No. 25-

IN THE

Supreme Court of the United States

JOHNATHAN H. DINH, DWIGHT D. JERECZEK,
SANDY CHUAN-DINH, DEBORAH JERECZEK,
STAN ELLIOTT, RYAN TRAN, THANH NGA TRAN,
WALTER NAHM, LAUREN NAHM, PAMELA PAYSON,
INDIVIDUALLY AND ON BEHALF OF
ALL OTHERS SIMILARLY SITUATED,

Petitioners,

v.

UNITED STATES,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

NANCIE G. MARZULLA
Counsel of Record
ROGER J. MARZULLA
MARZULLA LAW, LLC
1150 Connecticut Avenue, NW,
Suite 1050
Washington, DC 20036
(202) 822-6760
nancie@marzulla.com

Counsel for Petitioners

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COUNSEL PRESS

(800) 274-3321 • (800) 359-6859

QUESTIONS PRESENTED

This Court has consistently held that, where the government authorizes a third party to take private property for public use, the government is liable for that taking.[1] But the Federal Circuit has imposed a new (almost impossible to meet) additional burden on a plaintiff seeking to recover just compensation for a taking resulting from government-authorized, third-party actions: the plaintiff must show that the government also *coerced* the third party to take the property.[2]

Because the Federal Circuit is the only court of appeals with jurisdiction to hear claims for Fifth Amendment Just Compensation against the United States, this new standard imposes a prohibitively onerous burden in takings suits against the United States, conflicting with this Court's and the Federal Circuit's prior rulings.[3]

1. Can Congress insulate itself from Fifth Amendment takings liability by creating a separate, third-party entity and authorizing that entity to "independently" take private property without paying for it?

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1. *See, e.g.*, *Cedar Point Nursery v. Hassid*, 594 U.S. 139 (2021); *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982).

2. *Dinh v. United States*, 145 F.4th 1316, 1324–26 (Fed. Cir. 2025) (Pet. App. 14a–16a).

3. *See, e.g., Preseault v. United States*, 100 F.3d 1525 (Fed. Cir. 1996) (en banc); *Hendler v. United States*, 952 F.2d 1364 (Fed. Cir. 1991).

2. To state a claim for a Government-authorized third-party taking under the Fifth Amendment must the property owner also show that the third-party was coerced into taking the property?

PARTIES TO THE PROCEEDINGS BELOW

Petitioners were appellants in the U.S. Court of Appeals for the Federal Circuit. They are Johnathan H. Dinh, Dwight D. Jereczek, Sandy Chuan-Dinh, Deborah Jereczek, Stan Elliott, Ryan Tran, Thanh Nga Tran, Walter Nahm, Lauren Nahm, and Pamela Payson, individually and on behalf of all others similarly situated.

Respondent, the United States, was appellee in the Federal Circuit and defendant in the U.S. Court of Federal Claims.

RELATED PROCEEDINGS

This case arises from *Dinh v. United States*, No. 1:22-cv-00725-EGB (U.S. Court of Federal Claims) (Opinion filed June 5, 2023 and Order filed June 6, 2023), and *Dinh v. United States*, No. 2023-2100 (U.S. Court of Appeals for the Federal Circuit) (Opinion filed July 31, 2025). There are no other related cases within the meaning of Supreme Court Rule 14.2(b)(3).

TABLE OF CONTENTS

Page

Table of Contents

Page

TABLE OF APPENDICES

TABLE OF CITED AUTHORITIES

Page

Cases

PETITION FOR A WRIT OF CERTIORARI

That the government cannot insulate itself from Fifth Amendment liability by authorizing a third party to take private property is a settled principle in takings law.[4] But in this case, the Federal Circuit has created an additional element in such instances: the plaintiff must show that the government coerced the taking, thus imposing a heavier burden on plaintiffs who bring takings claims, in conflict with decisions of this Court and the Federal Circuit.

This petition asks whether Congress may insulate the United States from takings liability by creating a third-party entity, granting that entity authority to liquidate debt and transfer those funds to another—for a public purpose—and avoid takings liability by claiming that the government did not *coerce* the taking.

OPINIONS BELOW

The opinion of the U.S. Court of Appeals for the Federal Circuit affirming the judgment of the U.S. Court of Federal Claims is reported at *Dinh v. United States*, 145 F.4th 1316 (Fed. Cir. 2025), and is reproduced at App. A (Pet. App. 1a–17a). The opinion and order of the U.S. Court of Federal Claims dismissing Petitioners' claim for failure to state a taking claim is reported at *Dinh v. United States*, 166 Fed. Cl. 513 (2023), and reproduced at App. B (Pet. App. 18a–57a).

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4. *See, e.g., Cedar Point Nursery v. Hassid*, 594 U.S. 139 (2021); *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155 (1980); *Kaiser Aetna v. United States*, 444 U.S. 164 (1979); *Preseault v. United States*, 100 F.3d 1525 (Fed. Cir. 1996) (en banc); *Hendler v. United States*, 952 F.2d 1364 (Fed. Cir. 1991).

JURISDICTION

The Federal Circuit filed its opinion on July 31, 2025. (Pet. App. 1a). This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Just Compensation (Takings) Clause of the Fifth Amendment, U.S. Const. amend. V, states that "nor shall private property be taken for public use, without just compensation."[5]

Section 405(b) of the Puerto Rico Oversight, Management, and Economic Stability Act ("PROMESA"),[6] codified at 48 U.S.C. § 2194(n) states in relevant part:

> PURPOSES.—The purposes of this section are to—
>
> (1) provide the Government of Puerto Rico with the resources and the tools it needs to address an immediate existing and imminent crisis;
>
> * * *
>
> (4) make available a Federal restructuring authority, if necessary, to allow for an orderly

5. U.S. Const. amend V; Pet. App. 60a.

6. 48 U.S.C. § 2101 et seq.

> adjustment of all of the Government of Puerto Rico's liabilities; and
>
> (5) benefit the lives of 3.5 million American citizens living in Puerto Rico by encouraging the Government of Puerto Rico to resolve its longstanding fiscal governance issues and return to economic growth.[7]

The Puerto Rico statute creating COFINA, P.R. Laws Ann. tit. 13, § 11a, states in relevant part:

> (a) A public corporation and instrumentality of the Commonwealth of Puerto Rico, is hereby created, which constitutes a corporate and political entity independent and separate from the Commonwealth of Puerto Rico to be known as the Corporación del Fondo de Interés Apremiante de Puerto Rico ("COFINA"), whose name in English shall be Puerto Rico Sales Tax Financing Corporation.
>
> * * *
>
> (c) The source of repayment of COFINA bonds shall be the portion of the tax deposited in the Dedicated Sales Tax Fund pursuant to the provisions of § 12(a) of this title and any subsidy that COFINA may receive under the federal program known as "Build America Bonds."[8]

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7. 48 U.S.C. § 2194(n); Pet. App. 102a.

8. P.R. Laws Ann. tit. 13, § 11a.

The Puerto Rico statute creating the Dedicated Sales Tax Fund, P.R. Laws Ann. tit. 13, § 13, states in relevant part:

> (a) The moneys originating from the revenues indicated in § 12(a) of this title shall be deposited directly in the [Dedicated Sales Tax Fund] and shall be used exclusively for any of the following purposes:
>
> * * *
>
> (3) To directly or indirectly pay the items established in subsection (b) of § 11a of this title and the bonds issued by COFINA to meet the purposes established in said subsection (b) of § 11a of this title.
>
> (b) The revenues indicated in § 12(a) of this title deposited in the [Dedicated Sales Tax Fund] shall be used by COFINA[.] . . . COFINA is hereby authorized to pledge and otherwise encumber all or part of such revenues solely for the payment of principal, interest and redemption premium of such bonds and other obligations of such instrumentality that were incurred with respect to such bonds to meet the purposes set forth in §§ 11a–16 of this title and the payment of obligations incurred under any type of financing or surety agreement or interest rate swap agreement executed with respect to such bonds.[9]

9. P.R. Laws Ann. tit. 13, § 13.

STATEMENT OF THE CASE

The ruling below breaks sharply with an unbroken line of rulings by this Court following *Loretto*,[10] holding that federal, state, and local governments are liable for third-party actions that governments authorize that result in a taking.[11] The Federal Circuit, too, until this case, has consistently followed the *Loretto* rule.[12] This decision conflicts with this Court's precedents and creates an internal split within the Federal Circuit.

This Court should grant certiorari and hold, consistent with the Just Compensation Clause of the Fifth Amendment, that a plaintiff whose property has been taken by government-authorized, third-party actions is fully entitled to recover just compensation for the taking of their property rights, as the Fifth Amendment guarantees.

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10. *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982).

11. *See, e.g., Cedar Point Nursery v. Hassid*, 594 U.S. 139 (2021); *Horne v. Dep't of Agric.*, 576 U.S. 350 (2015); *Dolan v. City of Tigard*, 512 U.S. 374 (1994); *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825 (1987); *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982); *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155 (1980); *Kaiser Aetna v. United States*, 444 U.S. 164 (1979).

12. *See generally Preseault v. United States*, 100 F.3d 1525 (Fed. Cir. 1996) (en banc); *Hendler v. United States*, 952 F.2d 1364 (Fed. Cir. 1991).

1. Statutory Background

A. To Raise Money, Puerto Rico Borrowed Money from Investors and Issued Secured COFINA Bonds to Its Lenders

In 2006, the Puerto Rico Legislative Assembly created the Corporación del Fondo de Interés Apremiante ("COFINA") as a public corporation, independent from the Puerto Rican Government, to raise capital for Puerto Rico by issuing secured bonds.[13] The Legislative Assembly gave COFINA complete ownership and control of a newly created Dedicated Sales Tax Fund, to be used only for repayment of COFINA bond principal and interest.[14] Puerto Rico imposed a new sales and use tax to finance this Dedicated Sales Tax Fund.[15] By May 5, 2017, the Dedicated Sales Tax Fund held over $600 million as security for the repayment of COFINA bonds.[16]

To further entice investors to lend money to Puerto Rico, the Legislature gave COFINA Bondholders an automatically perfected statutory lien on the Dedicated

13. *See* P.R. Laws Ann. tit. 13, §§ 11a–16.

14. *See* P.R. Laws Ann. tit. 13, § 11a(c); *see also* P.R. Laws Ann. tit. 13, § 13(a)(3).

15. *See* P.R. Laws Ann. tit. 13, § 12; Pet. App. 3a.

16. Puerto Rico Treasury, *State Sales and Use Tax Distribution of Monthly Collection Fiscal Years 2014-15 – 2015-16*, https://hacienda.pr.gov/inversionistas/estadisticas-y-recaudos-statistics-and-revenues/ingresos-del-impuesto-sobre-ventas-y-uso-ivu-sales-and-use-tax-sut-revenues (last visited Oct. 24, 2025); Pet. App. 25a.

Sales Tax Fund, including pledged sales and use tax revenues and other COFINA assets to secure the repayment of the borrowed sums, plus interest.[17] The Legislative Assembly also assured COFINA Bondholders that the Puerto Rican Government could not, *under any circumstances,* access the Dedicated Sales Tax Fund to satisfy its financial obligations.[18] Further security for Bondholders and investors came from Congress's exclusion of Puerto Rico—and therefore COFINA—from eligibility to file for bankruptcy to access this secured fund.[19]

To underscore the secure nature of the COFINA bonds, the Puerto Rican Legislature flatly prohibited itself from enacting any new law that would "undermine any obligation or commitment of COFINA."[20]

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17. *See* P.R. Laws Ann. tit. 13, §13(b) ("COFINA is hereby authorized to pledge . . . such revenues solely for the payment of principal, interest and redemption premium. . . . Said pledge shall be valid and binding as of the time it is made without the need for a public or notarized document. The income or revenues thus encumbered . . . shall be subject to said lien immediately[.]").

18. *See* P.R. Laws Ann. tit. 13, §14(c) ("Puerto Rico hereby agrees and assures . . . [that] the Commonwealth shall not: . . . (ii) limit or restrain the powers hereby conferred by §§11a–16 of this title or the rights of COFINA to meet its agreements with bondholders, until such time as such bonds, regardless of their date, together with interest accrued, shall be entirely paid for and withdrawn. No amendment to §§ 11a–16 of this title, shall undermine any obligation or commitment of COFINA.").

19. *See* 11 U.S.C. § 101(52); 11 U.S.C. § 109(c).

20. P.R. Laws Ann. tit. 13 § 14(c).

For a decade, Puerto Rico regularly transferred the statutorily required part of its sales tax revenues into the COFINA Dedicated Sales Tax Fund.[21] Eventually, the Dedicated Sales Tax Fund held over $600 million[22]—enough to pay all outstanding principal and interest on all mature COFINA bonds.[23]

While the Dedicated Sales Tax Fund continued to accumulate funds for the sole purpose of repaying the COFINA bonds, and despite imposition of a new sales tax and massive borrowing, Puerto Rico's financial crisis was worsening.[24] But COFINA, set up as an independent corporation separate from the Puerto Rican Government, *remained solvent* and *able to pay its debts*.[25] COFINA continued to make timely bond payments to Plaintiffs-Appellants. The COFINA Dedicated Sales Tax Fund and other pledged revenues in which COFINA Bondholders held a security interest were not available to bail out Puerto Rico.[26]

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21. Puerto Rico Treasury, *State Sales and Use Tax Distribution of Monthly Collection Fiscal Years 2014-15 – 2015-16*, https://hacienda.pr.gov/inversionistas/estadisticas-y-recaudos-statistics-and-revenues/ingresos-del-impuesto-sobre-ventas-y-uso-ivu-sales-and-use-tax-sut-revenues (last visited Oct. 24, 2025).

22. Pet. App. 25a.

23. Pet. App. 29a.

24. Pet. App. 3a–4a, 25a.

25. Pet. App. 25a–29a.

26. *See* P.R. Laws Ann. tit. 13, § 13(b).

B. Congress Enacts the Puerto Rico Oversight, Management, and Economic Stability Act (PROMESA)

By 2016, Puerto Rico's financial crisis had become acute,[27] but federal law limited Puerto Rico's ability to address its fiscal problems. The federal Bankruptcy Code excluded U.S. territories, including Puerto Rico, from discharging their debts through bankruptcy.[28] This exclusion meant that, in 2016, Puerto Rico could not pursue federal bankruptcy protection from its creditors—including Petitioners.

To address Puerto Rico's fiscal crisis, in June 2016 Congress stepped in and passed the Puerto Rico Oversight, Management, and Economic Stability Act (PROMESA),[29] which eliminated protections under Puerto Rican law for Petitioners' (COFINA Bondholders) security interests in funds dedicated to guarantee repayment of Petitioners' loans.[30] Congress also established a federal Oversight Board to carry out the debt restructuring path in PROMESA.[31]

27. Pet. App. 4a, 25a.

28. 11 U.S.C. § 101(52) ("The term 'State' includes the District of Columbia and Puerto Rico, except for the purpose of defining who may be a debtor under chapter 9 of this title.").

29. Pet. App. 2a, 4a, 25a–28a.

30. Pet. App. 27a–29a.

31. 48 U.S.C. § 2121 (Oversight Board's purpose is "to provide a method for a covered territory to achieve fiscal responsibility and access to the capital markets."); Pet. App. 67a.

On June 30, 2016, President Obama signed PROMESA into law.[32]

In one of the early hearings on the PROMESA bill, Congress zeroed in on the COFINA bonds and the Dedicated Sales Tax Fund. During that hearing, Representative Duffy observed:

> [A]s Congress . . . we have the power to decide whether it is 30 percent, whether it is 100 percent, or whether it is 75 percent . . . [b]ut if COFINA is included, we are not at 30 percent. We are going to get up to 75 percent.[33]

Later, during floor debate on PROMESA, Representative Duffy was even more blunt: "[T]his institution believes that we should have the [secured] bondholders bear that loss instead of the American taxpayer."[34]

Congress recognized the serious constitutional ramifications its legislative actions could have. Senator Grassley specifically identified the potential taking

32. *See* Remarks on Signing the FOIA Improvement Act of 2016 and the Puerto Rico Oversight, Management, and Economic Stability Act, *Daily Compilation of Presidential Documents*, 2016 DCPD No. 00440 (June 30, 2016).

33. Puerto Rico's Debt Crisis and Its Impact on the Bond Markets: Hearing Before the Subcomm. on Oversight and Investigations of the H. Comm. on Financial Services, 114th Cong. (Feb. 25, 2016) (statement of Rep. Sean P. Duffy).

34. Providing for Consideration of H.R. 5278, Puerto Rico Oversight, Management, and Economic Stability Act, 162 Cong. Rec. H 3581, 3585 (June 9, 2016) (Statement of Rep. Sean P. Duffy).

liability the bill would create: "[S]hould the law be found unconstitutional under the Takings Clause, then the Federal government would be liable for money damages[.]"[35]

Nevertheless, Congress enacted PROMESA,[36] eliminating Petitioners' protections under Puerto Rican law and—by federal law—authorizing a newly created Oversight Board and PROMESA Title III Court—to restructure Petitioners' COFINA bonds and transfer their $600 million trust fund to the Puerto Rican Treasury.[37]

Invoking its power under Article IV, Section 3 of the Constitution, Congress created the Oversight Board to assume control over Puerto Rico's finances and oversee its debt restructuring.[38] The seven-member Board, appointed and removable solely by the President, wields sweeping authority over Puerto Rico's finances and has "sole discretion" to restructure its debt.[39]

In PROMESA, Congress further declared that "[n]either the Governor nor the Legislature may—(1) exercise any control, supervision, oversight, or review over the Oversight Board or its activities; or (2) enact, implement,

35. National Sea Grant College Program Amendments Act of 2015, 162 Cong. Rec. S 4690, 4699 (June 29, 2016) (Statement of Sen. Chuck Grassley).

36. Puerto Rico Oversight, Management, and Economic Stability Act (PROMESA), Pub. L. No. 114-187, 130 Stat. 549 (2016).

37. *See* Pet. App. 6a–7a, 28a–34a.

38. 48 U.S.C. § 2121(b)(2); Pet. App. 67a.

