No. 18-560

IN THE

Supreme Court of the United States

PEAJE INVESTMENTS LLC,

Petitioner,

v.

THE FINANCIAL OVERSIGHT AND MANAGEMENT BOARD FOR PUERTO RICO, *et al.*,

Respondents.

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

BRIEF IN OPPOSITION

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QUESTION PRESENTED

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." Section 101(51) defines a "security interest" to mean a "lien created by an agreement." It is undisputed that the Puerto Rico Highways and Transportation Authority Act contains no language granting or imposing a lien. Rather, the Act authorizes the Puerto Rico Highways & Transportation Authority ("HTA") to issue bonds and further authorizes HTA to decide whether those bonds should be secured by some or all revenues. HTA adopted a resolution authorizing the issuance of bonds and providing for their repayment from certain revenues.

The Question Presented is: When a statute does not impose a lien, but rather authorizes an instrumentality to issue bonds and to promulgate resolutions containing security provisions to be included in the bondholders' contract, do the statute and resolution together create a statutory lien for purposes of Bankruptcy Code § 101(53)?

RULE 29.6 STATEMENT

Respondents are not nongovernmental corporations and are therefore not required to submit a statement under Supreme Court Rule 29.6.

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BRIEF IN OPPOSITION

Respondents respectfully submit the petition for a writ of certiorari should be denied.

STATEMENT OF THE CASE

This case concerns whether an agency's voluntary resolution allegedly agreeing to pledge toll revenues to secure a bond issuance creates a "statutory lien" under the Bankruptcy Code. A unanimous panel of the First Circuit correctly affirmed the district court and held that it did not because by definition a statutory lien must arise "*solely* by force of a statute on specified circumstances and conditions." 11 U.S.C. § 101(53) (emphasis added). No lien arose by force of *statute* here. The only relevant statute merely authorizes the Puerto Rico Highways and Transportation Authority ("HTA") to issue bonds and to secure those bonds with its revenues *if it so chooses*; the statute does not create a lien under any specified circumstance. Instead, as alleged, any lien would have arisen only from a resolution in which HTA voluntarily agreed to pledge revenues to secure its bonds. A resolution is not a statute, however, or even a regulation that might have the force of law; and therefore a lien arising under the resolution is unquestionably not a statutory lien. Petitioner may possess a security interest—*i.e.*, a lien created by

agreement, 11 U.S.C. § 101(51)—but it does not have a statutory lien.[1]

Notably, while Petitioner urges here that it holds a statutory lien, it fails to mention it complained to the First Circuit it was not allowed to urge it held a security interest and not a statutory lien. Pet. App. 8a–15a. The instant ruling is interlocutory, and Petitioner retains the right the district court granted it to urge the opposite of what it argues in its Petition when the district court litigation continues.

The petition fails to satisfy any of the Court's criteria for granting certiorari. Despite Petitioner's attempt to manufacture a Circuit split, no Circuit has espoused principles that would create a statutory lien here.[2] In the cases cited by Petitioner, unlike here, a lien was created automatically by statute upon the occurrence of a triggering event specified in the statute. None of the cases holds a statutory lien arises from a volitional act by an agency choosing to issue bonds and to secure them with its revenues.

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[1] The hearing on Petitioner's motion below was limited to the claim that it has a statutory lien. Petitioner belatedly asserted it possessed a consensual security interest (and not a statutory lien because they are mutually exclusive), but the First Circuit affirmed the district court's ruling that Petitioner's alternative claim for a security interest could be taken up in a subsequent hearing. Pet. App. 9a–15a.

[2] Even though Petitioner acknowledges a Second Circuit opinion "consistent" with the First Circuit's opinion here and contends the Third, Fifth, and Ninth Circuits are inconsistent, neither Petitioner nor the courts below mentioned the alleged Circuit split, which is consistent with the fact that none exists.

Petitioner's contention that the decision below conflicts with this Court's precedent is more far-fetched. This Court has never applied 11 U.S.C. § 101(53) or opined on whether a party has a statutory lien. Petitioner in effect argues the empty proposition that this Court's precedent requires courts to read statutes correctly, and the First Circuit's supposed failure to read 11 U.S.C. § 101(53) correctly conflicts with that precedent. If that were sufficient to show a conflict with the Supreme Court, then every case involving statutory interpretation would be entitled to certiorari. In any event, the First Circuit did not construe the statute incorrectly.

This case is also not a good vehicle for reviewing the Question Presented for at least two reasons. *First*, even if the Court were to grant the petition and resolve the Question Presented in Petitioner's favor, Petitioner still would likely not be entitled to the relief it seeks. *Second*, there has been no final judgment below, and Petitioner has not exhausted all of its arguments in support of the requested relief, including its argument that it holds a security interest and not a statutory lien. That interlocutory posture "alone furnishe[s] sufficient ground for the denial of" the petition. *Hamilton-Brown Shoe Co. v. Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916).

