No. 22-367

In The
# Supreme Court of the United States

FINANCIAL OVERSIGHT & MANAGEMENT BOARD FOR PUERTO RICO,
*Petitioner,*
v.

COOPERATIVA DE AHORRO Y CREDITO ABRAHAM ROSA, et al.,
*Respondents.*

On Petition for Writ of Certiorari to the U.S. Court of Appeals for the First Circuit

**BRIEF IN OPPOSITION FOR JUST COMPENSATION CLAIMANTS OSCAR ADOLFO MANDRY-APARICIO, ET AL.**


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## QUESTION PRESENTED

Does the Fifth Amendment's self-executing limitation on the sovereign power of eminent domain that private property shall not "be taken for public use, without just compensation" protect judgments awarding just compensation from discharge in a government's bankruptcy proceedings?

## PARTIES TO THE PROCEEDINGS BELOW

Respondents Just Compensation Claimants[1] adopt the listing in the Petition. Each of the Respondents filing this Brief in Opposition is a member of Class 54 in the bankruptcy proceedings below. Class 54 claimants "hold pre[-bankruptcy-] petition constitutional Claims based on seizures or the inverse condemnation of real property pursuant to the Commonwealth's eminent domain power." App.106a.

Additionally, while the individual property owners listed in Exhibit A of Petitioner's Rule 12.6 letter did not file their own pleadings in the courts

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[1]The Just Compensation Claimants submitting this Brief are Oscar Adolfo Mandry-Aparicio; Maria Del Carmen Mandry-Llombart; Selma Verónica Mandry-Llombart; Maria Del Carmen Llombart Bas; Oscar Adolfo Mandry Bonilla; Gustavo Alejandro Mandry Bonilla; Yvelise Helena Fingerhut Mandry; Victor R. Fingerhut-Mandry; Juan C. Esteva-Fingerhut; Pedro Miguel Esteva-Fingerhut; Mariano Javier Mcconnie-Fingerhut; Janice Marie Mcconnie-Fingerhut; Victor M. Fingerhut-Cochran; Michelle Elaine Fingerhut-Cochrane; Rosa E. Mercado-Guzmán; Eduardo José Mandry-Mercado; Salvador R. Mandry-Mercado; Margarita Rosa Mandry-Mercado; Adrián Roberto Mandry-Mercado; Margaret Ann Fingerhut-Mandry; Jorge Rafael Eduardo Collazo Quiñones; Rafael Rodríguez Quiñones; Finca Matilde, Inc.; Ana Morán-Loubriel; Rafael Morán-Loubriel; Ramon Morán-Loubriel; Demetrio Amador, Inc.; and PFZ Properties, Inc. This Brief does not represent dairy industry Respondents (Class 53) or credit union Respondents, both of which made takings claims that were rejected by courts. *See* App.105a (dairy producers' claims arose from a settlement of takings claims, rather than a judgment); *In re Financial Oversight and Management Board for Puerto Rico*, No. 22-1048, 54 F.4th 42 (1st Cir. 2022) (rejecting credit unions' claim that government's fraudulent inducement to purchase bonds worked a taking when the bonds subsequently lost most of their value in the bankruptcy).

below, they also have an interest in the outcome because their just compensation awards and judgments are protected by the First Circuit decision below. Some Exhibit A Respondents, like Ana Morán-Loubriel, Ramón Morán-Loubriel, and Rafael Morán-Loubriel, are represented by this Brief in Opposition.

## CORPORATE DISCLOSURE STATEMENT

Respondent Finca Matilde, Inc., has no parent corporation, and no publicly held company owns 10% or more of its stock.

Respondent Demetrio Amador, Inc., has no parent corporation, and no publicly held company owns 10% or more of its stock.

Respondent PFZ Properties, Inc., has no parent corporation, and no publicly held company owns 10% or more of its stock.

All other Respondents on this brief are individuals.

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## INTRODUCTION AND SUMMARY OF REASONS FOR DENYING THE PETITION

When the Commonwealth of Puerto Rico exercised its sovereign power to take private property for public uses ranging from necessary infrastructure such as storm drains to the creation of nature preserves, it was constitutionally required to provide just compensation to the owners of the property it took. The amount of compensation the Commonwealth is obligated to provide was or will be determined either through valuation proceedings after quick-take possession or through inverse condemnation claims by the property owners. Puerto Rico's courts ordered many such payments of just compensation, and additional claims remained in litigation when, in response to Puerto Rico's financial mismanagement and debt crisis, Congress enacted the Puerto Rico Oversight, Management, and Economic Stability Act (PROMESA), 48 U.S.C. § 2101, *et seq.*, in 2016.

PROMESA established the Financial Oversight and Management Board for Puerto Rico (Board) and a process for restructuring Puerto Rico's debt akin to bankruptcy. App.13a. As part of this process, the Board assessed all aspects of the Puerto Rican economy, including all existing creditors, both public and private, and proposed a Plan of Adjustment (Plan). App.14a. Title III of PROMESA tasked the federal district court with confirming the Plan if it met certain conditions. The key condition relevant here is that the Plan cannot be confirmed unless it "complies with Federal law or requirements," 48 U.S.C. § 2106, and the court determines "the debtor is not prohibited by law from taking any action necessary to carry out the plan." 48 U.S.C. § 2174(b)(3).

