No. 20-126

IN THE

Supreme Court of the United States

ANDALUSIAN GLOBAL DESIGNATED ACTIVITY COMPANY, *et al.*,

Petitioners,

v.

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

Respondents.

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

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Generally, a creditor's pre-petition security interest does not attach to property acquired by a debtor after the date of its bankruptcy petition. 11 U.S.C. § 552(a). The only exception is: When the security interest has attached to property the debtor owns on its petition date, that interest will extend to proceeds of that property received post-petition. *Id.* § 552(b)(1).

In this case, a Puerto Rico statute provided that public employers would make monthly contributions to debtor Employees Retirement System of the Government of the Commonwealth of Puerto Rico ("ERS") based on a percentage of the wages and salaries employers pay employees. ERS pledged the contributions it received and its interest in receiving future contributions to secure Petitioners' bonds (even though the statute does not provide ERS any mechanism to enforce that interest). The First Circuit held, as a matter of Puerto Rico property law, ERS's interest as of its petition date in receiving future employer contributions did not constitute "property" but rather was a mere expectancy, and thus post-petition contributions were not proceeds of pre-petition "property."

The Question Presented is: Did ERS's statutory interest in receiving employer contributions constitute "property" under Puerto Rico law such that contributions generated by employees' post-petition work were proceeds of that property?

RULE 29.6 STATEMENT

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

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BRIEF IN OPPOSITION

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

STATEMENT OF THE CASE

The Petition should be denied because it asks the Court to review a determination of property rights under territorial law, and there is no Circuit split. In attempting to establish a federal issue, the Petition mischaracterizes the issues presented and the holding below.

The Petition centers on 11 U.S.C. § 552(b), which allows a creditor's pre-petition security interest in pre-petition property to attach to property acquired by a debtor after its bankruptcy petition is filed, but only if it represents proceeds of pre-petition property subject to the security interest. The issue below was whether, prior to its petition date, ERS's statutory interest in receiving future contributions not yet owing and non-existent because they would be based on work not yet performed, constituted "property" under Puerto Rico law, such that later contributions paid to ERS based on post-petition labor would be considered proceeds of pre-petition property.

This Court has repeatedly held that, absent unusual circumstances not existing here, questions concerning property rights in a bankruptcy case are governed by state law. *See, e.g.*, *Raleigh v. Ill. Dep't of Revenue*, 530 U.S. 15, 20 (2000); *Butner v. United States*, 440 U.S. 48, 54–55 (1979). In accord with those rulings, the First Circuit applied Puerto Rico law and determined that, on its petition date, ERS did

not hold a property right in employer contributions where they arise from employees' future work. *See* Pet. App. 20a–21a & n.7 (citing *Butner*, 440 U.S. at 54–55). Because ERS had no pre-petition property right to future contributions under Puerto Rico law, the court held that contributions paid to ERS after its petition date were not proceeds of pre-petition property. Accordingly, a pre-petition security interest could not attach to those contributions as "proceeds of pre-petition property" under 11 U.S.C. § 552(b).

There is thus no disputed federal law issue presented here. The First Circuit resolved the case below by determining the scope of ERS's pre-petition property interests under Puerto Rico law. No other court of appeals has ever addressed that issue, much less concluded differently on the meaning of Puerto Rico law. Even the cases cited by the Bondholders in support of their "Circuit split" argument hold that state law governs whether a debtor held pre-petition property within the meaning of 11 U.S.C. § 552(b). *See* Section II, *infra*.

The Bondholders try to manufacture a dispute about federal law by contending that the First Circuit imposed extra-textual requirements onto 11 U.S.C. § 552(b). Specifically, they argue the First Circuit held that "proceeds" of pre-petition property must be "fixed and calculable" on a debtor's petition date for § 552(b) to apply. That argument simply mischaracterizes the holding below. The First Circuit determined under Puerto Rico law, not under § 552(b), that no employer contributions could accrue and ERS would not gain property rights to receive any post-petition contributions for any post-petition work without a post-petition workforce, work, and payroll. Pet.

App. 20a–21a. That made it impossible for the future contributions to be proceeds of an ERS pre-petition right because none of the post-petition work and payroll existed or was even required to exist on the petition date. The First Circuit thus held that, under Puerto Rico law, ERS did not have a pre-petition property right to the post-petition revenues at issue, and § 552(b) therefore had no application. That holding did not turn on the meaning of § 552(b); it turned entirely on a predicate question concerning the scope of ERS's pre-petition property—an issue governed by territory law.

Because the decision below was decided under Puerto Rico law, the Court should deny the Petition. Moreover, the Petition does not satisfy any of the Court's criteria for certiorari. The Bondholders contend the decision below creates a split with four other Circuits concerning the meaning of § 552(b). Again, however, they mischaracterize the holding below. The First Circuit did not construe § 552(b); instead, it decided a predicate question of state property law. All the cases cited by the Bondholders in support of their "Circuit split" argument involved materially different facts and were decided under different states' laws. In those cases, the debtors held enforceable rights prior to their petition dates—for example, rights to proceeds of a government license or rights under a contract—and those rights constituted "property" under the relevant state's law.

Here, by contrast, the First Circuit correctly held that ERS's expectancy of future contributions was not "property" under Puerto Rico law. Among other things, the Bondholders' security interests arose out of a statute, which is not subject to foreclosure. The

fact that other courts determined that other types of interests constitute property under other states' laws does not create a Circuit split. *See* Section II, *infra* (distinguishing Bondholders' authorities).

