No. 21-659

In The Supreme Court of the United States

ASOCIACIÓN DE PERIODISTAS DE PUERTO RICO,

Petitioner,

v.

COMMONWEALTH OF PUERTO RICO ET AL.,

Respondents.

On Petition For Writ Of Certiorari To The Supreme Court Of Puerto Rico

BRIEF FOR *AMICUS CURIAE* COLEGIO DE ABOGADOS Y ABOGADAS DE PUERTO RICO (PUERTO RICO BAR ASSOCIATION) IN SUPPORT OF PETITIONER

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INTEREST OF *AMICUS CURIAE*[1]

The Colegio de Abogados y Abogadas de Puerto Rico ("Puerto Rico Bar Association" or "CAAPR" for its Spanish acronym), founded in 1840, is the oldest professional organization in Puerto Rico and the Caribbean. With approximately 3,000 active attorneys admitted to practice, the CAAPR has historically advocated for the interests of its members, the administration of justice, and the rights of the people, including access to justice. In its organic act the Legislative Assembly entrusted it with the duty "to abide by the Bill of Rights . . . of the Constitution of the Commonwealth of Puerto Rico and those civil rights conferred by the Constitution of the United States and its laws", 4 L.P.R.A. § 772(2), and to promote the greatest access to justice for all persons, and to assist in efforts to widen that access. *Id.* §§ 772(8) and 773(i) and (j).

The CAAPR submits this *amicus curiae* brief to discuss whether local laws and rules as construed by the Puerto Rico Supreme Court comply or are substantively and procedurally inconsistent with the United States Constitution. The case presents important substantive issues regarding access to information on the

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[1] Pursuant to Supreme Court Rule 37.6, *amicus curiae* and its counsel state that none of the parties to this case nor their counsel authored this brief in whole or in part, and that no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. The counsel of record for all parties received notice of the CAAPR's intention to file an *amicus curiae* brief on November 22, 2021, more than 10 days prior to the due date for the *amicus curiae* brief, in compliance with Supreme Court Rule 37.2(a). The parties consent to this filing.

judicial management of domestic violence cases, and grave procedural issues in the use of intrajurisdictional certification and summary disposition of a case by the Supreme Court of Puerto Rico. The CAAPR has strongly repudiated domestic violence as it is contrary to the values of peace, dignity and respect of individuals, families, and the community. It has a permanent Commission on Women's Rights to monitor developments related to domestic violence and to develop educational activities. The CAAPR has supported legislation based on a vigorous public policy on domestic violence, and its Governing Board has approved multiple resolutions on the subject.

SUMMARY OF ARGUMENT

The right of access to government information and to judicial processes and records is implicit in the fundamental freedoms of speech and of the press. It may be limited in exceptional circumstances if denial of access is justified by a compelling interest and the restriction is narrowly tailored to serve that interest. That standard was not met in this case.

The Puerto Rico Supreme Court misinterpreted applicable statutes by imposing a categorical denial of access of the public and the press to all judicial hearings and records in domestic violence cases. Its decision contradicts Puerto Rico's public policy on domestic violence and restricts the right to access to judicial records secured by the United States Constitution.

By intrajurisdictional certification, the Puerto Rico Supreme Court *sua sponte* stayed the process initiated by petitioner before the Court of First Instance. No party to the case and no inferior court initiated the certification. Simultaneously, the Supreme Court summarily decided the merits of the petition of access to judicial recordings, dispensing with all ordinary appellate procedures. This course of action denied petitioner of its right of access to courts under the due process clauses of the United States Constitution.

ARGUMENT

I. The right of access by the public and the press to judicial sessions and records may be restricted only after an individualized analysis of the specific case reveals that limited access is necessary to serve compelling state interests.

The federal government may not "abridg[e] the freedom of speech, or of the press, or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." U.S. Const., Amend. I. State governments are also prohibited from abridging the fundamental freedoms guaranteed by the First Amendment and the rest of the Bill of Rights incorporated in the concept of liberty of the Fourteenth Amendment. *Duncan v. Louisiana*, 391 U.S. 145 (1968); *McDonald v. City of Chicago*, 561 U.S. 742 (2010). The government of Puerto Rico may not restrict fundamental freedoms secured by the U.S. Constitution, *Balzac*

v. People of Puerto Rico, 258 U.S. 298 (1922). The free speech clause of the First Amendment applies fully in the territory. *Posadas de Puerto Rico v. Tourism Co. of Puerto Rico*, 478 U.S. 328 (1986); *El Vocero de Puerto Rico v. Puerto Rico*, 508 U.S. 147 (1993).

