

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF PUERTO RICO

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In re:

THE FINANCIAL OVERSIGHT AND  
MANAGEMENT BOARD FOR PUERTO RICO,

as representative of

THE COMMONWEALTH OF PUERTO RICO  
et al.,

Debtors.<sup>1</sup>

PROMESA  
Title III

No. 17-BK-3283-LTS  
(Jointly Administered)

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THE FINANCIAL OVERSIGHT AND  
MANAGEMENT BOARD FOR PUERTO RICO,

Plaintiff,

Adv. Proc. No. 21-00072-LTS

-v-

HON. PEDRO R. PIERLUISI URRUTIA in his official capacity as Governor of Puerto Rico; THE PUERTO RICO FISCAL AGENCY AND FINANCIAL ADVISORY AUTHORITY; HON. JOSÉ LUIS DALMAU SANTIAGO, in his official capacity as a representative of the Puerto Rico Senate; and HON. RAFAEL HERNÁNDEZ MONTAÑEZ, in his official capacity as a representative of the Puerto Rico

<sup>1</sup> 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).

House of Representatives,

Defendants.

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MEMORANDUM OPINION AND ORDER REGARDING  
THE OVERSIGHT BOARD’S MOTION FOR  
SUMMARY JUDGMENT PURSUANT TO BANKRUPTCY RULE 7056

LAURA TAYLOR SWAIN, United States District Judge

On July 2, 2021, the Financial Oversight and Management Board for Puerto Rico (the “Oversight Board”) brought this adversary proceeding against Governor Pedro R. Pierluisi Urrutia (the “Governor”), the Puerto Rico Fiscal Agency and Financial Advisory Authority (“AAFAF” and, together with the Governor, the “Executive Defendants”), the Honorable José Luis Dalmau Santiago (the “Senate President”), and the Honorable Rafael Hernández Montañez (the “House Speaker” and, together with the Senate President, the “Legislative Defendants”) requesting that this Court nullify and bar the implementation and enforcement of Act 7-2021 (“Act 7” or the “Act”), which was enacted by the Commonwealth of Puerto Rico on June 9, 2021.<sup>2</sup> (See Docket Entry No. 1, the “Complaint”). The Oversight Board argues that Act 7 was enacted in violation of numerous provisions of the Puerto Rico Oversight, Management, and Economic Stability Act (“PROMESA”).<sup>3</sup>

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<sup>2</sup> This Court granted limited intervention rights to the Service Employees International Union (the “SEIU”) and the International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (the “UAW” and together with the SEIU, the “Intervenor Defendants”) allowing the Intervenor Defendants to file oppositions to the Oversight Board’s Motion for Summary Judgment. (See Docket Entry Nos. 30 and 38.)

<sup>3</sup> PROMESA is codified at 48 U.S.C. § 2101 *et seq.* References to “PROMESA” provisions are to the uncodified version of the statute and are generally accompanied by parallel references to the codified provisions.

Now before the Court is the Oversight Board's motion for summary judgment, which is brought on the grounds argued in its *Memorandum in Support of the Financial Oversight and Management Board's Motion for Summary Judgment Pursuant to Bankruptcy Rule 7056* (Docket Entry No. 17, the "Motion for Summary Judgment").<sup>4</sup> The Court has carefully considered all of the written submissions made in connection with the Motion for Summary Judgment.<sup>5</sup> For the reasons

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<sup>4</sup> The Motion for Summary Judgment is supported by a *Statement of Uncontested Material Facts in Support of the Financial Oversight and Management Board for Puerto Rico's Motion for Summary Judgment* (Docket Entry No. 18, "SOF") and the *Declaration of Natalie A. Jaresko in Respect of the Oversight Board's Summary Judgment Motion* (Docket Entry No. 19, the "Jaresko Declaration").

<sup>5</sup> In addition to the Motion for Summary Judgment, the written submissions comprise the following: *Memorandum of Intervenor Service Employees International Union in Opposition to Summary Judgment Motion of Plaintiff Financial Oversight and Management Board for Puerto Rico* (Docket Entry No. 35, "SEIU Opposition"); *Response of Intervenor Service Employees International Union to Statement of Uncontested Material Facts of Plaintiff Financial Oversight and Management Board for Puerto Rico* (Docket Entry No. 37); the House Speaker's *Opposition to Plaintiffs' Motion for Summary Judgment* (Docket Entry No. 39, "House Speaker Opposition"); *Joinder of Intervenor United Auto Workers International Union to Opposition of Intervenor Service Employees International Union to Summary Judgment Motion of Plaintiff Financial Oversight and Management Board for Puerto Rico* (Docket Entry No. 40); the Senate President's *Opposing Statement of Material Facts* (Docket Entry No. 42); the Senate President's *Opposition to Plaintiff's Motion for Summary Judgment* (Docket Entry No. 43, "Senate President Opposition"); *Executive Branch Defendants' Opposition to Plaintiff's Motion for Summary Judgment Pursuant to Bankruptcy Rule 7056* (Docket Entry No. 44, "Executive Defendants Opposition"); *Declaration of Julian Bayne in Opposition to Plaintiff's Motion for Summary Judgment Pursuant to Bankruptcy Rule 7056* (Docket Entry No. 45); *Executive Branch Defendants' 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. 46); *Reply in Support of Financial Oversight and Management Board's Motion for Summary Judgment Pursuant to Bankruptcy Rule 7056* (Docket Entry No. 58, "Oversight Board Reply"); *Sur-reply of Intervenor Service Employees International Union and United Auto Workers International Union in Further Opposition to the Summary Judgment Motion of the Financial Oversight and Management Board for Puerto Rico* (Docket Entry No. 66, "SEIU Surreply"); *Amicus Brief on Behalf of Colegio De Abogados Y Abogadas de Puerto Rico* (Docket Entry No. 69); the House Speaker's *Surreply to Plaintiff's Reply to Defendants' Oppositions to Said Party's Motion for Summary Judgment* (Docket Entry No. 71); the Senate President's *Surreply to Plaintiff's Reply to Defendants' Opposition to Motion for Summary Judgment* (Docket Entry No.

that follow, the Motion for Summary Judgment is granted in part and denied in part. The Oversight Board's Motion for Summary Judgment is granted with respect to Counts I, II, and III, is denied with respect to Counts IV and V, and the Court declines to reach Count VI. Pursuant to PROMESA sections 204(a) and 104(k), Act 7 is hereby declared nullified, unenforceable, and of no effect. Defendants are enjoined from implementing and enforcing Act 7. Further, pursuant to PROMESA section 108(a)(2) and 104(k), section 1.02, section 5.02, Chapter 2, Chapter 3, Chapter 4, and the last sentence of section 5.01 of Act 7 are declared nullified, unenforceable, and of no effect. Defendants are enjoined from implementing and enforcing those provisions of Act 7.

