TABLE OF CONTENTS

Page

APPENDIX A: Opinion of the United States Court of Appeals for the First Circuit, dated Aug. 10, 2023 .... 1a

APPENDIX B: Opinion and Order of the United States District Court for the District of Puerto Rico, dated Mar. 3, 2023 .... 34a

APPENDIX C: Order Denying Rehearing, by the United States Court of Appeals for the First Circuit, dated Sept. 21, 2023 .... 83a

APPENDIX D: Relevant Statutory Provisions ... 93a

APPENDIX A

United States Court of Appeals
for the First Circuit

No. 23-1267

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

Debtors,

THE FINANCIAL OVERSIGHT AND MANAGEMENT BOARD FOR PUERTO RICO, as Representative for the Commonwealth of Puerto Rico,

Plaintiff, Appellee,

v.

RAFAEL HERNÁNDEZ-MONTAÑEZ,

Defendant, Appellant,

PEDRO PIERLUISI-URRUTIA,

Defendant, Appellee

No. 23-1268

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

Debtors,

THE FINANCIAL OVERSIGHT AND MANAGEMENT BOARD FOR PUERTO RICO, as Representative for the Commonwealth of Puerto Rico,

Plaintiff, Appellee,

v.

PEDRO PIERLUISI-URRUTIA,

Defendant, Appellant,

RAFAEL HERNÁNDEZ-MONTAÑEZ,

Defendant, Appellee

No. 23-1358

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

Debtors,

THE FINANCIAL OVERSIGHT AND MANAGEMENT BOARD FOR PUERTO RICO, as Representative for the Commonwealth of Puerto Rico,

Plaintiff, Appellee,

v.

PEDRO PIERLUISI-URRUTIA,

Defendant, Appellant,

RAFAEL HERNÁNDEZ-MONTAÑEZ,

Defendant, Appellee

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

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

Before

Kayatta, Lynch, and Howard, Circuit Judges.

Jorge Martínez-Luciano, with whom Emil Rodríguez-Escudero, and M.L. & R.E. Law Firm were on brief, for the appellant Hernández-Montañez.

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

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

Mark David Harris and Timothy W. Mungovan, with whom Martin J. Bienenstock, Julia D. Alonzo, Shiloh A. Rainwater, John E. Roberts, Guy Brenner, Shannon D. McGowan, Lucas Kowalczyk, and Proskauer Rose LLP were on brief, for appellee The Financial Oversight and Management Board for Puerto Rico.

August 10, 2023

KAYATTA, **Circuit Judge**. In June 2022, the Governor of Puerto Rico signed Act 41-2022 into law, tightening certain labor regulations that had been loosened about five years earlier. The Financial Oversight and Management Board for Puerto Rico (the "Board" or the "Oversight Board") argues that the Governor failed to submit the documentation necessary to demonstrate that Act 41 complied with the Board's fiscal plan for the Commonwealth, as required pursuant to the Puerto Rico Oversight, Management, and Economic Stability Act (PROMESA).

The Board sued the Governor to block the law's implementation, filing an adversary proceeding in the district court overseeing Puerto Rico's bankruptcy process under Title III of PROMESA. The Board then moved for summary judgment, and the Governor filed a motion for judgment on the pleadings, arguing that the "Title III court" lacked subject matter jurisdiction over the dispute. The district court, after concluding it had jurisdiction, granted the Board's motion for summary judgment and nullified the law. For the following reasons, we affirm the judgment of the district court.

I.

A.

We begin with an overview of those sections of

PROMESA that provide the foundation for this appeal.[1] Congress enacted PROMESA in 2016 "to address the Commonwealth's fiscal crisis, facilitate restructuring of its public debt, ensure its future access to capital markets, and provide for its long-term economic stability." Pierluisi v. Fin. Oversight & Mgmt. Bd. for P.R. (In re Fin. Oversight & Mgmt. Bd. for P.R.), 37 F.4th 746, 750 (1st Cir. 2022). PROMESA established the Oversight Board and gave it "wide-ranging authority to oversee and direct many aspects of Puerto Rico's financial recovery efforts." Id. Two of PROMESA's tools for "address[ing] the Commonwealth's fiscal crisis" are centrally relevant here: periodic fiscal plans certified by the Board, and a bankruptcy-like proceeding resulting in a plan of adjustment. See id.; Fin. Oversight & Mgmt. Bd. for P.R. v. Federacion de Maestros de P.R., Inc. (In re Fin. Oversight & Mgmt. Bd. for P.R.), 32 F.4th 67, 75 (1st Cir. 2022). We describe each in turn.

1.

PROMESA Title II empowers the Board to, among other things, develop and certify "fiscal plans" for the Commonwealth and its instrumentalities. See 48 U.S.C. § 2141. Fiscal plans must "provide a method to achieve fiscal responsibility and access to the capital markets," covering a period of at least five years. 48 U.S.C. § 2141(b)(1)–(2). In order to ensure the government's compliance with the

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[1] All uses of "section" refer to ROMESA, Pub. L. No. 114-187, 130 Stat. 549 (2016), unless otherwise specified.

policies and financial strategies set forth in certified fiscal plans, section 204(a) "outlines a multi-step, back-and-forth process by which the Oversight Board reviews Commonwealth legislation for consistency with" such plans. Pierluisi, 37 F.4th at 751; see 48 U.S.C. § 2144(a).

Section 204(a)(1) requires the Governor to submit all newly enacted laws to the Board within seven business days of the relevant law's enactment. 48 U.S.C. § 2144(a)(1). Section 204(a)(2) provides that, along with the text of the new law, the Governor must also submit: (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"; and (ii) a certification by that same entity as to whether the law is or is not "significantly inconsistent with the Fiscal Plan for the fiscal year." Id. § 2144(a)(2). If the relevant entity determines that the law is "significantly inconsistent," it must provide the "reasons for such finding." Id.

Following the Governor's submission, PROMESA puts the ball in the Board's court. Pursuant to section 204(a)(3), the Board must "notif[y] the Governor and the Legislature if a submission is problematic, either because it lacks a formal estimate or certification, or because the certification states that the law is significantly inconsistent with the fiscal plan." Pierluisi, 37 F.4th at 751; see 48 U.S.C. § 2144(a)(3). Further, under section 204(a)(4), the Board "may direct the Commonwealth to provide the missing estimate or certification, or,

if the Commonwealth has certified that the law is inconsistent with the fiscal plan, may direct the Commonwealth to 'correct the law to eliminate the inconsistency' or 'provide an explanation for the inconsistency that the Oversight Board finds reasonable and appropriate.'" Pierluisi, 37 F.4th at 751 (quoting 48 U.S.C. § 2144(a)(4)). Finally, section 204(a)(5) provides that if the Commonwealth "fails to comply with a direction given by the Oversight Board under [section 204(a)(4)] with respect to a law, the Oversight Board may take such actions as it considers necessary, consistent with [PROMESA], to ensure that the enactment or enforcement of the law will not adversely affect the territorial government's compliance with the Fiscal Plan, including preventing the enforcement or application of the law." 48 U.S.C. § 2144(a)(5).

Related to the Board's power under section 204(a)(5) to prevent "the enforcement . . . of the law," id., is a prohibition contained in section 108(a)(2), which applies broadly to constrain the Commonwealth's legislative power and is not limited to the context of fiscal plans. That section provides: "Neither the Governor nor the Legislature may . . . enact, implement, or enforce any statute, resolution, policy, or rule that would impair or defeat the purposes of [PROMESA], as determined by the Oversight Board." 48 U.S.C. § 2128(a)(2). And section 104(k) gives teeth to the Board's aforementioned powers to intervene in the Commonwealth's legislative process, providing that "[t]he Oversight

Board may seek judicial enforcement of its authority to carry out its responsibilities under [PROMESA].” 48 U.S.C. § 2124(k).

2.

PROMESA also created, through Title III, “a modified version of the municipal bankruptcy code for territories and their instrumentalities.” Federacion de Maestros, 32 F.4th at 75. “Title III authorize[s] the Board to place the Commonwealth and its instrumentalities into bankruptcy proceedings.” Id. As elaborated further below, district courts have jurisdiction over the Commonwealth’s bankruptcy proceedings, and the District of Puerto Rico is the proper venue for such proceedings. See 48 U.S.C. §§ 2166(a), 2167. Pursuant to section 308(a), Chief Justice Roberts designated Judge Laura Taylor Swain of the Southern District of New York “to sit by designation” in the District of Puerto Rico and “conduct the [Title III] case.” See 48 U.S.C. § 2168(a); Pierluisi, 37 F.4th at 751 n.4. The Board commenced the Title III case on behalf of the Commonwealth on May 3, 2017, and the “Title III court” -- the name commonly used to refer to the court sitting pursuant to the Chief Justice’s section 308(a) designation -- confirmed the Commonwealth’s plan of adjustment on January 18, 2022. In re Fin. Oversight & Mgmt. Bd. for P.R., 636 B.R. 1, 6 (D.P.R. 2022).

B.

The Board brought this lawsuit to block enforcement of Act 41-2022, which the Governor signed into law on June 20, 2022. All parties agree that Act 41

amends certain provisions of the Labor Transformation and Flexibility Act (LTFA or "Act 4-2017"). The LTFA, enacted in January 2017, generally sought to loosen rules imposed on private-sector employers. Act 41 reverses the LTFA's loosening of rules regarding sick leave, vacation leave, Christmas bonus eligibility, employee probationary periods, and employers' obligations to justify employee dismissals.

Each of the Board's certified Commonwealth fiscal plans, dating back to the first one certified on March 13, 2017, has recommended deregulatory changes viewed by the Board as increasing labor participation. As relevant here, the 2021 certified plan expressed concern that repeal of the LTFA would "discourage new hiring and reduce . . . labor market flexibility," declaring that "the Government must refrain from repealing Act 4-2017 or enacting new legislation that negatively impacts labor market flexibility." The Board repeated these statements in the fiscal plan certified on January 27, 2022.

Nonetheless, on March 10, 2022, the Puerto Rico House of Representatives passed HB 1244 -- the bill that would later become Act 41. Eight days later, the Board issued a resolution directing the Senate not to pass HB 1244 and the Governor not to enact or implement it, in part because the bill "propose[d] to repeal portions of the LTFA and reestablish many of the burdensome labor restrictions that existed prior to the passage of the LTFA." The resolution further advised that the Commonwealth was barred from enacting the bill under section 108(a)(2),

which, as described above, prohibits the Governor and the legislature from enacting or implementing any statute "that would impair or defeat the purposes of [PROMESA]." 48 U.S.C. § 2128(a). The Board approved taking legal action pursuant to section 104(k) to block enactment or enforcement of the bill.

The legislature then passed the bill on June 7, 2022. In response, the Board sent a letter to the Governor notifying him that the Board "ha[d] determined that HB 1244 impairs and defeats PROMESA's purposes." The letter continued, "By seeking to repeal the LTFA's reforms, the Bill is significantly inconsistent with the Certified Fiscal Plan. You are barred from signing the Bill into law by PROMESA Section 108(a)(2)." The Board further explained that if the Governor decided to sign the law, he would be required to submit a formal estimate and certification pursuant to section 204(a), and such estimate would need to "address the full economic impact of the issues raised in this letter, including how the Bill's impact on labor force participation will affect revenues."

The Governor signed HB 1244 into law on June 20, 2022, thus triggering the section 204(a) review process at the heart of this appeal. On June 29, the Puerto Rico Fiscal Agency and Financial Advisory Authority (AAFAF), acting on behalf of the Governor, submitted its section 204(a)(2) cost estimate and certification to the Board (the "Section 204(a) Submission"). The Section 204(a) Submission explained that "Act 41 seeks to improve the labor mar-

kets in Puerto Rico by: a) increasing the labor supply through improvements in the compensation of private sector employees and integration of new entrants into the formal workforce; and b) promoting increased labor market participation." With respect to the law's impact on the LTFA and compliance with the most recent fiscal plan, the report concluded:

> [T]he most important labor market reforms of Act 4-2017 were preserved and continue in effect post-Act 41 enactment. Specifically, only 13 of the 72 substantive sections of Act 4-2017 were subject to any modification . . . .
>
> Although Act 41 is consistent with the plain language [of the 2022 certified fiscal plan], in as much as it does not repeal Act 4-2017, an argument can be made that Act 41 "negatively impacts labor market flexibility." A close examination of Act 41 shows that it continues to largely preserve Act 4-2017's structural reforms and when taking into consideration the analysis provided herein, one may conclude Act 41 is not significantly inconsistent with the [2022] Fiscal Plan.

And regarding the law's economic impact, the AAFAF stated:

> [N]otwithstanding Act 41's expected positive impact on the labor supply, the ultimate economic impact of Act 41 will need to be evaluated while considering broader and competing macroeconomic factors affecting the

> Puerto Rico economy, including: U.S. inflationary pressure, global supply-chain constraints, and the continuing energy crisis. Considering the limitations on economic and labor statistics in Puerto Rico, including long reporting lags and limitations around coverage and national comparability, it 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-a-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.

The Section 204(a) Submission included as attachments fiscal impact certifications from the Puerto Rico Department of Treasury and the Puerto Rico Office of Management and Budget. These certifications -- which were completed on standardized two-page forms -- indicated that Act 41 would have no impact on government revenue and reported that the impact on expenditures would be limited to

$3,000, with such cost attributable to the publication of notices by the Puerto Rico Department of Labor.[2]

On July 19, 2022, the Board, pursuant to section 204(a)(3), notified the Governor and the legislature that the Section 204(a) Submission did not include "the required certification and formal estimate for Act 41." With respect to the estimate, the Board described that the Governor had failed to "assess[] [Act 41's] impact on the economy and on the Commonwealth's revenues and expenditures." The Board then explained that the submission's certification was inadequate because "the absence of a proper formal estimate . . . necessarily means that the certification is also deficient," and, in any event, Act 41 is significantly inconsistent with the fiscal plan. Citing section 204(a)(4), the Board "direct[ed] the Governor to provide the missing formal estimate and certification" by July 22. The letter further provided, "given the Oversight Board's determination that the Act impairs and/or defeats the purposes of PROMESA, the Government must immediately suspend the law's implementation and enforcement -- at least until the Government and the Oversight Board have fully exchanged their views concerning Act 41 and the Oversight Board changes its determination (which may not occur)."

The AAFAF responded three days later, "strongly disagree[ing] with the assertion that the

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[2] A subsequent update provided that the Department of Labor only spent $1,248.12 publishing the required notices, rather than $3,000 as initially estimated.

[Section 204(a) Submission] is non-compliant with PROMESA Section 204(a)'s requirements," and repeating the assertion that "[a] comprehensive economic analysis of Act 41 [would be] an ambitious and expansive undertaking that would require economists to design Puerto Rico-specific empirical studies and economic models." The Board and the AAFAF subsequently exchanged several more letters, with each party maintaining its position regarding the adequacy of the Section 204(a) Submission.

C.

On September 1, 2022, the Board initiated this adversary proceeding under Title III against the Governor. The Board sought an order nullifying Act 41 based on two independent claims: (i) the Board's determination pursuant to section 108(a)(2) that Act 41 "impair[s] or defeat[s] the purposes of [PROMESA]," 48 U.S.C. § 2128(a), and (ii) the Governor's failure to provide the required certification and formal estimate pursuant to section 204(a). The Speaker of the Puerto Rico House of Representatives intervened as a defendant on behalf of the House.

