No. 18-___

IN THE
Supreme Court of the United States

PEAJE INVESTMENTS LLC,
Petitioner,

v.

THE FINANCIAL OVERSIGHT AND MANAGEMENT BOARD FOR PUERTO RICO, AS REPRESENTATIVE FOR THE PUERTO RICO HIGHWAYS AND TRANSPORTATION AUTHORITY, *et al.*,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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Dated: October 26, 2018

QUESTION PRESENTED

Petitioner owns bonds issued by Respondent, the Puerto Rico Highway & Transportation Authority ("HTA"). The bonds are secured by a lien on toll revenues as directed by Puerto Rico statute and HTA regulations. Since before its bankruptcy filing, HTA has been spending all the toll revenues, and has announced its intention to continue spending these revenues indefinitely, leaving Petitioner unpaid.

Under the Bankruptcy Code, a "lien" is defined as a "charge against or interest in property to secure payment of a debt," 11 U.S.C. §101(37), and is entitled to protection depending on its type: whether it is a "statutory lien," a "security interest," or a "judicial lien," *id*., §§101(53), (51), (36). The First Circuit held that Petitioner's lien is not a statutory lien because, even though the lien is imposed unilaterally by statutory and agency regulation, the lien's elements are not all set out in a statute; some are specified in HTA's regulations as a matter of discretionary agency action. In contrast, the Third and Ninth Circuits have determined that a statutory lien need not be specified entirely in a statute, and may arise as a matter of discretionary agency action. Likewise, the Fifth Circuit has held that a lien imposed unilaterally by operation of law, as opposed to one arising from bilateral agreement, is properly a statutory lien. The question presented is:

Should the Court grant certiorari to resolve a conflict among the courts of appeals over the correct legal standard for determining whether a lien is a "statutory lien" under the Bankruptcy Code?

PARTIES TO THE PROCEEDING

The Following are additional Respondents:

Hon. Carlos Contreras-Aponte, in his official capacity as Executive Director of Puerto Rico Highways & Transportation Authority;

The Financial Oversight and Management Board for Puerto Rico, as Representative for the Commonwealth of Puerto Rico;

Hon. Ricardo Rosselló Nevares, in his official capacity as Governor of the Commonwealth of Puerto Rico;

Hon. Raúl Maldonado Gautier, in his official capacity as Secretary of Treasury of the Commonwealth of Puerto Rico;

Hon. José Iván Marrero Rosado, in his official capacity as Executive Director of the Office of Management & Budget;

Puerto Rico Fiscal Agency and Financial Advisory Authority;

Hon. Gerardo Jose Portela Franco, in his official capacity as Executive Director of the Puerto Rico Fiscal Agency and Financial Advisory Authority.

RULE 29.6 STATEMENT

Petitioner Peaje Investments, LLC ("Peaje") is a limited liability company organized and existing under the laws of the State of Delaware. No corporation is a parent of Peaje and no publicly held corporation owns 10% or more of its stock.

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The opinion of the court of appeals is published at 899 F.3d 1, and is reproduced in the appendix at Pet. App. 1a. The opinion of the district court is published at 301 F.Supp. 3d 290 (D.P.R. Sept. 8, 2017), and is reproduced at Pet. App. 24a.

JURISDICTION

The court of appeals entered its judgment on August 8, 2018. The court of appeals had jurisdiction under 28 U.S.C. §§1291, 1292, and 48 U.S.C. §2166. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

RELEVANT STATUTORY PROVISIONS

The following statutory provisions are relevant to this matter:[1] 11 U.S.C. §§101 (36), (37), (51), (53); P.R. Laws Ann. Tit. 9 §§2004(l), 2012(a), 2012(b), 2012(c), 2013, 2015; Puerto Rico Highway Transportation Authority Resolution No. 68-18 §§101, 401, 405, 409, 601, 602, 604, 802. The legislative history related to the provisions of the United States Code cited above are also implicated: S. Rep. No. 95-989 (1978).

[1] The relevant portions of these provisions are reproduced in Petitioner's Appendix. *See* Pet. App. 42a, 48a, 61a. Citations to the record set out in the Addendum, Joint Appendix, and Joint Supplemental Appendix filed below are cited as ADD_, A_, and SA_, respectively.

PRELIMINARY STATEMENT

This matter arises out of the municipal bankruptcy proceedings of Respondents the Commonwealth of Puerto Rico ("Commonwealth") and the Puerto Rico Highway & Transportation Authority ("HTA"). Petitioner Peaje Investments, LLC ("Peaje") owns more than $65 million in uninsured municipal bonds ("Bonds") that HTA issued. Pet. App. 3a. The Bonds are secured by a lien on certain toll revenues (the "Toll Revenues") as directed by Puerto Rico statute and HTA regulations.[2]

In particular, HTA's statutory enabling act (the "Enabling Act" or "Act") authorized HTA to issue the Bonds and specify the collateral securing them by way of governmental resolution. P.R. Laws Ann. Tit. 9 §2012(a), 2012(b); Pet. App. 4a, 17a-18a. In addition, the Act directs that the Bonds are non-recourse in nature, meaning they must be paid solely from the collateral securing them: "nor shall such bonds or the interest thereon be payable out of any funds *other than those pledged for the payment of such bond*s . . . ." P.R. Laws Ann. Tit. 9 §2015 (emphasis added); Pet. App. 18a.

Following these provisions, HTA promulgated an official resolution (the "68 Resolution" or "Resolution") also directing that the Bonds are non-recourse in nature and further specifying a lien on the Toll

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[2] The bonds are also secured by certain tax revenues that Respondents are also spending. Peaje's lien on the tax revenues is not at issue in this matter. *See* Pet. App. 4a n.1.

Revenues, stating: "the principal, interest and premiums are payable solely from Revenues . . . *which Revenues . . . are hereby pledged to the payment thereof* . . . ." HTA Res. No. 68-18, §601 (emphasis added); Pet. App. 4a, 21a.[3] For the sake of clarity, the 68 Resolution defines the term "Revenues" to include "Toll Revenues," and the term "Toll Revenues" to mean "the tolls or other charges . . . imposed by [HTA] for the use of any of its Traffic Facilities." HTA Res. No. 68-18 §101. As the foregoing makes plain, Peaje's lien on the Toll Revenues arises by operation of law under the Enabling Act and the 68 Resolution, not as the result of any bilateral agreement negotiated between HTA and any bondholder.

The Bankruptcy Code defines "lien" to mean a "charge against or interest in property to secure payment of a debt . . . ." 11 U.S.C. §101(37); Pet. App.

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[3] A "pledge" of collateral for the payment of a debt means the grant of a lien on the collateral securing the debt. *See, e.g.,* OXFORD ENGLISH DICTIONARY (Oxford 3d ed. 2010) (defining 'pledge' to mean "to give as security for a loan"); HTA Res. No. 68-18, § 602 (referring to the pledge granted in section 601 of the Resolution as a "lien on Revenues"). In municipal bond financings such as this one, the term "pledge" is uniformly recognized to mean a lien on the specified collateral to secure payment of the relevant debt. *See, e.g., In re Jefferson Cty., Ala.*, 474 B.R. 228, 266-67 (Bankr. N.D. Ala. 2012) (finding that project revenues pledged under municipal bond indenture were subject to a lien in favor of the bond trustee); *Pierce Cty. v. Wash.*, 148 P.3d 1002, 1008 (Wash. 2006) ("The Sound Transit bonds are payable from and secured solely by the pledge of Sound Transit's MVET and sales tax. The pledge constitutes a prior lien . . . .").

16a. In turn, the Code recognizes three lien subcategories: "statutory lien," "security interest," and "judicial lien." 11 U.S.C. §§101(53), (51), (36); Pet. App. 16a. The Code defines a "statutory lien" as a "lien arising solely by force of a statute on specified circumstances or conditions . . ., but does not include security interest or judicial lien . . . ." 11 U.S.C. §101(53). In turn, the Code defines "security interest" as a "lien created by an agreement." *Id.*, §101(51). Finally, the Code defines "judicial lien" as a "lien obtained by judgment, levy, sequestration, or other legal or equitable process or proceeding." *Id.*, §101(36). As the court below noted, these subclasses are "mutually exclusive," meaning that a lien must fall within only one of them. Pet. App. 9a, 16a. As the court below also explained, the classification of Peaje's lien matters because "Peaje's rights in the [bankruptcy case] differ considerably depending on whether it possesses a statutory lien or a lien resulting from a security agreement (i.e., a security interest)." *Id.* at 10a.

Construing these provisions, the court below concluded that a statutory lien arises in two circumstances: "a statute can create a lien outright or it can establish that a lien will attach automatically upon an identified triggering event other than an agreement to grant the lien." *Id.* at 19a. The question is whether an agency regulation imposing a lien properly constitutes such a "triggering event." The court below concluded that it does not. Specifically, the court determined that Peaje's lien does not qualify because, under the Enabling Act, "[a] pledge of revenues does not attach automatically when the Authority [HTA] passes a resolution issuing bonds,"

but rather "it arises only when the Authority chooses to grant it." *Id.* at 20a. The court concluded that, "[b]ecause the Act does not automatically trigger a lien upon the performance of a specified condition, *apart from the Authority's decision to grant a lien*, it does not create a statutory lien." *Id.* (emphasis added). In other words, the court excluded HTA's regulatory decision to pledge the Toll Revenues as a proper "circumstance or condition" triggering a statutory lien, even though the Enabling Act authorized this decision and the Act provides that the Bonds may be paid only from the collateral HTA designates to secure them.

In support of its interpretation, the court below held that it does not matter that the 68 Resolution pledging the collateral is a unilateral governmental regulation, as opposed to a bilateral agreement. According to the court, the "specified circumstances or conditions" giving rise to a statutory lien cannot include an agency's regulation because such "'is not a statute.'" *Id.* at 21a (quoting the District Court's opinion).

Certiorari is warranted because the decision below conflicts with the decisions of the Third, Fifth, and Ninth Circuits. Contrary to the First Circuit's holding in this case, decisions of the Third and Ninth Circuits recognize that agency action may give rise to a statutory lien so long as the agency action is authorized by statute and the lien arises by operation of law, rather than from a bilateral agreement between the parties. *See In re Schick*, 418 F.3d 321 (3d Cir. 2005); *Graffen v. City of Philadelphia*, 984 F.2d 91 (3d Cir. 1992); *Rankin v. DeSarno*, 89 F.3d

1123 (3d Cir. 1996); *In re Mainline Equipment*, 865 F.3d 1179 (9th Cir. 2017). As these decisions make plain, the proper test for determining if a lien is a statutory lien is not, as the court below held, whether "a statute . . . create[s] a lien outright" or "establish[es] that a lien will attach automatically upon an identified triggering event" other than discretionary agency activity. Pet. App. 18a-21a. As the Third Circuit has explained, it does not matter that the statute governing the relevant debt "lacks explicit lien-creating language . . . ." *Schick*, 418 F.3d at 328. Nor does it matter that the lien arose as a result of discretionary agency action. What matters is that the agency's discretionary action giving rise to the lien was "one of the specified conditions for the creation of the statutory lien." *Id.* at 326. Peaje's lien in this case amply meets the Third Circuit's standard. Conversely, the standard adopted below would foreclose the results reached in the decisions of the Third and Ninth Circuits.

The holding below likewise conflicts with the standard adopted by the Fifth Circuit. As the Fifth Circuit has explained, the correct test for distinguishing a "statutory lien" from a "security interest" is whether the lien is imposed unilaterally by operation of law, or whether it arises from a bilateral agreement between the parties. *In re Green*, 793 F.3d 463, 468-470 (5th Cir. 2015) (applying this standard). Under the Fifth Circuit's approach, Peaje's lien plainly qualifies as a statutory lien because it is imposed unilaterally by the Enabling Act and the 68 Resolution, not as the result of any bilateral contract negotiated between HTA and any bondholder. *See also Rankin*, 89 F.3d at 1127 (distinguishing a

statutory lien from a security interest on the basis of whether the lien arises from a "voluntary agreement" between the parties); *In re Lionel Corp.*, 29 F.3d 88, 94 (2d Cir. 1994) (acknowledging that "other courts" have determined that a statutory liens arises "by operation of statute and not by agreement between the parties . . . .") (citing *In re WWG Indus., Inc.*, 772 F.2d 810, 812 (11th Cir. 1985)).

Certiorari is further warranted because the decision below conflicts with this Court's precedents. As this Court has explained time and again, the courts are not at liberty to engraft terms or limitations onto congressional enactments that do not appear in the text. *See, e.g., Lamie v. Unites States Trustee*, 540 U.S. 526, 538 (2004) (declining to engraft additional term); *Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, 254 (1992) (declining to restrict application of provision where restriction not specified in text); *United States v. Locke*, 471 U.S. 84, 95 (1985) (courts do not have "carte blanche to redraft statutes in an effort to achieve that which Congress is perceived to have failed to do"). That, however, is exactly what the court below has done. Section 101(53) directs that a statutory lien arises on "specified circumstances or conditions" without restricting the "circumstances or conditions" to exclude agency regulation or discretionary agency action. The court below simply added that limitation on the theory that HTA's regulation is "not a statute." Pet. App. at 21a. That, however, impermissibly rewrites the definition of a "statutory lien."

Certiorari is further warranted because the question presented involves a vitally important issue

of law. Congress created the special classification of "statutory lien" in recognition of the fact that liens prescribed by statute and imposed unilaterally by operation of law characteristically fulfill important governmental purposes. Accordingly, statutory liens are treated differently from private liens that arise from bilateral negotiation or as the result of judicial proceedings that typically vindicate private interests. The decision below improperly excludes from the classification of statutory liens a large segment of liens properly included within it, with critically harmful consequences. Those who rely on statutory regimes that provide for the imposition of liens unilaterally through government regulation are entitled to rely on the statutory nature of those liens, including the holders of hundreds of billions of dollars of municipal bonds secured by such liens. The fact that the governing statutory regime delegates some lien-creating authority to a regulatory agency does not properly defeat the statutory nature of the lien.

Finally, certiorari is warranted because the decision below was otherwise wrongly decided. The First Circuit's holding recognizes an unworkable standard detrimental to the operation of commercial law in general, and bankruptcy law in particular. Accordingly, Peaje respectfully requests that the Court grant certiorari review.

STATEMENT

On May 3, 2017, the Commonwealth filed for bankruptcy protection under Title III of the Puerto Rico Oversight, Management, and Economic Stability Act, Pub. L. 114-187, 48 U.S.C. §§2101-2241 ("PROMESA"); Pet App. 3a, 6a. Thereafter, HTA

commenced its own case under PROMESA on May 21, 2017. *See* Pet App. 3a, 6a. In July of 2017, HTA defaulted on its payment obligations under the Bonds, missing the payment then due. Since then, HTA has continued spending all the Toll Revenues securing the Bonds, and has indicated that it intends to do so indefinitely, leaving the Bonds unpaid.

PROMESA authorizes both the Commonwealth and HTA to reorganize under a judicially-supervised plan of adjustment, subject to additional supervision by an oversight board (the "Oversight Board" or "Board"). *See* PROMESA §201(a), 48 U.S.C. §2141(a). With certain modifications not relevant here, PROMESA provides that the Commonwealth's and HTA's reorganization proceedings are governed by the provisions of Chapter 9 of the Bankruptcy Code, including the Code's provisions regarding the definition and treatment of liens in bankruptcy. *See id.* §301(a), 48 U.S.C. §2161(a); Pet. App. 9a-10a.[4]

HTA and the Bonds

HTA "was formed in 1965 as a public corporation and instrumentality of the Commonwealth." Pet. App. at 4a. Under the terms of HTA's Enabling Act, HTA is authorized to borrow money, issue bonds, and secure those bonds with liens on collateral. P.R. Laws Ann. Tit. 9 §2004(l). In 1968, HTA adopted the 68

[4] Chapter 9 is the chapter of the Code that generally governs municipal reorganization proceedings. *See* 11 U.S.C. §901 *et seq.*

Resolution, which authorized the issuance of the Bonds. HTA Res. No. 68-18; Pet. App. 4a.

