No. 19-____

IN THE

# Supreme Court of the United States

ASSURED GUARANTY CORP.; ASSURED GUARANTY MUNICIPAL CORP.; AND NATIONAL PUBLIC FINANCE GUARANTEE CORPORATION,

*Petitioners*,

v.

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

*Respondents*.

**On Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit**

## PETITION FOR A WRIT OF CERTIORARI


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## QUESTION PRESENTED

In 1988, Congress amended the Bankruptcy Code to provide a specific regime for the treatment of bond debt secured by "special revenues" in municipal bankruptcies. Among other amendments, Congress added an exception for "special revenues" to the provisions that otherwise establish a "stay of enforcement of claims against the debtor" during the pendency of bankruptcy proceedings. 11 U.S.C. § 922(d). That exception mandates that filing a bankruptcy petition "does not operate as a stay of application of pledged special revenues." Congress's stated goal was to ensure that special revenue bondholders retain their "unimpaired rights to the [special] revenue pledged to them" even after a municipality has declared bankruptcy. S. Rep. No. 100-506, at 12.

The question presented is:

Whether 11 U.S.C. § 922(d) mandates that there is no automatic stay of debt enforcement actions with respect to pledged special revenues.

## PARTIES TO THE PROCEEDING

Assured Guaranty Corp.; Assured Guaranty Municipal Corp.; and National Public Finance Guarantee Corporation, petitioners on review, were plaintiffs-appellants below.

Financial Guaranty Insurance Company, respondent on review, was a plaintiff-appellant below.

The Financial Oversight and Management Board for Puerto Rico; the Financial Oversight and Management Board for Puerto Rico, as representative for the Commonwealth of Puerto Rico; Puerto Rico Fiscal Agency And Financial Advisory Authority; The Financial Oversight And Management Board For Puerto Rico, as representative for the Puerto Rico Highways & Transportation Authority; Ricardo Rosselló-Nevares; Gerardo José Portela-Franco; Carlos Contreras-Aponte; José Iván Marrero-Rosado; Raúl Maldonado-Gautier; and Natalie A. Jaresko, respondents on review, were the defendants-appellees below.

## RULE 29.6 DISCLOSURE STATEMENT

Assured Guaranty Corp. and Assured Guaranty Municipal Corp. (f/k/a Financial Security Assurance Inc.) respectfully state that they are both wholly owned indirect subsidiaries of Assured Guaranty Ltd., which is a public corporation whose stock is traded publicly.

National Public Finance Guarantee Corporation respectfully states that it is an indirect, wholly owned subsidiary of MBIA, Inc., a publicly held corporation, and that no other publicly held corporation owns ten percent or more of its shares.

## RELATED PROCEEDINGS

This petition arises out of two consolidated cases:

- *Assured Guaranty Corp. et al.* v. *Commonwealth of Puerto Rico et al.*, No. 3:17-AP-00155 (LTS) (D.P.R. Jan. 30, 2018), *aff'd*, No. 18-1165 (1st Cir. Mar. 26, 2019).
- *Assured Guaranty Corp. et al.* v. *Commonwealth of Puerto Rico et al.*, No. 3:17-AP-00156 (LTS) (D.P.R. Jan. 30, 2018), *aff'd*, No. 18-1166 (1st Cir. Mar. 26, 2019).

Those two cases are adversary proceedings that are part of two debt adjustment proceedings under Title III of the Puerto Rico Oversight, Management, and Economic Stability Act, 48 U.S.C. §§ 2101 *et seq*.:

- *In re Financial Oversight and Management Board for Puerto Rico*, No. 3:17-BK-3283 (LTS) (D.P.R.).
- *In re Puerto Rico Highways and Transportation Authority*, No. 3:17-BK-3567 (LTS) (D.P.R.).[*]

[*] For a full list of other adversary proceedings, *see* https://www.prd.uscourts.gov/promesa/select-case-information.

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**On Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit**

## PETITION FOR A WRIT OF CERTIORARI

Assured Guaranty Corp., Assured Guaranty Municipal Corp., and National Public Finance Guarantee Corporation respectfully petition for a writ of certiorari to review the judgment of the First Circuit in this case.

## OPINIONS BELOW

The First Circuit's opinion (Pet. App. 1a-23a, 24a-26a) is reported at 919 F.3d 121. The District Court's opinion (Pet. App. 27a-64a) is reported at 582 B.R. 579. The First Circuit's order denying panel rehearing and rehearing en banc (Pet. App. 65a-119a) is reported at 931 F.3d 111.

## JURISDICTION

The First Circuit entered judgment on March 26, 2019, and entered a corrected judgment on May 29, 2019. Petitioners filed a timely petition for rehearing, which was denied on July 31, 2019. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

## STATUTORY PROVISIONS INVOLVED

Pertinent statutory provisions are reproduced in the Appendix (Pet. App. 120a-129a).

## INTRODUCTION

Many certiorari petitions forecast dire consequences if a lower court opinion is left in place; it is rare for evidence of those consequences to emerge before certiorari is even sought. This is one of those cases.

In the decision below, the First Circuit adopted an untenable interpretation of Section 922(d) of the Bankruptcy Code, a provision that has long been understood to guarantee that a municipality's "special revenue" bond debt, unlike other kinds of municipal debt, may continue to be enforced even if the municipality enters bankruptcy. Flouting that settled understanding, the First Circuit held that special revenue debt may *not* be enforced during the pendency of bankruptcy proceedings, and that it is purely at the municipality's discretion whether it will honor its payment obligations on such debt. Within days, multiple ratings agencies placed billions of dollars in special revenue bond debt on negative watch, warning that "[a] final ruling consistent with the March 26, 2019 Court of Appeals ruling would result in downgrades."[1] Two months later, the first downgrades actually happened.[2] A steady stream of additional downgrades has followed.

The First Circuit's decision has unsettled the multi-trillion-dollar revenue bond market and harmed local governments across the country, which depend on such bonds to raise money for vital public works like sewer and transportation systems. The case is therefore of "extraordinary importance" to local governments of all kinds, and urgently warrants "further review * * * by the Supreme Court." Pet. App. 83a (Lynch, J, dissenting from denial of rehearing en banc).

Nor is there any justification for the First Circuit's newly-minted interpretation of Section 922(d). As Judge Lynch explained in her vigorous dissent from the denial of en banc review, the First Circuit's opinion flouts the text and settled construction of Section 922(d) and renders the provision entirely superfluous. The only "authority" the First Circuit could muster for its views was a single treatise

[1] *Fitch Places Seven USPF Special Revenue Ratings on Negative Watch Pending Court Decision*, FitchRatings (Apr. 11, 2019), https://www.fitchratings.com/site/pr/10069117 [hereinafter "*Fitch Places Seven on Negative Watch*"].

