

No. 22-96

In The
Supreme Court of the United States

FINANCIAL OVERSIGHT AND
MANAGEMENT BOARD FOR PUERTO RICO,

Petitioner,

v.

CENTRO DE PERIODISMO INVESTIGATIVO, INC.,

Respondent.

**On Writ Of Certiorari To The
United States Court Of Appeals
For The First Circuit**

**BRIEF OF ASOCIACIÓN DE PERIODISTAS DE
PUERTO RICO AS *AMICUS CURIAE* IN SUPPORT
OF CENTRO DE PERIODISMO INVESTIGATIVO**

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I. INTEREST OF *AMICUS CURIAE*

Asociación de Periodistas de Puerto Rico (ASPPRO) is a nonprofit founded in 1971.¹ Its members are

¹ The parties have consented to the filing of this brief. The counsels who author this brief certify that counsels of parties did not author the brief in whole or in part. No monetary contribution was made by counsels of parties to fund the preparation or submission of this brief. Asociación de Periodistas de Puerto Rico (ASPPRO) certifies that it is a nonprofit corporation founded in

journalists from national and international media, independent journalists, and other communication professionals united by the commitment to practice journalism guided by the highest ethical standards. The ASPPRO's brief clarifies the need to hold the Board accountable to the right to information and free press rights.

II. INTRODUCTION AND SUMMARY OF ARGUMENT

As it has been widely acknowledged, fiscal policy is public policy. Public debt negotiations and restructuring processes significantly impact the enjoyment and fulfillment of rights. Safeguarding access to public information and the exercise of free press are essential for democracy, especially when these processes occur within an austerity crisis of a jurisdiction besieged by multiple disasters and with limited space for civic participation. Journalists, particularly independent media organizations, undertake the responsibility to advance transparency and access to information to mitigate the impact of lack of accountability on already harmed civil liberties.

This Court is tasked with determining whether the Board has immunity to a claim under territorial law seeking the disclosure of documents and

1971 pursuant to Puerto Rico corporate law framework. It has no parent corporations and does not issue stock. There is no publicly held corporation or other publicly held entity that owns 10% or more of ASPPRO.

communications related to debt negotiations under the control of the Financial Oversight and Management Board for Puerto Rico (FOMB or Board). The Board maintains that the Puerto Rico Oversight, Management, and Economic Stability Act (PROMESA), 48 U.S.C. § 2101 *et seq.*, does not abrogate the Board's sovereign immunity. This brief, which supports the Centro de Periodismo Investigativo's (CPI) claims, argues that the Board's position would put it in *sui generis*, privileged position that renders this body exempt from constitutional and statutory provisions concerning the right to information and free press that grant the press access to documents secured, prepared, and held by the Board regarding debt negotiation or restructuring processes. In addition, it provides a succinct overview of the constitutional dimensions of the right to access and receive public information, acknowledging the experience and testimonies of members of the press that have been barred or potentially excluded from access to public information because of FOMB's resistance to guarantee freedom of information. For the foregoing reasons, the appeals court's judgment should be affirmed.

III. ARGUMENT

PROMESA was approved by the Congress of the United States on June 30, 2016. While PROMESA recommended establishing an oversight board for the territories of Guam, American Samoa, the Commonwealth of Northern Mariana Islands, and the United States Virgin Islands, only Puerto Rico was obligated

to accept this entity. 48 U.S.C. § 2121(b). This legislation was an exercise of the Congressional plenary powers over the “needful rules and regulations for territories.” U.S. Const., art. IV, § 3. PROMESA, a federal legislation adopted by a national forum where the people of Puerto Rico have no voting rights, imposed over Puerto Rico a Board of seven unelected members appointed without the participation or vote of Puerto Rico publicly elected officials. Although created by the federal government, PROMESA states that the Board is an entity within the government of Puerto Rico. 48 U.S.C. § 2121(c).

The stated purpose of PROMESA is to provide mechanisms for a covered territory to achieve fiscal responsibility and access to the capital markets. 48 U.S.C. § 2121(a). The activities related to these objectives naturally include negotiations with creditors regarding debt adjustments and restructuring. Because of the unsurmountable and unsustainable public debt that burdens Puerto Rico, and the scope of the powers granted by PROMESA, such negotiations will impact the wellbeing of the people in the archipelago of Puerto Rico. Disclosure of these documents inherently derives from the purposes and public policy interests enshrined in PROMESA.

The FOMB has reiterated its position against public information requests alleging that these requests are inconsistent with PROMESA. The Board rejects abrogation of immunity included in PROMESA based on the *Pennhurst* doctrine, that divests federal courts of jurisdiction to hear suits against a state under its

own statutes. *Pennhurst State School and Hospital v. Halderman*, 465 U.S. 89, 106 (1984). Before the lower courts, FOMB also had argued that PROMESA preempted local or federal laws that grant the press access to documents secured, prepared, and held by the government except in the enumerated instances where access to information is mentioned in PROMESA, and that due to their sensitive nature, access to the aforementioned public documents could threaten the objectives of the Board itself.

