
THE PERFECT STORM: PUERTO RICO'S EVOLVING DEBT CRISES UNDER PROMESA

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In 2015, domestic and international creditors were bracing for a historic financial event as the United States territory Puerto Rico teetered on the brink of catastrophic default. After almost a decade of economic headwinds, substantial money-borrowing, and poor fiscal management, Puerto Rico's financial condition was quickly deteriorating. However, the island's legal status as a territory made it impossible for the government to take advantage of the U.S. Bankruptcy Code to renegotiate its debt with institutional investors. After the Supreme Court denied the island's own attempt to construct a restructuring process, Congress finally stepped in and enacted the Puerto Rico Oversight, Management, and Economic Stability Act in the summer of 2016. The Act, commonly referred to as PROMESA, creates a novel framework under which Puerto Rico can renegotiate its credit commitments and hopefully regain access to the credit market sometime in the future. In particular, PROMESA creates the Financial Oversight and Management Board (FOMB), which is an independent organization with oversight and approval authority over much of the Puerto Rico bankruptcy process.

However, because PROMESA as a legislative act is new and untested, several interesting questions arise as to the law's infrastructure around accountability of entities such as the FOMB. These questions are especially salient as Puerto Rico is

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the first U.S. territory to become insolvent; therefore, how these bankruptcy proceedings unfold will serve as important precedent for other territories or municipalities that may find themselves bankrupt.

This Note focuses on the FOMB and whether stakeholders, such as creditors or Puerto Rican citizens, can judicially challenge the fiscal decisions made by the FOMB throughout this restructuring process. While this Note ultimately concludes that stakeholders may not have a strong legal argument to reverse the FOMB's financial determinations in court, it also proposes that stakeholders may be more successful in appealing to congressional representatives to ensure that their voices are heard and their interests are accounted for throughout these unprecedented proceedings.

I.	Introduction	369
II.	Puerto Rico's Debt Crisis and PROMESA.....	375
	A. Origins of Puerto Rico's Debt Crisis.....	376
	B. The Puerto Rico Recovery Act and the Supreme Court.....	378
	1. The Puerto Rico Public Corporation Debt Enforcement and Recovery Act	379
	2. <i>Puerto Rico v. Franklin California</i> <i>Tax-Free Trust</i> and the Puerto Rico Debt Default.....	380
	C. The Congressional Solution: PROMESA	382
	D. Evolution of the Commonwealth Fiscal Plan	387
	E. Further Challenges for Puerto Rico, Creditor Confidence, and Austerity Measures	395
III.	PROMESA and a Legal Challenge to the Fiscal Plan.....	402
	A. Judicial Challenge Under Section 106 of PROMESA.....	405
	1. Plain Meaning Analysis of Section 106(e)	406
	2. Certification Determinations Versus Other Determinations	407
	3. In Context of PROMESA: Creditor Collective Action Exception	408

B.	Judicial Conclusions About Jurisdiction to Review “Certification Determinations” Under PROMESA.....	409
IV.	Due Process Challenge Under the U.S. Constitution	414
A.	Final Deprivation of Property.....	417
B.	FOMB Fiscal Plan Comment Process and Listening Sessions	419
C.	<i>Mathews v. Eldridge</i> : Procedural Due Process Test and Application.....	422
1.	Stakeholder Interests.....	423
2.	Risk of Error and Additional Procedural Safeguards.....	424
3.	Government’s Interests and Burdens	427
4.	Balancing Interests and Administrative Burdens	428
V.	Congressional Assessment and Action	434
VI.	Conclusion.....	440

I. INTRODUCTION

Until the mid-twentieth century, Puerto Rico’s economy was driven by agriculture.¹ Boosted by advantageous federal tax credits, generous government funding, and cheap labor, Puerto Rico’s economy quickly modernized—manufacturers rushed to establish factories on the island and local tourism flourished.² Yet over the last two decades, Puerto Rico’s economy has slipped into a prolonged recession.³ After Congress began repealing many of these beneficial tax policies, businesses relocated to more cost-effective locations and the island’s unemployment increased while tax revenue

¹ *Puerto Rico: The Economy*, ENCYCLOPAEDIA BRITANNICA, <https://www.britannica.com/place/Puerto-Rico/The-economy> [<https://perma.cc/JDQ5-Q9LT>].

² See *id.*; Nick Brown, *How Dependence on Corporate Tax Breaks Corroded Puerto Rico’s Economy*, REUTERS (Dec. 20, 2016), <http://www.reuters.com/investigates/special-report/usa-puertorico-economy/> [<https://perma.cc/FM7E-VWLM>].

³ *Puerto Rico*, *supra* note 1.

decreased.⁴ Puerto Rico began to rely heavily on borrowed money, and as of 2018, had accumulated over \$120 billion in debt and pension obligations.⁵

In June 2016, the U.S. Congress enacted the Puerto Rico Oversight, Management, and Economic Stability Act (“PROMESA”).⁶ The enactment of PROMESA created a unique set of bankruptcy procedures that would allow Puerto Rico and its territorial instrumentalities⁷ to restructure debt commitments and eventually reestablish access to capital markets.⁸ PROMESA also established the Financial Oversight and Management Board (“FOMB”), which supervises the island’s financial rehabilitation.⁹ In particular, the FOMB has approval authority over the island’s various financial plans, legislative actions, and governance reforms.¹⁰

The cornerstone of the PROMESA framework is a multi-year “fiscal plan” that outlines a long-term approach to eliminating the island’s deficits and to implementing reforms

⁴ Brown, *supra* note 2.

⁵ FIN. OVERSIGHT & MGMT. BD. FOR P.R., NEW FISCAL PLAN FOR PUERTO RICO: RESTORING GROWTH AND PROSPERITY 1 (Apr. 19, 2018), https://drive.google.com/file/d/1X3JdAwbf047oZ_6_1aABemfyzhPfrjE/view [<https://perma.cc/S4QS-2AXT>] [hereinafter APR. 2018 FISCAL PLAN].

⁶ Puerto Rico Oversight, Management, and Economic Stability Act, Pub. L. 114-187, 130 Stat. 549 (2016) (codified as amended in scattered sections of 48 U.S.C.) [hereinafter PROMESA]; D. ANDREW AUSTIN, CONG. RESEARCH SERV., R44532, THE PUERTO RICO OVERSIGHT, MANAGEMENT, AND ECONOMIC STABILITY ACT 1 (2016), <https://fas.org/sgp/crs/row/R44532.pdf> [<https://perma.cc/5FDW-EJJS>].

⁷ See PROMESA § 5(19)(A) (defining “territorial instrumentality” as “any political subdivision, public agency, instrumentality . . . or public corporation.”).

⁸ See STAFF OF H. COMM. ON NAT. RES., 114TH CONG., REP. ON H.R. 5278 “PUERTO RICO OVERSIGHT, MANAGEMNT [sic], ECONOMIC STABILITY ACT” (PROMESA) SECTION BY SECTION 11–14 [hereinafter COMM. REPORT ON H.R. 5278], https://republicans-naturalresources.house.gov/uploadedfiles/section_by_section_6.6.16.pdf [<https://perma.cc/7GH7-Y3SZ>].

⁹ See AUSTIN, *supra* note 6, at 3.

¹⁰ See, e.g., PROMESA § 104 (summarizing many of the FOMB’s procedural powers); *id.* § 201 (detailing the FOMB’s responsibility over fiscal plans).

that will repair its struggling economy.¹¹ More importantly, the fiscal plan serves as the FOMB's chief enforcement tool to ensure that the government's future spending practices, legislative activities, and debt restructuring efforts adhere to a broader recovery strategy.¹²

However, Puerto Rico's debt crisis is remarkably complex—the priority of creditors is unclear,¹³ and territorial bankruptcies have no legal precedent in the United States.¹⁴ Consequently, attempts to devise a fiscal plan that is mutually agreeable to all classes of creditors, local government actors, and Puerto Rican residents have been fraught with conflict.¹⁵ There exists a fundamental tension between honoring the island's contractual obligations and serving the needs of the island, especially under strained financial conditions. Specifically, creditors have voiced concerns that the fiscal plans are fundamentally flawed and that the overall drafting process lacks transparency.¹⁶ Certain

¹¹ See APR. 2018 FISCAL PLAN, *supra* note 5, at 1 (“[The Fiscal Plan] provides a blueprint of the structural reforms and fiscal measures that, if implemented, will give Puerto Ricans what they need and deserve—a growing economy with more and better jobs, a twenty-first century electricity grid, resilient infrastructure, and an effective and efficient public sector.”).

¹² COMM. REPORT ON H.R. 5278, *supra* note 8, at 8, 13–18 (summarizing the function of the fiscal plan, including which PROMESA provisions require consistency with the fiscal plan).

¹³ See Emma Orr & Michelle Kaske, *Puerto Rico Bondholders Deny Legitimacy of Each Other's Debt*, BLOOMBERG (May 23, 2017), <https://www.bloomberg.com/news/articles/2017-05-23/puerto-rico-bondholders-say-everybody-and-nobody-has-valid-claim> [<https://perma.cc/W4LM-N9QT>]; see also *infra* Section II.E.

¹⁴ See Jaime Farrant, *4 Reasons Why Puerto Rico's 'Bankruptcy' Process Matters to U.S. Residents*, NBC NEWS (June 5, 2017), <https://www.nbcnews.com/news/latino/4-reasons-why-puerto-rico-s-bankruptcy-process-matters-u-n766991> [<https://perma.cc/Q8CH-BKGE>].

¹⁵ See *infra* Section II.D.

¹⁶ See Daniel Bases, *Creditors Cry Foul on Puerto Rico's Latest Fiscal Plan*, REUTERS (Feb. 14, 2018), <https://www.reuters.com/article/us-usa-puertorico-creditors/creditors-cry-foul-on-puerto-ricos-latest-fiscal-plan-idUSKCN1FZ03W?il=0> [<https://perma.cc/R5BD-PPXR>]; Press Release, Assured Guar., Assured Guaranty Urges Puerto Rico Oversight Board to Reconsider Unlawful Fiscal Plan (May 15, 2018),

parties have also brought legal challenges claiming that fiscal plans certified by the FOMB violate provisions within PROMESA as well as protections within the U.S. Constitution.¹⁷

These debates highlight important normative questions regarding the scope of the FOMB's authority under PROMESA—how much power should a select group of unelected individuals¹⁸ be given under this framework, and what, if any, avenues of review should be available to check the FOMB's various governance decisions?¹⁹ Such issues have also become increasingly salient over the past two years. First, there have been many disagreements between the FOMB and Governor Ricardo Rosselló as each side struggles to assert a particular vision of the island's fiscal and operational affairs.²⁰

<http://assuredguaranty.com/assured-guaranty-urges-puerto-rico-oversight-board-to-reconsider-unlawful-f> [<https://perma.cc/9Z9M-KH97>]; Press Release, Grp. of P.R.'s Creditors, Puerto Rico's Creditors Unite to Call for a Credible, Pro-Growth Fiscal Plan (Feb 14, 2018) [hereinafter Creditor Press Release], <https://www.prnewswire.com/news-releases/puerto-ricos-creditors-unite-to-call-for-a-credible-pro-growth-fiscal-plan-300598668.html> [<https://perma.cc/YC6C-YPJE>].

¹⁷ See *infra* Part IV.

¹⁸ The FOMB is composed of seven presidentially appointed members. PROMESA § 101(e)(1)(A), 48 U.S.C. § 2121(e)(1)(A) (2012). For more background on PROMESA and the FOMB, see *infra* Section II.C.

¹⁹ See Ramon Rosario, Opinion, *Puerto Rico Federal Oversight Board Has Power Hungry Intentions*, HILL (Nov. 16, 2017), <http://thehill.com/opinion/energy-environment/360700-puerto-rico-federal-oversight-board-has-power-hungry-intentions> [<https://perma.cc/2P9A-XT8R>].

²⁰ For example, at the end of 2017, the FOMB attempted to install its own emergency manager to head the Puerto Rico Electric Power Authority ("PREPA") after it was revealed the instrumentality had entered into a suspicious \$300 million contract with a seemingly unqualified company, Whitefish Energy Holdings, for restoration of power and energy across the island. Steven Church, Rebecca Spalding & Michelle Kaske, *Who's in Charge of Puerto Rico? A Manhattan Judge Gets to Decide*, BLOOMBERG (Nov. 13, 2017), <https://www.bloomberg.com/news/articles/2017-11-13/whos-in-charge-of-puerto-rico-a-manhattan-judge-gets-to-decide> [<https://perma.cc/J7BT-LDHB>]. In response, the governor of Puerto Rico filed suit against the FOMB, arguing that allowing such an action would set a dangerous precedent and give the FOMB authority to displace other elected officials. See *id.* The FOMB responded that Congress had granted it

Second, economic data currently suggests that Puerto Rico's financial problems are not isolated, as other U.S. territories have also begun to feel the pressure of economic stagnation and unmanageable debt obligations.²¹ Hurricane Irma and

broad powers to do everything necessary to repair the island's finances, which in this case includes nominating a new leader of PREPA. *See id.*

Ultimately, the judge overseeing this PROMESA case rejected the FOMB's nomination request. *In re Fin. Oversight & Mgmt. Bd. for P.R.*, 583 B.R. 626, 632–33 (D.P.R. 2017) (“The FOMB’s authority to withhold approval and to make recommendations clearly gives it significant leverage to guide . . . the Commonwealth entities But nothing in the fiscal plan, budgeting, and enforcement provisions of PROMESA . . . suggests that the FOMB is the principal body empowered to manage PREPA’s day-to-day functions, or that it has direct authority to alter PREPA’s reporting structure and install a [chief transformation officer].”).

More recently, the FOMB and the governor also clashed on the April 2018 fiscal plan, which initially required pension cuts and labor reforms. Nick Brown, *Puerto Rico Board Approves Fiscal Plan as Governor Vows Defiance*, REUTERS (Apr. 19, 2018), <https://www.reuters.com/article/us-puertorico-debt-fiscal/puerto-rico-board-approves-fiscal-plan-as-governor-vows-defiance-idUSKBN1HQ2TG> [<https://perma.cc/2ECJ-YX2L>]. Local lawmakers were unwilling to enact these changes and insisted that the FOMB lacked the authority to require such legislation. *See id.* The two sides eventually negotiated a compromise, and, in October 2018, the FOMB updated the fiscal plan to reflect these changes. *See infra* Section II.D.

²¹ The U.S. Virgin Islands currently owes approximately \$7 billion in bond and pension debt and millions in unpaid health benefits to retired employees. Marc Joffe, *Hurricane Irma Could Tip US Virgin Islands into Bankruptcy*, FISCAL TIMES (Sept. 14, 2017), <http://www.thefiscaltimes.com/2017/09/14/Hurricane-Irma-Could-Tip-US-Virgin-Islands-Bankruptcy> [<https://perma.cc/BRB7-8P3H>]. As a result, credit rating agencies lowered their ratings of Virgin Island bond offerings. *Id.*

Similarly, the Northern Mariana Islands have an almost exhausted public pension system, and previously declared bankruptcy in 2012, although the case was dismissed. Mary Williams Walsh, *After Puerto Rico’s Debt Crisis, Worries Shift to Virgin Islands*, N.Y. TIMES (June 25, 2017), <https://www.nytimes.com/2017/06/25/business/dealbook/virgin-islands-debt-payment-pensions.html> (on file with the *Columbia Business Law Review*). American Samoa recently lost one of its biggest economic drivers when a local business closed operations after the company was required to match federal minimum wage standards, and even Guam, which heavily benefits from large American military establishments on the island, has become concerned about its own debt after Puerto Rico’s default. *Id.*; *see also* Robert Slavin, *Virgin Island Bonds Stir Concern*, BOND BUYER (Dec. 28,

Hurricane Maria have only exacerbated the financial stress on these territories.²² These storms not only destroyed roads, homes, and infrastructure, but also left many inhabitants without food, water, and power.²³ Rebuilding Puerto Rico requires significant financial investment,²⁴ and the region's local economies, including tourism, are recovering slowly.²⁵ Hence, the resolution of Puerto Rico's debt crisis through the mechanisms provided by PROMESA will serve not only as an important paradigm for the market but will also set an important legal precedent for future territorial insolvencies.²⁶

This Note explores some of the growing legal and practical concerns at the heart of Puerto Rico's unprecedented debt crisis, and especially focuses on several issues of first impression for courts interpreting and implementing PROMESA.²⁷ Part II provides an overview of Puerto Rico's

2017), <https://www.bondbuyer.com/news/concern-about-virgin-island-bonds-grow?tag=0000015b-2691-d5f6-a9df-e7b5ae090000> (on file with the *Columbia Business Law Review*).

²² Stephanie Rosenbloom, *After Irma: Caribbean Tourism, Island by Island*, N.Y. TIMES (Sept. 15, 2017), <https://www.nytimes.com/2017/09/15/travel/after-irma-caribbean-tourism-island-by-island.html> (on file with the *Columbia Business Law Review*).

²³ *Id.*

²⁴ Estimates indicate that Hurricane Maria created anywhere from \$80 billion to \$139 billion worth of damage. See APR. 2018 FISCAL PLAN, *supra* note 5, at 2; Jessica Resnick-Ault & Nick Brown, *Exclusive: Puerto Rico Open for Tourists Despite 'Mixed-Bag' Recovery – Governor*, REUTERS (Sept. 27, 2018), <https://www.reuters.com/article/us-puertorico-economy-exclusive/exclusive-puerto-rico-open-for-tourists-despite-mixed-bag-recovery-governor-idUSKCN1M72U3> [<https://perma.cc/7SVA-ZXJW>].

²⁵ See Colleen Long, *Puerto Rico Tourism Craters in Wake of Hurricane Maria*, CHI. TRIB. (Oct. 24, 2017), <http://www.chicagotribune.com/lifestyles/travel/ct-puerto-rico-tourism-hurricane-maria-20171024-story.html> [<https://perma.cc/3HK8-LVPJ>]; Resnick-Ault & Brown, *supra* note 24 (citing Puerto Rico governor's characterization that Puerto Rico's recovery from Hurricane Maria has been a "mixed bag").

²⁶ See generally Ike Brannon, *What We Do in Puerto Rico Sets a Precedent, Like It or Not*, HILL (May 5, 2016), <http://thehill.com/blogs/pundits-blog/economy-budget/278804-what-we-do-in-puerto-rico-sets-a-precedent-like-it-or-not> [<https://perma.cc/42JF-8NM7>].

²⁷ Like many bankruptcies, Puerto Rico's insolvency is complicated and messy. As a result, there are constantly new updates on almost every front

fiscal situation and describes Congress's attempt to address the problem through a new legislative framework. Part II also describes ongoing attempts to finalize a fiscal plan that is agreeable to all major stakeholders, and highlights some of the concerns related to these efforts. Part III then describes one legal challenge creditors have tried to bring to invalidate fiscal plan proposals that appear inconsistent with the statutory requirements provided in PROMESA. Relatedly, Part III focuses on an important threshold question as to whether the FOMB's approval of fiscal plans is judicially reviewable by a federal court. Part IV subsequently considers a second claim that stakeholders may bring in court, which is a due process challenge against the FOMB's fiscal plan certification process. This argument is especially important if the substance of the plan may not be judicially reviewable as discussed in Part III. Finally, Part V discusses the role that Congress can play in observing these proceedings and ensuring that the FOMB is acting effectively. Specifically, this Note argues that while action under PROMESA and other legal theories in court may not provide stakeholders with satisfactory recourse to challenge the actions of the FOMB, there are strong incentives for institutional actors, such as Congress, to promote more transparency and collaboration throughout this entire process. The ultimate goal of helping Puerto Rico regain access to debt markets is a critical long-term interest of the island, and much of it is inevitably dependent upon creditor confidence.

II. PUERTO RICO'S DEBT CRISIS AND PROMESA

This Part provides an overview of Puerto Rico's current debt crisis and Congress's subsequent legislative response. Section II.A details the confluence of factors that contributed to the island's extensive debt problem. Section II.B describes Puerto Rico's initial legislative solution to its financial situation and explains the Supreme Court's subsequent

of the restructuring process and ongoing litigation. This Note focuses on events up until February 2019, and attempts to present the most current information up until that point in time.

decision striking down the law as unconstitutional. Section II.C discusses the political backdrop that led to Congress's enactment of PROMESA and lays out the law's central provisions. Section II.D details ongoing efforts to develop a suitable fiscal plan, and finally, Section II.E summarizes some of the broader challenges that underlie the fiscal plan drafting and certification process.

A. Origins of Puerto Rico's Debt Crisis

As of 2018, Puerto Rico has accumulated over \$120 billion in liabilities consisting of approximately \$70 billion in debt and about \$50 billion in unfunded pension obligations.²⁸ The cause of this indebtedness can be attributed to factors such as federal rollback of critical fiscal policies and poor local budgetary governance.²⁹ This Section describes the various circumstances that contributed to Puerto Rico's initial economic growth, and then details how the repeal of certain fiscal policies precipitated Puerto Rico's economic nosedive and led to the island's debilitating dependence on borrowed money.

