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 FOR GFR MEDIA, LLC (EL NUEVO DÍA/PRIMERA HORA) AS AMICUS CURIAE IN SUPPORT OF RESPONDENT

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WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D.C. 20002

QUESTIONS PRESENTED

Is Petitioner, a territorial entity, immune from suit pursuant to the Eleventh Amendment of the United States Constitution?

Did Puerto Rico voluntarily *waive* its sovereign immunity in federal court by establishing a private cause of action against itself and all other territorial entities, including the FOMB, for accessing public records pursuant to the disclosing obligations emanating from Article II, Section 4 of the Puerto Rico Constitution?

CORPORATE DISCLOSURE STATEMENT

GFR Media, LLC is a privately-held media company, owned by FRG, LLC. No publicly held corporation owns 10% or more of its stock.

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INTEREST OF AMICUS CURIAE[1]

GFR Media, LLC ("GFR") is Puerto Rico's largest media conglomerate. GFR owns and publishes the newspapers *Primera Hora* and *EI Nuevo Día* – the latter widely understood as Puerto Rico's newspaper of record – as well as administers two of the websites, after Facebook, Goggle, and Instagram, with the most local internet traffic in Puerto Rico: www.endi.com (with approximately 4.3 million users) and www.primerahora.com (with close to 3 million users). Founded on May 18, 1970, *EI Nuevo Día* has been reporting on Puerto Rico's most critical public issues for the last 52 years. The unwavering mission of *El Nuevo Día* for over half a century has been holding the government accountable, while maintaining the readers fully informed on those governmental decisions affecting their lives. The paper of record's younger sibling, *Primera Hora*, was founded on November 17, 1999, and complements *El Nuevo Día*'s deeply rooted commitment to the values of transparency and accountability. *EI Nuevo Día* is the successor of *EI Día*, a Ponce newspaper founded on December 13, 1909. Thus, *EI Nuevo Día*, albeit under different corporate structures, has been at the forefront of, and reporting on, Puerto Rico's core historical and political issues for over 113 years.

During the course of its long and award-winning trajectory, *EI Nuevo Día* has litigated (on occasion at great personal and financial costs which included financial and political retaliation, censure, and other

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[1] No counsel for any party authored this brief in whole or in part, and no person other than Amicus and its counsels contributed money intended to fund this brief's preparation and submission. Both parties filed a blanket consent with regards to the filing of amicus briefs, including this one.

unlawful takings and audits) against governmental entities to vindicate the freedom of the press and the right to access public records and documents. *See EI Día, Inc. v. Governor Rosselló*, 20 F. Supp. 2d 296 (D. Puerto Rico 1998); *EI Día, Inc. v. Governor Rosselló*, 165 F.3d 106 (1st Cir. 1999).

El Nuevo Día, invoking the freedom of the press and the right to access public records and documents – rights that the Financial Oversight and Management Board for Puerto Rico ("FOMB") has so crudely flaunted in this case – has successfully served freedom of information requests against all branches of the Puerto Rico Government (including the municipalities and public corporations) seeking *inter alia*: the salaries, benefits, and travel expenses of Puerto Rico's senators, representatives, and their legislative aids; access live video streaming of courtroom proceedings; records belonging to the Judiciary, Legislative and Executive branches, including documents generated by public corporations such as the Puerto Rico Energy and Power Authority (PREPA), the Puerto Rico Election Commission, the Department of Health, and the Department of Education (among many others); information on the governor's cabinet nominees: their salaries, benefits, track records in previous governmental positions; information on how the municipalities use public funds; information on the incorporation of municipal corporations, the compensation of municipal contractors -- to name but a few areas of seminal public interest that Amicus, through the years, has been able to scrutinize with the sole of purpose of keeping fully informed its millions of readers in Puerto Rico and abroad – through its participation in the *Grupo de Diarios América*, a consortium bringing together the most widely-read newspapers across Latin America and the Caribbean.

Amicus's requests for the disclosure of public records have proven vitally important in responsibly maintaining the electorate well-informed, while unmasking endless corruption conspiracies, scandalous fraudulent schemes, and keeping the island's government accountable ---- regardless of who is in power.

Because the question presented before this Court, if wrongly decided, would severely destabilize the constitutional right to access and inspect public documents found under Article II, Section 4 of the Puerto Rico Constitution and, thus, destroy Amicus's ability to hold the FOMB accountable to the people it is supposed to serve, Amicus urges this Court to affirm the orders issued by the United States Court of Appeals for the First Circuit.

SUMMARY OF ARGUMENT

This Court has never held that the sovereign immunity implications of the Eleventh Amendment apply to Puerto Rico, or any other territory. Thus, the FOMB, a territorial entity, does not enjoy Eleventh Amendment immunity.

Nothing in the text, history, and purpose of PROMESA lends support to Petitioner's contention that Congress has preempted the fundamental right to access and inspect public documents found under Section IV of the Puerto Rico Constitution's Bill of Rights.

Amicus requests that this Court *affirm* the orders issued by the United States Court of Appeals for the First Circuit.

ARGUMENT

I. This Court has never held that Puerto Rico or any other territory, like a state, enjoys sovereign immunity under the Eleventh Amendment. Thus, the FOMB's argument that the Eleventh Amendment shields it from litigation in federal court *because* it is an entity within the Puerto Rico government is meritless.

While Amicus takes no sides on the wider political implications surrounding the question of whether the Eleventh Amendment is applicable to Puerto Rico, it strongly believes that this Court must approach Petitioner's attempt at cloaking itself with Eleventh Amendment immunity paying heed to the following indisputable facts.

