No. 22-367

In The
Supreme Court of the United States

THE FINANCIAL OVERSIGHT AND MANAGEMENT BOARD FOR PUERTO RICO, AS REPRESENTATIVE OF THE COMMONWEALTH OF PUERTO RICO, THE EMPLOYEES RETIREMENT SYSTEM OF THE GOVERNMENT OF THE COMMONWEALTH OF PUERTO RICO, AND THE PUERTO RICO PUBLIC BUILDINGS AUTHORITY,

Petitioner,

v.

COOPERATIVA DE AHORRO Y CREDITO ABRAHAM ROSA, ET AL.,

Respondents.

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

BRIEF IN OPPOSITION TO A PETITION FOR A WRIT OF CERTIORARI FILED BY SUIZA DAIRY, CORP.

RAFAEL A. GONZALEZ VALIENTE
Counsel of Record for Suiza Dairy, Corp.
GODREAU & GONZALEZ LAW, LLC
P.O. Box 9024176
San Juan, P.R. 00902-4176
(787) 726-0077
rgv@g-glawpr.com

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

QUESTION PRESENTED

Can governmental entities discharge "*just compensation*" claims incurred on account of the Fifth Amendment through restructuring proceedings?

PARTIES TO THE PROCEEDINGS

Suiza Dairy, Corp. is a party to the proceedings as a creditor with a regulatory taking claim against the Commonwealth of Puerto Rico and who filed a response to the appeal filed by the Petitioners before the First Circuit. Suiza Dairy, Corp. adopts the listing in the Petition as to the additional parties to the action. However, Suiza Dairy, Corp. notes that while the individual property owners listed in Exhibit A of Petitioners' Rule 12.6 letter did not file their own pleadings in the courts below, they absolutely have an interest in the outcome of this petition because their just compensation awards were protected by the First Circuit decision below.

CORPORATE DISCLOSURE STATEMENT

Respondent Suiza Dairy, Corp. is a privately held corporation whose parent corporation is Grupo Gloria Holding, Corp. No publicly held company owns 10% or more of its stock.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

FEDERAL CASES

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

INTRODUCTION AND SUMMARY OF REASONS FOR DENYING THE PETITION

Suiza Dairy, Corp. (hereinafter "Suiza") has a non-dischargeable claim against the Commonwealth of Puerto Rico (hereinafter "Commonwealth") for just compensation on account of a regulatory taking in violation of the Fifth Amendment of the U.S. Constitution.

By end of the first decade and the beginning of the second decade of the new century, the Commonwealth reached an economic and financial crisis which required that Congress take action. Exercising its power over its territories under Article IV, Section 3 of the Constitution, Congress formulated the Puerto Rico Oversight, Management, and Economic Stability Act (hereinafter "PROMESA") to allow the Commonwealth to restructure its debts and finances. 48 U.S.C. §2101 *et seq*. PROMESA required that a Financial Oversight and Management Board (hereinafter the "Board") be established which would then be in charge of the Commonwealth's restructuring processes. Among other options, Title III of PROMESA provides for the presentation of a petition before the Federal District Court for the restructuring of the debts of the Commonwealth and/or its instrumentalities.

Title III of PROMESA then allows the District Court to approve a Plan of Adjustment if it meets certain conditions. One of those conditions is that the "debtor is not prohibited by law from taking any action necessary to carry out the plan." 48 U.S.C. §2174(b)(3).

As part of the restructuring process, the Board presented a Plan of Adjustment that would affect and discharge certain claims held by property owners for just compensation pursuant to the Fifth Amendment of the Constitution of the United States of America. The property owners in question include the whole spectrum of eminent domain claimants, from direct action claimants where the government exercised its eminent domain powers to inverse condemnation actions and regulatory takings claims.

The Plan of Adjustment, as proposed by the Board, would have treated eminent domain claims as partially secured in the case of property owners with a direct-action claim – *to wit*, those claims in which the Commonwealth initiated a "quick-take" eminent domain procedure and for which funds were deposited in Court. Any portion of those claims not secured by the funds deposited in Court and all other eminent domain claims, including inverse condemnations and regulatory takings claims, would be treated as unsecured claims. Under the Plan of Adjustment proposed by the Board, unsecured claims would receive approximately twenty percent (20%) of their claims and the rest would be discharged.[1]

Suiza and the other property owners opposed the treatment proposed by the Board in the Plan of

---

[1] *See*, *In re Commonwealth of Puerto Rico*, No. 17,628 (D.P.R. Jul. 30, 2021), pg. 24. *See also*, *In re Commonwealth of Puerto Rico*, No. 17,639 (D.P.R. Jul. 30, 2021), Attachment #1, p. 24.

