**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO**

In re: THE FINANCIAL OVERSIGHT AND MANAGEMENT BOARD FOR PUERTO RICO, as representative of THE COMMONWEALTH OF PUERTO RICO, *et al.* Debtors.[1]	PROMESA Title III No. 17 BK 3283-LTS (Jointly Administered) Case No. 17 BK 4780-LTS
In re: THE FINANCIAL OVERSIGHT AND MANAGEMENT BOARD FOR PUERTO RICO, as representative of PUERTO RICO ELECTRIC POWER AUTHORITY, Debtor.	

[1] The Debtors in these Title III Cases, along with each Debtor's respective Title III case number and the last four (4) digits of each Debtor's federal tax identification number, as applicable, are the (i) Commonwealth of Puerto Rico (Bankruptcy Case No. 17 BK 3283-LTS) (Last Four Digits of Federal Tax ID: 3481); (ii) Puerto Rico Sales Tax Financing Corporation ("COFINA") (Bankruptcy Case No. 17 BK 3284) (Last Four Digits Tax ID: 8474); (iii) Puerto Rico Highways and Transportation Authority ("HTA") (Bankruptcy Case No. 17 BK 3567-LTS) (Last Four Digits of Federal Tax ID: 3808); (iv) Employees Retirement System of the Government of the Commonwealth of Puerto Rico ("ERS") (Bankruptcy Case No. 17 BK 3566-LTS) (Last Four Digits of Federal Tax ID: 9686). (Title III case numbers are listed as Bankruptcy Case numbers due to software limitations); and (v) Puerto Rico Electric Power Authority ("PREPA") (Bankruptcy Case No. 17 BK 4780-LTS) (Last Four Digits of Federal Tax ID: 3747). (Title III case numbers are listed as Bankruptcy Case numbers due to software limitations).

MEMORANDUM OF LAW OF THE UNITED STATES IN SUPPORT OF THE CONSTITUTIONALITY OF PROMESA

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Under 28 U.S.C. § 2403(a), the United States submits this memorandum of law in support of the constitutionality of the Puerto Rico Oversight, Management, and Economic Stability Act of 2016 (PROMESA), 48 U.S.C. §§ 2101–41. Three creditors have objected to the Fourth Amended Title III Plan of Adjustment (Plan) for the Puerto Rico Electric Power Authority (PREPA) on grounds that PROMESA violates the Constitution either on its face or as applied to approval of the Plan as proposed. This memorandum addresses these constitutional objections.

PRELIMINARY STATEMENT

Congress enacted PROMESA in 2016 during the worst fiscal crisis in Puerto Rico's history. PROMESA provides "[a] comprehensive approach" to facilitate Puerto Rico's economic recovery, by requiring "independent oversight" through the creation of the Financial Oversight & Management Board of Puerto Rico (Board) and by authorizing the Commonwealth and its instrumentalities to restructure debts in a process akin to that under Chapter 9 of the Bankruptcy Code. *Id.* § 2194(m). Since PROMESA was enacted, the Board has proposed – and this Court has confirmed – three title III plans of adjustment for the Commonwealth and various public entities.

Several creditors now object to the Board's proposed plan of adjustment for PREPA on the ground that PROMESA is unconstitutional either on its face or as applied to the Plan, if approved. Specifically, municipal bond insurers Assured Guaranty Corporation and Assured Guaranty Municipal Corporation (together, Assured) assert that PROMESA violates the Uniformity Clause, found in Article I, Section 8 of the Constitution. *See Assured Guaranty Corp. and Assured Guaranty Municipal Corp.'s (I) Objection to Corrected Fourth Amended*