Several decades ago, the U.S. federal government sought to transform Puerto Rico's largely agrarian economy into a hub for manufacturing.³⁰ Congress developed "Operation Bootstrap," a system of economic incentives aimed at attracting U.S. manufacturing companies to the island.³¹ The federal government also implemented favorable income tax

²⁸ FIN. OVERSIGHT & MGMT. BD. FOR P.R., NEW FISCAL PLAN FOR PUERTO RICO: RESTORING GROWTH AND PROSPERITY 7 (Oct. 23, 2018), <https://drive.google.com/file/d/17ca0ALe7vpYn0jEzTz3RfykpsFSM0ujK/view> [<https://perma.cc/3UGQ-ALGB>] [hereinafter OCT. 2018 FISCAL PLAN].

²⁹ AUSTIN, *supra* note 6, at 30. *See generally* D. ANDREW AUSTIN, CONG. RESEARCH SERV., R44095, PUERTO RICO'S CURRENT FISCAL CHALLENGES (2016), <https://fas.org/sgp/crs/row/R44095.pdf> [<https://perma.cc/E8FW-WLAV>].

³⁰ *See* John W. Schoen, *Here's How an Obscure Tax Change Sank Puerto Rico's Economy*, CNBC (Sept. 26, 2017), <https://www.cnbc.com/2017/09/26/heres-how-an-obscure-tax-change-sank-puerto-ricos-economy.html> [<https://perma.cc/5JE5-VVE7>].

³¹ *See* Brown, *supra* note 2.

policies that provided exemptions on corporate profits³² and authorized Puerto Rico to issue “triple tax exempt” bonds which did not require investors to pay federal, state, or local taxes on interests earned from these debt instruments.³³ Many of these debt offerings were also backed by strong statutory and constitutional guarantees, thus making them attractive and seemingly “risk-free” investments.³⁴ Consequently, local businesses, such as pharmaceutical and life science companies, prospered and contributed substantial tax revenue to the island.³⁵

While these policies were effective at propping up the island’s growing industries, tax reformers criticized some of these benefits as “corporate welfare.”³⁶ In 1996, Congress repealed the income tax exemptions and allowed the scheme to phase out over ten years.³⁷ Unsurprisingly, these policy changes had significant ramifications for Puerto Rico’s economy—corporations and businesses quickly left the island and local unemployment rates sky-rocketed.³⁸ This was subsequently followed by the Great Recession,³⁹ during which

³² See *id.*; see also Heather Long, *Puerto Rico’s Crisis: How Did It Get So Bad?*, CNNMONEY (May 12, 2016), <http://money.cnn.com/2016/05/12/investing/puerto-rico-debt-crisis/index.html> [<https://perma.cc/WF8S-2SLM>].

³³ 48 U.S.C. § 745 (2012); see also Thomas Heath, *To the Average Investor, Puerto Rico Debt Crash Is More Whimper, Less Bang*, WASH. POST (Oct. 10, 2017), https://www.washingtonpost.com/news/get-there/wp/2017/10/10/to-the-average-investor-puerto-rico-debt-crash-is-more-whimper-less-bang/?utm_term=.e90c7e159105 [<https://perma.cc/S7X9-7D4P>].

³⁴ For more details on the structure of these debt guarantees, see *infra* Section II.E.

³⁵ See APR. 2018 FISCAL PLAN, *supra* note 5, at 6.

³⁶ Schoen, *supra* note 30.

³⁷ See Long, *supra* note 32.

³⁸ Around the time the exemptions phased out, Puerto Rico’s unemployment rate fell dramatically, and as of 2017, the unemployment rate was more than twice that of the U.S. national average unemployment rate. Nathan Bomey, *6 Reasons Why Puerto Rico Slid into Financial Crisis*, CNBC (Oct. 5, 2017), <https://www.cnbc.com/2017/10/05/6-reasons-why-puerto-rico-slid-into-financial-crisis.html> [<https://perma.cc/EXX2-FX5F>].

³⁹ Schoen, *supra* note 30.

unemployed workers, including valuable skilled laborers, began leaving the island in search of work on the mainland.⁴⁰

As a consequence of these headwinds, Puerto Rico has seen its gross national product shrink by twenty percent, its labor participation fall to a low of thirty-eight percent, and its local population decrease by ten percent.⁴¹ Puerto Rico's tax base has shrunk dramatically, and in response, the island began taking advantage of its ability to issue safe and economically appealing bonds and borrowed significant funds to bridge these financing shortfalls.⁴²

However, this quickly drew the island into a dangerous "death spiral."⁴³ Poor tax policies and economic slowdown caused local businesses and workers to leave the island, which exacerbated the local tax revenue deficit. This forced an already distressed territory to assume more debt and simultaneously increase tax rates in an attempt to bridge the financing gap. These pressures drove more residents and local businesses to leave the island, thus perpetuating a downward cycle of economic deterioration.

B. The Puerto Rico Recovery Act and the Supreme Court

Recognizing the severity of Puerto Rico's financial condition, local government leaders enacted a statute that attempted to provide the island with legal mechanisms to

⁴⁰ This exodus of workers led to a shrinking future workforce, as families with young children began leaving the island. *See Long, supra* note 32; *see also* Patrick Gillespie, *Puerto Rico's Brain Drain: Fewer Children in Schools*, CNNMONEY (Dec. 23, 2015), <http://money.cnn.com/2015/12/23/news/economy/puerto-rico-brain-drain/?iid=EL> [<https://perma.cc/6WTX-U9LK>].

⁴¹ APR. 2018 FISCAL PLAN, *supra* note 5, at 7.

⁴² Schoen, *supra* note 30.

⁴³ *See* Clayton P. Gillette & David A. Skeel, Jr., *Governance Reform and the Judicial Role in Municipal Bankruptcy*, 125 YALE L.J. 1150, 1160 n.28 (2016) (citing to instances where courts have described depopulation and service inefficiency as a "death spiral" for distressed municipalities).

restructure its debt obligations.⁴⁴ However, the Supreme Court ultimately found this law to be unconstitutional.⁴⁵ Section II.B.1 provides an overview of this piece of legislation and how it was intended to manage the island's ballooning debt problem. Section II.B.2 summarizes the Supreme Court's rationale in striking down this law and highlights the compounding circumstances that compelled Congress to enact PROMESA.

1. The Puerto Rico Public Corporation Debt Enforcement and Recovery Act

As Puerto Rico's local deficit grew and economic conditions worsened, credit rating agencies began downgrading the island's public debt. This occurred several times between early 2014 and mid-2015,⁴⁶ and, as a result, investors began to lose confidence in Puerto Rico's ability to repay its debt obligations.⁴⁷ The island subsequently lost access to credit markets and this inability to continue borrowing money only further intensified the government's financial difficulties.⁴⁸ In the summer of 2014, Puerto Rican officials declared a state of fiscal emergency, and legislators responded by enacting the Puerto Rico Public Corporation Debt Enforcement and Recovery Act ("Recovery Act").⁴⁹

Because of Puerto Rico's territorial status, local legislators expressed skepticism that the island would have access to federal Chapter 9 bankruptcy procedures designed for state

⁴⁴ Recent Legislation, *Municipal Bankruptcy — Preemption — Puerto Rico Passes New Municipal Reorganization Act*, 128 HARV. L. REV. 1320, 1321–22 (2015) [hereinafter *Municipal Bankruptcy*].

⁴⁵ See *infra* Section II.B.2.

⁴⁶ AUSTIN, *supra* note 6, at 4.

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ Then-Governor Alejandro García Padilla introduced the Recovery Act on June 25, 2014, and Puerto Rico's Legislative Assembly immediately passed the law a few days later on June 28, 2014. *Municipal Bankruptcy*, *supra* note 44, at 1320–21.

municipalities.⁵⁰ Similarly, the island's public instrumentalities did not appear to fall under federal Chapter 11 bankruptcy for corporations.⁵¹ Legislators constructed the Recovery Act to fill this legal gap—it gave the island “a controlled, orderly way to negotiate with creditors to lower debt,” and thus was aimed at protecting the interests of both the public and creditors.⁵²

2. *Puerto Rico v. Franklin California Tax-Free Trust* and the Puerto Rico Debt Default

A group of Puerto Rico bondholders quickly brought challenges to the new Recovery Act. These corporations claimed that the local law was explicitly preempted by the U.S. Bankruptcy Code, as states and territories are prohibited from creating independent insolvency schemes.⁵³ The Puerto Rico government, however, believed the Recovery Act was an imperative piece of legislation for the island, as the federal bankruptcy code does not provide territories with access to crucial insolvency and restructuring processes.⁵⁴

⁵⁰ GOV'T DEV. BANK FOR P.R., THE FACTS ABOUT PUERTO RICO'S PUBLIC CORPORATIONS: DEBT ENFORCEMENT AND RECOVERY ACT [hereinafter PUERTO RICO'S PUBLIC CORPORATIONS], <http://www.bgfpr.com/documents/FactsAboutDebtEnforcementAndRecoveryAct.pdf> [https://perma.cc/5Z2A-PYEE]; see also 11 U.S.C. § 101(40) (2012) (defining “municipality” as a “political subdivision or public agency or instrumentality of a State”); *id.* § 101(52) (excluding the District of Columbia and Puerto Rico from the definition of “state” for purposes of defining who may be a debtor under Chapter 9); *id.* § 109(c)(1) (“An entity may be a debtor under chapter 9 . . . if and only if such entity . . . is a municipality”).

⁵¹ See 11 U.S.C. § 101(9) (defining “corporation” as including private corporations, joint-stock companies, business trusts, etc.); *id.* § 101(41) (defining “person” to include an individual, partnership, and corporation); *id.* § 109(d) (stating that a “person” that may be a debtor under Chapter 7 may also be a debtor under Chapter 11).

⁵² PUERTO RICO'S PUBLIC CORPORATIONS, *supra* note 50.

⁵³ See generally Brief for Franklin Respondents at 7–12, *Puerto Rico v. Franklin Cal. Tax-Free Tr.*, 136 S. Ct. 1938 (2016) (No. 15-233).

⁵⁴ See Brief for Petitioners at 11, *Franklin Cal.*, 136 S. Ct. 1938 (No. 15-233); see also PUERTO RICO'S PUBLIC CORPORATIONS, *supra* note 50.

During appeals to the United States Court of Appeals for the First Circuit⁵⁵ and eventually the Supreme Court,⁵⁶ Puerto Rico began to default on its debt obligations.⁵⁷ In August 2015, the territory failed to pay \$58 million due to creditors of its Public Finance Corporation.⁵⁸ Puerto Rico then defaulted on \$1 billion in debt payments in January 2016⁵⁹ and on \$422 million in debt payments due in May of the same year.⁶⁰

In June 2016, the Supreme Court announced its two-part decision in the case *Franklin California Tax-Free Trust v. Puerto Rico*,⁶¹ and held that: (1) while Puerto Rico is *not* a “State” under the Bankruptcy Code’s provision governing who qualifies as a debtor seeking relief under Chapter 9, (2) Puerto Rico *is* a “State” under the section’s preemption provision, meaning that the federal Bankruptcy Code did in fact preempt the Recovery Act.⁶² Section 101(52) of the Bankruptcy Code provides that the definition of a “State” shall include “the District of Columbia and Puerto Rico, *except for the purpose of*

⁵⁵ *Franklin Cal. Tax-Free Tr. v. Puerto Rico*, 805 F.3d 322 (1st Cir. 2015), *aff’d*, 136 S. Ct. 1938 (2016).

⁵⁶ *Franklin Cal.*, 136 S. Ct. 1938.

⁵⁷ The First Circuit announced its decision regarding the Recovery Act in July 2015, and the petition for review by the Supreme Court was submitted in August 2015, the same month of the island’s first default event. See *Franklin Cal.*, 805 F.3d at 322; see also *Petition for a Writ of Certiorari*, *Franklin Cal.*, 136 S. Ct. 1938 (No. 15-233).

⁵⁸ This debt was owned not by institutional investors but by ordinary Puerto Ricans through credit unions. Patrick Gillespie, *Puerto Rico Just Defaulted for the First Time*, CNNMONEY (Aug. 3, 2015), <http://money.cnn.com/2015/08/03/investing/puerto-rico-default/index.html> [<https://perma.cc/EG25-TN49>].

⁵⁹ Heather Long, *Puerto Rico Will Default AGAIN*, CNNMONEY (Dec. 30, 2015), <http://money.cnn.com/2015/12/30/investing/puerto-rico-default-january/?iid=EL> [<https://perma.cc/H4YG-JAEV>].

⁶⁰ Heather Long, *Puerto Rico Defaults on \$422 Million*, CNNMONEY (May 2, 2016), <http://money.cnn.com/2016/05/02/investing/puerto-rico-default-may-1/?iid=EL> [<https://perma.cc/7BBW-D7FD>].

⁶¹ The Court affirmed by a 5-2 vote, with Justice Samuel Alito recusing himself, and Justice Antonin Scalia’s seat being vacant at the time of the decision. *Franklin Cal.*, 136 S. Ct. at 1941.

⁶² *Id.* at 1946, 1949.

*defining who may be a debtor under chapter 9 of this title.*⁶³ By “[focusing] on the plain wording of the clause,” the majority determined that Puerto Rico was unambiguously prohibited from initiating municipal bankruptcy proceedings under Chapter 9.⁶⁴ However, the Court also held that the exclusion in section 101(52) did not extend to other provisions of Chapter 9 and thus, the Code’s preemption provision still applied to Puerto Rico.⁶⁵ So not only was the island precluded from initiating traditional municipal bankruptcy, but it was also prohibited from enacting independent procedures through targeted legislation such as the Recovery Act.

C. The Congressional Solution: PROMESA

After the Supreme Court’s ruling in *Franklin California*, Puerto Rico was back where it had started—the territory was still buried under billions of dollars in unpayable debt but had no viable path towards solvency. The island was nearing its fourth default, this time under unprecedented circumstances: the island’s constitutionally-guaranteed general obligation (“GO”) bonds were due to mature in July.⁶⁶

While Puerto Rico had previously defaulted several times, this particular instance was unique because GO bonds are typically considered the “crème de la crème of the bond world” and “[p]ayment is generally guaranteed.”⁶⁷ This particular

⁶³ 11 U.S.C. § 101(52) (2012) (emphasis added).

⁶⁴ *Franklin Cal.*, 136 S. Ct. at 1946. For the Bankruptcy Code’s “gateway provision,” see 11 U.S.C. § 109(c) (“An entity may be a debtor under chapter 9 of this title if and only if such entity (1) is a municipality; [and] (2) is specifically authorized . . . to be a debtor under such chapter by State law[.]”), which outlines eligibility to file for municipal bankruptcy.

⁶⁵ See 11 U.S.C. § 903(1) (“This chapter does not limit or impair the power of a *State* to control, by legislation or otherwise, a municipality . . . [except if] a *State* law prescribe[es] a method of composition of indebtedness of such municipality[.]”) (emphasis added).

⁶⁶ Heather Long, *Puerto Rico Makes Historic Default*, CNNMONEY (July 1, 2016), <http://money.cnn.com/2016/07/01/investing/puerto-rico-defaults-general-obligation-bonds/index.html> [https://perma.cc/93N4-AXXV].

⁶⁷ Heather Long, *President Obama Signs Puerto Rico Rescue Bill*, CNNMONEY (June 30, 2016), <http://money.cnn.com/2016/06/29/investing/puerto-rico-debt-promesa/index.html> [https://perma.cc/YJ97-9RGJ]. For

default would be the first instance since the Great Depression that a state or territory would default and fail to satisfy its GO obligations.⁶⁸ Not only would “the anticipated missed payments likely [have] roiled credit markets and sparked creditor lawsuits,”⁶⁹ but the island was already on the edge of becoming a humanitarian crisis.⁷⁰ In light of these concerns, Congress had to act fast.

Prior to the enactment of PROMESA, members of the House and Senate introduced several bills that sought to provide the territory with a legally viable solution. In March 2015, Resident Commissioner Pedro Pierluisi—Puerto Rico’s non-voting member of the U.S. House of Representatives⁷¹—introduced amendments to the Bankruptcy Code that would grant Puerto Rico full access to Chapter 9.⁷² Several months later, lawmakers introduced legislation that would establish

more details on the complex nature of Puerto Rico’s debt structure, see *infra* Section II.E.

⁶⁸ Long, *supra* note 66.

⁶⁹ Mike DeBonis & Steven Mufson, *Puerto Rico Rescue Bill Clears Congress Days Before Debt Cliff*, WASH. POST (June 29, 2016), https://www.washingtonpost.com/news/powerpost/wp/2016/06/29/senate-poised-to-act-on-puerto-rico-debt-days-before-debt-cliff/?utm_term=.d03a8263e53b [<https://perma.cc/YJ94-9YKX>].

⁷⁰ See Vann R. Newkirk II, *Will Puerto Rico’s Debt Crisis Spark a Humanitarian Disaster?*, ATLANTIC (May 13, 2016), <https://www.theatlantic.com/politics/archive/2016/05/puerto-rico-treasury-visit/482562/> [<https://perma.cc/Y5DK-BGL5>]. For example, lack of financial resources on the island led to local schools having “termite-riddled walls, tenuous electricity, and pools of standing water—perfect places for the mosquitoes that spread Zika to hide.” *Id.*

⁷¹ The post of Resident Commissioner within the House of Representatives was created by Congress in 1900. *Member FAQs*, OFF. OF THE CLERK, http://clerk.house.gov/member_info/memberfaq.aspx [<https://perma.cc/7GM8-KZC3>]. The Resident Commissioner serves for a four-year term and has most of the same authorities as a traditional House member. *Id.* For instance, the Resident Commissioner can serve on House Committees and can speak, introduce bills, and offer amendments on the House floor. *Id.* However, the Resident Commissioner does not have legislative voting power. *Id.*

⁷² AUSTIN, *supra* note 6, at 29 tbl.A-1. A similar measure was introduced in the Senate a few months later. *Id.*

a local fiscal oversight entity and a stay on Puerto Rico debt-related litigation until April 1, 2016.⁷³

The final draft of PROMESA incorporated many of these ideas.⁷⁴ Likely prompted by the Supreme Court's decision in *Franklin California* and a recognition that Puerto Rico's upcoming July 1 GO default would have profound ramifications for the island and credit markets, the House and Senate successfully passed H.R. 5278 and S. 2328 respectively in June 2016.⁷⁵ A day later, President Obama signed PROMESA into law.⁷⁶

Congress enacted PROMESA with the hope of returning the territory to solvency and restoring the island's access to credit markets.⁷⁷ Recognizing that insufficient governance and fiscal transparency partly caused the debt crisis,⁷⁸ Congress created the FOMB, an oversight entity with a broad mandate and strong statutory powers.⁷⁹ While Congress put

⁷³ *Id.*

⁷⁴ H.R. 5278, 114th Cong. (2016); S. 2328, 114th Cong. (2016). These bills were the second iteration of PROMESA and were a revised version of a previous bill that Representative Sean Duffy introduced a month prior. See AUSTIN, *supra* note 6, at 29 tbl.A-1. For a review of the differences between prior and final versions of the PROMESA bill, see *id.* at 1.

⁷⁵ The House passed the H.R. 5278 by a vote of 297–127, and the Senate approved amended S. 2328 by a 68–30 vote. AUSTIN, *supra* note 6, at 1.

⁷⁶ Long, *supra* note 67.

⁷⁷ STAFF OF H. COMM. ON NAT. RES., 114TH CONG., H.R. 5278: "PUERTO RICO OVERSIGHT, MANAGEMENT AND ECONOMIC STABILITY ACT (PROMESA)" [hereinafter PROMESA COMM. SUMMARY], https://naturalresources.house.gov/uploadedfiles/promesa_packet_6.6.pdf [<https://perma.cc/MWZ4-4ZTU>].

⁷⁸ H.R. REP. NO. 114-602, at 41 (2016).

⁷⁹ The FOMB is composed of seven presidentially appointed members who each have expertise in an area such as municipal bond markets, management, law, and business and government, but who are not officials or employees of any relevant territorial government. PROMESA §§ 101(e)(1)(A), 101(f), 48 U.S.C. §§ 2121(e)(1)(A), 2121(f) (2012). While leaders in Congress are responsible for the initial submission of names, the President makes the official appointments based on bipartisan recommendations to fill the board. *Id.* § 101(e)(2).

At the end of 2017, Aurelius Capital Management, a hedge fund, brought a legal challenge against the constitutionality of the FOMB. Tom Hals, *Aurelius Hedge Fund Seeks to Toss Puerto Rico's Bankruptcy Filing*,

the FOMB in place to guarantee that “Puerto Rico remedies its finances,” the FOMB was also tasked with ensuring “fairness” to creditors and debtors in the reorganization process.⁸⁰

The FOMB has powers over various areas and activities under PROMESA. For example, it may hold hearings and seek testimony, request information from creditors involved in PROMESA proceedings, issue subpoenas, enter into contracts, and enforce public employment laws.⁸¹ The FOMB is backed by the power of the judicial system to enforce “its authority to carry out its responsibilities,” and has recourse to criminal and administrative disciplinary actions if an

REUTERS (Aug. 7, 2017), <https://www.reuters.com/article/us-puertorico-debt-bankruptcy/aurelius-hedge-fund-seeks-to-toss-puerto-ricos-bankruptcy-filing-idUSKBN1AN27H> [<https://perma.cc/F9RJ-LEAC>]. In particular, Aurelius argues that the creation of the FOMB violated the U.S. Constitution’s Appointments Clause, as the appointed members were never confirmed by the Senate. *Id.* Aurelius also argues that while the FOMB only answers to the President, six of the seven members were hand-picked and nominated by Congress, which violates the basic principle of separation of powers. *Id.*

The FOMB contends, however, that the Appointments Clause does not apply when Congress is creating territorial offices under Article IV of the U.S. Constitution, as the federal government can exercise “plenary authority to structure territorial governments unconstrained by separation-of-powers principles[.]” Opposition to the Motion to Dismiss Title III Petition at 1, *In re Fin. Oversight & Mgmt. Bd. for P.R.*, 583 B.R. 626 (D.P.R. 2017) (No. 17 BK 3283).

