

Case No. 21-1301

**IN THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT**

CENTRO DE PERIODISMO INVESTIGATIVO, INC.,
Plaintiff-Appellee,

v.

FINANCIAL OVERSIGHT AND MANAGEMENT BOARD
FOR PUERTO RICO,
Defendant-Appellant.

On Appeal from the United States District Court for the
District of Puerto Rico, San Juan, in Consolidated Cases
Nos. 3:17-CV-01743-JAG and 3:19-CV-01936-JAG

**BRIEF OF AMICI CURIAE THE REPORTERS COMMITTEE FOR
FREEDOM OF THE PRESS AND 27 MEDIA ORGANIZATIONS IN
SUPPORT OF PLAINTIFF-APPELLEE URGING AFFIRMANCE**

Tomás A. Román-Santos (Bar No. 91488)
ROMÁN SANTOS LLC
P.O. Box 9295
San Juan, PR 00908
Telephone: (787) 300-2811
Facsimile: (787) 300-2814
tomas@roman-santos.com

Bruce D. Brown (Bar No. 1067194)
Counsel of Record for Amici Curiae
Katie Townsend*
Sarah Matthews*
Adam Marshall*
Madeline Lamo*
REPORTERS COMMITTEE FOR
FREEDOM OF THE PRESS
1156 15th St. NW, Suite 1020
Washington, D.C. 20005
Telephone: (202) 795-9300
Facsimile: (202) 795-9310
bbrown@rcfp.org
**Of Counsel*

CORPORATE DISCLOSURE STATEMENTS

The Reporters Committee for Freedom of the Press is an unincorporated association of reporters and editors with no parent corporation and no stock.

The Atlantic Monthly Group LLC is a privately-held media company, owned by Emerson Collective and Atlantic Media, Inc. No publicly held corporation owns 10% or more of its stock.

Boston Globe Media Partners, LLC, is a privately held company. No publicly held corporation owns 10% or more of its stock.

The Center for Investigative Reporting (d/b/a Reveal) is a California non-profit public benefit corporation that is tax-exempt under section 501(c)(3) of the Internal Revenue Code. It has no statutory members and no stock.

CNN en Español is a unit of Cable News Network, Inc. (“CNN”), which is a Delaware corporation that owns and operates numerous news platforms and services. CNN is ultimately a wholly-owned subsidiary of AT&T Inc., a publicly traded corporation. AT&T Inc. has no parent company and, to the best of CNN’s knowledge, no publicly held company owns ten percent or more of AT&T Inc.’s stock.

The Committee to Protect Journalists is a nonprofit organization no parent corporation and no stock.

First Look Institute, Inc. is a non-profit non-stock corporation organized under the laws of Delaware. No publicly-held corporation holds an interest of 10% or more in First Look Institute, Inc.

Fundamedios, Inc. is a non-profit corporation organized under the laws of Massachusetts, with no parent corporation and no stock.

Gannett Co., Inc. is a publicly traded company and has no affiliates or subsidiaries that are publicly owned. BlackRock, Inc. and the Vanguard Group, Inc. each own ten percent or more of the stock of Gannett Co., Inc.

The Inter American Press Association (IAPA) is a not-for-profit organization with no corporate owners.

The International Documentary Association is an not-for-profit organization with no parent corporation and no stock.

The Investigative Reporting Workshop is a privately funded, nonprofit news organization based at the American University School of Communication in Washington. It issues no stock.

The McClatchy Company, LLC is privately owned by certain funds affiliated with Chatham Asset Management, LLC and does not have publicly traded stocks.

The Media Institute is a 501(c)(3) non-stock corporation with no parent corporation.

MPA - The Association of Magazine Media has no parent companies, and no publicly held company owns more than 10% of its stock.

The National Press Club Journalism Institute is a not-for-profit corporation that has no parent company and issues no stock.

The National Press Club is a not-for-profit corporation that has no parent company and issues no stock.

National Press Photographers Association is a 501(c)(6) nonprofit organization with no parent company. It issues no stock and does not own any of the party's or amicus' stock.

New England First Amendment Coalition has no parent corporation and no stock.

New England Newspaper and Press Association, Inc. is a non-profit corporation. It has no parent, and no publicly held corporation owns 10% or more of its stock.

The News Leaders Association has no parent corporation and does not issue any stock.

News Media Alliance is a nonprofit, non-stock corporation organized under the laws of the commonwealth of Virginia. It has no parent company.

Online News Association is a not-for-profit organization. It has no parent corporation, and no publicly traded corporation owns 10% or more of its stock.

