No. 23-____

IN THE

Supreme Court of the United States

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

Petitioners,

v.

THE FINANCIAL OVERSIGHT AND MANAGEMENT BOARD FOR PUERTO RICO,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The questions presented are:

1. Under the Puerto Rico Oversight, Management, and Economic Stability Act ("PROMESA") Section 306(a)(2), the Title III Court's subject-matter jurisdiction includes only matters "arising under" PROMESA's Title III bankruptcy-like provisions or "arising in" or "related to" cases under Title III. This adversary proceeding (i) did not implicate any substantive right created by Title III, (ii) could exist entirely outside the Title III process, and (iii) had no direct or concrete effect on the Plan of Adjustment or Title III case. Did the First Circuit err in rejecting the "close nexus" test applied by the majority of other Courts of Appeals in determining post-confirmation "related-to" jurisdiction under the Bankruptcy Code to conclude that the Title III Court had post-confirmation subject-matter jurisdiction over this policy dispute between the Oversight Board and the Government?

2. Whenever a new law is enacted in Puerto Rico, PROMESA Section 204(a) requires the Governor to submit to the Board a "formal estimate . . . of the impact, *if any*, that the law *will have* on expenditures and revenues," 48 U.S.C. § 2144(a)(2)(A), and empowers the Board to "seek judicial enforcement of its authority" to "ensure that the enactment or enforcement of the law will not adversely affect the territorial government's compliance with the Fiscal Plan, including preventing the enforcement or application of the law," if the Governor fails to submit such an estimate and a certification that the new law is not significantly inconsistent with Puerto Rico's governing fiscal plan.

Id. §§ 2124(k); 2144(a)(5). Given Section 204(a)'s requirement that the estimate address only effects the new law "will have" on *the Government's* expenditures and revenues, did the First Circuit err in determining that PROMESA Section 204(a)'s "formal estimate" process requires the Government to project the law's speculative secondary effects in the private labor market?

PARTIES TO THE PROCEEDING

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

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

Speaker Rafael Hernández-Montañez, who filed a Petition for Writ of Certiorari with the Court on December 19, 2023, is an intervenor in the proceeding.

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PETITION FOR A WRIT OF CERTIORARI

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

OPINION BELOW

The First Circuit's opinion is reported at 77 F.4th 49, and is reprinted in the Appendix to the Petition (App.) at 1a.

JURISDICTION

The court of appeals entered its judgment on August 10, 2023. App. 1a. On September 21, 2023, the court of appeals denied Defendant-Appellee Rafael Hernández-Montañez's petition for rehearing and rehearing en banc. App. 83a. Petitioners invoke this Court's jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Relevant statutory provisions of the Puerto Rico Oversight, Management, and Economic Stability Act, 48 U.S.C. § 2101 *et seq.*, are reproduced at App. 93a.

INTRODUCTION

The decision below creates a circuit split that threatens to extend post-confirmation bankruptcy jurisdiction in the First Circuit far beyond that in any other Court of Appeals, leading to an impermissible incursion on both the Bankruptcy Code's goal of providing debtors a fresh start and Puerto Rico's already limited territorial self-rule. This incursion only

exists because of the intolerable colonial status imposed on Puerto Rico. The First Circuit recognized that other circuits apply the "close nexus" test, a narrowed test courts apply to determine post-confirmation bankruptcy jurisdiction, but nevertheless declined to apply it here. The close nexus test serves an important policy goal: it has long been recognized that in reorganization cases the confirmed debtor should be returned to the commercial community and cease to be under the "[indefinite] tutelage" of the bankruptcy court in which the reorganization of the case was pending.[1] Post-confirmation litigation that does not actually concern the relationship between debtors and creditors and has no relation to the confirmed bankruptcy plan—such as this—does not properly fall within the bankruptcy courts' jurisdiction. The First Circuit's rejection of the "close nexus test" leads to an incongruous result that will lock Puerto Rico into protracted litigation before the Title III Court, undermining PROMESA's[2] goal of helping Puerto Rico get a fresh start after its bankruptcy. The First Circuit's decision further threatens to worsen an already brewing circuit split, in which the First Circuit uses an ad

[1] *See N. Am. Car Corp. v. Peerless Weighing & Vending Mach. Corp.*, 143 F.2d 938, 940 (2d Cir. 1944).

[2] As used herein, (i) "PROMESA" means the Puerto Rico Oversight, Management, and Economic Stability Act, 48 U.S.C. §§ 2101 *et seq.*; (ii) "Board" means the Financial Oversight and Management Board for Puerto Rico; (iii) "Government" means the elected government of Puerto Rico; (iv) "AAFAF" means the Puerto Rico Fiscal Agency and Financial Advisory Authority; (v) "A_" references the Joint Appendix filed in the First Circuit; and (vi) "ADD_" references the Addendum in the brief by Petitioner Pierluisi in No. 23-1268.

hoc approach to apply expansive post-confirmation bankruptcy jurisdiction in some cases, while other circuits uniformly apply the close nexus test.

The First Circuit's decision also runs counter to basic principles of statutory interpretation and undermines the framework of democratic government. Congress adopted PROMESA to provide a means for Puerto Rico and other United States territories to restructure their debts and return to fiscal responsibility, while carefully balancing the fiscal powers of the Board—an unelected body appointed by the President of the United States—with the political powers of Puerto Rico's elected Government. In fact, PROMESA's statutory framework confirms that Congress did not intend to hobble the democratically elected Government's legislative process through onerous requirements. Each year, the Board certifies a fiscal plan, which provides Puerto Rico a blueprint for "achiev[ing] fiscal responsibility and access to capital markets . . . ." 48 U.S.C. § 2121(a). Section 204(a) of PROMESA requires that when Puerto Rico's elected government enacts a new law, the government provide to the Board an estimate of the "impact, *if any*, that the law *will have* on expenditures and revenues." *Id.* § 2144(a)(2)(A) (emphasis added). That language makes plain that Congress meant to require the Government to estimate reasonably foreseeable effects of a law, not speculative, indirect effects on Government revenues and spending that may never even occur. Relying on the government's certification, the Board

then reviews the law for consistency with the Commonwealth's certified fiscal plan. *Id.* § 2144(a)(2)(B).

