No. _____

IN THE

# Supreme Court of the United States

IN RE: THE FINANCIAL OVERSIGHT AND MANAGEMENT BOARD FOR PUERTO RICO, as representative for the Commonwealth of Puerto Rico; THE FINANCIAL OVERSIGHT AND MANAGEMENT BOARD FOR PUERTO RICO, as representative for the Puerto Rico Highways and Transportation Authority,

*Debtors,*

HON. WANDA VÁZQUEZ-GARCED (in her official capacity); THE PUERTO RICO FISCAL AGENCY AND FINANCIAL ADVISORY AUTHORITY,

*Plaintiffs*,

v.

THE FINANCIAL OVERSIGHT AND MANAGEMENT BOARD FOR PUERTO RICO; JOSÉ B. CARRIÓN, III; ANDREW G. BIGGS; CARLOS M. GARCÍA; ARTHUR J. GONZÁLEZ; JOSÉ R. GONZÁLEZ; ANA J. MATOSANTOS; DAVID A. SKEEL, JR.; NATALIE A. JARESKO,

*Respondents*.

OFFICIAL COMMITTEE OF UNSECURED CREDITORS,

*Intervenor*.

**On Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit**

## PETITION FOR A WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

1. Whether the Oversight Board may preemptively override the elected Government's ability to request reprogramming of funds under PROMESA section 204(c) via a blanket ban inserted into an Oversight Board-certified budget under PROMESA section 202.

2. Whether the Oversight Board may, by including in its certified fiscal plan a provision that suspends all reprogramming and prohibits any request from Puerto Rico's elected Government for Oversight Board authorization of reprogramming under PROMESA section 204(c), impose through the fiscal plan a policy recommendation that the Governor previously rejected under PROMESA section 205.

## PARTIES TO THE PROCEEDING

Petitioners here, Appellants below, are the Honorable Governor Wanda Vázquez Garced and the Puerto Rico Fiscal Agency and Financial Advisory Authority.

Respondents here, Appellees below, are the Financial Oversight and Management Board for Puerto Rico and its members: José B. Carrión, III; Andrew G. Biggs; Carlos M. García; Arthur J. González; José R. González; Ana J. Matosantos; David A. Skeel, Jr.; and Natalie A. Jaresko.

Respondent here, Intervenor below, is the Official Committee of Unsecured Creditors Committee of all Title III Debtors (other than the Puerto Rico Sales Tax Financing Corporation).

## CORPORATE DISCLOSURE STATEMENT

Governor Wanda Vázquez Garced and the Puerto Rico Fiscal Agency and Financial Advisory Authority are not required to file corporate disclosure statements under Supreme Court Rule 29.6, because neither is a non-governmental corporate party. AAFAF is a governmental public corporation and Governor Vázquez is a natural person.

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## OPINIONS BELOW

The opinion of the court of appeals (App. 1a-11a) is reported at 945 F.3d 3. The opinion of the district Court (App. 12a-62a) is reported at 330 F. Supp. 3d 685.

## JURISDICTION

The judgment of the court of appeals was entered on December 18, 2019. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Relevant statutory provisions of the Puerto Rico Oversight, Management, and Economic Stability Act, 48 U.S.C. § 2101 *et seq*., are reproduced at App. 63a-84a.

## STATEMENT OF THE CASE

This case poses important questions of first impression regarding the interpretation of PROMESA[1] and territorial governance in the United States. PROMESA provides for the Oversight Board—an unelected body appointed by the President of the United States—to provide fiscal oversight over Puerto Rico's elected Government. Because of Puerto Rico's territorial status, Congress was able to enact a law that altered Puerto Rico's framework of self-government. Yet in doing so, Congress was not seeking to eliminate Puerto Rico's self-governing structure. Congress carefully calibrated PROMESA to balance the Oversight Board's considerable fiscal powers against the political powers of the Island's elected Government. The First Circuit's opinion upends Congress's balance and transforms the Oversight Board into an entity that may unilaterally impose policy decisions on Puerto Rico's elected Government. This would effectively transform the Oversight Board from an entity *within* the territorial government, to an overlord entity *above* it. The First Circuit's ruling allows the Oversight Board to exercise authoritarian control over the elected Government (i) allowing the Oversight Board to rewrite PROMESA and existing territorial law to prevent the elected Government from reprogramming funds accounted

[1] As used herein: (i) "Oversight Board" means the Financial Oversight and Management Board for Puerto Rico, (ii) "AAFAF" means the Puerto Rico Fiscal Agency and Financial Advisory Authority, (iii) "PROMESA" means the Puerto Rico Oversight, Management, and Economic Stability Act, 48 U.S.C. §§ 2101 *et seq.*; and (iv) "Government" means the elected government of Puerto Rico.

for in prior year budgets but not ultimately used and (ii) allowing the Oversight Board unilaterally to adopt its own policy recommendations that the elected Government explicitly rejected. In doing so, the First Circuit disregarded numerous bedrock canons of statutory interpretation. If allowed to stand, the First Circuit's decision will foil Congress's intent in enacting PROMESA and cast aside decades of democracy in Puerto Rico. Certainly, a byproduct of Puerto Rico's current territorial status is that its people must suffer the indignity of having Congress unilaterally alter and reorganize their internal government structure. But in the wake of such an enormous transformation, the Oversight Board's powers must be interpreted narrowly to avoid completely eliminating Puerto Rico's framework of self-government.