Pulitzer Center on Crisis Reporting is a non-profit organization with no parent corporation and no stock.

Radio Television Digital News Association is a nonprofit organization that has no parent company and issues no stock.

The Society of Environmental Journalists is a 501(c)(3) non-profit educational organization. It has no parent corporation and issues no stock.

Society of Professional Journalists is a non-stock corporation with no parent company.

The Tully Center for Free Speech is a subsidiary of Syracuse University.

TABLE OF CONTENTS

TABLE OF AUTHORITIES.....	vi
STATEMENT OF IDENTITY AND INTEREST OF AMICI CURIAE AND SOURCE OF THEIR AUTHORITY TO FILE THIS BRIEF	1
INTRODUCTION	2
ARGUMENT	4
I. PROMESA does not preempt Puerto Rico’s public records laws.	5
A. Section 105 only shields the Board from liability for obligations “resulting” from its efforts to carry out PROMESA; it does not supplant the Board’s disclosure obligations arising under Puerto Rico law.....	5
B. Section 4 does not preempt disclosure requirements under Puerto Rico law because they are not inconsistent with PROMESA.	7
II. Congress created the Board to achieve greater transparency and accountability as to Puerto Rico’s finances—a goal entirely consistent with the aim of Puerto Rico’s public records laws.	13
A. PROMESA’s legislative history demonstrates the importance of transparency to the Board’s mission.....	14
B. The district court’s decisions requiring the Board to comply with Puerto Rico’s public records laws has enabled public oversight of the Board’s activities.	15
CONCLUSION	18

TABLE OF AUTHORITIES

Cases

<i>Antilles Cement Corp. v. Fortuño</i> , 670 F.3d 310 (1st Cir. 2012).....	8
<i>CPI v. FOMB</i> , No. 17-1743, 2018 WL 2094375 (D.P.R. May 4, 2018).....	<i>passim</i>
<i>De J. Cordero v. Prensa Insular De P.R., Inc.</i> , 169 F.2d 229 (1st Cir. 1948)	8, 9, 10
<i>FDA v. Brown & Williamson Tobacco Corp.</i> , 529 U.S. 120 (2000).....	6
<i>Graham Cty. Soil & Water Conservation Dist. v. United States ex rel. Wilson</i> , 559 U.S. 280 (2010)	6
<i>Grant’s Dairy—Me., LLC v. Comm’r of Me. Dep’t of Agric.</i> , 232 F.3d 8 (1st Cir. 2000)	7
<i>Hardt v. Reliance Standard Life Ins. Co.</i> , 560 U.S. 242 (2010)	6
<i>King v. Burwell</i> , 576 U.S. 473 (2015).....	6
<i>Medtronic, Inc. v. Lohr</i> , 518 U.S. 470 (1996).....	9
<i>P.R. Dep’t of Consumer Affairs v. Isla Petroleum Corp.</i> , 485 U.S. 495, 499 (1988)	8
<i>Santiago v. Bobb & El Mundo, Inc.</i> , 17 P.R. Offic. Trans. 182 (P.R. 1986)	5
<i>Soto v. Sec’y of Justice</i> , 12 P.R. Offic. Trans. 597 (P.R. 1982)	5, 10, 17, 18
<i>Tobin v. Fed. Express Corp.</i> , 775 F.3d 448 (1st Cir. 2014).....	7
<i>Vázquez-Garced v. FOMB</i> , 945 F.3d 3 (1st Cir. 2019).....	13
<i>Wis. Pub. Intervenor v. Mortier</i> , 501 U.S. 597 (1991).....	8

Statutes

48 U.S.C. § 2101, <i>et seq.</i>	<i>passim</i>
50 U.S.C. § 3141	9
Ariz. Rev. Stat. Ann. § 38-431.03	12
Ariz. Rev. Stat. Ann. § 39-121.01	13
D.C. Code Ann. § 2-532.....	13
D.C. Code Ann. § 2-575.....	12
H.R. Rep. No. 114-602 (2016)	14

P.R. Laws Ann. tit. 3, § 100112
 P.R. Laws Ann. tit. 32, § 17815
 Tex. Gov’t Code § 551.10112
 Tex. Gov’t Code § 552.00213
 Tex. Gov’t Code § 552.02113

