No. 19-391

IN THE

Supreme Court of the United States

ASSURED GUARANTY CORP., *et al.*,

Petitioners,

v.

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

Respondents.

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

BRIEF IN OPPOSITION

MARTIN J. BIENENSTOCK
Counsel of Record
STEPHEN L. RATNER
JEFFREY W. LEVITAN
MARK D. HARRIS
PROSKAUER ROSE LLP
11 Times Square
New York, NY 10036
(212) 969-3000
mbienenstock@proskauer.com

TIMOTHY W. MUNGOVAN
JOHN E. ROBERTS
ADAM L. DEMING
PROSKAUER ROSE LLP
One International Place
Boston, MA 02110
(617) 526-9600

MICHAEL A. FIRESTEIN
LARY ALAN RAPPAPORT
PROSKAUER ROSE LLP
2029 Century Park East
Los Angeles, CA 90067
(310) 557-2900

Counsel for Respondents the Financial Oversight and Management Board for Puerto Rico, for itself and as representative of the Commonwealth of Puerto Rico and the Puerto Rico Highways and Transportation Authority, and Natalie A. Jaresko

(For Continuation of Caption See Inside Cover)

291701

John J. Rapisardi
Suzzanne Uhland
Yaira Dubin
O'Melveny & Myers LLP
7 Times Square
New York, N.Y. 10036
(212) 326-2000
jrapisardi@omm.com

Peter Friedman
Counsel of Record
O'Melveny & Myers LLP
1625 Eye Street, N.W.
Washington, D.C. 20006
(202) 383-5300
Pfriedman@omm.com

Counsel to Respondent the Puerto Rico Fiscal Agency and Financial Advisory Authority

QUESTION PRESENTED

Section 922(d) of the Bankruptcy Code provides the "application of pledged special revenues" to "payment of indebtedness secured by such revenues" does not violate the automatic stay that takes effect when a debtor files a petition under Chapter 9 of the Bankruptcy Code or Title III of the Puerto Rico Oversight Management and Economic Stability Act ("PROMESA"). 11 U.S.C. § 922(d). Did the court below correctly hold that § 922(d) *allows* a debtor or creditor to "appl[y]" special revenues to repay the secured debt, but does not *compel* continued payments on special-revenue debt during the pendency of a restructuring case?

RULE 29.6 STATEMENT

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

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

CASES:

STATUTES:

OTHER AUTHORITIES:

BRIEF IN OPPOSITION

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

STATEMENT OF THE CASE

Petitioner bond insurers (collectively, "Assured") seek this Court's review of a straightforward statutory-interpretation question affecting an exceedingly narrow category of municipal bonds. There are no other judicial opinions addressing the question presented, much less any conflict of authority warranting this Court's review. Assured therefore resorts to an overstated assertion that academic commentators have disagreed on the question. But this Court does not sit to resolve disagreements among commentators.

Bankruptcy Code § 362(a), with its eight subsections, meticulously and automatically stays all judicial actions and non-judicial acts to compel payment of a debtor's debts. This case concerns whether the carefully worded provisions of 11 U.S.C. § 922(d), allowing "application of pledged special revenues" to the debt they secure, not only allow the debtor or a creditor holding the revenues to apply them to repay the secured debt, but also allow creditors to commence judicial actions to compel the debtor to turn over pledged special revenues without violating the other provisions of the automatic stay expressly barring commencement of actions. The district court and a unanimous panel of the First

Circuit correctly rejected that atextual argument. The Bankruptcy Code permits, but does not compel, debtors to make payments on special-revenue bonds or creditors already in possession of the debtors' revenues to apply them to outstanding debt. Nothing in the plain text of § 922(d), which simply allows "application" of pledged special revenues notwithstanding the otherwise applicable automatic stay, *obligates* debtors to make continuing payments. Nor does the statutory scheme as a whole support Assured's labored reading of § 922(d). While Assured might prefer to engraft compulsory language onto the provision's text, the First Circuit correctly refused to do so, and that conclusion does not warrant this Court's review.

Indeed, the petition fails to satisfy any of the Court's criteria for granting certiorari. Assured cannot identify a circuit split, because none exists. Instead, Assured cites a single Bankruptcy Court case, *In re Jefferson County*, 474 B.R. 228 (Bankr. N.D. Ala. 2012). But *Jefferson County* concerned the wholly distinct question of the scope of a creditor's lien, not whether turnover of pledged special revenues could be compelled. Indeed, the debtor there agreed to turn over post-petition revenues within the scope of the creditor's lien. Thus, as the First Circuit found, *Jefferson County* is inapposite.

In the absence of a single case supporting its reading, Assured manufactures a false controversy by selectively quoting from secondary sources. According to Assured, the First Circuit's ruling upends the "settled understanding" of § 922(d). But Assured ignores contrary authorities, and even Assured's own sources undermine its position, largely endorsing the First Circuit's reading of § 922(d).

Assured's attempt to drum up a national interest angle, characterizing the First Circuit ruling as a critical blow to the entire municipal bond market, is likewise untenable. Assured's dire forecast ignores the municipal bond market's continually strong performance following the ruling. Recent coverage describes investor demand for municipal bonds as having reached "nearly unprecedented levels," Heather Gillers & Gunjan Banerji, *Money Managers Gain Sway Over Muni Market*, Wall St. J. (Oct. 9, 2019), https://www.wsj.com/articles/money-managers-gain-sway-over-muni-market-11570629205 ["Gillers, *Muni Market*"], and investors' appetite for municipal bonds showed no signs of letting up after the First Circuit's decision, Guggenheim Investments, *Municipal Bonds: Unwavering Demand* (Aug. 22, 2019), https://www.guggenheiminvestments.com/perspectives/sector-views/municipal-bonds-unwavering-demand ["Guggenheim, *Unwavering Demand*"].

The market's non-reaction makes sense when Assured's supposedly contrary evidence is considered in context. As evidence of the "disruption" of a bond market with 50,000 issuers and over a million outstanding bonds, Assured and its amicus, the Securities Industry and Financial Markets Association ("SIFMA"), point to approximately 20 issuers placed under review and only five actual bond downgrades. It is unsurprising that Assured and SIFMA cannot identify further examples; their own sources confirm the group of pledged special-revenue bonds the ruling could conceivably affect—those issued by municipalities with drastically lower overall credit ratings than individual bond ratings—is remarkably small. Moreover, Assured nowhere explains why a market correction in response to new information is bad. Corrections up and down are what efficient markets are supposed to produce.

