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 a Writ of Certiorari to the Supreme Court of Puerto Rico

BRIEF OF *AMICI CURIAE* GANNETT CO., INC., THE NATIONAL PRESS PHOTOGRAPHERS ASSOCIATION, AND THE NEW YORK NEWS PUBLISHERS ASSOCIATION IN SUPPORT OF PETITIONER

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INTEREST OF AMICI CURIAE[1]

Amici curiae are Gannett Co., Inc., the National Press Photographers Association, and the New York News Publishers Association. As news media organizations, *Amici* have a strong interest in this case. The Supreme Court of Puerto Rico's holding barred access to all domestic violence proceedings and related recordings without addressing the public's First Amendment right of access. That decision undermines the press's vital role in informing the public about our nation's courts and the development of domestic violence law in particular. *Amici* write separately to ensure that the public's right of access to civil proceedings, a right that lower courts widely agree is guaranteed by the First Amendment, is not compromised, as it has been in this case.

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[1] Pursuant to Sup. Ct. R. 37, counsel for *amici curiae* state that no party's counsel authored this brief in whole or in part or made a monetary contribution to this brief. No other person aside from counsel for *amici curiae* made a monetary contribution to this brief. All counsel of record received timely notice of the intent to file this brief and written consent of the parties was obtained. Counsel additionally notes that Petitioner filed a Rule 12.6 Statement, dated Nov. 22, 2021, notifying this Court that a party to the proceedings below, the now deceased Miguel Ocasio Santiago, has no direct interest in the outcome of the petition and is not a proper party. Counsel notified Mr. Santiago's former counsel of the intent to file this brief, and his counsel advised that he is no longer representing Mr. Santiago or his estate.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

This case presents an ideal vehicle for this Court to clarify the nature and scope of the presumptive First Amendment right of access to civil proceedings and to official recordings of those proceedings. Courts that have addressed this question uniformly agree that the right of access applies to civil proceedings based on a tradition of public access and the significant positive role public access plays in the functioning of the legal system. The Puerto Rico Supreme Court's decision below barred access to all domestic violence proceedings and related recordings without addressing the public's First Amendment right of access. That decision conflicts with the holdings of Circuit Courts of Appeals and state courts of last resort on the application of the access right. Moreover, it is antithetical to everything this Court has ever said about the values of a transparent judicial process.

This case concerns an issue of significant interest to the public: the failure of Puerto Rican courts to issue restraining orders requested by a domestic violence victim shortly before her ex-boyfriend killed her. Public scrutiny of the sealed recordings here would promote judicial accountability and further the public's understanding of the judicial system. Blanket closure is out of step with the presumptive

openness of the vast majority of civil domestic violence proceedings nationwide and with a long tradition of access to their common law counterpart, divorce proceedings.

The Supreme Court of Puerto Rico's *sua sponte* decision to categorically bar access to all domestic violence proceedings and records deprived Petitioner of its required opportunity to be heard. Without strong procedural safeguards to protect the right of access, the public cannot challenge incorrect decisions, successfully advocate for legal reforms, or keep abreast of changes in the law.

This Court's review of the Supreme Court of Puerto Rico's wholesale ban on access to domestic violence proceedings is necessary to provide clear guidance to courts that routinely face questions about the nature and scope of the First Amendment right of access. *Amici* write separately to focus on civil proceedings in particular because this Court has yet to address the right of access to these proceedings and this case exemplifies why it should. Review is especially critical in the domestic violence context because media outlets routinely rely on domestic violence records in their reporting, including, for example, in covering the recent Christmas parade massacre in Waukesha, Wisconsin.[2] This Court should thus grant *certiorari*

[2] *See, e.g.*, Kristen Reed, *Domestic violence history of Christmas parade killings stretches to Georgia*, 11ALIVE.COM (Nov. 27, 2021), https://www.11alive.com/article/news/local/

to clarify the application of the First Amendment right of access to civil domestic violence proceedings.

ARGUMENT

I. The Puerto Rico Supreme Court's Decision Directly Conflicts With the Overwhelming Majority of Lower Federal and State Courts That Have Recognized a Presumptive Public Access Right

A. The First Amendment Right of Access Applies to Civil Proceedings

Courts across the nation uniformly agree that "[t]he press's right of access to civil proceedings and documents fits squarely within the First Amendment's protections." *Courthouse News Serv. v. Brown*, 908 F.3d 1063, 1069 (7th Cir. 2018); *see, e.g.*, *Dhiab v. Trump*, 852 F.3d 1087, 1099 (D.C. Cir. 2017) (Rogers, J., concurring in part) ("Every circuit to consider the issue has concluded that the qualified First Amendment right of public access applies to civil as well as criminal proceedings."); *NBC Subsidiary (KNBC-TV), Inc. v. Superior Ct.*,

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union-city/darrell-brooks-christmas-parade-killer-arrested-in-georgia/85-5a6f6361-7d0b-4eb7-a2dc-6545e0f65954; Megan O'Matz, *He Beat Her Repeatedly. Family Court Tried to Give Him Joint Custody of Their Children*, PROPUBLICA (Sept. 16, 2021), https://www.propublica.org/article/he-beat-her repeatedly-family-court-tried-to-give-him-joint-custody-of-their-children.

980 P.2d 337, 358 (1999) ("[E]very lower court opinion of which we are aware that has addressed the issue of First Amendment access to *civil* trials and proceedings has reached the conclusion that the constitutional right of access applies . . . .") (emphasis in original) (collecting cases). Even the Supreme Court of Puerto Rico itself has applied the right of access to civil proceedings, finding that "[r]ecognition of this right of access to judicial proceedings goes to the very roots of our pluralist democrat society." *Fulana de Tal & Sutana de Cual v. Demandado A.*, 138 D.P.R. 610, 621 (1995).

