No. 23-674

IN THE

Supreme Court of the United States

RAFAEL HERNANDEZ-MONTAÑEZ

Petitioner

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

BRIEF OF HON. JOSE LUIS DALMAU, PRESIDENT OF THE PUERTO RICO SENATE AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF *AMICI CURIAE*[1]

The individual serving as Amicus curiae holds the esteemed position of President of the Puerto Rico Senate[2], having been duly elected in accordance with the provisions set forth in the Constitution of the Commonwealth. The legislative body known as the Senate of Puerto Rico, exercising its inherent powers and prerogatives, duly passed a bill that subsequently received the formal endorsement and signature of Governor Pedro Pierluisi, acting within the confines of his constitutionally prescribed jurisdiction and authority. In accordance with the statutory framework delineated in the Puerto Rico Oversight, Management, and Economic Stability Act (referred to hereinafter as "PROMESA"), 48 U.S.C. § 2101 et seq., the Financial Oversight and Management Board of Puerto Rico (hereinafter referred to as "FOMB") has posited the contention that Act Number 41-2022 (hereinafter referred to as "Act 41"), which seeks to reinstate certain limited privileges previously enjoyed by private enterprise workers prior to January 2017, may ostensibly engender an economic downturn and impede the overarching objectives enshrined within PROMESA. The Senate of Puerto Rico expresses profound concern regarding the District Court's erroneous interpretation,

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[1] Pursuant to Supreme Court Rule 37.6, Amici makes the following disclosure: No counsel for a party to this matter authored any portion of this brief or made a monetary contribution to fund the preparation or submission of this brief. The parties received timely notification of the filing of this brief pursuant to Supreme Court Rule 37.2.

[2] Senator Jose Luis Dalmau has served in the Puerto Rico Senate from 2001 to the present and was elected its president in 2021.

initially put forth by the FOMB, which asserts that Act 41 failed to come into existence and/or never had legal existence. The esteemed President of the Senate of Puerto Rico asserts that the actions undertaken by the FOMB have transgressed upon the constitutional prerogatives bestowed upon the Legislative Assembly of Puerto Rico, thereby engendering substantial apprehension and distress. In light of the fact that both the District Court and the PROMESA lack the jurisdiction to invalidate Act 41, the Senate of Puerto Rico hereby presents this amicus curiae brief in a respectful manner, in support of the Defendant Appellant's brief.

The brief is filed in support of petitioner.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

Amici respectfully implore this Honorable Court to use its power to overturn the District Court's ruling regarding the legal restrictions governing the FOMB. The present matter at hand carries substantial significance in relation to the governance of Puerto Rico.

Setting up the FOMB gave it the power to start bankruptcy proceedings on behalf of Puerto Rico or its agencies, as required by the PROMESA, more specifically in line with 48 U.S.C. § 2164. Under the provisions set forth in the PROMESA, it is established that FOMB possesses the authority to commence bankruptcy proceedings on behalf of Puerto Rico or its instrumentalities. This authority is explicitly outlined in 48 U.S.C. § 2144 (a)(5).

The PROMESA legislation represents a temporary bankruptcy provision specifically designed to address the financial challenges faced by territories, including Puerto Rico. The stipulation necessitates that Puerto Rico undertake the restoration of its access to both short-term and long-term credit markets, ensuring that such access is provided at rates that are deemed reasonable and sufficient. Additionally, Puerto Rico is mandated to achieve a state of fiscal equilibrium by successfully balancing its budgets for a consecutive span of four fiscal periods. The termination of the FOMB shall be deemed effective upon the successful attainment of a state of equilibrium in

relation to four distinct budgets. 48 U.S.C. § 2149 is a provision within the federal statutory framework that warrants our attention.