The Board moved for summary judgment on September 29, 2022. On the same day, the Governor filed a Rule 12(c) motion for judgment on the pleadings, arguing that the court lacked subject matter jurisdiction. The district court granted the Board's motion with respect to section 204(a) -- nullifying Act 41 and any actions taken to implement it -- and denied the Governor's Rule 12(c) motion. The court

subsequently dismissed as moot the Board's claim with respect to section 108(a)(2). The Governor and the Speaker timely appealed.

II.

We review the district court's grant of summary judgment de novo, "construing the record in the light most favorable to the non-moving party." López-Santos v. Metro. Sec. Servs., 967 F.3d 7, 11 (1st Cir. 2020). We likewise review de novo the district court's denial of the Governor's 12(c) motion. Shay v. Walters, 702 F.3d 76, 79 (1st Cir. 2012).

The Governor and the Speaker raise two principal arguments on appeal: first, that the "Title III court" lacks subject matter jurisdiction over the Board's section 204(a) claim; and second, that the Governor's Section 204(a) Submission complied with the formal estimate and certification requirements. We address these arguments in turn.

A.

We begin with a technical, but important point: There is only one court at issue in this case -- the United States District Court for the District of Puerto Rico. And that court clearly has subject matter jurisdiction over this lawsuit, either under 28 U.S.C. § 1331 because, as all parties agree, this case turns on the resolution of federal questions, or under PROMESA section 306(a)(2), which gives the court "original but not exclusive jurisdiction of all civil proceedings arising under [Title III], or arising in or related to cases under [Title III]." 48 U.S.C. § 2166(a)(2).

So the argument by the Governor and the Speaker that the court below lacks subject matter jurisdiction cannot succeed. Rather, the argument must be that this case should not have been assigned to Judge Swain because subject matter jurisdiction rests only on 28 U.S.C. § 1331, and not on section 306(a)(2). According to this argument, because Judge Swain was specifically designated "to conduct the [Title III] case," 48 U.S.C. § 2168(a), "where a dispute does not fit within the jurisdictional parameters of [section 306(a)(2)] . . . it should not be entertained as an adversary proceeding overseen by [her]." Fin. Oversight & Mgmt. Bd. for P.R. v. Pierluisi (In re Fin. Oversight & Mgmt. Bd. for P.R.), 650 B.R. 334, 348 (D.P.R. 2023).

Assuming without deciding that Judge Swain's mandate is so limited, and that exceeding that mandate would provide sufficient grounds for reversal, we nevertheless reject the argument. We conclude that the Board's section 204(a) claim -- which served as the basis for the district court's decision on the merits -- falls within the ambit of Title III's jurisdictional grant.

As noted above, section 306(a)(2) provides that district courts generally have "original but not exclusive jurisdiction of all civil proceedings arising under [Title III], or arising in or related to cases under [Title III]." 48 U.S.C. § 2166(a)(2). This language mirrors 28 U.S.C. § 1334(b), which gives district courts jurisdiction over certain title 11 bankruptcy matters. See 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."); Asociación de Salud Primaria de P.R., Inc. v. Puerto Rico (In re Fin. Oversight & Mgmt. Bd. for P.R.), 330 F. Supp. 3d 667, 680 (D.P.R. 2018). Accordingly, the parties agree that our prior decisions interpreting that jurisdictional provision under title 11 should, at least to some extent, inform our interpretation of Title III's jurisdictional bounds.

In Gupta v. Quincy Medical Center, 858 F.3d 657 (1st Cir. 2017), we outlined the three forms of title 11 jurisdiction listed in 28 U.S.C. § 1334(b) – "arising under," "arising in," and "related to." Id. at 661–63. First, "proceedings 'aris[e] under title 11' when the Bankruptcy Code itself creates the cause of action." Id. at 662 (alteration in original). Second, "[w]e have defined 'arising in' proceedings generally as 'those that are not based on any right expressly created by title 11, but nevertheless, would have no existence outside of the bankruptcy.'" Id. at 662–63 (quoting Middlesex Power Equip. & Marine, Inc. v. Town of Tyngsborough (In re Middlesex Power Equip. & Marine, Inc.), 292 F.3d 61, 68 (1st Cir. 2002)). Third, "'related to' proceedings are those '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. at 663 (quoting In re Middlesex Power Equip. & Marine, Inc., 292 F.3d at 68).

"Arising under" jurisdiction is not at issue here, as it is undisputed that Title III itself did not create the Board's cause of action. The Board brought this

case based on provisions within PROMESA Title I (sections 108(a) and 104(k)) and Title II (section 204(a)). That leaves "arising in" and "related to" jurisdiction; and because "related to" is the broader of the two concepts, we begin there.

As described above, "'related to' proceedings are those 'which "potentially have some effect on the bankruptcy estate . . . or otherwise have an impact upon the handling and administration of the bankrupt estate."'" Id. This test is commonly referred to as the Pacor standard, based on the Third Circuit case that initially developed it. Pacor, Inc. v. Higgins, 743 F.2d 984, 994 (3d Cir. 1984). We have observed that "[a]lthough 'related to' jurisdiction 'cannot be limitless,' it is nonetheless 'quite broad.'" Gupta, 858 F.3d at 663 (citation omitted) (first quoting Celotex Corp. v. Edwards, 514 U.S. 300, 308 (1995); and then quoting Bos. Reg'l Med. Ctr., Inc. v. Reynolds (In re Bos. Reg'l Med. Ctr., Inc.), 410 F.3d 100, 105 (1st Cir. 2005)).

The Governor and the Speaker, however, urge us to apply the "close nexus" test -- a narrower conception of "related to" jurisdiction that several other circuits, but not the First Circuit, have adopted in the context of disputes arising after confirmation of a bankruptcy plan. See, e.g., Binder v. Price Waterhouse & Co., LLP (In re Resorts Int'l, Inc.), 372 F.3d 154, 166–67 (3d Cir. 2004) (defining the "close nexus" test); Montana v. Goldin (In re Pegasus Gold Corp.), 394 F.3d 1189, 1194 (9th Cir. 2005) (adopting the Third Circuit's "close nexus" test); Valley Historic Ltd. P'ship v. Bank of N.Y., 486 F.3d 831,

836–837 (4th Cir. 2007) (adopting the Third Circuit's "close nexus" test); Bank of La. v. Craig's Stores of Tex., Inc. (In re Craig's Stores of Tex., Inc.), 266 F.3d 388, 390–91 (5th Cir. 2001) (adopting a test that narrowed post-confirmation bankruptcy jurisdiction, similar to the "close nexus" test); Pettibone Corp. v. Easley, 935 F.2d 120, 122–23 (7th Cir. 1991) (concluding that bankruptcy jurisdiction narrows following confirmation).

Under the "close nexus" test, as articulated by the Third Circuit, "the essential inquiry [is] whether there is a close nexus to the bankruptcy plan or proceeding sufficient to uphold bankruptcy court jurisdiction over the matter. . . . Matters that affect the interpretation, implementation, consummation, execution, or administration of the confirmed plan will typically have the requisite close nexus." In re Resorts, 372 F.3d at 166–67. The test arose in part because the Pacor standard cannot be applied literally in the post-confirmation context. "[I]t is impossible for the bankrupt debtor's estate to be affected by a post-confirmation dispute because the debtor's estate ceases to exist once confirmation has occurred." Id. at 165. The Third Circuit further observed that "bankruptcy court jurisdiction 'must be confined within appropriate limits and does not extend indefinitely, particularly after the confirmation.'" Id. at 164 (quoting Donaldson v. Bernstein, 104 F.3d 547, 553 (3d Cir. 1997)).

We declined to apply the "close nexus" test in In re Boston Regional, which analyzed a post-confirmation dispute in the context of a chapter 11 plan of liquidation. 410 F.3d at 106–07. In distinguishing

that case from In re Resorts and others that have narrowed bankruptcy jurisdiction following confirmation, we pointed to differences between liquidating plans and "true reorganization plans," where "the corporation moves on" following the bankruptcy. Id. Crucially, we observed that "context is important," and "what is 'related to' a proceeding under title 11 in one context may be unrelated in another." Id. "The existence vel non of related to jurisdiction must be determined case-by-case." Id. at 107.

That logic guides our reasoning here. While general principles from our title 11 case law are instructive, those same principles dictate that we cannot rigidly import the jurisdictional tests from that context to this case. With the "sui generis nature of PROMESA" in mind, Federacion de Maestros, 32 F.4th at 78 (quoting Peaje Invs. LLC v. García-Padilla, 845 F.3d 505, 513 (1st Cir. 2017)), it becomes clear that what might be "related to" a Title III case is distinct from what might be "related to" a title 11 bankruptcy case.

So the central jurisdictional question on appeal is, simply put, whether the Board's claim -- that the Governor violated section 204(a) by failing to submit the requisite estimate and certification for Act 41 -- is "related to" the Commonwealth's Title III case, in which the Title III court confirmed the Commonwealth's plan of adjustment five months prior to Act 41's enactment.

The nature of the statutory scheme here provides the answer. "In enacting PROMESA, Congress

found that '[a] comprehensive approach to fiscal, management, and structural problems and adjustments . . . is necessary, involving independent oversight and a Federal statutory authority for the Government of Puerto Rico to restructure debts in a fair and orderly process.'" Id. at 74 (alteration in original) (quoting 48 U.S.C. § 2194(m)(4)). The fiscal plans developed under Title II and the bankruptcy procedures established under Title III are both part of that "comprehensive approach" -- complementary policy tools focused on the same goal. Section 314(b)(7) further demonstrates their complementary nature. That provision requires, as a condition precedent to the confirmation of the plan of adjustment, that the "plan [be] consistent with the applicable Fiscal Plan certified by the Oversight Board under [Title] II." 48 U.S.C. § 2174(b)(7); see In re Fin. Oversight & Mgmt. Bd. for P.R., 636 B.R. at 220, ex. A, ¶ 85.1(a). And just as a provision in Title III explicitly requires consistency with the fiscal plan certified under Title II, a provision in Title II explicitly requires consistency with the plan of adjustment confirmed under Title III: section 201(b)(1)(M) provides that fiscal plans may not call for the transfer of assets between territorial entities, unless such transfer is permitted by the plan of adjustment. 48 U.S.C. § 2141(b)(1)(M).

Given this backdrop, we conclude that the Board's efforts to enforce the Commonwealth's certified fiscal plan through section 204(a) are, at a minimum, "related to" the Commonwealth's Title

III case.[3] Any differences between the pre- and post-confirmation manifestations of the "related to" test are largely irrelevant in this context. In a typical bankruptcy case analyzing "relatedness," the court analyzes whether a claim arising under an area of law entirely unrelated to title 11 (e.g., contract or tort) is "related to" the bankruptcy case. See, e.g., In re Bos. Reg'l, 410 F.3d at 108 (charitable bequests); In re Resorts, 372 F.3d at 156–57 (professional malpractice and breach of contract); Pacor, 743 F.2d at 985 (products liability); Valley Historic Ltd. P'ship, 486 F.3d at 833 (breach of contract and tortious interference). Here, the substantive provisions underlying the Board's claim were enacted in the same piece of legislation and directed toward the same goal as Title III. That claim is thus "related" -- in a fundamental sense -- to the Commonwealth's Title III case; and this relation is quite different from the way a contract claim, for instance, may or may not be related to a traditional bankruptcy case.

The Governor argues that our conclusion here "would extend bankruptcy jurisdiction over virtually every dispute between the Government and the Board for years to come," violating "the bedrock principle of limited bankruptcy court jurisdiction, particularly post-confirmation." But the key rationales for applying "related to" jurisdiction more narrowly in the post-confirmation context are missing here. First, as we observed in In re Boston Regional, a broad post-confirmation construction of "related

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[3] For this reason, we need not address whether this dispute "aris[es] in" the Title III case.

to" jurisdiction "would unfairly advantage reorganized debtors by allowing such firms to funnel virtually all litigation affecting them into a single federal forum." 410 F.3d at 106. Here, by contrast, it is plain that the Commonwealth enjoys no "unfair[] advantage" by having this dispute heard in the Title III court; after all, the Governor and the Speaker -- the parties arguing that the case cannot be heard in the Title III court -- both claim to be representing the Commonwealth's best interests. And the appropriate forum, according to the Governor and the Speaker, is a non-Title III court sitting in the District of Puerto Rico. So this case is about whether the Board's claims should be heard by one judge or another within the District of Puerto Rico -- a far cry from a reorganized debtor seeking to "funnel" claims that would ordinarily be heard in state or federal courts across the country "into a single federal forum." Id. Another reason for narrowing bankruptcy jurisdiction with respect to reorganized corporate debtors is that "as the corporation moves on, the connection [to the bankruptcy] attenuates." Id. at 107. But 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.[4]

[4] Under section 209, the Board will terminate once the Board certifies that Puerto Rico (i) "has adequate access to short-term and long-term credit markets at reasonable interest rates" and (ii) has experienced balanced budgets, developed in accordance

Our conclusion today does not result in limitless "related to" jurisdiction. We address only whether this dispute -- regarding the application of PROMESA's fiscal plan compliance rules to newly enacted legislation – "relates to" the Commonwealth's Title III case.[5] There must, of course, be some limit to what is "related to" a Title III case. Cf. N.Y. State Conf. of Blue Cross & Blue Shield Plans v. Travelers Ins. Co., 514 U.S. 645, 655 (1995) (explaining, in the context of analyzing a statute that preempted state laws "relate[d] to" a particular subject, that "[i]f 'relate to' were taken to extend to the furthest stretch of its indeterminacy, then for all practical purposes pre-emption would never run its course . . . . But that, of course, would be to read Congress's words of limitation as mere sham . . . ."). Stronger arguments against jurisdiction will certainly arise where one of PROMESA's tools for financial reform does not provide the basis for the claim. But this dispute comfortably falls within the

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with modified accrual accounting standards, for at least four consecutive fiscal years. 48 U.S.C. § 2149.

[5] The Speaker points out that the Board has certified fiscal plans for a variety of territorial instrumentalities that have not been placed in Title III proceedings (e.g., the University of Puerto Rico and the Puerto Rico Aqueduct and Sewer Authority). We do not opine on the circumstances in which disputes centering on such instrumentalities may or may not "relate to" the Commonwealth's Title III case. Here, the fiscal plan for the Commonwealth itself (rather than one of its instrumentalities) is the focus of this dispute, and it is the Commonwealth's Title III proceeding that this dispute is "related to."

bounds of "related to" jurisdiction, the outer limits of which we need not now limn.

B.

Having concluded that Judge Swain properly acted within the scope of her designation, we now address the merits of the section 204(a) claim. The Governor and the Speaker assert that the Governor provided the requisite formal estimate of Act 41's financial impact and certification of the law's consistency with the fiscal plan. Because there is no dispute that the certification must rely on an appropriate formal estimate – and because, as described further below, the Governor and the Speaker make no argument that they can prevail on appeal if we conclude the estimate was inadequate -- this appeal necessarily turns on PROMESA's requirements for such estimates.

