

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 COURT OF PUERTO RICO, SAN JUAN

**BRIEF FOR *AMICUS CURIAE* LATINO JUSTICE PRLDEF
IN SUPPORT OF APPELLEE
CENTRO DE PERIODISMO INVESTIGATIVO, INC.**

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INTEREST OF *AMICUS CURIAE*

Amicus curiae LatinoJustice PRLDEF (“LatinoJustice”) is a national civil rights organization that has defended the constitutional rights and equal protection of all Latinos under the law. Founded in 1972 as the Puerto Rican Legal Defense and Education Fund, LatinoJustice works to create a more just society by using and challenging the rule of law to secure transformative, equitable and accessible justice; by empowering the greater pan-Latino community in the United States and Puerto Rico; and by fostering leadership through advocacy and education. During its almost 50-year history, LatinoJustice has advocated for and defended the civil, constitutional, and human rights and the equal protection of Puerto Ricans in Puerto Rico and the diaspora. Its continuing mission is to protect the civil rights of all Latinos, to cultivate Latino community leaders, and to engage in and support law reform litigation across the country addressing criminal justice, education, employment, fair housing, immigrants’ rights, language rights, redistricting and voting rights.

RULE 29 STATEMENT

All parties have consented to the filing of this brief. No party, party's counsel, or individual other than LatinoJustice and its counsel authored any portion of this brief or contributed money toward its preparation.

ARGUMENT

I. Introduction and Summary of Argument

The right to examine and participate in government is central to a functioning democracy. In this appeal, the Financial Oversight and Management Board for Puerto Rico (the “Board”) seeks to undermine that basic fundamental right in Puerto Rico, preferring instead to operate in secrecy (and to be freed of the constraints of Puerto Rico’s laws altogether). But the Board’s fundamentally antidemocratic position cannot be squared with either Puerto Rico’s commitment to public access to governmental records or with the U.S. Congress’s commitment to democratic governance. This Court should reject the Board’s invitation to subject the residents of Puerto Rico to the decisions of an agency immune to any demand for public transparency or accountability.

The public access right at issue in this suit has deep historical roots. On July 3, 1950, Congress passed the Puerto Rico Federal Relations Act, which “provide[d] for the organization of a constitutional government by the people of Puerto Rico.” 81 Cong. Ch. 446, Public Law 81-600. In passing the statute, Congress “recognize[d] the principle of government by consent,” *see Puerto Rico v. Sanchez Valle*, 136 S. Ct. 1863, 1868 (2016) (quoting Act of July 3, 1950, ch. 446, § 1, 64 Stat. 319), and demonstrated that the United States “not only believe[s] in, but practice[s], democracy.” 96 Cong. Rec. 9585 (June 3, 1950)

(debate over Public Law 81-600); *see also* 96 Cong. Rec. 9593 (June 3, 1950) (“[I]f we have any faith whatsoever in what we have been preaching to the world in World War I and World War II we ought to be willing to let the people under the American flag determine something about the form of government under which they live.”). Congress’s action enshrined in law the principle, long cherished in the United States, that democratic participation in governance is a fundamental right. *See, e.g., Wesberry v. Sanders*, 376 U.S. 1, 17–18 (1964) (“No right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live.”).

Puerto Rico’s Constitution affirms the island’s commitment to democratic principles, stating that the Commonwealth of Puerto Rico’s “political power emanates from the people and shall be exercised in accordance with their will[.]” P.R. Const., Art. I, § 1. The Constitution describes the form of Puerto Rico’s government, imbuing the legislative, executive, and judicial branches with distinct authority. P.R. Const., Art. III, IV, V. It guarantees a series of individual freedoms, including freedom of speech, freedom of the press, freedom of assembly, and the right to petition the government. P.R. Const., Art. II, § 4. And, crucially for this proceeding, Puerto Rico’s Constitution guarantees every citizen the right to access information about the workings of their government. *See Soto v. Srio. de Justicia*, 12 P.R. Offic. Trans. 597, 607–08 (1982).

The Board does not dispute that Centro de Periodismo Investigativo (“CPI”) has a constitutional right to demand the documents it seeks in this proceeding. Nor does the Board contend that it has provided an adequate explanation for its refusal to produce those documents. Instead, the Board contends that it—unlike every other agency within the Government of Puerto Rico—is entitled to withhold documents “whimsically and without apparent justification,” in violation of the Constitution that Puerto Rico adopted nearly seven decades ago. *Soto v. Srio. de Justicia*, 112 P.R. Dec. at 613. The Board seeks permission to operate as a secret government body, able to wield substantial power over the everyday lives of Puerto Ricans but uniquely exempted from the burden of public accountability. This position runs directly contrary to the democratic principles that led to the adoption of Puerto Rico’s Constitution in the first place, and this Court should reject the Board’s attempt to turn PROMESA into a broad rejection of democratic principles in Puerto Rico.

