

AFTER THE STORM:
HURRICANES IRMA AND MARIA
AND PUERTO RICO’S DEBT RESTRUCTURING

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INTRODUCTION

The United States territory of Puerto Rico is facing unprecedented fiscal and humanitarian crises, compounded by the devastation of hurricanes Irma and Maria in September, 2017.¹ As Puerto Rico struggles to emerge from the devastation of the storms, it is simultaneously working through a uniquely legislated form of municipal bankruptcy meant to restructure its debt and allow the island to emerge from financial ruin.²

This Note will examine Puerto Rico's pre-hurricane fiscal situation and how it came to be, the devised legislative solution, efforts to restructure pre-hurricane, and what those efforts look like post-hurricane Maria. This Note proposes that Congress and the courts, post-hurricane Maria, should provide support for the organization appointed by the United States government to manage Puerto Rico's bankruptcy-like cases, so that Puerto Rico can focus on rebuilding and successfully restructuring their debt to secure a prosperous future.

I. BACKGROUND

A. *Puerto Rico in Crisis*

Prior to the devastation of hurricanes Irma and Maria, the Commonwealth of Puerto Rico (referred to as "Puerto Rico" or "the Commonwealth") was well into the throes of a fiscal and humanitarian crisis.³ From the 1970's to the mid 2000's, manufacturers with operations in Puerto Rico enjoyed corporate tax benefits under Internal Revenue Code ("IRC") Section 926, until the culmination of a ten-year phase out of that portion of the Code by 2006.⁴ After the phase out ended,

¹ Bradley Blakeman, *Puerto Rico Was a Disaster Long Before Maria*, NEWSMAX.COM (Oct. 2, 2017, 11:01 AM), <https://www.newsmax.com/BradleyBlakeman/u-s-infrastructure-virgin-islands/2017/10/02/id/817085/>.

² Markup Memorandum of H.R. 5278, Committee on Natural Resources, 1 (May 23, 2016), https://naturalresources.house.gov/uploadedfiles/markup_memo_-_h.r._5278_05.24.16_05.25.16.pdf.

³ Matt Egan, *Who Owns Puerto Rico's Mountain of Debt? You Do*. CNN.COM, (Sept. 27, 2017, re-posted Oct. 9, 2017, 9:46 AM), <http://money.cnn.com/2017/09/27/investing/puerto-rico-debt-who-owns-trump/index.html>.

⁴ Puerto Rico In Crisis Timeline, 1, 3-4, CENTRO – THE CENTER FOR PUERTO RICAN STUDIES, HUNTER COLLEGE, CITY UNIVERSITY OF NEW YORK, https://centropr.hunter.cuny.edu/sites/default/files/PDF_Publications/Puerto-Rico-Crisis-Timeline-2017.pdf (last visited Sept. 3, 2018).

manufacturers left Puerto Rico, and the Commonwealth slid into a recession and accumulated a staggering amount of debt among itself and its instrumentalities.⁵ At the time of this writing, Puerto Rico's debt is over seventy million dollars, with an additional pressure of forty million dollars in unfunded government pension liabilities.⁶ Along with the recession, a humanitarian crisis has snowballed over the years.⁷ As manufacturers left Puerto Rico, they took well-paying jobs with them.⁸ Loss of such jobs, as well as other factors, have led many citizens to flee Puerto Rico to the United States mainland in search of better fortune.⁹ Between 2007 and early 2017, an estimated ten percent of Puerto Rico's population relocated to mainland United States or elsewhere.¹⁰ Those who remain in Puerto Rico face a high poverty rate,¹¹ and the existence of such a diminished and impoverished population proves problematic for the Commonwealth and its utilities when it comes to raising revenue to pay debts.¹² Additionally, Puerto Rico has an aging, outdated, and costly infrastructure.¹³ As one example, the Commonwealth's sole electric company, Puerto Rico Electric Power Authority ("PREPA"), still relies heavily on costly oil as opposed to stateside electric companies, which rely on other renewable resources such as natural gas, coal, and nuclear power.¹⁴ Further, although PREPA has outdated grids and fuel sources,

⁵ *Id.* at 4-5.

⁶ Letter from the Financial Oversight and Management Board for Puerto Rico to U.S. Senators Thom Tillis and Tom Cotton, 1, 6 (Apr. 25, 2017)<https://www.puertoricoreport.com/wpcontent/uploads/2017/05/TillisandCottonletter.pdf>.

⁷ *Statement of Oversight Board in Connection with PROMESA Title III Petition*, In re: Commonwealth of Puerto Rico, Debtor 2-4, (D.P.R. May 3, 2017) (No. 17 BK 3282-LTS), <https://cases.primeclerk.com/puertorico/Home-DownloadPDF?id1=NjE3NjAy&i2=0>.

⁸ Perry T. Graham, *Municipal Bankruptcy In "The Oldest Colony in The World" After Puerto Rico v. Franklin Cal. Tax-Free Tr. and PROMESA*, 63 LOY. L. REV. 179, 181-82, (2017).

⁹ *Id.* at 181.

¹⁰ *Statement of Oversight Board in Connection with PROMESA Title III Petition*, In re: Commonwealth of Puerto Rico, Debtor, 3, (D.P.R. May 3, 2017)(No. 17 BK 3282-LTS), <https://cases.primeclerk.com/puertorico/Home-DownloadPDF?id1=NjE3NjAy&i2=0>.

¹¹ *Statement of Oversight Board in Connection with PROMESA Title III Petition*, In re: Commonwealth of Puerto Rico, Debtor 3-4, (D.P.R. May 3, 2017)(No. 17 BK 3282-LTS), <https://cases.primeclerk.com/puertorico/Home-DownloadPDF?id1=NjE3NjAy&i2=0>.

¹² *Id.* at 2.

¹³ Bradley Blakeman, *Puerto Rico Was a Disaster Long Before Maria*, NEWSMAX.COM (Oct. 2, 2017, 11:01 AM), <https://www.newsmax.com/BradleyBlakeman/u-s-infrastructure-virgin-islands/2017/10/02/id/817085/>.

¹⁴ Steven Mufson, *Hurricane Maria Has Dealt A Heavy Blow To Puerto Rico's Bankrupt Utility and Fragile Electric Grid*, WASHINGTONPOST.COM, (Sept. 20, 2017), https://www.washingtonpost.com/news/energy-environment/wp/2017/09/20/puerto-ricos-power-company-was-already-bankrupt-then-hurricane-maria-hit/?utm_term=.4d430bf108be.

power rates have risen dramatically.¹⁵ Without significant assistance and change, Puerto Rico's downward spiral will likely continue.¹⁶ In 2014, Puerto Rico sought to avail itself and its utilities and agencies of municipal bankruptcy protection by passing legislation in order restructure its debts.¹⁷ The iterations of this action will be discussed in depth in the coming pages.

B. *Puerto Rico's Debt: How They Got Here*

Events over the past century set the wheels in motion for Puerto Rico's fiscal crisis.¹⁸ In 1917, passage of the Jones-Shafroth Act prevented federal, state and local governments from collecting taxes on any bonds issued by Puerto Rico or its municipalities (known as "triple tax-free" bonds).¹⁹ These triple tax-free bonds became very appealing to American investors.²⁰ A broad swath of America owns Puerto Rico's seventy-three million dollars in bond debt; it is owned primarily by individuals and mutual funds; a smaller percentage (less than 25%) is owned by hedge funds.²¹ There are almost 300 American mutual funds that own bonds, the larger owned by recognizable names such as T. Rowe Price, BlackRock, Goldman Sachs, and Franklin Templeton.²² "For the most part, Main Street America owns this debt", said Cate Long, founder of Puerto Rico Clearinghouse, a research firm.²³ Further, in 1961, an amendment to Puerto Rico's Constitution allowed the island's debt limit to be measured differently, allowing for additional debt to be issued that didn't count toward the limit, virtually making the debt limit obsolete.²⁴

¹⁵ Heather Long, *Puerto Rico to Hike Electricity Rates 26%*, CNN.COM (Jun. 30, 2017, 12:02 PM), <http://money.cnn.com/2016/06/30/investing/puerto-rico-crisis-electricity-price-hike/index.html>.

¹⁶ *Statement of Oversight Board in Connection with PROMESA Title III Petition*, In re: Commonwealth of Puerto Rico, Debtor, 4-5, (D.P.R. May 3, 2017)(Case No. 17 BK 3282-LTS), <https://cases.primeclerk.com/puertorico/Home-DownloadPDF?id1=NjE3NjAy&id2=0>.

