Nos. 15-233 & 15-255

In The Supreme Court of the United States

THE COMMONWEALTH OF PUERTO RICO, et al.,

Petitioners,

v.

FRANKLIN CALIFORNIA TAX-FREE TRUST, et al.,

Respondents.

MELBA ACOSTA-FEBO, et al.,

Petitioners,

v.

FRANKLIN CALIFORNIA TAX-FREE TRUST, et al.,

Respondents.

On Petitions For Writs Of Certiorari To The United States Court Of Appeals For The First Circuit

FRANKLIN PLAINTIFFS' BRIEF IN OPPOSITION

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QUESTION PRESENTED

Did a 1984 amendment to the federal Bankruptcy Code precluding Puerto Rico from using Chapter 9 of the Code allow Puerto Rico to enact its own version of Chapter 9 notwithstanding 11 U.S.C. § 903(1)'s express preemption of "State" municipal bankruptcy laws?

RULE 29.6 STATEMENT

In accordance with Rule 29.6 of the Rules of the Supreme Court of the United States, the Franklin Funds[1] respectfully state that none of the Franklin Funds has a parent corporation, and to its knowledge, no public corporation beneficially owns 10% or more of its stock.

[1] The Franklin Funds consist of Franklin California Tax-Free Trust (for the Franklin California Intermediate-Term Tax Free Income Fund), Franklin New York Tax-Free Trust (for the Franklin New York Intermediate-Term Tax Free Income Fund), Franklin Tax-Free Trust (for the series Franklin Federal Intermediate-Term Tax-Free Income Fund, Franklin Double Tax-Free Income Fund, Franklin Colorado Tax-Free Income Fund, Franklin Georgia Tax-Free Income Fund, Franklin Pennsylvania Tax-Free Income Fund, Franklin High Yield Tax-Free Income Fund, Franklin Missouri Tax-Free Income Fund, Franklin Oregon Tax-Free Income Fund, Franklin Virginia Tax-Free Income Fund, Franklin Alabama Tax-Free Income Fund, Franklin Florida Tax-Free Income Fund, Franklin Connecticut Tax-Free Income Fund, Franklin Louisiana Tax-Free Income Fund, Franklin Maryland Tax-Free Income Fund, Franklin North Carolina Tax-Free Income Fund, Franklin New Jersey Tax-Free Income Fund and Franklin Arizona Tax-Free Income Fund), Franklin Municipal Securities Trust (for the series Franklin California High Yield Municipal Bond Fund and Franklin Tennessee Municipal Bond Fund), Franklin California Tax-Free Income Fund, Franklin New York Tax-Free Income Fund and Franklin Federal Tax-Free Income Fund.

RULE 29.6 STATEMENT – Continued

In accordance with Rule 29.6 of the Rules of the Supreme Court of the United States, the Oppenheimer Rochester Funds[2] respectfully state that none of the Oppenheimer Rochester Funds has a parent corporation and no public corporation owns 10% or more of its stock.

[2] The Oppenheimer Rochester Funds consist of Oppenheimer Rochester Fund Municipals, Oppenheimer Municipal Fund (on behalf of its series Oppenheimer Rochester Limited Term Municipal Fund), Oppenheimer Multi-State Municipal Trust (on behalf of its series Oppenheimer Rochester New Jersey Municipal Fund, Oppenheimer Rochester Pennsylvania Municipal Fund, and Oppenheimer Rochester High Yield Municipal Fund), Oppenheimer Rochester Ohio Municipal Fund, Oppenheimer Rochester Arizona Municipal Fund, Oppenheimer Rochester Virginia Municipal Fund, Oppenheimer Rochester Maryland Municipal Fund, Oppenheimer Rochester Limited Term California Municipal Fund, Oppenheimer Rochester California Municipal Fund, Rochester Portfolio Series (on behalf of its series Oppenheimer Rochester Limited Term New York Municipal Fund), Oppenheimer Rochester AMT-Free Municipal Fund, Oppenheimer Rochester AMT-Free New York Municipal Fund, Oppenheimer Rochester Michigan Municipal Fund, Oppenheimer Rochester Massachusetts Municipal Fund, Oppenheimer Rochester North Carolina Municipal Fund and Oppenheimer Rochester Minnesota Municipal Fund.

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INTRODUCTION

This case concerns a provision of the federal Bankruptcy Code – Section 903(1) – that expressly preempts "State" laws authorizing the non-consensual restructuring of municipal debts.

Congress first enacted this provision in 1946, and re-enacted it in 1976 and again in 1978, each time for the express purpose of ensuring that "[o]nly under a Federal law should a creditor be forced to accept such an adjustment without his consent." H.R. Rep. No. 79-2246, at 4 (1946); *see also* H.R. Rep. No. 94-686, at 19 (1975); S. Rep. No. 95-989, at 110 (1978).

In 1984, Congress amended the Bankruptcy Code to add a definition of "State," which includes Puerto Rico and the District of Columbia "except for the purpose of defining who may be a debtor under chapter 9 of [the Code]." 11 U.S.C. § 101(52). The 1984 amendment does not affect Section 903(1), and there is no legislative history indicating that, by barring Puerto Rico and D.C. municipalities from invoking Chapter 9, Congress intended to exempt those jurisdictions from preemption and allow them to enact an identical statute (or a harsher version) as their own law.

Both the First Circuit and the district court therefore held that Section 903(1) continues to apply to Puerto Rico and preempts the Recovery Act, the Commonwealth of Puerto Rico's recently-enacted municipal bankruptcy statute. As the First Circuit

observed, its preemption ruling "follows straightforwardly from the [Bankruptcy Code's] plain text and is confirmed by both statutory history and legislative history." First Cir. Op. at 32a.

The First Circuit's decision does not conflict with that of any other Circuit, or indeed any other court. It raises no constitutional issues, only issues of statutory construction that would be rendered moot if Congress were to amend the Bankruptcy Code, as pending bills in both the House of Representatives and the Senate would do.

Moreover, under the terms of a recently-negotiated proposed deal among bondholders and the Puerto Rico Electric Power Authority ("PREPA"), the Commonwealth would agree not to use the Recovery Act against Respondents Franklin Plaintiffs or any other consenting bondholders.

