

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

COMITÉ DIALOGO AMBIENTAL,
INC., et al.,

Plaintiffs,

v.

FEDERAL EMERGENCY
MANAGEMENT AGENCY,
DEPARTMENT OF HOMELAND
SECURITY, DEANNE CRISWELL,
and ALEJANDRO MAYORKAS,

Defendants.

No. 3:24-cv-01145-JAG

BRIEF OF AMICI LATINOJUSTICE PRLDEF AND
THE AMERICAN CIVIL LIBERTIES UNION
IN SUPPORT OF PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

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<i>United States v. Belmont</i> , 301 U.S. 324 (1937)	18
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<i>Zicherman v. Korean Air Lines Co.</i> , 516 U.S. 217 (1996)	18

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40 C.F.R. § 1508(w)(1)(iii)(v)	4
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Executive Order 14008, 86 F.R. § 7619	12

Executive Order 14096, 88 F.R § 25251	12
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A. Cassese, <i>Self-Determination of Peoples: A Legal Reappraisal</i> (1995)	18
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<i>Case Concerning East Timor (Portugal v Australia)</i> , ICJ Reports 1995	18
Catalina M de Onis, <i>Energy Colonialism Powers the Ongoing Unnatural Disaster in Puerto Rico</i> , Frontiers in Communication (Jan 29, 2018).....	16
Centro Comprehensivo de Cáncer, <i>Boletín del Registro Central de Cáncer</i> (March 2013)	21
Colin Grabow and Alfredo Carrillo Obregon, <i>The Jones Act is Forcing Puerto Rico to Overpay for Energy</i> , Cato Institute (Jul. 25, 2022)	14
Council on Environmental Quality, <i>Environmental Justice: Guidance under the National Environmental Policy Act</i> (December 10, 1997)	12
E. Rivera Ramos, ‘Deconstructing Colonialism: The ‘Unincorporated Territory’ as a Category of Domination, <i>Foreign in a Domestic Sense: Puerto Rico, American Expansion, and the Constitution</i> (2001)	25
Environmental Protection Agency, <i>Environmental Justice</i> (May 8, 2024)	12
Environmental Protection Agency, <i>What Climate Change Means for Puerto Rico</i> (August 2019)	10
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Federal Emergency Management Agency, <i>FEMA Fact Sheet on Executive Order 12898: Environmental Justice</i> (March 2022).....	13
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Fernand de Varennes, <i>Report of the U.N. Special Rapporteur on Minority Issues</i> (2021)	21
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<i>From 1947 to 1998, Global Security: Health, Science and Policy Vol. 2 No. 1, (August 14, 2017)</i>	16
<i>Heterogeneity of Childhood Asthma Among Hispanic Children: Puerto Rican Children Bear a Disproportionate Burden</i> , 117 Pediatrics 43 (2006).....	16
International Convention on the Elimination of All Forms of Racial Discrimination (ICERD)..	19
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John Yoon, <i>Outage Leaves About 350,000 Customers in Puerto Rico Without Power</i> , N.Y. Times (June 13, 2024).....	15
Juan R. Torruella, <i>The Supreme Court and Puerto Rico: The Doctrine of Separate and Unequal</i> ,” Editorial de la Univ. de P.R. (1985).....	24
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Mariah Espada, <i>Solar Power is Helping Some Puerto Rico Homes Avoid Hurricane Fiona Blackouts</i> , TIME, (September 20, 2022)	7
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NASA, <i>Extreme Weather and Climate Change</i> _(April 2024).....	9
Nat’l Renewable Energy Lab’y Et Al., <i>Puerto Rico Grid Resilience and Transitions to 100% Renewable Energy Study (PR100) Summary Report</i> (February 2024).....	6
North Am. Elec. Reliability Corp., 2023 State of Reliability Overview (2023).....	6
PR 100 Final Results (February 2024).....	6
PR100 (February 2022).....	6
PR100 One-Year Progress (January 2023).....	6
<i>Public Facilities PEA</i> (AR11864)	8
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<i>Report of the U.N Special Rapporteur on Extreme Poverty and Human Rights</i> (2018)	21
Robert Walton, <i>Puerto Rico’s Electricity Rates Have Nearly Doubled Since 2020: IEEFA, Utility Dive</i> (July 18, 2022).....	14
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Sherrie Baver, <i>Environmental Justice and the Cleanup of Vieques</i> at 8, Centro Journal, City College of New York (March 2006).....	16
<i>Summary of the panel discussion on the negative impact of the legacies of colonialism on the enjoyment of human rights: Report of the Office of the UN High Commissioner for Human Rights</i> , A/HRC/54/4, (1 June 2023).....	19
<i>The Sustainable Development Goals Report</i> , United Nations (2023)	20
U.S. Commission on Civil Rights, <i>Civil Rights and Protections During the Federal Response to Hurricanes Harvey and María 2022 Statutory Report</i> (2022)	13, 21, 22
U.S. Dep’t of Homeland Sec., U.S. Dep’t of Energy, U.S. Dep’t of Hous. & Urb. Dev., Gov’t of Puerto Rico, Memorandum of Understanding: Collaboration for the Recovery and Resilience of Puerto Rico’s Energy Sector (February 1, 2022),	5
White House Statement, <i>Justice40 Initiative</i> (March 1, 2022); E.O. 14008, <i>Tackling the Climate Crisis at Home and Abroad</i>	20
White House Statement, <i>U.S. Action on Global Development</i> (Sept. 20, 2023)	20

INTEREST OF AMICUS CURIAE¹

LATINOJUSTICE PRLDEF (LatinoJustice) is a national civil rights organization founded in 1972 as the Puerto Rican Legal Defense and Education Fund. LatinoJustice is dedicated to protecting the civil, constitutional, and human rights of Puerto Ricans and the wider Latino community. For more than 50 years, LatinoJustice has been at the forefront of advocating against injustice throughout the United States. Our commitment extends to addressing systemic inequalities and promoting justice for marginalized communities.

LatinoJustice is particularly committed to ensuring a resilient and sustainable future for Puerto Ricans. In the aftermath of Hurricane Maria, LatinoJustice responded robustly to the unprecedented disaster that affected Puerto Ricans both on the Archipelago and in the Diaspora. We have since continued to support relief and recovery efforts, emphasizing the importance of equitable access to disaster relief. LatinoJustice's extensive experience in civil rights advocacy, disaster resilience, and environmental justice positions us as a significant stakeholder in this case. We bring a deep understanding of the legal and socio-economic challenges faced by Puerto Ricans and the broader Latino community, and we are committed to promoting policies that ensure equitable treatment and sustainable development.