As noted, the Enabling Act permitted HTA to issue the Bonds through the promulgation of governmental regulations in the form of a "resolution," P.R. Laws Ann. Tit. 9 §§2012(a), 2012(b); Pet. App. 17a, and HTA issued the 68 Resolution under this authority, HTA Res. No. 68-18, Preamble. Although the 68 Resolution elaborates various details regarding the Bonds and the liens securing them, the Act itself directs the general structure of HTA's obligations, validates the Bonds, provides for their enforcement, and directs their status as non-recourse obligations payable only from the collateral pledged to secure them.

In particular, the Enabling Act directs that the bonds HTA issues "shall be valid and binding" and that all bonds bearing the recital that they are issued under the Act (which the Bonds recite) "shall be conclusively deemed to be valid and to have been issued in conformity with the provisions of this [Act]." P.R. Laws Ann. Tit. 9 §2012(c). The Act further directs that the Bonds are non-recourse in nature, meaning they may be paid only from the collateral securing them: "nor shall such bonds or the interest thereon be payable out of any funds other than those pledged for the payment of such bonds . . . ." *Id.* §2015; Pet. App. 18a. Regarding enforcement, the Act authorizes the bondholders to bring suit to enforce their rights under the Bonds, and specifically authorizes the remedy of mandamus. P.R. Laws Ann. Tit. 9 §2013.

In turn, the 68 Resolution also stipulates that the Bonds are non-recourse in nature, and pledges the

Toll Revenues to secure their payment: "the principal, interest and premiums are payable solely from Revenues and from any funds received by [HTA] for that purpose from the Commonwealth *which Revenues and funds are hereby pledged to the payment thereof* . . . ." HTA Res. No. 68-18 §601 (emphasis added); Pet. App. 4a, 21a. As noted, the Resolution defines the term "Revenues" to include "Toll Revenues," and "Toll Revenues" to mean "the tolls or other charges . . . imposed by [HTA] for the use of any of its Traffic Facilities." HTA Res. No. 68-18 §101.[5]

The Resolution repeatedly refers to the "pledge" specified in section 601 as a "lien on Revenues," and establishes both the perfection and priority of this lien, directing that HTA "will not incur any indebtedness nor create nor cause or suffer to be created any debt, lien, pledge, assignment, encumbrance or any other charge having a priority to or being on a parity with the lien on Revenues" except in certain situations not relevant here. *Id.*, §602; *see also id.*, §§802 (prohibiting HTA from creating "a lien upon or a pledge of Revenues other than the lien and pledge created by this Resolution"), 409 (referring to "all bonds secured hereby").[6]

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[5] In addition to the Toll Revenues, the other "funds" pledged as collateral under section 601 include certain tax revenues, which are not at issue in this matter. *See supra* n. 2.

[6] The concept of "perfection" refers to whether a lien is established in a manner sufficient to have priority over a judgment-lien creditor. The Resolution establishes the perfection of the lien on the Toll Revenues by proscribing

To ensure the Bonds are paid in a timely manner, the Resolution requires HTA to deposit the Toll Revenues with a fiscal agent (the "Fiscal Agent"). *See id.*, §401; Pet. App. 5a. The Resolution further provides that the agent holds these funds "in trust" subject to "a lien and charge in favor of the holders of the bonds issued and outstanding under this Resolution and for the further security of such holders . . . ." HTA Res. No. 68-18 §401; *see also* HTA Res. No. 68-18 §409 (directing that the funds are not subject to any other lien); Pet. App. 5a.

The Resolution further establishes that the bondholders' lien is a "gross" lien, directing that HTA must first deposit sufficient funds into the bondholders' collateral account to meet all debt service and reserve requirements before HTA may otherwise spend the collateral. *See* HTA Res. No. 68-18 §§401, 405. The Commonwealth, in turn, is required by statute to transfer certain tax revenues to HTA to fund HTA's operations and further secure the Bonds. *See, e.g.,* P.R. Laws Ann. Tit. 13 §31751(a)(1)(B) (pledge of excise taxes); *id*., §§2021, 5681 (pledge of vehicle license fees).[7] Separately, the

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other liens and attachments. HTA Res. No. 68-18, §602. The concept of "priority" refers to whether a lien is granted priority over other obligations. The Resolution establishes the priority of the lien on the Toll Revenues by proscribing other liens with a priority greater than or equal to Peaje's lien, and by subordinating HTA's expenses to the payment of the Bonds. *Id*. §§401, 405, 409, 602, 604.

[7] The tax revenues are not at issue in this matter. *See supra* n. 2.

Commonwealth agreed to fund the maintenance, repair, and operation of the roads. HTA Res. No. 68-18 §604.

The Enabling Act and 68 Resolution thus comprehensively establish the validity of Peaje's lien on the Toll Revenues. Moreover, they establish that Peaje's lien attaches to the stream of revenues itself, *see id*. §601, together with the proceeds deposited with the Fiscal Agent, *see id.* §401. Under Puerto Rico law, the Resolution "has the same legal status as a law passed by the legislature" and "becomes part of" the Enabling Act. *Armstrong v. Ramos*, 74 F. Supp. 2d 142, 149 (D.P.R. 1999).[8]

The Pre-bankruptcy Litigation

For the past several years, the Commonwealth and HTA have, as noted, been taking the Toll Revenues securing the Bonds and using them for purposes other than paying the Bonds. HTA has thus defaulted on its obligations in two relevant ways: by failing to deposit the Toll Revenues with the Fiscal Agent (beginning in 2016), and by failing to make the payments due on the Bonds (beginning in July of 2017). Further, HTA has announced that it will

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[8] In the alternative, to the extent Peaje's lien is not governed by the Enabling Act and 68 Resolution with respect to any issue regarding the lien's creation, perfection, priority, or enforceability, the provisions of Article 9 of Puerto Rico's version of the Uniform Commercial Code ("UCC") apply and establish Peaje's lien rights. *See* 9-109(a), (c)(2), P.R. Laws Ann. Tit. 19 §2219; 9-201, P.R. Laws Ann. Tit. 19 §2231.

continue taking and spending the Toll Revenues for at least the next decade, leaving the Bonds unpaid.

Prior to HTA's bankruptcy filing, Peaje moved in the District Court to lift the now-expired interim stay under section 405 of PROMESA so that it could file a complaint challenging the diversion of its collateral. Pet. App. 6a. In that proceeding, HTA and the Commonwealth objected to Peaje's motion on the ground that it was unnecessary because HTA was not then in payment default and Peaje would be paid. A68-70. The District Court (Besosa, D.J.) agreed, finding that Peaje "continues to hold a security interest in a stable, recurring source of income that will eventually provide funds for the repayment of the [HTA] bonds . . . ." *Peaje Investments LLC v. Garcia-Padilla,* No. CV 16-2365 (FAB), 2016 WL 6562426, at *5 (D.P.R. Nov. 2, 2016), *aff'd in part, vacated in part sub nom. Peaje Investments LLC v. García-Padilla*, 845 F.3d 505 (1st Cir. 2017).

On Peaje's appeal to the First Circuit, HTA and the Commonwealth argued that the Bonds are "secured by a pledge of revenues generated by highway tolls, excise taxes on gasoline, vehicle license fees, and investment earnings." A869. They further represented that the bondholders "are adequately protected for the full value of their interest in the revenues that serve as their collateral, as they are being paid now, and they will continue to be paid in the future." *Id.* To further quell any concern, they represented that the diversion of the bondholders' collateral was only a temporary measure, and suggested that the diversion would cease soon after the appeal was over. *See id.* Following these

arguments and concessions, the First Circuit found that "[t]he bonds are secured by a lien on toll revenues, among other things," *see García-Padilla*, 845 F.3d at 510, and affirmed the District Court's decision denying Peaje's request for relief from the interim stay, Pet. App. 6a. As discussed below, however, the Commonwealth and HTA did not honor their representations regarding payment of the Bonds, and HTA subsequently defaulted on its payment obligations.

Upon the expiration of the interim stay, Peaje commenced an action against HTA in the District Court to prevent the ongoing destruction of its lien rights. *See Peaje Investments LLC v. Puerto Rico Highways & Transportation Authority*, 3:17-cv-01612-FAB (D.P.R.). Following HTA's bankruptcy filing, however, the District Court stayed that action, which remains stayed. *See id*. [ECF No. 16]; Pet. App. 6a-7a.

HTA's Bankruptcy Filing and Proceedings in the District Court

As part of the restructuring process, PROMESA requires the Commonwealth and HTA to develop fiscal plans for approval by the Oversight Board. *See* PROMESA §201(a), 48 U.S.C. §2141(a). HTA developed its own fiscal plan before its bankruptcy filing. After making certain modifications, the Board approved the plan on April 28, 2017.[9]

[9] HTA has since proposed a revised Fiscal Plan.

Despite the requirement that fiscal plans must respect "lawful liens," *see id.*, §201(b)(1)(N), 48 U.S.C. §2141(b)(1)(N), HTA's plan provides that bondholders will not receive any payment from their collateral for at least the next decade. The plan claims that HTA "has insufficient cash flows to service its debt," A156, and "Bondholders of [HTA] would cease to receive money for debt repayment by July 2017, when the reserve funds that have been used until now run out,"A144. The plan also reveals why HTA has insufficient cash: the Commonwealth is diverting the tax revenues and other funds that, under Puerto Rico statute, are to be used to fund HTA's operations. The plan provides that the Commonwealth will continue to "claw back" (divert) from HTA an average annual net amount of approximately $340 million (including the tax revenues) allocated to HTA, using these funds to pay the Commonwealth's general expenditures and debts. SA97.

Shortly after HTA's bankruptcy filing, Peaje commenced a set of adversary proceedings by filing a complaint (the "Complaint") in the Commonwealth's and HTA's respective bankruptcy cases, seeking the proper disposition of its collateral. A71; Pet. App. 7a. Peaje alleged in its Complaint that the Bonds are "secured by a valid, enforceable, first-priority lien on certain toll revenues that HTA collects in its operations . . . ." A72-73. Peaje also argued that its lien is properly classified as a "statutory lien" for bankruptcy purposes, and that, as a result, HTA may not charge any of its operating expenses against Peaje's collateral ahead of the payment of the Bonds. A104-105, A113-114.

Peaje also moved for a preliminary injunction to prevent the further destruction of its lien rights. A182. Peaje likewise sought relief from the bankruptcy stay for lack of adequate protection so that Peaje could pursue its separate pending action. *Id.*; Pet. App. 8a. With a view to providing HTA with additional operating liquidity, however, Peaje offered that HTA could retain a portion (approximately 25%) of the Toll Revenues. SA66-67.

On June 5, 2017, the District Court held a scheduling hearing on Peaje's requests for injunctive relief and relief from the bankruptcy stay. Pet. App. 8a. During the hearing, the Oversight Board explained the Commonwealth's intention to continue withholding the tax revenues from HTA, and that HTA would have only the Toll Revenues to pay its operating expenses, leaving nothing for bondholders. A262. While Peaje explained that the ongoing taking of its collateral constituted grounds for immediate injunctive relief, Peaje agreed to withdraw its request for a TRO and waive the requirement under section 362(e)(1) of the Bankruptcy Code that the court hold a hearing on Peaje's motion for stay relief within 30 days, so long as the matter could be heard as expeditiously as possible.[10] A261, A264-269. Subsequently, the court entered a briefing and discovery schedule, and set a date for an evidentiary hearing. *See Order* available at: *Peaje Investments LLC v. Puerto Rico Highways & Transportation*

[10] Section 362(e)(1) requires the trial court to hold a lift-stay hearing within 30 days of the filing of the motion—otherwise, the stay is vacated. *See* 11 U.S.C. §362(e)(1).

Authority, Adv. Proc. No. 17-151-LTS in 17 BK 3567-LTS (D.P.R.) [ECF No. 56].

In their subsequent opposition to Peaje's request for injunctive and stay relief, the Commonwealth and HTA asserted that Peaje did not have a "statutory lien" and that Peaje had disavowed any non-statutory lien interest. A67-70. Peaje timely filed a reply reiterating that its lien is, first and foremost, a "lien" that is valid and enforceable under Puerto Rico law. SA32. Peaje further explained that the classification of its lien as a "statutory lien" or a "security interest" under the Bankruptcy Code is a separate issue. SA45-46 ("Peaje also alleges that its lien is properly characterized as a 'statutory lien' for bankruptcy purposes, which is a separate question because the Bankruptcy Code has its own definition of 'statutory lien.'"). While Peaje explained that its lien is properly classified as "statutory" under the Bankruptcy Code, Peaje alternatively defended the validity of its lien under Article 9 of the Uniform Commercial Code (to the extent applicable). SA45-49. Peaje contended that, to the extent its "lien is not governed comprehensively by the Enabling Act and the 68 Resolution, Article 9 fills the gap." SA46 (citing 9-109(a), P.R. Laws Ann. Tit. 19 §2219; 9-201, P.R. Laws Ann. Tit. 19 §2231). Peaje further explained how its lien satisfies the requirements of Article 9. SA45-49.

The Commonwealth and HTA then moved to strike Peaje's defense of its lien under Article 9. Pet. App. 8a. They contended that, because Peaje argued that its lien was properly classified as statutory for bankruptcy purposes, therefore if Peaje does not have a statutory lien then it has no lien at all. SA68-71.

The District Court entered an order striking Peaje's legal arguments and evidence regarding the validity of its lien under Article 9, ruling that, if Peaje does not have a "statutory lien," then Peaje has not sufficiently alleged a valid lien interest for purposes of the pending motions. ADD1. In doing so, the court stressed that its "conclusion here is a limited one" and that "Peaje correctly notes that it has always premised its arguments on possession of a lien in the generic sense . . . ." ADD6-7. Nonetheless, the court limited Peaje to the argument that its lien is a "statutory lien" for purposes of its pending requests for relief.

The District Court held an evidentiary hearing on August 8, 2017. At the hearing, Peaje introduced documentary evidence showing that the Bonds are secured by a lien on the Toll Revenues. Among other things, Peaje submitted the Enabling Act, ADD71, the 68 Resolution, ADD25, several offering statements for the Bonds, A385, A569, HTA's audited financial statements, A282, a Commonwealth financial and operating data report, A734, and a screenshot from the Government Development Bank for Puerto Rico's website, A731, all of which acknowledge the Bonds are secured by the Toll Revenues.

On cross-examination, two of HTA's witnesses admitted the Bonds are secured by the Toll Revenues. Mr. Gonzalez, HTA's former Executive Director, admitted that "highway revenue bonds" are to be paid with the gross revenues of highway tolls. A276-279. As Executive Director, Mr. Gonzalez signed offering documents for the Bonds, which provide that "debt service on the Authority's revenue bonds constitute a

first lien on its gross revenues . . . ." A278. Mr. Gonzalez further testified that this statement was accurate and "principal and interest on the 1968 bonds had to be paid first with the toll revenues before any other expenses of the HTA could be paid with the toll revenues." A278-279. Similarly, Mr. Wolfe, a consultant to the Oversight Board and the Commonwealth, and "an author of the model of the [Commonwealth fiscal] plan," A280, testified that the Toll Revenues were "pledged revenue to these bonds . . . ," A281.

On September 8, 2017, the District Court entered its Order denying injunctive relief and relief from stay. Although the court previously acknowledged that Peaje "has always premised its arguments on possession of a lien in the generic sense," ADD6-7, the court determined that, because Peaje's does not have a "statutory lien," Peaje has not demonstrated a valid lien interest, Pet. App. 38a. The court reasoned that the Enabling Act merely authorized "HTA to enter into certain types of consensual liens—contracts between HTA and the bondholders[,]" and that the Act's mandate that the Bonds are "valid and binding obligations" was "similarly insufficient to establish a statutory lien." *Id*. at 35a. The court also found that "Peaje . . . failed to demonstrate a likelihood of success on the merits of its argument that the 1968 Resolution created statutory liens" based on its determination that the 68 Resolution "is not a statute." *Id*. at 37a. Although the court suggested that the Act authorized the incurrence of "consensual liens," it did "not opine or reach any conclusion . . . as to whether the 1968 Resolution gives rise to any . . . type of valid lien . . . ." *Id*. at 34a n.5. The court also concluded that, even

though HTA has no intention of paying Peaje, Peaje was "adequately protected" because HTA intends to spend a portion of Peaje's collateral maintaining the toll roads. *Id.* at 40a. In addition, the court denied Peaje's motion for injunctive relief on the grounds that Peaje "failed to establish that it will suffer irreparable harm . . . ." *Id.* at 38a.

