2023-2100

United States Court of Appeals for the Federal Circuit

JOHNATHAN H. DINH, DWIGHT D. JERECZEK, SANDY CHUAN-DINH, DEBORAH JERECZEK, STAN ELLIOTT, RYAN TRAN, THANH NGA TRAN, WALTER NAHM, LAUREN NAHM, PAMELA PAYSON, individually and on behalf of all others similarly situated,

Plaintiffs-Appellants,

– v. –

UNITED STATES,

Defendant-Appellee.

On Appeal from the United States Court of Federal Claims in No. 1:22-cv-00725-EGB, Honorable Eric G. Bruggink, Senior Judge

CORRECTED BRIEF FOR PLAINTIFFS-APPELLANTS

ROGER J. MARZULLA
NANCIE G. MARZULLA
MARZULLA LAW, LLC
1150 Connecticut Avenue, NW, Suite 1050
Washington, DC 20036
(202) 822-6760
roger@marzulla.com
nancie@marzulla.com

Counsel for Plaintiffs-Appellants

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COUNSEL PRESS (800) 4-APPEAL • (323019)

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

CERTIFICATE OF INTEREST

Case Number 2023-2100

Short Case Caption Dinh v. US

Filing Party/Entity Dinh, et al.

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Date: 09/26/2023

Signature: /s/ Roger J. Marzulla

Name: Roger J. Marzulla

1. Represented Entities. Fed. Cir. R. 47.4(a)(1).	**2. Real Party in Interest.** Fed. Cir. R. 47.4(a)(2).	**3. Parent Corporations and Stockholders.** Fed. Cir. R. 47.4(a)(3).
Provide the full names of all entities represented by undersigned counsel in this case.	Provide the full names of all real parties in interest for the entities. Do not list the real parties if they are the same as the entities. ☑ None/Not Applicable	Provide the full names of all parent corporations for the entities and all publicly held companies that own 10% or more stock in the entities. ☑ None/Not Applicable
Johnathan H. Dinh		
Dwight D. Jereczek		
Sandy Chuan-Dinh		
Deborah Jereczek		
Stan Elliott		
Ryan Tran		
Thanh Nga Tran		
Walter Nahm		
Lauren Nahm		
Pamela Payson		

☐ Additional pages attached

4. Legal Representatives. List all law firms, partners, and associates that (a) appeared for the entities in the originating court or agency or (b) are expected to appear in this court for the entities. Do not include those who have already entered an appearance in this court. Fed. Cir. R. 47.4(a)(4).

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Gregory H. Bevel, Esq.	Rochelle McCullough, LLP	
Rafael Gonzalez, Esq.	Godreau & Gonzalez Law, LLC	

5. Related Cases. Other than the originating case(s) for this case, are there related or prior cases that meet the criteria under Fed. Cir. R. 47.5(a)?

☐ Yes (file separate notice; see below) ☑ No ☐ N/A (amicus/movant)

If yes, concurrently file a separate Notice of Related Case Information that complies with Fed. Cir. R. 47.5(b). **Please do not duplicate information.** This separate Notice must only be filed with the first Certificate of Interest or, subsequently, if information changes during the pendency of the appeal. Fed. Cir. R. 47.5(b).

6. Organizational Victims and Bankruptcy Cases. Provide any information required under Fed. R. App. P. 26.1(b) (organizational victims in criminal cases) and 26.1(c) (bankruptcy case debtors and trustees). Fed. Cir. R. 47.4(a)(6).

☑ None/Not Applicable ☐ Additional pages attached

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STATEMENT OF RELATED CASES

No other cases pending before this Court are appeals from judgments based on the same underlying opinion. Counsel for Plaintiffs-Appellants, the COFINA Bondholders, is not aware of any pending related cases within the meaning of Federal Circuit Rule 47.5.

JURISDICTIONAL STATEMENT

Plaintiffs-Appellants, Johnathan Dinh, Sandy Chuan-Dinh, Dwight Jereczek, Deborah Jereczek, Stan Elliott, Ryan Tran, Thanh Nga Tran, Walter Nahm, Lauran Nahm, and Pamela Payson (collectively, "COFINA Bondholders"), sued in the U.S. Court of Federal Claims on behalf of a class of similarly situated bondholders, seeking just compensation for the per se taking of their property interests by Defendant-Appellee, the United States, invoking jurisdiction under 28 U.S.C. § 1295(a)(3).

The trial court entered final judgment in favor of the Government on June 6, 2023, holding that the COFINA Bondholders had failed to state a claim upon which relief could be granted under RCFC 12(b)(6).[1] On June 27, 2023, the COFINA Bondholders timely filed a notice of appeal under Fed. R. App. P. 4(a)(1)(B)(i).[2] This Court has jurisdiction under 28 U.S. § 1295(a)(3).

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[1] Appx1-25, Appx26.
[2] Appx248-250.

STATEMENT OF ISSUES

This is a per se taking case arising from Congressional action to alleviate a devastating financial crisis facing the Commonwealth of Puerto Rico, which is a territory of the United States. In an effort to locate funds to stabilize the Puerto Rican economy, Congress targeted funds, such as Plaintiffs-Appellants' (COFINA Bondholders) bonds, which were secured by a pledge of Sales and Use Tax Revenues as well as monies in the Dedicated Sales Tax Fund—containing hundreds of millions of dollars—set aside exclusively to repay the Plaintiffs-Appellants' bonds.[3] By legislation, titled the Puerto Rico Oversight, Management, and Economic Stability Act ("PROMESA"), Congress authorized an independent body, the Oversight Board—created by PROMESA for this purpose—to transfer a significant portion of the principal and interest each COFINA Bondholder was entitled to, the value of the pledged revenues, and bondholders' security interests and liens on the COFINA funds, to the Puerto Rican Government.[4] Without PROMESA, there was no lawful way for the Puerto Rican Government to access any of this property.

This Court has repeatedly held that Congressional actions can trigger the duty to pay just compensation. Congress, for instance, amended the federal Surface

[3] *See* Appx5 (the Dedicated Sales Tax Fund "held over $600 million as security for repayment of COFINA bonds' principal and interest.").
[4] Appx81.

Mining Control and Reclamation Act,[5] which destroyed the economic value of mining claims by prohibiting dredging and placer mining within a certain riverbed. Following that amendment, the Court, in *Whitney Benefits*,[6] concluded that the plaintiff could state a taking claim if it "could try on the shoe and it fit, i.e., if it could show its claim was within the river bed, and that it could not mine except by the prohibited method."[7] The Court explained that its conclusion "was much aided by the fact that . . . Congress recognized it might owe money to certain persons as a result of its legislation. . . ."[8]

Citing *Whitney Benefits*, the Court of Federal Claims, in *Love Terminal Partners*,[9] held that Congress's enactment of the Wright Amendment Reform Act, which required the city of Dallas to demolish a privately-owned airport terminal to accomplish a federal purpose, constituted a per se taking of that terminal and leasehold interest.[10]

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[5] 30 U.S.C. § 1201.
[6] *Whitney Benefits, Inc. v. United States*, 752 F.2d 1554 (Fed. Cir. 1985).
[7] *Id.* at 1559.
[8] *Id.*
[9] *Love Terminal Partners v. United States*, 97 Fed. Cl. 355 (2011); *rev'd on other grounds*, 889 F.3d 1331 (Fed. Cir. 2018).
[10] *Id.* at 383-384; *see generally Preseault v. United States*, 100 F.3d 1525 (Fed. Cir. 1996).

ISSUES PRESENTED FOR REVIEW IN THIS CASE:

By enacting PROMESA, Congress created and authorized the Oversight Board to require the devaluation of COFINA bonds and the transfer to Puerto Rico of pledged Sales and Use Tax Revenues and other funds dedicated to bond repayment.[11] Congress targeted these securities so that the Bondholders would "bear that loss[,]"[12] not "the American taxpayer."[13] Congress also knew that enactment of PROMESA could mean that "the Federal government"[14] could be found liable for an unconstitutional taking. Did the trial court err in dismissing the Bondholders' taking claim?

STATEMENT OF THE CASE

The Complaint alleges a per se taking of the COFINA Bondholders' security interests and a Congressionally authorized transfer of pledged Sales and Use Tax revenues and a dedicated sales tax fund—containing hundreds of millions of dollars—intended for repayment of COFINA bonds to Puerto Rico.[15] The

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[11] *See* Appx81.
[12] Providing for Consideration of H.R. 5278, Puerto Rico Oversight, Management, and Economic Stability Act, 162 Cong. Rec. H 3581, 3582 (June 9, 2016) (Statement of Rep. Sean P. Duffy).
[13] Providing for Consideration of H.R. 5278, Puerto Rico Oversight, Management, and Economic Stability Act, 162 Cong. Rec. H 3581, 3582 (June 9, 2016) (Statement of Rep. Sean P. Duffy).
[14] National Sea Grant College Program Amendments Act of 2015, 162 Cong. Rec. S 4690, 4691 (June 29, 2016) (Statement of Sen. Chuck Grassley).
[15] Appx81-83. Plaintiffs are the class of owners of First Subordinated Secured Bonds issued by the Corporación del Fondo de Interés Apremiante (COFINA); *see*

Government filed a scattershot motion to dismiss the Bondholders' Complaint, alleging the trial court lacked jurisdiction to hear the claims, that the Bondholders were collaterally estopped from bringing their taking claims, and that the Bondholders lacked a cognizable property interest, the taking of which should be tested under the multi-factor, *Penn Central*[16] regulatory taking standard.

The trial court correctly rejected all but one of the Government's arguments for dismissal. The trial court's analysis foundered on the fact that, because PROMESA did not explicitly devalue the bonds or require transfer of the pool of money to repay the bonds to the Puerto Rican Government, there was no taking. The trial court missed the point that, as the trial court correctly found in *Love Terminal Partners*,[17] "absent congressional action,"[18] any plans or commitments to transfer the pledged Sales and Use Tax revenues and the hundreds of millions of dollars in the Dedicated Sales Tax Fund to Puerto Rico would be "null and void."[19]

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also Appx232-233 class definition: "All persons and entities who owned First Subordinated Secured COFINA Bonds between the dates of June 30, 2016, and February 5, 2019, excluding those bondholders who voted for, consented to and approved the Amended Title III Plan of Adjustment of Puerto Rico Sales Tax Financing Corporation—which altered COFINA Bondholders' rights and value of their bonds—that was accepted by the PROMESA Title III Court in the District of Puerto Rico."

[16] *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104 (1978).

[17] *Love Terminal Partners*, 97 Fed. Cl. 355; *rev'd on other grounds*, 889 F.3d 1331 (Fed. Cir. 2018).

[18] *Id.* at 393.

[19] *Id.*

In this case, as was true in *Whitney Benefits*,[20] Congress targeted certain property interests and passed legislation intending to confiscate and authorizing the confiscation of those private interests for a public purpose, thereby triggering the protections of the Fifth Amendment.

Because the trial court's dismissal was based on clear legal error—its incorrect holding that the Bondholders failed to allege in their complaint a per se taking upon which relief could be granted—the Bondholders ask this Court to reverse the trial court's dismissal.

Factual Background

Despite a new sales tax and massive borrowing, by 2016, Puerto Rico faced a devastating financial crisis.[21] But the Corporación del Fondo de Interés Apremiante ("COFINA"), set up as an independent corporation separate from the Puerto Rican Government, remained solvent and able to pay its debts.[22] The COFINA Dedicated Sales Tax Fund and other pledged revenues in which COFINA Bondholders held a security interest—all of which COFINA held under lien as security for repayment of COFINA bonds—were not available to bail out the

[20] *Whitney Benefits, Inc. v. United States*, 752 F.2d 1554 (Fed. Cir. 1985).
[21] Appx74.
[22] Appx75.

Government.[23] And so the Dedicated Sales Tax Fund continued to grow, and COFINA continued to make timely bond payments to Plaintiffs-Appellants.[24]

In June 2016, Congress passed PROMESA to help alleviate Puerto Rico's financial crisis,[25] and on June 30, 2016, President Obama signed PROMESA into law,[26] stating, "[w]e finally have legislation that at least is going to give Puerto Rico the capacity, the opportunity to get out from under this lingering uncertainty."[27]

As a direct and intended result of Congress's enactment of the Puerto Rico Oversight, Management, and Economic Stability Act ("PROMESA"), Congress created a pathway whereby COFINA Bondholders would lose a significant portion of the principal and interest each bondholder was entitled to and the fair market value of their securities, their interest in pledged revenues, their security interest, and their liens in the Dedicated Sales Tax Fund, intended to repay their debt.[28] That a third party actually transferred the value of their bonds and pledged Sales and Use Tax revenues and portions of the Dedicated Sales Tax Fund to the Puerto

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[23] Appx75-76.
[24] Appx75-76.
[25] Appx76.
[26] Puerto Rico Oversight, Management, and Economic Stability Act or PROMESA, H.R. 5278 114th Congress (2016); 48 U.S.C. § 2101.
[27] Appx76 ¶ 21 (quoting Remarks on Signing the FOIA Improvement Act of 2016 and the Puerto Rico Oversight, Management, and Economic Stability Act, Daily Comp. Pres. Docs., 2016 DCPD No. 00440 (June 30, 2016)).
[28] Appx81.

Rican Government does not shield the federal Government from takings liability. Congress set up the Puerto Rico Oversight Board, and although not an agent of the United States, the Oversight Board, much like the city of Dallas acting under the Wright Amendment Reform Act in *Love Terminal*,[29] acted under the aegis of PROMESA-granted authority, and "its actions are imputed to the federal government for the purpose of a takings analysis."[30]

Nothing in PROMESA withdraws the Tucker Act remedy for any taking resulting from the Oversight Board acting consistent with the mandates of PROMESA. Although Congress designated the Oversight Board, through the passage of PROMESA, to fulfill its obligations of taking steps to free-up secured debts for use by the Puerto Rican Government, "it is the [federal government] that is responsible for any taking that stems from [the designated-party's] conduct."[31]

A. To Encourage Investors to Loan Money to Puerto Rico, the Commonwealth Assembly Created COFINA to Establish Secure Independent Funding for COFINA Loan Repayment

In 2006, the Legislative Assembly of Puerto Rico passed statutes that created the Corporación del Fondo de Interés Apremiante ("COFINA") as a public corporation, independent from the Puerto Rican Government, to borrow money for

[29] *Love Terminal Partners*, 97 Fed. Cl. 355; *rev'd on other grounds*, 889 F.3d 1331 (Fed. Cir. 2018).
[30] *Love Terminal Partners*, 97 Fed. Cl. at 424 (citing *Preseault v. United States*, 100 F.3d 1525, 1551 (Fed. Cir. 1996)).
[31] *Id.* at 424.

