APPENDIX A

United States Court of Appeals for the First Circuit

No. 21-1071

IN RE: THE FINANCIAL OVERSIGHT AND MANAGEMENT BOARD FOR PUERTO RICO, as Representative for the Commonwealth of Puerto Rico; THE FINANCIAL OVERSIGHT AND MANAGEMENT BOARD FOR PUERTO RICO, as Representative for the Puerto Rico Highways and Transportation Authority; THE FINANCIAL OVERSIGHT AND MANAGEMENT BOARD FOR PUERTO RICO, as Representative for the Puerto Rico Electric Power Authority (PREPA); THE FINANCIAL OVERSIGHT AND MANAGEMENT BOARD FOR PUERTO RICO, as Representative for the Puerto Rico Sales Tax Financing Corporation, a/k/a Cofina; THE FINANCIAL OVERSIGHT AND MANAGEMENT BOARD FOR PUERTO RICO, as Representative for the Employees Retirement System of the Government of the Commonwealth of Puerto Rico; THE FINANCIAL OVERSIGHT AND MANAGEMENT BOARD FOR PUERTO RICO, as Representative of the Puerto Rico Public Buildings Authority,

Debtors.

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

Plaintiffs, Counterdefendants-Appellants,

v.

THE FINANCIAL OVERSIGHT AND MANAGEMENT BOARD FOR PUERTO RICO

Defendant, Counterplaintiff-Appellee,

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF PUERTO RICO

Hon. Laura Taylor Swain, U.S. District Judge*

Before

Thompson and Lipez, Circuit Judges,
and Torresen,** District Judge.

William J. Sushon, with whom John J. Rapisardi, Peter Friedman, O'Melveny & Myers LLP, Luis C. Marini-Biaggi, Carolina Velaz-Rivero, and Marini Pietrantoni Muñiz LLC were on brief, for appellants.

Mark David Harris, with whom Timothy W. Mungovan, John E. Roberts, Guy Brenner, Martin J. Bienenstock, Lucas Kowalczyk, Shiloh A. Rainwater, and Proskauer Rose LLP were on brief, for appellee.

Jorge Martínez-Luciano, with whom Emil Rodríguez-Escudero, and M.L. & R.E. Law Firm were on brief, for the Speaker of the Puerto Rico House of Representatives, the Hon. Rafael Hernández-Montañez, amicus curiae.

June 22, 2022

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* Of the Southern District of New York, sitting by designation.

** Of the District of Maine, sitting by designation.

LIPEZ, **Circuit Judge**. In the legislation addressing the Commonwealth of Puerto Rico's fiscal crisis, Congress gave the Financial Oversight and Management Board for Puerto Rico ("the Oversight Board" or "the Board") authority to object to, and block the implementation of, local laws that are inconsistent with efforts to return the Commonwealth to fiscal solvency. Appellants, the Governor of Puerto Rico and the Puerto Rico Fiscal Agency and Financial Advisory Authority (known as "AAFAF" based on its Spanish acronym), contend that the district court erred when it rejected their contention that the Oversight Board acted arbitrarily and capriciously in objecting to four laws duly enacted by Puerto Rico's legislature. We disagree and therefore affirm.

I.

A. Legal Background

In 2016, Congress passed the Puerto Rico Oversight, Management, and Economic Stability Act ("PROMESA") to address the Commonwealth's fiscal crisis, facilitate restructuring of its public debt, ensure its future access to capital markets, and provide for its long-term economic stability.[1] See 48

[1] We have elsewhere provided a more comprehensive background on Puerto Rico's fiscal crisis and the enactment of PROMESA, including PROMESA's creation of a process for the Commonwealth to undergo bankruptcy proceedings. See, e.g., Aurelius Inv., LLC v. Puerto Rico, 915 F.3d 838, 843-46 (1st Cir. 2019) (overruled on other grounds by Fin. Oversight & Mgmt. Bd. for P.R. v. Aurelius Inv., LLC (In re Fin. Oversight & Mgmt. Bd. for P.R.), 140 S. Ct. 1649 (2020)); Union De Trabajadores De

U.S.C. § 2194(m)-(n). PROMESA established the Oversight Board, whose members are appointed by the President, with wide-ranging authority to oversee and direct many aspects of Puerto Rico's financial recovery efforts. See, e.g., id. §§ 2141-2147. Among its responsibilities is the certification of a fiscal plan and annual budget for the Commonwealth. Id. §§ 2141-2142. Of relevance to this appeal, PROMESA also provides the Oversight Board with the authority to review and ask the district court to enjoin the implementation of duly enacted Commonwealth legislation when the Oversight Board determines that the legislation does not comply with the approved fiscal plan or with PROMESA's statutory scheme to return Puerto Rico to fiscal solvency.[2]

Section 108(a)(2) of PROMESA, titled "Autonomy of Oversight Board," provides that "[n]either the Governor nor the Legislature [of the Commonwealth] 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." 48 U.S.C. § 2128(a). To that end, PROMESA outlines a multi-step, back-

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La Industria Eléctrica Y Riego v. FOMB (In re FOMB), 7 F.4th 31, 35 (1st Cir. 2021).

[2] During the period relevant to this appeal, Puerto Rico was operating under an approved "2019 Fiscal Plan" covering a five-year period. The 2019 plan was subsequently replaced by a 2020 Fiscal Plan, covering the period through Fiscal Year 2025, which was certified by the Oversight Board in May 2020.

and-forth process by which the Oversight Board reviews Commonwealth legislation for consistency with the statute's goals.

Section 204(a) provides that "not later than 7 business days after [the Commonwealth] duly enacts any law during any fiscal year in which the Oversight Board is in operation, the Governor shall submit the law to the Oversight Board" along with (1) "[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"; and (2) a "certification of compliance or noncompliance" by that entity stating whether the law is "significantly inconsistent with the Fiscal Plan for the fiscal year". Id. § 2144(a)(1)-(2). The Oversight Board then notifies the Governor and the Legislature if a submission is problematic, either because it lacks a formal estimate or certification, or because the certification states that the law is significantly inconsistent with the fiscal plan. Id. § 2144(a)(3). The Oversight Board may direct the Commonwealth to provide the missing estimate or certification, or, if the Commonwealth has certified that the law is inconsistent with the fiscal plan, may direct the Commonwealth to "correct the law to eliminate the inconsistency" or "provide an explanation for the inconsistency that the Oversight Board finds reasonable and appropriate." Id. § 2144(a)(4)(B). If the Commonwealth "fails to comply with a direction given by the Oversight Board," the Board "may take such actions as it considers necessary, consistent with [PROMESA], 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).[3]

In addition to this general review process for duly enacted legislation, PROMESA also gives the Oversight Board the authority to review any request by the Governor to the Legislature "for the reprogramming of any amounts provided in a certified Budget." Id. § 2144(c)(1). The Governor must submit any such request to reallocate budgeted funds to the Oversight Board. Id. The Board then reviews whether such request "is significantly inconsistent with the Budget." Id. The reprogramming cannot be adopted "until the Oversight Board has provided the Legislature with an analysis that certifies such reprogramming will not be inconsistent with the Fiscal Plan and Budget." Id. § 2144(c)(2).

Last, but certainly not least, PROMESA authorizes the Board to "seek judicial enforcement of its authority to carry out its responsibilities." Id. § 2124(k).

Although several of the provisions governing the Board's ability to review Commonwealth laws have not previously come before this court, the district court has authored several decisions that lay the

[3] The Legislature may request that the Oversight Board "conduct a preliminary review of proposed legislation" before enactment, but "any such preliminary review shall not be binding on the Oversight Board in reviewing any law subsequently submitted." 48 U.S.C. § 2144(a)(6).

groundwork for this appeal.[4] In its Law 29 I decision, the court rejected the Commonwealth's argument that its "certification of lack of inconsistency [between a law and the fiscal plan] insulates a newly enacted law from scrutiny or challenge by the Oversight Board." In re Fin. Oversight Mgmt. Bd. for P.R., 403 F. Supp. 3d 1, 12 (D.P.R. 2019) ("Law 29 I"). To the contrary, the court concluded, a certification by the Commonwealth is not "preclusive of inquiries [by the Board] as to its sufficiency or accuracy," and PROMESA "demands recognition of the Oversight Board's ability to question and, if necessary, bring before the [c]ourt challenges to the sufficiency and accuracy of documents as important as revenue estimates and certifications regarding significant inconsistencies with fiscal plans." Id. at 13-14. The court further 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. Id. at 13. Simply submitting a dollar estimate "on official agency letterhead, no matter how conclusory or incomplete," does not suffice. Id. at 12.

In its subsequent Law 29 II decision, the court held that Board determinations that Commonwealth laws impair or defeat the purposes of PROMESA are reviewed under the "arbitrary and

[4] Pursuant to 48 U.S.C. § 2168, the Chief Justice of the United States has designated Judge Swain to preside over certain cases involving PROMESA's implementation, and the relevant district court decisions were authored by Judge Swain.

capricious" standard typically used to review federal agency decisions. In re Fin. Oversight & Mgmt. Bd. for P.R., 616 B.R. 238, 252-53 (D.P.R. 2020) ("Law 29 II"). While acknowledging that PROMESA specifically provides that the Oversight Board "shall not be considered to be . . . [an] agency . . . of the Federal Government," 48 U.S.C. § 2121(c)(2), the court noted that the Board's "powers and functions are similar to those of agencies charged by Congress with carrying out the provisions of statutes," Law 29 II, 616 B.R. at 252. Under the "arbitrary and capricious" standard of review, the court "must decide whether the Oversight Board's determinations were supported by a rational basis and must affirm [its] decisions if they are 'reasoned[] and supported by substantial evidence in the record.'" Law 29 II, 616 B.R. at 253 (quoting Trafalgar Cap. Assocs., Inc. v. Cuomo, 159 F.3d 21, 26 (1st Cir. 1998)). Thus, the court held that the Oversight Board's determinations will only be set aside if they are "arbitrary, capricious, or manifestly contrary to the statute." Id. at 254 (quoting Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 844 (1984)).

In Law 29 II, the district court also noted that PROMESA "allows the Oversight Board to prevent the application or enforcement of a law when the Commonwealth government fails to comply with a direction given by the Oversight Board pursuant to section 204(a)[]." Id. at 248. And the Board "is not required to prove to the [c]ourt that [a law] is significantly inconsistent with the fiscal plan" to demonstrate the Commonwealth's failure to comply with its obligations under section 204. Id.

The Commonwealth did not appeal either of the Law 29 decisions.

B. Factual Background

This appeal involves four Commonwealth laws that were passed by the Legislature and challenged by the Board.[5] Below, we describe these laws and the communications between the Commonwealth and the Board, pursuant to section 204(a), following their enactment.[6]

1. Act 82 and Act 138

Because the communications regarding these two healthcare-related laws were intertwined, we discuss them together. Act 82, signed into law on July 30, 2019, creates a new regulatory scheme and establishes an "Office of the Regulatory Commissioner of Pharmacy Services and Benefit Managers" within the Puerto Rico Department of Health to regulate Pharmacy Benefit Managers ("PBMs") and Pharmacy Benefit Administrators ("PBAs"), entities that negotiate medication costs between pharmaceutical companies and third-party payers, including the Commonwealth. As the district court explained, "Act 82 changes the arrangements between

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[5] A fifth law was before the district court but is not part of the present appeal.

[6] Pursuant to Executive Order 2019-057, the Puerto Rico Department of Treasury ("Treasury"), AAFAF, and the Puerto Rico Office of Management and Budget ("OMB") work together to prepare fiscal impact estimates and certifications for any enacted laws. For simplicity, we refer to the Governor, AAFAF, OMB, and Treasury collectively as "the Commonwealth."

[these entities] and pharmacies to require that pharmacies be reimbursed for at least their cost of acquisition of medications." The Commonwealth asserts that this change is necessary to allow pharmacies to recover their actual drug acquisition costs, ensuring that they continue to acquire necessary medications for the people of Puerto Rico.

Act 138, signed into law on August 1, 2019, amends the Insurance Code of Puerto Rico to (1) prohibit health care insurers from denying provider enrollment applications submitted by qualified health care professionals in Puerto Rico, and (2) prohibit Managed Care Organizations from unilaterally terminating or rescinding contracts with health care providers. The Commonwealth asserts that the law was enacted "to discourage the mass exodus of health professionals [from Puerto Rico] and increase the availability of health care services throughout the Island."

The Commonwealth did not submit any section 204(a)-required materials on Act 82 within the statutory seven-day period. On September 12, 2019, more than a month after Act 138 was signed into law, the Commonwealth submitted to the Board a copy of the Act with a certificate reading as follows:

Legislative Measure Number:

- Act No. 138-2019 ("Act 138"), herein attached.

Estimate of Impact of the Legislative Measure on Expenditures and Revenues:

- Act 138 has no impact on expenditures or revenues.

Determination of the Legislative Measure's Compliance with the Fiscal Plan:

- Act 138 is not significantly inconsistent with the New Fiscal Plan for Puerto Rico.

On November 15, 2019, the Board notified the Commonwealth by letter of several concerns it had regarding both Act 82 and Act 138: (1) it still had not received any materials regarding Act 82; (2) the copy of Act 138 and certificate had been submitted after the seven-business-day period mandated by statute; (3) the Commonwealth had failed to provide the required formal estimate for Act 138; and (4) both Acts may be preempted by federal law. The Board requested that the Commonwealth submit the missing materials, including, specifically, "a formal estimate of the impact each Act will have on expenditures and revenues, including the impact on the government's medical insurance plan ('Vital')" and "an analysis of [the Acts] in relation to the corresponding federal statutes to ascertain there are no conflicting provisions that may jeopardize the grant of federal funds to the [Department of Health]." The Board noted that it "reserve[s] the right to take such actions as we consider necessary . . . including preventing the enforcement or application of" the Acts if it ultimately determines the Commonwealth has "failed to comply with our directive . . . or that [the] law[s] impair[] or defeat[] the purposes of PROMESA."

On November 18, 2019, more than three months after it was due, the Commonwealth submitted the following certification for Act 82:

Legislative Measure Number:

- Act No. 82-2019 ("Act 82"), herein attached.

Estimate of Impact of the Legislative Measure on Expenditures and Revenues:

- Act 82 has an approximate impact of $475,131.47 in the Department of Health's budget. However, Act 82 will be implemented using budgeted resources. If reprogramming of budgeted resources is needed, the appropriate agency will submit to the [Board] a formal request.
- Act 82 has no impact on revenues.

Determination of the Legislative Measure's Compliance with the Fiscal Plan:

- Act 82 is not significantly inconsistent with the 2019 Fiscal Plan for Puerto Rico.

A few days later, the Commonwealth responded to the Board's November 15 letter. The Commonwealth began by emphasizing its commitment to complying with section 204(a) of PROMESA, noting the then-Governor's recent Executive Order mandating compliance with that provision. However, the Commonwealth did not address the substance of the Board's concerns in its November 15 letter other than to vigorously contest the Board's ability to press the Commonwealth as to whether Acts 82 and 138 are preempted by federal law. In making its point that the consideration of possible federal preemption was outside the scope of the certification process, the Commonwealth insisted that

> Section 204(a)(3) only allows the Board to send notifications to the elected government under limited circumstances, specifically, if no certifications are sent or, if the Board understands an enacted law is significantly inconsistent with the certified fiscal plan.

In a December 18 response letter, the Board reiterated its concern that the Commonwealth was not complying with the section 204(a) requirements by failing to submit all required materials and submitting some materials after the seven-business-day deadline. The Board further asserted that the impact estimate for Act 82 was not sufficiently "formal" and was "not accurate" because "it provide[d] only an 'approximate impact' of the law on the Department of Health's budget" and was "dramatically at odds with other authority on the subject; specifically, the Health Insurance Administration's recent testimony at [a] public hearing that [Act 82] would increase the Government's health plan budget by $27 million." Regarding the preemption issue, the Board insisted that requiring a preemption analysis was consistent with section 204(a) because "if an enacted law negatively impacts the Commonwealth's budget because of conflicts with federal statutes, the law would not be consistent with the certified Fiscal Plan."

In a subsequent letter, the Commonwealth continued to assert that it had complied with its obligations under section 204(a) because it had "not received any notification [from the Board] that [the Acts] are significantly inconsistent with the Fiscal Plan." The Commonwealth also maintained that the

Board had no authority to either determine that the Acts are preempted by federal law or require the Commonwealth to consider whether they are so preempted. Finally, the Commonwealth rejected the suggestion that Act 82's estimate was "not accurate" because it was "dramatically at odds" with the Health Insurance Administration's testimony at the public hearing. Rather, it asserted, "any statement by an agency during the legislative process is subordinate to the determination of the appropriate government entities" – AAFAF, OMB, and Treasury – "in charge of issuing the [section 204(a)] certifications."

In a letter dated April 27, 2020, the Board stated that it had conducted its own analysis of the Acts because the Commonwealth had "so far failed to confirm that its analysis took into account germane factors pertaining to [the Acts] and their impact on federal funding." Based on its own analysis, the Board posed a series of detailed questions "regarding the financial assumptions on which the laws appear to be based." For example, for both Acts, the Board asked, "How will the potential impact from increases in PMPM [Per Member Per Month] rates be mitigated to maintain compliance with the Certified Commonwealth Fiscal Plan?"[7] The Board requested that the Commonwealth address its specific

[7] Generally, the PMPM rate is the "predetermined amount" that managed healthcare "plans are paid . . . per member per month [to] manage and pay for all services included in the benefit package." Bellin v. Zucker, 6 F.4th 463, 468 n.2 (2d Cir. 2021) (quoting Antonia C. Novello, N.Y. State Dep't of Health, New York

questions as part of formal estimates to be submitted no later than May 8, 2020. The Board further noted that "implementation of [the Acts] prior to satisfaction of the requirements of Section 204 would impair and defeat the purposes of PROMESA" and warned that it could take further action, including "seeking remedies for preventing" the Acts from being implemented.

The Commonwealth again responded that "no revised certifications are necessary" because, among other contentions, section 204(a) requires only a "'good faith' effort to determine the financial effects of a new law" and the certifications "include[d] all of the required elements under section 204(a)(2) and were provided in good faith." The Commonwealth also asserted, despite its mention in the certification of possible reprogramming, that because Act 82 would be "implemented using budgeted resources," a formal request for reprogramming would not be required.

2. Act 176

Act 176, signed into law on December 16, 2019, amends the "Government of Puerto Rico Human Resources Administration and Transformation Act" and the "Fiscal Plan Compliance Act" to undo reductions in the accrual rates of vacation and sick days for public employees.[8] The Commonwealth asserts

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State Management Long-Term Care, Interim Report to the Governor and Legislature at 20 (May 2003)).

[8] A prior law, Act 8-2017, reduced the accrual rates for certain public employees.

that the reductions in leave had "negatively affected the public employees who are entering the workforce because they have no time to spend with their loved ones which, in turn, affects their family life."

On December 26, 2019, the Commonwealth submitted to the Board a copy of Act 176 and the following certification:

Legislative Measure Number:

- Act No. 176-2019 ("Act 176"), herein attached.

Estimate of Impact of the Legislative Measure on Expenditures and Revenues:

- Act 176 amends Act 8-2017, known as the "Government of Puerto Rico Human Resources Administration and Transformation Act," and Act 26-2017, known as the "Fiscal Plan Compliance Act," in order to allow government employees to accrue 2.5 vacation days and 1.5 sick days per calendar month.
- The accrual caps for vacation and sick days remain at 60 and 90 days respectively. Additionally, Act 176 does not alter the prohibition established in Act 26-2017, with regard to the liquidation of vacation days accumulated in excess of the 60 days statutory limit.
- As prior to its enactment, government employees may only liquidate vacation days when there is a cessation from service. Act 176 does not allow public employees the liquidation of sick days.

- In addition, every governmental entity and instrumentality is required to formulate and manage a personnel vacation plan for each calendar year, which shall be strictly complied with by all employees, in order to ensure that said employees do not accumulate excess vacation days, while ensuring that the services provided by the corresponding governmental entities and instrumentalities are not interrupted.
- Consequently, insofar as Act 176 merely adjusts the accretion of vacation and sick days for public employees, but while strictly adhering to the liquidation prohibitions established in the 2019 New Fiscal Plan for Puerto Rico and Act 26-2017, we conclude that Act 176 has no impact on expenditures.
- Act 176 has no impact on revenues.

Determination of the Legislative Measure's Compliance with the Fiscal Plan:

- Act 176 is not significantly inconsistent with the 2019 Fiscal Plan for Puerto Rico.

On May 11, 2020, the Board informed the Commonwealth that it had failed to submit the required formal estimate in that the certification "fails to account for Act 176's impact on employee productivity, given that it permits employees to take more vacation days during the year." The Board estimated that "if full-time employees utilize all of the additional days Act 176 makes available to them (12-21 days depending on employee group), there could be a productivity loss of approximately five percent,

which in Fiscal Year 2021 is akin to losing the full-time equivalent production of 2,400 public employees." The Board therefore directed the Commonwealth to submit a "complete formal estimate by May 19, 2020 taking lost productivity into account." The Board stated that "implementation of Act 176[] prior to satisfaction of the requirements of Section 204 would impair and defeat the purposes of PROMESA" and expressly "reserve[d] the right to take such actions as it considers necessary" including preventing Act 176's implementation.

A week later, the Commonwealth responded, vigorously defending the completeness of the submitted certification. Specifically, the Commonwealth disputed the need to "account for any speculative decrease in 'employee productivity'" because section 204(a) requires only an estimate of the impact on expenditures and revenues and the certificate "does exactly that." The Commonwealth went on to assert that the existing caps on the accrual and liquidation of vacation and sick days, and a requirement that every governmental entity create personnel plans to manage the use of vacation days, rendered the Board's employee productivity concerns illusory.

3. Act 47

Act 47, signed into law on April 26, 2020, amends the "Puerto Rico Incentives Code" to expand the scope of healthcare professionals who are eligible for incentive tax benefits. The Commonwealth asserts that Act 47's purpose is to encourage more medical professionals to enter practice and to stem

the "flight" of healthcare professionals from Puerto Rico.

On May 4, 2020, the Commonwealth submitted to the Board the following certificate:

Legislative Measure Number:

- Act No. 47-2020 ("Act 47"), herein attached.
- Act 47 incorporates technical adjustments to Sections 1020.02(10), 2021.03(a) and 2023.02 of the Puerto Rico Incentives Code in order to provide tax incentives to more categories of health professionals. This legislation serves the public interest by promoting the retention of professionals in the health field[;] such a feat is particularly relevant in light of the COVID-19 pandemic.

Estimate of Impact of the Legislative Measure on Expenditures and Revenues:

- Act 47 has no impact on expenditures.
- Act 47 could have an estimated annual impact on revenues [of] $25.7 million dollars. However, said amount will depend [on]: (1) medical professionals that request tax incentives; (2) medical professionals ultimately approved to receive such incentives in light of the requisites; and (3) income ultimately reported by the qualified professionals. In other words, the impact provided by the Puerto Rico Department of the Treasury consists in an educated estimate that must [be] revised on an annual basis

in order to provide an accurate impact on the revenues.

<u>Determination of the Legislative Measure's Compliance with the Fiscal Plan:</u>

- Act 47 is not significantly inconsistent with the 2019 Fiscal Plan for Puerto Rico.

On May 21, 2020, the Board responded that the certificate lacked "even the barest specificity" regarding Act 47's fiscal impact. The Board took specific issue with the suggestion that Act 47's impact would be constant over the five-year term of the 2019 Fiscal Plan despite the Commonwealth's statement that the impact estimate "must [be] revised on an annual basis" due to the variables identified. The Board also challenged the Commonwealth's determination that Act 47 was not significantly inconsistent with the fiscal plan, opining that "it [is] difficult to understand how the Act, which the Government itself estimates 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, can be anything other than significantly inconsistent with the certified Fiscal Plan." For these reasons, the Board requested that the Commonwealth submit a "complete formal estimate . . . identifying," among other key variables, "[m]inimum and maximum estimates of the percentage of medical practitioners applying for th[e] incentive."

On May 28, the Commonwealth submitted what it termed a "revised estimate," indicating that the Act could have a minimum annual cost of $540,000

and a maximum annual cost of $40.1 million (approximately $200 million over the period of the fiscal plan), based on 7,188 potentially eligible medical professionals. The Commonwealth continued to maintain, however, that the Act was not significantly inconsistent with the fiscal plan given the plan's projected revenues of over $20 billion per fiscal year. That is, the Commonwealth asserted that even $40 million a year is, in the context of overall projected revenues, a relatively small amount and could not be a "significant" deviation from the fiscal plan. On June 5, the Board responded that the Commonwealth's submission "inappropriately minimizes the economic impact" of the Act and that "[v]iewing the costs of [the] Act [] in their proper context, meaning relative to the Commonwealth's own-source revenues, demonstrates that they are substantial." The Board concluded by warning that "[c]ontinuing to implement Act 47 as it is written, or proceeding to go forward with similarly significantly inconsistent legislation notwithstanding objections from the Oversight Board grounded in PROMESA, will lead the Oversight Board to have no choice but to seek judicial relief."