Adjustment and requested that they be paid the full just compensation owed to them under the Fifth Amendment.

The District Court in charge of the Title III PROMESA proceedings concluded that takings claims are constitutionally protected by the Fifth Amendment and have to be paid in full through the Plan of Adjustment. The First Circuit Court later confirmed the ruling of the District Court, holding that "*if the government takes private property, it must pay just compensation*." Ap. 33a.

The Fifth Amendment of the U.S. Constitution recognizes that government has the power to "take" private property for public use, but it conditions that power to the payment of "just compensation" to the victim of said taking. U.S. Const. Amend. V. ("[N]or shall private property be taken for public use, without just compensation."). *See also*, *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304, 314 (1987) ("As its language indicates, and as the Court has frequently noted, this provision does not prohibit the taking of private property, but instead places a condition on the exercise of that power.") As the District Court correctly held, the payment of just compensation is a "*a necessary condition to the exercise of government power to take private property for public use*." Ap. 174a.

Once the taking has occurred, the owner of the property is entitled to just compensation immediately and no future action of the government may relieve it

of the obligation to provide said compensation. *Knick v. Township of Scott*, 139 S.Ct. 2162, 2167 (2019). No law, such as PROMESA, may trump the constitutional imperative of providing just compensation.

The Board's assertion that the Commonwealth could use the $300 million owed to the taking's claimants "to provide essential public services to its residents"[2] is exactly the reason why the Fifth Amendment was created – to prohibit the taking of property from certain individuals to pay public expenses "which, in all fairness and justice, should be borne by the public as a whole." *Armstrong v. United States*, 364 U.S. 40, 49 (1960).

To paraphrase Justice Thomas, if the requirement of enforcing the Takings Clause of the U.S. Constitution makes PROMESA "unworkable, so be it". *Knick*, *supra* at 2180. But the matter is less dire than that. By the Board's own admission, the Plan of Adjustment is still viable even if the Commonwealth has to pay the just compensation claims in full.[3]

The Board also claims that the Ninth Circuit decision in *Cobb v. City of Stockton, California*, 909 F.3d 1256 (9th Cir. 2018) creates a circuit split. Pet. at 9-10. But in reality, the Ninth Circuit held that the appeal was equitably moot. ("None of the factors that we

---

[2] *See*, Pet. 22.

[3] Ap. 203a, fn. 47 ("The Plan remains feasible even accounting for the payment in full of the total of Eminent Domain/Inverse Condemnation Claims asserted to arise out of the Takings Clause.").

consider in deciding whether to apply the doctrine of equitable mootness favor Cobb.") *Id*, at 1266. The holding that purportedly favors the Board's position is, at best, *dicta*. No such circuit split actually exists.

The Board then alleges that the issue is of such importance that it requires this Court's intervention. But the same "statistics" put forth by the Board show that the issue is not one of real importance in municipal restructurings, much less determinative. The Board posits that one hundred and seventy (170) municipal entities have filed for bankruptcy protection since the year 2000. Pet. at 2. Out of those one hundred and seventy (170) cases, the issue of whether takings claims can be discharged has only arisen in three (3) of them – (i) City of Stockton, (ii) City of Detroit and (iii) Puerto Rico.[4] That does not denote that this issue is of "tremendous importance"[5] in municipal restructuring cases, but quite the opposite.

More importantly, in none of the three cases was the payment of the takings claims an impediment to the restructuring. The City of Detroit and the Commonwealth were able to confirm their plans in spite of being required to pay takings claims in full. And, although the City of Stockton did not pay takings claims

---

[4] In its Opinion and Order the First Circuit could only identify two other cases where the issue had been addressed by the courts, and *In re City of Detroit*, 524 B.R. 147 (Bankr. E.D. Mich. 2014). *See*, Ap. 30a-31a.