Nor does Assured offer the full picture of reactions to the decision. Assured omits that Standard & Poor's ("S&P") publicly announced that the First Circuit's ruling was consistent with its understanding of the market. Robin L. Prunty, *Credit FAQ: Has S&P Global Ratings' View On Special Revenue Debt Changed Following The First Circuit Decision?* S&P Global (May 1, 2019, 6:03 PM) https://www.spglobal.com/ratings/en/research/articles/190501-credit-faq-has-s-p-global-ratings-view-on-special-revenue-debt-changed-following-the-first-circuit-decision-10971767 ["Prunty, *S&P View on Special Revenue Debt*"]. Likewise, Assured also fails to acknowledge that, despite placing some bonds under review, Kroll Bond Rating Agency issued an upgrade as a direct result of the First Circuit decision, and has yet to issue any actual downgrades. *See* Keeley Webster, *Why the troubled Los Angeles schools got an upgrade to triple-A,* 391 The Bond Buyer F527 (2019) ["Webster, *Los Angeles schools upgrade*"]. Kroll's upgrade and S&P's non-reaction undermine Assured's disaster narrative, which is perhaps why Assured chose to ignore them.

In short, none of Assured's doomsday predictions have come to pass, and in light of the positive trends in the market, there is little to suggest any of them will. Assured's attempts to exaggerate the import of the First Circuit's ruling thus fail. This case does not meet this Court's standards for granting certiorari.

Nor is this case a proper vehicle to consider the question presented. Even if the Court were to grant the petition and find in Assured's favor, Assured's entitlement to relief is far from a foregone conclusion. The Bondholders' alleged liens exist against the Puerto Rico Highways and Transportation Authority ("HTA") on purported pledged special revenues in the possession of the Commonwealth of Puerto Rico in the first instance and are subject to the operating expenses of the system or project. 11 U.S.C. § 928(b). This poses numerous obstacles to Assured. Here operating expenses may well exceed revenues. Moreover, Assured also failed to allege facts showing the existence of an unavoidable lien or that its liens extend to revenue in the possession of the Commonwealth (as opposed to HTA), which are critical defects in its complaint that could preclude recovery on remand. Accordingly, although the court below disposed of Assured's claims based on the defects in its §§ 922(d) and 928(a) arguments, other routes would have led to the same result. Thus, even if this Court is inclined to weigh in on this issue, it should await a better vehicle and allow further development of case law in the meantime.

1. Puerto Rico is in the midst of what Congress has deemed a "fiscal emergency." 48 U.S.C. § 2194(m)(1). To address that emergency, Congress in 2016 enacted the Puerto Rico Oversight, Management, and Economic Stability Act ("PROMESA"). *Id.* §§ 2101–2241. PROMESA established the Financial Oversight and Management Board (the "Board") "to provide a method for [Puerto

Rico] to achieve fiscal responsibility and access to the capital markets." *Id.* § 2121(a)–(b)(1). Among other things, PROMESA grants the Board extensive authority to oversee budgets and long-term fiscal plans in the Commonwealth. *Id.* §§ 2141–2142.

When the Board began its work in 2016, the Commonwealth had $74 billion of debt, $49 billion of pension liabilities, and insufficient resources to satisfy those obligations. Hurricanes Maria and Irma exacerbated the crisis in the fall of 2017 by devastating the Commonwealth's infrastructure.

Unlike municipalities on the mainland, the Commonwealth and its instrumentalities are not permitted to file for relief under Chapter 9 of the Bankruptcy Code. *See Puerto Rico v. Franklin Cal. Tax-Free Trust*, 136 S. Ct. 1938, 1942 (2016). Title III of PROMESA thus establishes a procedure the Commonwealth and its instrumentalities can employ to restructure their debts. 48 U.S.C. § 2161–2177. The Board is authorized to commence a Title III case on behalf of the Commonwealth or any of its eligible instrumentalities when certain conditions are met. *Id.* § 2164(a). To date, the Board has filed six Title III cases on behalf of the Commonwealth and its instrumentalities, including HTA.

PROMESA incorporates dozens of Bankruptcy Code provisions into Title III including 11 U.S.C. §§ 922 and 928. See 48 U.S.C. § 2161(a).

2. HTA is one of the Commonwealth instrumentalities in a dire fiscal condition. HTA is responsible for developing, operating, and maintaining the Commonwealth's highways and transportation system. Pet. App. 5a. Historically,

HTA financed its operations in part through revenue bonds. *Id.*

HTA was established by the Puerto Rico Highways and Transportation Authority Act. 9 L.P.R.A. § 2001 *et seq.* (the "Enabling Act"). The Enabling Act authorizes HTA to raise capital by selling bonds. *Id.* § 2004(l). Pursuant to that authority, HTA adopted resolutions in 1968 and 1998 authorizing bond issuances. Pet. App. 34a; *see* HTA Res. 68-18 (1968); HTA Res. 98-06 (1998) (collectively, the "Resolutions"). In parallel provisions, the Resolutions created a fund with separate accounts for bond service, bond redemptions, and a reserve, and moneys deposited into those accounts are held in trust by a Fiscal Agent.

HTA owes approximately $4.1 billion in outstanding principal on the bonds issued under the Resolutions. Assured and the other Petitioners allege they hold and insure portions of that debt. Pet. 11; Pet. App. 34a.

3. As the fiscal crisis intensified, the Governor of Puerto Rico issued a series of executive orders suspending the allocation of revenues into reserve accounts for bondholder payment and reallocating that money to pay for public services. On May 21, 2017, the Board filed a Title III petition on HTA's behalf, which automatically stayed any creditor remedies against HTA. Pet. App. 6a, 37a; *see* 11 U.S.C. § 362(a) (incorporated into Title III case by 48 U.S.C. § 2161(a)).

4. Assured commenced an adversary proceeding within HTA's Title III case. Pet. App. 37a. Assured alleged that the Board violated Bankruptcy Code

§§ 922(d) and 928(a) by ceasing debt-service payments on the HTA bonds. Pet. App. 37a. According to Assured, §§ 922 and 928 require a debtor to turn over "pledged special revenues" while its Title III case is pending, and certain of HTA's revenues qualify as pledged special revenues that must be paid immediately.

The district court dismissed the complaint on the ground §§ 922 and 928 do not require a debtor to turn over pledged special revenues while its restructuring case is pending. As the court explained, "[n]othing in the language of Section 922(d) requires debtors, or third parties holding special revenues, to apply revenues to outstanding obligations." Pet. App. 52a-53a. The court further held that § 928(a) "clearly and simply provides that certain pre-petition liens will remain in place after the filing of the petition, notwithstanding Section 552(a)'s general protection of after-acquired property from pre-petition liens," but § 928(a) "does not address lien enforcement at all" or "address payment of the secured obligation." Pet. App. 50a.

5. A First Circuit panel unanimously affirmed. Like the district court, the court below held the plain text of §§ 922(d) and 928(a) is unambiguous and does not compel a debtor to turn over its pledged special revenues while its restructuring case is pending. Instead, § 928(a) "simply provides that consensual prepetition liens on special revenues will remain in place after the filing of the petition," and § 922(d) "permits rather than mandates payment" on special revenue bonds during the course of the restructuring case. Pet. App. 13a, 19a.

