No. 19-1305

IN THE

Supreme Court of the United States

WANDA VÁZQUEZ-GARCED,
GOVERNOR OF PUERTO RICO, *et al.*,

Petitioners,

v.

FINANCIAL OVERSIGHT AND MANAGEMENT
BOARD FOR PUERTO RICO, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF IN OPPOSITION

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QUESTION PRESENTED

The Puerto Rico Oversight, Management, and Economic Stability Act ("PROMESA") grants the Financial Oversight and Management Board (the "Board") authority over all budgets of governmental entities in Puerto Rico so that the Board may provide a method for the Commonwealth to return to fiscal solvency. 48 U.S.C. §§ 2121, 2142. A budget developed and certified by the Board is "deemed to be approved" by Puerto Rico's Governor and Legislature, *id.* § 2142(e)(3)(A), and is in "full force and effect" on the first day of the fiscal year, *id.* § 2142(e)(3)(C).

The Governor of Puerto Rico nevertheless asserts that she can make expenditures unauthorized in the budget certified by the Board as long as she can identify corresponding unused appropriations from prior fiscal years before the Board existed. The First Circuit held that PROMESA preempts the Governor's "reprogramming" authority under Puerto Rico law because such reprogramming by the Governor would undercut the budget control the statute grants the Board.

The Question Presented is: Are Puerto Rico laws authorizing the Governor to reprogram appropriations from prior fiscal years inconsistent with PROMESA and thus preempted?

RULE 29.6 STATEMENT

Respondents are not nongovernmental corporations and are therefore not required to submit a statement under Supreme Court Rule 29.6.

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BRIEF IN OPPOSITION

Respondents respectfully submit that the petition for a writ of certiorari should be denied.

INTRODUCTION

This case concerns a routine question of federal preemption of Puerto Rico law. The First Circuit held that PROMESA's conferral of exclusive authority on the Board to certify and enforce compliance with the Commonwealth's budgets preempts any Puerto Rico law authorizing the Governor to reprogram funds from prior fiscal years outside the budgetary process. Pet. App. 11a. That decision is clearly correct, and it presents no question warranting this Court's review.

In PROMESA, Congress established the Board as an independent fiscal agency within the Puerto Rico Government and gave it responsibility for returning the Commonwealth to fiscal stability. *See Fin. Oversight & Mgmt. Bd. for P.R. v. Aurelius Inv., LLC*, 140 S. Ct. 1649, 1655, 1661–62 (2020). To that end, Congress conferred on the Board exclusive authority to oversee the Commonwealth's budget and fiscal plans, and to ensure that the Government's spending complies with the Board-certified budgets. The First Circuit correctly concluded that the Governor's asserted authority to reprogram funds outside the budgetary process would directly undermine the comprehensive authority that PROMESA grants to the Board to certify and enforce compliance with the Commonwealth's budget for each fiscal year. That

holding represents a straightforward application of PROMESA's express preemption clause. 48 U.S.C. § 2103.

Neither of the Questions Presented in the Petition challenges that preemption holding. Instead, the Questions Presented focus on a different issue not actually presented in this case. According to Petitioner, the First Circuit held that "the Oversight Board has the power to overturn existing Puerto Rico territorial law." Pet. 26. Not so. The First Circuit issued a narrow ruling that the reprogramming authority asserted by the Governor is preempted by PROMESA itself. As a result, no question concerning the Board's authority to override Puerto Rico law is presented here. There is no basis for granting the Petition because it ignores the main holding below.

STATEMENT OF THE CASE

Puerto Rico is currently facing an unprecedented fiscal emergency that Congress found arose from "[a] combination of severe economic decline, and, at times, accumulated operating deficits, lack of financial transparency, management inefficiencies, and excessive borrowing." 48 U.S.C. § 2194(m)(4). To correct these problems, Congress concluded "[a] comprehensive approach to fiscal, management, and structural problems and adjustments that exempts no part of the Government of Puerto Rico is necessary, involving independent oversight . . . ." *Id.*

In PROMESA, Congress created independent oversight by establishing the Financial Oversight and Management Board to control all fiscal plans and budgets in the Commonwealth. To reinforce its

conferral of broad budgetary and fiscal authority on the Board, PROMESA expressly preempts any Puerto Rico laws that conflict with PROMESA. 48 U.S.C. § 2103 ("The 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.").

The issue in this case is whether the Governor of Puerto Rico can undo the oversight and control Congress granted the Board over Puerto Rico's budget by "reprogramming" prior fiscal year appropriations to cause expenses authorized by prior governments to be paid from monies controlled by the Board. Before Congress enacted PROMESA and conferred broad authority on the Board to approve and enforce compliance with Puerto Rico's budgets, Puerto Rico law permitted the Governor to spend funds appropriated in a prior year's budget but not actually spent then. The Board recognized that such reprogramming is antithetical to the goals of PROMESA because it would allow the Governor to spend money outside the budget approved and certified by the Board. Moreover, there are no unspent funds from past fiscal years but only old accounting entries for which no money is available. The Board therefore included in the certified fiscal plan and budget a provision confirming that the Governor may not reprogram unspent appropriations in *prior* fiscal years' budgets. Pursuant to a narrow express authorization in PROMESA, however, the Governor remained free to request that the Board reprogram for another purpose funds allocated in the *current* year's budget. *See* 48 U.S.C. § 2144(c)(1).

