No. 22-484

IN THE

Supreme Court of the United States

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

Petitioners,

v.

THE FINANCIAL OVERSIGHT AND MANAGEMENT BOARD FOR PUERTO RICO,

Respondent.

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

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INTRODUCTION

The Board attempts to reframe this case as a troubled vehicle for an "esoteric question." Opp. 1. It is not. While Puerto Rico is still a colony and its people—American citizens—intolerably deprived of fundamental rights, avenues do exist for its people to participate in the territory's governance by electing a government to enact and enforce laws. Because Puerto Rico is not a state, Congress can interfere with those rights, and did to some extent by enacting PROMESA. This case involves the question of how deep PROMESA's entrenchment cuts, and what level of power Puerto Rico's government retains under this novel statute. This Court has previously recognized the importance of questions related to PROMESA's balance of power between a territory's democratically elected government and a federally appointed oversight board. The elected government and the oversight board sometimes have very different public policy goals, and those differences impact the day-to-day lives of millions of U.S. citizens living in Puerto Rico. Because resolving the questions presented will clarify this balance and streamline litigation in Puerto Rico and any future territories that become subject to an oversight board under PROMESA, this Court should grant certiorari.

ARGUMENT

I. THIS CASE CLEANLY PRESENTS THE QUESTION OF WHAT STANDARD OF REVIEW GOVERNS THE BOARD'S DETERMINATIONS UNDER PROMESA.

The Board argues that the First Circuit "did not definitively answer the question" of what standard of

review governs the Title III Court's evaluation of the Board's decisions pursuant to the Section 204(a) process. Opp. 1. Not so. The First Circuit rejected the well-established body of administrative law developed under the arbitrary-and-capricious standard in favor of a flexible approach that violates basic administrative law principles and leaves Puerto Rico's democratically elected Government in the dark as to what the Board is actually permitted to do. *See* App. 30a-31a, 40a. That was error.

The Board also contends that this case is an improper vehicle for determining the standard of review because the First Circuit did not consider an alternative, *ultra vires* standard. Opp. 2. The Board urges this Court to wait until another dispute erupts that would allow the Board to present this standard for consideration. *Id.* 18. The short and complete response is that the *ultra vires* standard can never apply because the Board is judicially estopped from advocating it.

A. While the First Circuit expressly adopted an arbitrary-and-capricious standard of review for Board decisions, App. 40a ("[W]e conclude that the Board did not act arbitrarily and capriciously in exercising its authority under PROMESA."), the court divorced that standard from basic principles of administrative law, such as the prohibition on post-hoc justifications. App. 30a. Nothing about these holdings was "tentative" or "incomplete," such that they are not suitable for this Court's review. Opp. 16.

Nor would these questions "benefit from further percolation." *Id.* In fact, the standard of review has been percolating since PROMESA was enacted in

2016, kicking off the cycle of litigation between Puerto Rico's elected Government and the Board. The Title III Court first adopted the arbitrary-and-capricious standard in 2020. *See In re Fin. Oversight & Mgmt. Bd. for P.R.*, 616 B.R. 238, 252-53 (D.P.R. 2020). Since then, both the Title III Court and the First Circuit have consistently applied that standard in litigation concerning Section 204(a). *See* App. 40a, 110a, 116a; *In re Fin. Oversight & Mgmt. Bd. for P.R.*, 634 B.R. 187, 202 (D.P.R. 2021). If the Board were indeed to "be in existence for only a limited time," as the Board contends, Opp. 25; *but see infra* 10-11, that is all the more reason that this Court should intervene now to correct this error before the Board is allowed to override laws enacted by the democratically elected Government of Puerto Rico.

As the Petition explained, the toothless standard the Title III Court applied and the First Circuit affirmed is contrary to the way Puerto Rico is currently governed, which PROMESA did not erase. While Congress can radically modify democratic governance in Puerto Rico because it is a colony, not a state, it did not clearly do so via PROMESA. *See In re Fin. Oversight & Mgmt. Bd. for P.R.*, 583 B.R. 626, 634 (D.P.R. 2017) (Congress did not give the Board the "power to supplant, bypass, or replace the Commonwealth's elected leaders and their appointees in the exercise of their managerial duties whenever the Oversight Board might deem such a change expedient."). PROMESA in fact made clear that the elected Government—the only entity that reflects the will of U.S. citizens living in Puerto Rico—should retain a meaningful role in public policy-making. *See* Pet. 23-24.