To be sure, the rights of the residents of Puerto Rico to participate in democratic government are impinged in many ways not at issue in this lawsuit, including through Congress’s installation of the Board to oversee the activities of the democratically elected Government of Puerto Rico. *See, e.g.*, Juan R. Torruella, *Why Puerto Rico Does Not Need Further Experimentation with Its Future: A Reply to the Notion of ‘Territorial Federalism’*, 131 Harv. L. Rev. 65, 68

(2018). But in the absence of an explicit and specific statement of Congressional intent, this Court should not infer that Puerto Ricans’ democratic control over their own government has been entirely eliminated. Because PROMESA includes no provision exempting the Board from Puerto Rico’s public disclosure laws, this Court should reject the Board’s proposition that Congress silently intended to abdicate its longstanding commitment to democratic principles. The U.S. citizens residing in Puerto Rico should not have their remaining outlets for democratic oversight so blithely cast aside.

II. Argument

a. Right of Access to Public Documents Under Puerto Rican Law

The general public’s right to access government documents is enshrined in Puerto Rico’s Constitution. In 1982, the Puerto Rico Supreme Court ruled that the rights of freedom of speech and the press carried with them a corollary right of “the press’ and general public’s right of access to information.” *Soto v. Srio. de Justicia*, 12 P.R. Offic. Trans. 597, 607–08 (1982). This right is codified at 32 L.P.R.A. § 1781, which provides 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.”

The *Soto* Court explained that the public access right plays a crucial role in the functioning of Puerto Rico’s democratic government. Democracy requires

public participation in the form of making judgments. Sometimes these judgments take the form of simple votes—choosing between this candidate or that one—but democratic participation is not restricted to voting. Democratic participation encompasses the decision to publish an editorial advocating for a particular action, and the organization and commencement of a protest to register disapproval of a governmental decision. Because “[i]t is impossible to pass judgment on something without knowledge of the facts,” the right to access information about the government is a prerequisite to these meaningful forms of democratic participation. *Soto*, 12 P.R. Offic. Trans. at 608. Allowing the government to conduct its operation “under a secrecy cloak” would lead to a host of bad outcomes: “arbitrariness, bad administration, governmental unresponsiveness, public irresponsibility, and corruption.” *Id.* at 608 n.4. But a citizenry armed with access to information about the government’s functioning can “discover, in time, the dangerous areas and [] demand liability.” *Id.*; see also *Bhatia Gautier v. Roselló Nevares*, 199 D.P.R. 59 (P.R. 2017), at ADD 84–85¹ (“The access to public information is a fundamental pillar in every democratic society. This knowledge allows the citizens to evaluate and supervise the public duty adequately and

¹ Citations to “ADD” refer to the Addendum at the end of Defendant-Appellant’s brief at Dkt. 53.

contribute to an effective participation of citizens in the governmental procedures that impact its social environment.”).

Federal courts have similarly acknowledged the vital importance of access to governmental records to the functioning of a democracy. Having “a means for citizens to know ‘what their [federal] Government is up to’” is a “structural necessity in a real democracy.” *Nat’l Archives & Res. Admin. v. Favish*, 541 U.S. 157, 171–72 (2004) (describing the federal Freedom of Information Act (“FOIA”)); *see also N.L.R.B. v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 242 (1978) (“The basic purpose of FOIA is to ensure an informed citizenry, vital to the functioning of a democratic society, needed to check against corruption and to hold the governors accountable to the governed.”); *Coastal States Gas Corp. v. Dep’t of Energy*, 644 F.2d 969, 974 (3d Cir. 1981) (“FOIA was enacted in furtherance of the belief that ‘an informed electorate is vital to the proper operation of a democracy.’” (quoting S. Rep. No. 813, 89th Cong., 1st Sess. 3 (1965))); *Center for Public Integrity v. United States Dep’t of Defense*, 411 F. Supp. 3d 5, 10, 15 (D.D.C. 2019) (“Only an informed electorate can develop its opinions and persuasively petition its elected officials to act in ways which further the aims of those opinions. . . . In a functioning democracy, an informed electorate always inures to the public benefit.”).