### A. Puerto Rico's Framework of Self-Government

Puerto Rico is a territory of the United States subject to the ultimate plenary powers of Congress. *See Puerto Rico v. Sanchez-Valle*, 136 S. Ct. 1863, 1876 (2016); *Harris v. Rosario*, 446 U.S. 651 (1980). Using its powers under the Territory Clause to organize territorial Governments, for the last century Congress has created a framework of self-government for Puerto Rico and delegated some authority to manage its internal affairs. In that sense, the people of Puerto Rico have democratically elected their territorial government for nearly seventy years. In 1950, Congress authorized Puerto Rico to "organize a government pursuant to a constitution of [its] own adoption." Act of July 3, 1950, Pub. L. No. 81-600, §

1, 64 Stat. 319. In 1952, Puerto Rico's people ratified—and Congress ultimately approved—Puerto Rico's Constitution. *See* Act of July 3, 1952, Pub. L. No. 82-447, 66 Stat. 327. Since then, even though Puerto Rico remains subject to the Territory Clause, Puerto Ricans have elected their territorial Government with the "degree of autonomy and independence normally associated with States of the Union." *Examining Bd. of Eng'rs, Architects & Surveyors v. Flores de Otero*, 426 U.S. 572, 594 (1976). Part of this delegated structure of self-government was unilaterally altered by Congress with the passage of PROMESA, however.

### B. PROMESA's Power-Sharing Arrangement Between the Appointed Oversight Board and the Elected Government

By 2016, Puerto Rico was "in the midst of a fiscal crisis." *Puerto Rico v. Franklin Cal. Tax–Free Tr.*, 136 S. Ct. 1938, 1942 (2016), *see also* H.R. Rep. No. 114-602, at 40 (2016) (noting that the Commonwealth had over "$110 billion in combined debt and unfunded pension liabilities"). In response, on June 30, 2016, the United States Congress enacted PROMESA to "stabilize Puerto Rico's economy by establishing oversight of the Government's budget and fiscal policies and by providing a mechanism for the Commonwealth to restructure its debts." App. 17a (quotations and citation omitted); 48 U.S.C. § 2101. PROMESA created the Oversight Board "to provide a method for [Puerto Rico] to achieve fiscal responsibility and access to the capital markets," and "to assist the Government of Puerto Rico in reforming its fiscal governance." *Id.* §§ 2121(a), 2194(n)(3).

PROMESA section 104 enumerates the Oversight Board's specific powers, which include holding hearings, subpoenaing information, entering into contracts, and prohibiting public sector employees from participating in a strike. *Id.* § 2124.

Through PROMESA, Congress unilaterally reorganized the internal government structure of Puerto Rico. Therefore, it created the Oversight Board as an entity *within* the Government of Puerto Rico. 48 U.S.C. § 2121(c)(1). Even though PROMESA confers important fiscal-management powers on the Oversight Board, it also reserves political authority to the elected Government and ensures, subject to PROMESA Titles I and II, that the elected Government may continue to exercise the policymaking authority that is crucial to Puerto Rico's framework of self-government. *Id.* § 2163 (PROMESA Title III "does not limit or impair the power" of the elected Government "to control, by legislation or otherwise, the territory or any territorial instrumentality thereof in the exercise of [its] political or governmental powers," including "expenditures for such exercise."). PROMESA further preserves the elected Government's political authority through section 205, which grants the elected Government discretion to consider recommendations from the Oversight Board and then "submit a statement to the Oversight Board that provides notice as to whether the territorial government will adopt the recommendations." *Id.* § 2145(b)(1). PROMESA section 303, which preserves the "exercise of the political or governmental powers of the territory or territorial instrumentality," *id.* §

2163, also preserves the elected Government's policy-making powers.

### C. Development of Fiscal Plans and Budgets Under PROMESA

In keeping with PROMESA's collaborative approach, Congress gave the Oversight Board the power to develop fiscal plans and budgets in concert with Puerto Rico's elected Government. Under PROMESA section 201, the Governor "shall submit" a proposed fiscal plan to the Oversight Board. 48 U.S.C. § 2141(c)(2). Next, the Oversight Board reviews the Governor's proposed plan "to determine whether it satisfies" certain financial, informational, and other criteria set forth in section 201(b). *Id.* § 2141(c)(3). If the Oversight Board determines the criteria are not met, it must "provide to the Governor a notice of violation" and "an opportunity to correct the violation." *Id.* § 2141(c)(3)(B). The Governor then may submit revised plans, but if the Oversight Board ultimately determines that the Governor has failed to submit a compliant fiscal plan within the time allotted, the Oversight Board can develop and submit its own fiscal plan that satisfies section 201(b)'s criteria. *Id.* § 2141(d). Among those criteria is that a fiscal plan must "adopt appropriate recommendations submitted by the Oversight Board under section [205(a)]." *Id.* § 2141(b)(1)(K).

