

No. 22-96

IN THE
Supreme Court of the United States

FINANCIAL OVERSIGHT AND MANAGEMENT BOARD
FOR PUERTO RICO,

Petitioner,

—v.—

CENTRO DE PERIODISMO INVESTIGATIVO, INC.,

Respondent.

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

**BRIEF FOR *AMICI CURIAE* LATINOJUSTICE PRLDEF,
HISPANIC FEDERATION, AND LONG ISLAND HISPANIC
BAR ASSOCIATION IN SUPPORT OF RESPONDENT**

STEVEN A. ZALESIN
Counsel of Record

RYAN SHEEHAN

TARA NORRIS

ELIANNI DE LA CRUZ

PATTERSON BELKNAP WEBB
& TYLER LLP

1133 Avenue of the Americas

New York, New York 10036

(212) 336-2000

sazalesin@pbwt.com

*Attorneys for Amici Curiae
LatinoJustice PRLDEF,
Hispanic Federation, and
Long Island Hispanic Bar
Association*

TABLE OF CONTENTS

INTEREST OF *AMICI CURIAE*..... 1

SUMMARY OF ARGUMENT 2

ARGUMENT 4

I. Puerto Rico Has an Historically Strong
Commitment to Open, Transparent and
Democratic Governance 4

 A. Congress Provided for Democratic
 Governance in Puerto Rico..... 4

 B. There Can be No Democratic
 Governance Without Transparent
 Access to Public Records 7

II. The Public is Entitled to Access Board
Records to Understand its Decisions and
Participate in Puerto Rico’s Recovery 11

 A. Puerto Rico Faces Unprecedented
 Economic, Fiscal and Demographic
 Challenges 11

 B. The Board Is Exercising Far-
 Reaching Government Authority
 Over Significant Challenges Facing
 Puerto Rico 14

 1. The Puerto Rico Power Grid..... 14

 2. Public and Higher Education.... 19

 3. Other Issues..... 22

 C. The Materials Obtained by CPI
 Illustrate the Importance of Public
 Access to Board Records..... 24

CONCLUSION 28

TABLE OF AUTHORITIES

Cases

<i>Bhatia Gautier v. Roselló Nevares</i> , 199 D.P.R. 59 (P.R. 2017).....	9
<i>N.L.R.B. v. Robbins Tire & Rubber Co.</i> , 437 U.S. 214 (1978)	11
<i>Nat'l Archives & Res. Admin. v. Favish</i> , 541 U.S. 157 (2004)	11
<i>Puerto Rico v. Sanchez Valle</i> , 579 U.S. 59 (2016)	5
<i>Soto v. Srio. de Justicia</i> , 12 P.R. Offic. Trans. 597 (1982)	<i>passim</i>

Statutes

32 L.P.R.A. § 1781	8
48 U.S.C. § 2126(a)	1
65 Pa. Cons. Stat. Ann. §§ 67.101 <i>et seq.</i>	10
Ala. Code §§ 36-12-40 <i>et seq.</i>	10
Alaska Stat. §§ 40.25.100 <i>et seq.</i>	10
Ariz. Rev. Stat. Ann. §§ 39-121 to 39-124.....	10
Ark. Code Ann. §§ 25-19-101 <i>et seq.</i>	10
Cal. Gov. Code §§ 6250 to 6270	10

Colo. Rev. Stat. Ann. §§ 24-72-201 <i>et seq.</i>	10
Conn. Gen. Stat. §§ 1-200 <i>et seq.</i>	10
D.C. Code §§ 2-531–540.....	10
Del. Code Ann. tit. 29, §§ 10001 <i>et seq.</i>	10
Fla. Stat. Ann. §§ 119.01 to 119.165	10
Ga. Code Ann. §§ 50-18-70 to 50-18-76.....	10
Guam Code Ann. § 10101 <i>et seq.</i>	10
Haw. Rev. Stat. §§ 92F-1 <i>et seq.</i>	10
Idaho Code §§ 74-102 <i>et seq.</i>	10
Ill. Comp. Stat. Ann. §§ 140/1 <i>et seq.</i>	10
Ind. Code Ann. §§ 5-14-3-1 to 5-14-3-10	10
Iowa Code Ann. §§ 22.1 <i>et seq.</i>	10
Kan. Stat. Ann §§ 45-215 to 45-250	10
Ky. Rev. Stat. Ann. §§ 61.870 to 61.884.....	10
La. Rev. Stat. Ann. §§ 44:31 <i>et seq.</i>	10
Mass. Gen. Laws Ann. ch. 66, § 10	10
Md. Code, Gen. Provisions §§ 4-101 <i>et seq.</i>	10
Me. Rev. Stat. Ann. tit 1, §§ 400 <i>et seq.</i>	10

Mich. Comp. Laws Ann. §§ 15.231 <i>et seq.</i>	10
Minn. Stat. Ann. § 13.03.....	10
Miss. Code Ann. §§ 25-61-1 <i>et seq.</i>	10
Mo. Ann. Stat. §§ 109.180 <i>et seq.</i>	10
Mont. Const. Art. 2, § 9	10
N.C. Gen. Stat. §§ 132-1 <i>et seq.</i>	10
N.D. Cent. Code §§ 44-04-18 to 44-04- 18.31.....	10
N.H. Rev. Stat. § 91-A:1 <i>et seq.</i>	10
N.J. Stat. Ann. §§ 47:1A-1 <i>et seq.</i>	10
N.M. Stat. Ann. §§ 14-2-1 <i>et seq.</i>	10
N.Y. Pub. Off. Law § 84 <i>et seq.</i>	10
Neb. Rev. Stat. § 84-712	10
Nev. Rev. Stat. Ann. §§ 239.005 <i>et seq.</i>	10
Ohio Rev. Code Ann. §§ 149.43 to 149.45	10
Okla. Stat. Ann. tit. 51, §§ 24A.1 <i>et seq.</i>	10
Or. Rev. Stat. Ann. §§ 192.311 <i>et seq.</i>	10
Organic Act of 1900, ch. 145, §§ 2- 5, 39 Stat. 951-953.....	4
Organic Act of 1917, ch. 191, §§ 17-26, 31 Stat. 81-82.....	4

P.R. Const., Art. I, § 1.....	6
P.R. Const., Art. II, § 2	6
P.R. Const., Art. II, § 4	6, 8
P.R. Const., Art. III, IV, V	6
Pub. L. 80-362	5
Pub. L. 81-600	5
Pub. L. 447, 66 Stat. 327-28	5
R.I. Gen. Laws §§ 38-2-1 to 38-2-14	10
S.C. Code Ann. §§ 30-4-10 to 30-4-165.....	10
S.D. Codified Laws Ann. §§ 1-27-1 to 1- 27-48.....	10
Treaty of Paris, art. II, 30 Stat. 1755	4
Tenn. Code Ann. §§ 10-7-503 <i>et seq.</i>	10
Texas Government Code §§ 552.001 to 552.353.....	10
Utah Code Ann. §§ 63G-2-101 <i>et seq.</i>	10
Va. Code § 2.2-3704 <i>et seq.</i>	10
V.I. Code Ann. tit. 3, § 881–884	10
Vt. Stat. Ann. tit. 1, §§ 316 to 320.....	10
W. Va. Code § 29B-1-1 <i>et seq.</i>	10