The existence of a public access right does not mean that *all* government documents are available to the public at any point. Rather, it means that—unlike private individuals—the Government does not have a freestanding right to refuse to release information publicly without justification. *Soto*, 12 P.R. Offic. Trans. at 613. The Supreme Court of Puerto Rico recently clarified the public access right in *Bhatia Gautier v. Roselló Nevares*, 199 D.P.R. 59 (P.R. 2017). *See* ADD 68. In that case, Eduardo Bhatia Gautier, a member of the Puerto Rico Senate, sought a court order directing the Government of Puerto Rico to publish a copy of the Proposed Budget that was submitted to the Board on April 30, 2017. The Government objected, raising various procedural objections and arguing that the document was protected by executive privilege as a confidential “working document prepared during the deliberation stage prior to making the final decisions[.]” ADD 70. In its decision, the Supreme Court of Puerto Rico reaffirmed the “right to press and of the citizens in general to have access to public information as a fundamental right of constitutional rank,” ADD 84, and that access to that information “cannot be denied in a capricious and arbitrary way,” ADD 86.

The *Bhatia* court also explained that a governmental entity can “validly claim the confidentiality of information in its power” if it proves that the requested documents fall into one of the following categories:

- (1) a law so declares;
- (2) the communication is protected by one of the evidentiary privileges that the citizens may invoke;
- (3) reveal[ing] the information may injure the fundamental rights of third parties;
- (4) it deals with the identity of a confidante and
- (5) it is ‘official information’ pursuant to Rule 514 of [Puerto Rico Law of] Evidence.

ADD 86–87; *see also* ADD 87–96 (describing the government’s burden).

Following this explanation, the Supreme Court remanded the case to the lower courts and ordered the parties to submit memoranda that would allow the court to determine whether the Government’s invocation of privilege over the Budget was permissible.

Bhatia makes clear that, contrary to the Board’s fearmongering that affirming the district court will require it to “open *all* its books and records to public scrutiny,” Appellant’s Br. at 39 (emphasis added), Puerto Rico’s right of public access cannot be used as a cudgel to interfere with the workings of government—or, even more specifically, to interfere with the workings of the Board. Rather, it eliminates governmental officials’ ability to choose not to disclose information to the public based on self-interest, corruption, or political calculations.

The Board failed to convince the lower court that it has a legitimate case to withhold tens of thousands of documents from CPI. Tellingly, it is not arguing on appeal that any of its arguments in favor of non-disclosure were correct on their merits, and that the district court erred by refusing to recognize a legitimate privilege against disclosure. Rather, the Board seeks to establish that it is not required to disclose *any* documents in response to public request, and that it can instead “whimsically and without apparent justification deny access to information gathered through its public undertakings.” *Soto v. Srio. de Justicia*, 112 P.R. Dec. at 613. This argument runs counter to well-settled precedent and fundamental principles of democracy.

At its core, the Board’s position displays a fear of democratic accountability that this Court should not endorse. The Board contends that its documents should be secret because it “must make difficult budgetary decisions, which the Puerto Rico government has been unwilling to make for decades.” Appellant’s Br. at 39. This argument gets it exactly backward: the “difficulty” of the subject matter of the Board’s work and number of stakeholders involved are not reasons to keep its activities secret. To the contrary, as the visibility and importance of governmental activities increase, so does the public’s interest in gaining a clear view into what those activities are so that they can be appropriately assessed. The U.S. citizens residing in Puerto Rico have not, as the Board implies, lost the privilege of a

transparent government because of their Government’s past budgeting decisions. Yes, the Board must have “difficult and frank discussions” about its decisions. Appellant’s Br. at 39. But those discussions should not exclude the people for whose benefit the Board ostensibly operates. *See Fin. Oversight & Mgmt. Bd. for Puerto Rico v. Aurelius Inv., LLC*, 140 S. Ct. 1649, 1662 (2020) (the Board “acts not on behalf of the United States, but on behalf of, and in the interests of, Puerto Rico”).

b. The Board’s Decisions Are A Legitimate Focus of Public Inquiry

The argument that the Board’s refusal to disclose documents risks subjecting the residents of Puerto Rico to significant exercises of governmental authority without a corresponding level of insight into that authority is not merely theoretical. The Board has already exercised its statutory authority in ways that drastically impact everyday life in Puerto Rico. These decisions are appropriate subjects of public inquiry; in fact, any engaged public would be motivated to examine the activities of such an influential decision-making body closely. To be clear, although the residents of Puerto Rico are not able to directly influence the Board’s activities by voting, they are not entirely without avenues for democratic expression. Puerto Ricans can utilize their rights of free speech and assembly to write, advocate, protest, and organize around the Board’s activities—but, to do so

in a meaningful way, they must understand those activities without the Board shielding them from public view.

