No.

IN THE
# Supreme Court of the United States

ANDALUSIAN GLOBAL DESIGNATED ACTIVITY COMPANY, ET AL.,

*Petitioners*,

v.

THE FINANCIAL OVERSIGHT AND MANAGEMENT BOARD FOR PUERTO RICO, ET AL.,

*Respondents*.

**On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The First Circuit**

## PETITION FOR A WRIT OF CERTIORARI


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## QUESTION PRESENTED

Federal bankruptcy law generally provides that a creditor's lien does not extend to "property acquired . . . after the commencement of the [bankruptcy] case." 11 U.S.C. § 552(a). But the Bankruptcy Code creates an important exception—designed to protect the value of the multitudes of secured loans across our economy—where the debtor previously pledged as loan collateral "property . . . acquired before the commencement of the case" and the "proceeds . . . of such property." *Id.* § 552(b)(1). In those circumstances, the secured creditor's lien "extends to such proceeds . . . acquired . . . after the commencement of the case," in recognition of the security interest for which the creditor bargained. *Ibid.* Here, respondent Employees Retirement System of the Government of the Commonwealth of Puerto Rico ("ERS") raised $2.9 billion in bonds, pledging as collateral ERS' entitlement to receive statutorily mandated employer contributions to ERS' pension system. ERS filed for bankruptcy nine years later.

The question presented is whether ERS' entitlement to those future payments, though not fixed and calculable at the time of bankruptcy, is "property," and the subsequent payments "proceeds," within the meaning of Section 552(b)(1). Contrary to the decisions of the Fourth, Seventh, Eighth, and Tenth Circuits, the First Circuit held that they are not, thereby endangering secured lending and municipal finance.

## PARTIES TO THE PROCEEDING

The parties to the proceedings below were as follows:

Andalusian Global Designated Activity Company; Glendon Opportunities Fund, LP; Mason Capital Master Fund LP; Oaktree Opportunities Fund IX (Parallel 2), L.P.; Oaktree Opportunities Fund IX, L.P.; Oaktree Value Opportunities Fund, L.P.; Oaktree-Forrest Multi-Strategy, L.L.C. (Series B); Ocher Rose, L.L.C.; and SV Credit, L.P. were defendants before the district court and appellants in the First Circuit in No. 19-1699. Altair Global Credit Opportunities Fund (A), LLC and Nokota Capital Master Fund, L.P. were defendants before the district court, but not appellants in the First Circuit in No. 19-1699.

Puerto Rico AAA Portfolio Target Maturity Fund, Inc.; Puerto Rico AAA Portfolio Bond Fund, Inc.; Puerto Rico AAA Portfolio Bond Fund II, Inc.; Puerto Rico Fixed Income Fund, Inc.; Puerto Rico Fixed Income Fund II, Inc.; Puerto Rico Fixed Income Fund III, Inc.; Puerto Rico Fixed Income Fund IV, Inc.; Puerto Rico Fixed Income Fund V, Inc.; Puerto Rico GNMA and U.S. Government Target Maturity Fund, Inc.; Puerto Rico Investors Bond Fund I; Puerto Rico Investors Tax-Free Fund, Inc.; Puerto Rico Investors Tax-Free Fund II, Inc.; Puerto Rico Investors Tax-Free Fund III, Inc.; Puerto Rico Investors Tax-Free Fund IV, Inc.; Puerto Rico Investors Tax-Free Fund V, Inc.; Puerto Rico Investors Tax-Free Fund VI, Inc.; Puerto Rico Mortgage-Backed & U.S. Government Securities Fund, Inc.; Tax-Free Puerto Rico Fund, Inc.; Tax-Free Puerto Rico Fund II, Inc.; and Tax-Free Puerto Rico Target Maturity Fund, Inc. were defendants before the district court and appellants in the First Circuit in No. 19-1700.

The Financial Oversight and Management Board for Puerto Rico, as representative for the Employees Retirement System of the Government of the Commonwealth of Puerto Rico, was plaintiff in the district court and appellee in the First Circuit in Nos. 19-1699 and 19-1700.

The Official Committee of Retired Employees of the Commonwealth of Puerto Rico was an interested party in the district court and appellee in the First Circuit in Nos. 19-1699 and 19-1700.

## CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6, counsel for petitioners certify as follows:

Andalusian Global Designated Activity Company is a designated activity company. Warlander SARL, Nez Perce LLC, Palomino Master Ltd., and Palomino Fund Ltd. are direct or indirect parent corporations of Andalusian Global Designated Activity Company. No publicly held corporation owns 10% or more of Andalusian Global Designated Activity Company's stock.

Glendon Opportunities Fund, L.P., is a limited partnership; it is not a "nongovernmental corporation" for which disclosure is required under Rule 29.6. Nevertheless, no publicly held corporation owns 10% or more of its stock.

Mason Capital Master Fund LP is a limited partnership; it is not a "nongovernmental corporation" for which disclosure is required under Rule 29.6. Nevertheless, no publicly held corporation owns 10% or more of its stock.

Oaktree Opportunities Fund IX, L.P., is a limited partnership; it is not a "nongovernmental corporation" for which disclosure is required under Rule 29.6. Nevertheless, no publicly held corporation owns 10% or more of its stock.

Oaktree Opportunities Fund IX (Parallel 2), L.P., is a limited partnership; it is not a "nongovernmental corporation" for which disclosure is required under Rule 29.6. Nevertheless, no publicly held corporation owns 10% or more of its stock.

Oaktree Value Opportunities Fund, L.P., is a limited partnership; it is not a "nongovernmental corporation" for which disclosure is required under Rule

29.6. Nevertheless, no publicly held corporation owns 10% or more of its stock.

Oaktree-Forrest Multi-Strategy, LLC (Series B), is a limited liability company. Oaktree-Forrest Multi-Strategy, LLC (Series B), is owned by a retirement plan and no corporation is a parent of Oaktree-Forrest Multi-Strategy, LLC (Series B). No publicly held corporation owns 10% or more of its stock.

Ocher Rose, L.L.C., is a limited liability company. Its sole members are King Street Capital, L.P., and King Street Capital Master Fund, Ltd. No publicly held corporation owns 10% or more of its stock.

Puerto Rico AAA Portfolio Bond Fund, Inc., is a corporation. It has no parent corporation and no publicly held corporation owns 10% or more of its stock. Its investment advisor is UBS Asset Managers of Puerto Rico, a division of UBS Trust Company of Puerto Rico. Its administrator, custodian, and transfer agent is also UBS Trust Company of Puerto Rico. UBS Trust Company of Puerto Rico is an affiliate of UBS AG, which is a public corporation whose stock is traded publicly.

Puerto Rico AAA Portfolio Bond Fund II, Inc., is a corporation. It has no parent corporation and no publicly held corporation owns 10% or more of its stock. Its investment advisor is UBS Asset Managers of Puerto Rico, and its administrator, custodian, and transfer agent is UBS Trust Company of Puerto Rico.

Puerto Rico AAA Portfolio Target Maturity Fund, Inc., is a corporation. It has no parent corporation and no publicly held corporation owns 10% or more of its stock. Its investment advisor is UBS Asset Managers of Puerto Rico, and its administrator, custodian, and transfer agent is UBS Trust Company of Puerto Rico.

Puerto Rico Fixed Income Fund, Inc., is a corporation. It has no parent corporation and no publicly held corporation owns 10% or more of its stock. Its investment advisor is UBS Asset Managers of Puerto Rico, and its administrator, custodian, and transfer agent is UBS Trust Company of Puerto Rico.

Puerto Rico Fixed Income Fund II, Inc., is a corporation. It has no parent corporation and no publicly held corporation owns 10% or more of its stock. Its investment advisor is UBS Asset Managers of Puerto Rico, and its administrator, custodian, and transfer agent is UBS Trust Company of Puerto Rico.

Puerto Rico Fixed Income Fund III, Inc., is a corporation. It has no parent corporation and no publicly held corporation owns 10% or more of its stock. Its investment advisor is UBS Asset Managers of Puerto Rico, and its administrator, custodian, and transfer agent is UBS Trust Company of Puerto Rico.

Puerto Rico Fixed Income Fund IV, Inc., is a corporation. It has no parent corporation and no publicly held corporation owns 10% or more of its stock. Its investment advisor is UBS Asset Managers of Puerto Rico, and its administrator, custodian, and transfer agent is UBS Trust Company of Puerto Rico.