First, this Court has never found that the Eleventh Amendment's immunity implications are extensive to Puerto Rico. *See e.g. Puerto Rico Aqueduct and Sewer Authority v. Metcalf & Eddy, Inc.,* 506 U.S. 139, n. 1 (1993) ("As the case comes to us, the law of the First Circuit—that the Commonwealth of Puerto Rico is treated as a State for purposes of the Eleventh Amendment […] is not challenged here, and we express no view on this matter.) *Grajales v. Puerto Rico Ports Authority*, 831 F.3d 11, n. 3 (1st Cir. 2016) ("[T]he Supreme Court has expressly reserved on the question whether Eleventh Amendment immunity principles apply to Puerto Rico.") *Vaquería Tres Monjitas, Inc. v. Irizarry*, 587 F.3d 464 (1st Cir. 2009), *cert. denied*, 535 U.S. 1001 (2011).

At most, this Court held in *People of Porto Rico v. Rosaly y Castillo*, 227 U.S. 270 (1913)[2] that the territorial government established by Congress in Puerto Rico under the 1900 Foraker Act enjoyed *common law* sovereign immunity. Writing for the Court, Chief Justice White[3] concluded that "the government which the organic act established in Porto Rico is of such nature as to come within the general rule exempting a government sovereign in its attributes from being sued without its consent." *Id*. at 273. At no point *since then* has the Court expanded its holding in *Rosaly y Castillo*, to extend Eleventh Amendment protection to Puerto Rico.

Second, at no point has this Court (or any inferior federal court) *ever* found that a territory[4] enjoys Eleventh Amendment immunity.[5] *See e.g. Ngiraingas*

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[2] Note that in *Rosaly y Castillo*, this Court reversed the Puerto Rico Supreme Court – which by voice of Justice Emilio del Toro Cuebas had found that in enacting the 1900 Foraker Act Congress had not endowed Puerto Rico with sovereign immunity. 16 D.P.R. 508, 514 (1910). Interestingly, Felix Frankfurter, then a lawyer in the War Department, appeared before this Court on behalf of the territorial government of Puerto Rico.

[3] The intellectual architect of the territorial incorporation doctrine embraced by the Fuller Court in the so-called (and infamous) Insular Cases.

[4] See *United States v. Vaello Madero*, 142 S. Ct. 1539, 1541 (2022) ("The United States includes five Territories: American Samoa, Guam, the Northern Mariana Islands, the U. S. Virgin Islands, and Puerto Rico.")

[5] The same principle applies to the District of Columbia and the Native American nations. Refer, for instance, to *CSX Transp., Inc. v. Williams*, 406 F.3d 667, n. 7 (DC Cir. 2005) ("Eleventh Amendment immunity, however, extends only to States and our case law suggests that the District is not a State for the purpose of the Eleventh Amendment.") *Santa Clara Pueblo v. Martínez*, 436 U.S. 49, 58 (1978) ("Indian tribes have long been recognized

v. Sánchez, 495 U.S. 182, 202 (1990) ("The Eleventh Amendment does not of its own force apply to the Territories […]."); *Sakamoto v. Duty Free Shoppers, Ltd.*, 613 F.Supp. 381, 386 (D. Guam 1983) ("Thus, since the Eleventh Amendment to the Constitution of the United States does not encompass unincorporated territories, the Territory of Guam lacks the sovereignty of a state."); *U.S. v. Chang Da Liu*, 538 F.3d 1078, 1083 (9th Cir. 2008) ("In *Fleming*, we held that the Eleventh Amendment does not apply to the CNMI […]") (*citing Fleming v. Department of Public Safety*, 837 F.2d 401, 405 (9th Cir. 1988)). *Tonder v. M/V The Burkholder*, 630 F.Supp. 691, 694 (D. USVI 1986) ("Since the Eleventh Amendment does not apply in the Virgin Islands, there is no jurisdictional bar preventing this suit against [the College of the Virgin Islands] from proceeding in federal court.")

Third, the law of the First Circuit treating Puerto Rico as a state for purposes of the Eleventh Amendment arguably rests on infirm foundations, if seen in light of this Court's most recent ruminations on the issue of Puerto Rico's location within the Republic's federal superstructure. *See e.g. United States v. Vaello Madero*, at 1541 (2022) ("The United States includes five Territories: American Samoa, Guam, the Northern Mariana Islands, the U. S. Virgin Islands, and Puerto Rico.")

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as possessing the common-law immunity from suit traditionally enjoyed by sovereign powers. This aspect of tribal sovereignty, like all others, is subject to the superior and plenary control of Congress.")

The First Circuit initially adopted this holding in 1981,[6] in a footnote to an opinion authored by then Judge Breyer in *Ezratty v. Commonwealth of Puerto Rico*, 648 F.2d 770, n.7 (1st Cir. 1981). The First Circuit's decision in *Ezratty* was announced less than a fortnight before Judge Breyer's opinion in *Cordova & Simonpietri Ins. Agency Inc. v. Chase Manhattan*, 649 F.2d 36 (1981).[7] In *Córdova*, building on caselaw going back to Chief Judge Magruder's opinion in *Mora v. Mejías*, 206 F.2d 377 (1st Cir. 1953),[8] the First Circuit

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[6] For a detailed narrative of the First Circuit's approach to this issue refer to Adam D. Chandler, "Puerto Rico's Eleventh Amendment Status Anxiety," 120 YALE L. J. 2183, 2189 (2011).

[7] *Ezratty* was heard on February 4, 1981 and decided on May 8, 1981. *Córdova* was heard on February 5, 1981 and decided on May 19, 1981.