In sum, the Petitioners ask this court to review an issue:

- correctly decided by the First Circuit;
- in conflict with no other court;
- currently under consideration in the House and Senate; and
- that would recede upon consummation of the Commonwealth's proposed bondholder deal.

The Court should deny the Petitions.

STATEMENT OF THE CASE

A. Federal Statutory Background

For over 70 years, the federal bankruptcy laws have contained a comprehensive regime for restructuring the debts of municipalities. *See* Act of August 16, 1937, 50 Stat. 653 (enacting original Chapter X of Bankruptcy Act dealing with municipal bankruptcy); *United States v. Bekins*, 304 U.S. 27 (1938) (upholding constitutionality of Chapter X). Those provisions are now codified in Chapter 9 of the Bankruptcy Code, 11 U.S.C. §§ 901 *et seq*., titled "Adjustment of Debts of a Municipality."

For almost as long, the federal bankruptcy laws have contained a provision expressly barring certain "State" laws in the area of municipal bankruptcy. *See* Act of July 1, 1946, ch. 532, § 83(i), 60 Stat. 409, 415. That provision is now codified in Section 903(1) of the Bankruptcy Code, which provides:

> This chapter does not limit or impair the power of a State to control, by legislation or otherwise, a municipality of or in such State in the exercise of the political or government powers of such municipality, including expenditures for such exercise, but –
>
> (1) *a State law prescribing a method of composition of indebtedness of such municipality may not bind any creditor that does not consent to such composition*; and

> (2) a judgment entered under such a law may not bind a creditor that does not consent to such composition.

11 U.S.C. § 903 (emphasis added).[3]

Section 903(1), originally passed in nearly identical form in 1946, was enacted to ensure that "[o]nly under a Federal law should a creditor be forced to accept such an adjustment without his consent." H.R. Rep. No. 79-2246, at 4 (1946).

The parties agree that, from 1946 through 1984, Puerto Rico was barred by Section 903(1) and its predecessor statutes from enacting its own municipal bankruptcy laws. *See, e.g.*, GDB Pet. at 24.[4] At issue is the effect of a 1984 amendment to the Bankruptcy Code that added a definition of the term "State" to "include[ ] the District of Columbia and Puerto Rico, except for the purposes of defining who may be a debtor under chapter 9." Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98-353, 98 Stat. 333, 369 (codified at 11 U.S.C. § 101(52)). The new definition of "State" rendered municipalities

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[3] A "composition" is an "agreement between a debtor and two or more creditors for the adjustment or discharge of an obligation for some lesser amount." *Black's Law Dictionary* 346 (10th ed. 2014).

[4] Citations to "GDB Pet." are to the Petition of Melba Acosta-Febo, *et al.*, in Case No. 15-255; Citations to "Comm. Pet." are to the Petition of the Commonwealth of Puerto Rico, *et al.*, in Case No. 15-233.

in Puerto Rico and the District of Columbia ineligible for Chapter 9.

What is disputed is whether the exclusion of Puerto Rican municipalities from eligibility for Chapter 9 in 1984 somehow licensed Puerto Rico to adopt its own municipal bankruptcy statutes notwithstanding Section 903(1) of the Bankruptcy Code. Because Section 101(52) defines "State" to include Puerto Rico for all purposes "except for the purpose of defining who may be a debtor under chapter 9," 11 U.S.C. § 101(52), both the First Circuit and the district court found that the term "State," as used in Section 903(1), includes Puerto Rico, and that the Recovery Act is therefore preempted.

B. Factual Background

1. Respondents Franklin Plaintiffs, consisting of two sets of funds for which OppenheimerFunds, Inc. and Franklin Advisers, Inc. serve as investment advisors, are holders of approximately $1.56 billion in bonds issued by PREPA. JA 147, 150.[5] PREPA, a public corporation established pursuant to the Puerto Rico Electric Power Authority Act, Act No. 83 of May 2, 1941, P.R. Laws Ann. tit. 22, §§ 191 *et seq*. (the

[5] Citations to "JA" are to the Joint Appendix filed by the Commonwealth in the First Circuit. Citations to "GDB App." are to the appendix filed with the GDB's petition for a writ of certiorari. Citations to "First Cir. Op." and "Dist. Ct. Op." are to the versions of the First Circuit and district court opinions included as part of the GDB's appendix.

"PREPA Act"), issued the bonds (the "PREPA Bonds") under a Trust Agreement dated as of January 1, 1974 (the "Trust Agreement"). JA 333.

The PREPA Bonds are secured by a pledge of all or substantially all of the present and future revenues of PREPA, JA 347-48, and the Trust Agreement precludes the grant of any other liens on these revenues, JA 421-23. The holders of PREPA Bonds have the right to a receiver to collect the pledged revenues, PREPA Act § 17, P.R. Laws Ann. tit. 22, § 207; JA 411-12, and the right to compel an increase in electricity rates so that revenues will be sufficient to repay the bonds, JA 383-84. However, neither the PREPA Act nor the Trust Agreement allow bondholders to seize any asset of PREPA, and the Trust Agreement provides that all revenues must be used first to pay operating expenses, JA 384-86, ensuring the continued provision of electricity to the Commonwealth.

2. The Recovery Act applies only to a limited number of public corporations – principally, PREPA, the Aqueduct and Sewer Authority, and the Highways and Transportation Authority – not to the Commonwealth itself.[6] The Recovery Act authorizes these public corporations to impose a non-consensual

[6] The Recovery Act was aimed at PREPA above all. *See* Recovery Act, Statement of Motives, GDB App. 160a ("Public corporations of the Commonwealth of Puerto Rico that provide essential public services, PREPA being the most dramatic example, today face significant operational, fiscal, and financial challenges.").

restructuring on their creditors, through either primarily out-of-court (Chapter 2) or in-court (Chapter 3) proceedings.