Puerto Rico Fixed Income Fund V, Inc., is a corporation. It has no parent corporation and no publicly held corporation owns 10% or more of its stock. Its investment advisor is UBS Asset Managers of Puerto Rico, and its administrator, custodian, and transfer agent is UBS Trust Company of Puerto Rico.

Puerto Rico GNMA & U.S. Government Target Maturity Fund, Inc., is a corporation. It has no parent corporation and no publicly held corporation owns 10% or more of its stock. Its investment advisor is

UBS Asset Managers of Puerto Rico, and its administrator, custodian, and transfer agent is UBS Trust Company of Puerto Rico.

Puerto Rico Investors Bond Fund I is an investment trust; it is not a "nongovernmental corporation" for which disclosure is required under Rule 29.6. Nevertheless, it has no parent corporation and no publicly held corporation owns 10% or more of its stock. Its co-investment advisors are UBS Asset Managers of Puerto Rico and Popular Asset Management, a division of Banco Popular de Puerto Rico. Its administrator, custodian, and transfer agent is Banco Popular de Puerto Rico, Trust Division. Banco Popular de Puerto Rico is a public corporation whose stock is traded publicly.

Puerto Rico Investors Tax-Free Fund, Inc., is a corporation. It has no parent corporation and no publicly held corporation owns 10% or more of its stock. Its co-investment advisors are UBS Asset Managers of Puerto Rico and Popular Asset Management, and its administrator, custodian, and transfer agent is Banco Popular de Puerto Rico, Trust Division.

Puerto Rico Investors Tax-Free Fund II, Inc., is a corporation. It has no parent corporation and no publicly held corporation owns 10% or more of its stock. Its co-investment advisors are UBS Asset Managers of Puerto Rico and Popular Asset Management, and its administrator, custodian, and transfer agent is Banco Popular de Puerto Rico, Trust Division.

Puerto Rico Investors Tax-Free Fund III, Inc., is a corporation. It has no parent corporation and no publicly held corporation owns 10% or more of its stock. Its co-investment advisors are UBS Asset Managers of Puerto Rico and Popular Asset Management, and

its administrator, custodian, and transfer agent is Banco Popular de Puerto Rico, Trust Division.

Puerto Rico Investors Tax-Free Fund IV, Inc., is a corporation. It has no parent corporation and no publicly held corporation owns 10% or more of its stock. Its co-investment advisors are UBS Asset Managers of Puerto Rico and Popular Asset Management, and its administrator, custodian, and transfer agent is Banco Popular de Puerto Rico, Trust Division.

Puerto Rico Investors Tax-Free Fund V, Inc., is a corporation. It has no parent corporation and no publicly held corporation owns 10% or more of its stock. Its co-investment advisors are UBS Asset Managers of Puerto Rico and Popular Asset Management, and its administrator, custodian, and transfer agent is Banco Popular de Puerto Rico, Trust Division.

Puerto Rico Investors Tax-Free Fund VI, Inc., is a corporation. It has no parent corporation and no publicly held corporation owns 10% or more of its stock. Its co-investment advisors are UBS Asset Managers of Puerto Rico and Popular Asset Management, and its administrator, custodian, and transfer agent is Banco Popular de Puerto Rico, Trust Division.

Puerto Rico Mortgage-Backed & U.S. Government Securities Fund, Inc., is a corporation. It has no parent corporation and no publicly held corporation owns 10% or more of its stock. Its investment advisor is UBS Asset Managers of Puerto Rico, and its administrator, custodian, and transfer agent is UBS Trust Company of Puerto Rico.

SV Credit, L.P., is a limited partnership; it is not a "nongovernmental corporation" for which disclosure is required under Rule 29.6. Nevertheless, no publicly held corporation owns 10% or more of its stock.

Tax-Free Puerto Rico Fund, Inc., is a corporation. It has no parent corporation and no publicly held corporation owns 10% or more of its stock. Its investment advisor is UBS Asset Managers of Puerto Rico, and its administrator, custodian, and transfer agent is UBS Trust Company of Puerto Rico.

Tax-Free Puerto Rico Fund II, Inc., is a corporation. It has no parent corporation and no publicly held corporation owns 10% or more of its stock. Its investment advisor is UBS Asset Managers of Puerto Rico, and its administrator, custodian, and transfer agent is UBS Trust Company of Puerto Rico.

Tax-Free Puerto Rico Target Maturity Fund, Inc., is a corporation. It has no parent corporation and no publicly held corporation owns 10% or more of its stock. Its investment advisor is UBS Asset Managers of Puerto Rico, and its administrator, custodian, and transfer agent is UBS Trust Company of Puerto Rico.

## RULE 14.1(b)(iii) STATEMENT

Pursuant to this Court's Rule 14.1(b)(iii), the following proceedings are related to this case:

- *Fin. Oversight & Mgmt. Bd. for P.R.* v. *Andalusian Glob. Designated Activity Co.*, Nos. 17-bk-3283-KTS (Jointly Administered), 17-bk-3566-LTS (D.P.R.).

- *Fin. Oversight & Mgmt. Bd. for P.R.* v. *Andalusian Glob. Designated Activity Co.*, Nos. 19-1699, 19-1700 (1st Cir.) (judgment entered Jan. 30, 2020; rehearing petition denied Mar. 3, 2020).

- *Altair Glob. Credit Opportunities Fund (A), LLC* v. *United States*, No. 1:17-cv-00970 (Fed. Cl.).

Petitioners are aware of no additional proceedings in any court that are directly related to this case within the meaning of Rule 14.1(b)(iii).

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## PETITION FOR A WRIT OF CERTIORARI

Petitioners respectfully request a writ of certiorari to review the judgment of the United States Court of Appeals for the First Circuit.

## OPINIONS BELOW

The opinion of the court of appeals, Pet. App. 1a–38a, is reported at 948 F.3d 457. The district court's opinion, Pet. App. 51a–84a, is reported at 385 F. Supp. 3d 138.

## JURISDICTION

The district court had jurisdiction under 28 U.S.C. § 1331 and 48 U.S.C. § 2166(a)(1). The court of appeals had jurisdiction under 28 U.S.C. § 1291 and 48 U.S.C. § 2166(e)(1), (2). The court of appeals entered judgment on January 30, 2020, Pet. App. 48a, and denied timely petitions for rehearing on March 3, 2020, Pet. App. 92a–93a. On March 19, 2020, this Court entered an order extending the deadline to file any petition for a writ of certiorari due on or after that date to 150 days from the date of any order denying a timely petition for rehearing. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

## STATUTORY PROVISIONS INVOLVED

Relevant statutory provisions are set forth in the Appendix at 95a–104a.

## STATEMENT

This case presents a discrete yet highly consequential question of statutory construction on which the circuits are now divided. Four circuits have held that, where a debtor has pledged its "property" and the "proceeds . . . of such property" as loan collateral, Section 552(b)(1) of the Bankruptcy Code allows a security interest in those future "proceeds" to survive the filing of a bankruptcy petition. 11 U.S.C. § 552(b)(1). The First Circuit in this case, however, artificially narrowed Section 552(b)(1) as applicable *only* when those future proceeds are fixed and calculable at the time the petition is filed. That decision contravenes the statutory text—which nowhere mentions any "fixed" or "calculability" requirements—and makes no practical sense given the ubiquity of security interests in royalties, franchise payments, tax refunds, and other future revenue streams that are not fixed or calculable in advance. If allowed to stand, the decision below will undermine the certainty and predictability vital to capital markets, devalue scores of valid security agreements, and make it more difficult for commercial debtors and local governments alike to raise capital for urgent financial needs.

**1.** Secured lending is the practice of securing a loan by an interest in collateral, such as pledging a house as collateral for a mortgage, or tax revenues as collateral for a municipal bond. This "important feature"—*i.e.*, that creditors can recover the collateral following a default without being required to reduce the claim to judgment—makes secured loans especially attractive to creditors. U.C.C. § 9-601, cmt. 2 (Am. Law. Inst. & Unif. L. Comm'n 2017). As a result, secured loans are widespread and underpin roughly $4

trillion of U.S. transactions each year. Com. Fin. Ass'n Educ. Found., *2019 Secured Finance: Market Sizing & Impact Study Extract Report* at 6 (June 2019), https://tinyurl.com/y5wwhomc (all Internet sites last visited July 29, 2020).

