No. 21-1301

In the United States Court of Appeals for the First Circuit

CENTRO DE PERIODISMO INVESTIGATIVO, INC.,

Plaintiff-Appellee,

v.

FINANCIAL OVERSIGHT AND MANAGEMENT BOARD FOR PUERTO RICO,

Defendant-Appellant.

On appeal from the United States District Court for the District of Puerto Rico, San Juan, in consolidated cases Nos. 3:17-CV-01743-JAG and 3:19-CV-01936-JAG

BRIEF OF ESPACIOS ABIERTOS, THE NATIONAL FREEDOM OF INFORMATION COALITION, THE IOWA FREEDOM OF INFORMATION COUNCIL, AND THE NEVADA OPEN GOVERNMENT COALITION AS *AMICI CURIAE* IN SUPPORT OF APPELLEE AND AFFIRMANCE

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CORPORATE DISCLOSURE STATEMENT

Amici curiae are nonprofit organizations that have issued no stock or stake to the public, and have no parent companies, subsidiaries, or affiliates that issued any stock or stake to the public.

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INTEREST OF *AMICI CURIAE*[1]

Amici are public-interest nonprofit groups committed to government transparency and accountability. **Espacios Abiertos** (in English, Open Spaces) was founded in 2014 to effect long-term systemic change and socio-economic justice in Puerto Rico by promoting transparency, accountability, and civic participation. Its recent work has involved conducting studies on debt sustainability and macroeconomic policy for Puerto Rico in anticipation of the Financial Oversight and Management Board's ("the Board" or "FOMB") fiscal plans. To that end, Espacios Abiertos commissioned a study by the economists Pablo Gluzmann, Martin Guzman (now serving as Argentina's Minister of Finance) and Nobel prize-winner Joseph E. Stiglitz to analyze Puerto Rico's debt and propose suggestions for the Title III plans to ensure a sustainable economy.[2]

Espacios Abiertos has been at the forefront of seeking access to undisclosed assumptions and data concerning the Title III cases and related government plans. Espacios Abiertos has filed multiple freedom of information actions in Puerto Rico courts, including to seek disclosure of assumptions in the January 2018 New Fiscal

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[1] Leave to file this brief is sought. No counsel for any party authored this brief in whole or part, and no person apart from *amici curiae* and their counsel contributed money intended to fund the brief's preparation and submission. An Addendum of certified translations is attached per Local Rule 30.0(e).

[2] *See An Analysis of Puerto Rico's Debt Relief Needs to Restore Debt Sustainability* (Jan. 2018), *available at* https://espaciosabiertos.org/wp-content/uploads/DSA-English.pdf.

Plan submitted to FOMB[3] and to obtain adequate translation into Spanish of disaster recovery plans.[4] Relatedly, Espacios Abiertos has examined Board members' conflict-of-interest disclosures. After it wrote that the Governor's representative to FOMB had deficient disclosures, that liaison resigned.[5] And Espacios Abiertos has been thanked for its contribution as *amicus curiae* in federal litigation. *See Peña Martínez v. Azar*, 376 F. Supp. 3d 191, 197 (D.P.R. 2019).

Espacios Abiertos is the Puerto Rico affiliate of the **National Freedom of Information Coalition** (NFOIC) a nationwide nonprofit organization promoting open, transparent, and accessible government and public institutions. Other *amici* are state affiliates of NFOIC. NFOIC administers the Knight FOI Litigation Fund to support access to records cases and has filed *amicus* briefs in several cases raising important transparency issues.[6]

FOMB's attempt at total immunity from suit threatens more than the documents at issue. Such a rule would give FOMB license not to make its findings public generally, eroding transparency and trust between that unelected body and

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[3] *We Demand Transparency in Debt Sustainability Analysis*, Espacios Abiertos, https://bit.ly/3zWyv0A (last accessed June 24, 2021).

[4] *See* Press Release, Espacios Abiertos (July 23, 2018), https://bit.ly/35OE1o5.

[5] *See* Reuters, *Top Adviser to Puerto Rico Governor Resigns, 'in No Way Pressured'*, N.Y. Times (July 20, 2017), https://bit.ly/2TKSwqe.

[6] *See, e.g.*, Br. for Amici Curiae Am. Civil Liberties Union et al., *McBurney v. Young*, 569 U.S. 221 (2013); Br. of Amici Curiae Reporters Comm. et al., *Lepore v. United States*, No. 20-1836 (1st Cir.) (pending).

the millions of Puerto Ricans it governs. *Amici* respectfully submit this brief to underscore the importance of the right of access to public information, for which Puerto Rico has waived sovereign immunity.[7]

SUMMARY OF ARGUMENT

FOMB's sovereign immunity defense rests on a fundamental conflation of the "two independent aspects" of sovereign immunity: "immunity from suit in a federal forum . . . and substantive immunity from liability." *New Hampshire v. Ramsey*, 366 F.3d 1, 15 (1st Cir. 2004). FOMB concedes that if the claim is one for which it lacks substantive immunity from liability, there is no immunity from suit in federal court for those claims because PROMESA "creates federal jurisdiction over claims to which the Board is not immune." (FOMB Br. 26.) By contrast, FOMB argues, PROMESA's grant of exclusive jurisdiction in the federal forum does *not* waive or abrogate immunity "from claims under territory law" (*id.* 30)—in other words, waiving forum immunity does not waive *substantive* immunity under territory law. True enough. But the problem for FOMB is that Puerto Rico already waived substantive immunity from access to records claims in its own courts, and FOMB agrees it is part of Puerto Rico's government. And

[7] *Amici* take no position on whether Puerto Rico enjoys Eleventh Amendment immunity following *Puerto Rico v. Sánchez Valle*, 136 S. Ct. 1863 (2016). The Court need not reach that issue because FOMB lost any immunity it might have had. *Amici* assume, like the parties have, that FOMB is the real party in interest, rather than Board members.

because PROMESA abrogates, and FOMB waived, forum immunity, there is no Eleventh Amendment bar to these claims in federal court on either basis.

FOMB lacks both forms of sovereign immunity here. *First*, it waived substantive immunity. Puerto Rico, by creating a private cause of action against itself by statute and under its constitution for access to public records, waived substantive immunity from those claims in its own courts.

Second, FOMB argues (in a footnote) that PROMESA makes FOMB an arm of the Commonwealth for sovereign immunity purposes. But if FOMB steps into Puerto Rico's shoes, it must take that immunity as it finds it. Because Puerto Rico waived substantive immunity for these claims, FOMB would, too.

Third, Congress abrogated, and FOMB waived, its immunity from suit in a federal forum. (*See* CPI Br. 34, 44-45.) PROMESA provides that the court below has exclusive jurisdiction in "any action against" FOMB, 48 U.S.C. § 2126(a), which is unmistakably clear in abrogating immunity from federal suit. And FOMB waived forum immunity for the added reason that it moved for the Bankruptcy Court hear the case and bar the claims under the automatic stay, only raising the Eleventh Amendment defense after losing. (*See* CPI Br. 5-6, 11, 15-17.) Having entreated a federal court to resolve these claims, FOMB cannot now claim immunity here.

A contrary holding would allow a state or territory to "selectively invoke its Eleventh Amendment immunity to gain litigation advantage." *Ramsey*, 366 F.3d at 17; *see also Lapides v. Bd. of Regents*, 535 U.S. 613, 621 (2002). Worse, it would extinguish liability for sovereigns that chose to subject themselves to it: any exclusive federal jurisdictional grant would foreclose the state law claim in state court, and forum immunity would bar the same claim in federal court. The Court should instead hold FOMB to its concessions: if it is part of Puerto Rico's government and PROMESA authorizes federal suit against it, it has neither substantive nor forum immunity for these claims, and the Court should affirm.

ARGUMENT

I. Puerto Rico Waived Substantive Immunity by Creating a Cause of Action Against Itself for Access to Government Information.

A. Access to Government Information is a Fundamental Right of Surpassing Importance in Puerto Rico.

The public's right of access to government information dates to the Commonwealth's earliest laws. "Puerto Rico became a territory of the United States in 1898, as a result of the Spanish–American War." *Puerto Rico v. Sánchez Valle*, 136 S. Ct. 1863, 1868 (2016). "In its last years of Spanish rule Puerto Rico had achieved a measure of independence, but, under the Treaty of Paris, which ceded Puerto Rico to the United States, the island lost its autonomy." *Cordova Simonpietri v. Chase Manhattan Bank*, 649 F.2d 36, 39 (1st

Cir. 1981) (Breyer, J.). After a period of martial law, Congress passed the Foraker Act in 1900 to restore some self-rule to Puerto Rico. It "provided for Presidential appointment of Puerto Rico's Governor . . . the legislature's upper house, and the justices of its high court" but "it also provided for the selection, through popular election, of a lower legislative house with the power (subject to upper house concurrence) to alter, amend, modify, and repeal any and all laws . . . of every character." *FOMB v. Aurelius Inv., LLC*, 140 S. Ct. 1649, 1660 (2020) (cleaned up).

Among the early laws that Puerto Rico's legislature enacted was a 1905 evidentiary statute codifying that "[e]very citizen has a right to inspect and take a copy of any public document of Puerto Rico, except as otherwise expressly provided by law." P.R. Laws Ann. tit. 32, § 1781 (2019); *see De J. Cordero v. Prensa Insular de Puerto Rico, Inc.*, 169 F.2d 229, 232 n.1 (1st Cir. 1948). The government's immunity from judicial relief under the statute was soon at issue in *Lutz v. Post*, 14 P.R. 830 (P.R. 1908). There, a newspaper editor petitioned the local court for a writ of *mandamus* directing the Governor (then appointed by the President) to make available a judge's answer to ethics charges in his possession. *Id.* at 831. The trial court denied the application, and the plaintiff appealed. *Id.* at 832. In Puerto Rico's Supreme Court, the Governor argued that the court did not have jurisdiction to issue a writ ordering him to show cause why he should not

produce the document. *Id.* at 833. The court disagreed, citing *Marbury v. Madison*, 5 U.S. 137 (1803), 14 P.R. at 839-40, in holding it did:

> "[W]e are amply justified in holding that as to ministerial duties the general principle of allowing relief by *mandamus* against executive officers should be upheld and applied; and the mere fact that it is the Governor of Porto Rico against whom the relief, by this extraordinary writ, is sought should not impede or deter the courts in or from the exercise of their jurisdiction; since it is well established and cannot be denied that the authority of the courts is supreme in the consideration and determination of all legal questions, judicially submitted to them, within the proper limits of their jurisdiction; and no man is exempt from the operation of the law; and the duty of faithfully executing the laws is incumbent on the governor by virtue of his official oath, and should the relief sought be refused the applicants might be utterly without redress."

Id. at 840-41. Although the *Lutz* court did not explicitly discuss sovereign immunity, its reasoning implicitly overruled sovereign immunity for equitable relief against the government under the public records law; otherwise, such relief would be impossible. But it affirmed denying relief to the newspaper editor because he could not show he was "beneficially interested" under the *mandamus* statute and was improperly seeking the document "perhaps to gratify public curiosity, and to create a market for the newspaper". *Id.* at 842-43.

But the right of access expanded in the following decades. This Court, hearing an appeal from the Puerto Rico Supreme Court, explained that the latter in its decision below had "in effect overruled *Lutz v. Post*, stating that the right of the press to inspect public documents had progressed considerably since 1908 when

the *Lutz* case was decided and that probably 'the Justices who took part in its decision would not decide it now, insofar as this point is concerned, in the manner they did more than thirty eight years ago.'" *De J. Cordero*, 169 F.2d at 233 (quoting 67 P.R. 83, 95 (P.R. 1947)).

