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

ASOCIACIÓN PUERTORRIQUEÑA DE LA JUDICATURA; Plaintiff, v. **THE FINANCIAL OVERSIGHT AND MANAGEMENT BOARD FOR PUERTO RICO**; Defendant.	CIVIL NO. 17-1580 ( ) RE: Declaratory Judgment; 48 U.S.C. §§ 2102 et seq. (PROMESA)

BRIEF IN SUPPORT OF DECLARATORY JUDGMENT

APPEARS NOW Plaintiff, **ASOCIACIÓN PUERTORRIQUEÑA DE LA JUDICATURA** (hereinafter "**APJ**"), through the undersigned attorneys, and hereby states, alleges and respectfully requests as follows in support of the issuance of declaratory relief:

I. INTRODUCTION TO THE IMPORTANCE OF JUDICIAL INDEPENDENCE

"What distinguishes Man from the Animal is his ability to think." [1] What separates Humankind from the dispute resolution of the Animal World is the Rule of Law, jealously guarded and guaranteed by an independent judiciary.

A co-equal, independent judiciary is central and fundamental to the American systems of government and justice. While not conceived in 1789, the concept of an independent judiciary was cemented into the United States Constitution by the Founding Fathers.

These Founding Fathers were not gods. Nor were they angels. They were all white men; some were slaveholders, and all were property owners. Yet, they were collectively brilliant for

[1] Raymond E. Leopold, American Educator (1927-2010).

their time and fashioned the most enduring governmental document in history. The United States Constitution was forged out of the struggle from monarchical tyranny and the rubble of the Articles of Confederation. This Constitution has guided a Nation to seek a more perfect union with every evolving generation for eleven score and eight years.

Each co-equal branch in the American system of government has its own unique role within the overall structure. The Judiciary is the branch least able to defend itself and advocate for its rights and proper place in this constitutional structure. Yet without a strong and independent judiciary, the system envisioned and instituted by the Founding Fathers cannot survive.

The Judiciary is currently under attack on multiple fronts. A federal judge born in Indiana has been criticized by the current occupant of the Oval Office as unable to impartially dispense justice due to his Mexican heritage. The Attorney General of the United States is "surprised" that "one judge on a Pacific Island" can issue an order contrary to the position of the Executive Branch. [2]

Surely the highest-ranking attorney in the country knows that this is precisely how the system is designed to work. Yet he feels free to mislead the public, not all of whom are blessed with a law degree. And the Chief Executive feels free to suggest that ethnicity prevents impartiality, as if there is a judge alive in the country whose ancestors were not either immigrants, slaves or Native Americans.

The Judiciary cannot defend itself against these obtuse comments by members of the Executive Branch. Nor can the Judiciary force the Legislative Branch to act when it fails to fill judicial vacancies for political reasons. The only consequence for its failure to do its duty is felt

[2] Savage, Charlie. *Jeff Sessions dismisses Hawaii as 'an Island in the Pacific'*. April 20th, 2017. https://www.nytimes.com/2017/04/20/us/politics/jeff-sessions-judge-hawaii-pacific-island.html?_r=0. (Last accessed: April 27th, 2017).

by the overworked judicial districts that are left to suffer. Judges themselves are powerless to change this.

In a republican form of government, the Judicial Branch must be independent, and all attacks on that independence - the boisterous, the subtle and the inane - must be vigorously opposed. The recent directive by the Oversight Board ("OB") instituted by PROMESA for the Puerto Rico territory to cut the pensions of sitting and retired judges in Puerto Rico is such a frontal attack on judicial independence. For centuries, both federal and state case law have confirmed that such actions violate the essential element of judicial independence attributed to the Judiciary by the United States Constitution itself, as postulated by the Nation's Founding Fathers. This cannot be seriously questioned. The case law of the Puerto Rico Supreme Court is no exception, as evidenced, most recently, by the opinion issued in *Brau, Linares v. E.L.A. et al,* 190 D.P.R. 315 (2014).

Plaintiff presents before this Honorable Court an action for declaratory judgment concerning an issue that is neither unique nor opaque. Within the Fiscal Plan ("FP") that the Oversight Board approved and certified to direct the government's finances through the next ten years, the OB directed the Government of Puerto Rico to cut retroactively judicial pensions in spite of abundant clear law prohibiting such reductions. Presumably, the OB undertook this action relying on the federal law that created it: PROMESA. But the OB acted *ultra vires* because PROMESA does not empower it to make a demand that is contrary to constitutional law as well as the fundamental concepts of separation of powers and judicial independence that are central to the republican system of government established in Puerto Rico pursuant to Congressional mandate.

II. THE LEGAL HISTORY OF SEPARATION OF POWERS AND JUDICIAL INDEPENDENCE

Inspiration can spring from either admiration or anathema. King George III provided the latter as stimulus for the Founding Fathers when they drafted the Declaration of Independence, regarding the need for both separation of powers and judicial independence.

The Crown was quite comfortable with its judges in its rather large pocket. This led to a very specific grievance that, along with 26 other grievances, provided bedrock reasons for the colonists to declare their independence: "He has made judges dependent on his will alone, for the tenure of their offices, and the amount and payment of their salaries." [3]

At great cost to many, the Revolutionary War achieved a severing of ties with England, but not a unifying philosophy among the former colonists. Gun shy from the stain of repression by a central government for over 150 years, these nascent Americans were determined to forge a new path. The direction of that path, however, was anything but clear. The Articles of Confederation were a first step, but one that proved woefully inadequate to govern the new nation. As its shortcomings became apparent, a Constitutional Convention was called and a Constitution drafted. This document, however, needed to be approved by the thirteen states, and thus a Federalist versus Anti-Federalist intellectual battle ensued.

The Federalists were greatly benefitted by extraordinary essayists such as Alexander Hamilton, James Madison and John Jay. While the anti-Federalist boasted the likes of Patrick Henry and Richard Henry Lee, they were no match for the well-organized and effective Federalist wave. Ultimately, the Federalists prevailed once the Bill of Rights was added to the Constitution, protecting the individual rights that the Anti-Federalists held dearly.

---

[3] The Declaration of Independence (U.S. 1776), paragraph 11.

Along the way, various "Federalist Papers" were written to convince the country of the need for this new Constitution. Hamilton wrote extensively about the importance of preserving an independent judiciary in Federalist Paper Number 78:

> Whoever attentively considers the different departments of power must perceive, that, in a government in which they are separated from each other, the judiciary, from the nature of it functions, will always be the least dangerous to the political right of the Constitution; because it will be least in a capacity to annoy or injure them. The Executive not only dispenses the honors, but holds the sword of the community. The Legislature not only commands the purse, but prescribes the rules by which the duties and rights of every citizen are to be regulated. The Judiciary, on the contrary, has no influence over either the sword or the purse; no direction either of the strength or of the wealth of the society; and can take no active resolution whatever. It may truly be said to have neither FORCE nor WILL, but merely judgment; and must ultimately depend upon the aid of the executive arm even for the efficacy of its judgments.
>
> This simple view of the matter suggests several important consequences. *It proves incontestably, that the judiciary is beyond comparison the weakest of the three departments of power; that it can never attack with success either of the other two; and that all possible care is requisite to enable it to defend itself against their attacks***.** It equally proves that though individual oppression may now and then proceed from the courts of justice, the general liberty of the people can never be endangered from that quarter; […] And it proves, in the last place… that as, from the natural feebleness of the judiciary, it is in continual jeopardy of being overpowered, awed, or influenced by its co-ordinate branches; and that as nothing can contribute so much to its firmness and independence as permanency in office, *this quality may therefore be justly regarded as an indispensable ingredient in its constitution, and, in a great measure, as the citadel of the public justice and the public security*. [4]

In Federalist Paper No. 79, Hamilton specifically argued the importance of a protected salary as an indispensible aspect of judicial independence:

> Next to permanency in office, nothing can contribute more to the independence of the judges that a fixed provision for their support. [. . .] In the general course of human nature, a power over a man's subsistence amounts to a power of his will. [5]

[4] The Federalist Papers, Mentor, 1961, pages 465, 466. (Emphasis ours.)
[5] The Federalist No. 79 at 400 (Alexander Hamilton)(Gary Wills ed., 1982)(*The Federalist*), as cited in *DePascale v. State of New Jersey*, 211 N.J. 40 (2012) at 49.