A district court judge is named in Title III of the PROMESA as the right person to handle bankruptcy cases that the FOMB brings on behalf of the regulated entities in the territory. The Governor is constitutionally obligated to provide specific disclosures, encompassing prognostications regarding the potential ramifications of the newly enacted legislation on the public treasury as well as adherence to the pertinent certified fiscal plan. Notwithstanding the aforementioned, it is imperative to duly contemplate the mandate of the FOMB insofar as it pertains to the guarantee of unimpeded financial rehabilitation when undertaking the task of construing the said obligation. The FOMB duly engaged the services of an esteemed economist to undertake a comprehensive inquiry into the matter at hand. Regrettably, the economist's diligent efforts did not yield any estimation that could be deemed conclusive or predictive in nature. The authority vested in the FOMB to suspend legislation in Puerto Rico is a temporary and discretionary power granted in response to emergency circumstances. It is important to note that the assertion suggesting that Puerto Rico's sovereignty has been nullified by a recently enacted Organic Act lacks a factual basis.

The position of the Senate of Puerto Rico is that, pursuant to PROMESA Section 204(a) (5), a law that has been duly enacted cannot be rendered null and void *ab initio* by the District Court. The scope of the District Court's authority is limited to enjoining the

enforcement or application of the law, and it cannot be reasonably interpreted that the District Court has the power to declare a duly enacted law null and void from its inception.

ARGUMENT

I. BACKGROUND

The acquisition of Puerto Rico by the United States transpired through military occupation subsequent to the Spanish-American War of 1898. Pursuant to the Treaty of Paris, a legally binding agreement executed in December 1898 and subsequently ratified in April 1899, Spain duly and officially relinquished its sovereignty over the aforementioned island. See Treaty of Peace between the United States of America and the Kingdom of Spain, April 11, 1899, 30 Stat. 1754.

Following a transitory phase of military governance, the esteemed legislative body known as Congress duly promulgated an organic act, commonly referred to as the Foraker Act, with the noble purpose of instituting a civilian administration in the territory of Puerto Rico. See Organic Act of 1900, Ch. 191, 56th Cong., 1st Sess., 31 Stat. 77 (1900). The aforementioned Act established the framework for the Executive Branch, which is under the direction of a Governor and an Executive Council. Under the advice and consent of the Senate, the President of the United States appoints these individuals. Additionally, the Act established a House of Delegates, elected by eligible voters in Puerto Rico. Furthermore, it established a district court for Puerto Rico, presided over by a

district judge appointed by the President of the United States for a duration of four years. See id. §§ 17, 18, 27, 34.

Section 27 of the Foraker Act of 1900 unequivocally delineated the modality by which legislative acts were to be effectuated, namely through the auspices of Congressional authorization: "That all local legislative powers hereby granted shall be vested in a legislative assembly * * *." Organic Act of 1900, Ch. 191, 56th Cong., 1st Sess., 31 Stat. 77 (1900). In accordance with the provisions delineated in Section 31, Congress has explicitly preserved its prerogative to scrutinize local legislation: "That all laws enacted by the legislative assembly shall be reported to the Congress of the United States, which hereby reserves the power and authority, if deemed advisable, to annul the same." Id. The aforementioned citation serves as a legal reference to support the proposition or argument previously made.

In 1917, the Foraker Act was replaced by a subsequent organic act, commonly referred to as the Jones Act. This legislative measure introduced an elected Senate and bestowed upon the inhabitants of Puerto Rico a comprehensive enumeration of rights as well as the status of United States citizenship. See Organic Act of 1917, Pub. L. No. 64-368, 39 Stat. 951 (1917).

The Jones Act, as preserved by Section 34, incorporates the verbiage of the Foraker Act, which confers upon Congress the prerogative to scrutinize all territorial legislation: "All laws enacted by the legislature of Porto Rico shall be reported to the Congress of the United States, as provided in Section twenty-three

of this Act, which hereby reserves the power and authority to annul the same." 39 Stat. 951, 961.

In the year 1950, in response to the prevailing circumstances arising from the aftermath of the Second World War and in light of the escalating discontent with the existing colonial frameworks as well as instances of significant outbreaks of violence, the Congress of the United States duly passed Public Law 600. This pivotal legislation brought about a profound alteration in the manner in which Puerto Rico was governed. See Pub. L. No. 81-600, 64 Stat. 319. The aforementioned statute, "[f]ully recognizing the principle of government by consent," offered the people of Puerto Rico "in the nature of a compact" the authority to "organize a government pursuant to a constitution of their own adoption." 48 U.S.C. § 731b. Upon the successful endorsement of the aforementioned statute by the duly qualified voters of Puerto Rico through a referendum, the legislative body was duly empowered to exercise its authority in summoning a constitutional convention with the express purpose of formulating a constitution tailored to the unique circumstances and aspirations of Puerto Rico. 48 U.S.C. § 731c.