Wash. Rev. Code Ann. §§ 42.56.001 to 42.56.904.....	10
Wis. Stat. Ann. §§ 19.31 to 19.39	10
Wyo. Stat. Ann. §§ 16-4-201 to 16-4-205.....	10
Other Authorities	
96 Cong. Rec. 9585 (June 3, 1950)	5
96 Cong. Rec. 9593 (June 3, 1950)	5
Alexia Fernandez Campbell, <i>It Took 11 Months to Restore Power to Puerto Rico After Hurricane Maria. A Similar Crisis Could Happen Again.</i> , Vox (Aug. 15, 2018), https://www.vox.com/identities/2018/ 8/15/17692414/puerto-rico-power- electricity-restored-hurricane-maria	15
Amelia Cheatham and Diana Roy, <i>Puerto Rico: A U.S. Territory in Crisis</i> , Council on Foreign Relations, Foreign Affairs (last updated Sept. 29, 2022), https://www.cfr.org/backgrounder/pu erto-rico-us-territory-crisis	12, 13, 14

- Andrew Van Dam, *People Are fleeing Puerto Rico, Guam and Every Other U.S. territory. What Gives?*, Wash. Post (Sept. 23, 2022), <https://www.washingtonpost.com/business/2022/09/23/american-territories-population-loss/>..... 14, 18
- Becky Sullivan, *More Than 100,000 Clients In Puerto Rico Are Still Without Power 2 Weeks After Fiona*, Nat. Pub. Radio (Oct. 2, 2022), <https://www.npr.org/2022/10/02/1126462352/puerto-rico-hurricane-fiona-luma-energy-power-outages>..... 16
- 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>..... 21
- Carolyn Fast, *With the University of Puerto Rico Gutted, Private Equity Is Poised to Profit*, Century Found. (Jan. 5, 2022), <https://tcf.org/content/commentary/with-the-university-of-puerto-rico-gutted-private-equity-is-poised-to-profit/>..... 22

Danica Coto, *Puerto Rico federal finance board appoints new leader*, AP News (Nov. 17, 2022), <https://apnews.com/article/business-puerto-rico-congress-government-and-politics-27fa2df84b803128832d8fd22976f446> 15

Dánica Coto, *Puerto Rico Governor Denounces Power Company Amid Outages*, AP News (Aug. 18, 2022), <https://apnews.com/article/puerto-rico-pedro-pierluisi-quanta-services-inc-climate-and-environment-5049018d7ae13c5fe09a6b054c2d177d> 17, 19

E-mail from David A. Skeel, Jr., Financial Oversight & Management Board for Puerto Rico, to Wanda Garcia, President, Public School Alliance Association of Puerto Rico (Nov. 4, 2022) (on file with the Financial Oversight & Management Board for Puerto Rico), https://drive.google.com/file/d/1FfU2R5AKFZCLXIm_a5mvTY8Z_I40fNvI/view?usp=share_link 20

- Edmy Ayala & Patricia Mazzei, Puerto Rico Teachers Lead Push for Higher Pay for Public Workers, N.Y. Times (Feb. 10, 2022),
<https://www.nytimes.com/2022/02/10/us/puerto-rico-teachers-protests.html#:~:text=Teachers%20unions%20have%20been%20seeking,in%20stead%20%E2%80%94%20about%20%24470%20a%20month> 20, 21
- Eliván Martínez Mercado, *Republican Senators Quietly Pushed Privatization of Puerto Rico's Power Utility*, Centro Periodismo Investigativo (Dec. 1, 2018),
<https://periodismoinvestigativo.com/2018/12/republican-senators-quietly-pushed-privatization-of-puerto-ricos-power-utility> 26
- Financial Oversight & Management Board for Puerto Rico,
<https://oversightboard.pr.gov/> 27
- Financial Oversight and Management Board for Puerto Rico Media Release (Sept. 1, 2022),
<https://drive.google.com/file/d/13y42nIzmZfTliDkAE1ORmXZmo97Ukz8R/view?usp=sharing> 24

Fiscal Board Says Will Move Forward with LUMA Energy Reserve Account Despite Legislative Opposition, San Juan Daily Star (May 10, 2021), <https://www.sanjuandailystar.com/post/fiscal-board-says-will-move-forward-with-luma-energy-reserve-account-despite-legislative-opposition>..... 15

Giovanna Garofalo, *Gubernatorial Candidates Discuss P3s, Federal Gov't in Final Debate*, Wkly. J. (Oct. 28, 2020), https://www.theweeklyjournal.com/politics/gubernatorial-candidates-discuss-p3s-federal-gov-t-in-final-debate/article_3b3a1f34-1891-11eb-ad91-27ea3779ca4a.html 16, 18

Harry S. Truman, *Special Message to the Congress Transmitting the Constitution of the Commonwealth of Puerto Rico*, The American Presidency Project (Apr. 22, 1952), <https://www.presidency.ucsb.edu/documents/special-message-the-congress-transmitting-the-constitution-the-commonwealth-puerto-rico>..... 5, 7

- Harry S. Truman, *Statement by the President Upon Signing Bill Approving the Constitution of the Commonwealth of Puerto Rico*, The American Presidency Project (July 3, 1952), <https://www.presidency.ucsb.edu/documents/statement-the-president-upon-signing-bill-approving-the-constitution-the-commonwealth> 6
- Jaquira Diaz, *Let Puerto Rico Be Free*, Atlantic (Sept. 20, 2022), <https://www.theatlantic.com/magazine/archive/2022/11/puerto-rico-independence-not-statehood/671482/> 13
- Jennifer Hinojosa, Edwin Melendez, & Kathya Severino Pietri, *Population Decline And School Closure in Puerto Rico*, Center for Puerto Rican Studies (May 2019), https://centroprarchive.hunter.cuny.edu/sites/default/files/PDF_Publications/centro_rb2019-01_cor.pdf 13, 19, 20
- Jonathan M. Katz, *The Disappearing Schools of Puerto Rico*, N.Y. Times Mag. (Sept. 12, 2019), <https://www.nytimes.com/interactive/2019/09/12/magazine/puerto-rico-schools-hurricane-maria.html>..... 20

Joshua Partlow & Arelis R. Hernandez,
*Even Before Fiona, Puerto Rico's
Power Grid was Poised for Failure*,
Wash. Post (Sept. 19, 2022) 16, 17

Kellie Lunney, *Why Puerto Rico Has
Struggled to Stabilize Its Electricity
Grid*, Bloomberg L. (Sept. 30, 2022),
[https://news.bloomberglaw.com/envir
onment-and-energy/why-puerto-rico-
has-struggled-to-stabilize-its-
electricity-grid](https://news.bloomberglaw.com/environment-and-energy/why-puerto-rico-has-struggled-to-stabilize-its-electricity-grid) 18

Kim S. Nash & James Rundle, *Puerto
Rico's Power Distributor Suffered a
Cyberattack Hours Before a
Devastating Fire*, Wall St. J. (June
11, 2021)..... 16

Lani E. Medina, *An Unsatisfactory Case
of Self-Determination: Resolving
Puerto Rico's Political Status*, 33
Fordham Int'l L.J. 1048, 1064 (2010)..... 4

Letter from Jaime A. El Koury,
Financial Oversight & Management
Board, to Hon. Zaragoza Gomez,
President, Committee on Finance,
Federal Affairs and Oversight Board,
Senate of Puerto Rico (Oct. 31, 2022),
[https://drive.google.com/file/d/1GmJC
22HuaEN0Bv95Gsf8NO8j5s4Y6cJV/
view?usp=share_link](https://drive.google.com/file/d/1GmJC22HuaEN0Bv95Gsf8NO8j5s4Y6cJV/view?usp=share_link) 24

