Circuit has favorably cited *Royal Caribbean* (one of its other PRPA cases) in one of its recent decisions. But until a case arises involving PRPA, it is impossible to tell whether the First Circuit would continue to employ its post-*Hess* categorical approach, or revert to the old rule.

If such a case arose in the First Circuit, PRPA would obviously press for the categorical approach and urge that court to follow the decision below. PRPA would also emphasize that the very nature of the *Hess* test favors continued use of the categorical approach. As the court below noted, *Hess* requires considering "state intent, including the entity's functions; state control; and the entity's overall effects on the state treasury." Pet. App. 9a. Each of these factors lends itself to an all-or-nothing conclusion: In the ordinary case, either the state intended the entity to be an arm of the state or it did not; either the state controls the entity or it does not; and either the entity affects the state treasury or it does not. That is no doubt why the test is called the "*arm* of the state" test, not the "function of the state" test.

In any event, if petitioner is correct, the party

most affected by this inconsistency is PRPA, which could be subject to suit in the First Circuit but not in the D.C. Circuit. Thus, if a panel of the First Circuit were to adhere to its old approach as to PRPA, PRPA would have every incentive to challenge that decision. And PRPA would do so—*first*, by asking the First Circuit *en banc* to conform the panel decision to *Hess* and the D.C. Circuit's decision here; and *second*, if necessary, by petitioning for review in this Court. As it is, review by this Court is premature.

### B. None of Petitioner's "county sheriff" cases holds that whether a statewide entity is an arm of the state must be determined on a function-specific basis.

Nor is there any merit to petitioner's argument that the decision below creates a further split because the Seventh, Ninth, and Eleventh Circuits have considered whether "an entity is an arm of the state is an all-or-nothing proposition," and have acknowledged that states "*may* create entities to have multiple roles." Pet. 6-7 (emphasis added). Nothing in the decision below imposes any limits on the states' *ability* to create entities that expressly enjoy sovereign immunity for some purposes but not others. The decision merely holds that in the ordinary case, like this one, where the state has created an entity without drawing distinctions among its various functions, the arm-of-the-state question should be addressed on a categorical basis.

Moreover, all that these other cases establish is that a function-specific approach is appropriate when plaintiffs bring claims against *county sheriffs*.[3] By

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[3] *DiGenova* v. *Sheriff of DuPage County*, 209 F.3d 973, 875 (7th Cir. 2000) ("whether a sheriff acts for the State or a local

definition, county sheriffs oversee counties, which "do not enjoy Eleventh Amendment immunity." *Hess*, 513 U.S. at 47 (citing *Mt. Healthy City Sch. Dist. Bd. of Educ.* v. *Doyle*, 429 U.S. 274, 280 (1977)). Thus, if a county sheriff is to claim immunity, he must do so only as to one of his specific functions—otherwise, he would effectively be claiming that the county itself was entitled to immunity. It follows, therefore, that petitioner's "county sheriff" cases simply could not have held that the sovereign immunity status of a statewide, state-created entity like PRPA must be determined on a function-specific basis. And indeed, petitioner offers no basis to believe the county sheriffs in these cases asked for all-purpose arm-of-the-state treatment. Accordingly, these cases simply cannot be read as having reached a square holding on the question petitioner seeks to present. And they therefore cannot be—and are not—in conflict with the decision below.

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entity is not an all or nothing determination"); *Scott* v. *O'Grady*, 975 F.2d 366, (7th Cir. 1992) ("[t]he fact that [the sheriff and deputy sheriff] normally act as county officials does not mean that they can *never* act as an arm of the state") (emphasis in original); *Abusaid* v. *Hillsborough County Bd. of Commissioners*, 405 F.3d 1298, 1203 (11th Cir. 2005) ("the question is not whether the sheriff acts for the state or the county in some all-or-nothing-manner, but rather whether the sheriff is acting for the state in a particular area, or on a particular issue") (citation omitted); *Manders* v. *Lee*, 338 F.3d 1304, 1328 (11th Cir. 2003) (*en banc*) ("We need not answer, and do not answer, today whether Sheriff Peterson wears a 'state hat' for any other functions [besides establishing the county jail's use-of-force policy and overseeing deputies]."); *Streit* v. *County of Los Angeles*, 236 F.3d 552, 566 (9th Cir. 2001) ("We are satisfied that the [Los Angeles County Sheriff's Department] is not acting as an arm of the state when administering the local county jails.").

### C. Nothing in the decision below suggests the court would have reached a different result if it had conducted a function-specific analysis.