[2] *Rating Action: Moody's Downgrades Illinois State Toll Highway Authority to A1 and Assigns A1 Rating to Toll Highway Senior Revenue Bonds, 2019 Series A; Outlook Stable*, Moody's Investors Service (May 31, 2019), https://www.moodys.com/research/Moodys-downgrades-Illinois-State-Toll-Highway-Authority-to-A1-and--PR_905818650 [hereinafter, "*Moody's Downgrades Illinois*"].

whose erroneous, unsupported understanding of Section 922(d) is a stark outlier. Yet—because municipal bankruptcy cases usually moot out before they reach the court of appeals—there is unlikely to be corrective precedent from another court in the near future. Certiorari review is therefore necessary to prevent the First Circuit's erroneous interpretation from taking hold and inflicting lasting harm on the bond markets, municipalities, and the citizens they serve.

The context of this case makes a certiorari grant all the more important. The First Circuit issued its opinion as part of the Puerto Rico bankruptcy proceedings, which alone involve billions of dollars in special revenue bond debt. If the opinion is left to stand, holders of those bonds will be deprived of their statutory and constitutional rights to property, and Puerto Rico's credit in the bond market will suffer, jeopardizing the Commonwealth's ability to return to full financial health. That is not what Congress had in mind when it incorporated Section 922(d) into the Puerto Rico restructuring statute, which is designed to ensure that the Commonwealth regains its "access to the capital markets." 48 U.S.C. § 2141(b).

This Court should grant certiorari.

## STATEMENT

### A. Special Revenue Bonds and Chapter 9

1. Local governments face unique challenges in raising funds to undertake important public works projects and systems. Unlike a private corporation, a municipality generally cannot grant creditors a lien on one of its properties in order to secure a loan. Many state laws (and basic common sense) bar a practice that might result in a foreclosure on the

town hall or local public utility. Moreover, many states impose statutory restrictions on municipal borrowing.

To avoid these problems while still obtaining the financing they need, local governments have long turned to revenue bonds. These bonds are secured not by a piece of property or a promise of repayment from the city's general funds, but instead by a lien on a designated stream of revenue from a particular source, such as the municipality's excise taxes, toll revenues, or utility charges.

Revenue bonds are attractive to municipalities because they typically provide a way to raise money at relatively low interest rates without encumbering general funds. And they are attractive to bond purchasers because they are generally backed by a pledge of regular payments from a reliable income source, such as tolls, fares, or a specific tax stream. Further, these protections are often bolstered by statutory requirements mandating that the local government or instrumentality apply the revenues to make scheduled bond payments, and barring the government from diverting the pledged revenues to other purposes.

2. These benefits for both local governments and bond purchasers were jeopardized by Congress' overhaul of municipal bankruptcy law in the 1970s. In that period, Congress formally designated Chapter 9 as the chapter of the Bankruptcy Code governing municipalities, and made a number of Bankruptcy Code provisions applicable to municipalities that had previously applied exclusively to corporate debtors. Act to Amend Chapter IX of the Bankruptcy Act, Pub L. No. 94-260, 90 Stat. 315 (1976); Bank-

ruptcy Reform Act of 1978, Pub. L. No. 95-598, 92 Stat. 2549.

But these amendments had an unintended consequence: they made it more difficult for municipalities to raise money by threatening the viability of revenue bonds. For example, Section 552(a) of the Code dictates that "property acquired * * * by the debtor after the commencement of the [bankruptcy] case is not subject to any lien resulting from any security agreement entered into by the debtor before the commencement of the case." 11 U.S.C. § 552(a). Applied to municipalities, that broad language appeared to mean that revenue bondholders could not enforce a lien on any revenues that the municipality acquired after declaring bankruptcy. Because revenue bonds are generally nonrecourse, this provision threatened to decrease the value and creditworthiness of those bonds in the event that a municipality went into bankruptcy.

Section 362(a) was also problematic. That provision dictates that filing a bankruptcy petition "operates as a stay, applicable to all entities" of any effort to collect or enforce existing debt repayment obligations. *Id.* § 362(a). The stay was intended to give debtors a "breathing spell" to get their affairs in order without the pressure of being forced to make debt payments. S. Rep. No. 95-989, at 54 (1978). And Congress made the stay even broader in Chapter 9 by mandating that it also operates to halt efforts to collect debts from the municipalities' "officer[s] or inhabitant[s]." 11 U.S.C. § 922(a).

These stay provisions had the potential to interfere with a municipality's ability to raise money by undercutting the revenue payment obligations. Given the possibility of a bankruptcy stay, potential bond purchasers could no longer be confident that the mandates in state laws (or indentures/resolutions) would ensure regular payments throughout the life of the bond. And this difficulty was compounded because the same state laws and contracts that secure regular payments from a designated revenue stream generally dictate that the bondholder has no recourse to repayment from other municipal revenues. That meant that a city might declare bankruptcy, cease making revenue bond payments, spend the designated revenues for other purposes, and potentially leave the bondholder with *no* ability to obtain relief from the city's general funds once the bankruptcy was completed. *See* S. Rep. No. 100-506, at 5 (1988).

Both potential bond purchasers and local governments were keenly aware of this possibility. When Congress was considering reforming the municipal bankruptcy code, the City of Cleveland told the Senate that, during its period of fiscal distress in the late 1970s, it was unable to obtain desperately needed funds because "the lenders who contemplated providing financing * * * were discouraged given the concern that their security interests might terminate upon a Chapter 9 filing by the city." *Id.* at 4.

3. To counteract this and other problematic side effects of Chapter 9, Congress enacted the Municipal Bankruptcy Amendments of 1988, Pub. L. No. 100-597, 102 Stat. 3028. As relevant, that law introduced a new section—Section 928—that specifically exempted special revenues from Section 552(a), the provision that otherwise threatened to terminate a

bondholder's lien once a municipality entered bankruptcy. In particular, Section 928(a) mandated that:

> Notwithstanding section 552(a) of this title and subject to subsection (b) of this section, special revenues acquired by the debtor after the commencement of the [bankruptcy] case shall remain subject to any lien resulting from any security agreement entered into by the debtor before the commencement of the case.

11 U.S.C. § 928(a). Section 928(b), in turn, carved out an exception for the continued funding of "necessary operating expenses of [the] project or system," to ensure that a debtor could continue to operate the project producing the pledged revenue stream. *Id.* § 928(b).

Congress also added a specific exemption for special revenues to Sections 362(a) and 922(a), the provisions implementing the automatic stay of debt enforcement during the bankruptcy case. That exemption, found in Section 922(d), states:

> Notwithstanding section 362 of this title and subsection (a) of this section, a petition filed under this chapter does not operate as a stay of application of pledged special revenues in a manner consistent with section 92[8][3] of this title to payment of indebtedness secured by such revenues.

*Id.* § 922(d). As Congress explained, this new exception guarantees that the automatic stay does not

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[3] The text says "927," but that is universally regarded as a scrivener's error. *See* Pet. App. 85a-86a n.5.

impede "what many state statutes mandate: the application of pledged revenues after payment of operating expenses to the payment of secured bonds." S. Rep. No. 100-506, at 11. And it "insure[s] that revenue bondholders receive the benefit of their bargain with the municipal issuer, namely, they will have unimpaired rights to the project revenues pledged to them." *Id.* at 12; *see* H.R. Rep. No. 100-1011, at 4 (1988) (provision ensures that special revenues are not diverted "into the general treasury for distribution to all creditors" instead of being "used to repay holders of revenue bonds").