That expanded right was in turn recognized in Puerto Rico's constitution, which Congress authorized Puerto Rico to begin drafting in 1950. *See Sánchez Valle*, 136 S. Ct. at 1868. Puerto Rico's "voters ratified the draft constitution" in 1952, and Congress approved it with some conditions that the constitutional convention then accepted. *Id.* at 1869. Puerto Rico's constitution, providing for popular elections, states that its government is "republican in form" and "subordinate to the sovereignty of the people of Puerto Rico." *Id.* (quoting P.R. Const. Art. I, § 2). And for nearly forty years, Puerto Rico's Supreme Court has recognized "the right . . . of the citizens in general to have access to public information as a fundamental right of constitutional rank." *Bhatia Gautier v. Roselló Nevares*, 199 D.P.R. 59, FOMB Br. ADD84 (P.R. 2017). The high court has explained that "[t]his right is firmly related to the exercise of the rights of liberty of speech, press, [and] association" in its constitution and "is a fundamental pillar in every democratic society." (*Id.*) The reasoning is straightforward:

> "[I]f the People are not duly informed of the way in which the public duty is performed, their liberty to express, through vote or otherwise their satisfaction or lack of satisfaction with the

> persons, rules or procedures that govern them, will be impaired."

(*Id.* at ADD85.) But Puerto Rico's Supreme Court noted that, as of 2017, when the first of the consolidated actions below was filed, there was "no specific legislation to delimit the access of governmental documents to the public scrutiny." (*Id.* at ADD86.)

That changed in 2019, when the Transparency and Expedited Procedure for Access to Public Information Act became law. P.R. L. No. 141 (Aug. 1, 2019), ADD1-10 ("Transparency Act.") The Transparency Act cites the longstanding caselaw acknowledging access to public records, including "the claimant's right to turn directly to the court to claim his right." *Id.* at ADD2. Among other things, the Transparency Act created an expedited, free process for suing a government entity in Commonwealth court. *Id.*, Art. IX, ADD7-8. The Act states that these new remedies "shall not be interpreted restrictively or be construed to exclude other rights and procedures related to people who request public information that are not specifically mentioned here, such as the traditional petition for writ of mandamus." *Id.*, art. XII, ADD9. And the Transparency Act says that it "shall be interpreted in the most liberal and favorable manner" for plaintiffs. *Id.* "In the event of conflict between the provisions of [the] Act and that of any other legislation, the one that is most favorable" for plaintiffs prevails. *Id.*

This robust right to inspect today encompasses more than just press access. It is a "legal right" of "common citizens . . . to examine and investigate how their affairs are conducted" and is "based on the premise that everyone has the right to know and hear about government affairs." *Eng'g Servs. Int'l, Inc. v. P.R. Elec. Power Auth.*, No. CC-2018-513, 2020 WL 5659443, at *4, ADD13 (P.R. 2020) (cleaned up). Access to government records "facilitates the free discussion of government issues", "is an indispensable catalyst for citizen participation", and "promotes . . . government transparency." *Id.* With *Lutz* left behind, today "every citizen, just for being such, has active legitimacy to request and access public information." *Id.*, 2020 WL 5659443, at *5, ADD13.

The right of access is indispensable here. Puerto Rico's residents had no vote or elected representation in the creation, composition, or actions of FOMB, but their taxes fund it, *see* 48 U.S.C. § 2127(b). FOMB has the power to overrule Puerto Rico's legislature and to set other fiscal policies, *Aurelius*, 140 S. Ct. at 1662, such as ordering for "pensions to be reduced by as much as 8.5 percent, a measure that threatens the sole source of income for thousands of Puerto Rico's poor and elderly," *id.* at 1674 (Sotomayor, J., concurring in judgment). The only recourses against FOMB are to petition it, lobby Congress, or seek relief in court. But if FOMB can withhold access to its reasoning—which its claim to immunity

would broadly permit—it would not be "possible to effectively exercise the rights" that Puerto Rico's constitution ensures. *Bhatia Gautier*, FOMB Br. ADD85.

B. Establishing This Cause of Action Waived Puerto Rico's Substantive Immunity from It.

That backdrop makes clear that Puerto Rico waived substantive immunity from public records claims in its courts. Because "a state may waive its immunity from substantive liability without waiving its immunity from suit in a federal forum" or vice-versa, *Ramsey*, 366 F.3d at 15, the Court should consider separately waiver of both forms of immunity. Waiver of forum immunity "is without doubt a question of federal law." *Redondo Constr. v. P.R. Hwy. & Transp. Auth.*, 357 F.3d 124, 127 (1st Cir. 2004). Courts will find state statutory consent to waive immunity from suit in federal court "only where stated by the most express language or by such overwhelming implications from the text as will leave no room for any other reasonable construction." *Davidson v. Howe*, 749 F.3d 21, 28 (1st Cir. 2014) (cleaned up). The legislature's intent, though, is a question of state law. *See Redondo Constr.*, 357 F.3d at 128 ("In the context of state waivers of Eleventh Amendment immunity, we have confirmed that legislative intent is a matter of state law, on which the highest court of a state speaks with finality." (cleaned up)).

The Supreme Court and this Court have thus readily found that a state waived substantive immunity to claims in state court, even where the state did not

consent under its laws to a federal forum for those claims. *See, e.g.*, *Lapides*, 535 U.S. at 616 (noting that "a state statute had waived sovereign immunity from state-law suits in state court" in concluding that state law claims against a state could proceed in federal court); *Maysonet-Robles v. Cabrero*, 323 F.3d 43, 51 n.6 (1st Cir. 2003) (noting that Puerto Rico by statute waived immunity from liability in several categories of claims in its own courts, but not in federal court). And a state waives substantive immunity in its own courts by creating a cause of action against itself under its constitution or statutes. *See, e.g.*, *Great N. Ins. Co. v. Read*, 322 U.S. 47, 55 (1944) (statute creating cause of action for tax recovery made it "clear" that state "was consenting to suit in its own courts"); *Smith v. Reeves*, 178 U.S. 436, 441 (1900) (statute creating a cause of action against state treasurer necessarily showed that the state consented to suit "in one of its own courts" even though that was "not expressly declared in the statute"); *Beers v. Arkansas*, 61 U.S. 527, 529 (1857) (finding that state "waived the privilege of sovereignty as to authorize suits to be instituted against it in its own courts" under its constitution); *cf. R.I. Dep't of Envtl. Mgmt. v. United States*, 304 F.3d 31, 49 (1st Cir. 2002) ("*RIDEM*") ("It is reasonably apparent that the Supreme Court should be troubled by such an attempt to regain, by a change in forum, litigation advantage that the state has already renounced by a general statute.").

That is what Puerto Rico did here. Puerto Rico has long found a cause of action, by statute and under its constitution, to enforce the people's right of access to public information by ordering production of government documents. Although the Commonwealth cases cited above do not use the phrase "sovereign immunity," a waiver of substantive immunity is the inescapable conclusion when a state authorizes a suit against itself. *See Beers*, 61 U.S. at 529. Such an action would be meaningless if the state could simply invoke substantive immunity as a bar in every case. Rather, the only limitations to these claims are the privileges against production that Puerto Rico's Supreme Court recognizes (*see Bhatia Gautier*, FOMB Br. ADD86-87) and the Commonwealth statute defining public records (P.R. Laws Ann. tit. 3, § 1001(b)), which are the bases for the District Court's orders to review the Board's claimed privileges (*see* FOMB Br., ADD51, 55 n.27). FOMB cannot refuse the right of access "in a capricious and arbitrary way." *Bhatia Gautier*, FOMB Br., ADD86.

Because Puerto Rico's Supreme Court and statutes recognize a cause of action against the government not subject to any immunity defense in its courts, that determination controls as a matter of Commonwealth law, and Puerto Rico's intent to waive substantive immunity from these claims "is just as clear as if the waiver were made explicit in [its] statute". *Redondo Constr.*, 357 F.3d at 128.

II. FOMB Likewise Waived Substantive Immunity from Access to Information Claims.

As part of the government of Puerto Rico, FOMB would have the same substantive immunity from public records claims as Puerto Rico does: none. This Court determines whether an entity is the arm of a state for sovereign immunity purposes under a two-part test. "A court must first determine whether the state has indicated an intention—either explicitly by statute or implicitly through the structure of the entity—that the entity share the state's sovereign immunity." *Redondo Constr.*, 357 F.3d at 126. "In the absence of an explicit statement, an analysis of the entity's structure requires a wide-ranging survey of the entity's relationship with the state," with multiple factors guiding the inquiry. *United States v. Univ. of Mass., Worcester*, 812 F.3d 35, 39-40 (1st Cir. 2016). If the first step "is inconclusive, 'the court must proceed to the second stage and consider whether the state's treasury would be at risk in the event of an adverse judgment.'" *Id.* at 40 (quoting *Redondo Constr.*, 357 F.3d at 126). "A party claiming sovereign status bears the burden of demonstrating that it is an arm of the state." *Id.*

At the outset, FOMB has not met that burden. It argues in a footnote that "[t]here can be no reasonable dispute that the Board is an 'arm of the state' entitled to immunity" (FOMB Br. 23 n.3), citing the provision in PROMESA stating that FOMB "shall be created as an entity within the territorial government for which it

is established" rather than as a federal government entity, 48 U.S.C. § 2121(c). It does not apply this Court's two-step test for that analysis or even cite it. The order denying the first motion to dismiss below likewise noted that "[t]he parties did not address whether the Board should be considered an 'arm' of Puerto Rico for Eleventh Amendment purposes," and the District Court simply "assume[d] without deciding" that it was. (FOMB Br., ADD32 n.6.) This Court has "repeatedly held that arguments raised only in a footnote or in a perfunctory manner are waived." *Nat'l Foreign Trade Council v. Natsios*, 181 F.3d 38, 61 n.17 (1st Cir. 1999). The Board's waiver of this point is an independent basis to affirm the Eleventh Amendment holding.

The conclusion that FOMB is an "arm of the state" for sovereign immunity purposes is not obvious. At step one, the Commonwealth expressed no intention to create FOMB in its own statutes; that was merely a consequence of PROMESA, a federal statute.[8] Nor is FOMB subject to Puerto Rico's legislature or any other elected office of its government; the Governor is merely an "ex officio" Board member "without voting rights." 48 U.S.C. § 2121(e)(3). Although the District Court noted that PROMESA requires the Commonwealth to pay damages

[8] If PROMESA is sufficient proof of Puerto Rico's consent to create FOMB as an arm of the Commonwealth, then PROMESA's provision of exclusive jurisdiction in the federal courts is likewise consent to waive forum immunity there, as Part III explains below.

FOMB might incur (*see* FOMB Br., ADD32 n.6), no damages are sought here (*see* JA 20 ¶ 1.8). The choice between an arm of the state or federal government is not disjunctive; FOMB could be a "political subdivision to which the Eleventh Amendment does not extend." *Ainsworth Aristocrat Int'l Pty, Ltd. v. Tourism Co.*, 818 F.2d 1034, 1036 (1st Cir. 1987).

The "arm of the state" doctrine simply has not encompassed an entity that is a creation solely of federal statute, and that does not follow from a two-sentence footnote. *See Pastrana-Torres v. Corporación de P.R. para la Difusión Pública*, 460 F.3d 124, 128 (1st Cir. 2006) (explaining that even if the entity's "entire budget comes from the Commonwealth of Puerto Rico General Fund" it would "not necessarily [be] dispositive" and affirming because defendant did not meet its burden of proof under the two-part test). The Court should reject any attempt by FOMB to meet its burden of proof in later briefing. *See Waste Mgmt. Holdings v. Mowbray*, 208 F.3d 288, 299 (1st Cir. 2000) ("[I]ssues advanced for the first time in an appellant's reply brief are deemed waived.")

In any event, even if FOMB is an "arm" of the Commonwealth, it steps into the Commonwealth's shoes for sovereign immunity purposes, and FOMB may only "claim *the very same* sovereign immunity from suit that the [Commonwealth] enjoys". *Grajales v. P.R. Ports Auth.*, 831 F.3d 11, 13 (1st Cir. 2016) (emphasis

added). Because Puerto Rico waived substantive immunity from public records claims, FOMB did the same.