It is also likely that the court below would reach the same result even if it had applied the function-specific approach that the First Circuit applied before *Hess*. Indeed, petitioner does not even argue that the court below would have reached a different result had it done so.

Here, PRPA's specific function was implementing the economic and land-use priorities of the Governor to promote tourism in and around the Port. As to this function, the Commonwealth's *intent* was plain—as a matter of both legislative mandate and direct order of the Governor—specifically concerning the Golden Triangle project. That project called for tourist-friendly development, as opposed to cargo operations. App. 363-366. Because statute establishes PRPA as a facilitator of tourism, Act No. 65 of 1989, and the Commonwealth's instrumentality with jurisdiction over Port lands and structures in the Golden Triangle, 23 L.P.R.A. § 336, the Governor utilized PRPA to implement portions of the project. App. 364. Thus, the Governor was plainly using PRPA as an arm of the state as to the events at issue here.

Moreover, it was uncontested that the Governor ordered buildings torn down by PRPA to make way for the project. App. 228-229. This demonstrates the Governor's—and the Commonwealth's—*control* over the PRPA.

And finally, as to the effect on the Commonwealth's *treasury*, there is no question that PRPA is "financed largely through user fees and bonds," and

the Commonwealth is potentially liable by statute for certain torts committed by PRPA's officers. Pet. App. 20a (citing 23 L.P.R.A. § 336(l)(1)). In addition, as the Commonwealth pointed out below, PRPA's economic importance to Puerto Rico means that, as a practical matter, the Commonwealth would be forced to stand behind PRPA if it encountered financial difficulty. Moreover, the Commonwealth faces these financial risks, not just from PRPA's general operation, but from the specific "function" at issue here—*i.e.*, the implementation of the Government's land-use and economic development priorities and directives.

In short, the court below would very likely reach the same conclusion as to PRPA's status if it were directed to address that issue on a functional rather than categorical basis. For that reason too, even if there were a conflict on that issue, this case would be a poor vehicle with which to resolve it.

## II. The D.C. Circuit's Application Of The *Hess* Test Is Consistent With The Precedents Of This Court And Other Circuits

Petitioner is also incorrect in contending that the decision below departed from *Hess* itself—either in its analysis of "structural" factors, or in its analysis of the risk PRPA poses to the Commonwealth treasury.

### A. The D.C. Circuit's analysis of PRPA's "structural functions" does not conflict with *Regents*, *Hess*, or decisions in other circuits.

In that regard, petitioner first argues that the D.C. Circuit's analysis does not "balance" properly all of *Hess*'s "structural indicators of immunity." Pet. 11. Specifically, petitioner faults the court below for supposedly ignoring statutory signals involving PRPA's

status and autonomy. Pet. 11-14. But in fact, the D.C. Circuit conducted a meticulous inquiry on both scores, see Pet. 12 n.3, but simply did not balance the factors as petitioner had hoped.

1. In examining PRPA's status, the D.C. Circuit considered four questions:

- Whether Puerto Rico law expressly characterizes PRPA as a government instrumentality;
- Whether PRPA performs governmental functions;
- Whether PRPA is treated as a government instrumentality under other Puerto Rico laws; and
- Puerto Rico's representations in this case.

Pet. App. 11a-15a. In answering those questions, contrary to petitioner's assertions, the D.C. Circuit considered possible contrary indicators. For example, the court recognized that managing air and marine facilities "[is] not readily classified as typically state as opposed to local governmental functions." Pet. App. 13a (citing *Hess*, 513 U.S. at 45)). Yet the Court also observed that PRPA performed these functions "to promote the general welfare" and to "increase commerce and prosperity for the benefit of the people of Puerto Rico." *Ibid.* (citations omitted). Thus, the Court held that whatever mixed signals might be sent by aspects of PRPA's responsibilities, they were overwhelmed by signs that PRPA was an arm of the state. Pet. App. 9a-10a.

In *Hess*, by contrast, conflicting signals left the arm-of-the-state question unresolved: "Port Authority functions are not readily classified as typically State or unquestionably local," this Court noted, and "[t]his consideration, therefore, does not advance our inquiry." *Hess*, 513 U.S. at 45. But here, these func-

tions were supplemented by the Commonwealth's own statements, in its statutes and its statements before the FMC and the court, about PRPA's purposes, including the general welfare and the promotion of a strong island economy. The decision below reasonably (indeed, correctly) concluded that when the various "structural" factors were considered in light of these statements, they *did* "advance" the inquiry.

