APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

Nos. 18-1165, 18-1166

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,

ASSURED GUARANTY CORPORATION; ASSURED GUARANTY MUNICIPAL CORPORATION; FINANCIAL GUARANTY INSURANCE COMPANY; NATIONAL PUBLIC FINANCE GUARANTEE CORPORATION,

Plaintiffs, Appellants,

v.

THE FINANCIAL OVERSIGHT AND MANAGEMENT BOARD FOR PUERTO RICO, AS REPRESENTATIVE FOR THE COMMONWEALTH OF PUERTO RICO; FINANCIAL OVERSIGHT AND MANAGEMENT BOARD FOR PUERTO RICO; PUERTO RICO FISCAL AGENCY AND FINANCIAL ADVISORY AURTHORITY; THE FINANCIAL OVERSIGHT AND MANAGEMENT BOARD FOR PUERTO RICO, AS REPRESENTATIVE FOR THE PUERTO RICO HIGHWAYS & TRANSPORTATION AUTHORITY; RICARDO ROSSELLÓ-NEVARES; GERARDO JOSÉ PORTELA-FRANCO; CARLOS

CONTRERAS-APONTE; JOSÉ IVÁN MARRERO-ROSADO; RAÚL MALDONADO-GAUTIER; NATALIE A. JARESKO,

Defendants, Appellees,

JOSÉ B. CARRIÓN III; ANDREW G. BRIGGS; CARLOS M. GARCÍA; ARTHUR J. GONZÁLEZ; JOSÉ R. GONZÁLEZ; ANA J. MATOSANTOS; DAVID A. SKEEL, JR.; CHRISTIAN SOBRINO,

Defendants.

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

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

Before

Howard, Chief Judge,
Torruella, and Thompson, Circuit Judges.

Mark C. Ellenberg, with whom Howard R. Hawkins, Jr., Lary Stromfeld, Ellen V. Holloman, Gillian Groarke Burns, Thomas J. Curtin, Casey Servais, Cadwalader, Wickersham & Taft LLP, Heriberto Burgos-Pérez, Ricardo F. Casellas-Sánchez, Diana Pérez-Seda, and Casellas Alcover & Burgos were on brief, for appellants Assured Guaranty Corp. and Assured Guaranty Municipal Corp.

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

Eric Pérez-Ochoa, Alexandra Casellas-Cabrera, Lourdes Arroyo-Portela, Adsuar Muñiz Goyco Seda & Pérez-Ochoa, P.S.C., Jonathan Polkes, Marcia Goldstein, Gregory Silbert, Kelly DiBlasi, Gabriel A. Morgan, and Weil, Gotshal & Manges LLP on brief, for appellant National Public Finance Guarantee Corporation.

María E. Picó, Rexach & Picó, CSP, Martin A. Sosland, Jason W. Callen, and Butler Snow LLP on brief, for appellant Financial Guaranty Insurance Company.

Mark D. Harris, with whom Timothy W. Mungovan, Martin J. Bienenstock, Stephen J. Ratner, Jeffrey W. Levitan, Michael A. Firestein, Lary Alan Rappaport, Proskauer Rose LLP, Hermann D. Bauer, and O'Neill & Borges LLC were on brief, for appellees The Financial Oversight and Management Board for Puerto Rico, for itself and as representative for the Commonwealth of Puerto Rico and the Puerto Rico Highways and Transportation Authority, and Natalie A. Jaresko.

Luis Marini, Marini Pietrantoni Muñiz, LLC, John J. Rapisardi, Peter Friedman, Elizabeth L. McKeen, and O'Melveny & Myers LLP on brief, for appellees the Puerto Rico Fiscal Agency and Financial Advisory Authority and Gerardo Portela-Franco.

Luc A. Despins, with whom William K. Whitner, James B. Worthington, James T. Grogan III, Paul Hastings LLP, Juan J. Casillas-Ayala, Diana M. Battle-Barasorda, Alberto J.E. Añeses-Negrón, Ericka C. Montull-Novoa, and Casillas, Santiago &

Torres LLC were on brief, for Official Committee of Unsecured Creditors.

Laura E. Appleby, with whom Steven Wilamowsky, Aaron Krieger, Chapman and Cutler LLP and Kevin Carroll, as amicus curiae for The Securities Industry and Financial Markets Association.

Vincent J. Marriott III, with whom Chantelle D. McClamb, and Ballard Spahr LLP, as amicus curiae for The National Federation of Municipal Analysts.

March 26, 2019

TORRUELLA, Circuit Judge. Appellants, financial guarantee insurers that had insured bonds from the Puerto Rico Highway and Transportation Authority ("PRHTA") (hereinafter the "Insurers"), appeal from the dismissal of their Amended Complaint in an adversary proceeding arising within the debt adjustment proceeding that the Financial Oversight and Management Board (the "Board") commenced on behalf of the PRHTA under Title III of the Puerto Rico Oversight, Management, and Economic Stability Act ("PROMESA"), see 48 U.S.C. §§ 2161-2177. Because the district court did not err when it dismissed the Insurers' Amended Complaint pursuant to Fed. R. Civ. P. 12(b)(6) on the grounds that neither Section 922(d) nor Section 928(a) of the United States Bankruptcy Code entitle the Insurers to the relief they sought, we affirm.

I. Background

1. PROMESA

This is one of a sequence of appeals related to PROMESA, a statute enacted by Congress "in June 2016 to address an ongoing financial crisis in the Commonwealth of Puerto Rico." In re Fin. Oversight & Mgmt. Bd. for Puerto Rico, 872 F.3d 57, 59 (1st Cir. 2017) (citation omitted). To "help Puerto Rico achieve fiscal responsibility and access to the capital markets," the statute created the Board, which has "the ability to commence quasi-bankruptcy proceedings to restructure the Commonwealth's debt under a part of the statute often referred to as 'Title III.'" Id. PROMESA is largely modeled on municipal debt reorganization principles set forth in Chapter 9 of the Bankruptcy Code.

2. The PRHTA Bonds

In 1965, the Commonwealth of Puerto Rico ("the Commonwealth") created the PRHTA, a public corporation, to "oversee and manage the development of roads and various means of transportation" in the Commonwealth by passing Act No. 74-1965, known as the "Enabling Act." Assured Guar. Corp. v. Commonwealth of Puerto Rico (In re Fin. Oversight & Mgmt. Bd. of P.R.), 582 B.R. 579, 585-86 (D.P.R. 2018); see generally P.R. Laws Ann. tit. 9, § 2002. Pursuant to its Enabling Act, the PRHTA can secure capital by issuing municipal bonds. The PRHTA has issued several series of bonds (the "PRHTA Bonds") under Resolution No. 68-18 and Resolution No. 98-06 (collectively the "Resolutions"). The Insurers allege that pursuant to the Enabling Act and the Resolutions, the PRTHA Bonds are secured by a gross lien on (i) the revenues derived from the tolls on four highways within the Commonwealth (the "Pledged Toll Revenues"); (ii) gasoline, diesel, crude oil, and other special excise taxes levied by the Commonwealth (the "PRHTA Pledged Tax Revenues"); and (iii) special excise taxes consisting of motor vehicle license fees collected by the Commonwealth (together with the PRHTA Pledged Tax Revenues, the "PRHTA Pledged Special Excise Taxes"). According to the Insurers, the Puerto Rico Secretary of Treasury is required by statute to transfer the PRHTA Pledged Special Excise Taxes to PRHTA each month for the benefit of PRHTA bondholders. They further allege that the Pledged Toll Revenues and the PRHTA Pledged Special Excise Taxes (collectively, the "PRHTA Pledged Special Revenues") are the Insurers' property, which the PRHTA must transfer to the fiscal agent for the PRHTA Bonds on a monthly basis to replenish tripartite [1] funds (the "Reserve Accounts") held in trust by The Bank of New York Mellon ("BNYM").

3. The Debt Adjustment Proceeding

In March 2017, after the enactment of PROMESA and appointment of the Board,[2] the Board certified a financial plan by which the PRHTA Pledged Special

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[1] Each fund established by the Resolutions consists of a bond service fund, a bond redemption fund, and a reserve fund.

[2] For our decision regarding the constitutionality of the Board members' appointment, see Aurelius Inv., LLC v. Commonwealth of P.R., 915 F.3d. 838 (1st Cir. 2019).

Revenues formerly being deposited in the Reserve Accounts would instead be diverted and subsumed into the general revenues of Puerto Rico. On May 3 and 21, 2017, the Board commenced debt adjustment proceedings on behalf of the Commonwealth and the PRHTA, respectively, pursuant to Title III of PROMESA.

BNYM continued to make payments to the PRHTA bondholders through June 20, 2017, when the Puerto Rico Fiscal Agency and Financial Advisory Authority ("AAFAF" for its Spanish acronym), on behalf of PRHTA, instructed BNYM to cease making scheduled payments from the Reserve Accounts. The reasoning behind the instruction was that making such payments would constitute an act "to exercise control" over PRHTA's property in violation of the automatic stay that arose under 11 U.S.C. § 362(a), as incorporated by Section 301 of PROMESA, following the filing of the Title III petition on the PRHTA's behalf. Thereafter, on July 3, 2017, the PRHTA defaulted on a scheduled bond payment of $219 million. BNYM is abstaining from distributing funds from the Reserve Accounts until this matter is resolved.[3]

In June 2017, the Insurers initiated adversary proceedings against the Commonwealth, the PRHTA, the Board, the AAFAF, the Governor of the Commonwealth, and other individual defendants in

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[3] As of July 3, 2017, the Reserve Accounts contained cash and investments valued at approximately $76 million.

their official capacity (collectively the "Debtors").[4] In their Amended Complaint, which included four claims for relief, the Insurers essentially alleged that failure to continue to remit the PRHTA Pledged Special Revenues into the Reserve Accounts and pay them as payments come due violates Chapter 9 of the Bankruptcy Code. Specifically, the Insurers' first claim sought declarations that the PRHTA Bonds were secured by special revenues, that the application of such revenues to payments on the bonds is exempted from the automatic stay imposed by Title III of PROMESA, and that failure to continue to remit the PRHTA Pledged Special Revenues during the pendency of the Title III proceedings is in violation of Sections 922(d) and 928 of Chapter 9 of the Bankruptcy Code (which Section 301 of PROMESA makes applicable to Title III proceedings). The second claim sought declarations that the funds held in the Reserve Accounts are: (a) property of the PRHTA bondholders, (b) held in trust for the benefit of the bondholders, and (c) subject to a lien in their favor. They further sought a declaration that the PRHTA lacked enough property interest to prevent the disbursement of the funds currently held in the Reserve Accounts unless or until the PRHTA Bonds are fully retired or defeased. The third claim sought injunctive relief against further alleged violations of Sections 922(d) and 928 of the Bankruptcy Code. Finally, the fourth claim sought injunctive relief requiring the PRHTA to resume remittance of the special revenues securing the

[4] The Insurers are subrogated to the rights of the PRHTA bondholders whose claims they have paid.

PRHTA Bonds in accordance with Sections 922(d) and 928 of the Bankruptcy Code.

The Debtors moved to dismiss the Amended Complaint under Fed. R. Civ. P. 12(b)(1) and 12(b)(6), for lack of subject matter jurisdiction and failure to state a claim upon which relief could be granted. They essentially argued that the Amended Complaint failed to state a claim for relief because neither Section 922(d) nor Section 928 of the Bankruptcy Code requires PRHTA to remit payment of special revenues to bondholders during the pendency of the Title III proceedings nor do those statutes create a cause of action for bondholders to compel payment. Further, they claimed the PRHTA bondholders did not have a property interest in the funds in the Reserve Accounts.

After holding a hearing, the district court granted the motion to dismiss. Assured, 582 B.R. at 585. It held that neither provision of Chapter 9 requires or empowers the court to order continued remittance of PRHTA Pledged Special Revenues to the Reserve Accounts or payment of PRHTA Pledged Special Revenues to the PRHTA bondholders during the pendency of Title III proceedings. Specifically, the court found that "Section 928 does not mandate the turnover of special revenues." Id. at 593. Rather, "Section 928(a) merely exempts consensual prepetition liens on special revenues acquired by the debtor post-petition from Section 552(a) of the Bankruptcy Code, which could otherwise invalidate such liens with respect to revenues acquired post-petition." Id. Regarding Section 922(d), the court held that although it "excepts the 'application' of special revenues from the automatic stay," it does not "except actions to enforce special revenue liens," id. at 596, or otherwise impose a payment obligation, id. at 594. Therefore, the court concluded, the Insurers had failed to adequately state a claim upon which relief can be granted. Id. at 591-96. The court also held that the Insurers failed to plausibly plead that the bondholders had a property interest in the funds of the Reserve Accounts.[5] Id. at 597-98.

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[5] The district court found the second claim for relief to be premised on the following three different theories of bondholder interests in the Reserve Accounts: that (1) the PRHTA bondholders were outright owners of the funds in the Reserve Accounts and thus neither the automatic stay nor Section 305 of PROMESA barred them from collecting the funds; (2) the funds in the Reserve Accounts are held in trust for the benefit of the PRHTA bondholders "under terms that exclude cognizable property interests of PRHTA in those funds"; and (3) the funds in the Reserve Accounts are held in trust by BNYM for the benefit of the PRHTA bondholders. Assured, 582 B.R. at 591. The court concluded that, to the extent the Insurers' claim was premised on the third theory, the court lacked subject matter jurisdiction. It reasoned that a determination of the lien interest, by itself, would not resolve "the question of whether, when and from what, if any, funds the PRHTA bondholders are entitled to be paid." Id. Accordingly, the issue was not ripe, and the court lacked subject matter jurisdiction. The court then addressed the merits of the remaining two theories. Regarding the ownership-based theory, the court concluded that the Resolutions and statutory provisions on which the Insurers relied do not suggest that PRHTA bondholders were granted an outright ownership interest in the Reserve Accounts or the funds therein Id. at 597-98. As to the trust-based theory, the court noted that "[w]hile multiple interpretations could plausibly be supported" by the language of the Resolutions and the allegations of the Amended Complaint, each interpretation contemplates a contingent revisionary beneficial interest in the trust corpus, and perhaps even title, by PRHTA. Id. at 598. The court concluded that, given the revisionary interest on the

The Insurers appeal from the district court's dismissal of the first, third, and fourth claims of their Amended Complaint.

II. Discussion[6]

We review de novo the district court's grant of a motion to dismiss. In so doing, we treat all well-pleaded facts in the complaint as true and draw all reasonable inferences in favor of the plaintiff. Ocasio-Hernández v. Fortuño-Burset, 640 F.3d 1, 7 (1st Cir. 2011). A complaint will survive dismissal under Rule 12(b)(6) if it contains "enough facts to state a claim to relief that is plausible on its face." Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570 (2007).

Whether the Amended Complaint properly pleads a claim for relief as to the Insurers' first, third, and fourth claims hinges on the statutory construction of Sections 928(a) and 922(d) of the Bankruptcy Code. We thus turn to those statutes and provide some statutory context necessary to understand the parties' arguments.

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part of PRHTA, Section 305 of PROMESA prevented the court from interfering with the Reserve Accounts. Id. at 598-99. Hence, the court dismissed the second claim for failure to state a claim upon which relief can be granted. Id. at 599.

We need not address the district court's dismissal of the Insurers' second claim for relief because the Insurers have failed to develop on appeal any argument on the PRHTA bondholders' property interest in the Reserve Account funds. See United States v. Zannino, 895 F.2d 1, 17 (1st Cir. 1990).

[6] Because the district court correctly decided the issues, and persuasively explained its reasoning in a detailed opinion, we see no reason to write at length. See Moses v. Mele, 711 F.3d 213, 216 (1st Cir. 2013).

Section 552(a) of the Bankruptcy Code establishes generally that "property acquired by the . . . debtor after the commencement of the 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). Section 928, however, exempts consensual prepetition liens on special revenues from application of Section 552(a) in Chapter 9 cases. Specifically, Section 928 states:

> (a) Notwithstanding section 552(a) of this title and subject to subsection (b) of this section, 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.
>
> (b) Any such lien on special revenues, other than municipal betterment assessments, derived from a project or system shall be subject to the necessary operating expenses of such project or system, as the case may be.

11 U.S.C. § 928.

The Insurers argue that Section 928(a) not only overrides Section 522(a) and thus preserves prepetition liens, but also requires continued payments of special revenue bonds, such as the PRHTA Bonds, during the pendency of the Title III proceeding to avoid debtor misuse of the property subject to the lien.

It is elementary that in resolving a dispute over the meaning of a statute we begin with the language of the statute itself. Landreth Timber Co. v. Landreth, 471 U.S. 681, 685 (1985). We first "determine whether the language at issue has a plain and unambiguous meaning with regard to the particular dispute in the case." Robinson v. Shell Oil Co., 519 U.S. 337, 340 (1997). "The plainness or ambiguity of statutory language is determined by reference to the language itself, the specific context in which that language is used, and the broader context of the statute as a whole." Id. at 341 (citing Estate of Cowart v. Nicklos Drilling Co., 505 U.S. 469, 477 (1992); McCarthy v. Bronson, 500 U.S. 136, 139 (1991)). If "the statute's language is plain, 'the sole function of the courts is to enforce it according to its terms.'" United States v. Ron Pair Enters., Inc., 489 U.S. 235, 241 (1989) (quoting Caminetti v. United States, 242 U.S. 470, 485 (1917)). If, however, the language is not plain and unambiguous, we then turn to other tools of statutory construction, such as legislative history. See Arnold v. United Parcel Serv., Inc., 136 F.3d 854, 858 (1st Cir. 1998).

We find Section 928(a)'s plain language unambiguous. Section 928(a) simply provides that consensual prepetition liens on special revenues will remain in place after the filing of the petition, despite the fact that Section 552(a) generally protects property acquired after the petition from being subject to prepetition liens.[7] That is, without Section 928(a), pursuant to Section 552(a),

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[7] For its part, Section 928(b) allows debtors to offset "necessary operating expenses" of a "project or system" from "[a]ny such lien on special revenues" "derived from [that] project or system." 11 U.S.C. § 928(b).

consensual prepetition liens would be invalidated with respect to special revenues acquired by the debtor post-petition. As the district court found, Section 928, however, is silent about enforcement of liens or "payment of the secured obligation," and does not order any action on the part of the debtor. Assured, 582 B.R. at 593. We thus agree with the district court that Section 928 does not mandate the turnover of special revenues or require continuity of payments of the PRHTA Bonds during the pendency of the Title III proceeding. Id.

The Insurers contest the district court's conclusion that this reading of Section 928 is supported by the legislative history of the 1988 Municipal Bankruptcy Amendments ("1988 Amendments"), Pub. L. No. 100-597 (1988). See Assured, 582 B.R. at 593 (quoting a Senate Report "stating that Section 928 'is intended to negate Section 552(a),' which 'could terminate the security for municipal revenue bonds, but 'to go no further'" (quoting S. Rep. No. 100-506, at 12-13, 22-23 (1988))). Because the language of the statute is unambiguous, however, we find it unnecessary to turn to the legislative history. See Connecticut Nat'l Bank v. Germain, 503 U.S. 249, 254 (1992) ("When the words of a statute are unambiguous, then, th[e] first canon [of statutory construction] is also the last: 'judicial inquiry is complete.'" (quoting Rubin v. United States, 449 U.S. 424, 430 (1981))).

The Insurers next argue that Section 922(d) of the Bankruptcy Code requires Debtors to continue to turn over the revenues allegedly securing the PRHTA Bonds and exempts bondholder enforcement actions from the automatic stays of Sections 362 and 922(a) of the Bankruptcy Code.