III. FOMB Lacks Forum Immunity.

FOMB does not enjoy forum immunity from suit in federal court, either, for three reasons.

First, Congress abrogated FOMB's forum immunity from suit in federal court. (*See* CPI Br. 34, 44-45; FOMB Br. ADD33-38.) "Congress may abrogate the States' constitutionally secured immunity from suit in federal court only by making its intention unmistakably clear in the language of the statute." *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 73 (2000) (cleaned up) (cited at FOMB Br. 30). In *Kimel*, a federal statute said that it authorized suit against a state "in any Federal or State court of competent jurisdiction". *Id.* at 73-74. On appeal in the Supreme Court, the state defendant cited precedent holding that a state statute creating a cause of action "in any court of competent jurisdiction" did not waive immunity from suit in federal court. *Id.* at 75. The Supreme Court rejected that comparison and held that Congress's intent to abrogate forum immunity there was unmistakably clear. *Id.*[9] What distinguished the statute in *Kimel* was that it authorized suit "in any Federal" court, while the statute creating a cause of action

[9] Although the Court ultimately rejected abrogation because it held Congress there lacked the authority to abrogate sovereign immunity. *See id.* at 67.

in "any court of competent jurisdiction" was ambiguous by not referencing federal court at all. *Id.* at 75-76.

PROMESA is even more specific than the statute in *Kimel*. It provides that "any action against the Oversight Board . . . shall be brought in a United States district court for the" relevant territory, here, Puerto Rico. 48 U.S.C. § 2126. That is unmistakably clear in waiving forum immunity from suit in federal court. To be sure, this Court has not yet held explicitly that Congress may abrogate forum immunity without abrogating substantive immunity. But it has assumed that "a state may waive federal forum immunity without waiving substantive liability immunity." *Ramsey*, 366 F.3d at 15. This is a corollary of the same principle.

FOMB argues that nothing in PROMESA's jurisdictional provision "remotely evinces an intent by Congress to eliminate the Board's sovereign immunity from claims under territory law." (FOMB Br. 30.) But it didn't have to. PROMESA need not be "unmistakably clear" in its intent to abrogate *substantive* immunity because FOMB, stepping into Puerto Rico's shoes, has already done so for access to records claims. It is enough that, under *Kimel*, PROMESA is clear in abrogating immunity from suit in a federal forum.

FOMB cites *Blatchford v. Native Village of Noatak*, 501 U.S. 775, 786 n.4 (1991) for the proposition that creating federal jurisdiction to hear a claim does not abrogate sovereign immunity for it. (FOMB Br. 29.) This too conflates forum

immunity and substantive immunity. The next sentence that follows the Board's quotation from *Blatchford* says that "[a] State may waive its Eleventh Amendment immunity, and if it does, [the federal jurisdictional statute] certainly would grant a district court jurisdiction to hear the claim." *Id.* That is what Puerto Rico did for public records claims in its courts, so PROMESA grants the district court the power to hear them. *See Lapides*, 535 U.S. at 617.[10]

Next, FOMB does not object on appeal to the District Court's analysis of Congressional authority to abrogate forum immunity under Article IV (FOMB Br. ADD37-38), so the Court can end the sovereign immunity analysis there and affirm. *See Waste Mgmt.*, 208 F.3d at 299.

Second, and in the alternative, if the Court finds that PROMESA establishes Puerto Rico's consent for FOMB to function as an "arm of the state," then PROMESA would simply waive forum immunity rather than abrogate it. *See Ramsey*, 366 F.3d at 15. In either case, the result is the same.

[10] Likewise, *Maysonet-Robles* noted that "the grant of a federal forum does not alone constitute an abrogation of sovereign immunity", 323 F.3d at 54, but one of the problems for plaintiffs there was a mismatch: Puerto Rico had waived substantive immunity from liability for certain state law claims, *id.* at 51 n.6, and plaintiffs argued that federal jurisdiction for Section 1983 claims abrogated forum immunity for the state law claims, too, *id.* at 53-54. But Section 1983's forum provision applies only to Section 1983 claims, not to state law claims. PROMESA, by contrast, creates a federal forum for "any action against" FOMB. 48 U.S.C. § 2126(a).

Third, and together with the above grounds, FOMB waived immunity from suit in federal court by affirmatively invoking the jurisdiction of the Bankruptcy Court in the lead case below to resolve these claims before it ever raised an Eleventh Amendment defense. (*See* CPI Br. 5-6, 11, 15-17.) "A state can waive its Eleventh Amendment immunity to suit . . . by affirmative conduct in litigation." *Ramsey*, 366 F.3d at 15 (citing *Lapides*, 535 U.S. at 620). "[W]aiver by litigation conduct requires a showing that a state has voluntarily invoked the jurisdiction of the federal courts." *Bergemann v. R.I. Dep't of Envtl. Mgmt.*, 665 F.3d 336, 340 (1st Cir. 2011) (cleaned up). Waiver to forum immunity occurs in this Circuit "when a state employs procedural maneuvering to gain an unfair tactical advantage." *Id.* at 342. And when a state invokes federal jurisdiction for a claim for which it "previously had waived its immunity . . . in state court proceedings", it waives sovereign immunity altogether. *Id.*

FOMB waived forum immunity just as the state in *Ramsey* did. There, the state defendant appealed from entry of an arbitration award of prospective equitable relief and damages to plaintiffs on federal law claims, arguing that it was immune from suit in a federal forum and immune from substantive liability. *Id.* at 4. On appeal, this Court affirmed the injunctive relief and vacated the damages award. *Id.* at 4-5. As to injunctive relief, the Court reasoned that the state had waived any forum immunity because, before raising any

Eleventh Amendment defense, it affirmatively invoked the grievance process outlined in the federal statute to dismiss the suit. *Id.* at 15-16. "The plaintiffs did not assert that" the federal administrative process applied; "it was the state that made that argument" to "advantage[] itself to the detriment" of plaintiffs. *Id.* at 16. By invoking "procedures [that] ultimately provided for federal judicial review[] to obtain dismissal of a claim for injunctive relief," the state "waived any immunity may have to a federal forum and prospective equitable relief." *Id.* "To permit the state to reverse course" and later claim sovereign immunity "would contravene the reasons for the doctrine of waiver by litigation conduct recognized by *Lapides* and *Lapides's* core concern that a state cannot selectively invoke its Eleventh Amendment immunity to gain litigation advantage." *Id.* at 16-17.

The same is true here. Two weeks after CPI filed the first of the consolidated cases below, "the Board moved to reassign this case to Judge Swain as a related case" to the Title III actions. (JA42.) After the court denied that motion, FOMB affirmatively invoked the power of the automatic stay in the Title III cases to stay the lead case here. (JA41-48.) It did all this before it ever raised a sovereign immunity defense. (*Compare* ECF Nos. 5 and 13 *with* ECF No. 22 (JA3-4).) Indeed, it only raised that defense *after* Judge Swain lifted the automatic stay for these actions to continue. (*Compare* JA107-09 (order of August 18, 2017 lifting the automatic stay) *with* ECF No. 22 (JA4) (moving to dismiss on

sovereign immunity grounds on August 29, 2017).) FOMB affirmatively sought to move the case to a preferred federal forum and invoked a federal bankruptcy remedy to block the requested injunctive relief. As in *Ramsey*, the Board's "actions expressed a clear choice to submit its rights for adjudication in the federal courts." 366 F.3d at 16; *cf. Aquinnah/Gay Head Cmty. Ass'n v. Wampanoag Tribe*, 989 F.3d 72, 83 (1st Cir. 2021) ("We think a [sovereign] cannot raise the issue of sovereign immunity in a district court, forgo it . . . while seeking relief from an adverse ruling, and then employ it in a later appeal to secure a do-over.") The Board's belated claim to sovereign immunity only after it lost its preferred federal court remedy is precisely the sort of gamesmanship that *Lapides* and its progeny proscribe.

Other decisions from this Court are not to the contrary. In *Taylor v. U.S. Department of Labor*, 440 F.3d 1 (1st Cir. 2005), the state affirmatively sought a hearing from an administrative law judge to preempt an ongoing investigation that had not yet advanced to an enforcement action. *Id.* at 7. Because "[t]he only mechanism for moving the complaint to the adjudicatory stage where the sovereign immunity defense can be raised in the first instance is for one of the parties to request a hearing," the state did not suggest intent to waive sovereign immunity by seeking to present that argument before an ALJ. *Id.* *RIDEM* is also distinguishable because there the state had not waived *substantive*

immunity from liability under its own laws; "invoked the aid of the federal courts in an entirely new and different proceeding than the one in which is sought immunity"; and did so "for the sole and exclusive purpose of obtaining an immunity determination". 304 F.3d at 49-50; *see also Bergemann*, 665 F.3d at 342 ("In the case at hand, Rhode Island's sovereign immunity defense is equally as robust in both the state and federal court."). None of these facts is present here.

* * *

Each of these grounds independently shows that FOMB lacks forum immunity from federal court. Taken together, they make that conclusion even firmer. This is not a case in which the state or territory keeps substantive immunity against the specific claims at issue in its courts. A sovereign cannot come to federal court to get back immunity it gave up in its own. *See RIDEM*, 304 F.3d at 49.

The Board's repeated citations to *Pennhurst* are unavailing. *See Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89 (1984). *Pennhurst* involved a state with "a statute governing sovereign immunity, including an express preservation of its immunity from suit in federal court", and there was no other fact, like abrogation or waiver, that could make the state amenable to suit there. *Id.* at 103 n.12. Unlike in *Pennhurst*, Puerto Rico did not expressly preserve forum immunity by statute; PROMESA expressly abrogated it. "Additional limits cannot be

smuggled in under the Eleventh Amendment by barring a suit in federal court that does not violate the State's sovereign immunity." *Va. Off. for Prot. v. Stewart*, 563 U.S. 247, 260 (2011).

The Fifth Circuit, considering a similar argument as the Board's, rejected it. *See Meyers ex rel. Benzing v. Texas*, 410 F.3d 236, 252–55 (5th Cir. 2005).[11] There, the state removed to federal court multiple times and claimed sovereign immunity. *Id.* at 238. The plaintiffs appealed from the district court's dismissal of their claims on sovereign immunity grounds, and the Fifth Circuit reversed. *Id.* On appeal, the state cited *Pennhurst*, and the court rejected the comparison, reasoning that "*Pennhurst* differs from *Lapides* and this case so significantly that its interjection here is plainly inappropriate and somewhat questionable." *Id.* at 252. Like the state in *Meyers*, the Board's claims that "it is difficult to imagine allegations that fit more neatly into the *Pennhurst* framework" (FOMB Br. 23) and that the sovereign immunity issue "is not close" (*id.* 6)—without acknowledging its own actions or that as an "arm of the state" it would have waived substantive immunity for these claims in Commonwealth courts— "obscures and misconstrues the issue decided in that case and attempts to leave the false impression that

[11] This Court has noted that the Fifth Circuit takes a different approach. *See Bergemann*, 665 F.3d at 342; *Meyers*, 410 F.3d at 254-55. But the Fifth Circuit's pointed discussion of *Pennhurst* shows just how far afield the Board's citation to *Pennhurst* is.

Pennhurst's ruling . . . should apply by analogy to *Lapides* and this case." *Id.* That is not the law.