1. Puerto Rico is in the midst of what Congress found is a "fiscal emergency." 48 U.S.C. § 2194(m)(1). By 2016, Puerto Rico's government was billions of dollars in debt, and its utilities were operating at an annual deficit in the hundreds of millions. *See Puerto Rico v. Franklin Cal. Tax-Free Trust*, 136 S. Ct. 1938, 1942 (2016). "Puerto Rico's access to capital markets ha[d] also been severely compromised since ratings

agencies downgraded Puerto Rican bonds, including the utilities', to noninvestment grade in 2014." *Id.*; *see also Wal–Mart Puerto Rico, Inc. v. Zaragoza–Gómez*, 174 F. Supp. 3d 585, 602 (D.P.R. 2016) (Puerto Rico "ha[d] started to default on its debt obligations," and "it ha[d] no place to turn for external funding").

To address this financial crisis, Congress enacted the Puerto Rico Oversight, Management, and Economic Stability Act ("PROMESA") in 2016. PROMESA established the Financial Oversight and Management Board (the "Oversight Board") "to provide a method for [Puerto Rico] to achieve fiscal responsibility and access to the capital markets." *Id.* § 2121(a)–(b)(1). PROMESA grants the Oversight Board extensive authority to oversee budgets and long-term fiscal plans in the Commonwealth. *Id.* §§ 2141–2142. When the Oversight Board began its work, Puerto Rico had $74 billion of debt, $49 billion of pension liabilities, and insufficient resources to satisfy those obligations. Hurricane Maria deepened the crisis, devastating infrastructure and leaving many residents without power for a year. Against that backdrop, the Oversight Board has developed iterative fiscal plans and budgets designed to lay the groundwork for the Commonwealth to regain financial stability. The Oversight Board has certified fiscal plans and budgets for the Commonwealth and six instrumentalities.

Unlike municipalities on the mainland, Puerto Rico and its instrumentalities are not permitted to file for bankruptcy under Chapter 9 of the Bankruptcy Code. *See Franklin Cal. Tax-Free Trust*, 136 S. Ct. at 1942. Title III of PROMESA thus establishes a procedure that the Commonwealth and its

instrumentalities can employ to restructure their debts. 48 U.S.C. § 2161–2177. The Oversight Board is authorized to commence a Title III case on behalf of the Commonwealth or any of its eligible instrumentalities when certain conditions are met. *Id.* § 2164(a). To date, the Oversight Board has filed at least five Title III cases on behalf of the Commonwealth and its instrumentalities, which have required a massive investment of resources by the parties and the judiciary. In connection with those cases, at least forty-five adversary proceedings have been filed.

PROMESA applies dozens of Bankruptcy Code provisions in a Title III case, *id.* § 2161(a), including 11 U.S.C. § 101. Section 101 provides for three mutually exclusive categories of liens: statutory liens, security interests (also known as consensual liens), and judicial liens. 2 Collier on Bankruptcy ¶ 101.53. A statutory lien is defined as a "lien arising solely by force of a statute on specified circumstances or conditions." 11 U.S.C. § 101(53). A "security interest," by contrast, is a "lien created by an agreement." *Id.* § 101(51).

2. HTA is one of many public corporations in Puerto Rico in dire fiscal condition. HTA is responsible for the construction, operation, and maintenance of Puerto Rico's roads, highways, bridges, and mass transit. It finances its operations through revenue bonds, federal grants, certain tax revenues, vehicle fees, tolls, and other collected revenues.

HTA was established by the Puerto Rico Highways and Transportation Authority Act. *See* 9

L.P.R.A. § 2001 *et seq.* (the "Enabling Act"). The Enabling Act authorizes HTA to adopt resolutions to issue and sell bonds if it so chooses. *Id.* § 2004(l). It also "empower[s]" HTA to enter into agreements "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 . . . ." *Id.* The Enabling Act goes on to state:

> 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) (emphasis added).

In 1968, HTA adopted a resolution authorizing a bond issuance (the "1968 Resolution"), in which it agreed to deposit its revenues into a series of accounts for the payment of debt service (the "Reserve Accounts"). Pet. App. 52a–55a. The 1968 Resolution states that the Reserve Accounts are "subject to a lien and charge in favor of the holders of the bonds." Pet. App. 52a.

Petitioner Peaje Investments LLC ("Peaje") alleges it is the beneficial owner of about $65 million of the bonds issued by HTA under the 1968 Resolution. Pet. App. 3a.

3. As the fiscal crisis in Puerto Rico intensified, the Governor issued a series of executive orders that caused HTA to stop making deposits in the Reserve Accounts and instead use its revenues to pay its operating expenses. Pet. App. 5a–6a. Peaje sued, claiming the failure to make the deposits breached the agreements contained in the 1968 Resolution.

In May 2017, the Oversight Board filed a Title III petition on HTA's behalf. Pet. App. 6a. The filing of the Title III petition triggered an automatic stay of all creditor litigation against HTA, including the suit brought by Peaje. *See* 11 U.S.C. § 362(a) (incorporated into Title III by 48 U.S.C. § 2161(a)).

Peaje then filed an adversary complaint in HTA's Title III case. Pet. App. 7a. At the same time, Peaje moved for (1) a preliminary injunction directing HTA to resume making deposits into the Reserve Accounts and (2) relief from the automatic stay or adequate protection. In support of its motion, Peaje argued it possessed a statutory lien on HTA's toll revenues; it did not argue it possessed a security interest until too late for inclusion in the present motion.