In December 2018, the First Circuit heard oral argument in an appeal of the lower court’s decision that the FOMB did not violate the Appointments Clause. *See* Eva Lloréns Vélez, *Swain’s World: A Repeal of PROMESA Would Raise Concerns About Puerto Rico’s Fiscal Future*, CARIBBEAN BUS. (Dec. 6, 2018), <https://caribbeanbusiness.com/swains-world-a-repeal-of-promesa-would-raise-concerns-over-puerto-ricos-fiscal-future/> [<https://perma.cc/V33E-HYR9>].

In February 2019, the First Circuit overturned the lower court’s decision and held that members of the FOMB were in fact subject to the Appointments Clause. *See generally* *Aurelius Inv., LLC v. Puerto Rico*, No. 18-1671, 2019 WL 642328 (1st Cir. Feb. 15, 2019). Despite this conclusion, the court refused to dismiss all pending Title III petitions as Aurelius had requested. *Id.* at *16.

⁸⁰ PROMESA COMM. SUMMARY, *supra* note 77, at 7.

⁸¹ *See* PROMESA § 104.

individual provides false information or refuses an order by the FOMB.⁸²

The FOMB also has the “sole discretion,” in many instances, to review, approve, and officially certify various plans or actions of the local government.⁸³ The key governing document under PROMESA is the fiscal plan, which covers a multi-year time horizon.⁸⁴ Before approval, the FOMB must determine if the plan “provide[s] a method to achieve fiscal responsibility and access to the capital markets” by analyzing whether it satisfies a list of fourteen requirements.⁸⁵ After this analysis has been completed, the FOMB shall issue a “compliance certification” to the local governor and the legislature.⁸⁶

The FOMB plays a similar role in approving annual budgets,⁸⁷ debt readjustment plans, and other voluntary agreement plans relating to PROMESA’s Title III debt restructuring proceedings.⁸⁸ It also has authority to substantively review all legislative enactments promulgated by the Puerto Rico governor or legislature.⁸⁹ Within its review and approval powers, the FOMB is required to determine, among other things, whether the proposed plan or action is

⁸² *Id.*

⁸³ *See, e.g., id.* § 201(c)(3) (“[I]f the oversight board determines in its *sole discretion* that the proposed Fiscal Plan . . . satisfies such requirements, the Oversight Board shall approve the proposed Fiscal Plan.”) (emphasis added).

⁸⁴ *Id.* § 201(b). These fiscal plans can be drafted at the highest level for the Commonwealth government or for lower territorial instrumentalities. *Id.*

⁸⁵ *Id.* § 201(b)(1); *see also infra* note 95.

⁸⁶ *Id.* § 201(e).

⁸⁷ *Id.* § 202(a)–(b).

⁸⁸ *Id.* § 104(i)–(j). For more information on Title III, *see infra* Section IV.A.

⁸⁹ *Id.* § 204. The governor is required to submit the law to the FOMB with a certification of its compliance with the fiscal plan. *Id.* § 204(a)(2). If the FOMB receives notification that a law is inconsistent with the plan, the FOMB is given power to “take such actions as it considers necessary, consistent with [PROMESA], to ensure that the enactment or enforcement of the law will not adversely affect the territorial government’s compliance with the Fiscal Plan[.]” *Id.* § 204(a)(5).

compliant with the provisions of the existing fiscal plan.⁹⁰ Under this framework, the fiscal plan serves as an important guide to inform future decisions and behaviors of not only the FOMB, but also the Commonwealth government and its instrumentalities. It also creates a tangible outline for creditors and institutional actors in subsequent bankruptcy proceedings.

D. Evolution of the Commonwealth Fiscal Plan

A PROMESA fiscal plan lays out projections, revenue enhancements, and expenditure reductions that are aimed at reforming the island's financial condition.⁹¹ The plan analyzes how factors such as population and economic growth or contraction will impact current and future deficit levels.⁹²

Under section 201 of PROMESA, the FOMB and Puerto Rico governor are tasked with developing a schedule for drafting, revising, and approving fiscal plans.⁹³ The governor shall then submit a proposed plan for consideration,⁹⁴ and the FOMB must assess whether the proposal satisfies the statutory requirements of the plan as laid out by Congress.⁹⁵

⁹⁰ See, e.g., *id.* § 202(c)(1) (“[T]he Oversight Board shall determine in its sole discretion whether each proposed Budget is compliant with the applicable Fiscal Plan.”).

⁹¹ P.R. FISCAL AGENCY & FIN. ADVISORY AUTH., FISCAL PLAN FOR PUERTO RICO 5 (2017) [hereinafter MAR. 2017 FISCAL PLAN], <https://junta.supervision.pr.gov/wp-content/uploads/wpfd/50/58c71815e9d43.pdf> [https://perma.cc/2SV3-CQZV].

⁹² See generally *id.*; APR. 2018 FISCAL PLAN, *supra* note 5.

⁹³ PROMESA § 201(a). However, while the FOMB can consult with the governor in establishing a schedule, the FOMB “retain[s] sole discretion” to set or change dates “as it deems appropriate and reasonably feasible.” *Id.*

⁹⁴ *Id.* § 201(c)(2).

⁹⁵ See *id.* § 201(c)(3). Some of these requirements include: estimates of revenues and expenditures; ensured funding of essential public services and public pension systems; improvements of fiscal governance, accountability, and internal controls; fiscal targets; a debt sustainability analysis; information on capital expenditures and investments necessary to promote economic growth; assurance that assets, funds, or resources will not be improperly loaned to, transferred to, or otherwise used for the benefit of other purposes (unless permitted by the Puerto Rico constitution or in an

If necessary, the FOMB will work with the governor to revise or redraft the plan until it believes that the plan satisfies all of PROMESA's requirements.⁹⁶

On October 14, 2016, the governor of Puerto Rico submitted a preliminary draft of a fiscal plan to the FOMB.⁹⁷ After a brief public comment period,⁹⁸ the FOMB raised several substantive concerns about the plan. Over the course of the next several months, the FOMB and the governor worked together to modify and update many of the core assumptions, projections, and recommendations of the plan.⁹⁹ On March 13, 2017, the FOMB formally approved and certified a ten-year fiscal plan for the Commonwealth government.¹⁰⁰

This initial plan anticipated a budget deficit of \$66.9 billion over ten years, \$35.1 billion of which was allocated to debt payments.¹⁰¹ To address this projected deficit, the plan also recommended several measures that, if effectively

approved plan of adjustment); and provisions that respect the relative lawful priorities or lawful liens, in the constitution, other laws, or agreements. *Id.* § 201(b)(1).

⁹⁶ *See id.* §§ 201(b)(1), 201(c)(3), 201(e).

⁹⁷ *See generally* COMMONWEALTH OF PUERTO RICO FISCAL PLAN (2016), <https://juntasupervision.pr.gov/wp-content/uploads/wpfd/52/58210006a3536.pdf> [<https://perma.cc/443U-ULJF>] [hereinafter PROPOSED 2016 FISCAL PLAN].

⁹⁸ *See infra* Section IV.B.

⁹⁹ *See, e.g.*, Letter from José B. Carrion III, Chair, Fin. Oversight & Mgmt. Bd. for P.R., to Alejandro García Padilla, Governor of P.R. (Nov. 23, 2016), <https://juntasupervision.pr.gov/wp-content/uploads/wpfd/50/583c7b9086b20.pdf> [<https://perma.cc/J52W-9UGN>]; *see also* Letter from José B. Carrion III, Chair, Fin. Oversight & Mgmt. Bd. for P.R., to Alejandro García Padilla, Governor of P.R., & Ricardo Rosselló Nevares, Governor-Elect of P.R. (Dec. 20, 2016) [hereinafter 2016 Fiscal Plan Adjustment Letter], <https://juntasupervision.pr.gov/wp-content/uploads/wpfd/50/58598734087c1.pdf> [<https://perma.cc/NB9V-MSD7>].

¹⁰⁰ *See* FIN. OVERSIGHT & MGMT. BD. FOR P.R., BOARD RESOLUTION ADOPTED ON MAR. 13, 2017 (FISCAL PLAN CERTIFICATION) [hereinafter BOARD RESOLUTION], <https://juntasupervision.pr.gov/wp-content/uploads/wpfd/50/58f614484710d.pdf> [<https://perma.cc/KP69-QGEU>]. *See generally* MAR. 2017 FISCAL PLAN, *supra* note 91.

¹⁰¹ MAR. 2017 FISCAL PLAN, *supra* note 91, at 8.

implemented, would limit expenses, maximize revenue, and ultimately offset the \$66.9 billion.¹⁰² Some of these proposed changes included reforming aspects of the tax system¹⁰³ and launching efforts to attract new employers and incentivize greater job participation.¹⁰⁴ The fiscal plan also proposed several areas of financial governance reform, including increased transparency, centralized coordination of cash management, and mechanisms to reconcile revenue and expense figures.¹⁰⁵

The plan projected that, if such changes were effectively implemented, there would be a net surplus of \$7.9 billion that could then be used to service the island's various debt obligations.¹⁰⁶ Given the magnitude of the outstanding debt, creditors would receive at most around twenty-four percent of their original investments.¹⁰⁷ In other words, three-quarters of Puerto Rico's current debt obligations would not be repaid under this plan. Such a recovery rate represented a massive loss to lenders.¹⁰⁸

A few months later in September 2017, Hurricane Irma swept through the Caribbean, cutting off power to two-thirds

¹⁰² *See id.* at 8–9.

¹⁰³ These proposed reforms included improving tax collection and increasing tax rates on tobacco, as well as adjusting retirement benefits in the pension system. *Id.* at 18–23.

¹⁰⁴ *Id.* at 23.

¹⁰⁵ *Id.* at 33–37.

¹⁰⁶ *Id.* at 10. This surplus would be allocated to paying off debt obligations after the government had covered its other ordinary and necessary territorial expenses. *Id.*

¹⁰⁷ Alan Schankel, *Puerto Rico Update: Time Is on No One's Side*, JANNEY MONTGOMERY SCOTT LLC, Mar. 22, 2017, <https://www.janney.com/File%20Library/Fixed%20Income/PR-Update-March-2017.pdf> [<https://perma.cc/6U57-BVYW>].

¹⁰⁸ *See* Juan González, *Puerto Rico's \$123 Billion Bankruptcy Is the Cost of U.S. Colonialism*, INTERCEPT (May 9, 2017), <https://theintercept.com/2017/05/09/puerto-ricos-123-billion-bankruptcy-is-the-cost-of-u-s-colonialism/> [<https://perma.cc/M3J4-BS8S>] (describing this recovery rate as “not just a haircut for bondholders [but] a head-shaving, one that will send shock waves throughout the municipal bond market. After all, bonds backed by the full faith-and-credit of local government entities have long been considered among the safest of investments.”).

of Puerto Rico's inhabitants and leaving one-third of the island's population unable to access clean water.¹⁰⁹ Two weeks later, Hurricane Maria made landfall on Puerto Rico.¹¹⁰ Strong winds and catastrophic flooding destroyed the island's power grid and, in some areas, destroyed eighty to ninety percent of homes and public infrastructure, such as roads and bridges.¹¹¹

Given the impact of these storms and the island's growing financial needs for the recovery effort, the FOMB and the governor agreed to discard the previously certified fiscal plan and develop a new one.¹¹² Not only would this plan reflect the additional cost to rebuild the island, but it would also incorporate updated assumptions about population migration and changes to the tax base as a result of the hurricanes.¹¹³

In January 2018, the governor submitted a new proposed fiscal plan to the FOMB for consideration.¹¹⁴ Changes to the analysis turned the formerly projected surplus into a \$3.4 billion deficit that would accumulate over the next several

¹⁰⁹ See Robinson Meyer, *What's Happening with the Relief Effort in Puerto Rico?*, ATLANTIC (Oct. 4, 2017), <https://www.theatlantic.com/science/archive/2017/10/what-happened-in-puerto-rico-a-timeline-of-hurricane-maria/541956/> [<https://perma.cc/UHD5-JY9N>].

¹¹⁰ *See id.*

¹¹¹ *Id.*

¹¹² APR. 2018 FISCAL PLAN, *supra* note 5, at 2.

¹¹³ Patricia Mazzei & Mary Williams Walsh, *Hurricane-Torn Puerto Rico Says It Can't Pay Any of Its Debts for 5 Years*, N.Y. TIMES (Jan. 24, 2018), <https://www.nytimes.com/2018/01/24/us/puerto-rico-budget-hurricanes.html> [<https://perma.cc/RPV3-4C9B>] (noting that the previous plan "had to be reworked in light of Maria's vast devastation, which prompted tens of thousands of Puerto Ricans to flee the island amid job layoffs and power blackouts.").

¹¹⁴ Dawn Giel, *Puerto Rico Unveils Revised Fiscal Plan: No Debt Service Payments for the Next 5 Years*, CNBC (Jan. 25, 2018), <https://www.cnbc.com/2018/01/25/puerto-rico-unveils-revised-fiscal-plan-no-debt-service-payments-for-the-next-5-years.html> [<https://perma.cc/29ET-R5RG>]; *see also* Press Release, Fin. Oversight & Mgmt. Bd. for P.R., Oversight Board To Review Commonwealth, PREPA and PRASA Fiscal Plans (Jan. 25, 2018), https://drive.google.com/file/d/1rjnhyFn2kZEU-I22yoQwdewXEEtfl38_/view [<https://perma.cc/9UJX-RPPX>].

years.¹¹⁵ In response to this drastic change, the plan called for a moratorium on servicing the island's debts for at least five years, suggesting that bond holders would ultimately receive as little as five cents on the dollar.¹¹⁶

On February 13, 2018, Governor Ricardo Rosselló released a revised plan that incorporated \$18 billion in additional funds allocated by the federal government in a 2018 budget bill.¹¹⁷ This infusion of capital would transform Puerto Rico's projected deficit back to a surplus of around \$3.4 billion over the next six years.¹¹⁸ However, the additional federal money was clearly earmarked for the island's recovery and reconstruction efforts rather than the servicing of bondholder debt.¹¹⁹

¹¹⁵ Nick Brown, *In Bleak Forecast, Puerto Rico Sees No Debt Payment Ability Until 2022*, REUTERS (Jan. 24, 2018), <https://www.reuters.com/article/us-puertorico-debt-fiscalplan/in-bleak-forecast-puerto-rico-sees-no-debt-payment-ability-until-2022-idUSKBN1FE0AN> [<https://perma.cc/6PV2-S8EK>].

¹¹⁶ The new fiscal plan projects that Hurricane Maria will spur increased inflation, nearly triple a contraction in gross national product in 2018, and drive around 600,000 more people from the island in the next five years. *Id.* As a result, the new fiscal plan no longer shows the island with a surplus over the next several years but anticipates a \$3.4 billion gap over the next several years. *Id.*; see also Steven Mufson, *Puerto Rico Offers Fiscal Plan Settling Debt for Pennies on the Dollar*, WASH. POST (Jan. 25, 2018), https://www.washingtonpost.com/business/economy/puerto-rico-offers-fiscal-plan-settling-debt-for-pennies-on-the-dollar/2018/01/25/04f3adca-01e0-11e8-8acf-ad2991367d9d_story.html?utm_term=.f074f89f3616 [<https://perma.cc/H97M-P7TE>].

¹¹⁷ Hilary Russ, *Revised Puerto Rico Fiscal Plan Taps Federal Budget Money*, REUTERS (Feb. 13, 2018), <https://www.reuters.com/article/us-puertorico-debt-fiscalplan/revised-puerto-rico-fiscal-plan-taps-federal-budget-money-idUSKCN1FX322> [<https://perma.cc/LPZ9-9F4A>].

¹¹⁸ *Id.*

¹¹⁹ Steven Mufson, *In Puerto Rico, a Skirmish over How Much Debt the Bankrupt Island Can Handle*, WASH. POST. (Feb. 20, 2018), https://www.washingtonpost.com/business/economy/in-puerto-rico-a-skirmish-over-how-much-debt-the-bankrupt-island-can-handle/2018/02/16/3870e8b6-127a-11e8-9570-29c9830535e5_story.html?utm_term=.34999dbdd555 [<https://perma.cc/VFF7-TYQN>].

In a letter sent in February 2018, several members of Congress and the Senate sought to clarify with the FOMB that the money allocated to the

After two more months of unsuccessful negotiations to draft a mutually-acceptable plan with Governor Rosselló,¹²⁰ the FOMB decided to exercise its power to unilaterally propose, vote on, and certify a plan.¹²¹ The plan was approved by a vote of six to one on April 19, 2018¹²² despite public opposition from the Governor, who stated that the FOMB lacked authority to impose the pension cuts and labor reforms included in the plan.¹²³ The plan forecasted that without the proposed fiscal and structural measures, the island's deficit over the next six years would total \$5.2 billion; however, if the plan was properly enacted, the island would see a net surplus of \$6.7 billion, which could be used for debt payment through 2023.¹²⁴

Several weeks after the plan was initially certified, a group of creditors approached the FOMB with a compromise that would eliminate \$10 billion of the current outstanding debt obligations but guarantee creditors of different bond types a particular division of debt service.¹²⁵ The deal would move the

island in February 2018 was “100 percent” intended for use only in rebuilding the island and helping the residents recover from the hurricane. Letter from Nydia M. Velazquez, Member of Cong., Sean Duffy, Member of Cong., Tom MacArthur, Member of Cong., Raúl M. Grijalva, Member of Cong., Luis V. Guitiérrez, Member Of Cong., Robert Menéndez, U.S. Senator & Elizabeth Warren, U.S. Senator, to José B. Carrión III, Chairman, Fin. Oversight & Mgmt. Bd. for P.R. (Feb. 16, 2018), <https://velazquez.house.gov/sites/velazquez.house.gov/files/21618%20Letter%20to%20FOMB%20re%20disaster%20supplemental%20funds%20to%20be%20used%20only%20for%20relief.pdf> [<https://perma.cc/WHJ9-EC7D>].

¹²⁰ Arthur Laffer, *Puerto Rico's 'Shortsighted' Fiscal Plan Totally Misses the Mark*, CNBC (Mar. 2, 2018), <https://www.cnbc.com/2018/03/02/puerto-ricos-new-fiscal-plan-misses-the-mark-commentary.html> [<https://perma.cc/FA7X-N88U>].

¹²¹ Nick Brown, *Puerto Rico Board's Turnaround Plan Promises More Austerity*, REUTERS (Apr. 18, 2018), <https://www.reuters.com/article/us-puertorico-debt-fiscal/puerto-rico-boards-turnaround-plan-promises-more-austerity-idUSKBN1HP3B4> [<https://perma.cc/C7QY-M6UF>].

¹²² See generally APR. 2018 FISCAL PLAN, *supra* note 5.

¹²³ Brown, *supra* note 20.

¹²⁴ *Id.*; see also APR. 2018 FISCAL PLAN, *supra* note 5, at 123.

¹²⁵ Andrew Scurria, *Puerto Rico Bondholders Pitch \$10 Billion Debt-Cutting Deal*, WALL ST. J. (May 14, 2018), <https://www.wsj.com/>

island's pledged taxes into a separate account and distribute securities to participating creditors at a discount of about sixty cents on the dollar for various bondholders.¹²⁶ The FOMB, however, rejected this proposed settlement, stating that it was "completely unaffordable" for the island.¹²⁷

The FOMB and the governor also began working together to approve a budget for the next fiscal year that adhered to the approved fiscal plan. The first budget, submitted in early May, was rejected by the FOMB because it did not reflect provisions within the certified fiscal plan, including the elimination of Christmas bonuses for public servants and incorporation of labor reforms, such as pension cuts.¹²⁸ In response, Governor Rosselló reiterated his refusal to honor these elements of the plan.¹²⁹ After several discussions with the FOMB, however, the two parties negotiated a compromise—the FOMB agreed to reverse the decision to eliminate Christmas bonuses and reduce vacation and sick leave for public workers, and, in exchange, the governor promised that the territory would adopt an at-will employment scheme for the private sector as part of an overhaul of local labor laws.¹³⁰ The FOMB also agreed to

articles/puerto-rico-bondholders-pitch-10-billion-debt-cutting-deal-1526304771 (on file with the *Columbia Business Law Review*).

¹²⁶ *Id.*

¹²⁷ *Id.*

¹²⁸ Nick Brown, *Update 1-Board Rejects Puerto Rico's Proposed Budget, Asks for New One*, REUTERS (May 10, 2018), <https://www.reuters.com/article/puertorico-debt-budget/update-1-board-rejects-puerto-ricos-proposed-budget-asks-for-new-one-idUSL1N1SH2PV> [<https://perma.cc/V4YF-4H3W>].