On the auspicious occasion of June 4, 1951, a momentous popular referendum was conducted, wherein the esteemed populace of Puerto Rico, in their collective wisdom, resoundingly embraced the compact proffered by the august Congress. Subsequently, a Constitutional Convention, spanning the temporal realm from September 1951 to February 1952, was convened to deliberate upon matters of utmost constitutional import. The aforementioned convention was responsible for the drafting of the Constitution of

Puerto Rico. The proposed Constitution was subsequently presented to the citizens of Puerto Rico and once again received resounding approval (with a majority exceeding 80% of the vote) in a subsequent plebiscite held on March 3, 1952.

According to its preamble, the esteemed citizens of Puerto Rico, also known as "we, the people of Puerto Rico," have duly ordained and established the Constitution of Puerto Rico. P.R. Const. PMBL. The aforementioned action engendered the establishment of a novel political entity, known as the Commonwealth of Puerto Rico ("Estado Libre Asociado de Puerto Rico"), which explicitly delineates that the Commonwealth's "political power emanates from the people and shall be exercised in accordance with their will, within the terms of the compact agreed upon between the people of Puerto Rico and the United States of America." P.R. Const. art. I §1 (emphasis added); see also id. pmbl. ("We understand that the democratic system of government is one in which the will of the people is the source of public power.").

According to the constitutional framework established within the Puerto Rico Constitution, it is explicitly stated that all three branches of the government of the Commonwealth are "subordinate to the sovereignty of the people of Puerto Rico." P.R. Const. art. I § 2.

In accordance with the provisions set forth in Public Law 600, the esteemed Constitution was formally presented to the President of the United States. As a matter of course, the President made sure that, among other important things, the Constitution did include all the necessary parts for a republican form

of government. He then sent it to the respected body of Congress to be carefully looked over and judged. See generally 48 U.S.C. §§ 731c, d. The esteemed Congress duly deliberated upon the aforementioned Constitution and, in a similar vein, determined that it indeed established a system of governance in accordance with republican principles. Subsequently, Congress granted its approval, albeit contingent upon certain minor modifications pertaining to compulsory school attendance and the mechanism for constitutional amendments. Additionally, Congress mandated the removal of Section 20, which acknowledged a range of human rights that were considered innovative at the time. See Pub. L. No. 82-447, 66 Stat. 327. The report of the Senate, which was presented alongside the aforementioned legislation, expounded upon the notion that the endorsement of the Constitution would engender "the people of Puerto Rico to exercise self-government." S. Rep. No. 82-1720, at 6, 7 (1952).

President Truman expressed a similar sentiment on two occasions: first, when he transmitted the Puerto Rico Constitution to Congress, and second, when he affixed his signature to the Joint Resolution, thereby granting Congress' approval of said Constitution. According to President Truman's perspective, "the Commonwealth of Puerto Rico will be a government that is truly governed by the consent of the governed. No government can be invested with a higher dignity and greater worth than one based upon the principle of consent." Public Papers of the Presidents, Harry S. Truman 1952–53, at 471 (1966). He duly acknowledged that pursuant to the provisions of the constitution, the "full authority and responsibility of local self-government will be vested in the people of

Puerto Rico." Id., quoted in Córdova & Simonpietri Ins. Agency, Inc. v. Chase Manhattan Bank, N.A., 649 F.2d 36, 40 (1st Cir. 1981).

