United States Court of Appeals
for the
First Circuit

Case No. 18-1214

IN RE: THE FINANCIAL OVERSIGHT AND MANAGEMENT BOARD FOR PUERTO RICO, AS REPRESENTATIVE FOR THE COMMONWEALTH OF PUERTO RICO; THE FINANCIAL OVERSIGHT AND MANAGEMENT BOARD FOR PUERTO RICO, AS REPRESENTATIVE FOR THE PUERTO RICO HIGHWAYS & TRANSPORTATION AUTHORITY

Debtors

(For Continuation of Caption See Inside Cover)

On Appeal from the United States District Court for the
District of Puerto Rico (San Juan), No. 3:17-ap-00159-LTS

BRIEF OF CONGRESSMAN RAÚL GRIJALVA, RANKING MEMBER OF THE HOUSE COMMITTEE ON NATURAL RESOURCES, AND CONGRESSWOMAN NYDIA VELÁZQUEZ, MEMBER OF THE HOUSE COMMITTEE ON NATURAL RESOURCES, AS *AMICI CURIAE* IN SUPPORT OF NEITHER PARTY

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AMBAC ASSURANCE CORPORATION

Plaintiff-Appellant

v.

COMMONWEALTH OF PUERTO RICO; FINANCIAL OVERSIGHT AND MANAGEMENT BOARD FOR PUERTO RICO; PUERTO RICO FISCAL AGENCY AND FINANCIAL ADVISORY AUTHORITY; PUERTO RICO HIGHWAYS & TRANSPORTATION AUTHORITY; RICARDO ROSSELLO NEVARES; RAUL MALDONADO GAUTIER; JOSE IVAN MARRERO ROSADO; GERADO JOSE PORTELA FRANCO; JOSE B. CARRION III; ANDREW BIGGGS; CARLOS M. GARCIA; ARTHUR J. GONZALEZ; JOSE R. GONZALEZ; ANA J. MATOSANTOS; DAVID A. SKEEL, JR.; CHRISTIAN SOBRINO

Defendant-Appellees

OFFICIAL COMMITTEE OF UNSECURED CREDITORS

Intervenor

JOHN DOES 1-12

Defendants

TABLE OF CONTENTS

INTERESTS OF *AMICI CURIAE*

Amici curiae Hon. Raúl Grijalva is a member of the House of Representatives from Arizona's 3rd District, and *amici curiae* Hon. Nydia Velázquez is a member of the House of Representatives from New York's 7th District.[1] Rep. Grijalva has served as the Ranking Member of the United States House of Representatives Committee on Natural Resources (the "Committee") since the beginning of the 114th Congress, and Rep. Velázquez joined the Committee in April 2018. The Committee has jurisdiction over "[i]nsular areas of the United States," which jurisdiction includes the Commonwealth of Puerto Rico.[2] Rep. Grijalva and Rep. Velázquez participated in the drafting of and supported the enactment of the Puerto Rico Oversight, Management, and Economic Stability Act ("PROMESA"), and continue to advocate for its intended interpretation as bipartisan legislation.

Having reviewed the *Brief of Congressman Rob Bishop, Chairman of the House Committee on Natural Resources, as Amicus Curiae in Support of Neither Party* (the "Bishop Brief") submitted to this Court by Rep. Rob Bishop, Chairman of the Committee, Rep. Grijalva and Rep. Velázquez disagree with significant elements of the Bishop Brief regarding the legislative history and intent of

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[1] Undersigned counsel authored the brief in whole at the direction of *amici*. Except for *amici* and their counsel, no person contributed money intended to fund the preparation or submission of this brief.

[2] See Rule X of the Rules of the House of Representatives (115th Cong).

PROMESA. Therefore, Rep. Grijalva and Rep. Velázquez submit this brief to provide further clarity as to the history and legislative intent of PROMESA, and to ensure the Court has a broader, bipartisan understanding of PROMESA's origins.