After the parties conducted discovery in conjunction with the motion, Peaje filed a reply brief in which it argued for the first time that if its statutory lien argument failed, it nevertheless possessed a security interest in HTA's toll revenues. Respondents moved to strike that portion of the reply on the ground that Peaje had failed to argue for a security interest in its moving papers. The district court agreed to strike it, ruling that Peaje had waived any argument based on a security interest for purposes of its motion. *See* Pet. App. 34a n.5.

4. The district court denied Peaje's motion for a preliminary injunction on two grounds. First, the court held that Peaje failed to demonstrate a likelihood of success on the merits because it did not have a statutory lien on HTA's toll revenues. Pet. App. 34a–38a. The court did "not opine or reach any conclusion [] 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." Pet. App. 34a n.5.

Second, the court held that Peaje failed to show it would suffer irreparable harm absent an injunction. Pet. App. 38a–39a. In an effort to establish irreparable harm, Peaje had submitted expert testimony that its equity cushion (i.e., the value of the property subject to its alleged lien in excess of Peaje's secured claims) would be depleted unless HTA resumed making deposits in the Reserve Accounts. Pet. App. 30a–31a. The district court found that testimony "speculative" and "not . . . credible" because "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." Pet. App. 39a.

The district court also denied Peaje's motion for stay relief on two grounds: (1) Peaje did not possess a statutory lien and therefore had no property interest that could justify lifting the stay; and (2) any property interest was being adequately protected in any event. Pet. App. 39a–40a. The court found that HTA was using its toll revenues to maintain the Commonwealth's roads, which protected any property

interest that Peaje could have in the revenues by ensuring that tolls would continue to be collected in the future. Pet. App. 40a ("The Commonwealth and HTA's efforts to maintain those roads preserves the future availability of the revenues stream that Peaje argues secures the 1968 bonds.").

5. Peaje appealed the district court's order denying the preliminary injunction and stay relief, as well as the court's separate order striking the security interest argument from Peaje's reply brief. A unanimous First Circuit affirmed both orders. Pet. App. 1a–23a.

The First Circuit first held that the district court did not abuse its discretion when it struck Peaje's security interest argument from its reply brief. Pet. App. 9a–15a. The court noted that Peaje had waived the security interest argument for purposes of the present motion only and that Peaje would be free to argue it possessed a security interest on remand. Pet. App. 15a. However, for purposes of the present motion, Peaje was limited to arguing it possessed a statutory lien. *Id.*

The First Circuit then held Peaje did not possess a statutory lien on HTA's toll revenues. Pet. App. 15a–22a. The court began by quoting the statute, which provides a statutory lien must arise "solely by force of a statute upon specified circumstances or conditions." Pet. App. 16a (quoting 11 U.S.C. § 101(53)). The court noted that the statutory text describes two scenarios in which a statutory lien can arise: "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. The court observed the Enabling Act by its terms does not create a lien or specify any condition that would trigger a lien. Pet. App. 18a. Instead, the Act's provisions merely "permit the Authority to secure the payment of bonds by making a pledge of revenues, but they do not require that it do so." *Id.* "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." Pet. App. 20a. Accordingly, any lien would have been created only by an agreement in the 1968 Resolution—not by the Enabling Act—and, as the court noted, a resolution "is not a statute." Pet. App. 21a.

To try to escape this predicament, Peaje suggested the 1968 Resolution was a "regulation," and thus might be closer to qualifying as the requisite statute needed to create a statutory lien. The court rejected Peaje's contention. Pet. App. 21a. As the court concluded, the 1968 Resolution is not a regulation because it does not regulate third-party conduct and did not satisfy the notice and comment requirements for an agency regulation. *Id.* Instead, the court explained that the 1968 Resolution is akin to a resolution issued by a board of a private corporation, and such a resolution cannot give rise to a statutory lien. *Id.*

Because Peaje did not possess a statutory lien and had temporarily waived the argument that it possessed a security interest, the First Circuit affirmed the district court's holding that Peaje had no property interest "necessary to compel relief from the automatic stay." Pet. App. 22a. The First Circuit further affirmed the district court's denial of a

preliminary injunction because without a cognizable property interest in HTA's toll revenues, Peaje was not entitled to an order requiring HTA to turn over those revenues. *Id.*

Having affirmed the district court's primary holding that Peaje did not possess a statutory lien, the First Circuit vacated the district court's factual findings that (1) Peaje failed to establish irreparable harm; and (2) any property interest was adequately protected. Pet. App. 22a–23a. The First Circuit expressed no opinion on whether those factual findings were correct. *Id.* Instead, it instructed the district court to revisit those issues in light of any recent factual developments should Peaje on remand seek a preliminary injunction or stay relief under a security interest theory. *Id.*

Peaje did not seek panel rehearing or en banc review. Its petition followed.

