No. 20-1466

IN THE

# Supreme Court of the United States

HERMANDAD DE EMPLEADOS DEL FONDO DEL SEGURO DEL ESTADO, INC., *et al.*,

*Petitioners,*

*v.*

COMMONWEALTH OF PUERTO RICO, *et al.*,

*Respondents.*

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

## BRIEF IN OPPOSITION


TIMOTHY W. MUNGOVAN
JOHN E. ROBERTS
PROSKAUER ROSE LLP
One International Place
Boston, MA 02110
(617) 526-9600

MARTIN J. BIENENSTOCK
*Counsel of Record*
JONATHAN E. RICHMAN
MARK D. HARRIS
SHILOH A. RAINWATER
PROSKAUER ROSE LLP
Eleven Times Square
New York, NY 10036
(212) 969-3000
mbienenstock@proskauer.com

*Counsel for Respondent Financial Oversight and Management Board for Puerto Rico, for itself and as represenative of the Commonwealth of Puerto Rico*



305354

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

## QUESTIONS PRESENTED

State laws impairing contractual obligations do not violate the Contract Clause of the United States Constitution if they are reasonable and necessary to address an important public interest. *Sveen v. Melin*, 138 S. Ct. 1815, 1822 (2018).

Here, Petitioners challenge four Puerto Rico statutes limiting certain fringe benefits received by public corporation employees under their collective-bargaining agreements. Puerto Rico enacted these laws as part of a comprehensive effort to address what Congress has declared a "fiscal emergency" in the Commonwealth, requiring reforms that "exempt[] no part of the Government of Puerto Rico." 48 U.S.C. § 2194(m)(1), (4).

The Questions Presented are:

1. Did the court of appeals err in holding Petitioners failed to state a claim for relief under the Contract Clause, where they failed to allege facts giving rise to a plausible inference that the challenged laws were unreasonable and unnecessary to address Puerto Rico's unprecedented fiscal crisis?

2. Did the court of appeals insufficiently scrutinize the constitutionality of the challenged legislation?

3. Did the court of appeals give too much deference to the Puerto Rico legislature's assessment of the challenged legislation, despite expressly refusing to defer to such assessment?

## 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.

## STATEMENT OF THE CASE

As part of a comprehensive response to Puerto Rico's unprecedented fiscal crisis, the Commonwealth enacted legislation reducing fringe benefits for all governmental employees, including those who work at public corporations, and making it easier for those employees to be transferred to other public employers to avoid layoffs or furloughs. Petitioners challenged the legislation under the Contract Clause, arguing their members should not have their benefits reduced because their governmental employer was fiscally healthy. The Title III court and the court of appeals both held Petitioners' complaint failed to plausibly allege facts supporting an essential element of their Contract Clause claim: that the challenged Puerto Rico statutes were unreasonable and unnecessary to promote an important public interest. Petitioners now seek review of the court of appeals' decision.

The petition suffers from a fundamental error. The primary Question Presented proposed by Petitioners asks this Court to decide whether a plaintiff challenging a law impairing a public contract bears the ultimate "burden of proof" as to the law's reasonableness and necessity. But this suit was dismissed at the pleading stage. Which party bears the burden of *proof* simply does not factor into the case. Rather, the decision below implicates at most the question

whether the plaintiff bears the burden of plausibly *pleading* a violation of the Contract Clause. And that question is not certworthy for a host of reasons.

At the outset, Petitioners affirmatively conceded the pleading burden was theirs, and thereby waived any challenge. Here is what Petitioners argued to the First Circuit: "[W]hen a State is sued for impairment of contractual relationships in which it is a party, the *plaintiffs bear the burden* of pleading sufficient facts to allow a court to draw a reasonable inference that the challenged legislation is unreasonable or unnecessary to carry out the important governmental purpose." Pet. C.A. Br. 41–42 (emphasis added). At no point in their briefing below, oral argument, or petition for rehearing en banc did Petitioners argue the pleading burden should rest on the State. Having voluntarily assumed the pleading burden below, Petitioners cannot now complain the court of appeals erred in allocating it to them.

In any event, Petitioners' belated question of which party bears the burden at the pleading stage in a case challenging a law impairing a public contract does not satisfy the criteria for certiorari. No circuit has ever disagreed with the decision below by allocating the pleading burden to the State, and this Court has never considered burden issues in Contract Clause cases at all—at the pleading stage or otherwise. Petitioners attempt to manufacture a conflict with *U.S. Trust Co. of N.Y. v. New Jersey*, 431 U.S. 1 (1977), by quoting isolated snippets out of context. In fact, *U.S. Trust* was decided after trial and not on the pleadings, and therefore says nothing about pleading burdens in Contract Clause cases.

This case is also a poor vehicle because the decision below contains no analysis of the burden question for this Court to review. After all, Petitioners never raised the issue prior to their Petition. Moreover, before this Court reached any question about the parties' respective burdens, it would first face a thorny threshold question of constitutional law—namely, whether the Contract Clause applies to laws enacted by Puerto Rico. By its terms, the Clause applies only to laws enacted by a State, while this case involves laws enacted by a territory. This Court has never decided whether the Contract Clause applies to territorial laws. To decide how burdens are allocated in Contract Clause cases, the Court should await a case where that issue is unconditionally presented and not dependent on difficult threshold questions.

In addition to the question concerning burdens, the Petition raises two additional questions even further afield. The question concerning whether "intermediate scrutiny" applies in this case was neither raised by Petitioners below nor addressed in the decision under review. And the question of whether the Puerto Rico legislature was entitled to "full deference" grossly distorts the holding below. The court of appeals did not afford "full deference" to the Puerto Rico legislature. To the contrary, the court stated that, "[b]ecause the plaintiffs allege that Puerto Rico impaired a 'public contract' for its own 'benefit,' . . . its otherwise 'broad discretion to determine whether an impairment of a private contract is reasonable or necessary' is more constrained than it ordinarily would be.'" Pet. App. 11 (citation omitted). Using that "more constrained" standard of deference—which other ap-

pellate courts have also used, and with which no appellate court (including this Court) has ever disagreed—the court of appeals carefully considered the allegations in Petitioners' complaint and correctly found it had failed to plausibly allege the challenged laws were unreasonable or unnecessary.