Similarly, in *Hess* the port authority was not "type[d]" as a state agency. 513 U.S. at 44-45. But here, by contrast, the PRPA was expressly classed, by statute, as a "government instrumentality . . . and a government controlled corporation." Pet. App. 3a. "That statutory language," the court below correctly held, "plainly demonstrates Puerto Rico's intent to create a government instrumentality of the Commonwealth and thus strongly suggests that PRPA is an arm of the Commonwealth." Pet. App. 11a-12a.

In other words, unlike in *Hess*, the court below did not consider the indicia of Puerto Rico's intent to be in equipoise: The Commonwealth itself declared PRPA to be an instrumentality of and controlled by the state, and no contrary evidence was sufficient to offset that unqualified declaration.[4]

2. So too as to the control factor. In *Hess*, this Court explained that, "while 8 of the Port Authority's

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[4] Petitioner notes that this Court's statement in *Regents of the University of California* v. *Doe*, 519 U.S. 425, 429 (1997), that a "state instrumentality may invoke the State's immunity" merely shows that the word "instrumentality" is not dispositive. But contrary to petitioner's suggestion, Pet. 12-13, the court below did not rely solely on the word "instrumentality"—it also relied on PRPA's statutory description as a "government controlled corporation." Pet. App. 2a.

12 commissioners must be resident voters of either New York City or other parts of the Port of New York District, this indicator is surely offset by the States' controls." *Hess*, 513 U.S. at 49 (footnote omitted). Here, by contrast, "a majority of [PRPA's] directors are high officers in the Commonwealth who hold their directorships because of their positions in the government"; "perform their services for PRPA as part of their official government duties"; and "receive no extra or separate compensation for their board duties." Pet. App. 16a.

In light of these facts, the D.C. Circuit reasoned, "the Commonwealth (which can only act through its officers) directly controls PRPA." *Ibid.* Further, the Puerto Rico Attorney General opined that the Governor of Puerto Rico controls all its public corporations, including the port authority. Pet. App. 17a. Unlike the port authority in *Hess*, then, the court below was able to conclude that the facts "more than suffice" to demonstrate that the Commonwealth "directly controls" PRPA. Pet. App. 18a.

### B. The D.C. Circuit's "risk to the treasury" analysis is fully consistent with *Hess*.

Petitioner further contends that the D.C. Circuit erred in gauging PRPA's overall effect on the Commonwealth's treasury, "[r]ather than looking at any judgment that might be awarded in *the case being litigated*." Pet. 15 (emphasis in original). Remarkably, petitioner does not cite authority for this proposition—from this or any other court. And in fact, *Hess* analyzed the effect on the State's treasury at the broadest possible level, considering "[t]he Port Authority's *anticipated* and actual financial independence – its *long history* of paying its own way."

513 U.S. at 49 (emphasis added).

Under *Hess*, then, the D.C. Circuit got it right when it declared that forcing sovereign immunity to turn on whether the State paid the judgment "would inappropriately convert a *sufficient* condition for sovereign immunity into the single *necessary* condition for arm-of-the-state status. That is not the law. . . ." Pet. App. 19a (emphasis in original) (citing *Hess*, 513 U.S. at 45-46; *Lake Country Estates* v. *Tahoe Reg'l Planning Agency*, 440 U.S. 391, 401-401 (1979); *Mt. Healthy*, 429 U.S. at 280)).

In short, the D.C. Circuit properly followed the balancing test in *Hess*. Accordingly, even if error-correction were a ground for granting certiorari, review would be unwarranted here.

## III. The Failure Of The United States And The Federal Maritime Commission To File A Petition Shows That The Decision Below Poses No Serious Threat To Federal Interests

Finally, petitioner warns that "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," because the decision below was rendered in a circuit where "a large number of federal agency cases are brought." Pet. 18. Petitioner's concern is unfounded: Certainly the United States and the Federal Maritime Commission, which was a respondent in the court below, know their way to this Court. Yet they elected not to file a petition. And that decision demonstrates the lack of any serious federal interest in the issues presented.

There is, however, one non-party interested in this case—the Commonwealth itself, which filed a

brief in the court below supporting PRPA's status as an arm of the state. As the D.C. Circuit noted, since state intent is a component of the *Hess* arm-of-the-state test, courts "must respect" Puerto Rico's representations as to PRPA's status. Pet. App. 14a. Those representations confirm that the court below decided this case correctly, and that further review is unwarranted.

## CONCLUSION

At bottom, petitioner simply asks this Court to correct what it perceives as an error in the D.C. Circuit's application of a multi-factor balancing test, rather than to resolve any meaningful difference with another circuit on what that test is. If it were so inclined, this Court could make a cottage industry of second-guessing circuit courts in the application of balancing tests. But that is not the Court's role. And accordingly, the petition should be denied.

Respectfully submitted.

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