I.

BACKGROUND

The following facts are undisputed, except as otherwise indicated.<sup>6</sup> The discussion assumes the reader's working knowledge of the provisions of Titles I, II, III and VI of PROMESA.

This adversary proceeding arises from an ongoing dispute between the Oversight Board and the Executive and Legislative Defendants regarding the character and impact of Act 7. Specifically, the Oversight Board maintains that Act 7 violates sections 108(a), 204(a), 204(c), and 207 of PROMESA, and therefore, under PROMESA section 104(k), the Oversight Board is entitled to judicial relief enjoining the implementation of Act 7 and nullifying its provisions. (Compl. at Counts I-V). The Oversight Board further argues that PROMESA preempts Act 7 and therefore, because Act 7's provisions are inconsistent with PROMESA, the Act also violates

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76, "Senate President Surreply").

<sup>6</sup> Facts characterized as undisputed are identified as such in the Oversight Board's SOF or drawn from evidence as to which there has been no contrary, non-conclusory factual proffer. Citations to the Oversight Board's D.P.R. Local Civil Rule 56(b) statements of fact incorporate by reference citations to the underlying evidentiary submissions.

the Supremacy Clause of the United States Constitution and section 4 of PROMESA. (Compl. at Count VI). Defendants generally characterize the Act’s provisions as aspirational or conditional and contend that the issues raised by the Oversight Board are not ripe for adjudication. The Court has subject matter jurisdiction of this adversary proceeding pursuant to 48 U.S.C. § 2166.

1. PROMESA

On June 30, 2016, Congress enacted PROMESA to address Puerto Rico’s “fiscal emergency” created by a “combination of severe economic decline, and, at times, accumulated operating deficits, lack of financial transparency, management inefficiencies, and excessive borrowing.” PROMESA § 405, 48 U.S.C. § 2194(m). PROMESA provided for the establishment of the Oversight Board. PROMESA § 101, 48 U.S.C. § 2121. “The purpose of the Oversight Board is to provide a method for [Puerto Rico] to achieve fiscal responsibility and access to the capital markets.” Id. § 2121(a). The Oversight Board is given broad powers under PROMESA to fulfill its mandate, including the authority to “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. Vásquez Garced (In re Fin. Oversight & Mgmt. Bd. for P.R.), 403 F. Supp. 3d 1, 5 (D.P.R. 2019) (citing 48 U.S.C. §§ 2141-2152, 2175(a)). However, PROMESA “does not preclude the government from pushing back and seeking court determinations regarding the [Oversight Board’s] interpretations of PROMESA.” In re Fin. Oversight & Mgmt. Bd. for P.R., 583 B.R. 626, 637 (D.P.R. 2017).

This Court has previously addressed the unique dynamic PROMESA created

between the Oversight Board and the Commonwealth government. While PROMESA grants the Oversight Board significant powers to achieve its purpose, the statute does not, subject to the provisions of Titles I and II, “impair the power” of Puerto Rico “to control, by legislation or otherwise . . . the exercise of the political or governmental powers.” PROMESA § 303, 48 U.S.C. § 2163. Thus, PROMESA has created “an awkward power-sharing arrangement,” in which the Oversight Board has significant tools to shape Puerto Rico’s financial operations, but it has “not been given power to affirmatively legislate.” Rosselló Nevares v. Fin. Oversight & Mgmt. Bd. for P.R. (In re Fin. Oversight & Mgmt. Bd. for P.R.) (“Rosselló Nevares”), 330 F. Supp. 3d 685, 701 (D.P.R. 2018). The provisions governing the formulation and confirmation of plans of adjustment under PROMESA further reflect this division of responsibilities between the Oversight Board and the Commonwealth government. “Only the Oversight Board” may file a plan of adjustment. PROMESA § 312(a), 48 U.S.C. § 2172(a). Yet, the statute also provides that a plan of adjustment cannot be confirmed unless the Oversight Board obtains “legislative, regulatory, or electoral approval necessary under applicable law in order to carry out any provision of the plan” or confirmation is “expressly conditioned on such approval.” PROMESA § 314(b)(5), 48 U.S.C. § 2174(b)(5). This provision gives the Commonwealth government the ability to “obstruct implementation” or “complicate” the Oversight Board’s efforts to produce a confirmable plan of adjustment. Rosselló Nevares, 330 F. Supp. 3d at 701. The Oversight Board, on the other hand, has at its disposal its “budgetary tools,” other statutory powers, and negotiations in seeking “to elicit any necessary buy-in from the elected officials and legislators.” Id.<sup>7</sup>

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<sup>7</sup> PROMESA contemplates a primarily interactive process of development of fiscal plans and budgets and forbids certain actions by Puerto Rico governmental entities. Of relevance to the instant dispute, PROMESA gives the Oversight Board authority to seek judicial relief thwarting actions that the Oversight Board has determined frustrate or

On July 30, 2021, the Oversight Board proposed the *Seventh Amended Title III Joint Plan of Adjustment of the Commonwealth of Puerto Rico, et al.* (Docket Entry No. 17627 in Case No. 17-3283, the “Seventh Amended Plan of Adjustment”), which includes cuts to certain pensions and negotiated levels of recovery for bondholders. Voting in connection with the Seventh Amended Plan of Adjustment is underway and a confirmation hearing is scheduled to begin on November 8, 2021. (See *Order Establishing Procedures and Deadlines Concerning Objections to Confirmation and Discovery in Connection Therewith* (Docket Entry No. 17640 in Case No. 17-3283)).

## 2. Act 7

Act 7 begins with a preamble, statement of motives, and a “declaration of [a] state of emergency” in chapter 1, that embrace full restoration and preservation of public employee pension rights and condemns the Oversight Board’s proposed plan of adjustment, including its provisions for payments to bondholders based on negotiated compromises. It proposes a return to a defined-benefit public employee pension structure funded by, among other sources, monies to be saved on debt service if certain bond issues that have been challenged are invalidated. It includes a proposal for a plan of adjustment that would implement the pension and bond liability policies, and forbids government entities from devoting funds and efforts to the Oversight Board’s proposed plan of adjustment, effective immediately. Its pension changes include amendments to Act 106-2017 (“Act 106”), the Commonwealth’s “PayGo” public pension system, which was enacted by the Puerto Rico Legislature in connection with the Certified Fiscal Plan approved by the Oversight Board in 2017, as well as changes to pension-related provisions

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impair the purposes of PROMESA, and provides that the statute preempts inconsistent local laws and regulations. See PROMESA §§ 4, 104(k), 108(a), Title II; 48 U.S.C. §§ 2103, 2141-2152, 2124(k), 2128(a).



of the certified 2021 Fiscal Plan, and amendments to a number of existing pension-related statutes. (SOF ¶¶ 3-14.) The 2021 Fiscal Plan that forms the basis of the plan of adjustment proposed by the Oversight Board assumes that Act 106’s PayGo plan will remain in effect. (SOF ¶ 15.)