[5] *See*, Pet. 23.

in full, it appears to have been able to do so also.[6] In short, the Board does not provide any evidence to support its contention that this is such a critical issue in municipal bankruptcies as to merit this Court's intervention.

The First Circuit correctly confirmed the District Court's decision below. The petition should be denied.

STATEMENT OF THE CASE

(1) After the turn of the century, Puerto Rico went through a dire financial downturn that eventually led to the Commonwealth not being able to meet its obligations or provide basic services for its citizens. Since the Commonwealth is exempted from Chapter 9 of the Bankruptcy Code, Congress exerted its power under the Territorial Clause to enact PROMESA in order to provide for the restructuring of the Commonwealth's debts. 48 U.S.C. §2101, *et seq*.

PROMESA provides for the creation of the Board, which in turn is tasked with guiding the Commonwealth into financial stability and access to the capital markets. *Id*, §2121(a). Its Title III allows the Board to file a restructuring procedure for the Commonwealth

[6] *See*, *City of Stockton, supra* at 1279 ("I am not blind to the City's herculean task of pulling itself out of bankruptcy, but a ruling for Cobb would not topple the Plan, or somehow throw the City back into bankruptcy.").

or any of its instrumentalities before the Federal District Court. *Id*, §2164(a).

(2) Prior to the filing of the restructuring procedure, the Commonwealth had availed itself of the eminent domain power recognized by the Fifth Amendment. The Commonwealth used a local "quick-take" statute to acquire properties for public use. P.R. Laws Ann. Tit. 32, §2907. As part of that "quick-take" process, the Commonwealth deposited funds in State Court for what the Commonwealth understood was the fair value of the property in question. Some of those property owners challenged the value that the Commonwealth assigned to the property and obtained judgments awarding them additional money as just compensation for the taking of said property.

The Commonwealth also faced myriad claims for inverse condemnation and regulatory takings where the property owners argued that the Commonwealth had either invaded the property or impaired the use of said property to the extent that it constituted a taking. Those property owners have judgments which grant them just compensation for the uncompensated taking, regulatory taking or impairment of use of the property in question.

Since all types of takings are the same for purposes of the Fifth Amendment, all such claims need to be treated the same. *Cedar Point v. Hassid*, 141 S.Ct. 2063, 2072 (2021) ("Government action that physically appropriates property is no less a physical taking

because it arises from a regulation."); *see also*, *Palazzolo v. Rhode Island*, 533 U.S. 606, 617 (2001).

Suiza suffered a regulatory taking at the hands of the Commonwealth through an improper price-fixing scheme enacted for the milk industry. In order to obtain just compensation, Suiza and Vaquerias Tres Monjitas filed a complaint before the Federal District Court for the District of Puerto Rico. After nearly a decade of litigation, the case culminated in a settlement for the payment of the just compensation owed on account of the regulatory taking.

(3) In 2017, the Board filed a restructuring proceeding for the Commonwealth under Title III of PROMESA which culminated in the presentation of a Plan of Adjustment. The Plan of Adjustment proposed to pay "victims" of "quick-take" actions the full amounts deposited in State Court by the Commonwealth. All other taking or eminent domain claims, including deficiency claims in the "quick take" actions, would have been treated as unsecured claimants which would have been paid twenty percent (20%) of the actual value of their claims.[7] In other words, most eminent domain/takings claimants would be paid much less than the actual value of their property in

[7] The Plan of Adjustment provides for payment of only 20% to unsecured creditors. *See*, *In re Commonwealth of Puerto Rico*, No. 17,628 (D.P.R. Jul. 30, 2021), pg. 24. *See also*, *In re Commonwealth of Puerto Rico*, No. 17,639 (D.P.R. Jul. 30, 2021), Attachment #1, p. 24.

contravention of the Fifth Amendment and the holdings of this Court.[8]

The District Court held that this violated the Fifth Amendment right to just compensation. Thus, the Plan of Adjustment could not be confirmed as it did not meet the requirement that "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 modified the Plan of Adjustment to provide an alternative in which eminent taking claimants would be paid in full according to the Fifth Amendment, while preserving the right to appeal the determination of the District Court.

The Board filed an appeal to the First Circuit, who in turn confirmed the ruling below. The First Circuit held that "[b]ecause 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." Ap. 33a.