If allowed to stand, the First Circuit's decision will both create a circuit split regarding post-confirmation bankruptcy jurisdiction and thwart Congress's attempt to preserve certain powers to Puerto Rican elected officials, notwithstanding Puerto Rico's colonial status. The Court should grant certiorari to prevent the corrosion of bankruptcy policy upon which debtors and creditors rely and protect Puerto Rico's framework of territorial self-rule. Indeed, Congress recognized the importance of resolving disputes related to PROMESA's interpretation, providing that "[i]t shall be the duty of . . . the Supreme Court of the United States to advance on the docket and to expedite to the greatest possible extent the disposition of any matter brought under this [Act]." 48 U.S.C. § 2126(d). This is exactly the type of case Congress intended to expedite before this Court.

STATEMENT OF THE CASE

A. Puerto Rico's Framework of Self-Government

Puerto Rico has had an elected territorial government for nearly 70 years under Congressional authorization that permitted the people of Puerto Rico to "organize a government pursuant to a constitution of [its] own adoption." Act of July 3, 1950, § 1, Pub. L. No. 600, 64 Stat. 319. In 1952, Puerto Rico adopted its Constitution which, though it perpetuated Puerto Rico's colonial status, created a tripartite government that is "republican [in] form" and "subordinate to the sovereignty of the people of Puerto Rico." *See* P.R.

Const. art. I, § 2; Act of July 3, 1952, Pub. L. No. 447, 66 Stat. 327. Since then, the Commonwealth's people have elected their territorial Government.

PROMESA marks a targeted disruption of Puerto Rico's governance in an effort to manage its fiscal crisis. While PROMESA's goals are crucial to the welfare of Puerto Rico and its people, PROMESA is nevertheless an anti-democratic law that infringes on Puerto Ricans' already limited right to self-rule by instituting an unelected Board to oversee the Commonwealth's finances. Congress recognized as much, and PROMESA represents a carefully calibrated compromise designed to preserve as much of Puerto Rico's self-rule as possible while also ensuring that the Oversight Board can perform its role of instilling fiscal discipline.

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

In 2016, Puerto Rico was "in the midst of a fiscal crisis." *Puerto Rico v. Franklin Cal. Tax-Free Tr.*, 579 U.S. 115, 118 (2016); *see also* H.R. Rep. No. 114-602, at 40 (2016) (noting that the Commonwealth had over "$110 billion in combined debt and unfunded pension liabilities"). In response, on June 30, 2016, the United States Congress enacted PROMESA to "stabilize Puerto Rico's economy by establishing oversight of the Government's budget and fiscal policies and by providing a mechanism for the Commonwealth to restructure its debts." *In re Fin. Oversight & Mgmt. Bd. for P.R.*, 330 F. Supp. 3d 685, 689 (D.P.R. 2018). PROMESA created the Board "to provide a method for [Puerto Rico] to achieve fiscal responsibility and

access to the capital markets," and "to assist the Government of Puerto Rico in reforming its fiscal governance." 48 U.S.C. §§ 2121(a), 2194(n)(3). Title III of PROMESA established a framework through which Puerto Rico could file a petition to adjust its debts similar to a bankruptcy proceeding.

PROMESA confers important fiscal-management powers on the Board, including the power to develop "fiscal plans" that prescribe a high-level "blueprint[]" for the Government's fiscal goals; the Board must certify these fiscal plans annually. *In re Fin. Oversight & Mgmt. Bd. for P.R.*, 583 B.R. 626, 632 (D.P.R. 2017) (fiscal plan and budget are "blueprints for revenues, expenses, debt, and capital resources"). PROMESA § 201(b)(1) explains that a fiscal plan shall "provide a method to achieve fiscal responsibility and access to the capital markets." 48 U.S.C. § 2141(b)(1). While the Government in the first instance develops and submits a proposed fiscal plan to the Board, the Board "determines in its sole discretion" whether a proposed plan satisfies § 201(b), and can develop and approve its own plan if the Board cannot certify a Government-formulated fiscal plan by the Board's deadline. *Id.* §§ 2141(c)(3), (d)(2).

But PROMESA also reserves political authority to the elected Government and ensures that the Government may continue to exercise the policymaking authority crucial to Puerto Rico's framework of democratic government. Section 204, for example, provides that the Government retains its powers to make policy and enact laws. 48 U.S.C. § 2144 (contemplating that the Government will "duly enact[]" laws).

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

PROMESA also gives the elected Government latitude in enacting new legislation. Rather than requiring new laws to align identically with the governing fiscal plan, Section 204(a) seeks to ensure that Puerto Rico's new laws are not "significantly inconsistent" with the plan. *Id.* § 2144(a). Section 204(a) requires the Government to send the Board the text of each new law, along with (i) a "formal estimate prepared by an appropriate entity of the territorial government with expertise in budgets and financial management of the impact, if any, that the law will have on expenditures and revenues," *id.* § 2144(a)(2)(A), and (ii) a certification by that entity stating whether the law is or is not "significantly inconsistent with" the fiscal plan, *id.* §§ 2144(a)(2)(B)-(C). Section 204(a) does not define what constitutes a "formal estimate" or what "significantly inconsistent" means.

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

§ 2144(a)(4)(B).

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

D. Act 41 and its Compliance-Certification Process

On June 20, 2022, the Governor signed into law Act 41, which amended certain labor law provisions affecting solely Puerto Rico's private sector. A4547, 2354 (an Act to "expand the labor rights applicable to private enterprise"). Because Puerto Rico suffers severe labor supply constraints, Act 41 aims to increase labor force participation by improving compensation and increasing protections for private-sector employees, A2356-57, including amending:

- Act 4-2017 to require that ambiguous provisions in employment contracts be interpreted in favor of the employee and increase the statute of limitations from 1 year to 3 years for actions arising from an employment contract or its benefits.
- Article 4(a) of the "Act to Establish the Working Day in Puerto Rico" ("Act 379"), to eliminate required written notifications to employees before certain shifts and to modify provisions regarding breaks and schedule-change requests.

