No. 22-367

In the Supreme Court of the United States

FINANCIAL OVERSIGHT AND MANAGEMENT BOARD
FOR PUERTO RICO, PETITIONER

v.

COOPERATIVE DE AHORRO Y CREDITO
ABRAHAM ROSA, ET AL.

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

In debt-restructuring proceedings under the Puerto Rico Oversight, Management, and Economic Stability Act (PROMESA), 48 U.S.C. 2101 *et seq.*, petitioner proposed a plan of adjustment for the debts of the Commonwealth of Puerto Rico that would have treated certain prepetition eminent-domain and inverse-condemnation claims against the Commonwealth and its instrumentalities as general unsecured claims, which would have been paid on a pro rata basis (*i.e.*, only in part) and otherwise discharged. The district court rejected that aspect of the proposed plan and required petitioner to submit an amended plan that did not impair the claims at issue, after determining that PROMESA did not permit approval of a plan that would have relieved the Commonwealth of any obligation to pay the full amount of just compensation for takings of private property. The question presented is as follows:

Whether the amended plan of adjustment for the Commonwealth of Puerto Rico's debts properly excluded from impairment prepetition claims for just compensation arising from the Commonwealth's takings of private property for public use.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-33a) is reported at 41 F.4th 29. The order of the district court confirming the plan of adjustment (Pet. App. 242a-362a) is reported at 636 B.R. 1. The district court's findings of fact and conclusions of law (Pet. App. 46a-241a) are reported at 637 B.R. 223.

JURISDICTION

The judgment of the court of appeals (Pet. App. 34a-45a) was entered on July 18, 2022. The petition for a writ of certiorari was filed on October 17, 2022 (Monday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In 2016, the Commonwealth of Puerto Rico faced the most debilitating fiscal crisis in its history. The Commonwealth and its instrumentalities carried approximately $71 billion in debt. *Financial Oversight & Mgmt. Bd. for P.R.* v. *Aurelius Inv., LLC*, 140 S. Ct. 1649, 1655 (2020). The Commonwealth could not service those staggering debts, nor could it easily restructure them. *Ibid.* Congress had made Puerto Rico and its municipalities ineligible to petition for bankruptcy under the Bankruptcy Code, 11 U.S.C. 101 *et seq.*, but the Code also preempted Puerto Rico's effort to restructure its debts under local law. See *Aurelius Inv.*, 140 S. Ct. at 1655; *Puerto Rico* v. *Franklin Cal. Tax-Free Trust*, 579 U.S. 115, 125 (2016). The fiscal crisis threatened "the Commonwealth's very ability to persist." *Wal-Mart P.R., Inc.* v. *Zaragoza-Gomez*, 174 F. Supp. 3d 585, 592 (D.P.R.), aff'd, 834 F.3d 110 (1st Cir. 2016).

Congress responded by enacting the Puerto Rico Oversight, Management, and Economic Stability Act (PROMESA), 48 U.S.C. 2101 *et seq.*, which established a Financial Oversight and Management Board for Puerto Rico—petitioner here—to oversee the Commonwealth's finances. 48 U.S.C. 2121(b)(1). Among its other powers, petitioner serves as Puerto Rico's representative in "Title III" cases, which are bankruptcy-like judicial proceedings authorized by Title III of PROMESA for restructuring the debts of the Commonwealth and its instrumentalities. 48 U.S.C. 2172(a); see 48 U.S.C. 2161-2177.

2. In 2017, petitioner initiated a series of Title III proceedings on behalf of the Commonwealth and its governmental entities, as well as certain of its public corporations, in federal district court in Puerto Rico.

Pet. App. 14a; see 48 U.S.C. 2164. "After nearly five years of extensive mediation, negotiation, and litigation involving a vast array of stakeholders, [petitioner] proposed a plan of adjustment for the Commonwealth and two of its instrumentalities (the Employees Retirement System and the Puerto Rico Buildings Authority)." Pet. App. 14a; see 48 U.S.C. 2172(a). A "plan of adjustment" under PROMESA, like a plan of reorganization under Chapter 11 of the Bankruptcy Code, "designates classes of claims to be adjusted and specifies treatments for any class of claims that is impaired." Pet. App. 14a; see 48 U.S.C. 2161(a) (incorporating select provisions of Chapter 11 into Title III proceedings).