As discussed above, section 204(a)(2)(A) requires the Governor to provide "[a] formal estimate prepared by an appropriate entity of the territorial government with expertise in budgets and financial management of the impact, if any, that the law will have on expenditures and revenues." 48 U.S.C. § 2144(a)(2)(A). In Pierluisi, our only previous case regarding the scope of this provision, we cited approvingly the district court's description "that a 'formal estimate' under section 204(a) means a complete and accurate estimate 'covering revenue and expenditure effects of new legislation' over the entire [five-year] period of the fiscal plan." 37 F.4th at 752 (quoting Fin. Oversight & Mgmt. Bd. for P.R. v. Garced (In re Fin. Oversight & Mgmt. Bd. for P.R.),

403 F. Supp. 3d 1, 13 (D.P.R. 2019)). We applied that standard to the estimates the Governor submitted for two different healthcare-related laws. Id. at 753, 762–64. For one of those laws, the Governor's submission reported an impact of $475,131.47 on the Department of Health's budget and no impact on revenues. Id. at 754. For the other, the submission simply stated the law would have no impact on expenditures or revenue. Id. at 753. Because the Governor provided no "analysis or data" to support these "conclusory" statements, we held that the Board had reasonably determined that the submissions failed to comply with section 204(a). Id. at 762–64.

Here, the Governor made no attempt to submit an estimate of Act 41's impact on government revenues, despite conceding that "Act 41 could have secondary effects that might affect employment in the Commonwealth (thereby potentially affecting the tax base and revenues)." The only relevant financial figure included in the Section 204(a) Submission was an estimate of the Department of Labor's publishing costs. The Governor and the Speaker argue that no revenue estimate was required because Act 41 "regulates a purely private labor market, has no effect on tax rates, and creates no new sources of Government revenue." They assert that any impact on revenue would be speculative, maintaining that section 204(a) "does not require speculation about remote future fiscal effects."

But section 204(a)(2)(A) provides no exception for economic analysis that, as the Governor describes, is "difficult to perform" due to competing

"macroeconomic factors." Doing what the Governor and the Speaker ask -- essentially, eliminating the formal estimate requirement for all private sector regulatory laws -- would be inconsistent with section 204(a)'s text and purpose. "The procedures and obligations contemplated by section 204(a) are not procedure for procedure's sake. Rather, they serve the critical purpose of allowing the Board to determine that the legislation at issue adheres to the fiscal plan and will not impair PROMESA's purpose of restoring Puerto Rico to fiscal stability." Pierluisi, 37 F.4th at 766. Requiring the Governor to formally estimate the fiscal impact of legislation also has the salutary effect of decreasing the likelihood that the Commonwealth will enact legislation that will prolong the Board's supervision, or even worse, repeat the practices that led to the Commonwealth's insolvency. Accordingly, 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.

The Governor attempts to ground his interpretation of section 204(a)(2)(A) in its text, focusing on the following phrase: "estimate . . . of the impact, if any, that the law will have." 48 U.S.C. § 2144(a)(2)(A) (emphasis added). First, he asserts that "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. 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.'" Second, the "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."

While we do not reject the possibility that some laws will indeed have no effect that can be estimated, the statute's use of the term "estimate" makes clear that uncertainty as to a law's effects does not generally provide an excuse for making no serious attempt. See The American Heritage Dictionary of the English Language 609 (5th ed. 2011) (defining the noun form of "estimate" as "[a] tentative evaluation or rough calculation, as of worth, quantity or size"); Webster's New World College Dictionary 498 (5th ed. 2014) (defining the noun form of "estimate" as "a general calculation of size, value, etc."). Our conclusion is buttressed by the text's requirement that the estimate be "formal" -- signifying both the importance and the official nature of the estimate -- and by the requirement that the "formal estimate" be prepared by an "appropriate" entity with "expertise" in "budgets" and "financial management." See 48 U.S.C. § 2144(a)(2)(A). Although it may be "difficult" to foresee the revenue effects of Act 41 in light of competing economic factors, the Governor has failed to demonstrate that the effects of Act 41 are entirely unforeseeable or immeasurable through economic modeling.

Further, the Governor asserts that requiring an estimate that accounts for effects on the private labor market would go "beyond what the United States' Congressional Budget Office [(CBO)] is required to do." But he fails to address the fact that

for certain "major legislation," the CBO is currently required to assess macroeconomic effects, such as effects on labor supply. See Megan S. Lynch & Jane G. Gravelle, Cong. Rsch. Serv., R46233, Dynamic Scoring in the Congressional Budget Process 4, 13 (2023). In any event, what the CBO is required to do sheds little light on what PROMESA mandates. CBO estimates are generally prepared for all bills reported from congressional committees, see id. at 2, so it makes sense that more intensive modeling is not always required. Section 204(a), in contrast, kicks in only once a Commonwealth law is enacted. And, more importantly, CBO estimates are part of Congress's ongoing ordinary course of business, while section 204(a) was enacted in direct response to Puerto Rico's fiscal crisis and will no longer apply to Puerto Rico once the Board terminates.[6] Section 204(a) is thus a temporary measure addressing an acute need for detailed financial estimates, making comparisons to CBO estimates inapposite.

Additionally, the Governor argues that Act 41 is distinguishable from the healthcare laws at issue in Pierluisi. He asserts that those laws resulted in foreseeable government expenditures because they affected the prices health insurers would pay for medications and medical services, and such changes would affect the cost of government-provided health insurance. But the Board's requests for estimates for those laws were not limited solely to the impact on the government insurance plan. Pierluisi, 37 F.4th at 753. And even if the estimates relevant

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[6] See supra note 4.

there had been so limited, it is not at all clear that estimating the effect on government insurance costs would have been much simpler than estimating Act 41's effects. The laws did not simply set new rate schedules; rather, one law created a new system for negotiating medication costs, and the other altered regulations regarding healthcare providers' relationships with managed care organizations and health insurance networks. Id. The Governor also points out that our decision in Pierluisi turned in part on our "conclusion that the Government had declined to supply requested information to the Board and then short-circuited the collaborative § 204(a) process by suing the Board for declaratory relief." Here, the Governor asserts, "the Board stonewalled the Government and then abruptly terminated the § 204(a) process by suing." While the Governor is correct that our reasoning in Pierluisi did, in part, turn on the Governor's decision to "cut off the exchange and [take] the Board to court," id. at 763, the Board's decision to file suit in this case occurred only after repeated requests for the relevant revenue estimate, and the Governor's erroneous insistence that no such estimate was required.

Finally, the Governor argues that the district court erred by failing to address whether the Board's actions with respect to Act 41 were arbitrary and capricious. In the Governor's view, "the Board both pre-judged Act 41 and failed to provide the evidence and reasoning underlying the Board's rejection of the law." The Governor relatedly contends that summary judgment was improper with-

out first providing an adequate opportunity for discovery of certain Board materials, all of which pertain to the Board's allegedly arbitrary and capricious actions. But the Governor presents these alleged errors as stemming ultimately from the district court's "erroneous analysis" of the Section 204(a) Submission, and does not explain how this "arbitrary-and-capricious" argument could serve as an independent ground for reversal. In any event, we find unpersuasive the contention that the Board need have done more to explain in its correspondence with the Governor the reasons why -- prior to the submission of the appropriate formal estimate -- the enforcement of Act 41 would "adversely affect the territorial government's compliance with the Fiscal Plan." 48 U.S.C. § 2144(a)(5).

In sum, all of the arguments that the Governor and the Speaker make on the merits hinge on the contention that section 204(a) requires no more of the Governor than what he did. Having rejected all permutations of that contention, we are left with no reason to disturb the district court's order nullifying Act 41.

III.

For the foregoing reasons, the judgment of the district court is affirmed.

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

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

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

THE FINANCIAL OVERSIGHT AND MANAGEMENT BOARD FOR PUERTO RICO,

Plaintiff,

v.

HON. PEDRO R. PIERLUISI URRUTIA in his official capacity as Governor of Puerto Rico,

Defendant.

Adv. Proc. No. 22-00063-LTS

OPINION AND ORDER DENYING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT ON THE PLEADINGS AND GRANTING IN PART THE FINANCIAL OVERSIGHT AND MANAGEMENT BOARD FOR PUERTO RICO'S MOTION FOR SUMMARY JUDGMENT PURSUANT TO BANKRUPTCY RULE 7056

[Appearances intentionally omitted]

LAURA TAYLOR SWAIN,
United States District Judge

The Financial Oversight and Management Board for Puerto Rico (the "Oversight Board" or "Plaintiff") initiated the above-captioned adversary proceeding (the "Adversary Proceeding") on September 1, 2022, contending that the elected government of the Commonwealth of Puerto Rico (the "Commonwealth") could not lawfully implement Act 41-2022 ("Act 41") because Act 41 was enacted in violation of

the Puerto Rico Oversight, Management, and Economic Stability Act ("PROMESA") and that the labor reform policies embodied in Act 41 are inconsistent with the Commonwealth's certified fiscal plan. In the *Financial Oversight and Management Board for Puerto Rico's Complaint in Respect of Act 41-2022 Against the Governor of Puerto Rico* (Docket Entry No. 1 in Adv. Proc. No. 22-00063)[2] (the "Complaint"), the Oversight Board seeks entry of an order nullifying Act 41 based on its contentions that Governor Pedro Pierluisi Urrutia, in his official capacity as Governor of Puerto Rico (the "Governor"), violated sections 108(a) and 204(a) of PROMESA in connection with the enactment and implementation of Act 41.

Now before the Court is *Defendant's Motion for Judgment on the Pleadings* (Docket Entry No. 28) (the "Rule 12(c) Motion"), in which the Governor contends that this Court lacks jurisdiction to entertain the Oversight Board's' challenge of Act 41, and the *Financial Oversight and Management Board for Puerto Rico's Motion for Summary Judgment Pursuant to Bankruptcy Rule 7056* (Docket Entry No. 30) (the "Summary Judgment Motion" or "MSJ" and, together with the Rule 12(c) Motion, the "Motions"), in which the Oversight Board seeks an order invalidating and enjoining the implementation of Act 41. The Court has considered carefully all of the

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[2] All docket entry references herein are to entries in Adversary Proceeding No. 22-00063, unless otherwise specified.

parties' submissions.[3] The Court has subject matter jurisdiction of this action pursuant to section 306(1)

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[3] The written submissions comprise the *Statement of Uncontested Material Facts in Support of Financial Oversight and Management Board for Puerto Rico's Motion for Summary Judgment* (Docket Entry No. 31) ("Plaintiff's 56(b)"), filed by the Oversight Board; the *Motion to Join the Governor's Motion for Judgment on the Pleadings* (Docket Entry No. 44) (the "Speaker's Joinder"), filed by the Hon. Rafael Hernández-Montañez, in his official capacity as Speaker of the Puerto Rico House of Representatives (the "Speaker"); *Motion to Strike from the Summary Judgment Record, any and all References to the Expert Opinions of Dr. Robert Triest* (Docket Entry No. 45) (the "Motion to Strike"), filed by the Speaker; the *Financial Oversight and Management Board for Puerto Rico's Opposition to Defendant's Motion for Judgment on the Pleadings* (Docket Entry No. 50) (the "Rule 12(c) Objection"), filed by the Oversight Board; the *Opposition to Plaintiff's Motion for Summary Judgment* (Docket Entry No. 55), filed by the Speaker (the "Speaker's Opposition"), the *Memorandum of Law in Opposition to Financial Oversight and Management Board for Puerto Rico's Motion for Summary Judgment and Request for Relief under Fed. R. Civ. P. 56(d)* (Docket Entry No. 57) ("Governor's Opposition"), filed by the Governor; *The Governor's Response to Statement of Allegedly Uncontested Material Facts in Support of the Financial Oversight and Management Board for Puerto Rico's Motion for Summary Judgment* (Docket Entry No. 58), filed by the Governor; the *Reply to Plaintiff's Opposition to Defendant's Motion for Judgment on the Pleadings* (Docket Entry No. 72), filed by the Speaker; the *Amici Curiae Brief for the Puerto Rico Retailers Association, et. al.* (Docket Entry No. 74), jointly filed by the Puerto Rico Retailers Association, Restaurants Association of Puerto Rico, the Puerto Rico Marketing, Industry and Food Distribution Chamber, Puerto Rico Hotel & Tourism Association, Puerto Rico Hospital Association, the Puerto Rico Association of Automobile Distributors and Dealers, Asociación Hecho en Puerto Rico, Inc., the Puerto Rico Chamber of Commerce, the Puerto Rico Manufacturers Association, and the Puerto Rico Builders Association; *Defendant's Reply in Further Support of His Motion for Judgment*

of PROMESA, 48 U.S.C. § 2166(a), and 28 U.S.C. § 1367(a). For the reasons that follow, the Rule 12(c) Motion is denied in its entirety and the Summary Judgment Motion is granted with respect to Count II of the Complaint and denied with respect to Count I of the complaint. As explained below, and in accordance with the *Order to Show Cause Regarding Dismissal of Remaining Claim* that is being entered contemporaneously with this Opinion and Order, the parties are directed to show cause as to why, in light of the analysis and conclusions, the remaining claim should not be dismissed as moot.

I.

BACKGROUND

The following facts are undisputed, except as otherwise indicated.[4]

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on the Pleadings (Docket Entry No. 75) (the "Governor's Reply"), filed by the Governor; *The Financial Oversight and Management Board for Puerto Rico's (I) Reply to Speaker's Opposition to Oversight Board's Motion for Summary Judgment Pursuant to Bankruptcy Rule 7056, and (II) Opposition to Speaker's Motion to Strike from the Summary Judgment Record, any and all References to the Expert Opinions of Dr. Robert Triest* (Docket Entry No. 78), filed by the Oversight Board; and the *Reply to Governor's Opposition to Financial Oversight and Management Board for Puerto Rico's Motion for Summary Judgment Pursuant to Bankruptcy Rule 7056* (Docket Entry No. 79), filed by the Oversight Board.

[4] In evaluating the Rule 12(c) aspect of this motion practice, the Court views the relevant well-pleaded factual allegations of the Complaint in the light most favorable to the Plaintiff. For purposes of the Court's summary judgment analysis, facts characterized as undisputed are identified as such in the Oversight

PROMESA was enacted on June 30, 2016, to address the fiscal emergency in Puerto Rico created by a "combination of severe economic decline, and, at times, accumulated operating deficits, lack of financial transparency, management inefficiencies, and excessive borrowing." 48 U.S.C.A. § 2194(m)(1) (Westlaw through P.L. 117-262).[5] PROMESA "empowers the Oversight Board to, among other things, certify the fiscal plans and budgets of the Commonwealth and its instrumentalities, override Commonwealth executive and legislative actions that are inconsistent with certified fiscal plans and budgets, review new legislative acts, and commence a bankruptcy-type proceeding in federal court on behalf of the Commonwealth or its instrumentalities." Fin. Oversight & Mgmt. Bd. for P.R. v. Hon. Wanda Vázquez Garced (In re Fin. Oversight & Mgmt. Bd.

Board's statement pursuant to D.P.R. Local Civil Rule 56(b) or drawn from evidence as to which there has been no contrary, non-conclusory factual proffer. Citations to the Oversight Board's Local Civil Rule 56(b) Statement (see Pl.'s 56(b)) incorporate by reference the Oversight Board's citations to underlying evidentiary submissions. Citations to the "Brenner Declaration" and the "Skeel Declaration" (and exhibits thereto) reference the Oversight Board's underlying evidentiary submissions (see Docket Entry Nos. 32, the "Brenner Decl." and 33, the "Skeel Decl.") and references to the "Sushon Declaration" (and exhibits thereto) reference the declaration of William J. Sushon (see Docket Entry No. 59, the "Sushon Decl."). The Court declines to address assertions proffered by the parties that are immaterial and conclusory statements of law which the parties proffer as facts.

