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 a Writ of Certiorari to the United States Court of Appeals for the First Circuit

BRIEF OF ESPACIOS ABIERTOS AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT AND AFFIRMANCE

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INTEREST OF *AMICUS CURIAE*[1]

Espacios Abiertos (in English, Open Spaces) is a nonprofit organization founded in Puerto Rico in 2014 to bring about long-term systemic change in the Commonwealth by promoting transparency, government accountability, and civic participation. To further its mission, Espacios Abiertos regularly seeks mandamus in Commonwealth courts against Puerto Rico officials to compel the disclosure of material public records, often resulting in post-complaint mooting disclosures.

As part of Puerto Rico's debt restructuring, the Financial Oversight and Management Board for Puerto Rico ("the Board") requires the Commonwealth to prepare financial plans for the Board's approval. In January 2018, a Commonwealth agency issued a New Fiscal Plan for Puerto Rico at the Board's direction, which included, in summary form, the results of a debt sustainability analysis. Espacios Abiertos commissioned its own debt relief study—led by Pablo Gluzmann, Nobel laureate Joseph E. Stiglitz, and Martín Guzmán, now Argentina's Minister of Finance[2]—that it sought to compare with the

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[1] Both parties filed blanket consents to *amicus* briefs. No counsel for a party authored this brief in any part, and no person or entity other than *amicus* or *amicus* counsel made any monetary contribution to fund the brief's preparation or submission.

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

government's model. Without a fair summary of the Commonwealth's analysis, it couldn't recreate or challenge that work. So it sought mandamus in the San Juan trial court to compel disclosure of that backup.[3] Following a hearing with expert witnesses, the agency officials conceded the information was not privileged from disclosure. Amended fiscal plans followed.

Later in 2018, the Commonwealth called for public comment on a draft plan for recovery from Hurricanes Irma and María but made it available only in English.[4] The report was over 400 pages long with a public comment window of 9 days. As much as 80 percent of the Commonwealth is not fluent in English.[5] After Espacios Abiertos sued for mandamus, Puerto Rico officials then agreed to prepare a translation and extended the comment period. These are just two examples of the results Espacios Abiertos has achieved with mandamus. *See also Espacios Abiertos LLC v. Rosselló Nevárez*, KLAN201801348, 2019 WL

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[3] *See* Reorg Research, *Nonprofit Espacios Abiertos Sues AAFAF for Release of Debt Sustainability Analysis, Fiscal Plan Baseline Assumptions* (March 23, 2018), https://drive.google.com/file/d/1gLXKxSQia4Xr68UAnjNGzEpMCwUMb5vD/view.

[4] *See Transformation & Innovation in the Wake of Devastation: An Economic and Disaster Recovery Plan for Puerto Rico* (July 9, 2019 draft), *available at:* https://bit.ly/3vm7KkR.

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

13185089 (P.R. Cir. March 6, 2019) (tax expenditure plan disclosed during pending appeal to Puerto Rico Supreme Court); *P.R. Priv. Ass'n v. Laboy*, No. SJ-2020-CV-06276 (2020).

SUMMARY OF ARGUMENT

This is a mandamus action for access to public records. (Pet. App. 173a.) The Board claims, as a defendant in a litigation in federal court, sovereign immunity from suit in the exclusive federal forum. CPI and the courts below concluded that PROMESA abrogated that immunity. But there's a fundamental issue that makes resolving that disagreement unnecessary: a mandamus action to compel performance of ministerial duties is not an action against a sovereign at all.

I. That was the original understanding of the Constitution, as informed by English common law, and the practice of this Court and state supreme courts just after the Founding. Writs evolved out of the overlapping jurisdiction of royal, feudal, and communal courts that co-existed in the first centuries following the Norman Conquest. They began as letters from the King, with his seal affixed, sometimes bearing the Latin phrase, *vobis mandamus*—"we command you." In time, the Court of King's Bench heard petitions for writs, but the legal fiction persisted that the King himself presided. In petitions for mandamus, the complainant sues in the sovereign's name.

This tradition was well-known to the American colonists, and early state supreme court decisions duplicated it, often explicitly citing the King's Bench or English treatises to support mandamus power. In

some of its earliest and most important decisions, this Court did likewise. After *Marbury*, the scope of mandamus was clear: it would lie to compel a purely ministerial duty, like the delivery of a public record, but federal courts were powerless to order officials to reach a particular decision within their discretion to make.

After the Civil War, the Court held, and in other cases discussed, that mandamus could issue in federal court against a state official to comply with a ministerial duty created by state law. *Pennhurst* cast doubt on, but stopped short of, overruling those cases. *See Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89 (1984). Puerto Rico, for its part, followed *Marbury* in holding, for more than a century, that mandamus could compel a government official to make available a public record. Today, that ministerial duty applies to records requests from anyone, not just a party with a beneficial interest.

II. The traditional understanding of mandamus supplies the most straightforward resolution here. The Court does not have to decide whether Puerto Rico enjoys sovereign immunity like a State does or whether Congress abrogated that immunity. Because the real parties in interest are Board members in their official capacities, not the Commonwealth, this is not an action against a sovereign barred by sovereign immunity.

Mandamus is particularly appropriate here because, if the Board were immune from suit, there would be no remedy against it for the right to access public records enshrined in Puerto Rico's constitution and statutes. It offends the dignity of sovereigns just

as much to impose immunity the sovereign chose to waive as it does to take away immunity the sovereign chose to keep. Depriving the sovereign of the power to grant a remedy in the sovereign's name contravenes the principles of *Pennhurst*.

If sovereign immunity bars mandamus to compel performance of ministerial duties under Puerto Rico law, that will inject uncertainty into mandamus proceedings in Commonwealth courts and in States that use mandamus as a FOIA remedy in the absence of an express statutory waiver of immunity. The Court should hold instead that there is no immunity defense to mandamus for public records here and affirm.

