No. 22-484

IN THE

Supreme Court of the United States

PEDRO PIERLUISI, GOVERNOR OF PUERTO RICO, *et al.*,

Petitioners,

—v.—

FINANCIAL OVERSIGHT AND MANAGEMENT BOARD FOR PUERTO RICO,

Respondent.

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

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

This case concerns the standard of review for certain determinations made by the Financial Oversight and Management Board for Puerto Rico (the "Board"). Exercising its authority under the Puerto Rico Oversight, Management, and Economic Stability Act ("PROMESA"), the Board determined that four laws passed by the Commonwealth in 2019 and 2020 either "impair[ed] or defeat[ed]" the purposes of PROMESA or were significantly inconsistent with the Commonwealth's fiscal plan. The Board's statutory purposes include restoring Puerto Rico to fiscal responsibility and market access. The Questions Presented are:

1. Was it arbitrary and capricious for the Board to determine that Act 47 impairs or defeats the purposes of PROMESA when the Act was projected to cost the Commonwealth as much as $200 million without providing any offsetting revenues or savings?

2. Was it arbitrary and capricious for the Board to determine that Act 176 impairs or defeats the purposes of PROMESA by providing public employees additional sick and vacation days, thereby increasing the Commonwealth's cost of labor without any offsetting revenues or savings?

3. Was it arbitrary and capricious for the Board to conclude that the Governor had refused to provide information about the fiscal impact of Act 136?

4. Was it arbitrary and capricious for the Board to conclude that the Governor had refused to provide information about the fiscal impact of Act 82?

RULE 29.6 STATEMENT

Respondent the Financial Oversight and Management Board for Puerto Rico is not a nongovernmental corporation and is therefore not required to submit a statement under Supreme Court Rule 29.6.

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BRIEF IN OPPOSITION

Respondent respectfully submits that the petition for a writ of certiorari should be denied.

INTRODUCTION

The Petition asks this Court to grant certiorari on an esoteric question concerning the standard of review for certain decisions under PROMESA. The question at issue is rarely litigated, it was not fully answered by the court of appeals, and a critical argument about the merits was deemed "waived" below, all of which make the Petition highly uncertworthy.

The Petition centers on the standard that courts should apply when reviewing determinations made by the Board under 48 U.S.C. §§ 2128(a) and 2144(a). The Petition argues that the Board's determinations are reviewable under the same standard that applies to agency actions under the Administrative Procedure Act ("APA"). In other words, according to Petitioners, Board determinations should be reviewed under an arbitrary-and-capricious standard that incorporates the entire body of administrative law that applies in cases brought under the APA. That position is plainly incorrect because the Board is not a federal agency and thus not covered by the APA. *See* 48 U.S.C. § 2121(c)(2). More important, the question of whether Board determinations are reviewed under an APA-like standard is not certworthy for a number of reasons.

First, the court of appeals did not definitively answer the question, stating that to resolve the appeal it

"need not settle to what extent the universe of federal administrative law should be applied in reviewing Board determinations." Pet. App. 28a. Instead, the court of appeals opted for an incremental approach in which it would consider whether particular principles of administrative law apply to Board determinations on a case-by-case basis. Review by this Court would be premature before the court of appeals has analyzed and ruled on each of those principles.

Second, a critical argument concerning the standard of review was found to be "waived" at the court of appeals and was thus not addressed below. At the court of appeals, the Board argued that, because it is not an agency covered by the APA, its determinations are governed by an *ultra vires* standard, not an arbitrary-and-capricious standard. The Petition's question concerning the standard of review governing Board determinations under §§ 2128(a) and 2144(a) cannot be resolved without addressing that *ultra vires* argument. Yet the court of appeals found that the *ultra vires* argument was waived below because it was not urged in the trial court, even though the Board prevailed there. Pet. App. 26a n.12. This case is thus not a good vehicle for deciding the standard of review because one of the primary candidates was supposedly waived.

Third, a decision about the standard of review governing Board determinations would be sui generis; it would be limited to cases brought under PROMESA and would have no effect on any other case. The Court should preserve its resources for questions having significant impact on the state of the law, not a one-off like the one presented here.

The question concerning the standard of review is not frequently litigated under PROMESA, either. Contrary to the Petitioner's contention, this Court's intervention is not required to stem a supposed tidal wave of litigation between the Board and the Governor. In the seven years since PROMESA's enactment, there have been only a handful of litigations between the Board and the Governor of Puerto Rico over §§ 2128(a) and 2144(a). Especially given that the Board will terminate in a matter of years, *see* 48 U.S.C. § 2149, there is no compelling need for the Court to weigh in on the standard of review for Board determinations.

In addition to asking the Court to decide the standard of review, the Petition challenges the Board's application of §§ 2128(a) and 2144(a) to four particular Puerto Rico statutes. Needless to say, any question addressing the specific determinations made by the Board in this case is not certworthy because the answer would turn on the factual record below and would have no effect beyond this case.

This is thus exactly the type of Petition that the Court should *not* grant. It identifies no circuit split. It presents questions limited to PROMESA that were not actually answered below and concern statutory provisions that are rarely litigated. And there are vehicle problems. The Petition should be denied.

STATEMENT OF THE CASE

1. Puerto Rico has been suffering from what Congress found to be a "fiscal emergency" resulting from "accumulated operating deficits, lack of financial

transparency, management inefficiencies, and excessive borrowing." 48 U.S.C. § 2194(m)(1)–(2). In 2016, Congress enacted PROMESA to address that emergency. *Id.* §§ 2101–2241.