Title III Plan of Adjustment of the Puerto Rico Electric Power Authority and (II) Partial Joinder to (A) PREPA Ad Hoc Group Objection, (B) Goldentree Objection, and (C) Bond Trustee Objection ("Assured Objection") at 64-72 (Dkt. Nos. 4527 and 4605 in Case No. 17-4780). In addition, Creditor Isla del Rio, Inc. objects to the Plan's proposal to pay just compensation claims in cash, asserting that this poses a potential violation of the Fifth Amendment's Takings Clause. *See Objection to Confirmation of the Corrected Fourth Amended Title III Plan of Adjustment for the Puerto Rico Power of Authority and the Proposed Draft of Order of Confirmation* ("Isla del Rio Objection") (Dkt. No. 4528 in Case No. 17-4780). Finally, el Unión de Trabajadores de la Industria Eléctrica y Riego (UTIER) asserts that the Plan cannot be confirmed without violating the Due Process Clause because some unknown creditors may not receive sufficient notice of the Plan. *Unión de Trabajadores de la Industria Eléctrica y Riego Inc.'s Objection to the Corrected Fourth Amended Title III Plan of Adjustment for the Puerto Rico Electric Power Authority and Proposed Confirmation Order and Judgment Confirming Corrected Fourth Amended Title III Plan of Adjustment of the Puerto Rico Electric Power Authority* ("UTIER Objection") at 26-30 (Dkt. No. 4492 in Case No. 17-4780). UTIER also objects to the Plan on the ground that PROMESA is unconstitutional because it is allegedly founded on the *Insular Cases*, which UTIER contends should be overruled. UTIER Objection at 31-35.

To start, Assured's Uniformity Clause contentions have previously been rejected by this Court and fail under Supreme Court precedent. The uniformity requirement in Article I, Section 8 of the Constitution serves as a limitation on Congress's exercise of its enumerated powers within Article I; it does not apply when Congress exercises its broad authority under Article IV to legislate for the territories. Because Congress specifically invoked Article IV when it passed

PROMESA, the uniformity requirement does not apply to this statute. And even if the uniformity requirement were to apply, PROMESA does not run afoul of it. The Supreme Court has long recognized that Congress retains the power to craft bankruptcy legislation to resolve geographically isolated problems, and that is precisely what PROMESA does. PROMESA applies uniformly to the Commonwealth and its public corporations; that is all that is required under the Constitution.

Second, Isla del Rio's just compensation objection has merit only to the extent the Board may not have sufficient funds to fully compensate these creditors. Binding precedent holds that the Fifth Amendment requires the payment of just-compensation claims in full, so the Plan must assure full payment.

Finally, the Court need not consider UTIER's due process challenge because this challenge is unripe, and UTIER lacks standing to raise this argument. In any case, PROMESA provides a means for avoiding UTIER's concern about proper notice. Moreover, UTIER's arguments about the *Insular Cases* do not present a constitutional challenge to the Plan or to PROMESA.

ARGUMENT

I. PROMESA DOES NOT VIOLATE THE UNIFORMITY REQUIREMENT IN ARTICLE I, SECTION 8 OF THE CONSTITUTION

A. The Uniformity Requirement Does Not Apply When Congress Legislates Using Its Article IV Authority

When Congress enacted PROMESA, it "expressly invoked a constitutional provision allowing it to make local debt-related law (Article IV)." *Fin. Oversight & Mgmt. Bd. for P.R. v.*

Aurelius Inv., LLC, 140 S. Ct. 1649, 1664–65 (2020).[2] As a result, this Court has already held in a previous PROMESA title III case that PROMESA does not violate the uniformity requirement found in Article I, Section 8 of the Constitution because this requirement is "a limitation on a specific enumerated power within Article I, not a generally applicable limitation that restricts the exercise of legislative power where it would otherwise be proper under Article IV." *In re Fin. Oversight & Mgmt. Bd. for P.R.*, 637 B.R. 223, 255 (D.P.R. 2022). In reaching this conclusion, this Court emphasized that when "legislating with respect to the territories . . . Congress has authority to act like a state legislature, with sovereign authority unconstrained by certain of the restrictions that limit Congress's authority to enact laws for the United States 'as a political body of states in the union.'" *Id.* at 255 (citing *Cincinnati Soap Co. v. United States*, 301 U.S. 308, 323 (1937); *Palmore v. United States*, 411 U.S. 389, 397 (1973)).