Act 7 outlines an alternative model plan of adjustment and a new retirement system for public employees. (See Act 7 chs. 3, 4; SOF ¶¶ 4, 17.) Act 7’s proposed public retirement system, set forth in chapter 3 of the Act, is the Trust for the Joint Administration of the Retirement Systems of Puerto Rico (“FACSiR” by its Spanish acronym). (See SOF ¶ 18.) FACSiR would replace the current retirement system provided for under Act 106 and allow for potential increases in pension benefits if certain funding requirements are met. The FACSiR-related provisions of the Act purport to dedicate certain substantial assets and revenue sources to pension funding and benefits. (See Act 7 ch. 3, art. 3.04; SOF ¶¶ 18, 19.) The model plan of adjustment in Act 7, as detailed in chapter 4, offers an alternative reorganization of the Commonwealth’s debt and creates classes of creditors based on new categories of “Uncontested Bonds” and “Contested Bonds.” Creditors who are holders of “Contested Bonds” would be paid nothing. (See Act 7 ch. 4; SOF ¶ 21.) Chapter 2 of Act 7 declares the Commonwealth’s public policy with respect to the treatment of retirees in any plan of adjustment and requires the government to reject any plan that does not conform with Act 7’s policies. (See Act 7 ch. 2.) Chapter 2 also includes provisions that limit severely the ability of the government to cooperate with the Oversight Board on the creation or implementation of any conflicting plan of adjustment. (Id.; SOF ¶¶ 22, 23.) Chapter 5 of the Act includes a severability provision that states the Legislature’s intention that Act 7’s provisions be severable, and also provides that the nullification of any provision of the Act would be temporary only, expiring when the Oversight



Board ceases to exist. (See Act 7 ch. 5.)

On January 29, 2021, the Oversight Board wrote to the government to advise it that H.B. 120, the bill that eventually became Act 7, was inconsistent with the Fiscal Plan and violated various provisions of PROMESA. (SOF ¶ 30.) The Oversight Board had determined, based on these inconsistencies and its own findings of PROMESA violations, that the bill “impairs and defeats PROMESA’s purposes’ and the government was therefore statutorily barred from ‘passing and implementing HB 120.’” (SOF ¶ 31.) Over the Oversight Board’s objection, the House of Representatives passed H.B. 120 on February 23, 2021. (Jaresko Decl. ¶ 64.) Despite the Oversight Board’s continued objection and communications with the Legislature, the Senate approved H.B. 120 on May 13, 2021. (SOF ¶ 61.) On June 9, 2021, the Governor signed H.B. 120 into law as Act 7-2021. (SOF ¶ 63.)

When the Governor signed Act 7, he issued a signing statement acknowledging that the Act was “significantly inconsistent” with the 2021 Fiscal Plan. (SOF ¶ 64.) On June 18, 2021, pursuant to PROMESA § 204(a)(2), the Governor, through AAFAF, provided the Oversight Board with a certification that stated Act 7 is “significantly inconsistent” with the 2021 Fiscal Plan. (SOF ¶ 65.) The certification also stated that Act 7’s FACSIR pension system conflicts with the Fiscal Plan and the assumptions underlying the current plan of adjustment in the Commonwealth’s Title III proceeding. (SOF ¶ 66.) AAFAF concluded that Act 7 “modifies billions of dollars of debt to retirees without the approval of the Oversight Board” and “might require reprogramming budgeted resources” to support FACSIR. (SOF ¶¶ 70, 73.) In addition, the Oversight Board never received nor granted a request from the government to conduct a reprogramming in connection with Act 7. (SOF ¶ 71.) The Oversight Board has also not received nor approved a request to allow the government to modify the Commonwealth’s debt.

(SOF ¶ 74.)

In response to AAFAF’s certification, the Oversight Board notified the Governor and Legislature that it agreed with AAFAF’s conclusion that Act 7 is “significantly inconsistent” with the Fiscal Plan. (SOF ¶ 75.) The Oversight Board’s notification stated that Act 7 “cannot be corrected to eliminate the inconsistency, nor can the Government provide an explanation for the inconsistency that the Oversight Board will find reasonable and appropriate.” (SOF ¶ 76.) The Oversight Board then directed the Governor to confirm that Act 7 would not be implemented and directed the Legislature to repeal Act 7 in its entirety. (SOF ¶ 78.) The Executive Defendants responded to the Oversight Board that the Governor would propose other pieces of legislation to replace Act 7. (SOF ¶ 81.) The Legislature did not respond to the Oversight Board’s directive. (SOF ¶ 82.) On July 2, 2021, the Oversight Board initiated this adversary proceeding, requesting that this Court enjoin and nullify Act 7. (SOF ¶ 90.)

## II.

### DISCUSSION

#### 1. Case or Controversy Requirement

The Court begins by addressing the Executive and Legislative Defendants’ argument that the Oversight Board’s challenge to Act 7 is not ripe. (See House Speaker Opp. at 6, 15-18; Senate President Opp. at 3, 10-12; Exec. Defs. Opp. at 9-15.)

The Executive Defendants argue that the Oversight Board cannot establish that its claims are fit for adjudication or that Act 7 imposes an immediate hardship. (Exec. Defs. Opp. at 10-11.) The Executive Defendants maintain that Act 7 does not dictate the terms of a plan of adjustment, but only “formulate[s] the characteristics for a *future* plan of adjustment proposal that the Government would support.” (Id. at 12) (emphasis in original). The Executive

Defendants further argue that “[t]he mere risk that the Government could take some other and additional future action under Act 7 that may negatively affect the Board and the 2021 Fiscal Plan” does not make the Oversight Board’s claims ripe. (Id. at 13-14.) Act 7 poses no current harm to the Oversight Board, the Executive Defendants argue, because of the contingencies in Act 7 and “the Executive Branch Defendants’ decision not to implement Act 7 at all.” (Id. at 10.) The Legislative Defendants similarly argue that Act 7 “is not a self-executing piece of legislation” and “none of the reforms contemplated in it have been put into effect.” (House Speaker Opp. at 6; see Senate President Opp. at 3.) Specifically, the Legislative Defendants point to the provisions relating to FACSIR, which may only be created in the future and, because it must be implemented in accordance with PROMESA, can only be adopted with the approval of the Oversight Board in a confirmed plan of adjustment. (See House Speaker Opp. at 13-14; Senate President Opp. at 14.) The Legislative Defendants argue, therefore, that the changes contemplated by Act 7 are only “a proposal” and do not cause any imminent harm that requires judicial action. (House Speaker Opp. at 12; see Senate President Opp. at 14.)