ARGUMENT

I. There Is No Sovereign Immunity from Mandamus Actions to Compel Performance of Ministerial Duties.

The Court considers, at least in plan-of-the-convention waiver cases, the "evidence of the original understanding of the Constitution" and the "theory and reasoning of [the Court's] earlier cases," among other factors. *Alden v. Maine*, 527 U.S. 706, 741, 745 (1999). Although Puerto Rico had no independent sovereignty before becoming a U.S. territory, the *Alden* factors still show that Puerto Rico would not have understood mandamus for public records access to be an action against the Commonwealth that implicated sovereign immunity. In fashioning a mandamus remedy for access to public information, Puerto Rico looked not to the Spanish civil code but to the decisions of the Court of King's Bench in England and this Court. The Court's opinions from the early

nineteenth century and those of state supreme courts make clear there was no sovereign immunity defense to mandamus to perform a ministerial duty.

A. English Common Law Did Not Recognize Sovereign Immunity from Mandamus, Which Issued in the Sovereign's Name.

This understanding of mandamus has ancient origins in the tradition of prerogative writs.[6] The issuance of writs by the English King against lesser officials began as an Anglo-Saxon practice, the "writ-charter"; perhaps the earliest example issued around 990 commanding a shire court to hear a case.[7] The Normans and Angevins, looking to assert their authority over competing local courts, expanded the practice,[8] and so the first "forms of royal intervention were not strictly speaking judicial but executive or

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[6] See James Lambert High, *A Treatise on Extraordinary Legal Remedies: Embracing Mandamus, Quo Warranto, and Prohibition* 5 (1884); Thomas Tapping, *The Law & Practice of the High Prerogative Writ of Mandamus, As It Obtains in Both England & Ireland* 56 (1853 ed.).

[7] *See* Richard Sharpe, *The Use of Writs in the Eleventh Century*, 32 Anglo-Saxon Eng. 247, 250 & n.4 (2003).

[8] *See* Mark Hagger, *The Earliest Norman Writs Revisited*, 82 Hist. Research 181, 182, 186 & Table 2 (2009) (counting 1,021 writs and writ-charters issued by Henry I in England); Geoffrey C. Hazard, Jr., *The Early Evolution of the Common Law Writs: A Sketch*, 6 Am. J. Legal Hist. 114, 116 (1962); Sharpe, *supra*, at 257-83 (collecting writs issued from Edward the Confessor to Henry I).

administrative."[9] In its infancy, the writ was simply "a written directive from the king, witnessed and bearing his seal, directed to a royal official [or others] ordering the addressees to do or refrain from doing a designated act—*vobis mandamus*."[10]

As the realm grew increasingly complex to govern, the English crown would rely on justices to investigate the basis for a writ. Originally, they rode circuit with the King around the country, but by the 1300s, came to reside at Westminster as a subset of the *curia regis* known as the King's Bench, "over which the King once presided." Richard Fallon, Jr. et al., *Hart & Wechsler's The Federal Courts and the Federal System* 854-55 (6th ed. 2009).[11]

There is some scholarly debate over the specific antecedents for what became known as the writ of mandamus. Magna Carta, chapter 29, is the legendary

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[9] Hazard, Jr., *supra*, at 117; *see also* Robert H. Howell, *An Historical Account of the Rise and Fall of Mandamus*, 15 V.U.W. L. Rev. 127, 128 (1985); Edward Jenks, *The Prerogative Writs in English Law*, 32 Yale L. J. 523 (Apr. 1923).

[10] Hazard, Jr., *supra*, at 117; *see also In re Lauritsen*, 109 N.W. 404, 409 (Minn. 1906); High, *supra*, at 5 (similar).

[11] *See* Richard A. Smith, *King's Bench, Court Of*, Oxford Companion to British Hist., *available at*: https://bit.ly/3C2Kjkl (accessed Dec. 26, 2022); James E. Pfander & Jacob P. Wentzel, *The Common Law Origins of* Ex Parte Young, 72 Stanford L. Rev. 1269, 1302 (2020) ("The writs were typically prosecuted in the name of the Crown . . . such that when they issued, they did so as a 'command' issuing from the monarch herself, as if still sitting in person on the Bench." (cleaned up)).

source attributed by Chief Justice Coke.[12] Another candidate is the writ of *quare impedit*, which dates to the Statute of Malborough in 1285 and provided for the return to an ecclesiastical office.[13] Writs of privilege, "used by the central courts to protect their officers and litigants from arrest by the numerous local courts,"[14] issued as early as the fourteenth century.[15] Writs of restitution, a similar precursor, restored those wrongfully excluded by courts or

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[12] *Compare* Tapping, *supra*, at 56 (the origin of mandamus "may be safely referred to" chapter 29 of the Magna Carta) *with* Jenks, *supra*, 32 Yale L. J. at 530 n.33 ("Of course [mandamus] has also been attributed to *Magna Carta*. But that is common form.").

[13] Harold Weintraub, *English Origins of Judicial Review By Prerogative Writ: Certiorari and Mandamus*, 9 N.Y.L.F. 478, 486 & n. 48 (1963) (collecting cases).

[14] Edith G. Henderson, *Foundations of English Administrative Law: Certiorari and Mandamus in the Seventeenth Century* 49 (1963).