THE AMERICAN CIVIL LIBERTIES UNION (ACLU) is a non-partisan organization with over four million members, activists, and supporters dedicated to the principles of liberty and equality enshrined in the Constitution. The ACLU is devoted to protecting the civil

¹Amici affirms that no counsel for a party authored this brief in whole or in part, and no party other than amicus or its counsel made a monetary contribution to the preparation or submission of this brief. All parties received timely notice of the filing of this brief. Plaintiffs consented to the filing of this brief.

and democratic rights of all who live in the United States, including the residents of Puerto Rico and other unincorporated U.S. Territories — including the almost 3.5 million U.S. citizens among them. As the ACLU explained over 80 years ago, it is committed to the “[m]aintenance of civil liberties in the [territories],” which it considers “essential to political or economic reforms of any sort.” ACLU, *Civil Liberties in American Colonies* 7 (1939). Its Racial Justice Program challenges laws, policies and legal precedent that discriminate or otherwise disparately harm residents of the United States territories including Puerto Rico.² Its chapter in Puerto Rico is devoted to, among other things, promoting the internationally recognized right to self-determination for its residents. The ACLU’s interests are implicated whenever the federal government imposes its will on the rights of residents of the territories without their consent or meaningful participation, as alleged here.

INTRODUCTION

Amici respectfully submit this brief in support of Plaintiffs’ Motion for Summary Judgment. Plaintiffs seek to vacate and set aside the Programmatic Environmental Assessment (PEA) and Finding of No Significant Impact (FONSI) issued for the Puerto Rico Fossil Grid Entrenchment Program. For the reasons described below, Amici seek the same.

The Federal Emergency Management Agency (FEMA) violated the National Environmental Protection Act (NEPA) by failing to perform an Environmental Impact Statement (EIS), which NEPA requires given the nature and scope of FEMA’s plans for Puerto Rico. FEMA’s bare alternative analysis (PEAs), captured in its Puerto Rico Fossil Enrichment Project and Puerto Rico Public Facilities Project (Projects), failed to give meaningful consideration to

² ACLU, Racial Justice, Anti-Colonialism, <https://www.aclu.org/issues/racial-justice/anti-colonialism> (last visited Aug 21, 2024).

reasonable alternatives and other important factors, including how the ever-growing risk of climate change could affect its plans, alternatives to archaic fossil-fuel dependency, environmental policies, and the fundamental human right to health. FEMA continues to violate NEPA and undermines Puerto Rico's rights to self-determination and transparency from the local and federal government. These actions are arbitrary and capricious under NEPA³. Puerto Rican people set an ambitious goal of achieving completely renewable energy by 2050, codified this goal, and the PR 100 Study confirmed the achievability of this goal. Yet FEMA has disregarded Puerto Rican voices and directly relevant scientific studies, underscoring FEMA's indifference to the rights of the Puerto Rico's residents to a resilient future.

ARGUMENT

I. FEMA violated the National Environmental Protection Act (NEPA) by Ignoring the Risks of Climate Change and the Promise of Renewable Energy in Pursuing a Rebuild of Archaic Fossil-Fuel Based Electricity Grid.

a. FEMA Cannot be Excused for its Failure to Provide an Environmental Impact Statement (EIS).

FEMA failed to complete a proper NEPA analysis in deciding to conduct two Programmatic Environmental Assessments (PEAs) instead of an EIS. NEPA requires major federal actions that significantly affect the quality of the human environment to prepare an EIS. 42 U.S.C. § 4332(2)(C). The threshold questions to determine whether an agency must create an EIS are “(1) whether it [the agency] is dealing with legislative recommendations or major federal actions and (2) whether the environmental impacts [of the agency's proposals] are significant.”⁴ An EIS cannot be casually set aside. It serves a crucial function in advancing the broader goals of

³ When a plaintiff challenges an agency's action, such as an agency's decision not to issue an EIS, the reviewing court must determine whether the action was “[a]rbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.” 5 U.S.C. § 706(2)(A). *See also Marsh v. Oregon Natural Resources Council*, 490 U. S. 360, 375–376 (1989); *Kleppe v. Sierra Club*, 427 U. S. 390, 412 (1976).

⁴James E. Salzman and Barton H. Thompson, Jr., *Environmental Law and Policy* (343) (5th Ed. 2019).

environmental justice, as reflected in the NEPA. NEPA is meant to ensure that “important effects will not be overlooked or underestimated only to be discovered after resources have been committed or the die otherwise cast.” *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 349 (1989). NEPA requires a process whereby federal agencies take a “hard look” at the environmental consequences of their proposed actions. *United States v. Coal. For Buzzards Bay*, 644 F.3d 26, 31 (1st Cir. 2011). This “hard look” is intended to be captured in a comprehensive EIS.

FEMA’s failure to prepare an EIS here is arbitrary and capricious. If an agency’s plan constitutes a “major federal action” that unequivocally requires an EIS, or if an agency failed to adequately consider the significant effects that its proposed action would have on the environment, then its decision to forego an EIS is “arbitrary and capricious.” 42 U.S.C. § 4332(C); *See generally Motor Vehicle Mfrs. Ass’n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 US 29, 43 (1983). A major federal action is an action that the agency carrying out such action determines is subject to substantial federal control and responsibility. 40 C.F.R. § 1508(w). Some examples include adoption of formal plans which prescribe alternative uses of Federal resources and approval of or carrying out specific agency projects, “such as construction or management activities.” 40 C.F.R. § 1508(w)(1)(iii)(v).

Here, FEMA’s threadbare analysis—reflected in its two PEAs—are inadequate because it failed to consider reasonable alternatives to a fossil fuel system, the increasing risk of climate change, and dismissed impacts that the plans impose on the environment. Rebuilding an entire energy grid for the archipelago is a major federal action and requires nothing less than an EIS. Throughout the NEPA process, FEMA has failed to fully examine all necessary components and considerations, including the implications of reliance on a distributed energy grid, consideration

of environmental justice impacts, and public comments urging the creation of an EIS. FEMA must use the experiences borne from the destructive effects of Hurricanes Irma, Maria, and Fiona to revitalize the energy grid system and implement renewable and resilient energy generation. At minimum, it must consider how its plans affect Puerto Rico's goals for a renewable energy-based system. Anything less than an EIS is irrational and thus arbitrary. FEMA inexplicably dismissed a more resilient, reliable, and environmentally sustainable energy grid and put renewable energy alternatives on the same level of impact as rebuilding the energy grid. They ignored approaches embraced by expert studies, including the PR 100 study, and the policies of various federal agencies including FEMA itself. The PEAs must thus be vacated in favor of a full-throated EIS that explains FEMA's proposed actions and how they will affect the environment and Puerto Rico's renewable energy goals.

b. The PEAs Are Irredeemably Flawed Because They Do Not Consider Reasonable Alternatives of Renewable Energy Sources

Puerto Rico's goals are reflected in local law and through the PR100 study, a product of local and federal stakeholders, including FEMA, the Puerto Rico Electric Power Authority (PREPA), LUMA, industry sectors, and community groups. FEMA partly funded the PR100. Indeed, it signed a Memorandum of Understanding in February 2022 to commit to work toward and support Puerto Rico's renewable energy goals. Yet those goals conflict with the Finding of No Significant Impact (FONSI) that FEMA issued in its Projects' PEAs.⁵ The PEAs were erroneously adopted because the repair and rebuilding of an entire archipelago's energy grid that

⁵ Federal Emergency Management Agency, Puerto Rico Public Facilities Programmatic Environmental Assessment (December 2022) https://www.fema.gov/sites/default/files/documents/fema-4336-4339-4473-public-facilities-signed-fonsi_12272022.pdf; *see also U.S. Dep't of Homeland Sec., U.S. Dep't of Energy, U.S. Dep't of Hous. & Urb. Dev., Gov't of Puerto Rico, Memorandum of Understanding: Collaboration for the Recovery and Resilience of Puerto Rico's Energy Sector* (February 1, 2022), <https://www.energy.gov/sites/default/files/2022-02/MOU%20-%20DOE-DHS-HUD-Puerto%20Rico.pdf>

affects millions of people constituted major federal action over which FEMA, as a federal agency, continues to exercise substantial federal control. To constitute a proper and full analysis, FEMA must meaningfully consider renewable energy and the direct and indirect cumulative effects of this project.

