No. 22-____

IN THE

Supreme Court of the United States

HON. PEDRO PIERLUISI (in his official capacity); PUERTO RICO FISCAL AGENCY AND FINANCIAL ADVISORY AUTHORITY,

Petitioners,

v.

THE FINANCIAL OVERSIGHT AND MANAGEMENT BOARD FOR PUERTO RICO,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The Puerto Rico Oversight, Management, and Economic Stability Act ("PROMESA") establishes two anti-democratic limitations on the power of Puerto Rico's Governor and Legislature to enact or enforce new statutes. First, PROMESA Section 108(a) prohibits enacting or enforcing any law "that would impair or defeat the purposes of" PROMESA, "as determined by" the federally-appointed Financial Oversight and Management Board for Puerto Rico ("Board"). 48 U.S.C. § 2128(a)(2). Second, PROMESA Section 204(a) allows the Board to seek to nullify legislation that is "significantly inconsistent with" the Board's certified fiscal plan, *id.* § 2144(a), a blueprint for the Commonwealth's fiscal goals. As part of this process, Section 204(a) requires the Governor to submit to the Board a "formal estimate ... of the impact, if any, that the law will have on expenditures and revenues." *Id.* § 2144(a)(2)(A). If the Governor fails to submit such an estimate as well as a certification that the new law is not significantly inconsistent with the fiscal plan, Section 204(a) allows the Board to "seek judicial enforcement of its authority" to "ensure that the enactment or enforcement of the law will not adversely affect the territorial government's compliance with the Fiscal Plan, including preventing the enforcement or application of the law." *Id.* §§ 2124(k); 2144(a)(5).

The questions presented are:

1. What standard of review governs a district court's evaluation of the Board's determination that Puerto Rican legislation "would impair or defeat the purposes of" PROMESA, *id.* § 2128(a)(2), and its review of that legislation for consistency with the fiscal

plan, *id.* § 2144(a)?

2. Does this standard of review require the Board to reasonably and contemporaneously explain its decisions without relying on post-hoc justifications?

3. Did the court of appeals err in affirming the Title III Court's holding that the Board's determinations regarding Acts 47, 82, 138, and 176 were not arbitrary and capricious?

PARTIES TO THE PROCEEDING

Petitioners are the Honorable Pedro Pierluisi, in his official capacity, and the Puerto Rico Fiscal Agency and Financial Advisory Authority, plaintiffs and counterdefendants-appellants below.

Respondent is the Financial Oversight and Management Board for Puerto Rico, defendant and counterplaintiff-appellee below.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners the Honorable Pedro Pierluisi, in his official capacity, and the Puerto Rico Fiscal Agency and Financial Advisory Authority respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the First Circuit in this case.

OPINION BELOW

The First Circuit's opinion is reported at 37 F.4th 746, and is reprinted in the Appendix to the Petition (App.) at 1a-42a.

JURISDICTION

The court of appeals entered its judgment on June 22, 2022. App. 2a. On September 13, this Court extended the time to file a petition for a writ of certiorari until November 19, 2022. Petitioners invoke this Court's jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Relevant statutory provisions of the Puerto Rico Oversight, Management, and Economic Stability Act, 48 U.S.C. § 2101 *et seq.*, are reproduced at App. 151a-155a.

INTRODUCTION

The decision below implicates important issues of first impression and undermines Puerto Rico's long-standing framework of democratic government. Congress adopted PROMESA to provide a means for Puerto Rico and other United States territories to restructure their debts and return to fiscal

responsibility.[1] PROMESA's structure reflects an attempt to preserve the powers of Puerto Rico's elected Government, in contrast to a prior attempt by Congress to stabilize the District of Columbia's finances by creating an oversight board that stripped the local government of meaningful authority. PROMESA carefully balances the fiscal powers of the Financial Oversight and Management Board—an unelected body appointed by the President of the United States—with the political powers of Puerto Rico's elected Government.

Congress recognized the importance of resolving disputes related to PROMESA's interpretation, providing that "[i]t shall be the duty of ... the Supreme Court of the United States to advance on the docket and to expedite to the greatest possible extent the disposition of any matter brought under this [Act]." 48 U.S.C. § 2126(d). This is exactly the type of case Congress intended to expedite before this Court.

The opinion below allows the Board to strike down, without analytically-supported justification, any duly-enacted Commonwealth law the Board determines is inconsistent with PROMESA. The First Circuit ostensibly held that Board actions are subject to arbitrary-and-capricious review yet failed to hold the Board to that standard's most basic requirements. The panel did not require the Board to describe any

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

criteria for the very determinations it must make under PROMESA—whether legislation "would impair or defeat the purposes of" PROMESA, 48 U.S.C. § 2128(a)(2), or be "significantly inconsistent with" the fiscal plan, *id.* § 2144(a)(4)(B). PROMESA also requires the Commonwealth to submit a "formal estimate" of each new law's fiscal impact. *Id.* § 2144(a)(2)(A). The panel agreed with the Board's contention that the Commonwealth's estimate was insufficient but did not require the Board to explain its criteria for a "formal estimate." The absence of a clear standard upends PROMESA's balance of power because the Government cannot know *ex ante* how to satisfy the Board that its statutes pass muster. The panel also affirmed the Board's decisions based on post-hoc justifications ginned up during litigation, depriving the Government of its right under PROMESA to address the Board's concerns and correct legislation to better align with the fiscal plan.

If allowed to stand, the First Circuit's decision will thwart PROMESA's protections for Puerto Rican democracy and call into question the foundations of Puerto Rico's self-rule. The Court should grant certiorari to determine the standard of review governing Board decisions under PROMESA and which core principles of administrative law this standard incorporates. Without this Court's intervention, policy decisions by Puerto Rico's elected Government will be

overruled by an unelected federal body with no meaningful backstop of judicial review.

STATEMENT OF THE CASE

A. Puerto Rico's Framework of Self-Government

The people of Puerto Rico have democratically elected their territorial government for nearly 70 years. In 1950, Congress authorized Puerto Rico to "organize a government pursuant to a constitution of [its] own adoption." Act of July 3, 1950, § 1, Pub. L. No. 600, 64 Stat. 319. In 1952, Puerto Rico's people ratified—and Congress approved—Puerto Rico's Constitution, which created a tripartite government that is "republican [in] form" and "subordinate to the sovereignty of the people of Puerto Rico." *See* P.R. Const. art. I, § 2; Act of July 3, 1952, Pub. L. No. 447, 66 Stat. 327. Since then, the Commonwealth's people have elected their territorial Government with the "degree of autonomy and independence normally associated with States of the Union." *Examining Bd. of Eng'rs, Architects & Surveyors v. Flores de Otero*, 426 U.S. 572, 594 (1976).