[15] *See Middleton's Case*, 73 Eng. Rep. 752 (Common Pleas 1574). *Middleton's Case*, in turn, cited *Randolf's Case* (1313) and *Anable's Case*, 3 Dyer 333 (K.B. 1416 est.) in support of the writ. Though Sir Dyer reports *Anable's Case* as an opinion from Chief Justice Fortescue, the "case seems to have been in 1416," when Sir William Hankford was Chief Justice. *See* John Baker, *The Reinvention of Magna Carta 1216-1616* at n.349 (2017); Henderson, *supra*, at 53, 66-68 & App'x B at 175-76 (discussing *Anable's Case* and *Randolf's Case*); Weintraub, *supra*, at 487 (noting that "judicial records of the time of 6 Edw. 2 (1313) are also cited" in notes to *Middleton's Case*).

municipalities; the King's Bench granted several of them between 1606 and 1615.[16]

By all accounts the modern writ of mandamus emerged by 1615 in an opinion by Chief Justice Coke in *James Bagg's Case*, 77 Eng. Rep. 1271 (K.B. 1615).[17] Bagg, a judge and former mayor, had been accused by the town's current mayor of insulting him and a long line of predecessors.[18] The mayor removed Bagg from the local court, and Bagg petitioned King's Bench to return to his post. The court issued mandamus restoring Bagg, which Lord Coke described broadly:

> "And in this case, first, it was resolved, that to this court of King's Bench belongs (a) authority, not only to correct errors in judicial proceedings, [b]ut other errors and misdemeanors extra-judicial, tending to the breach of peace, or oppression of the subjects, or to the raising of faction, controversy, debate, or to any manner of misgovernment; so that no wrong or injury, either public or private, can

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[16] Henderson, *supra*, at 49; *see also id. at* App'x B at 163-176 (collecting cases).

[17] A writ in the form of mandamus issued with greater frequency following *Bagg's Case*, but the phrase "writ of mandamus" was not used until *Orme v. Pemberton*, 79 E.R. 119 (1640). *See* Kevin Costello, *Mandamus and Borough Political Life, 1615 to 1780*, 42:2 J. of L. Hist. 171, 175 n.28 (July 25, 2021) for identifying a case earlier than *Luskins v. Carver*, 82 Eng. Rep. 488 (K.B. 1646).

[18] Henderson, *supra*, at 46-48.

> be done, but that it shall be (here) reformed or punished by due course of law."

77 Eng. Rep. at 1277-78.

To be sure, separation of powers was not on the menu for the Coke court, and his broad claim to mandamus jurisdiction found an immediate critic in the Lord Chancellor. James I ordered Coke to explain what "any manner of misgovernment" meant, and by the end of 1616, Sir Henry Montagu replaced him as Chief Justice.[19] But "we should not too hastily assume that the contemporary view was ours, but rather should consider that Coke's and Mansfield's sweeping assertions of mandamus jurisdiction reflected English practice in other prerogative writs," which was likely "on the minds of the Founders," the States, and the public. Raoul Berger, *Standing to Sue in Public Actions: Is it a Constitutional Requirement?*, 43 Yale L.J. 816, 825 (1969). Coke was, after all, "widely recognized by the American colonists as the greatest authority of his time on the laws of England." *Payton v. New York*, 445 U.S. 573, 593-94 & n.36 (1980) (cleaned up) (collecting surveys).

"By 1762, on the eve of the American Revolution," use of mandamus in English courts "was widespread."[20] One recent survey of the English reports between 1220 and 1867 found up to 7,111

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[19] Costello, *supra*, at 174.

[20] Bruce C. French, *The Frontiers of the Federal Mandamus Statute*, 21 Vill. L. Rev. 637, 641 (1976); *see also* Costello, *supra*, at 171.

references to mandamus,[21] though a more modest count of the rolls found 297 writs of restitution or mandamus between 1660 and 1680, 308 between 1700 and 1720, and 373 between 1738 and 1768.[22] In a series of decisions just before the Revolution, Lord Mansfield defined the scope of the writ.[23] In *Rex v. Barker*, 97 E.R. 823 (1763), King's Bench ordered a meetinghouse to accept a Protestant minister. Writing for the court, the Chief Justice gave the definitive restatement:

> "A mandamus is a prerogative writ; to the aid of which the subject is intitled, upon a proper case previously shewn, to the satisfaction of the Court. . . . It was introduced, to prevent disorder from a failure of justice, and defect of police. Therefore it ought to be used upon all occasions where the law has established no specific remedy, and where in justice and good government there ought to be one. Within the

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[21] Paul Craig, *The Legitimacy of U.S. Administrative Law and the Foundations of English Administrative Law: Setting the Historical Record Straight* 36-37 (2016), *available at*: https://bit.ly/3URnB6o (but noting that the "very great majority" of cases "occurred from the sixteenth century onward" and that the estimate does not correct for duplication by multiple reporters, n. 130).

[22] Costello, *supra*, at 176-180 & Tables, 1-3, respectively.

[23] Weintraub, *supra*, at 502 (explaining that "the major outlines of the writ of mandamus had come to be clearly delineated" during Mansfield's tenure as Chief Justice of King's Bench, which ended in 1788).

> last century, it has been liberally interposed for the benefit of the subject and advancement of justice. The value of the matter, or the degree of its importance to the public police, is not scrupulously weighed. If there be a right, and no other specific remedy, this should not be denied."

Id. at 824-25.