Access to government information is concomitant of freedom of speech and other freedoms encompassed in the First Amendment.

> These expressly guaranteed freedoms share a common core purpose of assuring freedom of communication on matters relating to the functioning of government. . . . '[T]he First Amendment goes beyond protection of the press and the self-expression of individuals to prohibit government from limiting the stock of information from which members of the public may draw.' *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 783 (1978). Free speech carries with it some freedom to listen. In a variety of contexts this Court has referred to a First Amendment right to 'receive information and ideas.' *Kleindienst v. Mandel*, 408 U.S. 753, 762 (1972). *Richmond Newspapers v. Virginia*, 448 U.S. 555, 575-576 (1980).

As a result, this Court has historically recognized the right of the public and the press to judicial proceedings.

> The explicit, guaranteed rights to speak and to publish concerning what takes place at a trial would lose much meaning if access to observe the trial could, as it was here, be foreclosed arbitrarily. . . . [T]he First Amendment

> guarantees of speech and press, standing alone, prohibit government from summarily closing courtroom doors. . . . "For the First Amendment does not speak equivocally . . . It must be taken as a command of the broadest scope that explicit language, read in the context of a liberty-loving society, will allow." *Bridges v. California*, 314 U.S. 252, 263 (1941). *Richmond Newspapers v. Virginia*, *supra* at 576-577.

The value of openness of judicial proceedings lies not only in the concept of basic fairness of a criminal trial; it is essential to public confidence in the judicial institution.

> People in an open society do not demand infallibility from their institutions, but it is difficult for them to accept what they are prohibited from observing. Closed proceedings, although not absolutely precluded, must be rare and only for cause shown that outweighs the value of openness. [Citations omitted]. *Press-Enterprise Co. v. Superior Court of California*, 464 U.S. 501, 509 (1984).

Vigorous freedom of speech and of the press secure the free discussion of government affairs. *Mills v. Alabama*, 384 U.S. 214, 218 (1966). Judicial processes and judicial conduct are matters of great public concern, especially when judges deal with matters which by themselves generate public discussion. As public servants, judges are not immune from public oversight and criticism. *Bridges v. California*, 314 U.S. 252, 289 (1941) (Frankfurter, J., dissenting). "A responsible press has

always been regarded as the handmaiden of effective judicial administration. . . . The press does not simply publish information about trials but guards against the miscarriage of justice by subjecting the police, prosecutors, and judicial processes to extensive public scrutiny and criticism." *Sheppard v. Maxwell*, 384 U.S. 333, 350 (1966). Therefore, as matters of great public concern, the press ought to have access to judicial processes and documentation, in order to achieve its fundamental function to inform the general public. *Landmark Communications v. Virginia*, 435 U.S. 829, 838-839 (1978).

This right of access to judicial proceedings has been recognized in various contexts. The Supreme Court has recognized that the public and the press have a qualified First Amendment right to attend a criminal trial, *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596 (1982); *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980), to the process of *voir dire* to select jurors, *Press Enterprise Co. v. Superior Court*, *supra*, and to pretrial suppression hearings under the Sixth Amendment right to public trial. *Gannett Co. v. DePasquale*, 443 U.S. 368 (1979); *Waller v. Georgia*, 467 U.S. 39 (1984). In *Press-Enterprise Co. v. Superior Court of Cal., County of Riverside*, 478 U.S. 1 (1986) and in *El Vocero de Puerto Rico v. Puerto Rico*, 508 U.S. 147 (1993), this Court invalidated blanket closures of all preliminary hearings to determine probable cause that the defendant committed the offense and should be held for trial.

The right of access is not absolute. Specific findings of exceptional circumstances may warrant restrictions to serve overriding government interests; otherwise, a criminal trial must be open to the public. *Richmond Newspapers*, *supra* at 581. Even in a sex-offense trial in which a minor is the victim, a statutory blanket exclusion of the public during the victim's testimony based on generalized privacy or security interests cannot stand. *Globe Newspaper Co. v. Superior Court*, *supra*. Such exclusion does not permit a case-by-case consideration of specific interests at stake.