39. 48 U.S.C. § 2121(d)(1)(A); Pet. App. 68a.

or enforce any statute, resolution, policy, or rule that would impair or defeat the purposes of this chapter, as determined by the Oversight Board."[40]

Congress then created a special PROMESA Title III Court, with a judge appointed by the Chief Justice of the U.S. Supreme Court, to hear and decide cases brought by the Oversight Board under PROMESA.[41] Congress authorized the PROMESA Title III Court to administer a unique, quasi-bankruptcy regime for restructuring secured debt (including Petitioners' bonds)—which the Bankruptcy Code otherwise prohibits.[42]

2. Factual Background

Exercising the authority granted by Congress, the Oversight Board targeted Petitioners' secured bonds issued by COFINA for restructuring in the specially created PROMESA court.[43] Without Congress's authorization through PROMESA, the Oversight Board (which would not have existed) could not have taken steps to liquidate the $600 million held in trust by COFINA to secure repayment of Petitioners' bonds, nor could it have transferred those funds to the General Treasury of Puerto Rico rather than using them to repay the principal and interest on Petitioners' bonds, as Puerto Rican law required.

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40. 48 U.S.C. § 2128(a); Pet. App. 80a.

41. *See* 48 U.S.C. § 2168(a); Pet. App. 88a.

42. *See* 11 U.S.C. § 101(52); 11 U.S.C. § 109(c).

43. *See* Pet. App. 6a–7a, 28a–34a.

The Oversight Board targeted the COFINA bonds and drained the Dedicated Sales Tax Fund securing their repayment under Puerto Rican law as Congress contemplated when it enacted PROMESA, at a time when Puerto Rico's need for cash was acute: "A combination of severe economic decline and, at times, accumulated operating deficits . . . and excessive borrowing . . . created a fiscal emergency in Puerto Rico."[44] Congress needed money to bail out Puerto Rico, a United States territory, and because federal law barred Puerto Rico from entering bankruptcy,[45] Congress needed to come up with another solution for alleviating Puerto Rico's financial crisis.

3. Procedural History

The U.S. Court of Federal Claims dismissed Petitioners' suit for failure to state a claim, holding that the taking was regulatory, not per se,[46] and the Federal Circuit affirmed dismissal of COFINA Bondholders' taking claims, reasoning that PROMESA merely gave Puerto Rico "tools" to address its fiscal crisis and that the United States could not be held liable merely because it created the tools enabling the Board to take Petitioners' property.[47]

A panel of the Federal Circuit affirmed the dismissal, holding that the government was not liable for a third-party taking it had authorized but had not coerced.[48]

44. 48 U.S.C. § 2194(m)(1); Pet. App. 100a.

45. *See* 11 U.S.C. § 902; *see also* 11 U.S.C. § 101(52).

46. *See* Pet. App. 53a–57a.

47. Pet. App. 15a.

48. Pet. App. 15a–16a.

After the Federal Circuit issued its ruling, Petitioners filed this petition for a writ of certiorari.

REASONS FOR GRANTING THE PETITION

I. The Decision Below Directly Conflicts with This Court's Decisions and Decisions of the Federal Circuit Holding that the Government Is Liable for Government-Authorized, Third-Party Actions that Cause Uncompensated Taking of Private Property

This Court has consistently applied the constitutional promise that, under the Just Compensation Clause of the Fifth Amendment, the government has a "categorical duty" to pay just compensation when it takes private property for a public use.[49] The Court has rejected efforts by the government to evade its categorical duty to pay just compensation when the government authorizes a third-party to take private property instead of taking that property directly.[50]

By rejecting new methods the government contrives to avoid complying with its constitutional duty to pay just compensation, the Court has effectuated the principle stated by Justice Holmes in the seminal case of *Pennsylvania Coal Co. v. Mahon*:[51]

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49. *See, e.g.*, *Cedar Point Nursery v. Hassid*, 594 U.S. 139 (2021); *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982); *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155 (1980); *Kaiser Aetna v. United States*, 444 U.S. 164 (1979).

50. *See, e.g.*, *Cedar Point Nursery v. Hassid*, 594 U.S. 139, 147 (2021).

51. *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922).

> The protection of private property in the Fifth Amendment presupposes that it is wanted for public use, but provides that it shall not be taken for such use without compensation. . . . When this seemingly absolute protection is found to be qualified by the police power, the natural tendency of human nature is to extend the qualification more and more until at last private property disappears. But that cannot be accomplished in this way under the Constitution of the United States.[52]

A. The Decision Below Cannot Be Squared with This Court's and the Federal Circuit's Earlier Rulings

The Federal Circuit's ruling, however, construes the Fifth Amendment as imposing a greater or additional burden on plaintiffs than what this Court or the Federal Circuit has previously required in cases involving government-authorized, third-party takings.

In *Loretto v. Teleprompter Manhattan CATV Corp.*,[53] this Court held that a state statute authorizing the cable company to install equipment on Loretto's rooftop was a per se taking, notwithstanding that the cable company was neither commanded nor coerced to do so—just authorized. This Court clarified: "We conclude that a permanent physical occupation *authorized by government*

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52. *Id.* at 415.

53. *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982).

is a taking without regard to the public interests that it may serve."[54]

In *Kaiser Aetna v. United States*,[55] this Court held that a taking had occurred when the Corps of Engineers authorized (not coerced) the public to access a formerly private pond. In *Nollan v. California Coastal Comm'n*,[56] the Court held that a taking had occurred where a construction permit authorized (not commanded or coerced) the public to cross the owner's property to access the beach.

And in *Cedar Point Nursery v. Hassid*,[57] this Court held that a state regulation authorizing (not coercing) labor organizers to enter farm property for union purposes was a taking: "[T]he Court has long treated government-*authorized* physical invasions as takings requiring just compensation."[58]

Until now, the Federal Circuit had likewise found the United States liable for a taking where a federal statute authorizes a third party to enter onto private land. In *Hendler v. United States*,[59] officials of EPA and a California state agency entered private land to install monitoring wells under the authority of the

54. *Id.* at 426 (emphasis added).

55. *Kaiser Aetna v. United States*, 444 U.S. 164 (1979).

56. *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825 (1987).

57. *Cedar Point Nursery v. Hassid*, 594 U.S. 139 (2021).

58. *Id.* at 150 (emphasis added).

59. *Hendler v. United States*, 952 F.2d 1364 (Fed. Cir. 1991).

CERCLA (Superfund) environmental cleanup statute.[60] Rejecting the government's argument that it was not liable for the acts of California officials, the Federal Circuit held: "California state officials who entered onto plaintiffs' land did so under the *authority granted by CERCLA*"[61]—a federal statute—and "[i]t follows that their activities within the scope of the Order are attributable to the Federal Government for purposes of takings law just as are the activities of EPA itself."[62]

In *Preseault v. United States*,[63] a rails-to-trails takings claim, the Government tried to defend against taking liability because the actual conversion of the right-of-way from railway to public hiking and biking use was done by state and local government actions.[64] But the Federal Circuit held that the federal government was responsible for the taking because the federal rails-to-trails statute authorized the right-of-way conversion:

> Whether the State's role in the matter should have resulted in liability for the State, or whether the State could absolve itself by pointing to the Federal Government, as the State Court held, is immaterial. The *Federal Government authorized and controlled* the

60. *Id.* at 1367–1368.

61. *Id.* at 1379 (emphasis added).

62. *Id.*

63. *Preseault v. United States*, 100 F.3d 1525 (Fed. Cir. 1996) (en banc).

64. *Id.* at 1531.

> behavior of the State in this matter, and the consequences properly fall there.[65]

B. The Taking Here Should Have Been Analyzed as a Per Se Taking

This Court has analyzed cases involving funds of money and held that statutes which authorize the transfer of funds or other intangibles to another party are a compensable Fifth Amendment taking.

In *Webb's Fabulous Pharmacies, Inc. v. Beckwith*,[66] this Court held that a Florida statute authorizing the clerk of Court to transfer interest on an interpleader fund to the county—interest rightly owned by the creditors entitled to the fund—is a compensable taking.[67] This Court explained that the Florida statute had the "practical effect of appropriating for the county the value of the use of the fund for the period in which it is held in the registry[,]"[68] and held that

> a State, by *ipse dixit*, may not transform private property into public property without compensation, even for the limited duration of the deposit in court. This is the very kind of thing that the Taking Clause of the Fifth Amendment was meant to prevent. That Clause

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65. *Id.* (emphasis added).

66. *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155 (1980).

67. *See id.* at 161.

68. *Id.* at 164.

> stands as a shield against the arbitrary use of governmental power.[69]

Similarly, the Court applied a per se analysis to statutes authorizing a third party to change contract rights. In *Louisville Joint Stock Land Bank*,[70] the Supreme Court invalidated a bankruptcy statute that prohibited the bank from foreclosing because the statute deprived the mortgagee bank of its pre-existing contract rights, which are property, stating that "[t]he bankruptcy power, like the other great substantive powers of Congress, is subject to the Fifth Amendment."[71] Likewise, in *Lynch v. United States*,[72] the Court found that Congress cannot reduce expenditures by repudiating contractual obligations of the United States.[73]

The Court also applied a per se analysis to determine that eliminating a lien to secure payment, such as the Bondholders' lien on the Dedicated Sales Tax Fund, is a taking:

> The total destruction by the Government of all value of these liens, which constitute compensable property, has every possible element of a Fifth Amendment 'taking' and

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69. *Id.*

70. *Louisville Joint Stock Land Bank v. Radford*, 295 U.S. 555 (1935).

71. *Id.* at 589.

72. *Lynch v. United States*, 292 U.S. 571 (1934).

73. *Id.* at 580.

> is not a mere 'consequential incidence' of a valid regulatory measure. Before the liens were destroyed, the lienholders admittedly had compensable property. Immediately afterwards, they had none. This was not because their property vanished into thin air. It was because the Government for its own advantage destroyed the value of the liens.[74]

Despite consistent constitutional rulings putting Congress on notice that its legislation would likely trigger Fifth Amendment scrutiny, Congress enacted PROMESA, which authorized a third party—the Oversight Board—to take the Dedicated Sales Tax Fund held by COFINA to secure payment of principal and interest to Bondholders and transfer this property to Puerto Rico.[75] PROMESA explicitly authorized the Oversight Board to cancel Bondholders' existing bonds and to reissue them, in this case, at about half their original par value,[76] to destroy the Bondholders' lien on that fund, dedicated as collateral for repayment of principal and interest due under their COFINA bonds.[77]

Because these actions took place under the authority of PROMESA, a federal statute, the United States is liable for just compensation—as the Fifth Amendment requires regardless of the fact that Congress did not expressly

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74. *Armstrong v. United States*, 364 U.S. 40, 48 (1960).

75. Pet. App. 24a.

76. Pet. App. 31a–32a.

77. Pet. App. 31a–33a.

coerce the Oversight Board to transfer the COFINA Fund to Puerto Rico.

II. This Case Raises an Important Constitutional Issue With Broad Implications for Property Owners and Their Ability to Recover Just Compensation for Federally Authorized Takings

The federal government often accomplishes its policies by authorizing third parties that are not governmental entities to take action that, if done by a federal agency, would constitute a compensable Fifth Amendment taking. In *Hendler v. United States*,[78] a congressional enactment authorized third parties (California officials) to enter the plaintiff's property to install monitoring wells for detecting groundwater pollution. In *Kaiser Aetna v. United States*,[79] a congressional enactment gave the public the right to use the plaintiff's formerly private pond. And in *Louisville Joint Stock Land Bank v. Radford*,[80] a congressional enactment authorized a mortgagee to remain on the land despite having defaulted on the mortgage payments. In each of these cases, the congressionally authorized action was discretionary—not compelled or "coerced"—and under the Federal Circuit's holding in this case, would not have been a compensable taking.

State and local governments, too, authorize third parties to invade private property and are held liable for

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78. *Hendler v. United States*, 952 F.2d 1364 (Fed. Cir. 1991).

79. *Kaiser Aetna v. United States*, 444 U.S. 164 (1979).

80. *Louisville Joint Stock Land Bank v. Radford*, 295 U.S. 555 (1935).

that taking. *Cedar Point Nursery*[81] found a taking where a state statute authorized union organizers to enter private property, and *Knick*[82] found a taking where a local statute authorized the public to cross the plaintiff's land to access a cemetery. *Nollan*[83] authorized public access over the plaintiff's land to access the beach, taking an easement; and *Loretto*[84] found a taking where a local ordinance authorized the cable company to install equipment on the plaintiff's rooftop. Every one of these cases lacked the coercion that the Federal Circuit now requires, in addition to governmental authorization, to find a taking.

The threat to Fifth Amendment property rights is greatest when, as here, Congress authorizes another government—state, local, or territorial—to select and seize private property for a public purpose. As the Federal Circuit itself noted, when a third party acts under federal direction, order, or legislation, the third party "act[s] under the aegis of the United States, and its actions [are], for purposes of takings liability, the actions of the United States. That [the third party] could have acted on its own [is] immaterial."[85]

Congress enacted PROMESA to authorize the Oversight Board to take actions to reduce Puerto Rico's

81. *Cedar Point Nursery v. Hassid*, 594 U.S. 139 (2021).

82. *Knick v. Township of Scott, Pa.*, 588 U.S. 180 (2019).

83. *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825 (1987).

84. *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982).

85. *Preseault v. United States*, 100 F.3d 1525, 1551 (Fed. Cir. 1996) (describing the holding in *Hendler v. United States*, 952 F.2d 1364 (Fed. Cir. 1991)).

debt.[86] In doing so, Congress shifted Puerto Rico's debt burden from the public, or even just the residents of Puerto Rico, to Petitioners, violating the Fifth Amendment principle that government may not "force[] some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole."[87]

Before PROMESA, COFINA was required to repay its bondholders in strict accordance with Puerto Rican law and the governing bond instruments. Puerto Rican law prohibited the Puerto Rico Legislature or Governor from altering COFINA's obligations to its bondholders and changing the bonds' terms.[88] Funds in the Dedicated Sales Tax Fund, owned by COFINA, were pledged solely to bond repayment and could not be diverted for any other purpose.[89] PROMESA upended that framework. Under the authority vested in it by Congress through PROMESA, the Oversight Board slashed the amount owed to Petitioners, devalued Petitioners' remaining bonds, and destroyed their lien by draining the Dedicated Sales Tax Fund to pay Puerto Rico's general debts.

As the First Circuit recognized when describing the same sequence of events for another of Puerto Rico's instrumentalities:

> But for the passage of PROMESA, the Trustee and/or the bondholders could have pursued

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86. *See* 48 U.S.C. § 2194; Pet. App. 90a–103a.

87. *Armstrong v. United States*, 364 U.S. 40, 49 (1960).

88. *See* P.R. Laws Ann. tit. 13, §§ 11a–16.

89. *See* P.R. Laws Ann. tit. 13, § 12.

> various remedies authorized by the Authority Act and the Trust Agreement. Those remedies include suits at law and/or equity to enforce contractual covenants, to obtain an accounting, and to place [COFINA] in receivership.[90]

III. This Is the Perfect Case to Resolve This Issue Now

Because the trial court dismissed this case on the pleadings, the issues before this Court are purely legal. And the Federal Circuit's ruling announces a newly created takings rule in this case. This case, therefore, is a perfect vehicle for nipping this perversion of takings jurisprudence in the bud—before the ruling takes root.

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90. *In re Fin. Oversight & Mgmt. Bd. for Puerto Rico*, 121 F.4th 280, 292 (1st Cir. 2024).

CONCLUSION

The Court should grant this petition.

Respectfully submitted,

Nancie G. Marzulla
Counsel of Record
Roger J. Marzulla
Marzulla Law, LLC
1150 Connecticut Avenue, NW,
Suite 1050
Washington, DC 20036
(202) 822-6760
nancie@marzulla.com

Counsel for Petitioners

Dated: October 29, 2025

APPENDIX

TABLE OF APPENDICES

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT, DECIDED JULY 31, 2025

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

2023-2100

JOHNATHAN H. DINH, DWIGHT D. JERECZEK, SANDY CHUAN-DINH, DEBORAH JERECZEK, STAN ELLIOTT, RYAN TRAN, THANH NGA TRAN, WALTER NAHM, LAUREN NAHM, PAMELA PAYSON, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED,

Plaintiffs-Appellants,

v.

UNITED STATES,

Defendant-Appellee.

Appeal from the United States Court of Federal Claims in No. 1:22-cv-00725-EGB, Senior Judge Eric G. Bruggink.

Decided: July 31, 2025

Before MOORE, *Chief Judge*, STOLL, *Circuit Judge*, and GILSTRAP, *District Judge*.[1]

1. Honorable Rodney Gilstrap, District Judge, United States District Court for the Eastern District of Texas, sitting by designation.

Stoll, *Circuit Judge*.

Plaintiffs-Appellants Johnathan Dinh, Dwight Jereczek, Sandy Chuan-Dinh, Deborah Jereczek, Stan Elliott, Ryan Tran, Thanh Nga Tran, Walter Nahm, Lauren Nahm, and Pamela Payson are owners of certain bonds issued by an instrumentality of the Commonwealth of Puerto Rico. They sued the United States for the alleged taking of their private property—the diminished principal and interest value of their bonds and their lost security interest. The United States Court of Federal Claims determined it had subject matter jurisdiction over their action but nevertheless dismissed it for failure to state a claim upon which relief could be granted. For the following reasons, we affirm.

Background

Plaintiffs-Appellants filed a class-action lawsuit against the United States in the United States Court of Federal Claims ("Claims Court") alleging that the United States effected a taking under the Fifth Amendment when it enacted the Puerto Rico Oversight, Management, and Economic Stability Act ("PROMESA"). Pub. L. No. 114-187, 130 Stat. 549 (codified at 48 U.S.C. § 2101 *et. seq.*).

Plaintiffs-Appellants own bonds issued by the Puerto Rico Sales Tax Financing Corporation, the Corporación del Fondo de Interés Apremiante ("COFINA"). They allege that they "lost a significant portion of the principal and interest" of their bonds because COFINA restructured its debts pursuant to PROMESA's debt restructuring provision. J.A. 81 ¶ 31 (Complaint). In plain terms, Plaintiffs-Appellants point to the differential between what they would have received had COFINA not restructured its debts and the amount they actually received as the property allegedly taken by the United States.

I

Puerto Rico created COFINA in 2006 in response to a fiscal crisis. Puerto Rico had consistently spent more than it received in taxes and other revenues, borrowing to cover the difference. Eventually, Puerto Rico neared the limits on sovereign debt permitted under its Constitution, which strained its ability to access credit markets. Puerto Rico created COFINA as a public corporation, independent from the Puerto Rican Government, to issue secured bonds ("COFINA bonds") to raise funds for the Commonwealth.[2] P.R. Laws Ann. tit. 13, §§ 11a-16. When COFINA bonds come due, bondholders are repaid principal and interest out of a dedicated fund—the Dedicated Sales Tax Fund ("DSTF")—which is funded by a sales and use tax ("SUT") imposed by Puerto Rico. COFINA, not Puerto Rico, has complete ownership and control of this fund. *Id.* § 12. By May 2017, COFINA had issued over $17 billion in COFINA bonds.

