

[ORAL ARGUMENT NOT YET SCHEDULED]  
No. 22-5095

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IN THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT  
OF COLUMBIA CIRCUIT

CENTER FOR BIOLOGICAL DIVERSITY, FRIENDS OF THE EARTH, AND CENTER FOR  
INTERNATIONAL ENVIRONMENTAL LAW

*Plaintiffs-Appellants,*

v.

UNITED STATES INTERNATIONAL DEVELOPMENT FINANCE CORPORATION

*Defendants-Appellees*

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On Appeal from the United States District Court  
for the District of Columbia, 21-cv-1491-CRC  
The Honorable Judge Christopher R. Cooper

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**BRIEF OF *AMICUS CURIAE* ACCOUNTABILITY COUNSEL IN  
SUPPORT OF PLAINTIFFS-APPELLANTS**

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**CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES**

As required by Circuit Rule 28(a)(1), counsel for *Amicus Curiae*

Accountability Counsel certifies as follows:

**A. Parties and Amici.**

All parties, intervenors, and amici appearing before the district court and this Court are listed in the Brief for Appellants.

Amicus in this matter is Accountability Counsel.

**B. Rulings under Review.**

References to the rulings under review appear in the Brief for Appellants.

**C. Related Cases.**

This case has not been before this Court before. Amicus is unaware of any related cases pending in this or any other court.

**CORPORATE DISCLOSURE STATEMENT PURSUANT TO  
CIRCUIT RULE 26.1**

Accountability Counsel certifies that it is a non-profit corporation under the laws of California, registered with the Internal Revenue Service as a 501(c)(3) organization. Accountability Counsel does not have stock, nor does it have parent companies, subsidiaries, or affiliates that have issued shares to the public. No publicly held company has a 10% or greater ownership interest in Accountability Counsel.

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## STATEMENT OF INTEREST OF *AMICUS CURIAE*<sup>2</sup>

*Amicus Curiae* Accountability Counsel is a non-profit organization dedicated to amplifying the voices of communities around the world to protect their human rights and environment. Accountability Counsel’s lawyers advocate for justice on behalf of people harmed by the activities of development finance institutions and advocate directly with these institutions to ensure compliance with environmental and human rights laws, standards, and best practices. Accountability Counsel has filed amicus briefs in other cases concerning the accountability of development finance institutions.

Accountability Counsel has substantial expertise regarding development finance institutions, including specific expertise in the policy and practices of the Overseas Private Investment Corporation and its successor, the United States International Development Finance Corporation (“Development Finance Corporation”), the Defendant in this case. Accountability Counsel has supported communities engaging directly with these entities, including in filing complaints about environmental and human rights harms to the Overseas Private Investment Corporation’s independent accountability mechanism. Accountability Counsel has

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<sup>2</sup> No counsel for a party authored the brief in whole or in part. Apart from amicus and their counsel, no person contributed money to fund its preparation or submission. All parties received timely notice and have consented to the filing of this brief.

also provided in-depth policy reform recommendations to these entities on a range of issues, including transparency and accountability, and effectively measuring development impact. Accountability Counsel also successfully advocated for the inclusion of commitments to robust environmental and social policies and accountability to project-affected communities in the Development Finance Corporation's authorizing legislation.

Accountability Counsel has seen firsthand how critical stakeholder engagement and transparency, including that provided by the Government in Sunshine Act, is to the effectiveness of development finance institutions more broadly, and the Overseas Private Investment Corporation and Development Finance Corporation specifically.

All parties have consented to the filing of this brief.

## **INTRODUCTION AND SUMMARY OF ARGUMENT**

The Government in Sunshine Act (the "Sunshine Act"), 5 U.S.C. § 552b, is intended to facilitate transparency of and stakeholder engagement with government activities to ensure that decisions that affect the public are open and accessible. Transparency, along with meaningful stakeholder access and engagement, are particularly important for financial institutions like the U.S. International Development Finance Corporation ("Development Finance Corporation"), that use public money to address poverty and development challenges around the world.

Amicus Accountability Counsel agrees with Appellants that the Development Finance Corporation is subject to, and must comply with, the Sunshine Act's open government and transparency requirements. Appellants' brief aptly shows why the plain language of the relevant statutes, and the precedent of this Circuit, compel that conclusion. Appellants' Opening Brief at 12-18, 22-24. Amicus agree with those arguments but focus here on the importance of transparency and stakeholder engagement, including that made possible by the Sunshine Act, to the effective – and accountable – functioning of the institution, and why Congress could not have intended to exempt the Development Finance Corporation from its requirements.