Other Authorities

162 Cong. Rec. S4690-02 (June 29, 2016).....14
 Cindy Burgos Alvarado, *The Close Relationship Between the FEMA Official Under Federal Investigation and Noel Zamot*, CPI (May 30, 2019), <https://perma.cc/KU8Z-GJD7>16
 Eliván Martínez Mercado, *Senadores Republicanos Promovieran “En Voz Baza” la Privatización de la AEE*, CPI (Nov. 29, 2018), <https://perma.cc/2FCM-NE8P>16
 FOIA, Farm Credit System Insurance Corporation, <https://perma.cc/HED7-HCHS>11
 FOIA, Harry S. Truman Scholarship Foundation, <https://perma.cc/AKT3-LTVC>11
 Freedom of Information Act (FOIA), U.S. Interagency Council on Homelessness, <https://perma.cc/7YVW-JQU4>11
 Freedom of Information Act and Privacy Act, Federal Financial Institutions Examination Council, <https://perma.cc/T4R4-6SVX>.....11
 Freedom of Information Act, U.S. Commission of Fine Arts, <https://perma.cc/H7ZR-FMUQ>11
 Joel Cintrón Arbasetti, *El Cinturón de Seguridad de la Junta de Control Fiscal*, CPI (Dec. 5, 2018), <https://perma.cc/6LGA-G26J>16
 Luis J. Valentín Ortiz, *Puerto Rico’s Fiscal Control Board: Parallel Government Full of Lawyers and Consultants*, CPI (Aug. 1, 2018), <https://perma.cc/6M2F-EYSF>16
 Open Government Data, OPM.gov, <https://perma.cc/FG7N-U4MK>11
 White House Press Release, *President Obama Announces the Appointment of Seven Individuals to the FOMB* (Aug. 31, 2016), <https://perma.cc/8UL7-SNCG>15

**STATEMENT OF IDENTITY AND INTEREST OF AMICI CURIAE AND
SOURCE OF THEIR AUTHORITY TO FILE THIS BRIEF**

Amici have obtained consent to file this brief from both parties and therefore may file it pursuant to Federal Rule of Appellate Procedure 29(a)(2).

Pursuant to Federal Rule of Appellate Procedure 29(a)(4)(E), amici state that no party's counsel authored this brief in whole or in part, and no party, party's counsel, or any other person, other than the amici curiae, their members, or their counsel, contributed money that was intended to fund preparing or submitting this brief.

Amici are the Reporters Committee for Freedom of the Press, The Atlantic Monthly Group LLC, Boston Globe Media Partners, LLC, The Center for Investigative Reporting (d/b/a Reveal), CNN en Español, Committee to Protect Journalists, First Look Institute, Inc., Fundamedios Inc., Gannett Co., Inc., Inter American Press Association, International Documentary Assn., Investigative Reporting Workshop at American University, The McClatchy Company, LLC, The Media Institute, MPA - The Association of Magazine Media, National Press Club Journalism Institute, The National Press Club, National Press Photographers Association, New England First Amendment Coalition, New England Newspaper and Press Association, Inc., The News Leaders Association, News Media Alliance, Online News Association, Pulitzer Center on Crisis Reporting, Radio Television

Digital News Association, Society of Environmental Journalists, Society of Professional Journalists, and Tully Center for Free Speech (collectively, “amici”).

Amici are media outlets and organizations that advocate on behalf of journalists and the press. Lead amicus the Reporters Committee for Freedom of the Press is a voluntary, unincorporated association of reporters and editors that works to defend the First Amendment rights and freedom of information interests of the news media.

Amici submit this brief to urge this Court to affirm the district court’s orders rejecting attempts by Defendant-Appellant Financial Oversight and Management Board for Puerto Rico (the “Board,” “Oversight Board,” or “FOMB”) to evade Puerto Rico’s public records laws. As representatives and members of the news media who regularly rely on public records to inform the public, amici have a strong interest in ensuring that courts interpret freedom of information laws in a manner consistent with their purpose—to facilitate access to public records and assure government accountability. Transparency about the activities of government bodies, like the Board, is essential to inform the public, foster discourse, and provide a necessary check on government power.

INTRODUCTION

This case concerns whether Puerto Rico’s Oversight Board is, as it contends, exempt from compliance with the constitutional and statutory rights of access to

government records and information afforded the press and public under Puerto Rico law. Congress created the Board in 2016, to address Puerto Rico’s ongoing financial crisis. The district court properly held that because the Board is part of the Puerto Rico government, that territory’s disclosure laws ensure that the Board’s records are subject to public inspection. In fact, given the Board’s considerable power and control over Puerto Rico’s budget, this access is particularly important to ensure the Board’s accountability to the people of Puerto Rico.