Letter from Natalie A. Jaresko,
Financial Oversight & Management
Board for Puerto Rico to Hon. Pedro
Pierluisi-Urrutia, Gov. of Puerto Rico
(Apr. 27, 2021) (“Jaresko Letter”) (on
file with the Financial Oversight &
Management Board for Puerto Rico),
[https://drive.google.com/file/d/1TjJtj-
FYWxfd2lWujIql-3-6Pnb0-QmL/view](https://drive.google.com/file/d/1TjJtj-FYWxfd2lWujIql-3-6Pnb0-QmL/view)..... 23

Luis J. Valentín Ortiz & Joel Cintrón
Arbasetti, *Emails Expose Federal
Gov't Influence over Puerto Rico's
Fiscal Board*, Centro Periodismo
Investigativo (Nov. 28, 2018),
[https://periodismoinvestigativo.com/2
018/11/emails-expose-federal-govt-
influence-over-puerto-ricos-fiscal-
board/. -federal-govt-influence-over-
puerto-ricos-fiscal-board/](https://periodismoinvestigativo.com/2018/11/emails-expose-federal-govt-influence-over-puerto-ricos-fiscal-board/)..... 19, 25

Luis J. Valentín Ortiz, *McKinsey:
Puerto Rico Bondholder an Fiscal
Board's Lead Adviser*, Centro
Periodismo Investigativo (Dec. 13,
2018),
[https://periodismoinvestigativo.com/2
018/12/mckinsey-puerto-rico-
bondholder-and-fiscal-boards-lead-
adviser/](https://periodismoinvestigativo.com/2018/12/mckinsey-puerto-rico-bondholder-and-fiscal-boards-lead-adviser/)..... 27

Michael Forsythe, Walt Bogdanich, &
 Bridget Hickey, *As McKinsey Sells
 Advice, Its Hedge Fund May Have a
 Stake in the Outcome*, N.Y. Times
 (Feb. 19, 2019) 28

*Officials Find Body of Missing Woman
 After Questioning Boxer Felix
 Verdejo*, ABC News (May 2, 2021),
[https://abcnews.go.com/Sports/official-
 s-find-body-missing-woman-
 questioning-boxer-
 felix/story?id=77453217](https://abcnews.go.com/Sports/official-s-find-body-missing-woman-questioning-boxer-felix/story?id=77453217) 23

Rebecca Blackwell, Alessandra Rosa, &
 Elizabeth Aranda, *¿Nuestro Nuevo
 Hogar? [Our new home?]: Examining
 Puerto Rican Migration and
 Conceptions of Home, Place-Making,
 and Belonging*; 9 Women, Gender, &
 Fams. of Color, 208-09 (2021) 13, 14

Robert Walton, *House Lawmakers,
 Advocates Want \$5B to Help Puerto
 Rico Install Rooftop Solar, Storage
 Systems*, Utility Dive (Nov. 22, 2022),
[https://www.utilitydive.com/news/con-
 gress-5-billion-puerto-rico-install-
 rooftop-solar-storage-
 resiliency/637178/](https://www.utilitydive.com/news/congress-5-billion-puerto-rico-install-rooftop-solar-storage-resiliency/637178/) 19

Robert Walton, *Puerto Rico's Electricity Rates Have Nearly Doubled Since 2020*, Utility Dive (July 18, 2022), <https://www.utilitydive.com/news/puerto-rico-electricity-rates-doubled-since-2020-ieefa/627443/> 17

Statement, Financial Oversight & Management Board for Puerto Rico, FOMB – Statement – Gender Violence (May 2, 2021) 23

Supreme Court Again Avoids Examination of Insular Cases, P.R. Report (Nov. 28, 2022), <https://www.puertoricoreport.com/supreme-court-again-avoids-examination-of-insular-cases/#.Y4v1X3bMKUk> 20

Tom Sanzillo, *Oversight Board Rejection of Puerto Rico Debt Bill Misrepresents Purpose*, Inst. for Energy Econ. & Fin. Analysis (July 20, 2022), <https://ieefa.org/resources/ieefa-oversight-board-rejection-puerto-rico-debt-bill-misrepresents-purpose> 17, 18

Tom Sanzillo, *Puerto Rico Officials Fail to Learn From Past Hurricanes as Fiona Ravages Grid*, Inst. for Energy Econ. & Fin. Analysis (Nov. 1, 2022), <https://ieefa.org/resources/puerto-rico-officials-fail-learn-past-hurricanes-fiona-ravages-grid-0> 15, 16, 17, 19

INTEREST OF *AMICI CURIAE*¹

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.

Each of the *amici curiae*² are non-profit organizations that are dedicated to the advancement of the educational, economic, healthcare and civil rights interest of Puerto Ricans in Puerto Rico and the diaspora. The *amici* regard the question before the Court bearing on the public’s right to access the records of entities in the Government of Puerto Rico³ as critical to the rights, interests and well-being of all Puerto Ricans.

¹ All parties have provided blanket consent to the filing of *amici curiae* briefs and no party or counsel for a party in this case authored this brief in whole or in part or made any monetary contribution to its preparation or submission.

² The *amici* are LatinoJustice PRLDEF, Hispanic Federation, and Long Island Hispanic Bar Association.

³ The question presented is whether Section 106(a) of the Puerto Rico Oversight, Management, and Economic Stability Act, Pub. L. No. 114-187, 130 Stat. 562 (48 U.S.C. § 2126(a)), abrogates the sovereign immunity of the Financial Oversight and Management Board with respect to all federal and territorial claims.

SUMMARY OF ARGUMENT

In this appeal, the Financial Oversight and Management Board for Puerto Rico (the “Board”) seeks to operate in secret, out of sight of the people it effectively governs. That fundamentally undemocratic position cannot be squared with the United States Congress’s longstanding commitment to democratic governance in the Commonwealth of Puerto Rico. Nor can it be reconciled with the concomitant right of public access to government records enshrined in the Constitution Puerto Rico adopted seven decades ago.

The Board does not dispute that respondent Centro de Periodismo Investigativo (“CPI”) has a right to demand the documents it seeks under Puerto Rico’s Constitution. It also does not contend that any provision of Puerto Rico law shields it from producing those documents. Instead, the Board’s position is that—unlike the rest of Puerto Rico’s Government—the Board is entitled to withhold documents at its sole discretion “whimsically and without apparent justification.” *See Soto v. Srio. de Justicia*, 12 P.R. Offic. Trans. 597, 613 (1982). The basis for that exceptional proposition is that the Board is (purportedly) entitled to sovereign immunity over actions brought in federal court seeking production of its records pursuant to 48 U.S.C. § 2126(a).

While seeking to operate in the shadows, the Board is wielding far-reaching governmental power. Through its control of budget and fiscal policy, the Board is directly shaping the government’s response to unprecedented challenges facing Puerto Rico.

Those challenges include the management and repair of Puerto Rico's energy production and distribution infrastructure, which has suffered from decades of neglect and remains simultaneously unreliable and crippling expensive. They also include funding and oversight of Puerto Rico's public and higher education systems, which are starved of resources necessary to educate the next generation of Puerto Rico's leaders and entrepreneurs.