The former Governor deemed the Board's reprogramming provision to be a mere "recommendation" he was free to reject under 48 U.S.C. § 2145(a), a provision that allows the Governor to accept or reject recommendations from the Board. The Governor then sued to block enforcement of the reprogramming provision.

The First Circuit rejected the Governor's arguments. *First*, the court held that any Puerto Rico law authorizing the Governor to reprogram unused appropriations from prior budgets is inconsistent with PROMESA's grant of budgetary authority to the Board and is thus preempted. Pet. App. 8a–11a. The court therefore held that the Board's reprogramming provision fell within its authority because the provision simply implemented PROMESA's bar on the reprogramming at issue. *Id.* *Second*, the court held that even if the Board's reprogramming provision began as a "recommendation" to the Governor under § 2145, any choice by the Board to engage in § 2145's iterative negotiation process over the reprogramming at issue would not affect its authority under PROMESA ultimately to ban the reprogramming. Pet. App. 7a. "To rule that the Board loses its power to act unilaterally on a matter by first seeking the Governor's agreement would be to discourage the Board from first seeking common ground and listening to the Governor's reaction before finally deciding to act." *Id.*

The Petition completely ignores the preemption-based holding. It instead focuses solely on whether the Board's ban on reprogramming from prior budgets is enforceable even if it began as a "recommendation" to the Governor. As the First Circuit explained,

however, the Board's reprogramming provision is ultimately immaterial—or, in the words of the court, "superfluous"—because it merely makes explicit the consequences of PROMESA's budgetary framework. Pet. App. 11a. By operation of PROMESA, the Governor cannot unilaterally reprogram unspent appropriations from prior budgets regardless of whether the Board's ban on reprogramming is enforceable. The Petition's challenge to the enforceability of the reprogramming ban is thus a red herring. The Petition should be denied because even if the Governor were correct that the reprogramming ban is unenforceable (and she emphatically is incorrect), it would make no difference to the outcome of the case because PROMESA bars the reprogramming at issue.

In addition to disregarding the primary issue decided below, the Petition lapses into policy arguments that PROMESA should not displace the Governor's powers in favor of the Board. That is a position the Governor is urging before Congress rather than an issue for this Court to decide.[1] The Court's role is to interpret the statute as enacted, and

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[1] *See Hearing on PROMESA Implementation During the Coronavirus Pandemic Before the House Natural Resources Committee*, 116th Cong. 9 (June 11, 2020) (Written Statement of Omar J. Marrero, Esq., Chief Financial Officer of the Government of Puerto Rico on behalf of Governor Wanda Vázquez Garced) ("To address this issue, we submit that sections 201 and 202 of PROMESA should be amended to make clear that the Oversight Board's fiscal plan and budgetary powers do not extend to determining day-to-day operating level expenditures or the imposition of detailed public policy (such as education reforms).").

PROMESA is clear that the Board has the final say on budgetary issues like reprogramming.

At bottom, this case does not present any fundamental questions under PROMESA concerning the division of power between the Board and the Puerto Rico Government or the future of self-government in the Commonwealth. The parties agree PROMESA grants the Board extensive authority over fiscal plans and budgets. *E.g.*, Pet. 2, 4. Indeed, that authority is critical to the Board's ability to carry out its responsibility under PROMESA to return Puerto Rico to fiscal stability. The narrow question in this case is whether the reprogramming power asserted by the Governor undermines the Board's budgetary authority. The First Circuit correctly answered that question in the affirmative. That decision merely recognizes what PROMESA says.

1. PROMESA grants the Board extensive authority over budgets and long-term fiscal plans in the Commonwealth. *See* 48 U.S.C. §§ 2141–2142. A fiscal plan must cover a period of at least five years and provide a method for achieving fiscal responsibility and access to the capital markets. *Id.* § 2141(b)(1)–(2). In addition, PROMESA enumerates more than a dozen requirements the Board must ensure that a fiscal plan satisfies. *Id.* § 2141(b)(1)(A)–(N). For example, the Board must assure a fiscal plan contains provisions providing for the elimination of structural deficits, enabling the achievement of fiscal targets, and improving fiscal governance, accountability, and internal controls. *Id.* Congress emphasized the discretion and power it was granting the Board to decide how to accomplish these directives by providing that the district court has no jurisdiction

to review challenges to the Board's fiscal plan, budget, and other certifications. 48 U.S.C. § 2126(e).

For each fiscal year the Board is in existence, the Governor proposes a fiscal plan on a schedule determined by the Board. *Id.* § 2141(a), (c)(2). The Board has the "sole discretion" to determine whether the Governor's proposed fiscal plan meets PROMESA's statutory requirements. *Id.* § 2141(c)(3). If the Board determines the Governor's plan does meet those criteria, the Board shall certify the fiscal plan. *Id.* § 2141(c)(3)(A), (e). If not, the Board must provide the Governor with a notice of violation and an opportunity to revise the fiscal plan to correct the violation. *Id.* § 2141(c)(3)(B). "If the Governor fails to submit to the Oversight Board a Fiscal Plan that the Oversight Board determines in its sole discretion satisfies the requirements set forth in [§ 2141(b)] by the time specified" by the Board, the Board must develop and certify its own fiscal plan, which "shall be deemed approved by the Governor." *Id.* § 2141(d)(2), (e)(2).