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2. Consistent with the parties and the Claims Court, this opinion uses the terms "Puerto Rico" and "the Commonwealth" interchangeably.

Puerto Rico's financial crisis continued to worsen, but Puerto Rico and its instrumentalities[3] could not access the federal municipal bankruptcy process because Congress excluded Puerto Rico from being a debtor under Chapter 9 of the Bankruptcy Code, under which municipalities restructure their debts. 11 U.S.C. § 101(52). Congress enacted PROMESA to create "a system for overseeing Puerto Rico's finances, while also enabling the Commonwealth to gain bankruptcy protections similar to those available under the [Bankruptcy] Code" to address the "fiscal emergency" in the Commonwealth. *Fin. Oversight & Mgmt. Bd. for P.R. v. Centro de Periodismo Investigativo, Inc.*, 598 U.S. 339, 342, 143 S. Ct. 1176, 215 L. Ed. 2d 321 (2023). In furtherance of this purpose, PROMESA established a seven-member Financial Oversight and Management Board for Puerto Rico (the "Oversight Board") "to provide a method for a covered territory to achieve fiscal responsibility and access to the capital markets." 48 U.S.C. § 2121.

Subchapter III of PROMESA permits the adjustment of debts through the Title III restructuring process. So-called Title III proceedings generally mirror federal bankruptcy court proceedings and permit a party to petition a federal court to compel the creation and enforcement of a plan of adjustment. *See id.* § 2164 (describing the petition process under Title III); *see also id.* § 2161(a) (incorporating various provisions of the U.S. Bankruptcy Code, *e.g.*, 11 U.S.C. § 106). Under

3. Consistent with the parties and the Claims Court, this opinion uses the terms "Puerto Rico" and "the Commonwealth" interchangeably.

PROMESA, the Oversight Board represents Puerto Rico in Title III cases. *Fin. Oversight & Mgmt. Bd. for P.R.*, 598 U.S. at 343.

The Oversight Board has "sole discretion" to "designate any territorial instrumentality[4] as a covered territorial instrumentality that is subject to the requirements of this chapter." 48 U.S.C. § 2121(d)(1)(A); *see also id.* § 2121(d)(1)(B)–(E) (authorizing the Oversight Board "in its sole discretion" to take various actions—such as requiring budgets—to oversee territorial instrumentalities); *id.* § 2121(d)(2)(A) (granting the Oversight Board the "sole discretion . . . [to] exclude any territorial instrumentality from the requirements of this chapter"). PROMESA explicitly emphasizes the autonomy of the Oversight Board—stating that "[n]either the Governor nor the Legislature may . . . exercise *any control, supervision, oversight, or review* over the Oversight Board or its activities; or . . . enact, implement, or enforce any statute, resolution, policy, or rule that would impair or defeat the purposes of this chapter, *as determined by the Oversight Board*." *Id.* § 2128(a) (emphases added). PROMESA's delineation of the Oversight Board's duties related to issuing a restructuring certification also emphasizes the Oversight Board's autonomy. *Id.* § 2146(a) ("The Oversight Board, prior to issuing a restructuring certification regarding an entity . . . *shall determine, in its sole*

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4. "The term 'territorial instrumentality' means any political subdivision, public agency, instrumentality—including any instrumentality that is also a bank—or public corporation of a territory, and this term should be broadly construed to effectuate the purposes of this chapter." 48 U.S.C. § 2104(19)(A).

discretion, that . . . the entity has made good-faith efforts to reach a consensual restructuring with creditors." (emphasis added)).

II

Within a few months of PROMESA's enactment, the Oversight Board designated COFINA as a covered instrumentality subject to the requirements of PROMESA and eligible to qualify as a debtor under Title III. The following overview of the Title III proceeding underlying this action provides necessary background for understanding the issues on appeal.

At the outset, COFINA bondholders and the Commonwealth disputed who had superior rights in the SUT revenues deposited in the DSTF used to repay principal and interest on COFINA bonds as they became due. The Oversight Board determined that the best path to resolving the dispute was to file Title III petitions for both COFINA and the Commonwealth to afford the parties "additional time and breathing room to seek to resolve the impasse under the supervision of the Title III Court." *In re Fin. Oversight & Mgmt. Bd. for P.R.*, 361 F. Supp. 3d 203, 223 (D.P.R. 2019), *aff'd*, 987 F.3d 173, 177 (1st Cir. 2021). After filing the respective Title III cases, "[t]he Oversight Board analyzed various options for resolving the dispute and determined that the best path forward was to . . . appoint[] [] independent Oversight Board agents to serve separately as the respective representatives of the Commonwealth and COFINA in the Commonwealth-COFINA Dispute." *Id.* at 223–24.

The parties eventually reached an agreement resolving the dispute based on arm's-length negotiations between the appointed agents, which allocated the disputed SUT revenues as follows: 53.65% to COFINA, and 46.35% to the Commonwealth. *Id.* at 225. The Oversight Board then applied this framework in formulating COFINA's plan of adjustment.[5] *Id.* at 225–26. The Title III court confirmed the adjustment plan, and it was implemented.

III

Plaintiffs-Appellants then brought suit on behalf of a class of COFINA bondholders, alleging that Congress took their interests in COFINA bonds when it enacted PROMESA. J.A. 81 ¶ 31 (Complaint) (alleging loss of principal, interest, and security interest in COFINA funds). The Government moved to dismiss the Complaint, arguing that the Claims Court lacked subject matter jurisdiction and that Plaintiffs failed to state a claim. The Claims Court rejected the Government's argument that PROMESA displaced Tucker Act jurisdiction. The court explained, "we do not find in PROMESA the kind of clear congressional intent required to displace this court's jurisdiction under the Tucker Act." *Dinh v. United States*, 166 Fed. Cl. 513, 525 (2023). The court reasoned that (1) "requiring plaintiffs to bring their takings claim in district court amounts to limiting the remedies they may seek" because "[t]he Little Tucker Act . . . allows the district court to award only up to $10,000 of monetary relief—

5. Under the Oversight Board's plan, senior COFINA bondholders would make a 93.01% recovery on their bonds while junior COFINA bondholders would make a 56.41% recovery.

which is less than the amount plaintiffs seek in this action"; and (2) "plaintiffs lack a basis for injunctive or declaratory relief because they do not allege that PROMESA fails to meet the public use requirement or is so arbitrary as to violate due process." *Id.* at 525–26.

After finding jurisdiction, the Claims Court granted the Government's motion to dismiss for failure to state a claim, explaining that "Congress's enactment of PROMESA is not sufficient federal government action to constitute a taking" because "plaintiffs cannot complete their claim here without relying on what turn out to be the actions of independent actors." *Id.* at 530–31. Relying on the legal framework set forth in *A & D Auto Sales, Inc. v. United States*, 748 F.3d 1142, 1154 (Fed. Cir. 2014), the court explained "it is clear that plaintiffs could not establish either an agency relationship or coercion in this case as a matter of law" to satisfy the required Government action for a taking claim. *Dinh*, 166 Fed. Cl. at 531 (citing *A & D Auto Sales*, 748 F.3d at 1154).

Plaintiffs-Appellants appeal. We have jurisdiction under 28 U.S.C. § 1295(a)(3).

Discussion

We first address the Government's contention that the Claims Court erred in concluding it possessed subject matter jurisdiction to hear this case. We then turn to Plaintiffs-Appellants' argument that we should reverse the Claims Court's dismissal because the Complaint adequately alleged a Government-authorized taking effected by PROMESA. Finally, we address Plaintiffs-Appellants' contention that the Claims Court abused its discretion by declining to allow them to amend their Complaint.

I

We review "whether the Court of Federal Claims possesses subject-matter jurisdiction de novo." *Biltmore Forest Broad. FM, Inc. v. United States*, 555 F.3d 1375, 1380 (Fed. Cir. 2009) (citation omitted).

As relevant here, the Tucker Act waives sovereign immunity for, and provides for Claims Court jurisdiction over, monetary claims against the United States "founded [] upon . . . the Constitution . . . or upon any express or implied contract with the United States." 28 U.S.C. § 1491(a)(1). "A Fifth Amendment takings claim falls within the Tucker Act's grant of jurisdiction because it is a 'claim against the United States founded upon the Constitution.'" *Acceptance Ins. Cos. Inc. v. United States*, 503 F.3d 1328, 1336 (Fed. Cir. 2007) (citation omitted). To have jurisdiction under the Tucker Act, a plaintiff must identify a separate source of law that "can fairly be interpreted as mandating compensation by the Federal Government for the damage sustained." *United States v. White Mountain Apache Tribe*, 537 U.S. 465, 472, 123 S. Ct. 1126, 155 L. Ed. 2d 40 (2003) (cleaned up). "It is undisputed that the Takings Clause of the Fifth Amendment is a money-mandating source for purposes of Tucker Act jurisdiction." *Jan's Helicopter Serv., Inc. v. F.A.A.*, 525 F.3d 1299, 1309 (Fed. Cir. 2008).

The Government argues that the Claims Court erred in concluding it possessed jurisdiction to hear this case "because Congress explicitly directed that all cases arising under PROMESA, 'in whole or in part,' must be pursued in the District of Puerto Rico." Appellee's Br. 5. The Government recognizes that, "[a]s a general matter," the Claims Court "has jurisdiction to entertain takings claims seeking just compensation." Appellee's Br. 20. The Government contends, however, that Congress may—and, here, did—"displace" the Claims Court's jurisdiction, "including over constitutional takings claims." Appellee's Br. 21. The Government also argues that Congress's unambiguous intent that all claims arising out of PROMESA be brought in the District of Puerto Rico is sufficient to displace Tucker Act jurisdiction. Appellee's Br. 30. We disagree. We hold that PROMESA does not displace Tucker Act jurisdiction.

A determination of displacement of jurisdiction requires "an unambiguous [Congressional] intention to withdraw the Tucker Act remedy." *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1019, 104 S. Ct. 2862, 81 L. Ed. 2d 815 (1984). Where Congress provides a "precisely drawn, detailed statute" that "contains its own judicial remedies," that "specific remedial scheme establishes the exclusive framework for the liability Congress created under the statute . . . . [because a] self-executing remedial scheme supersedes the gap-filling role of the Tucker Act." *United States v. Bormes*, 568 U.S. 6, 12–13, 133 S. Ct. 12, 184 L. Ed. 2d 317 (2012) (internal citation omitted). On the other hand, when the Tucker Act is "capable of co-existence [with another statute], it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to reward each as effective." *Reg'l Rail Reorganization Act Cases*, 419 U.S. 102, 133–34, 95 S. Ct. 335, 42 L. Ed. 2d 320 (1974) (internal quotation and citation omitted).

PROMESA's relevant statutory provision states:

> (a) Jurisdiction
>
> Except as provided in section 2124(f)(2) of this title (relating to the issuance of an order enforcing a subpoena), and subchapter III (relating to adjustments of debts), any action against the Oversight Board, and *any action otherwise arising out of this chapter, in whole or in part, shall* be brought in a United States district court for the covered territory or, for any covered territory that does not have a district court, in the United States District Court for the District of Hawaii.

48 U.S.C. § 2126(a) (emphasis added).

PROMESA's provision falls short of the "specific and comprehensive scheme for administrative and judicial review" that we have found sufficient to displace the Tucker Act. *Vereda, Ltda. v. United States*, 271 F.3d 1367, 1375 (Fed. Cir. 2001) (citation omitted) (Tucker Act displaced where "statutes provide for a comprehensive administrative and judicial system to review the *in rem* administrative forfeiture of property seized"). Here, as in

Ruckelshaus, we view PROMESA's failure to mention or provide for recourse against the Government as reflecting Congress's belief that the general grant of jurisdiction under the Tucker Act would provide the necessary remedy for any taking that may occur. *Ruckelshaus*, 467 U.S. at 1018–19; *see also id.* at 1017 ("[R]epeals by implication are disfavored." (quoting *Reg'l Rail*, 419 U.S. at 133)).

As the Supreme Court explained in *Ruckelshaus*, the Tucker Act grants the Claims Court jurisdiction to render judgment upon certain claims against the United States founded on the Fifth Amendment of the Constitution as a money-mandating source "absent a clearly expressed congressional intention to the contrary." *Id.* at 1018. Here, we see no such expressed intention to withdraw Tucker Act jurisdiction. Therefore, the Claims Court correctly determined it had jurisdiction.

II

Turning now to Plaintiffs-Appellants' arguments, "[w]e review de novo the grant of a motion to dismiss for failure to state a claim." *Greenlee Cnty. v. United States*, 487 F.3d 871, 877 (Fed. Cir. 2007).

Plaintiffs-Appellants argue that the Claims Court's "ruling overlooks the well-established principle that government action authorizing a third party to take private property can constitute a taking." Appellants' Br. 28. That is, they argue that "[b]ecause [the Oversight Board's] actions took place under the authority of PROMESA, a federal statute, the United States is liable for just compensation—as the Fifth Amendment requires." Appellants' Br. 33–34. We disagree.

Plaintiffs-Appellants contend their case is analogous to *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 102 S. Ct. 3164, 73 L. Ed. 2d 868 (1982), *Cedar Point Nursery v. Hassid*, 594 U.S. 139, 141 S. Ct. 2063, 210 L. Ed. 2d 369 (2021), and *Hendler v. United States*, 952 F.2d 1364 (Fed. Cir. 1991), where the Government's authorization of third-party action gave rise to takings liability. But each of the cited cases is readily distinguishable because, in each, the Government *directly* took the property owner's right to exclude when it authorized the third party to enter onto private property. In *Loretto*, New York law required landlords to "permit a cable television company to install its cable facilities upon his property." 458 U.S. at 421. In *Cedar Point*, "[a] California regulation grant[ed] labor organizations a 'right to take access' to an agricultural employer's property in order to solicit support for unionization." 594 U.S. at 143 (citation omitted). And in *Hendler*, the "EPA issued an administrative order granting itself and the State of California access to plaintiffs' property for . . . locating, constructing, operating, maintaining, and repairing monitor/extraction wells." 952 F.2d at 1369 (internal quotation and citation omitted). In each of these cases, the Government compelled the property owners to suffer an invasion of their property. It is immaterial that the invasion was executed by a third party because it was the Government who directly took the property owner's right to exclude.

As we have explained, "[t]here is no per se rule either precluding or imposing liability when the government instigates action by a third party." *A & D Auto Sales*, 748 F.3d at 1153. Two broad principles guide our analysis when determining whether the government's instigation of third-party action constitutes a taking. First, we ask whether the "effects on the plaintiff are merely unintended or collateral" such as where "the plaintiff was but one member of an affected class of persons." *Id.* Second, we ask whether "the third party is acting as the government's agent or the government's influence over the third party was coercive rather than merely persuasive." *Id.* at 1154.

The Claims Court concluded that, "even if [it] assumed that Congress intended the restructuring of COFINA's debts—despite the fact that PROMESA does not once mention COFINA—plaintiffs could not get past the second hurdle" above. *Dinh*, 166 Fed. Cl. at 531 ("[I]t is clear that plaintiffs could not establish either an agency relationship or coercion in this case as a matter of law."). We agree.

It is undisputed the Oversight Board is not an agent of the United States. *See* Appellants' Br. 8 (acknowledging "the Puerto Rico Oversight Board," is "not an agent of the United States"). Thus, we look for any liability arising out of coercion. "The question of coercion is . . . complex," and "[t]he line between coercion (which may create takings liability) and persuasion (which does not create takings liability) is highly fact-specific and hardly simple to determine." *A & D Auto Sales*, 748 F.3d at 1154. Coercion is a question of degree, and in *A & D Auto Sales*, we contrasted an embargo exerting "irresistible pressure" with the "friendly persuasion" of conditional economic and military aid in explaining what degree of coercion amounts to a taking. *Id.* at 1155.

Plaintiffs-Appellants also do not dispute that their theory depends on the Oversight Board's actions. *See, e.g.*, Appellants' Br. 19–20 (emphasizing that without Congress's enactment of PROMESA "there would have been no Oversight Board and no authority for that Board to destroy these property interests"). By creating a board that acts autonomously with "sole discretion" to take a broad range of actions, 48 U.S.C. § 2121(d)(1)(A)–(E), the Government lacks the "ability to exercise general control over the [Board]'s action" or "compel specific action" emblematic of coercion. *A & D Auto Sales*, 748 F.3d at 1155. PROMESA simply incorporates bankruptcy law and provides Title III as avenue for restructuring debts. 48 U.S.C. § 2161 (incorporating numerous Title 11 bankruptcy provisions); *see generally id.* §§ 2161–78 (Title III) (providing for adjustment of debts). PROMESA also endows the Oversight Board with broad discretion to help Puerto Rico "achieve fiscal responsibility and access [] the capital markets." *Id.* § 2121(a). We agree with the Claims Court that providing Puerto Rico with additional tools to manage its economic security, as PROMESA does, does not equate to "the government instigat[ing] action by a third party." *A & D Auto Sales*, 748 F.3d at 1153; *see also B & G Enters., Ltd. v. United States*, 220 F.3d 1318, 1325 (Fed. Cir. 2000) ("Congress may have provided the bait, but [the state] decided to bite.").

While PROMESA undisputedly empowers the Oversight Board to initiate restructuring proceedings, the Oversight Board is not required to do so. The Oversight Board has discretion to determine whether such proceedings are warranted, and it is also vested with other powers to further its purpose, such as its ability to require budgets and reports on a monthly or quarterly basis from territorial instrumentalities. 48 U.S.C. § 2172; *id.* § 2121(d)(1)(B)–(C); *see also id.* § 2121(d)(2)(A) ("[The Oversight Board may in its] sole discretion . . . exclude any territorial instrumentality from the requirements of this chapter."); *id.* § 2161 (incorporating various bankruptcy provisions by reference). And when the Oversight Board initiates bankruptcy proceedings, "it acts not on behalf of the United States, but on behalf of, and in the interests of, Puerto Rico." *Fin. Oversight & Mgmt. Bd. for P.R. v. Aurelius Inv., LLC*, 590 U.S. 448, 466, 140 S. Ct. 1649, 207 L. Ed. 2d 18 (2020). We thus agree with the Claims Court that the United States lacks the requisite amount of coercive control over the Oversight Board's actions to create liability under the Fifth Amendment.