¹⁷ Puerto Rico Corporation Debt Enforcement and Recovery Act, 2014 P.R. Laws Act No. 71, (hereinafter, the "Recovery Act")

¹⁸ *Statement of Oversight Board in Connection with PROMESA Title III Petition*, In re: Commonwealth of Puerto Rico, Debtor, 10, (D.P.R. May 3, 2017)(No. 17 BK 3282-LTS), <https://cases.primeclerk.com/puertorico/Home-DownloadPDF?id1=NjE3NjAy&id2=0>.

¹⁹ *Id.*

²⁰ *Id.*

²¹ Matt Egan, *Who Owns Puerto Rico's Mountain of Debt? You Do*. CNN.COM, (Sept. 27, 2017, re-posted Oct. 9, 2017, 9:46 AM), <http://money.cnn.com/2017/09/27/investing/puerto-rico-debt-who-owns-trump/index.html>.

²² *Id.*

²³ *Id.*

²⁴ *Statement of Oversight Board in Connection with PROMESA Title III Petition*, In re: Commonwealth of Puerto Rico, Debtor. Title III Case No. 17 BK 3282-LTS, 10, (D.P.R. May

Additionally, the repeal of Section 936 of the IRC in 1996, which provided tax credit for Puerto Rican subsidiaries of United States corporations, caused many businesses in Puerto Rico to relocate after the credits were fully phased out in 2006.²⁵ The elimination of this tax benefit caused manufacturing jobs leave the island, thus having a devastating impact on the tax base.²⁶

C. *Adding Salt to the Wounds: Hurricanes Irma and Maria*

Adding to Puerto Rico's existing problems, two significant storms wrought havoc on the island in the fall of 2017.²⁷ Hurricane Irma, a category 5 storm, brushed past Puerto Rico on September 6, 2017, bringing high winds and power outages.²⁸ Irma wrought minimal damage, however, compared to hurricane Maria, an almost category 5 storm that made direct landfall over Puerto Rico a mere 14 days later, on September 20, 2017.²⁹ Whatever electrical power was spared by Irma was eliminated by Maria, leaving Puerto Rico one hundred percent without electricity.³⁰ Additionally, water sources were damaged, leaving much of the population without clean water.³¹ The aftermath of the storms have

3, (2017), <https://cases.primeclerk.com/puertorico/Home-DownloadPDF?id1=NjE3NjAy&id2=0>.

²⁵ Matt Egan, *Who Owns Puerto Rico's Mountain of Debt? You Do*, CNN.COM, (Sept. 27, 2017, re-posted Oct. 9, 2017, 9:46 AM), <http://money.cnn.com/2017/09/27/investing/puerto-rico-debt-who-owns-trump/index.html>.

²⁶ Antonio J. Pietrantonio, *Restructuring Puerto Rico's General Obligation Debt*, 85 REV. JUR. U.P.R. 629, 631 (2016).

²⁷ Brian Resnick and Eliza Barclay, *What Every American Needs To Know About Puerto Rico's Hurricane Disaster*, VOX.COM, (Oct. 16, 2017, 2:27 PM) <https://www.vox.com/science-and-health/2017/9/26/16365994/hurricane-maria-2017-puerto-rico-san-juan-humanitarian-disaster-electricity-fuel-flights-facts>.

²⁸ Alex Johnson, et. al., *Hurricane Irma Skirts Puerto Rico, Leaves 1 Million Without Power*, NBC News (Sept. 7, 2017, 11:02 PM), <https://www.nbcnews.com/storyline/hurricane-irma/hurricane-irma-skirts-puerto-rico-lashing-it-powerful-winds-flooding-n799086>.

²⁹ Robinson Meyer, *What's Happening with the Relief Effort in Puerto Rico?* THE ATLANTIC (Oct. 4, 2017) <https://www.theatlantic.com/science/archive/2017/10/what-happened-in-puerto-rico-a-timeline-of-hurricane-maria/541956/>.

³⁰ *Id.*

³¹ Oren Dorell and Atabey Nunez, *Puerto Rico's Water Woes Raise Fears of Health Crisis Six Weeks After Hurricane Maria*, USA TODAY, (Nov. 2, 2017 5:08 PM), <https://www.usatoday.com/story/news/world/2017/11/02/puerto-rico-water-woes-raise-fears-health-crisis-six-weeks-after-hurricane-maria/808672001/>.

brought new difficulties to Puerto Rico's crises, deepening and widening the berths of the existing financial and humanitarian issues.³²

D. Restructuring Unsustainable Debt: Chapter 9 Bankruptcy and Why it is Unavailable to Puerto Rico

1. An Overview of Chapter 9 – Bankruptcy/Debt Adjustment for Municipalities

The United States Constitution enables Congress to establish “uniform laws on the subject of Bankruptcies throughout the United States[.]”³³ Chapter 9 of the Federal Bankruptcy Code³⁴ is specifically designed to restructure debts of public entities.³⁵ Chapter 9's purpose is “to permit a financially distressed public entity to seek protection from its creditors while it formulates and negotiates a plan for adjustment of its debts[.]”³⁶ A significant difference in Chapter 9 from other types (say, Chapter 7 or 11) is that Chapter 9 does not contemplate liquidation of assets to pay creditors.³⁷ While such a liquidation would likely run afoul of the Tenth Amendment (which allows states their own sovereignty),³⁸ it would likely be problematic to liquidate public entities, as the public very often depends on their continuous services.³⁹ The basic components of a Chapter 9 municipal debt adjustment are a petition, a plan of adjustment of debt, and confirmation and implementation of the plan.⁴⁰ If a plan is not confirmed, or is not executed as confirmed, the case can be dismissed.⁴¹ A recent example of a largely successful Chapter 9 proceeding is the city of Detroit, Michigan.⁴² Insolvent with a debt of

³² Jose B. Carrion III, Chairman, Fin. Oversight & Mgmt. Bd. for PR, *Remarks at American Enterprise Institute Conference on Puerto Rico Policy after Hurricane Maria* (Nov. 6, 2017), <https://juntasupervision.pr.gov/documents/>.

³³ U.S. Const. art. I, § 8, cl. 4.

³⁴ 11 U.S.C. §§ 901-946 (1988).

³⁵ 6 Collier on Bankruptcy ¶ 900.01[1] (Alan N. Resnick & Henry J. Sommers eds. (16th ed. 2017)).

³⁶ *Id.*

³⁷ *Id.*

³⁸ *Id.*

³⁹ Amanda Wright, *Chapter 9: Municipal Bankruptcy*, MSU Extension White Paper, Michigan State University, 1, 11 (Dec. 6, 2012) http://msue.anr.msu.edu/uploads/236/31783/Municipal_Bankruptcy_White_Paper.pdf.

⁴⁰ Collier on Bankruptcy ¶ 900.01[1], (Alan N. Resnick & Henry J. Sommers eds., 16th ed. 2017).

⁴¹ *Id.*

⁴² *Id.*, see also Nicole Langston, *Reexamining the Doctrine of Equitable*

Mootness in Light of the Detroit Bankruptcy, 31 COM. L. WORLD Jan.-Mar. 2017 at 10.

over eighteen billion dollars and over 100,000 creditors, Detroit, under its status as a municipality, filed for bankruptcy protection under Chapter 9 in 2013.⁴³ Detroit faced similar core issues as Puerto Rico: declining population and pension obligations.⁴⁴ The city emerged a little under two years later with a clean balance sheet and renewed access to municipal markets.⁴⁵ In 2013, Detroit was thought of the “worst bankruptcy problem ever in Chapter 9”; at that time, a twenty billion dollar debt was unheard of.⁴⁶ Now that creditors, bondholders, and pension holders took cuts, Detroit has a fresh start due to Chapter 9.⁴⁷

2. Chapter 9 of the Bankruptcy Code is Unavailable to Puerto Rico

Prior to 1984, Chapter 9 bankruptcy could have been an option for Puerto Rico, as the Commonwealth was included as a “State” in the Bankruptcy Code.⁴⁸ When Congress passed a revision of the Bankruptcy Code in 1984, the definition of “State” was revised to exclude Puerto Rico from the definition for the purposes of who could be a debtor under Chapter 9.⁴⁹ This addition to the definition of “State” shut the door on Puerto Rico’s ability to pursue bankruptcy protection.⁵⁰

Denied the protection of the Bankruptcy Code, in 2014 Puerto Rico enacted the Puerto Rico Corporation Debt Enforcement and Recovery Act (“Recovery Act”), which provided a bankruptcy-like structure for its instrumentalities to restructure debt.⁵¹ The Recovery Act provided for two paths of restructuring for Puerto Rico’s utilities: Chapter 2 involved out- of-court negotiations with creditors, while Chapter 3 involved an in-court, judicially managed process.⁵² The Recovery Act had similarities to

⁴³ Nicole Langston, *Reexamining the Doctrine of Equitable*

Mootness in Light of the Detroit Bankruptcy, 31 COM. L. WORLD Jan.-Mar. 2017 at 10.

