A FLY IN THE OINTMENT: PROMESA'S DRAFTING ERROR IN SECTION 314(b)(7)

ABSTRACT

When Congress amended the Bankruptcy Code in 1984, Congress precluded Puerto Rico from seeking bankruptcy relief under chapter 9 (municipal bankruptcy). There is no satisfactory explanation for the exclusion because no legislative history exists to offer an explanation. Embroiled in a $123 billion debt crisis[1] *and left without a remedy, Puerto Rico enacted its own municipal bankruptcy law in 2014, in an effort to restructure some of its public debts.*

In Puerto Rico v. Franklin California Tax-Free Trust,[2] *the U.S. Supreme Court conclusively held that § 903 of the Bankruptcy Code preempts Puerto Rico's own municipal bankruptcy law.*[3] *Recognizing that Puerto Rico was truly left "in a no man's land," Congress enacted the Puerto Rico Oversight Management and Economic Stability Act ("PROMESA") in 2016 to assist Puerto Rico in restructuring its debts. PROMESA uniquely established the Financial Oversight and Management Board ("Oversight Board") to provide a method for Puerto Rico to achieve fiscal responsibility. The Oversight Board has the sole discretion to determine whether a plan of adjustment is consistent with an applicable certified Fiscal Plan.*

An internal inconsistency exists in PROMESA despite the apparent dichotomous roles of the Oversight Board and the court. Section 314(b)(7) hinders the efficiency of the bankruptcy system for two reasons. First, it gives the district court a meaningless power by inadvertently permitting the court to determine whether a plan of adjustment is consistent with the applicable Fiscal Plan. Second, it negates the sole discretionary authority of the Oversight Board. To effectuate the fundamental goal of a bankruptcy proceeding, § 314(b)(7) of PROMESA should be removed to resolve the conflict it creates.

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1 *Puerto Rico Debt Crisis: Making Sense of the Debacle*, BLOOMBERG (Aug. 18, 2017), https://www.bloomberg.com/graphics/2017-puerto-rico-debt-crisis/.

2 Puerto Rico v. Franklin Cal. Tax-Free Trust, 136 S. Ct. 1938 (2016).

3 *Id.* at 1940.

INTRODUCTION

The U.S. Supreme Court in *Puerto Rico v. Franklin California Tax-Free Trust*[4] bifurcated the definition of "State" for purposes of the Bankruptcy Code ("Code"). If Puerto Rico were considered a "State" for all purposes, perhaps its fate would have been different today. The Court concluded that, while Puerto Rico is a "State" subject to the preemption provision in § 903 of the Code, Puerto is not a "State" for purposes of who may be a debtor under chapter 9 (municipal bankruptcy).[5] In fact, § 101(52) of the Code specifically excludes Puerto Rico and the District of Columbia from being able to seek federal bankruptcy relief.[6] This raises the question: why? The truth is that Puerto Rico's anomalous treatment in the Code had neither attracted much of Congress's attention[7] nor been questioned until Puerto Rico was actually buried in debt.

No legislative history explains Congress's decision to exclude Puerto Rico from seeking federal bankruptcy relief.[8] However, there are several theories that suggest Congress's rationale for doing so. One such theory is that Congress "goofed" when it amended the Code in 1984.[9] Another theory suggests that Congress may have wanted to protect American investors in the U.S. mainland by preventing Puerto Rico from enacting its own municipal bankruptcy laws that "may or may not treat their nationwide creditors fairly."[10]

Realizing Puerto Rico's anomalous position of not being able to enact its own municipal bankruptcy laws, Congress enacted the Puerto Rico Oversight Management and Stability Act ("PROMESA") and established the Financial Oversight and Management Board ("Oversight Board") to provide the indebted island an avenue of bankruptcy-like relief.[11] In general, the Oversight Board is charged with providing a method to achieve Puerto Rico's fiscal responsibility

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4 Franklin Cal. Tax-Free Trust, 136 S. Ct. 1938.

5 *Id.* at 1946.

6 *See* 11 U.S.C. § 101(52) (2012).

7 Stephen Mihm, *Bankruptcy was Option for Puerto Rico Before Congress Goof*, BLOOMBERG LAW (Dec. 3, 2015), https://www.bloomberg.com/view/articles/2015-12-03/bankruptcy-was-option-for-puerto-rico-before-congress-goof.

8 *Id.* (quoting Kenneth Klee's testimony).

9 *See id.*

10 *See* Mary Williams Walsh, *Puerto Rico Fights for Chapter 9 Bankruptcy in Supreme Court*, N.Y TIMES (Mar. 22, 2016), https://www.nytimes.com/2016/03/23/business/dealbook/puerto-rico-fights-for-chapter-9-bankruptcy-in-supreme-court.html (quoting Matthew McGill, attorney who represented the creditors in Puerto Rico v. Franklin California Tax-Free Trust).

11 Stephen Perez-Nuño, *Congress Passes PROMESA Act for Puerto Rico Debt Crisis*, NBC NEWS (June 29, 2016), https://www.nbcnews.com/news/latino/congress-passes-promesa-act-puerto-rico-debt-crisis-n601291.

and economic growth.[12] The district court for the covered territory is charged with confirming a debt restructuring plan for the treatment of different classes of creditors against Puerto Rico and its instrumentalities ("plan of adjustment" or "plan").[13]

At a macro level, the fundamental purpose of the federal bankruptcy laws is to give debtors a "fresh start" from burdensome debts.[14] At a micro level, the statutory goal of a debt reorganization case under the Code is to get a plan of reorganization[15] confirmed by the court. It can be argued that the statutory goal of a debt adjustment case under PROMESA is to get a plan of adjustment confirmed by a district court, which has the original and exclusive subject matter jurisdiction over all debt adjustment cases.[16]

Section 314(b)(7) of PROMESA ("Confirmation") hinders the efficiency of the bankruptcy system because (1) it gives the court a meaningless power by inadvertently permitting the court to determine whether a plan of adjustment is consistent with the applicable Fiscal Plan; and (2) it negates the sole discretionary authority of the Oversight Board. Among other requirements, § 314(b) provides that the court shall confirm a plan of adjustment if it is consistent with an applicable Fiscal Plan.[17] While this may seem innocuous at first, the duty to approve and certify a Fiscal Plan is solely reserved to the Oversight Board.[18] PROMESA makes it quite convincing that it is the Oversight Board's exclusive responsibility to "certify a plan of adjustment only if it determines, *in its sole discretion*, that [the plan] is consistent with the applicable certified Fiscal Plan."[19] To effectuate the fundamental goal of a bankruptcy proceeding, § 314(b)(7) of PROMESA should be removed from § 314(b) to resolve the conflict created by its inclusion.

This Comment begins by explaining the historical development of American municipal bankruptcy law and providing the background facts necessary to understand what gave rise to the enactment of PROMESA. Additionally, this Comment provides information that offers an insight into the origins of Puerto

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[12] PROMESA, Pub. L. No. 114-187, Title I, § 2(a), 130 Stat. 553 (2016) (codified as amended at 48 U.S.C. § 2121(a) (2016)).

[13] *See* 48 U.S.C. § 2174.

[14] Marrama v. Citizens Bank of Mass., 549 U.S. 365, 381 (2007); *Process – Bankruptcy Basics*, U.S. COURTS, http://www.uscourts.gov/services-forms/bankruptcy/bankruptcy-basics/process-bankruptcy-basics.

[15] This Comment uses "plan of reorganization" and "plan of adjustment" synonymously.

[16] 48 U.S.C. § 2166(a)(1).

[17] *Id.* § 2174(b).

[18] *Id.* § 2141(c).

[19] *Id.* § 2124(j)(3) (emphasis added).

Rico's financial instability and its current economic status. The Analysis Section delineates how PROMESA differs from the Code with respect to the plan confirmation process. This Comment then deconstructs the language of § 314(b)(7) to demonstrate not only the conflict it creates, but its redundancy. Finally, this Comment concludes by offering a way to remove that internal inconsistency to maximize the efficiency of the bankruptcy system.

A. Historical Development of American Municipal Bankruptcy Law

Before the current Bankruptcy Code became effective in 1978, the first federal Bankruptcy Act of 1898 ("Bankruptcy Act") was the law in place.[20] The Bankruptcy Act was Congress's exercise of power to establish a uniform system of bankruptcy laws throughout the United States—a power expressly granted by the U.S. Constitution.[21] Congress's intent to create a uniform system of bankruptcy laws throughout the United States is evidenced by the inclusion of "Territories . . . and the District of Columbia" as "States" for purposes of the Bankruptcy Act,[22] which coincides with the year of United States' annexation of Puerto Rico as a U.S. Territory.[23] But when Congress codified the laws to form the Bankruptcy Code in 1978, it decided to remove the definition of "State" entirely from the definition section.[24] When the Code was amended in 1984, Congress reincorporated the definition of "State" with a kicker—it redefined Puerto Rico and the District of Columbia as "States," but excluded both from being debtors[25] under chapter 9 of the Code.[26]

Municipal bankruptcy is a relatively recent phenomenon in American bankruptcy law.[27] Congress enacted the first municipal bankruptcy legislation in 1934 ("Municipal Bankruptcy Legislation") as a result of the Great

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[20] KENNETH N. KLEE & WHITMAN L. HOLT, BANKRUPTCY AND THE SUPREME COURT: 1801–2014, 201 (1st ed. 2014).

[21] *See* U.S. CONST. art. I, § 8, cl. 4 (granting Congress the power to enact uniform laws on the subject of Bankruptcies throughout the United States); *see also* Franklin Cal. Tax-Free Trust, 136 S. Ct. at 1944.

[22] Bankruptcy Act of 1898, 30 Stat. 544 (1898).

[23] Franklin Cal. Tax-Free Trust, 136 S. Ct. at 1945.

[24] *Id.*

[25] *See* 11 U.S.C. § 101(13) (defining debtor as a "person or municipality concerning which a case under this title has been commenced").

[26] 11 U.S.C. § 101(52) (2012) ("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."); 2 COLLIER ON BANKRUPTCY ¶ 101 (16th ed. 2017); *Municipal Bankruptcy—Preemption—Puerto Rico Passes New Municipal Reorganization Act— Puerto Rico Public Corporation Debt Enforcement and Recovery Act, 2014 P.R. Laws Act No. 71*, 128 HARV. L. REV. 1320, 1321–22 (2015).

[27] 6 COLLIER ON BANKRUPTCY ¶ 900.LH (16th 2018).

Depression,[28] and the 1934 Municipal Bankruptcy Legislation was added to the Bankruptcy Act as Chapter IX.[29] Congress was aware of the Municipal Bankruptcy Legislation's potential interference with the sovereign powers of the states, as guaranteed by the Tenth Amendment to the U.S. Constitution,[30] but nonetheless saw the need to provide a remedy to over 1,000 powerless municipalities that were in default on their bond payments during the Great Depression.[31] Prior to this new legislation, municipalities had been unable to provide remedies to their creditors because the U.S. Constitution forbade the states from impairing obligations of contract.[32] After additional revisions to the existing Municipal Bankruptcy Legislation, the resulting legislation became a permanent part of the Bankruptcy Act in 1946.[33]

Chapter IX of the Bankruptcy Act remained unchanged and unused for 30 years until 1975, when New York City's financial crisis during President Gerald Ford's administration provided the impetus for major changes to the Municipal Bankruptcy Legislation.[34] Chapter IX as it existed was virtually unusable by a large city, such as New York City.[35] One of the requirements for relief under Chapter IX was that 51 percent of creditors had to accept a plan before a petition could even be filed.[36] This was problematic because a major municipality could hardly be expected to even locate 51 percent of its bondholders, due to the sheer number.[37] After rejecting the Ford administration's proposed revision to the legislation,[38] Congress revised Chapter IX for all municipalities throughout the United States.[39] The 1976 revision was part of the bankruptcy law reform process that Congress initiated in 1970, and this process ultimately resulted in the enactment of the U.S. Bankruptcy Code in 1978.[40]

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28 Many rural municipalities were unable to meet their interest and principal obligations on their bonds due to depressed market and low prices for farm products. 6 COLLIER ON BANKRUPTCY ¶ 900.LH.

29 *Id.*

30 *See* Ashton v. Cameron County Water District, 298 U.S. 513 (1936) (holding the Municipal Bankruptcy Legislation unconstitutional as an improper interference with the sovereignty of the states).