Two years later, Blackstone put mandamus this way: "a command issuing in the king's name from the court of king's bench, and directed to any person, corporation, or inferior court of judicature, within the king's dominions; requiring them to do some *particular* thing therein specified, which appertains to their office and duty . . . . it issues in all cases where the party hath a right to have any thing done, and hath no other specific means of compelling its performance." 3 *Commentaries on the Laws of England* 110 (1765). Notably, Blackstone explained that mandamus "lies for the production, inspection, or delivery, of public books and papers." *Id.* English law bristles with examples from this period. Among the earliest was a 1660 petition against the outgoing Sheriff of Nottingham "to deliver the records of the office to his successor."[24] Mandamus issued "to inspect and take copies of the Court rolls" in disputes over

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[24] Henderson, *supra*, at 81-82 & n.74.

tenancy,[25] "to command the delivery to a prisoner or his attorney of copies of the examinations of witnesses," [26] and "to command a bishop to allow inspection of his register," [27] among other examples.[28]

King's Bench granted these writs "without worrying about the English tradition of sovereign immunity."[29] In actions seeking writs against government officers, the "plaintiff proceeded in name of the Crown itself," and the defendant "was regarded as having acted '*coram non judice*,' or 'without jurisdiction,' and thus was, like any other private person," amenable to suit.[30]

But the writ would not issue for anything. To obtain relief, the petitioner's legal right had to be

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[25] Tapping, *supra*, at 211; *see, e.g.*, *State ex rel. Ferry v. Williams*, 41 N.J.L. 332, 334-36 (N.J. 1879) (collecting English cases in which mandamus issued to permit inspection of manorial records).

[26] Tapping, *supra*, at 278.

[27] Tapping, *supra*, at 196.

[28] *McBurney v. Young*, 569 U.S. 221 (2013), is not to the contrary. There, the Court held that a State's refusal to give equal FOIA access to citizens of other States did not vitiate a privilege or immunity of citizenship protected by the Constitution. *Id.* at 224. Here, by contrast, positive law—codified in statutes—provides mandamus for access to public records.

[29] Pfander & Wentzel, *supra*, 72 Stanford L. Rev. at 1335.

[30] *Id.* at 1336 (citation omitted).

clear. *See Rex v. Blooer*, 97 Eng. Rep. 697 (K.B. 1760).[31] When the legal right was subject to an official's judgment to grant, by contrast, no writ issued. *John Gile's Case*, 93 Eng. Rep. 914 (K.B. 1731), where the court denied an application for mandamus to command justices of the peace in Worcester to grant the petitioner a tavern license, stands among the earliest precedents for limiting mandamus to compel performance of ministerial duties.[32] In *Rex v. Bishop of Ely*, 101 Eng. Rep. 267 (K.B. 1794), the court denied mandamus to reinstate a fellow of a Cambridge college for "having written a seditious pamphlet." The seriatim opinions distinguished between the visitor's ministerial duty to hear an admission appeal and the visitor's discretion to decide the outcome.[33]

Even as King's Bench further defined mandamus over the next century, as one leading treatise summarized, "the most important principle" was "that mandamus will lie to compel the performance of duties purely ministerial in their nature."[34] But "as to all acts or duties necessarily calling for the exercise or

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[31] Audrey Davis, *A Return to the Traditional Use of the Writ of Mandamus*, 24 Lewis & Clark L. Rev. 1527, 1533-35 (2020) (note) (collecting cases).

[32] *See id.* at 1539 & n.110 (2020) (note) (quoting 2 Isaac 'Espinasse, *A Digest of the Law of Actions and Trials at Nisi Prius* 661 (London, T. Cadell 2d ed. 1793)).

[33] *See id.* at 268 (Kenyon, C.J.); *id.* at 269 (Annhurst, J., concurring); *id.* (Grose, J., concurring).

[34] High, *supra*, at 30.

judgment and discretion, on the part of the officer or body at whose hands their performance is required, mandamus will not lie"—a rule "universal" in its application by King's Bench.[35]

B. The Court's Opinions from *Marbury* to *Pennhurst* Find No Sovereign Immunity from Mandamus to Perform Ministerial Duties.

The "theory and reasoning" of this Court's cases after ratification and since then follow the same rule: there is no sovereign immunity defense to mandamus against an official to follow a ministerial duty. Like their English counterparts, "state and federal courts continued to caption proceedings in mandamus . . . as if prosecuted by the public as a whole, with federal courts naming the plaintiff as 'United States ex rel. [relator]' or even just 'United States,' and state courts doing the same with the words 'state,' 'commonwealth,' or 'people.' American courts explicitly recognized that these principles defeated the argument for sovereign immunity."[36] This Court has held likewise.

1. Antebellum Decisions of This Court and State Supreme Courts.

Start with *Hayburn's Case*, 2 U.S. 409 (1792). There, in reserving judgment on an application for mandamus from the U.S. Attorney General to add

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[35] Id.

[36] Pfander & Wentzel, *supra,* 72 Stanford L. Rev. at 1336.

Revolutionary War veterans to a pension program Congress created, the Court noted that it "considers the practice of the courts of King's Bench and Chancery in England, as affording outlines for the practice of this court," subject to the Court's changes, as necessary. *Id.* at 413.

With the practices of King's Bench in mind, the Court grappled with mandamus again in *United States v. Lawrence*, 3 U.S. 42 (1795), where the U.S. Attorney General sought mandamus to order a New York federal judge to issue a warrant for the arrest of a French naval commander. A unanimous Court denied the petition and held that the judge "was acting in a judicial capacity" in refusing to issue the warrant, and that the Court had "no power to compel a Judge to decide according to the dictates of any judgment, but his own." *Id.* at 53. By contrast, in *United States v. Deneale*, 25 F. Cas. 817 (D.C. Cir. 1801), the court issued mandamus to compel a former clerk to deliver "the record of wills" to his successor, without mentioning sovereign immunity.