- The "Act to Establish a Day of Rest" ("Act 289") to provide double pay to students who work on a mandatory day of rest for most employers.
- Provisions of the "Puerto Rico Vacation and Sick Leave Act" ("Act 180") to increase accrual rates for vacation and sick leave and the statute of limitations for wage claim actions.
- The "Puerto Rico Christmas Bonus for the Employees of Private Enterprise Act" ("Act 148"), modifying the hours requirement and total amounts of Christmas bonuses.
- Act No. 80 of May 30, 1976, as amended ("Act 80") to, among other things, modify severance pay provisions for termination without cause and to lengthen the statute of limitations for unjustified discharge actions.
- The "Employment Discrimination Act" ("Act 100") to establish a presumption of an Act 100 violation for discriminatory acts committed without just cause.
- The "Special Leave Act for Employees with Serious Illnesses of a Catastrophic Nature" ("Act 28") to include additional health conditions as catastrophic illnesses covered by a special license granted under Act 28.

Notably, Act 41 has no effect on Government employment. It does not increase Government employees' pay or benefits or require the Government to expend any additional funds. Nor does it address any

taxes or other Government revenue sources.

The Government submitted its certification (the "Certification") to the Board on June 29, 2022. A4550–51. The Certification explains:

> The provisions of Act 41 do not impact payroll expenditures for the Government of Puerto Rico (the "Government"), its agencies, public corporations, instrumentalities, and municipalities. As such, the impact of Act 41 should be evaluated in light of the marginal effects that the Act 41 Modifications will have on the economic behavior of private sector employers.
>
> A close examination of Act 41 will demonstrate that the most important labor market reforms of Act 4-2017 were preserved and continue in effect post-Act 41 enactment.

A4194. The Certification explained that Act 41 implemented a set of marginal benefits, similar to those in other U.S. jurisdictions, to induce "people to join the labor force and help alleviate Puerto Rico's tight labor supply, thus further spurring economic activity." A4196. The measures are tailored to Puerto Rico's circumstances, which include a labor shortage and employers' "high monopsonistically competitive pricing power." *Id.*

The Certification acknowledged that Act 41's ultimate effects would have to be disaggregated from "competing macroeconomic factors affecting the Puerto Rico economy, including: U.S. inflationary pressure, global supply-chain constraints, and the continuing energy crisis." A4197. Thus, "accurately

isolating and measuring Act 41's impact on the economy vis-à-vis competing macroeconomic supply and inflation shocks," is difficult given the limited economic and labor statistics in Puerto Rico. *Id.* The Certification concluded that a comprehensive analysis would require "Puerto Rico-specific empirical studies." *Id.* The Certification supported these findings with a report from DevTech Systems, Inc. A4200–13.

The Certification attached an OMB certification, stating that Act 41 "should not entail a fiscal impact and, if any, it would be minimal for the approved budget for fiscal year 2021-2022." A2382, 4550–51. The OMB certification in turn attaches a DOL certification, estimating the costs associated with publishing Act 41 notices to be $3,000 and concluding that Act 41 would not be significantly inconsistent with the Fiscal Plan. A2383-85, 4551. The Certification also attaches a certification from the Treasury that the Act has no effect on revenues, and thus "entails no fiscal impact." A2386-88. Based on this support, AAFAF's Certification acknowledges the challenges of estimating Act 41's indirect effects and the Board's arguments that Act 41 is contrary to the fiscal plan and concludes "Act 41 is not significantly inconsistent with the Fiscal Plan." A4199.

The Government revised its OMB and DOL certifications on July 22, 2022, to reflect that the DOL actually spent only $1,248.12 publishing notices related to Act 41, and not $3,000, as previously estimated. A2396–2402, 4558. As no other expenses were identified or assumed to be incurred, the OMB certified that Act 41 would not affect the next five years' budgets and was "not substantially inconsistent with the

Certified Fiscal Plan." A2397.

E. The Board's Pre-Judgment of Act 41

Even before the Government enacted Act 41 or submitted the § 204(a) estimate and certification, the Board had already made up its mind about the proposed legislation. In a June 13, 2022, letter sent before the legislature passed Act 41, the Board warned the Governor that "we expect the Section 204(a) certification will find HB 1244 to be significantly inconsistent with the Certified Fiscal Plan and do not believe any other accurate conclusion is possible." A4186, 4547. The Board made clear its mind was closed: "[r]egardless of the substance of [the Government's] certification, enactment, implementation, and enforcement of *HB 1244 will remain barred by PROMESA Section 108(a)(2).*" A4186 (emphasis added).

The Board sought to justify its position with unsubstantiated conclusions, including speculation that HB 1244 would deter investments, negatively affect labor participation, suppress economic growth, deprive the Government of revenues associated with that growth, and increase the public assistance burden. A4185. The Board also argued that HB 1244 was significantly inconsistent with the fiscal plan because the bill sought to repeal prior labor-law reforms and stated that the Governor was "barred from signing the Bill under PROMESA Section 108(a)(2)." A4186.

The Governor responded on June 20, 2022. He explained that Act 41 is designed to "promote more labor participation and make jobs in Puerto Rico more

attractive." A4602. The Governor noted that the Board's assertions were speculative, and even if true, represented only indirect private sector reactions, "several degrees removed" from the law's direct mandates." *Id.* The Governor explained that analyzing such attenuated consequences "far exceeds the scope required by the language of Section 204(a), . . . and cannot be a valid justification to preempt . . . appropriate Government action to enact a new private sector labor law." A4603. The Governor reminded the Board that the Title III Court had previously ruled that the Board could not preemptively nullify a law under PROMESA § 108. A4602.