The Board's proposed plan treated Puerto Rico's unpaid just compensation obligations for its affirmative takings by eminent domain as partially secured by the quick-take funds earlier deposited with the state court. *See* 32 L.P.R.A. § 2907. The proposed plan treated inverse condemnation claims and judgments as fully unsecured. App.106a. The Respondents filing this brief are property owners who obtained just compensation awards after the government took their property for public use, either via eminent domain or by inverse condemnation. They are "involuntary creditor[s]" seeking their constitutional due. *See People ex rel. Wanless v. City of Chicago*, 38 N.E.2d 743, 746 (Ill. 1941). As a practical matter, the Plan's treatment of eminent domain and inverse condemnation just compensation claims as partially or fully unsecured debt meant that property owners—collectively holding judgments worth at least $300 million—would receive mere pennies on the dollar for the properties the Commonwealth has taken.

Our Constitution obligates government to provide just compensation when it takes property for public use. U.S. Const. amend. V. ("[N]or shall private property be taken for public use, without just compensation."). Just compensation serves as the "full monetary equivalent" of the property. *United States v. Reynolds*, 397 U.S. 14, 16 (1970). This "monetary equivalence" requires "the fair market value of [the] property at the time of the taking" and "no subsequent action can relieve [the government] of the duty to provide compensation for the period during which the taking was effective." *Almota Farmers Elevator & Warehouse Co. v. United States*, 409 U.S. 470, 474

(1973); *Arkansas Game and Fish Comm'n v. United States*, 568 U.S. 23, 33 (2012) (same) (quoting *First English Evangelical Lutheran Church of Glendale v. Los Angeles Cnty.*, 482 U.S. 304, 321 (1987)). Government's obligation to compensate owners when it takes property is not an "empty formality, subject to modification at the government's pleasure." *Cedar Point Nursery v. Hassid*, 141 S.Ct. 2063, 2077 (2021). Any diminution in the amount of compensation results in property being taken without full recompense to the property owner, a constitutionally forbidden outcome. No statute—not even a bankruptcy statute—can alter the constitutional mandate.

The First Circuit decision correctly held that the government's Fifth Amendment just compensation obligation cannot be discharged in bankruptcy. Its decision properly applied the principles established by the Constitution and this Court. The existence of the single split-panel decision by the Ninth Circuit cited by Petitioner does not create any conflict that requires resolution by this Court. The Petition should be denied.

## STATEMENT OF THE CASE

### I. Puerto Rico Property Owners Are Owed Up to Tens of Millions of Dollars in Just Compensation for Takings

Puerto Rico exercised its eminent domain power to take private property for public use. It took immediate possession of some property by quick-take after depositing its assessment of just compensation with the state court while the parties disputed the final amount of just compensation owed. Petition for Writ

of Certiorari (Pet.) at 6. It took other properties without formally invoking its power of eminent domain, which required owners to sue in inverse condemnation for just compensation. *Id.* Because eminent domain and inverse condemnation represent alternative and equivalent ways of ensuring that government complies with the Constitution's requirement of just compensation,[2] both sets of property owners were combined into a single class—Class 54—for purposes of the proceedings below. App.105a–108a.

Respondents Oscar Adolfo Mandry-Aparicio; Maria Del Carmen Mandry-Llombart; Selma Verónica Mandry-Llombart; Maria Del Carmen Llombart Bas; Oscar Adolfo Mandry Bonilla; Gustavo Alejandro Mandry Bonilla; Yvelise Helena Fingerhut Mandry; Victor R. Fingerhut-Mandry; Juan C. Esteva-Fingerhut; Pedro Miguel Esteva-Fingerhut; Mariano Javier Mcconnie-Fingerhut; Janice Marie Mcconnie-Fingerhut; Victor M. Fingerhut-Cochran; Michelle Elaine Fingerhut-Cochrane; Rosa E. Mercado-Guzmán; Eduardo José Mandry-Mercado; Salvador R. Mandry-Mercado; Margarita Rosa Mandry-Mercado; Adrián Roberto Mandry-Mercado; and Margaret Ann Fingerhut-Mandry inherited the estate of Pastor Mandry Mercado. The estate included two parcels of land included within an area the Puerto Rico Legislature designated as the Natural Reserve Punta Cucharas. The heirs prevailed in a state court inverse

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[2] *See PennEast Pipeline Co., LLC v. New Jersey*, 141 S.Ct. 2244, 2255 (2021) ("Those vested with the power could either initiate legal proceedings to secure the right to build, or they could take property up front and force the owner to seek recovery for any loss of value.").

condemnation action, obtaining a judgment of $30,496,000, plus interest as of the date of the taking, August 9, 2008, entered on August 6, 2019. *In re The Financial Oversight and Management Board for Puerto Rico*, No. 17 BK 3283 (LTS), Objection to "Title III Joint Amended Plan of Adjustment of the Commonwealth of Puerto Rico, et al." by Sucesión Pastor Mandry Mercado, Excepting Javier Mandry Mercado, Doc. No. 12701 (filed Apr. 8, 2020). The judgment was confirmed by Puerto Rico's Court of Appeals and Puerto Rico's Supreme Court denied the Commonwealth's petition for certiorari. The judgment is thus final and firm and has not been paid.

Respondent Finca Matilde, Inc., holds an inverse condemnation just compensation judgment for $11,184,576, plus interest, entered November 27, 2013. This amount was confirmed on appeal and has not been paid. *In re The Financial Oversight and Management Board for Puerto Rico*, No. 17 BK 3283 (LTS), Objection to Confirmation of Seventh Joint Plan of Adjustment Filed by Finca Matilde, Inc., No. 18566 (filed Oct. 19, 2021).