PROMESA's process for developing and certifying a budget for the Commonwealth is similar. *Id.* § 2142. The Governor first proposes a budget for a given fiscal year, and the Board must determine in its "sole discretion" whether that budget complies with the certified fiscal plan. *Id.* § 2142(c)(1). If the Governor's budget is compliant, the Board shall approve it and submit it to the Legislature. *Id.* § 2142(c)(1)(A). If not, the Board issues a notice of violation and provides the Governor an opportunity to correct the violation. *Id.* § 2142(c)(2). "If the Governor fails to develop a Budget the Oversight Board determines is a compliant budget by" the deadline set by the Board,

the "Board shall develop" and submit its own budget to the Governor and the Legislature. *Id.*

The Board then submits the Governor's or the Board's budget to the Legislature, which adopts its own version of the budget. *Id.* § 2142(c)(1)(A)(ii), (d)(1). If the Board determines that the Legislature's budget complies with the certified fiscal plan, the Board certifies it. *Id.* § 2142(d)(1)(A). Otherwise, the Board must issue a notice of violation and allow the Legislature to correct the violation. *Id.* § 2142(d)(1)–(2). If the Legislature fails to submit a compliant budget before the first day of the fiscal year, the Board must develop and certify its own compliant budget. *Id.* § 2142(e)(3). A budget developed by the Board is "deemed to be approved" by the Governor and the Legislature and is in "full force and effect" on the first day of the fiscal year. *Id.*

The Board can also compel compliance with the certified budget. To that end, PROMESA requires the Governor to submit quarterly reports to the Board describing the Government's revenues, expenditures, and cash flows. *Id.* § 2143(a). If those reports reveal inconsistencies with budget projections, the Board may request additional information to explain the inconsistencies and can advise the Government to take remedial action. *Id.* § 2143(b). In the event that the Government refuses, the Board can certify "to the President, the House of Representatives Committee on Natural Resources, the Senate Committee on Energy and Natural Resources, the Governor, and the Legislature" the nature and amount of the inconsistency, *id.* § 2143(c)(1), and it may implement budgetary reductions and other compliance measures

if the inconsistency remains unaddressed, *id.* § 2143(d).

2. Separate and apart from the processes for certifying and enforcing fiscal plans and budgets, PROMESA § 205(a) permits the Board at any time to submit recommendations on actions the Government may take to comply with a certified fiscal plan or otherwise promote growth, efficiency, and financial stability in the Commonwealth. 48 U.S.C. § 2145(a). In response to any such recommendation, the Governor must submit a statement to the Board concerning whether the Government will adopt the recommendation. *Id.* § 2145(b)(1). If the Governor rejects a recommendation, she must inform the Congress and President of the United States of the reasons for her rejection. *Id.* § 2145(b)(3). There is no language in PROMESA suggesting the Board cannot include in a fiscal plan or budget a provision that is otherwise within the Board's authority simply because it was first presented to the Governor as a recommendation under § 205(a) and rejected.

3. In March 2018, then-Governor Ricardo Rosselló Nevares submitted a proposed fiscal plan to the Board pursuant to 48 U.S.C. § 2141(c). The Board determined the proposed fiscal plan did not meet PROMESA's statutory requirements and issued a notice of violation calling for certain revisions.

In response, the Governor sent a letter to the Board unilaterally deeming certain of the mandated revisions to be "recommendations" under § 205(a) that the Governor purportedly had authority to reject. The revisions were not intended as recommendations, however. To the contrary, the Board had informed the

Governor that his proposed fiscal plan could not satisfy the statutory requirements in 48 U.S.C. § 2141(b) unless the revisions were implemented.

The Governor thereafter submitted a revised fiscal plan to the Board that did not contain all the revisions the Board had mandated. The Board therefore determined the revised fiscal plan did not meet PROMESA's statutory requirements. Because the deadline for the Governor to submit a compliant fiscal plan had passed, the Board certified its own fiscal plan on April 19, 2018.

After further negotiations with the Governor, the Board certified a new fiscal plan in June 2018, which was substantially similar to the fiscal plan it had certified in April 2018.[2]

4. On June 29, 2018, the Legislature submitted a Fiscal Year 2019 budget to the Board. Pursuant to 48 U.S.C. § 2142(d)(1), the Board determined the Legislature's budget did not comply with the certified fiscal plan. Because July 1 is the start of the Commonwealth's fiscal year and the Legislature failed to submit a compliant budget by that date, the Board was required to develop and certify its own Fiscal Year 2019 budget for the Commonwealth. *See* 48 U.S.C. § 2142(e)(3). By force of PROMESA, the budget developed and certified by the Board was

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[2] Contrary to the Petition's suggestion, there was nothing improper about the certification of the fiscal plan. Pet. 9, 11. In any event, the Governor made "clear" below that he "is not challenging certification" of the fiscal plan. First Circuit Joint Appendix ("CA1 JA") 34, ¶ 8. And PROMESA deprives the district court of jurisdiction over any challenge to the fiscal plan. 48 U.S.C. § 2126(e).