Despite these clear statements by both this Court and the Supreme Court, as well as Congress, Assured asserts that PROMESA cannot have been enacted exclusively under Article IV because "Congress has no general power to destroy or impair contracts *except* by exercising the bankruptcy power under the Bankruptcy Clause." Assured Objection at 69-70 (emphasis in the original). The crux of Assured's argument is that PROMESA must have been passed under the Bankruptcy Clause because otherwise this statute violates the Fifth Amendment. *Id.* at 72.

Assured's argument misses the mark. First, PROMESA expressly provides that it was enacted under Article IV, not Article I. And the Takings Clause applies whether Congress is acting under Article I or Article IV. Although "[t]he bankruptcy power [in Article I] is subject to the Fifth Amendment's prohibition against taking private property without just compensation,"

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[2] *See* 48 U.S.C. § 2121(b)(2) ("The Congress enacts this Act pursuant to article IV, section 3 of the Constitution of the United States, which provides Congress the power to dispose of and make all needful rules and regulations for territories.")

United States v. Sec. Indus. Bank, 459 U.S. 70, 75 (1982) (internal citation omitted), so is the authority Congress used under Article IV for PROMESA. Both this Court and the First Circuit have so held. *In re The Fin. Oversight & Mgmt. Bd. of P.R.*, 41 F.4th 29, 42 (1st Cir. 2022) ("[t]he bankruptcy laws are subordinate to the Takings Clause."). Thus, Assured's premise is flawed: the Fifth Amendment applies whether or not PROMESA is subject to the uniformity requirement.

Moreover, Assured's reliance on *Continental Illinois National Bank & Trust Company of Chicago v. Chicago Rock Island & Pacific Railroad Company*, 294 U.S. 648, 680 (1935), is unavailing. In *Continental Illinois*, the Supreme Court held that a provision of the Bankruptcy Code did not violate the Fifth Amendment by allowing judges to issue an injunction restraining the sale of collateral. *Id.* Assured contends that this case stands for the proposition that federal legislation may impair or destroy contracts only if enacted under the Bankruptcy Clause. *See* Assured Objection at 69-70. But that is not what the Supreme Court held in *Continental Illinois*. Instead, it held that while Congress may not impair the obligation of contracts through "laws acting directly and independently to that end," it may do so "collaterally or incidentally" when passing legislation "pertinent to *any of the powers conferred by the Constitution*." *Cont'l Ill.,* 294 U.S. at 680 (emphasis added).

Assured's efforts to rely on cases governing state bankruptcy laws are equally unavailing. Assured asserts that bankruptcy laws enacted under Article IV may not exceed the scope of bankruptcy laws that a state could enact. *See* Assured Objection at 70-72. But Congress is not limited to the power of a state government when it legislates with respect to the territories; rather, it has the power of *both* the federal government *and* a state government. *Palmore*, 411 U.S. at 403 ("In legislating for [the territories], Congress exercises the combined power of the

general, and of a state government."); *Cincinnati Soap*, 301 U.S. at 317 ("[O]ver such a dependency the nation possesses the sovereign powers of the general government plus the powers of a local or state government in all cases where legislation is possible."). Thus, the limitations on a state's ability to enact local bankruptcy laws, which the Supreme Court outlined in *Baldwin v. Hale*, 68 U.S. 223 (1863), do not apply when Congress legislates with respect to a territory. Indeed, as Assured concedes, one of these limits is preemption – a doctrine that prevents state laws from interfering with federal law. Because PROMESA is a federal law, the doctrine of state preemption cannot apply, and *Baldwin v. Hale* is inapposite. This exception demonstrates that Congress' Article IV powers exceed those of any state.