PRELIMINARY STATEMENT

The Puerto Rico Oversight, Management, and Economic Stability Act ("PROMESA") was drafted and enrolled as a comprehensive, bipartisan solution to Puerto Rico's fiscal crisis. A core element of that solution was broad restructuring authority that would allow Puerto Rico to restructure *all* of its debts in a manner consistent with longstanding municipal bankruptcy principles. The purpose of PROMESA was not to grant Puerto Rico's creditors, including bondholders, special protections not enjoyed by other municipal creditors, nor to prevent any impairment of such creditors. Rather than depict PROMESA as a holistic solution to Puerto Rico's economic issues, the Bishop Brief inaccurately presents the legislative history of PROMESA as somehow granting heightened protections to creditors, an interpretation not borne out by a proper interpretation of the statutory language or the legislative history.

Where the language of a statute is unambiguous, courts do not look beyond these unambiguous words to legislative history to interpret Congressional intent. Particularly where statutes are the product of bipartisan legislation, the interpretation of such statutes is properly based on the text of the statutory provisions, and subsequently the intent of Congress as a whole in drafting the enrolled legislation. The Bishop Brief, however, attempts to offer an interpretation of PROMESA that does not accord with the enrolled version of the law.

Neither the legislative history nor the statutory text supports an interpretation of PROMESA granting creditors heightened rights beyond those of a traditional reorganization at the expense of debtors' rights. In fact, Congress granted Puerto Rico significant debtor protections not available under Chapter 9 of the Bankruptcy Code,[3] including the pre-petition stay in Section 405,[4] and the ability to restructure territory-level debt.[5] At the same time, Section 201(b)(1)(N)'s requirement that fiscal plans "respect the relative lawful priorities or lawful liens" was *not*, as the Bishop Brief asserts, intended to protect creditors from impairment, or to grant creditors any protections beyond those available in a Title III restructuring process under PROMESA. Instead, Section 201(b)(1)(N) was intended to ensure that fiscal plans respect the *order* of priorities among creditors, such that a fiscal plan does not prioritize payments or disbursements to a junior class of creditors over a senior class of creditors. Likewise, Section 303 was narrowly tailored to apply only to a territory moratorium law to the extent that it "prohibits the payment of principal or interest," but not to the extent that a moratorium law does anything short of prohibiting the payment of principal or interest, such as delaying the payment of principal or

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[3] Reference to the "Bankruptcy Code" shall be to Title 11 of the United States Code and reference to a "Chapter" shall be to a chapter of the Bankruptcy Code. Reference to a "Section" shall be to a section of PROMESA.

[4] 28 U.S.C. § 2194.

[5] See, e.g., 28 U.S.C. §2162.

interest. Congress was aware of Puerto Rico's Moratorium and Financial Rehabilitation Act (the "Moratorium Act") (Act. No. 21-2016) when drafting PROMESA, and deliberately chose to draft Section 303 in a way that would not preempt the Moratorium Act. There is no basis by which the plain language of PROMESA can be read as preventing any impairment of creditors.

Neither the legislative history nor the statutory text prioritize a Title VI restructuring to the exclusion of a possible Title III restructuring, as the Bishop Brief asserts. Congress envisioned Puerto Rico and its instrumentalities using the Title III restructuring process immediately after the termination of the Section 405 prepetition stay. Care was taken to ensure that there would be little-to-no gap between the expiration of the prepetition stay in Section 405 and the automatic stay in Title III. In fact, Congress explicitly chose *not* to require that Puerto Rico complete the voluntary restructuring process in Title VI before it and its instrumentalities could file a Title III petition, instead simply requiring that Puerto Rico make "good-faith efforts to reach a consensual restructuring with creditors" before filing a Title III petition. This is underscored by Congress choosing to allow the automatic stay to expire rather than to remain effective for an extended period to facilitate a Title VI process without interference by the actions of creditors unimpeded by the stay.

The Bishop Brief's broad assertions and insinuations that PROMESA,

through the intent of Congress, grants creditors heightened protections and makes filing a Title III reorganization an absolute last resort, are not supported by PROMESA's text. Rather, PROMESA provides Puerto Rico and its instrumentalities, as debtors, protections at least of the magnitude found in other municipal reorganizations. Critically, these protections not only benefit the debtors, but creditors and the Court in facilitating an orderly restructuring in accordance with creditors' relative priorities. It is inaccurate, however, to recast provisions serving to protect an orderly restructuring and to maintain the priority of creditors as showing Congressional intent to somehow prevent the impairment of creditors. Likewise, it is unavailing for the Bishop Brief to cite a partisan memo not part of the Congressional record as support for Congressional intent, particularly as the prevailing legislative history underscores the plain language of PROMESA as the intent of Congress.