In response, the Oversight Board argues that the dispute “presents a real case or controversy” because Act 7 is currently “operative and enforceable.” (Oversight Board Reply at 6.) The Oversight Board first argues that Act 7 has an immediate impact on the Oversight Board’s ability to fulfill its purpose under PROMESA. (Id.) The Oversight Board points specifically to Act 7’s conflicting proposal for a plan of adjustment that specifies how creditors should be treated, the Act’s limits on the use of the Bankruptcy Code’s “cram-down” provisions, and the prohibition on governmental cooperation with the Oversight Board on a plan of adjustment in conflict with Act 7’s policies. (Id.) These provisions, the Oversight Board argues, pose an immediate harm in that they limit its ability to negotiate and implement a plan of

adjustment. (Id. at 7.) The Oversight Board further contends that a decision on Act 7’s validity would not be an advisory opinion because the facts in this case are already set and the case poses a purely legal question of whether Act 7 conflicts with PROMESA. (Id. at 11.) Thus, the Oversight Board argues, this is not a case in which the Court must wait to see how an act is applied to specific facts to provide the requested relief; it can determine the questions raised based on the existence of Act 7 alone. (Id. at 14.)

“This Court’s jurisdiction extends only to ‘cases’ and ‘controversies,’ as authorized by Article III, Section 2, of the United States Constitution.” Milliman, Inc. v. Health Medicare Ultra, Inc., 641 F. Supp. 2d 113, 117 (D.P.R. 2009) (citing D.H.L. Assocs. v. O’Gorman, 199 F.3d 50, 53 (1st Cir. 1999)). This requires that all disputes be ripe to “prevent the courts . . . from entangling themselves in abstract disagreements.” Milliman, Inc., 641 F. Supp. 2d at 118. “In determining whether an issue is ripe for our review, we consider ‘(1) the fitness of the issues for judicial decision and (2) the hardship to the parties of withholding court consideration.’” Algonquin Gas Transmission, LLC v. Weymouth, Mass., 919 F.3d 54, 62 (1st Cir. 2019) (quoting Abbott Labs. v. Gardner, 387 U.S. 136, 149 (1967)). To assess the hardship to the parties, the Court should ask “whether granting relief would serve a useful purpose, or, put another way, whether the sought-after declaration would be of practical assistance in setting the underlying controversy to rest.” State of Rhode Island v. Narragansett Indian Tribe, 19 F.3d 685, 693 (1st Cir. 1994).

Here, the Oversight Board has met its burden of showing that its claims are ripe.

First, the matter is fit for adjudication. The underlying issue of this adversary proceeding is whether Act 7, as currently enacted, conflicts with the provisions of PROMESA. Thus, the actual controversy was created upon the passage of Act 7. See Verizon New England,

Inc. v. Int'l Bhd. of Elec. Workers, Loc. No. 2322, 651 F.3d 176, 189 (1st Cir. 2011) (“There is little difficulty in finding an actual controversy if all of the acts that are alleged to create liability have already occurred. The court is then merely being asked, as in any litigation, to determine the legal consequences of past events . . . .”) (internal quotation marks omitted). To resolve this question of whether Act 7 conflicts with PROMESA, the Court needs only to review the Act’s statutory language, not analyze how the provisions are applied to a specific factual scenario. “Courts are more likely to find a claim ripe if it is of an intrinsically legal nature . . . .” Riva v. Commonwealth of Massachusetts, 61 F.3d 1003, 1010-11 (1st Cir. 1995) (concluding facial challenge to law on stipulated record was “unabashedly legal” and could be resolved with no further factual examination); see Franklin Cal. Tax-Free Tr. v. Puerto Rico, 85 F. Supp. 3d 577, 589 (D.P.R. 2015) (finding plaintiffs’ claim requesting declaration that act was unconstitutional “conclusive in character, not dependent on hypothetical facts” and resolution would not lead to an advisory opinion).

Second, resolution of this dispute will assist the parties. The provisions of Act 7 have an immediate impact on the Oversight Board and the process of negotiating and seeking to confirm a plan of adjustment. Act 7 “enter[ed] into effect immediately upon its enactment.” Act 7 art. 5.03. Therefore, the Act is currently operative law. The Executive and Legislative Defendants’ arguments that the institution of Act 7’s amendments are dependent on future events is not persuasive as to all of Act 7’s provisions. See, e.g., id. art. 1.02 (nullifying, “[i]mmediately as of the date of this Act’s passage,” laws, regulations, and agreements “that run counter to the provisions of this Act”); id. art. 1.03 (making Act 7 “immediately applicable” to the Commonwealth government and its entities); id. art. 2.04 (amending AAFAF’s enabling statute to limit AAFAF’s authority to “assist in the creation, execution, supervision and oversight

of any Fiscal Plan, Budget, Debt Adjustment Plan or Restructuring Support Agreement” that is contrary to Act 7’s policy pronouncements). These provisions make clear that at least some of Act 7’s provisions have a current, non-contingent, impact.

Act 7 also has a direct impact on the relationship between the Oversight Board and the elected government. See Act 7 art. 2.14 (prohibiting the Commonwealth government from acting to enable a plan of adjustment proposed by the Oversight Board that does not conform to Act 7’s policies); Rosselló Nevares, 330 F. Supp. 3d at 697 (determining that question of whether Oversight Board has power to impose certain requirements to be ripe and “must be resolved to clarify for operational purposes the scope and limitations of the Oversight Board’s power and its relationship to the role and powers of the elected Government of Puerto Rico . . . .”). Further, Act 7 is inextricably tied to the negotiations concerning the Commonwealth’s plan of adjustment, both to the ability of the Oversight Board to negotiate plan terms with the government and to the implications of the Oversight Board-elected government relationship for the viability of the Oversight Board’s negotiations and agreements with other stakeholders. (See Act 7 preamble (describing a goal of Act 7 “to set out the public policy that will guide the conversations and representations of the Government of the Commonwealth of Puerto Rico . . . in any process of restructuring, adjustment, mediation or negotiation of claims against the retirement systems, their participants and pensioners”); see also Oversight Board Reply at 7; the House Speaker’s *Opposition to the Executive Branch Defendants’ Urgent Request for a Stay of the Proceedings* (Docket Entry No. 47) at 4; the Senate President’s *Opposition to Defendant’s Urgent Request for a Stay of the Proceedings* (Docket Entry No. 48) at 4.) The Oversight Board has put forth its Seventh Amended Plan of Adjustment, voting on this proposal is ongoing, and the confirmation hearing is quickly approaching. This case thus

presents an “issue of practical immediacy for the parties and for the people of Puerto Rico” and resolving the matter now will assist the parties. Rosselló Nevares, 330 F. Supp. 3d at 697; see Narragansett Indian Tribe, 19 F.3d at 694 (considering fact that resolving the dispute would facilitate negotiations between the parties in favor of ripeness).