31 6 COLLIER ON BANKRUPTCY ¶ 900.LH.

32 U.S. Const. art I, § 10, cl 1; 6 COLLIER ON BANKRUPTCY ¶ 900.LH (16th 2018).

33 6 COLLIER ON BANKRUPTCY ¶ 900.LH.

34 *Id.*

35 *Id.*

36 *Id.*

37 *Id.*

38 The legislation the Ford administration proposed was limited to the adjustment of debts of municipalities with populations of one million or more. 6 COLLIER ON BANKRUPTCY ¶ 900.LH.

39 *Id.*

40 *Id.*

There is no clear reason for why Congress excluded Puerto Rico from seeking relief under chapter 9 of the Code,[41] as there is no trace of legislative history or indication of Congress's intent,[42] except for the plain language of the amended Code. "What explains Congress wanting to put Puerto Rico in this anomalous position of not being able to restructure its debt?"[43] "Why would Congress preclude Puerto Rico from Chapter 9?"[44] These are some of the questions that Justices of the U.S. Supreme Court asked when arguments were presented before the Court for *Puerto Rico v. Franklin California Tax-Free Trust*[45] in March of 2016. As described in the following paragraphs, several theories suggest why Congress barred Puerto Rico from chapter 9 in 1984.

Since the amendments in 1984, many have asked the question of why Congress would want to prevent Puerto Rico from restructuring its debts. This is the question that everybody asks, for which there is no answer.[46] Matthew McGill, the attorney who represented Puerto Rico's creditors in *Puerto Rico v. Franklin California Tax-Free Trust*, offered a theory.[47] Mr. McGill said that the amendment was not that mysterious if one considered Congress's long history of micromanaging Puerto Rico's indebtedness.[48] By 1984, Puerto Rico and the District of Columbia[49] were the two most indebted territories.[50] Congress's encouragement of a widespread purchasing of the tax-exempt Puerto Rican bonds may have led Congress to protect American investors by making it hard for Puerto Rico to renege or write its own municipal bankruptcy laws.[51]

The attorney for the Commonwealth of Puerto Rico, Christopher Landau, offered an alternative explanation to the question. Mr. Landau said that "legal provisions were being misread, and Congress had not really intended to shut

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[41] Congress also excluded District of Columbia from seeking relief under chapter 9 of the Code. *See* 11 U.S.C. § 101(52).

[42] Walsh, *supra* note 10.

[43] *Id.* (quoting Justice Ruth Bader Ginsburg).

[44] *Id.* (quoting Chief Justice John G. Roberts, Jr.).

[45] Puerto Rico v. Franklin Cal. Tax-Free Trust, 136 S. Ct. 1938 (2016).

[46] Walsh, *supra* note 10.

[47] *See id.*

[48] Walsh, *supra* note 10 (citing a 1917 federal law that limited the amount of debt that Puerto Rico could take on).

[49] In 1995, Congress established the District of Columbia Financial Responsibility and Management Assistance Authority ("DC Control Board") and vested the DC Control Board with broad powers to balance Washington's budget. Jon Bouker, *The D.C. Revitalization Act: History, Provisions and Promises*, *in* BUILDING THE BEST CAPITAL CITY IN THE WORLD 81, 81–82 (2008) (*available at* https://www.brookings.edu/wp-content/uploads/2016/07/appendix-1.pdf).

[50] Walsh, *supra* note 10.

[51] *Id.*

Puerto Rico out of bankruptcy."[52] A hypothesis that corroborates Mr. Landau's theory is that Congress had simply made a drafting error when it amended the Code in 1984.[53] The legislators may have excluded Puerto Rico and the District of Columbia from access to federal bankruptcy law in a "bizarre oversight," when they redefined the definition of "State."[54] Unfortunately this radical change in Puerto Rico's status—from once being eligible to seek federal bankruptcy relief to being excluded after the 1984 amendments—stirred no debate or question in Congress until Puerto Rico's debts recently became unsustainable.[55]

1. *Congress Takes Away Puerto Rico's Eligibility to File for Municipal Bankruptcy*

There are two requirements that must be met to commence a bankruptcy case under any operative chapter of the Code.[56] The first is that a debtor must have capacity to file a bankruptcy petition.[57] For example, a legal entity that seeks to reorganize its debt under chapter 11[58] must be validly existing upon the filing of the petition under applicable state law.[59] The second requirement is that a debtor must be eligible to file a petition.[60]

The 1976 revision to the Municipal Bankruptcy Legislation permitted a municipality to file a petition under Chapter IX if it was "generally authorized" by state law to do so.[61] The adoption of the phrase "generally authorized" was the result of a compromise between the House version and the Senate version of the 1976 Act, in which the Senate had proposed a municipality had to be "specifically authorized" by state law to be eligible to file a municipal bankruptcy.[62] The broad language of "generally authorized" left its interpretation open to the courts, as it was not clear how "general" the authorization had to be in order for a municipality to satisfy the statutory

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52 *Id.*
53 Walsh, *supra* note 10.
54 Mihm, *supra* note 7.
55 *Id.*
56 KLEE & HOLT, *supra* note 20, at 196.
57 *Id.*
58 *See* DAVID G. EPSTEIN ET AL., BANKRUPTCY: DEALING WITH FINANCIAL FAILURE FOR INDIVIDUALS AND BUSINESSES 25 (4th ed. 2015) ("Chapter 11 contemplates a comprehensive financial restructuring of the debtor and that the debtor and creditors will negotiate a plan for payment of creditors that is to be approved by the bankruptcy court.").
59 KLEE & HOLT, *supra* note 20, at 196.
60 *Id.*
61 6 COLLIER ON BANKRUPTCY ¶ 900.LH.
62 H.R. Rep. No. 94-938, 94th Cong., 2d Sess. 16–17 (1976) ("Conference Report").

requirement.[63] While many courts construed the language broadly, the bankruptcy court for the Western District of Pennsylvania concluded in 1990 that a state statute did not give sufficient general authorization to file a bankruptcy petition.[64] Following this decision, the 1994 Act amended § 109(c)(2) of the Code ("Who may be a debtor"), by deleting the original language—"generally authorized"—and replacing it with the Senate's language of the 1976 Act—"specifically authorized."[65]

This amendment effectively negated § 109(c) of the Code, which sets out the requirements for whom may be a debtor under chapter 9. Among other statutory requirements, § 109(c) provides that an entity may be a debtor under chapter 9 if and only if the entity is a "municipality" and "is specifically authorized, in its capacity as a municipality or by name, to be a debtor under such chapter by State law, or by a governmental officer or organization empowered by State law to authorize such entity to be a debtor under such chapter . . . ."[66] Because Puerto Rico cannot specifically authorize its municipality to be a debtor under chapter 9, since it is not a "State" for purposes of who may be a debtor under chapter 9, it became ineligible to commence a municipal bankruptcy case under the Code. This then raised a question: Could Puerto Rico enact its own municipal bankruptcy laws?

2. *Puerto Rico Cannot Enact its Own Bankruptcy Laws*

In 1942, the U.S. Supreme Court decided a case[67] that addressed whether a state could enact its own municipal bankruptcy laws, holding that a New Jersey municipal bankruptcy statute was not preempted by the federal bankruptcy laws.[68] The Court's analysis stemmed from the constitutional analysis of who may be a debtor[69] in *United States v. Bekins*.[70] In *Bekins,* a state had authorized—*i.e.*, gave consent to—its municipality to seek bankruptcy relief under the federal

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[63] *See* 6 COLLIER ON BANKRUPTCY ¶ 900.LH.

[64] 6 COLLIER ON BANKRUPTCY ¶ 900.LH; *see In re* Carroll Township Auth., 119 B.R. 61, 63 (Bankr. W.D. Pa. 1990) (holding that that language of the state statute, "to sue, be sued, implead, be impleaded, to complain and/or defend in all courts" and "to do all acts and things necessary to convenient for the promotion of [their businesses] and the general welfare of the [authorities], and to carry out the powers granted to [them] by this act" was inadequate general authorization).

[65] 11 U.S.C. § 109(c)(2); 6 COLLIER ON BANKRUPTCY ¶ 900.LH.

[66] 11 U.S.C. § 109(c)(1)–(2).

[67] Faitoute Iron & Steel Co. v. Ashbury Park, 316 U.S. 502 (1942).

[68] *See* Franklin Cal. Tax-Free Trust, 136 S. Ct. at 1945 (discussing *Faitoute* and its holding that the federal bankruptcy laws did not preempt New Jersey's municipal bankruptcy laws, which required municipalities to seek relief under state law before resorting to the federal bankruptcy law).

[69] 11 U.S.C. § 109(c).

[70] United States v. Bekins, 304 U.S. 27 (1938).

bankruptcy laws before the municipality actually filed a petition.[71] To override the Court's decision in 1942,[72] Congress added a preemption provision, now codified in § 903 of the Code ("Reservation of State power to control municipalities"), that limits the states' powers to enact their own municipal bankruptcy laws.[73] Section 903 of the Code now 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—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 . . . .[74]

To analyze a chapter 9 case, one must determine whether the debtor is eligible to file a municipal bankruptcy[75] before determining whether the debtor is preempted by the Supremacy Clause of the U.S. Constitution[76] from enacting its own municipal bankruptcy laws.[77] When a debtor is ineligible to file a chapter 9 bankruptcy case under § 109(c), then any state law enacted to authorize the debtor to seek bankruptcy relief under the Code will be preempted by the Supremacy Clause of the U.S. Constitution.[78]

Table A. Section 109 and Section 903 of the Bankruptcy Code.

§ 109. Who may be a debtor.	**§ 903. Reservation of State power to control municipalities.**
(c) An entity may be a debtor under chapter 9 of this title if and only if such entity— (1) is a municipality;	This chapter does not limit or impair the power of a State to control, by legislation or governmental powers of such

[71] *See* Franklin Cal. Tax-Free Trust, 136 S. Ct. at 1944 (discussing the outcome of *Bekins* and the Court's constitutional analysis of 11 U.S.C. § 109(c)(2)).

[72] *See* Faitoute Iron & Steel Co., 316 U.S. 502.

[73] *See* Act of July 1, 1946, 60 Stat. 415 (1946); 6 COLLIER ON BANKRUPTCY ¶ 903.LH.

[74] 11 U.S.C. § 903.

[75] *Id*. § 109(c).

[76] U.S. CONST. art. VI, cl. 2.

[77] 11 U.S.C. § 903; *see* Franklin Cal. Tax-Free Trust, 136 S. Ct. at 1944 ("the provision of the Bankruptcy Code defining who may be a debtor under Chapter 9, which [the Court refers to] here as the 'gateway' provision, requires the States to authorize their municipalities to seek relief under Chapter 9 before the municipalities may file a Chapter 9 petition . . .").

[78] U.S. CONST. art. VI, cl. 2; *see, e.g.*, *Municipal Bankruptcy—Preemption—Puerto Rico Passes New Municipal Reorganization Act— Puerto Rico Public Corporation Debt Enforcement and Recovery Act, 2014 P.R. Laws Act No. 71*, 128 HARV. L. REV. 1320, 1323 (2015) (predicting how the Recovery Act was likely to be unconstitutional under the Supremacy Clause).

(2) is specifically authorized, in its capacity as a municipality or by name, to be a debtor under such chapter by State law, or by a governmental officer or organization empowered by State law to authorize such entity to be a debtor under such chapter;	municipality, including expenditures for such exercise, but— (1) a State law prescribing a method of composition of indebtedness of such municipality may not bind any creditor that does not consent to such composition; and
(3) is insolvent;	(2) a judgment entered under such a law may not bind a creditor that does not consent to such composition.
(4) desires to effect a plan to adjust such debts; and	
(5)(A) . . .	

In *Puerto Rico v. Franklin California Tax-Free Trust*,[79] the U.S. Supreme Court held that Puerto Rico is not a "State" for purposes of § 109(c) ("Who may be a debtor"), but that it is a "State" for purposes of § 903 ("Reservation of State power to control municipalities").[80] The Court's conclusion that Puerto Rico is not a "State" for purposes of § 109(c) means that Puerto Rico does not have the power to authorize its municipalities to seek relief under chapter 9 pursuant to § 109(c)(2).[81] Yet the Court concluded that Puerto Rico is "no less a 'State' for purposes of the preemption provision than it was before Congress amended the definition."[82] The bifurcation of the meaning of "State" as applied to different provisions in the Code seems absurd, but the language of the Code is clear.[83] Puerto Rico can neither seek relief under chapter 9, nor can it enact its own municipal bankruptcy laws.