As part of its decision, the First Circuit recognized that the Fifth Amendment is special, in as much as it is the only constitutional right/provision that requires the government to compensate the affected property

---

[8] As the First Circuit correctly states in its Opinion and Order, "just compensation" is "the full monetary equivalent of the property taken"; that is, "[t]he owner is to be put in the same position monetarily as he would have occupied if his property had not been taken." *Quoting*, *Almota Farmers Elevator & Warehouse Co. v. United States*, 409 U.S. 470, 473–74 (1973). *See*, p. 22a.

owner.[9] Without just compensation, the government simply may not take property from private citizens for public use. "[T]he Takings Clause 'does not prohibit the taking of private property, but instead places a condition on the exercise of that power.' " *Quoting*, *First English Evangelical Lutheran Church of Glendale v. Los Angeles Cnty.*, 482 U.S. 304, 314 (1987). *See*, Ap. 29a. In order to take property for public use, the government must provide just compensation. One simply cannot exist without the other.[10]

(4) The Board now requests that this Honorable Court issue a petition for writ of certiorari from the First Circuit decision. The Board raises a host of arguments in a scattershot approach in an attempt to sway the Court. But as we shall see, the Board is simply incorrect and the Court should deny the request to issue a writ of certiorari.

---

[9] "This makes the payment of just compensation unlike most other instances in which the government engages in a constitutional violation and is required to remedy that violation by paying money. For instance, nothing in the Constitution itself specifies any particular remedy that must be provided when the government engages in a Fourth Amendment violation. Indeed, absent remedies provided for by statute or federal common law, there is no right to monetary relief for most constitutional violations." *See*, Ap. 29a.

[10] *Knick v. Township of Scott*, *supra* at 2180 ("A 'purported exercise of the eminent-domain power' is therefore 'invalid' unless the government 'pays just compensation before or at the time of its taking.' ").

REASONS FOR DENYING THE PETITION

I. PROMESA is not a Bankruptcy Statute.

All of the Board's arguments are based on the assumption that PROMESA is a bankruptcy statute approved under the Bankruptcy Clause of the U.S. Constitution,[11] and that there is a conflict between the Fifth Amendment and the power to create uniform bankruptcy laws. ("This Court should grant certiorari to resolve this irreconcilable disagreement that the Fifth Amendment conflicts with the bankruptcy power . . . ") Ap. 2.[12]

The problem with that argument is that PROMESA was *not* approved pursuant to the Bankruptcy Clause. Rather, §101(b)(2) of the statute clearly states that "Congress enacts [P.R.O.M.E.S.A.] ***pursuant to Article IV, Section 3 of the Constitution of the United States***, which provides Congress the power to dispose of and ***make all needful rules and regulations for territories***." 48 U.S.C. §2121(b)(2). [Emphasis added].

There can be no question that the Fifth Amendment applies to Puerto Rico and the other Territories.

---

[11] U.S. Const. art. I, §8, cl. 4.

[12] *See also*, Ap. 3 ("The court below also mistakenly thought that the Takings Clause and Congress's bankruptcy power are in conflict when a debtor seeks to discharge a just compensation claim."); Ap. 20 ("This Court has never suggested that the discharge of a just-compensation claim or any other unsecured claim violated the Fifth Amendment because there is no conflict between the Fifth Amendment's creation of a claim and the bankruptcy power's restructuring of a claim.").

Tenoco Oil Company v. Department of Consumer Affairs, 876 F.2d 1013, 1029 N. 23 (1st Cir. 1989) ("We have no doubt, however, that the takings clause, like the due process and equal protection clauses, applies to the Commonwealth of Puerto Rico. *See*, *e.g.*, *Culebras Enterprises Corp. v. Rivera Ríos*, 813 F.2d 506 (1st Cir. 1987)"). Thus, the examination of whether PROMESA can supersede the requirements of the Fifth Amendment should end there.

Simply put, although PROMESA is a restructuring statute it was not passed pursuant to the Bankruptcy Clause but rather pursuant to the Territories Clause. Therefore, there is no "irreconcilable disagreement that the Fifth Amendment conflicts with the bankruptcy power". Ap. 2.

For that reason alone, the Court should deny the petition.