PROMESA section 202 establishes a similar process for budget development whereby the elected Government submits a budget to the Oversight Board, and the Oversight Board reviews the budget to determine if it complies with the fiscal plan. 48 U.S.C. § 2142(c)(1). If the Oversight Board

determines the budget is not compliant, the Oversight Board must provide the elected Government a "notice of violation" and "an opportunity to correct the violation." *Id.* § 2142(d)(1)(B). The elected Government must then "correct any violations" and "submit a revised Territory Budget to the Oversight Board." *Id.* § 2142(d)(2). If the Oversight Board determines that the elected Government has not submitted a compliant budget by the Oversight Board's deadline, "the Oversight Board shall develop a revised Territory Budget" that adheres to the fiscal plan. *Id.* The elected Government is then deemed to have approved to the Oversight Board's budget. *Id.* § 2142(e)(3).

### D. PROMESA Section 204(c)'s Limitations on Reprogramming

Even after fiscal plans and budgets are certified, PROMESA still provides substantial flexibility for the elected Government and the Oversight Board to collaborate on important adjustments in spending. In particular, to address needs that may arise over the course of a fiscal year, PROMESA permits the Governor to seek to reprogram funds provided for in an Oversight Board-certified budget. Consistent with PROMESA's collaborative approach, the reprogramming procedure involves both the Governor and the Oversight Board. Under PROMESA section 204(c), the Governor may request approval to "reprogram[]" funds appropriated in a certified budget and, in turn, the Oversight Board "shall analyze" the Governor's requests to ensure that any proposed reprogramming is not "inconsistent with the Fiscal Plan and Budget." 48 U.S.C. § 2144(c).

PROMESA section 204(c) thus honors the Oversight Board's fiscal and budgetary powers, while allowing crucial flexibility for the elected Government to reorder its spending in response to unforeseen circumstances, consistent with sound fiscal responsibility.

### E. PROMESA Section 205's Procedure for Recommendations from the Oversight Board to the Elected Government

Also consistent with Congress's balanced power-sharing arrangement, PROMESA establishes a collaborative structure whereby the Oversight Board and the elected Government must work together to develop fiscal policy for the Commonwealth. PROMESA section 205 permits the Oversight Board to submit "recommendations to the Governor or the Legislature on actions the territorial government may take" relating to certain policy areas. 48 U.S.C. § 2145(a). But section 205 makes clear that the elected Government is free to reject any Oversight Board recommendation, so long as the elected Government notifies the Oversight Board and provides a "statement of explanations" for the rejection "to the President and Congress." *Id*. § 2145(b)(3). Nothing in section 205 permits the Oversight Board to compel the elected Government to adopt an Oversight Board recommendation. PROMESA section 201(b)(1)(K), however, provides that a fiscal plan should "adopt *appropriate* recommendations submitted by the Oversight Board under section [205(a)]." *Id*. § 2141(b)(1)(K) (emphasis added).

### F. The 2019 Fiscal Plan and Budget for the Commonwealth of Puerto Rico

This dispute arises from the development of the PROMESA-mandated 2019 fiscal plan and budget for the Commonwealth of Puerto Rico. In developing the 2019 fiscal plan and budget, the Oversight Board deviated from PROMESA's collaborative approach and unilaterally dictated substantive policy by imposing limitations on the elected Government's reprogramming rights.

Between January 24, 2018, and April 5, 2018, following PROMESA's prescribed collaborative process, then-Governor Ricardo Rosselló submitted to the Oversight Board four versions of a proposed Commonwealth fiscal plan for fiscal year 2019. App. 18a. In response to those drafts, the Oversight Board provided recommendations for further revisions. App. 18a-19a. In the midst of this collaborative fiscal-plan development, the Oversight Board reversed course and, instead of providing recommendations and permitting Governor Rosselló to revise the fiscal plan further, the Oversight Board certified its own fiscal plan for the Commonwealth on April 19, 2018 (the "April 2018 Oversight Board Fiscal Plan."). App. 19a.

Next, the budget process began. On April 26, 2018, the Oversight Board sent Governor Rosselló a letter dated April 24, 2018, setting forth a proposed schedule for developing and certifying the Commonwealth's fiscal year 2019 budget and a revenue forecast for fiscal year 2019. *Id.* On May 4, 2018, Governor Rosselló submitted a proposed Commonwealth budget for fiscal year 2019 (the

"Governor's Proposed Budget") to the Oversight Board. App. 19a-20a.