The decisions and activities of development finance institutions like the Development Finance Corporation have far reaching implications for communities directly affected by the projects they finance, as well as taxpayers and other stakeholders interested in ensuring that the institution acts consistently with its mandate to make investments that effectively achieve positive development outcomes. As a result, transparency and meaningful stakeholder engagement have long been recognized by the United States, and the broader international community, as essential to the legitimacy, accountability, and effectiveness of such institutions.

As a publicly funded development finance institution, the public – including American taxpayers, as well as the people and communities who may be directly impacted by its financing decisions – are entitled to information provided, and the access made possible, by compliance with the Sunshine Act’s open government and transparency provisions. For this reason, the Development Finance Corporation’s predecessor, the Overseas Private Investment Corporation, complied with the Sunshine Act. Nothing in the Development Finance Corporation’s authorizing statute suggests that Congress intended it to be less transparent than its predecessor – indeed, the statute centers transparency in a way that strongly suggests the opposite. Moreover, it makes little sense to assume that Congress could have intended to provide for a weaker standard of transparency at the same time it transformed the institution into a bigger version of its predecessor, capable of far greater reach and impact.

Allowing the Development Finance Corporation to exempt itself from the Sunshine Act would undermine the ability of project-affected communities to have a say in the development decisions that directly affect them. It would undermine their ability, and that of civil society organizations and other stakeholders, to raise concerns about its investment decisions and to engage in meaningful advocacy to strengthen the policies and standards applicable to the institution’s decision-making.

The district court's decision should be reversed, and this Court should order the Development Finance Corporation to comply with the Sunshine Act.

## ARGUMENT

### **I. The Sunshine Act is intended to facilitate transparency of and stakeholder engagement with government activities, each of which are critical to the effective and accountable operation of development finance institutions.**

The Sunshine Act was passed after the Watergate scandal to ensure that the U.S. government operates in a transparent manner and that the general public is informed of, and can participate in governmental decisions.<sup>3</sup> By requiring that every portion of every meeting of an agency be open to public observation, the Sunshine Act enshrines the principle that “the public is entitled to the fullest practicable information regarding the decision making processes of the Federal government.”<sup>4</sup>

The Sunshine Act's transparency and access requirements are critical to the effective and accountable operation of the government broadly speaking, but this is especially true for the work of development finance institutions like the Development Finance Corporation.

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<sup>3</sup> See 5 U.S.C. § 552b(b); Kathy Bradley, *Do You Feel the Sunshine? Government in the Sunshine Act: Its Objectives, Goals, and Effect on the FCC and You*, 49 FED. COMM. L.J. 473, 475 (1997).

<sup>4</sup> S. Rep No. 354, at 1 (1975).

**A. The decisions and actions of development finance institutions have the potential to have far reaching consequences for a wide range of stakeholders.**

Development finance institutions are specialized financial institutions that are usually majority owned by a national government, or a group of governments in the case of international financial institutions and multilateral development banks.<sup>5</sup> Their mandates include the promotion of sustainable development, poverty reduction, and other pressing global challenges.<sup>6</sup> These institutions typically can provide loans, equity investments, political risk guarantees, technical assistance, and other assistance to the private sector to advance their mandates.

The United States is a major participant in development finance institutions around the world, including the World Bank Group, the African Development Bank, and the Inter-American Development Bank, among many others, and it sees its leadership within and across such institutions as critical for “shap[ing] the global development agenda” and “ensuring effectiveness” and positive on-the-

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<sup>5</sup> *About DFIs: European DFIs*, EDFI.EU, <https://www.edfi.eu/about-dfis/what-is-a-dfi/> (last visited Sept. 20 2022).