ARGUMENT

I. PROMESA WAS A COMPREHENSIVE SOLUTION TO PUERTO RICO'S FISCAL CRISIS, INCLUDING THE PROVISION OF BROAD RESTUCTURING AUTHORITY TO ALLOW PUERTO RICO TO RESTRUCTURE ALL OF ITS DEBTS IN A MANNTER CONSISTENT WITH MUNICIPAL BANKRUPTCIES.

The plain language of PROMESA is controlling. PROMESA does not grant heightened protections to creditors, nor does it narrowly limit the circumstances under which Puerto Rico and its instrumentalities may pursue a Title III

reorganization. The Bishop Brief, however, looks beyond PROMESA's text and attempts to recast PROMESA's purpose and effect without regard for the final, bipartisan product that was passed by Congress.

A. Proper Interpretation of PROMESA Begins With Deference to the Unambiguous Statutory Language, Which Provides That PROMESA Is a Comprehensive Approach to Resolving Puerto Rico's Fiscal Crisis.

Statutory interpretation involves a threshold examination of the language of the statute for ambiguities. Courts may look beyond the strict language of a statute only where ambiguities exist. In the case of ambiguities, Courts first look for clarification of the plain meaning of Congressional language, then at the specific context in which the language is used within the broader context of the statute as a whole, and finally to legislative history if ambiguity remains.[6] Only in extraordinary circumstances, including a "clearly expressed legislative intent to the contrary," can courts otherwise look beyond the unambiguous language of the statute.[7]

Particularly in cases where a statute is the result of bipartisan bill, the unambiguous plain language of the resulting statute is not subject to qualification by

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[6] See, e.g. Perez-Olivio v. Chavez, 394 F.3d 45, 49-50 (1st Cir. 2005) (citing Duckworth v. Pratt & Whitney, Inc., 152 F.3d 1, 5 (1st Cir.1998); United States v. Lachman, 387 F.3d 42, 50 (1st Cir. 2004); Robinson v. Shell Oil Co., 519 U.S. 337, 340, 117 S.Ct. 843, 136 L.Ed.2d 808 (1997)); see also Alliance To Protect Nantucket Sound, Inc. v. U.S. Dept. of Army, 398 F.3d 105, 109 (1st Cir. 2005).

[7] See U.S. v. Turkette, 452 U.S. 576, 580, 101 S.Ct. 2545, 69 L.Ed.2d 246 (1981).

legislative history, let alone qualification by partisan memoranda not representative of the ultimate intent of Congress. For example, Section 405(m) unambiguously provided that Congress found, "A combination of severe economic decline, and, at times, accumulates operating deficits, lack of financial transparency, management inefficiencies, and excess borrowing has created a fiscal emergency in Puerto Rico."[8] Thereafter, Congress found, "A comprehensive approach to fiscal, management, and structural problems and adjustments that exempts no part of the Government of Puerto Rico is necessary, involving independent oversight and a Federal statutory authority for the Government of Puerto Rico to restructure debts in a fair and orderly process."[9] The Bishop Brief, however, cites a 2018 post-PROMESA report from the U.S. Government Accountability Office in an attempt to reframe the causes of Puerto Rico's economic crisis as "inadequate financial management and oversight practices."[10]

Likewise, the Bishop Brief asserts that inadequate financial management and oversight caused the Committee to determine "that any legislative solution would require a strong, independent overseer to manage Puerto Rico's fiscal house until it

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[8] 48 U.S.C. § 2194(m)(1).

[9] 48 U.S.C. § 2914(m)(4).

[10] See Bishop Brief at 7-8 (citing U.S. Gov't Accountability Off., GAO-18-387, *Puerto Rico: Factors Contributing to the Debt Crisis and Potential Federal Actions to Address Them* 1 (2018), https://www.gao.gov/assets/700/691675.pdf.

emerged from the crisis."[11] The text of PROMESA, however, states that a purpose is to "allow the Government of Puerto Rico a limited period of time during which it can focus its resources on negotiating a voluntary resolution with its creditors instead of defending numerous, costly creditor lawsuits" and "provide an oversight mechanism to assist the Government of Puerto Rico in reforming its fiscal governance and support the implementation of potential debt restructuring."[12]

These unambiguous statutory provisions are controlling when interpreting PROMESA, and provide that PROMESA was enacted as a comprehensive solution to Puerto Rico's financial crisis to enable a "fair and orderly" restructuring of debts. As the plain language details, PROMESA was not created to grant creditors additional benefits not otherwise found in municipal restructurings, nor to limit Title III reorganizations to only the rarest of circumstances.