Plaintiff-Appellee Centro de Periodismo Investigativo (“CPI”) is a Puerto Rico-based nonprofit organization of investigative journalists dedicated to ensuring an informed public. It filed the first of these related cases in 2017, to obtain public records about the Board’s activities. Throughout the course of this litigation, CPI has secured the disclosure of thousands of public records, enabling it to report on numerous matters of public interest, including the Board’s controversial spending practices and the influence of outside government employees on its decision-making. The Board now challenges the district court’s decisions that have made this transparency possible in order to shield its taxpayer-funded activities from further public scrutiny.

Amici submit this brief to emphasize the importance of correctly interpreting the Puerto Rico Oversight, Management, and Economic Stability Act (“PROMESA” or the “Act”), 48 U.S.C. § 2101, *et seq.*, and to urge the Court to

reject the Board’s unfounded claim that the Act preempts Puerto Ricans’ constitutional and statutory rights of public access.¹

The Board’s extreme interpretation of specific statutory provisions disregards the text of PROMESA as a whole, as well as the purpose of the Act and the benefits of public oversight in furthering that purpose. It would be an absurd result if the Oversight Board that Congress established to create an open process to restore Puerto Rico’s fiscal health were allowed to keep the public in the dark about its activities. Such an outcome would further erode public confidence in the Board and undermine its effectiveness by inviting arbitrary actions, poor administration, and corruption. For the reasons herein, amici urge the Court to affirm the district court’s ruling and to recognize that the constitutional and statutory rights of access guaranteed to the press and public under Puerto Rico law apply to the Board.

ARGUMENT

Puerto Ricans have long enjoyed a right of access to government information and public documents under the Puerto Rico Constitution and Code of Civil Procedure. *Soto v. Sec’y of Justice*, 12 P.R. Offic. Trans. 597, 608 (P.R.

¹ Amici do not address the Board’s first argument—that the Eleventh Amendment and *Pennhurst* doctrine divest the federal courts of jurisdiction over this matter. See Br. for Def.-Appellant 20–31 (“FOMB Br.”). As CPI explains in its brief, the district court properly rejected these arguments. See Opp’n Br. for Pl.-Appellee 41–45 (“CPI Br.”).

1982) (recognizing a constitutional right of access to government information, explaining that “there is a close relationship between the freedom of speech and the freedom of information”); P.R. Laws Ann. tit. 32, § 1781 (recognizing citizens’ right to inspect and copy “public document[s] of Puerto Rico”). When the Supreme Court of Puerto Rico first recognized a constitutional right of access, it explained that “if democracy is to work, there can be no holding back of information; otherwise ultimate decisionmaking by the people, to whom that function is committed, becomes impossible.” *Soto*, 12 P.R. Offic. Trans. at 617 (internal citations omitted); *see also Santiago v. Bobb & El Mundo, Inc.*, 17 P.R. Offic. Trans. 182, 190 (P.R. 1986) (finding that reducing the barriers to government information was a “constitutional imperative” and essential to “a genuine democracy based on the free flow of ideas”). Accordingly, this constitutional right extends broadly to government information, with limited exceptions, such as when a privilege applies. *See, e.g., Santiago*, 17 P.R. Offic. Trans. at 190–91.

I. PROMESA does not preempt Puerto Rico’s public records laws.

A. Section 105 only shields the Board from liability for obligations “resulting” from its efforts to carry out PROMESA; it does not supplant the Board’s disclosure obligations arising under Puerto Rico law.

When statutory language is “plain and unambiguous,” it must be enforced “according to its terms.” *Hardt v. Reliance Standard Life Ins. Co.*, 560 U.S. 242,

251 (2010). “[W]hen deciding whether the language is plain, [courts] must read the words ‘in their context and with a view to their place in the overall statutory scheme.’” *King v. Burwell*, 576 U.S. 473, 486 (2015) (quoting *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000)). A court’s “duty, after all, is ‘to construe statutes, not isolated provisions.’” *Id.* (quoting *Graham Cty. Soil & Water Conservation Dist. v. United States ex rel. Wilson*, 559 U.S. 280, 290 (2010)).

A plain reading of Section 105 in context makes clear that it is not the sweeping grant of immunity that the Board claims it to be. This provision, on its face, only shields the Board from liability for “obligation[s]” or “claim[s] . . . *resulting* from actions taken to carry out” PROMESA. 48 U.S.C. § 2125 (emphasis added). As CPI correctly explains, this simply limits the Board’s liability with respect to claims “resulting” from its affirmative conduct taken to execute the Act. CPI Br. 49–54. Conversely, the Board’s obligation to disclose public records stems from the Puerto Rico Constitution and Code of Civil Procedure *ab initio*, not from any subsequent conduct. This reading of Section 105 comports with Section 4, discussed below, which provides that local laws apply to the Board except to the extent they are “inconsistent” with PROMESA. 48 U.S.C. § 2103.