C. Procedural Background

On June 12, 2020, the Commonwealth filed suit in federal court seeking, in relevant part, a declaratory judgment that, for each of the four laws in question, the Commonwealth had complied with section 204(a)'s formal estimate and fiscal plan compliance certification requirements. The Board subsequently filed counterclaims requesting injunctive relief barring the implementation and enforcement of each

law.[9] The Commonwealth moved for summary judgment on its claims related to Acts 138 (amending the health insurance code) and 176 (undoing reductions in vacation and sick days).[10] The Board filed

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[9] Among its counterclaims, the Oversight Board sought "nullification" of each law. The district court eventually dismissed all claims for "nullification" because the Board "ha[d] not demonstrated that such drastic relief [was] warranted under the particular circumstances." 511 F. Supp. 3d at 128, 131, 133, 138. Neither side raises the "nullification" claims on appeal, and we do not address them further.

The Commonwealth also sought declarations that the Oversight Board cannot "unilaterally" invalidate a law and must seek judicial relief under § 2124(k) to enjoin a law's implementation. In other words, the Commonwealth sought declarations that the mere invocation by the Board of noncompliance with PROMESA did not have any legal effect in and of itself. The district court eventually dismissed these counts given the court's disposition of the Board's summary judgment motions. The Commonwealth does not address these dismissals on appeal. However, we note the district court's statement that "[a] proper declaration of a negative section 108(a)(2) determination by the Board [i.e., that a law would impair or defeat the purposes of PROMESA] triggers a statutory prohibition on action by the Government to go forward with the targeted statute, . . . but it does not empower the Oversight Board unilaterally to void the legislation or create an injunction." In re Fin. Oversight & Mgmt. Bd. for P.R., 511 F. Supp. 3d 90, 134 (D.P.R. 2020).

[10] After the Commonwealth's commencement of the legal proceedings, the Oversight Board inquired as to whether the Commonwealth had implemented any of the challenged Acts "notwithstanding the Oversight Board's instructions to the contrary pursuant to several provisions of PROMESA." The Commonwealth responded that the Acts had either been fully implemented, partially implemented, or it was the intention of the Commonwealth to implement them, despite the ongoing dispute with the Board.

cross-motions for summary judgment as to Acts 138 and 176, motions for summary judgment on the Commonwealth's claims as to Acts 82 (regulating pharmacy reimbursement for medications) and 47 (increasing tax incentives for medical professionals), and motions for summary judgment on its counterclaims. In its opposition to the Board's summary judgment motions regarding Acts 82 and 47, the Commonwealth requested an order deferring a ruling and allowing additional discovery pursuant to Federal Rule of Civil Procedure 56(d).

In its decision on the summary judgment motions, the court (1) reiterated its holding in Law 29 II that it would apply arbitrary and capricious review to the Board's determination under section 108(a)(2) that a law's implementation would impair or defeat the purposes of PROMESA; and (2) held that it would also apply arbitrary and capricious review to the Board's determinations under section 204(a) that the Commonwealth had failed to comply with its obligations to submit "formal estimates" and certifications. In so holding, the district court rejected the Commonwealth's invitation to apply a distinct "substantial evidence" standard under Puerto Rico law. The Commonwealth argued that such a standard should apply because of the Supreme Court's holding that the Board is an entity within the government of Puerto Rico. See Fin. Oversight & Mgmt. Bd. for P.R. v. Aurelius Inv., LLC (In re Fin. Oversight & Mgmt. Bd. for P.R.), 140 S. Ct. 1649, 1659 (2020) ("Aurelius"). The district court, however, noted that "[t]he Aurelius decision was focused narrowly on the applicability of the

Appointments Clause and does not undermine this [c]ourt's prior reasoning about the level of deference properly afforded to the Oversight Board determinations on account of the Oversight Board's 'operational similarity' to a federal agency." In re Fin. Oversight & Mgmt. Bd. for P.R., 511 F. Supp. 3d 90, 121 (D.P.R. 2020) (quoting Law 29 II, 616 B.R. at 252).

Applying the "arbitrary and capricious" standard of review, the district court concluded that the Board's determinations regarding the Commonwealth's noncompliance with section 204(a), and its determinations that the challenged laws would impair or defeat PROMESA's purposes, were not "arbitrary and capricious." Regarding the Commonwealth's requests for discovery concerning Acts 82 and 47, the court stated that the Commonwealth had not "demonstrated that it lacks access to any evidence relating to any material fact that is necessary to oppose" the Board's motions. Id. at 127 n.22, 138 n.35. The court therefore enjoined the implementation and enforcement of all four laws, with a recognition that it could revisit such relief "if there emerge any significant changes in legal or factual conditions." Id. at 128 n.23, 131 n.28, 133 n.30, 138 n.36. The Commonwealth timely appealed.

II.

We review a district court's grant of summary judgment de novo. López-Santos v. Metro. Sec. Servs., 967 F.3d 7, 11 (1st Cir. 2020). Summary judgment is appropriate if the record, construed in the light most favorable to the nonmovant, presents

no genuine issue of material fact and demonstrates that the movant is entitled to judgment as a matter of law. Id.; Fed. R. Civ. P. 56(a). It is well-established that "[c]ross-motions for summary judgment do not alter the summary judgment standard, but instead simply 'require us to determine whether either of the parties deserves judgment as a matter of law on the facts that are not disputed.'" Wells Real Est. Inv. Tr. II, Inc. v. Chardon/Hato Rey P'ship, S.E., 615 F.3d 45, 51 (1st Cir. 2010) (quoting Adria Int'l Grp., Inc. v. Ferré Dev., Inc., 241 F.3d 103, 107 (1st Cir. 2001)).

Applying the "arbitrary and capricious" standard of review, the district court evaluated whether the Board's determinations were "reasoned[] and supported by substantial evidence in the record." 511 F. Supp. 3d at 120. Although the Commonwealth now agrees on appeal that the "arbitrary and capricious" standard applies, it argues that this means more than just considering whether the Board's determinations were reasoned and supported by substantial record evidence.[11] The Commonwealth contends that "arbitrary and capricious"

[11] Even in rejecting application of the Puerto Rico "substantial evidence" standard in favor of arbitrary and capricious review, the district court questioned whether there is "actually a difference between the two standards." 511 F. Supp. 3d at 121. As the district court explained, "[t]he Puerto Rico 'substantial evidence' standard requires [such] 'relevant evidence as a reasonable mind might accept as adequate to support a conclusion.'" Id. at 121-22 (quoting SPRINTCOM, Inc. v. P.R. Reguls. & Permits Admin., 553 F. Supp. 2d 87, 91-93 (D.P.R. 2008)). The court opined that

analysis must also consider attendant principles developed through decades of administrative law jurisprudence. Specifically, it contends that the Board (1) "must [have] explain[ed] the standard on which it bases its determination" (citing, inter alia, ACA Int'l v. FCC, 885 F.3d 687, 700 (D.C. Cir. 2018)) (2) "must have contemporaneously and reasonably explained its decision" (citing, inter alia, Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 48-49 (1983)); and 3) may not rely on "hindsight rationalizations" (citing, inter alia, DHS v. Regents of the Univ. of Cal., 140 S. Ct. 1891, 1909 (2020)).

By contrast, the Board contends that even if we assess whether its determinations were "arbitrary and capricious," we should not apply "the entire apparatus of administrative law."[12] That is, the Board

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this standard of adequate evidence "is appropriately considered as part of arbitrary and capricious review." Id. at 122.

[12] On appeal, for the first time, the Board argues in the alternative that we should apply a highly circumscribed "ultra vires" standard of review to its decisions. But the Board waived this argument by not raising it before the district court and by repeatedly asserting before that court that "arbitrary and capricious" review applied. See, e.g., 20-00080-LTS, Dkt. #16, 8-10 (Oct. 5, 2020); Bos. Redev. Auth. v. NPS, 838 F.3d 42, 47 (1st Cir. 2016) ("Having urged one standard of review in the district court, [a party] cannot now repudiate its earlier position and seek sanctuary in a different standard."). Moreover, raising a new standard of review for the first time on appeal, after the Commonwealth had already submitted its opening brief, does not reflect well on the Board and is inconsistent with the respect it should display in its interactions with the Commonwealth and the district court.

argues that "principles from federal administrative law that apply to agencies – the rule that administrative agencies must offer contemporaneous reasons for their actions, the ban on hindsight rationalization, and the requirement to articulate consistent standards for their determinations" – do not apply here because the Board is not a federal agency.

We see logic on both sides. On the one hand, PROMESA provides that the Oversight Board should be treated as an entity within the territorial government, not a federal agency, 48 U.S.C. § 2121(c)(1)-(2); territorial governments are expressly excluded from the definition of "agency" in the Administrative Procedure Act ("APA"), 5 U.S.C. § 701(b)(1)(C); and the administrative law principles cited by the Commonwealth have developed through judicial review of "agency" action pursuant to the APA. Further, the Board is in many ways a unique entity, which has been given, by PROMESA's express language, a tremendous degree of authority over aspects of Puerto Rico's financial recovery.

On the other hand, core administrative law principles are not creatures of the APA. Rather, developed over time, these principles promote fairness and transparency in the administrative process and provide concrete guideposts for reviewing agency action. See, e.g., SEC v. Chenery Corp., 332 U.S. 194, 196 (1947) (describing as a principle predating the APA's passage the "simple but fundamental rule of administrative law . . . that a reviewing court . . . must judge the propriety of [agency] action solely by the grounds invoked by the agency"). As the district

court recognized, there is clear "operational similarity" between the Board and a federal agency. In basic terms, both have been charged by Congress with using their statutory authority and organizational expertise to implement the terms of a complex statute. It stands to reason 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.

All that said, to decide this appeal, we need not settle to what extent the universe of federal administrative law should be applied in reviewing Board determinations. We do think, however, that some guidance is warranted on one important issue -- the extent to which either the Board or the Commonwealth can support its position with rationales and analysis proffered for the first time during litigation.

The Commonwealth takes issue with the Board's submission during the litigation of declarations that, the Commonwealth claims, provided new justifications for the Board's determinations regarding the challenged laws. The district court repeatedly cited two such declarations: one by Board Executive Director Natalie A. Jaresko regarding all four laws, and another by independent health policy consultant Phillip Ellis stating his conclusion that Act 82 would increase healthcare costs for the Commonwealth. See, e.g., 511 F. Supp. 3d at 129-30 & nn.25-26. The Commonwealth contends that this reliance was improper.

"It 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.'" Regents of the Univ. of Cal., 140 S. Ct. at 1907 (quoting Michigan v. EPA, 576 U.S. 743, 758 (2015)). An agency may later "elaborate" on those grounds, but it "may not provide new ones." Id. at 1908. In other words, an agency must stand by the reasons it provided at the time of its decision and cannot rely on post-hoc rationalizations developed and presented during litigation. See Citizens to Pres. Overton Park, Inc. v. Volpe, 401 U.S. 402, 419 (1971) ("The lower courts based their review on the litigation affidavits that were presented. These affidavits were merely 'post hoc' rationalizations, which have traditionally been found to be an inadequate basis for review." (internal citation omitted)); see also State Farm, 463 U.S. at 50; Regents of the Univ. of Cal., 140 S. Ct. at 1908-09.

There may be good reasons for applying these principles to the section 204(a) process. Requiring the Board to present to the Commonwealth all of its rationales for disapproving of a piece of legislation enables the Commonwealth to fairly respond to the Board's stated concerns, or to address those concerns based on a fuller understanding of the Board's reasoning. This enhanced communication between the Commonwealth and the Board could conceivably reduce the need for litigation. If and when a dispute does go to court, a fully developed record enables the district court to properly assess whether the Board's determinations were supported by "substantial evi-

dence" without considering post hoc rationalizations. See Regents of the Univ. of Cal., 140 S. Ct. at 1908-09.

However, 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. This case illustrates one reason why this is so. By taking the Board to court soon after the two sides had reached an impasse, the Commonwealth short-circuited the process, particularly as to Acts 176 and 47, considering that the Commonwealth filed suit just weeks after first hearing from the Board regarding those laws. When one side cuts off the process in this way by going to court, it is only fair that the other side can further develop its position in the litigation.

Therefore, in proceedings arising from the section 204(a) review process, the district 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. In this case, with one exception discussed below, it is not clear that the materials submitted by the Board in the litigation contained anything more than elaboration of rationales the Board had provided in the prelitigation correspondence. And this elaboration was certainly appropriate given that, as we have noted, the Commonwealth was the party that ended the correspondence by taking the Board to court. We thus

conclude that the district court did not err in considering the supplementary materials submitted by the Board. We turn now to our de novo review of the district court's judgment as to each law.

III.

A. Act 82

Before the district court, the Board generally contended that the Commonwealth had failed to comply with the estimate and certification requirements of section 204(a) in regard to Act 82 and that the Act is "significantly inconsistent" with the fiscal plan. The district court ultimately ruled for the Board solely on the basis of the Commonwealth's failure to comply with section 204(a), holding that

> the undisputed factual record, when viewed in the light most favorable to the Governor, establishes that the Government failed to comply with its statutory responsibility to provide a formal estimate and certification that was sufficiently informative and complete, such that the Oversight Board's determination of noncompliance and its ultimate decision to seek injunctive relief under section 204(a)(5) after repeated attempts to obtain a formal estimate and certification are neither arbitrary nor capricious. The only certificate of compliance and estimate submitted by the Government, which together comprise less than half a page of text, plainly fall short of even facial compliance with the formal estimate requirement; they provide no context or analysis to

> support the certification's assertion of consistency with the fiscal plan imposed by PROMESA § 204(a).

In re Fin. Oversight & Mgmt. Bd. for P.R., 511 F. Supp. 3d at 126. We agree.[13]

Despite the district court's prior explanation, in Law 29 I, that the formal estimate must cover the "revenue and expenditure effects of new legislation" over the entire period of the fiscal plan, 403 F. Supp. 3d at 13-14, the Commonwealth submitted a conclusory and unsupported estimate that did not even purport to account for the duration of the fiscal plan. As the district court accurately observed, the Commonwealth provided "absolutely no supporting rationale for the impact estimate of $475,131.47" and no "clearly articulated compound estimate that covers the entire duration of the 2019 Fiscal Plan." 511 F. Supp. 3d at 126. Nor did the Commonwealth take the "several opportunities" provided by the Board "to cure the perceived deficiencies and provide some sort of substantiation." Id. at 127. To the contrary, when the Board reasonably requested information about "the financial assumptions on which the law[] appear[s] to be based," pursuant to its authority under section 204(a)(4), the Commonwealth stonewalled. And then, having stonewalled, the Commonwealth cut off the exchange and took

[13] In its analysis, the district court declined to consider the significance of the fact that the Commonwealth had submitted the certifications for Acts 82 and 138 well after the statutory seven-day deadline. We also decline to address these timeliness issues as they are unnecessary to our decision.

the Board to court. It was entirely reasonable for the Board to ask the court to enjoin implementation of the law, consistent with section 204(a), given that the Commonwealth had refused to comply with its obligations under that section.

On appeal, the Commonwealth emphasizes the Board's requests in the pre-litigation correspondence that it consider whether Act 82 would jeopardize the receipt of federal funds.[14] But the district court did not "reach whether the Board's request for such analysis was arbitrary and capricious . . . because the Government's section 204(a) noncompliance is already patent" from its refusal to respond to the Board's other questions about Act 82's fiscal impact. In re Fin. Oversight & Mgmt. Bd. for P.R., 511 F. Supp. 3d at 126 n.20. We again agree that it is unnecessary to consider whether the Commonwealth had to, as part of the "formal estimate," account for Act 82's impact on the receipt of federal funds. Even putting this request aside, the Board made reasonable requests for the Commonwealth to

[14] In its correspondence with the Board regarding Act 82, the Commonwealth repeatedly took issue with the Board's requests that it consider whether Act 82 would jeopardize the receipt of federal funds. The Oversight Board consistently maintained in its correspondence with the Commonwealth that it "was not asking for a preemption analysis" but rather "an analysis of the [Acts] to determine whether any provisions jeopardize the grant of federal funds to the Puerto Rico Department of Health." Because we need not consider the preemption issue, we do not determine whether this distinction drawn by the Board is a distinction with a difference for purposes of the statutory review process under section 204(a).

support its estimate and the Commonwealth plainly did not comply.

The Commonwealth attempts to rewrite the record by suggesting that the Board's entire objection to the estimate and certification was based on the federal funds issue and the Board's reference to "the Health Insurance Administration's recent testimony at [a] public hearing that [Act 82] would increase the Government's health plan budget by $27 million." While we acknowledge that the Board did repeatedly press the federal funds issue, a fair reading of the record demonstrates that the Board expressed a broader concern that the Commonwealth's conclusory "approximate impact" estimate was insufficiently supported. It is simply not evident from the record that the Board based its objections solely on the federal funds issue, or on the purportedly conflicting testimony.

Finally, the district court did not abuse its discretion in denying the Commonwealth's request to defer summary judgment pending further discovery. See In re PHC, Inc. S'holder Litig., 762 F.3d 138, 142-43 (1st Cir. 2014) (explaining that we review the district court's denial of a Rule 56(d) motion for abuse of discretion). Other than a speculative suggestion that further discovery would have somehow undermined the Board's bases for questioning the Act's fiscal impact, the Commonwealth has not pointed to any type of information that would be germane to its claims and to which it did not already have access.

B. Act 138

As with Act 82, the district court ruled for the Board on the basis of its contention that the Commonwealth had failed to comply with its obligation under section 204(a). We again agree with the district court's analysis. For Act 138, the Commonwealth submitted a conclusory statement claiming "no impact on expenditures and revenues." The Board reasonably requested that the Commonwealth supply some analysis or data to back up that assertion, but the Commonwealth refused to do so. Again, the Board's determination that the conclusory and entirely unsubstantiated "no impact" statement did not constitute the required "formal estimate" was entirely reasonable. The Board was justified in directing the Commonwealth to address how the Act would impact expenditures and revenues. And it was justified in determining that, by not submitting a formal estimate or addressing the Board's specific questions, the Commonwealth had failed to comply with its obligations under section 204(a).[15]

Finally, for the same reasons we expressed in relation to Act 82, we reject the Commonwealth's contention that the district court abused its discretion

[15] Regarding Act 138 and Act 47, which is discussed further below, we are cognizant of Puerto Rico's important efforts to attract and retain doctors and other medical professionals. We encourage the Commonwealth to focus on providing robust documentation regarding these efforts as it continues to develop incentives for medical professionals to practice on the island.

by proceeding to rule on the summary judgment motions without further discovery.[16]

C. Act 176

The district court concluded that the Board had reasonably determined, pursuant to its authority under section 108(a)(2), that implementing Act 176 would "impair or defeat" PROMESA's purposes.[17] In re Fin. Oversight & Mgmt. Bd. for P.R., 511 F. Supp. 3d at 133. In so concluding, the district court endorsed the Board's stated concern that the law would negatively affect expenditures through decreased worker productivity: "Common sense and basic principles of economics dictate that, by allowing sick days and vacation days to accrue more quickly, without reducing pay levels, Act 176 affects expenditures by increasing the price the Government pays for labor – causing the Government to pay the same amount of money to each person for fewer days worked." Id. at 132. The district court

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[16] We again need not address the "federal funds" issue because, setting that topic of inquiry aside, the Board's requests for more analysis by the Commonwealth were reasonable, and the Commonwealth's responses were patently noncompliant.

[17] Before the district court, the Board argued both that (1) the Commonwealth had failed to meet its obligations under section 204(a) to submit proper estimates and certifications for the four laws; and (2) the four laws in their substantive effect would "impair or defeat the purposes of" PROMESA. The district court based its ruling on the first ground with respect to Acts 82 and 138 and, as explained below, on the second ground with respect to Acts 176 and 47. On appeal, the Board does not raise the first ground as an alternative basis for affirming the district court as to Acts 176 and 47.

further noted that the Commonwealth's recourse to the provision requiring each agency to institute plans governing their employees' taking of vacation days did not adequately address the Board's concern.

We agree with both points. The Board reasonably determined that Act 176 would decrease worker productivity – resulting in the Commonwealth essentially paying higher labor costs to provide services – and the Commonwealth did not refute this determination. It was thus reasonable for the Board to determine that the Act would impair implementation of the fiscal plan and PROMESA's purpose of securing the Commonwealth's fiscal solvency.[18]

The district court also based its decision on the Board's contention that Act 176 conflicts with the fiscal plan's goal of "right-siz[ing] the workforce to the population size" and ensuring that agencies "deliver services in as efficient a manner as possible." Id. at 132. The Commonwealth contends that these rationales were never articulated by the Board during the prelitigation correspondence. We agree that

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[18] The Commonwealth urges us to determine the precise meaning of "significantly," as in when a law is "significantly inconsistent with the Fiscal Plan for the fiscal year". Id. § 2144(a)(1)-(2) (emphasis added). It contends that a law can only "impair or defeat the purposes of" PROMESA if it is "significantly inconsistent" with the fiscal plan, and that the purported inconsistency between the fiscal plan and Act 176 cannot be deemed "significant." We need not determine the precise meaning of "significantly." Whatever its precise meaning, Act 176, with its sizable projected impacts on expenditures, can reasonably be deemed "significantly inconsistent" with the fiscal plan.

these rationales were first articulated during the litigation and were more than mere elaborations on the Board's stated concern about worker productivity. In the future in such a situation, the district court, mindful of traditional administrative law principles, should consider whether it is appropriate to accept a new rationale in support of the Board's position. Here, however, we are not troubled by the district court's consideration of the new rationales. As we have explained, although it would have been a better practice for the Board to have clearly articulated these rationales in its correspondence with the Commonwealth, it was not inappropriate for the Board to supplement its reasons for challenging the laws during the litigation, given the Commonwealth's abrupt termination of the section 204(a) process by taking the Board to court.

D. Act 47

Lastly, the district court ruled in the Board's favor regarding Act 47, "[b]ased on [the Board's] determination that the loss of tens of millions of dollars" from the expansion of tax incentives "would defeat or impair PROMESA's purposes, which was communicated to the Government in the course of correspondence concerning section 204(a)." Id. at 136. The district court explained that "[t]he fact that Act 47 has the undisputed potential to reduce revenues by about $200 million over five years by creating tax incentives with no offsets to make it revenue neutral renders its implementation a flagrant and significant deviation from" the fiscal plan's principle of "revenue neutrality." Id. at 137. We again agree with the district court. Simply put,

it was reasonable for the Board to determine that a law that could reduce revenues by up to $200 million with no corresponding offsets would "impair or defeat the purposes of" PROMESA.

The Commonwealth makes much of the fact that, in its pre-litigation correspondence, the Board did not specifically cite section 14.3.3, the provision regarding "revenue neutrality" in the 2019 fiscal plan.[19] But the Board expressly stated in its letter regarding Act 47 that "it [is] difficult to understand how the Act, which the Government itself estimates 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, can be anything other than significantly inconsistent with the certified Fiscal Plan." Given this description of revenue neutrality in all but name and the reference to the fiscal plan, we cannot conclude that the Commonwealth was unaware of the Board's revenue neutrality-based objection before the litigation. In other words, the revenue-neutrality issue was not truly raised for the first time during litigation and we are not troubled by the district court's consideration of this rationale.[20] We conclude, then,

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[19] The principle of revenue neutrality for tax measures, which is also in the 2020 Fiscal Plan, see 2020 Fiscal Plan at 218, provides that "any tax reform or tax law initiatives that the Government undertakes must be revenue neutral, that is, all tax reductions must be accompanied by offsetting revenue measures of a sufficient amount identified in the enabling legislation," 2019 Fiscal Plan at 124.

[20] Because we think it plain that a law that reduces revenues by up to $200 million with no offsetting measures is "significantly

for the same reasons articulated by the district court, that the Board reasonably determined that Act 47 would "impair or defeat the purposes of" PROMESA.[21]

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In summary, then, in the case of all four laws, we conclude that the Board did not act arbitrarily and capriciously in exercising its authority under PROMESA. To the contrary, the Board reasonably determined that the Commonwealth had either not met its obligations under section 204(a) to provide a "formal estimate" and certification (Acts 82 and 138), or that the laws would "impair or defeat the purposes of" PROMESA (Acts 176 and 47). The procedures and obligations contemplated by section

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inconsistent" with the fiscal plan and would "impair or defeat the purposes of" PROMESA, we need not, and do not, opine as to whether the Board could seek to enjoin any law that technically violates revenue neutrality, no matter how minimal the revenue reduction.

[21] The Commonwealth argues, in one paragraph of its brief, that the Oversight Board had a responsibility to "explain its change of position" because "[b]efore Act 47's passage, the Board's Municipal Affairs and Legislative Review Director had assured the Governor's Legislative Affairs Adviser that the Board had 'no issue' with Act 47." Even assuming this argument was preserved and is sufficiently developed before us, the Commonwealth has not demonstrated that this preliminary "assurance" from one official to another was sufficiently formal such that the Board's later position was indeed an "abrupt about face" meriting explanation. Cf. FCC v. Fox Television Stations, Inc., 556 U.S. 502, 515 (2009) (noting that an agency usually must provide some recognition of, and explanation for, a change in agency policy).

204(a) are not procedure for procedure's sake. Rather, they serve the critical purpose of allowing the Board to determine that the legislation at issue adheres to the fiscal plan and will not impair PROMESA's purpose of restoring Puerto Rico to fiscal stability. We therefore affirm the district court's judgment with respect to all four laws.[22]

IV.