The court observed that Congress has expressly commanded "performance, turnover, or payment" in other parts of the Bankruptcy Code. Pet. App. 18a (citing 11 U.S.C. §§ 365(d)(5), 542(a), and 542(b), each of which directs that entities "shall" perform certain actions). It concluded that the absence of any comparable language in § 922 is a strong indication that the provision is not a turnover statute. *Id.* The court construed §§ 922 and 928 as written and held that they do not require HTA to make debt payments while its Title III case is pending.

6. After the decision below was rendered, the First Circuit confronted a nearly identical issue in *Ambac Assurance Corp. v. Puerto Rico (In re Fin. Oversight & Mgmt. Bd. for P.R.)*, 927 F.3d 597, 604-05 (1st Cir. 2019). There, as here, the appellant argued that §§ 922 and 928 require a debtor to turn over pledged special revenues while its Title III case is pending. The First Circuit again rejected that argument, this time through a different unanimous panel featuring two judges who were not involved in the decision below.[1]

7. The First Circuit denied rehearing en banc. Judge Kayatta, joined by the three panel judges, authored a statement supporting the panel's holding and the denial of the petition for rehearing en banc. Judge Kayatta emphasized the breadth of the automatic stay and explained that nothing in §§ 922 and 928 overrides that express command by requiring

[1] A petition for a writ of certiorari in that case is also pending before the Court. *See Ambac Assurance Corp. v. Puerto Rico (In re Fin. Oversight & Mgmt. Bd. for P.R.)* Pet. Cert., No. 19-387 (Sept. 24, 2019).

a debtor to make payments during its restructuring case. Pet. App. 72a ("Nothing in the language [of § 922(d)] remotely suggests that it compels anyone to [apply special revenue funds]."). He also explained that § 928 did not compel continued payment of revenues, reasoning that it merely preserved bondholder liens on special revenues established by prepetition agreement. Pet. App. 75a-76a.

Judge Lynch wrote separately, dissenting from the denial of the en banc petition. Pet. App. 83a–117a. No other judge on the First Circuit joined the dissent.

The petition followed.

REASONS FOR DENYING THE PETITION

I. THERE IS NO DIVISION AMONG THE LOWER COURTS WITH RESPECT TO THE MEANING OF § 922(D), AND ANY "SETTLED UNDERSTANDING" AMONG BANKRUPTCY AUTHORITIES SUPPORTS THE DECISION BELOW.

Assured concedes that it cannot identify a single court of appeals decision disagreeing with the First Circuit's straightforward reading of § 922(d). Instead, Assured relies on a single inapposite district-court decision and what it characterizes as a "settled understanding" gleaned from a few statements by bankruptcy commentators that § 922(d) requires a debtor to turn over pledged special revenues during a restructuring case—an understanding that the decision below supposedly "flouted." Pet. 20-21. This Court does not exist to resolve disagreements among commentators. And, in any event, the reality does not support Assured's claim that a "settled understanding" exists that supports its position. In fact, the majority of bankruptcy authorities—including the leading treatise in the field and the judiciary's own guide—long ago endorsed the First Circuit's view that § 922(d) is permissive, not mandatory. Even among Assured's own cherry-picked sources, several expressly reject its position, others deny the existence of any "consensus," and only a few actually support its theory. The notion that this Court should intervene to restore some shattered agreement among certain pundits about § 922(d) is fanciful.

A. The single bankruptcy court decision that Assured cites is inapposite.

Unable to establish a circuit split, Assured resorts to arguing the decision below conflicts with a 2012 decision from a bankruptcy court in Alabama. Pet. 19–20 (citing *In re Jefferson Cnty.*, 474 B.R. 228 (Bankr. N.D. Ala. 2012)). That case did not adopt a different construction of § 922(d), however. Indeed, *Jefferson County* did not even address the question of whether § 922(d) requires a debtor to turn over pledged special revenues, as the court below noted. Pet. App. 21a (discussing *Jefferson County*).

Jefferson County did not address that question because the debtor there *agreed* to turn over post-petition revenues if the court determined they were covered by the creditor's lien. 474 B.R. at 274. Accordingly, the only issue before the court was the scope of the creditor's lien. *Id.* at 263 (observing that the disagreement to be decided was over the "breadth" of the expression "pledged special revenues" as used in § 922(d), and specifically what revenues it covered). The *Jefferson County* court did not decide the relevant issue here, which is whether § 922(d) is a turnover statute.

B. Assured's reliance on a purported conflict among bankruptcy authorities does not warrant this Court's review, and the authorities agree that § 922(d) is permissive in any event.

Unable to point to any judicial decisions addressing the question presented, much less a conflict of authority, Assured attempts to cobble together a disagreement among bankruptcy commentators. Even if a meaningful disagreement existed, it would be manifestly insufficient to warrant this Court's review. And in any event, Assured's argument is significantly overstated. The vast majority of bankruptcy authorities—including Collier on Bankruptcy, the definitive bankruptcy treatise—opine that § 922(d) *allows* debtors to pay special revenues to bondholders despite the stay, but does not *require* them to do so.

As the National Association of Bond Lawyers explains: "[W]hile pledged revenues held or received by an indenture trustee can continue to be applied by the trustee to pay down bond debt without court approval [under § 922(d)], a municipal debtor, absent a court order, *is not required* by the Code to turn over special revenues to the trustee during the chapter 9 case despite the retention of the trustee's security interest in such revenues." Nat'l Ass'n of Bond

Lawyers, Municipal Bankruptcy: A Guide for Public Finance Attorneys 53–54 (2011) (emphasis added); *see also* Francisco Vazquez, *Examining Chapter 9 Municipal Bankruptcy Cases*, in Chapter 9 Bankruptcy Strategies: Leading Lawyers on Navigating the Chapter 9 Filing Process, Counseling Municipalities, and Analyzing Recent Trends and Cases (2011), 2011 WL 5053640, at *15 ("Section 922(d) provides that notwithstanding the automatic stay, an indenture trustee or other paying agent *may* apply the special revenues that have been pledged to any amounts coming due or distribute the special revenues to bondholders." (emphasis added)); James E. Spiotto, *Municipal Insolvency: Bankruptcy, Receivership, Workouts, and Alternative Remedies*, in 2 Gelfand, State and Local Government Debt Financing § 14:13 (2d ed. 2019) ("Under Section 922(d), the debtor in a Chapter 9 proceeding should be *free*, notwithstanding the Chapter 9 filing, to continue to make payments on bonds with pledged special revenues, and an indenture trustee should be *permitted* to pay out such funds to holders." (emphasis added)).