Puerto Rico by issuing secured bonds.[32] The Legislative Assembly gave COFINA, not the Commonwealth of Puerto Rico, complete ownership and control of a newly created Dedicated Sales Tax Fund.[33] Puerto Rico imposed a new sales and use tax to finance this Dedicated Sales Tax Fund, dedicating specific amounts to be paid directly to COFINA to secure repayment of the debt to its Bondholders.[34]

For added security, and to further entice investors to lend money to Puerto Rico, COFINA Bondholders held an automatically perfected statutory lien on the Dedicated Sales Tax Fund, including pledged sales and use tax revenues and other COFINA assets to secure the repayment of the borrowed sums, plus interest.[35] The Legislative Assembly also assured COFINA Bondholders that the Puerto Rican Government could not, *under any circumstances,* access the Dedicated Sales Tax Fund to satisfy its financial obligations.[36] Further security for Bondholders and

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[32] Appx72; *see also* § 11a Dedicated Sales Tax Fund-Creation of the public corporation, 13 L.P.R.A. § 11a; Act 91 passed by the Legislative Assembly May 13, 2006, as amended by Act No. 291, approved December 26, 2006; Act No. 56, approved July 5, 2007; Act No. 1, approved January 14, 2009; Act No. 7, approved March 9, 2009, as amended; Act No. 18, approved May 22, 2009; Act 133, approved July 12, 2012; Act 116, approved October 10, 2013; Act 101, approved July 1, 2015; and Act 84, approved July 22, 2016.

[33] *See* P.R. Laws Ann. tit. 13, §§ 11a-16.

[34] Appx72-73; *see also* P.R. Laws Ann. tit. 13, §§ 11a-16; Act No. 117, passed by the Legislative Assembly on July 4, 2006.

[35] *Id.*

[36] Appx72-74.

investors came from the fact that Congress intentionally excluded Puerto Rico, and by extension COFINA, from filing bankruptcy.[37]

Between 2009 and 2011, COFINA borrowed money from investors, including Plaintiffs-Appellants, issuing COFINA bonds to some as capital appreciation bonds and others as current interest bonds.[38] By May of 2017, COFINA had borrowed and issued secured bonds for more than $17 billion.[39]

From 2007 to 2017, Puerto Rico regularly transferred the statutorily required portion of the sales tax revenues into the COFINA Dedicated Sales Tax Fund.[40] By May 5, 2017, the Dedicated Sales Tax Fund held over $600 million as security for the repayment of COFINA bonds.[41]

B. Puerto Rico's Financial Crisis

By 2016, Puerto Rico's financial crisis had dramatically worsened.[42] The Commonwealth's three public-owned utilities (power, water, and highways) were more than $20 billion in debt and had been since 2013. The Government

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[37] Appx74, Appx145.
[38] Appx73.
[39] *See* Congressional Research Service, Puerto Rico's Public Debts: Accumulation and Restructuring p. 2 (R46788, 2021).
[40] Appx72-73; *see also* P.R. Laws Ann. tit. 13, §14.
[41] Puerto Rico Treasury, *State Sales and Use Tax Distribution of Monthly Collection Fiscal Years 2014-15 – 2015-16*, https://hacienda.pr.gov/inversionistas/estadisticas-y-recaudos-statistics-and-revenues/ingresos-del-impuesto-sobre-ventas-y-uso-ivu-sales-and-use-tax-sut-revenues (last visited Aug. 24, 2023).
[42] Appx74.

Development Bank of Puerto Rico had run out of funds to lend, and access to the capital markets had dried up.

Puerto Rico faced an immediate financial crisis, but federal law limited the Commonwealth's options to address its problems. The federal Bankruptcy Code excluded U.S. territories, including Puerto Rico, from seeking relief under Chapter 9.[43] This exclusion meant that Puerto Rico could not pursue federal bankruptcy protection for its public utilities and other instrumentalities.

C. Congress Zeroed in on COFINA Secured Bondholders

In January 2016, Congress stepped in and began working on finding a legislative solution for Puerto Rico's financial crisis, identifying the large amount of Puerto Rico's secured debt as a target. Congress understood the gravity of Puerto Rico's debt crisis and looked for a way around the legal protections of COFINA-secured debt so that the pledged Sales and Use Tax revenues and other funds securing the COFINA bonds could be transferred to the Commonwealth.[44]

From January to June of 2016, Congress held multiple hearings on Puerto Rico's financial crisis. Central to its deliberations was how to restructure and claw back Puerto Rico's secured debt, which included the bonds held by COFINA

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[43] 11 U.S.C. § 101(52).
[44] Puerto Rico Oversight, Management, and Economic Stability Act or PROMESA, H.R. 5278 114th Congress (2016).

Bondholders. During those discussions, one House member pointed out the crux of Puerto Rico's debt:

> It is also important to remember that much of Puerto Rico's $72 billion worth of debt is what is known as special revenue debt, which enjoys unique protections under Chapter 9. . . . I think we have to consider a more comprehensive option, like a broader restructuring regime, that can bring in all of the creditors to the table, including the secured creditors.[45]

In one of the early hearings on Puerto Rico's debt crisis, Congress zeroed in on the COFINA bonds and the Dedicated Sales Tax fund. In response to testimony from economic experts that allowing Puerto Rico to restructure under Chapter 9 would exclude COFINA, allowing restructuring of only 30% of Puerto Rico's debt, the Chairman observed:

> "[A]s Congress . . . we have the power to decide whether it is 30 percent, whether it is 100 percent, or whether it is 75 percent . . . [b]ut if COFINA is included, we are not at 30 percent. We are going to get up to 75 percent."[46]

The Chairman of the House Subcommittee on Oversight and Investigations was even more blunt: "[T]his institution believes that we should have the [secured] bondholders bear that loss instead of the American taxpayer."[47]

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[45] Puerto Rico's Debt Crisis and Its Impact on the Bond Markets: Hearing before the Subcomm. on Financial Services, 114 Cong. (Feb. 25, 2016) (Statement of Rep. Carolyn B. Maloney).

[46] *Id.*

[47] Providing for Consideration of H.R. 5278, Puerto Rico Oversight, Management, and Economic Stability Act, 162 Cong. Rec. H 3581, 3582 (June 9, 2016) (Statement of Rep. Sean P. Duffy).

Yet Congress remained acutely aware of the serious legal ramifications its legislative actions could have. One senator pointedly remarked, "[s]hould the law be found unconstitutional under the Takings Clause, then the Federal government would be liable for money damages."[48]

Ultimately, Congress enacted the Puerto Rico Oversight, Management, and Economic Stability Act (PROMESA),[49] which eliminated protections under Puerto Rican law for COFINA Bondholders and the security interests guaranteeing repayment of their loans and established a federal oversight board to carry out the debt restructuring path in PROMESA.[50]

D. In PROMESA, Congress Tailored Quasi-Bankruptcy Provisions to Allow the Oversight Board to Transfer Pledged Sales and Use Tax Revenues and Portions of the Dedicates Sales Tax Fund to the Puerto Rican Government

In June 2016, Congress passed PROMESA to help alleviate Puerto Rico's financial crisis by making "available a Federal restructuring authority, if necessary, to allow for an orderly adjustment of all of the Government of Puerto Rico's liabilities[.]"[51] To accomplish this, Congress created an Oversight Board, whose

[48] National Sea Grant College Program Amendments Act of 2015, 162 Cong. Rec. S 4690, 4691 (June 29, 2016) (Statement of Sen. Chuck Grassley).
[49] Puerto Rico Oversight, Management, and Economic Stability Act or PROMESA, H.R. 5278 114th Congress (2016).
[50] Puerto Rico Oversight, Management, and Economic Stability Act or PROMESA, H.R. 5278 114th Congress (2016).
[51] 48 U.S.C. § 2194(n)(4).

members were appointed by the President, with exclusive authority to restructure Puerto Rico's debts.[52] Under PROMESA, Puerto Rico must adopt any recommendations made by the federally created Oversight Board.[53]

The Act could have just applied the federal Bankruptcy Code to Puerto Rico. But Congress chose not to do so; instead, Congress modified normal bankruptcy protections available to creditors, such as the COFINA Bondholders, under federal bankruptcy law. PROMESA provided that, upon the filing of a petition under Title III of the Act, an automatic stay applicable to all secured debts went into effect, one purpose of which is to "provide the Government of Puerto Rico with the resources and the tools it needs to address an immediate existing and imminent crisis[.]"[54] During the stay, creditors are prevented from starting or continuing a judicial or other action against the entity filing the Title III petition.[55]

Stayed creditors therefore under PROMESA cannot enforce a judgment, act to take property, enforce a lien, or collect on a claim against the entity filing the Title III petition. The automatic stay includes actions regarding bonds, loans, letters of credit, insurance obligations, and obligations arising from contracts.[56]

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[52] 48 U.S.C. § 2128(a).
[53] *Id.*
[54] 48 U.S.C. § 2194(n)(1).
[55] 48 U.S.C. § 2194(m)(5).
[56] 48 U.S.C. § 405(b).

Congress also created a special PROMESA Court, with a judge appointed by the Chief Justice of the U.S. Supreme Court, to hear and decide cases arising under PROMESA.[57] The PROMESA Court administers a quasi-bankruptcy regime for restructuring secured debt—which the Bankruptcy Code prohibits[58]—a provision again specifically targeted at COFINA bonds. Section 2121 establishes the Oversight Board exclusively for Puerto Rico.[59]

PROMESA differs in several respects from provisions for municipal bankruptcy under the Bankruptcy Act:

- PROMESA defines "Bond" and "Bond Claim"[60] so that secured obligations of Puerto Rico—such as COFINA bonds—can be discharged, just like unsecured bonds:

  > The term "Bond" means a bond, loan, letter of credit, other borrowing title, obligation of insurance, or other financial indebtedness for borrowed money, including rights, entitlements, or obligations whether such rights, entitlements, or obligations arise from contract, statute, or any other source of law, in any case, related to such a bond, loan, letter of credit, other borrowing title, obligation of insurance, or other financial indebtedness in physical or dematerialized form of which the issuer, obligor, or guarantor is the territorial Government.[61]

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[57] 48 U.S.C. § 2168.
[58] *See* 11 U.S.C. § 361.
[59] 48 U.S.C. § 2121(b)(1).
[60] *Compare* 48 U.S.C. § 2101(b)(2) *with* 48 U.S.C. § 2104(2)-(3).
[61] 48 U.S.C. § 2104(2).

- PROMESA authorized the restructuring of solvent corporations like COFINA, getting rid of the insolvency requirement under the Bankruptcy Act. COFINA was both solvent and current in paying its debts.[62] Congress—through PROMESA—nonetheless authorized COFINA to default on its debt to COFINA Bondholders and, under the Act, impair and alter the repayment terms it had agreed to under the Sales Tax Secured Bond Resolution—a result that would not have been lawful under the Bankruptcy Code or the law of Puerto Rico, absent Congress' passing the Act.[63]
- PROMESA stays preempt any contractual remedy—including termination—"[with] respect to the Government of Puerto Rico or any of its property" stemming from Puerto Rico's bankruptcy proceeding, failure to repay interest and principal on a debt, or breach of a condition or covenant while the automatic stay was in effect.[64] That Congress broadened the reach of the automatic stay in the Act ensured that bondholders would have no non-PROMESA recourse, effectively suspending their contractual remedies by forcing them to restructure their holdings within the bounds of PROMESA.

[62] Appx80.
[63] Appx78-79.
[64] 48 U.S.C. § 2194(a)(1)-(b), 2194(j).

E. But for the Enactment of PROMESA, the Oversight Board Could Not Have Invaded the COFINA Bondholders' Property Interests and Transferred Pledged Sales and Use Tax Revenues or any Portion of the Dedicated Sales Tax Fund to Puerto Rico

But for the authority Congress granted to the Oversight Board in PROMESA,[65] the Oversight Board could not have served as the instrumentality that resulted in COFINA halting payments to its Bondholders.[66] Nor would the Bondholders have been barred from suing or enforcing their lien on the Pledged Sales and Use Tax revenues or the large amounts held in the Dedicated Sales Tax Fund.[67] Over the COFINA Bondholders' objections, in February 2019, the PROMESA Court restructured COFINA's debt, severely curtailing COFINA Bondholders' repayment rights and their security interest in the Pledged Sales and Use Tax revenues and the Dedicated Sales Tax Fund.[68]

As alleged in the Complaint, as a direct and intended result of Congress's enactment of PROMESA, COFINA Bondholders lost a significant portion of the principal and interest each COFINA Bondholder was entitled to, the fair market value of the pledged revenues, their security interests, and liens on the COFINA Dedicated Sales Tax Fund, and other compensable property rights.[69]

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[65] Appx80.
[66] Appx5.
[67] Appx80.
[68] Appx81.
[69] Appx81.

Procedural Background

The COFINA Bondholders filed their class action complaint for just compensation in the United States' Court of Federal Claims on June 30, 2022,[70] and amended their Complaint twice to add additional Plaintiffs.[71]

The trial court granted the Government's Motion to Dismiss the Complaint under RCFC 12(b)(6), rejecting all arguments raised by the Government except one—whether the COFINA Bondholders had adequately alleged a plausible taking claim in their Complaint.[72] The trial court entered Final Judgment for the Government on June 6, 2023.[73]

COFINA Bondholders timely filed a notice of appeal on June 27, 2023.[74]

SUMMARY OF ARGUMENT

The trial court erred as a matter of law in dismissing this complaint for failure to state a claim under Rule 12(b)(6). The trial court's dismissal was based on its mistaken conclusion that actions taken under a federal statute authorizing

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[70] *See* Appx31-46.
[71] *See* Appx47-65; Appx66-85.
[72] *See* Appx1-25.
[73] *See* Appx26.
[74] *See* Appx248-250.

those actions cannot constitute a per se taking.[75] But this Court and the Supreme Court have repeatedly and flatly rejected that argument in other cases.[76]

In *Preseault v. United States*,[77] a rails-to-trails taking case, the Government attempted to defend against taking liability because the actual conversion of the right-of-way from railway to public hiking and biking use was carried out by state and local government actions.[78] But this Court held that the federal Government was responsible for the taking because the federal rails-to-trails statute authorized the right-of-way conversion:

> Whether the State's role in the matter should have resulted in liability for the State or whether the State could absolve itself by pointing to the Federal Government, as the State Court held, is immaterial. The Federal Government authorized and controlled the behavior of the State in this matter, and the consequences properly fall there.[79]

Here, absent Congress' enactment of the Puerto Rico Oversight, Management, and Economic Stability Act ("PROMESA")—without which there

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[75] Appx25.
[76] *See, e.g., Cedar Point v. Hassid*, 141 S. Ct. 2063 (2021) (state regulation authorizing labor organizers to enter farm property for union purposes was a taking); *see also Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987) (found a taking where construction permit authorized the public to cross the owner's property to access a beach); *Kaiser Aetna v. United States*, 444 U.S. 164 (1979) (found a taking when the Corps of Engineers authorized the public to access a formerly private pond).
[77] *Preseault v. United States*, 100 F.3d 1525, 1551 (Fed. Cir. 1996) (en banc).
[78] *Preseault*, 100 F.3d at 1531.
[79] *Id.*

would have been no Oversight Board and no authority for that Board to destroy these property interests—there would be no case pending before this Court to review.