PROMESA established the Board and charged it with helping the Commonwealth "achieve fiscal responsibility and access to the capital markets" at reasonable rates. *Id.* § 2121(a); *see also id.* § 2149(1). The Board is an "entity within the territorial government," not a federal agency. *Id.* § 2121(c)(1)–(2); *Fin. Oversight & Mgmt. Bd. for P.R. v. Aurelius Inv., LLC*, 140 S. Ct. 1649, 1661 (2020). Accordingly, by its terms, the Administrative Procedure Act does not apply to the Board. *See* 5 U.S.C. § 551(1).

To aid the Board in carrying out its statutory mission, PROMESA granted it extensive authority over budgets and long-term fiscal plans in the Commonwealth. 48 U.S.C. §§ 2141–2142. PROMESA also contains two provisions designed to ensure that laws enacted by the Commonwealth are consistent with the governing fiscal plan.

First, § 2128(a) prohibits Puerto Rico's Governor and legislature from enacting, implementing, or enforcing any law that would "impair or defeat the purposes of [PROMESA], as determined by the Oversight Board." *Id.* § 2128(a)(2). The Board is authorized to enforce that ban in court. *Id.* § 2124(k).

Second, § 2144(a) establishes a mandatory interactive process between the Governor and the Board concerning new legislation. Within seven days of enactment, the Governor is required to submit every law

to the Board, along with (i) a "formal estimate" of the law's impact on expenditures and revenues and (ii) a certification of whether the law is "significantly inconsistent" with the fiscal plan. *Id.* § 2144(a)(1)–(2). If the Governor fails to provide the formal estimate or certification, the Board can direct the Governor to supply the missing documents. *Id.* § 2144(a)(3), (4)(A). Similarly, if the Governor certifies a law as significantly inconsistent with the certified fiscal plan, the Board shall direct the Governor to "correct" the law or provide an explanation for the inconsistency that the Board finds "reasonable and appropriate." *Id.* § 2144(a)(4)(B). If the Governor fails to comply with a directive issued by the Board, the Board can "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 [Commonwealth's] compliance with the Fiscal Plan, including preventing the enforcement or application of the law." *Id.* § 2144(a)(5).

PROMESA does not specify the standard under which a court should review determinations by the Board under either statutory provision.

2. This case concerns four statutes enacted by the Puerto Rico legislature in 2019 and 2020, each of which the Board determined was significantly inconsistent with the governing fiscal plan and each of which was the subject of extensive communications between the Board and the Governor.[1]

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[1] The Puerto Rico Fiscal Agency and Financial Advisory Authority (known by its Spanish acronym, "AAFAF") also participated

a. **Act 47.** Act 47 expanded the number of healthcare professionals eligible for certain tax credits. Pet. App. 18a–19a. The Governor initially submitted an "educated estimate" that Act 47 would decrease the Commonwealth's annual revenues by $25.7 million. Pet. App. 19a–20a. Later, he reassessed the law's impact on revenues as ranging between $540,000 and $40.1 million annually. Pet. App. 20a–21a. Neither estimate explained how the impact was calculated. Pet. App. 19a–21a. And despite the possibility that Act 47 could cost as much as $200 million over the five years covered by the fiscal plan, the Governor certified Act 47 as "not significantly inconsistent" with the plan—again, without explanation. Pet. App. 20a–21a.

In a written response, the Board challenged the Governor's conclusion that Act 47 was not significantly inconsistent with the Commonwealth's fiscal plan. Pet. App. 20a. The Board also determined under § 2128(a) that Act 47 would impair and defeat the purposes of PROMESA. Pet. App. 21a, 96a. The Governor did not respond to the Board's letter and instead implemented Act 47. Pet. App. 100a, 102a–03a.

b. **Act 176.** Act 176 increased the rates at which public employees would accrue vacation and sick days. Pet. App. 15a–16a. Specifically, it allowed government employees to accrue 2.5 vacation days and 1.5 sick days per calendar month, while maintaining

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in these communications. For ease of exposition, this brief will refer to the Governor and AAFAF collectively as "the Governor." The underlying lawsuit also involved a fifth law no longer at issue.

caps on the total vacation and sick days that they could amass, as prescribed in an earlier law. *Id.* On the theory that Act 176 "merely adjusts the accretion of vacation and sick days for public employees . . . while strictly adhering to the liquidation prohibitions," the Governor estimated that it would have "no impact" on the Commonwealth's revenues or expenditures. Pet. App. 16a–17a.

The Board objected that the Governor had not submitted a "formal estimate" because he failed to account for Act 176's impact on employee productivity. Pet. App. 17a–18a. The Board observed that if full-time employees used all their newly awarded vacation and sick days, productivity would decrease by 5%, which was akin to reducing the workforce by 2,400 employees while still paying for them. *Id.* The Board also advised the Governor of its determination under § 2128(a) that Act 176 would impair and defeat the purposes of PROMESA. Pet. App. 18a. The Governor nevertheless ignored the Board's letter and implemented Act 176. Pet. App. 102a–03a.

c. **Acts 82 and 138.** The other two statutes concerned healthcare.

Act 82 regulated pharmacy-benefits managers and administrators and established an office within the Puerto Rico Department of Health ("PRDH") to regulate the entities that contract with pharmacies. Pet. App. 9a, 60a. Act 82 also imposed a floor on pharmaceutical prices and prohibited cost-control measures for prescription drugs. Pet. App. 9a–10a, 60a.

Act 138 required healthcare organizations to accept healthcare providers into their networks if they met certain criteria, irrespective of the price the provider charged for its services. Pet. App. 10a, 61a. Naturally, the Board was concerned that network providers would no longer have incentives to keep costs down. Act 138 also barred health-insurance organizations, insurers, and medical plans from including in their contracts with healthcare providers a right to unilaterally terminate or rescind the contract. Pet. App. 10a, 61a.