The PR100 Study confirmed the feasibility of Puerto Rico's critical goal to achieve 100 percent renewable energy by 2050. Importantly, the study explains that the current renewable energy resource potential in Puerto Rico exceeds by more than 10 times the required needs to meet the current and projected total annual loads through 2050. Nat'l Renewable Energy Lab'y Et Al., *Puerto Rico Grid Resilience and Transitions to 100% Renewable Energy Study (PR100) Summary Report* at 14 & 36 (February 2024). Although the study was published in 2024, FEMA played an integral part in interim, earlier, reports released periodically throughout the drafting, leaving no room for it to claim ignorance of the study's findings.⁶

The feasibility of Puerto Rico's energy goals is also confirmed by the fact that renewable energy sources and storage could be spread out across the archipelago.⁷ In 2022, The National Renewable Energy Lab, a national laboratory of the U.S. Department of Energy Office of Energy Efficiency & Renewable Energy, issued a study evaluating how to implement microgrids and minigrids in Puerto Rico. The study found that "the capability to form a microgrid within the physical boundaries of the traditional grid could potentially offer a high degree of flexibility in terms of the diversification of energy resources and the optimized energy delivery from local generation as well as resiliency under both normal and extreme operating conditions...." Rasel

⁶ Launch of PR100 (February 2022); PR100 6-month Progress update (July 2022); PR100 One-Year Progress Update (January 2023); PR 100 Final Results (February 2024).

⁷ M. Yazdanie, *Resilient Energy System Analysis and Planning Using Optimization Models*, 4 *Energy & Climate Change* 100097 (Dec. 2023); *See also* North Am. Elec. Reliability Corp., 2023 State of Reliability Overview 7-8 (2023).

Mahmud, David Narang & Michael Ingram, *Energy Resilient Recovery in Puerto Rico: Hurricane Maria Recovery Support 5* (Nat'l Renewable Energy Lab'y, 2022). Microgrids were found to be especially promising in that they could “provide a high degree of resiliency to natural disasters by delivering crucial energy needs to customers even when the main grid is unavailable” and with current technology “it is now possible to ensure the sustained, long-duration operation of a section of the grid or even a microgrid with no support from the main grid.” *Id* at 5-6. FEMA itself has written that “microgrids can help communities build resilient power systems” and that microgrids “[allow] communities to be more energy independent.” Fed. Emergency Mgmt. Agency, *Connecting Mitigation and Electric Power* (2020). FEMA can, for example look to Casa Pueblo in Adjuntas, Puerto Rico to understand how reasonable, feasible, resilient, and reliable solar microgrids can be as a source of electrical generation and provide a long-term sustainable recovery option for the archipelago. Casa Pueblo installed solar panels and storage to power 18 businesses in 13 buildings around the central plaza that withstood the force of Hurricane Fiona.⁸

Given (i) that the implementation of renewable energy microgrids is feasible given current technology, (ii) that FEMA has funded research concerning how to implement such technology, and (iii) that the agency has found such technology to increase the resilience of power systems, the agency should have considered the deployment of microgrids as a legitimate alternative source of energy instead of merely as a backup for the failed, outdated system. Unlike a fossil-fuel-based electrical grid, renewable energy sources do not emit greenhouse gases largely responsible for the climate crisis. By considering to a greater extent the voices of Puerto Rican

⁸ Mariah Espada, *Solar Power is Helping Some Puerto Rico Homes Avoid Hurricane Fiona Blackouts*, TIME, (September 20, 2022), <https://time.com/6215138/solar-power-puerto-rico-hurricane-fiona/>.

stakeholders, including their shared call for renewable energy, in its proposed action, FEMA could fulfill its goal of providing Puerto Rico with a functioning, more resilient grid that mitigates contributions to climate change. Its chosen course, by contrast, will hinder long-term resilience and recovery goals in Puerto Rico. FEMA's failure to address this feasible alternative violates its NEPA obligations.

To comply with NEPA, FEMA must provide an EIS that addresses diversification of centralization of power and Puerto Rico's renewable energy goals. FEMA continues to rely on fossil fuels to rebuild the energy grid in Puerto Rico and distribute it through a centralized system, with only minor investments in renewable energy sources for contingent energy supply. FEMA's PEAs give superficial attention to a renewables-based electric energy system as an alternative, deferring any consideration of both renewables and microgrids to any future projects or sub-projects that are proposed by funding subrecipients. The Public Facilities PEA and the discussed distributed solar as a source of backup for the facilities, not giving meaningful consideration to shifting fully to renewable sources. *Programmatic Env't'l Assessment, Public Facilities Infrastructure Recovery and Resiliency* (July 2022) (AR11864) (Galvin Dec., Ex 5).

c. Climate Change Threatens Puerto Rico and Must be Considered in an EIS.

Effects of a proposed action can include "climate change-related effects, including the contribution of a proposed action and its alternatives to climate change, and the reasonably foreseeable effects of climate change on the proposed action." 40 C.F.R. § 1508(i)(4). Climate change must be squarely considered by FEMA because it bears on the success of FEMA's plans including the potential degradation of the human environment on the archipelago. The importance of climate-change NEPA analysis was summarized by the Council on Environmental Quality (CEQ) in January 2023:

The United States faces a profound climate crisis and there is little time left to avoid a dangerous—potentially catastrophic—climate trajectory. Climate change is a fundamental environmental issue, and its effects on the human environment fall squarely within NEPA’s purview. Major Federal actions may result in substantial GHG emissions or emissions reductions, so Federal leadership that is informed by sound analysis is crucial to addressing the climate crisis. Federal proposals may also be affected by climate change, so they should be designed in consideration of resilience and adaptation to a changing climate.

National Environmental Policy Act Guidance on Consideration of Greenhouse Gas Emissions and Climate Change, 88 Fed. Reg § 1196-97 (Jan. 9, 2023). Even though this CEQ Guidance was adopted after FEMA’s PEA analysis in this case, the quoted language reflects the already-existing duty of all federal agencies to assess climate change effects in their NEPA analyses and is not a new rule.