While arguably in a different context, James Madison stated the obvious in Federalist Paper No. 10: "No man is allowed to judge in his own cause, because his interest would certainly bias his judgment, and, not improbably, corrupt his integrity." [6]

Armed with the unassailable positions of Hamilton and Madison that the judiciary should be a separate and co-equal branch of government, truly independent from the others, the U.S. Constitution included what has come to be known as the "No-Diminution Clause." [7] As explained in multiple cases, this Clause's proscription applies regardless of the motives of the Legislature or Executive, thus avoiding suspicion between the branches. [8] "The Clause places judge's remuneration, once established, beyond the power of the other two branches to diminish. This guarantees that the judicial power will not be exercised for the purpose of seeking favor or avoiding retribution from the other branches." [9]

In *Evans v. Gore*, 253 U.S. 245, 250 (1920), Chief Justice John Marshall stressed the critical necessity of judicial independence: "Is it not to the last degree important that he be rendered perfectly and completely independent, with nothing to influence or control him but God and his conscience?" And fixed judicial compensation is not a gift from the public in the judge's sole economic interest. As the Supreme Court aptly put in *Evans*, the provision is to be "construed, not as a private grant, but as a limitation in the public interest." [10]

This approach to judicial independence and a *bona fide* separation of powers between the three branches of government became the gold standard for the constitutions of the fifty states, as well as for Puerto Rico when, in 1950, the people of Puerto Rico were allowed by Congress to

[6] The Federalist Number Ten, James Madison, A Documentary History of the United States, Richard D. Heffner, A Mentor Book (1965).
[7] U.S. Const., Art. III, § 1.
[8] See, *United States v. Hatter*, 532 U.S. 557, 577 (2001).
[9] *DePascale v. State of New Jersey,* 211 N.J. 40 (2012), at 49-50.
[10] *Evans v. Gore, supra* at 253.

draft their own Constitution in order to "organize a government pursuant to a Constitution of their own adoption". [11] Section VI, below, will outline the adoption and defense of judicial independence over time across the land and seas.

III. THE PUERTO RICO CONSTITUTION: BORN OF AND BLESSED BY FEDERAL LAW

Upon the signing of the Treaty of Paris in 1898, the United States acquired from Spain the noncontiguous territories of Guam, the Philippines and Puerto Rico. [12] The Treaty of Paris itself provided that "the civil rights and the political conditions of the natural inhabitants of the territories ... shall be determined by Congress". [13]

During the very first years of the 20th Century, in a series of opinions known as the *Insular Cases*, the Supreme Court of the United States held that the Constitution of the United States extended *ex proprio vigore* to the territories. [14] The Court, however, differentiated between the application of the United States Constitution to incorporated territories that were surely destined for statehood and unincorporated territories that were not, applying the Constitution only partially to the latter. [15]

With respect to Puerto Rico, in the 119 years that have transpired between the acquisition by the United States of the island and the present, "the United States and Puerto Rico […] forg[ed] a unique political relationship, built on the island's evolution into a constitutional democracy exercising local self rule." [16] Always acting pursuant to the U.S. Constitution's Territory Clause, [17] [18] Congress established in Puerto Rico a three-branch local government and a

---

[11] Act of July 3, 1950, §1, 64 Stat. 319.
[12] *Treaty of Paris*, Dec. 10, 1898, 30 Stat. 1759.
[13] *Id* Art. 9.
[14] *See* cases cited in *Boumediene v. Bush*, 553 U.S. 723, 756-757 (2008).
[15] *Id*. at 757-758.
[16] *Puerto Rico v. Sánchez-Valle*, 136 S.Ct. 1863, 1868 (2016).
[17] U.S. Const., Art. IV, § 3, cl. 2.
[18] *Sánchez-Valle*, *supra*.

federal district court, with the governor, federal judges and Puerto Rico Supreme Court justices all appointed by the President of the United States. Over time, Congress granted Puerto Rico additional autonomy, including, among other rights, empowering the people of Puerto Rico to elect their own governor.

Fifty-two years into the process described by the Supreme Court of the United States as the "forging of a unique relationship" between the United States and Puerto Rico, in 1950 Congress enacted Public Law 600 to authorize the people of Puerto Rico to "organize a government pursuant to a Constitution of their own adoption". [19] Pursuant to Public Law 600, the eventual constitution had to "provide a republican form of government" and "include a bill of rights," with all other matters to be agreed upon in a constitutional convention. [20] While the people of Puerto Rico would first decide whether to adopt the constitutional convention's proposed charter, [21] Congress maintained the power to cast the dispositive vote , [22] such that any constitution that the people of Puerto Rico were to approve by referendum would become effective only "**upon approval by the Congress**". [23]

The constitution drafted through the convention was ratified by referendum held on March 3, 1952 [24] and submitted to Congress. On July 3, 1952 the United States Congress approved the Puerto Rico Constitution with various amendments, among which was the addition that "[a]ny amendment or revision to [it] shall be consistent with the resolution enacted by […] Congress […] approving [it], with the applicable provisions of the Constitution of the United

[19] Act of July 3, 1950, §1, 64 Stat. 319.
[20] . *Id*., §2, 64 Stat. 319.
[21] *See* §3, 64 Stat. 319.
[22] *See Sanchez-Valle*, 136 S.Ct. at 1868.
[23] *See* §3, 64 Stat. 319.
[24] *See* Act of July 3, 1952, 66 Stat. 327 (known as Public Law 447).

States, with the Puerto Rico Federal Relations Act, and with Public Law 600". [25] "The Puerto Rico Constitution created a new political entity, the Commonwealth of Puerto Rico," whose government had three branches (Art. I, §2) and, "resonant of American founding principles," described that tripartite government as "'republican in form' and 'subordinate to the sovereignty of the people of Puerto Rico.'" [26]

Most recently, in the opinion issued in *Sanchez-Valle* in January 2016, the Supreme Court of the United States held that, for purposes of the Double Jeopardy Clause, "the ultimate source of Puerto Rico's prosecutorial power is the Federal Government […], such that the Commonwealth and the United States are not separate sovereigns". [27] The High Court explained that this holding was not affected or altered by either of two facts: first, that "Puerto Rico boasts a relationship with the United States that has no parallel in [the] history [of the United States]" [28], and second, that Puerto Rico has established "wide-ranging self-rule exercised under its own Constitution." [29]

In its reasoning, the Supreme Court both recognized and agreed with the concept that the Puerto Rico Constitution was a manifestation of the will of the people of Puerto Rico and that it was premised on the essential principle of government by consent. The Court, however, was clear that while Congress, in fact, had used its broad latitude to develop an innovative approach to "*territorial governance,*" Congress had "**no capacity, no magic wand or airbrush, to erase or otherwise re-write its role in conferring political authority [to the people of Puerto Rico]", as much as it could not, as the delegator of power to the people of Puerto Rico, "make itself any less [of a delegator].**" In essence, the High Court held that the historical fact

[25] *See* Public Law 447, *supra*.
[26] *Sanchez-Valle*, 136 S.Ct., at 1869.
[27] *Id* at 1876.
[28] *Id*.,citing *Examining Bd. of Engineers, Architects and Surveyors v. Flores de Otero*, 96 S.Ct. 2264, (1976))
[29] *Id*.

that Congress granted the people of Puerto Rico the authority to exercise self-government was dispositive to the issue that, ultimately, **Congress was the source or origin of that people's power in all the matters in which it exercised self-rule**.