For these reasons, the Court finds that the Oversight Board’s challenge is ripe.

## 2. Summary Judgment Standard

Under Rule 56(a), summary judgment is appropriate if “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.”<sup>8</sup> 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 where any issue “may reasonably be resolved in favor of either party.” Vineberg v. Bissonette, 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) (internal quotation marks omitted). 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 Court now turns to the claims upon which the Oversight Board seeks summary judgment. These claims can be grouped into four categories: First, the Oversight

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<sup>8</sup> Federal Rule of Civil Procedure 56 is made applicable in this adversary proceeding by Federal Rule of Bankruptcy Procedure 7056. See PROMESA § 310; 48 U.S.C. § 2170.



Board’s request for nullification of Act 7 based on the failure of the government to comply with its demands under section 204(a) of PROMESA for assurances that Act 7 would not be implemented and for repeal of the statute (Compl. Count II); Second, the Oversight Board’s request for nullification of Act 7 based on the substance of the proposed amendments to the pension system and model plan of adjustment (id. Counts IV-V); Third, the Oversight Board’s request for nullification of Act 7 based on the restrictions imposed by the Act on AAFAF and the government in working with the Oversight Board and otherwise effectuating the plan of adjustment (id. Counts I, III) and; Fourth, the Oversight Board’s request for an order enjoining the implementation and enforcement of Act 7 because the Act is preempted by PROMESA (id. Count VI). For the reasons that follow, the Motion for Summary Judgment is granted in part and denied in part.

3. Count II: Section 204(a)

In Count II, the Oversight Board asserts that it “is entitled to an order pursuant to PROMESA section 104(k) and 204(a)(5) enjoining the implementation and enforcement of the Act, and nullifying the Act, on the grounds the Defendants failed to comply with section 204(a)” of PROMESA. (Compl. ¶ 80.)<sup>9</sup> Specifically, the Oversight Board contends that, since the Governor and AAFAF agreed that Act 7 was “significantly inconsistent” with the certified fiscal plan, the Governor and Legislature violated PROMESA section 204(a) by failing to agree not to implement the Act and failing to repeal the Act immediately. (Compl. ¶¶ 77-79.) Although, as

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<sup>9</sup> While the Oversight Board argues that Act 7 should be nullified under section 204(a) it urges the Court to rule on its other claims as well to avoid a ruling of “limited precedential value” which could be circumvented by future governmental action. (See Oversight Board Reply at 21-22.) The Executive Defendants, on the other hand, argue that if the Court were to nullify Act 7 under section 204(a) there would be no need for, and the Court should not reach any of the other claims raised by the Oversight Board. (See Exec. Defs. Opp. at 17-18.) The Court finds it appropriate to address certain of the Oversight Board’s further claims.

explained below, the Oversight Board’s demand for actions addressing Act 7’s noncompliance with the Fiscal Plan was not phrased in a manner that paralleled the statutory language of section 204(a), its import, and the effect of the Governor and Legislature’s failure to comply, warrant the section 204(a) relief that the Oversight Board seeks. Having concluded that Act 7’s significant inconsistencies could neither be corrected nor satisfactorily explained (conclusions with which Defendants do not disagree), the Oversight Board demanded an express undertaking not to implement Act 7 and to eventually repeal Act 7, corrective measures that would clearly eliminate the inconsistent impact of the legislation. The government failed to comply and the Oversight Board is thus empowered to take action, including preventing the enforcement or application of the law, to ensure that the enforcement of the law will not adversely affect the government’s compliance with the Fiscal Plan.

Section 204(a) mandates a process to ensure that government actions comply with the operative fiscal plans certified by the Oversight Board. See 48 U.S.C. § 2144. Under section 204(a), the Governor is required to submit new laws to the Oversight Board along with a certification as to whether the law is “significantly inconsistent” with the current fiscal plan. Id. § 2144(a)(2). If the Governor submits a law to the Oversight Board that he certifies is “significantly inconsistent with the Fiscal Plan,” the Oversight Board is to notify the Governor and Legislature of the inconsistency and direct “the territorial government to (i) correct the law to eliminate the inconsistency” or “(ii) provide an explanation for the inconsistency that the Oversight Board finds reasonable and appropriate.” Id. § 2144(a)(4)(B). Under the statute,

[i]f the territorial government fails to comply with a direction given by the Oversight Board . . . with respect to a law, the Oversight Board may take such actions as it considers necessary, consistent with this Act, to ensure that the enactment or enforcement of the law will not adversely affect the territorial government’s compliance with the Fiscal Plan, including preventing the enforcement or

application of the law.

Id. § 2144(a)(5).

The Governor acknowledged that Act 7 was significantly inconsistent with the 2021 Fiscal Plan in his signing statement that accompanied the Act. (SOF ¶ 64.) AAFAF provided the same analysis in its section 204(a) certification, which notified the Oversight Board that Act 7 was “significantly inconsistent with the Certified Fiscal Plan” and “[t]he reformulation of Puerto Rico’s pension system, as stated in Act 7, is contrary to the provisions of the Fiscal Plan and the assumptions of the [Plan of Adjustment] currently filed before the Title III Court.” (AAFAF’s Section 204(a) Certification for Act 7-2021, Compl., Ex. 15 at 7.) The Oversight Board sent a letter to the Governor and Legislature documenting its conclusion that Act 7 was inconsistent with the Fiscal Plan and “cannot be corrected to eliminate the inconsistency, nor can the Government provide an explanation for the inconsistency that the Oversight Board will find reasonable and appropriate,” (SOF ¶¶ 75-76), and demanding that the Governor confirm that Act 7 will not be implemented and that the Legislature confirm that it “will undertake the repeal of Act 7 in its entirety.” (SOF ¶ 78.) In response to the Governor’s assertion that he would propose other legislation in place of Act 7, the Oversight Board sent a demand that the Governor and legislative leadership execute a stipulation and “proposed order consenting to nullification of Act 7 in its entirety.” (SOF ¶¶ 81, 83-84.) As the Oversight Board argues here, it had “spent months articulating its concerns relating to the Act – in letters and in meetings” and “there is no requirement in PROMESA that the Oversight Board make a disingenuous request for an explanation for a given law’s inconsistency when it knows full well it could not find any explanation reasonable and appropriate, and that such law cannot be corrected to eliminate inconsistency with the Fiscal Plan.” (Oversight Board Reply at 23-24.)

There is no dispute that Act 7 is significantly inconsistent with the Fiscal Plan. Further, there is no real argument that the inconsistency can be explained in a manner that would satisfy the Oversight Board or that the Act can be corrected to remove the inconsistency. While the Governor has proposed alternative legislation to replace Act 7, this would not correct the inconsistency presented by Act 7 because the proposed bills do not contemplate the repeal of Act 7, and thus an inconsistency would remain between an executed law and the Fiscal Plan, in violation of PROMESA. See PROMESA § 204(a)(5), 48 U.S.C. § 2144(a)(5). The Legislative Defendants, who hold the power to repeal Act 7, have taken no measures to correct the inconsistency and instead continue to defend the Act.