II. There is no "Circuit Split" that Merits the Court's Intervention.

Petitioners claim that the First Circuit decision conflicts with the Ninth Circuit ruling in *Cobb v. City of Stockton*, *supra*. Pet. 9-10. There is no such conflict. Although the Ninth Circuit discusses the takings issue, *the actual ruling of the Court is based on the equitable mootness doctrine*.

In *Stockton*, as opposed to the instant case, Cobb's appeal did not request that he receive just compensation or that his claim be found to be non-dischargeable.

Cobb requested that the plan be unwound and the bankruptcy petition be dismissed.[13] On the other hand, Suiza and the other claimants simply requested that their constitutionally protected claims for just compensation be paid in full.

After analyzing Cobb's request to unwind the plan, the Ninth Circuit concluded that:

> 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. Thus, his appeal must be dismissed.
>
> *Id*, at 1266.

The equitable mootness holding should have ended the discussion. Any further holdings are *dicta* and need not be considered by this Court.

But there are also several other important differences between Cobb's claim in *Stockton* and the respondent's claims in the instant case. For example, the Ninth Circuit found that Cobb "listed his claim as unsecured and did not file any proceeding to have the court determine its secured status", he "did not object to the disclosure statement" and "did not seek

---

[13] "On appeal, [Cobb] reiterated his objection to the plan and repeated his claim that where a bankruptcy plan cannot be confirmed, the remedy is dismissal of the bankruptcy case." *Id*, at 1265.

exemption from discharge." *Id*, at 1267. On the other hand, Suiza listed its claim as a "Non-Dischargeable Regulatory Accrual Claim for U.S. Constitution Violations Involving Takings Clause" which has not been objected. Suiza and the other takings claimants objected to the Disclosure Statement submitted by the Board as well as the Plan of Adjustment. Suiza and the other takings claimants also specifically requested that their takings claim be excepted from discharge. All of these differences make *Stockton* inapplicable to the case at hand and differentiates it from the First Circuit decision below.

Finally, *Stockton* has a well thought out dissent by Judge Friedland. *Id*, at 1274-79. The dissenting analysis on the matter of the takings claim, coincides and is cited favorably by the First Circuit below. This, combined with the First Circuit decision below and the decision in the City of Detroit case, could lead to a change in the Ninth Circuit's position on the matter.

The Board then claims that the First Circuit decision conflicts with *Poinsett Lumber Mfg. v. Drainage Dist. No. 7*, 119 F.2d 270, 274 (8th Cir. 1941). But as the First Circuit correctly stated, *Poinsett* does not tackle the question of whether a just compensation claim is dischargeable in bankruptcy.

Poinsett addresses whether the bankruptcy court had jurisdiction over the appellant's claim and "whether or not the court abused its discretion in entering the order" denying appellant's request "to institute suit against the debtor in the state court". *Id*, at

271-272. The Eighth Circuit then explains that the appellant's claim could "have been adjudicated as fairly and as expeditiously in the bankruptcy court as it could be in the state court." *Id*, at 272. The appellant refused to participate in the restructuring process even though "every opportunity was given appellant to appear in the proceeding and assert its rights and claims" so it could not make a "a collateral attack" to the plan of composition. *Id*, at 274. It is important to note that the appellant in *Poinsett* only had a claim that *could possibly* constitute a taking but for which there was no ruling as to whether it was a taking or not.[14] But the fact of the matter is that appellant refused to litigate the action before the bankruptcy court despite being given every opportunity to do so.[15] The Eighth Circuit never addressed whether a just compensation claim could be discharged in bankruptcy or not.[16] Thus, no

---

[14] "For its claim and cause of action on which it asked permission to institute suit, appellant alleged in its petition that it owns 21,000 acres of land in Cross County, Arkansas, which has been damaged by water cast upon it by a floodway constructed by the debtor district, and for which it has not been compensated." *Poinsett*, *supra* at 271.

[15] "Thus, every opportunity was given appellant to appear in the proceeding and assert its rights and claims. If it claimed that it was not included in the plan nor affected by it, under §403, sub. a, it should have raised the question and that issue would have been determined by the judge, after hearing." *Poinsett*, *supra* at 274.

[16] "There can be but one final question presented upon such an appeal: *that is whether or not the court abused its discretion in entering the order complained of*. All alleged errors not relevant to that question are immaterial." [Emphasis added] *Poinsett*, *supra* at 272.

circuit split exists between the Eighth Circuit and the First Circuit on the issue presented in the instant petition.