In recognition of the critical importance of secured lending to our financial markets, the Bankruptcy Code "'prescribes a number of special rights and protections for the holders of secured claims'" to protect those claims from losing value during bankruptcy proceedings. *In re Treco*, 240 F.3d 148, 159–60 (2d Cir. 2001). These include giving secured creditors first-priority administrative claims for any diminution in the value of their collateral during the pendency of the automatic stay, *see* 11 U.S.C. § 507(b), authorizing relief from the automatic stay where a secured creditor lacks adequate protection in collateral, *id.* § 362(d), and requiring that a reorganization plan provide secured creditors with at least the value of their collateral, to qualify as "fair and equitable," *id.* § 1129(b)(2)(A).

The Bankruptcy Code also protects a creditor's security interest in the debtor's pledged collateral itself. Generally, the filing of a bankruptcy petition cuts off consensual liens on any "property acquired . . . after the commencement of the [bankruptcy] case," 11 U.S.C. § 552(a)—that is, such "postpetition" property cannot be claimed in satisfaction of the debt owed the creditor. Section 552(b) creates an important exception to that rule, however, designed to "'balance[ ] the Code's interest in freeing the debtor of [pre-bankruptcy] obligations with a secured creditor's right to maintain a bargained-for interest in certain items of collateral,'" *In re Days Cal. Riverside Ltd. P'ship*,

27 F.3d 374, 375 (9th Cir. 1994). Under that exception, a bankruptcy petition does not cut off a secured creditor's lien on the "proceeds" of pledged property if the lien covers both the "property of the debtor acquired before the [bankruptcy petition is filed]" and the "proceeds . . . of such property." 11 U.S.C. § 552(b)(1). In short, a secured creditor is entitled to "postpetition" *proceeds* on pledged property so long as the terms of the lien encompass that property and its proceeds.

**2.** Petitioners are the current owners of bonds that respondent Employees Retirement System of the Government of the Commonwealth of Puerto Rico ("ERS") issued in 2008 to secure much-needed pension financing. Under the unambiguous terms of the agreement, ERS backed its bonds with both its statutory entitlement to receive employer contributions to the pension system and the contributions themselves.

**a.** Established by the Puerto Rico government in 1951, ERS is a trust and independent government agency that provides pensions and other retirement benefits to employees of "the Government of Puerto Rico, or any public enterprise, or any municipality." 3 L.P.R.A. § 763(7); *see id.* §§ 761, 775.

For most of its existence, ERS has received contributions from employers and employees and used those contributions to pay benefits to retirees. Pet. App. 11a. Prior to legislation that modified the pension system, each year ERS received contributions from the Commonwealth that were appropriated through its annual budget, *see* Pet. App. 11a, and contributions directly from other public employers, *see* Pet. App. 71a–72a. By statute, ERS was entitled to receive a

percentage of each public employer's payroll as a base contribution, 3 L.P.R.A. § 787f; a pro rata "Uniform Contribution" based on the employer's share of total employer contributions that year, *id.* § 787q; and a supplemental contribution based on the number of the employer's pensioners, *see* Hybrid Defined Contribution Program—Amendment § 38, 2013 P.R. Laws 39, 92–93 (noted in 3 L.P.R.A. § 761 "Special Provisions"). These employer contributions totaled hundreds of millions of dollars annually between 2008 and 2016. Ernst & Young, *PROMESA Section 211 Report on the Puerto Rico Retirement Systems* 21, Ex. 12 (Sept. 2019), https://tinyurl.com/y8xa9uep. Public officials faced stiff penalties for failing to pay the required contributions. *See* 3 L.P.R.A. § 781a(a), (e), (f).

**b.** ERS' benefit obligations eventually outpaced required contributions by approximately $9.9 billion. Pet. App. 106a. So, in 2008, ERS sought to secure financing by issuing $2.9 billion in bonds. Pet. App. 106a–07a. Puerto Rico law authorized ERS to pledge any "assets of [ERS]" as collateral to "secur[e] . . . debt." 3 L.P.R.A. § 779(d) (2008). To attract investors, ERS secured the bonds with its valuable "statutory right to receive Employers' Contributions." Pet. App. 106a (Bond Resolution); *see also* Pet. App. 119a. ERS characterized this entitlement as a "legal asset" of ERS that "may be pledged to secure" its debt. Pet. App. 106a.

The Bond Resolution further defined the bonds' "Pledged Property" as including (1) "[a]ll Revenues"—meaning "[a]ll Employers' Contributions received by [ERS]," including "the contributions paid *from and after the date hereof* that are made by the Employers"; (2) "[a]ll right, title and interest of [ERS] in and to

Revenues, and all rights to receive the same"; and (3) "[a]ny and all cash and non-cash proceeds . . . from any of the Pledged Property." Pet. App. 117a–19a, 123a–24a (emphasis added). Relying on ERS' pledge of employer contributions as collateral, petitioners and other investors purchased ERS' bonds.

**c.** Despite this large cash infusion from petitioners and other investors, ERS continued to experience financial troubles, as did Puerto Rico and its other instrumentalities. In 2013, the Puerto Rico legislature responded by freezing active employees' accrual of pension benefits. Pet. App. 13a. To ensure funding for previously accrued benefits, the legislature continued to require that employer contributions "remain in effect." 3 L.P.R.A. § 761a; *see also* Pet. App. 13a.

In 2016, as Puerto Rico's fiscal problems mounted, Congress enacted the Puerto Rico Oversight, Management, and Economic Stability Act ("PROMESA"), Pub. L. No. 114-187, 130 Stat. 549 (codified at 48 U.S.C. §§ 2101–2241). Title III of PROMESA authorizes a newly created Financial Oversight and Management Board for Puerto Rico ("Board") to "file for federal bankruptcy protection" on behalf of Puerto Rico or its instrumentalities. *Fin. Oversight & Mgmt. Bd. for P.R.* v. *Aurelius Inv., LLC*, 140 S. Ct. 1649, 1655 (2020); *see* 48 U.S.C. §§ 2121(b), (d), 2124(j), 2162. PROMESA expressly incorporates many provisions of the federal Bankruptcy Code—including 11 U.S.C. § 552—to govern Title III proceedings. *See* 48 U.S.C. § 2161(a).

**3.** On May 21, 2017, the Board filed a Title III petition on behalf of ERS. Pet. App. 66a. Under PROMESA, that petition triggered an automatic stay

of any debt-related litigation against ERS. *See* 11 U.S.C. § 362; 48 U.S.C. § 2161(a). Petitioners moved for relief from the stay pursuant to 11 U.S.C. § 362(d), contending that their security interest in future employer contributions was not adequately protected. *See In re Fin. Oversight & Mgmt. Bd. for P.R.* ("*ERS I*"), 914 F.3d 694, 708 (1st Cir. 2019); Mot. of Secured Creditors for Adequate Protection & for Relief from the Automatic Stay at 19–27, *In re Fin. Oversight & Mgmt. Bd. for P.R.*, No. 17-bk-03566 (D.P.R. May 31, 2017), ECF 26.[1] The parties jointly resolved that motion by stipulating that ERS would file a separate adversary proceeding—the subject of this petition—to determine the "validity, priority, extent and enforceability" of petitioners' liens. *ERS I*, 914 F.3d at 708.

ERS filed the stipulated proceeding and was initially granted partial summary judgment. *In re Fin. Oversight & Mgmt. Bd. for P.R.*, 590 B.R. 577, 583 (D.P.R. Bankr. 2018). The district court held that petitioners did not have a "perfected" security interest in any "Pledged Property" because the bond filing statement did not adequately describe the collateral. *Id.* at 589, 598. The First Circuit reversed in an expedited appeal, holding that subsequent amendments to the

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[1] Shortly after the bondholders' motion was filed, the Puerto Rico legislature stopped requiring employer contributions to ERS and instead required employers to make the same contributions to the Commonwealth's general fund, which then paid the contributions to employees instead of ERS. Con. H.R. Res. 188, 18th Legislative Assemb., 2017 P.R. Laws Act 106, § 2.4(e); *see also* Pet. App. 13a–14a. Petitioners have challenged that amendment and sought to protect their security interest in the contributions in separate litigation that has been stayed pending resolution of this case. *See* Pet. App. 14a n.4.

initial bond filing statement cured the defective collateral description. *ERS I*, 914 F.3d at 719. The court of appeals then remanded for the district court to determine whether petitioners hold "valid, enforceable, attached, perfected, first priority liens on and security interest in the Pledged Property." *Id.* at 720.

On remand, the parties jointly asked the district court to decide an issue that had previously been briefed, but not resolved, on summary judgment—*viz.*, whether Section 552 severed petitioners' lien on future employer contributions. Pet. App. 58a–59a. The district court granted summary judgment to ERS, holding that "the contributions acquired post-petition were not proceeds of ERS' inchoate pre-petition right to receive future contributions." Pet. App. 77a, 84a. The court reasoned that, because "ERS has no right to collect" any contribution until "post-petition computations are performed based upon post-petition facts"—such as the contributing employer's payroll—"the proceeds of that right are therefore the proceeds of post-petition property," not prepetition property. Pet. App. 73a.