¹²⁹ See Michelle Kaske & Yalixa Rivera, *Puerto Rican Police Clash with Workers Protesting Pension Cuts*, BLOOMBERG (May 1, 2018), <https://www.bloomberg.com/news/articles/2018-05-01/puerto-rico-workers-protest-u-s-plan-to-slash-their-pensions> [<https://perma.cc/3SLY-KG24>]. Since the FOMB's plan, there has been increasing protests from local workers regarding these provisions that hurt local employees. *Id.*

¹³⁰ Danica Coto, *Puerto Rico Gov Submits \$25B Budget Amid Deal with Board*, ASSOCIATED PRESS (May 22, 2018), <https://www.apnews.com/d2ce13b374da43409c0b751874860064> [<https://perma.cc/SE76-2SEM>].

update the previously-certified fiscal plan to reflect these agreed-upon changes.¹³¹

However, two months after this compromise was struck, the FOMB announced that it was in the process of recertifying a new fiscal plan because the local legislature had failed to enact the labor reforms laid out at the end of May.¹³² By the end of June 2018, the FOMB had a new plan.¹³³ In particular, this plan cut the money available to the government over the next thirty years from almost \$40 billion to \$14 billion.¹³⁴ These new projections also imply that the money available for debt service would be significantly reduced.¹³⁵

¹³¹ *Puerto Rico, Oversight Board Reach Deal on Fiscal Plan*, REUTERS (May 21, 2018), <https://www.reuters.com/article/puertorico-debt-fiscalplan/puerto-rico-oversight-board-reach-deal-on-fiscal-plan-idUSN9N1RF02J> [<https://perma.cc/GKV5-S9FW>].

¹³² Hazel Bradford, *Puerto Rico Oversight Board to Recertify Fiscal Plan; COFINA Bondholders Close to Agreement*, PENSIONS & INV. (June 29, 2018), <https://www.pionline.com/article/20180629/ONLINE/180629812/puerto-rico-oversight-board-to-recertify-fiscal-plan-cofina-bondholders-close-to-agreement> [<https://perma.cc/542R-UU9B>]; see also FIN. OVERSIGHT & MGMT. BD. FOR P.R., STRUCTURAL REFORMS (May 30, 2018), https://drive.google.com/file/d/1zLKIi_DLJj3ytMlpQsI1orgrXlpqi4D/view [<https://perma.cc/LPZ8-K6C2>].

¹³³ FIN. OVERSIGHT & MGMT. BD. FOR P.R., NEW FISCAL PLAN FOR PUERTO RICO: RESTORING GROWTH AND PROSPERITY (June 29, 2018), <https://drive.google.com/file/d/1c9LACF1yzSi1sUE1NVaZHklo93TJR55M/view> [<https://perma.cc/L6LD-XW2L>]; see also Letter from Natalie A. Jaresko, Exec. Dir., Fin. Oversight & Mgmt. Bd. for P.R., to Ricardo A. Rosselló Nevares, Governor of P.R., Thomas Rivera Schatz, President of the Senate of P.R., Carlos J. Méndez Núñez, Speaker of the House of Representatives of P.R. (June 29, 2018), https://drive.google.com/file/d/1A4Hjh3dohOtsLDVm6Qlc5bXcEVRr_p5J/view [<https://perma.cc/85NB-77KJ>] (summarizing changes to the fiscal plan from previous iteration).

¹³⁴ Luis Valentin Ortiz, *Puerto Rico Oversight Board Certifies New Plan, Less Money for Debt*, REUTERS (June 29, 2018), <https://www.reuters.com/article/us-usa-puertorico-fiscal/puerto-rico-oversight-board-certifies-new-plan-less-money-for-debt-idUSKBN1JP390> [<https://perma.cc/8XEU-QPCQ>].

¹³⁵ *Id.*

Finally, in October 2018, the FOMB updated its financial analyses and certified a revised fiscal plan.¹³⁶ The plan makes several new assumptions about structural and fiscal reforms that the FOMB anticipates will create a cumulative surplus of about \$30 billion through 2033.¹³⁷ More specifically, the FOMB believes the plan is more realistic than the version certified in June—this new plan accounts for new assumptions about a population reduction, debt adjustment plans,¹³⁸ and an \$82 billion infusion of federal disaster and private insurance funds.¹³⁹ On the other hand, the plan also reflects what the FOMB considers to be the local government’s “lack of a political will” to make further beneficial structural reforms, including those to local labor laws, that the FOMB believes would stop economic decline.¹⁴⁰ As of February 2019, this remains the operative plan in place.

E. Further Challenges for Puerto Rico, Creditor Confidence, and Austerity Measures

The stated purpose of PROMESA, the FOMB, and the complex set of processes that the board oversees is to help the island achieve fiscal responsibility and ultimately reestablish access to credit markets.¹⁴¹ That access is contingent upon creditor confidence, which is difficult to rebuild after a territory has been insolvent.¹⁴² However, reconstructing

¹³⁶ OCT. 2018 FISCAL PLAN, *supra* note 28, at 7; *see also* FIN. OVERSIGHT & MGMT. BD. FOR P.R., CERTIFIED FISCAL PLAN FACT SHEET, <https://drive.google.com/file/d/1uimOkrz5D9avtQC-pu39vKLoyBN3uOlz/view> [<https://perma.cc/2VTY-7QWJ>].

¹³⁷ Eva Lloréns Vélez, *Puerto Rico Fiscal Plan Predicts Surplus if Reforms Are Carried Out*, CARIBBEAN BUS. (Oct. 22, 2018), <https://caribbeanbusiness.com/puerto-rico-fiscal-plan-predicts-surplus-if-fiscal-reforms-are-carried-out/> [<https://perma.cc/R2AE-3DKZ>].

¹³⁸ *See id.*

¹³⁹ *Id.*

¹⁴⁰ *Id.*

¹⁴¹ *See* PROMESA § 101(a), 48 U.S.C. § 2121(a) (2012); *see also id.* § 201(b)(1) (“A Fiscal Plan developed under this section shall . . . provide a method to achieve fiscal responsibility and access to the capital markets.”).

¹⁴² For example, in discussing the Great Recession, Chairman Ben Bernanke stated that “[a]s investors and creditors lost confidence in the

Puerto Rico's creditworthiness, especially in the eyes of investors, is uniquely difficult for two reasons.

First, Puerto Rico's debt is a complex system of funding sources and legal guarantees.¹⁴³ The island's inability to repay certain debt obligations is not only harmful to Puerto Rico's reputation as a debtor in the future, but also weakens the territory's credibility in offering important legal guarantees to its creditors in the event of default.

The Commonwealth of Puerto Rico has two main classes of protected bondholders: GO creditors and Puerto Rico Sales Tax Financing Corporation ("COFINA") creditors.¹⁴⁴ According to the Puerto Rico constitution, holders of GO bonds have a first lien on all general government revenues.¹⁴⁵

ability of certain firms to meet their obligations, their access to capital markets as well as to short-term funding markets became increasingly impaired[.]” Ben S. Bernanke, Chairman, Fed. Reserve, Address at the Economic Club of New York: Stabilizing the Financial Markets and the Economy (Oct. 15, 2008) (transcript available at <https://www.federalreserve.gov/newsevents/speech/bernanke20081015a.htm> [<http://perma.cc/AL5Z-8JTF>]).

¹⁴³ At the highest level, Puerto Rico's debt obligations can be divided into two broad categories: bonds considered by investors to be constitutionally protected and those that are not. Ken Sweet, *Q&A: Puerto Rico's Debt Crisis Explained*, BUS. INSIDER (May 2, 2016), <http://www.businessinsider.com/ap-qa-puerto-ricos-debt-crisis-explained-2016-5> (on file with the *Columbia Business Law Review*). For instance, creditors invested in bonds issued under the Puerto Rico Infrastructure Financing Authority or Government Development Bank are considered low to middle priority bonds that are not backed by any strong guarantees for repayment. *Id.* On the other hand, bonds issued by the Commonwealth of Puerto Rico are guaranteed payment in the text of Puerto Rico's constitution. *Id.*

¹⁴⁴ Robert Slavin, *GO vs. COFINA Battle Lies Ahead*, BOND BUYER (May 19, 2017), <https://www.bondbuyer.com/news/go-vs-cofina-battle-lies-ahead> (on file with the *Columbia Business Law Review*).

¹⁴⁵ In other words, the first use for any available government revenue should be to pay off the Commonwealth's debt to GO creditors. *See id.* Article VI, section 8 of Puerto Rico's Constitution reads: “In case the available revenues including surplus for any fiscal year are insufficient to meet the appropriations made for that year, interest on the public debt and amortization thereof shall first be paid[.]” P.R. CONST., art. VI, § 8; *see also* Richard Epstein, *A Political and Constitutional Analysis of Puerto Rican Debt Crisis*, FORBES (Nov. 6, 2017), <https://www.forbes.com/sites/>

COFINA creditors, however, insist that they enjoy a strong, statutorily-established priority over all sales revenue of the island.¹⁴⁶ The dispute between these two classes of creditors is rooted in conflicting readings of constitutional and statutory guarantees—GO bondholders believe they have a claim over revenues, including sales and use taxes; however, COFINA bondholders believe that because their bonds are serviced through tax revenues that flow into a separate fund, this sum of money should not be accessible to GO creditors.¹⁴⁷

While COFINA creditors recently made headway in resolving this dispute with GO creditor counterparts by gathering consensus for a broad debt restructuring plan,¹⁴⁸ both classes of creditors still hold explicit promises from the Puerto Rico government that their debt obligations have

richardepstein/2017/11/06/a-political-and-constitutional-analysis-of-puerto-rican-debt-crisis/2/#15112a08308e [https://perma.cc/GS9Z-E883]. GO priority is further affirmed in Puerto Rico's Management and Budget Office Act of 1980, which establishes "priority guidelines that place first the payment of interest and amortization corresponding to the public debt." *Id.* See generally P.R. LAWS ANN. tit. 23, §§ 101–110 (1980).

¹⁴⁶ See *Puerto Rico Sales Tax Financing Corporation (COFINA)*, GOV'T DEV. BANK FOR P.R., http://www.gdb-pur.com/investors_resources/cofina.html [https://perma.cc/Z4E9-F55X]. COFINA bonds were initially issued to raise funds for the Commonwealth to repay debt obligations of other entities. *Id.* These obligations are paid from and secured by a particular security interest in sales tax revenue. *Id.* Separately, the government enacted Act 91 which created a "Dedicated Sales Tax Fund" that is held separate from the Commonwealth's General Fund, and which is used to pay COFINA bond holders. *Id.*

¹⁴⁷ Additionally, the Commonwealth defaulted on its GO payment in July 2017; however, it has continued to pay its COFINA bonds. Slavin, *supra* note 144.

¹⁴⁸ See *Holdout Bondholders Join Puerto Rico Sales Tax Debt Restructuring*, REUTERS (Sept. 21, 2018), <https://www.reuters.com/article/usa-puertorico-bonds/holdout-bondholders-join-puerto-rico-sales-tax-debt-restructuring-idUSL2N1W70V7> [https://perma.cc/V6B5-WABY]. For more information on the importance of this debt restructuring deal, see Brad W. Setser, *Will the Proposed Restructuring of COFINA Bonds Assure Puerto Rico's Return to Debt Sustainability?*, COUNCIL ON FOREIGN REL. (Sept. 27, 2018), <https://www.cfr.org/blog/will-proposed-restructuring-cofina-bonds-assure-puerto-ricos-return-debt-sustainability> [https://perma.cc/AL64-U9KW].

priority over other uses of tax revenue. Despite these formal protections, there have been efforts to enact legislation or otherwise disburse payments to other parties in conflict with these guarantees.¹⁴⁹ More importantly, many aspects of previously proposed and certified fiscal plans appear to disregard these protections without much explanation.¹⁵⁰ Despite the strong social policy reasons for these particular financial resource allocations, creditors still assert that the fiscal plan drafting process has “[undermined] investor confidence in Puerto Rico’s commitment to paying debts, making Puerto Rico unlikely to be able to regain access to the credit markets at reasonable interest rates.”¹⁵¹ This, unfortunately, will have long-term impacts on the island’s ability to recover and grow in the future.

Second, while other cities and municipalities that have gone through insolvency proceedings have eventually been able to regain access to credit markets, the processes were extremely difficult and involved other mechanisms

¹⁴⁹ For example, Governor Rosselló, with the cooperation of the FOMB, pushed legislation through Puerto Rico’s House and Senate that would assure the priority of pension obligations over other bond debts, and treat these pension rights as vested as of the date of the enactment rather than the date of retirement, thus expediting the maturity of pension obligations and reducing the opportunity for creditors to get their appropriate share of the underlying revenue. Epstein, *supra* note 145.

¹⁵⁰ See Nick Brown & Daniel Bases, *Puerto Rico’s Major Bondholders Critical of Fiscal Turnaround Plan*, REUTERS (Mar. 28, 2017), <https://www.reuters.com/article/us-puertorico-debt/puerto-ricos-major-bondholders-critical-of-fiscal-turnaround-plan-idUSKBN16Z1OP> [<https://perma.cc/HXA5-UV55>] (“[C]reditors said the plan runs afoul of PROMESA by prioritizing government services ahead of general obligation debt in violation of the island’s constitution. COFINA creditors said it would also unlawfully transfer sales tax revenue, on which they have a lien, into the island’s general fund.”); see also Letter from The Ad Hoc Group of P.R. General Obligation Bondholders, Major COFINA Bondholders, and Assured Guaranty Corp. and Assured Guaranty Municipal Corp., to Members of the Oversight Bd. (Mar. 27, 2017) [hereinafter Joint Creditor Letter], <https://www.scribd.com/document/343224256/Joint-Creditor-Letter-to-Oversight-Board-on-Fiscal-Plan-for-Puerto-Rico> [<https://perma.cc/GX6S-RXM9>]; Creditor Press Release, *supra* note 16.

¹⁵¹ Joint Creditor Letter, *supra* note 150, at 10.

unavailable to Puerto Rico. In 1975, New York City found itself in a dire fiscal crisis after years of poor financial control and chronic budget deficits.¹⁵² New York Governor Hugh Carey took drastic cost-cutting measures¹⁵³ and encouraged the creation of several control boards and oversight entities to help facilitate the city's financial recovery process.¹⁵⁴ Nevertheless, municipal creditors were still reluctant to lend the city money.¹⁵⁵ Eventually, the federal government intervened and extended \$2.3 billion in short-term loans to the city.¹⁵⁶ However, it was not until 1979 that the city was again able to sell short-term bonds on the financing market.¹⁵⁷

More recently, Detroit, which is in the midst of its own municipal bankruptcy, took two years to regain access to the bond market.¹⁵⁸ However, even when the city was able to

¹⁵² George Sweeting & Andrea Dineen, *New York City and Los Angeles: Taxes, Budgets, and Managing the Fiscal Crisis*, in *NEW YORK AND LOS ANGELES: THE UNCERTAIN FUTURE* 193, 207 (David Halle & Andrew A. Beveridge eds., 2013).

¹⁵³ Such cost-cutting measures included instituting a wage freeze, laying off employees, and reducing subsidies to the subway system. *See id.* at 209.

¹⁵⁴ State legislation created the Municipal Assistance Corporation, which was authorized to refinance the city's maturing notes by selling bonds, and the Emergency Financial Control Board, which had the power to control the city's bank accounts, control or remove city officials, and review the city's financial plans, budgets, negotiated contracts, and borrowing agreements. *Id.* at 208–09.

¹⁵⁵ Robert Dunstan, *Overview of New York City's Fiscal Crisis*, 3 *CAL. RES. BUREAU*, Mar. 1, 1995, at 5, <https://www.scribd.com/document/149562131/Overview-of-New-York-City-s-Fiscal-Crisis-1995> (on file with the *Columbia Business Law Review*).

¹⁵⁶ *Id.*

¹⁵⁷ *Id.* at 7. It took the city another two years to issue investment-grade bonds after it achieved a balanced budget. *Id.* “Investment grade” bonds are assessed and rated by rating agencies and should be contrasted with “high-yield” or “junk” bonds, which are considered speculative and highly risky from a payback perspective. *See* Fidelity Learning Center, *Bond Ratings*, FIDELITY, <https://www.fidelity.com/learning-center/investment-products/fixed-income-bonds/bond-ratings> [<https://perma.cc/942L-NBRU>].

¹⁵⁸ Aaron Kuriloff, *Detroit Sells First Municipal Bonds Since Emerging from Bankruptcy*, *WALL ST. J.* (Aug. 19, 2015), <https://www.wsj.com/articles/detroit-sells-first-municipal-bonds-since-emerging-from->

borrow again, it had to pay investors a significant interest rate premium due to the recent insolvency.¹⁵⁹ By that time, Detroit had cut \$7 billion from its debt obligations, leaving certain groups of creditors to recover around forty percent of the outstanding debt.¹⁶⁰

In an effort to help the city, Michigan Governor Rick Snyder enacted legislation giving bondholders first claim to income taxes, essentially creating a guarantee that Detroit's bonds would be backed by the full faith and credit of the state.¹⁶¹ In August 2015, Detroit sold its first set of post-bankruptcy bonds.¹⁶² Despite these unique structural guarantees and the bond's investment-grade rating,¹⁶³ the bonds still cost the city over a percentage point more in interest payments than similarly rated debt.¹⁶⁴ Several months later, Detroit sold its first general obligation bonds after exiting bankruptcy.¹⁶⁵ However, according to some analysts, "Detroit would likely struggle if it were to sell bonds under its own name," as these bonds were attractive to investors only because they were backed by Michigan's tax revenue.¹⁶⁶

bankruptcy-1440008673 (on file with the *Columbia Business Law Review*). Detroit filed for bankruptcy in July 2013. Matthew Dolan, *Detroit Exits Municipal Bankruptcy Case*, WALL ST. J. (Dec. 10, 2014), https://www.wsj.com/articles/detroit-municipal-bankruptcy-case-to-end-1418229066?mod=article_inline (on file with the *Columbia Business Law Review*).

¹⁵⁹ Kuriloff, *supra* note 158.

¹⁶⁰ Elizabeth Campbell, *Bankruptcy Will Cost Detroit on New Bonds*, DETROIT NEWS (Aug. 18, 2015), <http://www.detroitnews.com/story/news/local/detroit-city/2015/08/18/city-bonds-cost-taxpayers/31917989/> [<https://perma.cc/4AEZ-YSMB>].

¹⁶¹ *Id.*

¹⁶² Kuriloff, *supra* note 158.

¹⁶³ Campbell, *supra* note 160. The city itself still had a "junk" credit rating. *Id.*

¹⁶⁴ Kuriloff, *supra* note 158.

¹⁶⁵ Edward Krudy, *Update 2-Detroit Prices First GO Bonds Since Bankruptcy*, REUTERS (July 28, 2016), <https://www.reuters.com/article/detroit-municipals/update-2-detroit-prices-first-go-bonds-since-bankruptcy-idUSL1N1AE1SX> [<https://perma.cc/3APK-D6SL>].

¹⁶⁶ *Id.*

Puerto Rico has yet to receive federal loans to assist with debt servicing the way New York City did during its bankruptcy.¹⁶⁷ Similarly, the island does not have the benefit of a contractual or legislative guarantee from a large, solvent state. Ironically, some of the island's most pressing controversies among creditors right now stem from the existence of similar bond terms and guarantees. Additionally, Detroit creditors were able to recoup much more of their outstanding debt than Puerto Rico creditors currently anticipate.¹⁶⁸

These realities indicate that in addition to focusing on how the island will resolve its current fiscal problems, Puerto Rico must also remain cognizant of the long-term hurdles that exist in rebuilding creditor confidence, especially since the island cannot rely on methods other municipalities have employed upon exiting bankruptcy proceedings.

Beyond the complicated details of Puerto Rico's debt obligations, there are also many critical, real-world considerations about how the territory's bankruptcy has negatively impacted local citizens. After the FOMB recertified a revised fiscal plan in October 2018, both Governor Rosselló and several Democratic members of Congress expressed concern that the plan's austere fiscal measures—which call for a \$629 million reduction in spending on education, pensions, and healthcare—would only create a surplus that

¹⁶⁷ The federal government has indicated that there would be no bailout of the bondholders. *See, e.g.,* Justin Sink & Jennifer Epstein, *No U.S. Bailout for Puerto Rican Debt, Trump's Budget Chief Says*, BLOOMBERG (Oct. 4, 2017), <https://www.bloomberg.com/news/articles/2017-10-04/trump-suggests-puerto-rico-s-debt-may-need-to-be-wiped-out> [<https://perma.cc/5GJ2-WYLL>]. Most of the federal money given to Puerto Rico has been focused on recovery efforts. *See* Patricia Mazzei, *What Puerto Rico Is, and Isn't, Getting in Disaster Relief*, N.Y. TIMES (Feb. 8, 2018), <https://www.nytimes.com/2018/02/08/us/puerto-rico-disaster-relief.html> [<https://perma.cc/5GJ2-WYLL>].

¹⁶⁸ Detroit shed about \$7 billion of its \$18 billion of debt obligations, meaning creditors suffered, on average, a haircut of around thirty-eight percent. Krudy, *supra* note 165.

would go directly to current creditor bondholders.¹⁶⁹ Because the pie of government dollars is fixed, any dollar reallocated to servicing bondholders is a dollar shifted from important social programs or disaster relief efforts. These changes are especially detrimental to local citizens who have been struggling to recover from financial downturns and the destruction of Hurricane Maria and Irma.

Therefore, the FOMB is dealing with fundamentally conflicting interests and must carefully craft a fiscal plan that appeases all parties' diverse social and economic interests. Given this complex reality, the FOMB is susceptible to a variety of legal challenges from creditors, Governor Rosselló, and local citizens who take issue with the allocation of government money in these multi-year bankruptcy plans that will heavily shape the territory's fiscal future. The following two sections provide in-depth discussions of these challenges, and consider whether there are valid legal claims to be made against the FOMB's fiscal plans.

