No. 19-1305

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

REPLY IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

PETER M. FRIEDMAN
O'MELVENY & MYERS LLP
1625 Eye Street, NW
Washington, DC 20006
(202) 383-5300

JOHN J. RAPISARDI
WILLIAM J. SUSHON
Counsel of Record
O'MELVENY & MYERS LLP
Seven Times Square
New York, New York 10036
(212) 326-2000
wsushon@omm.com

Attorneys for Petitioner

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REPLY IN SUPPORT OF PETITION FOR CERTIORARI

The Oversight Board's Opposition[1] tries to obscure the sweeping importance of the questions presented by the Petition. Those unanswered questions are critical both to Puerto Rico's restructuring process and its system of self-government. In framing this case as a "routine" question of preemption, the Opposition ignores that the First Circuit's entire preemption analysis turned on one of the key questions this Petition presents, namely whether PROMESA bans reprogramming requests for unspent funds from prior fiscal years. The First Circuit reached the issue of preemption only because it concluded that PROMESA imposes such a ban. Tellingly, while the Opposition contends that PROMESA on its face prohibits "reprogram[ming] unspent appropriations from prior budgets" (Opp. at 5), the Opposition nowhere quotes the language in PROMESA instituting such a ban. That's because there is none. That is one critical reason why this Court should review and reverse the First Circuit's decision.

The other reason is that this dispute is vital to the powers of the democratically elected Government in Puerto Rico, something the Opposition highlights.

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[1] As used herein, (i) "Opposition" or "Opp." means the Brief in Opposition filed on July 20, 2020; (ii) "Petition" or "Pet." means the Petition for a Writ of Certiorari filed on May 15, 2020. Unless otherwise specified, all capitalized terms herein shall have the meaning ascribed to them the Petition and all citations and quotations are omitted.

The Oversight Board exposed its shocking colonialist interpretation of its statutory powers in arguing that PROMESA does not even require the Oversight Board to "work together" with the elected Government on fiscal policy. Opp. at 28 n.6. Of course, that is wrong. Numerous PROMESA provisions require the Governor first to draft fiscal plans, budgets, and other key PROMESA documents for the Oversight Board's review. Nothing in PROMESA allows the Oversight Board to adopt any document binding on the elected Government without first providing the elected Government an opportunity to present its own plan. PROMESA crafted a delicate power sharing arrangement, because Congress was aware it was infringing upon the framework of self-government of Puerto Rico. Due to that extraordinary fact, the powers of the Oversight Board should be narrowly construed. Ultimately, this suit boils down to whether the Oversight Board has the power to be an entity *above* the Government of Puerto Rico, not *within* the Government. That is why the Opposition attempts to hide its expansive and colonialist view of PROMESA behind the veil of a "routine question" of preemption. In the words of Justice Scalia: "Frequently an issue of this sort will come before the Court clad, so to speak, in sheep's clothing: the potential of the asserted principle to effect important change in the equilibrium of power is not immediately evident, and must be discerned by a careful and perceptive analysis. But this wolf comes as a wolf." *Morrison v. Olson*, 487 U.S. 654, 699 (1988) (Scalia, J., dissenting).

Thus, this Court's review is warranted to determine whether the Oversight Board's domineering governing model should prevail, or whether Puerto Rico's framework of self-government still remains.

I. THE SUPPOSEDLY "ROUTINE" FEDERAL PREEMPTION ISSUE IN THIS CASE RESTS ENTIRELY ON THE OVERSIGHT BOARD'S ERRONEOUS INTERPRETATION OF PROMESA ADOPTED BY THE FIRST CIRCUIT.

The Oversight Board argues that preemption is the First Circuit's "central holding" and that the extent of the Oversight Board's powers to ban reprogramming "make[s] no difference" to the outcome of the case. Opp. at 5. This is a red herring. The First Circuit's preemption analysis necessarily required it to resolve the very statutory interpretation questions posed by the Petition. As the First Circuit put it: "The relevant question . . . is whether the Board in the first instance possessed the authority to impose unilaterally" a ban on reprogramming. Pet. App. at 8a. And the District Court noted that "questions of statutory interpretation regarding the interplay of Sections 205 and 201(b)(1)(K) of PROMESA" and "the effect of certification of an Oversight Board-developed budget under Section 202 of PROMESA" are "[a]t the core of this dispute." Pet. App. at 39a. The Petition does not "ignore" preemption; it focuses on the PROMESA statutory interpretation issues indispensable to the preemption determination, namely whether the Oversight Board has authority to ban reprogramming requests and, if

so, whether it may do so through including in a certified budget a recommendation already rejected by the Government under PROMESA section 205. *See* Pet. at 17–27.