Finally, the Bondholders' contention that the decision below threatens to destroy secured lending in the United States is overblown, to say the least. The First Circuit emphasized it decided the case "narrowly, based on these specific facts." Pet. App. 38a. The "specific facts" here are not present in most secured transactions. In a typical secured transaction, the debtor pledges property as collateral, and the pre-petition security interest attaches to post-petition proceeds of that property under 11 U.S.C. § 552(b). For example, if a debtor pledges its pre-petition patents to secure a debt, royalties received by the debtor post-petition could attach under § 552(b) because the royalties would be proceeds of the attached pre-petition (intellectual) property. The holding below applies only in the narrow circumstance where a debtor pledges not an account receivable, but an expectancy to currently nonexistent accounts receivable that may or may not come into existence post-petition in unknown amounts. In that circumstance, the debtor's interest may be too contingent under applicable state law to constitute attachable property.

1. The Commonwealth established ERS in 1951 as a trust to pay pension and other benefits to employees of the Commonwealth government, its public corporations, and its municipalities. P.R. Act 447-1951 (codified, as amended, at 3 L.P.R.A. §§ 761–788) (the "Enabling Act"). ERS was responsible for administering the benefits owed to retired public employees until

the Commonwealth changed its public pension system in 2017.

The ERS trust was funded partly by mandatory contributions from employees based on their compensation and partly by employer contributions. *See, e.g.*, 3 L.P.R.A. §§ 787e–787f. Each covered employer was required periodically to contribute to ERS an amount equal to a percentage of the total contributions paid by its employees. *Id.* § 787f.

2. On January 24, 2008, ERS issued approximately $2.9 billion in bonds (the "ERS Bonds") purportedly pursuant to a Pension Funding Bond Resolution (the "Resolution"). Pet. App. 106a–125a. The Bondholders allege they hold approximately $2 billion worth of the ERS bonds.

The Resolution provided the ERS Bonds would be payable "solely from the Pledged Property without recourse against other assets" and not out of "any funds or assets other than the Pledged Property." *Id.* at 108a. "Pledged Property" is defined in the Resolution to include all (1) "Revenues"; (2) "right, title and interest of [ERS] in and to Revenues, and all rights to receive the same"; and (3) "cash and non-cash proceeds, products, offspring, rents and profits from any of the Pledged Property." *Id.* at 118a–119a.[1]

"Revenues," in relevant part, includes "[a]ll Employers' Contributions received by [ERS] or [its] Fiscal

[1] "Pledged Property" also includes certain other personal property and accounts not relevant to the issues in the case. Pet. App. 119a. Likewise, "revenues" includes other components not relevant here. *Id.*at 123a–124a.

Agent." *Id.* at 123a–124a. "Employers' Contributions," in turn, is limited to contributions "payable to [ERS] . . . pursuant to Sections 2-116, 3-105 and 4-113 of the [Enabling] Act." *Id.* at 117a. Those contributions become payable only after work is performed by the employees. 3 L.P.R.A. §§ 781(e), 786-5, 787.

In connection with the bond issuance, ERS entered into a security agreement granting the Bondholders a security interest in "(i) the Pledged Property, and (ii) all proceeds thereof and all after-acquired property, subject to application as permitted by the Resolution." Pet. App. 63a–64a.

The offering statement for the ERS bond offering warned investors that the employer contributions paid to ERS could diminish over time: "The Legislature of the Commonwealth could reduce the Employer Contribution rate or make other changes in existing law that adversely affect the amount of Employer Contributions." *See* Joint Appendix, *Fin. Oversight & Mgmt. Bd. for P.R. v. Andalusian Glob. Designated Activity Co.*, No. 19-1699, at 260 (1st Cir. July 30, 2019).

3. In 2016, Congress enacted the Puerto Rico Oversight, Management, and Economic Stability Act ("PROMESA") to address what it found to be the "fiscal emergency" in Puerto Rico. 48 U.S.C. § 2194(m)(1). PROMESA established the Financial Oversight and Management Board for Puerto Rico (the "Board") and charged it with providing "a method for [Puerto Rico] to achieve fiscal responsibility and access to the capital markets." *Id.* § 2121(a).

Among other powers, the Board can commence a debt-restructuring case under Title III of PROMESA

on behalf of the Commonwealth and its covered instrumentalities, including ERS. *Id.* §§ 2146, 2162, 2164. PROMESA incorporates many provisions of the Bankruptcy Code into a Title III case, including 11 U.S.C. § 552. *See* 48 U.S.C. § 2161(a).

4. Section 552(a) prescribes the general rule that a security interest created by a pre-petition security agreement does not attach to property acquired by a debtor after the commencement of its bankruptcy case. 11 U.S.C. § 552(a). That provision facilitates a debtor's "fresh start" by ensuring that property acquired post-petition is free from pre-petition encumbrances, which allows the debtor to offer the new property as collateral to lenders of new money or as a source of payment for other creditors. *See Unsecured Creditors Comm. v. Marepcon Fin. Corp. (In re Bumper Sales, Inc.)*, 907 F.2d 1430, 1436 (4th Cir. 1990); *see also Local Loan Co. v. Hunt*, 292 U.S. 234, 244–45 (1934).

There are two exceptions to § 552(a)'s general rule. First, if a pre-petition agreement grants a security interest in property acquired by the debtor before the petition date, the security interest will attach to proceeds of that property acquired by the debtor after the petition date. *Id.* § 552(b)(1). Second, a pre-petition security interest will attach to "special revenues" acquired by a municipal debtor after its petition date. *Id.* § 928(a). "Special revenues" include receipts "derived from particular functions" of the debtor or the operation of certain "projects or systems," among other things. *Id.* § 902(2).

5. On May 21, 2017 (the "Petition Date"), the Board filed a petition under Title III of PROMESA on

behalf of ERS with the United States District Court for the District of Puerto Rico.