79 Franklin Cal. Tax-Free Trust, 136 S. Ct. 1938.

80 *Id.*.at 1946.

81 *Id.* at 1946.

82 *Id.* at 1947.

83 Justice Thomas delivered the opinion of the Court and reasoned that the plain text of the Bankruptcy Code begins and ends the statutory analysis. *See id.* at 1946 (2016).

Recognizing that Puerto Rico was truly left "in a no man's land,"[84] Congress enacted PROMESA in June of 2016 to assist the government of Puerto Rico and its instrumentalities in managing its public finances.[85] PROMESA established the Oversight Board and delegated sweeping powers to the Oversight Board to manage Puerto Rico's fiscal policies. This bill was not met without opposition by members of the Congress and the public. Many residents of Puerto Rico dubbed the Oversight Board a "Colonial Control Board"[86] and the bill itself a "Colonial Control Bill."[87] Senator Bob Menendez[88] filibustered the bill for four hours in opposition before the Senate approved it.[89] In a speech before the Senate floor, Senator Menendez said:

> Mark my words—if we don't seize this opportunity to address this crisis in a meaningful way, we'll be right back here in a year from now picking up the pieces. So while it's absolutely clear that we need to act and act decisively and expediently to help our fellow citizens in Puerto Rico, just as importantly, we need to get this right.[90]

The general consensus in Congress, however, was that the bill was a necessary compromise to restructure Puerto Rico's outstanding debts.[91]

All of these outcomes are the products of Congress's decision to exclude Puerto Rico from seeking relief under chapter 9 of the Code. While Congress could have amended the Code to allow Puerto Rico the same measure of relief

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[84] Brief for Appellant-Petitioner at 13-14, *Puerto Rico v. Franklin Cal. Tax-Free Trust*, 136 S. Ct. 1938 (2016) (No. 15-233).

[85] 48 U.S.C. §§ 2101-2241.

[86] *But see* Tony Favro, *Troubled US Local Government Divided over Benefits of Fiscal Control Boards*, CITYMAYORS (Dec. 5, 2012), http://www.citymayors.com/finance/us-fiscal-control-boards.html (last visited Jan. 16, 2019) ("Control boards are not meant to be democratic, but efficient. Their focus is on re-establishing long-term fiscal stability, and the wishes of citizens and elected officials for particular services are often ignored.").

[87] *See "A Dark Day for the People of Puerto Rico": U.S. Senate Moves to OK "Colonial Control Board"* (Democracy Now! television broadcast June 29, 2016), https://www.democracynow.org/2016/6/29/a_dark_day_for_the_people (transcript available on Democracy Now! website).

[88] The only Latino Senator to vote against the bill, he condemned the bill saying "PROMESA exacts a price far too high for relief that is far too uncertain." *See* Patricia Guadalupe, *Here's How PROMESA Aims to Tackle Puerto Rico's Debt*, NBC NEWS (June 30. 2016), https://www.nbcnews.com/news/latino/here-s-how-promesa-aims-tackle-puerto-rico-s-debt-n601741.

[89] *See "A Dark Day for the People of Puerto Rico"*, *supra* note 87.

[90] Senator Bob Menendez, Speech in Opposition to H.R. 5278, PROMESA (May 24, 2016) (*available at* https://www.menendez.senate.gov/news-and-events/press/menendez-speaks-in-opposition-to-house-puerto-rico-bill).

[91] *See generally* 114 CONG. REC. H.R.162–91 (June 9, 2016) (Rep. Grijalva: "When measured against a perfect bill, this legislation is inadequate. When measured against the worsening crisis in Puerto Rico, this legislation is vitally necessary.").

available to every other state, Congress failed to do so. Political arguments aside, PROMESA is Puerto Rico's only option.

Although modeled on chapters 9 and 11 of the Code,[92] PROMESA is an entirely separate piece of legislation from the Code, enacted to assist the Government of Puerto Rico, including its instrumentalities, in managing its public finances. PROMESA contains seven "titles," which are somewhat comparable to the various chapters in the Code. Title I ("Establishment and Organization of Oversight Board") establishes the Financial Oversight and Management Board for Puerto Rico.[93] Title II ("Responsibilities of Oversight Board") lays out the process for developing, submitting, approving, and certifying fiscal plans and budgets for Puerto Rico.[94] Title III ("Adjustments of Debts") includes provisions that govern the adjustment or reorganization of debt through a "plan" proposed by the debtor,[95] voted on by creditors, and confirmed by the court.[96] Title IV ("Miscellaneous Provisions") contains miscellaneous provisions, such as rules of construction[97] and the right of Puerto Rico to determine its future political status.[98] Title V ("Puerto Rico Infrastructure Revitalization") creates the position of the "Revitalization Coordinator"[99] to review and permit certain infrastructure projects within Puerto Rico.[100] Title VI ("Creditor Collective Action") provides a mechanism to formalize negotiated agreements between Puerto Rico and its creditors.[101] And finally, Title VII's ("Sense of Congress Regarding Permanent, Pro-growth Fiscal Reforms") sole section states that "any durable solution for Puerto Rico's fiscal and economic crisis should include permanent, pro-growth fiscal reforms that feature, among other things, a free flow of capital between possession of the United States and

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92 D. ANDREW AUSTIN, CONG. RES. SERV., R44532, THE PUERTO RICO OVERSIGHT, MANAGEMENT, AND ECONOMIC STABILITY ACT (PROMESA; H.R. 5278, S. 2328) 15 (2016).

93 48 U.S.C. § 2121(b)(1). *See generally* 48 U.S.C. §§ 2121–2129.

94 *See* 48 U.S.C. § 2141(a). *See generally* 48 U.S.C. §§ 2141–2152.

95 While it is the norm for the debtor to file a plan of adjustment in either chapter 9 or 11 of the Code, in a bankruptcy proceeding under Title III of PROMESA, only the Oversight Board may file a plan of adjustment of the debts of the debtor. *See* 48 U.S.C. § 2172(a).

96 *See* AUSTIN, *supra* note 92, at 15. *See generally* 48 U.S.C. §§ 2161–2177.

97 48 U.S.C. § 2191.

98 48 U.S.C. § 2192 ("Nothing in this Act shall be interpreted to restrict Puerto Rico's right to determine its future political status . . . ."). *See generally* 48 U.S.C. §§ 2191–2200.

99 A person appointed by the Governor of Puerto Rico to review and permit "Critical Projects," as defined in § 501(2) of PROMESA. 48 U.S.C. § 2212.

100 *See generally* 48 U.S.C. §§ 2211–2217.

101 John E. Mudd, *Title VI of PROMESA: Creditor Collective Action*, MUDDLAW (Mar. 9, 2017), https://johnmuddlaw.com/2017/03/09/title-vi-of-promesa-creditor-collective-action/ (last visited Jan. 21, 2018). *See generally* 48 U.S.C. §§ 2231–2232.

the rest of the United States."[102] This Comment focuses primarily on Title III, with some discussion of Titles I and II.

B. Origins of Puerto Rico's Economic Instability and the Birth of PROMESA

No single factor caused Puerto Rico's economic crisis; rather, multiple combined factors led to Puerto Rico's dramatic economic decline in the last decade.[103] Puerto Rico has been experiencing negative economic growth since 2006, largely owing to the eroding tax base due to migration to the U.S. mainland and low population growth.[104] Worsening economic conditions propelled vicious economic cycles in which migration was further accelerated and recovery was impeded.[105] Poor fiscal management and inefficient government spending were also damaging factors; debts now owed to bondholders exceed 100 percent of Puerto Rico's GNP.[106]

In general, the Puerto Rico Office of Management and Budget oversees Puerto Rico's public agencies, but it does not oversee public corporations or municipalities.[107] Puerto Rico has an unusually large number of public corporations[108] that play a prominent role in the economy.[109] Public corporations provide some of the most essential public services, such as banking, public infrastructure, health care, and electricity.[110] Puerto Rico's weakly-regulated public sector is illustrated by the high rates of electricity for paying customers, partially attributable to the Puerto Rican Electric Power Authority's ("PREPA")[111] decades-long practice of giving free electricity to all of Puerto Rico's municipalities, many government-owned enterprises, and even some for-profit businesses.[112]

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[102] 48 U.S.C. § 2241.

[103] Cheryl D. Block, *Federal Policy for Financially-Distressed Subnational Governments: The U.S States and Puerto Rico*, 53 WASH. U. J.L. & POL'Y 215, 222–23 (2017).

[104] Stephen Kim Park & Tim R. Samples, *Puerto Rico's Debt Dilemma and Pathways Toward Sovereign Solvency*, 54 AM. BUS. L.J. 9, 15–16 (2017).

[105] *Id.* at 16.

[106] Block, *supra* note 103, at 219.

[107] AUSTIN, *supra* note 92, at 30.

[108] Block, *supra* note 103, at 224; *see* AUSTIN, *supra* note 92, at 30, 31 ("Puerto Rico's public sector is composed of a Commonwealth government, some 50 public corporations . . . and municipal governments, among other instrumentalities.")

[109] AUSTIN, *supra* note 92, at 30.

[110] *Id.* at 31.

[111] Public corporation that provides electricity to Puerto Rico. *See* Block, *supra* note 103, at 223.

[112] *Id.* at 223–24.

In 2015, the President of Puerto Rico's Government Development Bank ("GDB"), the government's fiscal agent, testified that over the past eight years, outstanding public debt had increased by more than sixty percent while the economy had contracted by more than twenty percent.[113] In fact, bonds issued by public corporations account for over a third of Puerto Rico's public debt.[114] "Historically, Puerto Rico's public corporations have either issued bonds in the capital markets or received financial support from GDB to cover budget deficits and fund capital improvements; however, the fiscal crisis has effectively foreclosed both sources of funding and put public corporations at risk of default."[115]

For years, investors flocked to purchase tax-exempt Puerto Rican bonds.[116] The favorable tax treatment of Puerto Rican bonds is defined by the Jones-Shafroth Act of 1917, which granted U.S. citizenship to the residents of Puerto Rico[117]—and more relevantly—authorized the government of Puerto Rico to issue bonds and exempted all of the issued bonds from taxation by the U.S. government.[118] This extraordinary U.S. tax policy encouraged investors to purchase more and more Puerto Rican bonds and led to excessive governmental borrowing that has "concealed deficits and structural shortcomings."[119] By 2014, all major credit-rating firms downgraded Puerto Rico's bonds to non-investment grade, otherwise known as "junk" status.[120]

Even on the eve of bankruptcy, Puerto Rico continued to issue its junk status bonds, as hedge funds piled into Puerto Rico to purchase its debts at a discount price with high interest rates.[121] Unlike a chapter 7 bankruptcy case, in which the debtor is an individual or a business entity[122] with contending rights against its creditors, the impact of Puerto Rico's debt crisis is far more devastating on

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[113] *Id.* at 224.

[114] Block, *supra* note 103, at 224.

[115] *Municipal Bankruptcy — Preemption — Puerto Rico Passes New Municipal Reorganization Act. — Puerto Rico Public Corporation Debt Enforcement and Recovery Act, 2014 P.R. Laws Act No. 71*, 128 HARV. L. REV. 1320, 1321 (2015).

[116] Mary Williams Walsh, *The Bonds that Broke Puerto Rico*, N.Y TIMES (June 30, 2015), https://www.nytimes.com/2015/07/01/business/dealbook/the-bonds-that-broke-puerto-rico.html.

[117] Jones-Shafroth Act of 1917, Pub. L. No. 64–368, § 5, 39 Stat. 951, 953 (1917).

[118] *See id.* ("[A]ll bonds issued by the government of Puerto Rico . . . shall be exempt from taxation by the Government of the United States . . . or by any State, or by any county, municipality, or other municipal subdivision of any State or Territory of the United States . . . .").

[119] *Accord* Park & Samples, *supra* note 104, at 17.

[120] Block, *supra* note 103, at 219.

[121] Michael Corkery & Mary Williams Walsh, *Message of Puerto Rico Debt Crisis: Easy Bets Sometimes Lose*, N.Y TIMES (May 4, 2017), https://www.nytimes.com/2017/05/04/business/dealbook/puerto-rico-creditors-hedge-funds.html.