The Decision Below

On appeal, the First Circuit vacated the District Court's determinations regarding Peaje's requests for injunctive and stay relief, but affirmed the District Court's decision limiting Peaje to the argument that it holds a statutory lien, and likewise affirmed the District Court's legal determination that Peaje does not hold such a lien. Pet. App. 3a-4a.[11] On the merits of the statutory lien issue, the First Circuit defined its mission as a singular inquiry: "Does [Peaje] have a statutory lien on any property of [HTA]?" *Id.* at 15a. Acknowledging this to be a pure "legal question," *id.*, the court began its analysis by outlining the Bankruptcy Code's definitional scheme, which, as noted, recognizes three subclasses of "lien": "statutory

[11] Although the court observed that the question whether the District Court properly limited Peaje to arguing that it has a statutory lien was "admittedly a close call," Pet. App. 14a, it reasoned that "what gives us confidence that the [District Court] did not abuse its discretion . . . is the fact that any waiver here is not permanent" because, by vacating the District Court's determinations regarding Peaje's requests for injunctive and stay relief, Peaje may re-litigate these requests on the ground that it holds a security interest rather than a statutory lien, *id.* at 15a.

lien," "security interest," and "judicial lien," *id*. at 16a. As the court observed, the correct classification of Peaje's lien matters because "Peaje's rights in the [bankruptcy case] differ considerably depending on whether it possesses a statutory lien or a lien resulting from a security agreement (i.e., a security interest)." *Id.* at 10a.

After citing the relevant statutory provisions, the court began its analysis with a reference to *Collier*, which it characterized as describing "the 'essence' of a statutory lien as 'the need, or lack of need, for an agreement or judgment to create the lien.'" *Id.* at 16a (quoting 2 COLLIER ON BANKRUPTCY, ¶101.53 (16th ed.)). The court then turned to the provisions of the Enabling Act. The court acknowledged that section 2015 of the Act provides that the Bonds are non-recourse in nature and may be paid only from the collateral securing them: "the bonds issued by [HTA] shall not be a debt of the Commonwealth, 'nor shall such bonds or the interest thereon be payable out of any funds other than those pledged for the payment of such bonds and interest thereon pursuant to the provisions of §2004(l) of this title.'" *Id*. at 18a (quoting section 2015). Nonetheless, the court agreed with the District Court that "[n]o lien arises solely by force of [the] statutory provisions" of the Act. *Id*.

Regarding Peaje's argument that "a statutory lien need not be specified 'exclusively and formally in some statutory text,'" but may arise from "specified circumstances or conditions [that] include 'regulatory elaboration and agency action,'" the court rejected this standard. *Id.* at 18a-19a (quoting Peaje's argument). The court concluded instead that a statutory lien

arises in one of two circumstances: "a statute can create a lien outright or it can establish that a lien will attach automatically upon an identified triggering event other than an agreement to grant the lien." *Id.* The court then found this standard unsatisfied on the ground that "[a] pledge of revenues does not attach automatically when the Authority [HTA] passes a resolution issuing bonds," but rather "arises only when the Authority chooses to grant it." *Id.* at 20a. The court reasoned that, "[b]ecause the Act does not automatically trigger a lien upon the performance of a specified condition, *apart from the Authority's decision to grant a lien*, it does not create a statutory lien." *Id.* (emphasis added).

In reaching its conclusion, the court acknowledged Peaje's claim that, "even if the Enabling Act does not by itself create a statutory lien, the Act together with the 1968 Resolution does." *Id.* Likewise, the court acknowledged that "Peaje is correct that the Resolution contains *mandatory* language suggestive of lien creation." *Id.* (emphasis added). Nonetheless, the court rejected HTA's regulation imposing the lien on the Toll Revenues as a proper triggering event because "'the 1968 Resolution is not a statute.'" *Id.* at 21a (quoting the District Court's opinion).

REASONS FOR GRANTING THE PETITION

Certiorari is warranted because the decision below conflicts with the authoritative decisions of other courts of appeals. The decision below adopts a legal standard for determining a "statutory lien" that is irreconcilably at odds with the decisions of these other courts. Under the standards adopted by the Third, Fifth, and Ninth Circuits, Peaje holds a statutory lien.

Conversely, the legal standard adopted below would foreclose the results reached by these and other courts. This Court's review is necessary to resolve this conflict over the correct legal test for determining when a lien qualifies as a "statutory lien" within the meaning of section 101(53) of the Bankruptcy Code.

In addition, certiorari is warranted because the decision below conflicts with this Court's precedents. This Court has stated time and again that courts are not at liberty to rewrite congressional enactments or impose restrictions not evident in the statutory text. That, however, is exactly what the court below has done. Nothing in section 101(53) precludes delegated agency regulation from constituting a "circumstance or condition" properly giving rise to a statutory lien, and in concluding otherwise the court below effectively rewrote the statutory provision.

Certiorari is further warranted because the question presented is a vitally important issue of federal law. Congress created the "statutory lien" classification in recognition of the fact that liens imposed by operation of law under statutory regimes (as opposed to those arising from private bilateral agreement or judicial process) characteristically fulfill important governmental purposes. Moreover, those who rely on such regulatory regimes include the holders of hundreds of billions of dollars of municipal bonds secured by liens prescribed by statute. These regimes characteristically permit some degree of agency discretion regarding such things as collateral selection. The decision below, however, holds that such delegated regulation renders the resulting lien non-statutory. The unavoidable effect is to discourage

statutory delegations of lien-creating authority, notwithstanding the critical role such delegations play by permitting municipal agencies to tailor the terms of their bond offerings.

Finally, the decision below was otherwise wrongly decided. The test adopted by the court below is unworkable and stands at odds not only with Congress's carefully drafted scheme, but also its object and purpose. For these reasons, Peaje respectfully requests that the Court grant its petition.

I. THE DECISION BELOW CONFLICTS WITH THE DECISIONS OF OTHER COURTS OF APPEALS.

The decision below conflicts irreconcilably with authoritative decisions of the Third, Fifth, and Ninth Circuits. *See, e.g., In re Schick*, 418 F.3d 321 (3rd Cir. 2005); *Graffen v. City of Philadelphia*, 984 F.2d 91 (3rd Cir. 1992); *Rankin v. DeSarno*, 89 F.3d 1123, 1127 (3d Cir. 1996); *In re Green*, 793 F.3d 463 (5th Cir. 2015); *In re Mainline Equipment*, 865 F.3d 1179 (9th Cir. 2017); *see also, e.g., Alliance Capital Mgmt. L.P. v. County of Orange (In re County of Orange)*, 189 B.R. 499 (C.D. Cal. 1995); *In re Holmes*, 573 B.R. 549 (Bankr. D. NJ 2017); *In re Smith*, 401 B.R. 674 (Bankr. E.D. Pa. 2009); *In re Braxton*, 224 B.R. 564 (Bankr. W.D. Pa. 1998).

In *Schick*, various statutory and administrative regulations permitted the New Jersey motor vehicle commission to impose "surcharges" against drivers for various acts and omissions. 418 F.3d at 324. A different set of statutory and administrative regulations allowed the commission to pursue the

collection of the surcharges, including the optional "additional remedy" of filing a "certificate of debt" with the clerk of the local court, imposing a lien on the driver's real property. *Id.* at 324-325.

In concluding that such a lien qualified as a "statutory lien," the Third Circuit reasoned that it did not matter that the surcharge statute itself "lacks explicit lien-creating language . . . ." *Id.* at 328. Rather, what matters is that the agency's discretionary election to pursue the debt was "one of the specified conditions for the creation of the statutory lien." *Id.* at 326. Because that condition was satisfied, "the lien held by the [commission] is . . . within the definition of a statutory lien" set forth "in 11 U.S.C. § 101(53)." *Id.*; *see also Graffen*, 984 F.2d at 96 (concluding that "[w]e are satisfied that the lien here arose 'solely by force of statute' as 'Pennsylvania state law authorizes the City of Philadelphia to impose liens against property benefited by unpaid water and sewer service,'" notwithstanding that the lien arose based on the relevant agency's choice to pursue the lien in a manner authorized by statute and applicable regulations) (citations omitted).

As the Third Circuit has made plain, what distinguishes a 'statutory lien' from a 'security interest' or a 'judicial lien' is not whether all the elements of the lien are specified in a statute or are triggered automatically upon the occurrence of some specified event other than agency action, as the court below held. Rather, what matters is whether the lien arises from a "judicial process or proceeding," in which case it is a judicial lien, *Schick*, 418 F.3d at 329, or whether the lien arises "under [a]…statute, and not

from a consensual or voluntary agreement" between the parties, *Rankin v. DeSarno*, 89 F.3d 1123, 1127 (3d Cir. 1996).

Critically, the standard adopted by the First Circuit in this case would foreclose the result in *Schick* because, according to the court below, a statutory lien must either (1) be "created" in its entirety by a particular statute, or (2) must arise "automatically" upon the occurrence of a triggering event "identified" in the statute, which may *not* include a government agency's discretionary decision to impose a lien. Pet. App. 19a-20a. In *Schick*, the lien plainly was not "create[d] . . . outright" by a statute; nor did it arise "automatically" upon the driver's acts, the imposition of the surcharge, or even the nonpayment of the debt. Rather, it turned on the agency's regulatory decision to impose the surcharge together with its discretionary choice to pursue payment in a particular way that imposed a lien, *see Schick*, 418 F.3d at 329, the kind of circumstance the court below found to be disqualifying.

Conversely, application of the Third Circuit's legal standard in this matter would result in Peaje's lien being classified as a statutory lien. According to the Third Circuit, it does not matter that the statute governing the relevant obligation "lacks explicit lien-creating language . . . ." *Id.* at 328. Nor does it matter whether the lien arises "automatically" as a result of some triggering event specified in a statute. According to the Third Circuit, it is sufficient that the lien arises as a result of unilateral agency action authorized by statute and applicable regulations, and

does not arise as a result of judicial process or bilateral agreement between the parties.

Application of the standard adopted by the court below would likewise foreclose the result reached by the Ninth Circuit in *In re Mainline Equipment*, 865 F.3d 1179 (9th Cir. 2017). In *Mainline Equipment*, the debtor neglected to pay its local personal property taxes. Thereafter, the county elected to pursue the debt by voluntarily filing certificates of indebtedness with the local recorder, imposing various liens on the debtor's property. Concluding that these liens arose "'solely by force of statute,'" the Ninth Circuit concluded that they were "statutory liens." 865 F.3d at 1184-85. Under the First Circuit's standard, however, they would not so qualify because the liens were not created outright by statute and did not arise automatically upon a triggering event other than the County's discretionary decision to impose the liens by filing the relevant certificates.

Similarly, application of the standard adopted by the court below conflicts with the standard adopted by the Fifth Circuit in *In re Green*, 793 F.3d 463 (5th Cir. 2015). In *Green*, the debtor neglected to pay certain condominium fees. Under applicable law, the relevant condominium association was entitled to assert a lien (referred to under Louisiana law as a "privilege") for the unpaid fees by voluntarily recording its claim with the local recorder of deeds. The association also had previously declared its right to assert a lien for any unpaid fees in the condominium declaration document filed as part of the mortgage records. Notwithstanding this declaration, the Fifth Circuit concluded that the association's lien was properly a "statutory lien"

because it arose "as a matter of law" and *not* as the result of any bilateral agreement between the parties. 793 F.3d at 468-470.

In reaching its conclusion, the Fifth Circuit reasoned that the standard for distinguishing a "statutory lien" from a "security interest" is whether the lien is imposed unilaterally in accordance with some statutory scheme, in which case it is a statutory lien, or whether it arises as the result of a bilateral contract signed by the parties, in which case it is a security interest. *See id.* at 469 (distinguishing a statutory lien from a mortgage or other security interest based on the fact that a mortgage or other security interest requires a signed contract between the parties). That, however, is the standard the court below specifically rejected. Moreover, under the Fifth Circuit's test, Peaje's lien is clearly a statutory lien because Peaje's lien does not arise from any bilateral agreement between the parties—it is imposed unilaterally under the Enabling Act and the 68 Resolution. *See also County of Orange,* 189 B.R. at 502-04 (where the creation of a lien is not dependent on negotiated bilateral agreement between the parties, but arises as a result of a governmental entity's unilateral choice to impose a lien on particular collateral under a statutory scheme that authorizes that choice, the lien is a statutory lien) (*quoting* 2 COLLIER ON BANKRUPTCY, ¶101.53 at 101-150-51 (15th ed. 1994)).

In contrast, application of the standard adopted by the court below is generally consistent with the standard adopted by the Second Circuit in *In re Lionel Corp.*, 29 F.3d 88, 94-95 (2d Cir. 1994). In *Lionel*, the

debtor neglected to pay certain labor and material costs at a location it leased, and the claimant asserted a lien for the resulting debt under applicable law. In concluding that the lien constituted a statutory lien rather than a security interest, the court reasoned that the relevant basis for distinguishing the two categories is whether the lien in question came "into being as a result of statutory operation, without consent or judicial action," reasoning that "liens created consensually . . . or by judicial action . . . are not 'statutory liens' . . . ." *Id.* at 94. Under the Second's Circuit's "consent" standard, it appears that merely *one* party's consent to the lien would be sufficient to defeat a statutory lien. As the Second Circuit acknowledged, however, "other courts have also observed that mechanic's liens are statutory liens because they arise strictly by operation of statute and not by *agreement between the parties* . . . ." *Id.* at 94-95 (citing *In re WWG Indus., Inc.*, 772 F.2d 810, 812 (11th Cir. 1985) (emphasis added)). As the decisions of the Fifth and Third Circuits make clear, the legal standard these courts apply for distinguishing a "statutory lien" from a "security interest" does not turn on one party's "consent," but rather whether the lien arises from bilateral agreement *between* the parties, in which case it is a "security interest."

As the decisions well illustrate, the correct legal standard for determining a statutory lien is an important and recurring issue. Moreover, the conflict among the courts of appeals over the correct legal standard is widespread and unlikely to resolve itself absent this Court's intervention. Further, this case presents an ideal vehicle to resolve the conflict because the court below disposed of the question

exclusively as an issue of law. Finally, the resolution of the question is outcome-determinative—as the court below correctly observed, "Peaje's rights in the [bankruptcy case] differ considerably depending on whether it possesses a statutory lien or a lien resulting from a security agreement (i.e., a security interest)." Pet. App. 10a.

II. THE DECISION BELOW CONFLICTS WITH THIS COURT'S PRECEDENTS.

Certiorari is also warranted because the decision below impermissibly rewrites the governing statutory text. As noted, the relevant statute—section 101(53) of the Bankruptcy Code—defines a statutory lien as a "lien arising solely by force of a statute on specified circumstances or conditions . . . but does not include security interest or judicial lien . . . ." 11 U.S.C. §101(53). As its language reveals, nothing in the definition restricts the "circumstances or conditions" that may give rise to a statutory lien in the manner determined below. *Id*. In particular, nothing in the definition disqualifies agency regulation as a proper triggering event for a statutory lien, and the court below simply added the limitation on the ground that agency regulation "'is not a statute.'" Pet. App. 21a (quoting the District Court's opinion). This was improper because, as this Court has explained, the courts are not at liberty to rewrite statutory provisions to add terms or limitations that do not appear in the text. *See, e.g., Lamie v. Unites States Trustee*, 540 U.S. 526, 538 (2004) (court may not add terms not in the text); *Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, 254 (1992) (court may not impose limitation not in the text); *United States v.*

Locke, 471 U.S. 84, 95 (1985) (court may not rewrite a statutory provision).

The decision below likewise violates another of the Court's axioms of interpretation: "'[a] statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant.'" *Corley v. United States*, 556 U.S. 303, 314 (2009) (quoting *Hibbs v. Winn*, 542 U.S. 88, 101 (2004)). By rejecting delegated agency regulation as a proper "circumstance or condition" on the ground that agency regulation "is not a statute," the court below effectively collapsed the separate requirements of the definition into a single standard: that a statutory lien arises only "by force of a statute." That reading, however, ignores that a statutory lien properly arises by force of a statute "on circumstances or conditions." Because the interpretation adopted by the court below conflicts with this Court's interpretive precedents, certiorari is warranted.