Although Chapter 3 is explicitly modeled on Chapter 9 of the federal Bankruptcy Code, Recovery Act Statement of Motives, GDB App. 176a, its provisions are much harsher. Chapter 3 allows PREPA to discharge its bond obligations at a fraction of their amount over the objection of 100% of the PREPA Bonds. *See* Recovery Act §§ 315(d), 315(e), GDB App. 260a-261a; *see also id*. § 115(c), GDB App. 207a-208a. Chapter 3 also authorizes PREPA to seize the bonds' collateral to secure a new loan without providing adequate protection to the bonds, as the Bankruptcy Code and the Fifth and Fourteenth Amendments require. *Compare* Recovery Act § 322(c), GDB App. 275a *with* 11 U.S.C. § 364(d); *see also* S. Rep. No. 95-989, at 49 (1978) (concept of adequate protection "is derived from the fifth amendment protection of property interests"); H.R. Rep. No. 95-595, at 339 (1977) (same).

The Recovery Act purports to provide "creditor protections" of several sorts, but these are largely illusory. For example, a Chapter 3 plan must promise to repay PREPA Bondholders from one half of "positive free cash flow" for up to ten years, Recovery Act § 315(k), GDB App. 262a – but this is an empty promise, since cash flow is determined by rates and PREPA determines what the rates are. In addition, a Chapter 3 plan must provide bondholders with a recovery greater than they would have received by

enforcing their claims on the petition date, Recovery Act § 315(d), GDB App. 261a – but this provides no real protection, since the Recovery Act separately eliminates the PREPA Bondholders' rights to obtain a receiver or to compel an increase in revenues that would repay their bonds in full. *See id*. § 108(b), GDB App. 200a.

3. The Commonwealth cited a "fiscal emergency" in enacting the Recovery Act, *see* Statement of Motives, GDB App. 153a, and petitioners and amici continue to make such claims in their briefs. However, the asserted "fiscal emergency" refers to the *Commonwealth's* difficulties in paying its own general obligation debt. The Recovery Act does not apply to the Commonwealth's debt, but only to debt of PREPA and a limited number of other public corporations. *See* Recovery Act § 113, GDB App. 205a (setting forth eligibility criteria); *id.* §§ 102(46) & (50), GDB App. 194a (defining "petitioner" and "public sector obligor"). The only "crisis" alleged by Petitioners with respect to PREPA or these other corporations is imaginary: a "loss of essential public services," which cannot happen because the Trust Agreement provides for the use of first dollars in to pay operating expenses, JA 384-86, or a "race to the courthouse," which has not happened and cannot happen because of PREPA's immunity from execution.

The PREPA bondholders' remedy is not seizure of assets, but rather a Puerto Rico court's appointment of a receiver – who can and will keep the lights on, and who also can increase revenues, cut costs and

collect debts. *See* PREPA Act § 6(o), P.R. Laws Ann. tit. 22, § 196(o) (authorizing PREPA to secure payment of its bonds with a lien on "contracts, revenues, and income only"); § 17(b), P.R. Laws Ann. tit. 22, § 207(b) (authorizing receiver to "exercise all the rights and powers of the Authority with respect to such undertakings as the Authority itself might do").

Nor have Petitioners shown that PREPA or any other public corporation subject to the Act has any need for a non-consensual restructuring. They do not. As the Franklin Plaintiffs alleged below, in a complaint that the district court held stated a claim for violation of the Contracts Clause, PREPA has failed to pursue many alternatives that could eliminate the need for a restructuring. Dist. Ct. Op. at 137a-139a. Most obviously, PREPA could raise its rates, and could collect the hundreds of millions of dollars it is owed by other governmental corporations. Dist. Ct. Op. at 137a-139a; 2d Am. Compl. ¶ 50, JA 169-171.[7]

C. Proceedings Below

Interest on the PREPA Bonds was payable on July 1, 2014. Fearing a potential PREPA filing under

[7] PREPA has not raised its base rate for more than 25 years, *see* JA 481, and because of recent oil price declines, its overall charges per kilowatt hour fell by 30.3% from August 2014 to August 2015, *see* P.R. Elec. Power Auth., Monthly Report to the Governing Board August 2015, 5 (2015), *available at* http://www.aeepr.com/INVESTORS/DOCS/Financial%20Information/Monthly%20Reports/2015/August%202015.pdf.

the Recovery Act, the Franklin Plaintiffs filed their initial complaint against Petitioners and PREPA on June 28, 2014, seeking a declaration that the Act was preempted by the Bankruptcy Code and unconstitutional as an impairment of contract and a taking of property without compensation. JA 1. Another PREPA bondholder, BlueMountain Capital Management, LLC, later filed a complaint alleging similar constitutional violations, and the two cases were consolidated. JA 12-13.

Petitioners and PREPA moved to dismiss both complaints, and the Franklin Plaintiffs cross-moved for summary judgment on their preemption claim. JA 3, 5, 11, 13, 14. On February 6, 2015, the district court granted the Franklin Plaintiffs' summary judgment motion and permanently enjoined the Petitioners from enforcing the Act. The court ruled that the preemption issue was "not a close case": "Section 903(1)'s text and legislative history provide direct evidence of Congress's clear and manifest purpose to preempt state laws that prescribe a method of composition of municipal indebtedness that binds nonconsenting creditors, and to include Puerto Rico laws in this preempted arena." Dist. Ct. Op. at 118a-119a (internal citations omitted). The district court also denied Petitioners' motion to dismiss the Franklin Plaintiffs' Contracts Clause claims. *Id.* at 139a-140a.

Petitioners appealed, and the First Circuit unanimously affirmed the district court's holding that the Recovery Act is expressly preempted by Section

903(1) of the Bankruptcy Code. First Cir. Op. at 1a-73a. In a comprehensive opinion by Judge Lynch, the First Circuit ruled that this conclusion "follows straightforwardly from the plain text and is confirmed by both statutory history and legislative history." *Id*. at 32a. The court reviewed and rejected Petitioners' arguments to the contrary, labeling them "[c]reative [b]ut [u]nsound." *Id*. The First Circuit further held that, even absent express preemption, the Recovery Act was preempted under principles of conflict preemption. *Id*. at 43a-45a. Judge Torruella concurred in the judgment but wrote separately to address an issue that none of the parties had raised – namely, his view that Congress' exclusion of Puerto Rico's municipalities from eligibility for Chapter 9 was unconstitutional. *Id*. at 49a-73a.