i. Budget and Pension Cuts

As noted, the Board has taken myriad actions that directly impact the lives of Puerto Ricans. On April 27, 2021, the Board issued a letter objecting to Puerto Rico’s proposed budget for fiscal year 2022.² The Board issued a series of proposed “corrections” to various line items, drastically altering the funding available for governmental functions and programs. For example, the Board made the following budget adjustments:

- **Gender Violence:** The proposed budget allocated \$7 million to the Special Fund to Address Gender Violence Emergency “to fund initiatives for employees to respond more effectively to emergencies” in light of the epidemic of gender-based violence in Puerto Rico. The Board’s “corrective action” decreased that amount to a small fraction of the contemplated budget—only \$200,000. (This cut attracted significant attention because, the very weekend after the Board’s letter, two women were killed in what appeared to be instances of gender-based violence in Puerto Rico.³ The Board issued a statement defending its decision in response to the public outcry (and noting that the FY 2022 budget had yet to be certified), although it did not restore the requested funds.⁴)

² Letter from Natalie A. Jaresko to Gov. Pedro Pierluisi-Urrutia (April 27, 2021), <https://drive.google.com/file/d/1TjJtj-FYWxfd21WujIql-3-6Pnb0-QmL/view>.

³ *Officials find body of missing woman after questioning boxer Felix Verdejo*, ABCNews (May 2, 2021), at <https://abcnews.go.com/Sports/officials-find-body-missing-woman-questioning-boxer-felix/story?id=77453217>.

⁴ Financial Oversight and Management Board for Puerto Rico Statement (May 2, 2021),

- **Child Poverty:** The proposed budget allocated \$5.5 million to fund a program to address child poverty. The Board rejected the proposal, providing a “corrective action” with \$0 to address child poverty.
- **Health Care:** The proposed budget allocated \$5 million for an initiative to increase access to basic health care in underserved towns. The Board rejected this proposal and allocated \$0 to this item in the budget, proposing instead that the Department of Health “evaluate other available funding sources[.]”
- **Department of Justice:** The proposed budget allocated \$17 million to Puerto Rico’s Department of Justice “for technology and IT improvements within security forces.” The Board reduced this amount by more than 80% to \$2.8 million, “to hire additional resources for various units, including special prosecutors and agents for the Specialized Domestic Violence, Sexual Crimes, and Child Abuse Units.”
- **Higher Education:** The Board cut \$94 million from the University of Puerto Rico’s budget. This is only the most recent in a long line of reductions in the university’s budget since 2017, amounting to hundreds of millions of dollars. In the meantime, the cost of tuition has more than doubled.⁵
- **Central American and Caribbean Games 2022:** The proposed budget allocated \$50 million to support a bid to host the 2022 Central American and Caribbean Games as a possible economic stimulus to the island. The Board approved the expenditure subject to the receipt of federal funds. Puerto Rico withdrew its bid to host the games shortly thereafter.⁶

https://drive.google.com/file/d/1T5olqqgQ36mxiwglYUoWXiVAA8dbr_MY/view

⁵ Carmen Honker, *An Uphill Battle: University of Puerto Rico Students, Professors Respond to Severe Budget Cuts at Beloved Institution*, Pulitzer Center (Apr. 22, 2020), <https://pulitzercenter.org/stories/uphill-battle-university-puerto-rico-students-professors-respond-severe-budget-cuts-beloved>.

⁶ *Puerto Rico withdraws its candidacy for the 2022 Central American and Caribbean Games*, Caribbean News Roundup (May 1, 2021),

The Board’s discretionary “corrections” to Puerto Rico’s budget represent pure governmental decision-making: prioritizing between different proposed expenditures and measuring their public benefits against the strain on public coffers. These budgetary decisions impact every aspect of life in Puerto Rico—from services that support physical health and safety, to public institutions that preserve the rule of law, to entertainment and leisure events (and the concomitant economic opportunities).

The Board has proposed cuts outside the budgetary process, as well. In the Commonwealth of Puerto Rico’s bankruptcy case, its proposed restructuring plan would result in a reduction of the pension payments made to public employees of Puerto Rico—a group that includes judges for Puerto Rico’s judicial system. This proposal has led to an outcry from former and current judges, who contend that a reduction in judicial pay violates the Article VI, § 11 of the Puerto Rico Constitution.⁷ This decision not only has an immediate effect on the public employees affected, but it also has enormous implications for the continued strength of Puerto Rico’s judicial system. As this Court is well aware, the

<https://caribbeannewsroundup.com/puerto-rico-withdraws-its-candidacy-for-the-2022-central-american-and-caribbean-games/>.