The Board and the Governor engaged in a protracted back-and-forth concerning Acts 82 and 138, with the Board requesting basic fiscal information and projected impacts for the laws and the Governor stonewalling. At the outset, the Governor submitted his estimate and certification for Act 138 more than four weeks late. Pet. App. 10a, 61a. The certification was a mere three sentences long, and the estimate in its entirety comprised a single sentence: "Act 138 has no impact on expenditures or revenues." Pet. App. 10a, 61a. There were no supporting figures and no explanation of the methodology used to generate the estimate.

The Board responded that the Governor had failed to submit a "formal estimate" because it lacked even a basic explanation of how Act 138's impact on revenues and expenditures was derived. Pet. App. 11a, 63a. The Board thus directed the Governor to provide a formal estimate of the law's financial impact. Pet. App. 11a, 63a–64a.

For Act 82, the Governor's estimate and certification were likewise many weeks late. That estimate was all of six sentences. Pet. App. 12a, 64a–65a. It stated that Act 82 would have an "approximate" impact on expenditures of $475,131.47, which supposedly would come from "budgeted resources." Pet. App. 12a, 64a. The Governor did not explain how he calculated that "approximate" yet seemingly precise number or what budgeted resources were being referenced.

The Board objected that the estimate was inadequate, Pet. App. 13a, 66a–68a, and directed the Governor to provide the missing analysis, Pet. App. 68a.[2] The Governor refused to do so. Instead, he wrote that he had already complied with his obligations under PROMESA with respect to both Acts. Pet. App. 13a, 68a–70a.

Two months later, the Board again directed the Governor to provide formal estimates for Acts 82 and 138. Pet. App. 14a–15a, 70a–74a. The Governor responded that his earlier estimates were sufficiently "formal" under § 2144(a). Pet. App. 15a, 75a. A few

[2] The Board also noted that the Governor failed to analyze whether Acts 82 and 138 could disqualify the Commonwealth from receiving certain critical federal healthcare grants. Pet. App. 13a, 66a–68a. Despite the Governor's characterization of this inquiry as a demand for a "preemption" analysis, the Board repeatedly made clear that it was not seeking a preemption analysis but merely confirmation that the Governor had considered whether the acts jeopardized federal funding. The court of appeals determined that it did not need to consider preemption to resolve the case. Pet. App. 33a n.14.

weeks later, for the third and final time, the Board directed the Governor to provide formal estimates; the Governor never responded. Pet. App. 78a–80a.

3. Rather than comply with § 2144(a), the Governor ran to court, seeking rulings that the four laws were enforceable. Pet. App. 21a. The Board counterclaimed, seeking declaratory and injunctive relief to prevent enforcement. Pet. App. 21a–22a. On cross-motions for summary judgment, the district court sided with the Board and rejected the Governor's arguments. It enjoined the enforcement of Acts 47 and 176 under § 2128(a)(2) and enjoined the enforcement of Acts 82 and 138 under § 2144(a). Pet. App. 24a, 55a–56a.

The district court first addressed the standard of review. In a prior case, the court had held that, although the Board is not a federal agency, it bears "operational similarity" to an agency, and therefore determinations made by the Board under §§ 2128(a) and 2144(a) should be reviewed under some form of an arbitrary-and-capricious standard. *See Fin. Oversight & Mgmt. Bd. for P.R. v. Vázquez Garced (In re Fin. Oversight & Mgmt. Bd. for P.R.)*, 616 B.R. 238, 252–53 (D.P.R. 2020). The court adhered to that position below. Pet. App. 107a–08a. It also rejected the Governor's argument that Board determinations should be reviewed under the "substantial evidence" standard applicable to Puerto Rico agencies. Pet. App. 108a–10a.

The court then turned to the four statutes at issue, analyzing each one individually. *See* Pet. App. 60a–101a; 118a–47a.

Regarding Act 47, the court found that the Board's determination under 48 U.S.C. § 2128(a) that Act 47 impairs and defeats the purposes of PROMESA was neither arbitrary nor capricious. *See* Pet. App. 141a–47a. As the court explained, by the Governor's own admission, Act 47 would have reduced the Commonwealth's revenues by as much as $200 million over five years. Pet. App. 145a–46a. That significant loss of revenue would violate the fiscal plan's revenue-neutrality requirement and impair "PROMESA's expressed purpose of entrusting the . . . Board with the sole responsibility of establishing fiscal plans as part of 'a method for [Puerto Rico] to achieve fiscal responsibility and access to the capital markets.'" *Id.* (citing 48 U.S.C. §§ 2121(a), 2141(b)(1)).

The court likewise concluded that no reasonable fact finder could find arbitrary or capricious the Board's determination that Act 176 impairs or defeats the purposes of PROMESA. Pet. App. 135a. As the court explained, Act 176 would have significantly increased the number of vacation days and sick days accrued by public employees. *Id.* That, in turn, would increase the Commonwealth's cost of labor, undermine its ability to right-size the public workforce, and interfere with the provision of critical government services. *Id.* The court thus found that the Board had acted reasonably when it concluded that Act 176 "impairs PROMESA's purposes of guiding the Commonwealth to fiscal responsibility and ensuring the efficient provision of public services." *Id.* (citing 48 U.S.C. § 2141(b)(1)(B), (F)).