[122] *See* 11 U.S.C. §§ 101(41), 109(b).

the debtor—Puerto Rico—because it is the people, collectively, who suffer the weight of the economic burden. Since 2016, Puerto Rico has drastically reduced its public services, benefits and employment, and increased taxes to generate more revenue.[123] Puerto Rico's debt crisis has resulted in closing over 150 schools, laying off public sector workers, proposing to reduce the minimum wage, and forcing the population to migrate to the U.S. mainland.[124]

In March of 2016, a federal district judge held that Puerto Rico is "insolvent and no longer able to pay its debts as they become due."[125] Puerto Rico needed help, but avenues of relief available to Puerto Rico were practically nonexistent. Seeking relief under the Code was out of the question because Congress had excluded Puerto Rico from seeking such relief.[126] Puerto Rico then took matters into its own hands by enacting the Puerto Rico Public Corporation Debt Enforcement and Recovery Act ("Recovery Act").[127]

On the other side of the bankruptcy coin is the creditors' rights against the debtor. When Puerto Rico attempted to pass the Recovery Act to restructure its public debts, many hedge fund creditors sued immediately to prevent the enactment of the law.[128] Even some of "Wall Street's savviest hedge funds" did not expect to be engaged in such a prolonged battle to protect their investments.[129] The problem seems to be that "[m]any of the creditors think they are, or should be, first in line for the money,"[130] thus eluding a solution to Puerto Rico's debt problem. The Recovery Act was soon found to be preempted by the Supremacy Clause of the U.S. Constitution and by § 903 of the Code and therefore struck down by the U.S. Supreme Court.[131] Congress acted quickly to enact PROMESA, giving Puerto Rico a temporary solution at best.

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[123] Natasha Lycia Ora Bannan, *Puerto Rico's Odious Debt: The Economic Crisis of Colonialism*, 19 CUNY L. REV. 287, 288 (2016).

[124] Bannan, *supra* note 123, at 292–93.

[125] AUSTIN, *supra* note 92, at 32.

[126] 11 U.S.C. § 101(52) (2012); 2 COLLIER ON BANKRUPTCY ¶ 101 L.H.

[127] *Municipal Bankruptcy—Preemption—Puerto Rico Passes New Municipal Reorganization Act—Puerto Rico Public Corporation Debt Enforcement and Recovery Act*, 2014 P.R. Laws Act No. 71, 128 HARV. L. REV. 1320, 1322 (2015). The Recovery Act was meant to address the absence of recovery and reorganization relief for Puerto Rico's public corporations. Therefore, Puerto Rico itself was ineligible to seek relief under the Recovery Act. *See* GOV'T DEV. BANK FOR P.R., SUMMARY OF THE PUERTO RICO PUBLIC CORPORATION DEBT ENFORCEMENT AND RECOVERY ACT 2 (July 31, 2014), http://www.gdb-pur.com/documents/SummaryoftheRecoveryAct.pdf.

[128] Bannan, *supra* note 123, at 288.

[129] *See* Corkery & Walsh, *supra* note 121.

[130] Corkery & Walsh, *supra* note 121.

[131] Franklin Cal. Tax-Free Trust, 136 S. Ct. at 1944.

Notwithstanding its unconstitutionality,[132] Puerto Rico's enactment of the Recovery Act was an effort to provide consensual agreements to Puerto Rico's creditors and provide a statutory basis under which to restructure its debts.[133] The purpose of the Recovery Act was to "allow[] public corporations . . . to adjust their debts in the interest of all creditors affected thereby, provide[] procedures for the orderly enforcement and, if necessary, the restructuring of debt . . . , and maximize[] returns to all stakeholders."[134] By way of illustration, the Recovery Act resulted in a consensual and voluntary extension of PREPA's expected principal payment to its creditors, including sixty percent of its bond holders, merely days after the Recovery Act was passed.[135]

I. ANALYSIS

PROMESA is the first statute of its kind enacted to address municipal bankruptcy in a U.S. Territory, as Puerto Rico is the first U.S. Territory to have defaulted. The Bankruptcy Code serves as an excellent benchmark to compare the efficacy of PROMESA's procedures with respect to plan confirmation. When the basic provisions of the 1976 revision were incorporated into the Code, § 901 of the Code ("Applicability of other sections of this title") incorporated provisions of the Code's chapters 3, 5, and 11 into chapter 9 ("Adjustment of debts of a municipality") and made those provisions applicable to municipal debt adjustment cases.[136]

Because of such wholesale incorporation, chapter 9 takes up very little space in the Code.[137] Not surprisingly, PROMESA incorporates more than half of all of the sections in chapter 9 and modifies the remaining unincorporated sections to fit into Title III of PROMESA: Adjustment of Debts.[138] This is not surprising

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132 Even before the U.S. Supreme Court declared the Recovery Act unconstitutional in *Puerto Rico v. Franklin Cal. Tax-Free Trust*, 136 S. Ct. 1938, 1945 (2016), one law review article correctly anticipated the statute would "likely [be] unconstitutional under the Supremacy Clause" of the U.S. Constitution. *See Municipal Bankruptcy — Preemption — Puerto Rico Passes New Municipal Reorganization Act. — Puerto Rico Public Corporation Debt Enforcement and Recovery Act, 2014 P.R. Laws Act No. 71*, 128 HARV. L. REV. 1320, 1323 (2015).

133 *Municipal Bankruptcy — Preemption — Puerto Rico Passes New Municipal Reorganization Act. — Puerto Rico Public Corporation Debt Enforcement and Recovery Act, 2014 P.R. Laws Act No. 71*, 128 HARV. L. REV. 1320, 1321 (2015).

134 *Id.* at 1322 (quoting 2014 P.R. Laws Act No. 71, Statement of Motives, pt. D) (internal numbering omitted).

135 *Id.* at 1323.

136 *See* 6 COLLIER ON BANKRUPTCY ¶ 900.LH. Chapters 1, 3, and 5 of the Code are general provisions that apply to all of the operative chapters, such as chapters 7, 9, and 11. AUSTIN, *supra* note 92, at 15.

137 Chapter 9 contains only twenty sections in its entirety.

138 Among many others, § 301 of PROMESA incorporates §§ 902, 922, 923, 924, 925, 926, 927, 928, 942,

because Congress probably needed a starting point to come up with new legislation, and the Code already spelled out what needed to be done in order for a municipality to file for bankruptcy.

A. Reorganization under the Bankruptcy Code

Chapter 11 is frequently referred to as reorganization bankruptcy.[139] In every chapter 11 case, there must be a plan of reorganization voted into acceptance by the debtor's creditors and confirmed by the bankruptcy court.[140] Under § 1121 of the Code, the debtor has an exclusive period during which it may file a plan of reorganization.[141] The proposed plan must include a classification of claims[142] and must specify how each claim or interest of a particular class will be treated under the plan.[143] Section 1122(a) provides that if a plan places a claim or an interest in a particular class, then such claim or interest must be substantially similar to the other claims or interests of such class. Only creditors whose claims are "impaired" may vote on whether to accept or reject the plan.[144] The Code defines an impaired class as a class of creditors whose legal, equitable, and contractual right to payment is altered in any way under the plan.[145]

Under § 1126(c) of the Code, an entire class of claims is deemed to have accepted a plan if the plan is accepted by creditors who hold at least two-thirds in amount and more than one-half in number of the allowed claims under § 502.[146] An accepted plan that is confirmed by the court binds the debtor and any creditor.[147] Section 1129(a) of the Code sets out a comprehensive list of sixteen requirements that must be satisfied in order for the court to confirm a plan.[148]

944, 945, and 946 of the Code to Title III.

139 *Chapter 11 – Bankruptcy Basis*, U.S. COURTS, http://www.uscourts.gov/services-forms/bankruptcy/bankruptcy-basics/chapter-11-bankruptcy-basics.

140 *Id.*

141 The debtor has 120 days to file a plan after the date of order of relief and 180 days to get the plan accepted after the date of order of relief. 11 U.S.C. §§ 1121(b)–(c).

142 11 U.S.C. § 101(5)(A) ("Claim" means "right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured . . . .").

143 11 U.S.C. § 1123; *accord*. *Chapter 11 – Bankruptcy Basis*, *supra* note 139.

144 *Chapter 11 – Bankruptcy Basis*, *supra* note 139.

145 *See* 11 U.S.C. § 1124(1).

146 Allowance of claims or interests.

147 11 U.S.C. § 1141(a).

148 *See id*. § 1129(a).

Much of the chapter 11 framework is incorporated into the proceedings under Title III ("Adjustment of Debts") of PROMESA. Among others, § 301(a) of PROMESA incorporates §§ 1122, 1126(c), 1129(a)(2), 1129(a)(3), 1129(a)(6), 1129(a)(8), and 1129(a)(10) of the Code. Generally, Title III includes provisions for a plan of adjustment to be proposed by the Oversight Board, voted on by the creditors, and confirmed by the court.[149]

B. Debt Adjustment under PROMESA

The scope of a Title III proceeding is much broader than that of a chapter 9 proceeding under the Code.[150] PROMESA gives the government of Puerto Rico the eligibility[151] to seek bankruptcy-like relief under Title III. The term "Government of Puerto Rico" means the Commonwealth of Puerto Rico, including all of its territorial instrumentalities,[152] designated by the Oversight Board in accordance with § 101 of PROMESA.[153] At its meeting on September 30, 2016,[154] the Oversight Board designated sixty-three entities that would be subject to oversight under PROMESA.[155] Thus any political subdivision and public agency designated by the Oversight Board as a covered entity, such as the Puerto Rican Electric Power Authority ("PREPA"),[156] is considered a territorial instrumentality.

The Oversight Board consists of seven individual voting members selected from a list of individuals submitted by the leaders of the House of Representatives and Senate and appointed by the President of the United States.[157] The Governor serves as an eighth ex officio member of the Oversight

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149 AUSTIN, *supra* note 92, at 15.

150 *General Guidelines to PROMESA Title III*, MCCONNELL VALDÉS LLC (May 5, 2017), http://www.mcvpr.com/newsroom-publications-PROMESA-TitleIII.

151 48 U.S.C. § 2162.

152 *Id*. § 2104(11); *Id*. § 2104(19)(A) ("The term 'territorial instrumentality' means any political subdivision, public agency, instrumentality—including any instrumentality that is also a bank—or public corporation of a territory, and this term should be broadly construed to effectuate the purposes of this Act").

153 48 U.S.C. § 2104(7).

154 The Oversight Board and the Commonwealth of Puerto Rico has held more than 30 meetings with creditor representatives to work toward achieving a consensual financial restructuring from December 2016 through March 2017. Statement of Oversight Board in Connection with PROMESA Title III Petition at 5-6, *In re* Commonwealth of Puerto Rico, No. 17-cv-01567-LTS (D. P.R. May 3, 2017), http://www.prd.uscourts.gov/promesa/sites/promesa/files/documents/1/01-2.pdf.

155 *Id.*

156 PREPA is one of Puerto Rico's principal public corporations that supplies substantially all of the electricity consumed in Puerto Rico and "owns all transmission and distribution facilities and most of the generating facilities that constitute [Puerto Rico]'s electric power system[. . . .]" *Id.*

157 48 U.S.C. § 2121(e)(1). The President selects six members from the lists of recommendations and may select one member in the President's sole discretion. *See* AUSTIN, *supra* note 92, at 7.

Board without voting rights.[158] In general, each appointed member serves a term of three years[159] and serves without compensation.[160] Section 101(e)(2) of PROMESA ("Oversight Board Appointed Members") details the recommendation and selection mechanisms for appointed members.[161] To be eligible for appointment as a member of the Oversight Board, the individual must have "knowledge and expertise in finance, municipal bond markets, management, law, or the organization or operation of business or government . . . ."[162]

PROMESA sets out specific requirements that must be met before the Oversight Board can certify and the court can confirm a plan of adjustment. Section 314(b)(7) provides that the court shall confirm a plan if the plan satisfies all of the seven requirements under that provision. It states, among other things, that the court shall confirm a plan that is certified by the Oversight Board if "the plan is consistent with the applicable Fiscal Plan[163] certified by the Oversight Board under title II."[164] This is an important point because § 314(b)(7) is the only provision under § 314(b) that requires the court to review the Oversight Board's certification determination, contributing to the assertion that § 314(b)(7) creates an internal inconsistency. A distinction must be made between a plan of adjustment and a Fiscal Plan because only the court can confirm a plan while only the Oversight Board can approve a Fiscal Plan. Requiring the court to review whether the plan is consistent with the applicable Fiscal Plan is inherently contradictory.