Congress relied on Article IV when enacting PROMESA, and the Constitution does not prevent it from doing so. Because the uniformity requirement is "a limitation on a specific enumerated power within Article I," and "not a generally applicable limitation that restricts the exercise of legislative power where it would otherwise be proper under Article IV," *In re Fin. Oversight & Mgmt. Bd. for P.R.*, 637 B.R. at 255, this constitutional requirement does not apply to or invalidate PROMESA.

B. Even If the Uniformity Requirement Were Assumed to Apply, PROMESA Is Constitutional Because It Resolves Geographically Isolated Problems

Even assuming *arguendo* that the uniformity requirement applies, PROMESA easily passes constitutional muster. Assured argues that PROMESA violates the Bankruptcy Clause's uniformity requirement because the statute applies only to Puerto Rico even though other territories such as the United States Virgin Islands and Guam were experiencing financial distress at the time this law was enacted. Assured Objection at 65-68. In support, Assured relies on *Siegel v. Fitzgerald*, 596 U.S. 464 (2022), in which the Supreme Court held that a law that

subjected similarly situated debtors in different states to different bankruptcy filing fees violated the uniformity requirement. Assured Objection at 65-66.

Siegel, however, is readily distinguishable. In *Siegel*, the Supreme Court invalidated a statute that allowed debtors in North Carolina and Alabama to pay lower bankruptcy fees than debtors in other states. 596 U.S. at 468-80. Whereas the Trustee Program used in the majority of states was funded fully through user fees, the Administrator Program used in North Carolina and Alabama charged lower fees and defrayed program costs with appropriated funds. *See id.* at 469. The Supreme Court determined that this disparate treatment – which resulted in the petitioner paying $500,000 more in bankruptcy fees than an identical debtor in North Carolina or Alabama – was unconstitutional because it was due to "Congress' own decision to create a dual bankruptcy system funded through different mechanisms" rather than an "external and geographically isolated need." *Id.* at 478-79.

PROMESA is distinct from the statute at issue in *Siegel* because it was enacted in response to Puerto Rico's unique financial situation. The uniformity requirement does not require that PROMESA apply to all U.S. territories; the Supreme Court has expressly recognized that "[t]he problem dealt with (under the Bankruptcy Clause) may present significant variations in different parts of the country." *Blanchette v. Conn. Gen. Ins. Corps.*, 419 U.S. 102, 159 (1974) (internal citation omitted). As a result, "[t]he uniformity provision does not deny Congress the power to take into account differences that exist between different parts of the country, and to fashion legislation to resolve geographically isolated problems." *Id.* That is precisely what Congress did in passing PROMESA.

Indeed, during the congressional hearings on PROMESA, Members of Congress noted that no other territory's long-term economic stability was under a threat similar to that faced by

Puerto Rico. 162 Cong. Rec. H3601 (daily ed. June 9, 2016) (statement of Rep. Grijalva) ("While the debt crisis in Puerto Rico is, indeed, serious and real, there is no indication that any other territory faces a similar crisis."). A comparison of the territories' debt bears this out: by August 2015, Puerto Rico had begun defaulting on its debt, and its three main public pension systems were nearly insolvent, with a net aggregate liability of $44.9 billion. GAO, *Report to Congressional Committees, U.S. Territories Public Debt Outlook—2019 Update* (June 2019) ("2019 GAO Report") at 4, 22. In 2014 – two years before PROMESA was enacted – Puerto Rico had $67.8 billion in outstanding public debt, representing 66 percent of its Gross Domestic Product (GDP). GAO, *Report to Congressional Committees, U.S. Territories Public Debt Outlook* (October 2017) ("2017 GAO Report") at 12-14. By contrast, the U.S. Virgin Islands had public debt as of 2015 that was barely 4 percent of Puerto Rico's, at $2.6 billion. 2017 GAO Report at 47. Although this debt constituted 72 percent of its GDP, the U.S. Virgin Islands held a year's worth of debt service payments in reserve, and unlike Puerto Rico, as of 2016, it had not missed a payment on its debt. 2017 GAO Report at 47-48, 54; 2019 GAO Report at 24–25, 30. The outstanding public debts of other U.S. territories were likewise a small fraction of Puerto Rico's debt and of their respective GDPs. 2017 GAO Report at 22, 24 (American Samoa $69.5 million in FY 2015, representing approximately 11 percent of its GDP); 30-31 (Commonwealth of the Northern Mariana Islands $144.7 million in FY 2015, representing 16 percent of its GDP); and 38-39 (Guam $2.5 billion in FY 2015, representing 44 percent of its GDP).