IV. THE PURPOSE AND NATURE OF PROMESA

The Puerto Rico Oversight Management and Economic Stability Act [30] (hereinafter "PROMESA") was enacted by Congress pursuant to its power to "make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States". [31] Congress enumerated the powers it delegated to the OB in PROMESA, all aimed at "assist[ing] the Government of Puerto Rico ("GPR"), including instrumentalities, in managing its public finances." [32] As the only source of authority over the United States' territories, including Puerto Rico, Congress did not expressly delegate to the OB any of its plenary powers over these territories. As such, within the confines of Puerto Rico's territorial status, as it stands clearly delineated by the Supreme Court in *Sánchez-Valle*, after the passage of PROMESA Congress continues to hold all the powers it never expressly delegated to the OB in PROMESA. To that effect, PROMESA is what it is: an Act of Congress exercising its right to make all needful rules and regulations respecting the territory's finances.

To be clear, Plaintiff is not challenging PROMESA as a valid legislative act of Congress. Rather, Plaintiff here challenges a particular act of the OB that, in exercising its limited delegated powers, marched over and beyond the specific and limited delegation entailed in PROMESA. The act of the OB challenged by Plaintiff dramatically oversteps the mandate of

[30] 48 U.S.C. §§2101 *et seq*.
[31] U.S. Const., Art. IV, § 3, cl. 2.
[32] Report of the House Committee on Natural Resources ("CNR") upon passing the bill in the House of Representatives, June 3, 2016; (hereinafter "House CNR Report"). H.R. 5278 (S. 2328) was passed in the Senate without amendments on June 29, 2016, becoming Public Law 144-187, June 30, 2016. (Last accessed: April 25th, 2017).

Congress in Public Laws 600 and 447 and, thus, impinges on the exercised Congressional authority to allow the people of Puerto Rico to develop self-governance fully in line with the republican form of government that is embodied in the United States Constitution. The challenged act violates the fundamental concept of separation of powers and judicial independence.

PROMESA is, purely, a fiscal and financial management statute. PROMESA addresses Puerto Rico's debt by establishing an Oversight Board ("OB"), a process for restructuring debt, and expedited procedures for approving critical infrastructure projects. [33] A major objective of the Act is to prevent a taxpayer bailout, by helping Puerto Rico restructure its financial obligations and provide much needed oversight to put in place necessary reforms. [34]

In the portion of the House CNR Report containing remarks regarding the bill's background and the need for this legislation, reference is made to the fact that "Puerto Rico is a United States territory [whose] residents are United States citizens, [such that] Congress has the responsibility and authority to make all needful rules and regulations for Puerto Rico". [35] As a result, PROMESA's Sec. 101(b)(2) provides that it was enacted "pursuant to article IV, section 3 of the Constitution of the United States, which provides Congress the power to dispose of and make all needful rules and regulations for territories." [36] The necessity for action with respect to Puerto Rico as a territory of the United States, in the form of PROMESA, was premised, in turn, on the factual findings regarding Puerto Rico's fiscal crisis; specifically, the accumulated $110 billion plus in combined debt and unfunded pension liabilities. Given its genesis in the

[33] PROMESA summary by the Congressional Research Service of the Library of Congress; https://www.congress.gov/bill/114th-congress/senate-bill/2328 (Last accessed: April 25, 2017).
[34] Remarks by Mr. McConnell in the Senate, June 29, 2016; https://www.congress.gov/congressional-record/2016/6/29/senate-bill/2328 (Last accessed: April 25, 2017).
[35] Report of the House Committee on Natural Resources, *supra*.
[36] 48 U.S.C. §2121(b)(2).

"Territorial Clause" of the United States Constitution, in its Sec. 4 [37]PROMESA expressly provides that its provisions "shall prevail over any general or specific provision of territory law, State law or regulation that is inconsistent with this Act".

In its background remarks, the House CNR Report summarizes the four (4) most important concerns specifically addressed by PROMESA, which, it explains, were learned from the testimony received during Congressional hearings, whereby Members and stakeholder commented on H.R. 5278's precursor, H.R. 4900.[38] As such:

- In response to concerns regarding the need for energy and infrastructure developments on the island, PROMESA gave the Oversight Board the opportunity to fast-track infrastructure projects by co-opting existing Puerto Rico laws, thus providing infrastructure proponents with the assurance of regulatory certainty.

- With respect to the perceived need for an independent oversight board to oversee Puerto Rico's fiscal and governmental activities, in its Titles I and II PROMESA established an Oversight Board to remedy the deteriorating health of Puerto Rico's finances.

- To address Puerto Rico's need to access debt restructuring, Titles III and IV of PROMESA provided Puerto Rico's indebted entities, with the management of the Oversight Board, the opportunity to restructure their debts in a fair and equitable manner for their respective creditors.

- Finally, in response to Congress having been alerted regarding the concerns of stakeholders, PROMESA provided a workable solution that would ensure Puerto Rico regain access to capital markets and achieve fiscal responsibility and transparency.

Nothing in PROMESA addresses Puerto Rico's governmental system or structure, as set out in the 1952 Puerto Rico Constitution, or the fundamental aspects of Puerto Rico's relationship with the United States, as laid out in Public Laws 600 and 447, and the Puerto Rico Federal Relations Act.

[37] 48 U.S.C. §2103.
[38] *See* n. 32.

In the Report by the House CNR,[39] we find a section-by-section analysis/commentary of PROMESA. In Section 104, [40] the powers of the Oversight Board are set out, including those related to the routine day-to-day operation of the Oversight Board, as well as the powers relating to achieving fiscal stability and creditworthiness for Puerto Rico. Sections 201 and 202 of Title II outline the process for developing and approving Fiscal Plans and annual budgets for both the territorial government and covered territorial instrumentalities. The document "H.R. 5278: PROMESA" [41] describes PROMESA's Fiscal Plans as "the cornerstone of the Act", further describing the fiscal plans as the "chief enforcement tool for the Oversight Board to ensure accountability in the territory and its institutions." [42] To this effect, the House CNR explains in the cited document that "Fiscal Plans ensure the protection of the lawful priorities and liens as guaranteed by the Constitution and applicable laws." [43]

Finally, with respect to the provision in PROMESA's Sec. 201(b)(1)(C), requiring fiscal plans to "provide adequate funding for public pensions systems," the "House CNR Report" explains that this language should not be interpreted to reprioritize pension liabilities ahead of the lawful priorities or liens of bondholders, as established under the territory's constitution, laws, or other agreements. It is further explained that, while the language seeks to provide an adequate level of funding for pension systems, it does not allow for pensions to be ***unduly*** favored over other indebtedness in a restructuring.

In its approval with amendments of the Fiscal Plan for the covered territory of Puerto Rico, on March 13, 2017 the Oversight Board provided that the public pension systems, jointly,

---

[39] *See also*, "H.R. 5278: 'Puerto Rico Oversight Management and Economic Stability Act (PROMESA)'" (hereinafter "H.R. 5278: PROMESA"), issued by the House Committee on Natural Resources, where the bill was introduced; http//naturalresources.house.gov/uploadedfiles/promesa_packet_6.6 (Last accessed: April 25th, 2017).
[40] 48 U.S.C. §2124.
[41] *See* n. 39.
[42] *Id*.
[43] *Id*.

would absorb a progressive reduction of their outlays of 10% by the year 2020. The OB specifically noted that the public pension systems are comprised of the Employees' Retirement System ("ERS"), the Teachers' Retirement System ("TRS") and the Judiciary Retirement System ("JRS"). The *raison d'être* of the JRS, quite significantly, is vastly different from that of both the ERS and the TRS. The JRS, as we have seen, has its origin in the essential separation of powers scheme of the republican form of government that was instituted in Puerto Rico pursuant to the mandate of Public Law 600 and emanating from the federal Constitution.