Courts have recognized the right of access because, as this Court observed, "historically both civil and criminal trials have been presumptively open." *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 580 n.17 (1980). Courts applying the right have also repeatedly stressed the significant role public access plays in the proper functioning of civil proceedings. *See, e.g.*, *Rapid City J. v. Delaney*, 2011 S.D. 55, ¶ 20, 804 N.W.2d 388, 395 (finding open civil proceedings "protect the integrity of the system and assure the public of the fairness of the courts and our system of justice").

Courts have extended the right of access to various civil proceedings and records across the full spectrum of the judicial process. *See, e.g.*, *Doe v. Pub. Citizen*, 749 F.3d 246, 269 (4th Cir. 2014) (civil docket sheets); *Newman v. Graddick*, 696

F.2d 796, 801–02 (11th Cir. 1983) (civil pretrial, trial and post-trial proceedings on the release or incarceration of prisoners and their confinement); *Ex Parte Capital U-Drive-It, Inc.*, 369 S.C. 1, 10 (2006) (divorce proceeding records); *Boston Herald, Inc. v. Sharpe*, 432 Mass. 593, 612 (2000) (affidavits in domestic abuse protective order proceeding and divorce records). The Puerto Rican Supreme Court's decision below conflicts with the overwhelming weight of authority on the proper application of this access right. The Court should thus grant *certiorari*.

B. The First Amendment Right of Access Extends Equally to Transcripts or Official Recordings of Proceedings

Where the right of access applies to a specific judicial proceeding, this Court has repeatedly ordered the release of transcripts documenting the proceeding. *See Press-Enter. Co. v. Superior Court of California, Riverside Cty.,* 464 U.S. 501, 513 (1984) ("*Press-Enterprise I*") ("[N]ot only was there a failure to articulate findings with the requisite specificity but there was also a failure to consider alternatives to closure and *to total suppression of the transcript.*") (emphasis added); *Press-Enter. Co. v. Superior Court of California for Riverside Cty.,* 478 U.S. 1, 13–14 (1986) ("*Press-Enterprise II*") (holding trial court violated First Amendment by

refusing to unseal transcript of closed 41-day hearing); *see also United States v. Antar*, 38 F.3d 1348, 1361 (3d Cir. 1994) ("This strong presumption of access to records, including transcripts, provides independent support for the conclusion that the First Amendment right of access must extend equally to transcripts as to live proceedings."). In determining to release the transcripts, this Court has focused its analysis on whether the *proceedings themselves* had traditionally been open to the public and whether access to the proceedings would play a beneficial role. *See Press-Enterprise I,* 464 U.S. at 511; *Press-Enterprise II,* 478 U.S. at 11–13.

Consistent with these rulings, lower courts have found that the question of whether the First Amendment right applies to transcripts of judicial proceedings is "identical to whether the right applies to physical proceedings." *Newsday LLC v. Cty. of Nassau*, 730 F.3d 156, 163 n.8 (2d Cir. 2013). The analysis is identical because "[t]he transcript of a proceeding is so closely related to the ability to attend the proceeding itself that maintaining secrecy is appropriate only if closing the courtroom was appropriate." *Id.* at 165.

Here, the official Puerto Rican recordings at issue are even more closely related to the ability to attend the proceedings themselves than the transcripts in *Press-Enterprise I & II* and *Newsday*

because audio recordings capture inflection, tone of voice, hesitation, and much more. *See, e.g.*, *United States v. Simone*, 14 F.3d 833, 842 (3d Cir. 1994) (noting that a transcript "does not reflect the numerous verbal and non-verbal cues that aid in the interpretation of meaning"). The presumption that civil proceedings are open and that closely related documents, including official recordings, are publicly available was entirely ignored by the Supreme Court of Puerto Rico in this case. Because that decision so clearly conflicts with nationwide precedent, *certiorari* should be granted.

C. Puerto Rico's Categorical Closure Requirement Cannot be Reconciled With Historical Tradition and the Practice of Other States

The Puerto Rican Supreme Court closed all domestic violence proceedings without first analyzing, as required, whether the First Amendment right of access applies. Under this Court's two-pronged "experience and logic" test, courts must assess (1) "whether the place and process have historically been open to the press and general public[;]" and (2) whether public access "plays a significantly positive role in the functioning of the particular process in question." *Press-Enterprise II*, 478 U.S. at 8. Both prongs of the test are clearly met with respect to civil domestic violence proceedings because (1) their historical analogue, divorce proceedings, were open

to the public, and that tradition of openness continues to the present day; and (2) public access plays a significant positive role in facilitating the public's understanding of the court's role in victim safety and its confidence in the judiciary.

1. Civil Proceedings Pertaining to Domestic Disputes Were Historically Open to the Public

Until the late nineteenth century, Anglo-American common law permitted a husband to "subject his wife to corporal punishment or 'chastisement' so long as he did not inflict permanent injury upon her." Reva B. Siegel, *"The Rule of Love": Wife Beating As Prerogative and Privacy*, 105 Yale L.J. 2117, 2118 (1996). Although "[b]y the 1870s[] there was no judge or treatise writer in the United States who recognized a husband's prerogative to chastise his wife," another century passed before substantive legal reforms gave rise to domestic violence proceedings that challenged the traditional "concept of family privacy that shielded wife abuse" from protection under the law. *Id.* at 2118, 2129.