In order to limit the right of access "[t]he party seeking to close the hearing must advance an overriding interest that is likely to be prejudiced, the closure must be no broader than necessary to protect that interest, and the trial court must consider alternatives to closure." *Waller v. Georgia*, *supra* at 48, reiterated in *Pressley v. Georgia*, 558 U.S. 209, 214 (2010).

The First Amendment right of access to public trial extends beyond the accused, to the public itself. *Id.* at 212. Yet, government may be justified in inhibiting disclosure of sensitive information on rare circumstances.

> Where . . . the State attempts to deny the right of access . . . it must be shown that the denial is necessitated by a compelling governmental interest, and is narrowly tailored to serve that interest.
>
> The presumption of openness may be overcome only by an overriding interest based on

> findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest . . . with findings specific enough that a reviewing court can determine whether the closure order was properly entered. *Press-Enterprise Co. v. Superior Court of California*, *supra* at 509-510.

In this case, the Puerto Rico Supreme Court denied access to recordings of hearings before the Court of First Instance related to the application of the *Law for the Prevention and Intervention with Domestic Violence*, Law 54 of August 15, 1989, 8 L.P.R.A. 601 *et seq*. Concerned with the impact of making public the contents of the recordings in future cases of domestic violence, the Supreme Court intervened *sua sponte* to disallow the celebration of a hearing scheduled by the Court of First Instance, and ordered that the case be elevated to the Supreme Court via the writ of intrajurisdictional certification contemplated in the Puerto Rico Judiciary Act of 2003, 4 L.P.R.A. 24s(f), and the Rules of Civil Procedure, P.R. R. Civ. P. 52(d), 32 L.P.R.A. Ap. V. The Court invoked Rule 50 of the Rules of the Supreme Court (*See* Cert. Petition App. 204a) to dispense with all terms, writings or specific procedures ordinarily followed in cases before the Court and summarily decided to deny access to the requested recordings. The Court relied on Article 5.005 of the Puerto Rico Judiciary Act, 4 L.P.R.A. 25e. As construed by the Court, that provision "ensured confidentiality in the matters discussed in the specialized chambers on domestic violence." Judgment of the Supreme Court, Petition for Certiorari, at 7a. "[I]n the balance of

interests, the desire of the press to have access to confidential information on judicial processes related to domestic violence matters gives way to the protection of confidentiality and the right to privacy that all future victims have." *Id.*

Application of these standards requires consideration of the public policy interests behind the Puerto Rico legislation on domestic violence.

II. The categorical denial of access of the public and the press to all judicial hearings and records in cases of domestic violence contradicts Puerto Rico's public policy on domestic violence and limits the right of access to judicial records secured by the United States Constitution.

Before 1989, the surviving victims of gender violence in Puerto Rico lacked legal alternatives to free themselves from the circle of fear in their households. The unfortunate incidents reported in the press were generally considered private in nature, and victims were discouraged or turned down by the police, and the courts were unprepared to address the problem. The only remedies available to victims were referrals to social workers and spiritual counselors. New public policies and legislation were needed to address the social and public health problem of violence against women.

Finally, in 1989, the Puerto Rico Legislative Assembly passed Law Number 54, *Law for the Prevention and Intervention with Domestic Violence*, 8 L.P.R.A.

601 *et seq*. The law combines civil remedies and criminal sanctions, together with the educational measures to be implemented by the Office of Women's Affairs, now the Office of the Ombudsman for Women (OPM).

The Senate Committee Report that recommended favorably on the measure[2] summarized the four objectives of the new public policy:

> 1) To provide immediate protection to those affected by acts of domestic violence through protective orders aimed at preventing future domestic violence and other measures of a civil and criminal nature;
>
> 2) To classify violence against a domestic partner as punishable criminal behavior;
>
> 3) To establish the responsibility and intervention of the police and public authorities in the arrest of the aggressor, the protection of the victim and the collection of information related to incidents of domestic violence;
>
> 4) To establish measures for the prevention of domestic violence.

The final text delineated the public policy behind the law:

> The Government of the Commonwealth of Puerto Rico recognizes that domestic violence

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[2] *Informe Conjunto del Sustitutivo sobre el P. del S. 90 y P. del S. 470*, Com. De los Jurídico, de Desarrollo Cultural y Seguridad Social, Com. Especial de Asuntos de la Mujer, Senado de Puerto Rico, June 25th, 1989, 1a. Ses. Ord., 11ma. Asam. Leg., page 4. [Our translation].