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

for P.R.), 403 F. Supp. 3d 1, 5 (D.P.R. 2019) (citing 48 U.S.C. §§ 2141-2152, 2175(a)). The Oversight Board commenced a debt adjustment proceeding on behalf of the Commonwealth by filing a petition in this Court under Title III of PROMESA on May 3, 2017. (See Docket Entry No. 1 in Case No. 17-3283.)

A. Commonwealth Fiscal Plans and Labor Reform Measures

Dating back to the first certified Commonwealth fiscal plan, each Commonwealth fiscal plan certified by the Oversight Board has included various recommended measures addressing human capital, welfare, and labor reform. (Pl.'s 56(b) ¶¶ 5-8.) On January 26, 2017, the Commonwealth enacted Act 4-2017, which was titled the "Labor Transformation and Flexibility Act" (the "LTFA"). (Skeel Ex. 10.) The "Statement of Purpose" for the LTFA states that the law was intended to "modify [Puerto Rico's] labor laws and adapt them to the demands of the global markets so that [Puerto Rico is] able to promote [its] economic development and become more competitive." (Skeel Ex. 10 at 6; Pl.'s 56(b) ¶ 9.) The Oversight Board and the Governor agree that the LTFA created benefits for the Commonwealth's economy, although the Oversight Board contends that the law did not go far enough in enhancing Puerto Rico's economic growth and improving its labor force participation rate. (Pl.'s 56(b) ¶ 10.) Consequently, the Commonwealth fiscal plans certified by the Oversight Board following enactment of the LTFA included provisions directing further labor reforms with the stated purposes of enhancing the Commonwealth's labor force participation rate and

economic growth by reducing mandatory employer-provided benefits such as paid leave and Christmas bonuses. (Pl.'s 56(b) ¶¶ 11-16.) Although the Commonwealth enacted certain of the reforms on which the Oversight Board premised the fiscal plans, it did not adopt all of them, and the Oversight Board contends that the failure to do so has been detrimental to Puerto Rico's economy and its labor force participation rate. (Pl.'s 56(b) ¶¶ 20-25.)

On April 23, 2021, the Oversight Board certified a fiscal plan for the Commonwealth (Skeel Ex. 8) (the "2021 Fiscal Plan") that, like prior certified fiscal plans, included directions to the Commonwealth's Government to implement certain labor market reforms that were, according to the Oversight Board, important for Puerto Rico's economic growth. (Pl.'s 56(b) ¶¶ 27-28; Skeel Ex. 8 at 75-76.) The 2021 Fiscal Plan stated that the LTFA "did not go nearly as far as needed" in restricting employees' rights, and directed the Government not to repeal it. (Skeel Ex. 8 at 79 ("Its repeal would discourage new hiring and reduce the labor market flexibility, thus limiting the effectiveness of the EITC expansion in promoting labor force participation, economic growth, and the revenues associated with that growth. Therefore, the Government must refrain from repealing Act 4-2017 or enacting new legislation that negatively impacts labor market flexibility.").)

On January 27, 2022, the Oversight Board certified another Commonwealth fiscal plan (the "2022 Fiscal Plan"). (Skeel Ex. 9.) Like the 2021 Fiscal Plan, the 2022 Fiscal Plan directed the adoption of

further labor market reforms and stated that the Government "must refrain from repealing [the LFTA] or enacting new legislation that negatively impacts labor market flexibility." (Pl.'s 56(b) ¶¶ 28-30.)

B. Act 41

On March 10, 2022, the Puerto Rico House of Representatives passed the bill that would eventually become Act 41, House Bill 1244-2022 ("HB 1244"). (Pl.'s 56(b) ¶ 37.) In a resolution issued on March 18, 2022, the Oversight Board cited a June 24, 2021 Oversight Board communication to the Government in which it had taken the position that a prior version of the legislation sought to repeal reforms that the fiscal plan "expressly directed not be undone and thus would be significantly inconsistent with the Fiscal Plan and would impair and defeat PROMESA's purposes," and stated that HB 1244 "seeks to create new labor restrictions, proposes to repeal portions of the LTFA and reestablish many of the burdensome labor restrictions that existed prior to the passage of the LTFA, and proposes to impose additional labor restrictions." (Skeel Ex. 12 at 2.) The Oversight Board's resolution directed the Senate not to pass, the Governor not to enact, and the Government not to implement HB 1244, "advise[d]" the Legislative Assembly and the Governor that they were "barred by PROMESA section 108(a)(2) from enacting, implementing, and enforcing HB 1244," and approved legal action pursuant to the Oversight Board's authority under PROMESA to seek to nullify and bar enforcement of

HB 1244. (Pl.'s 56(b) ¶ 38; Skeel Ex. 12.)[6] The Oversight Board expressed similar sentiments in a status report to the Court on March 22, 2022. (Pl.'s 56(b) ¶¶ 39-40.)

HB 1244 was amended in the legislative assembly, and ultimately passed the House and the Senate on June 7, 2022. (Pl.'s 56(b) ¶ 41.) Following consultation with its retained advisor, Robert K. Triest, PhD, Chair of the Economics Department at Northeastern University, the Oversight Board passed a resolution on June 10, 2022, in which the Oversight Board again stated that the amended HB 1244 would impair or defeat PROMESA's purposes. (Skeel Ex. 13.) The Oversight Board's resolution declared that HB 1244, as amended, would

> discourag[e] new hiring and reduc[e] labor market flexibility in direct contravention of the Fiscal Plan, which in turn will (1) negatively impact Puerto Rico's dismal labor force participation rate; (2) reduce economic growth and market competition; (3) deprive the Commonwealth of the revenues associated with such revenue growth (including by reducing the effectiveness of the Earned Income Tax Credit); and (4) increase the Commonwealth's public assistance burden . . . .

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[6] Section 108(a)(2) of PROMESA provides that "[n]either the Governor nor the Legislature may . . . enact, implement, or enforce any statute, resolution, policy, or rule that would impair or defeat the purposes of this chapter, as determined by the Oversight Board." 48 U.S.C.A. § 2128(a)(2) (Westlaw through P.L. 117-262).

(Skeel Ex. 13; see Pl.'s 56(b) ¶¶ 44-45.) The resolution directed the Governor not to enact, implement or enforce HB 1244 and advised the Government that it was barred by section 108(a)(2) of PROMESA from enacting, implementing and enforcing the legislation. (Skeel Ex. 13 at 2-3.) Three days later, the Oversight Board sent a letter to the Governor describing various provisions of HB 1244 and reiterating and explaining further the Oversight Board's determination that HB 1244 was inconsistent with the 2022 Fiscal Plan and with PROMESA. (Skeel Ex. 14; Pl.'s 56(b) ¶ 46.) The June 13, 2022 letter also described certain of the "labor restrictions" to which the Oversight Board objected and asserted that providing the rights and benefits for workers contemplated by HB 1244 would

> (1) deter new investments in Puerto Rico and the jobs the new investments would create; (2) negatively impact Puerto Rico's dismal labor force participation rate; (3) reduce economic growth and market competition; (4) deprive the Commonwealth of the revenues associated with such revenue growth (including by reducing the effectiveness of the Earned Income Tax Credit); and (5) increase the Commonwealth's public assistance burden. Indeed, the Bill renders Puerto Rico less attractive to new investors wanting to create new businesses and more jobs because it increases labor costs and litigation rather than allowing the free market to determine employee compensation. Thus, the Bill hinders and diminishes the economic growth

> PROMESA promotes, and the Government should want to encourage.

(Skeel Ex. 14.) The Oversight Board's letter further stated that, if the Governor were to sign HB 1244 into law, the Governor would "be required to submit a formal estimate and certification pursuant to PROMESA Section 204(a) within seven (7) business days of enacting the law"[7] and warned the Governor

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[7] Section 204(a)(1) of PROMESA requires the Governor to submit all newly enacted laws to the Oversight Board. 48 U.S.C. § 2144(a)(1). Section 204(a)(2) requires that all such submissions must be accompanied by 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," a certification as to whether the law is or is not "significantly inconsistent with the Fiscal Plan for the fiscal year," and, if the entity has found the law to be significantly inconsistent with the fiscal plan, "the entity's reasons for such finding." 48 U.S.C.A. § 2144(a)(2) (Westlaw through P.L. 117-262). Subsections (a)(3) and (4) of section 204 permit the Oversight Board to notify the Governor and Legislature if the submission lacks the required estimate or certification or if the certification concluded that the law was significantly inconsistent with the fiscal plan, and to direct the Governor to fix the deficiency (by providing the missing submission or by changing the law to remedy the inconsistency) or to "provide an explanation for the inconsistency that the Oversight Board finds reasonable and appropriate." 48 U.S.C.A. § 2144(a)(2), (3) (Westlaw through P.L. 117-262). If the government does not comply with such instructions, section 204(a)(5) permits the Oversight Board to "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." 48 U.S.C.A. § 2144(a)(5) (Westlaw through P.L. 117-262).

that any such estimate would have to "address the full economic impact of the issues raised in this letter, including how the Bill's impact on labor force participation will affect revenues." (Skeel Ex. 14.)

On June 20, 2022, the Governor signed HB 1244 into law as Act 41-2022. (Pl.'s 56(b) ¶ 47.) Nine days later, the Puerto Rico Fiscal Agency and Financial Authority ("AAFAF"), acting on behalf of the Governor, submitted a document titled "Section 204(a) Certification" (Skeel Ex. 15) and three attachments to the Oversight Board. (Pl.'s 56(b) ¶ 53.) The three attachments consisted of (i) a "Fiscal Impact Certification" (the "OMB Certification") by the Office of Management and Budget ("OMB") and a certification (the "DOL Certification") by the Department of Labor and Human Resources ("DOL") (Brenner Ex. 5) , (ii) a certification by the Department of the Treasury (the "Treasury Certification") (Brenner Ex. 5), and (iii) a report prepared by consulting firm DevTech Systems, Inc. (the "DevTech Report") (Skeel Ex. 15A).[8]

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[8] Section 204(a)(2)(A) requires that a formal estimate be "prepared by an appropriate entity of the territorial government with expertise in budgets and financial management of the impact, if any, that the law will have on expenditures and revenues." 48 U.S.C.A. § 2144(a)(2)(A) (Westlaw through P.L. 117-262). The Section 204(a) Certification annexed the DevTech Report—a report prepared by a private consulting firm—as Attachment C. (Skeel Ex. 15A at 1.) The Governor concedes that the DevTech Report was not intended to constitute the formal estimate required by section 204(a). (See Pl.'s 56(b) ¶ 53 n.5 (citing Skeel Ex. 17).)

AAFAF's Section 204(a) Certification described, in general terms, various provisions of Act 41 and included a "high-level summary" of certain provisions of the LTFA that were or were not amended by Act 41. (Skeel Ex. 15 at 3-7.) The Section 204(a) Certification asserted that Act 41's provisions "do not impact payroll expenditures for the Government of Puerto Rico" and that its "impact . . . should be evaluated in light of the marginal effects that the Act 41 Modifications will have on the economic behavior of private sector employers." (Skeel Ex. 15 at 6.) The Section 204(a) Certification conceded that "an argument can be made that Act 41 'negatively impacts labor market flexibility'" but argued that, because Act 41 modified "only 13 of the 72 substantive sections of Act 4-2017," the law "continues to largely preserve Act 4- 2017's structural reforms." (Skeel Ex. 15 at 6-7.) It provided no financial computations or estimates of the fiscal impact of the legislation on the Commonwealth's revenues or expenses, and it asserted that "the ultimate economic impact of Act 41 will need to be evaluated while considering broader and competing macroeconomic factors affecting the Puerto Rico economy." (Skeel Ex. 15 at 9.)

On June 23, 2022, AAFAF responded to the Oversight Board's June 13, 2022 letter. AAFAF's letter stated that it "presume[d] that the [Oversight] Board must have conducted its own analysis of HB 1244's effect on the Commonwealth's revenues [and] expenses," and it "request[ed] that the Board provide the Governor with a copy of any and

all Oversight Board- conducted economic and financial analyses regarding HB1244's effect on the Commonwealth's revenues and expenses so that we can fully evaluate all available information." (Sushon Ex. 6 at 2.)

On July 19, 2022, the Oversight Board notified the Governor, the legislature, and AAFAF by letter that it viewed the Section 204(a) Certification as deficient (the "Deficiency Letter"), contending that (i) the DOL Certification, the only document containing a calculation, did not "purport to estimate the impact of the law on the Commonwealth's revenues and expenditures" and thus failed to comply with section 204(a) of PROMESA; (ii) the DOL is not an "appropriate entity" to provide an estimate pursuant to § 204(a); (iii) the DOL Certification did not provide an assessment of the legislation's impact over the entire "five year duration of the Fiscal Plan"; and (iv) the documents provided only conclusory statements regarding the Act's fiscal impact. (Skeel Ex. 16.) The Oversight Board, citing the 2022 Fiscal Plan's direction to refrain from repealing the LFTA, stated that Act 41 was "plainly" "significantly inconsistent"' with the 2022 Fiscal Plan and requested that the Governor "provide the missing formal estimate and certification" by July 22, 2022. (Skeel Ex. 16 at 2, 6, 8, 9.)

On July 22, 2022, AAFAF responded to the Deficiency Letter, noting that the Governor "strongly disagree[d] with the assertion that the PROMESA Section 204 Certification for Act 41 is non-compliant with PROMESA Section 204(a)'s requirements." (Skeel Ex. 17 at 1.) AAFAF asserted that conducting

a formal estimate of the impact of Act 41 would be "an ambitious and expansive undertaking." (Skeel Ex. 17 at 1-2.) AAFAF provided an updated certification from the DOL (the "Section 204(a) Certification Supplement") (Brenner Exs. 6-8), which contained a reduced cost assessment in relation to the "fiscal year 2021-2022" budget and stated that it reflected Act 41's cost of "implementation . . . on the Agency: Department of Labor and Human Resources." (Brenner Ex. 8 at 1.) The Section 204(a) Certification Supplement also included a letter from the Office of Management and Budget (Brenner Ex. 7) in which Juan Carlos Blanco Urrutia, the director of the Office of Management and Budget, explained that the expenditure reported by the DOL represented the actual cost to publish "three . . . regulations." (Ex. 7 at 1.) The letter asserted that "the Department [of Labor and Human Resources] does not identify any other incremental expense in its operation with the implementation of this Act; therefore, we conclude that the budgets for the next five years will not be affected." (Ex. 7 at 1.) AAFAF also reiterated its request for the Oversight Board's own underlying analytical material and additional time to comply with the estimate and certification requirements. (Brenner Ex. 6 at 3.)

On July 30, 2022, the Oversight Board (i) notified AAFAF that the Section 204(a) Certification Supplement did not remedy the deficiencies articulated in the Deficiency Letter, (ii) requested supplemental information, and (iii) requested that the Governor "suspend Act 41" while discussions continued. (Skeel Ex. 19 at 2.) AAFAF responded to the

Oversight Board's letter on August 4, 2022, declining to suspend Act 41 and maintaining that the Section 204(a) Certification and Section 204(a) Certification Supplement complied with section 204(a). (Skeel Ex. 20 at 2.) AAFAF again repeated its request for the analytical materials supporting the Oversight Board's conclusions, and further requested an opportunity to review those materials and to discuss them with the Oversight Board's economic advisor. (Skeel Ex. 20 at 4.) The Oversight Board sent a final letter on August 23, 2022, notifying AAFAF that the deficiencies outlined in the Deficiency Letter had not been remedied by the Section 204(a) Certification Supplement or the subsequent August 4, 2022 letter. (Skeel Ex. 23 at 1.)