As the Supreme Court declared in the very case on which Assured relies, the "requirement that bankruptcy laws be 'uniform' is not a straitjacket." *Siegel*, 596 U.S. at 467. In enacting PROMESA, Congress was responding appropriately to Puerto Rico's unique financial situation. Tailoring relief to address a specific problem or region does not offend the Uniformity

Clause. Courts have instead invalidated statutes under the Uniformity Clause when similarly situated debtors were treated differently. *Compare Siegel*, 596 U.S. at 478-81, *and Ry. Labor Exec.'s Ass'n v. Gibbons*, 455 U.S. 457, 470 (1982) (invalidating railroad reorganization statute that singled out one railroad and did not apply to other similarly-situated railroads), *with Blanchette*, 419 U.S. at 159 (upholding constitutionality of Regional Rail Reorganization Act that applied to only one region of the country because no railroad reorganization proceedings were pending outside of the defined region upon enactment), *and In re Shafer*, 689 F.3d 601, 612 (6th Cir. 2012) (upholding Michigan law that applied different exemptions to debtors in bankruptcy versus debtors outside of bankruptcy). PROMESA applies uniformly to the Commonwealth and its public corporations, many of whom have already gone through title III proceedings, and that is all that is required by the Uniformity Clause. Indeed, "Congress may enact non-uniform laws to deal with geographically isolated problems as long as the law operates uniformly upon a given class of creditors and debtors." *Schultz v. United States*, 529 F.3d 343, 351 (6th Cir. 2008) (characterizing Supreme Court's holding in *Blanchette*). Assured's uniformity objection, therefore, cannot succeed.

C. PROMESA's Severability Clause Cures Any Uniformity Problem

In any event, even if PROMESA violates an applicable uniformity requirement, it contains the cure for such a violation: Section 2102 states that,

> [i]f a court holds invalid any provision of this chapter or the application thereof on the ground that the provision fails to treat similarly situated territories uniformly, then the court shall, in granting a remedy, order that the provision of this chapter or the application thereof be extended to any other similarly situated territory, provided that the legislature of that territory adopts a resolution signed by the territory's governor requesting the establishment and organization of a Financial Oversight and Management Board pursuant to section 2121 of this title.

48 U.S.C. § 2102(b).

Assured contends that this provision cannot save the statute from a Uniformity Clause defect because "[c]ourts have no authority to rewrite a statute . . . even when invited to do so by Congress." Assured Objection at 69. But the Court does not need to "rewrite" the statute. Section 2102(b) on its face states, in effect, that PROMESA shall apply in other territories if a court determines that applying it only to Puerto Rico violates a uniformity requirement. And that interpretation of § 2102(b) is consistent with other provisions in the statute. Although section 2121(b) of PROMESA only establishes an oversight board for Puerto Rico, other subsections clearly contemplate the creation of oversight boards in other U.S. territories. *See* 48 U.S.C. § 2121(c) (noting that an oversight board "shall be created as an entity *within the territorial government for which it is established*") (emphasis added); 48 U.S.C. § 2121(d) (referencing "territorial *instrumentalities*") (emphasis added). It is a fundamental canon of statutory construction that "the words of a statute must be read in their context and with a view to their place in the overall statutory scheme" and that courts, in interpreting statutes, should "fit, if possible, all parts into a[] harmonious whole." *Food & Drug Admin. v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000) (quoting *Davis v. Mich. Dep't of Treasury*, 489 U.S. 803, 809 (1989); *Fed. Trade Comm'n v. Mandel Bros.*, 359 U.S. 385, 389 (1959)). Given the language in the severability clause and sections 2121(c)-(d), it would make little sense to interpret section 2121 such that it only allows for an oversight board in Puerto Rico. On the contrary, the same mechanism used to create the Board in Puerto Rico can clearly be extended to other territories.