Prior to states enacting civil protective order legislation in the 1970s, the only civil remedy available to domestic violence survivors was to seek a restraining order in a divorce proceeding. Jane K. Stoever, *Enjoining Abuse: The Case for Indefinite Domestic Violence Protection Orders*, 67

Vand. L. Rev. 1015, 1040 (2014). Divorce proceedings in civil courts in the United States trace their origin to shortly after the nation's founding. Herma Hill Kay, *From the Second Sex to the Joint Venture: An Overview of Women's Rights and Family Law in the United States During the Twentieth Century*, 88 Cal. L. Rev. 2017, 2026 (2000). In contrast to England, which did not permit absolute divorce until 1857, twelve states and the Northwest Territory had by 1799 adopted divorce statutes granting jurisdiction to civil courts. *Id.*

Divorce proceedings, which customarily were open to the public, "attracted a wide audience" by the mid-nineteenth century and a readership for divorce trial pamphlets that publishers produced. *Id.* at 2026 & n.46 (quoting Norma Basch, Framing American Divorce 148 (1999)). An 1891 divorce treatise, for example, notes that "[a]s a general rule, wherever the common law prevails, trials in all causes are in open court, to which spectators are admitted . . . . for the purity of our judicial system, and as a precaution against possible injustice." Mary Mcdevitt Gofen, *The Right of Access to Child Custody and Dependency Cases*, 62 U. Chi. L. Rev. 857, 867 & n.65 (1995) (quoting Joel Prentiss Bishop, 2 Marriage, Divorce, and Separation S 674 at 278 (T.H. Flood, 1891)) (footnotes omitted).

By 1931, nineteen states had statutes concerning access to divorce proceedings, with only Delaware's providing for presumptively private proceedings. *Id.* at 867–68. However, even Delaware's broad divorce closure rule then and now authorizes courts, in their discretion, to hold proceedings publicly. *Id.* at 868.[3]

Like Delaware, Puerto Rico until recently had a broad divorce closure rule making divorce proceedings private "except when one of the parties requests otherwise." P.R. R. Civ. P. 62.2 (enacted in 1979). The rule restricted access to records "to persons with a legitimate interest, or to other persons through court order and for a justified cause." *Id.* In 2008, the Permanent Advisory Committee on the Rules of Civil Procedure recommended that the rule be amended to turn the presumption of closure on its head. *See* Permanent Advisory Committee on the Rules of Civil Procedure, Report on Rules of Civil Procedure

[3] *See* 13 Del. Code Ann. § 1516(a) (West) ("All hearings and trials shall be private, but for reasons appearing sufficient to the Court any hearing or trial may be opened to any person who has a direct and legitimate interest in the particular case, or a legitimate educational or research interest in the work of the Court."). To our knowledge, West Virginia is the only other state that presumptively closes divorce proceedings, but its broad closure rule similarly provides judicial discretion to permit the inspection of confidential family court files "for good cause shown[.]" W.V. R. Prac. & Proc. Fam. Ct. R. 6(a)–(c).

(March 2008).[4]

Because the vast majority of these presumptively closed hearings were in fact being held in courtrooms that were generally open to the public, the Committee advised that the presumption be reversed in favor of transparency. *Id.* at 730-31. Judges in practice typically held hearings publicly as long as the parties waived their right to a private hearing. *Id.* The amended rule, adopted in 2009, accepted the Committee's suggestion and declared that "[a]ll hearings upon the merits of a case shall be conducted in open court in a courtroom, unless the nature of the proceedings, the law or the court, on motion of a party or on its own initiative, provides otherwise." P.R. R. Civ. P. 62.1 (recodified). The amendments brought Puerto Rico's divorce access rule in line with the prevailing presumption nationwide that parties seeking a divorce are generally "not entitled to a private court proceeding." 24 Am. Jur. 2d Divorce and Separation § 283; *see also* Iowa Code Ann. § 598.8 (West) (divorce proceedings generally "held in open court" but "[t]he court may in its discretion close [a] hearing"); Miss. Code. Ann. §§ 93-5-17, 21 (West) (presumptively open court proceedings); N.Y. Dom. Rel. Law § 235 (McKinney) (providing limited discretion to close proceedings if the public interest so requires and

[4] A true and correct copy of a certified English translation of an excerpt of the Report is attached as Exhibit A.

requiring sealing of records "except by order of the court").

Even though domestic violence survivors were generally unprotected by the law in the decades prior to the 1970s, hundreds of newspaper articles from the early 1900s "illustrate and document that domestic violence was not seen as a private matter." Elizabeth Katz, *Judicial Patriarchy and Domestic Violence: A Challenge to the Conventional Family Privacy Narrative*, 21 Wm. & Mary J. Women & L. 379, 405 (2015). Newspapers chronicling court appearances of "wife beaters" often recorded the man's full name and home address and common punishments, including being fined, sentenced to jail, or even whipped or flogged. *Id.* at 405–06.

2. In the Overwhelming Majority of Jurisdictions, Civil Domestic Violence Proceedings Are Open to the Public

Examining the current nationwide public access landscape for domestic violence proceedings is no easy task, since "[d]omestic violence can be implicated in – or central to – a variety of civil and criminal cases[,]" from custody and divorce to civil and criminal protection order applications, along with contempt and criminal assault proceedings, to name a few. Rebecca Hulse, *Privacy and Domestic Violence in Court*, 16 Wm. & Mary J. Women & L.

237, 261 (2010). Focusing more narrowly here on civil direct domestic violence matters, to our knowledge Puerto Rico stands alone in its total, mandatory denial of access to both the proceedings and records of such matters. In contrast, domestic violence proceedings and records "are public in the vast majority of states." *Id.* (examining nationwide access to "proceedings and records of cases containing criminal and civil direct domestic violence matters").

Massachusetts' domestic violence proceedings are presumptively open, as Petitioner points out, with the commonwealth's Supreme Judicial Court extending a First Amendment right of access to such proceedings more than two decades ago. *See Boston Herald, Inc. v. Sharpe*, 432 Mass. at 607 (finding right of access to affidavits filed in connection with protective order proceedings); Petition for Writ of Certiorari at 24-25. *Sharpe*, like here, involved media intervenors seeking access to court records following a domestic violence victim's murder by her partner. *Id.* at 594. Access to the proceeding permitted the public to play a significant positive role in "evaluat[ing] why an order may or may not have been successful in protecting a victim of domestic violence" and in facilitating "the public's understanding of and confidence in the judiciary." *Id.* at 607.