<sup>6</sup> *Id.*; U.N. Human Rights, *Development Finance Institutions*, OHCHR.ORG, <https://www.ohchr.org/en/development/development-finance-institutions> (last visited Sept. 20, 2022); *See also, e.g., Who We Are*, THE WORLD BANK, <https://www.worldbank.org/en/who-we-are> (last visited 21 Sep. 2022) (explaining the World Bank Group’s mission to end extreme poverty and boost shared prosperity).

ground impact.<sup>7</sup> A “key U.S. priority” is transparency, which the United States has long viewed as critical to the effectiveness and accountability of such institutions.<sup>8</sup>

The Development Finance Corporation is the U.S. government’s national development finance institution, and its purpose is likewise centered on the “economic development of less developed countries,” with an emphasis on “sustainable” and “inclusive” economic growth and “poverty reduction.”<sup>9</sup> Its investments focus on “impactful global development, advancing U.S. foreign policy, and generating returns for American taxpayers.”<sup>10</sup>

Although the intentions of development finance can be positive, development finance activities, especially the financing of major development projects, can pose significant risk of harm to nearby communities if not designed with sufficient safeguards and implemented in compliance with robust environmental, social, and human rights standards. Such harms can include large-scale economic and physical displacement,<sup>11</sup> significant environmental degradation

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<sup>7</sup>*Multilateral Development Banks*, U.S. DEPARTMENT OF THE TREASURY, <https://home.treasury.gov/policy-issues/international/multilateral-development-banks#:~:text=The%20Department%20of%20Treasury%20leads,Bank%20for%20Reconstruction%20and%20Development> (last visited Sept. 27, 2022).

<sup>8</sup> *Id.*

<sup>9</sup> 22 U.S.C. § 9611; 22 U.S.C. § 9612(b).

<sup>10</sup> Development Finance Corporation, *Overview*, DFC.ORG, <https://www.dfc.gov/who-we-are/overview> (last visited Sept. 27, 2022).

<sup>11</sup> Shreyas Suresh, *Understanding Community Harm: Displacement*, ACCOUNTABILITY CONSOLE, (Sep. 6, 2021)

and destruction,<sup>12</sup> labor rights and workplace safety violations,<sup>13</sup> sexual and gender-based violence,<sup>14</sup> and damage to cultural heritage sites.<sup>15</sup> Such harms in turn typically mean the development goals of a project fall short, or the project fails altogether.

These harms are far more likely to occur when project-affected communities are not informed of or consulted about projects at an early stage (or at all), and when robust environmental, social, and human rights due diligence is not carried out. When either, or both, are lacking, the institution's decision making occurs with incomplete information, insufficient to ensure projects are carried out in a

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<https://accountabilityconsole.com/newsletter/articles/understanding-community-harm-displacement/>.

<sup>12</sup> Belén Carriedo, *Understanding Community Harm: Environmental Impact*, ACCOUNTABILITY CONSOLE, (June 7, 2022),

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<sup>13</sup> See, e.g. Ronnie Greene and Jonathan Paye-Layleh, *US-backed Project Collapsed Amid Questionable Due Diligence, Worker Harm, Environmental Cost*, FOX NEWS, (Dec. 12, 2015), <https://www.foxnews.com/world/us-backed-project-collapsed-amid-questionable-due-diligence-worker-harm-environmental-cost> (reporting that workers employed by a project supported by the Overseas Private Investment Corporation alleged several labor violations, including health and safety violations)

<sup>14</sup> Leila Yow, *Understanding Community Harm: Gender-Based Violence*, ACCOUNTABILITY CONSOLE (Oct. 4, 2021),

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<sup>15</sup> Anthony Williams, *Understanding Community Harm Part 6: Cultural Heritage*, ACCOUNTABILITY CONSOLE (June 6, 2022),

<https://accountabilityconsole.com/newsletter/articles/understanding-community-harm-part-6-cultural-heritage/>.



way that is most likely to result in the intended development outcomes while minimizing negative consequences. For this reason, virtually all development finance institutions, including the Development Finance Corporation, have adopted safeguard policies and performance standards that include environmental, labor, human rights, and consultation requirements for financing and implementing projects in order to prevent harm to communities and the environment and increase development outcomes.<sup>16</sup>

The Development Finance Corporation's investment and other decisions, where done right, have the potential to contribute to positive outcomes on the ground, outcomes that are consistent with and advance U.S. foreign policy, and to generate financial returns for American taxpayers. But where the institution engages in poor decision-making, where it fails to abide by its safeguard policies and standards, and its investments result in unintended harms, it can have significant implications for a wide swath of stakeholders, including people living near the projects it finances, workers, and taxpayers.