In the thirty years since the enactment of the 1988 Amendments, the municipal bond market has thrived. Experts currently estimate that there are approximately $3.7 *trillion* in municipal revenue bonds. *See Municipal Bonds*, Charles Schwab, https://www.schwab.com/public/schwab/investing/accounts_products/investment/bonds/individual_bonds/municipal_bonds (last visited Sept. 20, 2019). Approximately $27 billion of revenue bonds have been issued by the Commonwealth of Puerto Rico and its agencies and authorities.

4. In 2016, Congress enacted legislation to address Puerto Rico's fiscal crisis. It recognized that a key goal was restoring the Commonwealth's "access to capital markets." 48 U.S.C. § 2141(b)(1). And the result of Congress's efforts was the Puerto Rico Oversight, Management, and Economic Stability Act, Pub. L. No. 114-187, 130 Stat. 549 (2016) (PROMESA). The Act creates a "Financial Oversight and Management Board" to oversee Puerto Rico's fiscal affairs. The Board is charged with developing "fiscal plans" for the Commonwealth and its agen-

cies. *See* 48 U.S.C. § 2141(a); Pet. App. 35a-36a. Among other things, those plans must "respect the relative lawful priorities *or lawful liens*" found in the Commonwealth's "constitution, other laws, or agreements." 48 U.S.C. § 2141(b)(1)(N).

In addition, Title III of PROMESA sets out provisions governing the "adjustments of debts" for the Commonwealth, and functions as the Commonwealth's version of Chapter 9. Indeed, Title III explicitly incorporates many of the provisions of Chapter 9, including Sections 922 and 928. The two provisions are therefore fully applicable to any bankruptcy proceedings under PROMESA.

### B. Factual and Procedural Background

1. In 1965, Commonwealth Act No. 74-1965 (the "Enabling Act") created the Puerto Rico Highway and Transportation Authority (PRHTA), a public corporation that oversees roads and other transportation systems for the Commonwealth. *See* Pet. App. 34a. The Enabling Act also provided that PRHTA may raise money by issuing municipal bonds secured by revenues from PRHTA projects and from certain dedicated excise taxes. Pursuant to this authority, PRHTA has issued bonds under general bond resolutions adopted in 1968 and 1998. *Id.* at 34a-35a. The Commonwealth's statutes and bond resolutions provide protections for bondholders: They establish liens on certain excise taxes and toll revenues and they ensure that those revenues will be applied to bond repayment. But they also offer protection for the Commonwealth by mandating that bondholders have no entitlement to repayment from the general treasury.

In March of 2017, the Financial Oversight and Management Board for Puerto Rico certified a fiscal plan dictating that the pledged revenues would no longer be applied to the repayment of bonds and "would instead be diverted and subsumed into the general revenues of Puerto Rico." Pet. App. 6a-7a. Two months later, PRHTA formally entered Title III debt adjustment proceedings under PROMESA. *Id.* at 37a. Bond payments ceased shortly thereafter.

2. Petitioners are holders and insurers of PRHTA bonds issued under the Enabling Act and the 1968 and 1998 bond resolutions. *See id.* at 34a. They instituted an adversary proceeding against respondents—the Commonwealth, the PRHTA, the Board, and others—asserting that the Commonwealth's diversion of the pledged special revenues, and PRHTA's consequent failure to continue to make bond payments, violate Sections 922(d) and 928, as incorporated by PROMESA. *Id.* at 37a. Petitioners sought a declaration to that effect and an injunction to prevent future violations. *Id.* at 48a.

Respondents moved to dismiss, and the District Court granted that motion. *See id.* at 27a-64a. It held that neither Section 922 nor Section 928 *requires* the continued payment of special revenues as mandated by the Enabling Act and bond resolutions. *Id.* at 57a-58a. Rather, it concluded that they merely "permit" voluntary payments. *Id.* at 55a.

The First Circuit affirmed. In the initial panel opinion, it reasoned that the language of Section 928 and Section 922 is "unambiguous": In the panel's view, those provisions preserve the liens on special revenues and permit *voluntary* payments on special revenue debt, but do not mandate that such payments continue or permit a creditor to initiate an enforcement action if they do not. *Id.* at 13a, 21a-22a.

As to Section 922(d), in particular, the panel acknowledged that this provision creates an "exception" to the automatic stay provisions. *Id.* at 18a. But the panel hypothesized that this exception was merely designed to clarify that the automatic stay does not prevent "a creditor from accepting voluntary payments" or "from applying debtor funds already in the creditor's possession." *Id.* at 20a-21a, 25a-26a.

The panel dismissed concerns that this interpretation would render Section 922(d) superfluous, given that the automatic stay bars only creditor enforcement actions, not voluntary actions by debtors. Citing a 1985 decision from the Seventh Circuit, *In re Hellums*, 772 F.2d 379 (7th Cir. 1985) (per curiam), the First Circuit asserted that the automatic stay had been interpreted more broadly to bar even a creditor's acceptance of a voluntary payment. Pet. App. 20a-21a. The panel further opined that because "the statute's language [is] unambiguous, there is no need to rely on legislative history." *Id.* at 22a.

3. Petitioners sought en banc review. Petitioners pointed out that, among other errors, the panel had flatly misread the Seventh Circuit's decision in *Hellums*, which had held that an automatic stay does *not* prohibit voluntary actions by a debtor. The panel issued an "errata" withdrawing the citation to *Hellums*. Pet. App. 24a-26a. In its place, the revised opinion cited a single bankruptcy treatise.

While the petition was pending, the First Circuit released a decision in another case arising from the Commonwealth's failure to make PRHTA bond payments, *Ambac Assurance Corp*. v. *Commonwealth of Puerto Rico*, 927 F.3d 597 (1st Cir. 2019). In that case, too, the panel affirmed the District Court's holding that Sections 922 and 928 do not mandate the continued payment of PRHTA bonds.[4]

4. The First Circuit denied petitioners' request for en banc review on July 31, 2019, over a vigorous dissent from Judge Lynch. Pet. App. 65a-119a. The judges who had taken part in both the decision below and *Ambac* also issued an extensive concurrence in the denial attempting to "elaborate" on the reasons for the panels' decisions.

The concurrence explained that—contrary to the panel's repeat insistence that the statutory language is "unambiguous"—"[t]here is some ambiguity in the text of section 922(d)." *Id.* at 70a. But, according to the concurrence, that newly acknowledged ambiguity did not defeat the panel's prior holding, because in its view petitioners' interpretation remained implausible.