Pursuant to Section 362, an automatic stay goes into effect upon the filing of a bankruptcy petition. See 11 U.S.C. §§ 362, 901(a). "The automatic stay is one of the fundamental protections that the Bankruptcy Court affords to debtors." Jamo v. Katahdin Fed. Credit Union (In re Jamo), 283 F.3d 392, 398 (1st Cir. 2002). It is intended to "effectively stop all creditor collection efforts, stop all harassment of a debtor seeking relief, and to maintain the status quo between the debtor and [its] creditors, thereby affording the parties and the [c]ourt an opportunity to appropriately resolve competing economic interests in an orderly and effective way." In re Witkowski, 523 B.R. 291, 296 (1st Cir. B.A.P. 2014) (alteration in original) (quoting Zeoli v. RIHT Mortg. Corp., 148 B.R. 698, 700 (D.N.H. 1993)). The automatic stay is "extremely broad in scope" and "appl[ies] to almost any type of formal or informal action against the debtor or the property of the estate," In re Slabicki, 466 B.R. 572, 580 (1st Cir. B.A.P. 2012) (quoting Patton v. Bearden, 8 F.3d 343, 349 (6th Cir. 1993)), including "any act to . . . enforce any lien against property of the estate," 11 U.S.C. § 362(a)(4).[8]

Section 922(a) expands the scope of the Section 362 automatic stay in Chapter 9 cases to "action[s] or proceeding[s] against an officer or inhabitant of the debtor that seeks to enforce a claim against the debtor," and to "enforcement of a lien on or arising

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[8] Section 362(b) establishes certain exceptions to Section 362(a)'s automatic stay, none applicable here. 11 U.S.C. § 362(b).

out of taxes or assessments owed to the debtor."[9] 11 U.S.C. § 922(a).

Section 922 further provides that notwithstanding the automatic stays under Sections 362 and 922(a), "a petition filed under [Chapter 9] does not operate as a stay of application of pledged special revenues in a manner consistent with [S]ection [928][[10]] of [Chapter 9] to payment of indebtedness secured by such revenues." 11 U.S.C. § 922(d). That is, pursuant to Section 922(d), the automatic stays of Sections 362 and 922(a) do not stay the "application" of "pledged special revenues" to payment of debt secured by such revenues.

The Insurers take issue with the district court's conclusion that although Section 922(d) "excepts the 'application' of special revenues from the automatic stay" -- and thus allows for voluntary payment by the debtor, "including the application of the debtor's

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[9] The statute reads as follows:

> A petition filed under this chapter operates as a stay, in addition to the stay provided by section 362 of this title, applicable to all entities, of--
>
> > (1) the commencement or continuation, including the issuance or employment of process, of a judicial, administrative, or other action or proceeding against an officer or inhabitant of the debtor that seeks to enforce a claim against the debtor; and
> >
> > (2) the enforcement of a lien on or arising out of taxes or assessments owed to the debtor.

11 U.S.C. § 922(a).

[10] The statute states "section 927," which the parties and the district court agree appears to be a scrivener's error.

funds held by a secured lender to secure indebtedness" -- it does not except bondholder actions seeking to enforce special revenue liens, Assured, 582 B.R. at 595-96, or otherwise impose a payment obligation, id. at 594. They allege that the district court's reading of Section 922(d) renders it "superfluous" because nothing prevents voluntary action of the debtor even in the absence of Section 922(d). Thus, their argument goes, Section 922(d)'s purpose is to exempt bondholder enforcement actions from the stay when their lien is secured by pledged special revenues. According to the Insurers, Section 922(d) operates as an absolute, categorical exception to the automatic stay imposed by Sections 362 and 922(a) of the Bankruptcy Code, compelling the PRHTA to continue to remit the proceeds of the Special Revenues into the Reserve Accounts (after covering its operating expenses) and allowing actions by bondholders to enforce their rights to those revenues.

Again, we turn first to the statute's language to determine its meaning. Landreth, 471 U.S. at 685 Section 922(d)'s plain language establishes that the application of pledged special revenues is not a violation of the automatic stay. It thus permits a debtor to pay creditors voluntarily during the pendency of the bankruptcy case and allows a secured claimholder to apply special revenues in its possession to pre-petition debt without violating the automatic stays of Sections 362 and 922(a). Nothing in the statute's plain language, however, addresses actions to enforce liens on special revenues, which are specifically stayed by Section 362(a)(4) of the Bankruptcy Code, or allows for the compelling of debtors, or third parties holding special revenues, to apply special revenues to outstanding obligations. When Congress wants to command performance, turnover, or payment, it knows how to do so expressly. See, e.g., 11 U.S.C. § 365(d)(5) (providing that a "trustee shall timely perform all of the" debtor's obligations); § 542(a) (instructing that "an entity" in possession of estate property "shall deliver" it to the trustee); § 542(b) (directing that "an entity . . . shall pay such debt to . . . "). By contrast, Section 922(d), as the district court found, "simply carves out one type of action (application of special revenues) from the automatic stay, without addressing any other constraints that may apply to that action, without any grant of relief from other aspects of the automatic stay, [ ] without imposing any requirement that the action be taken," and without offering any language of the consequences of failing to apply pledged special revenues to continued bond payments. Assured, 582 B.R. at 594; see also 6 Collier on Bankruptcy ¶ 922.05 (16th ed. 2018) (stating that "[S]ection 922(d) is limited to an exception from the automatic stay [and] does not suggest that its language compels payment of special revenues in the possession of the municipality").

Our construction of Section 922(d) complies with the tenet that in construing statutory provisions we must be mindful of "the broader context of the statute as a whole" and avoid creating a conflict between various sections. Robinson, 519 U.S. at 341; see also La. Pub. Serv. Comm'n v. FCC, 476 U.S. 355, 370 (1986). Although Section 922(d) provides an exception from the automatic stays of Sections 362 and 922(a), it does not carve out Section 904 of the

Bankruptcy Code. Therefore, Section 904, and its analog at Section 305 of PROMESA -- which prohibits judicial interference with the debtor's property or revenues[11] -- remains in full force in determining the effect of Section 922(d). Our construction that Section 922(d) permits rather than mandates payment during the course of the bankruptcy proceedings gives effect to that section without running afoul of Section 305 of PROMESA. See 6 Collier on Bankruptcy ¶ 922.05 (16th ed. 2018) (noting that a broader reading of Section 922(d), such as the one the Insurers advance, "could run afoul of [S]ection 904, which prohibits the court from interfering with any of the property or revenues of the debtor") (internal quotation marks and citation omitted).[12]

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[11] Specifically, Section 904 of the Bankruptcy Code establishes:

> Notwithstanding any power of the court, unless the debtor consents or the plan so provides, the court may not, by any stay, order, or decree, in the case or otherwise, interfere with: (1) any of the political or governmental powers of the debtor; (2) any of the property or revenues of the debtor; or (3) the debtor's use or enjoyment of any income-producing property.

11 U.S.C. § 904. Section 305 of PROMESA mirrors this language. See 48 U.S.C. § 2165.

[12] The Insurers argue that Section 305 poses no impediment to their more liberal construction of Section 922(d). Citing In re City of Stockton, 478 B.R. 8, 22 (Bankr. E.D. Cal. 2012) and In re County of Orange, 179 B.R. 185, 190 (Bankr. C.D. Cal. 1995), the Insurers argue that Section 305 of PROMESA does not foreclose the relief they seek under Section 922(d) of the Bankruptcy Code because, according to them, the latter is more specific than the former and a "specific statute controls over a

Furthermore, contrary to the Insurers' contention, our construction does not render Section 922(d) superfluous. Before Congress adopted the 1988 Amendments it was unclear whether Section 362(a) stayed a creditor from accepting voluntary payments from a debtor. See, e.g., In re Hellums, 772 F.2d 379, 380-81 (7th Cir. 1985) (per curiam) (noting that a

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general without regard to priority of enactment." Their argument is premised on faulty grounds.

First, if Section 922(d) clearly mandated what the Insurers contend, their argument would be stronger, and we would need to examine whether one section of PROMESA controls over another. But, when the plain language of a section is clear, we will not assign it an alternate interpretation that clashes with other clearly written sections. As Congress knows how to command performance when it wants to, so too does it know how to create exceptions to general rules when that is its intent. And, while Section 922(d) provides an exception from the automatic stays of Sections 362 and 922(a), it does not similarly provide an exception from Section 904 of the Bankruptcy Code.

Second, the cases cited by the Insurers are clearly inapposite. Section 305, like Section 904, prohibits judicial interference with the property and revenues of the debtor "unless the Oversight Board consents or the plan so provides." 48 U.S.C. § 2165. The cases cited by the Insurers considered the debtors' voluntary filing of the bankruptcy petitions as their consent for the exercise of the court's powers over the debtors. Thus, in the cases that the Insurers cite, Section 904 posed no impediment to the courts' exercise of its power over the debtor. Yet, we recently rejected this approach in Fin. Oversight & Mgmt. Bd. for P.R. v. Ad Hoc Grp. of PREPA Bondholders (In re Fin. Oversight & Mgmt. Bd. for P.R.), where we held that the Board's filing of the Title III petition could not be construed as consent to interfere with the debtor's property or revenues because such construction "would render Section 305 a nullity." 899 F.3d 13, 19 (1st Cir. 2018).

creditor's "continued acceptance of the payments under the circumstances was a violation of the stay regardless of the voluntary or involuntary nature of the payments") (internal quotations omitted). Thus, Section 922(d) served to clarify that a creditor's acceptance of a debtor's voluntary payments are excepted from the automatic stay.

The Insurers also point us to In re Jefferson Cty., 474 B.R. 228 (Bankr. N.D. Ala. 2012), to support their contention that Section 922(d) mandates the turnover of special revenues. We, however, find Jefferson County inapposite. In Jefferson County -- where the county did not contest that the creditors held a lien on the special revenues or whether it should turn over special revenues if said revenues were determined covered by the scope of the lien -- the issue was what revenues were covered by the lien, rather than whether Sections 922(d) and 928 require remittance of special revenues during the automatic stay. Because the court in Jefferson County did not address whether the debtor's payments were voluntary or mandatory, that case does not support the Insurers' argument that Section 922(d) mandates the turnover of special revenues.

The Insurers also challenge the district court's conclusion that its reading of Section 922(d) is consistent with the legislative history of the 1988 Amendments. See Assured, 582 B.R. at 594-95 (noting that Congress recognized that a municipality might want to continue to pay bondholders through the course of Chapter 9 bankruptcy proceedings in order to "retain access to credit markets" and -- mindful that the automatic stay "broadly prohibits all collection efforts against a debtor including the application of the debtor's funds held by a secured lender to secure indebtedness" -- "sought to permit such third-party applications . . . to proceed without having to seek relief from the automatic stay." (citing S. Rep. No. 100-506, at 6-7, 11, 21 (1988))) (internal quotation marks omitted). But again, because we find the statute's language unambiguous, there is no need to rely on legislative history. See Connecticut Nat'l Bank, 503 U.S. at 254.

We thus agree with the district court that Section 922(d) only makes clear that the automatic stay is not an impediment to continued payment, whether by the debtor or by another party in possession of pledged special revenues, of indebtedness secured by such revenues. See Assured, 582 B.R. at 594-95.

The Insurers and their amici make several arguments rooted in social policy and consideration of fairness urging the court to adopt their proposed broader construction of Sections 928(a) and 922(d), and advance their theory about the possible effect upholding the district court's interpretation might have on the municipal bonds market. Our duty, however, is to interpret the law, not to re-write it. See Obergefell v. Hodges, 135 S. Ct. 2584, 2611 (2015) (Roberts, J., dissenting) ("[J]udges have power to say what the law is, not what it should be.").

III. Conclusion

In sum, Sections 928(a) and 922(d) permit, but do not require, continued payment during the pendency of the bankruptcy proceedings. The two provisions stand for the premise that any consensual prepetition lien secured by special revenues will survive the period of municipal bankruptcy, and, accordingly, municipalities can elect to voluntary continue payment on these debts during the course of the bankruptcy proceedings so as to not fall behind and thus be at risk of being unable to secure financing in the future. Because neither provision requires Debtors to continue to remit the PRHTA Pledged Special Revenues into the Reserve Accounts or continue payments to bondholders during the pendency of the Title III proceedings, the district court properly dismissed the first, third, and fourth claims of the Amended Complaint.

Affirmed.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

Nos. 18-1165, 18-1166

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.

ASSURED GUARANTY CORPORATION; ASSURED GUARANTY MUNICIPAL CORPORATION; FINANCIAL GUARANTY INSURANCE COMPANY; NATIONAL PUBLIC FINANCE GUARANTEE CORPORATION,

Plaintiffs, Appellants,

v.

THE FINANCIAL OVERSIGHT AND MANAGEMENT BOARD FOR PUERTO RICO, AS REPRESENTATIVE FOR THE COMMONWEALTH OF PUERTO RICO; FINANCIAL OVERSIGHT AND MANAGEMENT BOARD FOR PUERTO RICO; PUERTO RICO FISCAL AGENCY AND FINANCIAL ADVISORY AURTHORITY; THE FINANCIAL OVERSIGHT AND MANAGEMENT BOARD FOR PUERTO RICO, AS REPRESENTATIVE FOR THE PUERTO RICO HIGHWAYS & TRANSPORTATION AUTHORITY; RICARDO ROSSELLÓ-NEVARES; GERARDO JOSÉ PORTELA-FRANCO; CARLOS

CONTRERAS-APONTE; JOSÉ IVÁN MARRERO-ROSADO; RAÚL MALDONADO-GAUTIER; NATALIE A. JARESKO,

Defendants, Appellees,

JOSÉ B. CARRIÓN III; ANDREW G. BRIGGS; CARLOS M. GARCÍA; ARTHUR J. GONZÁLEZ; JOSÉ R. GONZÁLEZ; ANA J. MATOSANTOS; DAVID A. SKEEL, JR.; CHRISTIAN SOBRINO,

Defendants.

ERRATA SHEET

The opinion of this Court, issued on March 26, 2019, is amended as follows:

Replace the paragraph starting at page 21, line 1, and ending at page 22, line 7, with the following:

> Furthermore, contrary to the Insurers' contention, our construction does not render Section 922(d) superfluous. Before Congress adopted the 1988 Amendments there was ample reason to believe that Section 362(a) stayed a creditor from accepting voluntary payments from a debtor or stayed a creditor from applying debtor funds already in the creditor's possession (as security) to the debt. See, e.g., 6 Collier on Bankruptcy ¶ 362.03 ("[I]nnocent conduct such as the cashing of checks received from account debtors of accounts assigned as security may be a technical violation [of Section 362(a)(6)]."). Thus, Section 922(d) made clear that a creditor holding pledged special revenues as security may apply those revenues to

outstanding debt, notwithstanding the automatic stay.

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

In re:

THE FINANCIAL OVERSIGHT AND MANAGEMENT BOARD FOR PUERTO RICO,
as representative of
THE COMMONWEALTH OF PUERTO RICO, *et al.*,

Debtors.[1]

PROMESA
Title III

No. 17 BK 3283-LTS
(Jointly Administered)

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[1] The Debtors in these Title III Cases, along with each Debtor's respective Title III case number listed as a bankruptcy case number due to software limitations and the last four (4) digits of each Debtor's federal tax identification number, as applicable, are (i) the Commonwealth of Puerto Rico (the "Commonwealth") (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 ("PRHTA") (Bankruptcy Case No. 17 BK 3567-LTS) (Last Four Digits of Federal Tax ID: 3808); (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); and (v) Puerto Rico Electric Power Authority ("PREPA") (Bankruptcy Case No. 17 BK 04780-LTS) (Last Four Digits of Federal Tax ID: 3747).

ASSURED GUARANTY CORP.; ASSURED GUARANTY MUNICIPAL CORP.; FINANCIAL GUARANTY INSURANCE COMPANY; AND NATIONAL PUBLIC FINANCE GUARANTEE CORPORATION,

Plaintiffs,

v.

COMMONWEALTH OF PUERTO RICO; FINANCIAL OVERSIGHT AND MANAGEMENT BOARD FOR PUERTO RICO; PUERTO RICO FISCAL AGENCY AND FINANCIAL ADVISORY AUTHORITY; PUERTO RICO HIGHWAYS AND TRANSPORTATION AUTHORITY; HON. RICARDO ROSSELLÓ-NEVARES; GERARDO JOSÉ PORTELA-FRANCO; CARLOS CONTRERAS-APONTE; JOSÉ IVÁN MARRERO-ROSADO; HON. RAÚL MALDONADO-GAUTIER; AND NATALIE A. JARESKO,

Defendants.

Adv. Proc. No. 17-155-LTS in
17 BK 3283-LTS

Adv. Proc. No. 17-156-LTS in
17 BK 3567-LTS

OPINION AND ORDER GRANTING MOTION TO DISMISS PLAINTIFFS' COMPLAINT PURSUANT TO FED. R. CIV. P. 12 (B)(1) AND (B)(6)

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LAURA TAYLOR SWAIN,
United States District Judge

Before the Court is Defendants' *Motion to Dismiss Plaintiffs' Amended Complaint Pursuant to Fed. R. Civ. P. 12 (b)(1) and (b)(6)* filed in each of the above-captioned adversary proceedings (docket entry[2] no. 46 (the "Motion")). The Court heard argument on the Motion on November 21, 2017 (the "Hearing"), and has considered carefully all of the arguments and submissions made in connection with the Motion. For the reasons that follow, the Court finds that it has jurisdiction pursuant to 48 U.S.C. § 2166 of all but one element of Plaintiffs' Claims. The remainder of Plaintiffs' Claims are dismissed pursuant to Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim upon which relief may be granted.[3]

I.

BACKGROUND

The following recitation of facts is drawn from the amended complaint (Docket Entry No. 39, the "Amended Complaint"), except where otherwise noted.

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[2] Identical submissions were filed in each of the above-captioned adversary proceedings. All docket entries refer to case no. 17 AP 155, unless otherwise specified.

[3] Plaintiffs have requested that the Court take judicial notice of Exhibits 3-12 that were attached to the Declaration of Ellen M. Halstead, dated September 12, 2017 (Docket Entry No. 68-1) and Defendants have raised evidentiary objections to the requests. The Court need not address the objections and declines to take judicial notice of the documents, as they are immaterial to the decisions set forth in this Opinion.

Plaintiffs are financial guarantee insurers that have insured various bonds issued by certain public corporations of the Commonwealth of Puerto Rico (the "Commonwealth" or "Puerto Rico"). (Am. Compl. ¶¶ 31-32.) Specifically, Plaintiffs Assured Guaranty Corp. and Assured Guaranty Municipal Corp. (collectively, "Assured") and Financial Guaranty Insurance Company ("FGIC") insure bonds (collectively, the "Authority Bonds") issued by the Puerto Rico Highways and Transportation Authority ("PRHTA"), the Puerto Rico Convention Center District Authority ("PRCCDA"), and the Puerto Rico Infrastructure Financing Authority ("PRIFA", and together with PRHTA and PRCCDA, the "Authorities"). (Id. ¶ 32.) Plaintiff National Public Finance Guarantee Corporation ("National") also insures bonds issued by PRHTA. (Id.) Plaintiffs assert that the Authority Bonds are secured by statutory and contractual liens on specific pledged special revenue streams (collectively, the "Pledged Special Revenues"). (Id.)

PRHTA was created in 1965 pursuant to Act No. 74-1965 (the "Enabling Act") to, among other things, oversee and manage the development of roads and various means of transportation in Puerto Rico. (Id. ¶ 33; see generally 9 L.P.R.A. § 2002.) PRHTA issued several series of bonds (the "PRHTA Bonds") pursuant to Resolution No. 68-18 (docket entry no 39-7, the "1968 Resolution") and Resolution No. 98-06 (docket entry no. 39-8, the "1998 Resolution" and, together with the 1968 Resolution, the "Resolutions"). (Id.) Plaintiffs assert that, pursuant to the Enabling Act and the Resolutions, the PRHTA Bonds are secured by a gross lien on (i) the revenues derived from PRHTA's toll facilities (the "Pledged

Toll Revenues"); (ii) gasoline, diesel, crude oil, and other special excise taxes levied by the Commonwealth (the "PRHTA Pledged Tax Revenues"); and (iii) special excise taxes consisting of motor vehicle license fees collected by the Commonwealth (the "Vehicle Fees" and, together with the PRHTA Pledged Tax Revenues, the "PRHTA Pledged Special Excise Taxes"). (Id. ¶ 34.)

The PRHTA Resolutions established sinking funds (collectively, the "Sinking Funds"). (Resolutions § 401.) Each Sinking Fund includes three separate accounts (the "Accounts"): (i) a bond service account, (ii) a redemption account, and (iii) a reserve account. (Id.) Pursuant to the Resolutions, PRHTA is required to deposit pledged revenues on a monthly basis with the fiscal agent. (Id. ¶ 37; Resolutions § 401.) Once the funds are received, the fiscal agent is required to deposit the funds in the Accounts based on the protocol established by the Resolutions. (Resolutions § 401.)