⁷ Vince Sullivan, *Puerto Rican Judge Group Calls Foul on Bankruptcy Cuts* (June 17, 2021), at <https://www.law360.com/benefits/articles/1395095/puerto-rican-judge-group-calls-foul-on-bankruptcy-cuts>.

operation of a judicial system and its ability to attract and retain judges has an incalculable impact on the community.

ii. Privatization of the Puerto Rico Electrical System

The Board also has supported a controversial public-private partnership between Puerto Rico’s Electric Power Authority (“PREPA”), a public utility, and the private company LUMA Energy, under which LUMA has taken over energy operations on the island and is responsible for supplying power to residents of Puerto Rico. This agreement represents an unprecedented transition of authority to manage the electrical grid.⁸ In May 2021—shortly before the planned transition on June 1, 2021—the Puerto Rico legislature informed the Board that it was not going to pass a resolution to create the fund necessary to execute the contract with LUMA. In response, the Board took the position that it could—and would—independently certify a budget that created the necessary fund.⁹

⁸ See, e.g., Michelle Kaske and Jim Wyss, *Puerto Rico’s Wrecked Utility Goes Private in Bid to Save Island*, Bloomberg (May 26, 2021), <https://www.bloomberg.com/news/articles/2021-05-26/puerto-rico-s-wrecked-utility-goes-private-in-bid-to-save-island> (calling the PREPA transition “very unique in the world”).

⁹ *Fiscal board says will move forward with LUMA Energy reserve account despite legislative opposition*, The San Juan Daily Star (May 10, 2021), <https://www.sanjuandaily.com/post/fiscal-board-says-will-move-forward-with-luma-energy-reserve-account-despite-legislative-opposition>.

LUMA proceeded to take over the power grid in Puerto Rico on June 1, 2021. In the short time since the transition, nearly a quarter of Puerto Ricans suffered a loss of power.¹⁰ The privatization of a major public utility has enormous implications for everyday life in Puerto Rico—especially in light of the many challenges that Puerto Ricans face in accessing reliable power in the wake of Hurricane Maria in 2017.

iii. Interactions with the Federal Government

The subset of documents that have been produced to CPI have done a tremendous amount to illustrate the practical workings of the Board—including that the Board has been dominated by the federal government to a significant extent, despite being an “independent” entity housed within the Government of Puerto Rico. Board members respond “almost instantly” to “continuous requests for information and meetings” made by federal agencies and Congressional offices.¹¹ To name one example described in CPI’s report, Board member Carlos

¹⁰ On June 10, 2021, approximately 900,000 Puerto Ricans lost power after LUMA suffered a cyberattack and a fire broke out at one of its substations. Kim S. Nash and James Rundle, *Puerto Rico’s Power Distributor Suffered a Cyberattack Hours Before a Devastating Fire*, The Wall Street Journal (June 11, 2021), <https://www.wsj.com/articles/puerto-ricos-power-distributor-suffered-a-cyberattack-hours-before-a-devastating-fire-11623453388>.

¹¹ Luis J. Valentín Ortiz and Joel Cintrón Arbasetti, *Emails Expose Federal Gov’t Influence over Puerto Rico’s Fiscal Board*, Centro Periodismo Investigativo (Nov. 28, 2018), <https://periodismoinvestigativo.com/2018/11/emails-expose-federal-govt-influence-over-puerto-ricos-fiscal-board/>.

García agreed to provide up-to-date information about the Board’s conversations with Puerto Rico’s creditors to then-House Speaker Paul Ryan’s office. Notably, Ryan had advocated for García’s appointment to the Board. The internal documents described in CPI’s report also show a close relationship between a private Washington D.C. law firm partner and then-Board chairman José Carrión, with the lawyer repeatedly coordinating meetings between Carrión and various federal officials. These documents paint a markedly different picture of the Board’s workings than the carefully sanitized official letters published on the Board’s website, which contains only minimal information (and lacks basic features, like a site-wide search function).¹²

Because the Board contends that it can withhold documents from the public for any reason, it can do so merely to shield its inner workings from criticism. CPI’s reporting demonstrates the importance of public reporting on precisely those communications that the Board seeks to hide from the public. Close relationships between the “independent” Board and members of Congress—as well as with lobbyists, lawyers, and creditors—might provide a strong reason to scrutinize the Board’s decisions and question whether they are serving the interests of Puerto Ricans.