The Board should not be permitted to exercise control over such weighty matters while operating as a secret government body uniquely exempt from public accountability. Permitting it to do so would run contrary to the democratic principles embodied in Puerto Rico's Constitution. A government that governs surreptitiously behind closed doors is not a true democracy. Self-governance necessitates citizen engagement. Meaningful citizen engagement requires access to information concerning government decisions.

The right to examine and participate in government—whether by voting or other means such as freedom of speech and assembly—is central to a functioning democracy such as Puerto Rico. This Court should not permit the Board to turn the Puerto Rico Oversight, Management, and Economic Stability Act (“PROMESA”) into a broad rejection of democratic principles. The decision of the Court of Appeals rejecting the Board's attempt to shield itself from public scrutiny should be affirmed.

ARGUMENT

I. Puerto Rico Has an Historically Strong Commitment to Open, Transparent and Democratic Governance

A. Congress Provided for Democratic Governance in Puerto Rico

The public access right at issue in this case has deep historical roots grounded in a series of policy decisions by the United States Congress dating back more than a century. Since Puerto Rico became a U.S. territory in 1898,⁴ Congress has exercised its plenary power over the territory to promote—and indeed require—democratic governance.

During the first half of the 20th century, Congress passed a series of laws increasing measures of democratic governance to the people of Puerto Rico. In 1900, the first Organic Act of Puerto Rico (also known as the Foraker Act) established a local civil government and judiciary.⁵ Two decades later, the Organic Act of 1917 (also known as the Jones Act) restructured Puerto Rico’s government to parallel that of a state government.⁶ At the same time, Congress established a bill of rights for the territory, replaced the prior unelected executive council with an

⁴ See Treaty of Paris, U.S.-Spain, art. II, Dec. 10, 1898, 30 Stat. 1755 (proclaimed Apr. 11, 1899).

⁵ Organic Act of 1900 (Foraker Act), ch. 191, §§ 17-26, 31 Stat. 81-82; see also Lani E. Medina, *An Unsatisfactory Case of Self-Determination: Resolving Puerto Rico's Political Status*, 33 Fordham Int'l L.J. 1048, 1064 (2010).

⁶ Organic Act of 1917 (Jones Act), ch. 145, §§ 2-5, 39 Stat. 951-953.

elected body, and granted the people of Puerto Rico U.S. citizenship.⁷ In 1947, Puerto Rico citizens assumed control over the executive branch of government, when Congress authorized them to elect the Governor of the territory.⁸

The current Government of Puerto Rico has its roots in the Puerto Rico Federal Relations Act of 1950, which “provide[d] for the organization of a constitutional government by the people of Puerto Rico.”⁹ In passing this statute, Congress “recognize[d] the principle of government by consent,”¹⁰ and demonstrated that the United States “not only believe[s] in, but practice[s], democracy.”¹¹

A large majority of Puerto Rico residents voted in a June 4, 1951 referendum to hold a Constitutional

⁷ Pub. L. 447 (1952), ch. 567, 66 Stat. 327-28.

⁸ Pub. L. 80-362; Harry S. Truman, *Special Message to the Congress Transmitting the Constitution of the Commonwealth of Puerto Rico*, The American Presidency Project (Apr. 22, 1952), <https://www.presidency.ucsb.edu/documents/special-message-the-congress-transmitting-the-constitution-the-commonwealth-puerto-rico>.

⁹ 81 Cong. Ch. 446, Public Law 81-600.

¹⁰ *Puerto Rico v. Sanchez Valle*, 579 U.S. 59, 64 (2016) (quoting Act of July 3, 1950, ch. 446, § 1, 64 Stat. 319).

¹¹ 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.”).

Convention and draft a Constitution for the island.¹² Less than a year later, the newly drafted Constitution was approved in a second referendum by another overwhelming majority of voters.¹³

The Constitution approved by the people of Puerto Rico affirms the Commonwealth's commitment to democratic principles, stating that "political power emanates from the people and shall be exercised in accordance with their will"¹⁴ The Constitution describes the form of Puerto Rico's government, imbuing the legislative, executive, and judicial branches with distinct authority.¹⁵ Of particular relevance here, the Constitution also includes a Bill of Rights guaranteeing a number of individual rights and freedoms. Those rights include the right to vote in free and fair elections.¹⁶ They also include corollary rights necessary for democratic government, including freedom of speech, freedom of the press, freedom of assembly and the right to petition the government.¹⁷

¹² Harry S. Truman, *Statement by the President Upon Signing Bill Approving the Constitution of the Commonwealth of Puerto Rico*, The American Presidency Project (July 3, 1952), <https://www.presidency.ucsb.edu/documents/statement-the-president-upon-signing-bill-approving-the-constitution-the-commonwealth>.

¹³ *Id.*

¹⁴ P.R. Const., Art. I, § 1.

¹⁵ P.R. Const., Art. III, IV, V.

¹⁶ P.R. Const., Art. II, § 2.

¹⁷ P.R. Const., Art. II, § 4.

On April 22, 1952, President Harry S. Truman transmitted the newly-drafted Constitution of Puerto Rico to Congress for approval.¹⁸ One year later, President Truman signed HJ. Res 430, formally approving the Puerto Rico Constitution. In doing so, the President emphasized that Puerto Rico's Constitution (and the procedures by which it was adopted) were "the culmination of a consistent policy of the United States to confer an ever-increasing measure of local self-government upon the people of Puerto Rico."¹⁹ President Truman cited the new Constitution as "evidence of this Nation's adherence to the principle of self-determination and to the ideals of freedom and democracy," which are "in accordance with principles we proclaim as the right of free peoples everywhere."²⁰

B. There Can be No Democratic Governance Without Transparent Access to Public Records

It is axiomatic in our nation's history and law that there can be no democratic government of the type called for by Puerto Rico's Constitution without public access to records of the institutions that govern. Consistent with that principle, the Puerto Rico Supreme Court has confirmed that the general public has a right to access government records that is enshrined in the Puerto Rico Constitution.

¹⁸ Truman, *supra* note 8.

¹⁹ *Id.*

²⁰ *Id.*

In 1982, the Puerto Rico Supreme Court ruled in *Soto v. Srio. de Justicia*, that the rights of freedom of speech and of the press guaranteed by Puerto Rico's Constitution carry with them as a corollary "the press' and general public's right of access to information." 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 the public to participate by passing judgment on the actions (or inaction) of the government. Sometimes these judgments take the form of votes for one candidate or another. But as the Puerto Rico Constitution recognizes, democratic participation is not restricted to voting. It also encompasses other rights such as freedom of speech, freedom of the press and freedom of assembly.²¹ The right to publish an editorial advocating for a particular cause, or to organize a protest challenging an elected official, is no less important to democracy than the ballot box.

In *Soto*, the Puerto Rico Supreme Court reasoned that the right to access information about the government is a prerequisite to meaningful forms of democratic participation because "[i]t is impossible to pass judgment on something without knowledge of the facts." *Soto*, 12 P.R. Offic. Trans. at 608.

²¹ P.R. Const., Art. II, § 4.