C. Procedural Background

The Oversight Board filed the Complaint on September 1, 2022, pleading two counts. (Compl. ¶¶ 102, 110.) In Count I, the Oversight Board seeks an order pursuant to sections 104(k) and 108(a)(2) of PROMESA determining that Act 41 is nullified because the Oversight Board has determined that it impairs and/or defeats the purposes of PROMESA. (Compl. ¶¶ 102-104.) In Count II, the Oversight Board requests an order pursuant to section 204(a) of PROMESA determining that Act 41 is nullified because the Governor (i) has not submitted a formal estimate and certification as required by section 204(a)(2) of PROMESA and (ii) has failed to comply with direction given by the Oversight Board under section 204(a)(4)(B) of PROMESA. (Compl. ¶¶ 110-14.)

On September 14, 2022, the Court granted Plaintiff's motion to set an expedited schedule for pretrial dispositive motion practice for this Adversary Proceeding. (See Docket Entry No. 18.) On September 15, 2022, the Governor answered the Complaint. (See Docket Entry No. 20.) The Governor filed the Rule 12(c) Motion on September 29, 2022, arguing that the "Court lacks subject matter jurisdiction over the Complaint." (Rule 12(c) Mot. at 1.) On the same day, the Oversight Board filed the Motion for Summary Judgment, arguing that there are no genuine issues of material fact with respect to Count I and Count II of the Complaint and that the Oversight Board is entitled to judgment as a matter of law on both Counts. (See MSJ at 22-23, 40-41.)

II.

Discussion

The Governor's Rule 12(c) Motion seeks dismissal of this Adversary Proceeding for lack of subject matter jurisdiction, while the Oversight Board's Summary Judgment Motion addresses the merits of the claims asserted in the Complaint. A court must address arguments concerning its jurisdiction before addressing the merits of a dispute, so the Court will first consider the Rule 12(c) Motion. See Deniz v. Municipality of Guaynabo, 285 F.3d 142, 149 (1st Cir. 2002).

I. The Rule 12(c) Motion

A. The Court's Jurisdiction

Pursuant to Rule 12(c) of the Federal Rules of Civil Procedure[9], "[a]fter the pleadings are closed—but early enough not to delay trial—a party may move for judgment on the pleadings." Fed. R. Civ. P. 12(c). The standard for resolution of a motion under Rule 12(c) is the same as that applicable to a motion under Rule 12(b)(1) (for lack of subject matter jurisdiction) or 12(b)(6) (for failure to state a claim upon which relief can be granted). See Doe v. Brown Univ., 896 F.3d 127, 130 (1st Cir. 2018); Cruz v. AAA Carting & Rubbish Removal, Inc., 116 F. Supp. 3d 232, 239 (S.D.N.Y. 2015). Accordingly, a court "consider[s] 'documents the authenticity of which are not disputed by the parties,' 'documents central to plaintiffs' claim,' and 'documents sufficiently referred to in the complaint,'" Claudio-De Leon v. Sistema Universitario Ana G. Mendez, 775 F.3d 41, 46 (1st Cir. 2014) (quoting Alternative Energy, Inc. v. St. Paul Fire & Marine Ins. Co., 267 F.3d 30, 33 (1st Cir. 2001)), and determines whether the pleadings demonstrate the existence of jurisdiction by viewing "the well-pleaded facts and the reasonable inferences therefrom in the light most favorable to the nonmovant." Doe v. Brown Univ., 896 F.3d at 130 (quoting Kando v. R. I. State Bd. of Elections, 880 F.3d 53, 58 (1st Cir. 2018)); see Lyman v. Baker, 954 F.3d 351, 359-60 (1st Cir. 2020) (stating that

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[9] Federal Rule of Civil Procedure 12 is made applicable in this Adversary Proceeding by Federal Rule of Bankruptcy Procedure 7012. See 48 U.S.C. § 2170 ("The Federal Rules of Bankruptcy Procedure shall apply to a case under this subchapter and to all civil proceedings arising in or related to cases under this subchapter.").

the same "burden of proof at the pleading stage[] and posture towards the facts alleged in the complaint" apply to motions under Rule 12(b)(1) as motions under Rule 12(b)(6)"). A court therefore "disregard[s] all conclusory allegations that merely parrot the relevant legal standard." Young v. Wells Fargo Bank, N.A., 717 F.3d 224, 231 (1st Cir. 2013).

The Rule 12(c) Motion is principally concerned with the question of whether the Court[10] has jurisdiction to adjudicate the Adversary Proceeding under section 306(a)(2) of PROMESA. (See Rule 12(c) Mot. at 6-16.) The Governor argues that the Complaint must be dismissed because the Oversight Board's claims fall outside the jurisdictional ambit of section 306(a)(2) of PROMESA, which confers on district courts "original but not exclusive jurisdiction of all civil proceedings arising under [Title III of PROMESA], or arising in or related to cases under [Title III of PROMESA]." 48 U.S.C.A. § 2166(a)(2) (Westlaw through P.L. 117-262). In short, the Governor—joined by the Speaker—contends that the Adversary Proceeding lacks a sufficient nexus to the Commonwealth's Title III Case to support jurisdiction under section 306(a)(2) of PROMESA and, as a result, the "Title III Court"—the term used by the Governor and the Speaker to denote the Court sitting pursuant to section 308(a)

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[10] References to the "Court" in the following jurisdictional analysis are to the undersigned in her capacity as a United States District Judge sitting by designation pursuant to 28 U.S.C. § 292(d) and 48 U.S.C. § 2168(a) in the United States District Court for the District of Puerto Rico (the "District of Puerto Rico").

of PROMESA, 48 U.S.C. § 2168(a), by designation of the Chief Justice of the United States—lacks subject matter jurisdiction to preside over the Adversary Proceeding. (Rule 12(c) Mot. at 3-4; Speaker Joinder at 2.) The Speaker and the Governor fail to sufficiently recognize, however, that the "Title III Court" sits within the Article III judiciary as part of the United States District Court for the District of Puerto Rico and that section 106(a) of PROMESA grants the district court, "[e]xcept as provided in section 2124(f)(2) of this title (relating to the issuance of an order enforcing a subpoena), and [Title] III (relating to adjustments of debts), [jurisdiction of] any action against the Oversight Board, and any action otherwise arising out of [PROMESA]." 48 U.S.C.A. § 2126 (Westlaw through P.L. 117-262).

In light of section 106(a) and the general federal question jurisdiction granted to the district court by 28 U.S.C. § 1331, the Governor's jurisdictional argument plainly fails, whether or not section 306(a) of PROMESA's specific Title III jurisdictional grant encompasses the Oversight Board's claims. Section 106(a) of PROMESA authorizes the District of Puerto Rico to exercise jurisdiction of certain disputes, including, most pertinently, disputes "arising out of" PROMESA. (See Rule 12(c) Mot. at 3, 16.) The undersigned is a United States District Judge, sitting by designation in the District of Puerto Rico pursuant to section 292(d) of title 28 of the United States Code, see Letter from Anna McKenna to Ruby Krajick and Maria Antongiorgi (May 6, 2022), https://promesa.prd.uscourts.gov/sites/default/files/LTS-Intercirc-Design-20220527-20221126_0.pdf, as

well as by designation of the Chief Justice of the United States pursuant to section 308 of PROMESA and, as such, there is no question that the Court has subject matter jurisdiction of the instant dispute. The Adversary Proceeding clearly arises out of PROMESA because it seeks judicial enforcement of powers and obligations established by the statute. (See Compl. ¶ 104 (seeking relief under sections 104(k) and 108(a)(2) of PROMESA), ¶ 114 (seeking relief under sections 104(k) and 204(a)(5) of PROMESA).)

Accordingly, the Court may properly exercise subject matter jurisdiction of the Adversary Proceeding, and the Governor's Rule 12(c) motion is denied. The Court's analysis next turns to whether it is proper to treat the Adversary Proceeding as an adversary proceeding within the Title III Cases over which the undersigned presides, or, alternatively, whether it is entirely outside the scope of section 308(a) of PROMESA and must be adjudicated as a civil matter outside of the Commonwealth's Title III case.

B. Section 308(a) of PROMESA

Section 308(a) of PROMESA provides for the designation of a district judge to conduct the Title III case of a territory. 48 U.S.C. § 2168(a); see also 48 U.S.C. 2164(g) (permitting the joint administration of affiliated Title III cases). On May 5, 2017, the undersigned was designated to be the presiding judge in the Commonwealth's Title III Case (see Docket Entry No. 4 in Case No. 17-3283), and disputes filed as adversary proceedings (or removed to the District

of Puerto Rico as adversary proceedings in connection with the Title III cases) are directed to the undersigned for resolution.

Although not directly stated in PROMESA, the designation of a judge to conduct a Title III case implies that, where a dispute does not fit within the jurisdictional parameters of Title III, or where the judge conducting a Title III case abstains from hearing a particular dispute, see 48 U.S.C.A. § 2169, it should not be entertained as an adversary proceeding overseen by the judge designated to conduct the Title III case, but rather be treated as a civil matter in the district court and assigned pursuant to the district's ordinary practices. While the Court has subject matter jurisdiction to preside over such disputes, the adjudication of such disputes would seem to be outside of the normal scope of the duties contemplated by section 308(a) of PROMESA. See 48 U.S.C.A. § 2168(a) (Westlaw through P.L. 117-262) ("For cases in which the debtor is a territory, the Chief Justice of the United States shall designate a district court judge to sit by designation *to conduct the case*." (emphasis added)).

Thus, the Court next addresses whether the Adversary Proceeding falls within the jurisdictional bounds of section 306(a)(2) of PROMESA, which confers on district courts "original but not exclusive jurisdiction of all civil proceedings arising under [Title III of PROMESA], or arising in or related to cases under [Title III of PROMESA]." 48 U.S.C.A. § 2166(a)(2) (West 117-262.) The jurisdictional language of section 306(a)(2) is analogous to that of the bankruptcy jurisdiction statute, 28 U.S.C. §

1334(b), and the Court has previously looked to case law applying the bankruptcy jurisdiction statute for guidance in interpreting and applying section 306(a)(2). See Asociación de Salud Primaria de P.R., Inc. v. Puerto Rico (In re Fin. Oversight & Mgmt. Bd. for P.R.), 330 F. Supp. 3d 667, 680 (D.P.R. 2018) ("[T]he First Circuit's interpretation of 28 U.S.C. § 1334 is instructive."); see also Roosevelt Campobello Int'l Park Comm'n v. EPA, 711 F.2d 431, 437 (1st Cir. 1983) (holding that two statutes' common purpose and matching language supported conclusion that Congress intended the construction of one to follow the other).

Proceedings that "arise under" Title III are those in which the cause of action is created by Title III. See In re Middlesex Power Equip. & Marine, Inc., 292 F.3d 61, 68 (1st Cir. 2002). Proceedings that "arise in" a Title III case are those which have "no existence outside of the bankruptcy." Gupta v. Quincy Med. Ctr., 858 F.3d 657, 664-65 (1st Cir. 2017) (quoting In re Wood, 825 F.2d 90, 97 (5th Cir. 1987)). "Arising in" jurisdiction is not determined by reference to a "but for" test but, rather, "the fundamental question is whether the proceeding by its nature, not its particular factual circumstance, could arise only in the context of a bankruptcy case." Gupta, 858 F.3d at 664-65 (citing In re Middlesex Power Equip. & Marine, Inc., 292 F.3d 61, 68 (1st Cir. 2002)). Prior to confirmation of a plan of adjustment, proceedings that are "related to" a Title III case are those 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."[11] In re Middlesex Power Equip. & Marine, Inc., 292 F.3d 61, 68 (1st Cir. 2002) (quoting Smith v. Commercial Banking Corp. (In re Smith), 866 F.2d 576, 580 (3d Cir. 1989)). However, following confirmation of a plan of reorganization under Chapter 11 of the Bankruptcy Code, many courts apply a stricter test, assessing whether the proceeding bears a "close nexus" to the bankruptcy proceeding or the confirmed plan. See In re Enivid, Inc., 364 B.R. 139, 147 (Bankr. D. Mass. 2007) ("Courts may exercise post-confirmation jurisdiction when 'there is a close nexus to the bankruptcy plan or proceeding, as when a matter affects the interpretation, implementation, consummation, execution, or administration of a confirmed plan or incorporated litigation trust agreement.'") (quoting In re Resorts Int'l, Inc., 372 F.3d 154, 167-68 (3d Cir. 2004)); see also Bos. Reg'l Med. Ctr., Inc. v. Reynolds (In re Bos. Reg'l Med. Ctr., Inc.), 410 F.3d 100, 107 (1st Cir. 2005) (noting that "there will be situations in which the fact that particular litigation arises after confirmation of are organization plan will defeat an attempted exercise of bankruptcy jurisdiction," but declining to apply "close nexus" test to liquidating chapter 11 plan) (citing In re Resorts Int'l, 372 F.3d at 166-68).[12]

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[11] This standard is drawn from the seminal case Pacor, Inc. v. Higgins, 743 F.2d 984, 994 (3d Cir. 1984), and the Court will therefore refer to it as the Pacor standard.

[12] The Oversight Board contends that the Court should not apply the "close nexus" framework, but should instead continue to ap-

ply the Pacor test because "there is no concern that post-confirmation bankruptcy jurisdiction will unduly extend federal jurisdiction," "[t]he Commonwealth is not a business debtor reentering the marketplace, and federal jurisdiction already exists over this action." (Rule 12(c) Obj. at 3.) Although the Oversight Board is correct that, as explained above, subject matter jurisdiction of the disputes framed by the Adversary Proceeding exists regardless of the scope of section 306(a)(2), the question at this juncture is whether the adversary proceeding should, like pre-confirmation disputes implicating Commonwealth fiscal matters that could conceivably have effects on the handling and administration of the debtor's property, be treated as a proceeding within the Title III case and handled by the undersigned rather than assigned pursuant to the regular procedures of District of Puerto Rico.

The First Circuit has not expressly adopted the "close nexus" test in the chapter 11 context or any other context, but it has endorsed the premise that "once confirmation has occurred, fewer proceedings are actually related to the underlying bankruptcy case." In re Bos. Reg'l Med. Ctr., Inc., 410 F.3d 100, 106 (1st Cir. 2005) ("That makes good sense: as the corporation moves on, the connection attenuates."). The Court therefore believes that the First Circuit would adopt a jurisdictional test substantially narrower than the Pacor standard with respect to post-confirmation litigation concerning the Title III Debtors. That would place it firmly in the majority of circuits that have adopted jurisdictional tests that have recognized courts' narrowed post-confirmation jurisdiction. See In re Indicon, Inc., 645 F. App'x 39, 40 n.1 (2d Cir. 2016) (noting that "our circuit . . . has applied [the close nexus test], in two summary orders, to both core and non-core post-confirmation proceedings"); In re Resorts Int'l, Inc., 372 F.3d at 167-68; Valley Historic Ltd. P'ship v. Bank of N.Y., 486 F.3d 831, 837 (4th Cir. 2007) (endorsing the close nexus test and noting the lack of any "conceivable bankruptcy administration purpose in providing a forum for" a dispute that would not affect creditor recoveries); In re Craig's Stores of Texas, Inc., 266 F.3d 388, 390 (5th Cir. 2001) ("After a debtor's reorganization plan

Here, the Oversight Board argues that section 306(a)(2) applies to the Complaint because its claims implicate the Court's enforcement of its own orders (referencing, in particular, paragraphs 25(c) and 79 of the Confirmation Order) in the face of conduct by the Governor (1) that is "reasonably likely, directly or indirectly, to impair the carrying out of the Commonwealth Plan's payment provisions, covenants, and other obligations" (Rule 12(c) Obj. at 9 (quoting Confirmation Order ¶ 79); see also Confirmation Order ¶ 25(c)(i)), or (2) that violates the 2022 Fiscal Plan and has been determined by the Oversight Board to impair or defeat PROMESA's purposes. (See Rule 12(c) Obj. at 9 (citing Confirmation

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has been confirmed, the debtor's estate, and thus bankruptcy jurisdiction, ceases to exist, other than for matters pertaining to the implementation or execution of the plan."); Pettibone Corp. v. Easley, 935 F.2d 120, 122 (7th Cir. 1991) ("Once the bankruptcy court confirms a plan of reorganization, the debtor may go about its business without further supervision or approval. The firm also is without the protection of the bankruptcy court"); In re Fairfield Communities, Inc., 142 F.3d 1093, 1095 (8th Cir. 1998) (recognizing bankruptcy courts' authority to retain jurisdiction over matters relating to plan administration and interpretation); Wilshire Courtyard v. Cal. Franchise Tax Bd. (In re Courtyard), 729 F.3d 1279, 1289 (9th Cir. 2013) (recognizing adoption of "close nexus" test); see also In re Gen. Media, Inc., 335 B.R. 66, 73 (Bankr. S.D.N.Y. 2005) (noting prevalence of view that, "once confirmation occurs, the bankruptcy court's jurisdiction shrinks").