Meanwhile, Governor Rosselló considered and rejected the policy recommendations in the April 2018 Oversight Board Fiscal Plan. On May 6, 2018, as PROMESA section 205(b)(3) requires, Governor Rosselló timely sent a written "statement of explanations" to the Oversight Board, the President, and Congress concerning Governor Rosselló's decision to reject the Oversight Board's recommendations. App. 20a. In this written statement, Governor Rosselló explained that certain Oversight Board "policy initiatives" in the April 2018 Oversight Board Fiscal Plan were "recommendations" under PROMESA section 205 that the Oversight Board lacks the power to impose on Puerto Rico's elected Government. *Id.* Specifically, Governor Rosselló identified five measures included in the April 2018 Oversight Board Fiscal Plan that he had rejected: (i) private-sector human-capital and labor reforms, (ii) pension reforms, (iii) government agency consolidations, (iv) compensation related initiatives, and (v) reductions in appropriations to UPR. *Id.* Governor Rosselló also rejected "all recommendations (both specific and general) contained in the Board Fiscal Plan where . . . the Board infringes in any manner with the Government's ability to determine how to organize its political affairs including specific assignments and decisions concerning different departments and units of the Government." Written statement from Hon. Ricardo Rosselló Nevares, Governor of Puerto Rico, to the President and Congress at 8–9 (May 6, 2018).

On May 10, 2018, the Oversight Board rejected Governor Rosselló's proposed budget, finding that it failed to comply with the April 2018 Oversight Board Fiscal Plan. Thereafter, the elected Government engaged in good faith negotiations with the Oversight Board and eventually reached an agreement under which (i) the Oversight Board would amend its fiscal plan to eliminate certain proposed employee-benefit reforms, while (ii) Governor Rosselló would present to the Puerto Rico Legislature a benefits-reform bill to repeal Puerto Rico's Wrongful Termination Act, Law No. 80 of May 30, 1976. Although Governor Rosselló submitted that bill, the Legislature—a separate and independent branch of the territorial government—did not repeal Act 80. Rather than reopen negotiations, the Oversight Board unilaterally reinstated its original certified fiscal plan. App. 22a. That same day, the Legislature passed and Governor Rosselló signed a territorial budget for fiscal year 2019. *Id.* A day later, the Oversight Board rejected that budget, finding that it failed to comply with the Oversight Board's unilaterally imposed fiscal plan, and certified its own Commonwealth budget. App. 22a-23a.

The Oversight Board's certified budget included four substantive joint resolutions restricting the Government's spending, including one addressing expenditures from the General Fund (the "General Fund Resolution") and one addressing expenditures for special programs (the "Special Resolution"). These resolutions and the April 2018 Oversight Board Fiscal Plan seek to limit the elected Government's reprogramming rights under PROMESA section

204(c). Specifically, section 7 of the General Fund Resolution and Special Fund Resolution and section 11.2.1 of the Fiscal Plan suspend the elected Government's power to authorize reprogramming or extension of appropriations of prior fiscal years under the Puerto Rico Government Accounting Act. Similarly, section 10 of the General Fund Resolution provides that the Puerto Rico Office of Management and Budget may withhold allocations to Executive Branch agencies and reprogram such withheld funds only for the purpose of funding certain pension, unemployment insurance, or tax obligations. Taken together, these substantive provisions effectively forbid all requests for reprogramming.

**G. Proceedings Below**

On July 5, 2018, then-Governor Rosselló and AAFAF sued the Oversight Board and its members in the Title III Court. The complaint challenged several provisions of the certified fiscal plan and budget, including the fiscal plans and budget's suspension of the elected Government's authority under existing law to seek reprogramming or extensions of budget appropriations from prior fiscal years and the fiscal plan and budget's adoption of policy recommendations explicitly rejected by the elected Government.

On July 12, 2018, the Oversight Board moved to dismiss the complaint. The Title III Court granted that motion in part. The Title III Court held that the Oversight Board did not infringe on the elected Government's reprogramming rights under PROMESA section 204(c) because the Oversight Board has the exclusive authority to certify budgets

and "[a] prior year authorization for spending that is not covered by the budget is inconsistent with PROMESA's declaration that the Oversight Board-certified budget for the fiscal year is in full force and effect, and is therefore preempted by that statutory provision by force of Section 4 of PROMESA." App. 53a. The Title III Court further held that PROMESA section 201(b)(1)(K) "allows the Oversight Board to make binding policy choices for the Commonwealth, notwithstanding the Governor's rejection of Section 205 recommendations." App. 44a.

The Title III Court certified the elected Government's appeal to the First Circuit under PROMESA section 306(e)(3), which permits appeals of interlocutory orders or decrees entered in a proceeding under Title III of PROMESA if there is no controlling Supreme Court or relevant Circuit Court authority, the issue is of public importance, or an immediate appeal of the aspects of its decision address claims that may materially advance the progress of the case. 48 U.S.C. § 2166(e)(3). The issues on appeal were: (i) whether the Oversight Board may mandate in a certified fiscal plan and budget prior recommendations that the Governor rejected under PROMESA section 205(b); and (ii) whether certification of a budget under PROMESA section 202(e) precludes reprogramming of previously authorized expenditures from prior years. App. 3a–4a, 6a.