REASONS FOR DENYING THE PETITIONS

I. THE DECISION BELOW IS CORRECT

Petitioners primarily challenge the correctness of the First Circuit's interpretation of the statutory provisions at issue. Error correction, of course, is not typically a sufficient basis for certiorari. *See* Sup. Ct. R. 10. And in this case, there was no error.

A. The First Circuit Correctly Applied the Plain Text, Statutory History and Legislative History of the Governing Bankruptcy Code Provisions

Section 903(1) of the Bankruptcy Code expressly preempts all "State" laws that authorize non-consensual municipal debt restructurings. As both courts below held, the Recovery Act is such a law. This result, the First Circuit and district court concluded, is dictated by the plain text of the Bankruptcy Code, as well as by the statutory and legislative history of Section 903(1).

The Bankruptcy Code defines "State" to include Puerto Rico for all purposes but one: "'State' includes the District of Columbia and Puerto Rico, except for the purpose of defining who may be a debtor under chapter 9 of [title 11]." 11 U.S.C. § 101(52). Section 903(1), in turn, prohibits all "State" laws that authorize non-consensual municipal debt restructurings. Because Section 903(1) has nothing to do with "defining who may be a debtor under chapter 9,"[8] the "State" laws that Section 903(1) prohibits include those of Puerto Rico. A contrary construction would violate the established maxim that, where Congress explicitly enumerates a single exception to a rule, additional exceptions should generally not be inferred. *See, e.g.*, *TRW Inc. v. Andrews*, 534 U.S. 19, 28 (2001).

[8] The eligibility requirements for being a debtor under the various chapters of the Bankruptcy Code are set forth in Section 109 of the Code, 11 U.S.C. § 109.

The statutory history and legislative history of Section 903(1) confirm this interpretation. Section 903(1) was first enacted in 1946, as part of Section 83(i) of the Bankruptcy Act. *See* Act of July 1, 1946, ch. 532, § 83(i), 60 Stat. 409, 415. The provision was enacted to overrule the Supreme Court's decision in *Faitoute Iron & Steel Co. v. City of Asbury Park*, 316 U.S. 502 (1942), which had sustained a New Jersey municipal debt restructuring statute in the face of a preemption challenge. *See* Hearings on H.R. 4307 Before the Special Subcomm. on Bankr. & Reorg. of the H. Comm. on the Judiciary, 79th Cong., at 15-16 (1946) (statement of Millard Parkhurst) (describing amendment as overruling *Faitoute*). The House Report explained that the statute was intended to ensure that "[o]nly under a Federal law should a creditor be forced to accept . . . an adjustment without his consent." H.R. Rep. No. 79-2246, at 4 (1946).

Congress subsequently retained this ban on non-consensual municipal debt restructurings in two successive versions of the federal bankruptcy laws, enacted in 1976 and 1978. *See* Act to Amend Chapter IX of the Bankruptcy Act, Pub. L. No. 94-260, 90 Stat. 315, 316-17 (1976); Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, 92 Stat. 2549, 2622. Each time, Congress stated that it was retaining the provision's preemptive language for the same reason it was originally enacted. *See* H.R. Rep. No. 94-938, at 16 (1976) (Conf. Rep.) (adopting Senate version of Section 83 over House version); H.R. Rep. No. 94-686, at 19 (1975) (explaining that Senate version of Section

83 retained preemptive language "for the same reason it was enacted by Congress" in 1946); S. Rep. No. 95-989, at 110 (1978) ("The proviso in section 83, prohibiting State composition procedures for municipalities, is retained. Deletion of the provision would 'permit all States to enact their own versions of Chapter IX,' Municipal Insolvency, 50 Am. Bankr. L.J. 55, 65, which would frustrate the constitutional mandate of uniform bankruptcy laws."). At all times prior to 1984, as Petitioners acknowledge, Section 903(1) applied to Puerto Rico, as well as to the states. *See, e.g.*, GDB Pet. at 24.

Thus, the only remaining question is whether the 1984 amendments to the Bankruptcy Code, by expressly excluding Puerto Rico's municipalities from eligibility for Chapter 9, thereby effected an *unwritten* modification to Section 903(1), excluding Puerto Rico from the scope of that section's preemptive bar. Both courts below correctly concluded that the answer is "no." The 1984 amendments made no change to the text of Section 903, nor did the legislative history of those amendments contain any indication that Congress intended to narrow Section 903(1)'s reach. The 1984 amendments made only one pertinent change, the addition of a definition of "State" – and as noted, this definitional change confirmed that Puerto Rico *is* a "State" for Section 903(1) purposes.

As the First Circuit observed, First Cir. Op. at 24a, 29a, a contrary reading of the 1984 amendments – so as to exclude Puerto Rico from the reach of

Section 903(1) – would violate this Court's teaching that courts should not read the Bankruptcy Code to "erode past bankruptcy practice absent a *clear indication* that Congress intended such a departure." *Cohen v. de la Cruz*, 523 U.S. 213, 221 (1998) (citation omitted; emphasis added); *see also United Savings Assn. of Texas v. Timbers of Inwood Forest Assocs., Ltd.*, 484 U.S. 365, 380 (1988) ("Such a major change in the existing rules would not likely have been made without specific provision in the text of the statute; it is most improbable that it would have been made without even any mention in the legislative history.") (internal citation omitted). No such "clear indication" is evident here – far from it. This is fatal to Petitioners' position, as both courts below held.[9]

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[9] The Commonwealth argues that, because "Congress unquestionably 'erode[d] past bankruptcy practice,' by stripping Puerto Rico of the benefits of Chapter 9, there is no reason to suppose that Congress intended to preserve past bankruptcy practice by continuing to subject Puerto Rico to the burdens of Chapter 9." Comm. Pet. at 17 (internal citation omitted). But the fact that Congress changed one aspect of the bankruptcy laws (excluding Puerto Rico from eligibility for Chapter 9) does not indicate – certainly not clearly – that Congress also intended to change *another* aspect of those laws (exempting Puerto Rico from the Section 903 bar). Carving out Puerto Rico from the long-standing prohibition of state municipal bankruptcy laws is exactly the sort of major change that "would not likely have been made without specific provision in the text of the statute," much less "without even any mention in the legislative history." *Timbers of Inwood*, 484 U.S. at 380; *see also Kellogg Brown & Root Servs., Inc. v. U.S. ex rel. Carter*, 135 S. Ct. 1970, 1977 (2015) ("Fundamental changes in the scope of a statute are not typically accomplished with so subtle a move.").