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<sup>16</sup> The Development Finance Corporation's Environmental and Social Policy and Procedures outline the environmental and social requirements of all of its projects. It incorporates the International Finance Corporation's Performance Standards on Social and Environmental Sustainability, which are widely used by other development finance institutions. Development Finance Corporation, *Environmental and Social Policy and Procedures* (2020), [https://www.dfc.gov/sites/default/files/media/documents/DFC\\_ESPP\\_07312020-final\\_1.pdf](https://www.dfc.gov/sites/default/files/media/documents/DFC_ESPP_07312020-final_1.pdf).

Communities affected by development finance have an interest in shaping the investment and other decisions that would affect them in a way that protects their rights and results in positive development outcomes on the ground. Taxpayers and constituents have an interest in ensuring that projects financed by their government (directly or indirectly) are good investments that fulfill their intended purpose, advance the intended governmental objectives, and do not cause unintended negative impacts.<sup>17</sup> These interests necessitate transparency and open access.

**B. Transparency and stakeholder engagement are critical to the Development Finance Corporation's ability to carry out its mandate and produce positive development outcomes.**

The effectiveness and accountability of institutions like the Development Finance Corporation depend upon transparency and meaningful stakeholder engagement.

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<sup>17</sup> See *Why Transparency Matters*, PUBLISH WHAT YOU FUND, <https://www.publishwhatyoufund.org/why-transparency-matters/> (last visited Sep. 20, 2022). Congress intended for the Development Finance Corporation's spending to be transparent to taxpayers and accountable to Congress. H. R. Rep 115-814 at 28 (2018). See also Development Finance Corporation, *Annual Management Report FY 2021* at 1 (2021) <https://www.dfc.gov/sites/default/files/media/documents/DFC%20Annual%20Management%20Report%20FY%202021.pdf> (discussing the Corporation's "stewardship of taxpayer funds" and its "steadfast commitment to accountability and transparency in all our programs and operations.")

It is widely recognized that a lack of transparency can foster corruption and lead to poor governance as well as limit an institution's ability to effectively produce positive development outcomes and minimize unintended (and often avoidable) harmful environmental and social impacts.<sup>18</sup> Without transparency, meaningful stakeholder engagement is impossible. Without timely access to information, communities may not know what is being financed in their area or how to engage in the decision-making and implementation process until it is too late. Decision-making that occurs without their input lacks critical information – including, but not limited to, the full range of risks and the best means of preventing harm to people and the local environment. By contrast, early and meaningful stakeholder engagement, particularly of those living near projects, ensures the institution has more complete information, leading to better decision-making and enhancing the project's ability to produce positive development outcomes and minimize the risk of unintended consequences.<sup>19</sup>

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<sup>18</sup> Publish What You Fund, *Advancing DFI Transparency: The Rationale and Roadmap for Better Impact, Accountability and Markets* at 7 (Nov. 2021), [https://www.publishwhatyoufund.org/wp-content/uploads/dlm\\_uploads/2021/10/Advancing-DFITransparency.pdf](https://www.publishwhatyoufund.org/wp-content/uploads/dlm_uploads/2021/10/Advancing-DFITransparency.pdf).

<sup>19</sup> See Christian Donaldson and Shona Hawkes, *Open Books: How Development Finance Institutions Can Be Transparent in Their Financial Intermediary Lending and Why They Should Be*, OXFAM (Oct. 2018) <https://oxfamilibrary.openrepository.com/bitstream/handle/10546/620559/bp-financial-institutions-disclosure-161018-en.pdf>.

Recognizing how critical both are to accountability and effectiveness, the U.S. has long made transparency and meaningful stakeholder engagement, including the ability of communities to input into the financing and policy decisions that can affect them, key priorities,<sup>20</sup> both for the institutions in which the United States participates and its own institutions.<sup>21</sup> Indeed, Congress put transparency directly at the heart of the Development Finance Corporation when it created it, intending it to be a “robust alternative” to “investments by authoritarian governments,” by “using best practices with respect to transparency and environmental and social safeguards.”<sup>22</sup> In other words, operating in accordance with the highest standards of transparency is meant to be a defining feature of the

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<sup>20</sup> Transparency and the rights of persons affected by development projects to meaningful participate in decisions about investments are likewise recognized by the international community in international law, regional agreements, and the internal standards of development institutions. *See, e.g.*, United Nations Declaration on the Right to Development, Art. 2(1), U.N. Doc A/RES/41/128 (Dec. 4, 1986); United Nations, Declaration on the Rights of Indigenous Peoples, Art. 32, U.N. Doc. A/RES/61/295 (Sept. 13, 2007); Regional Agreement on Access to Information, Public Participation and Justice in Environmental Matters in Latin America and the Caribbean, Art. 1, C.N.195.2018.TREATIES-XXVII.18 (Apr. 9, 2018); The World Bank, Bank Policy: Access to Information (2015) available at <https://ppfdocuments.azureedge.net/3693.pdf>