> is one of the most serious and complex problems in our society. [. . .]
>
> The efforts . . . to identify, understand, and handle abuse have been limited, and are often inadequate.
>
> The Government . . . reaffirms its constitutional commitment to protect the life, security, and dignity of men and women, regardless of sex, civil status, sexual orientation, gender identity, or immigrant status. It also recognizes that domestic violence violates the integrity of a person, his/her family, and members thereof, and constitutes a serious threat to the stability and preservation of the civilized coexistence of our People.
>
> As public policy, the Government . . . promotes the development, establishment, and strengthening of effective measures to offer protection and assistance to victims, options for the rehabilitation of the offenders, and strategies for the prevention of domestic abuse. Article 1.2 of Law 54, 8 L.P.R.A. 601.

In addition to a firm and clear public policy of repudiation of violence against women in the sphere of intimate relationships, the law contains provisions for protection through protective orders and other measures. The law, as subsequently amended, instructs the Women's Advocate Office to develop studies, educational campaigns, and training to promote changes in policies and procedures in government agencies in order to improve their responses to the needs of victims of abuse. Article 4.1, 8 L.P.R.A. 651.

The problem of domestic violence is no longer a private matter between couples in the intimacy of their home. It is a social problem that must be addressed publicly by the government and the people. Domestic violence transcends the walls of a home, the nucleus of the family, and "constitutes a serious threat to the stability and preservation of the civilized coexistence of our people." *Id*.

Despite the efforts made by the government to implement a policy of zero tolerance for domestic violence, several studies and current statistics reveal that the problem has worsened. The data collected by the Puerto Rico Police Department show that, during the year 2020, there were 5,517 incidents of domestic violence in which a woman was reported as a victim.[3] Only 53 of them resulted in convictions. Statistics from the judicial branch for 2021 reflect a total of 249 requests of protection orders, of which 208 were granted. In percentage terms, 84% of protection orders were issued and 16% were denied.[4] The lack of statistical uniformity among public agencies responsible for the implementation of Law 54 has been a recurring problem.

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[3] Policía de Puerto Rico, *Estadísticas sobre violencia doméstica*. Available at: https://policia.pr.gov/estadisticas-de-violencia-domestica/#1593036599958-289275b7-bd0a (last visit: Nov. 13, 2021).

[4] Observatorio de Equidad de Género, *Estado de situación de Violencia de Genero-Estadísticas disponibles sobre "Toque de Queda."* Available at: https://drive.google.com/file/d/1rXlLOOTpcwf1_YxjuxR8_CVpEAniVbOp/view (last visit: Nov. 13, 2021).

After the emergency caused in Puerto Rico by hurricanes Irma and Maria in September 2017, after the destructive impact of the earthquakes that affected the island beginning in January 2020, and finally the COVID-19 pandemic, an alarming increase in cases of gender-based violence became evident. Isolation, lack of essential services such as water and electricity, loss of jobs, economic difficulties, and limitations in accessing the justice system and support organizations, largely explain the increase in violence against women. Media coverage has raised great concern among citizens. As details of notorious domestic violence cases have been publicly revealed, diverse sectors, especially feminist organizations, those that offer services to surviving victims and human rights advocates have raised their voices to demand that the government respond to the problem of violence against women as an emergency.

Finally, on January 25, 2021, Governor Pedro Pierluisi-Urrutia issued Executive Order No. OE-2021-013, in which he decreed a state of emergency due to the increase in gender violence in Puerto Rico.[5] The executive order shows that for 2019, there were a total of 5,896 cases of violence against women,[6] and that "gender violence has a disastrous impact on our society and the increase in these cases highlights the inequalities

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[5] Orden Ejecutiva Núm. 2021-013, Orden Ejecutiva del Gobernador de Puerto Rico, Hon. Pedro R. Pierluisi. Available at: https://oig.cepal.org/sites/default/files/2021_oe013_pri.pdf (last visit: Nov. 13, 2021).

[6] *Id*. at 1.

that still affect our population."[7] Likewise, the Executive Order states that a part of the measures adopted is "the effective prosecution of gender violence cases, especially those that are against women."[8]

Against the backdrop of the public policy embodied in Law 54, when the Legislative Assembly passed the new Judiciary Act of 2003, Article 5.005, 4 L.P.R.A. 25e, provided specialized courtrooms for cases of domestic abuse.