Many other states' domestic violence proceedings are also presumptively open to the public. New York is a prime, and instructive, example. The state has created specialized domestic violence courts, like Puerto Rico, and cases referred there are "subject to the same substantive and procedural law as would have been applied to it had [they] not been transferred." N.Y. Ct. R. 141.5 (McKinney). New York's domestic violence courts are thus presumptively open to the public, N.Y. Jud. Law § 4 (McKinney), including any proceedings transferred from family court. *See* N.Y. Ct. R. 205.4 (b). Researchers studying specialized domestic violence courts began documenting their courtroom observations in public New York proceedings decades ago. *See, e.g.*, Amanda B. Cissner, Sarah Picard-Fritsche, & Nora Puffett, *The Suffolk County Integrated Domestic Violence Court: Policies, Practices and Impacts, October 2002 – December 2005 Cases*, Center for Court Innovation (Dec. 2011) at 31 (evaluation involved observing 121 cases).[5]

As the First Amendment requires, states across the nation have implemented far less restrictive

[5] New York limits access to certain records in divorce proceedings and in cases transferred from family court. N.Y. Fam. Ct. Act § 166 (McKinney) (family court records not "open to indiscriminate public inspection. However, the court in its discretion in any case may permit the inspection of any papers or records"); N.Y. Dom. Rel. Law § 235 (McKinney) (divorce records sealed "except by order of the court").

alternatives to Puerto Rico's mandatory closure of all domestic violence proceedings that adequately address the privacy concerns expressed by the Supreme Court of Puerto Rico. The most common restriction provides for the confidentiality of domestic abuse survivors' addresses and other personally identifying information. *See, e.g.*, Alaska Stat. Ann. § 47.10.070(d) (confidentiality of testimony concerning location of domestic violence survivor); Ark. R. Admin. R. 50(f)(2)(A) (counsel arguing required to use pseudonyms); Ark. Adm. Order No. 19 § VII.A (confidentiality of addresses of protective order petitioners requesting anonymity); N.M. Stat. Ann. § 40-13A-6 (West) (prohibition on public internet posting of certain information concerning protective order); Catherine F. Klein & Leslye E. Orloff, *Providing Legal Protection for Battered Women: An Analysis of State Statutes and Case Law*, 21 Hofstra L. Rev. 801, 1094–95 (1993) (collecting address confidentiality statutes).

In keeping with their constitutional obligations, other states designate specific records as confidential rather than resorting to automatic wholesale closure of domestic violence proceedings. Idaho, for example, provides for the presumptive confidentiality of protection order petitions and related records, except court orders. *See* Id. R. Admin. R. 32. Indiana designates as confidential any information in "a confidential form" that is "filed with a protective order" or "otherwise

acquired concerning a protected person." Ind. Code Ann. § 5-2-9-7 (West). Ohio directs courts to seal certain juvenile protective order records and records pertaining to proceedings where a protective order was denied. *See* Ohio Rev. Code Ann. § 2151.358(D) (West); Ohio Rev. Code Ann. § 3113.31(G)(2). Even in New Jersey, which generally grants confidentiality to domestic violence records (*see* N.J.S.A. 2 C:25-33; R. 1:38-3(d), (d)(9) (requiring court to "exclude[] from public access" all "[d]omestic violence records and reports pursuant to N.J.S.A. 2 C:25-33"), courts are still required to "mak[e] a case-by-case determination of the need for disclosure in order to narrowly tailor the confidentiality restrictions to the governmental interest" and "not deny access implicitly guaranteed under the First Amendment." *Pepe v. Pepe*, 609 A.2d 127, 130 (Ch. Div. 1992); *see Verni ex rel. Burstein v. Lanzaro*, 960 A.2d 405, 410–11 (N.J. App. Div. 2008) (vacating order sealing settlement proceedings and documents in personal injury litigation because speculative desire for privacy due to past acts of domestic violence did not outweigh significant public interest).

To our knowledge, the only state that presumptively closes all civil domestic violence proceedings is West Virginia, but its broad closure rule nevertheless permits "any person requested by a party" to attend a hearing and provides judicial discretion to permit the inspection of confidential

family court files "for good cause shown[.]" W.V. R. Prac. & Proc. Fam. Ct. R. 6(a)–(c); W.V. Dom. Violence C. P. R. 7. A separate rule presumptively designates as confidential records of a minor petitioner or respondent in domestic violence civil proceedings "unless opened for inspection" by a judge's order. W.V. Dom. Violence C. P. R. 6(a).

In stark contrast to the practice in Puerto Rico, the overwhelming majority of states' civil domestic violence proceedings are presumptively open to the public. And only a minority of states designate certain domestic violence records as confidential. Puerto Rico's sweeping mandatory closure rule — in all cases, under all circumstances — makes it an outlier and ignores the public's "powerful interest in monitoring [domestic violence] proceedings and judicial resolution of claims of domestic abuse." *Sharpe*, 432 Mass. at 608.

3. Public Access Plays a Significant Positive Role in the Functioning of Civil Domestic Violence Proceedings

Access to civil proceedings is critical because they provide an outlet for "community catharsis" and "frequently involve issues crucial to the public[.]" *Brown & Williamson Tobacco Corp. v. F.T.C.*, 710 F.2d 1165, 1179 (6th Cir. 1983). Access in the domestic violence context allows the public to evaluate the court's critical role "in protecting a

victim of domestic violence"—or, in this case, the failure to do so. *Sharpe*, 432 Mass. at 607. Because protective orders can impose significant restraints on defendants, access is "equally important" for the public to know "the basis on which a judge acted in a particular case." *Id.*

Secrecy "eliminates one of the important checks on the integrity of the system[,]" thereby "masking impropriety, obscuring incompetence, and concealing corruption." *Brown*, 710 F.2d at 1179. Secrecy can also serve to mask challenges related to the emergency nature of domestic violence proceedings. For example, one scholar examining civil protection order proceedings notes that "[w]omen are often unable to obtain comprehensive relief" in "truncated" proceedings, where they "may be precluded from presenting their evidence" or encouraged by judges "to negotiate outside the formal adjudicatory process, rather than to litigate, even though it has been well established that mediation is undesirable in domestic violence matters." Deborah M. Weissman, *Gender-Based Violence As Judicial Anomaly: Between "The Truly National and the Truly Local"*, 42 B.C. L. Rev. 1081, 1110–11 (2001).