Respondents Ana, Rafael, and Ramón Morán-Loubriel are siblings who inherited property that was subject to a quick-take on September 4, 2007, for inclusion in the "Karstic Zone of the Tanama River National Park." The government deposited $510,000 for the quick-take and the siblings sued for their assessment of just compensation in the amount of $873,316, plus interest. *See Compañía de Parques Nacionales de Puerto Rico v. Morán Simó*, No. KEF 2007-0660 (1003), 2013 WL 2298748 (P.R. App. Apr. 23, 2013). The litigation continues in the Commonwealth's court, pursuant to an order

modifying the stay that allowed the case to continue its course until judgment, but not to execute the judgment. Omnibus Order Granting Relief from the Automatic Stay, *In re Financial Oversight and Management Bd. for Puerto Rico*, No. 17 BK 3283-LTS, docket no. 3795 (Aug. 21, 2018).

Respondents Jorge Rafael Eduardo Collazo Quiñones and Rafael Rodríguez Quiñones jointly own property in an area formerly designated for touristic development. The government reclassified the property as a specially protected conservation area, thus denying the Quiñoneses all productive use of the property. The court ordered an evidentiary hearing to determine the amount of just compensation, which is stayed pending the bankruptcy proceedings. *See Jorge Rafael Eduardo Collazo Quiñones y Otros*, Sentencia Puerto Rico Appellate Court, Ponce Region, Panel VII, No. KLAN201401033 (Apr. 13, 2016).

Respondent Demetrio Amador, Inc.,[3] owns property upon which the government placed a storm drain pipe, a physical taking for which the Amador family was entitled to just compensation. In 2005, Demetrio Amador sued in inverse condemnation, seeking $1.5 million in just compensation. The government responded five years later by filing its own eminent domain lawsuit but, in 2014, the Puerto Rico Supreme Court ruled that the claims should be adjudicated in the original inverse condemnation suit. *Roberts v. E.L.A. de Puerto Rico*, No. CC-2012-0493

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[3] Respondent Demetrio Amador Roberts, founder and former president of Demetrio Amador, Inc., died in 2021. Other family members serve as officers of the corporation.

(P.R. July 14, 2014).[4] The remanded proceedings are stayed by Puerto Rico's bankruptcy.

Respondent PFZ Properties, Inc. owned beachfront land of approximately 1,346 cuerdas in the Municipality of Loíza. The land was zoned for tourism-related development. On August 13, 2008, the Commonwealth initiated quick-take eminent domain proceedings and took possession of the property after depositing nearly $5 million with the court as an estimate of just compensation. PFZ submitted an independent appraiser's valuation of $75,550,000, to which the Commonwealth responded with a new appraisal of $32,561,003 at the time of the taking. Further proceedings ensued in the Puerto Rico courts, and PFZ has not yet been compensated for the property, which remains in the possession of the Commonwealth. *See In re: The Financial Oversight and Management Board for Puerto Rico*, No. 17 BK 3283 (LTS), docket no. 18418, Objection to "Seventh Amended Title III Joint Plan of Adjustment of the Commonwealth of Puerto Rico, et al." by creditor PFZ Properties, Inc., at 2–4 (D.P.R. Oct. 7, 2021).

These property owners and many others objected to the Plan of Adjustment's treatment of their constitutionally mandated just compensation, which would have lumped them in with unsecured creditors. App.16a (treating just compensation claims as general unsecured debt, payable "at a pro-rata share of the overall recovery for general unsecured creditors"); App.59a–64a (objections noted). In other words, the property owners would be paid less than the full amount of just compensation the Commonwealth was

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[4] https://dts.poderjudicial.pr/ts/2014/2014tspr87.pdf.

obligated to provide for taking their properties. The Board's counsel estimated 20 cents on the dollar.[5]

## II. The Lower Courts Protected the Property Owners' Constitutional Right to Just Compensation

In the Title III (district) court, the Class 54 property owners asserted that once their properties were taken, the Just Compensation Clause required full payment, and nothing—bankruptcy law included—may impair the constitutional requirement for the "full and perfect equivalent" of their properties. App.105a–107a. *See Monongahela Navigation Co. v. United States*, 148 U.S. 312, 326 (1893). The district court agreed. *See* App.169a–181a. The court recognized that the Class 54 property owners had land physically taken from them, "for which an irreducible entitlement to just compensation immediately ripens under the Takings Clause." App.171a (citing *Knick v. Twp. of Scott*, 139 S.Ct. 2162, 2171 (2019)). The court distinguished judgment creditors who obtained judgments for damages under statutory provisions such as 42 U.S.C. § 1983 because the constitutional command of just compensation is "a *necessary* condition to the exercise of government power to take private property for public use." App.174a (emphasis added). To hold otherwise, the court noted, "would be to make the Takings Clause subject to federal bankruptcy law, which is precisely the opposite of what the Supreme Court has done." App.178a (footnote omitted). The court thus "directed the Board

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[5] *In re: Financial Oversight and Management Board for Puerto Rico*, Nos. PR 22-1079, PR 22-1092, PR 22-1119, PR 22-1120, Appendix for Appellant Suiza Dairy Corp. Vol. VI at 2522 (1st Cir. Mar. 22, 2022) (presentation of Martin J. Bienenstock).

to modify the plan of adjustment to provide for full payment of any valid eminent domain and inverse condemnation claims if the Board wished to make the plan confirmable." App.16a.

The First Circuit affirmed, concluding that the Constitution's command that government pay property owners just compensation is not "a mere monetary obligation that may be dispensed with by statute." App.26a. The government may not "eliminate [its] obligation to pay just compensation and instead pay only reduced amounts based on a formula applicable to most unsecured creditors." App.22a. Therefore, bankruptcy laws that otherwise reduce creditors' claims cannot impair or limit the right of property owners to the full compensation. App.26a.

The First Circuit rejected the Board's argument that the only "property" possessed by the owners were unsecured claims or judgments, "untethered from the substantive Takings Clause violation itself." App.25a.