REASONS FOR DENYING THE PETITION

I. THERE IS NO CIRCUIT SPLIT ON THE QUESTION PRESENTED.

Peaje twists the First Circuit's straightforward interpretation of 11 U.S.C. § 101(53) to manufacture a conflict among the Circuits where none exists. The cases cited by Peaje and the decision below all apply the same principle of law that a statutory lien must arise solely by force of statute upon specified circumstances. Peaje's cases merely applied that same principle to materially different state statutes that, unlike the Enabling Act, provided that a lien

would arise automatically upon a specified condition. That is not a Circuit split.

A. There Is No Split with the Third Circuit.

Peaje relies primarily on *In re Schick*, 418 F.3d 321, 325–27 (3d Cir. 2005), which held a lien to be statutory. The critical difference between *Schick* and this case is that the lien in *Schick* was "automatically created by the operation of two statutes" upon the filing of a certificate of debt by the Motor Vehicle Commission ("MVC"). *Id.* at 325, 329 n.7 (citing N.J.S.A. §§ 2A:16-1, 17:29A–35(b)(2)). The filing of a certificate of debt, as specified in the statute, was a "specified circumstance[] or condition[]" that triggered the creation of a lien by "force of [] statute," making the lien statutory. 11 U.S.C. § 101(53). The existence of the lien did not depend on any agreement to create a lien.

Here, by contrast, the Enabling Act does not automatically create a lien under any circumstance. The Enabling Act authorizes HTA to use its revenues to secure its bonds if it so chooses, but the Act does not create a lien of its own force; it does not require HTA to grant a lien; and it does not provide that a lien will arise automatically upon HTA's taking a specified action, such as issuing bonds. 9 L.P.R.A. § 2004(l). If a lien were created, therefore, it would not have arisen "solely by force of a statute" upon a "specified circumstance"; instead, it would have arisen solely from a voluntary agreement by HTA in the 1968 Resolution. That would make any such lien a security interest created by an agreement, not a statutory lien.

See 11 U.S.C. § 101(51) (defining "security interest" as a "lien created by an agreement").

Peaje contends that the Third Circuit found a statutory lien because the MVC (a creditor) was authorized by a statute to pursue the unpaid surcharges, and that MVC's decision to pursue unpaid surcharges was the "specified condition" that gave rise to the lien. Pet'n 27–28 ("According to the Third Circuit, it is sufficient that the lien arises as a result of unilateral agency action authorized by statute . . ."). Peaje contends that by the same logic, the court below should have found a statutory lien because HTA (a debtor) was authorized by the Enabling Act to pledge its revenues, and that pledge resulted in a lien. *Id.* That conclusion does not follow from Peaje's premise. The statutes in *Schick* mandated that if the MVC issued a certificate of debt against the delinquent motor vehicle owner, the lien would then arise automatically; thus, the lien arose "solely by force of a statute" upon a specified condition. Here, by contrast, the Enabling Act does not automatically create a lien when HTA determines to issue debt. Instead, the statute simply authorizes HTA to issue debt, which HTA can determine to secure or not to secure. That is why the First Circuit came to a different conclusion from *Schick*.[3] Although Peaje tries to portray *Schick* as a case that turns on discretionary agency action,

[3] It is thus irrelevant that the lien in *Schick* did not arise from "the driver's acts, the imposition of the surcharge, or even the nonpayment of the debt." Pet'n 27. The lien arose automatically because a statute mandated the docketing of the certificate of debt, which automatically created a lien under N.J.S.A. § 2A:16-1, making the lien statutory.

that ignores the distinction between the discretion here and the discretion in *Schick*. Here, the statute granted HTA the discretion to issue debt and the discretion whether to secure it or not and what the collateral should be. In *Schick*, the statute granted the agency discretion, as the relevant creditor, whether to file a certificate of debt "against" the debtor involved but mandated that if the agency chose to file the certificate, the debt would be secured by requiring the court clerk to docket the debt.

Significantly, Peaje's position that HTA's mere statutorily-granted discretion to issue debt and to secure it or not means the collateral security must be a statutory lien proves the opposite. If Peaje were correct, it would be impossible for HTA to grant a security interest.

Finally, contrary to Peaje's argument, the First Circuit would have found a statutory lien had it been presented with a statute like those in *Schick*. The decision below acknowledged that a statutory lien arises if a statute automatically creates a lien upon the occurrence of a specified triggering event, including a discretionary action taken by a party or agency, such as furnishing labor or materials under a contract. Pet. App. 19a (describing mechanics' liens and other common statutory liens). The First Circuit would thus agree that there was a statutory lien in *Schick* because the filing of a certificate of debt was a specified circumstance in the statute that triggered the creation of a lien by operation of statute. Here, the First Circuit correctly held that there was no statutory lien because, unlike the statutes in *Schick*, the Enabling Act does not automatically create a lien under any specified circumstance. The First Circuit

and Third Circuit thus do not disagree on the law; they simply reached different results when confronted with different statutes.[4]

B. There Is No Split with the Ninth Circuit.

Nor does the decision below conflict with *In re Mainline Equipment, Inc.*, 865 F.3d 1179 (9th Cir. 2017). There, the parties agreed the lien at issue was statutory because it arose under a statute that expressly created a "lien upon all personal and real property" of a delinquent taxpayer upon the county's recording of a certificate of delinquency. *Id.* at 1184–85 (citing Cal. Rev. & Tax. Code § 2191.4). The creditor county's recording of the delinquency certificate was thus a circumstance or condition specified in the statute that triggered the creation of a lien, making the lien statutory. *See* 11 U.S.C. § 101(53). Here, by contrast, there is no statute that