Indeed, the foremost treatise on bankruptcy law aligns completely with the First Circuit's construction of § 922. *See* 6 Collier on Bankruptcy ¶ 922.05 (Richard Levin & Henry J. Sommer eds. 16th ed. 2018) ("Collier"). According to Collier, § 922(d) allows a trustee or other agent of the debtor to make voluntary payments to indebtedness on special-revenue bonds without violating the automatic stay. *Id.* Noting that the plain text of § 922(d) indicates only that the automatic stay does not apply to such voluntary payments, Collier correctly explains that "the provision does not suggest that its language *compels* payment of special revenues in the possession of the municipality." *Id.* (emphasis added). Collier's reading of § 922(d) is on all fours with the decision below and dispels any suggestion that the court below upset a "settled understanding" of how § 922(d) operates.

Appreciating that Collier's reading of § 922(d) devastates its "settled understanding" argument, Assured attempts to downplay its significance. The petition's portrayal of Collier as a "single treatise" and a "stark outlier," however, stands in direct contrast to Collier's reputation as the preeminent bankruptcy treatise. This Court itself has lauded Collier as a "respected bankruptcy authority" and "a leading treatise on bankruptcy law." *Lamie v. United States Tr.*, 540 U.S. 526, 540 (2004); *Dewsnup v. Timm*, 502 U.S. 410, 418 n.4 (1992); *see also Marrama v. Citizens Bank of Mass.*, 549 U.S. 365, 373 n.9 (2007) (describing Collier's as a "prominent treatise").[2] Indeed, this Court has cited Collier favorably on more than 150 occasions, more than any other bankruptcy treatise by a wide margin.

The construction of § 922 adopted by the court below also comports with federal judiciary guidance, which describes the purpose of § 922(d) as allowing debtors and third parties in possession of pledged

---

[2] *See also, e.g.*, *In re Phila. Newspapers, LLC*, 599 F.3d 298, 331 (3d Cir. 2010) (describing Collier as "bankruptcy's leading treatise"); *Celli v. First Nat'l Bank (In re Layo)*, 460 F.3d 289, 293 (2d Cir. 2006) (describing Collier as "the leading bankruptcy treatise"); *In re A-1 Trash Pickup, Inc.*, 802 F.2d 774, 777 (4th Cir. 1986) (same).

special revenues to apply those revenues to indebtedness without violating the automatic stay. *See, e.g.*, Admin. Off. of the U.S. Courts, Bankruptcy Basics 51 (3d ed. 2011) (under § 922(d), "an indenture trustee or other paying agent *may* apply pledged funds to payments coming due or distribute the pledged funds to bondholders without violating the automatic stay" (emphasis added)); Fed. Jud. Ctr., Navigating Chapter 9 of the Bankruptcy Code 87 (1st ed. 2017) (same). As these sources show, the "shared consensus" surrounding § 922(d) supports the First Circuit's decision, not Assured's counterintuitive reading of that provision.

Against this settled understanding, Assured is able to proffer only a couple stray law-review articles that assert its position without analysis. To start, several of Assured's sources actually support the First Circuit's interpretation that payment of special revenues is permissive, not mandatory.[3] Only three sources opine that a creditor can compel the payment of special-revenue bonds.[4] Tellingly, each of these

[3] *See* Thomas J. Salerno et al., Advanced Chapter Eleven Bankruptcy Manual § 15.25 (2d ed. 2019-2 cumulative supp.) (stating that § 922(d) "*allows* a debtor" to make payments without violating the stay (emphasis added)); Matthew W. Kavanaugh & Randye B. Soref, Business Workouts Manual § 35:20 (2018) (§ 922(d) provides that "an indenture trustee or other paying agent *may* apply pledged funds to payments coming due or distribute the pledged funds to bondholders without violating the automatic stay" (emphasis added)); 1 Nat'l Bankr. Rev. Comm'n, National Bankruptcy Review Commission Report ch. 4 (1997), 1997 WL 985143, at *13.

[4] *See* Paul R. Glassman, *A Practical Guide to Chapter 9 Municipal Bankruptcy*, in Chapter 9 Bankruptcy Strategies:

sources presents its position as an *ipse dixit*, with no anchor in statutory text, legislative history, or interpretation of case law.[5] The remaining law-review articles that Assured cites simply acknowledge various views, undermining the purported existence of any "expert consensus" reading of § 922(d) that aligns with Assured's.[6] Pet. 20.

Leading Lawyers on Navigating the Chapter 9 Filing Process, Counseling Municipalities, and Analyzing Recent Trends and Cases (2011), 2011 WL 5053642, at *12; Michael L. Hall & George D. Gaskin III, *Municipal Bonds in Chapter 9: A Primer*, Am. Bankr. Inst. J., 38, 80 (2011); Michael J. Holleran et al., Bankruptcy Code Manual § 922:9 (2019).

[5] Assured cites another article that it misleadingly claims supports its view about § 922(d). *See* Pet. 18 (citing 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 J. Bankr. L. & Prac. 4 Art. 2 (2008)). That article neither discusses nor features a single citation to § 922(d), however. The quotation offered by Assured refers to *§ 928*, and takes no position on whether continued payment on revenue bonds is compulsory or permissive. *See id.* at n.116.

[6] *See* Kevin A. Kordana, *Tax Increases in Municipal Bankruptcies,* 83 Va. L. Rev. 1035, 1050 n.77 (1997) (recognizing "various views" of § 922(d), including the view that "§ 922(d) is permissive—i.e., a debtor may, but need not, continue to make payments from incoming special revenues" during a stay); 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 & n.189 (2015); *see also* Robert S. Amdursky, *The 1988 Municipal Bankruptcy Amendments: History, Purposes, and Effects*, 22 Urb. L. 1, 13 (1990) (acknowledging that "[s]ome bankruptcy experts" have construed § 922(d) "to apply only to special revenues that were transferred to the trustee for the bondholders prior to the filing of the petition"); David L. Dubrow, *Chapter 9 of the Bankruptcy*

In sum, the settled understanding trumpeted by Assured that the First Circuit supposedly defied, yielding dashed expectations by bondholders, is a fiction through and through. The matter was either unsettled or settled mostly in favor of the First Circuit's ruling. Either way, an accurate survey of the secondary source landscape provides no reason for this Court to review the decision below.

II. THE DECISION BELOW IS CORRECT.

It is unsurprising that the majority of bankruptcy authorities support the First Circuit's interpretation of § 922(d) because that interpretation is correct. As the court below reasoned, § 922(d) by its plain terms neither requires a debtor to make debt-service payments during its restructuring case nor authorizes a creditor to bring a debt-enforcement action. Pet. App. 11a–23a. Instead, § 922(d) merely provides that the regular bankruptcy stay does not prevent the application of pledged special revenues to payment of indebtedness. Assured's highly counterintuitive argument, that § 922(d) somehow can be used to compel a debtor to turn over its revenues during the course of its restructuring case, requires reading words into the statute that are simply not there.