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. Conversely, a citizenry armed with access to information about how the government functions can “discover, in time, the dangerous areas and . . . demand liability.” *Id.*

More recently, in a case seeking a court order directing the Government of Puerto Rico to publish a copy of a proposed budget submitted to the Board, the Puerto Rico Supreme Court reaffirmed the holding of *Soto* that the “right to press and of the citizens in general to have access to public information [is] a fundamental right of constitutional rank,” which is “firmly related to the exercise of the rights of liberty of speech, press, [and] association” and “cannot be denied in a capricious and arbitrary way.” *Bhatia Gautier v. Roselló Nevares*, 199 D.P.R. 59, 82 (P.R. 2017) (certified translation at J.A. 95a, 98a). In doing so, the Court emphasized that this right operates as a “fundamental pillar in every democratic society,” which “allows the citizens to evaluate and supervise” government actions, “adds to the transparency in the governmental duty,” and “promotes a healthy public administration.” J.A. 95a-96a.²²

²² The *Bhatia* Court explained that a governmental entity can “validly claim the confidentiality of information in its power” only if it proves that the requested documents fall into one of several enumerated categories, which are not at issue in this appeal. J.A. 98a-99a.

Because of the fundamental role transparency plays in democratic governance, every State has enacted legislation providing for public access to government records.²³ So too has the District of Columbia, Guam and the Virgin Islands.²⁴ The United States Congress and this Court also recognize

²³ 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.

²⁴ D.C. Code §§ 2-531–540; 5 Guam Code Ann. § 10101 *et seq.*; V.I. Code Ann. tit. 3, § 881–884.

that “a means for citizens to know ‘what their 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) (citation omitted) (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.”).

II. The Public is Entitled to Access Board Records to Understand its Decisions and Participate in Puerto Rico’s Recovery

The people of Puerto Rico and its diaspora’s compelling interest in the public records that are the subject of this appeal is not merely theoretical. As described below, the Board is exercising far-reaching control over issues and institutions that directly or indirectly touch nearly every aspect of Puerto Rican life. Without access to Board records, the people of Puerto Rico (and the United States at large) would have few means to understand the Board’s actions, and no meaningful opportunity to “pass judgment” on them. *See Soto*, 12 P.R. Offic. Trans. at 608.

A. Puerto Rico Faces Unprecedented Economic, Fiscal and Demographic Challenges

For the past decade, Puerto Rico has faced an unprecedented economic, fiscal and demographic crisis that has placed tremendous burdens on its people and institutions. The causes of that crisis are

complex, and reach far back into history. For example, legislation passed by Congress beginning in 1917 encouraged Puerto Rico to rely on debt to fill gaps in government funding.²⁵ Debt increased further in the 1990s after Congress began to phase out tax exemptions for companies operating in Puerto Rico, causing local factories to close.²⁶ In 2008, the financial crisis struck, slowing real estate investment, increasing unemployment and further diminishing the tax base.²⁷ Then, beginning in 2017, a series of natural disasters—including three hurricanes and the strongest earthquake in a century—devastated Puerto Rico, further crippling its infrastructure, slowing its economy and driving a surge in emigration, primarily to the continental United States.²⁸

The devastating effect of this cascading chain of events is hard to overstate. More than 40 percent of Puerto Ricans currently live below the poverty

²⁵ Amelia Cheatham & Diana Roy, *Puerto Rico: A U.S. Territory in Crisis*, Council on Foreign Relations, Foreign Affairs (last updated Sept. 29, 2022), <https://www.cfr.org/background/puerto-rico-us-territory-crisis>.

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Id.*

line.²⁹ The median household income (\$21,058) is less than one-half of that in the poorest American state.³⁰

The lack of economic opportunity in Puerto Rico has caused a surge in emigration.³¹ From 2006 to 2016, the population of Puerto Rico declined by approximately 14 percent.³² Emigration rates were especially high for young people who represent the future of Puerto Rico. The number of school-age children between the ages of five and nineteen declined by a startling 31 percent.³³ Then, in the six months after Hurricane Maria in 2017, 135,000 people (out of a total population of slightly more than 3 million) left the island.³⁴ A study released in 2019 predicated that the island's population would fall by another eight percent by 2024.³⁵ As a result of this emigration, one-third of the Puerto Rican-born

²⁹ Jaquira Diaz, *Let Puerto Rico Be Free*, Atlantic (Sept. 20, 2022), <https://www.theatlantic.com/magazine/archive/2022/11/puerto-rico-independence-not-statehood/671482/>.

³⁰ *Id.*

³¹ Rebecca Blackwell, Alessandra Rosa, & Elizabeth Aranda, *¿Nuestro Nuevo Hogar? [Our new home?]: Examining Puerto Rican Migration and Conceptions of Home, Place-Making, and Belonging*; 9 *Women, Gender, & Fams. of Color*, 208-09 (2021).

³² *Id.*

³³ Jennifer Hinojosa, Edwin Melendez, & Kathya Severino Pietri, *Population Decline And School Closure in Puerto Rico*, Center for Puerto Rican Studies (May 2019), https://centropuarchive.hunter.cuny.edu/sites/default/files/PDF_Publications/centro_rb2019-01_cor.pdf.

³⁴ Diaz, *supra* note 29.

³⁵ Cheatham & Roy, *supra* note 25.

population now lives in the continental United States.³⁶ More people of Puerto Rican descent live there than in Puerto Rico.³⁷

B. The Board Is Exercising Far-Reaching Government Authority Over Significant Challenges Facing Puerto Rico

Congress responded to the fiscal crisis in Puerto Rico by enacting the 2016 Puerto Rico Oversight, Management, and Economic Stability Act, or PROMESA. PROMESA created the Board and granted it sweeping powers to control Puerto Rico's budget and fiscal policies.³⁸ The Board is an unelected institution that has exercised its statutory authority in ways that significantly impact many of the most severe challenges facing Puerto Rico.

1. The Puerto Rico Power Grid

As one example, for decades the Puerto Rico power grid has been underfunded, inefficient and vulnerable to outages. Puerto Rico's Electric Power Authority ("PREPA"), the public utility responsible for managing the grid, accumulated more debt (\$9

³⁶ Andrew Van Dam, *People Are fleeing Puerto Rico, Guam and Every Other U.S. territory. What Gives?*, Wash. Post (Sept. 23, 2022), <https://www.washingtonpost.com/business/2022/09/23/american-territories-population-loss/>.

³⁷ Cheatham & Roy, *supra* note 25; Blackwell, Rosa, Aranda, *supra* note 31, at 208-09.

³⁸ Cheatham & Roy, *supra* note 25.

billion) than any other government agency.³⁹ When Hurricane Maria struck Puerto Rico in 2017, it caused the largest power outage in United States history.⁴⁰ More than 1.5 million customers lost power, which was not fully restored for 328 days.⁴¹

In 2021, the Board exercised its control over the island's budget to implement a public-private partnership intended to address problems with the power grid.⁴² Under that partnership, a private company, LUMA Energy, would assume control over power supply and distribution operations on the island.⁴³ The Board's Executive Director claimed

³⁹ Danica Coto, *Puerto Rico federal finance board appoints new leader*, AP News (Nov. 17, 2022), <https://apnews.com/article/business-puerto-rico-congress-government-and-politics-27fa2df84b803128832d8fd22976f446>.

⁴⁰ Alexia Fernandez Campbell, *It Took 11 Months to Restore Power to Puerto Rico After Hurricane Maria. A Similar Crisis Could Happen Again.*, Vox (Aug. 15, 2018), <https://www.vox.com/identities/2018/8/15/17692414/puerto-rico-power-electricity-restored-hurricane-maria>.