III

Plaintiffs-Appellants also contend that the Claims Court erred by declining to allow them to amend their Complaint to cure any deficiencies. We review the denial of a motion to amend a complaint for abuse of discretion. *Shinnecock Indian Nation v. United States*, 782 F.3d 1345, 1348 (Fed. Cir. 2015). Plaintiffs-Appellants' argument on appeal is conclusory and fails to explain how they would amend their complaint to establish government action or how any such edits would transform their allegations. Accordingly, we hold that the Claims Court did not abuse its discretion in declining to allow amendment. *Foman v. Davis*, 371 U.S. 178, 182, 83 S. Ct. 227, 9 L. Ed. 2d 222 (1962) (identifying "futility of amendment" as a basis for denying leave to amend).

CONCLUSION

We have considered Plaintiffs-Appellants' remaining arguments and do not find them persuasive. For the foregoing reasons, we affirm.

AFFIRMED

COSTS

No costs.

APPENDIX B — OPINION OF THE UNITED STATES COURT OF FEDERAL CLAIMS, FILED JUNE 5, 2023

IN THE UNITED STATES
COURT OF FEDERAL CLAIMS

No. 22-725C

JONATHAN DINH, *et al.*,

Plaintiffs,

v.

THE UNITED STATES,

Defendant.

Filed June 5, 2023

OPINION

BRUGGINK, *Judge.*

This is an action against the United States, seeking just compensation under the Fifth Amendment for the alleged taking of plaintiffs' private property. Plaintiffs in this case are owners of First Subordinated Secured Bonds issued by Corporación del Fondo de Interés Apremiante ("COFINA"), an instrumentality of the Commonwealth of Puerto Rico.[1] Plaintiffs allege that their property

1. As owners of First Subordinated Secured Bonds issued by COFINA, plaintiffs are in effect junior COFINA bondholders. Plaintiffs refer to First Subordinated Secured Bonds as "COFINA bonds" throughout their complaint.

interests as COFINA bondholders were taken without just compensation as a "direct and intended result" of Congress's enactment of the Puerto Rico Oversight, Management, and Economic Stability Act ("PROMESA"). *See* Second Am. Compl. ("Compl.")[2] ¶ 31. Pending is defendant's motion to dismiss for lack of jurisdiction, or, in the alternative, for failure to state a claim upon which relief can be granted. The motion has been fully briefed, and oral argument was held on April 13, 2023. For the reasons set out below, we grant defendant's motion to dismiss under Rule 12(b)(6) of the Rules of the United States Court of Federal Claims ("RCFC").

BACKGROUND

Enacted on June 30, 2016, PROMESA is a statute that authorizes an Oversight Board established under the Act to initiate bankruptcy proceedings—also referred to as Title III proceedings—for a territory or territorial instrumentality. PROMESA established an Oversight Board for Puerto Rico on the same date, created as "an entity within the territorial government"; PROMESA expressly states that an Oversight Board "shall not be considered to be a department, agency, establishment, or instrumentality of the Federal Government." 48 U.S.C. § 2121(c) (2018). As other COFINA-related cases make clear, the Oversight Board for Puerto Rico then took

2. After filing the original complaint on June 29, 2022, *see* ECF No. 1, plaintiffs amended their complaint twice. Unless otherwise noted, the "complaint" from hereon will refer to the second amended complaint filed on November 1, 2022. *See* ECF No. 9.

a series of discretionary actions, which resulted in the restructuring of COFINA's debts. Those actions included designating COFINA as an instrumentality covered by PROMESA, issuing a restructuring certification for COFINA, and then filing a Title III petition on behalf of COFINA in the United States District Court for the District of Puerto Rico. The Oversight Board also represented COFINA during the Title III case and submitted a plan of adjustment for COFINA's debts, which would allow junior COFINA bondholders (such as plaintiffs) to make a 56.41% recovery on the repayment of principal and interest on their bonds. *See In re Fin. Oversight & Mgmt. Bd. for P.R.*, 361 F. Supp. 3d 203, 233 (D.P.R. 2019), *aff'd*, 987 F.3d 173, 177 (1st Cir. 2021). The district court—also referred to as the "Title III court"—confirmed the plan of adjustment on February 5, 2019.

Plaintiffs' complaint, however, skips over the actions of the Oversight Board and makes only an oblique reference to the Title III court for having "rebuffed the COFINA Bondholders' challenge" to the curtailment of their property interests. *See* Compl. ¶ 30. Pushing both the Oversight Board and the Title III court into the barely acknowledged background, plaintiffs take aim instead at an act of Congress. The crux of plaintiffs' claim lies in the allegation that the United States is liable for just compensation because Congress's enactment of PROMESA caused the taking of their property. *See* Compl. ¶ 31 ("As a direct and intended result of Congress's enactment of [PROMESA], COFINA Bondholders lost a significant portion of the principal and interest each COFINA Bondholder was entitled to and the fair market value of the pledged revenues, their security interests and liens on COFINA funds, as well as other compensable property rights."); *id.* at ¶ 35 ("But for Congress's enactment of [PROMESA], Plaintiffs would have received the payments of principal and interest they were entitled to under the terms of their COFINA bonds and would have retained a security interest . . . that they could have executed in the event of default."). Plaintiffs characterize the alleged taking as a "legislative taking," which they define as "Congress's enactment of a statute that impairs or destroys the property rights of a targeted group of owners." Pls.' Resp. at 21.

As we will see, plaintiffs' claim cannot succeed on the merits without demonstrating sufficient federal action to warrant liability in the United States—hence plaintiffs' consistent assertion that Congress intended PROMESA to result in the taking of their property without just compensation. And yet, as plaintiffs conceded at oral argument, they suffered no actual injury on the day that Congress enacted PROMESA. To be able to point to injury, their claim requires moving further along the timeline of events. *See* Oral Arg. at 46:00 to 46:42 (plaintiffs conceding that their claim would not have been "ripe" in 2016 because "money hadn't actually been taken yet"). As we explain below, however, the fact that the actual injury occurred at a later date is fatal for plaintiffs because it means that the alleged taking was completed through the discretionary actions of a non-federal entity. Unsurprisingly, this dilemma has left plaintiffs reluctant to place precisely the date of taking in either their complaint or their brief; at most, they suggest that the alleged taking occurred somewhere during the date range of June 30, 2016, to February 5, 2019. *See* Pls.' Resp. at 17; *id.* at 18 ("But the issue of whether COFINA Bondholders owned their bonds on the date of taking—whether that be the date PROMESA was passed or the date it was implemented to deprive them of their property or some date in between—cannot be used to dismiss this case.").

In short, plaintiffs' claim attempts to navigate two opposing currents. It has to rely on sufficient federal action as the prime motive force, while simultaneously incorporating events and actors having nothing to do with the United States, an attempted course adjustment which has the potential for causing shipwreck. We are satisfied that no degree of navigational skill can salvage the effort.

I. The Creation of COFINA

In 2006, the Commonwealth of Puerto Rico was in the midst of a fiscal crisis: having consistently spent more than it received in taxes and other revenues, Puerto Rico faced decreased direct access to the credit markets because of the Puerto Rican Constitution's limits on sovereign debt.[3] *In re Fin. Oversight & Mgmt. Bd. for P.R.*, 987 F.3d 173, 177 (1st Cir. 2021). The Legislative Assembly of Puerto Rico passed Act 91 on May 13, 2006, as a response to the crisis. *Id.* The Act created COFINA, "a public

3. Because the allegations in this case almost wholly involve acts of legislatures and courts, the factual background blurs into the controlling law. We therefore cite cases and statutes where the cited material supplements but is not inconsistent with plaintiffs' statement of facts in the complaint.

corporation and instrumentality of the Commonwealth of Puerto Rico" that was "independent and separate" from the Commonwealth. *See* P.R. Laws Ann. tit. 13 § 11(a). The stated purpose of COFINA was to "issue[ ] bonds and utilize[e] other financing mechanisms" to pay the Commonwealth's outstanding debts as well as future operating expenses. *See id.* § 11(b).

The bonds that COFINA issued were different in kind from the general obligation ("GO") bonds issued by Puerto Rico. *See In re Fin. Oversight,* 987 F.3d at 177; Am. Jur. 2d Ed. § 295 ("General obligation bonds issued by states and governmental units are, by definition, payable from and secured by a pledge of the issuer's taxing power. . . . The full faith and credit of the issuer is pledged for repayment of general obligation bonds, and the promise to pay is unconditional."). That is, COFINA bonds were payable from and secured by specific collateral, not by a pledge of the full faith, credit and taxing power of Puerto Rico. *See* P.R. Laws Ann. tit. 13 § 13(d) (providing that the "full faith, credit and taxing power of the Commonwealth of Puerto Rico shall not be pledged" for the COFINA bonds).

Specifically, Act 91 required a portion of sales and use tax revenues ("SUT revenues") to be deposited directly in the Dedicated Sales Tax Fund ("DSTF") each year. The DSTF was the "property of COFINA," which was "[not] available to the Commonwealth of Puerto Rico." *Id.* at § 12. COFINA had to use the DSTF exclusively for the purposes specified in § 13, including the repayment of principal and interest on the COFINA bonds as they became due. *See id.* at § 13(a)(3). Moreover, Act 91 authorized COFINA to "pledge and otherwise encumber all or part of [the

DSTF]" for the repayment of principal and interest on the bonds. *Id.* at §13(b). That pledge was "valid and binding as of the time it is made without the need for a public or notarized document." *Id.*

COFINA subsequently made such a pledge in the Sales Tax Revenue Bond Resolution ("Bond Resolution"), the borrowing contract among COFINA, the COFINA bondholders, and the Bank of New York Mellon as trustee. The Bond Resolution, as amended and restated on June 10, 2009, gave the bondholders a security interest in: "(1) the DSTF, (2) all COFINA Revenues, as defined in the Bond Resolution, (3) all right, title, and interest of COFINA in and to COFINA Revenues, and all rights to receive the same, and (4) funds, deposits, accounts, and subaccounts held by the Trustee." Compl. ¶ 15. COFINA bondholders thus had automatically perfected liens which they could execute in the event of a default in the payments of principal and interest. *See id.* at ¶ 12.

Between 2009 and 2011, COFINA issued a series of bonds that bore interest rates between 3.63% and 7.48% and matured between August 1, 2017, and August 1, 2050. *Id.* at ¶ 13. Although plaintiffs here do not specify when they purchased their bonds, they allege that they were "at all material times the owners of a substantial quantity of COFINA bonds," where the "material times" refers to the date range from June 30, 2016, to February 5, 2019. *See id.* ¶¶ 1-8; Pls.' Resp. at 17.

By May 2017, there was $9.81 billion in aggregate principal amount of COFINA bonds outstanding, consisting of $7.39 billion principal amount of current interest bonds and $1.50 billion principal amount of capital appreciation bonds. Compl. ¶ 13. Puerto Rico regularly transferred the statutorily required portion of SUT revenues to the DSTF, so that by May 2017, the DSTF held over $600 million as security for the repayment of COFINA bonds' principal and interest. *Id.* at ¶ 12; Pls' Resp. at 3.

II. The Passage of PROMESA

Despite these new measures, Puerto Rico's financial crisis worsened so that by 2013, Puerto Rico's three public utility companies (power, water, and highways) were more than $20 billion in debt. Compl. ¶ 16; *see also Puerto Rico v. Franklin Cal. Tax-Free Tr.,* 579 U.S. 115, 118 (2016). Puerto Rican instrumentalities, however, could not access the federal municipal bankruptcy process under Chapter 9 of the Bankruptcy Code. *See Franklin Cal.* at 130. Their exclusion from federal bankruptcy protections dated back to 1984, when Congress amended the Bankruptcy Code's definition of a "State" to exclude Puerto Rico "for the purpose of defining who may be a debtor under chapter 9 of this title." *See* 11 U.S.C. § 101(52) (2018). The amendment precluded Puerto Rico—as well as any other United States territory—from authorizing its municipalities to file a Chapter 9 petition, which effectively barred access to federal bankruptcy proceedings for Puerto Rican instrumentalities. *See* 11 U.S.C. § 109(c)(2) (requiring "States" to authorize their municipalities to seek relief before a municipality may file a Chapter 9 petition); *id.* at § 101(40) (defining a "municipality" as a "political subdivision or public agency or instrumentality of a State").

As a result, Puerto Rico passed the Puerto Rico Corporation Debt Enforcement and Recovery Act ("Recovery Act") in 2014, providing a non-federal path for its instrumentalities to restructure their debts. The Recovery Act could not be enforced, however, because it was pre-empted by federal law. *Franklin Cal.*, 549 U.S. at 125 ("[The Bankruptcy Code] precludes Puerto Rico from authorizing its municipalities to seek relief under Chapter 9, but it does not remove Puerto Rico from the reach of Chapter 9's pre-emption provision.").

Ultimately, on June 30, 2016, Congress enacted PROMESA pursuant to its plenary power over the territories, *see* 48 U.S.C. § 2121(b)(2), making it possible for territories and their instrumentalities to adjust their debts in bankruptcy proceedings.[4] PROMESA, however, is not simply an extension of the Bankruptcy Code to the territories. The implementation of PROMESA first of all requires the establishment of an Oversight Board, the purpose of which is to "provide a method for a covered territory to achieve fiscal responsibility and access to

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4. PROMESA specifically established an Oversight Board for Puerto Rico on the date of its enactment. *See* § 2121(b)(1). Nevertheless, the language of PROMESA is general and also applies to territories other than Puerto Rico once an Oversight Board is established for such a territory. *See* § 2121(c)(1) ("An Oversight Board established under this section shall be created as an entity within the territorial government for which it is established in accordance with this title. . . . ").

the capital markets." *See* § 2121(a). Title I thus sets out the organization of an Oversight Board, while Title II and Title III outline its responsibilities—which include the approval of fiscal plans and budgets for a territory or territorial instrumentality, as well as duties related to the adjustment of debts. *See* §§ 2141, 2142, 2146.

As the portion of PROMESA that deals specifically with the adjustment of debts, Title III incorporates many sections of the Bankruptcy Code. *See* § 2161(a). But differences exist. For instance, the Bankruptcy Code requires a municipality to be insolvent to qualify as a debtor. *See* 11 U.S.C. § 109(c)(3). Title III, however, does not require a debtor to be insolvent. *See* 48 U.S.C. § 2162. Where the entity in question is a territorial instrumentality rather than a territory, all that Title III requires is that it: (1) be "covered" under PROMESA; (2) have a restructuring certification issued by an Oversight Board; and (3) desire to effect a plan to adjust its debts. *See id.* Indeed, the first two requirements are unique to Title III since they cannot be met unless the Oversight Board chooses to act, a determination it makes "in its sole discretion." *See* §§ 2121(d)(1)(A), 2146(a). Title III, moreover, does not authorize a debtor to directly file a petition for bankruptcy, unlike the Bankruptcy Code—the Oversight Board must file a petition on behalf of a debtor. *See* 48 U.S.C. § 2164(a); 11 U.S.C. §§ 301, 901. The filing of the petition by the Oversight Board commences a voluntary case under Title III, after which the Oversight Board continues to serve as the "representative of the debtor" and submits or modifies any plans of adjustment for the debtor. *See* 48 U.S.C. § 2175.

Title III also has its own provisions with respect to jurisdiction and venue. First, Title III provides district courts with "original and exclusive jurisdiction of all cases under [Title III]," and "original but not exclusive jurisdiction of all civil proceedings arising under [Title III], or arising in or related to cases under [Title III]." § 2166(a). Where a covered territorial instrumentality is the debtor, venue is proper in the district court for the territory in which the instrumentality is located. § 2167(a)(2). However, only the designated district court judge may conduct a Title III case, *see* § 2168, so that the district court hearing a Title III case is also referred to as the "Title III court" in judicial opinions.

To confirm a plan of adjustment submitted by an Oversight Board, the Title III court must determine if the plan meets the requirements of § 2174(b). Among other requirements, the plan must comply with applicable provisions of the Bankruptcy Code and with Title III of PROMESA, and the debtor must not be "prohibited by law from taking any action necessary to carry out the plan." *See* § 2174(b). An appeal of the Title III court's decision is taken "in the same manner as appeals in civil proceedings generally are taken to the courts of appeals from the district court." § 2166(e).

III. The Adjustment of COFINA's Debts Under Title III

On September 30, 2016, the Oversight Board for Puerto Rico designated COFINA as a "covered entity" subject to the requirements of PROMESA and eligible to qualify as a debtor under Title III. *In re Fin. Oversight,* 361 F. Supp. 3d at 219. For the Oversight Board to even begin formulating a Title III plan, however, there was an important threshold question that had to be resolved: whether COFINA or the Commonwealth had superior rights to the SUT revenues transferred to the DSTF. *Id.* at 220. The answer would determine which entity had possession of funds allegedly exceeding $600 million by May 2017 to pay its debts.

A dispute over the DSTF was set off in the lawsuit that GO bondholders filed on July 20, 2016, shortly after the Commonwealth defaulted on payments to GO bondholders pursuant to Executive Order 30. *See Lex Claims, LLC v. Garcia-Padilla,* 236 F. Supp. 3d 504, 512 (D.P.R. 2017), *rev'd in part,* 853 F.3d 549 (1st Cir. 2017) (holding that PROMESA's stay applies to litigation seeking declaratory and injunctive relief). In their complaint—amended in November 2016 to include new causes of action relating to COFINA—GO bondholders asked the court to declare the default unlawful and grant injunctive relief, including an order that COFINA transfer the SUT revenues it held to the Commonwealth. *Id.* Specifically, they alleged that the Commonwealth's obligation to pay GO bondholders was a "constitutional debt," and that the Puerto Rican constitution required using SUT revenues first to satisfy GO bond obligations, not COFINA bond obligations. *Id.* at 509-510. Because the First Circuit held that PROMESA's automatic stay provision applied, however, the constitutional issue that the GO bondholders raised was not resolved by the First Circuit's decision in April 2017.[5]

5. On April 29, 2017, the fate of the DSTF became more uncertain with the Puerto Rico Legislative Assembly's enactment of Act No. 246, which allowed COFINA's SUT revenues to be used

See Lex Claims, LLC v. Fin. Oversight & Mgmt. Bd., 853 F.3d 549, 551 (1st Cir. 2017).

Against this backdrop, the Oversight Board determined that the best way to resolve the dispute over the allocation of the DSTF was for it to file a Title III petition for both the Commonwealth and COFINA and afford the parties "additional time and breathing room to seek to resolve the impasse under the supervision of the Title III court." *In re Fin. Oversight,* 361 F. Supp. 3d at 223. Thus, on May 3, 2017, the Oversight Board issued a restructuring certificate and filed a Title III petition on behalf of the Commonwealth. *Id.* at 220. Likewise, on May 5, 2017, the Oversight Board issued a restructuring certification and filed a Title III petition on behalf of COFINA. *Id.* The two Title III cases were then combined for procedural purposes only.