Congress had to make difficult choices in writing PROMESA and responding to Puerto Rico's fiscal crisis. One of those choices was giving the Board the authority to review and block the implementation of laws enacted by the Puerto Rico legislature if they "impair or defeat the purposes of" PROMESA. We recognize the Commonwealth's objections to this

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[22] The Commonwealth also argues that the Oversight Board violated a norm of administrative law by not "treating like cases alike" when it objected to Acts 82, 138, and 176. Even if we were to accept the application of this "norm" to the Board's actions, it is not clear to us that this argument was raised before the district court, and we would therefore deem it waived. To the extent the argument was preserved, it is fatally underdeveloped. See United States v. Zannino, 895 F.2d 1, 17 (1st Cir. 1990) ("[I]ssues adverted to in a perfunctory manner, unaccompanied by some effort at developed argumentation, are deemed waived."). The Commonwealth merely cites to several other certifications that were accepted by the Board and asserts that these "other laws had a demonstrated, non-speculative fiscal effect or their certificates included similar levels of analysis." Asking us to perform this context-less comparison is simply asking us to do too much in building the Commonwealth's argument. See id. (noting that counsel cannot "leav[e] the court to do counsel's work, create the ossature for the argument, and put flesh on its bones").

unique structure. But that is the governing structure that applies here. The Board did not act "arbitrarily and capriciously" in exercising its authority under PROMESA.[23]

Affirmed. Each side to bear its own costs.

[23] We are disheartened by the antipathy between the parties that was evident in the briefing and at oral argument. In the future, we hope that the Commonwealth and the Board will recommit to working together in a non-adversarial fashion so that this type of litigation can be avoided, in the best interests of the people of Puerto Rico.

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

In re: THE FINANCIAL OVER-SIGHT AND MANAGEMENT BOARD FOR PUERTO RICO, as representative of THE COMMONWEALTH OF PUERTO RICO, et al., Debtors.[1]	PROMESA Title III No. 17 BK 3283-LTS (Jointly Administered)

[1] The Debtors in these Title III Cases, along with each Debtor's respective Title III case number and the last four (4) digits of each Debtor's federal tax identification number, as applicable, are the (i) Commonwealth of Puerto Rico (the "Commonwealth") (Bankruptcy Case No. 17-BK-3283-LTS) (Last Four Digits of Federal Tax ID: 3481); (ii) Puerto Rico Sales Tax Financing Corporation ("COFINA") (Bankruptcy Case No. 17-BK-3284-LTS) (Last Four Digits of Federal Tax ID: 8474); (iii) Puerto Rico Highways and Transportation Authority ("HTA") (Bankruptcy Case No. 17-BK-3567-LTS) (Last Four Digits of Federal Tax ID: 3808); (iv) Employees Retirement System of the Government of the Commonwealth of Puerto Rico ("ERS") (Bankruptcy Case No. 17-BK-3566-LTS) (Last Four Digits of Federal Tax ID: 9686); (v) Puerto Rico Electric Power Authority ("PREPA") (Bankruptcy Case No. 17-BK-4780-LTS) (Last Four Digits of Federal Tax ID: 3747); and (vi) Puerto Rico Public Buildings Authority ("PBA") (Bankruptcy Case No. 19-BK-5523-LTS) (Last Four Digits of Federal Tax ID: 3801) (Title III case numbers are listed as Bankruptcy Case numbers due to software limitations).

HON. WANDA VÁZQUEZ GARCED et al., Plaintiffs, v. THE FINANCIAL OVER-SIGHT AND MANAGEMENT BOARD FOR PUERTO RICO, Defendant.	Adv. Proc. No. 20-080-LTS
HON. WANDA VÁZQUEZ GARCED et al., Plaintiffs, v. THE FINANCIAL OVER-SIGHT AND MANAGEMENT BOARD FOR PUERTO RICO, Defendant.	Adv. Proc. No. 20-082-LTS
HON. WANDA VÁZQUEZ GARCED et al., Plaintiffs, v.	Adv. Proc. No. 20-083-LTS

THE FINANCIAL OVERSIGHT AND MANAGEMENT BOARD FOR PUERTO RICO,

Defendant.

HON. WANDA VÁZQUEZ GARCED et al.,

Plaintiffs,

v.

THE FINANCIAL OVERSIGHT AND MANAGEMENT BOARD FOR PUERTO RICO,

Defendant.

Adv. Proc. No. 20-084-LTS

HON. WANDA VÁZQUEZ GARCED et al.,

Plaintiffs,

v.

THE FINANCIAL OVERSIGHT AND MANAGEMENT BOARD FOR PUERTO RICO,

Defendant.

Adv. Proc. No. 20-085-LTS

OPINION AND ORDER DENYING THE GOVERNMENT'S MOTIONS FOR SUMMARY JUDGMENT AND GRANTING IN PART THE OVERSIGHT BOARD'S MOTIONS FOR SUMMARY JUDGMENT

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LAURA TAYLOR SWAIN,
United States District Judge

On June 12, 2020, Governor Wanda Vázquez Garced (the "Governor") and the Puerto Rico Fiscal Agency and Financial Advisory Authority ("AAFAF" and, together with the Governor, the "Government") commenced the above-captioned adversary proceedings (the "Adversary Proceedings") against the Financial Oversight and Management Board for Puerto Rico (the "Oversight Board" or the "Board") seeking declaratory relief related to five laws that were enacted by the Commonwealth of Puerto Rico (the "Commonwealth") in late 2019 and early 2020 and subsequently challenged on various grounds by the Oversight Board.[2] In each action, the Government seeks (i) a declaratory judgment that the Government's certification pursuant to section 204(a) of the Puerto Rico Oversight, Management, and Economic Stability Act ("PROMESA")[3] was adequate, that the Oversight Board cannot prevent enforcement of the law, and that any unilateral determinations by the Oversight Board of noncompliance with section 204(a) are non-binding; and (ii) a declaratory judgment that the Oversight Board cannot uni-

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[2] The Government also commenced a sixth Adversary Proceeding, regarding Act 90-2019, but has voluntarily dismissed that action. (See Docket Entry No. 5 in Adversary Proceeding No. 20-00081.)

[3] PROMESA is codified at 48 U.S.C. § 2101 et seq. References to PROMESA section numbers in the remainder of this Opinion and Order are to the uncodified version of the legislation.

laterally enjoin the implementation and enforcement of the relevant law under section 108(a)(2) of PROMESA. (See *Adversary Complaint for Declaratory Relief Related to Act 82*, Docket Entry No. 1 in Adversary Proceeding No. 20-00080, the "Act 82 Complaint," ¶¶ 46-54; *Adversary Complaint for Declaratory Relief Related to Act 138*, Docket Entry No. 1 in Adversary Proceeding No. 20-00082, the "Act 138 Complaint," ¶¶ 46-54; *Adversary Complaint for Declaratory Relief Related to Act 176*, Docket Entry No. 1 in Adversary Proceeding No. 20-00083, the "Act 176 Complaint," ¶¶ 43-51; *Adversary Complaint for Declaratory Relief Related to Act 181*, Docket Entry No. 1 in Adversary Proceeding No. 20-00084, the "Act 181 Complaint," ¶¶ 41-49; *Adversary Complaint for Declaratory Relief Related to Act 47*, Docket Entry No. 1 in Adversary Proceeding No. 20-00085, the "Act 47 Complaint," ¶¶ 52-60 (together, the "Complaints").)

On July 17, 2020, the Oversight Board filed an answer and counterclaims in each Adversary Proceeding, seeking (i) nullification of the relevant law pursuant to section 104(k) of PROMESA for failure to satisfy section 204(a) of PROMESA; (ii) a preliminary and permanent injunction barring implementation of the relevant law pursuant to sections 104(k) and 204(a)(5) of PROMESA; and (iii) an injunction barring implementation of the relevant law "to carry out" section 108(a)(2) of PROMESA. (See *Financial Oversight and Management Board for Puerto Rico's Answer and Counterclaims to Adversary Complaint for Declaratory Relief Related to Act 82*, Docket Entry No. 5 in Adversary Proceeding No. 20-00080, the "Act 82

Counterclaims," ¶¶ 30-48, 65-86; *Financial Oversight and Management Board for Puerto Rico's Answer and Counterclaims to Adversary Complaint for Declaratory Relief Related to Act 138*, Docket Entry No. 5 in Adversary Proceeding No. 20-00082, the "Act 138 Counterclaims," ¶¶ 30-70; *Financial Oversight and Management Board for Puerto Rico's Answer and Counterclaims to Adversary Complaint for Declaratory Relief Related to Act 176*, Docket Entry No. 6 in Adversary Proceeding No. 20-00083, the "Act 176 Counterclaims," ¶¶ 13-47; *Financial Oversight and Management Board for Puerto Rico's Answer and Counterclaims to Adversary Complaint for Declaratory Relief Related to Act 181*, Docket Entry No. 6 in Adversary Proceeding No. 20-00084, the "Act 181 Counterclaims," ¶¶ 14-34, 51-69; *Financial Oversight and Management Board for Puerto Rico's Answer and Counterclaims to Adversary Complaint for Declaratory Relief Related to Act 47*, Docket Entry No. 5 in Adversary Proceeding No. 20-00085, the "Act 47 Counterclaims," ¶¶ 17-51 (together, the "Counterclaims"). Additionally, the Oversight Board filed counterclaims in Adversary Proceeding Nos. 20-00080 and 20-00084 seeking (i) nullification of the relevant laws for failure to satisfy section 204(c) of PROMESA; and (ii) preliminary and permanent injunctions barring implementation of the relevant laws under section 104(k) of PROMESA for failure to satisfy section 204(c) of PROMESA. (See Act 82 Counterclaims ¶¶ 49-64; Act 181 Counterclaims ¶¶ 35-50.) On July 30, 2020, the Court consolidated all five Adversary Proceedings "for purposes of motion practice, including

any dispositive motions, and discovery." (Docket Entry No. 9 in Adversary Proceeding No. 20-00080.)

Currently before the Court are the Government's motions for summary judgment on its claims related to Acts 138 and 176 (see *Memorandum of Law in Support of Plaintiffs' Motion for Summary Judgment*, Docket Entry No. 12 in Adversary Proceeding No. 20-00082, the "Gov. Act 138 MSJ"; *Memorandum of Law in Support of Plaintiffs' Motion for Summary Judgment*, Docket Entry No. 13 in Adversary Proceeding No. 20-00083, the "Gov. Act 176 MSJ" (together, the "Government's Motions for Summary Judgment")), the Oversight Board's cross-motions for summary judgment in those two Adversary Proceedings (see *Memorandum of Law in Support of Financial Oversight and Management Board for Puerto Rico's Cross-Motion for Summary Judgment and in Opposition to Defendants' Motions for Summary Judgment on All Claims and Counterclaims Related to Acts 138 and 176*, Docket Entry No. 29 in Adversary Proceeding No. 20-00082, the "Bd. Act 138 Cross-MSJ"; Docket Entry No. 30 in Adversary Proceeding No. 20-00083, the "Bd. Act 176 Cross-MSJ"), and the Oversight Board's motions for summary judgment in the Adversary Proceedings relating to Acts 82, 181, and 47 (see *Memorandum of Law in Support of Financial Oversight and Management Board for Puerto Rico's Motion for Summary Judgment on All Claims and Counterclaims Related to Acts 47, 82, and 181*, Docket Entry No. 16 in Adversary Proceeding No. 20-00080, the "Act 82 MSJ"; Docket Entry No. 15 in Adversary Proceeding No. 20-00084, the "Act 181 MSJ"; Docket

Entry No. 13 in Adversary Proceeding No. 20-00085, the "Act 47 MSJ") (collectively, the "Motions for Summary Judgment" or "Motions"). The Court heard argument on the Motions for Summary Judgment on November 24, 2020 and has considered carefully all of the arguments and submissions made in connection with the Motions.[4] The Court

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[4] In addition to the Complaints, Counterclaims, and Motions for Summary Judgment set forth above, the Court has received and reviewed the following pleadings in connection with its consideration of the Motions for Summary Judgment: the *Declaration of William J. Sushon, Esq. in Support of Plaintiffs' Motion for Summary Judgment* (Docket Entry No. 13 in Adversary Proceeding No. 20-00082); the *Declaration of William J. Sushon, Esq. in Support of Plaintiffs' Motion for Summary Judgment* (Docket Entry No. 14 in Adversary Proceeding No. 20-00083); the *Statement of Uncontested Material Facts in Support of Plaintiffs' Motion for Summary Judgment* (Docket Entry No. 14 in Adversary Proceeding No. 20-00082, the "Gov. Act 138 SOF"); the *Statement of Uncontested Material Facts in Support of Plaintiffs' Motion for Summary Judgment* (Docket Entry No. 15, in Adversary Proceeding No. 20-00083, the "Gov. Act 176 SOF"); the *Statement of Uncontested Material Facts in Support of the Motion for Summary Judgment of the Financial Oversight and Management Board for Puerto Rico Related to Acts 47, 82, and 181* (Docket Entry No. 17 in Adversary Proceeding No. 20-00080; Docket Entry No. 16 in Adversary Proceeding No. 20-00084; Docket Entry No. 14 in Adversary Proceeding No. 20-00085); the *Declaration of Hadassa Waxman* (Docket Entry No. 18 in Adversary Proceeding No. 20-00080); the *Declaration of Natalie A. Jaresko* (Docket Entry No. 19 in Adversary Proceeding No. 20-00080, the "Jaresko Decl."); the *Declaration of Philip Ellis, Ph.D.* (Docket Entry No. 20 in Adversary Proceeding No. 20-00080); the *Statement of Uncontested Material Facts in Support of Cross-Motion for Summary Judgment of Financial Oversight and Management Board for Puerto Rico Related to Acts 138 and 176* (Docket Entry No. 30 in Adversary Proceeding No. 20-00082; Docket Entry No. 31 in Adversary Proceeding No. 20-00083, the

"Bd. Act 176 SOF"); *The Financial Oversight and Management Board for Puerto Rico's Response to Plaintiffs' Statement of Uncontested Material Facts in Support of Plaintiffs' Motion for Summary Judgment Regarding Act 138* (Docket Entry No. 31 in Adversary Proceeding No. 20-00082, the "Bd. Resp. to Act 138 SOF"); *The Financial Oversight and Management Board for Puerto Rico's Response to Plaintiffs' Statement of Uncontested Material Facts in Support of Plaintiffs' Motion for Summary Judgment Regarding Act 176* (Docket Entry No. 32 in Adversary Proceeding No. 20-00083, the "Bd. Resp. to Act 176 SOF"); the *Declaration of Philip Ellis, Ph.D.* (Docket Entry No. 32 in Adversary Proceeding No. 20-00082, the "Ellis Decl."); *The Elected Government's Opposition to Defendant's Motion for Summary Judgment on All Claims and Counterclaims Related to Acts 47, 82, and 181 and Request for Relief Under Rule 56(d)* (Docket Entry No. 36 in Adversary Proceeding No. 20-00080, the "Act 82 Opp."; Docket Entry No. 35 in Adversary Proceeding No. 20-00084, the "Act 181 Opp."; Docket Entry No. 34 in Adversary Proceeding No. 20-00085, the "Act 47 Opp."); the *Declaration of William J. Sushon, Esq. in Opposition to the Financial Oversight and Management Board for Puerto Rico's Motion for Summary Judgment on All Claims and Counterclaims Related to Acts 47, 82, and 181, and Request for Relief under Rule 56(d)* (Docket Entry No. 37 in Adversary Proceeding No. 20-00080); *The Elected Government's Response to Statement of Uncontested Material Facts in Support of the Motion for Summary Judgment of the Financial Oversight and Management Board for Puerto Rico Related to Acts 47, 82, and 181* (Docket Entry No. 38 in Adversary Proceeding No. 20-00080, the "Gov. Resp. to SOF"); the *Declaration of Aixa Cruz Pol in Opposition to Defendant's Motion for Summary Judgment on All Claims and Counterclaims Related to Acts 47, 82, and 181* (Docket Entry No. 39 in Adversary Proceeding No. 20-00080, the "Cruz Decl."); the *Declaration of Alex Lopez Echegaray in Opposition to the Financial Oversight and Management Board for Puerto Rico's Motion for Summary Judgment on All Claims and Counterclaims Related to Acts 47, 82, and 181* (Docket Entry No. 40 in Adversary Proceeding No. 20-00080, the "Lopez Decl."); *The Government's Reply in Further Support of Its Motion for Summary Judgment and Opposition to*

Cross-Motion for Summary Judgment on All Claims and Counterclaims Related to Acts 138 and 176 (Docket Entry No. 37 in Adversary Proceeding No. 20-00082, the "Gov. Act 138 Reply and Opp."; and Docket Entry No. 38 in Adversary Proceeding No. 20-00083, the "Gov. Act 176 Reply and Opp."); the *Government's Response to Statement of Uncontested Material Facts in Support of Cross-Motion for Summary Judgment of Financial Oversight and Management Board for Puerto Rico Related to Acts 138 and 176* (Docket Entry No. 38 in Adversary Proceeding No. 20-00082; Docket Entry No. 39 in Adversary Proceeding No. 20-00083); the *Reply Memorandum of Law in Support of Financial Oversight and Management Board for Puerto Rico's Motion for Summary Judgment on All Claims and Counterclaims Related to Acts 47, 82, and 181* (Docket Entry No. 49 in Adversary Proceeding No. 20-00080, the "Act 82 Reply"; Docket Entry No. 47 in Adversary Proceeding No. 20-00084; Docket Entry No. 46 in Adversary Proceeding No. 20-00085); *Reply Memorandum of Law in Support of Financial Oversight and Management Board for Puerto Rico's Cross-Motion for Summary Judgment on All Claims and Counterclaims Related to Acts 138 and 176* (Docket Entry No. 40 in Adversary Proceeding No. 20-00082; and Docket Entry No. 41 in Adversary Proceeding No. 20-00083, the "Bd. Act 176 Reply"); the *Notice of Appearance and Second Motion Requesting Leave to File an Amicus Brief and For Amicus Status* (Docket Entry No. 15238 in Case No. 17-3283, the "COOPHARMA Amicus Motion") filed by Cooperativa de Farmacias Puertorriqueñas ("COOPHARMA"); the *Informative Motion of the Financial Oversight and Management Board for Puerto Rico Submitting Supplemental Documents* (Docket Entry No. 62 in Adversary Proceeding No. 20-00080); *The Government's Statement of Support for Cooperativa de Farmacias Puertorriqueñas's Second Motion Requesting Leave to File an Amicus Brief and for Amicus Status* (Docket Entry No. 63 in Adversary Proceeding No. 20-00080); *the Financial Oversight and Management Board for Puerto Rico's Opposition to Motion of COOPHARMA for Leave to Participate as Amicus Curiae* (Docket Entry No. 65 in Adversary Proceeding No. 20-00080); the *Reply Brief to Financial Oversight Board's Opposition to Amicus Brief by COOPHARMA* (Docket Entry No.

has subject matter jurisdiction of these actions pursuant to 48 U.S.C. § 2166.

For the reasons that follow, the Court holds that the Oversight Board is entitled to summary judgment dismissing Count I of the Act 82 Complaint[5] and the Act 138 Complaint,[6] which seek declaratory relief concerning section 204(a) of PROMESA, and Count II of the Act 176 Complaint[7] and the Act 47 Complaint,[8] which seek declaratory relief concerning section 108(a)(2) of PROMESA. The Oversight Board is also entitled to summary judgment in its favor with respect to Act 82 Counterclaim II and Act 138 Counterclaim II, which seek injunctions under section 104(k) of PROMESA barring implementation of the relevant laws under section 204(a)(5) of PROMESA. The Oversight Board is entitled to summary judgment in its favor with respect to Act 176 Counterclaim III and Act 47 Counterclaim III, which seek injunctions barring implementation of

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66 in Adversary Proceeding No. 20-00080); *The Government's Informative Motion Regarding Recent Supplemental Authority Supporting Its Opposition to Defendant's Motion for Summary Judgment on All Claims and Counterclaims Related to Acts 47, 82, and 181* (Docket Entry No. 68 in Adversary Proceeding No. 20-00080); and *the Informative Motion of the Financial Oversight and Management Board for Puerto Rico Submitting Supplemental Documents* (Docket Entry No. 69 in Adversary Proceeding No. 20-00080).

[5] (See Adversary Proceeding No. 20-00080.)

[6] (See Adversary Proceeding No. 20-00082.)

[7] (See Adversary Proceeding No. 20-00083.)

[8] (See Adversary Proceeding No. 20-00085.)

the relevant laws under section 108(a)(2) of PROMESA. Additionally, the Oversight Board is entitled to summary judgment in its favor with respect to Act 181 Counterclaim IV,[9] which seeks an injunction under section 104(k) of PROMESA barring implementation of Act 181 under section 204(c) of PROMESA. The Court denies the Government's Motions for Summary Judgment in their entirety, and the remaining aspects of the Oversight Board's Motions for Summary Judgment are also denied. As explained below, and in accordance with the Order to Show Cause Regarding Dismissal of Remaining Claims and Counterclaims that is being entered contemporaneously with this Opinion and Order, the parties are directed to show cause as to why, in light of the analysis, conclusions, and injunctive relief granted herein, the remaining claims and counterclaims should not be dismissed as moot or otherwise for lack of subject matter jurisdiction.

I.

Background

The following facts are undisputed, except as otherwise indicated.[10]

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[9] (See Adversary Proceeding No. 20-00084.)

[10] Facts characterized as undisputed are identified as such in the parties' statements pursuant to D.P.R. Local Civil Rule 56 or drawn from evidence as to which there has been no contrary, non-conclusory factual proffer. Citations to the parties' Local Civil Rule 56 statements incorporate by reference citations to underlying evidentiary submissions.

PROMESA was enacted on June 30, 2016, to address the fiscal emergency in Puerto Rico created by a "combination of severe economic decline, and, at times, accumulated operating deficits, lack of financial transparency, management inefficiencies, and excessive borrowing." 48 U.S.C.A. § 2194(m)(1) (Westlaw through P.L. 116-217). To implement PROMESA, Congress established the Oversight Board and vested it with authority to provide the Commonwealth with a "method . . . to achieve fiscal responsibility and access to the capital markets." Id. § 2121(a). On May 3, 2017, the Commonwealth of Puerto Rico filed its petition under Title III of PROMESA. On May 9, 2019, the Oversight Board certified a fiscal plan for the Commonwealth (Docket Entry No. 56-1 in Adversary Proceeding No. 20-00080, the "2019 Fiscal Plan") and, on June 30, 2019, the Oversight Board certified a budget for fiscal year 2020, running from July 1, 2019 through June 30, 2020. (Gov. Resp. to SOF ¶¶ 1-2.)

These Adversary Proceedings arise from ongoing disputes between the Government and the Oversight Board concerning the interpretation and application of PROMESA provisions concerning submissions to, and the evaluation of new Commonwealth legislation by, the Oversight Board. Both the Government's claims and the Oversight Board's counterclaims focus on sections 108(a)(2) and 204(a) of PROMESA. The Oversight Board has also interposed counterclaims predicated on section 204(c) of PROMESA in the Adversary Proceedings concerning Act 82 and Act 181.

Section 108(a)(2) of PROMESA provides 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 this chapter, as determined by the Oversight Board." 48 U.S.C.A. § 2128(a)(2) (Westlaw through P.L. 116-217).

Under section 204(a) of PROMESA, the Governor must deliver to the Oversight Board the text of each new legislative enactment, 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 a certification by an "appropriate entity" regarding whether or not the submitted law is significantly inconsistent with the fiscal plan for the applicable fiscal year, id. §§ 2144(a)(2)(B)-(C). Section 204(a) contemplates responsive action by the Oversight Board with respect to each law in certain circumstances, with the aim of ensuring the territorial Government's compliance with the applicable fiscal plan. See id. § 2144(a).

Section 204(c)(1) of PROMESA, titled "Restrictions on budgetary adjustments," provides that,

> [i]f the Governor submits a request to the Legislature for the reprogramming of any amounts provided in a certified Budget, the Governor shall submit such request to the Oversight Board, which shall analyze whether the proposed reprogramming is significantly inconsistent with the Budget, and

> submit its analysis to the Legislature as soon as practicable after receiving the request.

Id. § 2144(c)(1). Section 204(c)(2) directs that "[t]he Legislature shall not adopt a reprogramming, and no officer or employee of the territorial government may carry out any reprogramming, until the Oversight Board has provided the Legislature with an analysis that certifies such reprogramming will not be inconsistent with the Fiscal Plan and Budget." Id.