The First Circuit has held that litigation involving a liquidating debtor "relates much more directly to a proceeding under title 11." In re Bos. Reg'l Med. Ctr., 410 F.3d at 106. Here, the Commonwealth is more like "a reorganized debtor [that] is attempting to make a go of its business." Id.

Order ¶ 25(c)(ii)).)[13] While the Complaint does not sufficiently allege that the Governor's conduct would "impair the Plan's payment provisions, covenants and other obligations," the allegations are sufficient to establish that this action involves the Oversight Board's determination that the Governor's actions are inconsistent with the Fiscal Plan and thus would "impair or defeat PROMESA's purposes" so as to come within the prohibition set forth in paragraph 25(c)(ii) of the Confirmation Order.

The Court's review of the Complaint does not find support for the Oversight Board's contention that the Complaint plausibly alleges jurisdiction arising from impairment of performance under the Commonwealth Plan. Rather, the Complaint conclusorily asserts that Act 41 "impairs the Commonwealth's ability to meet its obligations pursuant to the Plan" (Compl. ¶ 16), providing no concrete allegations of how Act 41 would impair performance of any particular provision of the Commonwealth Plan. Although paragraph 98 of the Complaint alleges that certain economic consequences might result from implementation of Act 41, it does not tie those economic consequences to the Common-

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[13] Although the Oversight Board also cites various provisions of the Commonwealth Plan and Confirmation order retaining jurisdiction over certain matters (see, e.g., Compl. ¶ 16; Rule 12(c) Obj. at 9), a court "may not 'retain' jurisdiction it never had—i.e., over matters that do not fall within" its relevant statutory grant of jurisdiction. Gupta., 858 F.3d at 663.

wealth's ability to comply with any specific obligation under the Commonwealth Plan. (See Compl. ¶ 98 ("In addition, the provisions of Act 41, which increase the costs and risks of hiring and firing employees, can only discourage hiring, thereby reducing labor force participation, economic growth and Commonwealth revenues, contrary to the 2022 Fiscal Plan and the Plan of Adjustment.").) Rather, paragraph 98 only alleges that Act 41 may upset the Oversight Board's expectations as to the economic consequences that would flow from the Commonwealth Plan.[14] At most, the Complaint plausibly alleges that Act 41 would have negative effects on the economy of Puerto Rico and on the Commonwealth's revenues, but, even taking those pleaded facts as true, there is no basis in the Complaint to conclude that those economic consequences will interfere with the payment of debts contemplated by the Commonwealth Plan. Accordingly, the Court's authority to enforce the Commonwealth Plan, includ-

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[14] Although the Oversight Board argues that there is additional "discussion of the [Commonwealth] Plan of Adjustment in the report of the Oversight Board's economic adviser" (Rule 12(c) Obj. at 18 n.14 (citing Compl. Ex. 29)), that discussion is similarly conclusory. Although the report discusses economic costs that might be incurred as a result of Act 41, it does not allege that those economic costs would violate or hinder compliance with any particular obligation established by the terms of the Commonwealth Plan. Rather, the report asserts in a general manner that those costs are inconsistent with unspecified "requirements and objectives of the . . . Plan of Adjustment" (Ex. 29 at 2; see also Ex. 29 at 8, 12) or with "[t]he success of the Fiscal Plan and the Plan of Adjustment" (Ex. 29 at 8).

ing its authority to enforce the provision of the Confirmation Order prohibiting actions that "imped[e], financially or otherwise, consummation and implementation of the transactions contemplated by the Plan," does not situate the Adversary Proceeding within the scope of section 306(a)(2) of PROMESA. (See Confirmation Order ¶ 25(c)(i).)

The Complaint does, however, plausibly allege that Act 41 is inconsistent with the 2022 Fiscal Plan and that the Oversight Board has determined that such inconsistency impairs or defeats the purposes of PROMESA. (See, e.g., Compl. ¶¶ 37-40, 56-57.) This claim clearly is one that, at a minimum, relates to the Commonwealth's Title III case under PROMESA, and it therefore falls within the Court's jurisdiction under section 306(a)(2). Section 108(a)(2) of PROMESA provides that "[n]either the Governor nor the Legislature may . . . enact, implement, or enforce any statute, resolution policy, or rule that would impair or defeat the purposes of this Act, as determined by the Oversight Board." This prohibition was incorporated into paragraph 25(c)(ii) of the Confirmation Order, which provides that, "pursuant to section 108(a)(2) of PROMESA, no person or entity shall enact, adopt or implement any law or policy "that . . . creates an[] inconsistency in any manner, amount or event between the terms and provisions of . . . a Fiscal Plan certified by the Oversight Board, . . . which action[] has been determined by the Oversight Board to impair or defeat the purposes of PROMESA." (Confirmation Order ¶ 25(c)(ii)).) See Gupta v. Quincy Med. Ctr., 858 F.3d at 663 ("Bankruptcy courts—like all federal

courts—may retain jurisdiction to interpret and enforce their prior orders.") (citing Travelers Indem. Co. v. Bailey, 557 U.S. 137, 151 (2009)); In re Motors Liquidation Co., 829 F.3d 135, 153 (2d Cir. 2016) ("A bankruptcy court's decision to interpret and enforce a prior sale order falls under this formulation of 'arising in' jurisdiction. An order consummating a debtor's sale of property would not exist but for the Code, see 11 U.S.C. § 363(b), and the Code charges the bankruptcy court with carrying out its orders." (citing 11 U.S.C. § 105(a)); see also In re Petrie Retail, Inc., 304 F.3d 223, 230 (2d Cir. 2002) (noting bankruptcy court's jurisdiction to enforce an "injunction issued as part of the bankruptcy court's sale order and confirmation order").

The replies filed by the Governor and the Speaker, asserting that the Oversight Board's claim is grounded substantively in section 108(a)(2) of PROMESA rather than the Confirmation Order, dispute the pertinence of the Court's ability to enforce the Confirmation Order. Regardless of the ultimate source of the law that will be applied in adjudicating the Adversary Proceeding, the inclusion of language implementing and contemplating the enforcement of section 108(a)(2) in the Confirmation Order grounds the instant dispute in the Confirmation Order and, more generally, the Title III process.[15] The Confirmation Order recognized that section 108(a)(2) barred certain conduct under certain

[15] Count II of the Complaint concerns enforcement of section 204(a) of PROMESA. This claim focuses on the failure of the Commonwealth to comply with section 204(a) in implementing Act 41, which allegedly repeals material aspects of the LFTA in

circumstances following confirmation of the Commonwealth Plan, no one—including the Governor or the Speaker—objected to the inclusion of the cited provisions of the Confirmation Order, and the Court retains jurisdiction to enforce it. Cf. U.S. Brass Corp. v. Travelers Ins. Grp., Inc. (In re U.S. Brass Corp.), 301 F.3d 296, 306 (5th Cir. 2002) (holding that dispute concerning implementation of plan satisfied "arising in" jurisdiction because of bank-

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violation of the 2022 Fiscal Plan. In light of the Confirmation Order's requirement of fealty to fiscal plans, Count II is plausibly within the scope of section 306(a)(2) of PROMESA. Even if it were not, the Court could exercise jurisdiction supplemental to its authority under Title III pursuant to section 1367(a) of title 28 of the U.S. Code. The scope of supplemental jurisdiction is, at the very least, "somewhat broader than the transaction-or-occurrence test." Glob. NAPs, Inc. v. Verizon New England Inc., 603 F.3d 71, 88 (1st Cir. 2010). Here, Count I and Count II each allege that the enactment and implementation of Act 41 was unlawful principally due to Act 41's alleged inconsistency with the 2022 Fiscal Plan, and that the statute must therefore be declared to be null and void. Each of the two counts addresses the process leading up to the enactment of Act 41, including the communications between the Oversight Board and the government and the determinations that the Oversight Board made prior to the passage and implementation of Act 41. They therefore "overlap in theory [and] chronology." Futura Dev. of P.R., Inc. v. Estado Libre Asociado de P.R., 144 F.3d 7, 13 (1st Cir. 1998). Additionally, because Count I and Count II each seek to remedy the alleged economic consequences arising from the continued effectiveness of Act 41, there is a meaningful overlap in the "nature of the injury" between both claims. Apparel Art Int'l, Inc. v. Amertex Enterprises Ltd., 48 F.3d 576, 584 (1st Cir. 1995). The Court's authority to conduct the Title III Cases therefore also embraces authority to address Count II of the Complaint.

ruptcy court's statutory authority to enforce unperformed terms of plan). Accordingly, the Court has authority under section 306(a)(2) of PROMESA to adjudicate disputes that concern such conduct. The Court need not determine at this juncture whether paragraph 25(c)(ii) of the Confirmation Order has any substantive impact incremental to section 108(a)(2) of PROMESA because the Oversight Board has not made any specific request for relief under that provision of the Confirmation Order that is different from its requests that are grounded in provisions of the statute. The Confirmation Order is cited as a basis for jurisdiction and, in the context of the factual allegations of the Complaint, it is properly such on its face.

C. Abstention

Having determined that the Court has jurisdiction of the Adversary Proceeding (supra section I.A), and that the Court may preside over the Adversary Proceeding consistent with section 308(a) of PROMESA (supra section I.B), the Court notes that no party has addressed whether the Court should decline to exercise jurisdiction of the Adversary Proceeding.

The Court has considered that question and determined that it is in the interests of justice, efficiency, and judicial economy for the Court to resolve the merits of this Adversary Proceeding. The matter has already been fully briefed by the parties, the Court is familiar with the issues (both in the context of adversary proceedings resolved prior to confirmation of the Commonwealth Plan and from its review

of the issues in the instant motion practice), and the briefing and review of arguments concerning discretionary abstention would delay further the adjudication of the merits of the Oversight Board's claims.

The Court advises the parties, however, that, prior to filing future post-confirmation lawsuits focused on issues arising under Title I or Title II of PROMESA as adversary proceedings arising in or relating to the Title III Cases, they should consider carefully, and address if such an action is commenced, whether the Court should find it appropriate to exercise its discretion to address such issues post-confirmation. In such a case, if a party makes an appropriate motion, the Court will address whether abstention in favor of adjudication outside of the Title III Case is appropriate. Cf. In re Motors Liquidation Co., 457 B.R. 276, 279 (Bankr. S.D.N.Y. 2011) (abstaining from proceeding that fell within scope of exclusive jurisdiction retained by court where dispute did not implicate "construction of any of [the court's] earlier orders" or "any particular knowledge or expertise warranting [the court's] exercise of the jurisdiction [it] retained, such as knowing what [the court] intended to accomplish when [it] issued the [order]"); In re Old Carco LLC, 636 B.R. 347, 360 (Bankr. S.D.N.Y. 2022) (abstaining from adjudication of proceeding where, among other things, non-bankruptcy issues predominated over bankruptcy issues); Montana v. Goldin (In re Pegasus Gold Corp.), 394 F.3d 1189, 1194 n.1 (9th Cir. 2005) ("[W]e are not persuaded by the Appellees' argument that jurisdiction lies because the action

could conceivably increase the recovery to the creditors. As the other circuits have noted, such a rationale could endlessly stretch a bankruptcy court's jurisdiction."). At a minimum, any plaintiff would be well-advised to proffer at the outset a clear theory as to the significance of the dispute to the Title III Cases.

Having determined that the Court can and should adjudicate the Adversary Proceeding, the Court next turns to the merits of the Oversight Board's Motion for Summary Judgment. For the reasons that follow, the Motion for Summary Judgment is granted in part and denied in part. The Oversight Board is entitled to judgment as a matter of law with respect to Count II of the Complaint. The Motion for Summary Judgment is denied with respect to Count I of the Complaint.

II. The Summary Judgment Motion

A. Standard of Review Under Fed. R. Civ. P. 56

Under Federal Rule of Civil Procedure 56(a),[16] summary judgment is appropriate when "the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). Material facts are those that "possess[] the capacity to sway the outcome of the litigation under the applicable law," and there is a genuine factual dispute

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

where an issue "may reasonably be resolved in favor of either party." Vineberg v. Bissonnette, 548 F.3d 50, 56 (1st Cir. 2008) (internal quotation marks and citations omitted). The Court must "review the material presented in the light most favorable to the non-movant, and . . . must indulge all inferences favorable to that party." Petitti v. New England Tel. & Tel. Co., 909 F.2d 28, 31 (1st Cir. 1990) (internal quotation marks and citations omitted). When a properly supported motion for summary judgment is made, the non-moving party "must set forth specific facts showing that there is a genuine issue for trial." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250 (1986) (quoting First Nat. Bank of Ariz. v. Cities Serv. Co., 391 U.S. 253, 288 (1968)). The non-moving party can avoid summary judgment only by providing properly supported evidence of disputed material facts. See LeBlanc v. Great Am. Ins. Co., 6 F.3d 836, 841-42 (1st Cir. 1993).

The Government Parties previously requested that the Court allow Defendants to conduct expedited discovery pursuant to Federal Rule of Civil Procedure 26. (See generally *Defendants' Urgent Motion for Limited Expedited Discovery*, Docket Entry No. 51) (the "Discovery Motion"). Defendants sought documents from the Oversight Board and a deposition of Dr. Robert K. Triest. (Discovery Mot. at 12.) The Court denied the Defendants' motion without prejudice. (See *Order Denying Motions Related to Governor's Request for Discovery*, Docket Entry No. 64.)

In the Governor's Opposition, the Governor argues that summary judgment in favor of the Oversight Board would be improper under Federal Rule of Civil Procedure 56(d) because, as asserted in the Discovery Motion, the Governor contends that discovery on certain issues is necessary to assess and defend against the Oversight Board's determination that Act 41 is inconsistent with PROMESA. (See Gov. Opp. at 46-50.)