6. The Commonwealth amended the Enabling Act in the summer of 2017 to convert its public pension to a "pay-as-you-go" or "pay-go" system. *See* Con. H.R. Res. 188, 18th Legis. Assemb. (2017); 2017 P.R. Laws Act 106 (together, the "2017 Amendment"). Under the pay-go system, employers are no longer required to contribute to ERS. Instead, retirement benefits are paid out of the Commonwealth's general fund, and participating employers (other than the Commonwealth itself) reimburse the Commonwealth.

7. In July 2017, the Bondholders filed an adversary proceeding in ERS's Title III case seeking declaratory relief concerning the validity and scope of their security interest.[2] One of the central issues was whether § 552(a) would prevent the Bondholders' prepetition security interest from attaching to employer contributions paid to ERS after the Petition Date and generated by work performed post-petition. The district court granted summary judgment to ERS on that question, holding "Bankruptcy Code Section 552 prevents any security interest resulting from liens

[2] In addition, the Bondholders filed an adversary proceeding concerning whether the Commonwealth's conversion to a pay-go system nullified their security interest by eliminating employer contributions to ERS. *See* Adv. Proc. No. 17-00219-LTS, Dkt. No. 1 (Adversary Complaint) (filed July 27, 2017). In that proceeding, the Bondholders assert that their security interest attaches to amounts paid under the new pay-go system even though there are no longer employer contributions to ERS. That adversary proceeding has not been resolved.

granted in [the Bondholders'] favor prior to the commencement of ERS's Title III case from attaching to revenues received by ERS during the post-petition period." Pet. App. 84a.

8. The Bondholders appealed, and the First Circuit affirmed. *Id.* at 1a–38a.

The First Circuit held that employer contributions paid to ERS after the Petition Date based on post-petition work are not proceeds of pre-petition property to which the Bondholders' pre-petition security interest could attach under § 552(b). *Id.* at 17a–29a. The court noted that the Bondholders had asserted two theories in support of their § 552(b) argument. *Id.* at 17a. The Bondholders first argued that ERS had a pre-petition property right to receive employer contributions; that their security interest attached to that property and any proceeds of that property; and that contributions paid to ERS post-petition were proceeds of ERS's pre-petition property to which the Bondholders' security agreement attached under § 552(b). *Id.* In the alternative, they argued their security interest attached to employers' alleged pre-petition obligations to ERS to pay down ERS's actuarial deficit, and that any such payments were proceeds of pre-petition property under § 552(b). *Id.* The First Circuit rejected both theories. *Id.* at 17a–29a.

a. In rejecting the Bondholders' first theory, the First Circuit noted that "local law [typically] creates and defines property interests in bankruptcy proceedings." *Id.* at 21a n.7 (citing *Butner*, 440 U.S. at 54–55). The court then reasoned that, as a matter of Puerto Rico law, ERS had no enforceable right on the Petition Date to any employer contributions for work

that might be performed afterward. It was impossible for employers to have such an obligation on the Petition Date for work that would not be performed until later. Therefore, ERS's pre-petition interest in receiving such future employer contributions was at best a mere expectancy, not a property right under Puerto Rico law. *Id.* at 20a–24a.

In reaching that conclusion, the court observed that ERS's collection of the contributions "was contingent on Puerto Rico's future fiscal status and the decisions of future Puerto Rico legislatures," as well as future work being performed. *Id.* at 20a. As it explained, Puerto Rico's legislature could amend the Enabling Act to eliminate the employer contributions—which the legislature did in 2017. *Id.* at 21a–22a & n.8. Moreover, the Official Statement accompanying the bond issuance put potential bondholders on notice that if the Commonwealth ran into fiscal problems, it would likely decrease or eliminate employer contributions to ERS. *Id.* at 22a.

For all of these reasons, the First Circuit held that, as of the Petition Date, ERS's possible receipt of post-petition employer contributions was not property under Puerto Rico law to which the Bondholders' security interest could attach on the Petition Date. *Id.* at 20a–22a & n.7. "The Bondholders thus lacked any secured interest in property that could produce post-petition 'proceeds' to which they could be entitled" under § 552(b). *Id.* at 20a.

b. The First Circuit also rejected the Bondholders' second theory based on "the plain language of the Security Agreement and Bond Resolution." *Id.* at 25a. The Bondholders had argued that they had a security

interest "in payments on the employers' 'obligation' to pay down the actuarial deficit, that Employers' Contributions are proceeds of this actuarial deficit obligation, and [that] the Bondholders have a security interest in these actuarial deficit 'proceeds' under § 552(b)(1)." *Id.* at 24a–25a. The First Circuit noted, however, that pursuant to the bond issuance documents, the Bondholders' security interest extended only to employer contributions made under §§ 2-116, 3-105, and 4-113 of the Enabling Act. *Id.* at 25a. The court examined those three provisions and concluded they "do not create an obligation of employers to pay the actuarial deficit." *Id.* "In consequence, there is no security interest granted by the Security Agreement in payments on any purported employer obligation to pay down the actuarial deficit." *Id.*; *see also id.* at 26a–28a. The Bondholders do not press this second theory in their Petition.

c. Having rejected the Bondholders' arguments under § 552(b), the First Circuit proceeded to rebuff their additional contentions that employer contributions are special revenues exempt from § 552(a) and that § 552(a) did not apply to their security interest as a matter of constitutional avoidance. *Id.* at 30a–38a. The Bondholders have also abandoned those two issues—which are the only issues interpreting federal law—in the Petition.

9. The Bondholders petitioned for Panel rehearing and rehearing en banc. The Court denied that petition without dissent.

The Bondholders' petition for certiorari followed.