On appeal, the First Circuit affirmed the Title III Court, holding that: (i) when a Governor rejects an Oversight Board-proposed policy recommendation under the procedure described in PROMESA section

205, the Oversight Board does not lose any "power that it otherwise might have had to include that policy in the fiscal plan (or budget)"; and (ii) because PROMESA section 202(e)(4)(C) precludes the elected Government from "reprogramming funds from prior fiscal years except to the extent such reprogrammed expenditures are authorized in a subsequent budget," the bar on reprogramming the Oversight Board included in its fiscal plan and budget is valid and consistent with PROMESA. App. 7a-8a, 10a.

## REASONS FOR GRANTING THE PETITION

### I. THIS CASE POSES IMPORTANT QUESTIONS ON THE GOVERNANCE OF TERRITORIES.

The Court should grant certiorari because this case presents "an important issue of first impression." *Am. Newspaper Publishers Ass'n v. NLRB*, 345 U.S. 100, 102 (1953). *See, e.g.*, *Texas Dep't of Hous. & Cmty. Affairs v. Inclusive Communities Project, Inc.*, 135 S. Ct. 2507, 2515 (2015) ("The question was one of first impression . . . and certiorari followed.") (citation omitted); *Reading Co. v. Brown*, 391 U.S. 471, 475 (1968) ("We granted certiorari because the issue . . . is one of first impression in this Court.") (citation omitted); *Am. Fed'n of Musicians v. Wittstein*, 379 U.S. 171, 175 (1964) ("The question being an important one of first impression . . . we granted certiorari."). This first-impression question of "the construction of a major federal statute" is a quintessential example of an important issue that warrants review. *United States v. Donovan*, 429 U.S. 413, 422 (1977). *See also SEC v. Zandford*, 535 U.S. 813, 818 (2002) ("We granted the SEC's petition for a writ of certiorari to review the

Court of Appeals' construction of the [statute].") (citation omitted); *Van Dusen v. Barrack*, 376 U.S. 612, 615 (1964) ("We granted certiorari to review important questions concerning the construction and operation [of the statute]."); *United States v. Hougham*, 364 U.S. 310, 311–12 (1960) ("Because the case raises important questions concerning the interpretation and application of the [statute], we granted the Government's petition for certiorari."). This Court also reviews cases that are of fiscal importance to a large number of people, such as a state or a U.S. territory. *See Territory of Alaska v. Am. Can Co.*, 358 U.S. 224, 225 (1959) ("The case is here by a petition for writ of certiorari which was granted in view of the fiscal importance of the question to [the Territory of] Alaska."); *see also Barnhart v. Walton*, 535 U.S. 212, 217 (2002) (granting certiorari where billions of taxpayer dollars were at stake).

This Court has recognized that, under the Territory Clause, "Congress has broad latitude to develop innovative approaches to territorial governance," *Sanchez-Valle*, 136 S. Ct. at 1876. The reorganization of Puerto Rico's government, through the creation of an entity within the territorial government to supervise its finances, is certainly an innovative and unprecedented approach to territorial governance. But, because the internal reorganization was imposed on the territory of Puerto Rico, Congress was careful to construct a power-sharing structure to allow the elected government to retain some of its political powers.

The First Circuit's interpretation of PROMESA

threatens to undermine the careful power-sharing agreement created by PROMESA and the framework of self-government of more than three million United States citizens living in Puerto Rico. Certainly, Puerto Rico's current status as a territorial entity with colonial aspects is insulting to the people of Puerto Rico; under the Territory Clause Congress is free to alter the framework of self-government of the Island without its people's consent. Therefore, recognizing that PROMESA represents an unprecedented incursion on Puerto Rico's democratically elected Government, Congress provided that "[i]t shall be the duty of . . . the Supreme Court of the United States to advance on the docket and to expedite to the greatest possible extent the disposition of any matter brought under this [Act]." 48 U.S.C. § 2126(d). The Title III Court has acknowledged that PROMESA "infringes on the scope of the authority of the elected Government." App. 47a.

Even though Puerto Rico's territorial status allows Congress unilaterally to alter the manner in which Puerto Ricans govern themselves, such an intrusion must be narrowly construed to salvage the remaining framework of self-government afforded to Puerto Rico. PROMESA's antidemocratic nature makes its interpretation all the more vital for this Court's review. *See Powell v. McCormack*, 395 U.S. 486, 547 (1969) (reviewing executive action where "[a] fundamental principle of our representative democracy" is at stake). Therefore, this case is the ideal vehicle for this Court to establish that the Oversight Board's powers must be interpreted

narrowly to respect the power-sharing structure established in PROMESA and to alleviate the obvious antidemocratic consequences of territorial status.