With respect to Act 82, the district court held that the Governor had failed to comply with his obligation

under § 2144(a) to provide a formal estimate. Pet. App. 120a. At "less than half a page of text" and containing "absolutely no supporting rationale," the Governor's certification "plainly [fell] short of even facial compliance with the formal estimate requirement." *Id.* As the court explained, the formal-estimate requirement demands more than "the mere presentation of a figure on official letterhead." Pet. App. 121a. Instead, an estimate must describe the effects of new legislation on revenues and expenditures over the entire period of the fiscal plan and provide "context or analysis to support" its assertions, including how the estimate was developed. Pet. App. 120a. The Governor's Act 82 estimate contained none of the context and analysis necessary to show whether the law was consistent with the operative fiscal plan. *Id.* For those reasons, the court found that the Board's determination that the Governor had failed to provide a "formal estimate" was neither arbitrary nor capricious. *Id.*

The court further found that the Board's determination to block Act 82's implementation after the Governor refused to provide the requested information about the law's fiscal impact was not arbitrary or capricious. Pet. App. 122a–24a. As the court noted, the Governor ignored the Board's directive under § 2144(a)(4) for additional information, which entitled the Board to seek injunctive relief under § 2144(a)(5). Pet. App. 124a.

Finally, the court reached a similar conclusion concerning Act 138, noting that the estimate for that law had "even less content" and was "devoid of any

analysis or data supporting" its "conclusory statements" that the law would have no impact on expenditures or revenues. Pet. App. 126a–27a. The court also faulted the Governor for his failure to remedy the estimate's deficiencies despite the Board's repeated requests for additional information. Pet. App. 127a–28a. The court ultimately held that "no reasonable fact finder could conclude that the Board's challenge to the estimate" was arbitrary or capricious. Pet. App. 130a–31a.[3]

4. A unanimous panel of the court of appeals affirmed. Pet. App. 1a–42a. Like the district court, the appellate court began with the parties' dispute concerning the standard of review. Pet. App. 25a–28a. The Governor argued that the APA's arbitrary-and-capricious standard applied, including all "attendant principles developed through decades of administrative law jurisprudence." Pet. App. 25a–26a.[4] The Board advocated for an *ultra vires* standard or, in the alternative, a form of arbitrary-and-capricious review that did not incorporate "the entire apparatus" of federal administrative law. Pet. App. 26a–27a.

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[3] The court did not reach other grounds that would have supported injunctions against the four laws' enforcement—for example, that Acts 47 and 176 also violated § 2144(a) or that Acts 82 and 138 also violated § 2128(a)(2). Instead, at the court's suggestion, the parties jointly stipulated to dismiss all remaining claims and counterclaims.

[4] This was a change of position from the district court, where the Governor had advocated for a "substantial evidence" standard. See Pet. App. 25a n.11, 109a.

The court declined to address the Board's argument for an *ultra vires* standard, holding that the argument had been waived, even though the Board had won before the Title III court. Pet. App. 26a n.12. The court thus applied an arbitrary-and-capricious standard. *Id.*

While professing to "see logic on both sides," the court left for another day the question of the extent to which federal administrative law as a whole applied in reviewing Board decisions. Pet. App. 27a–28a. Instead, it addressed only one issue—whether the Board could support its positions with rationales and analysis provided only after litigation had already begun. The court rejected any "hard-and-fast rule" limiting the Board to contemporaneous explanations for its actions. Pet. App. 30a. Given the "unique nature of the [§ 2144(a)] process," the "relationship between the Commonwealth and the Board under PROMESA," and case-specific factors, the court thought the issue should be addressed on a "case-by-case basis." *Id.* For example, in the instant case, because the Governor had "short-circuited" the § 2144(a) interactive process by suing, it was appropriate for the Board to supplement its reasons in litigation. More fine-tuning of the standard would have to await other cases.

The court then turned to the merits and examined each of the four laws individually, as well as the correspondence between the Governor and the Board concerning each law. Pet. App. 31a–40a. Based on the factual record, the court agreed with the district court's findings that the Board's determinations with respect to each law were neither arbitrary nor capricious. *Id.*

The Governor did not petition for rehearing. The Petition for a writ of certiorari followed.

REASONS FOR DENYING THE PETITION

I. None of the Petition's Questions Are Properly Presented in This Case.

The Petition primarily concerns the standard of review that courts should apply to determinations by the Board that a Puerto Rico law "impairs or defeats" the purposes of PROMESA (§ 2128(a)) or that the Commonwealth has not complied with the rules governing new legislation (§ 2144(a)). The Governor argues that the proper standard is arbitrary-and-capricious review, incorporating all the "key principles of administrative law" contained in the APA. Pet. 20. The Governor bases his position on the idea that the Board is an administrative agency and therefore bound by those principles. Pet. 24–25.

That central premise is fundamentally flawed. As the court of appeals recognized, the Board is indisputably not a federal agency, and therefore the APA by its terms does not apply. *See* 48 U.S.C. § 2121(c)(2); Pet. App. 27a. Nor is there any basis for viewing the Board as an agency of the Puerto Rico Government. The court of appeals repeatedly stressed the "unique" nature of the Board, and its "unique" relationship with the Commonwealth, including the "tremendous degree of authority" it had been granted over Puerto Rico's economy, far more than any ordinary agency would possess. Pet. App. 27a, 30a. At the same time, the court found that the Board bore some "operational similarity" to an agency. Pet. App. 28a. Facing those

conflicting attributes, the court opted to take a middle road, holding that *particular* administrative-law principles might apply, to be decided in the first instance by the trial court on a case-by-case basis, depending on the individual facts. *Id.*

Given the tentative and incomplete nature of the decision below, it would be imprudent for the Court to take up these questions on certiorari. This Court is a "court of review, not of first view." *Cutter v. Wilkinson*, 544 U.S. 709, 718 n.7 (2005); *see also Ret. Plans Comm. of IBM v. Jander*, 140 S. Ct. 592, 595 (2020) (explaining that Court does not typically pass on issues not decided in court of appeals). The court of appeals evidently believed that the scope of the Board's authority to invalidate territorial legislation should not be decided in one fell swoop, but rather should be worked out in the course of the dynamic relationship between the Board and the Commonwealth. As discussed below, there is no reason for this Court to jump ahead of the First Circuit in answering questions that have not been fully considered or answered and would benefit from further percolation.