As noted above, these actions relate to the Oversight Board's challenges, under sections 204(a) and 108(a)(2) of PROMESA, to five specific Commonwealth legislative enactments, two of which the Board has also challenged under section 204(c) of PROMESA. Act 82-2019, the "Pharmacy Services and Benefit Managers Regulatory Act," was signed into law on July 30, 2019, and regulates the activities of Pharmacy Benefit Managers ("PBMs") and Pharmacy Benefit Administrators ("PBAs"). (Docket Entry No. 32-1 in Adversary Proceeding No. 20-00080, "Act 82.") Act 138-2019, which the Commonwealth enacted on August 1, 2019, curtails the ability of managed care organizations ("MCOs") to exclude qualified healthcare providers from admission to their preferred-provider networks. (Docket Entry No. 13-2 in Adversary Proceeding No. 20-00082, "Act 138.") On December 16, 2019, the Commonwealth enacted Act 176-2019, which increases public employee vacation and sick leave accrual rates. (Docket Entry No. 14-2 in Adversary Proceeding No. 20-00083, "Act 176.") Act 181-2019, the "Bureau of the Puerto Rico Firefighters Corps Salary

Adjustment Act," was signed into law on December 26, 2019. (Docket Entry No. 31-1 in Adversary Proceeding No. 20-00084, "Act 181.") Act 47-2020, which amends the "Puerto Rico Incentives Code" to broaden health care provider eligibility for certain tax reductions, was signed into law on April 28, 2020. (Docket Entry No. 30-1 in Adversary Proceeding No. 20-00085, "Act 47.") Each law, the Government's estimates and certifications pursuant to section 204(a) of PROMESA, and the parties' written correspondence related thereto are described in further detail below.

A. Acts 82 and 138 (together, the "Healthcare Acts")

Act 82 creates a "Regulatory Law for Pharmacy Benefits and Services Administrators" and establishes an "Office of the Regulatory Commissioner of Pharmacy Benefits and Services Administrators" in the Puerto Rico Department of Health to further regulate PBMs, PBAs, and any similar entity that contracts services from pharmacies in Puerto Rico, among other purposes. (See Act 82.) Act 82 changes arrangements between PBMs and pharmacies to require that pharmacies be reimbursed for at least their cost of acquisition of medications, a change that the Oversight Board argues increases costs to the Commonwealth and decreases price competition. (Act 82 MSJ at 9-10.) The Government represents that Act 82 was designed to prohibit anticompetitive and deceptive practices that harm consumers. (Act 82 Opp. at 9.)

Act 138 amends the Insurance Code of Puerto Rico, Act 77-1957, to provide that "[n]o health insurance organization, insurer, third-party administrators, and other health plans may deny provider enrollment applications submitted by" any health care professional if the applicant is qualified to provide health care services in Puerto Rico. (Act 138 § 1.) Act 138 further amends Act 77-1957 to prohibit MCOs from unilaterally terminating or rescinding contracts with health care providers. (Id. § 2.) According to its Statement of Motives, Act 138 was enacted "to discourage the mass exodus of health professionals and increase the availability of health care services throughout the Island." (Id. at 3.)

On September 12, 2019, AAFAF, the Puerto Rico Department of Treasury (the "Treasury Department"), and the Puerto Rico Office of Management and Budget ("OMB"), on behalf of the Government, submitted to the Oversight Board a copy of Act 138 and a "Compliance Certificate of New Law Pursuant to 48 U.S.C. §[]2144(2)(B)" (Docket Entry No. 1-4 in Adversary Proceeding No. 20-00083, the "Act 138 Certificate"). (See Bd. Resp. to Act 138 SOF ¶ 9.) The Act 138 Certificate, in its entirety, reads as follows:

Legislative Measure Number:

- Act No. 138-2019 ('Act 138'), herein attached.

Estimate of Impact of the Legislative Measure on Expenditures and Revenues:

- Act 138 has no impact on expenditures or revenues.

Determination of the Legislative Measure's Compliance with the Fiscal Plan:

- Act 138 is not significantly inconsistent with the New Fiscal Plan for Puerto Rico.

(Act 138 Certificate.)

By letter dated November 15, 2019,[11] Oversight Board Executive Director Natalie A. Jaresko, on behalf of the Oversight Board, notified the Governor of several issues regarding both Act 82 and Act 138. With respect to Act 82, Ms. Jaresko's letter explained that, "[w]hile Act 82-2019 was signed into law on July 30, 2019, the Oversight Board has not received the formal cost estimate and certification of compliance or noncompliance as required by PROMESA Section 204(a)(2)." (Docket Entry No. 1-4 in Adversary Proceeding No. 20-00080, at 1.) As an independent concern, the letter expressed the Board's view that "there is possible federal preemption of the subject matter covered by Act 82-2019 under the statutory provisions of Title 42 of the U.S. Code and related Code of Federal Regulations." (Id.) The letter requested both a cost estimate and certification, as well as "an explanation as to why Act 82-2019 is not preempted." (Id.)

[11] The Oversight Board's November 15, 2019, letter and subsequent correspondence discussed in this background section address Act 90-2019, in addition to Act 82 and Act 138. In setting forth the portions of the parties' correspondence that relate each specific Act at issue, the Court discusses only those aspects that pertain to Acts 82 and 138.

Regarding Act 138, Ms. Jaresko's letter explained that a copy of Act 138 and the Act 138 Certificate were submitted after the seven business-day period mandated by PROMESA, and that the Act 138 Certificate "fail[s] to provide the formal estimate of the fiscal impact as required under" section 204(a)(2)(A) of PROMESA. (Docket Entry No. 13-5 in Adversary Proceeding No. 20-00082 at 2.) The Oversight Board also stated its "opinion that the subject matter covered by . . . Act 138-2019 [is] preempted by the statutory provisions of Title 42 of the U.S. Code and related Code of Federal Regulations." (Id.) The Oversight Board thus requested "a formal estimate of the impact each Act will have on expenditures and revenues, including the impact on the government's medical health insurance plan ('Vital'), as required by PROMESA Section 204(a)(2)(A)," as well as an analysis of Act 138 "in relation to the 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. (Id.) The Oversight Board, in conclusion, reserved its right to take any necessary follow-up action:

> Should the Oversight Board determine that you have failed to comply with our directive under Section 204(a)(4)(A), or that a law impairs or defeats the purposes of PROMESA, as determined by the Oversight Board, we reserve the right to take such actions as we consider necessary, consistent with Section

> 204(a)(5), including preventing the enforcement or application of Act 82-2019 . . . and Act 138-2019.

(Id.)

On November 18, 2019, the Governor submitted a "Certificate of New Law Pursuant to 48 U.S.C. §[]2144(2)(B)," in connection with Act 82, after being made aware that the certification had been overdue for more than three months. (Docket Entry No. 1-5 in Adversary Proceeding No. 20-00080, the "Act 82 Certificate"; see Gov. Resp. to SOF ¶¶ 21, 25.) The Act 82 Certificate, in its entirety, reads as follows:

> **Legislative Measure Number:**
>
> • Act No. 82-2019 ('Act 82'), herein attached.
>
> **Estimate of Impact of the Legislative Measure on Expenditures and Revenues:**
>
> • Act 82 has an approximate impact of $475,131.47 in the Department of Health's budget. However, Act 82 will be implemented using budgeted resources. If reprogramming of budgeted resources is needed, the appropriate agency will submit to the FOMB a formal request.
>
> • Act 82 has no impact on revenues.
>
> **Determination of the Legislative Measure's Compliance with the Fiscal Plan:**
>
> • Act 82 is not significantly inconsistent with the 2019 Fiscal Plan for Puerto Rico.

(Act 82 Certificate.)

By letter dated November 22, 2019, AAFAF Executive Director Omar J. Marrero responded to the Oversight Board's assertions in its November 15, 2020, letter. (See Docket Entry No. 13-6 in Adversary Proceeding No. 20-00082; Docket Entry No. 1-6 in Adversary Proceeding No. 20-00080.) Initially, Mr. Marrero stated that "it is emphatically the public policy of the Government to comply with Section 204(a) of PROMESA," explaining that "on October 25, 2019, Governor Vázquez signed Executive Order 2019-57 (the 'Executive Order') establishing streamlined procedures to comply with said Section and ordering compliance and cooperation from all agencies and dependencies in order to promptly comply with the certificates mandated by Section 204(a)." (Docket Entry No. 13-6 in Adversary Proceeding No. 20-00082, at 1; Docket Entry No. 1-6 in Adversary Proceeding No. 20-00080, at 1.) Mr. Marrero asserted that, "[i]n compliance with the Executive Order and Section 204(a), and since I assumed the position of Executive Director of AAFAF in August, 2019, the Government has sent 204(a) certifications to the Board for all Acts and Joint Resolutions enacted since that time." (Docket Entry No. 13-6 in Adversary Proceeding No. 20-00082, at 1; Docket Entry No. 1-6 in Adversary Proceeding No. 20-00080, at 1.) Mr. Marrero also addressed the substantive concerns raised by the Oversight Board:

> [I]n your second letter you state that for Acts 82 and 138 enacted during 2019, the Board believes there is possible federal preemption of the subject under the statutory provisions

> of Title 42 of the U.S. Code and related Code of Federal Regulations. Nothing in Section 204(a) of PROMESA allows the Board to request explanations from the elected government on alleged federal preemption of enacted laws. Section 204(a)(3) only allows the Board to send notifications to the elected government under limited circumstances, specifically, if no certifications are sent or, if the Board understands an enacted law is significantly inconsistent with the certified fiscal plan.

(Docket Entry No. 13-6 in Adversary Proceeding No. 20-00082, at 2; Docket Entry No. 1-6 in Adversary Proceeding No. 20-00080, at 2.)

In its December 18, 2019, responsive letter to AAFAF, the Oversight Board reiterated its position that the Government had failed to comply with section 204(a) of PROMESA following the enactment of the Healthcare Acts:

> Section 204(a) of PROMESA requires the submission to the Oversight Board of all laws not later than 7 business days after the law is enacted, together with a formal estimate of its impact and a certification of compliance or non-compliance. As you recognize, the government did not submit the required documentation concerning the laws . . . referenced in the Oversight Board's November 15 letter until November 22, 2019, which was after the required submission period. We must insist that

these requirements be fulfilled on a timely basis and just as importantly, be incorporated as part of the legislative process and not left for after enactment of legislation.

. . .

Regarding our request for an analysis of federal statutes for possible conflicting provisions regarding Acts 82-2019. . . and 138-2019,. . . [w]e point out the Government and the Oversight Board must cooperate to make sure the measures required to comply with the certified Fiscal Plan are implemented, and actions inconsistent with the Fiscal Plan are avoided. To that end, if an enacted law negatively impacts the Commonwealth's budget because of conflicts with federal statutes, the law would not be consistent with the certified Fiscal Plan. Even though a Section 204(a) certificate for Act 82-2019 was submitted, it is our understanding the estimate is not 'formal' and not accurate because it provides only an 'approximate impact' of the law on the Department of Health's budget. Furthermore, the $475,131.47 'approximate impact' provided in the certificate, is dramatically at odds with other authority on the subject; specifically, the Health Insurance Administration's recent testimony at the public hearing that Act 82-2019 would increase the Government's health plan budget by $27 million. As such, the Oversight Board has concerns the 'approximate impact' is not accurate.

> In view of the foregoing, . . . we ask you to comply with our request for an analysis as to whether federal law conflicts with Acts 82-2019 . . . and 138-2019, and whether any conflicts jeopardize the grant of federal funds.
>
> Please submit the required information by no later than December 27, 2019.

(Docket Entry No. 13-7 in Adversary Proceeding No. 20-00082, at 1-2; Docket Entry No. 1-7 in Adversary Proceeding No. 20-00080, at 1-2.)

In its December 27, 2019, letter to the Oversight Board, AAFAF reiterated its assertion that it is "emphatically the public policy of the Government to comply with section 204(a) of PROMESA." (Docket Entry No. 13-8 in Adversary Proceeding No. 20-00082, at 1; Docket Entry No. 1-8 in Adversary Proceeding No. 20-00080, at 1.) Additionally, AAFAF challenged the Oversight Board's preemption-based arguments:

> Concerning Acts 82-2018 . . . and 138-2019, . . . we believe Section 204(a) of PROMESA does not empower the Board to make determinations on alleged federal preemption of enacted laws. Section 204(a)(3) of PROMESA only allows the Board to send notifications to the elected government under limited circumstances, specifically, if no certifications are sent or, if the Board understands an enacted law is significantly inconsistent with the certified fiscal plan. To this date, we have not received any notification that Acts 82-2019 . . . and 138-2019 are significantly inconsistent

with the Fiscal Plan. In your letter you state that 'if an enacted law negatively impacts the Commonwealth's budget because it conflicts with federal statutes, the law would not be consistent with a certified Fiscal Plan'. That is a speculative statement. To begin with, federal preemption is an issue to be determined by the courts and specific tests have been developed by the Supreme Court of the United States to determine preemption issues . . . . Moreover, it is a well-known principle of law that during 'pre-emption analysis, courts . . . assume that the historic police powers of the States are not superseded unless that was the clear and manifest purpose of Congress'. . . . Therefore, the Government of Puerto Rico reiterates the Board has no power under Section 204(a) of PROMESA to determine whether a statute is preempted by federal law. Moreover, absent a specific judicial finding of preemption, it would be speculative to conclude a duly enacted law is inconsistent with the certified Fiscal Plan because of federal preemption.

Finally, regarding your statement that the approximate impact of Act 82-2019 provided in the 204(a) certification is 'dramatically at odds' with a statement provided the Health Insurance Administration at a public hearing, I remind you that the 'appropriate entities of the territorial government' in charge of issuing the certifications are AAFAF, OMB and Treasury. . . . As such, any statement by an

> agency during the legislative process is subordinate to the determination of the appropriate government entities.

(Docket Entry No. 13-8 in Adversary Proceeding No. 20-00082, at 1-2 (internal citations omitted); Docket Entry No. 1-8 in Adversary Proceeding No. 20-00080, at 1-2 (internal citations omitted).)

The Oversight Board sent its next letter regarding Act 82 and Act 138 to AAFAF on April 27, 2020. (See Docket Entry No. 13-9 in Adversary Proceeding No. 20-00082; Docket Entry No. 1-9 in Adversary Proceeding No. 20-00080.) It reads, in relevant part, as follows:

> On November 15, 2019, the Oversight Board asked AAFAF for an analysis of [the Healthcare Acts] to determine whether any provisions jeopardize the grant of federal funds to the Puerto Rico Department of Health ('PRDH') (the 'Requested Analysis'). Twice, AAFAF failed to provide this information, and instead claimed incorrectly the Oversight Board was requesting a federal preemption analysis of [the Healthcare Acts]. In its letter dated February 18, 2020, the Oversight Board again asked AAFAF for the Requested Analysis, as [the Healthcare Acts] could potentially imperil the Commonwealth's receipt of federal funds, making clear it was not asking for a preemption analysis. The Oversight Board asked for a response by February 21, 2020, but has received no response.

PROMESA Section 204(a)(2)(A) requires the Governor to submit 'a formal estimate prepared by an appropriate entity of the territorial government with expertise in financial management of the impact, if any, that the law will have on expenditures and revenues.' Any complete formal estimate must take into account any impact on future inflows or outflows of funds, including monies from the federal government. As Judge Swain recently ruled in the Law 29 matter,[12] these estimates must cover the fiscal impact of these laws over the entire period covered by the 2019 Fiscal Plan. *Opinion and Order Granting in Part the Oversight Board's Motion for Summary Judgment, Fin. Oversight & Mgmt. Bd. for P.R. v. Vázquez Garced*, Adv. Proc. No.

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[12] On August 22, 2019, in Financial Oversight & Management Board for Puerto Rico v. Vázquez Garced (In re Financial Oversight & Management Board for Puerto Rico), 403 F. Supp. 3d 1 (D.P.R. 2019) ("Law 29 I"), this Court denied the Governor and AAFAF's motion to dismiss an action by the Oversight Board seeking to nullify and enjoin implementation of certain legislative measures, including the "Act for Reductions of the Administrative Burdens of the Municipalities" ("Law 29"), which provided for spending outside of the Commonwealth's certified fiscal plan. On April 15, 2020, the Court granted in part the Oversight Board's motion for summary judgment and declared that Law 29 and several joint resolutions were unenforceable, and further held that the Governor and AAFAFwere enjoined from implementing and enforcing Law 29 on the basis that it violated sections 108(a)(2), 204(a), and 204(c) of PROMESA. See Fin. Oversight & Mgmt. Bd. for P.R. v. Vázquez Garced (In re Fin. Oversight & Mgmt. Bd. for P.R.), 616 B.R. 238 (D.P.R. 2020) ("Law 29 II").

19-00393 [ECF No. 107] (Apr. 15, 2019). Accordingly, we request again that the Government provide complete formal estimates for [the Healthcare Acts], pursuant to Section 204(a)(2)(A), including the Requested Analysis.

As the Government has so far failed to confirm that its analysis took into account germane factors pertaining to [the Healthcare Acts] and their impact on federal funding, we have conducted our own analysis. After reviewing each act and its necessary consequences, we have the following questions regarding the financial assumptions on which the laws appear to be based and the implications of those assumptions and laws and we request the required formal estimates to address them:

Act 82

- Does AAFAF expect the pharmacy reimbursement floor (i.e., the lowest Pharmacy Benefit Manager ('PBM') reimbursement sufficient to offset fully the pharmacy's acquisition cost) to have a downstream effect on PBM or Managed Care Organization ('MCO') rates on a Per Member Per Month ('PMPM') basis?
- How will the potential impact from increases in PMPM rates be mitigated to maintain compliance with the Certified Commonwealth Fiscal Plan?

. . .

Act 138

- What mechanisms does AAFAF anticipate will be established to enforce this provision? How will situations in which MCOs and providers cannot reach agreement on contract rates be mediated?
- Does AAFAF anticipate enactment of non-participating provider laws ('Non-Par') to regulate payments when MCOs and providers are unable to come to an agreement?
- Given anticipated enforcement mechanisms, does AAFAF expect this law to cause higher MCO PMPM rates?
- How will potential impact from increases in PMPM rates be mitigated to maintain compliance with the Certified Commonwealth Fiscal Plan?

Please provide the necessary formal estimates, including the information requested above, no later than May 8, 2020. Moreover, with your May 8, 2020 response, we request that you confirm that the [laws] have not yet been implemented and will not be implemented until this issue is resolved.

Pursuant to PROMESA Section 108(a)(2), the Governor and Legislature are each enjoined from, among other things, implementing any statute or rule that impairs or defeats the purposes of PROMESA as determined by the

> Oversight Board. To avoid any misunderstanding, please be advised the Oversight Board has determined implementation of [the Healthcare Acts] prior to satisfaction of the requirements of Section 204 would impair and defeat the purposes of PROMESA, such as preventing implementation of new laws prior to satisfaction of the requirements of Section 204.
>
> Finally, in her April 15, 2020 opinion, Judge Swain affirmed Section 204(a) authorizes the Oversight Board to move for the nullification of legislation where the Commonwealth has failed to comply with PROMESA. Accordingly, the Oversight Board reserves the right to take such actions as it deems necessary, consistent with Sections 104(k), 108(a) and 204(a)(2), including seeking remedies for preventing the enforcement of the [laws].

(Docket Entry No. 13-9 in Adversary Proceeding No. 20-00082, at 1-3; Docket Entry No. 1-9 in Adversary Proceeding No. 20-00080, at 1-3.)

In a letter dated May 8, 2020, AAFAF asserted that "no revised [section 204(a)] certifications are necessary, and the Board's threat to invalidate the Healthcare Acts under PROMESA section 108(a) as impairing the purposes thereof is misplaced." (Docket Entry No. 13-10 in Adversary Proceeding No. 20-00082, at 1; Docket Entry No. 1-10 in Adversary Proceeding No. 20-00080, at 1.) It went on to explain that,

Section 204(a) requires that the Government provide only a 'formal estimate . . . of the impact, if any, that the law will have on expenditures and revenues.' Thus, section 204(a) does not require the Government to anticipate every possible scenario. Rather, all that is required is a 'good faith' effort to determine the financial effects of a new law and the new law's consistency with the existing fiscal plan.

In light of the foregoing, we are convinced that the Government's section 204(a) certifications for the Healthcare Acts easily satisfy such statutory requirement. The section 204(a) certifications of the Healthcare Acts were prepared by the Puerto Rico Office of Management and Budget, which is the Government agency primarily responsible for managing the Government's finances and budgetary matters . . . . [T]he certifications describe[] the estimated effect of the applicable law on the Government's expenditures and revenues. For example, the Act 82 certification states that it will have an 'approximate impact of $475,131.47 in the Department of Health's budget' but will be 'implemented using budgeted resources,' such that a formal request for reprogramming is not required. In addition, the . . . Act 138 certification[] conclude[s] that there is 'no impact on expenditures and revenues.' . . . [T]he certifications conclude that the Healthcare Acts are 'not significantly inconsistent with the New Fiscal

Plan for Puerto Rico.' To the extent such certifications include all of the required elements under section 204(a)(2) and were provided in good faith, the Government has fully satisfied the applicable PROMESA's [sic] requirements.

As to the Board's speculation regarding preemption by or potential conflicts with federal law, we believe there is no need for the Government to respond thereto. *First*, this is a legal—not financial or budgetary—issue that is not the proper subject of a section 204(a)(2) certification. In such regard, nothing in PROMESA requires the Government to provide the Board with a legal opinion. Moreover, section 204(a)(2) is focused solely on financial and budgetary concerns, requiring the certification to describe only the 'impact' on 'expenditures and revenues'—not legal issues. Furthermore, to evidence the Congressional intent behind section 204(a)(2) certifications, we just need to look at who is responsible to prepare the certification; a government entity 'with expertise in budgets and financial management'.

Second, even if there were such an obligation, the analysis the Board requests would shed no light on whether the laws at issue are significantly inconsistent with whatever fiscal plan should be guiding Puerto Rico's spending going forward. In its most recent status report to the Title III Court, the Board acknowledged that 'the COVID-19 pandemic has reshaped

the economic landscape of the world, including Puerto Rico' and 'the Oversight Board must assess this new and changing landscape, beginning with the development of a revised Commonwealth fiscal plan and budget.' As a result, the May 9, 2019 Fiscal Plan for the Commonwealth (the most recent certified plan) will change in a matter of weeks, as the Board acknowledged, and must be revised to reflect Puerto Rico's new, post-pandemic economic reality.

Moreover, even if the Healthcare Acts' consistency with the May 2019 Fiscal Plan were still meaningful, the preemption analysis the Board has requested would still serve no meaningful purpose under PROMESA. If the Oversight Board were correct that the Healthcare Acts were preempted, those laws would be nullified and have no effect whatsoever. In other words, assuming the laws were preempted, the effect on the fiscal plan—in whatever form it takes after its current revisions—would be zero. As I have explained in prior letters to you, the ultimate decision on whether a law is preempted rests with the courts, not with the Government or the Oversight Board. . . .

For similar reasons, the Healthcare Acts do not 'impair or defeat the purposes of' PROMESA under section 108(a). The Oversight Board's purpose under PROMESA is 'to provide a method for a covered territory to achieve *fiscal responsibility and access to the*

> *capital markets*.' Judge Swain found Act 29 unenforceable in large part because she determined it would 'deprive[] the Commonwealth of hundreds of millions of dollars, . . . thereby diminishing market access.' In contrast, the Oversight Board has identified no fiscal effect from the . . . Healthcare Acts that would be inconsistent with the currently operative May 2019 Fiscal Plan.

(Docket Entry No. 13-10 in Adversary Proceeding No. 20-00082, at 1-3; Docket Entry No. 1-10 in Adversary Proceeding No. 20-00080, at 1-3.)[13]

Finally, on June 23, 2020, the Oversight Board sent AAFAF a letter setting forth the Board's "limit[ed] . . . response to the following few critical issues with the goal of narrowing or eliminating matters in dispute and the subject of the complaints

[13] As discussed further below, after the Government commenced the Adversary Proceedings, the Governor sent the Oversight Board a letter dated June 18, 2020, explaining that Act 82 "has only been partially implemented," owing to "the ongoing COVID-19 pandemic," and that "the Regulatory Office and Commissioner Regulator established under Act 82-2019 still need to be created and appointed. The Regulatory Office is expected to incur substantially all of the estimated expenditures related to the implementation of Act 82-2019." (Docket Entry No. 5-3 in Adversary Proceeding No. 20-00080, at 1.) It also states that, "[b]ecause the Regulatory Office is not yet operational, the Government has not yet incurred the estimated expenditures for Act 82-2019." (Id.) As for Act 138, the same letter simply states that "[t]he Office of the Insurance Commissioner has certified that Act 138-2019 is currently being implemented." (Id. at 2.)

filed by the Governor and AAFAF with respect to" the Healthcare Acts:

> First, the Oversight Board is not seeking a preemption analysis from the Governor or AAFAF. We seek an analysis assessing whether [the Healthcare Acts] jeopardize the grant of federal funds to the Puerto Rico Department of Health. Accordingly, the Oversight Board continues to seek formal estimates under PROMESA Section 204(a)(2)(A), which must consider whether [the Healthcare Acts] will jeopardize the grant of federal funds.
>
> Second, the Oversight Board rejects your assertion that revisions to the Fiscal Plan alleviate the Government of its Section 204(a) obligations. The fact that fiscal plans may be in the process of being revised does not exempt the submission of such formal estimates pursuant to PROMESA Section 204(a)(2)(A). There is a certified Fiscal Plan currently in effect, and Section 204(a) certifications must address consistency with the active Fiscal Plan. To the extent the Governor's certification differs under the 2020 Fiscal Plan compared to the 2019 Fiscal Plan, you should make that clear in your certification.
>
> Third, the certification of compliance for Act 82 states that although the measure would have an 'approximate impact of $475,131.47 in the Department of Health's budget,' Act 82 does not warrant a reprogramming request as

> it would be 'implemented using budgeted resources,' such that a formal request for reprogramming is not required. Your explanation is not consistent with PROMESA. PROMESA Section 204(c)(2) prohibits any reprogramming without the Oversight Board's review and certification that such spending will not be inconsistent with the certified Fiscal Plan, regardless of whether the proposed reprogramming purports to use 'budgeted resources.' The Oversight Board is prepared to treat your letter as a request for a certification of such reprogramming under PROMESA Section 204(c)(2), but to evaluate your request, you must first identify which budgeted resources you intend to use to cover the approximate impact your certification specifies.
>
> Finally, as to the statement that [the Healthcare Acts] do not impair or defeat the purposes of PROMESA because 'the Oversight Board has identified no fiscal effect from [the Healthcare Acts] that would be inconsistent with the currently operative May 2019 Fiscal Plan,' [the Healthcare Acts] do in fact impair and defeat the purposes of PROMESA, as determined by the Oversight Board because, among other reasons, the Government has not complied with Section 204(a) or Section 204(c) (in the case of Act 82).