## II. THE FIRST CIRCUIT'S RULING CONTRADICTS THIS COURT'S CANONS OF STATUTORY INTERPRETATION TO STRIP POWER FROM PUERTO RICO'S DEMOCRATICALLY ELECTED GOVERNMENT

In affirming the Title III Court's partial dismissal, the First Circuit held that the Oversight Board has authority to rewrite territorial Puerto Rico law as long as it does so in a certified fiscal plan or budget—in this case, by enforcing a blanket ban on the reprogramming of unspent funds from prior fiscal years. *See* App. 10a–11a (holding that the Oversight Board has final authority over whether to permit reprogramming under section 204(c) and therefore had the power to enforce a blanket ban in fiscal plan provisions). The First Circuit further held that PROMESA permits the Oversight Board "unilaterally" to "adopt[] a rejected recommendation" under section 205. App. 6a; *see* 48 U.S.C. § 2145. Both of these holdings violate numerous canons of statutory construction this Court has repeatedly endorsed. If allowed to stand, the First Circuit's decision would undermine Congress's careful balance embodied in PROMESA and muddle this Court's precedents regarding statutory interpretation throughout the First Circuit.

*The language of a clear and unambiguous statute controls.* "As in all statutory construction cases, we begin with the language of the statute. The first step is to determine whether the language at issue has a

plain and unambiguous meaning with regard to the particular dispute in the case." *Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 450 (2002) (quotations omitted). If the statutory language is "unambiguous and the statutory scheme is coherent and consistent," then "[t]he inquiry ceases." *Id.* (quotations omitted). Where "the statute's language is plain, the sole function of the courts is to enforce it according to its terms." *United States v. Ron Pair Enters., Inc.*, 489 U.S. 235, 241 (1989) (quotations omitted). The First Circuit erred at this first, basic step.

Section 204(c) is clear on its face: the Oversight Board "shall analyze" each reprogramming request to determine "whether the proposed reprogramming is significantly inconsistent with the Budget, and submit its analysis to the Legislature as soon as practicable after receiving the request." 48 U.S.C. § 2144(c)(1). This Court has instructed that "the word 'shall' usually creates a mandate, not a liberty." *Murphy v. Smith*, 138 S. Ct. 784, 787 (2018). While the Oversight Board has the power to determine whether any given reprogramming request is significantly inconsistent with the certified budget, PROMESA still requires that it "shall analyze" each request. The Oversight Board's blanket refusal even to consider individual requests flouts the statute's plain meaning. And recent emergencies underscore the wisdom of PROMESA's mandate. Puerto Rico has not only recently been rocked by two major hurricanes and a series of earthquakes, but also by the current coronavirus pandemic that poses an unprecedented threat to Puerto Rico's citizens' health and economic

well-being.[2] Reprogramming offers vital flexibility to the elected Government to respond to crises like these. The Oversight Board's effort to blind itself preemptively to reprogramming requests hobbles the elected Government's emergency response and shirks the Oversight Board's congressionally mandated PROMESA duty.

Section 205 is equally clear. It unambiguously empowers the elected Government to reject policy recommendations from the Oversight Board and provides no mechanism for the Oversight Board to override such a rejection. 48 U.S.C. § 2145. Subsection (a) provides that the Oversight Board "may at any time submit recommendations to the Governor or the Legislature on actions the territorial government may take to ensure compliance with the Fiscal Plan, or to otherwise promote . . . financial stability, economic growth, management responsibility, and service delivery efficiency." *Id.* § 2145(a). It then supplies a non-exhaustive list of ten topics that Oversight Board recommendations may address, including: management of "financial affairs"; "the structural relationship" of governmental agencies; "modification" and "addition[]" of "revenue structures"; pension reform; government-services reform; "effects" of territorial legal requirements on

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[2] *See, e.g.*, Frances Robles, *Months After Puerto Rico Earthquakes, Thousands Are Still Living Outside*, N.Y. TIMES (Mar. 1, 2020), https://www.nytimes.com/2020/03/01/us/puerto-rico-earthquakes-fema.html; Sandra Lilley, *Puerto Rico Imposes Curfew, Closings to Contain Coronavirus Spread*, NBC NEWS (Mar. 15, 2020), https://www.nbcnews.com/news/latino/puerto-rico-imposes-curfew-early-closings-contain-coronavirus-spread-n1159456.

government operations; "establishment of a personnel system"; "improvement of personnel training"; and "privatization and commercialization" of government entities. *Id.* § 2145(a)(1)–(10). Subsection (b) outlines how the elected Government may respond to Oversight Board recommendations. The elected Government "may take" a recommendation from the Oversight Board; if it so chooses, it must notify the Oversight Board and provide "a written plan to implement the recommendation that includes specific performance measures" and "a clear and specific timetable." *Id.* § 2145(b)(2). If the elected Government decides not to adopt an Oversight Board recommendation, the elected Government must provide a "statement [of] explanations for the rejection of the recommendation[]" to the Oversight Board, President, and Congress. *Id.* § 2145(b)(3). But either way, the process ends with the elected Government's decision to accept or reject a recommendation.