As explained above, climate change will have significant impacts on the electrical grid and residents of Puerto Rico. More specifically, climate change will cause stronger weather events leading to more damage to the transmission lines and reliance on fossil fuels generation will only increase the effects of climate change by contributing to the greenhouse effect.⁹ Moreover, FEMA itself, in its 2020 Guide to Expanding Mitigation, observed:

Experts predict that extreme weather will continue to jeopardize electric power systems. The need to transition to renewable power sources (including solar, wind, hydro, biofuels and others) is immediate, and strategies to facilitate that transition should be expedited, especially in island communities. Rather than repairing a grid that does not provide sustainable or reliable power, communities should evaluate and shift to new solutions.

Fed. Emergency Mgmt. Agency, *Guide to Expanding Mitigation: Making the Connection to Electric Power* (2020).

FEMA’s project will affect an archipelago of 3.2 million people who are under the threat of climate change. These changes are independent of the hurricanes that regularly hit Puerto Rico.

⁹ NASA, *Extreme Weather and Climate Change* (April 2024), <https://science.nasa.gov/climate-change/extreme-weather/>

Indeed, even before the historic tragedy of Hurricane Maria, the Environmental Protection Agency (EPA) identified how climate change will affect Puerto Rico, including rising sea levels, retreating shorelines, increased flooding, and other threats to human health.¹⁰ Historically disadvantaged communities will bear the brunt of the effects of climate change and environmental injustices, including adverse social and economic impacts, most of the environmental harm, the worst of the health concerns, and the least amount of investment opportunities to make their communities more resilient.

An EIS is the proper vehicle to identify existing climate and environmental justice issues caused by past colonialism, discuss the impact of current FEMA projects, and define ways to mitigate or eliminate concerns. FEMA has failed to meet its NEPA obligations to consider climate-change impacts. Had FEMA chosen to meaningfully consider renewable energy, climate change, and greenhouse gases, as sought by local stakeholders, the effects of its proposed actions, both indirect and cumulative, would have been properly assessed in an EIS. FEMA's disregard for the voices of local stakeholders and their stated preference for renewable energy, as reflected in local law and the PR100 study, and to instead continue with its plans to repair the electrical grid to pre-disaster conditions is not only emblematic of the federal government's long history of ignoring local interests, it also hinders Puerto Rico's ability to prepare for the ongoing and ever-increasing climate crisis. FEMA's oversight must be corrected by a thorough discussion of climate change related impacts in an EIS—one that incorporates and develops local concerns and preferences for Puerto Rico's future energy needs.

¹⁰ Environmental Protection Agency, *What Climate Change Means for Puerto Rico* (August 2019), <https://19january2017snapshot.epa.gov/sites/production/files/2016-09/documents/climate-change-pr.pdf>

II. FEMA Violated NEPA by Ignoring the Broader Effects of Its Plans Will Cause Puerto Rico.

a. The Cumulative Impacts on the Environmental Are Not “Short-Term and Less Than Major”¹¹

Substantial questions that trigger an EIS can arise from a variety of effects, including direct, indirect, and cumulative. 40 C.F.R. § 1508(i). Cumulative effects and other broadly included effects include ecological, historical, cultural, economic, and disproportionate and adverse effects on communities with environmental justice concerns. 40 C.F.R. § 1508(i)(4). Although physical impacts, not purely socioeconomic ones, on the human environment trigger an agency’s duty to prepare an EIS, the socioeconomic context of these impacts often shapes the analysis of the nature and scope of an action’s physical impacts on human communities and the environment. Jesse Hevia, *NEPA and Gentrification: Using Federal Environmental Review to Combat Urban Displacement*, 70 Emory L. J. 711, 721 (2021) (citing 40 C.F.R. § 1508.14 (2019)). Nonetheless, if an agency thoroughly evaluates the impacts of proposed actions and finds their actions will not perpetuate disproportionate and adverse effects or at minimum discusses mitigation efforts for minorities and low-income communities, they may then complete the PEAs and publish a Finding of No Significant Impact (FONSI). 40 C.F.R. § 1501.6.¹² However, a lack of meaningful consideration of the disproportionate adverse effects on environmental justice communities as required by NEPA is judged under the Administrative Procedure Act’s (APA) arbitrary and capricious standard. *See Marsh v. Oregon Nat. Res. Council*, 490 U.S. 360, 374, (1989); *See also Motor Vehicle Mfrs. Ass’n of U.S., Inc. v. State*

¹¹ Federal Emergency Management Agency, Puerto Rico Public Facilities Programmatic Environmental Assessment, 74-75 (August 2020) https://www.fema.gov/sites/default/files/2020-08/fema_ea_puerto-rico_utility-repair-replacement-realignment_guidedbook_august-2020.pdf

¹² *See generally* Council on Environmental Quality, *Environmental Justice: Guidance under the National Environmental Policy Act* (December 10, 1997).

Farm Mut. Auto. Ins. Co., 463 US 29, 43 (1983). Although NEPA does not use the words “environmental justice,” its purpose is obviously grounded in that value.¹³ Environmental justice as defined by the EPA and codified means

[t]he just treatment and meaningful involvement of all people, regardless of income, race, color, national origin, or Tribal affiliation, in agency decision-making that affects human health and the environment so that people are fully protected from disproportionate and adverse human health and environmental effects and hazards, including those related to climate change, cumulative impacts of environmental burdens, the legacy of racism, structural or systemic barriers, with respect to the development and enforcement of healthy, sustainable, equitable and resilient environment.

40 C.F.R. § 1508(m)(1-2).¹⁴

FEMA’s environmental justice obligations also stem from executive orders. As a federal agency, FEMA must implement Executive Order 12898: Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations,¹⁵ Executive Order 14008: Tackling the Climate Crisis at Home and Abroad,¹⁶ and Executive Order 14096: Advancing Racial Equity and Support for Underserved Communities Through the Federal Government.¹⁷ Collectively, these executive orders emphasize the importance of addressing environmental justice, climate change impacts, and equity within federal policies and programs to ensure fair treatment for marginalized and disadvantaged communities.

In light of Executive Order 12898, the CEQ issued guidance which includes six principles for environmental justice analyses to determine any disproportionately high and adverse human

¹³ 42 U.S.C. § 4331(b); *See also* Council on Environmental Quality, *Environmental Justice: Guidance under the National Environmental Policy Act* at 7 (December 10, 1997).

¹⁴ *See generally* Environmental Protection Agency, *Environmental Justice* (May 8, 2024), <https://www.epa.gov/environmentaljustice>.

¹⁵ Executive Order 12898, 60 F.R. § 7795.

¹⁶ Executive Order 14008, 86 F.R. § 7619.

