UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

CENTRO DE PERIODISMO INVESTIGATIVO,

Plaintiff,

v. Civil No. 17-1743 (JAG)

FINANCIAL OVERSIGHT AND MANAGEMENT BOARD FOR PUERTO RICO,

Defendant.

BRIEF OF *AMICUS CURIAE*
THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS
IN SUPPORT OF PLAINTIFF'S OPPOSITION TO
DEFENDANT'S MOTION TO DISMISS

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

INTRODUCTION

This case concerns whether the Financial Oversight and Management Board for Puerto Rico (the "Board") is exempt from the long-standing constitutional and statutory rights of access to government records and information that are afforded the public under Puerto Rico law. The Board is a government entity established by Congress as a result of Puerto Rico's financial crisis that wields considerable power and control over Puerto Rico's budget.

The Board argues that the Puerto Rico Oversight, Management, and Economic Stability Act ("PROMESA" or the "Act"), 48 U.S.C. § 2101, *et seq.*, which established the Board, preempts the rights of access guaranteed to the citizens of Puerto Rico and limits the Board's disclosure obligations to only certain information specifically identified in the Act. But there is no support for such an extreme interpretation in the statutory text, and the Board's position would require this Court to assume that where Congress is silent, it intends to supplant existing state law disclosure requirements. This would flip the well-established presumption against preemption on its head and lead to an absurd result: the "Oversight Board" that Congress established to create an open process to restore Puerto Rico's fiscal health, *id.* at § 2121(a), would be able to keep the public in the dark about matters of critical importance, thereby eroding public confidence in the Board and undermining its effectiveness by inviting arbitrary actions, poor administration, and corruption. Surely this was not Congress's intent.

For these reasons, the Reporters Committee for Freedom of the Press (the "Reporters Committee") submits this brief as *amicus curiae* in support of plaintiff Centro de Periodismo Investigativo ("CPI"), a nonprofit organization of investigative journalists, to urge the Court to deny the Board's motion to dismiss and to recognize that Puerto Rico's constitutional and statutory rights of access apply here.

ARGUMENT

I. Congress never intended to preempt Puerto Rico's rights of access.

A. Express preemption did not occur here.

The Board's insistence that PROMESA strips Puerto Ricans of their constitutional and statutory rights of access goes too far. (Board's Motion to Dismiss ("Mot.") at 9–13, Dkt. No. 22.) Contrary to the Board's assertions, the "Supremacy" section of PROMESA does not approach expressly preempting these rights under Puerto Rico law; that provision merely provides that the Act will prevail over state or territory law that is "inconsistent." 48 U.S.C. § 2103. There is nothing inconsistent between PROMESA, which aims to help Puerto Rico "achieve fiscal responsibility and access to the capital markets," 48 U.S.C. § 2121(a), and the public's right to government information and public documents under the Puerto Rico constitution and civil code, *Soto v. Sec'y. of Justice*, 12 P.R. Offic. Trans. 597, 608 (P.R. 1982) (recognizing constitutional right of access to government information); P.R. Laws Ann. tit. 32, § 1781 (recognizing citizen's right to inspect and copy "public document[s] of Puerto Rico"). Thus, there is no preemption here. *De J. Cordero v. Prensa Insular De P.R., Inc.*, 169 F.2d 229, 233 (1st Cir. 1948) (federal statute dealing with Puerto Rico auditor's custody of records did not conflict with—and therefore did not preempt—Puerto Rico statutory right of access that imposed additional disclosure obligations upon the auditor); *see also Wis. Pub. Intervenor v. Mortier*, 501 U.S. 597, 600–03, 606 (1991) (federal pesticide law did not preempt additional local pesticide regulations that were not in conflict).