¹² Financial Oversight & Management Board for Puerto Rico, <https://oversightboard.pr.gov/> (last visited June 19, 2021).

c. The Board Is Subject to Puerto Rico’s Public Access Laws as Part of the Puerto Rico Government

The Board’s assertion that Congress intended that it “should not be burdened by the obligations of local law,” Appellant’s Br. at 12, is ironic in light of its recent insistence to the Supreme Court that Congress intended for the Board to be an entirely “local” entity. *Fin. Oversight & Mgmt. Bd. for Puerto Rico v. Aurelius Inv., LLC*, Nos. 18-1334, -1496, -1514, Pet. Br. at 2 (“In enacting PROMESA, Congress could not have been clearer that the Board was to be an entity within the government of Puerto Rico that would act for the benefit of the people of Puerto Rico.”). The Supreme Court adopted the Board’s argument, explaining that Congress not only “state[d] that the Board is part of the local Puerto Rican government,” but also that it bestowed upon the Board “powers [that are] backed by Puerto Rican, not federal, law,” that it “reli[es] on local laws in aid of the Board’s procedural powers,” and that it “acts not on behalf of the United States, but on behalf of, and in the interests of, Puerto Rico.” *Fin. Oversight & Mgmt. Bd. for Puerto Rico v. Aurelius Inv., LLC*, 140 S. Ct. 1649, 1661–63 (2020). Having succeeded in establishing its identity as part of the Government of Puerto Rico, the Board cannot dodge its concurrent responsibilities under Puerto Rico’s local laws.

The Board’s proposed interpretation of the law would leave the Board’s activities uniquely shielded from public scrutiny. Because the Board is not a

federal agency, the federal Freedom of Information Act (“FOIA”) does not apply to it. *See Philip Morris Inc. v. Harshbarger*, 122 F.3d 58, 83 (1st Cir. 1997). State agencies, too, are subject to public records laws; each state has its own state-level Freedom of Information Act that provides for public access to government records.¹³ So too do the District of Columbia, Guam, and the Virgin Islands.¹⁴ It is difficult to imagine that Congress sought to achieve its stated goal of increasing

¹³ Ala. Code §§ 36-12-40 *et seq.*; Alaska Stat. §§ 40.25.100 *et seq.*; Ariz. Rev. Stat. Ann. §§ 39-121 to 39-124; Ark. Code Ann. §§ 25-19-101 *et seq.*; Cal. Gov. Code §§ 6250 to 6270; Colo. Rev. Stat. Ann. §§ 24-72-201 *et seq.*; Conn. Gen. Stat. §§ 1-200 *et seq.*; Del. Code Ann. tit. 29, §§ 10001 *et seq.*; Fla. Stat. Ann. §§ 119.01 to 119.165; Ga. Code Ann. §§ 50-18-70 to 50-18-76; Haw. Rev. Stat. §§ 92F-1 *et seq.*; Idaho Code §§ 74-102 *et seq.*; 5 Ill. Comp. Stat. Ann. §§ 140/1 *et seq.*; Ind. Code Ann. §§ 5-14-3-1 to 5-14-3-10; Iowa Code Ann. §§ 22.1 *et seq.*; Kan. Stat. Ann. §§ 45-215 to 45-250; Ky. Rev. Stat. Ann. §§ 61.870 to 61.884; La. Rev. Stat. Ann. §§ 44:31 *et seq.*; Me. Rev. Stat. Ann. tit. 1, §§ 400 *et seq.*; Md. Code, Gen. Provisions §§ 4-101 *et seq.*; Mass. Gen. Laws Ann. ch. 66, § 10; Mich. Comp. Laws Ann. §§ 15.231 *et seq.*; Minn. Stat. Ann. § 13.03; Miss. Code Ann. §§ 25-61-1 *et seq.*; Mo. Ann. Stat. §§ 109.180 *et seq.*; Mont. Const. Art. 2, § 9; Neb. Rev. Stat. § 84-712; Nev. Rev. Stat. Ann. §§ 239.005 *et seq.*; N.H. Rev. Stat. § 91-A:1 *et seq.*; N.J. Stat. Ann. §§ 47:1A-1 *et seq.*; N.M. Stat. Ann. §§ 14-2-1 *et seq.*; N.Y. Pub. Off. Law § 84 *et seq.*; N.C. Gen. Stat. §§ 132-1 *et seq.*; N.D. Cent. Code §§ 44-04-18 to 44-04-18.31; Ohio Rev. Code Ann. §§ 149.43 to 149.45; Okla. Stat. Ann. tit. 51, §§ 24A.1 *et seq.*; Or. Rev. Stat. Ann. §§ 192.311 *et seq.*; 65 Pa. Cons. Stat. Ann. §§ 67.101 *et seq.*; R.I. Gen. Laws §§ 38-2-1 to 38-2-14; S.C. Code Ann. §§ 30-4-10 to 30-4-165; S.D. Codified Laws Ann. §§ 1-27-1 to 1-27-48; Tenn. Code Ann. §§ 10-7-503 *et seq.*; Texas Government Code §§ 552.001 to 552.353; Utah Code Ann. §§ 63G-2-101 *et seq.*; Vt. Stat. Ann. tit. 1, §§ 316 to 320; Va. Code § 2.2-3704 *et seq.*; Wash. Rev. Code Ann. §§ 42.56.001 to 42.56.904; W. Va. Code § 29B-1-1 *et seq.*; Wis. Stat. Ann. §§ 19.31 to 19.39; Wyo. Stat. Ann. §§ 16-4-201 to 16-4-205.