¹⁷ Executive Order 14096, 88 F.R. § 25251.

health or environmental effects to low-income, minority, and tribal populations.¹⁸ FEMA even identified the possibility of environmental justice impacts in repairing a utility grid to pre-disaster conditions and outlined potential environmental justice concerns “where the pre-disaster condition would perpetuate disproportionate and adverse impacts.”¹⁹

FEMA must consider Puerto Rico’s geography when assessing the environmental effects of its plan for a fossil-fuel-based centralized energy system in Puerto Rico. That geography makes these effects significant. Puerto Rico’s centralized power grid crisscrosses the entire island of diverse landscapes, including rain forests, deserts, and especially treacherous mountains, to serve over 3 million people in developed communities that rim the entire coastal perimeter of the island, as well as interior, more-predominantly rural communities.²⁰ Puerto Rico’s electric energy system also powers water-supply systems for most Puerto Ricans; when the vulnerable electric grid collapses for weeks and months after a hurricane it causes severe and lasting health crises. U.S. Commission on Civil Rights, *Civil Rights and Protections During the Federal Response to Hurricanes Harvey and María 2022 Statutory Report* 198 (2022). Mass evacuation is not possible, nor can many people afford water, food, and other necessities during scarcity. The combination of Puerto Rico’s geographic isolation and colonial legal status inhibits the timeliness and adequacy of post-disaster aid. *Id.* at 302.

These effects are exacerbated by another legacy of Puerto Rico’s colonial status, the 1920 Jones Act, also known as the Merchant Marine Act. The Jones Act requires all goods transported

¹⁸ See Council on Environmental Quality, *Environmental Justice: Guidance under the National Environmental Policy Act* at 7 (December 10, 1997) (guidance directs agencies to considers composition of area, disproportionate and adverse effect either health or environmental, public health data concerning the cumulative exposure of hazards, interrelated cultural, social, historical, or economic impacts, and public participation and representation).

¹⁹ Federal Emergency Management Agency, *FEMA Fact Sheet on Executive Order 12898: Environmental Justice* (March 2022), https://www.fema.gov/sites/default/files/documents/fema_oehp-fact-sheet-environmental-justice.pdf.

²⁰ Maria Gallucci, *Rebuilding Puerto Rico’s Power Grid: The Inside Story*, Inst. Of Electrical & Electronic Engineers Spectrum (Mar. 12, 2018), <https://spectrum.ieee.org/rebuilding-puerto-ricos-power-grid-the-inside-story>.

between two U.S. ports to be transported on U.S.-built, U.S.-owned, U.S. flagged, and U.S. crewed vessels. *See* 46 U.S.C. § 55102, 55116, 55119. Because it is economically unviable for foreign shippers to ship directly to smaller markets like Puerto Rico, foreign shippers first ship Puerto Rico-bound goods to a major U.S. port along with goods headed for U.S. mainland. Sam Heavenrich, *The Neglected Port Preference Clause and the Jones Act*, 132 Yale L.J. 559, 563 (2022). The Puerto Rico-bound goods are then unloaded at the mainland port and reloaded on to a Jones Act-compliant vessel heading to Puerto Rico. The cost of this extra step is transferred to Puerto Rican consumers through an increased cost of living. *See id.* Specifically in the context of fossil fuels, the Jones Act prevents Puerto Rico from taking advantage of U.S. produced fuel. The high cost and scarcity of Jones Act-compliant tankers that can carry fossil fuels makes it extremely difficult for Puerto Rico to receive fossil fuel shipments from U.S. ports where U.S. produced fuel exports from.²¹ As a result, Puerto Rico mainly relies on unstable foreign sources for fossil fuels that generate 94% of its energy. In 2021, U.S. produced fuel only made up 0.002%, 0.56%, and 0.14% of liquefied natural gas, fuel oil, and propane in Puerto Rico respectively. This is in stark contrast to the neighboring Dominican Republic, located only 300 miles from Puerto Rico, who imported 96.4%, 80.2%, and nearly 100% of their liquefied natural gas, fuel oil, and propane respectively from the United States.²² Consequently, Puerto Rico also has a higher average electricity price than any U.S. state except Hawaii, and its residents spend 8% of their income for electricity compared to the nationwide average of 2.4%.²³ Further, instability in

²¹ Colin Grabow and Alfredo Carrillo Obregon, *The Jones Act is Forcing Puerto Rico to Overpay for Energy*, Cato Institute (Jul. 25, 2022) <https://www.cato.org/blog/jones-act-forcing-puerto-rico-overpay-its-energy-needs-0>.

²² *Id.*

²³ Robert Walton, *Puerto Rico's Electricity Rates Have Nearly Doubled Since 2020: IEEFA, Utility Dive* (July 18, 2022), <https://www.utilitydive.com/news/puerto-rico-electricity-rates-doubled-since-2020-ieefa/627443/>.

energy service is exacerbated in times of conflict and disaster. For instance, Puerto Rico experienced disruptions in service when companies failed to meet their supply commitments during Russia's invasion of Ukraine. Years after Hurricanes Irma, Maria, and Fiona, blackouts still occur regularly from events as routine as planned maintenance checks.²⁴ As a direct response to these continued disruptions of service to Puerto Ricans, LUMA raised energy prices for 3.2 million residents by 4.6% through September 2024.²⁵ These disruptions and increases in service cost disrupt the financial stability of Latino families, small businesses, and essential services in Puerto Rico, where 43% of residents live below the poverty line, as it leads to increased risks of heat stroke due to lack of cooling systems, lack of food refrigeration, and even deaths.²⁶ By failing to consider the difficulties Puerto Rico faces in obtaining reliable and economically efficient sources of fossil fuels due to the Jones Act and the findings of the PR100 study that outlines the benefits of reductions in fossil fuel purchases and increasing equitable renewable energy access, FEMA's PEAs failed to consider the full economic and environmental impacts finalizing the FEMA projects would have on Puerto Ricans.

b. These Projects Continue to Pollute the Environment and Exacerbate Existing Public Health Issues.

In addition to economic consequences from Puerto Rico's colonized history, its residents' health will suffer due to the climate change effects of FEMA's projects. Not only will minorities and low-income populations in Puerto Rico be exposed to disease, but they have been and will continue to be exposed to multiple pollutants that can have a cumulative adverse effect on their

²⁴ John Yoon, *Outage Leaves About 350,000 Customers in Puerto Rico Without Power*, N.Y. Times (June 13, 2024) <https://www.nytimes.com/2024/06/13/us/puerto-rico-outage.html>.