(Docket Entry No. 13-15 in Adversary Proceeding No. 20-00082, at 1-2; Docket Entry No. 5-4 in Adversary Proceeding No. 20-00080, at 1-2.)

B. Act 176

Act 176 amends the Government of Puerto Rico Human Resources Administration and Transformation Act, Act 8-2018, and the Fiscal Plan Compliance Act, Act 26-2017, to increase the accrual rates of vacation days and sick days for public employees to from 2 or 1.25 to 2.5 days per month, and from 1 to 1.5 days per month, respectively.[14] (Act 176 §§ 1-4.)

On December 26, 2019, AAFAF, the Treasury Department, and OMB, on behalf of the Government, submitted to the Oversight Board a copy of Act 176 and a "Compliance Certificate of New Law Pursuant to 48 U.S.C. §[]2144(2)(B)" (Docket Entry No. 14-3 in Adversary Proceeding No. 20-00083, the "Act 176 Certificate"). (See Bd. Resp. to Act 176 SOF ¶ 7.) The Act 176 Certificate, in its entirety, reads as follows:

Legislative Measure Number:

- Act No. 176-2019 ('Act 176'), herein attached.

Estimated Impact of the Legislative Measure on Expenditures and Revenues:

- Act 176 amends Act 8-2017, known as the 'Government of Puerto Rico Human Resources Administration and Transformation Act', and Act 26-2017, known as the 'Fiscal Plan Compliance

[14] Under the amendments to Act 26-2017, the sick day accrual rate for Government employees who are not subject to Act 8-2018 remains unchanged at 1.5 days per month. (See Jaresko Decl. ¶ 94.)

Act', in order to allow government employees to accrue 2.5 vacation days and 1.5 sick days per calendar month.

- The accrual caps for vacation and sick days remain at 60 and 90 days respectively. Additionally, Act 176 does not alter the prohibition established in Act 26-2017, with regard to the liquidation of vacation days accumulated in excess of the 60 days statutory limit.
- As prior to its enactment, government employees may only liquidate vacation days when there is a cessation from service. Act 176 does not allow public employees the liquidation of sick days.
- In addition, every governmental entity and instrumentality is required to formulate and manage a personnel vacation plan for each calendar year, which shall be strictly complied with by all employees, in order to ensure that said employees do not accumulate excess vacation days, while ensuring that the services provided by the corresponding governmental entities and instrumentalities are not interrupted.
- Consequently, insofar as Act 176 merely adjusts the accretion of vacation and sick days for public employees, but while strictly adhering to the liquidation prohibitions established in the 2019 New Fiscal Plan for Puerto Rico and Act 26-2017, we conclude that Act 176 has no impact on expenditures.
- Act 176 has no impact on revenues.

Determination of the Legislative Measure's Compliance with the Fiscal Plan:

- Act 176 is not significantly inconsistent with the 2019 Fiscal Plan for Puerto Rico.

(Act 176 Certificate.)

By letter dated May 11, 2020, the Oversight Board wrote the Governor and the Commonwealth Legislature "pursuant to Section 204(a) of PROMESA" and provided notice that the Act 176 Certificate "was not accompanied by the estimate required under paragraph (2)(A) of Section 204(a)." (Docket Entry No. 14-4 in Adversary Proceeding No. 20-00083, at 1.) The Oversight Board asserted that the Act 176 Certificate "fails to account for Act 176's impact on employee productivity, given that it permits employees to take more vacation days during the year," noting that "if full-time employees utilize all of the additional days Act 176 makes available to them (12-21 days depending on employee group), there could be a productivity loss of approximately five percent, which in Fiscal Year 2021 is akin to losing the full-time equivalent production of 2,400 public employees." (Id. at 1-2.) The Oversight Board asserted that, by failing to account for this impact of Act 176, the Act 176 Certificate was deficient and therefore directed the Government, "pursuant to Section 204(a)(4)(A), to provide a complete formal estimate by May 19, 2020 taking lost productivity into account." (Id. at 2.) The Oversight Board also advised the Government of its determination under section 108(a)(2) of PROMESA that implementation

of Act 176 impairs and defeats the purposes of PROMESA:

> Pursuant to PROMESA Section 108(a)(2), the Governor and Legislature are each enjoined from, among other things, implementing any statute or rule that impairs or defeats the purposes of PROMESA as determined by the Oversight Board. To avoid any misunderstanding, please be advised the Oversight Board has determined implementation of Act 176-2019 prior to satisfaction of the requirements of Section 204 would impair and defeat the purposes of PROMESA, such as preventing implementation of new laws prior to satisfaction of the requirements of Section 204(a).

(Id.) The Oversight Board further "reserve[d] the right to take such actions as it considers necessary, consistent with Sections 204(a)(5) and 108(a)(2), including preventing and seeking remedies for the enforcement or application of Act 176-2019." (Id.)

On May 19, 2020, AAFAF responded to the Oversight Board's May 11, 2020, letter. (See Docket Entry No. 14-5 in Adversary Proceeding No. 20-00083.) AAFAF asserted that, contrary to the Oversight Board's "implied contention, there is no requirement that the certification account for any speculative decrease in 'employee productivity,'" reiterating that "PROMESA section 204(a) requires only that the Government provide a 'formal estimate . . . of the impact, if any, that the law will have on *expenditures and revenues*.'" (Id. at 1-2 (citation omitted)

(ellipses in original).) AAFAF insisted that the Act 176 Certificate "does exactly that":

> As explained [in the Act 176 Certificate], 'Act 176 has no impact on expenditures' because the law 'merely adjusts the accretion of vacation and sick days for public employees.' Moreover, the additional vacation and sick day accruals will not affect expenditures because Act 176-2019: (i) retains existing limitations on the liquidation of vacation days, which cannot be paid until the employee no longer works for the Government and only up to the existing 60-day statutory limit; and (ii) does not allow for the liquidation of sick days at all. Under Act 176-2019, employees will be paid the same regardless of the accrual rate for vacation and sick days, and any expenditures made to departing Government employees for their unused vacation and sick days cannot exceed the limits established under Act 26-2017. The Board's May 2019 Commonwealth Fiscal Plan provides for these expenditures, and, in such regard, Act 176-2019 does not alter them in any way whatsoever.

(Id. at 2.)

Furthermore, AAFAF explained the rationale underlying its conclusion in the Act 176 Certificate that Act 176 has no impact on revenues: "nothing in Act 176-2019 prevents or otherwise prohibits the Government from continuing to collect revenue in the ordinary course of its operations. The accrual of additional vacation and sick days each month has

no impact on the Government's revenue collection processes." (Id.) AAFAF also asserted that "[n]othing in PROMESA section 204(a) requires the Government to speculate about unlikely outcomes or analyze every possible effect of a law, no matter how remote." (Id.) According to AAFAF's letter, the Oversight Board's position "ignores a key consideration in the Act 176-2019 compliance certificate," namely, that "all governmental entities must create strict personnel vacation plans for each fiscal year to prevent the accumulation of excess vacation days and ensure the continuity of uninterrupted government services." (Id. (citation omitted).) AAFAF asserted that "[t]his internal control measure protects against potential abuse of accrual policy, which appears to be the root of the Board's employee productivity concerns." (Id. at 2-3.) AAFAF concluded by asserting that "PROMESA does not mandate the analysis the Board has required *ultra vires*, and the certificate for Act 176-2019 is sufficient." (Id. at 3.)

C. Act 181

Act 181 increases salaries to the civil members and officials of the Bureau of the Puerto Rico Firefighters Corp by $125 a month (or $1,500 annually), effective retroactively on July 1, 2020, with a total estimated annual cost of $2,809,386.84. (Act 181; Gov. Resp. to SOF ¶ 48; Jaresko Decl. ¶ 124.) It is undisputed that this increase is in addition to the salary increase already contemplated within the fiscal plans: an annual increase of $500 in the 2019 Fiscal Plan; and a further increase of $1,500 in the 2020 Fiscal Plan. (Gov. Resp. to SOF ¶¶ 43-44.) Section 4 of Act 181 provides that funds generated from

inspections under the "Puerto Rico Department of Public Safety Act," shall first go to pay for the salary raise before being deposited into the general fund, and sections 6 and 7 establish a tax on fire and allied lines insurance premiums (the "3% Tax") to offset the pay raise. (Act 181, at 4-6.)

On January 23, 2020, the Governor submitted to the Oversight Board a "Certification of Act 181-2019 ('Act 181')." (Docket Entry No. 1-4 in Adversary Proceeding No. 20-00084, the "Act 181 Certificate.") The Act 181 Certificate, in its entirety, reads as follows:

Introduction

- The Financial Oversight and Management Board for Puerto Rico ('Oversight Board') certified the Fiscal Plan for the Government of Puerto Rico on May 9, 2019 ('Fiscal Plan') and the budget for Fiscal Year 2020 on June 30, 2019 (the 'Budget').
- Pursuant to Section 204 of the *Puerto Rico Oversight, Management, and Economic Stability Act* ('PROMESA'), this certification is being submitted to the Oversight Board with respect to Act 181.

Summary of Act 181:

- Act 181 provides a monthly salary increase of $125.00 to the members of the Fire Bureau of Puerto Rico beginning on July 1st, 2020. Said increase is equivalent to an annual sum of $2,809,386.84.

Estimated Impact of Act 181 Upon Expenditures and Revenues:

- Act 181 purports to satisfy the salary increase for members of the Fire Bureau of Puerto Rico with a 3% tax on fire and allied lines insurance policies (payable by the insurer).
- According to data pertaining to year 2017, the tax would have produced approximately $4,119,030.00 in new revenue. On the other hand, the tax would have provided estimated new revenue for $6,987,360.00 according to insurance policies subscribed during year 2018. Therefore, it is plausible that the new imposition provides sufficient resources to completely fund the salary increase.
- Additionally, Act 181 provides that the fees charged by the safety inspections carried out by the Bureau are to be directed to cover for the salary increase. In case the salary increase for the members of the Fire Bureau is fully covered, Act 181 requires any excess of inspection fees to be credited to the General Fund.
- If the primary sources to cover for the salary increase are insufficient, Act 181 requires the Office of Management and Budget to allocate resources to sustain the increase for the employees.
- If an internal reprogramming of budgeted resources is needed, the Department of Public Safety will submit to the Financial Oversight

and Management Board for Puerto Rico a formal request.

Determination of the Legislative Measure's Compliance with the Fiscal Plan:

- Act 181 is not significantly inconsistent with the 2019 Fiscal Plan for Puerto Rico.

(Act 181 Certificate.)

By letter dated May 11, 2020, the Oversight Board notified the Governor and the Legislature that the Act 181 Certificate was deficient, "couched in uncertainty," and "admittedly grounded in hypothetical facts." (Docket Entry No. 1-5 in Adversary Proceeding No. 20-00084, at 2.) As such, the Board argued, "the Compliance Certification for Act 181 was not accompanied by the estimate required under paragraph (2)(A) of Section 204(a)," and the Board directed the Government, "pursuant to Section 204(a)(4)(A), to provide a complete formal estimate by May 19, 2020 showing when the tax would commence to be collected, why you believe the annual tax collections in a sufficient amount from the first year of the increase are plausible, and the impacts on the fiscal plan if your projections are too optimistic." (Id. at 1-2.) The same letter also included the following invocation of section 108(a)(2):

> Pursuant to PROMESA Section 108(a)(2), the Governor and Legislature are each enjoined from, among other things, implementing any statute or rule that impairs or defeats the purposes of PROMESA as determined by the

> Oversight Board. To avoid any misunderstanding, please be advised the Oversight Board has determined implementation of Act 181-2019 prior to satisfaction of all Section 204 requirements would impair and defeat the purposes of PROMESA, such as preventing implementation of new laws prior to satisfaction of the requirements of Section 204.
>
> Should you fail to comply with this directive, the Oversight Board reserves the right to take such actions as it considers necessary, consistent with Sections 204(a)(5) and 108(a)(2), including preventing and seeking remedies for the enforcement or application of Act 181-2019.

(Id. at 2.)

The Governor never provided any follow-up analysis but AAFAF responded, on May 19, 2020, that the Act 181 Certificate was sufficient as originally submitted. (Gov. Resp. to SOF ¶¶ 56-57; Docket Entry No. 1-6 in Adversary Proceeding No. 20-00084, at 4-7.) The letter responded that, "[b]y definition, an **estimate** of future expenditures and revenues is a projection based on hypothetical facts and is uncertain," that "Section 204(a) requires nothing more," that the offsets were "more than sufficient to cover" the costs of Act 181, and that this Court's Law 29 decisions show that "PROMESA section 204(a) requires only a 'good faith' effort to determine the new law's financial effects and consistency with the existing fiscal plan." (Docket Entry No. 1-

6 in Adversary Proceeding No. 20-00084, at 4-5 (emphasis in original).) Notably, the letter also responds to the Board's assertion that section 108(a)(2) enjoined implementation of Act 181, and argues that the Board has consistently misconstrued the Law 29 decisions as justifying the repeated invocation of section 108(a)(2) to the effect that "implementation of [the laws] prior to satisfaction of all section 204 requirements would impair and defeat the purposes of PROMESA." (Id. at 5-7.)

On September 3, 2020, the Oversight Board sent a letter requesting information regarding the 3% Tax and its implementation, and in the following terms:

> As of this letter, we have not received any information regarding the implementation or collection of these new taxes. As you know, the certified Fiscal Plan provides that these new revenues will flow into a Special Revenue Fund and as such cannot be spent before collections occur. We therefore request information regarding (i) whether the Government has implemented the tax and if so, when; (ii) whether the Government has begun to collect the corresponding tax revenue and the amount collected to date, if any; (iii) whether the current collections and/or estimates of future collections will be recurring and constant to cover the Commonwealth's increased expenditures due to the salary increases envisioned in Act 181; and (iv) if the current and expected collections will cover the referenced salary increase, please tell us the precise date

> the Government started implementing the monthly salary increase for firefighters.

(Docket Entry No. 19-7 in Adversary Proceeding No. 20-00080, at 1.) The Board reiterated that "any implementation of Act 181 that is not in accordance with the certified Fiscal Plan violates PROMESA section 108(a)(2) which bars enactment and implementation of laws impairing or defeating PROMESA's purposes as determined by the Oversight Board. Accordingly, the Oversight Board reserves all rights for violations of the injunction in section 108(a)(2)." (Id. at 2.)

On September 8, 2020, AAFAF responded to the Oversight Board's questions, indicating that (i) the 3% Tax had been implemented through Ruling Letter CN-2020-282 issued on June 26th, 2020; (ii) less than half of the anticipated tax revenue had been collected to date; and (iii) the Office of the Commissioner of Insurance was unable to estimate future Act 181 collections. (Gov. Resp. to SOF ¶¶ 59-60; Jaresko Decl. ¶¶ 138-39; Docket Entry No. 19-8 in Adversary Proceeding No. 20-00080.)

D. Act 47

Act 47 was signed into law on April 28, 2020, to expand the number of healthcare professionals who are eligible for incentive tax benefits to include general practitioners and specialists in such fields as audiology, chiropractic, and optometry, in a manner that reduces revenues without providing any offsetting cost savings. (Act 47; Jaresko Decl. ¶¶ 144-45; Gov. Resp. to SOF ¶¶ 63-64.) Act 47's "Statement of Motives" explains that the purpose of the law is to

encourage more of the island's 10,500 enrolled physicians to join the existing ranks of practitioners, who currently number 9,000. (Act 47, at 1-2.) Those figures suggest that 1,500 physicians are enrolled but not practicing medicine in Puerto Rico. The Government notes that, in April 2020, the Oversight Board's Municipal Affairs and Legislative Review Director, Mr. German Ojeda, had assured the Governor's Legislative Affairs Adviser by phone that the Board had "no issue" with Act 47 becoming law. (Act 47 Opp., at 13 (citing Lopez Decl. ¶ 4); Gov. Resp. to SOF ¶ 63.)

On May 4, 2020, the Governor submitted to the Oversight Board a "Certificate of New Law Pursuant to 48 U.S.C. §[]2144(2)(B)." (Docket Entry No. 1-4 in Adversary Proceeding No. 20-00085, the "Act 47 Certificate.") The Act 47 Certificate, in its entirety, reads as follows:

Legislative Measure Number:

- Act No. 47-2020 ('Act 47'), herein attached.
- Act 47 incorporates technical adjustments to Sections 1020.02 (10), 2021.03 (a) and 2023.02 of the Puerto Rico Incentives Code in order to provide tax incentives to more categories of health professionals. This legislation serves the public interest by promoting the retention of professionals in the health field, such a feat is particularly relevant in light of the COVID-19 pandemic.

Estimate of Impact of the Legislative Measure on Expenditures and Revenues:

- Act 47 has no impact on expenditures.
- Act 47 could have an estimated annual impact on revenues for $25.7 million dollars. However, said amount will depend: (1) medical professionals that request tax incentives; (2) medical professionals ultimately approved to receive such incentives in light of the requisites; and (3) income ultimately reported by the qualified professionals. In other words, the impact provided by the Puerto Rico Department of the Treasury consists in an educated estimate that must revised on an annual basis in order to provide an accurate impact on the revenues.

Determination of the Legislative Measure's Compliance with the Fiscal Plan:

- Act 47 is not significantly inconsistent with the 2019 Fiscal Plan for Puerto Rico.

(Act 47 Certificate.)

On May 21, 2020, the Oversight Board notified the Governor and Legislature that the estimate and certification were both deficient and lacked "even the barest specificity" needed for a "formal estimate" of Act 47's impact, and thus the Board needed a formal estimate under section 204(a)(4)(A) showing "[m]inimum and maximum" estimates of each variable in the certification and of Act 47's impact on the 2019 Fiscal Plan. (Docket Entry No. 1-5 in Adversary Proceeding No. 20-00085; Gov. Resp. to

SOF ¶¶ 68-69, 73.)[15] AAFAF's estimate assumes, by not forecasting any variance in the estimate from year to year, that Act 47's impact will be constant over the five-year term of the 2019 Fiscal Plan, yet AAFAF admits that its "educated estimate" must be "revised on an annual basis" to be "accurate." (Gov. Resp. to SOF ¶¶ 71-72.) The Board's letter observed that, "[g]iven the number of variables cited in the Compliance Certification, it seems unlikely that a properly constructed formal estimate would assume identical costs in each year." (Docket Entry No. 1-5 in Adversary Proceeding No. 20-00085, at 2.)

The Oversight Board's letter also disputed the Governor's conclusion that Act 47 is not significantly inconsistent with the 2019 Fiscal Plan and

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[15] Specifically, the Oversight Board's letter requested a "complete formal estimate by May 28, 2020, identifying, among other things:

> 1. The total number of medical practitioners who are eligible to seek approval for the tax incentive;
> 2. Minimum and maximum estimates of the percentage of medical practitioners applying for this incentive;
> 3. The number of medical practitioners by each area of specialty or sub-specialty who are eligible to seek approval for the tax incentive;
> 4. Minimum and maximum estimates of these medical practitioners' estimated income, listed by each area of specialty or sub-specialty; and
> 5. Minimum and maximum estimates of the Act's impact on the certified Fiscal Plan based on the income reported by such practitioners in previous years.

(Docket Entry No. 1-5 in Adversary Proceeding No. 20-00085, at 2.)

queried how Act 47 "can be anything other than significantly inconsistent with the certified Fiscal Plan," as it risked violating revenue neutrality and lacked offsets for the projected tens of millions of dollars it would cost annually.[16] (Id. at 3.) The Board advised the Government against implementing Act 47, which it maintained "would impair and defeat the purposes of PROMESA." (Id.)

On May 28, 2020, without addressing the Oversight Board's other directives, AAFAF provided an impact range with a minimum cost of $540,000 and a maximum cost of $40.1 million, annually based on 7,188 potentially eligible professionals, but continued to maintain that Act 47 is not significantly inconsistent with the 2019 Fiscal Plan. (Docket Entry No. 1-6 in Adversary Proceeding No. 20-00085; Gov. Resp. to SOF ¶¶ 78-79, 83.) Although the parties dispute in the instant motion practice whether May 28, 2020, constitutes a revised estimate, AAFAF's letter describes it as such. (Docket Entry No. 1-6 in Adversary Proceeding No. 20-00085, at 3.) The Government's responsive letter explains the new estimate, and clarifies its position on PROMESA sections 108(a)(2) and 204, as follows:

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[16] Revenue neutrality is defined in Section 14.3.3 of the 2019 Fiscal Plan, and constitutes the principle that any tax reforms or initiatives by the Government that reduce tax revenues must be accompanied by offsetting revenue measures. (Hrg. Tr., Docket Entry No. 54 in Adversary Proceeding No. 20-00085, at 70:1-14; 120:16-121:15 (citing 2019 Fiscal Plan, at 124; 2020 Fiscal Plan, Docket Entry No. 1-1 in Adversary Proceeding No. 20-00085, at 218)).

Although we believe that further information in support of our Act 47-2020 compliance certification is not necessary or required under PROMESA section 204(a), the Government is willing to provide the following additional information as requested in your letter in the interest of transparency:

1. According to the records and data provided by the Treasury Department, there is an approximate universe of 9,222 doctors in Puerto Rico (using data corresponding to 2018). From this approximate universe, the Government estimates (using data corresponding to 2018) that around 5,137 medical practitioners could qualify for the tax incentives offered by a previous iteration to 47-2020 (Act 14-2017[]and Act 60-2019).

2. Based on these estimates, the Government projects that Act 47-2020 could have an estimated impact on income for 2020 in the range of $[]540,000.00 to $40,100,000.00, since there are 7,188 people who could qualify, but not necessarily qualify for the tax incentives.

3. The revised estimate varies from the original Section 204 certification, since the first estimate only took into account the type of physicians not qualified in the previous laws that were incorporated into Act 47-2020 to will [sic] enjoy the exemption now in under Law 14-2017 and[/]or Law 60-2019. This took the average of this benefits actual [sic] to esti-

mate the effect for those new type of professionals as it is are [sic] registered in SURI with a NAICS code representing health occupations.

4. On the other hand, this last estimate provides a more precise impact since it takes into account the taxpayer of unqualified medical practitioners from the income tax base. This considers your net income subject to tax and both the classification of this as registered in the SURI Merchants Registry with a NAICS code favored in Act 47-2020 and of all NAICS related to health professionals is considered. In addition, the occupation reported in your Income Tax return is considered to the health occupations.

The [Oversight Board's] Letter further asserts that the compliance certificate is deficient because Act 47-2020's effect is 'grossly overbroad' by 'provid[ing] exemptions for several classes of health practitioners . . . whose services do not appear implicated by the COVID-19 pandemic . . . and does not assist the Commonwealth in addressing the pandemic.' Again, this argument misapplies the statute. Under PROMESA section 204(a), the Board may challenge a compliance certification based solely on the new law's financial effect on the fiscal plan, not the public policy of the duly elected Government. While the Board and the Government can certainly discuss differences of opinion on issues of public policy, PROMESA does not grant the Board

unilateral authority to prevent the implementation of new laws simply because the Board disagrees with the Government's public policy decisions. The Government's foremost responsibility is to protect the health, safety, and welfare of the people of Puerto Rico, and the Board should not act in a way that could be seemed by the innocent eye as an attempt to usurp these unique political and governmental powers.

Finally, the Letter also continues to reiterate the blanket incantation that 'implementation of Act 47-2020, prior to satisfaction of all Section 204 requirements, would impair and defeat the purposes of PROMESA,' and therefore the Government is enjoined from implementing Act 47-2020 pursuant to PROMESA section 108(a). In our May 19 letter, we explained how the Title III Court recently made clear in *Fin. Oversight & Mgmt. Bd. for Puerto Rico v. Vázquez Garced (In re Fin. Oversight & Mgmt. Bd. for Puerto Rico*), Adv. Proc. No. 19-00393 (LTS), 2020 WL 1873380 (D.P.R. Apr. 15, 2020) that the Board must demonstrate a 'rational basis' in exercising its discretion under PROMESA section 108(a)(2). Hence, the Board's formulaic conclusion that Act 47-2020 impairs and defeats PROMESA's purposes—without identifying the *significantly* inconsistent fiscal effect of the Act 47-2020 on the May 2019 Fiscal Plan (as dis-

> cussed above)—shows that there is no rational basis for preventing Act 47-2020's implementation.