B. Petitioners Present No Valid Grounds for Reversal

As the First Circuit found, Petitioners' attempts to avoid the plain meaning and purpose of Section 903(1) are "[c]reative [b]ut [u]nsound." First Cir. Op. at 32a.

1. Petitioners' Textual Argument Lacks Merit

The GDB (though not the Commonwealth) attempts to supply a textual basis for reversal, contending that the Bankruptcy Code's definitions of the terms "creditor" and "debtor" radically limit Section 903(1)'s reach. GDB Pet. at 20. The First Circuit properly rejected this strained construction. First Cir. Op. at 33a-38a.[10]

The starting point for the GDB's argument is that Section 903(1)'s prohibition of State municipal bankruptcy laws applies only to laws that purport to bind "creditors." The Bankruptcy Code defines "creditor" as an "entity that has a claim against the debtor," 11 U.S.C. § 101(10)(A), and defines "debtor" as a "person or municipality concerning which a case

[10] This argument featured prominently in the briefs of both the GDB and the Commonwealth below. *See, e.g.*, Comm. Opening Br. at 27-28; GDB Opening Br. at 22-26. Following the First Circuit's rejection of this argument, it has receded in prominence and is not even mentioned in the Commonwealth's Petition.

under [title 11] has been commenced," 11 U.S.C. § 101(13). According to the GDB, the upshot of these provisions is that, until a Chapter 9 case has been commenced (giving rise to a "debtor"), no "creditors" exist, and therefore Section 903(1)'s prohibition does not apply. GDB Pet. at 20. In other words, Section 903(1) applies only to those municipalities that have actually commenced a Chapter 9 case, and States are free to enact municipal restructuring laws so long as those laws do not bind creditors *in a Chapter 9 case*.

As the First Circuit noted, this argument not only tortures the statutory language; it also "proves too much." First Cir. Op. at 34a. If adopted, it would vitiate Congress' stated purpose – to bar state municipal bankruptcy laws – not just in Puerto Rico, but nationwide. *Id*. at 35a. Any State would be free to enact its own municipal bankruptcy statute, which its municipalities would be free to employ as an alternative to Chapter 9.[11] Not surprisingly, the one other circuit court that has addressed this issue has similarly held, albeit with little discussion, that "[t]he plain language of this section [§ 903(1)] is not limited to bankruptcy proceedings." *City of Pontiac Retired*

[11] While the GDB attempts to limit the reach of its "creditor"/"debtor" argument to Puerto Rico, *see* GDB Pet. at 20 ("Puerto Rico's municipalities . . . can never be 'debtors'. . . ."), the argument's logic applies to *all* jurisdictions. If no "creditors" exist in the absence of a Chapter 9 "debtor," then Section 903(1) can never apply outside of a Chapter 9 case.

Employees Ass'n v. Schimmel, 751 F.3d 427, 431 (6th Cir. 2014) (en banc).

When rigid application of a statutory definition would nullify the statute's main purpose, courts employ the term's ordinary, rather than defined, meaning. *See Lawson v. Suwannee Fruit & S.S. Co.*, 336 U.S. 198, 201 (1949); *see also King v. Burwell*, 135 S. Ct. 2480, 2493 (2015) ("We cannot interpret federal statutes to negate their own stated purposes.") (quoting *N.Y.S. Dept. of Social Servs. v. Dublino*, 413 U.S. 405, 419-20 (1973)). Adopting the ordinary meaning of "creditor" makes particular sense here, because, as the First Circuit noted, the Bankruptcy Code frequently uses the term "creditor" in accordance with its ordinary, rather than its defined, meaning. First Cir. Op. at 36a-37a, n.28.

Moreover, the statutory history confirms that Congress intended to use "creditor" in its ordinary sense here. When Congress enacted Section 903(1)'s predecessor in 1946 (as part of Section 83(i) of the Bankruptcy Act), the Bankruptcy Act defined "creditor" to mean "the holder of a security or securities" – a definition that contained no requirement that the issuer of the security be a debtor. Act of July 1, 1946, ch. 532, § 82, 60 Stat. 409, 410 (1946). And when the definition of "creditor" was amended in 1976 to mean "holder . . . of a claim against the petitioner" (and to add a definition for the term "petitioner"), *see* Act to Amend Chapter IX of the Bankruptcy Act, Pub. L. No. 94-260, § 81(3), (8) 90 Stat. 315 (1976), the legislative history makes clear no substantive change was

intended. *See* H.R. Rep. No. 94-686, at 16 (1975) (the defined term "petitioner" was added "for convenience only").

The GDB's construction of "creditor" would require the Court to conclude that these minor definitional amendments fundamentally transformed Section 903(1) from a provision barring *all* state municipal restructuring laws into one permitting *any* state to enact such laws. This would contravene Congress' stated intent, as well as established statutory construction principles. *See Burwell*, 135 S. Ct. at 2495 (Congress "does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions.") (citation omitted); *Kellogg*, 135 S. Ct. at 1977 ("If Congress had meant to make such a change, we would expect it to have used language that made this important modification clear to litigants and courts.").

2. Petitioners' "Structural" Argument Lacks Merit

Petitioners rely principally not on the text of the Bankruptcy Code, but instead on its structure. Because Section 903(1) is merely "a proviso to Section 903, which in turn is part of Chapter 9," Comm. Pet. at 11, Congress supposedly must have meant Section 903(1) to apply only in Chapter 9 cases. And because Puerto Rico's municipalities are not eligible to file for

Chapter 9, they should not be subject to Section 903(1). *Id.* at 12.[12]

This argument fails for multiple reasons.

