No. 20-1466

In The
Supreme Court of the United States

UNIÓN HERMANDAD DE EMPLEADOS DEL FONDO DEL SEGURO DEL ESTADO, ET AL.,

Petitioners,

v.

COMMONWEALTH OF PUERTO RICO, ET AL.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The First Circuit

REPLY BRIEF FOR PETITIONERS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES—Continued

RULES

INTRODUCTION

Respondents question, for the first time now, whether the Contract Clause applies to the Commonwealth of Puerto Rico ("Commonwealth" or "Puerto Rico"). They suggest that it does not because Puerto Rico is a territory, and by its terms, the Contract Clause applies only to State laws. Respondents also argued that Puerto Rico Government's authority ultimately derives from the Federal Government, and as such, that laws enacted by the Commonwealth fall outside of the ambit of the Contract Clause, as do federal laws.

First, the fact that this Court has not expressed itself regarding the applicability of the Contract Clause in Puerto Rico, warrants this Court's intervention in this case. The District Court for the District of Puerto Rico, the First Circuit, and Puerto Rico Courts have applied it consistently to Commonwealth's laws. Second, Respondents relied on *Puerto Rico v. Sánchez-Valle*, 136 S.Ct. 1863 (2016), to suggest that the Contract Clause is inapplicable to Puerto Rico. Nonetheless, in that case, this Court was very specific that the ultimate source test applied there was for double jeopardy purposes only. Third, determining that the Contract Clause does not apply to Puerto Rico would be extending the infamous *Insular Cases*,[1]

[1] There is disagreement among commentators as to which cases are encompassed by the term "Insular Cases," but at a minimum, the term refers to six cases decided by this Court on May 27, 1901. *De Lima v. Bidwell*, 182 U.S. 1, 200 (1901); *Goetze v. United States*, 182 U.S. 221, 221-22 (1901); *Dooley v. United*

which this Court, recently decided not to do. Otherwise, it will leave the residents of Puerto Rico unprotected under the U.S. Constitution from the Commonwealth's interference with their contractual relations. Therefore, it makes no sense to exclude Puerto Rico from the Contract Clause.

Additionally, the First Circuit and Respondents are confusing pleading burden with the burden of proof as to Contract Clause cases. This case concerns the burden of proof because despite that it is on the pleading stage, the First Circuit affirmed Petitioners' complaint's dismissal on a probability standard, rather than plausibility. Contrary to other Circuits, in *UAW v. Fortuño*, 633 F.3d 37, 42 (1st Cir. 2011) the First Circuit allocated the burden of proof on the plaintiff regarding the reasonableness and necessity of legislation challenged under the Contract Clause and stated that, although the parties do not have to prove anything at the pleading stage, determining what party bears the burden of proof determines whether the complaint is legally sufficient to survive a motion to dismiss. It is on such rule that the First Circuit evaluated Petitioners' complaint to determine if dismissal was proper. Therefore, this case is about burden of proof and not pleading burden, because if the First Circuit would have placed the burden of proof on the Commonwealth,

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States, 182 U.S. 222, 236 (1901); *Armstrong v. United States*, 182 U.S. 243, 244 (1901) (same); *Downes v. Bidwell*, 182 U.S. 244, 287 (1901); *Huus v. New York & Porto Rico S.S. Co.*, 182 U.S. 392, 397 (1901). Petitioners also consider *Balzac v. Porto Rico*, 258 U.S. 298 (1922) as one of the *Insular Cases.*

then it would have examined the complaint differently and the outcome would have been other.

Petitioners did not waive the argument of the burden of proof. Before recurring to this Court, Petitioners requested rehearing *en banc* to the First Circuit on the grounds that it erred by not applying plausibility to Petitioners' complaint, and rather, probability. It is as a result of the First Circuit's confusion of pleading burden with burden of proof that the issue emerges.

For all the reasons stated herein, this Court should grant the Petition for writ of *certiorari*.

ARGUMENT

I. The Contract Clause applies to Puerto Rico.

At no point in their briefing below or oral argument, did Respondents question whether the Contract Clause applies to Puerto Rico. Therefore, they waived such argument. In fact, in the District Court and First Circuit, Respondents affirmatively conceded that the Contract Clause applied to Puerto Rico by arguing that the Commonwealth's laws in question are constitutional because they serve an important governmental purpose and are reasonable and necessary to address such purpose. Now, Respondents suggest that the Contract Clause does not apply to Puerto Rico because such clause only applies to the States.