None of these arguments are meritorious, particularly when such preemption would result in a displacement of the constitutional and human right of access to information and freedom of press. Even the most restrictive approach to the legislative text must conclude that nothing forbids public disclosure and that, therefore, the requests presented by the CPI are legitimate.

A. ACCESS TO INFORMATION AND FREE PRESS ARE RIGHTS PROTECTED BY THE CONSTITUTION OF PUERTO RICO

The right to information is protected by the Constitution of Puerto Rico and is directly connected to the exercise of other liberties, such as the right to speech, free press, and free association set forth in Article II, § 4 of the Constitution of Puerto Rico. *Soto v. Giménez*, 12 P.R. Offic. Trans. 587 (1982). Although Article II, Section 4 is worded similarly to the First Amendment of the United States Constitution, under the broader scope interpretation of Puerto Rico's *Magna Carta*, the

right to receive public information has been acknowledged as a constitutional imperative, essential to guarantee a genuine democracy based on the free flow of ideas. *Santiago v. Bobb & El Mundo, Inc.*, 17 P.R. Offic. Trans. 182, 190 (1986). The right of access to information is a corollary of democracy and is an essential component of the right to redress grievances. Given the limited spaces of civic participation in the public debt restructuring processes, it is one of the few mechanisms available to ensure accountability. As constitutionalist Efrén Rivera Ramos wrote, “to allow the government to manage public affairs under the cloak of secrecy is to invite arbitrariness, mismanagement, government indifference, public irresponsibility, and corruption” *Freedom of information: Need for its regulation in Puerto Rico*, 44 Rev. Jur. UPR 67, 69 (1975).

As it pertains to the right to free press, access to information is a “constitutional guarantee firmly linked to the exercise of the rights of freedom of speech, press and association.” *Kilometro O, Inc. v. Pesquera Lopez*, 207 D.P.R. 200, 225 (2021). As communicators of information, the press is a fundamental part of democracy and the right to redress grievances. It is the role of the press to “lay[] the foundations for public debate and citizen participation. For the press to be able to play this fundamental role, it is essential that it cannot be controlled by the government or manipulated to serve the interests of those in power.” *Asoc. Fotoperiodistas v. Rivera Schatz*, 180 D.P.R. 920, 955 (2011) (Rodríguez Rodríguez, J., dissenting). The importance of the right of access to public information therefore

lies in the notion that knowledge of public management facilitates the free discussion of government affairs and the full exercise of the constitutional rights involved. *Colón Cabrera v. Caribbean Petroleum*, 170 D.P.R. 582, 590 (2007).

In recent years, the Legislature of Puerto Rico has attempted to consolidate the jurisprudential development of the right to access information through two statutes. The Transparency and Expedited Procedure for Access to Public Information Act (Transparency Act), 3 L.P.R.A. § 9911 *et seq.*, and the Open Data Act of the Government of Puerto Rico, Law 122-2019, 3 L.P.R.A. § 9891 *et seq.*, aim to clarify a public policy that highlights access to receive information as a fundamental right. 3 L.P.R.A. § 9913, PR ST T. 3 § 9913. The *Transparency Act* states that “any information or document originated, preserved or received in an office of the Government, even if it is in the custody of a third party.” *Id.*

PROMESA itself requires the FOMB to publish and make available documents related to its work. The law lists instances that demand the disclosure of public documents, such as bylaws, rules, and procedures governing the Board’s activities. Duties to disclose documents and communications include publishing information provided by creditors seeking to participate in debt negotiations, annual reports to federal and local governments, and findings of investigations referent to disclosure and selling practices in connection with the purchase of bonds. 48 U.S.C. §§ 2121(h)(1), 2124(d)(1), 2124(p) and 2148, respectively. Other guarantees of

public information and participation within PROMESA include provisions regarding transparency in contracting. 48 U.S.C. § 2144. The FOMB sustains that documents beyond this enumeration remain confidential and that it is only through good faith that they are to be disclosed. Safeguarding access to information and the constitutional broader scope protections allow us to conclude that this is not a restrictive list. The constitutional and human right of access to information requires the Board to comply with a strict threshold to withhold the public documents and communications requested.

Documents held by FOMB are public documents, and thus the Board has the burden to prove that the confidentiality threshold is reached and that the exclusion of a particular piece of documentation from the eyes of the public is meritorious. Alleging that information is sensible or that its disclosure could impact negotiations is not enough. While the right to access to information is subject to specific limitations, the confidentiality of documents prepared, created, or in control of a government entity is the exception and never the rule. *Santiago*, 17 P.R. Offic. Trans. at 190-91(1986). The Supreme Court of Puerto Rico has reiterated that the exclusions are limited to instances where a) a law so declares; (2) the communication is protected by one of the evidentiary privileges that the citizens may invoke; (3) revealing the information may injure the fundamental rights of third parties; (4) it deals with the identity of a confidante; and (5) it is “official information” pursuant to Puerto Rico Rules of Evidence.