Marbury left no doubt that federal courts have power to issue mandamus to compel government officials to follow ministerial duties. Chief Justice Marshall's opinion for the Court quoted the above excerpts from *Barker* and Blackstone, noting that counsel cited "many other" authorities at argument that "show how far the practice has conformed to the general doctrines that have just been quoted." *Marbury v. Madison*, 5 U.S. 137, 169 (1803). The Court described cases in which the action complained of by the executive was within the President's discretion, which "can never be examinable by the courts." *Id.* at

166. "But where a specific duty is assigned by law, and individual rights depend upon the performance of that duty," mandamus would provide a remedy, for the defendant "is amenable to the laws for his conduct; and cannot at his discretion sport away the vested rights of others." *Id.*

Applying those principles, the Court found that mandamus could issue against James Madison, then the Secretary of State, to deliver the midnight commission from the outgoing President Adams for William Marbury to take his seat as a justice of the peace. But the Court famously found itself without jurisdiction to award that relief after holding the Judiciary Act of 1789's grant of original mandamus jurisdiction unconstitutional. *Id.* at 175-76. Along the way, the Court explained that mandamus could issue for the ministerial duty of copying documents:

> "[I]f so far from being an intrusion into the secrets of the cabinet, it respects a paper, which, according to law, is upon record, and to a copy of which the law gives a right, on the payment of ten cents . . . what is there in the exalted station of the officer, which shall bar a citizen from asserting, in a court of justice, his legal rights, or shall forbid a court to listen to the claim; or to issue a mandamus, directing the performance of a duty, not depending on executive discretion, but on particular acts of congress and the general principles of law?"

Id. at 137.

The same distinction between discretionary and ministerial duties mattered in *Kendall v. United States*, 37 U.S. 524 (1838), in which the Court

affirmed mandamus against the Postmaster General to pay amounts due to contractors for the Postal Service as set out by Congress. The Postmaster General argued that the action was "a proceeding against him to enforce the performance of an official duty" for which mandamus could not lie. *Id.* at 609. The Court recognized separation of powers as a limit to a federal court's power to grant that relief, to a point; "beyond that, all are subject to regulations by law, touching the discharge of the duties required to be performed." *Id.* That Congress could be powerless to enforce its regulation of the federal government was "an alarming doctrine" for the Court. *Id.* It explained that the duty to pay the disputed amounts stemmed from law, not Presidential discretion—it was "emphatically the case, where the duty enjoined is of a mere ministerial character," that the defendant is amenable to mandamus. *Id.*

State supreme courts shared a broad view of mandamus, often explicitly looking to King's Bench for guidance and in some cases granting mandamus to compel the delivery of documents:[37]

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[37] For an exhaustive summary of instances of mandamus in the colonial era through the early 1800s, *see* Leonard S. Goodman, *Mandamus in the Colonies—The Rise of the Superintending Power of American Courts*, published in two parts at 1 Am. J. Legal Hist. 308 (1957) & 2 Am. J. Legal Hist. 129 (1958).

- **Connecticut**: *Meacham v. Austin*, 5 Day 233, 235 (1811);[38]
- **Delaware**: *State v. Wilmington Bridge Co.*, 3 Del. 312, 315 (1840);
- **Kentucky**: *Speed v. Grayson*, 2 Ky. 266 (1803) (issuing mandamus commanding clerk to deliver "all the records, paper, and things" to successor);
- **Maryland**: *Runkel v. Winemiller*, 4 H. & McH. 429, 449 (Md. 1799) (Chase, J.);[39]
- **Massachusetts**: *Commonwealth v. Athearn*, 3 Mass. 285, 287 (1807) (mandamus can issue against a former clerk "to command him to deliver over the records" to successor);
- **New Jersey**: *State v. Holliday*, 8 N.J.L. 205, 206 (N.J. 1825);
- **New York**: *Sikes v. Ransom*, 6 Johns. 279, 280 (N.Y. Sup. Ct. 1810);

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[38] *See also Strong's Case*, 1 Kirby 345, 349 (Conn. Sup. Ct. 1787) (counsel citing *Bagg's Case* and the Statute of Anne in mandamus application, which the court granted).

[39] In colonial times, the Provincial Court of Maryland issued mandamus for a clerk "to deliver the records" of the court so a successor could take office. *Bordley v. Lloyd*, 1 H. & McH. 27, 28 (1709).

- **North Carolina**: *Cooper v. President & Dirs. of Dismal Swamp Canal Co.*, 6 N.C. 195, 196 (1812);[40]
- **Pennsylvania**: *Commonwealth v. Coxe*, 4 U.S. 170, 196 (Pa. 1800) (noting that mandamus issued in England to "compel an old officer to deliver records to a new one" and "a clerk of a company to deliver up books"); and
- **Virginia**: *Commonwealth v. Justices*, 4 Va. 9, 13-15 (1815).

2. The Postwar Era and Federal Mandamus Against State Officials.

This Court took up mandamus involving federalism issues in a series of cases after the Civil War. The Court upheld the power of federal courts to issue mandamus against state officials for constitutional claims. In *Board of Liquidation v. McComb*, 92 U.S. 531 (1875), "it was no objection that such an order might be sought in the federal courts against a state officer." *Puerto Rico v. Branstad*, 483 U.S. 219, 227 (1987). The Court noted that a "State, without its consent, cannot be sued by an individual; and a court cannot substitute its own discretion for that of" state officials. 92 U.S. at 541. Although the plaintiff raised a constitutional claim, the Court's reasoning embraced the ministerial duty basis for mandamus: it was "well settled, that, when a plain

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[40] *See also Richie v. McAuslin*, 2 N.C. 220 (1795) (asking if the form of relief against a lower court "should not have been a *mandamus*").

official duty, requiring no exercise of discretion, is to be performed, and performance is refused, any person who will sustain personal injury by such refusal may have a *mandamus* to compel its performance . . ." *Id.*; *see also Poindexter v. Greenhow*, 114 U.S. 270, 290-91 (1885).