Judge Lynch, writing in dissent, expressed "grave doubts about the panel's holding and the analysis of both the panel and the concurrence as to the denial of rehearing en banc." Pet. App. 83a (Lynch, J., dissenting from denial of rehearing en banc). She explained that the plain language and historical context of Section 922(d) demonstrate that it was enacted to ensure the continued payments of special revenues during the pendency of a bankruptcy

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[4] The plaintiffs in *Ambac* also intend to file a petition for certiorari raising this question. This Court may wish to consolidate the two cases.

proceeding, by removing the only obstacle to bond holders' enforcement of their state law rights—the automatic stay. *Id.* at 85a-87a. She cited multiple sources confirming Congress's intent in that regard. *See, e.g.*, *id.* at 85a-94a & nn.5-8, 99a-105a. She further noted that the panel's opinion conflicts with the only opinion to previously address this issue, and upset the long-settled understanding of bondholders and municipalities. *Id.* at 87a. She added that this decision would disrupt the municipal bond markets, while raising serious constitutional concerns under the Takings Clause and the Tenth Amendment. *Id.* at 111a-113a. Finally, Judge Lynch emphasized the "extraordinary importance" of the issue and the need for "further review * * * by the Supreme Court." *Id.* at 83a.

## REASONS FOR GRANTING THE PETITION

### I. THE FIRST CIRCUIT'S DECISION UPENDS THE SETTLED UNDERSTANDING OF AN IMPORTANT STATUTORY SCHEME.

For decades, courts, commentators, and practitioners have understood that the automatic bankruptcy stay contained in Sections 362(a) and 922(a) operates to prevent creditors from attempting to enforce debt repayment obligations during the pendency of bankruptcy proceedings. It is similarly well-recognized that, by creating an exception to the automatic stay for special revenues in Section 922(d), Congress ensured that the enforcement of special revenue debt obligations could continue during the pendency of the bankruptcy proceedings. As the plain text of the provision declares, filing for bankruptcy "does *not* operate as a stay of application of pledged special revenues * * * to payment of indebtedness." 11 U.S.C. § 922(d) (emphasis added).

The First Circuit flouted this settled understanding of the municipal bankruptcy scheme. The dramatic reaction of the bond market demonstrates how far afield the First Circuit travelled. Within days of the decision, ratings agencies had placed municipal revenue bonds on negative watch, explaining that the First Circuit's opinion—if left unchecked—will decrease the creditworthiness of municipal bonds. *See supra* pp. 2-3 & nn.1-2; *infra* pp. 23-25. Not long after, the ratings agencies actually downgraded several revenue bonds for the same reason, *id.*, and more may well follow if this Court does not step in. The result will not only harm bondholders, but the municipalities themselves: They will find it increasingly costly and difficult to raise the funds they need for important public works, if revenue bonds are rendered no more attractive than general obligation bonds. This Court's intervention is urgently needed.

### A. Until The Panel Decision, There Was General Agreement That Section 922(d) Exempts Special Revenue Debt From The Automatic Stay's Bar On Creditor Actions To Enforce Debt Payment Obligations In Bankruptcy.

1. As this Court and the courts of appeals have repeatedly explained, Section 362(a) of the Bankruptcy Code "stays a wide array of collection and enforcement proceedings against the debtor and his property." *Pennsylvania Dep't of Pub. Welfare* v. *Davenport*, 495 U.S. 552, 560 (1990); *see Czyzewski* v. *Jevic Holding Corp.*, 137 S. Ct. 973, 979 (2017); *see also, e.g.*, *Burton* v. *Infinity Capital Mgmt.*, 862 F.3d

740, 746-747 (9th Cir. 2017); *Aiello* v. *Providian Fin. Corp.*, 239 F.3d 876, 878 (7th Cir. 2001). In other words, the stay "give[s] the debtor a breathing spell from his creditors" by precluding "all collection efforts, all harassment, and all foreclosure actions." *Houck* v. *Substitute Tr. Servs.*, *Inc.*, 791 F.3d 473, 480-481 (4th Cir. 2015) (quoting S. Rep. No. 95-989, at 54).

In the municipal context, this "breathing spell" is even more expansive because the general stay of Section 362 is supplemented by Section 922(a), which ensures that creditors may not bring "a judicial * * * action or proceeding against an officer or inhabitant of the debtor that seeks to enforce a claim against the debtor." 11 U.S.C. § 922(a); *see also* 5 Hon. William L. Norton Jr. & William L. Norton III, Norton Bankruptcy Law & Practice § 90:16 (3d ed. 2019 update); Matthew W. Kavanaugh & Randye B. Soref, Business Workouts Manual § 35:20 (2018 update). Taken together, these automatic stay provisions temporarily override any state or local laws, regulations, contracts, and resolutions that require a municipality to apply its funds to debt repayment by rendering those state and local requirements unenforceable during the pendency of the bankruptcy proceedings.

2. Because it is uniformly understood that the automatic stay blocks the enforcement of payment obligations during the pendency of a bankruptcy, it is also well understood that the stay exception in Section 922(d) necessarily means that special revenue debt payment obligations can continue to be enforced as usual. The text makes that clear: Filing for bankruptcy "*does not* operate as a stay of applica-

tion of pledged special revenues * * * to payment of indebtedness secured by such revenues." 11 U.S.C. § 922(d) (emphasis added). And this is true "*[n]otwithstanding* section 362 * * * and [section 922(a)]"—that is, the provisions imposing the otherwise applicable automatic stay. *Id.*

Thus, shortly after the 1988 amendments were enacted, multiple experts explained that section 922(d) "makes the automatic stay provision generally inapplicable to the payment of pledged special revenues," thereby ensuring that courts "retain[] the power to enjoin application of the revenues where a debtor-municipality proposes to apply them in a manner inconsistent with section 928." Robert S. Amdursky, *The 1988 Municipal Bankruptcy Amendments: History, Purposes, and Effects*, 22 Urb. Law. 1, 12-13 (1990); *see also* Leonard Kopelman, *Municipal Bankruptcy: The Worst-Case Scenario*, Boston B.J., Sept.-Oct. 1990, at 9, 9-10.

Several years later, the National Bankruptcy Review Commission observed that under Chapter 9, "special revenues continue to be paid" during bankruptcy, and proposed (unsuccessfully) that similar protections should be extended to other types of municipal financing. 1 Nat'l Bankr. Rev. Comm'n, National Bankruptcy Review Commission Report ch. 4 (1997), 1997 WL 985143, at *13. Scholarship from the time confirmed this understanding. *See, e.g.*, Kevin A. Kordana, *Tax Increases in Municipal Bankruptcies*, 83 Va. L. Rev. 1035, 1049-50 (1997).

That view of Section 922(d) has continued to prevail. A "[p]ractical [g]uide to Chapter 9" from 2011 explains that under Section 922(d), "[r]evenue bondholders may * * * demand interest and principal payments after a bankruptcy filing and exercise remedies on default including foreclosure, without violating the automatic stay." Paul R. Glassman, *A Practical Guide to Chapter 9 Municipal Bankruptcy*, 2011 WL 5053642, at *12; *see also, e.g.*, Michael L. Hall & George D. Gaskin III, *Municipal Bonds in Chapter 9: A Primer*, Am. Bankr. Inst. J., July-Aug. 2011, at 38, 80.