The federalism and sovereignty concerns that FOMB raises (FOMB Br. 20-24) are inverted here. Using Puerto Rico's territorial status as a sword and shield—permitting Congress to abrogate Puerto Rico's sovereignty in all the ways but one, immunity from suit in a federal forum—contravenes the principles of federalism and fundamental fairness that *Lapides* and other cases recognize. Once a state or territory invokes the jurisdiction of the federal court, "it may not turn around and say the Eleventh Amendment bars the jurisdiction of the federal court." *Wis. Dep't of Corr. v. Schacht*, 524 U.S. 381, 393 (1998) (Kennedy, J., concurring). "And that determination reflects a belief that neither those who wrote the Eleventh Amendment nor the States themselves . . . would intend to create that unfairness." *Lapides*, 535 U.S. at 622. This Court has applied those principles even in cases, on different facts, where it found that Puerto Rico did not intend to waive sovereign immunity, and still admonished the Commonwealth for "jurisdictional game-playing [that] would be beyond the pale for any private litigant." *Maysonet-Robles*, 323 F.3d at 51; *see also, e.g.*, *Futura Dev. of P.R., Inc. v. Estado Libre Asociado*, 144 F.3d 7, 14 (1st Cir. 1998) ("[W]e wish to note again the manifest injustice of the conduct of the government of the Commonwealth of Puerto Rico throughout this affair. It has cleverly used its sovereignty to shield

itself from the fair consequences of its actions".) The difference here is that FOMB lost both forms of immunity.

Finally, FOMB acknowledges that its position "would leave CPI without a forum because the Board cannot be sued in a Commonwealth court" given PROMESA's grant of exclusive jurisdiction to federal court. (FOMB Br. 30-31.) But the principles of federalism are not served by eliminating a cause of action against a state that the state, as sovereign, created. The state's sovereignty, in our republican system, is merely a consequence of the people's sovereignty. "[T]he ultimate sovereignty rests in the people themselves." *Seminole Tribe v. Florida*, 517 U.S. 44, 151 (1996) (Souter, J., dissenting); *accord* P.R. Const. Art. I, § 2 ("The Government of the Commonwealth of Puerto Rico shall be . . . subordinate to the sovereignty of the people of Puerto Rico."). The sovereignty of the people of Puerto Rico is vanquished, not vindicated, by extinguishing a cause of action they created in their constitution to immunize a government they do not elect. "[I]t is difficult to think of a greater intrusion on state sovereignty than" that. *Pennhurst*, 465 U.S. at 106.

CONCLUSION

For all these reasons, the Court should affirm the district court's orders.

June 25, 2021

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 29(d) and 32(a)(7) because it contains 6,451 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii). This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6) because it has been prepared in proportionally spaced typeface (14-point Century Schoolbook and Times New Roman) using Microsoft Word 2019 for Office 365.

/s/ Brendan Benedict
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CERTIFICATE OF SERVICE

I certify that on June 25, 2021, I served this brief on all parties or their counsel of record through the CM/ECF system.

/s/ Brendan Benedict
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ADDENDUM

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[CERTIFIED TRANSLATION]

"Transparency and Expedited Procedure for Access to Public Information Act"

Act No. 141 of August 1, 2019

To adopt the "Transparency and Expedited Procedure for Access to Public Information Act," in order to establish a public policy on access to public information; to order, organize and establish simple, speedy and inexpensive procedural mechanisms that grant actual access to public information and documents; to establish principles and instruments to guarantee such access; to order Information Officers to be designated in every government entity; and for other related purposes.

STATEMENT OF PURPOSE

In the context of federal agencies, the Freedom of Information Act (FOIA), 5 United States Code § 552, acknowledges the right of citizens to access information and establishes time frames for the Government to reply to requests for public information. However, in Puerto Rico this right is of a constitutional nature, falling under the right of freedom of speech. At present, we do not have state regulations that establish a uniform procedure to obtain public information that is generated or kept by government entities. This is despite the fact that the Supreme Court of Puerto Rico has repeatedly acknowledged the right of access to public information as a necessary corollary to the rights of freedom of speech, press and association, which are explicitly promulgated by Article II §4 of the Constitution of Puerto Rico and the First Amendment of the Constitution of the United States of America. The underlying premise between access to public information and the right to freedom of speech is that if citizens are not properly informed about how public administration is conducted, then their freedom to express, by voting, or otherwise, their satisfaction or dissatisfaction with the individuals, rules and processes governing them will be restricted. Ortiz v. Bauermeister, 152 D.P.R. 161 (2000). "This intrinsically entails guaranteeing and facilitating to every citizen of our country the right to examine the contents of files, reports and documents compiled as part of the government's administration and kept at State agencies." Id, page 175.

In Puerto Rico, both citizens and the media, when requesting public information, are subject to discretional court processes, which are expensive and can take months. Even though this right is laid down in the Constitution, since there is no procedural mechanism to exercise it, the right is often violated. Regulating rights that are laid down in the Constitution through laws is normal and often imperative. For example, the Constitution of Puerto Rico acknowledges the right to unionize in the private sector and in public corporations and various state laws regulate the right, in order for workers to be able to exercise it, which avoids leaving this at the discretion of the employer. The same occurs with other rights, such as free public education, fair compensation, the right to a speedy trial, bail, among others. In relation to access to public information, it is vital to understand

that the lack of a mechanism to eliminate the excessive discretion that the Government and judges have today will not foster transparency in public administration.

In view of the foregoing, there is no doubt that in Puerto Rico, there is a right of access to public information as a corollary to the right of freedom of speech. Such right of access to public information, however, depends on whether the information being requested is really public. To that effect, Article 1(b) of the "Puerto Rico Public Document Act," provides that the following shall be deemed public:

> "[a]ny document originated, preserved or received in any office of the Commonwealth of Puerto Rico, in accordance with the law, or in relation to the management of public affairs, and which, in accordance with the provisions of section 1002 of this title is permanently or temporarily preserved as evidence of transactions or for its legal value. This shall also include documents that are produced electronically and meet the requirements established by laws and regulations."

Precisely, the Supreme Court held that "in order to acknowledge the right of access to public information, what is requested must necessarily qualify to be classified as a public document." Acevedo Hernández, Ex parte, 191 DPR 410 (2014). If a document falls within one of the categories cited in the definition above, it is considered to be of a public nature. Therefore, any citizen has the right to access it. Nevertheless, our Supreme Court has established that this right is not absolute and must be overridden in cases of imperative public interest. López Vives v. Policía de Puerto Rico, 118 D.P.R. 219 (1987); Soto v. Secretario de Justicia, 112 D.P.R. 477 (1982). In keeping with this, the Supreme Court has acknowledged situations in which the state can -validly- claim confidentiality in relation to documents or information, namely: "(1) when it is so declared by law; (2) when the communication is protected by an evidentiary privilege; (3) when disclosing the information can harm the fundamental rights of third parties; (4) when the document or information deals with the identity of an informer, Rule 32 of Evidence and; (5) when it involves official information" pursuant to Rule 514 of Evidence. Santiago v. Bobb y El Mundo, Inc., 117 DPR 153 (1986); Angueira Navarro v. Junta de Libertad Bajo Palabra, 150 DPR 10 (2000).

However, when we are not dealing with one of the aforementioned exceptional circumstances, the State cannot capriciously refuse to grant access to information that is in the hands of the Government. Ortiz v. Bauemeister, supra; Silva Iglesia v. Panel sobre el FEI, 137 D.P.R. 821 (1995); López Vives v. Policía de Puerto Rico, supra. "Therefore, such refusal must be well supported and justified. Under such circumstances, it would be legitimate for the State to restrict a citizen's access to a document of a public nature." Colón Cabrera v. Caribbean Petroleum, 170 D.P.R. 582 (2007).

Moreover, the Supreme Court of Puerto Rico has acknowledged that a petition for writ of mandamus is the current mechanism available to petition a Court to order the disclosure, inspection and reproduction of a public document. A petition for writ of mandamus has been the appropriate appeal mechanism to compel compliance with any duty, as is the case when access to public information is requested. Dávila v. Superintendente de Elecciones, 82 D.P.R. 264 (1960). Nevertheless, such appeal process has turned out to be a long and expensive process, despite the claimant's right to turn directly to the court to claim his right. See, Ortiz v. Panel sobre el FEI, 155 D.P.R. 219 (2001). Some of the determining factors for issuing a writ of mandamus are: 1) the potential impact that the writ may have on the public interests involved; 2) the avoidance of wrongful interference with proceedings of the Executive Power; and 3) that the action not be

confusable or harmful to the rights of third parties. See, Noriega v. Hernández Colón, 135 D.P.R. 406 (1994).

Thus, it is clear that since the beginning of the eighties, the Supreme Court of Puerto Rico has unequivocally acknowledged that the right of access to public information is a fundamental constitutional right. This right is based on the democratic principle that citizens must be informed, oversee and express their opinion on the actions of the State. In other words, the right of access to information is the right that gives citizens the power to demand that the government account for its actions, which is essential in achieving greater government transparency. In order for citizens to exercise this right fully, the Government of Puerto Rico has the obligation to establish clear, inexpensive, simple and expedited rules and procedures to access public information. Furthermore, it is very important for the rules governing public information to be based on the principle of transparency in government administration.

As part of the Plan for Puerto Rico, we undertook to guarantee and promote transparency in government administration and to regulate the fundamental right of access to public information in the Government of Puerto Rico. The objective of this Act is to comply with the aforementioned commitment; to foster an unequivocal culture of open Government action; to establish a proactive policy on the Government's duty to account for its actions; to discourage acts of corruption or against ethics; to promote citizen involvement and establish clear, speedy and inexpensive rules and principles for citizens to fully exercise their right of access to public information. As we implement these rules, we intend to also achieve much-needed uniformity in all government entities, which include the Legislative Branch, the Judicial Branch and the Executive Branch, as well as all the government entities, public corporations and municipalities. Citizens need to regain confidence and deserve a transparent, responsible government that oversees its processes. The People of Puerto Rico need to receive clear and reliable information and to remain well-informed of the decisions made, as these affect the development of communities and the future of Puerto Rican families.

Many governments have promised transparency, but have never been bound to ensure this. That is one of the factors that has contributed to the deterioration of the people's trust in their government, as the government has become a complex, bureaucratic structure that lacks transparency in its decisions. Thus, for this administration, it is very important to establish, as a public policy that has the force of law, a process to guarantee the adequate exercise of this constitutional right of access to information, so that all public officers understand that it is an obligation of the Government to inform and educate people about the principle and practice of government transparency. In order to implement the aforementioned public policy, all government entities shall designate, among their staff, Information Officers, who shall be in charge of producing the public information requested in an expedited manner for same to be inspected, reproduced, or both, as requested. These Information Officers shall be trained about the scope of this Act and case law established by our Supreme Court with regard to access to public information.

Likewise, the processes established for requesting information shall be rigid for compliance purposes. The public information must be delivered as quickly as possible and immediately if it exists. Any denial of this right shall require a legal explanation and a speedy

process, free of charge, before a court, to question such action on the part of the government. Courts shall also resolve these disputes in a speedy manner.

Our Government wishes to implement an access to public information that is characterized by simple, speedy, inexpensive and expedited procedures that foster transparency. In doing so, we promote the rendering of accounts, citizen participation and controls in government administration. It is important that there be an environment of respect, transparency and effective communication between the government and citizens. Maintaining order is important and government transparency is even more important. Citizens have the right to know how the Government handles public funds and how the Government makes decisions that will affect the future of Puerto Rico and its people.

To be decreed by the Legislative Assembly of Puerto Rico:

Article 1. — Name

This Act shall be known as the "Transparency and Expedited Procedure for Access to Public Information Act."

Article 2. — Applicability

The provisions of this Act are applicable to the Government of Puerto Rico, that is, the Legislative Branch, the Judicial Branch and the Executive Branch, including all of the government entities, public corporations and municipalities. These also apply to third parties who are custodians of public documents or information.

Article 3. — Public Policy

The following is established as the public policy of the Government of Puerto Rico:

1) Information and documentation produced by the Government are assumed to be public and equally accessible to all.

2) Information and documentation produced by the Government of Puerto Rico as part of its studies, transactions and exercise of public authority, either directly or by delegation, are part of the heritage and memory of the people of Puerto Rico.

3) The constitutional right of access to information requires government transparency.

4) Any information or document originated, preserved or received in an office of the Government, even if it is in the custody of a third party, is presumed to be public and must be accessible to the People and the press.