The Court later found no federal forum immunity from mandamus against a state official to follow a ministerial duty imposed by state law. In *Rolston v. Missouri Fund Commissioners*, 120 U.S. 390, 392 (1887), the Court affirmed entry of an injunction against state commissioners to prevent them from selling a mortgaged railroad. A state law made it the commissioners' duty "to assign the liens in question to the trustees when they make a certain payment." *Id.* at 411. After making the payment, but not receiving the liens, a bondholder sued. The commissioners argued that "the suit cannot be maintained because it is in its effect a suit against the state" barred by sovereign immunity. *Id.* The Court rejected the defense, holding that "the suit is to get a state officer to do what a statute requires of him. The litigation is with the officer, not the state." *Id.*; *see also In re Ayers*, 123 U.S. 443, 506 (1887) (explaining that the Eleventh Amendment "is not intended in any way . . . to forbid suits against officers in their official capacity" for mandamus "where such suits are authorized by law, and the act to be done or omitted is purely ministerial").

In *Ex Parte Young*, 209 U.S. 123 (1908), the Court held that federal courts could enjoin state officials from enforcing statutes that violated the Constitution, notwithstanding state sovereign immunity. But there

again the Court looked toward the general principle that mandamus can "direct affirmative action where the officer having some duty to perform not involving discretion, but merely ministerial in its nature, refuses or neglects to take such action." *Id.* at 158. Later cases reaffirmed this principle. *See Great N. Life Ins. Co. v. Read*, 322 U.S. 47, 50 (1944) (summarizing *McComb* and *Rolston* as holding that "the immunity of the sovereign does not extend" to bar mandamus "to perform a plain ministerial duty").

3. *Larson* and *Pennhurst* Preserve the Ministerial Duty Basis for Mandamus.

Neither *Larson* nor *Pennhurst* disturbed that rule. *See Larson v. Domestic & Foreign Com. Corp.*, 337 U.S. 682, 695 (1949). *Pennhurst* cited *Larson* as rejecting the argument that a suit for an injunction against a state official in federal court could proceed because the state official acted beyond the scope of his authority in committing torts. *See Pennhurst*, 465 U.S. at 112-13. But *Larson* went no further; the Court acknowledged that "[t]here may be, of course, suits for specific relief against officers of the sovereign which are not suits against the sovereign." 337 U.S. at 689. Thus, "where the officer's powers are limited by statute, his actions beyond those limitations are considered individual and not sovereign actions." *Id.* The traditional distinction between ministerial and discretionary duties still obtained: "in such cases the relief can be granted, without impleading the sovereign, only because of the officer's lack of delegated power" but "[a] claim of error in the exercise of that power is therefore not sufficient." *Id.* at 690.

Pennhurst is not to the contrary. There, the Court held that "a federal suit against state officials on the basis of state law contravenes the Eleventh Amendment when . . . the relief sought and ordered has an impact *directly on the State itself*." 465 U.S. at 117 (emphasis added). The defendants—officials at the Pennhurst hospital—were "found not to have improved conditions in a state institution adequately under state law." *Id.* at 107. The district court enjoined them "to provide suitable community living arrangements" and create "detailed procedures" for admission to the institution, all to be monitored by a special master. *Id.* at 93-94. The funding for these new undertakings came "almost entirely from the State." *Id.* at 124.

In holding that sovereign immunity barred the injunction, the Court carefully distinguished between suits against state officials for "purely discretionary duties," which "went to sovereign immunity, and not to the court's mandamus powers generally," *id.* at 110 & n.20, and those where the "state officials were ordered to comply with a 'plain ministerial duty,' a far cry from this case," *id.* at 109 n.18. The logic was that "discretionary duties have a greater impact on the sovereign because they 'bring the operation of the governmental machinery into play.'" *Id.* at 110 & n.20 (quoting *Larson*, 337 U.S. at 715 (Frankfurter, J., dissenting)). The all-encompassing directives in the injunction to spend more and do better under state law by federal power put the federal court in the position of superintending a state for "not fulfilling its legislative promises." *Id.* at 109. Because "it cannot be doubted that the statutes at issue" in *Pennhurst* gave

the state defendants "broad discretion" in their duties, their conduct "would not be ultra vires" even under the line of cases cited in dissent. *Id.* at 111.

But the *Pennhurst* majority assured the dissent that it was not overruling the ultra vires line of cases. *Id.* at 111 n.21. Rather, claims for mandamus or injunctive relief against state officials in federal court in future cases would "turn[] on whether the defendant state official was empowered to do what he did." *Id.* at 111, nn. 21 & 22.

This is the same understanding that governs mandamus actions in federal court against federal officials to follow ministerial duties today: "No separate waiver of sovereign immunity is required to seek a writ of mandamus to compel an official to perform a duty required in his official capacity." *Fornaro v. James*, 416 F.3d 63, 69 (D.C. Cir. 2005) (Roberts, J.); *see* Fallon, Jr., *Federal Courts* 854 ("The Supreme Court has held that mandamus actions are not barred by sovereign immunity."); *see also Houston v. Ormes*, 252 U.S. 469 (1920); *Minnesota v. Hitchcock*, 185 U.S. 373, 386 (1902); *Wash. Legal Found. v. United States Sent'g Comm'n*, 89 F.3d 897, 901 (D.C. Cir. 1996).

C. Puerto Rico Courts Issue Mandamus to Compel the Ministerial Function to Make Public Records Available.

Puerto Rico takes a similar approach to mandamus in its courts. Mandamus for access to public records dates to the Commonwealth's earliest laws. The Foraker Act, passed in 1900, offered Puerto Rico limited self-rule: the President appointed Puerto Rico's Governor, Supreme Court, and upper

legislative body, but a lower legislative house was popularly elected. *See FOMB v. Aurelius Inv., LLC*, 140 S. Ct. 1649, 1660 (2020). In 1905, Puerto Rico's legislature enacted an evidentiary statute codifying that "[e]very citizen has a right to inspect and take a copy of any public document of Puerto Rico, except as otherwise expressly provided by law." P.R. Laws Ann. tit. 32, § 1781 (2019); *see De J. Cordero v. Prensa Insular de Puerto Rico, Inc.*, 169 F.2d 229, 232 n.1 (1st Cir. 1948). The statute created a ministerial duty for ""[e]very public officer having the custody of a public document" to give, "on demand, a certified copy of it" in exchange for printing fees. P.R. Laws Ann. tit. 32, § 1782 (2019).