This statutory scheme is clear, unambiguous, and coherent. Subsection (a) provides that the elected Government "may take" Oversight Board recommendations. 48 U.S.C. § 2145(a); *see also Kingdomware Techs., Inc. v. United States*, 136 S. Ct. 1969, 1977 (2016) (noting that the word "may" suggests "discretion") (quotations omitted). Subsection (b) likewise states that the elected Government may opt "not [to] adopt any recommendation," so long as it provides an explanation to the Oversight Board, President, and Congress. 48 U.S.C. § 2145(b)(3). But nothing in Section 205 provides that the Oversight Board may

force the elected Government to adopt a recommendation, once rejected. With such clear statutory language prescribing the elected Government's latitude to take—or reject—the Oversight Board's recommendations, the only role for the reviewing court is to enforce the statute as written. *See Ron Pair Enters.*, 489 U.S. at 241. PROMESA unambiguously empowers the elected Government to reject Oversight Board recommendations.

*Avoid surplusage.* All words in a statute "must be given force, and provisions must be interpreted so as not to derogate from the force of other provisions." *United States v. Ramirez-Ferrer*, 82 F.3d 1131, 1138 (1st Cir. 1996); *see also Crowe v. Bolduc*, 365 F.3d 86, 97 (1st Cir. 2004) (explaining that no provision should be rendered "mere surplusage"). But if the First Circuit's interpretation were correct, PROMESA sections 204(c) and 205 would impermissibly be rendered "mere surplusage."

PROMESA's framework for reprogramming in Section 204(c) is unambiguous. The Governor may seek reprogramming at any time, subject to the Oversight Board's power to review the proposed reprogramming to ensure fiscal plan and budget compliance. Section 204(c) provides that "[i]f the Governor submits a request to the Legislature for the reprogramming of any amounts provided in a certified Budget, the Governor shall submit such request to the Oversight Board, which shall analyze whether the proposed reprogramming is significantly inconsistent with the Budget." 48 U.S.C. § 2144(c)(1). It further states that the Legislative Assembly "shall not adopt

a reprogramming . . . until the Oversight Board has provided the Legislature with an analysis that certifies such reprogramming will not be inconsistent with the Fiscal Plan and Budget." *Id.* § 2144(c)(2).

The Oversight Board's reprogramming prohibition seeks to short-circuit Congress's scheme. Those measures preemptively suspend the elected Government's power even to ask for reprogramming of funds from prior fiscal years, even though section 204 expressly allows the elected Government to "submit" reprogramming requests to the Oversight Board and provides only limited grounds for rejecting such requests. *See* 48 U.S.C. § 2144(c). Permitting the Oversight Board simply to issue a blanket ban on *all* reprogramming (no matter how beneficial it may be) as long as the Oversight Board does so in a certified fiscal plan or budget would obliterate section 204(c)'s carefully balanced framework. By directing the Oversight Board to review and giving it the authority to reject the Governor's reprogramming requests, Congress did not intend for the Oversight Board to suspend reprogramming requests altogether. *See, e.g., Jama v. ICE*, 543 U.S. 335, 341 (2005) ("We do not lightly assume that Congress has omitted from its adopted text [policies] that it nonetheless intends to apply, and our reluctance is even greater when Congress has shown elsewhere in the same statute that it knows how to make" a similar policy "manifest.")

For similar reasons, if the First Circuit's opinion were to stand, it would write section 205 out of PROMESA. The Oversight Board would have the ultimate power to impose any policy dictate on the

elected Government by including it in a fiscal plan and budget and so would have no reason to engage in section 205's collaborative process. Section 201(b)(1)(K) allows the Oversight Board to incorporate "*appropriate* recommendations" into a fiscal plan. The First Circuit necessarily reads "appropriate" to mean any policy decision the Oversight Board requires in its sole discretion, but that interpretation nullifies section 205's recommendation process. This is particularly troubling when an Oversight Board recommendation concerns not fiscal policy, but a purely political proposal.

While the Oversight Board has certain fiscal and budgetary powers under PROMESA, the statute also preserves the elected Government's political and legislative powers. 48 U.S.C. § 2163. The First Circuit justified its interpretation by speculating that Congress intended section 205 to be merely "a reminder that PROMESA favors collaboration when possible." App. 7a. But that cannot be so. If Congress intended the policy recommendation process to be a "reminder" rather than an operative provision of the statute, it "could simply have said so." *Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A.*, 530 U.S. 1, 7 (2000). The First Circuit's interpretation impermissibly renders section 205 a "dead letter." *United States v. Atl. Research Corp.*, 551 U.S. 128, 137 (2007) (rejecting interpretation that would render a provision a "dead letter").

*Review a statutory scheme as a whole.* This Court has explained that "[w]e do not . . . construe statutory phrases in isolation; we read statutes as a whole."

*Samantar v. Yousuf*, 560 U.S. 305, 319 (2010) (quotations omitted). But the First Circuit's ruling turns PROMESA's scheme on its head. Congress meticulously enumerated the Oversight Board's powers. *See, e.g.*, 48 U.S.C. § 2124(h) (enabling the Oversight Board to "ensur[e] the prompt enforcement of" laws prohibiting public-sector employee strikes); *id.* § 2124(g) (empowering the Oversight Board to enter into certain contracts). This specific, limited grant of powers is consistent with the principle that "creature[s] of statute" such as the Oversight Board have "only those powers expressly granted . . . by Congress." *Soriano v. United States*, 494 F.2d 681, 683 (9th Cir. 1974); *see also HTH Corp. v. NLRB*, 823 F.3d 668, 679 (D.C. Cir. 2016) ("As a creature of statute the [National Labor Relations] Board has only those powers conferred upon it by Congress.").