This case arises from petitioner's proposed treatment of two sets of prepetition claims against the Commonwealth (or its instrumentalities). The first set of claims at issue "resulted from proceedings initiated by the Commonwealth under its 'quick take' eminent domain statute," which permits Puerto Rico to acquire private property via eminent domain after "depositing an estimated compensation amount with the Puerto Rico court of first instance." Pet. App. 15a. If the property owner is dissatisfied with the deposited amount, the property owner may ask the Puerto Rico court to determine the amount of "just compensation." P.R. Laws Ann. tit. 32, § 2907(5) (Supp. 2022). The second set of claims at issue are prepetition claims for inverse condemnation, in which the Commonwealth had taken or was alleged to have taken the claimants' property interests without invoking eminent domain or otherwise paying just compensation. Pet. App. 15a.

Petitioner proposed to treat the eminent-domain claims as secured claims (to be paid in full) to the extent that the Commonwealth had deposited funds for the

property at issue under the quick-take statute and otherwise as general unsecured claims. Pet. App. 15a-16a. Thus, to the extent a property owner alleged that the amount of just compensation for a prepetition taking exceeded the funds already on deposit under the quick-take statute, petitioner proposed to treat the property owner's claim for the difference as a general unsecured claim. See *ibid.* Petitioner also proposed to treat all of the inverse-condemnation claims as general unsecured claims. *Id.* at 16a. The proposed plan of adjustment called for general unsecured claims to be paid on a pro rata basis and otherwise discharged. See *ibid.*

Creditors holding prepetition eminent-domain and inverse-condemnation claims against the Commonwealth (collectively, takings claims) objected to the plan's proposed impairment of those claims, asserting "that Congress lacks power to legislate the discharge of [such] Claims for less than payment in full of just compensation." Pet. App. 107a-108a. The district court certified those and other constitutional objections to the Attorney General under 28 U.S.C. 2403(a), and the United States intervened to defend the constitutionality of PROMESA. See Pet. App. 83a n.15. Before the United States made any further filing, the district court entered proposed findings of fact and conclusions of law that rejected the creditors' constitutional challenges to PROMESA. *Ibid.*

As relevant here, the district court declined to approve petitioner's proposed treatment of the takings claims and ordered petitioner to revise the plan of adjustment so that the takings claims would not be impaired—*i.e.*, so that the claims would be paid in full, to the extent they were ultimately found to be meritorious. Pet. App. 167a-181a; see *id.* at 16a n.1 (explaining

that the court "did not purport to decide the quantum of just compensation owed to any particular takings claimant"). The court determined that "holders of takings claims have a constitutional right to just compensation that is not subject to impairment or discharge under a plan of adjustment." *Id.* at 174a. The court also found that the plan of adjustment, if revised so as not to impair takings claims, would satisfy PROMESA's requirement that the debtor not be "prohibited by law from taking any action necessary to carry out the plan." 48 U.S.C. 2174(b)(3); see Pet. App. 167a-168a.

Petitioner submitted a revised plan providing for payment in full of the takings claims, while preserving an objection for appeal. Pet. App. 17a. The district court confirmed the revised plan. *Id.* at 242a-362a.

3. The court of appeals affirmed. Pet. App. 1a-33a. The court determined that the district court "properly found that the [Commonwealth] was prohibited by law from carrying out the plan as proposed," and therefore the plan as proposed could not have been confirmed under PROMESA, insofar as the plan would have "rejected any obligation by the Commonwealth to pay just compensation" for prepetition takings. *Id.* at 33a (citing 48 U.S.C. 2174(b)(3)).[1]

Petitioner contended that, under this Court's decision in *Knick* v. *Township of Scott*, 139 S. Ct. 2162

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[1] The United States participated in the appeal as an intervenor and urged the court of appeals to affirm on an alternative theory—namely, that the district court had discretion under 11 U.S.C. 944(c)(1), made applicable to Title III proceedings by 48 U.S.C. 2161(a), to except the takings claims from discharge in order to avoid the serious constitutional questions that would have arisen under the plan as it had been proposed. See Pet. App. 18a. The court of appeals declined to affirm on that basis. See *id.* at 18a-21a.