> [A]s we have explained, the issue on appeal here is not whether a taking has occurred—no one disputes that the government engaged in prepetition takings of some property—the relevant question is whether the denial of just compensation for such a taking violates the Fifth Amendment. Thus, *Kuehner* and the other cases the Board cites are only relevant if we assume that claims for just compensation are the same as any contractual claim for payments due, which begs the very question raised by this appeal.

App.27a (citing *Kuehner v. Irving Tr. Co.*, 299 U.S. 445 (1937)).

The First Circuit also rejected the Board's argument that "nothing about a claim for just compensation makes it any different for bankruptcy purposes than a claim for money damages for any other kind of constitutional violation." App.28a. Relying on the "language and nature of the Takings Clause," the First Circuit held that "compensation is different in kind from other monetary remedies." App.29a. The court concluded that "[s]imply put, the Fifth Amendment contemplates a 'constitutional obligation to pay just compensation.'" *Id.* (quoting *First English*, 482 U.S. at 315).

> Reduced to its nub, the issue we decide is rather simple. The Fifth Amendment provides that if the government takes private property, it must pay just compensation. Because the prior plan proposed by the Board rejected any obligation by the Commonwealth to pay just compensation, the Title III court properly found that the debtor was prohibited by law from carrying out the plan as proposed.

App.33a.

The First Circuit recognized that part and parcel of the power to take property is the corresponding obligation to actually pay for it. Anything that interferes with that obligation—including bankruptcy law—must yield to the Just Compensation imperative.[6]

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[6] The Plan currently is in effect. The Board never sought a stay or other relief pending appeals.

## REASONS FOR DENYING THE PETITION

### I. There Is No Conflict Requiring This Court's Resolution

#### a. The First Circuit Is Consistent with This Court's Decisions and the Overwhelming Majority of Cases Nationwide

This Court consistently describes the Just Compensation Clause as "self-executing," meaning that government is obligated to provide—and property owners are entitled to seek—just compensation without invoking any particular statute or state court procedures. *See, e.g.*, *Knick*, 139 S.Ct. at 2171; *United States v. Clarke*, 445 U.S. 253, 257 (1980). In other words, the Constitution "of its own force" ... "furnish[es] a basis for a court to award money damages against the government," notwithstanding sovereign immunity. *First English*, 482 U.S. at 316 n.9 (quotation omitted). *See also Phelps v. United States*, 274 U.S. 341, 343 (1927) ("Under the Fifth Amendment plaintiffs were entitled to just compensation ... the claim is one founded on the Constitution."); 1 Laurence H. Tribe, *American Constitutional Law* § 6-38, at 1272 (3d ed. 2000) (observing, based on *First English*, that the Takings Clause "trumps state (as well as federal) sovereign immunity").

For this reason, no statute—federal nor state—can operate to diminish or extinguish constitutionally-mandated just compensation. *Louisville Joint Stock Land Bank v. Radford*, 295 U.S. 555, 589 (1935); *see also United States v. Security Industrial Bank*, 459 U.S. 70, 75 (1982) (reaffirming the holding in *Radford* and explaining, "[t]he bankruptcy power is subject to

the Fifth Amendment's prohibition against taking private property without compensation"); *Blanchette v. Connecticut General Insurance Corps.*, 419 U.S. 102, 155 (1974) (ability of takings claimants to pursue any compensation shortfall in the Court of Claims ensured that their constitutional rights were protected). The First Circuit's decision, described above, is entirely consistent with these fundamental principles.

This Court's exposition of the law has been followed by cases nationwide in addition to the court below. For example, the Eighth Circuit relied explicitly on *Radford* to hold in *U.S. Nat'l Bank of Omaha v. Pamp*, 83 F.2d 493, 498 (8th Cir. 1936), that "[t]he power of Congress to enact laws on the subject of bankruptcy is subject to the provisions of the Fifth Amendment, and mortgage liens on real estate are protected by that amendment." The Seventh Circuit similarly applied *Radford* to hold in *In re Chicago, R.I. & Pac. Ry. Co.*, 90 F.2d 312, 314 (7th Cir. 1937), that "trust deeds constituted vested first liens upon the res of the railroad company's property and the income, which neither the legislative department nor the judiciary may impair without just compensation." The Sixth Circuit did the same in *In re Brentwood Outpatient, Ltd.*, 43 F.3d 256, 263 n.7 (6th Cir. 1994), which held that the bankruptcy power "is of course subject to fundamental constitutional restraints." (citing *Radford*). The Federal Circuit affirmed a district court opinion holding that the government's argument that Congress's power to establish "uniform laws on the Subject of Bankruptc[y]" remove its potential liability for a taking is "unconvincing and flatly contradicted by the case law." *Bair v. United*

*States*, 80 Fed.Cl. 287, 294 (2007) (citing *Security Industrial Bank* and *Radford*), *aff'd*, 515 F.3d 1323 (Fed. Cir. 2008).