1. Puerto Rico is in the midst of what Congress has called a "fiscal emergency" requiring "[a] comprehensive approach to fiscal, management, and structural problems and adjustments that exempts no part of the Government of Puerto Rico." 48 U.S.C. § 2194(m)(1), (4). Prior to Congress's intervention in 2016, Puerto Rico had $74 billion of funded debt, $49 billion of pension liabilities, and insufficient resources to satisfy those obligations.

In June 2016, Congress enacted the Puerto Rico Oversight, Management, and Economic Stability Act ("PROMESA") to address the Commonwealth's fiscal crisis. *Id.* §§ 2101–2241. Among other things, PROMESA established the Financial Oversight and Management Board for Puerto Rico (the "Board") and granted it extensive authority over long-term fiscal plans and budgets in the Commonwealth. *Id.* §§ 2141–2142.

A fiscal plan must cover a period of at least five years and provide a method for Puerto Rico to achieve fiscal responsibility and access to the capital markets. *Id.* § 2141(b). In addition, a fiscal plan must satisfy several statutory criteria, including providing for the elimination of structural deficits, improving fiscal governance and controls, and enabling the achievement of fiscal targets. *Id.*

In March 2017, the Board certified a fiscal plan for the Commonwealth, which provided a blueprint for addressing all aspects of Puerto Rico's fiscal crisis. Among many other reforms, the 2017 fiscal plan mandated a right-sizing of government employers and called for the Puerto Rico government to "[i]mprove employee mobili[ty] across government" and provide "uniform fringe benefits and eliminate vacation and sick day liquidations to produce higher attrition rates or other payroll-related savings."[1]

2. Petitioners are two labor unions: Hermandad de Empleados del Fondo del Seguro del Estado, Inc., a union representing employees of the State Insurance Fund Corporation ("CFSE"); and Unión de Médicos de la Corporación del Fondo del Seguro del Estado Corp., a union representing CFSE's medical doctors. CFSE is a public corporation providing medical and other services to Commonwealth residents who have suffered work-related injuries. Both unions allegedly entered into collective-bargaining agreements with CFSE that remain in effect.

In their complaint, the unions claimed the Commonwealth had enacted four statutes that unconstitutionally impaired their contractual rights under the collective-bargaining agreements:

a. *Law 66-2014*. Law 66 was enacted in 2014 to "declare a state of fiscal emergency" and "devise a plan to deal with the consequences of the fiscal and economic crisis of the downgrading of Puerto Rico's credit

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[1] *See* Fiscal Plan for Puerto Rico (Mar. 13, 2017), https://www.aafaf.pr.gov/wp-content/uploads/March-13-2017-Government-of-Puerto-Rico-Fiscal-Plans-Submissions-.pdf.

rating." C.A. Joint App'x ("JA") 370.[2] Among other things, Law 66 imposed changes affecting the accrual of vacation and other leave for public employees. The law required public corporations to "establish a plan whereby both union and nonunion employees shall exhaust the leaves accrued in excess so that no excess is carried over after the effective term of this Act." JA452. Law 66 did not reduce any leave time already accrued by employees. The relevant portions of Law 66 expired July 1, 2017.

To ensure the efficient delivery of government services, Law 66 authorized the transfer of employees among public employers regardless of whether union rules would otherwise prohibit it, unless such measures would be punitive, arbitrary, or burdensome for the employee or would reduce compensation or benefits. JA440.

In addition to labor matters, Law 66 addressed many other fiscal issues, including measures to reduce spending in the Executive branch; fiscal controls in government corporations; and reductions in the budgets of various governmental bodies. *E.g.*, JA370.

b. *Law 3-2017*: Law 3 was enacted in January 2017 and expired July 1, 2021. JA484. The Puerto Rico legislature found the law was necessary to address the worsening fiscal crisis and to comply with the soon-to-be-certified fiscal plan. JA478; JA480–481.

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[2] Because Petitioners did not include the challenged statutes in their appendix, this brief will reference the joint appendix at the court of appeals.

Among its provisions, Law 3 required public employees to use or lose accumulated sick days within the first six months after the year of accrual. JA492. As to previously accumulated sick days, the law permitted cash liquidation only upon an employee's departure from public service. *Id.* Like Law 66, Law 3 also contained many additional fiscal reforms that had nothing to do with the labor and employment relations of public corporations. *E.g.*, JA487–491.

c. *Law 8-2017*: Law 8, enacted in February 2017, created a unified system of government job classifications, authorized the transfer of employees among agencies and public corporations, and instituted merit systems for employee promotion, transfer, retention, and the like. JA502; JA507–508. With the exception of those employee-mobility provisions, most of Law 8 did not apply to public corporations like CFSE.

As stated in the Statement of Motives, the Legislature deemed Law 8 necessary due to the "disproportionate growth in the government apparatus," "excessive bureaucracy," and "disproportion in the salaries received by public servants performing the same functions in other agencies," JA502, as well as the "pressing need for mobility" within the public sector as an alternative to laying off government employees, JA503; *see also* JA505. The Legislature enacted Law 8 "[i]n compliance with . . . the requirements of the [Board]." JA505.

d. *Law 26-2017*: After the Board certified the March 2017 fiscal plan, Puerto Rico enacted Law 26, which imposed a variety of measures designed "to comply with the Fiscal Plan imposed according to the provisions of PROMESA." JA571. Law 26 addressed

matters of Commonwealth-wide interest not challenged here, such as transfer of surplus funds from government instrumentalities to the Commonwealth's Treasury, JA618–619; disposal of government-owned real estate, JA620–626; new excise taxes on tobacco products, JA628–636; and the creation of an emergency fund, JA636.