> The Judicial Branch shall designate specialized courtrooms with public access controls in all judicial regions to hear cases of domestic abuse.
>
> Domestic abuse cases shall be heard in a courtroom specifically designated therefor in each Judicial Region pursuant to Act No. 54 of August 15, 1989, as amended, known as the "Domestic Abuse Prevention and Intervention Act." This courtroom shall have public access controls to safeguard the identity of the victim, and the Judge presiding the specialized courtroom shall have discretion to determine which persons shall have access thereto.

This is the provision that the Puerto Rico Supreme Court invoked to deny access to the recordings requested by Petitioner in this case. Unfortunately, the Court relied solely on the first paragraph. It interpreted "specialized courtrooms with public access

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[7] *Id*. at 1.

[8] *Id*. at 3.

controls" to mean that in all cases of domestic violence the public would be excluded. In other words, the court construed the provision as a compulsory categorical closure of all domestic violence cases, the most radical meaning. If it were correct that the provision does provide a categorical closure, then it would be inconsistent with the interpretations of this Honorable Court in the cases previously discussed. *See Globe Newspaper Co. v. Superior Court*, *supra.* In *WXYZ v. Hand*, 658 F.2d 420, 427 (6th Cir. 1987) the court rejected a statute that mandated a suppression order:

> Deference to such legislative judgments is impossible when First Amendment rights are at stake. *Landmark Communications v. Virginia*, 435 U.S. 829 (1978). If the scope of the freedom of speech and of the press were subject to legislative definition, "the function of the First Amendment as a check on legislative power would be nullified." *Id*. at 844. If a statute like this one is ever to pass constitutional muster, it must require the state court to go behind the legislative determination. . . . [If the statute] mandates the issuance of a suppression order merely upon application, the statute is unconstitutional on its face.

The Puerto Rico Supreme Court did not even mention the text of the following paragraph, which delegates to the discretion of the presiding judge "to determine which persons shall have access" to the courtroom, "to safeguard the identity of the victim". The statute, as written, complies with the standard of individualized analysis of the case at hand, to

determine if there are circumstances which counsel against a totally open courtroom. In specific cases that warrant it, the court can justify narrowly drawn limits to the right of access by the public and the press. But the decision of the Supreme Court ignored this provision and imposed a categorical denial of access in all cases.

The decision presents an additional problem. Petitioner did not request to be present in a hearing, but to have access to recordings of hearings which had already occurred. It was no longer necessary to safeguard the identity of the victim, which was already in the public domain, nor was it even possible to protect her because, sadly, she had been murdered as a result of the denial of a protective order. But the misinterpretation of the law as a categorical closure of hearings was extended by the Supreme Court to a total sealing of the judicial record.

The decision contains no analysis of specific circumstances which could make it necessary to deny access to the recordings, as required by the jurisprudence of this Court. Denials of access must be narrowly tailored in specific situations to secure compelling state interests. *Globe Newspaper Co. v. Superior Court*, *supra*; *Richmond Newspapers, Inc. v. Virginia*, *supra*; *Waller v. Georgia*, *supra*; *Pressley v. Georgia*, *supra*. The Court relies on the fundamental right to privacy guaranteed by the Puerto Rico Constitution, which has been vigorously protected by the Court on many occasions. But the Court purports to justify the denial of access to protect the right to privacy of future victims,

and not the victim in this specific case who was already deceased. The denial of access to the recording was, therefore, not narrowly tailored to secure a compelling state interest, especially in view of the public policy embodied in Law 54, which removed the problem of domestic violence from the confidential intimacy of the household, where it remained hidden, in order to promote its fullest discussion out in the open.

The Puerto Rico Supreme Court briefly mentioned the vigorous protection afforded by its cases to the fundamental right of access to government information, citing two of its recent cases. The Court recognized that the right of the people and the press to access information of a public nature is jurisprudentially guaranteed. *Engineering Services International, Inc. v. Autoridad de Energía Eléctrica*, 205 D.P.R. 536 (2020). Then it correctly identified that access may be denied when: "(1) a law declares it so; (2) the communication is protected by some of the evidentiary privileges . . . ; (3) revealing the information may harm the fundamental rights of third parties; (4) it is the identity of a confidential informant and (5) it is 'official information' [under] Rule 514 of Evidence." *Bhatia Gautier v. Gobernador*, 199 D.P.R. 59 (2017). The Court seems to rely on the first criterion, that a law declares the confidentiality, specifically Article 5.005 of the Judiciary Act which, according to the Court, mandates closure of all hearings and sealing of all judicial records in domestic violence cases. The Court did not consider, however, prior cases which have decided that when that first criterion is used, the statute which declares the

confidentiality of the information must be subjected to strict scrutiny. In *Ortiz Rivera v. Bauermeister*, 152 D.P.R. 161, 177-178 (2000), the Court required that the restriction not be greater that necessary to achieve a compelling governmental interest. That is exactly the same standard of review set by this Honorable Court to evaluate denial of access to hearings and judicial documents by the press and the public. The Puerto Rico Supreme Court has, therefore, not only ignored its own precedents, but also the United States Constitution, as interpreted by this Supreme Court.