[4] The Third Circuit's decision in *Graffen v. City of Philadelphia* does not conflict with the decision below for similar reasons. 984 F.2d 91 (3d Cir. 1992) (cited in Pet'n 5, 25–26). There, a statute expressly imposed a lien on a city resident's property for unpaid municipal bills upon docketing of the claim by a prothonotary. *Id.* at 94 (citing 53 Pa. Stat. § 7106). The Third Circuit held that the lien was statutory. *Id.* at 96–97. *Graffen* reached a different result from the decision below because it involved a statute that—unlike the Enabling Act—expressly created a lien upon the satisfaction of a specified condition and that condition was satisfied by the creditor. Moreover, unlike the decision below, *Graffen* did not involve a claim that a discretionary agency action alone can create a statutory lien.

creates a lien under any specified circumstances or conditions, and *Mainline* is therefore inapposite.

In an attempt to manufacture a conflict between *Mainline* and the decision below, Peaje argues that the Ninth Circuit held a creditor agency's discretionary action (the county's decision to record a delinquency certificate) can give rise to a statutory lien while the First Circuit supposedly held a debtor agency's discretionary action (HTA's decision to secure its bonds with its revenues) does not give rise to a statutory lien. Pet'n 28. As with Petitioner's discussion of *Schick*, that argument ignores the material differences between the statutes in the two cases. The *Mainline* statute expressly provides that a lien will arise automatically if the county records a delinquency certificate; that is why the agency's action created a statutory lien there. 865 F.3d at 1184–85. The Enabling Act, by contrast, does not provide that a lien will automatically arise under any circumstance, which is why there is no statutory lien here. Again, the First and Ninth Circuits agree on the law; they just reached different results when they applied the law to different statutes.

C. There Is No Split with the Fifth Circuit.

Finally, Peaje contends the Fifth Circuit's decision in *In re Green*, 793 F.3d 463 (5th Cir. 2015), conflicts with the decision below. But again, *Green* is inapposite because, unlike here, that case involved a state statute that expressly creates a lien (called a "privilege" in Louisiana parlance). *Id.* at 467–68 (citing La. Rev. Stat. § 9:1123.115). The Fifth Circuit

held a lien arising automatically by force of that statute was a statutory lien. *Id.* at 469 ("[B]ecause Creditor's lien . . . is based on the privilege granted to it by the Louisiana Condominium Act, it is a statutory lien."). As discussed above, any lien held by Peaje is not a statutory lien because it did not arise by force of statute; rather, any lien would have been created by HTA's voluntary decision regarding the source of repayment in the 1968 Resolution. The decision below thus does not conflict with *Green*; the cases reached different results because they involved different statutes.

Peaje argues the decision below and *Green* applied a different "standard for distinguishing a 'statutory lien' from a 'security interest'" and that the First Circuit "specifically rejected" the Fifth Circuit's standard. Pet'n 29. That is incorrect. The First Circuit had no occasion to distinguish between a statutory lien and a security interest.[5] To the contrary, the First Circuit held Peaje had temporarily waived any argument about security interests and thus said nothing more on the topic. Pet. App. 15a.

Peaje also argues the Fifth Circuit would necessarily hold Peaje has a statutory lien because Peaje supposedly does not meet the *Green* test for a security interest. Pet'n 29. But *Green* does not provide a general test for a security interest. It only quotes the Bankruptcy Code's definition of a security interest in § 101(51). 793 F.3d at 467 & n.8. *Green*

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[5] Notably, Peaje includes no cite to the decision below when it contends the First Circuit "specifically rejected" the Fifth Circuit's standard.

simply observed that no voluntary security interest could exist in that case because the state-law requirements for the creation of the particular type of security interest were not satisfied. *Id.* at 468–69.

* * * * *

Accordingly, the decision below does not conflict with decisions of the Third, Fifth, or Ninth Circuits. Peaje acknowledges the decision below is "generally consistent" with the Second Circuit's decision in *In re Lionel Corp.*, 29 F.3d 88, 94–95 (2d Cir. 1994). Pet'n 29. The only other cases cited by Peaje are district and bankruptcy court cases that cannot create a Circuit split. Pet'n 25. In any event, Peaje provides no explanation of how those lower-court cases supposedly conflict with the decision below.

II. THE FIRST CIRCUIT'S DECISION DOES NOT CONFLICT WITH A DECISION OF THIS COURT.

The decision below does not conflict with precedent from this Court. Because this Court has never applied 11 U.S.C. § 101(53) to determine whether a party possesses a statutory lien, Peaje tries to demonstrate a conflict by citing cases that prescribe general canons of statutory construction. Pet'n 31–32. Peaje's position boils down to an assertion that the First Circuit misapplied the rules of statutory construction by construing 11 U.S.C. § 101(53) incorrectly. That argument attacks the merits of the decision below, which is not a persuasive ground for granting review.