In addition to this case, the First Circuit has applied the Contract Clause to Commonwealth laws at least twice, and without questioning whether it applies. *See Mercado-Boneta v. Administración del Fondo de Compensación*, 165 F.3d 9 (1st Cir. 1997); *UAW v. Fortuño*, 633 F.3d 37 (1st Cir. 2011). The Third Circuit has also applied the Contract Clause to laws enacted by the Government of the U.S. Virgin Islands. *See United Steel Paper v. Gov't of the Virgin Islands*, 842 F.3d 201 (3d Cir. 2016) (applying the Contract Clause to a law passed by the Virgin Islands' Legislature).

Relying on this Court's majority opinion in *Puerto Rico v. Sánchez-Valle*, 136 S.Ct. 1863 (2016), Respondents argued that the Contract Clause might not apply to Puerto Rico because its authority derives from the Federal Government to which the Contract Clause is inapplicable. They suggest that for purposes of the Contract Clause, Commonwealth laws are federal laws, and therefore, are outside the ambit of the Contract Clause. Nonetheless, this Court was very specific when it established that *Sanchez-Valle*'s analysis "hinge[d] on one single thing: the 'ultimate source' of the power undergirding the respective **prosecutions**." *Id*. at 1871. (emphasis added). Also, this Court stated that "'sovereignty' in this context does not bear its ordinary meaning. For whatever reason, the test that we have devised to decide whether two governments are distinct **for double jeopardy purposes** overtly disregards common *indicia* of sovereignty." *Id*. at 1870 (emphasis added). Therefore, this

Court's analysis in *Sanchez-Valle* was narrowed to Puerto Rico's "ultimate source" of power to prosecute for purposes of double jeopardy.

There are other instances where this Court has determined that Puerto Rico is like a State. In *Caledo-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663 (1974), this Court established that Puerto Rico laws are State statutes within the terms of the Three-Judge Act. Furthermore, that after 1952, Puerto Rico "had been organized as a body politic by the People of Puerto Rico," *id.* at 672, and that Puerto Rico laws are distinguishable from those of other Territories, which are subject to Congress' regulation. *Id.* at 673. *See also Examining Bd. of Engineers v. Flores de Otero*, 426 U.S. 572, 597 (1976) (recognizing that Congress "granted Puerto Rico a measure of autonomy comparable to that possessed by the States.").

There is no reason for the Contract Clause to be inapplicable to Puerto Rico. The Contract Clause protects private parties' contractual relations from the States' and Territories' interference. *See United Steel Paper*, 842 F.3d at 213. Deciding otherwise would be to extend the doctrine of the infamous *Insular Cases* to the Contract Clause, which recently this Court decided not to. *See Fin. Oversight & Mgmt. Bd. for P.R. v. Aurelius Inv., LLC*, 140 S.Ct. 1649, 1665 (2020). Establishing that the Contract Clause does not apply to Puerto Rico would leave the contractual relations of its residents unprotected by the U.S. Constitution.

This Court has not decided whether the Contract Clause applies to Puerto Rico despite that District Courts, the First Circuit, and Puerto Rico Courts have applied it without questioning its applicability. However, if Respondents are correct that there is doubt about the applicability of the Contract Clause to Puerto Rico, this warrants granting the Petition for Writ of *Certiorari* to confirm that such constitutional provision applies.

II. This case concerns burden of proof and not a pleading burden.

Respondents' argument is misleading by stating that this case concerns pleading burden and not the burden of proof. The First Circuit established that Petitioners bear the burden of proof on the reasonableness and necessity of the challenged legislation under the Contract Clause. App. 11. With that burden established, it examined the complaint accordingly and confirmed its dismissal for failure to state a Contract Clause claim. App. 11-18. The First Circuit relied at App. 12 on *UAW v. Fortuño*, 633 F.3d 37 (1st Cir. 2011), where it established, that despite that the parties do not have to prove anything at the pleading stage, determining what party bears the burden of proof on the constitutionality of the legislation in question, determines whether a complaint is legally sufficient to survive a motion to dismiss. *See UAW*, 633 F.3d at 42; App. 12.