In fact, while PROMESA does not directly address the public's rights of access under Puerto Rico law, several provisions in the Act evince Congress's aim of making the Board open to the public, a goal that is entirely consistent with Puerto Rico's constitutional and statutory

rights of access. *See*, *e.g.*, 48 U.S.C. § 2121(h)(1) (all "bylaws, rules, and procedures" adopted by the Board are "public documents"); *id.* at § 2124(e) ("All gifts, bequests or devises" given to the Board, and the identities of their donors, must be publicly disclosed within thirty days); *id.* at § 2124 (o, p) (the Board must make public the findings of its investigations into disclosure and selling practices); *id.* at § 2129(a, b) (all Board members and staff must make financial interest disclosures and comply with federal conflict of interest laws under 18 U.S.C. § 208, which includes a requirement to make conflict-of-interest exemptions available to the public under § 208(d)(1)). PROMESA even 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." *Id.* at § 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 . . . ." *Id.* at § 2144(b)(3).

PROMESA's legislative history helps explain why Congress valued a transparent process for Puerto Rico's debt management. As Senator Orrin Hatch (R-Utah) explained when he called for a vote on PROMESA in the Senate:

> I voted to invoke cloture on the bill because, thanks to . . . the government of Puerto Rico, it is the only option on the table . . . . Astoundingly, the government of Puerto Rico has not provided audited financial statements since 2013, despite its responsibilities to do so under continuing disclosure requirements and multiple requests from Congress and investors. . . . [W]e have yet to get anything resembling a firsthand account of the true fiscal situation in Puerto Rico. In fact, this lack of transparency–and that is putting it kindly–has gone on for years. . . . Therefore, in order to finally determine the true state of Puerto Rico's finances . . . I will, once again, be voting yes on this bill. . . . [It] promises 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, S4691-92 (June 29, 2016). President Barack Obama echoed the importance of 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 Financial Oversight and Management Board for Puerto Rico* (Aug. 31, 2016) (available at https://perma.cc/8UL7-SNCG).

Puerto Rico's constitutional and statutory rights of public access, which serve the goals of government transparency and accountability, only complement PROMESA. When the Puerto Rico Supreme Court first recognized a constitutional right of access to government information, it explained, "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 citation and quotation marks omitted); *see also Santiago v. Bobb & El Mundo, Inc.*, 17 P.R. Offic. Trans. 182, 190 (P.R. 1986) (reducing the barriers to government information was a "constitutional imperative" and essential to "a genuine democracy based on the free flow of ideas"). 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. Accordingly, the Board faces disclosure requirements under Puerto Rico law that are in addition to—*and not in conflict with*—its existing obligations under PROMESA and, in fact, further the purposes of the Act. *See De J. Cordero*, 169 F.2d at 233.

In an effort to evade these disclosure requirements, however, the Board first erroneously claims that Congress included only two disclosure requirements in PROMESA, (Mot. at 11 (citing 48 U.S.C. § 2124(p) and 2121(h)(1)), ignoring the other relevant provisions set forth above. Next, the Board invites legal error by urging this Court to read into those provisions a requirement that they constitute the Board's *exclusive* disclosure obligations, despite any statutory language to this effect.[1] Yet this approach would violate the most basic rule of statutory interpretation—the Court must give effect to the plain meaning of the Act as written. *Estate of Cowart v. Nicklos Drilling Co.*, 505 U.S. 469, 476 (1992) (finding controlling "the basic and unexceptional rule that courts must give effect to the clear meaning of statutes as written"). Where, as here, there is no ambiguity in the statutory text, nor extraordinary circumstances, the inquiry must end. *Id*. at 475.

If Congress had intended the Board's disclosure requirements under Sections 2121(h)(1) and 2124(p) to be exclusive, it would have made this clear. *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996) ("Congress does not cavalierly pre-empt state-law causes of action."); *Wis. Pub.*

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[1] Section 2121(h)(1) provides:

> ADOPTION OF BYLAWS FOR CONDUCTING BUSINESS OF OVERSIGHT BOARD.—
>
> (1) IN GENERAL.—As soon as practicable after the appointment of all members and appointment of the Chair, the Oversight Board shall adopt bylaws, rules, and procedures governing its activities under this Act, including procedures for hiring experts and consultants. Such bylaws, rules, and procedures shall be public documents, and shall be submitted by the Oversight Board upon adoption to the Governor, the Legislature, the President, and Congress. The Oversight Board may hire professionals as it determines to be necessary to carry out this Act.