F. PROMESA's Jurisdictional Provisions

Title III of PROMESA conferred jurisdiction of Title III restructuring cases to the district courts, thereby creating what is referred to as the "Title III Court." *See* 48 U.S.C. § 2166(a). The Title III Court's jurisdiction under PROMESA works the same way as a bankruptcy court's jurisdiction under the Bankruptcy Code. That is by design: Congress imported the Bankruptcy Code's subject matter jurisdictional provisions into PROMESA. Bankruptcy courts have jurisdiction over "proceedings arising under title 11 or arising in or related to a case under title 11 . . . ." 28 U.S.C. §§ 157(a), 1334(b). Similarly, Section 306(a)(2) of PROMESA provides for the Title III Court's jurisdiction over "proceedings arising under [Title III], or arising in or related to cases under [Title III]." 48 U.S.C. § 2166(a)(2); App. 17a.

Bankruptcy courts have "arising under" jurisdiction where "the Bankruptcy Code itself creates the cause of action." *Gupta v. Quincy Med. Ctr.*, 858 F.3d

657, 662 (1st Cir. 2017). "[A]rising in" jurisdiction exists where the proceeding "would have no existence outside of the bankruptcy." *Id.* at 662-63 (quoting *New England Power & Marine, Inc. v. Town of Tyngsborough (In re Middlesex Power Equip. & Marine, Inc.)*, 292 F.3d 61, 68 (1st Cir. 2002)). Bankruptcy courts have "related to" jurisdiction over proceedings "which 'potentially have some effect on the bankruptcy estate, such as altering debtor's rights, liabilities, options, or freedom of action, or otherwise have an impact upon the handling and administration of the bankrupt estate.'" *Id.* (quoting *Middlesex Power*, 292 F.3d at 68). "[R]elated to" jurisdiction is much broader than "arising under" or "arising in" jurisdiction, but not limitless. *Id.* (citing *Celotex Corp. v. Edwards*, 514 U.S. 300, 308 (2005); *Boston Reg'l Med. Ctr., Inc. v. Reynolds (In re Boston Reg'l Med. Ctr., Inc.)*, 410 F.3d 100, 105 (1st Cir. 2005)).

G. Proceedings Below

(1) Title III Court

On September 1, 2022, following months of disagreement over Act 41, the Board sued to nullify Act 41 under PROMESA §§ 204(a) and 108(a). The Board moved for summary judgment on September 29, 2022. A2209–17. That same day, the Governor moved for judgment on the pleadings on the basis that the Title III Court lacked post-confirmation subject-matter jurisdiction over the dispute. A2184–2208.

On March 3, 2023, the Title III Court granted the Board summary judgment, nullifying Act 41 *ab initio* under PROMESA § 204(a). The Title III Court held that it had subject matter jurisdiction over Count I

under PROMESA § 108(a) because the Confirmation Order for the Commonwealth's Title III case includes language mirroring § 108(a), and the Court retained jurisdiction to enforce that Confirmation Order. ADD24–26. The Court found that it had jurisdiction over Count II as it is "plausibly within the scope of section 306(a)(2) of PROMESA" "in light of the Confirmation Order's requirement of fealty to fiscal plans." ADD25. Alternatively, the Court held that it could exercise supplemental jurisdiction over Count II. *Id.*

The Court held that the Governor's certifications failed to satisfy § 204(a)(2)(A)'s formal estimate requirement because the Treasury certification "does not contain any numerical values underlying the conclusion that Act 41 'entails no fiscal impact' " and contained no "methodological or computational detail to support the limited certifications that are proffered." ADD33–34. The Court found "the Governor's submissions provided no context or analysis to support the certifications' assertion of consistency with the fiscal plan as required by section 204(a) of PROMESA." ADD32.

The Court also held that the Governor's submissions did not constitute a certification that Act 41 "is or is not consistent with the entire period of the Fiscal Plan." ADD34. The Court concluded that the "Governor's contention that 'indirect' impacts on the Government's finances of regulation of the private labor market need not be assessed in order to comply with Section 204(a) finds no basis in the statutory language." ADD35. The Court also found that the "Governor's argument that the required fiscal impact

assessment is impossible and his suggestion that the law remain in place while the Board and the Government take a 'wait and see' approach to assessing its impact fall far short of the requirements of PROMESA, and are unavailing." ADD36. As a result, the Court declared Act 41 null *ab initio* and "permanently prohibit[ed] and enjoin[ed] the Governor or other persons who are in active concert or participation with the Governor from taking any acts to help private parties implement or enforce Act 41." ADD44.

(2) First Circuit

On March 16, 2023, the Governor filed a notice of interlocutory appeal under 28 U.S.C. § 1292(a)(1), appealing the Order. A4702–07. On April 7, 2023, the Title III Court dismissed the remaining count in the Complaint (Count I) and the adversary case was closed. ADD42–47. On April 10, 2023, the Governor filed a notice of appeal, appealing the Order as of right. *See* Adv. Proc. Dkt. ECF No. 123.

On August 10, 2023, the First Circuit affirmed the Title III Court's holding, but went even further in its expansion of post-confirmation bankruptcy jurisdiction. The First Circuit acknowledged that "several other Circuits" have applied the "close nexus" text, "a narrower conception of 'related to' jurisdiction . . . in the context of disputes arising after confirmation of a bankruptcy plan." App. 20a. But the First Circuit declined to apply that widely adopted test to Title III jurisdiction, because "[t]he fiscal plans developed under Title II and the bankruptcy procedures established under Title III are both part of [a] 'comprehensive approach.'" *Id.* at 23a. "Any differences between the pre- and post-confirmation manifestations of the

'related to' test are largely irrelevant in this context." *Id.* at 24a.