Each Fiscal Plan contains the phrase "submitted, approved, and certified in accordance with § 201 [("Approval of Fiscal Plans")]"[165] as part of its definition. Section 5(10) of PROMESA defines Fiscal Plan as "a Territory Fiscal Plan or

158 48 U.S.C. § 2121(e)(3).

159 *Id.* § 2121(e)(5)(A).

160 *Id.* § 2121(g). *Compare* 11 U.S.C. § 503(b)(1)(A) ("After notice and a hearing, there shall be allowed administrative expenses . . . including the actual necessary costs and expenses of preserving the estate . . . .") *with* 48 U.S.C. § 2121(g) (2012) ("Members of the Oversight Board shall serve without pay, but may receive reimbursement from the Oversight Board for any reasonable and necessary expenses including by reason of service on the Oversight Board.").

161 For example, 48 U.S.C. § 2121(e)(2)(E) provides that an individual selected from a recommended list is not subject to Senate confirmation, but an individual appointed by the President who is not selected from a recommended list is subject to the advice and consent of the Senate.

162 There are two requirements to be eligible for appointment. The first is discussed in this Comment. The second is that an individual must not be "an officer, elected official, or employee of the territorial government, a candidate for elected office of the territorial government, or a former elected official of the territorial government" prior to appointment. 48 U.S.C. § 2121(f).

163 *See* 48 U.S.C. § 2104(10).

164 *Id.* § 2174(b)(7).

165 *Compare* 48 U.S.C. § 2104(14) *with* 48 U.S.C. § 2104(22).

an Instrumentality Fiscal Plan, as applicable." As suggested by its colloquial meaning, the term "Territory Fiscal Plan" means a fiscal plan for the Government of Puerto Rico.[166] Because there are more than sixty territorial instrumentalities designated by the Oversight Board that are subject to oversight under PROMESA,[167] there may be more than just a single Fiscal Plan.[168]

Section 201 of PROMESA ("Approval of Fiscal Plans") outlines a four-step process in the making of a Fiscal Plan: development, submission, approval, and certification.[169] The Governor must first develop and submit a proposed Fiscal Plan to the Oversight Board by a specified time.[170] If the Oversight Board determines that the Fiscal Plan satisfies all of the requirements under subsection (b) of the same section, then the Oversight Board must approve the proposed Fiscal Plan.[171] Finally, if the Oversight Board has approved the Fiscal Plan, then it must deliver a compliance certification for the approved Fiscal Plan to the Governor and the Legislature.[172]

The Oversight Board has the discretion to require the Governor to develop an Instrumentality Fiscal Plan[173] that is separate from the Territory Fiscal Plan.[174] Alternatively, it may require the Governor to include a covered territorial instrumentality in the Territory Fiscal Plan.[175] As of February 22, 2017, the Oversight Board has received five Instrumentality Fiscal Plans by five of the covered instrumentalities.[176] The Oversight Board has previously certified

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166 48 U.S.C. §§ 2104(14), 2104(22); *see* 48 U.S.C. § 2104(18) ("The term 'territorial government' means the government of a covered territory, including all covered territorial instrumentalities."); *see also* 48 U.S.C. § 2104(8) ("The term 'covered territory' means a territory for which an Oversight Board has been established under section 101.").

167 Statement of Oversight Board in Connection with PROMESA Title III Petition at Exhibit B, *In re* Commonwealth of Puerto Rico, No. 17-cv-01567-LTS (D. P.R. May 3, 2017), http://www.prd.uscourts.gov/promesa/sites/promesa/files/documents/1/01-4.pdf).

168 For purposes of this Comment, Fiscal Plan means Territory Fiscal Plan, unless otherwise noted by the author.

169 *See* 48 U.S.C. § 2141(a).

170 *Id*. § 2141(c)(2).

171 *Id*. § 2141(c)(3)(A).

172 *Id*. § 2141(e)(1). If the Governor fails to submit a Fiscal Plan that satisfies all of the requirements under subsection (b), then the Oversight Board must develop and submit a Fiscal Plan to the Governor and the Legislature. If this is the case, then the Fiscal Plan is deemed approved by the Governor, and the Oversight Board must issue a compliance certification for the Fiscal Plan to the Governor and the Legislature. *See* 48 U.S.C. §§ 2141(d)(2), (e)(2).

173 48 U.S.C. § 2104(14) ("The term 'Instrumentality Fiscal Plan' means a fiscal plan for a covered territorial instrumentality, designated by the Oversight Board in accordance with section 101, submitted, approved, and certified in accordance with section 201.").

174 *Id*. § 2121(d)(1)(E).

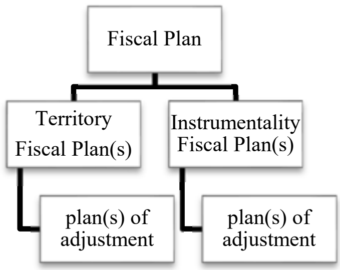
175 *Id*. § 2121(d)(1)(D).

176 These covered instrumentalities are: Government Development Bank of Puerto Rico (GDB), Highway

at least three[177] of the five Instrumentality Fiscal Plans, but is currently re-evaluating revised Fiscal Plans of several covered instrumentalities.[178]

In contrast, a plan of adjustment is one that only the Oversight Board may propose to restructure Puerto Rico's debts, after the Oversight Board has determined, in its sole discretion, that the plan is consistent with the applicable certified Fiscal Plan.[179] Like Fiscal Plans, there may be more than a single plan of adjustment, depending on the number of existing Fiscal Plans certified by the Oversight Board. Therefore, for every plan of adjustment, there must be an applicable Fiscal Plan with which the plan must be consistent.[180]

Diagram A. Relationship between a Fiscal Plan and a plan of adjustment.



Title III of PROMESA ("Adjustment of Debts") is like a hybrid of chapters 9 and 11 of the Bankruptcy Code.[181] Like § 901 of the Code ("Applicability of other sections of this title"), § 301 of PROMESA ("Applicability of other laws; definitions") incorporates nearly all of the Code sections that are made

and Transportation Authority (PRHTA), Public Corporation for the Supervision and Insurance of Puerto Rico Cooperatives (COSSEC), Puerto Rico Aqueduct and Sewer Authority (PRASA), and Puerto Rico Electric Power Authority (PREPA). *See* Press Release, Fin. Oversight & Mgmt. Bd. for P.R., Oversight Bd. Confirms Receipt of Fiscal Plans of Covered Instrumentalities (Feb. 22, 2017), https://oversightboard.pr.gov/documents/.

177 *See* FIN. OVERSIGHT & MGMT. BD. FOR P.R., UNANIMOUS WRITTEN CONSENT APPROVING CERTIFIED FISCAL PLAN, AS REVISED (2017), https://oversightboard.pr.gov/documents/ (GDB's Fiscal Plan); COSSEC, COSSEC FISCAL PLAN REVISED VERSION (AUG. 2017) (2017), https://oversightboard.pr.gov/documents/ (COSSEC's Fiscal Plan); PRASA, FISCAL PLAN AMENDED TO INCORPORATE MODIFICATIONS TO CERTIFIED FISCAL PLAN (2017), https://oversightboard.pr.gov/documents/ (PRASA's Fiscal Plan).

178 *See* Press Release, Fin. Oversight & Mgmt. Bd. for P.R., Oversight Bd. to Review Commonwealth, PREPA and PRASA Fiscal Plans (Jan. 25, 2018), https://oversightboard.pr.gov/documents/ (announcing receipt of the revised Fiscal Plans).

179 *See* 48 U.S.C. § 2172(a); *see also* 48 U.S.C. § 2124(j)(3).

180 48 U.S.C. § 2124(j)(3).

181 For example, § 312 of PROMESA gives the Oversight Board the exclusive authority to file a plan of adjustment of the debtor's debts, whereas § 941 of the Code gives the debtor the exclusive authority to file its plan of adjustment.

applicable to chapter 9. In fact, seventy-seven of the seventy-eight enumerated Code sections that are applicable to § 901 are incorporated into Title III.[182] Moreover, the statutory goal of Title III is arguably similar to that of chapter 11: to get a plan of debt adjustment approved by the court.[183] As is required in § 1129(a) of the Code ("Confirmation of plan"), Title III requires the court to confirm a plan if the following seven requirements are met.[184] Section 314(b) of PROMESA ("Confirmation") provides that the court shall confirm the plan of adjustment if:

> (1) the plan complies with the provisions of title 11, made applicable to a case under this title by section 301 of this Act;
>
> (2) the plan complies with the provisions of this title;
>
> (3) the debtor is not prohibited by law from taking any action necessary to carry out the plan;
>
> (4) except to the extent that the holder of a particular claim has agreed to a different treatment of such claim, the plan provides that on the effective date of the plan each holder of a claim of a kind specified in 507(a)(2) of title 11, United States Code, will receive on account of such claim cash equal to the allowed amount of such claim;
>
> (5) any legislative, regulatory, or electoral approval necessary under applicable law in order to carry out any provision of the plan has been obtained, or such provision is expressly conditioned on such approval;
>
> (6) the plan is feasible and in the best interests of creditors, which shall require the court to consider whether available remedies under the non-bankruptcy laws and constitution of the territory would result in a greater recovery for the creditors than is provided by such plan; and
>
> (7) *the plan is consistent with the applicable Fiscal Plan certified by the Oversight Board under title II.*[185]

While all of the seven conditions must be satisfied before the court can confirm a plan, §§ 314(b)(1) through (b)(6) do not require the court to review the Oversight Board's certification determinations. It is § 314(b)(7) that creates an internal inconsistency by suggesting that the court has the discretion to determine whether a plan of adjustment is consistent with an applicable Fiscal Plan. Section 314(b)(7) looks very much like § 104(j)(3) ("Powers of Oversight

[182] *See* 11 U.S.C. § 901(a) (2012). The only section that was not incorporated to § 301 of PROMESA is § 301 of the Code.

[183] EPSTEIN, *supra* note 58, at 293.

[184] 48 U.S.C. § 2174(b)(1)–(7).

[185] *Id*. § 2174(b)(1)–(7) (emphasis added).

Board”), which states that the Oversight Board “may certify a plan of adjustment only if it determines, *in its sole discretion,* that it is consistent with the applicable certified Fiscal Plan.”[186] The internal conflict created by § 314(b)(7) seems to negate the Oversight Board’s sole discretion. Furthermore, this conflict may lead to objections from holders of claims or interests allowed under § 502 of the Code (“Allowance of claims or interests”)[187] who reject the Oversight Board’s plan of adjustment, which is essentially derived from the applicable Fiscal Plan.

Table B. Section 104 and Section 314 of PROMESA.

§ 104. Powers of Oversight Board.	**§ 314. Confirmation**
(j) Restructuring filings. (3) Condition for plans of adjustment. The Oversight Board may certify a plan of adjustment only if it determines, in its sole discretion, that it is consistent with the applicable certified Fiscal Plan.	(b) Confirmation. The court shall confirm the plan if— (7) the plan is consistent with the applicable Fiscal Plan certified by the Oversight Board under title II [Responsibilities of Oversight Board].

If a holder of a claim or an interest brings a challenge against the Oversight Board, § 106(a) of PROMESA (“Treatment of actions arising from Act”) provides that “any action against the Oversight Board, and any action otherwise arising out of this chapter, in whole or in part, shall be brought in a United States district court for the covered territory . . . .”[188] However, subsection (e) of § 106 declares that no U.S. district court shall have jurisdiction to review challenges to the Oversight Board’s certifications under PROMESA.[189] Although at first reading it looks as though no court may review any of the Oversight Board’s certification determinations, subsection (e) does not preclude higher courts from reviewing challenges to the Oversight Board’s certifications. In fact, subsection (b) provides that any action against the Oversight Board under § 106(a) shall be “subject to review only pursuant to a notice of appeal to the applicable United States Court of Appeals.”[190]

[186] 48 U.S.C. § 2124(j)(3) (emphasis added).
[187] *See* 11 U.S.C. § 1126(a) (incorporated into PROMESA § 301 (codified at 48 U.S.C. § 2161(a) (2012))).
[188] 48 U.S.C. § 2126(a).
[189] *Id.* § 2126(e).
[190] *Id.* § 2126(b).