1. Contrary to the Commonwealth's contention that "absolutely nothing in the text, structure, or history" of the Bankruptcy Code indicates an intent to bar Puerto Rico from employing either its own or federal municipal bankruptcy law, *id*., this is precisely what the governing statutory language provides. Section 903(1) bars all "State" laws that authorize non-consensual municipal debt restructurings, and Section 101(52) defines Puerto Rico as a "State" for all purposes *except* Chapter 9 eligibility. As discussed above, the combined effect of these two provisions is unambiguous, and the statutory and legislative history confirms that Congress intended this result.

This outcome is not altered by the fact that Section 903(1) is part of Section 903 and could be considered a "proviso" to the main clause of that section, which preserves states' control over the political and governmental powers of their municipalities in

[12] The GDB (though not the Commonwealth) supplements Petitioners' structural argument with a related textual argument based on Section 903(1)'s use of the phrase "such municipality." That phrase, the GDB contends, must "refer[ ] back to those same municipalities described in [the main clause of] § 903" – and because that main clause supposedly applies only in Chapter 9, the application of Section 903(1) must be similarly limited. GDB Pet. at 19. This argument fails for the same reasons as the structural argument.

Chapter 9 cases. Even a proviso sometimes operates "affirmatively and independently," rather than "negatively and parasitically." *Alaska v. United States*, 545 U.S. 75, 106-08 (2005). Moreover, the location of Section 903(1) makes perfect sense. Congress added this provision in response to the Supreme Court's *Faitoute* decision, which had relied on the precursor to Section 903's main clause to support its holding that federal bankruptcy law did not preempt state municipal bankruptcy laws. *See Faitoute*, 361 U.S. at 508.[13]

2. Petitioners' structural argument suffers from the same flaw as the GDB's textual argument: It "proves too much." First Cir. Op. at 34a. If adopted, it would limit the reach of Section 903(1) to those municipalities that have actually commenced a Chapter 9 case. As a result, *all* States (not just Puerto

[13] The GDB also contends that, "as a general rule," the provisions of Chapters 7, 9, 11, 12 and 13 of the Bankruptcy Code apply only in that chapter. GDB Pet. at 18. However, to the extent any such "rule" may exist, it is rife with exceptions. Multiple Bankruptcy Code provisions, like Section 903(1), apply whether or not a case under the Code is pending. *See, e.g.*, 11 U.S.C. § 528 (imposing regulations on debt relief agencies); *id*. § 525 (prohibiting discriminatory treatment of former debtors); *id*. § 362(a)-(b) (making automatic stay applicable to proceedings under the Securities Investor Protection Act). Moreover, while Bankruptcy Code § 103, entitled "Applicability of chapters," provides that many specific chapters or subchapters of the Code apply "only in a case under such chapter," *see, e.g.*, 11 U.S.C. §§ 103(b)-(e), (g)-(k), Congress did not so limit any portion of Chapter 9.

Rico) would be free to enact their own municipal bankruptcy statutes, which municipalities could use as an alternative to Chapter 9, thereby gutting Congress' intended bar on state municipal bankruptcy statutes.[14]

3. Petitioners contend that Congress could not have intended to leave Puerto Rico "in a 'no man's land' where its public utilities cannot restructure their debts under *either* federal law *or* its own law." Comm. Pet. at 1 (emphasis in original); *see also id*. at 22; GDB Pet. at 27. But of course, Puerto Rico's municipalities can restructure their debts consensually, as PREPA is in the process of doing.

Moreover, as the First Circuit noted, "congressional retention of authority" is a sensible approach that "is not the same as a no-man's land." First Cir. Op. at 31a, n.24. Puerto Rico is far from the only jurisdiction whose municipalities cannot file for Chapter 9. Bankruptcy Code § 109(c)(2) requires specific state authorization before a municipality may file under Chapter 9, and approximately half the states do not provide such authorization. *See* Clayton

[14] Petitioners attempt to avoid this result, suggesting that only Puerto Rico and D.C. would be exempted because only these jurisdictions lack the power to authorize their municipalities to employ Chapter 9. But this limitation has no basis in the logic of the structural argument, which would limit Section 903(1)'s preemptive bar to Chapter 9 cases because that bar appears in "a proviso to Section 903, which in turn is part of Chapter 9," Comm. Pet. at 11. This argument applies as much to the 50 states as to Puerto Rico and D.C.

P. Gillette, *Fiscal Federalism, Political Will, and Strategic Use of Municipal Bankruptcy*, 79 U. Chi. L. Rev. 281, 296-97 (2012). Municipalities in these states, like Puerto Rico, require legislative (or executive) action before they may file for Chapter 9.

The Commonwealth is free to seek relief from Congress. Indeed, it is currently pursuing an amendment to the Bankruptcy Code that would permit its municipalities to be Chapter 9 debtors. *See* Puerto Rico Chapter 9 Uniformity Act, H.R. 870, S. 1774, 114th Cong. (2015). Congress may choose to enact such relief, or alternative relief. *See* First Cir. Op. at 30a, 47a. Alternatively, Congress may take no action. Any of these outcomes, including the creation of a "no-man's land," is Congress' choice to make, and none would give the courts a reason to disregard the clear dictates of the statute Congress wrote. *See Guss v. Utah Labor Relations Bd.*, 353 U.S. 1, 11 (1957) (Congress' "judgment must be respected whatever policy objections there may be to creation of a no-man's-land.").[15]

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[15] The Commonwealth derides as "pure fiction" the First Circuit's suggestion that Congress may have sought to retain for itself the power to decide what restructuring options best fit Puerto Rico's circumstances. Comm. Pet. at 22-23. But the court did not claim to divine Congress' actual reasons for excluding Puerto Rico from Chapter 9 – an impossible task, the court recognized, given the absence of any legislative history for the 1984 amendments. *See* First Cir. Op. at 29a. Rather, the First Circuit was responding to Petitioners' contention that the exclusion of Puerto Rico from both federal and state municipal

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Congress' retention of authority over this issue makes far more sense than Petitioners' alternative construction: that by excluding the Commonwealth's municipalities from Chapter 9, Congress licensed the Commonwealth to Xerox Chapter 9, make it worse, and then enact it as Puerto Rican law – a result that would nullify the effect of Puerto Rico's exclusion from Chapter 9 and gut Congress' goal of preempting state municipal restructuring laws.