III. THE QUESTION PRESENTED IS A VITALLY IMPORTANT QUESTION OF LAW.

Certiorari is further warranted because the question presented involves an issue of profound national significance. Congress's "statutory lien" classification recognizes that liens imposed through government regulation characteristically serve vital governmental interests, including its ability to raise revenues. This implicates not only statutory tax liens, but more critically statutory liens imposed through government regulation accompanying the issuance of municipal bonds. Recognizing the importance of such statutory liens, Congress has chosen to treat them

differently from private liens arising from bilateral agreement or through judicial process. The decision below harmfully excludes from the classification of statutory liens a large segment of liens properly included within it.

To begin with, the effect of the decision below is to defeat the interests of those entitled to the treatment Congress has prescribed for the holders of statutory liens, including the owners of hundreds of billions of dollars of municipal bonds secured by such liens. Moreover, the unavoidable consequence of the decision below is to discourage statutory regimes that delegate authority to government agencies over such details as collateral selection associated with the issuance of particular bonds. As the cases illustrate, such delegations are common. *See, e.g., Alliance Capital Mgmt. L.P. v. County of Orange (In re County of Orange)*, 189 B.R. 499, 502-04 (C.D. Cal. 1995) (notwithstanding that statutory scheme delegated to County the ability to select collateral, the resulting lien was properly a statutory lien). Such delegated authority is vitally important because it allows critical governmental flexibility. Under the plain terms of the Bankruptcy Code, the fact that a governing statutory regime delegates some lien-creating authority to a regulatory agency does not defeat the statutory nature of the resulting lien. Given the importance of the question presented, this Court's review is warranted.

IV. THE DECISION BELOW CREATES AN OTHERWISE INCORRECT STANDARD.

Finally, certiorari is warranted because the decision below adopts an unworkable and otherwise incorrect legal standard. As noted, the court below held that a statutory lien arises in two circumstances: "a statute can create a lien outright or it can establish that a lien will attach automatically upon an identified triggering event other than an agreement to grant the lien." Pet. App. 19a. In addition, the court added that a statutory lien cannot be triggered by delegated agency regulation, even if authorized by statute, because such regulation itself "is not a statute." *Id.* at 21a (citation and marks omitted). As a threshold matter, however, the court's two-circumstance standard cannot be correct for the simple reason that the first circumstance is an empty set: *all* statutory liens require a triggering event of some kind; none are created "outright." More substantively, the court erred in inappropriately narrowing the class of triggering events.

In support of its two-circumstance approach, the court cited a quotation from the legislative history and the Second Circuit's decision in *Lionel*. *See* Pet App. 19a. As noted, *Lionel* references a "consent" standard for distinguishing a "statutory lien" from a "security interest," but at the same time observes that other courts have applied a bilateral-agreement standard. *See supra* at 29-30. Critically, neither the statutory text nor its legislative history reference the concept of "consent." Both, however, consistently reference the concept of "agreement," with the legislative history illustrating that the kind of "agreement" that

distinguishes a "statutory lien" from a "security agreement" is *bilateral* agreement between the parties. 11 U.S.C. §101(51) (defining "security interest" as a "lien created by agreement"); S. Rep. No. 95-989 (1978) (illustrating the kinds of agreements giving rise to security interests as bilateral agreements between the parties). As noted, that is the approach taken by the Third, Fifth, and Ninth Circuits, which accurately reflects the text, history, and purpose of the legislative scheme. In contrast, the decision below creates an unworkable standard at odds with that scheme.

CONCLUSION

For the foregoing reasons, Peaje respectfully requests that the Court grant certiorari review of the decision below.

Respectfully submitted,

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Dated: October 26, 2018

APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT, FILED AUGUST 8, 2018

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

Nos. 17-2165, 17-2166, 17-2167

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.

PEAJE INVESTMENTS LLC,

Plaintiff, Appellant,

v.

THE FINANCIAL OVERSIGHT AND MANAGEMENT BOARD FOR PUERTO RICO, AS REPRESENTATIVE FOR THE PUERTO RICO HIGHWAYS & TRANSPORTATION AUTHORITY; HON. CARLOS CONTRERAS-APONTE, IN HIS OFFICIAL CAPACITY AS

Appendix A

EXECUTIVE DIRECTOR OF PUERTO RICO HIGHWAYS & TRANSPORTATION AUTHORITY; THE FINANCIAL OVERSIGHT AND MANAGEMENT BOARD FOR PUERTO RICO, AS REPRESENTATIVE FOR THE COMMONWEALTH OF PUERTO RICO; HON. RICARDO ROSSELLO NEVARES, IN HIS OFFICIAL CAPACITY AS GOVERNOR OF THE COMMONWEALTH OF PUERTO RICO; HON. RAUL MALDONADO GAUTIER, IN HIS OFFICIAL CAPACITY AS SECRETARY OF TREASURY OF THE COMMONWEALTH OF PUERTO RICO; HON. JOSE IVAN MARRERO ROSADO, IN HIS OFFICIAL CAPACITY AS EXECUTIVE DIRECTOR OF THE OFFICE OF MANAGEMENT & BUDGET; PUERTO RICO FISCAL AGENCY AND FINANCIAL ADVISORY AUTHORITY; HON. GERARDO JOSE PORTELA FRANCO, IN HIS OFFICIAL CAPACITY AS EXECUTIVE DIRECTOR OF THE PUERTO RICO FISCAL AGENCY AND FINANCIAL ADVISORY AUTHORITY,

Defendants, Appellees.

August 8, 2018, Decided

APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF PUERTO RICO

Appendix A

(Hon. Laura Taylor Swain, *U.S. District Judge*[*])

Before Howard, *Chief Judge*, Kayatta, *Circuit Judge*, and Torresen, *Chief U.S. District Judge*.[**]

KAYATTA, *Circuit Judge*. We are asked for the second time to weigh in on Peaje Investments LLC's claim that what it characterizes as its "collateral" is being permanently impaired. Peaje is the beneficial owner of $65 million of uninsured bonds issued by the Puerto Rico Highways and Transportation Authority ("Authority"). Peaje alleges that its bonds are secured by a lien on certain toll revenues of the Authority and that, in response to Puerto Rico's financial crisis, the Authority and the Commonwealth of Puerto Rico ("Commonwealth") are diverting funds to which Peaje believes it is entitled under the lien and using them for purposes other than paying the bonds. Because both the Authority and the Commonwealth have commenced bankruptcy cases under Title III of the Puerto Rico Oversight, Management, and Economic Stability Act ("PROMESA"), 48 U.S.C. §§ 2101-2241, Peaje instituted the adversary proceedings now on consolidated appeal to challenge this diversion. Despite the novelty and complexity of the bankruptcies from which this case arose, three narrow rulings dispose of the appeal now before us: First, the district court did not abuse its discretion in limiting Peaje to its argument that it holds a statutory lien on certain toll revenues of the Authority. Second, Peaje does not hold such a lien. And

[*] Of the Southern District of New York, sitting by designation.

[**] Of the District of Maine, sitting by designation.

third, we vacate the district court's alternative reasons for denying relief so that they may be reconsidered de novo on a comprehensive, updated record now that it is clear that Peaje has no statutory lien.

I.

The Authority was formed in 1965 as a public corporation and instrumentality of the Commonwealth. Pursuant to its enabling act ("Act" or "Enabling Act"), it may borrow money, issue bonds, and secure those bonds with pledges of revenues. P.R. Laws Ann. tit. 9 § 2004(1). In 1968, the Authority adopted Resolution No. 68-18 (the "1968 Resolution" or the "Resolution"). *See* Puerto Rico Highway Authority, Resolution No. 68-18, available at http://gdb.pr.gov/investors_resources/documents/FIRMDM-12808969-v1-PRHTA1968Resolution.pdf. In order to provide additional funds for the construction of roads, bridges, and other facilities, the 1968 Resolution provided for the issuance of bonds. *Id.* Art. II, § 201.

The Resolution guaranteed that the Authority would "promptly pay the principal of and the interest on every bond issued," but that it would do so "solely from Revenues and from any funds received by the Authority for that purpose from the Commonwealth which Revenues and funds are hereby pledged to the payment thereof in the manner and to the extent" provided by the Resolution. *Id.* Art. VI, § 601. The Resolution established a special account called the "Sinking Fund," which itself contains three separate accounts: the Bond Service Account, the Redemption Account, and the Reserve Account. *Id.* Art.

IV, § 401. The revenues (and any other pledged funds) deposited in these accounts were to be held in trust by the "Fiscal Agent," a bank or trust company appointed by the Authority, until, in the case of the Bond Service Account, they were applied to the principal and interest due on the bonds. *Id.* Art. IV, § 402. Pending the application of these funds, the Resolution provided that the money "shall be subject to a lien and charge in favor of the holders of the bonds . . . and for the further security of such holders until paid out or transferred." *Id.* Art. IV, § 401. Peaje is the beneficial owner of various bonds issued pursuant to the 1968 Resolution, with maturity dates ranging from 2023 to 2036. Peaje's basic position is that it holds, as security for its bonds, a lien on toll revenues generated from three specific highways maintained by the Authority. It further contends that its lien extends not just to toll revenues currently held by the Fiscal Agent, but also to the Authority's toll revenues before they are deposited with the agent.[1]

In April 2016, in response to growing economic problems in Puerto Rico, the Commonwealth enacted the Puerto Rico Emergency Moratorium and Financial Rehabilitation Act, pursuant to which then-Governor Alejandro García-Padilla issued several executive orders that suspended the Authority's obligation to deposit toll revenues with the Fiscal Agent. Peaje contends that, as a result, the Authority and the Commonwealth began using the toll revenues for purposes other than those allowed

1. Peaje contends that its lien also extends to certain tax revenues of the Authority. However, this portion of Peaje's purported lien is not at issue in this appeal.

by the Resolution, including to pay operating expenses. In July 2016, Peaje filed suit in district court to challenge this diversion of funds. But Congress had just enacted PROMESA, instituting a temporary stay of all proceedings against the Commonwealth and its instrumentalities. *See* 48 U.S.C. § 2194(b). Peaje therefore requested relief from the temporary stay, pursuant to PROMESA section 405(e)(2), 48 U.S.C. § 2194(e)(2), patterned after section 362(d) of the bankruptcy code ("Code"), 11 U.S.C. § 362(d). The district court denied relief, *Peaje Invs. LLC v. Garcia-Padilla*, Nos. 16-2365-FAB, 16-2384-FAB, 16-2696-FAB, 2016 U.S. Dist. LEXIS 153711, 2016 WL 6562426, at *6 (D.P.R. Nov. 2, 2016), and we affirmed in relevant part, *Peaje Invs. LLC v. García-Padilla*, 845 F.3d 505, 514, 516 (1st Cir. 2017) (*Peaje I*).

After PROMESA's temporary stay expired, Peaje filed a second action in district court in May 2017 seeking similar relief. But soon afterward, the Authority, acting through the Financial Oversight and Management Board, filed a bankruptcy petition under Title III of PROMESA. (The Commonwealth had already filed its Title III petition.) This petition triggered an automatic stay (this time for the pendency of the bankruptcy case) of all actions against the Authority, including Peaje's second suit. *See* 11 U.S.C. §§ 362(a), 922(a); *see also* 48 U.S.C. § 2161(a) (incorporating 11 U.S.C. §§ 362(a) and 922(a) into PROMESA).[2] Peaje then timely exercised its right

2. Although neither party addresses this point, the automatic stay under Code section 362 applies to proceedings against the debtor, while the automatic stay under Code section 922 applies to proceedings against officers or inhabitants of the debtor. *See*

to file an adversary proceeding seeking declaratory and injunctive relief in the jointly administered bankruptcy cases of the Authority and the Commonwealth.[3]

Specifically, Peaje asserted the following claims in two identical verified complaints, filed in the respective Title III cases of the Authority and the Commonwealth: (1) a declaration that the Authority's toll revenues qualify as "pledged special revenues" under Code section 922(d); (2) adequate protection or, in the alternative, relief from the stay; (3) a declaration that Code section 922(d) preempts fiscal plan implementation; (4) a declaration that Code section 922(d) requires the Authority to deposit toll revenues with the Fiscal Agent; (5) a declaration that neither Code section 552 nor 928(b) apply to its bonds; (6) a declaration that to the extent Code section 928(b) applies to its bonds, netting out "necessary operating expenses" would constitute a taking in violation of the Constitution; (7) relief from the stay so that it can challenge, on constitutional grounds, the diversion of toll revenues; and (8) injunctive relief requiring the Authority to resume depositing the toll revenues with the Fiscal Agent.

Along with its complaints, Peaje filed a motion for a temporary restraining order ("TRO") enjoining the

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11 U.S.C. §§ 362(a), 922(a); *see also In re Jefferson Cty.*, 474 B.R. 228, 248 (Bankr. N.D. Ala. 2012). Both provisions are implicated here because Peaje has sued the Authority and the Commonwealth, as well as individual officers in the government of Puerto Rico.

3. In the time since Peaje filed the adversary proceedings now on appeal, the Authority has defaulted on its bond payments.

Authority from continuing to divert the toll revenues.[4] The motion also sought relief from the automatic bankruptcy stay or, in the alternative, adequate protection. As we discuss more fully below, Peaje argued in its request for a TRO that it was entitled to relief because it holds a statutory lien on the Authority's toll revenues. The district court, to which we will hereinafter refer as the Title III court, held a preliminary hearing on Peaje's motion and defendants then filed an opposition brief in which they challenged Peaje's assertion of a statutory lien on the merits.[5]

After Peaje filed its Reply in the Title III court, defendants moved, on waiver grounds, to strike from that brief all assertions related to Peaje's alternative argument that it holds a non-statutory lien. The Title III court, relying on Local Civil Rule 7(c), granted the motion to strike on the grounds that Peaje had failed to argue, prior to its Reply, that it holds a non-statutory lien. *See* P.R.L.Cv.R. 7(c) (a reply memorandum "shall be strictly confined to replying to new matters raised in the objection

4. This application was later converted into a motion for a preliminary injunction.

5. Defendants also raised PROMESA section 305, 48 U.S.C. § 2165, as a bar to the relief sought by Peaje. This issue seems to have fallen by the wayside, garnering no mention in the district court's opinion and no further advocacy by defendants on appeal. Our opinion issued today in *Financial Oversight and Management Board for Puerto Rico v. Ad Hoc Group of PREPA Bondholders* (*In re Financial Oversight and Management Board for Puerto Rico*), No. 17-2079 does address the meaning and effect of section 305.

or opposing memorandum"); *see also* P.R. LBR 1001-1(b) (incorporating local rules of the District of Puerto Rico into the local bankruptcy rules). After an evidentiary hearing, the Title III court issued a second order denying both Peaje's request for a preliminary injunction and its request for adequate protection or, alternatively, relief from the stay. *See Peaje Invs. LLC v. P.R. Highways & Transp. Auth.*, 301 F. Supp. 3d 272, 273 (D.P.R. 2017). Peaje appeals from both orders.

II.

We turn first to the Title III court's decision to grant defendants' motion to strike. We have previously reviewed similar orders for abuse of discretion. *See Amoah v. McKinney*, 875 F.3d 60, 62 (1st Cir. 2017); *Turner v. Hubbard Sys., Inc.*, 855 F.3d 10, 12 (1st Cir. 2017). Presented with no argument to the contrary, we assume that the same standard applies here.

Some statutory context is necessary to understand Peaje's potential waiver. As we explain more fully in the next section of this opinion, the Code divides liens into three mutually exclusive categories, two of which are relevant here: statutory liens and security interests.[6] Two provisions of the Code, incorporated into PROMESA, *see* 48 U.S.C. § 2161(a), single out certain types of liens

6. Defendants have consistently referred to Peaje's alternative position as a consensual lien. But the Code's definitions section does not use this language, instead identifying a lien arising out of a contractual arrangement as a security interest. We use the latter term.

