No. 23-678

IN THE

Supreme Court of the United States

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

Petitioners,

v.

THE FINANCIAL OVERSIGHT AND MANAGEMENT BOARD FOR PUERTO RICO,

Respondent.

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

REPLY BRIEF FOR PETITIONERS

LUIS C. MARINI-BIAGGI
CAROLINA VELAZ RIVERO
MARINI PIETRANTONI MUÑIZ LLC
250 Ponce de Leon Avenue, Suite 900
San Juan, Puerto Rico 00918
(787) 705-2171

JOHN J. RAPISARDI
WILLIAM J. SUSHON
Counsel of Record
O'MELVENY & MYERS LLP
Seven Times Square
New York, NY 10036
(212) 326-2000
wsushon@omm.com

PETER M. FRIEDMAN
O'MELVENY & MYERS LLP
1625 Eye Street, NW
Washington, DC 20006
(202) 383-5300

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

TABLE OF AUTHORITIES

Page(s)

Statutes

REPLY BRIEF FOR PETITIONERS

The Board's Opposition seeks to characterize this case as presenting a narrow issue with little application outside Puerto Rico's restructuring that therefore does not warrant certiorari. That is wrong. The First Circuit's decision makes clear that courts often look to both PROMESA and the Bankruptcy Code to interpret identical language in both. That interplay makes the First Circuit's departure from other circuits' holdings on post-confirmation jurisdiction in bankruptcy a circuit split with profound implications outside the PROMESA context. And there is nothing minor or narrow about the lower courts' decision to disregard PROMESA's plain language in favor of an interpretation that hamstrings the already limited democratic rule in Puerto Rico.

A. The First Circuit's decision creates a circuit split over the treatment of post-confirmation jurisdiction.

1. This case's post-confirmation jurisdiction implications are not limited to matters under 48 U.S.C. § 2166(a)(2).

The First Circuit decision departs dramatically from the majority of circuit courts' approach to post-confirmation bankruptcy jurisdiction. Yet the Board contends that there is no circuit split because the First Circuit's decision is strictly limited to jurisdiction under PROMESA section 2166(a)(2), not bankruptcy matters pending under 28 U.S.C. § 1334(b). *See* Opp. at 14. Not so. Congress modeled PROMESA closely after Chapters 9 and 11 of the Bankruptcy Code and the language at issue on this

appeal reads word-for-word with that of 28 U.S.C. § 1334(b). PROMESA Section 2166(a)(2) provides:

> [N]otwithstanding 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.

28 U.S.C. § 1334(b) provides:

> [N]otwithstanding any Act of Congress that confers exclusive jurisdiction on a court or courts other than the district courts, the 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.

The only difference between these two provisions is the reference to the subchapter or title under which the bankruptcy case is filed. The operative "arising under" and "arising in or related to" language is identical. In circumstances like these, courts routinely look to case law interpreting the language of such similar statutes for guidance in statutory interpretation. *See Erlenbaugh v. United States*, 409 U.S. 239, 243 (1972) (noting that statutes addressing the same subject should be read "as if they were one law" (quotations omitted)); *Wachovia Bank, Nat'l Ass'n v. Schmidt*, 388 F.3d 414, 424 (4th Cir. 2004), *rev'd*, 546 U.S. 303 (2006), *remanded*, 445 F.3d 762

(4th Cir. 2006) ("Congress, like other rational speakers, uses words consistently when speaking about similar subjects, *regardless* of its generalized purposes."). Tellingly, the First Circuit itself relied on its *Boston Regional* decision, decided under 28 U.S.C. § 1334(b), and stated that the "logic" of that decision "guides [its] reasoning here." *See* Pet. App. 22a. Courts deciding matters under 28 U.S.C. § 1334(b) are similarly likely to look to the First Circuit's ruling here.

2. The decision advances the First Circuit's ad hoc approach to post-confirmation jurisdiction, not recognized by other courts.