⁴⁴ Marissa A. Wiesen, *Chapter 9 Bankruptcy in Detroit and the Pension Problem*, 49 NEW ENG. L. REV. ON REMAND 25, 27-28 (2014-2015).

⁴⁵ John A.E. Pottow, *What Bankruptcy Law Can and Cannot Do For Puerto Rico*, 85 REVISTA JURIDICA UNIV. P.R., 689, 702 (2016).

⁴⁶ *Id.* at 703.

⁴⁷ *Id.* at 702.

⁴⁸ *Puerto Rico v. Franklin Cal. Tax Free Tr.*, 143 S. Ct 1938, 194 (2016)(citing 11 U.S.C. § 101(52)(2012)).

⁴⁹ *Id.*

⁵⁰ *Id.* at 1945-46.

⁵¹ *Puerto Rico Public Corporation Debt Enforcement and Recovery Act*, HARV. L. REV. 1320, 1320 (2015).

⁵² *Id.* at 1322.

both Chapters 9 and 11 of the Bankruptcy Code; it provided for an automatic stay from actions by creditors, a requirement that a certain percentage of creditors agree to a restructuring plan, and oversight of the restructuring plan.⁵³

Bondholders quickly challenged the Recovery Act in numerous complaints.⁵⁴ Groups of investment funds holding bonds (Franklin California Tax-Free Trust, BlueMountain Capital Management, LLC and others) brought separate complaints against Puerto Rico and certain government officials to stop the Recovery Act.⁵⁵ Their complaints primarily asserted that the Federal Bankruptcy Code prevented Puerto Rico from “implementing its own municipal bankruptcy scheme.”⁵⁶ After consolidating the cases into one (*Puerto Rico v. Franklin California Tax Free Trust*)⁵⁷, the United States District Court for the District Of Puerto Rico ruled in the bondholder’s favor, concluding that “the preemption provision in Chapter 9 of the Federal Bankruptcy Code, 11 U.S.C. § 903(1),^[58] precluded Puerto Rico from implementing the Recovery Act and enjoined its enforcement.”⁵⁹ The consolidated case then went to the First Circuit, who affirmed the District Court’s decision.⁶⁰ The First Circuit looked at the definition of “State” in the Federal Bankruptcy Code⁶¹ and found that the definition “did not remove Puerto Rico from the scope of the pre-emption provision,” and further, “the pre-emption provision barred the Recovery Act.”⁶² The court also expressed its view that “it was up to Congress, not Puerto Rico, to decide when the government-owned companies could seek bankruptcy relief.”⁶³

⁵³ *Id.* at 1323.

⁵⁴ *Puerto Rico v. Franklin Cal. Tax Free Tr.*, 143 S. Ct. 1938, 1943 (2016).

⁵⁵ *Id.* at 1943.

⁵⁶ *Id.*

⁵⁷ *See generally Id.*

⁵⁸ 11.U.S.C. § 903(1) reads: “This chapter does not limit or impair the power of a State to control, by legislation or otherwise, a municipality of or in such State in the exercise of the political or governmental powers of such municipality, including expenditures for such exercise, but— (1) a State law prescribing a method of composition of indebtedness of such municipality may not bind any creditor that does not consent to such composition; . . . ”

⁵⁹ 143 S. Ct. at 1943.

⁶⁰ *Id.*

⁶¹ 11 U.S.C. § 101(52) reads: “In this title the following definitions shall apply:(52) The term “State” includes the District of Columbia and Puerto Rico, except for the purpose of defining who may be a debtor under chapter 9 of this title.”

⁶² 143 S. Ct. at 1943.

⁶³ *Id.*, (citing 85 F. Supp. 3d, at 601, 614).

Thereafter, the Commonwealth sought certiorari to the United States Supreme Court, which was granted.⁶⁴

Justice Thomas wrote the opinion for the Court, which Chief Justice Roberts, and Justices Kennedy, Breyer and Kagan joined.⁶⁵ Justice Sotomayor filed a dissent, in which Justice Ginsburg joined.⁶⁶ Puerto Rico (petitioners) argued that the definition of “State” in 11 U.S.C. 101(52) excluded Puerto Rico from Chapter 9 bankruptcy such that the pre-emption provision does not apply to them.⁶⁷ So if that is the case, Puerto Rico argued, the Commonwealth is free to implement its own bankruptcy scheme, which it put forth in the Recovery Act.⁶⁸ The consolidated consortium of bondholders (respondents), set forth a more narrow application of the “State” definition.⁶⁹ Respondents argued that the definition of “State” precluded Puerto Rico from “specifically authorizing its municipalities to seek relief, as required by the gateway provision, § 109(c)(2), but that Puerto Rico is no less a “State” for purposes of the pre-emption provision than the other States.”⁷⁰ In other words, while Puerto Rico can’t file Chapter 9 because it is not a “State”, it is still a “State” under the rest of the Bankruptcy Code, therefore the pre-emption provision would apply, making the Recovery Act pre-empted by the Federal Bankruptcy Code.⁷¹

The majority opinion agreed with bondholder’s narrow approach, and ruled that while the definition of “State” means that Puerto Rico cannot be a debtor under Chapter 9, that is where the definition ends.⁷² Puerto Rico is still a “State” with respect to the pre-emption provision of the Bankruptcy Code.⁷³ Therefore, with the ruling in the *Franklin* case, Puerto Rico is barred “from enacting its own municipal bankruptcy scheme to restructure the debt of its insolvent public utilities companies.”⁷⁴

⁶⁴ *Id.* at 1943.

⁶⁵ *Id.* at 1941.

⁶⁶ *Id.* at 1949.

⁶⁷ *Id.* at 1946.

⁶⁸ 143 S. Ct. at 1946.

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² *Id.*

⁷³ *Id.* at 1942.

⁷⁴ *Id.* 143 S. Ct. at 1942.

Even if Chapter 9 of the Bankruptcy Code had been amended to include Puerto Rico as a “State”, this would not have been enough in order for Puerto Rico to avail itself of Chapter 9 protections.⁷⁵ “States” cannot file bankruptcy under Chapter 9; therefore, the action could not involve the Commonwealth itself. Chapter 9 has strict requirements; only “municipalities” are eligible for protection.⁷⁶ Arguments would have likely been made that Puerto Rico’s instrumentalities (i.e. utility companies) do not fit the definition of a municipality under the Bankruptcy Code.⁷⁷ Litigation over these and other issues would have dragged on, wasting precious time for Puerto Rico.⁷⁸

With the *Franklin* ruling, Puerto Rico returned to limbo - precluded from filing bankruptcy under Chapter 9, and unable to devise its own restructuring scheme.

*E. Puerto Rico Oversight, Management and Economic Stability Act
(PROMESA)*

1. The Beginning of PROMESA

While the *Franklin* case was being decided in May/June of 2016,⁷⁹ the wheels were turning in Congress on a legislative solution for Puerto Rico. On May 18, 2016, Representative Sean Duffy introduced a bill, H.R. 5278 (a revision of a previous bill, H.R. 4900) to the United States House of Representatives.⁸⁰ Named the Puerto Rico Oversight, Management and Economic Stability Act (“PROMESA”), the bill purported to address the situation in Puerto Rico by establishing an oversight board, a debt restructuring path, and avenues for critical infrastructure projects.⁸¹ The House of Representatives passed the bill on June 9, 2016, and it was passed by the Senate on June 29, 2016.⁸² President Obama signed the bill into

⁷⁵ *Puerto Rico Oversight, Management, and Economic Stability Act (“PROMESA”): Overview and Restructuring Issues*, MICROJURIS.COM, 7 (Aug. 9, 2016), <https://noticiasmicrojuris.files.wordpress.com/2016/10/promesa-overview-and-restructuring-issues.pdf>.

⁷⁶ *Id.*, see also 11 U.S.C. § 109(c).

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ *Puerto Rico v. Franklin Cal. Tax Free Tr.*, 143 S. Ct. 1938, 1938 (2016).