[8] The First Circuit developed the thesis that Puerto Rico, upon the inauguration of its Constitution in 1952, ceased to be a territory in *Mora v. Mejías*, 206 F.2d 377, 387 (1st Cir. 1953). There Chief Judge Magruder suggested that the Commonwealth was now "a political entity created by the act and with the consent of the people of Puerto Rico and joined in union with the United States of America under the terms of the compact." Three years later, in *Figueroa v. People of Puerto Rico*, 232 F.2d 615, 620 (1st Cir. 1956), Magruder concluded that "the constitution of the Commonwealth is not just another Organic Act of the Congress. We find no reason to impute to the Congress the perpetration of such a monumental hoax. U.S. Public Law 600 offered to the people of Puerto Rico a 'compact' [. . .]." In *First Federal Savings and Loan Association v. Ruiz de Jesús*, 644 F.2d 910, 911 (1st Cir. 1981), Judge Levin Campbell followed Chief Judge Magruder's thesis declaring, in no uncertain terms, that "Puerto Rico's territorial status ended, of course, in 1952." Judge Stephen Breyer arrived at the same conclusion in *Ezratty v. Commonwealth of Puerto Rico*, 648 F.2d 770, 776, n.7 (1st Cir. 1981) ("The principles of the Eleventh Amendment . . . are fully applicable to the Commonwealth of Puerto Rico."). Similarly, in *Córdova & Simonpietri Insurance Agency v. Chase Manhattan Bank*, *supra* at 41 (1st Cir. 1981), Breyer found that "Puerto Rico's status

found that following the inauguration of the Puerto Rico Constitution in 1952 the island's "status changed from that of a mere territory to the unique status of Commonwealth. And the federal government's relations with Puerto Rico changed from being bounded merely by the territorial clause, and the rights of the people of Puerto Rico as United States citizens, to being bounded by the United States and Puerto Rico Constitutions, Public Law 600, the Puerto Rican Federal Relations Act […]." *Córdova* at 41.

Following on the heels of *Córdova*, the First Circuit announced in *U.S. v. López Andino*, 831 F.2d 1164, 1168 (1987) that "Puerto Rico is to be treated as a state for purposes of the double jeopardy clause." Close to thirty years later, in 2016, this Court overturned *López Andino* in *Puerto Rico v. Sánchez Valle*, 579 U.S. 59 (2016), holding that Puerto Rico is not a separate sovereign for purposes of the Double Jeopardy Clause and that "the ultimate source of Puerto Rico's prosecutorial power is the Federal Government." *Sánchez Valle* at 78.

Because *Ezratty* shares with *López Andino* the same infirm doctrinal foundation, it appears unlikely that its conclusion that the Eleventh Amendment is applicable to Puerto Rico could survive this Court's scrutiny.

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changed from that of a mere territory to the unique status of Commonwealth." In *U.S. v. López Andino*, 831 F.2d 1164, 1168 (1st Cir. 1987), Judge Hugh Bownes held that "Puerto Rico is to be treated as a state for purposes of the Double Jeopardy Clause." *López Andino* was overruled by this Court in *Sánchez Valle*. Rafael Cox Alomar THE PUERTO RICO CONSTITUTION (Oxford University Press, 2022), 37, n. 235.

II. Even assuming, *arguendo*, that this Court decides to treat Puerto Rico like a state for Eleventh Amendment immunity purposes, Puerto Rico voluntarily *waived* its sovereign immunity in federal court by establishing a private cause of action against itself and all other territorial entities, including the FOMB, for accessing public records pursuant to the disclosing obligations emanating from Article II, Section 4 of the Puerto Rico Constitution.

Puerto Rico's waiver of its sovereign immunity for purposes of consenting to private suits seeking access to public documents predates the Puerto Rico Supreme Court's finding of a fundamental right to governmental information under Article II, Section 4 of the Puerto Rico Constitution.[9] *See Soto v. Secretario de Justicia*, 112 D.PR. 477 (1982). *Also see, Dávila v. Superintendente General de Elecciones*, 82 D.P.R. 264 (1960);[10] *Prensa Insular de Puerto Rico, Inc. v. Cordero, Auditor*, 67 D.P.R. 89 (1947).[11]

It is undisputable fact that the Government of Puerto Rico voluntarily waived its sovereign immunity in the territorial courts to suits seeking access to public documents. Puerto Rico's waiver, moreover, extends to all territorial agencies and instrumentalities, including

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[9] "No law shall be made abridging the freedom of speech or of the press, or the right of the people peaceably to assemble and to petition the government for a redress of grievances."

[10] Plaintiffs seeking writ of mandamus ordering the Puerto Rico Election Board to surrender the list of voters who went to the polls in the 1956 general elections.

[11] Plaintiffs seeking writ of mandamus against the island's Comptroller requesting the disclosure of information pertaining to government contracts.

the FOMB, which as this Court found in *Financial Oversight and Management Board v. Aurelius Investment LLC*, 140 S. Ct. 1649, 1661 is "an entity within the territorial government."

Because PROMESA precludes the filing of any action against the FOMB in the territorial courts,[12] Puerto Rico's expansive consent to suits seeking disclosure and inspection of public documents necessarily encompasses its consent to suit in federal court.

It is a well established principle of American federalism that "a waiver of sovereign immunity in a sovereign's own court does not necessarily suffice to waive sovereign immunity in the court of another sovereign." *See* U.S. Solicitor General, *Amicus Curiae* Brief in this litigation at 32 (filed on Nov. 23, 2022) (*citing Great N. Life Ins. Co. v. Reed*, 322 U.S. 47, 54 (1944)).

This Court has held that a state will be deemed to have waived its immunity "only where stated 'by the most express language or by such overwhelming implication from the text as [will] leave no room for any other reasonable construction.'" *Edelman v. Jordan,* 415 U.S. 615, 673 (1974).

Thus, consent to suit in state court does not automatically waive immunity in federal court. *Port Authority Trans-Hudson Corp. v. Feeney*, 495 U.S. 299, 306 (1990) (finding that a state "does not waive its Eleventh Amendment immunity by consenting to suit

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[12] The language found in PROMESA's Section 106(a) leaves room to no other conclusion: "any action against the Oversight Board […] shall be brought in a United States district court for the covered territory or, for any covered territory that does not have a district court, in the United States District Court for the District of Hawaii."

only in its own courts.") This Court made it plain clear in *Port Authority* that "in order for a state statute or constitutional provision to constitute a waiver of Eleventh Amendment immunity, it must specify the [s]tate's intention to subject itself to suit in *federal court*." *Id.* (citing *Atascadero State Hospital v. Scanlon*, 473 U.S. 234, 241 (1985)).