With respect to labor reform, Law 26 limited public employees to fifteen vacation days per year, but permitted employees to use up to fifty accrued vacation days if certain factors applied. JA594. The law also limited employees to eighteen sick days per year (or twelve for persons hired after 2017). JA595–596. Law 26 barred employees from further accumulating unused vacation days and sick days and from liquidating their accumulated leave for cash while they were still employed. JA607. At the end of their employment, employees could liquidate up to sixty accumulated unused vacation days. *Id.*

The labor reforms imposed by Law 26 were intended to comply with the provisions of the certified fiscal plan calling for the Commonwealth to "[i]mprove employee mobilization across government, [implement] uniform fringe benefits and eliminate vacation and sick day liquidations to produce higher attrition rates or other payroll-related savings." JA662. The Legislature explained in the Statement of Motives accompanying Law 26 that it had opted for these benefit reforms because the alternative would have been drastic measures, such as an across-the-board "20% reduction in the salaries of all of the public employees." JA580.

3. The Contract Clause provides: "No State shall . . . pass any . . . Law impairing the Obligation of Contracts."[3] U.S. Const. art. I, § 10, cl. 1. Despite its categorical language, the Contract Clause does not forbid all laws impairing contractual obligations. *U.S. Trust*, 431 U.S. at 25. Indeed, every time a government reduces a tax or builds public buildings, it has less money to pay its debt contracts. The Contract Clause was clearly not intended to stop governments from governing. The clause must be read in light of the States' reserved powers to protect the health and welfare of its citizens. *Home Bldg. & Loan Ass'n v. Blaisdell*, 290 U.S. 398, 434–35 (1934). This Court has explained that every contract contains an implicit understanding that the State may amend the parties' obligations when necessary to promote an important public purpose. *City of El Paso v. Simmons*, 379 U.S. 497, 508–09 (1965).

In determining whether a law violates the Contract Clause, this Court employs a two-step test. *Sveen v. Melin*, 138 S. Ct. 1815, 1821–22 (2018). Step one considers whether the challenged law substantially impairs contractual rights. *Energy Rsrvs. Grp., Inc. v. Kan. Power & Light Co.*, 459 U.S. 400, 411 (1983). If there is no substantial contractual impairment, the Contract Clause claim must be dismissed. *Sveen*, 138 S. Ct. at 1822. If the law does substantially impair contractual rights, the inquiry turns to

[3] This Court has not decided whether the Contract Clause, which literally applies only to "State" laws, also covers laws enacted by Puerto Rico and other territories. *See* Point I.D *infra*.

whether the law is reasonable and necessary to promote an important government interest. *Id.*

Courts typically provide some level of deference to a legislature's finding that a law is reasonable and necessary to promote an important interest. *U.S. Trust*, 431 U.S. at 23. Where a state law impairs a public contract, however, "complete deference to a legislative assessment of reasonableness and necessity is not appropriate because the State's self-interest is at stake." *Id.* at 26.

4. Petitioners brought their lawsuit in July 2018. Their amended complaint requested declarations that the four challenged statutes violate the Contract Clause of the U.S. Constitution and the Collective Bargaining Clause of the Puerto Rico Constitution. Petitioners also sought related damages.

Petitioners conceded that the Contract Clause does not forbid laws reasonable and necessary to promote an important public purpose. JA25, 73. They further acknowledged "there was an actual fiscal crisis at hand" in Puerto Rico. JA74. They nevertheless alleged the four challenged statutes were unreasonable and unnecessary to address that fiscal crisis because (1) their employer, the CFSE, was solvent and thus should not have been included in cost-saving measures applicable to other public employers throughout the Commonwealth; and (2) there were supposedly other generic steps Puerto Rico could have taken to address the crisis—such as improving revenue collection, eliminating tax credits, right-sizing government agencies, and improving economic growth—although the complaint provided no details

about the purported savings or the specific measures proposed. JA76.

5. The Board and the government defendants moved to dismiss Petitioners' amended complaint for failure to state a claim. Pet. App. 29. The Title III court granted the motion in full, holding that Petitioners had failed to allege a plausible claim under the Contract Clause. Pet. App. 43–52.[4]

At the outset, the court assumed *arguendo* that the challenged laws substantially impaired Petitioners' rights under their collective-bargaining agreements. Pet. App. 45. It nevertheless observed that laws impairing contractual obligations pass muster under the Contract Clause if they are reasonable and necessary to promote an important government interest. Pet. App. 44. As the court explained, the challenged laws themselves stated that their purposes were to address Puerto Rico's fiscal crisis, ensure the provision of public services, and avoid layoffs—all of which were important public interests. Pet. App. 47. And Petitioners' complaint "contains no factual proffers controverting the recitations in the Challenged Legislation." *Id.* Accordingly, it was undisputed that the laws were enacted to promote important public interests. *Id.*

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[4] The Title III court initially ruled it lacked subject-matter jurisdiction to the extent that Act 26 superseded Acts 66, 3, and 8 and thus rendered moot declaratory relief concerning those laws. Pet. App. 40–42. The court of appeals disagreed, reasoning that the laws were in effect before Petitioners had filed suit and that Petitioners also sought damages for alleged harm caused during that time. Pet. App. 7–10.