Indeed, Assured's argument ignores the Supreme Court's direction for courts to "zero in on the precise statutory text," and "hew closely to the text of severability or nonseverabilty clauses," because these clauses leave "no doubt about what the enacting Congress wanted if one

provision of the law were later declared unconstitutional." *Barr v. Am. Ass'n of Political Consultants, Inc.*, 140 S. Ct. 2335, 2349 (2020) (plurality op.); *see, e.g.*, *Seila Law LLC v. CFPB*, 140 S. Ct. 2183, 2209 (2020).[3] Here, Congressional action is not required because Congress made abundantly clear the steps that should be followed if PROMESA were found unconstitutional: the Court should order the extension of PROMESA to other territories provided those territories request the establishment of their own oversight boards in accordance with 48 U.S.C. § 2121. Thus, even assuming that PROMESA must be extended to other territories, the statute's severability clause allows for PROMESA to remain a valid law and to continue to operate in the same manner in Puerto Rico. As such, the Court should overrule all of Assured's constitutional objections.

II. THE PROPOSED PLAN DOES NOT PRESENT ANY DUE PROCESS CONCERNS

UTIER asserts that the Plan cannot be confirmed because future claimants whose claims arise shortly before the Plan becomes effective may not receive proper notice of the Plan and/or confirmation proceedings. UTIER Objection at 26-30. Not only does UTIER lack standing to raise this challenge, but this issue is also unripe.

"[W]hen [a] plaintiff is not himself the object of the government action or inaction he challenges, standing is not precluded, but it is ordinarily 'substantially more difficult' to establish." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 562 (1992) (internal quotation omitted). UTIER appears to raise this argument on behalf of all Puerto Rican citizens and not

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[3] Moreover, as the Supreme Court has noted, "[w]hen the constitutional violation is unequal treatment . . . a court theoretically can cure that unequal treatment either by extending the benefits or burdens to the exempted class, or by nullifying the benefits or burdens for all." *Barr*, 140 S. Ct. at 2354.

simply union members. *See* UTIER Objection at 28 ("there are people in Puerto Rico who are currently being deprived of claims and causes of action that they are not even aware of yet or that have not come into existence, regardless of the nature of these claims."). But even assuming that UTIER limits its challenge to union members, it still lacks standing to raise this issue.

A union has standing to bring suit on behalf of its members only when (1) its members would have standing to sue in their own right; (2) the interests the union seeks to protect are germane to its purposes; and (3) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit. *Int'l Union of United Auto., Aerospace, and Agric. Implement Workers of Am. v. Brock*, 477 U.S. 274, 282 (1986) (citing *Hunt v. Wash. State Apple Adver. Comm'n*, 432 U.S. 333, 343 (1977)). UTIER can satisfy none of these requirements.

With respect to the first prong, to have standing, UTIER's members must demonstrate that (1) they suffered injury in fact that is concrete, particularized, and actual or imminent; (2) the injury was likely caused by the Board; and (3) the injury will likely be redressed by judicial relief. *Plazzi v. FedEx Ground Package Sys., Inc.*, 52 F.4th 1, 4 (1st Cir. 2022) (citing *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2003 (2021)). "To be 'concrete,' the injury in fact must be 'real, and not abstract.'" *Id.* (internal citations omitted). Here, UTIER's alleged injury is purely hypothetical: it alleges that unidentified future plaintiffs *may* develop a cause of action against PREPA and *may* not be aware of the Plan before it is confirmed. This hypothetical injury is not sufficient to establish standing. And given that UTIER is aware of the current litigation, its members – PREPA employees – likely are aware as well.[4]

[4] In any case, for unknown creditors, which these potential plaintiffs would be, bankruptcy law only requires general publication notice. *See In re Arch Wireless, Inc.*, 534 F.3d 76, 80 (1st Cir. 2008). UTIER does not argue to the contrary here.