Multiple manuals and treatises have endorsed the same view. For example, the Bankruptcy Code Manual states that "§ 922(d) provides that the automatic stays created by §§ 362 and 922(a) are inapplicable to efforts by the creditor to collect [special] revenues." Michael J. Holleran et al., Bankruptcy Code Manual § 922:9 (2019 update). The Advanced Chapter 11 Bankruptcy Practice manual similarly states that section "922(d) makes it clear that post-petition transfers of proceeds of special revenue projects should continue despite the automatic stay." Thomas J. Salerno et al., Advanced Chapter Eleven Bankruptcy Practice § 15.25 (2d ed. 2019-2 cumulative supp.). And the Norton Journal of Bankruptcy Law and Practice notes that "once [a] municipality files for Chapter 9," the "special revenue bonds continue to be secured and are * * * serviced if special revenues are available." Nicholas B. Malito, *Municipal Bankruptcy: An Overview of Chapter 9 and a Critique of the "Specifically Authorized" and "Insolvent" Eligibility Requirements of 11 U.S.C.A. § 109(c)*, 17 Norton J. Bankr. L. & Prac. 517 (2008); *see also, e.g.*, Alexander D. Flachsbart, *Municipal Bonds in Bankruptcy: § 902(2) and the Proper Scope of "Special Revenues" in Chapter 9*, 72 Wash. & Lee L. Rev. 955, 990-991 (2015).

To be sure, this view of Section 922(d) is not quite universal. Collier's treatise on bankruptcy argues that § 922(d) is permissive—a debtor may, but need not, continue to make special revenue payments during the pendency of Chapter 9 proceedings. 6 Collier on Bankruptcy § 922.05 (16th ed. 2019 update). The same treatise has also argued that the provision merely allows bondholders to keep special revenues already in their possession. *See id.*

This, however, is decidedly the minority view, and on the only documented occasion when a debtor attempted to rely on it, the bankruptcy court forcefully rejected it, observing that "the authority Collier's cites * * * is a quote from legislative history that does not uphold Collier's reading of § 922(d)." *In re Jefferson County*, 474 B.R. 228, 267 n.15 (Bankr. N.D. Ala. 2012).

3. Because of the nature of Chapter 9, judicial precedent is hard to come by,[5] and until this case *Jefferson County* was the only decision to squarely address

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[5] Municipal bankruptcies, while tremendously important when they occur, are rare. On average, fewer than 10 cases are filed nationally per year, and fewer than 500 cases have been filed since Chapter 9 became part of the U.S. bankruptcy laws in 1934. Bill Pepper, *Is the Gate Open for West Virginia Counties and Cities to File for Chapter 9 Bankruptcy Relief?*, 121 W. Va. L. Rev. 883, 883-884 (2019). That, combined with the reality that contested legal issues frequently settle out in negotiated plans of adjustment, means there are relatively few published judicial opinions interpreting and applying Chapter 9's provisions. *See* Juliet M. Moringiello, *Goals and Governance in Municipal Bankruptcy*, 71 Wash. & Lee L. Rev. 403, 480 (2014). The paucity of cases filed each year increases the importance of this Court's review.

the meaning of Section 922(d). It is firmly in keeping with the expert consensus that Section 922(d) ensures that special revenue payment obligations continue even after the filing of a bankruptcy petition.

In *Jefferson County*, the debtor-county had urged the Court to adopt Collier's narrow reading of Section 922(d). Specifically, the County argued that Section 922(d) merely permits a creditor to keep any special revenues already in the hands of a bond trustee, while allowing a debtor to make voluntary payments of other special revenues if it so chooses. The *Jefferson County* court squarely rejected that view.

The court first rejected the proposition that pledged special revenues only included funds already in the possession of a bond trustee. 474 B.R. at 271 ("Nothing could be more certain * * * than 'pledged special revenues' as used in § 922(d) includes all pledged revenues, not just revenues in the possession of a trustee * * *."). It then emphasized that Section 922(d) was enacted "to provide a mechanism whereby the pledged special revenues would continue to be paid uninterrupted to those to which/whom" the payments were due. *Id.* at 274. The provision therefore "excludes continued payment of these 'pledged special revenues' * * * from being stayed under 11 U.S.C. 362(a) or 11 U.S.C. 922(a)." *Id.* And it dictates that special revenues "are *not protected* from further actions by [the creditors' representative] to acquire them from the County." *Id.* at 272 (emphasis added). While the Jefferson County bankruptcy proceedings settled before the appeal could be decided, the lower court's decision has been repeatedly cited as an authoritative understanding of Section 922(d). *See, e.g.*, 3 Bankruptcy Desk Guide § 23:40 (2019 update); 5A Federal Procedure, Lawyers Edition § 9:1107 (2019 update); 5 Hon. William L. Norton Jr. & William L. Norton III, Norton Bankruptcy Law & Practice § 90:13 (3d ed. 2019 update).

**B. The First Circuit Flouted This Well-Settled Understanding With Dramatic Consequences For The Municipal Bond Market.**

1. The decisions below broke with the consensus and adopted Collier's untenable view of Section 922(d). The First Circuit acknowledged that, by its plain language, "Section 922(d) provides an exception from the automatic stays of Section 362 and 922(a)." Pet. App. 18a-19a. And it acknowledged its own precedent holding that an automatic stay applies to enforcement actions "*against* the debtor or the property of the estate." *Id.* at 15a (quoting *In re Slabicki*, 466 B.R. 572, 580 (B.A.P. 1st Cir. 2012) (emphasis added)). But the panel nonetheless rejected the logical conclusion that, by exempting "the application of pledged special revenues" from a stay blocking debt enforcement actions, Congress necessarily mandated that debt enforcement should continue with respect to special revenues. *Id.* at 16a (quoting 11 U.S.C. § 922(d)).

Instead, the First Circuit suggested that the exception was solely intended to "make[] clear that the automatic stay is not an impediment to continued payment" of special revenues if a debtor wishes to make *voluntary* special revenue payments. *Id.* at 22a. And the panel reasoned that a clarification might have been necessary because, before the enactment of Section 922(d), "there was ample reason to believe that Section 362(a) stayed a creditor from accepting voluntary payments" or "applying debtor funds already in the creditor's possession." *Id.* at 25a-26a.

In other words—in sharp contrast with the precedent of this Court and the other courts of appeals that have consistently understood the automatic stay to block debt *enforcement*—the panel opined that the automatic stay might reach any acceptance of a debt payment by the creditor. And it rested its interpretation of Section 922(d) on that slender and speculative reed.

The panel did not offer any additional precedent from this Court or the courts of appeals to bolster its novel understanding of the automatic stay. Indeed, the original panel opinion cited a single Seventh Circuit decision for the proposition that the automatic stay can inhibit a creditor's acceptance of a voluntary payment. *Id.* at 20a-21a (citing *In re Hellums*, 772 F.2d 379). But while the en banc petition was pending, the panel issued an "errata" withdrawing its reliance on *Hellums*. *Id.* at 24a-26a.