The Board's opposition shows exactly why the First Circuit's error must be corrected. By arguing that it should not be treated as a Puerto Rican *or* a federal agency, the Board sets itself out as a supercharged "fourth branch" of Puerto Rico's Government operating outside "the oversight of the executive and legislative branches of Puerto Rico" and immune from meaningful judicial review. Opp. 20; *see also id.* 17-18. The Board complains that the Government has cited no authority for the "fallacy that the Board is a Puerto Rico agency." Opp. 20-21. But the authority for this position, as the Board well knows, is PROMESA itself, which establishes the Board as an "entity within the territorial government." 48 U.S.C. § 2121(c)(1); *see also Fin. Oversight & Mgmt. Bd. for P.R. v. Aurelius Inv., LLC*, 140 S. Ct. 1649, 1661-63 (2020) (holding that, "consistent with this statement," the Board has "primarily local duties").

In fact, the Board itself has embraced this reality when expedient in other litigation—for example, in arguing that the Board is entitled to sovereign immunity. *See Centro de Periodismo Investigativo, Inc. v. Fin. Oversight & Mgmt. Bd. for P.R.*, 35 F.4th 1, 15 (1st Cir. 2022), *cert. granted sub nom. Fin. Oversight & Mgmt. Bd. for P.R. v. Centro de Periodismo Investigativo, Inc.*, No. 22-96, 2022 WL 4651269 (U.S. Oct. 3, 2022). The Board's criticism is especially ironic because it is the Board that cites no authority for the proposition that it is an uber-agency exempt from longstanding federal and Puerto Rican standards developed to ensure fairness in the administrative process.

B. The Board is equally misguided in arguing that

this case is a poor vehicle for resolving the standard of review because the First Circuit held that "one of the primary candidates" for that standard "was supposedly waived." Opp. 2. The Board frames this waiver in an oddly passive way, but it stemmed from the Board's own intentional—and successful—litigation strategy that judicially estops it from advocating an *ultra vires* standard in future litigation.

The Board had every opportunity to argue for an *ultra vires* standard to the Title III Court—both in this and prior litigation, *see In re Fin. Oversight & Mgmt. Bd. for P.R.*, 616 B.R. 238—but did not do so. Instead, it repeatedly argued for an arbitrary-and-capricious standard—and persuaded the Title III Court to adopt that standard. *See, e.g.*, *In re Fin. Oversight & Mgmt. Bd. for P.R.*, No. 20-ap-80 (Bankr. D.P.R. Oct. 5, 2020), ECF No. 16, at 15; *In re Fin. Oversight & Mgmt. Bd. for P.R.*, No. 20-ap-82 (Bankr. D.P.R. Oct. 19, 2020), ECF No. 29, at 14. The Board did not mention an *ultra vires* standard until its response brief in this appeal, which the First Circuit noted "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." App. 26a. Thus, any "vehicle" issue arising from the unavailability of *ultra vires* review is of the Board's own making, stemming from its tactical decision not to raise the argument before the Title III Court in this or prior cases concerning the Board's authority. This Court should not sanction such gamesmanship by allowing the Board to manufacture a vehicle issue in this manner.

And because the Board would be judicially

estopped from arguing for an *ultra vires* standard in *any* future litigation arising from the Section 204(a) process, the Court would wait in vain "for a case where the *ultra vires* argument is squarely preserved and decided below." Opp. 18; *see New Hampshire v. Maine*, 532 U.S. 742, 749 (2001) ("The doctrine of judicial estoppel prevents a party from asserting a claim in a legal proceeding that is inconsistent with a claim taken by that party in a previous proceeding." (citing 18 Moore's Federal Practice § 134.30 (3d ed. 2000))). Regardless, the Board's argument that *ultra vires* review governs fails on its face. *Ultra vires* review is a form of *non-statutory* review when an agency acts "in excess of its delegated powers" and "there is no alternative procedure for review of the statutory claim." *Fed. Express Corp. v. U.S. Dep't of Com.*, 39 F.4th 756, 763 (D.C. Cir. 2022) (citation omitted); *see also Leedom v. Kyne*, 358 U.S. 184, 188 (1958). But the Board does not dispute that PROMESA provides for judicial review of its Section 204(a) determinations; the question is what *statutory* standard of review governs those determinations. The *ultra vires* cases have no relevance to this question.