Accordingly, the OB cannot include the JRS in the budgetary cuts to reduce the pensions of the Judiciary in a retroactive manner. Excluding the JRS from the mandated progressive cut to achieve 10% reduction in pension outlays by the year 2020, in compliance with the constitutional mandate, does not consist of an ***undue*** favoring of the pensions of the judiciary. Rather, it maintains Puerto Rico's republican form of government intact, in adherence to the demands of the United States Congress allowing Puerto Rico to organize a constitutional government and maintaining a constitution that remains consistent with the Constitution of the United States, the Puerto Rican Federal Relations Act, Public Law 600 and Public Law 447. As the United States Supreme Court stated in *Evans v. Gore* in 1920, the granting of fixed judicial compensation is "not […] a private grant, but … a limitation in the public interest. [44]

V. THE *ULTRA VIRES* ACT OF THE OVERSIGHT BOARD

In its Title II, PROMESA lays out various processes that alternatively apply to the approval by the OB of fiscal plans for the Puerto Rico territory. [45] The process that took place with respect to the fiscal plan of the GPR, beginning on or around late September 2016, is that

[44] *Evans, supra* 253 U.S. at 253.
[45] 48. U.S.C.A §2141.

which PROMESA laid out in its §201, subsections (c)(3), (d)(1), and (e)(1).[46] Accordingly, after the GPR submitted its first proposed Fiscal Plan to the OB on October 14, 2016, the OB began to engage, directly with the GPR, in discussions by written communications that, in essence, amounted to the process contemplated in §201(b)(3)(B), providing for the notification by the OB to the GPR of notices of violation and recommendations for revision of the fiscal plan and the submission by the GPR of revised versions of its fiscal plan, directed at complying with the notification or notifications by the OB.

Throughout this process, the OB took on a leading role in directing the fiscal plan of the GPR to address closing the gap between revenues and expenses in the government's budget, in part, through specific cuts in pension costs. As such, in the term of time between October 2016 and March 2017, the GPR was obligated by the OB to divert from its original approach to pension reform in order to adopt the specific measures of choice of the OB and be able to procure the approval of the OB for a fiscal plan for Puerto Rico. The OB, thus, incurred in *ultra vires* acts in two respects.

First, the OB directed the GPR to achieve a savings of $200 million in the government's expenses by means of a progressive reduction of 10% in public pension outlays by the year 2020. Ultimately, the OB conditioned its approval of the Fiscal Plan for the Puerto Rico territory on the inclusion of this measure. At no time in this process did the OB make mention of the constitutional requirement that the salaries and pensions of the Judiciary not be reduced retroactively, as required by the principles illustrating the separation of powers in the republican system. In fact, specifically and repeatedly, the OB limited its expressions regarding exclusions from the proposed measure to indicating that: "any pension reform protect the neediest and

[46] 48 U.S.C. §2141(c, d, and e).

impose the largest cuts on those with large benefits". [47] As such, in the end the OB specifically provided that "the public pension system be overhauled through the measures in the Commonwealth's proposed fiscal plan, supplemented to provide for the progressively reduced total pension outlays by 10% by the year 2020, ... *with protections to ensure that no member is pushed below the federal poverty line as a result of the reductions*". [48]

In this manner, the OB has required that the GPR retroactively amend the pensions of the judiciary, contrary to the Puerto Rico Constitution, the United States Constitution, the case law interpreting both constitutions, and Public Laws 600 of 1950 and 447 of 1952. The chronology of events since the OB began its fury of activity fully demonstrates this.

The first public meeting of the OB took place on September 30, 2016. Quite ironically, the meeting took place at the U. S. Custom House building in New York named after Alexander Hamilton. As discussed above, in the Federalist Paper No. 78 it was Hamilton, specifically, who advocated for judicial independence as an "indispensable ingredient" of the United States Constitution and for the fact that next to permanency in office and a fixed provision for their support, nothing would contribute more toward that goal. [49] In this first meeting, the OB discussed formally for the first time its first substantial task: its request for information and a Fiscal Plan ("FP") from the Government of Puerto Rico. [50]

On October 14, 2016, the then-Governor of Puerto Rico, Alejandro García Padilla, and his financial team presented to the OB its *Fiscal and Economic Growth Plan (FEGP) for the*

---

[47] Letter and Attachments for the Governor of Puerto Rico, Ricardo Rosselló; https://junta.pr.gov/wp-content/uploads/wpfd/50/587fea840f998.pdf (Last accessed: April 26, 2017).
[48] Resolution - Fiscal Plan Certification; https://junta.pr.gov/wp-content/uploads/wpfd/50/58c6e140a43d4.pdf; (Last accessed: April 26, 2017).
[49] *See Brau, Linares*, 190 D.P.R. 315, 342-343 (2014) citing J. Madison, A. Hamilton and J. Fay, *The Federalist Papers*, New York, Ed. Arlington House, 1966, pp. 465-466; 472-473.
[50] General Release issued on Sept. 23, 2016 about First Public Meeting; https://junta.pr.gov/wp-content/uploads/wpfd/49/581f98cab0c55.pdf (Last accessed: April 26, 2017).

Central Government.[51] By letter dated November 23, 2016, the OB conveyed to then-Governor García Padilla its preliminary assessment of the FEGP and provided the timeline for the OB to certify the plan.[52] Among other comments, the OB communicated to the Governor that the FEGP needed more policy adjustment, particularly with respect to structural reforms and highlighted that the FP had to meet the 14 requirements set in PROMESA, among which is found the requirement that the plan "provide adequate funding for public pensions systems."[53] At that time, as the general release of the OB itself put it, the conclusion of the OB was that the FEGP did not comply with the requirements set forth in PROMESA.[54]

On December 20, 2016, the OB addressed both then-Governor García Padilla and Governor-Elect Ricardo Rosselló Nevares regarding the October 14, 2016 FEGP.[55] The OB explained in this communication that its updated estimate was that over the next ten years the Government of Puerto Rico's fiscal gap would amount to $67.5 billion, such that the Government would have to reduce expenses and increase revenues to close an average annual shortfall of $7 billion to meet its current legal obligations. The OB detailed the areas where the Government was required to take immediate action, among which pension reform was included, with the caveat that such reform had to respect the process established under PROMESA. Following this general statement, under the heading "restructuring long-term liabilities", in the December 20

[51] Agenda for October 16, 2016 Meeting; https://junta.pr.gov/wp-content/uploads/wpfd/48/581f997e7ebd0.pdf (Last accessed: April 26, 2017).
[52] Letter from the Chair of the OB to the Governor of Puerto Rico; https://junta.pr.gov/wp-content/uploads/wpfd/50/583c7b9086b20.pdf (Last accessed: April 26, 2017).
[53] *See* 48 U.S.C. §2141(b)(1)(C).
[54] (General Public Release regarding Revisions of the Baseline Projections of the Fiscal Plan; https://junta.pr.gov/wp-content/uploads/wpfd/49/58595509cff01.pdf (Last accessed: Arpil 26, 2017).)
[55] Letter to Governor and Governor Elect regarding Revisions to Baseline Projections of the Fiscal Plan; https://junta.pr.gov/wp-content/uploads/wpfd/50/58598734087c1.pdf (Last accessed: April 26, 2017).

letter the OB explained further that change was needed to "ensure the pension costs are sustainable and to address the massive pension liabilities over the years". [56]

By January 18, 2017, the aforementioned general guidelines took concrete form with the OB specifically requiring the Government to consider that "a reduction of approximately 10% in pension costs and related expenses may be necessary, for savings of $0.2 billion by fiscal year 2019". [57] Two (2) days later, on January 20, 2017, Governor Rosselló responded to the January 18 letter to highlight that the Government's approach was in "sharp contrast to [the OB's] proposed initiatives". [58] Regarding the requirement of approximately 10% reduction in pension costs and related expenses, Governor Rosselló listed his five (5) proposed initiatives to guarantee the sustainability of the public pensions system, which did not include the reduction contemplated by the OB in public pensions outlays.