In any event, the First Circuit did not violate any canons of construction. Peaje first cites to cases standing for the unremarkable proposition that courts may not add terms to a statute that do not appear in the statutory text. Pet'n 31 (citing *Lamie v. United States Trustee*, 540 U.S. 526, 538 (2004); *Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 254 (1992); *United States v. Locke*, 471 U.S. 84, 95 (1985)). According to Peaje, the First Circuit violated that canon by supposedly adding a limitation to 11 U.S.C. § 101(53) "disqualif[ying] agency regulation as a proper triggering event for a statutory lien." Pet'n 31.[6]

The First Circuit did no such thing. To the contrary, the First Circuit held the only limitation to a triggering event is it must be "specified" in the statute—which is precisely the limitation imposed by 11 U.S.C. § 101(53). Pet. App. 18a (quoting 11 U.S.C. § 101(53)). Accordingly, the First Circuit held "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 (emphasis added). The 1968 Resolution was not a triggering event because it

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[6] Peaje repeatedly mischaracterizes the 1968 Resolution as an "agency regulation." Pet'n i, 2, 4, 5, 7, 10, 23, 24, 31, 32, 34. To promulgate a regulation, HTA would have had to follow various statutory procedures to provide public notice and opportunity to comment. *See, e.g.*, 9 L.P.R.A. §§ 2121–2122. None of those procedures was followed for the 1968 Resolution because the 1968 Resolution is not a regulation. Instead, as the First Circuit explained, the 1968 Resolution is akin to a resolution adopted by a corporate board of directors. Pet. App. 21a–22a.

was not *specified* as a triggering event in the Enabling Act. Pet. App. 20a.

Peaje also contends the decision below violated the canon that all provisions in a statute must be given effect. Pet'n 32 (citing *Corley v. United States*, 556 U.S. 303, 314 (2009)). According to Peaje, the First Circuit ignored the words "on specified circumstances or conditions" in 11 U.S.C. § 101(53) and held that "a statutory lien arises only by 'force of statute.'" Pet'n 32. That blatantly mischaracterizes the holding below. The First Circuit expressly recognized a statutory lien can arise upon the occurrence of conditions and circumstances specified in a statute. Pet. App. 19a. It then (correctly) held the Enabling Act did not specify a lien would be automatically created upon HTA's adoption of the 1968 Resolution, which is why there is no statutory lien here. Pet. App. 20a.

III. THE DECISION DOES NOT IMPLICATE AN IMPORTANT OR RECURRING QUESTION OF LAW.

Peaje finally seeks review on the ground this case supposedly presents an issue of "profound national significance." Pet'n 32. That greatly overstates its import. The narrow question in this case is whether, notwithstanding the absence of any statutory language automatically creating a lien, a resolution in which a debtor agency voluntarily agrees to secure its bonds with certain revenues creates a statutory lien. While that question is no doubt important to Peaje in the context of this case, it will not have a significant impact on the law in general.

Peaje asserts statutory liens "serve vital government interests." Pet'n 32. Assuming that is true, it does not establish that the question addressed by the First Circuit is an important question of law beyond its import to the current case. The First Circuit held only that any lien here would not satisfy § 101(53)'s definition of a "statutory lien" because a statute does not provide that a lien arises automatically upon occurrence of a specified condition. Peaje's assertion that "a large segment of liens" would be excluded from the category of statutory liens by the decision below is baseless. Pet'n 33. As the decisions discussed above demonstrate, courts have uniformly held that a statute creates a statutory lien when it provides that a lien will arise in a particular circumstance—and the First Circuit did not hold otherwise.

Moreover, contrary to Peaje's assertion, Pet'n 33, this case does not implicate the question of whether a government agency may create a statutory lien by regulation. The First Circuit held that, as a matter of Puerto Rico law, the 1968 Resolution is not an agency regulation. Petitioner does not expressly challenge that conclusion, and it would not warrant this Court's review in any event.

Nor has Peaje established that the Question Presented is commonly recurring. To the contrary, Peaje can muster only a single district court case from 1995 to argue that the issue here recurs frequently. Pet'n 33 (citing *Alliance Cap. Mgmt. L.P. v. Cty. of Orange (In re Cty. of Orange)*, 189 B.R. 499 (C.D. Cal. 1995)). The reasoning of that district court case was considered and rejected below, *see* Pet. App. 20a n.8,

and no other case has ever cited *Orange County* for the proposition that a debtor agency's voluntary act can create a statutory lien absent explicit lien-creating language in a statute. Unlike here, the statute in *County of Orange* did not make resolution provisions part of the bondholders' contract.

IV. THIS CASE IS NOT A GOOD VEHICLE FOR REVIEW.

Even if the petition met any of the Court's criteria for certiorari, this is not the case to resolve the Question Presented. If the Court were to grant the petition and rule in Peaje's favor, Peaje still would not be entitled to the relief it seeks. Below, Peaje sought two forms of relief: (1) a preliminary injunction requiring HTA immediately to deposit its toll revenues in the Reserve Accounts; and (2) relief from the automatic stay or adequate protection. The district court declined to grant either remedy not only because Peaje lacked a statutory lien but also for additional, independent reasons. Accordingly, it is extremely unlikely that Peaje could secure the relief it seeks no matter how the Court resolves the petition.