II. THE FIRST CIRCUIT INCORRECTLY UPHELD THE BOARD'S DETERMINATIONS, THOUGH THE COURT NEED ONLY DETERMINE THE APPLICABLE STANDARD OF REVIEW AND REMAND.

A. Contrary to the Board's suggestion, granting certiorari does not require this Court to decide narrow, factbound questions or become mired in the factual record. Opp. 23-24. Rather, first and foremost, this case presents important questions purely of law

about what standard of review should govern a district court's evaluation of the Board's review of Puerto Rico's legislation.

As this Court has recognized, "where findings are infirm because of an erroneous view of the law, a remand is the proper course unless the record permits only one resolution of the factual issue." *Pullman-Standard v. Swint*, 456 U.S. 273, 292 (1982). As described below, the record here makes clear that the Title III Court incorrectly applied an arbitrary-and-capricious standard to the Acts at issue. *See infra* Part II.B; Pet. 28-30. But this Court need not reach that question. If it prefers, it may instead choose to decide the applicable standard of review and remand to the Title III Court to apply that standard. *See*, *e.g.*, *Johnson v. California*, 543 U.S. 499, 515 (2005) (reversing and remanding for the lower court to apply the correct legal standard in the first instance); *Consol. Rail Corp. v. Gottshall*, 512 U.S. 532, 557-58 (1994) (same); *Wilson v. Seiter*, 501 U.S. 294, 306 (1991) (same).

B. Should the Court choose to reach all three questions presented, however, the record demonstrates that the courts below misapplied the ostensible arbitrary-and-capricious standard. For instance, the Board rejected the Government's certifications of Acts 82 and 138 partly because they did not include a federal preemption analysis—though the Title III Court noted that the Board had provided "practically no articulable basis" for this concern. App. 119a; Pet. 28. The Board objects that it was not seeking a full preemption analysis "but merely confirmation that the Governor had considered whether the acts

jeopardized federal funding." Opp. 9 n.2. First, this claim is flatly disproven by the record, which shows that the Board requested "an explanation as to why Act 82-2019 is not preempted." App. 62a. Second, because the Board has never described a substantive standard for what legislation "impair[s] or defeat[s] the purposes of" PROMESA or is "significantly inconsistent with" a fiscal plan, 48 U.S.C. § 2128(a)(2); *id.* § 2144(a)(4)(B), the Government is left guessing as to what degree of analysis *is* required for the laws at issue, and whether that analysis might be required to satisfy the Board as to future legislation. This ambiguity renders the Board's decision-making process arbitrary and capricious. *See U.S. Postal Serv. v. Postal Regul. Comm'n*, 963 F.3d 137, 143 (D.C. Cir. 2020).

And the Board offers no response to the fact that it has declined to challenge laws with greater estimated fiscal impacts than the laws at issue here. *See* Pet. 31. Because the Board has failed to "satisfactorily explain why [the] challenged standard embraces one potential application but leaves out another, seemingly similar one," it has not met "the requirement of reasoned decisionmaking." *ACA Int'l v. FCC*, 885 F.3d 687, 700 (D.C. Cir. 2018) (citation omitted).

III. THE PETITION PRESENTS QUESTIONS THAT ARE VITAL TO PUERTO RICO'S GOVERNANCE.

A. PROMESA represents an unprecedented incursion on Puerto Rico's territorial self-rule. This incursion exists only because of the intolerable colonial status imposed on Puerto Rico by the Constitution. If Puerto Rico were a state, Congress could not have granted the Board such sweeping power. Given

Puerto Rico's current status, however, its 3.2 million U.S. citizens[1] are "required to live under budgets and Fiscal Plans with which their elected representatives do not agree"; "the laws [their] elected representatives enact[,] as well as the contracts, rules, regulations, and executive orders they issue[,] may be enjoined in the Board's discretion"; and "they must fund the Board—one they did not elect—with the taxes they pay." *United States v. Montalvo-Febus*, 254 F. Supp. 3d 319, 328 n.12 (D.P.R. 2017).