Contrary to the Board's suggestion, if applied to 28 U.S.C. § 1334(b), the First Circuit decision is inconsistent with other circuit courts' approach to post-confirmation jurisdiction. The First Circuit, unlike every other circuit court to address the issue, *see* Pet. 16–17, 22, advances the notion that courts should look at the "context" of a dispute to determine what test applies to post-confirmation bankruptcy jurisdiction. *See* Pet. App. 22a ("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."). This has significant consequences both in and outside of PROMESA proceedings.

Not only does the decision depart from the prevailing rule that post-confirmation matters must have a "close nexus" to a confirmed plan, but it also introduces a degree of unpredictability and inconsistency into post-confirmation bankruptcy proceedings. By allowing bankruptcy courts to

assume jurisdiction over post-confirmation matters with any conceivable connection to the bankruptcy matter—no matter how tangential—the First Circuit's decision disrupts the predictability that the "close nexus" test provides. This can be particularly troubling in the context of PROMESA and the Bankruptcy Code, where the public has an interest in clear rules and precedents to ensure fair and orderly proceedings.

The First Circuit is the only appellate court that has adopted this ad hoc approach. The close nexus inquiry ensures that at the post-confirmation stage a matter before the court "affect[s] an integral aspect of the bankruptcy process," *Binder v. Price Waterhouse & Co., LLP (In re Resorts Int'l, Inc.)*, 372 F.3d 154, 167 (3d Cir. 2004). The First Circuit's "context" driven approach is likely to result in jurisdictional overreach and conflict with the jurisdictional boundaries set by other circuits—which can impede the jurisdictional harmony that the federal system strives to maintain.

3. This matter is not about judicial assignment.

The Board's argument that this case is really about judicial assignment is equally unavailing. This matter is not and has never been about judicial assignment. The Board filed this case in the Title III Court and thus must meet the jurisdictional test applicable to Title III. *See Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 94–95 (1998) (holding that subject-matter jurisdiction must "be established as a threshold matter" that is "inflexible and without exception" and "spring[s] from the nature and limits of the judicial power of the United States" (quotations

omitted)). The fact that Judge Swain could have heard the case had it been filed in the district court is irrelevant to the fact that the Board must satisfy PROMESA's statutory requirements for subject-matter jurisdiction in the Title III Court.

For the same reasons, actions dismissed from bankruptcy court under the close nexus test may be refiled in federal district court under federal question or diversity jurisdiction. *See, e.g.*, *Hernandez Carrasquillo v. P.R. Tel. Co. (In re Hernandez Carrasquillo)*, No. 20-00133, 2022 WL 2134532 (Bankr. D.P.R. June 14, 2022) (granting motion to dismiss adversary proceeding as Bankruptcy Court lacked "related to" jurisdiction over claim under the Fair Debt Collection Practices Act, a federal law, because the outcome would not affect the estate); *Cantor v. Am. Banknote Corp.*, No. 06 Civ. 1392, 2007 WL 3084966, at *4 (S.D.N.Y. Oct. 22, 2007) ("[T]he Bankruptcy Court lacks jurisdiction over this action and, consequently, the [District] Court's subject matter jurisdiction has been properly established."). Of course, the same district judge who makes an ultimate determination in a bankruptcy case could coincidentally be the district court judge assigned to a case refiled in district court. But under the Bankruptcy Code, just as under PROMESA, the case must clear the first hurdle of subject-matter jurisdiction regardless of the particular judge ultimately assigned to a case.

B. PROMESA Section 204(a)'s Correct Interpretation Is Profoundly Important to the Role of the Elected Government of Puerto Rico.