Bankruptcy courts, where most bankruptcy cases begin and end, also proceed from the necessary premise that restructured debt cannot diminish or eliminate constitutionally-mandated just compensation. *See In re City of Detroit*, 524 B.R. 147, 270 (E.D. Mich. 2014) (Fifth Amendment prohibits municipal bankruptcy plan from allowing impairment of property owners' claims for just compensation after the city took their private property); *In re Michael's Cafeteria, Inc.*, 52 F.Supp. 799, 801 (W.D. La. 1943) ("When the vested lien of the landlord is taken away by an order of the bankruptcy court and the property impressed with that lien is given to the general creditors of the bankrupt, the landlord is clearly deprived of a property right without just compensation."); *Commw. of Penn. State Emp. Retirement Fund v. Roane*, 14 B.R. 542, 544 (E.D. Pa. 1981) ("'adequate protection' … is mandated by the Fifth Amendment"); *First Bank of Miller, Miller, S.D. v. Wieseler*, 45 B.R. 871, 874 n.1 (D.S.D. 1985) (same). In short, "there is almost universal agreement that the power given to Congress by the Bankruptcy Clause may not overstep the limitations imposed by the Due Process and Takings Clauses of the Fifth Amendment." *In re Persky*, 134 B.R. 81, 100 (Bankr. E.D.N.Y. 1991).

**b. Dicta from Two Judges on a Ninth Circuit Panel Does Not Create a Conflict That Requires This Court's Resolution**

Petitioner claims the decision below starkly conflicts with the Ninth Circuit decision in *In re City*

*of Stockton*, 909 F.3d 1256 (9th Cir. 2018). Pet.9–10.[7] This conflict, to the extent it exists, is significantly limited by *Stockton*'s procedural posture and primary holding. In that case, the City of Stockton exercised its quick-take power in 1998 to obtain possession of land owned by Andrew Cobb for a roadbed. The city placed $90,200 in an escrow account and initiated an eminent domain action. *Id.* at 1261. Condemnation and transfer of title would only come after determination and payment of final just compensation. The road was built in 2000. *Id.* Andrew Cobb died and his son, Michael Cobb, withdrew the money pursuant to a stipulation, which waived his defenses except a claim for greater compensation, a remedy he did not assert in the condemnation proceeding. *Id.* Seven years later, Cobb had second thoughts. *Id.* After the city rejected his attempt to return the $90,200, Cobb placed the money in an interest-bearing trust account. *Id.*

Meanwhile, despite the city's filing of the eminent domain action, it never actually prosecuted the lawsuit. After five years of idleness, the district court dismissed it in 2007, as required by state law. *Id.* Cobb then filed an inverse condemnation action, alleging

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[7] Petitioner also claims a conflict with *Poinsett Lumber & Mfg. Co. v. Drainage Dist. No. 7*, 119 F.2d 270, 274 (8th Cir. 1941), but as the First Circuit explained, *Poinsett* addressed only whether a bankruptcy reorganization itself worked a taking. App.28a. The *Poinsett* decision's failure to cite *U.S. National Bank of Omaha v. Pamp*, 83 F.2d 493, decided by the same court just five years earlier, further suggests that *Poinsett* has no bearing on the Fifth Amendment's override of bankruptcy laws that would otherwise deprive property owners of just compensation. *See also* App.174a–176a (district court distinguishing *Poinsett* because the drainage district was not a governmental agency and the claimant failed to preserve his objections to the readjustment plan).

that "because the City failed to prosecute the eminent domain action, the true market value of the parcel remained undetermined and thus Cobb had not received the just compensation due him." *Id.* The court dismissed the lawsuit as barred by the statute of limitations and the doctrine of intervening public use. *Id.* at 1262. Cobb appealed solely on the statute of limitations issue and prevailed in 2011. *Id.* A year later, Stockton filed for bankruptcy and Cobb submitted his inverse condemnation claim—now allegedly worth over $4 million in principal, interest, fees, costs, and taxes. *Id.* The city's proposed plan of adjustment listed Cobb's claim among the "general unsecured" class. *Id.* In 2014, Cobb objected, alleging that his "claims in inverse condemnation are protected by the Fifth and Fourteenth Amendments to the United States Constitution and cannot be impaired by the Plan." *Id.* The bankruptcy court overruled his objection, and the district court affirmed. Cobb appealed the decision while the bankruptcy plan went into effect. *Id.*

The Ninth Circuit affirmed because "Cobb did not pursue any bankruptcy stay remedies, much less pursue them with the requisite diligence. The plan has long been substantially consummated. He offers too little, too late. None of the factors that we consider in deciding whether to apply the doctrine of equitable mootness favor Cobb." *Id.* at 1266. There are significant problems with this analysis, as detailed by Judge Friedland in dissent. *Id.* at 1274–78 (Friedland, J., dissenting). But the equitable mootness aspect of Cobb's procedurally complex case does not bear on the question presented by the Petition in this case and

therefore this Court need not consider whether that aspect of the decision is wrong or right.

In any event, the equitable mootness holding should have ended Cobb's case. *Id.* at 1266 (Cobb's appeal "must be dismissed" as equitably moot). However, the two-judge majority went on to state that Cobb's claim failed on the merits, an opinion wholly unnecessary to the holding on equitable mootness. *Id.* at 1259. In dissent, Judge Friedland disagreed that the doctrine of equitable mootness could constitutionally be invoked to prevent a takings claimant from pursuing just compensation. *Id.* at 1269 (Friedland, J., dissenting). Stating, "[a] claim that falls outside of bankruptcy cannot be subject to the bankruptcy doctrine of equitable mootness. I would therefore reach the merits of Cobb's appeal rather than dismissing it," *id.*, Judge Friedland implicitly acknowledged that the majority's ruling on equitable mootness should have prevented any discussion of the takings question, rendering it dicta.

As the court below noted, App.30a, Judge Friedland's analysis was based on "constitutional first principles" *id.* at 1271, and this Court's decisions compel the result that "Congress's bankruptcy powers do not allow it to infringe upon rights guaranteed by the Takings Clause. Where a taking has occurred, just compensation is owed and cannot be reduced—bankruptcy notwithstanding. … [C]laims for just compensation should be excepted from discharge, such that they survive any bankruptcy intact." *Id.* at 1273 (Friedland, J., dissenting).