Additionally, despite that this case is on the pleading stage, the First Circuit imposed on Petitioners' complaint a requirement of "probability" and "feasibility" rather than "plausibility." For example, the First Circuit concluded, without any evidence, that the austerity measures imposed by the challenged legislation address the fiscal crisis, and that the alternatives provided by Petitioners to resolve the fiscal crisis without impairing their collective bargaining agreement are not adequate. App. 15-16. Also, the First Circuit stated that "limiting the amount of benefits paid out to workers would produce cost savings that could be useful in resolving a fiscal crisis." *Id*. at 13. Additionally, it established that "there is no basis for the unions' contention that the benefit cuts implemented by the challenged laws are unrelated to Puerto Rico's interest in addressing the fiscal challenges faced by its central government." *Id.* at 14. The First Circuit stated that "[i]n enacting the mobility provisions, the Puerto Rico Legislative Assembly was mindful given the Commonwealth's fiscal state, of what it believed to be a need to consolidate services, delegate them to the private sector, and in some cases, eliminate ones it believed to be wholly necessary." *Id.* at 17-18.

In sum, this case concerns what party bears the burden of proof on the constitutionality of laws questioned under the Contract Clause—for which there is a Circuit split. First, the First Circuit relied on *UAW v. Fortuño*'s rule that the burden of proof is on the plaintiffs to examine whether the complaint was legally sufficient to survive a motion to dismiss and

confirmed the dismissal. The outcome would have been different if it would have placed the burden of proof on the Commonwealth.

Second, the First Circuit erred in applying "probability" and "feasibility" to the complaint rather than "plausibility", which is the requirement at the pleading stage. *See Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). It did not take all the well-pleaded allegations in Petitioners' complaint in the most favorable way to them, and decided, without any evidence, that the challenged legislation is reasonable and necessary to constitutionally address the Commonwealth's fiscal crisis.

Respondents confused these two concepts too. For instance, they argued that Petitioners' "complaint alleged no facts showing the proposed alternatives were **feasible** or would have saved the Commonwealth as much money as the challenged laws." Resp. Br. at 28 (emphasis added). Therefore, this Court should grant the Petition for Writ of *Certiorari* to establish that the State bears the burden of proof on the unconstitutionality of a law questioned under the Contract Clause, and to clarify the differences between pleading burden and burden of proof, at least, in Contract Clause cases.

III. None of Petitioners' arguments were waived.

Respondents stated that Petitioners waived arguing that the burden of proof regarding the challenged legislation's reasonableness and necessity to address the Commonwealth's fiscal crisis is on the State. Also, that Petitioners conceded that the burden was on them. However, in their *Reply Brief* at the First Circuit, Petitioners emphasized that Respondents were urging the Court to evaluate the complaint in terms of probability and feasibility rather than plausibility. Pet. R. Br. at 7.[2] Also, in the *Petition for Panel Rehearing or Rehearing En Banc*, Petitioners alleged that by "sidestepping Plaintiffs' argument regarding the unreasonableness of the challenged legislation without any evidence [. . .] the [First Circuit's] scope of analysis is contrary to the U.S. Supreme Court case law on plausibility [. . .]." Pet. P.R. at 5.[3] Petitioners argued that despite that this case is on the pleading stage, the First Circuit "overvalued the Commonwealth's [fiscal crisis] by concluding, without evidence and giving complete deference to Puerto Rico's legislature, that the austerity measures imposed through the challenged legislation addresses Puerto Rico's fiscal crisis." Pet. M.R. at 11. Petitioners also alleged that the Court erred by relying on *Buffalo Teachers Fed'n v. Tobe*, 464 F.3d 362 (2d Cir. 2006) to conclude that the challenged legislation's measures address the

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[2] Refer to Petitioners' Reply Brief at the First Circuit.

[3] Refer to Petitioners' Petition for Panel Rehearing of Rehearing *en banc* at the First Circuit.

fiscal crisis, because such case was decided through summary judgment, and thus, evidence was reviewed. Therefore, Petitioners did not waive the argument.

IV. The Circuits are split on what party bears the burden of proof.

Respondents deny a Circuit split based on the pleading burden. Nonetheless, this case concerns the burden of proof on the reasonableness and necessity of legislation questioned under the Contract Clause. The Circuit split on this issue is evident. In fact, in *UAW v. Fortuño*, 633 F.3d 37, 43, n. 10 (1st Cir. 2011), the First Circuit recognized that the Circuits were split on the burden of proof issue. Also, in *Sullivan v. Nassau*, 959 F.3d 54, 66 (2d Cir. 2020), the Second Circuit acknowledges that the Circuits are split.