¹⁴ D.C. Code §§ 2-531–540; 5 Guam Code Ann. § 10101 *et seq.*; V.I. Code Ann. tit. 3, § 881–884.

transparency in Puerto Rico by greatly limiting public examination of the very arm of the Puerto Rican government charged with reaching those goals. *See* H.R. Rep. No. 114-602 at 41 (describing the goal of finding a “workable solution that will ensure Puerto Rico regains access to capital markets and achieves fiscal responsibility *and transparency*” (emphasis added)). Notably, the Board cites no authority to suggest that it was Congress’ intent to limit transparency into Board activities. Leaving the Board to wield powerful governmental authority while permitting it to shield its records from public scrutiny at will removes all possibility of democratic accountability. It is impossible to pass judgment on what the Board is doing if it is permitted to selectively produce the record of its own activities.¹⁵

¹⁵ Although this failure of democratic oversight most directly injures the residents of Puerto Rico, it also impacts other U.S. residents whose representatives in Congress may pass additional legislation affecting the Board’s activities (and could, if they chose, end the Board’s exercise of governmental authority in Puerto Rico altogether). Indeed, members of Congress have introduced bills that would directly impact the Board’s continued operation. *See* Puerto Rico Self-Determination Act of 2021, H.R. 2070, 117th Cong. (2021); Amendments to PROMESA Act of 2020, H.R. 6975, 116th Cong. (2020). The Board’s refusal to disclose documents—or even to provide a basis upon which the court could evaluate the reasonableness of its decision not to disclose documents—leaves *every* member of the U.S. public incapable of making an informed decision about the Board’s continued operations.

d. PROMESA Does Not Preempt Puerto Rico’s Public Records Law

The Board contends that two separate provisions of PROMESA excuse it from compliance with Puerto Rico’s public records laws: Section 105, which relates to liability for actions “taken to carry out this Act”, and Section 4, which provides that PROMESA will prevail over “inconsistent” territorial law. Contrary to the Board’s arguments, neither Section 105 nor Section 4 save it from compliance with Puerto Rico’s constitution, and the District Court correctly rejected these arguments. Moreover, adopting the Board’s arguments about PROMESA would set a dangerous and antidemocratic precedent by subjecting the residents of Puerto Rico to the decisions of a Board that is not itself bound by the rule of law.

i. Section 105

The Board first contends that Section 105 of PROMESA—which provides that “[t]he Oversight Board, its members, and its employees shall not be liable for any obligation of or any claim against the Oversight Board or its members or employees or the territorial government resulting from actions taken to carry out this Act”—renders it wholly exempt from compliance with Puerto Rico’s laws. Appellant’s Br. at 32. This interpretation stretches the outer bounds of the statutory text, which provides only that the Board is not “*liable*” for obligations or claims resulting from its actions. The word “liable” denotes a *legal* judgment (that

is, a judgment for damages), not a requirement to act in compliance with governing law. *See* Black’s Law Dictionary (11th ed. 2019) (defining “liable” as “[r]esponsible or answerable *in law*; *legally* obligated” (emphasis added)).

The Board’s argument to the contrary is stashed away in a footnote for good reason: it falls apart upon even cursory examination. The Board contends that “liable” in Section 105 refers to injunctive orders because an entirely different federal statute—42 U.S.C. § 1983—states that a person who violates the U.S. Constitution can be “*liable* to the party injured in an action at law, *suit in equity*, or other proper proceeding for redress[.]” But Congress’s decision to specify in Section 1983 that it intended to include suits in equity *as well as* actions at law underscores the absence of such an extension of the term “liable” to cover suits in equity in PROMESA. Moreover, to the extent the scope of Section 105’s grant of immunity from liability is ambiguous (it is not), reading Section 105 in conjunction with Section 106—which specifically contemplates the existence of “declaratory or injunctive relief against the Oversight Board”—makes clear that Section 105 does not preclude orders providing for injunctive relief.¹⁶ *See Food and Drug Admin. v.*

¹⁶ This interpretation is likewise consistent with *United States v. Morten*, 730 F. Supp. 2d 11, 14 (D.D.C. 2010), which is the sole legal support cited by the Board in support of its interpretation of Section 105. Appellant’s Br. at 33. *Morten* involved a breach of contract claim—the quintessential form of *legal* relief. *See Great-West Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204, 713 (2002).