(specifically, security interests) for special treatment. First, Code section 552(a) establishes a general rule, subject to several exceptions not relevant here, *see* 11 U.S.C. § 552(b), that property acquired by the debtor after the commencement of the bankruptcy case "is not subject to any lien resulting from any security agreement entered into by the debtor before the commencement of the case." 11 U.S.C. § 552(a); *see also Assured Guar. Corp. v. Commonwealth of Puerto Rico* (*In re Fin. Oversight and Mgmt. Bd. of P.R.*), 582 B.R. 579, 593 (D.P.R. 2018). Second, Code section 928(a) provides an exception to section 552(a)'s general rule for "special revenues acquired by the debtor after the commencement of the case." 11 U.S.C. § 928(a). Such revenues "shall remain subject to any lien resulting from any security agreement entered into by the debtor before the commencement of the case." *Id.* Code section 928(b) allows debtors to offset "necessary operating expenses" from "[a]ny such lien on special revenues." *Id.* § 928(b). As the text of both provisions makes clear, the general rule of section 552(a) and its exception in section 928(a) apply only to a "lien resulting from [a] security agreement."[7] *Id.* §§ 552(a), 928(a). Neither provision applies to statutory liens. *See* 5 *Collier on Bankruptcy* ¶ 552.01[2] (16th ed.); 6 *id.* ¶ 928.02[2]. Thus, Peaje's rights in the Title III proceeding differ considerably depending on whether it possesses a statutory lien or a lien resulting from a security agreement (i.e., a security interest).

7. "The term 'security agreement' means [an] agreement that creates or provides for a security interest." 11 U.S.C. § 101(50). Because the definition of "security agreement" incorporates the concept of a security interest, we, like the parties, use the two terms interchangeably.

With this framework in mind, we find that the district court did not abuse its discretion in granting the motion to strike. We begin where these adversary proceedings began, with the filing of the verified complaints. In its complaints, Peaje alleged, among other things:

> [T]he 1968 Bondholders' lien results from both the Enabling Act that created HTA and the binding municipal resolution governing Plaintiff's Bonds. Thus, that lien is a "statutory lien" within the meaning of Section 101(53) of the Bankruptcy Code, 11 U.S.C. § 101(53).

Peaje then went on to explicitly disclaim that Code sections 928 and 552(a) applied to its lien:

> As a result, Section 552 of the Bankruptcy Code does not apply to Plaintiff's Bonds, as the application of that provision is limited to "lien[s] resulting from any security agreement . . . [,]" *see* 11 U.S.C. § 552(a). . . . Nor does Section 928(b) of the Bankruptcy Code apply to those Bonds. That provision in some instances subordinates a bondholder's lien on "special revenues" to the "necessary operating expenses" of the "project or system" that generates those revenues, but is also limited in application to "lien[s] resulting from any security agreement[''] . . . .

Later in its complaints, Peaje reaffirmed that its lien was "unaffected by Section 928(b) because that lien does not result from a security agreement within the meaning of that provision." Peaje made similar statements regarding section 552.

Next, in its application for a TRO, filed the same day as the verified complaints, Peaje again argued that its "lien on the Toll Revenues [was] unaffected by Section 928(b) because that lien does not result from a security agreement within the meaning of that provision."

Then in the initial hearing on Peaje's request for a TRO, held on June 5, 2017, Peaje's attorney stated:

> There is not a security interest here. There is not a voluntary security agreement like you would see under Article 9. . . . This is not a security agreement or security interest under Article 9. This is a lien that is established pursuant to a municipal ordinance.

So, in three separate contexts prior to filing its Reply, Peaje explicitly denied that it held a security interest.

And yet, as Peaje points out, the comments quoted above from the June 5 hearing were sandwiched between two statements suggesting a broader assertion of lien rights. First, Peaje stated: "We don't say in our papers that we have a statutory lien or nothing. We say that we have a lien. We say that this lien arises from a municipal ordinance." And later, it continued: "We say this is a lien, first and foremost."

On the other hand, had Peaje been proceeding on the alternative theory that it should be granted relief to protect its interests secured by a security agreement rather than a statutory lien, one would have expected to see

an explanation for how to accommodate the effects of Code section 928(b), including an analysis of what constituted necessary operating expenses. And while Peaje's attorney asserted in the June 5 hearing that to the extent the Authority could surcharge its lien, it could do so only to a limited extent to account for the expenses necessary for generating the revenue stream, this argument was absent from Peaje's actual filing. In its motion for a TRO, Peaje rested primarily on its position that Code sections 552 and 928(b) left its lien "unaffected" because it is a statutory lien. To the extent it offered any alternative argument, it argued only that the application of section 928(b) would be unconstitutional because it would convert Peaje's gross lien into a net lien. The constitutional argument, whether correct or not, is hardly so self-evident as to have avoided any need to engage more seriously with the potential application of section 928(b) in order to advance the alternative argument that Peaje held a security interest. Peaje also did not explain why the sources that allegedly established its lien (the Enabling Act and the 1968 Resolution) supported the contention that Peaje's lien should be categorized alternatively as a security interest. All of this puts Peaje's claim of preservation on precarious grounds. Moreover, Peaje clearly understood how to adequately preserve an alternative argument, as evidenced by its very different approach on another issue: the application of the automatic stay to its claims, a question we need not reach today. In its motion for TRO, Peaje explicitly and repeatedly argued that the automatic stay did not apply to its case. But it also argued that, to the extent the stay did apply, it sought "out of an abundance of caution" relief from that stay.

Peaje argues that defendants conceded, both in this case and in related proceedings, that Peaje holds a lien of some type. There are, indeed, documents in the record, including bond offering statements from the Authority, reflecting that bonds issued under the 1968 Resolution are secured by a pledge of certain revenues of the Authority. But even assuming that defendants to some extent have conceded the existence of a lien, Peaje does not argue, nor could it, that defendants have conceded that Peaje holds a lien on the post-petition revenues it now seeks to obtain. *Cf. Peaje I*, 845 F.3d at 514 ("While Peaje may have had a contractual right to monthly deposits with the fiscal agent and the maintenance of the accounts at particular levels, its protected interest for purposes of the lift-stay motion was limited to its interest in repayment of the debt owed."). Nor does Peaje contend that defendants conceded the existence of a particular type of lien, which, as noted, has important consequences for the issues in this case.

In sum, whether Peaje waived its non-statutory lien argument is admittedly a close call. One can easily see why the statements to which the Title III court pointed made it appear that Peaje was limiting itself to asserting a statutory lien. At the same time, however, the mutually exclusive nature of a security interest and a statutory lien under the Code invited Peaje's counsel to characterize its lien as statutory (and thus by definition not a security interest), without intending to waive the logically alternative argument, which defendants' prior statements in *Peaje I* had not made an obvious subject of dispute. *See Peaje I*, 845 F.3d at 510 (observing without deciding that Peaje's bonds are secured by a lien on toll revenues without specifying the nature of the lien).

Ultimately, what gives us confidence that the Title III court did not abuse its discretion in granting the motion to strike is the fact that any waiver here is not permanent, a point that the Title III court itself made. Moreover, even were we to rule in favor of Peaje on this issue, and thus consider the other issues on appeal based on the premise that Peaje holds a security interest, the most Peaje could realistically expect to gain is a remand to take a renewed shot at obtaining relief on a supplemented record that reflects where matters now stand. For the reasons we explain in Part IV of this opinion, that is exactly what Peaje gets.

We therefore affirm the Title III court's holding that, for purposes of the motion now on review, Peaje has limited itself to arguments predicated upon its claim that it holds a statutory lien on the Authority's toll revenues.

III.

We turn now to the pivotal issue that Peaje presented below and raises on appeal: Does it have a statutory lien on any property of the Authority? The district court resolved this issue in the context of analyzing Peaje's request for a preliminary injunction, a ruling that we review overall for abuse of discretion. *See Waldron v. George Weston Bakeries Inc.*, 570 F.3d 5, 8 (1st Cir. 2009). But since the proper classification of Peaje's purported lien is a legal question, we review it de novo. *See id.* ("Within that [abuse of discretion] framework, we scrutinize the district court's . . . handling of abstract legal questions de novo.").

The Code defines a lien as a "charge against or interest in property to secure payment of a debt or performance of an obligation." 11 U.S.C. § 101(37). It then divides liens into three mutually exclusive categories: judicial liens, statutory liens, and security interests. The Code defines a statutory lien as:

> a lien arising solely by force of a statute on specified circumstances or conditions, or lien of distress for rent, whether or not statutory, but does not include security interest or judicial lien, whether or not such interest or lien is provided by or is dependent on a statute and whether or not such interest or lien is made fully effective by statute.

Id. § 101(53) (footnote omitted). *Collier on Bankruptcy* describes the "essence" of a statutory lien as "the need, or lack of need, for an agreement or judgment to create the lien." 2 *Collier, supra,* ¶ 101.53. It goes on:

> If the lien arises by force of statute, without any prior consent between the parties or judicial action, it will be deemed a statutory lien. . . . If the creation of the lien is dependent upon an agreement, it is a security interest even though there is a statute which may govern many aspects of the lien. The fact that a statute describes the characteristics and effects of a lien does not by itself make the lien a statutory lien.

Id.

Peaje argues that it holds a statutory lien by virtue of the Enabling Act. *See* P.R. Laws Ann. tit. 9 §§ 2001-2035. It points to various provisions of the Act that it claims "provide[] for [its] lien on the circumstances and conditions identified in its provisions." But none of the provisions Peaje cites supports this assertion. Under the Act:

> [T]he Authority is hereby empowered to . . . borrow money for any of its corporate purposes, and to issue bonds of the Authority in evidence of such indebtedness and to secure payment of bonds and interest thereon by pledge of, or other lien on, all or any of its properties, revenues or other income . . . .

P.R. Laws Ann. tit. 9 § 2004, (l). The Act further specifies that "the Authority may from time to time issue and sell its own bonds," *id.* § 2012(a), and that those bonds "may be authorized by resolution or resolutions of the Authority," *id.* § 2012(b). As to the pledging of revenues, the Act provides:

> Any resolution or resolutions authorizing any bonds may contain provisions, which shall be a part of the contract with the holders of the bonds:
>
> (1) As to the disposition of the entire gross or net revenues and present or future income or other funds of the Authority, including the pledging of all or any part thereof to secure payment of the principal of and interest on the bonds . . . .

Id. § 2012(e). Finally, section 2015 of the Act provides that, with some limited exceptions, the bonds issued by the Authority shall not be a debt of the Commonwealth, "nor shall such bonds or the interest thereon be payable out of any funds other than those pledged for the payment of such bonds and interest thereon pursuant to the provisions of § 2004(1) of this title." *Id.* § 2015.

As the Title III court found, these provisions permit the Authority to secure the payment of bonds by making a pledge of revenues, but they do not require that it do so. Even the language of section 2015 of the Act applies only to funds "pledged . . . pursuant to . . . § 2004(1)," *id.* § 2015, and such pledges are voluntary. *See id.* § 2004(1) (the Authority is "empowered" to issue bonds and secure them with pledges of revenues); *see also id.* § 2012(e) (a resolution authorizing bonds "*may* contain provisions" pledging revenues (emphasis added)). We therefore agree with the district court that "[n]o lien arises solely by force of [these] statutory provision[s]."

Peaje counters that a statutory lien need not be specified "exclusively and formally in some statutory text." Rather, Peaje argues, the Code provides that a statutory lien can arise from specified circumstances or conditions and, in its view, these include "regulatory elaboration and agency action." Peaje is correct about the definition but wrong about its application.

Under the Code, a statutory lien "aris[es] solely by force of a statute on *specified circumstances or conditions*." 11 U.S.C. § 101(53) (emphasis added). In

other words, a statute can create a lien outright or it can establish that a lien will attach automatically upon an identified triggering event other than an agreement to grant the lien. *See* S. Rep. No. 95-989, at 27 (1978) ("A statutory lien is . . . one that arises automatically, and is not based on an agreement to give a lien or on judicial action."); *see also Klein v. Civale & Trovato, Inc.* (*In re Lionel Corp.*), 29 F.3d 88, 94 (2d Cir. 1994) (characterizing statutory liens as "liens that come into being as a result of statutory operation, without consent or judicial action"). Take two examples: contractors' liens and tax liens. *See* 2 *Collier*, *supra*, ¶ 101.53 (identifying contractors' liens and tax liens as "[g]ood examples of statutory liens"); *see also* S. Rep. No. 95-989, at 27 (same). Contractors' liens, also known as mechanics' liens, "are creatures of statute," in that they "arise and are created by force of statute." 53 Am. Jur. 2d *Mechanics' Liens* § 3. Every state has a mechanics' lien law. *Id.* § 6. While these laws vary considerably across jurisdictions, *id.* § 8, and often require certain procedures for recording and enforcing the lien, the general concept is that when an individual supplies labor, materials, or services to improve the property of another, his claim for payment becomes a lien on the owner's property. *Id.* § 12; *see also id.* § 1. Once a worker furnishes labor or materials, a statutory lien often arises automatically without any further action. *See id.* § 1. The same is true of a tax lien in favor of the federal government. *See* 26 U.S.C. § 6321 (establishing that when an individual liable for taxes "neglects or refuses to pay the same after demand, the amount . . . shall be a lien in favor of the United States upon all property and rights to property, whether real or personal, belonging to such

person"). For both mechanics' liens and tax liens, the relevant statute specifies a circumstance or condition (the furnishing of labor or the refusal to pay taxes after demand) and provides (often through the use of mandatory, "shall" language) that when the specified circumstance or condition is satisfied, the lien attaches.

The Enabling Act differs from these statutes in an important respect: A pledge of revenues does not attach automatically when the Authority passes a resolution issuing bonds. Rather, it arises only when the Authority chooses to grant it. Because the Act does not automatically trigger a lien upon the performance of a specified condition, apart from the Authority's decision to grant a lien, it does not create a statutory lien.[8]

Perhaps aware that it faces an uphill battle, Peaje's backup argument is that, even if the Enabling Act does not by itself create a statutory lien, the Act together with the 1968 Resolution does. Peaje is correct that the Resolution contains mandatory language suggestive of lien creation. *See* 1968 Resolution, Art. IV, § 401 (funds held by the Fiscal Agent "shall be subject to a lien and charge in favor of the holders of the bonds issued and outstanding under this Resolution and for the further security of such holders

8. We are aware of contrary reasoning in *Alliance Capital Mgmt. L.P. v. County of Orange* (*In re County of Orange*), 189 B.R. 499 (C.D. Cal. 1995). *See id.* at 503 (finding the existence of a statutory lien, notwithstanding that the statute at issue "permits the County to decide *whether* to pledge, and *what* to pledge" (emphasis in original)). Not bound in any way by that opinion, we find its reasoning unpersuasive and decline to rely on it.

until paid out or transferred as herein provided"); *id.* Art. VI, § 601 (with some exceptions, "the principal, interest and premiums [of the bonds] are payable solely from Revenues and from any funds received by the Authority for that purpose from the Commonwealth which Revenues and funds are hereby pledged to the payment thereof"). But the Resolution poses a new problem for Peaje — to quote the Title III court, "the 1968 Resolution is not a statute."

Peaje's only response is to point to a case holding that a regulation adopted by a Commonwealth regulatory agency, the Department of Natural and Environmental Resources, had "the same legal status as a law passed by the legislature." *Armstrong v. Ramos*, 74 F. Supp. 2d 142, 149 (D.P.R. 1999). The Title III court was unpersuaded by the force of this analogy between an environmental regulation and a bond resolution passed by a public authority. The latter regulates no third-party conduct, imposes no burden on anyone other than the entity that issues it, and need not satisfy the public notice requirements generally applicable to agency regulations. *Cf. Intl Union, UMW v. MSHA*, 407 F.3d 1250, 1259, 366 U.S. App. D.C. 54 (D.C. Cir. 2005) (APA notice and comment requirements serve to, among other things, "ensure fairness to affected parties" and give them an opportunity to object to a proposed rule). A resolution issued by a public corporation is much more akin to a resolution adopted by the board of a private corporation: The state grants the corporation the power to issue bonds and grant security interests, and the corporation then resolves whether and how to do so. Peaje offers no reason

to view the origin of its bonds in any materially different manner.