Indeed, the Ninth, Sixth, and Seventh Circuits allocated the burden of proof on the State as to the reasonableness and necessity prong of the Contract Clause. *See University of Hawaii Professional Assembly v. Cayetano*, 183 F.3d 1096 (9th Cir. 1999); *State of Nev. Employees Ass'n v. Keating*, 903 F.2d 1123 1228 (9th Cir. 1990); *Elliot v. Board of School of Trustees of Madison Consolidated Schools*, 876 F.3d 926 (7th Cir. 2017). Pet. 20-24. On the contrary, the First Circuit placed the burden of proof on the plaintiff. *UAW v. Fortuño*, 633 F.3d 37, 42 (1st Cir. 2011).

In *Buffalo Teachers Federation v. Tobe*, 464 F.3d 362 (2d Cir. 2006), the Second Circuit gave the impression of placing the burden of proof on the

plaintiff. However, in 2020, it clarified that it will not take any position towards that issue. *Sullivan*, 959 F.3d at 66. This inconsistency in the Second Circuit has even led District Courts in New York to place the burden of proof on the State. *See Kuritz v. New York*, 2012 U.S. Dist. LEXIS 174031 at 64-65 (N.D.N.Y. Dec. 3, 2012) (The court determined that the State failed to demonstrate that the means chosen to address the fiscal crisis were necessary); *Donohue v. Paterson*, 715 F. Supp. 2d 306, 322 (N.D.N.Y. May 28, 2010) ("Defendants fail to articulate why the particular provisions were selected, and they appear to expect the Court to accept that the measures are reasonable and necessary solely because of the State's fiscal difficulties.").

Consequently, there are evident contrary court opinions regarding the burden of proof on the reasonableness and necessity inquiry of the Contract Clause when the State is a party to the impaired contract. This clearly affects the determination of whether a complaint plausibly states a Contract Clause claim. Therefore, the Petition for Writ of *Certiorari* must be granted.

V. The First Circuit's decision conflicts with this Court's case law on Contract Clause and plausibility.

Respondents argued that this Court typically does not grant *certiorari* to decide whether a lower court applied a rule of law correctly. Resp. Br. 25. However,

Rule 10 of this Court's Rule Book establishes that *certiorari* will be granted if a United States Court of Appeals decision "has so far departed from the accepted and usual course of judicial proceedings [. . .], as to call for an exercise of this Court's supervisory power," or if "has decided an important federal question in a way that conflicts with relevant decisions of this Court." Sup. Ct. R. 10(a), (c).

Here, the First Circuit departed from the plausibility standard established by this Court in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007) and *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). A complaint is plausible if, taking all the well-pleaded allegations in the most favorable way to the plaintiff, it can be inferred that the defendant is liable for the purported misconduct. *Iqbal*, 556 U.S. at 678. The plausibility standard does not impose a requirement of probability, but merely requires sufficient facts "to raise the reasonable expectation that the discovery will reveal evidence of illegal [conduct]." *Twombly*, 550 U.S. at 556. Nonetheless, as explained before, the First Circuit confirmed the dismissal of the complaint on a probability and feasibility standard, rather than plausibility, despite that Plaintiffs complied with *Iqbal* and *Twombly*. *See* Section II, *supra* for excerpts of the First Circuit's decision on this issue.

Additionally, the First Circuit departed from the Contract Clause standard established by this Court in *U.S. Trust of New York v. New Jersey*, 431 U.S. 1 (1977), that when a public contract has been impaired allegedly in violation of the Contract Clause, less

deference must be afforded to the State's justification of reasonableness and necessity because the State's self-interest is at stake. For example, without any evidence, the First Circuit stated that "[i]n enacting the mobility provisions, the Puerto Rico Legislative Assembly was mindful given the Commonwealth's fiscal state, of what it believed to be a need to consolidate services, delegate them to the private sector, and in some cases, eliminate ones it believed to be wholly unnecessary." App. at 17-18. Thus, the First Circuit gave full deference to the legislature as to the reasonableness and necessity of the challenged legislation. Also, this and other excerpts demonstrate that the First Circuit departed from the Contract Clause standard because it implied that a fiscal crisis justifies impairing contractual relations without making sure that no other reasonable alternative exists. *See* App. 13-15.

CONCLUSION

For all the reasons stated herein and in the *Petition for Writ of Certiorari* this Court should grant writ of *certiorari* to review and overrule the First Circuit' decision.

Respectfully submitted,

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