On February 28, 2017, the GPR under Governor Rosselló presented its FP to the OB[59] and the OB began to evaluate it. By March 9, 2017, the final words were etched in stone: the OB determined that the proposed plan did not comply with the requirements set forth in PROMESA, for which reason the OB recommended revisions. [60] With respect to the public pension systems, the OB concluded that the Government's proposal to reduce pension costs in a progressive way was inadequately implemented in the proposed plan.

---

[56] *Id*.

[57] Letter and Attachments for the Governor of Puerto Rico, Ricardo Rosselló; https://junta.pr.gov/wp-content/uploads/wpfd/50/587fea840f998.pdf (Last accessed: April 26, 2017).

[58] Letter to the Chairman of the Oversight Board, Mr. José L. Carrión from the Governor of Puerto Rico, Hon. Ricardo Rosselló, January 20, 2017; https://junta.pr.gov/wp-content/uploads/wpfd/50/587fea840f998.pdf (Last accessed: April 26, 2017).

[59] General Release regarding the Submission of the Fiscal Plan by the Government of Puerto Rico, March 1, 2017; https://junta.pr.gov/wp-content/uploads/wpfd/49/58b6db7c47c02.pdf (Last accessed: April 26, 2017).

[60] Letter to Gov. Rosselló Nevares, March 9, 2017; https://junta.pr.gov/wp-content/uploads/wpfd/50/58c1e7d75ab33.pdf (Last accessed: April 26, 2017).

Accordingly, in its *Board Resolution Adopted on March 13, 2017* the OB "approve[d] and certif[ied] the Governor's latest proposed Fiscal Plan, *as modified by [two] amendments*".[61] The second amendment required by the OB required that "the public pension system […] be overhauled..., **supplemented to provide for progressively reduced total pension outlays by 10% by fiscal year 2020**, to ensure the system can meet its obligations, **with protections to ensure that no member is pushed below the federal poverty line as a result of the reductions**". Following the issuance of its March 13, 2017 Board resolution, the OB issued a release whereby it further explained its actions. At this time the OB failed, again, to make any mention of the constitutional guarantees that preclude the reductions in the salaries, benefits and pensions of the Judiciary. Once again, the OB emphasized on the need to progressively reduce the **total cost of the pensions** to ensure the system's fulfillment of its obligations while also assuring that no member fall below the poverty line.

As the paper trail fully demonstrates, in the five (5) months between October 2016 and March 2017 the OB required unconstitutional retroactive reductions in the pensions of the Judiciary, alongside those of the government employees and public school teachers as a source to close the gap between the recurring expenditures and revenues of the GPR. The resulting mandate of the OB that all pensions of the public pension system be reduced to contribute to a balanced budget constitutes an *ultra vires* act of the OB. PROMESA specifically provides in its Sec. 4 that "[t]he provisions of this Act shall prevail over any general or specific provision of territory law, State law, or regulation that is inconsistent with this Act".[62] This list includes neither federal law nor the United States or Puerto Rico Constitutions.

---

[61] Resolution - Fiscal Plan Certification, March 13, 2017; https://junta.pr.gov/wp-content/uploads/wpfd/50/58c6e140a43d4.pdf (Last accessed: April 26, 2017).
[62] 48 U.S.C. § 2103.

The PROMESA requirement that a Fiscal Plan provide adequate funding for the public pensions systems cannot be achieved by retroactively reducing the salaries, benefits, and/or pensions of the Judiciary. This act by the OB is *ultra vires* because:

1. It is contrary to the requirement in Public Law 600 that Puerto Rico's Constitution establish a republican form of government;

2. It is contrary to the requirement of the United States Constitution that an independent Judiciary conform the third co-equal branch of such government;

3. It is contrary to section 10 of Article V and sections 10 and 11 of Article VI of the Puerto Rico Constitution, an Act of the United States Congress itself pursuant to Public Law 447 of 1952, providing that the salaries and benefits of the Judiciary shall not be reduced during their term in office;

4. It is contrary to Public Law 447 itself, which approved the Puerto Rico Constitution with the caveat that any amendments or revisions be consistent with Public Law 447, Public Law 600, the United States Constitution and the Puerto Rico Federal Relations Act; and,

5. It is contrary to all the case law, both federal and state, which runs through constitutional law in federal and state courts throughout the country.

PROMESA itemizes the powers of the OB with studious detail. Nowhere in PROMESA is there any mention of a power delegated to the OB that equates that which Congress, pursuant to the United States Constitution, has over the territories, including Puerto Rico. The power of the OB exists under the Territorial Clause but is not co-extensive with it. Congress never delegated any of its plenary authority over Puerto Rico to the OB. Thus, the OB's power over the territory is limited in a way that Congress's is not: the powers of the OB are bounded by the parameters set forth in its enabling act, whereas Congress retains its plenary powers, as set forth in the U.S. Constitution. Only Congress may act in such a manner as to alter or amend Puerto Rico's current self-government structure, within the confines of the Territorial Clause.

VI. THE LAW OF JUDICIAL INDEPENDENCE VIS-À-VIS JUDICIAL PENSIONS

Legal precedent has indisputably established that judicial pensions, in addition to judicial salaries and other benefits, are protected under the United States Constitution. Abundant legal precedent from the Supreme Courts of the States of the Union has held similarly upon interpreting state constitutions that mimic the United States Constitution, thus contain provisions protecting the salaries and benefits of the members of the States' Judiciary branches. Premised on the fact that, by Congressional mandate, Puerto Rico's Constitution also provides for a three-coequal branch system of government including an independent judiciary, Art. VI, Sections 10 and 11 and Art. V, Sec. 10 of Puerto Rico's Constitution have been interpreted also, and indisputably, to the effect that judicial salaries, benefits and pensions are not amenable to retroactive reduction by an act of the Legislative or the Executive Branches.

Art. III, §1 of the United States Constitution (the Compensation Clause) explicitly provides that judges shall "receive for their services a compensation, which shall not be diminished during their continuance in office." The term "compensation" has been repeatedly held as not only interchangeable with the term "salary," but to also include attending benefits such as pensions. [63] The protection granted the salaries and benefits of the judiciary entails that, regardless of the Congressional intent or purpose behind a law, if it enacts a retroactive reduction in the salaries of judges already appointed, such law will be found in violation of the Compensation Clause of the United States Constitution. [64] Legislative intent is irrelevant because "[t]he Constitution makes no exception for 'nondiscriminatory' reductions." [65]

---

[63] *See Booth v. United States*, 291 US 339 (1934).
[64] *U.S. v. Hatter*, 532 U.S. 557, 577 (2011).
[65] *U.S. v. Will*, 449 US 200, 226 (2000).

