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Testimony on Senate Bill No. 2181
Edward Barocas, Legal Director
American Civil Liberties Union of New Jersey
Senate State Government Committee
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Thank you for the opportunity to address you today in support of S2181. My name is Edward Barocas and I am the Legal Director for the American Civil Liberties Union of New Jersey. The ACLU-NJ is a private, non-profit organization that promotes and defends our founding American principles of freedom, justice and equality. The ACLU has more than 14,000 members and supporters in New Jersey, and half a million nationwide.

Open government is a cornerstone of democracy that enables the public and the press to “play a watchful role in curbing wasteful government spending and guarding against corruption and misconduct.”¹ It permits the people to be engaged in their governance. Indeed, openness engenders trust. By keeping its actions open to scrutiny, government can show the public that it has nothing to hide, while helping cast light on inappropriate or unlawful activity when it does occur. As explained by United States Supreme Court Justice Louis Brandeis, “Sunlight is...the best of disinfectants.”²

The legislature’s investigation related to the Port Authority of New York and New Jersey’s (PANYNJ) closure of local lanes to the George Washington Bridge in September 2013, has brought the issue of the PANYNJ’s lack of transparency and accountability to the fore. The lack of transparency at the PANYNJ has been a concern to New Jersey citizens well before the lane closure incident.³ The ACLU-NJ supports S2181 as a positive step toward addressing this

¹ *Burnett v. Cty. of Bergen*, 198 N.J. 408, 414 (2009).

² Louis D. Brandeis, *Other People’s Money and How the Bankers Use It* 92 (1914), New York, Frederick A. Stokes Co.

³ See, e.g., Kate Hinds, *Audit: Port Authority of New York and New Jersey is a “Challenged and Dysfunctional Organization”*, WNYC (Feb. 7, 2012), <http://www.wnyc.org/story/285422-audit-port-authority-of-new-york-and-new-jersey-is-a-challenged-and-dysfunctional-organization/>; Kate Hinds, *Port Authority Must Open Its Budget Process: Report*, WNYC (Jul. 16, 2013), <http://www.wnyc.org/story/307038-port-authority-must-open-its-budget-process-report/>. In August 2013, a United States Government Accountability Office study found that transparency of the Port Authority and other agencies could be enhanced. It noted: “For example, in September 2011, the New York State Committee on Open Government found that the PANYNJ’s freedom of information policy which allows the public to request PANYNJ documents and open meeting policy were more restrictive and provided less access than freedom of information and open meetings laws that apply to state agencies in New York.” United States Government Accountability Office, *Interstate Compacts: Transparency and Oversight of Bi-State Tolling Authorities Could Be Enhanced* 16 (2013), <http://www.gao.gov/assets/660/656956.pdf>. In 2012, the New Jersey

significant and long-standing concern, and we commend the bill's sponsors for moving the bill forward toward passage.⁴

However, an important element is missing from the current bill. While S2181 would subject the PANYNJ to many of the same transparency standards required of state agencies, local municipalities and school boards, absent from this bill is a provision setting forth consequences for non-compliance and remedies for actions taken in violation of the transparency provisions this bill sets forth.

We support S2181, although we do so with the understanding that a follow-up bill must be passed if there are to be real teeth in enforcing S2181's provisions. The ACLU-NJ recommends that the follow-up bill subject the PANYNJ to the same enforcement processes and remedies for non-compliance that all New Jersey state and local government entities face.

Currently, New Jersey's Open Public Meetings Act (OPMA) applies only to state and local public agencies. It does not apply to bi-state or multi-state agencies such as the PANYNJ. Those agencies can voluntarily adopt transparency regulations (and most, if not all, have done so, with varying degrees of openness) but they are, in effect, left to self-govern, and often institute regulations that provide for far less public oversight than those that apply to state agencies, municipalities and school boards. The absence of mandatory, statutory transparency requirements comparable to those that govern all state and local government entities must not be permitted to continue, especially in the wake of disclosures of actions of PANYNJ employees and officials over the past year.

As you are aware the PANYNJ is a bi-state agency and in order for laws pertaining to the agency to be enforceable, New Jersey and New York must adopt parallel laws. The New York legislature has already adopted a bill parallel to S2181. Both S2181 and its New York counterpart would mandate that PANYNJ follow most of the provisions of New Jersey's Open Public Meetings Act, including most notably requiring open public meetings and requiring public notice of agendas. Because these provisions represent a significant step forward, the ACLU-NJ strongly supports passage of this bill.

We also ask that you recognize that mandates are only as strong as their enforcement provisions. Under the Open Public Meetings Act, when an entity takes action in violation of the Act (for example, by voting to adopt a new ordinance or enter a contract without having provided the required notice to the public that such votes may take place), affected individuals can go to court to void the illegal actions.⁵ When a government body consistently violates OPMA's provisions, individuals can obtain a court-ordered injunction to ensure that the offending government body complies with the law in the future.⁶

S2181 does not contain any such enforcement mechanism or provide aggrieved parties with any remedy. Without such an enforcement mechanism clearly set forth in a statute, the PANYNJ

⁴ The ACLU-NJ believes that in addition to improving transparency of meetings and government action, residents cannot fully engage in their governance and guard against corruption without a right of access to government information. To that end, the ACLU-NJ fully supports S2183, which would require the PANYNJ to provide access to public records.

⁵ N.J.S.A. 10:4-15.

⁶ N.J.S.A. 10:4-16.

might again be left to its own devices, as there would potentially be no consequences for its unlawful actions.

Therefore, while ACLU-NJ supports the current bill, we ask the legislature to pledge to adopt a follow-up bill that would adopt the necessary enforcement mechanisms that currently exist in OPMA, as well as institute other best practice provisions not contained in the present bill.⁷ Anything less would shield the PANYNJ from consequences for unlawful activity that apply to all other New Jersey government agencies. Indeed, without clear consequences, failure to adopt such enforcement mechanisms may enable the PANYNJ to continue to operate in a culture of secrecy that is harmful to democratic governance and public trust.

⁷ For example, the ACLU-NJ recommends that provisions also be adopted to (1) prevent private discussions by officials about agenda items during public meetings; (2) require PANYNJ to videotape (rather than just audiotape) meetings; and (3) post additional public documents, such as meeting minutes and recordings of meetings, online.