Assured's reading is also inconsistent with the breadth of the automatic stay. The full blast of the automatic stay is elaborately set forth in Bankruptcy

---

Code: A Viable Option for Municipalities in Fiscal Crisis?, 24 Urb. L. 539, 572–73 (1992) (cited in dissent to denial of rehearing) (explaining the different ways that experts have proposed construing § 922(d)).

Code § 362(a)(1)-(8). Those eight provisions meticulously stay judicial actions, employment of process, acts to perfect, acts to enforce, acts to control, and the like. It defies credulity that § 922(d), which merely allows the "application" of pledged special revenues to "payment of indebtedness secured by such revenues," can or should be read to permit judicial actions, acts to control, employment of process, or anything beyond the simple application of money in an entity's possession to the debt it secures.

A. The plain text of § 922(d) supports the decision below.

By its terms, § 922(d) exempts the "application" of pledged special revenues from the automatic stay that takes effect upon the filing of a petition under Chapter 9 of the Bankruptcy Code or Title III of PROMESA. 11 U.S.C. § 922(d). Section 922(d) provides:

> 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][7] of this title to payment of indebtedness secured by such revenues.

11 U.S.C. § 922(d). In other words, a debtor or bond trustee's "application of pledged special revenues" to debt service is not subject to the stay imposed by 11 U.S.C. § 362 and 11 U.S.C. § 922(a). If the debtor

[7] Although the text of § 922(d) cross-references Bankruptcy Code § 927, that is recognized to be a scrivener's error. *See* Pet. 8.

chooses to apply those revenues to debt service, it is permitted to do so without violating the stay.

Nothing in the text of § 922(d) remotely suggests a debtor is *required* to make debt payments using its special revenues, however. To the contrary, § 922(d)'s express language is permissive, not mandatory. *See* Collier ¶ 922.05.

Assured nevertheless contends § 922(d) *mandates* that a debtor continue to remit special revenues to bondholders. Pet. 26. But the provision simply does not say that. Accordingly, to reach its desired outcome, Assured is forced to add to the statute words that Congress never wrote. For instance, Assured argues that the "most natural reading" of § 922(d) is that "the application of pledged special revenues *mandated by state laws and bond resolutions*" is not subject to the automatic stay. Pet. 26 (emphasis added, quotation marks omitted). However, § 922(d) says nothing about special-revenue payments that are "mandated" by law or bond resolutions. 11 U.S.C. § 922(d). In fact, § 922(d) contains no language about mandatory payments at all. It simply exempts from the automatic stay the "application" of pledged special revenues to debt payments. It does not require, or dictate the timing of, payment. Moreover, state law and territory law generally mandate payment of debt. That is why the Bankruptcy Code and Title III of PROMESA provide debtors with relief from debt obligations via the automatic stay in the first place.

As the court below explained (Pet. App. 18a), when Congress wishes to command performance, turnover, or payment in a bankruptcy case, it does so expressly. *See, e.g.*, 11 U.S.C. §§ 365(d)(5) ("The trustee shall timely perform all of the obligations of the debtor . . . ."), 542(a) ("[A]n entity . . . shall deliver to the trustee . . . ."), 542(b) ("[A]n entity . . . shall pay such debt to . . . the trustee . . . ."). By contrast, § 922(d) contains no language requiring the debtor to do anything. If Congress had intended to require a debtor to make debt payments during the course of its restructuring case, it surely would have said so in § 922(d) or elsewhere. But it did not. As the decision below recognized, courts are limited to construing statutes as they are written and do not have the power to rewrite the statutory text. Pet. App. 22a.

Nor does § 922(d) contain any language allowing a creditor to bring a debt-enforcement action despite the imposition of the automatic stay. In § 922(d), Congress rendered the automatic stay inapplicable to the "application of pledged special revenues" to payment of indebtedness. Nothing more or less. Assured would read the words "application of pledged special revenues" to mean "actions to enforce claims to payment of pledged special revenues." But again, § 922(d) does not say that.

Having no textual support for its position that § 922(d) requires a debtor to use special revenues to make debt payments during the restructuring case, Assured relies heavily on the "notwithstanding" preamble. Pet. 26–27. That preamble provides that § 922(d) applies "notwithstanding" the stay imposed by Bankruptcy Code §§ 362 and 922(a)—that is to say, § 922(d) is an exception to the stay. According to Assured, § 922(d) would be an exception to the automatic stay only if it "requir[es] debt payments and any necessary enforcement actions to continue as usual." Pet. 27.

But Assured is wrong: § 922(d) serves as an exception to the automatic stay under the construction adopted by the court below. As the court explained, the automatic stay is extremely broad. Pet. App. 15a. In addition to creditor enforcement actions, the stay bars an array of conduct involving the debtor's property, including a secured creditor's application of collateral in its possession to the debtor's outstanding debt. 3 Collier on Bankruptcy ¶ 362.03 (16th ed. 2019) ("[I]nnocent conduct such as the cashing of checks received from account debtors of accounts assigned as security may be a technical violation [of the automatic stay]."); *id.* ("[T]he stay applies to secured creditors in possession of collateral and to collateral in possession of a custodian."); *see also Thompson v. Gen. Motors Acceptance Corp.*, 566 F.3d 699, 703 (7th Cir. 2009) (holding that secured creditor's passive retention of collateral following filing of bankruptcy petition violates stay); *Metromedia Fiber Network Servs. v. Lexent, Inc. (In re Metromedia Fiber Network, Inc.)*, 290 B.R. 487, 493 (Bankr. S.D.N.Y. 2003) (holding that secured creditor's failure to remit collateral to debtor constitutes exercise of control over debtor's property, which would violate stay); *In re Reed*, 102 B.R. 243, 245 (Bankr. E.D. Okla. 1989) (noting that secured creditor's sale of collateral in its possession violates automatic stay).[8] As the court below explained,

[8] *See also In re Fulton*, 926 F.3d 916, 924-25 (7th Cir. 2019) (holding that secured creditor's passive retention of collateral violates stay); *Weber v. SEFCU (In re Weber)*, 719 F.3d 72, 81 (2d Cir. 2013) (same); *Cal. Emp't Dev. Dep't v. Taxel (In re Del Mission)*, 98 F.3d 1147, 1150 (9th Cir. 1996) (same); *Knaus v.*

§ 922(d) carves out an exception to the automatic stay by allowing debtors or bond trustees to apply pledged special revenues to pay secured debt. Pet. App. 15a–16a. The court's reading of § 922(d) is thus consistent with the "notwithstanding" preamble because the court reads § 922(d) to permit conduct that otherwise would violate the automatic stay. Assured's contention that, under the decision below, § 922(d) does not carve out any exception to the automatic stay is simply wrong. Pet. 27.