4. Petitioners' contention that the choice Congress made here departs from the practice it has historically followed for entities excluded from the federal Bankruptcy Code, such as banks and insurance companies, Comm. Pet. at 1-2; GDB Pet. at 14, is both inapposite and irrelevant. It is inapposite because, unlike municipalities, banks and insurance companies had long been subject to liquidation under other regulatory schemes, which is why they were excluded from the Bankruptcy Code pursuant to 11 U.S.C. § 109(b)(2). *See* S. Rep. No. 95-989, at 31 (1978) (explaining exclusion). It is irrelevant because, whereas Congress expressly preempted state municipal restructuring laws, it took no such action with respect to state bank and insurance company statutes. To the contrary, Congress made clear that state laws authorizing the restructuring of banks and insurance companies were permitted and, in some instances, "reverse-preempted" federal law. *See, e.g.*,

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restructuring laws was so absurd that Congress could not possibly have intended this result.

15 U.S.C. § 1012 (preserving state authority over "the business of insurance").

5. Petitioners attempt to invoke legislative history for the proposition that, from the outset, "Congress intended § 903(1) to preempt only municipal bankruptcy laws passed by States whose municipalities may be eligible for federal relief." GDB Pet. at 22; *see also* Comm. Pet. at 18. But Petitioners point to little more than language from an early version of the statute (the initial House Bill) that Congress did not enact. *See* GDB Pet. at 22-23.

This Court has cautioned against drawing inferences of Congressional intent based on prior, unenacted versions of statutes. *See, e.g.*, *Mead Corp. v. Tilley*, 490 U.S. 714, 723 (1989) ("We do not attach decisive significance to the unexplained disappearance of one word from an unenacted bill because 'mute intermediate legislative maneuvers' are not reliable indicators of congressional intent.") (citation omitted). In this case, the inference Petitioners ask this Court to draw contravenes the plain text of the statute that Congress *did* enact, as well as the clear statement of congressional purpose in the House Report for that statute, *see* H.R. Rep. No. 79-2246, at 4 (1946).

3. The Presumption Against Preemption Does Not Save the Recovery Act

As the First Circuit held, the presumption against preemption – if it applies here – is overcome by the plain meaning and purpose of the governing congressional statute. First Cir. Op. at 36a-37a. Moreover, the presumption simply does not apply in this case.

The presumption against preemption is triggered when "the field which Congress is said to have pre-empted has been traditionally occupied by the States." *United States v. Locke*, 529 U.S. 89, 108 (2000) (quoting *Jones v. Rath Packing Co.*, 430 U.S. 519, 525 (1977)). Conversely, it is "not triggered when the State regulates in an area where there has been a history of significant federal presence." *Id.*[16]

In this case, the field of municipal bankruptcy has been exclusively occupied by the federal government since 1946. And before the enactment of Chapter 9's precursor in 1937, there was little, if any, history of state *or* federal legislation in this area. *See* Michael W. McConnell & Randal C. Picker, *When Cities Go Broke: A Conceptual Introduction to Municipal*

[16] Moreover, the Court has not always applied the presumption against preemption to cases of express preemption, such as this one. *See Altria Group, Inc. v. Good*, 555 U.S. 70, 99 (2008) (Thomas, J., dissenting) (citing cases for proposition that "the Court's reliance on the presumption against pre-emption has waned in the express pre-emption context").

Bankruptcy, 60 U. Chi. L. Rev. 425, 427-28 (1993) ("Prior to 1933, there was neither state nor federal municipal bankruptcy legislation."); *see also United States v. Bekins*, 304 U.S. 27, 53-54 (1938) ("The natural and reasonable remedy through composition of the debts of the district was not available under state law by reason of the restriction imposed by the Federal Constitution upon the impairment of contracts by state legislation."). Because the Recovery Act falls in an area where only the federal government has historically legislated, it is entitled to no presumption against preemption.

Petitioners assert that states have "been enacting and enforcing debt-relief statutes since the early days of the Republic." GDB Pet. at 14; *see also* Comm. Pet. at 24. But this assertion is misleading in several respects. The relevant area is not "restructuring" or "debt relief" statutes, generally, but *municipal* bankruptcy laws, which have been almost exclusively the province of the federal government. Moreover, whatever the validity of state statutes authorizing extensions of maturities or other lesser forms of debt relief, this Court has consistently held that "the Contract Clause prohibits the States from enacting debtor relief laws which *discharge* the debtor from his obligations. . . ." *See Ry. Labor Execs. Ass'n v. Gibbons*, 455 U.S. 457, 472 n.14 (1982) (emphasis added); *Stellwagen v. Clum*, 245 U.S. 605, 615 (1918) ("It is settled that a state may not pass an insolvency law which provides for a discharge of the debtor from his

obligations. . . .").[17] The Recovery Act, which imposes a permanent injunction on the collection of debt, *see* Recovery Act §§ 115(b), (c), is such a statute.

II. THE DECISION BELOW DOES NOT INVOLVE A QUESTION OF FEDERAL LAW THAT WARRANTS THIS COURT'S REVIEW

Acknowledging that the First Circuit's decision does not conflict with that of any other court of appeals, Petitioners nevertheless seek review on the ground that the First Circuit's decision presents "an important question of federal law that has not been, but should be, settled by this Court." Comm. Pet. 27 (citing S. Ct. R. 10(c)); *see also* GDB Pet. 27. But Petitioners themselves have stated that the issue they raise is unique – which, if true, militates against this Court's review. And the supposed emergency conjured up by Petitioners is largely invented and has nothing to do with this appeal.[18]

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[17] For this reason, the GDB's assertion that the First Circuit's decision "made Puerto Rico's municipalities the only entities in the history of the United States to be ineligible for bankruptcy protection under both federal and State law," GDB Pet. 26, is deeply misleading.