Moreover, the underlying litigation is ongoing, and the First Circuit has authorized Peaje to try and seek the same relief under a different theory—namely, that it has a security interest and not a statutory lien. Pet. App. 23a. It would be premature for this Court to intervene in this case until Peaje has exhausted all its arguments for relief. If Peaje is ultimately denied the requested relief, it can bring another petition following final judgment.

A. Peaje Would Be Unlikely to Prevail on Its Motion for a Preliminary Injunction Even If the Petition Were Granted.

It is bedrock law that a preliminary injunction may not issue unless a plaintiff can establish, among other things, a likelihood of success on the merits of its claim and irreparable harm absent an injunction. *Winter v. Natural Res. Def. Council, Inc.,* 555 U.S. 7, 21 (2008). The district court held that Peaje failed to establish either of those elements. Pet. App. 38a. Even if the Court were to grant the petition and reverse on the merits, it is unlikely Peaje could establish irreparable harm on remand because the district court already ruled against Peaje on that issue and the facts have not materially changed since the court's decision.

The district court held that Peaje was not likely to succeed on its claims because it had no statutory lien on HTA's toll revenues. Pet. App. 38a. The court went on to find that Peaje had "failed to establish that it will suffer irreparable harm absent preliminary injunctive relief." *Id.* Peaje had tried to establish irreparable harm by arguing that its equity cushion was diminishing. Pet. App. 39a. However, the district court discredited the expert evidence that Peaje proffered in support. *Id.* Specifically, the court found Peaje's expert testimony to be "speculative" and "based on unproven and unsubstantiated assumptions about macroeconomic conditions in the Commonwealth." *Id.* Viewing the record as a whole, the court concluded that there was an "appreciable probability" that Peaje would continue to have an

equity cushion during the pendency of the Title III case. *Id.* "The Court therefore concludes 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*." *Id.* (emphasis added).

To be sure, the First Circuit vacated the district court's finding on irreparable harm "solely to make clear that [it has] no preclusive effect on remand." Pet. App. 23a. But the First Circuit went out of its way to clarify that it was not suggesting the district court's finding on irreparable harm was wrong. *Id.* ("[N]othing in this opinion should be read as implying any decision not expressly addressed within it."). Instead, the First Circuit merely instructed the district court to reconsider the question of irreparable harm in light of any recent factual developments since its first order should Peaje renew its motion on remand under the theory that it holds a security interest. *Id.* There is no reason to believe that on remand the district court would reverse course and find irreparable harm. If anything, HTA is now closer to a plan of adjustment (PROMESA's equivalent of a plan of reorganization).

There is an additional reason—not addressed in the decisions below but made plain by the record—why Peaje's motion for a preliminary injunction would likely fail even if this Court were to hold that Peaje possesses a statutory lien. If Peaje had a statutory lien, that lien would extend only to revenues already in the Reserve Accounts. Accordingly, regardless of whether it has a statutory lien, Peaje would not be entitled to the requested preliminary injunction,

which seeks the turnover of *all* toll revenues that HTA collects.

Any lien held by Peaje would have been created in § 401 of the 1968 Resolution. Pet. App. 52a–53a. After establishing an interest fund and the Reserve Accounts, that section states:

> The *moneys in said Fund and Accounts* shall be held by the Fiscal Agent in trust and applied as hereinafter . . . 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.

Pet. App. 52a (emphasis added). In other words, any lien would attach only to the "moneys" already in the Reserve Accounts. It would not attach to future revenues that HTA has not yet collected or that it has collected but not deposited in the Reserve Accounts.[7] Accordingly, even if this Court were to hold such a statutory lien exists, it would not entitle Peaje to the

[7] Moreover, as a matter of law, the automatic stay would prevent any statutory lien from attaching to post-petition revenues. *See, e.g.*, *United States v. Gold (In re Avis)*, 178 F.3d 718, 719, 722–24 (4th Cir. 1999) (holding that 11 U.S.C. § 362(a)(5) "precludes attachment of an IRS lien on assets acquired by the debtor during the bankruptcy proceeding"); *see also In re Birney*, 200 F.3d 225, 228 (4th Cir. 1999) (holding *Avis* rule applies to any lien arising "by operation of law").

relief it seeks—namely, a preliminary injunction requiring the turnover of *all* of HTA's toll revenues.