The First Circuit rejected the Government's argument that allowing the Title III court to hear this dispute would impermissibly extend bankruptcy jurisdiction, because "the key rationales for applying 'related to' jurisdiction more narrowly in the post-confirmation context are missing here." *Id.* at 24a. The First Circuit minimized the Government's objections to Title III jurisdiction because "the Commonwealth enjoys no 'unfair[] advantage' by having this dispute heard in the Title III court," and if not heard by the Title III Court, the "appropriate forum, according to the Governor and the Speaker, is a non-Title III court sitting in the District of Puerto Rico." *Id.* at 25a. The First Circuit also held that unlike a reorganized corporate debtor, "under PROMESA, the Commonwealth does not simply 'move on' from its fiscal crisis once the plan of adjustment is confirmed. The Board's oversight of the Commonwealth's financial recovery—including through the development and enforcement of fiscal plans—continues until the Board terminates." *Id.*

After determining that jurisdiction in the Title III Court was proper, the First Circuit addressed PROMESA's requirements for formal estimates submitted with newly enacted legislation under Section 204(a). *Id.* at 27a. The First Circuit held that the Act 41 certificate was inadequate, because "the Governor made no attempt to submit an estimate of Act 41's impact on government revenues." *Id.* at 28a-30a. The panel reasoned that, notwithstanding the uncertain and speculative nature of Act 41's potential macro-

economic effects, "where it is clear that a law could have an impact on revenues—as the Governor concedes here—section 204(a)(2)(A) requires an estimate of such impact." *Id.* at 29a.

REASONS FOR GRANTING THE PETITION

The First Circuit's decision creates a circuit split in which post-confirmation bankruptcy jurisdiction within the First Circuit will extend far beyond that in any other Court of Appeals. And its interpretation of PROMESA disregards PROMESA's plain language and statutory scheme. These questions matter not only for this and future legislation in Puerto Rico, but for the consistent application of post-confirmation bankruptcy jurisdiction throughout the country.

I. THE FIRST CIRCUIT STANDS ALONE IN APPLYING AN INCORRECT TEST FOR POST-CONFIRMATION BANKRUPTCY JURISDICTION.

The jurisdiction of the bankruptcy courts, like that of other federal courts, is grounded in, and limited by, statute. *Binder v. Price Waterhouse & Co., LLP (In re Resorts Int'l, Inc.)*, 372 F.3d 152, 161 (3d Cir. 2004). Just as the jurisdiction of Article I bankruptcy courts is circumscribed by the Bankruptcy Code, PROMESA delineates the Title III Court's limited subject matter jurisdiction. *See* 48 U.S.C. § 2166(a).

The First Circuit's decision endorses a broad expansion of post-confirmation jurisdiction not recognized by any other Court of Appeals, creating a circuit split by inviting courts to administer the close nexus test on ad hoc basis, contrary to the uniform approach other courts take. The decision results in debtors—

particularly municipal debtors—being indefinitely subject to bankruptcy court jurisdiction and undermines the fundamental principle of limited bankruptcy jurisdiction.

A. The First Circuit's decision creates a circuit split.

PROMESA was created to provide a mechanism for the reorganization of Puerto Rico's debts in response to its fiscal crisis and address a gap in the Bankruptcy Code for U.S. territorialities like Puerto Rico. For that reason, PROMESA was not created out of whole cloth; Congress borrowed from Chapter 9 and Chapter 11 of the Bankruptcy Code, so PROMESA takes on many of the characteristics of those chapters. PROMESA incorporates specific provisions from these Bankruptcy Code chapters. *See* 48 U.S.C. § 2161(a). The Title III Court and First Circuit have also recognized the analogs between Title III and Chapters 9 and 11. *In re Fin. Oversight & Mgmt. Bd. for P.R.*, 32 F.4th 67, 75 (1st Cir. 2022) ("PROMESA also created in Title III a modified version of the municipal bankruptcy code for territories and their instrumentalities."); *In re Fin. Oversight & Mgmt. Bd. for P.R.*, 939 F.3d 356, 362 (1st Cir. 2019) (acknowledging that the Title III Court properly looked to case law involving chapter 11 bankruptcies to determine whether to grant or deny stay relief).

Because Congress modeled PROMESA after the Bankruptcy Code, it is unsurprising that PROMESA's jurisdictional grant for the Title III Court is analogous to that under the Bankruptcy Code. PROMESA § 306(a) limits the Title III Court's jurisdiction to matters "arising under [Title III], or arising in or related

to cases under" Title III. *See* 48 U.S.C. § 2166(a). This language substantially mirrors the jurisdictional grant under 28 U.S.C. § 1334. *Compare* 48 U.S.C. § 2166(a)(2) ("The district courts shall have . . . original but not exclusive jurisdiction of all civil proceedings arising under this title, or arising in or related to cases under this title.") *with* 28 U.S.C. § 1334(b) ("[T]he district courts shall have original but not exclusive jurisdiction of all civil proceedings arising under title 11, or arising in or related to cases under title 11."). Like bankruptcy courts, the Title III Court "can only act in proceedings within [its] jurisdiction." *Resorts Int'l*, 372 F.3d at 161.

Thus, to proceed in the Title III Court—as in a bankruptcy court—an action must meet the test for "arising under," "arising in," or "related to" jurisdiction. "Related to" jurisdiction is the broadest, and before confirmation, a matter is "related to" a bankruptcy case if the outcome of the matter "could conceivably have any effect on the estate being administered in the bankruptcy." *Pacor, Inc. v. Higgins*, 743 F.2d 984, 994 (3d Cir. 1984) (emphasis omitted). This is commonly referred to as the "*Pacor* standard." But nearly all courts agree that the scope of "related to" jurisdiction substantially narrows following confirmation of a plan of reorganization. *E.g.*, *Montana v. Goldin (In re Pegasus Gold Corp.)*, 394 F.3d 1189, 1193–94 (9th Cir. 2005); *Resorts Int'l*, 372 F.3d at 167; *Papas v. Buchwald Cap. Advisors, LLC (In re Greektown Holdings, LLC)*, 728 F.3d 567, 577 (6th Cir. 2013); *Bank of La. v. Craig's Stores of Tex., Inc. (In re Craig's Stores of Tex., Inc.)*, 266 F.3d 388, 390 (5th Cir.

2001); *Valley Historic Ltd. P'ship v. Bank of N.Y.*, 486 F.3d 831, 837 (4th Cir. 2007).