5) The right of access to public information is a constitutional pillar and a fundamental human right.

6) Access to public information and documentation must be speedy, inexpensive and expedited.

7) Every person has the right to obtain public information and documentation, subject to applicable rules and exceptions.

8) The Government of Puerto Rico hereby establishes a policy that will ensure that its information and documentation will be open, which shall include the availability of technology and the necessary advances to guarantee that individuals who request such information or documentation will be able to access same in a timely, objective, real, complete, reusable and processable manner that is available in accessible, unaltered and complete formats.

Article 4. — Routine Disclosure of Information

The Government of Puerto Rico shall facilitate access to public information and shall routinely disclose, through its official websites and other means of communication, information about its operations, actions and results of its actions. Every government entity has the duty to disclose on its official website, in a periodic, proactive and updated manner, information about its operations, performance and control of delegated functions, as well as any and all public documentation generated by the entity routinely. Personnel files or any information of such nature shall not be public information.

In addition, the government shall establish adequate mechanisms to facilitate the accessibility, quality and reutilization of the information published electronically, as well as the identification and location thereof.

Article 5. — Information Officers

Every government agency or entity constituting the Government of Puerto Rico shall, except for good cause, identify at least three (3) public servants who form part of their existing staff, of which two (2) shall be career employees. The employees identified shall be the ones designated and certified as Information Officers in each government entity. When the organizational structure, functional complexity or size of an entity requires a greater or lower number of Information Officers, this shall be justified in writing and notified to the Office of the Secretary of Public Affairs of the Office of the Governor, or a similar office, who shall then determine whether or not the request is well-founded. As to the Legislative Branch and the Judicial Branch, these must assign the personnel that they deem pertinent as Information Officers and establish the internal process that they deem pertinent to evaluate the number of Officers to be designated.

Information Officers shall be trained about the contents of this Act, regulations, applicable procedures and their legal obligations as the employees responsible for compliance with this Act. They shall also be trained about the case law established by the Supreme Court on the subject matter of access to public information. They shall share the responsibility of ensuring compliance with this Act with the officer in charge of the government entity.

Information Officers shall have the obligation to receive requests for information, process these and facilitate access to the documents in the requested format, within the time frames established hereunder. Information Officers shall register information requests in the order that they are received and number them. The number assigned shall be the reference number used in any process or procedure to review the request. These Officers shall also provide the necessary

assistance to any citizen who wishes to make a request for information.

Information Officers shall also be the central contact person in the government entity that are assigned to for purposes of receiving requests for information and providing assistance to individuals who request information. The foregoing shall by no means limit the option that citizens and the press have to ask other officers of an entity for information, including a government entity's Press Officer. The names and contact information of Information Officers shall be available on the official website of each and every corresponding government entity, the Office of Management and Budget (OMB) and La Fortaleza [Governor's Mansion]. These must also be available on paper at the integrated services centers located throughout Puerto Rico.

Information Officers shall submit monthly reports on the number of requests received, the type of information requested, and the status of the requests. The requester's personal information shall not be disclosed. These reports shall be made public on the website of every government entity.

Article 6. — Requests

Any person may request public information by written or electronic request, without the need to certify any particular or legal interest. The Information Officer shall be responsible for notifying, by email, fax or regular mail, individuals who request public information or documentation that their request has been received, also providing the request identification number.

Information requests shall include at least one address or email address where the requester wishes to receive notifications, which format they wish to receive the information in, and a description of the information requested.

Article 7. — Time Granted to Deliver, or Make Available, Public Information

Subject to the provisions of this Act, the Information Officers of a government entity shall produce public information for inspection, reproduction, or both, at the request of any person, within a period no greater than ten (10) business days. In the case of the Executive Branch, the Office at the central level of the government entity or agency shall comply with the aforementioned time frame. Nevertheless, if the request is made directly at the level of a regional office of the government entity or agency, the time granted to deliver the information shall not be greater than fifteen (15) business days. In this case, the Information Officer at the regional level shall, diligently and within a period no greater than forty-eight (48) hours, inform the central level by email of the request received in order to determine the process to be followed, as applicable. The period to deliver the information shall begin to run on the date when the requester sent his information request to the government entity, as shown in the email message, the postmark, or fax receipt. If the government entity does not answer within the established time, it shall be understood that the entity has denied the request, in which case the requesting party may then turn to the Court. This time frame can be extended for one single period of ten (10) business days, as long as the Information Officer informs the requesting party of such request for extension of time within the

initial term established and sets forth in the request the reason why he needs additional time to deliver the information or documentation requested.

Any decision to refuse to disclose public information must specify in writing the legal grounds for such refusal or denial to deliver the information within the established time.

Information Officers shall meet the parameters of this Act if, based on the preferences of the requesting party, they perform one of the following actions:

a) If they make the information available to the person requesting it at the offices of the government entity for inspection and reproduction;

b) If they send the information to the requesting party by email;

c) If they send a copy of the information by First Class mail, as long as, the requesting party is willing to pay for the stamps and other associated costs; or

d) If they provide to the requesting party an internet (URL) address of a website with instructions on how to access the information requested.

Article 8. — Fees

As a general rule, the right of access to or inspection of public documents shall be permanent and free of charge. The issuance of noncertified and certified copies, recordings and reproductions shall be subject to the payment of reasonable fees and charges. The corresponding charges shall be established by regulations or administrative order. The payment of the direct costs of reproduction, the cost of sending the information by regular mail and the fees expressly authorized by law shall be deemed reasonable. Despite the foregoing, any person who demonstrates indigence, as regulated by regulation or administrative order, shall be exempted from the payment of fees or charges for such information request. In the Executive Branch, the Office of the Secretary for Public Affairs or similar office shall establish uniform guidelines on these administrative regulations that shall demand strict compliance with what is established in this Act, and may also establish a Code of Conduct to govern Information Officers in the performance of their duties. As to the Judicial Branch and Legislative Branch, these shall determine internally how they will create the uniform guidelines and Code of Conduct mentioned above.

The public information requested shall be delivered in the requested format through the means specified by the requesting party, as long as this does not entail a cost greater than delivery on paper or in the format that the government entity usually uses and does not jeopardize the completeness of the document. If the delivery of the requested information entails an extraordinary expense, the concerned government entity shall disclose same in the format that it has available or that costs less. The concerned government entity shall establish a way to certify effective delivery of the requested information.

Article 9. — Special Appeal for Judicial Review by the Court of First Instance

Any person who is notified by a government entity of the decision not to deliver the information requested or to whom the entity has failed to deliver the information within the established term or extension thereof shall have the right to file, either pro se, or through legal counsel, with the Court of First Instance of the Judicial Region of San Juan, a Special Appeal on Access to Public Information.

For purposes of such appeals, the Judicial Branch shall create and have available to the public a simple format to fill out. Filing such an appeal shall not require the cancellation of stamps or fees. Furthermore, except in the event of duly supported, extraordinary circumstances, no citizen shall be required to hire an attorney in order to file such an appeal and no citizen may be prevented from processing his case pro se. It is recommended that the Supreme Court establish a process for the random selection of judges to hear these cases.

Government entities shall be notified of such appeals by the Court itself, at no cost. To that effect, the Clerk of the Court of First Instance where the appeal is filed shall issue a notification to the government entity that has informed the requesting party of the decision not to deliver the information or that has failed to deliver the information within the established deadline in order for the entity to appear in writing, advising the entity that its failure to appear shall be construed to mean that it has accepted the allegations made in the complaint and that the Court will issue the remedy sought, in accordance with this Act, without further summoning or hearing the entity.

The appeal in question shall be filed within the period of strict compliance of thirty (30) days, starting on the date when the government entity notified its decision not to deliver the information requested or the date when the period granted to do so expired, in the event that there was no answer.

A government entity notified of an appeal under this Act shall be bound to appear in writing within a period of ten (10) business days, except for good cause, in which case the period granted shall be no greater than five (5) business days of the date of the notification issued to that effect by the Clerk of the Court of First Instance. The Court shall have discretion to shorten the ten (10) day period established when it believes that there is good cause to do so in order to protect the interests of the requesting party.

The Court shall hold a hearing within three (3) business days of receiving an answer from the government entity if it believes that the particular circumstances of the case and the information requested so require.

The Court shall then decide on the dispute in writing through a resolution based on the law, granting or denying the request to produce public information within a period of ten (10) days of the date when the government entity issued its answer to the court or when the hearing was held, if one is held.

Article 10. — Protection Against Retaliation

Any person who reports a violation or attempt to evade compliance with the obligations established in this Act and who testifies in an administrative, legislative or judicial procedure shall have the broadest protection available in his workplace and against any form of retaliation, in the event that the person is the object of persecution or harassment of any nature on the part of the government or in the workplace. The provisions of this Article shall supplement any current provisions providing protection to informers, under our legal code, and shall not undermine the exercise thereof.

Any person who in any way retaliates, either by persecution or by harassment on the part of the government or in the workplace, against an informer or witness, in accordance with the provisions of this Article, shall be committing a felony and, if convicted, shall be subject to a fine

of five thousand (5,000) dollars or a term of imprisonment of three (3) years or both, at the discretion of the court. There shall be no statute of limitation on such offenses.

Article 11. — Regulations

Every government entity of the Government of Puerto Rico shall amend or pass the necessary regulations, administrative orders or circular letters to ensure strict compliance with this Act.

Article 12. — Interpretation Clause

The rights mentioned above shall not be interpreted restrictively or be construed to exclude other rights and procedures related to people who request public information that are not specifically mentioned here, such as the traditional petition for writ of mandamus.

This Act shall be interpreted in the most liberal and favorable manner for persons who request public information. In the event of conflict between the provisions of this Act and that of any other legislation, the one that is most favorable for parties requesting public information and documentation shall prevail.

Article 13. — Transition Clause

The process that currently exists for citizens to request information in the Branches of Government shall remain in effect until the various Branches of Government take the pertinent actions to implement the processes established herein. The Branches of Government shall have a period of six (6) months to complete any and all necessary processes to comply with the provisions of this Act.

Article 14. — Severability Clause

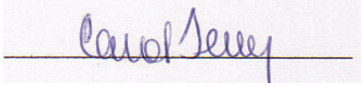
In the event that any clause, paragraph subparagraph, sentence, word, letter, article, provision, section, subsection, title, chapter, subchapter, heading or part of this Act is annulled or declared unconstitutional, the resolution, ruling or judgment issued to that effect shall not affect, undermine or invalidate the rest of this Act. The effect of such judgment shall be limited to the clause, paragraph subparagraph, sentence, word, letter, article, provision, section, subsection, title, chapter, subchapter, heading or part thereof that is so annulled or declared unconstitutional. If the application to a person or circumstance of any clause, paragraph subparagraph, sentence, word, letter, article, provision, section, subsection, title, chapter, subchapter, heading or part of this Act is invalidated or declared unconstitutional, the resolution, ruling or judgment issued to that effect shall not affect or invalidate the application of the rest of this Act to persons or circumstances where same can be validly applied. It is the express and unequivocal intent of the Legislative Assembly that the courts enforce the provisions and application of this Act to the greatest possible extent even if any part hereof is annulled, invalidated, affected or declared unconstitutional, or even if the application hereof to any particular person or circumstance is annulled, invalidated or

declared unconstitutional. This Legislative Assembly would have passed this Act regardless of the determination of severability that the Court may make.

Article 15. — Effective Period. This Act shall take effect immediately once it is passed.

CERTIFICATION OF TRANSLATION

I, Carol G. Terry, a US-Court-Certified-Interpreter, Certificate No. 03-001, and translator with an MA in Translation from the University of Puerto Rico, do hereby certify that, to the best of my knowledge and abilities, the foregoing TEN (10) PAGES are a true and correct translation of the original document in Spanish.



Carol G. Terry

2020 WL 5659443 (P.R.), 2020 TSPR 103

ENGINEERING SERVICES INTERNATIONAL, INC., Petitioner
v.
PUERTO RICO ELECTRIC POWER AUTHORITY, Respondent
Puerto Rico Energy Commission (PREC), Respondent Agency.