The Constitutional Convention of Puerto Rico subsequently acknowledged and embraced the stipulations set forth by Congress, "in the name of the people of Puerto Rico," Resolution No. 34 of the Constitutional Convention: To Accept, on Behalf of the People of Puerto Rico, the Conditions of Approval of the Constitution of the Commonwealth of Puerto Rico Proposed by the Eighty-Second Congress of the United States through Public Law 447 approved July 3, 1952, P.R. Laws Ann. Hist. (Hist. L.P.R.A.) § 9, and the Governor issued a formal proclamation to that effect, see Proclamation: Establishing the Commonwealth of Puerto Rico, P.R. Laws Ann. Hist. (Hist. L.P.R.A.) § 10. The Puerto Rico Constitution underwent appropriate amendments as per the deliberations of the Constitutional Convention, subsequently coming into force on the auspicious date of July 25, 1952. The amendments, which garnered resounding ratification from the populace of Puerto Rico, were duly endorsed through yet another referendum held on November 4, 1952. See generally Proclamation: Amendments to the Constitution of the Commonwealth of Puerto Rico, P.R. Laws Ann. Hist. (Hist. L.P.R.A.) § 11.

At the crux of the 1950s agreement between the Federal Government and Puerto Rico lays the fundamental tenet that Puerto Rico's prospective constitution "shall provide a republican form of government." 48 U.S.C. §731c. Thus, "resonant of American founding principles," the Puerto Rico Constitution set forth a tripartite government "'republican in form' and

subordinate to the sovereignty of the people of Puerto Rico.'" Puerto Rico v. Sanchez Valle, 136 S. Ct. 1863, 1869 (2016) (quoting P. R. Const., Art. I, §2); see also Torres v. Puerto Rico, 442 U.S. 465, 470 (1979); Fin. Oversight & Mgmt. Bd. for P.R. v. Aurelius Inv., 140 S. Ct. 1649, 1675 (2020) (Sotomayor, J., concurring).

"[T]he distinguishing feature" of such "republican form of government," this Court has recognized, "is the right of the people to choose their own officers for governmental administration, and pass their own laws in virtue of the legislative power reposed in representative bodies, whose legitimate acts may be said to be those of the people themselves." In re Duncan, 139 U. S. 449, 461 (1891) (discussing the republican governments of the States); see also Pacific States Telephone & Telegraph Co. v. Oregon, 223 U. S. 118, 149 (1912) (same). See also, The Federalist No. 39, at 251 (J. Madison) ("[W]e may define a republic to be * * * a government which derives all its powers directly or indirectly from the great body of the people").

It is important to note that Public Law 600 effectively got rid of all parts of the Jones Act that dealt with local government. This was done so that Puerto Rico could use its right to create a constitution and a republican system of government. One of the provisions that were explicitly repealed pertained to Section 34, which had previously conferred upon Congress the authority to review legislation originating from Puerto Rico. See Pub. L. 81-600, Sec. 5 (2). Henceforth, it is duly recognized that the citizens of Puerto Rico, by virtue of their Constitution, vested "[t]he legislative power * * * in a Legislative Assembly * * *." P.R. Const. art. III § 1. The enduring provisions

persevered and remained efficacious as the Puerto Rico Federal Relations Act. See Pub. L. No. 81-600 §§ 4, 5, 64 Stat. at 319-20 (1950).

As this esteemed Court has duly acknowledged, the procedural course set forth by Public Law 600 constituted a pivotal juncture in "Puerto Rico's transformative constitutional moment," Sanchez Valle, 136 S. Ct. at 1875, Through this legislative enactment, Congress effectively "relinquished its control over [the Commonwealth's] local affairs, grant[ing] Puerto Rico a measure of autonomy comparable to that possessed by the States." Id. at 1874 (quoting Examining Board of Engineers, Architects, and Surveyors v. Flores de Otero, 426 U.S. 572, 579 (1976)).

In the year 2006, the expiration of tax advantages, which had hitherto incentivized prominent corporate entities to engage in investment activities within the jurisdiction of Puerto Rico, came to pass. See Small Business Job Protection Act of 1996, §1601, 110 Stat. 1827. Numerous sectors have departed from the island. The phenomenon of emigration has experienced a notable escalation. The public debt of the government of Puerto Rico and its instrumentalities experienced a significant escalation, surging from $39.2 billion in the year 2005 to a staggering $71 billion by the year 2016. Fin. Oversight & Mgmt. Bd. for P.R. v. Aurelius Inv., 140 S. Ct. at 1655