In *Port Authority* an employee of a railroad owned by the Port Authority of New York and New Jersey sued its employer in federal court under the Federal Employers' Liability Act (FELA), 45 U.S.C. § 51 *et seq*. The railroad sought dismissal invoking its alleged Eleventh Amendment immunity. Yet, this Court held that the statutory consent to suit found in the bi-state compact entered into by New York and New Jersey for establishing the Port Authority was expansive enough to encompass "the [s]tates' consent to suit in federal court as well as state court." *Port Authority* at 306.

Although the facts surrounding *Port Authority* are easily distinguishable from the factual jigsaw puzzle leading to the present controversy, the fundamental principle announced by this Court there remains. Having consented to suit "in expansive terms" Puerto Rico's waiver "encompasses" consent to suit in both local and federal courts. Because PROMESA's deprivation of the territorial courts' ability to hear cases or controversies arising out of the FOMB's violation of the constitutional right to access and inspect public records is so destabilizing to the Puerto Rican legal order – severely weakening the scope of those expressive freedoms found under Section 4 of the local Bill of Rights – Puerto Rico's consent to suit must necessarily encompass actions in federal court.

Puerto Rico has historically expressed an unequivocal intent to expansively consent to actions seeking the

disclosure of public documents. At the time the Puerto Rico Supreme Court in *Soto*, *supra*, found an implied right to access and inspect public documents under Section 4 of the Puerto Rico Bill of Rights, and the Puerto Rico Legislature subsequently enacted legislation codifying the scope of that constitutional right, both branches clearly relied on the ability of the judiciary to enforce this constitutional right in the local courts and could not have foreseen the enactment of PROMESA at the hands of Congress, let alone the foreclosure of their power to vindicate the fundamental right of the people to access public information generated by a territorial entity such as the FOMB.

Holding that Puerto Rico has not waived its sovereign immunity in federal court for purposes of consenting to suits seeking to access and inspect public documents would lead to a fundamentally arbitrary and absurd outcome. For the first time since the founding of the Republic a territorial entity would enjoy absolute immunity from suit both in federal and territorial courts. Far greater immunity than the one enjoyed by the federal political branches, and any existing state entity.

III. Petitioner's contention that despite its territorial nature it remains immune from suit both in territorial and federal court, even in the face of the territorial government's voluntary waiver, leads to an untenable result: for the first time since the founding of the Republic a territorial entity would enjoy absolute immunity from suit, far greater than the immunity enjoyed by the political branches of the federal government, and any existing state entity.

The posture adopted by Petitioner in the present litigation is erroneous both as a matter of law and policy.

Petitioner's arbitrary reading of its location within Puerto Rico's internal legal order is highly problematic – vesting the FOMB (admittedly "an entity within the territorial government"[13]) with absolute power over the territorial political branches while at the same rendering it absolutely immune from Puerto Rico's disclosure laws both in federal court and territorial court.

Interestingly, and despite its contention that PROMESA preempts Section 4 of the Puerto Rico Constitution's Bill of Rights and the disclosure laws that emanate from it,[14] Petitioner does not shy away from expressly acknowledging in its service contracts with local providers that such contracts "shall be governed by the laws of the Commonwealth of Puerto

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[13] *Financial Oversight and Management Board v. Aurelius Investment LLC*, 140 S. Ct. 1649, 1661.

[14] *Centro de Periodismo Investigativo, Inc. v. Financial Oversight and Management Board for Puerto Rico*, 35 F.4th 1, 9 (1st Cir. 2022).

Rico independent of its choice of law principles." *See* https://drive.google.com/file/d/14AkH2L2J4eFwQ3atobhCc4-1PjuevCCi/view (Clause 17 of Independent Contractor Services Agreement.) In its employment contracts, moreover, Petitioner acknowledges that "[t]he validity, interpretation, construction, and performance of this Agreement *shall be governed by the laws of the Commonwealth of Puerto Rico* without regard to the choice of law principles thereof." *See* https://drive.google.com/file/d/1j_4kyCbRu4sXve7MrB34yxNNAMjyoFdw/view (Miscellaneous Clause of Employment Agreement).

The language used by Petitioner in its service and employment contracts clearly demonstrates its understanding that, far from preempted by PROMESA, the laws of Puerto Rico (which certainly include Section 4 of the Puerto Rico Constitution's Bill of Rights and the disclosure laws flowing from it) govern the FOMB's operations.

Petitioner conveniently claims for itself the power to switch the territorial legal order "on or off at will," *Boumediene v. Bush*, 553 U.S. 723, 765 (2008), readily binding itself to Puerto Rico's labor laws while declining to respect Puerto Rico's disclosure laws.

In justifying such an obviously irregular outcome, Petitioner has gone to great lengths in concocting a legal argument that is clearly without merit. From a public policy perspective, Petitioner's argument flies in the face of the values inspiring the framers of the American constitutional experiment. A close perusal of early American constitutional history unambiguously shows that the twin values of transparency and accountability were not lost on the framers.

So prominent were those values to the founding generation that in 1792 President George Washington voluntarily surrendered to Congress those documents in his power pertaining to the failed military campaign of General St. Clair in the Northwest Territory. *See Trump v. Mazars USA, LLP*, 140 S. Ct. 2019, 2029-2030 (2020). Along similar lines plodded President John Adams when in 1798, assailed by an imminent war with France, voluntarily released to Congress the infamous XYZ papers detailing the negotiations that had transpired in Paris between the American envoys (among them the future Chief Justice John Marshall) and the French Foreign Ministry then in the hands of the Marquise de Talleyrand. By 1807, in the waning days of his second term in office, President Thomas Jefferson voluntarily disclosed to Congress the records in his possession revealing former Vice-president Aaron Burr's treasonous activities in the frontier. *Mazars*, at 2030.

Washington, Adams, and Jefferson understood that the presidency is not without bounds, that its power is not absolute, and that transparency and accountability are core pillars of America's representative democracy. President Nixon, however, took the road less traveled – refusing to obey a subpoena *duces tecum* issued by the United States District Court for the District of Columbia directing him to surrender a series of tape recordings and documents relating to his conversations in the Oval Office with aides and advisers. *See United States v. Nixon*, 418 U.S. 683, 686 (1974). In justifying his untenable position, the president – as does Petitioner here – argued he enjoyed an absolute and unqualified immunity from judicial processes under all circumstances. *Id.* at 706. This Court unanimously rejected President Nixon's pretensions,

reminding the Nation that no one, not even "a president is above the law." *Id.* at 715.