III. PROMESA AND A LEGAL CHALLENGE TO THE FISCAL PLAN

As described in Part II, both Puerto Rico's creditors and other interested parties on the island have strong interests in a systematic and equitable resolution to the island's debt problems. While PROMESA provides specific requirements that must be satisfied before a fiscal plan can be ratified,¹⁷⁰ the FOMB possesses "sole discretion" to determine whether these particular statutory stipulations are in fact met.¹⁷¹ If they disagree with the underlying components of the plan,

¹⁶⁹ *Puerto Rico Gov: Fiscal Board's Austerity Plan Would Affect Gov't Services*, CARIBBEAN BUS. (Oct. 23, 2018), <https://caribbeanbusiness.com/puerto-rico-gov-fiscal-boards-austerity-plan-would-affect-govt-services/> [<https://perma.cc/2AGV-N66J>]; see also Megan Cerullo, *Rep. Nydia Velazquez Challenges Continuing Austerity Measures Included in Puerto Rico Fiscal Plan*, DAILY NEWS (Oct. 30, 2018), <http://www.nydailynews.com/news/national/ny-news-puerto-rico-fiscal-plan-nydia-velazquez-20181030-story.html> [<https://perma.cc/E9SH-Z8X8>].

¹⁷⁰ See PROMESA § 201(b), 48 U.S.C. § 2141(b) (2012).

¹⁷¹ See *id.* § 201(c)(3).

stakeholders may choose to bring a legal challenge examining whether these crucial decisions adhere to the text and underlying purpose of PROMESA.¹⁷²

The first challenge that a stakeholder could assert is that a fiscal plan violates the mandated requirements in PROMESA.¹⁷³ For example, GO and COFINA bondholders have made it clear that their legal claims over particular categories of revenue seem to have been summarily disregarded in past iterations of the plan.¹⁷⁴ Similarly, other investors, such as bond insurers, have taken issue with the fiscal plans' allocation of financial resources to purposes they believe are non-essential, yet have taken priority over debt service.¹⁷⁵

¹⁷² *Id.*

¹⁷³ In particular, PROMESA requires that the fiscal plan “ensure that assets, funds, or resources . . . are not loaned to, transferred to, or otherwise used for the benefit” of other entities—in other words, the fiscal plan cannot shift funds allocated to service one set of debt obligations to service another set of creditors. *Id.* § 201(b)(1)(M). Relatedly, the fiscal plan shall also “respect the relative lawful priorities or lawful liens . . . in the constitution, other laws, or agreements[.]” *Id.* § 201(b)(1)(N).

¹⁷⁴ See Joint Creditor Letter, *supra* note 150, at 3, 4 (stating that with respect to GO bondholders, “[b]y providing that payment on Constitutional Debt comes *after* all of the Commonwealth’s expenditures, the Fiscal Plan violates Puerto Rico’s Constitution and Section 201(b)(1)(N)” and with respect to COFINA bondholders, the “Fiscal Plan violates Section 201(b)(1)(M) by transferring COFINA’s property to the Commonwealth’s General Fund and violates Section 201(b)(1)(N) by failing to respect the COFINA bondholders’ lien on the assigned revenues granted to COFINA.”) (emphasis in original).

¹⁷⁵ See Adversary Complaint at 27, *Assured Guar. Corp. v. Puerto Rico*, 301 F. Supp. 3d 288 (D.P.R. 2017) (No. 17 BK 3283), [hereinafter *Assured Guaranty Complaint*] (citing that the fiscal plan violates various constitutional and contract debt priority provisions because “it assumes that *all* non-debt expenses of the Commonwealth government are to be paid before *any* payments are made for debt service.”) (emphasis in original); Adversary Complaint at 4, *Ambac Assurance Corp. v. Puerto Rico*, No. 17 BK 3283 (D.P.R. June 8, 2017) [hereinafter *Ambac Complaint*] (“[T]he Fiscal Plan . . . downgrad[es] the most senior debt obligations of the Commonwealth and its instrumentalities . . . to the very bottom of the payment priority waterfall . . . and in the process, imposes a 77.4% haircut on debt obligations[.]”).

But on the other side, Democratic congressional leaders have expressed concern with the October 2018 certified fiscal plan, stating that “Congress never intended PROMESA to be used to grant Puerto Rico’s creditors a priority, yet [the FOMB’s] fiscal plans would appear to do so, which is a clear contravention of Congressional intent.”¹⁷⁶

Before it can resolve the merits of these concerns, however, a court would first have to assess an important threshold question, which is whether it even has jurisdiction to hear any challenges by stakeholders brought against a fiscal plan. Section 106(a) of PROMESA provides that a district court has jurisdiction over “any action against the [FOMB], and any action otherwise arising out of [PROMESA] in whole or in part[.]”¹⁷⁷ While this seemingly grants federal courts jurisdiction to adjudicate claims challenging the FOMB’s actions relating to the certification of the fiscal plan, section 106(e) appears to create an explicit carve out, clarifying that federal district courts do not in fact have jurisdiction “to review challenges to the [FOMB’s] certification determinations under this Act.”¹⁷⁸ Without knowing the definition of the operative phrase “certification determination,” it is unclear whether substantive challenges from any stakeholder to the existing fiscal plan can be heard by courts pursuant to section 106(a) or whether such claims would be captured by the explicit exception in section 106(e).

Section III.A lays out the analytical path a court may take in assessing the possible interpretations of PROMESA’s jurisdictional provisions.¹⁷⁹ Section III.B then takes these

¹⁷⁶ Letter from Nydia M. Valázquez, Member of Cong., Darren Soto, Member of Cong., José E. Serrano, Member of Cong. & Elizabeth Warren, U.S. Senator, to José B. Carrión III, Chairman, Fin. Oversight & Mgmt. Bd. for P.R. (Oct. 30, 2018), <https://www.puertoricoreport.com/wp-content/uploads/2018/10/document1.pdf> [<https://perma.cc/RG4D-GB66>].

¹⁷⁷ PROMESA § 106(a).

¹⁷⁸ *Id.* § 106(e).

¹⁷⁹ In March 2017, several bond insurers, including Assured Guaranty Corporation (“Assured Guaranty”) and Ambac Assurance Corporation (“Ambac”), brought separate suits in the District of Puerto Rico against the Commonwealth government and the FOMB claiming that the plan violated provisions within PROMESA and the U.S. Constitution. *See generally*

analyses and considers how a court may resolve the issue of whether the statutory text prohibits federal courts from exercising jurisdiction over legal challenges to FOMB fiscal plans.

A. Judicial Challenge Under Section 106 of PROMESA

PROMESA section 106 proscribes the treatment of actions arising under the Act, and contains the “certification determination” phrase that is central to understanding the scope of court review of fiscal plan challenges.¹⁸⁰ The Section below addresses the interpretation of the section 106

Assured Guaranty Complaint, *supra* note 175; Ambac Complaint, *supra* note 175. Specifically, Assured Guaranty and Ambac claimed that the fiscal plan violated the Constitution’s Takings Clause, Contract Clause, and procedural and substantive due process protections. Assured Guaranty Complaint, *supra* note 175, at 4; Ambac Complaint, *supra* note 175., at 6. However, this Note will only focus on the challenge under PROMESA and the procedural due process claim.

In response to these legal claims, the FOMB moved to dismiss, citing that PROMESA explicitly denied district courts the jurisdiction to hear challenges related to the certification of a fiscal plan and also argued that the parties did not have valid constitutional claims. *See* Motion to Dismiss Plaintiffs’ Complaint Pursuant to Fed. R. Civ. P. 12(b)(1) and (b)(6), Assured Guar. Corp. v. Puerto Rico, 301 F. Supp. 3d 288 (D.P.R. 2017) (No. 17 BK 3283), *rev’d sub nom. In re* Fin. Oversight & Mgmt. Bd. for P.R., 872 F.3d 57 (1st Cir. 2017) [hereinafter Motion to Dismiss Assured Guaranty]; Motion to Dismiss Plaintiffs’ Complaint Pursuant to Fed. R. Civ. P. 12(b)(1) and (b)(6), Ambac Assurance Corp. v. Puerto Rico, 17 BK 3283 (D.P.R. July 28, 2017), *rev’d sub nom. In re* Fin. Oversight & Mgmt. Bd. for P.R., 872 F.3d 57 (1st Cir. 2017) [hereinafter Motion to Dismiss Ambac].

Due to Hurricane Maria, Assured Guaranty voluntarily withdrew its complaint. *See Assured Guaranty Pulls Puerto Rico Lawsuit, Cites Hurricane*, REUTERS (Oct. 7, 2017), <https://www.reuters.com/article/us-puertorico-debt-assured/assured-guaranty-pulls-puerto-rico-lawsuit-cites-hurricane-idUSKBN1CC0J9> [<https://perma.cc/LTQ5-EZFD>].

On May 23, 2018, Assured Guaranty renewed their challenge against Puerto Rico and the FOMB, this time challenging the newly-certified April fiscal plan. *See* Adversary Complaint, Assured Guar. Corp. v. Puerto Rico, 17 BK 3283 (D.P.R. May 23, 2018) [hereinafter Assurance Guaranty Adversary Complaint]. Some of the arguments discussed in this Note mirror those brought and discussed above.

¹⁸⁰ *See* PROMESA § 106.

jurisdictional issue in three parts. Section III.A.1 first considers the plain meaning of the phrase “certification determinations,” which is not explicitly defined in PROMESA. Section III.A.2 then broadens the analysis and evaluates how the phrase may be particularly meaningful in the context of the FOMB’s other responsibilities under PROMESA. Finally, Section III.A.3 examines how references to the section 106(e) exception elsewhere in the Act might provide additional insight as to the scope of the provision.

1. Plain Meaning Analysis of Section 106(e)

To interpret the meaning of the phrase “certification determinations,” a court will first consider “whether the language at issue has a plain and unambiguous meaning with regard to the particular dispute in the case.”¹⁸¹ Neither the words individually nor the words combined as a phrase are explicitly defined within PROMESA.

Because the phrase has no clear meaning in the statute, courts will next look to “[give] the words used their ordinary meaning.”¹⁸² In standard usage, the word “certification” is used to describe the act of “attesting,” or more specifically “the process of giving someone or something an official document stating that a specified standard has been satisfied.”¹⁸³ The term “determination” refers to “[t]he act of deciding something officially.”¹⁸⁴

When these terms are read together under ordinary grammar principles, the term “certification” acts as an adjective modifier of the noun “determination,” suggesting that it limits the scope of the exception in section 106(e) to one category of determinations—those that relate to certifications. Thus, district courts would be precluded from exercising

¹⁸¹ *Roberts v. Sea-Land Servs., Inc.*, 566 U.S. 93, 100 (2012) (internal quotations omitted) (quoting *Robinson v. Shell Oil Co.*, 519 U.S. 337, 340 (1997)).

¹⁸² *Id.* (internal quotations omitted) (quoting *Ingalls Shipbuilding, Inc. v. Director, Office of Workers' Compensation Programs*, 519 U.S. 248, 255 (1997)).

¹⁸³ *Certification*, BLACK’S LAW DICTIONARY (10th ed. 2014).

¹⁸⁴ *Determination*, BLACK’S LAW DICTIONARY (10th ed. 2014).

jurisdiction over the FOMB's actions that are characterized as delivering a certification subsequent to an official decision.

2. Certification Determinations Versus Other Determinations

The Supreme Court recognizes, however, that statutory language “cannot be construed in a vacuum. . . . [and] words of a statute must be read in their context and with a view to their place in the overall statutory scheme.”¹⁸⁵ This broader analysis is particularly applicable in this situation, as section 106(e) applies to “certification determinations *under this Act*.”¹⁸⁶

The FOMB's responsibilities fall into two distinct categories. The first category is composed of determinations that the FOMB makes in furtherance of some affirmative conclusion or action. For example, the FOMB has “sole discretion” to propose and implement an adapted method of financial accounting if it determines the local government is incapable of comprehensive reporting that complies with the default standard.¹⁸⁷ Under these circumstances, the FOMB has discretion to change an administrative guideline; however, a further certification step does not follow such a determination.¹⁸⁸

These responsibilities are distinguishable from the second category of FOMB discretionary powers. These are determinations that are made official through the formal delivery of a certification. For example, in the context of fiscal plans, the FOMB must first “determine whether [any proposed plan] satisfies the requirements set forth” earlier in the provision and once the FOMB has made that substantive

¹⁸⁵ *Roberts*, 566 U.S. at 101 (internal quotations omitted) (quoting *Davis v. Mich. Dep't. of Treasury*, 489 U.S. 803, 809 (1989)).

¹⁸⁶ PROMESA § 106(e), 48 U.S.C. § 2126(e) (2012) (emphasis added).

¹⁸⁷ *See, e.g., id.* § 5(1).

¹⁸⁸ Other illustrations of decisions that fall into this first category include the FOMB's determination that an instrumentality is subject to, or excluded from, the requirements of PROMESA, and the FOMB's determination to hire experts and consulting professionals as necessary. *See id.* §§ 101(d)–(h).

determination, the FOMB shall approve the plan.¹⁸⁹ However, once the fiscal plan has been approved, the FOMB “shall deliver a compliance certification” to the governor and the Puerto Rico legislature.¹⁹⁰ Consistent with its plain meaning definition, and as evidenced by existing FOMB communications with local officials,¹⁹¹ this certification serves as a formal signal to all relevant parties that a fiscal plan has definitively been approved by the appropriate oversight entity and is officially authorized for use in dependent PROMESA proceedings.¹⁹² Similar determinations, subsequently followed by a certification, are required for budgets,¹⁹³ plans of debt adjustments,¹⁹⁴ and voluntary agreements.¹⁹⁵

3. In Context of PROMESA: Creditor Collective Action Exception

Despite the conclusions that can be inferred from the analysis of the statutory text itself, courts also have a “duty to construe statutes, not isolated provisions.”¹⁹⁶ In this case, it is valuable to consider whether other statements of jurisdiction in PROMESA illuminate the scope of section 106(e).

The only explicit reference to section 106(e) that exists within PROMESA is in Title VI, which deals with creditor collective actions.¹⁹⁷ It states that: “[n]otwithstanding section

¹⁸⁹ *Id.* § 201(c)(3).

¹⁹⁰ *Id.* § 201(e)(1).

¹⁹¹ *See generally* BOARD RESOLUTION, *supra* note 100.

¹⁹² *See, e.g.*, PROMESA § 204(a)(2)(B) (“If the appropriate entity . . . finds that the law is not significantly inconsistent with the Fiscal Plan for the fiscal year, it shall issue a certification of such finding.”).

¹⁹³ *Id.* §§ 202(c)–(e).

¹⁹⁴ *Id.* § 104(j)(3).

¹⁹⁵ *Id.* § 104(i)(2). It is important to note that in each of these instances, the statutory requirement against which the FOMB is judging these plans or documents is compliance with the certified fiscal plan, rather than an independent set of stipulations such as those listed in § 201(b).

¹⁹⁶ *Graham Cty. Soil & Water Conservation Dist. v. U.S. ex rel. Wilson*, 559 U.S. 280, 290 (2010) (internal quotations omitted) (quoting *Gustafson v. Alloyd Co.*, 513 U.S. 561, 568 (1995)).

¹⁹⁷ Creditor collective action allows creditors to retroactively change their rights for portions of Puerto Rico’s debt. *See AUSTIN*, *supra* note 6, at

106(e), there shall be a cause of action to challenge unlawful application of this section.”¹⁹⁸ This provision therefore negates the exception in section 106(e), meaning that federal district courts do, in at least this instance, have jurisdiction to review challenges brought under this section of PROMESA.

Section 601 grants the FOMB¹⁹⁹ power to determine, and subsequently certify, an agreement as long as it is (1) deemed consistent with a certified fiscal plan, (2) is in the best interests of the creditors, and (3) is feasible.²⁰⁰ Based on the structure of this action, it is clear that this particular authority would fall under the category of “certification determinations.” Thus, pursuant to section 106(e), courts would lack jurisdiction to hear any legal challenges against these agreements. However, section 601(n)(2) nullifies the force of that provision, and courts in this instance would, therefore, have jurisdiction to hear certification determination claims of this type.

B. Judicial Conclusions About Jurisdiction to Review “Certification Determinations” Under PROMESA

While PROMESA itself does not define the boundaries of this exception to jurisdiction, both textual and contextual analyses indicate that section 106(e) does in fact seem to prohibit stakeholders, such as creditors, from seeking substantive review of FOMB certification decisions, including certification of a fiscal plan.

While the FOMB has certain responsibilities that resemble the ordinary decision-making authority of an entity, the phrase “certification determination” likely refers to instances where the FOMB is compelled by statute to formalize a particular determination by delivering an official certification

26. It draws from “collective action clauses” of sovereign bond debt and can help to expedite the restructuring process by allowing a supermajority of bondholders to agree on restructuring terms that becomes legally binding on all bondholders. *See id.*; *see also* PROMESA § 601.

¹⁹⁸ PROMESA § 601(n)(2).

¹⁹⁹ Title VI uses the term “administrative supervisor” to refer to the FOMB. *See id.* § 601(a)(1).

²⁰⁰ *Id.* § 601(g)(1)(C).

to the governor and legislature before proceeding.²⁰¹ The Supreme Court has recognized that the presence of contrasting language can indicate an important substantive distinction.²⁰² The juxtaposition of different types of FOMB determinations throughout the act strongly suggests that only decisions made for eventual certification are protected from judicial challenge under section 106(e). Since fiscal plans are first assessed for compliance with PROMESA statutory requirements and then certified by the FOMB, they fall under the scope of section 106(e) and cannot be substantively reviewed by a court.

The Supreme Court has also recognized that “where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.”²⁰³ Congress clearly contemplated the effect of section 106(e) on other provisions in PROMESA, as section 601 explicitly nullifies the jurisdictional language for one particular FOMB certification determination.²⁰⁴ The clear omission of this language in section 201, which governs the process of approving and certifying fiscal plans, strongly suggests that Congress did in fact want to preclude courts from reviewing fiscal plan certifications. Otherwise, Congress would have incorporated the same language found in section 601 elsewhere throughout the act.

Based on the factors of statutory analysis just described, there is little ambiguity that “certification determinations”

²⁰¹ See *supra* Section III.A.

²⁰² See, e.g., *United States v. Nordic Vill., Inc.*, 503 U.S. 30, 35–36 (1992) (“The distinction [the statute at issue in *Nordic Vill.*] establishes—between suits for monetary claims and suits for other relief—is a familiar one, and is suggested by the contrasting language used in subsections (a) and (b) (‘claim[s]’) and in subsection (c) (‘determination[s]’ of ‘issue[s]’). . . . [It is a] settled rule that a statute must, if possible, be construed in such fashion that every word has some operative effect.”) (brackets in original) (internal citations omitted).

²⁰³ *Russello v. United States*, 464 U.S. 16, 23 (1983) (internal brackets and quotations omitted).

²⁰⁴ See *supra* Section III.A.3.

include approvals of fiscal plans, and thus pursuant to section 106(e), district courts lack jurisdiction to hear related substantive challenges. However, while a court may find sufficient evidence to resolve the issue of jurisdiction in reference to just the text of PROMESA, courts may still briefly consider whether such a reading is reasonable given Congress's objective in enacting the law.²⁰⁵

Precluding judicial recourse to review the FOMB's actions may seem wholly inconsistent with the broader principles underlying Congress's enactment of PROMESA. The law is intended to "protect the lawful rights of the Island's investors" such that the island can regain access to capital markets in the future.²⁰⁶ The law establishes an oversight entity that "play[s] a key role to ensure fairness to creditors and debts" in the bankruptcy process,²⁰⁷ and also requires that a fiscal plan must respect creditor priorities and liens.²⁰⁸ Consequently, if Congress truly wanted to give the FOMB broad and exclusive discretion to certify fiscal plans along its own independent criteria, it would not have gone through the painstaking task

²⁰⁵ The Supreme Court has typically followed the rule that if the statutory language is unambiguous, the Court will have no reason to resort to consulting the statute's legislative history. *See, e.g.*, *United States v. Gonzales*, 520 U.S. 1, 6 (1997). However, the Court has also recognized that in some "rare cases . . . the literal application of a statute will produce a result demonstrably at odds with the intentions of its drafters." *United States v. Ron Pair Enters.*, 489 U.S. 235, 242 (1989) (internal quotations omitted) (quoting *Griffin v. Oceanic Contractors*, 458 U.S. 564, 571 (1982)). In that case, "the intention of the drafters, rather than the strict language, controls." *Id.* Thus, it can still be informative to consult the legislative record and understand whether the proposed, textual reading aligns with Congress's underlying intent.

²⁰⁶ *See* PROMESA COMM. SUMMARY, *supra* note 77, at 1.

²⁰⁷ *Id.* at 7; *see also* Memorandum from Majority Comm. Staff to All Nat. Res. Comm. Members 3 (May 23, 2016), https://naturalresources.house.gov/uploadedfiles/markup_memo__h.r._5278_05.24.16__05.25.16.pdf [<https://perma.cc/V5T6-2C66>] ("[T]hese new provisions will ensure fiscal plans keep intact the structural hierarchy of prioritized debt, and that funds are not illicitly funneled to other instrumentality accounts.").