Access to these proceedings would facilitate "[p]ublic confidence in and respect for the judicial system[,]" which "can be achieved only by permitting full public view of the proceedings." *United States v. Criden*, 675 F.2d 550, 556 (3d Cir.

1982). Without access in this context, the public cannot hold the judiciary accountable for the failure to protect domestic violence victims or mount an informed campaign for legal reforms.

Because this Court's experience and logic test is thus clearly met here, the Court should grant *certiorari* to clarify the scope of the First Amendment right of access to these proceedings and thereby correct Puerto Rico's unconstitutional closure regime.

II. The Press and Public are Entitled to an Opportunity to be Heard Prior to the Closure of Civil Proceedings and Sealing of Records

A. The Press and Public are Entitled to an Opportunity to Be Heard to Enforce the Rule of Law

While this Court has made clear that "representatives of the press and general public 'must be given an opportunity to be heard on the question of their exclusion'" prior to closure, examples of courts' failure to do so are not uncommon. *See Globe Newspaper Co. v. Superior Ct. for Norfolk Cty,* 457 U.S. 596, 609 n.25 (1982) (quoting *Gannett Co. v. DePasquale*, 443 U.S., at 401 (Powell, J., concurring)). Two of the more troubling illustrations in recent years of this widespread practice concerned thousands of secret

court dockets—often involving politically-connected and celebrity divorces, domestic violence and other domestic relations issues—unearthed by investigative journalists in Connecticut and Florida. *See, e.g.*, *In re Amends. to Fla. Rule of Jud. Admin. 2.420-Sealing of Ct. Recs. & Dockets*, 954 So. 2d 16, 18–19 (Fla. 2007); *Hartford Courant Co. v. Pellegrino*, 380 F.3d 83, 86 (2d Cir. 2004); Roma Perez, *Two Steps Forward, Two Steps Back: Lessons to Be Learned from How Florida's Initiatives to Curtail Confidentiality in Litigation Have Missed Their Mark*, 10 Fla. Coastal L. Rev. 163, 207 (2009). Public outcry triggered "considerable self-examination by the Connecticut judiciary" and resulted in the promulgation of new court rules in Connecticut requiring the provision of an opportunity to be heard in connection with requests to seal judicial documents. *Hartford Courant Co.,* 380 F.3d at 86. Similar reform measures were undertaken in Florida. *See In re Amends. to Fla. Rule of Jud. Admin. 2.420-Sealing of Ct. Recs. & Dockets*, 954 So. 2d at 18–19.

The Supreme Court of Puerto Rico's initial categorical closure decision, with no opportunity for Petitioner to present its arguments, violates the constitutional right of access. Robust public access to civil proceedings and "judicial records 'is a fundamental element of the rule of law[.]" *In re Leopold to Unseal Certain Elec. Surveillance Applications & Ords.*, 964 F.3d 1121, 1127 (D.C. Cir. 2020). Without strong procedural safeguards

to protect the right of access, the public cannot challenge incorrect legal interpretations or successfully advocate for what may be much-needed reforms. Indeed, the closure of all domestic violence proceedings and records threatens to make an entire body of law going forward "inaccessible to those who are governed by that law." *Id.*; *see also Hicklin Eng'g, L.C. v. Bartell*, 439 F.3d 346, 348 (7th Cir. 2006) ("The Supreme Court issues public opinions in all cases, even those said to involve state secrets.").

Closure is particularly harmful in the domestic violence context given the critical "role of public processes in reorienting an understanding of what was once cabined as 'private' and tolerated as within the familial realm." Judith Resnik, *Bring Back Bentham: "Open Courts," "Terror Trials," and Public Sphere(s)*, 5 L. & Ethics of Hum. Rights 2, 56 (2011).

B. Due Process Requires that a Trial Court Provide an Opportunity to Be Heard Prior to Closure

The press and public are entitled to procedural due process here because they have been deprived of their constitutionally protected interest in accessing judicial proceedings and records. As Justice Powell observed in *Gannett, Co. v. DePasquale,* it is simply not enough if "courts apply a certain standard to requests for closure. If the constitutional right of the press and public is to

have substance, representatives of these groups must be given an opportunity to be heard on the question of their exclusion." 443 U.S. 368, 400–01 (concurring); *Globe Newspaper,* 457 U.S. at 609 n.25 (adopting the procedural safeguards suggested by Justice Powell in *Gannett*). Procedural due process requires, at a minimum, "that the deprivation of a protected interest be accompanied by notice and an opportunity to be heard at a meaningful time, and in a meaningful manner." *United States v. Antar*, 38 F.3d 1348, 1362 (3d Cir. 1994) (citing *Goldberg v. Kelly*, 397 U.S. 254, 267 (1970)).

This Court has recognized that these procedural due process requirements must be satisfied for the First Amendment right of access "to be meaningful[.]" *Globe Newspaper Co.,* 457 U.S. at 609 n.25. Indeed, it is unclear how a court could meaningfully articulate an "overriding interest" with "findings specific enough" to support closure without holding a hearing. *Press-Enterprise I,* 464 U.S. at 501. Where a court is confronted with competing interests, it must "carefully balance the interests as required, articulate specific factual findings, and avoid merely making insufficient conclusory assertions as to the interests at stake." *Phoenix Newspapers, Inc. v. U.S. Dist. Ct. for Dist. of Arizona*, 156 F.3d 940, 949 (9th Cir. 1998). Since the interests at stake necessarily include the right of public access, "vindication of that right requires

some meaningful opportunity for protest by persons other than the initial litigants, some or all of whom may prefer closure." *Application of The Herald Co.*, 734 F.2d at 102.