Transparency and accountability are core pillars of America's representative democracy. Although this Court has yet to find a federal constitutional right to access and inspect public documents, *see Houchins v. KQED, Inc.,* 438 U.S. 1, 9 (1978) ("[t]his Court has never intimated a First Amendment guarantee of a right of access to all sources of information within government control"), there is an undeniably consistent commitment to transparency and accountability across the federal government, the fifty states and the District of Columbia.

At the federal level, the enactment in 1967 of the Freedom of Information Act (FOIA) constitutes "the most prominent expression of [the United States's] profound national commitment to ensuring an open Government."[15] In construing the metes and bounds of FOIA, this Court has found that its "mandate calls for broad disclosure of Government records." *See C.I.A. v. Sims*, 471 U.S. 159, 166 (1985). *See also Baldrige v. Shapiro*, 455 U.S. 344, 352 (1982) ("The broad mandate of the FOIA is to provide for open disclosure of public information.")

Similarly, all fifty states, and the District of Columbia, have enacted their own freedom of information statutes (including so-called 'open meetings' legislation), which closely mimic the FOIA. *See* https://www.nfoic.org/state-freedom-of-information-laws/,

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[15] See the Presidential Memorandum "For Heads of Department and Agencies – Transparency and Open Government" from 21.01.2009 (First Day in Office), weblink: https://obamawhitehouse.rchives.gov/the-press-office/2015/11/16/memorandum-transparency-and-open-government (Accessed November 27, 2022).

List of Freedom of Information Statutes for the Fifty States, and the District of Columbia.

Puerto Rico's constitutional right to access and inspect public documentation arises from the same values that led Washington, Adams, and Jefferson to voluntarily surrender their presidential papers to Congress, and in no way departs from the fundamental guarantees of freedom of information ingrained in the FOIA and in the wide-ranging corpus of state statutes mirroring FOIA.

If this Court grants Petitioner's request, the FOMB (despite the fact that its members are territorial officers appointed by the president of the United States without the advice and consent of the U.S. Senate[16]) will now enjoy far more protection from press disclosure requests than the president himself. *The New York Times*, *The Wall Street Journal*, *CNN*, and *Fox News* could, arguably, request and obtain public records from President Joe Biden, Vice-President Kamala Harris, or Speaker Nancy Pelosi, but not from the FOMB. Clearly, Congress could not have intended for such an absurd outcome when it enacted PROMESA.

Because Petitioner's absolutist (*Nixonesque)* pretensions run afoul this Nation's foundational values of transparency and accountability in the affairs of government, they must necessarily fail.

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[16] See *Financial Oversight and Management Board for Puerto Rico v. Aurelius Investment, LLC*, 140 S. Ct. 1649 (2020).

IV. Because in enacting PROMESA, Congress has not explicitly or implicitly preempted the fundamental right to access public information found under Article II, Section 4 of the Puerto Rico Constitution, Puerto Rico's voluntary waiver of its sovereign immunity, including the FOMB's, does not conflict with PROMESA's outer limits nor with the FOMB's autonomy.

A. The fundamental right to access and inspect public documents is inseparably entwined with the bundle of expressive rights founds in the Puerto Rico Bill of Rights, namely the freedoms of speech and the press, the right of the people to peacefully assemble and to petition the territorial government for the redress of grievances.

The Puerto Rico Supreme Court has left no room for ambiguity or equivocation: in Puerto Rico the right to access and inspect public documents sits at the pinnacle of the constitutional order – alongside the freedom of speech, the freedom of the press, the right to peacefully assemble, and the right to petition the government for redress of grievances. *See* P.R. Const. Art. II, Sec. 4.

Because the fundamental rights enshrined in Section 4 of the Puerto Rico Bill of Rights serve as guarantors of the constant ebb of thoughts and ideas safeguarding society's open and free scrutiny of governmental affairs, "it is logical to conclude that there is a close relationship between the freedom of speech and the freedom of information." *Soto v. Secretario de Justicia*, 112 D.P.R. 477, 485 (1982). *Also see Bhatia Gautier v. Gobernador*, 199 D.P.R. 59, 81

(2017) (*citing Ortiz v. Dir. Adm. de los Tribunales*, 152 D.P.R. 161, 175 (2000)).

In the words of Justice Negrón García, "[t]he premise is simple. It is impossible to pass judgment on something without knowledge of the facts; neither may redress from government damages be claimed through judicial proceedings or at the polls every four (4) years." *Soto* at 485.

While implied and unenumerated in the constitutional text, the right to access and inspect public documents is fundamental in the Puerto Rican legal order, as the island's high court announced in the historic[17] case of *Soto v. Secretario de Justicia*, *supra*.

Although the right to access and inspect public documents was only constitutionalized in 1982, it was not at all foreign to the island's legal topography before *Soto*, as Article 47 of the 1905 Puerto Rico Law of Evidence so eloquently shows (*"Every citizen has a right to inspect and take a copy of any public document of Puerto Rico, except as otherwise expressly provided by statute."*)[18] It is important to note, moreover, that

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[17] Note that *Soto* came on the heels of the uncovering of one of the worse episodes of governmental brutality in Puerto Rico's history, namely the assassination at the hands of local police of two unarmed pro-independence youths. *See* Justice Negrón García's opinion for the court in *Soto* at 480-483.