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

By 2016, Puerto Rico was "in the midst of a fiscal crisis." *Puerto Rico v. Franklin Cal. Tax-Free Tr.*, 579 U.S. 115, 118 (2016); *see also* H.R. Rep. No. 114-602, at 40 (2016) (noting that the Commonwealth had over "$110 billion in combined debt and unfunded pension liabilities"). In response, on June 30, 2016, the United States Congress enacted PROMESA to "stabilize

Puerto Rico's economy by establishing oversight of the Government's budget and fiscal policies and by providing a mechanism for the Commonwealth to restructure its debts." *In re Fin. Oversight & Mgmt. Bd. for P.R.*, 330 F. Supp. 3d 685, 689 (D.P.R. 2018). PROMESA created the Board "to provide a method for [Puerto Rico] to achieve fiscal responsibility and access to the capital markets," and "to assist the Government of Puerto Rico in reforming its fiscal governance." 48 U.S.C. §§ 2121(a), 2194(n)(3).

PROMESA confers important fiscal-management powers on the Board, including the power to develop fiscal plans in concert with Puerto Rico's elected Government. But PROMESA also reserves political authority to the elected Government and ensures that the Government may continue to exercise the policy-making authority crucial to Puerto Rico's framework of democratic government. Section 204, for example, provides that the Government retains its democratic powers to make policy and enact laws. 48 U.S.C. § 2144 (contemplating that the Government will "duly enact[]" laws).

(1) Section 204(a)'s Procedures for Newly-Enacted Legislation

PROMESA also gives the elected Government latitude in enacting new legislation. Rather than requiring new laws to align identically with the governing fiscal plan, Section 204(a) seeks to ensure that Puerto Rico's new laws are not "significantly inconsistent" with the plan. *Id.* § 2144(a). Section 204(a) requires the Government to send the Board the text of each new law, along with (i) a "formal estimate prepared by an appropriate entity of the territorial government

with expertise in budgets and financial management of the impact, if any, that the law will have on expenditures and revenues," *id.* § 2144(a)(2)(A), and (ii) a certification by that entity stating whether the law is or is not "significantly inconsistent with" the fiscal plan, *id.* §§ 2144(a)(2)(B)-(C). Section 204(a) does not define what constitutes a "formal estimate" or what "significantly inconsistent" means.

If a new law is submitted without the requisite estimate or certification, *id.* § 2144(a)(3)(B), or with a certification that the law is significantly inconsistent with the fiscal plan, *id.* § 2144(a)(3)(C), the Board must send the Governor a notification. If a certification or estimate is "missing," the Board "may direct the Governor to provide the missing estimate or certification (as the case may be)." *Id.* § 2144(a)(4)(A). If the Government has certified that a law is significantly inconsistent with the fiscal plan, the Board "shall direct the territorial government to (i) correct the law to eliminate the inconsistency; or (ii) provide an explanation for the inconsistency that the Oversight Board finds reasonable and appropriate." *Id.* § 2144(a)(4)(B).

If the Government "fails to comply with a direction given by the Oversight Board under paragraph (4)," the Board may "take such actions as it considers necessary, consistent with this chapter, to ensure that the enactment or enforcement of the law will not adversely affect the territorial government's compliance with the Fiscal Plan, including preventing the enforcement or application of the law." *Id.* § 2144(a)(5).

(2) Section 108(a)'s Targeted Enforcement Power

Section 108(a)(2), a provision titled "Autonomy of the Oversight Board," is designed to prevent the Government from trying to control the Board. It provides the Board a means to challenge governmental actions, including legislation. It states that "[n]either the Governor nor the Legislature may ... enact, implement, or enforce any statute, resolution, policy, or rule that would impair or defeat the purposes of [PROMESA], as determined by the Oversight Board." *Id.* § 2128(a)(2). Upon a Board "determin[ation]" that a law violates section 108(a)(2), the Board "may seek judicial enforcement" of that determination to prevent the implementation of that law. *Id.* § 2124(k).

C. The Government's Section 204(a) Compliance-Certification Procedure

The Government has an established policy complying with Section 204(a) and demonstrating that a statute is not "significantly inconsistent" with a fiscal plan. *See* C.A. App. 204-19. Executive Order 2019-057 establishes rigorous procedures for Section 204(a) compliance and requires cooperation from all Government agencies, instrumentalities, and public corporations. *See id.* The order also exclusively authorizes AAFAF, the Puerto Rico Department of Treasury ("Treasury"), and the Puerto Rico Office of Management and Budget ("OMB") to issue compliance certifications. *See id.*

Under the order, Treasury's Office of Legal Affairs initially reviews new laws for effects on Government expenditures and revenues. C.A. App. 496-97. If a law

has no apparent fiscal effect, Legal Affairs recommends that Treasury's Office of Economic and Financial Affairs issue a certification that the law has no effect on expenditures and revenues. *Id.* If the law has an apparent fiscal effect, Treasury performs a fiscal analysis using data from other Government agencies and Treasury's own micro and macro simulation models to determine the new law's fiscal effect. C.A. App. 497-498. AAFAF, Treasury, and/or OMB then issue the appropriate certification under Section 204(a). *See* C.A. App. 204-19.

D. The Challenged Acts and Their Compliance-Certification Process

(1) Act 138

On August 1, 2019, then-Governor Rosselló signed into law Act 138, which amended Puerto Rico's Insurance Code to prohibit health insurance companies from arbitrarily denying provider-enrollment applications from qualifying healthcare professionals and organizations in Puerto Rico. C.A. App. 679. The Government concluded that health insurance companies had been improperly denying enrollment applications from Puerto Rico's doctors, hospitals, laboratories, pharmacies, and similar providers—causing medical professionals to leave the Island. *See* C.A. App. 674-676. Act 138 was thus adopted to stop "the brain drain of Puerto Rican physicians." C.A. App. 675.

On September 12, 2019, AAFAF submitted the Act 138 Certification to the Board. *See* C.A. App. 638, 653. Because Act 138 requires no Commonwealth spending and does not diminish revenues, it is facially fiscally neutral. *See* C.A. App. 638. The certification

therefore estimated that Act 138 would have "no impact on expenditures and revenues" and concluded that Act 138 is "not significantly inconsistent" with the 2019 Fiscal Plan. C.A. App. 653.