III. The First Circuit Decision Correctly Interprets the Fifth Amendment and the Decisions of this Honorable Court.

The Framers specifically intended for the Constitution to protect the property rights of the people against encroachment from the government. Madison famously stated that it "*is not a just government, nor is property secure under it, where the property which a man has in his personal safety and personal liberty, is violated by arbitrary seizures of one class of citizens for the service of the rest.*"[17] Without the right to private property, there is no liberty.

This Court has followed that guiding light for centuries. As far back as 1893, in *Monongahgela Navigation Co. v. United States*, 148 U.S. 312, 325 (1893), this Court held "that no private property shall be appropriated to public uses unless a full and exact equivalent for it be returned to the owner."

As Justice Brandeis stated *in Louisville Joint Stock Land Bank v. Radford*, 295 U.S. 555, 602 (1935), "***no matter however great the Nation's need***, private property shall not be thus taken even for a wholly public use without just compensation." Justice Brandeis continues: "If the public interest requires,

[17] James Madison, "Property" (March 29, 1792).

and permits, the taking of property of individual mortgagees in order to relieve the necessities of individual mortgagors, resort must be had to proceedings by eminent domain; so that, ***through taxation, the burden of the relief afforded in the public interest may be borne by the public***." *Id*, [Emphasis added].

More recently, the Court has stated that the taking of the property itself creates "a claim for a violation of the Takings Clause as soon as a government takes his property for public use without paying for it." *Knick*, *supra* at 2167. The only remedy for such a violation is the one required by the Fifth Amendment itself – providing just compensation. *First English, supra* at 316. In the event of a taking, the government has the inescapable "duty to pay imposed by the amendment". *Id*, at 315. "[N]o subsequent action by the government can relieve it of the duty to provide compensation." *Knick*, *supra* at 2167.

In response, the Board raises a series of arguments that purportedly support its position that takings claims can be discharged in a municipal restructuring proceeding. Let's examine them in turn.

The Board's allegation that just compensation is a simple "damage remedy" that may be discharged in bankruptcy simply has no merit.[18] Just compensation is not a "damages remedy", ***it is a constitutional***

[18] Pet. 14. ("Today, most jurisdictions have enacted procedures to award damages for takings, making equitable relief unavailable. *See id*, at 2176. But that does not mean the Takings Clause requires a damages remedy.").

imperative.[19] "[O]nce there is a taking, compensation must be awarded . . . and [t]he government's post taking actions [. . .] cannot nullify the property owner's existing Fifth Amendment right." *Knick*, *supra* at 2167 & 2172.

But the Board itself accepts that "this Court has explained that the denial of just compensation ***is an element of a takings claim, not a remedy***." Pet., at 2 [Emphasis added]. In other words, the just compensation is not "damages" remedy as claimed by the Board, but an inescapable requirement of the taking itself.

Following that same line of argument, the Board also attempts to equate a just compensation claim to a damages claims for the violation constitutional rights under *Bivens*[20] and 42 U.S.C. §1983. According to the Board, since Bivens and §1983 damages' claims can be discharged, just compensation claims can also be discharged.

This argument ignores what is protected by each of the different constitutional rights. As examples, the First Amendment guarantees the freedom of expression and the Fourteenth Amendment protects a citizen from being deprived of his liberty without due process

---

[19] *Jacobs v. U.S.*, 290 U.S. 13 (1933); *see also*, *First English*, supra at 315 ("*Jacobs*, moreover, does not stand alone, for the Court has frequently repeated the view that, in the event of a taking, the compensation remedy is required by the Constitution").

[20] *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 389, 91 S.Ct. 1999, 29 L.Ed.2d 619 (1971).

of the law. These Amendments prohibit certain governmental action.

On the other hand, the Fifth Amendment does not prohibit any act of the government. It mandates just compensation *as the counterpoint* to the governmental power to take private property for public use – "the compensation remedy is required by the Takings Clause itself." *See*, *Knick v. Township of Scott, supra*, at 2173 ("Certainly it is correct that a fully compensated plaintiff has no further claim, ***but that is because the taking has been remedied by compensation***, not because there was no taking in the first place."). [Emphasis added]. As correctly stated by the First Circuit, "the Fifth Amendment contemplates a 'constitutional obligation to pay just compensation.'" (*quoting First English*, *supra* and *Armstrong, supra* at 49). *See*, Ap. 29a.