It has come to pass that Puerto Rico, in its discernment, has ascertained its incapacity to fulfill the obligations associated with the aforementioned debt. However, Puerto Rico encounters significant challenges in its ability to effectively undertake restructuring measures. The applicability of Chapter 9 of the

Federal Bankruptcy Code, which pertains to matters related to municipalities, did not extend to Puerto Rico, nor did it encompass the District of Columbia. See 11 U.S.C. § 109(c), § 101(52). However, it is important to note that, concurrent with this, the federal bankruptcy law invalidated Puerto Rico's local "debt restructuring" statutes. Puerto Rico v. Franklin Cal. Tax-Free Trust, 136 S. Ct. 1938 (2016); Fin. Oversight & Mgmt. Bd. for P.R. v. Aurelius Inv., 140 S. Ct. at 1655

In the month of June in the year 2016, the legislative body known as Congress proceeded to pass, and the esteemed President Barack Obama duly affixed his signature to Pub. L. No. 114-187, more commonly referred to as the Puerto Rico Oversight, Management, and Economic Stability Act (PROMESA), 48 U.S.C. § 2101 et seq., which was deemed by Congress to be indispensable in addressing the pressing matter of Puerto Rico's "fiscal emergency" and to assist in reducing the Island's "severe economic decline." See 48 U.S.C. § 2194(m) (1).

In order to effectuate the enactment of the PROMESA, the esteemed legislative body known as Congress duly established the Financial Oversight and Management Board of Puerto Rico (FOMB). The esteemed Congress, in its wisdom, has bestowed upon the Board the noble duty of bestowing independent supervision and control over the financial affairs of Puerto Rico. Moreover, the Board has been entrusted with the sacred task of assisting the island in its pursuit to "achieve fiscal responsibility and access to the capital markets." 48 U.S.C. § 2121 (a).

The PROMESA created Title III, which sets up a unique and customized framework for bankruptcy proceedings. This gives the territories and their government agencies the chance to effectively deal with and restructure their financial obligations. 48 U.S.C. §§ 2161–77.

In furtherance of the objectives set forth by the PROMESA, the United States Congress, in its wisdom, conferred upon the aforementioned legislation the power and authority to temporarily suspend the implementation and enforcement of subsequent legislative measures.

> Sec. 204. (a) (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 Over-sight Board may take such actions as it considers necessary, consistent with this Act, 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.

48 U.S.C. § 2144 (a)(5).

II. THE DISTRICT COURT MAY ONLY ENJOIN THE ENFORCEMENT OR APPLICATION OF THE LAW, NOT NULLIFY A DULY ENACTED LAW BASED ON PROMESA.

The legislative body known as Congress, in its exercise of its constitutional authority, promulgated the PROMESA, as codified in 48 U.S.C. § 2101 et seq. The primary purpose of this legislative enactment was to establish a mechanism, namely the FOMB, which would serve to safeguard, uphold, and enhance the fiscal soundness of the central government of Puerto Rico, as well as its affiliated instrumentalities. The authority to lawfully promulgate legislation is contingent upon the Government of Puerto Rico, which encompasses the Senate. The statutory framework established by PROMESA does not confer upon the FOMB the authority to enact legislation, nor does it empower said entity to impede the enactment of legislation.

Henceforth, it is to be understood that the PROMESA does not alter the fundamental constitutional framework governing the legislative process of enacting laws in Puerto Rico.

However, it is important to note that the PROMESA did indeed institute a subsequent course of action to guarantee the adherence of specific Puerto Rico statutes to the federal prerequisites outlined within it. The PROMESA legislation delineates the distinct pathways that a law must traverse, while simultaneously preserving the Legislative Assembly's authority to enact laws and present them to the

Governor for his endorsement. The commencement of the PROMESA roadmap is contingent upon the proper enactment of a law, and not prior to such enactment. Nowhere within the confines of the statute can one discern any provision that would permit the retrospective invalidation of legislation.

Pursuant to the provisions set forth in Section 106(a) of the PROMESA, the esteemed legislation bestows upon the federal jurisdiction the authority to preside over any legal proceeding initiated against the Oversight Board or that emanates from the Act itself. While it possesses a unique nature, it bears resemblance to any other federal statute that supersedes state or commonwealth law. It establishes a framework for the review and potential scrutiny of duly enacted laws that may subsequently be subject to challenge by the FOMB.