By enacting PROMESA, Congress intentionally authorized the creation of the Oversight Board and authorized the actions that abrogated Puerto Rican law that otherwise flatly prohibited the destruction of the value of the Bondholders' securities.[80] And Congress did so knowing that its actions could lead to this taking lawsuit and that the federal Government could be held liable for an unconstitutional taking of the Bondholders' property rights.[81]

Congress enacted PROMESA to authorize Puerto Rico, through a quasi-bankruptcy procedure, to reduce or eliminate its debt obligations, including its debts to COFINA Bondholders. As the PROMESA court characterized the statute: "PROMESA [is] a federal law enacted by Congress with the express purpose of allowing Puerto Rico to achieve fiscal responsibility and access to the capital

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[80] Act 91 passed by the Legislative Assembly May 13, 2006, as amended by Act No. 291, approved December 26, 2006; Act No. 56, approved July 5, 2007; Act No. 1, approved January 14, 2009; Act No. 7, approved March 9, 2009, as amended; Act No. 18, approved May 22, 2009; Act 133, approved July 12, 2012; Act 116, approved October 10, 2013; Act 101, approved July 1, 2015; and Act 84, approved July 22, 2016.
[81] National Sea Grant College Program Amendments Act of 2015, 162 Cong. Rec. S 4690, 4691 (June 29, 2016) (Statement of Sen. Chuck Grassley) ("Should the law be found unconstitutional under the Takings Clause, then the Federal government would be liable for money damages."

markets through, *inter alia*, adjustment of its debts and those of its instrumentalities."[82]

As authorized by Congress, the PROMESA restructuring plan canceled COFINA Bondholders' existing bonds and required that new bonds with new terms be issued by the reorganized COFINA under the New Bond Legislation and the New Bond Indenture,[83] and ordered that a portion of the Dedicated Sales Tax Fund, and a significant portion of the ongoing sales and use tax revenues pledged to secure the COFINA bonds, be transferred from COFINA to the Puerto Rico Treasury—making it unavailable for payment to Bondholders.[84]

The destruction of COFINA Bondholders' property rights under their bond instruments and the taking of their interests in the Pledged Sales and Use Tax revenues and the Dedicated Sales Tax Fund resulted from the acts of Congress, not the independent acts of some other sovereign, as the Government argued in the trial court. Puerto Rico is not a sovereign; it is a territory of the United States exercising only the authority granted by Congress.[85] Without the authority Congress created in PROMESA, Puerto Rico and COFINA were powerless to alter their debt obligations to COFINA Bondholders.

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[82] *In re Fin. Oversight & Mgmt. Bd. for Puerto Rico*, 361 F. Supp. 3d 203, 243 (D.P.R. 2019).
[83] *See generally id.* at 262-263.
[84] *Id.* at 263.
[85] U.S. Const. art. IV, § 3, cl. 2.

The trial court's truncated analysis of takings law, concluding that takings arising out of legislative actions are limited to physical taking claims, is reversible legal error.[86] Not so. There is no case so holding. Further, the Complaint alleges a per se taking, which courts routinely compare to physical takings.[87]

Because this complaint amply alleges facts that state a legislative taking upon which relief can be granted, the COFINA Bondholders ask this Court to reverse the trial court's dismissal.

ARGUMENT

1. Standard of Review

This Court reviews the takings determinations of the U.S. Court of Federal Claims "to determine if they are incorrect as a matter of law or premised on clearly erroneous factual determinations."[88] Because the trial court's dismissal was based on the complaint's allegations, there were no factual determinations; there is only a legal ruling in this appeal. The Court reviews the trial court's legal determination without deference and de novo.[89]

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[86] Appx24-25.
[87] *See e.g.*, *Brown v. Legal Foundation of Washington*, 538 U.S. 216, 217 (2003); *see also Phillips v. Washington Legal Foundation*, 524 U.S. 156, 172 (2003); *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155 (1980).
[88] *Dairyland Power Co-op. v. United States*, 645 F.3d 1363, 1368–69 (Fed. Cir. 2011).
[89] *Id.* at 1369.

Although Bondholders bear the burden of alleging facts that state a claim upon which relief can be granted, that burden is not a heavy one. "To avoid dismissal under RCFC 12(b)(6), a party need only plead 'facts to state a claim to relief that is plausible on its face,' with facts sufficient to nudge 'claims across the line from conceivable to plausible.'"[90] "A claim is plausible on its face when 'the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.'"[91]

When reviewing a dismissal under RCFC 12(b)(6), "the court accepts all well-pleaded factual allegations as true and draws all reasonable inferences in the claimant's favor."[92] "The Court does not weigh the evidence or determine the likelihood of a plaintiff ultimately prevailing in resolving a Rule 12(b)(6) motion, but rather assesses whether a plaintiff has alleged facts, which if proven, would entitle it to the relief sought."[93]

Fifth Amendment just compensation claims like this one are particularly unsuitable for dismissal because of their fact-specific nature:

> Due to the fact-intensive nature of takings cases, *Moden v. United States*, 404 F.3d 1335, 1342 (Fed. Cir. 2005), discovery is often "necessary to determine whether plaintiffs' allegations demonstrate a

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[90] *TrinCo Inv. Co. v. United States*, 722 F.3d 1375, 1380 (Fed. Cir. 2013) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 547 (2007)).
[91] *Id.*
[92] *TrinCo Inv. Co.*, 722 F.3d at 1377
[93] *L-3 Commc'ns Integrated Sys., L.P. v. United States*, 79 Fed. Cl. 453, 455 (2007).

taking, and, therefore, plaintiffs should be given the opportunity to develop facts in support of their claims." *Orr v. United States*, 145 Fed. Cl. 140, 158 (2019). The Court should therefore exercise care in takings cases not to deny Plaintiffs that opportunity by the precipitous grant of motions to dismiss under RCFC 12(b)(6).[94]

2. Bondholders' Complaint Adequately Alleged Their Property Rights in Their Bond Contracts and Their Lien on the Pledged Sales and Use Tax Revenues and the Dedicated Sales Tax Fund to Secure Repayment of Principal and Interest

The Fifth Amendment provides, "nor shall private property be taken for public use without just compensation."[95] This constitutional guarantee "was designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole."[96] This just compensation guarantee extends to all kinds of property, not just real property:

> Property interests are about as diverse as the human mind can conceive. Property interests may be real and personal, tangible and intangible, possessory and nonpossessory. They can be defined in terms of sequential rights to possession (present interests—life estates and various types of fees—and future interests), and in terms of shared interests (such as those of a mortgagee, lessee, bailee, adverse possessor), and there are interests in special kinds of things (such as water, and commercial contracts). And property interests play across the entire range of legal ideas.[97]

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[94] *State v. United States*, 146 Fed. Cl. 693, 701 (2020).
[95] U.S. Const. amend. V.
[96] *Armstrong v. United States*, 364 U.S. 40, 49 (1960).
[97] *Adams v. United States*, 391 F.3d 1212, 1219 (Fed. Cir. 2004) (quoting *Fla. Rock Indus., Inc. v. United States*, 18 F.3d 1560, 1572 n.32 (Fed. Cir. 1994)).

Contracts, including bonds, are protected property under the Fifth Amendment.[98] Liens to secure repayment of debt are likewise protected property.[99] And specific funds of money held for another are also property that, when taken, gives rise to a right to just compensation.[100]

Here, the Complaint amply alleges that each named Plaintiff held a bundle of property rights as the owner of COFINA-issued bonds, with repayment of principal and interest secured by Pledged Sales Tax Revenues and a Dedicated Sales and Use Tax Fund that, by 2017, held over $600 million.[101] As to each Plaintiff Bondholder, the Complaint makes identical factual allegations:

> Plaintiffs [Johnathan Dinh, Sandy Chuan-Dinh, Dwight Jereczek, Deborah Jereczek, Stan Elliott, Ryan Tran, Thanh Nga Tran, Walter Nahm, Lauran Nahm, and Pamela Payson] were at all material times the owners of a substantial quantity of the COFINA bonds, with the right to repayment of principal and interest when due as detailed in the Sales Tax Revenue Bond Resolution, as amended and restated on June 10, 2009. As COFINA Bondholders, Plaintiffs-Appellants were also the owners of a security interest in: (1) the Dedicated Sales Tax Fund, (2) all COFINA Revenues, as defined in the Bond Resolution, (3) all right, title, and interest of COFINA in and to COFINA Revenues, and all rights to receive the same, and (4) funds, deposits, accounts, and subaccounts held by the Trustee under the bond resolution.[102]

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[98] *United States Trust v. New Jersey*, 431 U.S. 1 (1977); *Lynch v. United States*, 292 U.S. 571, 579 (1934); *Cienega Gardens v. United States*, 331 F.3d 1319 (Fed. Cir. 2003).
[99] *Armstrong*, 364 U.S. 40; *Louisville Joint Stock Land Bank v. Radford*, 295 U.S. 555 (1935); *Shelden v. United States*, 7 F.3d 1022 (Fed. Cir. 1993).
[100] *Brown v. Legal Foundation of Washington*, 538 U.S. 216, 217 (2003); *see also Phillips v. Washington Legal Foundation*, 524 U.S. 156, 172 (2003).
[101] Appx5.
[102] Appx67.

The Complaint explains that in 2006, COFINA[103] was created as an independent, public corporation, separate and independent from the Commonwealth of Puerto Rico, with complete ownership of the Dedicated Sales Tax Fund:

> [T]he Legislative Assembly of Puerto Rico passed a series of statutes that created COFINA, a public corporation with the authority to borrow money by issuing secured bonds. The legislation created COFINA as an independent corporation, separate from the Government of Puerto Rico, with complete ownership and control of the Dedicated Sales Tax Fund that secured COFINA's repayment of any issued bond principal and interest.[104]

To enable COFINA to repay these bonds, the Puerto Rico Legislative Assembly enacted a new tax on various goods and services.[105] "This legislation required that a specified portion of that sales tax be paid into COFINA's Dedicated Sales Tax Fund, which COFINA would then use to repay the principal and interest when the bonds became due."[106] "The bond covenants gave COFINA bondholders a lien on the pledged property and other COFINA assets to secure repayment to the COFINA Bondholders of the sums COFINA borrowed."[107]

As of May 2017, this COFINA Dedicated Fund held over $600 million[108] pledged as security for the repayment of Bondholders. The Dedicated Sales Tax Fund was the "'property of COFINA' and 'was not available to the Commonwealth

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[103] COFINA's full name is the Corporación del Fondo de Interés Apremiante.
[104] Appx72.
[105] Act No. 117 passed by the Legislative Assembly on July 4, 2006.
[106] Appx52-53.
[107] Appx52-53.
[108] Appx5.

of Puerto Rico.'"[109] The Complaint further alleges that, unaffected by the financial woes of the Government of Puerto Rico, COFINA (an independent entity) continued to collect funds and continued to pay Bondholders' interest:

> Meanwhile, COFINA, as an independent corporation separate from the Puerto Rico government, remained solvent and able to pay its debts. The COFINA Dedicated Sales Tax Fund and the pledged revenues in which COFINA Bondholders had a security interest—all of which COFINA held under lien as security for repayment of COFINA bonds—were not available to pay government expenses and continued to grow. COFINA continued to make payments to COFINA Bondholders as required by the Sales Tax Revenue Bond Resolution.[110]

By May 2017, COFINA held over $600 million in the Dedicated Sales Tax Fund.[111] The Puerto Rican legislature could not change the terms of the Bondholders' contract with COFINA, including the pledge on sales tax revenues and the Dedicated Sales Tax Fund securing the payments.

3. PROMESA Authorized the Taking of COFINA Bondholders' Property Rights—Entitling Them to Fifth Amendment Just Compensation

Had Congress directly reduced the amounts payable to COFINA Bondholders or directly transferred the balance of the Dedicated Fund to Puerto Rico, destroying their lien, Bondholders' right to just compensation under the Fifth Amendment would be unquestioned. That Congress did so by creating an

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[109] Appx5 (quoting § 13 Dedicated Sales Tax Fund-Use, 13 L.P.R.A. § 13).
[110] Appx75-76.
[111] Appx5; Appx73.

Oversight Board and authorizing it to take Bondholders' property rights does not eliminate the Government's Fifth Amendment obligation to pay for the property it took.

A. The Government Is Liable for a Taking It Authorizes

The trial court erred in ruling that, to state a taking cause of action, Bondholders must show that "either the Oversight Board acted as an agent of the United States in filing a Title III petition for COFINA or the United States coerced the Oversight Board to do so."[112] But the trial court's ruling overlooks the well-established principle that government action authorizing a third party to take private property can constitute a taking.

In *Loretto v. Teleprompter Manhattan CATV Corp.*,[113] the Supreme Court held that a state statute authorizing the cable company to install equipment on Loretto's rooftop was a per se taking; the cable company was neither commanded nor coerced to do so—just authorized. The Supreme Court stated, "We conclude that a permanent physical occupation authorized by government is a taking without regard to the public interests that it may serve." [114]

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[112] Appx24.
[113] *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982).
[114] *Id.* at 426.

In *Kaiser Aetna v. United States*,[115] the Supreme Court held that a taking had occurred when the Corps of Engineers authorized (not commanded or coerced) the public to access a formerly private pond. In *Nollan v. California Coastal Comm'n*,[116] the Supreme Court also held that a taking had occurred where a construction permit authorized (not commanded or coerced) the public to cross the owner's property to access the beach.

And in *Cedar Point Nursery v. Hassid*,[117] the Supreme Court held that a state regulation authorizing (not commanding or coercing) labor organizers to enter farm property for union purposes was a taking: "the Court has long treated government-authorized physical invasions as takings requiring just compensation."[118]

This Court, too, has found the United States liable for a taking where a federal statute authorizes a third party to enter onto private land. For example, in *Hendler v. United States*[119] officials of EPA and a California state agency entered private land to install monitoring wells under authority of the CERCLA (Superfund) environmental cleanup statute.[120] Rejecting the Government's

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[115] *Kaiser Aetna v. United States*, 444 U.S. 164 (1979).
[116] *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987).
[117] *Cedar Point Nursery v. Hassid*, 141 S. Ct. 2063 (2021).
[118] *Id.* at 2073.
[119] *Hendler v. United States*, 952 F.2d 1364 (Fed. Cir. 1991)
[120] *Id.* at 1367–1368.

argument that it was not liable for the acts of California officials, this Court held: "California state officials who entered onto plaintiffs' land did so under the authority granted by CERCLA,"[121] a federal statute, and "[i]t follows that their activities within the scope of the Order are attributable to the Federal Government for purposes of takings law just as are the activities of EPA itself."[122]

In *Preseault v. United States*,[123] a rails-to-trails taking claim, the Government attempted to defend against taking liability because the actual conversion of the right-of-way from railway to public hiking and biking use was done by state and local government actions.[124] But this Court held that the federal Government was responsible for the taking because the federal rails-to-trails statute authorized the right-of-way conversion:

> Whether the State's role in the matter should have resulted in liability for the State or whether the State could absolve itself by pointing to the Federal Government, as the State Court held, is immaterial. The Federal Government authorized and controlled the behavior of the State in this matter, and the consequences properly fall there.[125]

The trial court blithely dismissed these cases on grounds that they involved physical takings rather than regulatory takings. But courts have applied the same

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[121] *Id.* at 1379.
[122] *Id.*
[123] *Preseault v. United States*, 100 F.3d 1525, 1551 (Fed. Cir. 1996) (en banc).
[124] *Preseault*, 100 F.3d at 1531.
[125] *Id.*

rule to funds of money, contract rights, and liens—holding that statutes that authorize the transfer of funds or other intangibles to another party constitute a compensable Fifth Amendment taking.