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

The Oversight Board seeks summary judgment in its favor on Count I and Count II of the Complaint. In Count I, the Oversight Board requests a declaration pursuant to sections 104(k) and 108(a)(2) of PROMESA that Act 41 is nullified based on the Oversight Board's determination that Act 41 impaired and/or defeated the purposes of PROMESA, and a permanent injunction prohibiting the Governor from taking any steps to help private parties implement Act 41. (See Compl. ¶¶ 102-104 and Prayer for Relief.) In Count II, the Oversight Board requests a declaration pursuant to section 204(a) of PROMESA that Act 41 is nullified because the Governor has failed to comply with the requirements of section 204(a) and a permanent injunction prohibiting the Governor from taking any steps to help private parties implement Act 41. (See Compl. ¶¶ 110-14 and Prayer for Relief.) The Court will first address the merits of Count II.

B. Count II: Section 204(a) of PROMESA

Section 204(a) of PROMESA establishes a sequential process for the submission of new legislative enactments to the Oversight Board and for related Oversight Board action under certain circumstances. Section 204(a)(1) generally requires the Governor to submit laws to the Oversight Board within seven business days of their enactment.[17]

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

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

With each such submission, section 204(a)(2) generally requires the Governor to provide the Oversight Board with documentation addressing two issues. The Governor must deliver a "formal estimate prepared by an appropriate entity of the territorial government with expertise in budgets and financial management of the impact, if any, that the law will have on expenditures and revenues." 48 U.S.C.A. § 2144(a)(2)(A) (Westlaw through P.L. 117-262). The Governor must also provide a certification by an "appropriate entity" that the submitted law "is not significantly inconsistent with the Fiscal Plan for the fiscal year," id. § 2144(a)(2)(B) (emphasis added), or that the submitted law is "significantly inconsistent with the Fiscal Plan for the fiscal year," id. § 2144(a)(2)(C).

Pursuant to section 204(a)(3) of PROMESA,[18] the Oversight Board "shall send a notification to the

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> Oversight Board is in operation, the Governor shall submit the law to the Oversight Board.

48 U.S.C.A. 2144(a)(1) (Westlaw through P.L. 117-262).

[18] Section 204(a)(3) provides, in full, that:

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

Governor and the Legislature" if the Governor fails to submit an estimate, fails to submit a certification, or submits a certification that a law is significantly inconsistent with the fiscal plan. Id. § 2144(a)(3). If the Governor fails to submit an estimate or certification, section 204(a)(4)(A) empowers the Oversight Board to direct the Governor to supply the missing submission. See id. § 2144(a)(4)(A). If the Governor submits a certification that the law is significantly inconsistent with the governing fiscal plan, section 204(a)(4)(B) empowers the Oversight Board to direct the territorial government to "correct the law to eliminate the inconsistency" or to "provide an explanation for the inconsistency that the Oversight Board finds reasonable and appropriate." Id. § 2144(a)(4)(B). Section 204(a)(5) provides that, if the territorial government fails to comply with the Oversight Board's direction pursuant to section 204(a)(4), "the Oversight Board may take such actions as it considers necessary, consistent with this chapter, to ensure that the enactment or enforcement of the law 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).

> (C) the Governor submits a law to the Oversight Board under this subsection that is accompanied by a certification described in paragraph (2)(C) that the law is significantly inconsistent with the Fiscal Plan.

48 U.S.C.A. 2144(a)(3) (Westlaw through P.L. 117-262).

1. Formal Estimate Requirement (Section 204(a)(2)(A))

It is undisputed that no estimate, formal or otherwise, of the impact on Commonwealth revenues and expenditures over the period of the 2022 Fiscal Plan has ever been provided for Act 41 despite requests and directions by the Oversight Board pursuant to section 204(a)(2)(A) of PROMESA to do so. In a July 22, 2022 letter, AAFAF asserted that it would be "an ambitious and expansive undertaking" to estimate the indirect impact of Act 41 on the basis of information that is currently available. (Skeel Ex. 17 at 2; Brenner Ex. 6 at 2.) 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. (See Skeel Exs. 15, 15A; and Brenner Ex. 5-8.) The DOL Certification stated that the fiscal assessment underlying the certification was based on "fiscal year 2021-2022" and limited to the "impact on the Agency: Department of Labor and Human Resources." (Brenner Ex. 5 at 1-2.) The Treasury Certification does not contain any numerical values underlying the conclusion that Act 41 "entails no fiscal impact." (Brenner Ex. 5 at 5.) Rather, the Treasury Certification is based on "fiscal year 2021-2022" and is limited to "impact on the Agency: Department of Treasury." (Id.) Thus, the submissions by the Governor plainly fall short of facial compliance with the formal estimate requirement.

This Court has previously explained that "a 'formal estimate' under section 204(a) means a complete and accurate estimate 'covering revenue and

expenditure effects of new legislation' over the entire period of the fiscal plan." Pierluisi v. Fin. Oversight & Mgmt. Bd. for P.R. (In re Fin. Oversight & Mgmt. Bd. for P.R.), 37 F.4th 746, 752 (1st Cir. 2022) ("Five Laws Appeal") (quoting Fin. Oversight & Mgmt. Bd. for P.R. v. Vásquez Garced (In re Fin. Oversight & Mgmt. Bd. for P.R.), 403 F. Supp. 3d 1, 13 (D.P.R. 2019) ("Law 29 I")). Thus, for example, in the Five Laws Appeal, the First Circuit found that the Commonwealth failed to provide a formal estimate for Act 82 when its certification included "a conclusory and unsupported estimate" that failed to explain revenue and expenditure effects of the new legislation. Id. at 764. Similarly, the First Circuit concluded that Commonwealth failed to provide a formal estimate for Act 138 when its certification included a conclusory statement asserting "no impact on expenditures and revenues" without "some analysis or data to back up that assertion." Id.; see also Law 29 I, 403 F. Supp. 3d at 12-13; Fin. Oversight & Mgmt. Bd. for P.R. v. Vázquez Garced (In re Fin. Oversight & Mgmt. Bd. for P.R.), 616 B.R. 238, 248 (D.P.R. 2020) ("Law 29 II"); Vázquez Garced v. Fin. Oversight & Mgmt. Bd. for P.R., 511 F. Supp. 3d 90, 97 (D.P.R. 2020), aff'd sub nom. Pierluisi v. Fin. Oversight & Mgmt. Bd. for P.R. (In re Fin. Oversight & Mgmt. Bd. for P.R.), 37 F.4th 746 (1st Cir. 2022).

This Court has held that section 204(a)(2)(A) requires that a "formal estimate" cover "revenue and expenditure effects of new legislation," in enough detail to estimate the law's impact over the full duration of the relevant fiscal plan. Law 29 I, 403 F.

Supp. 3d at 13-14. The Section 204(a) Certification and the Section 204(a) Certification Supplement contain no methodological or computational detail to support the limited certifications that are proffered, which are facially insufficient in any event to meet the clear requirements of the statute and the Oversight Board's directions. (Skeel Ex. 15; Brenner Exs. 5-8.) As this Court has held, the "formality" requirement for an estimate is not satisfied by the mere presentation of a figure on official letterhead. Law 29 I, 403 F. Supp. 3d at 12-13. The Section 204(a) Certification and Section 204(a) Certification Supplement do not provide even a narrative explanation of how the estimates by the DOL and Treasury were derived.

Additionally, the Oversight Board issued several letters, including the July 30, 2022 letter that attached a presentation concerning the economic impact of Act 41, which provided the Governor with several opportunities to cure the perceived deficiencies prior to enactment of the statute and to provide more concrete data and analysis underpinning the DOL Certification and the Treasury Certification. Nonetheless, the Governor declined to provide documentation beyond the Section 204(a) Certification Supplement. Thus, the Governor has failed to show that the "formal" estimate requirement of section 204(a)(2)(A) has been satisfied.

2. Certification of Consistency with the Fiscal Plan (Section 204(a)(2)(B)-(C))

It is undisputed that the Governor has never provided the Oversight Board with a certification that

Act 41, which was enacted on June 20, 2022, is or is not consistent with the entire period of the 2022 Fiscal Plan. Instead, the Governor has provided purported certifications by the Office of Management and Budget, Department of Labor and Human Resources, and Department of Treasury regarding effects on expenditures and revenues of those governmental units for 2021-2022, the year preceding the enactment of Act 41. The Section 204(a) Certification asserts that Act 41 "do[es] not impact payroll expenditures of the Government of Puerto Rico" and that its "impact should be evaluated in light of the marginal effects that the Act 41 Modifications will have on the economic behavior of private sector employers." (Skeel Ex. 15 at 6.) AAFAF acknowledged that "an argument can be made that Act 41 'negatively impacts labor market flexibility,'" but asserted that Act 41 "largely preserve[s]" Act 4-2017's structural reforms because it only modified certain sections of the earlier Act. (Skeel Ex. 15 at 7.) The Section 204(a) Certification Supplement also included a letter from the Office of Management and Budget (Brenner Ex. 7 at 1), which further explained that the expenditure reported in the DOL Certificate ($1,248.12) represented the actual cost to publish "three . . . regulations." (Ex. 7 at 1.) The conclusions of that letter were expressly based upon the DOL's certification (see Brenner Ex. 7 at 1 ("[T]he Department [of Labor and Human Resources] does not identify any other incremental expense in its operation with the implementation of [Act 41]; therefore, we conclude that the budgets for the next five years will not be affected.")), which did

not purport to come to any conclusions concerning revenues and expenses of the government generally nor address any period outside of "fiscal year 2021-2022." (Brenner Ex. 8 at 1.)

None of the Governor's arguments in defense of the certification submissions is availing. His plea that the submissions are not noncompliant because the statute does not define "formal estimate" is contrary to prior decisions of the First Circuit and this Court in this Title III case. The Governor's contention that "indirect" impacts on the Commonwealth'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.

Neither the Governor nor the Speaker has identified any factual issue material to Count II that warrants discovery prior to adjudication of the Oversight Board's request for relief on the Section 204(a) compliance issue, or that precludes judgment in the Oversight Board's favor on Count II.[19]

The Governor's argument that the required fiscal impact assessment is impossible and his sugges-

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[19] The Governor renews the discovery requests originally sought in the Discovery Motion. (Gov. Opp. at 44-50.) Neither the Governor nor the Speaker has demonstrated that he lacks access to documents necessary to oppose the Oversight Board's Motion for Summary Judgment as to Count II, such that discovery under Rule 56(d) of the Federal Rules of Civil Procedure would be appropriate. See In re PHC, 762 F.3d at 143. Accordingly, the Government Parties' request for discovery is denied insofar as it relates to Count II.

tion that the law remain in place while the Oversight 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. Nor is there any merit in the contention that the failure can be laid at the feet of the Oversight Board because the Oversight Board did not lay out complete details and underlying data in support of its conclusion that Act 4-2017 labor reforms should stay in place. As this Court has previously held, "[t]he Oversight Board is not required to prove to the Court that [a law] is significantly inconsistent with the fiscal plan" to show that the Government failed to comply with its obligation under section 204(a)(1) of PROMESA. Law 29 II, 616 B.R. at 248. Section 204(a) provides no exception to the certification and formal estimate requirements for difficulty of analysis. It provides that, where the Governor fails to fulfill his statutory duty to provide the requisite meaningful documentation, the Oversight Board may act to "ensure that the enactment or enforcement of the law will not adversely affect the [Commonwealth's] compliance with the Fiscal Plan, including preventing the enforcement or application of the law" in question. 48 U.S.C.A. § 2144(a)(5) (Westlaw through P.L. 117-262).

Here, the Governor has failed to comply with section 204(a). Act 41, which eliminates certain reforms imposed by the LTFA concerning the accrual of sick and vacation days and restored the pre-LTFA employee probation period, Christmas bonus eligibility, the presumption that any dismissal of an employee is not justified, and extended the statute of

limitation for employees to commence an action against an employer, is plainly violative of the 2022 Fiscal Plan's direction that the Government refrain from repealing the LTFA or enacting new legislation that would negatively affect Puerto Rico's labor market flexibility. (See Brenner Ex. 4; see also Skeel Decl. ¶ 58.) The Oversight Board is therefore entitled as a matter of law to relief pursuant to sections 104(k) and 204(a)(5) of PROMESA "to ensure that the enactment or enforcement of [Act 41] will not adversely affect the territorial government's compliance with the Fiscal Plan." 48 U.S.C.A. § 2144(a)(5) (Westlaw through P.L. 117-262). The only way to prevent the enforcement and application of the law, which regulates the private sector and provides for private civil enforcement remedies, is to nullify it ab initio. Accordingly, the Court hereby declares that Act 41, and any actions that have been taken to implement it, are null and void ab initio. The Court further permanently prohibits and enjoins 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.

C. Count I: Sections 104(k) and 108(a)(2) of PROMESA

Section 108(a)(2) of PROMESA provides that "[n]either the Governor nor the Legislature may (1) exercise any control, supervision, oversight, or review over the Oversight Board or its activities; or (2) enact, implement, or enforce any statute, resolution, policy, or rule that would impair or defeat the purposes of [PROMESA], as determined by the

Oversight Board." 48 U.S.C.A. § 2128(a) (Westlaw through P.L. 117-262). The Oversight Board is authorized, under section 104(k) of PROMESA, to "seek judicial enforcement of its authority to carry out its responsibilities under this Act." Id. § 2124(k).

In Count I, the Oversight Board seeks a declaration that Act 41 is nullified because the Oversight Board has determined that the legislation impairs and/or defeats the purposes of PROMESA. (Compl. ¶¶ 102-104.) Having nullified and enjoined the enforcement of Act 41 based on the Governor's non-compliance with section 204(a), the Court need not address Count I of the Complaint. The accompanying *Order to Show Cause Regarding Dismissal of Remaining Claim* requires the parties to show cause, in writing, as to why Count I should not be dismissed as moot in light of the disposition of Count II.

D. Speaker's Motion to Strike

The Speaker filed a motion to strike from Plaintiffs' summary judgment briefing any mention of Dr. Robert K. Triest. (Mot. to Strike at 2-3, 7.) The Speaker characterizes certain references to Dr. Triest's work with the Oversight Board as unsworn testimony in violation of Federal Rule of Civil Procedure 56(c)(2) and Federal Rule of Civil Procedure 56(c)(4). Having made its determination as to the validity of Act 41 based on section 204(a) and without reference to the substance of Dr. Triest's work or the Oversight Board's reliance thereon, the Court need not resolve the issue of admissibility of the

challenged facts or references pertaining to Dr. Triest. Accordingly, the Motion to Strike is denied as moot.

III.

CONCLUSION

For the foregoing reasons, the Oversight Board's Motion for Summary Judgment is granted with respect to Count II of the Complaint, and it is denied with respect to Count I of the Complaint. Act 41, and any actions that have been taken to implement it, are null and void ab initio. The Court further permanently prohibits and enjoins 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.

The accompanying *Order to Show Cause Regarding Dismissal of Remaining Claim* directs the parties to show cause as to why, in light of the foregoing analysis and decision, the remaining counts and counterclaims should not be dismissed as moot.

This Opinion and Order resolves Docket Entry Nos. 28, 29, 44, and 45 in Adversary Proceeding No. 22-00063. This adversary proceeding remains referred to Magistrate Judge Dein for general pretrial management.

SO ORDERED.

Dated: March 3, 2023

/s/ Laura Taylor Swain
LAURA TAYLOR SWAIN
United States District Judge

APPENDIX C

United States Court of Appeals for the First Circuit

No. 23-1267

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

Debtors,

THE FINANCIAL OVERSIGHT AND MANAGEMENT BOARD FOR PUERTO RICO, as Representative for the Commonwealth of Puerto Rico,

Plaintiff, Appellee,

v.