In the Supreme Court of Puerto Rico.
Case Number: CC-2018-513
San Juan, Puerto Rico, as of September 14, 2020.

Certiorari
Court of Appeals: Judicial Region of San Juan and Caguas, Panel IV

Petitioner's Attorney: Attorney Manuel Fernández Mejías

Respondent's Attorneys: Attorney Jorge R. Ruiz Pabón, Attorney Carlos M. Aquino Ramos, Attorney Fernando J. Fornaris Fernández, Attorney Victoria D. Pierce King

Puerto Rico Energy Commission: Attorney Sylvia B. Ugarte Araujo

Subject Matter: Constitutional Law - Right of Access to Public Information. The Electric Power Authority is required to publish the resolutions issued by its Governing Board, prior to the amendment introduced by the Puerto Rico Energy Public Policy Act, Act No. 17-2019, which ordered it prospectively.

Opinion of the Court issued by the ASSOCIATE JUSTICE MR. ESTRELLA MARTÍNEZ.

***1** We are responsible for addressing a dispute related to access to information generated by one of Puerto Rico's main public corporations. Specifically, we must decide whether the Electric Power Authority is required to publish the resolutions issued by its Governing Board, prior to an amendment to the organic law that orders it on prospective terms. Under the right of access to public information and after a full study of the applicable law, we resolve it in the affirmative. With this in mind, let us look at the factual and procedural background of the dispute before us.

I.

On May 10, 2017, the corporation Engineering Services International, Inc. (ESI or the petitioner) filed a complaint with the Puerto Rico Energy Commission (PREC) against the Puerto Rico Electric Power Authority (PREPA or the respondent). ESI claimed that PREPA had not published certain records and minutes from the meetings of PREPA's Governing Board. ESI argued that these were public documents to be disclosed under the *Puerto Rico Electric Power Authority Act, infra.* Because of the above, ESI requested that the PREC order the publication of the records and minutes at issue.

On its part, PREPA sought the dismissal of the complaint submitted on the grounds of several arguments. Regarding the dispute before us, PREPA indicated that it had already published the information requested by ESI. As a result, the PREC ordered ESI to show why the complaint submitted should not be dismissed.

In compliance with that order, ESI appeared before the PREC and maintained that, although PREPA published the records and minutes requested, its claim should not be dismissed. This was so, as ESI amended the complaint in order to clarify that PREPA had an obligation to disclose both the records and minutes from the meetings and the final **resolutions** issued by its Governing Board. ESI indicated that the records, minutes, and resolutions of PREPA's Governing Board were public documents, and PREPA was therefore required to publish them. The petitioner noted that, prior to 2014, PREPA sporadically published the resolutions issued, and even included an image of the website on which they were disclosed.[1] ESI claimed that, after 2015, the respondent ceased to publish the decisions. Similarly, the petitioner stated that, at the point, it had no access to any resolution because that website was deleted. Accordingly, ESI requested the publication of the resolutions issued by PREPA's Governing Board from 2015 to 2017.

***2** By a motion in opposition, PREPA claimed that ESI's request constituted a "fishing expedition", since it did not explain the purpose or need for obtaining such information. It also argued that the *Puerto Rico Electric Power Authority Act, infra,* establishes that PREPA should publish the records and minutes of its Governing Board meetings, but not the resolutions.

In response, ESI replied that its right to access public information was not subject to it substantiating its request, as it was the "right of the people of Puerto Rico to know the truth of what

is happening in PREPA".[2] For that purpose, it emphasized that, in this context, "there is no space for talking about a 'fishing expedition'".[3]

In addition, ESI argued that the *Puerto Rico Electric Power Authority Act, infra*, established a public policy of transparency and access to information. In accordance with the foregoing, the petitioner noted that the fact that that statute referred to the publication of records and minutes does not presuppose the automatic confidentiality of the decisions by PREPA's Governing Board. In that line, the petitioner claimed that it was PREPA the one having the burden of proof to substantiate why the information requested was confidential.

On the other hand, PREPA submitted a rejoinder in which it reiterated the arguments put forward. To that end, it insisted that ESI had no legal basis for accessing that information and that it had to specify the purpose of its request.

In the face of this situation, the PREC determined that the resolutions of PREPA's Governing Board "are the documents containing the formal decisions, as well as the actions taken by the public corporation".[4] The CEPR reasoned that "[t]hese are the most relevant documents for understanding and knowing how the Authority operates".[5] It therefore concluded that, although the *Puerto Rico Electric Power Authority Act, infra,* required only the publication of records and minutes, the statute established a firm public policy in favor of transparency and citizen participation. As a result, it ruled that "the principle of accountability and transparency set out in Act 57-2014, which governs the country's energy market, makes essential the publication and the easy access to citizens of the Resolutions of the Authority's Governing Board".[6] Consequently, the PREC ordered PREPA to disclose its Governing Board's resolutions within thirty days, through an electronic mechanism that is easily accessible and free of charge to the public.

***3** Dissatisfied, PREPA filed *a Motion for Reconsideration* with the PREC. The PREC did not adjudicate the request, so PREPA appeared in due course before the Court of Appeals through a recourse for judicial review. In it, the respondent argued, among several points, that the applicable law did not require the publication of the resolutions of PREPA's Governing Board. On its part, ESI opposed the action and reiterated the arguments put forward before the administrative forum.

In this way, the intermediate appeal forum reversed the PREC's decision and ruled that the *Puerto Rico Electric Power Authority Act, infra,* did not require PREPA to disclose its Governing Board's resolutions. This is so, since it interpreted the statute only requiring the publication of the records and minutes.

Dissatisfied with the determination of the Court of Appeals, ESI appears before us through an appeal of *certiorari.* In short, the petitioner argues that, both from the text of the law and from its legislative history, there is a clear and firm legislative intention in favor of transparency and citizen participation. To that end, it argues that those principles can only be fulfilled if the public is aware of the decisions made by PREPA. In that direction, it notes that a comprehensive reading of the statute results in the inevitable conclusion that PREPA is required to disclose the decisions issued by its Governing Board, as well as the records and minutes of its meetings.

Moreover, PREPA objects to the appeal and reiterates that its organic law only requires the publication of records and minutes. It also states that the reproduction of the requested decisions would be onerous for PREPA. This is so, since it argues that several resolutions may arise from each meeting of PREPA's Governing Board and that, prior to its publication, PREPA would have to edit them to omit confidential information. In accordance with the foregoing, it claims that the PREC's order to reproduce that information within thirty days is unsustainable.

On 26 October 2018, the Plenary Court agreed to address the recourse before us. With the benefit of the appearance of both parties, we proceed to resolve.

II.

A.

As it is known, Puerto Rico's citizens enjoy a right of access to public information, which ensures that everyone can examine the content of files, reports, and documents collected by the State in their governmental efforts. *Ortiz v. Dir. Adm. de los Tribunales, 152 DPR 161, 175 (2000).* The right of access to public information is an inherent principle of every democratic society, so we have been consistent in recognizing its fundamental and constitutional character. *Trans Ad de P.R. v. Junta de Subastas, 174 DPR 56, 67 (2008)*; *Ortiz v. Dir. Adm. de los Tribunales,* supra; *Soto v. Srio de Justicia, 112 DPR 477, 503 (1982)*. This is so, by virtue of the view that its exercise is

closely linked to the rights of freedom of expression, press, and association. Art. II, Sec. 4, Const. ELA (Commonwealth of Puerto Rico Constitution), LPRA, Volume 1; *Soto v. Srio de Justicia,* supra, pp. 485-486. In line with this constitutional mandate, our order has statefully recognized that "[e]very citizen has the right to inspect and obtain a copy of any Puerto Rico public document, except as expressly provided otherwise by law". Article 409 of the Puerto Rico Code of Civil Procedure, 32 LPRA sec. 1781.

***4** The right of access to public information is based on the premise that everyone has the right to know and hear about government affairs. E. Rivera Ramos, *La libertad de información: La necesidad de su reglamentación en Puerto Rico (Freedom of Information: Need for Its Regulation in Puerto Rico),* 44 Rev. Jur. UPR 67, 67-68 (1975). In a democratic society, "it is imperative to recognize the common citizens' "legal right to examine and investigate how their affairs are conducted". *Ortiz v. Dir. Adm.de los Tribunales,* supra (quoting *Soto v. Srio de Justicia,* supra, 485). In this way, knowledge of public administration activities facilitates the free discussion of government issues and the full exercise of freedom of expression. *Colón Cabrera v. Caribbean Petroleum, 170 DPR 582, 590 (2007).*

In turn, the right to access public information is an indispensable catalyst for citizen participation. *Trans Ad de P.R. v. Auction Board,* supra, p. 70. The flow of public information generates informed discussions and strengthens the ability of citizens to participate effectively and intelligently in government affairs.

Access to information is also an essential control tool, allowing people to make informed judgments about their government's actions. *Colón Cabrera v. Caribbean Petroleum,* supra. Our democratic principles "guarantee the right of the people to pass an oversight judgment on all the actions and determinations of the Government". *Trans Ad de P.R. v. Junta de Subastas,* supra, p. 67. Otherwise, "[a]llowing the government's administration of public affairs under the cloak of secrecy is to invite arbitrariness, mismanagement, government indifference, public irresponsibility, and corruption." Rivera Ramos, *op.cit.,* 69. For this reason, "[t]oday secrecy in public affairs is the exception and not norm". *Santiago v. Bobb y El Mundo, Inc., 117 DPR 153, 159 (1986).* In this way, the right of access to public information promotes and facilitates government transparency.

However, the right of access to public information is activated once the information requested by a person is, in fact, public. For these purposes, Article 1(b) of *the Puerto Rico Public Documents Administration Act,* Act No. 5 of December 8, 1955, as amended, 3 LPRA sec. 1001, establishes that the following shall be considered a public document:

> ***5** ... [A]ny document which originates, or is kept or received in any dependency of the Commonwealth of Puerto Rico according to the law or in relation with the management of public affairs and which, in accordance with the provisions of sec. 1002 of this title, is required to be permanently or temporarily preserved as evidence of transactions or because of its legal value. It includes those produced electronically that meet the requirements established by laws and regulations.

Once a document is classified as public, every citizen, just for being such, has active legitimacy to request and access public information. *Colón Cabrera v. Caribbean Petroleum,* supra, p. 589; *Ortiz v. Dir. Adm. de los Tribunales,* supra, p. 176. This is so, since, "to the extent that every citizen has the right to inspect any public document, the act of denying access, by itself, causes the requester clear, palpable, and real harm". *Ortiz v. Dir. Adm. de los Tribunales,* supra, p. 177.

As a corollary to the above, the right of access to public information necessarily requires the State to disclose public information in order to "expedite the pursuit of interested citizens -- including critics and adversaries – in figuring out the truth and to avoid obstacles in the way." *Soto v. Srio de Justicia,* supra, 504. Therefore, the right of access to information materializes to the extent that the State discloses and publishes information related to its governmental efforts.

However, this Court has recognised certain cases in which the State may claim the confidentiality of public information. To this end, we have decided that a claim of confidentiality by the State may succeed by way of exception when the State **accurately and unequivocally** proves

any of the following: (1) a law so declares; (2) communication is protected by some evidentiary privilege; (3) disclosure of information may damage the fundamental rights of third parties; (4) a confidant is involved, according to Rule 515 of Evidence 2009, 32 LPRA Ap. VI, or (5) it is official information under Rule 514 of Evidence 2009, 32 LPRA Ap. VI. *Santiago v. Bobb y El Mundo, Inc.,* supra.