A violation of the right to free speech is not resolved until that person is allowed to speak. Nor, in the case of a person imprisoned without due process, is the constitutional violation remedied until he is released.

In the case of a taking, the constitutional violation is not resolved until just compensation is provided, the property is returned or the offending regulation invalidated. *First English*, *supra* at 321 ("Once a court determines that a taking has occurred, the government retains the whole range of options already available – amendment of the regulation, withdrawal of the invalidated regulation, or exercise of eminent domain.").

No statute, be it a bankruptcy statute or otherwise, may thwart the "constitutional obligation to pay just compensation"[21], any more than it could suppress free speech.[22] This Court has been clear: "[t]he bankruptcy power, like the other great substantive powers of Congress, is subject to the Fifth Amendment." *Louisville Joint Stock Land Bank v. Radford*, 295 U.S. 555, 589 (1935). *See also*, *U.S. v. Security Indus. Bank*, 459 U.S. 70, 75 (1982) ("The bankruptcy power is subject to the Fifth Amendment's prohibition against taking private property without compensation.").

The Board then claims that the First Circuit decision "creates an unprecedented exception to the rule that unsecured claims may be discharged in bankruptcy." Pet. 16-20. First, as explained above, this assumes that just compensation claims can be considered unsecured claims and not a constitutional right. But even if such a contention were correct, the Board's assertions are still without merit, since they are based on the incorrect assumption that all unsecured claims are always dischargeable.

The reality is that there are multiple exceptions to the discharge of unsecured debts. The Bankruptcy

---

[21] *First English*, *supra.*

[22] *See also*, First Circuit Opinion and Order – Ap. 23a-24a ("Accordingly, although the Constitution grants Congress the express authority to enact "uniform Laws on the subject of Bankruptcies," U.S. Const. art. I, §8, cl. 4, those laws are not categorically exempt from the requirements of the Fifth Amendment (any more than they are exempt from, for example, the First Amendment).").

Code excepts nineteen types of unsecured debts from discharge[23] and PROMESA itself excepts several types of unsecured claims from discharge.[24] The Board's argument would lead to the illogical conclusion that a mere statute can create an exception to discharge, but the Constitution could not.

But that discussion misses the point entirely. As the dissent in *Stockton* stated, "the Constitution's mandate that takings claims be excepted from discharge does not depend on whether those claims were initially classified in any bankruptcy proceeding as secured or unsecured; the whole point of nondischargeability is that nondischargeable claims pass through bankruptcy unaffected[.]" *City of Stockton*, *supra* at 1278. A just compensation claim must pass through bankruptcy unaffected by constitutional imperative.

Finally, the Board claims that the First Circuit decision will create "anomalous outcomes" in certain hypothetical situations. First and foremost, those hypotheticals were not before the First Circuit and are not before this Court. Thus, the Court should not issue a writ of certiorari to address such hypothetical situations.

But in any event, the Board is not correct in the interpretation of those hypotheticals. The first such example is a situation in which "a municipality unlawfully took a painting to display it in a city museum"

---

[23] 11 U.S.C. §523.

[24] 48 U.S.C. §2164.

and according to the Board the municipality "would not be liable under the Takings Clause to pay just compensation but instead would have liability under the tort of conversion." Pet. 21. The suggestion is that the municipality could then discharge the supposed tort for the unlawful acquisition of the painting.

As a preliminary matter, said controversy was not before the First Circuit below nor is it before the Court now. This is hypothetical situation that has no bearing on the matter at hand and does not merit the Court's intervention.

But the argument fails on the most basic level. It seeks to compare clear and accepted takings claims, protected by the Fifth Amendment, to what amounts to a tort. Under the hypothetical scenario presented by the Board, the unlawful acts of the government *simply do not constitute a taking* and are dischargeable because they are not protected by the Fifth Amendment. ("An unauthorized or unlawful taking is not compensable under the fifth amendment, but is a claim sounding in tort." *Catalina Properties, Inc. v. United States*, 143 Ct. Cl. 657, 660, 166 F. Supp. 763 (1959)).