In sum, Peaje does not hold a statutory lien. As anticipated by the parties, this conclusion, together with our conclusion that the Title III court did not abuse its discretion in construing the limited nature of Peaje's motion, resolves this appeal. With the only asserted lien (a statutory lien) found not to exist, for purposes of this appeal Peaje claims no relevant property interest necessary to compel relief from the automatic stay. *See* 11 U.S.C. § 362(d)(1) (requiring the bankruptcy court to grant relief from the automatic stay "for cause, including the lack of adequate protection *of an interest in property* of [a] party in interest" (emphasis added)); *id.* § 922(b) (incorporating section 362(d) into section 922). Similarly, Peaje cannot establish a likelihood of success on the merits of its claims for declaratory and injunctive relief without an interest in the underlying toll revenues and was therefore not entitled to a preliminary injunction on the basis requested. *See Bruns v. Mayhew*, 750 F.3d 61, 65 (1st Cir. 2014) ("Because we hold that the appellants cannot succeed on the merits of their claim, we need not consider the likelihood of irreparable harm.").

IV.

Before concluding, we address the Title III court's alternative bases for denying relief as set forth briefly in the court's opinion: that Peaje failed to establish irreparable harm and that defendants established adequate protection of Peaje's interests. Peaje's contention

on appeal that the district court "inverted" the burden of proof for the adequate protection analysis is defied by the district court's conclusion "that the Defendants have met their burden of showing that Peaje's interest is adequately protected." Nevertheless, for two reasons, we think it necessary for the Title III court to revisit these rulings anew should Peaje on remand renew its requests for relief consistent with this opinion. First, we find it difficult to evaluate such a brief treatment of two critical issues without understanding, at least, the Title III court's view as to the precise nature and extent of Peaje's collateral, its value at the time the Authority filed the bankruptcy petition, and the percentage of the toll revenues required in order to allow the toll highways to operate so as to generate future revenues. Second, the Title III court's analysis was necessarily sensitive to its view of how events would unfold, and much has transpired since September 2017, when it issued the order. We therefore vacate these two alternative findings, solely to make clear that they have no preclusive effect on remand. All that being said, nothing in this opinion should be read as implying any decision not expressly addressed within it.

V.

For the foregoing reasons, we *affirm* both the Title III court's order granting defendants' motion to strike and the primary grounds for its order denying Peaje's request for a preliminary injunction and relief from the stay. We otherwise *vacate* and *remand* for further proceedings consistent with this opinion, including the resolution of any updated motions for relief Peaje should choose to file. No costs are awarded.

APPENDIX B — OPINION OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF PUERTO RICO, FILED SEPTEMBER 8, 2017

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

No. 17 BK 3283-LTS; Adv. Proc. No. 17-151-LTS
in 17 BK 3567-LTS; Adv. Proc. No. 17-152-LTS
in 17 BK 3283-LTS

IN RE: THE FINANCIAL OVERSIGHT AND MANAGEMENT BOARD FOR PUERTO RICO, AS REPRESENTATIVE OF THE COMMONWEALTH OF PUERTO RICO, *et al.*,

Debtors.[1]

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1. The Debtors in these Title III Cases, along with each Debtor's respective Title III case number and the last four (4) digits of each Debtor's federal tax identification number, as applicable, are the (i) Commonwealth of Puerto Rico (Bankruptcy Case No. 17 BK 3283-LTS) (Last Four Digits of Federal Tax ID: 3481); (ii) Puerto Rico Sales Tax Financing Corporation ("COFINA") (Bankruptcy Case No. 17 BK 3284-LTS) (Last Four Digits of Federal Tax ID: 8474); (iii) Puerto Rico Highways and Transportation Authority ("HTA") (Bankruptcy Case No. 17 BK 3567-LTS) (Last Four Digits of Federal Tax ID: 3808); and (iv) Employees Retirement System of the Government of the Commonwealth of Puerto Rico ("ERS") (Bankruptcy Case No. 17 BK 3566-LTS) (Last Four Digits of Federal Tax ID: 9686). (Title III case numbers are listed as Bankruptcy Case numbers due to software limitations).

Appendix B

PEAJE INVESTMENTS LLC,

Plaintiff,

-v-

PUERTO RICO HIGHWAYS &
TRANSPORTATION AUTHORITY, *et al.*,

Defendants.

September 8, 2017, Decided
September 8, 2017, Filed

LAURA TAYLOR SWAIN,
United States District Judge.

OPINION AND ORDER DENYING MOTION FOR PRELIMINARY INJUNCTION AND MOTION FOR RELIEF FROM THE AUTOMATIC STAY

Before the Court is the *Motion of Peaje Investments LLC (A) for Temporary Restraining Order and Preliminary Injunction, and (B) for Relief from Stay or, Alternatively, Adequate Protection* (docket entry[2] no. 2 (the "Motion")).[3] An evidentiary hearing on the Motion took place before the undersigned on August 8,

2. All docket entries refer to case no. 17 AP 151, unless otherwise specified.

3. At a preliminary hearing on the Motion, the movants withdrew their request for a temporary restraining order.

2017 (the "August Hearing"), and the evidentiary record is now closed. The Court has considered carefully the submissions of both parties and the evidentiary record, including the argument and testimony presented at the August Hearing and the parties' subsequently-filed written closing arguments.

For the reasons that follow, the Motion is denied in its entirety. This Memorandum Opinion and Order constitutes the Court's findings of fact and conclusions of law pursuant to Federal Rules of Civil Procedure 52(a)(2) and 65, made applicable in these adversary proceedings by Federal Rules of Bankruptcy Procedure 7052 and 7065.

I.

FINDINGS OF FACT

The Puerto Rico Highways and Transit Authority ("HTA") is a public corporation and instrumentality of the Commonwealth of Puerto Rico (the "Commonwealth"). 9 L.P.R.A. § 2002. (Docket entry no. 1, Adversary Complaint ("Compl.") ¶ 21; Docket entry no. 96, Memorandum of Law in Opposition ("Opp.") p. 7.) HTA was created by Act No. 74-1965 (the "HTA Enabling Act"). 9 L.P.R.A. § 2002. (Compl. ¶ 21; Opp. p. 10.)

The HTA Enabling Act empowers HTA to "borrow money for any of its corporate purposes, and to issue bonds of the [HTA] in evidence of such indebtedness and to secure payment of bonds and interest thereon by pledge of, or other lien on, all or any of its properties,

revenues or other income." 9 L.P.R.A. § 2004(l). (Compl. ¶ 33.) The HTA Enabling Act also empowers HTA to "from time to time issue and sell its own bonds and have them outstanding for any of its corporate purposes." 9 L.P.R.A. § 2012(a).

The HTA Enabling Act further empowers HTA to promulgate resolutions authorizing the issuance of bonds, which resolutions "may contain provisions, which shall be a part of the contract with the holders of the bonds," including provisions relating to "the disposition of the entire gross or net revenues and present or future income or other funds of the [HTA], including the pledging of all or any part thereof to secure payment of the principal of and interest on the bonds to the extent permitted by the provisions of § 2004(l)." 9 L.P.R.A. § 2012(e)(1). Under the HTA Enabling Act, the "bonds of [HTA] bearing the signature of the officers of [HTA] in office on the date of the signing thereof shall be valid and binding obligations, notwithstanding that before the delivery thereof and payment therefor any or all of the officers whose signatures or facsimile signatures appear thereon shall have ceased to be such officers of [HTA]." *Id.* § 2012(c).

HTA promulgated a resolution authorizing the issuance of bonds on June 13, 1968 (the "1968 Resolution"). (Compl. ¶ 34; Docket entry no. 99, Declaration of Bradley R. Bobroff, Ex. 3 (the 1968 Resolution).) The 1968 Resolution provides for the creation of certain funds and accounts, with the monies held in those funds and accounts "subject to a lien and charge in favor of the holders of the bonds issued and outstanding under this

Resolution." (1968 Resolution § 401; *see* Compl. ¶ 35.) HTA "covenant[ed]" in the 1968 Resolution to deposit certain defined "Revenues" in the accounts covered by this lien, including the "Toll Revenues" charged by HTA for the use of enumerated "Traffic Facilities." (1968 Resolution §§ 101, 401; *see* Compl. ¶ 35.) The 1968 Resolution requires that the Revenues be deposited with a Fiscal Agent on a monthly basis. (1968 Resolution § 401; *see* Compl. ¶ 37.) Section 601 of the 1968 Resolution further provides that the 1968 Bonds "are payable solely from Revenues and from any funds received by [HTA] for that purpose from the Commonwealth which Revenues and funds are hereby pledged to the payment thereof in the manner and to the extent hereinabove particularly specified." (1968 Resolution § 601.)

The 1968 Resolution requires that HTA "not incur any indebtedness nor create or cause or suffer to be created any debt, lien, pledge, assignment, encumbrance or any other charge having a priority to or being on a parity with the lien on Revenues on the Bonds," except upon certain enumerated conditions. (1968 Resolution § 602; *see* Compl. ¶ 40.)

Peaje Investments LLC ("Peaje") is the beneficial owner of approximately $65 million in bonds issued pursuant to the 1968 Resolution (which series of bonds will be referred to as the "1968 Bonds," and the holders of those bonds, as the "1968 Bondholders"). (Compl. ¶ 20.) In connection with the instant adversary proceedings and motion practice, Peaje asserts that it has "lien rights" in connection with the 1968 Bonds that arise solely from

the language of (1) the Enabling Act, and (2) the 1968 Resolution. (Compl. ¶ 78.)

In January 2015, the Commonwealth enacted Act 1-2015, which added Section 12A to the HTA Enabling Act. This new section provides, in relevant part, that after the occurrence of certain conditions precedent, "liens and pledges are hereby created and executed" on certain revenues, including for the benefit of the holders of 1968 Bonds. P.R. Act No. 1-2015 § 12A(b). These statutory conditions precedent have never been satisfied.

On April 6, 2016, the Commonwealth enacted the Puerto Rico Emergency Moratorium and Financial Rehabilitation Act, Act No. 21-2016 (the "Moratorium Act"). Pursuant to the Moratorium Act, then-Governor Alejandro García Padilla of Puerto Rico issued certain executive orders (the "Executive Orders") that suspended HTA's obligation to deposit Revenues with the Fiscal Agent (as these terms are defined in the 1968 Resolution) beginning in May 2016. (Compl. ¶¶ 45-48.) In January 2017, the Commonwealth enacted the Puerto Rico Financial Emergency and Fiscal Responsibility Act of 2017, Act No. 5-2017 (the "Financial Emergency Act"). The Financial Emergency Act provides, in relevant part, that executive orders issued under the Moratorium Act "shall continue in full force and effect until amended, rescinded or superseded." Financial Emergency Act § 208(e).

HTA has ceased depositing the Toll Revenues with the Fiscal Agent. (Compl. ¶ 60.) Defendants proffered unrebutted testimony that HTA is using the Toll Revenues,

among other revenue streams, to maintain both the Traffic Facilities and other components of the Commonwealth's transportation infrastructure. (*See* Transcript of August Hearing ("Tr.") at 69:3-22, 86:5-15, 96:6-98:4.) Defendants also proffered the testimony of Sergio L. Gonzalez, the former Executive Director of HTA, who testified that HTA's retention of the Toll Revenues is necessary to ensure that the Traffic Facilities and other transportation infrastructure of the Commonwealth will remain in working order. (Ex. SSS ¶¶ 6, 33, 47-56.) Peaje did not tender credible evidence demonstrating that the Traffic Facilities, from which the Toll Revenues are drawn, could be maintained in working order absent this Toll Revenue funding, instead proffering only the testimony of Dr. Hildreth, who opined that there was a possibility that the necessary funds could be drawn from other sources. (*See, e,g.*, Ex. 91 ¶¶ 15-17.) The Court does not find Dr. Hildreth's testimony credible on this point, as he acknowledged under cross-examination that he did not perform any independent analysis of the availability of the potential sources of funding he identified, nor did he have any independent knowledge about the repercussions of drawing on such sources for transportation maintenance purposes. (Tr. at 184:3-190:17.)

Peaje presented the testimony of Thomas Stanford in support of its argument that the equity cushion (*i.e.*, the value of the collateral in excess of the value of any allegedly secured claims) supporting the 1968 Bonds would be eroded by HTA's use of the Toll Revenues to fund its general expenses rather than depositing those funds with the Fiscal Agent. Stanford could not, however, testify with

any certainty that Peaje actually had an equity cushion as of the date the Title III petition for HTA was filed, nor could he state with certainty that Peaje's equity cushion was actually likely to be depleted. Instead, Stanford's testimony presented 21 different hypothetical scenarios based on different assumptions. (*See* Tr. 58:14-59:6; Ex. 92 ¶¶ 3-4; Ex. 93 ¶¶ 4-12.) In one-third of those scenarios, the value of Peaje's equity cushion would not be fully depleted even if Defendants made no payments for two full years. (Ex. 93 ¶ 14.) The Court finds that Stanford's testimony does not provide a sufficient basis for a determination that any one of the 21 scenarios is necessarily likely to occur, nor for a conclusion that one of the scenarios showing elimination of Peaje's equity cushion is in fact the most likely to occur.

II.

CONCLUSIONS OF LAW

In determining a motion for a preliminary injunction, this Court considers: "(1) the plaintiff's likelihood of success on the merits; (2) the potential for irreparable harm in the absence of an injunction; (3) whether issuing the injunction will burden the defendants less than denying an injunction would burden the plaintiffs and (4) the effect, if any, on the public interest." *Sindicato Puertorriqueno de Trabajadores v. Fortuno*, 699 F.3d 1, 10 (1st Cir. 2012) (quoting *Jean v. Mass. State Police*, 492 F.3d 24, 26-27 (1st Cir. 2007)). "The sine qua non of this four-part inquiry is likelihood of success on the merits: if the moving party cannot demonstrate that he is likely

to succeed in his quest, the remaining factors become matters of idle curiosity." *New Comm Wireless Servs., Inc. v. SprintCom, Inc.*, 287 F.3d 1, 9 (1st Cir. 2002). In order to establish likelihood of success on the merits, "plaintiffs must show 'more than mere possibility' of success—rather, they must establish a 'strong likelihood' that they will ultimately prevail." *Sindicato Puertorriqueno*, 699 F.3d at 10 (quoting *Respect Main PAC v. McKee*, 622 F.3d 13, 15 (1st Cir. 2010)).

Peaje's motion for a preliminary injunction seeks an order directing HTA to resume depositing Toll Revenues with the Fiscal Agent, and prohibiting the Commonwealth from interfering with the execution of that order. For the reasons that follow, the Court concludes that Peaje has not demonstrated either (i) a likelihood of success on the merits of its underlying claim that the 1968 Bonds are secured by a statutory lien that is exempt, pursuant to 11 U.S.C. §§ 922(d) and 928, from the automatic stay imposed by 11 U.S.C. § 362, made applicable in these proceedings by 48 U.S.C. § 2161, or (ii) that the absence of preliminary injunctive relief would result in irreparable harm to Peaje. Accordingly, Peaje has not demonstrated—on this record—entitlement to preliminary injunctive relief.

Section 2161 of Title 48 of the United States Code makes certain provisions of Title 11 of the United States Code (the "Bankruptcy Code") applicable to these proceedings under Title III of the Puerto Rico Oversight, Management, and Economic Stability Act ("PROMESA"), including, as relevant to these proceedings, Sections 101, 362, 902, 922, and 928 of the Bankruptcy Code.

Appendix B

Section 362(a)(3) of the Bankruptcy Code, as applicable here, provides that the filing of a PROMESA Title III case "operates as a stay" of "any act to obtain possession of property of the estate or of property from the estate or to exercise control over property of the estate." Section 922(d) of the Bankruptcy Code enumerates certain exceptions to this general injunction, including a provision that the filing of a PROMESA Title III petition "does not operate as a stay of application of pledged special revenues in a manner consistent with section [928][4] of [Title 11] to payment of indebtedness secured by such revenues." In turn, Section 928(a) provides, in relevant part, that "special revenues acquired by the debtor after the commencement of the case shall remain subject to any lien resulting from any security agreement entered into by the debtor before the commencement of the case."