That is likely because, as the en banc petition observed, *Hellums* did not suggest that Section 362 could be read to stay voluntary payments. To the contrary, *Hellums* repeatedly stated that a debtor retains "the right * * * to *voluntarily* re-affirm otherwise dischargeable obligations" even after the automatic stay is in place. 772 F.2d at 381 (emphasis added). In other words, the First Circuit's own citation demonstrates that, three years before Section 922(d) was enacted, precedent already established that debtors have the ability to make voluntary payments despite the automatic stay—rendering the panel's interpretation of Section 922(d) superfluous. In short, the retraction of the *Hellums* citation itself strongly signals the need for certiorari.

2. If there was any doubt as to whether the First Circuit's opinion strays far from the settled understanding of the automatic stay and Section 922(d), it has been erased by the swift reaction of the municipal bond market. Immediately after the opinion was announced, the ratings agencies began to downgrade their assessment of revenue bonds in light of the First Circuit's novel interpretation of Section 922(d).

Moody's Investors Service, for example, placed the rating of seven municipal utilities and one special assessment district in cities such as Chicago, Cleveland and Dallas under review for downgrade, an action that affected approximately $13.8 billion in outstanding rated debt. *Rating Action: Moody's Places 8 Ratings Under Review for Downgrade in Wake of Recent Court Ruling on Special Revenue Pledges*, Moody's Investors Service (May 13, 2019), https://www.moodys.com/research/Moodys-places-8-ratings-under-review-for-downgrade-in-wake--PR_905836610. Moody's explained that the review was necessitated by the "legal developments in the Puerto Rico * * * bankruptcy-like proceeding" and the "uncertainty" engendered by the First Circuit's ruling. *Id.*

Two weeks later, Moody's downgraded the ratings of the Illinois State Toll Highway Authority. *Moody's Downgrades Illinois*. In doing so, Moody's again cited explicitly to the First Circuit's opinion, reasoning that if states are permitted to pursue bankruptcy filings, the First Circuit decision might deprive revenue bonds of protection during bankruptcy proceedings. *Id*. And in late July, Moody's downgraded Cleveland, Ohio's water revenue bonds, once more pointing to the First Circuit's decision affirming that Puerto Rico "is not required to pay debt service on 'special revenue' bonds." *Rating Action: Moody's Downgrades Cleveland, OH's Senior Lien Water Revenue Bonds to Aa2; Outlook Stable,* Moody's Investors Service (July 29, 2019), https://www.moodys.com/research/Moodys-downgrades-Cleveland-OHs-senior-lien-water-revenue-bonds-to--PR_905922284.

Similarly, Kroll Bond Rating Agency ("Kroll") announced that twenty-two of its ratings would be affected based on the recent "special revenue opinions." Press Release, Kroll Bond Rating Agency, KBRA Reviewing Special Revenue Bond Implications of Court Ruling (Mar. 27, 2019), https://www.krollbondratings.com/announcements/10497. Kroll had previously explained that, "[f]or 30 years the market has relied upon an understanding that revenues securing special revenue bonds would not be subject to the automatic stay during a bankruptcy." Kroll Bond Rating Agency, Has Special Revenue Bond Protection Been Turned on its Head?, (Feb. 12, 2018), https://www.krollbondratings.com/show_report/8757. Indeed, it was "[t]his understanding [that] ha[d] enabled [Kroll] to assign higher credit ratings to some special revenue bonds compared to the general obligation bonds of the municipality." *Id*. Kroll warned that, if a contrary interpretation is allowed to stand, "the credit landscape of the municipal market may be transformed." *Id*.

Fitch Ratings, Inc. has likewise noted that the First Circuit's decision is "inconsistent with Fitch's and market participants' general understanding of the meaning of section 922(d) and the treatment of special revenue obligations in bankruptcy." And it has warned that "[a] final ruling consistent with the March 26, 2019 Court of Appeals ruling would result in downgrades to the affected ratings." *Fitch Places Seven on Negative Watch*.

It is rare, to say the least, for a decision by a single Court of Appeals to incur such widespread and damaging economic consequences for both private and governmental entities. And these actions are likely only the beginning. Unless this Court steps in, the First Circuit's decision will disrupt the $3.7 trillion market for municipal revenue bonds. *See Municipal Bonds*. Section 922(d) undergirds the credit-worthiness of trillions of dollars of debt, held everywhere from endowments and pension funds to retirement accounts of ordinary Americans. And it is not only these bondholders who will be hurt; municipalities will suffer greatly as the increase in risk associated with revenue bond debt makes it harder and more expensive for them to raise money to pay for important public works systems and improvement projects. It is therefore of paramount importance for the Court to intercede now to restore the settled understanding of that provision.

## II. THE FIRST CIRCUIT'S DECISION IS WRONG.

The First Circuit's dramatic departure from the status quo might be justified if there were a strong rationale for the panel's novel interpretation. But the panel offered scant analysis in support of its reading, and the en banc concurrence largely retreats from the little reasoning the panel offered. The fact that the First Circuit erred in a matter of such "extraordinary importance" for local governments and financial markets provides yet another reason to grant certiorari. Pet. App. 83a (Lynch, J., dissenting from denial of rehearing en banc).

1. In the initial opinion, the panel predicated its understanding of Section 922(d) primarily on the provision's "plain language." According to the panel, the text unambiguously "establishes that the application of pledged special revenues is not a violation of the automatic stay" but does not actually mandate the application if the debtor opts to divert the revenues instead. *Id.* at 17a. That mangles the statute's text.

Section 922(d) states that a bankruptcy petition "does not operate as a stay of application of pledged special revenues." 11 U.S.C. § 922(d). The most natural reading of that text is that the "application of pledged special revenues" mandated by state laws and bond resolutions/indentures is not paused or "stay[ed]" by a declaration of bankruptcy. And because the application is not stayed, the debtor must continue to make payments as specified in the applicable state and local laws and bond resolutions/indentures if it wishes to avoid debt enforcement actions.

That plain-text reading is the only way to make sense of the entirety of Section 922(d). This provision opens by stating that the stay does not operate against special revenues, "*[n]otwithstanding* section 362 of this title and subsection (a) of this section." *Id.* The use of "a 'notwithstanding' clause clearly signals the drafter's intention that the provisions of the 'notwithstanding' section override conflicting provisions of any other section." *Cisneros* v. *Alpine Ridge Grp.*, 508 U.S. 10, 18 (1993). Sections 362(a) and 922(a) impose a stay on actions "to enforce a claim against the debtor." Thus, by referencing those provisions in the notwithstanding clause, Congress "clearly signal[led]" an intent to "override" the stay of enforcement actions in the body of Section 922(d). That is true only if Section 922(d) exempts special revenues from the stay, requiring debt payments and any necessary enforcement actions to continue as usual.

By contrast, as Judge Lynch observed, if the panel's interpretation were correct, the "notwithstanding" clause would not "override" anything because special revenue payments would be purely voluntary, and actions "to enforce a claim against the debtor" would continue to be stayed in exactly the manner that Sections 362(a) and 922(d) specify. *See* Pet. App. 96a.

