IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

IN RE: **THE FINANCIAL OVERSIGHT AND MANAGEMENT BOARD FOR PUERTO RICO** As a representative of the **COMMONWEALTH OF PUERTO RICO** Debtor[1]	**CASE NO. 17-BK-3283 (LTS)** **PETITION UNDER TITLE III OF THE PUERTO RICO OVERSIGHT, MANAGEMENT AND ECONOMIC STABILITY ACT**
THE FINANCIAL OVERSIGHT AND MANAGEMENT BOARD FOR PUERTO RICO Plaintiff **V.S.** **HON. PEDRO PIERLUISI-URRUTIA**, in his official capacity as Governor of Puerto Rico Defendant **HON. RAFAEL HERNÁNDEZ-MONTAÑEZ**, in his official capacity as Speaker of the Puerto Rico House of Representatives Intervenor-Defendant	**ADV. PROC. NO. 22-00063 (LTS)** **DECLARATORY JUDGMENT; INJUNCTIVE AND OTHER EQUITABLE RELIEF**

[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).

MOTION TO REQUEST THAT THE INJUNCTION PREVENTING THE ENFORCEMENT OF PUERTO RICO ACT NUMBER 41-2022 BE STAYED PENDING APPEAL

TO THE HONORABLE COURT:

COMES NOW defendant-intervenor **Hon. Rafael Hernández-Montañez**, in his official capacity as Speaker of the Puerto Rico House of Representatives, through the undersigned counsels and very respectfully **SETS FORTH** and **PRAY:**

I. INTRODUCTION

There is absolutely no other jurisdiction subject to Congressional authority, in which the handling of internal affairs is subject to an "awkward power-sharing arrangement" in which an unelected Board to which federal law grants "significant tools to shape Puerto Rico's financial operations" but cannot "affirmatively legislate", as that authority remains with Puerto Rico's elected officers. FOMB v. Pierluisi-Urrutia, 634 B.R. 187, 194 (D.P.R. 2021). Because of this awkwardness to the relationship and because both of the aforementioned entities answer to different masters (the former answers to Congress while the latter answers to Puerto Rican voters), friction will and has occurred. Puerto Rico's constitutional government was not designed to have the three branches of republican government share any of their powers, which results in a constant need for the judiciary to police the borders of this unique scheme.

This case is, by far, the single most consequential attempt by the Financial Oversight and Management Board for Puerto Rico's (hereinafter referred to as "FOMB" or "the Board") to expand upon its statutory mission of "provid[ing] a

method for a covered territory to achieve fiscal responsibility and access to the capital markets" to seek to shape the **policy** regarding the rights of **private sector** employees. Private enterprises in Puerto Rico were not in a general state of default, the Government was; the Puerto Rico Oversight, Management and Financial Accountability Act (hereinafter referred to as "PROMESA") does not apply to the private sector, it applies only to the Government; and Title III is reserved exclusively for covered territorial entities, as private bankruptcies in Puerto Rico are governed by the Bankruptcy Code. Hence, for the Board to challenge legislation that exclusively targets the private sector, there ought to be a clear and discernible link to the goal of restoring the Government's fiscal health. The Board's mission is not to steer Puerto Rico into any particular policy views, only to facilitate the reorganization of its debt.

While worker benefits such as mandatory paid sick leave for private sector employees remain a lofty aspiration of many at the federal level and in most state houses, Puerto Rico has enjoyed such protections for many decades before they were rolled back in January 2017 through Act 4-2017. The historical record shows that the most thriving era of Puerto Rico's economy coincided with the existence of the aforementioned policies and other benefits. There have traditionally been two ideological camps regarding this matter, on the one hand, proponents of the trickle-down/small government economics approach believe that broad employee rights discourage investment and on the other hand, more socially liberal individuals believe that employees are more than mere cogs in the machine and that the

recognition of several basic rights makes for a more productive workforce. The FOMB objects to Act 41, not because of an evidence-based contention that restoring a few rights to private sector employees would, in concrete ways, hamper the Government's Road to recovery but rather because of the FOMB's desire to impose its preferred philosophy in the crafting of policy. Courts are not equipped or empowered to decide debates on the adequacy of economic philosophies, a province that is exclusively reserved to the political branches.