When a holder of a claim or an interest objects to the Oversight Board's certification of a plan of adjustment, the litigant must appeal the case to a Court of Appeals before the case can be reviewed, since no U.S. district court has jurisdiction to review the Oversight Board's certification determinations.[191] In contrast, a civil proceeding arising under Title III, or arising in or related to cases under Title III, can be litigated in a district court.[192]

It seems ironic that one provision permits a district court to confirm a plan, inter alia, if it is consistent with the applicable Fiscal Plan, while another provision prohibits the district court from reviewing the Oversight Board's certification determinations. The court determining whether a plan of adjustment is consistent with the applicable Fiscal Plan is effectively equivalent to negating one of the Oversight Board's exclusive responsibilities laid out in § 201 ("Approval of Fiscal Plans") and specifically, the Oversight Board's sole discretionary authority under § 104(j)(3) ("Powers of Oversight Board"). Such a conflict does not arise in the Bankruptcy Code.

C. How PROMESA Differs from the Bankruptcy Code

PROMESA differs from the Code in one major aspect: the confirmation process of a plan of adjustment. Since the statutory goal of a chapter 11 case is to get a debt restructuring[193] and repayment plan confirmed by the court,[194] it can be argued that the statutory goal of a Title III case under PROMESA is similar. In the most simplistic terms, under the Code, the debtor submits a confirmable plan to the court and the court confirms it if all of the sixteen requirements listed under § 1129(a) of the Code are met.[195] However, under PROMESA, the Oversight Board must have certified a Fiscal Plan before it can submit a plan of adjustment to the court. There are seven requirements in total that must be satisfied before the court can confirm a plan. Of the seven requirements under § 314(b) of PROMESA, only one section creates an internal inconsistency by requiring the court to review a plan that has already be certified by the Oversight Board: § 314(b)(7).

A side-by-side comparison of § 314(b) with selective sections of § 1129(a) of the Code shows that § 314(b)(7) is the only provision that does not have a

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191 48 U.S.C. § 2126(e).

192 *Id.* § 2166(a)(2) (The district courts shall have . . . original but not exclusive jurisdiction or all civil proceedings arising under this title . . . .").

193 This Comment uses "restructuring" and "adjustment" synonymously.

194 EPSTEIN, *supra* note 58, at 293.

195 *See* 11 U.S.C. § 1129(a).

comparable section in the Code and therefore the only provision that creates an internal inconsistency. With the exception of § 314(b)(7), §§ 314(b)(1) through 314(b)(6) do not impinge on the sole discretionary authority of the Oversight Board. These provisions instruct the court to perform nonconflicting tasks, as similarly stated under § 1129(a) of the Code. For example, as illustrated by *Table C(1)* below, § 314(b)(3) is substantially comparable to § 1129(a)(3) of the Code.[196] Section 314(b)(5) of PROMESA broadens the scope of court and governmental regulatory approvals under § 1129(a)(4) and § 1129(a)(6) of the Code by encompassing "any legislative, regulatory, and electoral approval" necessary to carry out the plan.[197] Additionally, PROMESA's § 314(b)(6) combines the requirements of both the "Feasibility Test"[198] of § 1129(a)(11) and the "Best Interests Test"[199] of § 1129(a)(7) of the Code.

Table C(1). Comparison of Section 314(b) to Selective Sections of 1129(a).[200]

PROMESA **§ 314. Confirmation.**	**Bankruptcy Code** **§ 1129. Confirmation of plan.**
(b) Confirmation. The court shall confirm the plan if— (1) the plan complies with the provisions of title 11, made applicable to a case under this title by section 301 of this Act;	(a) The court shall confirm a plan only if all of the following requirements are met: (1) The plan complies with the applicable provisions of this title.
(2) the plan complies with the provisions of this title;	(2) The proponent of the plan complies with the applicable provisions of this

196 However, unlike the Code, PROMESA does not require the court to determine whether a plan has been proposed in good faith.

197 *Compare* § 314(b)(5) of PROMESA *with* § 1129(a)(4) and § 1129(a)(6) of the Code.

198 Section 1129(a)(11) of the Code is also known as "Feasibility Test" by practitioners. *See* Jamie Harris, *Feasibility: Confirming a Chapter 11 Plan*, DLG (Jan. 15, 2015), http://dlgfirm.com/feasibility-confirming-a-chapter-11-plan/.

199 Section 1129(a)(7) of the Code is also known as "Best Interests Test" by practitioners. *See What is the Best Interests of Creditors Test?* CULHANE MEADOWS PLLC, http://chapter11dallas.com/chapter-11-business-bankruptcy/best-interests-creditors-test/ (last visited Jan. 15, 2019).

200 Some sections of the Code are purposefully arranged in the order of relevance, and not arranged in numerical order, to demonstrate their similarity to the corresponding section in PROMESA.

	title.
(3) the debtor is not prohibited by law from taking any action necessary to carry out the plan;	(3) The plan has been proposed in good faith and not by any means forbidden by law.
(4) except to the extent that the holder of a particular claim has agreed to a different treatment of such claim, the plan provides that on the effective date of the plan each holder of a claim of a kind specified in 507(a)(2) of title 11, United States Code, will receive on account of such claim cash equal to the allowed amount of such claim;	(9) Except to the extent that the holder of a particular claim has agreed to a different treatment of such claim, the plan provides that— (A) with respect to a claim of a kind specified in section 507(a)(2) . . . of this title, on the effective date of the plan, the holder of such claim will receive on account of such claim cash equal to the allowed amount of such claim . . .
(5) any legislative, regulatory, or electoral approval necessary under applicable law in order to carry out any provision of the plan has been obtained, or such provisions is expressly conditioned on such approval;	(4) Any payment made or to be made by the proponent, by the debtor . . . for services or for costs and expenses in or in connection with the case . . . has been approved by, or is subject to the approval of, the court as reasonable. (6) Any governmental regulatory

	commission with jurisdiction, after confirmation of the plan, over the rates of the debtor has approved any rate change provided for in the plan, or such rate change is expressly conditioned on such approval.
(6) the plan is feasible and in the best interests of creditors, which shall require the court to consider whether available remedies under the non-bankruptcy laws and constitution of the territory would result in a greater recovery for the creditors than is provided by such plan; and	(11) Confirmation of the plan is not likely to be followed by the liquidation, or the need for further financial reorganization . . . (7) With respect to each impaired class of claims or interests— (A) each holder of a claim or interest of such class— (i) has accepted the plan; or (ii) will receive or retain under the plan on account of such claim or interest property of a value, as of the effective date of the plan, that is not less than the amount that such holder would so receive or retain if the debtor were liquidated

	under chapter 7 . . . on such date . . .
(7) the plan is consistent with the applicable Fiscal Plan certified by the Oversight Board under title II.	

In this respect, PROMESA's most significant difference from the Code is the establishment and creation of the Oversight Board.[201] While the Code reserves the right to file a plan of reorganization exclusively to the debtor,[202] PROMESA designates that exclusive right to the Oversight Board.[203] And the Oversight Board must certify a proposed plan before the federal district court for the covered territory can confirm it.[204] In sum, the Oversight Board has the sole discretionary power to certify a plan,[205] and neither the Governor of Puerto Rico ("Governor") nor its Legislature[206] can "exercise any control, supervision, oversight, or review over the Oversight Board or its activities . . . ."[207]

Under PROMESA, there are at least two plans that need to be approved by two different authorities before the court can confirm a plan of adjustment for the debts of the debtor: (1) the applicable Fiscal Plan certified by the Oversight Board[208]; and (2) the plan of adjustment confirmed by the court. Whereas a single confirmable plan is required under either of chapter 9 and 11 of the Code for the reorganization of an entity's debts, PROMESA provides that a plan of adjustment must be consistent with the applicable Fiscal Plan in order for the court to confirm it.[209] The problem is that this language seems to negate the Oversight Board's sole discretionary authority, which is evidenced by the language in § 104(j)(3) ("Powers of Oversight Board").[210]

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201 Title I of PROMESA establishes a Financial Oversight and Management Board. 48 U.S.C. §2121(b)(1) ("A Financial Oversight and Management Board is hereby established for Puerto Rico.")

202 11 U.S.C. § 941; 6 COLLIER ON BANKRUPTCY ¶ 941.02.

203 48 U.S.C. § 2172(a). *Contra* 11 U.S.C. § 941 ("The debtor shall file a plan for the adjustment of the debtor's debts.").

204 48 U.S.C. § 2124(j)(2)(B).

205 *Id.* § 2124(j)(3).

206 *Id.* § 2104(15) (meaning "the legislative body responsible for enacting the laws of a covered territory.").

207 *Id.* § 2128(a)(1).

208 *See id.* § 2141.

209 *Id.* § 2174(b)(7).

210 23 U.S.C. § 104(j)(3) ("The Oversight Board may certify a plan of adjustment only if it determines, in its sole discretion, that it is consistent with the applicable certified Fiscal Plan.").

1. *Section 314(b)(7) Gives Meaningless Power to Courts*

To resolve the meaning of a statutory provision, a court begins its analysis with the language of the statute itself.[211] As currently written, § 314(b)(7) necessarily prompts the court to review an applicable Fiscal Plan, which by definition, has already been "submitted, approved, and certified, in accordance with section 201."[212] This is no less than a challenge against the Oversight Board's certification determinations—and if so—the district court has no jurisdiction to review such a challenge.[213] But § 306(a)(1) of PROMESA ("Jurisdiction") provides that the district courts shall have original and exclusive subject matter jurisdiction of all cases under Title III, unless Congress confers exclusive jurisdiction on a court, or a civil proceeding arising under, in, or related to cases under Title III.[214] In the course of reviewing whether a plan of adjustment complies with the requirements set out in § 314(b) ("Confirmation"), the presiding district court would almost certainly run afoul of § 104(j)(3) ("Powers of Oversight Board").

A simple rephrasing of the language by applying logic further reveals that § 314(b)(7) is superfluous. Section 314(b)(7) provides that the court shall confirm the plan if "the plan is consistent with the applicable Fiscal Plan certified by the Oversight Board under title II."[215] In comparison, § 104(j)(3) of PROMESA reads, "[t]he Oversight Board may certify a plan of adjustment only if it determines, in its sole discretion, that it is consistent with the applicable certified Fiscal Plan."[216] Note that the word, "may" should really be read as "shall," because §§ 104(j)(1)–(2) provide that the Oversight Board "must" certify the submission of a plan of adjustment.

Table C(2). Section 104(j) and Section 314(b)(7) of PROMESA.

§ 104. Powers of Oversight Board.	**§ 314. Confirmation.**
(j) Restructuring filings.	(b) Confirmation. The court shall confirm the plan if—
(1) In general.—Subject to paragraph (3),	. . .

[211] *See* Franklin Cal. Tax-Free Trust, 136 S. Ct. at 1946.

[212] *See* 48 U.S.C. §§ 2104(10), (14), (22).

[213] *Id*. § 2126(e).

[214] *See* 48 U.S.C. § 2166(a)(2); *see also* 48 U.S.C. § 2168(a) ("For cases in which the debtor is a territory, the Chief Justice of the United States shall designate a district court judge to sit by designation to conduct the case.").

[215] 48 U.S.C. § 2174(b)(7).

[216] *Id*. § 2124(j)(3).

before taking an action described in paragraph (2) on behalf of a debtor or potential debtor in a case under title III, the Oversight Board must certify the action. (2) Actions described.—The actions referred to in paragraph (1) are— (A) the filing of a petition; or (B) the submission or modification of a plan of adjustment. (3) Condition for plans of adjustment. The Oversight Board may certify a plan of adjustment *only if* it determines, in its sole discretion, that it is consistent with the applicable certified Fiscal Plan (emphasis added).	(7) the plan is consistent with the applicable Fiscal Plan certified by the Oversight Board under title II [Responsibilities of Oversight Board].

As a matter of logic, the phrase "only if" in § 104(j)(3) indicates that words that come after the phrase are a necessary condition to that antecedent. Thus § 104(j)(3) can be translated as follows: If the Oversight Board has certified a plan of adjustment, then it must have determined, in its sole discretion, that the plan is consistent with the applicable certified Fiscal Plan.