The statute was soon at issue in *Lutz v. Post*, 14 P.R. 830 (P.R. 1908). There, a newspaper editor petitioned the local court for mandamus directing the Governor (then appointed by the President) to make available a judge's answer to ethics charges in his possession. *Id.* at 831. The trial court denied the application, and the plaintiff appealed. *Id.* at 832. In Puerto Rico's Supreme Court, the Governor argued that the court did not have jurisdiction to issue mandamus against him. *Id.* at 833. The court—made up entirely of Presidential appointees—looked not to the Napoleonic Code or Justinian, but to the tradition of Coke, Mansfield, and *Marbury*:

> "[W]e are amply justified in holding that as to ministerial duties the general principle of allowing relief by mandamus against executive officers should be upheld and applied; and the mere fact that it is the Governor of P[ue]rto Rico against whom the

> relief, by this extraordinary writ, is sought should not impede or deter the courts in or from the exercise of their jurisdiction; since it is well established and cannot be denied that the authority of the courts is supreme in the consideration and determination of all legal questions, judicially submitted to them, within the proper limits of their jurisdiction; and no man is exempt from the operation of the law; and the duty of faithfully executing the laws is incumbent on the governor by virtue of his official oath, and should the relief sought be refused the applicants might be utterly without redress."

Id. at 840-41.

Ultimately, though, the *Lutz* court found that mandamus to produce the document in that case was discretionary because the plaintiff newspaper editor had not shown he was "beneficially interested" under the mandamus statute and was improperly seeking the document "perhaps to gratify public curiosity, and to create a market for the newspaper." *Id.* at 842-43.

Puerto Rico's Supreme Court "in effect overruled" the portion of *Lutz* that held that a newspaper could not show a beneficial interest in public records. *Cordero*, 169 F.2d at 233. The First Circuit noted that "the right of the press to inspect public documents had progressed considerably since 1908 when the *Lutz* case was decided and . . . 'the Justices who took part in its decision would not decide it now, insofar as this point is concerned, in the manner they did more than thirty eight years ago.'" *Id.* (quoting 67 P.R. 83, 95 (P.R. 1947)). The Puerto Rico Supreme Court rejected the

argument that there was no positive duty requiring an official to permit inspection of documents. It was "not necessary that the duty to permit the inspection be expressly imposed by law as an obligation appertaining to an office;" rather, it is enough that "the right of inspection *ipso facto* gives rise to the duty . . . to permit the inspection." *Cordero*, 67 P.R. at 92. Citing *Marbury* and Blackstone, the Court explained that mandamus would lie to allow inspection of public records, and that the press was beneficially interested to claim that relief. *Id.* at 93-95.[41]

Puerto Rico began drafting its Constitution in 1950, which incorporated that broader understanding of the right of access to public records. *See generally Bhatia Gautier v. Roselló Nevárez*, 199 D.P.R. 59 (P.R. 2017) (J.A. 72a-117a) (certified translation). In 2019, the Transparency Act became law, which explains that a "petition for writ of mandamus has been the appropriate appeal mechanism to compel compliance with any duty, as is the case when access to public information is requested." (J.A. 8a, Br. Am. Curiae of Espacios Abiertos et al., at ADD13) (certified translation). With the limitations of *Lutz* left behind, today "every citizen, just for being such, has active legitimacy to request and access public information" with mandamus. *Eng'g Servs. Int'l, Inc. v. P.R. Elec. Power Auth.,* No. CC-2018-513, 2020 WL 5659443, at *4, (P.R. 2020).

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[41] *See also Nogueras Cartagena v. Rexach Benítez*, 141 P.R. Dec. 470, 543-44 (1996) (Naveira de Rodón, J., dissenting) (citing *Bagg's Case* as persuasive authority for mandamus).

II. Affirming on Mandamus Grounds Avoids Injecting Uncertainty into Access to Information Suits.

A mandamus action against a government agent to compel performance of a duty required in his official capacity is not an action against a sovereign. The Court can affirm the judgment for that reason alone. *See Schweiker v. Hogan*, 457 U.S. 569, 585 n.24 (1982); *see also Mitchell v. Wisconsin*, 139 S. Ct. 2525, 2551 (2019) (Gorsuch, J., dissenting). To "conclude that PROMESA does not abrogate the Board's immunity, the Court must determine that such immunity exists." U.S. Br. 15 n.2. The simplest path to determining that no such immunity exists is recognizing that a sovereign is not the real party in interest. The Court can do that without unsettling decades of law on whether Puerto Rico enjoys sovereign immunity independent of the federal government or holding that any such immunity was abrogated across-the-board. Affirming on mandamus grounds is necessarily limited to actions seeking mandamus, an exceptional remedy granted only when there are no others to enforce a clear legal right.