(Docket Entry No. 1-6 in Adversary Proceeding No. 20-00085, at 2-4.)

In a response letter dated June 5, 2020, the Oversight Board claimed the estimate "inappropriately minimizes the economic impact of Act 47," given that Act 47 could cost $200 million over five years, which would be "significantly inconsistent" with the fiscal plans, and the Governor failed to explain the inconsistency to the Board's satisfaction. (Docket Entry No. 1-7 in Adversary Proceeding No. 20-00085, at 1-2; Gov. Resp. to SOF ¶¶ 84-86.) The Government had responded that Act 47 is not significantly inconsistent with the 2019 Fiscal Plan because any revenue differential constitutes less than 0.128% of the plan's annual revenue projections. (Docket Entry No. 1-6 in Adversary Proceeding No. 20-00085, at 1-2; Gov. Resp. to SOF ¶ 85.) The Board's counterargument was that "the relevant analysis of the financial costs of Act 47 is its impact on the Commonwealth's own-source revenues, in the General Fund, not on all revenues received by the Commonwealth" and that, "[b]y comparing the estimated cost of Act 47 to all revenues received by the Commonwealth, [AAFAF's] Letter overstates the amount of the Commonwealth's revenue and understates the relative cost of Act 47." (Docket Entry No. 1-7 in Adversary Proceeding No. 20-00085, at 1.)

Although the Government did not detail its analytical process for certifications in its pre-litigation

correspondence, the Government proffers in the instant motion practice that it "has a carefully designed, formal process for providing section 204(a) certifications that ensure that they are both formal and accurate as contemplated by PROMESA." (Gov. Resp. to SOF ¶¶ 26, 33, 34, 37, 68, 69.)

E. Procedural Background

The Government commenced the Adversary Proceedings on June 12, 2020. In Count I of each complaint, the Government seeks a declaratory judgment that the Government's cost estimate in its certification satisfies the "formal estimate" requirement under section 204(a)(2)(A) of PROMESA, and that the Government's determination that the relevant law is "not significantly inconsistent" with the applicable fiscal plan satisfies the relevant requirement under PROMESA section 204(a)(2)(B). (See, e.g., Act 138 Compl. ¶¶ 49, 50.) In connection with Count I of each complaint, the Government also seeks declarations that the Oversight Board lacked authority to (i) send a notification of failure to provide an estimate pursuant to section 204(a)(3)(A) of PROMESA, (ii) direct the Governor to provide a "missing" estimate pursuant to section 204(a)(4)(A) of PROMESA, (iii) send a notification of failure to provide a certification pursuant to section 204(a)(3)(B) of PROMESA, and (iv) direct the Governor to provide a "missing" certificate pursuant to section 204(a)(4)(A) of PROMESA. (See, e.g., id.) Additionally, the Government seeks a declarationwith respect to each of the laws that the Oversight Board cannot "take such actions as it considers necessary . . . 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" under section 204(a)(5) of PROMESA. (See, e.g., id. ¶ 51.) In Count II of each complaint, the Government seeks a declaration that the Oversight Board's invocation of section 108(a)(2) of PROMESA "is and was of no force and is and was without any effect with respect to the validity and enforcement" of the relevant law. (See, e.g., id. ¶ 54.)

Following the Government's commencement of the Adversary Proceedings, by letter to the Governor dated June 15, 2020, the Oversight Board inquired as to whether the Government of Puerto Rico had implemented Acts 82, 138, 176, and 181 of 2019, and Act 47 of 2020, "notwithstanding the Oversight Board's instructions to the contrary pursuant to several provisions of PROMESA." (See Docket Entry No. 5-2 in Adversary Proceeding No. 20-00080.) In response, AAFAF informed the Oversight Board by letter dated June 18, 2020, that, inter alia, (i) "Act 82-2019 has only been partially implemented," and that "[b]ecause the Regulatory Office is not yet operational, the Government has not yet incurred the estimated expenditures for Act 82-2019"; (ii) the "Office of the Insurance Commissioner has certified that Act 138-2019 is currently being implemented"; (iii) the "Office of Administration and Transformation of Human Resources has certified that Act 176-2019 has been implemented to calculate public employee vacation and sick days since January 2020"; (iv) "Act 181-2019 is in the process of being

implemented"; and (v) "[i]t is the Government's position that Act 47-2020 will be fully implemented." (See Docket Entry No. 5-3 in Adversary Proceeding No. 20-00080.)

The Oversight Board filed answers and counterclaims in the Adversary Proceedings on July 17, 2020. Counterclaim I in each action requests an order pursuant to section 104(k) of PROMESA nullifying the relevant law on the grounds that the Government failed to comply with section 204(a) of PROMESA. (See, e.g., Act 138 Counterclaims ¶ 40.) Counterclaim II in each action seeks a preliminary and permanent injunction pursuant to sections 104(k) and 204(a)(5) of PROMESA barring the Government from implementing, enforcing, or applying the relevant law, in light of the alleged failure to comply with section 204(a) of PROMESA. (See, e.g., id. ¶ 48.) Counterclaim III in Adversary Proceeding Nos. 20-00082, 20-00083, and 20-00085, and Counterclaim V in Adversary Proceeding Nos. 20-00080 and 20-00084 seek injunctions barring implementation and enforcement of the relevant laws pursuant to sections 104(k) and 108(a)(2) of PROMESA. (See, e.g., id. ¶ 70; Act 82 Counterclaims ¶ 86.) Finally, Counterclaim III in Adversary Proceeding Nos. 20-00080 and 20-00084 requests nullification—and Counterclaim IV of the same Adversary Proceedings requests preliminary and permanent injunctions barring implementation—of the relevant laws under section 104(k) of PROMESA on the grounds that the Government failed to comply with section 204(c) of PROMESA. (See, e.g., Act 82 Counterclaims ¶¶ 54, 64.) As noted previously, the Court has entered

an order consolidating these Adversary Proceedings "for purposes of motion practice, including any dispositive motions, and discovery." (Docket Entry No. 9 in Adversary Proceeding No. 20-00080, at 2.)

On September 28, 2020, the Government moved for summary judgment on its claims related to Acts 138 and 176. (Gov. Act 138 MSJ; Gov. Act 176 MSJ.) On October 5, 2020, the Oversight Board filed motions for summary judgment on the Government's claims in the Act 82, Act 181, and Act 47 Complaints, and on all corresponding counterclaims. (Act 82 MSJ; Act 181 MSJ; Act 47 MSJ.) On October 19, 2020, the Oversight Board filed cross-motions for summary judgment on the Government's claims in the Acts 138 and 176 complaints, and on all corresponding counterclaims. (Bd. Act 138 Cross-MSJ; Bd. Act 176 Cross-MSJ.) On October 23, the Government filed opposition briefs to the Oversight Board's Motions for Summary Judgment in the Act 82, Act 181, and Act 47 Complaints, in which the Government also requested relief under Rule 56(d) of the Federal Rules of Civil Procedure to conduct discovery in advance of any resolution of the motion practice in the Oversight Board's favor. (Act 82 Opp.; Act 181 Opp.; Act 47 Opp.)

II.

STANDARDS UNDER FED. R. CIV. P. 56

The pending motions and cross-motions are brought pursuant to Rule 56 of the Federal Rules of

Civil Procedure.[17] Under Federal Rule of Civil Procedure 56(a), summary judgment is appropriate when "the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). Material facts are those that "possess[] the capacity to sway the outcome of the litigation under the applicable law," and there is a genuine factual dispute where an issue "may reasonably be resolved in favor of either party." Vineberg v. Bissonnette, 548 F.3d 50, 56 (1st Cir. 2008) (internal quotation marks and citations omitted). The Court must "review the material presented in the light most favorable to the non-movant, and . . . must indulge all inferences favorable to that party." Petitti v. New England Tel. & Tel. Co., 909 F.2d 28, 31 (1st Cir. 1990) (internal quotation marks and citations omitted). When a properly supported motion for summary judgment is made, the non-moving party "must set forth specific facts showing that there is a genuine issue for trial." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250 (1986) (internal quotation marks and citation omitted). The non-moving party can avoid summary judgment only by providing properly supported evidence of disputed material facts. See LeBlanc v. Great Am. Ins. Co., 6 F.3d 836, 841-42 (1st Cir. 1993).

Under Rule 56(d), "[i]f a nonmovant shows by affidavit or declaration that, for specified reasons, it

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[17] Federal Rule of Civil Procedure 56 is made applicable in these Adversary Proceedings by Federal Rule of Bankruptcy Procedure 7056. See 48 U.S.C. § 2170.

cannot present facts essential to justify its opposition" to summary judgment, "the court may: (1) defer considering the motion or deny it; (2) allow time to obtain affidavits or declarations or to take discovery; or (3) issue any other appropriate order." Fed. R. Civ. P. 56(d). A party seeking denial or deferral of a motion for summary judgment under Rule 56(d) must "(i) 'show good cause for the failure to have discovered the facts sooner'; (ii) 'set forth a plausible basis for believing that specific facts . . . probably exist'; and (iii) 'indicate how the emergent facts . . . will influence the outcome of the pending summary judgment motion.'" In re PHC Inc. S'holder Litig., 762 F.3d 138, 143 (1st Cir. 2014) (quoting Resolution Trust Corp. v. N. Bridge Assocs., Inc., 22 F.3d 1198, 1203 (1st Cir. 1994)). Stated differently, a nonmovant seeking discovery under Rule 56(d) must meet the requirements of "authoritativeness, timeliness, good cause, utility, and materiality." Id. at 144 (quoting Resolution Trust Corp., 22 F.3d at 1203).

III.

DISCUSSION

The Government moves for summary judgment on both counts of its Complaints in Adversary Proceeding Nos. 20-00082 and 20-00083. The Oversight Board seeks summary judgment in its favor on each of its Counterclaims and on each of the Government's counts in each of the Adversary Proceedings. The following section discusses the provisions of PROMESA that the parties have relied on in support of their respective claims.

A. Statutory Framework Under PROMESA

1. Section 108(a)(2) of PROMESA

Section 108(a)(2) of PROMESA provides that "[n]either the Governor nor the Legislature may (1) exercise any control, supervision, oversight, or review over the Oversight Board or its activities; or (2) 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." 48 U.S.C.A. § 2128(a) (Westlaw through P.L. 116-217). The Oversight Board is authorized, under section 104(k) of PROMESA, to "seek judicial enforcement of its authority to carry out its responsibilities under this Act." Id. § 2124(k).

In Law 29 II, this Court, having considered the Oversight Board's "operational similarity" to an agency of the federal government, determined that the arbitrary and capricious standard applied to review of the Oversight Board's determinations under section 108(a)(2). 616 B.R. at 252-53 (citing 48 U.S.C. § 2121(c)(2); Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837 (1984)). Under that standard, "the Court 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 Capital Assoc., Inc. v. Cuomo, 159 F.3d 21, 26 (1st Cir. 1998)). The Court found that PROMESA established "the Oversight Board's determinations as the benchmark for the

operation of section 108(a)(2)'s prohibition of territorial actions that 'would impair or defeat the purposes of' PROMESA." Id. (citing 48 U.S.C. §§ 2121(a), 2128(a)(2)). Thus, the Court found that the Oversight Board's determinations regarding section 108(a)(2) should only be set aside if they were "arbitrary, capricious, or manifestly contrary to the statute." Id. at 254 (quoting Chevron, 467 U.S. at 843-44).

The Court held that the Oversight Board determinations in connection with Law 29—which eliminated the obligation of municipalities to contribute to the Commonwealth government health plan and its pay-as-you-go pension system—"pass[ed] muster under this test." Id. Specifically, the Court upheld the Board's determinations that Law 29 (i) "appropriate[d] funding that is not included in certified fiscal plans and budgets"; (ii) "[was] significantly inconsistent with the fiscal plans and budgets certified by the" Oversight Board, as supported by "a rational basis and substantial record evidence"; and (iii) increased Commonwealth expenses, impairing the "functioning of financial measures approved by the Oversight Board in the exercise of powers explicitly conferred upon it by PROMESA," as shown by undisputed facts. Id.

In connection with the instant motion practice, the Government argues that, in light of the U.S. Supreme Court's determination in Financial Oversight & Management Board for Puerto Rico v. Aurelius Investment, LLC (In re Financial Oversight & Management Board for Puerto Rico), 140 S. Ct. 1649, 1659 (2020) ("Aurelius"), that the Oversight Board

is an entity within the government of Puerto Rico, the Chevron "arbitrary and capricious" standard is no longer the correct standard of review for the Oversight Board's section 108(a)(2) determinations because it is used to review federal, not state or territory, actions. The Government therefore asserts that the "substantial evidence" standard that is applied under Puerto Rico law to the review of actions of Commonwealth agencies must be applied to review of actions of the Oversight Board. To the extent that there is actually a difference between the two standards, however, the Oversight Board is a sui generis entity created within the Puerto Rico government by Congress acting pursuant to its territorial governance authority and nothing in Aurelius requires the Court to modify its approach to review of Oversight Board determinations under section 108(a)(2).

The Aurelius decision was focused narrowly on the applicability of the Appointments Clause and does not undermine this Court's prior reasoning about the level of deference properly afforded to Oversight Board determinations on account of the Oversight Board's "operational similarity" to a federal agency. Id. at 1665; Law 29 II, 616 B.R. at 252. The Oversight Board asserts, in any event, that the two standards are materially the same, and accepts that the arbitrary and capricious standard involves an examination of whether substantial evidence exists showing that a determination is neither arbitrary nor capricious. (Act 82 Reply at 10 (citing Ass'n of Data Processing Serv. Orgs., Inc. v. Bd. of Governors of Fed. Reserve Sys., 745 F.2d 677, 684

(D.C. Cir. 1984); Buffonge v. Prudential Ins. Co. of Am., 426 F.3d 20, 27 (1st Cir. 2005); Leahy v. Raytheon Co., 315 F.3d 11, 17 (1st Cir. 2002); and Law 29 II, 616 B.R. at 253).) The Puerto Rico "substantial evidence" standard requires "relevant evidence as a reasonable mind might accept as adequate to support a conclusion." SPRINTCOM, Inc. v. Puerto Rico Regulations & Permits Admin., 553 F. Supp. 2d 87, 91-93 (D.P.R. 2008). As this Court recognized in Law 29 II, the inquiry as to whether the determination in question is supported by substantial evidence is appropriately considered as part of arbitrary and capricious review. See 616 B.R. at 252-53. Indeed, where there are pertinent factual issues, such an inquiry would seem unavoidable. The Court will therefore evaluate the Oversight Board's section 108(a)(2) determinations at issue here under the arbitrary and capricious standard. Moreover, as discussed further below, and for reasons similar to those set forth above and in Law 29 II, the Court will apply the "arbitrary and capricious" standard of review to the Oversight Board's determinations under section 204(a) that are at issue in the instant motion practice.

2. Section 204(a) of PROMESA

Section 204(a) of PROMESA establishes a sequential process for the submission of new legislative enactment to the Oversight Board and related Oversight Board action under certain circumstances. Section 204(a)(1) generally requires the Governor to submit laws to the Oversight Board

within seven business days of their enactment.[18] With each such submission, section 204(a)(2) generally requires the Governor to provide the Oversight Board with documentation addressing two issues. The Governor must deliver 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." 48 U.S.C.A. § 2144(a)(2)(A) (Westlaw through P.L. 116-217). The Governor must also provide a certification by the "appropriate entity" that the submitted law "is not significantly inconsistent with the Fiscal Plan for the fiscal year," id. § 2144(a)(2)(B), or that the submitted law is "significantly inconsistent with the Fiscal Plan for the fiscal year," id. § 2144(a)(2)(C).

Pursuant to section 204(a)(3) of PROMESA,[19] the Oversight Board "shall send a notification to the

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[18] Section 204(a)(1) provides as follows:

> Except to the extent that the Oversight Board may provide otherwise in its bylaws, rules, and procedures, not later than 7 business days after a territorial government duly enacts any law during any fiscal year in which the Oversight Board is in operation, the Governor shall submit the law to the Oversight Board.

48 U.S.C.A. § 2144(a)(1) (Westlaw through P.L. 116-217).

[19] Section 204(a)(3) provides as follows:

> The Oversight Board shall send a notification to the Governor and the Legislature if—
> (A) the Governor submits a law to the Oversight Board under this subsection that is not accompanied by the estimate required under paragraph (2)(A);

Governor and the Legislature" if the Governor fails to submit an estimate, fails to submit a certification, or submits a certification that a law is significantly inconsistent with the fiscal plan. Id. § 2144(a)(3).

If the Governor fails to submit an estimate or certification, section 204(a)(4)(A) provides the Oversight Board with authority to direct the Governor to supply the missing submission. See id. § 2144(a)(4)(A). If the Governor submits a certification that the law was significantly inconsistent with the governing fiscal plan, section 204(a)(4)(B) provides the Oversight Board with authority to direct the territorial government to "correct the law to eliminate the inconsistency" or to "provide an explanation for the inconsistency that the Oversight Board finds reasonable and appropriate." Id. § 2144(a)(4)(B).

Section 204(a)(5) provides that, if the territorial government fails to comply with the Oversight Board's direction pursuant to section 204(a)(4), "the Oversight Board may take such actions as it considers necessary, consistent with this chapter, to ensure that the enactment or enforcement of the law

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(B) the Governor submits a law to the Oversight Board under this subsection that is not accompanied by either a certification described in paragraph (2)(B) or (2)(C); or
(C) the Governor submits a law to the Oversight Board under this subsection that is accompanied by a certification described in paragraph (2)(C) that the law is significantly inconsistent with the Fiscal Plan.

48 U.S.C.A. § 2144(a)(3) (Westlaw through P.L. 116-217).

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).

In Law 29 I, this Court rejected the Government's argument, raised at the motion to dismiss stage, that a governor's certification under section 204(a) that a newly enacted law is not significantly inconsistent with the operative fiscal plan, irrespective of its accuracy or completeness, insulates that law from scrutiny by the Oversight Board. 403 F. Supp. 3d at 12-13 ("Defendants explicitly argue that delivery of any sort of estimate on official agency letterhead, no matter how conclusory or incomplete, . . . is effective to insulate the legislation from any challenge by the Oversight Board . . . . Defendants' position elevates form over substance and is . . . not consistent with the letter, spirit, or legislative context of the statutory provisions upon which Defendants rely."). The Court expressly held that the Oversight Board possesses the authority to challenge the sufficiency and accuracy of revenue estimates and certifications regarding significant inconsistencies with fiscal plans. Id. ("It must be assumed in construing PROMESA, a statute that created the Oversight Board and fiscal plan structure as means of remedying long-standing deficits and fiscal irregularities, that Congress expected the Governor and the relevant territorial entity to comply with the statutory predicates in good faith, and the statute does not expressly provide that the Governor's documentation is preclusive of inquiries as to its suffi-

ciency or accuracy."). In observing that Congress expected the territorial entity to act in good faith, the Court did not find that good faith alone would overcome any need for sufficiency or accuracy of documentation required under section 204(a).

Subsequently, in Law 29 II, the Court granted summary judgment in favor of the Oversight Board on its claim against the Government pursuant to section 204(a)(5) of PROMESA seeking nullification of, and injunctive relief barring the enforcement of, Law 29 based on the Government's failure to comply with section 204(a)(1) of PROMESA. 616 B.R. at 248. The Government had provided the Oversight Board with a certificate pursuant to 48 U.S.C. § 2144(a)(2)(b) (the "Law 29 Certificate") which contained "estimate[s] of impact" of Law 29 on the Commonwealth government health plan of approximately $766 million over the five-year period covered by the fiscal plan, and on the Commonwealth's pay-as-you-go pension system of approximately $166 million in Fiscal Year 2020 alone, without including an estimate of the impact on the pension system with respect to subsequent fiscal years and instead noting that an actuarial study as to those amounts was forthcoming. Id. at 242-43. The Law 29 Certificate nevertheless stated that Law 29 was not significantly inconsistent with the applicable fiscal plan. Id. at 243. The Oversight Board notified the Government by letter that the Law 29 "Certificate was 'deficient' because it 'failed to provide the formal estimate of the fiscal impact that [Law 29] will have, as required under paragraph (2)(A) of

Section 204(a)' of PROMESA." Id. (citations omitted) (alteration in original). More specifically, the Board asserted that the Law 29 Certificate could not have validly concluded that Law 29 was not significantly inconsistent with the Fiscal Plan without the referenced actuarial study regarding its impact on the pension system having been completed, and without having included an analysis of the impact that Law 29 will have on the Commonwealth's applicable fiscal plan. Id. The Government did not respond to the Oversight Board's letter, prompting the Board to seek relief from this Court. Id.

Once again rejecting the Government's argument that PROMESA does not empower the Oversight Board to challenge the Governor's section 204(a) certifications and estimates, the Court concluded that the undisputed facts established that the Governor's estimate and certification regarding Law 29 were non-compliant with section 204(a)(2) of PROMESA because they failed to account for the entire period covered by the applicable fiscal plan. Id. at 248. The Court also based its conclusion on the undisputed fact that the Government had failed to respond to the Oversight Board's notification pursuant to section 204(a)(3) of PROMESA, noting that "Section 204(a)(5) allows the Oversight Board to prevent the application or enforcement of a law when the Commonwealth government fails to comply with a direction given by the Oversight Board pursuant to section 204(a)(4) of PROMESA." Id. The Court thus enjoined the Government from implementing and enforcing Law 29 and deemed law 29 a nullity. Id.

Consistent with the Court's approach with respect to Oversight Board determinations under section 108(a)(2) of PROMESA, the Court will review the Board's challenges under section 204(a) of PROMESA to the sufficiency and accuracy of the Government's estimates regarding impacts on revenues and expenditures and its certifications regarding significant inconsistencies with fiscal plans under the arbitrary and capricious standard.

3. Section 204(c) of PROMESA

Section 204(c) of PROMESA provides that the "Legislature shall not adopt a reprogramming, and no officer or employee of the territorial government may carry out any reprogramming, until the Oversight Board has provided the Legislature with an analysis that certifies such reprogramming will not be inconsistent with the Fiscal Plan and Budget." 48 U.S.C.A. § 2144(c)(2) (Westlaw through P.L. 116-217).

If reprogramming is likely necessary to implement a new law, the Government may not unilaterally reprogram funds, but must submit to the Oversight Board's analysis and certification process for reprogramming requests because once "a certified budget is in full effect as of the first day of the covered period, means and sources of government spending are necessarily rendered unavailable if they are not provided for within the budget." Rosselló Nevares v. Fin. Oversight & Mgmt. Bd. for P.R. (In re Fin. Oversight & Mgmt. Bd. for P.R.), 330 F. Supp. 3d 685, 704 (D.P.R. 2018), aff'd, 945 F.3d 3 (1st Cir. 2019). This Court has held, and the First

Circuit has concurred, that "[i]t beggars reason, and would run contrary to the reliability and transparency mandates of PROMESA, to suppose that a budget for a fiscal year could be designed to do anything less than comprehend all projected revenues and financial resources, and all expenditures, for the fiscal year." Id. Consequently, "if a certified budget is to have 'full force and effect,' subsection 202(e)(3)(C) [of PROMESA], there can be no spending from sources not listed in that budget, regardless of what any territorial laws say." Vázquez Garced v. Fin. Oversight & Mgmt. Bd. for P.R. (In re Fin. Oversight & Mgmt. Bd. for P.R.), 945 F.3d 3, 8 (1st Cir. 2019) (quoting Rosselló Nevares, 330 F. Supp. 3d at 704).

In Law 29 II, this Court declined to "distinguish between a reprogramming and the creation of a revenue deficiency in the budget that the Government would likely have to remedy through reprogramming." Law 29 II, 616 B.R. at 249 (internal quotations omitted). The Court held that reprogramming occurs where funds are appropriated "for expenses not provided for in a certified budget." Id. Reprogramming after failing to obtain certification of such reprogramming violates PROMESA § 204(c)(2), and is subject, under section 104(k) of PROMESA, to a mandatory permanent injunction prohibiting implementation and enforcement of the relevant law by this Court. Id. at 250.

Against that backdrop, the Court turns next to the specific claims and counterclaims that have been asserted in each Adversary Proceeding. For the reasons explained below, the Oversight Board is

entitled to summary judgment dismissing Count I of the Act 138 and Act 82 Complaints and Count II of the Act 176 and Act 47 Complaints, and to judgment as a matter of law with respect to Act 138 Counterclaim II, Act 82 Counterclaim II, Act 176 Counterclaim III, Act 47 Counterclaim III, and Act 181 Counterclaim IV. The Government's Motions for Summary Judgment are denied in their entirety. The remaining aspects of the Oversight Board's Motions for Summary Judgment are also denied. Pursuant to the *Order to Show Cause Regarding Dismissal of Remaining Claims and Counterclaims* that is being entered contemporaneously with this Opinion and Order, the parties are directed to show cause as to why, given the analysis and conclusions herein, the remaining counts and counterclaims should not be dismissed as moot or otherwise for lack of subject matter jurisdiction.