Upon the commencement of these cases, the Title III court requested that the Oversight Board work with interested creditor parties to formulate a procedure for resolving the Commonwealth-COFINA dispute. *Id.* at 224. The Title III court approved such a procedure on

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to pay Puerto Rico's general debts under certain circumstances. *See* Compl. ¶ 29; Fiscal Plan Compliance Act, Act 26-2017 (Apr. 29, 2017) ("[T]he Executive Branch is hereby empowered to use COFINA funds occasionally, only as the last resort, and subject to the filing of a sworn certification with the Legislative Assembly."). Although unclear on the details, plaintiffs allege that on May 3, 2017, "[w]ithin days" of the enactment of Act No. 246, COFINA defaulted on its obligations to COFINA bondholders. *See* Compl. ¶ 29.

August 10, 2017, which provided for the appointment of agents independent from the Oversight Board to litigate, mediate, and/or settle the dispute. *Id.* Then, on June 7, 2018, agents appointed to represent the Commonwealth and COFINA announced the terms of an "Agreement in Principle" at the end of arm's-length negotiations. *Id.* at 225. The central component of the Agreement divided the disputed SUT revenues by allocating 53.65% to COFINA and 46.35% to the Commonwealth.[6] *Id.*

In July 2018, the Oversight Board began working on a plan of adjustment for COFINA's debts using the framework of the Agreement. *Id.* at 225-26. The Oversight Board first certified the "Title III Plan of Adjustment of Puerto Rico Sales Tax Corporation" on October 19, 2018, which it then amended three times. *Id.* at 228-29. After the Oversight Board certified the Third Amended Plan ("the Plan"), the Title III court heard arguments on all objections to the Plan and confirmed it on February 5, 2019. Its upshot was that senior COFINA bondholders would make a 93.01% recovery on their bonds while junior COFINA bondholders would make a 56.41% recovery, or about fifty-five cents on the dollar in new COFINA bonds

6. Plaintiffs allege in their complaint that they were "not parties [to the agreement that resolved the Commonwealth-COFINA dispute]" and that they were "unaware of this agreement until it was submitted to the federal district court for approval." Compl. ¶ 30. Nevertheless, they acknowledge that "some COFINA Bondholders challenged this secret agreement that drastically curtailed their bond rights and security for repayment," and that the Title III court "rebuffed the COFINA Bondholders' challenge to this agreement." *See id.*

relative to the par value of their original bonds. *Id.* at 233; *see also In re Fin. Oversight,* 987 F.3d at 179.

The Title III court made the following conclusions of law as it confirmed the Plan. First, the Plan fully complied with applicable provisions of the Bankruptcy Code, including the provision about creditors voting to accept or reject the plan. The court found that "[a]ll classes of creditors entitled to vote to accept or reject the Plan have voted to accept the Plan in accordance with the requirements set forth. . . ." *Id.* at 240. Second, the Plan fully complied with Title III of PROMESA. *Id.* at 240. Third, COFINA, the debtor, was not prohibited by law from taking any action necessary to carry out the plan. *Id.*

Addressing junior COFINA bondholders' argument that the Plan and Settlement Agreement effected a taking without just compensation in violation of the Fifth Amendment, the Title III court applied the three-factor test for regulatory takings under *Penn Central Transp. Co. v. City of New York,* 438 U.S. 104 (1978) and rejected the challenge.[7] *Id.* at 244. First, the court held

7. The test for regulatory takings under *Penn Central* is "an essentially ad hoc, factual" inquiry that looks to the following three factors as having particular significance: (1) "[t]he economic impact of the regulation on the claimant"; (2) "the extent to which the regulation has interfered with distinct investment-backed expectations"; (3) "the character of the governmental action." *Penn Central,* 438 U.S. at 124. The Court held in *Penn Central* that a taking is more readily found "when the interference with property can be characterized as a physical invasion by government than when interference arises from some public program adjusting the benefits and burdens of economic life to promote the common good." *Id.* (internal citation omitted).

that the Plan would not result in the total destruction of the value of bondholders' property. *Id.* at 244. Second, the court held that the Plan would interfere only with "bondholders' subjective investment expectations," rather than "reasonable expectations"—which must take account of the claims in the Commonwealth-COFINA dispute that the Plan proposed to resolve. *Id.* Third, the court held that Plan was a "quintessential example" of a "public program adjusting the benefits and burdens of economic life to promote the common good." *Id.* Moreover, even in the event that the Plan resulted in a taking, the court was "satisfied that the value to be received by bondholders as a result of the settlement of the Commonwealth-COFINA dispute and under the Plan constitutes just compensation." *Id.* As the court noted, the alternative to the Plan was "protracted litigation in the Adversary Proceeding, which could lead to an all-or-nothing recovery for either the Commonwealth or COFINA." *Id.* at 246.

Once confirmed, the Plan was implemented on February 12, 2019, and an appeal followed. *In re Fin. Oversight,* 987 F.3d at 180. The First Circuit affirmed the confirmation of the plan, dismissing the appeal as equitably moot. *Id.* at 177 ("No party sought to stay the Title III court's order approving the Plan, which has been fully implemented for nearly two years and given rise to transactions involving billions of dollars and likely tens of thousands of individuals.").

Plaintiffs filed the present suit as a class action[8] on June 29, 2022, naming Jonathan Dinh and Dwight

8. Plaintiffs' motion to certify the class under RCFC 23(c) was filed on May 1, 2023. Consideration of the motion was stayed until resolution of the pending motion to dismiss.

Jereczek as Representative Plaintiffs whose claims are "typical of the claims of all other members of the COFINA Bondholders class as described in this Complaint." ECF No. 1. They amended the complaint twice, first on October 31, 2022, and again on November 1, 2022, adding eight named Representative Plaintiffs to the original complaint. *See* ECF No. 8, 9. The descriptions of all Representative Plaintiffs are identical; they assert the same takings claim "on behalf of all persons and entities that owned [First Subordinated Secured] COFINA bonds between June 30, 2016, and February 5, 2019, excluding persons or entities that voted for or consented to the alteration of their COFINA bond rights." *See* Compl. ¶ 8. Plaintiffs allege that "[a]s a direct and intended result of Congress's enactment of [PROMESA], COFINA Bondholders lost a significant portion of the principal and interest each COFINA Bondholder was entitled to and the fair market value of the pledged revenues, their security interests and liens on COFINA funds, as well as other compensable property rights." *Id.* at ¶ 31.

Defendant filed its motion to dismiss on December 7, 2022. It makes four arguments regarding this court's asserted lack of subject matter jurisdiction and five arguments asserting plaintiffs' failure to state a claim upon which relief may be granted.

DISCUSSION

I. This Court Has Subject Matter Jurisdiction over Plaintiffs' Takings Claim Under the Tucker Act.

Because subject matter jurisdiction is a "threshold requirement for a court's power to exercise jurisdiction over a case," *Dow Jones & Co., Inc. v. Ablaise Ltd.*, 606 F.3d 1338, 1348 (Fed. Cir. 2010), we first determine whether we have subject matter jurisdiction to hear plaintiffs' takings claim. In doing so, we "accept as true all undisputed facts asserted in the plaintiff 's complaint and draw all reasonable inferences in favor of the plaintiff." *Trusted Integration, Inc. v. United States,* 659 F.3d 1159, 1163 (Fed. Cir. 2011).

The subject matter jurisdiction of this court is defined by the Tucker Act, which grants jurisdiction to this court to "render judgment upon any claim against the United States founded either upon the Constitution, or any act of Congress or any regulation of an executive department." 28 U.S.C. §1491(a)(1) (2018). Although the Tucker Act constitutes an unequivocal waiver of sovereign immunity, it does not create a substantive right for monetary relief against the United States. *See United States v. White Mountain Apache Tribe,* 537 U.S. 465, 472 (2003). Thus, to support this court's subject matter jurisdiction, there must be a separate source of law that "can fairly be interpreted as mandating compensation by the Federal Government for the damage sustained." *Id.* (quoting *United States v. Testan,* 424 U.S. 392, 400 (1976)). Where a money-mandating source exists, this court has exclusive jurisdiction to award compensation in excess of $10,000, because concurrent jurisdiction of district courts under the Little Tucker Act is limited to claims "not exceeding $10,000 in amount." *See* 28 U.S.C. § 1346(a)(2).

Here, a money-mandating source undoubtedly exists: the text of the Fifth Amendment mandates just compensation when the government takes private property for public use. U.S. Const. amend. V ("[N]or shall property be taken for public use, without just compensation."). Notwithstanding the presumption of Tucker Act jurisdiction under the Takings Clause, however, defendant asserts that this court lacks subject matter jurisdiction over plaintiffs' takings claim for four reasons. We reject all four.

A. Plaintiffs Allege a Taking Effected by an Act of Congress, Which This Court Has Jurisdiction to Hear Under the Tucker Act.

Defendant's first argument is based on what it takes to be the "true nature" of plaintiffs' takings claim as opposed to what plaintiffs have pleaded in their complaint. That is, defendant argues that this court lacks jurisdiction because "properly framed, the acts that purportedly took plaintiffs' property interests include a series of discretionary decisions by the Oversight Board, which the Supreme Court unanimously held does not constitute the United States for statutory and constitutional purposes." Def.'s Reply at 2.

The basic premise behind defendant's argument is correct: this court lacks jurisdiction over claims against a party other than the United States. *United States v. Sherwood,* 312 U.S. 584, 588 (1941). Thus, to establish jurisdiction, a plaintiff claiming a taking in this court must allege that their property was taken by federal action. *See Altair Global Credit Opportunities Fund (A), LLC v. United States,* 151 Fed. Cl. 276, 285 (2020) (*Altair II*). To be sure, defendant does not deny that plaintiffs have made such allegations: here, plaintiffs clearly allege a taking by federal legislation. Nor does defendant argue that plaintiffs' allegations are frivolous. Instead, defendant objects to the "true nature" of plaintiffs' claim, arguing that the alleged taking is "necessarily predicated" on the actions of a non-federal entity. *See* Def.'s Mot. to Dismiss at 11. Such an argument, however, goes to the merits of plaintiffs' claim rather than our jurisdiction, because it concerns whether plaintiffs can actually establish sufficient federal action to create a takings liability for the United States.

Although difficult to maintain at times, the distinction between a jurisdictional question and a question on the merits of a claim is not a meaningless one. The Federal Circuit has repeatedly held that once the plaintiff identifies a money-mandating source to establish Tucker Act jurisdiction, whether the plaintiff is entitled to relief under that source is a question on the merits of the claim. *See Greenlee Cnty., Ariz. v. United States,* 487 F.3d 871, 876 (Fed. Cir. 2007); *Doe v. United States,* 463 F.3d 1314, 1325 (Fed. Cir. 2006). There is, in short, "no further jurisdictional requirement that the court determine whether the additional allegations of the complaint state a nonfrivolous claim on the merits." *See Jan's Helicopter*

Serv., Inc. v. Fed. Aviation Admin., 525 F.3d 1299, 1309 (Fed. Cir. 2008). Thus, whether a particular government action is sufficient to create a takings liability is a question that we address when we evaluate a motion to dismiss for failure to state a claim. *See Del-Rio Drilling Programs, Inc. v. United States,* 146 F.3d 1358, 1362 (Fed. Cir. 1998).

Because plaintiffs' complaint unambiguously alleges that federal action took their property without just compensation, we have subject matter jurisdiction under the Tucker Act. *See Altair II,* 151 Fed. Cl. at 288 (assuming jurisdiction over claims alleging that Congress's enactment of PROMESA effected a taking).

B. PROMESA Does Not Displace This Court's Tucker Act Jurisdiction over Plaintiffs' Takings Claim.

Defendant also argues that this court lacks subject matter jurisdiction because PROMESA mandates that this action be brought in the district court for the District of Puerto Rico:

> Except as provided in . . . title III (relating to adjustments of debts), any action against the Oversight Board, and any action otherwise arising out of this Act, in whole or in part, shall be brought in a United States district court for the covered territory. . . . 48 U.S.C. § 2126(a).

Defendant asserts as a threshold matter that this action "'arises out of' PROMESA, if not 'in whole' then certainly at least 'in part,' because [plaintiffs'] takings claim is explicitly based on Congress's enactment of PROMESA." Def.'s Mot. to Dismiss at 14. Defendant then argues that the broad and mandatory language of § 2126(a)—as seen in the use of "any" and "shall"—is sufficient indication of Congress's intent to displace Tucker Act jurisdiction over plaintiffs' takings claim. It maintains that "[i]f a statute is clear enough in making another forum exclusive, it does not need to 'mention' the Tucker Act by name, refer to the Fifth Amendment or constitutional claims, nor does it need to use any other magic words to exclude this Court from its application." Def.'s Reply at 5.

Assuming for now that plaintiffs' takings claim arises out of PROMESA, in whole or in part, we do not find in PROMESA the kind of clear congressional intent required to displace this court's jurisdiction under the Tucker Act. Although Congress has the power to withdraw Tucker Act jurisdiction, including jurisdiction over takings claims, *see Horne v. Dep't of Agric.,* 569 U.S. 513, 527 (2013), a withdrawal of Tucker Act jurisdiction by implication is disfavored. *Ruckelshaus v. Monsanto Co.,* 467 U.S. 986, 1017 (1984). Thus, Tucker Act jurisdiction is not displaced unless another remedial scheme reflects Congress's "unambiguous intention to withdraw the Tucker Act remedy" otherwise available to the plaintiff. *See Acceptance Ins. Cos. Inc. v. United States,* 503 F.3d 1328, 1336 (Fed. Cir. 2007). In undertaking this analysis, courts must examine "the purpose of the [statute alleged to displace the Tucker Act], the entirety of its text, and the structure of review that it establishes." *Horne,* 569 U.S. at 527.

Examining the entirety of PROMESA shows, first of all, that requiring plaintiffs to bring their takings claim in district court amounts to limiting the remedies they may seek. Because PROMESA does not itself waive sovereign immunity,[9] a plaintiff suing the United States for monetary relief must look to either the Tucker Act or the Little Tucker Act for a waiver of sovereign immunity. The Little Tucker Act, however, allows the district court to award only up to $10,000 of monetary relief—which is less than the amount plaintiffs seek in this action. Thus, were plaintiffs to sue in district court, the district court would lack jurisdiction to grant the monetary relief that they seek. Defendant did not assert otherwise at oral argument, merely pointing to forms of equitable relief which the district court could have granted had the plaintiffs brought their takings claim there earlier, such as declaring the enactment of PROMESA unconstitutional under the Declaratory Judgment Act or refusing to confirm the Plan. *See* Oral Arg. at 7:00 to 9:50.

Equitable relief, however, cannot replace monetary relief in takings suits. As the Supreme Court has

9. There is no provision of PROMESA that may be read as an unequivocal waiver of sovereign immunity. Remedies contemplated under § 2126 do not include relief sought against the United States:

> Except with respect to any orders entered to remedy constitutional violations, no order of any court granting declaratory or injunctive relief against the Oversight Board, including relief permitting or requiring the obligation, borrowing, or expenditure of funds, shall take effect during the pendency of the action before such court. . . . §2126(c).

repeatedly held, equitable relief is "generally unavailable" for takings claims because "[a]s long as an adequate provision for obtaining just compensation exists, there is no basis to enjoin the government's action effecting a taking." *See Knick v. Township of Scott, Pa.,* 139 S. Ct. 2162, 2176 (2019); *E. Enters. v. Apfel,* 524 U.S. 498, 521 (1998) ("[T]he Declaratory Judgment Act allows individuals threatened with a taking to seek declaration of the constitutionality of the disputed government action before *potentially uncompensable* damages are sustained.") (internal citation and quotation marks omitted) (emphasis added). Indeed, except where government action "fails to meet the 'public use' requirement" or "is so arbitrary as to violate due process," the Takings Clause does not actually prohibit government interference with private property. *See Lingle v. Chevron U.S.A., Inc.,* 544 U.S. 528, 543 (2005). The Takings Clause is "designed not to limit the governmental interference with property rights *per se,* but to secure *compensation* in the event of otherwise proper interference amounting to a taking." *Id.* at 537 (internal citation and quotation marks omitted).

In the light of these principles, it is clear that monetary relief is the sole remedy that plaintiffs could in fact seek for the alleged taking. First, plaintiffs lack a basis for injunctive or declaratory relief because they do not allege that PROMESA fails to meet the public use requirement or is so arbitrary as to violate due process. *See* Compl. ¶ 35 (acknowledging that PROMESA was enacted for the "public purpose of ameliorating Puerto Rico's financial crisis"). Moreover, the case that defendant cites as an example of the Title III court's refusal to confirm a plan for violation of the Fifth Amendment is inapposite: there, "no one dispute[d] that [Puerto Rico] engaged in prepetition takings of some property." *In re Fin. Oversight & Mgmt. Bd.,* 41 F.4th 29, 43 (1st Cir. 2022). The debtor thus had an *existing* obligation to pay just compensation and the question before the Title III court was whether the Fifth Amendment permitted the impairment of that obligation through bankruptcy. *See id.* at 46. Defendant does not cite, and we have not found, a case in which the Title III court refused to confirm a plan because the plan itself would effect an uncompensated taking.

Given the inadequacy of remedies available in district court for plaintiffs' takings claim, we do not find in PROMESA unambiguous congressional intent to displace this court's Tucker Act jurisdiction. Indeed, this case is unlike those cases in which Tucker Act jurisdiction was displaced by a "specific and comprehensive scheme for administrative and judicial review" of the plaintiff's takings claim. *See Alpine PCS, Inc. v. United States,* 878 F.3d, 1086, 1092 (Fed. Cir. 2018). In such cases, two conditions were met: first, the alleged taking resulted from a federal agency's action; second, Congress had created a statutory framework for both administrative and judicial review of that agency's actions. *See Alpine PCS, Inc.,* 878 F.3d at 1097-98 (explaining how the Communications Act provides for administrative and judicial review of challenges to license cancellations, including claims that a cancellation effected a taking); *Horne,* 569 U.S. at 527 (explaining how the Agricultural Marketing Agreement Act provides for administrative and judicial review of objections to marketing orders, including claims that a marketing order effected a taking); *Vereda, Ltda. v. United States,* 271 F.3d 1367, 1375 (Fed. Cir. 2001) (explaining how the Controlled Substance Act provides for administrative and judicial review of challenges to forfeitures of property, including claims that a forfeiture effected a taking). Neither of those conditions, however, are met here. Plaintiffs allege a taking effected by Congress's enactment of PROMESA itself, which is not a claim for which PROMESA provides a scheme of administrative and judicial review.[10]

Because PROMESA does not reflect Congress's unambiguous intent to displace Tucker Act jurisdiction, we retain jurisdiction over plaintiffs' takings claim.