Other courts recognize that *Stockton*'s only controlling holding involves equitable mootness. Virtually all subsequent cases that cite *Stockton* do so

only on the subject of equitable mootness.[8] The only courts to consider the *Stockton* panel's treatment of takings claims in a bankruptcy context are the lower courts in this case, which adopted Judge Friedland's dissenting opinion on the non-dischargeability of just compensation. In short, the two-judge majority opinion that would permit dischargeability of just compensation in bankruptcy proceedings is an outlier that has been subsequently ignored.[9]

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[8] *Paradise U.S.D. v. Fire Victim Trust*, No. 20-cv-05414-HSG, 2021 WL 428629 (N.D. Cal. Feb. 8, 2021) (discussing equitable mootness and finality); *Int'l Church of the Foursquare Gospel v. PG&E Corp.*, No. 20-cv-04569-HSG, 2020 WL 6684578 (N.D. Cal. Nov. 12, 2020) (same) *McDonald v. PG&E Corp.*, No. 20-cv-04568-HSG, 2020 WL 6684592 (N.D. Cal. Nov. 12, 2020) (same); *In re PG&E Co. v. Fire Victim Trust*, No. 21-15447, 2022 WL 911780 (9th Cir. Mar. 29, 2022) (same); *In re CPESAZ Liquidating, Inc.*, No. CC-21-1123-LGT, 2022 WL 2719642 (9th Cir. July 12, 2022) (same); *Clark v. Council of Unit Owners of 100 Harborview Drive Condominium*, No. SAG-18-03542, 2019 WL 4673434 (D. Md. Sept. 25, 2019) (same); *Melkonian v. Kutyan*, No. 2:19-cv-01842-JLS, 2020 WL 2114938 (C.D. Cal. Feb. 13, 2020) (same). *See also Tailored Fund Cap LLC v. RWDY, Inc.*, No. 5:20-CV-762, 2020 WL 6343307 (N.D.N.Y. Oct. 29, 2020) (cites dissent regarding capacity of potential creditors to wait until conclusion of bankruptcy before pressing their claims); *Altair Global Credit Opportunities Fund (A), LLC v. United States*, 151 Fed.Cl. 276, 288 (2020), *appeal withdrawn*, No. 2021-1577, 2022 WL 861384 (Fed. Cir. Mar. 23, 2022) (citing majority opinion solely regarding holding that the Board is a local entity, and its actions cannot be attributed to the federal government, and takings claimants must go to the District of Puerto Rico under PROMESA).

[9] There were no petitions for rehearing, rehearing en banc, or certiorari following the *Stockton* decision, likely because of the sudden death of Cobb's counsel, Bradford J. Dozier, in a mountaineering accident six weeks before the decision issued.

## II. The First Circuit Correctly Decided the Question Presented

PROMESA permits a Plan of Adjustment to be confirmed only if it "complies with Federal law or requirements," 48 U.S.C. § 2106, and "the debtor is not prohibited by law from taking any action necessary to carry out the plan." 48 U.S.C. § 2174(b)(3). To the extent the Plan diminished or extinguished claims for just compensation after a taking, as the Board concedes it did (App.22a), the actions were "prohibited by law" and the courts below therefore properly carved out those claims to allow the vast bulk of the Plan to move forward without constitutional impediment. App.16a–17a.[10]

The Board casts this dispute as a battle between co-equal constitutional provisions: Article I, Section 8, which grants Congress the authority to enact "uniform Laws on the subject of Bankruptcies," and the Fifth Amendment, which commands payment of just compensation for a taking of private property. The premise is flawed. Because the Federal

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Bradford John Dozier Obituary, Echovita, https://www.echovita.com/us/obituaries/ca/stockton/bradford-john-dozier-8289277 (visited Nov. 16, 2022).

[10] Respondent United States invited the First Circuit to view the matter as a mere statutory matter because the Bankruptcy Code allows courts to exercise equitable powers, which it argued conflicts with PROMESA's demand that the Plan's confirmation not be contrary to law. *See* App.18a–21a. This approach introduces unnecessary and unhelpful questions of statutory interpretation and policy that would be required to resolve conflicts between statutes of equal weight. *See Epic Systems Corp. v. Lewis*, 138 S.Ct. 1612, 1624 (2018) ("Allowing judges to pick and choose between statutes risks transforming them from expounders of what the law *is* into policymakers choosing what the law *should be*."). The First Circuit properly rejected it.

Bankruptcy Code's municipality-related Chapter 9 did not apply to Puerto Rico, *Financial Oversight and Mgmt. Bd. for Puerto Rico, v. Aurelius Investment, LLC*, 140 S.Ct. 1649, 1655 (2020), Congress enacted PROMESA pursuant to U.S. Constitution Article IV, section 3, authorizing "all needful rules and regulations for territories." 48 U.S.C. § 2121(b)(2). But as the First Circuit correctly noted, Congress's ability to pass bankruptcy laws—for territories or otherwise—is not implicated in this case. App.23a. Even if PROMESA itself were under attack, the constitutional authority to enact laws does not protect the laws themselves from scrutiny to ensure compliance with all the Constitution's requirements. *See Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177–78 (1803). The First Circuit's straightforward application of a constitutional provision that overrides a conflicting statute settles the question without the need to engage in balancing multiple factors. *See United States v. Arthrex, Inc.*, 141 S.Ct. 1970, 1986 (2021) ("In a case that presents a conflict between the Constitution and a statute, we give 'full effect' to the Constitution….").