Section 2124(p) provides:

> (p) FINDINGS OF ANY INVESTIGATION.—The Oversight Board shall make public the findings of any investigation referenced in subsection (o).

Intervenor, 501 U.S. at 607 ("mere silence" by Congress could not "suffice to establish a 'clear and manifest purpose' to pre-empt local authority"); *De J. Cordero*, 169 F.2d at 234 (instructing that conflict between federal statute and Puerto Rico law providing right of access to public documents "is not to be presumed, but must be clearly and affirmatively evident"). This is particularly true here, "for 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 (right to access documents in auditor's custody not preempted). The magnitude of the rights at stake further heightens the presumption against preemption; the Court must assume that Congress did not intend to strip the citizens of Puerto Rico of their long-standing constitutional and statutory rights of access to government information and public documents—rights that have existed for 35 and 112 years, respectively, *Soto*, 12 P.R. Offic. Trans. at 608; *De J. Cordero*, 169 F.2d at 232 n.1—since Congress has not expressed a "clear and manifest purpose" to do so. *See Medtronic*, 518 U.S. at 485 (internal citations and quotation marks omitted).

The Board's sole support for its preemption argument in the statutory text is a single narrow provision permitting the Board to conduct an "executive session" that is closed to the public. (Mot. at 11.) But Congress only authorized this type of session under 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 the vote to convene an executive session." 48 U.S.C. § 2121(h)(4). If anything, this provision demonstrates Congress's opposite intent—that unless these special circumstances exist, Board meetings are, by default, open to the public. In any event, this provision has no bearing on the public's right to access documents nor

does it speak more broadly about the right to access government information outside these particular "executive sessions."

Contrary to the Board's assertions, (Mot. at 11), the First Circuit's decision in *United States v. Hernandez-Ferrer* actually undercuts its position. 599 F.3d 63, 67–68 (1st Cir. 2010). There, the court held that Congress did not intend to provide for tolling of an inmate's supervised release term during the period when he was a fugitive, given the absence of any statutory language to that effect and the fact that Congress had included an express tolling provision in another statute covering other circumstances (when the offender had been imprisoned in connection with a different crime). *Id.* The First Circuit looked to the plain meaning of the statute and did not import a tolling requirement where none existed. *Id.* at 68 ("If Congress had wanted to authorize tolling when an offender absconds from supervision, we believe that it would have said so."). This decision thus makes clear that courts should assume Congress knows how to include language that restricts public access when that is its intent, as it did in one narrow provision of the Act, *see* 48 U.S.C. § 2121(h)(4) (permitting non-public "executive sessions" of the Board under certain circumstances), and as it has done in past legislation, *see, e.g.*, Drivers' Privacy Protection Act, 18 U.S.C. § 2721 (restricting access to drivers' personal information from state motor vehicle departments). Since Congress chose not to include such language in the remaining provisions of PROMESA, the Court should not read it in. Moreover, the approach advocated by the Board would likely contravene Congressional intent; Congress has historically recognized the public's strong interest in open government,[2] and, as set forth

[2] *See, e.g.*, *Dep't of Air Force v. Rose*, 425 U.S. 352, 361 (1976) (recognizing Congress's objective in enacting the Freedom of Information Act was to "pierce the veil of administrative secrecy and to open agency action to the light of public scrutiny") (internal citations and quotation marks omitted); S. Judiciary Comm., Subcom. on Admin. Prac. & Proc., *FOIA Source Book: Legislative Materials, Cases, Articles* at III (l974) (letter from Sen. Edward M. Kennedy

above, Congress incorporated language throughout the Act that make clear its intent that the Board be an open and transparent entity.