B. Act 82 (Adversary Proceeding No. 20-00080) – Section 204(a) of PROMESA

The Oversight Board seeks summary judgment in its favor on Count I of the Act 82 Complaint, and on Act 82 Counterclaims I and II, arguing that the Governor failed to comply with the estimate and certification requirements of section 204(a), and that Act 82 is significantly inconsistent with the Fiscal Plan because it will increase expenditures by at least $475,131.47 without any offsetting savings or revenues. (Act 82 MSJ at 29.) As noted above, Act 82 establishes certain pharmacy service provider pricing formulas and regulatory provisions relating to PBMs and PBAs. The Oversight Board argues

that the Governor failed to (i) submit a timely estimate and certification; (ii) provide a compliant estimate; and (iii) comply with the FOMB's directive to submit a compliant estimate as required by PROMESA section 204(a). (Id. at 29-30.) The Oversight Board asserts that section 204(a) has been violated in that the estimate and certification provided were submitted more than four months late (id. at 30 (citing Act 82 Compl. ¶¶ 31, 34)); the estimate submitted was informal and approximate, lacking any supporting data or analysis (id. at 30 (citing Docket Entry No. 1-7 in Adversary Proceeding No. 20-00080, at 2)); and the Governor refused to provide additional analysis in response to the Board's request citing public testimony by the Puerto Rico Health Insurance Administration that Act 82 would cost about $27 million annually (id. at 30 (citing Jaresko Decl. ¶ 45; Docket Entry No. 1-7 in Adversary Proceeding No. 20-00080, at 2)). The Oversight Board also argues that the Governor's proffered approximation of the statute's impact fails to specify whether it covers the entire period of the Fiscal Plan or only 2020, and that the estimate fails to consider whether Act 82 jeopardizes the health department's receipt of federal funds. (Id. at 31.) Finally, the Oversight Board maintains that the Governor has repeatedly failed to provide a compliant estimate as requested by the Board under section 204(a)(3) of PROMESA. (Id. at 32.)[20]

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[20] To the extent the Oversight Board's correspondence pressed the Government for an analysis of how Act 82 could affect the receipt of federal funds, the correspondence reveals practically no articulable basis for the Oversight Board's concerns. This

The Court finds that the undisputed factual record, when viewed in the light most favorable to the Governor, establishes that the Government failed to comply with its statutory responsibility to provide a formal estimate and certification that was sufficiently informative and complete, such that the Oversight Board's determination of noncompliance and its ultimate decision to seek injunctive relief under section 204(a)(5) after repeated attempts to obtain a formal estimate and certification are neither arbitrary nor capricious. The only certificate of compliance and estimate submitted by the Government, which together comprise less than half a page of text, plainly fall short of even facial compliance with the formal estimate requirement; they provide no context or analysis to support the certification's assertion of consistency with the fiscal plan imposed by PROMESA § 204(a). (See Docket Entry No. 1-5 in Case No. 20-00080; cf. Law 29 I, 403 F. Supp. 3d at 14.) This Court has held that section 204(a)(2)(A) requires that a "formal estimate" cover "revenue and expenditure effects of new legislation," in enough detail to estimate the law's impact over the full duration of the relevant fiscal plan. Law 29 I,

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Court does not reach whether the Board's request for such analysis was arbitrary and capricious, however, because the Government's section 204(a) noncompliance is already patent in that the Board's request for evidence in support of the Government's estimate was never satisfied, nor were its other, more specific questions about the anticipated impact of PMPM rates on the fiscal plan answered. (Docket Entry No. 1-7 in Adversary Proceeding No. 20-00080, at 1-2; Docket Entry No. 1-9 in Adversary Proceeding No. 20-00080, at 1-3.)

403 F. Supp. 3d at 13-14. Apart from providing an "approximate impact" on the Department of Health's budget, such information is largely missing from the Act 82 Certificate. (Docket Entry No. 1-5 in Case No. 20-00080.) The "formality" requirement for an estimate is not satisfied by the mere presentation of a figure on official letterhead, yet that is the only formal feature of the Act 82 Certificate. (Id.; Law 29 I, 403 F. Supp. 3d at 12-13 ("Defendants explicitly argue that delivery of any sort of estimate on official agency letterhead, no matter how conclusory or incomplete, . . . is effective to insulate the legislation from any challenge by the Oversight Board, . . . [but] Defendants' position elevates form over substance and is . . . not consistent with the letter, spirit, or legislative context of the statutory provisions upon which Defendants' rely.").) The document does not proffer even a narrative explanation of how the estimate was derived.

Despite the Government's insistence, in a post hoc affidavit that provides no methodological or computational detail to support a certification, that it follows a rigorous protocol for calculating fiscal impacts of new laws, absolutely no supporting rationale for the impact estimate of $475,131.47 has been provided to the Oversight Board, let alone any clearly articulated compound estimate that covers the entire duration of the 2019 Fiscal Plan. (Compare Cruz Decl. ¶¶ 6-18, with Act 82 Certificate.) In short, the Government has failed to show its work in support of its "formal" estimate and certification.

Furthermore, ever since the Oversight Board issued its letter of December 18, 2019, expressing concerns over whether the Government's estimate was accurate, the Government was afforded several opportunities to cure the perceived deficiencies and provide some sort of substantiation, but the Government declined to provide anything more. (Docket Entry No. 1-7 in Adversary Proceeding No. 20-00080, at 1-2.) Rather than provide insight into the basis of its assertions, the Government quibbled that the Oversight Board's reliance on a contradictory statement by the Health Insurance Administration was misplaced, and insisted that only estimates provided by AAFAF, the OMB, and the Treasury Department are worthy of attention. (Docket Entry No. 1-8 in Adversary Proceeding No. 20-00080, at 2.) In its letter of April 27, 2020, the Oversight Board made clear that it wanted the formal estimate to "take into account any impact on future inflows or outflows of funds, including monies from the federal government," to explain how Act 82 would impact the fiscal plan by increasing PMPM rates, and explain whether sufficient offsets could counteract such impacts. (Docket Entry No. 1-9 in Adversary Proceeding No. 20-00080, at 1-2.)

Even if not every element of the Oversight Board's request for information was grounded in the statutory structure with sufficient clarity to support a non-arbitrary finding of noncompliance with section 204(a)(2) of PROMESA, the Board's determination that the Government failed to satisfy those requirements is plainly not arbitrary or capricious, for

the simple reason that the Government made no effort to clarify the cumulative estimate for the duration of the fiscal plan, or even explain how it reached its estimate. As this Court has previously held, "[t]he Oversight Board is not required to prove to the Court that [a law] is significantly inconsistent with the fiscal plan" to show that the Government failed to comply with its obligation under section 204(a)(1) of PROMESA. Law 29 II, 616 B.R. at 248. It was therefore neither arbitrary nor capricious for the Oversight Board to determine that the Government had failed to provide a sufficiently "formal estimate" or "certification."

For the foregoing reasons, summary judgment is granted in favor of the Oversight Board with respect to Count I of the Act 82 Complaint and Act 82 Counterclaim II. The Court holds that the Governor has failed to comply with section 204(a)(1) of PROMESA, since it failed to substantiate its estimate and failed to distinguish between the short-term impact of Act 82 and its projected impact for the duration of the 2019 Fiscal Plan,[21] and that the Oversight Board has the authority pursuant to section 204(a)(5) of PROMESA to prevent enforcement of a law to ensure that the law will not adversely affect compliance with the applicable fiscal plan.[22]

[21] The Court declines to address other arguments regarding the untimeliness of the Act 82 Certificate and whether the Government should have conducted an analysis of the impact Act 82 could have on the receipt of federal funds.

[22] Nor has the Government demonstrated that it lacks access to any evidence relating to any material fact that is necessary to oppose the Oversight Board's motion for summary judgment,

The Oversight Board's determinations that enforcement and implementation of this law, which is projected to involve significant expenditures that are not clearly provided for in the fiscal plan and for which the Government has not provided the requisite analytical support, should be prevented is neither arbitrary nor capricious, and establishes the Oversight Board's legal entitlement under section 104(k) and 205(a)(5) of PROMESA to injunctive relief barring the implementation and enforcement of Act 82.[23] The Court denies summary judgment on all counterclaims seeking nullification of Act 82 because the Oversight Board has not demonstrated that such drastic relief is warranted under these particular circumstances.[24]

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such that discovery under Rule 56(d) of the Federal Rules of Civil Procedure would be appropriate. See In re PHC, 762 F.3d at 143.

[23] The Court's grant of injunctive relief could be revisited if there emerge any significant changes in legal or factual conditions as to make such relief equitable. See Agostini v. Felton, 521 U.S. 203, 215-16 (1997) (recognizing appropriateness of relief from an injunction under Rule 60(b)(5) of the Federal Rules of Civil Procedure where Movant shows a significant change in factual conditions, statutory law, or decisional law); Sierra Club v. U.S. Army Corps of Engineers, 732 F.2d 253, 256 (2d Cir. 1984) (noting that "a court may modify a final or permanent injunction only where conditions have so changed as to make such relief equitable, i.e., a significant change in the law or facts").

[24] Given the foregoing conclusions, and as set forth in the accompanying *Order to Show Cause Regarding Dismissal of Remaining Claims and Counterclaims*, the parties are directed to show cause in writing as to why the Court should not dismiss the following count and counterclaims as moot or otherwise for lack of subject matter jurisdiction: Count II of the Act 82 Complaint,

C. Act 138 (Adversary Proceeding No. 20-00082) – Section 204(a) of PROMESA

As discussed above, Act 138 limits MCOs' ability to deny healthcare providers access to MCOs' preferred provider networks and to terminate contracts with such providers. The Government seeks summary judgment in its favor on Count I of the Act 138 Complaint, arguing that the Act 138 Certificate satisfies section 204(a) because it was provided in good faith by an appropriate entity of the territorial government with expertise in budgets and financial management, and Act 138 on its face requires no additional expenditures and does not reduce revenues. (See Gov. Act 176 MSJ at 15.) The Oversight Board opposes the Government's motion and cross-moves for summary judgment on Count I of the Act 138 Complaint and Act 138 Counterclaims I and II based on its theory that Act 138 will cause MCOs to incur higher costs, which will ultimately be borne by the Commonwealth. (Bd. Act 138 Cross-MSJ at 22-23.) The Oversight Board asserts that the Act

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which seeks a declaratory judgment that the Oversight Board cannot unilaterally enjoin implementation and enforcement of Act 82 under section 108(a)(2) of PROMESA; Act 82 Counterclaim I, which seeks nullification of Act 82 under section 104(k) of PROMESA for failure to satisfy section 204(a) of PROMESA; Act 82 Counterclaim III, which seeks nullification of Act 82 under section 104(k) of PROMESA for failure to satisfy section 204(c) of PROMESA; Act 82 Counterclaim IV, which seeks a preliminary and permanent injunction barring implementation of Act 82 under section 104(k) of PROMESA for failure to satisfy section 204(c) of PROMESA; and Act 82 Counterclaim V, which seeks an injunction barring the implementation of Act 82 under section 108(a)(2) of PROMESA.

138 Certificate failed to comply with section 204(a) because it incorrectly concluded that Act 138 is not significantly inconsistent with the Fiscal Plan, and because it lacked a compliant formal estimate of Act 138's fiscal impact. (Id. at 24.) The Oversight Board also argues that the Government's Act 138 Certificate was deficient because it failed to account for whether Act 138 could jeopardize the Puerto Rico Department of Health's receipt of federal funds. (Id. at 24-25.)

The Court concludes that the Oversight Board is entitled to summary judgment dismissing Count I of the Act 138 Complaint and summary judgment in its favor on Act 138 Counterclaim II. As an initial matter, it is undisputed that the Act 138 Certificate contains only the conclusory statements that "Act 138 has no impact on expenditures or revenues" and that "Act 138 is not significantly inconsistent with the New Fiscal Plan for Puerto Rico," and is devoid of any analysis or data supporting those assertions. (Docket Entry No. 13-3 in Adversary Proceeding No. 20-00083.) This is unsurprising, however, as the declaration of the Treasury Department that was proffered by the Government in connection with the instant motion practice demonstrates that the Government's procedure for assessing new laws that do not expressly call for changes in revenues or expenditures, such as Act 138, for compliance with PROMESA does not contemplate an analytical step that would account for any of the laws' collateral fiscal effects. (See Cruz Decl. ¶ 4 ("The Office of Legal Affairs reads and analyzes the content of each new law or joint resolution. If the language of the new

law or joint resolution does not present an issue of fiscal effect, the Office of Legal Affairs recommends that the Office of Economic and Financial Affairs issue a certification under PROMESA section 204(a) that the new law or joint resolution has no effect on expenditures and revenues.").) The Act 138 Certificate, containing even less content than the Act 82 Certificate, lacks a formal estimate and certification that is sufficiently informative and complete to satisfy the Government's obligations under section 204(a)(2). Cf. Law 29 I, 403 F. Supp. 3d at 12-13 (Government's conclusory estimate not effective to insulate new legislation from challenge by the Oversight Board).

It is also undisputed that the Oversight Board requested revisions to the Act 138 Certificate to remedy its failure to include a formal estimate of Act 138's fiscal impact, as required by section 204(a)(2)(A) of PROMESA. (See, e.g., Docket Entry No. 13-5 in Adversary Proceeding No. 20-00082, at 2.) In its April 27, 2020, letter to AAFAF, the Oversight Board posed specific questions apparently aimed at determining the anticipated costs associated with Act 138 and its effect on the Commonwealth's compliance with the applicable fiscal plan. (Docket Entry No. 13-9 in Adversary Proceeding No. 20-00082, at 2.) For example, the Board inquired as to whether AAFAF expects Act 138 to cause higher MCO PMPM rates. (Id.) The Oversight Board also asked how the potential impact from increases in PMPM rates will be mitigated to maintain compliance with the applicable fiscal plan. (Id.). The Government refused to provide responses to the Board's

questions and has consistently maintained that no revisions to the Act 138 Certificate are necessary. (See Docket Entry No. 13-10 in Adversary Proceeding No. 20-00082, at 1.)

Given the conclusory nature of the Act 138 Certificate, it was not difficult for the Oversight Board to make the required evidentiary showing to support a finding that its decisions to send the Government a section 204(a)(3) notification and direct the Government to provide the missing estimate and certification under section 204(a)(4)(A) had rational bases, and the Board has made such a showing here. In the context of the instant motion practice, the Oversight Board has submitted evidence supporting its proffer that the Oversight Board has determined that Act 138 will result in increased healthcare costs which will ultimately be borne by the Commonwealth,[25] as well as additional evidence that substantiates its theory.[26] In response, the Govern-

[25] (See Jaresko Decl. ¶ 70 ("The Oversight Board . . . determined Act 138 will inhibit MCOs' ability to control costs because they will be forced to accept providers with more expensive practice patterns."); id. ¶ 71 ("The Oversight Board believes that such additional costs [associated with Act 138] will be borne by the Commonwealth, even though they are not accounted for in the Fiscal Plan.").)

[26] (See, e.g., Ellis Decl. ¶ 14 ("Act 138 will almost certainly increase costs for private insurance plans and Medicaid plans in Puerto Rico by prohibiting those plans from excluding doctors, hospitals, and other providers of care from the plans' networks, and thereby reducing incentives for such providers to compete on price."); id. ¶ 15 ("Increases in costs for health plans in Puerto

ment points principally to Act 138's intended purposes as articulated in the statute by the Legislative Assembly, which focus on the retention of medical professionals rather than costs associated with incentivizing such retention by impeding the ability of MCOs to reject membership applications on price grounds and to remove providers from networks. (See Gov. Act 138 Reply and Opp. at 26 ("Act 138 was enacted in response to 'an unprecedented public health crisis, which has [made] it increasingly difficult for the people to obtain basic and specialized health care service' because of the massive 'brain drain' of healthcare professionals leaving the Island." (quoting Act 138 at 2)).) Those statutory provisions, which speak solely to the intended purpose and not any fiscal effects of Act 138, do not frame any genuine issue of material fact as to whether the Oversight Board's fiscal concerns associated with Act 138 and its decision to request revisions to the Act 138 Certificate were rational and supported by substantial evidence.[27]

Rico, such as managed care organizations ('MCOs'), will adversely affect the fiscal position of the Commonwealth by increasing spending on Medicaid and reducing income tax revenues (due to increases in costs for employer-sponsored insurance). Act 138 may also increase the costs borne by the Commonwealth in the provision of subsidized insurance to public sector employees and their families.").)

[27] Because the Court concludes that the Oversight Board's section 204(a) requests were warranted based on the Government's failure to adequately address the Board's concerns regarding the Act 138's general economic impact, the Court declines to address the parties' arguments concerning the timeliness of the Act 138 Certificate and whether the Government should have conducted

In sum, given the conclusory nature of the Act 138 Certificate and the Oversight Board's rational concerns regarding Act 138's economic effects, 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. Furthermore, because it is undisputed that the Government failed to comply with the Oversight Board's directive under section 204(a)(4)(A) of PROMESA to correct the deficient Act 138 Certificate or otherwise address the pertinent fiscal issues identified by the Oversight Board, the Board's determination to seek injunctive relief under sections 104(k) and 204(a)(5) was also supported by a rational basis. Accordingly, the Board is entitled to summary judgment dismissing Count I of the Act 138 Complaint and to summary judgment in its favor on Act 138 Counterclaim II. The Government is enjoined, pursuant to sections 104(k) and 204(a)(5) of PROMESA, from implementing and enforcing Act 138. See Law 29 II, 616 B.R. at 248 ("Section 204(a)(5) allows the Oversight Board to prevent the application or enforcement of a law when the Commonwealth government fails to comply with a direc-

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an analysis of the impact Act 138 could have on the Puerto Rico Department of Health's receipt of federal funds. Indeed, with respect to the latter issue, counsel for the Oversight Board admitted during oral argument that the Board's inquiries related to federal funding were meant to elicit prognostication about political dynamics of future health care funding negotiations with mainland authorities. (See Hrg. Tr., Docket Entry No. 46 in Adversary Proceeding No. 20-00082, at 63:16-65:17.)

tion given by the Oversight Board pursuant to section 204(a)(4) of PROMESA.").[28] The Court denies summary judgment on all counterclaims seeking nullification of Act 138 because the Oversight Board has not demonstrated that such drastic relief is warranted under these particular circumstances.[29]

D. Act 176 (Adversary Proceeding No. 20-00083) – Section 108(a)(2) of PROMESA

In the Adversary Proceeding pertaining to Act 176, which increases the accrual rate of public employee vacation and sick days, the Government

[28] The Court's grant of injunctive relief could be revisited if there emerge any significant changes in legal or factual conditions as to make such relief equitable. See Agostini, 521 U.S. at 215-16 (recognizing appropriateness of relief from an injunction under Rule 60(b)(5) of the Federal Rules of Civil Procedure where Movant shows a significant change in factual conditions, statutory law, or decisional law); Sierra Club, 732 F.2d at 256 (noting that "a court may modify a final or permanent injunction only where conditions have so changed as to make such relief equitable, i.e., a significant change in the law or facts").

[29] Given the foregoing conclusions, and as set forth in the accompanying *Order to Show Cause Regarding Dismissal of Remaining Claims and Counterclaims*, the parties are directed to show cause in writing as to why the Court should not dismiss the following count and counterclaims as moot or otherwise for lack of subject matter jurisdiction: Count II of the Act 138 Complaint, which seeks a declaratory judgment that the Oversight Board cannot unilaterally enjoin implementation and enforcement of Act 138 under section 108(a)(2) of PROMESA; Act 138 Counterclaim I, which seeks nullification of Act 138 under section 104(k) of PROMESA for failure to satisfy section 204(a) of PROMESA; and Act 138 Counterclaim III, which seeks an injunction under section 108(a)(2) of PROMESA barring the implementation of Act 138.

moves for summary judgment in its favor on Count II of the Act 176 Complaint, arguing that the Oversight Board has no authority under section 108(a)(2) to unilaterally enjoin the Government from implementing Act 176, and that the Oversight Board's determination that Act 176 impairs or defeats PROMESA's purposes lacked the requisite evidentiary support. (See Gov. Act 176 MSJ at 19-23.) The Oversight Board opposes the Government's motion and cross-moves for summary judgment on Count II of the Act 176 Complaint and Act 176 Counterclaim III, arguing that its determination that Act 176 impairs or defeats the purposes of PROMESA is neither arbitrary nor capricious and that its announcement of its determination was sufficient to trigger section 108(a)(2)'s statutory ban on Government action as to which the Oversight Board has made such a finding. (Bd. Act 176 Cross-MSJ at 21-22.)

The Court concludes that the Oversight Board is entitled to summary judgment dismissing Count II of the Act 176 Complaint and summary judgment in its favor on Act 176 Counterclaim III. It is undisputed that Act 176 permits Commonwealth government employees to accrue and take additional vacation and sick days with no other change in compensation levels. (See Bd. Act 176 SOF ¶ 43.) It is also undisputed that the applicable fiscal plan requires the Government to implement headcount-reduction measures to right-size the Government's workforce to a level commensurate with the current size of the Commonwealth's population, which has diminished over the past several years. (See id. ¶ 35; Jaresko Decl. ¶ 17 ("The Fiscal Plan . . . provides for right-

sizing measures which include reducing headcount of public employees in some instances."); 2019 Fiscal Plan at 24 ("In the past five years, Puerto Rico's population has trended downward by 1-2% every year as residents have left to seek opportunities elsewhere and birth rates have declined.").) Common sense and basic principles of economics dictate that, by allowing sick days and vacation days to accrue more quickly, without reducing pay levels, Act 176 affects expenditures by increasing the price that the Government pays for labor—causing the Government to pay the same amount of money to each person for fewer days worked. The Oversight Board expressed this obvious concern in terms of lost "productivity," computing the working hours forgone. The Oversight Board has, furthermore, submitted evidence supporting its proffer that the Board had determined that Act 176 "undermines the ability to right-size the workforce to the population size as contemplated in the Fiscal Plan by reducing the required work days for Government employees, effectively reducing the amount of services, without also reducing salaries and wages." (Jaresko Decl. ¶ 107.)

The Government argues that the Oversight Board's concerns about lost productivity are unfounded because the Government has in place legal requirements that prohibit employee vacations from interfering with the provision of Government services. (See Gov. Act 176 Reply and Opp. at 5-6 (citing Act 8-2017 § 9.1.1(b)).) The Government's reliance on Act 8-2017 is unavailing. In the Act 176 Cer-

tificate, the Government explained that "every governmental entity and instrumentality is required to formulate and manage a personnel vacation plan for each calendar year, which shall be strictly complied with by all employees, in order to ensure that said employees do not accumulate excess vacation days, while ensuring that the services provided by the corresponding governmental entities and instrumentalities are not interrupted." (Docket Entry No. 14-3 in Adversary Proceeding No. 20-00083.) Even if that assertion is true, it does not necessarily follow that Act 176 does not increase the Commonwealth's labor costs. Act 8-2017 simply provides that "[e]ach Agency is required to devise a vacation plan for every calendar year, in collaboration with the supervisors and employees, whereby it shall be established the period during which employees shall enjoy their vacation time in the manner that is more compatible with the needs for service." Act 8-2017 § 9.1.1(b). Nothing about that provision dispels the Oversight Board's legitimate concerns regarding Act 176's inconsistency with the right-sizing measures contemplated in the applicable fiscal plan. The Government's asserted ability to cover necessary services with fewer workers while providing more time off to all of its employees is not indicative of a basis for progress toward right-sizing to reduce labor costs and increase the efficient deployment of the workforce. (See, e.g., 2019 Fiscal Plan, at 76 ("A new model for government operations will 'right-size' the Government through agency consolidation and reduction and/or elimination of government services."); id. at 82 (Government right-sizing

measures should be implemented to "improv[e] agency operational expenditures" and ensure that agencies "deliver services in as efficient a manner as possible").)

Accordingly, the Oversight Board's determination that Act 176 impairs PROMESA's purposes of guiding the Commonwealth to fiscal responsibility and ensuring the efficient provision of public services, see 48 U.S.C. §§ 2141(b)(1)(B), (F), is supported by substantial record evidence, including (i) the text of Act 176, which permits public employees to accrue more sick and vacation days per year without otherwise modifying their compensation; (ii) the applicable fiscal plan, which requires the Government to implement headcount-reduction measures to right-size the Government's workforce to the population's size; and (iii) the Jaresko Declaration, which evidences the Oversight Board's determinations that Act 176 undermines the ability to right-size the workforce to the population size as contemplated in the applicable fiscal plan and the Oversight Board's efforts to fulfill its statutory mission to guide the Commonwealth to fiscal responsibility (see Jaresko Decl. ¶¶ 107-08.) No further evidence or analysis is necessary to support the Oversight Board's rational conclusion that Act 176 will impair or defeat PROMESA's purposes. Similarly, for the reasons discussed above, the Board's refusal to modify its position in light of Act 8-2017's vacation scheduling provisions had a rational basis. Thus, no reasonable fact finder could determine that the Oversight Board's section 108(a)(2) determination was arbitrary or capricious. The Oversight Board is

therefore entitled to summary judgment dismissing Count II of the Act 176 Complaint and summary judgment in its favor on Act 176 Counterclaim III. The Government is enjoined, pursuant to sections 104(k) and 108(a)(2) of PROMESA, from implementing and enforcing Act 176.[30] The Court denies summary judgment on all counterclaims seeking nullification of Act 176 because the Oversight Board has not demonstrated that such drastic relief is warranted under these particular circumstances.[31]

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[30] The Court's grant of injunctive relief could be revisited if there emerge any significant changes in legal or factual conditions as to make such relief equitable. See Agostini, 521 U.S. at 215-16 (recognizing appropriateness of relief from an injunction under Rule 60(b)(5) of the Federal Rules of Civil Procedure where Movant shows a significant change in factual conditions, statutory law, or decisional law); Sierra Club, 732 F.2d at 256 (noting that "a court may modify a final or permanent injunction only where conditions have so changed as to make such relief equitable, *i.e.*, a significant change in the law or facts").