UTIER also cannot demonstrate that the due process rights it allegedly seeks to protect are germane to its interests. As it notes in its objection, its mission is to protect and defend PREPA workers and negotiate collective bargaining agreements on their behalf. *See* UTIER Objection at 3. Taken to its extreme, this mission could encompass any litigation brought on behalf of its members. But securing its members' interests in bankruptcy is not the bread and butter of UTIER's work and is only tangential to its mission. *Contra Brock*, 477 U.S. at 286 (finding litigation that involved interpretation of statute that union lobbied for was germane to the union's interests, particularly because Congress gave the unions a role in the administration of the program created by this statute).

Finally, any alleged due process violation would be very fact-specific and require participation of the injured member. Indeed, the court would need to consider whether the notice was sufficient and whether the injured party had knowledge of the Plan's confirmation. *See, e.g.*, *In re San Miguel Sandoval*, 327 B.R. 493 (B.A.P. 1st Cir. 2005). As such, UTIER lacks standing to raise this constitutional challenge on behalf of its members.

For similar reasons, UTIER's due process challenge is also unripe. A case is only ripe if an injury that has not yet occurred "is sufficiently likely to happen to warrant judicial review." *Project Veritas Action Fund v. Conley*, 270 F. Supp. 3d 337, 342 (1st Cir. 2017) (internal quotation omitted). In determining if a case is ripe for review, courts consider (1) whether an issue is fit for judicial decision and (2) whether the parties will endure hardship if the court declines to hear the case. *Abbott Labs. v. Gardner*, 387 U.S. 136, 148 (1967).

With respect to fitness, the critical question is whether the claim involves uncertain and contingent events that may not occur at all. *Ernest & Young v. Depositors Econ. Prot. Corp.*, 45 F.3d 530, 536 (1st Cir. 1995). As noted above, the alleged due process violation is entirely

hypothetical – it depends on a UTIER member developing a claim against PREPA between now and the Plan confirmation, not being aware of the confirmation proceedings, and being prohibited from filing a proof of claim. This chain of events is wholly speculative and cannot render UTIER's challenge fit for review.

Likewise, UTIER cannot satisfy the hardship prong of the ripeness test. This inquiry "encompasses the question of whether plaintiff is suffering any present injury from a future contemplated event." *McInnis-Misenor v. Me. Med. Ctr.*, 319 F.3d 63, 70 (1st Cir. 2003) (internal citations omitted). Courts decline to find hardship when a plaintiff can later obtain relief from a court should the event in question occur. *Id.* Here, a court could easily remedy any due process violation that may occur by holding that the discharge injunction does not apply to that plaintiff's claim; courts regularly do so when creditors do not receive sufficient notice as required by the Bankruptcy Code. *See, e.g.*, *Arch Wireless*, 534 F.3d at 87 (declining to apply discharge injunction because known creditor did not have actual knowledge of the bar date, confirmation hearing, or the contents of the confirmation plan). As UTIER points out, PROMESA adopts Section 944 of the Bankruptcy Code, which provides that a debtor is not discharged from any debt owed to an entity who had neither notice nor actual knowledge of the case before the debtor's bankruptcy plan is confirmed. 11 U.S.C. § 944(c)(2); 48 U.S.C. § 2161. Courts have found that a failure to provide proper notice impinges on a claimant's due process rights. *See In re San Miguel Sandoval*, 327 B.R. at 506 ("proceedings in bankruptcy cases are subject to the requirements of due process under the Fifth Amendment of the United States Constitution.").