"deemed to be approved by the Governor and the Legislature" and was "in full force and effect" beginning July 1, 2018—the first day of the 2019 fiscal year. 48 U.S.C. § 2142(e)(3). The First Circuit upheld the Board's decision to reject the Legislature's proposed budget and certify its own. *See Mendez-Nunez v. Fin. Oversight & Mgmt. Bd. for P.R. (In re Fin. Oversight & Mgmt. Bd. for P.R.)*, 916 F.3d 98 (1st Cir. 2019).

5. The fiscal plan and budget certified by the Board included a provision stating that the Governor may not reprogram funds allocated in a prior year's budget. Before PROMESA's enactment, Puerto Rico Act 230-1974 had authorized the Governor to spend in the then-current fiscal year funds that had been allocated in a prior year's budget but never spent. Governor Rosselló took the position that, even after PROMESA took effect, Act 230-1974 permitted him to identify unused appropriations in a prior year's budget and spend those amounts in the current fiscal year even though (1) such spending was not authorized by the Board-certified budget and (2) any money associated with prior year appropriations was no longer available. Governor Rosselló never identified any unspent funds, stated how much money he intended to reprogram, or explained to what purpose he would put that money. *See* Pet. App. 8a n.6 ("The Governor does not seem to have disclosed exactly what funds its office proposes to use for what purposes.").

The certified fiscal plan and budget stated that the Governor may not invoke his power under Act 230-1974 or any other law to "authorize the reprogramming or extension of appropriations of prior

fiscal years." CA1 JA173. The fiscal plan and budget did not, however, affect the Governor's right under PROMESA § 204(c) to request that the Board certify a reprogramming of funds allocated in the current year's certified budget. *See* 48 U.S.C. § 2144(c); *see also* CA1 JA173 ("Notwithstanding this section, the appropriations approved in the budget certified by the Oversight Board may be modified or reprogrammed with the approval of the Oversight Board."). In that way, the budget would remain flexible: Should unexpected expenses arise or a natural disaster occur, the Governor could request that the Board reallocate to a different purpose funds provided for in the certified budget.

6. In July 2018, then-Governor Rosselló filed a complaint within the Commonwealth's Title III debt-restructuring case, alleging the Board exceeded its authority by including certain "policy initiatives" in the certified fiscal plan and budget. As relevant here, the complaint challenged the provision in the fiscal plan and budget concerning the Governor's power to reprogram appropriations made in prior years' budgets. According to the Governor, the reprogramming provision and other challenged provisions were "recommendations" that he rejected under PROMESA § 205(a), and they were thus unenforceable. *See* 48 U.S.C. 2145(a). The complaint sought declaratory and injunctive relief preventing the Board from enforcing the challenged provisions.

The Title III court dismissed the complaint in large part. Pet. App. 16a–62a. With respect to reprogramming, the court held PROMESA preempts Act 230-1974 and any other Puerto Rico law authorizing the Governor to reprogram

appropriations from prior fiscal years. Pet. App. 52a–53a. As the court explained, PROMESA gives the Board ultimate authority over budgetary issues and provides that a budget developed by the Board is "in full force and effect." *Id.* "Since a certified budget is in full effect as of the first day of the covered period, means and sources of government spending are necessarily rendered unavailable if they are not provided for within the budget." Pet. App. 53a. Accordingly, any law allowing the Governor to engage in spending not authorized in the certified 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." *Id.* (citing 48 U.S.C. § 2103).

Since PROMESA itself prevents the Governor from reprogramming appropriations in prior years' budgets, the Title III court held that the provision in the fiscal plan and budget barring such reprogramming "may well be superfluous, and in any event merely has the same effect as PROMESA's explicit provisions." *Id.*

With respect to recommendations in general, the Title III court held 48 U.S.C. § 2141(b)(1)(K)—which requires a fiscal plan to adopt "appropriate recommendations"—allows the Board to include measures within its authority in a fiscal plan even if they had previously been rejected by the Governor.[3] Pet. App. 44a–49a.

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[3] Although this suit initially concerned the Governor's challenge to a number of measures that the Governor characterized as recommendations that he could disregard, the only measure that

7. The Title III court certified portions of its decision for interlocutory review pursuant to 48 U.S.C. § 2166(e)(3). Specifically, the court certified: (1) "the broader question of whether Plaintiffs were entitled to declarations concerning the ability of the Oversight Board to treat as mandatory fiscal plan and budgetary provisions that the Governor had specifically rejected"; and (2) "the issue of whether the certification of a budget under PROMESA precludes reprogramming of previously-authorized expenditures from prior years."

8. The First Circuit agreed to accept the certified interlocutory appeal and affirmed. Pet. App. 1a–11a. The court began by noting the parties had limited the scope of the appeal to whether the Title III court had correctly rejected the Governor's challenge to the provision in the fiscal plan and budget barring reprogramming from prior fiscal years. Pet. App. 4a.