In *Webb's Fabulous Pharmacies v. Beckwith*,[126] for example, the Supreme Court held that a Florida statute authorizing the clerk of Court to transfer interest on an interpleader fund to the county—interest rightly owned by the creditors entitled to the fund—is a compensable taking:

> The deposited fund was . . . property held only for the ultimate benefit of Webb's creditors, not for the benefit of the Court and not for the benefit of the county. And it was held only for the purpose of making a fair distribution among those creditors . . . less proper charges authorized by the Court, would be distributed among the creditors as their claims were recognized by the Court. The creditors thus had a state-created property right to their respective portions of the fund.[127]

The Supreme Court explained that the Florida statute had the "practical effect of appropriating for the county the value of the use of the fund for the period in which it is held in the registry[,]"[128] and held that

> a State, by *ipse dixit*, may not transform private property into public property without compensation, even for the limited duration of the deposit in Court. This is the very kind of thing that the Taking Clause of the Fifth Amendment was meant to prevent. That Clause stands as a shield against the arbitrary use of governmental power.[129]

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[126] *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155 (1980).
[127] *Id.* at 161.
[128] *Id.* at 164.
[129] *Id.*

Similarly, the Supreme Court has applied a per se analysis to statutes authorizing a third party to alter contract rights. In *Louisville Joint Stock Bank*,[130] the Supreme Court held that a bankruptcy statute that authorized the mortgagor to purchase the collateral at below market value deprived the mortgagee bank of its pre-existing contract rights, which are property, constituting a taking because "[t]he bankruptcy power, like the other great substantive powers of Congress, is subject to the Fifth Amendment."[131] And in *Lynch v. United States*,[132] the Supreme Court found that Congress cannot reduce expenditures by repudiating contractual obligations of the United States.[133]

The Court has also used a per se analysis to determine that eliminating a lien to secure payment, such as the Bondholders' lien on the repayment fund, is a taking:

> The total destruction by the Government of all value of these liens, which constitute compensable property, has every possible element of a Fifth Amendment 'taking' and is not a mere 'consequential incidence' of a valid regulatory measure. Before the liens were destroyed, the lienholders admittedly had compensable property. Immediately afterwards, they had none. This was not because their property vanished into thin air. It was because the Government for its own advantage, destroyed the value of the lien. . . .[134]

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[130] *Louisville Joint Stock Land Bank*, 295 U.S. 555.
[131] *Id.* at 589.
[132] *Lynch v. United States*, 292 U.S. 571, 579 (1934).
[133] *Id.* at 280.
[134] *Armstrong*, 364 U.S. at 48.

In *Shelden v. United States*,[135] this Court found that a statute authorizing government seizure of a third-party's house, on which the plaintiff held a mortgage, was a taking:

> When the forfeiture order transferred all of Washington's interest in the property to the United States, the Government took a property interest from the Sheldens for a public purpose . . . ("*in personam* forfeitures serve the public's interests in enforcing penal sanctions"). In accordance with the principles of the Fifth Amendment, the Sheldens must be compensated.[136]

Here PROMESA authorized a third party—the Oversight Board—to take Pledged Sales and Use Tax Revenues as well as a portion of the Dedicated Sales Tax held by COFINA to secure payment of principal and interest to Bondholders and transfer this property to Puerto Rico.[137] PROMESA also authorized the Oversight Board to cancel Bondholders' existing bonds and to reissue them, in this case, at about half their original par value.[138] And, by draining the balance held for Bondholders in the Dedicated Sales Tax Fund, PROMESA destroyed their lien on that Fund as collateral for repayment of principal and interest due under their COFINA bonds.[139] Because these actions took place under the authority of

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[135] *Shelden*, 7 F.3d 1022.
[136] *Shelden*, 7 F.3d at 1026.
[137] Appx5.
[138] Appx9, Appx81.
[139] Appx81.

PROMESA, a federal statute, the United States is liable for just compensation—as the Fifth Amendment requires.

B. The Complaint Adequately Alleges a Government-Authorized Taking Under PROMESA

Bondholders' complaint alleges that in 2016 Congress enacted PROMESA, in which "Congress specifically targeted bonds as part of its Puerto Rico debt restructuring law, including COFINA bonds," and that as a result of the actions taken under authority of this statute, "[a]s a direct and intended result of Congress's enactment of the Act, COFINA Bondholders lost a significant portion of the principal and interest each COFINA Bondholder was entitled to and the fair market value of the pledged revenues, their security interests and liens on COFINA funds, as well as other compensable property rights."[140] The trial court's ruling that the complaint failed to state a cause of action was legal error and should be reversed.

To begin, the complaint alleges that in 2016, Congress found that Puerto Rico faced a fiscal emergency:

> A combination of severe economic decline and, at times, accumulated operating deficits, lack of financial transparency, management inefficiencies, and excessive borrowing has created a fiscal emergency in Puerto Rico. [141]

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[140] Appx41, Appx61.
[141] Appx41.

The complaint alleges that the Puerto Rico government was unable to restructure its debt because the Bankruptcy Act excluded United States territories like Puerto Rico from its coverage,[142] and also prohibited Puerto Rico from adopting its own territorial bankruptcy code.[143] So, to remedy this fiscal emergency, Congress enacted PROMESA as "a Federal statutory authority for the Government of Puerto Rico to restructure debts in a fair and orderly process."[144] To ensure that the federal statute was supreme, PROMESA provides that "provisions of this chapter shall prevail over any general or specific provisions of territory law, State law, or regulation that is inconsistent with this chapter."[145] And, for good measure, Congress invoked its absolute authority over federal property and territories, stating that it "enact[d] [P.R.O.M.E.S.A.] pursuant to U.S. Const. art. IV, Section 3 of the Constitution of the United States, which provides Congress the power to dispose of and make all needful rules and regulations for territories."[146]

The complaint alleges that

> at the time Congress passed the Act, secured debt—including COFINA Bondholders' COFINA bonds—constituted the largest portion of Puerto Rico's outstanding debt. Congress considered but intentionally

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[142] Appx76-77; *see* 11 U.S.C. § 902; *see* 11 U.S.C. § 101(52).
[143] Appx76-77; *see Puerto Rico v. Franklin California Tax-Free Tr.*, 579 U.S. 115 (2016).
[144] Appx77.
[145] Appx78.
[146] Appx79.

> rejected the option of simply extending Chapter 9 of the Bankruptcy Code to include Puerto Rico because secured special revenue debt, including COFINA Bondholders' COFINA bonds, would have been protected against impairment in a Chapter 9 proceeding.[147]

As one member of Congress stated in a hearing before the Subcommittee on Oversight and Investigations of the House Committee on Financial Services,

> [i]t is also important to remember that much of Puerto Rico's $72 billion worth of debt is what is known as special revenue debt, which enjoys unique protections under Chapter 9. So even if [Puerto Rico] had Chapter 9, there would be a whole area that would be protected from restructuring. . . I think we have to consider a more comprehensive option, like a broader restructuring regime, that can bring in all of the creditors to the table, including the secured creditors.[148]

To implement Congress' restructuring plan, PROMESA created an Oversight Board to "make available a Federal restructuring authority . . . to allow for an orderly adjustment of all of the Government of Puerto Rico's liabilities[.]"[149] This Oversight Board consists of seven individual voting members selected from a list of individuals submitted by the House of Representatives and Senate leaders and appointed by the President of the United States.[150] The actions of the Oversight Board are authorized exclusively by Congress: "[n]either the Governor nor the Legislature may exercise any control, supervision, oversight, or review over the Oversight Board or its activities; or [e]nact, implement, or enforce

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[147] Appx79.
[148] Appx80.
[149] Appx79.
[150] 48 U.S.C. § 2121(e).

any statute, resolution, policy, or rule that would impair or defeat the purposes of this Act, as determined by the Oversight Board."[151]

Under PROMESA, the Oversight Board has, in its sole discretion, approval and modification rights over the Commonwealth and its instrumentalities' fiscal plans and budgets, as well as restructuring filings and plans of adjustment.[152] PROMESA authorizes the Oversight Board to file restructuring plans in a specially created court, whose judge is appointed by the Chief Justice of the Supreme Court. In exercising this authority, the Oversight Board filed the restructuring plan for COFINA, reducing the sums due under their bonds and depriving them of contract rights created by the bond resolution.

PROMESA also authorized transfer of pledged sales tax revenues as well as portions of the Dedicated Sales Tax Fund to Puerto Rico, destroying Bondholders' lien on the pledged revenues and the Fund to secure repayment under their bonds:

> Under the authority of the Act, on April 29, 2017, Puerto Rico enacted Act No. 246, allowing Pledged Property—including COFINA's Sales Tax Secured Fund—to be clawed back to the general treasury, where it could be used to pay Puerto Rico's general debts.[153] Within days, on May 3, 2017, COFINA defaulted on its obligations to COFINA Bondholders. However, due to the Act stay provisions, COFINA Bondholders had neither a contractual nor judicial remedy for COFINA's default and no way to enforce their security interest in the Sales Tax Secured Fund.[154]

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[151] Appx79.
[152] 48 U.S.C. § 2145.
[153] Fiscal Plan Compliance Act, Act 26-2017 (Apr. 29, 2017).
[154] Appx80.

This transfer of pledged revenues and funds from COFINA to Puerto Rico was specifically authorized by PROMESA—and could not have been accomplished without federal statutory authority because the bond resolution and the statutes creating the fund ensured that the Puerto Rican Government could not alter the fund.

In short, PROMESA authorized a taking that was intended and the direct, natural result of the government action.[155] Before PROMESA was enacted, COFINA was required to pay its Bondholders in strict accordance with their bond instruments. Under Act 91, which created COFINA and authorized it to issue bonds, the Puerto Rico legislature was prohibited from altering the bonds' terms.[156] Hundreds of millions of dollars in the Dedicated Sales Tax Fund could not be used for any other purpose but repayment to COFINA Bondholders.[157] But, under the authority of PROMESA, the amount due to Bondholders was severely cut, and the lien for repayment was destroyed by removing the funds securing that lien.

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[155] *Ridge Line, Inc. v. United States*, 346 F.3d 1346, 1355 (Fed. Cir. 2003).
[156] § 11a Dedicated Sales Tax Fund-Creation of the public corporation, 13 L.P.R.A. § 11a.
[157] *See* Puerto Rico Treasury, State Sales and Use Tax Distribution of Monthly Collection Fiscal Years 2014-15 – 2015-16, https://hacienda.pr.gov/inversionistas/estadisticas-y-recaudosstatistics-and-revenues/ingresos-del-impuesto-sobre-ventas-y-uso-ivu-sales-and-use-tax-sutrevenues (last visited Jan. 13, 2023).

Because the complaint adequately alleges all of these facts, dismissing Bondholders' case at the pleading stage was error.

C. These Allegations State a Cause of Action Whether Applying the Per Se or the *Penn Central* Test

The Supreme Court recently clarified that an appropriation of property, for the Government or someone else, is properly analyzed as a per se taking and that the *Penn Central*[158] regulatory test is applicable where Government restricts the owners' use (but does not appropriate):

> The essential question is not, as the Ninth Circuit thought, whether the government action at issue comes garbed as a regulation (or statute, ordinance, or miscellaneous decree). It is whether the Government has physically taken property for itself or someone else—by whatever means—or has instead restricted a property owner's ability to use his own property. *See Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Plan. Agency*, 535 U.S. 302, 321–323 (2002). Whenever a regulation results in a physical appropriation of property, a *per se* taking has occurred, and *Penn Central* has no place.[159]

The trial court erroneously concluded that only a physical taking can constitute a per se taking. Not so. The Supreme Court has applied the per se taking test to cases involving the transfer of money from private to public use. Where a statute required the transfer of private interest earnings to the public, for instance, the Court rejected the Ninth Circuit's application of the *Penn Central*[160] regulatory

[158] *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104 (1978).
[159] *Cedar Point Nursery v. Hassid*, 141 S. Ct. 2063, 2072 (2021).
[160] *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982).

taking test—holding that the taking of monetary interests is analogous to the physical occupation of the rooftop in *Loretto*:[161]

> We agree that a *per se* approach is more consistent with the reasoning in our *Phillips* opinion than *Penn Central*'s ad hoc analysis. As was made clear in *Phillips*, the interest earned in the IOLTA accounts "is the 'private property' of the owner of the principal.". . . If this is so, the transfer of the interest to the Foundation here seems more akin to the occupation of a small amount of rooftop space in *Loretto*.[162] Without more, such a government invasion of property rights gives rise to a taking claim regardless of the size of the property taken.[163] Here, through PROMESA, Congress authorized the seizure and transfer of money in COFINA's Dedicated Sales Tax Fund to pay the debts of Puerto Rico—a per se taking without reference to the other *Penn Central* factors.[164]

But even applying the *Penn Central* test, the Bondholders' Complaint states a cause of action for just compensation. Where the Government action destroys an essential stick in the bundle of property rights, the Supreme Court has found a taking without reference to other *Penn Central* factors. In *Hodel v. Irving*,[165] after finding that the economic impact and reasonable expectations factors did not support a Fifth Amendment taking, the Court nevertheless held that a regulation that virtually abrogated the right to pass on a certain type of property was a taking

[161] *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104 (1978).
[162] *Brown v. Legal Found. of Washington*, 538 U.S. 216, 235 (2003) (citations omitted).
[163] *See Nollan*, 483 U.S. 825; *Loretto*, 458 U.S. 419; *Kaiser Aetna v. United States*, 444 U.S. 164 (1979).
[164] *See Brown*, 538 U.S. at 217–218, 235.
[165] *Hodel v. Irving*, 481 U.S. 704 (1987).

because "[i]n one form or another, the right to pass on property—to one's family in particular—has been part of the Anglo-American legal system since feudal times."[166]

In *Kaiser Aetna v. United States*,[167] the Supreme Court found a taking where the regulation destroyed "one of the most essential sticks in the bundle of rights that are commonly characterized as property—the right to exclude others."[168] In *Louisville Joint Stock Bank*,[169] the Supreme Court struck down a bankruptcy provision that revised the repayment terms of the mortgage.

Here, the Government's statutory authorization in PROMESA to substantially decrease the amount owed COFINA Bondholders, to transfer funds out of the Dedicated Sales Tax Fund pledged for repayment of that debt, and divert pledged sales and use tax revenues for use by the Commonwealth of Puerto Rico, is a per se taking that requires no *Penn Central* analysis. The sole purpose of PROMESA was to restore financial health to Puerto Rico—at the expense of private property owners such as the COFINA Bondholders.

And although the investment-backed expectations of the property owners are not relevant in a per se taking case, the COFINA Bondholders, like the developers

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[166] *Id.*
[167] *Kaiser Aetna v. United States*, 444 U.S. 164 (1979).
[168] *Id.* at 176.
[169] *Louisville Joint Stock Land Bank v. Radford*, 295 U.S. 555 (1935).

in *Cienega*,[170] made their investments in the COFINA securities with the reasonable expectation that the statutory regime, which secured repayment of their entire loan to COFINA, would remain the same. That statutory regime required that a portion of the sales tax be paid into COFINA's Dedicated Sales Tax Fund, which would be used to repay the borrowed principal and interest; a perfected lien on the Dedicated Sales Tax Fund; and a contract prohibition on legislative nullification of these rights by the Government of Puerto Rico.[171]

In addition, Puerto Rico and COFINA were excluded from protections afforded by the Bankruptcy Act.[172] COFINA Bondholders made their investments in reliance on an airtight legal regime that could be altered only by the extraordinary provisions of PROMESA, which created a new, replacement legal regime aimed directly at the destruction of their security and rights to repayment of their bonds.