Table C(3). Breakdown of Section 104(j)(3) of PROMESA.

Beginning of § 104(j)(3) original:	"The Oversight Board may certify a plan of adjustment . . ."
§§104(j)(1)-(2) translated in relevant part:	Before submitting a plan of adjustment on behalf of the debtor in a case under title III, the Oversight Board must certify the action.

Beginning of § 104(j)(3) rephrased:	The Oversight Board shall certify a plan of adjustment . . .
Rest of § 104(j)(3) original:	". . . only if it determines, in its sole discretion, that it is consistent with the applicable certified Fiscal Plan."
	replace "only if" with "then" to form "if . . . then" sentence structure ⇓
§ 104(j)(3) translated:	If the Oversight Board has certified a plan of adjustment, then it must have determined, in its sole discretion, that the plan is consistent with the applicable certified Fiscal Plan.

Section 314(b)(7) reads, "[t]he court shall confirm [the plan of adjustment] if the plan is consistent with the applicable Fiscal Plan certified by the Oversight Board under [title] II."[217] When § 314(b)(7) is rephrased so that the if-clause precedes the then-clause, then the revised sentence would read as follows: If the plan of adjustment is consistent with the applicable Fiscal Plan, then the court shall confirm the plan.

Table C(4). Breakdown of Section 314(b)(7) of PROMESA.

§ 314(b)(7) original:	"The court shall confirm the plan [of adjustment] if the plan is consistent with the applicable Fiscal Plan certified by the Oversight Board under title II."
Rephrased to "if . . . then" sentence structure	⇓ If the plan of adjustment is consistent with the applicable Fiscal Plan certified by the Oversight Board under title II, then the court shall confirm the plan.

217 48 U.S.C. § 2174(b)(7).

PROMESA gives the Oversight Board the sole discretion to determine whether a plan of adjustment is consistent with the applicable Fiscal Plan.[218] By definition, no other entity can make this determination. The if-clause of § 314(b)(7) can be translated as follows: "if the plan of adjustment [determined by the Oversight Board, in its sole discretion] is consistent with the applicable Fiscal Plan certified by the Oversight Board under title II . . ." then the court shall confirm the plan. Section 314(b)(7)'s current language is confusing because it seems to suggest that the court shall determine whether the plan of adjustment is consistent with the applicable Fiscal Plan, when in fact, only the Oversight Board has the authority to make this determination.

When a certified plan of adjustment exists in the first place, it means that the plan is already consistent with the applicable Fiscal Plan because by virtue of § 104(j)(3) ("Powers of Oversight Board"), the Oversight Board has already determined that it is so. If § 314(b)(7) were amended to improve clarity, it would read as follows: The court shall confirm the plan of adjustment. Period. This amended language is essentially the preamble to § 314(b) that precedes the seven requirements that must be satisfied before the court can confirm a plan of adjustment.[219] Consequently, § 314(b)(7) is superfluous and serves no unique function in PROMESA.

Table C(5). Application of PROMESA's Section 104(j)(3) to Section 314(b)(7).

Simplification	**§ 104(j)(3) translated:**	**§ 314(b)(7) rephrased:**
If A, then B.	If the Oversight Board has certified a plan of adjustment, then it must have determined, in its sole discretion, that the plan is consistent with the applicable certified Fiscal Plan. ⇓	If the plan of adjustment is consistent with the applicable Fiscal Plan under title II, then the court shall confirm the plan. ⇓
If A, then B. If B, then C.	If a plan of adjustment exists, then it is consistent with the applicable Fiscal Plan. ⇒	If a plan of adjustment exists, then it is consistent with the applicable Fiscal Plan. If the plan of adjustment is consistent with the applicable Fiscal

[218] *See* 48 U.S.C. § 2124(j)(3).
[219] *See id.* § 2174(b).

	Plan, then the court shall confirm the plan.
	⇓
If A, then C.	If a plan of adjustment exists, then the court shall confirm the plan.
A.	⇓
Therefore C.	The court shall confirm the plan of adjustment.

One of the three most important tools federal courts use to interpret statutes is text.[220] The U.S. Supreme Court follows as many as 187 canons of construction to interpret statutes.[221] In a famous law review article, the late Columbia Law Professor Karl Llewellyn has suggested that "there are two opposing canons on almost every point,"[222] therefore canons can be used readily to cancel each other out.[223] One canon of construction that may be invoked against this author's textual deconstruction of § 314(b)(7) is the rule against surplusage. This rule stands for the proposition that one section of a statute should not be construed in a manner that renders another section superfluous.[224] However, the U.S. Supreme Court's preference for avoiding surplusage is not absolute.[225] Words must be read "in their context and with a view to their place in the overall statutory scheme."[226]

In the context of PROMESA, it is quite clear that Congress conferred upon the Oversight Board a broad range of exclusive powers and responsibilities, including the debtor's exclusive right to file a plan of adjustment, normally reserved to the debtor under chapter 9 of the Code.[227] The phrase, "sole discretion," describing the Oversight Board's scope of power, appears twenty

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220 The other two are purpose and legislative history. SAMUEL ESTREICHER & DAVID L. NOLL, LEGISLATION AND THE REGULATORY STATE 91 (2015).

221 William N. Eskridge, Jr., *Book Review: The New Textualism and Normative Canons, Reading Law: The Interpretation of Legal Texts, by Antonin Scalia and Bryan A. Garner*, 113 COLUM. L. REV. 531, 541 (2013).

222 *Id.* (quoting Karl N. Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons about How States are to be Construed*, 3 VAND. L. REV. 395, 401 (1950)).

223 Anita S. Krishnakumar, *Dueling Canons*, 65 DUKE L.J. 909, 912 (2016).

224 *Id.* at 923 n.51.

225 *See* Lamie v. U.S. Trustee, 540 U.S. 526, 536 (2004) (citing Chickasaw Nation v. United States, 534 U.S. 84 (2001)); *see also* Marx v. Gen. Revenue Corp., 568 U.S. 371, 384 (2013) ("The canon against surplusage is not an absolute rule")).

226 King v. Burwell, 135 S. Ct. 2480, 2489 (2015) (quoting FDA v. Brown & Williamson, 592 U.S. 120 (2000)).

227 *See* 11 U.S.C. § 941 ("The debtor shall file a plan for the adjustment of the debtor's debts.").

five times throughout PROMESA.[228] As elucidated by the simple logical restructuring of the sentences in § 104(j)(3) ("Powers of Oversight Board") and § 314(b)(7) ("Confirmation"), the rest of PROMESA's relevant provisions strongly support the inference that Congress did not intend to give the court authority to review whether a plan of adjustment is consistent with an applicable Fiscal Plan.

2. *Section 314(b)(7) Negates Oversight Board's Sole Discretionary Authority*

Title II of PROMESA ("Responsibilities of Oversight Board") provides for the Oversight Board's broad range of responsibilities concerning the approval of Fiscal Plans. A "Fiscal Plan,"[229] as used throughout PROMESA, is either a Territory Fiscal Plan[230] or an Instrumentality Fiscal Plan.[231] A requirement that is common to both definitions is that a Fiscal Plan must be "submitted, approved, and certified in accordance with section 201."[232] This is important because one of the requirements that must be satisfied before a court can confirm a plan of adjustment is that the plan must be consistent with the applicable Fiscal Plan certified by the Oversight Board under Title II.[233]

The certification process is almost entirely the Oversight Board's responsibility. After the Oversight Board delivers a notice of schedule to the Governor, the Governor must develop and submit a proposed Fiscal Plan to the Oversight Board.[234] As an ex officio member of the Oversight Board without any voting rights,[235] the Governor plays a subordinate role in supporting the Oversight Board's fulfillment of its responsibilities.[236] The Oversight Board

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[228] The author has counted the number of times the phrase appears in PROMESA.

[229] 48 U.S.C. § 2104(10).

[230] 48 U.S.C. § 2104(22) (meaning a fiscal plan for a territorial government, which are Puerto Rico, Guam, American Samoa, the Commonwealth of the Northern Mariana Islands, or the U.S. Virgin Islands, as defined in § 5(20)).

[231] 48 U.S.C. § 2104(14) ("The term 'Instrumentality Fiscal Plan' means a fiscal plan for a covered territorial instrumentality . . . ." Territorial instrumentality means "any political subdivision, public agency, instrumentality—including any instrumentality that is also a bank—or public corporation of a territory . . . ." as defined in PROMESA § 5(19)(A) (codified as amended at 48 U.S.C. § 2104(19)(A) (2012)).

[232] *See* 48 U.S.C. §§ 2104(10), (14), (22).

[233] *Id.* § 2174(b)(7).

[234] *Id.* § 2141(c)(2). The flipside of this process is the Oversight Board's development and submission of a fiscal plan to the Governor and the Legislature, if the Governor fails to submit a fiscal plan to the Oversight Board. In this scenario, the proposed fiscal plan is deemed approved by the Governor. *See* 48 U.S.C. §§ 2141(d)(2), (e)(2).

[235] 48 U.S.C. § 2121(e)(3).

[236] *See id.* § 2141(c)(2) ("The Governor shall submit to the Oversight Board any proposed Fiscal Plan required by the Oversight Board . . . .").

then reviews any proposed Fiscal Plan against the list of fourteen requirements provided in § 201(b) ("Requirements for Approval of Fiscal Plans") and approves the Fiscal Plan if it determines, in its sole discretion, that all of the requirements are satisfied.[237] A proposed Fiscal Plan must satisfy all of the following requirements:

> (A) provide for estimates of revenues and expenditures in conformance with agreed accounting standards and be based on–
>
> > (i) applicable laws; or
> >
> > (ii) specific bills that require enactment in order to reasonably achieve the projections of the Fiscal Plan;
>
> (B) ensure the funding of essential public services;
>
> (C) provide adequate funding for public pension systems;
>
> (D) provide for the elimination of structural deficits;
>
> (E) for fiscal years covered by a Fiscal Plan in which a stay under titles III or IV is not effective, provide for a debt burden that is sustainable;
>
> (F) improve fiscal governance, accountability, and internal controls;
>
> (G) enable the achievement of fiscal targets;
>
> (H) create independent forecasts of revenue for the period covered by the Fiscal Plan;
>
> (I) include a debt sustainability analysis;
>
> (J) provide for capital expenditures and investments necessary to promote economic growth;
>
> (K) adopt appropriate recommendations submitted by the Oversight Board under section 205(a);
>
> (L) include such additional information as the Oversight Board deems necessary;
>
> (M) ensure that assets, funds, or resources of a territorial instrumentality are not loaned to, transferred to, or otherwise used for the benefit of a covered territory or another covered territorial instrumentality of a covered territory, unless permitted by the constitution of the territory, an approved plan of adjustment under title III, or a Qualifying Modification approved under title VI; and

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237 48 U.S.C. § 2141(c)(3).

> (N) respect the relative lawful priorities or lawful liens, as may be applicable, in the constitution, other laws, or agreements of a covered territory or covered territorial instrumentality in effect prior to the date of enactment of this Act [June 30, 2016].[238]

If the Oversight Board approves the Governor's proposed Fiscal Plan, then it must deliver a compliance certification to the Governor and the Legislature.[239]

Once the Oversight Board certifies a Fiscal Plan, it can then file a plan of adjustment[240] that is consistent with the applicable certified Fiscal Plan.[241] Even before the Oversight Board can submit a plan of adjustment, it must certify the act of submission itself[242] as provided in § 206 ("Oversight Board duties related to restructuring").[243] PROMESA requires the Oversight Board to perform one certification after another and manifests Congress's intent to give the Oversight Board the ultimate decision-making power.[244]

Against this backdrop, § 314(b)(7) seems like a drafting error that inadvertently negates the Oversight Board's sole discretionary authority. Suppose a court finds a particular plan of adjustment inconsistent with an applicable certified Fiscal Plan and thereby chooses not to confirm the plan. What does this mean? Has the court run afoul of § 104(j)(3) ("Powers of Oversight Board") by encroaching on the Oversight Board's sole discretionary power to certify a plan of adjustment?

Fourteen requirements must be satisfied before the Oversight Board can approve and certify a proposed Fiscal Plan,[245] and PROMESA delegates the Oversight Board the sole authority to review a proposed Fiscal Plan.[246] Almost[247] every single requirement under § 201(b) ("Requirements for

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238 48 U.S.C. § 2141(b).