In any event, the Court never had to resolve the merits of the above contentions, as it agreed with the FOMB that: 1) the instant matter may be heard as an adversary proceeding in the post-confirmation phase of the Commonwealth's Title III case; and 2) the Governor failed to adequately comply with his duties under Section 204(a) of PROMESA, 48 U.S.C. § 2144(a) (docket number 90). FOMB v. Pierluisi-Urrutia, 2023 U.S. Dist. LEXIS 37200 (D.P.R. 2023). The end result was that Act 41 was declared null and void, *ab initio*, and its enforcement was **enjoined**. Because injunctions are immediately appealable under 28 U.S.C. § 1292(a)(1), the appearing party has filed the corresponding notice of appeal (docket number 92).

Plaintiff filed the instant action months after Act 41 was signed into law and never sought any preliminary injunctive relief, at any time, patiently waiting several additional months for dispositive motions to be adjudicated. It is difficult to conclude that a party that remained idle in the face of Act 41 being in effect may allege any sort of prejudice for a few additional weeks of the legislation being in

effect. On the flip side of this, several organizations representing private sector employers (some of which have appeared as *amici* in the instant case) have publicly stated their intent to sue private sector employees to collect benefits paid under Act 41, something that even led the Secretary of the Puerto Rico Department of Labor to issue Opinion Number 2023-01[2].

For the reasons that follow, we respectfully move for a stay of the March 3, 2023 order pending what we have every reason to expect will be an expedited appeal.

II. APPLICABLE PROCEDURAL STANDARD

Rule 8007(a)(1)(C) of the Federal Rules of Bankruptcy Procedure allows a party to an appeal from an order entered in a bankruptcy proceeding to seek "an order **suspending**, modifying, restoring, or granting an injunction while an appeal is pending" (emphasis added). This is the same type of relief that is available under Fed. R. App. P. 8(a)(a)(C). Under both rules, the relief may ultimately be requested before the appellate court but must first be sought before the court that issued the decree that is being appealed from.

As eloquently expressed by Justice Frankfurter in his majority opinion in Scripps-Howard Radio, Inc. v. FCC, 316 U.S. 4, 9-10 (1942):

> No court can make time stand still. The circumstances surrounding a controversy may change irrevocably during the pendency of an appeal, despite anything a court can do. But within these limits it is reasonable that an appellate court should be able to prevent irreparable injury to the parties or to the public resulting from the premature enforcement of a determination which may later be found to have been wrong. It has always been held, therefore, that as part of its

[2] https://www.trabajo.pr.gov/ley41_2022.asp

> traditional equipment for the administration of justice, a federal court can stay the enforcement of a judgment pending the outcome of an appeal.

While a trial court's decision to issue a stay pending appeal is reviewable under the deferential abuse-of-discretion standard, there are concrete aspects of the matter the consideration of which is mandatory and that guide the court's decision, namely: "(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies". Nken v. Holder, 556 U.S. 418, 434 (2009) (citing Hilton v. Braunskill, 481 U.S. 770, 776 (1987)). It is not difficult to see that "[t]here is substantial overlap between these and the factors governing preliminary injunctions **not because the two are one and the same, but because similar concerns arise whenever a court order may allow or disallow anticipated action before the legality of that action has been conclusively determined**". Id. (internal citation omitted; emphasis added).

We now separately address each of the aforementioned factors.

III. DISCUSSION

A) LIKELIHOOD OF SUCCESS ON THE MERITS

Given the fact that the party seeking the appeal has sought review before a higher court because he/she understands that the trial court erred in its ruling and that, on the other side of the equation, that court issued its pondered decision after

hearing all sides, this is an uncomfortable matter to discuss at this level, yet we must.

In the instant case, we respectfully posit that likelihood of success on the merits largely related to the **novel** nature of both the jurisdictional argument and of the application of Section 204(a) in the context of a statute with a subject matter that is so far removed from the topic of public finances. We discuss each as aspect of the Court ruling separately.

Jurisdiction to Hear the Case as a Post-Confirmation Adversary Proceeding in the Title III Case

As previously stated, the Speaker has already sought appellate review prior to the issuance of a final judgment is because injunctive relief has been deployed. It however goes without saying that a proper basis for challenging an injunction is discussing any the jurisdiction of the issuing court.

While, with the enactment of PROMESA the governor and both houses have lost some of their constitutional prerogatives to the FOMB, the Puerto Rico judiciary's role in the context of PROMESA was reduced to enforcing subpoenas. 48 U.S.C. § 2124(f). Hence, the appearing party never proposed that jurisdiction over the instant case fell anywhere other than in federal court. The issue raised by Governor Pierluisi and joined by the Speaker was never about whether case was to be heard by the District Court, the issue was whether an **ordinary** civil action needed to be filed and go to the general pool of sitting Article III judges or if could instead be litigated as an adversary proceeding in the post-confirmation stage of the

Commonwealth, and thus presided over by the judge that was designated for Title III matters pursuant to 48 U.S.C. § 2168(a).