If this case were properly analyzed as a regulatory taking, which it is not, the complaint amply alleges that, because of PROMESA, COFINA bonds were reduced to a fraction of their pre-PROMESA value, with lower principal amounts,

[170] *Cienega Gardens v. United States*, 331 F.3d 1319 (Fed. Cir. 2003).
[171] Appx72; *see also* § 11a Dedicated Sales Tax Fund-Creation of the public corporation, 13 L.P.R.A. § 11a.
[172] 11 U.S.C. § 101(52) ("The term 'State' includes the District of Columbia and Puerto Rico, except for the purpose of defining who may be a debtor under chapter 9 of this title.").

lower interest rates, and loss of interest during the multi-year pendency of the PROMESA Court proceeding.[173] PROMESA authorized the transfer of hundreds of millions of dollars held as security for repayment of COFINA Bondholders' principal and interest—a complete wipeout of the COFINA Dedicated Sales Tax Fund and a diversion of pledged sales and use tax revenues that destroyed COFINA Bondholders' lien on that fund and the pledged revenues.[174]

The complaint alleges COFINA Bondholders have suffered severe economic impact because of PROMESA, amply satisfying the *Penn Central* considerations. PROMESA resulted in a nearly complete abnegation of COFINA Bondholders' rights under the legal regime that induced them to invest in COFINA bonds, destroying the reasonable, investment-based expectations of the Bondholders.

4. The Trial Court Should Have Allowed Bondholders to Amend Their Complaint

In their Response to the Government's Motion to Dismiss, Bondholders requested that

> [s]hould the Court find the Complaint deficient, the COFINA Bondholders ask for leave to amend the Complaint to cure any deficiencies. RCFC 15(a) provides that once a responsive pleading or a motion to dismiss has been filed, a plaintiff may amend the complaint with leave of the court, and "the court should freely give leave when justice so requires" because cases should be decided on the merits, not mere technicalities in pleadings.[175]

[173] Appx81.
[174] Appx81.
[175] Appx151 (quoting RCFC 15(a)(2)).

However, the trial court denied this request.

In *Foman v. Davis*,[176] the Supreme Court reversed the denial of a plaintiff's motion to amend a complaint after the trial court found that it had failed to state a claim, explaining that cases should be decided on the merits, not mere technicalities in pleadings.[177]

In *Ashcroft v. Iqbal*,[178] having held that the complaint failed to state a claim for relief, the Supreme Court then remanded the case back with instructions that "[t]he Court of Appeals should decide in the first instance whether to remand to the District Court so that respondent can seek leave to amend his deficient complaint."[179]

CONCLUSION AND STATEMENT OF RELIEF REQUESTED

The trial court erred as a matter of law in holding that the complaint failed to state a claim upon which relief could be granted and should be reversed.
The COFINA Bondholders ask this Court to reverse the trial court's decision to dismiss their lawsuit and to remand this case for further proceedings on the merits of their taking claims, including leave to amend their Complaint, if appropriate.

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[176] *Foman v. Davis*, 371 U.S. 178 (1962).
[177] *Id.* at 181-182.
[178] *Ashcroft v. Iqbal*, 556 U.S. 662 (2009).
[179] *Iqbal*, 556 U.S. at 687.

Respectfully submitted,

/s/ Roger J. Marzulla
Roger J. Marzulla
Nancie G. Marzulla
MARZULLA LAW, LLC
1150 Connecticut Avenue, NW
Suite 1050
Washington, DC 20036
(202) 822-6760
roger@marzulla.com
nancie@marzulla.com

September 26, 2023

Counsel for the COFINA Bondholders

ADDENDUM

In the United States Court of Federal Claims

No. 22-725C
(Filed: June 5, 2023)

* *

JONATHAN DINH *et al.*,

Plaintiffs,

v.

THE UNITED STATES,

Defendant.

* *

Roger J. Marzulla, Marzulla Law, LLC, Washington DC, with whom was *Nancie G. Marzulla*, for plaintiffs. *Gregory H. Bevel*, Rochelle McCullough, LLP, Dallas TX, and *Rafael Gonzalez*, Godreau & Gonzalez Law, LLC, San Juan PR, of counsel.

Nathanael B. Yale, Senior Trial Counsel, United States Department of Justice, Civil Division, Commercial Litigation Branch, Washington, DC, with whom were *L. Misha Preheim*, Assistant Director, *Patricia M. McCarthy*, Director, and *Brian M. Boynton*, Principal Deputy Assistant Attorney General, for defendant.

OPINION

BRUGGINK, *Judge*.

This is an action against the United States, seeking just compensation under the Fifth Amendment for the alleged taking of plaintiffs' private property. Plaintiffs in this case are owners of First Subordinated Secured Bonds issued by Corporación del Fondo de Interés Apremiante ("COFINA"),

an instrumentality of the Commonwealth of Puerto Rico.[1] Plaintiffs allege that their property interests as COFINA bondholders were taken without just compensation as a "direct and intended result" of Congress's enactment of the Puerto Rico Oversight, Management, and Economic Stability Act ("PROMESA"). *See* Second Am. Compl. ("Compl.")[2] ¶ 31. Pending is defendant's motion to dismiss for lack of jurisdiction, or, in the alternative, for failure to state a claim upon which relief can be granted. The motion has been fully briefed, and oral argument was held on April 13, 2023. For the reasons set out below, we grant defendant's motion to dismiss under Rule 12(b)(6) of the Rules of the United States Court of Federal Claims ("RCFC").

BACKGROUND

Enacted on June 30, 2016, PROMESA is a statute that authorizes an Oversight Board established under the Act to initiate bankruptcy proceedings—also referred to as Title III proceedings—for a territory or territorial instrumentality. PROMESA established an Oversight Board for Puerto Rico on the same date, created as "an entity within the territorial government"; PROMESA expressly states that an Oversight Board "shall not be considered to be a department, agency, establishment, or instrumentality of the Federal Government." 48 U.S.C. § 2121(c) (2018). As other COFINA-related cases make clear, the Oversight Board for Puerto Rico then took a series of discretionary actions, which resulted in the restructuring of COFINA's debts. Those actions included designating COFINA as an instrumentality covered by PROMESA, issuing a restructuring certification for COFINA, and then filing a Title III petition on behalf of COFINA in the United States District Court for the District of Puerto Rico. The Oversight Board also represented COFINA during the Title III case and submitted a plan of adjustment for COFINA's debts, which would allow junior COFINA bondholders (such as plaintiffs) to make a 56.41% recovery on the repayment of principal and interest on their bonds. *See In re Fin. Oversight & Mgmt. Bd. for P.R.*, 361 F. Supp. 3d 203, 233 (D.P.R. 2019), *aff'd*, 987 F.3d 173, 177 (1st Cir. 2021). The district court—also referred to as the "Title III

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[1] As owners of First Subordinated Secured Bonds issued by COFINA, plaintiffs are in effect junior COFINA bondholders. Plaintiffs refer to First Subordinated Secured Bonds as "COFINA bonds" throughout their complaint.

[2] After filing the original complaint on June 29, 2022, *see* ECF No. 1, plaintiffs amended their complaint twice. Unless otherwise noted, the "complaint" from hereon will refer to the second amended complaint filed on November 1, 2022. *See* ECF No. 9.

court"—confirmed the plan of adjustment on February 5, 2019.

Plaintiffs' complaint, however, skips over the actions of the Oversight Board and makes only an oblique reference to the Title III court for having "rebuffed the COFINA Bondholders' challenge" to the curtailment of their property interests. *See* Compl. ¶ 30. Pushing both the Oversight Board and the Title III court into the barely acknowledged background, plaintiffs take aim instead at an act of Congress. The crux of plaintiffs' claim lies in the allegation that the United States is liable for just compensation because Congress's enactment of PROMESA caused the taking of their property. *See* Compl. ¶ 31 ("As a direct and intended result of Congress's enactment of [PROMESA], COFINA Bondholders lost a significant portion of the principal and interest each COFINA Bondholder was entitled to and the fair market value of the pledged revenues, their security interests and liens on COFINA funds, as well as other compensable property rights."); *id*. at ¶ 35 ("But for Congress's enactment of [PROMESA], Plaintiffs would have received the payments of principal and interest they were entitled to under the terms of their COFINA bonds and would have retained a security interest . . . that they could have executed in the event of default."). Plaintiffs characterize the alleged taking as a "legislative taking," which they define as "Congress's enactment of a statute that impairs or destroys the property rights of a targeted group of owners." Pls.' Resp. at 21.

As we will see, plaintiffs' claim cannot succeed on the merits without demonstrating sufficient federal action to warrant liability in the United States—hence plaintiffs' consistent assertion that Congress intended PROMESA to result in the taking of their property without just compensation. And yet, as plaintiffs conceded at oral argument, they suffered no actual injury on the day that Congress enacted PROMESA. To be able to point to injury, their claim requires moving further along the timeline of events. *See* Oral Arg. at 46:00 to 46:42 (plaintiffs conceding that their claim would not have been "ripe" in 2016 because "money hadn't actually been taken yet"). As we explain below, however, the fact that the actual injury occurred at a later date is fatal for plaintiffs because it means that the alleged taking was completed through the discretionary actions of a non-federal entity. Unsurprisingly, this dilemma has left plaintiffs reluctant to place precisely the date of taking in either their complaint or their brief; at most, they suggest that the alleged taking occurred somewhere during the date range of June 30, 2016, to February 5, 2019. *See* Pls.' Resp. at 17; *id*. at 18 ("But the issue of whether COFINA Bondholders owned their bonds on the date of taking—whether that be the date PROMESA was passed or the date it was implemented to deprive them of their property or some date in between—cannot be used to dismiss this case.").

In short, plaintiffs' claim attempts to navigate two opposing currents. It has to rely on sufficient federal action as the prime motive force, while simultaneously incorporating events and actors having nothing to do with the United States, an attempted course adjustment which has the potential for causing shipwreck. We are satisfied that no degree of navigational skill can salvage the effort.

I. The Creation of COFINA

In 2006, the Commonwealth of Puerto Rico was in the midst of a fiscal crisis: having consistently spent more than it received in taxes and other revenues, Puerto Rico faced decreased direct access to the credit markets because of the Puerto Rican Constitution's limits on sovereign debt.[3] *In re Fin. Oversight & Mgmt. Bd. for P.R.*, 987 F.3d 173, 177 (1st Cir. 2021). The Legislative Assembly of Puerto Rico passed Act 91 on May 13, 2006, as a response to the crisis. *Id*. The Act created COFINA, "a public corporation and instrumentality of the Commonwealth of Puerto Rico" that was "independent and separate" from the Commonwealth. *See* P.R. Laws Ann. tit. 13 § 11(a). The stated purpose of COFINA was to "issue[] bonds and utilize[e] other financing mechanisms" to pay the Commonwealth's outstanding debts as well as future operating expenses. *See id*. § 11(b).

The bonds that COFINA issued were different in kind from the general obligation ("GO") bonds issued by Puerto Rico. *See In re Fin. Oversight*, 987 F.3d at 177; Am. Jur. 2d Ed. § 295 ("General obligation bonds issued by states and governmental units are, by definition, payable from and secured by a pledge of the issuer's taxing power. . . . The full faith and credit of the issuer is pledged for repayment of general obligation bonds, and the promise to pay is unconditional."). That is, COFINA bonds were payable from and secured by specific collateral, not by a pledge of the full faith, credit and taxing power of Puerto Rico. *See* P.R. Laws Ann. tit. 13 § 13(d) (providing that the "full faith, credit and taxing power of the Commonwealth of Puerto Rico shall not be pledged" for the COFINA bonds).

Specifically, Act 91 required a portion of sales and use tax revenues ("SUT revenues") to be deposited directly in the Dedicated Sales Tax Fund

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[3] Because the allegations in this case almost wholly involve acts of legislatures and courts, the factual background blurs into the controlling law. We therefore cite cases and statutes where the cited material supplements but is not inconsistent with plaintiffs' statement of facts in the complaint.

("DSTF") each year. The DSTF was the "property of COFINA," which was "[not] available to the Commonwealth of Puerto Rico." *Id*. at § 12. COFINA had to use the DSTF exclusively for the purposes specified in § 13, including the repayment of principal and interest on the COFINA bonds as they became due. *See id*. at § 13(a)(3). Moreover, Act 91 authorized COFINA to "pledge and otherwise encumber all or part of [the DSTF]" for the repayment of principal and interest on the bonds. *Id.* at §13(b). That pledge was "valid and binding as of the time it is made without the need for a public or notarized document." *Id.*

COFINA subsequently made such a pledge in the Sales Tax Revenue Bond Resolution ("Bond Resolution"), the borrowing contract among COFINA, the COFINA bondholders, and the Bank of New York Mellon as trustee. The Bond Resolution, as amended and restated on June 10, 2009, gave the bondholders a security interest in: "(1) the DSTF, (2) all COFINA Revenues, as defined in the Bond Resolution, (3) all right, title, and interest of COFINA in and to COFINA Revenues, and all rights to receive the same, and (4) funds, deposits, accounts, and subaccounts held by the Trustee." Compl. ¶ 15. COFINA bondholders thus had automatically perfected liens which they could execute in the event of a default in the payments of principal and interest. *See id*. at ¶ 12.

Between 2009 and 2011, COFINA issued a series of bonds that bore interest rates between 3.63% and 7.48% and matured between August 1, 2017, and August 1, 2050. *Id.* at ¶ 13. Although plaintiffs here do not specify when they purchased their bonds, they allege that they were "at all material times the owners of a substantial quantity of COFINA bonds," where the "material times" refers to the date range from June 30, 2016, to February 5, 2019. *See id*. ¶¶ 1-8; Pls.' Resp. at 17.

By May 2017, there was $9.81 billion in aggregate principal amount of COFINA bonds outstanding, consisting of $7.39 billion principal amount of current interest bonds and $1.50 billion principal amount of capital appreciation bonds. Compl. ¶ 13. Puerto Rico regularly transferred the statutorily required portion of SUT revenues to the DSTF, so that by May 2017, the DSTF held over $600 million as security for the repayment of COFINA bonds' principal and interest. *Id*. at ¶ 12; Pls' Resp. at 3.

II. The Passage of PROMESA

Despite these new measures, Puerto Rico's financial crisis worsened so that by 2013, Puerto Rico's three public utility companies (power, water, and highways) were more than $20 billion in debt. Compl. ¶ 16; *see also*

Puerto Rico v. Franklin Cal. Tax-Free Tr., 579 U.S. 115, 118 (2016). Puerto Rican instrumentalities, however, could not access the federal municipal bankruptcy process under Chapter 9 of the Bankruptcy Code. *See Franklin Cal*. at 130. Their exclusion from federal bankruptcy protections dated back to 1984, when Congress amended the Bankruptcy Code's definition of a "State" to exclude Puerto Rico "for the purpose of defining who may be a debtor under chapter 9 of this title." *See* 11 U.S.C. § 101(52) (2018). The amendment precluded Puerto Rico—as well as any other United States territory—from authorizing its municipalities to file a Chapter 9 petition, which effectively barred access to federal bankruptcy proceedings for Puerto Rican instrumentalities. *See* 11 U.S.C. § 109(c)(2) (requiring "States" to authorize their municipalities to seek relief before a municipality may file a Chapter 9 petition); *id*. at § 101(40) (defining a "municipality" as a "political subdivision or public agency or instrumentality of a State").