(2019), any prepetition violation of the Fifth Amendment's just-compensation requirement was complete when the Commonwealth took property without paying just compensation for it, after which the property owners had a claim for money owed to them by the Commonwealth but not any entitlement to specific property (except with respect to funds on deposit under the quick-take statute). Pet. App. 24a-25a. Petitioner further contended that "claims for money * * * may be adjusted in bankruptcy without issue," *id.* at 24a, and that the Takings Clause is implicated in bankruptcy proceedings only when Congress has exercised its bankruptcy powers to divest creditors of vested "rights in specific property," *id.* at 26a.

The court of appeals rejected those contentions. In its view, petitioner had "overread[]" this Court's decision in *Knick*. Pet. App. 25a. The court of appeals explained that *Knick* establishes that "a Fifth Amendment violation occurs 'as soon as a government takes . . . property for public use without paying for it,'" *ibid.* (quoting *Knick*, 139 S. Ct. at 2170), but that *Knick* does not support petitioner's theory that any "subsequent denial of [just] compensation," including by operation of bankruptcy law, is beyond the purview of the Fifth Amendment, *id.* at 26a. And with respect to petitioner's reliance on cases "standing for the proposition that the Fifth Amendment only protects rights in specific property and not unsecured claims for money," *ibid.*, the court explained that those cases addressed a different constitutional question—namely, whether Congress itself has "effected a taking of property" through federal bankruptcy law, *id.* at 27a, not whether Congress may eliminate a state or local government's obligation to pay

just compensation for takings that have already occurred.

The court of appeals also rejected petitioner's analogy between the takings claims at issue here and other claims for money damages for constitutional violations, which the court assumed *arguendo* to be dischargeable in bankruptcy. Pet. App. 28a & n.6. In the court's view, the "language and nature of the Takings Clause" indicate that "just compensation is different in kind from other monetary remedies" for a constitutional violation. *Id.* at 29a. The court observed that the Fifth Amendment uniquely "spells out both a monetary remedy" for the taking of private property for public use and also "the necessary quantum of compensation due." *Id.* at 30a. The court stated that a divided panel of the Ninth Circuit had taken a different view on "a similar question in the context of the municipal bankruptcy of Stockton, California," but it found the dissenting opinion in that case to be more persuasive. *Ibid.* (discussing *Cobb* v. *Stockton* (*In re City of Stockton*), 909 F.3d 1256 (9th Cir. 2018)).

Finally, the court of appeals found petitioner's policy arguments to be unavailing. Pet. App. 33a. Petitioner speculated that affirmance would invite a "parade of horribles" in the future by making it more difficult for a municipality to restructure its debts in bankruptcy. *Ibid.* But that speculation was based on a hypothetical municipality that "owes a considerable amount of money to property owners" for past takings. *Ibid.* The court saw no reason to adopt petitioner's position in order to relieve such a municipality from the consequences of its prior uncompensated takings. *Ibid.*

ARGUMENT

Petitioner contends (Pet. 12-22) that the district court erred in refusing to confirm a plan of adjustment that would have treated certain prepetition takings claims against the Commonwealth of Puerto Rico as general unsecured claims, to be paid on a pro rata basis (*i.e.*, only in part) and otherwise discharged. Petitioner further contends (Pet. 8-11) that the decision below conflicts with a decision by the Ninth Circuit involving a municipal bankruptcy, *Cobb* v. *Stockton* (*In re City of Stockton*), 909 F.3d 1256 (2018). Those contentions do not warrant further review. Interpreting PROMESA to authorize the impairment of prepetition takings claims would have raised serious constitutional questions. Therefore, as the United States explained below, it would have been proper as a matter of constitutional avoidance for the district court to exercise its discretion under 11 U.S.C 944(c)(1) to treat the takings claims as nondischargeable. Although the court of appeals declined to affirm on that basis, petitioner fails to identify any error in the decision below that would warrant this Court's review, or any square conflict of authority. This case would also be an unsuitable vehicle in which to address the Fifth Amendment question petitioner seeks to present because this case arises in the idiosyncratic context of a Title III proceeding under PROMESA, rather than a municipal bankruptcy under Chapter 9 of the Bankruptcy Code. Accordingly, the petition for a writ of certiorari should be denied.