**4.** Petitioners timely appealed, and the First Circuit affirmed. Pet. App. 16a, 38a. The panel held that ERS' statutory entitlement to employer contributions "constituted merely an expectancy and not a property 'right'" under Section 552(b)(1) because the amount of any subsequent contributions was not fixed and calculable at the time of ERS' bankruptcy petition. Pet. App. 20a. The panel reasoned that the contribution amounts "could not be determined as of the petition date," "depended on work occurring on or after the pe-

tition date," and "might [be] reduce[d] (or, by implication, eliminate[d])" by the Puerto Rico legislature. Pet. App. 20a–21a.

For the same reasons, the panel rejected petitioners' argument that postpetition employer contributions were "proceeds" of prepetition property within the meaning of Section 552(b)(1). Because "such Contributions only become receivables after the employers' employees actually performed the work necessary for payroll to be calculated," the panel concluded, "there were no . . . proceeds of . . . any prepetition receivables." Pet. App. 29a.

In so ruling, the First Circuit expressly declined to follow precedent from other circuits. It rejected the Tenth Circuit's decision in *In re Tracy Broadcasting Corp.*, 696 F.3d 1051 (10th Cir. 2012)—which involved a right to proceeds from a hypothetical future sale of an FCC license—as "not binding on us." Pet. App. 24a n.9. And it refused to apply the Fourth Circuit's decision in *United Virginia Bank* v. *Slab Fork Coal Co.*, 784 F.2d 1188 (4th Cir. 1986), on the basis that it involved a contractual right to future payments rather than a statutory one. Pet. App. 22a.

The First Circuit also held that Section 928's preservation of liens on postpetition "special revenues," 11 U.S.C. § 928(a), did not cover petitioners' lien on ERS' employer contributions because those contributions "derived" from "employee labor and statutory obligations," rather than from ERS' provision of pension benefits. Pet. App. 33a–34a.

**5.** The full court of appeals, with Judges Torruella and Barron recused, denied a timely rehearing petition. Pet. App. 93a. That same day, the panel issued

an Errata Sheet clarifying that it was not deciding the validity of petitioners' liens regarding other prepetition contributions. Pet. App. 43a. The panel did not amend its decision in any other way.

## REASONS FOR GRANTING THE PETITION

This Court's review is warranted because the First Circuit's decision conflicts with the decisions of four other circuits regarding the scope of an immensely important provision of the Bankruptcy Code that affects a wide swath of security interests. The decision below also upends decades of settled bankruptcy law, undermining creditors' bargained-for rights in secured loans and ultimately making it harder for debtors—especially local governments—to obtain financing secured by future revenues.

The Bankruptcy Code generally gives debtors a "fresh start" by cutting off liens on any *property* debtors acquire after filing for bankruptcy. *In re Bumper Sales, Inc.*, 907 F.2d 1430, 1436 (4th Cir. 1990); *see* 11 U.S.C. § 552(a). But Section 552(b) sets forth an exception—critical to the vitality of secured-lending markets—for the *proceeds* of pledged property that are acquired after the bankruptcy petition is filed. 11 U.S.C. § 552(b)(1). So long as a creditor has bargained for both the "property of the debtor" and the "proceeds . . . of such property," *ibid.*, as collateral, Section 552(b)(1) honors the "creditor's rights to maintain a bargained-for interest" in such postpetition proceeds, and permits the creditor to recover those proceeds as satisfaction for the debt it is owed, *In re Bering Trader, Inc.*, 944 F.2d 500, 502 (9th Cir. 1991).

The First Circuit significantly narrowed this exception by grafting onto it two requirements nowhere found in the statute's text. The court of appeals ruled

that, as a matter of federal statutory construction, "property" and "proceeds" must be "fixed" and calculable at the time of the bankruptcy petition to fall within the meaning of Section 552(b)(1). Pet. App. 23a–24a. That rule, however, would nullify *most* security interests in future revenue streams, which typically are not fixed and calculable in advance.

The First Circuit's imposition of these atextual requirements directly conflicts with the decisions of four other circuits, which have held that Section 552(b)(1) encompasses security interests indistinguishable from petitioners' liens here. *See United Va. Bank* v. *Slab Fork Coal Co.*, 784 F.2d 1188, 1191 (4th Cir. 1986); *In re Fullop*, 6 F.3d 422, 429 (7th Cir. 1993); *In re Sunberg*, 729 F.2d 561, 562 (8th Cir. 1984); *In re Tracy Broad. Corp.*, 696 F.3d 1051, 1059 (10th Cir. 2012). Like ERS' entitlement to future employer contributions, the right to future payments in these cases depended on postpetition activities or legislative grace and concerned future payments that could not be calculated in advance. These circuits have uniformly rejected the view, embraced by the First Circuit, that such a right is "too remote" to fall within the meaning of Section 552(b)(1). *Tracy*, 696 F.3d at 1059. Thus, the decision below abruptly departs from well-settled bankruptcy law and creates the anomaly that the fundamental statutory terms "property" and "proceeds" in Section 552(b)(1) now mean one thing in the First Circuit, and quite another thing in other circuits and in other provisions of the Bankruptcy Code.

The practical consequences of the decision below are also staggering. As explained below, trillions of dollars of loans each year are backed by rights to similar future revenues, including $121 billion backed by

credit-card debt and much of the $3.8 trillion municipal bond market. *See infra* 28–33; S&P Global Ratings, *Ten Years After the Financial Crisis, Global Securitization Lending Transformed by Regulation and Economic Growth* at 5 (July 21, 2017), https://tinyurl.com/ybmeks8p. A broad range of industries critically relies on secured financing backed by rights to future revenue streams that are not fixed and calculable in advance—including: music and pharmaceutical companies pledging rights to future license and patent royalties; oil, gas, and farming operations pledging rights to future products and profits; and hotels and tech startups pledging rights to future sales. *See infra* 28–29. Local governments likewise commonly pledge future revenues as collateral to raise emergency funds. *See*, *e.g.*, Ilya Perlovsky & Tom DeMarco, Fidelity Capital Markets, *Overview of the Taxable Municipal Market* at 7 (Summer 2018), https://tinyurl.com/yxrxhr9x. The court of appeals' ruling not only renders many of these enormously valuable existing security interests worthless in the event of bankruptcy, but also makes it more difficult for a would-be debtor to obtain a secured loan on what are often its most valuable assets and thereby to avoid bankruptcy entirely.

This Court's review is urgently needed to resolve this circuit split, restore uniformity to the federal bankruptcy laws, and avoid destabilizing secured lending and municipal financing.

## I. THE DECISION BELOW CREATES AN INTOLERABLE CIRCUIT SPLIT ON THE SCOPE OF SECTION 552(B)(1) OF THE BANKRUPTCY CODE.

The First Circuit's holding that Section 552(b)(1) applies only to "property" and "proceeds" that are

fixed and calculable at the time a bankruptcy petition is filed directly conflicts with the decisions of four other circuits. That circuit conflict is especially intolerable in light of the Constitution's requirement of "uniform Laws on the subject of Bankruptcies." U.S. Const. art. I, § 8, cl. 4.

### A. Four Circuits Have Held That Section 552(b)(1) Encompasses An Entitlement To Future Payments That Are Not Fixed And Calculable Prepetition.

The Fourth, Seventh, Eighth, and Tenth Circuits have held that an entitlement to receive future payments falls within Section 552(b)(1) even where those future payments are not fixed and calculable at the time the debtor files for bankruptcy.

In *Slab Fork Coal*, the Fourth Circuit held that Section 552(b)(1) encompasses a contractual right to receive future payments from the sales of yet-to-be-mined coal. 784 F.2d at 1191. The court of appeals reasoned that, because "the pre-petition lien . . . covered the contract *and such proceeds* as might be derived from that contract," and the contract called for future "payment for the coal received . . . post-petition," both the contract and "the rights" to proceeds under it "were . . . intangible rights . . . subject to [the creditor's] lien" under Section 552(b)(1). *Id.* at 1190–91. Even though the "coal had to be supplied . . . before any right to payment arose," and the amount or price of the coal could not be determined in advance, Section 552 did not sever the lien because "that is true for all payments under the contract, whether generated pre-petition or post-petition." *Id.* at 1191. The Fourth Circuit explained that "[n]o change in the right to payment . . . was brought about by the filing of a bankruptcy petition, where the underlying asset and

all proceeds therefrom were subject to a valid pre-petition security interest." *Ibid*.