B. Congress Did Not Intend for Puerto Rico's Creditors to Have Special Protections That Other Municipal Creditors Do Not Enjoy.

The Bishop Brief contains a series of statements that PROMESA "provides that creditors' rights must be protected during negotiations and any restructuring process,"[13] that the "Committee intended PROMESA to ensure, among other things, that any debt restructuring would remain fair to creditors and that creditor rights

[11] Bishop Brief at 8.

[12] See 48 U.S.C. §2194(n)(2) and (3).

[13] Bishop Brief at 3.

would be protected . . .,"[14] and that "creditor rights are protected at all stages of the PROMESA process."[15] These statements are neither controversial nor inaccurate on their face, and underscore that orderly reorganizations, including those undertaken pursuant to the Bankruptcy Code, contain protections for the rights of creditors. It is inaccurate, however, to suggest that the plain language of PROMESA grants—or that Congress intended to grant—*heightened* protections for creditors beyond those typical of other orderly restructurings. The Bishop Brief appears to infer, however, that creditor protections provided for in PROMESA are paramount to an extent beyond those found in the Bankruptcy Code, and that any impairment of a creditor's rights is prohibited. This is, however, contrary to the plain language of PROMESA.

In fact, through PROMESA, Congress granted Puerto Rico significant *debtor* protections that other municipal debtors do not enjoy, including (1) Section 405's prepetition stay, which is not available to municipal debtors in Chapter 9;[16] and (2) the ability to restructure territory-level debt, which is not available to states under Chapter 9.[17] These examples demonstrate not only that Congress did not intend to give Puerto Rico's creditors special, heightened protections, but that Congress

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[14] Id. at 21

[15] Id. at 24.

[16] See 48 U.S.C. § 2194.

[17] See, e.g., 28 U.S.C. §2162.

intended to grant Puerto Rico, as a debtor, unique protections from creditors not available in Chapter 9 municipal bankruptcies.

Similarly, through PROMESA, Congress eliminated or significantly weakened the standard Chapter 9 eligibility requirements necessary to allow Puerto Rico to commence a Title III restructuring. Specifically, Section 206(a) provides that a restructuring certification requires a determination by the Oversight Board that (1) the entity has made good-faith efforts to reach a consensual restructuring with creditors, and (2) the entity has adopted audit procedures and made public information regarding a possible restructuring.[18] In contrast, 11 U.S.C. § 109(c) provides a broader set of requirements.[19] As such, PROMESA effectively has a lower eligibility threshold for Title III restructuring than found under Chapter 9.

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[18] 48 U.S.C. § 2146.

[19] 11 U.S.C. § 109(c) provides that a qualifying Chapter 9 debtor "(1) is a municipality; (2) is specifically authorized, in its capacity as a municipality or by name, to be a debtor under such chapter by State law, or by a governmental officer or organization empowered by State law to authorize such entity to be a debtor under such chapter; (3) is insolvent; (4) desires to effect a plan to adjust such debts; and (5)(A) has obtained the agreement of creditors holding at least a majority in amount of the claims of each class that such entity intends to impair under a plan in a case under such chapter; (B) has negotiated in good faith with creditors and has failed to obtain the agreement of creditors holding at least a majority in amount of the claims of each class that such entity intends to impair under a plan in a case under such chapter; (C) is unable to negotiate with creditors because such negotiation is impracticable; or (D) reasonably believes that a creditor may attempt to obtain a transfer that is avoidable under section 547 of this title."

C. Through PROMESA, Congress Intended That Fiscal Plans Maintain and Ensure Existing Creditor Priorities.

Section 201(b)(1)(N) provides that a fiscal plan must "respect the relative lawful priorities or lawful liens, as may be applicable, in the constitution, other laws, or agreements of a covered territorial instrumentality in effect prior to June 30, 2016."[20] This requirement was not, as the Bishop Brief suggests, intended to protect creditors from impairment, or to grant creditors any protections beyond those available in a Title III restructuring process. Instead, Section 201(b)(1)(N) was intended to ensure that fiscal plans respect the *order* of priorities among creditors, as in cases under the Bankruptcy Code, such that a junior creditor is not preferred over a senior creditor.