<sup>21</sup> For example, 22 U.S.C. § 262m-7 requires the U.S. government to abstain from voting on a project at a multilateral development finance institution unless an environmental impact assessment has been made available to affected groups, local non-governmental organizations, and the public at least 120 days before the vote. It also requires Treasury, which directs the U.S. government’s involvement at these multilateral institutions, to take into consideration recommendations from interested members of the public.

<sup>22</sup> 22 U.S.C. § 9611.

Development Finance Corporation that sets it above and apart from other sources of development financing.

The Development Finance Corporation cannot live up to its mandate and intended purpose if it is permitted to exempt itself from the Sunshine Act. The Sunshine Act's requirements are a key means of providing transparency into, and the opportunity for meaningful stakeholder engagement with, the decision-making process of a development finance institution like the Development Finance Corporation. Amicus, along with other advocates and members of the public, have seen this first hand. The Overseas Private Investment Corporation, the Development Finance Corporation's predecessor, abided by the Sunshine Act's requirements of open meetings and documentation of these meetings.<sup>23</sup> Its meeting notifications provided information on projects and policies to be considered by the Board of Directors, information critical for stakeholders aiming to influence these decisions, including communities that would be, or already are, affected by these prospective projects or policies governing the institution's work. And it provided notice and opportunity for civil society and other members of the public to share

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<sup>23</sup> 5 U.S.C. § 552b(b); 82 Fed. Reg. 24403 (May 26, 2017) (*Sunshine Act: Overseas Private Investment Corporation Board Meeting Notice*).

concerns about proposed and ongoing projects in a productive way, as well as concrete recommendations for institutional policies.<sup>24</sup>

The Development Finance Corporation's decision to operate in a less transparent manner than its predecessor is not only at odds with the relevant statutes, *see* Appellants' Opening Brief at 12-18, it is also at odds with best practices. It is a threat to the institution's effectiveness as well as its legitimacy as a development institution, and it threatens to undermine the United States' ability to continue to be a global leader on transparency within and across other such institutions.

**II. There is no basis in law or policy for subjecting the Development Finance Corporation to lesser transparency than applied to its predecessor.**

The Development Finance Corporation is the more powerful successor to the Overseas Private Investment Corporation. There is no basis in law or policy to subject the institution in its new form to a lesser standard of transparency than applied to its predecessor. To the contrary, by expanding the institution's mandate and reach and putting transparency at the center of its mission, Congress foreclosed

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<sup>24</sup> Overseas Private Investment Corporation, *Minutes of the Open Session of the June 15, 2017 Board of Directors Meeting* (2017) [https://www.dfc.gov/sites/default/files/2019-08/bd\\_mtg-minutesopen\\_session-06-15-2017.pdf](https://www.dfc.gov/sites/default/files/2019-08/bd_mtg-minutesopen_session-06-15-2017.pdf).

the conclusion that it could have meant to implicitly provide for any exemptions from the Sunshine Act's open government and transparency requirements.

**A. Nothing in the Development Finance Corporation's authorizing statute suggests that the Congress intended it to be exempt from the Sunshine Act requirements, and other provisions show Congress had greater transparency in mind.**

The Overseas Private Investment Corporation was created in 1971 to serve as the U.S. government's development finance institution and mobilize private capital to help solve critical development challenges.<sup>25</sup> The institution was subject to the Sunshine Act and abided by its requirements.<sup>26</sup> In 2018, Congress enacted the Better Utilization of Investments Leading to Development Act in order to replace the Overseas Private Investment Corporation with a new, bigger institution: the Development Finance Corporation. Appellants' brief aptly explains why a plain language reading of the board composition provisions in that statute subject the institution to the Sunshine Act. *See* Appellants' Opening Brief at 12-18. Amicus agree and emphasize here that reading the authorizing statute as a whole strongly supports that conclusion.

There is nothing in the statute, nor the legislative history, that suggests that Congress intended the Development Finance Corporation to be subject to *less*

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<sup>25</sup> *OIG Oversight: Overseas Private Investment Corporation Overview*, OFFICE OF INSPECTOR GENERAL U.S. AGENCY FOR INTERNATIONAL DEVELOPMENT, <https://oig.usaid.gov/OPIC> (last visited Sep. 27, 2022).