The panel attempted to escape this problem by asserting that Sections 362(a) and 922(d) stay not only enforcement actions by a creditor, but even the creditor's acceptance of voluntary payments. *Id.* at 18a-19a. But, as noted, that understanding finds *no* support in text of the Bankruptcy Code or the precedent of the other courts of appeals. *See supra* pp. 15-21. Indeed, as Judge Lynch also noted, the only support that the panel could ultimately find for this proposition is a general statement from Collier that "is neither authoritative nor adequate." Pet. App. 111a.

Other portions of Section 922(d) undermine the panel's interpretation. Section 922(d) also specifies that this continued "application of pledged special revenues" to debt repayment must be "in a manner consistent with section 92[8] of this title." 11 U.S.C. § 922(d). Section 928, in turn, dictates that special revenues remain subject to a lien during the pendency of a bankruptcy unless those revenues are "necessary operating expenses" of the relevant project. *Id.* § 928(b). Read as whole, then, the provision and its cross-reference to Section 928 indicate that the special revenue lien endures, and payments must continue as usual, *except* that the debtor may retain the amounts required for "necessary operating expenses." *Id.* §§ 922(d), 928(b).

The panel's interpretation cannot account for the cross-reference to Section 928, and the carve-out for "necessary operating expenses." If Section 922(d) merely *permits* the debtor to make special revenue payments as it so chooses, why would it be necessary to specify that the debtor can retain "necessary operating expenses"? Under the panel's reading, the debtor could retain *any* and *all* funds that it chooses.

The upshot is that the panel opinion ignored key portions of the statute (including its use of a "notwithstanding" clause and its cross-reference to Section 928) while simultaneously rendering Section 922(d) a nullity: Under the panel's interpretation, that provision simply permits voluntary payments that debtors were already allowed to make. It is implausible, to say the least, that Congress would have amended Chapter 9 in 1988 to add a provision that achieves precisely nothing. "When Congress acts to amend a statute," it presumably "intends its amendment to have real and substantial effect." *United States* v. *Quality Stores, Inc.*, 572 U.S. 141, 148 (2014) (internal quotation marks omitted); *see* James E. Spiotto, *The History and Justification for Timely Payment of Statutory Liens and Pledged Special Revenues Bond Financing in a Chapter 9 Municipal Debt Adjustment Proceeding: Is a Model State Law Necessary or Required?*, 39 Mun. Fin. J. 47, 83-88 (2019) (summarizing flaws in First Circuit's decision).

2. Perhaps realizing the many problems with the panel's assertion that the text "unambiguously" requires its interpretation, the en banc concurrence gives up on that position. It asserts, instead, that there is "some ambiguity in the text of section 922(d)," Pet. App. 70a, but that the ambiguity still does not justify reading Section 922(d) to mandate the continued application of special revenues to debt repayment.

The concurrence primarily attempted to support that contention by relying on legislative history that allegedly "clarifies" that Section 922(d) was merely meant to allow a creditor to make use of funds that were already "in the possession of the bond trustee." Pet. App. 71a (quoting S. Rep. No. 100-506, at 13). That reliance is misplaced. Section 922(d) undoubtedly does require continued special revenue payments by a "bond trustee"—a third party that, in some special revenues schemes, receives the revenues from the debtor and pays them out to the bond holder. The snippet of legislative history that the concurrence cites establishes as much. *Id.* (quoting S. Rep. No. 100-506, at 11, 13). But that legislative history in no way suggests that it is *only* funds in possession of a bond trustee that must continue to be applied to debt repayment during a bankruptcy. In fact, the full sentence excerpted by the concurrence makes clear that Section 922(d) extends well beyond funds in the hands of a trustee: "In [the context of Section 922(d),] 'pledged revenues' includes funds in the possession of the bond trustee *as well as other pledged revenues.*" S. Rep. No. 100-506, at 13 (emphasis added).

Moreover, as the en banc dissent emphasizes, the legislative history makes it crystal clear that Congress was addressing the "real concern that revenues dedicated to the repayment of municipal and local obligations will be diverted to other purposes once a municipality or local government enter[s] bankruptcy." Pet. App. 91a (Lynch, J., dissenting from denial of rehearing en banc) (quoting S. Rep. No. 100-506, at 5). And Congress solved the problem by enacting an amendment to "insure that revenue bondholders receive the benefit of their bargain with the municipal insurer, namely, *they will have unimpaired rights to the project revenue pledged to them*." S. Rep. No. 100-506, at 12 (emphasis added). Creditors' rights would hardly be "unimpaired" if they could access special revenues only when those revenues were already in the hands of a bond trustee. Indeed, the legislative history cutting against the panel's position is far more voluminous and explicit. *See* Pet. App. 85a-94a & nn.5-8, 99a-105a (Lynch, J., dissenting from denial of rehearing en banc).

3. The problems with the panel's decision do not end there. The panel also sought to bolster its read-

ing through a flawed interpretation of Section 305 of PROMESA and its Chapter 9 analogue, Section 904.[6] These provisions were added to the Bankruptcy Code in deference to the sovereignty of municipal (and later Commonwealth) debtors; they mandate that the Title III or bankruptcy court may not issue orders that "interfere with" the debtors' "use or enjoyment" of its property. 48 U.S.C. § 2165; 11 U.S.C. § 904. But, as Judge Lynch notes, Section 922(d) advances the sovereign interests of the debtor in "us[ing] and enjoy[ing]" its property in the way mandated by its own laws and regulations, and in raising capital in the first place. *See* Pet. App. 105a-109a (Lynch, J., dissenting from denial of rehearing en banc). And—as the dissent notes—even if there were some conflict between Section 922(d) and Sections 305 and 904, the court would be forced to honor Section 922(d) because it is the more specific provision, *id.* at 109a.

That is all the more true because any understanding of Section 922(d) that permits a debtor to ignore state laws and contracts mandating special revenue payments would raise grave constitutional concerns. Such a reading would both threaten bondholders' property interests in the special revenues, in violation of the Takings Clause, and infringe on state sovereignty, in violation of the Tenth Amendment.

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[6] The First Circuit's subsequent decision in *Ambac* offered additional, equally flawed reasoning in support of this erroneous understanding of Sections 305 and 904. The *Ambac* certiorari petition asks this Court to consider the propriety of that interpretation, and petitioners in this case strongly support the need for review of that opinion.

*Id.* at 111a-113a. The panel's decision to overlook these constitutional concerns provides yet another reason its decision cannot be permitted to stand.

## III. THIS COURT'S INTERVENTION IS URGENTLY NEEDED.

It is vital that the Court intervene now, rather than wait for a later case or hold this petition until the Court decides the constitutionality of an entirely distinct aspect of PROMESA. *See Fin. Oversight & Mgmt. Bd. for Puerto Rico* v. *Aurelius Inv., LLC* ("*Aurelius*"), No. 18-1334. Any delay will harm municipalities, prolong the confusion in the municipal bond markets, and inflict many millions of dollars in damages on petitioners and similarly situated bondholders. Nor is the First Circuit correct in its blithe assertion that any ill consequences of its decision may be avoided by the use of a "lift stay" motion.