As correctly noted by this Honorable Court, the weight of the authority is to the effect that matters may only be heard as adversary proceedings in the presence of a **close nexus** with the bankruptcy proceeding or with the plan that has been confirmed. Pierluisi-Urrutia, 2023 U.S. Dist. LEXIS 37200, at * 24. The Court also conceded that this is also an issue not expressly addressed by our Circuit. Id. at * 25 n. 12.

Plaintiff's chief argument in support of its decision to present the instant matter as an adversary proceeding was that, because the confirmed plan repeats prohibitions that emanate directly from the plain language of PROMESA, the instant action somehow seeks to **enforce** the term of the plan. This contention was flatly rejected by this Honorable Court. Pierluisi-Urrutia, 2023 U.S. Dist. LEXIS 37200, at * 25-27.

The one argument that was validated for jurisdictional purposes is grounded on the allegations in the complaint, to the effect 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" and that consequently the claim asserted by the Board "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)". Pierluisi-Urrutia, 2023 U.S. Dist. LEXIS 37200, at * 28. This finding is clearly related to the merits of the FOMB's

claim that Act 41 should be struck under Section 108(a)(2) of PROMESA, 48 U.S.C. § 2128(a)(2), because it supposedly is inconsistent with the purposes of the statute. However, the Court never reached that claim, instead disposing of the matter on the grounds that the governor did not comply with § 204(a). There is nothing in the Court's opinion that explains how it is that a territorial governor's failure to make adequate disclosures to the Board regarding legislation that is enacted has any connection whatsoever to the Title III proceedings. The objective fact is that § 204(a) disclosures is something that governors must do while still under the FOMB's yoke, **regardless of whether or not a Title III petition is pending or has even been filed**.

Even if the Court had decided the merits of the § 108(a)(2) claim (by definition, found in Title I of the statute), said section is also unmoored from Title III proceedings and the same holds true for fiscal plans enacted under Section 201 (part of Title II of the statute). The first fiscal plan that was approved by the FOMB was certified by the FOMB on **March 13, 2017** and the first Title III petition was filed many weeks thereafter, on **May 1, 2017**. The fiscal plan was approved by the Board without there needing to be a Title III case pending.

It is also worth pointing that there are many covered territorial entities with certified fiscal plans that have never been subjected to Title III bankruptcy proceedings before this Honorable Court. These include the Puerto Rico Aqueduct and Sewer Authority, the University of Puerto Rico, the Puerto Rico Industrial Development Corporation, the Municipal Revenue Collection Center and even the

Municipality of Aibonito[3], to name a few. Nobody would seriously argue that § 108(a)(2) cannot be enforced, say against the University, if it materially deviates from its fiscal plan simply because it is not subjected to a Title III case. In the same way that the University can be sued in federal court without it being an adversary proceeding under Title III, a suit against the Commonwealth does not automatically become an adversary proceeding simply because it is a debtor in the post-confirmation stage.

Because fiscal plans are mandatory regardless of the existence of a Title III proceeding and because Section § 108(a)(2) imposes a general restriction that is also completely unmoored from judicial reorganizations, the pleadings regarding Act 41's purported inconsistency with fiscal plans does not satisfy the close nexus to the Title III required for this case to be handled as an adversary proceeding.

We most respectfully posit that the Speaker is likely to prevail on the jurisdictional argument.

The § 204(a) Issue

Although legislation is thoroughly studied and debated in the legislative committees and on the floor of both chambers, Section 204(a) places upon the governor (who merely decides to sign or veto the finished product), the responsibility of defending the enactment before the Board[4]. The appearing party is in the process of seeking an amendment to this provision before both houses of Congress. As it stands, the governor is better suited to explain his § 204(a) actions

[3] https://juntasupervision.pr.gov/fiscal-plans/

[4] The statute does require that the legislature be served notice of any objections to the new enactment, only the governor is allowed to respond to those objections.

in this case in detail. However, since this case was decided on a generalized finding of non-compliance, we are able to address the matter.