²⁵ <https://www.usnews.com/news/business/articles/2024-07-01/puerto-rico-approves-electricity-rate-increase-weeks-after-massive-blackout>

²⁶ Andrea Zambrana-Rosario et al., *Impact of Infrastructure Disruptions on Puerto Rican Household Capabilities, Health, and Well-Being*, Natural Hazards Center Public Health Disaster Research Report Series, Report 21 (2022) <https://hazards.colorado.edu/public-health-disaster-research/impact-of-infrastructure-disruptions-on-puerto-rican-household-capabilities-health-and-well-being>.

health. Evidence of such disproportionate adverse environmental and cumulative effects in Puerto Rico began in the 1940s with Operation Bootstrap and continues to this day. The rapid industrialization of the archipelago resulted in harmful pharmaceutical companies, petrochemical companies, and other corporate polluters releasing harmful chemicals into the environment, exposing residents to multiple pollutants.²⁷ In addition to the harmful pollutants released by corporations, the US Navy occupied land in Puerto Rico to conduct bombing and training exercises until early 2000s, sometimes using depleted uranium bullets and Agent Orange that created massive adverse environmental effects to human health, flora, and fauna.²⁸ In 2005, the EPA declared the bombing range a Superfund site, a term given to an abandoned hazardous waste area; the archipelago contains 26 total superfund sites.²⁹ The effects continue to be seen today as parts of the island of Vieques are not only uninhabitable, but residents and visitors cannot even go to part of the island without the possibility of bombs reacting or increased risks of cancer.³⁰

Despite these historical injustices, FEMA Projects continue to perpetuate environmental burdens on historically disadvantaged communities in Puerto Rico. These Projects not only expose residents to pollutants from fossil fuels but also exacerbate already existing health disparities, particularly affecting Latino children who experience higher rates of asthma and

²⁷ Catalina M de Onis, *Energy Colonialism Powers the Ongoing Unnatural Disaster in Puerto Rico*, *Frontiers in Communication* (Jan 29, 2018).

²⁸ Sherrie Bayer, *Environmental Justice and the Cleanup of Vieques* at 8, *Centro Journal*, City College of New York (March 2006).

²⁹ Nada Hassanein, *In Vieques, Puerto Rico, Cancer Rates are High. Advocates Say Navy Bombing May Be to Blame*, *USA Today* (June 14, 2023), <https://www.usatoday.com/story/news/health/2023/06/12/vieques-puerto-rico-navy-bombing-cancer-rates/70227463007/>; see also <https://www.epa.gov/superfund/search-superfund-sites-where-you-live>.

³⁰ See *Id.* (A 2017 analysis found Vieques women had 280% higher lung or bronchus cancer rates compared to other Puerto Rican women, and men had a 200% higher rate); see Hans Sanderson et al., *Civilian Exposure to Munitions-Specific Carcinogens and Resulting Cancer Risk for Civilians on Puerto Rican Island of Vieques Following Military Exercise From 1947 to 1998*, *Global Security: Health, Science and Policy* Vol. 2 No. 1, 40-61 (August 14, 2017), <https://www.tandfonline.com/doi/full/10.1080/23779497.2017.1369358>.

respiratory issues.³¹ FEMA did not adequately consider the adverse human health effects that fossil fuel pollution and these projects would contribute to the population. FEMA must include this historical context in its analysis to determine cumulative effects because an agency must look at the incremental effects of other past, present, and reasonably foreseeable actions regardless of what agency or person undertook such actions. 40 C.F.R. § 1508(i)(3).

Given its decision to issue a FONSI and the lack of meaningful discussion of these considerations, FEMA does not adequately address the significant disproportionate environmental justice impacts that the legacy of colonialism has on the minority and low-income populations of Puerto Rico. These include the social burden, the economic impacts, the human health impacts, or the underinvestment issues of repairing a vulnerable and unreliable fossil fuel electrical grid. Current issues will be exacerbated by repairing a failing fossil fuel electrical grid which would have massive adverse impacts on environmental justice communities in Puerto Rico. FEMA must be ordered to complete a single EIS that considers all significant environmental issues related to FEMA's Projects and that fully considers previous harms with persistent ramifications.

III. FEMA's Fossil Entrenchment Plan Violates the Right of Self-Determination of the People of Puerto Rico.

As the above discussion suggests but which should be said outright, FEMA's Fossil Entrenchment Plan violates the right to self-determination of the People of Puerto Rico, by having the United States authoritatively impose on Puerto Rico—its colonial territory—an energy plan that stands in diametrical opposition to the will and needs of Puerto Ricans.

³¹ *Heterogeneity of Childhood Asthma Among Hispanic Children: Puerto Rican Children Bear a Disproportionate Burden*, 117 *Pediatrics* 43, 43-53 (2006).

All nations enjoy the right to self-determination.³² By virtue of this right, they may, among other things, freely pursue their political, economic, social, and cultural development. The right to self-determination creates legal obligations for countries like the U.S. that enjoy sovereignty over colonial territories and sets out a series of limitations intended to restrict sovereignty.³³ International law affects the political relationship between Puerto Rico and the United States. Under international law, the U.S. has a fiduciary duty to Puerto Rico and is required to act exclusively in the best interests of Puerto Rico, thus creating the conditions for economic, social and political development. See U.N. Charter, Article 73, and its interpretation by the International Court of Justice (ICJ): *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion, 1971 ICJ 16; (I.C.J. Reports 1950, p. 131).

FEMA's Fossil Entrenchment Plan, as discussed below, is not in the best interests of the people of Puerto Rico, as they have expressed in local law and elsewhere, and will perpetuate dependency—which will increase the cost of living, promote displacement, and jeopardize the health and life of Puerto Rican residents—while ignoring the will and determination of the elected government.

It is also a disservice to the causes of racial and environmental justice. The Plan is another example, among many, of the federal government imposing its will on people over

³² “All peoples have the right of self-determination. By virtue of that right they may freely determine their political status and freely pursue their economic, social and cultural development.” Article 1.1 of the *International Covenant on Civil and Political Rights* (ICCPR), 999 U.N.T.S. 171. The United States ratified the ICCPR in 1992. Upon ratification, it became the “supreme law of the Land” under the Supremacy Clause, which gives ratified treaties the status of federal law. U.S. Const. Art. IV § 2; *Missouri v. Holland*, 252 U.S. 416, 432 (1920); *United States v. Belmont*, 301 U.S. 324 (1937); *Zicherman v. Korean Air Lines Co.*, 516 U.S. 217, 226 (1996). Furthermore, the right to self-determination has been recognized as an *erga omnes* right and as part of customary international law by the International Court of Justice. See *Case Concerning East Timor (Portugal v Australia)*, ICJ Reports 1995, par. 29; *Legal Consequences of the Separation of the Chagos Archipelago From Mauritius in 1965*, Advisory Opinion, ICJ Reports 2019, par. 152.

³³ A. Cassese, *Self-Determination of Peoples: A Legal Reappraisal* (1995), pp. 186-187.

whom it exercises near absolute control; it is, in short, another expression of a colonial relationship. The connection between colonialism and racism cannot be seriously contested. A recent report by the United Nations High Commissioner for Human Rights reaffirmed the intrinsic link between colonialism and racism.³⁴ This relationship has also been recognized by the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD).³⁵

The people of Puerto Rico have made a legally-binding commitment to transition entirely towards renewable energy by 2050. 22 L.P.R.A. secs. 1141 *et seq.* FEMA's Plan, however, prolongs and institutionalizes Puerto Rico's dependence on fossil fuels for decades to come. The limitations imposed by Puerto Rico's colonial status mean that crucial decisions regarding infrastructure development and energy policies do not lie in the hands of its people, but rather are determined by the United States. *Pierluisi v. Fin. Oversight & Mgmt. Bd. for P.R.*, 37 F.4th 746, 767 (1st Cir. 2022); see, e.g., *Fin. Oversight & Mgmt. Bd. for P.R. v. Aurelius Inv., LLC*, 590 U.S. 448 (2020).