The Oversight Board minimizes Section 204(a)'s vital role in the power-sharing arrangement between Puerto Rico's elected government and the Board. In enacting PROMESA, Congress gave the Board "wide-ranging" authority over Puerto Rico's fiscal decisions, but preserved the elected government's political and legislative power. *See Fin. Oversight & Mgmt. Bd. for P.R. v. Aurelius Inv., LLC*, 140 S. Ct. 1649, 1674 (2020) (Sotomayor, J., concurring in the judgment). Section 204(a)'s legislative review process is key to that delicate balance and thus its correct interpretation is a matter of profound importance to the operation of both the elected government and the Oversight Board. After all, the Board has brought suit under this (in its words) "limited one sub-section of PROMESA," Opp. at 24, to invalidate eight duly enacted laws in just the past four years. *See, e.g.*, *The Fin. Oversight & Mgmt. Bd. for Puerto Rico v. Vázquez Garced (In re the Fin. Oversight & Mgmt. Bd. for Puerto Rico)*, 616 B.R. 238, 245 (D.P.R. 2020) (invoking PROMESA § 204(a) to invalidate Act 29-2019); *Vázquez Garced v. The Fin. Oversight & Mgmt. Bd. for Puerto Rico (In re the Fin. Oversight & Mgmt. Bd. for Puerto Rico)*, 511 F. Supp. 3d 90, 128 (D.P.R. 2020) (asserting counterclaims to invalidate Act 82-2019, Act 138-2019, Act 176-2019, Act 181-2019, and Act 47-2020 under PROMESA § 204(a)); *The Fin. Oversight & Mgmt. Bd. for Puerto Rico v. Pierluisi Urrutia (In re the Fin. Oversight & Mgmt. Bd. for*

Puerto Rico), 634 B.R. 187 (D.P.R. 2021) (invoking PROMESA § 204(a) to invalidate Act 7-2021); *Fin. Oversight & Mgmt. Bd. for Puerto Rico v. Hernández-Montañez (In re Fin. Oversight & Mgmt. Bd. for Puerto Rico)*, 650 B.R. 334 (D.P.R. 2023) (invoking PROMESA § 204(a) to invalidate Act 41-2022). This is the second petition for certiorari resulting from that steady stream of litigation. Petition for Writ of Certiorari, *Pierluisi v. Fin. Oversight & Mgmt. Bd. for Puerto Rico*, 143 S. Ct. 1070 (2023) (No. 22-484) (involving the Board's challenge of Acts 47, 82, 138, and 176 under PROMESA § 204). The importance of interpreting Section 204(a) cannot be understated.

Nor does the Governor ask this Court to sit simply as "a court of error correction." *See* Opp. 21 (quoting *City & Cnty. of S.F. v. Sheehan*, 575 U.S. 600, 621 (2015) (Scalia, J., concurring in part). The Board characterizes the lower courts' decision as a straightforward interpretation of a narrow statute—and this case as a poor vehicle for this challenge—because the Governor failed to comply *at all* with Section 204(a)(2). *See* Opp. 22–23, 27–28. But as the Governor explained in the Petition, *see* Pet. 27–28, the Governor did comply. Section 204(a) requires an estimate of the "impact, *if any*, that the law *will have* on expenditures and revenues." 48 U.S.C. § 2144(a)(2) (emphasis added). AAFAF supplied an estimate explaining that Act 41's effects were not reasonably foreseeable or predictable, and therefore that the law "will have" no effects that can be estimated. *See* Pet. 27–28. The Board unilaterally determined that AAFAF's certification was facially noncompliant with Section 204(a), and now argues

(tautologically) that its own conclusion insulates this case from review. *See* Opp. 27–28. Such circular reasoning demonstrates precisely why a narrow reading of the statute—that accords with its plain language—is so important to prevent the Board from running roughshod over the elected government's legislative process.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

LUIS C. MARINI-BIAGGI
CAROLINA VELAZ RIVERO
MARINI PIETRANTONI MUÑIZ LLC
250 Ponce de Leon Avenue, Suite 900
San Juan, Puerto Rico 00918
(787) 705-2171

JOHN J. RAPISARDI
WILLIAM J. SUSHON
Counsel of Record
O'MELVENY & MYERS LLP
Seven Times Square
New York, NY 10036
(212) 326-2000
wsushon@omm.com

PETER M. FRIEDMAN
O'MELVENY & MYERS LLP
1625 Eye Street, NW
Washington, DC 20006
(202) 383-5300

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