B. Section 4 does not preempt disclosure requirements under Puerto Rico law because they are not inconsistent with PROMESA.

Contrary to the Board’s arguments, Section 4 merely ensures that the Act prevails over state or territory laws to the extent they are “inconsistent” and does not preempt Puerto Rico’s public records laws.² 48 U.S.C. § 2103. As the district court correctly held, because “PROMESA was enacted to restructure Puerto Rico’s debt, and not to dictate the way Puerto Rico’s government discloses information to the public, Puerto Rico law requiring disclosure of public information cannot be said to be inconsistent with PROMESA.” *CPI v. FOMB*, No. 17-1743, 2018 WL 2094375, at *10 (D.P.R. May 4, 2018). The district court also found that “Congress has not expressed a desire, neither in PROMESA nor in its legislative history, to have federal law be exclusive in the area of disclosures by the Board.” *Id.* at *11.

² Under the Supremacy Clause of the U.S. Constitution, Congress can either expressly or implicitly preempt the law of a state or territory. *Tobin v. Fed. Express Corp.*, 775 F.3d 448, 452 (1st Cir. 2014). Implied preemption can occur in one of two ways: through “field preemption”—where a federal regulatory scheme “is so pervasive as to warrant an inference that Congress did not intend the states to supplement it”—and through “conflict preemption,” which “takes place either when compliance with both state and federal regulations is impossible or when state law interposes an obstacle to the achievement of Congress’s discernible objectives.” *Grant’s Dairy—Me., LLC v. Comm’r of Me. Dep’t of Agric.*, 232 F.3d 8, 15 (1st Cir. 2000) (citations omitted). Here, the Board claims that Section 4 is an “express preemption provision” but uses the term “inconsistent,” thus incorporating “concepts of conflict preemption.” FOMB Br. 36. Since the Board’s brief focuses exclusively on conflict preemption (having abandoned its field preemption argument asserted before the district court), amici’s brief does as well.

That Puerto Rico law imposes disclosure obligations on the Board *in addition* to those imposed by PROMESA does not render them inconsistent with the Act. *See, e.g., Wis. Pub. Intervenor v. Mortier*, 501 U.S. 597, 600–03 (1991) (federal pesticide law did not preempt additional local pesticide regulations that were not in conflict); *De J. Cordero v. Prensa Insular De P.R., Inc.*, 169 F.2d 229, 233 (1st Cir. 1948) (federal statute addressing Puerto Rico auditor’s custody of records did not conflict with—and therefore did not preempt—Puerto Rican statute providing right of access that imposed additional disclosure obligations upon the auditor). In fact, “courts routinely have upheld state statutes that impose tougher restrictions than their federal counterparts,” so long as the local law—like the disclosure provisions here, *see infra*—do not “undermine the purposes of the federal statute.” *Antilles Cement Corp. v. Fortuño*, 670 F.3d 310, 325–26 (1st Cir. 2012) (citations omitted) (finding that federal law imposing protectionist requirements on Puerto Rico did not preempt Puerto Rico laws that imposed even stricter protectionist measures). “For preemption purposes, the laws of Puerto Rico are the functional equivalent of state laws.” *Id.* at 323 (citing *P.R. Dep’t of Consumer Affairs v. Isla Petroleum Corp.*, 485 U.S. 495, 499 (1988)). Thus, the district court properly found that the Board can “comply with both sets of law.” *CPI*, 2018 WL 2094375, at *13.

This Court must not read a transparency preemption provision into PROMESA that does not exist, for Congress does not “cavalierly” preempt state or territorial law, particularly in a field that states and territories “have traditionally occupied.” *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996) (“In all pre-emption cases . . . we start with the assumption that the historic police powers of the States were not to be superseded by [federal law] unless that was the clear and manifest purpose of Congress.”) (internal citation, quotation marks omitted); *see also De J. Cordero*, 169 F.2d at 234 (finding right of access to documents in auditor’s custody not preempted because a conflict between federal statute and Puerto Rico disclosure law must not “be presumed, but must be clearly and affirmatively evident”). And “it is difficult to imagine anything of more exclusively local concern than the matter of the extent to which public documents in the custody of the [Board] are to be available for public inspection.” *De J. Cordero*, 169 F.2d at 234.