<sup>26</sup> *See* 82 Fed. Reg. 24403. *See also* Section I.B.

transparency than its predecessor. To the contrary, the statute explicitly calls for the Development Finance Corporation to abide by the *highest* transparency standards, as a central way of differentiating it from other government financing – in particular, China.<sup>27</sup> Other provisions of the authorizing statute added other specific requirements throughout that demonstrate a concerted effort to provide for *more* public engagement, *more* transparency, and *more* opportunity for public scrutiny, as compared to its predecessor.<sup>28</sup>

The authorizing statute clearly envisions an institution that would, if anything, be *more* transparent and provide *greater* opportunity for engagement than its predecessor. Allowing the Development Finance Corporation to exempt itself from the open government and transparency requirements of the Sunshine Act is wholly inconsistent with that intent.

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<sup>27</sup> 22 U.S.C. § 9611; H. R. Rep115-814 at 24-25.

<sup>28</sup> *See, e.g.*, 22 U.S.C. § 9654 (requiring the Corporation to “maintain a user-friendly, publicly available, machine-readable database” with detail on various categories of information); 22 U.S.C. § 9613(b)(1)(C) (requiring the Board to develop a policy on engagement and consultation, with the input of stakeholders and other members of the public, and requiring that such policy be publicly available); 22 U.S.C. § 9614(a)-(b)(requiring the Board to establish a “transparent and independent accountability mechanism” and requiring that the mechanism “annually evaluate and report to the Board and Congress regarding compliance with... transparency standards,” among other things).



**B. The Development Finance Corporation was created to be a bigger version of its predecessor, capable of greater impact, making the Sunshine Act’s requirements all the more important.**

In many ways, the Development Finance Corporation is a more powerful version of its predecessor. Congress gave it the ability to make equity investments, provide technical assistance, and conduct feasibility studies, among other new financial tools that were not available to the Overseas Private Investment Corporation.<sup>29</sup> Congress also increased its investment cap – from \$29 billion to \$60 billion. These new capabilities are meant to enable the Development Finance Corporation to “multiply” its development impact.<sup>30</sup>

The potential for increased impact goes hand in hand with a *greater* need for transparency, not less. With its substantially increased investment cap – more than double that of its predecessor – the Development Finance Corporation can finance far more projects, on a far larger scale. While that is meant to enable it to produce greater positive impacts than its predecessor could, it comes with a far greater risk of unintended negative impacts as well.

Likewise, a broader range of financial tools comes with both positive opportunities as well as the risk of additional negative consequences, particularly

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<sup>29</sup> H.Rep.115-814 at 24. *See also* Development Finance Corporation, Press Release: U.S. International Development Finance Corporation Begins Operations (Jan. 20, 2020), <https://www.dfc.gov/media/press-releases/us-international-development-finance-corporation-begins-operations>.

<sup>30</sup> *Id.*

for communities living near major development projects. Analysis of complaints filed with the independent accountability mechanisms at similar institutions show, for example, that equity investments<sup>31</sup> and technical assistance support<sup>32</sup> can result in environmental and social harms, including displacement and damage to livelihoods. New financial tools may also come with increased financial risk. The Congressional Budget Office, for example, found that while the ability to provide equity investments has the potential of increasing rates of returns to the U.S. government, it also poses additional financial risks to the government and taxpayers.<sup>33</sup>

The Development Finance Corporation's decision to nonetheless act to exempt itself from the Sunshine Act, and especially the decision to do so without the required public notice and comment period, *see* Appellants' Opening Brief at 28-30, paints a troubling picture. The importance of public access to the decisions of the institution has only increased with its increased power and reach and the inherent risks that come with that. It is unreasonable to conclude that Congress

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<sup>31</sup> *Equity Investments Complaints*, ACCOUNTABILITY CONSOLE, [https://accountabilityconsole.com/complaints/?year\\_filed=&year\\_closed=&min\\_duration=&max\\_duration=&investments\\_investment\\_type=3](https://accountabilityconsole.com/complaints/?year_filed=&year_closed=&min_duration=&max_duration=&investments_investment_type=3) (last visited Sept. 21, 2022).