The Title III court went on to hold that Petitioners' complaint failed to plausibly allege that the challenged laws were unreasonable or unnecessary to promote those important public interests. Pet. App. 48–52. Petitioners never disputed the pleading burden was on them. *See* Pet. Dist. Ct. Br. 27–29. Rather, they attempted to establish unreasonableness and lack of necessity by alleging there were alternative measures the Commonwealth could have taken to address the fiscal crisis (although they did not dispute the Legislature's finding that, but for the measures adopted, public employees might have faced pay cuts of as much as 20 percent)—such as by improving tax revenue collection, eliminating tax credits, stimulating economic growth, and right-sizing government agencies. Pet. App. 49. The Title III court held such generic allegations could be made in any litigation challenging state laws enacted to address financial crises and were insufficient to satisfy the plausibility standard. Pet. App. 48–52. Among other things, the complaint failed to allege facts suggesting the Commonwealth could feasibly implement Petitioners' proposed alternatives or that the alternatives would be sufficient to address the Commonwealth's fiscal crisis. Pet. App. 49–50. Because they lacked any factual support, the proposed alternatives were insufficient "to draw a reasonable inference that the Challenged Legislation is unreasonable and unnecessary to effectuate an important government purpose." Pet. App. 52.[5]

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[5] The Title III court also dismissed as time-barred Petitioners' claims under the Collective Bargaining Clause of the Puerto Rico Constitution. Pet. App. 53–61. That ruling was affirmed on appeal, Pet. App. 19–21, and is not challenged here.

6. A unanimous panel of the court of appeals affirmed. Pet. App. 1–21. The court held that to state a viable claim under the Contract Clause, a plaintiff must allege facts sufficient to raise a plausible inference that the challenged laws were unreasonable and unnecessary to promote an important governmental purpose. Pet. App. 12. Notably, Petitioners expressly conceded they bore that burden. *See* Pet. C.A. Br. 41–42 ("[W]hen a State is sued for impairment of contractual relationships in which it is a party, *the plaintiffs bear the burden* of pleading sufficient facts to allow a court to draw a reasonable inference that the challenged legislation is unreasonable or unnecessary to carry out the important governmental purpose." (emphasis added)). Petitioners had not disputed that resolving Puerto Rico's fiscal crisis was an important governmental purpose and that the challenged statutes would lead to cost savings "that could be useful in resolving a fiscal crisis." Pet. App. 13.

The court rejected the contention that it was unreasonable or unnecessary for the Commonwealth to seek cost savings at CFSE because, under Puerto Rico law, any cost savings at CFSE would be passed on to the Commonwealth. Pet. App. 14–15 (citing Law 26-2017). The court also held that Petitioners' proposals for "alternative[]" actions that the Commonwealth could take were legally insufficient. Pet. App. 15–16. Vague, "bare bones" allegations about improving "revenue collection" or eliminating unnamed "tax credits" did not satisfy their pleading burden. *Id.* Petitioners had not specified, for example, which tax credits could have been eliminated or why the proposed "alternatives" would have saved enough money to make the labor reforms in the challenged laws unnecessary. *Id.*

Petitioners sought panel rehearing and rehearing en banc. In their rehearing petition, they again did not contest that they bore the burden to plead that the challenged laws were unreasonable and unnecessary, but instead maintained that they had satisfied their pleading burden. *See, e.g.*, Pet. C.A. Pet. for Reh'g or Reh'g En Banc 10. Both requests for rehearing were denied without dissent. Pet. App. 65–67. The petition for certiorari followed.

## REASONS FOR DENYING THE PETITION

### I. Petitioners' First Question Presented Mischaracterizes the Holding Below, While the Question Actually Presented Does Not Merit Review.

#### A. This Case Does Not Concern the Allocation of Burdens of Proof.

The bulk of the Petition focuses on the first Question Presented, which asks whether a plaintiff challenging a law impairing a public contract under the Contract Clause bears the "burden of proof" of showing the law is reasonable and necessary to promote an important government purpose. Pet. i. That question mischaracterizes the real issue presented here. This case was resolved at the pleading stage on a motion to dismiss. *E.g.*, Pet. App. 18 ("[T]hose cursory allegations do not suffice to meet the plaintiffs' pleading burden in alleging violations of the Contracts Clause."). The relevant question, therefore, is not which party bears the ultimate burden of *proof*, but rather what a plaintiff must *plead* to survive a motion to dismiss. Petitioners' erroneous framing of the first

Question Presented is reason enough to deny review of that Question.

Although Petitioners conflate the two concepts, the burden of proof is fundamentally different from the pleading burden. The former determines which side wins if the evidence is in equipoise. *See Goldman Sachs Grp., Inc. v. Ark. Teacher Ret. Sys.*, 141 S. Ct. 1951, 1963 (2021). The latter determines whether the case should proceed to discovery or be dismissed outright at the beginning. *See United Auto., Aerospace, Agr. Implement Workers of Am. Int'l Union v. Fortuño ("UAW")*, 633 F.3d 37, 48 (1st Cir. 2011) (Boudin & Howard, JJ., concurring). The two burdens need not be synchronized and rest on the same party. *See Alaska Dep't of Envtl. Conservation v. EPA*, 540 U.S. 461, 494 n.17 (2004) (quoting 2 J. Strong, McCormick on Evidence § 337, at 411–12 (5th ed. 1999)); *see also Schaffer v. Weast*, 546 U.S. 49, 57 (2005) ("[T]he burden of persuasion as to certain elements of a plaintiff's claim may be shifted to defendants, when such elements can fairly be characterized as affirmative defenses or exemptions."). Indeed, as two judges in an earlier Contract Clause case explained, there may be good reasons to impose the pleading burden on the plaintiff regardless of who bears the ultimate burden of proof—including to require the plaintiff to focus its claim. *UAW*, 633 F.3d at 48 (Boudin & Howard, JJ., concurring).[6]

[6] To be sure, the court below stated in passing that, in addition to the pleading burden, the plaintiff also bears the burden of proof on the reasonableness and necessity of challenged legislation. Pet. App. 11. That brief mention was not the basis of the

To be clear, Petitioners' first Question Presented concerning the burden of proof would not be certworthy even if it had been presented below. The burden of proof is "unlikely to matter very much in most Contract Clause cases" because the only relevant evidence is legislative history, which is readily available to both sides. *Id.*; *see also Buffalo Teachers Fed'n v. Tobe*, 464 F.3d 362, 365 (2d Cir. 2006) (explaining the ease of discerning the state's motivation in impairing a contract from "committee hearings, public reports, and legislation"). Indeed, the Petition fails to cite a single Contract Clause case where the burden of proof was outcome-determinative.