Assured's argument based on *In re Hellums* is the product of this mistaken contention. Assured makes much of the fact that, following its original opinion, the panel released an errata sheet replacing a single case citation to *In re Hellums*, 772 F.2d 379, 380-81 (7th Cir. 1985), with a citation to Collier, and modifying slightly the accompanying proposition. Pet. App. 25a-26a. Assured speculates that the panel was distancing itself from the idea that debtors were always permitted to make voluntary payments during a stay, rendering § 922(d) superfluous under the First Circuit's interpretation. Pet. 22-23. That reads far too much into a minor editorial change, without any evidentiary basis. The panel recognized that, in addition to serving a clarifying function as to permitted debtor activity, § 922(d) also enables creditors (and debtor custodians) to apply debtor funds in their possession to secure indebtedness, an act that ordinarily violates the stay. *See, e.g.*, Collier ¶ 362.03; *see also Thompson*, 566 F.3d at 703; *Metromedia Fiber*

Concordia Lumber Co. (In re Knaus), 889 F.2d 773, 775 (8th Cir. 1989) (same).

Network, 290 B.R. at 493; *In re Reed*, 102 B.R. at 245; *supra* n.5 (collecting cases).

Assured's reliance on § 922(d)'s cross-reference to 11 U.S.C. § 928 is likewise misguided. Pet. 28–29. Section 928(a) merely provides that post-petition pledged special revenues remain subject to liens created by prepetition security agreements. 11 U.S.C. § 928(a). The provision says nothing about permitting a creditor to enforce such a lien, however. Section 928(b) provides that any lien on special revenues "shall be subject to the necessary operating expenses" of the project or system that generates them. *Id.* § 928(b). Section 928(b) thus limits the scope of a lien; it says nothing about authorizing a creditor to enforce its lien. Nor does the First Circuit's interpretation of § 922(d) nullify § 928(b), which sets valuable limits on creditor and bond trustee application of pledged special revenues in their possession to secured indebtedness otherwise permitted under § 922(d), among other things.

Assured's interpretation of § 922(d), on the other hand, is flatly inconsistent with § 928(b). By providing that a revenue bondholder's security interest in the underlying project's gross revenues is subject to the project's expenses, Congress recognized that debt payments would not always be made to bondholders because a debtor's expenses could exceed revenues or a debtor might need excess funds for purposes such as replacing or upgrading equipment. Any argument that Congress intended to force such payments to the creditor is at odds with Congress's express provision that the lien attaches only to special revenues, if any, left over after paying the operating expenses of the system or project.

Finally, Assured's interpretation of § 922(d) runs afoul of the canon that "[s]tatutory construction . . . is a holistic endeavor" that requires a provision to be interpreted in conjunction with the rest of the statute. *United Sav. Ass'n of Tex. v. Timbers of Inwood Forest Assoc.*, 484 U.S. 365, 371 (1988). The general rule in reorganization bankruptcy cases is that even secured claims get paid after confirmation of the plan, not before. *See Orix Credit Alliance v. Delta Resources (In re Delta Resources)*, 54 F.3d 722, 729-30 (11th Cir. 1995).

A mandatory application of special revenues would be inconsistent with other provisions of the Bankruptcy Code and PROMESA. For example, §§ 502(b)(2) and 506(b) disallow post-petition interest except to the extent the claim-holder is oversecured. Section 1129(b)(2)(A) allows the debtor to impose a new note with different terms or two other treatments on holders of secured claims. It would make no sense that Congress would allow a debtor to restructure claims secured by special revenues in the plan of adjustment, but compel the debtor to pay over special revenues in partial satisfaction of the claims during the duration of a case, which can last several years. Moreover, where special revenues are not large enough to oversecure outstanding bonds, § 502(b)(2) would block the accrual of postpetition interest in the first place. Then, any mandatory turnovers of special revenues would be principal repayments. But, there is no reason Congress would require principal repayments during the case when it allows principal repayment to be stretched out under a plan of adjustment pursuant to § 1129(b)(2)(A)(i).

In short, Assured's § 922(d) reading turns the operation of Title III on its head. And by requiring the debtor to distribute its property during the pendency of the case, Assured's position undermines the Board's exclusive right to propose a plan of adjustment pursuant to 48 U.S.C. § 2172(a). Mandating distribution of debtor property before the plan proponent decides how it wants to address the underlying claims impairs the Board's exclusive right to propose the plan. By contrast, the First Circuit's plain language reading of § 922(d) fully aligns with Title III, enabling the debtor to propose a plan that fully and appropriately values collateral and provides for the treatment of secured claims.

B. The legislative history, even if relevant, does not support Assured's reading of § 922(d).

Resisting the statute's plain language, Assured creates an artificial ambiguity by mischaracterizing the First Circuit opinions. Assured argues, in an attempt to create disagreement between the panel decision and statement denying rehearing, that the latter admitted ambiguity while the former did not. Pet. 29-30. This mistaken reading of the rehearing denial does not withstand scrutiny. Indeed, Judge Kayatta on denial of rehearing explicitly stated that there was no *relevant* ambiguity. *See* Pet. App. 72a-73a & n.2 (agreeing with the panel that as to the relevant question—whether § 922(d) is permissive or compulsory—the provision is unambiguous, but providing further analysis addressing potential ambiguity in the statute as to the related question of *whom* § 922(d) permits to apply pledged special revenues to the debt, *e.g.*, creditor, debtor, or fiscal agent). Judge Kayatta's own words thus refute any contention that he disagreed with the panel as to the clarity of the statutory language. Because the statute unambiguously does *not* compel continued payment on special-revenue bonds—the only question at issue in this case—there is no basis to resort to parsing the legislative history, as both the panel decision and rehearing denial held.

The dissent also errs, fighting to render § 922(d) as a whole ambiguous by inferring some hidden meaning behind the provision's status as an exception to the automatic stay. Yet the dissent cannot point to specific language in §§ 922(d), 362, or 922(a) to justify the confusion it manufactures. It thus strays far from the statute's plain language, and the ambiguity it urges rings hollow.

In any event, even were the statute ambiguous, the legislative history also supports the First Circuit's interpretation of § 922(d). The history shows that § 922(d) was passed to address concerns over the breadth of the automatic stay in the special-revenue context, ensuring that bond trustees could apply funds to the payment of outstanding debt with the debtor's permission, and that debtors could do so voluntarily. The legislative history specifically as to § 922(d) bears this out. *See* S. Rep. No. 100-506, at 11-13 (1988). Notably, if Assured wants to invoke legislative history, it should acknowledge the legislative history refutes any notion that § 922(d) allows creditors to compel turnover of special revenues, given that it refers to allowing bond trustees to apply funds with the debtor's permission.