As a result, Puerto Rico passed the Puerto Rico Corporation Debt Enforcement and Recovery Act ("Recovery Act") in 2014, providing a non-federal path for its instrumentalities to restructure their debts. The Recovery Act could not be enforced, however, because it was pre-empted by federal law. *Franklin Cal*., 549 U.S. at 125 ("[The Bankruptcy Code] precludes Puerto Rico from authorizing its municipalities to seek relief under Chapter 9, but it does not remove Puerto Rico from the reach of Chapter 9's pre-emption provision.").

Ultimately, on June 30, 2016, Congress enacted PROMESA pursuant to its plenary power over the territories, *see* 48 U.S.C. § 2121(b)(2), making it possible for territories and their instrumentalities to adjust their debts in bankruptcy proceedings.[4] PROMESA, however, is not simply an extension of the Bankruptcy Code to the territories. The implementation of PROMESA first of all requires the establishment of an Oversight Board, the purpose of which is to "provide a method for a covered territory to achieve fiscal responsibility and access to the capital markets." *See* § 2121(a). Title I thus sets out the organization of an Oversight Board, while Title II and Title III outline its responsibilities—which include the approval of fiscal plans and budgets for a territory or territorial instrumentality, as well as duties related

[4] PROMESA specifically established an Oversight Board for Puerto Rico on the date of its enactment. *See* § 2121(b)(1). Nevertheless, the language of PROMESA is general and also applies to territories other than Puerto Rico once an Oversight Board is established for such a territory. *See* § 2121(c)(1) ("An Oversight Board established under this section shall be created as an entity within the territorial government for which it is established in accordance with this title . . . .").

to the adjustment of debts. *See* §§ 2141, 2142, 2146.

As the portion of PROMESA that deals specifically with the adjustment of debts, Title III incorporates many sections of the Bankruptcy Code. *See* § 2161(a). But differences exist. For instance, the Bankruptcy Code requires a municipality to be insolvent to qualify as a debtor. *See* 11 U.S.C. § 109(c)(3). Title III, however, does not require a debtor to be insolvent. *See* 48 U.S.C. § 2162. Where the entity in question is a territorial instrumentality rather than a territory, all that Title III requires is that it: (1) be "covered" under PROMESA; (2) have a restructuring certification issued by an Oversight Board; and (3) desire to effect a plan to adjust its debts. *See id*. Indeed, the first two requirements are unique to Title III since they cannot be met unless the Oversight Board chooses to act, a determination it makes "in its sole discretion." *See* §§ 2121(d)(1)(A), 2146(a). Title III, moreover, does not authorize a debtor to directly file a petition for bankruptcy, unlike the Bankruptcy Code—the Oversight Board must file a petition on behalf of a debtor. *See* 48 U.S.C. § 2164(a); 11 U.S.C. §§ 301, 901. The filing of the petition by the Oversight Board commences a voluntary case under Title III, after which the Oversight Board continues to serve as the "representative of the debtor" and submits or modifies any plans of adjustment for the debtor. *See* 48 U.S.C. § 2175.

Title III also has its own provisions with respect to jurisdiction and venue. First, Title III provides district courts with "original and exclusive jurisdiction of all cases under [Title III]," and "original but not exclusive jurisdiction of all civil proceedings arising under [Title III], or arising in or related to cases under [Title III]." § 2166(a). Where a covered territorial instrumentality is the debtor, venue is proper in the district court for the territory in which the instrumentality is located. § 2167(a)(2). However, only the designated district court judge may conduct a Title III case, *see* § 2168, so that the district court hearing a Title III case is also referred to as the "Title III court" in judicial opinions.

To confirm a plan of adjustment submitted by an Oversight Board, the Title III court must determine if the plan meets the requirements of § 2174(b). Among other requirements, the plan must comply with applicable provisions of the Bankruptcy Code and with Title III of PROMESA, and the debtor must not be "prohibited by law from taking any action necessary to carry out the plan." *See* § 2174(b). An appeal of the Title III court's decision is taken "in the same manner as appeals in civil proceedings generally are taken to the courts of appeals from the district court." § 2166(e).

III. The Adjustment of COFINA's Debts Under Title III

On September 30, 2016, the Oversight Board for Puerto Rico designated COFINA as a "covered entity" subject to the requirements of PROMESA and eligible to qualify as a debtor under Title III. *In re Fin. Oversight*, 361 F. Supp. 3d at 219. For the Oversight Board to even begin formulating a Title III plan, however, there was an important threshold question that had to be resolved: whether COFINA or the Commonwealth had superior rights to the SUT revenues transferred to the DSTF. *Id.* at 220. The answer would determine which entity had possession of funds allegedly exceeding $600 million by May 2017 to pay its debts.

A dispute over the DSTF was set off in the lawsuit that GO bondholders filed on July 20, 2016, shortly after the Commonwealth defaulted on payments to GO bondholders pursuant to Executive Order 30. *See Lex Claims, LLC v. Garcia-Padilla*, 236 F. Supp. 3d 504, 512 (D.P.R. 2017), *rev'd in part*, 853 F.3d 549 (1st Cir. 2017) (holding that PROMESA's stay applies to litigation seeking declaratory and injunctive relief). In their complaint—amended in November 2016 to include new causes of action relating to COFINA—GO bondholders asked the court to declare the default unlawful and grant injunctive relief, including an order that COFINA transfer the SUT revenues it held to the Commonwealth. *Id*. Specifically, they alleged that the Commonwealth's obligation to pay GO bondholders was a "constitutional debt," and that the Puerto Rican constitution required using SUT revenues first to satisfy GO bond obligations, not COFINA bond obligations. *Id*. at 509-510. Because the First Circuit held that PROMESA's automatic stay provision applied, however, the constitutional issue that the GO bondholders raised was not resolved by the First Circuit's decision in April 2017.[5] *See Lex Claims, LLC v. Fin. Oversight & Mgmt. Bd.*, 853 F.3d 549, 551 (1st Cir. 2017).

Against this backdrop, the Oversight Board determined that the best way to resolve the dispute over the allocation of the DSTF was for it to file

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[5] On April 29, 2017, the fate of the DSTF became more uncertain with the Puerto Rico Legislative Assembly's enactment of Act No. 246, which allowed COFINA's SUT revenues to be used to pay Puerto Rico's general debts under certain circumstances. *See* Compl. ¶ 29; Fiscal Plan Compliance Act, Act 26-2017 (Apr. 29, 2017) ("[T]he Executive Branch is hereby empowered to use COFINA funds occasionally, only as the last resort, and subject to the filing of a sworn certification with the Legislative Assembly."). Although unclear on the details, plaintiffs allege that on May 3, 2017, "[w]ithin days" of the enactment of Act No. 246, COFINA defaulted on its obligations to COFINA bondholders. *See* Compl. ¶ 29.

a Title III petition for both the Commonwealth and COFINA and afford the parties "additional time and breathing room to seek to resolve the impasse under the supervision of the Title III court." *In re Fin. Oversight*, 361 F. Supp. 3d at 223. Thus, on May 3, 2017, the Oversight Board issued a restructuring certificate and filed a Title III petition on behalf of the Commonwealth. *Id*. at 220. Likewise, on May 5, 2017, the Oversight Board issued a restructuring certification and filed a Title III petition on behalf of COFINA. *Id*. The two Title III cases were then combined for procedural purposes only.

Upon the commencement of these cases, the Title III court requested that the Oversight Board work with interested creditor parties to formulate a procedure for resolving the Commonwealth-COFINA dispute. *Id*. at 224. The Title III court approved such a procedure on August 10, 2017, which provided for the appointment of agents independent from the Oversight Board to litigate, mediate, and/or settle the dispute. *Id*. Then, on June 7, 2018, agents appointed to represent the Commonwealth and COFINA announced the terms of an "Agreement in Principle" at the end of arm's-length negotiations. *Id*. at 225. The central component of the Agreement divided the disputed SUT revenues by allocating 53.65% to COFINA and 46.35% to the Commonwealth.[6] *Id*.

In July 2018, the Oversight Board began working on a plan of adjustment for COFINA's debts using the framework of the Agreement. *Id*. at 225-26. The Oversight Board first certified the "Title III Plan of Adjustment of Puerto Rico Sales Tax Corporation" on October 19, 2018, which it then amended three times. *Id*. at 228-29. After the Oversight Board certified the Third Amended Plan ("the Plan"), the Title III court heard arguments on all objections to the Plan and confirmed it on February 5, 2019. Its upshot was that senior COFINA bondholders would make a 93.01% recovery on their bonds while junior COFINA bondholders would make a 56.41% recovery, or about fifty-five cents on the dollar in new COFINA bonds relative to the par value of their original bonds. *Id*. at 233; *see also In re Fin. Oversight*, 987 F.3d at 179.

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[6] Plaintiffs allege in their complaint that they were "not parties [to the agreement that resolved the Commonwealth-COFINA dispute]" and that they were "unaware of this agreement until it was submitted to the federal district court for approval." Compl. ¶ 30. Nevertheless, they acknowledge that "some COFINA Bondholders challenged this secret agreement that drastically curtailed their bond rights and security for repayment," and that the Title III court "rebuffed the COFINA Bondholders' challenge to this agreement." *See id*.

The Title III court made the following conclusions of law as it confirmed the Plan. First, the Plan fully complied with applicable provisions of the Bankruptcy Code, including the provision about creditors voting to accept or reject the plan. The court found that "[a]ll classes of creditors entitled to vote to accept or reject the Plan have voted to accept the Plan in accordance with the requirements set forth . . . ." *Id*. at 240. Second, the Plan fully complied with Title III of PROMESA. *Id*. at 240. Third, COFINA, the debtor, was not prohibited by law from taking any action necessary to carry out the plan. *Id*.

Addressing junior COFINA bondholders' argument that the Plan and Settlement Agreement effected a taking without just compensation in violation of the Fifth Amendment, the Title III court applied the three-factor test for regulatory takings under *Penn Central Transp. Co. v. City of New York*, 438 U.S. 104 (1978) and rejected the challenge.[7] *Id*. at 244. First, the court held that the Plan would not result in the total destruction of the value of bondholders' property. *Id*. at 244. Second, the court held that the Plan would interfere only with "bondholders' subjective investment expectations," rather than "reasonable expectations"—which must take account of the claims in the Commonwealth-COFINA dispute that the Plan proposed to resolve. *Id*. Third, the court held that Plan was a "quintessential example" of a "public program adjusting the benefits and burdens of economic life to promote the common good." *Id*. Moreover, even in the event that the Plan resulted in a taking, the court was "satisfied that the value to be received by bondholders as a result of the settlement of the Commonwealth-COFINA dispute and under the Plan constitutes just compensation." *Id*. As the court noted, the alternative to the Plan was "protracted litigation in the Adversary Proceeding, which could lead to an all-or-nothing recovery for either the Commonwealth or COFINA." *Id*. at 246.

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[7] The test for regulatory takings under *Penn Central* is "an essentially ad hoc, factual" inquiry that looks to the following three factors as having particular significance: (1) "[t]he economic impact of the regulation on the claimant"; (2) "the extent to which the regulation has interfered with distinct investment-backed expectations"; (3) "the character of the governmental action." *Penn Central*, 438 U.S. at 124. The Court held in *Penn Central* that a taking is more readily found "when the interference with property can be characterized as a physical invasion by government than when interference arises from some public program adjusting the benefits and burdens of economic life to promote the common good." *Id*. (internal citation omitted).

Once confirmed, the Plan was implemented on February 12, 2019, and an appeal followed. *In re Fin. Oversight*, 987 F.3d at 180. The First Circuit affirmed the confirmation of the plan, dismissing the appeal as equitably moot. *Id*. at 177 ("No party sought to stay the Title III court's order approving the Plan, which has been fully implemented for nearly two years and given rise to transactions involving billions of dollars and likely tens of thousands of individuals.").

Plaintiffs filed the present suit as a class action[8] on June 29, 2022, naming Jonathan Dinh and Dwight Jereczek as Representative Plaintiffs whose claims are "typical of the claims of all other members of the COFINA Bondholders class as described in this Complaint." ECF No. 1. They amended the complaint twice, first on October 31, 2022, and again on November 1, 2022, adding eight named Representative Plaintiffs to the original complaint. *See* ECF No. 8, 9. The descriptions of all Representative Plaintiffs are identical; they assert the same takings claim "on behalf of all persons and entities that owned [First Subordinated Secured] COFINA bonds between June 30, 2016, and February 5, 2019, excluding persons or entities that voted for or consented to the alteration of their COFINA bond rights." *See* Compl. ¶ 8. Plaintiffs allege that "[a]s a direct and intended result of Congress's enactment of [PROMESA], COFINA Bondholders lost a significant portion of the principal and interest each COFINA Bondholder was entitled to and the fair market value of the pledged revenues, their security interests and liens on COFINA funds, as well as other compensable property rights." *Id*. at ¶ 31.

Defendant filed its motion to dismiss on December 7, 2022. It makes four arguments regarding this court's asserted lack of subject matter jurisdiction and five arguments asserting plaintiffs' failure to state a claim upon which relief may be granted.

DISCUSSION

I. This Court Has Subject Matter Jurisdiction over Plaintiffs' Takings Claim Under the Tucker Act.

Because subject matter jurisdiction is a "threshold requirement for a court's power to exercise jurisdiction over a case," *Dow Jones & Co., Inc. v. Ablaise Ltd*., 606 F.3d 1338, 1348 (Fed. Cir. 2010), we first determine

[8] Plaintiffs' motion to certify the class under RCFC 23(c) was filed on May 1, 2023. Consideration of the motion was stayed until resolution of the pending motion to dismiss.

whether we have subject matter jurisdiction to hear plaintiffs' takings claim. In doing so, we "accept as true all undisputed facts asserted in the plaintiff's complaint and draw all reasonable inferences in favor of the plaintiff." *Trusted Integration, Inc. v. United States*, 659 F.3d 1159, 1163 (Fed. Cir. 2011).

The subject matter jurisdiction of this court is defined by the Tucker Act, which grants jurisdiction to this court to "render judgment upon any claim against the United States founded either upon the Constitution, or any act of Congress or any regulation of an executive department." 28 U.S.C. §1491(a)(1) (2018). Although the Tucker Act constitutes an unequivocal waiver of sovereign immunity, it does not create a substantive right for monetary relief against the United States. *See United States v. White Mountain Apache Tribe*, 537 U.S. 465, 472 (2003). Thus, to support this court's subject matter jurisdiction, there must be a separate source of law that "can fairly be interpreted as mandating compensation by the Federal Government for the damage sustained." *Id.* (quoting *United States v. Testan*, 424 U.S. 392, 400 (1976)). Where a money-mandating source exists, this court has exclusive jurisdiction to award compensation in excess of $10,000, because concurrent jurisdiction of district courts under the Little Tucker Act is limited to claims "not exceeding $10,000 in amount." *See* 28 U.S.C. § 1346(a)(2).

Here, a money-mandating source undoubtedly exists: the text of the Fifth Amendment mandates just compensation when the government takes private property for public use. U.S. Const. amend. V ("[N]or shall property be taken for public use, without just compensation."). Notwithstanding the presumption of Tucker Act jurisdiction under the Takings Clause, however, defendant asserts that this court lacks subject matter jurisdiction over plaintiffs' takings claim for four reasons. We reject all four.

A. Plaintiffs Allege a Taking Effected by an Act of Congress, Which This Court Has Jurisdiction to Hear Under the Tucker Act.