[18] The Spanish official version of Article 47 reads as follows: "*Todo ciudadano tiene derecho a inspeccionar y sacar copia de cualquier documento público de Puerto Rico, salvo lo expresamente dispuesto en contrario por la ley.*" The above-refenced Law of Evidence (enacted by the territorial government pursuant to the quantum of legislative authority delegated to it by Congress under the 1900 Foraker Act) became fully effective on March 9, 1905. See 32 L.P.R.A. § 1781. For the Puerto Rico Supreme Court's construction of Article 47 of the 1905 statute refer, for instance, to *Vidal v. Marrero*, 20 D.P.R. 264, 265 (1914).

the language of the 1905 territorial statute was imported to Puerto Rican latitudes, *in toto*, from Article 902 of the 1881 Idaho Code of Civil Procedure.[19] The language found in Article 47 of the 1905 statute was subsequently incorporated into Article 409 of the 1933 Code of Civil Procedure,[20] and left undisturbed by the Rules of Evidence approved by the Puerto Rico Legislature in 1979.[21] It was against this background, that the Puerto Rico Supreme Court, three years later, constitutionalized the right to access and inspect public documents.

The *Soto* Court's transformation of an erstwhile statutory right into a constitutional right of the first order, far from unravelling the framers' design, ran parallel to the ideological values informing the drafting of the Puerto Rico Bill of Rights during the

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Note that the term "public documents," referenced in the 1905 local statute, was fully defined in Article 1184 of Puerto Rico's 1902 Civil Code.

[19] Note that following the Spanish Crown's cession of Puerto Rico to the United States pursuant to the 1898 Treaty of Paris, the old Spanish Code of Civil Procedure was replaced with a new Code of Civil Procedure for the most part based on the 1881 Idaho Code of Civil Procedure, which itself came from the 1872 California Code of Civil Procedure. Hence, the historical pedigree of the Puerto Rico rule shows that it is by no means foreign to the American legal landscape.

[20] For the Puerto Rico Supreme Court's reading of Article 409 of the 1933 Code of Civil Procedure see, among others, *Dávila v. Superintendente General de Elecciones*, *supra* at 279-282 (1960); *Prensa Insular de Puerto Rico, Inc. v. Cordero*, *supra* at 97-99 (1947).

[21] Refer to Rule 84(b) of the 1979 Rules of Evidence. P.R. Laws Ap. Tit. 32A, § IV. *Also see* 108 D.P.R. 437 (1979).

course of the 1952 constitution-making exercise.[22] Imbued in the postwar values found in the 1948 Universal Declaration of Human Rights,[23] the Puerto Rican framers unsurprisingly placed at centerstage the "inviolability of human dignity," (*see* P.R. Const, Art. II, Sec. 1) which necessarily encompasses the freedoms of conscience, thought, speech and all related

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[22] On July 3, 1950, President Truman signed U.S. Public Law 600, providing "for the organization of a constitutional government by the people of Puerto Rico." Pub. L. No. 81- 600, 64 Stat. 319 (codified at 48 U.S.C. §§ 731 et seq.) Congress adopted this statute "in the nature of a compact so that the people of Puerto Rico may organize a government pursuant to a constitution of their own adoption." *Id*. U.S. Public Law 600, which required that the new Constitution provide for a republican form of government and a bill of rights, was ratified by the people of Puerto Rico in a referendum held on June 4, 1951, after which delegates to the Constitutional Convention were selected by the local electorate on August 27, 1951, to draft the Constitution. The people of Puerto Rico approved the new Constitution in a referendum held on March 3, 1952, and it was subsequently transmitted to Congress for definitive approval. On July 1, 1952, Congress sanctioned the new Constitution, but not without first modifying several of its provisions. President Truman's signature of U.S. Public Law 447, on July 3, 1952, cleared the way for Governor Luis Muñoz Marín's inauguration of the Constitution on July 25, 1952. The Constitution of Puerto Rico was approved by 80 percent of the voters participating in the referendum. See Constitutional Convention, Res. No. 34 of July 10, 1952 (1952) (P.R.) (codified in P.R. Laws Ann. tit. 1, at 144–146). For the congressional act approving the 1952 Constitution, see Pub. L. No. 82- 447, 66 Stat. 327 (1952). See Rafael Cox Alomar, THE PUERTO RICO CONSTITUTION (Oxford University Press, 2022), 35-36.

[23] Note that Article 19 of the 1948 Universal Declaration of Human Rights explicitly recognizes the existence of a right "to seek, receive and impart information and ideas through any media and regardless of frontiers."

expressive activities guaranteed under Sections 3[24] and 4[25] of the Puerto Rico Bill of Rights.[26] Thus, the implied right to access and inspect public documents constitutes a derivation of the above-referenced liberties.

The Puerto Rico Supreme Court has made it plain clear that the right of the press and of every citizen to access and inspect public documents is fundamental and that the government's refusal to disclose its records necessarily triggers strict scrutiny. Thus, the government must bear the burden of showing that its refusal to surrender the relevant public documentation is necessary to achieve a compelling governmental interest. *Kilómetro O, Inc. v. Pesquera López*, 207 D.P.R. 200, 210 (2021), *Bhatia Gautier v. Gobernador*, *supra* at 82 (2017), *Trans Ad de P.R. v. Junta de Subastas*, 174 D.P.R. 56, 68 (2008), *Ortiz v. Dir. Adm. de los Tribunales*, *supra* at 175 (2000).

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[24] "No law shall be made respecting an establishment of religion or prohibiting the free exercise thereof. There shall be complete separation of church and state." Similarly, Article 19(2) of the International Covenant on Civil and Political Rights establishes that "[e]veryone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice." 99 U.N.T.S. 171 (1996).

[25] "No law shall be made abridging the freedom of speech or of the press, or the right of the people peaceably to assemble and to petition the government for a redress of grievances."

[26] For the framers' expansive reading of Sections 3 and 4 of the Bill of Rights see, for instance, DIARY OF SESSIONS OF THE PUERTO RICO CONSTITUTIONAL CONVENTION, (Lexis-Nexis of Puerto Rico Inc., 2003), Vol. 4, 2564. Also refer to Rafael Cox Alomar THE PUERTO RICO CONSTITUTION (Oxford University Press, 2022), 59-107.