In 2016, the Puerto Rico Oversight, Management, and Economic Stability Act ("PROMESA") was enacted by the U.S. Congress and signed into law to provide, among other things, federal statutory authority pursuant to which the Commonwealth and its instrumentalities may restructure their debts.[4] See PROMESA § 405(m). Pursuant to PROMESA, a Financial Oversight and Management Board (the "Oversight Board") was established with the purpose of developing "a method [for the Commonwealth] to

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[4] PROMESA is codified at 48 U.S.C. §2101 et seq. References to "PROMESA" in the remainder of this opinion are to the uncodified version of the legislation.

achieve fiscal responsibility and access to capital markets." Id. § 101(a). "Among other things, PROMESA (i) establishes a process for the Oversight Board to approve fiscal plans . . . and budgets of the Commonwealth and its instrumentalities, including PRHTA;" (ii) establishes a process for the Oversight Board to file a bankruptcy-type petition on behalf of the Commonwealth and its instrumentalities, including PRHTA; and (iii) establishes "an alternative mechanism for adjusting the Commonwealth's bond debt or the bond debt of its instrumentalities outside of a bankruptcy proceeding . . . ." (Am. Compl. ¶ 57.)

The Oversight Board has thus far certified, as relevant here, two fiscal plans: (i) the Commonwealth's 2017-2026 fiscal plan (attached as "Exhibit A" to the Amended Complaint, the "PR Fiscal Plan") and (ii) PRHTA's 2017-2026 fiscal plan (attached as "Exhibit B" to the Amended Complaint, the "PRHTA Fiscal Plan" and, together with the Commonwealth Fiscal Plan, the "Fiscal Plans"). (Id. ¶ 3.) To implement certain measures consistent with the Fiscal Plans, the Commonwealth enacted a Fiscal Plan Compliance Law (H.B. 938, Commonwealth Act No. 26-2017, the "Compliance Law") on or about April 29, 2017. (Id. ¶ 68.) Plaintiffs assert that the Fiscal Plans authorize the Commonwealth to redirect and misappropriate the Pledged Toll Revenues and the PRHTA Pledged Special Excise Taxes (collectively, the "PRHTA Pledged Special Revenues") from PRHTA to the Commonwealth unlawfully. (Id. ¶ 58.)

On July 1, 2016, PRHTA defaulted on a debt service payment on PRHTA Bonds aggregating approximately $4.5 million. (Id. ¶ 42.) Approximately $4 million of the default amount was insured and paid to holders of PRHTA Bonds (the "PRHTA Bondholders") by National and $83,039.34 was reinsured and paid to the PRHTA Bondholders by Assured. (Id.) PRHTA subsequently defaulted on a debt service payment on January 1, 2017, totaling approximately $1 million on certain bonds insured and paid to the PRHTA Bondholders by National. (Id.)

On May 3, 2017, the Oversight Board commenced a debt adjustment proceeding on behalf of the Commonwealth under Title III of PROMESA.[5] (Id. ¶ 78.) Shortly thereafter, on May 21, 2017, the Oversight Board commenced such a proceeding on behalf of PRHTA. (Id. ¶ 79.) On June 3, 2017, Plaintiffs commenced the above-captioned adversary proceedings, alleging that PRHTA's failure to continue to make payments on the PRHTA Bonds as they come due violates Sections 922(d) and 928(a) of the Bankruptcy Code (which are made applicable in Title III proceedings by Section 301 of PROMESA) and requesting declaratory relief regarding the ownership of certain funds held in the reserve accounts created by the Resolutions (collectively, the "Reserve Accounts.") (See generally Docket Entry No. 1 (the "Complaint"), and the Am. Compl.)

On June 20, 2017, the Puerto Rico Fiscal Agency and Advisory Authority ("AAFAF"), on behalf of PRHTA, delivered an instruction to the Bank of New York Mellon ("BNYM"), as Fiscal Agent, instructing BNYM to "refrain from making the scheduled July 1,

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[5] See 48 U.S.C.S. §§ 2164, 2172-2174 (LexisNexis 2017).

2017 payment to the Bondholders from the [Reserve] Account" and asserting that any such payment would constitute "an act to exercise control" over PRHTA's property in violation of the automatic stay that arose under 11 U.S.C. § 362(a), as incorporated by Section 301 of PROMESA, upon the filing of PRHTA's Title III petition.[6] Following the delivery of the instruction, on July 3, 2017, PRHTA defaulted on a scheduled bond payment in the amount of $219 million. (Id. ¶ 109.) Plaintiffs are subrogated to the rights of the PRHTA bondholders whose claims they have paid. (Id.)

II.

DISCUSSION

Defendants move pursuant to Rule 12(b)(1) of the Federal Rules of Civil Procedure ("Rule 12(b)(1)") to dismiss the Amended Complaint for lack of subject matter jurisdiction, and pursuant to Federal Rule of Civil Procedure 12(b)(6) ("Rule 12(b)(6)") to dismiss the Amended Complaint for failure to state a claim upon which relief may be granted. A court "confronted with motions to dismiss under both Rules 12(b)(1) and 12(b)(6), [] ordinarily ought to decide the former before broaching the latter." Deniz v. Municipality of Guaynabo, 285 F.3d 142, 149 (1st Cir. 2002) (internal citations omitted).

A. Rule 12(b)(1): Subject Matter Jurisdiction

A wide variety of challenges to the Court's subject matter jurisdiction may be asserted under Fed. R.

[6] See Docket Entry No. 39-4.

Civ. P. 12(b)(1), including challenges going to ripeness, mootness, the existence of a federal question and sovereign immunity. See Valentín v. Hospital Bella Vista, 254 F.3d 358, 362–63 (1st Cir. 2001). The Court also has an independent duty to assess whether it has subject matter jurisdiction of an action. See Fed. R. Civ. P. 12(h)(3); FW/PBS, Inc. v. City of Dallas, 493 U.S. 215, 231 (1990) ("federal courts are under an independent obligation to examine their own jurisdiction"). "When a defendant moves to dismiss for lack of federal subject matter jurisdiction, 'the party invoking the jurisdiction of a federal court carries the burden of proving its existence.'" Johansen v. United States, 506 F.3d 65, 68 (1st Cir. 2007) (citing Murphy v. United States, 45 F.3d 520, 522 (1st Cir. 1995)).

1. Impact of PROMESA Section 305.

Defendants argue that Section 305 of PROMESA deprives this Court of "jurisdiction to grant the relief Plaintiffs seek, namely, an order declaring PRHTA revenues must be disbursed to pay principal and interest on the PRHTA bonds and affirmatively enjoining Debtors to require those payments." (Mot. at 18.) As federal courts are ones of limited jurisdiction, the Court must address the issue of subject matter jurisdiction prior to engaging with the merits of an action. See Fed. R. Civ. P. 12(h)(3) (providing that if a federal "court determines at any time that it lacks subject-matter jurisdiction, the court must dismiss the action."); see also Kokkonen v. Guardian Life Ins. Co. of Am., 511 U.S. 375, 377 (1994). The Court therefore turns first to the question of whether Section 305 of PROMESA implicates the Court's jurisdiction or instead only circumscribes the powers of and remedies that are available to the Court.

Section 305 is titled "Limitation on Jurisdiction and Powers of Court" and provides that:

> Subject to the limitations set forth in titles I and II of [PROMESA], notwithstanding any power of the court, unless the Oversight Board consents or the plan so provides, the court may not, by any stay, order, or decree, in the case or otherwise, interfere with—
>
> > (1) any of the political or governmental powers of the debtor;
> >
> > (2) any of the property or revenues of the debtor; or
> >
> > (3) the use or enjoyment by the debtor of any income-producing property.

48 U.S.C.S. § 2165 (LexisNexis 2017). The language of Section 305 substantially mirrors that of Section 904 of title 11 of the United States Code ("Section 904" and the "Bankruptcy Code," respectively), which similarly limits the powers of courts adjudicating municipal bankruptcy cases. Defendants' argument that Section 305 limits the subject matter jurisdiction of the Court is focused on the section's title, "Limitation on Jurisdiction and Powers of Court." 48 U.S.C.S. § 2165 (LexisNexis 2017).

The Supreme Court has cautioned that courts should avoid characterizing statutory threshold requirements and other preconditions to suit as limitations on a court's subject matter jurisdiction unless Congress expressly characterizes the provision in question as such. Arbaugh v. Y & H Corp., 546 U.S. 500, 515-16 (2006). While a statute's title or heading may be instructive in resolving ambiguities, a court's determination as to whether a statutory provision is jurisdictional should turn on an examination of the statutory language in the context of the entire statutory scheme. See Pa. Dep't of Corrs. v. Yeskey, 524 U.S. 206, 212 (1998) (declining to rely on a statute's title where the text was not ambiguous); see also GMC v. Darling's, 444 F.3d 98, 108 (1st Cir. 2006) (quoting Darling's v. Ford Motor Co., 2003 ME 21, 825 A.2d 344, 346 (2003) (stating that courts "examine[] the plain meaning of the statutory language and consider[] the language the context of the whole statutory scheme") (internal quotations marks and citations omitted).)

Here, an evaluation of Section 305 in the context of the immediately following provision of Title III indicates that Section 305 does not limit the Court's subject matter jurisdiction. Section 306 of PROMESA explicitly delineates the Court's subject matter, personal, and property jurisdiction in the Title III context, thus implying that Section 305 complements the grant and limitations of jurisdiction by delineating certain restrictions on the Court's remedial powers when functioning within the jurisdictional landscape mapped by Section 306. Indeed, the language of Section 305, which focuses specifically on the Court's ability to interfere with the debtor's governmental functions, revenues, or property absent Oversight Board consent, clearly indicates a concern with the powers and remedies a court may employ in adjudicating a Title III case, and does not present itself as restricting the court's ability to hear matters raising issues implicating such matters. See Sioux Honey Ass'n v. Hartford Fire Ins. Co., 672 F.3d 1041, 1052 (Fed. Cir. 2012) ("[A] court's power to grant relief is not synonymous with its ability to exercise jurisdiction, as these two concepts are separate and distinct. Power does not necessarily envelop the concept of jurisdiction.").

Moreover, the mere inclusion of a reference to jurisdiction in Section 305's title, without any elaboration on the issue of jurisdiction in the body of the provision, does not necessarily indicate an intention that Section 305 should operate to limit the Court's subject matter jurisdiction. The title refers to both jurisdiction and powers of the Court; the body of the statute speaks exclusively to power, and nothing in the statute expressly ties issues of power to issues of jurisdiction. Congress's use of jurisdictional language in the body of PROMESA Section 306 reinforces the distinct purposes of the two statutory provisions. "'[W]here Congress includes particular language in one section of a statute but omits it in another section of the Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.'" Sioux Honey, 672 F.3d at 1052, quoting Russello v. United States, 464 U.S. 16, 23 (1983) (internal quotation marks omitted). In light of the Supreme Court's instruction in Arbaugh that limitations on jurisdiction should not be implied absent clear Congressional intent, the Court will not treat Section 305 as a jurisdictional provision[7] and

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[7] While some courts have cursorily characterized 11 U.S.C. § 904, which contains substantially the same provisions and is similarly titled, as jurisdictional, this Court is aware of no other courts that have explicitly addressed this issue in light of

will next consider whether the basic constitutional predicate for the exercise of federal court jurisdiction—Article III's case-or-controversy requirement—has been satisfied. See Arbaugh, 546 U.S. at 515-16.

2. Do Plaintiffs' Claims Present a Justiciable Case or Controversy?

Article III courts are empowered to hear only actual controversies that are "real and substantial . . . admitting of specific relief through a decree of a conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical state of facts." Aetna Life Ins. Co. v. Haworth, 300 U.S. 227, 241 (1937). Such relief may be declaratory in character "[w]here there is such a concrete case admitting of an immediate and definitive determination of the legal rights of the parties in an adversary proceeding upon the facts alleged." Id. at 241. "[T]he question in each case is whether the facts alleged, under all the circumstances, show that there is a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment." Md. Cas. Co. v. Pac. Coal & Oil Co., 312 U.S. 270, 273 (1941).

When considering a complaint requesting a declaratory judgment, courts will often analyze the

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Arbaugh. See, e.g., In re Sanitary & Improv. Dist. No. 7, 96 B.R. 967, 970 (Bankr. D. Neb. 1989) ("Therefore, this Court rules as a matter of law that it has no jurisdiction to entertain this suit against the SID under Section 904 of the Code or the Nebraska statutes.").

case or controversy requirement through the lens of ripeness. See In re NSCO, Inc., 427 B.R. 165, 176 (Bankr. D. Mass. 2010). A court will first "consider whether an issue is fit for review, e.g., whether a challenged . . . action is final and whether determination of the merits turns upon facts which may not yet be sufficiently developed and [will then] . . . consider the question of hardship, a question which typically turns upon whether the challenged action creates a direct and immediate dilemma for the parties." El Dia, Inc. v. Hernandez Colon, 963 F.2d 488, 495 (1st Cir. 1992) (quotation marks and internal citations omitted). "The linchpin of ripeness under the Declaratory Judgment Act, as in all Article III cases, is adverseness," which requires "legal interests, of sufficient immediacy and reality." Rhode Island v. Narragansett Indian Tribe, 19 F.3d 685, 692-93 (1st Cir. 1994) (quoting Md. Cas. Co., 312 U.S. at 273) (internal quotation marks omitted). A sound measure of adverseness is "conclusivity," which is an evaluation as to whether the "specific relief [sought] through a decree [is] of conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical state of facts." Id. (quoting Aetna, 300 U.S. at 239-42).

In their First Claim for Relief, Plaintiffs assert, and seek declarations, that the PRHTA bonds are secured by special revenues within the meaning of certain sections of the Bankruptcy Code, that the application of such revenues to payments on the bonds is exempted from the automatic stay by Section 922(d) of the Bankruptcy Code, and that Defendants' failure to continue to remit such revenues during these PROMESA Title III proceedings to satisfy debt service obligations on the

PRHTA Bonds violates Sections 922(d) and 928 of the Bankruptcy Code, which have been incorporated into PROMESA. Their Third Claim for Relief seeks an injunction against further violations of Sections 922(d) and 928. Defendants dispute on a number of grounds the propositions that Sections 922(d) and 928 require the continuation of PRHTA Bond payments during the pendency of the Title III proceedings. The Fourth Claim for Relief seeks an injunction requiring Defendants to remit revenues securing the bonds in accordance with Sections 922(d) and 928. The parties' submissions clearly frame a ripe controversy with respect to the question of whether the cited Bankruptcy Code sections require continued payments, one that can conclusively be resolved through a declaration of the import of the statutes and the rights and obligations of the parties. The claims for injunctive relief frame and arise from the same current controversy and, if Plaintiffs prevail on their basic contention, will also present a ripe issue for adjudication as to the Court's power to grant the requested injunctive relief. Accordingly, the Court concludes that it has subject matter jurisdiction of Plaintiffs' First and Fourth Claims for Relief. Plaintiffs' Third Claim for Relief also focuses on Sections 922(d) and 928, seeking an injunction prohibiting Defendants from further violating Sections 922(d) and 928. While there is a question of whether this claim for relief is duplicative of the First and Fourth Claims for Relief, it is sufficient to frame a case or controversy for jurisdictional purposes.

In their Second Claim for Relief, Plaintiffs allege that all of the funds held in the Reserve Accounts "are property of the PRHTA Bondholders, held in trust for their benefit, and subject to a lien in their favor," and seek declarations that all funds in the Reserve Accounts are property of the PRHTA Bondholders and that "PRHTA lacks an interest sufficient to prevent funds held in the Reserve Accounts from flowing to the PRHTA Bondholders, unless and until all outstanding PRHTA Bonds have been fully retired or defeased." (Am. Compl ¶¶ 118, 122-23.) This Second Claim appears to be premised on three different theories of bondholder interests in the Reserve Account—that the bondholders are the direct owners of the funds therein, that the funds are held in trust under terms that exclude cognizable property interests of PRHTA in those funds, and that the funds are property of PRHTA but subject to a lien in favor of the PRHTA Bondholders. Plaintiffs' Second Claim presents justiciable issues that are capable of conclusively resolving their issue regarding PRHTA's right to prohibit disbursement of the Reserve Account to the extent Plaintiffs assert that PRHTA has insufficient property interests to prevent the payments, although PROMESA Section 305's limitations on the Court's powers to grant relief may ultimately impede Plaintiffs' ability to state a claim upon which relief may be granted. To the extent, however, their claim of rights in the account is limited to a lien on property of PRHTA, they have neither alleged facts nor proffered a legal theory that would entitle them to a determination that the parties' respective property interests are such as to preclude PRHTA from preventing disbursement of the funds. A determination of the nature or extent of any PRHTA lien interest would therefore be merely advisory, requiring further facts and litigation to ascertain its impact, if any, on rights to control disbursements from the Reserve Account. The Court concludes that it lacks subject matter jurisdiction of the Second Claim for Relief to the extent that claim is premised solely on Plaintiffs' assertion of a lien interest in the Reserve Account funds. A determination of the lien interest, standing alone, will not resolve conclusively the question of whether, when and from what, if any, funds the PRHTA bondholders are entitled to be paid. Such lien-related issues are implicated in the First and Fourth Claims for Relief, and may ripen in other respects in the future in connection, for instance, with claims and objections to claims, and litigation concerning confirmation of a plan of adjustment.

The Court now turns to the merits issues presented by Plaintiffs' remaining claims and the instant motion practice—whether Plaintiffs have stated claims upon which relief may be granted.

B. Rule 12(b)(6): Merits

In order to survive a motion to dismiss for failure to state a claim upon which relief can be granted under Rule 12(b)(6), a complaint must contain sufficient factual matter "to state a claim to relief that is plausible on its face." Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570 (2007). A court should "accept well-pled factual allegations in the complaint as true and make all reasonable inferences in the plaintiff's favor." Melendez-Morales v. Dep't of Army, No. CIV.08-1298 DRD BJM, 2011 WL 925561, at *2 (D.P.R. Jan. 28, 2011) (citing Miss. Pub. Employees' Ret. Sys. v. Boston Scientific Corp., 523 F.3d 75, 85 (1st Cir. 2008)). The court may "consider documents the authenticity of which [is] not disputed by the parties, documents central to the plaintiffs' claim, and documents sufficiently referred to in the complaint." Id. (citing to Curran v. Cousins, 509 F.3d 36, 44 (1st Cir. 2007)). The complaint must allege enough factual content to nudge a claim "across the line from conceivable to plausible." Ashcroft v. Iqbal, 556 U.S. 662, 680 (2009) (citing Twombly, 550 U.S. at 570).

1. Plaintiffs' First, Third and Fourth Claims for Relief

As noted above, Plaintiffs request: (1) a declaratory judgment stating that application of the PRHTA Pledged Special Revenues does not violate the automatic stay and that Defendants' failure to remit post-petition payments to the PRHTA Bondholders violates Sections 922(d) and 928(a) of the Bankruptcy Code; (2) an order enjoining Defendants from further violations of Section 922(d) and 928(a); and (3) an injunction ordering Defendants "remit revenues securing the PRHTA Bonds in accordance with Sections 922(d) and 928(a)." (Am. Compl. ¶¶ 114, 125, 129.) Defendants move to dismiss Plaintiffs' claims for injunctive and declaratory relief regarding Defendants' alleged obligation pursuant to Sections 922(d) and 928(a) to remit payments to PRHTA Bondholders during the pendency of these Title III proceedings, arguing that those Bankruptcy Code sections, which are incorporated into Title III by Section 301 of PROMESA, do not require PRHTA to make payments during the pendency of the Title III proceeding. Because the viability of Plaintiffs' claims turns on whether the cited Bankruptcy Code sections mandate current payments, the Court leaves aside for the moment the question of whether

Plaintiffs have a valid security interest in pledged special revenues and examines in the first instance the parties' contentions concerning Sections 928 and 922(d) of the Bankruptcy Code.