The court then addressed the Governor's contention that the reprogramming provision was unenforceable because the Governor had previously rejected it as a "recommendation" under PROMESA § 205(a). Pet. App. 5a–8a. The court observed that it was "doubtful from the record" that the Board had actually presented the reprogramming provision as a recommendation under § 205(a). Pet. App. 7a n.5. But in any event, the court held that the Board was

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remains at issue is the reprogramming provision. As to that provision, the district court held that PROMESA itself preempted the Governor's reprogramming authority. Pet. App. 52a–53a. This case therefore does not present any question about the measures that the Board may include in fiscal plans more generally.

not prohibited from adopting the reprogramming provision even if it had first been presented as a recommendation and had been rejected by the Governor, so long as the provision was otherwise within the Board's authority. Pet. App. 6a. As the court explained, "[t]here is no language at all in Section 205 suggesting that, by first seeking the Governor's agreement on a matter, the Board somehow loses whatever ability it otherwise had to act unilaterally on the matter." *Id.* Therefore, "any evidence that the Board recommended that the Governor adopt a ban on certain reprogramming can make no difference to the outcome of this appeal." Pet. App. 8a.

The relevant question, according to the First Circuit, was not whether the Governor had previously rejected the ban on reprogramming but rather whether the Board had the authority to impose the ban in the first place. Pet. App. 8a. In answering that question, the First Circuit quoted at length from the Title III court's "cogent" preemption analysis. Pet. App. 9a. Like the Title III court, the First Circuit held that because PROMESA gives the Board ultimate authority over budgets, the Governor may not "spend[] any funds that are not budgeted." Pet. App. 8a. Indeed, the Court explained, "[i]t beggars reason, and would run contrary to the reliability and transparency mandates of PROMESA, to suppose that a budget for a fiscal year could be designed to do anything less than comprehend all projected revenues and financial resources, and all expenditures, for the fiscal year." Pet. App. 9a. The First Circuit thus "agree[d]" with the Title III court's holding that PROMESA "itself precludes the territorial

government from reprogramming funds from prior fiscal years . . . and any Puerto Rico law to the contrary is preempted by virtue of PROMESA section 4"—that is, PROMESA's express preemption clause. Pet. App. 10a. The court found that the provision in the certified fiscal plan and budget barring reprogramming from prior fiscal years was "at worst superfluous" because PROMESA itself bars such reprogramming. Pet. App. 10a–11a.

The Governor did not seek rehearing or rehearing en banc.

REASONS FOR DENYING THE PETITION

I. THE PETITION FAILS TO ADDRESS THE PRIMARY HOLDING BELOW.

Petitioner attempts to cast this case as presenting significant questions concerning the Board's authority to "override" Puerto Rico law, Pet. i, and to impose "policy decisions" on Puerto Rico's Governor, Pet. 2. Nothing could be further from the truth. This case presents a narrow question concerning the preemptive effect of PROMESA itself with respect to a matter encompassed within the Board's core authority over the Commonwealth's budget. Because the Board's reprogramming provision simply made explicit that PROMESA prohibits the Governor from reprogramming funds from prior fiscal years, the First Circuit did not have any occasion to consider the extent of the Board's authority to "override" Puerto Rico law or to impose policy recommendations on the Government. Those questions therefore are not presented here.

As the First Circuit explained, PROMESA grants the Board authority over all budgetary matters in the Commonwealth. Pet. App. 9a. A budget certified by the Board thus "comprehend[s] all projected revenues and financial resources, and all expenditures, for the fiscal year" and is in "full force and effect" on the first day of the fiscal year. *Id.* (quoting 48 U.S.C. § 2142(e)(3)). Accordingly, any Puerto Rico law purporting to authorize the Governor to source and spend amounts not provided for in the certified budget would undercut the Board's authority over budgets in the Commonwealth. *Id.* "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." *Id.* (emphasis added) (citing 48 U.S.C. § 2103).

This case is therefore about preemption. The Petition nevertheless completely ignores the preemption holding. Instead, both of the Governor's Questions Presented address a different issue never litigated or discussed in either opinion below: the enforceability of the provision in the certified fiscal plan and budget purportedly barring requests for reprogramming from past budgets. Pet. i. The first Question Presented by the Governor asks whether the Board's reprogramming provision—which on its face bars reprogramming of funds from previous fiscal years—is inconsistent with PROMESA § 204(c), which permits the Governor to request permission to reprogram funds allocated by the budget for the current fiscal year. *Id.* The second Question

Presented asks whether the Governor may disregard the reprogramming provision because, in his view, that provision began as a recommendation under PROMESA § 205. *Id.*

Those questions, however, are entirely beside the point. As the First Circuit explained, the provision in the fiscal plan and budget barring certain reprogramming is "superfluous at worst." Pet. App. 11a. Regardless of whether that provision is enforceable, the Governor may not reprogram appropriations from prior years by operation of PROMESA. Pet. App. 8a–9a ("PROMESA prohibits the Governor from spending any funds that are not budgeted *regardless of whether the recommendation had been adopted [in the fiscal plan and budget]*." (emphasis added)).

Accordingly, even if the Court were to grant certiorari on the two Questions Presented and agree with the Governor that a provision barring requests for reprogramming is unenforceable, it would have no practical effect. The Governor would still not be permitted to reprogram appropriations made in past budgets because PROMESA preempts any law authorizing such reprogramming. Certiorari is therefore not warranted because the Governor's Questions Presented fail to address the primary holding below. Any decision on the Questions Presented cannot change the outcome of the case. *See Adarand Constructors, Inc. v. Mineta*, 534 U.S. 103, 109–10 (2001) (per curiam) (holding that certiorari was improvidently granted where petition failed to address lower court's independently dispositive holding that petitioner lacked standing to bring various claims).