While the Oversight Board acts as though the answers to these underlying issues are plain from PROMESA's face, the Opposition nowhere quotes PROMESA's language to explain how PROMESA prohibits reprogramming from *prior* years' budgets or even how PROMESA's language is supposedly "inconsistent" with Commonwealth law permitting such reprogramming. *See generally* Opp. at 2–3, 16–18. The Opposition instead relies on the First Circuit's analysis of PROMESA's reprogramming and budgeting provisions—the very analysis this Petition respectfully asks this Court to review. *See* Opp. at 17–18. The First Circuit based its analysis on the text of sections 202 and 204 of PROMESA, the same sections for which the Petition seeks this Court's interpretation: "PROMESA section 202(e)(4)(c) itself precludes the territorial government from reprogramming funds from prior fiscal years except to the extent such reprogrammed expenditures are authorized in a subsequent budget approved by the Board"—the only reason for the First Circuit's conclusion that "any Puerto Rico law to the contrary is preempted." Pet. App. at 10a. The First Circuit also found that "[t]he fact that subsection 204(c)(1) allows the Governor to 'request' a reprogramming of 'any amounts *provided in a certified budget*' simply confirms that the final choice whether to allow reprogramming rests with the Board." Pet. App. at 10a (emphasis in original). The "primary issue" in the

case is therefore the Oversight Board's power to ban reprogramming requests, not the mechanical preemption analysis that follows from that conclusion, as the Opposition urges. Opp. at 5.

The Oversight Board's preemption argument is also circular. The Oversight Board argues, relying on the Title III Court's opinion, that each fiscal year budget must "comprehend all projected revenues and financial resources, and all expenditures, for the fiscal year" and that "means and sources of government spending are necessarily rendered unavailable if they are not provided for within the budget." Opp. at 13–15. This is likely why the Opposition raises a new (and incorrect) factual argument: "there are no unspent funds from past fiscal years but only old accounting entries for which no money is available." Opp. at 3. That is simply wrong. Unspent funds from prior fiscal years do not evaporate when the fiscal year renews. Those funds remain in the Government's bank account. *See* Puerto Rico Fiscal Agency and Financial Advisory Authority, *Summary of Bank Account Balances for the Government of Puerto Rico and its Instrumentalities, Information as of July 31, 2019* (Sept. 2, 2019), https://www.aafaf.pr.gov/wp-content/uploads/aafaf-bank-account-balances-government-pr-instrum-07-31-2019.pdf (showing that unspent funds in government bank accounts in June 2019, the last month of Fiscal Year 2019, are still available in July 2019, the first month of Fiscal Year 2020). But even if the Oversight Board were correct, by its own logic, any request by the Government to reprogram unspent funds from a prior fiscal year would be, in effect, a

reprogramming request for the *current* fiscal year budget—exactly the sort of request section 204(c) of PROMESA authorizes.

II. THIS CASE POSES VITAL QUESTIONS REGARDING THE BALANCE OF POWER BETWEEN THE ELECTED GOVERNMENT AND THE OVERSIGHT BOARD.

A. The Oversight Board's Opposition Demonstrates Precisely Why the Petition's Unanswered Questions Are Sufficiently Important to Warrant Review.

The Opposition attempts to minimize this case's importance, by arguing outright both that the issues are somehow not important, and that review is unwarranted because the decision below was correct.[2] But the Opposition in fact underscores the crucial importance of the questions presented here, because the Oversight Board's argument for a narrow view of the issues necessarily carries with it the complete displacement of Puerto Rico's framework of self-government. This expansive reading of the Oversight Board's powers belies the Opposition's characterization of the case as a "budgetary matter" about "old accounting entries" of no great consequence. Opp. at 20, 3.

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[2] The Opposition argues that an "attack[]" on "the merits of the decision below . . . is not a persuasive ground for granting review," but nevertheless devotes more than seven pages to defending them. Opp. at 23–30.