These facts are sufficient to trigger the Oversight Board’s authority under PROMESA section 204(a)(5) to seek judicial relief. The Oversight Board’s request for the repeal of Act 7 and an agreement not to implement Act 7 did not strictly conform to PROMESA’s statutory text, but the Oversight Board’s direction constitutes a request for the Governor and Legislature to “correct” the inconsistency between Act 7 and the Fiscal Plan. The government’s refusal to make such a correction enables the Oversight Board to seek judicial relief to prevent the enforcement of legislation that is in conflict with a certified Fiscal Plan. See Oversight & Mgmt. Bd. for P.R. v. Vázquez Garced (In re Fin. Oversight & Mgmt. Bd. for P.R.) (“Vázquez Garced II”), 616 B.R. 238, 248 (D.P.R. 2020).

The ultimate determination of whether Act 7 violates PROMESA, and whether nullification is the appropriate remedy, is one for the Court to make. See PROMESA § 104(k), 48 U.S.C. § 2124(k) (allowing Oversight Board to “seek judicial enforcement of its authority to carry out its responsibilities under” PROMESA); Vázquez Garced v. Fin. Oversight & Mgmt. Bd. for P.R. (In re Fin. Oversight & Mgmt. Bd. for P.R.) (“Vázquez Garced III”), 511 F. Supp.

3d 90, 124 (D.P.R. 2020) (“[T]he Court will review the Board’s challenges under section 204(a) of PROMESA to . . . certifications regarding significant inconsistencies with fiscal plans under the arbitrary and capricious standard.”).<sup>10</sup> The Court concludes that nullification of Act 7 in its entirety is the proper remedy here. It is undisputed that Act 7 is inconsistent with the Fiscal Plan, thus no additional evidence is required to support the Oversight Board’s determination. Further, it is clear that Act 7 fundamentally interferes with the Fiscal Plan by prohibiting the Commonwealth government from complying with a Fiscal Plan that is in conflict with Act 7. See Act 7 art. 2.04; Vázquez Garced II, 616 B.R. at 248 (nullifying act when “it [was] patently obvious” that its provisions were inconsistent with the yearly fiscal plan). The Act also instructs the government to divert resources to prepare for the implementation of Act 7’s provisions in violation of the current Fiscal Plan. Act 7 further threatens to upend the current financial operations of the Commonwealth by impeding the Oversight Board’s advancement of its plan of adjustment, which the Oversight Board has certified is consistent with the Fiscal Plan. See Act 7 art. 2.01(n) (requiring “that no part of the funds and resources of the state government earmarked for activities related to the participation of the [Commonwealth] . . . in the processes under Title III of PROMESA, shall be directed towards the achievement of any Adjustment Plan inconsistent with the provisions of this Act”).

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<sup>10</sup> The Oversight Board argues that the more lenient “ultra vires” review is the correct standard by which to judge its determinations under § 108(a) and § 204(a). (See MSJ at 20 n.9) (“The [ultra vires] standard focuses narrowly on whether the Oversight Board patently misconstrued a statute, disregarded a specific and unambiguous statutory directive, or violated a specific command.”). As noted above, this Court held in Vázquez Garced III, 511 F. Supp. 3d at 122, that the arbitrary and capricious standard is the appropriate lens through which to assess the Oversight Board’s determinations under these sections of PROMESA. The Court is not persuaded that its determination of the standard was erroneous. In any event, under any standard, the Oversight Board is entitled to relief because there is no dispute as to the underlying facts, the Oversight Board has the power under PROMESA to issue directions and seek relief, and there are no grounds upon which the Court could conclude that Act 7 is consistent with the current Fiscal Plan.

For these reasons, the Oversight Board’s Motion for Summary Judgment on Count II is granted and Act 7 and all actions taken pursuant to it are nullified in their entirety.

4. Counts IV and V: Sections 207 and 204(c) of PROMESA

In Counts IV and V, the Oversight Board argues that this Court should enjoin the implementation of Act 7 and nullify its provisions because the fiscal impact of the proposed FACSIR retirement system violates sections of PROMESA concerning reprogramming and the Commonwealth’s debt.

Section 207 of PROMESA provides that “[f]or so long as the Oversight Board remains in operation, no territorial government may, without the prior approval of the Oversight Board, issue debt or guarantee, exchange, modify, repurchase, redeem, or enter into similar transactions with respect to its debt.” 48 U.S.C. § 2147. Section 204(c) outlines procedures the Governor must follow concerning the reprogramming of funds provided for in a certified budget and fiscal plan. See 48 U.S.C. § 2144(c). The Governor must submit such requests to the Oversight Board to allow the Oversight Board to “analyze whether the proposed reprogramming is significantly inconsistent with the Budget.” Id. § 2144(c)(1). “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.” Id. § 2144(c)(2).

Sections 207 and 204(c) address only actual readjustments of debt and reprogramming of budgets, not declarations concerning such potential changes. The Oversight Board has shown that, if Act 7’s proposed modifications to the retirement system were enacted, they would effect a modification of debt and require the reprogramming of funds. Because Act

7's debt payments and reprogramming would only be implemented if Act 7 were included in a final, confirmed plan of adjustment, however, Act 7 itself does not modify any debt or reprogram any funds. See, e.g., Act 7 art. 3.01 ("FACSiR shall exist by virtue of its organic law once the authorization of an Adjustment Plan modeled in accordance with the provisions of Chapter 4 of this Act . . . has been legislated."); (Senate of Puerto Rico H. R. 120 Joint Positive Report, Docket Entry No. 35, Ex. 1 at 2 ("[I]f this model Adjustment Plan is finally approved, [Act 7] proposes to establish a trust for joint management of the Island's governmental retirement system, for the teachers and the judiciary. . . .")). Thus, on the record before the Court, there is no violation of PROMESA sections 207 and 204(c).

The Court thereby denies the Motion for Summary Judgment with respect to Counts IV and V.

5. Counts I and III: Section 108(a)(2)

Section 108(a) of PROMESA provides that "[n]either the Governor nor the Legislature may . . . (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. § 2128(a)(2). "The express purpose of the Oversight Board is to 'provide a method for [Puerto Rico] to achieve fiscal responsibility and access to the capital markets.'" Vázquez Garced II, 616 B.R. at 254.