As clearly recognized by this Court, the restrictions imposed by the State to deny access to information must satisfy the criteria of **strict scrutiny.** See *Bhatia Gautier v. Governor, 199 DPR 59, 82 (2017)*; *Ortiz v. Dir. Adm. de los Tribunales,* supra, p. 178; *Colón Cabrera v. Caribbean Petroleum,* supra, p. 593. Therefore, by relying on any of the above exceptions, the State cannot capriciously or arbitrarily deny access to public information. *Colón Cabrera v. Caribbean Petroleum,* supra, p. 590. On the contrary, by claiming the confidentiality of any public document, "the State has the burden of proving that it satisfies any of the exceptions listed above". Id., 591. Consequently, any refusal of the State to disclose public affairs must be duly substantiated and justified. In this context, "mere generalizations are not sufficient". *Santiago v. Bobb y El Mundo, Inc.,* supra.

***6** In the event of disputes of this nature, courts should be "cautious in lightly granting any request for state confidentiality". *Santiago v. Bobb y El Mundo, Inc.,* supra. Thus, "[i]n the face of the State's hermetic resistance to making viable the right of access to information, it is a responsibility of the courts to open up the path." *Soto v. Srio de Justicia,* supra, 504. Otherwise, "we would be backtracking the steps advanced in favor of the right of access to government information and equality -- in the contentious sphere -- between the state and private citizens." *Santiago v. Bobb y El Mundo, Inc.,* supra, 160.

B.

With such guiding principles, we proceed to set out the development of the statutory framework governing PREPA. PREPA is a public corporation run by a governing entity, its Governing Board, which exercises the general policy and strategic direction of the entity. *Puerto Rico Electric Power Authority Act,* Act No. 83 of May 2, 1941, 22 LPRA secs. 193-194. PREPA's Governing Board has, among several responsibilities, a duty to "develop and maintain a clear and transparent accountability framework", to establish "a model of participatory and dynamic governance" and to implement operational measures. 22 LPRA sec. 194.

As a corollary to the above, PREPA's Governing Board issues a series of documents after regular and extraordinary meetings, in which the above-outlined work is carried out. These documents include agendas, schedules, records, minutes, and resolutions.

However, PREPA is governed mostly by the provisions of its organic law, the *Puerto Rico Electric Power Authority Act, supra,* 22 LPRA secs. 191-240a. As expected, that statute has been amended on numerous occasions for a variety of purposes. As far as what is relevant to the dispute under our consideration, the *Puerto Rico Electric Power Authority Act, supra,* was amended by Act No. 29-2013, 2013 LPR 350-360 (Part 1). Among several matters, Act No. 29-2013 aimed to ensure that PREPA operates "efficiently and **transparently".** (Emphasis supplied). Id., 2013 LPR 350.

***7** In order to achieve this endeavor, the Legislative Assembly determined that citizens needed to know about the events and decisions taken at the meetings of PREPA's Governing Board. To that end, Act No. 29-2013, *supra*, established the following:

> Regular, extraordinary, and committee meetings of the [Governing] Board shall be private. However, **the work agendas and the records (minutes) of the regular and extraordinary meetings of the Board will be published** on the Authority's Internet portal, once approved by the Board at a subsequent meeting. (Emphasis supplied). 2013 LPR 355.

Thus, PREPA would be required to disclose "what happened, treated, or agreed" by the Governing Board. 2013 LPR 356. In this way, the right of Puerto Rican citizens to know the PREPA's efforts was strengthened through a measure that did not turn out to be onerous for the government entity.

However, the publication of that documentation was subject to the deleting of certain confidential information

by PREPA's Governing Board. This is so, since the Legislative Assembly provided that some elements and matters should be omitted from the documents that arose under these meetings. To that end, Act No. 29-2013, *supra,* specified that, prior to the publication of these documents, the following subjects could be deleted:

> (i) [A]ny information that is privileged under the provisions of the Evidence Rules, (ii) any information related to the negotiation of collective agreements, (iii) the ideas discussed in connection with the negotiation of potential Authority contracts, (iv) any information on strategies in disputed matters of the Authority, (v) any information on internal investigations of the Authority while they are ongoing, (vi) the intellectual property of third parties, and (vii) the business secrets of third parties. 2013 LPR 355.

As can be seen, the same statute identified information which, according to the criteria of the Legislative Assembly, should not be disclosed.

In line with that, the legislative history shows a clear intention of the Legislative Assembly to promote greater transparency in PREPA's operations. In particular, the Puerto Rico Senate Committee on Government, Government Efficiency, and Economic Innovation explained that "more information needs to be provided to the public and the addition of a higher level of openness is needed in the data and information that will be available to public scrutiny." *Informe recomendando la aprobación del P. de la C. 715, con enmiendas (Report Recommending the Approval of House Bill 715, with Amendments),* Commission on Government, Government Efficiency, and Economic Innovation, 18 April 2013, 1st Ordinary Session, 17th Legislative Assembly, 10. It was rightly estimated that "this publicity requirement will not result in significant expenditures of Authority funds, but will be a significant step in keeping the public informed of the work and decisions of the Board and the use of PREPA resources". Id.

***8** Subsequently, *the Energy Transformation and Relief Act,* Act No. 57-2014, 22 LPRA secs.1051-1056, again amended the PREPA's organic law, in order to further strengthen access to the entity's public information. From the statement of motives, it is understood that it was adopted with the intention of transforming PREPA through a series of amendments, including the implementation of "mechanisms to promote greater citizen participation and access to information". *Energy Transformation and Relief Act,* Act No. 57-2014, 2014 LPR 305.

This effort materialized with the creation and implementation of a public policy in favor of "promoting [] transparency and citizen participation **in** all processes related to energy service in Puerto Rico". (Emphasis supplied). *Energy Transformation and Relief Act, supra,* 22 LPRA sec. 1051. Similarly, the legislation requires the implementation of a "variety of mechanisms to allow customers of the Authority and certified energy-generating companies in Puerto Rico to have spaces to express their concerns, give suggestions, and be included in decision-making processes". 22 LPRA sec. 1051a. In accordance with this public policy, the statute provides that:

> **[A]ll information,** data, statistics, reports, plans, reports, and documents **received and/or disclosed** by any of the agencies created by this Act, by the Authority, and by any energy company shall be subject to the following principles:
>
> (1) The information must **be complete,** with the exception of information that must be deleted as privileged under the Rules of Evidence adopted by the Judicial Branch of Puerto Rico;
>
> (2) disclosure of information should be **timely;**
>
> ...
>
> (4) information should **not** be subject to broader confidentiality rules than is necessary;
>
> ...
>
> (6) the public will have **access** to the information electronically without having to register or open an account, and free of charge;
>
> ... (Emphasis supplied). 22 LPRA sec. 1051b.

Therefore, the legislation establishes that any documentation received or generated by PREPA is

public information that must be disclosed to the general public.

***9** In addition, the statute repealed the previous provisions establishing the privacy of PREPA's Governing Board meetings by establishing that "[t]he ordinary and extraordinary meetings of the Board must be **transmitted** simultaneously over the Internet and subsequently made available on the Authority's Internet portal". (Emphasis supplied). *Puerto Rico Electric Power Authority Act, supra,* 22 LPRA sec. 194.

Similarly, the *Energy Transformation and Relief Act, supra,* kept the guideline of publishing "what happened, what was treated, or what was agreed on the Board" by disclosing the schedules, agendas, and records (minutes) of the meetings. *Puerto Rico Electric Power Authority Act, supra,* 22 LPRA sec. 194. Similar to the previous amendment, the publication of such information is subject to the omission of certain confidential information contained in such documents by PREPA's Governing Board. For these purposes, the statute specifies that, prior to the publication of these documents, the following subjects should be deleted:

> (i) [I]nformtion that is privileged under the provisions of the Puerto Rico Evidence Rules; (ii) information related to the negotiation of collective agreements, labour disputes or personnel matters, such as appointments, evaluations, discipline, and dismissal; (iii) ideas regarding the negotiation of potential Authority contracts or the determination to resolve or terminate existing contracts; (iv) information on strategies in disputed matters of the Authority; (v) information on internal investigations of the Authority while they are ongoing; (vi) aspects of the intellectual property of third parties; (vii) third-party business secrets; (viii) matters to be kept by the Authority in confidence under any confidentiality agreement; or (ix) public safety matters of the Authority, its assets, or its employees, or related to threats against them. Id.

As can be seen, the Legislative Assembly expressly and specificly identified those issues which it understood should not be disclosed to the public.

In this way, the *Energy Transformation and Relief Act, supra,* amended the applicable framework to enable access to PREPA's information and operations. As a result, "[f]rom the tariff-review process to that of its day-to-day operations, PREPA is subject to a **constant duty to inform the people."** L.A. Avilés, *La Comisión de Energía de Puerto Rico y la Autoridad de Energía Eléctrica: Hacia un modelo colaborativo de regulación tarifaria (The Puerto Rico Energy Commission and the Electric Power Authority: Towards a Collaborative Model of Tariff Regulation),* 7 U. P.R. Bus. LJ 310, 329 (2016). Due to the "high degree of transparency that the law wants to achieve", it has been interpreted that "every citizen, being legitimized, can obtain the relevant and necessary information to claim his/her rights under the law or demand its compliance". Id.

***10** Like the text of the law, the legislative history of the *Energy Transformation and Relief Act, supra,* shows a strong legislative intention to promote greater transparency in PREPA and to ensure access to its public documentation. This statute was the product of several bills in both legislative bodies, which were intended to "increase and facilitate public access to information on the functioning and operation of the Authority, giving greater transparency to the processes". *Informe positivo sobre el Sustitutivo del Senado al P. del S. 837, P. del S. 838, P. del S. 839, P. del S. 840, P. del S. 841, P. del S. 842, P. del S. 843, P. del S. 881, P. del S. 882 y al Sustitutivo de la Cámara de Representantes al P. de la C. 1457 y el P. de la C. 1618 (Positive Report on the Senate Substitute Bill to the Senate Bill 837, Senate Bill 838, Senate Bill 839, Senate Bill 840, Senate Bill 841, Senate Bill 842, Senate Bill 843, Senate Bill 881, Senate Bill 882, and to the House Substitution Bill to the House Bill 1457 and House Bill 1618),* 12 May 2014, 3rd Ordinary Session, 17th Legislative Assembly, on page 3.

In line with this, one of the main objectives of the measure was "[t]o enjoy greater transparency and citizen participation in the administrative and operational processes of the Electric Power Authority, recognizing that Puerto Rico citizens are the ones that own that public corporation". *Diario de Sesiones del Senado de Puerto Rico (Puerto Rico Senate Session Journal),* 3rd Ordinary Session, 17th Legislative Assembly (March 20, 2014), p. 14003. Thus, "the principles of transparency, collaboration, and citizen participation would be the parameters of action" for PREPA. Id., p. 14005.

In addition, it was understood that "the country deserves from its public corporation to know what is going on in there, not because they might be doing it right or wrong, but because it is the right thing for one to know how things are done in that corporation. And this reform seeks to push the Authority; it leads the Authority to be more transparent with everyone." *Diario de Sesiones de la Cámara de Representantes (Puerto Rico House of Representatives Session Journal),* 3rd Ordinary Session, 17th Legislative Assembly (May 13, 2014), p. 217. Similarly, the measure was based on the premise that, "[w]ithout the transparency we require not only of the Authority, but of the entire government, we will never have the trust of the people and, without the trust, we could lose our democratic system." Id, p. 265.

Finally, following the facts before our consideration, the *Puerto Rico Electric Power Authority Act, supra,* was recently amended by the *Puerto Rico Energy Public Policy Act,* Act No. 17-2019, http://www.oslpr.org/2017-2020/leyes/pdf/ley-17-11-Abr-2019.pdf. This statute maintains the amendments incorporated through the *Energy Transformation and Relief Act, supra.* In other words, public policy for transparency and citizen participation in PREPA remains in force, and the Governing Board continues to be required to publish its meetings' records, schedules, and minutes.