A. The Standard of Review for Board Determinations Was Not Definitively Resolved Below and Should be Elaborated in Future Cases.

The Petition contends that the standard of review for Board determinations should be arbitrary-and-capricious review, incorporating the "key principles of administrative law" contained in the APA. Pet. 20–26. It also argues that, as a consequence, the Board

may never supplement the reasons it gives for its determinations at a later time. Pet. 26–34.

The decision below did not resolve either of those issues cleanly. First, the court of appeals declined to consider a crucial argument concerning the standard of review that it held was waived in this particular case. Pet. App. 26a n.12. Second, the court held that it was unnecessary to address all the "principles of administrative law" that Petitioners asserted should apply. Pet. App. 28a. Third, even as to the one principle it expressly considered—the need for contemporaneous reasons—the court held that it depended on "case-by-case" analysis. Pet. App. 30a. It would be imprudent to grant certiorari in a case where the questions presented were not decided in a full and comprehensive manner.

1. ***Whether the Standard is Arbitrary-and-Capricious Review.*** The Board argued below that the standard of review for Board determinations should not be arbitrary and capricious, but rather *ultra vires*. C.A. Resp. Br. 33–38. The logic of that position is straightforward. As explained above, the Board is not subject to the APA—a point the Governor concedes. *See* 48 U.S.C. § 2121(c)(2); 5 U.S.C. § 552(a); Pet. 21. No other statute (including PROMESA itself) sets forth a standard for reviewing Board determinations. In the absence of a statute, it is well settled that decisions by governmental entities are evaluated under an *ultra vires* standard—also known as "nonstatutory" review—which considers only whether the entity exceeded its statutory authority. *See Fed. Express Corp. v. U.S. Dep't of Com.*, 39 F.4th 756, 763–64 (D.C. Cir. 2022); *see also Leedom v.*

Kyne, 358 U.S. 184, 188 (1958); *Healing v. McAnnulty*, 187 U.S. 94, 108–10 (1902). The deferential *ultra vires* standard is particularly appropriate for determinations under § 2128(a), which grants special deference to the Board—invalidating any statute that would impair or defeat the purpose of PROMESA, "*as determined by the Oversight Board*." 48 U.S.C. § 2128(a) (emphasis added).

The court of appeals held that the Board waived its *ultra vires* argument, however. Pet. App. 26a n.12. By default, therefore, the court held that arbitrary and capricious was the standard. In a future case, however, where all arguments are preserved, the court of appeals may very well decide that *ultra vires* is the correct standard of review. *E.g.*, *B&B Hardware, Inc. v. Hargis Indus.*, 575 U.S. 138, 148 (2015) (noting that issue preclusion attaches only when an argument is actually litigated and determined by a valid and final judgment).

If the Court were to grant the Petition, it would need either (i) to ignore the waiver (or rule that the court of appeals was wrong to find waiver) and decide in the first instance whether *ultra vires* is the correct standard of review; or (ii) accept the waiver and determine the applicable standard without considering one of the primary candidates. Neither option is ideal. The more prudent approach would be to wait for a case where the *ultra vires* argument is squarely preserved and decided below. *See, e.g.*, ECF 30 in Adv. Pro. No.

22-00063 (D.P.R.) at 36–40 (Board preserving *ultra vires* argument at the district court).[5]

2. ***Whether All APA Administrative-Law Principles Apply.*** The Governor spends the bulk of the Petition arguing that the same administrative-law principles that apply when courts review federal agency decisions under the APA should apply to Board determinations under §§ 2144(a) and 2128(a). Pet. 20–34. The court of appeals was unwilling to go that far or to resolve that issue. Pet. App. 28a ("[T]o decide this appeal, we need not settle to what extent the universe of federal administrative law should be applied in reviewing Board determinations."). Again, there is no reason for this Court to grant certiorari to decide whether the applicable standard of review incorporates APA administrative-law principles when the court of appeals did not answer that question in the first instance.

What's more, the Petition's theory for why APA principles as a whole must apply makes little sense.

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[5] To be clear, the Board maintains that the waiver ruling below was wrong. The Board did not push for *ultra vires* review before the district court because there was precedent from that court applying arbitrary-and-capricious review (*see In re Fin. Oversight & Mgmt. Bd. for P.R.*, 616 B.R. at 252) and because its determinations in this case pass muster under any standard of review. It is hornbook law that as appellee at the court of appeals, the Board was permitted to seek affirmance on any ground supported by the record—including on the ground that its determinations satisfy *ultra vires* review. *See Schweiker v. Hogan*, 457 U.S. 569, 585 & n.24 (1982). The Board is not seeking this Court's review of the waiver ruling because it prevailed below.

In a single paragraph lacking any citations to authority, the Governor argues that the Board is an agency of *Puerto Rico* and therefore subject to review under Puerto Rico's "substantial evidence" standard. *See* 3 L.P.R.A. § 2175 ("LPAU" by its Spanish acronym). Pet. 25. He then contends that the substantial-evidence standard incorporates all the principles and case law handed down by federal courts under the APA. *Id.*

The Board is no more a Puerto Rico agency than a federal one, however. It was not established by the Puerto Rico government to implement or administer particular legislation. Instead, it was established by *Congress* as a kind of fourth branch of the territorial government. *See* 48 U.S.C. § 2121(b). Rather than operate under the oversight of the executive and legislative branches of Puerto Rico, the Board is expressly exempt from their control and is empowered to block legislative and executive actions that interfere with its mission. *See id.* § 2128(a)(1), (2). The territorial government lacks control over the appointment and removal of the Board's members. *Id.* § 2121(e). No Puerto Rico agency possesses such sweeping authority and autonomy.