In making these required case-by-case determinations, every Circuit Court that has "addressed the question of whether notice and an opportunity to be heard must be given before closure . . . to which there is a First Amendment right of access, have uniformly required adherence to such procedural safeguards." *In re Hearst Newspapers, L.L.C.,* 641 F.3d 168, 182 (5th Cir. 2011), *as revised* (June 9, 2011) (collecting cases).[6] This uniform adherence even extends to cases where a party alleges that a strong privacy interest outweighs the opportunity to be heard. *See, e.g.*, *In re Washington Post Co.*, 807 F.2d 383, 391 (4th Cir. 1986) (declining to lift procedural safeguards to purportedly protect national security interests).

Here, the Supreme Court of Puerto Rico's *sua sponte* order taking immediate jurisdiction over

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[6] *See, e.g.*, *In re Providence J. Co., Inc.*, 293 F.3d 1, 13 (1st Cir. 2002); *Application of The Herald Co.*, 734 F.2d 93, 102 (2d Cir. 1984); *United States v. Raffoul*, 826 F.2d 218, 225 (3d Cir. 1987); *Stone v. Univ. of Maryland Med. Sys. Corp.*, 855 F.2d 178, 181 (4th Cir. 1988); *In re Knoxville News-Sentinel Co., Inc.*, 723 F.2d 470, 475–76 (6th Cir. 1983); *In re Associated Press*, 162 F.3d 503, 507 (7th Cir. 1998); *United States v. Brooklier*, 685 F.2d 1162, 1168 (9th Cir. 1982); *Newman v. Graddick*, 696 F.2d at 802; *Washington Post v. Robinson*, 935 F.2d 282, 289 (D.C. Cir. 1991).

Petitioner's access motion and annulling an already scheduled hearing is an egregious twofold deprivation of Petitioner's opportunity to be heard. App. 3a-4a. The Puerto Rican Supreme Court not only stripped Petitioner of the opportunity to be heard in the trial court regarding public access, but simultaneously failed to afford Petitioner the opportunity to brief or argue following the Supreme Court's order as mandated by P.R. Sup. Ct. R. 26 (providing 30 days to file brief following certification). *Id.* The Supreme Court followed this ruling with two summary denials of Petitioner's motions for reconsideration, again with no opportunity to be heard. App. 69a, 76a.

The court made no findings of fact, as required, to support its conclusory determination that closure was necessary to protect the "privacy of victims of domestic violence." App. 4a. Nor did it even attempt to explain how closure could be necessary to protect a deceased victim's privacy where, as here, her family supports access. This determination conflicts with decisions of Courts of Appeals, state courts of last resort, and even the Supreme Court of Puerto Rico itself. *See supra* at Point I.A; *Fulana de Tal & Sutana de Cual v. Demandado A.*, 138 D.P.R. 610, 622 (1995) (stating mere conclusory assertion of right of privacy is insufficient to outweigh presumptive right of access and, if allowed, would "eventually fossilize the freedom of expression and of the press, by turning

them into museum pieces").

The court's blanket denial of access met neither the procedural nor the substantive requirements for closure and only serves to erode public trust in the judiciary.

CONCLUSION

For the foregoing reasons, *Amici Curiae* respectfully request that this Court grant *certiorari.*

Respectfully submitted,

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EXHIBIT A

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Vicente de la Vega, certified by the Administrative Office of the United States Court and by the Court Interpreters Certification Board of the State of Florida, swears, deposes and states that the attached certified translation **EXCERPT** is accurate and has been performed by a translator fully qualified to translate in the **SPANISH** and **ENGLISH** languages, as engaged to this effect by and on behalf of Precision Translating Services, Inc.

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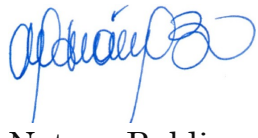
Vicente de la Vega

The foregoing instrument was acknowledged before me by means of [x] physical presence or [ ] online notarization on November 22, 2021 by **Vicente de la Vega,** who is personally known to me or who has produced a Florida Driver's License as identification.

My commission expires:



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SUPREME COURT OF PUERTO RICO
SECRETARIAT OF THE JUDICIAL AND
NOTARY CONFERENCE

REPORT ON RULES OF CIVIL PROCEDURE

MARCH 2008

SUPREME COURT OF PUERTO RICO
SECRETARIAT OF THE JUDICIAL AND
NOTARY CONFERENCE

REPORT ON RULES OF CIVIL PROCEDURE*

Members of the Permanent Advisory Committee
on the Rules of Civil Procedure

José A. Andréu Garcia,
President
Lady Alfonso de Cumpiano
Francisco G. Bruno Rovira
Héctor J. Canty Pérez
José A. Cuevas Segarra
Waleska Delgado Marrero
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Members of the Secretariat of the Judicial and Notary Conference

Lilia M. Oquendo Solis, Director
Thainie Reyes Ramirez, Legal Advisor
Maribel Cruz Fernandez, Legal Advisor

*This revised report contains the modifications made by the Permanent Advisory Committee by means of Errata, prior to the celebration of the Twenty-Fourth Judicial Conference, held on February 14, and 15, 2008, and other modifications made in a meeting held on March 14, 2008.

RULE 62. ON HEARINGS AND RECORDS
Rule 62.1 Hearings, orders in chamber and records

(a) All hearings of cases on their merits will be held in a courtroom that is **open to the public,** unless the nature of the procedure, **act or** the court. **on their own initiative or at the request of a party. should stipulate** otherwise. All other acts or procedures may be performed or processed by a judge in their offices, or in any other place, without requiring the assistance of the Secretary or other officials.