Defendant's first argument is based on what it takes to be the "true nature" of plaintiffs' takings claim as opposed to what plaintiffs have pleaded in their complaint. That is, defendant argues that this court lacks jurisdiction because "properly framed, the acts that purportedly took plaintiffs' property interests include a series of discretionary decisions by the Oversight Board, which the Supreme Court unanimously held does not constitute the United States for statutory and constitutional purposes." Def.'s Reply at 2.

The basic premise behind defendant's argument is correct: this court lacks jurisdiction over claims against a party other than the United States. *United States v. Sherwood*, 312 U.S. 584, 588 (1941). Thus, to establish jurisdiction, a plaintiff claiming a taking in this court must allege that their property was taken by federal action. *See Altair Global Credit Opportunities Fund (A), LLC v. United States*, 151 Fed. Cl. 276, 285 (2020) (*Altair II*). To be sure, defendant does not deny that plaintiffs have made such allegations: here, plaintiffs clearly allege a taking by federal legislation. Nor does defendant argue that plaintiffs' allegations are frivolous. Instead, defendant objects to the "true nature" of plaintiffs' claim, arguing that the alleged taking is "necessarily predicated" on the actions of a non-federal entity. *See* Def.'s Mot. to Dismiss at 11. Such an argument, however, goes to the merits of plaintiffs' claim rather than our jurisdiction, because it concerns whether plaintiffs can actually establish sufficient federal action to create a takings liability for the United States.

Although difficult to maintain at times, the distinction between a jurisdictional question and a question on the merits of a claim is not a meaningless one. The Federal Circuit has repeatedly held that once the plaintiff identifies a money-mandating source to establish Tucker Act jurisdiction, whether the plaintiff is entitled to relief under that source is a question on the merits of the claim. *See Greenlee Cnty., Ariz. v. United States*, 487 F.3d 871, 876 (Fed. Cir. 2007); *Doe v. United States*, 463 F.3d 1314, 1325 (Fed. Cir. 2006). There is, in short, "no further jurisdictional requirement that the court determine whether the additional allegations of the complaint state a nonfrivolous claim on the merits." *See Jan's Helicopter Serv., Inc. v. Fed. Aviation Admin.*, 525 F.3d 1299, 1309 (Fed. Cir. 2008). Thus, whether a particular government action is sufficient to create a takings liability is a question that we address when we evaluate a motion to dismiss for failure to state a claim. *See Del-Rio Drilling Programs, Inc. v. United States*, 146 F.3d 1358, 1362 (Fed. Cir. 1998).

Because plaintiffs' complaint unambiguously alleges that federal action took their property without just compensation, we have subject matter jurisdiction under the Tucker Act. *See Altair II*, 151 Fed. Cl. at 288 (assuming jurisdiction over claims alleging that Congress's enactment of PROMESA effected a taking).

B. PROMESA Does Not Displace This Court's Tucker Act Jurisdiction over Plaintiffs' Takings Claim.

Defendant also argues that this court lacks subject matter jurisdiction because PROMESA mandates that this action be brought in the district court

for the District of Puerto Rico:

> Except as provided in . . . title III (relating to adjustments of debts), any action against the Oversight Board, and any action otherwise arising out of this Act, in whole or in part, shall be brought in a United States district court for the covered territory. . . . 48 U.S.C. § 2126(a).

Defendant asserts as a threshold matter that this action "'arises out of' PROMESA, if not 'in whole' then certainly at least 'in part,' because [plaintiffs'] takings claim is explicitly based on Congress's enactment of PROMESA." Def.'s Mot. to Dismiss at 14. Defendant then argues that the broad and mandatory language of § 2126(a)—as seen in the use of "any" and "shall"—is sufficient indication of Congress's intent to displace Tucker Act jurisdiction over plaintiffs' takings claim. It maintains that "[i]f a statute is clear enough in making another forum exclusive, it does not need to 'mention' the Tucker Act by name, refer to the Fifth Amendment or constitutional claims, nor does it need to use any other magic words to exclude this Court from its application." Def.'s Reply at 5.

Assuming for now that plaintiffs' takings claim arises out of PROMESA, in whole or in part, we do not find in PROMESA the kind of clear congressional intent required to displace this court's jurisdiction under the Tucker Act. Although Congress has the power to withdraw Tucker Act jurisdiction, including jurisdiction over takings claims, *see Horne v. Dep't of Agric*., 569 U.S. 513, 527 (2013), a withdrawal of Tucker Act jurisdiction by implication is disfavored. *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1017 (1984). Thus, Tucker Act jurisdiction is not displaced unless another remedial scheme reflects Congress's "unambiguous intention to withdraw the Tucker Act remedy" otherwise available to the plaintiff. *See Acceptance Ins. Cos. Inc. v. United States*, 503 F.3d 1328, 1336 (Fed. Cir. 2007). In undertaking this analysis, courts must examine "the purpose of the [statute alleged to displace the Tucker Act], the entirety of its text, and the structure of review that it establishes." *Horne*, 569 U.S. at 527.

Examining the entirety of PROMESA shows, first of all, that requiring plaintiffs to bring their takings claim in district court amounts to limiting the remedies they may seek. Because PROMESA does not itself waive sovereign immunity,[9] a plaintiff suing the United States for monetary

[9] There is no provision of PROMESA that may be read as an unequivocal waiver of sovereign immunity. Remedies contemplated under § 2126 do not include relief sought against the United States:

relief must look to either the Tucker Act or the Little Tucker Act for a waiver of sovereign immunity. The Little Tucker Act, however, allows the district court to award only up to $10,000 of monetary relief—which is less than the amount plaintiffs seek in this action. Thus, were plaintiffs to sue in district court, the district court would lack jurisdiction to grant the monetary relief that they seek. Defendant did not assert otherwise at oral argument, merely pointing to forms of equitable relief which the district court could have granted had the plaintiffs brought their takings claim there earlier, such as declaring the enactment of PROMESA unconstitutional under the Declaratory Judgment Act or refusing to confirm the Plan. *See* Oral Arg. at 7:00 to 9:50.

Equitable relief, however, cannot replace monetary relief in takings suits. As the Supreme Court has repeatedly held, equitable relief is "generally unavailable" for takings claims because "[a]s long as an adequate provision for obtaining just compensation exists, there is no basis to enjoin the government's action effecting a taking." *See Knick v. Township of Scott, Pa*., 139 S. Ct. 2162, 2176 (2019); *E. Enters. v. Apfel*, 524 U.S. 498, 521 (1998) ("[T]he Declaratory Judgment Act allows individuals threatened with a taking to seek declaration of the constitutionality of the disputed government action before *potentially uncompensable* damages are sustained.") (internal citation and quotation marks omitted) (emphasis added). Indeed, except where government action "fails to meet the 'public use' requirement" or "is so arbitrary as to violate due process," the Takings Clause does not actually prohibit government interference with private property. *See Lingle v. Chevron U.S.A., Inc.*, 544 U.S. 528, 543 (2005). The Takings Clause is "designed not to limit the governmental interference with property rights *per se*, but to secure *compensation* in the event of otherwise proper interference amounting to a taking." *Id.* at 537 (internal citation and quotation marks omitted).

In the light of these principles, it is clear that monetary relief is the sole remedy that plaintiffs could in fact seek for the alleged taking. First, plaintiffs lack a basis for injunctive or declaratory relief because they do not allege that PROMESA fails to meet the public use requirement or is so arbitrary as to violate due process. *See* Compl. ¶ 35 (acknowledging that

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> Except with respect to any orders entered to remedy constitutional violations, no order of any court granting declaratory or injunctive relief against the Oversight Board, including relief permitting or requiring the obligation, borrowing, or expenditure of funds, shall take effect during the pendency of the action before such court . . . . §2126(c).

PROMESA was enacted for the "public purpose of ameliorating Puerto Rico's financial crisis"). Moreover, the case that defendant cites as an example of the Title III court's refusal to confirm a plan for violation of the Fifth Amendment is inapposite: there, "no one dispute[d] that [Puerto Rico] engaged in prepetition takings of some property." *In re Fin. Oversight & Mgmt. Bd.*, 41 F.4th 29, 43 (1st Cir. 2022). The debtor thus had an *existing* obligation to pay just compensation and the question before the Title III court was whether the Fifth Amendment permitted the impairment of that obligation through bankruptcy. *See id.* at 46. Defendant does not cite, and we have not found, a case in which the Title III court refused to confirm a plan because the plan itself would effect an uncompensated taking.

Given the inadequacy of remedies available in district court for plaintiffs' takings claim, we do not find in PROMESA unambiguous congressional intent to displace this court's Tucker Act jurisdiction. Indeed, this case is unlike those cases in which Tucker Act jurisdiction was displaced by a "specific and comprehensive scheme for administrative and judicial review" of the plaintiff's takings claim. *See Alpine PCS, Inc. v. United States*, 878 F.3d, 1086, 1092 (Fed. Cir. 2018). In such cases, two conditions were met: first, the alleged taking resulted from a federal agency's action; second, Congress had created a statutory framework for both administrative and judicial review of that agency's actions. *See Alpine PCS, Inc.*, 878 F.3d at 1097-98 (explaining how the Communications Act provides for administrative and judicial review of challenges to license cancellations, including claims that a cancellation effected a taking); *Horne*, 569 U.S. at 527 (explaining how the Agricultural Marketing Agreement Act provides for administrative and judicial review of objections to marketing orders, including claims that a marketing order effected a taking); *Vereda, Ltda. v. United States*, 271 F.3d 1367, 1375 (Fed. Cir. 2001) (explaining how the Controlled Substance Act provides for administrative and judicial review of challenges to forfeitures of property, including claims that a forfeiture effected a taking). Neither of those conditions, however, are met here. Plaintiffs allege a taking effected by Congress's enactment of PROMESA itself, which is not a claim for which PROMESA provides a scheme of administrative and judicial review.[10]

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[10] Defendant's reliance on *Hinck v. United States*, 550 US. 501 (2007) is also misplaced because *Hinck* did not involve Tucker Act jurisdiction over takings claims. Instead, *Hinck* addressed whether 28 U.S.C. § 6404(h)(1) vests exclusive jurisdiction in the Tax Court to review § 6404(e)(1) determinations despite statutes granting jurisdiction to the district courts and the Court of Federal Claims to review tax refund actions. *See Hinck*, 550 U.S. at 507. And in answering that question in the affirmative, the Court relied not

Because PROMESA does not reflect Congress's unambiguous intent to displace Tucker Act jurisdiction, we retain jurisdiction over plaintiffs' takings claim.

C. Exercising Jurisdiction over Plaintiffs' Takings Claim Would Not Require Improper Review of the Title III Court's Decision.

Next, defendant argues that even if PROMESA does not displace the Tucker Act, this court still lacks jurisdiction because "considering the merits of [plaintiffs'] claim would require this Court to review and find error in the decisions of the Title III court in adjudicating COFINA's restructuring." Def.'s Mot. to Dismiss at 18. Specifically, defendant points out that the Title III court already considered and "rejected claims from junior COFINA bondholders that the confirmation plan arising from PROMESA effected a Fifth Amendment taking of the bondholders' liens on the SUT revenues." *Id.* at 19.

As is well established, this court "has no jurisdiction to review the merits of a decision rendered by a federal district court." *Shinnecock Indian Nation v. United States*, 782 F.3d 1345, 1352 (Fed. Cir. 2015); *see also Allustiarte v. United States*, 256 F.3d 1349, 1352 (Fed. Cir. 2001) (holding that the Court of Federal Claims lacks jurisdiction to review the decision of bankruptcy courts). We thus lack jurisdiction to hear claims which amount to a collateral attack on the judgment of the district court, such as a claim in which the plaintiff alleges that the district court effected a taking by improper application of the law. *See Shinnecock Indian Nation*, 782 F.3d at 1353.

But plaintiffs' takings claim is not a collateral attack on the decision of the Title III court. According to plaintiffs, the confirmation of the Plan "simply describes part of the process that resulted in the taking of COFINA Bondholders' property," a process to which plaintiffs attribute no legal error. *See* Pls.' Resp. at 11. Indeed, we have jurisdiction over plaintiffs' takings claim because it does not require us to scrutinize the Title III court's reasoning or result—the merits of plaintiffs' claim do not depend on whether

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only on the principle that a "precisely drawn, detailed statute pre-empts more general remedies," but also on the principle that "when Congress enacts a specific remedy when no remedy was previously recognized . . . the remedy provided is generally regarded as exclusive." *See id.* at 506. The latter principle does not apply here because PROMESA did not create a previously unrecognized remedy for takings in violation of the Fifth Amendment.

the Title III court properly confirmed the Plan. *See Boise Cascade Corp. v. United States*, 296 F.3d 1339, 1345 (Fed. Cir. 2002) (holding that the Court of Federal Claims had jurisdiction over the plaintiffs' takings claim because the claim was "not based on the propriety of the district court's decision"). Plaintiffs could succeed on the merits even if the Title III court's decision was proper, because the theory of liability behind their takings claim is an attack on Congress's enactment of PROMESA for authorizing the Title III process in the first place.

Moreover, the takings claim that the Title III court rejected is not the same takings claim plaintiffs bring here. That is, the Title III court only considered whether the Plan and Settlement Agreement submitted by the Oversight Board would take COFINA bondholders' property without just compensation. *See In re. Fin. Oversight*, 361 F. Supp. 3d at 244 ("[T]he character of the governmental action strongly supports the Court's conclusion that the Plan and Settlement Agreement do not result in an unconstitutional taking."); *id*. at 245 ("The objections to the Plan and Settlement Agreement based upon the Takings Clause of the United States Constitution are therefore overruled."). The Title III court did *not* address whether the United States could be held liable for a taking based specifically on Congress's enactment of PROMESA.

Because plaintiffs' takings claim is not an improper collateral attack on the decision of the Title III court, we retain jurisdiction over their claim.

D. This Court Has Jurisdiction over the Claims of Plaintiffs Added in the Amended Complaints.

Defendant's final argument is that we lack jurisdiction over the claims of plaintiffs added in the amended complaints, because the amendments were filed outside of the six-year statute of limitations for this court. *See* 28 U.S.C. § 2501 ("Every claim of which the United States Court of Federal claims has jurisdiction shall be barred unless the petition thereon is filed within six years after such claim first accrues."). In making this argument, defendant asserts—based on the allegations of the complaint—that the underlying takings claim accrued on June 30, 2016, when PROMESA was enacted.[11] It

[11] Plaintiffs did not challenge this assumption about claim accrual in their response to defendant's motion, even though they acknowledged at oral argument that their claim would not have been ripe in 2016. Notwithstanding the imprecision in plaintiffs' takings claim, we take their allegations at face value for purposes of ruling on defendant's jurisdictional arguments. Because plaintiffs allege that Congress's enactment of PROMESA took their

apparently concedes that the originally named plaintiffs filed timely claims, whereas the amended complaints untimely added the claims of eight other plaintiffs.