III. The use of intrajurisdictional certification in combination with summary disposition dispensing with all ordinary appellate procedures denied Petitioner of its right of access to courts under the due process clauses of United States Constitution.

In addition to its substantive infirmity, the decision of the Puerto Rico Supreme Court is the product of a procedural anomaly resulting from the combined use of "certification" under Puerto Rico law, and summary disposition of the merits of the case under Rule 50 of the Supreme Court Rules.

The intrajurisdictional certification procedure relevant here is regulated by Article 3.002(f) of the Puerto Rico Judiciary Act of 2003, 4 L.P.R.A. 24s(f):

> The Supreme Court or each of its [panels] shall hear on the following matters: [. . .]

> (f) Through a certification, to be issued discretionally, *motu proprio* or upon petition by a party, it may bring forth immediately, consider and resolve, any matter pending in the Court of First Instance, . . . when novel questions of law or of great public interest are raised that include any substantial constitutional issue under the Constitution of the Commonwealth of Puerto Rico or the Constitution of the United States.

A very similar text is reproduced in Rule 52.2(d) of the Puerto Rico Rules of Civil Procedure of 2009. 32 L.P.R.A. app. V.

This procedure has been employed rather frequently in the last couple of decades by the Puerto Rico Supreme Court, especially in the context of political and electoral cases regarding the legitimacy of democratic processes, or those in which the Court considered that a prompt resolution serves the public interest. *Suárez v. CEE I*, 163 D.P.R. 347 (2004); *Presidente de la Cámara v. Gobernador*, 167 D.P.R. 149 (2006); *McClintock v. Rivera Schatz*, 171 D.P.R. 584 (2007); *U.P.R. v. Laborde Torres*, 180 D.P.R. 253 (2010); *PIP v. ELA*, 186 D.P.R. 1 (2012); *Torres Montalvo v. ELA*, 194 D.P.R. 760 (2016); *Senado de PR v. Gobierno de PR*, 203 D.P.R. 62 (2019); *Pierluisi-Urrutia v. Comisión Estatal de Elecciones*, 204 D.P.R. 841 (2020).

The Court itself has cautioned that certification should be exceptionally employed because it is preferable that cases go through the ordinary process for controversies to mature in due course, without the

untimely intervention of the court of last resort. *Rivera Soto v. Junta de Calidad Ambiental*, 164 D.P.R. 1 (2005). Although the law only requires that the case be pending in the Court of First Instance, the Supreme Court should cautiously evaluate on a case-by-case basis whether issuing the intrajurisdictional certification is of such public interest, presents novel issues and the application of the exceptional procedure advances the administration of justice. *Guardiola Rodríguez v. Cooperativa de Seguros Múltiples*, 201 D.P.R. 136 (2018).

These criteria were not met in this case, which did not present political or electoral issues. It did present an issue of public interest, but there was no urgency since the Court of First Instance had promptly scheduled a hearing to be held only four days after filing of the petition. In that hearing the court could have considered arguments for and against granting the petition, and whether there were circumstances in the specific case which made it necessary to limit the right of access to the information requested, to secure a compelling government interest. Unfortunately, that hearing was never held, and the required analysis was never made, because the Supreme Court untimely intervened by issuing *sua sponte* the writ of certification.

In marked contrast, certification in the federal courts is regulated in 28 U.S.C. § 1254(2):

> Cases in the courts of appeals may be reviewed by the Supreme Court . . .
>
> (2) By certification at any time by a court of appeals of any question of law in any civil or

> criminal case as to which instructions are desired, and upon such certification the Supreme Court may give binding instructions or require the entire record to be sent up for decision of the entire matter in controversy.