Bhatia v. Governor, 199 D.P.R. 59, 82-83 (2017).² In any case, restrictions to access to public information must be justified, and denials cannot be made on arbitrary or capricious grounds. Restrictions must comply with the judicial standard of strict scrutiny. *Engineering Services International v. Puerto Rico Power Authority*, 205 D.P.R. 136, 148 (2020).

The right to access to information guarantees that every person will be able to examine the contents of records, reports, and documents gathered by the government in its official business. See *Ortiz v. Court Administration Office*, 152 D.P.R. 175 (2000). Documents under the control of the Board and gathered during debt negotiation processes, particularly those received from other public institutions such as those obtained from the Treasury and the White House, should be made immediately available to the press. The enjoyment of constitutional rights should not be made arbitrarily burdensome. Because agencies and courts must be guardians of procedural economy, a duty that encompasses the Board as an entity financed with funds from the government of Puerto Rico, there is no reasonable ground to deny public information provided by another public entity and in custody of the Board.

² Certified translation available at JA98a.

B. THE BOARD THREATENS THE RIGHT TO FREEDOM OF PRESS BY FORBIDDING ACCESS TO PUBLIC INFORMATION AND BY FOSTERING A CHILLING EFFECT THAT DISINCENTIVIZES PUBLIC INFORMATION REQUESTS

The FOMB has made it clear that it is not agreeable to open access to information. Beyond the disclosures expressly mandated by PROMESA, such as gifts to members of the FOMB, 48 U.S.C. § 2124(e), requests from the press are met with resistance. ASPPRO member experience shows that the Board has been hermetic when answering questions from journalists and offering interviews, especially when questioned about their expenses or specific decisions. While the FOMB does issue public statements and has a portal to disclose information, it is far less forthcoming engaging with questions and requests from the press. As a result, stories are shelved or are published without reaction from the Board. In other cases, had the documents not been publicly available, the press would have not been able to confront Board members with the record. As a recent example, one Board member denied that they had discussed imposing a new charge on consumers during the negotiation of PREPA's debt restructuring. Documents obtained by the press confirmed the charge was considered by the FOMB. On the other hand, record shows that the CPI has consistently tried to use the mechanisms established in the Transparency Act to obtain public information to be denied by the FOMB. The reiterated resistance to transparency

and accountability, in a context of economic scarcity and reduced audiences due to population loss, is a considerable barrier for the press to access or even attempt to access public information.

The Board's limitations on public and press access to information hinder free discussion of government affairs that the Puerto Rico Supreme Court upholds as the basis for the right to public information. See *Colón Cabrera*, 170 D.P.R. at 590. Courts have served as a necessary recourse to guarantee the fundamental rights of access to information and freedom of the press wherever government officials fail to do so. ASPPRO has spent considerable time and effort to obtain public documents in recent years, turning to the legal system when other measures failed.³ In most cases, courts have sided with ASPPRO and access to information. However, this might no longer be an option against FOMB. If the Board is successful, ASPPRO and the Puerto Rico press will not be able to draw upon the power of the courts to compel it to comply even with access to information provisions on PROMESA. Abrogation of sovereign immunity allows judicial review to serve as a much-needed counterbalance to the Board's considerable powers.

³ See, e.g., *Asoc. de Periodistas de P.R. Inc. v. Vazquez Garced*, 2020 WL 4529668; *Centro de Periodismo Investigativo v. García Padilla*, 2016 WL 3038915 (TCA); *ASPPRO v. Secretario de Hacienda*, SJ2014CV00237.

IV. CONCLUSION

As has been repeatedly stated by scholars, journalists, and advocates, this unelected Board wields plenary fiscal powers over Puerto Rico and mandates over public policy decisions with minimal oversight or accountability. Granting the Board the power to evade access to information claims would aggravate the democratic crisis that Puerto Rico currently faces, diminish the free and informed discussion of government affairs, and the full exercise of the constitutional rights. The future of the archipelago of Puerto Rico depends on the just and accountable resolution of the unsustainable debt crisis. Constitutional and human rights protections, such as freedom of information and press, aim to level an inequitable playfield to give people eyes and a voice in processes that are mostly unintelligible. The role of the CPI and journalists in Puerto Rico and elsewhere is to safeguard equity and accountability in these processes. In the particular case of members of the local press, ensuring access to public documents becomes more important due to lack of resources and several barriers to access to justice that would otherwise render this constitutional right unenforceable.

For the aforementioned reasons, *amicus* respectfully urges this Court to affirm the decision of the appeals court.

Respectfully submitted,

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