Plaintiffs argue that Section 928(a) of the Bankruptcy Code not only overrides the general rule of Bankruptcy Code Section 552(a) (which provides that property acquired by a debtor after the commencement of a bankruptcy proceeding is not subject to liens resulting from pre-petition security agreements), by providing for attachment of liens post-petition to the extent they secure certain special revenue bonds, but also requires, either alone or in concert with Section 922(d), continuity of payments on such bonds during the Title III proceeding. Section 928 reads in its entirety as follows:

> (a) Notwithstanding section 552(a) of [the Bankruptcy Code] and subject to subsection (b) of this section, 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.
>
> (b) Any such lien on special revenues, other than municipal betterment assessments, derived from a project or system shall be subject to the necessary operating expenses of such project or system, as the case may be.

11 U.S.C.S. § 928 (LexisNexis 2010). The Court again turns to the traditional tools of statutory construction, examining the plain language of the section in the context of the Bankruptcy Code, and, to the extent there is any ambiguity, the legislative

history. See Perez-Olivo v. Chavez, 394 F.3d 45, 49-51 (1st Cir. 2005) (using standards tools of statutory construction including the plain language of the statute, the context of the section within the whole statute, and legislative history to evaluate the reasonableness of an agency interpretation). By its plain language, Section 928(a) merely exempts consensual prepetition liens on special revenues acquired by the debtor post-petition from Section 552(a) of the Bankruptcy Code, which could otherwise invalidate such liens with respect to revenues acquired post-petition. See 11 U.S.C.S. § 552(a) (LexisNexis 2016); 6 COLLIER ON BANKRUPTCY ¶ 928.02 (16th ed. 2017).

Section 928(a) includes no language that could be construed to implicate the payment of special revenues to the bondholders or the timing thereof. The statute clearly and simply provides that certain pre-petition liens will remain in place after the filing of the petition, notwithstanding Section 552(a)'s general protection of after-acquired property from pre-petition liens. Section 928 does not address lien enforcement at all, nor does it address payment of the secured obligation; it thus neither expressly nor impliedly provides any exception from, inter alia, the stay imposed by Bankruptcy Code Section 362(a)(4) on "any act to . . . enforce any lien against property of the estate." Nor does any provision of Section 928 purport to mandate action on the part of the obligor.

The Court notes that its reading of the statute, as unambiguous and limited to protecting post-petition attachment of certain liens, is consistent with the legislative history of the 1988 Municipal Bankruptcy Amendments, Pub. L. No. 100-597 (1988) (the "1988

Amendments"). The legislative history reflects Congressional concern that, notwithstanding the protection provided to municipalities by Bankruptcy Code Section 904 from involuntary interference with their governmental functions and use of the property, Section 552(a) could, by invalidating special revenue bond liens, subject municipal debtors to treatment of special revenue obligations as general obligations. In Section 928, Congress sought only to address the narrow concern that Section 552(a) not invalidate a lien on post-petition special revenues. See S. Rep. No.100-506, at 12-13, 22-23 (1988) (stating that Section 928 "is intended to negate Section 552(a)," which "could terminate the security for municipal revenue bonds," but "to go no further."); see H.R. Rep. 100-1011, at 4-5, 7-8 (1988) (Commenting that without the enactment of Section 928 "the risk exists that a lien on special revenues could be avoided under Bankruptcy Code Section 552(a), effectively turning the revenue bond into a general obligation bond"); see also Bank of N.Y. Mellon v. Jefferson Cnty. (In re Jefferson Cnty.), 482 B.R. 404, 432-36 (Bankr. N.D. Ala. 2012) ("[T]he purpose for the changes . . . brought about by the 1988 Amendments was to make clear that retention of the pre-bankruptcy lien status of pledged special revenues should occur in a municipal bankruptcy."). Based on the plain language of Section 928, its context within the Bankruptcy Code, and the confirmatory content of its legislative history, the Court concludes that Section 928 does not mandate the turnover of special revenues.[8]

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[8] Plaintiffs, furthermore, have failed to proffer any factual allegations that would plausibly support a claim that

Plaintiffs' assertions that Section 922(d) of the Bankruptcy Code requires Defendants to turn over the revenues allegedly securing the PRHTA Bonds, and that Section 922(d) exempts bondholder enforcement actions from the automatic stays otherwise in effect pursuant to Sections 362(a) and 922(a) of the Bankruptcy Code,[9] are also unavailing. Section 922(d) provides that:

> Notwithstanding section 362 of [the Bankruptcy Code] and subsection (a) of this section, a petition filed under this chapter does not operate as a stay of application of pledged special revenues in a manner consistent with section 92[8] of [the Bankruptcy Code] to payment of indebtedness secured by such revenues.

11 U.S.C.S. § 922(d) (LexisNexis 2010). The plain language of Section 922(d) makes clear its limited purpose and effect, and refutes Plaintiffs' contention that it imposes a payment obligation. Section 922(d) exempts "the application of pledged special revenues" from the automatic stay. It does not address actions to enforce liens on special revenues, which are stayed by Section 362(a)(4), and it does not sanction non-consensual interference with governmental properties or revenues, which is constrained by PROMESA Section 305 (which, as noted above, operates in substantially similar fashion to Section 904 of the Bankruptcy Code). Nothing in the language of Section 922(d) requires debtors, or third

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Defendants have violated any lien protection afforded to bondholders by Section 928(a).

[9] (Opp'n at 42.)

parties holding special revenues, to apply the revenues to outstanding obligations. Section 922(d) simply carves out one type of action (application of revenues) from the automatic stay, without addressing any other constraints that may apply to that action, without any grant of relief from other aspects of the automatic stay, and without imposing any requirement that the action be taken. It makes clear that the automatic stay is not an impediment to continued payment, whether by the debtor or by another party in possession of pledged special revenues, of indebtedness secured by such revenues, if other relevant circumstances permit or require such payments.[10] Id.; see also 6 COLLIER ON BANKRUPTCY ¶ 922.05. Nor does anything in the plain language of Section 922(d) demonstrate that Congress intended that the provision give holders of instruments secured by such revenues the power to compel continued application of such revenues to payments during the course of a Chapter 9 bankruptcy proceeding.

This reading of the unambiguous language of Section 922(d) is consistent with the legislative history of the 1988 Amendments, which introduced Section 922(d) into the Bankruptcy Code. As relevant here, Committee reports show that Congress intended that the amendments would address two issues. First, Congress recognized that

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[10] Because neither Section 922(d) nor 928 provides for the compulsory payment of the special revenue to the bondholders, the Court need not address at this juncture the parties' arguments concerning the identification of "operating expenses" to which liens on special revenues may be subject under Section 928(b).

a municipality might want to keep special revenue bond payments current through the course of Chapter 9 bankruptcy proceedings in order to retain access to credit markets, prevent any inadvertent exposure of general revenues to claims of special revenue bondholders, and/or to keep itself in compliance with financial strictures imposed by state law.[11] S. Rep. No.100-506 at 6-7 ("[A] municipality might well attempt to ignore [the termination of a pledge under Section 552] and continue to pay bondholders as originally promised" in order to "ensure the debtor's continued access to credit markets."); H.R. Rep. 100-1011, at 3, 7 ("[S]ection 922[(d)] states that the automatic stay of the Bankruptcy Code . . . does not operate to stay paying pledged revenues"). Second, Congress, realizing that the automatic stay imposed by Section 362(a) of the Bankruptcy Code broadly prohibits all collection efforts against a debtor including the application of "the debtor's funds held by a secured lender to secure indebtedness," sought to permit such third-party applications, in the context of municipal restructurings, to proceed without having to seek relief from the automatic stay. S. Rep. No.100-506 at 11, 21. Congress did not, however, exempt such application of revenues by third parties from the

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[11] Plaintiffs point to a passage in the Senate Report that observes that "[r]easonable assurance of timely payment is essential to the orderly marketing of municipal bonds and notes and continued municipal financing" as evidence that Section 922(d) was intended to mandate payment. S. Rep. No.100-506 at 21. This observation is, however, equally consistent with the proposition that Congress sought to permit municipalities to continue to pay special revenues voluntarily in order to maintain their continued standing in credit markets.

restrictions on non-consensual interference with debtor property that are imposed by Section 904 of the Bankruptcy Code in connection with municipal bankruptcies and by Section 305 of PROMESA in connection with this Title III proceeding. As with Section 928, there is no indication that Congress intended to require continued payments, or to grant bondholders power to compel such payments, and the statute is silent with respect to the consequences of failure to apply pledged special revenues to timely continued bond payments.

This narrow, straightforward reading of Section 922(d) is consistent with Section 904 of the Bankruptcy Code and, as relevant here, Section 305 of PROMESA and gives adequate effect to both sections. The Court is mindful that, "[w]here possible, [different] provisions of a statute should be read so as not to create a conflict," but "no construction should be adopted which would render statutory words or phrases meaningless, redundant or superfluous." La. Public Serv. Comm'n v. FCC, 476 U.S. 355, 370 (1986) (statutes should be read to avoid conflicts between various sections); United States v. Ven-Fuel, Inc., 758 F.2d 741, 751-52 (1st Cir. 1985) (statutes should be interpreted to give effect to all words and phrases). Reading Section 922(d) to permit, but not compel, bond payments gives meaning to Section 922(d) while also respecting the Bankruptcy Code and PROMESA prohibitions on judicial interference with a municipality's governmental functions and revenues. See La. Public Serv. Comm'n, 476 U.S. at 370 (statutes should be read to avoid conflicts between various sections); see Ven-Fuel, 758 F.2d at 751-52 (statutes should be interpreted to give effect to all words and phrases). Indeed, the legislative history evidences Congress' concern that applicability of the automatic stay provisions to municipality-authorized payments on revenue bonds would be inconsistent with the protections afforded to municipalities under Section 904. See S. Rep. No.100-506 at 21 ("the use of an automatic stay may be contrary to Section 904 and interfere with the government, affairs and the municipality's use or enjoyment of income producing property.").

Plaintiffs cite In re Jefferson County, 474 B.R. 228 (Bankr. N.D. Ala. 2012), in support of their argument that Section 922(d) mandates the turnover of special revenues. While the Jefferson County court made references to expectations of continued payment of pledged special revenues during that municipal bankruptcy case, no issue of refusal to pay had been presented to the court. Rather, the question before the court was what funds qualified as pledged special revenues pursuant to Sections 922(d) and 928 of the Bankruptcy Code. Id. at 262-74.[12]

Plaintiffs' alternative theory, that Section 922(d) exempts bondholder enforcement actions from the automatic stay, is similarly unavailing. As explained above, the plain language and the legislative history of Section 922(d) suggest that Congress, in granting the exemption, only permitted municipalities and others in possession of pledged special revenues to

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[12] The Jefferson County court's decision in a related proceeding, Bank of N.Y. Mellon v. Jefferson Cnty. (In re Jefferson Cnty.), was similarly limited to an issue arising from a dispute of over the computation of ongoing post-petition payments. See generally 482 B.R. 404 (Bankr. N.D. Ala. 2012).

apply those revenues to the relevant debt without running afoul of the automatic stay. Sections 362(a) and 922(a), on the other hand, explicitly stay the prosecution of certain actions against the debtor. Section 922(d) excepts the "application" of special revenues from the automatic stay but does not address other types of enforcement actions that are stayed by sections 362(a) and 922(a). The Court therefore concludes that Section 922(d) does not except actions to enforce special revenue liens.

Finally, in their opposition brief, Plaintiffs request that the Court invoke Bankruptcy Code Section 105 and use its equitable power to "issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of [the Bankruptcy Code]" to require Defendants to remit the special revenues to PRHTA Bondholders. See 11 U.S.C.S. § 105(a) (LexisNexis 2014). The Court's authority under Section 105 is discretionary and "should not be used contrary to the clear wording of the Bankruptcy Code, its legislative history, and the Rules of Bankruptcy Procedure." Marrama v. Citizens Bank of Mass., 313 B.R. 525, 532 n.6 (B.A.P. 1st Cir. 2004). Because neither Section 922(a) nor 928 mandates the turnover of funds, the Court finds that Section 105 does not authorize the transformation of a permissive Bankruptcy Code provision in to a mandatory one. See id.

Because neither Section 922(d) nor Section 928 requires or empowers the Court to order the payment of the pledged special revenues to the PRHTA Bondholders, Plaintiffs' First, Third and Fourth Claims for Relief fail to state claims upon which relief may be granted and are therefore dismissed.[13]

2. Second Claim for Relief

In the Second Claim for Relief of the Amended Complaint, Plaintiffs seek orders declaring that (i) all funds held in the Reserve Accounts are property of the PRHTA Bondholders and (ii) PRHTA lacks an interest sufficient to prevent funds held in the Reserve Accounts from flowing to the PRHTA Bondholders, unless and until all outstanding PRHTA Bonds have been fully retired or defeased. (Am. Compl. ¶¶ 122-23.) As noted above, the structure of the allegations in Plaintiffs' Second Claim for Relief, particularly in paragraph 118 of the Amended Complaint, suggests that Plaintiffs are proceeding on three theories of entitlement to the reserve funds—first, that the PRHTA Bondholders own outright the funds in the Reserve Account (See Am. Comp. ¶ 118 ("all funds in the Reserve Accounts are property of the PRHTA Bondholders")), second, that the PRHTA Bondholders are beneficiaries of a trust that holds the funds in the Reserve Account (see id. ("all funds in the Reserve Accounts are . . . held in trust for their benefit")), and third, that the PRHTA Bondholders hold a lien on the funds in the

[13] Plaintiffs' request, in the First Claim for Relief, for a declaration that "the filing of a Title III petition by PRHTA does not operate as a stay of the application of PRHTA Pledged Special Revenues to the payment of the PRHTA bonds" (Am. Compl. ¶ 113) does not, in and of itself, frame a justiciable case or controversy. There appears to be no dispute that the statute says what it says, to wit, that application of pledged special revenues is not stayed. Thus, a grant of the relief sought in paragraph 113 would be a redundant advisory opinion.

Reserve Account (see id. ("all funds in the Reserve Accounts are . . . subject to a lien in their favor")). The Court has already determined that the Court lacks subject matter jurisdiction of the Second Claim for Relief to the extent it is premised solely on the existence of a lien. The Court will now address the merits of Plaintiffs' ownership- and trust-based theories.

a. Bondholders as Reserve Account Owners

Plaintiffs allege that they (or their subrogors) own the Reserve Account funds and, on the basis of such alleged ownership, assert that neither the automatic stay nor Section 305 of PROMESA presents a barrier to collection of the funds because they are not the property of any Title III debtor. Indeed, Plaintiffs assert throughout the Amended Complaint that the "funds held in the Reserve Accounts are the exclusive property of the PRHTA Bondholders" and not of the Commonwealth.[14] (Am. Compl. ¶¶ 4, 6, 35, 36.) In support of this proposition, Plaintiffs appear to rely on Section 401 of the Resolutions and certain statutory provisions. (Id. ¶¶ 4, 35-36, 106).

Section 401 of the 1968 Resolution provides, in relevant part, that:

> The moneys in [the Reserve] Account[] shall be held by the Fiscal Agent in trust and applied

[14] Although Plaintiffs appear to assert distinct theories of outright ownership and beneficial ownership of the Reserve Account assets, the Amended Complaint tends to conflate these two arguments and the factual allegations supporting them. (See Am. Compl. ¶ 35.)

> as hereinafter provided with regard to . . . such . . . 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.

(Docket Entry No. 39-7 at 41.) Section 401 of the 1998 Resolution includes language that is substantially similar. (See Docket Entry No. 39-8 at 47.) These provisions are devoid of language that could plausibly support an inference that PRHTA has conferred a full exclusive ownership interest in Reserve Account funds on the PRHTA Bondholders. Indeed, the recitations that the funds are to be held "in trust" and are subject "to a lien and charge" for "the further security" of the Bondholders are facially incompatible with full legal ownership of the funds in the Reserve Accounts by the PRHTA Bondholders. "[T]he assertion of a lien is inconsistent with the assertion of [a] title" interest. <u>William W. Bierce, Ltd. v. Hutchins</u>, 205 U.S. 340, 347 (1907). The existence of a trust is equally inconsistent with full, outright ownership because a trust divides ownership of property, placing legal title with trustee while the beneficiary enjoys an equitable interest. <u>See</u> <u>U.S. Fid. & Guar. Co. v. Guzman</u>, No. CIV. 10-1078 FAB/MEL, 2012 WL 4790314, at *5 (D.P.R. Sept. 20, 2012), <u>report and recommendation adopted sub nom.</u> <u>United States Fid. & Guar. Co. v. Cobian-Guzman</u>, No. CIV 10-1078 (FAB), 2012 WL 12996294 (D.P.R. Oct. 5, 2012) (citing 31 L.P.R.A. § 2541).

The statutes cited by Plaintiffs only authorize the collection, deposit, and pledge of the highway tolls and excise taxes, and do not in any way suggest that the PRHTA Bondholders were granted an ownership interest in such funds or accounts. See 13 L.P.R.A. § 31751(a)(1) (authorizing the deposit and pledge of taxes collected on petroleum products and governing the payment of associated bonds); 9 L.P.R.A. § 2021 (authorizing the deposit and pledge of vehicle license fees and prescribing the use of such funds); 9 L.P.R.A. § 5681 (same).[15]

The Court finds that Plaintiffs have failed to plead plausibly that the PRHTA Bondholders hold an outright ownership interest in the Reserve Accounts.

b. Bondholders as Beneficiaries of a Trust

The Court now turns to Plaintiffs' assertion that the funds held in the Reserve Accounts are "held in trust" by the fiscal agent, BNYM, for the benefit of the PRHTA Bondholders. (See, e.g., Am. Compl. ¶¶ 105, 118.) Plaintiffs rely on Sections 401 and 501 of the 1968 Resolution, as well as Sections 401 and 410 of the 1998 Resolution.[16] Section 501 of the 1968 Resolution is titled "**Deposits Constitute Trust Funds**; Security for Deposits" and provides, in

[15] Plaintiffs also reference 9 L.P.R.A. § 2013(a)(2), which grants bondholders the right to commence a suit against PRHTA for an accounting "as if it were the trustee of an express trust." The right to sue PRHTA "as if it were the trustee" provides no plausible basis for an inference that the bondholders already own the revenues.

[16] The relevant language of Section 401 of the 1968 Resolution is substantially similar to that of Section 401 of the 1998 Resolution.

relevant part, that "[a]ll moneys deposited with the Fiscal Agent under the provisions of [the] Resolution **shall be held in trust** . . . and shall not be subject to lien or attachment by any creditor of [PRHTA]." Id. § 501 (emphasis added) (Docket Entry No. 39-7). The Section goes on to state that "[a]ll moneys deposited with the Fiscal Agent [] shall be continuously secured, for the benefit of the Authority and the holders of the bonds . . . ." Id. Section 410 of the 1998 Resolution provides that "moneys held for the credit" of the relevant Reserve Account "shall be held in trust and disbursed by the Fiscal Agent." 1998 Resolution § 410 (Docket Entry No. 39-8). Sections 207 and 711 of the 1998 Resolution also make reference to "trusts [] created" by the resolution. 1998 Resolution §§ 207, 711

Defendants argue that the use of the word "trust" in the resolutions is not, alone, sufficient to create a trust under the law of Puerto Rico, and that the full nature of the contemplated transaction should be considered. Defendants assert that the funds in the Reserve Accounts are only "held in trust first for the 'further security' of the [PRHTA] [B]ondholders and then to be disbursed to PRHTA once the bondholders are fully paid" and, as such, the funds are "not held in trust for the sole purpose of paying the bondholders." (Mot. at 23 (citing 1968 Resolution § 401; 1998 Resolution § 401).)

While multiple interpretations could plausibly be supported by the documentation and the allegations of the Amended Complaint, each contemplates that PRHTA has title or at minimum some contingent reversionary beneficial interest in the trust corpus. The Amended Complaint acknowledges, furthermore, that public revenues are the source of the Reserve Funds. Under these circumstances, PROMESA Section 305's prohibitions on interference with Debtor property interests, revenues and use and enjoyment of income-producing property deprive this Court of power to interfere with the Debtors' dealings with the Reserve Fund property.[17] The Second Claim for Relief, accordingly, fails to state a claim upon which relief may be granted to the extent it is premised on the contention that the Reserve Fund assets are held in trust for bondholders.

III.