This case was decided on the grounds that the governor failed to submit "[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) (emphasis added). The plain language of the statute contemplates the possibility that a new may have **no effect whatsoever** on public expenditures and revenues. The Board has not established that it was possible for appropriate entity of the territorial government with expertise in budgets and financial management to accurately measure the impact that returning some basic private workers' rights to pre-2017 levels would have on what the government takes in or spends. Indeed, the Power Point presentations that the FOMB attempted to introduce made no attempts to provide such estimates with concrete figures but rather predicted doom and gloom in service of a certain philosophic position.

The only decision so far issued by the First Circuit in which § 204(a) is extensively applied to several laws is Pierluisi-Urrutia v. FOMB, 37 F.4th 746 (1st Cir. 2022). The case concerned a challenge to four separate enactments, three of which clearly implicated an expenditure of public funds (Act 82-2019[5], Act 176-2019[6] and Act 47-2020[7]) and a third one (Act 138-2019) that is comparable to Act 41

[5] Allowed for the negotiated purchase prices of medications, including those purchased by the government.
[6] Concerning vacation and sick leave of public employees.
[7] Creating tax incentives for physicians.

in its lack of connection to government finances, as it merely "amend[ed] the Insurance Code of Puerto Rico to (1) prohibit health care insurers from denying provider enrollment applications submitted by qualified health care professionals in Puerto Rico, and (2) prohibit Managed Care Organizations from unilaterally terminating or rescinding contracts with health care providers". Id. at 753-758. In finding that Act 138 was correctly nullified on § 204(a) grounds, the Court correctly found that the government had merely submitted a conclusory and unsubstantiated statement that the law had no fiscal impact (which might have very well been the case) and that it was reasonable for the FOMB to ask for further clarification, which was never provided. Id. at 764. This is not what happened in the instant case as the government did not merely issue a "no fiscal impact" declaration but reasonably explained that, because of the particular nature of Act 41, any tangible impact was impossible to project at the time, without having to resort to speculation. As previously stated, it has not been shown that it is possible to preparate an estimate that is accurate on how, if in any significant way, public finances will be affected by Act 41. Interestingly enough, after the act having been in the books for almost three full quarters, no significant impact has been detected.

The fact that Section 204(a) reasonably requires that the government estimate the impact that new laws have on its finances does not mean that such estimates are possible in every case. The government should not be penalized for failing to tender what cannot be prepared nor should legislative activity be chilled merely because not all legislation is amenable to a precise estimate of fiscal impact.

B) IRREPARABLE INJURY

It has been held in the context of seeking stays pending appeal that the irreparable injury prong requires more than a showing of a "simple possibility" that such injury may occur. Nken, 556 U.S. at 434-435. Most of the cases addressing some depth the irreparable injury conundrum are not applicable to government parties such as the defendants in this case, as they generally involve **individuals** seeking to stave off fates such as execution, incarceration, prosecution or deportation.

Here, the Commonwealth's Government, represented by both political branches in the instant case are now being forced (in the middle of budget preparation season) to change the entire scheme of payroll retentions and advice to employers from what it has been for months. The legislature will have to rush to establish protections for the orderly handling of recovery efforts by employers so that any such efforts may be handled in an orderly way that protects low-income workers. In the case of Ledbetter v. Baldwin, 479 U.S. 1309 (1986) (Powell, J., inchambers), the Commissioner of the Georgia Department of Human Resources was seeking review and a pendente lite stay in a case in which the District Court had struck as unconstitutional a state plan for the distribution of certain welfare benefits. Id. at 1309-1310. In finding that the government had established irreparable injury, the Justice issuing the stay found that "[t]he State will bear the administrative costs of changing its system to comply with the District Court's order. Even if this Court reverses the judgment of the District Court, it is unlikely

that the State would be able to recover these costs". Id. at 1310. This could not be any more similar to the situation at hand.

In any event, as recently held by the Supreme Court:

> **No one questions that States possess "'a legitimate interest in the continued enforce[ment] of [their] own statutes.'"** Cameron v. EMW Women's Surgical Center, P. S. C., 595 U. S. ___, ___, 142 S. Ct. 1002, 212 L. Ed. 2d 114, 124 (2022) (quoting Taylor, 477 U. S., at 137, 106 S. Ct. 2440, 91 L. Ed. 2d 110). No one questions that States may organize themselves in a variety of ways. After all, the separation of government powers has long been recognized as vital to the preservation of liberty, and it is through the power to "structure . . . its government, and the character of those who exercise government authority, [that] a State defines itself as a sovereign." Gregory v. Ashcroft, 501 U. S. 452, 460, 111 S. Ct. 2395, 115 L. Ed. 2d 410 (1991). **Nor does anyone question that, when a State chooses to allocate authority among different officials who do not answer to one another, different interests and perspectives, all important to the administration of state government, may emerge**. See, e.g., Brnovich v. Democratic National Committee, 594 U. S. ___, 141 S. Ct. 2321, 210 L. Ed. 2d 753 (2021) (Arizona's secretary of state and attorney general took opposite sides).