⁸⁰ *The Road to PROMESA*, PASQUINES.COM, (last visited Nov. 20, 2017), <https://pasquines.us/2016/07/28/the-road-to-promesa/>.

⁸¹ H.R.4900, 114th Cong. (2015-2016) (enacted).

⁸² *The Road to PROMESA*, PASQUINES.COM, (last visited Nov. 20, 2017), <https://pasquines.us/2016/07/28/the-road-to-promesa/>.

law on June 30, 2016.⁸³ Just before he signed the bill, he remarked, “[W]e finally have legislation that at least is going to give Puerto Rico the capacity, the opportunity to get out from under this lingering uncertainty with respect to their debt, and start stabilizing government services and to start growing again.”⁸⁴ The President went on to comment that PROMESA wasn’t perfect, but it was a start: “It’s not, in and of itself, going to be sufficient to solve all the problems that Puerto Rico faces, but it is an important first step on the path of creating more stability, better services, and greater prosperity over the long term for the people of Puerto Rico.”⁸⁵

2. The Oversight Board Reigns Supreme

Titles I and II of PROMESA establish the organization and responsibilities of a “Financial Management and Oversight Board” (“Oversight Board”).⁸⁶ The Oversight Board consists of seven members appointed by the President.⁸⁷ The members cannot be elected officials, and they must have “knowledge and expertise in finance, municipal bond markets, management, law, or the organization or operation of business or government[.]”⁸⁸ The Oversight Board was created to exist as an independent entity within Puerto Rico’s government, and not as a part of the United States government.⁸⁹ The purpose of the Oversight Board is to “provide a method for a covered territory to achieve fiscal responsibility and access to the capital markets.”⁹⁰ The Oversight Board has broad powers under PROMESA.⁹¹ The Oversight Board has, in its sole discretion, approval and modification rights over the Commonwealth and its instrumentalities’ fiscal plans and budgets,⁹² as well as restructuring filings and plans of adjustment.⁹³ The Oversight Board can also seek

⁸³ *Id.*

⁸⁴ *Remarks by the President at Bill Signings of the FOIA Improvement Act of 2016 and PROMESA*, THE WHITE HOUSE, PRESIDENT BARACK OBAMA, (Jun. 30, 2016 4:36 PM), <https://obamawhitehouse.archives.gov/the-press-office/2016/06/30/remarks-president-bill-signings-foia-improvement-act-2016-and-promesa>.

⁸⁵ *Id.*

⁸⁶ 48 U.S.C. §§ 2121-2129, 2141-2152 (2016).

⁸⁷ 48 U.S.C. § 2121(e)(2016).

⁸⁸ 48 U.S.C. §§ 2121(f)(1) & (2)(2016).

⁸⁹ 48 U.S.C. § 2121(c) (2016).

⁹⁰ 48 U.S.C. § 2121(a) (2016).

⁹¹ Markup Memorandum of H.R. 5278, *supra* note 2, at 3.

⁹² 48 U.S.C. § 2141 (2016); 48 U.S.C. § 2142 (2016).

⁹³ 48 U.S.C. § 2121(j) (2016).

official data from the federal government and Puerto Rico's government,⁹⁴ obtain information about creditors and their claims,⁹⁵ and accept "gifts, requests or devises of services or property, both real and personal" for the facilitation of its work.⁹⁶ The Oversight Board has authority, in its sole discretion, to enter into contracts as well as certify any voluntary agreements with bondholders to restructure claims.⁹⁷ The Oversight Board has the ability to enforce certain laws of a covered territory (with the example given of laws prohibiting public sector employees from participating in a strike or lockout).⁹⁸ The Oversight Board is also empowered to bring civil actions to enforce its authority to carry out its responsibilities under PROMESA.⁹⁹

The Oversight Board's power is additionally buffered by Section 108, which establishes that neither the Governor nor Legislature of Puerto Rico can exercise any control or review over the Oversight Board, nor can they "enact, implement or enforce any statute, resolution, policy or rule that would impair or defeat the purposes of [PROMESA], as determined by the Oversight Board."¹⁰⁰

3. Eligibility under PROMESA

Entities covered under PROMESA include both "Covered Territories" and "Covered Territorial Instrumentalities."¹⁰¹ A Covered Territory is defined as one where an Oversight Board has been established – in this case, Puerto Rico.¹⁰² Further denoting the Oversight Board's power, a "Covered Territorial Instrumentality" means any Territorial Instrumentality designated by the Oversight Board to be subject to PROMESA's requirements.¹⁰³ The Oversight Board can consider the following entities when they look to pull instrumentalities into coverage under PROMESA: "any political subdivision, public agency, instrumentality – including any instrumentality that is also a bank – or

⁹⁴ 48 U.S.C. § 2121(c) (2016).

⁹⁵ 48 U.S.C. § 2121(d) (2016).

⁹⁶ 48 U.S.C. § 2121(e) (2016).

⁹⁷ 48 U.S.C. § 2121(g)&(i) (2016).

⁹⁸ 48 U.S.C. § 2121(g) (2016).

⁹⁹ 48 U.S.C. § 2121(k) (2016).

¹⁰⁰ 48 U.S.C. § 2121(a) (2016).

¹⁰¹ 48 U.S.C. §§ 2104(7) -(8) (2016).

¹⁰² 48 U.S.C. § 2104(8), 48 U.S.C. § 2121(b)(1) (2016).

¹⁰³ 48 U.S.C. § 2104(7)(2016).

public corporation of a territory.”¹⁰⁴ The definition goes on to state that the term “Territorial Instrumentality” should be “broadly construed to effectuate the purposes of [PROMESA].”¹⁰⁵ Additionally, drafters again thought broadly and of the future when they defined “Territory”. Although the purpose of the Oversight Board in Section 101 was established specifically for Puerto Rico,¹⁰⁶ included in the definition of “Territory” is Puerto Rico, Guam, American Samoa, the Commonwealth of the Northern Mariana Islands, and the United States Virgin Islands.¹⁰⁷ This definition indicates the drafters likely thought that this framework could be potentially used for other United States territories in the future.

4. Automatic Stay

Upon enactment of PROMESA, an automatic stay went into effect.¹⁰⁸ The purpose of the automatic stay, similar to Chapters 9 and 11 of the Bankruptcy Code¹⁰⁹, is to give Puerto Rico breathing room so it can focus on negotiating with creditors rather than being inhibited by a multitude of actions from creditors.¹¹⁰ Additionally, PROMESA states another purpose of the automatic stay is to “provide the Government of Puerto Rico with the resources and the tools it needs to address an immediate existing and imminent crisis[.]”¹¹¹ During the period of an automatic stay, creditors are prevented from starting or continuing a judicial or other action against Puerto Rico.¹¹² Additionally, they may not enforce a judgment, act to take property, enforce a lien, or collect on a claim against Puerto Rico.¹¹³ The automatic stay includes actions with respect to bonds, loans, letters of credit, insurance obligations, and obligations arising from contracts.¹¹⁴

PROMESA provided for an initial, finite automatic stay that began at enactment on June 30, 2016, initially to end on February 15, 2017, but

¹⁰⁴ 48 U.S.C. § 2104(19)(2016).

¹⁰⁵ *Id.*

¹⁰⁶ 48 U.S.C. § 2121(b)(1) (2016).

¹⁰⁷ 48 U.S.C. § 2104(20) (2016).

¹⁰⁸ 48 U.S.C. § 2194(b) (2016).

¹⁰⁹ 11 U.S.C. § 362 (2012), 11 U.S.C. § 922 (2012).

¹¹⁰ 48 U.S.C. § 2194(n)(2) (2016).

¹¹¹ 48 U.S.C. § 2194(n)(1) (2016).

¹¹² 48 U.S.C. § 2194(b)(1) (2016).

¹¹³ 48 U.S.C. §§ 2194(b)(2) -(6) (2016).