More than two months later, on November 15, 2019, the Board rejected the Act 138 Certification for "fail[ing] to provide the formal estimate of the fiscal impact as required under" Section 204(a). C.A. App. 222. The Board speculated that Act 138 may be "preempted by the statutory provisions of Title 42 of the U.S. Code and related Code of Federal Regulations." *Id.*; *see also id.* (requesting analysis of "corresponding federal statutes to ascertain there are no conflicting provisions that may jeopardize the grant of federal funds to the [Puerto Rico Department of Health]"); C.A. App. 233 (requesting analysis "for possible conflicting provisions").

After AAFAF explained that the Board could not require legal analysis under the guise of a formal estimate, *see* C.A. App. 228, and more than five months after the Board's initial rejection of the certification, the Board posed several questions "regarding the financial assumptions on which [Act 138] appear[s] to be based and the implications of those assumptions," C.A. App. 239. The Board did not explain the basis for these questions or identify any fiscal effect of Act 138 that would be inconsistent with the then-operative fiscal plan. Indeed, until litigation began, the Board identified no specific fiscal effect of Act 138. *See* C.A. App. 221, 232.

(2) Act 82

Act 82 established the "Office of the Regulatory

Commissioner of the Administrators of Pharmacy Services and Benefits Managers" to regulate middlemen that negotiate medication costs between pharmaceutical companies and third-party payers. *See* C.A. App. 254-259. Before Act 82, these entities were unregulated in Puerto Rico, causing market inefficiencies, lack of transparency, and inflated prescription drug prices. *Id.* Act 82 prohibits them from engaging in anticompetitive and deceptive practices that harm consumers, health insurance plans, and pharmacies, as well as the Government. *Id.*

The Act 82 Certification, submitted on November 18, 2019, specified that Act 82 would have an "approximate impact of $475,131.47 on the Department of Health's budget," which will be "implemented using budgeted resources" already certified by the Board. C.A. App. 225. The Act 82 Certification also certified that Act 82 would have no effect on revenues, and that it was "not significantly inconsistent" with the 2019 Fiscal Plan. *Id.* On December 18, 2019, the Board rejected this certification, contending that its "estimate is not 'formal' and not accurate because it provides only an 'approximate impact' of [Act 82] on the Department of Health's budget." C.A. App. 233. In this and subsequent communications with AAFAF, the Board's only justifications for the rejection were that (i) the certification's "approximate impact" of $475,131.47 was inaccurate because it was at odds with unspecified testimony from an unnamed official in the Health Insurance Administration, *see id.*; C.A. App. 225; and (ii) the certification did not include the same legal analysis the Board required for Act 138 to determine whether Act 82 conflicted with federal law,

see C.A. App. 233.

Though the Government repeatedly explained that (i) the Act 82 Certification included all PROMESA-mandated elements; (ii) the Board's requests for a legal analysis were outside PROMESA's scope; and (iii) the Board had identified no fiscal effect inconsistent with the operative fiscal plan, *see* C.A. App. 242-44, the Board nonetheless concluded that Act 82 "do[es] in fact impair and defeat the purposes of PROMESA ... because, among other reasons, the Government has not complied with Section 204(a)," C.A. App. 697.

(3) Act 176

In late 2019, the Government enacted Act 176 to provide eligible public employees with the right to accumulate vacation and sick leave at the rates of 2.5 and 1.5 days per month, respectively. *See* C.A. App. 873-76. These new rates represent a modest increase of 0.5 days per month over the prior prevailing rates. To ensure Act 176 would not affect the Government's payment obligations to employees or overall productivity, the Legislature retained existing caps on vacation and sick days and the requirement that each agency develop a plan to ensure paid days off do not disrupt government services. C.A. App. 853. Act 176 does not require the Government to expend any funds, nor does it reduce revenue; the Act is fiscally neutral. On December 26, 2019, the Government submitted a certification estimating that Act 176 would have "no impact on expenditures" or "revenues," and concluded that Act 176 is "not significantly inconsistent" with the 2019 Fiscal Plan. *Id.*

After five months of silence, C.A. App. 839-40, the Board rejected this certification as inadequate because it "was not accompanied by the estimate required under [Section 204(a)(2)(A)]." C.A. App. 690. The Board's only justification was speculation that Act 176 may have an "impact on employee productivity, given that it permits employees to take more vacation days during the year." C.A. App. 690-91. The Board provided no evidence, documentation, studies, or further explanation. AAFAF responded that the Board had ignored the requirement that all Government entities establish strict vacation plans to prevent abuse and ensure uninterrupted government services. *See* C.A. App. 857. In its letters to AAFAF, the Board never addressed this issue or explained why, in its view, a Section 204(a) certification must account for potential secondary fiscal effects such as speculative changes in productivity.

(4) Act 47

As part of the Government's coordinated effort with the Board to combat the COVID-19 pandemic, the Legislature passed Act 47 to provide tax relief to health professionals, whose sacrifices have been integral to protecting Puerto Ricans' health, safety, and welfare. C.A. App. 290. Before the Act's passage, the Board's Municipal Affairs & Legislative Review Director assured the then-Governor's Legislative Affairs Adviser that the Board had "no issue" with the Act. C.A. App. 504. Then-Governor Vázquez signed Act 47 into law on April 28, 2020. C.A. App. 1027.

On May 4, 2020, the Government submitted the Act 47 Certification to the Board. *See* C.A. App. 1009, 1031. The Government certified that Act 47 would

have no effect on expenditures but could reduce annual revenues by approximately $25.7 million. *Id.* The certification concluded that Act 47 was "not significantly inconsistent" with the 2019 Fiscal Plan. *Id.*

On May 21, 2020, despite the Board's earlier assurance concerning Act 47, the Board rejected the Act 47 Certification because (i) it "failed to provide the formal estimate of the impact [Act 47] will have on expenditures and revenues"; and (ii) Act 47 "will reduce revenue by tens of millions of dollars per year, without any corresponding cut in spending or proposal to increase revenues from other sources." C.A. App. 1033, 1035. The Board requested that the Government include in any revised certification "proposed measures to cover the projected lost revenue as a result of the Act." C.A. App. 1035. That letter also criticized as "grossly overbroad" the Government's decision to extend Act 47's incentives to a variety of healthcare workers. C.A. App. 1034 n.1. The Board demanded extensive data to second-guess the Government's estimate, such as (i) the number of medical practitioners eligible for the tax incentive; (ii) high and low estimates for the percentage of practitioners expected to apply; and (iii) minimum and maximum estimates of eligible practitioners' income. *See* C.A. App. 1034.