<sup>32</sup> *Advisory Services Complaints*, ACCOUNTABILITY CONSOLE, [https://accountabilityconsole.com/complaints/?year\\_filed=&year\\_closed=&min\\_duration=&max\\_duration=&investments\\_investment\\_type=2](https://accountabilityconsole.com/complaints/?year_filed=&year_closed=&min_duration=&max_duration=&investments_investment_type=2) (last visited Sept. 21, 2022).

<sup>33</sup> H. R. Rep 115-814 at 35.

implicitly meant to pair these changes to the institution, including changes that emphasized the importance of transparency, with a reduction in transparency and public access that would come from an exemption to the Sunshine Act.

**III. Exempting the Development Finance Corporation from the Sunshine Act has already undermined and will continue to undermine the ability of project-affected communities and other stakeholders to effectively engage with the Development Finance Corporation.**

Allowing the Development Finance Corporation to exempt itself from the Sunshine Act's transparency and stakeholder engagement requirements undermines the ability of civil society organizations, project-affected communities, and other stakeholders to have a full understanding of the institution's decisions and activities, and it limits their ability to engage with the institution in a constructive way. This in turn limits the institution's ability to engage in fully-informed decision making, which undermines its ability to effectively further its mandate and threatens its legitimacy as a development institution. While limiting the kind of transparency and engagement enabled by the Sunshine Act has significant ramifications across many aspects of the institution, Amicus focuses here on two areas with which it has particular expertise: the role of the independent accountability mechanisms at institutions like the Development Finance Corporation and the internal policies and standards that govern the decisions of the institution.

Many development finance institutions, including the Overseas Private Investment Corporation, and now the Development Finance Corporation, have independent accountability mechanisms, to which communities affected by the institution's activities can lodge complaints that raise concerns about particular investments, such as environmental and social harms.<sup>34</sup> These mechanisms typically have two primary functions with respect to such complaints. First, they can conduct a compliance review, investigating whether the institution complied with its environmental and social policies and standards in the course of the project, and issuing findings and recommendations and monitoring the institution's compliance thereafter. Second, they can offer dispute resolution, typically bringing the complainants and the institution's client together through a mediation or other process to try to reach a mutually agreeable solution to the grievances associated with a particular project.<sup>35</sup>

These mechanisms are intended to provide an avenue for affected communities to seek redress of some kind from the institution for harms they have

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<sup>34</sup> *Independent Accountability Mechanisms Network*, <https://lnadbg5.adb.org/ocrp002p.nsf> (last visited Sept. 20, 2022).

<sup>35</sup> The Development Finance Corporation's authorizing statute requires its accountability mechanism to provide a forum for resolving concerns regarding the impacts of specific Corporation-supported projects with respect to [environmental, social, labor, human rights, and transparency] standards. 22 U.S.C. § 9614. *See also* Development Finance Corporation, *Board Resolution: Independent Accountability Mechanism for the U.S. International Development Finance Corporation* (2020).

experienced and give them a voice in how such situations are resolved. But they are also an important source of accountability and scrutiny, meant to ensure the institution is abiding by its performance standards and policies, and living up to its development mandate more broadly. They are a key means of evaluating the impacts of its investments, and thereby ensuring better development outcomes and continued learning. Such mechanisms are thus crucial to the effectiveness, accountability, and legitimacy of the institution within which they reside.

But these mechanisms are meaningless if complainants cannot readily access and engage with these mechanisms in a timely and meaningful manner. Timely access to information about projects from the earliest stages, before final decisions are made about a proposed project, and continuing through all stages and decision points of the project lifecycle, is a necessary prerequisite for such mechanisms to have any meaningful impact.

Information provided according to the Sunshine Act's requirements by the Overseas Private Investment Corporation helped lay this necessary foundation. Information about projects under consideration by the Board at upcoming Board meetings and information about when projects were approved by the Board was essential for complainants and their advocates to be able to identify risks and to access the institution's accountability mechanism. It ensured information was made available before a project was committed, while there was still opportunity to

provide information to feed into that decision, to improve project outcomes and prevent or minimize avoidable harm. It also provided information necessary to evaluate when a complaint could be lodged, since the project's timeline was critical to determining eligibility under the mechanism's rules.<sup>36</sup>

By exempting itself from the Sunshine Act, the Development Finance Corporation has made it harder for project-affected communities and other stakeholders to access timely information about the institution's decisions, which in turn affects their access and engagement with its accountability mechanism.