This external control hampers Puerto Rico's ability to fully implement its renewable energy goals, perpetuating a cycle of colonialism that disables Puerto Ricans from making autonomous decisions about purely local affairs. Indeed, Puerto Rico's growing energy crisis has been fueled by its colonial condition and unattained right to self-determination.

a. FEMA's Fossil Entrenchment Plan undermines the United States' environmental policies and the fundamental human right to health.

Clean, cost-effective energy is an indispensable component of modern life—playing a crucial role in economic growth, social stability, quality of life, and health outcomes.

³⁴ *Summary of the panel discussion on the negative impact of the legacies of colonialism on the enjoyment of human rights: Report of the Office of the UN High Commissioner for Human Rights*, A/HRC/54/4, 1 June 2023, par. 23.

³⁵ Ratified by the US in 1994.

Accordingly, the United Nation’s 2030 Agenda for Sustainable Development Goals (SDGs) calls for universal “access to affordable, reliable, sustainable and modern energy for all.” *The Sustainable Development Goals Report*, United Nations (2023), 26. Importantly, the United States has officially expressed that it “is committed to the full implementation of 2030 Agenda and the SDGs, at home and abroad.” White House Statement, *U.S. Action on Global Development* (Sept. 20, 2023). The United States has further pledged—through the Justice40 Initiative and Executive Order 14008—to deliver federal investments aimed at guaranteeing that “communities that are marginalized by underinvestment and overburdened by pollution” would achieve “clean energy and energy efficiency.” White House Statement, *Justice40 Initiative* (March 1, 2022); E.O. 14008, *Tackling the Climate Crisis at Home and Abroad*.

Yet, FEMA’s reconstruction of existing powerlines and other fossil-dependent infrastructure – all without the meaningful say of local stakeholders -- will not reduce Puerto Rico’s power grid’s vulnerability to the environmental problems that climate change will likely exacerbate, such as wind, floodings, and corrosion from saltwater exposure. To the contrary, by repairing and reconstructing an outdated, inefficient, and centralized fossil fuel energy grid, FEMA’s plan will overburden Puerto Rican communities with greenhouse gases and hazardous pollutants. Considering that many of the power plants that FEMA will reconstruct sit near Puerto Rico’s lowest-income communities—collectively known as “*la ruta del hambre*”, this southeast region has an average poverty rate above 50%³⁶—FEMA’s Plan represents a multi-billion investment on environmental damage and health catastrophes that will primarily, disproportionately harm poor families.

³⁶ Composed by the municipalities of Salinas, Arroyo, Patillas, Maunabo, Guayama y Yabucoa. A. Díaz Rolón, *Expuesta la “ruta del hambre”*, El Vocero (September 20, 2017); A. Díaz Rolón, *Más sólida la ‘ruta del hambre’*, El Vocero (September 29, 2019).

Health is a fundamental human right.³⁷ Nonetheless, poor communities throughout Puerto Rico are often located close to polluting industries “that pose an imminent and persistent threat to their human right to health.” Philip Alston, *Report of the U.N. Special Rapporteur on Extreme Poverty and Human Rights* (2018). These communities suffer especially from the effects of exposure to toxic remains of fossil fuels burned by power plants, which contain chemicals that cause cancer, developmental disorders, and reproductive problems. *Id.* Notably, residents of “*la ruta del hambre*” suffer the highest rate of cancer in Puerto Rico, averaging 300 cases for every 100,000 individuals. Centro Comprehensivo de Cáncer, *Boletín del Registro Central de Cáncer* (March 2013). Despite these extremely grave health consequences, the situation suffered by these Puerto Rican communities “[is] simply not prioritized.” Fernand de Varennes, *Report of the U.N. Special Rapporteur on Minority Issues* (2021).

In Puerto Rico, “marginalized groups are disproportionately forced to live in areas where they have an increased risk of being exposed to natural disasters and extreme weather events, sometimes in addition to living with elevated exposure to high levels of pollution and contamination, because of systemic societal inequalities. Moreover, there have been stark racial disparities in policy for government assistance to [these] victims [during] natural disasters.” Ashwini K.P., *Report of the U.N. Special Rapporteur on Contemporary forms of Racism* (2024). “In concrete terms, this means disproportionally higher cancer and disease rates, more children with learning deficiencies or developmental challenges, and lower life expectancies,” in violation of the fundamental human right to health. U.N. Special Rapporteur Fernand de Varennes, *supra*.

Findings from the 2022 Statutory Report by the U.S. Commission on Civil Rights—examining FEMA’s compliance with federal civil rights laws in connection with its response in

³⁷ Constitution of the World Health Organization, 1. Signed by the United States on July 22, 1946.

Puerto Rico following Hurricane Maria—further indicate that many “decades of underinvestment leading to economic and structural vulnerabilities in Puerto Rico, as well as disparities in the timing, amount, and distribution of emergency relief funds, caused the Island to suffer disproportionately compared to U.S. states affected by [natural] disasters.” *Civil Rights and Protections During the Federal Response to Hurricanes Harvey and Maria*, at 29. The Report also found that the lower levels of assistance provided to Puerto Rico compared with other responses to natural disasters violated domestic legal prohibitions on discrimination based on race, national origin, and linguistic characteristics. *Id.* Despite an expected increase in the frequency and intensity of hurricanes, FEMA has neglected to provide an adequate caliber of recovery assistance. *Id.* As demonstrated by the planning and design of microgrids in New Jersey after superstorm Hurricane Sandy, FEMA has the capability to rebuild energy systems with renewable resources yet has flagrantly disregarded these solutions for Puerto Rico. To uphold FEMA’s Plan, therefore, would be yet another example of the United States paternalistically implementing a federal program that is out-of-touch with the Puerto Rico’s dire energy and health situation.

b. FEMA’s Fossil Entrenchment Plan is rooted in Puerto Rico’s colonial status.

“The link between poverty and the absence of political rights is perfectly illustrated by Puerto Rico.” U.N. Special Rapporteur Philip Alston, *supra*. If it were a State, Puerto Rico would be the poorest in the Union—yet it is not a State, but a colonial territory. While Puerto Rico is currently not on the United Nations’ list of non-self-governing territories, the United Nations Special Committee on Decolonization has determined, since 1972 to this day, that a “colonial relationship” exists between the United States and Puerto Rico. U.N. Special Rapporteur Fernand de Varennes, *supra*.