As the district court observed, “[i]f Congress wanted Puerto Rico’s disclosure laws to be inapplicable to the Board, [it] could have explicitly said so, as it did with certain local laws” and “in other statutes.” *CPI*, 2018 WL 2094375, at *15 (citing 50 U.S.C. § 3141 (permitting the Central Intelligence Agency director to exempt the agency’s operational files from the federal Freedom of Information Act); 48 U.S.C. § 2123(c) (exempting Oversight Board from compliance with

certain local employment and procurement laws)). Congress did not do so. Thus, the Court should reject the Board’s claim that Congress intended to strip Puerto Ricans, *sub silentio*, of their long-standing constitutional and statutory right to inspect government records—which have been recognized for 39 and 116 years, respectively. *See Soto*, 12 P.R. Offic. Trans. at 608; *De J. Cordero*, 169 F.2d at 232 n.1.

The Board asserts a number of additional arguments to support its theory that Puerto Rico’s public records laws impose obligations that are “inconsistent” with PROMESA and are therefore preempted. All are meritless. First, the Board claims that compliance with these laws would frustrate its ability to “engage in sensitive discussions and negotiations” and to “periodically report to the Congress and the President.” FOMB Br. 38–39. That policy argument simply does not relieve the Board from its obligations to comply with Puerto Rico law. And in any case, the experience of federal and state agencies—almost all of whom are subject to a variety of public records and transparency laws—belies the notion that disclosing non-exempt records to the public renders the government’s work impossible. As the district court explained, “when facing a request for public documents pursuant to Puerto Rico law, the Board could, for example, disclose documents deemed discoverable and deny access to others explaining the basis for the denial pursuant to applicable privilege and confidentiality laws.” *CPI*, 2018

WL 2094375, at *14. Indeed, the Board itself has invoked claims of privilege throughout this litigation. CPI Br. 29.

Second, the Board claims that Congress “could not have intended for the Board to be subject to” Puerto Rico’s disclosure laws because they are too “onerous,” given the Board’s “small staff.” FOMB Br. 39. But the Board has managed to produce thousands of records during the course of this litigation. And similarly sized (and even smaller) federal agencies are subject to the federal Freedom of Information Act—including, for example, the Commission of Fine Arts (11 employees),³ the Federal Financial Institutions Examination Council (10 employees),⁴ the Harry S. Truman Scholarship Foundation (four employees),⁵ the U.S. Interagency Council on Homelessness (15 employees),⁶ and the Farm Credit System Insurance Corporation (11 employees).⁷ *Open Government Data*, OPM.gov, <https://perma.cc/FG7N-U4MK>. Similarly, Puerto Rico public record laws apply to all its government agencies, regardless of size. *See* P.R. Laws Ann.

³ *See Freedom of Information Act*, U.S. Commission of Fine Arts, <https://perma.cc/H7ZR-FMUQ>.

⁴ *See Freedom of Information Act and Privacy Act*, Federal Financial Institutions Examination Council, <https://perma.cc/T4R4-6SVX>.

⁵ *See FOIA*, Harry S. Truman Scholarship Foundation, <https://perma.cc/AKT3-LTVC>.

⁶ *See Freedom of Information Act (FOIA)*, U.S. Interagency Council on Homelessness, <https://perma.cc/7YVW-JQU4>.

⁷ *See FOIA*, Farm Credit System Insurance Corporation, <https://perma.cc/HED7-HCHS>.

tit. 3, § 1001(b), (g) (defining scope of public records law as applying to “every department, agency or corporate entity, board, committee, body, bureau, office and every other government body of the three (3) branches of the Commonwealth Government and the municipalities”). That a government entity is small does not mean that its work should be hidden from public view.

Third, the Board claims that because PROMESA allows it to hold executive sessions in private under certain circumstances, the law must exempt the Board from Puerto Rico’s disclosure laws altogether. FOMB Br. 40. This argument is, like the Board’s other arguments, meritless. Congress only authorized executive sessions under PROMESA in certain limited circumstances—when the majority of the full voting membership of the Board votes to do so—and then “only for the business items” set forth as part of that vote. 48 U.S.C. § 2121(h)(4). Thus, if anything, this provision demonstrates Congress’s intent to ensure public oversight of the Board; unless these special circumstances exist, Board meetings are, by default, open to the public. And, in any event, this provision has no bearing on the public’s right to access records, nor does it speak more broadly about the right to access government information outside executive sessions. Open meeting laws often permit public bodies to hold executive sessions under limited circumstances. *See, e.g.*, Ariz. Rev. Stat. Ann. § 38-431.03 (Arizona); D.C. Code Ann. § 2-575(b)–(c) (District of Columbia); Tex. Gov’t Code § 551.101 (Texas). Such

provisions have never been—and could not be—interpreted to provide those public bodies a license to evade their public records obligations. *See, e.g.*, Ariz. Rev. Stat. Ann. § 39-121.01 (providing that all officers and public bodies of the Arizona government shall maintain their public records and make them available to the public upon request); D.C. Code Ann. § 2-532 (providing that the public may inspect and copy the public records of any District of Columbia public body); Tex. Gov’t Code §§ 552.002, 552.021 (providing that public information shall be available to the public).