Except for the First Circuit, every Court of Appeals to address the scope of post-confirmation "related to" jurisdiction has limited it to matters that have a "close nexus" to the bankruptcy case. *See, e.g.*, *Vanguard Prods. Corp. v. Citrin (In re Indicon, Inc.)*, 645 F. App'x 39, 40 n.1 (2d Cir. 2016); *Resorts Int'l*, 372 F.3d at 168–69; *Valley Historic*, 486 F.3d at 837; *Geruschat v. Ernst Young LLP (In re Seven Fields Dev. Corp.)*, 505 F.3d 237 (3d Cir. 2007); *Craig's Stores of Tex.*, 266 F.3d at 390; *U.S. Brass Corp. v. Travelers Ins. Grp., Inc. (In re U.S. Brass Corp.)*, 301 F.3d 296, 204 (5th Cir. 2002); *Pettibone Corp. v. Easley*, 935 F.2d 120, 122 (7th Cir. 1991); *Fairfield Cmtys., Inc. v. Daleske (In re Fairfield Cmtys., Inc.)*, 142 F.3d 1093, 1095 (8th Cir. 1998); *Wilshire Courtyard v. Cal. Franchise Tax Bd. (In re Wilshire Courtyard)*, 729 F.3d 1279 (9th Cir. 2013); *Pegasus Gold Corp.*, 394 F.3d at 1193–94. The Courts of Appeals agree that a matter has a close nexus to the bankruptcy case where it "affects the interpretation, implementation, consummation, execution, or administration of a confirmed plan or incorporated litigation trust agreement[.]" *Resorts Int'l*, 372 F.3d at 168–69. A close nexus does not exist merely when the resolution of a lawsuit could conceivably impact creditor recoveries at some undefined point in the future. *See Penthouse Media Grp. v. Guccione (In re Gen. Media, Inc.)*, 335 B.R. 66, 75 (Bankr. S.D.N.Y. 2005) ("A bankruptcy court cannot hear a post-confirmation dispute simply because it might conceivably increase the recovery to creditors, because the rationale could

'endlessly stretch a bankruptcy court's jurisdiction.'" (quoting *Pegasus Gold*, 394 F.3d at 1194 n.1).

It is no surprise that the Courts of Appeals have taken such a uniform approach, because consistent application of the close nexus test serves a critical policy goal. It is essential that a bankruptcy court exercises its "unflagging obligation to examine its subject matter jurisdiction at every stage of the proceedings"—particularly following confirmation where "bankruptcy jurisdiction is extremely limited." *See Valley Historic*, 486 F.3d at 838; *Falise v. Am. Tobacco Co.*, 241 B.R. 48, 58 (E.D.N.Y. 1999). Without this test, "related to" jurisdiction "easily could result in the bankruptcy court retaining jurisdiction of all cases that affect the reorganized debtor for many years thereafter" resulting in an "unwarranted expansion" of bankruptcy jurisdiction. *Boston Regional*, 410 F.3d at 106. The close nexus inquiry thus ensures that at the post-confirmation stage, a matter before the court "affect[s] an integral aspect of the bankruptcy process." *Resorts Int'l*, 372 F.3d at 167.

The First Circuit decision opens the door to the unwarranted expansion of bankruptcy jurisdiction. The First Circuit first declined to apply the "close nexus" test in *Boston Regional*, where the Court determined that the test does not apply to liquidating bankruptcies because the post-confirmation debtor does not continue as a going concern. 410 F.3d at 106. Here, the First Circuit dramatically widened the gap between it and the other Courts of Appeals by declining to apply the close nexus test in yet another context. The court concluded that given the "sui generis nature of PROMESA," the Board's fiscal plan-related

challenges needed to satisfy only the conceivable effect test. Expanding on its approach in *Boston Regional*, the court reasoned that, unlike a corporate debtor that "moves on" after its bankruptcy case such that the "the connection [to the bankruptcy] attenuates," the Commonwealth "does not simply 'move on'" as it remains subject to the Board's fiscal oversight. App. 25a.

But the First Circuit overlooked PROMESA's fundamental goal: to help Puerto Rico move on from bankruptcy and re-enter the public debt markets. 48 U.S.C. § 2121(a) ("The purpose of the Oversight Board is to provide a method for a covered territory to achieve fiscal responsibility and access to the capital markets."). Puerto Rico is thus the polar opposite of the liquidating bankruptcy example the First Circuit considered in *Boston Regional*. 410 F.3d at 106 (emphasizing that a liquidating debtor "has no authority to reenter the marketplace."). The First Circuit's decision means that virtually any PROMESA-related challenge can be filed against the Commonwealth in the Title III Court and be subject to the Court's bankruptcy jurisdiction—no matter how attenuated its connection to the Title III proceedings. Such a result undermines Puerto Rico's efforts to move on from bankruptcy post-confirmation, as PROMESA always envisioned.

The decision also has significant collateral implications outside the PROMESA context, as it joins other First Circuit precedent in chipping away at the close nexus test and the important policy function it serves. The First Circuit has opened the door for parties to circumvent Congress's statutory limits on

bankruptcy jurisdiction, particularly for other municipal bankruptcies under Chapter 9. Such a broad erosion of the close nexus test has not been recognized by any other Court of Appeal and thus results in a grossly lopsided circuit split which pits First Circuit courts, including the District of Puerto Rico, against virtually all other courts in the country.

B. The First Circuit's application of the "conceivable effect" test post-confirmation contravenes bankruptcy policy.

The First Circuit's incorrect application of the "conceivable effect" test to post-confirmation matters directly contravenes bankruptcy policy. The central purpose of the Bankruptcy Code is to give debtors a "fresh start." *Grogan v. Garner*, 498 U.S. 279, 286 (1991). This important policy has remain unchanged for decades*, see Local Loan Co. v. Hunt*, 292 U.S. 234, 244 (1934) (finding that bankruptcy provides debtors "a new opportunity in life with a clear field for future effort, unhampered by the pressure and discouragement of pre-existing debt."), and is no different in a Title III case, *see In re Fin. Oversight & Mgmt. Bd. for P.R.*, 73 F.4th 53, 57 (1st Cir. 2023) (implicating the "fresh start" policy in a Title III case); *In re Fin. Oversight & Mgmt. Bd. for P.R.*, 52 F.4th 465, 486 (1st Cir. 2022) ("PROMESA forthrightly acknowledges the Commonwealth's dire fiscal emergency and draws on it to lay out specific tools and various expediting procedures in an effort to keep all PROMESA goings-on in harmony with the ultimate goal of helping the Commonwealth achieve financial stability by efficiently restructuring its debts."); *Mun. of San Juan v.*

Puerto Rico, 919 F.3d 565, 577 (1st Cir. 2019) (applying bankruptcy policy to PROMESA).