239 *Id.* § 2141(e)(1).

240 *Id.* § 2172(a).

241 *Id.* § 2124(j)(3).

242 *See id.* § 2124(j)(1)–(2).

243 Oversight Board duties related to restructuring. Section 206(a) of PROMESA (codified as amended at 48 U.S.C. § 2146(a)) sets out the requirements for restructuring certification.

244 *See* 48 U.S.C. § 2146(b) (A vote of no fewer than five members of the Oversight Board is required to issue a restructuring certification.).

245 *Id.*

246 *See* 48 U.S.C. § 2141(c)(3).

247 This author qualifies the requirements as "almost" all finance-related because reasonable persons could disagree that § 201(b)(1)(K) (requiring that the Fiscal Plan adopt appropriate recommendations submitted by the Oversight Board under § 205(a)); 201(b)(1)(L) (requiring that the Fiscal Plan include such additional information as the Oversight Board deems necessary); and § 201(b)(1)(N) (requiring that the Fiscal Plan respect the relative lawful priorities or lawful liens in effect prior to the date of PROMESA's enactment) are arguably not finance-related.

Approval of Fiscal Plans") requires the performance of in-depth financial analyses to ensure that a Fiscal Plan will "provide a method to achieve fiscal responsibility and access to the capital markets . . . ."[248] That an individual must have "knowledge and expertise in finance . . . ."[249] to be eligible for appointment as an Oversight Board member—corroborates the fact that approving and certifying a Fiscal Plan requires extensive knowledge in finance. When the Oversight Board decides that a proposed Fiscal Plan is worthy of approval, at that point the Oversight Board has already completed its analyses and determined that each requirement has been met.

If the court is to ascertain whether a plan satisfies each requirement, the court must necessarily engage in a reviewing process. For example, § 314(b)(6) requires that the plan of adjustment must be "feasible and in the best interests of creditors, which shall require the court to consider whether available remedies under the non-bankruptcy laws and constitution of the territory would result in a greater recovery for the creditors than is provided by such plan . . . ." The court *has* to review at least two things: (1) whether the plan is feasible; and (2) whether the plan is in the best interests of creditors. By the same reasoning, § 314(b)(7) permits the court to determine whether the plan is consistent with the applicable Fiscal Plan certified by the Oversight Board, when in fact, district courts are prohibited from reviewing the Oversight Board's certification determinations.

D. Development of Fiscal Plans Since PROMESA's Passage

After Congress voted to pass PROMESA, then-President Barack Obama appointed the seven members of the Oversight Board on August 31, 2016.[250] Former Governor Alejandro García Padilla's initial Fiscal Plan was rejected by the Oversight Board for lack of debt sustainability analyses and returned to the Governor for revision with a deadline of December 15, 2016.[251] In March 2017, the Oversight Board approved the revised Fiscal Plan proposed by the succeeding Governor Ricardo Rosselló.[252] By this time, members of the Oversight Board had unanimously approved and certified the Oversight Board's voluntary petition under Title III before the U.S. District Court for the District

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248 48 U.S.C. § 2141(b)(1).

249 *Id.* § 2121(f).

250 CTR. FOR PUERTO RICAN STUDIES, P.R. IN CRISIS TIMELINE 9 (2017), https://centropr.hunter.cuny.edu/sites/default/files/PDF_Publications/Puerto-Rico-Crisis-Timeline-2017.pdf.

251 Letter from José B. Carrión III, Chairman & Member, Oversight Bd., to García Padilla, Governor of P.R. (Nov. 23, 2016) (*available at* https://oversightboard.pr.gov/documents/); *see also* CTR. FOR PUERTO RICAN STUDIES, *supra* note 250, at 10.

252 *Id.*

of Puerto Rico, on behalf of Puerto Rico.[253] United States Chief Justice John Roberts appointed U.S. District Judge Laura Taylor Swain of the Southern District of New York to oversee the Title III case.[254] The Oversight Board has since certified several Title III filings by Puerto Rico's covered instrumentalities.[255]

After Hurricane Maria swooped through the Caribbean island in September of 2017, knocking out the island's entire power grid,[256] Puerto Rico incurred as much as $95 billion of damages in additional debt,[257] on top of its $123 billion debt.[258] The devastating storm has exacerbated Puerto Rico's already-crippled economy and further obscured its road to economic recovery.[259] PREPA faces millions of additional dollars in debt, on top of its more than $ 11 billion of total liabilities in fiscal year 2017.[260] This is a serious liquidity problem not just for PREPA but for Puerto Rico, as PREPA is a key part of Puerto Rico's debt reconstruction.[261]

Puerto Rico's certified Fiscal Plan—which was premised on no federal funding—was no longer workable in the face of the new challenges. In the immediate days following the catastrophic storm, the Oversight Board authorized the Governor to re-allocate up to $1 billion of the Government's

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253 *See* Press Release, Financial Oversight and Management Board for Puerto Rico, Oversight Board Certifies Title III Filings (May 3, 2017) (*available at* https://oversightboard.pr.gov/documents/); *see* CTR. FOR PUERTO RICAN STUDIES, *supra* note 250, at 13.

254 CTR. FOR PUERTO RICAN STUDIES, *supra* note 250, at 13; *accord General Guidelines to PROMESA Title III*, MCCONNELL VALDÉS LLC (May 5, 2017), http://www.mcvpr.com/newsroom-publications-PROMESA-TitleIII.

255 *See generally* FIN. OVERSIGHT & MGMT. BOARD. FOR P.R., https://oversightboard.pr.gov/documents/ (last visited Jan. 16, 2019) (listing documents of the Oversight Board's unanimous written consents to Title III filings by covered instrumentalities, including PREPA and PRHTA).

256 *See* Steven Mufson, *Hurricane Maria has Dealt a Heavy Blow to Puerto Rico's Bankrupt Utility and Fragile Electric Grid*, WASH. POST (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=.f2f60aef92c2.

257 Michelle Kaske, *Puerto Rico to Redraw Plan for Ending Debt Crisis Due to Storm*, BLOOMBERG MARKETS (Oct. 31, 2017), https://www.bloomberg.com/news/articles/2017-10-31/puerto-rico-to-redraw-plan-for-ending-debt-crisis-due-to-storm; *see* Yalda Hakim, *Puerto Rico's Hard Road to Recovery After Hurricane Maria*, BBC NEWS (Nov.10 2017), http://www.bbc.com/news/world-us-canada-41929287 ("This is the largest [Federal Emergency Management Agency] response in the Caribbean, the most catastrophic event in Puerto Rico and probably in the U.S.").

258 *See Puerto Rico Debt Crisis: Making Sense of the Debacle*, BLOOMBERG (Aug. 18, 2017), https://www.bloomberg.com/graphics/2017-puerto-rico-debt-crisis/.

259 Kaske, *supra* note 257.

260 Alvin Baez, *Puerto Rico Unveils Revised Fiscal Plan*, CNBC (Jan. 25, 2018), https://www.cnbc.com/2018/01/25/puerto-rico-unveils-revised-fiscal-plan-no-debt-service-payments-for-the-next-5-years.html.

261 *See* Mufson, *supra* note 256.

Territory Budget[262] to respond to the damages caused by Hurricane Maria[263] and urged Congress to provide the maximum amount of federal assistance.[264] Creditors were expected to concede to even steeper cut-backs on their debt repayments than previously anticipated.[265] On January 25, 2018, Governor Rosselló submitted a revised Fiscal Plan for the Commonwealth to the Oversight Board.[266] After a series of revisions, the Oversight Board certified the latest revised Fiscal Plan for the Commonwealth of Puerto Rico on October 23, 2018.[267] The Oversight Board has also certified several revised Instrumentality Fiscal Plans, including the Fiscal Plan for Puerto Rico Sales Tax Financing Corporation ("COFINA") and the Fiscal Plan for PREPA.[268] COFINA is the only instrumentality to have its plan of adjustment certified by the Oversight Board, and a confirmation hearing is scheduled to be heard at the District Court for the District of Puerto Rico on January 16, 2019.[269]

CONCLUSION

While a Fiscal Plan draws the big picture for a long-term fiscal and economic growth of a target entity, a plan of adjustment is narrower in focus as it provides for the treatment of various classes of creditors' claims or interests against the entity. Under PROMESA, only the Oversight Board may file a plan of adjustment on the debtor's behalf.[270] It is the Oversight Board's exclusive responsibility to evaluate whether a proposed Fiscal Plan satisfies all of the fourteen requirements set out in § 201(b) ("Requirements for Approval of Fiscal Plans"). Without a certified Fiscal Plan in place, no plan of adjustment can exist.

The road to certifying a Fiscal Plan is complex and requires expertise in finance and debt analyses. There is more than a single Fiscal Plan and consequently more than a single plan of adjustment that must be consistent with an applicable Fiscal Plan. An unsatisfactory Fiscal Plan is sent back to the

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262 48 U.S.C. § 2104(21) ("The term 'Territory Budget' means a budget for a territorial government submitted, approved, and certified in accordance with section 202.").

263 Letter from Oversight Board, to Ricardo Rosselló, Governor of P.R. (Sept. 21, 2017) (*available at* https://oversightboard.pr.gov/documents/).

264 *Id.*

265 *See* Kaske, *supra* note 257.

266 Baez, *supra* note 260. The revised Fiscal Plan called for zero debt service payments to its creditors over the next five years.

267 Letter from Oversight Board, to Ricardo Rosselló, Governor of P.R. (Oct. 24, 2018).

268 *Id.*; FIN. OVERSIGHT & MGMT. BOARD FOR P.R., UNANIMOUS WRITTEN CONSENT CERTIFYING COFINA'S FISCAL PLAN (2018) (*available at* https://oversightboard.pr.gov/documents/).

269 *Commonwealth of Puerto Rico (17-03283)*, PRIME CLERK, https://cases.primeclerk.com/puertorico/ (last visited Jan. 16, 2019).

270 48 U.S.C. § 2172(a).

Governor with a notice of violation that includes the Oversight Board's recommendations for revisions to a proposed Fiscal Plan.[271] Unexpected factors, such as the catastrophic Hurricane Maria and the inadvertent drafting error introduced by § 314(b)(7), delay the certification process—and ultimately hinder the debtor's efforts toward getting a plan confirmed. Because § 314(b)(7) gives courts meaningless power and negates the Oversight Board's sole discretion as provided in PROMESA, it should be removed from § 314(b) to maximize the efficiency of the bankruptcy system.

The Oversight Board was not designed to be in place forever. PROMESA provides that the Oversight Board shall terminate if the Oversight Board certifies that the applicable territorial government has adequate means to sustain its markets and budgets for at least four consecutive fiscal years.[272] The Oversight Board exists for the purpose of providing a method for Puerto Rico to achieve fiscal responsibility and access to the capital markets.[273] In PROMESA, Congress effectuated its intent to delegate broad powers to the Oversight Board with respect to Puerto Rico's fiscal policies. If the court steps in to review whether a plan of adjustment is consistent with the applicable Fiscal Plan, it would be a direct challenge against the Oversight Board's sole discretion granted to it pursuant to § 104(j)(3). While any challenges against the Oversight Board's certifications must be brought in the district court for the covered territory,[274] it is troubling to imagine that a district court would bring an action against the Oversight Board in its own court.[275] Confusion over this internal inconsistency will almost certainly delay Puerto Rico's debt adjustment process.

CHRISTINE J. JOH[*]

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[271] *See* 48 U.S.C. § 2141(c)(3).

[272] *See id.* § 2149.

[273] *Id.* § 2121(a).

[274] *Id.* § 2126(a).

[275] District courts have the original and exclusive subject matter jurisdiction of all cases under Title III. *See* 48 U.S.C. § 2166(a)(1).

[*] Notes and Comments Editor, *Emory Bankruptcy Developments Journal*; JD/MBA Candidate, Emory University School of Law, Goizueta Business School (2019); B.A., *summa cum laude*, Albright College (2011). First and foremost, I thank God for his grace, and to God I give all glory. Next, I want to thank Professor Sue Payne for her undivided attention and valuable guidance throughout the entire writing process, and Elizabeth Hartsell for her helpful insights. I also want to extend my gratitude to all of the staff members and editors of EBDJ. Last, but not least, I want to give special thanks to my family and friends for their unconditional support.