1. The judgment below is correct. Whether or not the district court was compelled to treat the prepetition takings claims at issue here as nondischargeable, PROMESA authorized the court to do so. A contrary

construction of PROMESA would give rise to serious constitutional questions under this Court's precedent.

a. The Fifth Amendment provides: "[N]or shall private property be taken for public use, without just compensation." U.S. Const. Amend. V. "As its language indicates, and as [this] 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." *First English Evangelical Lutheran Church* v. *County of Los Angeles*, 482 U.S. 304, 314 (1987). If the government takes private property for public use, the affected property owner has a "Fifth Amendment right to full compensation * * * at the time of the taking." *Knick* v. *Township of Scott*, 139 S. Ct. 2162, 2170 (2019). Although the compensation may be paid later, including through a post-taking judicial process, this Court has stated that the property owner's right to just compensation is "irrevocable." *Id.* at 2172 (citing *First English*, 482 U.S. at 315, 318).[2]

This Court has considered the intersection of the Takings Clause and Congress's Article I power to enact "uniform Laws on the subject of Bankruptcies," U.S. Const. Art. I, § 8, Cl. 4, on several occasions. In *United States* v. *Security Industrial Bank*, 459 U.S. 70 (1982), the Court considered a provision of the Bankruptcy Code, enacted as part of the Bankruptcy Reform Act of

[2] The Fifth Amendment applies of its own force only to the federal government but is applicable to the States through the Fourteenth Amendment. See, *e.g.*, *Chicago, Burlington & Quincy R.R.* v. *Chicago*, 166 U.S. 226, 241 (1897). This Court has assumed that the Takings Clause of the Fifth Amendment also applies to Puerto Rico (and petitioner does not contend otherwise), either directly or by incorporation. See *Calero-Toledo* v. *Pearson Yacht Leasing Co.*, 416 U.S. 663, 668 n.5 (1974).

1978 (1978 Act), Pub. L. No. 95-598, 92 Stat. 2549, authorizing individual debtors to avoid certain liens on household goods. See 11 U.S.C. 522(f)(1). Lien holders contended that application of that provision to avoid liens that predated the 1978 Act "would violate the Fifth Amendment." *Security Indus. Bank*, 459 U.S. at 73. This Court agreed with the lien holders' premise that "[t]he bankruptcy power is subject to the Fifth Amendment's prohibition against taking private property without compensation." *Id.* at 75 (citing *Louisville Joint Stock Land Bank* v. *Radford*, 295 U.S. 555 (1935)). The Court therefore had "substantial doubt whether the retroactive destruction of the * * * liens," without just compensation, would "comport[] with the Fifth Amendment." *Id.* at 78. Citing the "cardinal principle that this Court will first ascertain whether a construction of [a] statute is fairly possible by which the constitutional question may be avoided," *ibid.* (citation omitted), the Court construed the relevant provision not to apply to liens that had attached before the enactment of the 1978 Act. See *id.* at 78-82.

In *Radford*, the Court likewise observed that "[t]he bankruptcy power, like the other great substantive powers of Congress, is subject to the Fifth Amendment." 295 U.S. at 589. That case concerned a 1934 amendment to the federal Bankruptcy Act, which was designed to limit mortgage foreclosures on farms during the Depression. The statute provided a bankrupt farmer with an option to retain possession of a mortgaged farm and ultimately to purchase it, free and clear of any mortgage, at its currently appraised value. See *id.* at 575-576. This Court concluded that the statute, which applied only retroactively to mortgages already in existence at the time of its enactment, operated as an

uncompensated taking of the lending banks' property interests, and the Court held the statute "void" on that basis. *Id.* at 602; see *id.* at 589, 601-602; cf. *Kuehner* v. *Irving Trust Co.*, 299 U.S. 445, 451-452 (1937) (explaining that *Radford* involved secured interests in property and that the Takings Clause does not limit Congress's authority to provide for the readjustment of other obligations in bankruptcy, such as contracts).