CONCLUSION

For the foregoing reasons, Defendants' motion pursuant to Federal Rule of Civil Procedure 12(b)(6) to dismiss the First, Third and Fourth Claims for Relief of the Amended Complaint is granted. The Second Claim for Relief is dismissed pursuant to Rule 12(b)(6) to the extent that Claim for Relief is premised on a claim of outright PRHTA Bondholder

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[17] Defendants, citing to cases applying Section 541 of the Bankruptcy Code, argue that "a remote or theoretical contingent reversionary interest in a debt service reserve fund is insufficient to make such a fund property of the estate." (Opp'n at 52.) However, the issues before the Court is not whether a contingent reversionary interest constitutes property of the debtor's estate for purposes of Section 541 of the Bankruptcy Code. Section 541 is not incorporated into PROMESA and Section 305 of PROMESA does not reference "property of the estate." Instead, Section 305 deprives this Court of power to interfere with, among other things, "any of the property" of the debtor. See 48 U.S.C.S. § 2165(2) (LexisNexis 2017). A contingent reversionary interest constitutes property of the debtor.

ownership of the funds in the Reserve Accounts or trust beneficiary status, and dismissed pursuant to Rule 12(b)(1) to the extent it is premised on a lien on the Reserve Accounts. This Opinion and Order resolves docket entry nos. 46 and 47 in 17 AP 155, and docket entry nos. 48 and 49 in 17 AP 156. The Clerk of Court is directed to enter judgment accordingly and close this adversary proceedings.

SO ORDERED.

Dated: January 30, 2018

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

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

Nos. 18-1165, 18-1166

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.

ASSURED GUARANTY CORPORATION; ASSURED GUARANTY MUNICIPAL CORPORATION; FINANCIAL GUARANTY INSURANCE COMPANY; NATIONAL PUBLIC FINANCE GUARANTEE CORPORATION,

Plaintiffs, Appellants,

v.

THE FINANCIAL OVERSIGHT AND MANAGEMENT BOARD FOR PUERTO RICO, AS REPRESENTATIVE FOR THE COMMONWEALTH OF PUERTO RICO; FINANCIAL OVERSIGHT AND MANAGEMENT BOARD FOR PUERTO RICO; PUERTO RICO FISCAL AGENCY AND FINANCIAL ADVISORY AURTHORITY; THE FINANCIAL OVERSIGHT AND MANAGEMENT BOARD FOR PUERTO RICO, AS REPRESENTATIVE FOR THE PUERTO RICO HIGHWAYS & TRANSPORTATION AUTHORITY; RICARDO ROSSELLÓ-NEVARES; GERARDO JOSÉ PORTELA-FRANCO; CARLOS

CONTRERAS-APONTE; JOSÉ IVÁN MARRERO-ROSADO; RAÚL MALDONADO-GAUTIER; NATALIE A. JARESKO,

Defendants, Appellees,

JOSÉ B. CARRIÓN III; ANDREW G. BRIGGS; CARLOS M. GARCÍA; ARTHUR J. GONZÁLEZ; JOSÉ R. GONZÁLEZ; ANA J. MATOSANTOS; DAVID A. SKEEL, JR.; CHRISTIAN SOBRINO,

Defendants.

Before
HOWARD, Chief Judge,
TORRUELLA, LYNCH, THOMPSON, KAYATTA, and BARRON,* Circuit Judges.

ORDER OF COURT
Entered: July 31, 2019

The petition for rehearing having been denied by the panel of judges who decided the case, and the petition for rehearing en banc having been submitted to the active judges of this court and a majority of the judges not having voted that the case be heard en banc, it is ordered that the petition for rehearing and the petition for rehearing en banc be denied.

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* Judge Barron is recused and did not participate in this matter.

KAYATTA, Circuit Judge, with whom HOWARD, Chief Judge, TORRUELLA, Circuit Judge, and THOMPSON, Circuit Judge, join, statement on denial of rehearing en banc. The central issue in this case is whether the creditor-bondholders, without first obtaining permission from the Title III court, may commence a judicial proceeding against a Commonwealth debtor to obtain a court order restoring the flow of post-petition pledged special revenues from the debtor. Two panels of this court recently held that sections 922 and 928 of the municipal bankruptcy code do not afford creditors a shortcut to bypass the requirement of obtaining traditional stay relief in order to bring such an enforcement action. See Ambac Assurance Corp. v. Commonwealth of Puerto Rico (In re Fin. Oversight & Mgmt. Bd. for P.R.), 927 F.3d 597, 604–05 (1st Cir. 2019); Assured Guar. Corp. v. Fin. Oversight & Mgmt. Bd. for P.R. (In re Fin. Oversight & Mgmt. Bd. for P.R.), 919 F.3d 121, 127–32 (1st Cir. 2019). Because I believe that the dissent's objection to our denial of the creditors' petition for rehearing en banc is unsupported by the text of sections 922 and 928 and misconstrues the legislative context and history accompanying those provisions, I elaborate on my support for the panel's holding and for the denial of the petition.

I.

The creditors' desire to commence a proceeding without permission from the Title III court implicates section 362(a) of the bankruptcy code, which automatically stays a broad variety of creditor actions against the debtor or the debtor's property upon the debtor's filing of a bankruptcy petition. See generally 11 U.S.C. § 362(a). One of the creditor actions that section 362(a) stays is the "commencement . . . of a judicial . . . proceeding against the debtor that . . . could have been commenced before the commencement of the [bankruptcy] case . . . or to recover a claim against the debtor that arose before the commencement of the [bankruptcy] case." Id. § 362(a)(1). Under other subsections, the stay also applies to many creditor actions that fall short of commencing a judicial proceeding. These include, in relevant part, "any act . . . to exercise control over property of the [debtor]," id. § 362(a)(3); see also id. § 902(1) (stating that "property of the estate" when used in the municipal bankruptcy context "means property of the debtor"), "any act to . . . enforce any lien against property of the [debtor]," id. § 362(a)(4), "any act to . . . enforce against property of the debtor any lien to the extent that such lien secures a lien that arose before the commencement of the [bankruptcy] case," id. § 362(a)(5), and "any act to collect, assess, or recover a claim against the debtor that arose before the commencement of the [bankruptcy] case," id. § 362(a)(6).

The leading treatise on bankruptcy law recognizes the breadth of actions encompassed by the collective subsections of section 362(a), particularly in the municipal bankruptcy context. See 3 Collier on Bankruptcy ¶ 362.03 (Richard Levin & Henry J. Sommer eds. 16th ed. 2018) [hereinafter Collier] ("[I]nnocent conduct such as the cashing of checks received from account debtors of accounts assigned as security may be a technical violation [of section

362(a)(6)]."); id. ("[T]he stay applies to secured creditors in possession of collateral and to collateral in possession of a custodian."); see also 6 Collier, supra, ¶ 901.04 ("The applicability of section 362 to municipal debt adjustment cases is a continuation of prior law. However, the protection afforded by section 362 is substantially broader for the debtor . . . ."). The case law also acknowledges the breadth of creditor conduct stayed by section 362(a). See, e.g., Thompson v. Gen. Motors Corp., 566 F.3d 699, 703 (7th Cir. 2009) (holding that a secured creditor's passive retention of collateral after the filing of a bankruptcy petition violates section 362(a)(3)); Lex Claims, LLC v. Fin. Oversight & Mgmt. Bd., 853 F.3d 548, 551–52 (1st Cir. 2017) (citing Thompson with approval); Metromedia Fiber Network Servs. v. Lexent, Inc. (In re Metromedia Fiber Network, Inc.), 290 B.R. 487, 493 (Bankr. S.D.N.Y. 2003) (observing that a secured creditor's failure to remit collateral to the debtor constitutes an exercise of control over the debtor's property); In re Reed, 102 B.R. 243, 245 (Bankr. E.D. Okla. 1989) (noting that a secured creditor's sale of collateral in its possession violates the automatic stay provision).[1]

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[1] Citing no contrary authority, the dissent says that the "application of pledged revenues that a bondholder already holds is not and never was clearly barred by the automatic stay." Given the foregoing case law and the very broad language of the stay, it is hard to see much lack of clarity here. But even if we were to assume that the law was then unclear as to the reach of the automatic stay, the panel's reading of section 922(d) would still function to clarify the law in a manner contrary to the existing case law, which would preclude one from declaring the provision superfluous.

More importantly, the drafters of what became section 922(d) expressed concern about the broad reach of the automatic stay as applied to what the municipal bankruptcy code labels "special revenues." See 11 U.S.C. § 902(2) (defining "special revenues"). Under many municipal bond arrangements, like those at issue in this case, the debtor turns over funds to a fiscal agent, or trustee, who then turns over the funds to the creditor, who in turn applies the funds to outstanding debt. But the breadth of the automatic stay poses a problem for this general scheme. As the Senate Report accompanying the 1988 amendments to the municipal bankruptcy code observes, "[t]he automatic stay of Bankruptcy Code Section 362 is extremely broad, preventing any post-petition collection activities against the debtor, including application of the debtor's funds held by a secured lender to secure indebtedness." S. Rep. No. 100-506, at 11 (1988) (emphasis added). New section 922(d), enacted in the wake of that Senate Report, addressed this concern directly. It states: "Notwithstanding [the automatic stay], a petition filed under this chapter does not operate as a stay of application of pledged special revenues in a manner consistent with section [928] of this title to payment of indebtedness secured by such revenues." 11 U.S.C. § 922(d).

There is some ambiguity in the text of section 922(d). The passive syntax fails to indicate who (e.g., creditor, debtor, or fiscal agent) it is that the provision permits to apply pledged special revenues to the debt. And, I suppose, one might also wonder what exactly "application" means.

To answer those questions, one might most easily look at that part of the Senate Report that specifically addresses section 922, quoted above. That portion of the Report expressly and unambiguously refers to the application of pledged special revenues already in the hands of the secured creditor. And, if one views the fiscal agent or trustee as an agent of the creditor in transmitting funds when due, one might find in section 922(d) permission for such a transfer by the fiscal agent as well. This latter view finds support in another portion of the Senate Report, which explicitly clarifies that section 922(d) makes the automatic stay inapplicable to the bond trustee's application of funds to the payment of outstanding debt. See S. Rep. No. 100-506, at 13 ("In this context, 'pledged revenues' includes funds in the possession of the bond trustee . . . ."). This reading would not somehow render section 922(d) superfluous or of no effect. Rather, it would clearly permit exactly what the Senate Report said Congress was concerned about in referring to the "application of the debtor's funds held by a secured lender to secure indebtedness." Id. at 11.

The foregoing notwithstanding, the bondholders and the dissent point to this ambiguity in section 922(d) as license to hunt the legislative record for bigger game: a conclusion that section 922(d) was intended to allow creditors to commence, without prior permission from the Title III court, a judicial proceeding to secure a court order compelling the debtor to continue making payments in accordance with the bondholder resolutions after the filing of a

Title III petition. I see two flaws in this hunt through the legislative record.

First, its aim exceeds the license afforded by the relevant ambiguity in section 922(d). If a hypothetical statutory provision were deemed to be ambiguous because it refers to "motor vehicles operated on public roads," we might look to the pertinent legislative history to see if "electric bikes" were in mind when Congress drafted that provision. But we would not seize upon language in the legislative history to hold that "motor vehicles" includes "kayaks." See 14 Penn Plaza LLC v. Pyett, 556 U.S. 247, 259 n.6 (2009) ("[R]eading the legislative history in the manner suggested by respondents would create a direct conflict with the statutory text . . . . In such a contest, the text must prevail."); Exxon Mobil Corp. v. Allapattah Servs., Inc., 545 U.S. 546, 568 (2005) ("Extrinsic materials have a role in statutory interpretation only to the extent they shed a reliable light on the enacting Legislature's understanding of otherwise ambiguous terms."). Similarly, while section 922(d) may be ambiguous as to who it allows to apply funds, it is clear that it only grants permission to act; i.e., it allows some actor to apply funds "notwithstanding" the automatic stay. 11 U.S.C. § 922(d). Nothing in the language remotely suggests that it compels anyone to make such an application. So, if, as the dissent maintains, this case is really about "whether a debtor . . . must continue to pay pledged special revenues," nothing in the permission granted by section 922(d) could possibly provide an answer that helps the bondholders.[2]

Second, whatever "application" may mean, it cannot reasonably be read as "commencing a judicial proceeding" to compel payment. The dissent points to two contemporaneous dictionary definitions of the term "application" to demonstrate the term's ambiguity. But even the dissent's proffered definition of "application" -- "[a]ppropriation of a payment to some particular debt," Application, Black's Law Dictionary (6th ed. 1990) -- could not reasonably encompass the instigation of an enforcement action against a debtor.

As subsection (a)(1) of the automatic stay provision demonstrates, Congress knew how to refer to the filing of a lawsuit against a debtor, and it did so in straightforward terms in that instance. See 11 U.S.C. § 362(a)(1) (staying "the commencement or continuation . . . of a judicial, administrative, or other action or proceeding against the debtor that was or could have been commenced before the [bankruptcy] case"). Had Congress wanted to exempt from the stay a creditor's judicial action to enforce the terms of a bondholder agreement, it would have been exceedingly easy to do so by invoking the language used in subsection (a)(1). See Lozano v. Montoya Alvarez, 572 U.S. 1, 16 (2014) (observing that when the drafters of legislation did

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[2] For this reason, I read the statement in Assured Guaranty that section 922(d) is "unambiguous," 919 F.3d at 132, as correctly saying that the provision contains no relevant ambiguity that would invite the reading proffered by the bondholders.

not use "obvious alternative" language, "the natural implication is that they did not intend" that alternative). But Congress did not do so. Further, if one looks at all seven subsections of section 362(a) and asks which one covers the "application" of funds to a debt, one would never pick subsection (1). It reasonably follows that 922(d) leaves that subsection undisturbed.

Nor does section 922(d)'s reference to section 928 require a contrary result. Section 922(d) commands that "application of pledged special revenues" be done in a manner "consistent" with section 928 -- which in turn provides that liens on special revenues "shall be subject to the necessary operating expenses" of the project or system. See 11 U.S.C. §§ 922(d), 928(b). The dissent contends that this cross-reference to 928(b) means that "application" must refer to something more than funds already in the hands of a creditor. Not so. In a non-municipal bankruptcy proceeding, a bankrupt debtor (or its trustee) can move the bankruptcy court to compel a third party in possession of estate property to turn over that property to the debtor. See 11 U.S.C. § 542. Similarly, in the municipal bankruptcy context, the Senate Report makes evident that the bankruptcy court "retain[s] the power to enjoin application of proceeds . . . upon a specific showing of need, for example, where a secured creditor was about to apply proceeds of a gross revenue pledge in a manner inconsistent with policies of the proposed new section." S. Rep. No. 100-506, at 11; see also 6 Collier, supra, ¶ 922.05 n.22 ("[T]he bankruptcy court has ample authority under its general equitable powers to accomplish what the statute appears to contemplate, namely, use of pledged special revenues when necessary for the continued operation of the project or system from which the revenues are derived."). Thus, in ordinary course, section 922(d) enables a creditor to apply pledged special revenues in its possession to outstanding debt unless the Title III or bankruptcy court enjoins the creditor from doing so upon a showing by the debtor of a need to pay necessary operating expenses.

II.

The creditors and the dissent also suggest that section 928(a) of the municipal bankruptcy code might be read to accomplish what section 922(d) clearly does not. But section 928(a) bears no relevant ambiguity. It simply means what it says: The provision orders 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." 11 U.S.C. § 928(a). In other words, post-petition pledged special revenues are still subject to the pre-petition lien created by the bondholder agreements despite the filing of a bankruptcy petition. Contrary to the dissent's view, section 928(a) suggests nothing about the enforcement of a creditor's lien on pledged special revenues. It merely preserves a secured creditor's right to those post-petition funds throughout the bankruptcy proceeding, and the creditor can then assert its right to those funds during the plan-of-adjustment confirmation phase, see generally 11 U.S.C. § 943(a) (granting standing to object to a plan of adjustment to "special tax payer[s]"); id. § 902(3) (defining "special tax payer"); 6 Collier, supra,

¶ 943.02 (explaining that "creditors whose claims are affected by the plan of adjustment" have standing to object), or earlier by requesting stay relief "for cause," such as "the lack of adequate protection" of that collateral, 11 U.S.C. § 362(d)(1). Nor does subsection 928(b) -- which, again, provides that "any such lien on special revenues . . . derived from a project or system shall be subject to the necessary operating expenses of such project or system," id. § 928(b) -- compel a different reading. That subsection merely limits the pool of post-petition funds to which a creditor has an interest; in practical terms, this means a creditor cannot object -- through a request for stay relief or at the plan-confirmation phase -- to the debtor's use of post-petition pledged special revenues for "necessary operating expenses."

The Senate Report accompanying the 1988 amendments makes this explicit. As that Report explains, "[new] Section [928], along with the definition of special revenues in Section 902(3), protects the lien on revenues. . . . It is intended to negate Section 552(a) in the municipal context and to go no further. In other words, it is not intended to create new rights . . . ." S. Rep. No. 100-506, at 12 (emphasis added). Section 552(a) of the bankruptcy code, incorporated from the non-municipal context, provides that "property acquired . . . by the debtor after the commencement of [bankruptcy] 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). As the Senate Report explains, this provision created a slew of potential problems in the municipal context. Among those problems included the termination of creditors' security interests in future special revenues. This, in turn, made it possible that (1) revenue bonds would be converted into general obligation debt upon the filing of bankruptcy; (2) future streams of special revenues would be made accessible to general creditors; (3) municipal debt limits would be exceeded; and (4) municipalities that elected to continue paying bondholders would face difficulty in obtaining plan confirmation. See S. Rep. No. 100-506, at 5–9. As the Senate Report makes evident, section 928(a) simply reverses the problems created by section 552, but it does nothing more.

III.

The foregoing should be enough to end the debate. The ambiguity of the statutory text is simply not broad enough to allow one to read these sections as allowing the bondholders to commence a collection action without first obtaining leave of court. In resisting this conclusion, the dissent and the creditors also commit the further error of badly misconstruing the context and legislative history accompanying the 1988 amendments in support of their reading of sections 922(d) and 928(a).

As evidence that these provisions should be read to allow a creditor to bring a post-petition enforcement action against a debtor to enforce the terms of a bondholder agreement, the dissent points to one portion of the Senate Report that reads: "[T]he amendments insure that revenue bondholders receive the benefit of their bargain with the municipal issuer, namely, they will have unimpaired rights to the project revenue pledged to them." Id. at 12. When read in context, however, it is apparent that this statement was made in reference to the new section 928(a) and its elimination of the problems created by section 552 of the bankruptcy code, discussed above. See id. As I have already explained, section 928(a) does ensure that creditors receive the benefit of their bargain by securing their liens on future streams of pledged special revenues (and their right to protect their property interests in those revenues at the appropriate time and through the appropriate channels) despite the debtor's bankruptcy filing. Of course, it is true that a debtor's decision to discontinue making payments and to divert its revenues elsewhere might impair the security created by such liens. The risk that a debtor will misuse collateral exists in every bankruptcy case, municipal or otherwise. But that possibility gives us no license to rewrite section 922(d) to authorize the commencement of a judicial proceeding against the debtor without leave of the Title III or bankruptcy court. Rather, in such an event, the statute and the case law direct the creditor to seek and obtain relief from the stay to protect its interests. See 11 U.S.C. § 362(d); infra Part IV.

The dissent also points to the Senate Report's assertion that the "[r]easonable assurance of timely payment is essential to the orderly marketing of municipal bonds and notes and continued municipal financing." S. Rep. No. 100-506, at 21. Unlike the previous quote, this excerpt does refer to the new section 922(d). But in reading this passage to suggest that section 922(d) mandates the continued payment of pledged special revenues or to allow an enforcement action to achieve the same end, the dissent ignores the Senate's use of the qualifier "reasonable" before "assurance." More importantly, it ignores the larger context in which Congress passed the 1988 amendments. Both the Senate and House Reports note examples of municipalities electing to continue making payments to bondholders after filing for bankruptcy -- despite the practical difficulties created by section 552 of the bankruptcy code discussed above -- to ensure their creditworthiness. See id. at 6 (providing examples, including the San Jose School District and Medley, Florida); H.R. Rep. No. 100-1011, at 3 (1988) (discussing the San Jose School District); see also S. Rep. No. 100-506, at 25 ("[S]ection 552 may prevent troubled municipalities from giving the kind of assurances that are necessary for continued financing."). Along with section 928(a), section 922(d) facilitates voluntary payments from a municipal debtor -- and therefore a municipality's ability to give "reasonable assurance of timely payment" -- to a creditor by allowing a creditor in receipt of pledged special revenues to apply those revenues to outstanding debt.