An essential component of Puerto Rico’s colonial arrangement entails complete external control of its financial assets. Namely, all fiscal decisions that weigh on the maintenance and modernization of Puerto Rico’s depleted, fossil-dependent energy grid rest in the hands of the PROMESA’s Fiscal Oversight and Management Board. This is especially relevant for FEMA’s Plan. The \$12.8 billion investment that composes the Fossil Entrenchment Plan will not be managed by Puerto Rico officials, but by the externally-imposed FOMB—a federally-appointed group of unelected, financial managers with loose connections to Puerto Rico that may exercise endless discretion and unreviewable decision-making authority over the Territory’s local matters. *In re Fin. Oversight & Mgmt. Bd.*, 7 F.4th 31, 34 (1st Cir. 2021) (holding that 48 U.S.C. § 2126(e) prevents Title III courts from reviewing challenges to the FOMB’s certification decision on energy-related matters).

Functionally, the FOMB has authority to supersede and undo the executive and legislative actions of elected Puerto Rican officials, thereby dictating the economic policies and energy future of the territory. *Pierluisi*, 37 F.4th at 767 (1st Cir. 2022) (holding that the FOMB possesses authority to review and block the implementation of laws enacted by the Puerto Rico legislature if they “impair or defeat the purposes of” PROMESA). Decisions on energy imports, infrastructure investments, and environmental regulations are not final without the FOMB’s approval. *Id.* By investing in fossil fuels, ballooning the cost of electricity, consistently allowing service interruptions, and holding their decisions to be unreviewable, the FOMB has deepened Puerto Rico’s energy insecurity and deprived the Territory from critical means of subsistence.³⁸

³⁸ “All peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation, based upon the principle of mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence.” Article 1.2 of the ICCPR.

At the core of the controversy surrounding PROMESA is its undemocratic, colonial nature—which continues to strip Puerto Rico from its right to self-determination. The FOMB has usurped authority over Puerto Rico’s budget, financial restructuring, and economic policies—effectively displacing local governance and electoral participation with external oversight. *See Aurelius Inv., LLC*, 590 U.S. 448 (2020); *see*, C. Ponsa-Kraus, *Political Wine in a Judicial Bottle: Justice Sotomayor’s Surprising Concurrence in Aurelius*, 130 *Yale L.J. Forum* 101 (Sept. 21, 2020).

The governance of U.S. territories under frameworks such as PROMESA reveals deep-seated issues of racial prejudice and systemic inequality. *See, The Supreme Court and Puerto Rico: The Doctrine of Separate and Unequal*,” Juan R. Torruella, Editorial de la Univ. de P.R. (1985). PROMESA is not only a reflection, but a continuation, of the racist rhetoric espoused in the *Insular Cases*. It reinforces the racist trope that Puerto Ricans are ‘unfit’ to handle their own local governance and, thus, require the United States to control their purse—a structure analogous to a court-imposed conservatorship for minors and incapacitated individuals. *See*, F. Fajana and L. Fiol-Matta, *The Scourge of the Insular Cases: Ending Constitutional Apartheid in Puerto Rico*, 92 *REV. JUR. UPR* 1 (2023).

“In the light of recent Supreme Court jurisprudence and Congress’s adoption of the Puerto Rico Oversight, Management, and Economic Stability Act there seems to be good reason for the Special Political and Decolonization Committee of the United Nations to conclude that the island is no longer a self-governing territory.” U.N. Special Rapporteur Philip Alston, *supra*. “The draconian and drastic austerity measures [imposed by the FOMB] . . . without regard to any obvious human rights considerations in the Board’s decisions, have led to dramatic cuts and reductions in areas such as public education, public health and other areas of social and

economic rights.” U.N. Special Rapporteur Fernand de Varennes, *supra*. Consequently, “Puerto Ricans are being controlled by a colonial-type entity by an overseas power to the detriment of the people of Puerto Rico, without any meaningful representation at the national level and with no ability to really move to govern themselves on their own territory, and that they are therefore a non-self-governing territory in the international sense.” *Id.*

The United States Government’s discriminatory treatment of the people of Puerto Rico has racial motivations that stem from the archipelago’s colonial history. It is a racist culture against territories and its inhabitants supported by the Territories Clause of the United States Constitution and ratified by recent Supreme Court decisions under the doctrine of the *Insular cases*. (See *Puerto Rico v. Sánchez-Valle*, 136 S. Ct. 1863 (2016) (declared Puerto Rico as a territory without sovereignty for purposes of the double jeopardy doctrine), *Fin. Oversight & Mgmt. Bd. for P.R. v. Aurelius Inv., LLC*, 140 S. Ct. 1649 (2020) (excluding PROMESA Board members from the Appointment Clause of the U.S. Constitution), *United States v. Vaello-Madero*, No. 20-303 (denying supplemental social security (SSI) to the disabled or blind, residents of Puerto Rico). This discriminatory treatment is still based, albeit implicitly nowadays, on long-discredited theories regarding the “superiority” of some cultures over others which are considered inferior and incapable of self-government.³⁹

Under international law, the U.S. has “an ongoing fiduciary duty to Puerto Rico pending the latter’s full decolonization.” S. Lausell, *Id.* It requires “that the United States act exclusively in the best interests of Puerto Rico” creating the conditions for economic, social and political development. The actions taken by FEMA and the FOMB, regarding Puerto Rico’s Electric Grid,

³⁹ E. Rivera Ramos, ‘Deconstructing Colonialism: The ‘Unincorporated Territory’ as a Category of Domination’, in C. Duffy Burnett and B. Marshall (eds.), *Foreign in a Domestic Sense: Puerto Rico, American Expansion, and the Constitution* (2001), p. 113.

are yet another example of wrong policies inherent to colonialism, perpetuating racialized contamination, promoting displacement, and jeopardizing the health and life of the residents of Puerto Rico, while ignoring the will and determination of its peoples and elected government.

CONCLUSION

FEMA's minimal analysis for the Puerto Rico Fossil Grid Entrenchment Project PEA and the Public Facilities PEA and subsequent Finding of No Significant Impact fail to meet the necessary thresholds under NEPA and must be vacated. FEMA fails to evaluate and discuss reasonable alternatives to its projects, ignores the current and impending impact of climate change, and neglects the environmental justice considerations in their analysis. Furthermore, these projects perpetuate systemic, ongoing harm against residents of Puerto Rico. These projects violate the right to self-determination of the People of Puerto Rico because FEMA authoritatively imposes on Puerto Rico—its colonial territory—an energy plan that stands in diametrical opposition to the will and needs of Puerto Ricans. To properly rectify these flaws in FEMA's analyses—and to recognize the integral findings in the PR100 study, consider environmental justice impacts, and recognize the right to self-determination for the People of Puerto Rico—the Court must vacate the PEAs and FEMA must be ordered to complete a single EIS for both projects that fully comply with statutory requirements and regulations.

Dated: _____, ___, 2024

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Certificate of Service

I hereby certify that on _____, ____, 2024, I filed the foregoing Motion for Leave to File Amicus Brief and accompanying Exhibits via CM/ECF, which will send notification to all parties' counsels of record.

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