b. In light of the foregoing principles, the United States argued below that serious constitutional questions would arise if PROMESA were construed to authorize the discharge of valid prepetition claims for just compensation under the Takings Clause. See U.S. C.A. Br. 6-17. If the Fifth Amendment applies when Congress itself takes private property for public use through the operation of bankruptcy law, cf. *Security Indus. Bank*, 459 U.S. at 75; *Radford*, 295 U.S. at 601-602, it is not obvious how Congress could extinguish another governmental entity's Fifth Amendment obligation to pay just compensation for a taking that has already occurred. Cf. *First English*, 482 U.S. at 321 (stating that "no subsequent action by the government can relieve it of the duty to provide compensation" for a taking that has already occurred).

Petitioner contends (Pet. 16-20) that this Court's decisions in *Security Industrial Bank* and *Radford* are distinguishable because those cases concerned security interests—liens and mortgages—held by creditors when the bankruptcy proceedings commenced. In petitioner's view (see *ibid.*), those cases stand only for the proposition that the security interests themselves are the kind of vested interests in property to which the protections of the Fifth Amendment apply. And petitioner describes (Pet. 16) the takings claims in this case

as involving only "unsecured rights to payment" of money from the Commonwealth, not any secured interests in specific property (setting aside any funds on deposit under the quick-take statute, see pp. 3-4, *supra*).

But petitioner fails to explain why those distinctions should carry the day here. The right to receive just compensation for the taking of private property is secured by the text of the Fifth Amendment itself. "Because of 'the self-executing character' of the Takings Clause 'with respect to compensation,' a property owner has a constitutional claim for just compensation at the time of the taking," *Knick*, 139 S. Ct. at 2171 (quoting *First English*, 482 U.S. at 315), and this Court has stated that later governmental action generally "cannot nullify" the property owner's just-compensation claim, *ibid.* The text of the Takings Clause also distinguishes the claims at issue in this case from other claims for money damages for alleged violations of the Constitution that lower courts have found to be dischargeable in municipal bankruptcies. See Pet. 12-13, 15 (citing 42 U.S.C. 1983 and *Bivens* v. *Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971)). Unlike other constitutional provisions, the Takings Clause "prescribe[s] the quantum of compensation required in the event of a violation." Pet. App. 32a. Not paying just compensation to the property owner is a constituent part of the constitutional violation under the Takings Clause in a way that cannot be said, for example, of not paying money damages to remedy an unlawful search.

Petitioner observes that, "historically, money damages were an alternative remedy and never the exclusive remedy for a Fifth Amendment taking." Pet. 14 (citing *Knick*, 139 S. Ct. at 2175-2176). Petitioner is correct that, as an original matter, the Fifth Amendment

does not require the federal government or the States to afford property owners a judicial remedy for money damages, or to waive sovereign immunity from such suits. Indeed, "[a]t the time of the founding there usually was no compensation remedy available to property owners." *Knick*, 139 S. Ct. at 2175.[3] But that history does not support petitioner's position in this case. Petitioner does not identify any "alternative remedy" (Pet. 14) that would have remained available to the affected property owners here. The plan of adjustment, as proposed, would have allowed the Commonwealth to keep the private property that it had taken, without paying just compensation.