AAFAF explained that the Board's primary objection to the Act 47 Certification—that it was based on hypothetical facts—is inherent in an "estimate," which is all PROMESA requires. C.A. App. 1038. Nevertheless, AAFAF provided additional information and updated estimates. AAFAF explained that Act 47 still was not significantly inconsistent with the 2019

Fiscal Plan because the additional marginal expenditure of $25.7 million represented a *de minimis* percentage of the Fiscal Plan's more than $20 billion in baseline annual revenue forecast. *See* C.A. App. 1038-39, 74-75. AAFAF also updated its annual revenue-reduction estimate to a minimum of $540,000 and a maximum of $40,100,000. C.A. App. 1039.

The Board replied on June 5, 2020, rejecting the Act 47 Certification even in light of this additional information. *See* C.A. App. 246. The Board took the maximum revenue reduction the Government had estimated, multiplied it by five years to yield a $200 million estimated effect, and on that basis concluded Act 47 is "significantly" inconsistent with the fiscal plan. *See id.*

E. Proceedings Below

(1) Title III Court

On June 12, 2020, the Government filed actions seeking declaratory relief concerning five challenged laws: Acts 138, 176, 82, 47, and 181. Because the Board subsequently accepted the Government's certification that Act 181 was not significantly inconsistent with the fiscal plan, Act 181 was not addressed in the appeal before the First Circuit and is not addressed in this petition.

For each of the challenged acts, the Government sought declarations that (i) the Government's Section 204(a) certification was adequate, the Board could not enjoin the law, and the Board's unilateral determination of non-compliance with Section 204(a) was not binding; and (ii) the Board cannot unilaterally, without court intervention, enjoin the implementation and

enforcement of each law under Section 108(a)(2). App. 48a-49a. The Board filed an answer and mirror-image counterclaims in each action. App. 49a-51a. The Title III Court consolidated the actions for motion practice. App. 50a-51a.

On September 28, 2020, the Government moved for summary judgment on its Act 138 and 176 claims. The Board subsequently cross-moved for summary judgment on those two laws and sought summary judgment as to Acts 82 and 47. App. 51a-52a. The Title III Court resolved the summary-judgment motions in one opinion. The court held that the Board's decisions under Section 204(a) should be reviewed "under the arbitrary and capricious standard." App. 110a, 116a. The court referred to its prior decision in *In re Fin. Oversight & Mgmt. Bd. for P.R.*, 616 B.R. 238 (D.P.R. 2020) ("*Law 29 II*"), which held that "the arbitrary and capricious standard applied to review of the Oversight Board's determinations under section 108(a)(2)," App. 107a.

In *Law 29 II*, the Title III Court observed that "[a]lthough Congress invoked the Territories Clause of Article IV of the Constitution in enacting the statute and PROMESA expressly provides that the Oversight Board 'shall not be considered to be ... [an] agency ... of the Federal Government,'" 616 B.R. at 252 (quoting 48 U.S.C. § 2121(c)(2)), "the Oversight Board's powers and functions are similar to those of agencies charged by Congress with carrying out the provisions of statutes," *id.* "[T]his operational similarity renders precedent governing judicial review of federal agency actions instructive in considering whether the Oversight Board has acted in a manner

consistent with the provisions of PROMESA." *Id.* The Title III Court concluded that in evaluating the Board's decisions, it "must decide whether the Oversight Board's determinations were supported by a rational basis and must affirm the Oversight Board's decisions if they are 'reasoned, and supported by substantial evidence in the record.'" *Id.* at 253 (quoting *Trafalgar Cap. Assocs., Inc. v. Cuomo*, 159 F.3d 21, 26 (1st Cir. 1998)).

Applying that standard to the Board's Section 204(a) determinations, the Title III Court held that the Board's determinations that the Act 82 and Act 138 Certifications did not comply with Section 204(a) were not arbitrary and capricious. App. 120a, 130a. The court stated that the Act 82 Certification "plainly fall[s] short of even facial compliance with the formal estimate requirement" because it "provide[s] no context or analysis to support the certification's assertion of consistency with the fiscal plan imposed by PROMESA § 204(a)." App. 120a. The court concluded that the Act 138 Certification "lacks a formal estimate and certification that is sufficiently informative and complete to satisfy the Government's obligations under section 204(a)(2)." App. 127a.

As for Act 138, the court relied on evidence submitted by the Board only "[i]n the context of the instant motion practice" to hold that the Board had made a sufficient showing supporting its determination that "Act 138 will result in increased healthcare costs which will ultimately be borne by the Commonwealth." App. 128a. Thus, "no reasonable fact finder could conclude that the Board's challenge to the estimate and certification in the Act 138 Certificate was

arbitrary or capricious." App. 130a. The court did not address the Board's substantive decision as to Act 82, however, declining to decide whether the Board's insistence on "an analysis of how Act 82 could affect the receipt of federal funds" was arbitrary and capricious—despite noting that "the correspondence reveals practically no articulable basis for the Oversight Board's concerns." App. 119a n.20.

As for Act 176, the Title III Court held that the Board's Section 108(a) determination that the act impairs or defeats PROMESA's purposes was not arbitrary and capricious. App. 135a. In doing so, the court credited the Board's assertion—made for the first time during litigation—that Act 176 "undermines the ability to right-size the workforce to the population size as contemplated in the Fiscal Plan." App. 133a.

The court likewise upheld the Board's Section 108(a) determination as to Act 47, even though the Board's determination rested on a "[r]evenue neutrality" theory explained for the first time at oral argument—that the express language of "Section 14.3.3 of the 2019 Fiscal Plan" requires any revenue reduction be "accompanied by offsetting revenue measures" of a sufficient amount identified in the enabling legislation. App. 96a n.16. The court credited this belated explanation, citing Act 47's "undisputed potential to reduce revenues by about $200 million over five years by creating tax incentives with no offsets to make it revenue neutral," which "renders its implementation a flagrant and significant deviation from section

14.3.3 of the 2019 Fiscal Plan." App. 145a.[2]

On that basis, the Title III Court granted summary judgment in the Board's favor as to Count I of the Act 82 and Act 138 Complaints, seeking declaratory relief concerning Section 204(a); Count II of the Act 176 and Act 47 Complaints, seeking declaratory relief concerning Section 108(a)(2); Counterclaim II of the Act 82 and Act 138 Complaints, seeking injunctions under Section 104(k) barring implementation of the laws under Section 204(a)(5); and Counterclaim III of the Act 176 and Act 47 Complaints, seeking injunctions barring implementation of the laws under Section 108(a)(2). App. 148a. The Title III Court denied the Government's motions for summary judgment. App. 148a-149a. The parties stipulated to the remaining counts' dismissal without prejudice, and the Title III Court entered its judgment closing the case. C.A. App. 522-524.