Berger v. N.C. Conference of the NACP, 142 S. Ct. 2191, 2201 (2022) (emphasis added)

It bears noting that the Berger Court found that the leadership of the North Carolina Legislature had a strong enough interest in the continued enforcement of its enactments that it could intervene in a case challenging one such enactments regardless of whether or not the executive branch had no interest in defending the challenged provision. Id. at 2202-2203.

Having established that the appearing party has a recognized and legitimate interest in the continued enforcement of statutory enactments such as Law 41, we must note that such legitimate interests may be considered in the context of

irreparable injury for purposes of a request for a stay pending appeal. In such cases "claims of irreparable injury to the interests of the State must be weighed against the plaintiffs' claims of irreparable injury to their interests if a stay is granted". Williams v. Sbaraz, 442 U.S. 1309, 1314 (1979) (Stevens, J., in Chambers). This, of course takes us to the final two prongs of the analysis.

C) INJURY TO OTHER INTERESTED PARTIES

The lines of interest in the instant case, on one side is the Government of Puerto Rico and the workers that benefit from Act 41 and on the other side is the FOMB and several employers/business organizations that prefer the more draconian scheme of Act 4. There is not an iota of evidence on the record that the several months in which Law 41 was in effect caused any concrete injuries to employers, many of whom are represented by the *amici* in the instant case. We do not know of a single private enterprise that has become insolvent or otherwise had to file for bankruptcy because of Act 41. The impact of some additional vacation sick leave, Christmas bonus, etc., has a more marked effect on individual employees than it does on employers.

In the case of the FOMB, it waited until **September 1, 2022** to challenge a statute that was signed into law on **June 20, 2022**. **At no point did the FOMB move for a preliminary injunction to stop the enforcement of Act 41**. As per a briefing schedule proposed by the Board itself, it was not until **September 29, 2022** that said party moved for summary judgment and thereafter patiently awaited the March 3, 2023 ruling. It is a very hard sell for the FOMB to now argue

that it would be severely prejudiced if Act 41 continues in effect for the several weeks that appellate procedures may last.

There are cases in which it is difficult to balance the equities in terms of injuries to the party seeking a stay and the parties opposing it. This is not one of those cases.

D) PUBLIC INTEREST CONSIDERATIONS

Given the absolute absence of evidence on the record to the effect that Puerto Rico's economy is somehow hampered by Act 41, it cannot be said that a stay would undermine the general public. On the other side of the equation are the public interest considerations engendered by reducing employee benefits during this time. It has traditionally been held that preserving employee rights and benefit serves the public interest. See e.g. United States v. Lee, 455 U.S. 252, 258 (1982) (rejecting religious objections to payment of social security taxes and finding that "[b]ecause the social security system is nationwide, the governmental interest is apparent. The social security system in the United States serves the public interest by providing a comprehensive insurance system with a variety of benefits available to all participants, with costs shared by employers and employees"); see also Barrios-Velázquez v. Asociación de Empleados del Estado Libre Asociado, 84 F.3d 487, 494 (1st Cir. 1996) ("Plaintiffs contend that for public interest purposes, the government of Puerto Rico has delegated to the AEELA the traditional activity of promoting savings among government employees, and providing them benefits such

as loans, insurance and medical services. We agree with Plaintiffs that providing such benefits to public employees probably does promote the public interest").

We respectfully posit that the public interest is best served by a stay.

WHEREFORE, it is respectfully requested from this Honorable Court that the injunction entered on March 3, 2023, be hereby **STAYED** pending appeal.

CERTIFICATE OF SERVICE

The undersigned counsel hereby certifies that the instant document has been filed with the Court's CM/ECF System, which will simultaneously serve notice on all counsels of record, to their registered e-mail addresses. Any non-registered attorneys and/or parties will be served via regular mail.

In San Juan, Puerto Rico this 16th day of March, 2023.

RESPECTFULLY SUBMITTED,

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