Pursuant to the provisions set forth in Section 104(k) of the aforementioned legislation, it is explicitly provided that the FOMB, as duly constituted under the said act, possesses the prerogative to actively pursue legal recourse through the judicial system in order to effectively exercise its authority and discharge its responsibilities as mandated by the statute in question. However, it must be duly noted that the PROMESA does not bestow upon the FOMB an inherent and automatic authority to compel a separate entity to undertake specific actions. In order to effectuate the exercise of its mandate, it is incumbent upon the FOMB to duly initiate proceedings before the appropriate jurisdiction, namely the Federal Court. Henceforth, it is imperative to acknowledge that the

FOMB possess the authority to pursue legal recourse in order to safeguard the territorial government's adherence to the Fiscal Plan. This includes the prerogative to impede the enforcement or implementation of any legislation that may have detrimental consequences on said compliance. Please refer to the provisions outlined in Section 204(a)(5) of the PROMESA.

Upon careful examination of the aforementioned statement, it becomes evident that in accordance with the principles of constitutional law, a law that has been duly enacted cannot be rendered null and void solely by the District Court, as per the provisions outlined in PROMESA Section 204 (a) (5). It is important to note that the court's authority is limited to restraining or prohibiting the enforcement or application of said law, rather than outright nullification. It is plausible that an alternative interpretation may arise, wherein the District Court possesses the authority to render a duly enacted law null and void from its inception.

In the case of In re Financial Oversight & Management Board for Puerto Rico, 511 F. Supp. 3d 90, 138 (D.P.R. 2020), the Government found itself restrained from executing and upholding Acts 82, 138, 176, 181, and 47 subsequent to a thorough examination by the District Court. It is important to note that while the court determined that the position of the FOMB was not arbitrary, the aforementioned acts were not rendered null and void. The Honorable Court, in its recent pronouncement, duly upheld the decision rendered by the District Court in the aforementioned case, while meticulously scrutinizing the

provisions enshrined within the PROMESA. The case of In re Financial Oversight and Management Board for Puerto Rico, 37 F.4th 746 (1st Cir. 2022) is a notable legal matter that warrants our attention.

In so doing, this Court explained that:

> 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 unique structure. But that is the governing structure that applies here.

37 F.4th at 766-67.

In the aforementioned judicial ruling, the present Court affirmed the District Court's injunction against the Commonwealth's execution and application of Acts 82, 138, 176, 181, and 47. However, it is important to note that none of the aforementioned laws have been invalidated, let alone rendered null *ab initio*.

See also Jonathan F. Mitchell, The Writ-Of-Erasure Fallacy, 104 Virginia Law Review 933, 947 (2018) ("[N]either the courts nor the executive has the power to prevent a duly enacted statute from taking effect. All that a court can do is decline to enforce the statute and enjoin the executive from enforcing it.").

In essence, it is imperative to recognize that a Puerto Rico law, once duly enacted, does not suffer from inherent invalidity, even in instances where the FOMB deems said statute to be in conflict with its certified fiscal plans. The sole prerogative of the FOMB lies in its capacity to initiate legal proceedings by contesting the law before the District Court. Subsequently, the District Court possesses the limited authority to impede the enactment and execution of the statute.

In recent years, it has become evident that the FOMB has exhibited a notable propensity for extending its influence into policy matters that surpass the confines of fiscal plans and budgets. This behavior is in contrast to its prescribed statutory mission, which primarily revolves around facilitating a mechanism for a covered territory to attain fiscal responsibility and gain access to the capital markets. Pursuant to the provisions set forth in 48 U.S.C. § 2121(a), it is hereby established that certain legal principles and guidelines shall be adhered to within the context of this particular statutory provision. In the present matter, it is pertinent to note that Act 41, which came

into force in Puerto Rico on July 20, 2022[3], it is evident that the FOMB has endeavored to impede the desires of the electorate of Puerto Rico by employing PROMESA as a means to assert its own policy perspectives regarding the entitlements of employees within the private sector. The FOMB, lacking any discernible objective criteria, contended that Puerto Rico's Act 41, whose underlying objective sought to reinstate certain limited privileges enjoyed by private enterprise employees in the years preceding January 26, 2017[4], would purportedly have a detrimental impact on the economy and impede the objectives of PROMESA.