Emphasizing that the Oversight Board's powers are targeted, PROMESA section 303 expressly reserves the elected Government's powers "to control, by legislation or otherwise, the territory." 48 U.S.C. § 2163. If Congress had intended the Oversight Board to have unfettered power to force sweeping policy changes on the elected Government by including those changes in a certified fiscal plan and budget, even though the elected Government expressly rejected them under section 205's iterative process, Congress need not have troubled carefully to lay out the Oversight Board's powers. Section 303's broad reservation of political power to the elected Government to "control" the territory, coupled with the Oversight Board's specifically enumerated powers, demonstrates that Congress created a

statutory scheme that (i) gives the Oversight Board only those powers that are expressly enumerated and (ii) reserves to the elected Government broad policy-making power for the territory.

In other words, Congress "does not alter the fundamental details of a [statutory] scheme" through "ancillary provisions—it does not, one might say, hide elephants in mouseholes." *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 468 (2001); *accord Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1626–27 (2018). But that is just what the First Circuit has held; by ruling that section 201(b)(1)(K) permits the Oversight Board to "act unilaterally" to force any number of policy decisions on the elected Government, the First Circuit has upended Puerto Rico's framework of self-government in favor of an all-powerful Oversight Board. This reading elevates section 201(b)(1)(K), one of 14 subsections regarding fiscal plans, to a complete overhaul of Puerto Rico's democratic framework. Certainly, Congress has broad powers to unilaterally reorganize and alter the Puerto Rico territorial government. But such awesome powers cannot be written into a statute by judicial *fiat*. Courts should not assume that Congress would have displaced the territorial government's entire framework of democratically elected government without expressly saying so. *See FDA v. Brown & Williamson Tobacco Corp.,* 529 U.S. 120, 160 (2000) ("[W]e are confident that Congress could not have intended to delegate a decision of such economic and political significance to an agency in so cryptic a fashion.").

In addition to empowering the Oversight Board to impose rejected policy decisions on Puerto Rico by

including them in certified fiscal plans, the First Circuit also ruled that the Oversight Board has the power to overturn existing Puerto Rico territorial law. PROMESA section 204(a) prescribes a narrow mechanism for evaluating new legislation enacted by the elected Government. *See* 48 U.S.C. § 2144(a) (providing that the elected Government must submit newly enacted laws to the Oversight Board along with a certification of no significant inconsistency with the fiscal plan). PROMESA does not confer any power on the Oversight Board to review *existing* Puerto Rico laws. But the Oversight Board's reprogramming measures expressly rewrite existing territorial legislation. Those measures provide that "[a]ny power" of the elected Government, "including the authorities granted under Act 230-1974, as amended, known as the 'Puerto Rico Government Accounting Act' ('Act 230')," to "authorize the reprogramming or extension of appropriations of prior fiscal years is hereby suspended." Joint Appendix at 173, 310, 367, *In re Fin. Oversight & Mgmt. Bd. for Puerto Rico*, 945 F.3d 3 (1st Cir. 2019) (No. 18-2154).

The First Circuit reasoned that PROMESA section 4 justifies this incursion, because that section provides that "[t]he provisions of this chapter shall prevail over any general or specific provisions of territory law, State law, or regulation that is inconsistent with this chapter." 48 U.S.C. § 2103. But Congress' explanation that *PROMESA itself* prevails over conflicting territorial law does not dictate that PROMESA empowers *the Oversight Board* to write any policy decision it desires into new law through the fiscal plan and budget process, and then determine

that its policy trumps territorial law. Congress would not have imposed such a fundamental limitation on Puerto Rico's framework of self-government in such "vague terms." *Whitman*, 531 U.S. at 468. Under the Territory Clause, had Congress wanted to give the Oversight Board the power to legislate, it could certainly have done so. But it did not—as the Oversight Board has conceded. *See* Defendants' Memorandum of Law in Support of Motion to Dismiss at 12, *In re Fin. Oversight & Mgmt. Bd. for Puerto Rico*, 330 F. Supp. 3d 685 (D.P.R. 2018) (No. 17-3283), ECF No. 17; Omnibus Hearing Transcript at 155, *Fin. Oversight & Mgmt. Bd. for Puerto Rico*, 330 F. Supp. 3d 685 (D.P.R. July 25, 2018) (No. 17-3283). Due to the nature of the Board's powers and the power sharing agreement crafted in PROMESA, the Oversight Board's powers should be construed as narrowly as possible.

## CONCLUSION

This case poses fundamental issues of first impression not just for Puerto Rico's debt restructuring, but for the very legal framework in which territories have been governed under the Constitution. The First Circuit's ruling distorts PROMESA and disregards this Court's guidance. Review is warranted to clarify these important unprecedented questions of statutory interpretation.

The petition for writ of certiorari should be granted.

Respectfully submitted,

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