¹¹⁴ 48 U.S.C. § 2194(a) (2016).

was extended by the Oversight Board until May 1, 2017.¹¹⁵ Beyond May 1, 2017, an automatic stay is reinstated if an entity files a petition under Title III of PROMESA, which is a court-monitored process for adjustment of debts.¹¹⁶ There is no specific language in PROMESA for an automatic stay under a Title III case, however Section 30(a) of PROMESA incorporates a multitude of sections from Chapters 9 and 11 of the Bankruptcy Code, including Sections 362 (Chapter 11) and 922 (Chapter 9), which deal with the automatic stay once a petition is filed.¹¹⁷

5. Debt Adjustment under PROMESA

i. *Title III – Court Managed Adjustment*

PROMESA provides a court-overseen debt adjustment vehicle under Title III for Puerto Rico and its instrumentalities.¹¹⁸ The Oversight Board has broad powers over the proceedings under Title III.¹¹⁹ The Oversight Board must file a restructuring certification as one of the requirements for an entity to be a debtor in a Title III case.¹²⁰ Requirements of a restructuring certification are that the Oversight Board has determined an entity has made good faith efforts to negotiate with creditors, has implemented procedures to provide financial statements, made financial statements and other information accessible to interested parties, and the entity must be a “Covered Territory” under PROMESA that has a fiscal plan in place (i.e. approved by the Oversight Board).¹²¹ Once these are met, the Oversight Board can file the Title III petition for the entity.¹²²

¹¹⁵ 48 U.S.C. § 2194(d); see also *Statement of Oversight Board In Connection with PROMESA Title III Petition*, In re: Commonwealth of Puerto Rico, Debtor, 10, 13 (D.P.R. May 3, 2017) (No. 17 BK 3282-LTS), <https://cases.primeclerk.com/puertorico/Home-DownloadPDF?id1=NjE3NjAy&id2=0>.

¹¹⁶ 48 U.S.C. § 2161(a)(2016).

¹¹⁷ 48 U.S.C. § 2161 (2016), see also 11 U.S.C. § 362 (2012), 11 U.S.C. § 922 (2012).

¹¹⁸ Puerto Rico Oversight, Management, and Economic Stability Act (“PROMESA”): Overview and Restructuring Issues, MICROJURIS.COM 1, 32 (Aug. 9, 2016) <https://noticiasmicrojuris.files.wordpress.com/2016/10/promesa-overview-and-restructuring-issues.pdf>.

¹¹⁹ *Id.*

¹²⁰ *Id.*, see also 48 U.S.C. § 2146 (2016); 48 U.S.C. § 2163 (2016).

¹²¹ 48 U.S.C. § 2146(a)(2016).

¹²² 48 U.S.C. § 2164(a)(2016).

Once a Title III petition is filed, the case looks much like a Chapter 9 case, as PROMESA imports much of Chapter 9.¹²³ Of course the existence and supervisory powers of the Oversight Board differentiate from Chapter 9, as does the court overseeing the cases. Whereas Chapter 9 cases are filed in bankruptcy courts,¹²⁴ Title III cases are filed in district court, and the Chief Justice of the United States designates a district court judge to oversee the Title III cases.¹²⁵

As of Fall 2017, there have been five Title III petitions filed with the United States District Court for the District of Puerto Rico (see chart on next page).¹²⁶ On May 5, 2017, Chief Justice John Roberts of the United States Supreme Court appointed the Honorable Laura Taylor Swain, a United States District Judge for the Southern District of New York, to oversee the Title III cases pursuant to PROMESA.¹²⁷

¹²³ 48 U.S.C. §2161 (2016).

¹²⁴ 11 U.S.C. § 301 (2016).

¹²⁵ 48 U.S.C. § 2164 (2016); 48 U.S.C. § 2168 (2016).

¹²⁶ *In re*: The Financial Oversight and Management Board for Puerto Rico, Notice of Commencement of Cases Under Title III of PROMESA, Entry of Order for Relief and Related Matters, No. 17 BK 3283-LTS (May 3, 2017) <http://cases.primeclerk.com/puertorico/Home-DownloadPDF?id1=NjM3MDg1&id2=0>.

¹²⁷ Designation of Presiding District Judge Under Title 48 §2168 of the United States Code, (May 5, 2017), <https://cases.primeclerk.com/puertorico/Home-DownloadPDF?id1=NjE3NjA3&id2=0>; see also 48 U.S.C. § 2168(a)(2016).

Title III Petitions for Debt Adjustment Filed as of 11/1/17

Entity	Acronym	Title III Case Filing Date	Portion of Total Debt Held ¹²⁸
Commonwealth of Puerto Rico ¹²⁹	(Commonwealth)	5/9/2017	\$17.8B
Puerto Rico Sales Tax Financing Corporation ¹³⁰	“COFINA”	5/9/2017	\$17.6B
Puerto Rico Highway and Transportation Authority ¹³¹	“HTA”	5/21/2017	\$4.1B
Employees Retirement System for the Commonwealth of Puerto Rico ¹³²	“ERS”	5/21/2017	\$3.2B
Puerto Rico Electric Power Authority ¹³³	“PREPA”	7/3/2017	\$9B

¹²⁸ (Referring to all numbers in far right column), Statement of Oversight Board in Connection with PROMESA, In re: Commonwealth of Puerto Rico, Debtor at 9, (May 3, 2017) (No. 17-03283), <https://cases.primeclerk.com/puertorico/Home-DownloadPDF?id1=NjE3NjAy&id2=0>.

¹²⁹ In re: Commonwealth of Puerto Rico, Debtor, Statement of Oversight Board in Connection with PROMESA Title III Petition (May 3, 2017), <https://cases.primeclerk.com/puertorico/Home-DownloadPDF?id1=NjE3NjAy&id2=0>.

¹³⁰ Financial Oversight and Management Board for Puerto Rico, *Unanimous Written Consent Approving and Issuing Certifications Pursuant to Sections 104 and 206 of PROMESA for the Puerto Rico Sales Tax Financing Corporation (COFINA)*, (May 9, 2017), <https://cases.primeclerk.com/puertorico/Home-DownloadPDF?id1=NjE3ODQx&id2=0>

¹³¹ Financial Oversight and Management Board for Puerto Rico, *Unanimous Written Consent Approving and Issuing Certifications Pursuant to Sections 104 and 206 of PROMESA for the Puerto Rico Highways and Transportation Authority (HTA)*, (May 21, 2017), (No. 3:17-cv-01686-LTS), <https://cases.primeclerk.com/puertorico/Home-DownloadPDF?id1=NjIzMjkx&id2=0>.

¹³² Financial Oversight and Management Board for Puerto Rico, *Unanimous Written Consent Approving and Issuing Certifications Pursuant to Sections 104 and 206 of PROMESA for the Employees Retirement System of the Government of the Commonwealth of Puerto Rico (ERS)*, (May 21, 2017) (No. 3:17-cv-01686-LTS), <https://cases.primeclerk.com/puertorico/Home-DownloadPDF?id1=NjIzMjk1&id2=0>.

¹³³ Board Resolution Adopted on June 30, 2017, *Certifications Pursuant to Sections 104 and 206 of PROMESA for the Puerto Rico Electric Power Authority (PREPA)* (Jul. 3, 2017), (No. 3:17-cv-01686-LTS), <https://cases.primeclerk.com/puertorico/Home-DownloadPDF?id1=NzA4NjU1&id2=0>.

ii. *Title VI – Creditor Collective Action*

Under Title VI, “Creditor Collective Action”, PROMESA provides for a process of modifications of bonds of Puerto Rico or a Covered Territorial Instrumentality.¹³⁴ Title VI provides for “pooling” of creditors; modifications can be made in the event a majority of the creditors in the pool agree; the modification will be applied even to those creditors in the minority who did not agree.¹³⁵ The provisions of Title VI were used by Puerto Rico’s Government Development Bank (“GDB”) in conjunction with the Puerto Rico Fiscal Agency and Financial Advisory Authority when the parties entered into a Restructuring Support Agreement effective May 17, 2017.¹³⁶ The Agreement includes a wind down of GDB operations, and a restructuring of GDB’s obligations, and issuance of new bonds by a new entity.¹³⁷ By entering into this agreement, the entities avoided “the delay, expense and uncertainty associated with litigation.”¹³⁸

II. ANALYSIS

A. *The Oversight Board: Created by PROMESA, Tasked with the Impossible?*

PROMESA provides that the purpose of the Oversight Board is to “achieve fiscal responsibility and to restore access to the capital markets.”¹³⁹ PROMESA has given the Oversight Board extensive powers to do so; they are the gatekeepers of debt analysis, budgets and fiscal plans and the entities’ compliance therewith, creditor negotiations, Title III petitions, and much more.¹⁴⁰ The Oversight Board must work toward its goals of fiscal responsibility, while keeping in mind the people of Puerto

¹³⁴ 48 U.S.C. §§ 2231 – 2232 (2016).

¹³⁵ *Puerto Rico Oversight, Management, and Economic Stability Act (“PROMESA”): Overview and Restructuring Issues*, MICROJURIS.COM 1, 26 (Aug. 9, 2016), <https://noticiasmicrojuris.files.wordpress.com/2016/10/promesa-overview-and-restructuring-issues.pdf>.