It is well settled that so long as the requested document is "public" in nature, namely generated, received, or kept by a governmental entity (even if under the custody of a third party),[27] the press and every citizen enjoy standing to seek its disclosure and, moreover, file in court a petition for a writ of mandamus against the government if the disclosure petition is denied.[28] *Kilómetro O, Inc. v. Pesquera López*, *supra* at 209 (2021).

The Puerto Rico Supreme Court has identified a few instances where a public entity's refusal to disclose passes constitutional muster under heightened review: whenever (1) an existing law (in full force and effect) so requires it; (2) the requested document is protected by an evidentiary privilege; (3) the disclosure may impair the fundamental rights of third parties; and/or (4) run afoul the safeguards found under Puerto Rico Rules of Evidence 514 and 515 with respect to informants. *Kilómetro O, Inc. v. Pesquera López*, *supra* at 210 (2021).

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[27] See Article 3 of the 2019 Transparency and Expedited Procedure for Accessing Public Information Act (hereinafter Puerto Rico Law No. 141 of 2019), 3 P.R. Law Ann. §9913. Note that Puerto Rico Law No. 141 of 2019 was enacted for the purpose of codifying the metes and bounds of Puerto Rico's fundamental right to public information in light of the Puerto Rico Supreme Court's caselaw. For a brief commentary on why it was necessary to pass special legislation on this subject see, for instance, José Julián Álvarez González, "Derecho Constitucional," 74 REV. JUR. U.P.R. 597, 631-633 (2005). Also refer to Carlos F. Ramos Hernández, "Acceso a la Información: Transparencia y Participación Política, 85 REV. JUR. U.P.R. 1015 (2016), Alba Nydia López Arzola, "Hacia una ley general de transparencia para Puerto Rico," 53 REV. JUR. U.I.P.R. 89 (2019).

[28] Refer to Articles 9 and 12 of Puerto Rico Law No. 141 of 2019.

Even assuming, *arguendo*, that Petitioner contends that the disclosure of the requested documents, namely "documents regarding Puerto Rico's fiscal situation, communications among Board members, contracts, meeting minutes, and financial disclosure forms for Board's members" *Centro de Periodismo Investigativo, Inc. v. Financial Oversight and Management Board for Puerto Rico*, 35 F.4th 1, 6 (1st Cir. 2022), is too oppressive or disruptive a task, the Puerto Rico Supreme Court has long held that courts enjoy ample discretion to craft the necessary procedural mechanisms for addressing the non-moving party's production concerns – especially when the request is too voluminous or technologically challenging. Thus, Puerto Rico law provides a mechanism for Petitioner to comply with the disclosure requirements emanating from Section 4 of the Puerto Rico Bill of Rights, while safeguarding its interest in producing the requested records in a timely, yet orderly manner. *See e.g. Nieves v. Junta*, 160 D.P.R. 97 (2003); *Noriega v. Gobernador*, 130 D.P.R. 919 (1992); *Noriega v. Gobernador*, 122 D.P.R. 650 (1988).[29]

Because the records requested by Respondent are "public," within the meaning of Puerto Rico law, and are not protected from disclosure by any of the above-referenced exceptions, the FOMB (which as this Court found in *Aurelius* is a territorial entity[30]) is required to

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[29] Also refer to Judge Alfonso Martínez Piovanetti's opinion in *Centro de Periodismo Investigativo, Inc. v. Autoridad de Asesoría Financiera y Agencia Fiscal* (*AAFAF*), SJ 2017 CV 00396 (Feb. 16, 2021) at 34.

[30] In *Aurelius*, the Court noted by voice of Justice Breyer that "PROMESA says that the Board is "an entity within the territorial government." *Financial Oversight and Management Board v. Aurelius Investment LLC*, 140 S. Ct. 1649, 1661 (2020).

disclose the requested documents per the strictures of Article II, Section 4 of the Puerto Rico Constitution.

B. Nothing in the text, history, and purpose of PROMESA lends support to the proposition that Congress intended to preempt the fundamental right to access and inspect public documents found under Article II, Section 4 of the Puerto Rico Constitution and Puerto Rico Law No. 141 of August 1, 2019.[31]

It is a well settled principle of American federalism that Congress, acting in furtherance of the mandate emanating from the Supremacy Clause, U.S. Const. Art. VI cl.2, "has the power to preempt state [and territorial] law" *Crosby v. National Foreign Trade Council*, 530 U.S. 363, 372 (2000), when state or territorial law "conflicts with federal law." William Funk, INTRODUCTION TO AMERICAN CONSTITUTIONAL LAW: STRUCTURE AND RIGHTS (West Academic Publishing, 2020), 308. Also see Noah Feldman and Kathleen Sullivan, CONSTITUTIONAL LAW (Foundation Press, 2022), 280.

In *Crosby*, writing for a unanimous Court, Justice Souter reiterated that "[e]ven without an express provision for preemption, we have found that state law must yield to a congressional Act in at least two circumstances. When Congress intends federal law to

[31] Amicus understands that while the preemption issue was not briefed by Petitioner in its *Certiorari* petition, it goes to the heart of this controversy, as the U.S. Solicitor General intimated in her brief. See U.S. Solicitor General, *Amicus Curiae* Brief at 32-33.

"occupy the field," and to the extent of any conflict with a federal statute." *Id.* at 372-373.

Explicit Preemption

It is clear, that PROMESA (contrary to the Federal Bankruptcy Code) does not contain an express preemption provision with respect to the disclosure of public documentation. See *Puerto Rico v. Franklin California Tax-Free Trust*, 579 U.S. 115, 126-127 (2016).

Implied Preemption

Field Preemption

Yet, "[a]bsent explicit preemptive language, Congress' intent to supersede state law altogether may be found from a 'scheme of federal regulation so pervasive as to make reasonable the inference that Congress left no room to supplement it,'" *Pacific Gas* at 204.

Field preemption is only triggered when state or territorial law directly conflicts with an exclusive zone of federal regulation.