Notably, Section 201(b)(1)(N) provides that a fiscal plan must "respect the *relative* lawful priorities or lawful liens."[21] Accordingly, this Section is comparable to the absolute priority rule of 11 U.S.C. § 1129(b)(2), which prevents junior claims from receiving distributions unless senior creditors are paid in full. As such, under Section 201(b)(1)(N), a creditor can still be impaired under a fiscal plan as long as they are not impaired in a manner contrary to their priority. In fact, legislative history makes clear that "[t]his provision does not exempt any creditor from haircuts

[20] 48 U.S.C. §2141(b)(1)(N).

[21] Id. (emphasis added).

and simply memorialized what a federal judge would almost certainly do in any event—that is, look to relative payment priorities set forth in applicable state law when administering a debt restructuring process."[22] Rep. Grijalva submitted a statement for the record on the House floor emphasizing that the Committee twice rejected an amendment that would have changed the phrase "respect the relative lawful priorities" in Section 201(b)(1)(N) to "*comply* with the lawful priorities."[23] This rejection underscores that the Committee rejected stronger language for weaker language, and was certainly not granting creditors heightened protections.

Reviewing the evolution of this language, a March 29, 2016 discussion draft of PROMESA contained no language regarding creditors' priorities.[24] Subsequently, an April 12, 2016 draft of PROMESA provided that to be eligible for Title III restructuring, the Oversight Board was required to determine that "such appropriate consideration is given to relative priority of claims as established by law so that no one group or class of creditors gains an advantage over any other class in which such advantage did not exist prior to the Oversight Board's determination."[25]

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[22] See H.R. Rep. No. 114-602, at 116 (2016) (Rep. Pedro Pierluisi's Additional Views).

[23] See 162 Cong Rec. H3601 (daily ed. June 9, 2016) (statement of Rep. Grijalva).

[24] A copy of this discussion draft ("Discussion Draft") is available at https://naturalresources.house.gov/uploadedfiles/puertorico_discussion_draft.pdf

[25] H.R. 4900 § 206(a)(5) (April 12, 2016).

Subsequently, the May 18, 2016 draft of PROMESA provided that, instead of being a condition of eligibility for a Title III reorganization as in the April 12 draft, the priority language was moved to the portion of the bill detailing fiscal plan qualifications, and modified to the form in the enrolled bill.[26] Therefore, not only does the unambiguous plain language of PROMESA not grant creditors protection from impairment, but PROMESA's legislative history makes clear that Congress did not otherwise intend to somehow prevent the impairment of creditors, as opposed to supporting creditor treatment in accordance with a creditor's relative priority.

D. Section 303 Does Not Preempt the Mortarium Act.

Section 303 was narrowly tailored to apply *only* to a territory moratorium law "solely to the extent that it prohibits the payment of principal or interest."[27] It does not, however, apply to the extent that a moratorium law does anything short of prohibiting the payment of principal or interest, such as delaying such payments. Congress was aware of Puerto Rico's Moratorium Act when drafting PROMESA, and deliberately chose to draft Section 303 not to preempt the Moratorium Act. With regard to the underlying time frame, the Moratorium Act was signed into law on April 6, 2016. Thereafter, the first version of PROMESA introduced on April 12,

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[26] H.R. 5278 (May 18, 2016) § 201(b)(1)(N).

[27] 48 U.S.C. 2163(1).

2016[28] did not include any language in Section 303 regarding territory moratorium laws, even though Congress was aware that the Moratorium Act has been enacted six days earlier. In connection with the May 18, 2016 version of PROMESA, narrowly-tailored language was introduced providing that that:

> a territory law prescribing a method of composition of indebtedness or a moratorium law, but solely to the extent that it prohibits the payment of principal or interest by an entity not described in section 109(b)(2) of Title 11, may not bind any creditor of a covered territory or any covered territorial instrumentality thereof that does not consent to the composition or moratorium[29]

Had Congress intended to preempt the Moratorium Act, it would have added express language to Section 303 preempting that act. With full knowledge of the Moratorium Act, however, Congress explicitly narrowed the preemption of moratorium laws by adding language limiting its application to a moratorium law "solely to the extent that it prohibits the payment of principal or interest."[30] Therefore, because Congress knew about the Moratorium Act, and knew that it did not prohibit debt payments, but instead temporarily suspended debt payments, the addition of the limiting phrase in Section 303 indicates Congressional intent to avoid preempting the Moratorium Act.