Instead, Assured (and the dissent) hunt through the history in search of soundbites, stripping quotes of context to argue for an interpretation of § 922(d) that the history does not embrace. Assured twice asserts Congress passed § 922(d) 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." Pet. 9, 30 (quoting S. Rep. No. 100-506, at 12). As the rehearing denial pointed out in faulting the dissent for the same transgression, "[w]hen read in context, however, it is apparent that this statement was made in reference to the new [§] 928(a) and its elimination of the problems created by [§] 552 of the bankruptcy code." Pet. App. 78a. This is consistent with the panel's reading of § 922, which attributes to § 928(a) the exact purpose the history articulates. Pet. App. 13a-14a. Assured ignores this, wrenching the quote out of context and hiding that it pertained to § 928(a), not § 922(d).

Assured likewise states that Congress passed § 922(d) to "guarantee[] that the automatic stay does not impede 'what many state statutes mandate: the application of pledged revenues after payment of operating expenses to the payment of secured bonds.'" Pet. 8-9 (quoting S. Rep. No. 100-506, at 11). This is precisely what the First Circuit's interpretation accomplishes: while the decision below reads § 922(d) to provide that the automatic stay does not impede application of special revenues to payment of bonds, Assured's reading *mandates* such application.

Though Assured declares that additional "voluminous and explicit" portions of the legislative history "cut[] against the panel's position," Pet. at 30, these portions materialize in neither the petition nor the history itself. Thus, even if the language of § 922(d) were ambiguous—and again, there is nothing to support such a finding—the legislative history cuts in favor of the First Circuit's interpretation, not Assured's.

C. Assured's constitutional concerns are meritless.

Assured and the dissent raise vague constitutional concerns, which the majority decision correctly rejected as baseless. Indeed, though Assured expresses anxiety over the Tenth Amendment and Takings Clause implications of the First Circuit's decision, *see* Pet. 31-32, these worries are unaccompanied by legal analysis likely because they fail under the slightest scrutiny.

As the rehearing denial pointed out, the automatic stay has long withstood challenge under the Fifth Amendment Takings Clause. *See* Pet. App. 81a (collecting cases). Assured's purported concerns are vitiated by the availability of stay relief under § 362(d), along with other statutory protections.[9] *See, e.g.*, 48 U.S.C. § 2174 (ensuring, through the provision of the plan, that creditor constitutional rights are not impaired). Thus, the automatic stay causes only a delay in enforcement of a lien, not a constitutionally cognizable deprivation. Assured identifies no reason

---

[9] Section 362(d) provides that, where a creditor fears that the value of its collateral is diminishing as a result of the automatic stay, it can seek stay relief. Courts are required to grant relief where there is a "lack of adequate protection of an interest in property." 11 U.S.C. § 362(d)(1).

why such delay should somehow nonetheless rise to the level of a constitutional violation in the context of special-revenue debt.

Likewise, again as the rehearing denial emphasizes, Pet. App. 81a, the Supreme Court has held that the bankruptcy laws governing municipalities do not offend the Tenth Amendment. *See United States v. Bekins*, 304 U.S. 27, 51-52 (1938). Moreover, as previously discussed, it is the First Circuit's § 922(d) reading—not Assured's—that respects sovereignty interests by leaving the choice of how to apply funds in the governmental debtor's hands, rather than enabling creditors to force distribution of funds.

III. ASSURED VASTLY EXAGGERATES THE MARKET IMPACT OF THE DECISION BELOW.

Assured proclaims ominously that the decision below foretells "dire consequences" for municipalities and for the municipal-bond market, and that those consequences have already begun to emerge. Pet. 2. According to Assured and its amicus, the decision below has already caused "widespread and damaging economic consequences," *id.* at 23-25, it threatens to "jeopardiz[e] the Commonwealth's ability to return to full financial health," *id.* at 4, and it may even "disrupt the $3.7 trillion market for municipal revenue bonds," *id.* at 25. These are startling claims. Even more remarkable than the claims themselves, however, is the near-total absence of economic data to support them.

The reality is that the market for municipal bonds is, by historical standards, extraordinarily strong.

See, e.g., Debbie Carlson, *Why Muni Bonds Are a Good Investment Play*, U.S. News & World Report (Aug. 15, 2019), https://money.usnews.com/investing/bonds/articles/why-muni-bonds-are-a-good-investment-play ("Municipal bonds, in general, are performing well, supported by favorable supply and demand dynamics, and it's expected to continue."). Investor demand for municipal bonds persists at "nearly unprecedented levels," Gillers, *Muni Market*, and municipal issuers "continue to enjoy favorable borrowing conditions." Guggenheim, *Unwavering Demand*. Indeed, in August, the month after the First Circuit's rehearing denial, and five months after the panel decision, "[m]onthly municipal bond issuance . . . reached a nearly two-year high, breaching $38 billion" and the municipal bond market experienced its "10th straight month of gains." *Monthly Municipal Market Update August 2019* PIMCO (Sept. 2019), https://www.pimco.com/en-us/insights/investment-strategies/munis-and-the-markets/monthly-municipal-market-update-august-2019. Notwithstanding Assured's dire forecasts of dashed market expectations leading to disruption, the municipal-bond market is thriving. Because no "settled understanding" has been disturbed, neither has the market.

It is not surprising that actual economic conditions repudiate Assured's and SIFMA's doomsday predictions, given the sparse evidence on which their claims are based. Assured and SIFMA together manage to identify only twenty-one bond issuers under review following the decision, many of which subsequently had their current ratings confirmed, *see* SIFMA Br. at 18 n.41, and only five actual downgrades—hardly the "steady stream" of downgrades they trumpet, *see* Pet. 3, 23-25; SIFMA Br. 17-19 & n.41. To put that number into perspective, there are more than *50,000* municipal bond issuers and more than a million municipal bonds outstanding in the market. *Muni Facts*, Municipal Securities Rulemaking Board http://www.msrb.org/msrb1/pdfs/MSRB-Muni-Facts.pdf. Assured and SIFMA are arguing that a drop of water has caused a catastrophic rise in sea level.

The sparseness of Assured's examples reflects the minuscule number of bonds and issuers that the ruling could conceivably affect. The special-revenue bonds to which § 922(d) applies are but a small subset of the overall universe of municipal bonds. *See* 11 U.S.C. § 902(2) (defining "special revenues" to include only those derived from certain sources). As Assured's own sources explain, the ruling has the potential to reach only a tiny fraction of that subset—namely, bonds issued by municipalities with a large disparity between their overall credit quality and the ratings of their special-revenue bonds. 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. By clarifying that municipalities are not required to continue to make payments on special-revenue bonds after a bankruptcy case is filed, the First Circuit opinion "underscore[d] the importance of the linkage between a local government's general credit quality and that of its enterprises." *Id.* Thus, only municipal entities with special-revenue bond ratings that do not accurately reflect this linkage could be affected. Municipal entities that fit this description account for a negligible portion of the overall market. That is why, despite their alarmist rhetoric, Assured and SIFMA are only able to identify five examples of actual bond downgrades, and a small handful of other bonds "placed . . . under review" by ratings agencies. Pet. 23; 24-26.