B. Implied preemption did not occur here.

The Board does not dispute that Congress adopted an explicit preemption provision when it enacted PROMESA that provides reliable indication of Congress' intent regarding preemption. (Mot. at 10 (citing 48 U.S.C. § 2103) ("The provisions of this Act shall prevail over any general or specific provisions of territory law, State law, or regulation that is inconsistent with this Act.").) Accordingly, the federal preemption analysis here is governed entirely by the express language of PROMESA's preemption provision. *See, e.g.*, *Cal. Fed. Sav. & Loan Ass'n v. Guerra*, 479 U.S. 272, 282 (1987) (finding "no need to infer congressional intent to pre-empt state laws" where statute stated, like here, that federal law only preempted "inconsistent" state laws, thus providing a "reliable indicium of congressional intent").

In any event, the Board's argument for field preemption is meritless. "Very few statutes have a complete preemption effect," and PROMESA, which only indirectly touches on public access issues vis-à-vis the Board's duties and obligations, clearly does not. 13D Wright & Miller, Fed. Prac. & Proc. Juris. § 3566 (3d ed. 2017). Even if Congress did intend to preempt the entire field related to Puerto Rico's debt management, this does not necessitate a finding that Congress also preempted the separate field of Puerto Rico public access law. *See Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 249 (1984) (finding that even though federal law preempted direct state regulation of safety aspects of nuclear energy, it had not preempted the ancillary field of state tort law related to radiation hazards); *Goodyear Atomic Corp. v. Miller*, 486 U.S. 174,

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(D-Mass)) (available at https://perma.cc/TFV9-JYNC) (recognizing the "important role of the Freedom of Information Act in maintaining our system of government for and of the people" and acknowledging "the problems raised by government secrecy").

186 (1988) (upholding state provision that was only "incidental" rather than direct regulation of nuclear facility). Moreover, the PROMESA scheme is not "so pervasive as to make reasonable the inference that Congress left no room" for Puerto Rico law to supplement it with respect to the Board's disclosure requirements. *Wis. Pub. Intervenor*, 501 U.S. at 613 (internal citation and quotation marks omitted). As discussed above, Puerto Rico law aligns with PROMESA by obligating the Board to make information and documents available to the public.[3]

The Board's final argument that Puerto Rico access laws conflict with PROMESA, (Mot. at 13), is flawed for all the reasons previously discussed. Complying with state-imposed disclosure requirements is neither physically impossible nor does it frustrate any purpose of the PROMESA statutory scheme. *See Silkwood*, 464 U.S. at 257. While the Board claims this will undermine its "deliberations and delicate negotiations," (Mot. at 11), this concern goes to the merits of whether particular documents are subject to disclosure, not to whether the public's rights of access have been preempted in the first place. Moreover, if anything, shedding additional light on the Board's operations will increase public confidence in the Board and prevent the type of government secrecy that exacerbated Puerto Rico's financial crisis and prompted Congress to pass PROMESA, as Senator Hatch's testimony, above, illustrates.

II. Allowing the Board to evade its disclosure obligations would keep the citizens of Puerto Rico in the dark about issues of critical public importance.

The public's need for the information at issue in this case is particularly compelling. The Board has broad oversight powers over the Puerto Rico government, including the power to

[3] The Board also urges the Court to dismiss this case, claiming it has already disclosed "many" of the requested documents (which CPI disputes). (Mot. at 8-9; Opposition to Mot. at 12, 19, Dkt. No. 25.) But such voluntarily disclosures—many of which occurred after CPI filed its Complaint on June 1, 2017—do not and cannot substitute for the public's enforceable rights to access government information and documents. Recognition of these rights is critical to prevent the Board from simply refusing to provide any further documents or information going forward.