In *Fullop*, the Seventh Circuit held that Section 552(b)(1) encompasses an entitlement to a portion of, and sales from, oil and gas extracted in the future. 6 F.3d at 429. There, the asserted "property at issue" was a "working interest" in an oil and gas lease, and "the proceeds" were the sales of "post-petition oil runs." *Ibid.* The court of appeals acknowledged that the working interest itself constituted an entitlement only to "oil and gas that *may* be produced," and did not guarantee either the presence of oil or gas or any future sales. *Id.* at 425 (emphasis added). And the court noted that arguably "the extracted oil and its proceeds at issue were actually acquired by the debtor after he filed the petition." *Id*. at 429. Nevertheless, because the security agreement created a lien on both the working interest and its proceeds, the later-extracted oil and its proceeds "remained subject to the pre-petition lien as the product or profits of the working interest." *Ibid.*

In *Sunberg*, the Eighth Circuit held that Section 552(b)(1) encompasses an entitlement to future benefits from a federal payment-in-kind ("PIK") program. 729 F.2d at 562. The court of appeals reasoned that the security interest expressly covered the debtor's "general intangibles" and proceeds thereof, and thus was "intended" to cover future PIK shipments of corn to the debtor. *Ibid.* Acknowledging that "[t]he parties may not have foreseen the degree of PIK benefits," the court dismissed this concern because "the same can be said of most collateral acquired after a security agreement is entered." *Id.* at 562–63. The Eighth Circuit also rejected the view that Section 552(b)(1) did not

apply because USDA regulations put various "restrictions on the nature and form" of assignment of PIK benefits. *Id.* at 563. Because the regulations did not "prevent one who is entitled to the benefits from pledging the benefits as security on loans," those regulations had no bearing on whether the pledged entitlement fell within Section 552(b)(1). *Ibid.*

In *Tracy*, the Tenth Circuit considered whether Section 552(b)(1) encompasses an FCC licensee's "right to [receive] the proceeds of" a future sale of its FCC license. 696 F.3d at 1058. The bankruptcy and district courts had ruled that "any such 'right' was too remote" to fall within Section 552(b)(1), because it was based on the "contingencies" that there would be "an agreement to transfer the license" and FCC "approval of the transfer." *Id.* at 1059. But the Tenth Circuit reversed, concluding that there could "be no dispute" that the right to proceeds of a future license sale was a "property interest" in the form of "a general intangible." *Id.* at 1060. The court of appeals explained that the lower courts had ignored "commercial realities": "If the security interest could not attach before there was a contract for the sale of the license, the interest would have little value, particularly when the sale results from financial problems of the licensee, the very circumstances for which a creditor desires protection." *Id.* at 1061.

In these circuits, Section 552(b)(1) straightforwardly applies to an entitlement to future payments so long as the creditor's lien covers both the entitlement—the "property of the debtor"—and the payments—the "proceeds . . . of such property." 11 U.S.C. § 552(b)(1). Under the statutory text, it is immaterial that the amount of payments cannot be definitively calculated on the day the bankruptcy proceedings

commence, or that their issuance is purportedly contingent on future work or legislative grace. They are still "proceeds . . . of such property" that may be recovered in satisfaction of a pre-bankruptcy debt.

This case would have come out differently under the rule applied in these circuits. There is no doubt that petitioners' security interest extended to ERS' "property" and the "proceeds . . . of such property." 11 U.S.C. § 552(b)(1). The Bond Resolution expressly pledged "[a]ll right, title and interest of [ERS]" in "[a]ll Employers' Contributions received by [ERS]," as well as "[a]ny and all cash and non-cash proceeds" thereof. Pet. App. 118a–19a, 124a. Thus, had ERS' bankruptcy been litigated in the Fourth, Seventh, Eighth, or Tenth Circuit, petitioners' lien on employer contributions would have survived ERS' bankruptcy petition under Section 552(b)(1).

### B. The First Circuit Held That Section 552(b)(1) Applies To An Entitlement To Future Payments Only If The Payments Are Fixed And Calculable Prepetition.

The First Circuit expressly parted ways with its sister circuits in ruling that Section 552(b)(1) applies to an entitlement to future payments only if they are fixed and calculable when the bankruptcy proceedings commence. The First Circuit concluded that ERS' statutory entitlement to future employer contributions "constituted merely an expectancy and not a property 'right'" within the meaning of Section 552(b)(1) because: (1) the "amounts" of future contributions "could not be determined as of the petition date" and (2) "depended on work occurring on and after the petition date"; and (3) the legislature "might reduce (or, by implication, eliminate) Employers' Con-

tributions." Pet. App. 20a–21a. For the same reason—because "such Contributions only become receivables after" the performance of postpetition work—the court of appeals held that the contributions also are not "proceeds" within the meaning of Section 552(b)(1). Pet. App. 29a.

That decision cannot be reconciled with the decisions of the Fourth, Seventh, Eighth, and Tenth Circuits. As here, the amounts of any future payments in those cases could not be determined as of the petition date. The coal in *Slab Fork Coal* was yet to be mined or priced, 784 F.2d at 1191; the oil and gas in *Fullop* had not yet been extracted, 6 F.3d at 429; the "degree of PIK benefits" in *Sunberg* was not foreseeable, 729 F.2d at 562–63; and no sale of the FCC license in *Tracy* had even been contemplated by the time of the bankruptcy petition, 696 F.3d at 1059. Yet each court of appeals reached the opposite conclusion as the First Circuit and held that Section 552(b)(1) nonetheless encompassed the entitlement to future payments.

Similarly, the amount of, and right to demand, future payments in those cases depended on work occurring after the petition date. *See*, *e.g.*, *Slab Fork Coal*, 784 F.2d at 1191 ("coal had to be supplied . . . before any right to payment arose"). The Seventh and Tenth Circuits expressly rejected the position adopted by the First Circuit here—*i.e.*, that Section 552(b)(1) does not cover an entitlement to future payments that are purportedly contingent on the performance of postpetition work. *See Fullop*, 6 F.3d at 429; *Tracy*, 696 F.3d at 1061. As the Tenth Circuit explained, "commercial realities require a contrary holding": "We can see no policy reason to prevent the attachment of a security interest in the right of the [debtor] . . . that may well

be the [debtor's] best tool to obtain capital." *Tracy*, 696 F.3d at 1061.

*Tracy* is also at odds with the First Circuit's rationale that the Puerto Rico legislature hypothetically could "disregard[ ]" ERS' statutory entitlement and reduce future contributions. Pet. App. 21a–22a. The bankruptcy and district courts in *Tracy* had trained on that same rationale, but the Tenth Circuit rejected their view that "any such 'right' [to the proceeds from the sale of the FCC license] was too remote" because it depended on "approval of the transfer" by a government body. 696 F.3d at 1059–61. Tellingly, the panel here brushed *Tracy* aside in a footnote as "of course, not binding on us" and half-heartedly attempted to distinguish *Tracy* on the basis that "the FCC license already existed." Pet. App. 24a n.9. But the "property" right at issue in *Tracy* was not the license itself, which could not be pledged as collateral under federal law—it was the right to *proceeds* from a hypothesized *future sale* of that license. *See Tracy*, 696 F.3d at 1058. The decision below thus directly conflicts with *Tracy* and the decisions in other circuits.

### C. The Decision Below Undermines The Constitutional Imperative Of Uniform Bankruptcy Laws.

The divergence between the First Circuit's decision and those of the Fourth, Seventh, Eighth, and Tenth Circuits on the scope of Section 552(b)(1) is especially intolerable because it arises in the bankruptcy context where, the text of the Constitution makes clear, consistency is uniquely important. The Framers understood the critical "importance of authorizing a uniform federal response" to bankruptcy. *Cent. Va. Cmty. Coll.* v. *Katz*, 546 U.S. 356, 369 (2006).

Recognizing that "[u]niformity among state debtor insolvency laws was an impossibility," "[t]he Framers sought to provide Congress with the power to enact uniform laws" regarding bankruptcy. *Ry. Labor Execs.' Ass'n* v. *Gibbons*, 455 U.S. 457, 472 (1982). The Constitution thus specifically emphasizes the need for "uniform Laws on the subject of Bankruptcies throughout the United States." U.S. Const. art. I, § 8, cl. 4.[2]

The First Circuit's decision undermines this constitutional imperative in at least two ways.