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[28] H.R. 4900.

[29] H.R. 5278 § 303.

[30] 48 U.S.C. 2163.

II. PROMESA PERMITS THE TITLE III RESTRUCTRING PROCESS TO OCCUR IMMEDIATELY AFTER THE EXPIRATION OF THE PREPETITION STAY AND WITHOUT COMPLETING A TITLE VI PROCESS.

The Bishop Brief asserts:

> Although the Oversight Board has steered debtors into Title III proceedings, Title III was created as a last resort, to be used in truly intractable cases after a lengthy negotiation period proved fruitless. To implement this, the Committee imposed several gating requirements on the Oversight Board to prohibit a rush into the Title III restructuring process and to ensure the Oversight Board would consistently and proactively engage with the creditor community.[31]

This vision of Title III as a "last resort" with a host of "gating requirements" is contrary to the unambiguous statutory language and the Congressional intent of PROMESA. The plain language of PROMESA as well as pertinent legislative history support that a Title III restructuring is not a manner of last resort.

A. Congress Envisioned Puerto Rico Using the Title III Restructuring Process Immediately After Expiration of the Section 405 Stay.

The automatic stay is a cornerstone of reorganizations under the Bankruptcy Code, the purpose of which is not only to provide debtors with protections from creditors in order to pursue reorganization, but to allow courts to evaluate competing

[31] See Bishop Brief at 12.

economic interests in an orderly manner.[32] Along these same lines, the Congressional record makes clear that Congress ensured that there would be little-to-no gap between the expiration of the Section 405 prepetition stay and the commencement of the automatic stay under Title III. As initially drafted, February 15, 2017 was set as the hard deadline for expiration of the prepetition stay.[33] Subsequently, Antonio Weiss, Counselor to the Secretary of the United States Department of the Treasury ("Treasury Dept."), testified on April 13, 2016, before the Committee that the Treasury Dept. was concerned the February 15, 2017 deadline could create a gap between the prepetition stay and the Title III stay. Mr. Weiss stated:

> [A]ny stay on litigation must ensure that the Commonwealth has sufficient breathing space to allow for voluntary negotiations. *A stay must also allow for a transition without interruption from voluntary negotiations to a period of restructuring, if needed. As drafted, there is a risk the stay may terminate prior to the commencement of a restructuring, resulting in a chaotic race to the courthouse*.[34]

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[32] See, e.g., In re Witkowski, 523 B.R. 291, 296 (B.A.P. 1st Cir. 2015); In re Rodriguez-Camacho, 361 B.R. 294, 299 (B.A.P. 1st Cir. 2007); In re Torres, 544 B.R. 741, 748 (D.P.R. 2015)

[33] H.R. 4900 § 405(d)(1).

[34] *Testimony of Counselor Antonio Weiss Before the House Committee on Natural Resources on a Discussion Draft of the Puerto Rico Oversight, Management, and Economic Stability Act*, 114th Cong., at 1 (Apr. 13, 2016), https://www.treasury.gov/press-center/press-releases/Pages/jl0417.aspx ("Weiss Testimony") (emphasis added).

Subsequently, upon the introduction of H.R. 5278 on May 18, 2016, Section 405(d)(1)(B)-(C) included an option to extend the prepetition stay for an additional 60 to 75 days.

The testimony of Mr. Weiss asserting that the expiration of the February 15, 2017 prepetition stay would potentially result in "a chaotic race to the courthouse" plainly follows an interpretation of PROMESA pursuant to which Title III reorganizations can be commenced immediately following the expiration of the Section 405 prepetition stay, and not only many months or years later. Thereafter, the inclusion of language to extend the prepetition stay for an additional 60 to 75 days underscores that Congress agreed with the interpretation discussed by Mr. Weiss and heeded his concerns. As such, this revision makes clear that Congress envisioned that a Title III restructuring could commence immediately after the expiration of the prepetition stay.

B. Congress Explicitly Chose to Allow Puerto Rico and Its Instrumentalities to File a Title III Petition Before Completing a Title VI Restructuring.