(2) First Circuit

The Government appealed the Title III Court's order and judgment. The Government argued that the Title III Court had misapplied the arbitrary-and-capricious standard, which "means more than just considering whether the Board's determinations were reasoned and supported by substantial record evidence" and "must also consider attendant principles developed through decades of administrative law

[2] The Government also opposed the Board's summary-judgment motion as to Acts 82 and 47 as premature under Federal Rule of Civil Procedure 56(d). App. 104a. The district and appellate courts rejected this argument, App. 34a, and the Government does not raise it in this petition.

jurisprudence." App. 25a-26a. Specifically, it argued that the Board must have (1) explained the standard on which it based its determination; (2) reasonably and contemporaneously explained its decision; and (3) not relied on "hindsight rationalizations."[3] App 26a.

The panel observed that "the principles used to review whether a federal agency decision is arbitrary or capricious could also be useful in evaluating a decision by the Board," noting that "core administrative law principles are not creatures of the APA [Administrative Procedure Act]" but rather "promote fairness and transparency in the administrative process and provide concrete guideposts for reviewing agency action." App. 27a-28a. But the court ultimately decided "not [to] settle to what extent the universe of federal administrative law should be applied in reviewing Board determinations." App. 28a.

Despite this declaration, however, the panel made an explicit holding that runs contrary to APA precedent. While "[i]t is a 'foundational principle of administrative law' that judicial review of agency actions is limited to 'the grounds that the agency invoked when it took the action,'" App. 29a (quoting *Dep't of Homeland Sec. v. Regents of the Univ. of Cal.*, 140 S. Ct.

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[3] The Government argued that this level of review was required by both an arbitrary-and-capricious standard and Puerto Rico's substantial-evidence standard. Gov't Br., at 30-31, No. 21-1071 (1st Cir. May 7, 2021) ("Gov't Br."); Gov't Reply Br., at 7-8, No. 21-1071 (1st Cir. July 29, 2021) ("Gov't Reply Br."). Given the Title III Court's ruling and the similarity between those standards, however, the Government focused its briefing in the First Circuit on the arbitrary-and-capricious standard. Gov't Reply Br. at 7-8.

1891, 1907 (2020)), the court reasoned that the Government had "short-circuited" the Section 204(a) process "[b]y taking the Board to court soon after the two sides had reached an impasse," App. 30a. The panel thus held that "in proceedings arising from the section 204(a) review process, the Title III Court should consider, on a case-by-case basis, whether and to what extent it will allow either side to support its position with supplementary materials first proffered during litigation." App. 30a.

Applying these standards, the First Circuit affirmed the Title III Court's holdings as to each law. App. 31a-40a. The Government did not petition for rehearing.

REASONS FOR GRANTING THE PETITION

This case poses administrative-law questions with vital implications for Puerto Rico's fiscal recovery and democratic government. These questions matter both for the laws at issue in this litigation and for future Puerto Rican legislation while the Board remains in place. It is imperative that this Court grant certiorari to clarify what standards govern the unelected Board's power to override Puerto Rico's democratic legislative process.

I. THE COURT OF APPEALS ERRED BY APPLYING AN INCORRECT STANDARD OF REVIEW THAT OVERRIDES KEY PRINCIPLES OF ADMINISTRATIVE LAW

The courts below professed to apply arbitrary-and-capricious review. App. 40a, 116a. But their review overrode key principles of administrative law, most notably that the regulating entity must (1) reasonably

explain its decisions, including the criteria it considered, and (2) support those decisions with contemporaneous, not post-hoc, justifications.

PROMESA does not prescribe a standard of review for the Board's determinations under Sections 108(a)(2) or 204(a). *Law 29 II*, 616 B.R. at 252; *see also* App. 116a. It also provides that the Board is not a federal agency but rather "an entity within the territorial government." 48 U.S.C. § 2121(c). The APA would normally "fill[] [the] gap" where a statute does not prescribe a standard of review, *Ruskai v. Pistole*, 775 F.3d 61, 67 (1st Cir. 2014), but the APA excludes "the governments of the territories or possessions of the United States" from its ambit, 5 U.S.C. § 701(b)(1)(C). The Title III Court acknowledged this tension but reasoned that the "operational similarity" between the Board and a federal agency "renders precedent governing judicial review of federal agency actions instructive in considering whether the Oversight Board has acted in a manner consistent with the provisions of PROMESA." *Law 29 II*, 616 B.R. at 252; *see also* App. 107a-108a (citing *Law 29 II*, 616 B.R. at 252-54). The Title III Court thus reviewed the Board's actions under an arbitrary-and-capricious standard that drew from APA precedent. App. 107a-110a.

While the First Circuit also professed to apply arbitrary-and-capricious review, it explicitly declined to "settle to what extent the universe of federal administrative law should be applied in reviewing Board determinations." App. 28a. It thus did not consider the Government's arguments that the Board must "explain[] the standard on which it bases its determination" and "contemporaneously and reasonably

explain[] its decision." App. 26a (citing *ACA Int'l v. FCC*, 885 F.3d 687, 700 (D.C. Cir. 2018) and *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 48-49 (1983)). As for the Government's argument that the Board may not "rely on 'hindsight rationalizations,'" *id.* (citing *Regents*, 140 S. Ct. at 1909), the panel adopted a case-by-case approach that runs contrary to the well-established "prohibition on *post hoc* rationalizations" in administrative law, *Regents*, 140 S. Ct. at 1909.

This ad-hoc, muddled approach leaves both the Government and the Board in the dark about what standard governs review of the Board's actions. Which guardrails are specific to the APA and which are "core administrative law principles," App. 27a, that apply in the context of PROMESA? Until this Court answers these questions, litigation will consume much of the legislative process in Puerto Rico and frustrate the territory's ability to implement the policies its voters have chosen.

A. PROMESA's History and Purpose Demand a Robust Standard of Review for Board Determinations.

Whatever standard of review applies to the Board's actions under PROMESA, it must reflect the temporary fiscal goals of the statute as well as Puerto Rico's status as "an autonomous political entity, 'sovereign over matters not ruled by the Constitution.'" *Rodriguez v. Popular Democratic Party*, 457 U.S. 1, 8 (1982) (quoting *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 673 (1974)). The toothless standard the Title III Court adopted and the First Circuit endorsed tramples this sovereignty by shifting

policy-making from the democratically-elected Government to the federally-appointed Board.