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10. Defendant's reliance on *Hinck v. United States,* 550 US. 501 (2007) is also misplaced because *Hinck* did not involve Tucker Act jurisdiction over takings claims. Instead, *Hinck* addressed whether 28 U.S.C. § 6404(h)(1) vests exclusive jurisdiction in the Tax Court to review § 6404(e)(1) determinations despite statutes granting jurisdiction to the district courts and the Court of Federal Claims to review tax refund actions. *See Hinck,* 550 U.S. at 507. And in answering that question in the affirmative, the Court relied not only on the principle that a "precisely drawn, detailed statute pre-empts more general remedies," but also on the principle that "when Congress enacts a specific remedy when no remedy was previously recognized . . . the remedy provided is generally regarded as exclusive." *See id.* at 506. The latter principle does not apply here because PROMESA did not create a previously unrecognized remedy for takings in violation of the Fifth Amendment.

C. Exercising Jurisdiction over Plaintiffs' Takings Claim Would Not Require Improper Review of the Title III Court's Decision.

Next, defendant argues that even if PROMESA does not displace the Tucker Act, this court still lacks jurisdiction because "considering the merits of [plaintiffs'] claim would require this Court to review and find error in the decisions of the Title III court in adjudicating COFINA's restructuring." Def.'s Mot. to Dismiss at 18. Specifically, defendant points out that the Title III court already considered and "rejected claims from junior COFINA bondholders that the confirmation plan arising from PROMESA effected a Fifth Amendment taking of the bondholders' liens on the SUT revenues." *Id.* at 19.

As is well established, this court "has no jurisdiction to review the merits of a decision rendered by a federal district court." *Shinnecock Indian Nation v. United States,* 782 F.3d 1345, 1352 (Fed. Cir. 2015); *see also Allustiarte v. United States,* 256 F.3d 1349, 1352 (Fed. Cir. 2001) (holding that the Court of Federal Claims lacks jurisdiction to review the decision of bankruptcy courts). We thus lack jurisdiction to hear claims which amount to a collateral attack on the judgment of the district court, such as a claim in which the plaintiff alleges that the district court effected a taking by improper application of the law. *See Shinnecock Indian Nation,* 782 F.3d at 1353.

But plaintiffs' takings claim is not a collateral attack on the decision of the Title III court. According to plaintiffs, the confirmation of the Plan "simply describes part of the process that resulted in the taking of COFINA Bondholders' property," a process to which plaintiffs attribute no legal error. *See* Pls.' Resp. at 11. Indeed, we have jurisdiction over plaintiffs' takings claim because it does not require us to scrutinize the Title III court's reasoning or result—the merits of plaintiffs' claim do not depend on whether the Title III court properly confirmed the Plan. *See Boise Cascade Corp. v. United States,* 296 F.3d 1339, 1345 (Fed. Cir. 2002) (holding that the Court of Federal Claims had jurisdiction over the plaintiffs' takings claim because the claim was "not based on the propriety of the district court's decision"). Plaintiffs could succeed on the merits even if the Title III court's decision was proper, because the theory of liability behind their takings claim is an attack on Congress's enactment of PROMESA for authorizing the Title III process in the first place.

Moreover, the takings claim that the Title III court rejected is not the same takings claim plaintiffs bring here. That is, the Title III court only considered whether the Plan and Settlement Agreement submitted by the Oversight Board would take COFINA bondholders' property without just compensation. *See In re. Fin. Oversight,* 361 F. Supp. 3d at 244 ("[T]he character of the governmental action strongly supports the Court's conclusion that the Plan and Settlement Agreement do not result in an unconstitutional taking."); *id.* at 245 ("The objections to the Plan and Settlement Agreement based upon the Takings Clause of the United States Constitution are therefore overruled."). The Title III court did *not* address whether the United States could be held liable for a taking based specifically on Congress's enactment of PROMESA.

Because plaintiffs' takings claim is not an improper collateral attack on the decision of the Title III court, we retain jurisdiction over their claim.

D. This Court Has Jurisdiction over the Claims of Plaintiffs Added in the Amended Complaints.

Defendant's final argument is that we lack jurisdiction over the claims of plaintiffs added in the amended complaints, because the amendments were filed outside of the six-year statute of limitations for this court. *See* 28 U.S.C. § 2501 ("Every claim of which the United States Court of Federal claims has jurisdiction shall be barred unless the petition thereon is filed within six years after such claim first accrues."). In making this argument, defendant asserts—based on the allegations of the complaint—that the underlying takings claim accrued on June 30, 2016, when PROMESA was enacted.[11] It apparently concedes that the originally named plaintiffs filed timely claims, whereas the amended complaints untimely added the claims of eight other plaintiffs.

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11. Plaintiffs did not challenge this assumption about claim accrual in their response to defendant's motion, even though they acknowledged at oral argument that their claim would not have been ripe in 2016. Notwithstanding the imprecision in plaintiffs' takings claim, we take their allegations at face value for purposes of ruling on defendant's jurisdictional arguments. Because plaintiffs allege that Congress's enactment of PROMESA took their property without just compensation, we construe June 30, 2016 to be the date of taking, which makes claims filed after July 1, 2022 untimely in the absence of tolling or RCFC 15(c)(1)(B).

Defendant argues that we lack jurisdiction over the claims of untimely added plaintiffs because § 2501 may not be equitably tolled by the filing of a class action complaint. We need not address the availability of equitable tolling, however, because tolling is not the only way to add plaintiffs who might otherwise be barred by § 2501. RCFC 15(c)(1)(B) provides another avenue: the rule allows complaints to be amended outside the statute of limitations so long as the amendment "relates back" to the original pleading. *See Big Oak Farms, Inc. v. United States,* 141 Fed. Cl. 482, 489 (2019) (identifying RCFC 15(c)(1)(B) and class action tolling as two different avenues for adding plaintiffs outside the statute of limitations); *Barron Bancshares, Inc. v. United States,* 366 F.3d 1360, 1370 (Fed. Cir. 2004) (holding that RCFC 15(c) "overcome[s]" jurisdictional challenges based on § 2501). To determine whether the addition of plaintiffs sufficiently "relates back" under RCFC 15(c)(1)(B), this court weighs whether: "(1) the claim arose out of the 'same conduct, transaction, or occurrence' as the original complaint; (2) the new plaintiff shares an 'identity of interest' with the original complaint; (3) the defendant had 'fair notice' of the new plaintiff 's claim; and (4) the addition of the new plaintiff causes the defendant prejudice." *See Big Oak Farms,* 141 Fed. Cl. at 489.

All four of these factors weigh in favor of finding that the addition of plaintiffs "relates back" to the original complaint. The additional plaintiffs allege, just like the original plaintiffs, that they are owners of a substantial quantity of First Subordinated Secured COFINA bonds and that their property interests as bondholders were taken without just compensation as the direct and intended result of Congress's enactment of COFINA. *See* Compl. ¶ 1-8. Moreover, whether the additional plaintiffs can establish a claim does not depend on factual circumstances unique to each plaintiff; whatever effect the enactment of PROMESA may have had on the value of COFINA bonds and the junior COFINA bondholders' rate of recovery, the impact would have been the same. *See Big Oak Farms*, 141 Fed. Cl. at 490-91 (finding no "identity of interest" or "fair notice" to the defendant because "the duration and severity of the flooding must be assessed on a case by case basis along with the character of the land at issue" for each plaintiff to establish a takings claim). Nor does the addition of eight plaintiffs cause undue prejudice to defendant by significantly expanding discovery or unreasonably broadening the issues. *See id.* at 491 ("Increasing the number of plaintiffs by over 100 creates a clear litigation burden particularly given the years that have passed and the proof required to prove impacts to property more than seven years after the flooding in 2011.").

Because RCFC 15(c)(1)(B) allows the amendments that were made, we find that we have jurisdiction over the claims of all plaintiffs currently named in the second amended complaint. Having found no impediment to our jurisdiction over this action, we next address whether plaintiffs state a claim upon which relief could be granted.

II. Plaintiffs Fail to State a Claim Under RCFC 12(b)(6).

The court may grant a motion to dismiss for failure to state a claim when "a complaint does not allege facts that show the plaintiff is entitled to the legal remedy sought." *Steffen v. United States,* 995 F.3d 1377, 1379 (Fed. Cir. 2021). Although the court is required to accept as true all factual allegations pleaded when ruling on a RCFC 12(b)(6) motion, the complaint must contain "enough facts to state a claim to relief that is plausible on its face" to survive dismissal. *Frankel v. United States,* 842 F.3d 1246, 1249 (Fed. Cir. 2016) (quoting *Bell Atl. Corp. v. Twombly,* 550 U.S. 544, 570 (2007)). A claim is plausible on its face "when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* (quoting *Ashcroft v. Iqbal,* 556 U.S. 662, 678 (2009). Mere "labels and conclusions" or "a formulaic recitation of the elements of a cause of action" are not sufficient. *Twombly,* 550 U.S. at 555.

Defendant makes five arguments in support of its motion to dismiss under RCFC 12(b)(6): (1) plaintiffs do not plausibly allege cognizable property interests; (2) even if plaintiffs allege cognizable property interests, collateral estoppel bars the claim that such interests were taken; (3) there is no government action sufficient to establish a taking because Congress did not command or coerce the Oversight Board to restructure COFINA's debts; (4) plaintiffs allege a mere frustration of contract rights by the government, which is insufficient to constitute a taking; (5) plaintiffs fail to state a cognizable regulatory takings claim under *Penn Central.* As explained below, we reject the first two arguments but agree with defendant's third argument that Congress's enactment of PROMESA is not a sufficient basis to support a takings claim. Having concluded that plaintiffs fail to state a claim upon which relief could be granted, we do not find it necessary to decide defendant's remaining two arguments.

A. Plaintiffs' Allegations Regarding Their Property Interests Do Not Warrant Dismissal.

When adjudicating a takings claim, the court must first determine whether the plaintiff has established a property interest cognizable under the Fifth Amendment. *Huntleigh USA Corp. v. United States,* 525 F.3d 1370, 1377 (Fed. Cir. 2008). It is only after identifying a valid property interest that the court must determine "whether the government action at issue amounted to a compensable taking of that property interest." *Id.* at 1378 (quoting *Am. Pelagic Fishing Co., L.P. v. United States,* 379 F.3d 1363, 1372 (Fed. Cir. 2004)).

The Fifth Amendment protects tangible property, such as real and personal property, as well as intangible property, such as contractual rights and rights to enforce a lien. *Id.* at 1377-78 (holding that the contract rights the plaintiff alleged were valid property interests under the Fifth Amendment); *Armstrong v. United States,* 364 U.S. 40, 44 (1960) (holding that the petitioners' rights to enforce their asserted liens were compensable property interests under the Fifth Amendment).

Because the Fifth Amendment does not itself create a property interest, however, "the existence of a property interest is determined by reference to existing rules or understandings stemming from an independent source such as state law." *Phillips v. Wash. Legal Found.*, 524 U.S. 156, 164 (1998) (citing *Bd. of Regents of State Colls. v. Roth,* 408 U.S. 564, 577 (1972)). When the asserted property interest arose is also critical, because "only persons with a valid property interest *at the time of the taking* are entitled to compensation." *Reoforce, Inc. v. United States,* 853 F.3d 1249, 1263 (Fed. Cir.2017) (quoting *Wyatt v. United States,* 271 F.3d 1090, 1096 (Fed. Cir. 2001)); *see also A&D Auto Sales, Inc. v. United States,* 748 F.3d 1142, 1153 (Fed. Cir. 2014) (holding that plaintiffs had valid and compensable property interests because "[t]he challenged government action did not predate the acquisition of the plaintiffs' interests").

Plaintiffs allege in their complaint that they were "at all material times the owners of a substantial quantity of COFINA bonds," from which two types of cognizable property interests arise: first, a contractual right to repayment of principal and interest on the bonds, and second, a lien on the DSTF and all COFINA revenues that could be enforced in the event of a default on that repayment.[12] *See* Compl. ¶ 1-7. And as they clarify in their

12. A valid security interest would be limited to a lien on SUT revenues already collected at the time of the alleged taking, because Puerto Rico law does not recognize the mere expectancy of property as a property interest. *See In re Fin. Oversight,* 948 F.3d at 468 n.8 ("Puerto Rico law recognizes that the mere expectancy of property is not itself a property interest."); *id.* at 472 ("It is impossible to have a lien on something that does not exist.").

response to defendant's motion, the reference to "material times" means the date range from June 30, 2016, to February 5, 2019. *See* Pls.' Resp. at 17. Defendant argues, however, that plaintiffs fail to plausibly allege cognizable property interests because their complaint contains no more than a "boilerplate allegation" later supplemented with attorney argument. *See* Def.'s Reply at 12.

Although we agree that the complaint lacks specific factual allegations regarding each plaintiff's ownership of COFINA bonds, a right to repayment on the bonds as well as a lien on revenues are valid property interests, and there is no reason to believe that plaintiffs could not supply particularized allegations about when they acquired the bonds. *See Steffen,* 995 F.3d at 1380 (finding that granting leave to amend the complaint would be futile because the plaintiffs could not establish one of the statutory requirements as a matter of law). As such, dismissal under RCFC 12(b)(6) is not the appropriate remedy for plaintiffs' failure to include specific allegations establishing their bond ownership. *See A&D Auto Sales,* 748 F.3d at 1158-59 ("The plaintiffs have failed to properly allege economic loss, but at oral argument in this court they . . . made clear that they intended to establish loss of value. In this situation the appropriate remedy is to grant leave to amend to include specific allegations establishing loss of value."). Indeed, defendant's argument is belied by its next assertion, in which it contends that the Title III court already resolved the claim that plaintiffs' property interests (presumably not illusory) were taken.

B. Collateral Estoppel Does Not Bar Plaintiffs' Claim.

Collateral estoppel, or issue preclusion, "bar[s] the revisiting of issues that have already been litigated by the same parties or their privies based on the same cause of action." *Banner v. United States,* 238 F.3d 1348, 1354 (Fed. Cir. 2001). The four requirements of collateral estoppel are: "(1) the issues are identical to those in a prior proceeding, (2) the issues were actually litigated, (3) the determination of the issues was necessary to the resulting judgment, and (4) the party defending against preclusion had a full and fair opportunity to litigate the issues." *Id.* As discussed above, however, the takings claim that the Title III court addressed is not the same claim that plaintiffs present here: the Title III court did not decide whether the United States was liable for a taking based on Congress's enactment of PROMESA. Accordingly, the issues here are not identical to those in a prior proceeding, and collateral estoppel does not bar plaintiffs' claim.

C. Nevertheless, Regardless of Which Regulatory Takings Test Is Applied, Congress's Enactment of PROMESA Does Not Amount to a Taking as a Matter of Law.

Earlier, we rejected defendant's argument that we lack jurisdiction because plaintiffs' takings claim is necessarily predicated on the actions of the Oversight Board, a territorial entity. We took plaintiffs' allegations in the complaint at face value for purposes of our jurisdictional inquiry and held that whether there was sufficient federal action to warrant liability in the United States went to the merits of plaintiffs' claim, not to our jurisdiction. We now address that question on the merits.

Although it is clear that plaintiffs assert a regulatory taking, the parties disagree about which type of test applies. Plaintiffs argue for application of a *per se* regulatory takings test; defendant argues that the more nuanced *Penn Central* test applies. The dispute turns out to be immaterial, however. Irrespective of which test is applied, there is a fatal flaw in plaintiffs' logic. The United States has to have been responsible for the taking, yet, as we alluded to earlier, plaintiffs cannot complete their claim here without relying on what turn out to be the actions of independent actors. Indeed, it became clear at oral argument that plaintiffs recognize that nothing was taken from them by the mere passage of PROMESA—their property interests were impaired only after the Oversight Board, a non-federal entity, took a series of actions. Barring unusual circumstances not present here, however, a taking involving third parties is insufficient to amount to a compensable regulatory taking. *See A&D Auto Sales,* 748 F.3d at 1153.

The Federal Circuit held in *A&D Auto Sales* that although "[t]here is no per se rule either precluding or imposing liability when the government instigates action by a third party," there are "two broad principles" to guide the analysis. *Id.* First, "government action directed to a third party does not give rise to a taking if its effects on the plaintiff are merely unintended or collateral." *Id.* Second, even if the effects on the plaintiff are direct and intended, takings liability is limited to circumstances in which "the third party is acting as the government's agent or the government's influence over the third party was coercive rather than merely persuasive." *See id.* at 1154.

Thus, to be entitled to just compensation, plaintiffs would need to show that: (1) Congress enacted PROMESA with the intent to restructure COFINA's debts and take plaintiffs' property interests as COFINA bondholders; and (2) either the Oversight Board acted as an agent of the United States in filing a Title III petition for COFINA or the United States coerced the Oversight Board to do so. Yet, even if we assumed that Congress intended the restructuring of COFINA's debts—despite the fact that PROMESA does not once mention COFINA—plaintiffs could not get past the second hurdle. They in fact make no attempt to do so, alleging neither an agency relationship nor coercion. *See* Oral Arg. at 48:44 to 49:04 ("There wasn't coercion. We're not arguing that. What we are saying is there was only one reason why Congress passed PROMESA. And that was to get at the funds held by COFINA and a handful of other entities that had also issued bonds.").

Indeed, it is clear that plaintiffs could not establish either an agency relationship or coercion in this case as a matter of law. Whereas "[a]n agency relationship may exist where the third party is hired or granted legal authority to carry out the government's business," *A&D Auto Sales,* 748 F.3d at 1154, the Supreme Court has held that the Oversight Board is a territorial entity that "acts not on behalf of the United States, but on behalf of, and in the interests of, Puerto Rico" in a Title III proceeding. *Fin. Oversight & Mgmt. Bd. for P.R. v. Aurelius Inv., LLC,* 140 S. Ct. 1649, 1662 (2020). As such, the Oversight Board could not have acted as an agent of the United States in the Title III case for COFINA. *See Altair II,* 151 Fed. Cl. at 287 ("The acts of the [Oversight] Board are not attributable, directly or indirectly, to the United States in a manner needed to sustain liability under the fifth amendment for an alleged taking."). Similarly, no reading of the language of PROMESA could support a finding that the United States required the Oversight Board to initiate Title III proceedings on behalf of COFINA. To the contrary, PROMESA expressly provided for the Oversight Board to act in its "sole discretion" at each of the step that was necessary for the restructuring of COFINA's debts.