Judges are not exempt from their duty to pay income and property taxes as citizens of the state. Members of the judiciary are subject to those taxes levied by the legislature that apply to all citizens equally, without special distinction, such as contributions to Medicare. [66] The Legislature, however, may not *directly* reduce judicial salaries as part of an equitable effort to reduce all government salaries. The distinction is due to the fact that, while taxation affects compensation just as well, it does so indirectly rather than directly. As regards direct reductions, the Courts look to the outcome of any legislation that includes a reduction in salary, not the motivation behind it. [67]

In *Booth v. United States*, 291 US 339 (1934), the United States Supreme Court faced whether a federal judge who retires under section 260 of the Judicial Code [68] continues to have a vested interest in his compensation sufficient to merit protection under the Compensation Clause. The Court found that in such situations, the retiring judge in question "does not relinquish his office" and as such, his salary must remain intact. This applies even if, by means of a previous increase the salary earned by the judge at the moment of retirement was higher than the one earned when he took office. [69] It is patently clear that the word "compensation" is construed to include pensions, and that upon retiring, a judge is entitled to receive a pension commensurate with what had been fixed by law prior to that stage. The legislature has discretion to appoint judicial salaries since the phenomenon of inflation made it "inadmissible" for the federal Constitution to include a fixed amount of compensation; but this body is prevented from "chang[ing] the condition of the individual for the worse." [70]

---

[66] *See O'Malley v. Woodrough*, 307 US 277, 282 (1939); *Hatter, supra*, at 572.
[67] *Hatter, supra*, at 577.
[68] 28 U.S.C. §375.
[69] *See Booth* at 351-352.
[70] *Will, supra*, at 220, citing The Federalist No. 79, p. 491-492 (1818).

In keeping with these principles, various states have included the prohibition against judicial salary reductions in their own constitutions. For instance, Maine and New Jersey have both specifically adopted the federal Compensation Clause into their constitutions. Moreover, these states actually expanded the federal constitutional provisions by extending this protection to judges appointed for finite terms as opposed to lifetime appointments, so long as they experience "continuance" in office.[71] Other states, such as New York, specify in their own constitutional compensation clauses that increases in judicial compensation will be established through affirmative legislation.[72] In Indiana, participation in the judicial retirement system is voluntary, but the Indiana Constitution still protects judicial compensation in the form of pensions, of those who chose to participate in the retirement system.[73]

Delaware also expanded the non-diminution clause it had adopted directly from the federal Constitution to include emoluments of office, extending this protection to all public officers in the state after their election or appointment and forbidding either direct or indirect changes.[74] "Emoluments" was defined as "the profit arising from office or employment; that which is received as compensation for services, or which is annexed to the possession of office as salary, fees and prerequisites."[75] In *Carper v. Stiftel*, 384 A.2d 2 (Del. Supr. 1977), the Delaware Supreme Court interpreted that "emoluments" encompassed the judicial pension system and that a proscribed diminution could be caused either by increasing contributions to the plan or decreasing benefits.

As stated above, a proscribed reduction in salary even includes the modification of contributions to judicial pensions. This is so even when implemented prospectively as an

[71] *See Voorhees v. Sagadahoc County*, 900 A.2d 733, 737 (2006).
[72] *See Pines v. State*, 115 A.D.3d 80, 85 (2014).
[73] *See Board of Trustees of Public Employees' Retirement Fund v. Hill*, 472 N.E.2d 204, 208-209 (1985).
[74] *See Lee v. State Bd. of Pension Trustees*, 739 A.2d 336, 342- 343.
[75] *Lee* at 343.

aggregate contribution, if there is no simultaneous increase to compensate members of the judiciary for the net loss. In *DePascale v. State of New Jersey*, 211 NJ 40 (2012), the Supreme Court of New Jersey determined that since the mandatory pension and health-care contributions established by a recent law affected the take-home salaries of the judiciary and represented a ten percent (10%) decline in disposable income, the law violated the Compensation Clause of the New Jersey Constitution. A previous bill had already set forth an increased contribution rate for public employees as part of pension and health benefit reforms, but its terms stated the application would be prospective and only include new members of the Judicial Retirement System as permitted under the state constitution. [76]

In holding as summarized, *DePascale* followed the Supreme Court of the United States' holding in *US v. Will, supra*, that the Legislature did not have the power to repeal cost of living increases to the judiciary that had taken effect as law, despite the fact that there was a freeze of this type of increase applicable to other government officials, because the right to the increases had already vested. The Delaware Supreme Court had addressed this issue and come to the same conclusion approximately thirty years earlier in *Stiftel v. Malarkey*, 384 A.2d 9 (1977), holding that statutory enactments removing the prospective cost of living increments for public officials violated Article XV, Sec. 4 of the Delaware Constitution. There is an obvious overlap between federal and state jurisdictions when it comes to shielding judicial pensions and analogous benefits from diminution.

It is worth noting that in *DePascale*, the New Jersey Supreme Court highlighted that no court of last resort, including the United States Supreme Court, had upheld the constitutionality of legislation increasing the contributions of judges to their pension plans and that the' State, in

[76] *DePascale, supra* 211 NJ at 46.

defending its legislative enactment had pointed to no support in United States Supreme Court case law for its proposition that a diminution in judicial salary, however characterized, passed constitutional muster. [77] Additionally, the New Jersey Supreme Court explained that the Constitutional prohibition contained in the Compensation Clause remained firm *even when a state is facing a dire economic situation*:

> We are fully cognizant of the serious fiscal issues that confront the State and that led to the passage of Chapter 78. We recognize that those issues require resolution. The Framers understood that the future fiscal affairs of our State could not be predicted and therefore refused to prescribe in the Constitution a set dollar amount to either judicial pay or pension … That wise decision by the Framers in no way is inconsistent with the concomitant recognition that the pay of sitting judges cannot be reduced or diminished during their service. ... Even a "worthwhile" public policy goal must be established through constitutional means. [78]

Finally, when Puerto Rico drafted its own Constitution in 1952, it followed the tracks of the federal government and states like Maine and New Jersey. In Sections 10 and 11 of Art. VI, the Puerto Rico Constitution provided, respectively, that the compensation of judges was to be established by the Legislature, could not be reduced during their term in the position, and that no law could extend their term in office nor diminish the salaries and benefits after their appointment. The Puerto Rico Constitution, moreover, was more specific than the federal Constitution. In its Art. V, Sec. 10, Puerto Rico's Constitution specifically provided that the Legislature was to establish a pension system for the Judiciary, which would activate upon mandatory retirement at the age of 70. The Puerto Rico Constitution further includes the terms "salary" and "emoluments" in its analogous No-Diminution Clause, which terms have been

[77] *Id*. at 42, 60.
[78] *Id*. at 63-64.

consistently interpreted to comprise all benefits related to a public employee's work charge, which logically includes pensions.

Within the past few years, the Puerto Rico Supreme Court has definitively established the unconstitutionality of reducing judicial salaries and/or emoluments. In *Brau, Linares v. ELA*, 190 D.P.R. 315 (2014), the Puerto Rico Supreme Court held that a proposed judicial pension reform was unconstitutional insofar as it was not limited to incoming judges, but rather affected the future retirement of judges who were already named and working as such. Similar to *DePascale*, the original bill under scrutiny in *Brau, Linares* provided that some reductions or changes would be prospective. In the end, however, the final text of the law added cuts to various bonuses and increased contributions to the pension system, among others, yet failed to specify that these additional changes also were prospective. The *Brau, Linares* Court concluded that the protection of judicial salaries, emoluments and pensions withstood even against arguments by the Government that the measures were intended to combat a fiscal crisis.

Brau, Linares is a bedrock case because the Puerto Rico High Court distilled applicable precedent from federal and other state jurisdictions, as well as Puerto Rico, to come to its decision. In its review of case law, the Court concurred that judicial compensation includes pensions, and that neither salaries nor pensions may be reduced retroactively.[79] The Puerto Rico Supreme Court also highlighted in *Brau, Linares* that the judicial retirement system established in the Puerto Rico Constitution is vested with a double level of protection; that is, under a state charter as well as the federal Constitution.[80]

---

[79] *See, e.g., Lee v. State Bd. Of Pension Trustees*, 739 A.2d 336 (Del. 1999); *White v. Com. Employees' Retirement System*, 565 A.2d 839 (Pa. 1989); *Board of Trustees of Public Employees Retirement Fund v. Hill*, 472 N.E.2d 204 (Ind. 1985).