¹³⁶ Financial Oversight and Management Board for Puerto Rico, *Oversight Board Authorizes Government Development Bank to Restructure Debts Under Title VI of PROMESA*, (Jul. 14, 2017), <https://juntasupervision.pr.gov/documents/>.

¹³⁷ *Id.*

¹³⁸ *Id.*

¹³⁹ 48 U.S.C. § 2121(a)(2016).

¹⁴⁰ 48 U.S.C. §§ 2141 – 2146 (2016).

Rico – fellow American citizens – and those citizens' current resources, their hardships both before and after the hurricanes, and their future.

Jose B. Carrion III, chairman of the Oversight Board, acknowledged the difficulty the Oversight Board faces when he commented that the Oversight Board's work "is not easy."¹⁴¹ The decisions [made by the Oversight Board] end up annoying everyone.¹⁴² If we receive criticism from all sides, it is because we are doing our work."¹⁴³ Indeed, the Oversight Board's actions have received criticism from many directions. In July 2017, a group of bondholders claimed the Oversight Board was "the biggest impediment" to solving Puerto Rico's fiscal crisis; the group was critical of the Oversight Board-approved fiscal plan for the Commonwealth as well as the Oversight Board's financial analyses used in approving the plan.¹⁴⁴

Members of Congress have also weighed in; Representatives Nydia Velazquez and Jose Serrano wrote a letter to the Oversight Board in May 2017 and expressed their views that the Oversight Board was being too severe in its decisions.¹⁴⁵ Reps. Velazquez and Serrano felt the drastic cost cutting in the Oversight Board -approved fiscal plans (such as cuts to the university system, health care spending and pension reductions) were too harmful to the people of Puerto Rico, and would have a deleterious effect on the island's growth and economic recovery.¹⁴⁶

Other members of Congress took the opposite view; Senators Tom Cotton and Thom Tillis also wrote a letter to the Oversight Board, expressing their fears that the Oversight Boards' fiscal decisions thus far were not enough and didn't comply with PROMESA.¹⁴⁷ They felt the Oversight Board should have negotiated more with creditors prior to filing

¹⁴¹ Marian Diaz, *Carrion Doubts About Government Savings*, EL NUEVO DIA, (Jun. 25, 2017, 10:43 AM), <https://www.elnuevodia.com/english/english/nota/carriondoubtsaboutgovernmentsavings-2334533/>.

¹⁴² *Id.*

¹⁴³ *Id.*

¹⁴⁴ Joanisabel Gonzalez, *The Board Is "Impediment"*, EL NUEVO DIA, (Jul. 14, 2017,), <https://www.elnuevodia.com/english/english/nota/theboardisimpediment-2340407/>.

¹⁴⁵ Velazquez and Serrano Express Concern About Austerity Measures to PROMESA Board, PUERTO RICO REPORT, (May 13, 2017), <https://www.puertoricoreport.com/velazquez-serrano-express-concern-austerity-measures-promesa-board/#.WgjW18anGUk>.

¹⁴⁶ *Id.*

¹⁴⁷ *Senators and Board Discuss PROMESA*, PUERTO RICO REPORT, (May 11, 2017), <https://www.puertoricoreport.com/senators-board-discuss-promesa/#.WgjfAcanGUL>.

Title III cases.¹⁴⁸ The Oversight Board responded with its own letter, laying out the decisions they have made and the corresponding rationale.¹⁴⁹ There seems to be distrust of the Oversight Board on all sides. While the Oversight Board has taken adversary action under Title III against Puerto Rico's governor to enforce a fiscal plan; an interested third party has also used this route to make a claim against the Oversight Board.¹⁵⁰ Not only does the Oversight Board have its work cut out for them with the daunting tasks ascribed to them under PROMESA, they also have to defend themselves, both in the court of public opinion as well as the Title III court.

B. *Adversary Cases Involving the Oversight Board*

There have been two adversary complaints filed in the Title III court in connection with the Oversight Board.¹⁵¹ On August 22, 2017, the American Federation of State, County & Municipal Employees ("AFSCME") filed a complaint on behalf of their Puerto Rican affiliates (who represent Commonwealth employees) against the Oversight Board and other Puerto Rican government entities.¹⁵² The complaint alleges that the actions of the Oversight Board are illegal and violate PROMESA and its statutory authority, and also raise constitutional concerns.¹⁵³

¹⁴⁸ *Id.*

¹⁴⁹ *Id.*

¹⁵⁰ Adversary Compl. For Declaratory and Injunctive Relief, American Fed'n. of State, County, & Mun. Employees v. Fin. Oversight & Mgmt. Bd. for Puerto Rico, Adv. Proc. at 2 (D.P.R. filed Aug. 22, 2017)(No. 17-00243), <https://cases.primeclerk.com/puertorico/Home-DocketInfo?DocAttribute=4383&DocAttrName=ADV.CASENO.17-00243%2CAMERICANFEDERATIONOFSTATE%2CCOUNTYANDMUNICIAPLEMPLOYEESV.THEFINANCIALOVERSIGHTANDMANAGEMENTBOARDFORPUERTORICO>.

¹⁵¹ *Id.*, see also Fin. Oversight & Mgmt. Bd. for Puerto Rico v. Rossello-Nevarés, Adv. Proc. No. 17-00250, 2 (D.P.R. filed Aug. 28, 2017), <https://cases.primeclerk.com/puertorico/Home-DocketInfo?DocAttribute=4384&DocAttrName=ADV.CASENO.17-00250%2CFINANCIALOVERSIGHTANDMANAGEMENTBOARDFORPUERTORICOV.ROSELLONEVARES>.

¹⁵² Adversary Compl., American Fed'n of State, Cty., & Mun. Emp.'s v. Fin. Oversight & Mgmt. Bd. for Puerto Rico, Adv. Proc. at 2 (D.P.R. filed Aug. 22, 2017)(No. 17-00243), <https://cases.primeclerk.com/puertorico/Home-DocketInfo?DocAttribute=4383&DocAttrName=ADV.CASENO.17-00243%2CAMERICANFEDERATIONOFSTATE%2CCOUNTYANDMUNICIAPLEMPLOYEESV.THEFINANCIALOVERSIGHTANDMANAGEMENTBOARDFORPUERTORICO>. (Hereinafter the "AFSCME case").

¹⁵³ *Id.*

Specifically, the complaint takes aim at amendments the Oversight Board added to a Commonwealth fiscal plan submitted by Puerto Rico's governor, Ricardo Rossello-Nevares (hereafter, "Governor Rossello").¹⁵⁴ After Governor Rossello resubmitted several rounds of revised fiscal plans at the Oversight Board's insistence, the Oversight Board added two amendments before approving and certifying the final fiscal plan.¹⁵⁵ One amendment made further cuts to government employee retirement plans than the original plan contemplated, these cuts were contingent on whether budget targets were met.¹⁵⁶ AFSCME also added that the cuts to the retirement plans were amplified by an August 4, 2017 decree by the Oversight Board.¹⁵⁷ The other amendment implemented government employee furloughs and eliminated Christmas bonuses, also contingent on budget targets.¹⁵⁸ AFSCME argues that these amendments violate PROMESA's directives as to fiscal plans; specifically 201(b)(1)(C) (where a fiscal plan is required to "provide adequate funding for public pension systems,") and 201 (b)(1)(B), which requires that any fiscal plan under PROMESA must "ensure the funding of essential public services."¹⁵⁹ Further, AFSCME argues PROMESA does not allow the Oversight Board to amend fiscal plans submitted to them, as it must either approve a fiscal plan as-is, or develop its own fiscal plan.¹⁶⁰ AFSCME argues the Oversight Board did neither when it added amendments to Governor Rossello's fiscal plan.¹⁶¹ AFSCME also puts forth an argument that reduction of government employee pensions, cancellations of bonuses and implementation of employee furloughs is a taking of property without due process or just compensation in contravention of the Fifth Amendment to the United States Constitution as well as Puerto Rico's Constitution.¹⁶² AFSCME's interest in this case, as a labor union, is to advocate for the members of its Puerto Rican affiliates, who they claim would suffer grievous harm by the measures mentioned within.¹⁶³ AFSCME asks the court to: (1) declare that the amendments to the fiscal plan were unlawful and to provide injunctive relief so that the amendments cannot be enforced, and (2) declare that any reduction or elimination of

¹⁵⁴ *Id.* at 3.

¹⁵⁵ *Id.* at 4.

¹⁵⁶ *Id.* at 4-5.

¹⁵⁷ *Id.* at 7.