(b) **The** information on the records for the cases **that by law or the court. on their own initiative or at the request of a party. state its confidentiality.** as well as the copies thereof, may be shown or delivered only to persons with legitimate interest or to other persons via judicial order and with justified cause. They will be supplied, only after exhibition of need and the express permission of the court, to officials of the General Court of Justice in their official processes and to those persons of proven professional or scientific reputation who state in writing their

interest in obtaining information for the performance of their official labor, studies or work, always doing so under the conditions stipulated by the judge.

(c) The following persons will be deemed to have legitimate interest:

(1) Parties to the lawsuit and their heirs.

(2) The attorneys for the parties in the lawsuit.

(3) The notaries who authorize public instruments from whose face or content it may arise that the legal documents is a supplemental document to the public instrument granted by them; as well as in those circumstances in which the notaries are required to have a copy of the legal document for the correction of errors or faults notified by the Honorable Registrar of Property.

(4) Any other person whom one of the parties in the lawsuit has authorized by sworn declaration.

The persons mentioned above shall not have to present a request to the court in order to be granted access to the court records.

Other persons who may wish to review the records or obtain a copy of the documents that appear therein shall have to present a request before the court, justifying therein the grounds that may justify the examination thereof.

The Chief Justice of the Supreme Court of Puerto Rico shall whatever administrative means deemed necessary to comply with what which is set forth herein.

Comments on Rule 62.1

I. Origin

This rule corresponds, in part, to Rule 62.2 of the [Code of] Civil Procedure of 1979.

II. Scope

The rule was renumbered to adjust it to the new order that arose from the elimination of the rules related to appeals, namely the relocation of Rule 61 of 1979 and the division of Rule 62 of 1979.

Rule 62.2 of 1979 was amended by Act. No. 329 of December 30, 1998, to state that hearings in cases on family relations be held in private. Later on, Act. No. 70 of April 20, 2000, amended the rule again to establish that records in cases on family relations, as well as copies thereof, would be accessible only by those persons with legitimate interest. Shortly thereafter, Act No. 227 of September 2, 2003, clearly stated which persons are those who have legitimate interest so that they may have access to those records. These amendments were in response to the interest in protecting the right of citizens to maintain the privacy of their personal and family life.

As a general rule, cases are held in a courtroom that is open to the public. However, through legislation they outlined in Rule 62.2 of 1979 those subjects that would have to be elucidated in private, unless one of the parties should

request otherwise. In the vast majority of courts, the elucidation of these cases comes about in a courtroom that is open to the public since, due to the manner in which our court system is structured, these cases cannot be heard in private without having to take certain measures. In practice, judges ask the parties if they waive the right to have the hearing held in private. If there is no such waiver, in the majority of cases, they are granted the final slot so as not to create a delay in the day's proceedings, since the court would have to request those persons who are present to leave the courtroom until the hearing is held.

Because of this, the Committee decided to modify the rule so that these matters would be held in a room open to the public, unless the party requests otherwise.

In this manner, the party is the one that demands that their right to privacy be safeguarded. Modifications to the rule also recognize that a lay may establish the confidential nature of any process. In this regard, from the list established in Rule 62.2 of 1979, the only process that must be held in private, by decree of law, is the adoption procedure, since the Adoptions Act[417] demands that it be this way. However, the provisions of the Civil Code that establish other matters say nothing with respect to the confidentiality of those processes.

On the other hand, it was maintained from Rule 62.2 of 1979 that a hearing also could be held in private due to the nature of the procedure or at the discretion of the court.

In those cases in which the parties may elucidate any dispute in camera, as permitted by Subsection (a) of this Rule, and arrive at an agreement, the doctrine established in Reyes Torres v. Collazo Reyes, 118 D.P.R. 730 (1987), requires that the judge return to the Chambers and state into the record the terms of the agreement to fully grant the parties their right to be heard.

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[417] Article 10 of Act No. 9 of January 19, 1995, as amended, (Adoption Act), establishes the private nature of the hearings.
(32 L.P.R.A. Sect. 2699i).

On the other hand, part of Subsection (a) of the Rule of 1979 was placed as Subsection (b) in order to indicate in a separate subsection the manner in which the information from the records would be provided to interested persons. The following subsection and the title of the rule was modified as a result of this change.

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TRIBUNAL SUPREMO DE PUERTO RICO SECRETARIADO DE LA CONFERENCIA JUDICIALY NOTARIAL

INFORME DE REGLAS DE PROCEDIMIENTO CIVIL

MARZO DE 2008

TRIBUNAL SUPREMO DE PUERTO RICO SECRETARIADO DE LA CONFERENCIA JUDICIALY NOTARIAL

INFORME DE REGLAS DE PROCEDIMIENTO CIVIL*

Miembros del Comité Asesor Permanente de Reglas de Procedimiento Civil

Hon. José A. Andréu Garcia, Presidente
Lcda. Lady Alfonso de Cumpiano
Lcdo. Francisco G. Bruno Rovira
Hon. Héctor J. Conty Pérez
Lcdo. José A. Cuevas Segarra
Lcda. Waleska Delgado Marrero
Lcdo. Rafael Hernández Colon
Hon. Luis E. Maldonado Guzman
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Lcdo. José E. Otero Matos
Lcdo. Harold D. Vicente González
Lcda. Sylvia Vilanova Hernández

Miembros del Secretariado de la Conferencia Judicial y Notarial

Lcda. Lilia M. Oquendo Solis, Directora
Lcda. Thainie Reyes Ramirez, Asesora Legal
Lcda. Maribel Cruz Fernández, Asesora Legal

*Este informe revisado contiene las modificaciones realizadas por el Comite Asesor Permanente mediante Fe de Erratas, previo a la celebracion de la Vigesima Cuarta Conferencia Judicial, celebrada el 14 y 15 de febrero de 2008 y otras modificaciones realizadas en una reunion celebrada el 14 de marzo de 2008.