Although plaintiffs cite a number of cases where mere "authorization" by the federal government was sufficient to constitute a taking, those cases are not apposite. *See, e.g., Cedar Point Nursery v. Hassid,* 141 S. Ct. 2063 (2021); *Preseault v. United States,* 100 F.3d 1525 (Fed. Cir. 1996); *Hendler v. United States,* 952 F.2d 1364 (Fed. Cir. 1991). Whereas each of those cases involved authorization of physical takings, plaintiffs here do not and could not allege a physical appropriation of property. Such factual predicates, however, matter. Under the Supreme Court's takings jurisprudence, the difference between physical and non-physical takings is significant enough that it is "inappropriate to treat cases involving physical takings as controlling precedents for the evaluation of a claim that there has been a 'regulatory taking,' and vice versa." *See Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Plan.*

Agency, 535 U.S. 302, 323 (2002). Plaintiffs do not cite, and we have not found, any case in which mere authorization was sufficient to constitute a compensable taking when property was not physically appropriated.

Because the mere enactment of PROMESA had no impact on plaintiffs' property interests, plaintiffs cannot receive just compensation without showing that the Oversight Board acted either as an agent of the United States or under coercion of the United States. Plaintiffs, however, cannot show either. Accordingly, Congress's enactment of PROMESA is not sufficient federal government action to constitute a taking. We therefore dismiss plaintiffs' claim for failure to state a claim upon which relief can be granted.

CONCLUSION

For the foregoing reasons, defendant's motion for dismissal under RCFC 12(b)(6) is GRANTED. The Clerk is directed to enter judgment accordingly. No costs.

/s/
Eric G. Bruggink
Senior Judge

APPENDIX C — JUDGMENT OF THE UNITED STATES COURT OF FEDERAL CLAIMS, FILED JUNE 6, 2023

IN THE UNITED STATES
COURT OF FEDERAL CLAIMS

No. 22-725 C

JONATHAN DINH, *et al.*,

Plaintiffs,

v.

THE UNITED STATES

Defendant.

Filed: June 6, 2023

JUDGMENT

Pursuant to the court's Opinion, filed June 5, 2023, granting defendant's motion to dismiss,

IT IS ORDERED AND ADJUDGED this date, pursuant to Rule 58, that plaintiffs' complaint is dismissed for failure to state a claim upon which relief can be granted. No costs.

Lisa L. Reyes
Clerk of Court

By: s/ Debra L. Samler

Deputy Clerk

Appendix C

NOTE: As to appeal to the United States Court of Appeals for the Federal Circuit, 60 days from this date, see RCFC 58.1, re number of copies and listing of all plaintiffs. Filing fee is $505.00.

APPENDIX D — CONSTITUTIONAL PROVISION INVOLVED

U.S.C.A. Const. Amend. V

Amendment V. Grand Jury Indictment for Capital Crimes; Double Jeopardy; Self-Incrimination; Due Process of Law; Takings without Just Compensation

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

APPENDIX E — EXCERPTS OF PUBLIC LAW 114–187—JUNE 30, 2016

48 USC 2101. **SEC. 2. EFFECTIVE DATE.**

(a) In General.—Except as provided in subsection (b), this Act shall take effect on the date of the enactment of this Act.

(b) Title III and Title VI.—

(1) Title III shall apply with respect to cases commenced under title III on or after the date of the enactment of this Act.

(2) Titles III and VI shall apply with respect to debts, claims, and liens (as such terms are defined in section 101 of title 11, United States Code) created before, on, or after such date.

Appendix E

48 USC 2104. **SEC. 5. DEFINITIONS.**

In this Act—

(1) AGREED ACCOUNTING STANDARDS.—The term "agreed accounting standards" means modified accrual accounting standards or, for any period during which the Oversight Board determines in its sole discretion that a territorial government is not reasonably capable of comprehensive reporting that complies with modified accrual accounting standards, such other accounting standards as proposed by the Oversight Board.

(2) BOND.—The term "Bond" means a bond, loan, letter of credit, other borrowing title, obligation of insurance, or other financial indebtedness for borrowed money, including rights, entitlements, or obligations whether such rights, entitlements, or obligations arise from contract, statute, or any other source of law, in any case, related to such a bond, loan, letter of credit, other borrowing title, obligation of insurance, or other financial indebtedness in physical or dematerialized form of which the issuer, obligor, or guarantor is the territorial government.

(3) BOND CLAIM.—The term "Bond Claim" means, as it relates to a Bond—

> (A) right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured; or

(B) right to an equitable remedy for breach of performance if such breach gives rise to a right to payment, whether or not such right to an equitable remedy is reduced to judgment, fixed, contingent, matured, unmatured, disputed, undisputed, secured, or unsecured.

(4) BUDGET.—The term ''Budget'' means the Territory Budget or an Instrumentality Budget, as applicable.

(5) PUERTO RICO.—The term "Puerto Rico" means the Commonwealth of Puerto Rico.

(6) COMPLIANT BUDGET.—The term ''compliant budget'' means a budget that is prepared in accordance with—

(A) agreed accounting standards; and

(B) the applicable Fiscal Plan.

(7) COVERED TERRITORIAL INSTRUMENTALITY.—The term ''covered territorial instrumentality'' means a territorial instrumentality designated by the Oversight Board pursuant to section 101 to be subject to the requirements of this Act.

(8) COVERED TERRITORY.—The term ''covered territory'' means a territory for which an Oversight Board has been established under section 101.

(9) Executive director.—The term "Executive Director" means an Executive Director appointed under section 103(a).

(10) Fiscal plan.—The term "Fiscal Plan" means a Territory Fiscal Plan or an Instrumentality Fiscal Plan, as applicable.

(11) Government of puerto rico.—The term "Government of Puerto Rico" means the Commonwealth of Puerto Rico, including all its territorial instrumentalities.

(12) Governor.—The term "Governor" means the chief executive of a covered territory.

(13) Instrumentality budget.—The term "Instrumentality Budget" means a budget for a covered territorial instrumentality, designated by the Oversight Board in accordance with section 101, submitted, approved, and certified in accordance with section 202.

(14) Instrumentality fiscal plan.—The term "Instrumentality Fiscal Plan" means a fiscal plan for a covered territorial instrumentality, designated by the Oversight Board in accordance with section 101, submitted, approved, and certified in accordance with section 201.

(15) Legislature.—The term "Legislature" means the legislative body responsible for enacting the laws of a covered territory.

(16) MODIFIED ACCRUAL ACCOUNTING STANDARDS.—The term "modified accrual accounting standards" means recognizing revenues as they become available and measurable and recognizing expenditures when liabilities are incurred, in each case as defined by the Governmental Accounting Standards Board, in accordance with generally accepted accounting principles.

(17) OVERSIGHT BOARD.—The term "Oversight Board" means a Financial Oversight and Management Board established in accordance with section 101.

(18) TERRITORIAL GOVERNMENT.—The term "territorial government" means the government of a covered territory, including all covered territorial instrumentalities.

(19) TERRITORIAL INSTRUMENTALITY.—

(A) IN GENERAL.—The term "territorial instrumentality" means any political subdivision, public agency, instrumentality—including any instrumentality that is also a bank—or public corporation of a territory, and this term should be broadly construed to effectuate the purposes of this Act.

(B) EXCLUSION.—The term "territorial instrumentality" does not include an Oversight Board.

(20) TERRITORY.—The term “territory” means—

(A) Puerto Rico;

(B) Guam;

(C) American Samoa;

(D) the Commonwealth of the Northern Mariana Islands; or

(E) the United States Virgin Islands.

(21) TERRITORY BUDGET.—The term ‘‘Territory Budget’ means a budget for a territorial government submitted, approved, and certified in accordance with section 202.

(22) TERRITORY FISCAL PLAN.—The term “Territory Fiscal Plan’’ means a fiscal plan for a territorial government submitted, approved, and certified in accordance with section 201.

Appendix E

TITLE I—ESTABLISHMENT AND ORGANIZATION OF OVERSIGHT BOARD

48 USC 2121. **SEC. 101. FINANCIAL OVERSIGHT AND MANAGEMENT BOARD.**

(a) PURPOSE.—The purpose of the Oversight Board is to provide a method for a covered territory to achieve fiscal responsibility and access to the capital markets.

(b) ESTABLISHMENT.—

(1) PUERTO RICO.—A Financial Oversight and Management Board is hereby established for Puerto Rico.

(2) CONSTITUTIONAL BASIS.—The Congress enacts this Act pursuant to article IV, section 3 of the Constitution of the United States, which provides Congress the power to dispose of and make all needful rules and regulations for territories.

(c) TREATMENT.—An Oversight Board established under this section—

(1) shall be created as an entity within the territorial government for which it is established in accordance with this title; and

(2) shall not be considered to be a department, agency, establishment, or instrumentality of the Federal Government.

(d) OVERSIGHT OF TERRITORIAL INSTRUMENTALITIES.—

(1) DESIGNATION.—

(A) IN GENERAL.—An Oversight Board, in its sole discretion at such time as the Oversight Board determines to be appropriate, may designate any territorial instrumentality as a covered territorial instrumentality that is subject to the requirements of this Act.

(B) BUDGETS AND REPORTS.—The Oversight Board may require, in its sole discretion, the Governor to submit to the Oversight Board such budgets and monthly or quarterly reports regarding a covered territorial instrumentality as the Oversight Board determines to be necessary and may designate any covered territorial instrumentality to be included in the Territory Budget; except that the Oversight Board may not designate a covered territorial instrumentality to be included in the Territory Budget if applicable territory law does not require legislative approval of such covered territorial instrumentality's budget.

(C) SEPARATE INSTRUMENTALITY BUDGETS AND REPORTS.—The Oversight Board in its sole discretion may or, if it requires a budget from a covered territorial instrumentality whose budget does not require legislative approval under applicable territory law, shall designate a covered territorial instrumentality to be the subject of an Instrumentality Budget separate from the applicable Territory Budget and require that the Governor develop such an Instrumentality Budget.

(D) INCLUSION IN TERRITORY FISCAL PLAN.—The Oversight Board may require, in its sole discretion, the Governor to include a covered territorial instrumentality in the applicable Territory Fiscal Plan. Any covered territorial instrumentality submitting a separate Instrumentality Fiscal Plan must also submit a separate Instrumentality Budget.

(E) SEPARATE INSTRUMENTALITY FISCAL PLANS.—The Oversight Board may designate, in its sole discretion, a covered territorial instrumentality to be the subject of an Instrumentality Fiscal Plan separate from the applicable Territory Fiscal Plan and require that the Governor develop such an Instrumentality Fiscal Plan. Any covered territorial instrumentality submitting a separate Instrumentality Fiscal Plan shall also submit a separate Instrumentality Budget.

(2) Exclusion.—

(A) In general.—An Oversight Board, in its sole discretion, at such time as the Oversight Board determines to be appropriate, may exclude any territorial instrumentality from the requirements of this Act.

(B) Treatment.—A territorial instrumentality excluded pursuant to this paragraph shall not be considered to be a covered territorial instrumentality.

(e) Membership.—

(1) In general.—

(A) The Oversight Board shall consist of seven members appointed by the President who meet the qualifications described in subsection (f) and section 109(a).

(B) The Board shall be comprised of one Category A member, one Category B member, two Category C members, one Category D member, one Category E member, and one Category F member.

(2) Appointed members.—

(A) The President shall appoint the individual members of the Oversight Board, of which—

(i) the Category A member should be selected from a list of individuals submitted by the Speaker of the House of Representatives;

(ii) the Category B member should be selected from a separate, non-overlapping list of individuals submitted by the Speaker of the House of Representatives;

(iii) the Category C members should be selected from a list submitted by the Majority Leader of the Senate;

(iv) the Category D member should be selected from a list submitted by the Minority Leader of the House of Representatives;

(v) the Category E member should be selected from a list submitted by the Minority Leader of the Senate; and

(vi) the Category F member may be selected in the President's sole discretion.

(B) After the President's selection of the Category F Board member, for purposes of subparagraph (A) and within a timely manner—

(i) the Speaker of the House of Representatives shall submit two non-overlapping lists of at least three individuals to the President; one list shall include three individuals who maintain a primary residence in the territory or have a primary place of business in the territory;

(ii) the Senate Majority Leader shall submit a list of at least four individuals to the President;

(iii) the Minority Leader of the House of Representatives shall submit a list of at least three individuals to the President; and

(iv) the Minority Leader of the Senate shall submit a list of at least three individuals to the President.

(C) If the President does not select any of the names submitted under subparagraphs (A) and (B), then whoever submitted such list may supplement the lists provided in this subsection with additional names.

(D) The Category A member shall maintain a primary residence in the territory or have a primary place of business in the territory.

(E) With respect to the appointment of a Board member in Category A, B, C, D, or E, such an appointment shall be by and with the advice and consent of the Senate, unless the President appoints an individual from a list, as provided in this subsection, in which case no Senate confirmation is required.

(F) In the event of a vacancy of a Category A, B, C, D, or E Board seat, the corresponding congressional leader referenced in subparagraph (A) shall submit a list pursuant to this subsection within a timely manner of the Board member's resignation or removal becoming effective.

(G) With respect to an Oversight Board for Puerto Rico, in the event any of the 7 members have not been appointed by September 1, 2016, then the President shall appoint an individual from the list for the current vacant category by September 15, 2016, provided that such list includes at least 2 individuals per vacancy who meet the requirements set forth in subsection (f) and section 109, and are willing to serve.

(3) Ex officio member.—The Governor, or the Governor's designee, shall be an ex officio member of the Oversight Board without voting rights.

(4) CHAIR.—The voting members of the Oversight Board shall designate one of the voting members of the Oversight Board as the Chair of the Oversight Board (referred to hereafter in this Act as the "Chair") within 30 days of the full appointment of the Oversight Board.

(5) TERM OF SERVICE.—

(A) IN GENERAL.—Each appointed member of the Oversight Board shall be appointed for a term of 3 years.

(B) REMOVAL.—The President may remove any member of the Oversight Board only for cause.

(C) CONTINUATION OF SERVICE UNTIL SUCCESSOR APPOINTED.—Upon the expiration of a term of office, a member of the Oversight Board may continue to serve until a successor has been appointed.

(D) REAPPOINTMENT.—An individual may serve consecutive terms as an appointed member, provided that such reappointment occurs in compliance with paragraph (6).

(6) VACANCIES.—A vacancy on the Oversight Board shall be filled in the same manner in which the original member was appointed.

(f) Eligibility for Appointments.—An individual is eligible for appointment as a member of the Oversight Board only if the individual—

(1) has knowledge and expertise in finance, municipal bond markets, management, law, or the organization or operation of business or government; and

(2) prior to appointment, an individual is not an officer, elected official, or employee of the territorial government, a candidate for elected office of the territorial government, or a former elected official of the territorial government.

(g) No Compensation for Service.—Members of the Oversight Board shall serve without pay, but may receive reimbursement from the Oversight Board for any reasonable and necessary expenses incurred by reason of service on the Oversight Board.

(h) Adoption of Bylaws for Conducting Business of Oversight Board.—

(1) In general.—As soon as practicable after the appointment of all members and appointment of the Chair, the Oversight Board shall adopt bylaws, rules, and procedures governing its activities under this Act, including procedures for hiring experts and consultants. Such bylaws, rules, and procedures shall be public documents, and shall be submitted by the Oversight Board

upon adoption to the Governor, the Legislature, the President, and Congress. The Oversight Board may hire professionals as it determines to be necessary to carry out this Act.

(2) ACTIVITIES REQUIRING APPROVAL OF MAJORITY OF MEMBERS.—Under the bylaws adopted pursuant to paragraph (1), the Oversight Board may conduct its operations under such procedures as it considers appropriate, except that an affirmative vote of a majority of the members of the Oversight Board's full appointed membership shall be required in order for the Oversight Board to approve a Fiscal Plan under section 201, to approve a Budget under section 202, to cause a legislative act not to be enforced under section 204, or to approve or disapprove an infrastructure project as a Critical Project under section 503.

(3) ADOPTION OF RULES AND REGULATIONS OF TERRITORIAL GOVERNMENT.—The Oversight Board may incorporate in its bylaws, rules, and procedures under this subsection such rules and regulations of the territorial government as it considers appropriate to enable it to carry out its activities under this Act with the greatest degree of independence practicable.

(4) EXECUTIVE SESSION.—Upon a majority vote of the Oversight Board's full voting membership, the Oversight Board may conduct its business

in an executive session that consists solely of the Oversight Board's voting members and any professionals the Oversight Board determines necessary and is closed to the public, but only for the business items set forth as part of the vote to convene an executive session.

48 USC 2126. **SEC. 106. TREATMENT OF ACTIONS ARISING FROM ACT.**

(a) JURISDICTION.—Except as provided in section 104(f)(2) (relating to the issuance of an order enforcing a subpoena), and title III (relating to adjustments of debts), any action against the Oversight Board, and any action otherwise arising out of this Act, in whole or in part, shall be brought in a United States district court for the covered territory or, for any covered territory that does not have a district court, in the United States District Court for the District of Hawaii.

(b) APPEAL.—Notwithstanding any other provision of law, any order of a United States district court that is issued pursuant to an action brought under subsection (a) shall be subject to review only pursuant to a notice of appeal to the applicable United States Court of Appeals.

(c) TIMING OF RELIEF.—Except with respect to any orders entered to remedy constitutional violations, no order of any court granting declaratory or injunctive relief against the Oversight Board, including relief permitting or requiring the obligation, borrowing, or expenditure of funds, shall take effect during the pendency of the action before such court, during the time appeal may be taken, or (if appeal is taken) during the period before the court has entered its final order disposing of such action.

(d) EXPEDITED CONSIDERATION.—It shall be the duty of the applicable United States District Court, the applicable United States Court of Appeals, and, as applicable, the

Supreme Court of the United States to advance on the docket and to expedite to the greatest possible extent the disposition of any matter brought under this Act.

(e) Review of Oversight Board Certifications.— There shall be no jurisdiction in any United States district court to review challenges to the Oversight Board's certification determinations under this Act.

48 USC 2128. **SEC. 108. AUTONOMY OF OVERSIGHT BOARD.**

(a) In General.—Neither the Governor nor the Legislature may—

(1) exercise any control, supervision, oversight, or review over the Oversight Board or its activities; or

(2) enact, implement, or enforce any statute, resolution, policy, or rule that would impair or defeat the purposes of this Act, as determined by the Oversight Board.

(b) Oversight Board Legal Representation.—In any action brought by, on behalf of, or against the Oversight Board, the Oversight Board shall be represented by such counsel as it may hire or retain so long as the representation complies with the applicable professional rules of conduct governing conflicts of interests.