²⁰⁸ *See* PROMESA COMM. SUMMARY, *supra* note 77, at 3–4.

of listing out fourteen comprehensive specifications.²⁰⁹ Additionally, it seems counterintuitive that Congress would deny creditors access to an important enforcement mechanism to ensure the FOMB is properly respecting legislative stipulations.

However, other facets of Congress's thought process in enacting PROMESA may cast doubt on these initial intuitions. While the preceding logic focuses on the requirement that fiscal plans "respect the relative lawful priorities or lawful liens,"²¹⁰ this particular provision is easily misinterpreted, as recognized by Representative Raul Grijalva during House consideration of the bill.²¹¹ During committee markup, several amendments to change the word "respect" to "comply with" were proposed but subsequently rejected.²¹² Recognizing that the verb "comply with" was unduly restrictive, the Committee chose to leave the FOMB

²⁰⁹ See *Advocate Health Care Network v. Stapleton*, 137 S. Ct. 1652, 1659 (2017) (noting that the surplusage canon of construction presumes that each word Congress uses is "there for a reason"); see also *Duncan v. Walker*, 533 U.S. 167, 174 (2001) ("We are thus reluctant to treat statutory terms as surplusage in any setting. . . . We are especially unwilling to do so when the term occupies so pivotal a place in the statutory scheme[.]") (internal quotations and citations omitted).

²¹⁰ See PROMESA § 201(b)(1)(N), 48 U.S.C. §2141(b)(1)(N) (2012). For example, in their letter to the FOMB, Senator Thom Tillis and Senator Tom Cotton stated, "We have heard numerous concerns regarding the Fiscal Plan's failure to comply with lawful priorities and liens established by Puerto Rico's Constitution. . . . Multiple creditor groups have asserted that the Commonwealth and the [FOMB] have not attempted to negotiate with bondholders. . . . This is a violation of both the spirit and letter of PROMESA, which plainly intends for the Commonwealth and the [FOMB] to make every effort to reach a negotiated settlement with bondholders[.]" See Letter from Thom Tillis, U.S. Senator, & Tom Cotton, U.S. Senator, to José B. Carrión III, Chairman, Fin. Oversight & Mgmt. Bd. for P.R. (Apr. 7, 2017) [hereinafter Letter from Senator Tillis & Senator Cotton], <https://www.puertoricoreport.com/wp-content/uploads/2017/05/TillisandCottonletter.pdf> [<https://perma.cc/EC5U-937P>].

²¹¹ See 162 CONG. REC. H3600–02 (daily ed. June 9, 2016) (statement of Rep. Grijalva).

²¹² *Id.* at H3601.

with additional “flexibility afforded by the verb ‘respect,’ which is more open-ended.”²¹³

Additionally, Congress was concerned with the speed and timing of PROMESA proceedings.²¹⁴ Leading up to the law’s enactment, Puerto Rico was at risk of defaulting on a large GO debt payment.²¹⁵ Despite recognizing that the bill was not perfect, Senator Richard Blumenthal urged his colleagues to vote for the bill anyway, stating that “[w]e can come back next month, next year, or sooner to try to make it better. But there is no better bill available this week, before July 1, and the impending humanitarian crisis will most affect and most enduringly hurt the people of Puerto Rico.”²¹⁶ These sentiments were echoed during House discussions, where Representative Alcee Hastings commented that “[t]he people of the Commonwealth of Puerto Rico face an urgent fiscal crisis, and this institution’s delay in addressing this crisis has left the United States citizens on that island in dire straits.”²¹⁷

In light of this context, it is unsurprising that Congress might develop particular mechanisms to streamline the

²¹³ *See id.* Members of Congress believed that the suggestion that “respect” should be read as a much stronger provision would be “misleading” and “[would] not reflect . . . the bill or the evolution of the language throughout the legislative process.” *Id.*

²¹⁴ Note that attributing one sole intent to Congress is oftentimes problematic. *Compare* King v. Burwell, 135 S. Ct. 2480, 2493 (2015) (Chief Justice Roberts states that Congress based portions of the Affordable Care Act on three major reforms: (1) guaranteed issue and community rating requirements; (2) a requirement that individuals maintain health insurance coverage or make a payment to the IRS; and (3) the tax credits for individuals with household incomes between 100 percent and 400 percent of the federal poverty line) *with id.* at 2505 (Scalia, J., dissenting) (Justice Scalia states “[i]t is entirely plausible that tax credits were restricted to state Exchanges deliberately—for example, in order to encourage States to establish their own Exchanges,” thus disagreeing with Chief Justice Roberts’s characterization of Congress’s intent being limited to just the three reforms specified).

²¹⁵ Long, *supra* note 66.

²¹⁶ 162 CONG. REC. S4604 (daily ed. June 28, 2016) (statement of Sen. Blumenthal).

²¹⁷ 162 CONG. REC. H3582 (daily ed. June 9, 2016) (statement of Rep. Hastings).

administrative timeline of PROMESA's actions.²¹⁸ Congress is likely to have anticipated that challenges to the FOMB's actions could create intractable delays at every critical juncture in PROMESA proceedings, and therefore sought to limit these diversions.

In sum, the majority of factors that a court may consider in an effort to understand the scope of district court jurisdiction in section 106 indicate that stakeholders were never intended to have the ability to challenge fiscal plans in court.

IV. DUE PROCESS CHALLENGE UNDER THE U.S. CONSTITUTION

If courts find that there is no jurisdiction to hear claims directly challenging the substantive provisions of a fiscal plan, stakeholders may bring an action claiming that the fiscal plan certification process in fact violates procedural due process rights, especially since courts are prohibited from exercising jurisdiction over challenges to the plans themselves. GO, COFINA, and other creditors have liens and other constitutional or statutory rights that establish enforceable claims on the revenue of Puerto Rico.²¹⁹ On the other hand, Puerto Rico citizens impacted by the fiscal plan's austerity measures may also have a claim based on the local

²¹⁸ Another example of Congress's concern about the timing and efficiency of PROMESA proceedings is found in § 106(d): "It shall be the duty of the [courts] to advance on the docket and to expedite to the greatest possible extent the disposition of any matter brought under this Act." PROMESA § 106(d), 48 U.S.C. § 2126(d) (2012).

²¹⁹ See *supra* Section II.E. This argument assumes that the plaintiffs' liens and other constitutional and statutory rights are recognizable property interests that are protected from seizure without due process or proper compensation. See, e.g., Plaintiffs' Memorandum in Opposition to Defendants' Motion to Dismiss the Complaint Pursuant to Fed. R. Civ. P. 12(b)(1) and (b)(6) at 44–59, *Assured Guar. Corp. v. Puerto Rico*, 301 F. Supp. 3d 288 (D.P.R. 2017) (No. 17 BK 3283) [hereinafter Plaintiffs' Opposition Memo]. This Note also does not address the question of whether the fiscal plan violates substantive due process rights of creditors but focuses instead on claims of procedural due process violations.

government's inability to issue certain welfare benefits.²²⁰ In many cases, these interests cannot be arbitrarily deprived without constitutionally adequate notice and the opportunity to be heard.²²¹

In order to establish such a violation, a party must show that: (1) it has a valid property interest, (2) the government is threatening to, or has in fact, deprived it of its interest, and (3) such a deprivation occurred without adequate opportunity to be heard.²²² The first element, which considers whether creditors have a valid property interest or whether citizens have an interest in welfare benefits, can be a complex and widely contested issue; this Note does not delve into this complicated dispute, and therefore assumes that at least some

²²⁰ See, e.g., *Goldberg v. Kelly*, 397 U.S. 254 (1970).

²²¹ Plaintiffs' Opposition Memo, *supra* note 219, at 59; see also U.S. CONST. amends. V, XIV (prohibiting the federal and state governments from depriving any person of "life, liberty, or property, without due process of law."). Puerto Rico's status as a territory does not change the right to due process, even though the Fifth Amendment, on its face, applies to the federal government, and the Fourteenth Amendment, on its face, applies to states. The Supreme Court has recognized that it is "unnecessary to determine which Amendment applie[s] to Puerto Rico," since "[t]he Joint Resolution of Congress approving the Constitution of the Commonwealth of Puerto Rico, subjects its government to the applicable provisions of the Constitution of the United States," and "there cannot exist under the American flag any governmental authority untrammelled by the requirements of due process of law[.]" *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 668–69 n.5 (1974) (internal quotations and citations omitted). As such, it is also not important to identify which entity (either Congress for enacting PROMESA and delegating powers to the FOMB, or the FOMB as a territorial entity under PROMESA § 101(c)(1)) would ultimately be responsible for the deprivation.

Finally, it is important to note that a federal court could exercise jurisdiction over due process challenges pursuant to 28 U.S.C. § 1331. See 28 U.S.C. § 1331 (2012) ("The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.").

²²² See Thomas W. Merrill & Margaret L. Merrill, *Dodd-Frank Orderly Liquidation Authority: Too Big for the Constitution?*, 163 U. PA. L. REV. 165, 204 (2014); see also U.S. CONST. amends. V, XIV.

relevant stakeholder could satisfy this first element.²²³ The Note instead explores the latter two issues. In particular, stakeholders challenging the fiscal plan process would first need to establish when, over the course of a PROMESA proceeding, deprivation of property has occurred; then, these stakeholders can proceed to the next issue of whether sufficient process was provided.²²⁴

Section IV.A examines the unique structure of a PROMESA proceeding and considers when exactly a party's property interest is deprived.²²⁵ Section IV.B then outlines the

²²³ For more context on the creditor property interest argument, compare Motion to Dismiss *Ambac*, *supra* note 179, at 28–38 (addressing why creditors have not established property interests because they are not secured claimholders and do not hold property through contractual rights to be paid in advance of other stakeholders) with Plaintiffs' Opposition Memo, *supra* note 219, at 45–58 (summarizing federal jurisprudence recognizing that constitutionally-protected property interests and first-priority payments are property interests).

²²⁴ See, e.g., *Am. Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40, 59 (1999) (“Only after finding the deprivation of a protected interest do we look to see if the . . . procedures comport with due process.”).

²²⁵ Regarding due process claims, “the Supreme Court has tended to treat notice as a requirement distinct from other procedural elements.” *Merrill & Merrill*, *supra* note 222, at 205. For an example of this, see *Fuentes v. Shevin*, 407 U.S. 67, 80 (1972) (“Parties whose rights are to be affected are entitled to be heard; and in order that they may enjoy that right they must first be notified.”) (internal quotations and citations omitted).

In this case, the FOMB has not only publicly released each iteration of the proposed fiscal plan but has also sent out general public statements notifying stakeholders of different stages of the review or certification process. See, e.g., Fin. Oversight & Mgmt. Bd. for P.R., Invitation to Comment on the Government of Puerto Rico Fiscal Plan Presented on Oct. 14, 2016 (Nov. 9, 2016) [hereinafter *Invitation to Comment*], <https://juntasupervision.pr.gov/wp-content/uploads/wpfd/50/5824d1640f292.pdf> [<https://perma.cc/3DTQ-VSYR>].

Given these details, it would seem that notice was in fact given in a reasonable manner such that creditors could find the information easily. See *Dusenbery v. United States*, 534 U.S. 161, 171 (2002) (noting “our cases have never required actual notice”); see also *Mullane v. Cent. Hanover Bank & Tr. Co.*, 339 U.S. 306, 315 (1950) (requiring that the notice “is in itself reasonably certain to inform those affected” and “where conditions do not reasonably permit such notice, that the form chosen is not substantially less

various opportunities stakeholders have to contribute their thoughts and suggestions during the fiscal plan drafting and approval process. Section IV.C describes the procedural due process standard as laid out by the Supreme Court in *Mathews v. Eldridge* and applies that framework to the current situation in Puerto Rico to determine whether there is a due process violation.

A. Final Deprivation of Property

The Constitution requires only that parties have an opportunity to be heard prior to the deprivation of property.²²⁶ In traditional bankruptcies, this occurs in court when creditors' rights to debt payments are determined.²²⁷ However, under PROMESA's unique framework, the existence of a fiscal plan that precedes the Act's analogous bankruptcy proceedings complicates this inquiry. Because the fiscal plan is a controlling document that allocates financial resources to various activities and functions of the local government, both the court and creditors are bound by its particular terms.²²⁸ This in turn also determines how much money is available for use in governmental functions, as the amount of money Puerto Rico's government has is fixed.

Therefore, it would seem that the determination of creditors' right to debt repayment, and therefore the instance of deprivation for various stakeholders, is shifted from Title III, the reorganization stage of PROMESA, to the preceding fiscal plan certification stage.

Title III of PROMESA was drafted to mirror the judicial proceedings in Chapter 9 for municipal bankruptcies and

likely to bring home notice than other of the feasible and customary substitutes.") (internal citations omitted).

²²⁶ U.S. CONST. amends. V, XIV (prohibiting the federal and state governments from depriving any person of "life, liberty, or property, without due process of law."); *see also* Motion to Dismiss Assured Guaranty, *supra* note 179, at 39 (quoting *Hodel v. Va. Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 299 (1981)).

²²⁷ *See infra* note 231.

²²⁸ *See* PROMESA §§ 104(j), 314, 48 U.S.C. §§ 2124(j), 2174 (2012).

Chapter 11 for business bankruptcies.²²⁹ There is no question that deprivation of property rights occurs in typical bankruptcy cases²³⁰—an entity typically files for bankruptcy only when it is unable to meet its financial obligations in full, and the court provides a venue for debtors, creditors, and other stakeholders to negotiate a plan for proportionate debt repayment. However, traditional bankruptcies do not present procedural concerns despite the existence of property deprivation because stakeholders are usually afforded sufficient opportunity to be heard in court.²³¹

Under Title III, creditors are afforded many of the same procedural protections that can be found in traditional bankruptcy. For example, if a creditor disputes the terms of its debt recovery, it can ask a judge to “consider whether available remedies under the non-bankruptcy laws and constitution of the territory would result in a greater recovery[.]”²³² Thus, Title III “provides ample protection to all interested parties,” and following that logic, the FOMB asserts that there can be no due process violations.²³³

²²⁹ See AUSTIN, *supra* note 6, at 15.

²³⁰ See, e.g., *In re Golden*, 16 B.R. 580, 585 (Bankr. S.D. Fla. 1981) (“There is a deprivation of property in any bankruptcy action whereby a creditor is not paid the entire amount of its claim.”).

²³¹ See *United States v. Bekins*, 304 U.S. 27, 54 (1938) (“As the bankruptcy power may be exerted to give effect to a plan for the composition of the debts of an insolvent debtor, we find no merit in appellant’s objections under the Fifth Amendment.”); see also U.S. COURTS, U.S. BANKRUPTCY COURTS—BUSINESS AND NONBUSINESS CASES COMMENCED, BY CHAPTER OF THE BANKRUPTCY CODE, DURING THE ONE-MONTH PERIOD ENDING JULY 31, 2017, BASED ON DATA CURRENT AS OF SEPT. 30, 2017 http://www.uscourts.gov/sites/default/files/data_tables/bf_f2.1_0930.2017.pdf [<https://perma.cc/QK7D-7DQ2>] (showing over 450 Chapter 11 filings over the month of July 2017, indicating that parties are not disputing whether regular bankruptcy proceedings violate procedural due process rights).

²³² PROMESA § 314.

²³³ Motion to Dismiss *Ambac*, *supra* note 179, at 40–41. The FOMB cites Title III of PROMESA as incorporating “the relevant procedural framework of the Bankruptcy Code and Rules.” *Id.*; see also PROMESA §§ 301–317.

While the FOMB is correct in stating that Title III includes robust mechanisms for judicial process, review, and remedies, it makes a critical assumption that the deprivation of property in fact occurs during Title III proceedings. However, there is a strong argument that the deprivation actually occurs before Title III is initiated. The development of a fiscal plan precedes the resolution of debt through Title III, and thus that document in effect strictly limits the range of outcomes that can exist throughout the rest of the PROMESA proceedings.²³⁴ As indicated in Section II.D, recent iterations of the fiscal plan have projected heavy losses for creditors and a severe reduction in government spending on important public services. Even if stakeholders took full advantage of the procedural mechanisms of Title III, the court cannot compel retroactive changes to the plan and its allocation of funds.

As such, the actual deprivation in this case seems to occur not at the Title III stage, but rather when the terms of the fiscal plan are approved and certified by the FOMB. If this is the case, the remaining question then becomes whether the process afforded to stakeholders such as creditors and Puerto Rico constituents leading up to the plan's certification meets the constitutional due process standard.

B. FOMB Fiscal Plan Comment Process and Listening Sessions

On October 14, 2016, then-Governor Alejandro García Padilla of Puerto Rico²³⁵ submitted the first draft of the fiscal plan to the FOMB.²³⁶ Several weeks later, on November 10, the FOMB released an "Invitation to Comment," and both individuals and organizations could use a survey template to

²³⁴ PROMESA § 314(b)(7).

²³⁵ See Press Release, Fin. Oversight & Mgmt. Bd. for P.R., Oversight Board Publishes Written Comments on the Government of Puerto Rico's Proposed Fiscal Plan (Dec. 8. 2016), <https://juntasupervision.pr.gov/wp-content/uploads/wpfd/49/5849b89f0b032.pdf> [https://perma.cc/A82C-3WRS].

²³⁶ PROPOSED 2016 FISCAL PLAN, *supra* note 97.

record reactions, concerns, and feedback to the plan.²³⁷ In total, the comment period lasted thirteen days after the initial press release.²³⁸

The FOMB then aggregated and published all of the commentary that was received.²³⁹ Notably, many respondents chose to discard the template format and submitted detailed, freeform written responses about their concerns with the plan.²⁴⁰ Some bondholders commented that because the fiscal plan elevated all other expenses over constitutional debt service, it was in direct violation of the Puerto Rico Constitution and Congress's requirement that the plan respect lawful priorities.²⁴¹ Other respondents pointed out

²³⁷ See generally Invitation to Comment, *supra* note 225. This form could be submitted electronically to the FOMB through email. See *id.*

²³⁸ Press Release, Fin. Oversight & Mgmt. Bd. for P.R., PROMESA Oversight Board Invites Individuals and Organizations to Provide Written Comments on the Government of Puerto Rico's Proposed Fiscal Plan (Nov. 10, 2016), <https://juntasupervision.pr.gov/wp-content/uploads/wpfd/49/5824dbae7d50a.pdf> [<https://perma.cc/JL69-YG79>]; Press Release, Fin. Oversight & Mgmt. Bd. for P.R., PROMESA Oversight Board Reminds the Public that Today Is the Deadline to Provide Written Comments on the Government of Puerto Rico's Proposed Fiscal Plan (Nov. 23, 2016), <https://juntasupervision.pr.gov/wp-content/uploads/wpfd/49/5835dc8ba545e.pdf> [<https://perma.cc/7CL2-CYAK>].

²³⁹ FIN. OVERSIGHT & MGMT. BD. OF P.R., LOG OF RESPONSES TO PUBLIC CONSULTATION REQUEST, <https://juntasupervision.pr.gov/wp-content/uploads/wpfd/50/5849b4ee7abe2.pdf> [<https://perma.cc/5KM6-K2DP>]. Most notably, 50% of the respondents identified as Puerto Rico residents while only 2% identified as creditors and 18% requested their identity be kept confidential. The other respondents included Trade Associations (11%), Employees of Puerto Rico (2%), and "Other" (18%). *Id.*

²⁴⁰ See, e.g., FIN. OVERSIGHT & MGMT. BD. OF P.R., PUBLIC COMMENTS TO GOVERNMENT OF PR FISCAL AND ECONOMIC GROWTH PLAN - CATEGORY CREDITORS 16–19, <https://juntasupervision.pr.gov/wp-content/uploads/wpfd/50/5849b4d65d0c2.pdf> [<https://perma.cc/DG8M-8QVJ>].

²⁴¹ FIN. OVERSIGHT & MGMT. BD. OF P.R., PUBLIC COMMENTS TO GOVERNMENT OF PR FISCAL AND ECONOMIC GROWTH PLAN - CATEGORY OTHERS 12 [hereinafter OTHER COMMENTS TO FP], <https://juntasupervision.pr.gov/wp-content/uploads/wpfd/50/5849b4eb7d711.pdf> [<https://perma.cc/4J4D-VCGT>]. An ad hoc group of GO bondholders stated:

flaws or oversimplifications in the plan that exaggerated revenue figures or understated expenses.²⁴² In total, 114 responses were recorded and over four hundred pages of feedback was provided.

As a result of its own analysis, the FOMB denied certification of the plan.²⁴³ The FOMB noted that Puerto Rico would likely face a deficit much larger than the one in the proposal,²⁴⁴ and requested that the governor rework the plan with new measures aimed at spurring economic growth and reducing the deficit.²⁴⁵ However, the FOMB did not cite or reference any of the feedback received during the comment process and failed to provide stakeholders with another opportunity to assess the numbers and details of the new plan.

After several more rounds of iteration,²⁴⁶ the FOMB held an open meeting at which the governor presented his final plan to the FOMB and in that session, provided the public with an opportunity to comment.²⁴⁷ The FOMB issued its approval and certification of this final version of the fiscal plan

“The Board should not seriously entertain any Fiscal Plan premised on the notion of impairing Constitutional debt while paying other expenses in full. . . . The Commonwealth has instituted measures to continue making unconstitutional transfers to COFINA while not paying the Constitutional debt [and] [t]he Fiscal Plan takes billions of dollars that have been or will be ‘clawed back’ to pay Constitutional debt and instead uses those funds for other purposes.”