Most strikingly, the Oversight Board argues that, contrary to the Government's straightforward assertion that "the Oversight Board and the elected Government must work together to develop fiscal policy," "[s]ection 205 merely allows, but does not require, the Board to collaborate with the Governor on fiscal policy." Opp. at 28 n.6. Of course, this is wrong. PROMESA is replete with provisions that require the Oversight Board to collaborate with the elected Government on budgetary and fiscal matters, just three of which are:

- **Section 201**, which requires the Governor to prepare the first draft the fiscal plan for each fiscal year, which the Oversight Board then reviews. 48 U.S.C. § 2141(c)(2)–(3). The Oversight Board can impose its own fiscal plan only if (i) the Board determines that the Governor's draft fails to satisfy PROMESA's fiscal plan requirements; (ii) the Board has provided the Governor a notice of violation and an opportunity to revise the fiscal plan; and (iii) the Governor has failed timely to submit a compliant fiscal plan. *Id.* § 2141(c)–(d).
- **Section 202**, which provides that the Governor must prepare the first draft of each fiscal year's budget. *Id.* § 2142(c)(1). The Oversight Board must determine whether that budget is compliant with the fiscal plan "[i]n consultation with the Governor." *Id.* As with the fiscal plan, the Board can adopt its own budget only if (i) the Board determines the Governor's budget does not comply with the fiscal plan; (ii) the Board provides a notice of

violation explaining why the proposed budget is noncompliant and "an opportunity to correct the violation"; and (iii) the Governor has failed timely to submit a compliant budget. *Id.*

- **Section 203**, which requires the Governor and Oversight Board to work together to ensure that the Government remains compliant with the certified budget. *Id.* § 2143. The Governor must submit a financial report at the end of each fiscal quarter, on which the Oversight Board relies to assess whether the Government is compliant with the certified budget. *Id.* § 2143(a)–(b). If the Oversight Board determines that the Government's actual cash flows are inconsistent with the certified budget, the Board must afford the Government an opportunity to explain or correct the inconsistency before the Board can take any unilateral corrective action. *Id.* § 2143(b)(1)(A)–(B).

But more fundamentally, the Oversight Board's striking assertion that it does not even consider itself obligated to "work together" with the Government exposes the fate that would befall Puerto Rico's people if the Oversight Board's interpretation of its powers were allowed to stand. The Oversight Board's lone wolf philosophy runs contrary to its own argument that this case does not turn on PROMESA's balance of powers and emphasizes the need for the Court's review.

The Opposition also errs in arguing that this case does not warrant review "merely because it is an issue of first impression." Opp. at 21. n.5. The elected

Government showed that review is called for here not just because this appeal presents an issue of first impression, but because it is an *important* issue of first impression that implicates the balance of powers between the Oversight Board and the elected Government. *See* Pet. at 14–15 ("The Court should grant certiorari because this case presents an important issue of first impression."). PROMESA trenches on Puerto Rico's framework of self-government, making it particularly important that PROMESA's intrusions on self-governance be read narrowly. *See* Pet. at 16–17.

B. The Absence of a Circuit Split Is Irrelevant Here, Because Only the First Circuit Rules on Questions Concerning PROMESA.

The Oversight Board also suggests that the absence of a circuit split here undermines the Petition's merit. But the lack of a circuit split in no way detracts from the importance of the issues at hand, because a conflict cannot possibly arise involving questions about PROMESA. The statute's interpretation as it pertains to the relationship between the Oversight Board and Puerto Rico's elected Government (the Government of the only territory currently subject to PROMESA) by necessity arises only within the First Circuit, which has jurisdiction over appeals from the Title III Court. *See* 48 U.S.C. § 2126(b). No other Court of Appeals will ever weigh in on this issue. This Court has previously granted certiorari in a case involving PROMESA based on the importance of the issues, not a circuit split (*see Fin. Oversight & Mgmt. Bd. for P.R. v.*

Aurelius Inv., 140 S. Ct. 1649 (2020)), and should do the same here.

CONCLUSION

This case raises important issues regarding the interpretation of a statute that fundamentally alters the framework of self-government for more than three million American citizens. In arguing that the Court should lend a deaf ear, the Oversight Board urges an expansive reading of its own power, hidden behind an argument of "routine questions." This only emphasizes the need to review the First Circuit's decision. The Court should grant certiorari to resolve these vital issues of first impression.

Respectfully submitted,

PETER M. FRIEDMAN
O'MELVENY & MYERS LLP
1625 Eye Street, NW
Washington, DC 20006
(202) 383-5300

JOHN J. RAPISARDI
WILLIAM J. SUSHON
Counsel of Record
O'MELVENY & MYERS LLP
Seven Times Square
New York, New York 10036
(212) 326-2000
wsushon@omm.com

July 31, 2020