The details of this appellate procedure are detailed in Rule 19 of the Rules of the Supreme Court. The fundamental difference lies in the appellate nature of federal certification *vis à vis* the *nisi prius* nature of certification under Puerto Rico law. Contrary to the sound notions embodied in 28 U.S.C. § 1254(2) and this Court's Rule 19, the Puerto Rico Supreme Court decided to exercise intrajurisdictional certification jurisdiction on its own, without any petition by the parties or the lower court. In doing so, instead of revising a lower court decision or providing desired guidance, the Supreme Court plainly turned itself into a court of first – and exclusive – instance whose decision, saved for this Honorable Court's discretionary intervention, conclusively decided the matter. Simply put, the entire vertical structure of the judicial process was openly cast aside through the unsuitable use of certification. This was condemned by this Court over a hundred years ago. *Baltimore & O.R. v. Interstate Commerce*, 215 U.S. 216 (1909). As a result, exercise of this type of appellate jurisdiction is very rare. This is, in and of itself, constitutionally troublesome. When one considers Puerto Rico Courts' previous behavior in related controversies, one can only wonder about the real motives behind such an imprudent course of action in this case. *See Rivera-Puig v. Garcia-Rosario*, 983 F.2d 311, 315-316 (1st Cir. 1992) (probing the Supreme Court's

handling of disputes over judicial closure in three distinct occasions and remanding the case to the district court with instructions to take any action necessary to achieve compliance with the openness mandate prescribed by this Court in *Press-Enterprise II*.)

The problem is compounded by the simultaneous use of certification and Rule 50 of the Supreme Court Rules.

> Rule 50. Additional power of regulation of the court
>
> In situations not provided for by these regulations, the court will direct the process in the way that in its opinion serves the best interests of all parties.
>
> The power of the court to dispense with specific terms, writings, or procedures in order to achieve the fairest and most efficient dispatch of the case or matter in question is reserved.

The Puerto Rico Supreme Court certified *sua sponte* the case initiated three days before in the Court of First Instance, before the hearing scheduled to be held the next day. It decided the merits of the petition for access to the recordings by invoking Rule 50, thus "dispens[ing] with specific terms, writings, or procedures", avowedly to serve the best interests of all parties and to achieve the fairest and most efficient dispatch of the case.

No one may genuinely doubt that "[t]he core of due process is the right to notice and a meaningful opportunity to be heard." *LaChance v. Erickson*, 522 U.S.

262, 266 (1998). In other words, for over a century now, this Court has recognized that "[t]he opportunity to be heard is an essential requisite of due process of law in judicial proceedings." *Postal Telegraph Cable v. City of Newport*, 247 U.S. 464, 476 (1918). Yet, the Puerto Rico Supreme Court's use of Rule 50 blatantly stripped Petitioner of its due process right. The Petitioner was never put on notice that the Court was going to short-circuit the procedure, and the decision was rendered without any briefing on the merits, much less argument.

This course of action under Rule 50 is in marked contrast to this Honorable Court's rules on summary disposition of cases. Rule 16 states that "[a]fter considering the documents distributed under Rule 15, the Court will enter an appropriate order. The order may be a summary disposition on the merits." Rule 15 requires that not only there be a petition before the Court, but that briefs in opposition have also been allowed and filed. It would seem unconscionable to decide a case without a petition and an opposition. Yet, that is exactly what the Puerto Rico Supreme Court did in this case.

CONCLUSION

The Court's *sua sponte* intrajurisdictional certification and the invocation of Rule 50 were both, individually and on their own, constitutionally untenable. Their combined use in this case contradicts basic principles and safeguards for the proper operation of our judicial system. This procedural infirmity resulted in the substantive deprivation of petitioner's fundamental right of access to judicial records without a strict analysis of the specific circumstances that made it necessary to deny such access to secure compelling governmental interests.

Perhaps in another situation, the proper remedy would be to vacate the decision below and remand the case to the territorial judicial system to hold an evidentiary hearing and to hear arguments regarding the propriety of granting or denying access to the recordings. But considering the tragic death of both the victim and the confessed perpetrator, there are no longer any privacy interests or rights of the accused to be protected. The only live interests that remain in this case are the public policy interests regarding the epidemic of domestic and gender violence in Puerto Rico, and fundamental rights of the press and the public to judicial records, implicit in freedom of speech and of the press.

Amicus Colegio de Abogados y Abogadas de Puerto Rico appeals to the most basic sense of procedural justice of this Honorable Court to review and eventually

reverse the unfortunate decision below, so that Andrea Ruiz-Costas' death will not be totally in vain.

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Respectfully submitted,

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