REASONS FOR DENYING THE PETITION

I. The Petition Presents Questions of State Law Only.

The Petition's central claim is that the First Circuit found ERS's pre-petition interest in future employer contributions insufficient because it grafted two new conditions onto § 552(b), supposedly holding that proceeds must be "fixed and calculable" at the time of the bankruptcy filing for a security interest to attach. *E.g.*, Pet. 2, 8, 11, 12, 13, 16, 19, 21, 23, 25, 28, 30, 32, 33. That position is doubly wrong. The First Circuit did not interpret § 552(b) at all. Rather, it applied Puerto Rico law to determine that ERS had no property right in unaccrued future employer contributions, which made § 552(b) inapplicable. Nor did the court invent any rule that § 552(b) does not apply unless proceeds are "fixed and calculable." The Bondholders stitched together that test from snippets of the opinion taken out of context, and then incorrectly ascribed it to the court.

The issue before the First Circuit was whether, pre-petition, ERS held a "property" right to collect employer contributions generated by future, post-petition work. Pet. App. 20a–24a. That question is critical because if whatever pre-petition interest ERS held was not "property" under state law, the § 552(b) analysis would end there. That statutory provision applies only where a "security agreement extends to property of the debtor acquired before the commencement of the case and to proceeds" of such property. 11 U.S.C. § 552(b). If there is no pre-petition property, then

there is nothing to which the security interest can to attach.

As explained below, Puerto Rico law determines whether ERS's pre-petition interest in unaccrued employer contributions constituted "property." Accordingly, the decision below turned solely on state law, and the Petition presents questions of state law alone. An issue of state law is "not properly subject to review in this Court." *Webb v. Webb*, 451 U.S. 493, 494 n.1 (1981); *see also Wolf v. Weinstein*, 372 U.S. 633, 636 (1963) (dismissing writ as improvidently granted where case "primarily implicates questions of Pennsylvania law and presents no federal question of substance").

A. State Law Governs Whether a Debtor Holds Pre-Petition "Property" Whose Proceeds Are Subject to a Creditor's Security Interest.

The Bondholders contend that whether a property interest qualifies for § 552(b) treatment is a question of federal law. Pet. 22. As a matter of settled law, they are wrong. In cases like this one, the scope of a party's property rights is determined on the basis of state law, not federal law. *Raleigh v. Ill. Dep't of Revenue*, 530 U.S. 15, 20 (2000); *Butner v. United States*, 440 U.S. 48, 54–55 (1979).

The question in *Butner* (like here) was whether a creditor's pre-petition security interest extended to certain property (rents) acquired by the debtor after the date of its bankruptcy petition. 440 U.S. at 50–51. The parties disputed whether that question should be

decided according to state or federal law. *Id.* at 51–54. The Court concluded that because property interests are created and defined by state law, "there is no reason why such interests should be analyzed differently simply because an interested party is involved in a bankruptcy proceeding." *Id.* at 55.[3] Were a court to apply federal law to determine the extent of a party's property rights in a bankruptcy case rather than the state law that would govern outside bankruptcy, a party could receive a "windfall merely by reason of the happenstance of bankruptcy." *Id.*[4]

This Court has repeatedly reaffirmed *Butner*'s holding—as recently as this year—that apart from the rare situation where there is some contrary and overriding federal interest, property interests in a bankruptcy case are governed by state law. *See, e.g.*, *Rodriguez v. FDIC*, 140 S. Ct. 713, 718 (2020); *Stern v. Marshall*, 564 U.S. 462, 495 (2011); *Travelers Cas. & Sur. Co. of Am. v. Pac. Gas & Elec. Co.*, 549 U.S. 443, 450–51 (2007); *Nobleman v. Am. Sav. Bank*, 508 U.S.

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[3] The only exception to this rule is where a federal interest requires a different result from what state law dictates. *Butner*, 440 U.S. at 55; *Raleigh*, 530 U.S. at 20. There is no contrary federal interest here, however, and the Petition does not argue otherwise.

[4] The Bondholders misconstrue *Butner*'s "windfall" quote to suggest that a uniform federal standard must govern property interests in federal court. Pet. 19–20 (selectively quoting *Butner*, 440 U.S. at 55). What the Court actually required was "[u]niform treatment of property interests by both state and federal courts *within a State*"—meaning that a federal bankruptcy court must determine property rights by reference to state law, just as a state court would. *Butner*, 440 U.S. at 55 (emphasis added).

324, 329 (1993); *Barnhill v. Johnson*, 503 U.S. 393, 398 (1992).

Indeed, the very same cases cited by the Bondholders, which they claim show a Circuit split, confirm that state law controls. As discussed in Point II below, those cases do not establish any split because they dealt with pledges of property under relevant state law, whereas ERS did not pledge property here. More pointedly, in each of those cases, the Circuit applied *state law* to determine whether the creditor possessed a property interest for purposes of § 552(b). As one of the Bondholders' cases put it, "property-rights issues of this sort are ordinarily a matter of state law." *Valley Bank & Tr. Co. v. Spectrum Scan, LLC (In re Tracy Broad. Corp.)*, 696 F.3d 1051, 1053–54 (10th Cir. 2012); *see also In re Sunberg*, 729 F.2d 561, 562 (8th Cir. 1984) (holding that whether the debtor's pre-petition rights "were proper collateral to secure [the creditor's] loans" for purposes of § 552(b) was "a matter of state commercial law"); Section II, *infra.*

Rather than being a case about ERS having accounts receivable on its Petition Date whose post-petition collection would be proceeds of the pre-petition accounts, at issue here is only ERS' right to receive future accounts receivable to be created after its Petition Date. Its Petition Date right to receive future accounts receivable dependent on future work forces and payrolls provided ERS nothing to enforce or collect on its Petition Date. The First Circuit correctly held, under those circumstances, that ERS's expectancy of future contributions was not "property" under Puerto Rico law. The fact that other courts determined other

types of interests constitute property under other states' laws does not create a Circuit split.

Tellingly, the Bondholders fail to cite a single case where federal law determined whether a debtor's pre-petition asserted rights constituted "property" for purposes of § 552(b).