As noted above, Section 206(a) provides that a restructuring certification issued before entering Title III only requires a determination by the Oversight Board that (1) the entity has made good-faith efforts to reach a consensual restructuring with creditors, and (2) the entity has adopted audit procedures and made public

information regarding a possible restructuring.[35] As detailed in this unambiguous language, Congress explicitly chose not to require that Puerto Rico or its instrumentalities complete the voluntary restructuring process in Title VI before it could file a Title III petition. Instead, Congress required that Puerto Rico make "good-faith efforts to reach a consensual restructuring with creditors" before filing a Title III petition.

Additionally, the legislative history upholds this unambiguous interpretation. The March 29, 2016 PROMESA discussion draft required that Puerto Rico have "made reasonable effort to reach a voluntary agreement with holders of its debt."[36] Subsequently, the April 12, 2016 draft of PROMESA required that Puerto Rico have "completed the process set forth in title VI" before the Oversight Board issues a restructuring certificate.[37] The day after, Mr. Weiss submitted his written testimony to the Committee, as referenced above, which included a criticism of tying eligibility for the Title III process to completion of the Title VI process. Specifically, Mr. Weiss stated:

> First, we support tools that facilitate voluntary restructurings. But the bill's version of a collective action clause imposes an unworkable, mandatory process that will only delay the ability to reach a comprehensive resolution. Under the proposed approach, all of Puerto

[35] 48 U.S.C. § 2146.

[36] Discussion Draft § 202.

[37] H.R. 4900 § 206.

> Rico's numerous debtors would have to complete a complicated process before any single entity could begin to restructure.[38]

Following the testimony of Mr. Weiss, the subsequent version of PROMESA in H.R. 5278 removed the Title VI completion requirement. Instead, that version of the bill provided that Puerto Rico must have "made good-faith efforts to reach a consensual restructuring with creditors,"[39] as subsequently codified. Rep. Pierluisi submitted additional views in the Committee Report on this version of the bill stating, "Good-faith efforts to reach a consensual restructuring agreement can take different forms, including—but not limited to—use of the 'collective action clause' provisions of Title VI of PROMESA."[40]

The plain language of the statute contradicts any assertion that a Title III restructuring is only to be used as a last resort after a Title VI restructuring, as no such requirement exists among the other requirements in the statutory language. Further, while the unambiguous language of the statute controls, the legislative history makes abundantly clear that Congress did not intend for Title III restructurings to occur only as a last resort. Instead, the legislative history unmistakably shows that such language was removed from the bill as such a

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[38] Weiss Testimony at 2.

[39] H.R. 5278 § 206.

[40] See H.R. Rep. No. 114-602, at 116 (2016) (Rep. Pedro Pierluisi's Additional Views).

provision requiring the completion of a Title VI restructuring before commencing a Title III restructuring would have been "unworkable."

III. THE BISHOP BRIEF DOES NOT PRESENT THE INTENT AND PURPOSE OF PROMESA AS PASSED BY CONGRESS

As the above-referenced analysis details, the Bishop Brief does not accurately address the unambiguous language of PROMESA nor the underlying Congressional intent. As an overarching matter, the Bishop Brief attempts to recast PROMESA as law designed to give protections to Puerto Rico's creditors exceeding those typically available under the Bankruptcy Code, and which only permits a Title III reorganization in the most dire, and exceptional of circumstances. On the contrary, the unambiguous language of PROMESA provides that it is a "comprehensive approach to fiscal, management, and structural problems . . . for the Government of Puerto Rico to restructure debts in a fair and orderly process."[41] As part of this comprehensive approach, Congress gave Puerto Rico significant debtor protections not otherwise available to municipal debtors under Chapter 9, including the prepetition stay and the ability to restructure territory-level debt, while also requiring that fiscal plans "respect the relative lawful priorities of lawful liens."[42] Nothing in the language of PROMESA nor its pertinent legislative history suggests that, e.g.,

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[41] 48 U.S.C. § 2194(m).

[42] 48 US.C. § 2141(b)(1)(N).

PROMESA somehow prohibits any impairment of creditors. Instead, PROMESA incorporates respect of creditors' priorities in Section 201[43] in a manner similar to the absolute priority rule found in 11 U.S.C. § 1129(b)(2).