Defendant argues that we lack jurisdiction over the claims of untimely added plaintiffs because § 2501 may not be equitably tolled by the filing of a class action complaint. We need not address the availability of equitable tolling, however, because tolling is not the only way to add plaintiffs who might otherwise be barred by § 2501. RCFC 15(c)(1)(B) provides another avenue: the rule allows complaints to be amended outside the statute of limitations so long as the amendment "relates back" to the original pleading. *See Big Oak Farms, Inc. v. United States*, 141 Fed. Cl. 482, 489 (2019) (identifying RCFC 15(c)(1)(B) and class action tolling as two different avenues for adding plaintiffs outside the statute of limitations); *Barron Bancshares, Inc. v. United States*, 366 F.3d 1360, 1370 (Fed. Cir. 2004) (holding that RCFC 15(c) "overcome[s]" jurisdictional challenges based on § 2501). To determine whether the addition of plaintiffs sufficiently "relates back" under RCFC 15(c)(1)(B), this court weighs whether: "(1) the claim arose out of the 'same conduct, transaction, or occurrence' as the original complaint; (2) the new plaintiff shares an 'identity of interest' with the original complaint; (3) the defendant had 'fair notice' of the new plaintiff's claim; and (4) the addition of the new plaintiff causes the defendant prejudice." *See Big Oak Farms*, 141 Fed. Cl. at 489.

All four of these factors weigh in favor of finding that the addition of plaintiffs "relates back" to the original complaint. The additional plaintiffs allege, just like the original plaintiffs, that they are owners of a substantial quantity of First Subordinated Secured COFINA bonds and that their property interests as bondholders were taken without just compensation as the direct and intended result of Congress's enactment of COFINA. *See* Compl. ¶ 1-8. Moreover, whether the additional plaintiffs can establish a claim does not depend on factual circumstances unique to each plaintiff; whatever effect the enactment of PROMESA may have had on the value of COFINA bonds and the junior COFINA bondholders' rate of recovery, the impact would have been the same. *See Big Oak Farms*, 141 Fed. Cl. at 490-91 (finding no "identity of interest" or "fair notice" to the defendant because "the duration and severity of the flooding must be assessed on a case by case basis along with the character of the land at issue" for each plaintiff to establish a takings claim). Nor does the addition of eight plaintiffs cause

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property without just compensation, we construe June 30, 2016 to be the date of taking, which makes claims filed after July 1, 2022 untimely in the absence of tolling or RCFC 15(c)(1)(B).

undue prejudice to defendant by significantly expanding discovery or unreasonably broadening the issues. *See id*. at 491 ("Increasing the number of plaintiffs by over 100 creates a clear litigation burden particularly given the years that have passed and the proof required to prove impacts to property more than seven years after the flooding in 2011.").

Because RCFC 15(c)(1)(B) allows the amendments that were made, we find that we have jurisdiction over the claims of all plaintiffs currently named in the second amended complaint. Having found no impediment to our jurisdiction over this action, we next address whether plaintiffs state a claim upon which relief could be granted.

II. Plaintiffs Fail to State a Claim Under RCFC 12(b)(6).

The court may grant a motion to dismiss for failure to state a claim when "a complaint does not allege facts that show the plaintiff is entitled to the legal remedy sought." *Steffen v. United States*, 995 F.3d 1377, 1379 (Fed. Cir. 2021). Although the court is required to accept as true all factual allegations pleaded when ruling on a RCFC 12(b)(6) motion, the complaint must contain "enough facts to state a claim to relief that is plausible on its face" to survive dismissal. *Frankel v. United States*, 842 F.3d 1246, 1249 (Fed. Cir. 2016) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). A claim is plausible on its face "when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id*. (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). Mere "labels and conclusions" or "a formulaic recitation of the elements of a cause of action" are not sufficient. *Twombly*, 550 U.S. at 555.

Defendant makes five arguments in support of its motion to dismiss under RCFC 12(b)(6): (1) plaintiffs do not plausibly allege cognizable property interests; (2) even if plaintiffs allege cognizable property interests, collateral estoppel bars the claim that such interests were taken; (3) there is no government action sufficient to establish a taking because Congress did not command or coerce the Oversight Board to restructure COFINA's debts; (4) plaintiffs allege a mere frustration of contract rights by the government, which is insufficient to constitute a taking; (5) plaintiffs fail to state a cognizable regulatory takings claim under *Penn Central*. As explained below, we reject the first two arguments but agree with defendant's third argument that Congress's enactment of PROMESA is not a sufficient basis to support a takings claim. Having concluded that plaintiffs fail to state a claim upon which relief could be granted, we do not find it necessary to decide defendant's remaining two arguments.

A. Plaintiffs' Allegations Regarding Their Property Interests Do Not Warrant Dismissal.

When adjudicating a takings claim, the court must first determine whether the plaintiff has established a property interest cognizable under the Fifth Amendment. *Huntleigh USA Corp. v. United States*, 525 F.3d 1370, 1377 (Fed. Cir. 2008). It is only after identifying a valid property interest that the court must determine "whether the government action at issue amounted to a compensable taking of that property interest." *Id.* at 1378 (quoting *Am. Pelagic Fishing Co., L.P. v. United States*, 379 F.3d 1363, 1372 (Fed. Cir. 2004)).

The Fifth Amendment protects tangible property, such as real and personal property, as well as intangible property, such as contractual rights and rights to enforce a lien. *Id.* at 1377-78 (holding that the contract rights the plaintiff alleged were valid property interests under the Fifth Amendment); *Armstrong v. United States*, 364 U.S. 40, 44 (1960) (holding that the petitioners' rights to enforce their asserted liens were compensable property interests under the Fifth Amendment). Because the Fifth Amendment does not itself create a property interest, however, "the existence of a property interest is determined by reference to existing rules or understandings stemming from an independent source such as state law." *Phillips v. Wash. Legal Found.*, 524 U.S. 156, 164 (1998) (citing *Bd. of Regents of State Colls. v. Roth*, 408 U.S. 564, 577 (1972)). When the asserted property interest arose is also critical, because "only persons with a valid property interest *at the time of the taking* are entitled to compensation." *Reoforce, Inc. v. United States,* 853 F.3d 1249, 1263 (Fed. Cir.2017) (quoting *Wyatt v. United States*, 271 F.3d 1090, 1096 (Fed. Cir. 2001)); *see also A&D Auto Sales, Inc. v. United States,* 748 F.3d 1142, 1153 (Fed. Cir. 2014) (holding that plaintiffs had valid and compensable property interests because "[t]he challenged government action did not predate the acquisition of the plaintiffs' interests").

Plaintiffs allege in their complaint that they were "at all material times the owners of a substantial quantity of COFINA bonds," from which two types of cognizable property interests arise: first, a contractual right to repayment of principal and interest on the bonds, and second, a lien on the DSTF and all COFINA revenues that could be enforced in the event of a default on that repayment.[12] *See* Compl. ¶ 1-7. And as they clarify in their

[12] A valid security interest would be limited to a lien on SUT revenues already collected at the time of the alleged taking, because Puerto Rico law

response to defendant's motion, the reference to "material times" means the date range from June 30, 2016, to February 5, 2019. *See* Pls.' Resp. at 17. Defendant argues, however, that plaintiffs fail to plausibly allege cognizable property interests because their complaint contains no more than a "boilerplate allegation" later supplemented with attorney argument. *See* Def.'s Reply at 12.

Although we agree that the complaint lacks specific factual allegations regarding each plaintiff's ownership of COFINA bonds, a right to repayment on the bonds as well as a lien on revenues are valid property interests, and there is no reason to believe that plaintiffs could not supply particularized allegations about when they acquired the bonds. *See Steffen*, 995 F.3d at 1380 (finding that granting leave to amend the complaint would be futile because the plaintiffs could not establish one of the statutory requirements as a matter of law). As such, dismissal under RCFC 12(b)(6) is not the appropriate remedy for plaintiffs' failure to include specific allegations establishing their bond ownership. *See A&D Auto Sales*, 748 F.3d at 1158-59 ("The plaintiffs have failed to properly allege economic loss, but at oral argument in this court they . . . made clear that they intended to establish loss of value. In this situation the appropriate remedy is to grant leave to amend to include specific allegations establishing loss of value."). Indeed, defendant's argument is belied by its next assertion, in which it contends that the Title III court already resolved the claim that plaintiffs' property interests (presumably not illusory) were taken.

B. Collateral Estoppel Does Not Bar Plaintiffs' Claim.

Collateral estoppel, or issue preclusion, "bar[s] the revisiting of issues that have already been litigated by the same parties or their privies based on the same cause of action." *Banner v. United States*, 238 F.3d 1348, 1354 (Fed. Cir. 2001). The four requirements of collateral estoppel are: "(1) the issues are identical to those in a prior proceeding, (2) the issues were actually litigated, (3) the determination of the issues was necessary to the resulting judgment, and (4) the party defending against preclusion had a full and fair opportunity to litigate the issues." *Id.* As discussed above, however, the takings claim that the Title III court addressed is not the same claim that plaintiffs present here: the Title III court did not decide whether the United States was liable for a taking based on Congress's enactment of PROMESA.

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does not recognize the mere expectancy of property as a property interest. *See In re Fin. Oversight*, 948 F.3d at 468 n.8 ("Puerto Rico law recognizes that the mere expectancy of property is not itself a property interest."); *id.* at 472 ("It is impossible to have a lien on something that does not exist.").

Accordingly, the issues here are not identical to those in a prior proceeding, and collateral estoppel does not bar plaintiffs' claim.

C. Nevertheless, Regardless of Which Regulatory Takings Test Is Applied, Congress's Enactment of PROMESA Does Not Amount to a Taking as a Matter of Law.

Earlier, we rejected defendant's argument that we lack jurisdiction because plaintiffs' takings claim is necessarily predicated on the actions of the Oversight Board, a territorial entity. We took plaintiffs' allegations in the complaint at face value for purposes of our jurisdictional inquiry and held that whether there was sufficient federal action to warrant liability in the United States went to the merits of plaintiffs' claim, not to our jurisdiction. We now address that question on the merits.

Although it is clear that plaintiffs assert a regulatory taking, the parties disagree about which type of test applies. Plaintiffs argue for application of a *per se* regulatory takings test; defendant argues that the more nuanced *Penn Central* test applies. The dispute turns out to be immaterial, however. Irrespective of which test is applied, there is a fatal flaw in plaintiffs' logic. The United States has to have been responsible for the taking, yet, as we alluded to earlier, plaintiffs cannot complete their claim here without relying on what turn out to be the actions of independent actors. Indeed, it became clear at oral argument that plaintiffs recognize that nothing was taken from them by the mere passage of PROMESA—their property interests were impaired only after the Oversight Board, a non-federal entity, took a series of actions. Barring unusual circumstances not present here, however, a taking involving third parties is insufficient to amount to a compensable regulatory taking. *See A&D Auto Sales,* 748 F.3d at 1153.

The Federal Circuit held in *A&D Auto Sales* that although "[t]here is no per se rule either precluding or imposing liability when the government instigates action by a third party," there are "two broad principles" to guide the analysis. *Id*. First, "government action directed to a third party does not give rise to a taking if its effects on the plaintiff are merely unintended or collateral." *Id*. Second, even if the effects on the plaintiff are direct and intended, takings liability is limited to circumstances in which "the third party is acting as the government's agent or the government's influence over the third party was coercive rather than merely persuasive." *See id*. at 1154.

Thus, to be entitled to just compensation, plaintiffs would need to show that: (1) Congress enacted PROMESA with the intent to restructure COFINA's debts and take plaintiffs' property interests as COFINA

bondholders; and (2) either the Oversight Board acted as an agent of the United States in filing a Title III petition for COFINA or the United States coerced the Oversight Board to do so. Yet, even if we assumed that Congress intended the restructuring of COFINA's debts—despite the fact that PROMESA does not once mention COFINA—plaintiffs could not get past the second hurdle. They in fact make no attempt to do so, alleging neither an agency relationship nor coercion. *See* Oral Arg. at 48:44 to 49:04 ("There wasn't coercion. We're not arguing that. What we are saying is there was only one reason why Congress passed PROMESA. And that was to get at the funds held by COFINA and a handful of other entities that had also issued bonds.").

Indeed, it is clear that plaintiffs could not establish either an agency relationship or coercion in this case as a matter of law. Whereas "[a]n agency relationship may exist where the third party is hired or granted legal authority to carry out the government's business," *A&D Auto Sales,* 748 F.3d at 1154, the Supreme Court has held that the Oversight Board is a territorial entity that "acts not on behalf of the United States, but on behalf of, and in the interests of, Puerto Rico" in a Title III proceeding. *Fin. Oversight & Mgmt. Bd. for P.R. v. Aurelius Inv., LLC*, 140 S. Ct. 1649, 1662 (2020). As such, the Oversight Board could not have acted as an agent of the United States in the Title III case for COFINA. *See Altair II,* 151 Fed. Cl. at 287 ("The acts of the [Oversight] Board are not attributable, directly or indirectly, to the United States in a manner needed to sustain liability under the fifth amendment for an alleged taking."). Similarly, no reading of the language of PROMESA could support a finding that the United States required the Oversight Board to initiate Title III proceedings on behalf of COFINA. To the contrary, PROMESA expressly provided for the Oversight Board to act in its "sole discretion" at each of the step that was necessary for the restructuring of COFINA's debts.

Although plaintiffs cite a number of cases where mere "authorization" by the federal government was sufficient to constitute a taking, those cases are not apposite. *See, e.g., Cedar Point Nursery v. Hassid*, 141 S. Ct. 2063 (2021); *Preseault v. United States*, 100 F.3d 1525 (Fed. Cir. 1996); *Hendler v. United States*, 952 F.2d 1364 (Fed. Cir. 1991). Whereas each of those cases involved authorization of physical takings, plaintiffs here do not and could not allege a physical appropriation of property. Such factual predicates, however, matter. Under the Supreme Court's takings jurisprudence, the difference between physical and non-physical takings is significant enough that it is "inappropriate to treat cases involving physical takings as controlling precedents for the evaluation of a claim that there has been a 'regulatory taking,' and vice versa." *See Tahoe-Sierra Pres. Council, Inc. v.*

Tahoe Reg'l Plan. Agency, 535 U.S. 302, 323 (2002). Plaintiffs do not cite, and we have not found, any case in which mere authorization was sufficient to constitute a compensable taking when property was not physically appropriated.

Because the mere enactment of PROMESA had no impact on plaintiffs' property interests, plaintiffs cannot receive just compensation without showing that the Oversight Board acted either as an agent of the United States or under coercion of the United States. Plaintiffs, however, cannot show either. Accordingly, Congress's enactment of PROMESA is not sufficient federal government action to constitute a taking. We therefore dismiss plaintiffs' claim for failure to state a claim upon which relief can be granted.

CONCLUSION

For the foregoing reasons, defendant's motion for dismissal under RCFC 12(b)(6) is GRANTED. The Clerk is directed to enter judgment accordingly. No costs.

s/Eric G. Bruggink
ERIC G. BRUGGINK
Senior Judge

In the United States Court of Federal Claims

No. 22-725 C
Filed: June 6, 2023

JONATHAN DINH, et al.
Plaintiffs

v. **JUDGMENT**

THE UNITED STATES
Defendant

Pursuant to the court's Opinion, filed June 5, 2023, granting defendant's motion to dismiss,

IT IS ORDERED AND ADJUDGED this date, pursuant to Rule 58, that plaintiffs' complaint is dismissed for failure to state a claim upon which relief can be granted. No costs.

Lisa L. Reyes
Clerk of Court

By: s/ Debra L. Samler

Deputy Clerk

NOTE: As to appeal to the United States Court of Appeals for the Federal Circuit, 60 days from this date, see RCFC 58.1, re number of copies and listing of all plaintiffs. Filing fee is $505.00.

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

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