II. THE DECISION BELOW DOES NOT IMPLICATE ANY QUESTION OF EXCEPTIONAL IMPORTANCE.

The Petition greatly exaggerates the significance of the decision below. According to the Governor, the decision "threatens to undermine . . . the framework of self-government" in Puerto Rico. Pet. 16. That is simply not true, and as explained above, is part of the Governor's efforts to have Congress amend PROMESA. The narrow question before the First Circuit was whether the Governor is permitted to identify unspent appropriations in a prior year's budget to justify spending not authorized by the Board in the current certified budget. Pet. App. 4a. In answering that question, the First Circuit applied a rule of law both parties accept as true: that PROMESA gives the Board "oversight of the Government's budget and fiscal policies." Pet. 4; *see also* Pet. 2 (recognizing the Board's "considerable fiscal powers"). Applying that rule to the question before it, the First Circuit held the reprogramming power asserted by the Governor runs counter to PROMESA's mandate that the Board control budgetary matters in the Commonwealth. Pet. App. 10a (citing 48 U.S.C. § 2142). The Petition fails to demonstrate that this holding threatens Puerto Rico's system of self-government. Under the court's decision, PROMESA itself preempts the Governor's spending authority to the extent it conflicts with the Board's control of the budget.

The Petition notes that, when enacting PROMESA, "Congress was careful to construct a power-sharing structure to allow the elected

government to retain some of its political powers." Pet. 15. The decision below does not hold otherwise. In fact, the First Circuit acknowledged PROMESA's power-sharing structure and explained that the Puerto Rico Government retains significant political powers that the Board lacks. Pet. App. 7a ("There are certainly policies and actions that can be adopted and pursued only with the Governor's approval."). The court nevertheless held that the specific issue before it—reprogramming—implicates budgetary matters that fall within the Board's purview. Pet. App. 9a. That narrow authority to reprogram any unspent funds from previous fiscal years does not implicate broader questions concerning the policies pursued by the Puerto Rico Government or the allocation of policymaking authority as between the Board and the remainder of the Government. Indeed, the Governor does not even explain what unspent funds she believes are available or the purposes for which one would use them. In other words, the First Circuit merely held that reprogramming from past budgets is a specific power PROMESA took away from the Government.[4]

Contrary to the Governor's suggestion, the fact that the Petition raises questions of first impression is not a basis for granting certiorari. Pet. 14–15. PROMESA is a new statute, and therefore all questions under PROMESA are questions of first

[4] The Governor's reliance on 48 U.S.C. § 2163 is therefore misplaced. *See* Pet. 5–6, 23. That provision preserves the powers of the Puerto Rico Government "[s]ubject to the limitations" set forth in PROMESA. 48 U.S.C. § 2163. Because PROMESA expressly limits the Government's authority over budgetary matters, § 2163 has no bearing on the reprogramming issue in this case. *See* 48 U.S.C. § 2142.

impression. Many petitions for certiorari present questions this Court has never previously answered, but that does not make them certworthy. The relevant criterion is not whether a petition presents a question of first impression but rather whether it presents *exceptionally important* questions. Sup. Ct. R. 10. The narrow question concerning reprogramming decided below is not exceptionally important by any yardstick.[5]

The Governor also misses the mark when she contends certiorari is warranted due to this case's supposed "fiscal importance." Pet. 15 (citing *Barnhart v. Walton*, 535 U.S. 212 (2002), and *Territory of Alaska v. Am. Can Co.*, 358 U.S. 224 (1959)). The Governor has not stated how much money she intends to reprogram from prior budgets or for what purpose. *See* Pet. App. 8a n.6. Accordingly, there is no basis for the Court to conclude that the questions concerning reprogramming presented in the Petition will have a significant fiscal impact on Puerto Rico. For all anyone knows based on the record in this case, the

[5] None of the cases cited in the Petition suggest that certiorari is warranted merely because a petition presents a question of first impression. For example, in *Reading Co. v. Brown*, the petition was granted because the question was "important in the administration of the bankruptcy laws" and provoked a 4-3 split *en banc* decision from the Circuit court below. 391 U.S. 471, 475 (1968) (cited in Pet. 14). In *American Newspaper Publishers Association v. NLRB* (quoted in Pet. 14), certiorari was granted because there was a split among the Circuits on the question presented. 345 U.S. 100, 102 (1953) (citing "conflict upon an important issue of first impression" between Sixth and other Circuits). *SEC v. Zandford* (cited in Pet. 14) similarly involved a Circuit split. *See* Petition for a Writ of Certiorari, *Zandford*, 535 U.S. 813 (2001) (No. 01-147), 2001 WL 34092101 at *15.

present dispute concerns a *de minimis* amount of money. In all events, the dispute over reprogramming almost certainly implicates much less money than the billions of dollars at stake in *Barnhart*, 535 U.S. at 217.