Likewise, the Bishop Brief makes a number of other arguments that ignore their similarities to the Bankruptcy Code. For example, the Bishop Brief asserts that PROMESA incorporates 11 U.S.C. 362(d) as an indication of its commitment to the protection of creditors.[44] That bankruptcy provision permits the court to lift the automatic stay where collateral is not adequately protected.[45] This is indeed a standard element of bankruptcy cases originating under the Bankruptcy Code, and is applied by Courts in appropriate circumstances based on the facts of that case. It is not, however, indicative of Congressional intent to grant heightened protections to creditors. Similarly, the Bishop Brief notes that that Section 314(b)(6) must be "feasible and in the best interests of creditors."[46] These are likewise key provisions in plans under the Bankruptcy Code[47] that do not give creditors heightened protections or insulation from impairment, but instead promote fair and orderly reorganizations that respect creditors' existing priorities. There is no basis by which

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[43] Id.

[44] See Bishop Brief at 22; 48 U.S.C. §2161.

[45] See 11 U.S.C. § 362(d).

[46] See Bishop Brief at 24; 48 U.S.C. § 2174(b)(6).

[47] See, e.g., 11 U.S.C. 1129(a)(7) and (11).

the inclusion of these standard provisions somehow indicate that creditors cannot be impaired, or otherwise hold heightened protections from those found in the Bankruptcy Code.

Additionally, the Bishop Brief asserts that PROMESA incorporates 11 U.S.C. § 928's special revenue provision through Section 301[48] as emphasis that creditors receive protections under Title III. This assertion is not inaccurate or controversial unless it is used to advocate for creditor protections *beyond* those included in the plain language of PROMESA. Within PROMESA, Section 305[49] effectively incorporates 11 U.S.C. § 904, and provides that "unless the Oversight Board consents or the plan so provides, the court may not . . . interfere with (1) any of the political or governmental powers of the debtor; (2) any of the property of the revenues of the debtor; or (3) the use or enjoyment by the debtor of any income-producing property."[50] Again, the unambiguous language of PROMESA supports an orderly reorganization that allows Puerto Rico to maintain its ability to govern while protecting the priorities of creditors.

Just as the plain language of the PROMESA does not accord with various assertions in the Bishop Brief regarding Congressional intent, the above-referenced

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[48] 48 U.S.C. § 2161.

[49] 48 U.S.C. § 2165.

[50] Id.

portions of the legislative history contrast with numerous of the Bishop Brief's assertions regarding Congressional intent. Notably, the Bishop Brief proffers an explanation of the purposes of PROMESA and extensively quotes from documents including a Markup Memorandum[51] from Republican committee staff that do not reflect final bipartisan compromises reflected in the enrolled statutory language. Not only is legislative history only at issue where the statutory language is ambiguous, but even where legislative history is considered, this does not include documents that were not part of the Congressional record. The partisan Markup Memo is not an official part of the legislative record, and should be accorded no weight whatsoever by the Court in interpreting the Congressional intent underlying PROMESA. Instead, the Markup Memo represents a partisan discussion of PROMESA not representative of the broader intent of Congress in drafting and passing PROMESA. Above-referenced examples of amendments to PROMESA following testimony before the Committee are tangible examples of definitive legislative history that reveal Congressional intent. Alternatively, the Bishop Brief's attempt to offer the Markup Memo to this Court as evidence of Congressional Intent (or to undermine the plain language of the statute) should be disregarded as an attempt to revise PROMESA through the judicial system after its passage by

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[51] See Markup Memorandum from House Committee on Natural Resources on H.R. 5278 (May 23, 2016), *available at* https://naturalresources.house.gov/uploadedfiles/markup_memo_--_h.r._5278_05.24.16__05.25.16.pdf (the "Markup Memo")

Congress. As repeatedly noted above, the plain and unambiguous language of PROMESA as passed by Congress is controlling. If review of legislative history is required, only bona fide legislative history should be considered.

CONCLUSION

Rep. Grijalva and Rep. Velázquez submit that the analysis above provides an accurate and authoritative discussion of PROMESA's interpretation and the Congressional intent behind that law.

August 27, 2018.

Respectfully Submitted,

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By: /s/______________________

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 29(a)(5), containing _____ words excluding the portions of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

This brief also complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word in Times New Roman font size 14.

*/s/*_______________
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