The Bondholders claim that under *United States v. Craft*, 535 U.S. 274, 278–79 (2002), whether certain interests "constitute 'property' under a federal bankruptcy statute 'is ultimately a question of federal law.'" Pet. 22. That jerry-rigged quote is highly misleading. The case was about the federal tax-lien statute, 26 U.S.C. § 6321, which creates a federal statutory lien "upon all property and rights to property" of a delinquent taxpayer. *Craft*, 535 U.S. at 276. It nowhere mentions bankruptcy. *Craft* followed the rule that state law defines property rights, and it looked to Michigan law to determine whether the taxpayer owned property or rights to property to which a federal tax lien could possibly attach. *Id.* at 282. Only after determining that property rights and rights to property existed under state law did the Court determine the federal tax lien would attach to those rights. *Id.* at 283 ("Michigan law grants a tenant by the entirety some of the most essential property rights: the right to use the property, to receive income produced by it, and to exclude others from it."). While the Bondholders concede that *Craft* ruled state law determines whether there are "sticks" in a person's bundle, the Bondholders wrongly contend that whether those sticks constitute property under a federal bankruptcy statute is a question of federal law. What Craft says is: "Whether those sticks qualify as 'property' for

purposes of the *federal tax lien statute* is a question of federal law." *Id.* at 279 (emphasis added). The *Craft* Court ultimately found property rights under Michigan law to which the federal tax lien did attach. *Id.* at 282. It did not hold that federal law can create property rights, however.

Contrary to the Bondholders' contention (Pet. 24), there would be nothing "inconsistent" about the term "property" being treated differently under the Bankruptcy Code versus the federal tax-lien statute. "We have several times affirmed that identical language may convey varying content when used in different statutes . . . ." *Yates v. United States*, 574 U.S. 528, 537–38 (2015) (collecting examples).

Puzzlingly, the Bondholders contend that *Travelers Casualty & Surety Co. of America v. Pacific Gas & Electric Co.*, 549 U.S. 443 (2007), supports their position that federal law determines the scope of ERS's pre-petition property. Pet. 22. Not only is that wrong, but *Travelers* was not even concerned with that question. In *Travelers*, the creditor's pre-petition contract entitled it to attorneys' fees. 549 U.S. at 446. The debtor argued the Bankruptcy Code disallows claims for attorneys' fees incurred in litigating bankruptcy issues. *Id.* at 449. This Court held that the claim should be allowed because applicable state law would permit recovery of attorneys' fees, and nothing in the Bankruptcy Code is to the contrary. *Id.* at 452. Relying heavily on *Butner*, *Travelers* opined that "property interests are created and defined by state law," and "unless some federal interest requires a different result, there is no reason why such interests should be analyzed differently simply because an interested party is

involved in a bankruptcy proceeding." *Id.* at 451 (quoting *Butner*, 440 U.S. at 55) (emendations omitted).[5]

Even more strangely, the Bondholders seem to acknowledge that state law controls the definition of property here. They engage in a lengthy discussion of the Uniform Commercial Code, claiming that Article 9 provides the standard for adjudicating ERS's property rights. Pet. 22–25. But the UCC is state law. *See, e.g.*, *Bank One Chi., N.A. v. Midwest Bank & Tr. Co.*, 516 U.S. 264, 266 (1996). It is irrelevant if this case does not "hinge[] on the law of any particular jurisdiction," but only on "general principles" of the UCC. Pet. 22 n.3. State law is state law, whether it varies by jurisdiction or not.[6]

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[5] The Bondholders' reliance on *Segal v. Rochelle*, 382 U.S. 375 (1966), for the proposition that the term "property" turns on federal law, is similarly misplaced. Pet. 20, 23, 26, 29. The question in *Segal* was whether the debtor's federal loss-carryback refund claims that could not be lodged with the IRS until after the bankruptcy commenced were property the bankruptcy trustee should distribute to creditors or property of the discharged debtor. 382 U.S. at 376–377. The rule of decision was former 11 U.S.C. § 110(a)(5) (repealed), which provided the property should be distributed by the trustee if the debtor "could by any means have transferred" it. This Court found that condition satisfied because, *under Texas law*, "an assignment of the claims at issue would be enforced in equity in the normal case." *Id.* at 384 (citing *Trinity Universal Ins. Co. v. First State Bank,* 183 S.W.2d 422 (Tex. 1944); *United Hay Co. v. Ford,* 76 S.W.2d 480 (Tex. 1934) (dictum)).

[6] The Bondholders' discussion of the UCC is misguided in any event. Contrary to the Bondholders' contention, Article 9 of the

B. The First Circuit Applied Puerto Rico Law to Determine ERS Lacked a Property Right to Employer Contributions.

There can be no serious question that the First Circuit followed settled principles and applied Puerto Rico law to conclude the Bondholders lacked a pre-petition property right in employer contributions generated by post-petition work. For starters, that is what the court said it was doing. Citing *Butner*, the First Circuit stated that "[t]ypically, local law creates and defines property interests in bankruptcy proceedings." Pet. App. 21a n.7 (citing *Butner*, 440 U.S. at 54–55).[7] The court then analyzed whether, under Puerto Rico law, ERS's interest in the employer contributions was a property right or a mere expectancy. *Id.* at 20a–24a. As the court pointed out, the distinction between an expectancy and "property" is enshrined in Puerto Rico law. *See id.* (citing *Redondo-Borges v. HUD*, 421 F.3d 1, 9 (1st Cir. 2005) (applying Puerto Rico law); *Carrasquillo v. Aponte Roque*, 682 F. Supp. 137, 141 (D.P.R. 1988) (applying Puerto Rico law)).

Three factors persuaded the court that ERS's pre-petition interest was only an expectancy, not a property right, under Puerto Rico law. First, the Puerto

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UCC does not define what constitutes "property." Pet. 25. Instead, the UCC relies on general state-law principles to define the property subject to Article 9. U.C.C. § 9-408, Cmt. 3.