Finally, the Board’s reliance on *Vázquez-Garced v. FOMB*, 945 F.3d 3 (1st Cir. 2019), is misplaced. In that case, the Court recognized that PROMESA explicitly requires the Board to certify any budget proposed by the governor of Puerto Rico and thus precludes the governor from independently authorizing “reprogramming” of funds without Board authorization. *Id.* at 8 (discussing 48 U.S.C. § 2142(c)(3)–(4)). Allowing such unauthorized spending—unlike the public records obligations at issue here—would unquestionably conflict with PROMESA’s mandate.

II. Congress created the Board to achieve greater transparency and accountability as to Puerto Rico’s finances—a goal entirely consistent with the aim of Puerto Rico’s public records laws.

As the district court concluded, “Puerto Rico disclosure law actually helps PROMESA’s legislative purpose by shining light into the Board’s dealings with

the government of Puerto Rico. After all, sunlight is the best of disinfectants.” *CPI*, 2018 WL 2094375, at *15 (internal citations omitted). The district court explained, correctly, that “a citizen’s right to access public documents goes hand in hand with PROMESA’s purpose,” noting that when “enacting the Act, Congress expressed concern with Puerto Rico’s lack of transparency and unaudited financial information.” *Id.* (citing, *inter alia*, H.R. Rep. No. 114-602, at 40–46 (2016) (finding that PROMESA was a necessary legislation “[d]ue to the realities facing the island, and the inability of its local politicians to bring order and transparency”)).

A. PROMESA’s legislative history demonstrates the importance of transparency to the Board’s mission.

PROMESA’s legislative history supports the district court’s analysis. As Senator Orrin Hatch (R-Utah) explained when he called for a vote on PROMESA in the Senate, the Act “promise[s] to finally uncover what is beneath the opaque, weblike structure of the Puerto Rican government’s finances, and if we are actually going to be able to meaningfully address the island’s financial challenges, that will be a very important step.” 162 Cong. Rec. S4690-02, S4692 (June 29, 2016).

President Barack Obama echoed this call for transparency in his announcement appointing the seven members of the Board: “In order to be successful, the [Board] will need to establish an open process for working with the people and Government of Puerto Rico, and the members will have to work collaboratively to

build consensus for their decisions.” White House Press Release, *President Obama Announces the Appointment of Seven Individuals to the FOMB* (Aug. 31, 2016), <https://perma.cc/8UL7-SNCG>. Notably, numerous provisions within the Act also evince Congress’s aim of making the Board transparent and accountable to the public.⁸

Accordingly, the Board’s additional disclosure requirements under Puerto Rico law are not only *not in conflict* with its existing obligations under PROMESA but also *further* the purposes of the Act.

B. The district court’s decisions requiring the Board to comply with Puerto Rico’s public records laws has enabled public oversight of the Board’s activities.

The district court’s conclusion that the Board is subject to Puerto Rico law guaranteeing public access to records of its work has resulted in the disclosure of

⁸ See, e.g., 48 U.S.C. § 2121(h)(1) (all “bylaws, rules, and procedures” adopted by the Board are “public documents”); § 2124(e) (“All gifts, bequests or devises” given to the Board, and the identities of their donors, must be publicly disclosed within thirty days of receipt); § 2124(o, p) (the Board must make public the findings of its investigations into disclosure and selling practices); § 2129(a, b) (all Board members and staff must make financial interest disclosures and comply with federal conflict of interest laws). In addition, PROMESA mandates “transparency in contracting,” requiring the Board to “promote compliance” with Puerto Rico’s law requiring government agencies “to maintain a registry of all contracts executed” and “to remit a copy to the office of the comptroller for inclusion in a comprehensive database available to the public.” § 2144(b)(1). A related section empowers the Board to require its approval on government contracts but provides that any such policy “should be designed . . . to increase the public’s faith in this process[.]” § 2144(b)(3).

thousands of public records to CPI. *See* CPI Br. 16. Those disclosures, in turn, have resulted in crucial reporting that has shed light on the Board’s sometimes controversial activities and expenditures. CPI was able to report, for example, that the Board’s projected expenditures related to debt restructuring—\$1.4 billion as of 2018—far exceed the estimated 10-year budget of \$370 million set in 2016.⁹ CPI has also reported on the Board’s significant expenditures on personal security,¹⁰ U.S. senators’ behind-the-scenes influence on the Board’s decision-making,¹¹ and the role a Federal Emergency Management Agency official under investigation for bribery played in facilitating major contract awards from the Board.¹²