The First Circuit rested its analysis squarely on this Court's "very clear" cases declaring that bankruptcy laws are subordinate to the Takings Clause. App.23a (citing *Sec. Indus. Bank* and *Radford*). It then rejected the Board's arguments that (1) the Takings Clause prohibition on discharge in bankruptcy narrowly applies only to "impairment of rights in specific property held at the time of filing, not the impairment of unsecured prepetition claims for money," and (2) that just compensation awards are

no different than any other monetary compensation for constitutional violations. App.24a.

The Board's first argument rests on a misunderstanding of this Court's holding in *Knick*. In short, the Board views *Knick* as separating the right to assert a taking from the right to obtain a remedy. App.13. As the First Circuit correctly held, the Board "overreads *Knick*" to "untether" a takings violation from the entitlement to just compensation. App.25a. *Knick* held that property owners seeking just compensation for a taking need not pursue state administrative remedies prior to filing suit in federal court. 139 S.Ct. at 2170–75. The challenged exhaustion requirement was wrongly imposed because the property owner's right to compensation "arises at the time of the taking," *id.* at 2170, and there is no reason why constitutionally-protected property rights should be uniquely excepted from the general rule that plaintiffs alleging violations of their constitutional rights may proceed directly to federal court without exhausting state procedures. *Id.* at 2167 (citing *Heck v. Humphrey*, 512 U.S. 477, 480 (1994) (quoting *Patsy v. Bd. of Regents of Fla.*, 457 U.S. 496, 501 (1982))). Nothing in *Knick* remotely addresses—much less approves of—permanently reducing the amount of compensation owed by the government for property it has already taken. *See Knick*, 139 S.Ct. at 2172 (citing *First English* as holding that a "property owner acquires an irrevocable right to just compensation immediately upon a taking"). *Cf. Crozier v. Fried. Krupp Aktiengesellschaft*, 224 U.S. 290, 306 (1912) (Just Compensation Clause does not require compensation in advance of a taking, or even contemporaneously, but it must be paid); *United*

*States v. Klamath & Moadoc Tribes*, 304 U.S. 119, 123 (1938) ("The established rule is that the taking of property by the United States in the exertion of its power of eminent domain implies *a promise to pay* just compensation, i.e., value at the time of the taking plus an amount sufficient to produce the full equivalent of that value paid contemporaneously with the taking.") (citation omitted, emphasis added). As the First Circuit explained, "[w]e decline to read *Knick* as changing the Fifth Amendment right to receive just compensation unto a mere monetary obligation that may be dispensed with by statute." App.26a.

As to the second argument, the First Circuit correctly relied on the *unique* qualities of just compensation—the only monetary remedy specifically commanded in the text of the Constitution. App.29a ("just compensation is different in kind from other monetary remedies"). The command for just compensation is a "structural limitation" on government's authority to take private property, and it is a limitation that should encourage government officials to exercise the taking power with caution. *Id.* For this reason, property owners' right to just compensation for the taking of their property is not equivalent to other types of monetary compensation for breach of contract or other constitutional violations. App.26a–28a.

The Petition, relying on *Stockton*, conflates constitutional tort recovery via 42 U.S.C. § 1983[11] with constitutionally-mandated just compensation for takings. The First Circuit rightly rejected this claim,

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[11] *See Monell v. Dep't of Social Services of City of N.Y.*, 436 U.S. 658, 691 (1978).

holding that just compensation awards are a unique type of property because, unlike tort or contract damages, they exist solely by constitutional command. App.30a. It explained,

> a claim under the Takings Clause is different in kind from actions under *Bivens* and section 1983. Neither *Bivens* nor section 1983 rest on a provision of the Constitution that mandates a specific remedy in the same way the Takings Clause mandates just compensation; nor do *Bivens* or section 1983 prescribe the quantum of compensation required in the event of a violation.

App.32a (footnote omitted). This is correct because there is a "*constitutional* obligation to pay just compensation." *Armstrong v. United States*, 364 U.S. 40, 49 (1960) (emphasis added); *see also Jacobs v. United States*, 290 U.S. 13, 16 (1933) ("[A] promise [to pay] was implied because of the duty to pay imposed by the [Fifth] Amendment."). Just compensation thereby serves as "full and perfect equivalent in money of property taken." *United States v. Miller*, 317 U.S. 369, 373 (1943) (citations omitted). Unlike other civil actions, claims for just compensation do not determine culpability—the owner had property needed for a public use and the judgment establishes the amount representing the full and perfect equivalent for the property taken. *See United States v. Commodities Trading Corp.*, 339 U.S. 121, 124 (1950) ("The word 'just' in the Fifth Amendment evokes ideas of 'fairness' and 'equity'...."). Because the First Circuit correctly applied this Court's interpretation and application of the Fifth Amendment, there is no reason for this Court's review.

### III. The Financial Effects of the Decision Below on Bankrupt Municipalities Is Minimal

The Petition exaggerates the financial implications of paying Just Compensation Respondents their constitutional due. The amounts in question for the property owners in this case—$300 million for *all* Class 54 claimants, Pet.22—is not chump change (certainly not to the property owners owed the full and perfect equivalent for their taken property); but it pales in light of, say, the $55 *billion* owed to pensioners. *See* App.123a. The just compensation awards represent only half of one percent (0.005) of the owed pension payments, which themselves are only a fraction of Puerto Rico's overall economy subject to restructuring. Moreover, counsel for the Board explicitly advised the district court during the confirmation hearing that every just compensation claim could be paid without affecting the feasibility of the Plan.[12] Puerto Rico's

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[12] The relevant confirmation hearing transcript is included in the record below. *In re: Financial Oversight and Management Board for Puerto Rico*, Nos. PR 22-1079, PR 22-1092, PR 22-1119, PR 22-1120, Appendix for Appellant Suiza Dairy, Corp. Vol. VI at 2525-26 (Mar. 22, 2022). It reads:

> MR. CAPDEVILA-DIAZ [on behalf of Finca Matilde, Inc.]: … I understood that there is enough money to make the Plan feasible if the Court determines that the whole, entire amount is nondischargeable, but I don't think it was clear if it would be at the effective date, or deferred cash payments, or within the Plan, or outside the Plan.
>
> THE COURT: Mr. Bienenstock, did you mean to be specific about that?
>
> MR. BIENENSTOCK [for the Board]: Well, first, the excess cash of 532 million shows that we have the cash

infrastructure and public services are in no way dependent on depriving property owners of constitutionally-mandated just compensation.