[80] *See Brau, Linares*, 190 D.P.R. at 347, *citing García Martínez v. Gobernador*, 109 DPR 294, 297 (1979).

Puerto Rico indisputably followed in the footsteps of the federal founding fathers when crafting its Constitution in 1952. For the past 65 years, this jurisdiction has upheld the importance of judicial independence as maintained through undiminished judicial compensation. Thirty-two years ago, the Puerto Rico Superior Court overturned a law that retroactively reduced the pensions of all sitting and retired judges.[81] The Court declared the law unconstitutional because it frustrated the purposes and motives of the Commonwealth Constitution by allowing an undue intrusion upon the judicial branch, notwithstanding the apparent proper motives of the legislature when enacting it. The *Brau, Linares* Court concluded that the Legislature had attempted to effectively "achiev[ing] indirectly what the Puerto Rico Constitution prohibits and tries to avoid."[82] Right on point as regards the inquiry presented before this Court, the *Brau,* Linares Court found that while the intent to ameliorate the country's financial difficulties at that time may have been "laudable," making the law's provisions retroactive was a grave mistake.[83]

With *Dávila* judicial independence withstood the legislative branch's constitutional assault. This case bolstered the doctrine of judicial independence and placed the executive branch on watch against potential *ultra vires* acts in this respect until *Brau, Linares*, nearly thirty years later. Even so, since *Dávila* there has been no doubt that the Puerto Rico Supreme Court would ultimately decide in favor of defending the separation of powers doctrine and the judicial independence that is part and parcel of the former through the protection of judicial salaries, emoluments, and pensions. Like other courts before, the highest forum in Puerto Rico determined in *Brau, Linares* that sitting and retired judges at the moment of the law's implementation had a vested interest in their pensions that was protected constitutionally. The

[81] *Dávila v. ELA*, 86 S.T.S. 65 (1986).
[82] *Brau, Linares* 190 D.P.R. at 352, *citing Dávila*, 86 S.T.S. at 66 (translation ours).
[83] *See Brau, Linares* 190 D.P.R. at 353.

legislature could not deprive them of this compensation, and so the law was limited to prospective application in keeping with the extensive precedent on the subject.

The analysis of case law presented is but a portion of relevant judicial precedent from federal and state courts. Across varied states and federal districts, there is agreement that judicial independence, safeguarded by non-diminishable compensation, is the most effective means of upholding the separation of powers doctrine. This doctrine is the *ne plus ultra* of the republican system of government; should it fail, the entire political system would come into question and undermine centuries of legal policy.

VII. DECLARATORY JUDGMENT IS APPROPRIATE

Plaintiff APJ seeks a judgment from this court declaring that the OB acted *ultra vires* in approving and certifying a Fiscal Plan for the Puerto Rico territory, pursuant to PROMESA, that required the GPR to implement a retroactive reduction of the pension payments to the judiciary. The declaration sought is premised on the provisions of the United States and the Puerto Rico Constitution, as well as the interpretative case law of the United States and Puerto Rico Supreme Courts, all to the effect that, neither the salaries nor the benefits of the judiciary, including their pensions, may be retroactively reduced. [84]

The declaratory judgment statute explicitly recognizes the limitation imposed by Art. III of the Constitution of the United States to the jurisdiction of federal courts, to "cases" and "controversies" [85] by premising relief of this nature on the existence of an actual controversy. [86] [87] The party seeking a declaratory judgment has the burden of establishing the existence of such

[84] *See generally Hatter*, *supra*; *Booth*, *supra*; *Brau, Linares*, *supra*.
[85] U.S. Const. Art. III, § 2, cl.1
[86] "In a case of actual controversy within its jurisdiction, [. . .], any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such." 28 U.S.C. §2201(a).
[87] *See Sallen v. Corinthians Licenciamientos LTDA*, 273 F.3d 14, 25 n. 12 (1st Cir.2001) cited in *Diagnostic Imaging Supplies v. General Electric Co.*, 2006 WL 2077032 (D.P.R.).

actual case or controversy.[88] In determining whether this burden has been satisfied, the relevant question in each case "is whether the facts alleged under all the circumstances show that there is a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment."[89]

Additionally, requests for a declaratory judgment may not be granted unless they arise in a context of a controversy "ripe" for judicial resolution.[90] The need of ripeness as an Article III requirement is emphasized in the Declaratory Judgment Act itself (*supra*), which refers to an "actual" controversy, making it a *sine qua non* of any assumption of federal jurisdiction.[91] Where challenges are asserted to government actions and ripeness questions arise, a court must consider both, "fitness" for review and "hardship".[92] Plaintiff APJ's complaint easily meets the jurisdictional test requiring an actual case or controversy, as well as both requirements of the fitness test.

APJ presents to this court a "live and acute controversy that must be resolved",[93] rather than an abstract or hypothetical question that is unfit for the remedy requested. Beginning July 1, 2017 the GPR will begin to comply with the mandate of the OB requiring the reduction of the pensions paid out to the Judiciary. As such, the declaration that the act by the OB mandating the relevant action from the GPR is *ultra vires* will resolve a real controversy between the APJ and the OB regarding a substantial controversy between the parties. On March 13, 2017 the OB

---

[88] *Diagnostic Imaging Supplies*, at 2, citing *Cardinal Chemical Co. v. Morton Int'l, Inc.*, 508 U.S. 83 (1993)(citing, in turn, *Aetna Life Ins. Co. of Hartford, Conn. v. Haworth,* 300 U.S. 227, 240-241 (1937)).
[89] *Lizza & Sons, Inc. v. Hartford Acc. & Indem. Co.*, 247 F.2d 262, 265 (1st Cir. 1957), citing *Maryland Casualty Co. v. Pacific Coal & Oil Co.*, 312 U.S. 270, 273 (1941).
[90] *Abbot Labs. v. Gardner*, 387 U.S. 136, 148-149 (1967), *abrogated on other grounds by Califano v. Sanders*, 430 U.S. 99 (1977).
[91] *Verizon New England, Inc. v. Int'l Bhd. of Elec. Workers, Local No. 2322*, 651 F.3d 176, 188 (1st Cir. 2011).
[92] *Ernst & Young v. Depositors Economic Protection Corp.*, 45 F.3d 530, 535 (1st Cir. 1995), *cited in Verizon New England, Inc.*, 651 F.3d at 188.
[93] *Steffel v. Thompson*, 415 U.S. 452, 459 (1974)

engaged in final form in the challenged act of approving and certifying a FP for Puerto Rico.[94] Moreover, the GPR is currently obligated to make its budget comply with this FP beginning July 1, 2017.[95] At this time, then, there is no pending action by the OB regarding this matter. Moreover, given that the March 13, 2017 FP is in effect and it sets the mandatory parameters for the budget to be implemented in fiscal year 2017-2018, the required the cut in pensions payment by GPR will occur come July 1, 2017.

The controversy between the APJ and the OB allows an immediate and definitive determination of the legal rights of the concerned parties pursuant to the absolutely clear applicable case law from the United States and Puerto Rico Supreme Courts. On the one side, the OB has already engaged in an act that is purportedly within the mandate of PROMESA while, on the other hand, Plaintiff APJ claims that such act surpasses the limited authority delegated by Congress to the OB and the APJ members stand to be adversely affected by the implementation of the FP beginning with the 2017-2018 budget. Once the GPR begins to reduce the pensions to be paid out to retired judges beginning July 1, 2017, the already retired members of the APJ and those members who subsequently retire will have a claim against the GPR for such moneys unlawfully and unconstitutionally retained.