Brown & Williamson Tobacco Corp., 529 U.S. 120, 132 (2000) (“In determining whether Congress has specifically addressed the question at issue, a reviewing court should not confine itself to examining a particular statutory provision in isolation. The meaning—or ambiguity—of certain words or phrases may only become evident when placed in context.”).

Moreover, crediting the Board’s proposed interpretation of Section 105 would immunize the Board—and its *members and staff*—from any requirement to follow Puerto Rican law at all so long as it can muster some tangential connection to the Board’s activities. *See* Appellant’s Br. at 12 (contending that the Board and its members are absolutely immune from the “burden[]” of complying with the law for all “actions taken to carry out this chapter”). The Board and its members cannot be permitted to justify unlawful acts by asserting a connection between the act and the goals of PROMESA.¹⁷ To conclude otherwise would undermine a central component of democratic governance: that government officials are, like those they govern, subject to the law. If Congress had intended for the Board and its members to be totally unbound by law in the course of carrying out its duties, it

¹⁷ Board members, for example, must follow Puerto Rico’s traffic laws, even if they are traveling to and from Board meetings. *See, e.g.*, 9 L.P.R.A. § 5122 (setting maximum lawful speed limits and penalties for exceeding them); 9 L.P.R.A. § 5222(b), (j) (drivers must stop at red lights); 9 L.P.R.A. § 5056 (drivers must have passed a practical examination to operate a motor vehicle in Puerto Rico).

would presumably have spent more than 40 words outlining the basis for granting such broad impunity. *See, e.g., Benenson v. Commissioner of Internal Rev.*, 887 F.3d 511, 525 (1st Cir. 2018) (“Congress does not ‘hide elephants in mouseholes.’” (quoting *Whitman v. Am. Trucking Ass’ns*, 531 U.S. 457, 468 (2001))).

Finally, even if Section 105’s reference to “liability” includes court orders directing the Board to comply with applicable law, the orders appealed in this action did not “result[] from actions taken to carry out this Act.” The District Court issued those orders as a result of the Board’s refusal to either turn over certain public documents or provide justification for their refusal in court. That refusal was not an “action taken to carry out” PROMESA; after all, the Board has repeatedly failed to provide evidence to substantiate its baseless assertion that production of the documents at issue would interfere with the Board’s activities. Nothing in PROMESA suggests that secrecy is inherent to the Board’s activities.

ii. Section 4

In addition, the Board argues that Puerto Rico’s public records law is “inconsistent” with PROMESA and therefore is preempted by Section 4. This argument depends on a tortured interpretation of the word “inconsistent,” since the standard meaning—that the laws are not compatible with each other—is clearly inapplicable here: as the District Court correctly found, the Board could easily comply with all of the provisions of PROMESA (including its specific disclosure

provisions) and respond to public records requests under Puerto Rico law. ADD 50.

The Board contends that Puerto Rico’s disclosure obligations will interfere with the achievement of Congress’s policy preferences as embodied in PROMESA. But the Board’s argument on this point is as frustratingly vague as its submissions to the Magistrate Judge in district court: because it has declined to describe the documents that it is withholding with any specificity, it cannot explain why responding to CPI’s requests will impede the Board’s achievements of Congress’s goals in passing PROMESA. Moreover, Puerto Rican law already recognizes a “deliberative process privilege” that can be invoked to avoid releasing documents that are “deliberative” and “pre-decisional.” ADD 91. The issue here is not that the Board was directed to release documents that are protected by that privilege; it is that the Board has refused to prove that its documents legitimately fall within the scope of that privilege at all. This Court should not credit the Board’s sleight-of-hand—the fact that certain documents may legitimately be privileged against disclosure does not give the Board *carte blanche* to withhold documents that are not so privileged.

CONCLUSION

Although created by the U.S. Congress, the Board is part of the Government of Puerto Rico, and it does not exist above the laws of the Commonwealth. *Amicus*

curiae respectfully requests that the Court affirm the right of the citizens of Puerto Rico to understand and examine the activities of their own government and exercise their democratic rights.

DATED: June 25, 2021

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 29(a)(5) and Fed. R. App. P. 32(a)(7)(B) because it contains 6,115 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

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CERTIFICATE OF SERVICE

I hereby certify that I filed the foregoing brief with the Clerk of the United States Court of Appeals for the First Circuit via the CM/ECF system this 25th day of June, 2021. I certify that counsel for all parties in this case are registered CM/ECF users and will be served by the appellate CM/ECF system.

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