Unlike in *Boston Regional*, Puerto Rico's bankruptcy is not a liquidating case in which the debtor does not continue on to its "fresh start." Failing to limit post-confirmation bankruptcy jurisdiction has the consequence of "the bankruptcy court retaining jurisdiction of all cases affecting the reorganized debtor" without end. *Boston Regional,* 410 F.3d at 106. By allowing "related to" jurisdiction to live on immortal, the First Circuit has shackled Puerto Rico to its bankruptcy cases and rendered it unable to attain the "fresh start" promised by bankruptcy law and PROMESA.

Moreover, the policies for applying the close nexus test to limit post-confirmation jurisdiction are even more pronounced in Title III cases should the Court interfere with the debtor's activity. Under PROMESA, Congress statutorily preserved to the territorial Government powers fundamental to the notions of self-rule, such as to control public policy, govern the Commonwealth on a day-to-day basis, and protect Puerto Ricans' welfare, safety, and health. 48 U.S.C. §§ 2163, 2165. Vesting jurisdiction in the Title III Court for every dispute involving PROMESA or that has any conceivable effect on the bankruptcy plan or Commonwealth's revenues would perpetuate an unprecedented incursion on the powers of Puerto Rico's Government, at odds with Congress's express intent and Puerto Rico's fundamental right to democratic self-government.

II. THE COURT OF APPEALS DISREGARDED BEDROCK CANONS OF STATUTORY INTERPRETATION.

After holding that the Title III Court properly exercised jurisdiction of this dispute, the First Circuit short-circuited its review of the merits by holding that PROMESA Section 204(a)'s "formal estimate" requires the Governor to prepare an analysis of speculative effects that may—or may not—arise from a law that acts only on the private markets. App. 34a. That interpretation contravenes the essential principle that a statute must be interpreted according to its plain meaning and runs counter to PROMESA's history and purpose.

A. The First Circuit Disregarded the Plain Meaning of PROMESA Section 204(a).

"As in all statutory construction cases, we begin with the language of the statute. The first step is to determine whether the language at issue has a plain and unambiguous meaning with regard to the particular dispute in the case." *Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 450 (2002) (quotations omitted). If the statutory language is "unambiguous and the statutory scheme is coherent and consistent," then "[t]he inquiry ceases." *Id.* (quotations omitted). Where "the statute's language is plain, the sole function of the courts is to enforce it according to its terms." *United States v. Ron Pair Enters., Inc.*, 489 U.S. 235, 241 (1989) (quotations omitted). The First Circuit erred at this foundational step.

Section 204(a) is clear and unambiguous on its face: it requires an estimate of the "impact, *if any*,

that the law *will have* on expenditures and revenues." 48 U.S.C. § 2144(a)(2)(A) (emphasis added). *First*, the plain meaning of "will have" requires at a minimum that the future fiscal effects be reasonably foreseeable and estimable to be included in the § 204(a) estimate. *See CSL Plasma Inc. v. U.S. Customs & Border Prot.*, 628 F. Supp. 3d 243, 254 (D.D.C. 2022) ("will happen" means that an outcome is certain to occur, as opposed to one that "may happen"). Had Congress meant to require the Government to estimate speculative, secondary, or tertiary effects of new legislation, it would have chosen "could have," "may have," or "potentially have." But Congress eschewed such formulations in favor of the more definitive "will have," requiring an estimate only of reasonably foreseeable effects.

Here, AAFAF supplied an estimate that explained why Act 41 did not have any reasonably foreseeable effects that could be predicted:

> [I]t is difficult to perform current and reliable economic analysis geared towards accurately isolating and measuring Act 41's impact on the Puerto Rico Economy vis-à-vis competing macroeconomic supply and inflation shocks, whose size and scope are unprecedented in the last four decades of data in the United States. Hence, a comprehensive economic analysis requires the design of Puerto Rico-specific empirical studies in order to capture the subtleties of Act 41's differing treatment of subclasses within the Puerto Rico labor market.

App. 14a. AAFAF explained that the effects of Act 41 were not reasonably foreseeable or predictable and

therefore that the law "will have" no effects that can be estimated. That explanation satisfied the Governor's obligation under Section 204(a) and should have stopped this dispute in its tracks. But the First Circuit held that "where it is clear that a law *could have* an impact on revenues—as the Governor concedes here—section 204(a)(2)(A) requires an estimate of such impact." *Id.* at 29a (emphasis added). The First Circuit's very holding disregards the plain words of the statute.

Second, Section 204(a)'s use of the words "impact, *if any*," reflects Congress's common sense understanding that there are some laws that will not have foreseeable (or even any) fiscal effects. *See Alioto v. Hoiles*, 341 F. App'x 433, 439–40 (10th Cir. 2009) (statute requiring "statement as to what extent, if any, the client could be required to pay any compensation to the attorney for related matters" meant that a statement "is required only to the extent there are related matters" because "all the words used by the legislature have meaning" (quotation omitted)). This suggests that Congress contemplated that there would be laws for which no fiscal effects would occur at all. Yet the Title III Court found the Certification lacking because it included "no methodological or computational detail." ADD34. But when a law regulates a purely private labor market, has no effect on tax rates, and creates no new sources of Government revenue, it is unclear what "methodological or computational detail" about this *lack* of effects could possibly satisfy the Board or the lower courts. It is the quintessential "proving a negative."