develop and approve its long-term fiscal plans and annual budgets—matters of fundamental importance to the people of Puerto Rico.[4] Puerto Ricans have a strong interest in understanding the Board's financial decisions, which will directly impact their lives and the future of Puerto Rico. This Court should thus decline the Board's invitation to exempt it, with its tremendous power and influence, from the basic disclosure obligations applicable to every other Puerto Rico government entity. Such a result would undermine the core purpose of the right of access: to inform the citizens upon which a representative government depends. *Soto*, 12 P.R. Offic. Trans. at 617 ("The public, as sovereign, must have all information available in order to instruct its servants, the government."). It would also contravene the Puerto Rico Supreme Court's guidance in this area: The government "may invoke the secrecy cloak for its own actions only in cases of an overriding public interest," and "all legislation tending to hide information from a citizen under a confidentiality cloak, should be strictly construed in favor of the people's right to be informed." *Id.* at 613, 619.

For these reasons, the Court should reject the Board's unduly broad interpretation of the preemption doctrine. This would not only comport with Congress's intent but would also serve Puerto Rico's interests in open government and protect core constitutional and statutory rights guaranteed to its citizens. *See* Erwin Chemerinsky, *Empowering States When It Matters*, 69 Brook. L. Rev. 1313, 1326 (2004) ("Preempting state laws limits the ability of states to make choices that are responsive to their residents' desires, to experiment, and to advance liberty and

[4] If the Puerto Rico governor fails to submit a fiscal plan within a period of time set by the Board that the Board, in its sole discretion, determines has satisfied certain statutory requirements, then the Board will develop its own fiscal plan for Puerto Rico, which shall be "deemed" approved by the governor. 48 U.S.C. § 2141(a-e). Similarly, if the governor and legislature fail to develop and approve a budget before the applicable fiscal year begins, that the Board determines is compliant with the fiscal plan, then the Board will develop its own budget, which will be deemed approved by the governor and legislature. *Id.* at § 2142(c)(2), (d)(2), (e)(3).

freedom within their boundaries. Simply put, a broad vision of inferred preemption invalidates beneficial state laws.").

Finally, the Court should also reject the Board's additional, extreme argument that it is immune from suit in any forum because sovereign immunity purportedly shields it from suit in federal court, and the Act's jurisdictional provision, 48 U.S.C. § 2126(a), prevents suit in any other court. (Mot. at 8 n.2.) Without delving into the thicket of the Board's sovereign immunity argument, which CPI's brief addresses, it bears noting that when Congress created the Board, it required any action against this new entity (except in certain circumstances not relevant here) to be brought in a U.S. district court, 48 U.S.C. § 2126(a), a strong indication that Congress did not intend for the Board to be immune from suit. Moreover, contrary to the Board's argument, even if the Board were entitled to sovereign immunity, the Act must then be construed to permit this action to be brought in state court. Put another way, assuming, *arguendo*, that the Act's jurisdictional provision is unconstitutional under the Eleventh Amendment, it must be severed, allowing suits like this one against the Board, as contemplated by Congress, to be brought in Puerto Rico courts. *See Webster v. Doe,* 486 U.S. 592, 603–04 (1988) (interpreting federal statute to avoid constitutional defect and permit judicial review of constitutional claims despite language indicating that matter was committed to agency discretion). The Board's contention that there is no forum in which citizens of Puerto Rico can vindicate their rights of access to documents and information pertaining to the Board is meritless; such a conclusion would amount to an impermissible abrogation of Puerto Rico constitutional and statutory laws that are of critical public importance, despite any statutory language expressing such an intent by Congress.

CONCLUSION

For all the reasons stated herein, the Reporters Committee respectfully urges the Court to deny the Board's motion to dismiss, recognize that Puerto Rico's constitutional and statutory rights of access apply to the Board, and require disclosure of the requested information.

Dated: October 16, 2017

Respectfully submitted,

/s Tomás A. Román-Santos

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will send notifications of such filing to all CM/ECF participants in this case.

Dated: October 16, 2017

By: /s/ Tomás A. Román-Santos
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