Treating the Board as a territorial agency subject to review under the LPAU would undermine PROMESA's basic premise that a "comprehensive approach . . . involving *independent* oversight" is "necessary" to resolve Puerto Rico's fiscal crisis. *Id.* § 2194(m)(4) (emphasis added). It would not make sense under Puerto Rico law, either, because the "principal function" of agency review under the LPAU is to ensure that Puerto Rico agencies do not exceed

the powers delegated to them by the Commonwealth. *See Assoc. Ins. Agencies, Inc. v. Comisionado de Seguros de P.R.*, 144 D.P.R. 425, 435 (P.R. 1997). The Board has not been delegated *any* power by the Commonwealth. Instead, it was established by Congress pursuant to Article IV of the Constitution. *See Aurelius*, 140 S. Ct. at 1656. Because the entire Petition hinges on the fallacy that the Board is a Puerto Rico agency, it should be denied.[6]

The Governor's argument that APA review must apply because the Board wields less authority than the D.C. Oversight Board did is similarly misguided. Pet. 24. The Governor cites no case applying *any* standard of review to the D.C. Oversight Board's actions. And regardless, the Board's authority to block legislation that it unilaterally deems contrary to PROMESA's purposes, *see* 48 U.S.C. § 2128(a)(2), is greater than the D.C. Oversight Board's authority was.[7] The Board has many powers the D.C. Oversight

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[6] The Governor's attempt to import APA review via Puerto Rico's sovereignty likewise misses the mark. Pet. 23–24. He argues that APA-style review must apply because Congress legislated knowing about Puerto Rico's self-governance. Pet. 23–24. He cites authority showing that, in the ERISA context, the Court has resorted to background principles of trust law when developing a standard of review. *See Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 111 (1989). But the Governor offers no authority for the proposition that principles of *self-governance* dictate an APA-like standard of review for entities like the Board. If anything, Congress's specification that the Board is not an agency shows that it did *not* intend for background APA principles to apply.

[7] The Governor also posits that the "fundamental" administrative principles on which he relies derive not from the APA (or

Board did not have, such as unilateral power over fiscal plans and budgets.

3. Whether the Board Must Provide All Reasons Underlying its Determinations Contemporaneously. The Governor maintains that the Board should be required to explain its decisions in all cases contemporaneously and never be allowed to supplement those reasons in litigation. The court of appeals offered no conclusive answer to that question, either, instead holding that it must be decided "on a case-by-case basis"—taking into account various fact-specific considerations such as whether the Commonwealth was given an opportunity to fairly respond to the Board's stated concerns, whether there is a "fully developed record," and whether the Commonwealth "short-circuited" the process by rushing to court, as happened here. Pet. App. 30a.

Until a clearer picture emerges in the lower courts concerning which types of circumstances and factors support limiting the Board to contemporaneous reasons, it would be premature for this Court to grant certiorari. Additional applications by the Board of these standards would also aid the decisional process here. Rather than extrapolating from a single data

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LPAU) but from notions of fairness in the "administrative process." Pet. 26. That is a distinction without a difference because the Board is not administrative agency.

point, the question should percolate further in the First Circuit and the district court.

B. Whether the Board's Determinations Here Were Arbitrary and Capricious Is Too Narrow and Fact-Specific to Warrant Review.

The Petition's third question—whether the court of appeals correctly affirmed that the Board's determinations regarding Acts 47, 82, 138, and 176 were not arbitrary and capricious—is far too narrow and factbound to warrant review. Determining whether a particular decision is arbitrary and capricious necessarily requires a "searching and careful" "inquiry into the facts." *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971). That was true below: To decide whether the Board's determinations with respect to the four statutes at issue survived judicial scrutiny, the courts below had to examine the content of each of those disparate statutes and the nearly-year-long course of communications between the Board and the Governor concerning each. Pet. App. 31a–41. The analysis for each of the four laws was unique and turned on the factual record specific to each law. *Id.* That the Petition takes seventeen pages to describe the background of the case confirms the point. Pet. 4–20.

A question that turns on the facts of a case "does not meet the standards that guide the exercise of [this Court's] certiorari jurisdiction." *Izumi Seimitsu Kogyo Kabushiki Kaisha v. U.S. Philips Corp.*, 510 U.S. 27, 34 (1993); *see also Cash v. Maxwell*, 132 S. Ct. 611, 613 (2012) (Sotomayor, J., respecting denial of

certiorari) ("Mere disagreement with the [court of appeals'] highly factbound conclusion . . . is an insufficient basis for granting certiorari."); *United States v. Johnston*, 268 U.S. 220, 227 (1925) ("We do not grant . . . certiorari to review evidence and discuss specific facts."). That is because factbound decisions have little effect on other cases. The Petition's third question is so closely tied to the specific facts of this case that its resolution would require the Court to delve deeply into the factual record, and any decision would have little impact on the state of the law. The Court's resources are better expended resolving questions with broader implications.

II. The Standard of Review for Board Determinations Is Not of Broad Importance.

Review is further unwarranted because the issues raised in this case are unique. Two of the statutes were evaluated for their substance, and two were not considered because the Government failed to provide formal estimates of their impacts.

The Petition contends that this Court's review is necessary because the Governor and the Board are supposedly constantly at loggerheads over §§ 2128(a) and 2144(a) and the Government cannot govern without clarity on what those provisions require. Pet. 35–36. Neither contention is true. The Governor knows exactly what type of legislation impairs or defeats the purposes of PROMESA under § 2128(a): statutes like Act 82, which cost the Commonwealth hundreds of millions of dollars that it does not have. And the Governor knows what § 2144(a) requires as well. Indeed,

his predecessor developed a policy to ensure compliance with the "formal estimate" requirement of § 2144(a). Pet. App. 9a n.6.