It is true that the respondent sued the Board as an entity, rather than naming Board members in their official capacities in the complaint. *See* U.S. Br. 21 n.4. But the "elementary mechanics of captions and pleading" cannot deprive CPI of mandamus. *Idaho v. Coeur D'Alene Tribe*, 521 U.S. 261, 270 (1997). The Court's "cases establish that, in the context of lawsuits against state and federal employees or entities, courts should look to whether the sovereign is the real party in interest to determine whether sovereign immunity

bars the suit." *Lewis v. Clarke*, 581 U.S. 155, 161-62 (2017). In doing so, it is not "the characterization of the parties in the complaint" that matters, but whether the relief runs against the sovereign. *Id.*

An action against a government official to compel the ministerial obligation to produce public records is not an action against a sovereign in Puerto Rico courts. And if a ministerial duty arose under federal law against a federal official, there would be no immunity from mandamus in federal court to compel performance of that duty, either. While *Pennhurst* cast doubt on *Rolston* and language from the Court's prior mandamus cases, it stopped short of explicitly overruling them. And *Pennhurst*'s federalism concerns do not apply here, where the nominal defendant is a territory, not a State.

To affirm on traditional mandamus grounds, the Court does not have to extend *Ex Parte Young* actions to enforce ministerial duties under state law writ large. It is enough to limit mandamus against state or Commonwealth officials in federal court for performance of ministerial duties under local law to instances when relief in local courts is foreclosed by federal forum exclusivity. That combination of facts—a federal statute compelling non-federal claims to be brought exclusively in federal court—is unlikely to ever reoccur outside the territories. Precisely because Puerto Rico is a territory, the incursions on its self-rule tolerated here would be impossible to implement against a State. The Court should not allow Puerto Rico's sovereignty to be abrogated in all the ways but one.

A contrary holding—that the Board is immune from mandamus actions if Congress did not abrogate that immunity—presents three challenges.

First, if the Board's immunity defense succeeds, mandamus against Board members for public records will be extinguished. The Board admitted below that its position would leave plaintiffs without a forum given PROMESA's grant of exclusive jurisdiction to federal court. (J.A. 4a, FOMB Br. 30-31.) This makes a world of difference from typical cases in which the relief against the state official is available in state courts. *Cf. Coeur D'Alene*, 521 U.S. at 274 (finding no need to extend *Young* where the State's courts "are open to hear the case").

Here, like in *Lapides v. Board of Regents*, 535 U.S. 613 (2002), the Commonwealth is not immune from the claim at issue in its courts. Rejecting the idea that a state defendant could remove to federal court and gain immunity from claims it was not immune from under state law, the Court found "that neither those who wrote the Eleventh Amendment nor the States themselves . . . would intend to create that unfairness." *Id.* at 622. Just as a State may not invoke the jurisdiction of the federal court and then "turn around and say the Eleventh Amendment bars the jurisdiction of the federal court," the Board should not be permitted to channel all claims to federal court only to say they are barred there. *Wis. Dep't of Corr. v. Schacht*, 524 U.S. 381, 393 (1998) (Kennedy, J., concurring). Without mandamus as the remedy of last resort in federal court, there will be no remedy at all.

Second, the Board's position would allow it to show even less in the future. The Board points out that

PROMESA permits closed-door proceedings, *see* 48 U.S.C. § 2121(h)(4), but proposes a rule that would excuse producing meeting minutes. "But the local zoning board or town council is not the Star Chamber," *T-Mobile S., LLC v. City of Roswell*, 574 U.S. 293, 315 (2015) (Roberts, C.J., dissenting), and neither is an unelected body governing over 4 million people. A ruling foreclosing mandamus against Board members for records access transforms sovereign immunity into official impunity, allowing the Board to publish its reasoning only in English or not at all.

Third, even a ruling in CPI's favor that suggests there is immunity from mandamus that requires abrogation or waiver could inject uncertainty into mandamus relief for public records access against other Puerto Rico government officials and in States where mandamus is the FOIA remedy. Defendants in future cases might introduce, in Commonwealth courts, a sovereign immunity defense. If the ministerial duty exception is irrelevant, Puerto Rico courts may have to confront for the first time whether the Commonwealth waived sovereign immunity for public records claims in it courts—something taken for granted for more than a century.

Some States still use mandamus as a FOIA remedy, too. *See, e.g.*, *State ex rel. Lucas Cnty. Bd. of Comm'rs v. Ohio Envt'l Prot. Agen.*, 724 N.E.2d 411 (Ohio 2000); *Town of Manalapan v. Rechler*, 674 So. 2d

789, 790 (Fla. Dist. Ct. App. 1996).[42] The ability to see public records might be frustrated in States that have not yet passed a law expressly waiving sovereign immunity for those claims. States might not have thought that necessary given the history of mandamus to compel performance of ministerial duties.

* * *

Mandamus expresses the will of the sovereign. But the sovereign is not dignified by blocking relief that issues in the sovereign's name. And the State or Commonwealth's sovereignty, in our republican system, is merely a consequence of the people's sovereignty. "[T]he ultimate sovereignty rests in the people themselves." *Seminole Tribe v. Florida*, 517 U.S. 44, 151 (1996) (Souter, J., dissenting); *accord* P.R. Const. Art. I, § 2 ("The Government of the Commonwealth of Puerto Rico shall be . . . subordinate to the sovereignty of the people of Puerto Rico."). The sovereignty of the people of Puerto Rico is vanquished, not vindicated, by extinguishing a right they created in their constitution to immunize a government they do not elect. "[I]t is difficult to think of a greater intrusion on . . . sovereignty than" that. *Pennhurst*, 465 U.S. at 106.

The people of Puerto Rico deserve better. The Court should apply the longstanding doctrine that sovereign immunity is no defense to mandamus to compel performance of ministerial duties. And those

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[42] *See* Reporters Comm. for Freedom of the Press, *Pleading Format*, https://www.rcfp.org/open-government-sections/5-pleading-format/ (accessed Dec. 26, 2022) (collecting cases).

governed by the Board without a say may finally learn, after five years of litigation and confirmation of Puerto Rico's restructuring plan, what the Board insists on keeping from them.

CONCLUSION

For all these reasons, the Court should affirm the judgment of the court of appeals.

Respectfully submitted,

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