The Oversight Board argues that it is entitled to orders enjoining and nullifying Act 7 because it has made the required determination under section 108(a)(2) that Act 7's provisions "impair or defeat the purposes of" PROMESA and Act 7's implementation and enforcement are therefore "statutorily barred." (MSJ at 19.) The Oversight Board cites its analysis of the financial impact of Act 7's proposed modifications to the retirement systems. (Id.



at 21.) The Oversight Board further contends that Act 7 prevents it from “discharging its duties by barring government cooperation with the Oversight Board.” (Id. at 22.) This bar on cooperation, the Oversight Board argues, is the government’s “attempt to ‘sabotage’ the Oversight Board’s mandate to restore fiscal responsibility and access to capital markets.” (Id.) The Oversight Board also maintains that, even if Act 7 were to be interpreted as a general policy statement, it would still violate PROMESA because the language of section “108(a)(2) strikes policies, not just statutes.” (Oversight Board Reply at 28.) Thus, the Oversight Board argues, the record supports its determination that Act 7 impairs and defeats the purposes of PROMESA. (MSJ at 22-23.)

Opposition to the Oversight Board’s position falls into two basic categories. First, opponents argue that Act 7 cannot be deemed to “impair or defeat the purposes” of PROMESA because “Act 7 is no more than an expression of public policies” that have no immediate impact on the Commonwealth’s finances. (SEIU Opp. at 12; see Senate President Opp. at 10.) A policy that simply opposes pension cuts in a plan of adjustment cannot impair or defeat PROMESA, they assert, and nothing in PROMESA prohibits Puerto Rico’s elected officials from expressing their opinions. (SEIU Surreply at 3; see also Senate President Surreply at 3, 5; House Speaker Opp. at 19.) Second, opponents argue that the Oversight Board’s determination that the proposed revisions in Act 7 impair or defeat PROMESA was “arbitrary and capricious” because the Oversight Board does not provide any evidence underlying its conclusion or articulate the standard by which it made its decision. (Senate President Opp. at 6-10.)<sup>11</sup> As explained below, these arguments are

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<sup>11</sup> The Executive Defendants do not directly address the Oversight Board’s argument to enjoin and nullify Act 7 under section 108(a) of PROMESA. Instead, the Executive Defendants argue that nullification pursuant to PROMESA section 204(a) is “the only basis on which the Court could appropriately nullify Act 7.” (Exec. Defs. Opp. at 18.)

unavailing because elements of Act 7 patently interfere with the Oversight Board's exercise of powers conferred upon it by PROMESA and the fulfillment of its responsibilities under PROMESA.

The Oversight Board's determination that a law impairs or defeats the purposes of PROMESA is subject to review under the arbitrary and capricious standard. Vázquez Garced II, 616 B.R. at 253; see Vázquez Garced III, 511 F. Supp. 3d at 131; supra note 10. Under this standard, "the Court must decide whether the Oversight Board's determinations were supported by a rational basis and must affirm the Oversight Board's decisions if they are 'reasoned, and supported by substantial evidence in the record.'" Vázquez Garced III, 511 F. Supp. 3d at 120 (quoting Trafalgar Capital Assoc., Inc. v. Cuomo, 159 F.3d 21, 26 (1st Cir. 1998)). The Oversight Board's section 108 determinations have been upheld by this Court when government actions "impair[] the functioning of financial measures approved by the Oversight Board in the exercise of powers explicitly conferred upon it by PROMESA." Vázquez Garced II, 616 B. R. at 254 (finding Oversight Board rationally concluded acts violated section 108 when "[t]he record demonstrates that [the acts] appropriate funding that is not included in certified fiscal plans and budgets, and are significantly inconsistent with the fiscal plans and budgets certified by the Oversight Board for the Commonwealth").

The Oversight Board's determination that Act 7 impaired or impeded the purposes of PROMESA in violation of section 108(a) is amply supported in the record. As an initial matter, the Court will address the Senate President's contention that the Oversight Board did not adequately support its determination that Act 7 impairs or defeats PROMESA. The Court does not find this argument persuasive. Here, the Oversight Board has determined that Act 7 impairs and defeats the purposes of PROMESA because the fiscal impact of the proposed

pension changes, treatment of bond obligations and disposition of resources “would fundamentally undermine the Commonwealth’s ability to achieve fiscal responsibility and access to capital markets.” (Compl. ¶ 2.) The Oversight Board actively engaged with the Governor and Legislature and specified the bases of its determination in correspondence during Act 7’s journey through the legislative process and after the enactment of the statute. (See, e.g., SOF ¶¶ 31, 43, 51, 75, 77; Feb. 3, 2021 Oversight Board Ltr. to House of Representatives, Docket Entry No. 7, Ex. B; Mar. 19, 2021 Oversight Board Ltr. to the Senate President and House Speaker, Compl., Ex. 13 at 2-3.) The Oversight Board has been transparent about its determination that Act 7 conflicts with PROMESA and has supported this determination with substantial factual evidence in the record.

Nor is the Court persuaded by the Defendants’ argument that Act 7 contains only contingent policy proposals that have no current impact on the Oversight Board’s responsibilities or the Commonwealth’s finances, and therefore the Act cannot “impair or defeat” the purposes of PROMESA. On the contrary, many provisions of Act 7 are currently operative and explicitly interfere with the Oversight Board’s ability to achieve PROMESA’s purpose by restricting the Commonwealth’s compliance with fiscal plans and budgets or limiting the Oversight Board’s pursuit of a plan of adjustment. These barriers imposed on the Oversight Board impair or defeat the purposes of PROMESA and therefore serve as an additional basis to nullify and enjoin the following provisions: section 1.02, section 5.02, Chapter 2, Chapter 3, Chapter 4, and the last sentence of section 5.01.

First, the Court finds that Act 7’s primacy provisions violate PROMESA. Sections 1.02 and 5.02 declare the supremacy of Act 7 over any other Commonwealth law, regulation, policy, certification, and other agreements. These provisions create a potential

conflict between this Act and laws or agreements made pursuant to or in connection with a Fiscal Plan or certified budget. See Vázquez Garced II, 616 B.R. at 254 (enjoining Commonwealth’s act when “discrepancy [with fiscal plan] necessarily impairs the functioning of financial measures approved by the Oversight Board in the exercise of powers explicitly conferred upon it by PROMESA”). PROMESA’s fiscal plans and budgets are critical for the Oversight Board to achieve PROMESA’s purpose and Act 7’s mandate that its provisions prevail over all others would undermine these financial tools, and thus, these provisions violate PROMESA.