The Board itself has conceded that CPI’s reporting informed the public, including in academic and business circles, through “multiple articles discussing in-depth the Board’s communications with federal government officials on issues including the potential privatization of [the Puerto Rico Electric Power Authority], the Board’s security procedures, and the involvement of McKinsey in the creation

⁹ Luis J. Valentín Ortiz, *Puerto Rico’s Fiscal Control Board: Parallel Government Full of Lawyers and Consultants*, CPI (Aug. 1, 2018), <https://perma.cc/6M2F-EYSF>.

¹⁰ Joel Cintrón Arbasetti, *El Cinturón de Seguridad de la Junta de Control Fiscal*, CPI (Dec. 5, 2018), <https://perma.cc/6LGA-G26J>.

¹¹ Eliván Martínez Mercado, *Senadores Republicanos Promovieron “En Voz Baza” la Privatización de la AEE*, CPI (Nov. 29, 2018), <https://perma.cc/2FCM-NE8P>.

¹² Cindy Burgos Alvarado, *The Close Relationship Between the FEMA Official Under Federal Investigation and Noel Zamot*, CPI (May 30, 2019), <https://perma.cc/KU8Z-GJD7>.

of fiscal plans.” *CPI Br. 16* (citing *FOMB Mot. in Compliance with Court’s March 1, 2019 Order, CPI v. FOMB*, No. 17-1743, Dkt. 90 at 11 (D.P.R. Apr. 1, 2019)).

As a result of *CPI’s* reporting, the public is better positioned to understand and assess the Board’s work, its use of taxpayer funds, 48 U.S.C. § 2127(b), and whether it is fulfilling its mandate to restore Puerto Rico’s financial health. This transparency is particularly important because the Board has broad powers over the government of Puerto Rico, including, among other things, the power to approve budgets, to “oversee the development and execution of a ‘fiscal plan,’” to “commence quasi-bankruptcy proceedings to restructure Puerto Rico’s debt,” and to review territorial legislation to ensure compliance with the current fiscal plan. *CPI*, 2018 WL 2094375, at *1, 4 (citing relevant provisions of PROMESA). These decisions will directly affect the lives of Puerto Ricans and the future of Puerto Rico. Accordingly, as the Board proceeds with its work, the public must continue to have access to its records to ensure its accountability to the public.

Shielding the Board from further public scrutiny would only exacerbate public distrust and undermine the core purpose of the right of access: to inform the public upon which a representative government depends. “The public, as sovereign, must have all information available in order to instruct its servants, the government.” *Soto*, 12 P.R. Offic. Trans. at 617 (citations omitted). As the

Supreme Court of Puerto Rico has cautioned, the government “may invoke the secrecy cloak for its own actions only in cases of an overriding public interest.” *Id.* at 613. Here, the public interest overwhelmingly favors upholding Puerto Rico law and ensuring that the Board is subject to the same disclosure obligations applicable to every other Puerto Rican government entity.

CONCLUSION

For the foregoing reasons, amici respectfully urge this Court to affirm the decisions of the district court.

Dated: June 25, 2021

Respectfully submitted,

/s/ Bruce. D. Brown

Bruce D. Brown (Bar No. 1067194)

Counsel of Record for Amici Curiae

Katie Townsend*

Sarah Matthews*

Adam Marshall*

Madeline Lamo*

REPORTERS COMMITTEE FOR

FREEDOM OF THE PRESS

1156 15th St. NW, Suite 1020

Washington, D.C. 20005

Telephone: (202) 795-9300

Facsimile: (202) 795-9310

bbrown@rcfp.org

**Of Counsel*

Tomás A. Román-Santos

(Bar No. 91488)

ROMÁN SANTOS LLC

P.O. BOX 9295

San Juan, PR 00908

T. 787-300-2811

F. 787-300-2814

tomas@roman-santos.com

Certificate of Compliance

1. This document complies with the type-volume limit of Federal Rule of Appellate Procedure 32(a)(7)(B) because, excluding the parts of the document exempted by Federal Rule of Appellate Procedure 32(f), it contains 4,171 words.

2. This document complies with the typeface and type-style requirements of Federal Rule of Appellate Procedure 32(a)(5)–(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word in Times New Roman, size 14 font.

Dated: June 25, 2021

/s/ Bruce D. Brown

Bruce D. Brown

Counsel of Record for Amici Curiae