⁴¹ *Id.*

⁴² After the Puerto Rico legislature informed the Board that it would not pass a resolution to create the fund necessary to implement the partnership, the Board stated it would independently certify a budget that created the fund. *Fiscal Board Says Will Move Forward with LUMA Energy Reserve Account Despite Legislative Opposition*, San Juan Daily Star (May 10, 2021), <https://www.sanjuandailystar.com/post/fiscal-board-says-will-move-forward-with-luma-energy-reserve-account-despite-legislative-opposition>.

⁴³ Tom Sanzillo, *Puerto Rico Officials Fail to Learn From Past Hurricanes as Fiona Ravages Grid*, Inst. for Energy Econ. & Fin. Analysis (Nov. 1, 2022), <https://ieefa.org/resources/puerto-rico-officials-fail-learn-past-hurricanes-fiona-ravages-grid-0>.

privatization would reduce costs and ensure reliable service.⁴⁴ Instead, the power grid has continued to deteriorate. On June 10, 2021, approximately 900,000 Puerto Ricans lost power after LUMA Energy suffered a cyberattack.⁴⁵ When Hurricane Fiona—a Category 1 storm not expected to cause widespread power outages—struck in 2021, it triggered an island-wide blackout that took several weeks to resolve.⁴⁶ According to a report released by Puerto Rico’s Energy Bureau in August 2022, privatization failed to reduce the number of outages, and increased repair times to restore services.⁴⁷ To

⁴⁴ Giovanna Garofalo, *Gubernatorial Candidates Discuss P3s, Federal Gov’t in Final Debate*, Wkly. J. (Oct. 28, 2020), https://www.theweeklyjournal.com/politics/gubernatorial-candidates-discuss-p3s-federal-gov-t-in-final-debate/article_3b3a1f34-1891-11eb-ad91-27ea3779ca4a.html.

The contract with LUMA Energy was structured as a fee-for-service contract. LUMA Energy was not required to invest any of its own money into the grid. Sanzillo, *supra* note 43.

⁴⁵ Kim S. Nash & James Rundle, *Puerto Rico’s Power Distributor Suffered a Cyberattack Hours Before a Devastating Fire*, Wall St. J. (June 11, 2021), <https://www.wsj.com/articles/puerto-ricos-power-distributor-suffered-acyberattack-hours-before-a-devastating-fire-11623453388>.

⁴⁶ Joshua Partlow & Arelis R. Hernandez, *Even Before Fiona, Puerto Rico’s Power Grid was Poised for Failure*, Wash. Post (Sept. 19, 2022), <https://www.washingtonpost.com/nation/2022/09/19/puerto-rico-blackout-hurricane-fiona/>; Becky Sullivan, *More Than 100,000 Clients In Puerto Rico Are Still Without Power 2 Weeks After Fiona*, Nat. Pub. Radio (Oct. 2, 2022), <https://www.npr.org/2022/10/02/1126462352/puerto-rico-hurricane-fiona-luma-energy-power-outages>.

⁴⁷ Dánica Coto, *Puerto Rico Governor Denounces Power Company Amid Outages*, AP News (Aug. 18, 2022), <https://apnews.com/article/puerto-rico-pedro-pierluisi-quanta->

make matters worse, introducing a new operator delayed the release of federal funds allocated to improve the power grid after Hurricane Maria.⁴⁸ As of September 2022, only \$40.3 million of the allocated \$12 billion had been spent.⁴⁹

At the same time service continued to deteriorate, energy costs soared. In 2022, residents of Puerto Rico paid 33.4 cents/kWh for electricity, almost double the cost in 2020.⁵⁰ Rates increased seven times in 2022 alone.⁵¹ The Board's 2022 fiscal plan acknowledges that residents of Puerto Rico pay significantly more for electricity than elsewhere in the United States and comparable island markets, even without considering the recent surge in prices.⁵² That disparity has an outsized effect on the population of Puerto Rico, where median incomes are lower.⁵³ Puerto Rico residents spend approximately

services-inc-climate-and-environment-5049018d7ae13c5fe09a6b054c2d177d; Partlow & Hernandez, *supra* note 46.

⁴⁸ *Id.*

⁴⁹ Sanzillo, *supra* note 43; Partlow & Hernandez, *supra* note 46.

⁵⁰ Robert Walton, *Puerto Rico's Electricity Rates Have Nearly Doubled Since 2020*, Utility Dive (July 18, 2022), <https://www.utilitydive.com/news/puerto-rico-electricity-rates-doubled-since-2020-ieefa/627443/>.

⁵¹ Coto, *supra* note 47.

⁵² Tom Sanzillo, *Oversight Board Rejection of Puerto Rico Debt Bill Misrepresents Purpose*, Inst. for Energy Econ. & Fin. Analysis (July 20, 2022), <https://ieefa.org/resources/ieefa-oversight-board-rejection-puerto-rico-debt-bill-misrepresents-purpose>.

⁵³ *Id.*

eight percent of their household income on electricity, while residents of the continental United States spend just a fraction of that amount.⁵⁴

The unreliability and cost of Puerto Rico's power grid directly contributes to the Commonwealth's fiscal, economic and demographic challenges. High energy costs strain the finances of island residents.⁵⁵ The lack of a reliable power grid disincentivizes businesses from investing in infrastructure necessary to reverse two decades of decline in manufacturing.⁵⁶ These pressures increase poverty, fuel emigration and further erode the tax base.

Not surprisingly, management of Puerto Rico's energy infrastructure has become a contested political issue. During the most recent election, the candidates for Governor of Puerto Rico vigorously debated the merits of privatization.⁵⁷ More recently, after a year of protests on the streets and in social media, Governor Pedro Pierluisi for the first time stated publicly that he was "not satisfied" with LUMA Energy and that it was "obvious" changes needed to be made.⁵⁸ Members of the United States Congress—which enacted PROMESA and created the

⁵⁴ Kellie Lunney, *Why Puerto Rico Has Struggled to Stabilize Its Electricity Grid*, Bloomberg L. (Sept. 30, 2022), <https://news.bloomberglaw.com/environment-and-energy/why-puerto-rico-has-struggled-to-stabilize-its-electricity-grid>.

⁵⁵ Sanzillo, *supra* note 52.

⁵⁶ Van Dam, *supra* note 36.

⁵⁷ Garofalo, *supra* note 44.

⁵⁸ Coto, *supra* note 47.

Board—also have weighed in, with some supporting privatization⁵⁹ and others proposing different solutions to problems with the power grid.⁶⁰

2. Public and Higher Education

Like the power grid, the public and higher education systems of Puerto Rico have suffered dramatic harm during the last decade of Puerto Rico’s crisis. The number of operational primary schools declined from 1,515 in 2006 to only 855 in 2018.⁶¹ In 2017, the Department of Education began to pursue a program to reduce costs by encouraging the creation of semi-privatized charter schools.⁶² By 2019, 65

⁵⁹ Luis J. Valentín Ortiz & 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/>. -federal-govt-influence-over-puerto-ricos-fiscal-board/.

⁶⁰ For example, in 2022 more than 30 members of Congress indicated they will seek \$5 billion for rooftop solar energy systems in Puerto Rico (a solution that many homeowners and businesses turned to in the wake of the grid’s failure after Hurricane Maria). In doing so, the members of Congress cited the “limited success” and “lack of coordination” in existing modernization efforts. Sanzillo, *supra* note 43; Robert Walton, *House Lawmakers, Advocates Want \$5B to Help Puerto Rico Install Rooftop Solar, Storage Systems*, Utility Dive (Nov. 22, 2022), <https://www.utilitydive.com/news/congress-5-billion-puerto-rico-install-rooftop-solar-storage-resiliency/637178/>.