Second, the Court concludes that chapter 2 impairs PROMESA’s purposes. Chapter 2 sets out the “public policy” of the Commonwealth in which Act 7 curtails the government’s cooperation with the Oversight Board on a plan of adjustment, restricts the use of funds and prevents compliance with fiscal directives approved by the Oversight Board, and purports to dictate the allocation of funds in a manner that is inconsistent with approved fiscal plans or budgets. See, e.g., Act 7 art. 2.01(n) (limiting use of government resources for Title III proceedings promoting the confirmation of a plan of adjustment that is inconsistent with Act 7); id. art. 2.04 (precluding AAFAF from “assist[ing] in the creation, execution, supervision and oversight of any Fiscal Plan, Budget, Debt Adjustment Plan or Restructuring Support Agreement . . . that are contrary to the Public Policy set forth in [Act 7]”); id. art. 2.05 (requiring AAFAF to review contracts for inconsistencies with the Fiscal Plan **or** with the Public Policy provided in Act 7 to potentially suspend or cancel such contracts for noncompliance with either). Thus, the Court concludes the prohibitions set forth in chapter 2, whether viewed as directives to act or simple statements of policy, conflict with and impair PROMESA.

Third, the Court considers chapters 3 and 4 of Act 7. The Defendants have argued that chapter 3 is a proposal that will only go into effect in the future if the Oversight

Board adopts the Commonwealth’s proposed plan of adjustment, which is detailed in chapter 4. However, the Commonwealth government has made clear that, immediately upon the passage of Act 7, it intended to be “contractually bound” by certain promises with respect to the protection of income to be transferred to FACSIR and the rights outlined in chapter 4’s model plan of adjustment.<sup>12</sup> See, e.g., Act 7 art. 3.03(a)(4) (“With the intention of being contractually bound, the [Commonwealth] agrees and undertakes with FACSIR and with any Participant or Retiree of the Retirement Systems or FACSIR . . . to not engage in and to not authorize any government entity to engage in . . . any action that . . . undermines the rights, remedies, or collaterals of the Participants and Retirees of the Retirement Systems under the Adjustment Plan model in Chapter 4 of this Act.”). Moreover, the final sentence of section 5.01 states that if any portion of Act 7 is invalidated because, in part, it violates PROMESA, those provisions shall go into effect at the moment the Oversight Board expires. See Act 7 art. 5.01 (“If the declaration of unconstitutionality of any . . . part of this Act is based on the federal preemption doctrine, the supremacy clause, or the plenary powers of the Constitution of the United States manifested through PROMESA, or otherwise invalidated by its inconsistency with the powers conferred or delegated to the [Oversight Board] under Titles I, II, III, and VI of PROMESA, the validity of those parts of this Act thus declared shall be temporarily suspended until the Expiration of the FOMB materializes, in accordance with Section 209 of PROMESA.”). This sentence, in conjunction with the government’s previously stated intention to be contractually bound by the provisions set forth in

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<sup>12</sup> The Commonwealth’s intention to currently control the funds for FACSIR is further supported by the Act’s use of the present tense and failure to use qualifying language such as “shall” or “will” in provisions where the Commonwealth discusses income for the FACSIR’s system. Compare Act 7 art. 3.02 (“FACSIR shall assume all legitimate obligations of the Retirement Systems . . .”) (emphasis added) with id. art. 3.04 (“Any and all ownership and rights to FACSIR’s Income were or have been transferred, or are hereby transferred, to FACSIR.”) (emphasis added).

chapters 3 and 4, makes clear that the government’s resolve to engage in conduct that directly conflicts with the Fiscal Plan is not hypothetical, but is a present intent that impairs PROMESA in violation of section 108(a). See Vázquez Garced III, 511 F. Supp. 3d at 137 (“Since PROMESA charges the Oversight Board with providing a method for Puerto Rico to achieve fiscal responsibility and fiscal plans are a key instrument under PROMESA for the achievement of the statute’s goals, it is neither arbitrary nor capricious for the Oversight Board to determine that a direct violation . . . of a clear Fiscal Plan policy position does, in fact, impair or defeat PROMESA’s purposes.”).

The Commonwealth’s determination to be contractually bound by the promises outlined in Act 7 and its commitment to “not engage in and to not authorize any government entity to engage in” any limitation of the rights outlined for retirees in the model plan of adjustment proposed in chapter 4 purport to create active barriers to the Oversight Board’s efforts to ensure compliance with the Fiscal Plan in the future and ensure the successful implementation of a plan of adjustment. The last sentence of section 5.01 further attempts to limit the power of the Court to enforce PROMESA and aims to dismantle any plan of adjustment put forth by the Oversight Board and confirmed by the Court. Such provisions directly conflict with PROMESA’s purposes to provide long-term financial stability for the Commonwealth and are invalid. The Court therefore finds chapter 3, chapter 4, and the last sentence of section 5.01 violate PROMESA section 108(a)(2).

The provisions detailed above explicitly conflict with the Oversight Board’s authority with respect to the Commonwealth’s financial operations and its ability to carry out its purpose. The Oversight Board’s determination that Act 7 “impair[s] or defeat[s] the purposes of [PROMESA]” in violation of section 108(a)(2) is well founded as to these provisions, and the

Court need go no further for purposes of this decision in light of its determination as to the remainder of the statute under PROMESA section 204(a). The Oversight Board is therefore entitled to summary judgment on Counts I and III with respect to section 1.02, section 5.02, Chapter 2, Chapter 3, Chapter 4, and the last sentence of section 5.01. Nullification of these provisions of the statute is appropriate, especially in light of Act 7’s directive that if any provision of Act 7 is deemed to be invalid, that part of the Act will be considered only “temporarily suspended.” Act 7 art. 5.01; see Vázquez Garced III, 511 F. Supp. 3d at 138 (recognizing nullification is “drastic relief.”).<sup>13</sup>

### CONCLUSION

For the foregoing reasons, the Oversight Board’s Motion for Summary Judgment is granted with respect to Counts I, II, and III of the Complaint, is denied with respect to Counts IV and V, and the Court declines to reach Count VI. Pursuant to sections 204(a)(5) and 104(k) of PROMESA, Act 7 in its entirety and all actions taken pursuant to it are hereby declared nullified, unenforceable and of no effect. Defendants are, furthermore, enjoined from implementing and enforcing Act 7. Pursuant to PROMESA sections 108(a)(2) and 104(k), the following provisions of Act 7 and all actions taken pursuant to them are declared nullified, unenforceable, and of no effect: section 1.02, section 5.02, Chapter 2, Chapter 3, Chapter 4, and the last sentence of section 5.01. Defendants are enjoined from implementing and enforcing such provisions.

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<sup>13</sup> In light of the foregoing conclusions, the Court declines to address the Oversight Board’s Motion for Summary Judgment insofar as it seeks summary judgment on Count VI of the Complaint. The Oversight Board requests in Count VI that this Court enjoin the implementation of Act 7 for violation of the Supremacy Clause of the United States Constitution and section 4 of PROMESA. The Court has already nullified all of Act 7 pursuant to PROMESA section 204(a), and nullified specific provisions of Act 7 that impair or defeat the purposes of PROMESA, and prohibits their implementation and enforcement.



This Memorandum Opinion and Order resolves Docket Entry No. 17.

SO ORDERED.

Dated: October 13, 2021

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