### B. Petitioners Waived Any Argument Concerning the Allocation of Pleading Burdens.

Although Petitioners now ask this Court to rule the State must, as a defense, plead a law is reasonable and necessary, they took precisely the opposite position below. *See* Pet. C.A. Br. 41–42 ("[W]hen a State is sued for impairment of contractual relationships in which it is a party, *the plaintiffs bear the burden* of pleading sufficient facts to allow a court to draw a reasonable inference that the challenged legislation is unreasonable or unnecessary to carry out the important governmental purpose." (emphasis added)); Pet. Dist. Ct. Br. 27–29 (arguing that the amended complaint adequately pleads that the challenged laws are unreasonable and unnecessary). By voluntarily

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decision, however, because the case was resolved on the pleadings on a motion to dismiss.

accepting the burden in the lower-court proceedings, and by failing to raise any argument about burden allocation in their petition for rehearing en banc, Petitioners failed to preserve a challenge based on burden allocations at this Court. *See Wood v. Milyard*, 566 U.S. 463, 473 (2012) ("For good reason, appellate courts ordinarily abstain from entertaining issues that have not been raised and preserved in the court of first instance.").

Because Petitioners previously conceded the pleading issue, the decision below contains no analysis of pleading burdens for this Court to review. This Court is not in the business of deciding issues in the first instance. *See Ret. Plans Comm. of IBM v. Jander*, 140 S. Ct. 592, 595 (2020) ("[T]he Second Circuit did not address these arguments, and, for that reason, neither shall we." (internal quotation marks and citation omitted)); *Cutter v. Wilkinson*, 544 U.S. 709, 719 n.7 (2005) ("[W]e are a court of review, not of first view."); *NCAA v. Smith*, 525 U.S. 459, 470 (1999) ("[W]e do not decide in the first instance issues not decided below."). To the extent the Court is interested in how burdens should be allocated in Contract Clause cases, it should wait for a case featuring "the benefit of a well-developed record and a reasoned opinion on the merits." *Bankers Life & Cas. Co. v. Crenshaw*, 486 U.S. 71, 80 (1988).

### C. The Question of Allocation of Pleading Burdens Does Not Satisfy Any of the Criteria For Review.

Even putting aside waiver, the question of pleading burdens is not worthy of certiorari for several reasons. First, there is no conflict with the decisions of this Court with respect to pleading burdens. Second, there is no circuit split. Third, the pleading burden was correctly allocated below.

#### *1. There Is No Conflict with Any Decision of this Court.*

Contrary to Petitioners' contention, the decision below does not "contradict[] controlling precedent of this Court." Pet. 12. Petitioners argue the ruling below concerning burden allocation conflicts with this Court's decision in *U.S. Trust Co. of N.Y. v. New Jersey*, 431 U.S. 1 (1977). Yet elsewhere they admit that whether a plaintiff bears the pleading burden on the reasonableness and necessity prong of a Contract Clause claim is a question that "this Court has not settled." Pet. 14; *see also* Pet. 12 (characterizing this case as "the first opportunity for this Court" to resolve the burden question); *UAW*, 633 F.3d at 48 (Boudin & Howard, JJ., concurring) (noting this Court has never addressed the parties' respective burdens in Contract Clause cases). It goes without saying that the decision below cannot conflict with this Court's precedent with respect to an issue the Court has never decided.

Petitioners base their conflict argument on snippets from *U.S. Trust* taken out of context. *See* Pet. 13–15, 19–20, 23–24. For example, Petitioners cite

the statement that when a plaintiff challenges a law impairing a public contract, "complete deference to a legislative assessment of reasonableness and necessity is not appropriate because the State's self-interest is at stake." Pet. 13 (quoting *U.S. Trust*, 431 U.S. at 26). But that sentence says nothing about the allocation of the pleading burden. It just means that, when a law impairs a public contract, a court will not automatically defer to a legislative finding that the law is reasonable and necessary, but instead will review the reasonableness and necessity of the law for itself. In other words, the "*substantive* test of justification *vel non* is [] adjusted in the plaintiff's favor," not the allocation of pleading burdens. *UAW*, 633 F.3d at 48 (Boudin & Howard, JJ., concurring). *U.S. Trust* was not decided on the pleadings, so it does not address pleading burdens in a Contract Clause case.

Petitioners also quote a statement from *U.S. Trust* that "the State ha[s] failed to demonstrate" that the measure at issue was reasonable and necessary. *See* Pet. 19 (quoting 431 U.S. at 31). They extrapolate that in cases involving public contracts, the burden is always on the State to demonstrate the reasonableness and necessity of a challenged law. Pet. 19–20. That is too much weight to place on so slender a reed. Neither party raised any burden issue in *U.S. Trust*, and the case did not turn on the parties' respective burdens. Moreover, *U.S. Trust* was decided after trial (*see* 431 U.S. at 3), so to the extent the Court was discussing burdens, it was speaking about burdens of proof, not pleading burdens.

### *2. There Is No Circuit Split.*

There is also no split among the circuits concerning which side bears the burden of pleading reasonableness and necessity in a Contract Clause case. Pet. App. 12. The First and Third Circuits are the only circuits that have addressed the pleading burden in cases involving public contracts, and they are in accord that the burden is on the plaintiff to plead facts showing the challenged law is unreasonable or unnecessary. *See* Pet. App. 13; *Watters v. Bd. of Sch. Dirs. of the City of Scranton*, 975 F.3d 406, 416 (3d Cir. 2020) (affirming dismissal of Contract Clause claim on Rule 12(b)(6) motion for failure to plead reasonableness and necessity).