Moreover, many ratings agencies did *not* react to the decision below in the manner ascribed to the few Assured identified. For example, conspicuously absent from Assured's discussion is any mention of S&P, the world's largest credit agency by number of ratings issued. *See* U.S. Securities and Exchange Commission, *Annual Report on Nationally Recognized Statistical Rating Organizations* at 9 (Dec. 2018), https://www.sec.gov/2018-annual-report-on-nrsros.pdf. Following the First Circuit ruling, S&P issued a statement that it saw "the decision as consistent with [its] view that the credit quality of special revenue debt . . . is directly linked to the obligor's fundamental credit quality." Prunty, *S&P View on Special Revenue Debt*. S&P therefore saw no need to review or downgrade any of its bond ratings. As it explained:

> [W]hen issuers fall under financial distress we expect that they may be motivated to explore all options to minimize the burden of their liabilities. This could include stopping or renegotiating the terms of their payment obligations, including special revenue secured debt. *We already incorporate this concept* into

> our analysis of priority lien obligations by linking these ratings to the fundamental credit quality of the related obligor.

Id. (emphasis added). In other words, even before the decision, S&P understood that the performance of special-revenue bonds could be interrupted by a municipal bankruptcy filing, and took that contingency into account in rating them.[10]

Even among the handful of ratings agencies that Assured and SIFMA focus on, the story is far more equivocal than they depict. Kroll issued an *upgrade* for one of the bonds under review as a direct result of the First Circuit decision. *See* Webster, *Los Angeles schools upgrade*. As a Kroll analyst stated, "[a]s a result of the ruling, we reviewed the state laws that are relevant for the ratings where we relied on special revenue provisions" and "concluded that the ruling's language actually strengthened our view of the California law and the mechanics for protecting bondholders." *Id.* The analyst cited the strength of the bonds' pledged-revenue source—a voter-approved property tax collected only for bond debt service—as supporting the upgrade. *Id.* Despite placing a few bonds under review, Kroll has yet to issue any actual downgrades.

---

[10] SIFMA mentions the S&P release in a footnote, but instead of confronting its substance, plucks out a quote noting that the First Circuit ruling did not align with some market participants' predictions. SIFMA downplays the remainder of the release with the anodyne comment that the ruling "will have little effect on S&P Global's ratings methodology." SIFMA Br. 19 n.45. SIFMA ignores the fact that the *reason* it will have little effect is that S&P already expected such a ruling.

The little negative coverage that the opinion did receive did not inspire any decrease in demand for municipal bonds. In fact, market data indicates that investors remained undeterred, as the Moody's and Fitch reports that Assured and SIFMA cited "did not precipitate any unusual pricing volatility." Guggenheim, *Unwavering Demand* (citing Bloomberg, Moody's, and Fitch Data as of July 19, 2019).

In sum, Assured resorts to hyperbole to obfuscate an ordinary—even mundane—outcome: mixed coverage from industry insiders and a predictable lack of investor reaction to a ruling with implications limited to an isolated corner of the market. Assured's and SIFMA's warnings of economic chaos are baseless, and their efforts to inflate the importance of this decision fail.

IV. THIS CASE IS A POOR VEHICLE FOR REVIEW.

Even if the petition were otherwise certworthy (which it is not), this case is a poor vehicle because a favorable ruling for Assured on the Question Presented is highly unlikely to bring it any relief.

First, a bondholder's lien on pledged special revenues is subject to the debtor's operating expenses. 11 U.S.C. § 928(b). In this case, HTA has been operating at a deficit for many years. Consequently, there are no revenues in excess of operating expenses. Thus, even if Assured had a meritorious claim requiring the turnover of HTA's net revenues under § 922(d) (it does not), there would be no net revenues to turn over.

Second, by its terms, § 922(d) applies only to the extent pledged special revenues are subject to an unavoidable lien. Assured fails to allege facts establishing that it has any unavoidable lien, statutory or consensual, however. Nor can Assured establish that any purported lien would extend to such revenues held by the Commonwealth. Without an unavoidable security interest in pledged special revenues, § 922(d) does not come into play.

Third, even if Assured could demonstrate the existence of a security interest, under the terms of the Resolutions, any such interest would attach only to revenues already held in the Reserve Accounts—which constitutes a relatively small amount of money. Specifically, after establishing an interest fund and the Reserve Accounts, § 401 of the Resolutions provides:

> The *moneys in said Funds and Accounts* shall be held by the Fiscal Agent in trust and applied as hereinafter . . . and, pending such application, *shall be subject to a lien* and charge in favor of the holders of the bonds issued and outstanding under this Resolution and for the further security of such holders until paid out or transferred as herein provided.

(emphases added). In other words, any lien would attach only to the "moneys" already in the Reserve Accounts. It would not attach to future revenues HTA has not yet collected or deposited in the Reserve Accounts. Under no circumstance would Assured be entitled to the order it seeks requiring HTA to turn over revenues not already on deposit in the Reserve Accounts.

Accordingly, this case does not present a good vehicle to review the Question Presented because Assured is unlikely to succeed in securing the relief it seeks regardless of the outcome of the petition. If the Question Presented is as important as Assured suggests, the Court will have an opportunity to address it in a subsequent case that presents a more suitable vehicle for review.

CONCLUSION

The petition should be denied.

November 25, 2019 Respectfully submitted,

MARTIN J. BIENENSTOCK
Counsel of Record
STEPHEN L. RATNER
JEFFREY W. LEVITAN
MARK D. HARRIS
PROSKAUER ROSE LLP
Eleven Times Square
New York, NY 10036
(212) 969-3000
mbienenstock@proskauer.com

TIMOTHY W. MUNGOVAN
JOHN E. ROBERTS
ADAM L. DEMING
PROSKAUER ROSE LLP
One International Place
Boston, MA 02110
(617) 526-9600

MICHAEL A. FIRESTEIN
LARY ALAN RAPPAPORT
PROSKAUER ROSE LLP
2029 Century Park East
Los Angeles, CA 90067
(310) 557-2900

Counsel for Respondents the Financial Oversight and Management Board for Puerto Rico, for itself and as representative of the Commonwealth of Puerto Rico and the Puerto Rico Highways and Transportation Authority, and Natalie A. Jaresko

PETER FRIEDMAN
Counsel of Record
O'MELVENY & MYERS LLP
1625 Eye Street, N.W.
Washington, D.C. 20006
(202) 383-5300
Pfriedman@omm.com

JOHN J. RAPISARDI
SUZZANNE UHLAND
YAIRA DUBIN
O'MELVENY & MYERS LLP
7 Times Square
New York, N.Y. 10036
(212) 326-2000
jrapisardi@omm.com

Counsel to Respondent the Puerto Rico Fiscal Agency and Financial Advisory Authority