Finally, the Petition's reliance on 48 U.S.C. § 2126(d) is puzzling. Pet. 16. That provision merely requires courts to expedite cases brought under PROMESA "to the greatest possible extent." 48 U.S.C. § 2126(d). The provision does not remotely suggest that Congress was apprehensive about the fiscal powers it granted to the Board or that all questions arising under PROMESA are somehow certworthy. To the contrary, this Court has already denied several petitions for certiorari brought under PROMESA. *See Ambac Assurance Corp. v. Fin. Oversight & Mgmt. Bd. for P.R.*, 140 S. Ct. 856 (2020) (cert. denied); *Assured Guar. Corp. v. Fin. Oversight & Mgmt. Bd. for P.R.*, 140 S. Ct. 855 (2020) (cert. denied); *Fin. Oversight & Mgmt. Bd. for P.R. v. Andalusian Global Designated Activity Co.*, 140 S. Ct. 47 (2019) (cert. denied); *Peaje Invs. LLC v. Fin. Oversight & Mgmt. Bd. for P.R.*, 139 S. Ct. 1169 (2019) (cert. denied). Notably, the Governor did not file the Petition expeditiously or move to expedite consideration of the Petition under § 2126(d), which makes the Petition's discussion of that provision even more perplexing.

III. THE DECISION BELOW DOES NOT CREATE A CIRCUIT SPLIT OR CONFLICT WITH ANY PRECEDENT OF THIS COURT.

The Petition does not even attempt to argue the decision below creates a Circuit split. Instead, it contends that the decision "contradicts" canons of statutory construction followed in this Court's precedent. Pet. 17–27. That argument attacks the merits of the decision below, which is not a persuasive ground for granting review.

All the canons supposedly violated by the First Circuit (e.g., statutes should be read as a whole, surplusage should be avoided) are elementary principles neither "contradicted" by nor even mentioned in the decision below. Instead, the First Circuit merely interpreted the statute before it. Accordingly, there is nothing more at stake than the Governor's contention that the First Circuit committed an error of statutory construction. The Governor's assertion that the decision below will "muddle this Court's precedents regarding statutory interpretation throughout the First Circuit" is baseless. Pet. 17. This case involves a garden-variety question of statutory construction.

IV. THE DECISION BELOW WAS CORRECTLY DECIDED.

Finally, the Petition should be denied because the decision below was correctly decided.

The First Circuit held that PROMESA preempts any Puerto Rico law authorizing the Governor to reprogram appropriations made in prior fiscal years.

See Point I, *supra*. The Petition does not even attempt to challenge the correctness of that preemption holding. The holding is plainly correct because any law allowing the Governor to source and spend money not provided for in a certified budget would undercut the exclusive authority Congress gave the Board over budgetary matters in the Commonwealth. *See* 48 U.S.C. § 2142. The Board's control over the fiscal plan and budgets is critical to its efforts to achieve its core mission—to "provide a method for a covered territory to achieve fiscal responsibility." 48 U.S.C. § 2121(a). That is why Congress provided that the Board would have the exclusive final authority to certify budgets and to enforce compliance with them. Permitting the Governor to spend money outside the certified budget would undermine those authorities.

Instead of challenging the preemption holding, the Petition argues that the First Circuit erred by upholding the provision in the certified fiscal plan and budget barring reprogramming from prior budgets. Pet. 17–27. According to the Petition, the reprogramming provision violates §§ 204 and 205 of PROMESA and is thus unenforceable. *Id.*

As explained above, the reprogramming provision ultimately has no bearing on the outcome of the case. *See* Point I, *supra*. As the First Circuit held, the Governor is barred from reprogramming from past budgets by operation of PROMESA. *Id.* Accordingly, the reprogramming provision in the fiscal plan and budget is "superfluous," and its enforceability is irrelevant. Pet. App. 11a.

In any event, the First Circuit also properly construed PROMESA §§ 204 and 205, 48 U.S.C.

§§ 2144–2145, in upholding the reprogramming provision.

A. The First Circuit Properly Construed PROMESA § 204.

Section 204(c) of PROMESA permits the Governor to "request" that the Board reprogram "amounts provided in a certified Budget." 48 U.S.C. § 2144(c)(1). In other words, if the current budget certified by the Board allocates an amount for a particular purpose, the Governor may ask that the amount be reallocated for another purpose. Any such request must be approved by the Board as consistent with the fiscal plan before any reprogramming can occur. *Id.* § 2144(c)(2).

The Petition argues the reprogramming provision in the certified budget violates § 204(c) because it supposedly imposes a "blanket ban" on all reprogramming requests. Pet. 17, 18, 22. That argument was not raised below. Instead, the Governor contended below that she can reprogram budgets without Oversight Board consent.

In any event, the Petition mischaracterizes what the reprogramming provision actually says. As the complaint in this matter acknowledged, the provision merely suspended the Governor's power "to authorize the reprogramming or extension of appropriations"—in other words, to *unilaterally* reprogram appropriations—"of *prior fiscal years*." CA1 JA59, ¶ 73 (emphasis added). The provision does not, however, suspend the Governor's ability under § 204(c) to *request* a reprogramming of funds allocated in the *current fiscal year's* budget. In fact, the

reprogramming provision acknowledges that the Governor can request a reprogramming under § 204(c): "Notwithstanding this section, the appropriations approved in the budget certified by the Oversight Board may be modified or reprogrammed with the approval of the Oversight Board." CA1 JA60, ¶ 73.