RAFAEL HERNÁNDEZ-MONTAÑEZ,

Defendant, Appellant,

PEDRO PIERLUISI-URRUTIA,

Defendant, Appellee

No. 23-1268

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

Debtors,

THE FINANCIAL OVERSIGHT AND MANAGEMENT BOARD FOR PUERTO RICO, as Representative for the Commonwealth of Puerto Rico,

Plaintiff, Appellee,

v.

PEDRO PIERLUISI-URRUTIA,

Defendant, Appellant,

RAFAEL HERNÁNDEZ-MONTAÑEZ,

Defendant, Appellee

No. 23-1358

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

MANAGEMENT BOARD FOR PUERTO RICO, as Representative of the Puerto Rico Public Buildings Authority,

Debtors,

THE FINANCIAL OVERSIGHT AND MANAGEMENT BOARD FOR PUERTO RICO, as Representative for the Commonwealth of Puerto Rico,

Plaintiff, Appellee,

v.

PEDRO PIERLUISI-URRUTIA,

Defendant, Appellant,

RAFAEL HERNÁNDEZ-MONTAÑEZ,

Defendant, Appellee

Before
Barron, Chief Judge,
Lynch, Howard, Kayatta, Gelpí, Montecalvo, and Rikelman, Circuit Judges.

ORDER OF COURT

Entered: September 21, 2023

Pursuant to First Circuit Internal Operating Procedure X(C), the petition for rehearing en banc has also been treated as a petition for rehearing before the original panel. The petition for rehearing having been denied by the panel of judges who decided the case, and the petition for rehearing en banc having been submitted to the active judges of

this court and a majority of the judges not having voted that the case be heard en banc, it is ordered that the petition for rehearing and petition for rehearing en banc be denied.

GELPÍ, Circuit Judge, concurring in the denial of rehearing en banc. The panel's decision holding that the present case was properly before Judge Swain and that the Financial Oversight and Management Board ("the Board") could invalidate Puerto Rico Act 41-2022, in my view, is legally correct. Accordingly, I vote to deny en banc review.

I write separately to address a matter which Appellant, the Speaker of Puerto Rico's House of Representatives ("the Speaker"), raised before the panel and raises again before the en banc court: the lack of consent of the governed, which the citizenry of Puerto Rico live under.[1] See Appellant Hernández-Montañez's Br. at 2-3 ("[T]he Board sought to frustrate the will of Puerto Rico's voters by attempting to weaponize PROMESA to impose its policy views on what should be the rights of private sector employees."); Appellant Hernández-Montañez's Pet. Reh'g at 1 ("[T]he panel's decision dramatically expands the already significant authority . . . of [the Board] in a way that has the effect of further diluting the authority of Puerto

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[1] Consent of the governed is a paramount principle set forth in the Declaration of Independence. In a Lockean sense, it establishes that rule cannot take place without the consent of the people being governed. It is one of the pillars upon which the United States was established.

Rico's elected government and, by extension, diluting the votes that Puerto Ricans cast every first Tuesday of November in a leap year.").

It is true that Congress, by enacting the Puerto Rico Oversight, Management, and Economic Stability Act ("PROMESA"), 48 U.S.C. § 2101, et seq., has given the Board ample veto power over actions by Puerto Rico's government that, in one way or another, have a fiscal impact (or lack thereof) on its coffers. The Speaker implies that this democratic anomaly further invalidates the statute and the Board's action, for which he has sought our review. But the Speaker has chosen the incorrect forum to present this argument.

The Speaker's plight is by no means unheeded. Congress approved Puerto Rico's Constitution, duly enacted by its People, in 1952 to "accord to [it] the degree of autonomy and independence normally associated with States of the Union." Examining Bd. of Eng'rs, Architects & Surveyors v. Flores de Otero, 426 U.S. 572, 594 (1976). Following the enactment of PROMESA, however, "the republican form of government bestowed by Congress upon the Island's government . . . has been de facto trumped." Gustavo A. Gelpí, The Constitutional Evolution of Puerto Rico and Other U.S. Territories (1898 - Present) 218 (Interamerican Univ. of P.R. 2017); see United States v. Santiago, 998 F. Supp. 2d 1, 2 (D.P.R. 2014) (Gelpí, J.) ("United States citizens residing in Puerto Rico, have historically lived under a system of federal laws in which the constitutional principle of consent of the

governed is a fallacy." (emphasis omitted)); Salvador E. Casellas, Commonwealth Status and the Federal Courts, 80 Rev. Jur. U.P.R. 945, 962 (2011) ("Over a half-century after the Commonwealth was established, the principle of the consent of the governed, in the case of Puerto Rican-Federal relations, has been substantially eroded, largely due to the widening sphere of federal authority." (emphasis omitted)).

As my much-esteemed late colleague, Judge Juan R. Torruella, aptly put it, we live in a nation "that touts itself as the bastion of democracy throughout the world," and yet "[i]t is now an unassailable fact that what we have in the United States-Puerto Rico relationship is government without the consent or participation of the governed." Juan R. Torruella, The Insular Cases: A Declaration of Their Bankruptcy and My Harvard Pronouncement, in Reconsidering the Insular Cases: The Past and Future of the American Empire 61, 74 (Gerald L. Neuman & Tomiko Brown-Nagin eds., 2015).[2] Such characterization could not be more prophetic than upon PROMESA's enactment. Not only do we now have a federal law specifically tailored to temporarily and partially

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[2] Judge Torruella's keynote address at Harvard Law School's conference "Reconsidering the Insular Cases" is also available on YouTube. See Harvard Law School, The Insular Cases: A Declaration of Their Bankruptcy and My Harvard Pronouncement, YouTube (Feb. 19, 2014), https://www.youtube.com/watch?v=aixtvS4Jack.

supersede Puerto Rico's Constitution,[3] but one which gives carte blanche to a Board -- composed of presidential appointees not subject to Senate confirmation - to override an otherwise validly enacted law of Puerto Rico.[4] But this woeful predicament is one which existed in Puerto Rico even prior to the enactment of its Constitution, as evidenced by the Supreme Court of Puerto Rico's statement that its "high executive officers d[id] not derive their authority and power from the consent of the governed." Buscaglia v. Dist. Ct. of San Juan, 145 F.2d 274, 283 (1st Cir. 1944).

So, as democratically abhorrent and offensive a premise as the above dilemma of the People of Puerto Rico may be -- as citizens of a Nation established under a government for the people, by the people -- the Speaker cannot count on the principle of the consent of the governed to invalidate PROMESA, nor the Board's annulment of Act 41-2022.[5] "In our Nation's history, no Act of Congress

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[3] The Speaker himself recognizes PROMESA's preemptive provisions. See Appellant Hernández-Montañez's Br. at 1-2 ("To the extent that Puerto Rico's Constitution was not repealed by PROMESA (even if a few of its provisions do preempt it), its implementation must always be respectful of the People's democratic exercise of electing officers to represent their interests and to enact policies to make their lives better.").

[4] See Fin. Oversight & Mgmt. Bd. for P.R. v. Aurelius Inv., LLC, 140 S. Ct. 1649, 1665 (2020) (upholding the constitutionality of the appointment process for the Board's members).

[5] Consent of the governed is not part of the constitutional charter for our national governance, to wit, the Constitution and

[directed at a territory] has eve[r] been held unconstitutional based on the principle of consent of the governed. Indeed, said concept is not a fundamental guarantee within the Bill of Rights, nor in any specific article of the Constitution." United States v. Pedro-Vidal, 371 F. Supp. 3d 57, 59 (D.P.R. 2019) (Gelpí, J.).[6] Otherwise, every federal Act directed towards Puerto Rico beginning in 1900, including Congress's unilateral amendments to its constitution in 1952, would be void. See Aurelius, 140 S. Ct. at 1660-61 ("[O]ur precedents . . . have long acknowledged that Congress may structure local [territorial] governments under Article IV and Article I in ways that do not precisely mirror the constitutional blueprint for the National Government.").[7]

Ultimately, then, the final word rests on the shoulders of Congress. See Nat'l Bank v. County of Yankton, 101 U.S. 129, 133 (1879) (holding that

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Bill of Rights, nor the Laws of the United States. As such, consent of the governed does not provide any right of action that may be pursued via the Article III branch, as the Speaker incorrectly suggests.

[6] This situation is not unique to Puerto Rico, given that "with the exception of the thirteen original States, . . . other states underwent a period of territorial governance before admission to the Union. During such territorial periods, federal laws applied therein, despite a lack of participation in the federal [lawmaking] process." Pedro-Vidal, 371 F. Supp. 3d at 59.

[7] As Aurelius makes clear, Puerto Rico continues to fall under the Territorial Clause of the U.S. Constitution. 140 S. Ct. at 1654.

Congress "has full and complete legislative authority over . . . the departments of the territorial governments" and that "[i]t may do for the Territories what the people, under the Constitution of the United States, may do for the States," in a controversy arising in the Dakota territory).[8]

Thus, it is to Congress, and not this Court, that the Speaker should address his consent of the governed grievance so that the People of Puerto Rico may live out those sacrosanct guarantees upon which the United States was formed.

By the Court:

Maria R. Hamilton, Clerk

[counsel intentionally omitted]

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[8] In regard to a dispute regarding Alaska, see In re Annexation of Slaterville to Town of Fairbanks, 83 F. Supp. 661, 663 (Terr. Alaska 1949) ("It must be remembered that Congress, in the government of the territories . . . has plenary power, save as controlled by the provisions of the Constitution; that the form of government it shall establish is not prescribed, and may not necessarily be the same in all the territories. We are accustomed to that generally adopted for the territories, of a quasi state government, with executive, legislative, and judicial officers . . . ; but Congress is not limited to this form. In the District of Columbia[,] it has adopted a different mode of government, and in Alaska still another." (quoting Binns v. United States, 194 U.S. 486, 491 (1904))).

APPENDIX D

RELEVANT STATUTORY PROVISIONS

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

(a) SUBMISSION OF LEGISLATIVE ACTS TO OVERSIGHT BOARD

(1) Submission of acts

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

(2) Cost estimate; certification of compliance or noncompliance

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

(A) A formal estimate prepared by an appropriate entity of the territorial government with expertise in budgets and financial management of the impact, if any, that the law will have on expenditures and revenues.

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

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

(3) Notification

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

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

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

(C) the Governor submits a law to the Oversight Board under this subsection that is accompanied by a certification described in paragraph (2)(C) that the law is significantly inconsistent with the Fiscal Plan.

(4) Opportunity to respond to notification

(A) Failure to provide estimate or certification

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

may be), in accordance with such procedures as the Oversight Board may establish.

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

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

(i) correct the law to eliminate the inconsistency; or

(ii) provide an explanation for the inconsistency that the Oversight Board finds reasonable and appropriate.

(5) Failure to comply

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

(6) Preliminary review of proposed acts

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

(b) EFFECT OF APPROVED FISCAL PLAN ON CONTRACTS, RULES, AND REGULATIONS

(1) Transparency in contracting

The Oversight Board shall work with a covered territory's office of the comptroller or any functionally equivalent entity to promote compliance with the applicable law of any covered territory that requires agencies and instrumentalities of the territorial government to maintain a registry of all contracts executed, including amendments thereto, and to remit a copy to the office of the comptroller for inclusion in a comprehensive database available to the public. With respect to Puerto Rico, the term "applicable law" refers to 2 L.P.R.A. 97, as amended.

(2) Authority to review certain contracts

The Oversight Board may establish policies to require prior Oversight Board approval of certain contracts, including leases and contracts to a governmental entity or government-owned corporations rather than private enterprises that are

proposed to be executed by the territorial government, to ensure such proposed contracts promote market competition and are not inconsistent with the approved Fiscal Plan.

(3) Sense of Congress

It is the sense of Congress that any policies established by the Oversight Board pursuant to paragraph (2) should be designed to make the government contracting process more effective, to increase the public's faith in this process, to make appropriate use of the Oversight Board's time and resources, to make the territorial government a facilitator and not a competitor to private enterprise, and to avoid creating any additional bureaucratic obstacles to efficient contracting.

(4) Authority to review certain rules, regulations, and executive orders

The provisions of this paragraph shall apply with respect to a rule, regulation, or executive order proposed to be issued by the Governor (or the head of any department or agency of the territorial government) in the same manner as such provisions apply to a contract.

(5) Failure to comply

If a contract, rule, regulation, or executive order fails to comply with policies established by the Oversight Board under this subsection, the Oversight Board may take such actions as it considers necessary to ensure that such contract, rule, ex-

ecutive order or regulation will not adversely affect the territorial government's compliance with the Fiscal Plan, including by preventing the execution or enforcement of the contract, rule, executive order or regulation.

(c) RESTRICTIONS ON BUDGETARY ADJUSTMENTS

(1) Submissions of requests to Oversight Board

If the Governor submits a request to the Legislature for the reprogramming of any amounts provided in a certified Budget, the Governor shall submit such request to the Oversight Board, which shall analyze whether the proposed reprogramming is significantly inconsistent with the Budget, and submit its analysis to the Legislature as soon as practicable after receiving the request.

(2) No action permitted until analysis received

The Legislature shall not adopt a reprogramming, and no officer or employee of the territorial government may carry out any reprogramming, until the Oversight Board has provided the Legislature with an analysis that certifies such reprogramming will not be inconsistent with the Fiscal Plan and Budget.

(3) Prohibition on action until Oversight Board is appointed

(A) During the period after a territory becomes a covered territory and prior to the appointment of all members and the Chair of the Oversight Board, such covered territory shall

not enact new laws that either permit the transfer of any funds or assets outside the ordinary course of business or that are inconsistent with the constitution or laws of the territory as of June 30, 2016, provided that any executive or legislative action authorizing the movement of funds or assets during this time period may be subject to review and rescission by the Oversight Board upon appointment of the Oversight Board's full membership.

(B) Upon appointment of the Oversight Board's full membership, the Oversight Board may review, and in its sole discretion, rescind, any law that—

(i) was enacted during the period between, with respect to Puerto Rico, May 4, 2016; or with respect to any other territory, 45 days prior to the establishment of the Oversight Board for such territory, and the date of appointment of all members and the Chair of the Oversight Board; and

(ii) alters pre-existing priorities of creditors in a manner outside the ordinary course of business or inconsistent with the territory's constitution or the laws of the territory as of, in the case of Puerto Rico, May 4, 2016, or with respect to any other territory, 45 days prior to the establishment of the Oversight Board for such territory;

but such rescission shall only be to the extent that the law alters such priorities.

(d) IMPLEMENTATION OF FEDERAL PROGRAMS

In taking actions under this chapter, the Oversight Board shall not exercise applicable authorities to impede territorial actions taken to—

(1) comply with a court-issued consent decree or injunction, or an administrative order or settlement with a Federal agency, with respect to Federal programs;

(2) implement a federally authorized or federally de legated program;

(3) implement territorial laws, which are consistent with a certified Fiscal Plan, that execute Federal requirements and standards; or

(4) preserve and maintain federally funded mass transportation assets.

48 U.S.C. § 2166(a). Jurisdiction

(a) FEDERAL SUBJECT MATTER JURISDICTION

The district courts shall have—

(1) except as provided in paragraph (2), original and exclusive jurisdiction of all cases under this subchapter; and

(2) except as provided in subsection (b), and notwithstanding any Act of Congress that confers exclusive jurisdiction on a court or courts other than the district courts, original but not exclusive jurisdiction of all civil proceedings arising

under this subchapter, or arising in or related to cases under this subchapter.