Approving such a plan would, at a minimum, have raised serious constitutional questions. Consistent with this Court's reasoning in *Security Industrial Bank*, *supra*, the United States urged the lower courts to avoid confronting those questions by instead resolving this dispute on statutory grounds. See U.S. C.A. Br. 17-20. Specifically, the United States invoked Section 944(c)(1) of the Bankruptcy Code, which PROMESA makes applicable in Title III cases, see 48 U.S.C. 2161(a), and which states that a "debtor is not discharged * * * from

[3] Congress did not generally authorize suits against the United States for just compensation until 1887, when it enacted the Tucker Act and authorized the Court of Claims to hear cases "founded upon the Constitution." Act of Mar. 3, 1887, ch. 359, 24 Stat. 505; see *United States* v. *Mitchell*, 463 U.S. 206, 212-214 (1983); *Jacobs* v. *United States*, 290 U.S. 13, 15-16 (1933). Before then, individuals asserting that the federal government had taken their property without paying just compensation were left to lobby Congress for private bills or to sue individual federal officials for trespass. See *Mitchell*, 463 U.S. at 212-213; cf. *Knick*, 139 S. Ct. at 2175-2176 (describing common-law actions against responsible officials as the "typical recourse" before the 1870s).

any debt * * * excepted from discharge by the plan or order confirming the plan," 11 U.S.C. 944(c)(1). That provision authorized the district court to except the takings claims from discharge in the plan of adjustment, even if the court was not compelled to do so.

To be sure, other provisions of the Bankruptcy Code generally specify which debts are nondischargeable. See, *e.g.*, 11 U.S.C. 523 (2018 & Supp. II 2022); 11 U.S.C. 727(b), 1141(d), 1228(c), 1328(c). But those other provisions do not foreclose treating additional debts as nondischargeable where the Code does not expressly forbid doing so and where doing so would avoid "serious constitutional problems." *Artis* v. *District of Columbia*, 138 S. Ct. 594, 606 (2018) (quoting *INS* v. *St. Cyr*, 533 U.S. 289, 300 (2001)) (brackets omitted); see *In re City of Detroit*, 524 B.R. 147, 267-270 (Bankr. E.D. Mich. 2014) (invoking Section 944(c)(1), at the urging of the United States, to except from discharge certain takings claims against the City of Detroit).

c. The court of appeals declined to resolve this case on the statutory ground advocated by the United States. Pet. App. 18a-21a. The court instead invoked an alternative provision of PROMESA, which states that a plan of adjustment may be confirmed only if, among other things, "the debtor is not prohibited by law from taking any action necessary to carry out the plan." 48 U.S.C. 2174(b)(3); see Pet. App. 33a. In the court's view, the plan as proposed by petitioner did not satisfy that requirement because the Fifth Amendment would have prohibited the Commonwealth from failing to pay just compensation for prepetition takings that it had already effected. See Pet. App. 22a-33a.

The court of appeals was mistaken insofar as it viewed the alternative ground advocated by the United

States as an impermissible basis for affirmance on this record. But any analytical error in the decision below would not warrant further review by this Court. Although the court of appeals could have avoided the Fifth Amendment questions that it addressed, the court answered those questions in such a way as to reach the correct bottom-line result in any event. The district court refused to confirm a plan of adjustment that would have discharged prepetition takings claims, and the court of appeals affirmed. As a result, the judgment below respects this Court's admonition that Congress's Article I bankruptcy powers are "subject to the Fifth Amendment's prohibition against taking private property without compensation." *Security Indus. Bank*, 459 U.S. at 75 (citing *Radford*, *supra*).

2. Petitioner does not identify any compelling basis for further review.

a. Petitioner principally contends (Pet. 8-11) that the decision below conflicts with the Ninth Circuit's decision in *City of Stockton*, *supra*. In that case, the City of Stockton petitioned for bankruptcy under Chapter 9 of the Bankruptcy Code, and the bankruptcy court confirmed a complex plan of reorganization over the objection of a creditor with a prepetition taking claim against the City. 909 F.3d at 1261-1262. The plan treated the creditor's claim as a general unsecured claim. See *ibid.* The objecting creditor did not seek a stay, *id.* at 1263, and the court of appeals principally held that the case was "equitably moot," *id.* at 1259—*i.e.*, that it would have been inequitable to attempt to unwind the many transactions that had already occurred under the confirmed plan in order to grant relief to the objecting creditor. See *id.* at 1265-1266.