The reprogramming provision therefore does not issue a "blanket ban" on all reprogramming requests. It merely suspends reprogramming from past budgets but preserves the Governor's right under § 204(c) to request a reprogramming within the current budget. 48 U.S.C. § 2144(c). Accordingly, if the Governor needs funds to deal with an unexpected crisis or a natural disaster, she can make a reprogramming request to the Board under § 204(c). *Id.* The Petition's contention that the First Circuit read § 204(c) out of the statute is based on the faulty premise that the Board banned all reprogramming requests—a premise with no basis in reality.

B. The First Circuit Properly Construed PROMESA § 205.

The Petition is also wrong when it argues that the First Circuit misconstrued PROMESA § 205, 48 U.S.C. § 2145. *See* Pet. 19–21. That provision allows the Board to make recommendations to the Governor concerning actions the Government can take to "ensure compliance with the Fiscal Plan, or to otherwise promote the financial stability, economic growth, management responsibility, and service delivery efficiency of the territorial government." 48 U.S.C. § 2145(a). The Governor may reject a

recommendation made under § 205(a), but she must explain the rationale for her rejection to the President and Congress of the United States. *Id.* § 2145(b).

The Governor's theory is that if she disagrees with a provision in a certified fiscal plan (such as the provision barring reprogramming from prior years), she can simply call it a "recommendation," reject it under § 205(a), and thereby prevent the Board from enforcing it. The First Circuit aptly characterized that argument as "puzzling to say the least." Pet. App. 6a.

For one thing, the Board never presented the reprogramming provision as a "recommendation" under § 205, as the First Circuit recognized. *See* Pet. App. 7a n.5 ("It appears doubtful from the record before us that the Board ever actually recommended that the Governor agree to any bar on action concerning reprogramming."). Instead, the Board included the reprogramming provision in the certified fiscal plan and budget. PROMESA does not authorize the Governor to decide that a binding provision in a fiscal plan or budget is a mere "recommendation." To the contrary, the statute leaves it to the Board to determine whether to submit a fiscal policy provision as a "recommendation" under § 205 or make it binding by including it in a fiscal plan. *See* 48 U.S.C. § 2145(a) ("The Oversight Board may at any time submit recommendations . . . "). The fact that the Governor decided to treat the reprogramming provision as a recommendation under § 205 does not make it so. Section 205 thus has no bearing on the analysis in this

case because the Board never made a recommendation under § 205.[6]

Moreover, even if the Board had submitted the reprogramming provision as a recommendation under § 205, and the Governor had rejected it, it still would not preclude the Board from including the provision in the certified fiscal plan and enforcing it. As the First Circuit explained, there is "no language" in PROMESA suggesting that the Governor's rejection of a recommendation prevents the Board from including in a fiscal plan a provision that is otherwise permissible. Pet. App. 6a ("[W]e see nothing in this language that precludes the Board from adopting a rejected recommendation if it otherwise has the power to adopt the recommended action on its own.").

Accordingly, the only question concerning the enforceability of the reprogramming provision is whether the Board had the authority to include the provision in the fiscal plan in the first place. As the First Circuit recognized, the answer to that question is unequivocally "yes." Pet. App. 8a–11a. PROMESA provides that a fiscal plan "shall" include provisions that "improve fiscal governance, accountability, and internal controls." 48 U.S.C. § 2141(b)(1)(F). The reprogramming provision improves fiscal controls and accountability in the Commonwealth and was thus

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[6] The Petition mischaracterizes § 205 as showing that "the Oversight Board and the elected Government must work together to develop fiscal policy." Pet. 8. Section 205 merely allows, but does not require, the Board to collaborate with the Governor on fiscal policy. *See* Pet. App. 7a. PROMESA gives the Board ultimate authority over all fiscal matters in the Commonwealth. 48 U.S.C. §§ 2141–2142.

properly included in the fiscal plan. And because PROMESA itself preempts the Governor's authority to reprogram funds from prior fiscal years, the Board clearly had authority to include a provision in the fiscal plan making that preemption explicit.

The Petition has no answer to any of these points. Instead, it resorts to building straw men. For example, the Petition argues that the decision below would permit the Board to impose "any policy dictate" it wants on the Commonwealth—including policies unrelated to fiscal or budgetary matters. Pet. 22–23.[7] However, the decision below simply holds that whatever powers the Board has, it does not forfeit them by first making recommendations concerning the policies it wishes to advance.

Moreover, contrary to the Petition's contention, the decision below does not render § 205 a dead letter. Pet. 23. As the First Circuit explained, § 205 provides the Board with the option to recommend policies that the Government can implement to hasten the Commonwealth's recovery. Pet. App. 7a. Some of those policies will be beyond the Board's authority to implement and therefore can only be presented as recommendations under § 205. *Id.* And even with respect to policies that the Board can impose unilaterally, § 205 gives the Board the option to seek

[7] As mentioned above, the Governor is making that argument to Congress. PROMESA § 108(a)(2) provides neither the Governor nor the legislature may "enact, implement, or enforce any statute, resolution, policy, or rule that would impair or defeat the purposes of this chapter, as determined by the Oversight Board." 48 U.S.C. § 2128(a)(2).

consensus with the Governor on the best path forward. *Id.*

CONCLUSION

The petition should be denied.

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Respectfully submitted,

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