¹⁵⁸ *AFSCME*, No. 17-00243 at 8-9; *Id.* at 9.

¹⁵⁹ *Id.* at 6-7.

¹⁶⁰ *Id.* at 8.

¹⁶¹ *Id.*

¹⁶² *Id.* at 11-12.

¹⁶³ *Id.*

Commonwealth employee retirement plans are an unconstitutional taking of property without compensation or due process of law, among other requests.¹⁶⁴

An answer to AFSCME's complaint has not been filed as of this writing, however we may glean some of what would be the Oversight Board's arguments in support of its two amendments to the Commonwealth's fiscal plan in its own action, a complaint filed against Governor Rossello, on August 28, 2017.¹⁶⁵ The complaint addresses specifically the two amendments to the Commonwealth fiscal plan, and asks the court to declare that the two amendments are included in the fiscal plan, that they are mandatory and binding parts of the fiscal plan, and that the Governor must enforce and comply with the entire fiscal plan, including the amendments.¹⁶⁶ The Oversight Board complained that each version of the fiscal plan that Governor Rossello submitted was not compliant with PROMESA, and after several versions were submitted, the Oversight Board added the two amendments so that it complied with PROMESA.¹⁶⁷ The Oversight Board asserts that it was within its power under PROMESA to amend the fiscal plan under Section 201(d)(2), which provides that if the Governor fails to submit a plan that complies with PROMESA, the Oversight Board may submit a plan that satisfies PROMESA requirements.¹⁶⁸ The Oversight Board alleges that Governor Rossello is in violation of PROMESA by refusing to recognize the two amendments as part of the fiscal plan; he has declared them as optional and has refused to implement neither the furlough program nor the pension cuts proffered in the two amendments, and he has made strong statements to that effect publicly.¹⁶⁹ The Oversight Board argues that PROMESA does not provide for decision making by the Governor as to whether a fiscal plan does or does not satisfy PROMESA, or any discretion as to whether or not to comply with an Oversight Board certified fiscal plan.¹⁷⁰

¹⁶⁴ *Id.* at 45-46.

¹⁶⁵ Order Granting Mot. To Stay Adversary Proceedings, Fin. Oversight & Mgmt. Bd. for Puerto Rico v. Rossello-Nevarés, Adv. Proc. at 1-2, (D.P.R. filed Aug. 28, 2017) (No. 17-00250), <https://cases.primeclerk.com/puertorico/Home-DocketInfo?DocAttribute=4384&DocAttrName=ADV.CASENO.17-00250%2CFINANCIALOVERSIGHTANDMANAGEMENTBOARDFORPUERTORICOV.ROSELLONEVARES>.

¹⁶⁶ *Id.* at 13, 19, 21-23.

¹⁶⁷ Fin. Oversight & Mgmt. Bd. for Puerto Rico, No. 17-00250 at 2-3.

¹⁶⁸ *Id.* at 8-9.

¹⁶⁹ *Id.* at 4.

¹⁷⁰ *Id.*

The Oversight Board acknowledges that a fiscal plan central to the Oversight Board's purpose (to "achieve fiscal responsibility and access to capital markets") requires "unpopular and difficult choices."¹⁷¹ Further, the complaint notes that Congress' intent in giving the Oversight Board sole discretion over fiscal plans under PROMESA was to insulate the Oversight Board from being swayed by political and other pressures.¹⁷²

C. *How the Hurricanes Affected the Adversary Cases Involving the Oversight Board*

On September 30, 2017, post hurricane Maria, the Oversight Board mentioned in a press release that in order to direct its focus to hurricane recovery efforts, it would withdraw the case against Governor Rossello and postpone any further talk about furloughs until the next fiscal year.¹⁷³ On October 4, 2017, in a response to a motion to dismiss by the Oversight Board, the case against Governor Rossello was dismissed without prejudice by the court.¹⁷⁴

As for the AFSCME case against the Oversight Board, on October 23, 2017, the judge granted AFSCME's motion for a stay of the litigation.¹⁷⁵ While the Oversight Board originally opposed the stay prior to the hurricanes, arguing that AFSCME should not have an interest in an adversary proceeding, after the storm the Oversight Board abandoned that opposition and agreed to the stay of litigation.¹⁷⁶ AFSCME's rationale for

¹⁷¹ *Id.* at 2.

¹⁷² *Id.*

¹⁷³ *General Release Regarding Measures Taken by the Financial Oversight and Management Board in the Aftermath of Hurricane Maria*, THE FINANCIAL OVERSIGHT AND MANAGEMENT BOARD FOR PUERTO RICO (Sept. 30, 2017) <https://juntasupervision.pr.gov/index.php/en/documents/>.

¹⁷⁴ Order Dismissing Case, Fin. Oversight & Mgmt. Bd. for Puerto Rico v. Rossello-Nevarés, Adv. Proc. Order Dismissing Case (filed Aug. 28, 2017) (No. 17-00250), <https://cases.primeclerk.com/puertorico/Home-DownloadPDF?id1=NzA4NTM2&id2=0>.

¹⁷⁵ Order Granting motion to Stay Adversary Proceedings, Fin. Oversight & Mgmt. Bd. for Puerto Rico v. American Fed'n of State, Cty. & Mun. Emp.'s, AFL-CIO, Adv. Proc., (filed Oct. 23, 2017) No. 17-00250,

<https://cases.primeclerk.com/puertorico/Home-DownloadPDF?id1=NzExMjI2&id2=0>.

¹⁷⁶ Opp'n of Fin. Oversight and Mgmt. Bd. to Non-Party American Federation of State, Cty. & Mun. Emp.'s, AFL-CIO's Mot. To Stay Proceeding or, in the Alternative (I) Consolidate Proceedings or (II) Allow Intervention under Federal Rule of Bankr. Procedure 7024, Fin. Oversight & Mgmt. Bd. for Puerto Rico v. Rossello-Nevarés, Adv. Proc., (filed 9/19/17) (No.

the motion to stay “is that given the devastation and suffering on the island, now is no time to be moving forward in adversary proceedings such as these regarding the proposed furlough of public employees and cuts to employee pensions and benefits[.]”¹⁷⁷

D. The Potential Impact of a Decision in the AFSCME Case

Either way the AFSCME case is decided, the decision may be a turning point for the Oversight Board in its effort to carry out its myriad of responsibilities under PROMESA. Under PROMESA, as discussed previously, Congress gave the Oversight Board sweeping powers, putting them in control of the ebb and flow of the financial restructuring of Puerto Rico. The Oversight Board controls restructuring negotiations with creditors under Title VI,¹⁷⁸ and are the gatekeepers of budgets, fiscal plans and the filing of cases under Title III.¹⁷⁹ The central issues in both adversary cases surround whether the Oversight Board can add amendments to an entity-authored fiscal plan before approving and certifying the plan. PROMESA doesn’t address this issue specifically, and each party will argue by interpreting PROMESA in their favor. Whatever the court may decide could possibly add an interpretation of PROMESA language into the record that will likely be relied upon in future cases. A decision against the Oversight Board would likely weaken its power in enforcing PROMESA provisions and embolden its critics. Other entities would likely bring actions against the Oversight Board in hopes of similar successes. On the other hand, if the court finds for the Oversight Board and against AFSCME, this would likely strengthen the Oversight Board’s decision-making power under PROMESA, which would assist them in carrying out its legislative purpose. It would also likely quiet the rumblings of future action from other entities on this and similar topics. This would allow the Oversight Board to continue its work under Titles III and VI; and in doing so, they could be a bit less encumbered by actions resulting from its decisions, at least on this issue.

17-00250)

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[https://cases.primeclerk.com/puertorico/Home-](https://cases.primeclerk.com/puertorico/Home-DownloadPDF?id1=NzA4MjEz&id2=0)

¹⁷⁷ Informative Mot. of the American Fed’n of State, Cty. & Municipal Empl.’s, AFL-CIO Regarding The Proposed Adjournment of the October 4, 2017 Omnibus Hearing, at 2, (filed Sept. 28, 2017) (No. 17-03283), <https://cases.primeclerk.com/puertorico/Home-DownloadPDF?id1=NzA4Mzgz&id2=0>.

¹⁷⁸ 48 U.S.C. § 2231 (2016).

¹⁷⁹ 48 U.S.C. §§ 2161-2177 (2016).

III. EVALUATION

A. *How the Court Should Proceed in the AFSCME Adversary Case*

As soon as practicable, and with deference to hurricane recovery efforts, the court should lift the stay and proceed in the AFSCME case, so the parties can resolve this issue and put it behind them in order to focus on Puerto Rico's recovery.