No other circuit has addressed the pleading burdens in a Contract Clause case involving a public contract.[7] The cases cited by Petitioners were not decided at the pleading stage, and they therefore do not discuss pleading burdens at all. *See Elliot v. Bd. of Sch. Trs. of Madison Consol. Schs.*, 876 F.3d 926, 938 (7th Cir. 2017) (summary judgment ruling); *Buffalo Teachers*, 464 F.3d at 365–66 (summary judgment ruling); *Univ. of Haw. Pro. Assembly v. Cayetano*, 183 F.3d

[7] Petitioners do not dispute the consensus rule that a plaintiff bears the pleading burden on the reasonableness and necessity inquiry in cases involving *private* contracts. *See Seltzer v. Cochrane (In re Seltzer)*, 104 F.3d 234, 236 (9th Cir. 1996); *Buffalo Teachers*, 464 F.3d at 365; *see also UAW*, 633 F.3d at 47 (Boudin & Howard, JJ., concurring) (citing "customary rule" that plaintiff bears the burden of pleading facts to support reasonableness and necessity prong). Instead, they argue the pleading burden shifts to the State in cases involving public contracts.

1096, 1106 (9th Cir. 1999) (preliminary injunction ruling); *Toledo Area AFL-CIO Council v. Pizza*, 154 F.3d 307, 311–12 (6th Cir. 1998) (preliminary injunction ruling). Petitioners' cases concern a different question—namely, which party has the ultimate burden of *proving* that a law impairing a public contract is or is not reasonable and necessary. As discussed above, the pleading burden is different from the ultimate burden of proof. *See* Point I.A, *supra*. The Sixth, Seventh, and Ninth Circuits may well agree with the First Circuit that the pleading burden is on the plaintiff in cases involving public contracts; the question simply has not yet arisen in those circuits.

Perhaps recognizing there is no circuit split concerning the applicable pleading burdens, Petitioners resort to arguing the circuits disagree about which party bears the ultimate burden of proof. Pet. 14–24. Again, however, whether such a split exists has nothing to do with *this case*, which concerns pleading burdens, not burdens of proof.

#### *3. The Court Below Properly Allocated the Pleading Burden to Petitioners.*

Certiorari should be denied for the further reason that the First Circuit was correct when it assigned Petitioners the burden of pleading facts showing the challenged laws were unreasonable and unnecessary. Pet. App. 12. A Contract Clause claim has two elements: the challenged law must substantially impair contractual rights and it must be unreasonable or unnecessary to promote an important government purpose. *See Sveen*, 138 S. Ct. at 1821 (describing Contract Clause inquiry as a "two-step test"); *UAW*, 633

F.3d at 47–48 (Boudin & Howard, JJ,, concurring) ("[T]he unreasonableness of the impairment, like the substantiality of the impairment, can be said to be an element of the claim . . . ."). As a general rule, a plaintiff has the burden of pleading facts to support each element of a cause of action. *See, e.g.*, *Brownback v. King*, 141 S. Ct. 740, 749 (2021). By that logic, to survive a motion to dismiss, a Contract Clause plaintiff should be required to plead facts supporting a plausible inference that the challenged law is unreasonable or unnecessary.

Placing the pleading burden on the plaintiff in cases involving public contracts is consistent with this Court's precedent. In *Faitoute Iron & Steel Co. v. City of Asbury Park*, like here, the plaintiff challenged a law impairing a public contract. 316 U.S. 502 (1942). This Court affirmed the dismissal of the Contract Clause claim on a motion to dismiss, holding that the law was a legitimate exercise of the State's police power. *Id.* at 507, 513–14 & n.2. Although the Court did not explicitly discuss pleading burdens, its dismissal of the Contract Clause claim at the pleading stage shows the plaintiff had failed to meet its burden of pleading that the law was an unreasonable or unnecessary exercise of the State's police power.

Placing the pleading burden on the plaintiff makes practical sense, too, to force the plaintiff to focus its claims. *See UAW*, 633 F.3d at 48 (Boudin & Howard, JJ., concurring). At the time a complaint is filed, a plaintiff already will know from the public record what important purpose the law was designed to promote. Conversely, "the mystery at the complaint

stage is likely to be the peculiar claim of unreasonableness that the plaintiff plans to invoke. Knowing this (and the facts claimed to support it) at the outset means that a judgment can be made early on as to whether to go beyond the complaint stage." *Id.*

If Petitioners were correct that a plaintiff has no burden to plead facts showing a law is unreasonable or unnecessary, *every* challenge to a law substantially impairing a public contract would automatically proceed to costly discovery. That would discourage States from enacting laws promoting the public good, which is precisely the result this Court has sought to avoid in its Contract Clause jurisprudence. *See, e.g.*, *Blaisdell*, 290 U.S. at 437 ("[T]he police power[] is an exercise of the sovereign right of the Government to protect the lives, health, morals, comfort and general welfare of the people, and is paramount to any rights under contracts between individuals." (citation omitted)). If a State enacts a law impairing a public contract, it is likely facing a fiscal crisis like the one Puerto Rico is facing today. A plaintiff challenging such a law should be required to establish the plausibility of its claim before forcing the impecunious State into costly litigation.

### D. This Court Has Never Decided Whether the Contract Clause Applies to Puerto Rico.

Another reason to deny certiorari is that this case presents a difficult threshold question neither raised nor examined below. This Court has never decided whether the Contract Clause applies to laws enacted by the Commonwealth of Puerto Rico. By its plain

terms, the Clause applies only to laws enacted by States. U.S. Const. art. I, § 10, cl. 1. Although Puerto Rico possesses the "degree of autonomy and independence normally associated with States," *Examining Bd. of Eng'rs, Architects & Surveyors v. Flores de Otero*, 426 U.S. 572, 594 (1976), it is a territory and not a State. It thus does not fall within the literal scope of the Contract Clause.