Id. at 12–13; *see also supra* Section II.E.

²⁴² *See, e.g.*, OTHER COMMENTS TO FP, *supra* note 241, at 31–45. (pointing out the fiscal plan ignores the impact major increase in electricity rates would have on the Puerto Rico economy).

²⁴³ 2016 Fiscal Plan Adjustment Letter, *supra* note 99.

²⁴⁴ *Id.* These projections were calculated by the government’s own team of staff and advisors and were vetted by the FOMB and its advisors, as well as independent third-parties. *Id.* at 1–2. The FOMB calculated a deficit that was almost \$10 billion larger. *Id.* at 1.

²⁴⁵ *Id.* at 2.

²⁴⁶ *See supra* Section II.D.

²⁴⁷ *See* BOARD RESOLUTION, *supra* note 100.

in that same open meeting, and never initiated another multi-day comment period for any other draft after the first one.²⁴⁸

As described in Section II.D, the initial fiscal plan has since been abandoned, and the FOMB has ultimately drafted several new plans that claim to better reflect the current economic realities on the island. Since this process began, it does not appear that any additional comment period has been initiated. The FOMB did host three separate listening sessions for experts and stakeholders to present on topics of their choice, but these events occurred before a new plan was developed and released.²⁴⁹ There is also no indication that prior to the certifications in April 2018 and October 2018, there were any comment or review periods for stakeholders of interest.

C. *Mathews v. Eldridge*: Procedural Due Process Test and Application

The final step in the analysis is to consider whether the comment period and listening sessions that were made available to creditors and Puerto Rico citizens provided a sufficient opportunity to be heard. The general standard for determining procedural adequacy was defined by the Supreme Court in *Mathews*, which balances: (1) the private individual's interests in retaining property and injury threatened by the action; (2) the risk of error through the procedures used and probable value, if any, of additional or substitute procedural safeguards; and (3) the costs and administrative burden of additional processes, and interests

²⁴⁸ Press Release, Fin. Oversight & Mgmt. Bd. for P.R., Oversight Board Certifies Fiscal Plan for Puerto Rico (Mar. 13, 2017), <https://juntasupervision.pr.gov/wp-content/uploads/wpfd/49/58c6e47508b7a.pdf> [<https://perma.cc/PVC4-MWGX>].

²⁴⁹ See *id.*; see also Press Release, Fin. Oversight & Mgmt. Bd. for P.R., Oversight Board to Hold Second Listening Session on Fiscal Measures (Nov. 27, 2017) [hereinafter Second Listening Session Release], <https://juntasupervision.pr.gov/wp-content/uploads/wpfd/49/5a1c5a71ed567.pdf> [<https://perma.cc/6LLP-8TAH>].

of the government²⁵⁰ in efficient adjudication.²⁵¹ Notably, this test does not consider whether the “totality of private interests outweigh the totality of government interests,” but instead “appears to contemplate a marginalist inquiry” into whether changing the existing procedures is worth the associated administrative burdens.²⁵²

1. Stakeholder Interests

Regarding the first prong, Puerto Rico’s creditors and investors have a clear economic interest in the bonds they hold.²⁵³ In aggregate, Puerto Rico’s creditors and pensioners are owed over \$120 billion,²⁵⁴ with forty percent of the debt owed to Puerto Rico residents and twenty percent owed to hedge funds.²⁵⁵ U.S. municipal bond funds hold \$7.8 billion in Puerto Rico debt and U.S. mutual funds held about \$8.4 billion when the island first filed for PROMESA bankruptcy protection in May 2017.²⁵⁶ Similarly, major bond insurers, such as Assured Guaranty and Ambac, each hold close to \$10 billion in Puerto Rican debt.²⁵⁷ Nevertheless, while these

²⁵⁰ In this case, the “government’s” interest is represented through the FOMB, as it is formally an entity within Puerto Rico, but functions as a representative of Puerto Rico’s interests. See PROMESA § 101(c)(1), 48 U.S.C. § 2121(c)(1) (2012).

²⁵¹ *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976).

²⁵² *Merrill & Merrill*, *supra* note 222, at 211.

²⁵³ See William D. Cohan, *Puerto Rico’s Human Catastrophe Is Hedge Funds’ Inhuman Nightmare*, VANITY FAIR (Oct. 2, 2017), <https://www.vanityfair.com/news/2017/10/puerto-rico-hurricane-debt-creditors> [<https://perma.cc/93V6-S6DC>].

²⁵⁴ APR. 2018 FISCAL PLAN, *supra* note 5, at 1.

²⁵⁵ Nathan Bomey, *‘Wipe Out’ Puerto Rico Debt? Hedge Funds, Residents at Risk of Losses*, USA TODAY (Oct. 5, 2017), <https://www.usatoday.com/story/money/2017/10/05/puerto-rico-bankruptcy-hurricane-maria-investors/735824001/> [<http://perma.cc/F4EH-E4YC>].

²⁵⁶ *Id.*

²⁵⁷ See Cooper J. Howard, *From Bad to Worse: An Update on Puerto Rico’s Debt Problems*, CHARLES SCHWAB (Oct. 19, 2017), <https://www.schwab.com/resource-center/insights/content/from-bad-to-worse-update-on-puerto-ricos-debt-problems> [<http://perma.cc/SK22-37SQ>].

absolute figures are large, it is important to consider them in context. Many of the stakeholders with the largest financial exposures to Puerto Rican debt, such as bond insurers, are in the business of underwriting risk and are able to balance risk factors across an entire portfolio of holdings.²⁵⁸ Similarly, many of the institutional creditors that hold Puerto Rican bonds are sophisticated actors, and likely recognize that any investment carries with it a degree of risk.²⁵⁹ Therefore, while the magnitude of loss in this case is significant, it is not entirely clear what the impact might be on these large corporate investors and insurers.

Institutional creditors are not the only ones with a significant interest in Puerto Rico's insolvency. Of the territory's debt, close to \$50 billion relates to unfunded pension liabilities, which directly impact local citizens and their retirement savings.²⁶⁰ Perhaps even more concerning is the reality that Puerto Rico may not have enough funds to provide its citizens with effective governmental services.²⁶¹

2. Risk of Error and Additional Procedural

²⁵⁸ For example, the Supreme Court has previously recognized that “[i]t is characteristic of insurance that a number of risks are accepted, some of which involve losses, and that such losses are spread over all the risks so as to enable the insurer to accept each risk at a slight fraction of the possible liability upon it.” *Grp. Life & Health Ins. Co. v. Royal Drug Co.*, 440 U.S. 205, 211 (1979) (internal quotations and citation omitted). As noted above, some of the stakeholders exposed in Puerto Rico are bond insurers.

²⁵⁹ See generally J. WILLIAM HICKS, INTERNATIONAL DIMENSIONS OF U.S. SECURITIES LAW § 4:9 (2017) (“[T]he general character of investment securities makes some of them inherently riskier than others. . . . For example, secured debt is less risky than unsecured debt and among unsecured debt obligations ‘junk bonds’ typically carry higher interest rates (which explains why these bonds are also called ‘high yield’) than other forms of unsecured debt.”).

²⁶⁰ Mary Williams Walsh, *Puerto Rico Declares a Form of Bankruptcy*, N.Y. TIMES (May 3, 2017), <https://www.nytimes.com/2017/05/03/business/dealbook/puerto-rico-debt.html> [<https://perma.cc/8X8A-VKJK>].

²⁶¹ *Id.* See generally Newkirk, *supra* note 70.

Safeguards

The second prong of the test requires consideration of not only the risk of error that can occur under the current process available, but also the value of instituting additional or substitute procedural safeguards.²⁶² One important factor to consider in this evaluation is the FOMB's expertise and competency in evaluating the terms of a plan and assessing its short-term and long-term impacts. In a case involving medical reimbursements under Medicare, the Supreme Court assessed this prong of the *Mathews* test by considering whether the presiding officers in the appeals hearing were sufficiently knowledgeable to accurately adjudicate these claims.²⁶³ The Court found that these "hearing officials" were "*qualified* individual[s] with the ability to conduct formal hearings and with a general understanding of medical matters and terminology," and had "*a thorough knowledge* of the Medicare program and the statutory authority and regulations upon which it is based[.]"²⁶⁴ As a result, the appellee's right to due process was not violated because, according to the Court, the use of a different adjudicator or the introduction of additional procedures would not have reduced the risk of erroneous deprivation.²⁶⁵

In this case, the main arbiter of the fiscal plan drafting process is the FOMB. The entity is composed of individuals who are submitted for consideration by members of Congress, appointed by the President, and have "knowledge and expertise in finance, municipal bond markets, management, law, or . . . government."²⁶⁶ Additionally, the FOMB does not operate alone in finalizing the fiscal plan, as the governor and other local officials are usually involved.²⁶⁷ However, while diversity and depth of expertise is apparent here, creditors

²⁶² See *supra* notes 250–51 and accompanying text.

²⁶³ See *Schweiker v. McClure*, 456 U.S. 188, 199 (1982).

²⁶⁴ *Id.* (emphasis in original) (internal quotations and citations omitted).

²⁶⁵ *Id.* at 200.

²⁶⁶ PROMESA §§ 101(e)–(f), 48 U.S.C. §§ 2121(e)–(f) (2012).

²⁶⁷ See *supra* Section II.D.

can take issue with the fact that the FOMB does not have a creditor representative, which might lead to blind spots in the decision-making process. Similarly, Puerto Rican citizens can argue that because all of the board members are nominated by the President, there is a lack of democratically-elected representatives that can advocate for issues facing average Puerto Rican citizens.

Another factor to consider is that in the end, developing a fiscal plan is “not merely a mathematical exercise of balancing the checkbook,”²⁶⁸ but is rather a complicated process of balancing interests that pull in separate directions. In this situation, the concept of “erroneous” deprivation is misleading, as the FOMB is not responsible for making a straightforward positive or negative determination but is rather tasked with formulating a comprehensive recovery plan for an economically declining, insolvent territory. The FOMB has noted that any plan it approves “must strike the right balance between fiscal adjustment, structural reform and debt restructuring,” and also consider the “impact of potential changes on Puerto Rican [residents], as well as on institutional stakeholders and society at large.”²⁶⁹

The Supreme Court has recognized that due process does not require that “the procedures used to guard against an erroneous deprivation . . . be so comprehensive as to preclude any possibility of error[.]”²⁷⁰ Rather, “the fundamental fairness of a particular procedure does not turn on the result obtained in any individual case,” but should be “shaped by the risk of error inherent in the truth-finding process[.]”²⁷¹ Therefore, it would be improper to focus squarely on either the creditor’s terms of recovery or the resources available for

²⁶⁸ Press Release, Fin. Oversight & Mgmt. Bd. of P.R., Oversight Board Addresses Larger Fiscal Deficit 2 (Dec. 20, 2016), <https://juntasupervision.pr.gov/wp-content/uploads/wpfd/49/58595509cff01.pdf> [<https://perma.cc/G95K-R4A7>].

²⁶⁹ *Id.* (internal quotations omitted).

²⁷⁰ *Walters v. Nat’l Ass’n of Radiation Survivors*, 473 U.S. 305, 320–21 (1985) (quoting *Mackey v. Montrym*, 443 U.S. 1, 13 (1979) (internal quotations omitted)).

²⁷¹ *Id.* at 321 (internal quotation marks and citations omitted).

public services—the emphasis should be on whether the process that was afforded to the important stakeholders was vulnerable to flawed or imbalanced determinations.

3. Government’s Interests and Burdens

The third prong of the *Mathews* test requires an assessment of the government’s, and by association the FOMB’s, interests in this case.²⁷² Here, those interests are not entirely irreconcilable with those of the creditors or local citizens.²⁷³ Since faith in the island’s creditworthiness will determine whether entities will be willing to lend money to Puerto Rico in the future, all parties share a common “urgent interest . . . in an accurate and just decision”²⁷⁴ regarding creditor debt resolution under the fiscal plan.²⁷⁵ After Puerto Rican debt issuers were initially downgraded to junk status,²⁷⁶ the island found it prohibitively more expensive to fund itself as lenders would require higher interest rates to match the riskiness of loan payback.²⁷⁷ Combating this consequence in

²⁷² See *supra* notes 250–51 and accompanying text.

²⁷³ See *Memphis Light, Gas & Water Div. v. Craft*, 436 U.S. 1, 18 (1978) (“The utility’s interests are not incompatible with affording the notice and procedure described above. Quite apart from its duty as a public service company, a utility—in its own business interests—may be expected to make all reasonable efforts to minimize billing errors and the resulting customer dissatisfaction and possible injury.”).

²⁷⁴ *Lassiter v. Dep’t of Soc. Servs.*, 452 U.S. 18, 27 (1981).

²⁷⁵ Congress’s desire for Puerto Rico to regain access to the credit markets is reflected in PROMESA, as the FOMB can only be terminated if the government “has adequate access to short-term and long-term credit markets at reasonable rates” to meet its borrowing needs. PROMESA § 209(1), 48 U.S.C. § 2149(1) (2012); see also COMM. REPORT ON H.R. 5278, *supra* note 8, at 3.

²⁷⁶ See, e.g., *Rating Action: Moody’s Downgrades \$13 Billion of Puerto Rico Bonds, Revises Outlook to Negative from Developing*, MOODY’S INVESTORS SERV. (Apr. 5, 2017), https://www.moody.com/research/Moodys-Downgrades-13-Billion-of-Puerto-Rico-Bonds-Revises-Outlook--PR_903936797 [<https://perma.cc/AAU6-BTAN>].

²⁷⁷ See Mark DeCambre, *Puerto Rico Has More Than \$70 Billion in Debt Because of This*, MARKETWATCH (Oct. 7, 2017), <https://www.marketwatch.com/story/why-does-puerto-rico-have-more-than-70-billion-in-debt-2017-10-04> [<https://perma.cc/E6SM-FWWM>].

the future remains an important interest for the FOMB and Puerto Rican officials.

However, the need to build creditor confidence must be balanced with other broader interests. As of February 2019, Puerto Rico is still recovering from a series of devastating hurricanes and dedicating financial resources to rebuilding the island is likely going to take priority over things like payment to corporate investors.²⁷⁸ The FOMB also has a strong interest in diminishing administrative burdens and the cost of lengthened and more robust proceedings. Given the number of stakeholders affected by the fiscal plan, it would not be surprising if parties attempted to delay the process and make requests for pre-certification hearings after every new draft is introduced.²⁷⁹ However, the cost of operating the FOMB and hiring experts, lawyers, and advisors to assist with these PROMESA proceedings is already incredibly high.²⁸⁰ Requiring the FOMB to introduce a host of supplementary hearings or lengthier comment periods will certainly add to the monetary costs of this process and create intractable delays, leaving both creditors and citizens in limbo.

4. Balancing Interests and Administrative Burdens

In this instance, creditors clearly have large financial interests in and significant exposures to Puerto Rico.²⁸¹ Investors are also heavily influenced by signals from the

²⁷⁸ See *supra* notes 22–25 and accompanying text.

²⁷⁹ See *Mackey v. Montrym*, 443 U.S. 1, 18 (1979) (“Moreover, the incentive to delay arising from the availability of a presuspension hearing would generate a sharp increase in the number of hearings sought and therefore impose a substantial fiscal and administrative burden on the Commonwealth.”) (citation omitted); see also *Dixon v. Love*, 431 U.S. 105, 114 (1977).

²⁸⁰ Michelle Kaske & Jodi Xu Klein, *Puerto Rico Finds Going Bust Isn’t Cheap as Consultant Fees Rise*, BLOOMBERG (June 12, 2017), <https://www.bloomberg.com/news/articles/2017-06-12/puerto-rico-finds-going-bust-isn-t-cheap-as-consultant-fees-rise> [https://perma.cc/9XYK-2J5X].

²⁸¹ See Howard, *supra* note 257.

territory and the market indicating when debt obligations are unpayable. When it was first announced that the island was going to default on upcoming interest payments, bond insurer Ambac, with a \$10 billion exposure to the territory's debt through its insurance business, saw its stock price fall almost thirty percent, "causing investors to sustain substantial losses."²⁸² Investors have also expressed concern that MBIA, another bond insurer with heavy exposure to Puerto Rico debt, may not "survive heavy losses" because the company was undercapitalized.²⁸³ While it is true that many of Puerto Rico's bondholders, whether they are regular investors or bond insurers, are sophisticated actors who structure their businesses around managing and balancing risks in their investments,²⁸⁴ that does not diminish the fact that Puerto Rico's situation is unprecedented in scope and size. As a result, many of these investors may not have the requisite financial resources to weather either the perception of, or actual, losses from neglected debt servicing.²⁸⁵

While the FOMB shares an interest in trying to preserve creditor confidence so that Puerto Rico can once again gain access to credit markets in the future, the FOMB also has important counterbalancing interests. Most importantly, Puerto Rico has, for some time, been in "crisis mode" recovery.²⁸⁶ Therefore, a large consideration for the governor

²⁸² Amended Class Action Complaint at 6, *Wilbush v. Ambac Fin. Grp., Inc.*, No. 16-cv-05076, 2016 WL 8259638 (S.D.N.Y. Nov. 23, 2016).

²⁸³ Matt Wirz, *Bond Insurer MBIA Targeted by Short Sellers After Puerto Rico Hurricane*, WALL ST. J. (Dec. 21, 2017), <https://www.wsj.com/articles/hedge-funds-target-mbia-after-puerto-rico-hurricane-1513852201> (on file with the *Columbia Business Law Review*).

²⁸⁴ See *supra* Section II.E.

²⁸⁵ See Howard, *supra* note 257 (reporting that bond insurers National and Ambac have fifty-five percent and ninety-two percent, respectively, of their exposure to Puerto Rico debt with claims paying resources—essentially meaning that neither company has enough money to meet their own obligations if Puerto Rico does not service any of their debt in the short-term); see also *supra* Section II.D.

²⁸⁶ Alayna Treene, *The Puerto Rico Recovery, by the Numbers*, AXIOS (Oct. 9, 2017), <https://www.axios.com/the-puerto-rico-recovery-by-the->

and the FOMB when drafting a viable fiscal plan is to account for the costs of providing necessary services to local citizens, government entities and programs, and recovery efforts. Second, the FOMB has several practical considerations related to procedural and administrative efficiency. In the past, delays and inaction caused the island to default on many of its debt payments, which further exacerbated its financial situation.²⁸⁷ The Supreme Court has recognized that “due process is not so rigid as to require that the significant interests in . . . economy must *always* be sacrificed.”²⁸⁸ This push and pull has come to define many of the disagreements that have surfaced during these PROMESA proceedings, and the FOMB should constantly be trying to strike the optimal balance between sufficient process and a reasonable pace of progress.

Over these last several iterations of the fiscal plan, both creditors and the citizenry have been given only a limited opportunity to contribute feedback. While the FOMB received the governor’s first draft of a proposed fiscal plan in October 2016, the public request for feedback was not released until early November, and thereafter, parties had only two weeks to read, digest, analyze, and formulate a response.²⁸⁹ At no point in time were the stakeholders given an opportunity to meet face-to-face with the FOMB to discuss the underlying assumptions. Creditors have also expressed concerns about a lack of transparency with regards to many of the calculations and figures that inform the terms of the fiscal plan.²⁹⁰

Even when the FOMB chose to reject the first draft of the fiscal plan, it did not demonstrate that it had considered and attempted to address the core concerns of respondents gathered during the comment period. The adjustments that the FOMB directed the governor to consider did not seem to

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[<https://perma.cc/P7HR-QRNP>].

²⁸⁷ See *supra* Section II.A.

²⁸⁸ *Gagnon v. Scarpelli*, 411 U.S. 778, 788 (1973) (emphasis added).

²⁸⁹ See *supra* Section IV.B.

²⁹⁰ See Joint Creditor Letter, *supra* note 150; Creditor Press Release *supra* note 16.

stem from the feedback received from outside stakeholders, but arose out of independent empirical projections completed by advisors.²⁹¹ Therefore, it is not clear to what extent the FOMB truly considered the feedback of other commentators.²⁹²

After this initial comment period, the FOMB continued to review the plan with the governor but did not offer another feedback period. During recent efforts to revise the fiscal plan after Hurricane Maria, the FOMB offered three separate “listening sessions” for any interested stakeholders to participate.²⁹³ However, before the April 2018 fiscal plan was approved, it is clear that despite communications between the FOMB and the governor, other stakeholders were not included in the conversation.²⁹⁴

If stakeholders were provided with a more substantial opportunity to meet with the governor and FOMB, they may have been able to help better communicate their interests in the broader scope of Puerto Rico’s insolvency problem. This would also perhaps help to alleviate some of the aggravation facing creditors who were denied their debt claims without a full explanation or demonstrated effort to collaborate²⁹⁵ and

²⁹¹ See generally Joint Creditor Letter, *supra* note 150.

²⁹² See generally *id.*

²⁹³ See Second Listening Session Release, *supra* note 249.

²⁹⁴ See Assured Guar., *supra* note 16 (commenting that “[u]nfortunately, the [FOMB] again formulated a fiscal plan without appropriate transparency of information and assumptions, and without collaboration with creditors.”).

²⁹⁵ For example, in early 2017, the governor of Puerto Rico and the creditors of PREPA (possessing around \$9 billion in debt) negotiated for months on a specific deal that would see creditors take a fifteen percent loss on their securities and wait longer to get repaid. See Michelle Kaske, *Puerto Rico Board Rejects Power Utility Debt Restructuring*, BLOOMBERG (June 28, 2017), <https://www.bloomberg.com/news/articles/2017-06-28/puerto-rico-board-rejects-power-utility-debt-restructuring> [https://perma.cc/G8KT-YU6F].