Peaje contends that Section 922(d) mandates the "application" of such pledged special revenues to the payment of secured indebtedness and that, because the lien securing the revenues is statutory in nature, the gross Toll Revenues must be applied to service the 1968 Bonds. Peaje's ability to show a likelihood of success on the merits of its underlying claims in this action therefore requires an initial showing that the transfer of the Toll Revenues to the Fiscal Agent for payment to the 1968 Bondholders would be the "payment of indebtedness secured by [pledged special] revenues" under Section 922(d) that could be exempt from the automatic stay pursuant to Section 928(a).

4. The reference in the text of Section 922(d) is to "section 927," which the parties and the Court agree appears to be a scrivener's error.

The Defendants have not contested that the Toll Revenues are "pledged special revenues" within the meaning of 11 U.S.C. § 902(2)(A), and accordingly the Court concludes that Peaje has demonstrated a likelihood of success on the merits of this first aspect of its claim. The Court therefore turns to the question of whether Peaje has established a likelihood of success on the merits of its argument that the 1968 Bonds are secured by a statutory lien.[5]

Peaje asserts that the 1968 Bonds are secured by a statutory lien arising from the HTA Enabling Act and the 1968 Resolution. The Court concludes that Peaje has not demonstrated a likelihood that it will succeed on the merits of establishing that either of these two documents created a statutory lien securing the 1968 Bonds.

"[T]here are two types of secured claims: (1) voluntary (or consensual) secured claims, each created by agreement between the debtor and the creditor and called a 'security interest' by the [Bankruptcy] Code, and (2) involuntary secured claims, such as a judicial or statutory lien, which are fixed by operation of law and do not require the consent of the debtor." *U.S. v. Ron Pair Enterprises, Inc.*, 489 U.S. 235, 240 (1989), 109 S. Ct. 1026, 103 L. Ed. 2d 290 (internal citations omitted); *see also* 11 U.S.C. § 101(53) (defining statutory lien as a lien "arising solely by force of a statute on specified circumstances or conditions"). In the context

5. The Court does not opine or reach any conclusion here as to whether the 1968 Resolution gives rise to any other type of valid lien, as that question was not presented by the instant motion practice. (*See* docket entry no. 185 (Memorandum Opinion and Order Granting Motion to Strike).)

of this motion practice, Peaje relies solely on the claim that the 1968 Bonds are subject to an involuntary statutory lien, and that both the HTA Enabling Act and the 1968 Resolution are statutes that, by operation of law, give the 1968 Bondholders a secured claim on the Toll Revenues.

Peaje has not identified a lien that arises "solely" by force of the HTA Enabling Act "on specified circumstances or conditions" as required by Section 101(53). Rather, the HTA Enabling Act provides that HTA may issue bonds pursuant to resolutions, which resolutions "may" contain provisions "pledging" certain revenues to bondholders, which provisions "shall be a part of the contract with the holders of the bonds." HTA Enabling Act § 2012(e). No lien arises solely by force of this statutory provision. Rather, this provision permits HTA to enter into certain types of consensual liens—contracts between HTA and the bondholders. Peaje's invocation of the language in the HTA Enabling Act that provides that bonds are "valid and binding obligations" is similarly insufficient to establish a statutory lien. This phrase is drawn from Section 2012(c) of the HTA Enabling Act and, read in its full context, establishes only that HTA bonds are valid and binding "notwithstanding that before the delivery thereof and payment therefor any or all of the officers whose signatures or facsimile signatures appear thereon shall have ceased to be such officers of the [HTA]." *Id.* § 2012(c). This provision does not operate independently to secure any claims but, rather, preserves the validity of consensual agreements between HTA and bondholders despite the turnover of HTA personnel.

Appendix B

The cited provisions of the HTA Enabling Act differ starkly from the statutes at issue in the cases cited by Peaje in which courts found the existence of statutory liens. For example, in *In re Braxton*, the statute at issue provided that certain "contributions and the interest and penalties thereon due and payable . . . *shall be a lien upon* the franchises and property . . . of the employer liable therefor *and shall attach thereto* from the date a lien for such contributions, interest and penalties is entered of record." 224 B.R. 564, 567 (Bankr. W.D. Pa. 1998) (quoting 43 P.S. § 788.1 (1991) (emphasis added)). Under the statute at issue in *Braxton*, no agreement was necessary for a lien to be created.

A similar statutory provision was at issue in *Fonseca v. Government Employees Association (AEELA)*, 542 B.R. 628 (B.A.P. 1st Cir. 2015). In *Fonseca*, the court considered a statute that liquidated the monetary value of an employee's paid leave time when the employee retired, and provided for a lump sum payment to the employee, which lump sum "shall be subject to other deductions authorized by law." *Id.* at 637 (quoting 3 P.R. Laws Ann. § 703d). The *Fonseca* Court held that because "the statute specifically provides that the lump sum payment for the liquidation of accumulated leave can be withheld . . . [those] sections give rise to a statutory lien." *Id.* As in *Braxton*, the statute in question defined with specificity the nature of the collateral and required no further discretionary action for a lien to come into force. It was, quite plainly, a lien "arising solely by force of a statute." 11 U.S.C. § 101(53).

Peaje correctly notes that the statutory liens in *Braxton* and *Fonseca* were created only on the performance of certain conditions (*e.g.*, accrual of contribution liabilities; entering the lien on record), but the HTA Enabling Act creates no automatic lien even upon the performance of conditions. Rather, the HTA Enabling Act provides that a "contract" between HTA and a third party *may* contain a lien, which consensual lien would be enforceable assuming that it satisfied certain conditions. In this respect, the HTA Enabling Act is not meaningfully different from Article 9 of the Uniform Commercial Code, which is a model statutory provision that defines certain conditions under which a lien becomes enforceable. That a lien arising under Article 9 is enforceable because of statutory provisions does not, however, make that lien a statutory lien under Section 101(53) of the Bankruptcy Code; similarly, that HTA's liens trace their validity to the HTA Enabling Act's grant of authority to create liens does not make liens that HTA subsequently decided to create statutory in nature.

Peaje has similarly failed to demonstrate a likelihood of success on the merits of its argument that the 1968 Resolution created statutory liens. Simply put, the 1968 Resolution is not a statute. The Bankruptcy Code does not define "statute," and so the Court looks to relevant secondary sources for the definition of this term. Black's Law Dictionary (10th ed. 2014) defines a "statute" as "a law passed by a legislative body; specifically, legislation enacted by any lawmaking body, such as a legislature, administrative board, or municipal court." HTA, a public corporation and instrumentality of the Commonwealth, is

certainly not a legislature. Nor does Peaje cite any legal authority to support the proposition that a resolution of a public corporation is statutory in nature. Rather, the cases Peaje cites stand for the proposition that the administrative rulemaking of an executive body by *regulation* can, in certain circumstances, be statutory. *See, e.g., Armstrong v. Ramos*, 74 F. Supp. 2d 142, 149 (D.P.R. 1999) (holding that a particular regulation was "a legislative rule" and therefore "becomes part of the agency's enabling act and has the same legal status as a law passed by the legislature" because the regulation was "issued by an agency pursuant to a statutory delegation and implement[ed] the statute"). Peaje has not shown that the 1968 Resolution is, by its terms, an administrative regulation under Puerto Rican law or statutory in any other respect, and therefore has not shown that the 1968 Resolution gives rise to a statutory lien.

Accordingly, the Court concludes that Peaje has failed to establish a likelihood of success on the merits of its claim to a statutory lien that could provide a proper basis for injunctive relief.[6]

Peaje has also failed to establish that it will suffer irreparable harm absent preliminary injunctive relief.

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6. Because the Court has concluded that Peaje has not demonstrated the existence of a valid lien, Peaje's arguments that Defendants' actions involve an unconstitutional taking of the value of its lien necessarily fail. Nor need the Court address Peaje's argument that Section 922(d) of the Bankruptcy Code mandates continued payments with respect to obligations secured by pledged special revenues.

Peaje has not proffered credible evidence demonstrating that the value of its alleged collateral is diminishing due to Defendants' actions. Rather, Peaje tendered only speculative testimony by Stanford, which was based on unproven and unsubstantiated assumptions about macroeconomic conditions in the Commonwealth—and which testimony did not establish with any certainty that the value of Peaje's equity cushion is likely to be further depleted at all or in the near term. Indeed, Stanford's testimony indicated that there was an appreciable probability that Peaje would continue to have an equity cushion even if the Defendants failed to transfer any Toll Revenues to the Fiscal Agent for two full years, a time frame within which the issue of confirmation of a plan of adjustment for HTA could be resolved. The Court therefore concludes, having considered the totality of the record, that Peaje has not established that the lack of injunctive relief would result in irreparable harm, even were it able to demonstrate the existence of a lien.

Absent a likelihood of success on the merits or a demonstration of irreparable harm, Peaje is not entitled to preliminary injunctive relief, and that aspect of Peaje's motion is accordingly denied.

Peaje moves, in the alternative, for relief from the automatic stay pursuant to 11 U.S.C. § 362(d)(1). As an initial matter, Peaje's failure to establish, on this record, that it has a statutory lien means that it has similarly failed to establish an "interest in property" required to demonstrate cause to lift the stay.

Even were Peaje able to demonstrate such an interest, however, the Court concludes that the Defendants have established that Peaje's interests are adequately protected by Defendants' efforts to maintain the Commonwealth's toll roads in working condition to ensure that the Toll Revenues will be available in the future. The Court finds credible and persuasive the written and oral testimony of former HTA Executive Director Gonzalez, which demonstrated that removing the Toll Revenues from HTA's available resources would severely diminish HTA's ability to maintain the Commonwealth's toll roads—and the other Commonwealth roads necessary for vehicular access to the toll roads—in working order. The Commonwealth and HTA's efforts to maintain those roads preserves the future availability of the revenue stream that Peaje argues secures the 1968 Bonds.

As noted above, the Court does not find the rebuttal testimony of Dr. Hildreth credible or persuasive, as Dr. Hildreth did not conduct any independent investigation into the actual availability of the sources of money he identified as potentially available to HTA. The Court concludes that the Defendants have met their burden of showing that Peaje's interest is adequately protected by HTA's use of the Toll Revenues to maintain the Commonwealth's toll road infrastructure to ensure that the Toll Revenue stream will continue to flow after the conclusion of the Title III proceedings.

Accordingly, the Court concludes that, insofar as Peaje may be entitled to adequate protection, Defendants have carried their burden of proving that the value of Peaje's

alleged collateral is being adequately protected by HTA during the pendency of the automatic stay. Peaje's motion for relief from the stay is, accordingly, denied.

III.

CONCLUSION

For the foregoing reasons, the Motion is denied in its entirety.

This Opinion and Order resolves docket entry nos. 2 and 205 in 17 AP 151; nos. 2 and 196 in 17 AP 152, 45 N.Y.S. 141; and no. 25 in 17 BK 3567.

SO ORDERED.

Dated: September 8, 2017

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

APPENDIX C — TEXT OF PERTINENT STATUTORY PROVISIONS

11 U.S.C. Sec. 101. Definitions

*****

(36) The term "judicial lien" means lien obtained by judgment, levy, sequestration, or other legal or equitable process or proceeding.

(37) The term "lien" means charge against or interest in property to secure payment of a debt or performance of an obligation.

*****

(51) The term "security interest" means lien created by an agreement.

*****

(53) The term "statutory lien" means lien arising solely by force of a statute on specified circumstances or conditions, or lien of distress for rent, whether or not statutory, but does not include security interest or judicial lien, whether or not such interest or lien is provided by or is dependent on a statute and whether or not such interest or lien is made fully effective by statute.

*****

Appendix C

P.R. Laws Ann. Tit. 9 Sec. 2004. Powers

Subject to the provisions of § 2005 of this title, the Authority is hereby empowered to:

*****

(l) To borrow money for any of its corporate purposes, and to issue bonds of the Authority in evidence of such indebtedness and to secure payment of bonds and interest thereon by pledge of, or other lien on, all or any of its properties, revenues or other income, and subject to the provisions of § 8 of Art. VI of the Constitution of the Commonwealth, pledge to the payment of said bonds and interest thereon, the proceeds of any tax or other funds which may be made available to the Authority by the Commonwealth.

*****

P.R. Laws Ann. Tit. 9 Sec. 2012. Bonds

(a) By authority of the Commonwealth of Puerto Rico, granted hereby, the Authority may from time to time issue and sell its own bonds and have them outstanding for any of its corporate purposes.

(b) The bonds may be authorized by resolution or resolutions of the Authority and may be of such series, may bear such date or dates, may mature at such time or times not exceeding fifty (50) years from their respective dates, may bear interest at such rate or rates not exceeding

the maximum rate then permitted by law, may be in such denomination or denominations, may be in such form, either coupon or registered bonds, may carry such registration or conversion privileges, may be executed in such manner, may be payable in such medium of payment and at such place or places, may be subject to such terms of redemption, with or without premium, may be declared or become due at such time before the maturity date thereof, may provide for the replacement of mutilated, destroyed, stolen or lost bonds, may be authenticated in such manner and upon compliance with such conditions, and may contain such other terms and covenants as such resolution or resolutions may provide. The bonds may be sold at public or private sale for such price or prices as the Authority shall determine; Provided, That refunding bonds may be exchanged for outstanding bonds of the Authority on such terms as the Authority may deem to be in the best interests of the Authority. Notwithstanding the form and tenor thereof, and in the absence of an express recital on the face thereof that the bond is nonnegotiable, all bonds of the Authority shall at all times be, and shall be understood to be, negotiable instruments for all purposes.

(c) The bonds of the Authority bearing the signature of the officers of the Authority in office on the date of the signing thereof shall be valid and binding obligations, notwithstanding that before the delivery thereof and payment therefor any or all of the officers whose signatures or facsimile signatures appear thereon shall have ceased to be such officers of the Authority. The validity of the authorization and issuance of the bonds shall not be dependent on or affected in any way by any proceedings relating to the construction, acquisition, extension, or

improvement of the undertaking for which the bonds are issued, or by any contracts made in connection with such undertaking. Any resolution authorizing the bonds may provide that any such bond may contain a recital that it is issued pursuant to the provisions of this chapter, and any bond containing such recital under authority of any such resolution shall be conclusively deemed to be valid and to have been issued in conformity with the provisions of this chapter.

*****

P.R. Laws Ann. Tit. 9 Sec. 2013. Remedies of Bondholders

(a) Subject to any contractual limitations binding upon the holders of any issue of bonds, or trustees therefor, including but not limited to the restriction of the exercise of any remedy to a specified proportion or percentage of such holders, any holder of bonds, or trustee therefor, shall have the right and power, for the equal benefit and protection of all holders of bonds similarly situated:

> (1) By mandamus or other suit, action, or proceeding at law or in equity to enforce his rights against the Authority, its officers, agents, and employees to perform and carry out its and their duties and obligations under this chapter and its and their covenants and agreements with bondholders;
>
> (2) by action or suit in equity to require the Authority to account as if it were the trustee of an express trust;

(3) by action or suit in equity to enjoin any acts or things which may be unlawful or in violation of the rights of the bondholders, and

(4) to bring suit upon the bonds.

(b) No remedy conferred by this chapter upon any holder of the bonds, or any trustee therefor, is intended to be exclusive of any other remedy, but each such remedy is cumulative and in addition to every other remedy, and may be exercised without exhausting and without regard to any other remedy conferred by this chapter or by any other law. No waiver of any default or breach of duty or contract, whether by any holder of the bonds, or any trustee therefor, shall extend to or shall affect any subsequent default or breach of duty or contract or shall impair any rights or remedies thereon. No delay or omission of any bondholder or any trustee therefor to exercise any right or power accruing upon default shall impair any such right or power or shall be construed to be a waiver of any such default or acquiescence therein. Every substantive right and every remedy, conferred upon the holders of the bonds, may be enforced or exercised from time to time and as often as may be deemed expedient. In case any suit, action, or proceeding to enforce any right or exercise any remedy shall be brought or taken and then discontinued or abandoned, or shall be determined adversely to the holder of the bonds, or any trustee therefor then and in every such case the Authority and such holder, or such trustee, shall be restored to their former positions and rights and remedies as if no such suit, action, or proceeding had been brought or taken.