REGLA 62. DE LAS VISTAS Y LOS EXPEDIENTES

Regla 62.1. Vistas, órdenes en cámara y expedientes

(a) Todas las vistas de los casos en sus méritos serán celebradas en un salón de sesiones del tribunal **abierto al público,** salvo que la naturaleza del procedimiento, **la lev o** el tribunal, **a iniciativa propia o a instancia de parte, disponga** lo contrario. Todos los otros actos o procedimientos podrán ser realizados o tramitados por un juez en su despacho, o en cualquier otro lugar, sin necesidad de la asistencia del Secretario u otros funcionarios.

(b) La información sobre los expedientes de los casos **que por lev o el tribunal, a iniciativa propia o a solicitud de parte, disponga su confidencialidad,** así como las copias

de los mismos, podrán ser mostradas o entregadas sólo a personas con legítimo interés, o a otras personas mediante orden judicial y por causa justificada. Sólo se suministrarán, previa muestra de necesidad y permiso expreso del tribunal, a funcionarios del Tribunal General de Justicia en sus gestiones oficiales, y aquellas personas de acreditada reputación profesional o científica que por escrito prueben su interés en obtener información para la realización de sus labores oficiales, estudios o trabajos, y siempre, bajo las condiciones que el juez estipule.

(c) Serán personas con legítimo interés las siguientes;

(1) Las partes en el pleito y sus herederos.

(2) Los abogados de las partes en el pleito.

(3) Los notarios que autoricen instrumentos públicos de cuya faz o contenido surja que el documento judicial es un documento complementario al instrumento público otorgado por éstos; así como en aquellas circunstancias en las cuales **a** los notarios se les requiera copia del documento judicial para la subsanación de errores o faltas notificadas por el Honorable Registrador de la Propiedad.

(4) Cualquier otra persona que una de las partes en el pleito haya autorizado mediante declaración jurada.

Las personas antes mencionadas no tendrán que presentar una solicitud al tribunal para que se les permita el acceso a los expedientes judiciales.

Las demás personas que quieran revisar los expedientes u obtener copia de los documentos que obran en el mismo, tendrán que presentar una solicitud ante el tribunal mediante la cual demuestren las causas que justifican el examen de los mismos.

El Juez Presidente del Tribunal Supremo de Puerto Rico tomará aquellas medidas administrativas necesarias para dar cumplimiento a lo aquí expuesto.

Comentarios a la Regla 62.1

I. Procedencia

Esta regla corresponde, en parte, a la Regla 62.2 de Procedimiento Civil de 1979.

II. Alcance

La regla se renumeró para atemperarla al nuevo orden que surgió por la eliminación de las reglas relativas a los recursos apelativos; la reubicación de la Regla 61 de 1979 y la división de la Regla 62 de 1979.

La Regla 62.2 de 1979 fue enmendada por la Ley Núm. 329 de 30 de diciembre de 1998, para disponer que las vistas en los casos de relaciones de familia fueran celebradas en privado. Posteriormente, la Ley Núm. 70 de 20 de abril de 2000, la enmendó nuevamente para establecer que los expedientes en los casos de relaciones de familia, así como las copias de los mismos, solo fueran accesibles a las personas con legítimo interés. Poco después, la Ley Núm. 227 de 2 de septiembre de 2003, expuso claramente quiénes son las personas con legítimo interés a los fines de que puedan tener acceso a dichos expedientes. Estas enmiendas respondieron al interés de proteger el derecho de los ciudadanos a mantener la intimidad de su vida personal y familiar.

Como regla general, los casos se ven en un salón de sesiones abierto al público. No obstante, mediante legislación se esbozó en la Regla 62.2 de 1979 los

asuntos que se tendrían que dilucidar en privado, salvo que una de las partes solicitara lo contrario. La dilucidación de estos casos, en la gran mayoría de los tribunales, se ven en un salón de sesiones abierto al público ya que debido a la manera en que se encuentra estructurado nuestro sistema de tribunales, éstos se ven imposibilitados a celebrarlas en privado sin tener que tomar medidas. En la práctica, los jueces le preguntan a las partes si renuncian al derecho a que la vista sea celebrada en privado. En caso de no haber renuncia, en la mayoría de los casos, se les otorga el último turno, a fin de no crear dilación en los procedimientos del día, toda vez que el tribunal tendría que solicitarles a las personas presentes que abandonen el salón de sesiones hasta que la vista sea celebrada.

Debido a ello, el Comité decidió modificar la regla para que estos asuntos sean celebrados en un salón abierto al público, a menos que la parte solicite lo contrario.

De esta manera la parte es la que exige que se salvaguarde su derecho a la intimidad. Las modificaciones a la regla también reconocen que una ley puede establecer el carácter confidencial de algún proceso. En cuanto a ello, de la lista establecida en la Regla 62.2 de 1979, el único proceso que por decreto de ley debe celebrarse en privado es el procedimiento de adopción, ya que la

Ley de Adopción[417] lo exige de esa manera. No obstante, las disposiciones del Código Civil que establecen los demás asuntos callan con respecto a la confidencialidad de esos procesos.

De otra parte, se mantuvo de la Regla 62.2 de 1979, que la vista se podrá también celebrar en privado, debido a la naturaleza del procedimiento o a discreción del tribunal.

En los casos en que las partes diluciden alguna diferencia en cámara, conforme permite el inciso (a) de esta regla, y lleguen a algún acuerdo, la doctrina establecida en Reves Torres v. Collazo Reves, 118 D.P.R. 730 (1987), requiere que el juez regrese a Sala y haga constar en el registro los términos del acuerdo para conceder plenamente a las partes su derecho a ser oídas.

Por otro lado, se ubicó como inciso (b) parte del inciso (a) de la Regla de 1979, a los fines de indicar en un inciso aparte la manera en que se proveerá la información de los expedientes a las personas con interés. A raíz de este cambio, se modificó el siguiente inciso y el título a la regla.

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[417] El Artículo 10 de la Ley Núm. 9 de 19 de enero de 1995, según enmendada, (Ley de Adopción), establece el carácter privado de las vistas. (32 L.P.R.A. sec. 2699i).