The Reports' references to "payments," S. Rep. No. 100-506, at 13; H.R. Rep. No. 100-1011, at 7, and the Senate Report's subsequent statement that "[w]here a pledge of revenues survives under Section [928], it would be needlessly disruptive to financial markets for the effectuation of the pledge to be frustrated by an automatic stay," S. Rep. No. 100-506, at 21, must be understood in a similar light. And the dissent ignores the immediately succeeding sentence from the Senate Report, which states: "Further, the use of an automatic stay may be contrary to Section 904 and interfere with the government, affairs and the municipality's use or enjoyment of income producing property." Id. at 21. The reference to section 904 of the municipal bankruptcy code would make no sense under the preferred interpretation of section 922 tendered by the bondholders and the dissent.

IV.

I add three brief final thoughts. First, I note that the dissent's arguments regarding section 305 of PROMESA are adequately addressed in our recent opinion in Ambac Assurance Corp., 927 F.3d at 602–05. I do not rehash those arguments here.

Second, stay relief under section 362(d) of the bankruptcy code is not the paper tiger that the dissent makes it out to be. That section affords the bankruptcy or Title III court no discretion to decline a request for stay relief upon a showing of a "lack of adequate protection of an interest in property." See 11 U.S.C. § 362(d)(1) (stating that a bankruptcy court "shall grant relief from the stay" for "lack of adequate protection of an interest in property" (emphasis added)); see generally Fin. Oversight & Mgmt. Bd. for P.R. v. Ad Hoc Group of PREPA Bondholders (In re Fin. Oversight & Mgmt. Bd. for P.R.), 899 F.3d 13, 20 (1st Cir. 2018) ("[S]ection 362(d)(1) guards against the possibility that the automatic stay could deprive a creditor of its property interest by precluding the creditor from exercising any rights it possesses to protect that interest from destruction.").

Finally, I note that the application of the automatic stay provision to the bondholders' claims against the Commonwealth raises no new issues of constitutional dimension that would warrant a different reading of sections 922 and 928. Courts, including the U.S. Supreme Court, have time and again affirmed the constitutionality of section 362 of the bankruptcy code against Fifth Amendment Takings Clause claims. See, e.g., Wright v. Union Cent. Life Ins. Co., 311 U.S. 273, 278 (1940) ("Safeguards were provided to protect the rights of secured creditors, throughout the proceedings, to the extent of the value of the property. There is no constitutional claim of the creditor to more than that." (citations omitted)); United Sav. Ass'ns of Tex. v. Timbers of Inwood Forest Assocs., Ltd. (In re Timbers of Inwood Forest Assocs., Ltd.), 793 F.2d 1380, 1390 (5th Cir. 1986) ("In general, the Fifth Amendment requires only that the value of the secured position of a creditor be maintained during the stay."); Lend Lease v. Briggs Transp. Co. (In re Briggs Transp. Co.), 780 F.2d 1339, 1342 (8th Cir. 1985) ("The bankruptcy code's automatic stay . . . causes only a temporary delay of a creditor's right to enforce its lien on the collateral. . . . [The] suspension of the right to enforce a lien is within Congress's constitutional bankruptcy powers." (citations omitted)).

And as for the dissent's invocation of the Tenth Amendment, the Supreme Court -- more than eighty years ago and before section 922(d) even existed -- upheld the municipal bankruptcy code against such an attack. See United States v. Bekins, 304 U.S. 27, 51–52 (1938) ("The statute is carefully drawn so as not to impinge upon the sovereignty of the State. The State retains control of its fiscal affairs.").

V.

For the above-stated reasons, I support the denial of the creditors' petition for rehearing en banc.

-- Dissenting Opinion Follows --

LYNCH, <u>Circuit Judge</u>, dissenting from the denial of rehearing en banc. With the greatest respect for my colleagues, I dissent. I have grave doubts about the panel's holding and the analysis of both the panel and the concurrence as to the denial of en banc, and I believe that further review is warranted, if not by this court, then by the Supreme Court. At its core, this case is about whether, under municipal bankruptcy law, the government debtor must continue to pay pledged special revenues to special revenue bondholders during a bankruptcy proceeding (or, put another way, whether a debtor can elect not to pay, and order a fiscal agent not to pay, special revenue bondholders despite the indenture). This issue is of extraordinary importance: it goes well beyond the Title III proceedings in the Commonwealth as to both potential municipal and state defaults, affects special revenue bonds nationwide, and has Constitutional implications.

The petitioners are insurers ("the Insurers") of Puerto Rico Highway and Transportation Authority ("PRHTA") special revenue bonds secured by liens on pledged special revenues. They allege the Commonwealth has diverted these special revenues to uses not authorized by the terms of the bonds. Specifically, the Commonwealth stopped the making of payments from the reserve accounts associated with the bonds, taking the position that automatic stay provisions incorporated from the Bankruptcy Code into the Puerto Rico Oversight, Management, and Economic Stability Act ("PROMESA") barred such special revenue payments. The Commonwealth, by legislation, also ordered the fiscal agent for the special revenue bonds, the Bank of New York Mellon, "to halt payments to [PR]HTA bondholders."[3] Ambac Assurance Corp. v. Puerto Rico (In re Fin. Oversight & Mgmt. Bd. for P.R.), 927 F.3d 597, 601 (1st Cir. 2019). The petitioners sought relief, alleging that: under several provisions of the Bankruptcy Code, see 11 U.S.C. §§ 922(d), 928, and U.S. Constitutional requirements, the filing of the Title III petition does not operate as a stay against the application of pledged special revenues to these special revenue bondholders; such payments are required during the pendency of the Title III proceeding; and the Commonwealth's actions effectively have nullified their ability to collect the pledged revenues. It is estimated that the sums at issue are about $2.6 billion of the $4.5 billion in outstanding PRHTA bonds.

The panel opinion, from which further review is sought, holds that under Sections 362, 922(d), and 928 of the Bankruptcy Code, mandatory payments to PRHTA special revenue bondholders from the reserve accounts, and actions by those bondholders or insurers to enforce their liens on such revenues, are automatically stayed. Assured Guaranty Corp. v. Fin. Oversight & Mgmt. Bd. for P.R. (In re Fin. Oversight & Mgmt. Bd. for P.R.), 919 F.3d 121, 132-33 (1st Cir. 2019). As a result, during the Title III

[3] The recent panel opinion in Ambac Assurance Corp. v. Puerto Rico (In re Financial Oversight & Management Board for P.R.), 927 F.3d 597 (1st Cir. 2019), builds off of Assured Guaranty Corp. v. Financial Oversight & Management Board for P.R. (In re Financial Oversight & Management Board for P.R.), 919 F.3d 121 (1st Cir. 2019), in part, and I disagree with aspects of it as well.

proceeding, these bondholders cannot receive payment of special revenues promised to them at issuance unless the Commonwealth voluntarily makes such payment.[4] Id. One other option, which is not discussed by the opinion, is for the special revenue bondholders (or the subrogated insurers) to petition the district court to lift the stay as to their interests; in my view, it is not likely that Congress intended to impose such a burden on those bondholders, preferring instead to make the automatic stay inapplicable to start with.

I disagree with the panel opinion that the statutory exceptions to the stay are limited to giving the debtor the voluntary option of payment and disagree that the text is unambiguous. Any interpretation of the text of Section 922(d) and Section 928 of the Bankruptcy Code[5] requires resort to both context and

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[4] I do not address the issue of ownership of the reserve accounts, because, as the panel opinion correctly states, "the Insurers have failed to develop on appeal any argument on the PRHTA bondholders' property interest in the Reserve Account funds." Assured Guaranty, 919 F.3d at 127 n.6. I also do not address the Insurers' argument that they should prevail on the text of the stay exceptions alone because I view the text as ambiguous.

[5] Section 922 states, in relevant part:

> (a) A petition filed under this chapter operates as a stay, in addition to the stay provided by section 362 of this title, applicable to all entities, of --
>
> > (1) the commencement or continuation, including the issuance or employment of process, of a judicial, administrative, or other action or proceeding against an officer or inhabitant of the debtor that seeks to enforce a claim against the debtor; and

legislative history. That required analysis supports the Insurers' position: because payment of the special revenues pursuant to the relevant bond resolution(s) is mandatory during the bankruptcy proceeding (after deducting "necessary operating expenses" per Section 928(b)), bondholders can bring

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> (2) the enforcement of a lien on or arising out of taxes or assessments owed to the debtor.
>
> . . .
>
> (d) Notwithstanding section 362 of this title and subsection (a) of this section, a petition filed under this chapter does not operate as a stay of application of pledged special revenues in a manner consistent with section 92[8] of this title to payment of indebtedness secured by such revenues.

11 U.S.C. § 922. Section 922 refers to "section 927" rather than 928, but the panel opinion rightly notes that this appears a scrivener's error; this has been widely accepted, including by the parties in this case. Assured Guaranty, 919 F.3d at 130 n.10.

Section 928 provides:

> (a) Notwithstanding section 552(a) of this title and subject to subsection (b) of this section, 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.
>
> (b) Any such lien on special revenues, other than municipal betterment assessments, derived from a project or system shall be subject to the necessary operating expenses of such project or system, as the case may be.

11 U.S.C. § 928.

an action to enforce their liens if necessary without first having to seek relief from the automatic stay. The panel opinion, which stints on the analysis required by rules of construction, also conflicts with the persuasive view in In re Jefferson County, 474 B.R. 228 (Bankr. N.D. Ala. 2012), that "[t]he structure and intent of what Congress enacted by its 1988 amendments to chapter 9 [of the Bankruptcy Code] was to provide a mechanism whereby the pledged special revenues would continue to be paid uninterrupted," id. at 274.

My understanding of the statutes essentially preserves the status quo before the filing, and the benefit of the bargain between the issuer and bondholder, as to these special revenues; provides assurance for the massive and important municipal bond market; and supports the operation of local governments. Nothing in substantive municipal bankruptcy law excuses the debtor or any of its intermediaries from continued payment of special revenues, and the automatic stay does not apply to these special revenues due to the exceptions created by Sections 922 and 928.

I.

The procedural history and basic facts of this case are ably described in the panel opinion. See Assured Guaranty, 919 F.3d at 124-27. Before explaining why I disagree with the panel's analysis, however, some background on the statutory arrangement is necessary.

Title III of PROMESA incorporates by reference numerous provisions from the Bankruptcy Code. See

48 U.S.C. § 2161. These include the automatic stay provisions at 11 U.S.C. §§ 362(a)[6] and 922 (and the express exceptions in those provisions), and the

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[6] The automatic stay provision at Section 362 states, in relevant part:

> (a) Except as provided in subsection (b) of this section, a petition filed . . . operates as a stay, applicable to all entities, of --
>
> > (1) the commencement or continuation, including the issuance or employment of process, of a judicial, administrative, or other action or proceeding against the debtor that was or could have been commenced before the commencement of the case under this title, or to recover a claim against the debtor that arose before the commencement of the case under this title;
> >
> > (2) the enforcement, against the debtor or against property of the estate, of a judgment obtained before the commencement of the case under this title;
> >
> > (3) 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;
> >
> > (4) any act to create, perfect, or enforce any lien against property of the estate;
> >
> > (5) any act to create, perfect, or enforce against property of the debtor any lien to the extent that such lien secures a claim that arose before the commencement of the case under this title;
> >
> > (6) any act to collect, assess, or recover a claim against the debtor that arose before the commencement of the case under this title . . . .

11 U.S.C § 362(a).

provision regarding the "[p]ost petition effect of security interest" at 11 U.S.C. § 928.

Importantly, Section 922(d) and Section 928 were added to the Bankruptcy Code as part of the 1988 amendments to Chapter 9 of the Bankruptcy Code, to solve certain problems created by prior law in the area of municipal bankruptcy. See Pub. L. No. 100-597, 102 Stat. 3028, 3029 (codified at scattered sections of 11 U.S.C.). Here, I identify certain problems Congress was trying to solve, in the municipal bond market and in municipal bankruptcy, by enacting the 1988 amendments.

Before the 1988 amendments, concerns had been brought to Congress about the Bankruptcy Code's application to municipal bankruptcy, and the problems that prior amendments had caused. Chapter 9, which addresses municipal bankruptcy, had been substantially amended in 1976. See Act to Amend Chapter IX of the Bankruptcy Act, Pub. L. No. 94-260, 90 Stat. 315 (1976). It was amended again in 1978. See The Bankruptcy Reform Act of 1978, Pub. L. No. 95– 598, 92 Stat. 2549. The latter revision problematically incorporated by reference a number of concepts from the law of corporate bankruptcy into municipal bankruptcy law.[7] Id. § 901(a); 92 Stat. at 2621.

In making the revisions ten years later, Congress stated, "[b]ecause the worlds of commercial finance and municipal finance are so diverse, the simple

[7] A more minor revision to municipal bankruptcy law was made by the Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98-353, 98 Stat. 333.

incorporation by reference of the 1978 commercial finance concepts into the municipal bankruptcy arena simply did not work." See S. Rep. No. 100-506, at 3 (1988). The House Report to the 1988 amendments pointed out that a municipality is different than other debtors in bankruptcy, because "a municipality cannot simply go out of business" and "must continue to provide its residents with essential services." H.R. Rep. No. 100-1011, at 2 (1988). And so Chapter 9 "is designed just for municipalities, to keep them in existence." Id. Accordingly, both the Senate and House Reports for the 1988 amendments stated a need to fix "inconsistencies between bankruptcy law and principles of municipal finance." Id. at 3; accord S. Rep. No. 100-506, at 1.

Congress had been urged to make these amendments by a range of officials and groups including the Vice Mayor of San Jose, California (on behalf of the National League of Cities), the National Bankruptcy Conference, and the National Association of Bond Lawyers. H.R. Rep. No. 100-1011, at 1. In response, Congress then articulated several specific concerns stemming from the commercial concepts that had been incorporated into municipal bankruptcy law. One of the concerns was that, without the amendments, Section 552(b) of the Bankruptcy Code might "effectively destroy the distinction between general obligation debt and limited revenue obligation debt," in part by allowing "general creditors of the municipality to seek payment from the pledged revenues." S. Rep. No. 100-506, at 5.

Revenue bonds are bonds "issued to finance projects or programs . . . [such as] toll roads, water systems, sports and convention centers, health care facilities, sewer and waste water treatment facilities, power generating facilities, waste disposal facilities, or low and moderate income housing programs," and are paid through pledged revenue from the project or system. S. Rep. No. 100-506, at 4. By contrast, general obligation bonds are those "for which the general taxing power of the issuer is pledged to repay the bonds." Id. at 4-5. There are clear, well-delineated contrasts between these types of bonds. For revenue bonds, "bondholders cannot look to any other assets of the municipality for repayment," H.R. Rep. No. 100-1011, at 4, meaning that "the general taxpayers are usually not committed to repaying the [revenue] bonds or funding operational deficits through general tax revenues," S. Rep. No. 100-506, at 5. Accordingly, the rates on the different types of bonds can be different for the same municipality, because revenue bonds generally depend on the prospects of the project or system itself rather than the general creditworthiness of the municipality. So, the conversion of one type of bond into the other creates an obvious problem.

The Senate Report also stated the "real concern that revenues dedicated to the repayment of municipal and local obligations will be diverted to other purposes once a municipality or local government enter[s] bankruptcy." S. Rep. No. 100-506, at 5. That is exactly what happened here. The Report expressed concern about the possible unconstitutionality of invalidating such a lien under

Section 552(a).[8] In doing so, it cited two Supreme Court cases, Ashton v. Cameron County Water Improvement District No. 1, 298 U.S. 513 (1936), and United States v. Bekins, 304 U.S. 27 (1938). S. Rep. No. 100-506, at 6.

Congress articulated yet another concern about the operation of the automatic stay provision at Section 362 as to special revenue bonds. The Senate Report explained:

> The automatic stay of Bankruptcy Code Section 362 is extremely broad, preventing any post-petition collection activities against the debtor, including application of the debtor's funds held by a secured lender to secure indebtedness.
>
> This provision is overly broad in Chapter 9, requiring the delay and expense arising from a request for relief from the automatic stay to accomplish what many state [statutes] mandate: the application of pledged revenues

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[8] Section 552(a) provides that "[e]xcept as provided in subsection (b) of this section, property acquired by the estate or by the debtor after the commencement of the 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).

The Senate Report stated that New Section 928 was "intended to negate Section 552(a) in the municipal context," by "remov[ing]" the limitation of rights formerly allowed by Section 552(a) in the municipal revenue bond context (i.e., the termination of a pre-petition lien on pledged special revenues, contrary to some "state law and constitutional provisions"). S. Rep. No. 100-506, at 12-13.

> after payment of operating expenses to the payment of secured bonds. The automatic stay should specifically be inapplicable to application of such revenues.
>
> The Bankruptcy Court could retain the power to enjoin application of proceeds, however, upon a specific showing of need, for example, where a secured creditor was about to apply proceeds of a gross revenue pledge in a matter inconsistent with policies of the proposed new section.

Id. at 11 (emphasis and spacing added). Put simply, the prior law, as to the automatic stay, caused a problem in subjecting the special revenue payments made by municipalities to the bondholders, to the automatic stay. Congress wanted to solve that problem with the 1988 amendments. As to the solution, Congress expressly rejected forcing the bondholder to make a "request for relief" (that is, a lift-stay motion) from the automatic stay. Further, it wanted to keep the burden on the debtor to justify non-payment, and not on the special revenue bondholder: the Report continued that the debtor could seek to enjoin the "application of pledged revenues . . . to the payment of secured bonds" upon a "specific showing of need" based on a creditor's intent "to apply proceeds of a gross revenue pledge in a matter inconsistent with policies of the proposed new section."[9] Id. That is clearly not the situation

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[9] Taking the concurrence's assertion (whether accurate or not) that a lift-stay motion for cause is easily done, the same logic would extend to a municipal debtor's action to enjoin

here; there is no assertion that the Insurers were planning to apply special revenues in a way inconsistent with the statute.

In two consistent reports, Congress explained the problems it was trying to solve with the 1988 amendments, and I now turn to the text of the relevant statutes.

II.

A. The Statutory Text Requires Resort to Context and Legislative History

The panel opinion holds that the language in each of Sections 922(d) and 928(a) is unambiguous, and that therefore the court did not need to inquire further. Assured Guaranty, 919 F.3d at 129 ("Because the language of the statute is unambiguous . . . we find it unnecessary to turn to the legislative history."); id. at 132 ("[B]ecause we find the statute's language unambiguous, there is no need to rely on legislative history."). I disagree that the analysis can be so truncated here.

I agree, of course, that "[i]n statutory interpretation disputes, a court's proper starting point lies in a careful examination of the ordinary meaning and structure of the law itself." Food Mktg. Inst. v. Argus Leader Media, 139 S. Ct. 2356, 2364 (2019). And so I begin there. In doing so, I remain mindful that "[t]he plainness or ambiguity of statutory language is determined by reference to the language itself, the specific context in which that

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application of proceeds based on a "specific showing of need." S. Rep. No. 100-506, at 11.

language is used, and the broader context of the statute as a whole."[10] Robinson v. Shell Oil Co., 519 U.S. 337, 341 (1997). Statutory context is important, as always, because we have a "duty to construe statutes, not isolated provisions," and so I pay careful attention to context in analyzing the provisions at issue. Graham Cty. Soil & Water Conservation Dist. v. U.S. ex rel. Wilson, 559 U.S. 280, 290 (2010) (quoting Gustafson v. Alloyd Co., 513 U.S. 561, 568 (1995)).

First, Section 922(d) provides a limited exception to the automatic stay provisions for "application of pledged special revenues . . . to payment of indebtedness secured by such revenues." 11 U.S.C. § 922(d). The panel concluded that this exception unambiguously means that payment of special revenues to bondholders is permissible during the bankruptcy proceeding, but only when the debtor voluntarily chooses to make such a payment. It then held that the section authorizes bondholders who have received but not yet applied those revenues to the debt to go ahead and do so (as though that were the problem to be solved). See Assured Guaranty, 919 F.3d at 130.