Contrary to the picture painted by the Governor, there has been little litigation between him and the Board over §§ 2128(a) or 2144(a). *Contra* Pet. 35–36. In fact, since PROMESA was enacted in 2016, there has been a grand total of *five* lawsuits involving those provisions.[8] There is no tide of litigation over §§ 2128(a) and 2144(a) demanding this Court's intervention, only a trickle. Given that the Board will be in existence for only a limited time, *see* 48 U.S.C. § 2149, a decision by the Court in this case will have little shelf life.

What's more, the questions presented are limited to one statute—PROMESA—and will have no effect on cases arising under any other statute. Although the Governor pretends that this case raises "administrative-law" questions (Pet. 20), that is demonstrably false because the Board is not a federal agency. *See* 48 U.S.C. § 2121(c)(2) (the Board "shall not be considered to be a department, agency, establishment, or instrumentality of the Federal Government").

The Governor also misses the mark when he argues that PROMESA's expedition provision shows that all questions arising under PROMESA are exceptionally important. Pet. 35 (citing 48 U.S.C.

[8] One of those cases settled almost immediately after it was filed. *See* ECF 6 in Adv. Pro. No. 21-00119 (D.P.R.). The other four were resolved by the district court, and only one (this case) was appealed.

§ 2126(d)). The expedition provision by its terms shows that what is important is a speedy final answer, not that every issue is important. 48 U.S.C. § 2126(d). And this Court has repeatedly rejected petitions brought under PROMESA, which belies any notion that questions arising under the statute are *per se* important. *See, e.g.*, *Fin Oversight & Mgmt. Bd. for P.R. v. Federacion de Maestros de P.R. (In re Fin. Oversight & Mgmt. Bd. for P.R.)*, 32 F.4th 67 (1st Cir. 2022), *cert. denied*, 143 S. Ct. 445 (2022); *Pinto-Lugo v. Fin. Oversight & Mgmt. Bd. for P.R. (In re Fin. Oversight & Mgmt. Bd. for P.R.)*, 987 F.3d 173 (1st Cir. 2021), *cert. denied*, 142 S. Ct. 74 (2021). By the same token, the fact that the Court has on occasion granted certiorari to answer questions concerning fiscal issues in the territories (Pet. 35) does not mean that every such case is certworthy. *See, e.g.*, *Assured Guar. Corp. v. Carrion (In re Fin. Oversight & Mgmt. Bd. for P.R.)*, 919 F.3d 121 (1st Cir. 2019), *cert. denied*, 140 S. Ct. 855 (2020) (case with significant fiscal impact on Puerto Rico's restructuring).

Finally, the Governor's contention that the decision below has "profound" implications for Puerto Rico's sovereignty is overblown. Pet. 34–35. The decision below turned on its facts—including the facts that (i) two of the statutes at issue would cost the Commonwealth a significant sum of money with no offsetting revenues; and (ii) the Governor refused to provide certain information requested by the Board. *See* Point III, *infra*. No broader rule was handed down. To the extent there has been an incursion into Puerto Rico's sovereignty, it is the result of Congress enacting PROMESA pursuant to the Territories Clause, not anything to do with the decision below.

III. The Decision Below Was Correct.

Review is further unwarranted because the result below was undoubtedly correct under *any* standard of review. The Board was justified in blocking the enforcement of each of the four statutes at issue either because the law blatantly conflicted with PROMESA's purposes or because the Governor refused to provide information concerning its fiscal impact, as required by 48 U.S.C. § 2144(a).

This is not a close case. As explained in more detail below, the Governor admits that Act 47 could cost the Commonwealth up to $200 million over five years. *See* Pet. App. 38a. Act 47 is thus plainly significantly inconsistent with the fiscal plan (which requires laws to be revenue-neutral) and would impair or defeat the purposes of PROMESA under § 2128(a). Similarly, the estimates provided by the Governor for Acts 82 and 138 were manifestly deficient under § 2144(a)—consisting of just a handful of conclusory sentences. *See* Pet. App. 32a, 35a.

Because the facts are so one-sided, this is a poor vehicle in which to define the standards governing Board determinations. *See, e.g.*, *Gentile v. State Bar of Nev.*, 501 U.S. 1030, 1057 (1991) (case was a "poor vehicle for defining with precision the outer limits under the Constitution of a court's ability to regulate an attorney's statements about ongoing adjudicative proceedings" because the speech at issue was "so innocuous"); *Illinois v. McArthur*, 531 U.S. 326, 339 (2001) (Stevens, J., dissenting) ("Because the governmental interest implicated by the particular criminal prohibi-

tion at issue in this case is so slight, this is a poor vehicle for probing the boundaries of the government's power to limit an individual's possessory interest in his or her home pending the arrival of a search warrant."). To the extent the court is interested in defining the applicable standard of review, it should await a case where the propriety of the Board's actions is at least subject to a serious challenge.[9]

a. Act 47. By the Governor's own estimate, Act 47 had the "potential to reduce revenues by about $200 million over five years by creating tax incentives with no offsets to make [them] revenue neutral." Pet. App. 38a. The Board determined that such a vast loss of revenue would undermine the Board's revenue projections, enlarge deficits, make it more difficult to achieve fiscal targets, and diminish funds that the Commonwealth could use to promote economic growth. *See* App. 142a; *see also* 48 U.S.C. § 2141(b)(1)(A), (D), (G), (I), (J). The Board further determined that Act 47 would impair or defeat the purposes of PROMESA by hindering the Commonwealth's ability to attain fiscal stability and market access. *See* App. 141a–43a; *see also* 48 U.S.C.

[9] The Governor's act of racing to court to sue over the four laws creates further vehicle issues. The decisions below do not turn exclusively on the propriety of the Board's determinations under §§ 2128(a) and 2144(a) but also on the Governor's refusal to follow the § 2144(a) process. *E.g.*, Pet. App. 32a–34a. If the Court wants to address the standard for reviewing the Board's determinations, it should await a case where those determinations are the sole determinative factor, not a case like this one where the Governor's actions are also at play.