1. When a statute does not expressly provide the standard of review, this Court looks to the statute's "language and history." *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 110 (1989); *cf. In re Value Merchants, Inc.*, 202 B.R. 280, 285 (E.D. Wis. 1996) (where not dictated by substantive statute or APA, standard of review "depends, rather, on the language of the statutes under which the agency and the reviewing court act and the nature of the issue being litigated"). In *Firestone*, for example, the Court observed that "ERISA abounds with the language and terminology of trust law" and that the statute's "legislative history confirms that" it was intended to codify certain "principles developed in the evolution of the law of trusts." 489 U.S. at 110 (citation omitted). The Court thus looked to trust law when developing the standard of review for ERISA. *Id.* at 111.

PROMESA was enacted against the backdrop of "Congress' recognition of [Puerto Rico's] complete self-government" in 1952, when both Congress and Puerto Rico ratified the Puerto Rican Constitution. *Fin. Oversight & Mgmt. Bd. for P.R. v. Aurelius*, 140 S. Ct. 1649, 1672, 1675 (2020) (Sotomayor, J., concurring in the judgment); *see also Puerto Rico v. Sanchez Valle*, 579 U.S. 59, 64-65 (2016). As the Court has recognized, the federal government has "relinquished its control over the organization of the local affairs of the island and granted Puerto Rico a measure of autonomy comparable to that possessed by the States." *Flores de Otero*, 426 U.S. at 597. PROMESA's purpose is to "allow[] Puerto Rico and its entities to file for

federal bankruptcy protection." *Aurelius*, 140 S. Ct. at 1655. To the degree the statute grants the Board authority to "supervise and modify Puerto Rico's laws (and budget)," it is only to the extent necessary to "achieve fiscal responsibility and access to the capital markets." *Id.* (quoting 48 U.S.C. §§ 2141-47). While PROMESA "substitutes a different process for determining certain local policies (related to local fiscal responsibility) in respect to local matters," *id.* at 1662, it does so only "temporar[ily]," *id.* at 1677 (Sotomayor, J., concurring in the judgment). PROMESA is thus "a temporary bankruptcy measure intended to assist in restoring Puerto Rico to fiscal security," not "an organic statute clearly or expressly purporting to renege on" this relinquishment of federal control. *Id.*

This conclusion is bolstered by Congress's intentional decision to grant the Board less "unilateral power" than the D.C. oversight board received. *In re Fin. Oversight & Mgmt. Bd. for P.R.*, 583 B.R. 626, 633 (D.P.R. 2017). "The D.C. Board was empowered, for example, to essentially declare significantly inconsistent legislative acts null and void unilaterally," but Congress "declined to include such provisions" when "drafting PROMESA section 204." *Id.*

2. The Board's unique role as a territorial agency created by federal statute also indicates that Congress intended it to be subject to at least the level of judicial review imposed on territorial agencies. This Court has held that the Board is an entity within the local Puerto Rican government—not the federal government. *Aurelius*, 140 S. Ct. at 1661. Following this reasoning, the First Circuit recently held that sovereign immunity applies to the Board. *Centro de*

Periodismo Investigativo, Inc. v. Fin. Oversight & Mgmt. Bd. for P.R., 35 F.4th 1, 15 (1st Cir. 2022), *cert. granted sub nom. Fin. Oversight & Mgmt. Bd. for P.R. v. Centro de Periodismo Investigativo, Inc.*, No. 22-96, 2022 WL 4651269 (U.S. Oct. 3, 2022). That reasoning also requires that the Board be held to the same standards as other Puerto Rican agencies.

Puerto Rico law provides that "[t]he findings of fact of the decisions of the agencies shall be upheld by the court if they are *based upon substantial evidence* contained in the administrative files." P.R. Laws Ann. Tit. 3, § 2175. Where a statute does not expressly provide for judicial review, Puerto Rican courts apply the substantial-evidence standard. *See Rivera Santiago v. Srio. De Hacienda*, 119 D.P.R. 265, 19 P.R. Offic. Trans. 282, 294 (1987) (holding that "[a]lthough … the statute does not impose on the administrative body the obligation to make findings of fact and to state the grounds for its decision … the administrative agency must do so as a matter of course"). As the Government argued below, *see* Gov't. Br. at 30-31; Gov't. Reply Br. at 7-8, this standard is similar to the APA's arbitrary-and-capricious standard.

3. The standard of review adopted by the lower courts, however, is so deferential as to transfer Puerto Rico's domestic policy-making authority from the elected Government to the federally-appointed Board. As discussed below, the Title III Court and First Circuit did not require the Board to describe any criteria or standard for what constitutes a "formal estimate" or what makes a law "significantly inconsistent with" the fiscal plan under Section 204(a), or for what "impair[s] or defeat[s] the purposes of" PROMESA under

Section 108(a)(2). *See infra* 27-32. In fact, they upheld the Board's decisions that the laws in question did not pass muster even though the Board has repeatedly signed off on laws whose certifications include similar degrees of detail or estimate a *greater* fiscal impact than the laws here—some of which were fiscally neutral on their face. Nor did the courts below require the Board to explain its contemporaneous reasoning when it issued its decisions, but rather allowed it to rely on post-hoc justifications concocted during litigation. Such a standard of review condemns "arbitrary and capricious" conduct in name only. In practice, this standard functions as a rubber stamp on the Board's decision to halt any policy with which it disagrees, undermining PROMESA's limits on the Board's function as well as the very fact of Puerto Rican sovereignty.

B. The Standard of Review Should Require the Board Reasonably and Contemporaneously to Explain Its Decisions.

Whatever standard of review governs the Board's decisions should incorporate the fundamental administrative principle of reasoned, contemporaneous explanation. The First Circuit correctly noted that this principle is not a "creature[] of the APA" but rather "promote[s] fairness and transparency in the administrative process and provide[s] concrete guideposts for reviewing agency action." App. 27a. Nevertheless, the panel disregarded that core requirement here.

At the heart of the Board's failure to provide reasoned and contemporaneous explanation is the fact that it has never explained what constitutes a "formal estimate" under Section 204(a)(2)(A), what it means to be "significantly inconsistent with" a fiscal plan

under Section 204(a)(4)(B), or what it means to "impair or defeat the purposes of" PROMESA under Section 108(a)(2). 48 U.S.C. §§ 2128(a)(2), 2144(a)(2)(A), and (a)(4)(B). Moreover, it has declined to challenge numerous laws whose "formal estimates" contained similar levels of analysis or projected far greater fiscal impacts than those at issue here. As a result, the Government is "unable to discern the [Board's] basic path of analysis" and thus "unable to determine the reasonableness of [its] decision[s]." *Ry. Labor Execs.' Ass'n v. U.S. R. R. Ret. Bd.*, 749 F.2d 856, 862 (D.C. Cir. 1984).