The Oversight Board has not yet responded to the AFSCME complaint, but once they do, the court should quickly move to consider the parties' arguments. If the Oversight Board's arguments are similar to those presented in its complaint against Governor Rossello (that the amendments to the fiscal plans are valid under PROMESA and the court should declare such and order that they be enforced as part of the Commonwealth fiscal plan)¹⁸⁰ and the pre-hurricane opposition to the motion to stay in the AFSCME case (that AFSCME, as a third party, does not have a right to intervene in the proceedings of a PROMESA fiscal plan),¹⁸¹ the court should expeditiously rule on the case in favor of the Oversight Board.

The court should primarily consider the letter of the law in PROMESA regarding the Oversight Board's ability to amend a fiscal plan. Section 201(b) of PROMESA provides the requirements of a fiscal plan, which must be approved by the Oversight Board.¹⁸² Among the requirements is subsection (L), which states the fiscal plan can "include such additional information as the Oversight Board deems necessary[.]"¹⁸³ The Oversight Board had gone back and forth with Governor Rossello over three rounds of fiscal plans, each of which the Oversight Board

¹⁸⁰ Adversary Complaint for Declaration and Injunctive Relief, Fin. Oversight & Mgmt. Bd. for Puerto Rico v. Rossello-Nevares, 2-4, (filed Aug. 28, 2017) (No. 17-00250), <https://cases.primeclerk.com/puertorico/Home-DocketInfo?DocAttribute=4384&DocAttrName=ADV.CASENO.17-00250%2CFINANCIALOVSIGHTANDMANAGEMENTBOARDFORPUERTORICOV.ROSELLONEVARES>.

¹⁸¹ Opp'n of Fin. Oversight and Mgmt. Bd. to Non-Party American Federation of State, Cty. & Mun. Emp.'s, ALF-CIO's Mot. To Stay Proceeding or, in the Alternative (I) Consolidate Proceedings or (II) Allow Intervention Under Federal Rule of Bankr. Procedure 7024, American Fed'n. of State, County, & Mun. Employees v. Fin. Oversight & Mgmt. Bd. for Puerto Rico, Adv. Proc. No. 17-00243, (filed Sept. 19, 2017) (No. 17-00243), <https://cases.primeclerk.com/puertorico/Home-DownloadPDF?id1=NzA4MjEy&id2=0>.

¹⁸² 48 U.S.C. § 2141, §201(b)(2016).

¹⁸³ Id. at (b)(L).

deemed did not meet PROMESA requirements to “adequately address the instability in Puerto Rico’s pension systems and need for structural changes to ensure long-term stability and restore public confidence in the pension system[.]”¹⁸⁴ Rather than continue the back and forth with the rejection and resubmission of fiscal plan drafts, the Oversight Board added information to the plan and approved it.¹⁸⁵ Further, PROMESA’s Section 201(d)(2) provides that if the Governor fails to submit a fiscal plan that complies with PROMESA requirements, the Oversight Board may then develop and submit a plan that satisfies the requirements.¹⁸⁶

It is understandable that AFSCME and Governor Rossello are resistant to the implementations of furloughs, elimination of Christmas bonuses, and the cutting of pensions of Puerto Rico’s government employees. These are difficult and agonizing decisions that affect people’s everyday lives and their bottom line. It is even more difficult after the devastation of the hurricanes. However, this is why the Oversight Board was put into place – to make difficult decisions for the long-term recovery of Puerto Rico, independent of elected officials and special interest groups.¹⁸⁷

Similar difficult and unpopular decisions about pension cuts to government employees were considered and implemented in the city of Detroit’s Chapter 9 bankruptcy case.¹⁸⁸ Detroit also faced legal challenges to the decision to cut pensions under its restructuring plan, although the city ultimately prevailed on appeal using the doctrine of equitable mootness.¹⁸⁹

In considering their decision, the court should also give weight to the legislative history of PROMESA with respect to the Oversight Board’s

¹⁸⁴ Adversary Compl. For Declaratory and Injunctive Relief, 2, 13 Fin. Oversight & Mgmt. Bd. for Puerto Rico v. Rossello-Nevarés, (filed Aug. 28, 2017)(No. 17-00250), <https://cases.primeclerk.com/puertorico/Home-DocketInfo?DocAttribute=4384&DocAttrName=ADV.CASENO.17-00250%2CFINANCIALOVSIGHTANDMANAGEMENTBOARDFORPUERTORICOV.ROSELLONEVARES>.

¹⁸⁵ *Id.* at 13-14.

¹⁸⁶ 48 U.S.C. § 2141(d)(2)(2016).

¹⁸⁷ Markup Memorandum of H.R. 5278, *supra* note 2, at 1.

¹⁸⁸ Steven Yaccino and Michael Cooper, *Cries of Betrayal as Detroit Plans to Cut Pensions*, NY TIMES (Jul. 21, 2013), <http://www.nytimes.com/2013/07/22/us/cries-of-betrayal-as-detroit-plans-to-cut-pensions.html>.

¹⁸⁹ (*In re City of Detroit*), *Mich.*, 838 F.3d 792, 795 (6th Cir. 2016).

responsibilities. The drafters of PROMESA felt strongly that an independent body was needed to oversee the Puerto Rican government's management of the fiscal situation.¹⁹⁰ Further, they acknowledged that the broad powers granted to PROMESA were similar to those that were given to a previous oversight board of similar purposes in Washington, D.C., to which the Oversight Board is often compared.¹⁹¹ Finally, it was noted that the oversight board model was successfully used elsewhere (Washington D.C., and a number of states) to ensure effectiveness in returning to fiscal responsibility.¹⁹²

B. Impact of the Oversight Board Post-Hurricanes: What is Next?

Chairman of the Oversight Board Jose B. Carrion III remarked on Monday, November 6, 2017, that hurricane Maria “turned everything – or almost everything – upside down[,]”¹⁹³ and as a result, it has caused “EVERYONE in Puerto Rico - citizens, small businesses, large corporations, government, not-for profits. . . EVERYONE - to rethink EVERYTHING.”¹⁹⁴ The Oversight Board is now looking at fiscal plans under the Title III cases and working with entities to revise them, considering the impacts of the storms and their “new reality”.¹⁹⁵ Revised fiscal plans must balance post-storm recovery as well as continue the original path toward fiscal responsibility.¹⁹⁶

With revised fiscal plans, the issues regarding the amendments to fiscal plans will likely linger – the main conflict being: the Oversight Board wants to make deeper cuts to pensions, and Governor Rossello will likely resist such cuts. In the midst of challenges to its authority, the Oversight Board has and will look to Congress to reaffirm its authority under PROMESA.¹⁹⁷ Whether and in what degree Congress decides to provide that support remains to be seen.

¹⁹⁰ Markup Memorandum of H.R. 5278, *supra* note 2, at 2.

¹⁹¹ *Id.* at 3.

¹⁹² *Id.*

¹⁹³ Jose B. Carrion III, *supra* note 32, at 1.

¹⁹⁴ *Id.* at 2.

¹⁹⁵ *Id.* at 2-3.

¹⁹⁶ *Id.* at 4-5.

¹⁹⁷ Alex Wolf, *Back Us Up, Puerto Rico Oversight Board Tells Congress*, LAW360.COM, (Nov. 7, 2017) <https://advance.lexis.com/document/?pdmfid=1000516&crd=db39a68f-306b-4238-a8ea-de6108a9e02e&pdworkfolderid=994b2b95-9ab4-4f88-bac2-8292adc1ef37&ecom=-yJtk&earg=994b2b95-9ab4-4f88-bac2-8292adc1ef37&prid=2999d696-1854-4418-a2ec-6b4bfc5c54a>.

CONCLUSION

Puerto Rico is dealing with impossible circumstances, made much worse after the hurricanes. Puerto Rico needs support from the United States government to rebuild, both physically and fiscally. Both Congress and the courts should, within the confines of PROMESA, affirm the power granted by the legislation to the Oversight Board, so that it can continue making the difficult decisions necessary to ensure the future of Puerto Rico. Jose B. Carrion III has stated, “[We] must build tomorrow’s economy by making now – in this even more challenging and demanding scenario – the difficult choices we have long known are necessary and, finally, start building a better Puerto Rico for this and future generations.”¹⁹⁸ There may be decisions made that are painful for some, but return to prosperity for Puerto Rico in the long term is important for the people of Puerto Rico, and the United States.

¹⁹⁸ Jose B. Carrion III, *supra* note 32, at 6.