⁶¹ Hinojosa, Melendez, & Pietri, *supra* note 33.

⁶² Jonathan M. Katz, *The Disappearing Schools of Puerto Rico*, N.Y. Times Mag. (Sept. 12, 2019), <https://www.nytimes.com/interactive/2019/09/12/magazine/puertorico-schools-hurricane-maria.html>.

percent of public schools in rural areas, and 35 percent of public schools in urban areas, had closed.⁶³

After PROMESA was enacted in 2016, the Board stepped in to reduce expenditures supporting Puerto Rico's public-school system. The Board raised the retirement age for teachers and restructured the existing pension system to reduce certain benefits.⁶⁴ It reduced the Governor's proposed increase to public-school teachers' base pay—which, at \$1,750 per month, had not increased in 13 years.⁶⁵ And it continued to invest in a public-private partnership supporting charter schools.⁶⁶

In early 2022, island residents protested the closing of public schools and low teacher pay after a teacher died in a car crash leaving his night job as a

⁶³ Hinojosa, Melendez, & Pietri, *supra* note 33.

⁶⁴ *Supreme Court Again Avoids Examination of Insular Cases*, P.R. Report (Nov. 28, 2022), <https://www.puertoricoreport.com/supreme-court-again-avoids-examination-of-insular-cases/#.Y4v1X3bMKUk>.

⁶⁵ Edmy Ayala & Patricia Mazzei, *Puerto Rico Teachers Lead Push for Higher Pay for Public Workers*, N.Y. Times (Feb. 10, 2022), <https://www.nytimes.com/2022/02/10/us/puerto-rico-teachers-protests.html#:~:text=Teachers%20unions%20have%20been%20seeking,instead%20%E2%80%94%20about%20%24470%20a%20month>.

⁶⁶ E-mail from David A. Skeel, Jr., Financial Oversight & Management Board for Puerto Rico, to Wanda Garcia, President, Public School Alliance Association of Puerto Rico (Nov. 4, 2022) (on file with the Financial Oversight & Management Board for Puerto Rico), https://drive.google.com/file/d/1FfU2R5AKFZCLXIm_a5mvTY8Z_I40fNvI/view?usp=share_link.

security guard (he was believed to have fallen asleep at the wheel from the exhaustion of working three jobs to make ends meet).⁶⁷ The protests culminated in a “sick out” during which more than 80 percent of Puerto Rico’s teachers refused to report to work.⁶⁸

The Board also has made drastic budget cuts that threaten the future of the island’s leading higher education institutions. The University of Puerto Rico (“UPR”), which has 11 campuses across the Commonwealth, is the oldest such institution in Puerto Rico.⁶⁹ Beginning in 2017, the Board implemented a series of reductions to UPR’s budget. Its 2019-2024 fiscal plan for UPR reduces government appropriations for the University from \$879 million to less than \$400 million, a decrease of 54 percent.⁷⁰ To make ends meet, UPR has been forced to hire part-time adjunct professors, instead of full-time, tenure-track positions.⁷¹ Morale among professors, administrators and students is low.⁷²

⁶⁷ Ayala & Mazzei, *supra* note 65.

⁶⁸ *Id.*

⁶⁹ 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>.

⁷⁰ *Id.* Board members have commented that the budget cuts are intended to bring the percentage of government funding for UPR in line with other public universities. *Id.* Commentators have attributed the cuts to political ideology and preferences. *Id.*

⁷¹ *Id.*

⁷² *Id.* (“The effects were very tactical and concrete. There has been a decreasing in the composition of the faculty and other

In addition, the cost of undergraduate tuition at UPR has tripled in view of the budget cuts.⁷³ As a result, UPR is now unaffordable for many lower income students, and enrollment has dropped 14 percent.⁷⁴ Students that otherwise would have stayed in the Commonwealth are driven to study abroad. Young people that study abroad are less likely to return home after graduation.⁷⁵ The Board's decisions to cut funding for UPR are likely to result in additional emigration of young people with advanced degrees, which further exacerbates the Commonwealth's existing economic, fiscal and demographic challenges.

3. Other Issues

The power grid and education issues discussed above are just two of the many issues through which the Board's exercise of governmental power has affected the lives of Puerto Ricans. For example, during the budgeting process for the current fiscal year, the Board issued a letter objecting to the Government's proposed budget, and provided a series of proposed "corrections" that drastically altered the funding available for governmental functions and

university personnel. Those who have retired have not been replaced . . . We have not had pay raises; there is no money for sabbaticals or leave to do research for several years now.").

⁷³ Carolyn Fast, *With the University of Puerto Rico Gutted, Private Equity Is Poised to Profit*, Century Found. (Jan. 5, 2022), <https://tcf.org/content/commentary/with-the-university-of-puerto-rico-gutted-private-equity-is-poised-to-profit/>.

⁷⁴ *Id.*

⁷⁵ *Id.*

programs.⁷⁶ The Board cut funding for gender-based violence programs⁷⁷ from \$7 million allocated by the legislature to only \$225,000.⁷⁸ It reduced \$17 million allocated to Puerto Rico’s Department of Justice “for technology and IT improvements within security forces” to \$2.8 million, and redirected that funding “to hire additional resources for various units, including special prosecutors and agents for the Specialized Domestic Violence, Sexual Crimes, and Child Abuse Units.”⁷⁹ And it cut funding entirely for two programs intended to address child poverty and increase access to basic health care in underserved towns.⁸⁰

More recently, the Board filed a lawsuit seeking to nullify legislation passed by Puerto Rico’s legislature providing greater employment benefits to

⁷⁶ Letter from Natalie A. Jaresko, Financial Oversight & Management Board for Puerto Rico to Hon. Pedro Pierluisi-Urrutia, Gov. of Puerto Rico (Apr. 27, 2021) (“Jaresko Letter”) (on file with the Financial Oversight & Management Board for Puerto Rico), <https://drive.google.com/file/d/1TjJtj-FYWxfd2lWujIql-3-6Pnb0-QmL/view>.

⁷⁷ *Id.* at 3. This cut attracted significant attention because, the very weekend after the Board’s letter, two women were killed in instances of gender-based violence in Puerto Rico. *Officials Find Body of Missing Woman After Questioning Boxer Felix Verdejo*, ABC News (May 2, 2021), <https://abcnews.go.com/Sports/officials-find-body-missing-woman-questioning-boxer-felix/story?id=77453217>.

⁷⁸ Statement, Financial Oversight & Management Board for Puerto Rico, FOMB – Statement – Gender Violence (May 2, 2021) (on file with author).

⁷⁹ See Jaresko Letter, *supra* note 76, at 5.

⁸⁰ *Id.* at 4.

employees in the private sector.⁸¹ Its basis for doing so was the Board’s judgment that the legislation would lead to fewer jobs, higher emigration and lower economic growth and tax revenues.⁸² The Board also rejected a bill proposed in the Senate that sought to expand employment opportunities for the autistic population of Puerto Rico by establishing a tax deduction for private employers that hire individuals diagnosed with autism.⁸³ Without access to the Board’s records regarding these substantial decisions dictating government policies and priorities, the public has no basis to understand the Board’s actions, much less “pass judgment” on them. *See Soto*, 12 P.R. Offic. Trans. at 608.