In *United States v. Locke*, 529 U.S. 89, 115 (2000), this Court found that the Ports and Waterways Safety Act (PWSA) exclusively controlled the field with respect to the design, construction, alteration, repair, maintenance, operation, equipping, personnel qualification, and manning of tanker vessels. The *Locke* Court held that the PWSA completely preempted Washington State's tanker regulations.

The opposite is true here. As the U.S. District Court for the District of Puerto Rico rightly concluded,[32] in enacting PROMESA at no point did Congress preempt

[32] 2018 WL 2094375 at 10.

the entire field with respect to Puerto Rico's disclosure laws.

The argument raised by Petitioner before the U.S. District Court below, to the effects that PROMESA's fiscal regulatory framework is "so pervasive as to make reasonable the inference that Congress left no room to supplement it," *Pacific Gas* at 204, with disclosure requirements pursuant to territorial law is meritless.

Puerto Rico's disclosure laws do not conflict with PROMESA's statutory and public policy goals, which aim to restructure the island's governmental debt and stabilize the island's fiscal edifice. A close perusal of PROMESA suggests that Congress did not intend to preclude enforcement of territorial laws, such as the local disclosure statutes, which do not interfere with PROMESA's above-referenced goals.

Direct Conflict Preemption

The idea that "even where Congress has not entirely displaced state [or territorial] regulation in a specific area, state [or territorial] law is preempted to the extent that it actually conflicts with federal law," *Pacific Gas* at 204, goes back to founding of the Republic.

In the historic *Gibbons v. Ogden*, 22 U.S. 1 (1824), Chief Justice Marshall held that the New York monopoly law upon which Ogden operated his steamboat service between New York City and Elizabethtown in New Jersey was totally incompatible with a 1793 federal statute regulating the coasting trade and fisheries and was, thus, preempted.

Very different to the insurmountable conflict facing Ogden and Gibbons in the early stages of the steamboat revolution, for the FOMB to comply both with

PROMESA and with Puerto Rico's local disclosure laws does not amount to "a physical impossibility." *Pacific* at 204.

Obstacle Preemption

It is well settled that even in the absence of so-called "direct conflict preemption," Funk at 308, a state or territorial law might be preempted if the challenged state or territorial law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Crosby* at 373.

In *Crosby*, this Court unanimously found that a 1996 Massachusetts statute regulating state contracts with companies doing business in Myanmar placed a considerable obstacle in the enforcement of a 1997 federal statute explicitly delegating authority to the president of the United States over sanctions against Myanmar.

The application of Puerto Rico's disclosure laws to the FOMB in no way compromises PROMESA's regulatory purposes and objectives nor does it undermine the foundations of American federalism, as did the 1996 Massachusetts law preempted in *Crosby*.

Preemption in the Territories

Despite the indisputable fact that Puerto Rico, along with the remaining territories, is devoid of the inherent sovereignty enjoyed by the states and consequently subject to Congress's plenary powers under the U.S. Constitution's Territorial Clause (Art. IV, Sec. 3, Cl. 2),[33] this Court on numerous occasions has

[33] Refer, for instance, to *Grafton v. United States*, 206 U.S. 333, 354 (1907) ("The government of a state does not derive its powers from the United States, while the government of the Philippines owes its existence wholly to the United States, and its judicial

refused to preempt territorial statutes gravitating around the regulatory orbit surrounding federal statutes.[34]

It is well established that the preemption doctrine applies with equal vigor in the territories. More specifically, as this Court by voice of Justice Scalia reiterated in *Puerto Rico Dept. of Consumer Affairs v. Isla Petroleum, Corp.*, 485 U.S. 495, 499 (1988), "the test for federal pre-emption of the law of Puerto Rico at issue here is the same as the test under the Supremacy Clause for pre-emption of the law of a State."

Applying that test, the *Isla Petroleum* Court found that Congress's 1973 Emergency Petroleum Allocation Act (EPAA) did not preempt the local directives issued by the territorial Department of Consumer Affairs in 1986 regulating the price of oil in the island.

Similarly in *People of Puerto Rico v. Shell Co.,* 302 U.S. 253, 271 (1937), fifteen years before the inauguration of the 1952 Commonwealth Constitution and ten years prior to Congress's enactment of the 1947 Elective Governor Act,[35] this Court reversed the

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tribunals exert all their powers by authority of the United States.") Coinciding with the *Grafton* rationale, this Court in *Puerto Rico v. Sánchez Valle*, *supra* at 69 (2016) suggested that unlike the territories, "the States rely on authority originally belonging to them before admission to the Union and preserved to them by the Tenth Amendment."

[34] See, for instance, *State v. Norman*, 16 Utah 457 (1898) (holding that Congress did not preempt Utah's 1892 anti-polygamy statutes, enacted four years before Utah's 1896 admission to the Union); *In re Murphy*, 5 Wyo. 297 (1895) (holding that Congress did not preempt Wyoming's 1890 anti-polygamy statutes, enacted a few months before Wyoming's 1890 admission to the Union).

[35] 61 Stat. 770 (1947).

Puerto Rico Supreme Court – holding instead that the federal Shearman Act did not preempt the island's local antitrust territorial legislation, which was fully valid and enforceable.

Puerto Rico's territorial condition in no way detracts from the inescapable conclusion that in enacting PROMESA Congress did not preempt Puerto Rico's disclosure laws, which are fully applicable against the FOMB in federal court.

Conclusion

The FOMB's preemption argument has a fatal flaw: it fails to understand that "the purpose of Congress is the ultimate touchstone in every pre-emption case." *Wyeth v. Levine*, 555 U.S. 555, 565 (2009). The FOMB's contention must necessarily fail because it "elevat[es] extratextual purpose over textual commands," 126 HARV. L. REV. 1056, 1058 (2013).

Because nothing in the text, history, and purpose of PROMESA lends support to the FOMB's proposition that in enacting PROMESA Congress intended to preempt Puerto Rico's disclosure laws, Petitioner's preemption argument is without merit and must fail.

CONCLUSION

For all these reasons, this Court should affirm the orders issued by the United States Court of Appeals for the First Circuit.

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