*First*, as explained above, the words "property" and "proceeds" now mean one thing in the First Circuit with respect to Section 552(b)(1), and something else entirely in other circuits. The First Circuit's decision thus has created the anomalous result that the scope of a creditor's lien on an entitlement to future payments depends on where the debtor happens to file for bankruptcy. If the debtor files for bankruptcy in the Fourth, Seventh, Eighth, or Tenth Circuits, any such lien will be honored even if the future payments are not fixed and calculable in advance. But if the debtor files for bankruptcy in the First Circuit, those same liens are worthless. Those diametrically opposed outcomes violate this Court's longstanding rule that "[u]niform treatment of property interests" is essential "to reduce uncertainty, to discourage forum

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[2] Although this constitutional command tolerates "le[aving] the determination of property rights in the assets of a bankrupt's estate to state law," *Butner* v. *United States*, 440 U.S. 48, 54 (1979), the First Circuit construed the meaning of "property" and "proceeds" under Section 552(b)(1) purely as a matter of federal law; nothing in its decision turns on any provision of state law. *See* Pet. App. 21a n.7 (mentioning Puerto Rico law only in passing as reflecting "generally accepted" principles).

shopping, and to prevent a party from receiving 'a windfall merely by reason of the happenstance of bankruptcy.'" *Butner*, 440 U.S. at 55.

*Second*, under the decision below, the fundamental statutory terms "property" and "proceeds" no longer mean the same thing across all provisions of the Bankruptcy Code. Section 541, for example, defines an estate's "property" as including its "[p]roceeds." 11 U.S.C. § 541(a)(6). Whereas the word "property" in Section 541 encompasses "everything of value the bankrupt may possess," including property interests that are subject to "contingenc[ies]" or "c[annot] be claimed" at the time of a bankruptcy petition, *Segal* v. *Rochelle*, 382 U.S. 375, 379–80 (1966), the same word in a different provision—Section 552(b)(1)—means something far narrower under the First Circuit's ruling. That result is incoherent and imperils this Court's teaching that "'identical words used in different parts of the same act'" should have "'the same meaning.'" *Util. Air Regulatory Grp.* v. *EPA*, 573 U.S. 302, 319 (2014) (citation omitted).

Accordingly, the decision below creates a patchwork of inconsistency that destroys the "uniform" bankruptcy laws required by the Constitution. U.S. Const. art. I, § 8, cl. 4.

* * *

The courts of appeals are divided on the scope of Section 552(b)(1). Had ERS been located in the Fourth, Seventh, Eighth, or Tenth Circuit, postpetition employer contributions plainly would have fallen within Section 552(b)(1). But because ERS happened to be located within the First Circuit, petitioners' bargained-for interest in such employer contributions is now a nullity. That stark divergence in the meaning

of federal law would be enough to warrant certiorari in the normal course, but the constitutional value of uniformity in bankruptcy laws at play in this case should remove any doubt. Accordingly, this Court should resolve the conflict in the lower courts on the scope of Section 552(b)(1).

## II. THE FIRST CIRCUIT'S INTERPRETATION OF SECTION 552(B)(1) LACKS ANY TEXTUAL FOUNDATION AND ARTIFICIALLY NARROWS THE STATUTE'S SCOPE.

Certiorari is further warranted because the decision below departs from longstanding bankruptcy jurisprudence. Under a straightforward construction of Section 552(b)(1), petitioners have a lien on postpetition employer contributions because the Bond Resolution covers both prepetition "property of the debtor"—*i.e.*, ERS' statutory right to receive employer contributions—and the "proceeds . . . of such property." 11 U.S.C. § 552(b)(1). The First Circuit's attempt to impose, as a matter of federal law, two *additional* requirements nowhere found in the text of Section 552(b)(1) marks a sea change in bankruptcy law.

**A.** An entitlement to postpetition payments falls within Section 552(b)(1) so long as the debtor has pledged both its "property"—*i.e.*, the entitlement to payment—and the "proceeds" of that property—*i.e.*, the payments themselves. There is no separate requirement that the "property" or "proceeds" be fixed and calculable at the time of the bankruptcy petition.

**1.** The statutory text creates just two requirements for a prepetition lien to cover "proceeds . . . acquired by the estate after the commencement of the case." 11 U.S.C. § 552(b)(1). The lien must "extend[ ]

to property of the debtor acquired before the commencement of the case"; and it must extend to "proceeds . . . of such property." *Ibid.* The text contains no additional requirements.

Although Section 552(b)(1) does not define "property" or "proceeds," the term "property" commonly refers to a "'bundle of sticks'" encompassing a wide variety of property types and interests. *United States* v. *Craft*, 535 U.S. 274, 278–79 (2002). Property can be real, personal, or intellectual, tangible or intangible. Dale A. Whitman et al., *The Law of Property* § 1.3 (4th ed. 2019). These categories can be subdivided further into present, future, and contingent interests, all of which may be calculable or non-calculable at any given time. *Id.* § 3.2. While "[s]tate law determines . . . which sticks are in a person's bundle," whether those sticks constitute "property" under a federal bankruptcy statute "is ultimately a question of federal law." *Craft*, 535 U.S. at 278–79; *accord Travelers Cas. & Sur. Co. of Am.* v. *Pac. Gas & Elec. Co.*, 549 U.S. 443, 450–51 (2007).

The underlying "state law" here is Article 9 of the Uniform Commercial Code ("UCC") on secured transactions—which has been adopted in every State and Puerto Rico. *See*, *e.g.*, *Tracy*, 696 F.3d at 1060 (consulting UCC Article 9 in construing Section 552(b)(1)); Mark Edwin Burge, *Uniform Commercial Code: 2016 Legislative Agenda*, ContractsProf Blog (Feb. 4, 2016), https://tinyurl.com/y7bnyahr.[3] The relevant UCC Ar-

[3] Accordingly, nothing about this case hinges on the law of any particular jurisdiction. As noted, the First Circuit's decision relies only on general principles of UCC Article 9 and mentions Puerto Rico law only in passing. *See supra* n.2. The decision

ticle 9 provisions, in turn, reflect the hornbook definition of property rights and do not include any relevant limitations on the scope of the terms "property" and "proceeds."

For example, while the UCC does not generally define "property," it defines "[g]eneral intangible[s]" and "payment intangibles" as "property" to which "a security interest" may attach. 19 L.P.R.A. § 2212(a)(12)(B), (42) (U.C.C. § 9-102(a)(12)(B), (42)). General intangibles is a catch-all category for "*any*" non-real property "other than" specific enumerated exceptions not relevant here, *id.* § 2212(a)(42) (U.C.C. § 9-102(a)(42)) (emphasis added). That catch-all category includes payment intangibles, where the principal obligation is a monetary obligation—as with an entitlement "to receive money from a future" activity. *Tracy*, 696 F.3d at 1055; *see also* 19 L.P.R.A. § 2212(a)(61) (U.C.C. § 9-102(a)(61)). UCC Article 9 also broadly defines "[p]roceeds" as "whatever is collected on, or distributed on account of, collateral" as well as "rights arising out of collateral." 19 L.P.R.A. § 2212(a)(64) (U.C.C. § 9-102(a)(64)).

Analogous statutory provisions confirm that, as a matter of federal law, "property" and "proceeds" need not be fixed and calculable. As noted above, Section 541 of the Bankruptcy Code defines an estate's "property" as including its "[p]roceeds." 11 U.S.C. § 541(a)(6). This Court has long held that "'property'" in Section 541 should "be[ ] construed most generously" and includes property that cannot be calculated or claimed until a future date. *Segal*, 382 U.S. at 379 (anticipated tax refund). Section 6321 of the Tax Code similarly gives a first-priority lien to the United

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leaves no doubt that the First Circuit construed the scope of Section 552(b)(1) as a matter of federal law.

States "upon all property and rights to property . . . belonging to" a delinquent tax payer. 26 U.S.C. § 6321. That provision was "'meant to reach every interest in property that a taxpayer might have'"—without any relevant limitations. *Drye* v. *United States*, 528 U.S. 49, 56 (1999). It would be "inconsistent with Congress's intent" to construe the word "property" differently for federal tax-lien purposes than for bankruptcy purposes. *In re Atl. Bus. & Cmty. Dev. Corp.*, 994 F.2d 1069, 1076 (3d Cir. 1993).