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[10] See also King v. Burwell, 135 S. Ct. 2480, 2489 (2015) ("[O]ftentimes the meaning -- or ambiguity -- of certain words or phrases may only become evident when placed in context."). As the Supreme Court has said, "clear evidence of congressional intent may illuminate ambiguous text." Milner v. Dep't of Navy, 562 U.S. 562, 572 (2011); accord Azar v. Allina Health Servs., 139 S. Ct. 1804, 1814 (2019) ("[C]lear legislative history can illuminate ambiguous text." (internal quotation marks omitted)).

I disagree with the panel opinion about the likely meaning of Section 922(d), and at the least would find its text ambiguous. The statute begins: "Notwithstanding section 362 of this title and subsection (a) of this section . . . ." 11 U.S.C. § 922(d). Section 362(a) refers in part to "any act to create, perfect, or enforce any lien against property of the estate," id. § 362(a)(4) (emphasis added), and Section 922(a) similarly refers in part to the "enforcement of a lien," id. § 922(a)(2). The Supreme Court has explained that "in construing statutes, the use of such a 'notwithstanding' clause clearly signals the drafter's intention that the provisions of the 'notwithstanding' section override conflicting provisions of any other section." Cisneros v. Alpine Ridge Grp., 508 U.S. 10, 18 (1993). On the panel's narrow understanding, there is no conflict because the stay provisions do not prohibit the debtor from making voluntary payment. In my view, the use of the word "notwithstanding" makes it unlikely that, in Section 922(d), Congress intended only to allow the debtor to voluntarily pay the pledged revenues at the debtor's whim. I point out that, in general, the stay provisions do not refer to any voluntary actions taken by the debtor, as opposed to actions directly against the debtor.

Nor does the language support the panel's reading that the clause has to do with what the bondholder can do when it has received such a payment but (in essence) has not cashed it. So, my disagreement also extends to the panel's narrow interpretation of the word "application" in Section 922.[11] The statute does not use "application" as a term standing alone, but in reference to the "payment of indebtedness secured by such revenues." 11 U.S.C. § 922(d) (emphasis added). Even the section of Collier relied on by the panel and the concurrence accepts that "it can be argued that the word 'application' . . . means that the municipality must pay over to the creditor special revenues in the possession of the municipality." 6 Collier on Bankruptcy ¶ 922.05 (16th ed. 2018). A different bankruptcy treatise seemed to accept the Jefferson County view that "[Section] 922(d) applies not only to revenues in the hands of the trustee, but also requires the debtor to continue to pay over post-petition revenues for application in accordance with the indenture." 5 Norton Bankruptcy Law and Practice 3d § 90:13 (2019).

Beyond that, application of pledged revenues that a bondholder already holds is not and never was clearly barred by the automatic stay provisions, so that does not justify the panel's narrow reading of "application." See 11 U.S.C. § 904 (protecting "the debtor's use or enjoyment of any income-producing property" from "interfere[nce]"). So, this statutory language about application, when understood in context, may well be understood as allowing

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[11] The plain meaning of the full phrase is not luminously clear from the text alone; roughly contemporary dictionaries have quite broad definitions of "application." See, e.g., "Application," Black's Deluxe Law Dictionary (6th ed. 1990) (defining "application" as, in the "Payments" context, "[a]ppropriation of a payment to some particular debt"); "Application," Oxford English Dictionary (2nd ed. 1989) (defining "application" in numerous, and broad, ways).

enforcement of these particular liens, in situations like this where continued payment is not made according to the terms of the issuance. To be clear, I do not read the word "application" alone to mean to "commence a judicial proceeding." Rather, Section 922(d) as a whole can be read as allowing enforcement (through a judicial proceeding if necessary) by creating a prospective exception to the stay for the required continued payment of special revenues in accordance with the indenture. "Application . . . to the payment of indebtedness" is a mandatory process, on this understanding, and so the debtor can sue to enforce it as necessary.[12]

Second, Section 928(a) can be reasonably read more broadly than how the panel read it, that "consensual prepetition liens on special revenues will remain in place after the filing of the petition." Assured Guaranty, 919 F.3d at 128. The statute says that "special revenues acquired by the debtor after the commencement of the case shall remain subject" to such liens, 11 U.S.C. § 928(a) (emphasis added); this can plausibly be read as contemplating enforcement of the liens when necessary to forestall the debtor from diverting and subsequently misusing the pledged revenues, just as is happening here (taking the pleadings to be true). This interpretation would provide more protection to the lienholders without

[12] Deploying a motor vehicles/electric bikes/kayaks analogy, the concurrence warns of "exceed[ing] the license afforded by the relevant ambiguity" in the statute. I disagree that this is an apt analogy at all, nor does it eliminate the need to consider the legislative history and context. Nor am I "hunt[ing] the legislative record for bigger game" in my consideration of relevant extrinsic materials.

requiring recourse to a lift-stay motion (which I discuss further below).

Proximate statutory context supports this view. Section 928(b) provides that such "lien[s] on special revenues" "shall be subject to the necessary operating expenses of such project or system." Id. § 928(b). If continued payment of special revenues were merely voluntary during the pendency of a bankruptcy proceeding due to the automatic stay provisions, this carveout would have little practical effect; municipalities concerned about meeting the operating expenses of a project or system could simply choose not to pay pledged special revenues at all during the pendency of bankruptcy proceedings, with no concern for setting aside only the necessary operating expenses.

B. Legislative History of the 1988 Amendments Supports the Insurers' Position

Having shown there are different ways to read the language from the text alone, I turn back to the Senate and House Reports and, to a much lesser degree, submissions to the Senate Subcommittee on Courts and Administrative Practice regarding the 1988 amendments. For the latter category, I look in particular at statements and testimony by James W. Perkins, Lawrence P. King, and James E. Spiotto, because this testimony is referred to in the Senate Report.[13] S. Rep. No.100-506, at 2. Importantly,

[13] Though "excerpts from committee hearings" can be "among the least illuminating forms of legislative history," Advocate Health Care Network v. Stapleton, 137 S. Ct. 1652, 1661 (2017) (quoting N.L.R.B. v. SW Gen., Inc., 137 S. Ct. 929, 943 (2017)), formal submissions that correlate closely to the official

those submissions comport with statements in the reports, and with a reasonable reading of the terms in the eventual statute.[14] I first consider legislative history as related to specific words in the statutes, and then consider more closely the purposes of the 1988 amendments as expressed by Congress.[15]

The Congressional sources do not support the view that the term "application" only refers to the situation where a municipality wants to pay pledged revenues voluntarily but has not yet paid them to an indenture trustee. Nor do they support the views that "pledged revenues" only refers to such revenues that have already been received by an indenture trustee but not yet applied, or to such revenues that

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Congressional reports -- and are in fact cited by the Reports -- can still provide some value in discerning congressional intent.

[14] It is significant that one of the experts on whom Congress relied has taken the position that the panel opinion is incorrect (and previously took the position that the district court was incorrect in this case). See James Spiotto, The First Circuit Court of Appeals Ruling on 'Assured' Should be Reheard or Reversed; Recent Ruling Sends a Harsh Message to Municipal Bond Market, MuniNet Guide (Apr. 3, 2019), https://muninetguide.com/the-first-circuit-court-of-appeals-ruling-on-assured-should-be-reheard-or-reversed-recent-ruling-sends-a-harsh-message-to-municipal-bond-market (stating that the panel opinion "was contrary to all prior case law . . . by courts hearing Chapter 9 cases, the recognized commentaries on special revenues and the legislative history for the 1988 Amendments to the Federal Bankruptcy Code").

[15] By considering the "reliable light" shed on parts of the statutory scheme by the legislative history, Exxon Mobil Corp. v. Allapattah Servs., Inc., 545 U.S. 546, 568 (2005), this section gives proper respect to Congress.

the creditor itself has in hand and wants to apply to the debt.

Instead, the Senate Report states more broadly that, by the amendments, the automatic stay "is made inapplicable to the payment of principal and interest on municipal bonds paid from pledged revenues." Id. at 13 (emphasis added). The House Report is also explicit about payment:

> To help achieve a primary goal of the bill, new subsection (d) to section 922 states that the automatic stay of Bankruptcy Code section 362 does not operate to stay paying pledged revenues, consistent with new section 92[8] of the Bankruptcy Code, to the revenue bondholders holding liens on such revenues.

H.R. Rep. No. 100-1011, at 7 (emphasis added). The word "voluntarily" cannot be read into this reference to "paying."[16] "Consistent with [Section 928]" means, then, that payment of the "special revenues acquired

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[16] The Statement of the National Bankruptcy Conference explained this portion of the proposed amendments similarly to the Senate's conclusion: "Pledged revenues received after the commencement of the bankruptcy case would be applied first to the operating expenses of the system, project or function producing the revenues . . . before application to the indebtedness for which the revenues were pledged and only then to other lawful purposes." Bills Pertaining to Title 11 of the United States Code, The Bankruptcy Code Hearing on S. 1626, S. 1358, S. 1863, and S. 2279 Before the Subcomm. on Courts and Admin. Practice of the S. Comm. on the Judiciary, 100th Cong. 556 (1988). "Received" can only refer to receipt by the debtor here (who runs the project or system at issue), because the sentence allows for the application to the operating expenses first. See id. at 534-565.

by the debtor after the commencement of the case" would happen after the municipality deducts the "necessary operating expenses of [the] project or system." 11 U.S.C. § 928(b). Reading "application . . . to payment of indebtedness" as only referring to a situation where a creditor or indenture trustee already has the funds cannot be squared with the broader references to payment in the Reports.

Relatedly, as to the definition of "pledged revenues," the Senate Report states that pledged revenues "[i]n this context" "includes funds in the possession of the bond trustee as well as other pledged revenues." S. Rep. No. 100-506, at 13. The appellee PROMESA Board argues that the Report was unclear on this point, and so the statement does not cut either way. But "other pledged revenues" seems to mean what it says: all the rest of the pledged revenues that are not, at that time, "in the possession of the bond trustee." Id. So again, the legislative history does not support the view that yet-uncollected pledged revenues (to be paid to bondholders prospectively) are excised from the meaning of "pledged revenues" in the amendments. See 11 U.S.C. § 902(2) (defining "special revenues"). Nor does it support the view that the amendments only target already-paid installments held by the bondholders (or, in the same vein, already-escrowed payments to an indenture trustee). My views are consistent with the definition of "pledged revenues" in a municipal bond handbook. See The Handbook of Municipal Bonds 1295 (Sylvan G. Feldstein & Frank J. Fabozzi eds., 2012) (defining "pledged revenues" as "[r]evenues legally pledged to the repayment of a bond").

As to the legislative history demonstrating the relevant goals of the 1988 amendments, in its overview summarizing the "significant amendments" to the law made by the 1988 amendments, the Senate Report states that "the amendments insure that revenue bondholders [will] receive the benefit of their bargain with the municipal issuer, namely, they will have unimpaired rights to the project revenue pledged to them." S. Rep. No. 100-506, at 12. This statement, in my view, is general and not in reference only to one of the amended provisions, as the concurrence argues. Several experts who provided statements or testimony at the Senate subcommittee hearing made similar points to mine. See Bills Pertaining to Title 11 of the United States Code, The Bankruptcy Code Hearing on S. 1626, S. 1358, S. 1863, and S. 2279 Before the Subcomm. on Courts and Admin. Practice of the S. Comm. on the Judiciary, 100th Cong. 532 (1988) (statement of James E. Spiotto) ("[T]he bill preserves the bargain that was made by all the parties . . . ."); id. at 528 (statement of James W. Perkins) ("[T]he bill preserves the bargain that was made.").

Rights of revenue bondholders to special revenues are not "unimpaired" if the payments are not made but put off indefinitely, and are even more impaired if there is no guarantee that any of the pledged revenue will be paid, if at all, until the end of a bankruptcy proceeding. And they are certainly not "unimpaired" if, during the bankruptcy proceeding, the debtor can divert and spend the pledged revenues in ways unrelated to the necessary operating expenses of the project or system or the special revenue payment obligations. Further, as to the "bargain" struck between parties when revenue bonds are issued and sold, surely it involves the payment of the pledged revenues, not just giving the issuing municipality the option to pay or not during a bankruptcy proceeding (which may take years).

Next, the Senate Report stresses that "[r]easonable assurance of timely payment is essential to the orderly marketing of municipal bonds and notes and continued municipal financing." S. Rep. No. 100-506, at 21. This statement favors the bondholders' view. If Congress simply intended the amendments to prevent a (possibly unconstitutional) destruction of a lien, the panel's result would seem to subvert this intent. The panel's narrow understanding here also does little to support the "essential" "reasonable assurance" for creditors of "timely payment." A creditor, as the panel has it, would be left at the mercy of whether the debtor will decide to make voluntary payment (a highly unlikely scenario in many situations, as exemplified by the present case). Payment, in that event, cannot be said to be "timely" when municipalities, by their choices, can force the special revenue bondholders to wait for payment until the end of the bankruptcy proceeding. And I do not ignore the "reasonable" qualifier to "assurance," but cannot see that the mere allowance of voluntary payment would provide <u>any</u> real assurance that, when push comes to shove and a municipality files for bankruptcy, creditors will receive "timely payment" of pledged special revenues.[17]

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[17] The concurrence argues that I ignore the "larger context" of the amendments here, and points to examples in the Senate and House Reports about "municipalities electing to continue

Finally, the Senate Report states that "[w]here a pledge of revenues survives . . . it would be needlessly disruptive to financial markets for the effectuation of the pledge to be frustrated by an automatic stay."[18] Id. (emphasis added). Creating an exception to the stay that is limited only to a choice by a municipality of whether to continue payment would not prevent "disrupti[ons]" to the financial markets, contrary to Congress's clearly-stated intent to avoid such disruptions. Id.

C. PROMESA Section 305 Does Not Require A Narrower Reading

I disagree with the panel opinion, and with a later opinion building in part off of that opinion, that Section 305 of PROMESA (which closely resembles Section 904 of the Bankruptcy Code) requires that

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making payments to bondholders after filing for bankruptcy." The Senate Report gives examples of a city and a school district that "ignore[d] [Section 552] and continue[d] to pay the bondholders as originally promised," S. Rep. 100-506, at 6, and the House Report similarly describes "continued post-petition" payments made by the school district "in the same manner as if no bankruptcy ha[d] been filed," H.R. Rep. No. 100-1011, at 3. But the provision those municipalities ignored was only one that "terminated" the pledge. S. Rep. 100-506, at 12; see 11 U.S.C. § 552(a) ("[P]roperty acquired by the estate or by the debtor after the commencement of the case is not subject to any lien resulting from any security agreement entered into by the debtor before the commencement of the case.").

[18] "[E]ffectuation of the pledge" most likely means continued payment of the pledged revenues and enforcement of liens if needed to obtain payment. The payment of revenues to bondholders is what has been pledged between the parties when the bonds were issued and sold, in a straightforward sense, including by enforcement of the liens.

Section 922(d) be interpreted narrowly. See Assured Guaranty, 919 F.3d at 131; Ambac Insurance Corp., 927 F.3d at 602-03. Here, I believe Section 928 is relevant as well.

Section 305 of PROMESA states:

> Subject to the limitations set forth in subchapters I and II of this chapter, notwithstanding any power of the court, unless the Oversight Board consents or the plan so provides, the court may not, by any stay, order, or decree, in the case or otherwise, interfere with—
>
> (1) any of the political or governmental powers of the debtor;
>
> (2) any of the property or revenues of the debtor; or
>
> (3) the use or enjoyment by the debtor of any income-producing property.

48 U.S.C. § 2165. This court has stated that Section 305 is intended to be "respectful and protective of the status of the Commonwealth and its instrumentalities as governments, much like section 904 of the municipal bankruptcy code respects and protects the autonomy of states and their political subdivisions." Fin. Oversight & Mgmt. Bd. for P.R. v. Ad Hoc Grp. of PREPA Bondholders (In re Fin. Oversight & Mgmt. Bd. for P.R.) (PREPA), 899 F.3d 13, 21 (1st Cir. 2018). But Section 305 does not bar, for example, the Title III court from lifting the automatic stay, id.; instead, it generally protects the Commonwealth from the Title III court "imping[ing]

on [the Commonwealth's] autonomy" by "directly interfering." Id.; see Aurelius Capital Master, Ltd. v. Puerto Rico (In re Fin. Oversight & Mgmt. Bd. for P.R.), 919 F.3d 638, 648 (1st Cir. 2019).

First, I am not convinced that the prospective relief from the automatic stay granted by Sections 922 and 928 really constitutes the "interference" with which Section 305 is most concerned. As one commentator significantly points out: "The argument that section 904 requires a narrow interpretation is incorrect. If anything, it is the automatic stay which interferes with the normal workings of the affairs of a municipality. Section 922(d) makes the automatic stay inapplicable to revenue bonds and thereby limits the court's sphere of interference over municipal affairs."[19] David L. Dubrow, Chapter 9 of the Bankruptcy Code: A Viable Option for Municipalities in Fiscal Crisis?, 24 The Urb. Law. 539, 573 (1992). On my understanding of the statutory scheme, the debtor and the bondholders are left "with the same rights and obligations as prior to the Chapter 9 filing," id., limiting the Title III court's "interference" (if it can be called that) to merely preserving the situation that the buyer and seller agreed upon at the issuance of the special revenue bonds, including through enforcement of the liens if necessary. The narrow action by the Title III court would simply prevent "a marked change in the status quo ante undercutting creditor rights" by

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[19] Also, Congress, in the Senate Report, stated its concern that the automatic stay itself might "interfere with the government, affairs and the municipality's use or enjoyment of income producing property." S. Rep. No. 100-506, at 21.

allowing a debtor to make no special revenue payments during the bankruptcy proceeding, a result I believe is "unlikely to have been implemented by Congress without some discussion and expression of awareness." PREPA, 899 F.3d at 20.

Again, such special revenue bonds are generally based on a specific project or system and are not usually supported by broader property of the municipality (as general obligation bonds would be). In this way, the advance exceptions from the automatic stay are more like the bankruptcy or Title III court "merely stand[ing] aside by lifting the automatic stay, . . . allow[ing] the processes of state or territorial law to operate in normal course as if there were no bankruptcy," id. at 21, rather than a normal enforcement action by, for example, a general obligation creditor attempting to jump the line during the pendency of the bankruptcy proceeding.

Second, even if this action were viewed as "interference," some "interference" is plainly necessary under Section 928, as the Board accepts ("Section 928(b) ensures a municipal debtor may elect to apply revenues to pay necessary operating expenses subject to court determinations, in the event of a dispute, over which expenses are 'necessary.'" (emphasis added)). That is, where there is a dispute over how much of the revenue is actually "necessary" for the debtor to operate the project or system, the court must determine the proper amount -- and so must "interfere" in this limited way with the debtor's property, if the decided amount is lower than the debtor otherwise wishes to keep for the operating of the project or system. The Senate Report is clear that the court must be involved in making the necessity determination: "Prepetition operating expenses are included [in 'necessary operating expenses'] to the extent payment is deemed necessary by the court for this purpose." S. Rep. No. 100-506, at 22 (emphasis added). Limited "interference" to effectuate the goals of Congress in Section 922(d) would be equally appropriate in this narrow context. The specific stay exceptions, and Congress's intent in enacting them many years after the initial enactment of Section 904,[20] support the view that the stay exceptions construed here override Section 305 in specific and limited ways. See Nitro-Lift Techs., L.L.C. v. Howard, 568 U.S. 17, 21 (2012) (per curiam) (recognizing the "the ancient interpretive principle that the specific governs the general (generalia specialibus non derogant) [for] . . . laws of equivalent dignity"). That includes enforcement if necessary, where a debtor refuses to make the special revenue payments as promised by the relevant bond resolution(s).