Unlike States, whose authority predates the ratification of the Constitution, the Puerto Rico government's authority ultimately derives from the federal government. *See Puerto Rico v. Sanchez Valle*, 136 S. Ct. 1863, 1871, 1875 (2016). Laws enacted by the federal government are not subject to the Contract Clause. *Pension Benefit Guar. Corp. v. R.A. Gray & Co.*, 467 U.S. 717, 734 n.9 (1984). There is thus a serious question whether laws enacted by the Puerto Rico government likewise fall outside the ambit of the Contract Clause. Moreover, these specific Commonwealth laws were enacted to conform to a fiscal plan certified by the Board under a federal statute, PROMESA, which is an additional reason why they may not be subject to the Contract Clause.

Were the Court to grant certiorari, it would face at the outset whether the Contract Clause applies to laws enacted by Puerto Rico before it could turn to the question presented concerning burdens in a Contract Clause case. The need to address that potentially thorny constitutional question counsels against review. To the extent the Court is interested in resolving burden questions in Contract Clause cases, it should await a case where those burden questions are cleanly presented.

### E. Whether Petitioners Satisfied Their Pleading Burden Is Not a Certworthy Question—and, in Any Event, Petitioners Did Not Come Close.

In the alternative, Petitioners argue that, even if the burden to plead the challenged laws were unreasonable and unnecessary was properly placed on them, the Court should grant certiorari to review whether they satisfied that burden. Pet. 11–12, 16 n.3, 29–33. Effectively, Petitioners are contesting the First Circuit's application of the *Iqbal* and *Twombly* plausibility standard to the facts here. *See* Pet. App. 11–12 (citing *Ashcroft v. Iqbal*, 556 U.S. 662 (2009), and *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007)). Needless to say, this Court does not typically grant certiorari to decide whether a lower court applied a rule of law correctly. Sup. Ct. R. 10; *see also, e.g.*, *Taylor v. Riojas*, 141 S. Ct. 52, 55 (2020) (Alito, J., concurring).

In all events, the court of appeals correctly applied the plausibility standard below. Regardless of the level of deference granted to the Puerto Rico Legislature, Petitioners' complaint is bereft of any allegations suggesting that the challenged laws are unreasonable or unnecessary to help resolve Puerto Rico's fiscal crisis, as the court below observed. *See* Pet. App. 12–18. Each of Petitioners' three arguments for why their complaint is supposedly sufficient fails.

*First*, Petitioners claim CFSE is a "self-sufficient" public corporation, so that it was unreasonable for the Commonwealth to reduce fringe benefits for its employees even if other public employees throughout the

Commonwealth had to bear that reduction. Pet. 30–31. That makes no sense. That logic would mean when a government is running out of money, it can never save money from instrumentalities that have greater solvency. Besides, Congress determined that resolving Puerto Rico's fiscal crisis requires a "comprehensive" approach that "exempts *no part* of the Government of Puerto Rico." 48 U.S.C. § 2194(m)(4) (emphasis added). That means the Commonwealth can take steps to save money across the board—including at its better-performing public corporations. By law, cost savings at the Commonwealth's public corporations can, under certain circumstances, be transferred to the Commonwealth's general fund. *See* Pet. App. 14–15 (citing Act No. 26-2017). Thus, reducing fringe benefits for employees of public corporations like CFSE may increase the Commonwealth's overall fiscal health. The Legislature expressly determined to include all public corporations within Law 66 because "[e]mployees and public corporations in general . . . are part of the Commonwealth, thus its fiscal health affects the fiscal health of the Central Government," JA425, and because of interrelationships between public corporations and the Government Development Bank, which had loaned money to various public corporations, JA382.

Although Petitioners contend "the challenged legislation's text is missing an explanation of why and how the impairment of CFSE's workers' contractual rights will address the Central Government's fiscal crisis," Pet. 31, the explanation is obvious: The challenged laws were not directed at CFSE, and, by reduc-

ing fringe benefits, the laws would save the public corporations money, which could be passed on to the Commonwealth.

The challenged statutes are part of a comprehensive approach to resolving the Commonwealth's fiscal crisis. For example, aside from those statutes, the Commonwealth has enacted legislation to stimulate economic growth in the private-sector labor market (Law 4-2017); declared a financial emergency and authorized the Governor to determine payment priority for the Commonwealth's available resources (Law 5-2017); continued the effect of certain debt-moratorium orders issued under 2016 legislation (Law 46-2017); and enacted pension-reform measures (Law 106-2017). There is nothing unreasonable about requiring the CFSE and every other public corporation to share in the sacrifices being made by all stakeholders across Puerto Rico society.

*Second*, Petitioners argue the challenged laws are *per se* unreasonable because the public purpose they attempt to address (Puerto Rico's fiscal crisis) existed at the time the Commonwealth took on the obligations it now seeks to impair. Pet. 31. Factually, that is false. The collective-bargaining agreements at issue in this case were executed in 2001 and 2011. *Id.* At that point, Puerto Rico was not facing the fiscal crisis that it was facing in 2014-17. It was not until the second decade of this century that the Commonwealth became insolvent; indeed, Puerto Rico issued public debt until 2014, and it was not until 2016 that Congress intervened by enacting PROMESA.

*Third*, Petitioners contend that they plausibly alleged the Commonwealth could have taken other steps to address its fiscal emergency. Pet. 31–33. But Petitioners' alleged "alternatives" are nothing more than generic proposals untailored to any specific circumstances: (1) "Increas[ing] . . . revenue collection"; (2) "elimination of useless tax credits"; (3) "[r]ightsizing measure[s]"; and (4) "investment in economic growth projects." JA76. The court of appeals correctly held those "bare bones" allegations—which could be made about virtually every distressed governmental entity—did not plausibly show the challenged laws were unnecessary. Pet. App. 15–16.