For there to be a taking, certain factors must be met. A Takings claimant must "demonstrate that the invasion of his property rights was the natural and probable result of the [government's] actions" . . . as a "prerequisite for a Takings Clause claim". *Mac'Avoy v. The Smithsonian Inst.*, 757 F.Supp. 60 (1991). Thus, the hypothetical scenario is simply inapplicable to the

case at hand because the requirements and protections of the Fifth Amendment are not present.

In sum, none of the Boards arguments have any weight and the Court should not waste precious resources in reviewing the clearly correct and well substantiated decision of the First Circuit.

IV. The First Circuit Decision Below does not have "Significant" Effect on Municipal Restructurings

In an attempt to sway the Court into accepting the writ of certiorari, the Board argues that this issue is central and determinative to municipal restructurings.

But the Board's own statements show this to be untrue. The Board asserts that since the year 2000, one hundred and seventy (170) municipal bankruptcies have been filed. To our knowledge, out of those one hundred and seventy (170) cases, only three (3) have addressed the issue at hand – the City of Stockton, the Commonwealth of Puerto Rico and the City of Detroit. In none of those three (3) cases has the issue been determinative.

Although the City of Detroit and the Commonwealth were required to pay the takings claims in full, they were able to confirm their respective plans. And, even though, the City of Stockton was not required to do so, Judge Friedland explains that the City of Stockton never claimed it was unable to pay the takings claims or that payment of the eminent domain claims

would derail the confirmation or execution of the plan.[25]

The matter does not appear to have been an issue that was even raised in the other one hundred and sixty-seven (167) municipal bankruptcy cases, and it was definitely not an issue of "tremendous importance" in any of them. In fact, it does not seem to have been a factor in the countless other municipal bankruptcies filed prior to the year 2000 either, since no other Court appears to have issued a ruling on the matter.[26]

The amounts involved also support the conclusion that the matter is not really significant. In the case at hand, the Board itself states that the amount the Commonwealth would have to pay is somewhere around $300 million dollars. Although this is a large amount, it is a drop in the bucket in a restructuring that "proposed to reduce the Commonwealth's debt by 80%, saving more than $50 billion in debt-service payments and addressing nearly $55 billion in unfunded pension liabilities." Pet. at 5.

This leads us to the inescapable conclusion that the controversy is not really decisive in municipal

---

[25] *Cobb v. City of Stockton, supra* at 1279. ("I am not blind to the City's herculean task of pulling itself out of bankruptcy, but a ruling for Cobb would not topple the Plan, or somehow throw the City back into bankruptcy.").

[26] In its Opinion and Order the First Circuit could only identify two other cases where the issue had been addressed by the courts, *Cobb v. City of Stockton*, *supra* and *In re City of Detroit*, *supra*. *See*, Ap. 30a-31a.

bankruptcies in general. Thus, it is not something that requires the Court's attention at this time.

Finally, it is important to remember that in most cases, the municipal entities can opt to return the property that was unconstitutionally taken or can have the offending regulation amended/invalidated instead of providing just compensation.[27] This would obviate the need to provide just compensation at all.

The Board argues that the Commonwealth can use those funds to provide additional essential services. But that is exactly what the Framers wished to prevent and what this Court has repeatedly repudiated. Any essential services that the Commonwealth, or any other governmental entity, wishes to provide for the benefit of all citizens, must "be borne by the public as a whole." *Armstrong*, *supra* at 49.

To quote Justice Thomas, "[i]f [the requirement of enforcing the Fifth Amendment] makes some regulatory programs 'unworkable in practice,' so be it – [the Court's] role is to enforce the Takings Clause as written." *Knick*, *supra* at 2180.

[27] *First English*, *supra* at 321 ("Once a court determines that a taking has occurred, the government retains the whole range of options already available – amendment of the regulation, withdrawal of the invalidated regulation, or exercise of eminent domain.").

CONCLUSION

The petition should be denied.

DATED: January 9, 2023.

Respectfully submitted,

RAFAEL A. GONZALEZ VALIENTE
Counsel of Record for
Suiza Dairy, Corp.
GODREAU & GONZALEZ LAW, LLC
P.O. Box 9024176
San Juan PR, 00902-4176
(787) 726-0077
rgv@g-glawpr.com