1. The Board's repeated failure to articulate a comprehensible standard for what level of analysis is required to support a "formal estimate" and "certification" under Section 204(a)(2) renders its decisions in this case arbitrary and capricious. An "[a]dministrative action is 'arbitrary and capricious [if] it fails to articulate a comprehensible standard' for assessing the applicability of a statutory category." *ACA Int'l*, 885 F.3d at 700 (quoting *U.S. Postal Serv. v. Postal Regul. Comm'n*, 785 F.3d 740, 753-54 (D.C. Cir. 2015)). "If a 'purported standard is indiscriminate and offers no meaningful guidance' to affected parties, it will fail 'the requirement of reasoned decisionmaking.'" *Id.*

An agency fails to satisfy this requirement if it "cannot satisfactorily explain why a challenged standard embraces one potential application but leaves out

another, seemingly similar one."[4] *Id.* In other words, agencies must "treat like cases alike." *Westar Energy, Inc. v. Fed. Energy Regul. Comm'n*, 473 F.3d 1239, 1241 (D.C. Cir. 2007); *see County of Los Angeles v. Shalala,* 192 F.3d 1005, 1022 (D.C. Cir. 1999) ("A long line of precedent has established that an agency action is arbitrary when the agency offer[s] insufficient reasons for treating similar situations differently.") (quoting *Transactive Corp. v. United States*, 91 F.3d 232, 237 (D.C. Cir. 1996)).

At no point has the Board explained what criteria make an estimate sufficiently "formal." While the Title III Court has explained that "a 'formal estimate' under section 204(a) means a complete and accurate estimate 'covering revenue and expenditure effects of new legislation' over the entire period of the fiscal plan," App. 7a (quoting *In re Fin. Oversight & Mgmt. Bd. for P.R.*, 403 F. Supp. 3d 1, 13 (D.P.R. 2019)), the Board has since accepted other Section 204(a) certifications that include similar levels of analysis to the certifications in this case and that do not cover fiscal effects "over the entire period of the fiscal plan," *see* C.A. App. 449-50, 489-94.

As for the laws at issue in this litigation, the Board required far more than an analysis of their effects on revenues and expenditures. The Board rejected the Government's certifications of Acts 82 and 138, for example, partly because they did not include a federal preemption analysis. C.A. App. 222. Not only does

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[4] The Government uses the term "agency" in describing the administrative-law principles it argues constrain the Board's actions, while acknowledging that PROMESA stipulates that the Board is not a federal agency. *See* 48 U.S.C. § 2121(c).

this requirement go far beyond what the text of Section 204(a)(2) and the Title III Court seem to require, it conflicts with the plain meaning of the statute, which specifies that the estimate be prepared by "an appropriate entity of the territorial government with expertise in budgets and financial management"—*not* a lawyer. 48 U.S.C. § 2144(a)(2)(A). The Board further objected to the Act 82 Certification as "not 'formal' and not accurate because it provides only an 'approximate impact' of the law on the Department of Health's budget," and because that estimate differed from an unnamed official's public comments about the law's potential impact. App. 67a. This objection again conflicts with the statutory text, as "estimate" means "a rough or approximate calculation." *Estimate*, Merriam-Webster Dictionary (2022).

The Board rejected the Government's Act 47 Certification, meanwhile, because it did not include a range of potential fiscal impacts and because it assumed any impact would be consistent for the duration of the fiscal plan. App. 94a-95a. After the Government submitted the requested impact range, however, the Board—without explaining its reasoning—selected the high end of this range and *assumed that it would be consistent* for the duration of the fiscal plan. App. 100a. This process left the Government with a raft of questions. Must a "formal estimate" always include a range of potential fiscal impacts, yet assume the highest end of that range? Is impact measured year-to-year or cumulatively?

When asked at oral argument about "the minimum objective characteristics of a formal estimate," the Board's counsel stated that "it's not as if there is

a rigid list of requirements." C.A. Supp. App. 925. Rather, the Board "gets to the heart of the matter" and looks for an estimate "that makes sense, that deals with the impact, that's clearly what I think any logical business person ... would want to do." C.A. Supp. App. 926. This "I know it when I see it" response does not come close to offering "meaningful guidance" to the Government or a satisfactory explanation of why Section 204(a)(2) "embraces one potential application but leaves out another, seemingly similar one." *ACA Int'l*, 885 F.3d at 700 (citing *U.S. Postal Serv.*, 785 F.3d at 754-55). It thus fails the requirement of reasoned decisionmaking and demonstrates the arbitrary and capricious nature of the Board's decisions. *Id.*

2. The Board's refusal to describe a substantive standard for what legislation "impair[s] or defeat[s]" the purposes of PROMESA or is "significantly inconsistent with" a fiscal plan likewise renders its decisions arbitrary and capricious. Courts regularly remand decisions to an agency where the agency "set[s] out a 'cryptic' standard, fail[s] to explain how that standard applie[s] to the facts, [or] worse still, applie[s] that standard inconsistently across similar cases." *U.S. Postal Serv. v. Postal Regul. Comm'n*, 963 F.3d 137, 143 (D.C. Cir. 2020); *see also Ry. Labor Execs.' Ass'n*, 749 F.2d at 857 (remanding where agency decision "lacked any coherent articulation" of meaning of statutory provisions and "consequently lacked any reasoned analysis"). In *Pearson v. Shalala*, 164 F.3d 650, 660 (D.C. Cir. 1999), for example, the D.C. Circuit held that the FDA's refusal to "define the criteria" it applied to determine which health claims reflected "significant scientific agreement" was

arbitrary and capricious.

Here, the only criterion the Board has offered for legislation that "impair[s] or defeat[s]" the purposes of PROMESA or is "significantly inconsistent with" a fiscal plan is patently unreasonable. The Board argued below that *any* deviation from strict revenue neutrality "constitutes a *per se* significant inconsistency." Bd. MSJ Reply at 19, *In re Fin. Oversight & Mgmt. Bd. for P.R.*, No. 20-ap-80 (D.P.R. Oct. 23, 2020), ECF No. 49. This position, however, would erase "significantly" from Section 204(a), impermissibly rendering this part of the statute "superfluous, void or insignificant." *Corley v. United States*, 556 U.S. 303, 314 (2009) (citation omitted). In declining to opine on this argument, *see* App. 39a n.20, the First Circuit failed to hold the Board to the requirement of reasoned explanation. As in *Pearson*, adequate explanation of the Board's decisions "necessarily implies giving some definitional content to the phrase" "significantly inconsistent." 164 F.3d at 660.