For instance, the complaint alleged no facts showing the proposed alternatives were feasible or would have saved the Commonwealth as much money as the challenged laws. Moreover, the challenged laws were not only about saving money; they were about standardizing benefits among public employers to facilitate employee mobility and save jobs if a particular employer had excess employees who could be transferred to another public employer instead of being laid off. Petitioners also failed to identify *which* "useless tax credits" could be eliminated, *which* government agencies were in need of "rightsizing," or *which* techniques for improving revenue collection the Commonwealth should have employed. Petitioners' alternatives are the equivalent of proposing that the Commonwealth solve its fiscal crisis by collecting more taxes and spending less money. If such generic allegations were sufficient to state a claim, every Contract Clause case would proceed to discovery because those same allegations could be made in literally every case involving the impairment of a public contract. *See, e.g.*, *Buffalo*

*Teachers*, 464 F.3d at 372 (noting that "it is always the case that to meet a fiscal emergency taxes conceivably may be raised"). Plausibility demands more.

Petitioners' inability to allege a plausible claim under the Contract Clause is hardly surprising. If ever there were a situation where sweeping fiscal reform was necessary, this is it. As the Court is aware, the challenged laws were part of a comprehensive effort to resolve perhaps the greatest public-debt crisis in American history. Every stakeholder in Puerto Rico society is sharing in the burden of putting the Commonwealth's fiscal house in order. Even if the ultimate burden were on the *Commonwealth* at all stages of the case to show that the challenged laws were reasonable and necessary, the Commonwealth would have no trouble satisfying that burden. Petitioners' Contract Clause claim is implausible and was correctly dismissed.

## II. Petitioners' Second and Third Questions Presented Do Not Merit Review.

The second and third of Petitioners' Questions Presented are likewise unworthy of the Court's review. The second question asks whether "intermediate scrutiny" applies when a plaintiff challenges a law impairing a public contract. Pet. ii. The Court should not consider that question because it was not pressed or passed upon below. *See United States v. Williams*, 504 U.S. 36, 41 (1992). Under intermediate scrutiny, a court must consider whether there is an "exceedingly persuasive justification" for a law. *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 136 (1994) (citation

omitted). Neither party raised any argument concerning whether that intermediate scrutiny standard applied below. Accordingly, the court of appeals never addressed intermediate scrutiny in its decision. Instead, the parties and the court of appeals agreed that the Puerto Rico legislature was entitled to less deference because the challenged laws allegedly impaired a public contract. *See* Pet. App. 11. That is the standard both parties asked for, and that is the standard the court applied. "Intermediate scrutiny" never came up.

Even putting aside that deficiency, the second Question Presented does not meet any of the criteria for certiorari. The Petition does not argue that there is any conflict among the circuits concerning the second question, and it fails to cite a single Contract Clause case that turned on the level of scrutiny applied. Instead, the Petition merely argues in the abstract that intermediate scrutiny *should* apply to laws impairing public contracts, citing cases involving the First Amendment, gender-based classifications, the right to privacy, and the right to education. Pet. 24–27 (citing cases). The Court should decline the invitation to weigh in on a purely academic question that was presented neither below nor in any other case—particularly when Petitioners have failed to explain exactly how "intermediate scrutiny" would look different, or why it would lead to a different result.

The third Question Presented is similarly deficient. It asks "[w]hether the severity of a fiscal crisis by itself justifies full deference to Puerto Rico's legislature's assessment of reasonableness and necessity of laws that impair public contracts." Pet. ii. Again, that

question was not pressed or passed upon below. No party argued that the Puerto Rico legislature is entitled to "full deference" in light of the Commonwealth's fiscal crisis. And the court of appeals did not grant the legislature "full deference." To the contrary, the court held that "[b]ecause plaintiffs allege that Puerto Rico impaired a 'public contract' for its own 'benefit,' . . . its otherwise 'broad discretion to determine whether an impairment of a private contract is reasonable and necessary' is more constrained than it ordinarily would be." Pet. App. 11 (citation omitted). That is precisely the standard handed down by this Court in *U.S. Trust*, 431 U.S. at 26.

The third question is thus built on a false premise. Although Petitioners repeatedly assert the court of appeals gave the Puerto Rico legislature a "blank check" and effectively held that "any measure" would pass muster in light of the Commonwealth's fiscal crisis, *e.g.*, Pet. 29, 33, 35, 36, that is not what happened. Instead, the court of appeals accorded only a "more constrained" deference to the legislature's decisions, analyzed the generic allegations in the complaint, and found them insufficient to raise a plausible inference that the four laws at issue were unreasonable or unnecessary. Pet. App. 12–18. Petitioners' attempt to divine a broader holding has no support in the decision below.

Like the second question, the third Question Presented fails to meet any of the criteria for certiorari. The question is expressly limited to Puerto Rico's fiscal crisis and thus does not implicate any legal question of national importance. Petitioners do not contend the Circuits are split on the question or that the

decision below conflicts with this Court's precedent with respect to the question. To the contrary, the decision below adopts the rule in *U.S. Trust* and in every other circuit to address the issue that a legislature is entitled to less deference when it enacts a law impairing a public contract. *Compare* Pet. App. 11, *with U.S. Trust*, 431 U.S. at 26, *and Cont'l Ill. Nat'l Bank & Tr. Co. of Chi. v. Washington*, 696 F.2d 692, 701 (9th Cir. 1983). Nor does the Petition contend the third question is one that arises frequently. To the contrary, it has never presented itself in any case—including the case below.

## CONCLUSION

The petition for a writ of certiorari should be denied.

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Respectfully submitted,

MARTIN J. BIENENSTOCK
*Counsel of Record*
JONATHAN E. RICHMAN
MARK D. HARRIS
SHILOH A. RAINWATER
PROSKAUER ROSE LLP
Eleven Times Square
New York, NY 10036
(212) 969-3000
mbienenstock@proskauer.com

TIMOTHY W. MUNGOVAN
JOHN E. ROBERTS
PROSKAUER ROSE LLP
One International Place

Boston, MA 02110
(617) 526-9600

*Attorneys for Respondents Financial Oversight and Management Board for Puerto Rico, for itself and as representative for the Commonwealth of Puerto Rico*