APJ does not seek declaratory relief regarding a *threatened* governmental action, but rather regarding an action which course is certainly set to occur. Even if it were the case that the relevant action was only threatened at this time, this fact would not preclude this Court from granting the relief requested.[96] While Plaintiff's members are not quite yet being affected by the action, damage is evidently forthcoming to them in the term of less than two (2) months. As

---

[94] *See* Resolution - Fiscal Plan Certification, March 13, 2017, n. 26.
[95] PROMESA sec. 202(c)(1) (28 U.S.C. § 2142(c)(1) ("The Governor shall submit to the Oversight Board proposed Budgets ... the Oversight Board shall determine in its sole discretion whether the proposed Budget is compliant with the applicable Fiscal Plan.).
[96] *See Medimmune, Inc. v. Genetech, Inc.*, 459 U.S. 118, 128 (2007).

such, the factual and legal dimensions of the dispute presented are well defined and nothing about the dispute would render it unfit for judicial resolution. APJ's claim does not involve uncertain and contingent events that may not occur as anticipated or may not occur at all. [97] Moreover, as is evident from the presentation in this brief, that APJ's claim is of an intrinsically legal nature and presents a concrete factual situation, such it is more likely to be found ripe. [98]

Finally, the challenged action creates a direct and immediate dilemma for the parties, such that the hardship prong of ripeness is also met. [99] Looking at this prong from the flipside of the hardship question facilitates the analysis. As such, when we 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" [100], the answer is a certain yes. The useful purpose served by the sought-after declaration is evident: once such a declaration is issued, and before a concrete harm is taken on by the judiciary, the OB will know for certain whether it can follow through with the FP approved or whether it has to find an alternative, legal source for the portion of the fiscal gap that it intends to address with the monies that, as it stands now, are to be reduced from the pensions of the judiciary.

With the enactment of PROMESA and the institution of the OB for Puerto Rico, a new aspect of the controversy regarding the extent of the "non-diminution" constitutional protection of the pensions of the Judiciary has arisen. A declaration of this Court that the OB acted *ultra vires* in directing that the pensions of the judiciary be reduced to contribute to the fiscal gap in

---

[97] *Riva v. Comm of Mass.*, 61 F.3d 1003, 1009 (1st Cir. 1995) *citing Massachusetts Ass'n of Afro-American Police, Inc. v. Boston Police Dep't*, 973 F.2d 18, 20 (1st Cir. 1992).
[98] *See Riva*, 61 F.3d at 1010, *referencing Pacific Gas & Elec. Co. v. State Energy Resources Conserv. & Dev. Comm'n*, 461 U.S 190, 201 (1983) and *California Bankers Ass'n v. Schultz*, 416 U.S. 21, 56 (1974).
[99] *W.R. Grace & Co. v. USEPA*, 959 F.2d 360, 364 (1st Cir. 1992), *cited in Riva*, *supra*.
[100] *Riva*, *supra*, *citing State of R.I. v. Narragansett Indian Tribe*, 19 F.3d 685, 693 (1st Cir 1994) *cert denied*, 513 U.S. 919 (1994).

the government's operating budget would lay to rest the controversy arising from the recent and never-before-seen event of the institution an OB for Puerto Rico.

Plaintiff APJ's members will face a cognizable hardship if judicial review of the relevant act is denied. [101] The harm to Plaintiff APJ's members is evident in the fact that many of them will immediately begin receiving reduced pensions by as much as anywhere between 6% and 24% or the equivalent of a reduction between $150.00 and $2,400.00 per month. [102] Clearly, the hardship to these individuals will be direct, rather than collateral. [103] What is more, if the requested relief is not provided promptly, Plaintiff APJ's members will soon have a claim for damages against the very same government that is obligated to comply for the next ten years with the FP that mandates the very reduction they are challenging. In the term of time that it will take for claims by members of the Judiciary to be heard in court, they, their widows, minor children and/or dependents will go without these moneys and the need they satisfy with the funds; some may even pass away without ever recovering what has been guaranteed to them by the Puerto Rico Constitution, as empowered and ratified by the United States Congress.

And of course, the fundamental concept of judicial independence, thus an element at very core of our system of government, will suffer irreparable harm.

VII. CONCLUSION

The case law that supports Plaintiff APJ's request for declaratory judgment is overwhelming. There is no support in all the United States Supreme Court case law for the proposition that a diminution in judicial salary, however characterized, passes constitutional muster, even when the rationale behind an attempt to this effect may be as imperative as a fiscal

[101] *Ernst & Young*, 45 F.3d at 536.
[102] Fiscal Plan Submitted by the Government of Puerto Rico, February 28, 2017, at p. 65; https://junta.pr.gov/wp-content/uploads/wpfd/50/58b79bb6009fd.pdf (Last accessed: May 2, 2017).
[103] *See, e.g.*, cases cited in *Ernst & Young*, 45 F.3d at 536-537.

crisis of Puerto Rico's magnitude. The principle of judicial independence protected by this proscription, simply, is too preeminent to the republican system of government at the heart of our democracy to admit any exception.

The case of Puerto Rico may not be a sole, sore exception to the rule, with or without PROMESA and the OB. Congress did not delegate to the OB any of its power with respect to the manner in which Puerto Rico was to execute the authority granted to establish some form of self-government or, for that manner, how that the structure of that self-government is to change, if at all, at this point in time.

The approval by the OB of a FP that provides for the retroactive reduction in the pensions of the judiciary impermissibly alters Puerto Rico's current self-government structure in a manner that only corresponds to Congress. Congress approved the Puerto Rico Constitution with its "Compensation" and "Non-diminution" clauses and it shall remain so until Congress provides otherwise. Because Congress has "no capacity, no magic wand or airbrush, to erase or otherwise re-write its role in conferring political authority" to the people of Puerto Rico, the act of the OB requiring a reduction in the judiciary's pensions, which attempts against its basic structure of governance as it was approved by Congress in 1952, constitutes an *ultra vires* act of that entity, and must be declared as such by this Honorable Court. To do otherwise undermines centuries of judicial tradition and constitutes a *de facto* amendment of the Puerto Rico Constitution. There can be no doubt that such act by the OB against this Congressionally enacted document is not sanctioned by either judicial or legislative precedent.

Declaratory judgment is not only appropriate but necessary. The harm to Plaintiff APJ's members is imminent; the damage to the public interest has been inflicted as of March 13, 2017. The latter blow, if allowed to subsist, is of irreparable magnitude, because the vital elements of a

strong democratic government are indispensable to Puerto Rico, as much as they are to the United States, since Congress remains as the ultimate source of or origin of the People of Puerto Rico's power. The OB does not have the power to change this.

WHEREFORE, Plaintiff APJ respectfully requests that this Honorable Court issue **JUDGMENT** declaring the act of the OB in approving and certifying a FP for PR that directs the government to reduce retroactively and impermissibly the pensions of the Judiciary is *ultra vires*.

RESPECTFULLY SUBMITTED.

In San Juan, Puerto Rico this 3rd day of May, 2017.

INDIANO & WILLIAMS, P.S.C.
207 del Parque Street; 3rd Floor
San Juan, P.R. 00912
Tel: (787) 641-4545; Fax: (787) 641-4544
david.indiano@indianowilliams.com
jeffrey.williams@indianowilliams.com
leticia.casalduc@indianowilliams.com

by: ***s/ David C. Indiano***
DAVID C. INDIANO
USDC-PR NO. 200601

by: ***s/ Jeffrey M. Williams***
JEFFREY M. WILLIAMS
USDC-PR No. 202414

by: ***s/ Leticia Casalduc-Rabell***
LETICIA CASALDUC-RABELL
USDC-PR No. 213513