The need to resolve the questions presented is especially pressing in light of this undemocratic reality. If the will of the Puerto Rican people is to be usurped by the federally appointed Board, determining the procedural and substantive limits on the Board's power is essential to preserving the integrity and credibility of the arrangement.

B. The Board seeks to minimize the import of the questions presented by asserting that only five lawsuits regarding Sections 2128(a) or 2144(a) have been filed since PROMESA was enacted in 2016. Opp. 25. Contrary to the Board's calculation, at least eight legislative acts have been stalled by PROMESA litigation[2]—not to mention countless others that have been slowed by rounds and rounds of pre-litigation

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[1] U.S. Census Bureau, *Quick Facts: Puerto Rico*, https://www.census.gov/quickfacts/PR (last visited Mar. 3, 2023).

[2] *See In re Fin. Oversight & Mgmt. Bd. for P.R.*, 616 B.R. 238 (Law 29); App. 49a (consolidated litigation regarding Acts 47, 82, 138, 176, 181); *In re Fin. Oversight & Mgmt. Bd. for P.R.*, 634 B.R. 187 (Act 7); *In re Fin. Oversight & Mgmt. Bd. for P.R.*, No. 22-ap-63 (Bankr. D.P.R.) (Act 41).

correspondence between the Government and the Board. Given that PROMESA empowers the Board to seek judicial enforcement of its actions at any time, *see* 48 U.S.C. § 2124(k), the lack of clarity as to the standard of review governing that enforcement often forces the Government to capitulate to the Board's decisions, even when they are arbitrary or capricious, under threat of sanctions. *See, e.g.*, C.A. App. 222, 691, 1035 (threatening enforcement action should the Government not comply with the Board's demands).

C. In addition, any standard of review that the Court announces in this case will have wide-ranging ramifications for Puerto Rico and other U.S. territories. PROMESA gives the Board authority over every "statute, resolution, policy, or rule" that the Government may adopt. 48 U.S.C. § 2128(a)(2). It also applies to other United States territories, not just to Puerto Rico. *Id.* § 2104(8), (20). Given the fiscal and political importance this case presents to the territories, this Court should grant certiorari, as it has historically done. S*ee, e.g., Centro de Periodismo*, 2022 WL 4651269 (granting certiorari to resolve whether and to what degree the Board may assert sovereign immunity); *Aurelius*, 140 S. Ct. at 1656 (granting certiorari to resolve whether Appointments Clause governs selection of Board members); *Territory of Alaska v. Am. Can Co.*, 358 U.S. 224, 225 (1959) (certiorari granted "in view of the fiscal importance of the question to [the Territory of] Alaska.").

D. Further, the Board's assertion that it "will be in existence for only a limited time" is speculative and misleading. Opp. 25. On the contrary, the Board's existence will not end in the near future, making

guidance from the Court all the more necessary. In fact, the unprecedented encroachment on Puerto Rico's governance allowed by PROMESA might empower the Board to determine when to relinquish its self-attributed powers unless the Court places a clear standard as a safeguard to avoid this overreach of authority. *See* 48 U.S.C. § 2149 (providing that Board shall terminate "upon [its own] certification" that certain conditions have been met, including that "for at least 4 consecutive fiscal years" "the expenditures made by the territorial government during each fiscal year did not exceed the revenues of the territorial government during that year").

*

If allowed to stand, the rule adopted by the First Circuit will further erode communications and relations between the Government and the Board, hinder Puerto Rico's fiscal recovery, and undermine Congress's carefully crafted process for evaluating new laws under Section 204(a). The Court's intervention in this case would help end the parties' cycle of litigation and clear the path for achieving PROMESA's goal of long-term fiscal stability for the Commonwealth.

CONCLUSION

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

Respectfully submitted.

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March 7, 2023