B. PROMESA's History and Purpose Demand a Narrow Reading of the Board's Powers.

This Court has explained that "[w]e do not . . . construe statutory phrases in isolation; we read statutes as a whole." *Samantar v. Yousuf*, 560 U.S. 305, 319 (2010) (quotations omitted). But the First Circuit's ruling disregards PROMESA's scheme. Congress meticulously enumerated the Oversight Board's powers. *See, e.g.*, 48 U.S.C. § 2124(h) (enabling the Oversight Board to "ensur[e] the prompt enforcement of" laws prohibiting public-sector employee strikes); *id.* § 2124(g) (empowering the Oversight Board to enter into certain contracts). This specific, limited grant of powers is consistent with the principle that "creature[s] of statute" such as the Oversight Board have "only those powers expressly granted . . . by Congress." *Soriano v. United States*, 494 F.2d 681, 683 (9th Cir. 1974); *see also HTH Corp. v. NLRB*, 823 F.3d 668, 679 (D.C. Cir. 2016) ("As a creature of statute the [National Labor Relations] Board has only those powers conferred upon it by Congress."). The lower courts' determination that the Oversight Board can simply reject an estimate with which it disagrees—even when the Governor has provided an explanation that satisfies the plain language of the statute—impermissibly shifts policy-making from the democratically-elected Government to the federally-appointed Board.

Moreover, requiring the Governor to estimate the macroeconomic effects of a law that acts only on the private labor markets goes beyond not only the plain language of PROMESA, but even what the United States' Congressional Budget Office is usually

required to do. *See* Megan S. Lynch & Jane G. Gravelle, Cong. Rsch. Serv., R46233, *Dynamic Scoring in the Congressional Budget Process* 4 (2023) (noting that CBO cost estimates "do not typically include the macroeconomic effects . . . such as changes in labor supply and the capital stock"). Even when the CBO is required to estimate macroeconomic effects for certain "major legislation," it must "include a qualitative assessment of the long-term budgetary effects and macroeconomic variables" only "to the extent practicable." *Id.* at 6. The First Circuit summarily rejected this argument, reasoning that PROMESA's temporary status as a response to Puerto Rico's fiscal crisis necessitates more intensive analysis of new legislation. App. 31a. But the First Circuit failed to recognize that requiring such an expansive analysis—even where the effects of a law may not be estimable—simply hands the Oversight Board a veto card for any new Commonwealth legislation it opposes. The fact that PROMESA is temporary, intended to restore Puerto Rico's access to the public markets and preserve Puerto Rico's elected government, cuts *against* concluding that Congress intended to give the Board such expansive powers, not in favor of it as the First Circuit concluded. *See id.* at 32a. Considered in the proper context of PROMESA's temporary status and the Board's limited powers, it defies logic that Congress would require the Government to perform a more stringent analysis even than the CBO performs for Congress' own new legislation.

III. THIS CASE HAS PROFOUND IMPLICATIONS FOR THE ROLE OF THE ELECTED GOVERNMENT AND RESPECT FOR THE WILL OF THE PEOPLE OF PUERTO RICO.

PROMESA represents an unprecedented incursion on Puerto Rico's already limited territorial self-rule, which is intrinsically linked to its colonial status. If Puerto Rico were a state, Congress could not give the Oversight Board the powers PROMESA has granted it. But in light of Puerto Rico's current status, this Court has recognized that Congress has given the Board "considerable power—including the authority to substitute its own judgment for the considered judgment of the Governor and other elected officials." *Fin. Oversight & Mgmt. Bd. for P.R. v. Aurelius Inv., LLC*, 140 S. Ct. 1649, 1662 (2020); *see also id.* at 1674 (Sotomayor, J., concurring in the judgment) (describing "the Board's wide-ranging, veto-free authority over Puerto Rico"). But Congress did not take away all of powers of the elected government—the sole entity that represents the will of the people of Puerto Rico. Thus, despite Puerto Rico's colonial status, to preserve Congress' intent when establishing the "awkward power-sharing" arrangement between Puerto Rico's elected government and the Board, the procedural and substantive limits on the Board's power must be clear and well understood by all parties. *In re Fin. Oversight & Mgmt. Bd. for P.R.*, 330 F. Supp. 3d at 689.

For that reason, Congress recognized the importance of resolving disputes related to PROMESA's interpretation. 48 U.S.C. § 2126(d) ("It shall be the duty of . . . the Supreme Court of the United States to

advance on the docket and to expedite to the greatest possible extent the disposition of any matter brought under this [Act]."). And this Court has historically reviewed cases that are of fiscal or political importance to United States territories. *See, e.g.*, *Fin. Oversight & Mgmt. Bd. for P.R. v. Centro de Periodismo Investigativo, Inc.*, 143 S. Ct. 82 (2022) (mem.) (granting certiorari to resolve whether and to what degree the Board may assert sovereign immunity); *Aurelius*, 140 S. Ct. at 1656 (granting certiorari to resolve whether Appointments Clause governs selection of Board members); *Territory of Alaska v. Am. Can Co.*, 358 U.S. 224, 225 (1959) ("The case is here by a petition for writ of certiorari which was granted in view of the fiscal importance of the question to [the Territory of] Alaska.").

Clarification is also necessary to quell ongoing litigation between the Board and Puerto Rico's elected officials. The Board's failure to articulate standards for the Section 204(a) process continues to stymie relations between the Board and the Government and feed this cycle of litigation. *See, e.g.*, *In re Fin. Oversight & Mgmt. Bd. for P.R.*, 945 F.3d 3 (1st Cir. 2019) and *In re Fin. Oversight & Mgmt. Bd. for P.R.*, 37 F.4th 746 (1st Cir. 2022). Without intervention from this Court, Puerto Rico's basic lawmaking function will be subsumed by protracted, expensive litigation over the substance and mechanics of the Section 204(a) process—and PROMESA's goal of long-term fiscal stability for the Commonwealth will be unattainable.

CONCLUSION

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

Respectfully submitted.

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