Since the FOMB didn't make any strong, logical arguments against enacting the aforementioned legislative proposal, the bill made it through the deliberative process in both legislative chambers and was then signed by the Governor. Despite the prevailing pessimistic conjectures surrounding the potential ramifications of Act 41, it is worth noting that the FOMB, in a rather deliberate manner, elected to initiate legal proceedings challenging the aforementioned legislation a month and a half subsequent to its official enactment. It is of utmost significance to underscore that the FOMB refrained from seeking a preliminary injunction to suspend the application of Act 41 during the

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[3] The aforementioned act duly took effect on July 20, 2022, subject to a deferred application for select employers of lesser scale, which commenced on September 18, 2022.

[4] Indeed, during Puerto Rico's most economically prosperous era (1950-1990), workers enjoyed pretty much the same rights that the Board now describes as detrimental to economic development.

pendency of the legal proceedings. The FOMB, in an apparent departure from the customary practice of filing a routine case that would be assigned to the general pool of judges within the district, has invoked 48 U.S.C. § 2166(a)(2) in an impermissible manner. This invocation has resulted in the matter being treated as an adversary proceeding within the Title III bankruptcy framework of the Commonwealth, where a confirmed plan has been in place for a considerable period of time.

However, it is important to note that on the date of March 3, 2023, the District Court, in its capacity, rendered a declaration that Act 41 lacks enforceability and possesses no legal effect. Furthermore, the court proceeded to restrain and prohibit the implementation and execution of said act through the issuance of an Opinion and Order. Henceforth, it is to be duly noted that Act 41 was valid until the present moment. Therefore, it can be argued that the actions undertaken by private employers during the duration in which Act 41 was in effect pose legal validity.

Consequently, the Senate of Puerto Rico's position is that the Opinion & Order, in any case, can only have prospective effect and that the District Court could not have held that Act 41 was null *ab initio*. By the sheer force of its prospective effect, it is imperative to acknowledge that any and all actions carried out during the period in which Act 41 was fully operational possess inherent validity and are immune from being reversed or nullified.

CONCLUSION

The Title III Court's ruling, which declared Act 41 null and void from the start and forbade its execution and enforcement, ought to be subject to potential revision. The contention put forth posits that the present controversy, which exclusively concerns PROMESA Titles I and II, lies beyond the scope of the subject-matter jurisdiction of the Title III Court. The Court has upheld a stringent standard for evaluating and validating Section 204(a)(5) of Act 41 as proposed by the government, a standard that deviates from the straightforward wording of Section 204(a) and dismisses the government's rationale for its inability to address the financial implications and coherence of the fiscal plan in future years. The Court, in its erroneous judgment, has absolved the FOMB of its constitutional duty to provide justifications for its arbitrary and capricious decision-making process. Furthermore, the petitioner was unjustly denied the opportunity to engage in the necessary process of discovery, which was crucial in countering the summary judgment motion. Upon careful examination of the facts as presented, it becomes evident that each of the aforementioned errors, when taken into consideration, provides sufficient grounds to warrant a reversal of the decision in question.

The stance adopted by the Senate of Puerto Rico is predicated upon the interpretation of PROMESA Section 204(a)(5), which asserts that a law that has undergone proper enactment procedures cannot be invalidated retroactively by the District Court. The jurisdiction of the District Court is circumscribed to the act of restraining the implementation or utilization of

a statute, and it cannot be reasonably construed that the District Court possesses the authority to pronounce a law, duly enacted, as devoid of legal effect from its inception.

Based on the aforementioned justifications, it is evident that the position asserted by the Defendant-Appellant is demonstrably accurate. Therefore, the Amici respectfully implore this Honorable Court to reverse the Opinion and Order of the District Court, which resulted in the nullification of a duly enacted law.

Respectfully submitted,

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