Appendix E

48 USC 2145. **SEC. 205. RECOMMENDATIONS ON FINANCIAL STABILITY AND MANAGEMENT RESPONSIBILITY.**

(a) IN GENERAL.—The Oversight Board may at any time submit recommendations to the Governor or the Legislature on actions the territorial government may take to ensure compliance with the Fiscal Plan, or to otherwise promote the financial stability, economic growth, management responsibility, and service delivery efficiency of the territorial government, including recommendations relating to—

(1) the management of the territorial government's financial affairs, including economic forecasting and multiyear fiscal forecasting capabilities, information technology, placing controls on expenditures for personnel, reducing benefit costs, reforming procurement practices, and placing other controls on expenditures;

(2) the structural relationship of departments, agencies, and independent agencies within the territorial government;

(3) the modification of existing revenue structures, or the establishment of additional revenue structures;

(4) the establishment of alternatives for meeting obligations to pay for the pensions of territorial government employees;

(5) modifications or transfers of the types of services that are the responsibility of, and are delivered by the territorial government;

(6) modifications of the types of services that are delivered by entities other than the territorial government under alternative service delivery mechanisms;

(7) the effects of the territory's laws and court orders on the operations of the territorial government;

(8) the establishment of a personnel system for employees of the territorial government that is based upon employee performance standards;

(9) the improvement of personnel training and proficiency, the adjustment of staffing levels, and the improvement of training and performance of management and supervisory personnel; and

(10) the privatization and commercialization of entities within the territorial government.

(b) Response to Recommendations by the Territorial Government.—

(1) In general.—In the case of any recommendations submitted under subsection (a) that are within the authority of the territorial government to adopt, not later than 90 days after

receiving the recommendations, the Governor or the Legislature (whichever has the authority to adopt the recommendation) shall submit a statement to the Oversight Board that provides notice as to whether the territorial government will adopt the recommendations.

(2) Implementation plan required for adopted recommendations.—If the Governor or the Legislature (whichever is applicable) notifies the Oversight Board under paragraph (1) that the territorial government will adopt any of the recommendations submitted under subsection (a), the Governor or the Legislature (whichever is applicable) shall include in the statement a written plan to implement the recommendation that includes—

(A) specific performance measures to determine the extent to which the territorial government has adopted the recommendation; and

(B) a clear and specific timetable pursuant to which the territorial government will implement the recommendation.

(3) Explanations required for recommendations not adopted.—If the Governor or the Legislature (whichever is applicable) notifies the Oversight Board under paragraph (1) that the territorial government will not adopt

any recommendation submitted under subsection (a) that the territorial government has authority to adopt, the Governor or the Legislature shall include in the statement explanations for the rejection of the recommendations, and the Governor or the Legislature shall submit such statement of explanations to the President and Congress.

Appendix E

48 USC 2162. **SEC. 302. WHO MAY BE A DEBTOR.**

An entity may be a debtor under this title if—

(1) the entity is—

(A) a territory that has requested the establishment of an Oversight Board or has had an Oversight Board established for it by the United States Congress in accordance with section 101 of this Act; or

(B) a covered territorial instrumentality of a territory described in paragraph (1)(A);

(2) the Oversight Board has issued a certification under section 206(b) of this Act for such entity; and

(3) the entity desires to effect a plan to adjust its debts.

48 USC 2164. **SEC. 304. PETITION AND PROCEEDINGS RELATING TO PETITION.**

(a) Commencement of Case.—A voluntary case under this title is commenced by the filing with the district court of a petition by the Oversight Board pursuant to the determination under section 206 of this Act.

(b) Objection to Petition.—After any objection to the petition, the court, after notice and a hearing, may dismiss the petition if the petition does not meet the requirements of this title; however, this subsection shall not apply in any case during the first 120 days after the date on which such case is commenced under this title.

(c) Order for Relief.—The commencement of a case under this title constitutes an order for relief.

(d) Appeal.—The court may not, on account of an appeal from an order for relief, delay any proceeding under this title in the case in which the appeal is being taken, nor shall any court order a stay of such proceeding pending such appeal.

(e) Validity of Debt.—The reversal on appeal of a finding of jurisdiction shall not affect the validity of any debt incurred that is authorized by the court under section 364(c) or 364(d) of title 11, United States Code.

(f) Joint Filing of Petitions and Plans Permitted.—The Oversight Board, on behalf of debtors under this title, may file petitions or submit or modify plans of adjustment jointly if the debtors are affiliates; provided, however, that nothing in this title shall be construed as authorizing substantive consolidation of the cases of affiliated debtors.

(g) Joint Administration of Affiliated Cases.—If the Oversight Board, on behalf of a debtor and one or more affiliates, has filed separate cases and the Oversight Board, on behalf of the debtor or one of the affiliates, files a motion to administer the cases jointly, the court may order a joint administration of the cases.

(h) Public Safety.—This Act may not be construed to permit the discharge of obligations arising under Federal police or regulatory laws, including laws relating to the environment, public health or safety, or territorial laws implementing such Federal legal provisions. This includes compliance obligations, requirements under consent decrees or judicial orders, and obligations to pay associated administrative, civil, or other penalties.

(i) Voting on Debt Adjustment Plans Not Stayed.—Notwithstanding any provision in this title to the contrary, including sections of title 11, United States Code, incorporated by reference, nothing in this section shall prevent the holder of a claim from voting on or consenting to a proposed modification of such claim under title VI of this Act.

48 USC 2168. **SEC. 308. SELECTION OF PRESIDING JUDGE.**

(a) For cases in which the debtor is a territory, the Chief Justice of the United States shall designate a district court judge to sit by designation to conduct the case.

(b) For cases in which the debtor is not a territory, and no motion for joint administration of the debtor's case with the case of its affiliate territory has been filed or there is no case in which the affiliate territory is a debtor, the chief judge of the court of appeals for the circuit embracing the district in which the case is commenced shall designate a district court judge to conduct the case.

Appendix E

48 USC 2175. **SEC. 315. ROLE AND CAPACITY OF OVERSIGHT BOARD.**

(a) ACTIONS OF OVERSIGHT BOARD.—For the purposes of this title, the Oversight Board may take any action necessary on behalf of the debtor to prosecute the case of the debtor, including—

(1) filing a petition under section 304 of this Act;

(2) submitting or modifying a plan of adjustment under sections 312 and 313; or

(3) otherwise generally submitting filings in relation to the case with the court.

(b) REPRESENTATIVE OF DEBTOR.—The Oversight Board in a case under this title is the representative of the debtor.

Appendix E

48 USC 2194. **SEC. 405. AUTOMATIC STAY UPON ENACTMENT.**

(a) DEFINITIONS.— In this section:

(1) LIABILITY.—The term "Liability" means a bond, loan, letter of credit, other borrowing title, obligation of insurance, or other financial indebtedness for borrowed money, including rights, entitlements, or obligations whether such rights, entitlements, or obligations arise from contract, statute, or any other source of law related to such a bond, loan, letter of credit, other borrowing title, obligation of insurance, or other financial indebtedness in physical or dematerialized form, of which—

(A) the issuer, obligor, or guarantor is the Government of Puerto Rico; and

(B) the date of issuance or incurrence precedes the date of enactment of this Act.

(2) LIABILITY CLAIM.—The term "Liability Claim" means, as it relates to a Liability—

(A) right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured; or

(B) right to an equitable remedy for breach of performance if such breach gives rise to a right to payment, whether or not such right to an equitable remedy is reduced to judgment, fixed, contingent, matured, unmatured, disputed, undisputed, secured, or unsecured.

(b) In General.—Except as provided in subsection (c) of this section, the establishment of an Oversight Board for Puerto Rico (i.e., the enactment of this Act) in accordance with section 101 operates with respect to a Liability as a stay, applicable to all entities (as such term is defined in section 101 of title 11, United States Code), of—

(1) the commencement or continuation, including the issuance or employment of process, of a judicial, administrative, or other action or proceeding against the Government of Puerto Rico that was or could have been commenced before the enactment of this Act, or to recover a Liability Claim against the Government of Puerto Rico that arose before the enactment of this Act;

(2) the enforcement, against the Government of Puerto Rico or against property of the Government of Puerto Rico, of a judgment obtained before the enactment of this Act;

(3) any act to obtain possession of property of the Government of Puerto Rico or of property from the Government of Puerto Rico or to exercise control over property of the Government of Puerto Rico;

(4) any act to create, perfect, or enforce any lien against property of the Government of Puerto Rico;

(5) any act to create, perfect, or enforce against property of the Government of Puerto Rico any lien to the extent that such lien secures a Liability Claim that arose before the enactment of this Act;

(6) any act to collect, assess, or recover a Liability Claim against the Government of Puerto Rico that arose before the enactment of this Act; and

(7) the setoff of any debt owing to the Government of Puerto Rico that arose before the enactment of this Act against any Liability Claim against the Government of Puerto Rico.

(c) Stay Not Operable.—The establishment of an Oversight Board for Puerto Rico in accordance with section 101 does not operate as a stay—

(1) solely under subsection (b)(1) of this section, of the continuation of, including the issuance or employment of process, of a judicial, administrative, or other action or proceeding against the Government of Puerto Rico that was commenced on or before December 18, 2015; or

(2) of the commencement or continuation of an action or proceeding by a governmental unit to enforce such governmental unit's or organization's police and regulatory power, including the enforcement of a judgment other than a money judgment, obtained in an action or proceeding by the governmental unit to enforce such governmental unit's or organization's police or regulatory power.

(d) Continuation of Stay.—Except as provided in subsections (e), (f), and (g) the stay under subsection (b) continues until the earlier of—

(1) the later of—

(A) the later of—

(i) February 15, 2017; or

(ii) six months after the establishment of an Oversight Board for Puerto Rico as established by section 101(b);

(B) the date that is 75 days after the date in subparagraph (A) if the Oversight Board delivers a certification to the Governor that, in the Oversight Board's sole discretion, an additional 75 days are needed to seek to complete a voluntary process under title VI of this Act with respect to the government of the Commonwealth of Puerto Rico or any of its territorial instrumentalities; or

(C) the date that is 60 days after the date in subparagraph (A) if the district court to which an application has been submitted under subparagraph 601(m)(1)(D) of this Act determines, in the exercise of the court's equitable powers, that an additional 60 days are needed to complete a voluntary process under title VI of this Act with respect to the government of the Commonwealth of Puerto Rico or any of its territorial instrumentalities; or

(2) with respect to the government of the Commonwealth of Puerto Rico or any of its territorial instrumentalities, the date on which a case is filed by or on behalf of the government of the Commonwealth of Puerto Rico or any of its territorial instrumentalities, as applicable, under title III.

(e) Jurisdiction, Relief From Stay.—

(1) The United States District Court for the District of Puerto Rico shall have original and exclusive jurisdiction of any civil actions arising under or related to this section.

(2) On motion of or action filed by a party in interest and after notice and a hearing, the

> United States District Court for the District of Puerto Rico, for cause shown, shall grant relief from the stay provided under subsection (b) of this section.

(f) Termination of Stay; Hearing.—Forty-five days after a request under subsection (e)(2) for relief from the stay of any act against property of the Government of Puerto Rico under subsection (b), such stay is terminated with respect to the party in interest making such request, unless the court, after notice and a hearing, orders such stay continued in effect pending the conclusion of, or as a result of, a final hearing and determination under subsection (e)(2). A hearing under this subsection may be a preliminary hearing, or may be consolidated with the final hearing under subsection (e)(2). The court shall order such stay continued in effect pending the conclusion of the final hearing under subsection (e)(2) if there is a reasonable likelihood that the party opposing relief from such stay will prevail at the conclusion of such final hearing. If the hearing under this subsection is a preliminary hearing, then such final hearing shall be concluded not later than thirty days after the conclusion of such preliminary hearing, unless the thirty-day period is extended with the consent of the parties in interest or for a specific time which the court finds is required by compelling circumstances.

(g) Relief To Prevent Irreparable Damage.—Upon request of a party in interest, the court, with or without a hearing, shall grant such relief from the stay provided under subsection (b) as is necessary to prevent irreparable damage to the interest of an entity in property, if such interest will suffer such damage before there is an opportunity for notice and a hearing under subsection (e) or (f).

(h) Act in Violation of Stay Is Void.—Any order, judgment, or decree entered in violation of this section and any act taken in violation of this section is void, and shall have no force or effect, and any person found to violate this section may be liable for damages, costs, and attorneys' fees incurred in defending any action taken in violation of this section, and the Oversight Board or the Government of Puerto Rico may seek an order from the court enforcing the provisions of this section.

(i) Government of Puerto Rico.—For purposes of this section, the term "Government of Puerto Rico", in addition to the definition set forth in section 5(11) of this Act, shall include—

(1) the individuals, including elected and appointed officials, directors, officers of and employees acting in their official capacity on behalf of the Government of Puerto Rico; and

(2) the Oversight Board, including the directors and officers of and employees acting in their official capacity on behalf of the Oversight Board.

(j) No Default Under Existing Contracts.—

(1) Notwithstanding any contractual provision or applicable law to the contrary and so long as a stay under this section is in effect, the holder of a Liability Claim or any other claim (as such term is defined in section 101 of title 11, United States Code) may not exercise or continue to exercise any remedy under a contract or applicable law in respect to the Government of Puerto Rico or any of its property—

(A) that is conditioned upon the financial condition of, or the commencement of a restructuring, insolvency, bankruptcy, or other proceeding (or a similar or analogous process) by, the Government of Puerto Rico, including a default or an event of default thereunder; or

(B) with respect to Liability Claims—

(i) for the non-payment of principal or interest; or

(ii) for the breach of any condition or covenant.

(2) The term "remedy" as used in paragraph (1) shall be interpreted broadly, and shall include any right existing in law or contract, including any right to—

(A) setoff;

(B) apply or appropriate funds;

(C) seek the appointment of a custodian (as such term is defined in section 101(11) of title 11, United States Code);

(D) seek to raise rates; or

(E) exercise control over property of the Government of Puerto Rico.

(3) Notwithstanding any contractual provision or applicable law to the contrary and so long as a stay under this section is in effect, a contract to which the Government of Puerto Rico is a party may not be terminated or modified, and any right or obligation under such contract may not be terminated or modified, solely because of a provision in such contract is conditioned on—

(A) the insolvency or financial condition of the Government of Puerto Rico at any time prior to the enactment of this Act;

(B) the adoption of a resolution or establishment of an Oversight Board pursuant to section 101 of this Act; or

(C) a default under a separate contract that is due to, triggered by, or a result of the occurrence of the events or matters in paragraph (1)(B).

(4) Notwithstanding any contractual provision to the contrary and so long as a stay under this section is in effect, a counterparty to a contract with the Government of Puerto Rico for the provision of goods and services shall, unless the Government of Puerto Rico agrees to the contrary in writing, continue to perform all obligations under, and comply with the terms of, such contract, provided that the Government of Puerto Rico is not in default under such contract other than as a result of a condition specified in paragraph (3).

(k) Effect.—This section does not discharge an obligation of the Government of Puerto Rico or release, invalidate, or impair any security interest or lien securing such obligation. This section does not impair or affect the implementation of any restructuring support agreement executed by the Government of Puerto Rico to be implemented pursuant to Puerto Rico law specifically enacted for that purpose prior to the enactment of this Act or the obligation of the Government of Puerto Rico to proceed in good faith as set forth in any such agreement.

(l) Payments on Liabilities.—Nothing in this section shall be construed to prohibit the Government of Puerto Rico from making any payment on any Liability when such payment becomes due during the term of the stay, and to the extent the Oversight Board, in its sole discretion, determines it is feasible, the Government of Puerto Rico shall make interest payments on outstanding indebtedness when such payments become due during the length of the stay.

(m) FINDINGS.—Congress finds the following:

(1) A combination of severe economic decline, and, at times, accumulated operating deficits, lack of financial transparency, management inefficiencies, and excessive borrowing has created a fiscal emergency in Puerto Rico.

(2) As a result of its fiscal emergency, the Government of Puerto Rico has been unable to provide its citizens with effective services.

(3) The current fiscal emergency has also affected the longterm economic stability of Puerto Rico by contributing to the accelerated outmigration of residents and businesses.

(4) A comprehensive approach to fiscal, management, and structural problems and adjustments that exempts no part of the Government of Puerto Rico is necessary, involving independent oversight and a Federal statutory authority for the Government of Puerto Rico to restructure debts in a fair and orderly process.

(5) Additionally, an immediate—but temporary—stay is essential to stabilize the region for the purposes of resolving this territorial crisis.

(A) The stay advances the best interests common to all stakeholders, including but not limited to a functioning independent Oversight Board created pursuant to this Act to determine whether to appear or intervene on behalf of the Government of Puerto Rico in any litigation that may have been commenced prior to the effectiveness or upon expiration of the stay.

(B) The stay is limited in nature and narrowly tailored to achieve the purposes of this Act, including to ensure all creditors have a fair opportunity to consensually renegotiate terms of repayment based on accurate financial information that is reviewed by an independent authority or, at a minimum, receive a recovery from the Government of Puerto Rico equal to their best possible outcome absent the provisions of this Act.

(6) Finally, the ability of the Government of Puerto Rico to obtain funds from capital markets in the future will be severely diminished without congressional action to restore its financial accountability and stability.

(n) PURPOSES.—The purposes of this section are to—

(1) provide the Government of Puerto Rico with the resources and the tools it needs to address an immediate existing and imminent crisis;

(2) allow the Government of Puerto Rico a limited period of time during which it can focus its resources on negotiating a voluntary resolution with its creditors instead of defending numerous, costly creditor lawsuits;

(3) provide an oversight mechanism to assist the Government of Puerto Rico in reforming its fiscal governance and support the implementation of potential debt restructuring;

(4) make available a Federal restructuring authority, if necessary, to allow for an orderly adjustment of all of the Government of Puerto Rico's liabilities; and

(5) benefit the lives of 3.5 million American citizens living in Puerto Rico by encouraging the Government of Puerto Rico to resolve its longstanding fiscal governance issues and return to economic growth.

(o) VOTING ON VOLUNTARY AGREEMENTS NOT STAYED.—Notwithstanding any provision in this section to the contrary, nothing in this section shall prevent the holder of a Liability Claim from voting on or consenting to a proposed modification of such Liability Claim under title VI of this Act.

SEC. 406. PURCHASES BY TERRITORY GOVERNMENTS.

The text of section 302 of the Omnibus Insular Areas Act of 1992 (48 U.S.C. 1469e), is amended to read as follows: "The Governments of the Commonwealth of Puerto Rico, Guam, American Samoa, the Commonwealth of the Northern Mariana Islands, and the United States Virgin Islands are authorized to make purchases through the General Services Administration.".