Additional limitations on the scope of Section 552(b) also would undermine its purpose. Congress created Section 552(b) to "'balance[ ] the Code's interest in freeing the debtor of prepetition obligations with a secured creditor's rights to maintain a bargained-for interest in certain items of collateral.'" *In re Days Cal. Riverside Ltd. P'ship*, 27 F.3d 374, 375 (9th Cir. 1994). "Congress intended to cover a wide range of derivative property" in Section 552(b), *Fin. Sec. Assurance, Inc.* v. *Tollman-Hundley Dalton, L.P.*, 74 F.3d 1120, 1124 (11th Cir. 1996), so that "financial institutions across the country [can] lend . . . with confidence," *id.* at 1126 (Clark, J., concurring in part and dissenting in part). Allowing large swaths of collateral based on future payments to fall outside the scope of Section 552(b)(1) would frustrate this legislative goal.

**2.** Properly construed, Section 552(b)(1) easily encompasses the postpetition employer contributions at issue here because ERS pledged as collateral both its prepetition property—*i.e.*, its "statutory right to receive" employer contributions—and "all . . . proceeds" thereof. Pet. App. 106a, 119a (pledging "all rights to receive" the contributions); *see also* Pet. App. 118a–19a, 124a.

Specifically, ERS pledged "[a]ll right, title and interest of [ERS]" in "[a]ll Employers' Contributions received by [ERS]," as well as "[a]ny and all cash and non-cash proceeds" thereof. Pet. App. 118a–19a, 124a. ERS' entitlement "to receive money from a future" activity is a quintessential "payment intangible" that constitutes "property" under the UCC and Section 552(b)(1). *Tracy*, 696 F.3d at 1055; *see also*, *e.g.*, *Slab Fork Coal Co.*, 784 F.2d at 1191; *Sunberg*, 729 F.2d at 562. And the employer contributions are themselves "proceeds" of ERS' statutory entitlement because they are "collected" by ERS "on account of" that entitlement. 19 L.P.R.A. § 2212(a)(64) (U.C.C. § 9-102(a)(64)); *see Tracy*, 696 F.3d at 1055; *Slab Fork Coal*, 784 F.2d at 1191; *Sunberg*, 729 F.2d at 562. ERS' "admitted intent to pledge the [employer contributions] as security" cements the conclusion that they were "proper collateral" subject to Section 552(b)(1). *Sunberg*, 729 F.2d at 562.

**B.** The First Circuit's contrary conclusion turned on its view that, for Section 552(b)(1) to apply, the "property" and "proceeds" must be fixed and calculable when the bankruptcy petition is filed. Pet. App. 23a–24a. That holding effectively grafts onto Section 552(b)(1) two additional requirements that the text does not contain. Nothing in the statute or relevant UCC provisions even remotely suggests that a "payment intangible," "general intangible," or any other kind of property must be fixed and calculable in advance for a right to that intangible to constitute "property." Indeed, courts have uniformly rejected those very limitations in this context. *See*, *e.g.*, *Tracy*, 696 F.3d at 1055; *Fullop*, 6 F.3d at 425, 429; *Slab Fork Coal*, 784 F.2d at 1191; *Sunberg*, 729 F.2d at 562.

Courts have rejected those limitations in analogous contexts, too. As this Court explained in *Segal*, the "property" of the estate under Section 541 includes property interests that are subject to several "contingenc[ies]" and "c[annot] be claimed" until after the bankruptcy petition is filed. 382 U.S. at 380; *see also*, *e.g.*, *Chartschlaa* v. *Nationwide Mut. Ins. Co.*, 538 F.3d 116, 122 (2d Cir. 2008) ("every conceivable interest of the debtor, future, nonpossessory, [or] contingent" is "within the reach of § 541" (alteration and quotation marks omitted)). And lower courts have routinely construed Section 6321 of the Tax Code as encompassing interests in future payments that were not calculable or payable at the time of the tax-lien filing. *See*, *e.g.*, *MLQ Inv'rs, L.P.* v. *Pac. Quadracasting, Inc.*, 146 F.3d 746 (9th Cir. 1998) (proceeds from future sale of FCC license); *In re Connor*, 27 F.3d 365 (9th Cir. 1994) (future pension benefits).

At bottom, the First Circuit's holding fundamentally conflates whether ERS had a prepetition *right* to receive employer contributions—which it unquestionably did—with whether those contributions were *due and payable* at the time of ERS' bankruptcy petition. As even the Board recognized below, "[a] pre-petition contract can give rise to a property *right* to receive post-petition payments for work performed post-petition under the contract even if those payments were not *due* on the petition date." C.A. Appellee Br. at 25 n.9 (filed Aug. 28, 2019) (emphases added); *see also Slab Fork Coal*, 784 F.2d at 1191 ("It is true that coal had to be supplied . . . before any *right to payment* arose, but that is true for all payments under the contract." (emphasis added)).

A statutory, as opposed to contractual, right to payment is no different. Although it "could be disregarded by a subsequent legislature," as the panel noted, Pet. App. 21a–22a, that is true of any property right, *see Lucas* v. *S.C. Coastal Council*, 505 U.S. 1003, 1029 (1992). The potential for legislative alteration, however, does not make the right something less than "property." *See*, *e.g.*, *Tracy*, 696 F.3d at 1065 (right to proceeds of future sale contingent on agency approval is "property"); *In re Feiler*, 218 F.3d 948, 956 (9th Cir. 2000) (right to receive federal tax refunds is "property"). That is especially true in the context of secured interests because UCC Article 9 deems "ineffective" any legislative restriction that "[w]ould impair the creation, attachment, or perfection of a security interest." 19 L.P.R.A. § 2308(c) (U.C.C. § 9-408(c)).

By imposing two new limitations on the meaning of "property" and "proceeds" under Section 552(b)(1) and conflating basic principles of property law, the decision below upends well-settled law and interferes with security interests for which creditors *and* debtors expressly bargained. Certiorari is warranted to realign the First Circuit's erroneous, outlier view.

## III. THE QUESTION PRESENTED IS ENORMOUSLY IMPORTANT, WITH SWEEPING PRACTICAL CONSEQUENCES.

The First Circuit's unfounded interpretation of Section 552(b)(1) has far-reaching and destabilizing practical consequences. Capital markets require certainty and stability to function efficiently. The court of appeals' decision undercuts those values by throwing the meaning of covered "property" and "proceeds" into doubt. As a result, the decision imperils widespread secured-lending practices and threatens to

wreak havoc on municipal bond markets. That decision not only devalues *existing* security interests but also, as a result, will make it significantly harder for debtors to obtain similar secured loans *in the future*. Certiorari is urgently needed for these additional practical reasons.

**A.** Secured lending "underpins, either directly or indirectly, about one-fifth of the transaction volumes that make up the $20 trillion US gross domestic product." Com. Fin. Ass'n Educ. Found., *2019 Secured Finance: Market Sizing & Impact Study Extract Report* at 6 (June 2019), https://tinyurl.com/y5wwhomc. Many secured loans are backed by future revenue streams that inherently are not fixed and calculable in advance.

The First Circuit's ruling eviscerates these common and extremely valuable security interests, including rights to:

- intellectual property royalties, *In re Barbara K. Enters., Inc.*, No. 08-bk-11474, 2008 WL 2439649, at *12 (Bankr. S.D.N.Y. June 16, 2008);

- payments from a franchise, *In re SRJ Enters., Inc.*, 150 B.R. 933, 939–40 (Bankr. N.D. Ill. 1993);

- sales of government licenses, *Freightliner Mkt. Dev. Corp.* v. *Silver Wheel Freightlines, Inc.*, 823 F.2d 362, 369 (9th Cir. 1987);

- small-business loans backed by "[p]ortions of future sales," U.S. Fed. Reserve Sys., *2020 Report on Employer Firms: Small Business Credit Survey* at 7 (2020);

- proceeds from sales of yet-to-be-extracted natural resources, *Fullop*, 6 F.3d at 429; *Slab Fork Coal*, 784 F.2d at 1191; and

- tax refunds or government benefits, *Segal*, 382 U.S. at 379; *Feiler*, 218 F.3d at 956.

In fact, trillions of dollars of loans are secured by future revenues similar to ERS' employer contributions. *See* S&P Global Ratings, *Ten Years After the Financial Crisis, Global Securitization Lending Transformed by Regulation and Economic Growth* at 5 (July 21, 2017), https://tinyurl.com/ybmeks8p. To take just one commonplace example, in 2017 there were $121 billion in loans backed by rights to consumers' monthly credit-card payments, which are neither fixed nor calculable in advance. *Ibid.* Creditors will be far less likely to make such loans in the future if they are not permitted to recover the collateral in the event of the debtor's bankruptcy.