[7] A later errata sheet added another footnote to the court's opinion, changing the numbering in the official reporter. *See* Pet. App. 43a; 948 F.3d 457 (1st Cir. 2020). This opposition follows the footnote numbering in Petitioners' appendix.

Rico legislature could at any time reduce or even eliminate employer contributions to ERS, a possibility about which the Bondholders were warned. Pet. App. 20a–22a. Second, the Bondholders were also warned that employer contributions would likely be reduced in the event of a fiscal downturn. *Id.* at 20a. Third, ERS did not have a right to collect post-petition contributions until work was performed after the Petition Date. *Id.* Taking those points together, the court held that ERS's contingent possibility of receiving post-petition contributions was "too indeterminate" and contingent to constitute property. *Id.* at 24a.

Notwithstanding those reasons given by the First Circuit, the Bondholders contend the court was actually applying a new, invented requirement that post-petition payments must be "fixed and calculable" on the debtor's petition date. Pet. 16. They also claim the court grafted those conditions onto § 552 and relied on them to disqualify ERS's interest in future employer contributions.

The Bondholders base that claim on a snippet they plucked from a section of the opinion below distinguishing a previous First Circuit case, *Cadle Co. v. Schlichtmann*, 267 F.3d 14 (1st Cir. 2001). *Cadle* involved a creditor (Cadle Co.) that had a security interest in a contingent fee receivable of a law firm, which the firm was to collect at the conclusion of certain litigation. *Id.* at 16. Before that happened, the law firm dissolved and one of the partners declared bankruptcy. The question was whether Cadle's security interest survived the dissolution and the personal bankruptcy. *Id.* The court held that it did, because Cadle

had been given an "unqualified security interest in a specific fund." *Id.* at 21.

In the decision below, the First Circuit reaffirmed *Cadle*—indeed, finding that it *supported* the Board's position here—but distinguished it "on the facts." Pet. App. 23a. While *Cadle* involved a concrete pre-petition account receivable (including an interest in specific deposited settlement funds), here employers had no obligation to make additional contributions before the underlying labor was performed. As the court below put it, the employer contributions to ERS were "future, yet-to-be calculated or contributed," *id.*, while the *Cadle* funds were "fixed" pre-petition and payable at any time, *id.* at 24a.

Because of that passing reference to the fee in *Cadle* being "fixed" and "calculated," the Bondholders accuse the First Circuit of *sub silentio* fashioning a new rule that interests must be "fixed and calculable" to fall within § 552(b). That theory is insupportable. *First*, in both *Cadle* and the case below, the First Circuit explained that it was applying state law, not federal law, to the debtor's pre-petition property rights. In *Cadle,* it was Massachusetts law, 267 F.3d at 20 n.3; here, Puerto Rico law, Pet. App. 21a n.7. Section 552(b) did not factor into either analysis. The court was merely deciding whether state law would classify the interests at issue as property rights or expectancies.

Second, the First Circuit *gave* its actual reasons for classifying ERS's interest as an expectancy. The first two reasons—the Legislature's power to change the contribution system and the warning that it

might—had nothing to do with whether post-petition contributions to ERS were "fixed and calculable" in advance. The third reason also addressed a different point, namely that employer contributions based on post-petition work were not "payable" to ERS on the Petition Date. *Id.* at 20a. The court likened this case to one where a debtor's accounts receivable arise only after its petition date solely based on post-petition property. *Id.* (citing *N.H. Bus. Dev. Corp. v. Cross Baking Co. (In re Cross Baking Co.)*, 818 F.2d 1027 (1st Cir. 1987)). In those cases, as here, post-petition payments on the accounts receivable are post-petition property, not proceeds of pre-petition property. *See Cross Baking*, 818 F.2d at 1032.

Third, it is implausible to suppose that the First Circuit announced a new standard under § 552(b) in the course of distinguishing its own precedent, without saying so—indeed, while claiming that the precedent *supported* its ruling here. Pet. App. 23a. If the First Circuit actually intended to change the standard, despite all indications to the contrary, then it will undoubtedly do so in clearer fashion in another decision. Until then, any claims that this Court's review of an intra-circuit conflict is necessary and urgent are premature.

The Petition also contends that the decision below violates the constitutional mandate that bankruptcy laws be uniform because it allows "property" to mean different things in different jurisdictions. Pet. 18–21 (citing U.S. Const. art. I, § 8, cl. 4). That argument is a non-starter. More than a century ago, this Court squarely held that a bankruptcy statute is uniform even if it incorporates state law in a manner that

could lead to different results in different States. *See Hanover Nat'l Bank v. Moyses*, 186 U.S. 181, 189–90 (1902) ("The general operation of the law is uniform although it may result in certain particulars differently in different states."). *Butner* reaffirmed that reliance on state law concerning property rights under the Bankruptcy Code is consistent with the Constitution's uniformity requirement. 440 U.S. at 54–55 & n.9. In all events, PROMESA was enacted by Congress in an exercise of its Article IV powers and is therefore not subject to the uniformity requirement imposed by Article I. *See* 48 U.S.C. § 2121(b)(2).[8]

C. Because the Petition Raises Only Questions of State Law, It Should Be Denied.

As an exercise of its discretionary certiorari power, this Court virtually never grants review over cases that present solely questions of state law. *See, e.g.*, *Webb*, 451 U.S. at 494 n.1; *Wolf*, 372 U.S. at 636. The reasons for that policy are straightforward. First, the decision of any federal court on a question of state law is not binding on state tribunals. *See Leavitt v. Jane L.*, 518 U.S. 137, 146 (1996) (Stevens, J., dissenting). Second, it would be unusual for a question of state law to have the kind of "national significance" appropriate for a grant of certiorari. *Id.* Third, this Court has acknowledged that lower-court federal judges are typically in a better position to determine

[8] The Petition also argues that a "uniformity" problem arises because the First Circuit interpreted the term "proceeds" in § 552(b) differently from other Circuits. Again, that argument mischaracterizes the First Circuit's holding, as explained above. *See* Section I(A), *supra*.

how local courts would decide questions of local law. *Id.* *Butner* itself cited that final reason in refusing to review the property-law question at issue there. *Butner,* 440 U.S. at 58.