These terms are far superior, from a creditor’s perspective, to the severe haircut under the current fiscal plan. It also helped to foster goodwill between the two sides, as it demonstrated that the government was open and willing to compromise where possible. However, the FOMB voted against certifying the agreement due to concerns about the deal’s ability to

some of the tension that has led to violent protests that have roiled San Juan, the Puerto Rican capital.²⁹⁶ Comment periods and listening sessions are limited in their ability to provide parties of all interests a venue to hear each other and establish a better mutual understanding.²⁹⁷

However, a core question embedded in the due process analysis is whether offering incremental processes, on top of those currently available, would better safeguard creditors' interests, and, therefore, improve their final outcome.²⁹⁸ In this case, there are three reasons why additional comment periods or in-person meetings may not make a substantial difference to the creditors' final outcome.

First, Puerto Rico's pie of financial resources is generally fixed. Especially after the devastation of Hurricane Maria, the island is hemorrhaging money as it seeks to rebuild basic infrastructure, businesses, and homes. The reality, therefore, is that even if all the stakeholders could come together, it is not clear what "concessions" the FOMB can make to serve creditor interests without simultaneously hurting the interests of local citizens.

Second, many of the concerns that creditors in particular have raised since the first fiscal plan are conceptually very similar. Creditors such as GO and COFINA bondholders

lower electricity rates and modernize the system. *Id.* These negotiations also took place early in the process, and after Hurricane Maria, it is unclear whether the government would be as willing to give creditors such terms on a deal simply for the reason that there may not be enough monetary resources, given the cost of the recovery efforts, for this to be viable.

²⁹⁶ See Patricia Mazzei, *Protest in Puerto Rico Over Austerity Measures Ends in Tear Gas*, N.Y. TIMES (May 1, 2018), <https://www.nytimes.com/2018/05/01/us/puerto-rico-protests.html> [<https://perma.cc/JFK2-8MTM>].

²⁹⁷ In *Goldberg v. Kelly*, the Supreme Court noted that "written submissions do not afford the flexibility of oral presentations; they do not permit the recipient to mold his argument to the issues the decision maker appears to regard as important," and therefore in some cases, "written submissions [can be] a wholly unsatisfactory basis for decision." 397 U.S. 254, 269 (1970). In this case, the debt structure and balancing of creditor claims with regular government expenses and existing recovery efforts is all incredibly complex and could benefit from interactions beyond those of written submissions. See *supra* Section II.E.

²⁹⁸ See Merrill & Merrill, *supra* note 222, at 211.

fundamentally disagree with the FOMB's attempt to discharge other expenses over servicing public debt, as required by the Constitution of Puerto Rico.²⁹⁹ Creditors have also raised, on frequent occasion, concerns that the FOMB has not been transparent about the assumptions and projections that underlie its complex analysis. Therefore, it may be redundant and unproductive to allocate individual comment periods or schedule listening sessions and in-person meetings to discuss the same variation of issues at every stage of the process.

Finally, there is evidence that creditors may not even have to depend on the FOMB and its formal PROMESA processes to voice their objections and influence the terms of a proposed fiscal plan. As described in Section IV.B, while the comment period offered by the FOMB allowed interested stakeholders to submit their thoughts in writing, a large majority of respondents chose to disregard the template provided and instead submitted their own lengthy commentary in whatever form they believed appropriate. Many of the core groups of creditors have also utilized their own platforms to release similar types of written feedback through direct letters and press releases that comment on flaws in the proposed fiscal plans. For example, a group of GO bondholders, COFINA bondholders, and several large bond insurers released a long letter to the board describing, in detail, concerns each class of creditors had regarding the substance and transparency of the plan.³⁰⁰ More recently, a collection of some of the same creditors released critical statements about the fiscal plan drafts prepared post-Hurricane Maria.³⁰¹ Thus, it is not clear how institutional creditors are deprived of an opportunity to

²⁹⁹ See Joint Creditor Letter, *supra* note 150.

³⁰⁰ See *id.*

³⁰¹ Creditor Press Release, *supra* note 16; see also Press Release, Assured Guar., Assured Guaranty Responds to Puerto Rico's Revised Fiscal Plan Proposals (Jan. 25, 2018) [hereinafter Assured Guaranty Press Release], <http://assuredguaranty.newshq.businesswire.com/press-release/assured-guaranty-responds-puerto-ricos-revised-fiscal-plan-proposals> [https://perma.cc/M37K-YDS9]. For more information on the contents of this press release, see *infra* note 323.

be heard when they have already demonstrated the willingness and ability to publicly offer their (often unsolicited) thoughts and criticisms. Similarly, some citizens have taken to the streets to voice their frustration and disagreement with the territory's current state.³⁰²

For these reasons, a court would likely find that there is no due process violation. Current evidence indicates that despite the strong interests of various stakeholders and the limited feedback processes that have been made available, both creditors and Puerto Rican citizens have still been able to find other ways to contribute to the broader discussion about the fiscal plans and financial path of the island. Requiring the FOMB to introduce a host of supplementary processes will create greater monetary and tactical delays without any clear benefits for the government or other interested parties.

V. CONGRESSIONAL ASSESSMENT AND ACTION

Despite the fact that stakeholders may not be successful in court, Congress can still play an important and useful role in safeguarding certain interests, especially given the broader, long-term goal of helping to repair Puerto Rico solvency and of ultimately regaining access to credit markets.

While the FOMB holds direct power to shape the fiscal plan certification process, it is still a statutory entity with powers purely delegated through legislation. Thus, the FOMB is still subject to the political scrutiny of the federal government, and Congress has the ultimate authority to monitor and amend PROMESA in response to changing circumstances. Congress clearly has a vested interest in the proper interpretation and enactment of its laws and there is evidence to indicate that at least some members of Congress have begun to question whether the FOMB is deviating from its allocated responsibilities and ultimate goal.

In June 2017, U.S. Senators Thom Tillis and Tom Cotton contacted the FOMB and expressed concern that the first certified fiscal plan violated the spirit and text of

³⁰² Mazzei, *supra* note 296.

PROMESA.³⁰³ In particular, the letter stated that “[m]ultiple creditor groups have asserted that the [FOMB has] not attempted to negotiate with bondholders . . . and in fact [has] failed to respond to creditors’ attempts to initiate negotiations.”³⁰⁴ Some of the substantive concerns raised in the letter included the “[p]lan’s failure to comply with lawful . . . liens,” “elevation of all non-debt spending above debt service,” and “unexplained economic assumptions” that drive Puerto Rico’s fiscal projections over the next several years.³⁰⁵

However, that certified fiscal plan has since been abandoned,³⁰⁶ and recent proposals of updated plans indicate

³⁰³ See Press Release, Tom Cotton, U.S. Senator, Cotton Seeks Additional Answers from the Financial Oversight and Management Board for Puerto Rico (June 13, 2017), https://www.cotton.senate.gov/?p=press_release&id=708 [<https://perma.cc/YT6D-VP5G>]; Letter from Senator Tillis & Senator Cotton, *supra* note 210; see also Letter from Tom Cotton, U.S. Senator, to Jose B. Carrion III, Chairman, Fin. Oversight & Mgmt. Bd. for P.R., <https://www.cotton.senate.gov/files/documents/170613PROMESALettertoCarrion.pdf> [<https://perma.cc/K2FD-4ZZA>] [hereinafter Letter from Senator Cotton] (stating that the FOMB’s response letter to the April 7th letter was “vague and unresponsive,” and requesting that additional insight be provided as to why the FOMB believes that the current fiscal plan properly “respect the relative lawful priorities or lawful liens” as required by § 201(b)(1)(N)). To see the FOMB’s response letter, see Letter from José B. Carrión, Chair, Fin. Oversight & Mgmt. Bd. for P.R., to Thom Tillis, U.S. Senator, & Tom Cotton, U.S. Senator (Apr. 25, 2017), <https://juntasupervision.pr.gov/wp-content/uploads/wpdf/50/58ffadd569e07.pdf> [<https://perma.cc/GEF3-T7D4>].

³⁰⁴ Letter from Senator Tillis & Senator Cotton, *supra* note 210.

³⁰⁵ See *id.* Senator Cotton cited that investors stood to lose billions of dollars “as a result of the Board’s bizarre interpretation” of PROMESA’s requirements, which not only jeopardizes the retirement savings of many constituents in Puerto Rico and on the mainland, but also “creates a dangerous precedent that property and investor rights are open to interpretation in a fiscal crisis, which could badly destabilize the municipal bond market.” Letter from Senator Cotton, *supra* note 303. Senator Tom Cotton also made a follow-up statement: “If this is what ‘respecting’ legal obligations means [under PROMESA § 201(b)(1)(N)], what would ‘disrespecting’ them look like?” *Id.*

³⁰⁶ Heather Gillers & Andrew Scurria, *Puerto Rico Faces Restart on Financial Plan After Maria*, WALL ST. J. (Sept. 26, 2017), <https://www.wsj.com/articles/puerto-rico-had-a-financial-plan-before->

that previously projected budget surpluses are now projected to be steep budget shortfalls.³⁰⁷ In reaction to these new terms, Rob Bishop, then-chairman of the House Natural Resources Committee,³⁰⁸ commented that while “[t]hese plans are a first step in Puerto Rico’s future recovery . . . [i]t is imperative the Oversight Board and Governor fully integrate those who hold the debt into the development of these plans, thereby guaranteeing accuracy and transparency in the underlying assumptions.”³⁰⁹ Reiterating that “the Board’s stated goal under PROMESA is to return Puerto Rico to fiscal accountability and the capital markets, and this can only occur if the fiscal plans respect the lawful priorities and liens of debt holders[,]” Representative Bishop remarked that his Committee “will be following the development of these plans intently to ensure financial stability and success return to the island.”³¹⁰ Two months later, Representative Bishop once again expressed to the FOMB that there was frustration with “the [FOMB’s] inability and unwillingness to reach consensual restructuring agreements with the holders of Puerto Rico’s debt,” noting that “[t]o date, the Committee [on Natural Resources] has been unsatisfied with the implementation of PROMESA, and the lack of respect for the Congressional requirements of the Fiscal Plan.”³¹¹

hurricane-maria-now-it-may-have-to-start-over-1506457739 (on file with the *Columbia Business Law Review*).

³⁰⁷ Michelle Kaske & Yalixa Rivera, *Puerto Rico Plan Leaves Almost No Money for Bond Payments*, BLOOMBERG (Jan. 25, 2018), <https://www.bloomberg.com/news/articles/2018-01-25/puerto-rico-fiscal-plan-leaves-almost-no-money-for-bond-payments> [https://perma.cc/3S7R-TGDZ].

³⁰⁸ The House Committee on Natural Resources was responsible for the initial drafts and final text of PROMESA. See AUSTIN, *supra* note 6, at 1.

³⁰⁹ Press Release, H. Comm. on Nat. Res., Bishop Statement on Puerto Rico Fiscal Plans, PREPA Privatization (Jan. 25, 2018), <https://naturalresources.house.gov/newsroom/documentsingle.aspx?DocumentID=403838> [https://perma.cc/7LSD-4KKE].

³¹⁰ *Id.*

³¹¹ Letter from Rob Bishop, Chairman, H. Comm. on Nat. Res., to José B. Carrión III, Chairman, Fin. Oversight & Mgmt. Bd. for P.R. (Mar. 29, 2018), https://naturalresources.house.gov/uploadedfiles/bishop_letter_to_ob.pdf [https://perma.cc/FV66-UG3F].

In January 2019, the Democratic Party took control of the House. Representative Grijalva, the new chairman of the House Natural Resources Committee, has since stated that he plans to use the committee's authority to begin probing into the situation in Puerto Rico, including assessing allegations of the FOMB's conflicts of interest and pending proposals for paying back existing Puerto Rico creditors.³¹² While Representative Grijalva appears to disagree with the FOMB's decisions to institute austerity measures to pay back creditors in the first instance,³¹³ the notion that committee leadership is taking a closer look at all of the decisions being made in Puerto Rico's insolvency is a good first step to improving upon the existing PROMESA mechanics as laid out in the legislative text and as seen in practice.³¹⁴

Members of Congress have not been the only government actors to express concern over the FOMB's courses of action. In a ruling regarding the FOMB's attempt to install a new head officer of Puerto Rico's power and electricity utility,³¹⁵ U.S. District Court Judge Laura Swain³¹⁶ articulated

³¹² See Jeff Stein, *Democrats Pledge to Use New House Majority to Investigate Puerto Rico's Oversight Board*, WASH. POST (Dec. 7, 2018), https://www.washingtonpost.com/business/2018/12/07/democrats-pledge-use-new-house-majority-investigate-puerto-ricos-oversight-board/?noredirect=on&utm_term=.f8ee50ef3e2c [https://perma.cc/DMF7-Z9ZD].

³¹³ See *id.*

³¹⁴ See Mary Williams Walsh, *Transparency of Puerto Rico Bankruptcy Is the Aim of a New Bill*, N.Y. TIMES (Dec. 19, 2018), <https://www.nytimes.com/2018/12/19/business/puerto-rico-bankruptcy-promesa-mckinsey.html> [https://perma.cc/8KJV-RRSB] (discussing new bipartisan bill to strengthen reporting requirements in Puerto Rico's bankruptcy proceedings; sponsors include Republican Rep. Bishop, the former chairman of the House Natural Resources Committee and Jenniffer González-Colón, the Republican who represents Puerto Rico as a nonvoting member).

³¹⁵ For further details on this suit, see *supra* note 20 and accompanying text.

³¹⁶ Judge Swain was nominated by Chief Justice John G. Roberts, Jr. to preside over Puerto Rico's PROMESA bankruptcy proceedings. Matthew Goldstein, *Judge in Puerto Rico's Debt Lawsuit Handled Major Financial Cases*, N.Y. TIMES (May 5, 2017), <https://www.nytimes.com/2017/05/>

discomfort with the FOMB's claims of possessing such broad and exclusive powers. The FOMB had asserted that PROMESA bestowed "quintessential managerial, business, and executive" powers to the entity,³¹⁷ allowing it to "direct any activities incidental to the execution of certified fiscal plans, approved budgets and, ultimately, a plan of adjustment," including replacing existing government officials with its own selection.³¹⁸ However, Judge Swain held that even though "Congress created a PROMESA Oversight Board with significant leverage in the form of guidance, gatekeeping, and enabling powers that would in essence provide guardrails for the territorial government on its journey to fiscal credibility and responsibility," the FOMB's powers are not without limitations.³¹⁹ Judge Swain contrasted "[t]he degree of unilateral power that Congress has granted to the FOMB"³²⁰ with that granted to the District of Columbia Financial Control Board (the "D.C. Board") in 1995³²¹ to resolve D.C.'s fiscal deficit problems at the time. While the D.C. Board was empowered to "essentially declare significantly inconsistent legislative acts null and void

05/business/dealbook/judge-puerto-rico-case.html (on file with the *Columbia Business Law Review*); see also PROMESA § 308, 48 U.S.C. § 2168 (2012) ("[T]he Chief Justice of the United States shall designate a district court judge to sit by designation to conduct the case.").

³¹⁷ Op. & Order Denying Urgent Motion of FOMB to Confirm Appointment of a Chief Transformation Officer at 8, *In re Fin. Oversight & Mgmt. Bd. for P.R.*, 583 B.R. 626 (D.P.R. 2017) (No. 17-3283) (internal quotation marks omitted).

³¹⁸ *Id.*

³¹⁹ *Id.* at 14.

³²⁰ *Id.* at 13.

³²¹ PROMESA's analogue during the D.C. fiscal crisis was the District of Columbia Financial Responsibility and Management Assistance Act of 1995. See *id.* For more information regarding the D.C. fiscal crisis and the D.C. fiscal board, see Michael Janofsky, *Congress Creates Board to Oversee Washington, D.C.*, N.Y. TIMES (Apr. 8, 1995), <http://www.nytimes.com/1995/04/08/us/congress-creates-board-to-oversee-washington-dc.html> (on file with the *Columbia Business Law Review*).

unilaterally,” Congress declined to include such a provision in PROMESA.³²²

Given the complicated issues at stake in Puerto Rico’s insolvency, Congress has a significant interest in conducting a more comprehensive reassessment as to whether the current PROMESA proceedings do, in fact, adhere not only to the explicit provisions of the law, but also to the spirit and eventual goal of Puerto Rico’s restructuring efforts. In particular, it is important to understand whether the FOMB has achieved the right balance between efficiency of process and protection of stakeholder interests. One of the main long-term aims for Puerto Rico and the FOMB is to rebuild investor confidence. For better or for worse, accomplishing this goal depends on stakeholder perception that the island is competent at handling the complex web of stakeholder interests. Much of the controversy around the FOMB’s attempts to certify a fiscal plan stems from the fact that there is little transparency, and this is especially problematic given that many of the major creditors believe they have strong, inalienable guarantees that should not be wholly ignored without real explanation or justification.³²³

Given new House leadership and increased congressional efforts to better understand how the Puerto Rico bankruptcy

³²² Op. & Order Denying Urgent Motion of FOMB to Confirm Appointment of a Chief Transformation Officer at 13, *In re Fin. Oversight & Mgmt. Bd. for P.R.*, 583 B.R. 626 (No. 17-3283); *see also* H.R. REP. NO. 114-602, pt. 1, at 111 (2016) (“[PROMESA] establishes a board that is robust but reasonable. Its powers are far less potent than the powers that Congress conferred upon the board that it established for the District of Columbia[.]”).

³²³ Dominic Frederico, President and CEO of Assured Guaranty, commented that “the Revised Fiscal Plans repeat and exacerbate flaws in the original plans,” and “[t]his disregard for creditors’ rights would shake, on a nationwide basis, investors’ confidence in the enforceability of their contracts, the rule of law and public officials’ willingness to abide by the commitments they have made,” ultimately making it “more expensive for municipalities throughout the United States to fund essential services and infrastructure for their taxpayers.” Assured Guaranty Press Release, *supra* note 301. He believes that collaboration between all stakeholders “would be a far better solution than certifying a non-collaborative five-year plan in which no one can have confidence because its assumptions and development are secretive.” *Id.*

is unfolding,³²⁴ both creditors and affected citizens may have a chance to join the political conversation and raise their concerns outside of the judicial process. Although congressional Democrats have signaled discomfort with paying back creditors, as doing so would have a significant impact on the territory's ability to fund itself in other important areas,³²⁵ Puerto Rico also has a long-term interest in preserving its ability to borrow in the future, and this is something that the new Democratic leaders should keep in mind.

Each interaction between the FOMB and creditors will either lay an important foundation of confidence in the island's future financial integrity or sow seeds of skepticism regarding Puerto Rico's willingness to honor its obligations. Given what is at stake, Congress has the responsibility to provide ultimate supervision of these PROMESA proceedings and ensure that the island resolves its financial problems while simultaneously optimizing goals on other fronts.

VI. CONCLUSION

Puerto Rico is at a historic legal and financial crossroads. The island is buried under an unprecedented amount of outstanding debt,³²⁶ and many of its core debt guarantees seem fundamentally incompatible.³²⁷ On top of these dire financial problems, Puerto Rico has had to grapple with unparalleled damage and destruction brought by Hurricane Irma and Hurricane Maria.³²⁸ PROMESA, the legislative solution that Congress specifically designed to help the territory address its myriad of problems,³²⁹ is a novel bankruptcy scheme and remains largely untested. The

³²⁴ See *supra* notes 312, 314.

³²⁵ See, e.g., Letter from Members of Cong. & U.S. Senators to Members of the Fin. Oversight & Mgmt. Bd. for P.R. (Dec. 6, 2018), <https://www.puertoricoreport.com/wp-content/uploads/2018/12/Bicameral-letter-to-FOMB.pdf> [<https://perma.cc/3FPY-XLS9>].

³²⁶ See *supra* note 28 and accompanying text.

³²⁷ See *supra* Section II.E.

³²⁸ See *supra* notes 113–16 and accompanying text.

³²⁹ See *supra* Section II.C.

situation in Puerto Rico will set an important precedent, not only as an example of how to resolve territorial bankruptcies outside of the traditional bankruptcy code,³³⁰ but also as another test case that adds to the universe of experience regarding municipal bond crises and creditor confidence.

From a legal perspective, stakeholders have several avenues by which to challenge the direction of these current proceedings, and two of these theories are presented and analyzed in this Note. Ultimately, a close examination of these legal issues indicates that neither PROMESA nor a theory of procedural due process violation will give creditors the recourse to invalidate a certified fiscal plan. These limitations are created both by the textual construction of the existing law and by the unique circumstances of opportunity and process offered by the FOMB.

In light of these conclusions, stakeholders may find more success in appealing to Congress and to the broader interests at stake here. Having an obscured and unilateral PROMESA process is not going to solve the larger problems that caused Puerto Rico's situation in the first place. Ultimately, it will make financial recovery and habitation on the island even more difficult in the future. Therefore, the onus rests on the federal legislative branch to evaluate the effectiveness of PROMESA, the decisions of the FOMB, and the direction Puerto Rico's bankruptcy situation. And if Congress believes it is necessary, requisite changes must be made to steer the entire process onto a new path.

³³⁰ See *supra* note 21 and accompanying text.