The range of businesses that could thus lose their primary means of obtaining financing under the First Circuit's ruling is astounding. The hotel industry, for example, has long relied on credit backed by future variable rent revenues. *See* Erin Casey & Randy Klein, *The Pre-Petition Right to Post-Petition Income Streams and the Misinterpretation of § 552*, 29 Am. Bankr. Inst. J. 58, 58 (2010). And following the path-breaking "Bowie Bonds" issued in the 1990s and backed by royalties from David Bowie's future album sales, music companies routinely obtain financing by pledging rights to licensing royalties as collateral. *See* John M. Gabala Jr., *"Intellectual Alchemy": Securitization of Intellectual Property as an Innovative Form of Alternative Financing*, 3 J. Marshall Rev. Intell. Prop. L. 307, 307–08 (2004). Other innovative forms

of secured lending are now at risk, too, including the exponentially popular revenue-based financing. *See* Lighter Capital, *The Rise of Revenue-Based Financing* at 15 (May 2019), https://tinyurl.com/ybmzg8d8. Early-stage tech companies, *ibid.*, as well as pharmaceutical companies, oil and gas ventures, farming and mining operations, and movie producers, now commonly obtain loans that "get[ ] repaid as a percentage of a company's revenue stream," such as its sales or royalties. J. Brad Bernthal, *The Evolution of Entrepreneurial Finance: A New Typology*, 2018 BYU L. Rev. 773, 791. The decision below thus imperils established as well as newer and more innovative forms of secured financing, all of which involve future payments that are not fixed and calculable in advance.

**B.** The decision below also jeopardizes the approximately $3.8 trillion municipal bond market. *See* Ilya Perlovsky & Tom DeMarco, Fidelity Capital Markets, *Overview of the Taxable Municipal Market* at 7 (Summer 2018), https://tinyurl.com/yxrxhr9x. "[S]tate or local governments, public utilities, transportation enterprises, institutions of higher education," and numerous other government entities all regularly issue bonds "secured with . . . revenue streams"—indeed, such bonds are often their only means of quickly raising additional funds. *Id.* at 3. Such general revenue streams, however, are not fixed or calculable beforehand. Under the decision below, these municipal bonds will be little more than extravagant IOUs that are worthless in the event of a bankruptcy. In capital markets where certainty and predictability are currency, that result spells disaster for municipalities seeking to leverage their future revenue streams to obtain much-needed financing.

ERS may argue that municipalities could still secure bonds with liens on "special revenues" that would survive a possible bankruptcy under Section 928. *See* 11 U.S.C. § 928(a). That is cold comfort for municipalities and creditors alike. With Section 552(b)(1), Congress protected *all* bargained-for liens on the "proceeds" of prepetition "property." There is no reason to artificially narrow the secured-lending options that Congress made available to municipalities—especially when "special revenues" are limited to only a select few, statutorily enumerated categories. *See id.* § 902(2). Moreover, as this case shows, there is no guarantee that a lien on a future revenue stream will, in fact, fall within the "special revenues" exception. The First Circuit ruled just the opposite with respect to petitioners' liens here. Pet. App. 33a–34a. Future creditors thus may balk at being forced to rely on the "special revenues" exception to protect the value of their bargained-for security interest.

These effects could cripple small businesses and municipalities in the current economic climate. "During periods of substantial budget deficits"—like now—state and local governments "frequently" issue "pension obligation bonds" to provide "budget relief." Roger L. Davis, *An Introduction to Pension Obligation Bonds and Other Post-Employment Benefits* at 7 (3d ed. 2006). ERS did just that with its 2008 bond issue. But without any guarantee that a security interest in those obligations would survive a bankruptcy, few lenders would be willing to extend credit when it is most needed.

The First Circuit's decision, ironically, could even cause acute problems for municipalities and Puerto Rico. Municipalities and their instrumentalities—in the First Circuit and elsewhere—regularly issue

bonds secured by tax-revenue streams.[4] An instrumentality of Puerto Rico, for example, has issued COFINA bonds secured by future sales-tax revenues. *See In re Fin. Oversight & Mgmt. Bd. for P.R.*, 301 F. Supp. 3d 274, 276 (D.P.R. 2017). In restructuring COFINA's debt, the plan of adjustment issued senior secured bondholders new replacement COFINA bonds. Am. Order & J. Confirming the Third Am. Title III Plan of Adjustment of Puerto Rico Sales Tax Financing Corporation, Ex. A pp.14, 21, ECF 5055 in No. 17-bk-03283 (D.P.R. Feb. 5, 2019). But these new bonds are also secured by future tax revenues that are no more fixed and calculable than the employer contributions here. *See id.* at Ex. A pp. 39–40. As a result, the scope of collateral securing the bonds could be subject to challenge in any future restructuring under the First Circuit's decision; and creditors may find similar security interests undesirable in the future.

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[4] *See*, *e.g.*, Massachusetts School Building Authority Senior Dedicated Sales Tax Bonds 2015 Series B, Official Statement (May 5, 2015), https://tinyurl.com/yyqhqog2; Massachusetts Bay Transportation Authority Senior Sales Tax Bonds, 2005 Series A, Official Statement (Feb. 16, 2005), https://tinyurl.com/y68hxk3q; Chicago Public Schools, Board of Education of the City of Chicago, Official Statements (Sept. 20, 2019), https://tinyurl.com/y5vq9j8e; Chicago Transit Authority Second Lien Sales Tax Receipts Revenue Bonds Series 2017, Official Statement (Jan. 10, 2017), https://tinyurl.com/y4mb4kkv; Los Angeles County Metropolitan Transportation Authority Proposition C Sales Tax Revenue Bonds, Senior Bonds, Series 2017-A, Official Statement (Jan. 25, 2017), https://tinyurl.com/y2zxacv7; Metropolitan Atlanta Rapid Transit Authority (Georgia) Sales Tax Revenue Bonds (Third Indenture Series) Refunding Series 2006A, Official Statement (Mar. 29, 2006), https://tinyurl.com/y4t5ejds; New York City Transitional Finance Authority Future Tax Secured Bonds Fiscal 2003 Series C Subseries C2 through Subseries C5, Official Statement (Oct. 30, 2002), https://tinyurl.com/y3yj2emj.

The decision below thus directly undermines Puerto Rico's "ability . . . to obtain funds from capital markets in the future," 48 U.S.C. § 2194(m)(6)—which was the entire purpose of PROMESA.

The consequences of leaving the First Circuit's ruling unchecked cannot be understated: "It is generally accepted that the continued functioning of [the municipal bonds] market is essential to the continued funding and operation of state and local governments and our economy more generally." U.S. Sec. & Exch. Comm'n, Public Statement, *The Importance of Disclosure for Our Municipal Markets* (May, 4, 2020), https://tinyurl.com/yb4javun. Certiorari is critically needed.

## IV. This Case Is An Ideal Vehicle For Deciding The Proper Scope Of Section 552(b)(1).

This case provides an ideal opportunity to decide whether Section 552(b)(1) encompasses an entitlement to future payments that are not fixed and calculable at the time a bankruptcy petition is filed.

That question is squarely and cleanly presented here. The parties briefed this issue before the district court, Pet. App. 58a–59a, and the court of appeals, *see* Pet. App. 16a, and both courts addressed the issue, Pet. App. 20a–24a, 68a–77a. By denying rehearing en banc, the First Circuit signaled that it will not revisit this issue. Moreover, the question presented is an issue of law—the interpretation of a statute—that requires no factual development. The case comes before the Court on a summary judgment posture, based on facts the district court "found . . . to be undisputed." Pet. App. 60a.

The question presented also is dispositive. In *ERS I*, the First Circuit determined that petitioners "satisfied Article 9's perfection requirements." 914 F.3d at 719. Following *ERS I*, the only remaining question was whether petitioners had a security interest in "the Pledged Property" even if the property could not be collected until "'after the commencement of ERS's Title III case.'" *Id.* at 720. A decision from this Court holding that, under Section 552(b)(1), petitioners' security interest extends to postpetition employer contributions necessarily resolves that issue.

* * *

Petitioners and others, like many secured creditors, extended large amounts of credit based on Section 552(b)(1)'s guarantee that their bargained-for security interest in future employer contributions would survive any potential bankruptcy proceedings. Contrary to settled law, the First Circuit upended those expectations, and its decision destabilizes countless other secured loans, including for municipalities that need immediate access to secured-lending markets. This case presents an ideal opportunity for the Court to address the clear circuit split, clarify the meaning of Section 552(b)(1), and ensure that the bankruptcy laws uniformly protect the value of bargained-for security interests.

## CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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