Third and finally, even were I to assume arguendo that the Title III court cannot directly order the payment of the pledged revenues based on Section 305's prohibitions on that court's authority (meaning it cannot directly enforce the liens), I would still agree with the Jefferson County view that "resort to another court for the limited purpose of obtaining the [pledged revenues after deduction of necessary operating expenses] is potentially available should the [debtor] not voluntarily remit the [pledged

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[20] Congress was, of course, aware of Section 904 when it made the 1988 amendments; the Senate Report mentions that section multiple times. S. Rep. No. 100-506, at 6, 9, 21.

revenues]," Jefferson County, 474 B.R. at 272 (emphasis added), without first requiring a lift-stay motion to the Title III court. After all, Section 305 does not restrict non-Title III courts. See Ambac Insurance Corp., 927 F.3d at 605.

III.

There are three other arguments which support my view that merit further consideration.

A. Superfluity of Section 922(D)

In my view, the bondholders' superfluity argument regarding Section 922(d) has not been dealt with fully either in the original panel opinion or in the revision to the opinion.[21] I am not convinced by the attempt to shift the rationale for rejecting the superfluity argument from an erroneous reliance on a Seventh Circuit opinion to Collier. See Assured

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[21] Months after the opinion's initial issuance, after the filing of the en banc petition, and without further briefing, the revision changed the cited support for the rejection of a colorable legal argument, removed the only case citation in that rejection, and changed the phrase "was unclear" to "ample reason to believe." Errata, Dkt. No. 115, Assured Guaranty, 919 F.3d 121 (Nos. 18-1165; 18-1166).

The Seventh Circuit case initially cited was In re Hellums, 772 F.2d 379 (7th Cir. 1985) (per curiam). Several years before the 1988 amendments, this case noted that its holding "preserve[d] the right of a debtor to voluntarily re-affirm otherwise dischargeable obligations." Id. at 382. I see this as contrary to the panel opinion's view that, before the 1988 amendments, there was reason to believe that voluntary payment (and acceptance of that payment) was not allowed by Chapter 9 during the pendency of the municipal bankruptcy proceeding.

Guaranty, 919 F.3d at 132 ("Before Congress adopted the 1988 Amendments there was ample reason to believe that Section 362(a) stayed a creditor from accepting voluntary payments from a debtor or stayed a creditor from applying debtor funds already in the creditor's possession (as security) to the debt." (citing 6 Collier on Bankruptcy ¶ 362.03)). The general statement quoted from Collier [22] about "cashing of checks" is neither authoritative nor adequate. This section of Collier is not directed at, and indeed never refers to, municipal bankruptcies in particular.

At their core, the stay provisions address actions taken against the debtor, not voluntary actions by the debtor. Put simply, the stay provisions do not generally create restrictions on what the debtor may do voluntarily. See 11 U.S.C. § 362(a); id. § 922. The panel's understanding likely renders Section 922(d) superfluous. Even if one disagrees with my conclusion on superfluity, this argument is serious and I believe merits further consideration than that afforded in the panel opinion.

B. Constitutional Concerns and the Canon of Avoidance

The bondholders are correct in their en banc petition that the reasoning in the panel opinion raises concerns under the Takings Clause as well as

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[22] The parenthetical from the panel opinion is: "[I]nnocent conduct such as the cashing of checks received from account debtors of accounts assigned as security may be a technical violation [of Section 362(a)(6)]." Assured Guaranty, 919 F.3d at 132 (alterations in original) (quoting 6 Collier on Bankruptcy ¶ 362.03)).

under the Tenth Amendment. The Supreme Court has held that the "total destruction . . . of all compensable value of . . . liens, which constitute compensable property, has every possible element of a Fifth Amendment 'taking.'" United States v. Sec. Indus. Bank, 459 U.S. 70, 77 (1982) (quoting Armstrong v. United States, 364 U.S. 40, 48 (1960)). But the panel opinion does not mention those concerns or consider the canon of constitutional avoidance.

As a practical matter, the panel opinion allows the Commonwealth to divert and spend the pledged revenues during the pendency of the bankruptcy proceeding, unless the debtor suddenly changes its approach and voluntarily makes payments or the bondholders get the stay lifted for cause, an issue to which I return below. The PRHTA bondholders, and their insurers, may indeed "be left to stand by helplessly as the debtor spen[ds] the creditor's collateral," here the pledged revenues. PREPA, 899 F.3d at 20. The Supreme Court has cautioned us "to avoid an interpretation of a federal statute that engenders constitutional issues if a reasonable alternative interpretation poses no constitutional question," Gomez v. United States, 490 U.S. 858, 864 (1989), and my dissent has offered such a reading.[23]

Next, the opinion's holding is not limited to Puerto Rico, in that the interpreted language from the Bankruptcy Code in Sections 922 and 928 was

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[23] I appreciate that Ambac Insurance Corp., issued after Assured Guaranty, does not foreclose a constitutional challenge "in a separate action" because Section 305 does not restrict non-Title III courts. 927 F.3d at 605.

incorporated into PROMESA without alteration. As a result, there may well also be a constitutional avoidance issue as to the Tenth Amendment rights of states to which the holding will apply. Congress intended to preserve state power over regulation of revenue bonds. See H.R. Rep. No. 100-1011, at 7 (stating that Section 928 "leaves the legal and contractual limitations of revenue bonds and state law intact"). Further, the Senate Report noted Tenth Amendment concerns and the importance of "state law mandates." S. Rep. No. 100-506, at 6, 7. This too is not addressed by the panel or concurrence.[24]

C. Lift-Stay Motions Under Section 362

The panel opinion does not discuss one avenue it presumably leaves open for dissatisfied bondholders in the situation in which the PRHTA bondholders (and the Insurers) find themselves: for them to file a lift-stay motion for cause under Section 362. This section provides, in relevant part:

> On request of a party in interest and after notice and a hearing, the court shall grant relief from the stay provided under subsection (a) of this section, such as by terminating, annulling, modifying, or conditioning such stay -- (1) for cause, including the lack of adequate protection of an interest in property of such party in interest
>
> . . . .

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[24] It would have been helpful to receive briefing from the state attorneys general in this circuit regarding the effects of the holding on state law and regulation concerning special revenue bonds.

11 U.S.C. §362(d)(1). I simply do not see this as a realistic option here. And, though a lift-stay motion can be a powerful tool, it does not give the special revenue bondholders the protection that Congress intended.

In practice, there are inherent risks for the creditor in moving to lift the stay, including about its ability to meet a good cause requirement. And, on appeal, review is only for abuse of discretion. Fields Station LLC v. Capital Food Corp. of Fields Corner (In Re Capitol Food Corp. of Fields Corner), 490 F.3d 21, 23 (1st Cir. 2007). Relegating petitioners to seeking a lift-stay motion as the only recourse for the debtor's misappropriation of pledged revenues is contrary to what Congress intended. That result would not provide real assurance of timely payment, as necessary for "orderly marketing of municipal bonds and notes and continued municipal financing." S. Rep. No. 100-506, at 21. The panel's result imposes on bondholders the cost and inherent uncertainty of lift-stay litigation and the delay of payment of the pledged revenues, plus the general loss in value caused by that delay. See id. at 11 ("This [automatic stay] provision is overly broad in Chapter 9, requiring the delay and expense arising from a request for relief from the automatic stay . . . ." (emphasis added)).

IV.

I briefly emphasize my strong disagreement with the separate concurrence, beyond what I have already said. I make four points here.

First, as a general matter, the "central issue in this case" is <u>not</u> simply "whether the creditor-bondholders . . . may commence a judicial proceeding against a Commonwealth debtor to obtain a court order restoring the flow of post-petition pledged special revenues from the debtor"; it is whether a debtor -- here, the Commonwealth -- must continue to pay pledged special revenues to bondholders during a bankruptcy proceeding. The enforcement of that lien stems from the mandatory nature of the payment of the special revenues, due to their exemption from the stay. Treating the case as primarily about lien enforcement, should the debtor choose not to pay special revenue bondholders, ignores the broader scheme that Congress has set up for special revenues during municipal bankruptcy proceedings (and incorporated into PROMESA for the Commonwealth's Title III proceeding).

Second, I cannot see that the concurrence's narrow view of Section 922(d) -- that it merely allows special revenues held by a secured creditor or a trustee to be applied to the debt during the bankruptcy proceeding -- effectuates Congress's stated broader interests in, for example, allowing cash-strapped municipalities to raise money and preventing disruptions to the financial markets. The narrow view is surely <u>part</u> of the effect of this section, but hardly the complete effect.

Taking the concurrence's narrow view is damaging, because it will likely harm troubled municipalities' attempts to finance critical systems and projects, contrary to Congress's intent here. That is, potential buyers of revenue bonds with concerns about the general creditworthiness of a municipality (rather than concerns with the system or project itself) would lack any clear assurance of timely payment of the special revenues, beyond that the potential buyers could eventually apply funds they already held once the municipality went into bankruptcy. This gives scant to no assurance to a diligent prospective buyer. And contrary to the concurrence, the emphasized clause in the Senate Report -- "including application of the debtor's funds held by a secured lender to secure indebtedness" -- is best read as an example rather than a comprehensive category, given the following sentence's broader reference to "the application of pledged revenues after payment of operating expenses to the payment of secured bonds" with no qualification as to the holder of the special revenues. S. Rep. 100-506, at 11.

Third, the concurrence misconstrues my concern about the canon of constitutional avoidance. The view in the panel opinion and concurrence of the interplay between Section 362 and special revenues does raise Takings concerns. In a situation like this, where special revenues have been diverted (taking the pleadings as true), I cannot see that "the value of the secured position of a creditor [is] maintained during the stay." United Sav. Ass'ns of Tex. v. Timbers of Inwood Forest Assocs., Ltd. (In re Timbers of Inwood Forest Assocs., Ltd.) 793 F.2d 1380, 1390 (5th Cir. 1986).

Fourth, as explained above, my constitutional concerns also go the Tenth Amendment. This concern relates specifically to statutory amendments made forty years after the 1938 Supreme Court case cited by the concurrence, which is accordingly of little relevance. See The Bankruptcy Reform Act of 1978, Pub. L. No. 95–598, 92 Stat. 2549; see also Bekins, 304 U.S. at 51–52. The potential interference with state schemes for special revenues, and for municipal financing more generally, merits serious consideration.

* * *

For these reasons, I respectfully dissent and urge further review.

By the Court:

Maria R. Hamilton, Clerk

cc:
Hon. Laura Taylor Swain
Frances Rios de Moran, Clerk, United States District Court for the District of Puerto Rico
Heriberto J. Burgos-Perez
Ricardo F. Casellas-Sanchez
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Georg Alexander Bongartz
Laura Appleby
Aaron Maxwell Krieger
Steven Wilamowsky
Vincent J. Marriott III
Chantelle McClamb
Paul John Ricotta
William W. Kannel

APPENDIX E

STATUTORY PROVISIONS INVOLVED

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1. **11 U.S.C. § 362 provides in pertinent part:**

Automatic stay

(a) Except as provided in subsection (b) of this section, a petition filed under section 301, 302, or 303 of this title, or an application filed under section 5(a)(3) of the Securities Investor Protection Act of 1970, operates as a stay, applicable to all entities, of--

(1) the commencement or continuation, including the issuance or employment of process, of a judicial, administrative, or other action or proceeding against the debtor that was or could have been commenced before the commencement of the case under this title, or to recover a claim against the debtor that arose before the commencement of the case under this title;

(2) the enforcement, against the debtor or against property of the estate, of a judgment obtained before the commencement of the case under this title;

(3) 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;

(4) any act to create, perfect, or enforce any lien against property of the estate;

(5) any act to create, perfect, or enforce against property of the debtor any lien to the extent that such lien secures a claim that arose before the commencement of the case under this title;

(6) any act to collect, assess, or recover a claim against the debtor that arose before the commencement of the case under this title;

(7) the setoff of any debt owing to the debtor that arose before the commencement of the case under this title against any claim against the debtor; and

(8) the commencement or continuation of a proceeding before the United States Tax Court concerning a tax liability of a debtor that is a corporation for a taxable period the bankruptcy court may determine or concerning the tax liability of a debtor who is an individual for a taxable period ending before the date of the order for relief under this title.

* * * * *

(d) On request of a party in interest and after notice and a hearing, the court shall grant relief from the stay provided under subsection (a) of this section, such as by terminating, annulling, modifying, or conditioning such stay--

(1) for cause, including the lack of adequate protection of an interest in property of such party in interest;

(2) with respect to a stay of an act against property under subsection (a) of this section, if--

(A) the debtor does not have an equity in such property; and

(B) such property is not necessary to an effective reorganization;

(3) with respect to a stay of an act against single asset real estate under subsection (a), by a creditor whose claim is secured by an interest in such real estate, unless, not later than the date that is 90 days after the entry of the order for relief (or such later date as the court may determine for cause by order entered within that 90-day period) or 30 days after the court determines that the debtor is subject to this paragraph, whichever is later--

(A) the debtor has filed a plan of reorganization that has a reasonable possibility of being confirmed within a reasonable time; or

(B) the debtor has commenced monthly payments that--

(i) may, in the debtor's sole discretion, notwithstanding section 363(c)(2), be made from rents or other income generated before, on, or after the date of the commencement of the case by or from the property to each creditor whose claim is secured by such real estate (other than a claim secured by a judgment lien or by an unmatured statutory lien); and

(ii) are in an amount equal to interest at the then applicable nondefault contract rate of interest on the value of the creditor's interest in the real estate; or

(4) with respect to a stay of an act against real property under subsection (a), by a creditor whose claim is secured by an interest in such real property, if the court finds that the filing of the petition was part of a scheme to delay, hinder, or defraud creditors that involved either--

(A) transfer of all or part ownership of, or other interest in, such real property without the consent of the secured creditor or court approval; or

(B) multiple bankruptcy filings affecting such real property. If recorded in compliance with applicable State laws governing notices of interests or liens in real property, an order entered under paragraph (4) shall be binding in any other case under this title purporting to affect such real property filed not later than 2 years after the date of the entry of such order by the court, except that a debtor in a subsequent case under this title may move for relief from such order based upon changed circumstances or for good cause shown, after notice and a hearing. Any Federal, State, or local governmental unit that accepts notices of interests or liens in real property shall accept any certified copy of an order described in this subsection for indexing and recording.

* * * * *

2. **11 U.S.C. § 552 provides:**

Postpetition effect of security interest

(a) Except as provided in subsection (b) of this section, property acquired by the estate or by the debtor after the commencement of the case is not subject to any lien resulting from any security agreement entered into by the debtor before the commencement of the case.

(b)(1) Except as provided in sections 363, 506(c), 522, 544, 545, 547, and 548 of this title, if the debtor and an entity entered into a security agreement before the commencement of the case and if the security interest created by such security agreement extends to property of the debtor acquired before the commencement of the case and to proceeds, products, offspring, or profits of such property, then such security interest extends to such proceeds, products, offspring, or profits acquired by the estate after the commencement of the case to the extent provided by such security agreement and by applicable nonbankruptcy law, except to any extent that the court, after notice and a hearing and based on the equities of the case, orders otherwise.

(2) Except as provided in sections 363, 506(c), 522, 544, 545, 547, and 548 of this title, and notwithstanding section 546(b) of this title, if the debtor and an entity entered into a security agreement before the commencement of the case and if the security interest created by such security agreement extends to property of the debtor acquired before the commencement of the case and to amounts paid as rents of such property or the fees, charges, accounts, or other payments for the use or occupancy of rooms and other public facilities in hotels, motels, or other lodging properties, then such security interest extends to such rents and such fees, charges, accounts, or other payments acquired by the estate after the commencement of the case to the extent provided in such security agreement, except to any extent that the court, after notice and a hearing and based on the equities of the case, orders otherwise.

3. **11 U.S.C. § 904 provides:**

Limitation on jurisdiction and powers of court

Notwithstanding any power of the court, unless the debtor consents or the plan so provides, the court may not, by any stay, order, or decree, in the case or otherwise, interfere with--

(1) any of the political or governmental powers of the debtor;

(2) any of the property or revenues of the debtor; or

(3) the debtor's use or enjoyment of any income-producing property.

4. **11 U.S.C. § 922 provides:**

Automatic stay of enforcement of claims against the debtor

(a) A petition filed under this chapter operates as a stay, in addition to the stay provided by section 362 of this title, applicable to all entities, of--

(1) the commencement or continuation, including the issuance or employment of process, of a judicial, administrative, or other action or proceeding against an officer or inhabitant of the debtor that seeks to enforce a claim against the debtor; and

(2) the enforcement of a lien on or arising out of taxes or assessments owed to the debtor.

(b) Subsections (c), (d), (e), (f), and (g) of section 362 of this title apply to a stay under subsection (a) of this section the same as such subsections apply to a stay under section 362(a) of this title.

(c) If the debtor provides, under section 362, 364, or 922 of this title, adequate protection of the interest of the holder of a claim secured by a lien on property of the debtor and if, notwithstanding such protection such creditor has a claim arising from the stay of action against such property under section 362 or 922 of this title or from the granting of a lien under section 364(d) of this title, then such claim shall be allowable as an administrative expense under section 503(b) of this title.

(d) Notwithstanding section 362 of this title and subsection (a) of this section, a petition filed under this chapter does not operate as a stay of application of pledged special revenues in a manner consistent with section 927 of this title to payment of indebtedness secured by such revenues.

5. **11 U.S.C. § 928 provides:**

Post petition effect of security interest

(a) Notwithstanding section 552(a) of this title and subject to subsection (b) of this section, 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.

(b) Any such lien on special revenues, other than municipal betterment assessments, derived from a project or system shall be subject to the necessary operating expenses of such project or system, as the case may be.

6. **48 U.S.C. § 2141 provides in pertinent part:**

Approval of fiscal plans

(a) In general

As soon as practicable after all of the members and the Chair have been appointed to the Oversight Board in accordance with section 2121(e) of this title in the fiscal year in which the Oversight Board is established, and in each fiscal year thereafter during which the Oversight Board is in operation, the Oversight Board shall deliver a notice to the Governor providing a schedule for the process of development, submission, approval, and certification of Fiscal Plans. The notice may also set forth a schedule for revisions to any Fiscal Plan that has already been certified, which revisions must be subject to subsequent approval and certification by the Oversight Board. The Oversight Board shall consult with the Governor in establishing a schedule, but the Oversight Board shall retain sole discretion to set or, by delivery of a subsequent notice to the Governor, change the dates of such schedule as it deems appropriate and reasonably feasible.

(b) Requirements

(1) In general

A Fiscal Plan developed under this section shall, with respect to the territorial government or covered territorial instrumentality, provide a method to achieve fiscal responsibility and access to the capital markets, and--

(A) provide for estimates of revenues and expenditures in conformance with agreed accounting standards and be based on--

(i) applicable laws; or

(ii) specific bills that require enactment in order to reasonably achieve the projections of the Fiscal Plan;

(B) ensure the funding of essential public services;

(C) provide adequate funding for public pension systems;

(D) provide for the elimination of structural deficits;

(E) for fiscal years covered by a Fiscal Plan in which a stay under subchapters III or IV is not effective, provide for a debt burden that is sustainable;

(F) improve fiscal governance, accountability, and internal controls;

(G) enable the achievement of fiscal targets;

(H) create independent forecasts of revenue for the period covered by the Fiscal Plan;

(I) include a debt sustainability analysis;

(J) provide for capital expenditures and investments necessary to promote economic growth;

(K) adopt appropriate recommendations submitted by the Oversight Board under section 2145(a) of this title;

(L) include such additional information as the Oversight Board deems necessary;

(M) ensure that assets, funds, or resources of a territorial instrumentality are not loaned to, transferred to, or otherwise used for the benefit of a covered territory or another covered territorial instrumentality of a covered territory, unless permitted by the constitution of the territory, an approved plan of adjustment under subchapter III, or a Qualifying Modification approved under subchapter VI; and

(N) respect the relative lawful priorities or lawful liens, as may be applicable, in the constitution, other laws, or agreements of a covered territory or covered territorial instrumentality in effect prior to June 30, 2016.

* * * * *

7. **48 U.S.C. § 2165 provides:**

Limitation on jurisdiction and powers of court

Subject to the limitations set forth in subchapters I and II of this chapter, notwithstanding any power of the court, unless the Oversight Board consents or the plan so provides, the court may not, by any stay, order, or decree, in the case or otherwise, interfere with--

(1) any of the political or governmental powers of the debtor;

(2) any of the property or revenues of the debtor; or

(3) the use or enjoyment by the debtor of any income-producing property.