Accordingly, the unlikely due process violations that UTIER describes do not render the Plan or PROMESA unconstitutional. In the event that a creditor fails to receive proper notice, a court can redress any due process concern by preventing discharge of his claims.[5]

III. THE PLAN CAN BE CONFIRMED ONLY IF JUST COMPENSATION CLAIMS ARE PAID IN FULL

Although the current Plan proposes to treat eminent domain and inverse condemnation claims as unimpaired, such that they will receive just compensation, *see* Plan at 36, 47. (Dkt. No. 4345), creditor Isla del Rio takes issue with the Plan's proposal to pay these creditors in cash. *See* Isla del Rio Objection at 10. Specifically, Isla del Rio asserts that the Plan cannot be confirmed unless the Board establishes that it has sufficient cash to pay these creditors in full. *Id.* at 8-10.

Isla del Rio is correct that just compensation claims must be paid in full. Indeed, when this Court previously considered the joint plan of adjustment to restructure the Commonwealth's debt, along with the debt of the Puerto Rican Public Building Authority (PBA) and the Employee Retirement System (ERS), it held that claims for just compensation under the Fifth Amendment could not be impaired or discharged. No. 17-03282, Dkt. No. 19721 at 3. The Board responded by amending the Plan, proposing to pay eminent domain claims in full unless the Court's determination that these claims could not be discharged was overturned on appeal. Following this amendment, the Court confirmed the title III Plan, and the First Circuit affirmed the decision, holding that the Fifth Amendment precludes impairment or discharge of prepetition claims for less than just compensation. *In re The Fin. Oversight & Mgmt. Bd. of P.R.*, 41 F.4th at 41.

[5] UTIER also asserts that the discharge injunction is overly broad because it applies to post-petition obligations. UTIER Objection at 30. Because this objection does not raise a constitutional issue, we do not address it.

Consistent with this precedent, the Court should ensure that just compensation claims will be paid in full before confirming the Plan.

IV. THE COURT NEED NOT ADDRESS THE *INSULAR CASES*

Finally, UTIER objects to the Plan based upon the premise that PROMESA is unconstitutional because it is founded on the *Insular Cases*. UTIER Objection at 33-35. UTIER argues that the *Insular Cases* "reflect outdated theories of imperialism and racial inferiority" and should be overturned. *Id.* at 33. UTIER asserts that PROMESA was passed because of the *Insular Cases*, and therefore, PROMESA should also be repealed, and the Plan should not be confirmed. *Id.* at 33-34.

The United States agrees that aspects of the *Insular Cases'* reasoning and rhetoric, which invoke racist stereotypes, are indefensible and repugnant. But UTIER's criticisms of the *Insular Cases* do not present an identifiable constitutional question, much less provide any reason to hold PROMESA unconstitutional. Congress enacted PROMESA pursuant to its authority under Article IV of the Constitution to address the financial circumstances being faced in the Commonwealth of Puerto Rico. The statute neither relies on the historical distinctions among territories discussed in the *Insular Cases* nor depends on those decisions in any other way. *See* 48 U.S.C. § 2121(b)(2) ("The Congress enacts this Act pursuant to article IV, section 3 of the Constitution of the United States, which provides Congress the power to dispose of and make all needful rules and regulations for territories.") Accordingly, this case presents no occasion to address the *Insular Cases*.

CONCLUSION

For the foregoing reasons, the United States respectfully asks the Court to uphold the constitutionality of PROMESA.

Dated: March 13, 2024

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 13th day of March 2024, I caused a true and correct copy of the foregoing *Memorandum of Law of the United States in Support of the Constitutionality of PROMESA* to be filed with the Clerk of the Court using the CM/ECF system which will generate electronic notification to all CM/ECF participants in these cases.

/s/ Jessica L. Cole
Jessica L. Cole