Even if a government struggles to find the cash to pay just compensation, this has no bearing on its constitutional obligation to do so. *Childrens' Home, Inc. v. State Hwy. Bd.*, 125 Vt. 93, 99 (1965) ("The fact as to which government, state or federal, had to bear the burden of paying the final award in this case had no proper place in the proceedings.... It had no relevancy and tended to obscure the issue of just compensation by introducing the extraneous matter concerning the source of the funds."); *Shapiro v.*

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> on hand at the outset on the effective date. As a practical matter, Your Honor, these claims, almost all are disputed. And we don't anticipate that there would be a cash need on the effective date for all of them, but we have it just in case.
>
> THE COURT: Thank you. So you are not making a proposal to pay them in full. You are showing that you would be able to pay them in full, but anticipating litigation challenging the allowability of the claims on the merits; is that correct?
>
> MR. BIENENSTOCK: Yes, Your Honor.

*See also In re The Financial Oversight and Management Board for Puerto Rico*, No. 3:17-BK-3283 (LTS), Confirmation Hearing—Day 5, docket no. 19280, at 52:

> MR. BIENENSTOCK: In terms of just the numbers, the eminent domain claims approximate 400 million dollars, and could be paid by reducing amounts that would otherwise go into the pension trust, other reserve accounts, and elsewhere. By itself, the Oversight Board does not believe that would cause the Oversight Board to withdraw the Plan on feasibility grounds, although it would obviously make the numbers tighter, with less margin for error.

*Maryland-National Capital Park and Planning Comm'n*, 235 Md. 420, 427 (1964) ("the source of funds which will pay for the land taken is not material or an issue in these cases"). For this reason, courts preclude government counsel from telling jurors in valuation cases that their own tax dollars ultimately would pay any compensation due. *See, e.g.*, *Dep't of Public Works and Bldgs. v. Sun Oil Co.*, 66 Ill.App.3d 64, 68 (1978); *Bd. of Cnty. Road Comm'rs of Wayne Cnty. v. GLS LeasCo, Inc.*, 394 Mich. 126, 135 (1975); *Denver Joint Stock Land Bank v. Bd. of Comm'rs of Elbert Cnty.*, 105 Colo. 366, 368–69 (1940). Puerto Rico knowingly took the Respondents' properties; it cannot avoid its obligation to pay just compensation because it would rather spend the money elsewhere.

Municipal bankruptcies are thankfully rare. Only 27 states even permit certain local governments to declare bankruptcy. Jeff Chapman et al., *By the Numbers: A Look at Municipal Bankruptcies Over the Past 20 Years* (July 6, 2020).[13] Out of 38,779 cities, towns, counties, and villages nationwide, only 31 filed for bankruptcy between 2001 and 2020 and, of those, 12 were dismissed and two cities each filed twice. *Id.* (Puerto Rico excluded). An additional 95 special-purpose districts (e.g., for fire protection, health care, and schools) filed for bankruptcy. *Id.*[14] Moreover, the

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[13] https://www.pewtrusts.org/en/research-and-analysis/articles/2020/07/07/by-the-numbers-a-look-at-municipal-bankruptcies-over-the-past-20-years.

[14] The Petition supports its claim of 170 such bankruptcies by a report behind a paywall. https://www.statista.com/statistics/1118479/bankruptcy-filings-us-chapter-9-municipality/. However, the source data broadly defines "financially-distressed municipality" to include "cities, counties, townships, school

Board's counsel argued to the district court below that municipalities could not file for bankruptcy deliberately to avoid paying just compensation judgments because such a petition would be filed in bad faith. Transcript, Confirmation Hearing—Day Five, *In re: The Financial Oversight and Management Board for Puerto Rico*, No. 3:17-BK-3283 (LTS) at 71-72 (Nov. 15, 2021) (In such a hypothetical situation, Mr. Bienenstock argued, "the takings victims would be in your court immediately arguing that the petition is not filed in good faith and, therefore, must be dismissed. And the Bankruptcy Code and Title III provide Your Honor all the ammunition you need to deal with that bad actor situation.").

Finally, the Petition argues that Puerto Rico needs to repurpose the just compensation money "to provide much-needed public services and to support the Commonwealth's fiscal recovery." Pet.2. Such an approach completely undercuts the purpose of the Just Compensation Clause, which is to prevent individual property owners from being forced to subsidize public expenses "which, in all fairness and justice, should be borne by the public as a whole." *Armstrong*, 364 U.S. at 49.

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districts, and public improvement districts. It also includes revenue-producing bodies that provide services which are paid for by users rather than by general taxes, such as bridge authorities, highway authorities, and gas authorities." https://abi-org.s3.amazonaws.com/Newsroom/Bankruptcy_Statistics/Chapter9_Filings1980_Current_Compatibility_Mode.pdf.

## CONCLUSION

The Petition should be denied.

DATED: January 2023.

Respectfully submitted,

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