Those reasons apply with equal force here. Even if this Court were to decide whether ERS's interest in future employer contributions qualified as property—or what the standard should be—that ruling would not bind the Puerto Rico courts, which would be free to hold differently. *A fortiori*, it would not bind any other state court. And, as in *Butner*, the First Circuit is in a better position to decide whether Puerto Rico law would recognize a property right here. Accordingly, this Petition is singularly not certworthy.

II. There is No Genuine Circuit Split over the Requirements of § 552(b).

The Bondholders' contention that the decision below creates a circuit split is unsustainable. Pet. 12–21. Their argument turns on the same misconceptions discussed above that the First Circuit was construing § 552(b)—which it was not—and that the court required future proceeds to be "fixed and calculable"—which it did not. The outcomes of the cases cited by the Bondholders were different from this one simply because the underlying facts (in particular, the concreteness of the asserted property interests) were different. That is not a circuit split.

1. The Bondholders cite *Valley Bank & Trust Co. v. Spectrum Scan, LLC (In re Tracy Broadcasting)*, 696 F.3d 1051 (10th Cir. 2012), which involved a FCC broadcast license. Pet. 15. The question there was

whether the license qualified as pre-petition property of the debtor such that a security interest could attach to post-petition sale proceeds of that license under § 552(b). *In re Tracy*, 696 F.3d at 1059–66. The Tenth Circuit decided that question by reference to Nebraska's Uniform Commercial Code, which allows the creation of a security interest in the proceeds of a sale of a licensee's rights under a government license. *Id.* at 1061–64. As the court explained, Nebraska Uniform Commercial Code § 9-408 "implicitly recognizes (and the comments to the section explicitly endorse) that a lien on the right to sale proceeds of a government license can attach when a lender extends credit to a licensee." *Id.* at 1064. FCC regulations are also in accord. *Id.* at 1062. Ultimately, the court held the debtor's right to the proceeds of a future sale of its license was not "too speculative to support attachment" even before a sale was in the offing. *Id.* at 1065.

At the outset, it is crystal clear that the Tenth Circuit was not applying some generalized notion of federal common law when it decided that the FCC license qualified as property. That question turned specifically on Nebraska law, which "speak[s] directly to that issue and emphatically support[s] attachment." *Id.*; *see also* Section I, *supra.*

Moreover, there is no inconsistency between *Tracy* and the decision below. The Tenth Circuit applied the same legal standard as the First Circuit below: whether the debtor had a pre-petition expectancy that was "too speculative to support attachment of a security interest in that right." 696 F.3d at 1065; *cf.* Pet. App. 24a (holding that ERS's pre-petition expectancy to employer contributions was "too indeterminate" to

support attachment). The degree of speculation and indeterminacy was substantially greater here than in *Tracy*, which is why the license in *Tracy* was held to be property but ERS's expectancy in future contributions was not. That is not a conflict.

2. The next case cited by the Bondholders is also inapposite. *In re Sunberg,* 729 F.2d 561 (8th Cir. 1984), involved farmer-debtors who had pledged their crops, contract rights, and general intangibles. One of their contract rights was the right to receive from the government surplus corn in exchange for not using certain acreage to grow crops. *Id*. at 561–62. Applying Iowa law, the Eighth Circuit held that the surplus corn was proceeds of the contract rights and general intangibles, which were pre-petition property. *Id*. at 562.

ERS's contingent expectancy of collecting future employer contributions under a statute subject to amendment is far more attenuated than the contractual right determined to constitute "property" in *Sunberg*. *First*, lenders like the bank in *Sunberg* can foreclose on contracts and perform under them. Statutes are not subject to foreclosure and the Bondholders cannot substitute themselves for ERS under the statute. They are not legislators. *Second*, ERS has no power to create collateral. It is totally dependent on other public employers directing employees to perform work, to pay them, and to pay ERS an employers' contribution. *Third*, the Bond Resolution here provided that a subsequent legislature could reduce or, by implication, eliminate the employer contributions. Pet. App. 21a. *Fourth*, the obligation to make employer contributions could be disregarded by any subsequent

legislature (which it was). *Id.* at 21a-22a (citing *United States v. Winstar Corp.*, 518 U.S. 839, 873 (1996)).[9] By contrast, ERS's contingent interest to collect future employer contributions was totally dependent on the conduct of other governmental employers, under a statute not subject to foreclosure, but to amendment and repeal. That right is far more attenuated than the contractual right determined to constitute "property" in *Sunberg*.

3. *Jones v. Salem Nat'l Bank (In re Fullop)*, 6 F.3d 422 (7th Cir. 1993), is also in accord. In *Fullop*, the debtor granted a security interest in his "working interest" to extract oil and gas from leased property. *Id.* at 429. Under Illinois law, a working interest is considered existing real property. *Id.* at 427 (citing *Fry v. Farm Bureau Oil Co.*, 119 N.E.2d 749, 750 (Ill. 1954)). The court thus held that gas and oil extracted after the debtor's petition date were proceeds of the debtor's pre-petition real property pledged as collateral. *Id.* at 429. As with the other cases, the court simply reached a different conclusion under state law concerning whether the debtor held pre-petition "property" based on different facts.