Another area of concern is the policies and standards that govern the Development Finance Corporation's decisions, and which are central to the institution's ability to fulfill its mandate, as well as the process by which they are decided and implemented. It is essential that development finance institutions have in place strong policies and safeguards governing environmental, social, and human rights, as well as strong monitoring policies that ensure effective development outcomes while minimizing harm to project-affected communities and workers. And it is just as essential that such institutions comply with such standards and policies. Stakeholders must be able to ensure the institution lives up

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<sup>36</sup> See, e.g., Overseas Private Investment Corporation, *Office of Accountability: Operational Guidelines Handbook for Problem-Solving and Compliance Review Services* at para. 4.2.2 (2014) (explaining the eligibility requirement to receive a complaint, including the type of project for which a complaint is eligible and the stages at which eligibility begins and ends).

to the high standards Congress intended in creating the Development Finance Corporation, and they must be able to monitor whether the institution is complying with the standards and fulfilling its mandate.

Civil society, community advocates, and other stakeholders had historically relied on information and opportunities provided through the Sunshine Act to carry out this work with respect to the Overseas Private Investment Corporation. This has included relying on Sunshine Act notifications of public hearing opportunities and providing recommendations at these hearings on how to strengthen the policies governing the institution's work and the effective implementation of these policies. The Development Finance Corporation's decision to exempt itself from the Sunshine Act has already negatively impacted stakeholders' ability to influence the agency's policies and will continue to do so.

The Development Finance Corporation's process of creating its new accountability mechanism, as its authorizing statute and its bylaws require, provides one such example.<sup>37</sup> Civil society organizations such as Amicus have decades of experience in shaping the design of and in utilizing independent accountability mechanisms of similar institutions, and have identified valuable lessons learned that can be applied in creating new mechanisms. But instead of

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<sup>37</sup> 22 U.S.C. § 9614; Development Finance Corporation, *Corporate Bylaws*, Art. VI, sec.1 (2019).

ensuring such information fed into its process, the Development Finance Corporation's Board only made it known that it would be approving the framework governing the accountability mechanism a few days before the Board meeting at which it planned to do so. Had it followed the Sunshine Act's requirements and provided notification of the Board meeting agenda, civil society would have been able to better engage in advocacy and information sharing on the framework and ensure that it was designed to provide accessibility, transparency, and to be able to effectively resolve environmental and human rights grievances. The framework as finalized by the Board, without the benefit of full information and access, contains some provisions that are unclear or confusing, and in other instances, are contrary to international recognized best practices,<sup>38</sup> despite Congress's clear intent that the institution abide by the highest standards.<sup>39</sup> This might have been avoided had the Sunshine Act been followed.

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<sup>38</sup> See Accountability Counsel, et al., *Good Policy Paper: Guiding Practice from the Policies of Independent Accountability Mechanisms* (Dec. 2021), <https://accountabilitycounsel.org/wp-content/uploads/2021/12/good-policy-paper-final.pdf>.

<sup>39</sup> For example, although it is standard practice at development finance institutions' accountability mechanisms to allow for the consideration of complaints for projects involving multiple financial institutions and filed at multiple accountability mechanisms, the Board's framework limits the eligibility of such complaints. See Development Finance Corporation, *Board Resolution: Independent Accountability Mechanism for the U.S. International Development Finance Corporation* at Sec. 7.



The Development Finance Corporation's decision to exempt itself from the Sunshine Act, and its decision to do so without public notice or comment, has no basis in law or policy and raises serious concerns about the institution's ability to effectively carry out its mandate. Accordingly, Amicus echo Appellants' request that the Court order the Development Finance Corporation to comply with the Sunshine Act. *See* Appellants' Opening Brief at 27-30.

### CONCLUSION

For the foregoing reasons, the district court's decision should be reversed

DATED: October 3, 2022

Respectfully submitted,

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**CERTIFICATION OF COMPLIANCE WITH CIRCUIT RULE 32(g) TYPE-VOLUME LIMITATION, TYPEFACE REQUIREMENTS, AND TYPE STYLE REQUIREMENTS**

1. This brief complies with the type-volume limitation of Circuit Rule 32(e)(2) because this brief contains 5,137 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).
2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Times New Roman font.

DATED: October 3, 2022

/s/ Michelle C. Harrison  
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**CERTIFICATE OF SERVICE**

The undersigned certifies that this Amicus Brief was electronically filed with the Clerk of the Court on October 3, 2022, using the CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the CM/ECF system.

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