In the alternative, the majority in *City of Stockton* reasoned that the objecting creditor's arguments against plan confirmation lacked merit. 909 F.3d at 1266. The court stated that the "Takings Clause is only implicated in bankruptcy if the creditor has actual property rights," and not if the creditor merely has "a contractual or statutory right for monetary relief." *Ibid.* And the court viewed the objecting creditor's claim as the latter kind of claim. It explained that the creditor had "waive[d] all claims and defenses," other than "a claim for greater compensation" under the California quick-take statute; had allowed the City to construct a road on the property; and had accepted the City's characterization of his claim as unsecured in the bankruptcy proceeding. *Ibid.*; see *id.* at 1266-1268. The court viewed the creditor's arguments against plan confirmation as an improper attempt to "excuse all of these failures," observing that "[o]ne cannot play possum during bankruptcy proceedings and then claim some new interest after a plan has been confirmed." *Id.* at 1267-1268.

Petitioner fails to show any square conflict of authority between the decision below and the Ninth Circuit's decision in *City of Stockton*. Much of the reasoning of the latter decision was driven by the objecting creditor's dilatory conduct—lying in wait and then asking the court of appeals to reverse the entire plan. See *City of Stockton*, 909 F.3d at 1266-1268. Notably, the objecting creditor "did not seek exemption from discharge," *id.* at 1267, which is the revision to the plan that the district court required here. It is thus far from clear that the Ninth Circuit would reach the same result in a case like this one, where the creditors have diligently preserved their objections to petitioner's proposal to treat their prepetition takings claims as general unsecured claims.

Moreover, the Ninth Circuit's decision in *City of Stockton* rested at least in part on the premise that "'just compensation' under the Takings Clause is not equivalent to 'full compensation,'" 909 F.3d at 1268 (citation omitted)—a premise undercut by this Court's later decision in *Knick*, which referred to "[t]he Fifth Amendment right to *full* compensation" and explained that "the compensation must generally consist of the total value of the property when taken, plus interest from that time." 139 S. Ct. at 2170 (emphasis added). In light of *Knick*, as well as the First Circuit's opinion here, the Ninth Circuit might well revisit *City of Stockton* if asked to do so in an appropriate case.

Petitioner also errs in asserting (Pet. 11) that the decision below conflicts with the Eighth Circuit's decision in *Poinsett Lumber & Manufacturing Co.* v. *Drainage District No. 7 of Poinsett County*, 119 F.2d 270 (1941). That case does not address whether Congress may authorize the discharge of prepetition takings claims against another governmental entity. Instead, the creditor in that case contended that it was entitled to an exception from a stay entered in a "composition" proceeding, *id.* at 271, so that the creditor could pursue a taking claim against the debtor in state court. As relevant here, the creditor argued that its taking claim was not within the set of claims that could be addressed in the composition proceeding (and therefore fell outside the stay of litigation) because the taking claim was "invested with a constitutional sanctity." *Id.* at 272. The court of appeals rejected that argument, explaining that it had previously determined that takings claims could be addressed in composition proceedings because any adjustment in such proceedings required the general assent of the class of affected creditors. *Id.* at 272-273;

cf. *Radford*, 295 U.S. at 585 (explaining that a "composition is an agreement with * * * creditors in lieu of a distribution of the property in bankruptcy"). The court of appeals did not actually address any composition agreement, nor did it determine whether the bankruptcy court had authority to discharge any prepetition takings claims over the objection of the holders of such claims.

b. Petitioner also briefly reprises (Pet. 13-14) its argument that the bankruptcy court's order was inconsistent with this Court's decision in *Knick*. The court of appeals correctly rejected petitioner's "overread[ing]" of *Knick*. Pet. App. 25a. In *Knick*, this Court determined that an alleged violation of the Takings Clause by a state or local government is complete, and therefore ripe for adjudication in federal court under 42 U.S.C. 1983, when the taking occurs—even if the state or local government provides a post-taking remedy for the payment of just compensation that the property owner has not yet invoked. See 139 S. Ct. at 2170-2173; see also *id.* at 2177-2179 (overruling *Williamson Cnty. Reg'l Planning Comm'n* v. *Hamilton Bank*, 473 U.S. 172 (1985), to the extent that decision held otherwise). The Court made clear in *Knick* that a violation of the Takings Clause is "complete at the time of the taking." *Id.* at 2177.