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[9] The Bondholders try to minimize the contingent nature of ERS's statutory interest by contending that "any property right" can be disregarded by a subsequent legislature. Pet. 27 (citing *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1029 (1992)). The difference, though, is that a legislature can repeal a statutory interest like ERS's as a matter of course, but if the legislature takes a property right it must pay just compensation. That makes a property right more concrete than a statutory interest like the one ERS held pre-petition.

4. Finally, *United Va. Bank v. Slab Fork Coal Co.*, 784 F.2d 1188 (4th Cir. 1986), involved a contract under which a coal company (Slab Fork) would mine and supply coal to another company (Armco). A bank acquired a security interest in Slab Fork's contract and its proceeds. 784 F.2d at 1189. When Slab Fork declared bankruptcy, it procured coal from a third party to deliver to Armco, and Slab Fork continued to receive payments from Armco. *Id.* The Fourth Circuit held that the bank's interest in the existing contract was property, and the payments from Armco were collateral proceeds that fell under § 552(b). *Id.* at 1191. Thus, the bank had a security interest in those funds that was not cut off by § 552(a). *Id.*

As the First Circuit correctly ruled, *Slab Fork* is not inconsistent with the outcome here because ERS's interest in future employer contributions is far less substantial and concrete than the *Slab Fork* bank's interest in coal revenue. Pet. App. 22a.

In short, none of the collateral in the Bondholders' cases was subject to the contingencies, unenforceability, repealability, and control of third parties that exist here. There is no basis to believe that those courts would decide this case differently from the First Circuit were they to face similar facts.

III. The Decision Below Does Not Implicate Any Important Question.

The Bondholders greatly overstate the significance of the First Circuit's decision when they contend it will have "far-reaching and destabilizing practical consequences" on the nation's capital markets. Pet.

27. Again, this argument depends on a fundamental misreading of the First Circuit's decision.

The Bondholders assert that the decision below limits § 552(b)'s application to cases where post-petition proceeds are "fixed and calculable" in advance. Pet. 28. They say that rule "eviscerates" a wide swath of security interests. *Id.* But, as explained above, the decision does no such thing. The First Circuit merely invoked the universally accepted rule that a security interest can attach only to pre-petition property (as determined by State law) and to proceeds of that pre-petition property. Pet. App. 20a–24a. Just because ERS's particular pre-petition expectancy did not constitute property does not mean that *all* security interests have been "eviscerated."

The "common and extremely valuable security interests" cited in the Petition—such as those involving intellectual property, franchise agreements, or government licenses—are unaffected by the First Circuit's ruling. Pet. 28. Unlike the Bondholders' security interest below, those security interests attach to true pre-petition property and proceeds of that property. For example, a security interest can attach pre-petition to a debtor's existing patents and, as proceeds of the patents, royalties on those patents. If the debtor files for bankruptcy, the security interest could also attach to royalties paid post-petition under § 552(b) because those royalties are proceeds of pre-petition property in which the secured party had a security interest. The First Circuit's decision does not hold otherwise. The decision merely held that ERS had no pre-petition property right in future employer contributions to which the Bondholders' security interest could attach on the unique facts of this case,

which involves a repealable statutory interest in receiving future employer contributions ERS has no control over. Pet. App. 20a.

For similar reasons, the First Circuit's decision does not "jeopardize[]" the municipal-bond market. Pet. 30–31. Again, in arguing that the sky will fall on that market, the Bondholders mischaracterize the First Circuit's decision as holding that a municipality's post-petition revenues must be "fixed and calculable" for § 552(b) to apply. *Id.* at 30. In reality, a municipality remains free to pledge its property and proceeds of that property as security for a loan. Under § 552(b), the resulting security interest can extend to proceeds of the pledged pre-petition property received by the municipality after a bankruptcy filing—regardless of whether those proceeds were "fixed and calculable" on the petition date. Moreover, the protections afforded special-revenue bondholders (which these Bondholders are not) pursuant to 11 U.S.C. § 928(a) are unaffected by the decision below. The decision below applies only when a debtor pledges an expectancy that is not property under state law.

Notably, the Petition cites no evidence that the municipal-bond market reacted to the First Circuit's decision with alarm or dismay. If the decision had actually "jeopardized" the entire municipal-bond market as the Bondholders contend, the market presumably would have reacted with more than a shrug.

IV. This Case Is a Poor Vehicle to Review the Questions Presented.

Even if the Petition were otherwise certworthy (which it is not), this case is a poor vehicle to review the Questions Presented because a favorable ruling for the Bondholders is unlikely to bring them any relief. At the end of the day, the Bondholders seek a declaration that their security interest attaches to all employer contributions paid to ERS after the Petition Date and based on work performed post-petition. Even if the Court were to reverse the First Circuit's ruling and hold that ERS *did* have a pre-petition property right to contributions generated by post-petition work such that § 552(b) could apply, it would make no practical difference because the Bondholders' security interest still would not attach to post-petition contributions for at least two reasons.

First, there no longer are any employer contributions to which the Bondholders' security interest could attach. The 2017 Amendments to the Enabling Act eliminated employer contributions to ERS. Although the Bondholders seek to attach payments made by employers under the Commonwealth's new pay-go system, their security interest does not extend to those payments under the plain terms of the Security Agreement.

Second, as has been asserted in other adversary proceedings, the ERS bond issuance was *ultra vires* because it was not conducted in compliance with the 1988 Amendment to the Enabling Act. *See* Adv. Proc. Nos. 19-355, 19-356, 19-357, 19-358, 19-359, and 19-361 (LTS) (D.P.R. May 29, 2019). Because ERS lacked

any authority to issue the ERS Bonds, the Bondholders lack any security interest under the bonds.

Accordingly, this case does not present a good vehicle to review the Question Presented because the Bondholders are unlikely to succeed in securing the relief they seek regardless of the outcome of the petition.

CONCLUSION

The petition should be denied.

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Respectfully submitted,

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