Appendix C

P.R. Laws Ann. Tit. 9 Sec. 2015. Commonwealth and Political Subdivisions not Liable on Bonds.

Except as to any bonds of the Authority the payment of which is guaranteed by the Commonwealth of Puerto Rico, the bonds issued by the Authority shall not be a debt of the Commonwealth of Puerto Rico or any of its political subdivisions, and neither the Commonwealth of Puerto Rico nor any such political subdivision shall be liable thereon, nor shall such bonds or the interest thereon be payable out of any funds other than those pledged for the payment of such bonds and interest thereon pursuant to the provisions of § 2004(l) of this title.

APPENDIX D — EXCERPTS OF A RESOLUTION AUTHORIZING THE ISSUANCE OF PUERTO RICO HIGHWAY AUTHORITY HIGHWAY REVENUE BONDS, DATED JUNE 13, 1968

PUERTO RICO HIGHWAY AUTHORITY

Resolution No. 68-18

Adopted June 13, 1968

*****

WHEREAS, Act No. 74, approved June 23, 1965 (hereinafter sometimes called the "Enabling Act") created the Puerto Rico Highway Authority (hereinafter sometimes called the "Authority") as a body corporate and politic constituting a public corporation and governmental instrumentality of the Commonwealth of Puerto Rico for the purpose of continuing the government program of providing highways to facilitate the movement of vehicular traffic, relieve hazards and handicaps on the congested roads and highways of the Commonwealth and to meet the increasing demand for additional traffic facilities resulting from the continuing economic development of the Commonwealth; and

WHEREAS, by virtue of the Enabling Act, the Authority has, among others, the power

*****

> (vii) to borrow money for any of its corporate purposes, and to issue bonds, notes or other obligations of the Authority in evidence of

such indebtedness and to secure payment of bonds, notes and other obligations and interest thereon by pledge of, or other lien on, all or any of its properties, revenues or other income, and subject to the provisions of Section 8 of Article VI of the Constitution of the Commonwealth, pledge to the payment of said bonds and interest thereon, the proceeds of any tax or other funds which may be made available to the Authority by the Commonwealth,

(viii) to issue bonds for the purpose of funding, refunding, purchasing, paying or discharging any of its outstanding bonds or other obligations, and

(ix) to do all acts or things necessary or desirable to the carrying out of the powers granted to the Authority by the Enabling Act or by any other act of the Legislature of Puerto Rico; provided, however, that neither the Commonwealth of Puerto Rico nor any of its political subdivisions shall be liable for the payment of the principal of or interest on any bonds issued by the Authority and such principal and interest shall be payable only from the funds of the Authority pledged for such payment pursuant to clause (vii) of this preamble; and

*****

WHEREAS, the Authority has determined to provide at this time for the issuance of bonds of the Authority for the purpose of providing fund to pay the Outstanding Notes

and for providing additional funds for use by the Authority for continuing its highway construction program; and

WHEREAS, the Authority has also determined to provide for the issuance from time to time of additional bonds under the terms and conditions hereinafter set forth for any of the purposes specified in the Enabling Act; now, therefore,

BE IT RESOLVED by the Puerto Rico Highway Authority:

Puerto Rico Highway Authority
Resolution No. 68-18 Sec. 101. Definitions

*****

The word "Revenues" shall mean (a) all moneys received by the Authority on account of gasoline tax allocated to the Authority by Act No. 75, approved June 23, 1965; (b) Toll Revenues; (c) the proceeds of any other taxes, fees or charges which the Legislature of Puerto Rico has allocated or may hereafter allocate to the Authority and expressly authorize the Authority to pledge to the payment of the principal of and interest on Bonds or other obligations of the Authority and which are pledged by the Authority to the payment of the principal and interest on Bonds or other obligations issued under the provisions of this Resolution; provided that written notice of such pledge has been delivered to Standard & Poor's Corporation, Moody's Investors Service, Inc. and any other rating agency then rating the bonds; and

(d) investment earnings on deposit to the credit of the funds and accounts established hereunder, except for the Construction Fund.

*****

The term "Toll Revenues" shall mean the tolls or other charges, if any, imposed by the Authority for the use of any of its Traffic Facilities.

*****

The term "Traffic Facilities" shall mean any of the following facilities for which bonds or other obligations shall be issued by the Authority under the provisions of this Resolution the cost of which facilities paid from the proceeds of such bonds or other obligations shall not have been reimbursed to the Authority from funds not encumbered by this Resolution:

> (1) roads, avenues, streets, thoroughfares, speedways, bridges, tunnels, channels, stations, terminals, and any other land or water facilities necessary or desirable in connection with the movement of persons, freight vehicles or vessels;
>
> (2) parking lots and structures and other facilities necessary or desirable in connection with the parking, loading or unloading of all kinds of vehicles and vessels;

All property, rights, easements, and interests therein necessary or desirable for the construction, maintenance, control, operation or development of such traffic facilities.

*****

Puerto Rico Highway Authority
Resolution No. 68-18 Sec. 401. Sinking Fund Bond Service Account Redemption and Reserve Account

A special fund is hereby created and designated "Puerto Rico Highway Authority Highway Revenue Bonds Interest and Sinking Fund" (herein sometimes called the "Sinking Fund"). There are hereby created in the Sinking Fund three separate accounts designated "Bond Service Account", "Redemption Account" and "Reserve Account", respectively.

The moneys in said Funds and Accounts shall be held by the Fiscal Agent in trust and applied as hereinafter provided with regard to each such Fund and Account and, pending such application, shall be subject to a lien and charge in favor of the holders of the bonds issued and outstanding under this Resolution and for the further security of such holders until paid out or transferred as herein provided.

The Authority covenants that all of the Revenues (other than investment earnings on deposits to the credit of funds and accounts established hereunder), and any other funds of the Commonwealth allocated to the Authority for the payment of principal and interest on bonds of the Authority issued under the provisions of this Resolution,

which it receives will be deposited monthly with the Fiscal Agent to the credit of the following Accounts and Fund in the amounts specified and in the following order:

> (a) to the credit of the Bond Service Account, an amount equal to one-sixth (1/6) of the amount of interest payable on all bonds of each Series issued hereunder on the interest payment date next succeeding and (beginning with the twelfth month preceding the first maturity of any serial bonds of such Series) an amount equal to one-twelfth (1/12) of the next maturing installment of principal of such serial bonds; provided, however, that the amount so deposited on account of interest in each month after the delivery of the bonds of any Series under the provisions of this Resolution up to and including the month immediately preceding the first interest payment date thereafter of the bonds of such Series shall be that amount which when multiplied by the number of such deposits will be equal to the amount of interest payable on such bonds on such first interest payment date less the amount of any accrued interest paid on such bonds and deposited with the Fiscal Agent to the credit of the Bond Service Account;
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> (b) to the credit of the Redemption Account, for a period of 12 months beginning with the second month preceding each fiscal year in which there is an Amortization Requirement for the bonds

of any Series, an amount equal to one-twelfth (1/12) of the Amortization Requirement for such fiscal year for the term bonds of each Series then outstanding plus an amount equal to one-twelfth (1/12) of the premium, if any, which would be payable on the first redemption date in the following fiscal year on a like principal amount of bonds if such principal amount of bonds should be redeemed prior to their maturity from moneys in the Sinking Fund;

(c) to the credit of the Reserve Account, such amount as is required to make the amount deposited to the credit of said Account in the then current fiscal year at least equal to twenty per centum (20%) of the Reserve Requirement; provided, however, that no such deposit under this clause (c) shall be made in any month if the amount then to credit of the Reserve Account shall be equal to the Reserve Requirement or in excess of such amount as may be required to make the amount then to credit the Reserve Account equal to the Reserve Requirement; provided, further, that notwithstanding the above, in the event of an increase in the Reserve Requirement due to the issuance of additional Series of Bonds, such increase may be funded by deposits in each of five (5) years commencing in the fiscal year in which such additional Series of Bonds is issued, of 20% of such increase in the Reserve Requirements, and

(d) the balance, if any, remaining after making the deposits under clauses (a), (b) and (c) above, shall be deposited to the credit of the Construction Fund for use by the Authority for any of its authorized purposes subject to the provisions of Sections 604 and 605 of this Resolution.

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Puerto Rico Highway Authority
Resolution No. 68-18 Sec. 405. Certificate to be Filed for Withdrawal from Construction Fund

Before any payment or withdrawal shall be made from moneys in the Construction Fund there shall be filed with the Fiscal Agent a certificate signed by the Executive Director of the Authority or an officer of the Authority designated by him for such purpose setting forth the amount of money to be so disbursed and stating that such money will be used to pay the costs of constructing Traffic Facilities or for other purposes permitted by this Resolution. Upon receipt of such certificate the Fiscal Agent shall withdraw from the Construction Fund and deposit to the credit of a special checking account in its commercial department in the name of the Authority the amount so specified in such certificate. The Fiscal Agent shall also at any time at the written direction of the Executive Director of the Authority transfer any part of the moneys in the Construction Fund to the credit of the Redemption Account.

Appendix D

Puerto Rico Highway Authority
Resolution No. 68-18 Sec. 409. Balance in Funds to Authority When Bonds Paid

After provision shall be made for the payment of all bonds secured hereby and the interest thereon and all expenses and charges herein required to be paid the Fiscal Agent shall pay any balance in the Sinking Fund and any balance in any other fund then held by it to the Authority.

Puerto Rico Highway Authority
Resolution No. 68-18 Sec. 601. Payment of Principal, Interest and Premium

The Authority covenants that it will promptly pay the principal of and the interest on every bond issued under the provisions of this Resolution at the places, on the dates and in the manner provided herein and in said bonds and in any coupons appertaining to said bonds, and any premium required for the retirement of said bonds by purchase or redemption, according to the true intent and meaning thereof. Except as in this Resolution otherwise provided, the principal, interest and premiums are payable solely from Revenues and from any funds received by the Authority for that purpose from the Commonwealth which Revenues and funds are hereby pledged to the payment thereof in the manner and to the extent hereinabove particularly specified.

Appendix D

Puerto Rico Highway Authority
Resolution No. 68-18 Sec. 602. Pledge of Revenues

The Authority will not incur any indebtedness nor create or cause or suffer to be created any debt, lien, pledge, assignment, encumbrance or any other charge having a priority to or being on a parity with the lien on Revenues on the Bonds, except upon the conditions and in the manner provided herein; provided that, subject to Section 802(c) of the Resolution, as said Section may be amended from time to time, the Authority may, and is hereby permitted to, enter into agreements with issuers of Credit Facilities or Liquidity Facilities which involve liens on Revenues on a parity with, but not prior to, that of the Bonds. Any other indebtedness incurred by the Authority after the effective date hereof under documents not in effect on the effective date hereof shall contain a statement that such indebtedness is junior, inferior and subordinate in all respects to the Bonds and agreements with issuers of Credit Facilities or Liquidity Facilities secured on a party with the Bonds as to lien on and source and security for payment from Revenues hereunder For purposes of the above limitation on incurrence of indebtedness, indebtedness shall not be deemed to include contracts entered into in the ordinary course of business or agreements to repay advances received from the Federal government. Nothing in this Resolution shall be deemed to prohibit the Authority from entering into currency swaps, interest rate swaps or from other arrangements for hedging of interest rates on any indebtedness.

Appendix D

Puerto Rico Highway Authority
Resolution No. 68-18 Sec. 604. Costs of Maintaining Traffic Facilities to be Paid from Construction Fund if not Paid from General Funds of Commonwealth

As recited in the preambles hereof the Authority has entered into an agreement with the Secretary of Public Works pursuant to which the Secretary of Public Works has agreed to pay the costs of maintaining, repairing and operating all Traffic Facilities financed by the Authority in whole or in part by the issuance of bonds of the Authority under the provisions of this Resolution, from general funds of the Commonwealth of Puerto Rico which are made available to him for such purpose. The Authority covenants, however, that if and to the extent funds for this purpose are not provided by the Commonwealth of Puerto Rico, the Authority will pay such costs from unencumbered funds then on deposit in the Construction Fund or from the Revenues thereafter deposited to the credit of the Construction Fund pursuant to clause (d) of Section 401 of this Resolution.

The Authority further covenants that it will cause an annual general evaluation to be made by the Traffic Engineers of the level of maintenance of said Traffic Facilities financed in whole or in part by the issuance of bonds under the provisions of this Resolution, which Traffic Facilities shall be, in the judgment of the Authority with the approval of the Traffic Engineers, material to the overall system of traffic facilities operated by the Authority, such evaluation to be directed towards surface and shoulder conditions, condition of all structures and

signs on said Traffic Facilities. References in Section 605 to "the Traffic Facilities referred to in Section 604" shall mean those Traffic Facilities which are financed in whole or in part by the issuance of Bonds and which are material, in the judgment of the Authority and the Traffic Engineers, to the overall system of traffic facilities operated by the Authority.

Puerto Rico Highway Authority
Resolution No. 68-18 Sec. 802.
Consent of Bondholders

Subject to the terms and provisions contained in this Section, and not otherwise, the holders of not less than two-thirds (2/3) in aggregate principal amount of the bonds then outstanding shall have the right, from time to time, anything contained in this Resolution to the contrary notwithstanding, to consent to and approve the adoption of such resolution or resolutions supplemental hereto as shall be deemed necessary or desirable by the Authority for the purpose of modifying, altering, amending, adding to or rescinding, in any particular, any of the terms or provisions contained in this Resolution or in any supplemental resolution; provided, however, that nothing herein contained shall permit, or be construed as permitting, (a) an extension of the maturity of the principal of or the interest on any bond issued hereunder, or (b) a reduction in the principal amount of any bond or the redemption premium or the rate of interest thereon, or (c) the creation of a lien upon or a pledge of Revenues other than the lien and pledge created by this Resolution, or (d) a preference or priority of any bond or

bonds over any other bond or bonds, or (e) a reduction in the aggregate principal amount of the bonds required for consent to such supplemental resolution Nothing herein contained, however, shall be construed as making necessary the approval by bondholders of the adoption of any supplemental resolution as authorized in Section 801 of this Article.

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APPENDIX E — EXCERPTS OF SENATE REPORT 95-989

S. REP. 95-989, S. Rep. No. 989, 95TH Cong., 2ND Sess. 1978, 1978 U.S.C.C.A.N. 5787 (Leg. Hist.)

P.L. 95-598, BANKRUPTCY REFORM ACT OF 1978

SENATE REPORT NO. 95-989

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S. Rep. 95-989 Sec. 101. Definitions

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Paragraph (27) defines 'judicial lien.' It is one of three kinds of liens defined in this section. A judicial lien is a lien obtained by judgment, levy, sequestration, or other legal or equitable process or proceeding.

Paragraph (28) defines 'lien.' The definition is new and is very broad. A lien is defined as a charge against or interest in property to secure payment of a debt or performance of an obligation. It includes inchoate liens. In general, the concept of lien is divided into three kinds of liens: judicial liens, security interests, and statutory liens. Those three categories are mutually exclusive and are exhaustive except for certain common law liens.

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Appendix E

Paragraphs (36) and (37) define 'security agreement' and 'security interest.' A security interest is one of the kinds of liens. It is a lien created by an agreement. Security agreement is defined as the agreement creating the security interest. Though these terms are similar to the same terms in the Uniform Commercial Code, article IX, they are broader. For example, the U.C.C. does not cover real property mortgages. Under this definition, such a mortgage is included, as are all other liens created by agreement; even though not covered by the U.C.C all U.C.C. security interests and security agreements are, however, security interests and security agreements under this definition. Whether a consignment or a lease constitutes a security interest under the bankruptcy code will depend on whether it constitutes a security interest under applicable state or local law.

Paragraph (38) defines another kind of lien, 'statutory lien.' The definition, derived from current law, states that a statutory lien is a lien arising solely by force of statute on specified circumstances or conditions and includes a lien of distress for rent (whether statutory, common law, or otherwise). The definition excludes judicial liens and security interests, whether or not they are provided for or are dependent on a statute, and whether or not they are made fully effective by statute. A statutory lien is only one that arises automatically, and is not based on an agreement to give a lien or on judicial action. Mechanics', materialmen's, and warehousemen's liens are examples. Tax liens are also included in the definition of statutory lien.

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