§ 2121(a). Those determinations were reasonable under any yardstick. As the court of appeals explained, it is "plain that a law that reduces revenues by up to $200 million with no offsetting measures . . . would 'impair or defeat the purposes of' PROMESA[.]" App.39a–40a & n.20. The Petition offers no meaningful response to those points.

Instead, the Governor faults the Board for failing to specify precisely how much revenue a law must cost the Commonwealth before the law is significantly inconsistent with the fiscal plan and impairs or defeats PROMESA's purposes. Pet. 30–31. But the Board was not required to engage in such precise line-drawing exercises. As the court below explained, $200 million on its face is not a *de minimis* amount of money. App. 39a–40a n.20. The Puerto Rico Governor and Legislature were obviously on notice that Act 47 was significantly inconsistent with the Commonwealth's fiscal plan and that its enforcement would impair or defeat the purposes of PROMESA.

The Governor also complains that his communications with the Board about Act 47 "left [him] with a raft of questions" about what constitutes a "formal estimate." Pet. 29. It is unclear why that matters. The courts below enjoined Act 47 not because its estimate was deficient under § 2144(a) but because the act itself "directly thwart[ed]" the Board's fiscal-responsibility measures and thus impaired and defeated the purposes of PROMESA under § 2128(a). *See* Pet. App. 146a.

b. Act 176. The Board reasonably determined that Act 176—which granted Commonwealth employees additional vacation and sick leave—would impair "PROMESA's purpose of securing the Commonwealth's fiscal solvency" by rendering the public workforce both less productive and more costly. Pet. App. 36a–37a. The Governor "did not refute this determination" below, Pet. App. 37a, and he does not refute it in the Petition, either. The Board further determined that Act 176 would undermine measures in the fiscal plan concerning the efficient provision of essential public services, the right-sizing of the public workforce, and the improvement of fiscal governance and internal controls. *Id.*; *see also* 48 U.S.C. § 2141(b)(1)(B), (F). For those reasons, the Board determined that Act 176 would impair or defeat the purposes of PROMESA. App. 37a–38a.

As the court of appeals explained, the Board's determinations concerning Act 176 were "reasonable" and dictated by "[c]ommon sense and basic principles of economics." App. 36a–37a. The Petition does not explain why any of those determinations by the Board were impermissible. Instead, the Governor complains that he was not allowed to "cure" Act 176's "alleged defects" because the Board failed to raise in prelitigation correspondence its concern that Act 176 would conflict with the fiscal plan's goal to right-size the public workforce. Pet. 33–34. But the Governor has only himself to blame for short-circuiting the prelitigation § 2144(a) process by running to court to sue the Board. Pet. App. 21a, 37a–38a. And in any event, the right-sizing issue was not necessary to the decision below. The court of appeals sustained the Board's determination that Act 176 "would impair implementation

of the fiscal plan and PROMESA's purpose" based solely on the Board's determinations that Act 176 would decrease worker productivity and increase expenditures. Pet. App. 37a. The Board undisputedly articulated those rationales to the Governor in the prelitigation communications.

c. Act 82. The Governor's estimate accompanying Act 82—which stated that the law would have an "approximate impact of $475,131.47" on the Commonwealth's expenditures—was the epitome of conclusory. Pet. App. 31a–32a. It did not explain how the "approximate" figure was derived or provide supporting data or analysis, and it did not state whether the $475,131.47 was the cost for one year or for the entire five-year span covered by the Commonwealth's fiscal plan. *Id.* On any concept of a formal estimate, this failed.

The Board thus reasonably directed the Governor to submit a formal estimate by providing more information to explain and support his estimate. *See* 48 U.S.C. § 2144(a)(4)(A). The Governor refused to comply with that directive, which allowed the Board to block Act 82's implementation. *See id.* § 2144(a)(5). The statutory analysis is that straightforward.

The Petition does not address any of these points. Instead, it merely complains that, in rejecting the estimate, the Board asked the Governor to consider whether Act 82 would jeopardize federal funding and asked him to explain a discrepancy between the estimate's cost and a PRDH official's public comments about the law's impact. Pet. 28–29. Neither of those requests motivated the decision below, however. *See*

Pet. App. 33a n.14, 34a. The court below found for the Board because Act 82's estimate lacked any supporting data, and the Governor failed to comply with the directive to supply that missing information. Pet. App. 31a–33a. The federal funding issue and the PRDH testimony are red herrings.

d. Act 138. As the court of appeals explained, the estimate accompanying Act 138—which contained only the lone statement that the act would have "no impact on expenditures or revenues"—was "conclusory and entirely unsubstantiated." Pet. App. 35a. It contained "even less content" than the facially inadequate Act 82 estimate and was undisputedly "devoid of any analysis or data supporting" the bald assertion about the act's purported lack of fiscal impact. Pet. App. 126a–27a.[10]

As with Act 82, the Board directed the Governor to provide a formal estimate of Act 137's impact on revenues and expenditures, and the Governor repeatedly refused to comply with that directive. As with Act 82, the Governor's failure to comply with the Board's directive permitted the Board to block the enforcement of Act 137. *See* 48 U.S.C. § 2144(a)(5). The Petition does not dispute any of these points.

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[10] The deficiency of the Act 138 estimate, as well as that of Act 82's estimate, was "unsurprising," as the district court found, because the Governor, by his own admission, failed to fully assess the laws' effect on expenditures and revenues in preparation of the estimates. App. 126a.

CONCLUSION

For the foregoing reasons, the Petition for a writ of certiorari should be denied.

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Respectfully submitted,

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