B. Peaje Would Be Unlikely to Prevail on Its Motion for Stay Relief Even If the Petition Were Granted.

For similar reasons, Peaje would be unlikely to prevail on its motion for stay relief even if the petition were granted. PROMESA imposes an automatic stay of litigation against the debtor upon the filing of a Title III petition. *See* 11 U.S.C. § 362(a) (incorporated into Title III by 48 U.S.C. § 2161(a)). An aggrieved party can move for relief from the automatic stay "for cause." *Id.* § 362(d). The most common type of "cause" is a "lack of adequate protection of an interest in property." *Id.*

Below, Peaje moved for relief from the automatic stay or adequate protection, arguing it has a statutory lien on HTA's toll revenues that is not being adequately protected. As with the preliminary-injunction motion, the district court denied the lift-stay motion on two independent grounds: (1) Peaje did not possess a statutory lien and therefore had no property interest entitled to protection (Pet. App. 39a); and (2) even if Peaje did have a statutory lien on HTA's toll revenues, that lien was adequately protected (Pet. App. 40). With respect to adequate protection, the district court observed HTA was using its toll revenues to maintain Puerto Rico's roads and thus ensure the collection of toll revenues in the future, which is a form of adequate protection. *Id.* As the court explained, "[t]he Commonwealth's and HTA's efforts to maintain those roads preserves the

future availability of the revenue stream that [Peaje] argues secures the 1968 bonds." *Id.*

The First Circuit vacated the district court's adequate protection finding solely so that if Peaje were to move again for stay relief on remand, the district court would reconsider adequate protection in light of any new factual developments since its original September 2017 ruling. Pet. App. 23a. However, there have not been any factual developments that could cause the district court to change its original ruling. HTA continues to use its toll revenues to maintain the Commonwealth's roads, which the district court has previously determined provides Peaje with adequate protection. Thus, even if this Court were to hold that Petitioner has a statutory lien, it is extremely unlikely that Petitioner would be entitled to the relief it has sought.

C. The Decision Is Interlocutory.

This case is also not a good vehicle because Peaje has not exhausted its arguments for relief. The First Circuit's decision was rendered on interlocutory review of a non-final order denying a preliminary injunction and stay relief. In affirming the district court's denial of both motions, the First Circuit recognized Peaje could "on remand renew its requests for relief" by arguing that it possesses a security interest rather than a statutory lien. Pet. App. 23a. The First Circuit held that Peaje had waived any argument based on a security interest only "for purposes of the motion now on review" but held that Peaje could "take a renewed shot at obtaining relief" by asserting a security interest on remand. Pet. App.

15a. Accordingly, the decision below is not the final word on whether Peaje is entitled to a preliminary injunction or stay relief. To conserve its resources, the Court is better served waiting until Peaje's preliminary-injunction and stay-relief motions are finally resolved before considering whether to take up this case.

In all events, Peaje will have another opportunity to seek this Court's review after the district court issues a final judgment. Peaje would thus not be prejudiced if this petition were denied.

V. THE DECISION BELOW IS CORRECT.

Finally, review is not warranted because the decision below is clearly correct. By definition, a statutory lien must arise "solely by force of a statute on specified circumstances or conditions." 11 U.S.C. § 101(53). The First Circuit correctly read that provision to mean that a statutory lien must be created automatically by a statute upon the occurrence of a triggering event specified in a statute. Pet. App. 19a.

The First Circuit examined the only statute identified by Peaje—the Enabling Act—and correctly determined it contains no mandatory "shall" language creating a statutory lien or specifying a triggering event that would automatically give rise to a statutory lien. Pet. App. 20a. By its terms, the Enabling Act merely "empower[s]"—i.e., permits—HTA to issue bonds and to secure the bonds with its revenues if it so chooses. 9 L.P.R.A. § 2004(l). The Act further states that HTA "may" sell bonds, *id.* § 2012(a); those

bonds "may be authorized" by HTA resolution, *id.* § 2012(b); and any resolution "may contain provisions" pledging revenues, *id.* § 2012(e), which provisions shall be included in the bondholders' contract. That language does not require HTA to issue bonds or grant a lien on its revenues when it does issue bonds. As the First Circuit aptly held, "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." Pet. App. 20a. Accordingly, "it does not create a statutory lien." *Id.* Nothing prevents HTA from issuing unsecured bonds.

Peaje attacks the merits of the decision below by employing the same failed arguments it makes elsewhere in its petition. For example, Peaje contends the First Circuit wrongly held a debtor agency regulation can never be a triggering event under 11 U.S.C. § 101(53). Pet'n 34. That is not what the First Circuit held; it merely held based on the text of the Enabling Act that the Act did not specify that an agency resolution like the 1968 Resolution was a circumstance that would automatically give rise to a lien by force of statute.

Peaje also argues the decision below incorrectly held that the 1968 Resolution did not create a statutory lien because "such regulation itself is not a statute." Pet'n 34. Peaje again mischaracterizes the decision below. The First Circuit held that the 1968 Resolution is a resolution akin to a corporate resolution—not a regulation that might have the force of law—and Peaje does not expressly challenge that conclusion. Pet. App. 21a–22a. The First Circuit thus had no occasion to consider whether an agency

regulation with the force of law could ever give rise to a statutory lien.

The fundamental flaw in Peaje's merits argument is its refusal to acknowledge the Enabling Act expressly 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" as to the pledging of any funds. 9 L.P.R.A. § 2012(e) (emphasis added). Thus, when Peaje contends that its "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," Pet'n 29, Peaje is simply ignoring the plain language of the Enabling Act, which authorizes HTA to place security provisions inside a consensual contract with the bondholders if it chooses to do so. Thus, at most, any lien created is a security interest under Bankruptcy Code § 101(51)—not a statutory lien under 11 U.S.C. § 101(53).

CONCLUSION

The petition for a writ of certiorari should be denied.

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Respectfully submitted,

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