Nothing in *Knick* suggests, however, that the Fifth Amendment exits the scene after a taking has occurred, such that any later denial of just compensation for the already-completed taking—including by operation of bankruptcy law—is constitutionally innocuous. If anything, *Knick* emphasized that the right to just compensation is "irrevocable" and is "'required by the Constitution'" itself. 139 S. Ct. at 2172 (citation omitted).

c. Even if the question presented were the subject of a square conflict of authority, further review would not be warranted. The question whether Congress may authorize the discharge of prepetition takings claims against another governmental entity does not arise frequently, as demonstrated by the dearth of appellate authority on the issue. Few governmental entities with eminent-domain authority file for bankruptcy. Only a handful of cities appear to have petitioned for bankruptcy since the landmark Detroit bankruptcy in 2013. See Jeff Chapman et al., The Pew Charitable Trusts, *By the Numbers: A Look at Municipal Bankruptcies Over the Past 20 Years* (July 6, 2020) (online data set as of 2020, identifying three cities filing after Detroit). The higher number cited by petitioner (Pet. 23) reflects the fact that many "municipal" bankruptcies (*i.e.*, filings under Chapter 9 of the Bankruptcy Code) in fact involve special-purpose governmental entities like school districts, transportation authorities, or hospital systems. See 11 U.S.C. 109(c)(1) (allowing Chapter 9 filings by "a municipality" that state law authorizes to be a debtor); 11 U.S.C. 101(40) (defining a "municipality" as a "political subdivision or public agency or instrumentality of a State"). Petitioner does not explain why bankruptcies involving those kinds of entities would be relevant here.

Nor does petitioner support any dire prediction (see Pet. 23) that future municipal debtors will be unable to restructure their debts unless they can discharge prepetition obligations to pay just compensation for their takings of private property. In this particular case, petitioner told the district court that the exclusion of takings claims from discharge would not render the plan infeasible, and the court agreed. Pet. App. 203a n.47. Petitioner cannot now undercut that representation by

suggesting that reversal is necessary to the viability of Puerto Rico's debt adjustment. And in general, the question whether prepetition takings claims are ever dischargeable in bankruptcy would bear on the feasibility of a municipality's reorganization only in the presumably rare event that unpaid takings claims constitute "a substantial portion" of the "municipality's debt obligations"—that is, if the municipality "owes a considerable amount of money to property owners for past takings and files for bankruptcy in the hopes that it may leave the takings in place without paying anything like just compensation for the property." *Id.* at 33a. Petitioner fails to demonstrate that those circumstances, which are not present here, are likely to arise with any frequency.

3. In any event, this case would be an unsuitable vehicle in which to address the Fifth Amendment question that petitioner seeks to present. This case arises in the idiosyncratic context of a reorganization of the debts of a territorial government under PROMESA—which rests in part on Congress's Article IV authority over territories, U.S. Const. Art. IV, § 3, Cl. 2—rather than a reorganization of the debts of a municipality under Chapter 9 of the Bankruptcy Code. See 48 U.S.C. 2121(b)(2). This Court has never squarely addressed whether or how the Takings Clause applies to the government of Puerto Rico. See p. 9 n.2, *supra*. Moreover, under PROMESA the choice to commence a Title III proceeding for the Commonwealth and its instrumentalities rested with petitioner—a Board established by federal law—rather than with the governmental entities that had effected the prepetition takings. See *Financial Oversight & Mgmt. Bd. for P.R.* v. *Aurelius Inv., LLC*, 140 S. Ct. 1649, 1655, 1662 (2020). And be-

cause PROMESA incorporates only certain provisions of the Code, any consideration of whether alternative statutory grounds are available in this case to avoid the constitutional questions might be different than in a typical Chapter 9 bankruptcy.

If, as petitioner maintains, the question is significant and likely to recur, the Court would benefit from awaiting a future case in which the question is presented in a more typical municipal bankruptcy.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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