C. The Materials Obtained by CPI Illustrate the Importance of Public Access to Board Records

To date, the Board has produced approximately 18,500 documents to CPI. *See* Pet. Br. 11. These documents, and CPI’s reporting on them in a series of articles entitled “Los Emails de la Junta,”⁸⁴

⁸¹ Financial Oversight and Management Board for Puerto Rico Media Release (Sept. 1, 2022), <https://drive.google.com/file/d/13y42nIzmZfTTiDkAE1ORmXZmo97Ukz8R/view?usp=sharing>.

⁸² *Id.*

⁸³ Letter from Jaime A. El Koury, Financial Oversight & Management Board, to Hon. Zaragoza Gomez, President, Committee on Finance, Federal Affairs and Oversight Board, Senate of Puerto Rico (Oct. 31, 2022), https://drive.google.com/file/d/1GmJC22HuaEN0Bv95Gsf8NO8j5s4Y6cJV/view?usp=share_link.

⁸⁴ Translated in English to, “Puerto Rico Fiscal Board’s Emails.”

provide tangible examples of why public access is so important. The documents produced have done a tremendous amount to illuminate the practical workings of the Board. CPI's articles raise significant questions related to influence over Board decisions and potential conflicts of interest that the public is entitled to have answered.

For example, the documents obtained by CPI include Board emails and other communications with Congress, the White House, the Department of the Treasury and other federal agencies.⁸⁵ Those documents reflect frequent communications between the Board and various stakeholders in the federal government via “discussions, warnings, ‘recommendations’ and questions over issues such as the approval of fiscal plans, debt negotiations, Puerto Rico’s political status, the future of the government-owned Electrical Power Authority (PREPA), the operations of the Fiscal Board and the federal funds allocated for Puerto Rico, including recovery money after hurricanes Irma and Maria.”⁸⁶ Although the Board is 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.⁸⁷

Reports published by CPI provide specific examples of policies that were advocated by stakeholders in the federal government prior to being

⁸⁵ Ortiz & Arbasetti, *supra* note 59.

⁸⁶ *Id.*

⁸⁷ *Id.*

adopted by the Board. For example, Board emails obtained by CPI show coordination between the Board, the Department of the Treasury and the Government of Puerto Rico over the leadership, timing and announcement of the PREPA privatization initiative.⁸⁸ Shortly after Hurricane Maria decimated Puerto Rico's power grid in 2017, representatives of Senators Jeff Flake of Arizona and Mike Lee of Utah privately contacted multiple Board members to communicate the Senators' "interest in helping push some needed reforms to Puerto Rico's energy sector, including PREPA privatization."⁸⁹ These previously unreported communications raise potential conflict-of-interest issues, given that those Senators received "more than \$1.3 million in donations from energy sector companies, some of which could benefit from PREPA's privatization."⁹⁰ Documents like these obtained by CPI paint a markedly different picture of the federal government's influence over the Board's workings than the carefully sanitized official letters published on the Board's website.⁹¹

⁸⁸ Eliván Martínez Mercado, *Republican Senators Quietly Pushed Privatization of Puerto Rico's Power Utility*, Centro Periodismo Investigativo (Dec. 1, 2018), <https://periodismoinvestigativo.com/2018/12/republican-senators-quietly-pushed-privatization-of-puerto-ricos-power-utility/>.

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ *See* Financial Oversight & Management Board for Puerto Rico, <https://oversightboard.pr.gov/>.

The documents obtained by CPI also reveal the extent to which other entities have played a key role in advising the Board on a range of issues. For example, the management consulting firm McKinsey provided extensive advice and counsel in connection with many of the Board's most important functions, including "preparing and implementing the government's fiscal plans," "determining the future of Puerto Rico's health, education and transportation systems," and "advis[ing] in the island's court-ordered bankruptcy process under Title III of PROMESA, which seeks to restructure more than \$120 billion in public debt."⁹² At the same time it was advising the Puerto Rico government on the restructuring of its debt, a subsidiary of McKinsey owned at least \$20 million in Puerto Rico bonds.⁹³ Media outlets both inside and outside Puerto Rico have reported on McKinsey's potential conflict of interest, and the issue has drawn the attention of members of Congress.⁹⁴

The Board contends that it can withhold documents from the public for any reason, including to shield its inner workings from criticism. CPI's

⁹² Luis J. Valentín Ortiz, *McKinsey: Puerto Rico Bondholder and Fiscal Board's Lead Adviser*, Centro Periodismo Investigativo (Dec. 13, 2018), <https://periodismoinvestigativo.com/2018/12/mckinsey-puerto-rico-bondholder-and-fiscal-boards-lead-adviser/>.

⁹³ *Id.*

⁹⁴ Michael Forsythe, Walt Bogdanich, & Bridget Hickey, *As McKinsey Sells Advice, Its Hedge Fund May Have a Stake in the Outcome*, N.Y. Times (Feb. 19, 2019), <https://www.nytimes.com/2019/02/19/business/mckinsey-hedge-fund.html>.

work demonstrates the importance of reporting on precisely those communications that the Board seeks to hide from the public. Close relationships between the “independent” Board and the federal government, and potential conflicts of interest of some of the Board’s closest advisors, provide strong reasons to scrutinize the Board’s decisions and question whether they are serving the interests of Puerto Ricans.

It is true that the people of Puerto Rico are not able to directly influence the Board’s activities by voting. However, that does not diminish the importance of transparency. Puerto Rico residents are not without avenues for democratic expression. Puerto Ricans can utilize their rights of freedom of the speech, press and assembly to write, advocate, protest and organize around the Board’s activities. Likewise, members of the Puerto Rican diaspora in the United States—which comprise influential voter constituencies in states like New York and Florida—can express their preferences as to the Board’s governance of Puerto Rico through their elected representatives in Congress, which enacted PROMESA and created the Board in the first place. To do any of these things in a meaningful way, however, the people of Puerto Rico and its diaspora must understand the operation and decisions of the Board, without the Board shielding them from public view.

CONCLUSION

Although created by the United States Congress, the Board is part of the Government of Puerto Rico, which does not exist above the laws of

the Commonwealth. As such, under the Commonwealth's Constitution, the Board's decisions are an appropriate subject of public inquiry. Without such public inquiry, the democratic principles that undergird the Government of Puerto Rico and the policy of the United States to confer an ever-increasing measure of local self-government upon the people of Puerto Rico cannot be upheld. Accordingly, *amici curiae* LatinoJustice PRLDEF, Hispanic Federation, and Long Island Hispanic Bar Association respectfully request this Court to affirm the holding of the Court of Appeals, and to reject the Board's attempt to shield itself from public scrutiny.

Dated: December 27, 2022

Respectfully submitted,

STEVEN A. ZALESIN
Counsel of Record
RYAN SHEEHAN
TARA NORRIS
ELIANNI DE LA CRUZ
PATTERSON BELKNAP WEBB & TYLER
LLP
1133 Avenue of the Americas
New York, NY 10036
(212) 336-2000
sazalesin@pbwt.com

*Attorneys for Amici Curiae
LatinoJustice PRLDEF, Hispanic
Federation, and Long Island
Hispanic Bar Association*

LOURDES ROSADO
JOSE PEREZ
LÍA FIOL-MATTA
LATINOJUSTICE PRLDEF
475 Riverside Drive, Suite 1901
New York, NY 10115
(212) 219-3360
lrosado@latinojustice.org
jperez@latinojustice.org
lfiol-matta@latinojustice.org

*Attorneys for Amicus Curiae
LatinoJustice PRLDEF*