***11** However, in line with the legislative intention behind the above amendments, it was expressly clarified that PREPA must maintain an Internet portal with free access to provide a variety of documents, including "[c]opy of all its contracts and the **resolutions** of the Governing Board". (Emphasis supplied). *Puerto Rico Energy Public Policy Act, supra,* p. 45. However, the validity of this amendment is prospective, as expressly provided for in Article 8.6 of the Statute. Id., p. 120. This, together with PREPA's repeated pattern of objections, leads us to a case and controversy that requires to ponder the petitioner's and the State's claims in accordance with law.

C.

Finally, the principles of legal hermeneutics applicable to the dispute before our consideration need to be noted. As it is well known, in Puerto Rico's legal system, a number of rules are established to guide our adjudicative role in interpreting the statutes approved by the Legislative Assembly. To this end, it is a cardinal principle that any law is presumed constitutional, since it is understood that the Legislative Assembly acts in accordance with constitutional mandates and prohibitions. *Acevedo Vilá v. Meléndez, 164 DPR 875, 884 (2005).*

Likewise, it is known that, "[w]hen the law is clear free from all ambiguity, its letter should not be belittled under the pretext of fulfilling its spirit." Article 14 of the Puerto Rico Civil Code, 31 LPRA sec. 14. Because of the above, the courts must first turn to the text of the laws before us. In this endeavor, we must fully study the statute interpreting its provisions as a whole, but not in separate sections. *Const. José Carro v. Mun. Dorado, 186 DPR 113, 127 (2012).* For this reason, "we are obliged to harmonize, as far as possible, all the provisions of the law, in order to obtain a more sensible, logical, and reasonable result". *Rosado Molina v. ELA y otros, 195 DPR 581, 590 (2016).*

However, if ambiguities, doubts, or gaps arise when studying the statute as a whole, we must interpret its provisions in accordance with legislative intent. *Spyder Media, Inc. v. Mun. de San Juan, 194 DPR 547, 556 (2016).* This is so, since "the letter of the law should not be blindly followed when it would be detrimental to its spirit and its end". *Rivera Fernández v. Mun. Carolina, 190 DPR 196, 202 (2014).* In that direction, this Court has reiterated that the Judicial Branch has a responsibility to assess the legislative purpose of the laws when the following circumstances occur:

> ***12** Courts are authorized **to interpret** laws when, among others, they are unclear or inconclusive on a particular point; when the objective, in doing so, is to fill a gap in them; or when, for the purpose of mitigating the adverse effects of law enforcement on a particular situation, justice so requires. (Emphasis on the original). *Consejo Titulares v. Gómez Estremera et al., 184 DPR 407, 428-429 (2012)*; *Pueblo v. Vega Vélez, 125 DPR 203, 214 (1990).*

In these circumstances, "there is only a rule of

interpretation that is **absolutely unchanged,** and this is that **the true intention and desire of the legislative branch must be discovered and enforced."** (Emphasis on the original). R.E. Bernier and J.A. Cuevas Segarra, *Aprobación e interpretación de las leyes en Puerto Rico (Approval and Interpretation of Laws in Puerto Rico),* 2nd revised ed., San Juan, Pubs. J.T.S., 1987, Vol. 1, Chapter 30, p. 242. Therefore, our goal shall be to effectively assess and identify the will of the Legislative Assembly.

To this end, courts can use sources extrinsic to the text of the law, such as legislative history, committee reports, and legislative debates. *Cordero Vargas v. Pérez Pérez, 198 DPR 848, 864 (2017).* In this exercise, "in interpreting and applying a statute, it must be done with the social purpose that inspired it in mind". *Departmento de Hacienda v. Telefónica, 164 DPR 195, 204 (2005)*. "This seeks to prevent obtaining conclusions or interpretations that lack legal logic or a sense of justice, when interpreting a statute." Id., p. 940.

It is also a standard of hermeneutics that "[t]he laws referring to the same subject matter or whose subject matter is the same must be interpreted by referring to each other, for what is clear in one of its precepts can be taken to explain what is doubtful in another." Article 18 of the Puerto Rico Civil Code, 31 LPRA sec. 18. According to the above, when confronting various statutes related to each other, we must interpret them "as a harmonious whole, read them together, and not interpret their provisions in isolation". R.E. Bernier and J.A. Cuevas Segarra, *op. cit.,* Chapter 73, p. 481. In these circumstances, it is presumed that the laws governing the same matters "reflect the public policy enacted by the Legislative Assembly and that its provisions must be interpreted by referring to each other as a whole". *Cardona v. Depto. Recreación y Deportes, 129 DPR 557, 568-569 (1991)*.

***13** When examining the applicable law, we proceed to resolve the dispute before our consideration.

III.

As we explained above, ESI requests that PREPA publish the resolutions agreed at the meetings of PREPA's Governing Board, as well as disclose the relevant records and minutes. The petitioner argues that resolutions are public documents and that, in accordance with the public policy promoting access to information and transparency at PREPA, they must be disclosed to the public.

For its part, PREPA argued before the primary forums that it is not required to disclose the resolutions of its Governing Board because ESI did not substantiate or justify the need to access those documents. It also states that the *Puerto Rico Electric Power Authority Act, supra,* requires only the publication of records and minutes. Finally, it insisted that it would be very onerous to reproduce the resolutions for approximately forty-two meetings held between 2015 and 2017.

From the outset, it is necessary to determine whether the decisions requested by ESI constitute public information. As explained above, a public document is the one that originates, is retained, or is received in any State unit in relation to the administration of public affairs. *Puerto Rico Public Documents Administration Act, supra,* 3 LPRA sec. 1001(b).

The Governing Board manages the matters and operations of PREPA, which is a public corporation. On their part, the disputed resolutions are documents that evidence the "formal decisions, as well as the actions taken" by the Governing Board at its meetings.[7] Consequently, decisions are documents generated in the administration of public affairs and therefore constitute public information.

Once it is concluded that the information requested by ESI is public documentation, the right of every citizen to access it is activated. *Ortiz v. Dir. Adm. de los Tribunales,* supra, p. 176. As this Court has stated before, every person, just for being so, has the right to access public information. Id. In addition, it is apparent from the statutory framework described above that PREPA is required to disclose documentation related to its matters and operations, regardless of the reason why any person requests it. ESI therefore does not have a duty to explain why it is interested in accessing PREPA's public documents.

***14** Having clarified these threshold matters, we proceed to explore PREPA's denial to disclose the public documents at issue. As explained above, the State has the burden of proof to demonstrate that the confidentiality of a public document is justified by a pressing interest. In this context, mere generalizations and arbitrary arguments are not sufficient. *Santiago v. Bobb y El Mundo, Inc.,* supra. In the face of such a legal reality, PREPA merely argues that it is not statutorily obliged to publish the resolutions of its Governing Board. Let us therefore go on to interpret all the provisions of the *Puerto Rico Electric Power Authority, supra,*

to assess whether this is so.

Admittedly, at the time of the facts, that statute established that PREPA's Governing Board should publish the schedules, agendas, and records (minutes) of its meetings, but did not make reference to resolutions. 22 LPRA sec. 194. However, this isolated reading does not resolve the dispute before us, since the mere reference to schedules, agendas, and records (minutes) does not entail the automatic confidentiality of other documents.

Analyzing the statute as a whole brings up that, since 2013, the Legislative Assembly has ordered the publication of "what happens, what is treated, or what is agreed" at the meetings of the Governing Board by means of records (minutes). *Puerto Rico Electric Power Authority Act, supra,* 22 LPRA sec. 194. If the resolutions are also, as PREPA itself acknowledges, documents that "collect what was agreed" at its meetings, prohibiting their publication is contradictory to the text of the law itself.[8] In other words, it is unreasonable to conclude that the Legislative Assembly is interested in having the Puerto Rico citizens aware of "what happens, what is treated, or what is agreed" by PREPA's Governing Board, but not of the resolutions that show "the formal decisions, as well as the actions taken by the public corporation".[9]

In addition, an analysis of the provisions of the *Puerto Rico Electric Power Authority Act, supra,* in the light of the public policy established by the *Energy Transformation and Relief Act, supra,* again leads to the inevitable conclusion that public access to the requested resolutions was considered. As we explained above, *the Energy Transformation and Relief Act, supra,* expressly implemented a public policy in favor of the transparency of PREPA's efforts. As a result, it strengthened access to PREPA's information by establishing that any information received and created by PREPA must be disclosed in a timely manner, in a complete manner and through an electronic portal. 22 LPRA sec. 1051b. It also reiterated that PREPA's information should not be subject to broader confidentiality rules than necessary.

***15** In this scenario, prohibiting the publication of the requested resolutions would significantly frustrate the public policy embodied in the *Energy Transformation and Relief Act, supra.* Similarly, it would contravene the express text of the law, as it would prevent the timely and complete publication of a public document. As an aggravating factor, it would be subjecting hundreds of documents to an automatic confidentiality rule, without a valid legal basis.

Moreover, the *Puerto Rico Electric Power Authority Act, supra,* clearly and expressly states what confidential matters may be removed from documents generated in these meetings. 22 LPRA sec. 194. Without going through judgment on the validity of these allegedly confidential matters, it should be noted that the Legislative Assembly previously specified the issues and matters that should not be disclosed to the public. None concerns the possible confidentiality of Governing Board resolutions.

In the face of this, PREPA merely claims that the publication of the decisions would be onerous, since they would have to delete the confidential matters specified in the statute. This containment does not convince us, because this exercise is carried out with the other documents published by the Governing Board, in which PREPA edits the documents to omit that information that the Legislative Assembly understood confidential prior to publication. Moreover, the alleged onerosity of reproducing documentation is not sufficient grounds for addressing the right of access to public information and the principles of transparency and citizen participation governing PREPA.

Accordingly, a comprehensive analysis of the applicable statutory framework shows that PREPA is required to disclose the resolutions of its Governing Board. Therefore, PREPA did not validly support its claim for confidentiality, let alone claim a pressing interest in doing so. Because of the above, it is necessary to order the publication of the resolutions of PREPA's Governing Board. Our democratic order and strong public policy in favor of transparency and access to government efforts demand this.

IV.

On the basis of the above reasons, we resolve that PREPA should publish the resolutions from its Governing Board meetings held from 2015 to 2017, within three **months** of notification of this Opinion. Accordingly, we reversed the Court of Appeals' determination and partially amended the opinion of the Puerto Rico Energy Commission in order to extend the term originally granted.

***16** Judgment of conformity shall be delivered.

Luis F. Estrella Martínez

Associate Judge

SENTENCE

On the grounds established in the above Opinion, which becomes an integral part of this Judgment, it is resolved that PREPA shall publish the resolutions corresponding to the meetings of its Governing Board held from 2015 to 2017, within three **months** of notification of this Opinion. Accordingly, the Court of Appeal's determination is reversed, and the opinion of the Puerto Rico Energy Commission is partially amended in order to extend the term originally granted.

The Interim Secretary of the Supreme Court pronounced it, sent it to the Court, and certified it. Associate Justice Ms. Rodríguez Rodríguez and Associate Justice Mr. Rivera García concur without written opinion. Associate Justice Mr. Feliberti Cintrón is inhibited.

Maria I. Colón Falcón

Supreme Court Secretary, Interim

Footnotes

1 Appendix of *certiorari, Moción en cumplimiento de orden y sobre enmienda a querella (Motion in Compliance with Order and Amendment to Complaint),* pp. 63-65.

2 Id., *Réplica a moción de querellante (Response to Complainant's Motion)* , p.77.

3 Id.

4 Id., *Resolución final (Final Resolution),* p. 30.

5 Id.

6 Id., pp. 30-31.

7 Appendix of *certiorari, Resolución final (Final Resolution),* p. 30.

8 Opposition at the request of *certiorari,* p. 11.

9 Appendix of *certiorari, Resolución final (Final Resolution),* p. 30.

I, Juan E. Segarra, USCCI #06-067/translator, certify that the foregoing is a true and accurate translation, to the best of my abilities, of the document in Spanish which I have seen.