1. As noted, the municipal bond market has already been profoundly affected by the First Circuit's decision, *see supra* pp. 23-25, and ratings agencies are likely to continue to downgrade municipal bonds until this Court steps in. It is therefore urgent that the Court intervene soon. For one thing, municipalities and their agencies will be constrained in their access to the financing they need for vital public works so long as the First Circuit's decision remains in place. For another, the First Circuit's decision has sown confusion in the bond market, and only this Court can provide the certainty the bond market needs.

The urgency is even more profound with respect to petitioners and similarly situated holders of Commonwealth bonds. As long as the First Circuit decision stands, the Commonwealth is free to divert and spend tens of millions of dollars that are required by Commonwealth law to be transferred to PRHTA for payment to bondholders. And bondholders have no certainty that they will *ever* be able to recover these lost funds. That is bad for the bondholders, but it is also bad for the Commonwealth, whose ability to raise money in the future will be harmed if its bond offerings are not effectively secured.

2. The panel and en banc concurrence suggest that these consequences are not as severe as petitioners suggest because, under 11 U.S.C. § 362(d), a bondholder can always seek relief from the automatic stay from the Title III court if it can demonstrate a "lack of adequate protection" for one of its property rights. *See* Pet. App. 80a. That is incorrect for several reasons.

*First*, the bond ratings agencies obviously have not viewed this "lift stay" relief as providing sufficient protection for bondholder rights. If they had, the First Circuit's decision would not have prompted such swift and damaging responses from those agencies.

*Second*, Congress itself made clear that "lift stay" relief was not enough to preserve bondholders' interests. If that relief was adequate, there would have been no need for Section 922(d) at all. As the legislative history confirms, Congress enacted Section 922(d) because it believed that special revenue bondholders should not be forced to seek stay relief in order to protect the rights that were already guaranteed under state law. *See supra* pp. 8-9.

*Third*, seeking relief from the automatic stay is far from simple. A creditor must first file a motion in the bankruptcy court, which entitles the debtor to contest the requested stay relief through a hearing. *See* 11 U.S.C. § 362(d). In that hearing, the burden falls partly on the creditor to show that it is entitled to relief it seeks. By requiring a secured *creditor* to seek relief from the stay, the decision below flips the balance struck by Congress. Rather than continued payment being the default, the decision forces the creditor to prove that it is entitled to the continued payments that Section 922(d) mandates.

The lift-stay proceedings in Puerto Rico's Title III cases to date only highlight the problem with forcing bondholders to employ this avenue for relief. For example, certain bondholders of the Employees Retirement System ("ERS") filed motions to lift the automatic stay, contending that bondholders lacked adequate protection because the Commonwealth had diverted all of their collateral. *See, e.g.*, *Altair Glob. Credit Opportunities Fund (A) L.L.C.* v. *Garcia Padilla*, No. 3:16-cv-02696-FAB (D.P.R.), Dkt. 1; *In re Fin. Oversight & Mgmt. Bd. for Puerto Rico*, No. 17-03566-LTS (D.P.R.), Dkts. 26, 289. These lift-stay motions, which in various forms have now been pending for *over three years*, have been mired in disputes about discovery, among other things. *See, e.g.*, No. 17-03566-LTS (D.P.R.), Dkts. 639, 605. And twice on the eve of the lift-stay hearings, the Title III Court issued decisions (one since reversed, the other now on appeal) holding that the bondholders either have unperfected liens, or no liens at all. *See, e.g.*, *In re Fin. Oversight & Mgmt. Bd. for Puerto Rico*, No. 17-00213-LTS (D.P.R.), Dkt. 215 (concluding ERS bondholders' liens were unperfected and thus subject to avoidance under Section 544 of the Bankruptcy Code); *id.*, Dkt. 251 (concluding that ERS bondholders' liens were terminated by Section 552(a) of the Bankruptcy Code). During this three-year period, the ERS bondholders' collateral has been diverted, consumed, and commingled with general funds.

Similarly, a lift-stay motion brought by Assured and other creditors in the Title III case of the Puerto Rico Electric Power Authority (*In re Fin. Oversight & Mgmt. Bd. for Puerto Rico*, No. 17-04780-LTS (D.P.R.)) has been pending for *ten months*, even after the Title III court denied a prior lift-stay motion based on Section 305 of PROMESA, and that decision was vacated by the First Circuit. *See Fin. Oversight & Mgmt. Bd. for Puerto Rico* v. *Ad Hoc Group of PREPA Bondholders*, 899 F.3d 13, 21 (1st Cir. 2018). The current (second) lift-stay motion has entailed all of the labor and expense of a major lawsuit, including the filing of a declaration in support of the motion containing 62 documents and totaling 2,903 pages (*see* Dkt. 977); entry of a protective order regarding discovery (*see* Dkt. 1052); discovery disputes (*see, e.g.*, Dkt. 1066); several depositions; and the preparation and filing of multiple expert reports (*see, e.g.*, Dkts. 1105, 1106, 1107, 1211).

If the First Circuit's decision stands, these kinds of burdens on courts and litigants will become far more frequent, offering yet another reason for this Court to weigh in.

3. Finally, there is no need for this Court to hold the petition until it issues a decision in *Aurelius*, No. 18-1334. While that case arises out of the Puerto Rico bankruptcy, it poses an entirely distinct ques-

tion: whether the Appointments Clause governs the appointment of members of the Financial Oversight and Management Board for Puerto Rico. However that decision is resolved, it could not have any effect on the question presented here—the proper interpretation of Section 922(d), a provision of the municipal bankruptcy code that is merely incorporated by reference in PROMESA. In fact, the First Circuit issued both the decision below and the parallel decision in *Ambac* after another panel had already held the members of the Oversight Board were unconstitutionally appointed. Yet the court did not mention that case, let alone suggest that its ultimate disposition might affect this one.

Moreover, in analogous circumstances involving the Patent Trial and Appeal Board (PTAB), the Court has contemporaneously heard both a challenge to the constitutionality of a Board and a case regarding the interpretation of a statute under the Board's purview. Specifically, in *Oil States Energy Services, LLC* v. *Greene's Energy Group, LLC*, 138 S. Ct. 1365 (2018), the Court considered whether review proceedings before the PTAB that could result in canceling an issued patent were constitutional. The same Term—indeed, the very same day of oral argument—the Court considered an issue of PTAB procedure in such proceedings (whether the PTAB must address every patent claim challenged by a petitioner). *See SAS Inst., Inc.* v. *Iancu*, 138 S. Ct. 1348 (2018). The pendency of the constitutional challenge did not stop the Court from deciding an important statutory question that had properly been presented to it. There is no reason for the Court to act differently here—if anything, the justification for hearing these two cases within a few months of one another is stronger, given that the question presented affects *all* municipal bankruptcies, not just cases involving the Oversight Board. In addition, municipal bankruptcies are exceedingly rare; they almost never reach the courts of appeals, let alone this Court. It is thus vital the Court to act now.

## CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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