[31] Given the foregoing conclusions, and as set forth in the accompanying *Order to Show Cause Regarding Dismissal of Remaining Claims and Counterclaims*, the parties are directed to show cause in writing as to why the Court should not dismiss the following count and counterclaims as moot or otherwise for lack of subject matter jurisdiction: Count I of the Act 176 Complaint, which seeks a declaratory judgment that the Act 176 Certificate satisfies the requirements of section 204(a) of PROMESA, that the Oversight Board cannot prevent enforcement of the law, and that any unilateral determinations by the Oversight Board of noncompliance with section 204(a) are non-binding; Act 176 Counterclaim I, which seeks nullification of Act 176 under section 104(k) of PROMESA for failure to satisfy section 204(a) of

Although, for the reasons discussed above, summary judgment in favor of the Oversight Board is warranted on Count II of the Act 176 Complaint, which requests declarations that "the Board's invocation of PROMESA section 108(a)(2) is and was of no force and is and was without any effect with respect to the validity and enforcement of Act 176" and that "any Board action to invalidate or prevent the enforcement of Act 176 without first seeking judicial approval of such action, exceeds the Board's powers under PROMESA section 108(a)(2) and would be unlawful, and are null and void" (Act 176 Compl. ¶ 51; id. at 20-21), it is appropriate to reiterate the Court's holding in Law 29 II that "Section 108(a) does not itself authorize the Oversight Board to nullify legislation." 616 B.R. at 252. Rather, "104(k) allows the Oversight Board to seek judicial enforcement of its authority to carry out its responsibilities under PROMESA, including its responsibilities pursuant to section 108(a)." Id. A proper declaration of a negative section 108(a)(2) determination by the Board triggers a statutory prohibition on action by the Government to go forward with the targeted statute, resolution, policy, or rule, but it does not empower the Oversight Board unilaterally to void the legislation or create an injunction. The Board appears to have conceded in its Act 176 Reply that it must seek relief from this Court in the event that the Government disregards its section

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PROMESA; and Act 176 Counterclaim II, which seeks a preliminary and permanent injunction under sections 104(k) and 204(a)(5) of PROMESA barring the implementation of Act 176.

108(a)(2) determinations (see Bd. Act 176 Reply at 7).

E. Act 181 (Adversary Proceeding No. 20-00084) – Section 204(c) of PROMESA

The Oversight Board seeks summary judgment in its favor on Act 181 Counterclaims III and IV, arguing that the Governor admits that Act 181 (which provides a retroactive pay raise for firefighters) would cost $2.8 million and that the taxes imposed therein may not cover those costs, thus implicating a need for reprogramming that has neither been requested nor authorized, in violation of section 204(c) of PROMESA, but the Governor has nonetheless stated that the law would be implemented on September 30, 2020, with retroactive effect. (Act 181 MSJ at 34 (citing Docket Entry No. 1-4 in Adversary Proceeding No. 20-00084; Gov. Resp. to SOF ¶ 62; Jaresko Decl. ¶ 141).) The Board also argues that Act 181 impermissibly imposes a spending decision on it, contrary to sections 201 through 204 of PROMESA. (Id. at 35 (citing Jaresko Decl. ¶ 143).) Finally, the Board contends that, even if taxes contemplated by Act 181 offset the salary raises, a law allowing the Governor to spend outside the certified budget is inconsistent with PROMESA and thus is preempted because it would undermine the FOMB's budgetary authority. (Id. at 35-36 (quoting Vázquez Garced, 945 F.3d at 8 ("Simply put, if a certified budget is to have 'full force and effect,' there can be no spending from sources not listed in that budget, regardless of what any territorial laws say."), and citing Law 29 II, 616 B.R. at 249).) The Court finds that Act 181 violates section 204(c), both because it

will likely require reprogramming, and because it purports to spend funds from a source not listed in any certified budget by creating the 3% Tax.

In its Law 29 II decision, this Court rejected the notion that there is any meaningful distinction between reprogramming and a revenue deficiency in the budget that the Government would likely need to remedy through reprogramming, and the Court does so again here. See Law 29 II, 616 B.R. at 249. The Government may not avoid the bar on implementation of statutes calling for unauthorized reprogramming by holding onto its cards and waiting until a post-implementation date to request reprogramming if the law as written is likely to require reprogramming due to insufficiency of budgeted funds. Here, the Government's Act 181 Certificate indicates that, should the 3% Tax and inspection revenues not cover the cost of Act 181, and it appears from the record that they do not, the Government will formally request reprogramming or stop paying the salary increase. (Gov. Resp. to SOF ¶ 50.) If the Government does not stop paying the increased salaries, the statute creates a spending deficit that will likely need to be remedied through reprogramming. (Docket Entry No. 31-1 in Adversary Proceeding No. 20-00084.) Given that the Government did not seek or obtain an Oversight Board-approved reprogramming, the implementation of Act 181 violates section 204(c) of PROMESA.

Accordingly, because the undisputed facts establish that Act 181 creates a revenue deficiency in the budget that the Government would likely need to

remedy through reprogramming that has been neither requested nor authorized, Act 181 is in violation of section 204(c) of PROMESA, and the Oversight Board is entitled to summary judgment in its favor on Counterclaim IV.[32] The Government is enjoined, under sections 104(k) and 204(c) of PROMESA, from implementing and enforcing Act 181. See Law 29 II, 616 B.R. at 248 ("Section 204(a)(5) allows the Oversight Board to prevent the application or enforcement of a law when the Commonwealth government fails to comply with a direction given by the Oversight Board pursuant to section 204(a)(4) of PROMESA.").[33] The Court denies summary judgment on all counterclaims seeking nullification of Act 181 because the Oversight Board

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[32] Nor has the Government demonstrated that it lacks access to any genuinely disputed material fact necessary to oppose the Oversight Board's Motion, such that discovery under Rule 56(d) of the Federal Rules of Civil Procedure would be appropriate. See In re PHC, 762 F.3d at 143.

[33] The Court's grant of injunctive relief could be revisited if there emerge any significant changes in legal or factual conditions as to make such relief equitable. See Agostini, 521 U.S. at 215-16 (recognizing appropriateness of relief from an injunction under Rule 60(b)(5) of the Federal Rules of Civil Procedure where Movant shows a significant change in factual conditions, statutory law, or decisional law); Sierra Club, 732 F.2d at 256 (noting that "a court may modify a final or permanent injunction only where conditions have so changed as to make such relief equitable, *i.e.*, a significant change in the law or facts").

has not demonstrated that such drastic relief is warranted under these particular circumstances.[34]

F. Act 47 (Adversary Proceeding No. 20-00085) – Section 108(a)(2) of PROMESA

With respect to Act 47, which expands the number of healthcare professionals who are eligible for incentive tax benefits without providing any offsetting cost savings, the Oversight Board seeks summary judgment in its favor on Count II of the Act 47 Complaint and on Act 47 Counterclaim III, arguing that the "estimated" loss of revenue associated with

[34] Given the foregoing conclusions, and as set forth in the accompanying *Order to Show Cause Regarding Dismissal of Remaining Claims and Counterclaims*, the parties are directed to show cause in writing as to why the Court should not dismiss the following counts and counterclaims as moot or otherwise for lack of subject matter jurisdiction: Count I of the Act 181 Complaint, which seeks a declaratory judgment that the Act 181 Certificate satisfies the requirements of section 204(a) of PROMESA, that the Oversight Board cannot prevent enforcement of the law, and that any unilateral determinations by the Oversight Board of noncompliance with section 204(a) are non-binding; Count II of the Act 181 Complaint, which seeks a declaratory judgment that the Oversight Board cannot unilaterally enjoin the implementation of Act 181 under section 108(a)(2) of PROMESA; Act 181 Counterclaim I, which seeks nullification of Act 181 under section 104(k) of PROMESA for failure to satisfy section 204(a) of PROMESA; Act 181 Counterclaim II, which seeks a preliminary and permanent injunction under sections 104(k) and 204(a)(5) of PROMESA barring the implementation of Act 181; Act 181 Counterclaim III, which seeks nullification of Act 181 under section 104(k) of PROMESA for failure to satisfy section 204(c) of PROMESA; and Act 181 Counterclaim V, which seeks an injunction barring implementation of Act 181 for failing to satisfy section 108(a)(2) of PROMESA.

Act 47 "would impair the Commonwealth's ability to attain fiscal stability and market access," in violation of section 108(a)(2) of PROMESA. (Act 47 MSJ at 26 (citing Gov. Resp. to SOF ¶ 81; Jaresko Decl. ¶ 163; Docket Entry No. 1-6 in Adversary Proceeding No. 20-00085, at 3).) The Oversight Board further argues that the loss of revenue would "undermine the Oversight Board's revenue projections, enlarge deficits, make it more difficult to achieve fiscal targets, and diminish funds that the Commonwealth can use to promote economic growth." (Id. (citing PROMESA §§ 201(b)(1)(A), (D), (G), (I), (J); SOF ¶ 82; Jaresko Decl. ¶ 164; Docket Entry No. 1-6 in Adversary Proceeding No. 20-00085, at 3).) Based on its determination that the loss of tens of millions of dollars would defeat or impair PROMESA's purposes, which was communicated to the Government in the course of correspondence concerning section 204(a) compliance, the Oversight Board seeks an order enjoining the implementation and enforcement of Act 47. (Id. at 22, 26-27 (citing Law 29 II, 616 B.R. at 254-55).) In its letter of May 21, 2020, the Board cited the inconsistency of the revenue deficit with the revenue neutrality principle established by the fiscal plan, among other issues; stated that it had determined that the loss of revenue associated with implementing Act 47 "would impair and defeat the purposes of PROMESA"; and advised that Act 47 "must not be implemented at this time." (Docket Entry No. 1-5 in Adversary Proceeding No. 20-00085.) As the Jaresko Declaration explains in support of the Board's determination, the Board reasons that Act 47 would

violate the revenue neutrality principle as set forth in the 2019 Fiscal Plan, impair the Commonwealth's ability to attain fiscal stability and market access, undermine the Oversight Board's revenue projections, enlarge deficits, make it more difficult to achieve fiscal targets, and diminish funds the Commonwealth can use toward growth. (Jaresko Decl. ¶¶ 157, 159, 163-65.) The same letter informed the Government that it was "enjoined" from implementing Act 47 because the Board had determined that Act 47 would impair and defeat the purposes of PROMESA. (Docket Entry No. 1-5 in Adversary Proceeding No. 20-00085, at 3.)

In its May 28, 2020, response, the Government objected to the Oversight Board's "blanket incantation that 'implementation of Act 47-2020, prior to satisfaction of all Section 204 requirements, would impair and defeat the purposes of PROMESA,' and therefore the Government is enjoined from implementing Act 47-2020 pursuant to PROMESA section 108(a)." (Docket Entry No. 1-6 in Adversary Proceeding No. 20-00085, at 4.) The Government argued that the Law 29 decisions imposed a "rational basis" standard on the Oversight Board's determinations, and that the Board's failure to substantiate its claims of significant inconsistencies with the 2019 Fiscal Plan revealed the lack of a rational basis. (Id. at 4.) The Oversight Board responded, in part, by threatening to "seek judicial relief" if the Government failed to forgo implementing or revising Act 47. (Docket Entry No. 1-7 in Adversary Proceeding No. 20-00085, at 2.)

At the hearing on the instant summary judgment motions, counsel for the Oversight Board emphasized that Act 47 violates a specific requirement of revenue neutrality regarding tax measures, as set forth in Section 14.3.3 of the 2019 Fiscal Plan. (Hrg. Tr., Docket Entry No. 54 in Adversary Proceeding No. 20-00085, at 70:1-14; 120:16-121:15 (citing 2019 Fiscal Plan, at 124; 2020 Fiscal Plan, at 218)). That provision states as follows:

> Principle of Revenue Neutrality
>
> Puerto Rico needs to drive toward more formality and increased compliance within the tax base, but it cannot lose revenues in the process. Therefore, any tax reform or tax law initiatives that the Government undertakes or pursues during a year within the 2019 Fiscal Plan period must be revenue neutral, that is, all tax reductions must be accompanied by offsetting revenue measures of a sufficient amount identified in the enabling legislation. Each tax measure must also include confidence building elements, such as behavioral adjustments and reasonable capture rates. To ensure revenue neutrality, the implementation of any tax law initiatives must occur sequentially, with the Government ensuring that initiatives are paid for before rates are reduced. Enforcement mechanisms must be part of any tax initiative package to prevent a scenario where tax reductions are not accompanied by sufficient offsetting revenue measures identified in the enabling legislation.

(2019 Fiscal Plan, at 124; 2020 Fiscal Plan, at 218.)

The Court finds that the Oversight Board's determination under section 108(a)(2) regarding Act 47 was neither arbitrary or capricious, and that the Government's implementation violates section 108(a)(2). By identifying a contradiction between Act 47's tax revenue reductions and the express language of section 14.3.3 of the 2019 Fiscal Plan, the Oversight Board has substantiated its rational basis for asserting that Act 47 clearly contradicts PROMESA's expressed purpose of entrusting the Oversight Board with the sole responsibility of establishing fiscal plans as part of "a method for a covered territory to achieve fiscal responsibility and access to the capital markets." 48 U.S.C.A. §§ 2121(a), 2141(b)(1) (Westlaw through P.L. 116-217). The fact that Act 47 has the undisputed potential to reduce revenues by about $200 million over five years by creating tax incentives with no offsets to make it revenue neutral renders its implementation a flagrant and significant deviation from section 14.3.3 of the 2019 Fiscal Plan. Since PROMESA charges the Oversight Board with providing a method for Puerto Rico to achieve fiscal responsibility and fiscal plans are a key instrument under PROMESA for the achievement of the statute's goals, it is neither arbitrary nor capricious for the Oversight Board to determine that a direct violation (at least of this magnitude of uncompensated revenue reduction) of a clear Fiscal Plan policy position does, in fact, impair or defeat PROMESA's purposes. 48 U.S.C.A. §§ 2121(a), 2141(b)(1) (Westlaw through P.L. 116-217).

Act 47 directly thwarts a fiscal responsibility method established by the Oversight Board, specifically the revenue neutrality principle as set forth in the 2019 Fiscal Plan, placing Act 47 into direct conflict with PROMESA's purpose of allowing the Board to establish a "method . . . to achieve fiscal responsibility and access to the capital markets." (Id.) Because the Oversight Board's determination that Act 47 violates section 108(a)(2) of PROMESA by violating the revenue neutrality principle within the 2019 Fiscal Plan is neither arbitrary nor capricious, and because the underlying contradiction undermines the Oversight Board's "method . . . to achieve fiscal responsibility and access to the capital markets" which PROMESA indicates is the purpose for the Oversight Board, injunctive relief is appropriate under section 108(a)(2).

For the foregoing reasons, the Oversight Board's motion for summary judgment is granted with respect to Count II of the Act 47 Complaint and Act 47 Counterclaim III. The Court holds that the Board has shown a rational basis to support its determination that Act 47 violates section 108(a)(2) of PROMESA and that its reasoning is supported by substantial evidence in the form of the estimation of the magnitude of the likely impact and the specific revenue-neutrality provision of the 2019 and 2020 Fiscal Plans.[35] As a result, the Government is enjoined, under sections 104(k) and 108(a)(2) of

[35] Nor has the Government demonstrated that it lacks access to any genuinely disputed material fact necessary to oppose the Oversight Board's Motion, such that discovery under Rule 56(d)

PROMESA, from implementing and enforcing Act 47.[36] The Court denies summary judgment on all counterclaims seeking nullification of Act 47 because the Oversight Board has not demonstrated that such drastic relief is warranted under these particular circumstances.[37]

IV.

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of the Federal Rules of Civil Procedure would be appropriate. See In re PHC, 762 F.3d at 143.

[36] The Court's grant of injunctive relief could be revisited if there emerge any significant changes in legal or factual conditions as to make such relief equitable. See Agostini, 521 U.S. at 215-16 (recognizing appropriateness of relief from an injunction under Rule 60(b)(5) of the Federal Rules of Civil Procedure where Movant shows a significant change in factual conditions, statutory law, or decisional law); Sierra Club, 732 F.2d at 256 (noting that "a court may modify a final or permanent injunction only where conditions have so changed as to make such relief equitable, *i.e.*, a significant change in the law or facts").

[37] Given the foregoing conclusions, and as set forth in the accompanying *Order to Show Cause Regarding Dismissal of Remaining Claims and Counterclaims*, the parties are directed to show cause in writing as to why the Court should not dismiss the following count and counterclaims as moot or otherwise for lack of subject matter jurisdiction: Count I of the Act 47 Complaint, which seeks a declaratory judgment that the Act 47 Certificate satisfies the requirements of section 204(a) of PROMESA, that the Oversight Board cannot prevent enforcement of the law, and that any unilateral determinations by the Oversight Board of noncompliance with section 204(a) are non-binding; Act 47 Counterclaim I, which seeks nullification of Act 47 under section 104(k) of PROMESA for failure to satisfy section 204(a) of PROMESA; and Act 47 Counterclaim II, which seeks a preliminary and permanent injunction under sections 104(k) and 204(a)(5) of PROMESA barring the implementation of Act 47.

CONCLUSION

For the foregoing reasons, the Oversight Board is entitled to summary judgment dismissing Count I of the Act 82 and 138 Complaints (Docket Entry No. 1 in Adversary Proceeding No. 20-00080 ¶¶ 46-51, and Docket Entry No. 1 in Adversary Proceeding No. 20-00082 ¶¶ 46-51), and Count II of the Act 176 and 47 Complaints (Docket Entry No. 1 in Adversary Proceeding No. 20-00083 ¶¶ 49-51, and Docket Entry No. 1 in Adversary Proceeding No. 20-00085 ¶¶ 58-60), and to judgment as a matter of law with respect to Act 138 Counterclaim II (Docket Entry No. 5 in Adversary Proceeding No. 20-00082 ¶¶ 40-48), Act 82 Counterclaim II (Docket Entry No. 5 in Adversary Proceeding No. 20-00080 ¶¶ 40-48), Act 176 Counterclaim III (Docket Entry No. 6 in Adversary Proceeding No. 20-00083 ¶¶ 31-47), Act 47 Counterclaim III (Docket Entry No. 5 in Adversary Proceeding No. 20-00085 ¶¶ 36-51), and Act 181 Counterclaim IV (Docket Entry No. 6 in Adversary Proceeding No. 20-00084 ¶¶ 41-50). The Government's Motions for Summary Judgment are denied in their entirety, as are the remaining aspects of the Oversight Board's Motions for Summary Judgment. The Government is hereby enjoined from implementing and enforcing Acts 82, 138, 176, 181, and 47.[38] The accompanying *Order to Show Cause Re-*

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[38] This Court has also reviewed, and now grants, the COOPHARMA Amicus Motion, because COOPHARMA has shown that it has a special interest that justifies permitting it to be heard on this motion practice. See Strasser v. Doorley, 432 F.2d

garding Dismissal of Remaining Claims and Counterclaims directs the parties to show cause as to why, in light of the foregoing analysis and decision, the remaining counts and counterclaims should not be dismissed as moot or otherwise for lack of subject matter jurisdiction.[39]

This Opinion and Order resolves Docket Entry No. 14 in Adversary Proceeding No. 20-00080; Docket Entry Nos. 12 and 28 in Adversary Proceeding No. 20-00082; Docket Entry Nos. 13 and 29 in Adversary Proceeding No. 20-00083; Docket Entry No. 13 in Adversary Proceeding No. 20-00084; Docket Entry No. 12 in Adversary Proceeding No. 20-00085; and Docket Entry No. 15238 in Case No. 17-3283.

567, 569 (1st Cir. 1970); In re Fin. Oversight & Mgmt. Bd. for P.R., 361 F. Supp. 3d 203, 216 n.10 (D.P.R. 2019).

[39] The remaining claims are, (i) in Adversary Proceeding No. 20-00080, Count II of the Act 82 Complaint and Act 82 Counterclaims I, III, IV, and V (Docket Entry Nos. 1 and 5); (ii) in Adversary Proceeding No. 20-00082, Count II of the Act 138 Complaint and Act 138 Counterclaims I and III (Docket Entry Nos. 1 and 5); (iii) in Adversary Proceeding No. 20-00083, Count I of the Act 176 Complaint and Act 176 Counterclaims I and II (Docket Entry Nos. 1 and 6); (iv) in Adversary Proceeding No. 20-00084, Counts I and II of the Act 181 Complaint, as well as Act 181 Counterclaims I, II, III, and V (Docket Entry Nos. 1 and 6); (v) in Adversary Proceeding No. 20-00085, Count I of the Act 47 Complaint, as well as Act 47 Counterclaims I and II (Docket Entry Nos. 1 and 5).

SO ORDERED.

Dated: December 23, 2020	/s/ Laura Taylor Swain LAURA TAYLOR SWAIN United States District Judge

APPENDIX C

RELEVANT STATUTORY PROVISIONS

48 U.S.C. § 2124. Powers of Oversight Board

* * *

(k) CIVIL ACTIONS TO ENFORCE POWERS

The Oversight Board may seek judicial enforcement of its authority to carry out its responsibilities under this chapter.

* * *

48 U.S.C. § 2126. Treatment of actions arising from chapter

* * *

(d) EXPEDITED CONSIDERATION

It shall be the duty of the applicable United States District Court, the applicable United States Court of Appeals, and, as applicable, 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 chapter.

* * *

48 U.S.C. § 2128. Autonomy of Oversight Board

(a) IN GENERAL

Neither the Governor nor the Legislature may —

(1) exercise any control, supervision, oversight, or review over the Oversight Board or its activities; or

(2) enact, implement, or enforce any statute, resolution, policy, or rule that would impair or defeat the purposes of this chapter, as determined by the Oversight Board.

(b) OVERSIGHT BOARD LEGAL REPRESENTATION

In any action brought by, on behalf of, or against the Oversight Board, the Oversight Board shall be represented by such counsel as it may hire or retain so long as the representation complies with the applicable professional rules of conduct governing conflicts of interests.

48 U.S.C. § 2144. Review of activities to ensure compliance with Fiscal Plan

(a) SUBMISSION OF LEGISLATIVE ACTS TO OVERSIGHT BOARD

(1) Submission of acts

Except to the extent that the Oversight Board may provide otherwise in its bylaws, rules, and procedures, not later than 7 business days after a territorial government duly enacts any law during any fiscal year in which the Oversight Board is in operation, the Governor shall submit the law to the Oversight Board.

(2) Cost estimate; certification of compliance or noncompliance

The Governor shall include with each law submitted to the Oversight Board under paragraph (1) the following:

(A) 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.

(B) If the appropriate entity described in subparagraph (A) finds that the law is not significantly inconsistent with the Fiscal Plan for the fiscal year, it shall issue a certification of such finding.

(C) If the appropriate entity described in subparagraph (A) finds that the law is significantly inconsistent with the Fiscal Plan for the fiscal year, it shall issue a certification of such finding, together with the entity's reasons for such finding.

(3) Notification

The Oversight Board shall send a notification to the Governor and the Legislature if--

(A) the Governor submits a law to the Oversight Board under this subsection that is not accompanied by the estimate required under paragraph (2)(A);

(B) the Governor submits a law to the Oversight Board under this subsection that is not accompanied by either a certification described in paragraph (2)(B) or (2)(C); or

(C) the Governor submits a law to the Oversight Board under this subsection that is ac-

companied by a certification described in paragraph (2)(C) that the law is significantly inconsistent with the Fiscal Plan.

(4) Opportunity to respond to notification

(A) Failure to provide estimate or certification

After sending a notification to the Governor and the Legislature under paragraph (3)(A) or (3)(B) with respect to a law, the Oversight Board may direct the Governor to provide the missing estimate or certification (as the case may be), in accordance with such procedures as the Oversight Board may establish.

(B) Submission of certification of significant inconsistency with Fiscal Plan and Budget

In accordance with such procedures as the Oversight Board may establish, after sending a notification to the Governor and Legislature under paragraph (3)(C) that a law is significantly inconsistent with the Fiscal Plan, the Oversight 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.

(5) Failure to comply

If the territorial government fails to comply with a direction given by the Oversight Board under

paragraph (4) with respect to a law, the Oversight 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.

(6) Preliminary review of proposed acts

At the request of the Legislature, the Oversight Board may conduct a preliminary review of proposed legislation before the Legislature to determine whether the legislation as proposed would be consistent with the applicable Fiscal Plan under this subtitle, except that any such preliminary review shall not be binding on the Oversight Board in reviewing any law subsequently submitted under this subsection.

* * *