Moreover, the Board's decisions as to other laws reveal its revenue-neutrality argument in this case to be a pretext. As the Government pointed out in its briefing below, the Board has declined to challenge laws with greater estimated fiscal impacts than those here. *See, e.g.*, C.A. App. 449-50 (Board did not object to law that estimated an additional $1,147,200 in expenditures and no impact on revenues). If revenue neutrality were the issue, the Board would object to every law that projected additional expenditures that were not balanced by a corresponding increase in revenues, or vice versa. Yet neither the Title III Court nor the First Circuit required the Board to

"satisfactorily explain" why the laws at issue in this case were significantly inconsistent with the fiscal plan when other laws with similar projected fiscal impacts were not. *See ACA Int'l*, 885 F.3d at 700.

The Board's lack of articulable standards was on display at oral argument, when its counsel responded to a question about when legislation "impair[s] or defeat[s] the purposes of" PROMESA by insisting merely that "the Board only wants to do the right thing, and is rational, and it always has reasons for things it's doing." C.A. Supp. App. 980. But the Government cannot simply take the Board at its word. To guarantee reasoned decisionmaking and transparency, the Board must describe a "comprehensible standard" for significant inconsistency that offers "meaningful guidance" to the Government, *ACA Int'l*, 885 F.3d at 700, and applies consistently "across similar cases," *U.S. Postal Serv.*, 963 F.3d at 143.

C. The Standard of Review Should Prohibit the Board From Relying on Post-Hoc Rationalizations.

The standard of review for Section 204(a) decisions should also incorporate the "simple but fundamental rule of administrative law" that a court "must judge the propriety of" agency action "solely by the grounds invoked by the agency." *SEC v. Chenery Corp.*, 332 U.S. 194, 196 (1947); *see also Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962) ("The courts may not accept appellate counsel's post hoc rationalizations for agency action."). The court of appeals acknowledged this rule yet held that, "given the unique nature of the section 204(a) process, and the relationship between the Commonwealth and the

Board under PROMESA, a hard-and-fast rule that the Board never may proffer supplementary rationales or analysis during litigation would not be appropriate." App. 30a.

The panel reasoned that because the Government "short-circuited the process" by "taking the Board to court," it was "only fair" for the Board to "further develop its position in the litigation." App. 30a. This rationale seems to contemplate a multi-step administrative process with a set end date. But in fact, Section 204(a) mandates no such process, and the Board has not put one in place. Instead, the Board and the Government simply exchange letters about a law until one of the entities takes the other to court.

Because Section 204(a) empowers the Board to seek judicial enforcement of its determinations at any point after the Government "fails to comply with a direction given by" the Board under that subsection, *see* 48 U.S.C. § 2144(a)(5), the administrative process was essentially complete after the Board determined that the Government had failed to comply with its direction. *See, e.g.*, C.A. App. 691. At that point, the Board had a duty at least to raise all of its justifications so that the Government could respond to them, as Section 204(a) requires. *See* 48 U.S.C. § 2144(a)(4)(B) (entitling Government to an opportunity to cure any inconsistency in a law flagged by the Board or to supplement its explanation of any alleged inconsistency). If the Board is not required contemporaneously to explain *why* a law is significantly inconsistent with the fiscal plan, the Government will not have the information it needs to cure any alleged defects. Here, for example, the Government was not

able to respond to the Board's concern that Act 176 would "conflict[] with the fiscal plan's goal of 'right-siz[ing] the workforce to the population size,'" App. 37a (citation omitted), because the Board did not raise this concern until litigation.

The First Circuit's "case-by-case" approach to post-hoc justifications invites courts to "substitute their or counsel's discretion for that of the" Board. *Burlington Truck Lines*, 371 U.S. at 169. It also further incentivizes litigation, as the Board may now reasonably assume that it will be able to introduce additional justifications for its actions as that litigation unfolds. In this way, the rule adopted by the First Circuit will further erode communications and relations between the parties, hinder Puerto Rico's fiscal recovery, and undermine Congress's carefully crafted process for evaluating new laws under Section 204(a). There is no reason why the Board should merit an exception to the long-established rule that "an agency's discretionary order be upheld, if at all, on the same basis articulated in the order by the agency itself." *Burlington Truck Lines*, 371 U.S. at 169.

II. THIS CASE HAS PROFOUND IMPLICATIONS FOR PUERTO RICO'S SOVEREIGNTY AND TERRITORIAL SELF-RULE

PROMESA represents an unprecedented incursion on Puerto Rico's self-governance and territorial self-rule. As this Court has recognized, PROMESA gives the Board "considerable power—including the authority to substitute its own judgment for the considered judgment of the Governor and other elected officials." *Aurelius*, 140 S. Ct. at 1662; *see also id.* at 1674 (Sotomayor, J., concurring in the judgment)

(describing "the Board's wide-ranging, veto-free authority over Puerto Rico"). To retain the integrity and credibility of this governmental structure, the procedural and substantive limits on the Board's power must be clear and well-understood by all parties.

For that reason, Congress recognized the importance of resolving disputes related to PROMESA's interpretation. 48 U.S.C. § 2126(d) ("It shall be the duty of ... the Supreme Court of the United States to advance on the docket and to expedite to the greatest possible extent the disposition of any matter brought under this [Act]."). And this Court has historically reviewed cases that are of fiscal or political importance to United States territories. *See, e.g.*, *Fin. Oversight & Mgmt. Bd. for P.R.*, 2022 WL 4651269 (granting certiorari to resolve whether and to what degree the Board may assert sovereign immunity); *Aurelius*, 140 S. Ct. at 1656 (granting certiorari to resolve whether Appointments Clause governs selection of Board members); *Territory of Alaska v. Am. Can Co.*, 358 U.S. 224, 225 (1959) ("The case is here by a petition for writ of certiorari which was granted in view of the fiscal importance of the question to [the Territory of] Alaska.").

Clarification is also necessary to quell ongoing litigation between the Board and Puerto Rico's elected officials. The Board's failure to articulate standards for the Section 204(a) process continues to stymie relations between the Board and the Government and feed this cycle of litigation. *See, e.g.*, Bd. MSJ at 36, *Fin. Oversight & Mgmt. Bd. for Puerto Rico v. Pierluisi*, Adv. Proc. No. 22-063-LTS (D.P.R. Sept. 29, 2022), ECF No. 30 (Board acknowledges that First

Circuit found it "waived any argument about *ultra vires* review" in this litigation, but advocates for *ultra vires* standard in new litigation regarding Puerto Rico Act 41-2022). Without intervention from this Court, Puerto Rico's basic lawmaking function will be subsumed by protracted, expensive litigation over the substance and mechanics of the Section 204(a) process—and PROMESA's goal of long-term fiscal stability for the Commonwealth will be unattainable.

CONCLUSION

For these reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted.

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