[18] Amicus curiae Eduardo Bhatia urges the Court to accept the Petitions primarily on the grounds stated in Judge Torruella's concurring opinion. However, the issues addressed in that concurrence, concerning the constitutionality of the 1984 amendments to the Bankruptcy Code, had not been raised by any of the parties below; this case therefore would not be a

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1. Petitioners contend that the issues raised by the Petitions are unique to Puerto Rico, making a circuit split highly unlikely. *See* Comm. Pet. at 27 ("no circuit split is realistically possible here"); GDB Pet. at 30 ("It is exceedingly unlikely that a Circuit split will ever develop."). To the extent this is true, it is a reason to deny certiorari, not to grant it. *Cf. Watt v. Alaska*, 451 U.S. 259, 274-75 (1981) (Stevens, J., concurring); *N.L.R.B. v. Mexia Textile Mills, Inc.*, 339 U.S. 563, 573 (1950) (Frankfurter, J., dissenting).

2. Petitioners urge the Court to grant immediate review because "the Commonwealth is in the midst of a financial meltdown that threatens the island's future" and leaves Puerto Rico's citizens "at the mercy of their creditors." Comm. Pet. at 3; *see also* GDB Pet. at 27-28 ("This Court's intervention is the only foreseeable means of preventing [a] descent into chaos" involving "hundreds or even thousands of lawsuits" and the potential loss of "vital services like electricity and public transportation").

The reality is entirely different. More than eight months have passed since the district court struck down the Recovery Act. No shutdown of public services has occurred or been threatened. No bondholder lawsuits have been brought against PREPA. And any such lawsuits, if eventually brought, would not risk a

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suitable vehicle for considering those issues. The other amici curiae, Puerto Rico-based foundations and non-profits, advance "emergency" arguments similar to those made by Petitioners.

power shutdown: The Trust Agreement calls for the use of first dollars in to pay operating expenses, JA 384-86, so PREPA will keep operating even if it cannot meet its debt service obligations in full.[19]

Nor has the invalidation of the Recovery Act impeded PREPA's ability to restructure. To the contrary, following the decisions of the courts below, PREPA intensified its negotiations with its creditors and, last month, reached agreements in principle with its principal bondholders and its bank lenders over the terms of a consensual restructuring. *See* PREPA Public Disclosure (Sept. 2, 2015);[20] Press Release, PREPA Reaches Agreement with Fuel Line Lenders (Sept. 22, 2015).[21]

Pursuant to the term sheet they entered into with PREPA, bondholders would exchange their old bonds for new bonds issued by a newly-formed government corporation and payable solely from a surcharge on electric bills. It is a condition to the restructuring that approximately 85% of the old

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[19] Petitioners and amici attempt to shift the Court's focus from PREPA's circumstances to the *Commonwealth's* fiscal crisis. But that broader crisis has little if any relevance to the Recovery Act, which applies only to PREPA and a few other public corporations. *See* Recovery Act § 102(50), 113, GDB App. 194a, 205a.

[20] Available on the GDB's website at: http://www.bgfpr.com/documents/PREPA-PublicDisclosure-September-2-2015.pdf.

[21] Available through the Reorg Research news service at http://new.reorg-research.com/data/documents/20150922/5601c79d144fd.pdf.

uninsured bonds exchange; the Franklin Plaintiffs and other institutions holding over 35% of those bonds have already agreed to do so, subject to the terms of a Restructuring Support Agreement that is being negotiated. As part of the restructuring, Puerto Rico will commit that the new issuer and the new bonds will never be subject to the Recovery Act. *See* PREPA Public Disclosure (Sept. 2, 2015). This pending restructuring diminishes, if not eliminates, the supposed emergency underlying Petitioners' arguments for certiorari.

Finally, Puerto Rico is not left in a "no man's land." It can return to Congress for permission to use Chapter 9 – just as Michigan law required Detroit to ask the governor for permission to file for Chapter 9, and as Chicago, for example, would have to ask Illinois for a change in law to file under Chapter 9. Puerto Rico has done precisely that. Bills have been filed in both the House and the Senate that would amend the Bankruptcy Code to permit Puerto Rico's municipalities to file under Chapter 9. *See* Puerto Rico Chapter 9 Uniformity Act, H.R. 870, S. 1774, 114th Cong. (2015).

Congress is also considering a number of alternatives to Chapter 9. Proposals have been advanced to appoint a federal financial control board similar to the one Congress created to address Washington, D.C.'s

fiscal crisis in 1995,[22] and to authorize the U.S. Treasury to guarantee future Puerto Rico bonds.[23] Just yesterday, the Treasury Department presented a wide-ranging plan to address Puerto Rico's current crisis through means that would include both a federal control board and authorization for all of the Commonwealth's debt (not just public corporation debt) to restructure under federal law.[24] Hearings on Puerto Rico's crisis were held before the Senate Finance Committee on September 29, 2015[25] and before the Senate Energy and Natural Resources Committee on October 22, 2015.[26]

In short, far from exacerbating Puerto Rico's problems or putting its citizens at the mercy of their creditors, the decisions below have spurred movement

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[22] *See* Billy House, Puerto Rico Advisory Board Backed by Leader of U.S. House Panel, BloombergBusiness (Oct. 1, 2015), available at http://www.bloomberg.com/news/articles/2015-10-01/puerto-rico-advisory-board-backed-by-leader-of-u-s-house-panel.

[23] *See* Puerto Rico Financial Improvement and Bond Guarantee Act of 2015, H.R. 3725, 114th Cong. (2015).

[24] *See* Mary Williams Walsh, Michael Corkery & Julie Hirschfeld Davis, *Obama Administration Draws Up Plan to Help Puerto Rico With Debt*, N.Y. Times, Oct. 21, 2015, available at http://nyti.ms/1GUvZVz.

[25] *See* Financial and Economic Challenges in Puerto Rico: Hearing Before the S. Comm. on Finance, 114th Cong. (Sept. 29, 2015), available at http://www.finance.senate.gov/hearings/.

[26] *See* Hearing on Puerto Rico: Economy, Debt, and Options for Congress, 114th Cong. (Oct. 22, 2015), available at http://www.energy.senate.gov/public/index.cfm/hearings-and-business-meetings.

toward a consensual resolution between PREPA and its creditors, as well as a variety of potential congressional solutions. Those developments should be allowed to continue.

CONCLUSION

The petitions for writs of certiorari should be denied.

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